

The logo for the Texas Municipal League, featuring a green square with a white star in the center. The words "Texas", "Municipal", and "League" are stacked vertically in white text within the square.

Legislative UPDATE

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Texas Supreme Court: Cities Have Unlimited Liability on Certain Contracts

Last week, the Texas Supreme Court issued a unanimous opinion in [*Wasson Interests, Ltd. v. City of Jacksonville*](#). The Court held against the city and opened the door to contractual liability for cities in many different contexts, including economic development incentive agreements.

Cities are immune from being sued, unless that immunity is expressly waived by the Texas Legislature. Turning that rule on its head, the Supreme Court created a judicial, non-legislative waiver of governmental immunity where none had existed for decades. At issue in *Wasson* was whether the governmental-proprietary distinction found in the Texas Tort Claims Act applies to contractual claims against a city. The Court held that it does, without any hint from the Texas Legislature that it ought to.

With regard to torts, the Texas Tort Claims Act waives immunity in limited circumstances and limits the damages that can be recovered against a city when performing a governmental function. (Under the Tort Claims act, a “governmental function” provides for the health, safety, and welfare of the general public. Examples of governmental functions include police and fire protection, health and sanitation services, parks and zoos, zoning, animal control, and many more.)

In contrast, the Tort Claims Act maintains the broad common law waiver of immunity for a city that is performing a proprietary function. (A “proprietary function” is one that a city may, in its discretion, perform. For example, providing electricity to residents is an example of a “proprietary function” under the Tort Claims Act.) If a city is found liable for a tort caused by a proprietary function, the amount of damages may be unlimited.

Why is tort law relevant to a contractual dispute? The legislature has also provided a limited waiver of immunity for contract claims through a different law – Chapter 271 of the Local Government Code. That law provides a limited waiver of immunity when a city enters into a contract for *goods and services* only, and the recovery is limited to *the balance due and owing under the contract*. The key is that the city is liable only for the amount of the contract, which allows the city to budget for and predict any liability under it.

The plaintiff in *Wasson* argued that the governmental-proprietary distinction in the Tort Claims act should be “superimposed” into the contracts realm. The Court agreed, essentially imposing unlimited liability on cities for certain contracts. In other words, the court essentially ignored its mandate from the Texas Legislature to be very conservative in finding new waivers of governmental immunity.

The *Wasson* case dealt with a city’s 99 year residential lease of lakefront property. The original lessees conveyed their interest to Wasson Interests, Ltd., which began renting out the property (a commercial use) in violation of the lease agreement. Because a land lease is not considered a contract for goods and services, the Court concluded that immunity is not waived by Chapter 271. Rather, the Court remanded to the trial court the question of whether a land lease to a private person is something a city does for the interests of only its citizens (i.e., it is *proprietary* and not worthy of immunity protection).

Proprietary contracts can include those related to utility services and amusements. They may also include economic development agreements. In other words, if a court concludes that an economic development incentive agreement is a proprietary function, a city could have unlimited liability if sued for its alleged breach under this new case.

Cities enter into many different kinds of economic developments agreements. For example, cities enter into contracts to abate property taxes or sales taxes, to enact tax increment financing, form public/private partnerships, and to offer other economic development incentives (such as Chapter 380 grants). It is through these tools that cities put themselves on the front lines of increasing economic prosperity in their communities and throughout the state. The *Wasson* decision undermines the key legal position of cities that enter into these contracts, namely that cities are protectors of the taxpayer dollar. Cities should now exercise caution when drafting and approving contractual economic development incentives.

Why might a city act to terminate an economic development incentive contract? One obvious reason is that a business prospect doesn’t create a promised number of jobs or fulfil some other essential benchmark under the contract. Prior to last week’s decision, taxpayers could count on the city’s absolute judgment to withhold additional payments in such cases. After *Wasson*, businesses will be empowered to sue for payment of any disputed taxpayer funds.

As a result, city officials should work closely with their legal counsel to review the risks of entering into any contracts that may be considered proprietary in nature, including economic development agreements. As controversial as economic development incentives are in some political circles these days, this opinion ratchets up the pressure on city officials by denying them their essential position as ultimate arbiter of economic performance. Cities must now weigh the potential costs of judicial involvement in economic development negotiations, agreements, and disputes. Maybe the critics of economic development incentives are right, and it just isn't worth the trouble. Time will tell.

The city is asking for the Court to reconsider its opinion. Texas Municipal League and Texas City Attorneys Association will support the city as appropriate.

Local Drone Regulation in Jeopardy

The U.S. Senate is poised to vote on a long-term reauthorization of the Federal Aviation Administration ([S. 2658](#)). The bill includes a dangerous provision (Section 2142) that would allow the FAA to override state and municipal authority over when and where commercial drones operate.

The Senate may vote on the bill as early as next week. This makes it critical that Senate Commerce Committee membership hear from cities in their states that this language must be fixed before the bill goes to the full Senate for a vote.

In addition to [NLC's efforts](#) to galvanize support to ensure local control for local airspace, the Wall Street Journal ran an [op-ed](#) echoing municipal concerns with the provision.

Senator Ted Cruz is a member of the Senate Commerce Committee. City officials with concerns should [contact his office](#) to express their concern.

This article was reprinted with permission from the National League of Cities. For more information, contact Matthew Colvin, Principal Associate, Infrastructure and Development, at colvin@nlc.org or 202-626-3176.

TxDOT Rules May Shift Excess Joint Project Costs to Cities

The Texas Department of Transportation (TxDOT) is proposing rule changes that may shift certain costs of local participation projects to cities. The proposal includes a number of amendments, but the greatest concern relates to joint project costs that are paid using the "specified percentage method" or the "periodic method" of payment. In those funding arrangements, a city – rather than TxDOT – will be responsible for any extra funds required to complete a project.

City officials that frequently enter into joint project agreements with TxDOT should review the proposed changes and provide comments to TxDOT. The proposed changes and information about filing comments are available in the [March 11 edition](#) of the *Texas Register*. Comments must be filed with TxDOT by 5:00 pm on April 11.

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