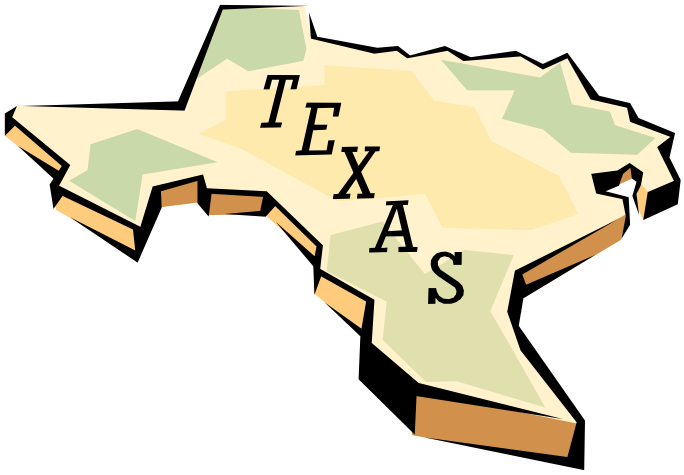

RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TEXAS CITY ATTORNEYS ASSOCIATION
TEXAS MUNICIPAL LEAGUES
ANNUAL CONFERENCE
San Antonio, Texas
October 30, 2008

Presented by:
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&
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Mike Hayes was appointed as in-house City Attorney for the City of Kerrville in September 2002 and remains employed in that capacity. Mike started out in the El Paso City Attorney's office and then ventured on to Houston and the law firm of Olson & Olson. He grew up in San Antonio, received his undergraduate degree from the University of Texas at Austin in 1990, and then his law degree from St. Mary's University in 1994. He is married to another burnt orange bleeder and is brainwashing his 3 children toward all things UT. He is still waiting for the Spurs point guard position to open up and for an invite to training camp. He thought this was going to be the year.

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Miguel has been an associate at Denton, Navarro, Rocha & Bernal P.C. for just over two years and is the City Attorney for the City of Jourdanton and Assistant City Attorney for the cities of Cibolo, Roma, Shavano Park, and San Felipe. He is in charge of municipal prosecution for the cities of Live Oak, Cibolo, and Jourdanton. Born and raised in the Bronx NY, Miguel is a graduate from Princeton University in 2000, and Brooklyn Law School in 2004. He also studied at the University of San Francisco School of Law and is a faithful New York Giants fan (for now).

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Police and Fire Civil Service / Collective Bargaining

City of Santa Fe v. Boudreaux 256 S.W.3d 819 (Tex. App.-Houston [14 Dist.] 2008 no pet.)

AN APPEAL TO A CITIZEN'S REVIEW COMMITTEE PER THE COLLECTIVE BARGAINING AGREEMENT CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The City terminated the employment of police officers Victor Boudreaux and Jeremy Creech. Under the terms of a collective bargaining agreement between the City and its police department, both officers appealed their termination. The City argued that the provision allowing disciplined police officers to appeal to a Citizen's Review Committee represented an unconstitutional private delegation of legislative authority. The trial court held in favor of the employees, and ordered the City to participate in the grievance process. The City appealed on the grounds that the appeal provision was unconstitutional.

To determine whether a private delegation of legislative power is constitutional, we consider the following factors:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?

2. Are the persons affected by the private delegate's actions adequately represented in the decision-making process?

3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?

4. Does the private delegate have a pecuniary or other personal interest that may conflict with its public function?

5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?

6. Is the delegation narrow in duration, extent, and subject matter?

7. Does the private delegate possess special qualifications or training for the task delegated to it?

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

The Court of Appeals considered the above factors and held that the provision was an unconstitutional delegation of legislative authority, reversed the trial court's judgment, and rendered judgment for the City.

Bartholomew U. Stephens v. City of Houston et al., 260 S.W.3d 163 (Tex.

App.—Houston [1st Dist.] June 12, 2008 no pet.).

CIVIL SERVICE COMMISSION'S DECISION UPHOLDING EMPLOYEE'S INDEFINITE SUSPENSION WAS NOT APPEALABLE.

Williams, the director of the City's Health and Human Services Department, indefinitely suspended Stephens pursuant to City Charter and City Code. Stephens appealed Williams' decision to the Civil Service Commission (CSC). The CSC "upheld and sustained" Stephens' indefinite suspension, resulting in dismissal from City employment. Stephens then filed a petition seeking a declaration that his dismissal was beyond the power of the department head and wrongful, and he sought reinstatement to his prior position and back pay. The City filed a plea to the jurisdiction.

The Court of Appeals dismissed the appeal because Stephens did not appeal the CSC's final dismissal order on constitutional grounds, and therefore had no right to appeal the trial court's order.

City of Pasadena v. Roland C. Kuhn, 260 S.W.3d 93 (Tex. App.—Houston [1st Dist.] 2008).

CITY RETAINED SOVEREIGN IMMUNITY FROM SUIT BECAUSE OFFICER DID NOT ACT RECKLESSLY.

