

## THE TEXAS TWO-STEP: A STREAMLINED APPLICATION OF GOVERNMENTAL IMMUNITY TO CONTRACTS IN TEXAS

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*Contracts remain essential to building our communities. While contracts with governmental entities are the foundation of city growth, the boundaries of governmental immunity in a contract setting have changed throughout the years. However, Texas jurisprudence does create a path that allows predictability in contracting, even at the intersection of governmental immunity and the Texas Local Government Code. That path is the Texas Two-Step.*

### I. INTRODUCTION

Municipalities enter into contracts daily. From a grocery store moving in across the corner from a neighborhood to the construction of a harbor port, contracts with the city range from community details to large-scale corporate contracts bringing in thousands of jobs. One might assume, because contracts are so essential to a city government, that the practice of contracting with a municipality would have clear boundaries. However, routine does not always equate to simplicity. The intersection of governmental immunity and contracts reveals significant nuance in answering the deceptively common question of whether a party can recover, and under what terms, from a contract with a city. Answering this question in Texas is a multi-layered analysis that requires an understanding of governmental immunity, waiver of immunity under the Local Government Code Chapter 271, and a look into applications of these concepts throughout Texas jurisprudence.

Put simply, Texas courts have no streamlined answer to the question of governmental immunity as applied to contracts between municipalities and private parties. Guidance on the question of governmental immunity exists, but no single, bright-line analysis sets forth a standard on which the

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government and private parties can rely. Ultimately, a successful suit requires understanding and identifying multiple hurdles along the way to achieving the desired outcome. This comment explains the varying answers to the question of whether a party can recover on a breached contract with local government to provide guidance to government entities and private parties alike. Further, this comment distills the variation into a widely applicable two-step test gathered from the application of governmental immunity by the Supreme Court of Texas and lower courts. For purposes of this comment, this test is called the “Texas two-step,” and it helps provide clarity and predictability by pointing to various patterns in Texas courts among the muddle. The first step requires application of the common-law tort government and proprietary function test, and the second step requires determining whether the contract is subject to Local Government Code Chapter 271.

## II. PIECES OF THE GOVERNMENTAL IMMUNITY QUESTION

Before presenting the Texas two-step, it is important to understand the key pieces and sources of controversy in the governmental-immunity puzzle. First, the founding principles of governmental immunity influence Texas’s evaluation of contracts in a government setting.<sup>1</sup> Second, looking at how the court applies the governmental-immunity principles in the tort setting informs the application of governmental immunity to contracts.<sup>2</sup> The Texas Torts Claims Act, often referred to as the tort common-law dichotomy, serves as the foundation of the application of tort law to contract law.<sup>3</sup> Third, the Texas Local Government Act Chapter 271 is the complicating agent in the simple application of the common-law tort dichotomy to the contract setting. This Act provides opportunity for waiver of governmental immunity.<sup>4</sup> The interaction of these three pieces is what drives development of the answer to whether a municipality remains immune from suit on a particular contract claim.

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<sup>1</sup> See *Wasson Ints., Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 431 (Tex. 2016) [hereinafter *Wasson I*].

<sup>2</sup> See *Wasson Ints., Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 146 (Tex. 2018) [hereinafter *Wasson II*].

<sup>3</sup> *Id.* at 147–48.

<sup>4</sup> TEX. LOC. GOV’T CODE ANN. § 271.152.

### A. *Governmental Immunity*

Governmental immunity is an inquiry inherent in dealings with the government and sets contracts with the government apart from everyday transactions between private parties. Governmental immunity arises from the common-law concept that “no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”<sup>5</sup> Governmental immunity protects political subdivisions, such as counties, cities, and school districts.<sup>6</sup> The term sovereign immunity implicates a different category of immunity focused on “the state and its various divisions, such as agencies and boards.”<sup>7</sup> Immunity functions to protect the state from various forms of suits, including those for money damages.<sup>8</sup> Modern justifications for immunity include shielding the public from monetary consequences of government choices, protecting the state from suit,<sup>9</sup> and freeing the government from the “distraction and expenses that would ensue if citizens could sue the government whenever they pleased.”<sup>10</sup> In this way, cities and municipalities clearly fall within strictures of governmental immunity. Because of this, every suit with a city requires asking where and when this immunity applies.

In Texas, governmental immunity has two components of immunity: (1) immunity from liability; and (2) immunity from suit.<sup>11</sup> Immunity from liability bars enforcement of a judgment against a government entity, and immunity from suit is a total bar to suit against the government entity unless the Legislature has waived such immunity.<sup>12</sup> When entering a contract, a government entity necessarily waives immunity from liability, but it does not waive immunity from suit.<sup>13</sup> Therefore, each case presents the question: has the government entity waived immunity from suit? Consequentially, if the

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<sup>5</sup>Tooke v. City of Mexia, 197 S.W.3d 325, 331 (Tex. 2006) (quoting Hosner v. DeYoung, 1 Tex. 764, 769 (1847)).

<sup>6</sup>Harris Cnty. v. Annab, 547 S.W.3d 609, 612 (Tex. 2018) (quoting Travis Cent. Appraisal Dist. v. Norman, 342 S.W.3d 54, 57–58 (Tex. 2011)).

<sup>7</sup>*Id.*

<sup>8</sup>Hays St. Bridge Restoration Grp. v. City of San Antonio, 570 S.W.3d 697, 703–04 (Tex. 2019).

<sup>9</sup>*Id.*

<sup>10</sup>Reata Constr. Corp. v. City of Dall., 197 S.W.3d 371, 382 (Tex. 2006) (Brister, J., concurring).

<sup>11</sup>Tooke v. City of Mexia, 197 S.W.3d 325, 332 (Tex. 2006).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

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government entity has not waived immunity from suit, a party cannot even challenge the contract, much less recover remedies flowing from the contract, in court.

The legislative branch is the designated branch of government that answers the question of when a government entity has waived immunity from suit. A variety of rationales underly this deference to the Legislature:

“[T]he handling of contract claims against the government involves policy choices more complex than simply waiver of immunity,” including whether to rely on administrative processes and what remedies to allow; the government should not be kept from responding to changing conditions for the public welfare by prior policy decisions reflected in long-term or ill-considered obligations; the claims process is tied to the appropriations process, and the priorities that guide the latter should also inform the former; and the Legislature is able to deal not only with these policy concerns but also with individual situations in deciding whether to waive immunity by resolution, cases by case, or by statute.<sup>14</sup>

Hence, the Legislature provides needed uniformity in the governmental contract context. To follow this theme of uniformity, a waiver of immunity must be clear and unambiguous.<sup>15</sup> The rules and rationales of governmental immunity play in the background of each contract with the government, and therefore, the foundations of the Texas two-step.

