

Case Nos. 08-1003, 08-1005, and 09-0064

In the Supreme Court of Texas

**KIRBY LAKE DEVELOPMENT, LTD.,
MITER DEVELOPMENT CO., L.L.C.,
TAYLOR LAKE, LTD., and
FRIENDSWOOD DEVELOPMENT COMPANY, LTD.,**

Petitioners,

vs.

CLEAR LAKE CITY WATER AUTHORITY,

Respondent.

**On Petitions for Review from the Fourteenth Court of Appeals
Houston, Texas**

**BRIEF OF *AMICUS CURIAE*
GREATER HOUSTON BUILDERS ASSOCIATION
IN SUPPORT OF PETITIONERS**

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IDENTITY OF AMICUS CURIAE

Chartered in 1941, the Greater Houston Builders Association ("GHBA") is a non-profit 501(c)(6) trade association representing builders and developers throughout the Houston area. GHBA is the fourth largest construction industry trade organization in the country, and represents approximately 1,800 member companies, including Petitioner Friendswood Development Company. In the Houston area alone, the building industry annually generates at least \$4 billion in wages, \$2 billion in federal, state, and local revenues and fees, and an additional \$4.3 billion in consumer spending. Furthermore, the industry contributes more than one hundred thousand jobs to the area.

GHBA is vitally interested in the governmental immunity issue common to these appeals. Many of GHBA's members enter contracts with public entities, like Clear Lake City Water Authority, and will be hurt by any ruling that such entities can walk away from their debts because they have immunity from suit on contracts like these.

GHBA has not accepted any compensation from the parties for the preparation of this brief. The undersigned attorneys from Akin Gump Strauss Hauer & Feld LLP have been compensated for their legal services only by GHBA.

GHBA urges this Court to hold that Petitioners' suits are not barred by governmental immunity.

IDENTIFY OF PARTIES, STATEMENT OF THE CASE, STATEMENT OF JURISDICTION, AND STATEMENT OF FACTS

GHBA adopts these parts of Petitioners' Consolidated Brief on the Merits.

ISSUE PRESENTED

Are Petitioners' suits barred by the doctrine of sovereign immunity, or are they permitted by Texas Local Government Code § 271.152 and Texas Water Code § 49.006?

SUMMARY OF ARGUMENT

When the Texas Legislature considered H.B. 2039 in 2005, it was concerned that Texas governmental entities were improperly using the doctrine of sovereign immunity to avoid paying their just debts. Testimony by ordinary citizens and by industry experts demonstrated the harm such immunity would have, both on the private contractors and on the public entities themselves. Consequently, the Legislature sought to re-affirm the common law cases holding that public entities waive immunity when they contract for goods and services. Noting that several courts of appeals had “ignored prior Texas case law and ha(d) disregarded the plain meaning of statutes” by holding that the familiar statutory waiver language “sue and be sued” was no longer sufficient to waive immunity, the Legislature amended the Local Government Code to provide an express statutory waiver of immunity from suit in cases arising from breach of contract. According to the Author's Statement of Intent:

H.B. 2039 clarifies and re-expresses the legislature's intent that all local governmental entities that are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts, subject to the limitations set forth in H.B. 2039.

The Clear Lake City Water Authority (hereinafter the “Authority”) now asks this Court to avoid the Legislature's intent and let the Authority use the doctrine of sovereign immunity to keep from paying its bills. GHBA's response to that is simple: “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the

whole people by its example.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting). If our government teaches that debts can be avoided so easily, that is a dangerous lesson, especially for an entity like the Authority, which depends for its survival on the payment of taxes.

The roads, bridges, water lines, sewers, and drainage facilities constructed by Petitioners constitute “services” and thus lawsuits over them are not barred by immunity under Texas Local Government Code § 271.151(2). Because that statute does not define “services,” this Court should look to common language sources to determine the activities the statute was meant to cover. Such sources, including Black’s Law Dictionary, the Merriam-Webster Dictionary, and the American Heritage Dictionary, define “service” in a way that would include the construction services Petitioners provided to the Authority. These “services” provide more than an indirect or attenuated benefit to the Authority, as recently recognized by the First Court of Appeals. GHBA submits that these construction and development contracts satisfy the criteria for “goods or services” and therefore should effect a statutory waiver of immunity under section § 271.152.

