TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00253-CV

River City Partners, Ltd., Appellant

v.

City of Austin, Appellee

FROM THE 200TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-006086, THE HONORABLE JAN SOIFER, JUDGE PRESIDING

MEMORANDUM OPINION

This appeal arises from a dispute over a municipal ordinance that limits the size of retail development in the Barton Springs Zone of Austin. *See* Austin, Tex., Code of Ordinances, § 25-2-651 (2019) (BSZ Ordinance). In 2017, River City Partners applied for permission to construct an automobile dealership and service center that would exceed the ordinance's limitations. Permission was refused, and River City sued the City of Austin seeking declaratory and injunctive relief. River City's primary argument was that chapter 245 of the Local Government Code required the City to consider only its regulations in effect at the time the first permit application for the project was filed with the City. *See generally* Tex. Loc. Gov't Code §§ 245.001–.007. The district court sustained the City of Austin's plea to the jurisdiction on governmental immunity grounds. We affirm.

BACKGROUND

Regulatory Framework

"Generally, the right to develop property is subject to intervening regulations or regulatory changes." *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998) (op. on reh'g). Chapter 245 alters this rule by limiting the ability of regulatory agencies to enforce changes in land-use regulations against development projects already in progress. *See Shumaker Enters., Inc. v. City of Austin*, 325 S.W.3d 812, 814–15 & n.5 (Tex. App.—Austin 2010, no pet.); *see also* Tex. Loc. Gov't Code § 245.001(3) (defining "project" as "an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor"). As relevant to this appeal, section 245.002 provides:

> (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed.
>
> (b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.

Act of May 11, 1999, 76th Leg., R.S., ch. 73, § 2, 1999 Tex. Gen. Laws 432, 432–33 (current version at Tex. Loc. Gov't Code § 245.002(a)–(b)).[1]

[1] The statute as amended clarifies that rights vest in a project with the filing of a permit application that "gives the regulatory agency fair notice of the project and the nature of the permit sought" and provides that an application or plan is considered filed on the date it is sent by certified

The rights created by this provision, commonly called vested rights, attach to a project rather than a permit holder and follow any conveyances or transfers of rights related to the project. *See City of San Antonio v. Greater San Antonio Builders Ass'n*, 419 S.W.3d 597, 601 (Tex. App.—San Antonio 2013, pet. denied.); *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 250 (Tex. App.—Austin 2011, pet. denied). However, chapter 245 does not apply to certain types of permits and land use regulations including, as relevant here, certain "municipal zoning regulations." *See* Tex. Loc. Gov't Code § 245.004(2).

Background Facts

The property at issue is located at the intersection of State Highway 71 and Old Bee Cave Road in the Oak Hill Area of Austin. The events relevant to this appeal date to 1985, when the City had recently annexed the area and, consequently, had no permanent zoning classifications in place. On the recommendation of the City's land-development office, the Austin City Council made permanent zoning classification for several properties, including the one at issue here, contingent on meeting certain development standards more stringent than required by the City's general zoning ordinances. The standard relevant here is floor area ratio (FAR), the requirement that structures not exceed a certain size relative to the land. *See* Austin, Tex., Code of

---

mail. *See* Act of Sept. 1, 2005, 79th Leg., R.S., ch. 6, § 2, 2005 Tex. Gen. Laws 5, 5–6 (codified at Tex. Loc. Gov't Code § 245.002(a), (a–1)). The City cites to the current version of the statute but acknowledges that the Legislature provided that the amendments to subsection 245.002(a) and the addition of subsection (a)(1) "apply only to a project commenced on or after the effective date" of those amendments. *See* Tex. Loc. Gov't Code § 245.002(g). We apply the pre-2005 version of the statute here because River City alleges its project commenced with permit applications filed before the amendments' effective date. *See Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 250 n.1 (Tex. App.—Austin 2011, pet. denied) (concluding that "the amended language, strictly speaking, is not before us").

Ordinances, § 25-1-21(42) ("Floor Area Ratio means the ratio of gross floor area to gross site area."); *see also id*. § 25-1-21(46), (47) (defining "gross floor area" and "gross site area").