Roland Kuhn filed a personal injury action against the City following a collision at an intersection with a police car. The trial court denied the City's plea to the jurisdiction, and the City appealed. The Court of Appeals held that the City retained sovereign immunity from suit under the Texas Tort Claims Act because the officer did not act recklessly. The Court of Appeals reversed the trial court's order and rendered judgment that the case be dismissed.

City of Houston v. Joseph A. Buttitta, ---S.W.3d.---, No. 01-07-00323-CV 2008 WL 2756610 (Tex. App.—Houston [1st Dist.] July 17, 2008).

CITY COULD NOT ASK THE TRIAL COURT TO SET ASIDE THE COMMISSION'S DECISION, AND AS SUCH, TRIAL COURT HAD NO SUBJECT MATTER JURISDICTION OVER THE UNDERLYING DISPUTE

In 2006, City determined that officer had engaged in conduct that violated various Houston Police Department policies and accepted his request to receive a voluntary 2-level demotion. A letter explaining the misconduct and demotion was placed in the officer's personnel file. The officer filed a motion with the Police Officers' Civil Service Commission, (CSC), requesting that the letter be removed, and the CSC granted the officer's request. The City filed a petition in district court requesting a declaration that the CSC did not have jurisdiction to order the removal or the return of the letter to the file. The officer filed a plea to the jurisdiction, which the trial court granted, dismissing the case and the Court of Appeals affirmed. The Court of Appeals reasoned that Section 143.015, Tex. Local Gov't Code provides that fire fighters and police officers dissatisfied with a CSC decision may file a petition in district court asking that the decision

be set aside, but does not state that the municipality involved may do the same. Accordingly, a city may not appeal a decision of the Police Officers' Civil Service Commission under Chapter 143, Tex. Local Gov't Code.

Section 143.015 of the Local Government Code provides that fire fighters and police officers dissatisfied with a Commission decision may file a petition in district court asking that the decision be set aside, but does not state that the municipality involved may do the same. Tex. Loc. Gov't Code Ann. § 143.015(a) (Vernon 2008). Accordingly, only aggrieved fire fighters and police officers have a right to seek judicial review of a Commission decision, not municipalities.

Wichita County v. Bonnin --- S.W.3d ----, 2008 WL 2511174 (Tex. App.-Fort Worth June 19, 2008 no pet.)

SHERIFF'S DEPARTMENT SALARIES WERE PROPERLY SUBMITTED TO VOTERS.

Suit by a Wichita County jailer seeking to enforce the terms of a petition related to the sheriff's department employees' salaries after voters approved a ballot that included only portions of the items in the petition. Court of Appeals reversed summary judgment for Plaintiff and rendered judgment for the County and County Commissioners Court. The items on the ballot were statutorily limited because the language of section 152.072(d) mandates that the only issue that may be submitted to voters regarding the salaries of members of the sheriff's department is whether the proposed minimum salary should be adopted, precluding the submission of any other salary related issue to the voters. Tex. Loc. Gov't Code Ann. § 152.072(d).

Jackson v. City of Texas City, --- S.W.3d ----, 2008 WL 2854163 (Tex. App.-Houston [1 Dist.] July 24, 2008)

TERMINATION OF FIREFIGHTERS FOR FAILURE TO SATISFACTORILY COMPLETE EMT TRAINING WAS NOT SUBJECT TO PROVISIONS OF THE CIVIL SERVICE ACT

Jackson and Nuñez began working for the Texas City Fire Department (TCFD) in June 2001 and October 2001, respectively. Both Jackson and Nuñez signed a document entitled "Conditions of Employment," which was adopted under the terms of a collective bargaining agreement between TCFD and Texas City. The document stated, in part:

It is understood that each Civil Service employee hired after January 1, 2000, will be required to be EMT (Emergency Medical Technician) certified at the basic level or will be detailed to attend EMT (Emergency Medical Technician) training to become certified at the basic level. It is understood that each Civil Service employee hired after January 1, 2000, may be required to be EMT (Emergency Medical Technician) certified at the paramedic level or will be detailed to attend EMT (Emergency Medical Technician)

training to become certified at the paramedic level at some time during their employment with the department. . .Upon receiving State Certification, each employee is to comply with and fulfill all existing and future requirements of the Texas Department of Health to maintain their level of certification. Furthermore, each employee with a basic EMT or paramedic level of certification is to comply with and fulfill all existing and future requirements of the Texas City Fire Department and/or Medical Director.

Following this paragraph, the document stated, "It is understood that failure to satisfactorily complete the EMT Basic or Paramedic training and qualify for State Certification and maintain certification at a level established by the department constitutes cause for disciplinary action up to and including termination of the employee."

