NO. 05-07-00137-CV

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

City of Farmers Branch, Bob Phelps, Tim O'Hare, Bill Moses, Charlie Bird, James Smith, and Ben Robinson,

Appellants,

v.

Guillermo Ramos,

Appellee.

APPELLEE'S BRIEF

Appeal from the 116th District Court of Dallas County
The Honorable Bruce Priddy, Presiding

BICKEL & BREWER STOREFRONT, P.L.L.C.

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ATTORNEYS FOR APPELLEE GUILLERMO RAMOS

ORAL ARGUMENT REQUESTED

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Guillermo Ramos ("Ramos" or "Appellee"), Plaintiff below, files this brief in opposition to the appeal of The City of Farmers Branch (the "City" or "Farmers Branch"), Bob Phelps, Tim O'Hare, Bill Moses, Charlie Bird, James Smith, and Ben Robinson, Defendants below (collectively, "Appellants"),[1] as follows:

I.

STATEMENT OF CASE

A. Introduction And Overview

Appellants assert that they have sovereign immunity from well-pled claims for violations of the Texas Open Meetings Act ("TOMA"), a statute that expressly imposes obligations and potential liability on municipalities and municipal officials. Appellants' plea to the jurisdiction, which was limited in scope to Ramos' alleged failure to plead TOMA violations, was properly denied by the trial court. Not only did Ramos' First Amended Petition (the "Petition") describe in detail multiple TOMA violations – thus surviving Appellants' jurisdictional challenge as a matter of law – but Appellants' extrinsic evidence (which the trial court considered, over Ramos' objection, to eliminate any doubt on the issue) did nothing to rebut those allegations.

Perhaps realizing the lack of merit to their appeal, Appellants raise for the first time the argument that Ramos' claims are "moot" and that their TOMA violations have

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[1] Under TEX. R. APP. P. 38.1(j), Appellants were required to file an appendix that included at least: (1) the trial court's order denying their plea to the jurisdiction; and (2) the text of all ordinances and statutes on which their argument is based. Appellants failed to do so. Therefore, for the convenience of the Court, Ramos submits herewith his appendix that includes the authorities omitted by Appellants.

been "corrected by ratification" as a result of the City's adoption of a new ordinance that is not even in the record and was not the subject of the proceedings below. Appellants could have raised those matters in the trial court but chose not to do so. In any event, the new ordinance in question does not alleviate the need for appropriate relief. A declaratory judgment is warranted and, indeed, is necessary to expose Appellants' secret deliberations and deal-making to public scrutiny. The letter and spirit of TOMA require nothing less.

B. Nature Of The Case

On Monday, November 13, 2006, the City of Farmers Branch City Council ("City Council") adopted, among other measures, Ordinance No. 2892 ("Ordinance 2892") and Ordinance No. 2893 ("Ordinance 2893") (together, the "Ordinances").[2] The Ordinances were transparently targeted at the City of Farmers Branch's immigrant population, the overwhelming majority of which is Latino.[3] As expected, the politically-charged and highly controversial Ordinances proved to be divisive among the City's residents.[4] More importantly for the purposes of this suit, in drafting, deliberating upon, and enacting the Ordinances, Appellants repeatedly violated TOMA.[5] In fact, Appellants routinely and

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[2] *See* Clerk's Record ("C.R.") at 418.

[3] *See id.* at 418-19.

[4] *See generally id.* at 418-35.

[5] *See id.* at 419.

unlawfully met in closed sessions and cynically schemed to deny the public access to the deliberations and discussions regarding the Ordinances.[6]

C. Course Of Proceedings

On December 4, 2006, Ramos filed suit to obtain declaratory relief relating to Appellants' wrongful acts and to prevent future violations of TOMA.[7] On December 22, 2006, Appellants filed their Plea to the Jurisdiction, Special Exceptions, Motion to Dismiss, Motion for Protective Order and Original Answer ("Plea to the Jurisdiction").[8] In their Plea to the Jurisdiction, Appellants asserted that Ramos' claims should be dismissed for lack of jurisdiction because "Plaintiff has failed to plead facts sufficient to establish a valid TOMA claim."[9] It is clear from the Plea to the Jurisdiction that Appellants were merely challenging the facial sufficiency of Ramos' Petition – and, particularly, the allegations relating to Appellants' several violations of TOMA.[10]

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[6] *See id.*

[7] *See id.* at 8.

[8] *See id.* 24-33.

[9] *Id.* at 26.

[10] *See id.* ("Plaintiff has not specifically and expressly pled a statutory waiver of Farmers Branch's sovereign immunity for the injunctive and declaratory claims. Plaintiff has failed to plead facts sufficient to establish a TOMA violation . . . Plaintiff has failed to plea a valid cause of action sufficient to justify a waiver of the City's sovereign immunity.").

Indeed, the trial court correctly noted that the Plea to the Jurisdiction was directed solely at the adequacy of Ramos' pleading,[11] as did Ramos' counsel.[12] Even Appellants'

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[11] *See* Reporter's Record ("R.R."), V.3 at 21:1-6 (The Court: "[L]et's talk about my – what I consider in this plea to the jurisdiction . . . [A]s I read the plea to the jurisdiction, I believe it is just on the face of the pleadings, that it's a pleading defect."); *id.* at 22:19-23 (The Court: "[I]f we are talking about just on the pleadings, on the facial applicability, it would seem to me that whatever [Ramos may] say has to at least for purposes of considering the pleadings should be accepted as true."); *id.* at 34:2-35:5 (The Court: "As I read the defendants' plea to the jurisdiction . . . it seems to me to be clear that this is a facial attack on the pleadings that [Ramos has] not pled sufficient facts. And in such a procedure, I have to assume everything is pled is true, and then we decide whether those facts are sufficient to confer jurisdiction . . . Whether those facts are true or not is not at issue today. We can get another hearing on the second type of plea to the jurisdiction whether – assuming such a plea is filed at a later date, but right now what I see as being considered here is the sufficiency of the pleading, not the truth of the pleaded matters.").

[12] *See* R.R., V.3 at 29:21-25 and 30:17-19 (Ramos' Counsel: "So the question then becomes, Your Honor, is the plea to the jurisdiction that they filed, does it challenge the pleadings, or does it affirmatively say we take exception to what you are saying and we believe the facts are different than what you have pled? . . . [Appellants'] counsel himself, Your Honor, at the beginning of his presentation says, this goes to, quote the face of their pleadings, end quote."); *id.* at 16:6-18 (Ramos' Counsel: "[T]his motion by its terms goes to whether or not adequate facts have been pled demonstrating a TOMA violation and therefore a waiver of immunity. It did not say those facts were wrong or that they were going to submit evidence suggesting that what was pled is different than what they say reality is. And the Supreme Court has been very clear that pleas to the jurisdiction are of two types, the first – and that's exactly what they have given us notice of – goes only to the sufficiency of our pleading, and therefore, the only focus ought to be upon that pleading, and not upon any extrinsic evidence."); *id.* at 14:14-24 (Ramos' Counsel: "[T]hey themselves by their motion and their admission are challenging the sufficiency of our pleading . . . The Supreme Court has been very clear that when a plea to the jurisdiction goes to the pleadings – and it's abundantly clear that this one does – that that's what the Court looks at, whether or not you have pled the elements of a TOMA violation.").

counsel admitted that their Plea to the Jurisdiction related exclusively "to the face of [Ramos'] pleadings."[13]

In order to preserve the status quo and prevent the enforcement of Ordinance 2892, on January 9, 2007, Ramos filed an application for temporary restraining order.[14] That application was heard on January 10, 2007, at which time the trial court took the request under advisement and set the Plea to the Jurisdiction for a non-evidentiary hearing on January 16, 2007.[15] The trial court thereafter entered a temporary restraining order on January 11, 2007, enjoining Appellants from effectuating and enforcing Ordinance 2892 (the "TRO").[16]

On the morning of January 16, 2007, Ramos filed his Petition asserting that even after this suit was initiated, Appellants continued to violate TOMA in connection with the enactment of Ordinance 2900.[17] In contravention of Rule 2.09 of the Local Rules of the Civil Courts of Dallas County, Texas, Appellants filed their Brief in Support of the

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[13] *See* R.R., V.3 at 10:8-11 (Appellants' Counsel: "The question at the outset, Your Honor, and the same one that we are going to be focused on during the entirety of this particular argument relates to the face of their pleadings."); *id.* at 12:4-6 ("They have got to demonstrate within the four corners of their pleading the factual applicability of the statute.").

[14] *See* C.R. at 36-415.

[15] *See* R. R., V.2 at 62:2–63:20; *id.* at 66:9-19 (Appellants state that, in regard to the hearing on the Plea to the Jurisdiction, they will not put on a witness and instead will merely assert legal argument).

[16] *See* C.R. at 416-17.

[17] *See id.* at. 418-434.

Defendants' Plea to the Jurisdiction on the morning of the hearing on that Plea – January 16, 2007.[18]

Apparently recognizing the sufficiency of Ramos' Petition and its well-pled claims for violation of TOMA, Appellants belatedly attempted during the hearing to transform their Plea to the Jurisdiction into a challenge to the veracity of Ramos' allegations by offering extrinsic evidence. Ramos' counsel timely objected to that evidence, noting Appellants' effort to go beyond the face of the Petition.[19] After initially expressing reluctance to consider that evidence, but faced with Appellants' request to "make a record,"[20] the trial court ultimately admitted the exhibits in question.[21] Having done so,

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[18] *See id.* at. 436; *see also* L.R. 2.09 (requiring that briefs be filed with the clerk of the court at least two working days before the hearing).

