

WAIVER OF GOVERNMENTAL IMMUNITY: AGENCY CONTESTED CASE
PROCEEDINGS AND ITS APPLICATION TO SETTLEMENTS

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I. GOVERNMENTAL IMMUNITY

A. The Doctrine and Its Waiver

In 1847, the Texas Supreme Court held that “no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”¹ The court had no citation or legal authority for its holding.²

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¹Hosner v. DeYoung, 1 Tex. 764, 769 (1847).

²See *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003).

However, in modern times, the court has justified the doctrine due to long-held beliefs that it is a natural attribute of sovereignty and simply an established principle of jurisprudence in all civilized nations.³

The concept of “sovereign immunity” refers to the State’s immunity from suit and liability which includes the various divisions of state government including agencies, boards, hospitals and universities.⁴ “Governmental immunity,” in contrast, provides immunity to political subdivisions of the State, including counties, cities and school districts.⁵ Yet, the doctrines of immunity and waiver are the same.

Particularly in modern times, the State has chosen to voluntarily relinquish the privilege of absolute immunity by waiving it in certain contexts, but generally, retaining its protections in order to protect the public treasury.⁶ It is critical to understand how the state must legally act to provide such waiver. The Texas Supreme Court has made it clear that waiver must be found in a constitutional provision or a statute and must be set forth in clear and unambiguous language.⁷

There are two aspects to immunity: (1) immunity from suit⁸ and (2) immunity from liability.⁹ Immunity from suit prohibits suits against the State.¹⁰ Immunity from liability protects the State or political subdivisions from judgments even after waiver has occurred to be sued.¹¹ As to the requisite clarity of waiver and whether the waiver is for suit and/or liability, the Legislature has instructed the courts on how to interpret statutes where there is a dispute as to when, and to what extent waiver was intended. The Texas Government Code § 311.034 states, “In order to preserve the

³ *Id.* at 694–95.

⁴ *Id.* at 694, n.3; *see also* *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

⁵ *Wichita Falls State Hosp.*, 106 S.W.3d at 694, n.3; *see also* *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Ford*, 212 S.W.3d 320, 324 (Tex. 2006); *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995); *Guillory v. Port of Hous. Auth.*, 845 S.W.2d 812, 813 (Tex. 1993).

⁶ *Wichita Falls State Hosp.*, 106 S.W.3d at 695; *see also Fed. Sign*, 951 S.W.2d at 417.

⁷ *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010); *Wichita Falls State Hosp.*, 106 S.W.3d at 696.

⁸ *Wichita Falls State Hosp.*, 106 S.W.3d at 696.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; *Fed. Sign*, 951 S.W.2d at 405.

legislature's interest in managing state fiscal matters through the appropriation process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."¹²

Based on the Legislature's guidance and the significant decision it is to waive immunity, the court clearly prefers the Constitution and/or statute to literally use the words "waives sovereign or governmental immunity" and "waiver for suit and/or liability."¹³ Then, the State's intent is clear and unambiguous.¹⁴ However, the court has held that even without the use of the "magic words," they have on rare occasions found waiver in the following contexts:

- (1) Waiver exists when the provision in question would be meaningless unless immunity was waived, or
- (2) The Legislature requires that the state be joined in a lawsuit for which immunity would otherwise attach, or
- (3) The statute waiving immunity sets forth measures to insulate public resources from the reach of judgment creditors.¹⁵

In this context, when the court is construing a statute lacking the "magic words," it will resolve all ambiguities by finding a retention of immunity.¹⁶ If the text and legislative history "leave room to doubt" whether the Legislature waived sovereign or governmental immunity, the court is less likely to find a waiver.¹⁷

B. Settlement

In relation to a suit or lawsuit, a settlement is "an agreement ending a dispute or a lawsuit,"¹⁸ and a "final (full) settlement" is "a settlement and

¹²TEX. GOV'T CODE ANN. § 311.034 (West 2013).

¹³See *Wichita Falls State Hosp.*, 106 S.W.3d at 696–97.

¹⁴See *id.*

¹⁵*Id.* at 697–98.

¹⁶*Id.* at 697.