Jackson and Nuñez successfully completed their probationary period and became non-probationary employees of TCFD in 2002. In 2005, the TCFD Fire Chief assigned both Jackson and Nuñez to attend EMT training and to become certified as EMTs at the paramedic level. Jackson and Nuñez attended the required training classes, but neither was able to pass the training class or sit for the certification exam. In 2006, the Fire Chief terminated Jackson's and Nuñez' employment with the TCFD via letter. Despite the fact that the Fire Chief's letters did not inform them of a right to appeal, both Jackson and Nuñez attempted to appeal their terminations with the Civil Service Commission (CSC), requesting that their appeals be heard by an independent third-party hearing examiner pursuant to section 143.057, Tex. Local Gov't Code. The civil service director notified both men by letter that they were not eligible to appeal their discharges to a hearing examiner because their discharges had been labeled as non-disciplinary. Neither the CSC nor a hearing examiner issued any decision with regard to Jackson's and Nuñez' appeals.

Jackson and Nuñez filed suit, requesting that the trial court issue a declaratory judgment that the City had violated their rights under Tex. Loc. Gov't. Code Chapter 143, ("the Act") and that it enjoin the City from discharging them without utilizing the procedures mandated in the Act. Jackson and Nuñez also requested a writ of mandamus directing the City to comply immediately with the Act by processing their appeals before a third party hearing examiner. The trial court granted the City's plea to the jurisdiction.

In affirming the trial court's decision the Court of Appeals held that if the terms of the Act do not apply to a termination, the City's CSC is not required to hold a hearing, and the terminated employees do not have a justifiable claim.

City of Athens v. James MacAvoy, 260 S.W.3d 676 (Tex. App.—Tyler, 2008).

COURT DID NOT HAVE JURISDICTION TO CONSIDER A MERE ERROR IN THE

EXAMINER'S CONSTRUCTION OF THE STATUTE

The City placed one of its police officers on indefinite suspension after an investigation revealed that the officer had engaged in sexual relations with a woman while on duty and committed other violations of Athens Police Department (APD) policy. The investigation began after the officer's actions were brought to the attention of the APD by the woman's husband. The officer appealed his suspension, and the hearing examiner determined that the woman and her husband were the complainants and that discipline could not be imposed because their signed complaints had not been provided to the officer. The City appealed, alleging the hearing examiner was without jurisdiction to apply Section 614.023, Tex. Gov't Code and that his misinterpretation of the statute resulted in a decision that exceeded his jurisdiction. The officer filed a plea to the jurisdiction, arguing that the district court lacked jurisdiction to consider the City's appeal. The district court granted the officer's plea. The Court of Appeals held that the trial court has jurisdiction to consider whether a hearing examiner's application of a statute was outside the hearing examiner's jurisdiction. The Court also held that a police hearing examiner has the authority to review and apply Section 614.023(b), Tex. Gov't Code, and any error in construction of the statute does not give a court jurisdiction to hear the case. Therefore, the trial court's order granting the plea to the jurisdiction that issue was affirmed

City of Temple v. Steven Taylor, --- S.W.3d ----, 2008 WL 3984371 No. 03-07-00630-CV (Tex. App.—Austin Aug. 27, 2008).

CALCULATION OF "FULL COMPENSATION" TO BE PAID TO A SUSPENDED OFFICER WHO IS RESTORED TO HIS POSITION INCLUDES OFFSETS FOR INCOME EARNED FROM OTHER SOURCES DURING THE PERIOD OF SUSPENSION.

Following the reduction of indefinite suspension and also reinstatement to the police force, police officer brought action against City seeking declaratory judgment that he was entitled to the full amount of back pay incurred during the time he was suspended.

The Court of Appeals held that a City employee's back pay award must be reduced by the amount of compensation earned from other sources during the period of suspension under the Civil Service Act, Chapter 143 Tex. Local Gov't Code.

Kris Carr v. City of Fort Worth, --- S.W.3d ----, 2008 WL 3917993 No. 2-07-375-CV (Tex. App.—Fort Worth Aug. 26, 2008).

FIRE ENGINEER'S INDEFINITE SUSPENSION CREATED A VACANCY IN THE DEPARTMENT AND THE FIRE CHIEF HAD A NONDISCRETIONARY DUTY TO FILL VACANCY FROM PROMOTION ELIGIBILITY LIST

The Fort Worth Fire Department (FWFD) placed fire engineer Dawson on "detached duty" for one

year while FWFD investigated her for alleged departmental violations. "Detached duty" status required Dawson to stay home from work and routinely call in to FWFD.

Following the investigation, the Fire Chief gave Dawson notice that she was being indefinitely suspended without pay. The letter stated that the suspension would take effect on February 15, 2002. Dawson filed a written appeal of the suspension with the Director of the Civil Service Commission (CSC) on February 26, 2002. At this point, it was discovered that the Fire Chief McMillen had failed to file a copy of the indefinite suspension letter with the CSC as required by the law. Due to this failure, the CSC returned Dawson to duty on February 28, 2002. The Fire Chief did not promote anyone to the rank of fire engineer to fill Dawson's position during the fourteen days that she was suspended. Another firefighter believed that Dawson's indefinite suspension created a vacancy and because he believed that he should have been promoted during this period, he filed suit against the City.

