CITY OF DALLAS, Petitioner/Counter-Respondent, v. **KENNETH E. ALBERT, *et al.*,** Respondents/Counter-Petitioners.	§ § § § § §	**No. 07-0284** **In the Supreme Court of Texas** *On Appeal from the Fifth Court of Appeals* *No. 05-03-01297-CV*
CITY OF DALLAS, Petitioner/Counter-Respondent, **v.** **DAVID R. BARBER, *et al.*,** Respondents/Counter-Petitioners.	§ § § § § §	**No. 07-0285** **In the Supreme Court of Texas** *On Appeal from the Fifth Court of Appeals* *No. 05-03-01298-CV*
CITY OF DALLAS, Petitioner/Counter-Respondent, **v.** **ANTHONY ARREDONDO, *et al.*,** Respondents/Counter-Petitioners.	§ § § § § §	**No. 07-0286** **In the Supreme Court of Texas** *On Appeal from the Fifth Court of Appeals* *No. 05-03-01299-CV*
CITY OF DALLAS, Petitioner/Counter-Respondent, **v.** **KEVIN MICHAEL WILLIS, *et al.*,** Respondents/Counter-Petitioners.	§ § § § § §	**No. 07-0287** **In the Supreme Court of Texas** *On Appeal from the Fifth Court of Appeals* *No. 05-03-01300-CV*

BRIEF ON THE MERITS OF PETITIONERS KENNETH E. ALBERT, ET AL., DAVID L. BARBER, ET AL., ANTHONY ARREDONDO, ET AL., AND KEVIN M. WILLIS, ET AL.

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RECORD REFERENCES

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STATEMENT OF THE CASE

Nature of the Case:	Respondents/Counter-Petitioners ("Plaintiffs") are individuals who are or have been employed by Petitioner/Counter-Respondent, the City of Dallas (the "City"), as fire fighters and police officers. Plaintiffs filed suit seeking back pay and other employment benefits from the City based on the City's violation of a voter-approved ordinance setting a pay scale for police officers and fire fighters employed by the City. The City counterclaimed, seeking to have Plaintiffs refund salaries they already had been paid. After nine years of litigation, the City filed a plea to the jurisdiction asserting governmental immunity from suit in this breach of contract action.
Trial Court:	The Honorable Robert T. Dry, Jr., Presiding Judge of the 199th District Court of Collin County, Texas. The Honorable John R. Roach, former Judge of the 199th District Court of Collin County, also presided over this case.
Trial Court's Disposition:	On August 11, 2003, the trial court denied the City's plea to the jurisdiction.
Court of Appeals:	Fifth Court of Appeals (Dallas); panel consisting of Justices Morris, FitzGerald, and Francis. Opinion by Justice Morris.
Parties in Court of Appeals:	Defendant/Appellant – The City of Dallas. Plaintiffs/Appellees – as listed under Identity of Parties and Counsel. Intervenor – Dallas Police and Fire Pension System.
Court of Appeals' Disposition:	On August 10, 2004, the court of appeals affirmed the trial court's denial of the City's plea to the jurisdiction. On December 21, 2006, on the City's motion for rehearing and based on this Court's recent decisions, the court of appeals reversed the denial of the plea to the jurisdiction as to the breach of contract claims, affirmed the denial of the plea to the jurisdiction as to the requests for declaratory relief, and remanded the case so that Plaintiffs could present their case under Texas Government Code §§ 271.151-.160. *See City of Dallas v. Albert*, 214 S.W.3d 631 (Tex. App.—Dallas 2006, pet. filed); App. Tab 4.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal from an interlocutory trial court order under Texas Government Code § 22.001(a) and (e) and § 22.225(c) and (e), because the court of appeals opinion conflicts with prior decisions of other Texas appellate courts in several respects. Additionally, this Court has jurisdiction of this appeal under Texas Government Code § 22.001(a)(6), because the court of appeals committed an error of law that is of such importance to the jurisprudence of this State that it requires correction by the Supreme Court.

To establish a jurisdictional conflict, the opinion of the lower court must be inconsistent with a prior decision of another Texas appellate court, and the inconsistency must one that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants. TEX. GOV'T CODE §§ 22.001(e), 22.225(e).

The court of appeals opinion conflicts with *City of Canyon v. Febr*, 121 S.W.3d 899 (Tex. App.—Amarillo 2003, no pet.), in which the Amarillo Court of Appeals held that governmental immunity is not a bar to an action seeking enforcement of a city's obligation to abide by the initiative and referendum provisions of the city's charter. The legal principle announced in *Febr* conflicts with the same principal of law announced by the court of appeals in this case. Municipalities and their citizens are entitled to know whether ordinances passed pursuant to the initiative and referendum process are enforceable or, instead, if municipalities are entitled to avoid enforcement suits by asserting governmental immunity. Resolving the conflict between the opinion of the court below and the decision

in *Fehr* will remove unnecessary uncertainty in the law.

The court of appeals opinion conflicts with this Court's prior decisions in *State v. Oakley*, 227 S.W.3d 58 (Tex. 2007) and *Tex. A & M University v. Lawson*, 87 S.W.3d 518 (Tex. 2002), in which this Court held that sovereign immunity, once waived, cannot be reimposed or recovered. The lower court, in contravention of the principles announced in *Oakley* and *Lawson*, held that a governmental entity, by withdrawing a counterclaim, could reinstate the immunity it waived by filing the counterclaim in the first place. This inconsistency in decisions should be resolved to remove unnecessary uncertainty in the law.

The court of appeals opinion conflicts with this Court's prior decisions in *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444 (Tex. 1996), *Dallas I.S.D. v. Porter*, 709 S.W.2d 642 (Tex. 1982), *Flynt v. Garcia,* 587 S.W.2d 109 (Tex. 1979), *Haginas v. Malbis Mem. Found.,* 354 S.W.2d 368 (Tex. 1962), and *Isbell v. Kenyon-Warner Dredging Co.,* 261 S.W. 762 (Tex. 1924). In each of these cases, this Court held that a trial court could not be divested of jurisdiction by subsequent facts or actions. As this Court has repeatedly stated, the general rule is that no subsequent fact or event in a particular case can defeat the court's jurisdiction once that jurisdiction is lawfully acquired. The general rule conflicts with the legal principle announced by the court of appeals in this case – that, by dismissing its counterclaim in the trial court, the City reinstated its sovereign immunity from suit and divested the trial court of subject-matter jurisdiction over Petitioners' claims. Litigation against governmental entities is common, and litigants are entitled to know whether a governmental entity can unilaterally divest the trial court of subject-matter jurisdiction that it previously acquired. Resolving this

conflict will remove unnecessary uncertainty in the law and unfairness to litigants.

The court of appeals opinion conflicts with this Court's prior decisions in *Reata Constr, Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988), *Tex. Dept. of Corrections v. Herring*, 513 S.W.2d 6 (Tex. 1974), and *Tex. Co. v. State*, 281 S.W.2d 83 (Tex. 1955), which stand for the proposition that a governmental entity must participate in litigation on the same basis as any other litigant. In *Davis*, this Court stated: "We consider it established that governmental units litigate as any other party in Texas courts and must observe the same rules that bind all other litigants, which include the laws governing pleadings and burden of proof." *Davis*, 752 S.W.2d at 519. In *Reata* this Court held: "Once [a governmental entity] asserts affirmative claims for monetary recovery, the City must participate in the litigation process as an ordinary litigant ...." The court of appeals decision, however, did not require the City to participate in litigation as an ordinary litigant. Instead, it holds that all governmental entities, including the City, are extraordinary litigants, holding the power to divest a court of subject-matter jurisdiction by voluntarily dismissing a counterclaim. The inconsistency between the opinion below and existing decisions of this Court should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants who litigate against governmental entities.

ISSUES PRESENTED

Issue No. 1:

Did the court of appeals err when it held that a civil action seeking enforcement of an ordinance enacted pursuant to the initiative and referendum process is barred by the doctrine of governmental immunity?

Issue No. 2:

Did the court of appeals err when it held that the City could restore its previously waived governmental immunity, and deprive the trial court of jurisdiction, by withdrawing the counterclaim it filed nine years earlier?

Issue No. 3:

Because of the unique facts and circumstances of this case, should this Court apply the equitable doctrine of prospectivity and hold that *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), does not apply retroactively to this case?

In the

Supreme Court of Texas

Austin, Texas

On Appeal from the Fifth Court of Appeals,
Dallas, Texas

BRIEF ON THE MERITS OF PETITIONERS KENNETH E. ALBERT, ET AL., DAVID L. BARBER, ET AL., ANTHONY ARREDONDO, ET AL., AND KEVIN MICHAEL WILLIS, ET AL.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents/Counter-Petitioners, Kenneth E. Albert, *et al.*, David L. Barber, *et al.*, Anthony Arredondo, *et al.*, and Kevin Michael Willis, *et al.*, (collectively, "Plaintiffs") file this Brief on the Merits in support of their Petition for Review seeking reversal, in part, of the Fifth Court of Appeals' December 21, 2006, judgment in this case.

INTRODUCTION

This case is important to the jurisprudence of the State for the following reasons:

- It presents a conflict between two important concepts – the constitutionally guaranteed right of citizens to exercise political power, and the judicially created ability of a municipality to claim governmental immunity to avoid litigation and protect public funds.

- It presents a question that is bound to recur: Can a governmental entity reinstate immunity it previously waived? This question arises because of a recent decision by this Court, and only this Court can provide the definitive answer.

- There is a large amount in controversy – potentially more than $1 billion according to the City.

- A large number of plaintiffs have a stake in the outcome – almost 1700 in these four related actions. The plaintiffs are fire fighters and police officers who protect and serve the citizens of Dallas and who, in exchange for their service, depend on the taxpayers of Dallas for their livelihood.

- The lower court's decision conflicts with numerous decisions of this Court and other appellate courts.

Because this case presents questions that are important to the State's jurisprudence, this Court should grant review to answer those questions.

STATEMENT OF FACTS

Plaintiffs are individuals who are or have been employed by the City of Dallas as fire fighters and police officers. The first of these lawsuits, *Albert v. City of Dallas*, was brought by a group of fire fighters and was filed 15 years ago, on June 30, 1994. The second lawsuit, *Willis v. City of Dallas*, was brought by police officers, and filed on February 13, 1995, 14 ½ years ago. The third lawsuit, *Barber v. City of Dallas*, was brought by fire fighters who were not included in the *Albert* case but wished to litigate their claims against the City of Dallas. It was filed on May 31, 1995, over 14 years ago.

All of Plaintiffs' claims in all of the lawsuits arise out of an ordinance adopted by the City of Dallas in 1979 in accordance with a *binding* referendum (the "Referendum") approved by the citizens of the City of Dallas in an election held under the initiative and referendum

provisions of the Dallas City Charter.[1] App. Tab 1, 2; *See* KA Supp. CR 15-24; DB Supp. CR 5-14; AA Supp. CR 4-14; KW Supp. CR 13-23. The ordinance stated, among other things, that each sworn police officer, fire fighter, and rescue officer employed by the City of Dallas would receive a pay raise, and that "the current percentage pay differential between the grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained ...."[2] App. Tab 2. Plaintiffs have asserted that the ordinance constitutes essential terms of their employment contracts with the City and imposes upon the City an obligation to maintain the percentage differential between the salaries paid to the various grades in the sworn ranks in all future salary adjustments. *See* KA Supp. CR 15-24; DB Supp. CR 5-14; AA Supp. CR 4-14; KW Supp. CR 13-23. They have further asserted that the City breached its contracts of employment with them by repeatedly raising the salaries of the highest ranking officers without implementing corresponding salary increases for the lower ranks. *Id.* Plaintiffs have stated claims for breach of contract (seeking back pay, benefits, and prejudgment and post-judgment interest) and seek a declaratory judgment as to the proper construction of the ordinance. *Id.*

In April 1995, 16 fire fighters in the *Albert* case moved for partial summary judgment on the issues of liability and back pay. *See Arrendondo v. City of Dallas*, 79 S.W.3d 657, 662 (Tex. App.—Dallas 2002, pet. denied); App. Tab 7. The City responded by filing an amended answer and counterclaim, and a motion for summary judgment. The City

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[1] Plaintiffs request that the Court take judicial notice of the Dallas City Charter pursuant to Texas Rule of Evidence 204 and Texas Government Code §9.008(a) and (b) which can be found at 1 KA CR 106-25B. In addition to the copy of the Charter found in the Clerk's Record, the Charter is also available at http://www.dallascityhall.com/pdf/cao/01Chartr.pdf (last visited June 28, 2009).

[2] For a detailed description of the events leading to the adoption of the pay ordinance, *see Arrendondo v. City of Dallas*, 79 S.W.3d 657, 659-62 (Tex. App.—Dallas 2002, pet. denied); App. Tab 7.

contended that if the ordinance required the pay grade differentials to be maintained forever, then salary adjustments that did not maintain the differential were void and unenforceable and all of the plaintiffs in the *Albert* case were required to return any additional money paid to them pursuant to those salary adjustments. *See Arrendondo*, 79 S.W.3d at 662; *see also* 1 KA CR 84-85. By its motion for summary judgment, the City requested judgment against each of the *Albert* plaintiffs for the salary paid them to the extent it exceeded the salary authorized under three specific resolutions. *Arrendondo*, 79 S.W.3d at 662-63. The City also amended its pleading in the other cases (*Barber* and *Willis*) to assert their counterclaim for the refund of salaries paid to the plaintiffs. *See* 1 DB CR 42; 1 KW CR 36, 97.

Ultimately, after a great deal of activity in the trial court and after a 22-month abatement of proceedings ordered by the trial court to give the City time to bring itself into compliance with the pay ordinance, the trial court, on May 26, 1999, granted the 16 fire fighters' motion for summary judgment and awarded them damages. *Id.* at 663-64. It also overruled the City's motion for summary judgment. *Id.* Five months later, on October 19, 1999, the trial court severed the 16 fire fighters' claims from those of the remaining plaintiffs in *Albert* (thus creating the *Arredondo* case), and its summary judgment order became final. *Id.* at 664. The City appealed. *Id.* at 665. On June 4, 2002, the court of appeals reversed, holding that the ordinance was ambiguous and that the trial court erred in finding as a matter of law that the City failed to comply with the ordinance. *Id.* at 666-69.

Nine years after the litigation was commenced, on June 4, 2003, the City filed a plea to the jurisdiction in each of the four cases, contending for the first time that its

governmental immunity from suit had not been waived and, therefore, the trial court lacked subject-matter jurisdiction over the case. 1 KA CR 89; 1 DB CR 62; 1 AA CR 130; 1 KW CR 112. The City argued in its pleas to the jurisdiction that it was immune from suit because a governmental entity does not waive immunity from suit simply by contracting with a private party. *Id.* Instead, according to the City, express consent is required to show that immunity from suit has been waived. *Id.* The City asserted that the Plaintiffs did not allege in their petition that the City had waived immunity and, therefore, did not state a basis for the trial court's jurisdiction. *Id.*

The City's after-the-fact justification for waiting until 2003 to file its pleas to the jurisdiction is two-fold: first, that the legislature mandated that a waiver of immunity be effected by clear and convincing language when it enacted Government Code § 311.034; and second, "recent cases" mandated that a waiver of immunity from suit be effected by clear and unambiguous language. *See* City's Petitions for Review at 4. However, Government Code § 311.034 was passed in 2001 and effective on June 15, 2001 – two years before the City filed its pleas to the jurisdiction. Similarly, the "recent opinions" cited by the City in its pleas to the jurisdiction, went back to at least June 1997 – six years before the City filed its pleas to the jurisdiction.[3] *See, e.g.* 1 KA CR 94-99.

Plaintiffs responded by filing amended petitions, asserting that the "sue and be sued" provisions of Local Government Code § 51.075 and the Dallas City Charter were explicit waivers of governmental immunity, and that by contracting with Plaintiffs and accepting the benefits of those contracts, the City waived immunity. *See, e.g.* 2 KA CR 281-82; *see also* 2 KA

[3] For example, the City relied on *Fed. Sign v. Tex. Southern Univ.*, 951 S.W.2d 401 (Tex. 1997), for the proposition that a waiver of immunity must be clearly and unambiguously expressed.

CR 315-20. The trial court denied the City's pleas to the jurisdiction. App. Tab 3; 2 KA CR 342-43; 2 DB CR 312-13; 2 AA CR 373-74; 2 KW CR 324-25. The City appealed.

While the appeal was pending, this Court handed down its opinion in *Reata Constr. Corp. v. City of Dallas*, 47 TEX. SUP. CT. J. 408, 2004 WL 726906 (Tex. April 2, 2004). Based on the Court's holding in *Reata*, Plaintiffs supplemented their briefing to the court of appeals to assert that the City's counterclaim was an additional basis supporting the trial court's denial of the City's pleas to the jurisdiction. The City responded by voluntarily dismissing its counterclaims – nine years after filing them. *See City of Dallas v. Albert*, 140 S.W.3d 920, 922 (Tex. App.—Dallas 2004); App. Tab 6. The court of appeals then held that *Reata* compelled it to decide that the City waived its immunity by filing a counterclaim seeking affirmative relief against Plaintiffs. *Id.* at 923. The City filed a motion for rehearing.

On June 30, 2006, this Court withdrew its first opinion in *Reata* and substituted a new opinion in its place, limiting the extent of the waiver of governmental immunity caused by a governmental body filing claims for affirmative relief. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). The Court also handed down its opinion in *Tooke v. City of Mexia*, holding that the phrases "sue and be sued" and "plead and implead" do not constitute a clear and unambiguous waiver of immunity. 197 S.W.3d 325, 342 (Tex. 2006).

Based on the new *Reata* opinion, the City filed a motion for rehearing in the court of appeals. On December 21, 2006, the court of appeals granted the City's motion for rehearing and handed down a new opinion. *See City of Dallas v. Albert*, 214 S.W.3d 631 (Tex. App.—Dallas 2006, pet. filed); App. Tab 5. The new opinion holds that the City's

withdrawal of its counterclaims revived its immunity from suit and divested the trial court of subject-matter jurisdiction over the Plaintiffs' claims, unless the Plaintiffs can establish under Local Government Code §§ 271.151-160 that their claims are not barred. *Id.* at 635-36; App. Tabs 4, 5. The court of appeals remanded the case to the trial court to give Plaintiffs the opportunity to prove that their claims fall within §§ 271.151-160. *Id.* at 636-37. Both the City and Plaintiffs seek this Court's review of the court of appeals decision.

SUMMARY OF THE ARGUMENT

First Issue. When the citizens of Dallas passed the Referendum, they were acting as the City's legislature. The citizens, acting as and for the City, decided that the City's budget should be expended for a specific purpose, and that the policy of the City would be that fire fighters' and police officers' future salaries would be based on a specific ratio among the ranks. When the beneficiaries of the citizens' benevolence sought to enforce the ordinance, the City, after nine years of litigation, asserted that it was immune from their suit. One hundred fifty years of case law, however, shows that a municipality does not enjoy immunity from suit, as the City has asserted here. Furthermore, because the City, through its citizens, made these decisions, the need for immunity (to protect the public treasury and allow public servants to make policy decisions) does not exist under these circumstances. Additionally, the requirement that a waiver of immunity be clearly and unambiguously expressed is not an end to itself, but merely a method to guarantee that courts adhere to legislative intent. Immunity should not be found if it would defeat the true purpose of the law, which it would do here by making the Referendum a nullity. Finally, the City is not

entitled to assert governmental immunity when the beneficiaries of the Referendum seek its enforcement because it would be asserting immunity against itself.

Second Issue. The City hopes to have reinstated its immunity, and deprived the trial court of subject matter jurisdiction, by dismissing its counterclaim against the Firefighters. The City's position is contrary to case law on two grounds: first, this Court and other courts have held that a governmental entity cannot unwaive, reimpose, or recover waived immunity; and second, as this Court has stated on a number of prior occasions, when jurisdiction is once lawfully and properly acquired, no later fact or event can defeat the court's jurisdiction. If governmental entities are allowed to unwaive a prior waiver of immunity, they become "super litigants" who can freely manipulate a court's jurisdiction. Additionally, there are numerous practical reasons not to allow the government to unwaive immunity by withdrawing a counterclaim. Consequently, the Court should hold that jurisdiction, once established, cannot be destroyed by the government's withdrawal of a counterclaim. Additionally, *Reata's* offset rule creates an insoluble problem when applied in a case like this. It is unworkable and must be reconsidered. Finally, the Court should decouple sovereign immunity and subject-matter jurisdiction, because treating sovereign immunity as a jurisdictional concept creates unnecessary doctrinal conflicts.

Third Issue. On the day this Court handed-down its decision in *Tooke v. City of Mexia,* the *Albert* case had been pending for 12½ years and the other cases were nearly as old. At the time, these cases were pending in the Dallas Court of Appeals on the City's motion for rehearing. After *Tooke*, the court of appeals handed down a new opinion in this

case reversing the trial court's order overruling the City's pleas to the jurisdiction. Because the facts of these cases are unique, and because the equities surrounding this 15-year-old litigation are compelling, this Court should exercise its discretion to hold that, in this instance, *Tooke* will not be applied retroactively to these cases.

ARGUMENT AND AUTHORITIES

I. Immunity and the Initiative and Referendum Process (Addressing Issue No. 1)

A. The citizens of Dallas, acting as a legislative body, expressed the public policy of the City through the initiative and referendum process.

The initiative and referendum process affords direct participation by the people in lawmaking. The system has its historical roots in the people's dissatisfaction with officialdom's refusal to enact laws. *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980). The process is an implementation of the basic principle of Article I, § 2, of the Texas Bill of Rights: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." *Id.*; *see also* TEX. CONST. art. I, § 2. It entails the exercise by the people of a right reserved to them, not the exercise of a right granted. *Coalson*, 610 S.W.2d at 747; *Taxpayer's Ass'n of Harris County v. City of Houston*, 105 S.W.2d 655, 657 (Tex. 1937). In order to protect citizens in the exercise of this reserved legislative power, initiative provisions in city charters should be liberally construed in favor of the power reserved. *Coalson*, 610 S.W.2d at 747; *Glass v. Smith*, 244 S.W.2d 645, 648-49 (Tex. 1951); *Taxpayer's Ass'n*, 105 S.W.2d at 657. Moreover, when the people exercise their rights and powers under the initiative provisions of a city charter, they are acting as, and

become, the legislative branch of the municipal government. *Glass*, 244 S.W.2d at 649. The point of the initiative and referendum process is to implement "the will of the public." *Coalson*, 610 S.W.2d at 747.

