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The Metes and Bounds of Governmental Immunity and Political Subdivisions: Limiting Tort Liability for Municipal Utility Districts in Texas Recent Development.

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RECENT DEVELOPMENT

THE METES AND BOUNDS OF GOVERNMENTAL IMMUNITY AND POLITICAL SUBDIVISIONS: LIMITING TORT LIABILITY FOR MUNICIPAL UTILITY DISTRICTS IN TEXAS

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I. INTRODUCTION

Texas promotes the conservation and development of the state's natural resources, in part, through the creation of water-related districts.[1] Operating as separate political subdivisions within the state, water districts are authorized by the Texas constitution[2] and can be created by the Texas Commission on Environmental Quality, a county commissioners court, or the legislature.[3] Municipal utility districts (MUD[s]) represent one type of water district that operates within the state and engages in the control and management of water, including storm and flood water, irrigation, overflow drainage, and sanitation.[4]

To establish a MUD, a majority of the landowners within the proposed district file a petition with the Texas Natural Resource Conservation Commission.[5] The district can be composed of "all

1. *See* TEX. CONST. art. XVI, § 59(a) (declaring the conservation of natural resources as a public right and duty); 45 MARTIN ROCHELLE & MICHELLE MADDOX SMITH, TEXAS PRACTICE: ENVIRONMENTAL LAW § 2.18(c) (2d ed. 2005) (discussing Texas's constitutional policy supporting the creation of water districts). *See generally* 73 TEX. JUR. 3D *Water* § 394 (2003) (providing a synopsis of the purpose and composition of municipal utility districts in Texas).

2. *See* TEX. CONST. art. XVI, § 59(b) (authorizing water districts as separate political subdivisions).

3. *See* TEX. COMM'N ON ENVTL. QUALITY, TEXAS WATER DISTRICTS: A GENERAL GUIDE 1 (2004), http://www.tceq.state.tx.us/files/gi-043.pdf_4232133.pdf (distinguishing various types of water districts in Texas). "General law" districts are created by the Texas Commission on Environmental Quality or the county commissioners court. *Id.* "Special law" districts, on the other hand, "have been ... created by or altered by an act of the [l]egislature." *Id.* The distinction between special law and general law is critical in determining which laws apply to a district's activities. *Id.* Generally, a general law district is governed by the Texas Water Code and a special law district "must comply with its enabling legislation." *Id. See generally* TEX. WATER CODE ANN. § 49 (Vernon 2008) (codifying provisions applicable to general law districts in Texas).

4. *See* TEX. WATER CODE ANN. § 54.012 (Vernon 2002) (creating MUDs for particular purposes).

5. TEX. WATER CODE ANN. § 54.014 (Vernon 2002); 45 MARTIN ROCHELLE & MICHELLE MADDOX SMITH, TEXAS PRACTICE: ENVIRONMENTAL LAW § 2.18(c)(1) (2d ed. 2005). The petition to create the district should include the district's boundaries,

or part of any county" or city and the "land composing a district need not be in one body."[6] The petition is granted if the district's proposed purpose is feasible, practical, necessary, and beneficial to the land as evidenced by a three-factor test concerned with comparable services, reasonableness of cost, and impact on the environment.[7] Once approved, the district is governed by a five-member board of directors and is granted broad authority to accomplish the purposes for which it was created.[8] This broad grant of authority includes the power to acquire "facilities, plants,

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nature of proposed work, and a name. TEX. WATER CODE ANN. § 54.015 (Vernon 2002).

6. TEX. WATER CODE ANN. § 54.013 (Vernon 2002); *see* 73 TEX. JUR. 3D *Water* § 394 (2003) (discussing the composition of MUDs). If a proposed district includes land that is "within the corporate limits of a city or within the extraterritorial jurisdiction of a city," written consent from the city is required before the district can be created. TEX. WATER CODE ANN. § 54.016(a) (Vernon 2002); *see* TEX. LOC. GOV'T CODE ANN. § 42.042(a) (Vernon 2008) (requiring consent for a subdivision formed in an extraterritorial jurisdiction); *see also* 73 TEX. JUR. 3D *Water* § 395 (2003) (providing that other water districts created under the Texas constitution may be converted to a MUD, and existing MUDs may consolidate into one district). *See generally* Op. Tex. Att'y Gen. No. JM-1115 (1989), *available at* 1989 WL 430766 (opining that mineral interests located under land subject to a municipal utility district cannot be excluded from an initial petition to create the district, but may be excluded from the boundaries of the district after the initial petition has been approved).

7. TEX. WATER CODE ANN. § 54.021(a) (Vernon 2002). The Texas Natural Resource Conservation Commission employs a balancing test when determining whether the project is feasible, practical, necessary, and beneficial. The following factors are considered:

> (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
> (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
> (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:
> (A) land elevation;
> (B) subsidence;
> (C) groundwater level within the region;
> (D) recharge capability of a groundwater source;
> (E) natural run-off rates and drainage;
> (F) water quality; and
> (G) total tax assessments on all land located within a district.

Id. § 54.021(b).

8. TEX. WATER CODE ANN. § 54.101 (Vernon 2002). A director must be eighteen years old, a Texas resident, and a qualified voter or owner of land within the district. TEX. WATER CODE ANN. § 54.102 (Vernon 2002). The board manages district affairs and is authorized to appoint a general manager to carry out its orders. TEX. WATER CODE ANN. § 49.056 (Vernon 2008); *see* TEX. WATER CODE ANN. § 54.201(a) (Vernon 2002) (enumerating district powers and duties).

equipment, and appliances" as necessary to supply water, collect and treat waste, control excess water (e.g., local storm water), irrigate, alter land elevation, navigate waters, and establish parks and recreational facilities to district inhabitants.[9] In accordance with that purpose, each board member must make a sworn statement, take an oath of office, and execute a $10,000 bond "payable to the district and conditioned on the faithful performance of that director's duties."[10] The board itself must then adopt a written code of ethics and policies relating to travel expenditures, investments, and accounting.[11]

Fulfilling a MUD's purpose involves active participation in commerce, resulting in invariable susceptibility to tort liability.[12] As such, every MUD should be knowledgeable of the methods available to both minimize potential liability and maximize existing statutory protections.[13] With that knowledge, proactive implementation of an operational plan that integrates a district's liability-minimization goals will aid in district efficiency, productivity, and management of operational costs. As separate political subdivisions within the state, MUDs generally enjoy governmental immunity from both suit and liability.[14] However,

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9. TEX. WATER CODE ANN. § 54.201(b) (Vernon 2002); *see* TEX. COMM'N ON ENVTL. QUALITY, TEXAS WATER DISTRICTS: A GENERAL GUIDE 2 (2004), http://www.tceq.state.tx.us/files/gi-043.pdf_4232133.pdf (explaining the duties and powers of MUDs); *see also* Harris County Water Control & Improvement Dist. No. 110 v. Tex. Water Rights Comm'n, 593 S.W.2d 852, 855 (Tex. Civ. App.—Austin 1980, no writ) (holding that facilities proposed by a MUD must serve the district's purpose); 36A DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 46.23 (2d ed. 2002) (discussing a MUD's power to provide recreational facilities). Generally, recreational facilities established by a district must be "related . . . to the preservation and conservation of natural resources." 36A DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 46.23 (2d ed. 2002). For example, a public park along the shore of a lake maintained by a water district could conceivably be related to preservation of resources, while a facility offering "a community center, three swimming pools, four tennis courts, and a clubhouse" would not be. *Id.*

10. TEX. WATER CODE ANN. § 49.055(a)–(c) (Vernon 2008).

11. TEX. WATER CODE ANN. § 49.199(a) (Vernon 2008).

12. *See generally* 94 C.J.S. *Waters* § 561 (2001) ("[W]here a given water district's independent powers become extensive, said district may be classified a commercial enterprise, and thus be placed outside the state's immunity shield.").

13. *See id.* (discussing the interaction of a water district's balance of power between the discretional use of resources protected by the state and the extensive powers which may make a district a commercial enterprise acting outside of sovereign immunity).

14. *See generally* Bennett v. Brown County Water Improvement Dist. No. 1, 153 Tex. 599, 603, 272 S.W.2d 498, 500–01 (1954) (providing that water districts are political subdivisions of the state performing governmental functions, and thus are protected by

MUDs remain amenable to suit in instances where governmental immunity has been waived.[15]

The purpose of this paper is to identify and discuss statutory protections available to shield MUDs from liability and to advocate for the development of a proactive liability-minimization plan as an integral part of a MUD's operational framework. To that end, Part I discussed the role and purposes of MUDs in Texas, the source of MUD power, and the constitutional policy supporting MUD purposes. Part II discusses the origin of governmental immunity, while Part III analyzes case law development of governmental immunity as a defense to both suit and liability. Parts IV through VII discuss waivers of governmental immunity and instances where governmental immunity is unavailable as a defense. Specifically, waiver of governmental immunity under the Texas Tort Claims Act and Texas Water Code, along with liability under non-negligent causes of action—nuisance and inverse condemnation—is discussed. Part VIII concludes with a summary of the status of governmental immunity as applied to MUDs and encourages a MUD's board of directors to keep abreast of governmental immunity developments, establish a liability-minimization plan before a MUD commences operations, and periodically update any liability-minimization plan to reflect expanding operations and legal developments.

II. THE ORIGIN OF GOVERNMENTAL IMMUNITY

The concept of governmental immunity was introduced to the United States at common law and is rooted in the fiction that "the

governmental immunity).

15. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2005) (waiving governmental immunity for enumerated torts); *see also* Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (holding that governmental immunity does not alleviate the duty of repayment for destruction of private property); City of Houston v. Clear Channel Outdoor, Inc., 161 S.W.3d 3, 8 (Tex. App.—Houston [14th Dist.] 2004) (recognizing general governmental immunity waiver for political subdivisions under the Texas Water Code), *rev'd per curiam on other grounds*, 197 S.W.3d 386 (Tex. 2006), *aff'd*, 233 S.W.3d 441 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); Foster v. Denton Indep. Sch. Dist., 73 S.W.3d 454, 460 (Tex. App.—Fort Worth 2002, no pet.) (holding that governmental immunity does not protect against claims based on inverse condemnation); Wickham v. San Jacinto River Auth., 979 S.W.2d 876, 880 (Tex. App.—Beaumont 1998, pet. denied) (holding that governmental immunity does not protect against a nuisance claim).

[K]ing can do no wrong."[16] Governmental immunity has since "bec[o]me a familiar axiom in American jurisprudence."[17] Unlike sovereign immunity, which protects the state and its entities from suit and liability, "[g]overnmental immunity . . . protects political subdivisions of the [s]tate."[18] Specifically, governmental immunity can be asserted as an affirmative defense to liability or suit and automatically exists as a defense in legal actions where the plaintiff seeks damages, unless immunity is waived.[19] Whether the defense is couched as sovereign immunity or governmental immunity depends solely on the defendant's position within the governmental hierarchy. Although application of the defenses differ, each operates the same conceptually.[20]

Federal Sign v. Texas Southern University[21] sets forth the

16. Bertrand v. Bd. of County Comm'rs, 872 P.2d 223, 225 (Colo. 1994); s*ee also* Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. 1, 17 (1926) (discussing the legal theories justifying sovereign immunity); Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 686 (1996) ("English sovereign immunity was based on the theory that because the King was the source of all laws, no legal right against the King could exist.").

17. *Bertrand*, 872 P.2d at 225. *See generally* Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1–2 (1924) (discussing how governmental immunity was introduced in America without sufficient understanding and has survived "mainly by reason of antiquity"). Legal scholars have opined that the maxim of "the King can do no wrong" merely meant that the King was not privileged to do wrong and was not intended to convey the idea that the King was incapable of committing a legal wrong. *Id.* at 4. Nevertheless, the concept has survived in American jurisprudence and has been justified by the United States Supreme Court on "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

18. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Political subdivisions have been found to include "counties, cities, and school districts." *Id.*; *see also* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 694–95 (1996) (distinguishing sovereign and governmental immunity).

19. *See* Tooke v. City of Mexia, 197 S.W.3d 325, 331–32 (Tex. 2006) (discussing the established principle that a state is immune from suit unless it consents or it is waived by the legislature).

20. *See* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 694–95 (1996) ("[G]overnmental immunity is an expansive term including all governmental subdivisions . . . . Therefore, sovereign immunity . . . falls under the much broader umbrella of governmental immunity.").

21. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401 (Tex. 1997), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 2260 (Vernon 2000), *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001).

governmental immunity standard in Texas. The plaintiff in *Federal Sign* brought a contract claim against Texas Southern University (TSU), a state school, alleging breach of a contract for the supply of scoreboards in a basketball arena.[22] The plaintiff sued TSU for lost profits and expenses resulting from partial performance under the contract.[23] At trial, TSU unsuccessfully asserted sovereign immunity as a defense.[24] However, on appeal, the school persuaded the court that sovereign immunity barred the contract claim, and the Texas Supreme Court agreed:

> [W]hen the [s]tate contracts with private citizens, the [s]tate waives only *immunity from liability*. However, a private citizen must have legislative consent to sue the [s]tate on a breach of contract claim. The act of contracting does not waive the [s]tate's *immunity from suit*. Accordingly, we expressly overrule any cases that hold to the contrary.[25]

The court refused to set limitations on sovereign immunity because the "[Texas Supreme] Court has uniformly held that it is the [l]egislature's sole province to waive or abrogate sovereign immunity."[26] After *Federal Sign*, parties that contracted with the state were first required to establish clear and unambiguous legislative consent to sue before relying on any waivers of liability.[27] In the absence of such a legislative waiver, both sovereign and governmental immunity defeat the subject matter jurisdiction of a court, "'and thus [are] properly asserted in a plea to the [court's] jurisdiction.'"[28] Governmental entities may assert

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22. *Id.* at 403.