The Court of Appeals held that an employee's indefinite suspension created a vacancy in the fire department, even though the suspension letter was never filed with the CSC. The Court also held that the vacancy had to be filled from the promotion eligibility list within 60 days of the vacancy under the Civil Service Act, Chapter 143, Tex. Local Gov't Code.

Waiver of Immunity – Contract

City of Houston v. Petroleum Traders Corp., 261 S.W.3d 350 (Tex. App.—Houston [14th Dist.] 2008).

FUEL PURCHASES WERE A "GOVERNMENTAL FUNCTION," RATHER THAN A PROPRIETARY FUNCTION AND CITY RETAINED IMMUNITY FOR INTENTIONAL TORT CLAIM OF CONVERSION

The City accepted a bid from Petroleum Traders Corporation (PTC) to supply fuel to the City. The City began to place fuel orders with PTC in July 2005, but stopped orders in May 2008. PTC sued the City for breach of contract and *quantum merit*. The City filed a plea to the jurisdiction asserting that it was immune from suit. PTC added claims for takings and conversion, and the City filed a second plea to address the new claims. The trial court denied the City's first plea to jurisdiction and granted the City's second plea on the takings claim.

The Court of Appeals concluded that the contract between the City and PTC was properly executed and the City's immunity from suit on PTC's contract claim had been waived by statute. The Court further held that the City was immune from suit on PTC's remaining claims.

City of Mesquite v. PKG Contracting, Inc., ---S.W.3d.--- No. 05-07-00627-CV 2008 WL 2673246 (Tex. App.—Dallas July 9, 2008).

CITY WAIVED IMMUNITY FROM BREACH OF CONTRACT CLAIMS WHEN IT ENTERED INTO PROPERLY EXECUTED CONTRACT FOR GOODS OR SERVICES.

PKG contracted with the City to construct a storm drainage system and disputes arose over which party was responsible for moving certain utilities from the construction right-of-way. PKG sued the City, claiming the City represented that utility lines would be removed before PKG began work, and that the City failed to move the utility lines as it was required to do under the contract. The City filed a plea to the jurisdiction based on immunity from suit, which the trial court denied. The Court of Appeals affirmed, holding that the City waived its immunity from suit under Section 271.152, Tex. Local Gov't Code when it entered into a properly executed written contract for goods and services.

Winship Constr., Inc. v. City of Portland, No. 13-07-371-CV 2008 WL 3867849 (Tex. App.—Corpus Christi Aug. 21, 2008) (mem. op.).

CONSTRUCTION COMPANY RAISED A FACT ISSUE REGARDING ITS CLAIM THAT THE PARTIES AGREED TO ALLOW EXTRA TIME FOR COMPLETION BECAUSE OF DELAYS OUTSIDE OF COMPANY'S CONTROL.

Winship entered into a contract with the City to build improvements to the City's Aquatic Center and Festival Site Pavilion. The project costs, including change orders, totaled approximately $1.4 million. The project had two parts: (1) Winship was to repair the Festival Site Pavilion in 180 calendar days and complete the base work in 300 days, and (2) a project engineer [hired by the City] was to oversee and approve all work.

Despite the engineer's approval of the final payment, the City withheld $44,545 from Winship. Winship filed a suit for breach of contract in order to receive the remainder of payment. The City answered and filed two motions for summary judgment claiming a right to withhold the money because Winship was late and breached the contract. The first motion, based on sovereign immunity, was denied. The second motion, based either on a breach of contract defense or failure to exhaust administrative remedies, was granted.

The Court of Appeals held that Winship raised a fact issue in its claim that the parties agreed to allow extra time for completion because of delays outside of the Winship's control. The Court allowed the claims to go forward.

Waiver of Immunity – Tort

Singleton v. Casteel --- S.W.3d ----, 2008 WL 4367341 (Tex. App.-Houston [14 Dist.] September 25, 2008)

MOTION TO DISMISS GRANTED PURSUANT TO SECTION 101.106(E) OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE.

Casteel filed a lawsuit against the City, the League City Police Department (LCPD), and LCPD officers. In his suit, Casteel asserted claims of ((1) malicious prosecution against the City, LCPD, and the

officers, ((2) negligent hiring and negligent formation and/or implementation of policy against the City and LCPD, and (3) civil conspiracy and intentional infliction of emotional distress against the officers. The City, LCPD, and the officers subsequently filed an answer which included, among other things, a motion to dismiss the claims against the officers pursuant to Section 101.106, Tex. Civ. Prac. & Rem. Code. The trial court denied the motion to dismiss Casteel's claims against the officers.

Pursuant to Section 101.106(e), "[i]f a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall be immediately dismissed on the filing of a motion by the governmental unit." Here, Casteel filed suit alleging torts against both the City and the officers. Because "all tort theories" are "under this chapter" for purposes of section 101.106, subsection (e) applies to Casteel's tort claims. Further, both the City and the officers sought dismissal of the claims against the officers under subsection (e). Thus, the officers were entitled to dismissal of Casteel's claims against them.