In 1986, River City's predecessor in title applied to rezone the property to the Community Commercial classification. At the time, the City's zoning regulations for that classification set a 1:1 FAR, meaning developers could construct up to one square foot of gross floor area per square foot of land. The City conditioned its approval on the owner impressing the land with a restrictive covenant that, among other things, limited development to no more than 0.2:1 FAR. The owner executed and recorded the requested covenant (1986 Covenant), and the Austin City Council reclassified the property to Community Commercial a short time later.

In April 2003, the property owner applied to the City for approval to create an eight-lot commercial subdivision. *See* Tex. Loc. Gov't Code § 212.004(a) (requiring owner of tract of land inside municipal borders "who divides the tract in two or more parts to lay out a subdivision of the tract" to "have a plat of the subdivision prepared"). While the application was still pending, the Austin City Council enacted the BSZ Ordinance. *See* Austin, Tex., Ordinance No. 031204-57 (Dec. 5, 2003) (codified in Austin City Code chapter 25-2). The BSZ Ordinance designates twenty-two activities as retail uses and provides that "a principal retail use and its accessory uses may not exceed 50,000 square feet of gross floor area." *See* Austin, Tex., Code of Ordinances, § 25-2-651(C), (D). Retail uses include, as relevant here, "automobile repair services" and "automotive sales." *Id.* § 25-2-651(C)(5), (6).

The City approved the plat application the following year and issued a final subdivision plat (2004 Subdivision Plat). The plat notes state that development on the lots "will be limited to 65% impervious [cover] with a maximum floor to area ratio not to exceed 0.2 to 1 pursuant to the restrictive covenant dated October 4, 1986." River City subsequently purchased

six of the lots and applied for permission to construct an auto dealership and service center. The plans called for a 76,272-square-foot structure to house an automotive sales department and service center and a 14,886-square-foot structure for a used car sales department. Aware that its plans exceeded the BSZ Ordinance's limits on use size, River City sought an exemption on the ground that the BSZ Ordinance conflicted with the 1986 Covenant. The City initially agreed and, in November 2017, informed River City that:

> The zoning overlay outlined in section 25-2-651 of the Land Development Code is in conflict with the [1986] restrictive covenant recorded as part of zoning case C14-85-288.112. The zoning overlay in 25-2-651 was adopted subsequent to the recordation of the original covenant in October 1986 and limits the rights granted by the original covenant. The project is entitled to the rights granted in the 1986 covenant and the current development will not be subject to the requirements of 25-2-651.

The City reconsidered seven months later:

> Staff is aware that our previous communication indicated that 25-2-651 would not be applicable to this development. However, after further investigation and study of the impacts of the application of 25-2-651(D) it does not appear to significantly reduce the allowable development potential below the 120,569 SF of allowable gross building area provided under the restrictive covenant. For example, the site could be permitted to have 49,999 SF of auto sales and 49,999 SF of auto service use as a secondary and separate use, plus a third permitted use such as restaurant, office, or other uses allowed in the GR zoning classification.

In October 2018, River City sued to enjoin the City from enforcing the ordinance and sought relief under the Uniform Declaratory Judgment Act (UDJA). *See* Tex. Civ. Prac. & Rem. Code § 37.004(a). Specifically, River City sought a declaration that chapter 245 of the Local Government Code requires the City not to enforce the BSZ Ordinance, *see* Tex. Loc. Gov't Code §§ 245.001–.007, that River City's application fits into one of the ordinance's exemptions, *see* Austin, Tex., Code of Ordinances, § 25-2-651(B)(1), or that the City should be estopped from

applying the BSZ Ordinance. The City filed a plea to the jurisdiction arguing River City had failed to plead facts waiving the City's governmental immunity. The district court sustained the plea and dismissed River City's claims with prejudice. This appeal followed.

LEGAL STANDARDS

"Governmental immunity generally protects municipalities and other state subdivisions from suit unless the immunity has been waived by the constitution or state law." *University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 512 (Tex. 2019) (quoting *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014)). Immunity from suit is properly asserted in a plea to the jurisdiction because it implicates courts' subject-matter jurisdiction. *See id.* When a governmental entity challenges jurisdiction on immunity grounds, "the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *See Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam) (quoting *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003)).

We review a trial court's disposition of a plea to the jurisdiction de novo. *City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 575 (Tex. 2018). When a plea to the jurisdiction challenges the adequacy of the pleadings, as here, we construe the pleadings "liberally in favor of the plaintiff to determine whether the facts alleged affirmatively demonstrate the court's jurisdiction to hear the matter." *Id.* If the pleadings fail to establish jurisdiction but do not affirmatively negate jurisdiction, the plaintiff is entitled to a "reasonable opportunity to amend" its pleadings. *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839 (Tex. 2007) (citing *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004)).