### *B. Tort Governmental-Proprietary Dichotomy*

One waiver of governmental immunity the Legislature has provided exists in tort law. The Texas Tort Claims Act modifies the immunity of government entities by waiving immunity to suit in particular circumstances of liability and damages.<sup>16</sup> On a basic level, whether a government entity remains immune from suit depends on whether its function is governmental or proprietary.<sup>17</sup> This distinction is relatively well defined in the tort context. Governmental functions are those “that are enjoined on a municipality by law

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<sup>14</sup> *Id.* (quoting *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 522 (Tex. 2002)).

<sup>15</sup> *Id.* at 333.

<sup>16</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215.

<sup>17</sup> *Tooke*, 197 S.W.3d at 343.

and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public."<sup>18</sup> There are thirty-six functions enumerated as governmental functions, including a variety of activities from street construction and design to tax collection to firework displays.<sup>19</sup>

On the other hand, proprietary functions are those that "a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality."<sup>20</sup> These functions "include, but [are] not limited to . . . (1) the operation and maintenance of a public utility; (2) amusements owned and operated by the municipality; and (3) any activity that is abnormally dangerous or ultrahazardous."<sup>21</sup> The application of the common-law dichotomy to contracts was not always present in Texas law, and the dichotomy's evolution and application are discussed later in this comment.<sup>22</sup> Nevertheless, the governmental-proprietary dichotomy influences, and eventually directly applies to, the contract setting. Hence, the tort dichotomy is another foundation of the Texas two-step analysis.

### C. Local Government Code Chapter 271

Chapter 271 of the Local Government Code is the final key player in the ultimate Texas two-step governmental-immunity analysis.<sup>23</sup> This chapter of the Local Government Code was an attempt to resolve confusion regarding whether governmental immunity had been waived for other local government entities besides the state and county<sup>24</sup> and was passed in 2005.<sup>25</sup> The original bill was intended to include a municipality, a public school district or junior college district, and a special-purpose district.<sup>26</sup> Supporters hoped that this codified waiver would "bring fairness to business relationships between contractors and local government entities, thus encouraging top contractors

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<sup>18</sup>TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a).

<sup>19</sup>*Id.* §§ 101.0215(a)(3), (26), (27).

<sup>20</sup>*Id.* § 101.0215(b).

<sup>21</sup>*Id.*

<sup>22</sup>*See infra* Part III.a.

<sup>23</sup>*See* *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006).

<sup>24</sup>H. Rsch. Org., Bill Analysis, Tex. H.B. 2039, 79th Leg., R.S. (2005).

<sup>25</sup>Act of May 23, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Laws 1548, 1549 (codified at TEX. LOC. GOV'T CODE ANN. § 271.151).

<sup>26</sup>*Id.*

to take on government contracts.”<sup>27</sup> Further, it was posited in legislative history that the chapter would grow the variety of contractors and further ensure quality work from companies that took on government projects.<sup>28</sup>

The final version of the law, as codified, provides protections by waiver of immunity and capacity for the company to seek redress for certain contracts for goods and services. Section 271.152 states:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.<sup>29</sup>

The statute covers “written contract[s] . . . for providing goods or services to the local governmental entity.”<sup>30</sup> In addition, Section 271.153 limits recovery to certain remedies that are listed in the Act.<sup>31</sup> In this way, the Act sets up a basic framework in order for a party to assert the government’s waiver of immunity to suit. Put simply, the contract must be between a party and a “local government entity,” the contract must be for providing “goods or services,” and the remedy sought must fall within the boundaries outlined in Section 271.153. While the Act itself might appear to answer the main question set forth in this comment of when governmental immunity is waived in a municipal situation, application of the Act to a particular contract required numerous decisions by the Supreme Court of Texas to discern clear application.<sup>32</sup> Ultimately, applications of Chapter 271’s waiver of immunity to what might seem a routine contract claim continue to evolve in the Supreme Court of Texas and lower courts. The application of governmental

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<sup>27</sup>H. Rsch. Org., Bill Analysis, Tex. H.B. 2039, 79th Leg., R.S. (2005).

<sup>28</sup>*Id.*

<sup>29</sup>TEX. LOC. GOV’T CODE. ANN. § 271.152.

<sup>30</sup>*Id.* § 271.151(2)(A).

<sup>31</sup>*Id.* § 271.153.

<sup>32</sup>*See* City of Hous. v. Williams, 353 S.W.3d 128, 135 (Tex. 2011) (further defining which contracts fall subject to Section 271); Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth., 320 S.W.3d 829, 840 (Tex. 2010) (clarifying the purpose of Section 271.153 as limiting amount due by a governmental agency rather than foreclosing on the determination of whether liability exists); Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self–Ins. Fund, 212 S.W.3d 320, 327 (Tex. 2006) (discussing whether the language of the statute was clear and unambiguous as to waive governmental immunity).

immunity, the tort dichotomy, and Chapter 271 come together and eventually work together in the Texas two-step.

### III. THE TEXAS TWO-STEP

The Supreme Court of Texas presents no single analysis to determine whether the circumstances of a contract waive immunity from suit. However, through multiple cases, the court presents two overarching steps to answer the question of whether a local governmental entity is immune from suit. Each step provides an opportunity to waive governmental immunity and allow suit against the city for breach of contract. The first step looks generally at the traditional common-law tort dichotomy between governmental and proprietary actions, where the government is immune from suit if it is acting in a governmental capacity. Step two of the analysis asks whether Chapter 271 waives governmental immunity, giving another opportunity to determine waiver even if the government was acting in a governmental capacity. Step two is comprised of two additional questions outlined below. Together these steps are the Texas two-step. So, in following the Texas two-step, an entity can ask the following questions for guidance:

1. Is the government's role in entering the contract proprietary or governmental?
2. If the role was governmental, was immunity waived by Chapter 271?
  - a. Does the *contract* fall subject to Chapter 271?
  - b. Do the *damages* fall subject to Chapter 271?

In essence, while the two seemingly simple steps emerge from Supreme Court of Texas precedent, Texas jurisprudence was once a maze of applications through the contours of the dichotomy and the packed language of Chapter 271. Therefore, a history of the waiver in Texas jurisprudence and comparison between cases in its evolution illuminates both the Texas two-step analysis as a workable framework to evaluate potential waiver of governmental immunity and pitfalls to be aware of each step of the way. Six major cases outline the evolution of governmental immunity in Texas, and the most recent case appears to throw an additional wrench in the winding process. While no case presents a streamlined analysis, each case presents different issues that arise as pieces of the governmental-immunity question.

