

## Immunity from Mechanics Liens Reconfirmed

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The Texas Property Code protects public lands from attachment, execution, and forced sale. Tex. Prop. Code Ann. §43.002. If a city commissions construction work on public property, the contractor, subcontractors, and material suppliers may not impose a lien on that land. But what happens when a city purchases or acquires land that was improved by private parties prior to the city's acquisition? A recent case involving Linbeck Construction and the City of Grand Prairie discussed that issue and confirmed the position that liens filed against private land that later becomes public are invalid. *See Linbeck Constr. Corp v. City of Grand Prairie*, 293 S.W.3d 896 (Tex. App.—Dallas 2009, pet. filed). However, the opinion issued by the Fifth District Court of Appeals raises another interesting issue that merits further consideration.

In 2000, a private developer contracted with Linbeck to build an entertainment facility in Grand Prairie. When the project achieved substantial completion, the city contracted with the developer to buy the land upon which the facility was being constructed. After substantial completion and after the sale to the city, Linbeck submitted two more pay applications to the original owner pursuant to its contract. The final payments due to Linbeck were never made because the original owner declared bankruptcy. Linbeck then filed an affidavit securing a mechanic's and materialman's lien in the amount of \$2,984,482.

In August 2002, Linbeck filed suit against the city seeking foreclosure of its mechanic's lien. The City bonded around the lien, answered the lawsuit, and filed a plea to the jurisdiction. Interestingly, the city also filed counterclaims against Linbeck (but dropped those claims prior to the trial court's ruling on the plea to the jurisdiction). The trial court granted the plea to the jurisdiction as to Linbeck's claims for declaratory judgment, foreclosure of the lien, attorney's fees, and unjust enrichment.

On review, the appellate court cited Section 43.002 of the Texas Property Code for the proposition that public land is not subject to attachment or forced sale. *See Linbeck v. Grand Prairie*, 293 S.W.3d 896, 900. However, because the City bonded around the lien, that section did not provide direct support for granting the city's plea.

The appellate court instead focused on case law addressing immunity from suit. *Id.* Citing *Mission Consolidated ISD and Reata*, the court stated that cities enjoy governmental immunity from lawsuits and liability for money damages. *Id.* (citing *Mission Consolidated Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006)). The court disagreed with Linbeck's argument that a suit seeking foreclosure of a lien is not a suit for money damages. Linbeck argued that a foreclosure suit merely sought to enforce a valid security interest. The court stated that, because the ultimate goal of the enforcement action was to secure money damages through a forced sale of land, Linbeck's suit was for money damages and was therefore barred by sovereign immunity. *Id.*

Linbeck has filed a petition for review with the Supreme Court of Texas. If the court accepts the petition, certain aspects of the decision will be of particular interest to

cities. First, Grand Prairie initially filed a counterclaim against Linbeck. Typically, filing a counter claim is sufficient to waive sovereign immunity in a construction contract case. See *Anderson, Clayton & Co. v. State*, 62 S.W2d 107 (Tex. 1933). The appeals court dismissed that fact in affirming the trial court's granting the plea to the jurisdiction because it had previously dealt with a case where a city's counterclaim had been nonsuited. See *City of Dallas v. Albert*, 214 S.W.3d 631 (Tex. App.—Dallas 2006, pet granted Oct. 23, 2009). The *Linbeck* court did not devote significant attention to this point, but merely relied up *Albert*. Because petition in *Albert* has been granted, the court might have an opportunity to discuss whether waiver of immunity by filing a counterclaim is revocable.

For city attorneys and other practitioners, this case has some practical lessons. If a city becomes involved in litigation or a dispute where a party seeks to enforce lien rights, the city need not bond around the lien. A plea to the jurisdiction and a declaratory judgment action seeking to declare the lien invalid should be all that is required. The city should rely on Section 43.002 of the Property Code for that remedy.

Further, it would be wise to not file counterclaims unless the city is prepared to litigate all claims that relate to or arise from the claims affirmatively alleged by the city. The recovery of monetary damages likely does not involve a declaratory judgment sought by a city, so a necessary declaratory judgment action will not likely result in a waiver of immunity. Certainly, at least until *Albert* is decided by the Supreme Court of Texas, cities should be wary of filing counterclaims if the city also seeks to preserve its immunity.

One certain lesson from *Linbeck* is that public land is exempt from a lien even if originally owned by private company. The one question that was not answered is whether the purchase of land with lien attached will extinguish liens. Practically this may not matter because a city seeking to purchase land with valid liens attached should require the seller to use the proceeds to pay debts and secure lien releases.