DISCUSSION

River City argues the district court erred in dismissing its suit for declaratory relief from the threatened enforcement of the BSZ Ordinance. The UDJA authorizes a person whose rights "are affected by a statute [or] municipal ordinance" to "have determined any question of construction or validity arising under the . . . statute [or] ordinance. . . and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). This authorization does not create jurisdiction but is "merely a procedural device for deciding cases already within a court's jurisdiction." *Texas Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011) (quoting *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)). River City must therefore identify a waiver of governmental immunity to establish the district court's jurisdiction over its claim for relief. *See id.* (observing that immunity bars "an otherwise proper [UDJA] claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity"). Here, the only alleged waiver is found in chapter 245 of the Local Government Code: "A political subdivision's immunity from suit is waived in regard to an action under this chapter." Tex. Loc. Gov't Code § 245.006(b). This provision plainly makes waiver of immunity turn on whether the plaintiff pled a claim to enforce chapter 245's protections. *See id.*; *Village of Tiki Island v. Premier Tierra Holdings Inc.*, 555 S.W.3d 738, 745–46 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (recognizing waiver of immunity under section 245.006 turns on whether plaintiff has "plead a claim to enforce chapter 245"); *City of McKinney v. Hank's Rest. Grp.*, 412 S.W.3d 102, 116 (Tex. App.—Dallas 2013, no pet.) (noting waiver of immunity under section 245.006 turns on whether plaintiff "allege[d] facts sufficient to demonstrate that its declaratory-judgment claims come within the scope of Chapter 245"). The question, then, is whether River City's factual allegations, taken as true, state a claim

to which chapter 245 applies. *See Village of Tiki Island*, 555 S.W.3d at 745–46; *Hank's Rest. Grp.*, 412 S.W.3d at 116.

Analysis

The City initially argues that River City failed to plead facts showing that vested rights attached to the project. If we disagree, the City contends that River City failed to show that the BSZ Ordinance is not exempt from chapter 245's protections. These questions raise issues of statutory construction, which present a question of law that we review de novo. *See Aleman v. Texas Med. Bd.*, 573 S.W.3d 796, 802 (Tex. 2019). Our goal when construing a statute is to ascertain and give effect to the Legislature's intent. *Id.* To do this, we start with the plain meaning of the text "unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results." *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017). And we do not construe individual provisions in isolation but rather "consider the context and framework of the entire statute[.]" *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 326 (Tex. 2017). We apply these same principles to construe municipal ordinances. *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 164 (Tex. 2016).

We first consider, as a threshold issue, whether any application or document filed with the City constitutes a permit application sufficient to invoke chapter 245's protections. *See* Act of May 11, 1999, 76th Leg., R.S., ch. 73, § 2, 1999 Tex. Gen. Laws at 432–33 (amended 2005). River City contends that either the 1986 Covenant or the 2004 Subdivision Plat constitutes a permit. A permit is "a license, certificate, approval, registration, consent, permit . . . or other form of authorization required by law, rule, regulation, order, or ordinance that a person must

obtain to perform an action or initiate, continue, or complete a project for which the permit is sought." Tex. Loc. Gov't Code § 245.001(1). The City disputes whether the 1986 Covenant is a permit but does not address the 2004 Subdivision Plat. In fact, the City acknowledges in its brief that "preliminary plats, subdivision plats, plans for development of real property, and site plans can be 'Permits' or applications for 'Permits.'" We agree that an application for a subdivision plat can constitute a permit application under chapter 245. Immediately after requiring regulatory agencies to consider "[a]ll permits required" for a project as "a single series of permits," the statute expressly states that "[p]reliminary plans and related subdivision plats" constitute part of the series of permits. *See id.* § 245.002(b). The 2004 Subdivision Plat therefore constitutes a permit under chapter 245. *See City of San Antonio v. En Seguido, Ltd.*, 227 S.W.3d 237, 244 (Tex. App.—San Antonio 2007, no pet.) (holding that "the filing of a plan for development or plat application, including preliminary plans and plats, gives rise to vested rights"). And because there is no dispute the application was filed before the BSZ Ordinance's effective date, we conclude vested rights attached to the project on the filing of the subdivision plat application.