The Dallas City Charter provides for the enactment of ordinances through the initiative and referendum process. *See* DALLAS CITY CHARTER, Ch. IV, § 12, Ch. XVIII, §§ 11-14; App. Tab 1. Under the City's initiative and referendum process, if a majority of the qualified electors vote in favor of a proposed ordinance, that ordinance "shall thereupon become a valid and binding ordinance of the city." *Id.*, Ch. XVIII, § 14. "[A]ny ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people." *Id.* The City Council, however, can seek to have any such ordinance repealed or amended by submitting an appropriate proposition to the voters. *Id.* The City Council can do this at "any succeeding general city election." *Id.* If the City Council's proposition receives a majority of the votes cast, the ordinance is repealed or amended. *Id.* Thus, the Dallas City Charter provides for the enactment of ordinances through the initiative and referendum process, and for repealing those ordinances. The Charter, however, does not permit the City to ignore an ordinance enacted through the initiative and referendum process.

In 1979, the citizens of Dallas directed their government to give a pay raise to each sworn police officer, fire fighter, and rescue officer employed by the City of Dallas, and to maintain "the current percentage pay differential between the grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force" into the future. *See* App. Tab

2. Obviously, the citizens of Dallas were interested in ensuring that their police officers, fire fighters, and rescue officers were adequately compensated, and would continue to be adequately compensated in the future. As this Court has recognized, citizens are "vitally interested in having their officers and employees paid a living wage, and a wage commensurate with the duties involved." *Taxpayer's Ass'n*, 105 S.W.2d at 657. The prescribing of salaries for public officers and employees "is but an expression of a public policy." *Id.*

Unfortunately, after a few years, the City – instead of forthrightly asking the voters to repeal the ordinance – chose to ignore its citizens' public policy decision. Now, the City seeks to avoid the effect of its actions by asserting that it is immune from Plaintiffs' suits to enforce the voters' decision to pay them salaries commensurate with their duties.

B. The City does not have immunity from suit.

1. For 150 years it was clear that a city did not have immunity from suit, which is the kind of immunity the City asserts here.

Common law immunity was adopted in Texas in 1847 in *Hosner v. DeYoung*, where this Court held that "no ***state*** can be sued in her own courts without her consent." 1 Tex. 764, 769 (1847) (emphasis added); *see also Marshall v. Clark*, 22 Tex. 23 (1858) (**state** cannot be sued without its consent); *Bates v. Repub. of Tex.*, 2 Tex. 616 (1847) (same); *Borden v. Houston*, 2 Tex. 594 (1847) (same); *League v. DeYoung*, 2 Tex. 487 (1847) (same). In *Rose v. The Governor*, 24 Tex. 496, 504 (1859) the Court introduced the concept that statutes conferring a right to sue the State (*i.e.*, waiving immunity) "should be construed with strictness, so as to

extend the right only to those by whom it was clearly intended that it should be enjoyed."[4]

Immunity, if any, enjoyed by municipalities historically has been treated differently. In 1884, in *City of Galveston v. Posnainsky*, 62 Tex. 118 (1884), the Court was asked to resolve whether a city was liable for negligence. The Court noted that the city was a municipal corporation, "having the powers usually conferred on such corporations." The Court observed that "[i]n this state such corporations are not made liable for injuries resulting from neglect by any express statute; and if liable, they are so solely on the ground that the proper application of the principles of the common law makes them so liable." The Court did not mention any right enjoyed by cities to avoid suit unless consent was given, even though it had been applying that right for 35 years when the State was a party.

The Court in *Posnainsky* went into detail on the topic of whether a city can be liable for negligence, ultimately drawing a line between negligence associated with "the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate assent and exclusively for public purpose" (*i.e*, governmental functions) and "the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it at its request" (*i.e*, proprietary functions). *Posnainsky* also opines that cities, "which are incorporated through special charters ... at the request of those who are most directly benefited by them," must be distinguished from counties, which "are created by the legislature by general laws without reference to the wish of their inhabitants." In other words, the Court recognized a

[4] *Rose* is seldom cited, but appears to be the first decision stating that a waiver of immunity to suit must be strictly construed in favor of the governmental entity. That concept now appears in many immunity decisions. *See, e.g., Tex. Natural Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

distinction between cities and counties.[5] Ultimately, the Court in *Posnainsky* held that the city was liable for its negligence.[6]

Posnainsky's rule developed to be that the State and counties were not liable for their torts because they exercised only governmental functions. *See, e.g., State v. Isbell*, 94 S.W.2d 423, 425 (Tex. 1936); *Brooks v. State*, 68 S.W.2d 534, 534 (Tex. Civ. App.—Austin 1934, writ ref'd); *Harris County v. Gerhart*, 283 S.W. 139, 140 (Tex. 1926); *Heigel v. Wichita County*, 19 S.W. 562 (Tex. 1892). But, because cities performed both governmental and proprietary functions, they were liable for torts committed while performing proprietary functions, but not those committed while performing governmental functions. *See, e.g., City of Austin v. Daniels*, 335 S.W.2d 753, 754-55 (Tex. 1960); *City of Wichita Falls v. Robison*, 46 S.W.2d 965, 966 (Tex. 1932).[7] In *State v. Brannan*, the Commission of Appeals explained this non-liability doctrine, as follows:

> All authority possessed by a state is that conferred on it as a sovereignty by the people and consequently it can act in no other capacity than that of a sovereignty. It is inherently and exclusively sovereign and must necessarily act as such at all times and in all capacities. As a sovereignty, it is immune from liability for torts and since it can act in no other capacity than that of a sovereignty, it is necessarily immune from liability for torts at all times and in all its capacities. On the other hand, a municipal corporation may act in a dual

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[5] *Posnainsky's* distinction between cities and counties was reaffirmed in a number of subsequent opinions. *See, e.g., Harris County v. Gerhart*, 283 S.W. 139, 140 (Tex. 1926); *Heigel v. Wichita County*, 19 S.W. 562 (Tex. 1892). As recently as 1980, in *Turvey v. City of Houston*, 602 S.W.2d 517, 519, 520 (Tex. 1980), this Court has noted the difference in immunity provided to cities and counties.

[6] Three years after *Posnainsky*, in *City of Houston v. Isaacs*, 3 S.W. 693 (Tex. 1887), the Court considered another personal injury case against a city. Again, neither the city nor the Court suggested that consent to sue the city was required. Interestingly, the Court did not mention *Posnainsky*.

[7] In a 1968 article, Justice Greenhill noted that the court-made distinction between governmental and proprietary acts had "led to discrimination between claimants" that "almost amounts to a denial of the equal protection of the law or a denial of the protection of equal laws ***in areas of tort law***." *See* J. Greenhill, *Should Governmental Immunity for Torts be Re-examined, and If So, by Whom?*, 31 TEX. B.J. 1036, 1065-66 (Dec. 1968). As Justice Greenhill's statement implies, by 1968, the non-liability doctrine still was confined to tortious acts committed by the government, not to other government acts.

> capacity. It may carry on governmental functions as an agency of the state, in which event it shares the state's immunity and is exempt from liability for torts; or it may engage in proprietary or business activities of peculiar interest to itself and its inhabitants and not as agent for the state, in which event it is not a sovereignty, nor the agent of a sovereignty, and is not immune. In other words, a city has no sovereignty of its own and likewise no immunity of its own, but borrows its sovereignty from the state and is immune only in so far as it acts as an agent of the state.

111 S.W.2d 347, 348-49 (Tex. Comm'n App. 1937).

Thus, two distinct doctrines had been recognized by this Court before 1900. The first was the consent-to-suit doctrine, under which the ***State*** could not be sued without its consent. The second was the non-liability-for-torts doctrine, under which the State, counties, and other governmental entities created by the legislature by general law, were not liable for their ***tortious*** conduct[8], but a city could be liable for its tortious conduct, depending on whether it was performing governmental or proprietary functions. In time, these two doctrines would come to be called "immunity from suit" and "immunity from liability."[9] Several aspects of these two doctrines were clear:

First, by negative inference, it is clear from the case law that the consent-to-suit doctrine (immunity from suit) did not apply to cities because dozens of cases were decided without any mention that a city could not be sued without the State's consent. During the

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[8] In time, some case law began to suggest that the liability of these governmental entities for negligence also would be determined by whether the entity was engaged in a governmental or propriety function. *See, e.g.*, *State v. Isbell*, 94 S.W.2d 423, 425 (Tex. 1936); *State v. McKinney*, 76 S.W.2d 556, 556 (Tex. Civ. App.—Beaumont 1934, no writ).

[9] *Missouri Pac. R. Co. v. Brownsville Nav. Dist.*, 453 S.W.2d 812, 813 (Tex. 1970) appears to be this Court's first overt reference to "two different governmental immunities," although earlier opinions distinguished between the two. The Court in *Missouri Pacific* notes that there exists "immunity from suit without consent even though there is no dispute as to liability of the sovereign" and "immunity from liability even though consent to suit has been granted." *Id.* The first statement was too broad as compared to the common law in that it did not limit the consent-to-suit doctrine to the State; and the second statement was too broad in that it did not inform that the non-liability doctrine was confined to torts.

same time, however, the consent requirement was consistently discussed and applied in opinions regarding suits against the State. *See, e.g.*, *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960); *Herring v. Houston Nat'l Exchange Bank*, 269 S.W. 1031, 1032 (Tex. 1925).

Second, it is clear that the consent-to-suit and non-liability doctrines were distinct doctrines because, in a series of cases, this and other courts held that the State's having given consent to sue did not mean that it also consented to liability. *See, e.g.*, *State v. Isbell*, 94 S.W.2d 423, 425 (Tex. 1936)[10]; *State v. Brannan*, 111 S.W.2d 347, 349 (Tex. Comm'n App. 1937); *Brooks v. State*, 68 S.W.2d 534, 534 (Tex. Civ. App.—Austin 1934, writ ref'd); *State v. McKinney*, 76 S.W.2d 556, 556 (Tex. Civ. App.—Beaumont 1934, no writ).

Third, it is clear that the non-liability doctrine (immunity from liability) was a tort-only doctrine. Literally dozens of cases had applied it in negligence and other tort cases, but courts also had held that it did not apply to breach of contract actions against any governmental entity. *See State v. Elliott*, 212 S.W. 695, 698-701 (Tex. Civ. App.—Galveston 1919, writ ref'd) (once permission to sue State is given, State is liable for breach of contract); *Superior Incinerator Co. v. Tompkins*, 59 S.W.2d 102, 103 (Tex. Comm'n App. 1933, recommendation accepted) ("A contract is just as binding upon a municipal corporation as upon an individual. ... It cannot claim exemption or immunity from liability arising out of its contracts on account of its municipal capacity.").

Forth, while the consent-to-suit doctrine (immunity to suit) was to be strictly applied to protect the ***State*** from law suits, the non-liability doctrine (immunity from liability) was to

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[10] *Isbell* is an opinion by the Texas Commission of Appeals. Because the opinion was adopted by the Supreme Court, the case is cited as though it were a decision of the Texas Supreme Court, and it has the full authority of a Texas Supreme Court decision. Texas Rules of Form (11th Ed.) ¶ 5.2.1.

be construed narrowly in regard to a city liability. *See City of Houston v. Shilling*, 240 S.W.2d 1010, 1012 (Tex. 1951) ("We see no demand of public policy to depart from this strict limitation on the immunity of municipalities for its torts.").[11]

2. *The Tort Claims Act abrogated the State's immunity from suit and liability in some respects, but did not change fundamental immunity principles applicable to cities.*

The next major development in immunity law occurred in 1969. In response to pressure that the non-liability doctrine had become unfair and inconsistent, the Legislature adopted the Tort Claims Act. *See* 61st Leg., R.S., ch. 292, 1969 TEX. GEN LAWS 874 (*codified at* TEX. REV. CIV. STAT. art 6252-19[12]); *see also generally* J. Greenhill, *Should Governmental Immunity for Torts be Re-examined, and If So, by Whom?*, 31 TEX. B.J. 1036 (Dec. 1968) (describing problems with application of non-liability doctrine). The Tort Claims Act waived immunity for "personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor driven equipment ... or death or personal injuries so caused from some condition or use of tangible property, real or personal ...." TEX. REV. CIV. STAT. art 6252-19, § 3[13]. The Tort Claims Act did three major things: (1) it abrogated the non-liability rule as to the State and counties for some tort actions; (2) it relieved plaintiffs from the burden of obtaining legislative consent to bring actions allowed by the Act against the State; and (3) in regard to some city activities, it altered the governmental/proprietary function distinction that had

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[11] As recently as 1987, in *City of Gladewater v. Pike*, 727 S.W.2d 514, 519 (Tex. 1987), the Court noted that the doctrine of non-liability was to be construed narrowly against cities.

[12] The Tort Claims Act is now codified at TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109.

[13] This section is now codified at TEX. CIV. PRAC. & REM. CODE § 101.021.

developed in the common law for suits against cities.[14] But it did not create immunity from suit for cities or create an immunity in contract actions.

3. *Immunity language has recently changed and now purports to give cities immunity beyond what they historically enjoyed at common law.*

This Court's language regarding city immunity changed in 1995 in *City of LaPorte v. Barfield*, 898 S.W.2d 288 (Tex. 1995). The Court began its analysis in *Barfield* by saying that "[a] city is immune from liability ***for its governmental actions***, unless that immunity is waived." *Id.* at 291 (emphasis added). Of course, "immunity from liability for governmental actions" is substantially broader than non-liability for torts committed while performing governmental functions. In support of this broad statement of immunity, the Court cited *City of Round Rock v. Smith*, 687 S.W.2d 300 (Tex. 1985) and *City of Austin v. Daniels*, 335 S.W.2d 753, 754-55 (Tex. 1960). Neither case supports the broad statement of immunity.[15]

Barfield's broader language regarding city immunity has prevailed in recent decisions. In *Reata Constr. Corp. v City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) the Court stated that "[s]overeign immunity protects the State from lawsuits for money damages," citing *Tex. Natural Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) which, in turn, cited *Federal Sign v. Tex. Southern Univ.*, 951 S.W.2d 401 (Tex. 1997). *Reata's* statement is broad, but generally correct if limited as it was in *Federal Sign* to "the State of Texas, its agencies and its

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[14] For example, under the Tort Claims Act, a city could be liable for negligence involving a motor-driven vehicle even if that negligence occurred in performance of what would have been called a governmental function in the common law.

[15] In *Smith*, the Court stated the proposition as follows: "A city is liable ***for torts*** committed by its employees when the city is performing a proprietary function. On the other hand, a city is ***immune from liability for torts*** committed by its employees when the city is performing a governmental function unless the state by statute has waived immunity." *Smith*, 687 S.W.2d at 302 (emphasis added). In *Daniels*, the Court stated the proposition as follows: "When acting in a governmental capacity, the city is not liable in damages ***for torts*** of its employees." *Daniels*, 335 S.W.2d at 754 (emphasis added).

officials," and if tied to the need to obtain legislative consent for suit against the State. *See Federal Sign*, 951 S.W.2d at 405. The Court goes on to say, however, that "[p]olitical subdivisions of the state, including cities, are entitled to such immunity ... unless it has been waived." For this proposition, the Court cites *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003), but *Taylor* and the cases cited therein do not support this expansive proposition.[16] The Court in *Reata* then states that "[s]overeign immunity encompasses immunity from suit, which bars a suit unless the state has consented, and immunity from liability, which protects the state from judgments even if it has consented to the suit," citing *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). *Jones* supports this proposition, but the State, not a city, was a party in *Jones*, and the opinion's statement regarding immunity from suit is limited by this fact. While *Reata's* language goes beyond the historic common law concept of the limited immunity enjoyed by cities, its broad language did not change the outcome—the city did not have immunity from suit in the first place (because cities never have enjoyed immunity from suit), so the holding that the city waived immunity from suit by filing a counterclaim reaches the correct outcome, that the city did not have immunity.

In *Tooke v. City of Mexia*, 197 S.W.3d 325, 331-32 (Tex. 2006), the Court used broad language again to describe immunity, declaring without citation to authority that sovereign immunity "has come to be applied to the various governmental entities in this State." *Tooke*, however, was not decided on the question of whether a city enjoys immunity from suit.

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[16] The cited footnote in *Taylor* informs that "sovereign immunity" is a term that applies to the State and "governmental immunity" is a term that applies to political subdivisions. The footnote does not describe the parameters of either doctrine, or the distinctions between them. It cites numerous cases, but, the cases do not support *Reata's* proposition that cities enjoy the same immunity as the State. Instead, the cases apply the common law rules discussed above.

Instead, the opinion presumes that cities enjoy immunity from suit, and the case is decided on whether the city waived that immunity. To the extent *Tooke* holds that cities are immune from suit in all actions, including breach of contract actions, it cannot be squared with 150 years of common law developed after 1845. Cities never have benefited from the consent-to-suit doctrine and the non-liability doctrine, which cities did enjoy to a limited extent, always was limited to torts.[17]

Two years ago, the Court decided *City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007), a negligence case. Again, this Court spoke broadly of the immunity enjoyed by cities, and stated for the first time that their immunity is derived from their own sovereignty, which creates a "heavy presumption" in favor of the city enjoying immunity. *Id.* at 469-70. Again, the case was decided on another point (whether a city has immunity from a suit brought by a superior governmental entity, the State). Again, the cases cited to support the proposition that a city enjoys immunity from suit either do not support the proposition or rely on prior cases that do not support the proposition.[18] As in *Tooke*, *City of Galveston's* holding that cities are immune from suit in all actions, including breach of contract actions, cannot be squared with 150 years of common law. The question of a city's historic immunity from suit, however, does not appear to have been squarely presented in *City of Galveston.* The statement in *City of Galveston* that there is a heavy presumption in favor of immunity cannot be aligned

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[17] *See Meska v. City of Dallas*, 429 S.W.2d 223, 224 (Tex. Civ. App.—Dallas 1968, writ ref'd) (appellant sought judicial abrogation of immunity from liability doctrine under which "it has long been the law of this state that municipalities are immune from tort liability for the alleged negligence of their employees when engaged in the performance of governmental duties.").

[18] For example, the Court in *City of Galveston* relies on *Barfield* and on the two cases cited by *Barfield. See City of Galveston*, 217 S.W.3d at 469, n.10. As has already been discussed, the two cases cited in *Barfield* to support the proposition that cities enjoy broad immunity for their "governmental actions" simply do not stand for that proposition.

with this Court' prior holdings that a city's immunity should be narrowly applied. *See Pike*, 727 S.W.2d at 519; *Shilling*, 240 S.W.2d at 1012 (Tex. 1951).

4. *The Court should confirm the historic rule that cities do not enjoy immunity from suit.*

Before 1995, cities had ***no immunity from suit*** and ***limited immunity from liability for torts*** committed while carrying-on governmental functions, with that immunity being derived from the State's immunity and narrowly applied. Now, due to expansive language in a few opinions, cities may enjoy a heavy presumption in favor of blanket immunity from all causes of action filed against them, with that immunity being attributed to their own sovereignty. This progression has been made with little consideration of whether cities historically have enjoyed immunity from suit and little consideration of the public policy underlying the historic immunity rules.

Here, the City has never suggested that it is immune from liability in this breach of contract action. Clearly, it is not. *See Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 405 (Tex. 1997); *Elliott*, 212 S.W. at 698-701. It has asserted only that it is immune from suit.[19] As noted above, historically, the City would not enjoy immunity from suit in any action, including a breach of contract action. This Court's recent opinions, however, suggest otherwise. *Barfield* used broad language, but the language did not affect the result. *Reata* reached the correct conclusion (the city did not have immunity from suit) for the wrong

[19] *Fort Worth I.S.D. v. City of Fort Worth*, 22 S.W.3d 831 (Tex. 2000) is a similar case to the case at hand, except the City did not assert immunity from suit. In *Fort Worth I.S.D.*, a school district sued a city for breach of obligations under an ordinance regarding taxes being paid to the city by a telephone-service provider. *Id.* at 835-39. The city claimed immunity from liability. The opinion does not explain why the city did not assert immunity from suit, but one can presume it is because cities have never enjoyed immunity from suit. This Court ultimately found that the city did not have immunity from liability in regard to the school district's breach of contract action based on the violation of city ordinances. *Id.* at 843.

reason.[20] *Tooke* and *City of Galveston* cannot be aligned with 150 years of case law and should be regarded as anomalies resulting from the failure of the parties to squarely present the issue to the Court. Thus, for the reasons stated above, Plaintiffs believe that the City does not have immunity from suit in this case, and the court should so hold.

C. Even if the City enjoys immunity from suit, it does not apply under these facts.

1. Allowing the City to assert immunity would render the Referendum—and the initiative and referendum process—a nullity.

If the City is correct that government immunity bars enforcement of a binding Referendum, the will of the people of Dallas will have been ignored, the public policy they expressed will have been thwarted, city leaders will be empowered to ignore their citizens' wishes as expressed in lawfully passed referendums, and the initiative and referendum process in Texas will have become a dead letter. This cannot and should not be the law in Texas.

Assuming, without conceding, that the City enjoys immunity from suit, that immunity should not be available when it does not achieve the purposes of the doctrine. Sovereign immunity[21] is a common-law doctrine that initially developed without any legislative or constitutional enactment. *Cohens v. Virginia*, 19 U.S. 264, 293 (1821) (recognizing the sovereign immunity doctrine without citing statutory or constitutional authority); *Hosner v. Deyoung*, 1 Tex. 764, 769 (1846) (same); *see also Tex. A&M Univ. v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). Recognizing that sovereign immunity is a common-law doctrine, the

[20] Of course, if a city can have immunity from suit, Plaintiffs believe it was waived by the City filing a counterclaim, as the Court held in *Reata*.