¹⁷*Id.*

¹⁸*Settlement*, BLACK'S LAW DICTIONARY (9th ed. 2009).

release of all pending claims between the parties.”¹⁹ It goes without citation that settlements are an integral part of the litigation process.²⁰ As the first definition states, it can end a “dispute” or a lawsuit, clearly meaning the parties, who are not even legal parties yet, can resolve a dispute even before a lawsuit is commenced. In the alternative, it can occur after a lawsuit is officially filed, after discovery, after trial and before judgment, after judgment and even on appeal of the judgment. There simply is no difference if the government is a party when immunity has been waived.²¹

Settlements are simply used to avoid the expenses of trial and appeal and provide an alternative remedy that the parties are willing to live with in lieu of a legal judgment.²²

However, a settlement is the party and the government entering into a contract.²³ The Legislature has provided a settlement agreement, even though an integral part of the litigation process, is nevertheless a contract and treated the same as any other contract.²⁴ Based on this provision, the Texas Supreme Court has agreed that a suit upon a settlement agreement is a separate breach of a contract action.²⁵ Therefore, the issue arises if the Legislature waived immunity to suit and/or liability and then the parties settle, if a dispute arises under the settlement agreement, did the original waiver of sovereign immunity to suit include a waiver to sue upon the contract – settlement agreement?

The Texas Supreme Court faced this very issue in *Texas A & M University–Kingsville v. Lawson* in 2002.²⁶ The result was a plurality opinion based on legal theory and a concurrence in judgment by Justice Enoch.²⁷

¹⁹ *Full Settlement*, BLACK’S LAW DICTIONARY (9th ed. 2009).

²⁰ See *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997) (stating that “Texas law strongly favors and encourages voluntary settlements”); see also *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

²¹ See *City of Pharr v. Garcia*, No. 13-18-00288-CV, 2019 WL 3721342, at *3 (Tex. App.—Corpus Christi Aug. 8, 2019, no pet. h.).

²² Alyson M. Weiss, *Federal Jurisdiction to Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6)*, 10 CARDOZO L. REV. 2137, 2137 (1989).

²³ TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (West 2019).

²⁴ *Id.*

²⁵ See *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658–59 (Tex. 1996).

²⁶ 87 S.W.3d 518 (Tex. 2002).

²⁷ *Id.* at 523–24.

The plurality held the original waiver of immunity to suit in fact waived immunity for suit upon the settlement agreement.²⁸ Otherwise, the governmental entity could nullify the waiver by settling and refusing to comply with the settlement agreement.²⁹ For not allowing such suit upon breach of the settlement agreement would impair the purpose of waiver by limiting its application to only suits that proceed to final judgement. The plurality concluded the governmental entity should not be able to re-gain immunity by settling a case.³⁰ Justice Enoch concurred but solely on the legal basis that when the Legislature, by authorizing state agencies to enter into contracts, there is an express waiver of immunity.³¹

The dissent adhered to the law set forth above that a governmental entity does not waive immunity to suit by merely entering into a contract and the private citizen must have Legislative consent to sue the State on the breach of contract claim.³² And, once again, that legislative waiver must be in clear and unambiguous language.³³ That required, in the dissent's mind, an express waiver in the statute for settlement agreements.³⁴ The dissent concludes that: "This is nothing more than an ordinary contract dispute."³⁵

Since there was not a majority opinion as to the applicable law and logic, the plurality decision has very limited precedential value and would control the result only in identical cases.³⁶ However, Texas law strongly favors and encourages voluntary settlements.³⁷ Further, as the plurality stated, "having determined to allow suits on such claims and prescribed the available remedies, the Legislature must surely have considered—indeed, hoped—that claims would often be settled."³⁸ Indeed, the dissent seems to wholly ignore or reject that settlement is an integral part of the litigation process and to prohibit its enforcement, is to denigrate the entire litigation system.³⁹

²⁸ *Id.* at 518.

²⁹ *Id.* at 521.

³⁰ *Id.* at 522.

³¹ *Id.* at 523 (Enoch, J., concurring).

³² *Id.* at 524. (Rodriguez J., dissenting)

³³ *Id.* at 525; *see supra* note 12.