ARGUMENT

I. The Contracts at Issue Fully Satisfy the Criteria for Statutory Waiver of Immunity.

A. The Ordinary Meaning of “Services” in § 271.151(2) of the Texas Local Government Code Includes the Construction of Roads and Facilities Referenced in the Contracts Under Review.

Section 271.151(2) of the Local Government Code defines a “contract subject to this subchapter” as “a written contract stating the essential terms of the agreement for providing goods or **services** to the local government entity that is properly executed on behalf of the local government entity.” TEX. LOC. GOV’T CODE ANN. § 271.151(2) (Vernon 2005) (emphasis added) However, the statute does not define the term “services” or offer any indication of its breadth or limitations. The term must therefore be interpreted according to its plain and ordinary meaning. *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n. 19 (Tex. 2006) (undefined statutory terms are given their ordinary meaning).

Seeking to steer the Court’s interpretation of the term “services” in a narrow direction, the Authority has offered a single definition from a dated source, the 1978 edition of Black’s Law Dictionary.¹ Yet, given the importance of legislative intent in interpreting the meaning of a statutory term, this Court should not limit itself to a legal dictionary for a definition familiar to the legislators whose understanding is critical to the intent underlying the statute. Moreover, given that the statute was enacted in 2005, this Court should consider resources more contemporary with the statute’s passage than 1978.

¹ Defining “service” as “[d]uty or labor to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter.” See Respondent’s Brief on the Merits at 37.

While Black's Law Dictionary is a valuable reference for the legal profession, other more common definitional sources should also be considered in determining the ordinary meaning of the statutory term "services." For instance, the Merriam-Webster Dictionary defines "service" as "a facility supplying some public demand" and mentions telephone service as an example. Merriam-Webster Collegiate Dictionary 1137 (11th ed. 2007). Particularly in point, the American Heritage Dictionary defines a "service" as a "facility providing the public with the use of something, *such as water or transportation.*" American Heritage Dictionary 1591 (4th ed. 2000) (emphasis added). And the contemporary edition of Black's Law Dictionary defines "service" as "[t]he act of doing something useful for a person or company for a fee" or "[a]n intangible commodity in the form of human effort, such as labor, skill, or advice." Black's Law Dictionary 638 (2d. Pocket ed. 2001).

Based on these sources, commonly used by both the general public and the legal profession, the construction of streets, roads, bridges and "Facilities"² referenced in the contracts under review plainly fall within the ordinary meaning of the term "services." According to the contracts at issue, developers were "to arrange for the construction of water distribution lines, sanitary sewer lines, and drainage facilities to provide service to houses" and to "build the streets, roads, and bridges for the Subdivision." *Clear Lake Water Auth. v. Friendswood Dev. Co., Ltd.*, 256 S.W.3d 735, 739, 750 (Tex. App.–Houston [14th Dist.] 2008, pet. dismissed) (hereinafter "*Friendswood I*"). Certainly,

² The Agreement in *Clear Lake Water Auth. v. Friendswood Dev. Co., Ltd.*, 256 S.W.3d 735 (Tex. App.–Houston [14th Dist.] 2008, pet. dismissed) (hereinafter "*Friendswood I*"), states that "such water distribution lines, sanitary sewers, and drainage facilities are collectively referred to in the Agreement as the 'Facilities'". *Id.* at 747-48.

water, sewer and drainage facilities constitute “a facility supplying some public demand” and are analogous to telephone service under the Merriam-Webster definition. Similarly, it would be difficult to argue that water distribution lines, roads, streets and bridges are not “facilit[ies] providing the public with the use of something, such as water or transportation” under the American Heritage Dictionary definition. Finally, the developers’ effort, labor, and skill in constructing such facilities to be purchased for a fee by the Authority fully satisfies even the most demanding definition supplied by the modern Black’s Law Dictionary.