[21] Sovereign immunity protects the state, while governmental immunity, which derives from or is an aspect of the state's sovereign immunity, protects political subdivisions of the state. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

judiciary can modify or abrogate immunity by modifying the common law. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695-96 (Tex. 2003); *Tex. Dept. of Crim. Justice v. Miller*, 51 S.W.3d 583, 593 (Tex. 2001) (Hecht, J., concurring) (judicial abolition of immunity may be necessary to prompt the Legislature to enact a reasoned system for determining the government's responsibility for its torts). Therefore, it remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances immunity exists in the first instance. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006).

Governmental immunity is not, and never has been, absolute. For example, a governmental entity waives immunity from liability when it contracts with a private person. *Federal Sign v. Tex. Southern Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Also, a governmental entity's immunity from suit is waived when the legislature or the entity grants permission or consent to sue. *Id.* at 405. And a governmental entity's immunity from suit is waived when it files a counterclaim in pending litigation, at least to the extent of an offset. *Reata*, 197 S.W.3d at 377. Furthermore, this Court has repeatedly held that immunity should not be found if finding immunity would defeat the true purpose of the law. *See, e.g., Tex. Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004); *Wichita Falls*, 106 S.W.3d at 697. The requirement that a waiver of immunity (consent to be sued) be expressed clearly and unambiguously is not an end to itself, but merely a method to guarantee that courts adhere to legislative intent. *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000).

The purpose of immunity is to protect the public treasury and allow public servants

the freedom to make policy decisions without having to worry about legal challenges. *See Wichita Falls*, 106 S.W.3d at 695; *Tex. Home Mgmt v. Peavy*, 89 S.W.3d 30, 43 (Tex. 2002). But when the citizens of a city, acting as the city's legislature, make a policy decision that requires an expenditure of city monies, the city's public servants do not need protection to make a policy decision, and there is no need to protect public funds. There is no need for immunity.

In short, applying governmental immunity here would essentially allow the City's leaders to veto a binding referendum passed 2-1 by the voters, and to disregard the voters' policy decision to expend public funds for a particular purpose. Under these circumstances, this Court should find that the doctrine of governmental immunity, even if otherwise available, is not available to the City under the facts of this case.

2. The referendum provisions of the Dallas City Charter must be read to consent to suit to enforce the voter-approved Referendum.

The City has never taken the position that it has immunity from liability in these cases. Instead, it bases its immunity defense on its assertion that Plaintiffs did not obtain consent or permission to sue the City. Assuming, without conceding, that consent to sue was required, the City's argument is countered by the Referendum. The legislative intent, as expressed by the voters of Dallas, was clear – the City's first responders were to be given a raise and paid in the future pursuant to a specific framework. The power to bind the City to the payment of public funds for the benefit of Petitioners was a necessary element of the voters' approval of the Referendum. The entire process would have no meaning without the obligation for payment. This Court should not impute to the voters who passed the

Referendum an intention to enact an ineffective law. The Referendum is effective only if it is enforceable, and allowing immunity to trump an action to enforce the Referendum defeats the true purpose of the law.

If the City's immunity argument were to be accepted, the City would be asserting immunity against itself. In *City of Canyon v. Fehr*, the opponents of amendments to a city zoning ordinance sought to require the city to adopt a resolution negating the zoning ordinance, repeal the amendments, or submit the rezoning issue to the voters pursuant to the city's initiative and referendum process. 121 S.W.3d 899, 901-02 (Tex. App.—Amarillo 2003, no pet.). The Amarillo Court of Appeals held that a suit to compel a city to order a referendum election is not barred by the doctrine of governmental immunity. *Id.* at 902-03. In discussing why governmental immunity does not bar such suits, the court reasoned that if a municipality was allowed to assert immunity, it would, in effect, be invoking the doctrine against itself because its citizens, in the initiative and referendum process, are acting as the sovereign. *Id.* at 902.

This rationale applies with equal logic to the present case. There is no valid distinction between an action to compel a city to hold a referendum election, and an action to compel a City to comply with the result of a binding referendum approved by the voters. In both cases, the City would be essentially invoking the doctrine of sovereign immunity against an act of the sovereign, *i.e.*, the people acting as the municipal legislature. The court of appeals' decision is inconsistent with *Fehr*. *See Albert*, 214 S.W.3d at 637-38.[22]

Seventy years ago, in *Taxpayer's Ass'n of Harris County v. City of Houston*, a taxpayers'

[22] The inconsistency between the court of appeals' decision and *Fehr* provides this Court with jurisdiction over this interlocutory appeal. *See* TEX. GOV'T CODE §22.001(a), (e), §22.225(c), (e).

group sued to enjoin the City of Houston from complying with two ordinances adopted by vote of the people under the referendum provisions of Houston's charter. 105 S.W.2d 655, 656 (Tex. 1937). The ordinances fixed the minimum salaries for certain city employees, including fire fighters. *Id.* This Court held that the ordinances were binding on the City of Houston. Now, 70 years later, the same basic case will end with a different result unless the lower court's judgment is reversed. The Firefighters urge this Court to find that the bar of governmental immunity is not applicable when, as here, the people of a constitutional democracy act as the sovereign and authorize and compel the expenditure of public funds.

II. Offsets and Jurisdiction (Addressing Issue No. 2)

A. *Reata's* holding coupled with existing case law creates an insoluble problem.

In *Reata*, this Court held that a governmental entity waives immunity, to the extent of an offset, by filing a counterclaim. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). *Reata* can be viewed as helpful to those litigating against governmental entities. But, in application, it is not. *Reata*, when coupled with existing precedents holding that the existence of sovereign immunity prevents the attachment of subject-matter jurisdiction, creates an insoluble problem if the governmental entity's counterclaim, on which jurisdiction is based, is dismissed. According to the court of appeals: (1) if a governmental entity defendant has not consented to suit, the trial court lacks subject matter jurisdiction, (2) the government can consent to suit (waive immunity) by filing a counterclaim, but its consent is given (immunity is waived) only to the extent of an offset, (3) if the counterclaim is dismissed, the possibility of an offset disappears, (4) without the possibility of an offset, the

limited consent to suit (waiver of immunity) disappears, (5) the disappearance of the limited consent to suit means that there is no longer a basis for the trial court's jurisdiction, and (6) without jurisdiction, the trial court must dismiss. *See City of Dallas v. Albert*, 214 S.W.3d 631, 635-36 (Tex. App.—Dallas 2006, pet. filed).

In other words, according to the court below, the government's voluntary dismissal of its counterclaim divests a trial court of jurisdiction. This holding, however, conflicts with other subject-matter jurisdiction principles. This Court has held in other contexts that no later fact or event can defeat a court's jurisdiction once that jurisdiction was lawfully and properly acquired. *See* Part II.B.2, below. Which subject-matter jurisdiction rule should prevail? Should the rule that a court has no choice but to dismiss a case if it lacks subject-matter jurisdiction prevail? Or should the rule that no later fact or event can defeat a court's subject-matter jurisdiction prevail? The only possible answer is that whether the issue is discussed as immunity or jurisdiction, a governmental entities' voluntary dismissal of its counterclaim should not be held to unwaive immunity or divest the trial court of jurisdiction. Furthermore, as is discussed in Part II.D., below, the real answer is that this Court should uncouple sovereign immunity and subject-matter jurisdiction.

B. A governmental entity should not be allowed to unwaive a prior waiver of immunity and divest a court of jurisdiction.

1. State and federal cases hold that a governmental entity cannot unwaive a prior waiver of immunity.

Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003).

Even constitutional rights can be waived. *See, e.g., Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (declining to consider due process and equal protection arguments because they were waived). Attempts to unwaive previously waived rights are rarely successful.[23] More importantly, both this Court and federal courts have refused to allow a governmental entity to reinstate its previously waived immunity.

In *State v. Oakley*, the plaintiff (Danzinger) had been wrongful imprisonment for murder. 227 S.W.3d 58, 59-60 (Tex. 2007). Danzinger was exonerated by DNA evidence and released from prison. He sued the City of Austin in federal court for civil rights violations. He settled his suit against the city for a substantial sum of money. He then sued the State under Civil Practice and Remedies Code Chapter 103, which provides for compensation to a person wrongfully convicted of a crime. *See generally* TEX. CIV. PRAC. & REM. CODE ch. 103. The State filed a plea to the jurisdiction, asserting sovereign immunity.

Chapter 103 expressly waives the State's immunity from suits brought under Chapter 103. *See id.* § 103.153(a). But it also provides that a person who receives compensation under that chapter cannot bring an action involving the same subject matter against any governmental entity or employee. *See id.* § 103.153(b). The State's argument was that Chapter 103 was impliedly saying that a person could not do as Danzinger had done (recover from a political subdivision, then also recover from the State under Chapter 103), and that

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[23] A criminal defendant, for example, can unwaive a prior waiver of the right to counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); TEX. CODE CRIM. P. 1.051(h). Even so, he cannot do so if it would upset the orderly procedure in the courts, interfere with the fair administration of justice, or delay trial. *See Culverhouse v. State*, 755 S.W.2d 856, 861 (Tex. Crim. App. 1988); *Hubbard v. State*, 749 S.W.2d 341, 344 (Tex. Crim. App. 1987). Similarly, a criminal defendant who waives his jury-trial right will be allowed to reassert that right, but only if the court finds that his request to do so is made sufficiently in advance of trial that granting his request will not interfere with the orderly administration of the business of the court, result in unnecessary delay or inconvenience to witnesses, or prejudice the State. *Marquez v. State*, 921 S.W.2d 217, 222 (Tex. Crim. App. 1996).

the State, therefore, was immune from Danzinger's Chapter 103 action. According to this Court, Chapter 103 "plainly prohibits those who receive compensation from the State from then suing local governmental entities or employees. ... But it says nothing about granting any immunity to the State ... [and] nothing about reimposing [immunity]." *Oakley*, 227 S.W.2d at 63. ***"The issue here is whether sovereign immunity, having been expressly waived, should be impliedly reimposed. Texas law prohibits implied waivers of immunity, but it has never mandated implied reimposition."*** *Id.* at 64 (emphasis added).

In *Texas A & M University v. Lawson*, the University terminated Lawson's employment as a faculty member. 87 S.W.3d 518, 518-19 (Tex. 2002). Lawson sued for alleged violations of the Whistleblower Act. The parties settled and the University agreed to tell prospective employers that Lawson was employed at the University as an assistant professor at a particular salary. Sometime later, Lawson brought a second suit against the University for breach of the settlement agreement, alleging that the University responded to employment inquiries in a manner different than it had agreed to do. The University filed a plea to the jurisdiction, asserting immunity. In resolving the University's immunity claim, this Court stated—

> [T]he Legislature has waived immunity from suit for violations of the Whistleblower Act, which was one of Lawson's claims in his earlier suit against the University .... Lawson was ... entitled to sue the University for violating the statute and if he prevailed, to hold the University liable. We agree with the trial court that when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued. ***The government cannot recover waived immunity*** by settling without defeating the purpose of the waiver in the first place.

87 S.W.3d at 521 (emphasis added); *see also State v. Shumake*, 199 S.W.3d 279, 281, 288 (Tex. 2006) (rejecting State's contention that recreational use statute "reinstates immunity" for premises liability claims arising on State-owned recreational property).

Federal courts have not allowed the unwaiver of sovereign immunity either. The Eleventh Amendment to the United State Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States." U.S. CONST. amend. XI. The Eleventh Amendment is a sovereign immunity provision. When a state removes a case to federal court, it voluntarily invokes the federal court's jurisdiction and waives its Eleventh Amendment sovereign immunity. *Lapides v. Board of Regents*, 535 U.S. 613, 620, 624 (2002).

In *Embury v. King*, a former employee of the University of California sued the University's regents in state court for violations of state and federal law. 361 F.3d 562, 563 (9th Cir. 2004). The defendants removed the case to federal court and moved to dismiss, asserting Eleventh Amendment immunity. The federal district court denied the motion, holding that, although the defendants, as an instrumentality of the State of California, were immune from suit for damages in federal court, the defense had been waived by their action in removing the case from state court to federal court. The Ninth Circuit affirmed, stating:

> [R]emoval itself affirmatively invokes federal judicial authority and therefore waives Eleventh Amendment immunity .... The removal is the waiver, regardless of whether ... the waiver could also have been effected by subsequent events. ***Allowing a State to waive immunity to remove a case to federal court, then "unwaive" it to assert that the federal court could not act, would create a new definition of chutzpah.*** We decline to give the State such unlimited leeway, and instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment

immunity.

Id. at 566 (emphasis added; citations omitted); *see also Elmore v. Schriro*, 2006 WL 2355398, *13 (D. Ariz., August 4, 2006) (state cannot unwaive its waiver of Eleventh Amendment immunity).

As *Oakley*, *Lawson*, and *Embury* show, the government cannot reimpose, recover, or unwaive immunity it has previously waived. Here, the City clearly waived whatever immunity it had (at least to some extent) by filing a counterclaim. Under the reasoning of *Oakley*, *Lawson*, and *Embury*, it cannot reinstate its immunity by voluntarily dismissing that counterclaim. The court of appeals erred in concluding otherwise.[24]

2. *State and federal cases hold that the government cannot divest a court of subject-matter jurisdiction by dismissing a counterclaim.*

Subject-matter jurisdiction is essential to a court's power to decide a case and a court "must not act" without determining that it has subject-matter jurisdiction to do so. *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000); *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Subject-matter jurisdiction cannot be conferred on a court by waiver or consent. *Dubai Petro. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000); *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943). And it can be raised at any time by the parties or the court, even for the first time on appeal, *Texas Ass'n of Business*, 852 S.W.2d at 445-46. But, ***"[a]s a general rule, where jurisdiction is once lawfully and properly acquired, no later fact or event can defeat the court's jurisdiction."*** *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996); *Dallas I.S.D. v. Porter*, 709 S.W.2d 642,

[24] The conflict between the opinion below and this Court's decisions in *Oakley* and *Lawson* gives this Court jurisdiction of this interlocutory appeal. *See* TEX. GOV'T CODE §22.001(a), (e), §22.225(c), (e).

643 (Tex. 1982); *Flynt v. Garcia*, 587 S.W.2d 109, 109-10 (Tex. 1979); *Haginas v. Malbis Mem. Found.*, 354 S.W.2d 368, 371 (Tex. 1962); *Isbell v. Kenyon-Warner Dredging Co.*, 261 S.W. 762, 763 (Tex. 1924).

An analogous circumstance to the present case arises when state-law claims are asserted in federal court. A federal court has jurisdiction of claims brought under the United States Constitution or the laws of the United States. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1331. State-law claims having a common nucleus of operative facts with federal-law claims may be asserted in federal court alongside the federal claims, even though the federal court otherwise would not have jurisdiction of those state-law claims. In that circumstance, a federal court's jurisdiction extends to the pendent state-law claims. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). If the federal-law claims providing the court's jurisdiction are disposed, the court is not divested of jurisdiction. Instead, the court retains discretion to exercise supplemental jurisdiction over the pendent state-law claims. *See* 28 U.S.C. § 1367. Thus, a subsequent act or fact (the dismissal of the federal-law claim providing jurisdiction) does not divest the federal court of jurisdiction.

The court of appeals' decision that the trial court in this case lost jurisdiction when the City dismissed its counterclaim is inconsistent with *Continental Coffee*, *Porter*, *Flynt*, *Haginas*, and *Isbell*, and with federal authority regarding pendent state claims.[25]

Not only would it be inconsistent with established state and federal precedent to allow the government to destroy jurisdiction by voluntarily dismissing a claim, it also would not be a good policy. If this Court were to hold that dismissing (voluntarily or involuntary) a

[25] The inconsistency with prior state-court decisions establishes this Court's jurisdiction. *See* TEX. GOV'T CODE §22.001(a), (e), §22.225(c), (e).

counterclaim reinstates the government's immunity, divests the trial court of subject-matter jurisdiction, and requires dismissal of the action, it would discourage plaintiffs from filing motions for summary judgment to dispose of meritless claims brought by the government because prevailing on the motion would result in the dismissal of the plaintiff's case. Discouraging plaintiffs from attempting to dispose of meritless claims would, in turn, result in wasting the court's, parties' and jury's time by having to litigate and resolve those meritless claims.

At the same time, governmental entities would be encouraged to file counterclaims – no matter how dubious – in every case because the filing of a counterclaim would give it an opportunity for a financial recovery and, if nothing else, provide additional bargaining power with the plaintiff. Then, if the government sensed an unfavorable outcome, it would kill the entire case by nonsuiting its counterclaim (which it has a right to do under Civil Procedure Rule 162) and divesting the trial court of jurisdiction.

Even if a trial court could refuse to allow the unilateral dismissal of a counterclaim in contravention of Rule 162's plain language, this State's appellate courts would spend a decade creating a body of law regarding the circumstances that do or do not warrant a trial court refusing to allow the governmental entity's voluntary dismissal of a counterclaim. To prevent the dismissal, would the plaintiff have to show that the counterclaim was asserted in bad faith; that it was groundless; that it was brought for the purpose of gaining a litigation advantage; or something else? Would it matter whether the counterclaim was dismissed early in the case or, instead, in the middle of trial or on appeal? These questions, and others,

would have to be answered, and the answers would have to be applied on a case-by-case basis.

Furthermore, finding that dismissal of a counterclaim divests the court of jurisdiction and requires dismissal also could affect – for reasons unrelated to the merits of the claims – a trial court's willingness to render a summary judgment on, or otherwise dismiss, the government's counterclaim. It would allow the defendant to manipulate the trial court of jurisdiction, would be contrary to Texas Rule of Civil Procedure 162's provision that a nonsuit does not affect an opposing party's claims, and would be contrary to the notion that jurisdiction cannot be conferred by waiver or consent. In effect, it would make the government a "super litigant" that did not have to abide by the rules applicable to other litigants, which conflicts with court opinions that the government must litigate according to the rules applicable to everyone else. *See Reata*, 197 S.W.3d at 377 ("Once it asserts affirmative claims for monetary recovery, the City must participate in the litigation process as an ordinary litigant ..."); *see also Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988) (governmental units litigate as any other party in Texas courts and must observe the same rules that bind all other litigants, which include the laws governing pleadings and burden of proof); *Tex. Dept. of Corrections v. Herring*, 513 S.W.2d 6, 7-8 (Tex. 1974) (same); *Tex. Co. v. State*, 281 S.W.2d 83, 90 (Tex. 1955) (same). The court of appeals' decision that a governmental entity can divest the trial court of jurisdiction in a circumstance when other litigants cannot is inconsistent with *Reata*, *Davis*, *Herring*, and *Texas Co.*[26]

In *Lapides v. Board of Regents*, the United States Supreme Court noted that allowing a

[26] The inconsistency of the lower court's decision with this Court's prior decisions establishes this Court's jurisdiction of this appeal. *See* TEX. GOV'T CODE §22.001(a), (e), §22.225(c), (e).

governmental entity to invoke a trial court's jurisdiction and then assert immunity "could generate seriously unfair results." 535 U.S. 613, 619 (2002). The Court further found that the Eleventh Amendment rests upon "the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Id.* at 620 (citing *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring)). Consequently, the Supreme Court refused to accept Georgia's request to be allowed to both invoke the district court's jurisdiction and assert immunity, because it would allow Georgia and other states to "achieve unfair tactical advantages." *Id.* at 621.

Additionally, a party – even the government – should not be allowed to manipulate a trial court's jurisdiction. For example, in *Phifer v. Nacogdoches Cty Central Appraisal Dist.*, the appraisal district filed suit in Nacogdoches County to collect delinquent taxes. 45 S.W.3d 159, 163-64 (Tex. App.—Tyler 2000, pet. denied). The property owner had died and a probate proceeding also was pending in Cherokee County. After the tax suit was filed but before judgment, the estate sold the property in question. The executor of the estate then argued that the Nacogdoches County district court lost jurisdiction in favor of the Cherokee County probate court. The Tyler Court of Appeals disagreed. "The guidelines of the statute [Probate Code § 5C] must necessarily apply at the time suit is filed. Otherwise, an estate could simply divest a court of jurisdiction by selling the property between the date suit is filed and the date of judgment. Parties cannot manipulate jurisdiction." *Id.* at 169.

Federal courts also attempt to prevent manipulation of a court's jurisdiction. For

example, by pleading damages less than the minimum amount necessary for federal court jurisdiction, a plaintiff can circumvent the defendant's attempt at removal. As the Fifth Circuit has noted, this rule allows plaintiffs to manipulate federal jurisdiction when the plaintiff's pleading does not actually set the ceiling for the damages that may ultimately be awarded. *See DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995). Because the rule invites manipulation, the Fifth Circuit has created an exception to the rule: "[I]f a defendant can prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount, removal is proper unless the plaintiff shows that at the time of removal he was legally certain not to be able to recover that amount." *Allen v. R & H Oil and Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (citing *DeAguilar*, 47 F.3d at 1412). In other words, the Fifth Circuit and other federal courts understand that parties should not be encouraged to manipulate a court's jurisdiction.

3. The Court should hold to a straightforward, easy-to-administer rule that filing a counterclaim waives immunity.

If the court of appeals' decision is allowed to stand, governmental entities will be able to manipulate the jurisdiction of Texas courts and will be encouraged to file counterclaims in all cases. This Court clearly has the power to prevent this from happening. Sovereign immunity exists in Texas because this Court has recognized it, not because the constitution or any statute requires it. *See Wichita Falls*, 106 S.W.3d at 94-95. As Justice Hecht stated in *Texas Department of Criminal Justice v. Miller*, "[t]he common law rule of immunity in Texas was the judiciary's to recognize, and it is ours to disregard." 51 S.W.3d 583, 592-93 (Tex. 2001) (Hecht, J., concurring).

