NO. 04-14-00886-CV

IN THE COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

CITY OF SAN ANTONIO

APPELLANT

v.

HAYS STREET BRIDGE RESTORATION GROUP

APPELLEE

From the 73rd District Court of Bexar County, Texas
Trial Court No. 2012-CI-19589
Honorable David A. Canales, Judge Presiding

BRIEF OF APPELLEE, HAYS STREET BRIDGE RESTORATION GROUP WITH AMENDMENTS INCORPORATED

Amy Kastely
Texas Bar No. 24006638
233 Lotus Avenue
San Antonio, TX 78210
(210) 216-3241 – Phone
(210) 338-8668 – Fax
amykastely@fastem.com
Attorney for Appellee,
Hays Street Bridge Restoration Group

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

IDENTITY OF PARTIES AND COUNSEL

Appellee includes this part merely to correct the Fax number for Appellee's Counsel:

Appellee
Hays Street Bridge Restoration Group

Appellate and Trial Counsel
Amy Kastely
State Bar No. 24006638
Attorney at Law
233 Lotus Avenue
San Antonio, TX 78210
(210) 216-3241 – Phone
(210) 338-8668 – Fax
amykastely@fastem.com

STATEMENT OF THE CASE

Appellee includes a Statement of the Case because Appellant's version is incomplete and misleading, and it includes incorrect citations to the Record. *See* Texas Rule of Appellate Procedure 38.2(a)(1)(B).

Nature of the case.	Appellee sued Appellant for (1) breach of a written contract, for which Appellee sought specific performance and (2) declaratory judgement, seeking a declaration that the City "owned, claimed, or held" the land at 803 N. Cherry as a park within the meaning of Local Government Code §253.001 and therefore that the Ordinance transferring the land to Alamo Beer Co. was invalid and unenforceable until and unless the transfer was approved by a vote of eligible San Antonio voters; this claim also sought to enjoin the transfer until such approval was obtained. 3 CR 55-66, 4 RR 18-19.
Course of proceedings.	The jury found (1) Appellant had breached the contract and (2) that the City had not "owned, held or claimed the property located at 803 North Cherry Street as a park." 3 CR 201-14.
Trial court disposition.	The trial court entered a judgment (1) finding that the City had breached the contract with Appellee and ordering the City to specifically perform its obligation under the contract and (2) denying Appellee's declaratory judgment claim. 3 CR 278-79.

STATEMENT REGARDING ORAL ARGUMENT

Although the contract law issues in this case are routine, the facts are somewhat complicated so that oral argument may aid the Court on those issues. The law on governmental immunity has undergone significant reformulation in the past ten years and for that reason, oral argument may aid the Court in deciding this case.

TO THE HONORABLE FOURTH COURT OF APPEALS:

Appellee, HAYS STREET BRIDGE RESTORATION GROUP, files this its Brief of Appellee, and respectfully shows the Court as follows:

STATEMENT OF THE FACTS

Appellant's Statement of Facts is incomplete and misleading, often representing "facts" as if they are undisputed, even though the evidence is conflicting, and/or the jury explicitly rejected the alleged fact and/or the trial court judgment deemed facts in conflict with Appellant's statement. In addition, several references to the record in Appellant's Statement of Fact do not support statements in the text. Finally, large parts of the Appellant's Statement of Facts are blatantly argumentative, in clear violation of Rule 38.1(g), Tex. R. App. P. 38.1(g), see, e.g., App. Br. at 4-5. In addition to providing a concise statement of the facts without argument, the following Statement of the Facts identifies particular instances of these improprieties in Appellant's Statement.

Circumstances leading to the Contract

The Hays St. Bridge Restoration Group (hereinafter the "Hays St. Group" or the "Group") was formed by a diverse group of San Antonians, including leading engineers, academics, retired government officials, and community activists, many of whom had already been working for years to save the Hays St. Bridge, a beloved Eastside icon. 4 RR 77-78, 4 RR 173-174, 4 RR 178-179. Its historic significance has

been recognized by the National Register of Historic Places, the Texas Historical Commission, and by the City of San Antonio It has been designated as a Texas Historic Civil Engineering Landmark and it has been named by the Heritage Bridge Foundation as a Historic Bridge. 4 RR 84. The Bridge had been closed to vehicular traffic in 1982 and to pedestrian traffic in 1994; it was in a deteriorated condition. 4 RR 85.

The Hays St. Group organized broad community support for preservation of the Bridge. The Group gathered design and reconstruction estimates, raised money, and solicited in-kind services from San Antonio's engineering and architectural community. 4 RR 90-91. By 2000, the Group had identified the Transportation Equity Act as a possible source of grant money, funded by the federal government and administered through the Texas Department of Transportation. At this time, the Hays St. Group began talking to the City Planning Department about the possibility of soliciting the land at 803 N. Cherry as land to be used to support public access to and enjoyment of the renovated Hays St. Bridge.

Working with the City's Planning Department, the Hays St. Group helped to prepare an application for the TxDot grant, 4 RR 175-176, which was approved by the San Antonio City Council in May 2001, 4 RR 52-53, PX8 and in January 2002, the project was awarded $2.89 million for the project. 4 RR 176.

Under the grant, the City would have to fund $718,114 (20% of the grant) in cash or in-kind contributions. 4 RR 176-177. Accordingly, before agreeing to accept the

grant, City officials insisted upon a written contract for fundraising services between the Hays St. Restoration Group and the City (hereinafter the "Memorandum Agreement" or "the Contract"). 4 RR 262. PX 1. Under this contract, the Group assumed the obligation of raising money and other assets from private donors to satisfy the City's obligation to contribute 20% of the cost of the Hays St. Bridge Restoration Project. 4 RR 261. In exchange, the City promised to Ensure that any funds generated by the Restoration Group for the Hays Street Bridge would go directly to the Hays St. Bridge Restoration Project budget. PX 1. A copy of the duly executed contract is attached to Appellant's Brief at Tab A.

With the City's encouragement, the Hays St. Group solicited donation of 803 N. Cherry for the Hays St. Bridge Restoration Project

With the City's encouragement, the Hays St. Group solicited the donation from the Dawson family, owners of the Land. 4 RR 103-104. After the initial solicitation, The City required that two environmental studies be performed, both of which were arranged by the Hays St. Group. PX1.

The Dawsons agreed to donate the property to the Hays St. Bridge Restoration Project early in 2005 and, with the encouragement of City representatives, the gift was announced at a large fundraising event hosted by the Hays St. Group in March of 2005. 4 RR 189-191. Potential donors were shown preliminary plans for the Land to be used for parking, restroom facilities, and educational information to enable and enhance public enjoyment of the historic Bridge. 4 RR 191-205.