City of El Paso v. Wilkins --- S.W.3d ----, 08-07 00087-CV 2008 WL 2059139 (Tex. App. - El Paso May 15, 2008)

FAILURE TO DISPATCH OFFICERS INVOLVED CONVEYANCE OF INFORMATION, NOT INADEQUATE CONDITION OF COMMUNICATIONS SYSTEM.

Interlocutory appeal by City from the denial of its plea to the jurisdiction of Plaintiffs' claims under the Tex. Tort Claims Act (the Act) for wrongful death. Mr. Blackham had called 9-1-1, requested the police come to his house, and then hung up. When police arrived 2 ½ hours later, Mr. Blackham was found dead; he had committed suicide. Plaintiffs brought suit seeking damages and alleged a waiver under the Act, stating the inadequate condition of the communications system contributed to the delay that caused Blackham's death.

The Court of Appeals found that, the allegation of the inadequate condition of the "communication system" is based on the failure to timely dispatch a police unit in response to the call. The officers who actually responded to the call stated that the delay is not unusual especially if there was a busy night since at times there could be as little as three units patrolling. The Court found that (1) this failure to dispatch involved the conveyance of information, which is not tangible personal or real property; (2) information is an abstract concept, lacking corporeal, physical, or palpable qualities; and 3) people, likewise, are not personal or real property, so the call takers, dispatchers, and officers cannot be considered as a condition or use of tangible property.

Green v Alford, --- S.W.3d ----, 14-05-00407-CV 2008 WL 2744232 (14th Court of Appeals-Houston July 15, 2008 no pet)

FIREFIGHTER DRIVING TRUCK THAT INJURED PLAINTIFFS ACTED RECKLESSLY AND WAS NOT ENTITLED TO A LIMITATION OF LIABILITY.

A fire truck collided with another vehicle, causing Plaintiff Driver to sustain a broken neck and causing permanent neurological damage to his 9 yr. old son. The trial court found that the firefighter driving the truck, acted recklessly and was not entitled to official immunity or limitation of liability. The Court of Appeals affirmed and found the following (1) that the fire fighter driving had poor vision and was driving without glasses or corrective lenses as required by his driver's license,; (2) he may have entered the intersection without using a siren; and 3) he failed to establish that he acted in good faith. Therefore, the Court held that the firefighter is not entitled to a statutory limitation of liability, and the City is not authorized to indemnify the fire fighter because he was found to be grossly negligent.

Powers v. City of Conroe and Conroe Animal Control, No. 09-07-591 CV 2008 WL 2917052 (Tex. App.—Beaumont July 31, 2008) (mem. op.).

ANIMAL CONTROL AND POLICE PROTECTION ARE GOVERNMENTAL FUNCTIONS

Powers pled that her neighbors have a "white bichon [frise] intact male [dog] that runs at large 24/7." She stated the dog would come into her yard and charge at her three pound chihuahua even though she had told her neighbors to keep their dog out of her yard. On one occasion when the neighbor's dog tried to attack her dog, Powers fell face-down on concrete on her property as she attempted to separate the dogs; she indicated she injured herself. Plaintiffs sued the City alleging that the City was negligent and "derelict" in failing to enforce the law and failing to control and protect her from her neighbors' dog.

The Court of Appeals held that the City has sovereign immunity under the Texas Tort Claims Act because animal control is a governmental function.

Hernandez v. City of McAllen, No. 13-06-00377-CV 2008 WL 2930231 (Tex. App.—Corpus Christi-Edinburg July 31, 2008) (mem. op.).

THE DRAINAGE BOX COVER IS PART OF THE CITY'S DRAINAGE SYSTEM, WHICH PART OF THE CITY'S ROAD SYSTEM, THE DESIGN OF WHICH CONSTITUTES A DISCRETIONARY ACT

Plaintiff sued City, alleging theories of premises defect and special defect. Plaintiff claims arose from injuries sustained when she stepped onto a concrete drainage box cover, which gave way, causing her to fall into the drainage box. The City filed a plea to the jurisdiction contending that it was entitled to sovereign immunity because the City's alleged negligent acts concerning the design and construction of the drainage box cover are discretionary acts. The trial court denied the City's plea.

The Court of Appeals held that immunity was not waived because

the design and implementation of a drainage box cover in the roadway was a discretionary act.

Indemnity Insurance Co. v. City of Garland, 258 S.W.3d 262 (Tex. App.—Dallas June 24, 2008 no pet.).

