

NO. 2017-36216

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
CITY OF HOUSTON, ET AL.,	§	
	§	
Defendants.	§	190TH JUDICIAL DISTRICT

DEFENDANT CITY OF HOUSTON'S PLEA TO THE JURISDICTION

Defendant City of Houston (the "City") files this Plea to the Jurisdiction seeking dismissal of all claims filed against it by Plaintiff Houston Firefighters' Relief and Retirement Fund ("Plaintiff" or "HFRRF").

I. SUMMARY OF ARGUMENT

This Court should dismiss HFRRF's claims against the City for lack of subject matter jurisdiction because the City is immune from suit in this case.

HFRRF alleges that this Court has jurisdiction to hear its declaratory judgment claims pursuant to the Texas Declaratory Judgments Act (the "Declaratory Judgments Act") because HFRRF challenges the constitutionality of Texas Senate Bill 2190 ("SB 2190"). But the City's governmental immunity for those claims has not been waived for several reasons.

First, the City is immune from HFRRF's declaratory judgment claims because HFRRF has not met its burden to allege a valid waiver of immunity. Texas law provides that in order to allege a valid waiver of immunity, HFRRF must first meet its burden to establish a valid constitutional challenge to SB 2190. *See Gen. Servs. Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 599 (Tex. 2001) (dismissing inverse condemnation claim for want of jurisdiction

because allegations did not state a takings claim); *see also Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 395 (Tex. App.—Fort Worth 2008, no pet.) (when a plaintiff fails to allege facts that constitute a taking, dismissal for want of jurisdiction is appropriate) (citing *Gen. Servs. Com'n*, 39 S.W.3d at 600). For the reasons set forth in Certain Defendants' Response in Opposition to Plaintiff's Application for Temporary Injunction, Subject to Certain Defendants' Plea to the Jurisdiction, which is incorporated by reference as if fully set forth herein, HFRRF has not and cannot establish a valid constitutional challenge.

Second, the Declaratory Judgments Act “does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law.” *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam). To the extent HFRRF's claims for declaratory relief seek a declaration of HFRRF's rights under the predecessor statute to SB 2190, or an interpretation of that statute, the City is immune from those claims.

Third, to the extent that HFRRF seeks retrospective relief, the City is immune from claims from such relief. *See City of Dallas v. Albert*, 354 S.W.3d 368, 378-79 (Tex. 2011) (a party cannot obtain retrospective relief against a government entity or its officials, whether by a declaratory judgment action or an *ultra vires* claim, because such claims are barred by immunity).

Finally, to the extent alleged, the City is immune from HFRRF's *ultra vires* claims because *ultra vires* claims may not be asserted against a government entity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009).

For these reasons, this Court has no jurisdiction to determine HFRRF's claims against the City.

II. LEGAL STANDARD

A. This Court Must Dismiss The City Where, As Here, The Court Has No Subject-Matter Jurisdiction To Hear HFRRF's Claims Against The City

It is well-established that where a trial court lacks subject matter jurisdiction to hear a plaintiff's claims, it must dismiss the those claims. *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (“the trial court lacks subject matter jurisdiction and must dismiss those claims without prejudice to refileing”); *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012) (same). “A plea to the jurisdiction seeks to dismiss a case for want of jurisdiction.” *See City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2009).

Governmental immunity from suit deprives a trial court of subject matter jurisdiction unless such immunity is waived. *See Mission Consol. Ind. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 & n.2 (Tex. 2008); *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). The party suing the governmental entity has the burden to both plead and prove consent to suit under a clear and unambiguous constitutional or statutory waiver of that immunity. *See Tex. Nat. Res. Cons. Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-55 (Tex. 2002); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

B. This Court Should Rule on The City's Plea To The Jurisdiction Before Considering HFRRF's Application For Temporary Injunction

As an initial matter, this Court should rule on the City's plea to the jurisdiction before it considers HFRRF's application for a temporary injunction. *City of Galveston v. Gray*, 93 S.W.3d 587 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