23. *Id.*

24. *Id.* at 404.

25. *Id.* at 408. When the state contracts for its benefit, it is treated the same way a private citizen would be and likewise is not immune from liability. *Little-Tex*, 39 S.W.3d at 594.

26. *Fed. Sign*, 951 S.W.2d at 409.

27. *See Little-Tex*, 39 S.W.3d at 593 (concluding that Texas Government Code sections 2260.001–.108 "established an administrative procedure for certain breach-of-contract claims against the State"); *see also* City of Galveston v. State, 217 S.W.3d 466, 468 (Tex. 2007) (finding that in contracting with Galveston, the State did not expressly rely on a legislative statute that clearly and unambiguously waived the City's liability from suit); Tooke v. City of Mexia, 197 S.W.3d 325, 332 (Tex. 2006) ("We have consistently deferred to the [l]egislature to waive sovereign immunity from suit, because this allows the [l]egislature to protect its policymaking function.").

28. Montgomery County v. Fuqua, 22 S.W.3d 662, 665 (Tex. App.—Beaumont 2000, pet. denied) (quoting Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 639 (Tex. 1999)). *See generally* 2 TEX. JUR. 3D *Administrative Law* § 196 (2004) ("Unlike immunity from suit,

a defense of immunity at any point in a suit when facts sufficiently establish that immunity has not been waived.[29]

Although the Texas legislature subsequently enacted a statute establishing an administrative procedure for breach of contract claims against "unit[s] of state government,"[30] the general rule remains the same: sovereign immunity and governmental immunity are viable defenses against suit and liability unless immunity is waived by the legislature.[31]

III. GOVERNMENTAL IMMUNITY AS A DEFENSE

Governmental immunity from suit bars suit against a governmental entity, while governmental immunity from liability bars enforcement of any judgment against the entity resulting from an authorized suit.[32] Generally, governmental immunity provides protection for entities or agents performing governmental functions.[33] A governmental function is "solely for the public benefit" and is distinct from proprietary functions.[34] The Texas Supreme Court has held that MUDs are protected by governmental immunity because MUDs perform governmental functions—assisting with the preservation of the state's resources for the benefit of the public.[35] These immunity protections are

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immunity from liability does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to jurisdiction.").

29. *See Fuqua*, 22 S.W.3d at 665 (outlining when the government may assert immunity).

30. TEX. GOV'T CODE ANN. § 2260 (Vernon 2000); *see also Little-Tex*, 39 S.W.3d at 595 (recognizing that Texas Government Code section 2260 provides an exclusive administrative procedure for contract disputes against the state).

31. *See Little-Tex*, 39 S.W.3d at 595 (asserting that the legislature retained immunity as a viable defense against suit).

32. *Tooke*, 197 S.W.3d at 332.

33. *See id.* at 343 (describing the proprietary-governmental dichotomy).

34. *Id.* Proprietary functions are also conducted by governmental entities, but involve functions that benefit "those within its corporate limits, and not [those conducted] as an arm of the government." *Id.*; *see also* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 689–90 (1996) (discussing the distinction between governmental and proprietary functions).

35. *See* Bennett v. Brown County Water Improvement Dist. No. 1, 153 Tex. 599, 603, 272 S.W.2d 498, 500 (1954) ("[Water districts] created under [s]ection 59(a) of [a]rticle XVI of the [c]onstitution, and statutes enacted thereunder carrying out the purposes of such constitutional provision, are not classed with municipal corporations, but are held to be political subdivisions of the [s]tate, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.").

broad and sweeping, even extending to situations in which the state itself is the would-be plaintiff.

In *City of Galveston v. State*,[36] the issue was whether the City enjoyed governmental immunity from suit or liability in a tort action brought by a state agency.[37] The City agreed to maintain nearby utilities, including water lines, as part of an agreement with the Texas Department of Transportation (TxDOT) for the construction of Highway 275.[38] When one of the city water lines ruptured, the attorney general sued the City on behalf of the State of Texas to recover money damages under a common-law tort action for "negligent installation, maintenance, and upkeep" of the water line and damages to state property.[39] The City filed a plea to the court's jurisdiction asserting governmental immunity from suit.[40] In response, TxDOT contended that the City had no immunity from tort actions brought by a state agency under common law, and because the City's immunity was derived from the state, it could not be asserted against the State.[41] The court rejected TxDOT's argument and held that suits by the state against a city for money damages could not be brought absent "clear and unambiguous" consent from the legislature.[42]

The court recognized that governmental immunity can be waived for certain torts under the Texas Tort Claims Act (TTCA), but the State failed to argue or plead applicability of the TTCA.[43] The State also failed to assert any general statute authorizing the

36. City of Galveston v. State, 217 S.W.3d 466 (Tex. 2007).

37. *Id.* at 468 (providing the procedural history for the City's immunity defense submitted in a motion for summary judgment).

38. *Id.*

39. *Id.* The attorney general has constitutional authority to bring suit on behalf of the state. TEX. CONST. art. IV, § 22. The attorney general's primary functions are to give legal advice by opinion to "the governor, heads of departments and state institutions, committees of the legislature, and county authorities" and to bring actions on behalf of the state in civil litigation. TEX. CONST. art. IV, § 22 interp. commentary (Vernon 2007).

40. *City of Galveston*, 217 S.W.3d at 468.

41. *Id.* at 471–73. The State argued that "it 'defies logic' to allow [immunity] to be asserted against the State." *Id.* at 473; *cf.* Tex. Ass'n of Sch. Bds. Risk Mgmt. Fund v. Benavides Indep. Sch. Dist., 221 S.W.3d 732, 734 (Tex. App.—San Antonio 2007, no pet.) (holding that governmental immunity also exists as between political subdivisions).

42. *City of Galveston*, 217 S.W.3d at 468–71. The court emphasized that the "heavy presumption in favor of immunity arises not just from separation-of-powers principles but from practical concerns," noting that the "line" cannot be easily drawn by courts. *Id.* at 469.

43. *Id.* at 470.

state or the attorney general to sue a political subdivision for money damages.[44] The court concluded that although the state has the *power* to waive a city's immunity, it has no *authority* to do so without legislative consent.[45]

The court rejected the State's argument that because cities derive their immunity from the state, they cannot invoke immunity against it. Instead, political subdivisions in Texas enjoy immunity from suit when performing governmental functions.[46] Immunity itself arises from common law and therefore must be changed by the legislature.[47] Specifically, home-rule cities "derive their powers from the Texas [c]onstitution, not the [l]egislature" and "have all the powers of the state not inconsistent with the [c]onstitution,"[48] including immunity from suit for governmental functions.[49] Accordingly, statutes need not *grant* immunity from suit, but rather *limit* immunity from suit.[50] Practical concerns coupled with the complexity of governmental units make the legislature better qualified to make distinctions, exceptions, and limitations regarding the extent to which any "city, county, port, [or] *municipal utility district*" may be liable for money damages.[51]

Like a home-rule city, a MUD is a political subdivision of the state and enjoys immunity from suit when performing its functions, all of which are governmental.[52] Although water districts are

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44. City of Galveston v. State, 217 S.W.3d 466, 470 (Tex. 2007).

45. *See id.* at 471 (emphasizing that the issue was one of authority, not power).

46. *See id.* at 477–78 (noting that immunity applies to governmental functions when the entity is acting as an agent of the state for public benefit).

47. *See, e.g.*, Archibeque v. N. Tex. State Hosp.–Wichita Falls Campus, 115 S.W.3d 154, 157 (Tex. App.—Fort Worth 2003, no pet.) (recognizing that the legislature must waive governmental immunity). *See generally* 2 TEX. JUR. 3D *Administrative Law* § 196 (2004) (recognizing express legislative consent as the sole means for suing a governmental entity).

48. *City of Galveston*, 217 S.W.3d at 469 (internal quotation marks omitted) (holding that the "high standard" of immunity for home-rule cities is justified because such cities derive their power from the constitution).

49. *See id.* (holding that home-rule cities are immune from being sued for governmental functions). *But see id.* at 477 n.21 (Willett, J., dissenting) (disagreeing that home-rule cities require a more elevated level of immunity protection than other cities). "Texas cities, home-rule or otherwise, are deemed to be [s]tate agents for immunity purposes when performing governmental functions." *Id.*

50. *Id.* at 469 (majority opinion); *accord* Proctor v. Andrews, 972 S.W.2d 729, 733 (Tex. 1998) (recognizing that when immunity is derived from the constitution, locating grants of immunity are unnecessary, but rather limitations must be identified).

51. *City of Galveston*, 217 S.W.3d at 469 (emphasis added).

52. *See* 36A DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL

subject to significant state supervision, they are self-governing. Article XVI, section 59 of the Texas constitution declares water districts to be "governmental agencies and bodies politic and corporate" and further declares the conservation and development of the state's natural resources to be public rights and duties.[53] State supervision of MUDs is pursuant to this public policy, but provisions dealing with a MUD's management—including waivers of immunity—are and must be adopted by the legislature.[54] "A district's status as a public body entitles it to the usual privileges [of other] local government entities."[55] Accordingly, MUDs are shielded from suit and liability unless waiver can be established.[56]

Recognizing the ramifications of an absolute shield from suit and liability for governmental entities, the Texas legislature has generally waived governmental immunity from both suit and liability for certain torts under the TTCA.[57] Likewise, courts have held that certain statutory provisions outside of the TTCA—those that allow governmental entities to "sue and be sued" or "plead and be impleaded"—also provide a statutory waiver of governmental immunity when read in the context of the entire statute.[58] Finally, governmental entities are not shielded from claims on the basis of non-negligent nuisance[59] or inverse

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DISTRICT LAW § 46.8 (2d ed. 2002) (discussing conservation districts as political subdivisions and recognizing that, in Texas, municipalities only perform governmental functions).

53. TEX. CONST. art. XVI, § 59; *see City of Galveston*, 217 S.W.3d at 469 (recognizing that entities created by constitution are protected by governmental immunity).

54. *See* TEX. CONST. art. XVI, § 59 interp. commentary (Vernon 1993) (illustrating the state's and legislature's power over supervision of natural resources).

55. 36A DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 46.8 (2d ed. 2002).

56. *See id.* § 46.9 (explaining that public bodies are entitled to sovereign immunity).

57. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2005) (listing liability for governmental units in the state).

58. *See* Alamo Cmty. Coll. Dist. v. Browning Constr. Co., 131 S.W.3d 146, 154 (Tex. App.—San Antonio 2004, pet. dism'd) (holding that the legislature "waived immunity for community college districts" by using the "sue and be sued" language in the Texas Education Code); City of Houston v. Clear Channel Outdoor, Inc., 161 S.W.3d 3, 8 (Tex. App.—Houston [14th Dist.] 2004) ("In conclusion, . . . 'sue and be sued' or 'plead and be impleaded' is sufficient language to waive immunity from suit."), *rev'd per curiam on other grounds*, 197 S.W.3d 386 (Tex. 2006), *aff'd*, 233 S.W.3d 441 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

59. *See* Wickham v. San Jacinto River Auth., 979 S.W.2d 876, 880 (Tex. App.—Beaumont 1998, pet. denied) (recognizing that immunity cannot serve as a defense in a non-negligent nuisance claim).

condemnation,[60] and may also be liable on contract claims.[61]

IV. WAIVER OF GOVERNMENTAL IMMUNITY UNDER THE TTCA

Under the TTCA, governmental immunity from both suit and liability is waived under two conditions: when an employee of the entity has caused "property damage, personal injury, [or] death" through the negligent use of a motor vehicle or equipment;[62] or when personal injury or death has been caused by a "condition or use of tangible personal or real property."[63] The suing party must establish that any alleged personal injuries fall under one of these TTCA immunity exceptions to both suit and liability in order to maintain an action against a governmental entity.[64] Although suits have been brought under both conditions, injuries caused by a "condition or use of tangible personal or real property"[65] result in most instances of litigation, "because of [this condition's]

60. *See* Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (holding that the Texas constitution waives governmental immunity in inverse condemnation causes of action); Dahl v. State, 92 S.W.3d 856, 862 (Tex. App.—Houston [14th Dist.] 2002, no pet.) ("The State does not have sovereign immunity from a *valid* inverse condemnation claim."); Foster v. Denton Indep. Sch. Dist., 73 S.W.3d 454, 460 (Tex. App.—Fort Worth 2002, no pet.) (recognizing that inverse condemnation claims are excepted from the sovereign immunity doctrine).