In sum, in interpreting the ordinary meaning of the term “services” under Section 271.151(2) of the Local Government Code, this Court should look beyond the narrow definition proffered by the Authority and apply the more general definition likely contemplated by the legislators. Remember, the Texas Legislature intended for public entities to be subject to suit for their contractual debts, not for them to avoid those debts based on an antiquated legal doctrine wholly unrelated to the contractor’s conduct or performance. “[B]y enacting section 271.152, the Legislature intended to loosen the immunity bar....” *Ben Bolt-Palito Blanco Consol. Indep. Sch. District v. Tex. Political Subdivisions Prop./Cas. Joint Self-Insurance Fund*, 212 S.W.3d 320, 327 (Tex. 2006). Based on the definition of “services” found in several commonly-used resources, the roads, streets, bridges and “Facilities” referenced in the various contracts at issue plainly satisfy the statutory requirement. Consequently, GHBA agrees with both the *Friendswood I* Court and Petitioners that the Authority’s governmental immunity is statutorily waived pursuant to Local Government Code § 271.152.

B. The Roads and Other Facilities Constructed by the Developers Do Not Constitute a Mere Indirect or Attenuated Benefit to the Authority.

In its brief on the merits at 36-37, the Authority quotes from *East Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723 (Tex. App.–Houston [1st Dist.] 2009, no pet.) (hereinafter “*East Houston*”), to support its position that the construction of road and other Facilities in *Friendswood I* should not constitute services sufficient to waive governmental immunity under Local Government Code § 271.152. Respondent’s Brief on the Merits at 35-37. Specifically, the Authority implicitly argues that the construction of roads, water lines, and drainage facilities is merely an “attenuated benefit” to the Authority, analogous to the loan program for refurbishment of low-income housing considered in *East Houston*. Yet, the *East Houston* Court analyzed the facts and holding in *Friendswood I* and ultimately found the loan program distinguishable. 294 S.W.3d at 735. According to the *East Houston* court, unlike the services provided in *Friendswood I* and in *Ben Bolt*, 212 S.W.3d 320 (Tex. 2006), “section 271.152 does not apply to contracts like the one at issue here, in which the benefit that the City would receive is an indirect, attenuated one.” *Id.* at 736. Hence, rather than offer support for the Authority’s interpretation of “services” under Local Government Code §271.151(2), the court in *East Houston* actually agreed with Petitioners that the water and transportation construction services provided in *Friendswood I* were neither indirect nor attenuated; rather, they constituted “services” sufficient to avoid any sovereign immunity bar to suit. *Id.*

As an alternative argument, the Authority asserts that the special relationship to provide mutual services between the parties found in *Ben Bolt* does not exist in the

present situation. However, the *East Houston* court has already addressed and rejected such an argument:

Furthermore, the *Ben Bolt* court looked to the special relationship between the parties to conclude that they provided mutual services to each other * * *. **Likewise**, the [*Friendswood I*] court followed the reasoning in *Ben Bolt* in determining that **the development company had provided a service for the water authority in constructing streets, roads, and bridges.**

Id. at 736 (emphasis added). The *East Houston* case supports Petitioners, not the Authority.

II. Contractors Will Feel a Sweeping Detrimental Impact if Public Entities Are Held to Have Immunity from Suit Despite TEXAS LOCAL GOVERNMENT CODE § 271.151 - .152 and TEXAS WATER CODE § 49.066.

Texas contractors and developers do a large amount of business with government entities like the Authority. They enter binding contracts - - binding on them at least - - expecting that (1) they will be paid, and (2) they will have a remedy should the public entity breach its contractual obligations. Texas contractors are willing to do business with government entities based on the long-held assumption that public entities cannot simply “skip out on the bill” by asserting governmental immunity. Should this Court hold to the contrary, that would have a major adverse effect on both the contractors and the government entities that rely on them.

In the 1990s and early 2000s, several courts began reversing long-established jurisprudence that contracting governmental entities waived immunity as part of their agreements to buy goods and services. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S. (2005) (“Several recent Texas courts of appeals decisions have ignored prior Texas case law and have disregarded the plain

meaning of statutes by holding that they do not constitute a statutory waiver of immunity from suit in cases arising from breach of contract.”), attached as Exhibit A at 1. Based on concerns arising from these court decisions, the Texas Legislature in 2005 held public hearings and ultimately passed H.B. 2039 “to clarify and re-express the Legislature’s intent that all local governmental entities that are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts,” *Id.* In particular, testimony received during the public hearings convinced the Legislature that if public entities were granted immunity from suit for breaches of their contractual obligations, (1) contractors and the construction industry would suffer, and (2) government entities would face increased costs due to diminished industry competition and the poorer quality of public construction projects.