[19] *See* R.R., V.3 at 14:2-3 (Ramos' Counsel: "Your Honor, we object to reference to evidence that they are attempting to submit here."); *id.* at 16:19-21 (Ramos' Counsel: "That's the objection, that they are offering proof that has nothing to do with the character and nature of the plea to the jurisdiction that they filed."); *id.* at 30:23-31:4 (Ramos' Counsel: "Your Honor, we don't have adequate notice of that, and that's not what was in their plea to the jurisdiction. And any brief that was filed today, which by the way violated Local Rule 2.09, that suggests that now they are altering their approach and they want to go beyond the face of our pleadings, Your Honor, is unfair."); *id.* at 31:22-32:6 (Ramos' Counsel: "Your Honor, this is solely a challenge to the pleading, it is not right, and we haven't had notice for them now to say, oh, it's a different kind of plea . . . there is now evidence that suggests that things are other than how you pled them. That's a different plea, and it's not what was presented and what we understood was going to be heard here today, Your Honor.").

[20] *See* R.R., V.3 at 36:1-2 (Appellants' Counsel: "[W]e would like to make a bill for appeal relative to our submission of the documents.").

[21] *See* R.R., V.3 at 110:4-6 and 15-18 (The Court: "I'm wavering back and forth whether to consider the documentary evidence presented by defendants or not . . . Before

the trial court then directed Appellants' counsel to explain how that evidence in any way controverted the allegations set forth in Ramos' Petition.[22] Appellants failed to undercut a single statement in that pleading,[23] thus eliminating any doubt as to the sufficiency of the Petition.[24]

On January 18, 2007, the trial court heard arguments regarding discovery[25] and set a status conference for January 26, 2007.[26] During that status conference, Appellants and

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I let them in, I am going to let you make your evidentiary objections to them, but I think I am going to go ahead and consider them and put them in the record.").

[22] *See* R.R., V.3 at 130:21-24 (The Court: "So show me where [Ramos'] pleadings fly in the face with the actual facts as proven by self-authenticating documents for the City of Farmers Branch.").

[23] *See* R.R. V. 3 at 138-156; *see also* R.R., V.3 at 155:18-156:6 (Ramos' Counsel: "[A]fter having been given the opportunity to point to the Court how this new evidence controverts our pleadings . . . [t]hey controverted nothing. Our pleading stands. And I would suggest, Your Honor, that that pretty much closes the inquiry now that the Court has indulged them by going ahead and admitting their evidence just to see what it might prove. Even though we've in a way converted this from sufficiency of pleading to a factual attack [on] the truth of our allegations, we survive even that attack." The Court: "Okay, ready to move on to your other motions, Mr. Boyle?" [Appellants' Counsel]: "I am indeed, Your Honor.")

[24] *See,* e.g., R.R., V.3 at 55:8-23 (The Court: " . . . Paragraph 36, they say there was not a notice that Ordinance 2892 was to be considered at the November 13th hearing within 72 hours. Now if true, is that sufficient to show a TOMA violation?" [Appellants' Counsel]: "If it's true that the Farmers Branch City Council undertook something on November 13th that wasn't posted 72 hours in advance, yes, that would be a violation of TOMA.")

[25] *See* R.R., V.4.

[26] *See id.* at 55:1–7; *see also* C.R. at 600-01.

Appellee agreed to dissolve the TRO[27] and the trial court orally: (1) denied Appellee's Motion for Expedited Discovery; (2) denied Appellants' Motion for Protective Order; (3) denied Appellants' Plea to the Jurisdiction; and (4) per the parties' agreement, extended Appellants' deadline to respond to outstanding discovery to thirty days after January 26, 2007.[28] On February 2, 2007, the trial court entered an agreed order dissolving the TRO[29] and the Order Denying Plea to the Jurisdiction.[30] Finally, on February 5, 2007, Appellants filed their Notice of Accelerated Appeal.[31] By this interlocutory appeal, Appellants seek reversal of the trial court's denial of their Plea to the Jurisdiction.[32]

II.

STATEMENT OF FACTS

A. Farmers Branch And Councilman O'Hare's Proposal

In August 2006, Appellant and City Councilman Tim O'Hare publicly proposed that the City undertake a "crack down" on illegal immigration in the City by, *inter alia*,

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[27] *See* C.R. at 602-603; R.R., V.5 at 24:18–25:17.

[28] *See* R.R., V.5 at 31:25–35:22; C.R. at 604.

[29] *See* C.R. at 602-03.

[30] *See id.* at 604.

[31] *See id.* at 605-606.

[32] It appears, however, that this appeal is being pursued for its corollary effect, a stay on discovery which will prevent the public from knowing how and why their government enacted the controversial Ordinances until after the election on May 12, 2007. *See., e.g.*, Appellee's Response In Opposition To Appellants' Motion To Extend Time To File Appellants' Brief.

prohibiting landlords from leasing to illegal aliens, penalizing businesses that employ illegal aliens, making English the City's official language, and eliminating subsidies for city-funded youth programs that involve the children of illegal immigrants.[33] Without any supporting proof, O'Hare argued that an influx of illegal immigrants into the City was responsible for the allegedly poor reputation of the public schools in the local district, a lack of "acceptable appreciation" in property values, and a high crime rate.[34]

B. The Illegal Landlord Conscription Act: City Ordinance 2892

On Monday, November 13, 2006, the City Council adopted a so-called emergency measure, Ordinance No. 2892, titled:

> AN ORDINANCE AMENDING CHAPTER 26, BUSINESSES, ARTICLE IV APARTMENT COMPLEX RENTAL, MANDATING A CITIZENSHIP CERTIFICATION REQUIREMENT PURSUANT TO 24 C.F.R. 5 ET SEQ.; PROVIDING FOR ENFORCEMENT; PROVIDING A PENALTY; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.[35]

As written, Ordinance 2892 was designed to force private landlords to act as immigration officials by requiring them to inquire regarding the citizenship and immigration status of their tenants and prospective tenants and to provide that

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[33] *See* C.R. at 422.

[34] *See id.*

[35] *See id.* at 423.

information to City officials.[36] Ordinance 2892 was adopted without deliberation or debate by City Council members in any open meetings.[37]

C. Appellants Violated TOMA In Connection With The Landlord-As-Immigration-Officer Act: City Ordinance 2892.

Although the alleged purpose of Ordinance 2892 was to protect the public welfare, Appellants intentionally prevented the public from observing or participating in the negotiations, consideration, discussion, and enactment of 2892.[38] In fact, the City Council did not hold a properly noticed open meeting concerning Ordinance 2892.[39] Indeed, the agenda for the City Council meeting on November 13, 2006, did not mention or otherwise describe the Ordinance – although numerous other (less-important) proposed ordinances and resolutions are specifically identified and explained therein.[40]

Further, with a quorum present and/or in an effort to circumvent the quorum requirements of TOMA, Appellants engaged in closed sessions and otherwise secret deliberations during which the provisions of Ordinance 2892 were drafted, negotiated, and agreed upon.[41] Among other things, during those secret deliberations, Appellants discussed the need for and importance of a unanimous vote by the City Council in

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[36] *See id.* at 424.

[37] *See id.*

[38] *See id.* at 426.

[39] *See id.* at 424-25.

[40] *See id.* at 427.

[41] *See id.* at 427-28.

support of Ordinance 2892.[42] Indeed, a unanimous vote in favor of Ordinance 2892 was secured in those secret meetings through, among other things, an agreement to exclude public libraries and recreation centers from a resolution declaring English as the City's official language.[43] Thus, when the City Council voted publicly on Ordinance 2892, the vote was merely a rubber-stamp of Appellants' agreement previously reached in secret.[44] Tellingly, it was only after the vote on Ordinance 2892 that the floor was opened for public discussion.[45]

D. Appellants Violated TOMA In Connection With The Yard Act: City Ordinance 2893.

Ordinance 2893 focuses on residential property maintenance.[46] For example, Ordinance 2893 imposes a ban on certain flower pots and similar yard-related items and aesthetic conditions.[47] Ordinance 2893 is unmistakably and improperly directed toward a definable ethnic group – Hispanics – in Farmers Branch.[48] This controversial ordinance, like Ordinance 2892, was negotiated in a "back room," away from the public light, and

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[42] *See id.* at 428.

[43] *Id.*

[44] *Id.*

[45] *See id.*; *see also* Appellants' Brief at 7 ("Following the passage of Ordinance 2892, the City Council welcomed and received a significant amount of input.") (emphasis added).

[46] *See* C.R. at 429.

[47] *Id.*

[48] *Id.*

designed to alienate and/or decrease the Hispanic population in Farmers Branch.[49] Appellants failed to comply with TOMA in connection with the enactment of Ordinance 2893 by, with a quorum present and/or in an effort to circumvent TOMA, drafting, deliberating, and in fact agreeing upon Ordinance 2893 in closed meetings.[50]

E. Appellants Continued To Violate TOMA Even After Initiation Of This Lawsuit.

In December 2006, Ramos and other Farmers Branch residents conducted a petition drive to require Ordinance 2892 either be repealed or put before the citizens for a city-wide vote ("Petition").[51] The petition drive received overwhelming support, garnering more than twice the number of minimum signatures needed to require a general vote.[52] The City Council was therefore required to immediately reconsider Ordinance 2892 and to either repeal it or submit it for a public vote.[53]

Despite the filing of this lawsuit, Appellants continued to violate TOMA. Indeed, prior to holding an open meeting to consider the Petition, Appellants indicated that the City Council's decision had already been made, again behind closed doors.[54] In fact, the Assistant City Attorney (Appellants' counsel in this proceeding), admitted that

[49] *Id.*

[50] *Id.*

[51] *See id.* at 431

[52] *Id.*

[53] *Id.*

[54] *Id.*

Appellants had reached a consensus outside properly-noticed City Council meetings, when he told a local newspaper that, as early as December 18, 2006, Farmers Branch had already decided to call an election on the issue.[55] Not surprisingly, on January 8, 2007, Appellants again rubber-stamped a decision reached behind closed doors.[56]

III.