### A. *Evolution of the Texas Two-Step in the Supreme Court of Texas*

The Supreme Court of Texas began to unpack the modern application of governmental immunity in 2006, and jurisprudence continues to evolve.<sup>33</sup> The evolution of the Texas two-step, however, can be identified in five key cases heard by the Texas Supreme Court. With each case, the Texas Supreme Court takes the analysis down a different path. In this way, the first few cases discussed do not focus on the first step of the Texas two-step but rather introduce the issues and foreshadow the Texas two-step. The first step of the Texas two-step is ultimately identifiable in the *Wasson* line of cases beginning in 2016.<sup>34</sup> Nevertheless, the key issues introduced in the cases preceding *Wasson* greatly influence the boundaries of the Texas two-step analysis.

#### 1. *Tooke v. City of Mexia*: Introduction of the Governmental Immunity Question

In 2006, *Tooke v. City of Mexia* introduced Texas jurisprudence to the issues inherent in the governmental-immunity questions in the contract setting by addressing both the application of the common-law dichotomy and Chapter 271.<sup>35</sup> In *Tooke*, the Tookes sued the City of Mexia for lost profits and attorneys' fees based on a contract that the city entered with J.E. Tooke & Sons, a sole proprietorship owned by Everett and Judy Tooke.<sup>36</sup> The contract was for labor and equipment for the curbside collection of brush and leaves within the city for a period of three years, and the Tookes performed under the contract for about 14 months.<sup>37</sup> But, after this period, the city's Director of Public Works notified the Tookes that the budget to fund their services was shrinking, and three months later, the City manager notified them by letter that the city "was 'discontinuing' the contract."<sup>38</sup>

As outlined previously, step one of the Texas two-step is to apply the common-law tort dichotomy to the city's purpose and actions entering the contract. This step was eventually approved by the Supreme Court of Texas in *Wasson I* in 2016.<sup>39</sup> However, a decade before, the *Tooke* court ultimately

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<sup>33</sup> See, e.g., *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

<sup>34</sup> See *Wasson I*, *supra* note 1.

<sup>35</sup> See generally *Tooke*, 197 S.W.3d 325.

<sup>36</sup> *Id.* at 329–30.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 330.

<sup>39</sup> See *Wasson I*, *supra* note 1, at 430.



rejected the *Tookes*' argument of application of the common-law dichotomy to the contract setting as a means to achieve waiver of immunity.<sup>40</sup> Thus, while the Supreme Court did not apply the dichotomy in this case, it opened the door to later application by postulating that if this dichotomy were to be applied, it would follow what the Legislature set forth for tort suits.<sup>41</sup> The court stated that for purposes of tort liability, the Legislature statutorily classified "garbage and solid waste removal, collection, and disposal" as governmental functions.<sup>42</sup> The court generally followed the pattern of function classification set forth in tort law, and therefore, "the *Tookes*' contract did not qualify" for waiver from governmental immunity.<sup>43</sup> The court's analysis laid the groundwork for what would eventually be affirmed as the first step in the Texas two-step.

Instead of commenting further on the common-law dichotomy, the court focused on application of the newly created Chapter 271. The court summarized the purpose of this Chapter as "waiving immunity from suit for contract claims against most local governmental entities in certain circumstances."<sup>44</sup> However, the court did not fully evaluate the effects of Chapter 271 because the *Tookes*' claimed damages of lost profits fell outside of the statute's prescribed remedies.<sup>45</sup> In this way, the court clarified that the type of damages sought must fall under those listed in Chapter 271, and therefore, pleading the correct types of damages was necessary for a party to achieve waiver of governmental immunity.<sup>46</sup> The court characterized the enumerated damages in Section 271.153 as "limited."<sup>47</sup> The damages allowed by Section 271.153 at the time of the *Tooke* case included:

The total amount of money awarded in adjudication brought against a local governmental entity . . . is limited to the following: (1) the balance due and owed by the local governmental entity under the contract . . . ; (2) the amount owed for change orders or additional work the contractor is

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<sup>40</sup> *Tooke*, 197 S.W.3d at 343.

<sup>41</sup> *See id.* at 343–44.

<sup>42</sup> *Id.* at 343 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(6)).

<sup>43</sup> *Id.* at 344.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 346.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 345.

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directed to perform by a local governmental entity . . . ; and  
(3) interest as allowed by law.<sup>48</sup>

Damages specifically could not include consequential damages (with a few exceptions), exemplary damages, or damages for unabsorbed office overhead.<sup>49</sup> So, the Tookes' claim for lost profits did not fall within enumerated damages in Section 271.153. Generally, the *Tooke* case set the stage for the inquiry of governmental immunity in a contract case, as it situated the question of whether a contract fell within Chapter 271 damages as a key inquiry in determining potential waiver from suit. While the court did not follow the Texas two-step until later, in *Tooke*, the court foreshadowed its application in the *Wasson* cases in 2016 and 2018.

## 2. *City of Houston v. Williams*: Foundations of Step 2(a)

*City of Houston v. Williams* is similarly situated to the *Tooke* case, as it foreshadows a step in the Texas two-step.<sup>50</sup> The *Williams* court presented a more specific approach than the sweeping language the *Tooke* court used to describe Chapter 271's application. This language regarding when a contract is subject to Chapter 271 is applied by later courts as step 2(a) of the Texas two-step.<sup>51</sup> In *Williams*, 540 former Houston firefighters brought a breach of contract claim alleging wrongful underpayment of lump sums due upon termination of their employment.<sup>52</sup> The firefighters asserted three writings as contracts sufficient to qualify for governmental-

immunity waiver in Chapter 271.<sup>53</sup> The three writings were: (1) certain City of Houston Ordinances; (2) Chapter 143 of the Local Government Code; and (3) two Meet and Confer Agreements and a Collective Bargaining Agreement negotiated by the Houston Professional Fire Fighters Association with the City.<sup>54</sup> The court held that both the Meet and Confer Agreements and the Collective Bargaining Agreement constituted written contracts within the scope of Chapter 271.<sup>55</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 346.

<sup>50</sup> See *City of Hous. v. Williams*, 353 S.W.3d 128 (Tex. 2011).