The Court has found circumstances in which the immunity it has created can be waived by the governmental entity that otherwise would enjoy that immunity. *Reata* sets out one of those circumstances. But *Reata* gives rise to a new question: Can a governmental entity can waive, and then unwaive, immunity. That question will come up again and again until this Court further defines the parameters of *Reata's* waiver of immunity. The Court should define those parameters sooner rather than later. This Court judicially established the doctrine that filing a counterclaim waives immunity. It is incumbent upon the Court to judicially establish the exceptions and limitations to the doctrine.

In that regard, this Court should follow the Ninth Circuit's lead and "decline to give the State such unlimited leeway." *Embury v. King*, 361 F.3d at 566. As the Ninth Circuit did in *Embury*, this Court should "hold to a straightforward, easy-to-administer rule" that filing a counterclaim waives immunity. The court of appeals' opinion should be reversed because, once the City waived its consent to be sued by seeking affirmative relief, the City cannot avoid the consequences of its actions by attempting to undo the waiver.

C. Even if filing a counterclaim is held to be an irrevocable waiver of immunity, *Reata's* offset limitation still creates a problem.

1. Reata's offset rule is unworkable and should be revisited.

Holding that a governmental entity cannot unwaive immunity and destroy subject-matter jurisdiction by dismissing a counterclaim does not, however, fully resolve the issues raised in this case. *Reata's* rule that in a suit for damages, a governmental entity waives its immunity by filing a counterclaim, ***but only to the extent of an offset***, is an unworkable rule. If governmental entity withdraws its counterclaim (as happened here) or the

counterclaim is dismissed pursuant to a motion for summary judgment, there are three options under *Reata's* offset rule, none of which is satisfactory.

First, this Court could hold that dismissing a counterclaim reinstates the government's immunity and divests the trial court of subject-matter jurisdiction, requiring dismissal of the action (as the court of appeals held in this case). As is discussed above, this option is contrary to precedent and there are significant policy reasons to refuse to adopt it.

Second, this Court could hold that dismissing a counterclaim has no effect on the trial court's jurisdiction, but, because an offset is no longer possible, the plaintiff cannot recover damages. This option is illogical because it allows the trial court to have jurisdiction, but, at the same time, deprives it of the ability to do anything with that jurisdiction (powerless power).

Third, this Court could hold that filing a counterclaim is an irrevocable waiver of immunity, and withdrawing the counterclaim allows the trial court to render judgment for any amount of damages proved by the plaintiff (*i.e. Reata's* offset limit disappears). While consistent with established precedent that once jurisdiction is acquired, it cannot be divested, this option is easily avoided because the government can simply reduce its counterclaim to the smallest possible amount of money, rather than withdrawing it.

Unless this Court revisits *Reata's* offset rule, the problems it creates are virtually insoluble. The third alternative above is the best of the three bad alternatives, but it is not really a viable solution. The only practical solution is to disavow *Reata's* offset rule and announce instead that by filing a counterclaim, a governmental entity waives immunity.

Such a decision would be in keeping with this State's prior precedents.

2. *Reata's holding goes beyond precedent that has been in place for 75 years.*

In 1933 in *Anderson, Clayton & Co. v. State*, 62 S.W. 107 (Tex. 1933)[27], the State sued Anderson, Clayton for an injunction to prevent it from continuing to transport goods on Texas's highways without a permit. While the case was pending, the State's agents arrested and harassed Anderson, Clayton's drivers. Anderson, Clayton counterclaimed against State officers for an order enjoining them from continuing to interfere with the operation of its trucks. The State nonsuited its claims before trial, and the State officials filed a plea to the jurisdiction asserting that Anderson, Clayton's suit against them was a suit against the State brought without the State's consent. The Court noted that "[i]t long has been the public policy that a state may not be sued without its consent." *Id.* at 537. The Court continued as follows:

> But the authorities sustain the further rule that, where a state voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense ***by answer or cross-complaint*** germane to the matter in controversy.
>
> The state having invoked the jurisdiction of the district court of Nueces county, a court of competent jurisdiction, for a judicial determination of the question as to whether the defendants were subject to the provisions of the foregoing act and liable for the penalties described therein, ***it became subject to the same rules as other litigants***, except in so far as such rules may be modified in favor of the state by statute or may be inapplicable or unenforceable because of exemptions inherent in sovereignty. ... That court at the instance of the state acquired jurisdiction of the parties and subject-matter in controversy, and, ***the defendants having sought affirmative relief in a cross-bill, the jurisdiction of the court cannot afterwards be***

[27] *Anderson, Clayton* is an opinion by the Texas Commission of Appeals that was adopted by this Court.

> ***defeated by the state*** upon a plea that the cross-petitioners were seeking an injunction against the enforcement of a penal statute.

Id. at 537-38 (emphasis added; citations omitted). Thus, *Anderson, Clayton* holds that a defendant in litigation against the State may, without the State's consent, assert a counterclaim against the State if it is "germane to the matter in controversy."

In *State v. Humble Oil & Refining Co.*, 169 S.W.2d 707 (Tex. 1943), the defendant paid $10,791 in taxes it did not owe. It deducted that amount from a later tax bill, and the State sued. This Court held that the defendant did not have a right to set-off the overpayment of a previous tax bill against the current tax bill because each tax bill was separate and independent of the other. *Id.* at 44-46. *Anderson, Clayton* was distinguished because the claim in *Anderson, Clayton* was dependent upon and connected with the subject-matter of the State's claims. *Id.* at 45.

Eighteen years later, the Third Court of Appeals in *State v. Martin*, 347 S.W.2d 809 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) stated what it understood to be the applicable rule: When the State sues, it waives immunity to a counterclaim that is "incident to, connected with, arises out of, or is germane to the suit or controversy brought by the State." *Id.* at 814.

In *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299 (Tex. 2000), the Texas Commission on Human Rights filed suit against Kinnear, alleging he violated the Texas Fair Housing Act. Kinnear counterclaimed for attorney fees as provided by the Act, which the trial court ultimately awarded to him. This Court held that "[b]ecause the Commission initiated [the] proceeding under the Texas Fair Housing Act, and Kinnear claimed attorney

fees as a consequence of that suit, the jurisdictional question in this case was answered when the Commission filed suit." *Id.* at 300. Thus, the Court acknowledged that the trial court had jurisdiction of claims against the State in a case in which the State filed suit, and it allowed the defendant to recover money (attorney fees) from the State even though the State recovered nothing from the defendant.

In *Reata*, the Court followed *Anderson, Clayton* and *Humble*, holding (like the Austin Court of Appeals had done in *Martin*) that "immunity from suit does not bar claims against the governmental entity if the claims are connected to, germane to, and defensive to the claims asserted by the entity." *Reata*, 197 S.W.3d at 377. The Court, however, went beyond *Anderson, Clayton*, *Humble*, and *Martin* to hold that "the City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims." *Id.* Not only does this aspect of *Reata's* holding lack support in the prior case law relating to offsets,[28] it is contrary to the outcome in *Kinnear*, which allowed the opposing party to recover from the State on his counterclaim even though the State recovered nothing from him.

3. Stare decisis should not prevent the Court from revisiting an unworkable holding.

With *Reata's* offset holding, the government has gone from a privileged entity that cannot be dragged into court without its consent to a super litigant that can participate in

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[28] In support of the proposition, the Court cites *City of LaPorte v. Barfield*, 898 S.W.2d 288, 297 (Tex. 1995) and *Anderson, Clayton & Co. v. State*, 62 S.W. 107, 110 (Tex. 1933). In *City of LaPorte*, the Court held that the Political Subdivisions Law waived immunity for back pay and reinstatement in wrongful termination cases. 898 S.W.2d at 296. It does not hold that immunity is waived by filing suit or by filing a counterclaim, or that immunity is limited to the amount of an offset. *Anderson, Clayton* is described above. It does not provide that immunity is limited to the amount of an offset. Neither case supports the proposition that immunity is limited to the amount of an offset.

litigation without risk of loss. It is one thing to say that sovereign immunity is inherently unfair because the government can refuse to be liable to its citizens for injuries it has caused them. It is an entirely different thing to say that the government can voluntarily participate in risk-free litigation. *Reata's* offset holding turns a privileged entity into a super litigant. There are policy reasons for allowing the government to be a privileged entity that can avoid litigation. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (purpose of sovereign or governmental immunity is to protect the public treasury and allow public servants the freedom to make policy decisions without having to worry about legal challenges). There are few policy reasons for allowing the government to be a super litigant once it has voluntarily invoked a trial court's jurisdiction and joined into litigation.

Reata's offset rule is not just unfair, it is unsupported by precedent and unworkable. *Stare decisis* is an important concept in ensuring the stability and consistency of the law. It is "highly binding" in the field of statutory interpretation and of "particular force" in decisions involving land titles, forms of contracts in general use, insurance policies, and common law rules of long standing, upon which parties have relied in conducting their personal, family, and business affairs. *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 193, n.3 (Tex. 1968). But "[t]he common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution." *Reagan v. Vaughn*, 804 S.W.2d 463, 465 (Tex. 1990) (quoting *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309-10 (Tex. 1987)). "The law is not static; and the courts, ***whenever reason and equity demand***, have been the primary instruments for changing the common law through a continual re-evaluation of common law concepts in

light of current conditions." *Id.* (quoting *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978)) (emphasis added). A common law rule of recent origin that is not workable – like the offset rule in *Reata* – should be reconsidered. *See Witte v. U.S.*, 515 U.S. 389, 406 (1995) (Scalia, J., dissenting) (if "jurisprudence is not only wrong but unworkable as well" it should not be given *stare decisis* effect).

D. Sovereign immunity should not be inextricably tied to subject-matter jurisdiction.

The City is unapologetic in its position that a governmental entity should be allowed to file a nonsuit to reinstate immunity and divest the trial court of subject-matter jurisdiction. The City's position is that the rules governing subject-matter jurisdiction compel dismissal. If this is so, one must ask whether public policy is served by inextricably tying sovereign immunity to subject-matter jurisdiction. In a concurring opinion in *Reata*, Justice Brister argues that the two should not be inextricably tied together because sovereign immunity has aspects of both subject-matter and personal jurisdiction, but is not entirely like either one. *Reata*, 197 S.W.3d at 379-83. Justice Brister is correct. Strictly applying subject-matter jurisdiction rules creates inconsistencies in litigation that should be avoided. For example—

- If a governmental entity files a suit against a private party, it cannot assert immunity from suit because it cannot both commence a case and be immune from it. *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000). It also has waived immunity from the defendant's counterclaim in that suit. *Id.* In this circumstance, the trial court's subject-matter jurisdiction is not affected by the fact that the government is one of the litigants.

- If the same private party sues the government (rather than vice versa) and the government answers, the government can raise immunity at any time (even on appeal), and have the case dismissed. *Texas Ass'n of Business v. Texas Air Control Board*, 825 S.W.2d 440, 445 (Tex. 1993). This is inconsistent with the idea that a court's subject-matter jurisdiction is determined based only on the plaintiff's

pleading. *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 55 (Tex. 2000). And it is inconsistent with concept that subject-matter jurisdiction cannot be conferred on a court by a party. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

- If the same governmental entity in the same case answers ***and counterclaims***, it has waived immunity, but it has not exposed itself to unlimited damages. *Reata*, 197 S.W.3d at 374. According to the lower court, it can reinstate immunity and divest the trial court of subject-matter jurisdiction by voluntarily dismissing its counterclaim, which can be done any time before the plaintiff has introduced all of its evidence. TEX. R. CIV. P. 162. Again, this is inconsistent with the concept that subject-matter jurisdiction cannot be conferred on a court. *Dubai*, 12 S.W.3d at 76. It is inconsistent with the idea that subject-matter jurisdiction, once acquired, cannot be lost. *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996). It also is inconsistent with the government having to litigate like any other person. *Texas Department of Corrections v. Herring*, 513 S.W.2d 6, 7-8 (Tex. 1974).

- If the same governmental entity in the same case files the same answer and counterclaim, but does not nonsuit the counterclaim in a timely manner, it may have waived its immunity and cannot raise immunity on appeal. *See* TEX. R. CIV. P. 162; *but see Texas Ass'n of Business*, 852 S.W.2d at 445-46 (lack of subject-matter jurisdiction may be raised at any time).

As can be seen, participating in litigation by filing suit waives immunity to a counterclaim for damages and establishes the trial court's subject-matter jurisdiction; answering and vigorously defending does not waive immunity and does not establish the trial court's subject-matter jurisdiction; filing the smallest imaginable counterclaim waives immunity to some extent, but establishes the trial court's subject-matter jurisdiction; and voluntarily dismissing the counterclaim before the plaintiff closes his evidence may reestablish immunity and may divest the trial court of subject-matter jurisdiction. Why should participation in litigation establish jurisdiction in some instances, but not in others? The conclusion that sovereign immunity presents an issue of subject-matter jurisdiction is especially illogical given that the jurisdiction-invoking and revoking events have nothing to

do with the substantive claims raised in the case. ***It is a form of subject-matter jurisdiction having nothing to do with the subject matter of the litigation.***

Sovereigns traditionally have been protected from litigation because governmental functions may be hampered if tax resources have to be used to defend lawsuits and pay judgments rather than for their intended purposes. *Reata*, 197 S.W.3d at 375. Immunity also exists to protect governmental units from lawsuits that seek to control the unit's lawful actions. *Texas Natural Res. Conserv. Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002). These rationales for immunity are not advanced by tying sovereign immunity to subject-matter jurisdiction for all purposes. If the government chooses to litigate, it has chosen to forego its right to avoid litigation costs, it has voluntarily opened itself to paying a judgment, and it has voluntarily opened itself to having its actions controlled by the outcome of the litigation. The government should have the opportunity to avoid being forced to participate in litigation. It should not have the ability to litigate for nine years, seek affirmative relief in the trial court, seek and attain appellate relief, and then assert immunity while its second appeal is on-going—and divest the courts of jurisdiction. This case shows that tying sovereign immunity to subject-matter jurisdiction can create doctrinal problems without advancing the interests that sovereign immunity is intended to protect. Consequently, as Justice Brister advocated in *Reata*, sovereign immunity should be regarded as a hybrid form of jurisdiction, with unique rules designed to achieve the goals of immunity. One of those rules should be that filing a claim or counterclaim permanently waives sovereign or governmental immunity such that the government must litigate, and is subject to a judgment, like any other litigant.

III. Prospectivity
(Addressing Issue No. 3)

A. *Tooke* overruled this Court's long-standing precedent holding that the phrase "sue and be sued" constituted a clear waiver of immunity.

On the day this Court handed-down its decision in *Tooke,* this appeal was pending before the Dallas Court of Appeals on the City's motion for rehearing, which complained of the court of appeals' affirmance of the trial court's denial of the City's plea to the jurisdiction.[29] *Tooke* changed sovereign-immunity law by overruling *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, this Court's 1970 decision holding that the phrase "sue or be sued" plainly waived governmental immunity. *See* 453 S.W.2d 812, 813 (Tex. 1970); *see also Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006) (explicitly overruling *Missouri Pacific*). Although the phrase "sue and be sued" is present in the Dallas City Charter and had been found by at least one other court (following *Missouri Pacific*) to have waived the City's immunity,[30] under *Tooke*, that phrase, standing alone, does not waive immunity and will not support the denial of the plea to the jurisdiction. The opinion in *Tooke* required the court of appeals to reconsider its prior opinion in this case, and to reverse in part the trial court's denial of the City's plea to the jurisdiction.

B. This Court has the discretion to decline to retroactively apply its decision in *Tooke* to this case if to do so would be inequitable or unfair.

As a matter of course, a decision of this Court operates retroactively unless the Court determines that considerations of fairness and policy require a prospective application of its

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[29] *Tooke* was handed down on June 30, 2006. The City's motion for rehearing was filed in the court of appeals on September 9, 2004, and granted on December 21, 2006.

[30] *See Webb v. City of Dallas*, 314 F.3d 787 (5th Cir. 2002).

decision. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). The test employed to determine if a decision will apply prospectively is essentially an equitable one that employs three factors: (1) whether the decision is establishing a new rule of law or is simply clarifying existing legal principles, (2) whether the principles set out in the decision would be advanced or hindered by either retroactive or prospective application, and (3) whether retroactive application could produce "substantial inequitable results." *Id.* (citing *Carrollton Farmers Branch I.S.D. v. Edgewood I.S.D.*, 826 S.W.2d 489, 518-19 (Tex. 1992) (in turn, citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971))).

In considering these three factors, the Court has noted that the strength of the first and third factors can compel prospective application, even when the second factor suggests that retrospective application is appropriate. *Elbaor*, 845 S.W.2d at 251 (citing federal court cases having reached the same conclusion). Although all three factors weigh against applying *Tooke* to this case, the first and third prongs strongly support prospective application.

C. A fundamental change in precedent, coupled with the unique circumstances of this case, suggest that *Tooke* should not be applied to this case.

It is undeniable that *Tooke* overruled long-standing precedent on which the parties to this case relied for at least nine years. *Tooke's* fundamental change to the jurisprudence regarding the waiver of sovereign immunity is a powerful indicator that retroactive application should not occur here.[31]

The third factor – whether the retroactive application of a decision would produce

[31] If *Tooke* had merely clarified the law, this doctrine would not be available to the Firefighters. *See Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 57 (Tex. 1997) (Court's decision rendered after the jury decided Giles' case applied to Giles' case because Court's decision simply clarified the law regarding punitive damages in bad-faith insurance litigation).

"substantial inequitable results" – also provides a compelling argument for prospective application.[32] For the first 12½ years of the life of this case, *Missouri Pacific* was the law of Texas. *Missouri Pacific* was the law of Texas:

- when the pay ordinance passed in 1979;
- when the Firefighters filed suit in 1994;
- when the City filed its counterclaim in 1995;
- when the trial court granted a summary judgment in favor 16 fire fighters and abated the case to give the City time to comply with the pay ordinance in 1997;
- when the trial court lifted the abatement (almost two years after entering it), and severed the 16 fire fighters' claims in 1999;
- when the City appealed the summary judgment in 1999;
- when the court of appeals reversed the summary judgment in 2002[33];
- when the City ***finally*** filed a plea to the jurisdiction in 2003;
- when the court of appeals handed down its first decision on the City's jurisdiction appeal in 2004;
- and when the City filed it motion for rehearing in the court of appeals in 2004 (which remained pending for more than two years awaiting *Reata*).

Indeed, until December 2006, the established law in Texas was that the phrase "sue and be sued" contained in the Dallas City Charter waived immunity. Missouri Pacific was in effect for 36 years from 1970 to 2006, yet the City, knowing that the phrase waived its immunity, never amended its Charter to remove "sue and be sued" or to otherwise make

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[32] The unique circumstances also serve to distinguish this case from the main, and would limit the availability of this argument in subsequent appeals. Similarly, it is this Court's equitable doctrine that would be applied to its own precedent here, and, as such, this doctrine would not be available to the courts of appeals in applying this Court's decisions.

[33] *See Arrendondo v. City of Dallas*, 79 S.W.3d 657 (Tex. App.—Dallas 2002, pet. denied).

clear that this phrase was not intended as a waiver of immunity. Even the United States Fifth Circuit Court of Appeals relied on *Missouri Pacific* to conclude that Dallas City Charter waived the City's immunity. *See Webb v. City of Dallas*, 314 F.3d 787 (5th Cir. 2002). And the City clearly accepted the authority of *Missouri Pacific* for at least nine years in this litigation.

Quite simply, had this case not had been pending for so long, and if the trial court had not abated the case for almost two years, the controversy regarding the City's immunity would never have arisen and the case would have been decided under the holding of *Missouri Pacific*. The application of *Tooke* in the final days of an extremely protracted case is substantially inequitable to Plaintiffs. This is particularly true in light of the fact that Plaintiffs have never had the opportunity to plead or argue circumstances that would support their claims in light of *Tooke*. For instance, in *Tooke*, the Court held that the phrases "sue and be sued" and "plead and implead," which are found in the Dallas City Charter, "standing alone," do not, "by themselves," waive immunity. *Tooke*, 197 S.W.3d at 342. This leaves open the possibility that immunity could be waived through other provisions of the City Charter.[34] But because *Missouri Pacific* was the law while this case was pending before the trial court, Plaintiffs were not on notice that it was necessary to raise those additional provisions as a basis for the trial court's jurisdiction.

PRAYER

For the reasons stated herein, Respondents/Counter-Petitioners, Kenneth E. Albert,

[34] The Dallas City Charter contains provisions in addition to "sue and be sued" that may establish a waiver of immunity. For example, it clearly accepts that the City may be sued, by providing that the City attorney may appear in all litigation affecting the City and represent the City in such manner as he deems to be in the City's best interest, and to institute such legal proceedings as may be necessary or desirable on behalf of the City. *See* DALLAS CITY CHARTER, Ch. VII, §3(10). This provision, coupled with a number of other provisions, may show that the City has waived immunity.

et al., David L. Barber, *et al.*, Anthony Arredondo, *et al.*, and Kevin M. Willis, *et al.*, respectfully request that this Court grant their Petition for Review, and, upon review: (a) reverse the court of appeals judgment to the extent it reverses the trial court's order overruling of the City's plea to the jurisdiction, (b) affirm the court of appeals judgment in all other respects, and (c) remand this case to the trial court for trial on the merits.

In the event that this Court grants the petition for review yet disagrees with Plaintiffs that the City does not have immunity or that it has been waived, this Court should not render judgment as the City requests, but should remand this case in the interest of justice.[35] Because of the procedural history of this case, Plaintiffs have not been able to present to the trial court other grounds that could result in a finding that the City has waived its immunity, such as additional provisions in the City Charter indicating a waiver of immunity. Should the Court decide this case adversely to the Firefighters, it should nonetheless remand the case to the trial court so that the Firefighters can replead in accordance with *Tooke*.

The Firefighters also request that they be awarded all costs of this appeal and any other relief to which they are entitled.

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[35] This Court is free to remand a case to the district court if it is in the interest of justice to do so, "even if a rendition of judgment is otherwise appropriate." TEX. R. APP. P. 60.3; *see also Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840-41 (Tex. 2000); *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993); *Caller-Times Pub. Co., Inc. v. Triad Communications, Inc.*, 826 S.W.2d 576, 588-89 (Tex. 1992). "'The most compelling case for a remand in the interest of justice is where we overrule existing precedents on which the losing party relied at trial.'" *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 258 (Tex. 2004) (quoting *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992)).