DISMISSAL OF CLAIM AGAINST CITY EMPLOYEE WAS NOT A "JUDGMENT AGAINST" THE EMPLOYEE TO BAR THE CARRIER'S CLAIM AGAINST THE CITY UNDER THE TORT CLAIMS ACT

A City truck driven injured Brown. Indemnity Insurance paid Brown's workers' compensation claims. Indemnity filed a subrogation lawsuit against the City under the Texas Tort Claims Act for the alleged negligence of the City's employee. Indemnity Insurance agreed to dismiss its claims against the City's employee with prejudice. The City then moved for summary judgment seeking dismissal of all claims against it. The trial court granted the City's motion and ordered that Indemnity take nothing "on the grounds that the agreed order of dismissal with prejudice of Indemnity's claims against the City's employee bars any recovery against the City." The Court of Appeals held that the order dismissing Indemnity's claims against the City's employee was not a judgment "against" the employee for purposes of Section 101.106(d), Tex. Civil Practice and Remedies Code, and that Indemnity's claims against the City are not barred by Section 101.102((1)(b), Tex. Civil Practice and Remedies Code or by collateral estoppel.

Carmela Bustillos v. City of Midland, No. 11-07-00038-CV 2008 WL 2058551 (Tex. App.—Eastland May 15, 2008).

UNCOVERED WATER METER BOX DOES NOT CONSTITUTE A SPECIAL DEFECT

Bustillos sued the City for injuries she sustained when she stepped into an uncovered water meter box. Bustillos worked as a cashier at a Family Dollar store in Midland and one evening, she exited a side door of the store for the purpose of carrying trash out to the store's dumpsters that were located adjacent to an alley running behind the store. She stepped into the hole. Bustillos alleged that the hole was located next to one of the dumpsters in a grassy area and that the condition of the property constituted a special defect under the Texas Tort Claims Act. The City filed a plea to the jurisdiction that contested the status of the open water meter box as a special defect.

The trial court held that Bustillos was not an "ordinary user" of the alley at the time the incident occurred as an ordinary user of the alley would not encounter the hole because the dumpsters located on the side of the alley precluded users from traveling in a path parallel to the alley. The Court granted the City's Plea to the jurisdiction and dismissed Bustillos' suit. The Court of Appeals affirmed.

Kelemen v Elliott 260 S.W.3d 518 Tex. App.-Houston [1 Dist.] 2008)

CLAIMS AGAINST THE FELLOW OFFICER DID NOT ARISE FROM CONDUCT THAT FELL WITHIN THE GENERAL SCOPE OF HIS EMPLOYMENT SO AS TO BE PRECLUDED UNDER ELECTION OF REMEDIES CLAUSE

Plaintiff officer alleged that a fellow officer assaulted her by grabbing her arm and kissing her while both were on duty at the City's police department. The City terminated her at the end of her 6-month probationary period and she then filed suit against the City and officer. The City answered and filed a motion to dismiss under Section 101.106(e), Tex. Civil Practice & Remedies Code. The trial court granted the motion and severed the suit against individual officer.

The Plaintiff asserted claims against the other officer for assault, and the claims against the City for gender discrimination in violation of the Texas Commission of Human Rights Act and violation of the Texas Whistleblower Act. Both of which are not claims filed under the Tort Claims Act.

The Court of Appeals held that: (1) the City did not come under the purview of the TTCA so as to preclude tort claims against fellow officer, and (2) the claims against the fellow officer did not arise from conduct that fell within the general scope of his employment so as to be precluded under election of remedies clause.

City of Dallas v. Kenneth Reed, 258 S.W.3d 620 (Tex. 2008).

TWO-INCH DIFFERENCE IN ELEVATION BETWEEN LANES IN THE ROADWAY WAS A "SPECIAL DEFECT" FOR PURPOSES OF TORT CLAIMS ACT

Reed, a motorcyclist, had a single vehicle accident and brought a personal injury action against the City of Dallas, alleging that his accident was caused by a two to three-inch difference in elevation between lanes in the roadway. The trial court denied the City's plea to the jurisdiction and the Court of Appeals affirmed, holding that the difference in elevation between lanes in the roadway was a "special defect" for purposes of the Texas Tort Claims Act. The City appealed the Court of Appeal's judgment and the Supreme Court reversed the Court of Appeal's judgment, holding that: ((1) variance in elevation in roadway was not a "special defect"; and ((2) the City did not know of the roadway's allegedly dangerous condition in order to warn of the danger.

City of Austin v. Trudy Leggett, 257 S.W.3d 456 (Tex. App.—Austin 2008).

FLOODING OF CITY INTERSECTION WAS AN "ORDINARY PREMISES-DEFECT" RATHER THAN A "SPECIAL PREMISES-DEFECT"

The mother of seventeen year-old who drowned while driving through a flooded street intersection sued the City for wrongful death. The trial court denied the City's plea to the jurisdiction. The Court of Appeals reversed the trial court holding that: ((1) the condition that caused her son's death was not the City's storm

water detention pond or other City property; ((2) the flooding of City intersection was an ordinary defect and not a special defect; and (3) the City had no actual knowledge that the street intersection had flooded before the boy drowned.