<sup>51</sup> See, e.g., *Hous. Cmty. Coll. Sys. v. HV BTW, LP*, 589 S.W.3d 204 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

<sup>52</sup> *Williams*, 353 S.W.3d at 131.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

The court outlines a three-step process, and within it, a five-factor analysis pulled from the words of Chapter 271 to determine whether a contract falls within the provision. The court interpreted the language of the statute as requiring three elements:

(1) the party against whom the waiver is asserted must be a “local governmental entity” as defined by section 271.151(3), (2) the entity must be authorized by statute or the Constitution to enter into contracts, and (3) the entity must in fact have entered into a contract that is “subject to this subchapter,” as defined by section 271.151(2).<sup>56</sup>

Further, a contract “subject to this subchapter” is “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity.”<sup>57</sup> The court found that the first two elements were present in the firefighters’ case.<sup>58</sup> First, the City of Houston was a type of municipality because it was incorporated as a home-rule city.<sup>59</sup> Therefore, it was a local government entity subject to Chapter 271.<sup>60</sup> The circumstances also met the second requirement—capacity to authorize contracts—because the city’s charter specifically authorizes it to “contract and be contracted with.”<sup>61</sup>

The third element, however, presented a “more difficult inquiry.”<sup>62</sup> The *Williams* court read five distinct elements in the wording of Chapter 271 and determined that all five elements were necessary to establish that the contract was “subject to this subchapter,” and therefore, waived governmental immunity.<sup>63</sup> In order to be a “contract subject to this subchapter,” a contract must: “(1) . . . be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity.”<sup>64</sup>

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<sup>56</sup> *Id.* at 134–35.

<sup>57</sup> *Id.* at 135.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (quoting Hous., Tex., Code of Ordinances charter, art. II, § 1 (1905)).

<sup>62</sup> *Id.* at 135.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (quoting TEX. LOC. GOV’T CODE ANN. § 271.151(2)).

These steps provide an infinitely more detailed look at the requirements of Chapter 271, differing from the *Tooke* court's broad characterization of Chapter 271 as impacting "most local governmental entities in certain circumstances."<sup>65</sup> The *Williams* court's in-depth presentation and breakdown of Chapter 271 moves it from a broadly applied statute to multiple tests to trigger its application. The clarity in *Williams* provided a straightforward test, albeit eight steps long, that, at first glance, appears to provide a clear path for parties to follow. But, while *Williams* began to define the boundaries of Chapter 271, it also initiated the complication that persists throughout governmental-immunity jurisprudence and that is infrequently applied. Nevertheless, the eight steps ultimately provide the foundations for step 2(a) of the Texas two-step and help answer whether Chapter 271 applies to a particular contract.

3. *Zachry Constr. Corp. v. Port of Houston Auth.*: Foundations of Step 2(b)

*Zachry Construction Corporation v. Port of Houston Authority* is the last case before the court finally employs the Texas two-step in the *Wasson* cases.<sup>66</sup> *Zachry Construction Corporation* introduces damage specifications, which is another piece of the governmental-immunity puzzle and step 2(b) in the Texas two-step inquiry. In this case, Zachry Construction Corporation contracted the Port Authority of Harris County (the Port) to build a wharf on the Bayport Ship Channel.<sup>67</sup> The wharf was specified to be built of five sections, each extending 135 feet wide and 332 feet long.<sup>68</sup> In addition, the project required dredging forty feet beneath the wharf and surrounding area, totaling around \$62,485,733.00 for the dredging and associated environmental-preservation costs.<sup>69</sup> A few delays soon affected Zachry's performance of the original contract with the Port.<sup>70</sup> First, there was an issue with crane delivery.<sup>71</sup> Second, nine months into the project, the Port realized that it required "two 1,000-foot berths to accommodate the ships it ultimately

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<sup>65</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 344 (Tex. 2006).

<sup>66</sup> 449 S.W.3d 98 (Tex. 2014).

<sup>67</sup> *Id.* at 101.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 101–02.

<sup>70</sup> *Id.* at 102–03.

<sup>71</sup> *Id.* at 102.

expected to service.<sup>72</sup> This required a sixth section be added to the wharf, along with alterations to the original construction plan.<sup>73</sup> In negotiating the construction of this new section of the wharf, titled “Change Order 4,” the Port began withholding liquidated damages from Zachry’s payments despite a promise not to withhold these damages.<sup>74</sup> The Port ultimately withheld \$2.36 million, and Zachry eventually fulfilled its construction obligations in January 2009, more than two and a half years after the deadline.<sup>75</sup> Zachry sued the Port for the withheld delay damages.<sup>76</sup>

The driving questions in *Zachry* were whether and how Chapter 271’s limitations on recovery “help define and restrict the scope of the waiver of immunity.”<sup>77</sup> The court found that the act was instrumental in determining scope of recovery and emphasized the type of damages sought as an integral part of the governmental-immunity determination.<sup>78</sup> The court first revisited the *Tooke* case, re-emphasizing the role damages played in precluding the Tookes’ achieving waiver of immunity.<sup>79</sup> The court stated that “[h]ad the Tookes claimed payment for work done, immunity would have been waived, regardless of whether the Tookes could prevail, as long as the Tookes had some supporting evidence.”<sup>80</sup> After this observation, the court framed damages as an element precluding waiver of immunity, stating: “the Act does not waive immunity from suit on a claim for damages not recoverable under Section 271.153.”<sup>81</sup>

In this way, *Zachry* presents an analysis evidencing a different facet of the Chapter 271 waiver question. Where *Williams* focused on whether the contract fell within Chapter 271 in the eight-step analysis, *Zachry* focused on damages as a litmus test of whether the contract fell or did not fall within the statute. The *Zachry* case appears to put lower courts on notice that waiver can be lost both in the nature of the contract, as seen in *Williams*, and the type of damages. This adds further nuance to the waiver question, presenting another

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 103.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 105.

<sup>78</sup> *See id.* at 108, 109.

<sup>79</sup> *Id.* at 108.

<sup>80</sup> *Id.* at 110.

<sup>81</sup> *Id.*

potential avenue for an entity to lose on the Chapter 271 waiver question beyond just the subject of the contract.

#### 4. *Wasson I* and *Wasson II*: The Application of Step One

Before 2016, *Tooke*, *Williams*, and *Zachry* introduced various steps and ideas that remain foundational to the Texas two-step. Specifically, *Tooke* introduced the issue of whether the common-law tort dichotomy applied to contracts cases. *Wasson I* and *Wasson II* lift the ideas established in *Tooke* regarding application of the tort dichotomy to the contract setting and, ultimately, provide step one of the Texas two-step. Through *Wasson I* and *Wasson II*, the Supreme Court of Texas distilled the first step in the overall process in its application of the tort governmental and proprietary dichotomy to the contract setting. The dichotomy established in the *Wasson* cases is considered often in the lower courts.<sup>82</sup> The Supreme Court's commentary and development of the dichotomy in this line of cases set the trajectory for the lower courts in Texas.