During its consideration of H.B. 2039, the Texas House of Representatives Committee on Civil Practices heard testimony from citizens and industry experts describing the severe negative impact if public entities could assert immunity from suit for breaches of contract.³ For example, Paul Workman, a commercial contractor with offices in Houston, Dallas and Austin, testified that his company contracts with public entities precisely *because* there has always been the assurance that a remedy was available if a dispute were to arise.⁴ Exhibit B, at 10 (using pagination at bottom of page). Stating that immunity from suit for public entities “tears at the very heart of contracts in

³ The House of Representatives Committee on Civil Practices has archived the videos of its hearings. These videos can be found on the Committee’s website at <http://www.house.state.tx.us/media/chamber/79.htm>. The video for the March 30, 2005 hearing referenced and quotes from it in this section have been transcribed, and the transcript is attached to this Brief as Exhibit B.

⁴ Mr. Workman’s testimony begins at hour 4:44 in the hearing on March 30, 2005. See Ex. B, beginning at 10.

our state,” Mr. Workman testified that if contractors could not bring suit for work performed pursuant to a valid contract, the following would be the resulting consequences:

- (1) Good and legitimate contractors will be driven away from bidding for public jobs due to the increased risk of non-payment. Public entities will then be left with fewer and poorer quality contractors from which to choose.
- (2) Overall construction costs for governmental entities will increase because of the poorer quality of government construction projects.
- (3) Large contractors who have been left unpaid on a public contract will pass down any unpaid sums to small and minority businesses that ultimately “will be left holding the bag.”

Id. At 11-12.

Other citizens echoed the concerns of Mr. Workman. Tom Vaughn, a public sector construction contractor who works throughout the state, warned that numerous small contractors and sub-contractors would be forced out of business if public entities failed to fully pay contractors and then could hide behind immunity from suit for breaching their agreements.⁵ *Id.* at 33-36. Similarly, Richard Ringo, a commercial construction contractor from Weatherford, testified that governmental immunity from suit in public jobs would be devastating to contractors.⁶ *Id.* at 36-37. In particular, Mr. Ringo warned that immunity would significantly reduce the availability of legally required surety bonds. *Id.*

⁵ Mr. Vaughn’s testimony begins at hour 4:34 in the hearing on March 30, 2005. See Ex. B, beginning at 33.

⁶ Mr. Ringo’s testimony begins at hour 4:37 in the hearing on March 30, 2005.

John Ward of the Texas Surety Federation supported Mr. Ringo's claims regarding the availability of surety bonds based on the lack of guaranteed payment. According to Mr. Ward, without waiver of governmental immunity, insurers would only provide surety bonds to the largest contracting companies because only they can withstand a public entity's failure to pay.⁷ *Id.* at 40-43. The practical effect would be that smaller contractors and sub-contractors would be penalized for their size and perceived inability to withstand such a non-payment. *Id.* The inability to purchase surety bonds would then drive smaller contractors out of the public construction business. *Id.* Mr. Ward also expressed concern that prices on public contracts would significantly increase because of the reduced number of bonded contractors able to compete for public projects. *Id.*

From the foregoing testimony, it is undisputed that there would be a substantial damaging impact both on contractors and the public entities they serve if governmental entities were to be immune from suit for breach of contract.⁸ GHBA supports a holding of statutory waiver of immunity under Texas Local Government Code § 271.151 - .152 and Texas Water Code § 49.066, so that these predicted effects do not become a reality for GHBA's members, all Texas contractors, and the public.

⁷ Mr. Ward's testimony begins at hour 4:04 in the hearing on March 30, 2005.

⁸ A member of GHBA has also stated to GHBA officials that if public entities such as the Authority are not found to have statutorily waived government immunity, he would pay less money for a specific purchase of land for development because he could not be assured of being paid for water systems by the water district. This developer's concerns are representative of the impact this Court's decision will have on the construction industry, and they echo the many warnings given in testimony before the House Committee on Civil Practices when it considered H.B. 2039.

CONCLUSION

On behalf of its approximately 1,800 members, GHBA respectfully urges this Court to hold for Petitioners on the issue of governmental immunity and hold that both Texas Local Government Code § 271.152 and Texas Water Code § 49.066 effect a statutory waiver of immunity for public entities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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