61. *See* TEX. GOV'T CODE ANN. § 2260.051 (Vernon 2008) (providing the exclusive procedure for asserting a contract claim against a "unit of state government" and setting out the procedure for asserting such a claim). In 1999, the Texas legislature adopted a procedure for asserting breach of contract claims against a governmental unit. *Id.* The procedure requires the claim to be submitted to an administrative law judge who "may recommend that the legislature: (1) appropriate money to pay the claim . . . or (2) not appropriate the money to pay the claim" and deny consent to suit. TEX. GOV'T CODE ANN. § 2260.1055 (Vernon 2000). This procedure "does not waive sovereign immunity to suit or liability." TEX. GOV'T CODE ANN. § 2260.006 (Vernon 2000); *see also* TEX. GOV'T CODE ANN. § 2260.104 (Vernon 2008) (listing the procedures an administrative law judge shall abide by in a contested hearing); TEX. GOV'T CODE ANN. § 2260.1055 (Vernon 2000) (providing that the administrative law judge shall submit recommendations to the legislature involving claims for damages exceeding $250,000). Instead, the legislature retains the authority to deny or grant waiver. TEX. GOV'T CODE ANN. § 2260.007 (Vernon 2008). The Texas Supreme Court has upheld this procedure as constitutional. Gen. Serv. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 599–600 (Tex. 2001). The procedure does not apply to claims for personal injury or death arising from breach of contract or contracts executed prior to August 30, 1999. TEX. GOV'T CODE ANN. § 2260.002 (Vernon 2008).

62. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (Vernon 2005).

63. *Id.* § 101.021(2).

64. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 2005) (expressly waiving immunity for violation of the Act).

65. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 2005).

breadth and vagueness."[66]

The Fourteenth District Court of Appeals in Houston has opined that "it is technically possible to characterize any imaginable action as a case involving use of tangible [property]."[67] The Texas Supreme Court has also urged the Texas legislature to clarify the "condition or use" waiver under the TTCA.[68] Still, the legislature has chosen not to provide guidelines for evaluating liability under this component of the TTCA. Instead, the legislature has responded with over thirty years of silence, opting instead to "reenact the statute without material change."[69] This silence is generally presumed to constitute legislative approval of the court's broad and liberal construction of the statute.[70]

In light of the foregoing, susceptibility to suit for conditions relating to the use of real and personal property is likely to arise for MUDs. Under a broad construction, any number of MUD functions could give rise to a waiver under the TTCA.[71] Because

66. 35 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 2.12 (2d ed. 2002) ("The most difficult legal aspect of the Torts Claims Act remains the issue of the condition or use of property in such a manner that can impose liability."); *see also* Robinson v. Cent. Tex. MHMR Ctr., 780 S.W.2d 169, 170 (Tex. 1989) (noting that since its inception, waiver under the TTCA for condition and use of property has "been a fertile field for litigation and controversy").

67. Lowe v. Harris County Hosp. Dist., 809 S.W.2d 502, 504 (Tex. App.—Houston [14th Dist.] 1989, no pet.).

68. *See Robinson*, 780 S.W.2d at 170 (reiterating the court's request that the legislature provide guidance for establishing liability under the "condition or use" property component of the TTCA); Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983) (noting that the TTCA is subject to broad or narrow interpretations because the "legislature has not changed the troublesome waiver provision"); Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 301 (Tex. 1976) (Greenhill, J., concurring) (writing the entire concurrence as a plea to the legislature "to express more clearly its intent as to when it directs that governmental immunity is waived").

69. *See Robinson*, 780 S.W.2d at 172 (Spears, J., concurring) (opining that the "legislature has long since acquiesced" to the judicial interpretation of the TTCA).

70. *See id.* (noting that the legislature's silence is an acquiescence and that the court's holding merely reaffirmed precedent). In *Lowe*, the court held that providing defective equipment and failing to provide equipment at all waived immunity under the TTCA. *Lowe*, 540 S.W.2d at 300. *But see Robinson*, 780 S.W.2d at 174–75 (Hecht, J., dissenting) (arguing that no matter how liberally a statute is to be interpreted, the word "use" cannot be extended to include "non-use" and doing so results in "a general waiver in virtually all tort cases").

71. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(d) (Vernon Supp. 2008) (permitting liability despite other limitations if the owner's conduct amounts to gross negligence, malicious intent, or bad faith); 42 TEX. JUR. 3D *Government Tort Liability* § 22 (2005) (explaining that the TTCA makes governmental units "liable for personal injury and death proximately caused by a condition or use of tangible personal or real property,

MUDs are specifically authorized to acquire facilities, plants, equipment, and appliances to carry out MUD purposes,[72] waivers for the use of personal and real property could conceivably arise, in part, from equipment used to supply and control water or collect and treat waste, and could also extend to equipment used for irrigation and in recreational facilities.[73] On the other hand, real property claims can arise from altering land elevation and providing parks.[74] It is impossible to contemplate all the possible scenarios that could give rise to waiver under the TTCA for MUDs. Instead, understanding the elements necessary to establish each waiver is more advisable.

For claims involving use of personal property, immunity is waived under the TTCA when the property is actually "used" by the governmental entity.[75] "Use" means "to put or bring into action," not merely "to make available."[76] Mere negligent supervision or allowing someone else to "use" personal property, without more, does not constitute "use" for purposes of waiver under the TTCA.[77] However, when "an integral safety

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if the governmental unit would, were it a private person be liable").

72. *See* TEX. WATER CODE ANN. §§ 49.057(h), 49.219 (Vernon 2008) (providing the right of water districts to acquire facilities, equipment, and appliances to perform its purposes).

73. *See* Tex. A&M Univ. v. Bishop, 156 S.W.3d 580, 583 (Tex. 2005) (establishing that, under the TTCA, the governmental unit is liable for its conduct if it "used" tangible property within the Act's terms); 42 TEX. JUR. 3D *Government Tort Liability* § 24 (2005) (discussing the governmental unit's liability under the TTCA for injury and death caused by the "use" of tangible personal or real property).

74. *See generally* State v. Shumake, 199 S.W.3d 279, 283 (Tex. 2006) (discussing government liability under the TTCA and Texas Recreational Use Statute); 42 TEX. JUR. 3D *Government Tort Liability* § 24 (2005) ("A premises liability defendant may be held liable for a dangerous condition on the property . . . even if it did not own or physically occupy the property.").

75. *See Bishop*, 156 S.W.3d at 583 (noting that the governmental entity itself must be the user of the property); Sheth v. Dearen, 225 S.W.3d 828, 832 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (recognizing "use" of property as a prerequisite to suit under the TTCA); 42 TEX. JUR. 3D *Government Tort Liability* § 22 (2005) (discussing the "use" requirement of the TTCA).

76. San Antonio State Hosp. v. Cowan, 128 S.W.3d 244, 246 (Tex. 2004); *see* LeLeaux v. Hampshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992) (recognizing that although the TTCA does not specify whose use is necessary, the "plausible reading" is that the government must be the user).

77. *See Bishop*, 156 S.W.3d at 583 (distinguishing facts involving "use" of personal property from those involving non-use). Immunity has only been recognized by the Texas Supreme Court when the government itself is the user. *Id.* "This limitation is not expressly stated in [the TTCA], but [has been] read . . . into [the statute]." *Cowan*, 128

component is entirely lacking rather than merely inadequate," waiver has been recognized.[78] Most injuries involve some type of property, so requiring merely that property be involved would result in unlimited liability.[79] Accordingly, in order to establish waiver of governmental immunity, a plaintiff must successfully allege that the personal property causing her injuries was provided by the governmental entity and was either missing an "integral" safety component or was actively "used" by the entity.[80] Unlike claims involving personal property, claims involving real property do not require "use."[81]

Premises liability claims involving conditions or defects on real property are generally of two types: those arising from negligent activity on the property (negligent activity claims), and those arising from a defect in the condition of real property (premises defect claims).[82] Liability under the TTCA can be found under both claims, but in order to prevail on either, a plaintiff must demonstrate that a property owner failed to provide the proper standard of care to individuals on the property.[83] In claims under the TTCA arising from a premises defect, the landowner owes the same duty that a private party would owe a licensee on private

S.W.3d at 246.

78. *Bishop*, 156 S.W.3d at 584; *see* Robinson v. Cent. Tex. MHMR Ctr., 780 S.W.2d 169, 171 (Tex. 1989) (asserting that a life preserver was a necessary part of swimming attire provided to a mentally disabled student by caregivers); Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528, 529 (Tex. 1975) (maintaining that the hospital's failure to provide rails on the patient's bed was sufficient under the TTCA to waive governmental immunity). *But see* Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 585–86 (Tex. 1996) (holding that non-use of an intravenous drug is insufficient to waive governmental immunity under the TTCA).

79. Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343 (Tex. 1998).

80. *Bishop*, 156 S.W.3d at 583–84.

81. *See generally id.* at 583 (discussing the "use" requirement in the context of "tangible personal property").

82. Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 527 (Tex. 1997) (citing Redinger v. Living, Inc., 689 S.W.2d 415, 417 (Tex. 1985)).

83. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon Supp. 2008) (setting forth the duty of care owed for claims of premises defects); City of San Antonio v. Estrada, 219 S.W.3d 28, 32 (Tex. App.—San Antonio 2006, no pet.) ("Negligent activity and premises defect are independent theories of recovery."); *see also* Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 587 (Tex. 2001) ("The Tort Claims Act provides a limited waiver of sovereign immunity, allowing suits to be brought against governmental units only in certain, narrowly defined circumstances.").

property.[84] This includes a duty not to injure willfully, wantonly, or through gross negligence.[85] An exception to this rule applies when an owner knows of a dangerous condition of which the user is unaware.[86] Under those circumstances, the owner has a duty to either warn of the dangerous condition or "make the condition reasonably safe."[87] Although MUDs will generally be amenable to both suit and liability for failure to exercise the applicable duty of care, granting property for recreational use and erecting warning signs both function as affirmative steps to further limit liability if a cause of action under the TTCA is established.

A. *Liability Limited Under the Texas Recreational Use Statute*

The Texas Recreational Use Statute (RUS) limits the legislative waiver of immunity found in the TTCA in situations where a governmental entity allows use of its property for recreation.[88] Specifically, the RUS provides that the owner or occupier of real property does not assure that the premises are safe for recreational purposes and does not assume responsibility for the actions of third parties admitted to the property.[89] It also provides that the owner or occupier of real property does not owe the invitee recreational-user a greater degree of care than is owed to a trespasser on the premises.[90] Therefore, although an individual

84. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon Supp. 2008).

85. *See* State v. Tennison, 509 S.W.2d 560, 562 (Tex. 1974) (noting that the legal status of an injured party determines the duty owed to the party by the landowner); McVicker v. Johnson County, 561 S.W.2d 610, 611 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (discussing the duty owed by a licensor to a licensee).

86. *McVicker*, 561 S.W.2d at 611.

87. *See* Kopplin v. City of Garland, 869 S.W.2d 433, 438 (Tex. App.—Dallas 1993, writ denied) (discussing premises defect claims and the duty owed to licensees); Spencer v. City of Dallas, 819 S.W.2d 612, 617 (Tex. App.—Dallas 1991, no writ) (summarizing when a governmental entity can be liable under the TTCA and the applicable standard of care).

88. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(c) (Vernon Supp. 2008) (limiting liability when a landowner grants his property for recreational use). *See generally* James L. Isham, Annotation, *Liability of Local Government Entity for Injury Resulting from Use of Outdoor Playground Equipment at Municipally Owned Park or Recreation Area*, 73 A.L.R.4TH 496 (1989) (providing a case analysis of government liability for injuries to recreational users and the applicable duty of care).

89. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(c) (Vernon Supp. 2008) (limiting government liability when the land is for recreational use). *See generally* Robin Cheryl Miller, Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R.4TH 262 (1986) (discussing state and federal cases analyzing liability under recreational use statutes).

90. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(c)(2) (Vernon Supp. 2008).

may bring a premises defect claim against a governmental entity, the claim is severely restricted by the RUS. *State v. Shumake*[91] illustrates the outcome of coupling liability under the TTCA with the RUS liability limits.

In *Shumake*, a young girl drowned when she was sucked underwater and trapped in a man-made culvert while tubing on the Blanco River in Blanco State Park, which is owned and operated by the Texas Parks and Wildlife Department (TPWD).[92] The girl's parents sued TPWD, alleging that a premises defect brought about the wrongful death of their daughter.[93] Although the Shumakes acknowledged that TPWD owed them only the duty of care owed to trespassers, they alleged that the agency breached its duty because it "was aware of [the] dangerous situation . . . but failed to make the culvert safe or warn of the danger."[94] Under this exception, a landowner who has actual knowledge that a trespasser is coming and will encounter a known dangerous condition created by the landowner may owe a duty to warn or take some other action for the trespasser's protection.[95]

TPWD filed a plea to the court's jurisdiction seeking dismissal of the Shumakes' claims based on the RUS and the fact that Texas case law had never recognized the trespasser exception argued by the Shumakes.[96] In urging the court to dismiss the case against it, TPWD argued that at the time the RUS was enacted, landowners were only required to refrain from causing injury to trespassers willfully, wantonly, or through gross negligence, and were not required to make their property safe for trespassers or warn them of dangerous conditions on the property.[97] In other words,

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"Trespassers take the premises as they find them." 42 TEX. JUR. 3D *Government Tort Liability* § 25 (2005); *see* Kirwan v. City of Waco, 249 S.W.3d 544, 552 (Tex. App.—Waco 2008, pet. granted) ("[T]he recreational use statute permits premises defect claims based on natural conditions as long as the condition is not open and obvious and the plaintiff furnishes evidence of the defendant's alleged gross negligence.").