³⁴ *Lawson*, 87 S.W.3d at 525 (Rodriguez, J., dissenting).

³⁵ *Id.*

³⁶ *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 176–77 (Tex. 1994).

³⁷ *See supra* note 20.

³⁸ *Lawson*, 87 S.W.3d at 522.

³⁹ *See id.* at 523; *see also supra* note 20.

The Austin Court of Appeals was confronted with a near-identical controversy.⁴⁰ The only difference was that settlement occurred before suit was filed.⁴¹ As pointed out earlier, the legal definition of a settlement is to resolve a “dispute” or lawsuit.⁴² A natural part of the litigation process is to avoid it in its entirety by mediation before a formal lawsuit is filed. The Austin Court held that *Lawson* applied since the governmental body was “exposed” to liability and thus, the settlement had “adjudicative value.”⁴³ Yet, consistent with the need for clear and unambiguous waiver, in a second decision, the Austin Court held that even though a party had waiver, she failed to timely activate the required administrative process, but she was still able to obtain a settlement.⁴⁴ However, since the failure to timely file would ultimately prohibit appeal to the district court, the Court held the lawsuit “had no adjudicative value to our court system.”⁴⁵

In the only other post-*Lawson* decision, the Corpus Christi Court of Appeals inserted a new issue of grave importance.⁴⁶ In this case, a school teacher was challenging the failure of a school district to renew his contract.⁴⁷ The legislature expressly and unambiguously provided the teacher could legally challenge that decision.⁴⁸ After a formal hearing,⁴⁹ a decision by the hearings examiner,⁵⁰ a final decision issued by the Board of Trustees,⁵¹ the teacher could appeal to the Commissioner of Education.⁵² The Commissioner of Education had the power to issue the ultimate, final decision.⁵³ If the teacher was still not satisfied he had been treated fairly, he had the right to

⁴⁰ See *Travis Cty. v. Rogers*, No. 03-14-00186-CV, 2015 WL 4718726, at *1–2 (Tex. App.—Austin July 29, 2015, no pet.) (mem. op., not designated for publication).

⁴¹ *Id.* at *3.

⁴² See *supra* note 18.

⁴³ *Rogers*, 2015 WL 4718726, at *4.

⁴⁴ *Tex. Dept. of Health v. Neal*, No. 03-09-00574-CV, 2011 WL 1744966, at *4 (Tex. App.—Austin May 6, 2011, pet. denied) (mem. op., not designated for publication).

⁴⁵ *Id.*

⁴⁶ *Donna Indep. Sch. Dist. v. Gracia*, 286 S.W.3d 392, 395 (Tex. App.—Corpus Christi 2008, no pet.).

⁴⁷ *Id.* at 393.

⁴⁸ TEX. EDUC. CODE ANN. § 21.251(a) (West 2018).

⁴⁹ *Id.* § 21.256.

⁵⁰ *Id.* § 21.257.

⁵¹ *Id.* § 21.258–.259.

⁵² *Id.* § 21.301.

⁵³ *Id.* § 21.304.

appeal to a district court in the county in which the district's central administrative offices were located.⁵⁴

Instead of proceeding through this very long, expensive process where the ultimate decision was unknown, the teacher settled before instituting the administrative process but at a time when he could still timely file to formally proceed through the multiple-hearing process.⁵⁵ The Court held without explanation that this pre-litigation settlement "had no adjudicative value in our court system."⁵⁶

How was this any different than the Austin Court's decision that there was "value" when a party settled before instituting suit in the district court?⁵⁷ Was it due to the fact that the teacher had to begin the process in the administrative system? The Court, in a footnote, stated that when a party "who settle[s] claims against [a] governmental entit[y] while [his] case[] [is] in the administrative process, [he] cannot return to the administrative process or turn to the courts when a governmental entity allegedly breaches a settlement agreement's terms."⁵⁸ That is contrary to the *Lawson* holding that he may proceed to district court upon the breach of contract claim.⁵⁹

Therefore, was the Corpus Christi Court saying that when the Legislature clearly and unambiguously by express terms allows a citizen to assert a legal challenge against a governmental body in an administrative tribunal, there is no waiver of sovereign immunity to "suit"? If true, the statement is not surprising for the Court to so believe for that issue is one of first impression, but it is one of critical importance to the entire Texas judicial system. It will be established that if a political subdivision is subject to a contested case proceeding due to waiver of governmental immunity by the Legislature, then the case has adjudicative value to the judicial system.