In *Gray*, the court held that the trial court abused its discretion by refusing to rule on the city's and the county's pleas to the jurisdiction and instead, granting a motion for continuance. *Id.* at 591. The court found that a governmental unit's entitlement to be free from

suit is effectively lost if the trial court erroneously assumes jurisdiction and subjects the governmental unit to pre-trial discovery and the costs incident to litigation; therefore, the trial court abused its discretion and there was no adequate remedy at law. *Id.* at 593 (granting a petition for writ of mandamus and ordering the trial court to rule on the pleas to the jurisdiction); *see also In re Greenwell*, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding) (granting mandamus to require the trial judge to rule on a city's motion for partial summary judgment based on governmental immunity when the judge refused to rule on the motion until after trial).¹

Here, if the Court considers HFRRF's application for temporary injunction before ruling on the City's plea to the jurisdiction, the City stands to lose much more than the city and the county did in *Gray*. In addition to being subject to discovery and the costs of litigation—which alone was enough to trigger a mandamus remedy in *Gray*—the City in this case is facing a temporary injunction which threatens to invalidate a duly enacted Texas law and forcibly alter the budget for the entire City of Houston. Accordingly, this Court should rule on the plea to the jurisdiction before considering HFRRF's application for temporary injunction.

¹ *See also In re Kleven*, 100 S.W.3d 643, 644-45 (Tex. App.—Texarkana 2003, no pet.) (five and six-month delays on ruling on discovery motions was abuse of discretion); *In re Shredder Co., L.L.C.*, 225 S.W.3d 676, 679-80 (Tex. App.—El Paso 2006, no pet.) (eight-month delay on ruling on motion to compel arbitration after hearing was abuse of discretion); *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, no writ) (ten-month delay in setting hearing on motion to compel discovery was abuse of discretion); *O'Donniley v. Golden*, 860 S.W.2d 267, 269 (Tex. App.—Tyler 1993, no writ) (thirteen-month delay in ruling on motion for appointment was an abuse of discretion).

III. ARGUMENT & AUTHORITIES

A. The City is Entitled To Dismissal of HFRRF's Declaratory Judgment Claims For Want of Subject Matter Jurisdiction

1. The City is immune from HFRRF's declaratory judgment claims because HFRRF has not met its burden to establish a valid constitutional challenge to SB 2190

“When bringing suit against a governmental unit, the plaintiff bears the burden of establishing the court's subject matter jurisdiction by alleging a valid waiver of immunity.” *Anheuser–Busch, LLC v. Harris Cty. Tax Assessor–Collector*, No. 01–15–00422–CV, 2016 WL 5920766, at *5 (Tex. App.–Houston [1st Dist.] Oct. 11, 2016, no pet. h.). Here, in order to allege a valid waiver of immunity, HFRRF must meet its burden to establish a valid constitutional challenge to SB 2190. *City of Dallas v. Turley*, 316 S.W.3d 762, 771-72 (Tex. App.—Dallas 2010, pet. denied) (holding that the trial court erred in denying the city’s plea to the jurisdiction because plaintiffs did not establish a valid challenge to a city ordinance).²

Here, HFRRF has not alleged a valid waiver of immunity against Defendants because it has not met its burden to establish a valid constitutional challenge to SB 2190. The reasons for this are set forth in Certain Defendants’ Response in Opposition to Plaintiff’s Application for Temporary Injunction, Subject to Certain Defendants’ Pleas to the Jurisdiction, and the exhibits thereto, which Defendants incorporate fully herein.

² If a plea to the jurisdiction challenges the existence of jurisdictional facts, courts consider relevant evidence when necessary to resolve the jurisdictional issues raised, even where those facts implicate the merits of the case of action. *See Kirwan*, 298 S.W.3d at 622-24; *Garcia*, 253 S.W.3d at 657-58. Here, given the overlap between the validity of HFRRF’s constitutional claims and the existence of a valid waiver of immunity, the Court should consider the constitutionality challenge to SB 2190.