91. State v. Shumake, 199 S.W.3d 279 (Tex. 2006).

92. *Id.* at 281.

93. *Id. See generally* State v. Burris, 877 S.W.2d 298, 299 (Tex. 1994) (distinguishing premises defects from special defects); 42 TEX. JUR. 3D *Government Tort Liability* § 24 (2005) (discussing premises defect claims under the TTCA).

94. *Shumake*, 199 S.W.3d at 281–82.

95. *Id.* at 283; *see also* RESTATEMENT (SECOND) OF TORTS §§ 335, 337 (1965) (discussing landowner liability for artificial conditions that are highly dangerous to trespassers).

96. *Shumake*, 199 S.W.3d at 282.

97. *Id.* at 282–83.

although a recreational property owner may be held liable to a recreational user for negligent activities, it could not be held liable for premises defects. As such, TPWD argued that the legislature intended the RUS to reinstate governmental immunity for premises defect claims previously waived by the TTCA.[98]

In reaching its decision, the court did not adopt either party's line of reasoning. Instead, it based its holding on section 75.002(d) of the RUS, which provides that the recreational user's status as a trespasser shall not limit the liability of a recreational property owner "who has been grossly negligent or has acted with malicious intent or in bad faith."[99] Because this standard expressly differs from the standard generally owed to trespassers and does not distinguish between premises defects and negligent activities, both of which may be caused by gross negligence, the court concluded that the standard permits a premises defect claim against a property owner found to have acted with gross negligence, malicious intent, or bad faith.[100] In so holding, the court concluded that the RUS does not reinstate sovereign immunity for premises defect claims arising on state-owned recreational properties, but merely limits the state's liability under such claims.[101] Because the RUS generally immunizes landowners from liability unless they are guilty of gross negligence or willful or malicious conduct, conditions that may give rise to a duty to guard or warn against a dangerous condition become important.[102]

Gross negligence has been defined by the Texas legislature as "an act or omission . . . of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with

98. *Id.* at 283.

99. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(d) (Vernon Supp. 2008). "The fact that the owner or occupant knew of or had reason to anticipate entrants on the premises does not in itself elevate conduct not otherwise wilful or wanton to that level." 48 AM. JUR. PROOF OF FACTS 2D *Wilful Misconduct* § 3 (1987). The following facts and circumstances will help to establish that a landowner acted with malicious intent or bad faith: (1) existence of a dangerous condition; (2) seriousness of danger; (3) defendant's knowledge of the trespasser's presence; and (4) conduct demonstrating conscious disregard. *Id.*

100. *Shumake*, 199 S.W.3d at 285–87.

101. *Id.* at 288.

102. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(d) (Vernon Supp. 2008) (identifying the circumstances in which immunity is limited); Robin Cheryl Miller, Annotation, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R.4TH 341 (1986) (discussing the exception to immunity as upheld when the government willfully or maliciously failed to warn of danger).

conscious indifference to the rights, safety, or welfare of others."[103] This does not include "a duty to warn or protect trespassers from obvious defects or conditions."[104] The majority in *Shumake* disagreed with Justice Brister, dissenting, who interpreted this to mean that states must warn "that it is dangerous for a nine-year-old child to go tubing in a rushing river during high water."[105] Instead, the court held that:

> [Landowners can] assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake. But a landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use.[106]

Because storm water detention ponds, waste collection equipment, and like structures are not naturally occurring on MUD property, these structures could, *arguably*, constitute a condition that a recreational user would not reasonably expect, giving rise to a gross negligence analysis.[107] Invoking limitations under the RUS can successfully limit liability under the TTCA—as long as a MUD does not act with gross negligence through willful or malicious conduct—and greatly reduce the risk of being liable under tort causes of action for premises defect claims.[108] RUS protection against premises defect claims will extend to a MUD

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103. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (Vernon 2008); *see* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 19–20 (Tex. 1994) (recognizing the longstanding definition of gross negligence and noting that the TTCA made no changes to the common law definition); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981) (discussing the history of defining gross negligence in tort actions and finding that because "heedless and reckless disregard" is synonymous with "gross negligence," they should be defined the same when submitted to the jury).

104. *See* State v. Shumake, 199 S.W.3d 279, 288 (Tex. 2006) (disputing the dissent's suggestion that the court's holding requires an expanded duty to warn even of inherently dangerous conditions).

105. *Id.* at 290 (Brister, J., dissenting).

106. *Id.* at 288 (majority opinion).

107. *See id.* (holding that failure to warn of unexpected dangerous conditions may give rise to gross negligence liability); *see also* Kirwan v. City of Waco, 249 S.W.3d 544, 552 (Tex. App.—Waco 2008, pet. granted) (discussing natural conditions that a recreational user might not "reasonably expect").

108. *See* Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653, 659 (Tex. 2007) ("The statute effectively requires for liability either gross negligence or an intent to injure."); 42 TEX. JUR. 3D *Government Tort Liability* § 25 (2005) (delineating the duty of care owed by the government under statutory limitations of liability).

whether it donates its entire property for recreational use or simply grants an easement for recreational use.[109]

Recently, the Texas court of appeals in Tyler held that whether a landowner is liable at all under the TTCA for injuries sustained by a recreational user is dependent on whether or not the governmental entity retains ownership of the land being used or grants an easement, effectively conveying ownership to the holder of the easement.[110] In *Stephen F. Austin State University v. Flynn*,[111] the plaintiff alleged that the University granted a bike trail easement to the City of Nacogdoches for recreational biking.[112] The trail was adjacent to a shot put field on the University's campus.[113] While bike riding on the trail, plaintiff was hit and knocked to the ground by a stream of water from an oscillating sprinkler located in the shot put field.[114] The plaintiff sued the University for personal injuries sustained as a result of the University's alleged negligent use of personal property—the sprinkler.[115] She argued that although she was a recreational user, she was injured on the easement owned by the City of Nacogdoches, and not property owned by the University.[116] Accordingly, the RUS could not protect the University from liability since the RUS protects "an owner, lessee, or occupant of real property" where the injury occurs.[117] Plaintiff also alleged two theories of alternative liability. First, that even if the University did own the portion of the trail where the injuries occurred, her injuries resulted from the University's negligent

109. *See Flynn*, 228 S.W.3d at 658 (noting that dedication of an easement does not transfer title; thus, RUS protection still applies).

110. Stephen F. Austin State Univ. v. Flynn, 202 S.W.3d 167, 174–75 (Tex. App.—Tyler 2004), *rev'd on other grounds*, 228 S.W.3d 653 (Tex. 2007).

111. Stephen F. Austin State Univ. v. Flynn, 202 S.W.3d 167 (Tex. App.—Tyler 2004), *rev'd on other grounds*, 228 S.W.3d 653 (Tex. 2007).

112. *Id.* at 170.

113. *Id.*

114. *Id.*

115. *Id.*; *see* DeRouen v. Falls County Sheriff's Dep't, No. 10-07-00258-CV, 2008 WL 2841138, at *3 (Tex. App.—Waco July 23, 2008, no pet.) (mem. op.) (opining that waiver under the TTCA is appropriate when tangible personal property has been used negligently, not intentionally).

116. *Flynn*, 202 S.W.3d at 170.

117. *See id.* at 174 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(c) (Vernon Supp. 2008)) (stating that when an easement is granted, the landowner loses protection under the RUS for the portion of land subject to the easement).

activity on the property, not from a premises defect.[118] Second, if the University did own the trail, it was not "reasonably safe and presented an unreasonable risk of harm," of which the University did not warn of or correct, constituting gross negligence.[119]

The University filed a plea to the court's jurisdiction seeking dismissal of the plaintiff's claim based on the TTCA and the RUS.[120] The University argued that because the plaintiff was a recreational user, the University owed only a duty to her as a trespasser; it could not be held liable in the absence of gross negligence, malicious intent, or bad faith; and it had no duty to warn or make the premises safe.[121] The University also argued that the plaintiff failed to "prove her injuries resulted from grossly negligent contemporaneous conduct by [a University] employee who used tangible property."[122] Although the University granted the bike trail easement to the City of Nacogdoches, it retained ownership of the property and could thus enjoy the RUS limitations on liability.[123]

The court recognized that if the easement existed, then the University owed no duty to plaintiff and if no such easement was in operation, then plaintiff's cause of action for any premises defect must fail because the RUS limits recovery for premises defects.[124] Because the sprinkler was a condition of real property, plaintiff's cause of action was for a premises defect.[125]

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118. *Id.* at 170.

119. *Id.*

120. *See id.* at 171 (arguing that the University enjoys sovereign immunity for plaintiff's premises defect claim and the RUS bars negligence claims).

121. Stephen F. Austin State Univ. v. Flynn, 202 S.W.3d 167, 173 (Tex. App.—Tyler 2004), *rev'd on other grounds*, 228 S.W.3d 653 (Tex. 2007); *see also* State v. Shumake, 199 S.W.3d 279, 287–88 (Tex. 2006) (discussing when landowners owe trespassers a duty to warn or make dangerous conditions safe in order to benefit from recreational use statute protections).

122. *Flynn*, 202 S.W.3d at 173.

123. *Id.*

124. *See id.* at 175 (noting that the RUS applies to the "owner, lessee, or occupant of real property," which the University failed to prove); *see also* Lavigne v. Holder, 186 S.W.3d 625, 628 (Tex. App.—Fort Worth 2006, no pet.) (stating that an easement is an interest in land). "An easement confers upon one person the right to use the land of another for a specific purpose." Hubert v. Davis, 170 S.W.3d 706, 710 (Tex. App.—Tyler 2005, no pet.) (citing Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868, 870 (Tex. App.—Austin 1988, writ denied)).

125. *See* Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 527 (Tex. 1997) (recognizing two types of premises defects claims—those previously existing and those created in the course of some activity); Redinger v. Living, Inc., 689 S.W.2d 415, 417 (Tex.

"[A]lthough [the University] denied the existence of the easement, [it] provided no proof that it, rather than the [C]ity of Nacogdoches, controlled the portion of the trail where the plaintiff was injured."[126] Because the RUS benefits the "owner, lessee, or occupant of the real property," and the University failed to show that it fell "into that category of defendants," the court held that the RUS did not apply.[127] Accordingly, the court of appeals held that plaintiff established a waiver of immunity and a cause of action for premises liability under the TTCA.[128]

The University appealed to the Texas Supreme Court on the issue of whether a landowner retains ownership of property when it dedicates an easement for public recreational use and is therefore protected by the RUS when a recreational user or member of the public is injured while using the easement.[129] The court answered affirmatively, holding that "[a]n easement does not convey title to property," but rather is a non-possessory interest.[130] Because the University retained ownership of the property subject to the easement, it was protected by the RUS.[131]

Whenever a MUD installs equipment—like a sprinkler—that "is erected or growing upon or affixed to the land," any resulting injury will be deemed a premises defect claim.[132] Any premises defect claim asserted against a MUD will first be limited by the TTCA to the extent that the MUD would only owe a duty not to

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1985) (recognizing liability for premises defects and liability arising out of an "activity or instrumentality").

126. *Flynn*, 202 S.W.3d at 175.

127. *Id.*

128. *Id.*

129. Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653, 655–56 (Tex. 2007); *see also* Roberson v. City of Austin, 157 S.W.3d 130, 136 (Tex. App.—Austin 2005, pet. denied) (providing that "an easement does not divest fee ownership of the property"; instead, the grantor retains ownership).

130. *Flynn*, 228 S.W.3d at 658. When a public recreational use easement is granted, the grantor retains ownership of the underlying fee simple and likewise retains status as "owner" for purposes of protection by the RUS. *Id.* "Unlike a possessory interest in land, an easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes." Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697, 700 (Tex. 2002).

131. *See Flynn*, 228 S.W.3d at 658 (holding that as the property owner, the University retained its status as a protected class member under the RUS).

132. *See* Stephen F. Austin State Univ. v. Flynn, 202 S.W.3d 167, 173 (Tex. App.—Tyler 2004), *rev'd on other grounds*, 228 S.W.3d 653 (Tex. 2007) (defining a premises defect claim as involving the condition of real property).

injure willfully, wantonly, or through gross negligence.[133] There would be an additional duty to warn of any dangerous condition that the MUD knows about—but is unknown to the easement user—or make the condition reasonably safe.[134]

It could be argued that a user might be unaware of the existence of any number of MUD structures (e.g., collection centers or voltage equipment) along a proposed easement trail through its property, and such structures could be deemed inherently dangerous conditions, giving rise to a duty to warn or make them reasonably safe. However, assuming an easement is granted for recreational use, premises liability claims against the MUD will likely be restricted by the RUS, as long as the MUD is deemed the owner of the land subject to the easement.[135] The RUS was designed to benefit landowners; therefore, any party attempting to invoke its protections must prove that it owns the land or preclude liability altogether by demonstrating that the easement holder is the actual landowner.[136] After the recent Texas Supreme Court ruling in *Flynn*, neither granting recreational use of property in general nor granting a recreational use easement will preclude landowners from invoking protections under the RUS.[137]

B. *Warning Signs and Other Precautions As a Means of Limiting Liability*

Erecting warning signs and special fencing around MUD equipment can limit liability for premises defect claims by trespassers or recreational users, depending on the specific

133. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon Supp. 2008) (providing that the licensee standard applies to claims for premises defects); McVicker v. Johnson County, 561 S.W.2d 610, 611 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (discussing the duty owed to licensees).