The actual transfer of 803 N. Cherry was delayed because Union Pacific was reluctant to finalize its donation of the Bridge itself and the City did not want to accept 803 N. Cherry without final assurance that the Bridge also would be donated. Finally, in 2007, the Dawson family told the Group and the City that they could wait no longer, DX 3 so even before transfer of the Bridge itself, donation of 803 N. Cherry was accepted as part of the Hays St. Bridge Restoration Project. PX 3 Meanwhile, informal design plans for the Project were expanded to include the land to enable and enhance public appreciation of the historic Bridge. 4 RR 191-205, PX9, 5 RR 77-79.

The Hays St. Group fulfilled its obligations under the Memorandum Agreement

The Group worked tirelessly, expending many hundreds of hours fundraising for the Project and raising and fulfilled its obligations under the Fundraising Contract by raising or helping to raise more than $200,000 in cash and $400,000 in in-kind donations), including the donation of 803 N. Cherry, which adjoins the Bridge on its north east side (hereinafter the "803 N. Cherry" or the "Land"). 4 RR 118 (but not including the donation from Union Pacific, for which the Group expended many more hours of work). 4 RR 204-207. There is no support for Appellant's suggestion that the Group did not fulfill its obligations under the Memorandum Agreement. (App. Br. at 6).

The City Breached the Memorandum Agreement

Restoration of the Bridge itself was completed in 2010, and on July 20th, the Bridge was rededicated and reopened for public use as part of the City's hike and bike trails. 4 RR 202. The Hays St. Group continued its work to complete the construction of educational and recreational facilities, parking, and restrooms on the adjoining Land. 4 RR 202-205.

Unbeknownst to the Group, however, a new City administration had decided to transfer 803 N. Cherry to the Alamo Beer Company. PX 14. Finally, in June 2011, City staff met with representatives of the Hays St. Group and informed them of this decision. 4 RR 205-215, 217-219. Despite repeated objection from the Hays St. Restoration Group and other community members, the City transferred of the Land to Alamo Beer Company. 5 RR 152.

Significant Events in the Procedural History of the Case.

Part II of the Appellant's Statement of Facts is entirely without support in the record and is a serious misstatement of the Appellee's Claims. Part IV is almost entirely argumentative.

The original Petition in this lawsuit was filed on December 6, 2012. This Petition included two claims: one for breach of the written contract evidenced by the Memorandum Agreement and the second for declaratory judgement, seeking a declaration that the City "owned, claimed, or held" the land at 803 N. Cherry as a park within the meaning of Local Government Code §253.001 and therefore that the Ordinance transferring the land to Alamo Beer Co. was invalid and unenforceable until and unless the transfer was approved by a vote of eligible San Antonio voters; this claim also sought to enjoin the transfer until such approval was obtained. 3 CR 55-66, 4 RR 18-19.

The jury found (1) Appellant had breached the contract and (2) that the City had not "owned, held or claimed the property located at 803 North Cherry Street as a park." 3 CR 201-14. Following denial of various post-verdict motions by the City, the trial court entered a judgment (1) finding that the City had breached the contract with Appellee and ordering the City to specifically perform its obligation under the contract and (2) denying Appellee's declaratory judgment claim. 3 CR 278-79.

SUMMARY OF THE ARGUMENT

I. The Memorandum Agreement evidences a legally binding contract between the parties. The title "Memorandum of Understanding" does not preclude the document from being a valid and enforceable contract, and the Memorandum Agreement included an exchange of consideration.

II. The District Court correctly determined that the City is not immune from Appellee's breach of contract claim. The Contract between the City and the Hays Street Bridge Restoration Group is a contract for the provision of fundraising services and therefore is subject to Local Government Code §271.152. Moreover, the waiver of immunity in §271.152 extends to a breach of contract claim that seeks specific performance of the contract. Section 271.153 does not prohibit the remedy of specific performance, and every court that has addressed the question has concluded that the remedy of specific performance is available in an action for breach of contract as to which immunity is waived by Local Government Code §271.152. If this Court finds that the City's immunity is not waived by Local Government Code §271.153, Appellee requests the Court to remand the case to allow the Hays St. Group to amend its petition.

III. The Trial Record includes legally sufficient evidence of a breach by the City and injury to HSBRG. The trial court correctly ruled that the word "funds" is ambiguous as used in the Memorandum Agreement, correctly submitted Jury Question 4, correctly rejected the City's proposed jury question 4, and correctly upheld

the jury's affirmative answer to Jury Question 4. There is more than a scintilla of evidence to support the jury's finding that the City breached its contract with the Hays Street Bridge Group and more than a scintilla of evidence that the Hays Street Group was injured by the City's breach.

IV. The land at 803 N. Cherry is within the scope of the contract. Contrary to the City's proposed interpretation, involvement of the San Antonio Area Foundation was not a condition precedent to the City's obligation under the contract Moreover, the Local Transportation Project Advance Funding Agreement does not have the effect of excluding 803 N. Cherry from the Memorandum Agreement.

ARGUMENT

I. The Memorandum Agreement evidences a legally binding contract between the parties.

Several of the arguments set forth under this Issue in Appellant's Brief, App Br 7-9, are relevant only to Appellant's fourth Issue, regarding the scope of the contract, so Appellee will address those arguments in Section IV, below.

A. The title "Memorandum of Understanding" does not preclude the document from being a valid and enforceable contract.

A valid and enforceable contract requires (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 349 (Tex. App. 2007). In this case, a written document, entitled a "Memorandum of Understanding," was drafted by Ms. Nina Nixon Mendez, of the City Planning Department and a representative of the City Attorney's Office. 5 RR 9-10. The document was then presented to and reviewed with representatives of the Group, who then signed the document, together with Emil Monsivais, Director of the City Planning Department and the authorized representative of the City. 5 RR 10. This was an offer and an acceptance. The parties' signatures provide objective evidence of their agreement to the terms of the contract. The language and formality of the document indicate the parties' intent that the contract be mutual and binding. As Ms. Nixon Mendez observed, the Group became obligated to

the City because "they signed the contract–signed the Memorandum of Understanding." 5 RR 32.

The Appellant apparently argues that the signed document cannot be a binding contract because it is entitled "Memorandum of Understanding." (App. Br. at 8). Yet Appellant cites no legal authority for this assertion, and numerous cases have found "memorandums of understanding" to be legally enforceable contracts, *see, e.g. Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 623 (2000) ("a separate contract—the 1989 memorandum of understanding—entitled the companies to receive these suspensions"); *Fluorine On Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 855-857 (5th Cir. 2004) (holding that a "memorandum of understanding" was an enforceable contract under Texas law); *In re Sterling Chemicals, Inc. et al.*, 261 S.W.3d 805 (Tex. App.—Hous. 2008) (Memorandum of Understanding is a contract subject to the normal rules of contract interpretation); *Murphy v. Seabarge, Ltd*., 868 S.W.2d 929, 933 (Tex. App.—Hous. 1994) (whether parties intended the Memorandum of Understanding to be a legally binding contract is an issue of fact that must be decided by the jury).