⁵⁴ *Id.* § 21.307(a)(1).

⁵⁵ *Donna Indep. Sch. Dist. v. Gracia*, 286 S.W.3d 392, 393, 395 (Tex. App.—Corpus Christi 2008, no pet.).

⁵⁶ *Id.* at 395.

⁵⁷ *See supra* notes 40–43.

⁵⁸ *Gracia*, 286 S.W.3d at 395, n.4.

⁵⁹ *See* 87 S.W.3d 518, 523 (Tex. 2002).

II. WAIVER OF GOVERNMENTAL IMMUNITY WHEN THE LEGISLATURE EXPRESSLY REQUIRES IN CLEAR AND UNAMBIGUOUS LANGUAGE A GOVERNMENTAL BODY IS SUBJECT TO LEGAL CHALLENGE IN AN ADMINISTRATIVE CONTESTED CASE PROCEEDING

A. *Waiver of Immunity To Be Sued In Her Own Courts – Does It Include Being Subject to a Contested Case In a Regulatory Agency?*

It has been established that all judicial decisions regarding waiver of immunity have involved the Legislature providing for a “suit” in a “court,” namely an Article V district court.⁶⁰ Therefore, it is a case of first impression to consider whether the Legislature subjecting a governmental body or political subdivision to an administrative contested case proceeding constitutes waiver of sovereign or governmental immunity.

First, agencies have no inherent power and are solely creatures of statute.⁶¹ Such powers must be granted in clear and express language.⁶² Article V of the Texas Constitution, Section 8 expressly provides that the Legislature may delegate certain causes of action to an administrative agency for determination.⁶³ The Supreme Court of Texas held as long ago as 1907, that this constitutionally allowed delegation of power by the Legislature is the conference of judicial power upon an agency.⁶⁴ The Court later stated this constitutional section allows the Legislature to delegate the power to an agency to issue and cause process to be served by its own officers, to enter orders which are final, unless set aside on appeal and to enforce its judgments which govern valuable property rights.⁶⁵ In modern times, the Court has held that there is no question or debate that a contested case proceeding is a “trial.”⁶⁶

⁶⁰ See *supra* Part I.

⁶¹ Harris Cty. Appr. Dist. v. Tex. Workforce Comm’n, 519 S.W.3d 113, 130 (Tex. 2017).

⁶² City of Hous. v. Rhule, 417 S.W.3d 440, 442 (Tex. 2013).

⁶³ Tex. Const. art. V, § 8.

⁶⁴ See *Mo., K. & T. Ry. Co. of Tex. v. Shannon*, 100 S.W. 138, 141 (1907).

⁶⁵ *Corzeli v. Harrell*, 186 S.W.2d 961, 967 (Tex. 1945).

⁶⁶ *Coal. of Cities v. Pub. Util. Comm’n of Tex.*, 798 S.W.2d 560, 564 (Tex. 1990).

This is so for if a governmental body is subject to a contested case proceeding,⁶⁷ it is entitled to notice,⁶⁸ informal disposition,⁶⁹ a hearing conducted by the State Office of Administrative Hearings (SOAH),⁷⁰ subject to the Texas Rules of Evidence,⁷¹ with the right to direct and cross examination,⁷² and that the decision shall be based on the trial record.⁷³ Prior to the trial, the parties are entitled to full discovery rights.⁷⁴

After the trial is completed, the SOAH Judge shall issue a proposal for decision that includes findings of fact and conclusions of law.⁷⁵ A finding of fact may only be found to exist upon a determination that the evidence preponderates in favor of its existence.⁷⁶ Such findings, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting them.⁷⁷ This Proposal For Decision (PFD) is then filed with the regulatory agency where the agency shall make a final decision.⁷⁸ The agency must base its decision on the record developed in the contested case proceeding and the proffered PFD from the SOAH Judge.⁷⁹ The agency must abide by the PFD unless it can set forth a reason and legal basis to modify the findings.⁸⁰

Therefore, as the Texas Supreme Court held, a governmental body is subject to a trial with all rights to fully litigate the case with a final decision rendered by the agency determining all facts and law to finally resolve the cause of action.⁸¹ That there is the exercise of judicial power is without doubt

⁶⁷ Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§ 2001.051–.147 (West 1993).