July 1, 2009

Respectfully submitted,

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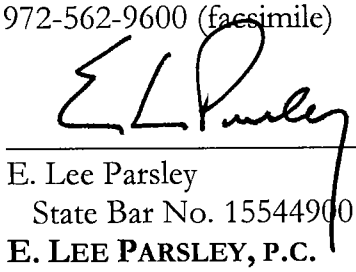

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CERTIFICATE OF SERVICE

I certify that on July 1, 2009, a copy of this Brief on the Merits was served by the method stated below on:

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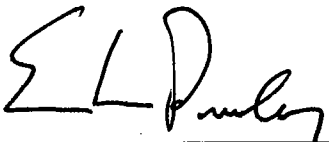

E. Lee Parsley

In the

Supreme Court of Texas

Austin, Texas

On Appeal from the Fifth Court of Appeals,
Dallas, Texas

BRIEF ON THE MERITS OF PETITIONERS KENNETH E. ALBERT, ET AL., DAVID L. BARBER, ET AL., ANTHONY ARREDONDO, ET AL., AND KEVIN MICHAEL WILLIS, ET AL.

APPENDIX

1

SEC. 10. APPROVAL OF MAYOR NOT NECESSARY.

The approval or signature of the mayor shall not be necessary to make an ordinance or resolution valid.

SEC. 11. INITIATIVE AND REFERENDUM OF ORDINANCES.

Any proposed ordinance may be submitted to the city council in the form in which the petitioner desires the ordinance to be passed, by a petition filed with the city secretary in the following manner:

(1) A committee of at least five registered voters of the City of Dallas must make application to the city secretary and file an intention to circulate a petition, giving the date and the proposed ordinance to be circulated. Unless the final petition, with the required number of signatures is returned within 60 days from this date, it will not be received for any purpose.

(2) The petition must contain the names of a number of qualified voters in the city equal to 10 percent of the qualified voters of the City of Dallas as appears from the latest available county voter registration list.

(3) The petition must comply in form, content, and procedure with the provisions of Section 12, Chapter IV of this Charter. (Amend. of 4-2-83, Prop. No. 2; Amend. of 5-1-93, Prop. No. 6)

SEC. 12. CITY SECRETARY TO EXAMINE PETITION.

Within 30 days after the date the petition is filed, the city secretary shall examine and ascertain whether or not the petition is signed by the requisite number of qualified voters and shall attach to the petition a certificate showing the result of the examination. If the petition is found to be sufficient, the city secretary shall submit the petition to the city council without delay. (Amend. of 4-2-83, Prop. No. 2; Amend. of 5-1-93, Prop. No. 6)

SEC. 13. CITY COUNCIL EITHER TO PASS ORDINANCE OR CALL ELECTION.

If the petition properly signed, is presented to the city council, the council shall either:

(1) pass said ordinance without alteration within 20 days after the attachment of the secretary's certificate of sufficiency to the accompanying petition (subject to referendary vote under provisions of this Charter); or

(2) forthwith the secretary shall attach to the petition accompanying such ordinance his certificate of sufficiency, the city council of the city shall proceed to call a special election, at which said ordinance, without alteration, shall be submitted to a vote of the people.

SEC. 14. BALLOTS; ONE OR MORE ORDINANCES MAY BE VOTED; PROVISION FOR REPEAL.

The ballots used when voting upon said ordinance shall be in a manner so as to apprise the voters of the nature of the proposed ordinance and contain two propositions so that they may vote either "for" or "against" the propositions indicating their preference on the ordinance. If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city, and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people.

Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of this section of the Charter, but more than one special election shall not be held in any period of six months.

The city council may submit a proposition for the repeal of any such ordinance or for amendments thereto, to be voted upon at any succeeding general city election, and should such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall be repealed or amended accordingly.

SEC. 15. PROMULGATION OF ORDINANCES BEFORE ELECTION.

Whenever any ordinance or proposition is required by the Charter to be submitted to the voters of the city at any election, the city secretary shall cause the ordinance or proposition to be printed in the official newspaper of the city and published once at least 10 days prior to election.

CITY OF DALLAS

STATE OF TEXAS

COUNTY OF DALLAS

CITY OF DALLAS

I, **BARRY J. DAVIS**, Assistant City Secretary of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of

ORDINANCE NO.16084

passed by the city council on January 22, 1979.

WITNESS MAY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the 3rd day of October, 1994.

Barry J. Davis

BARRY J. DAVIS
CITY SECRETARY
CITY OF DALLAS, TEXAS

SEAL

October 3, 1994
DATE

Monesia Davis
PREPARED BY

790292

1/22/79

ORDINANCE NO. 16084

An Ordinance approving the canvassing report of the votes cast at the Special Election held January, 20, 1979, concerning the pay of certain employees of the Police and Fire Departments; declaring the results; declaring the adoption of the ordinance submitted to the voters upon a petition for initiative and referendum; and providing an effective date.

WHEREAS, the Canvassing Committee of the City Council has filed its Canvassing Report of the Special Election held pursuant to Ordinance Nos. 15957 and 16048, and the City Council has duly examined the Canvassing Report and finds that it is in all things correct; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. The City Council finds that the Special Election held on January 20, 1979, pursuant to Ordinance Nos. 15957 and 16048, was duly ordered and notice given in accordance with law; that the Special Election was held in the manner provided by law; that only duly qualified electors of the City of Dallas voted in the election; and that returns of the election have been made by the proper officials.

SECTION 2. That the canvass of the returns of the Special Election and the tabulation of the votes cast FOR and AGAINST in answer to the propositions submitted on the official ballot, as stated by the Report of the Canvassing Committee, are hereby approved and adopted.

SECTION 3. That Proposition No. 1 and Proposition No. 2 did receive a majority of the votes cast at the Special Election FOR adoption, and both propositions are therefore declared and ordered adopted.

SECTION 4. In accordance with Section 14 of Chapter XVIII of the City Charter, the following ordinance which was submitted to a vote of the people, is hereby declared to have been adopted as a valid and binding ordinance of the City:

> "Be it ordained that: (1) From and after October 1, 1978, each sworn police officer and fire fighter and rescue officer employed by the City of Dallas, shall receive a raise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas sworn police officer or fire fighter and rescue officer with three years service computed on the pay level in effect for sworn police officers and fire fighter and rescue officers of the City of Dallas with three years service in effect in the fiscal year beginning October, 1977; (2) The current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained; and (3) Employment benefits and assignment pay shall be maintained at levels of not less than those in effect for the fiscal year beginning October, 1977."

SECTION 5. That this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

APPROVED AS TO FORM:

LEE E. HOLT, City Attorney

By Analalie Muncy

Assistant City Attorney

Passed and correctly enrolled _____.

3480B/jn

790292

REPORT OF THE CANVASSING COMMITTEE AND
ORDINANCE APPROVING THE REPORT

January 22, 1979

TO THE HONORABLE MAYOR AND CITY COUNCIL OF THE CITY OF DALLAS:

We the undersigned, your Committee of the City Council, appointed on January 17, 1979, to canvass the returns of the Special Election held on January 20, 1979, for the purpose of submitting to the qualified voters of the City certain questions concerning the pay of certain employees in the Police and Fire Departments hereby report that the following propositions were submitted to the qualified voters of the City of Dallas, to-wit:

Proposition No. 1

SHALL the City adopt the following ordinance?

"Be it ordained that: (1) From and after October 1, 1978, each sworn police officer and fire fighter and rescue officer employed by the City of Dallas, shall receive a raise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas sworn police officer or fire fighter and rescue officer with three years service computed on the pay level in effect for sworn police officers and fire fighter and rescue officers of the City of Dallas with three years service in effect in the fiscal year beginning October, 1977; (2) The current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained; and (3) Employment benefits and assignment pay shall be maintained at levels of not less than those in effect for the fiscal year beginning October, 1977."

Proposition No. 2

SHALL the action of the Dallas City Council be approved which adopted an alternative revised pay plan including increases in base pay up to 9.6% and increasing gross pay in the Police and Fire Departments by 7.5%, and including the following features:

1. Establishing a step pay plan which incorporates two new merit steps for Senior Officers and higher ranks;

2. Adding a new rank of Senior Officer to both Police and Fire pay schedules;

3. Adding a new Paramedic rank to the Fire pay schedule;

4. Maintaining current education and longevity pay concepts; and

5. Increasing the base salary range from 0% to 9.6%, depending on rank/grade?

We have carefully canvassed the returns of the Special Election and find that the following number of votes were cast respectively FOR and AGAINST the two propositions.

Proposition No. 1

FOR	33,896
AGAINST	25,876

Proposition No. 2

FOR	29,781
AGAINST	19,493

That the votes by Precincts are attached hereto as Exhibit "A" and made a part hereof for all purposes.

From this tabulation it appears that Proposition No. 1 and Proposition No. 2 were approved, adopted, and carried by the majority of the qualified voters of the City of Dallas participating in the Special Election.

Don Hicks

Lucy Patterson

John A. Walton

Canvassing Committee of the City Council of the City of Dallas

3479B/jn

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199TH JUDICIAL DISTRICT COURT

COUNTY OF COLLIN

McKINNEY, TEXAS

ANTHONY ARREDONDO, ET AL Plaintiffs, VS. THE CITY OF DALLAS, TEXAS, Defendant, AND DALLAS POLICE & FIRE PENSION SYSTEM, Intervenor.	§ § § § § § § § § § § §	NO. 199-01743-99

ORDER DENYING DEFENDANT'S PLEA TO THE JURISDICTION

On the 16th day of July, 2003, Defendant, The City of Dallas, Texas (the "City"), presented its Plea to the Jurisdiction in the above-styled and numbered cause. All parties appeared by and through their respective attorneys of record. After hearing arguments of counsel, the Court took the matter under advisement and received additional briefing from the parties. After having considered the relevant case and statutory law, after taking judicial notice of the applicable provisions of the City Charter of the City of Dallas, Texas, and upon consideration of the pleadings, the evidence and arguments presented, and the record of this case, the Court is of the opinion that the City's Plea to the Jurisdiction should be denied. Accordingly,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City's

Plea to the Jurisdiction be, and it is hereby, DENIED.

SIGNED this the 11 day of August, 2003.

JUDGE PRESIDING

199TH JUDICIAL DISTRICT COURT

COUNTY OF COLLIN

McKINNEY, TEXAS

DAVID L. BARBER, ET AL Plaintiffs, VS. THE CITY OF DALLAS, TEXAS, Defendant, AND DALLAS POLICE & FIRE PENSION SYSTEM, Intervenor.	§ § § § § § § § § § § §	NO. 199-00624-95

ORDER DENYING DEFENDANT'S PLEA TO THE JURISDICTION

On the 16th day of July, 2003, Defendant, The City of Dallas, Texas (the "City"), presented its Plea to the Jurisdiction in the above-styled and numbered cause. All parties appeared by and through their respective attorneys of record. After hearing arguments of counsel, the Court took the matter under advisement and received additional briefing from the parties. After having considered the relevant case and statutory law, after taking judicial notice of the applicable provisions of the City Charter of the City of Dallas, Texas, and upon consideration of the pleadings, the evidence and arguments presented, and the record of this case, the Court is of the opinion that the City's Plea to the Jurisdiction should be denied. Accordingly,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City's

Plea to the Jurisdiction be, and it is hereby, DENIED.

SIGNED this the 11 day of August, 2003.

JUDGE PRESIDING

199TH JUDICIAL DISTRICT COURT

COUNTY OF COLLIN

McKINNEY, TEXAS

KENNETH E. ALBERT, ET AL, Plaintiffs,	§	
VS.	§	NO. 199-697-94
THE CITY OF DALLAS, TEXAS, Defendant,	§	
AND	§	
DALLAS POLICE & FIRE PENSION SYSTEM, Intervenor.	§	

ORDER DENYING DEFENDANT'S PLEA TO THE JURISDICTION

On the 16th day of July, 2003, Defendant, The City of Dallas, Texas (the "City"), presented its Plea to the Jurisdiction in the above-styled and numbered cause. All parties appeared by and through their respective attorneys of record. After hearing arguments of counsel, the Court took the matter under advisement and received additional briefing from the parties. After having considered the relevant case and statutory law, after taking judicial notice of the applicable provisions of the City Charter of the City of Dallas, Texas, and upon consideration of the pleadings, the evidence and arguments presented, and the record of this case, the Court is of the opinion that the City's Plea to the Jurisdiction should be denied. Accordingly,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City's

Plea to the Jurisdiction be, and it is hereby, DENIED.

SIGNED this the 11 day of August, 2003.

JUDGE PRESIDING

199TH JUDICIAL DISTRICT COURT

COUNTY OF COLLIN

McKINNEY, TEXAS

KEVIN MICHAEL WILLIS, ET AL Plaintiffs, VS. THE CITY OF DALLAS, TEXAS, Defendant, AND DALLAS POLICE & FIRE PENSION SYSTEM, Intervenor.	§ § § § § § § § § § § §	NO. 199-00200-95

ORDER DENYING DEFENDANT'S
PLEA TO THE JURISDICTION

On the 16th day of July, 2003, Defendant, The City of Dallas, Texas (the "City"), presented its Plea to the Jurisdiction in the above-styled and numbered cause. All parties appeared by and through their respective attorneys of record. After hearing arguments of counsel, the Court took the matter under advisement and received additional briefing from the parties. After having considered the relevant case and statutory law, after taking judicial notice of the applicable provisions of the City Charter of the City of Dallas, Texas, and upon consideration of the pleadings, the evidence and arguments presented, and the record of this case, the Court is of the opinion that the City's Plea to the Jurisdiction should be denied. Accordingly,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City's

Plea to the Jurisdiction be, and it is hereby, DENIED.

SIGNED this the 11 day of August, 2003.

JUDGE PRESIDING

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF DALLAS, Appellant

No. 05-03-01299-CV V.

ANTHONY ARREDONDO, CHARLES S. SWANER, JAMES M. STOVALL, JOSEPH M. BETZEL, LISA M. CLAYTON, KENNETH L. FOREMAN, ELMER J. DAVIS, JACE P. SEPULVADO, BRIAN CATON, ROBERT L. ROGERS, TIM Q. ROSE, GEORGE J. TOMASOVIC, JAMES M. CRAFT JR., DAVID T. CHASE, HOWARD R. RUSSELL, DANNY WATSON, Appellees

Appeal from the 199th Judicial District Court of Collin County, Texas. (Tr.Ct.No. 199-01743-99).
Opinion delivered by Justice Morris, Justices FitzGerald and Francis participating.

We **VACATE** our judgment of August 10, 2004. This is now the judgment of the Court. In accordance with this Court's opinion of this date, we **AFFIRM** the trial court's denial of the City's plea to the jurisdiction with respect to appellees' request for a declaratory judgment. We **REVERSE** the trial court's order with respect to appellees' claims for breach of contract and **REMAND** the cause to the trial court for further proceedings consistent with this opinion. It is **ORDERED** that each party bear its own costs of appeal.

Judgment entered December 21, 2006.

JOSEPH B. MORRIS
JUSTICE

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Westlaw.

214 S.W.3d 631
(Cite as: 214 S.W.3d 631)

City of Dallas v. Albert
Tex.App.-Dallas,2006.

Court of Appeals of Texas,Dallas.
CITY OF DALLAS, Appellant,
v.
Kenneth E. ALBERT, et al., Appellees.
City of Dallas, Appellant,
v.
David L. Barber, et al., Appellees.
City of Dallas, Appellant,
v.
Anthony Arredondo, et al., Appellees.
City of Dallas, Appellant,
v.
Kevin Michael Willis, et al., Appellees.
Nos. 05-03-01297-CV to 05-03-01300-CV.

Dec. 21, 2006.
Rehearing Overruled Feb. 22, 2007.

Background: Firefighters brought action seeking unpaid back wages allegedly due pursuant to ordinance. City filed counterclaims for alleged overpayments of salaries. The 199th Judicial District Court, Collin County, Robert T. Dry Jr., J., denied city's pleas to jurisdiction. Firefighters appealed and city cross-appealed. The Court of Appeals, 79 S.W.3d 657, reversed and remanded. After supplemental briefing, the Court of Appeals, 140 S.W.3d 920, affirmed and modified.

Holdings: On rehearing, the Court of Appeals, Morris, J., held that:

(1) neither city charter nor section of the Texas Local Government Code providing that municipalities may plead and be impleaded waived city's immunity;

(2) to the extent city had waived its immunity by filing counterclaims, city reinstated its immunity when it dismissed its counterclaims;

(3) remand was required so trial court could allow firefighters the opportunity to argue that legislature waived city's immunity from suit by enacting new statutory provisions; and

(4) although sovereign immunity did not protect city from firefighters' request for a declaratory judgment construing wage ordinance, Declaratory Judgments Act did not waive city's immunity from suits for money damages.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] States 360 ⇐191.4(1)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.4 Necessity of Consent
360k191.4(1) k. In General. Most Cited Cases

Sovereign immunity from suit protects State, its agencies, and its officials from lawsuits for damages unless it is waived by clear and unambiguous legislative consent to suit.

[2] Municipal Corporations 268 ⇐1016

268 Municipal Corporations
268XVI Actions
268k1016 k. Capacity to Sue or Be Sued in General. Most Cited Cases

A city is deemed an agent of the state for sovereign immunity purposes when exercising its powers for a public purpose.

[3] Municipal Corporations 268 ⇐199

268 Municipal Corporations

268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k199 k. Pay and Other Compensation. Most Cited Cases
Neither the "sue and be sued" and "plead and be impleaded" language in city charter, nor section of the Texas Local Government Code providing that municipalities may plead and be impleaded, waived city's immunity from suit by firefighters who sought unpaid back wages allegedly due pursuant to ordinance. V.T.C.A., Local Government Code § 51.075.

[4] Judgment 228 ⚿636

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k635 Courts or Other Tribunals Rendering Judgment
228k636 k. In General. Most Cited Cases

Judgment 228 ⚿713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases
Determinations of law are not generally given preclusive effect, particularly when there is a difference in the forums in which the two actions are determined.

[5] Municipal Corporations 268 ⚿199

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k199 k. Pay and Other Compensation. Most Cited Cases
To the extent city had waived its immunity from suit by firefighters by filing counterclaims for alleged overpayments of salaries, city reinstated its immunity from suit when it dismissed its counterclaims.

[6] States 360 ⚿199

360 States
360VI Actions
360k199 k. Set-Off and Counterclaim. Most Cited Cases
The government continues to have immunity from suit for affirmative damage claims against it for monetary relief exceeding amounts necessary to offset its own claims; government only waives immunity, therefore, to the extent the opposing party's claims could offset any recovery against it.

[7] States 360 ⚿199

360 States
360VI Actions
360k199 k. Set-Off and Counterclaim. Most Cited Cases
Where the government brings its own affirmative claims, it has obviously concluded that the expense of litigation is worthwhile in light of its potential recovery in that case; once the government asserts its affirmative claims, it must participate as any other litigant and is subject to all proper defensive matters, including offset.

[8] States 360 ⚿199

360 States
360VI Actions
360k199 k. Set-Off and Counterclaim. Most Cited Cases
Any waiver of immunity is limited to the extent of the government's affirmative claim, and the trial court's jurisdiction to render judgment is limited to deciding the government's entitlement to a particular sum and any appropriate offset of that sum.

[9] Municipal Corporations 268 ⚿199

268 Municipal Corporations
268V Officers, Agents, and Employees

268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k199 k. Pay and Other Compensation. Most Cited Cases
Remand of firefighters' wage claims was required so trial court could allow firefighters the opportunity to argue that legislature waived city's immunity from suit by enacting new statutory provisions. V.T.C.A., Local Government Code §§ 271.151-271.160.

[10] Municipal Corporations 268 ⇐1016

268 Municipal Corporations
268XVI Actions
268k1016 k. Capacity to Sue or Be Sued in General. Most Cited Cases

Municipal Corporations 268 ⇐1027

268 Municipal Corporations
268XVI Actions
268k1027 k. Parties. Most Cited Cases
Governmental entities must be joined in suits to construe their legislative pronouncements; accordingly, there is no governmental immunity in suits to construe legislation.

[11] States 360 ⇐191.9(2)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(2) k. Declaratory Judgment. Most Cited Cases
Sovereign immunity cannot be circumvented by characterizing a suit for damages as a declaratory judgment action.

[12] Declaratory Judgment 118A ⇐143.1

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(G) Written Instruments and Contracts
118AII(G)1 In General
118Ak143 Particular Contracts
118Ak143.1 k. In General. Most Cited Cases

States 360 ⇐191.9(2)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(2) k. Declaratory Judgment. Most Cited Cases
Parties cannot frame a breach of contract cause of action as a declaratory judgment action to determine a public contract's validity, enforce performance under a contract, or impose contractual liabilities against a governmental entity.

[13] Municipal Corporations 268 ⇐723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Although sovereign immunity did not protect city from firefighters' request for a declaratory judgment construing wage ordinance and declaring the rights, status, and legal relations of the parties under the ordinance, Declaratory Judgments Act did not waive city's immunity from suits for money damages. V.T.C.A., Civil Practice & Remedies Code § 37.004.

***632** Madeleine B. Johnson, City Attorney, James B. Pinson, Assistant City Attorney, Dallas, for appellant.
***633** Bill Boyd, John R. Stooksberry, Boyd & Veigel, P.C., McKinney, for appellees.

Before Justices MORRIS, FITZGERALD, and FRANCIS.

OPINION ON REHEARING
Opinion by Justice MORRIS.
We issued our original opinion in the above referenced cases on August 10, 2004. *See City of*

Dallas v. Kenneth E. Albert, 140 S.W.3d 920 (Tex.App.-Dallas 2004, no pet.). In that opinion, we concluded the Texas Supreme Court's holding in *Reata Construction Corp. v. City of Dallas,* 47 Tex. Sup.Ct. J. 408, 2004 WL 726906 (Tex. Apr. 2, 2004) (per curiam) compelled us to decide that the City of Dallas had waived its sovereign immunity in these suits by filing counterclaims for affirmative relief. We therefore affirmed the trial court's orders denying the City's pleas to the jurisdiction. The City filed motions for rehearing in each cause. We held the motions under advisement because of the supreme court's announced reconsideration of its *Reata* opinion upon which we relied.