The elements of contract formation, particularly the parties' intent to be bound, most often involve questions of fact. *R.R. Comm'n of Texas v. Gulf Energy Expl. Corp*., 2016 WL 363771, at *12 (Tex. Jan. 29, 2016) ("The question of the parties' intent to be bound is usually one of fact, and we cannot say that this case presents the

unusual situation in which that question may be decided as a matter of law); *Foreca, S.A. v. GRD Development Co., Inc.*, 758 S.W. 2d 744, 746 (Tex. 1988) (the parties intent to be bound "was properly submitted to and answered by the jury in fulfillment of its fact finding responsibilities"). In this case, the document's title is arguably relevant to the first two Jury Questions: "Did the Hays Street Bridge Restoration Group and the City of San Antonio agree to the terms outlined in the MOU?" and "Did the Hays Street Bridge Restoration Group and the City of San Antonio sign the MOU with the intent that it be a mutual and binding agreement?" but it does not require a negative answer to those question. The jury's affirmative answers are supported by an abundance of evidence, however, and Appellant has not challenged the factual or legal sufficiency of these findings.

B. The Contract included an exchange of consideration.

The City's second challenge to the existence of a valid contract appears to be that the contract lacks consideration. (App. Br. at 10). This challenge must fail for two reasons. First, the Memorandum itself, in "Article III. Responsibilities," specifies the mutual obligations of the parties; this clearly is an exchange of consideration. *See Copeland v. Alsobrook*, 3 S.W.3d 598 (Tex. App.–San Antonio 1999) ("A promise for a promise is sufficient consideration in Texas."). Second, under Texas law, the existence of a written contract triggers a presumption that consideration for the agreement exists, *Blockbuster, Inc. v. C–SPAN Entertainment, Inc.*, 276 S.W.3d 482,

488; (Tex. App.–2008), and that presumption is not rebutted merely because the consideration is nonpecuniary. *Curlin v. Hendricks*, 35 Tex. 225, 229 (1872).

Moreover, consideration consists of either a benefit to the promisor or a detriment to the promisee, and the benefit or detriment need not be pecuniary. *Garza v. Villarreal*, 345 S.W.3d 473, 483 (Tex. App.—San Antonio 2011). A promise to use one's "best efforts" to achieve some result that is uncertain of success is not illusory and can be sufficient consideration for a return promise. *City of The Colony v. N. Texas Mun. Water Dist.*, 272 S.W.3d 699, 728 (Tex. App.—Fort Worth 2008).

Here, the City promised to allocate all funds generated by the Hays Street Group and the Group promised to use its best efforts to fundraise for the project. This is an exchange of consideration.

II. The District Court correctly determined that the City is not immune from Appellee's breach of contract claim

A. The Contract between the City and the Hays Street Bridge Restoration Group is a Contract for the Provision of Fundraising Services and therefore is subject to Local Government Code §271.152

Section 271.152 of the Local Government Code provides that immunity from suit is waived for some contracts: "A local governmental entity that is authorized by statute or the constitution to enter into a contract 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." Tex.

Loc. Gov't Code § 271.152. A contract is "subject to this subchapter" if it "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." Tex. Loc. Gov't Code Ann. §271.151(2)(A). Section 271.152 was enacted in 2005 and was expressly given retroactive effect. *Tooke v. City of Mexia*, 197 S.W.3d 325, 344-45 (Tex. 2006) (citing Act of May 23, 2005, 79th Leg., R.S., ch. 604, §2, 2005 Tex. Gen. Laws 1548, 1549).

The Texas Supreme Court has observed that §271.152 clearly provides waiver of a local government's immunity from suit. *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006) ("The statute's plain language allows for enforcement of contracts against local governmental entities by waiving their immunity from suit."). In addition, the Texas Supreme Court has interpreted the word "services" in §271.151(2)(A) to be "broad enough to encompass a wide array of activities." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth*, 320 S.W.3d 829, 839 (Tex. 2010).

This Court has identified five requirements for a contract to qualify for waiver of immunity under §§271.151 & 271,152: (1) the contract must 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." *Solis v. City of Laredo*, 353 S.W.3d 528, 532 (Tex. App.—San Antonio 2011).

Further, the Texas Supreme Court has noted that the essential terms of a contract for services under §271.151(2) would be the names of the parties, the services or property at issue, and basic obligations. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010).

In this case, the Memorandum Agreement is written; it includes the names of the parties, the services at issue (the Hays Street Bridge Restoration Group fundraising work), and the basic obligations of the parties (Hays Street Group would use its best efforts to solicit donations for the Project and in exchange, the City would ensure that all resources generated by the Group would be used for the Hays Street Bridge Project); it thus provides for services to the local governmental entity; and it was signed by the Director of Planning, who was authorized to execute this contract on behalf of the City. Accordingly, the contract between the Hays Street Group and the City fits the description in §271.151(2)(A) and is subject to Subchapter I.

The City does not offer any argument against this conclusion but instead contends that the Local Government Code does not waive the City's immunity to suit for a breach of contract action seeking specific performance. Thus, the City asserts, its immunity to suit has not been waived in this case because the Hays St. Group' breach of contract claim sought specific performance of the contract, rather than monetary damages. (App. Br. at 12).

The City's interpretation of §§271.152 and 271.153 are wrong, as explained in the following section. For purposes of clarity, it should be noted that the City has incorrectly referred to the current version of §271.153**(c)** as "271.153**(b)**" Appellant Brief at 13-14.

B. The waiver of immunity in §271.152 extends to a breach of contract claim that seeks specific performance of the contract.

As discussed above, §271.152 provides that, by entering a written contract involving goods or services, a local government entity waives immunity to suit "for the purpose of adjudicating a claim for breach of the contract …" The term "adjudication" is defined as "the bringing of a civil suit and prosecution to final judgment in county or state court …" Tex. Loc. Gov't Code Ann. § 271.151(1).

Under long-standing Texas contract doctrine, when a breach of contract claim is brought and successfully prosecuted to final judgment in county or state court, the plaintiff is entitled to monetary damages or, in the alternative and subject to the trial court's discretion, an order of specific performance. *Anderson Energy Corp. v. Dominion Oklahoma Texas Expl. & Prod., Inc.*, 469 S.W.3d 280, 301 (Tex. App. 2015) ("Specific performance is an equitable remedy that may be awarded for a breach of contract, as a substitute for money damages when such damages would not be adequate."); *Davis v. Luby*, No. 04–09–00662–CV, 2010 WL 3160000, at *3 (Tex. App.–San Antonio Aug. 11, 2010, no pet.) (mem. op.) ("Specific performance is not a

separate cause of action, but rather is an equitable remedy used as a substitute for monetary damages when such damages would not be adequate."). Thus, in prosecuting a breach of contract claim, the plaintiff must elect between the inconsistent remedies of money damages and specific performance. *Id*. (in a breach of contract suit, "one must elect to sue for either money damages or specific performance"); *Pitman* v. *Lightfoot*, 937 S.W.2d 496, 533 (Tex. App.-San Antonio 1996, writ denied) ("A party who seeks redress under two or more theories of recovery for a single wrong must elect, before the judgment is rendered, under which remedy he wishes the court to enter a judgment."). This election of remedies is part of the adjudication of a breach of contract action.