⁶⁸ *Id.* § 2001.052.

⁶⁹ *Id.* § 2001.056.

⁷⁰ *Id.* § 2001.058.

⁷¹ *Id.* § 2001.081.

⁷² *Id.* § 2001.087.

⁷³ *Id.* § 2001.060.

⁷⁴ *Id.* §§ 2001.091–.103; *see also* 1 TEX. ADMIN. CODE §§ 155.251–.259 (2017).

⁷⁵ TEX. GOV'T. CODE ANN. § 2003.042(a)(6).

⁷⁶ *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.); *Beaver Express Serv., Inc. v. R.R. Comm'n*, 727 S.W.2d 768, 775 n.3 (Tex. App.—Austin 1987, writ denied).

⁷⁷ TEX. GOV'T. CODE ANN. § 2001.141(d).

⁷⁸ *See id.* § 2001.141.

⁷⁹ *Id.*

⁸⁰ *Id.* § 2001.058(d); *see also* § 2001.141(a)–(c).

⁸¹ *See Corzelius v. Harrell*, 186 S.W.2d 961, 967 (Tex. 1945).

and reinforced by the further holdings of the Texas Supreme Court that a final agency order has res judicata or claim preclusion effect and collateral estoppel or issue preclusion effect in subsequent contested case proceedings⁸² and in any subsequent district court proceedings⁸³ concerning the same controversy. Nothing is more persuasive of the fact that agencies are exercising judicial power than the Texas Supreme Court holding that such final orders have res judicata and collateral estoppel effect in the constitutional court system.

However, many lawyers and justices may point to the fact that the Texas Supreme Court has held that an agency is not an Article V “court” nor is a contested case proceeding a “lawsuit.”⁸⁴ Yet, such holdings do not negate the fact that an agency has judicial powers. An agency is clearly not a constitutional court.⁸⁵ As established, agencies are creatures of statute and may only exercise such judicial power over the specific causes of action provided for in the statute.⁸⁶ Thus, an agency does not have the inherent powers of the judiciary nor the constitutional general jurisdiction to hear and decide all recognized causes of action.⁸⁷ It has no power to determine constitutional issues nor the inherent power to hold a person in civil and criminal contempt.⁸⁸ Likewise, the term “lawsuit” is utilized in the Texas Rules of Civil Procedure that do not apply to agencies.⁸⁹ One may not assert in an agency any and all causes of action that arise out of a common nucleus of operative fact which are within the general jurisdiction of the court, legal or equitable as can and must be done in a lawsuit.⁹⁰ Of course, an agency is not an Article V “court” nor does it have jurisdiction over “lawsuits,”⁹¹ but that does not change the fact that the agency is vested with Article V judicial

⁸² *Coal. of Cities v. Pub. Util. Comm’n of Tex.*, 798 S.W.2d 560, 563–65 (Tex. 1990).

⁸³ *Igal v. Brightstar Info. Tech.*, 250 S.W.3d 78, 86–93 (Tex. 2008); *see also* *Tricon Tool & Supply, Inc. v. Thumann* 226 S.W.3d 494, 511–513 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

⁸⁴ *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 n.7 (Tex. 1993).

⁸⁵ *See* *Beyer v. Emps. Ret. Sys.*, 808 S.W.2d 622, 627 (Tex. App.—Austin 1991, writ denied).

⁸⁶ *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004).

⁸⁷ *Id.*

⁸⁸ *Cent. Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997).

⁸⁹ *See* *Huntsville Mem’l Hosp. v. Ernst*, 763 S.W.2d 856, 859 (Tex. App.—Houston [14th Dist.] 1988, no writ).

⁹⁰ *See* *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).