On June 30, 2006, the Texas Supreme Court withdrew its original opinion in *Reata* and substituted a new opinion in its place. *See Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371 (Tex.2006). In its new opinion, the supreme court limited the extent of the waiver of sovereign immunity caused by the City's filing claims for affirmative relief. *See id.* at 377. Because the Texas Supreme Court significantly changed its analysis on which we relied when deciding the issue of waiver of sovereign immunity in our original opinion, we grant the City's motion for rehearing and withdraw our opinion issued August 10, 2004. This is now the opinion of this Court.[FN1]

FN1. Concurrent with issuing this opinion, we also issue our opinion on rehearing in *City of Dallas v. Martin,* 214 S.W.3d 638 (Tex.App.-Dallas 2006). With the exception of the arguments concerning collateral estoppel and appellees bringing this suit as agents of the City, the issues and arguments addressed in this opinion are substantively identical to those addressed in *Martin.*

I.

These cases arose out of an ordinance adopted by the City of Dallas in 1979 in accordance with a voter-approved pay referendum. The ordinance stated, among other things, that each sworn police officer, fire fighter, and rescue officer employed by the City would receive a pay raise and that "the current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained." Appellees contend the ordinance amended their alleged employment contracts with the City to add a requirement that the City maintain the percentage pay differential between the grades in all future salary adjustments. Appellees filed suits claiming the City breached its contracts with them by repeatedly raising the pay of the highest ranking officers without making corresponding increases to the salaries received by the lower ranks. Appellees asserted claims for breach of contract seeking back pay, benefits, and prejudgment and post-judgment interest. Appellees also sought a declaratory judgment to establish that their construction of the ordinance was correct.

In response to appellees' claims, the City filed answers and counterclaims for alleged overpayments of salaries. According to the City, if appellees' construction of the ordinance was correct, then all salary adjustments made after the ordinance was adopted were void and unenforceable. The City argued that if the salary adjustments***634** were unenforceable, appellees were required to return to the City any additional money paid to them pursuant to the allegedly void salary adjustments.

On June 4, 2003, the City filed pleas to the trial court's jurisdiction contending that its governmental immunity from suit had not been waived and, therefore, the trial court lacked subject matter jurisdiction over each case. Appellees responded that the City's immunity from suit was expressly waived in both section 51.075 of the Texas Local Government Code and chapter II of the Dallas City Charter. Specifically, the Local Government Code states that a municipality may "plead and be impleaded in any court." *See*TEX. LOCAL GOV'T CODE ANN. § 51.075 (Vernon 1999). The Dallas City Charter states that the City has the power to "sue and be sued" and to "implead and be impleaded in all courts." DALLAS CITY CHARTER ch. II, § 1(2), (3) (Aug. 1999). Appellees additionally argued the City was collaterally estopped from asserting sovereign immunity because the City litigated the same issue

in another case and the Fifth Circuit Court of Appeals decided the issue adversely to the City. The trial court denied the City's pleas to the jurisdiction, and the City appealed.

During the pendency of the City's appeal, the Texas Supreme Court issued its original opinion in *Reata Construction Corp. v. City of Dallas.* In *Reata,* the supreme court held that a city's intervention in a lawsuit to assert claims for affirmative relief constituted a waiver of governmental immunity. *See Reata Constr. Corp. v. City of Dallas,* 47 Tex. Sup.Ct. J. 408, 2004 WL 726906 (Tex. Apr. 2, 2004) (per curiam). Following issuance of the *Reata* decision, appellees in these cases supplemented their briefing to argue that the City's counterclaims for alleged overpayments were claims for affirmative relief invoking the trial court's jurisdiction much like the City's intervention in *Reata.* According to appellees, *Reata* provided another basis to affirm the trial court's denial of the City's plea to the jurisdiction. The City responded by voluntarily dismissing its counterclaims. It then argued that the dismissal of the counterclaims rendered appellees' supplemental argument moot.

Approximately two years after issuing its original opinion in *Reata,* the Texas Supreme Court withdrew its opinion and issued a new opinion limiting the waiver of governmental immunity caused by a governmental entity's assertion of claims for affirmative relief. *See Reata,* 197 S.W.3d at 377. The supreme court also on the same day issued its opinion in *Tooke v. City of Mexia,* 197 S.W.3d 325 (Tex.2006). In *Tooke,* the court addressed the impact of phrases such as "sue and be sued" and "plead and be impleaded" on governmental immunity. The court concluded such phrases did not reflect, in and of themselves, a clear legislative intent to waive immunity. In light of the Texas Supreme Court's recent decisions in *Reata* and *Tooke,* we must re-examine the trial court's orders denying the City's pleas to the jurisdiction.

II.

[1][2] It is well established that sovereign immunity from suit protects the State of Texas, its agencies, and its officials from lawsuits for damages unless it is waived by clear and unambiguous legislative consent to suit. *See Fed. Sign v. Tex. S. Univ.,* 951 S.W.2d 401, 405 (Tex.1997). A city, such as the City of Dallas, is deemed an agent of the state for sovereign immunity purposes when exercising its powers for a public purpose. *See Reata,* 197 S.W.3d at 377. Appellees' suit against the City is a lawsuit arising out of the City's exercise of its power to adopt public ordinances. Accordingly,***635** sovereign immunity from suit protects the City, and the court lacks subject matter jurisdiction over these cases unless unambiguous consent to be sued has been granted.

[3] Appellees contend that consent was granted by the legislature in section 51.075 of the Texas Local Government Code where the legislature stated that municipalities "may plead and be impleaded in any court." *See*TEX. LOCAL GOV'T CODE ANN. § 51.075. Appellees further argue that consent to suit can be found also in chapter II of the Dallas City Charter, which states that the City has the power to "sue and be sued" and to "implead and be impleaded in all courts." DALLAS CITY CHARTER ch. II, § 1(2), (3) (Aug. 1999).

[4] In *Tooke,* the supreme court held the phrases " sue and be sued" and "plead and be impleaded" mean different things in different statutes and do not, by themselves, waive immunity. *See Tooke,* 197 S.W.3d at 342. The court also specifically stated that neither section 51.075 of the Texas Local Government Code nor a city charter provision addressing the capacity of the City of Mexia to "sue and be sued" and "plead and be impleaded" is a clear and unambiguous waiver of immunity. *See id.* at 342-43. The court followed its *Tooke* ruling in *Reata v. City of Dallas* and held that, as with the charter for the City of Mexia, the "sue and be sued" and "plead and be impleaded" language in the Dallas City Charter did not waive the City's immunity from suit. *See Reata,* 197 S.W.3d at 378.

Accordingly, we must likewise conclude that neither section 51.075 of the Texas Local Government Code nor the Dallas City Charter grants the trial court jurisdiction over appellees' claims in these cases.[FN2]

FN2. Appellees also argue the City is collaterally estopped from arguing that section 51.075 of the Texas Local Government Code and chapter II of the Dallas City charter do not waive immunity because that issue was decided against the City in *Webb v. City of Dallas,* 314 F.3d 787 (5th Cir.2002). In *Webb,* the Fifth Circuit examined the same provisions of the Local Government Code and the Dallas City Charter and concluded the language was an express waiver of immunity from suit. *See Webb,* 314 F.3d at 795-96. The Fifth Circuit's opinion in *Webb* pre-dates the Texas Supreme Court's opinions in both *Tooke* and *Reata.* Furthermore, determinations of law are not generally given preclusive effect. *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst,* 90 S.W.3d 268, 288 (Tex.2002). This is particularly true when there is a difference in the forums in which the two actions are determined. *See Tankersley v. Durish,* 855 S.W.2d 241, 246 (Tex.App.-Austin 1993, writ denied).

[5] As an alternative basis for finding jurisdiction and affirming the trial court's orders, appellees argue that the City's counterclaims seeking affirmative monetary relief against them waived the City's sovereign immunity from suit. For the purposes of our analysis, we will assume the City's decision to bring counterclaims waived its immunity from suit for appellees' claims in these cases to the extent set forth in *Reata.* What we determine is the effect, if any, of the City's decision to withdraw its counterclaims. Applying *Reata* and its underlying rationale, we conclude that, to the extent the City may have waived its immunity from suit in these cases by filing counterclaims, it reinstated its immunity from suit when it dismissed its counterclaims.

[6] In *Reata,* the Texas Supreme Court held that a " decision by the City of Dallas to file suit for damages encompassed a decision to leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive of claims the City asserts." *Id.* This waiver of immunity is ***636** limited, however. The government continues to have immunity from suit for affirmative damage claims against it for monetary relief exceeding amounts necessary to offset its own claims. *Id.* at 377. The government only waives immunity, therefore, to the extent the opposing party's claims could offset any recovery against it. *Id.* at 378.

[7] At the heart of the decision in *Reata* is the seminal idea that sovereigns should be, and traditionally have been, protected from the expense of litigation because governmental functions would be hampered by requiring tax resources to be expended on defending lawsuits and paying judgments rather than on their intended purposes. *See id.* at 375. Where the government brings its own affirmative claims, however, it has obviously concluded that the expense of litigation is worthwhile in light of its potential recovery in that case. *See id.* at 383 (Brister, J., concurring). Once the government asserts its affirmative claims, it must participate as any other litigant and is subject to all proper defensive matters, including offset. *See id.* at 377.

[8] A government's decision to expend resources in pursuit of a potential recovery, however, does not encompass the unrelated issue of putting public funds at risk of a potentially costly judgment. It is for this reason that any waiver of immunity is limited to the extent of the government's affirmative claim. *See id.* Although under *Reata* an opposing party may assert an offset claim against the government, the opposing party cannot recover damages against the governmental entity. *See id.* The trial court's jurisdiction to render judgment is limited to deciding the government's entitlement to a particular sum and any appropriate offset of that sum. *See id.* at 383 (Brister, J., concurring). In this way, the government can control the amount of public funds it is willing to subject to the often unpredictable litigation process.

Because the City's waiver of immunity by filing counterclaims in these cases was limited to a determination of whether it could recover any of the amounts it alleged it was owed, the trial court's jurisdiction was necessarily dependent upon the

continued existence of the City's counterclaims. Once the City dismissed its affirmative claims, appellees' claims for damages were no longer " germane to," "connected with," or "properly defensive of" any claims being made by the City. Because appellees' claims for damages were no longer in the nature of an offset, they no longer fell within the limited waiver of immunity described in *Reata.* Therefore, the City's now withdrawn counterclaims cannot form the basis of the trial court's jurisdiction over appellees' claims.

[9] Although the supreme court's opinions in *Tooke* and *Reata* limited the potential bases for waiver of sovereign immunity, during the same time those opinions were being issued and while this case was pending on rehearing, the Texas Legislature enacted sections 271.151-60 of the Texas Local Government Code. Sections 271.151-60 waive immunity from suit for certain claims against local governmental entities. *See*TEX. LOCAL GOV'T CODE ANN. § 271.152 (Vernon 2005). The sections apply retroactively to claims that arise under a written contract for goods or services if sovereign immunity has not been waived with respect to the claims before the effective date of the subchapter. *See* Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549. Appellees have pleaded claims for breach of contract. The appropriate action in cases such as these is to remand the claims to the trial court to allow appellees the opportunity to argue that the legislature has ***637** waived the City's immunity from suit by these new statutory provisions. *See City of Houston v. Clear Channel Outdoor, Inc.,* 197 S.W.3d 386, 386-87 (Tex.2006); *McMahon Contracting, L.P. v. City of Carrollton,* 197 S.W.3d 387, 387 (Tex.2006).

[10] In addition to their breach of contract claims, appellees also brought a declaratory judgment action. Under the Uniform Declaratory Judgments Act, persons "affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM.CODE ANN. § 37.004 (Vernon 1997). Governmental entities must be joined in suits to construe their legislative pronouncements. *See Tex. Educ. Agency v. Leeper,* 893 S.W.2d 432, 446 (Tex.1994). Accordingly, there is no governmental immunity in suits to construe legislation. *See id.; Tex. Natural Res. Conservation Comm'n v. IT-Davy,* 74 S.W.3d 849, 859-60 (Tex.2002).

[11][12][13] Sovereign immunity cannot be circumvented, however, by characterizing a suit for damages as a declaratory judgment action. *See IT-Davy,* 74 S.W.3d at 856. Parties cannot frame a breach of contract cause of action as a declaratory judgment action to determine a contract's validity, enforce performance under a contract, or impose contractual liabilities against a governmental entity. *Id.* at 855. In these cases, appellees have claimed the ordinance at issue is part of alleged contracts between them and the City. Appellees have also claimed damages based on breaches of these alleged contracts. Although sovereign immunity does not protect the City from appellees' request for a declaratory judgment construing the ordinance at issue, the Declaratory Judgments Act does not waive the City's immunity from suits for money damages. *See Leeper,* 893 S.W.2d at 445 (DJA allows courts to declare relief whether or not further relief is or could be claimed.). We conclude, therefore, that the trial court was correct in denying the City's plea to the jurisdiction to the extent appellees' claims for a declaratory judgment are limited to declaring the rights, status, and legal relations of the parties under the ordinance.

Finally, appellees contend that sovereign immunity is not a defense to their contract claims because the City cannot use the doctrine of sovereign immunity against itself. Appellees suggest that by seeking to enforce the alleged contractual benefits granted them as City employees in the referendum process, they are bringing suit not as private third parties but rather as agents of the City itself. We disagree.

The cases cited by appellees in support of their argument involve citizens suing municipalities to compel initiative and referendum acts. *See Blum v. Lanier,* 997 S.W.2d 259 (Tex.1999); *City of Canyon v. Fehr,* 121 S.W.3d 899

(Tex.App.-Amarillo 2003, no pet.). The court held in each case that citizens who exercise their rights under initiative provisions act not as third parties but as the legislative branch of the municipal government. *See Blum,* 997 S.W.2d at 262; *Fehr,* 121 S.W.3d at 902-03. In *Fehr,* the court concluded that such suits were not barred by sovereign immunity because the doctrine cannot be used by the municipality against itself. *See Fehr,* 121 S.W.3d at 902. In the cases before us, appellees are not seeking to compel an initiative or referendum, nor are they in any other way acting as the legislative branch of the municipal government. They are, instead, seeking to recover personal and individual damages for breaches of alleged employment contracts with the City. Because appellees are not acting as a ***638** political subdivision in bringing these suits, the rationale of *Blum* and *Fehr* does not apply.

Based on the foregoing, we affirm the trial court's denial of the City's pleas to the jurisdiction with respect to appellees' requests for a declaratory judgment. We reverse the trial court's orders with respect to appellees' claims for breach of contract and remand the causes to the trial court for further proceedings consistent with this opinion.

Tex.App.-Dallas,2006.
City of Dallas v. Albert
214 S.W.3d 631

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140 S.W.3d 920

140 S.W.3d 920
(Cite as: 140 S.W.3d 920)

City of Dallas v. Albert
Tex.App.-Dallas,2004.

Court of Appeals of Texas,Dallas.
CITY OF DALLAS, Appellant,
v.
Kenneth E. ALBERT, et al., Appellees.
City of Dallas, Appellant,
v.
David L. Barber, et al., Appellees.
City of Dallas, Appellant,
v.
Anthony Arredondo, et al., Appellees.
City of Dallas, Appellant,
v.
Kevin Michael Willis, et al., Appellees.
Nos. 05-03-01297-CV to 05-03-01300-CV.

Aug. 10, 2004.
Rehearing Granted Aug. 27, 2004.

Background: Firefighters brought action seeking unpaid back wages allegedly due pursuant to ordinance. The 199th Judicial District Court, Collin County, Robert T. Dry, Jr., J., entered summary judgment for firefighters. Firefighters appealed and city cross-appealed. The Court of Appeals, 79 S.W.3d 657, reversed and remanded.

Holdings: After supplemental briefing, the Court of Appeals, Joseph B. Morris, J., held that:

(1) city waived sovereign immunity by filing counterclaim, and

(2) waiver issue was not mooted by city's withdrawal of counterclaim.

Affirmed and remanded.

*921 Madeleine B. Johnson, City Attorney, and James B. Pinson, Office of City Attorney, Dallas, for Appellant in No. 05-03-01297-CV.
Bill Boyd, John Stooksberry, Boyd & Veigel, P.C., McKinney, for Appellees in Nos. 05-03-01297-CV, 05-03-01298-CV.
James B. Pinson, Office of City Attorney, Dallas, for Appellant in Nos. 05-03-01298-CV, 05-03-01299-CV, 05-03-01300-CV.
Bill Boyd, Boyd & Veigel, P.C., McKinney, for Appellees in Nos. 05-03-01299-CV, 05-03-01300-CV.

Before Justices MORRIS, FITZGERALD, and FRANCIS.

OPINION

Opinion by Justice MORRIS.

In these interlocutory appeals, we are presented with the issue of whether the City of Dallas waived its sovereign immunity from suit and, therefore, subjected itself to the jurisdiction of the trial court. Among the several grounds for asserting that such a waiver occurred, appellees contend the City invoked the trial court's subject matter jurisdiction when it filed counterclaims seeking affirmative relief. This Court recently addressed this issue in *City of Irving v. Inform Construction, Inc.*, No. 05-03-01460-CV, --- S.W.3d ----, 2004 WL 1852795 (Tex.App.-Dallas August 9, 2004, no pet. h.) and concluded that the filing of a counterclaim seeking affirmative relief is an intentional relinquishment of any claim to governmental immunity. Because the City waived its immunity from suit by seeking affirmative relief from the trial court, we affirm the trial court's orders denying the City's pleas to the jurisdiction and remand the causes for further proceedings.

I.

Generally, these cases concern a city ordinance adopted by the City of Dallas in *922 1979 in

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accordance with a voter-approved pay referendum. The ordinance states, among other things, that each sworn police officer, fire fighter, and rescue officer employed by the City would receive a pay raise and that "the current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained." Appellees contend the ordinance amended their alleged oral employment contracts with the City to add a requirement that the City maintain the percentage pay differentials between the grades in all future salary adjustments. Appellees filed suits alleging the City breached its contracts with them by repeatedly raising the pay of the highest ranking officers without making corresponding changes to the salaries received by the lower ranks. Appellees asserted claims for breach of contract seeking back pay, benefits, and prejudgment interest. Appellees also sought a declaratory judgment with accompanying attorneys' fees and costs incurred to establish that their interpretation of the ordinance was correct.

In response to appellees' claims, the City filed answers and counterclaims for alleged overpayments of salaries. According to the City, if appellees' interpretation of the ordinance is correct, then all salary adjustments made after the ordinance was adopted were void and unenforceable requiring appellees' to return any additional salaries paid pursuant to those adjustments.

On June 4, 2003, the City filed pleas to the trial court's jurisdiction contending that its governmental immunity from suit had not been waived and, therefore, the trial court lacked subject matter jurisdiction over each case. Appellees responded that the City's immunity from suit was expressly waived in both section 51.075 of the Texas Local Government Code and Chapter II of the Dallas City Charter. Specifically, the Local Government Code states that a municipality may "plead and be impleaded in any court." *See*TEX. LOCAL GOV'T CODE ANN. § 51.075 (Vernon 1999). The Dallas City Charter states that the City has the power to "sue and be sued" and to "implead and be impleaded in all courts." DALLAS CITY CHARTER ch. II, § 1(2), (3) (Aug.1999). Appellees additionally argued the City was collaterally estopped from asserting sovereign immunity because the City litigated the same issue in another case and the Fifth Circuit Court of Appeals decided the issue adversely to the City. The trial court denied the City's plea to the jurisdiction, and the City appealed.

During the pendency of this appeal, and after briefing and submission of the cases for decision, the Texas Supreme Court issued its opinion in *Reata Construction Corp. v. City of Dallas. See Reata Constr. Corp. v. City of Dallas,* 47 Tex. Sup.Ct. J. 408, --- S.W.3d ----, 2004 WL 726906 (Tex. Apr. 2, 2004) (per curiam) (mo. for reh'g filed). In *Reata,* the court held that a city's intervention in a lawsuit to assert claims for affirmative relief constituted a waiver of governmental immunity. Following issuance of the *Reata* decision, appellees in this case filed a motion to supplement their briefing arguing that the City's counterclaims for alleged overpayments were claims for affirmative relief invoking the trial court's jurisdiction much like the city's intervention in *Reata.* According to appellees, *Reata* provides another basis to affirm the trial court's denial of the City's plea to the jurisdiction. The City responded by voluntarily dismissing its counterclaims and attempting to distinguish between an intervention and a counterclaim for purposes of waiver of immunity. We granted appellees' motion to supplement their briefing. We address ***923** below the effect of the City's filing and subsequent voluntary dismissal of its counterclaims.

II.

It is well established that sovereign immunity from suit protects the State of Texas, its agencies, and its officials from lawsuits for damages unless it is waived by clear and unambiguous consent to suit. *See Fed. Sign v. Tex. S. Univ.* 951 S.W.2d 401, 405 (Tex.1997). A city, such as the City of Dallas, is deemed an agent of the state for sovereign immunity purposes when exercising its powers for a public purpose. *See City of San Benito v. Ebarb,* 88 S.W.3d 711, 720 (Tex.App.-Corpus Christi 2002, pet. denied). Appellees' suit against the City for breach of contract and declaratory judgment is a

lawsuit for damages arising out of the City's exercise of its power to adopt public ordinances. *See id.* at 721 (suit brought for purpose of declaring rights that seeks to impose liability against the state for damages is barred by sovereign immunity). Accordingly, sovereign immunity from suit protects the City, and the court lacks subject matter jurisdiction over these cases, unless the immunity has been waived.