Accordingly, the waiver of immunity from suit in §271.152 necessarily encompasses breach of contract claims seeking either monetary damages or specific performance, "subject to the terms and conditions of this subchapter." *Zachry Const. Corp. v. Port of Houston Auth. of Harris County*, 449 S.W.3d 98, 108 (Tex. 2014) ("The "subject to" phrase most reasonably refers to "waives", thus making the provisions of the Act limitations on the waiver of immunity."). Since no provision in Local Government Code Chapter 271, Subchapter I prohibits the remedy of specific performance in a breach of contract claim, the District Court in this case correctly held that the City's immunity from suit is waived by §271.152.

The City argues against this conclusion by asserting that §271.153 waives immunity from suit only for breach of contract claims that seek monetary damages and that the only waiver of immunity for an action seeking specific performance is contained in subsection 271.153(c). App Br 10-14 ("This is the only section where the legislature expressly waived immunity for specific performance"). In constructing this argument, the City never mentions §271.152. At the end of this argument, the City cites *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty*, 449 S.W.3d 98, 108-10 (Tex. 2014), and the Texas Supreme Court's discussion, in that opinion, of the interplay between §§271.152 and 271.153. (App. Br. 14) Although the City suggests that this discussion supports its interpretation of §271.153, it does not. The Texas Supreme Court did not hold that §271.153 waives immunity to suit. Instead, the Court held that §271.152 waives immunity to suit and that "Section 271.153's limitations on recovery are incorporated into Section 271.152 by its last 'subject to' clause and are thereby conditions on the Act's waiver of immunity." *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 109 (Tex. 2014). In other words, "Section 271.152 uses Section 271.153 to further define to what extent immunity has been waived." *Id.* Accordingly, §271.152 does not waive immunity to suit for a claim seeking only monetary damages that are prohibited by §271.153. *Id* at 109; Tooke *v. City of Mexia*, 197 S.W.3d 325, 344-46 (Tex. 2006) (no waiver of immunity to suit if the only remedy sought is prohibited by §271.153).

In this case, then, the appropriate question is whether §271.153 prohibits the remedy of specific performance. This question is addressed in the next part.

C. Section 271.153 does not prohibit the remedy of specific performance

1. Subsection 271.153(c) is not applicable to this case.

The Hays Street Group's claim arose in 2012, when the City transferred the land at 803 N. Cherry to the Alamo Beer Company in violation of its 2002 contract with the Hays Street Group. Section 271.153(c) was enacted in 2013, with the express provision that it would not apply to contracts executed before June 14, 2013. 2013 Tex. Sess. Law Serv. Ch. 1138 (H.B. 3511), Section 4(c). The version of §271.153 applicable to this case is as follows:

> § 271.153. Limitations on Adjudication Awards
>
> (a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:
>
> (1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;
> (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and
> (3) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.
>
> (b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

(1) consequential damages, except as expressly allowed under Subsection (a)(1);
(2) exemplary damages; or
(3) damages for unabsorbed home office overhead.

The Texas Supreme Court faced a similar situation in *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011), which involved a contract created in 1982, an alleged breach of contract that occurred in 1999, a lawsuit that was filed in 2000, a plea to the jurisdiction filed in 2003, enactment with retroactive application of §§271.151-271.158 in 2005, and enactment without retroactive application of an amendment of §271.153(a)(3) (regarding attorney's fees and having no significance to the case at bar) in 2009. The Supreme Court limited its analysis to the applicable version of §271.153. *Id.* at 412, n 5.

2. Even if § 271.153(c) is considered, §271.153 does not prohibit the remedy of specific performance

a) The maxim of *expressio unius est exclusio alterius* is not a rule of law.

The City's interpretation of §271.153 rests on the maxim of *expressio unius est exclusio alterius*—the expression of one is the exclusion of another. As applied to statutory interpretation, this maxim holds that legislative silence may be significant. The City argues that the inclusion of the remedy of specific performance in subsection 271.153(c) (regarding contracts for reclaimed water as defined in §271.151(2)(B)),

means that the legislature intended to prohibit specific performance as a remedy in cases involving contracts for goods or services (§271.151(2)(A)).

Yet, as the Texas Supreme Court has repeatedly emphasized, the maxim of expressio unius est exclusio alterius is not a rule of law, legislatures do not always intend their silence to be significant, and the maxim must be treated with great caution:

> A statute's silence can be significant. When the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended. If so, we must honor that difference.
>
> Of course, legislatures do not always mean to say something by silence. Legislative silence may be due to mistake, oversight, lack of consensus, implied delegation to courts or agencies, or an intent to avoid unnecessary repetition.

PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship, 146 S.W.3d 79, 84 (Tex. 2004); *cf. Mid-Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 265 (Tex. 1999) (*citing Grothues v. City of Helotes*, 928 S.W.2d 725, 728 n. 4 (Tex. App.—San Antonio 1996, no writ)) ("The doctrine of expressio unius est exclusio alterius is simply an aid to determine legislative intent, not an absolute rule. As a rule of reason and logic, it should not be mechanically applied to compel an unreasonable interpretation.").

As an aid to interpretation of Local Government Code §271.153, the maxim of expressio unius est exclusio alterius directs the Court to look more closely at the legislature's intent in enacting this section and, in particular, to determine whether, by

adding subsection 271.153(c) in 2013, the legislature intended to prohibit the remedy of specific performance.

b) The 79th Legislature did not intend that subsections 271.153(a) and (b) would prohibit the remedy of specific performance.

The goal of statutory interpretation is to identify and give effect to the legislature's intent. *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998) ("Our objective when we construe a statute is to determine and give effect to the Legislature's intent."); *Bruington Eng'g, Ltd. v. Pedernal Energy, L.L.C.*, 456 S.W.3d 181, 185 (Tex. App.—San Antonio 2014), reconsideration en banc denied (Jan. 28, 2015) ("our primary objective is to discern and give effect to the Legislature's intent."); Tex. Gov't Code Ann. § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.").

To determine legislative intent, the Court looks at the common meaning of the statute's words, the statutory context, the legislative history, existing law, and the legal and historical circumstances giving rise to the enactment (commonly referenced as "the old law, the evil, and the remedy"). *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("statute's words," "context of the statute," "statute as a whole,"); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998) ("legislative history," "the old law, the evil, and the remedy").

(1) The clear language of Section 271.153

Section 271.153 is entitled "Limitations on Adjudication Awards" and it explicitly limits "(t)he total amount of money awarded in an adjudication …" Nothing in §271.153 purports to prohibit the contractual remedy of specific performance or to restrict the waiver of immunity to suit in §271.152 to only those breach of contract actions that seek monetary damages. With two minor amendments which have no bearing on this case,[1] this language remains in this current version of §271.13; the 2013 Act that added §271.153(c) did not change the title of this provision nor the wording of subsections (a) and (b) in any way.