Both *Wasson I* and *Wasson II* involve the same facts. The Wassons entered an existing ninety-nine-year lease with the City of Jacksonville for lakefront property.<sup>83</sup> The lease required that the property be used for residential purposes only.<sup>84</sup> In 2009, the Wassons moved from the property and transferred the interest to Wasson Interests, Ltd. (WIL).<sup>85</sup> Once the property was conveyed to WIL, the entity began renting the property for short-term leases.<sup>86</sup> The City responded to this change in use by sending an eviction notice, and shortly after, WIL entered into a reinstatement agreement with the City that required halting all commercial activity on the property.<sup>87</sup> In 2011, however, the City contended WIL violated the reinstatement agreement.<sup>88</sup> WIL responded with a breach of contract claim, seeking an injunction and declaratory relief.<sup>89</sup> The City filed a motion for traditional and

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<sup>82</sup> See, e.g., *Stegall v. TML Multistate Intergovernmental Emp. Benefits Pool, Inc.*, No. 05-18-00239-CV, 2019 WL 4855226 (Tex. App.—Dallas Oct. 2, 2019, no pet.); *City of League City v. Jimmy Chngas Inc.*, 619 S.W.3d 819, 823 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

<sup>83</sup> *Wasson I*, *supra* note 1, at 430.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 430–31.

<sup>88</sup> *Id.* at 431.

<sup>89</sup> *Id.*

no-evidence summary judgment, where one ground was based on governmental immunity.<sup>90</sup> The trial court granted this motion without comment.<sup>91</sup> The court of appeals affirmed based on governmental immunity and explicitly rejected WIL's proposition that the governmental and proprietary dichotomy applied to a contract setting.<sup>92</sup>

The Texas Supreme Court granted review based on confusion surrounding whether the common-law tort dichotomy applied to the contract setting.<sup>93</sup> Ultimately, the court held that the common-law tort dichotomy did apply to contracts and set forth a detailed rationale for the application.<sup>94</sup> The court began this conversation by articulating a true distinction between actions of the government through the city and the city acting as a business in a proprietary nature. The court explained: “[l]ike *ultra vires* acts, acts performed as part of a city's proprietary function do not implicate the state's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign.”<sup>95</sup> The court characterized the adoption of the tort dichotomy to contract law as “prescrib[ing] a relatively simple two-step process for addressing the applicability of immunity” where “[t]he judiciary determines the applicability of immunity in the first instance and delineates its boundaries.”<sup>96</sup> Then, to determine whether the action is proprietary or governmental, the court stated that “[i]n the tort-claims context, this distinction has been clearly established, both by this Court and by legislative recognition.”<sup>97</sup> In this way, the court set a clear framework for the general determination of the applicability of immunity. Then, when immunity is found by the court, the court determines whether the entity's action waives the immunity.

Further, the court found the application of the dichotomy in the contract setting to remain cohesive with Chapter 271's purpose and application.<sup>98</sup> The city argued that the “legislature has abrogated, or at least failed to

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See id.*

<sup>94</sup> *Id.* at 439.

<sup>95</sup> *Id.* at 434. Note: Here, the court is referring to a two-step process to generally determine whether governmental immunity even applies. This is distinct from the Chapter 271 Texas two-step presented in this comment.

<sup>96</sup> *Id.* at 435.

<sup>97</sup> *Id.* at 436.

<sup>98</sup> *See id.* at 437–38.

incorporate, the dichotomy.”<sup>99</sup> The court employed the rules of construction to determine application and found that there was “no clear repugnance [between the two]: the dichotomy is applied to determine whether there is immunity *in the first instance*, while Chapter 271 acts to waive *already existing* immunity in certain circumstances.”<sup>100</sup> In this statement, the court articulated the Texas two-step’s basic framework for determining governmental immunity that applies today, bringing in prior articulations of what is step two of the Texas two-step. First, a party should determine whether the city or municipality’s actions served a governmental or proprietary function.<sup>101</sup> Second, if the municipality was acting in a governmental capacity and therefore has immunity, it must be determined whether this immunity is subsequently waived by Chapter 271.<sup>102</sup> While more nuances appear down the road, just as with the evolution and eventual application of the dichotomy to contracts, this constitutes an early application of the Texas two-step.

*Wasson II* determined whether the actions of the city were governmental or proprietary in nature, mirroring the dichotomy analysis applied in tort cases. The court lifts the definitions of proprietary and governmental from the Texas Torts Claims Act but also adds a four-factor test to provide additional clarity in the transposition of the dichotomy from torts to contracts.<sup>103</sup> The four factors are: (1) whether the municipality’s act of entering into the contract was mandatory or discretionary; (2) whether the contract was intended to benefit the general public or the municipality’s residents; (3) whether the municipality was acting on the State’s behalf or its own behalf when it entered the leases; and (4) whether the municipality’s act of entering into the contract was sufficiently related to governmental function to render the act governmental even if it would otherwise have been proprietary.<sup>104</sup> The court continues that if there is a tie, the courts “should consider immunity’s nature and purpose and the derivative nature of a city’s access to that protection.”<sup>105</sup> In this case, the court determined that the lease with the Wassons was discretionary, benefitted the city’s own residents, was an action by the City on its own behalf, and that leasing the property was not

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<sup>99</sup> *Id.* at 437.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *Wasson II*, *supra* note 2, at 150.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at 154.



“essential” to the city’s operation and not governmental.<sup>106</sup> Therefore, the lease was in the City’s proprietary function and not immune from suit at the first step of the Texas two-step process to determine waiver of immunity.

The *Wasson* cases set the stage for the Texas two-step. First, *Wasson I* clarified that the governmental and proprietary dichotomy is applied to the contract setting. Second, *Wasson II* outlined the contours of this inquiry by providing a four factor test. Both cases together complete step one of the process, answering the question of whether there is immunity. While this adds clarity to the law, it is important to note the nuance of the four factors in *Wasson II*. Each factor is a fact-based inquiry, and if these inquiries create a tie between governmental and proprietary functions, the court can step in with judgment based on the broad public policy of immunity. While these cases provide a clear first step, nuance remained and still exists in reconciling the variety of cases that eventually involve both the dichotomy and the Chapter 271 waiver.