SUMMARY OF ARGUMENT

Appellants seek reversal of the trial court's denial of their Plea to the Jurisdiction on two grounds. First, Appellants assert that Appellee has failed to sufficiently plead that they violated TOMA. Second, they argue that Ordinance 2903 moots all of Ramos' claims and ratifies Appellants' prior TOMA violations. Appellants' arguments are without merit for at least three reasons.

First, the trial court properly denied Appellants' Plea to the Jurisdiction because Appellee more than adequately pled that Appellants violated TOMA in enacting Ordinances 2892, 2893, and 2900. Second, Appellants' enactment of Ordinance 2903 was not raised by Appellants below and is, therefore, not properly before the Court on appeal. In any event, that new ordinance (which was not the subject of the proceedings below) does not moot Appellee's claims. Finally, the Court should dismiss the appeal of Bob Phelps, Tim O'Hare, Bill Moses, Charlie Bird, James Smith, and Ben Robinson (the "Individual Appellants") for want of jurisdiction, because Section § 51.014(a)(8) of the

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[55] *Id.*

[56] *Id.*

Texas Civil Practices & Remedies Code, under which this interlocutory appeal is being pursued, applies only to orders granting or denying a plea to the jurisdiction by a "governmental unit."[57] It does not include employees or officials of governmental units.[58] Accordingly, the trial court's denial of Appellants' Plea to the Jurisdiction should be affirmed and the appeal dismissed with respect to the Individual Appellants.

IV.

ARGUMENT AND AUTHORITIES

A. Standard Of Review

A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a claim without regard to whether its merit.[59] In determining a plea to the jurisdiction, a court: (1) may not weigh the merit of the claims; (2) must construe the pleadings in the plaintiff's favor; and (3) must consider only the plaintiff's pleadings.[60] Where a plaintiff

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[57] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *Dallas County Cmty. College District v. Bolton*, 990 S.W.2d 465, 466-67 (Tex. App.—Dallas 1999, no pet.) (dismissing individual board members' interlocutory appeal of denial of plea to the jurisdiction for lack of jurisdiction); *Castleberry Ind. Sch. Dist. v. Doe*, 35 S.W.3d 777, 779-80 (Tex. App.—Fort Worth 2001, pet. denied) ("Section 51.014(a)(18) does not confer jurisdiction over the interlocutory appeal brought by Myers and Burgett, and we dismiss their appeals for want of jurisdiction.").

[58] *See id.*

[59] *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

[60] *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *Blue*, 34 S.W.3d at 554 ("[T]he plea should be decided without delving into the merits of the case."); *Texas Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) ("When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas

fails to plead a jurisdictional fact, but does not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be afforded the opportunity to amend.[61]

The party asserting the plea bears the burden of showing that, even if all the allegations in the plaintiff's petition are true, there is an incurable defect that renders the court without jurisdiction to hear the case.[62] If a fact question exists regarding the jurisdictional issue, the plea must be denied, and the factual question resolved by the trier of fact.[63] In any event, a plaintiff cannot be forced to put on its entire case simply to establish jurisdiction.[64] Here, Ramos has more than sufficiently pled several violations of

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appellate courts, 'construe the pleadings in favor of the Plaintiff and look to the pleader's intent.'") (citations omitted).

[61] *See County of Cameron*, 80 S.W.3d at 555; *see also Godley Indep. Sch. Dist. v. Woods*, 21 S.W.3d 656, 661 (Tex. App.—Waco 2000, pet. denied) (holding that a special exception, not a plea to the jurisdiction should be filed where the party challenges the sufficiency of the pleadings).

[62] *See Rylander v. Caldwell*, 23 S.W.3d 132, 135 (Tex. App.—Austin 2000, pet. granted).

[63] *See id.* at 227-28.

[64] *See Blue*, 34 S.W.3d at 554 ("[D]oes not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction."); *Hays County v. Hays County Water Planning Commission*, 69 S.W.3d 253, 257-59 (Tex. App.—Waco 2002, no pet.) (affirming denial of a plea to the jurisdiction where governmental unit asserted that the plaintiff failed to identify an action taken in violation of TOMA because "determining whether an action was taken in violation of the Act is a question to be decided at a trial on the merits").

TOMA.[65] Accordingly, the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

B. The Trial Court's Denial Of Appellants' Plea To The Jurisdiction Should Be Affirmed Because Ramos Has Adequately Pled That Appellants Violated TOMA.

Appellants assert that the trial court erred in not granting their Plea to the Jurisdiction based on sovereign immunity.[66] TOMA, however, "expressly waives sovereign immunity for violations of the act."[67]

Nevertheless, Appellants erroneously assert that sovereign immunity has not been waived because Ramos has failed to adequately allege violations of TOMA.[68] In other words, Appellants contend that on the face of the Petition, Ramos has failed to plead a violation of TOMA.[69] Appellants' argument is therefore limited to a facial challenge to the sufficiency of Appellee's pleadings.[70]

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[65] *See generally* C.R. at 418-435.

[66] *See generally* Appellants' Brief.

[67] *Hays County*, 69 S.W.3d at 257; *see also* Tex. Gov't. Code § 551.142 (a) ("An interested person . . . may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body").

[68] *See* Appellants' Brief at 3-13; C.R. at 2-3; C.R. at 436-447.

[69] *See, e.g.*, R.R., V.3 at 12:4-7 ("They have got to demonstrate within the four corners of their pleading the factual applicability of that statute [TOMA]. And we don't think that they have even with the new first amended petition"); *id.* at 9:3-6; 11:13-16; 33:20–35:15 (The Court: ". . . as it is pled right now—what I believe what is before the Court right now is the sufficiency of plaintiff's pleading, the allegations—whether the allegations are sufficient to confer jurisdiction on this Court."); *id.* at 52:3-6 ("If you take

As set forth below, and as reflected in the Petition, Ramos has more than adequately pled violations of TOMA.[71] Therefore, the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

1. **Standard for sufficiency of pleadings**

Texas Rules of Civil Procedure 45 and 47 govern the sufficiency of pleadings.[72] In particular, Rule 45(b) provides that a pleading shall "consist of a statement in plain concise language of the plaintiff's cause of action . . . That an allegation be evidentiary shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole."[73] Likewise, Rule 47 requires that a pleading contain "a short statement of the cause of action sufficient to give fair notice of the claim involved."[74]

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the facts as they allege them, the facts that they have alleged in here, your Honor, that's what we are saying is insufficient as they don't constitute a violation of TOMA."); R.R., V.2 at 40:25.

[70] *See Hays County*, 69 S.W.3d at 257-259 ("Hays County claims that [plaintiff] fails to state a justiciable cause because it does not identify any action taken in violation of [TOMA] . . . In reality, Hays County's argument that no action was taken in violation of the Act goes to the merits of [plaintiffs'] claims and thus is not the proper subject of an interlocutory appeal. . . . Regardless, determining whether an action was taken in violation of the Act [TOMA] is a question to be decided at trial on the merits; therefore we reject this ground."); *see also* Appellants' Brief at 5 ("Appellee's claims and associated factual support are not sufficient to make even a facial showing of a TOMA violation").

[71] *See generally* C.R. at 418-35.

[72] *See* TEX. R. CIV. P. 45; TEX. R. CIV. P. 47.

[73] TEX. R. CIV. P. 45(B).

[74] TEX. R. CIV. P. 47.

The fair notice requirement "is met if an opposing attorney can ascertain the nature and the basic issues of the controversy from the pleadings."[75] The sufficiency of pleadings is properly challenged by special exception, not by a plea to the jurisdiction.[76]

Here, Appellants merely contend that Ramos has not sufficiently alleged a violation of TOMA, rather than that Ramos cannot allege a violation of the act.[77] Appellants' assertions notwithstanding, the Petition states claims for violations of TOMA and provides fair notice of those claims.[78] Accordingly, the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

2. **Overview of TOMA**

The fundamental tenet of the Texas Open Meetings Act is that all meetings of a governmental body must be open to the public, with limited exceptions.[79] TOMA applies to all meetings involving a "quorum" of a governmental body.[80] Even in the absence of a

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[75] *Hays County*, 69 S.W.3d at 258.

[76] *See Woods*, 21 S.W.3d at 661 ("If . . . the pleading party cannot amend the petition to show jurisdiction under any circumstances, [the opposing party] may file a plea to the jurisdiction. . . . If, on the other hand, the petition is susceptible to amendment to show the court's jurisdiction, the opposing party should file a special exception and obtain an order to amend.").

[77] *See* Appellants' Brief at 5; C.R. at 26 (Appellants' Plea to the Jurisdiction uses the words "allege" and "plead" and variations thereof seven times).

[78] *See* C.R. at 418-435; *see also Hays County,* 69 S.W.3d at 661.

[79] *See* Tex. Gov't. Code § 551.002 ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter").