(2) The legislative history

Local Government Code, Chapter 271, Subchapter I was enacted by the Seventy-Ninth Legislature (2005 Regular Session) as HB 2039. The bill's sponsors, as well as the House Civil Practices Committee Report, expressed the belief that legislation authorizing local government entities to "sue or be sued" waived such entities' immunity from suit and that "recent cases" rejecting this interpretation were wrongly decided. In the view of these legislators, then, HB 2039 "is intended to clarify and re-express the Legislature's intent that all local governmental entities that have been given

1. Section 271.153 was amended in 2009 and 2011, but neither of these amendments are relevant or applicable to this case. See 2009 Tex. Sess. Law Serv. Ch. 1266 (H.B. 987) (adding "reasonable and necessary attorney's fees that are equitable and just" to subsection 271.153(a); 2011 Tex. Sess. Law Serv. Ch. 226 (H.B. 345) (adding "including interest as calculated under Chapter 2251, Government Code") to subsection 217.153(a).

or 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 Bill was discussed at some length in both of the House and Senate Committees, and the Bill was amended in substantial ways (e.g. to apply only to claims for breach of contract, instead of to "all claims arising from the contract") but Appellee has found no mention of any limitation on remedies other than the express limitations on monetary damages contained in §271.153.

c) The 83rd Legislature did not intend that the addition of subsection 271.153(c) would prohibit the remedy of specific performance for breach of contracts not covered by that subsection.

(1) The clear language

The clear language of the 2013 amendment to Local Government Code §§271.151 and 271.153 establishes that it was intended to establish waiver of immunity for Water Supply contracts under §271.152, subject to the limitations on monetary awards in §271,153(c). Nothing in the clear language of these amendments purports to narrow the waiver for contracts described in §271.151(2)(A).

(2) The legislative history

The legislative history of the 2013 addition of subsection is somewhat complicated, but it is clear that the amendment was exclusively focused on the increasing need for judicial resolution in disputes involving contracts in which

electricity generating companies contract to buy reclaimed water from city entities. There was no discussion of the impact that amendment on the waiver of immunity in other breach of contract cases.

The Amendment began with Senate Bill 958, which proposed the addition of a new chapter to the Civil Practices and Remedies Code, entitled Chapter 113 Water Supply Contract Claim Against Local District or Authority. Within a few days an identical bill was filed in the House, as H.B 2592. Soon thereafter, a third bill was filed in the House as H.B. 3511. This third bill did not mention the change to the Civil Practices and Remedies Code but instead proposed the addition of §§271.151(2)(B) and 271.153(c), both focusing exclusively on contracts in which a local government entity has agreed to sell or deliver reclaimed water for industrial use. H. B. 3511 was considered and amended after public hearings before the House Committee on Natural Resources and the Senate Committee on Natural Resources, while S.B. 958 was considered and amended after hearing in the Senate Committee on State Affairs. The texts were then combined with the text of S.B. 958 being added to H.B. 3511, which was approved by both legislative bodies.

Testimony in the public hearings focused on the conflicts that had arisen or could arise in these types of water supply contracts. Witnesses from local water treatment entities and the electrical power industry testified and legislators discussed issues of force major and the risks of decreased water supplies at some length. However, despite

reviewing the video recordings of the numerous committee discussions and the available documentation, Appellee has not found a single reference to the possibility that this Amendment would impact the scope of the waiver of immunity for other contracts subject to §271.152.

D. Every court that has addressed the question has concluded that the remedy of specific performance is available in an action for breach of contract as to which immunity is waived by Local Government Code §271.152.

Although money damages is the preferred remedy in most contract cases, several courts have considered the question whether the waiver of immunity in Local Government Code §271.152 extends to claims seeking specific performance. In each of these cases, the court concluded that it does.

Dallas Area Rapid Transit v. Monroe Shop Partners, Ltd., 293 S.W.3d 839 (Tex. App.—Dallas 2009) involved a "Contract of Sale and Development" in which Dallas Area Rapid Transit ("DART"), a regional transit agency authorized under Chapter 452 of the Texas Transportation Code, promised to sell, and Monroe Shop Partners, Ltd. ("Monroe") promised to purchase and develop, certain historically significant property near a DART rail station. In December 2007, DART terminated the Contract, contending Monroe failed to obtain the required financing. Monroe sued DART for breach of the contract, seeking monetary damages or, in the alternative, specific performance. *Dallas Area Rapid Transit*, 293 S.W.3d at 840, 842. DART filed an interlocutory appeal from the trial court's denial of its plea to the jurisdiction,

asserting, among other points, that "Subchapter I of Chapter 271 of the Local Government Code does not purport to waive immunity to a suit for specific performance." Brief for Appellant at 12, *Dallas Area Rapid Transit,* (05-08-01526-CV), 2009 WL 380859. DART's argument is very similar to that made by the City in this case, including its reliance on *Catalina Dev., Inc. v. City of El Paso*, 121 S.W. 3d 704 (Tex. 2003), (App. Br. at 15-16). The Court of Appeals rejected this argument. *Dallas Area Rapid Transit*, 293 S.W.3d at 842. (The limitation in "Section 271.153 addresses only money damages, not equitable remedies like specific performance.").

Similarly in *City of N. Richland Hills v. Home Town Urban Partners, Ltd*., 340 S.W.3d 900, 904 (Tex. App.—Fort Worth 2011), Hometown Urban Partners et al. sued the City of North Richland Hills, alleging breach of a Development Agreement, among other claims. The Court of Appeals held that the City's governmental immunity had been waived for breach of contract claim, because the contract was one for goods or services under Local Government Code §271.151(2) and because the plaintiff sought monetary damages for amounts due and owing under the contract or specific performance, both of which are permitted under §§271.151-271.158. Id. at 910 ("Appellees pleaded that there are amounts due and owing under the Development Agreement and that they seek specific performance of the Development Agreement, … Appellees' pleadings are sufficient to invoke the trial courts' subject matter jurisdiction.").

There are cases that have disapproved orders for specific performance in actions for breach of contract as to which immunity to suit was waived under §271.152, but none of these cases suggest that the remedy of specific performance was prohibited by the other provisions of Subchapter I. *See, e.g., Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011) (holding that specific performance is not appropriate because there was an adequate remedy at law and declining to adopt the City's assertion that a government entity can never be subjected to an order of specific performance); *City of McAllen v. Casso*, 13-11-00749-CV, 2013 WL 1281992, at *15 (Tex. App.—Corpus Christi Mar. 28, 2013) (Memorandum Opinion) ("The award of specific performance was … in violation of the one-satisfaction rule.").

The cases relied upon by the City are not relevant to this case.