As stated above, the Texas Supreme Court recently held that when a city files a plea in intervention asserting claims for affirmative relief it waives immunity and subjects itself to the jurisdiction of the trial court with regard to "any claim that is incident to, connected with, arises out of, or is germane to the controversy brought by the State." *See Reata,* --- S.W.3d at ----, 2004 WL 726906 at * 3. In *City of Irving v. Inform Construction, Inc.,* this Court held that filing a counterclaim for affirmative relief had the same legal effect as filing a plea in intervention under *Reata* and, therefore, also constituted a waiver of governmental immunity. *See Inform Constr.,* No. 05-03-01460-CV, slip op. at 5, --- S.W.2d at ----, 2004 WL 1852795.Although the City argues there are fundamental differences between pleas in intervention and counterclaims that should prevent its counterclaims from being considered a waiver of immunity, we are not persuaded to depart from this Court's earlier holding. The claims presented by appellees are clearly germane to the counterclaims brought by the City. Accordingly, the City has waived its governmental immunity from appellees' suits. *See id.*

The City also contends the issue of waiver based on its counterclaims is moot because it has voluntarily dismissed all its counterclaims against appellees. The City cites no authority, however, to support its assertion that once it has waived immunity, it can simply decide to withdraw its consent to suit and divest the trial court of its jurisdiction. Similar to a general appearance before a trial court that irrevocably waives a party's right to challenge personal jurisdiction in that suit, the City cannot avoid the consequences of its actions by attempting to undo its act of waiver. *See Rush v. Barrios,* 56 S.W.3d 88, 105 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (party's filing of plea in intervention was a waiver of immunity even though it was later voluntarily dismissed without prejudice). The long-standing rule in Texas is that where jurisdiction is lawfully and properly acquired, no subsequent fact or event in the particular case can serve to defeat the jurisdiction. *DISD v. Porter,* 709 S.W.2d 642, 643 (Tex.1986). We see no reason to make an exception to the rule in this case.

We affirm the trial court's orders denying the City's pleas to the jurisdiction. We remand the causes for further proceedings.

Tex.App.-Dallas,2004.
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79 S.W.3d 657
(Cite as: 79 S.W.3d 657)

Arredondo v. City of Dallas
Tex.App.-Dallas,2002.

Court of Appeals of Texas,Dallas.
Anthony ARREDONDO, et al.,
Appellants/Cross-Appellees,
v.
The CITY OF DALLAS, Texas,
Appellee/Cross-Appellant.
No. 05-99-01819-CV.

June 4, 2002.

Firefighters brought action seeking unpaid back wages allegedly due pursuant to ordinance. The 199th District Court, Collin County, Robert T. Dry, Jr., entered summary judgment for firefighters. Firefighters appealed and city cross appealed. The Court of Appeals, Fitzgerald, J., held that: (1) severing firefighter's and city's claims from those of city police and fire pension system and other firefighters was not abuse of discretion, and (2) ordinance providing that current percentage pay differential between grades in sworn ranks of firefighters shall be maintained was patently ambiguous, and thus, summary judgment could not be granted on firefighter's claim for unpaid back wages allegedly due pursuant to ordinance.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ⚿217

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k217 k. Final Judgment. Most Cited Cases
Trial court's order severing firefighter's and city's claims related to firefighter's entitlement to unpaid back wages from those of city police and fire pension system and other firefighters was final judgment, even though order did not expressly dispose of firefighter's claim for attorney fees, where order stated that, upon signing of order, prior order granting partial summary judgment would become final order in severed cause and that all issues had been decided.

[2] Motions 267 ⚿51

267 Motions
267k50 Form and Requisites of Orders
267k51 k. In General. Most Cited Cases
Mere inclusion of word final in order does not make it final; rather, there must be some other clear indication that trial court intended order to completely dispose of entire case.

[3] Action 13 ⚿60

13 Action
13III Joinder, Splitting, Consolidation, and Severance
13k60 k. Severance of Actions. Most Cited Cases
Severing firefighter's and city's claims related to firefighter's entitlement to unpaid back wages from those of city police and fire pension system and other firefighters was not abuse of discretion, where partial summary judgment had been granted to firefighters. Vernon's Ann.Texas Rules Civ.Proc., Rule 41.

[4] Action 13 ⚿55

13 Action
13III Joinder, Splitting, Consolidation, and Severance
13k54 Consolidation of Actions
13k55 k. In General. Most Cited Cases

Action 13 ⚿60

13 Action
13III Joinder, Splitting, Consolidation, and

79 S.W.3d 657
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Severance
13k60 k. Severance of Actions. Most Cited Cases
Claim may be properly severed if it is part of controversy involving more than one cause of action; trial judge is given broad discretion in manner of severance and consolidation of causes. Vernon's Ann.Texas Rules Civ.Proc., Rule 41.

[5] Action 13 ⇐60

13 Action
13III Joinder, Splitting, Consolidation, and Severance
13k60 k. Severance of Actions. Most Cited Cases
Although trial court need not sever interlocutory summary judgment, it has broad discretion in determining whether to grant severance. Vernon's Ann.Texas Rules Civ.Proc., Rule 41.

[6] Action 13 ⇐60

13 Action
13III Joinder, Splitting, Consolidation, and Severance
13k60 k. Severance of Actions. Most Cited Cases
If summary judgment in favor of one defendant is proper in case with multiple defendants, severance of that claim is proper so it can be appealed. Vernon's Ann.Texas Rules Civ.Proc., Rule 41.

[7] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Court of Appeals reviews summary judgment de novo.

[8] Judgment 228 ⇐185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
In deciding whether there is fact issue raised to preclude summary judgment, court accepts all evidence favorable to nonmovant as true, indulges nonmovant with every favorable reasonable inference, and resolves any doubt in nonmovant's favor.

[9] Judgment 228 ⇐185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
In deciding whether there is fact issue raised to preclude summary judgment, court disregards all conflicts in evidence.

[10] Municipal Corporations 268 ⇐199

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k199 k. Pay and Other Compensation. Most Cited Cases
Ordinance providing that current percentage pay differential between grades in sworn ranks of firefighters shall be maintained was part of contract between city and firefighters, and thus, any ambiguity in ordinance would be fact issue, rather than legal issue.

[11] Municipal Corporations 268 ⇐199

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k199 k. Pay and Other Compensation. Most Cited Cases

Ordinance providing that current percentage pay differential between grades in sworn ranks of firefighters shall be maintained was patently ambiguous, where phrase "shall be maintained" was reasonably susceptible to more than one meaning.

[12] Judgment 228 ⇐181(27)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(27) k. Public Officers and Employees, Cases Involving. Most Cited Cases
Ordinance providing that current percentage pay differential between grades in sworn ranks of firefighters shall be maintained was patently ambiguous, and thus, summary judgment could not be granted on firefighter's claim for unpaid back wages allegedly due pursuant to ordinance.

[13] Contracts 95 ⇐176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases
Whether contract is ambiguous is question of law for court to decide.

[14] Contracts 95 ⇐143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases
If contract can be given definite or certain legal meaning or interpretation, then it is not "ambiguous" ; if, however, contract is reasonably susceptible to more than one meaning, it is ambiguous.

[15] Contracts 95 ⇐143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases
Contract ambiguity may be either patent or latent; " patent ambiguity" is one evident on face of contract, while "latent ambiguity" exists when contract is unambiguous on its face, but fails because of some collateral matter that creates ambiguity.

[16] Appeal and Error 30 ⇐173(6)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k173 Grounds of Defense or Opposition
30k173(6) k. Asserting Invalidity of Contract or Other Instrument. Most Cited Cases
Patent ambiguity of contract may be considered for first time on appeal from motion for summary judgment.

[17] Contracts 95 ⇐176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases
Ordinarily, if contract is ambiguous, ambiguity raises fact question to be determined by jury.

[18] Statutes 361 ⇐176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases
If statute is ambiguous, then it raises legal issue, not fact issue, to be determined by court as matter of law.

[19] Municipal Corporations 268 ⇐199

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k199 k. Pay and Other Compensation. Most Cited Cases
Court of Appeals could not entertain city's argument that ordinance providing that current percentage pay differential between grades in sworn ranks of firefighters shall be maintained was invalid under statute providing that no other issue could be joined on same ballot as proposition to increase salaries for fire department, where city failed to file election contest suit within 30 days of return date of referendum ballot. Vernon's Ann.Texas Civ.St. art. 1269q (Repealed).

[20] Elections 144 ⇐278

144 Elections
144X Contests
144k278 k. Limitations and Laches. Most Cited Cases
Election contest must be filed within 30 days after return date of election; 30 day limit is jurisdictional and non-waivable.

***659** Bill Boyd,Boyd & Veigel, P.C., McKinney, for Appellant.
James B. Pinson, Office of City Attorney, Dallas, for Appellee.

Before Justices KINKEADE, MOSELEY, and FITZGERALD.

OPINION

Opinion By Justice FITZGERALD.

Anthony Arredondo, et al. (Plaintiffs),[FN1] and the City of Dallas, Texas, appeal the trial court's summary judgment granting Plaintiffs unpaid back wages pursuant to a 1979 ordinance that constituted part of Plaintiffs' employment contract with the City. Plaintiffs bring one point of error contending the trial court failed to award them sufficient back wages. The City brings nine cross points contending the trial court erred in rendering summary judgment for Plaintiffs because the ordinance is ambiguous and because Plaintiffs failed to establish as a matter of law the amount of back wages to which they are entitled. The City also contends the trial court erred in severing Plaintiffs' claims from those of the remaining 808 firefighters who brought identical claims against the City. We conclude the trial court did not abuse its discretion in granting the severance. We further conclude the ordinance is ambiguous. We reverse the trial court's judgment and remand the cause to the trial court for further proceedings.

FN1. Plaintiffs in this case are: Anthony Arredondo, Charles S. Swaner, Joseph M. Betzel, James M. Stovall, Lisa M. Clayton, Kenneth L. Foreman, Elmer J. Davis, Jace P. Sepulvado, Brian Caton, Robert L. Rogers, Tim Q. Rose, George J. Tomasovic, James M. Craft, Jr., David T. Chase, Howard R. Russell, and Danny Watson.

FACTUAL AND PROCEDURAL BACKGROUND

On September 8, 1978, the Dallas Police and Fire Action Committee presented the City with a signed petition seeking an ordinance for the purpose of: (1) obtaining a pay increase effective October 1, 1978 for City sworn police officers and firefighters equal to no less than fifteen percent of the October 1, 1977 base salary of a third-year officer; (2) maintaining the "current percentage pay differential between grades in the sworn ranks" of police officers and firefighters; and (3) maintaining salary and benefits at levels not less than those in effect in October 1977.[FN2] The City Secretary approved the petition and submitted it to the City Council. Under the City Charter, the City Council had two choices: ***660** it could either pass the ordinance embodied in the petition without alteration or call a special election submitting the ordinance to a vote of the people. *See*DALLAS, TEX., CHARTER ch. XVIII, § 13. The City Council decided to call a special election on January 20, 1979 to submit the ordinance to a vote of the people. Before the election, the City passed a resolution concerning the pay scale of the fire department. Resolution

78-2735,[FN3] passed September 27, 1978 and effective October 1, 1978, established a new pay scale for the City's employees, including police and fire department personnel. At the January 20, 1979 special election, the voters approved the referendum.

FN2. The text of the ordinance sought and subsequently approved was:
Be it ordained that: (1) From and after October 1, 1978, each sworn police officer and fire fighter and rescue officer employed by the City of Dallas, shall receive a raise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas sworn police officer or fire fighter and rescue officer with three years service computed on the pay level in effect for sworn police officers and fire fighter and rescue officers of the City of Dallas with three years service in effect in the fiscal year beginning October, 1977; (2) The current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained; and (3) Employment benefits and assignment pay shall be maintained at levels of not less than those in effect for the fiscal year beginning October, 1977.

FN3. Resolution 78-2735 provided:
September 27, 1978
WHEREAS, the City Council of the City of Dallas has adopted a budget for the year beginning October 1, 1978, and,
WHEREAS, the budget adopted is predicated upon approved summary position allocations, and,
WHEREAS, it is necessary to authorize the specific positions which constitute these position allocations; Now, Therefore,
BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:
SECTION 1. That the attached Salary Schedules I, IA, and ID, reflecting a pay adjustment of 3% increase for all positions listed, be approved effective October 1, 1978;
That the attached Schedule IC, reflecting a pay adjustment of 5% increase for all positions listed, be approved effective October 1, 1978;
That the attached Schedule IB, reflecting a pay adjustment of 5% increase for all positions listed except 6% for employees in Step 7, be approved effective October 1, 1978;
That the attached Schedule IE, establishing new rates for the Physicians, be approved effective October 1, 1978;
That the attached Schedules II and IIA reflecting alphabetical and numerical classification titles be approved as listed effective October 1, 1978;
That the attached Schedule III, reflecting a pay adjustment of 5 1/2% increase, plus certain other adjustments, be approved effective October 1, 1978, but that operation of the merit steps 4 and 5 in this schedule be deferred pending results of the police and fire salary referendum;
That the attached Schedule IV, reflecting pay adjustments of up to 3% increase for selected positions listed, be approved effective October 1, 1978;
That the attached Schedule V, reflecting a pay adjustment of 3% up to 5% increase, plus certain other adjustments, be approved effective October 1, 1978;
That Classifications not on the above schedules be paid at rates previously authorized by the City Council.
SECTION 2. That the departmental position allocations according to the attached schedules be approved effective October 1, 1978, and continuing through September 30, 1979, unless otherwise specified in the attached Schedule.
SECTION 3. That rates of pay shall be as specified in the Salary Schedules approved by the City Council.
SECTION 4. That the City Manager is authorized to transfer positions between accounts within departments of the General Fund and between accounts within other funds.
SECTION 5. That this resolution shall take

effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas and it is accordingly so resolved.

On January 22, 1979, the City Council adopted the ordinance approved by the voters in Ordinance 16084 (the Ordinance).[FN4] *See* Dallas, Tex., Ordinance 16,084 (Jan. 22, 1979). On January 24, 1979, the City Council passed Resolution 79-0348, purporting to implement the Ordinance.[FN5] To implement the pay scale ***661** provisions mandated by the Ordinance, Resolution 79-0348 rescinded the pay scale established in Resolution 78-2735. Resolution 79-0348 established a pay scale maintaining the percentage pay differential in effect during fiscal year October 1977-78 between the ranks of police officers and firefighters at the rank of Deputy Chief and below and giving each rank a fifteen percent pay raise. On January 31, 1979, the City Council passed Resolution 79-0434, which recognized the need to give "the Assistant Police Chiefs, Assistant Fire Chiefs, Chief of Police, and Fire Chief" a raise "to maintain the percentage of pay differential between these grades and other grades in the sworn ranks," and the resolution approved new salary rates for the police and fire chiefs and assistant chiefs.[FN6]

FN4. Under the City Charter, the Ordinance became effective immediately after the election, and the City could not repeal the Ordinance except through a vote of the people approving the repeal. *See* DALLAS, TEX., CHARTER ch. XVIII, § 14.

FN5. Resolution 79-0348 provided:
January 24, 1979
WHEREAS, the City Council approved position allocations and salary schedules for sworn members of the Police and Fire Departments, specifically in Resolution No. 78-2735 dated September 27, 1978, and Phase II in Resolution No. 78-3567 dated December 20, 1978; and,
WHEREAS, pursuant to Chapter XVIII, Section 13, Dallas City Charter, a special election was held on January 20, 1979, at which the voters approved an ordinance which authorized a raise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas police officer or fire fighter and rescue officer with three years service computed on the pay level for police officers, fire fighters, and rescue officers with three years service in effect in the fiscal year beginning October 1, 1977, and further providing that the current percentage of pay differential between grades in the sworn ranks shall be maintained; and,
WHEREAS, the attached Salary Schedule III implements the ordinance approved at the special election; and,
WHEREAS, it is necessary to void and rescind the September 27, 1978, Salary Schedule III-Position Classification and Salary-Police and Fire Department and Resolution No. 78-3567 Dated December 20, 1978, as a result of the approval of the above-described ordinance at the special election; Now, Therefore,
BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:
SECTION 1. That Salary Schedule III-Position Classification and Salary-Police and Fire Department as approved in Resolution No. 78-2735 dated September 17, 1978 and Resolution No. 78-3567 dated December 20, 1978, be and are hereby rescinded and voided.
SECTION 2. That the attached Salary Schedule III be and is hereby approved.
SECTION 3. That the City Manager is hereby authorized to implement the provisions of the ordinance approved at said special election.
SECTION 4. That the City Manager is hereby authorized to increase the appropriation in General Fund 100001, Org. 1996-Salary and Benefit Reserve, Account 3981 by $3,911,000.00, and decrease the balance in the General fund 100001, Emergency Reserve, Account 0778 by a like amount.
SECTION 5. That all other provisions

contained in Resolution No. 78-2735 dated September 27, 1978, not amended or rescinded shall remain in effect.
SECTION 6. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charger of the City of Dallas and it is accordingly so resolved.

FN6. Resolution 79-0434 provided:
WHEREAS, the City Council approved position allocations and salary schedules for the City of Dallas, specifically in Resolution No. 78-2735 dated September 27, 1978, and Phase II in Resolution No. 78-3656 dated December 20, 1978; and,
WHEREAS, pursuant to Chapter XVIII, Section 13, Dallas City Charter, a special election was held on January 20, 1979, at which the voters approved an ordinance which authorized a rise in salary in an amount equal to not less than 15% of the base salary of a City of Dallas police officer or fire fighter and rescue officer with three years service computed on the pay level for police officers, fire fighters, and rescue officers with three years service in effect in the fiscal year beginning October 1, 1977, and further providing that the current percentage of pay differential between grades in the sworn ranks shall be maintained; and,
WHEREAS, it is necessary to adopt salaries for the Assistant Police Chiefs, Assistant Fire Chiefs, Chief of Police and Fire Chief to maintain the percentage of pay differential between these grades and other grades in the sworn ranks; Now, Therefore,
SECTION 1. That the following salary rates are approved retroactive to October 1, 1978:
[Setting out the salary rates for the fire and police chiefs and assistant chiefs]
SECTION 2. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas and it is accordingly so resolved.

***662** In the succeeding years, the City raised the salary of all firefighters through the annual pay resolutions. Over time, however, the Fire Chief's salary crept higher in relation to the salary of the other firefighters. By October 1, 1994, the percentage pay differential between the Fire Chief's pay and the pay of the other firefighters was twelve to fifteen percentage points higher than it had been in 1979.

On June 30, 1994, more than eight hundred present and former members of the sworn ranks of the Dallas Fire Department sued the City of Dallas. The firefighters interpreted the phrase "[t]he current percentage pay differential between grades ... shall be maintained" as requiring the City to keep the 1979 percentage pay differential in all subsequent pay resolutions. They alleged the City had failed to maintain the percentage pay differential because the Fire Chief earned proportionally more than they did compared to 1979. The firefighters sought back wages for the higher salaries they would have received had the City maintained the percentage differential between their pay and the Fire Chief's pay. The firefighters also sought a declaration that the beginning base salaries for the grades of Battalion Chief and below do not comply with the Ordinance and a declaration establishing the base salary for those grades for the City to be in compliance with the Ordinance. The firefighters also sought attorney's fees under section 37.009 of the civil practice and remedies code for their declaratory judgment action and under section 38.001 of the civil practice and remedies code for their breach of contract claims. *See*TEX. CIV. PRAC. & REM.CODE ANN. §§ 37.009, 38.001 (Vernon 1997).

On June 7, 1995, the City filed a counterclaim seeking a declaratory judgment that the Ordinance merely prohibited the City from decreasing the percentage pay differential between grades but did not prohibit the City from increasing the differential. The City also sought declarations that if all of the resolutions authorizing payment of salary after October 1, 1978 to the sworn ranks of the fire fighter and rescue officers failed to comply with the Ordinance, then those resolutions were ultra vires and void. The City alleged that if the

resolutions authorizing payment of salary to the firefighters were void, then the salaries paid to the firefighters after October 1, 1978 were an illegal donation of public funds, and the City sought to recover all of the amounts paid to the firefighters as salary after October 1, 1978 to the extent they exceeded the salaries authorized under Resolution 78-2735 or Resolutions 79-0348 and 79-0434.

On April 10, 1995, Plaintiffs, who are sixteen of the firefighters suing the City, moved for partial summary judgment on the issues of liability for back pay and declaratory relief. On June 7, 1995, the City filed a motion for summary judgment seeking dismissal of Plaintiffs' claims because they waived the claims, ratified them, or were estopped from asserting them by accepting salary benefits under the resolutions passed after January 20, 1979. The City also asserted that the legislature had validated the City's acts. The City also requested judgment against ***663** Plaintiffs for the gross salary paid them to the extent it exceeded the salaries authorized under Resolution 78-2735 or Resolutions 79-0348 and 79-0434.

On December 4, 1995, the trial court entered an order stating the court "finds and declares that there is no genuine issue as to the material fact that the City of Dallas has failed to maintain the percentage pay differentials between grades in the sworn ranks of the fire fighter and rescue force as those differentials existed on October 1, 1978." The court overruled Plaintiffs' motion in all other respects. The December 4, 1995 order did not reference the City's motion for summary judgment.

The parties stipulated on June 18, 1996, to the base pay of the Fire Chief on January 22, 1979, the base pay of the different grades of the other firefighters under Resolutions 78-2735 and 79-0348, and the percentage difference between the Fire Chief's base pay and each of the other levels of firefighters' base pay under Resolutions 78-2735 and 79-0348. The parties also stipulated to the base pay of the Fire Chief and to the base pay of each grade of the other firefighters from 1989 through 1995.

On October 11, 1996, Plaintiffs filed their first supplemental motion for partial summary judgment. This motion asserted the fact that the Fire Chief had received proportionally higher pay raises since 1979 than the lower ranks of the fire department. Plaintiffs relied on the stipulations and other evidence and prayed the trial court to adjudge the City liable for back pay from 1990, based on the percentage pay differential established by Resolution 79-0348. On January 9, 1997, the City filed its motion for summary judgment asserting that it was entitled to summary judgment on its affirmative defenses. The City also argued that if its affirmative defenses did not bar Plaintiffs' suit, then the evidence shows the salary paid to Plaintiffs was illegal, and the City is entitled to judgment for all salary paid to Plaintiffs exceeding the amount authorized by Resolution 78-2735 or Resolutions 79-0348 and 79-0434, plus interest.