134. *See* Kopplin v. City of Garland, 869 S.W.2d 433, 438 (Tex. App.—Dallas 1993, writ denied) (discussing an exception to the duty owed to a licensee standard); Spencer v. City of Dallas, 819 S.W.2d 612, 617 (Tex. App.—Dallas 1991, no writ) (discussing the duty owed to licensees when the landowner knows of a dangerous condition); *McVicker*, 561 S.W.2d at 611 (providing that when a landowner knows there is a dangerous condition, he has a duty "to make the condition reasonably safe").

135. *See Flynn*, 228 S.W.3d at 658 (holding that the owner of a recreational easement is protected by the RUS).

136. *See Flynn*, 202 S.W.3d at 175 (holding that the RUS is intended to benefit "the owner, lessee, or occupant of the real property").

137. *See Flynn*, 228 S.W.3d at 658 (holding that the owner of land subject to an easement is protected by the RUS).

determinations of the fact-finder.[138] For instance, although a MUD would generally only owe recreational users the duty owed to trespassers, if a court found that the dangers associated with a storm water detention pond or water pump were not natural or obvious, and represented an unexpected dangerous condition, the MUD could be required to warn or make the condition reasonably safe in order to protect itself from liability.[139] On the other hand, if a court found that a user could reasonably expect to encounter the pond on the property in the course of the permitted recreational use, signs or other precautions would not be necessary to shield liability.[140]

In *Smither v. Texas Utilities Electric Co.*,[141] Texas Utilities Electric Company (TU) maintained an electric plant along a canal located on property it owned.[142] Flows from the electric generators were cooled by a dam before entering the canal for re-circulating, creating an area of highly turbulent currents at the foot

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138. *See* Tex. Cities Gas Co. v. Dickens, 140 Tex. 433, 437–38, 168 S.W.2d 208, 210 (1943) (discussing the duty owed to trespassers and licensees).

> The rule that there is no duty to keep premises safe for trespassers or licensees is for the protection of the property owner. So long as he creates no nuisance, he is entitled to use his property as he sees fit. He is entitled to assume that his possession will not be disturbed by outsiders. It would be placing an unreasonable burden upon him to require that he keep his premises safe for strangers who come uninvited on his land for purposes of their own. Such persons must take the premises as they find them; and if they fall into an unsuspected danger, the loss is their own.

Id. Under facts where the injured is a trespasser, there will generally be no duty owed with respect to "activities or conduct . . . on the premises." Smither v. Tex. Utils. Elec. Co., 824 S.W.2d 693, 695 (Tex. App.—El Paso 1992, writ dism'd) (holding there is no duty to warn a trespasser of dangerous conditions on the property, as they assume the risk of injury when entering the property for their own benefit). However, even where the facts indicate no duty is owed, posting warning signs and erecting fencing or other barriers "show[s] a conscious concern for . . . safety over and above what the law require[s]." *Id.* at 696.

139. *See* State v. Shumake, 199 S.W.3d 279, 285 (Tex. 2006) (recognizing an exception to the general rule that a landowner with "actual knowledge that a trespasser is coming and will encounter a known dangerous condition . . . may owe a duty to warn or take some other action for the trespasser's protection").

140. *See id.* at 288 (recognizing that warnings are not necessary for obvious conditions on property). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(f)–(g) (Vernon Supp. 2008) (providing that if recreational users will engage in hockey or skating on the premises, the RUS requires landowners to post signs that warn users about limited liability under the RUS, although the standard of care remains the same).

141. Smither v. Tex. Utils. Elec. Co., 824 S.W.2d 693 (Tex. App.—El Paso 1992, writ dism'd).

142. *Id.* at 694.

of the dam, which attracted fish and consequently fishermen.[143] TU's property around the canal was enclosed by a six-foot chain-link fence topped by barbed wire slanted over the canal by a cable barrier fence.[144] "No trespassing" signs were attached to the chainlink fence and other signs within the fence line warned of "deep water-strong current" danger.[145] Additionally, Texas Parks and Wildlife game wardens patrolled the area.[146] While fishing along the canal and electric plant, a fisherman-trespasser drowned.[147] Survivors of the fisherman sued TU for wrongful death as a result of gross negligence.[148]

TU argued that it owed no duty to trespassers to keep the premises in safe condition despite the fact that there had been four prior drownings.[149] The court held that landowners only owe trespassers the duty not to injure through willful or wanton conduct, or grossly negligent acts or omissions.[150] The "acts or omissions" refer to the activities or conduct of the occupier on the premises, "not the conditions of the premises."[151] Because the fisherman drowned, not from any conduct by TU on the premises, but rather from a dangerous condition, the court affirmed in favor of TU.[152] The court noted that erecting a fence and barrier, posting signs, and patrolling were beneficial to trespassers and

143. *Id.*

144. *Id.*

145. *Id.*

146. *Smither*, 824 S.W.2d at 695.

147. *Id.* at 694.

148. *Id.* at 695; *see also* Kirwan v. City of Waco, 249 S.W.3d 544, 550–52 (Tex. App.—Waco 2008, pet. granted) (discussing the gross negligence exception to protection under the recreational use statute and analyzing whether a premises defect claim can be brought for a natural condition—structurally unstable cliff rock). The plaintiff in *Kirwan* argued that natural conditions on property can form the basis of a claim under the TTCA when the defect is hidden. *Kirwan*, 249 S.W.3d at 551. The defendant-City argued that it could not be held liable for "inherent dangers of nature." *Id.* at 552. The court held that "[c]rumbling rocks and cracks do not conclusively prove that the danger of structurally unstable cliff rock is open and obvious." *Id.* at 553. While crumbling rock could give notice of a slip and fall risk, it does not alert an average person that the ground underneath will give out completely. *Id.* As such, the defect was hidden and is actionable under the TTCA. *Id.*

149. *See Smither*, 824 S.W.2d at 694 (noting the previous drowning deaths of four fishermen on the property and TU's contention of no duty owed to trespassers).

150. *Id.* at 695.

151. Smither v. Tex. Utils. Elec. Co., 824 S.W.2d 693, 695 (Tex. App.—El Paso 1992, writ dism'd).

152. *Id.* at 696.

showed a conscious concern by TU for trespasser safety "over and above what the law required."[153]

This case illustrates the proposition that "more can sometimes be better." Although generally a MUD would not owe a duty to warn trespassers or make conditions safe, it is possible that a fact-finder could decide that structures, facilities, or equipment used by the MUD are dangerous conditions requiring warning and steps to make them safe. Taking proactive steps to minimize public access, such as fencing off a portion of a pond away from public trails and erecting signs that prohibit public access to portions of MUD property, can, in some instances, demonstrate a conscious concern for trespassers beyond what is required by law.[154] In other instances, the same measures can demonstrate attempts to warn and make safe a dangerous condition, as required by law.[155]

V. WAIVER OF GOVERNMENTAL IMMUNITY OUTSIDE THE TTCA

General statutory language is sometimes construed to waive governmental immunity from suit. Prior to the Texas Supreme Court decision in *Tooke v. City of Mexia*,[156] courts of appeals in Texas were split on whether merely using phrases such as "sue and be sued" or "plead and be impleaded" in a statute constituted a general legislative waiver of immunity from suit.[157] For instance,

153. *Id.* When analyzing liability for gross negligence, courts consider the adequacy of warnings as a fact question. *See* Tex. Dep't of Transp. v. Gutierrez, 243 S.W.3d 127, 136 (Tex. App.—San Antonio 2007, pet. filed) (holding that a "loose gravel" sign was inadequate to warn of possible dangers because loose gravel in itself is not dangerous); State v. McBride, 601 S.W.2d 552, 557 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (stating that merely posting a "SLOW" sign and stating a miles-per-hour limit completely failed to warn of a muddy road condition).

154. *See Smither*, 824 S.W.2d at 696 (acknowledging that warning signs demonstrate concern for the trespasser).

155. *See* State v. Shumake, 199 S.W.3d 279, 288 (Tex. 2006) (indicating that landowners may need to warn of hidden dangers on the premises).

156. Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006).

157. *See, e.g.*, Alamo Cmty. Coll. Dist. v. Browning Constr. Co., 131 S.W.3d 146, 154 (Tex. App.—San Antonio 2004, pet. dism'd) (denying the district's governmental immunity defense because the Texas Education Code allows such entities to "sue and be sued"). *But see, e.g.*, Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist., 123 S.W.3d 63, 66 (Tex. App.—Dallas 2003) (holding that "sue or be sued" language does not waive immunity but rather speaks to capacity once immunity has been waived), *rev'd on other grounds*, 197 S.W.3d 390 (Tex. 2006); City of Dallas v. Reata Constr. Corp., 83 S.W.3d 392, 398 (Tex. App.—Dallas 2002) (holding that "sue or be sued" language does not waive a city's sovereign immunity), *rev'd on other grounds*, 197 S.W.3d 371 (Tex. 2006).

City of Dallas v. Reata Construction Corp.[158] involved a negligence action against a property owner and subcontractor, with third-party claims by the subcontractor against the City of Dallas.[159] Allegedly, as a result of negligent mapping and identification of pipes by the City, a water pipe had been struck during construction.[160] In its defense, the City pled governmental immunity.[161] In order to show that the Texas legislature had waived the City's governmental immunity to suit, the subcontractor relied on the Texas Local Government Code and the Dallas City Charter which allowed the City to "sue and be sued."[162] The Dallas court of appeals disagreed that this was an express and complete waiver of immunity, but rather held that the "provisions simply [spoke] to the City's capacity to sue and its capacity to be sued when immunity *has* been waived" by other statutory authority.[163]

After *Reata*, the Dallas court of appeals revisited the issue of governmental immunity in *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District*.[164] In this case, a statute from the Texas Education Code allowed the trustees of a school district to "sue and be sued."[165] The court relied on *Reata* to determine that such language originated in the corporate law context and could therefore be easily read as a "designation to give a particular entity a legal existence in the courts."[166] The court went on to provide that:

> At a minimum, we conclude [the statute] is ambiguous as to whether it addresses the District's capability to sue and be sued as an entity or is an expression of the [l]egislature's intent to waive the District's

158. City of Dallas v. Reata Constr. Corp., 83 S.W.3d 392 (Tex. App.—Dallas 2002), *rev'd on other grounds*, 197 S.W.3d 371 (Tex. 2006).

159. *Id.* at 393.

160. *Id.*

161. *Id.* at 394.

162. *Id.* at 398 (referencing both the 1999 Dallas City Charter and Texas Local Government Code section 51.075, which provide language that the City has the power to "sue and be sued").

163. *Reata*, 83 S.W.3d at 398.

164. *See* Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist., 123 S.W.3d 63, 65 (Tex. App.—Dallas 2003) (holding that "sue and be sued" language in the Texas Education Code does not waive governmental immunity), *rev'd on other grounds*, 197 S.W.3d 390 (Tex. 2006).

165. *Id.*

166. *Id.*

immunity from suit. We are required to construe the statute in a manner that retains the District's immunity.[167]

On the other hand, the Fourth District Court of Appeals in San Antonio reached a different understanding of a "sue and be sued" provision. In *Alamo Community College District v. Browning Construction Co.*,[168] the court denied a defense of governmental immunity because the Texas Education Code allows such entities to "sue and be sued."[169] The court stated that, at most, the "sue and be sued" language "arguably" shows intent to waive governmental immunity.[170] The court went on to address the conflict with *Satterfield*, concluding that the *Satterfield* decision was an improper overruling of previous case law, and refused to deviate from precedent until the Texas Supreme Court overruled those past decisions.[171] Ultimately, the court accepted the "sue and be sued" provision in the Texas Education Code as a general consent to suit.[172] Likewise, the Fourteenth District Court of Appeals in Houston held that a "sue and be sued" provision provided general consent to suit in *City of Houston v. Clear Channel Outdoor, Inc.*[173] and distinguished cases involving previously-scrutinized statutes as containing different terms that were less clear waivers than "sue and be sued."[174]

Ultimately, in *Tooke v. City of Mexia*, the Texas Supreme Court settled the appellate court split.[175] In *Tooke*, the City contracted with the plaintiff to furnish the labor and equipment for collecting

167. *Id.*

168. Alamo Cmty. Coll. Dist. v. Browning Constr. Co., 131 S.W.3d 146 (Tex. App.—San Antonio 2004, pet. dism'd).

169. *See id.* at 151–52 (holding that "sue and be sued" language is a clear and unambiguous waiver by the legislature of immunity for community college districts).

170. *Id.* at 154.

171. *Id.*

172. *See id.* (holding that the legislature made it very clear that immunity for community college districts is waived).

173. City of Houston v. Clear Channel Outdoor, Inc., 161 S.W.3d 3, 8 (Tex. App.—Houston [14th Dist.] 2004), *rev'd per curiam on other grounds*, 197 S.W.3d 386 (Tex. 2006), *aff'd*, 233 S.W.3d 441 (Tex. App.—Houston [14th Dist.] 2007).