⁹¹ *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 n.7 (Tex. 1993).

power and exercises the judicial power of a tribunal to issue a final and binding order based on a specific statutory cause of action that is forever binding on the parties, the agency, and the Article V judicial system.⁹²

Even though this is an issue of first impression, this analysis demonstrates the Texas Supreme Court is bound to hold that if the Legislature in clear and express language subjects a governmental body to an agency contested case proceeding, the Legislature has clearly waived the governmental body's governmental immunity for the contested case order legally binds the governmental body in a dispute as to the facts, the legal issues, and their application. Any other result would nullify the meaning and effect of Article V, Section 8 of the Constitution.

Of course, if the governmental body is aggrieved by a formal decision in a contested case, it is entitled to Article V judicial review.⁹³ However, the court does not issue a new order for it cannot substitute judgment for the state agency on the weight of the evidence.⁹⁴ It may merely affirm or reverse and remand the agency order.⁹⁵ The court simply has the power to review the validity of the agency's legal conclusions for errors of law and determine whether the findings of fact are supported by substantial evidence.⁹⁶ Therefore, a district court is without authority to vacate the agency order and render judgement⁹⁷ or to modify an order such that the district court is directing the agency to incorporate certain terms in its new order.⁹⁸

So, is the power of an agency issuing a final contested case order, the same power of a "court" handling a "lawsuit"? Without a doubt, but it is simply exercising a very specific judicial power delegated in clear and unambiguous language in a statute pursuant to Article V Section 8 of the

⁹² See *Harris v. O'Connor*, 185 S.W.2d 993, 998–99 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.); *Estes v. Hartford Accident & Indem. Co.*, 46 S.W.2d 413, 416 (Tex. Civ. App.—El Paso 1932, writ ref'd).

⁹³ TEX. GOV'T CODE ANN. § 2001.171 (West 2016); see also *Tex. Dep't. of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 173 (Tex. 2004).

⁹⁴ TEX. GOV'T. CODE ANN. § 2001.174.

⁹⁵ *Id.* § 2001.174(1)–(2).

⁹⁶ *City of San Marcos v. Tex. Comm'n on Env'tl. Quality*, 128 S.W.3d 264, 270 (Tex. App.—Austin 2004, pet. denied); *H. G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 602 (Tex. App.—Austin 2000, pet. denied).

⁹⁷ See *Save Our Springs All., Inc. v. City of Kyle*, 382 S.W.3d 540, 544–45 (Tex. App.—Austin 2012, no pet.).

⁹⁸ *City of Stephenville v. Tex. Parks & Wildlife Dep't*, 940 S.W.2d 667, 678 (Tex. App.—Austin 1996, writ denied).

Texas Constitution. Thus, the Corpus Christi Court of Appeals was simply incorrect that the administrative process has no adjudicative value to the court system. The agency contested case process produces final and binding orders, which if valid, have *res judicata* and collateral estoppel effect in the administrative and constitutional court system.⁹⁹

B. Waiver of Governmental Immunity in The License or Permitting Process

Probably one of the most controversial decisions and actions taken by a municipality is building and managing a landfill. For years such decisions were made solely by the municipality with the cloak of governmental immunity as to where such landfill would be located and how it was operated,¹⁰⁰ but the Legislature determined a time had come for such decisions to be ultimately made by the Texas Commission on Environmental Quality (TCEQ).¹⁰¹ The Legislature determined if the TCEQ felt it was necessary, every municipality would be required to obtain a license.¹⁰² This would not seem to necessarily be a waiver of governmental immunity by itself even though the city now has to obtain permission.¹⁰³ There is no provision at this point for a suit or contested case proceeding.¹⁰⁴

However, after a city applies for a license and the TCEQ determines it is administratively complete so that the Executive Director is satisfied a license should be issued,¹⁰⁵ the license is not issued. Without requiring the consent of the city, the contents of the proposed permit are published for public consumption and one or more public hearings may be held.¹⁰⁶ At this point,

⁹⁹*Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 92 (Tex. 2008); *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex.*, 798 S.W.2d 560, 565 (Tex. 1990); *Estes v. Hartford Accident & Indem. Co.*, 46 S.W.2d 413, 416 (Tex. Civ. App.—El Paso 1932, writ ref'd).