John Anderson, Jr. v. City of San Antonio, et al., No. 04-07-00385-CV 2008 WL 2115604 (Tex. App.—San Antonio May 21, 2008)

WHEN A PUBLIC OFFICIAL CONSIDERS TWO COURSES OF ACTION THAT COULD REASONABLY BE BELIEVED TO BE JUSTIFIED, AND SELECTS ONE, HE SATISFIES THE GOOD FAITH PRONG OF OFFICIAL IMMUNITY AS A MATTER OF LAW

Anderson, a fire fighter, accepted outside employment from a company that contracts with the City. The Fire Chief subsequently denied Anderson's request for permission to do so. As a result, Anderson ceased his employment with the outside company and filed suit against the Fire Chief and the City seeking declaratory, injunctive, and monetary relief. The City filed a motion for summary judgment claiming that Anderson failed to plead a viable cause of action and that even if he had, there was no evidence showing that the City violated the law. The trial court denied the City's motion for summary judgment, but granted the Fire Chief's motion for summary judgment on the basis of official immunity. Anderson appealed the judgment in favor of the Fire Chief. The Court of Appeals affirmed the trial court's granting of the Fire Chief's summary judgment holding that when a public official considers two courses of action that could reasonably be believed to be justified, and selects one, he satisfies the good faith prong of official immunity as a matter of law.

City of Dallas v. Manuel Giraldo, et al., --- S.W.3d ----, 2008 WL 3892387 No. 05-07-00023-CV (Tex. App.—Dallas Aug. 25, 2008).

ROADWAY DID NOT PRESENT AN UNEXPECTED AND UNUSUAL DANGER TO ITS ORDINARY USERS AT TIME OF ACCIDENT.

Giraldo was a passenger in the back seat of a friend's car when the driver lost control of the car on a curve on a Dallas road. The car skidded off the side of the road and collided with a bulldozer parked eight to ten feet off the edge of the road. Giraldo died as a result of the accident. Another passenger in the car told a police officer that the driver had been drinking alcoholic beverages earlier that evening and was speeding before the crash.

The Court of Appeals held that (1) the trial court should have granted the City's plea to the jurisdiction under the Texas Tort Claims Act because dirt on a road is not a special defect where an ordinary user of a road should expect to encounter dirt; (2) the alleged defects of mud and dirt on the roadway and the bulldozer situated too close to the roadway are not of the same kind or class as the excavations or obstructions the statute contemplates; and 3) the passenger in a car driven by an

intoxicated driver who was speeding along a curved, unlit road at 1:00 a.m. was not an "ordinary user of the road" within the meaning of the statute.

Texas Bay Cherry Hill, L.P. v. City of Fort Worth, No. 257 S.W.3d 379 (Tex. App.—Fort Worth 2008).

PLAN DID NOT CONSTITUTE A REGULATORY TAKING AND CITY'S ADOPTION OF PLAN WAS A GOVERNMENTAL FUNCTION FOR IMMUNITY PURPOSES

An apartment complex owner sued the City, alleging that the City tried to diminish the complex's value by disparaging it and interfering with business relationships when the complex was targeted for redevelopment by the City. The trial court granted the City's plea to the jurisdiction. The Court of Appeals affirmed, holding that the redevelopment was a governmental function and the City was immune from suit for the redevelopment

Public Information Act:

City of Fort Worth v. Abbott, 258 S.W.3d 320 (Tex. App.-Austin 2008)

DNA RECORDS AT ISSUE ARE EXEMPT FROM DISCLOSURE UNDER THE PIA

The Attorney General issued a letter ruling concluding that certain DNA records held by the City's forensic science laboratory were subject to disclosure under the Texas Public Information Act (PIA). The City filed suit challenging the ruling and the requestors intervened and sought a writ of mandamus to compel the disclosure of the information. The trial court granted the requestors' writ of mandamus and ordered the City to disclose the information at issue. Because Government Code Section 411.153(b) prohibits the release of information in the DNA records at issue, and exempts that information from disclosure under the PIA, the Court of Appeals reversed the trial court's order granting the writ of mandamus and rendered judgment in favor of the City.

Elections:

Pedro Mendez v. City of Amarillo, 2008 WL 2582987 No. 07-07-0207-CV (Tex. App.—Amarillo June 30, 2008).

SINCE THE CANVASSING AUTHORITY IS THE GOVERNING BODY OF THE MUNICIPALITY THE PROPER CONTESTEE UNDER SECTION 233.003 OF THE TEXAS ELECTION CODE IS THE MAYOR, AS THE PRESIDING OFFICER OF THE CITY COMMISSION

A petition drive sought to amend the City's charter to reform the method of electing City commissioners. The group sought to increase the number of commissioners and also sought to establish election by single member districts. The two amendments were combined when placed on the ballot. After the proposition was defeated, Mendez filed suit contending that the wording of the ordinance establishing the ballot language violated state law. The City filed a

plea to jurisdiction, contending that the trial court had never acquired jurisdiction because Mendez did not file suit against a contestee, as required by Texas Election Code section 233.003, within the prescribed time after the election, *see* § 233.006. The trial court granted the City's plea, and the Court of Appeals affirmed the ruling.