### 5. *Hays Street Bridge*: Affirmation and Re-Articulation of Step Two

On the heels of *Wasson II* came *Hays Street Bridge Restoration Group v. City of San Antonio*.<sup>107</sup> The court applied the Texas two-step in *Hays Street Bridge*.<sup>108</sup> However, *Hays Street Bridge* expanded recovery under Chapter 271 wider than ever articulated in *Williams*, *Zachry*, or either of the *Wasson* cases by allowing a party to enforce specific performance, a remedy not listed in Chapter 271.<sup>109</sup> Despite the damages challenge presented in *Hays Street Bridge*, the Texas two-step stands as a workable framework for evaluation of governmental immunity.

*Hays Street Bridge* involved the clash of a historic-bridge society and the City’s growing economic interest in investing in new business ventures. The Hays Street Bridge is a “landmark” in San Antonio and was built in the 1880s.<sup>110</sup> After the City ordered the Bridge closed for safety reasons, a group of citizens developed the Hays Street Bridge Restoration Group “to persuade the City to preserve and restore the Bridge for community use.”<sup>111</sup> The Group

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<sup>106</sup>*Id.* at 150, 152, 153.

<sup>107</sup>570 S.W.3d 697 (Tex. 2019).

<sup>108</sup>*Id.*

<sup>109</sup>*See generally id.*

<sup>110</sup>*Id.* at 699.

<sup>111</sup>*Id.* at 700.

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also envisioned a park next to the restored bridge, transforming the entire area into “a cultural attraction by affording space for parking, educational facilities, restrooms, a park, and a hike-and-bike trail.”<sup>112</sup> The City decided to pursue and fund twenty percent of the project, eventually obtaining a \$2.89 million federal grant administered by the Texas Department of Transportation.<sup>113</sup> In 2002, the Restoration Group and the City signed a memorandum of understanding, where the Restoration Group agreed to raise matching funds with the City, and the City agreed that any funds generated by the Restoration Group would go directly to the Hays Street Bridge project.<sup>114</sup>

In 2010, the City finished restoring the Bridge but “then decided not to use the [adjoining property] for a park.”<sup>115</sup> The City instead adopted an ordinance in 2012 that allowed the sale of the property to Alamo Beer Company for \$295,000.00.<sup>116</sup> The City would eventually return this payment to the brewery through an economic-incentive package.<sup>117</sup> The Restoration Group sued.<sup>118</sup> The Restoration Group alleged breach of contract and sought only specific performance.<sup>119</sup> The Group claimed that the City breached its promise in the agreement “to apply ‘funds’ raised by the Restoration Group ‘directly’ to the City’s ‘budget . . . for the Hays Street Bridge Project.’”<sup>120</sup> The trial court ruled in favor of the Restoration Group, reasoning that the “‘unique purpose and circumstances of the [[agreement] could not] be adequately remedied by monetary damages.’”<sup>121</sup>

The court of appeals reversed and followed the Texas two-step.<sup>122</sup> The court first asked whether the City was immune from suit in the dichotomy analysis and then whether Chapter 271 waived immunity.<sup>123</sup> The court of

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 701.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (quoting *Hays St. Bridge Restoration Grp. v. City of San Antonio*, No. 2012CI19589, 2014 WL 5113713, at \*1 (73rd Dist. Ct., Bexar County, Tex. Sep. 19, 2014), *rev'd*, 551 S.W.3d 755 (Tex. App.—San Antonio 2017), *rev'd*, 570 S.W.3d 697 (Tex. 2019)).

<sup>122</sup> *See id.* at 701–02.

<sup>123</sup> *Id.*

appeals found that the City's functions under the agreement were governmental and that Chapter 271 did not waive immunity for specific performance.<sup>124</sup> Nevertheless, the Supreme Court of Texas heard the case to answer the question "whether the waiver of governmental immunity for certain claims provided by the Local Government Contract Claims Act . . . at the time this case arose applies when the remedy sought is specific performance rather than money damages."<sup>125</sup>

The court held that Chapter 271 waived immunity, even though specific performance was not listed in the available damages falling within Chapter 271.<sup>126</sup> At the beginning of its analysis, the court follows the court of appeals and tracked the Texas two-step. First, the court asked whether the City's actions were governmental or proprietary.<sup>127</sup> The court found that the agreement fit within governmental functions enumerated in the Texas Torts Claims Act Section 101.0215(a).<sup>128</sup> This section includes "bridge construction and maintenance" and "community development or urban renewal activities" as governmental functions.<sup>129</sup> The court briefly verified this finding with the four factors set out in *Wasson II*.<sup>130</sup>

Next, the court asked the second question in the two-step process to determine whether Chapter 271 waived the established immunity.<sup>131</sup> However, the court's characterization of *Zachry* and interpretation of Chapter 271 allowed the Restoration Group to recover under specific performance, even though it is not explicitly listed alongside the required circumstances for waiver in Section 271.153.<sup>132</sup> In a few short sentences, the court reasoned that while Section 271.153(a) "limits '[t]he total amount of money awarded' to enumerated categories of damages' . . . Subsection (b) clarifies that '[d]amages awarded' against a local governmental entity 'may not include' certain additional categories."<sup>133</sup> The court further articulated that neither subsection "mentions any equitable remedy" and "to read [this] as impliedly prohibiting every suit seeking an equitable remedy against a local

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 699.

<sup>126</sup> *Id.* at 708.

<sup>127</sup> *Id.* at 704–05.

<sup>128</sup> *Id.* at 705.

<sup>129</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(4).

<sup>130</sup> *Hays St. Bridge*, 570 S.W.3d at 705 (citing *Wasson II*).

<sup>131</sup> *Id.* at 706.

<sup>132</sup> *Id.* at 707–08.

<sup>133</sup> *Id.* (quoting TEX. LOC. GOV'T CODE ANN. § 271.153).

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governmental entity would too greatly restrict the general waiver of immunity in Section 271.152.”<sup>134</sup>

The court framed waiver under Chapter 271 with a slightly different emphasis on damages than evidenced in *Williams* and *Zachry*, complicating step two of the Texas two-step. Where *Williams*, *Zachry*, and even aspects of *Tooke* looked to Chapter 271 to determine whether the type of damages sought were listed in the act, *Hays Street Bridge* opens the door for equitable remedies to waive immunity, shifting the focus from the enumerated list of damages to advocacy in Chapter 271’s application. While the *Hays Street Bridge* court maintained some of the basic features of the Texas two-step, the finding that Chapter 271 permitted specific performance threw a wrinkle in the clarity set forth in the *Wasson* cases and other precedent.

Specifically, the language at the end of the *Hays Street Bridge* opinion deviates from prior analysis because it seems that the waiver is generally intended to be construed to easily allow parties to determine whether their contract falls within Chapter 271. In prior cases, the court painstakingly picked apart and interpreted each word of Chapter 271, showing that achieving waiver is not a wide-open door to contract damages plus equitable, or even unlisted, remedies. The court’s reading of an unenumerated damage into Chapter 271 appears to further muddy the already murky waters by presenting a broader view than previously interpreted.