The City argues that notwithstanding the rights vested in the project by section 245.002, the BSZ Ordinance falls into one of the statutory exemptions. *See* Tex. Loc. Gov't Code § 245.004(2). River City has the burden to show the exemptions inapplicable to the ordinance it seeks to enjoin. *See FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 269 (Tex. App.—Fort Worth 2016, pet. denied) (holding plaintiff's burden to plead facts affirmatively establishing trial court's jurisdiction extends to showing statutory exemptions inapplicable to claim); *Hank's Rest. Grp.*, 412 S.W.3d at 116 (same). Chapter 245 "does not apply to," as relevant here, "municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change

development permitted by a restrictive covenant required by a municipality." Tex. Loc. Gov't Code § 245.004(2). River City argues that the BSZ Ordinance is not exempt because it affects "building size" and "change[s] development permitted by" the 1986 Covenant. *See id.*

The parties disagree over how to determine whether a municipal zoning regulation affects one of the subjects listed in section 245.004(2).[2] The common, ordinary meaning of "affect" is "to produce an effect on." *Affect*, Black's Law Dictionary (11th ed. 2019); *see FLCT*, 493 S.W.3d at 269 (employing same definition when construing section 245.004(2)). River City argues the question should turn on the effect of the regulation as applied to a specific development project. The City responds that a regulation's effect "is best determined by the regulation on its face."

River City's as-applied approach is consistent with parts of chapter 245 that apply on a project-by-project basis. *See, e.g.*, Act of May 11, 1999, 76th Leg., R.S., ch. 73, § 2, 1999 Tex. Gen. Laws 432 (amended 2005) (providing that rights vest in project when application for first permit necessary to initiate project is filed); Tex. Loc. Gov't Code § 245.003 (providing chapter 245 "applies only to a project in progress on or commenced after" certain date); *id.* § 245.005(a), (b) (authorizing regulatory agency to place expiration date on permit if "no progress has been made towards completion of the project"). Subsection 245.004(2) does not employ similar language, or even include the term "project," *see id.* § 245.004(2), and we must presume that omission was intentional, *see Cadena Comercial USA*, 518 S.W.3d at 325–26 ("We

[2] The parties do not dispute that the BSZ Ordinance constitutes a "municipal zoning regulation" under subsection 245.004(2) because it restricts the size of certain uses where larger uses would have previously been allowed. *See FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 269 (Tex. App.—Fort Worth 2016, pet. denied) (holding municipal ordinance that "restricted the locations where alcohol can be sold within districts where it had formerly been permitted" constituted zoning ordinance affecting "property classification").

presume the Legislature 'chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.'" (quoting *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011))). Instead, the plain language exempts a category of municipal zoning regulations—those "that do not affect . . . building size," among other matters. *See* Tex. Loc. Gov't Code § 245.004(2). This interpretation is consistent with section 245.004's other provisions, which exempt categories of regulations that affect land use. *See, e.g.*, *id.* § 245.004(3) (exempting "regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size"), (4) (exempting "regulations for sexually oriented businesses") (5) (exempting "municipal or county ordinances, rules, regulations, or other requirements affecting colonias"), (8) (exempting "regulations for utility connections"). In sum, we conclude that a municipal zoning regulation is exempt under subsection 245.004(2) if it does not affect preexisting municipal zoning regulations on "landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size[.]" *See id.* § 245.004(2); *see also FLCT*, 493 S.W.3d at 269 (examining effect of ordinance restricting alcohol sales on municipality's preexisting zoning regulations on that subject).

The City goes a step further and argues that courts should determine the effect of an ordinance solely on its face. Applying this approach, the City contends that "the text of the regulation itself shows it regulates size of use, not building size, and that should end the matter." The City's position is inconsistent with well-settled statutory construction principles. *See Houston Belt*, 487 S.W.3d at 164 (applying rules of statutory construction to construe municipal ordinances). Construing an ordinance "start[s] with the plain and ordinary meaning of the