In support of its immunity argument, the City relies on *Tex. Natural Res.Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002), *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838 (Tex. 1958), and *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003). (App. Br. at 15-16). Yet each of these cases was decided before Local Government Code §271.152 was enacted, and each involved the question whether a claim arising from an alleged breach of contract could be brought as an action for declaratory judgment against a government official or entity. That approach was used because courts had previously held that an action for injunctive relief against a government official was not an "action against the state,"

and therefore was not subject to sovereign or governmental immunity. *In IT-Davy, W.D. Haden and Catalina Development*, however, the Texas Supreme Court held that an action for declaratory judgment that arose from an alleged breach of contract was invariably an "action against the state" and therefore did not fall with the class of declaratory judgment cases not subject to sovereign or governmental immunity. Thus, these cases held that claims arising from an alleged breach of contract by a government entity could be brought only if immunity against such claim had been waived by the legislature. That is what the Texas Legislature did by enacting §271.152.

In addition to these three cases, the City cites *Multi-County Water Supply Corp. v. City of Hamilton*, 321 S.W.3d 905 (Tex. App.—Houston [14th Dist.] 2010) for the same proposition, "a government entity has immunity from suits seeking to control government actions." But, again, that case dealt with the limited question whether immunity barred an action for declaratory judgment when the underlying claim arose from an alleged breach of contract. In that case, the City of Hamilton contracted to sell treated water to Multi-County Water Supply Corp. and allegedly increased the price in violation of the contract. Multi-Water Supply Corp. did not bring a breach of contract action against the City of Hamilton and it did not allege waiver of immunity under §271.153. Accordingly, the court did not address application of that provision. *City of Galveston v. CDM Smith, Inc*., 470 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2015), review denied (Oct. 23, 2015) (recognizing that the decision in

Multi-County Corp. is limited to declaratory judgment actions and holding that §271.152 waives immunity for breach of contract actions).

Finally, the City relies on the "default rule of immunity" articulated by this Court in *City of San Antonio ex rel. City Pub. Serv. Bd. v. Wheelabrator Air Pollution Control, Inc.,* 381 S.W.3d 597, 604 (Tex. App.—San Antonio 2012) (interpreting *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006)). However, this idea was expressly rejected by the Texas Supreme Court in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 434 (Tex. Apr. 1, 2016).

E. If this Court finds that the City's immunity is not waived by Local Government Code §271.153, Appellee requests the Court to find that the Contract with the Hays Street Bridge Restoration Group was undertaken by the City in its Proprietary Capacity and the City has no Government Immunity in this Case.

In *Wasson Interests, Ltd*, the Texas Supreme Court held that the distinction between governmental and proprietary functions applies to breach of contract claims and therefore that a city government does not have governmental immunity regarding functions that are proprietary. 489 S.W.3d at 434-439. Prior to that decision, the Fourth Court of Appeals had ruled that the distinction did not apply to breach of contract actions, particularly after enactment of Local Government Code §§271.151-158, and that cities would have immunity from suit from all claims other than those as to which immunity was specifically waived by the legislature. *Wheelabrator*, 381 S.W.3d at 604. This is a significant change in the law of governmental immunity and

this Court is now obligated to decide this case according to current law. *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993).

The distinction between the governmental and proprietary functions of a municipal government was explained by the Texas Supreme Court: "A municipal corporation functions in a dual capacity. At times it functions as a private corporation, and at other times it functions as an arm of the government." *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949); *Accord*, *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006) ("The distinction has not been a clear one, but generally speaking, a municipality's proprietary functions are those conducted 'in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government,' while its governmental functions are 'in the performance of purely governmental matters solely for the public benefit.'); *City of Tyler v. Ingram*, 164 S.W.2d 516, 519 (Tex. 1942) ("A municipal corporation functions in a dual capacity. At times it functions as a private corporation, and at other times it functions as an arm of the government."); *Martinez v. City of San Antonio*, 220 S.W.3d 10, 14 (Tex. App.—San Antonio 2006, no pet.). Similarly, the Texas legislature has described governmental functions as "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty" and proprietary functions as "those functions that a municipality may, in its discretion, perform…" Tex. Civ. Prac. & Rem. Code Ann. § 101.0215.

The City's contract with the Hays Street Bridge Restoration Group is clearly of a proprietary nature. From the City's perspective, the only purpose for the contract was to secure the Group's efforts to raise money. *Cf. Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 452 (Tex. 2016) (municipality's operation of its own public utility is a proprietary function).

The City's asserts that the contract with the Hays Street Group was part of its governmental role of constructing and maintaining bridges, *citing* Tex. Civ. Prac. & Rem. Code Ann. § 101.0215 (a)(4) (App. Reply Br. at 6-7). While it is true that §101.0215 is an important guide for courts applying the governmental-proprietary distinction, *Wasson Interests, Ltd.*, 489 S.W.3d at 439, that section does not categorize fundraising activities, and so the Court must employ the common law distinction – were the drafting and executing of this contract activities that the City undertook "as an arm" of the state government or was they done to enhance and protect the City's corporate coffers? *Dilley*, 222 S.W.2d at 993; *Hudson v. City of Houston*, 392 S.W.3d 714, 722 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (when the activity at issue is not mentioned in § 101.0215 of the Texas Civil Practices and Remedies Code, the court must apply the common law).

Surely this fundraising activity is not part of the City's bridge construction and maintenance function, because the activities involved—fundraising—is not part of a municipalities regular bridge construction and maintenance. *Cf. Canario's, Inc. v. City*

of Austin, 03-14-00455-CV, 2015 WL 5096650, at *4 (Tex. App.—Austin Aug. 26, 2015, pet. denied) (the City's "collecting, holding, and distributing escrow funds related to a construction project was a proprietary function"); *Hudson v. City of Houston*, 392 S.W.3d at 724 ("when a municipality chooses to undertake activities that are not integral to its function as an arm of the state, those functions are generally considered proprietary functions"); *City of Dallas v. City of Corsicana*, 10-14-00090-CV, 2015 WL 4985935, at *4 (Tex. App.—Waco Aug. 20, 2015, pet. filed) (business recruiting via tax abatement is a proprietary function).

Accordingly, the current record is sufficient for the Court to decide that the disputed contract was undertaken by the City in its proprietary capacity.

III. The Trial Record includes legally sufficient evidence of a breach by the City and injury to HSBRG

When a party not bearing the burden of proof on an issue challenges the legal sufficiency of the evidence, "In determining that there is 'no evidence' to support a jury finding, the appellate court must consider the evidence in the light most favorable to the finding, considering only the evidence and inferences which support the finding, and rejecting the evidence and inferences contrary to the finding." *Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496, 497 (Tex. 1978); *see also, City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005) (reviewing courts "must assume jurors made all inferences in favor of their verdict"). If more than a scintilla of

evidence supporting the finding exists, the jury's finding must be upheld. *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51, 60 (Tex. App.—San Antonio 2005).

The elements of a breach of contract claim are (1) a valid contract between plaintiff and defendant; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the breach caused an injury to plaintiff. *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 349 (Tex. App.–San Antonio 2007). The City challenges the legal sufficiency of the evidence on the third and fourth of these elements.