[80] *See* Tex. Gov't. Code § 551.001; Tex. Gov't. Code § 551.002.

quorum, a violation of TOMA occurs if a "member or group of members knowingly conspires to circumvent this chapter by meeting in less than a quorum for the purpose of secret deliberations in violation of this chapter."[81] The Texas Supreme Court requires "exact and literal compliance with the terms of the Texas Open Meetings Act."[82]

Under TOMA, the public must be given written notice of the time, place, and subject matter of all meetings of a quorum of a governmental body.[83] The notice must be posted at least 72 hours in advance in a place readily accessible to the general public.[84] In addition, a record must be made of the date, hour, place, and subject of each meeting held by the governmental body.[85]

Closed meetings[86] are allowed only in limited circumstances, which are construed narrowly to effectuate the overarching principle that governmental meetings are to be

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[81] *See* Tex. Gov't. Code § 551.143.

[82] *Gardner v. Herring*, 21 S.W.3d 767, 770 (Tex. App.—Amarillo 2000, no pet.) (*quoting Acker v. Texas Water Com'n*, 790 S.W.2d 299, 300 (Tex. 1990)); *see also City of Bells v. Greater Texoma Utility Authority*, 790 S.W.2d 6, 10 (Tex. App.—Dallas 1990, pet. denied) ("This Court ruled that literal compliance was required under the Open Meetings Act").

[83] *See* Tex. Gov't. Code § 551.041.

[84] *See* Tex. Gov't. Code § 551.043.

[85] *See* Tex. Gov't. Code § 551.021.

[86] "Closed meeting" is defined as "a meeting to which the public does not have access." Tex. Gov't. Code § 551.001(1).

open to the people.[87] Indeed, the exceptions to TOMA's open meeting requirement are affirmative defenses[88] on which the governmental entity or official bears the burden of proof.[89] Further, the exceptions do not extend to any final action, decision, or vote of a governmental body,[90] and do not apply if a third-party is present at the closed meeting.[91] Moreover, even if an exception applies, a governmental body may not conduct a closed

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[87] *See, e.g., Acker*, 790 S.W.2d at 300 ("We have previously noted that there is a broad scope to the coverage of the Open Meetings Act and a narrowness to its few exceptions"); *Cox Enters., Inc. v. Bd. of Trustees Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 958 (Tex. 1986) (TOMA "requires every regular, special, or called meeting of a governmental body to be open to the public, with certain narrow-drawn exceptions.") (citation omitted); *Finlan v. City of Dallas*, 888 F. Supp. 779, 790 (N.D. Tex. 1995) ("It is hard to see how this specific, limited, narrow exception applies to lobbying plans in the Texas legislature. The attorney consultation and real estate exceptions are not magic talismans that can be dragged out every time a body subject to TOMA wants to have a secret meeting.").

[88] *See Olympic Waste Servs. v. The City of Grand Saline*, 204 S.W.3d 496, 504 (Tex. App.—Tyler 2000, no pet.) ("The City did not conclusively establish the affirmative defense provided by the statutory exception allowing the governmental entity to avoid an open meeting by consulting with its attorney and the City actually violated the Open Meetings Act.") (citation omitted).

[89] *See Markowski v. City of Mallin*, 940 S.W.2d 720, 726-27 (Tex. App.—Waco 1997, writ denied) (in determining whether the attorney-consultation exception under TOMA applied to particular city council discussions, the court held that "the party asserting privilege has the burden of proving that the attorney-client privilege applies.") (citation omitted).

[90] *See* Tex. Gov't. Code § 551.102 ("A final action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.").

[91] *See, e.g., Finlan*, 888 F. Supp. at 787 ("When third parties are allowed into closed meetings . . . the privilege is waived so that the public cannot be legitimately shut out.").

meeting unless it first convenes a properly-noticed open meeting during which the presiding officer announces that a closed meeting will be held and identifies the section of TOMA authorizing the closed meeting.[92]

One of the narrow exceptions to TOMA's mandate that all meetings be open is the attorney-consultation exception.[93] The attorney-consultation exception, however, does not apply to discussions regarding general negotiations, policy discussions, the wisdom of particular measures, or matters not directly related to contemplated litigation or the rendition of attorney advice.[94] Thus, even if an executive session was initially convened under the attorney-consultation exception, TOMA is violated if communications during the closed session are not limited to the solicitation and receipt of legal advice.[95]

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[92] *See* Tex. Gov't. Code § 551.101.

[93] *See* Tex. Gov't. Code § 551.071.

[94] *See, e.g., Olympic Waste Servs.*, 204 S.W.3d at 502-04; Op. Tex. Att'y. Gen. No. JC-0233 (2000).

[95] *See Olympic Waste Servs.* 204 S.W.3d at 503-04 (holding that governmental body violated TOMA by discussing, in addition to the legal consequences of terminating a contract, its "resulting contractual options."); *Gardner*, 21 S.W.3d at 776 ("In other words, one could infer from the totality of evidence that while the closed session may have been convened to obtain legal advice, the Board members also deliberated upon the substantive aspects of Hernandez's complaint. And, in doing so, one could further infer that the scope of Section 551.071 was exceeded. Thus, the record fails to establish as a matter of law that the participants in the meeting merely sought and obtained legal advice permitted by Section 551.071(1) of the Act or that legal counsel merely advised the Board on matters within the ambit of Section 551.071(2).") (internal citation omitted).

Violations of TOMA have significant consequences. All official actions taken in violation of TOMA are voidable.[96] Further, mandamus and injunctive relief are specifically authorized.[97] In addition, it is a crime to knowingly attempt to circumvent TOMA, to participate in an unauthorized closed meeting, or to participate in a closed meeting knowing that a certified agenda or tape recording is not being made.[98] Finally, TOMA is a remedial statute, pursuant to which courts may fashion relief designed to "stop, prevent, or reverse a violation or threatened violation of the act."[99]

3. Ramos has sufficiently pled Appellants' violations of TOMA in connection with Ordinance 2892.

Appellants assert that "Appellee's claims and associated factual support are not sufficient to make even a facial showing of a TOMA violation"[100] and that "Appellee in his Amended Petition has not made any allegations that the Agenda notice for the City

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[96] *See* Tex. Gov't. Code § 551.141.

[97] *See* Tex. Gov't. Code § 551.142.

[98] *See* Tex. Gov't. Codes §§ 551.143-551.145.

[99] Tex. Gov't. Code § 551.142; *see also City of San Antonio v. Hardee*, 70 S.W.3d 207, 213 (Tex. App.—San Antonio 2001, no pet.) ("This Court has held the Open Meetings Act to be a remedial statute which should be liberally construed to affect its purpose."); *Hays County Water Planning Partnership v. Hays County*, 41 S.W.3d 174, 183 (Tex. App.—Austin 2001, pet. denied) (holding that governmental body violated TOMA, albeit not in a final action, and remanding to trial court to consider appropriate remedial remedies).

[100] *See* Appellants' Brief at 5.

Council Meeting of November 13, 2006, . . . [was] insufficient under TOMA."[101] Those bald assertions notwithstanding, Appellee has plainly alleged that Appellants violated TOMA in regard to Ordinance 2892 by: (1) failing to properly notice the City Council meeting of November 13, 2006; and (2) drafting, deliberating, negotiating, debating, and agreeing upon Ordinance 2892 behind closed doors.[102] Therefore, the trial court's denial of Appellants' Plea to the Jurisdiction should be affirmed on that point alone.

a. **The notice of the City Council meeting of November 13, 2006 was insufficient in regard to Ordinance 2892.**

Under TOMA, the City Council is required, at least 72 hours in advance,[103] to "give written notice of the date, hour, place, and subject of each meeting."[104] The more important the subject matter, the more detailed the notice must be.[105] Further, a city must ensure that its notices are not misleading. Thus, a notice calling for a "discussion" of an

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[101] *Id.* at 9.

[102] *See* C.R. 426-29.

[103] Tex. Gov't. Code § 551.043.

[104] Tex. Gov't. Code § 551.041.

[105] See *Cox Enters, Inc.*, 706 S.W.2d at 959; *Point Isabel Indep. Sch. Dist. v. Hinajosa*, 797 S.W.2d 176, 180 (Tex. App.—Corpus Christi 1990, writ denied) (TOMA "requires highly specific subject matter notice of meetings in which important governmental actions are taken because of the high degree of public interest in such actions.") (citation omitted); *Mayes v. City of DeLeon*, 922 S.W.2d 200, 203 (Tex. App.—Eastland 1996, writ denied) (Under TOMA "[t]he notice must provide full and adequate notice of the subject matter, particularly where the subject is of special interest to the public.") (citations omitted); *Markowski,* 940 S.W.2d at 726 ("The notice must be more specific if the public has a special interest in the topic under discussion.").

item is insufficient notice to allow final action (*e.g.* a vote).[106] Moreover, if a city consistently distinguishes between subjects for public deliberation and subjects for executive session, an abrupt departure from the practice renders the notice inadequate.[107]

Here, the notice of the City Council meeting held on November 13, 2006, was insufficient in regard to Ordinance 2892. In particular, Ramos has alleged:

> The City Council did not hold a properly noticed open meeting concerning Ordinance 2892. Indeed, the agenda for the November 13, 2006 City Council meeting, which was purportedly posted on the bulletin board at Farmers Branch City Hall on Friday, November 10, 2006, at 1:30 p.m., did not mention or otherwise describe the Ordinance—although numerous other proposed ordinance and resolutions are specifically identified herein.... Accordingly, Defendants failed to properly notice the November 13, 2006 City Council meeting, in regards to Ordinance 2892, in violation of Tex. Gov't. Code §§ 551.041 and 551.043.[108]

Thus, not only was Ordinance 2892 – a matter of great concern to residents of Farmers Branch[109] – not mentioned in the notice, but the failure to specifically mention it was an abrupt and conspicuous departure from Appellants' normal practice.[110]

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[106] *See River Rd. Neighborhood Ass'n v. South Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dism'd w.o.j.) ("Considering all of the facts and circumstances present in this case, it can only be concluded that the notice of the May 31 meeting which described the purpose of the meeting only as "discussion, was deceptive because... it did not alert the public to the fact that action might be taken.").