2. The City is immune from HFRRF’s claims for declaratory relief to the extent HFRRF seeks a declaration of its rights under Article 6243e.2(1), or an interpretation of Article 6243e.2(1)

The Declaratory Judgments Act “does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law.” *Sefzik*, 355 S.W.3d at 621. Similarly, the Declaratory Judgments Act also does not waive immunity for claims seeking an interpretation of an ordinance or statute. *See City of McKinney v. Hank’s Rest. Group, L.P.*, 412 S.W.3d 102, 112-13 (Tex. App.—Dallas 2013, no pet.) (holding that the City of McKinney was immune from several of plaintiff’s requests for declaratory relief because those requests all “involve[d] claims that City officials [we]re violating or misapplying the law in some respect.”); *Becky, Ltd. v. City of Cedar Park*, 2017 WL 224527, at *5-7 (Tex. App.—Austin, May 19, 2017, no pet. h.) (holding that the Declaratory Judgments Act did not waive the City of Cedar Park’s governmental immunity because plaintiff was “seeking a declaration of rights and challenging the City's actions under the ordinances.”).

Here, HFRRF seeks a declaration that the City must “allocate funding in accordance with the existing version of Article 6243e.2(1), including among other things, the [HFRRF] Board’s adopted rate of return.” *See* HFRRF’s Brief in Support of Its Application for Temporary Injunction, at 2. To the extent that claim amounts to HFRRF seeking a declaration of its rights under Article 6243e.2(1), or an interpretation of Article 6243e.2(1), the City is immune from that claim.

B. The City Is Immune From HFRRF’s Claims For Retrospective Relief

To the extent that HFRRF seeks retrospective relief, the City is immune from claims from such relief. A party cannot obtain retrospective relief against a government entity or its officials, whether by a declaratory judgment action or an *ultra vires* claim, because such claims

are barred by immunity. *See Albert*, 354 S.W.3d at 378-79. It is well-settled that a party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment. *Id.* (citing *City of Houston v. Williams*, 216 S.W.3d 827, 828–29 (Tex. 2007) (per curiam)). Claims seeking retrospective monetary relief are barred by immunity where the injury alleged has already occurred leaving the claimant with only one plausible remedy—an award of money damages. *Id.* at 374. A successful claimant is entitled to only prospective relief “as measured from the date of injunction.” *Id.* at 376 (citing *Edelman v. Jordan*, 415 U.S. 651, 669 (1974)).

Here, HFRRF requests “[r]etrospective relief in the form of a money judgment for any underpayment of monies owed by the City to the Fund for failing to act in accordance with Article 6243e.2(1) and Texas Constitution article XVI, section 67, from July 1, 2017 to the date of the Final Judgment[.]” *See* HFRRF’s First Amended Petition at 18. Such claims are barred by immunity. Accordingly, to the extent that HFRRF seeks this or any other retrospective relief, this Court should find that the City is immune from such a claim.

C. The City Is Immune From HFRRF’s *Ultra Vires* Claims

An *ultra vires* claim requires the litigant to prove that a governmental official acted without legal authority or failed to perform a purely ministerial act. *Heinrich*, 284 S.W.3d at 372. Such claims have been recognized as an exception to the sovereign immunity of the governmental official. *Id.* But an *ultra vires* claim cannot be asserted against the governmental entity itself. *Id.* at 373. The governmental entity instead retains its immunity from an *ultra vires* lawsuit. *Id.* Therefore, the Court must sustain the City’s plea to the jurisdiction because the City is immune from HFRRF’s *ultra vires* claim.

IV. CONCLUSION & PRAYER

Accordingly, for the foregoing reasons, Defendant City of Houston respectfully requests the Court to sustain this Plea to the Jurisdiction, enter an order dismissing all of HFRFF's claims against Defendant City of Houston in this case for want of subject-matter jurisdiction, and grant any and all such other and further relief, whether at law or in equity, to which the City of Houston may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This pleading has been served upon all counsel of record in compliance with the Texas

Rules of Civil Procedure on June 20, 2017:

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