On August 1, 1997, the trial court ruled on the October 11, 1996 and January 9, 1997 motions for summary judgment by granting Plaintiffs' motion in part and denying the City's motion. The trial court concluded:
The City had failed to maintain the percentage pay differential between the grades in the sworn ranks of the fire department as those differentials existed on October 1, 1978;
The percentage pay differential in effect on January 20, 1979 was established by Resolution 78-2735;
Ordinance 16084 implemented the requirements of the special referendum election of January 20, 1979;
Resolution 79-0348 failed to maintain the percentage pay differentials;
From January 24, 1979 to the present, the City has failed to maintain the percentage pay differentials between the grades in the sworn ranks of the fire department as they existed on January 20, 1979.

The trial court also rendered declaratory judgment that:The City has a legal obligation to each Plaintiff to comply with the requirements of Ordinance 16084 by maintaining the percentage pay differential between the grades in the sworn ranks of the fire department.
The City is required by law to bring itself into compliance with Ordinance 16084 for past failure to maintain the percentage pay differential and to insure that the differentials are maintained in the future. The City has ***664** some discretion to

decide what action it should take to satisfy this legal obligation.
The City should be given a reasonable time to resolve its past failure to maintain the differentials and to insure that the differentials are maintained in the future. Thus, the cause was not ready for resolution and should be abated.

The trial court also declared the City had no obligation to resolve the effects of its failure to maintain the percentage pay differential before June 30, 1990. The court declared that it lacked the power at that time to redraft the City's resolutions for establishing the salaries for the fire department and that the City could comply by increasing or decreasing any or all salaries in the fire department or by taking some other action to bring the City into compliance with the Ordinance and Resolution 78-02735. The trial court then abated the cause until further order.

On January 20, 1998, five-and-a-half months after the trial court abated the cause, Plaintiffs moved to lift the abatement order, asserting that the City had done nothing in the meantime to comply with the Ordinance and Resolution 78-2735. On March 10, 1998, the trial court ordered the abatement lifted and the cause reinstated. On September 16, 1998, the City moved for summary judgment on Plaintiffs' claims, and on January 27, 1999, Plaintiffs moved for summary judgment on their claims. The parties presented essentially the same arguments on Plaintiffs' claims as in their previous motions. Neither motion expressly moved for summary judgment on the City's counterclaim for excessive wages paid Plaintiffs since October 1, 1978.

On May 26, 1999, the trial court determined that the City had been given a reasonable time to comply with the Ordinance and Resolution 78-2735 but had failed to do so and that no genuine issue of fact remained. The trial court rendered judgment that the City was liable for back pay to each Plaintiff. The court then rendered a take nothing judgment on the City's counterclaim because, "by the granting of Plaintiffs' Motion, the counterclaim filed herein by the City against the 16 Plaintiffs has been wholly negated, and a take-nothing judgment should be entered against the City on said counterclaim."

On October 19, 1999, the Dallas Police and Fire Pension System intervened, alleging the City owed it twenty-seven and one-half percent of the amount of back pay awarded to Plaintiffs and that the City was required to withhold for the Pension System six and one-half percent to eight and one-half percent of the back pay awarded Plaintiffs.

[1][2] On October 20, 1999, the trial court severed Plaintiffs' and the City's claims from those of the Pension System and the remaining 808 firefighters. This order became the final judgment.[FN7]

> FN7. The May 26, 1999 summary judgment order and the October 20, 1999 severance order do not expressly dispose of Plaintiffs' claim for attorney's fees. However, the trial court states in the severance order,
> IT IS FURTHER ORDERED that, upon the court's signing of this Order, the Order Granting Partial Summary Judgment dated May 26, 1999 will become the final order in the Severed Cause.
> The Court finds that, because of the severance ordered herein, all issues and matters between Movants and the City have been decided, and that this Order constitutes a final judgment in the Severed Cause.
> The mere inclusion of the word "final" in the order does not make it final. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex.2001). "Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* The above-quoted language in the severance order meets this requirement. Plaintiffs do not complain on appeal of the trial court's failure to award attorney's fees.

***665 ISSUES ON APPEAL**

Both Plaintiffs and the City appeal the trial court's judgment. Plaintiffs bring one point of error contending the trial court erred by using the percentage pay differential established by

Resolution 78-2735 to calculate Plaintiffs' damages; they assert the trial court should have used Resolution 79-0348 to determine the current percentage pay differential.

The City brings nine cross points of error. The first cross point challenges the City's liability for any damages by contending the Ordinance is patently ambiguous concerning whether the duty to "maintain " the current percentage pay differential applies only to the calculation of the raise required by clause 1 of the Ordinance or whether it applies to all subsequent pay resolutions as Plaintiffs assert and the trial court held. The second cross point contends Plaintiffs' interpretation of the Ordinance would violate Article 1269q of the Texas Revised Civil Statutes.[FN8] The City's third through sixth and eighth and ninth cross points contend that if the City is liable to Plaintiffs, then Plaintiffs did not prove as a matter of law the amount of damages awarded by the trial court. The City's seventh point of error contends that the trial court erred by granting Plaintiffs' motion for severance. Because the issue of the propriety of the severance raises jurisdictional considerations, we address it first.

FN8. *See*TEX.REV.CIV. STAT. ANN. art. 1269q (repealed). Act of May 15, 1973, 63d Leg., R.S., ch. 218, § 1, 1973 Tex. Gen. Laws 506, 506-07, *repealed by* Act of May, 1, 1987, 70th Leg., R.S., ch. 149, § 49, 1987 Tex. Gen. Laws, 707, 1307 (now codified at TEX. LOCAL GOV'T CODE ANN. § 141.034(d) (Vernon 1999)). This state statute provided a means for police and firefighters to obtain a salary raise through a petition and referendum procedure.

SEVERANCE

[3][4][5][6] The City contends the trial court abused its discretion by granting Plaintiffs' motion for severance. Rule 41 of the Texas Rules of Civil Procedure provides "[a]ny claim against a party may be severed and proceeded with separately." TEX.R. CIV. P. 41. A claim may be properly severed if it is part of a controversy involving more than one cause of action; the trial judge is given broad discretion in the manner of severance and consolidation of causes. *Cherokee Water Co. v. Forderhause,* 641 S.W.2d 522, 526 (Tex.1982); *see also Guar. Fed. Sav. Bank v. Horseshoe Operating Co.,* 793 S.W.2d 652, 658 (Tex.1990). Although the trial court need not sever an interlocutory summary judgment, it has broad discretion in determining whether to grant a severance. *Guidry v. Nat'l Freight, Inc.,* 944 S.W.2d 807, 812 (Tex.App.-Austin 1997, no writ). If summary judgment in favor of one defendant is proper in a case with multiple defendants, severance of that claim is proper so it can be appealed. *Id.* (citing *Cherokee,* 641 S.W.2d at 526); *see also Cooke v. Maxam Tool and Supply, Inc.,* 854 S.W.2d 136 (Tex.App.-Houston [14th Dist.] 1993, writ denied) (noting that in *Cherokee,* supreme court found severance of summary judgment in similar circumstances was not an abuse of discretion, court likewise held severance of summary judgments from remaining case not abuse of discretion). We conclude the trial court did not err in granting Plaintiffs' motion for severance.

SUMMARY JUDGMENT

[7][8][9] We review a summary judgment de novo. *Reynosa v. Huff,* 21 S.W.3d 510, 512 (Tex.App.-San Antonio 2000, no pet.); ***666** *Dickey v. Club Corp. of Am.,* 12 S.W.3d 172, 175 (Tex.App.-Dallas 2000, pet. denied). The standards for reviewing a traditional summary judgment are well established. *See Sysco Food Servs., Inc. v. Trapnell,* 890 S.W.2d 796, 800 (Tex.1994); *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548-49 (Tex.1985). In deciding whether there is a fact issue raised to preclude summary judgment, we accept all evidence favorable to the nonmovant as true, indulge the nonmovant with every favorable reasonable inference, and resolve any doubt in the nonmovant's favor. *Nixon,* 690 S.W.2d at 548-49. We disregard all conflicts in the evidence and accept as true all evidence supporting the nonmovant. *See Fought v. Solce,* 821 S.W.2d 218, 219 (Tex.App.-Houston [1st Dist.] 1991, writ denied). All doubts as to the existence of a genuine issue of

material fact are resolved against the movant. *See id.*(citing *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.,* 391 S.W.2d 41, 47 (Tex.1965)).

Ambiguity

[10][11][12][13][14] In its first cross point, the City contends that summary judgment is inappropriate in this case because the Ordinance is patently ambiguous. Whether a contract is ambiguous is a question of law for the court to decide. *Friendswood Dev. Co. v. McDade & Co.,* 926 S.W.2d 280, 282 (Tex.1996). If a contract can be given a definite or certain legal meaning or interpretation, then it is not ambiguous. *Id.; Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983). If, however, the contract is reasonably susceptible to more than one meaning, it is ambiguous. *Coker,* 650 S.W.2d at 393.

[15] A contract ambiguity may be either patent or latent. A patent ambiguity is one evident on the face of the contract, while a latent ambiguity exists when a contract is unambiguous on its face, but fails because of some collateral matter that creates an ambiguity. *Nat'l Union Fire Ins. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex.1995) (example of latent ambiguity would be if contract called for goods to be delivered to "the green house on Pecan Street," but there were in fact two green houses on Pecan Street). The City argues on appeal that the ordinance is facially ambiguous, i.e., that it contains a patent ambiguity, and that in the context of the entire Ordinance, the meaning of the phrase "shall be maintained" is reasonably susceptible to more than one meaning.

[16] Plaintiffs argue that the City did not preserve the ambiguity argument it presents on appeal because the City neither pleaded it nor asserted it in response to Plaintiffs' motions for summary judgment.[FN9] Patent ambiguity of a contract may be considered for the first time on appeal from a motion for summary judgment. *See A.W. Wright & Assocs., P.C. v. Glover, Anderson, Chandler & Uzick, L.L.P.,* 993 S.W.2d 466, 470 n. 3 (Tex.App.-Houston [14th Dist.] 1999, pet. denied); ***667** *see also Coker,* 650 S.W.2d at 394 (concluding contract was ambiguous even though parties affirmatively asserted it was unambiguous, and trial court and court of appeals agreed it was unambiguous); *Highlands Mgmt. Co. v. First Interstate Bank,* 956 S.W.2d 749, 752 n. 1 (Tex.App.-Houston [14th Dist.] 1997, pet. denied) (same); *cf. White v. Moore,* 760 S.W.2d 242, 243 (Tex.1988) (reversing summary judgment in will-contest case due to ambiguity in will even though parties agreed the will was unambiguous). Thus, under these circumstances, we may consider whether the contract is ambiguous. *See Sage St. Assocs. v. Northdale Constr. Co.,* 863 S.W.2d 438, 445 (Tex.1993) ("A court may conclude that a contract is ambiguous even in the absence of such a pleading by either party.") (citing *Coker,* 650 S.W.2d at 393, and *White,* 760 S.W.2d at 243).

> FN9. In its March 31, 1999 response to Plaintiffs' January 27, 1999 motion for partial summary judgment, the City stated, "as a matter of law, the terms of the alleged contract of employment between the Plaintiffs and the City are so vague and ambiguous as to be unenforceable." The City did not state in the response that the ambiguity concerned the interpretation of the words "shall maintain" in clause 2 of the Ordinance. In its June 9, 1995 response to Plaintiffs' April 10, 1995 motion for partial summary judgment, the City presented an alternative to Plaintiffs' interpretation of the Ordinance: the City asserted that the Ordinance, "properly construed, requires only that the percentage pay differentials between grades cannot be reduced, and does not prohibit an increase in the percentage pay differentials between grades." The City did not assert in its June 9, 1995 response the interpretation of the Ordinance it presents on appeal.

[17][18] Ordinarily, if a contract is ambiguous, the ambiguity raises a fact question to be determined by a jury. *See, e.g., Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.,* 940 S.W.2d 587, 589

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(Tex.1996); *Reilly v. Rangers Mgmt., Inc.,* 727 S.W.2d 527, 529 (Tex.1987). If a statute is ambiguous, then it raises a legal issue, not a fact issue, to be determined by the court as a matter of law. *See, e.g., City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 357 (Tex.2000) (generally, matters of statutory construction are legal questions). Before we reach the City's ambiguity argument, we determine whether the asserted ambiguity raises a factual question because the Ordinance is part of a contract or a legal question because the Ordinance is a statute.

We first note that in the December 14, 1998 Order Denying Defendant's Motion for Partial Summary Judgment, the trial court declared that "City Ordinance No. 16084 constitutes an implied part of each employment contract between the City and the members of the sworn ranks of the City's Fire Fighter & Rescue Force ...," and neither party disputes that the Ordinance constituted part of the City's contract with Plaintiffs.

Further, in *Fort Worth Independent School District v. City of Fort Worth,* 22 S.W.3d 831 (Tex.2000), the supreme court considered the situation of ambiguities in ordinances that constituted a contract between the city, the school district, and a telephone utility company. *See id.* at 845-46. The supreme court determined that the ambiguity in the contract created by the ordinances was a fact question. *See id.* at 846. In this case the City, through the voters, reached a contractual agreement with Plaintiffs regarding their pay. Applying *Fort Worth Independent School District,* any ambiguity in the Ordinance would be a fact issue because it is part of a contract. *See id.* Consequently, if the contract is ambiguous, then summary judgment is inappropriate because the contract's interpretation becomes a fact issue. *See Donahue v. Bowles, Troy, Donahue, Johnson, Inc.,* 949 S.W.2d 746, 753 (Tex.App.-Dallas 1997, writ denied).

The contractual provision at issue, the Ordinance, provides:
Be it ordained that:
(1) From and after October 1, 1978, each sworn police officer and fire fighter and rescue officer employed by the City of Dallas, shall receive a raise in salary in an amount equal to *not less than* 15% of the base salary of a City of Dallas sworn police officer or fire fighter and rescue officer with three years service computed on the pay level in effect for sworn police officers and fire fighter and rescue officers of the City of Dallas with three years service in effect***668** in the fiscal year beginning October, 1977;
(2) The current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force *shall be maintained;* and
(3) Employment benefits and assignment pay shall be maintained at levels of not less than those in effect for the fiscal year beginning October, 1977.

(Emphasis added; reformatted for clarity.)

The parties differ in their interpretation of the word "maintain" in clause 2 of the Ordinance. The City argues the phrase "the current percentage pay differential ... shall be maintained" means that in calculating the exact amount of raise each grade of officer receives under the Ordinance, the City keeps the same percentage pay differential between the grades existing immediately before the Ordinance took effect. The City argues the word "maintain" is limited to a "one-time across-the-board salary increase." Plaintiffs argue the word "maintain" means both the continuation of the existing percentage pay differential in calculating the raise in clause 1 *and* that the percentage pay differential must be kept exactly the same in all future pay resolutions. Thus, the issue is the temporal limitation of the word "maintain" as used in the Ordinance.

Plaintiffs argue their interpretation is supported by the application of the word "maintain" in *Malone v. El Paso County Water Improvement District No. 1,* 20 S.W.2d 815 (Tex.Civ.App.-El Paso 1929, writ ref'd). That case concerned whether the Water Improvement District had properly maintained a canal. *Id.* at 820.The court concluded that permitting the canal "to become 'clogged with weeds, grass and other obstacles which impeded, blocked and retarded the proper flow of water,' would we think disclose an improper maintenance of the canal." *Id.* Clearly, this is a completely

different usage of the word "maintain" and is irrelevant to the issue before us. Even if the use of the word "maintain" in *Malone* were applicable to clause 2 of the Ordinance, the case is still distinguishable because the contract in that case contained an express temporal limitation on the duty to "maintain" the canal: " 'The United States will so continue to operate and maintain said project works,' until the notice provided by the Reclamation Act is given." *Id.* Because clause 2 of the Ordinance contains no similar indication whether the word "maintain" is temporally limited, nothing in *Malone* mandates one interpretation of the word "maintain" over the other.

The issue before us is whether the phrase "shall be maintained" in the context of the entire Ordinance is reasonably susceptible to more than one meaning. Having analyzed both the City's and Plaintiffs' interpretations of the Ordinance, we conclude both are reasonable. Thus, the Ordinance is patently ambiguous.

Because the Ordinance constitutes a contract between the City and Plaintiffs, resolution of the ambiguity issue requires a determination by the fact-finder as to the intent of the parties to the contract, i.e., what the City and Plaintiffs thought the Ordinance meant, as evidenced by, among other things, their conduct and any information disseminated by them to the voters. Further, because in this instance the City was bound by the decision of the voters and in fact had no authority to change any language in the Ordinance as drafted by the Dallas Police and Fire Action Committee, the intent of the voters is also relevant in resolving the ambiguity. While we acknowledge that ascertaining the intent of the voters can be a difficult ***669** task, it is not insurmountable. *See, e.g., State v. Allison,* 143 Or.App. 241, 923 P.2d 1224, 1230 (1996) (in interpreting statute enacted by initiative, court found following to be probative evidence of voter intent: statements contained in voters' pamphlets and contemporaneous newspaper stories, magazine articles, and other reports from which voters might have derived information about the initiative); *Arvin Union Sch. Dist. v. Ross,* 176 Cal.App.3d 189, 221 Cal.Rptr. 720, 725 (1985) (in interpreting measure adopted by vote of people, court will examine language of initiative "in light of the political and social milieu that existed at the time the [initiative] came before the voters").

We conclude the Ordinance, and thus the parties' contract, is reasonably susceptible to more than one meaning. The summary judgment evidence is not conclusive as to which interpretation the parties intended. The Ordinance is, therefore, patently ambiguous and the trial court erred in granting summary judgment. *See Fort Worth Indep. Sch. Dist.,* 22 S.W.3d at 845-46. We sustain the City's first cross point.

Article 1269q

[19] In its second cross point, the City contends (1) the Ordinance violates former Article 1269q of the Texas Revised Civil Statutes; [FN10] and (2) because it violates Article 1269q, the Ordinance also violates the Home Rule Amendment to the Texas Constitution. TEX. CONST. art. XI, § 5.

FN10. The text of 1269q was originally in section 1583-2 of the Texas Penal Code. *See* Act of May 15, 1973, 63d Leg., R.S., ch. 218, § 1, 1973 Tex. Gen. Laws 506, 506-07. In 1973, the text was transferred to article 1269q of the Texas Revised Civil Statutes. *See* Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 5, 1973 Tex. Gen. Laws 883, 995, 996f. In 1987, the legislature repealed article 1269q and incorporated its provisions into the Texas Local Government Code. *See*TEX. LOCAL GOV'T CODE ANN. § 141.034 (Vernon 1999); Act of May 1, 1987, 70th Leg., R.S., ch. 149, § 49, 1987 Tex. Gen. Laws, 707, 1307 (repealing article 1269q).

At the time of the election, Article 1269q provided that, in a city the size of Dallas, no other issue could be joined on the same ballot as a proposition to increase the salaries of the fire department and police department. *See* Act of May 15, 1973, 63d Leg., R.S., ch. 218, § 1, 1973 Tex. Gen. Laws 506, 507. The City argues that Plaintiffs' construction

of the ordinance would violate this statute because clause 2 would constitute another issue impermissibly joined with the pay raise proposition. Further, the City contends because Plaintiffs' proposed construction would violate Texas law, it would also violate the Home Rule Amendment, which invalidates any provision of a home-rule ordinance that is "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas,* 852 S.W.2d 489, 490-91 (Tex.1993) (quoting TEX. CONST. art. XI, § 5).

In its Amended Reply Brief of Cross Appellant, the City concedes it waived the constitutional argument made in this cross point by not asserting it in its response to Plaintiffs' motion for summary judgment. The City contends, however, that its argument that the Ordinance violated Article 1269q is not waived. Specifically, the City contends that because Plaintiffs' interpretation of clause 2 would violate Texas law, the only reasonable construction of the Ordinance that does not violate the law is their construction that clause 2 applies only to the pay raise set out in clause 1. According to the City, this argument is not a matter in avoidance that it was required to include in its response to the motion for summary judgment, but a reason why any ***670** ambiguity in the Ordinance should be resolved as a matter of law in its favor.

[20] Assuming without deciding that the City did not waive this argument by failing to include it in its response to Plaintiffs' motion for summary judgment, the City's argument still fails. The City, by claiming Plaintiffs' construction of the ordinance would violate article 1269q, is challenging the validity of placing clause 2 on the 1979 election ballot. This argument is nothing more than a back-door attempt to contest the election more than twenty years after it was held. *See, e.g., Clary v. Hurst,* 104 Tex. 423, 138 S.W. 566, 571 (1911) (election contest embraces any type of suit in which validity of an election or any part of elective process is made subject matter of litigation). Under Texas law, an election contest must be filed within thirty days after the return date of the election; the thirty-day limit is jurisdictional and non-waivable. *Mitchell v. Carroll Indep. Sch. Dist.,* 435 S.W.2d 280 (Tex.Civ.App.-Fort Worth 1968, writ dism'd w.o.j.); *Walker v. Thetford,* 418 S.W.2d 276 (Tex.Civ.App.-Austin 1967, writ ref'd n.r.e.). It is undisputed the City did not file an election contest suit within thirty days of the return date of the referendum ballot. Thus, we cannot entertain the City's argument that clause 2 is invalid under Article 1269q.

Remaining Cross Points

The City's third, fourth, fifth, eighth, and ninth cross points involve alleged errors in the trial court's damage award. Because we reverse the trial court's summary judgment for a factual determination of the meaning of the Ordinance, we need not address these issues. Further, because the trial court's disposition of the City's counterclaim was dependent on its interpretation of the Ordinance, we necessarily reverse the trial court's ruling on the counterclaim and remand that issue to the trial court. We, therefore, need not address the City's sixth cross point complaining that the trial court granted more relief than requested by disposing of the City's counterclaim.

We reverse the trial court's judgment and remand the cause for further proceedings.

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