[107] *See* Op. Tex. Att'y. Gen. No. JC-0057 (1999) at 5.

[108] *See* C.R. at 427.

[109] *See, e.g.*, C.R. at 426.

[110] *See id.* at 427 (As alleged, "numerous other proposed ordinance[s] and resolutions are specifically identified" in the notice for the City Council meeting of November 13, 2006.); R.R., V.3 at 146:22-147:21 (Ramos' Counsel: "What's

Indeed, in order to argue that Ordinance 2892 was included within the notice, Appellants are forced to cite to the inclusion of the following: "[c]onsultation with the City attorney on issues related to . . . rental licensing,"[111] in the minutes for – not the notice of – the City Council meeting on November 13, 2006. According to Appellants, the inclusion of the phrase "rental licensing" within the general recitation of the issues to be discussed in executive session with counsel constitutes sufficient notice that Appellant would vote on the highly controversial Ordinance 2892 on November 13, 2006.[112] That contention fails for at least six reasons.

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particularly interesting, Your Honor, is you go to the third page of that Agenda, Item C.6. Consider adopting ordinance 2891. Why do I choose that one? Because it's the ordinance right before the one in question. And it goes on for what, six lines describing what the ordinance is. Go to Item D.1. Considering adopting ordinance 2893. That's the number right after 2892. Identifies it by number, describes what the ordinance is. On and on. It looks like there were at least a dozen resolutions and ordinances that were mentioned by name and number and the public was told that council was going to consider adoption of those resolutions and ordinances. Recall what our allegation is. No mention whatsoever is made in here of 2892. You now can see, assuming this is a true and correct copy, we're exactly right when we said that. And we're exactly right when the Texas case law says the more important an issue, the more specific it has to be in the notice. This was the most important thing that was considered that evening, and look what they did. I would almost say it's so conspicuous in its absence, it suggests, I think, somewhat of a playing around with the notice requirements. That's exactly what happened.")

[111] Appellants' Brief at 6; R.R. Ex. 8 (E.2).

[112] *See* Appellants' Brief at 6-7.

First, the referenced exhibit is the minutes of the City Council meeting, not the notice of the meeting.[113] Second, Appellants' Plea to the Jurisdiction is merely a facial challenge to the sufficiency of Appellee's pleadings,[114] and Appellee has alleged that the notice "did not mention or otherwise describe the Ordinance."[115] Third, "comparing the content of the notice[116] given and the action taken at the meeting,"[117] the notice is plainly insufficient.[118] Fourth, because Ordinance 2892 was a matter of significant public

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[113] *See* R.R. Ex. 8; R.R., V.3 at 138:10-140:17 (Appellants admit that the notice of the City Council meeting of November 13, 2006, "hasn't been submitted into evidence.").

[114] *See supra* n. 10-13, 69-70, 100.

[115] C.R. at 427.

[116] As set forth above, Appellants are referring to the after-the-fact minutes and not the prior notice of the meeting.

[117] *See Markowski*, 940 S.W.2d at 726 ("To determine if the notice sufficiently informs the public of the topic under discussion, the court will focus its analysis on comparing the content of the notice given and the action taken at the meeting.") (citation omitted); *see also River Rd. Neighborhood Ass'n*, 720 S.W.2d at 557.

[118] Appellants' cited authority is inapposite. *See Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex. 1975) (holding the following to be sufficient notice: "Board would consider other matters concerning the Authority's operation 'including the ratification of the prior action of the Board taken on October 19, 1972, in response to changes in electric power rates for electric power sold within the boundaries of the City of San Marcos, Texas.'"); *Rettberg v. Tex. Dept. of Health*, 873 S.W.2d 408, 410-12 (Tex. App.—Austin 1994, no writ) (holding that notice stating that the board would "discuss the evaluation, designation and duties of the board's executive secretary" was sufficient to allow the board to vote in open session to recommend to the State Commissioner of Health that plaintiff's appointment as executive secretary be rescinded); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 86-87 (Tex. App.—Austin 2004, pet. denied) (simply noting that the notice was sufficient without analysis). In each of those cases the notice was far more specific and none of the cases involved

concern,[119] Appellants were obligated to provide a more detailed notice.[120] Fifth, because Appellants consistently differentiate between topics to be considered in executive session and those to be openly discussed, the alleged inclusion of Ordinance 2892 solely in the matters to be discussed in executive session is inadequate.[121] Sixth, even assuming, *arguendo,* that Ordinance 2892 was in fact noticed as a matter to be discussed in executive sessions, such notice was insufficient because it failed to inform the public that Appellants would take final action on the Ordinance.[122]

Ramos' allegations, therefore, not only provide "fair notice" of Appellee's claims, but specifically set forth violations of Tex. Gov't. Codes § 551.041 and 551.043.[123] Rules 45 and 47 of the Texas Rules of Civil Procedure require nothing more.[124] Therefore, Ramos adequately pled violations of TOMA and the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

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issues of special significance to the public. Thus, Appellants' cited authority is inapposite.

[119] *See, e.g.*, C.R. at 418, 423, 425, 431.

[120] *See, e.g., Mayes*, 922 S.W.2d at 203 (TOMA requires that the "notice must provide full and adequate notice of the subject matter particularly where the subject is of special interest to the Public.") (citations omitted).

[121] *See* Op. Tex. Att'y Gen. No. JC-0057 (1999) at 5.

[122] *See River Rd. Neighborhood Ass'n*, 720 S.W.2d at 557.

[123] Tex. Gov't. Codes § 551.041 and 551.043; *see also supra* n. 103-108.

[124] *See* TEX. R. CIV. P. 45; TEX. R. CIV. P. 47.

b. **Appellants unlawfully drafted, deliberated, and agreed to Ordinance 2892 in improperly closed meetings and executive sessions.**

Moreover, Ramos has plainly alleged that Appellants violated Tex. Gov't. Code §§ 551.002, 551.071, 551.102, and 551.143(a)[125] with respect to Ordinance 2892. Specifically, Ramos has alleged that Appellants:

> with a quorum present and/or in an effort to circumvent the requirements of TOMA, engaged in closed session and otherwise secret deliberations during which the provisions of Ordinance 2892 were drafted, deliberated, negotiated, debated, and agreed upon. Among other things, during these secret deliberations, Defendants discussed the need and importance of there being a unanimous vote by the City Council in support of Ordinance 2892. In order to obtain this unanimity and to evade TOMA, it is now evident that, behind closed doors, Ordinance 2892 was negotiated, modified, and revised to secure the votes of all Defendants. Indeed, the unanimous vote in favor of Ordinance 2892 was secured in these secret meetings through, among other things, an agreement to exclude public libraries and recreation centers from the English-as-an-official-language resolution. In fact, Mayor Phelps admits that in closed session and through serial secret conversations, Defendants deliberated on Ordinance 2892 and discussed how they would vote on the Ordinance. Thus, when the City Council voted publicly on Ordinance 2892, the vote was merely a rubber-stamp of

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[125] *See* Tex. Gov't. Code § 551.002 ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter."); Tex. Gov't. Code § 551.071 ("A governmental body may not conduct a private consultation with its attorney except: (1) when the governmental body seeks the advice of its attorney about: (A) pending or contemplated litigation; or (B) a settlement offer; or (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter."); Tex. Gov't. Code § 551.102 ("A final action decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter"); Tex. Gov't. Code § 551.143(a) ("A member or group of members of a governmental body commits an offense if the member of group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.").

> Defendants' agreement reached in secret. Tellingly, it was only after the vote on Ordinance 2892 that the floor was opened for public discussion.[126]

The thrust of the foregoing allegations is that Appellants unlawfully convened executive sessions and otherwise conducted serial closed meetings in which they deliberated, drafted, and in fact formally agreed to Ordinance 2892.[127] Those allegations not only provide "fair notice" of Ramos' claims, but they specifically set forth violations of Tex. Gov't. Code §§ 551.002, 551.071, 551.102, and 551.143.[128] Therefore, the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

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[126] C.R. at 428.