174. *See id.* (citing Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970)) (holding that "sue and be sued" waives sovereign immunity, and if the legislature had meant otherwise, it could have used more exacting language to express that intention).

175. *See* Tooke v. City of Mexia, 197 S.W.3d 325, 328–29 (Tex. 2006) (providing guidance for statutory construction of "plead and be impleaded" or "sue and be sued" language).

brush and leaves on curbsides within the City for three years.[176] After approximately fourteen months, the City discontinued the contract for lack of funding.[177] The plaintiff sued the City for breach of contract.[178] The City raised governmental immunity, which Tooke argued, in part, was waived by the "plead and be impleaded" language in section 51.075 of the Texas Local Government Code.[179]

Specifically, section 51.075 provides that home-rule municipalities "may plead and be impleaded in any court."[180] The court provided that when evaluating the implications of such phrases, relevant considerations include whether "the provision in question would be meaningless unless immunity were waived" and "whether the statute also provides an objective limitation on potential liability."[181] Accordingly, the effect of "sue and be sued" and "plead and be impleaded" clauses depends on the context in which they are used. In some instances the words can waive immunity, and in other instances they can mean only that a governmental entity has the capacity to sue and be sued in its own name.[182] Some statutes use these general phrases in connection

176. *Id.* at 329.

177. *Id.* at 330.

178. *Id.* The City of Mexia is a home-rule municipality and is generally protected from suit and liability by governmental immunity. *Id.* at 329–30. The court held that language allowing a municipality to "plead and be impleaded" was not a waiver of immunity otherwise enjoyed by the municipality. *Tooke*, 197 S.W.3d at 329–30; *see also* TEX. LOC. GOV'T CODE ANN. § 51.075 (Vernon 2008) ("The municipality may plead and be impleaded in any court."). The court noted that, when authorized by statute, immunity will be waived for a municipality upon breach of contract. *Tooke*, 197 S.W.3d at 344–46. In those instances, damages will be limited according to the statute. *Id.* Here, however, the court found plaintiff's complaint was for lost profits, which are considered consequential damages; thus, they are excluded from recovery. *Id.*; *see also* TEX. LOC. GOV'T CODE ANN. § 271.152 (Vernon 2005) (stating that constitutional or statutorily created government cities waive sovereign immunity when "adjudicating a claim for breach of contract").

179. *See* TEX. LOC. GOV'T CODE ANN. § 51.075 (Vernon 2008) (establishing that a municipality may plead and be impleaded in a county court); *see, e.g.*, Dallas Fire Fighters Ass'n v. City of Dallas, 231 S.W.3d 388, 388–89 (Tex. 2007) (providing that "plead and be impleaded" in the Texas Local Government Code does not waive governmental immunity).

180. TEX. LOC. GOV'T CODE ANN. § 51.075 (Vernon 2008); *see also Tooke*, 197 S.W.3d at 333 (discussing the effect of "plead and be impleaded" language).

181. *See* Tooke v. City of Mexia, 197 S.W.3d 325, 330 (Tex. 2006) (considering whether phrases like "sue and be sued" and "plead or be impleaded" waived government immunity).

182. *See* U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 742 (2004)

with a clearly expressed provision to waive, retain, or confer immunity.[183] Still, in other statutes, "sue and be sued" and "plead and be impleaded" language has nothing to do with immunity at all; instead, it refers only to an entity's capacity to participate in litigation.[184] The court found that "plead and be impleaded" in the context of section 51.075 of the Local Government Code does not "reflect[] a clear legislative intent to waive immunity from suit."[185] Instead, as used, it reveals nothing about intent to waive immunity, and "the chapter in which it is placed provide[s] [no] additional indication."[186] Accordingly, *Tooke* overruled the court's prior holding in *Missouri Pacific Railroad Co. v. Brownsville Navigation District*,[187] that "sue and be sued" language generally gives "consent for a [governmental entity] to be sued."[188] Instead, "sue or be sued" in a statute does not represent a clear and unambiguous waiver of immunity from suit by itself, but may waive immunity when read in context with other statutory language.[189]

(providing that "sue and be sued" in the Postal Reorganization Act waives immunity); Loeffler v. Frank, 486 U.S. 549, 554–55 (1988) (providing that "sue and be sued" clauses constitute a broad waiver of immunity); Fed. Hous. Admin. v. Burr, 309 U.S. 242, 246 (1940) (holding that "sue and be sued" language allows suit against the Federal Housing Administration).

183. *Tooke*, 197 S.W.3d at 340. *See generally* TEX. GOV'T CODE ANN. § 404.103 (Vernon 2001) (waiving all defenses of governmental immunity by and on behalf of the Texas Treasury Safekeeping Trust Company); TEX. EDUC. CODE ANN. §§ 76.04(i), 111.33(ii) (Vernon 2002) (granting legislative consent to suits against the Board of Regents of the University of Texas System, while retaining governmental immunity as to the Board of Regents of the University of Houston unless otherwise authorized by law); TEX. HEALTH & SAFETY CODE ANN. § 403.006 (Vernon 2008) (conferring governmental immunity as to the Texas Low-Level Radioactive Waste Disposal Compact Commission); TEX. LOC. GOV'T CODE ANN. § 262.007 (Vernon 2005) (waiving sovereign immunity with respect to contracts for engineering, architectural, or construction services, and the goods related to these services, while retaining sovereign immunity to suits in federal court).

184. *Tooke*, 197 S.W.3d at 341–42. *See generally* TEX. FAM. CODE ANN. § 1.105(a) (Vernon 2006) ("A spouse may sue and be sued without the joinder of the other spouse."); TEX. FIN. CODE ANN. § 93.001(c)(1) (Vernon 2006) (providing that a savings bank may "sue and be sued" in its corporate name).

185. *Tooke*, 197 S.W.3d at 342.

186. *Id.* at 343.

187. Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812 (Tex. 1970), *overruled by Tooke*, 197 S.W.3d 325.

188. *Tooke*, 197 S.W.3d at 340 (brackets in original).

189. *See id.* at 342 (stating that the holding in *Missouri Pacific* is inconsistent with the legislative intent in recent statutes and the language is ambiguous when examined outside of the surrounding text).

Tooke makes it clear that "sue and be sued," or like provisions, appearing within statutory language do not, by themselves, waive immunity for governmental entities.[190] Instead, the impact of the provision on governmental immunity is ascertained by examining surrounding text and legislative intent, and it can even be inferred by other relevant statutes.[191] When evaluating statutorily created governmental immunity, *Tooke* requires a district court to employ a more complex analysis than previously required. Comparing Texas district court decisions on whether the "sue and be sued" language in the context of the Texas Water Code provides general consent to suit, before and after *Tooke*, illustrates the shift towards this complex analysis and identifies a MUD's amenability to suit.

A. *"Sue and Be Sued" Provision in the Texas Water Code*

The Texas Water Code uses "sue and be sued" language in section 49.066(a).[192] Specifically, section 49.066 provides:

> (a) A district may *sue and be sued* in the courts of this state in the name of the district by and through its board. A suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board. All courts shall take judicial notice of the creation of the district and of its boundaries.
>
> (b) Any court in the state rendering judgment for debt against a district may order the board to levy, assess, and collect taxes or assessments to pay the judgment.
>
> (c) The president or the general manager of any district shall be the agent of the district on whom process, notice, or demand required or permitted by law to be served upon the district may be served.
>
> (d) Except as provided in Subsection (e), no suit may be instituted in any court of this state contesting:
>
> (1) the validity of the creation and boundaries of a district created under this code;
>
> (2) any bonds or other obligations created under this code; or
>
> (3) the validity or the authorization of a contract with the United States by the district.
>
> (e) The matters listed in Subsection (d) may be judicially inquired into at any time and determined in any suit brought by the State of

190. *Id.*
191. *Id.*
192. TEX. WATER CODE ANN. § 49.066(a) (Vernon 2008).

> Texas through the attorney general. The action shall be brought on good cause shown, except where otherwise provided by other provisions of this code or by the Texas Constitution. It is specifically provided, however, that no such proceeding shall affect the validity of or security for any bonds or other obligations theretofore issued by a district if such bonds or other obligations have been approved by the attorney general as provided by Section 49.184.
>
> (f) A district or water supply corporation shall not be required to give bond for appeal, injunction, or costs in any suit to which it is a party and shall not be required to deposit more than the amount of any award in any eminent domain proceeding.[193]

Before *Tooke*, the Fourteenth District Court of Appeals in Houston held that the "sue and be sued" provision in section 49.066(a) of the Texas Water Code was a general consent to suit.[194] In *Loyd v. ECO Resources, Inc.*,[195] the court held that a MUD's immunity from suit is waived in section 49.066(a) of the Texas Water Code.[196] In *Loyd*, a MUD sold water to residential homeowners on a monthly basis and hired a contractor to deliver the water to the homeowners.[197] The homebuilder and homeowners sued the MUD alleging that because it and its contractor were not adding corrosion inhibitors to the water supply, pipes in a number of homes were corroding, leaking, and causing damage.[198] The plaintiffs asserted multiple causes of action including breach of contract, nuisance, negligence, and liability under the Texas Deceptive Trade Practices Act.[199] The district asserted governmental immunity.[200]

The court recognized that MUDs, which generally perform governmental functions, will usually have governmental immunity; however, the "sue and be sued" language in section 49.066(a) of

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193. *Id.* § 49.066 (emphasis added).

194. *See* Loyd v. ECO Res., Inc., 956 S.W.2d 110, 120 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (holding that "sue and be sued" language in the Texas Water Code was a general waiver of governmental immunity), *abrogated by* Clear Lake City Water Auth. v. Friendswood Dev. Co., 256 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

195. Loyd v. ECO Res., Inc., 956 S.W.2d 110 (Tex. App.—Houston [14th Dist.] 1997, no pet.), *abrogated by Clear Lake City*, 256 S.W.3d 735.

196. *Id.* at 122 (relying on the Texas Supreme Court's holding in *Tooke*).

197. *Id.* at 120.

198. *Id.* at 119.

199. *Id.* at 120–21.

200. *Loyd*, 956 S.W.2d at 121.

the Texas Water Code waives that immunity.[201] The court failed to provide any additional analysis to support its conclusion that the legislature intended to waive governmental immunity in the Texas Water Code. In *EPGT Texas Pipeline, L.P. v. Harris County Flood Control District*,[202] the First District Court of Appeals in Houston agreed that the "sue and be sued" language in section 49.066(a) waives immunity from suit by legislative consent.[203]

The Fourth District Court of Appeals in San Antonio arrived at a different understanding of the term "sue and be sued" as it is used in the Texas Water Code. The court, rather than relying entirely on prior decisions, offered in-depth analysis on section 49.066 as it relates to governmental immunity. In *Bexar Metropolitan Water District v. Education & Economic Development Joint Venture*,[204] Bexar Metropolitan (Bexar Met) entered into a contract to sell a parcel of land to the defendants.[205] When Bexar Met refused to close, plaintiffs sued for specific performance of the contract.[206] The trial court denied Bexar Met's jurisdictional plea of governmental immunity.[207] Bexar Met, in turn, filed an interlocutory appeal.[208] The plaintiff argued that governmental immunity did not apply to the suit because the water district was involved in a proprietary function.[209] The court rejected this argument because a

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201. *Id.* at 122; *see, e.g.*, Bennett v. Brown County Water Improvement Dist. No. 1, 153 Tex. 599, 606–07, 272 S.W.2d 498, 502 (1954) (recognizing that preservation of the state's natural resources is a governmental function).

202. EPGT Tex. Pipeline, L.P. v. Harris County Flood Control Dist., 176 S.W.3d 330 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd).

203. *Id.* at 339 (citing Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813–14 (Tex. 1970)); *see also Loyd*, 956 S.W.2d at 122 (discussing how there is no waiver of immunity by "sue and be sued" language).

204. Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25 (Tex. App.—San Antonio 2006, pet. dism'd by agr.).

205. *Id.* at 27.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Bexar Metro.*, 220 S.W.3d at 28. Generally, governmental immunity is not a defense when the governmental entity is engaged in a proprietary function. *See* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 689–90 (1996) (discussing the distinction between governmental and proprietary functions). However, when the "proprietary" function—selling real property for a profit—is performed by a water district created by state constitution, the function is deemed to be governmental. *Id.*

conservation district created under article XVI, section 59 of the Texas constitution "is a political subdivision of [the] [s]tate and performs only governmental functions."[210] Next, plaintiff argued that suits for equitable relief are excluded from governmental immunity because the same risks are not present.[211] However, the court concluded that in any action attempting to control state action, governmental immunity applies.[212]

Finally, plaintiff argued that: (1) section 49.066(a) of the Texas Water Code waived Bexar Met's immunity from suit because "sue and be sued" should be read in the context of how the law existed when it was both enacted and amended; (2) "the legislature intended to waive immunity to suit because it enacted section 49.066 after the Texas Supreme Court held" in *Missouri Pacific* that such phrases constitute a general waiver of immunity; and (3) the "broad waiver of immunity was simply narrowed by" subsequent amendments for the purpose of giving meaning to the remaining provisions of the section which would be "pure surplusage if the water district were immune from all suits."[213] The court rejected the plaintiff's arguments and held that section 49.066(a) does not waive a governmental entity's immunity from suit.[214] The court's holding was based on the following analysis:

1. *Timing of Codification Unpersuasive*

First, the court relied on the analysis in *Tooke*, which "did not consider the fact that the legislature codified the authority to 'plead and be impleaded' *after Missouri Pacific* to be any evidence of a legislative intent to waive immunity."[215] Likewise, the legislature's codification of the "sue and be sued" language in section 40.066 after *Missouri Pacific* did nothing to support the phrase as a general waiver of immunity.[216]

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210. *Bexar Metro.*, 220 S.W.3d at 28; *see, e.g.*, City of Galveston v. State, 217 S.W.3d 466, 469 (Tex. 2007) (recognizing that entities created by constitution are protected by governmental immunity).