#### *B. Affirmation of the Texas two-step in lower court opinions*

Despite the varied chronology in the evolution of the Texas two-step steps and the unanticipated *Hays Street Bridge* holding, the Texas two-step remains the process applied by lower courts. These applications illuminate a patchwork of analysis throughout Texas history brought together by the reliable framework of the Texas two-step. Some deviation and nuance in the Texas two-step appear in lower-court evaluations of the Chapter 271 waiver, but this merely reflects the practical evolution of the Texas Supreme Court’s focus within the waiver question. As we have seen, the supreme court focuses on the various aspects of Chapter 271, ranging from contractual language to particular damages, but never puts all provisions of Chapter 271 in a streamlined analysis. Thus, any variance in the lower courts reflects the Supreme Court’s wide focus and does not undermine the Texas two-step as a workable method to answer the ultimate question of whether a city remains immune from suit on a contract with a private party. First, lower court

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<sup>134</sup>*Id.* at 708.

opinions affirm the Texas two-step analysis by employing the common-law tort dichotomy as the first step in the analysis. Second, other lower court cases have followed the Chapter 271 interpretation by *Hays Street Bridge*, casting a wide net of waiver under Chapter 271 and using damages as the threshold inquiry to determine whether Chapter 271 applies.

### 1. Lower court applications affirm Step One

Lower courts across Texas affirm the initial inquiry of waiver as starting with the question of whether the municipality or city entered into the contract in a governmental or proprietary capacity, following the *Hays Street Bridge* decision. Where the action is found to be proprietary, there is waiver of governmental immunity, and the inquiry stops before the second question of the Texas two-step. *Elizabeth Benavides Elite Aviation Inc. v. City of Laredo* and *In re USA Promlite Technology Inc.* serve as good examples of the demarcation and significance of the step one inquiry.<sup>135</sup>

In *Elite Aviation Inc.*, the issue presented was whether the City acted in its proprietary capacity in entering a lease agreement with Elite Aviation Inc.<sup>136</sup> Unlike previous cases, the court provided a quick application of the law, evidencing the court's takeaways from the *Wasson* and *Hays Street Bridge* jurisprudence. The court outlined the first inquiry as determining whether the action was proprietary or governmental, citing the four factors that the Texas Supreme Court "fleshed out" in *Wasson I.*<sup>137</sup>

In addition, the court characterized the four factors as further instructions to look at in making the governmental versus proprietary distinction.<sup>138</sup> However, the court identified the building and funding of airports as a governmental function as enumerated in the Texas Civil Practices and Remedies Code.<sup>139</sup> The court found that because the terms of the lease were centered around an enumerated governmental function and there was other evidence in the lease pointing to the government as the director of actions

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<sup>135</sup> See *Elizabeth Benavides Elite Aviation, Inc. v. City of Laredo*, No. 04-19-00717-CV, 2020 WL 2044678, at \*3 (Tex. App.—San Antonio Apr. 29, 2020, no pet.) (mem. op., not designated for publication); see also *In re USA Promlite Tech. Inc.*, 629 B.R. 855 (Bankr. S.D. Tex. 2020), *aff'd in part, rev'd in part and remanded sub nom.* *USA Promlite Tech. Inc. v. City of Hidalgo*, No. BR H-19-3331, 2021 WL 3190900 (S.D. Tex. July 28, 2021).

<sup>136</sup> *Elite Aviation Inc.*, 2020 WL 2044678, at \*2.

<sup>137</sup> *Id.* (quoting *Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 705 (Tex. 2019)).

<sup>138</sup> *See id.*

<sup>139</sup> *Id.* at \*3.

concerning the airport, such as recitals stating the purpose of the lease in fulfilling the city's purpose and references to approval by the city council, immunity was not waived.<sup>140</sup> This case presents the law in a straightforward manner, affirming by application the Texas two-step's first step as set forth in *Wasson I* and *Wasson II*.

The dispute in *In Re USA Promlite Technology Inc.* arose from a contract between the City of Hidalgo and U.S.A. Promlite Technology for the purpose of installing LED lights in all city buildings and lights in public spaces.<sup>141</sup> Promlite sued the City for breach of contract, unjust enrichment, and quantum meruit.<sup>142</sup>

The court began the opinion by discussing the origins of immunity, then continued to identify and analyze whether the contract with Promlite was entered in a governmental or proprietary context.<sup>143</sup> Once again, the court applied the dichotomy according to the statutory language in the Texas Torts Claims Act, supplemented by the four factors presented in *Wasson II*.<sup>144</sup> The court found that the City entered the contract in its governmental capacity “[b]ecause several of the contracted for spaces are listed in [S]ection 101.0215(a) [of the Texas Torts Claims Act] and two of the four *Wasson II* factors weigh in favor of classifying the City's actions as governmental, with one factor weighing against and one factor being neutral.”<sup>145</sup> In this explanation, the court applies the first step of the Texas two-step as a balance between application of the Texas Torts Claims Act and the four *Wasson II* factors. In this way, the court affirms the necessity of the first step of the Texas two-step and evidences that waiver of immunity analysis should always begin by applying the common-law dichotomy.

Lastly, *City Carrollton v. Weir Brothers Contracting* provides a current application of the common-law dichotomy applied as the first step of the Texas two-step.<sup>146</sup> The City entered into a lease agreement with Blue Sky Sports Center of Carrollton, LP, where Blue Sky agreed to lease 30 acres for

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<sup>140</sup>*Id.*

<sup>141</sup>629 B.R. 855, 860 (Bankr. S.D. Tex. 2020), *aff'd in part, rev'd in part and remanded sub nom.* USA Promlite Tech. Inc. v. City of Hidalgo, No. BR H-19-3331, 2021 WL 3190900 (S.D. Tex. July 28, 2021).

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 866.

<sup>144</sup>*See id.* at 869.

<sup>145</sup>*Id.* at 870.