[127] *See id.*

[128] *See Board of Trustees v. Cox Enters., Inc.*, 679 S.W.2d 86 (Tex. App.—Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986) (holding that board violated TOMA by taking vote in executive session although it then returned to open session and voted unanimously for the individual who won in the vote in executive session, because there was sufficient evidence that the actual resolution of the issue occurred in closed session); *Esperanza Peace And Justice Center v. City of San Antonio,* 316 F. Supp. 2d 433, 478 (W.D. Tex. 2001) ("[I]t is apparent from the record that what occurred at the September 11, 1997 city council meeting was a mere ratification of the deal already struck in closed deliberations the day before. No deliberations occurred at the open meeting; those had already occurred in private. The council merely confirmed the deal already memorialized in the consensus memorandum. As the council had no power to deliberate and vote on the budget at a meeting not convened in accordance with the Act, it could not later ratify the void act at a properly convened meeting. The attempted ratification was ineffective, and the council's defunding of plaintiffs is void. To hold otherwise would permit a governmental body convened in accordance with the Act to 'rubber stamp' deliberations and decisions already made in violation of the Act. It would also allow evisceration of the Act's worthy goals of ensuring the public's right to know what decisions government officials make and to have those officials articulate fully the basis on which they act.") (internal citations omitted); *Willmann v. City of San Antonio*, 123 S.W.3d 469, 481 (Tex. App.—San Antonio 2003, pet. dismissed) (reversing grant of summary judgment in favor of city

Nonetheless, based on a fundamental misunderstanding of the scope of the attorney-consultation exception to TOMA, Appellants assert that the above allegations fail to state a claim.[129] First, the attorney-consultation provision is a narrow exception and an affirmative defense to the requirement that all meetings be open, on which Appellants bear the burden of proof.[130] Appellants, however, make no effort to prove that, contrary to the Petition's well-pled allegations, Appellants' deliberations in executive session were all within the scope of the attorney-client privilege.[131] Second, the attorney-consultation exception applies only to the rendition, receipt, and solicitation of legal advice and not to negotiations or discussions regarding policy, the wisdom of

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where: "At the open meeting, the committee's recommendations were approved without meaningful discussion by the City Council").

[129] *See* Appellants' Brief at 10. Appellants cite *Markowski v. City of Marlin*, 940 S.W.2d at 726-27, for the proposition that "all the information discussed during such closed sessions [consultation with counsel] should be protected by the attorney-client privilege." *Markowski*, however, merely holds that "when a pending lawsuit involves unresolved charges or complaints about an officer or employee, it is permissible for the council to discuss those charges with its attorney as long as the discussion relates to the " *Markowski*, 940 S.W.2d at 726 (emphasis added). Appellants simply ignore that Appellee has alleged that Appellants discussed, in an executive session, much more than threatened litigation. Appellee has alleged that Appellants voted on, and generally discussed, Ordinance 2892 in an executive session. *See* C.R. at 425-30.

[130] *See Olympic Waste Servs.*, 204 S.W.3d at 504; *Markowski*, 940 S.W.2d at 726-27.

[131] *See* Appellants' Brief at 11-12. Appellants simply baldly assert that they "adjourned into closed session to 'seek the City Attorney's advice regarding the [ordinance]' . . . because of 'contemplated litigation.'" Appellants' Brief at 11. Appellants entirely ignore that they alleged that the discussions in the executive session went well beyond the solicitation and receipt of legal advice regarding contemplated litigation. *See* C.R. at 428, 430.

particular measures, or other matters not directly related to the provision of legal advice.[132] Here, as set forth in the Petition, Appellants exceeded the ambit of the narrow attorney-consultation exception by not limiting discussions in executive session to the receipt and solicitation of legal advice but, instead, deliberating, negotiating, and agreeing to Ordinance 2892 behind closed doors under the purported guise of the attorney-client privilege.[133]

Further, Appellants seek to evade responsibility by asserting that, at most, Appellants merely expressed their opinions and Ramos has not alleged that final action on Ordinance 2892 occurred in an executive session, which Appellants concede (as they must) would be a violation of TOMA.[134] Ramos, however, has specifically alleged that Appellants agreed in executive session to vote unanimously in favor of Ordinance 2892.[135] Further, Ramos has alleged that Appellants not only agreed to Ordinance 2892 behind closed doors, but they deliberated on it as well – thus exceeding

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[132] *See, e.g., Olympic Waste Servs.*, 204 S.W.3d at 502-04; Op. Tex. Att'y. Gen. No. JC-0233 2000); Op. Tex. Att'y. Gen. No. JM-100 1983).

[133] *See* C.R. at 428.

[134] *See* Appellants' Brief at 12; *see also* Tex. Gov't. Code § 551.102.

[135] *See* C.R. at 428. Appellants' reliance on *Board of Trustees*, 679 S.W.2d 86, is misplaced. Indeed, its holding directly supports Appellee ("The district contends the action in executive session was simply a straw vote and did not violate the ACG, but there is sufficient evidence [secret ballots taken in executive session, announced who received most votes, then re-convened open session and voted unanimously for the winner of the earlier vote] to support the trial court's conclusion that the actual resolution of the issues was made in executive session.").

the scope of the attorney-consultation exception.[136] Such actions subject Appellants to appropriate remedial relief.[137] Moreover, Appellants completely ignore Ramos' allegations that Appellants violated TOMA not just by exceeding the limits of the attorney-consultation exception, but by participating in serial closed meetings for which no notice was issued whatsoever.[138]

Apparently realizing that Ramos has more than sufficiently alleged violations of TOMA, Appellants attempt to dispute the truth of certain alleged facts.[139] Not only are such contentions without merit, but they are inappropriate for several reasons. First, Appellants challenged only the sufficiency of the pleadings.[140] Second, the Plea to the Jurisdiction does not involve any primarily-jurisdictional facts.[141] Instead, the factual

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[136] *See* C.R. at 428.

[137] *See, e.g., Hays County*, 41 S.W.3d at 183 ("Hays County's argument-essentially 'no harm; no foul'—is facially tempting. . . . It is not enough to say that because the commissioners court took no action following Molenaar's presentation, there has been no harm to the public; and the district court cannot, therefore, order a remedial remedy. Such a holding would ignore the public's interest as expressed by the Supreme Court in *Cox Enterprises*. Therefore, we decline to hold as a matter of law that there is no remedy available to HCWPP.") (internal citations omitted).

[138] *See* C.R. at 428.

[139] *See* Appellants' Brief at 6 ("Such assertions wholly ignore several significant and indisputable facts."); *id.* at 7 ("This general allegation is contrary to the indisputable facts regarding the adoption of Ordinance 2892").

[140] *See supra* n. 10-13, 69-70, 100.

[141] *See Blue,* 34 S.W.3d at 554-55 (limiting factual review to primarily jurisdictional facts as opposed to the merits).

disputes which Appellants attempt to raise go directly to the merits of Appellants' claims. Thus, contrary to Texas Supreme Court precedent, Appellants attempted to force Ramos to put on his entire case just to establish jurisdiction.[142] Indeed, in large part, Appellants are relying upon an affirmative defense – the attorney consultation-exception – to contest the allegations on the Petition.[143] This attempt to force Ramos to prove his case is even more inappropriate given that no discovery has been taken.[144] Because Ramos has sufficiently pled violations of TOMA, the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

4. **Ramos has sufficiently pled Appellants' violations of TOMA in connection with Ordinance 2893.**

Appellants inexplicably devote most of their argument concerning Ordinance 2893 to demonstrating that a bus tour conducted on October 10, 2006 (the "Bus Tour") was sufficiently noticed.[145] Ramos, however, does not allege that the Bus Tour was insufficiently noticed.[146] Instead, Ramos alleges that Appellants failed to comply with

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[142] *See Blue,* 34 S.W.3d at 554.

[143] *See* Appellants' Brief at 9-12.

[144] *See* R.R., V.5 at 35:5-22.

[145] *See* Appellants' Brief at 7-8.

[146] Appellants repeatedly cite to page 17 of the Amended Petition, but that page includes only Appellee's request for relief. *See* C.R. at 434; *see also* C.R. at 418-436. The only reference to the Bus Tour in the Amended Petition is: "The City Council adopted 2893 following a bus tour that it took on October 10, 2006. The 'tour' moved through neighborhoods in which residents were predominantly Hispanic and without regard to immigration status of neighborhood residents." C.R. at 429.

TOMA in connection with the enactment of Ordinance 2893 by drafting, deliberating on, and in fact agreeing to Ordinance 2893 in closed meetings.[147]

Appellants' only challenge to the above allegations is the false assertion that: "Appellee does not assert that such discussions, if they occurred at all, included at least four members of the Farmers Branch City Council."[148] To the contrary, Ramos specifically alleges that Appellants "failed to comply with TOMA in connection with the enactment of Ordinance 2893 by, with a quorum present and/or in an effort to circumvent TOMA, drafting, deliberating, an[d] in fact agreeing upon Ordinance 2893 in closed meetings."[149] Those allegations provide "fair notice" of Ramos' claim and describe violations of TOMA.[150]

5. **Appellants violated TOMA in connection with Ordinance 2900.**

Ramos also has alleged that Appellants violated TOMA by agreeing to Ordinance 2900, behind closed doors, prior to the open meeting of the City Council on January 8, 2007.[151] Therefore, Ramos has sufficiently pled violations of TOMA, and the trial court's order denying Appellants' Plea to the Jurisdiction should be affirmed.

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[147] C.R. at 430.

[148] *See* Appellants' Brief at 9.

[149] *See* C.R. at 429.

[150] *See supra* pp. 17-18, n. 81, 90, 93-95, 125, 128-130, 132, 134, 135, 137.

[151] *See* CR. 431-432.

C. Ordinance 2903 Does Not Moot Ramos' Claims Or Ratify Appellants' Past Violations of TOMA.

As a fallback position to their meritless appeal of the trial court's denial of their Plea to the Jurisdiction, Appellants argue that Ordinance 2903, passed on January 22, 2007, repealed Ordinances 2892 and 2900, thereby mooting Ramos' request that those two Ordinances be declared void.[152] This contention is without merit for two reasons: (1) Appellants did not present that argument to the trial court; and (2) Ordinance 2903 does not moot Ramos' claims in any event.