However, before addressing the City's legal sufficiency arguments, a few preliminary matters must be clarified. First, all of the Hays St. Group' pleadings have alleged that the City breached the obligation set forth in Article III of the contract, which is entitled "Responsibilities," to the subparagraph entitled "Department of Planning (Historic Preservation and Neighborhood and Urban Design)," item number 3 ("Ensure that any funds generated by the Restoration Group for the Hays Street Bridge go directly to the approved City of San Antonio budget, as authorized by TxDot, for the Hays Street Bridge project costs …"). 1 CR 17, 1 CR 280, 1 CR 291, 2 CR 320, 3CR 59, 4 RR 18. The City's statement that "HSBRG never identified any provision of the MOU the City is alleged to have breached," (App. Br. at 17), is simply incorrect.

Second, the City omits any discussion of the critical word "funds" in its legal sufficiency argument (Issue 3), thereby avoiding reference to important factual evidence presented at trial. In its discussion of Issue 4, however, the City asserts that the trial court erred in submitting Jury Question 4 and in rejecting one of the City's proposed questions. (App. Br. at 23 (referring to proposed questions 2 and 4 but apparently meaning only proposed question 4, 3 CR 218)). Accordingly, Appellee will address these assertions at this point.

A. The trial court correctly ruled that the word "funds" is ambiguous as used in the Memorandum Agreement, correctly submitted Jury Question 4, correctly rejected the City's proposed jury question 4, and correctly upheld the jury's affirmative answer to Jury Question 4.

When interpreting a contract, the primary goal is "to ascertain the true intentions of the parties as expressed in the agreement." *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273, 279-80 (Tex. App.—San Antonio 2013). The parties' intentions should be understood in light of the facts and circumstances surrounding the contract's execution so long as those circumstances inform, rather than vary from or contradict, the contract's text. *Id.* (*citing Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 & n. 25 (Tex. 2011)). In addition, courts must construe the contract "from a utilitarian standpoint bearing in mind the particular business activity sought to be served" and must attempt to avoid "a construction that is unreasonable, inequitable, and oppressive." Thus, courts "need not embrace strained

rules of interpretation which would avoid ambiguity at all costs." *Reilly v. Rangers Mgmt., Inc*., 727 S.W.2d 527, 530 (Tex. 1987).

Accordingly, when a contract's "meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation," the contract is ambiguous and its meaning must be resolved by the fact-finder. *Rico v. Judson Lofts, Ltd.*, 404 S.W.3d 762, 767 (Tex. App.—San Antonio 2013). Finally, "whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered." *Id.*

Contrary to the City's claim that "there is nothing ambiguous about the word "funds," there can be no doubt that the word fund is susceptible to more than one interpretation. In particular, it can be understood to mean "only money" or it can mean "money and other property, including real property." *See, e.g.,* Merriam-Webster Unabridged Dictionary (defining "fund" as "a sum of money or other resources"); *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224, 227-28 (5th Cir. 1988), *cert. denied*, 488 U.S. 868 (1989) (under Texas law, "funds" includes "property of various kinds"); *In re Estate of Abshire*, 02-10-00060-CV, 2011 WL 3671998, at *6 (Tex. App.—Fort Worth Aug. 18, 2011, pet. den'd) (mem. op.) ("the trial court erred by finding that "funds" did not include Abshire's real property"); *Goggans v.Simmons*, 319 S.W.2d 442, 445 (Tex.Civ.App.-Fort Worth 1958) (the word "funds" means

property of any kind, including real property). There are abundant examples, in Texas and other jurisdictions, in texts of law, business, literature, and many more.

Moreover, the Memorandum Agreement itself does not resolve the meaning of "funds." There is no definition given. The City's agreement with TxDot, which the City insists is necessary to proper interpretation of the Memorandum Agreement, (App. Br. at 7-8,) provides that "Donations of real property, cash, materials, and services required for the development of the Project may be eligible to count towards the local **funding** share of a project as in-kind contributions," 6 RR PX 7 at 5, 6 RR DX 1 at 5, contained in Tab C to Appellant's Brief.

Accordingly, the trial court correctly ruled that the word "funds" is ambiguous as used in the Memorandum Agreement, correctly submitted Jury Question 4, and correctly rejected the City's proposed jury question 4. Moreover, the City's agreement with TxDot itself provides more than a scintilla of evidence to support the Jury's finding, in answer to Jury Question 4, that the parties intended that the word "funds" included donations of money and in-kind donations.

B. There is more than a scintilla of evidence to support the jury's finding that the City breached its contract with the Hays Street Bridge Group.

First, in the context of the City's Motion in Limine seeking to limit the admission of evidence regarding details of the transfer of 803 N. Cherry to the Alamo Beer

Company, the City stipulated that "it's undisputed that the City moved forward with selling the property to somebody and not using it as a park." 4 RR 215

Moreover, the evidence introduced at trial included more than a scintilla of evidence that the Defendant City of San Antonio breached the contract by transferring the land at 803 N. Cherry, which the Hays Street Bridge had solicited as a donation to the Hays Street Bridge Project, to the Alamo Beer Company for its private use. The City Staff recommended and the City Council approved a plan to transfer the land at 803 N. Cherry to the Alamo Beer Company for private commercial use. 5 RR 152.

Finally, Gary Houston, testified that in May or June of 2011, Michael Etienne, Director of the City's Capital Improvement Management Program Real Estate Division, formally announced that "the park was no longer in play and that the City had decided to use this land for commercial development." 4 RR 218, 5 RR 101. This repudiation of the contract with the Hays Street Bridge Restoration Group, is direct evidence of the City's breach of that contract. *Murray v. Crest Const., Inc*., 900 S.W.2d 342, 344 (Tex.1995) (""the repudiation of a contract before the time of performance has arrived [which] amounts to a tender of breach of the entire contract and allows the injured party to immediately pursue an action for damages."); *Colvin v. Rickert*, 04-05-00165-CV, 2006 WL 285993, at *8 (Tex. App.—San Antonio Feb. 8, 2006, pet. denied); *America's Favorite Chicken Company v. Samaras*, 929 S.W.2d 617, (Tex.—App. San Antonio 1996, writ denied)

C. There is more than a scintilla of evidence that the Hays Street Group was injured by the City's breach.

The City did not propose a jury question on the issue of injury caused by the breach of contract and none was given; the trial court did not make and was not requested to make a written finding on this issue. Thus, under Texas Rule of Civil Procedure Rule 279 ("Omissions from the Charge"), a finding that the plaintiff was injured by the breach is deemed to be found, if the trial record includes sufficient evidence to support such a finding. Tex. R. Civ. P. 279.

The trial evidence contains more than a scintilla of evidence that the City's breach of the Memorandum Agreement has caused injury to the Plaintiff: (1) The City's breach exposed the Group to public ridicule and potential liability because both City employees and Group members represented to potential donors that the donated land was to be available to enhance public use of the renovated Hays Street Bridge, (2) the breach had the effect of diverting the benefits of the Group's unpaid work to a private developer, the Alamo Beer Company, over the strong objection of the Group itself, (3) the City's breach has severely diminished the Group's reputation and credibility within the community and among potential donors and supporters, injuring its future fundraising ability, and impairing its ability to fulfill the mission for which it was created. 5 RR 159 These are the "significant injuries" caused directly by the City's breach, supported by more than a scintilla of evidence in the record.