ordinance's words," *see id.*, but we cannot interpret those words and phrases in isolation, *see Worsdale v. City of Killeen*, 578 S.W.3d 57, 69 (Tex. 2019) ("As we have so often said, text cannot be divorced from context."). This is particularly important when construing zoning ordinances. Municipalities have discretion to regulate land use, *see City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982), and the extent of their powers in this area varies, *see Town of Lakewood Village v. Bizios*, 493 S.W.3d 527, 530–31 & n.3 (Tex. 2016) (discussing different authority of home-rule and general-law municipalities to regulate land use). A regulation that does not regulate "building size" on its face could still "affect" municipal regulation of building size depending on how the municipality otherwise regulates land use. We will therefore construe the BSZ Ordinance in the context of the City's entire Land Development Code (LDC) to determine whether it affects building size. *See Board of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 430–31 (Tex. 2002) (construing municipal zoning ordinance in context of city's entire land development code); *Milestone Potranco Dev., Ltd. v. City of San Antonio*, 298 S.W.3d 242, 245 (Tex. App.—San Antonio 2009, pet. denied) (construing municipal tree-preservation ordinance "as a whole and in the context of the [City's] entire Unified Development Code").

As already discussed, the LDC requires that structures not exceed a certain FAR, the "ratio of gross floor area to gross site area." *See* Austin, Tex., Code of Ordinances, § 25-1-21(42). "Gross floor area" means, as relevant here, "the total enclosed area of all floors in a building with a clear height of more than six feet, measured to the outside surface of the exterior walls." *See id.* § 25-1-21(46). On the other hand, "gross site area" refers to the total area of the site—"the area on which a building has been proposed to be built or has been built." *See id.* § 25-1-21(47) & (105). Requiring that development on a property not exceed a certain FAR thus creates an upper limit on building size.

River City argues that the BSZ Ordinance affects this limit by effectively setting the maximum permissible size of any structure housing a covered use. The City responds that "several different uses can be within one structure, or even different structures on the same lot, and a building can be built that is over 50,000 square feet." We agree with the City that limiting certain uses to less than 50,000 square feet of gross floor area does not change the amount of floor area within the structure or the size of the site. However, River City contends that the BSZ Ordinance effectively limits building size by including "accessory uses" in the 50,000 square foot size limitation. *See id.* § 25-2-651(D) (providing that "a principal retail use and its accessory uses may not exceed 50,000 square feet of gross floor area."). If the term "accessory uses" included all other possible uses, the BSZ Ordinance would effectively impose a size limit on any structure that houses a principal retail use. But we do not construe the term to have such a broad meaning. The BSZ Ordinance does not define an accessory use, so we apply the LDC's definition: a use that is "incidental to, and customarily associated with, a principal use." *See id.* § 25-1-21(1).[3] The term plainly encompasses a specific subcategory of uses closely associated with a principal use, and we see nothing in the BSZ Ordinance to suggest a different meaning was intended. On the contrary, another part of the ordinance provides that a "principal retail use that exceeded the [gross floor area] limitations on [the BSZ Ordinance's effective date] "may be changed to another retail use if the existing impervious cover and gross floor area are not increased." *See id.* § 25-2-651(F). Construing the BSZ Ordinance as a whole, *see Houston Belt*, 487 S.W.3d at 164, we conclude that

[3] The LDC provides that its definitions control "[u]nless a different definition is expressly provided." *See* Austin, Tex., Code of Ordinances, § 25-1-21 (2019).

it does not prohibit multiple retail uses inside the same structure.[4] Having rejected River City's arguments, we hold that River City failed to show that the BSZ Ordinance affects building size.

We now turn to whether the BSZ Ordinance "change[s] development permitted by" the 1986 Covenant.[5] *See* Tex. Loc. Gov't Code § 245.004(2). "A restrictive covenant is a negative covenant that limits permissible uses of land." *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 279 (Tex. 2018) (quoting Restatement (Third) of Prop.: Servitudes § 1.3(3) (Am. L. Inst. 2000)). Restrictive covenants are contracts, and we construe them according to the general rules of contract construction. *See id.* at 280. As with any contract, our goal is to give effect to the parties' intent as reflected in the language they chose. *Id*. To do this, we construe the covenant as a whole and seek to give effect to every part. *Id.*

River City contends that the 1986 Covenant contains no "restrictions on building size or use for automotive sales and service" and so enables River City to construct a car dealership and service center of any size. River City's argument is essentially that the parties to the 1986 Covenant intended to allow any use not expressly restricted in the covenant. The covenant's text is narrower: the parties agreed to impress the land "with certain covenants and restrictions running with the land." They specifically agreed that development would not exceed a 0.2 FAR, development would comply with an ordinance protecting the Williamson Creek watershed, and

[4] Consistent with our conclusion, the City affirmatively states in its brief that the BSZ Ordinance allows River City to have "49,999 [square feet] of auto sales and 49,999 [square feet] of auto service use as a secondary and separate use, plus a third permitted use such as a restaurant, office, or other uses allowed" by the Community Commercial zoning classification.