1. Issues relating to Ordinance 2903 are not properly before the Court.

Issues relating to Ordinance 2903 are not properly the subject of this appeal because they were not raised to the trial court. Although Ordinance 2903 was adopted on January 22, 2007, the trial court did not enter an order denying Appellants' Plea to the Jurisdiction until February 2, 2007.[153] In the intervening period, Appellants could have filed an amended plea to the jurisdiction.[154] Nonetheless, Appellants failed to do so, opting instead (apparently as a tactical matter) to assert the argument for the first time on

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[152] *See* Appellants' Brief at 12-13.

[153] *See* C.R. at 604. The trial court denied the Plea to the Jurisdiction from the bench on January 26, 2007. See R.R., V. 5. at 33:1-2.

[154] *See* R.R., V.4 at 39:2-24 (after discussing the forthcoming repeal of ordinances 2892 and 2900, Appellants stated: "to allow us to file an amended plea to jurisdiction based on the 'amended pleadings'"); R.R., V.4 at 36:3-25 ("[W]e would ask the Court for additional time to provide a revised and amended plea to the jurisdiction and submit our corresponding evidence and if necessary, have a follow-up hearing on that."); *see also* R.R., V.4 at 34:19-25 (the Court offered to set another hearing if Appellants wished to pursue a plea to the jurisdiction to challenge the truth of Ramos' allegations as opposed to merely the sufficiency).

appeal. On February 5, 2007, Appellants chose to pursue this accelerated appeal on the record as it then existed,[155] which does not include Ordinance 2903 or the argument now presented.[156]

As a consequence, Appellants now request that the Court take judicial notice of Ordinance 2903.[157] While courts may take judicial notice of a municipal ordinance, the ordinance must be verified to be part of the record.[158] Furthermore, while courts have discretion to allow supplementation of the record after submission, such discretion should not be exercised in the absence of unusual circumstances.[159] Here, Appellants chose to proceed with this interlocutory appeal, rather than amend their Plea to the Jurisdiction, in order to take advantage of the resulting stay of discovery. The Court should not reward such conduct by considering Ordinance 2903.

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[155] *See* C.R. at 605-06.

[156] *See generally* C.R.

[157] *See* Appellants' Brief at 12.

[158] *See City of Houston v. Southwest Concrete Construction, Inc.*, 835 S.W.2d 728, 735 n.5 (Tex. App.–Houston [14th Dist.] 1992, writ denied); *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 256 (Tex. App.–Dallas 1994, *rev'd on other grounds*) (page from brief filed in an earlier appeal to the United States Supreme Court and attached to brief was not considered by court because it was outside the record). Here, the Court may not take judicial notice of Ordinance 2903, because Appellants have not submitted a verified copy.

[159] *See Nuby v. Allied Bankers Life Ins. Co.*, 797 S.W.2d 396, 298 (Tex. App.–Austin 1990, no writ).

Moreover, absent fundamental error, "a court of appeals has no discretion to reverse an error-free judgment based on a new argument . . . raised for the first time on appeal."[160] Obviously, the trial court did not commit fundamental error[161] by not ruling on an issue which Appellants could have raised with the trial court, but purposefully chose not to do so.

With an election fast approaching on May 12, 2007,[162] and discovery responses coming due,[163] Appellants opted to hastily pursue an interlocutory appeal which stays all discovery.[164] Only with the stay secured did Appellants assert that Ordinance 2903 moots Ramos' claims. Perhaps not surprisingly,[165] Appellants did so in an effort to ensure that this accelerated appeal, and thus discovery, would not be completed until after

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[160] *See Larsen v. Manager Fund*, 835 S.W.2d 66, 74 (Tex. 1992).

[161] *See Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) ("Fundamental error survives today only in those rare instances in which the record shows on its face that the court lacked jurisdiction").

[162] *See, e.g.*, Appellants' Motion to Extend Time to File Appellants' Brief ("Motion to Extend Time") at ¶ 3.

[163] *See* R.R., V.5 at 35:12-21.

[164] TEX. CIV. PRAC. & REM. CODE § 51.014 (8).

[165] Such conduct is, however, contrary to Appellants' expressed desire "to have the most swift and judicious ability to get to a point of disposition without the unnecessary delay to the parties." R.R., V.5 at 29:9 - 13.

the election on May 12, 2007.[166] Having chosen not to present Ordinance 2903 or arguments concerning it to the trial court, Appellants should not now be allowed to claim mootness. Appellants should either have raised the issue before pursuing this appeal, or assert it to the trial court on remand.

2. In any event, Ordinance 2903 does not moot Appellee's claims.

a. The mootness doctrine

The mootness doctrine is intended to preclude courts from ruling on abstract or academic questions which generally arise in instances in which the act sought to be enjoined has already been accomplished, and thus cannot be redressed.[167] In essence, the doctrine is intended to preclude courts from rendering advisory opinions.[168] Generally, a case is considered moot if the issues presented are no longer "live" or if the parties lack a

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[166] *See* TEX. CIV. PRAC. & REM. CODE § 51.01416; *see also* Motion to Extend Time; Appellee's Response in Opposition to Appellants' Motion to Extend Time to File Appellants' Brief.

[167] *See Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988) ("Generally, a case is determined to be moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (quotations, citations omitted); *see also City of Dallas v. Rutledge*, 258 S.W. 534, 537 (Tex. Civ. App.—Dallas 1924, no writ) ("A case is said to be moot when the question to be determined is abstract, one that does not rest upon existing facts or rights.").

[168] *See Brownsville Indep. Sch. Dist. Bd. Of Trustees v. Brownsville Herald*, 831 S.W.2d 537, 538 (Tex. App.—Corpus Christi 1992, no writ) ("Courts are created not for purposes of deciding abstract or academic questions of law or to render advisory opinions, but solely for judicial determination of *presently existing* disputes between parties in which effective judgment can be rendered.").

cognizable interest in the outcome.[169] Put another way, a case becomes moot "when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy."[170] Thus, a case is not moot if some issues remain in controversy.[171] Here, the remaining questions include, without limitation: (1) did Appellants violate TOMA; and (2) if Appellants violated TOMA, what remedial relief should be entered?

b. Ordinance 2903 does not obviate the need for remedial relief.

Ordinance 2903 does not moot Ramos' claims for several reasons. First, Appellants do not contend that Ordinance 2903 has any effect on Ordinance 2893; thus those claims are still "alive." Second, although Ordinance 2903 purports to repeal Ordinances 2892 and 2900, it does not cure Appellants' violations of TOMA in regard to those ordinances. Thus, while Ordinance 2903 may obviate the need to void Ordinances 2892 and 2900, contrary to Appellants bald assertion,[172] it does not remedy Appellants' breach of their duties owed to residents of Farmers Branch under TOMA[173] – namely, the

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[169] See *Camarena*, 754 S.W.2d at 151.

[170] *Pantera Energy Co. v. R.R. Comm'n of Texas*, 150 S.W.3d 466, 471 (Tex. App.—Austin 2004, no pet.).

[171] *See In re Gruebel*, 153 S.W.3d 686, 689 (Tex. App.—Tyler 2005, no pet.).

[172] *See* Appellants' Brief at 14 ("Because the alleged violation was subsequently remedied, the injunction is improper.").

[173] Appellants are correct that TOMA allows for reauthorization of a final action taken in violation of TOMA. However, "[a] governmental entity may ratify only what it could have lawfully authorized initially." *Ferris v. Tex. Bd. of Chiropractic Examiners*,

public's right "not only to know what government decides but to observe how and why every decision is reached."[174] As discussed below, Ramos is entitled to a remedy for Appellants' breach.[175] Thus, Ramos' claims are not moot.

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808 S.W.2d 514, 518 (Tex. App.—Austin 1991, writ denied) (citation omitted). Appellants could not have lawfully authorized closed deliberations regarding Ordinance 2892 and 2893. TOMA protects citizens' right to observe those deliberations. Those deliberations must be made public in order for Appellants' violations to be remedied.

[174] *Acker*, 790 S.W.2d at 300.

[175] Indeed, had Appellants raised this issue before the trial court, Ramos would have included in the record the Order on Remedies, in *Garza v. Dallas Indep. Sch. Dist.*, Cause No. 01-08448-J, in the 191st District Court of Dallas County, Texas, issued December 18, 2001 at p. 10 ("*Publication of the Closed Session Transcripts*. Defendants argue that any harm caused by the improper meetings has been cured by the Court 'ordering that they be made public.' The Court's previous order of November 30, 2001 specifically ordered them produced to the other parties in the case. Defendants complied. . . . While those portions are now 'public' in the sense that they are in an open court record, they have not been made public in the same way a board meeting would be. Furthermore, the tapes themselves have not been produced in any form or made public. Accordingly, the Court will enter an injunction requiring DISD to publish a copy of this Order on Remedies and the closed meeting transcripts ordered produced by the November 30, 2001 order of this Court on a publicly accessible website, make copies available to the public at all subsequent Board meetings regarding redistricting and have copies available for review at the Board's offices during regular office hours to members of the public who request."); *see id.* at pp. 8-10 ("Here, the violations included hours of deliberations over policy, political and personal issues underlying restrictions in closed sessions. As other states have found, simply revoting does not cure the taint of the improper deliberations. Since the Court cannot erase from the Trustees' minds the information they learned during the improperly closed sessions, 'reversing' the violations requires undoing the harm caused by the inability of the public to witness its government in action . . . Defendants have repeatedly engaged in violations of the Act by deliberating policy and debating maps in closed sessions. Defendants' continued assertion through counsel that they did not violate the Act supports a finding that such violations will continue to occur in the future if not enjoined. . . . The Court finds that a specific injunction proscribing deliberations about policy, political or personal concerns relevant to redistricting and debating various maps in closed sessions should be entered.") (internal citations omitted).