¹⁰⁰*Schneider v. City of Cuero*, 749 S.W.2d 614, 616 (Tex. App.—Corpus Christi 1988, writ denied).

¹⁰¹TEX. HEALTH & SAFETY CODE ANN. § 361.011(a) (West 2016) (defining the term “commission”); *see also* § 361.003(5).

¹⁰²*Id.* § 361.027.

¹⁰³*See supra* notes 13–14; *see also* TEX. HEALTH & SAFETY CODE ANN. § 361.027; TEX. WATER CODE ANN. §§ 5.552–.553 (West 2018).

¹⁰⁴*See* TEX. GOV'T CODE ANN. §§ 361.001–.992 (West 2013).

¹⁰⁵TEX. WATER CODE ANN. §§ 5.552(a)–.553(a).

¹⁰⁶*Id.* §§ 5.552–.555.

any “affected person”¹⁰⁷ who participated in the public hearing and raised a disputed issue of fact and/or law that is relevant and material to the decision on the application,¹⁰⁸ has the right to a contested case proceeding to be held before SOAH.¹⁰⁹ Therefore, the Legislature created a legal cause of action in affected persons against the city to attempt to wholly defeat and/or modify the proposed permit.¹¹⁰ This allows a challenge to all factual assertions and whether it complies with all applicable statutory and regulatory requirements, if so challenged by the affected person(s).¹¹¹ Thus, there is simply no question that the Legislature in clear and unambiguous language has waived the governmental immunity of the city subject to a cause of action that allows affected persons to challenge the city’s right, duties, obligations and privileges under the license. As set forth above, the SOAH Judge will issue a PFD on whether the city is legally entitled to the license or not with a final decision rendered by the TCEQ.¹¹² Even though the “magic words” were not used in the statute,¹¹³ the permitting process would be a nullity and meaningless if the city’s rights are not determined by an independent tribunal and the city has been joined in a judicial proceeding where waiver is mandatory for the statute provides the TCEQ has the power to determine the city’s right, duties, obligations, and privileges under the statute.

Waiver does not stop at this point. What if after the rendition of the TCEQ final order, those affected persons assert they are aggrieved by the final decision in the contested case and want to appeal to the Article V judicial system? An aggrieved party who has exhausted their administrative remedies may appeal to district court.¹¹⁴

Please note that at this point if the affected/aggrieved persons desire to appeal, this means the city was awarded a license to build and manage a landfill at the proposed site, and even if the city did not receive all the terms of the license they desired, they have chosen not to appeal. Therefore, this involuntary appeal of the license was clearly and unambiguously required by

¹⁰⁷ *Id.* § 5.115.

¹⁰⁸ *Id.* § 5.556(d)(1)–(3).

¹⁰⁹ *Id.* §§ 5.556(d)–(e), 5.557(a).

¹¹⁰ *See id.* § 5.557(a).

¹¹¹ *Id.*

¹¹² *See supra* Part II, A.

¹¹³ *See supra* notes 15–16.

¹¹⁴ *See supra* note 93.

the Legislature and waived the city's governmental immunity.¹¹⁵ As established above, the Article V court system could affirm the order granting the permit or reverse and remand the order thereby depriving the city of the rights, duties, obligations, and privileges it secured in the TCEQ order.¹¹⁶ It is clear this legislative right of appeal directly attacks and may set aside the legal rights of the city.

Yet, it may be argued there is no waiver of immunity for the city is not required to be named as a party but does have the right to have a copy of the petition to be served upon them.¹¹⁷

There are two answers to this concern. First, the waiver of governmental immunity occurred by the statute providing that affected persons could legally challenge the permit within a contested case.¹¹⁸ The appeal to the district court is simply the appeal of the contested case order.¹¹⁹ There is no case in Texas jurisprudence that holds after immunity is waived as to "suit" in the district court, that the Legislature must also provide for a second express waiver for appeal.¹²⁰ Therefore, waiver of governmental immunity to be subject to a contested case proceeding and final order is clearly sufficient waiver for appeal to the Article V court system.