IV. The land at 803 N. Cherry is within the scope of the contract

In this issue, the City challenges the trial court's interpretation of the contract on three points. The first is that the City had no obligation regarding the 803 N. Cherry land (hereinafter the "Land"), because the Land was not transferred to the San Antonio Area Foundation. (App. Br. at 20). The second apparently is that the scope of the contract is defined in the separate agreement between the City and TxDot and the documentation for that agreement does not include the Land. *Id.* This is the argument that the City included in its discussion of Issue 1, but it bears no relevance to that issue, so Appellee will respond to it below. Third, the City argues that the trial court erred in its determination that the word "funds" is ambiguous as it is used in the contract. Appellee responded to this argument in Part III. A., above.

A. Involvement of the San Antonio Area Foundation was not a condition precedent to the City's obligation under the contract

The City asserts that the obligation described in Section III, list item (3) does not apply to all donations to the Hays Street Bridge Project solicited by the Hays Street Group, but only to those that are first deposited with the San Antonio Area Foundation. (App. Br. at 20-21). In other words, the City insists that the words "via the San Antonio Area Foundation's Hays Street Bridge Restoration Fund" must be interpreted as a condition precedent to the City's obligation to "Ensure that any funds generated

by the Restoration Group for the Hays Street Bridge go directly to the approved City of San Antonio budget, as authorized by TxDOT, for the Hays Street Bridge project."

Under well establish principles of Texas contract law, "[i]t is not to be presumed that the parties intended that an impossible thing should be done, or that the parties deliberately entered into an agreement calling for an impossible condition or event as a test of performance. *Dewhurst v. Gulf Marine Inst. of Tech*., 55 S.W.3d 91, 97 (Tex. App.—Corpus Christi 2001). The Texas Supreme Court has explained that the words in a contract will not be construed as a condition precedent without a close examination of the parties intent, *Solar Applications Eng'g, Inc. v. T.A. Operating Corp*., 327 S.W.3d 104, 109 (Tex. 2010). Normally, an intent to create a condition will be indicated by words such as "if," "provided that," "on condition that," or some similar phrase of conditional language. *Id.* In addition, "because of their harshness in operation, conditions are not favorites of the law" and "[w]hen the intent of the parties is doubtful or when a condition would impose an absurd or impossible result," contract language should not be interpreted as a condition. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990).

The City's interpretation of the words "via the San Antonio Area Foundation's Hays Street Bridge Restoration Fund" would lead to just such an absurd or impossible result. This part of the Memorandum Agreement, Section III, list item 3, deals with the City's responsibility with regard to contributions solicited by the Hays Street

Group. Yet nothing in the agreement suggests any reason why the City's responsibility should depend on whether the contributions were transferred directly to the City or through the San Antonio Area Foundation. The City's employee, who helped the City Attorney to draft the Memorandum Agreement, testified that the involvement of the San Antonio Area Foundation was not important to the purpose of the agreement. 5 RR 29-20. Yet the City's interpretation would have the effect of forfeiting a significant part of the protection sought by the Hays Street Group in entering the agreement.

The City's suggested interpretation must be rejected.

B. The Local Transportation Project Advance Funding Agreement does not have the effect of excluding 803 N. Cherry from the Memorandum Agreement.

1. The Advance Funding Agreement is largely irrelevant to the meaning of the Memorandum Agreement.

The Advance Funding Agreement was signed after the contract between the City and the Hays St. Group was executed. PX 7, DX 1. Moreover, the Hays St. Group was not given a copy of the Advance Funding Agreement. Thus, while the Advance Funding Agreement may indicate something about the City's unstated intent and understanding, it does not determine the scope of the Memorandum of Agreement. "While under some circumstances the understanding of a party to an agreement is of some importance in interpreting it, what one party to an agreement understands or believes does not ordinarily govern its construction, unless such understanding or belief was induced by the conduct or declaration of the other party or was known to

the other party." *McBride v. Ponder*, 242 S.W.2d 253, 256 (Tex. Civ. App.—San Antonio 1951).

2. Even if the Advance Funding Agreement is found to have some bearing on the intention of the parties to the Memorandum Agreement, it does not indicate that 803 N. Cherry is not subject to that contract.

In its argument to the Court, as well as in its argument to the trial court and to the jury, the City contends that the Memorandum Agreement precludes coverage of the land at 803 N. Cherry because the Advance Funding Agreement does not mention a park. (App. Br. at 7). The Advance Funding Agreement also does not mention restroom facilities, an information center, or visitor parking, the essential functions planned for the 803 N. Cherry land. 4 RR 196-205.

However, the Advance Funding Agreement explicitly provides that additional components may be added to the Project covered by the Agreement. 4 RR PX7, DX1. If the trial court accepted the City's argument that the Advance Funding Agreement is relevant to interpretation of the Memorandum Agreement, then the court certainly could have found that the land at 803 N. Cherry is subject to the Memorandum Agreement.

PRAYER

For the reasons stated in this brief, Appellee Hays Street Bridge Restoration Group respectfully requests that this Court uphold the jury verdict and the judgment of the District Court in all respects.

Respectfully submitted,

/s/ Amy Kastely

Attorney for Appellee Hays Street Bridge Restoration Group
Texas Bar No. 24006638
233 Lotus Ave., San Antonio, TX 78210
(210) 216-3241 – Phone
(210) 338-8668 – Fax
amykastely@fastem.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Appeellee's Brief has been delivered via e-mail transmission on this 13th day of April 2016, to the following attorneys for Appellant:

Deborah Lynne Klein
Office of the City Attorney Litigation Division
111 Soledad Street, 10th Floor
San Antonio, TX 78205
deborah.klein@sanantonio.gov

Dan Pozza
Pozza & Whyte, PLLC
239 E. Commerce Street
San Antonio, TX 78205
danpozza@pozzaandwhyte.com

/s/ Amy Kastely

CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this Brief of Appellee complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(D) because this brief contains 9,684 words, excluding parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This brief complies with the typeface requirement of Tex. R. App. P. 9.4(e) because this brief has been prepared in a conventional typeface of 14-point font in the text.

/s/Amy Kastely

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Appellee's Brief With Amendments Incorporated has been delivered via e-mail transmission on this 22nd day of September 2016, to the following attorneys for Appellant:

Deborah Lynne Klein
Office of the City Attorney Litigation Division
Frost Bank Tower
100 West Houston Street.
San Antonio, TX 78205
deborah.klein@sanantonio.gov

Dan Pozza
Pozza & Whyte, PLLC
239 E. Commerce Street
San Antonio, TX 78205
danpozza@pozzaandwhyte.com

/s/ Amy Kastely