The explicit command of TOMA is for openness at every stage of the deliberations.[176] TOMA is a remedial statute[177] that is designed to "stop, prevent, or reverse a violation of threatened violation."[178] Appellants contend that because Ordinances 2892 and 2893 have been repealed, there is no harm and thus no remedy. That "no harm, no foul" argument has been rejected because TOMA is a remedial statute that protects citizens' right to know how and why their government reaches every decision.[179] Thus, voiding final actions taken in violation of TOMA is not the only remedy provided for by TOMA.[180] Accordingly, courts have conducted *in camera* reviews of transcripts, recordings, minutes, and other evidence of closed meetings,[181] and required disclosure to the public of discussions held during improperly closed

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[176] *See Acker*, 790 S.W.2d at 300.

[177] *See e.g., City of San Antonio v. Hardee*, 70 S.W.3d 207, 213 (Tex. App.—San Antonio 2001, no pet.) ("This Court has held the Open Meetings Act to be a remedial statute which should be liberally construed to effect its purpose").

[178] Tex. Gov't. Code § 551.142.

[179] *See Hays County Water Planning*, 41 S.W.3d at 183 ("Hays County's argument-essentially 'no harm; no foul'—is facially tempting. . . . It is not "enough to say that because the commissioners court took no action following Molenaar's presentation, there has been no harm to the public; and the district court cannot, therefore, order a remedial remedy. Such a holding would ignore the public's interest as expressed by the Supreme Court in *Cox Enterprises*. Therefore, we decline to hold as a matter of law that there is no remedy available to HCWPP.") (internal citations omitted).

[180] *See* Tex. Gov't. Code § 551.142.

[181] *See, e.g., Finlan*, 888 F. Supp. at 783-84 ("In litigation involving an alleged violation of the TOMA, the Court is entitled to make an *in camera* inspection of tape recordings of closed meetings. These tape records are confidential under the Texas Open Records Act unless a court rules otherwise in an action under the TOMA.").

meetings.[182] Further, when Texas courts find violations of TOMA, they often impose injunctions prohibiting future conduct in violation of TOMA.[183]

Accordingly, assuming *arguendo* that Ordinance 2903 renders Ramos' request to void Ordinances 2892 and 2900 moot, Ramos' claims for relief nevertheless remain alive and ripe. The trial court may still fashion appropriate remedial measures including: (1) declaring that Appellants violated TOMA; [184] (2) compelling Appellants to disclose to the public all transcripts, minutes, recordings, and other evidence of closed meetings; and

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[182] *See supra* n. 175.

[183] *See, e.g., Harris County Emergency Serv. Dist. No. 1 v. Harris County Emergency Corps.*, 999 S.W.2d 163, 171 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (upholding injunction barring defendant from holding emergency meetings unless in compliance with TOMA); *Salazar v. Gallardo*, Cause No. 13-01-389-CV, 2001 Tex. App. LEXIS 6751, *3 (Tex. App.—Corpus Christi October 4, 2001, no pet.) (not designated for publication) (entering injunction to prevent future violations of TOMA) (not designated for publication); *Hitt v. Mabry*, 687 S.W.2d 791, 796 (Tex. App.—San Antonio 1985, no writ) (entering injunction to prevent future violations of TOMA).

[184] *See* R.R. V. 5 at 30:10-31:14 (Ramos' Counsel: "[O]ne of the things we have to consider, Your Honor, is what the spirit and the purpose of the open meetings act is. It certainly is not merely to catch public officials in governmental units in violations of the act and having them undo something . . . and go forward as if the violation never occurred. Your Honor, one of the reasons we are seeking declaratory relief is . . . [i]f this Court were to declare that 2892 was [a violation] because there were things that should have been discussed in open that were discussed in closed session, it would mean that documents memorializing those supposedly closed sessions need to be opened up for public purview. If we don't go forward with the declaratory relief and try to make open those things that should have been open but were improperly declared to be closed, then half the purpose of the open meetings act is defeated. And that's one of the reasons that we want to go forward . . . [W]e still want relief."); *id.* at 27:4-28:1-12 (Ramos' Counsel: "[W]hat we have done and other courts have done with us in other circumstances . . . [is to] fashion some remedial relief . . . The public, my client, is entitled to know what was going on here, what was said in those meetings that were improvidently held on the back channel or not in the open as they should have been. And that's why the case remains.").

(3) requiring Appellants to comply with TOMA in the future. These remedial remedies are necessary because, as alleged in the Amended Petition, Appellants have a pattern of improperly drafting, deliberating, and agreeing to ordinances behind closed doors.[185]

Here, Appellants intentionally prevented the public from observing or participating in the negotiation, deliberation, and formulation of the highly controversial Ordinances.[186] Indeed, through this appeal, Appellants continue to thwart the public's right to know how and why these controversial Ordinances were adopted. Ramos seeks to enforce and vindicate[187] the public's right to know how and why Appellants approved Ordinances 2892, 2893, and 2900. The subsequent repeal of Ordinances 2892 and 2900 has not vindicated this right. Ordinance 2903 is inevitably the fruit of the unlawfully closed meetings that led to the enactment of Ordinances 2892 and 2900. Indeed, with an election looming, Appellants continue to seek to prevent residents of Farmers Branch from knowing how and why those Ordinances were passed.[188] The contents of these improperly closed meetings must be divulged because TOMA is a recognition of "the

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[185] *See* C.R. at 418-35. Appellants reliance on *Cornyn v. City of Garland*, 994 S.W.2d 258 (Tex. App.—Austin 1999, no pet.), is misplaced because it merely stands for the proposition that a declaration that a defendant violated TOMA not coupled with other remedial relief besides a broad injunction requiring the City of Garland to comply with TOMA, was improper. Here, Appellants seek appropriate remedial relief. *See, e.g., supra* n. 175, 179, 183-184.

[186] *See* C.R. at 426.

[187] *See, e.g.,* R.R., V.5 at 30:10 – 31:12.

[188] *See* Appellee's Response in Opposition to Appellants' Motion to Extend Time.

wisdom contained in the words of Justice Brandeis that: 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' The executive and legislative decisions of our governmental officials as well as the underlying reasoning must be discussed openly before the public rather than secretly behind closed doors."[189]

Further, the TOMA violations at issue are matters of significant public concern that are capable of repetition while nevertheless evading review. In particular, if Ramos' claims were deemed moot, governmental units and officials would be allowed to draft, debate, and agree upon final actions in violation of TOMA and, if such conduct is challenged, simply repeal the final action and re-approve the action, without ever having to disclose the contents of the improperly closed meeting. To allow such conduct is to make a mockery of TOMA.[190] Therefore, even accepting Appellants' contention that the need to void Ordinances 2892 and 2900 is obviated by Ordinance 2903, Ramos' claims are live, ripe, and justiciable.

In order to vindicate Ramos and the public's rights under TOMA, and to prevent future violations, the trial court should fashion appropriate remedial measures, including

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[189] *Acker*, 790 S.W.2d at 300 (internal citations omitted).

[190] *See, e.g., Esperanza Peace And Justice Center,* 316 F. Supp. 2d at 478; *Finlan*, 888 F. Supp. at 783 ("In our country, we have a basic belief that in a democracy the people do not need their government to protect them from themselves."); *Board of Trustees*, 679 S.W.2d at 89 ("The Act was intended to keep decision making with reference to public business in the open so citizens can know how their representatives vote, and to allow citizen input in the decision making process prior to the taking of final action. To allow public officials to make their actual decisions in private sessions and then merely report their decision or present a formal, unanimous front of the public in an open meeting would thwart much of that purpose.") (citations omitted).

declaring that Appellants violated TOMA, entering an injunction requiring future compliance with TOMA, requiring disclosure of the contents of unlawfully closed meetings, and awarding Ramos reasonable attorneys' fees and costs.

D. The Individual Appellants' Appeal Should Be Dismissed For Lack Of Jurisdiction.

Finally, the Court should dismiss the appeal of the Individual Appellants for want of jurisdiction. Texas Civil Practices & Remedies Code § 51.014(a)(8), under which this interlocutory appeal is being pursued, applies only to orders granting or denying a plea to the jurisdiction by a "governmental unit."[191] It does not include employees or officials of governmental units. [192]

V.

CONCLUSION AND REQUEST FOR RELIEF

For all the foregoing reasons, Appellee Guillermo Ramos respectfully requests that the Court affirm the trial court's denial of Appellants' Plea to the Jurisdiction and award him such further relief to which he may be entitled.

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[191] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *Bolton*, 990 S.W.2d at 466-67 (dismissing for lack of jurisdiction the interlocutory appeal of the denial of a plea to the jurisdiction of individuals sued in their official capacities); *Castleberry Ind. Sch. Dist.*, 35 S.W.3d at 779-80 ("[S]ection 51.014(a)(18) does not confer jurisdiction over the interlocutory appeal brought by Myers and Burgett, and we dismiss their appeals for want of jurisdiction.").

[192] *See id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing document to be served upon the following counsel in the above cause via certified mail, return receipt requested, 7001 25510 0001 7703 5342, in accordance with the Texas Rules of Appellate Procedure, on this 3rd day of May, 2007.

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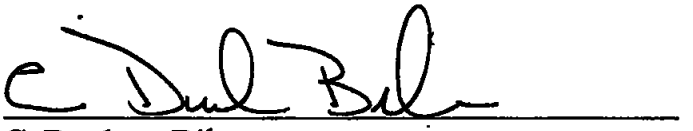

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