211. *Bexar Metro.*, 220 S.W.3d at 28.

212. *Id.*

213. *Id.* at 29.

214. Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25, 29 (Tex. App.—San Antonio 2006, pet. dism'd by agr.).

215. *Id.* at 30.

216. *Id.* at 30–31.

2. *Immunity Is Inherent in Bexar Met's Original Creation*

The court then turned to the 1945 Act creating Bexar Met, and stated that "'as a governmental agency, a body politic and corporate,' [Bexar Met] was given 'the powers vested by the [c]onstitution' . . . including the general power 'to sue and be sued in its corporate name.'"[217] Accordingly, the court concluded that by authorizing Bexar Met to "sue and be sued in its corporate name," the legislature intended to provide that Bexar Met is an entity capable of being sued itself rather than only through a personal representative, "leaving aside whether suit was barred by immunity."[218] As with the statutes examined in *Tooke*, the legislature did not intend the "sue and be sued" language in section 49.066(a) to be a general waiver of governmental immunity from suit, but rather "refer[s] to an entity's *capacity* to be involved in litigation."[219]

3. *Immunity Was Not Waived in Section 49.066 As Enacted*

The court recalled that Chapter 49 of the Texas Water Code was enacted in 1995 in a legislative effort to achieve uniformity among local water districts.[220] The "sue and be sued" language used when section 49.066(a) was enacted was "substantially similar" to the language of the 1945 Act creating Bexar Met, and "the meaning of the words did not change."[221] Additionally, the court provided that construing the phrase so as not to encompass a waiver of immunity from suit does not render the remaining subsections of section 49.066 "pure surplusage."[222] Instead:

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217. *Id.* (citing Act of May 10, 1945, 49th Leg., R.S., ch. 306, § 3, 1945 Tex. Gen. Laws 491, 492–93 (amended 1953, 1957, 1997, 2003)).

218. *Id.* at 30.

219. *Bexar Metro.*, 220 S.W.3d at 30 (internal quotation marks omitted) (citing Tooke v. City of Mexia, 197 S.W.3d 325, 333–34 (Tex. 2006)).

220. *Id.* at 30–31; *see* House Comm. on Natural Res., Subcomm. on Dists., Bill Analysis, Tex. S.B. 626, 74th Leg., R.S. (1995), *available at* http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=74R&Bill=SB626 (providing information regarding the legislative purpose of Chapter 49 of the Texas Water Code, text of the bill as introduced, and actions taken during session); 36A DAVID B. BROOKS, TEXAS PRACTICE SERIES: COUNTY AND SPECIAL DISTRICT LAW § 46.3 (2d ed. 2002) (providing a "history of state administration over water districts" in Texas). Chapter 49 was enacted to alleviate inconsistencies regarding various types of water districts and to provide procedural uniformity. 36A DAVID B. BROOKS, TEXAS PRACTICE SERIES: COUNTY AND SPECIAL DISTRICT LAW § 46.3 (2d ed. 2002).

221. *Bexar Metro.*, 220 S.W.3d at 31.

222. *Id.*

> Nothing in subsections (b) through (f) references a water district's immunity from suit. Rather, subsections (d) and (e) affirmatively prohibit the prosecution of certain types of claims against a district except through a quo warranto proceeding . . . [a]nd subsections (b), (c), and (f) apply in suits to which the district is either not immune (e.g., suits for unconstitutional takings) or for which immunity has been waived (e.g., suits under the Texas Tort Claims Act . . .).[223]

Accordingly, as enacted, section 49.066 does not waive immunity from suit.[224]

4. *Immunity Was Not Waived in Section 49.066 As Amended*

Section 49.066(a) was amended in 1999 to authorize suit for contract damages against a district if the contract was written and approved by the district's board.[225] The court found that the amendment "does not 'authorize' a suit against a water district; nor does it expressly waive immunity. Rather, the amendment creates a condition precedent: if a suit for contract damages is otherwise authorized, it may be maintained only if the stated condition is met."[226] For instance, the legislature amended section 271.152 of the Texas Local Government Code, waiving sovereign immunity for breach of contract claims against governmental entities authorized to enter into a contract for goods and services.[227] Section 271.151(3)(c) expressly applies the breach of contract provisions to water conservation districts.[228] Thus, including water districts would have been unnecessary because suits were already waived under section 49.066 of the Water Code.[229] The 1999 amendment to section 49.066(a) of the Water

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223. *Id.*; *see also* BLACK'S LAW DICTIONARY 1285 (8th ed. 2004) (defining "quo warranto" as "a common law writ used to inquire into the authority by which a public office is held or a franchise is claimed").

224. Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25, 31 (Tex. App.—San Antonio 2006, pet. dism'd by agr.).

225. *Id.*

226. *Id.*; *see also* Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 249 (Tex. 2002) (holding that a condition precedent to suit does not waive immunity in the Texas Local Government Code), *superseded by statute*, TEX. LOC. GOV'T CODE ANN. §§ 271.151–.160 (Vernon 2005 & Supp. 2008), *as recognized in* Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2002).

227. *See Bexar Metro.*, 220 S.W.3d at 31 (interpreting the legislature's intent in section 271.152 of the Texas Local Government Code).

228. *Id.*

229. *Id.* at 32.

Code merely requires that breach of contract suits, authorized against water districts under the Local Government Code, be based on written contracts approved by the district's board; it does not generally waive immunity.[230]

The Texas Supreme Court dismissed the plaintiff's petition for review in *Bexar Metro.* As such, the Fourth District Court of Appeals' analysis of section 49.066 stands as precedent in its jurisdiction, and the "sue and be sued" language in section 49.066(a) of the Texas Water Code does not provide a general waiver of governmental immunity for water districts.

VI. GOVERNMENTAL IMMUNITY WAIVED UNDER NUISANCE CAUSE OF ACTION

In the absence of any of the theories of liability discussed above, "[g]overnmental entities may be liable for nuisances created or maintained in the course of non-negligent performance of governmental functions."[231] To uphold a claim for nuisance, a party must show that a condition "substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."[232] In *Wickham v. San Jacinto River Authority*,[233] property owners sued dam operators when a dam allegedly caused downstream property to flood during a rainfall.[234] The dam operators increased the amount of water released from the dam during a storm at a rate that kept a nearby lake from reaching its maximum capacity, causing water to flood adjacent property instead.[235] The court in *Wickham* specifically held that "sovereign immunity is not a defense to a claim of non-negligent nuisance."[236] To qualify as a non-negligent nuisance, "the condition created by the entity must in some way constitute an unlawful invasion of property or the rights of others beyond that arising merely from its negligent or

230. *Id.*

231. Wickham v. San Jacinto River Auth., 979 S.W.2d 876, 880 (Tex. App.—Beaumont 1998, pet. denied).

232. *Id.*

233. Wickham v. San Jacinto River Auth., 979 S.W.2d 876 (Tex. App.—Beaumont 1998, pet. denied).

234. *Id.* at 881–82.

235. *Id.*

236. *Id.* at 880.

improper use."[237]

In *Montgomery County v. Fuqua*,[238] two residential property owners sued the County for recurring flood damage from lake overflow and alleged inadequate drainage on the county roads.[239] The property owners alleged that:

> [T]he drainage nuisance reduced the market value of their properties . . . [and] the County knew or should have known that the failure to correct the drainage problem would cause damage and depreciation to the property, and therefore the County voluntarily and intentionally or negligently interfered with the use and enjoyment of [the owners'] properties.[240]

The County responded that the theory of non-negligent nuisance only applies to municipalities, but the court held that this defense was waived for "fail[ing] to cite supporting authority."[241]

In *City of Tyler v. Likes*,[242] "an open drainage channel running across [residential] property directed water through two drainage culverts just east of [the] property."[243] During one heavy rain, floodwaters overflowed from the channel causing property damage.[244] The homeowner sued the City for "negligently constructing and maintaining the culverts, negligently diverting water onto her property," inverse condemnation, and nuisance.[245] The negligence claims were rejected as falling outside the TTCA;

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237. Kerr v. Harris County, No. 01-02-00158-CV, 2003 Tex. App. LEXIS 7766, at *16 (Tex. App.—Houston [1st Dist.] Aug. 29, 2003, no pet.) (citing Shade v. City of Dallas, 819 S.W.2d 578, 581 (Tex. App.—Dallas 1991, writ denied)), *aff'd in part, vacated in part*, 177 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.); *see also* Gotcher v. City of Farmersville, 151 S.W.2d 565, 566 (Tex. 1941) (discussing elements necessary for a non-negligent nuisance cause of action).

238. Montgomery County v. Fuqua, 22 S.W.3d 662 (Tex. App.—Beaumont 2000, pet. denied).

239. *Id.* at 666.

240. *Id.* at 668.

241. *Id.*; *see also* TEX. CONST. art. I, § 17 (providing that a governmental entity can be liable for a non-negligent nuisance when performing a governmental function); Tarrant County v. English, 989 S.W.2d 368, 374 (Tex. App.—Fort Worth 1998, pet. denied) (recognizing that municipalities can be liable for a non-negligent nuisance when performance of a governmental function "constitutes an unlawful invasion of the property or rights of others that is inherent in the thing or condition itself, beyond that arising from its negligent or improper use").

242. City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997).

243. *Id.* at 493.

244. *Id.*

245. *Id.* at 492.

therefore, the City was protected by governmental immunity.[246] The court further held that the City was not liable under a theory of non-negligent nuisance because: (1) "it did not intentionally do anything to increase the amount of water in the watershed"; (2) the culvert system had been completed more than ten years before the home was built; (3) the City had made no improvements in the interim to increase the amount of water into the watershed; and (4) the culvert system was not "abnormal or out o[f] place in its surroundings within the watershed district."[247]

Because governmental immunity is not a defense to a non-negligent nuisance claim,[248] a MUD would not be protected from suit if a plaintiff raised this cause of action. The theory of non-negligent nuisance has been held applicable to municipalities for the purpose of waiving governmental immunity to suit.[249] Accordingly, MUDs would likely not be shielded from liability if any condition complained about "in some way constitute[d] an unlawful invasion of property or the rights of others beyond that arising merely from its negligent or improper use."[250] Such conditions could include reduced market value because of flooding.[251] A MUD would not, however, be liable for any alleged nuisance caused by the negligent performance of a governmental function.[252] When determining liability under a non-negligent nuisance theory, courts will likely consider a MUD's

246. *Id.*

247. *Likes*, 962 S.W.2d at 504.

248. Wickham v. San Jacinto River Auth., 979 S.W.2d 876, 880 (Tex. App.—Beaumont 1998, pet. denied).

249. *See* Gotcher v. City of Farmersville, 151 S.W.2d 565, 566 (Tex. 1941) (noting that there are authorities that hold municipalities liable for nuisance damages even though they are performing a governmental function); *Wickham*, 979 S.W.2d at 880 (recognizing the defense of governmental immunity except for a non-negligent nuisance).

250. Kerr v. Harris County, No. 01-02-00158-CV, 2003 Tex. App. LEXIS 7766, at *16 (Tex. App.—Houston [1st Dist.] Aug. 29, 2003, no pet.) (citing Shade v. City of Dallas, 819 S.W.2d 578, 581 (Tex. App.—Dallas 1991, writ denied)) ("Non-negligent, or intentional nuisance is actionable, and the City is not immune under the Texas Tort Claims Act."), *aff'd in part, vacated in part*, 177 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.); *see also Gotcher*, 151 S.W.2d at 566 (discussing when a municipality would be amenable to suit for a non-negligent nuisance).

251. *See Likes*, 962 S.W.2d at 497 (explaining that the proper measure for the property owner's damages was the loss of market value caused by the City's negligence).