[5] We need not decide whether the 1986 Covenant constitutes a permit because we conclude that the BSZ Ordinance does not change development permitted by the 1986 Covenant. *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

the property would have no more than 65% impervious cover.[6] Nothing in the text indicates that the parties intended their agreement to address anything other than these three restrictions, and we may not add enlarge the terms of their agreement to address other matters. *See id.* ("[T]he words in a covenant 'may not be enlarged, extended, stretched or changed by construction.'" (quoting *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987)); *see also In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (orig. proceeding) (stating general rule that courts "cannot make new contracts between the parties and must enforce the contract as written"). Because the 1986 Covenant does not authorize River City to use the land as a car dealership and service center without size restriction, River City failed to show that the BSZ Ordinance changes development permitted by the covenant. *See* Tex. Loc. Gov't Code § 245.004(2).

Having concluded as a matter of law that the BSZ Ordinance does not affect building size or change development permitted by a restrictive covenant, we hold that River City failed to plead facts establishing the district court's jurisdiction to decide its claim under chapter 245. In addition to that claim, River City asked the district court to declare that the 1986 Covenant is exempt under the BSZ Ordinance's terms, *see* Austin, Tex., Code of Ordinances, § 25-2-651(B)(1) (providing BSZ Ordinance is inapplicable "to a retail use on property" that is "subject to a settlement agreement adopted by council before December 6, 2003 that prescribes development regulations"), or that the City should be estopped from applying the BSZ Ordinance. The district court also lacked jurisdiction over these claims. Chapter 245 waives immunity from suit "in regard to an action under this chapter." Tex. Loc. Gov't Code § 245.006(b); *see Harper*

[6] "Impervious cover" refers to "the total area of any surface that prevents the infiltration of water into the ground, such as roads, parking areas, concrete, and buildings." *See* Austin, Tex., Code of Ordinances, § 25-1-23 (2019).

Park Two, 359 S.W.3d at 254 n.11 (construing waiver to apply only to suits "to enforce the statute's protections"). The substance of River City's remaining claims is that the City cannot enforce the BSZ Ordinance for reasons unrelated to River City's vested rights under chapter 245. River City cannot alter the substance of these claims by recasting them as claim for relief under chapter 245. *See Sampson v. University of Tex. at Austin*, 500 S.W.3d 380, 386 (Tex. 2016) ("Creative pleading does not change the nature of a claim."). We hold the district court lacked jurisdiction over River City's second and third claims for declaratory relief.

Repleading

For the reasons explained above, we conclude River City failed to allege a valid waiver of the City's immunity. Nevertheless, River City asks us to remand to the district court to so that it can amend their pleadings to attempt to cure the jurisdictional defect. *See Koseoglu*, 233 S.W.3d at 839 (reiterating that court must afford litigants "reasonable opportunity to amend . . . unless the pleadings affirmatively negate the existence of jurisdiction"). The right to amend "typically arises when the pleadings fail to allege enough jurisdictional facts to demonstrate the trial court's jurisdiction." *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016). However, if a plaintiff received a "reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction," and the "amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action." *Sykes*, 136 S.W.3d at 639. This dismissal "is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined." *Id.* Here, River City amended its pleadings twice after the City filed its plea to the jurisdiction, and we have concluded that pleading failed to establish the district court's jurisdiction. River City is not entitled to

relitigate jurisdiction. *See id.*; *Spence v. State*, No. 03-17-00685-CV, 2019 WL 1868841, at *8–9 (Tex. App.—Austin Apr. 26, 2019, pet. denied) (mem. op.) (affirming dismissal with prejudice when plaintiffs had opportunity to amend after State moved to dismiss on immunity grounds and amended pleadings did "not allege[] facts that would constitute a waiver of sovereign immunity"). We decline River City's request for a remand.

CONCLUSION

We affirm the district court's judgment.

Edward Smith, Justice

Before Chief Justice Rose, and Justices Triana and Smith

Affirmed.

Filed: June 4, 2020