In the alternative, as unusual as it seems that the city is not an indispensable party to the appeal, the issue on appeal is solely whether the city has a legal right to the license and under what terms.¹²¹ The city may clearly intervene in the appeal¹²² and in most cases would do so. The failure of the Legislature to mandate party status of the city is simply irrelevant due to the fact that the statute clearly and unambiguously provides it is the legal rights of the city that will be determined. That is simply waiver of governmental immunity.

In sum, the critical fact is that by the Legislature subjecting a political subdivision to an involuntary contested case proceeding before SOAH and the regulatory agency, such act clearly constitutes a waiver of governmental immunity for the governmental body's legal rights, duties, privileges, and

¹¹⁵ See TEX. WATER CODE ANN. §§ 5.556, 5.557(a).

¹¹⁶ See *supra* Part II, A.

¹¹⁷ TEX. GOV'T CODE ANN. § 2001.176(b)(2) (West 2016).

¹¹⁸ TEX. WATER CODE ANN. § 5.556.

¹¹⁹ TEX. GOV'T CODE ANN. § 2001.171.

¹²⁰ See *State ex rel. Best v. Harper*, 562 S.W.3d 1, 15 (Tex. 2018).

¹²¹ See *supra* Part II, B.

¹²² See TEX. GOV'T CODE ANN. § 2001.176(b)(2).

obligations will be finally determined in such a proceeding with Article V judicial review.

C. Settlement by the City and Affected Persons

What if the permit is granted and the affected/aggrieved persons are making noise of appealing or, in fact, have appealed? What if these persons are willing to concede that it is inevitable the permit will be ultimately issued for the site under certain conditions? Therefore, the persons offer to settle and drop the appeal if the city agrees to possibly some conditions the TCEQ could have but did not require and/or the city is willing to agree to other conditions of the persons even though the TCEQ has so power to so require? Take for instance, the persons want an agreement by the city that they will never seek permission of the TCEQ, ever, to expand beyond that granted in the new permit.

As discussed earlier, the judiciary generally favors settlement of causes of actions between the parties.¹²³ But what if the time comes where the persons are outraged that the city breaches the settlement agreement and applies to expand the landfill? Again, as set forth earlier, the general holdings of the Texas courts prior to *Lawson* is that this indeed may be commenced in a district court for it is a common law breach of contract action, but it will be dismissed unless the Legislature expressly provided for waiver of governmental immunity to suit upon a contract.¹²⁴

First, it is asserted that based on the legal analysis set forth in this paper, by the Legislature expressly, in clear and unambiguous language, subjecting the city to an involuntary trial (contested case proceeding), that was heard and determined by officers constitutionally and statutorily vested with judicial power, an express waiver of governmental immunity occurred.

Second, where the settlement occurred before the activation of the contested case process or at the end of the contested case when the final order was issued or on appeal to the judiciary, these facts are “on all fours” to the *Lawson* decision discussed above¹²⁵ and the breach of contract suit may be lawfully commenced by those persons as against the city in order to preserve the waiver of governmental immunity and not allow the city to “regain it” by settlement. In the alternative, the suit may be commenced due to the fact the

¹²³ See *supra* note 20.

¹²⁴ See *supra* notes 23–25.

¹²⁵ See *supra* Part I, B.

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Legislature knew and probably hoped that settlements would occur and thus the initial waiver included suit upon a breach of settlement.

III. CONCLUSION

It goes without citation that settlement of license or permit disputes within the administrative process is common. It is time for the judiciary to recognize that by the Legislature subjecting governmental entities to the agency contested case process, it is clearly and without a doubt a waiver of governmental immunity. Therefore, *Lawson* applies and suit upon a breach of the settlement agreement should be allowed.

It is clearly needed to have a strong majority of the current Texas Supreme Court to affirm *Lawson*. The ability to enforce bona fide settlements made by a governmental body in the Article V or administrative adjudicatory system is simply critical to protect the integrity of our judicial system. To not acknowledge that a Legislative waiver of immunity includes a suit upon a settlement agreement is simply nonsensical for that is simply an argument of form over substance and as the plurality clearly implied, simply an absurd result. Finally, failure to adhere to the *Lawson* plurality will unnecessarily burden the Article V judicial system with appeals to the highest court available since the option of a reasonable, enforceable settlement is not possible.