252. *See id.* at 504 ("To the extent that Likes's nuisance claim is based on the City's negligent performance of its governmental functions, the City is immune from liability for property damages.").

intent—that is—whether its discharge route or any associated equipment is "abnormal or out of place in its surroundings"[253] or poses "an unusual hazard or risk."[254]

VII. GOVERNMENTAL IMMUNITY WAIVED FOR INVERSE CONDEMNATION

Governmental immunity from liability may also be in question where a private party brings an inverse condemnation claim against a MUD. Courts recognize that governmental immunity is not a defense to an inverse condemnation claim.[255] A private party can bring an inverse condemnation claim seeking compensation from a governmental entity when that person's property has been "taken, damaged, or destroyed for or applied to public use without adequate compensation."[256]

In *Berry v. City of Reno*,[257] the Fort Worth court of appeals evaluated the claims of an owner whose property was flooded by the alleged negligent construction of a drainage system.[258] The court applied the doctrine of governmental immunity to bar the negligence claims in the suit but evaluated the inverse condemnation cause of action.[259] The property owner lost the inverse condemnation claim because he did not provide evidence to show

253. *Id.*

254. *Id.* (citing William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 416–17 (1942)). Under a non-negligent nuisance theory, a plaintiff must be able to demonstrate that "the alleged nuisance is inherent in the condition or thing itself, beyond that arising from alleged improper or negligent use." *Wickham*, 979 S.W.2d at 880. In *City of Galveston*, the State could have been successful on a non-negligent nuisance claim if it could prove the installation, maintenance, and upkeep of the municipal waterline running under the state highway was "abnormal or out of place" or otherwise "posed an unusual risk," both of which would be seemingly difficult to prove. *Compare* City of Galveston v. State, 217 S.W.3d 466, 468–71 (Tex. 2007) (holding that waiver of immunity was a decision for the legislature, and therefore, the court would not address the negligence claim as it failed because of the City's immunity), *with* City of Tyler v. Likes, 962 S.W.2d 489, 504 (Tex. 1997) (stating that for immunity to be waived for non-negligent nuisance claims, the activity must be unusually hazardous or abnormal in its surroundings).

255. Nueces County v. Hoff, 105 S.W.3d 208, 211 (Tex. App.—Corpus Christi 2003), *rev'd on other grounds*, 153 S.W.3d 45 (Tex. 2004); Dahl v. State, 92 S.W.3d 856, 862 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Foster v. Denton Indep. Sch. Dist., 73 S.W.3d 454, 460 (Tex. App.—Fort Worth 2002, no pet.).

256. TEX. CONST. art. I, § 17.

257. Berry v. City of Reno, 107 S.W.3d 128 (Tex. App.—Fort Worth 2003, no pet.).

258. *Id.* at 130.

259. *Id.* at 132–33.

that the City took his property for public use.[260] "Generally, the trend in Texas is toward defining public use in terms of the general benefit to the [s]tate."[261] *Berry* is important to immunity questions raised by MUDs because the court determined that a drainage system that serves even one individual constitutes a "public use."[262] Accordingly, a property owner can only be successful on an inverse condemnation claim against a MUD by showing three elements: "(1) the [s]tate intentionally performed certain acts in the exercise of its lawful authority, (2) that resulted in a 'taking' of property, (3) for public use."[263]

Both the intent and taking elements were at issue in *Kerr v. Harris County*.[264] In *Kerr*, a flood control district implemented a revised storm water management policy after flooding occurred from high amounts of rainfall during the middle of development construction.[265] When the revised drainage plan resulted in flooding again a few years later, the Kerrs sued Harris County, the Harris County Flood Control District (District), and several MUDs for the damage resulting to several homes they owned.[266] The MUDs were dismissed for lack of evidence on intentionality,[267] but the discussion of the court regarding the District may be applicable to the role MUDs play in communities.

The Kerrs alleged both inverse condemnation and nuisance.[268]

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260. *Id.* at 133–35.

261. *Id.* at 133.

262. *See Berry*, 107 S.W.3d at 133 (citing Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469, 475 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)) (holding a pipeline running across private land was a public use even though it only served one individual).

263. *Id.*; Kerr v. Harris County, No. 01-02-00158-CV, 2003 Tex. App. LEXIS 7766, at *10 (Tex. App.—Houston [1st Dist.] Aug. 29, 2003, no pet.), *aff'd in part, vacated in part*, 177 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.). *Kerr* was superseded because county civil courts at law have exclusive jurisdiction over inverse condemnation and nuisance claims. *Kerr*, 177 S.W.3d at 294 (citing City of Houston v. Boyle, 148 S.W.3d 171, 177–79 (Tex. App.—Houston [1st Dist.] 2004, no pet.)); *see also* TEX. GOV'T CODE ANN. § 25.1032(c) (Vernon 2008) ("A county civil court at law has exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy.").

264. Kerr v. Harris County, No. 01-02-00158-CV, 2003 Tex. App. LEXIS 7766, at *7–10 (Tex. App.—Houston [1st Dist.] Aug. 29, 2003, no pet.), *aff'd in part, vacated in part*, 177 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.).

265. *Id.* at *3–5.

266. *Id.* at *5.

267. *Id.* at *19–20.

268. *Id.* at *4–5.

For the inverse condemnation claim, the Kerrs argued that they must only show that the District intended the acts that caused the damage.[269] The District argued that the plaintiffs must prove it intended the damage.[270] The court held that the intent element can be satisfied "if the damage is necessarily incident to or necessarily a consequential result of an authorized, intentional act,"—not just by showing that the government's intentional act caused damage or by showing mere negligence.[271] The court went on to note that the District's acts must be "substantially certain" to result in the damage alleged:[272]

> Thus, we must determine whether the Harris County entities proved, as a matter of law, that the flooding of plaintiffs['] homes was *not* "necessarily incident to or necessarily a result of" their intentional acts in designing and implementing the flood control plan for the White Oak Bayou watershed. Specifically, we are concerned with whether the Harris County entities were aware that flooding of plaintiffs' homes was "substantially certain" to occur [if they implemented the revised plan].[273]

Accordingly, a MUD could be stripped of its immunity as a result of activities that it is "substantially certain" will result in damage to any potential plaintiffs.[274] Generally, whether an entity knows of the certainty of an event will be a fact question for the judge or jury.[275] Although the *Kerr* court decided that the isolated flooding incident could not be a "taking" as a matter of law,[276] the court expressly welcomed the possibility for the recovery of property damages that fall below a complete taking, amounting to a nuisance, as discussed above.[277]

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269. *Kerr*, 2003 Tex. App. LEXIS 7766, at *10–11.

270. *Id.*

271. *Id.* at *11–12.

272. *Id.* at *12 (citing City of Houston v. Renault, 431 S.W.2d 322, 326 (Tex. 1968)).

273. *Id.* at *12–13.

274. Kerr v. Harris County, No. 01-02-00158-CV, 2003 Tex. App. LEXIS 7766, at *12–13 (Tex. App.—Houston [1st Dist.] Aug. 29, 2003, no pet.), *aff'd in part, vacated in part*, 177 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.).

275. *See id.* at *14 ("This evidence presents a clear question of fact regarding whether the actions of the Harris County entities, in not completing the Pate plan, but in choosing to implement the Klotz plan instead, created a condition whereby the flooding of the plaintiffs' homes was substantially certain to occur.").

276. *See id.* at *8 (citing Brazos River Auth. v. City of Graham, 354 S.W.2d 99, 107–09 (Tex. 1972)) (suggesting that even sporadic flooding would not constitute a taking).

277. *Id.*

VIII. CONCLUSION

As a general rule, MUDs are political subdivisions that perform governmental functions and accordingly are protected from both suit and liability by governmental immunity.[278] Unlike a municipal corporation whose functions benefit those within its corporate limits, MUDs are created by constitution to assist with preservation of the state's natural resources.[279] This purpose is inherently for the public benefit, and as such, MUDs only perform governmental functions. Despite this broad protection, MUDs are amenable to suit for torts recognized under the TTCA.[280] Any suit filed under the TTCA against a MUD could be fashioned as either a negligent use of personal property claim or a premises defect claim.[281] When faced with a tort arising from either of these claims, a MUD should be particularly concerned about property safety and the presence of artificial structures or equipment located on its property. Specifically, storm-water detention ponds and water pumps are two of many possibilities giving rise to tort claims. In order to minimize the likelihood or extent of liability under the TTCA, a MUD should consider erecting warning signs or allowing all, or a portion, of its property to be used for recreation.[282]

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278. *See* Tooke v. City of Mexia, 197 S.W.3d 325, 331–32 (Tex. 2006) (recognizing that governmental immunity protects against suit and liability); Bennett v. Brown County Water Improvement Dist. No. 1, 153 Tex. 599, 603, 272 S.W.2d 498, 500 (1954) (providing that water districts created by the state constitution for the preservation of natural resources perform governmental functions).

279. *See Tooke*, 197 S.W.3d at 343 (referring to the proprietary-governmental dichotomy and noting that although the distinction is not a clear one, generally, functions for the public benefit are protected, while functions conducted in a private capacity to benefit a segment of the public are not). *See generally* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 692–93 (1996) (discussing the "sporadic decisions" of Texas courts involving the distinction between governmental and proprietary functions and prompting passage of the Texas Tort Claims Act).

280. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.066 (Vernon 2007); *see* City of Galveston v. State, 217 S.W.3d 466, 470 (Tex. 2007) (recognizing that the TTCA waives governmental immunity for both suit and liability).

281. *See* Tex. A&M Univ. v. Bishop, 156 S.W.3d 580, 583 (Tex. 2005) (discussing liability for use of personal property under the TTCA). *See generally* Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 527 (Tex. 1997) (recognizing that there are two types of premises liability claims: negligent activity claims and premises defect claims).

282. *See* State v. Shumake, 199 S.W.3d 279, 287–88 (Tex. 2006) (providing that the RUS limits governmental liability when governmental property is dedicated for

To date, the "sue or be sued" language of the Texas Water Code does not constitute a blanket waiver of a MUD's governmental immunity from suit.[283] In order to be amenable to suit, the plaintiff must demonstrate another statutorily authorized waiver or seek special permission from the legislature to maintain suit.[284] MUDs may also assert a defense of immunity from liability, forcing the suing party to establish an exception under nuisance law or inverse condemnation.[285] Otherwise, MUDs, as governmental entities operating within the state, maintain immunity protections, even against the state itself.[286]

A MUD's board is tasked with governing MUD operations in furtherance of its purpose, which includes management of district affairs.[287] Proper management of district affairs necessarily includes a proactive, rather than reactive, response to liability considerations. MUD boards are already required to adopt written policies related to travel expenditures, investments, evaluation of professional services, and better use of management information.[288] An effective "framework for assessing, managing, and reducing liabilities associated with" MUD operations would be an organized "add-on" to existing requirements and should be executed in five phases: "commitment and policy; planning; implementation; monitoring and measuring; and review and improve[ment]."[289] This approach would allocate liability

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recreational use); Kopplin v. City of Garland, 869 S.W.2d 433, 438 (Tex. App.—Dallas 1993, writ denied) (acknowledging that when an owner is aware of a dangerous condition on its property, the owner has a duty to take affirmative steps to warn or make it safe).

283. *See* Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25, 30–32 (Tex. App.—San Antonio 2006, pet. dism'd by agr.) (providing that the "sue and be sued" provision of the Texas Water Code is not a general waiver of governmental immunity).

284. *See City of Galveston*, 217 S.W.3d at 468 (finding that a city's immunity from suit "depends entirely upon statute" and the plaintiff must assert reliance on such statute).

285. *See* Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (holding that a governmental entity is not shielded from liability when its actions result in a taking); Wickham v. San Jacinto River Auth., 979 S.W.2d 876, 880 (Tex. App.—Beaumont 1998, pet. denied) (recognizing that governmental immunity does not apply to non-negligent nuisance claims).

286. *See City of Galveston*, 217 S.W.3d at 468 (recognizing governmental immunity protection asserted by a city against the state).

287. TEX. WATER CODE ANN. § 49.057 (Vernon 2008) (codifying a director's duty to manage district affairs).

288. TEX. WATER CODE ANN. § 49.199 (Vernon 2008) (enumerating provisions applicable to district policies and audits).

289. ILISE L. FEITSHANS, CORPORATE COMPLIANCE SERIES: DESIGNING AN

management "into the realm of strategic decision in order to reduce risks."[290] Informed by the foregoing discussion, the board should first conduct a liability risk assessment. The assessment results should then be "translated into a [written] policy statement, objectives, and targets" that are referenced by the board when evaluating operations and making development decisions.[291]

In a society driven by advanced technological developments coupled with complex and systematic social interactions, the need for a proactive approach to liability management is intensified. Boards have a duty to remain abreast of laws affecting the MUDs they direct. That duty necessarily includes efforts to shield liability. Collectively, boards, MUDs, and the state itself would be served by adopting written policies aimed at identifying potential civil liability threats and developing standard procedures to minimize such threats. In so doing, a MUD will be positioned to most effectively carry out its intended purpose—to protect the state's natural resources—in a way that is both effective and economically conscious.

EFFECTIVE OSHA COMPLIANCE PROGRAM § 1:162 (2008) (discussing standards adopted by companies to minimize environmental risks associated with occupational health and safety law). The suggested approach is modeled after the generic environmental management standards developed by the International Organization for Standardization (ISO). ISO is a non-governmental organization that develops and publishes standards in response to private and public sector needs. Technical committees develop the standards in conjunction with governmental entities, consumer groups, and the private sector. The standards are published in Geneva, Switzerland, and used by roughly 157 countries as a means of establishing standardized procedures across countries. INT'L ORG. FOR STANDARDIZATION, ISO IN BRIEF (2006), http://www.iso.org/iso/isoinbrief_2006-en.pdf.

290. ILISE L. FEITSHANS, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE OSHA COMPLIANCE PROGRAM § 1:162 (2008).

291. *Id.*