<sup>146</sup>*See* No. 05-20-00714-CV, 2021 WL 1084554, at \*3 (Tex. App.—Dallas Mar. 22, 2021, pet. denied).

the operation of a multi-use sports service facility.<sup>147</sup> Arthur James, Inc. (AJI) entered into a contract for grading of the property, and AJI entered into a subcontract with Weir Brothers Contracting, LLC to perform the grading.<sup>148</sup> Weir began its work in February 2017, but was issued an “Order to Stop All Work” because the grading equipment breached a capped landfill.<sup>149</sup> On June 19, the City terminated its agreement with AJI.<sup>150</sup> On October 20, Weir submitted an invoice for payment for the amount of \$728,270.00 for the grading completed before the Stop Work Order, but the City refused to pay the invoice.<sup>151</sup> Weir sued the city for breach of contract, but the City asserted that governmental immunity barred jurisdiction for Weir’s claims.<sup>152</sup> Weir responded that the City was not immune because it was acting in its proprietary capacity.<sup>153</sup>

The court directly followed the Texas two-step in analysis but only had to evaluate the first step because the City’s actions were proprietary. The court summarized the Texas two-step in a single sentence and stated that “[i]mmunity protects municipalities from suit based on the performance of a governmental function unless there is an express statutory waiver of immunity.”<sup>154</sup> The court first looked at the enumerated governmental and proprietary functions for guidance, stating that “[b]ecause neither leasing nor grading property is listed as a governmental or proprietary function in [S]ection 101.0215, the general definitions of those functions control our determination.”<sup>155</sup> The court found that while the complex’s service would “‘complement’ a nearby public recreational facility . . . nothing in the record suggests the lease with Blue Sky was essential to the City’s operation of that public facility so as to render the act governmental.”<sup>156</sup> Because the action was proprietary, there was no reason to look at statutory waiver. This case provides an apt example of how the dust has settled in the first step of the Texas two-step. It is clear that application since the *Wasson* cases follows,

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<sup>147</sup> *Id.* at \*1.

<sup>148</sup> *Id.* at \*2.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at \*3 (citing *Wasson Ints. Ltd., v. City of Jacksonville* 559 S.W.3d 142, 146 (Tex. 2018); *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002)).

<sup>155</sup> *Id.* at \*4.

<sup>156</sup> *Id.* at \*5.

generally, the process of: (1) determining whether the action falls within statutory language; and (2) if it does not, applying the definitions of each function and the four *Wasson* factors for guidance. If the contract serves a proprietary interest at step one, the application and inquiry into waiver is finished. The city has no immunity.

## 2. Lower court applications affirm Step Two

As discussed earlier, *Williams* and *Zachry* are foundational cases for the second step of the Texas two-step. *Williams* provides the step 2(a) determination of whether the contract falls within Chapter 271. *Zachry* provides the step 2(b) determination of whether the damages requested are covered in Chapter 271. *Hays Street Bridge* provided a less predictable test for damages than outlined in *Zachry*, as it allowed recovery for specific performance unenumerated by Chapter 273. To apply this variation, lower courts have taken *Hays Street Bridge*'s expansion of damages into account in step 2(b) of the inquiry. Although *Hays Street Bridge* could be interpreted to open the door to advocacy as to whether and when Chapter 271 applies to damages beyond those enumerated, lower court applications of *Hays Street Bridge* have remained confined to application of its holding that specific performance is allowed. So, while *Hays Street Bridge* seems to open the door to infinite damages to be read into Chapter 271 and step 2(b), subsequent lower court cases emphasize the expansion of damages more as a consideration and application of waiver to specific performance than a call to action to include more remedies in the Chapter 271 waiver.

*Houston Community College System v. HV BTW, LP* presents a straightforward application of the step two Chapter 271 analysis.<sup>157</sup> The court first determined whether the contract is of a type that is subject to Chapter 271 by considering the language of Chapter 271.<sup>158</sup> The court next walked through the damages required to achieve waiver under Chapter 271.<sup>159</sup> Houston Community College argued that the “current version of the statute foreclose[d]” the waiver for specific performance allowed by *Hays Street Bridge*.<sup>160</sup> However, the court upheld application of *Hays Street Bridge*. The court stated that “[t]he version of the statute at issue in *Hays* applied to only one type of contract,” for which the “supreme court held that since the statute

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<sup>157</sup> See 589 S.W.3d 204, 209 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

<sup>158</sup> *Id.* at 210–12.

<sup>159</sup> *Id.* at 216.

<sup>160</sup> *Id.*



limited damages, not remedies, it did not foreclose the plaintiff's lawsuit for specific performance."<sup>161</sup> In this way, the court integrated specific performance, via the *Hays Street Bridge* holding, into the step 2(b) inquiry. So, while *Hays Street Bridge* seems to deviate from the clarity of the second step in the Texas two-step, it is simply folded into step 2(b) application. *Hays Street Bridge* does not undermine the consistency of the Texas two-step's application. Importantly, the court also discussed amendments to Chapter 271 in 2013, but still held that despite the new language, "[i]f the legislature had intended to eliminate specific performance as an available remedy for service contracts, it could have done so."<sup>162</sup>

Another 2019 court of appeals case also analyzed governmental immunity under the step two framework. The court characterized Chapter 271 as a "a limited waiver of immunity for local governmental entities that enter into certain contracts."<sup>163</sup> First, the court focused on whether the contract was to provide a service and, therefore, was to trigger application of Chapter 271.<sup>164</sup> This inquiry is step 2(a) of the Texas two-step. Because the court determined that the contract did not fall within the requirements specified in Section 271.151, it did not directly reach the issue of whether the damages were also compliant with Chapter 271, step 2(b), and therefore, effectuated waiver of governmental immunity.<sup>165</sup> Nonetheless, the court clearly applied the Texas two-step, once again situating step two of the Texas two-step as a reliable means to evaluate whether a contract waives governmental immunity.

#### IV. CONCLUSION

Contracts with municipalities and cities involve a range of subjects, often worth millions of dollars of taxpayer money. In this comment alone, the types of contracts have included: contracts for labor and construction, firefighter employment and retirement documents, wharf construction contracts, lease agreements, and landmark restoration projects—just to name a few. Hence, contracts with the city impact both big and small business and affect the outcome and growth of business locally and nationally. In this way,

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<sup>161</sup> *Id.* at 216–17.

<sup>162</sup> *Id.* at 218.

<sup>163</sup> *Hous. Auth. of Austin v. Elbendary*, 581 S.W.3d 488, 494 (Tex. App.—Austin 2019, no pet.) (quoting *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 412 (Tex. 2011)).

<sup>164</sup> *Id.*

<sup>165</sup> *See id.* at 494–95.

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determining a city's immunity from suit, or waiver of immunity, is consequential in the pursuit of finding stability and consistency in contracts, and therefore, business. While different pieces of the Texas two-step evolved over time, the Texas-two step ultimately emerges as a reliable process to predict waiver of immunity. The Texas two-step can serve as a guide for both cities and private parties as each continues to navigate significant transactions and as cities continue to grow in commerce and innovation.