Flores v. Cuellar --- S.W.3d ----, 2008 WL 3926405 (Tex. App.-San Antonio, 2008)

EXPERT TESTIMONY REGARDING ALLEGED UNRELIABILITY OF ELECTRONIC VOTING DEVICES WAS BASED ON SPECULATION AND NOT FREE FROM CONTRADICTION, AND THEREFORE TRIAL COURT WAS NOT REQUIRED TO ACCEPT THIS EVIDENCE AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER A NEW ELECTION.

A primary run-off election was held to select the Democratic nominee for the office of Webb County Sheriff. Flores, the incumbent, was opposed by appellee Cuellar (brother of the Congressman). In an election night vote count conducted by county election officials, Cuellar won the election by a margin of 37 votes. In a subsequent recount conducted by the Democratic Party, Flores won the election by a margin of 133 votes. Then, in a court-supervised recount, Cuellar won the election by a margin of 39 votes. Flores filed an election contest challenging the results of the court-supervised recount. Flores claimed the results reported from the electronic voting devices were unreliable and could not be utilized in determining the winner of the election. Flores asked the trial court to find that the true outcome of the election could not be determined and to order a new election.

To overturn this election, Flores was required to prove by clear and convincing evidence that voting irregularities materially affected the election results. Because Flores did not establish by clear and convincing proof that voting irregularities materially affected the outcome of the election, the Court of Appeals affirmed that the trial court did not abuse its discretion in refusing to order a new election.

Employment:

City of San Antonio v. Michael Cancel, --- S.W.3d ----, No. 07-07-0285-CV 2008 WL 2884932 (Tex. App.—Amarillo July 28, 2008).

CLAIMS OF SAME-SEX SEXUAL HARASSMENT ARE ACTIONABLE UNDER THE TEXAS COMMISSION ON HUMAN RIGHTS ACT (TCHRA); MALE CITY EMPLOYEE WAS NOT SUBJECTED TO SUCH FREQUENT OR SEVERE SEXUAL HARASSMENT BY MALE DIRECTOR THAT WOULD CREATE A HOSTILE OR ABUSIVE WORK ENVIRONMENT TO A REASONABLE PERSON IN EMPLOYEE'S POSITION

Cancel, while working on the mezzanine level of Terminal 1 at the airport, was approached by Martinez. Martinez asked Cancel what was wrong. Cancel responded that he was going through a divorce. Martinez explained to Cancel that he had been through a similar situation and asked Cancel if he wanted to come into Martinez's office to talk

about it. Cancel agreed. Upon entering the office and at Martinez's request, Cancel closed the office's door. After some initial discussion of Cancel's divorce, Martinez told Cancel that he should do something crazy like taking off all of his clothes. This suggestion made Cancel uncomfortable and he tried to steer the conversation back to his pending divorce. However, Martinez persisted and repeatedly recommended that Cancel do something crazy, like take off his clothes. Martinez then told Cancel that he knew people in modeling, that he thought Cancel had model potential, and asked Cancel if he had ever considered modeling. Martinez asked Cancel to lift up his shirt. Cancel obliged, but he was wearing an undershirt and only lifted his outer shirt. Cancel described the conversation as Martinez "swarming" him; however, Cancel acknowledged that Martinez never got up from his chair. During this conversation, Cancel noticed that Martinez "kept messing with his pants area." Martinez asked Cancel if he had ever had or performed a lap dance. After 20 to 30 minutes had elapsed, Cancel told Martinez that he needed to leave. As Cancel stood to leave the office, Martinez offered Cancel his phone number in case Cancel needed anything. Cancel refused Martinez's phone number, left the office, and immediately reported the incident to his supervisor. Cancel never encountered Martinez again while employed by the City.

Cancel's supervisor asked him if he wanted to report the incident, but Cancel said that he did not know. Cancel was concerned because Martinez was a highly placed official in the aviation department and Cancel did not want to lose his job. Cancel went home early on July 5, 2005. Upon his return, he was sent to help out on the mezzanine level of Terminal 1 on July 6th or 7th. Cancel refused to work in that area. As a result, Cancel was transferred to another terminal where he felt isolated from his co-workers. Approximately one week after the meeting with Martinez, Cancel reported the incident to airport police. The police prepared a report of the complaint and reported it to the Municipal Integrity Office. After a jury award of $90,000.00 for mental anguish and emotional pain and suffering, the City appealed.

The Court of Appeals recognized a cause of action for same sex sexual harassment, but held that the employee had failed to prove a hostile work environment based on one alleged incident of sexual harassment.

Kuykendall v. City of Grand Prairie, et al., 257 S.W.3d 515 (Tex. App.—Dallas June 26, 2008).

HEARING EXAMINER'S DECISION TO IMPOSE DISCIPLINE FOR CONDUCT NOT MENTIONED IN THE RECOMMENDATION OF DEMOTION AFTER FINDING THE CHARGED MISCONDUCT WAS NOT SUPPORTED BY THE EVIDENCE CONSTITUTED A DECISION SO ARBITRARY AND UNREASONABLE THAT IT AMOUNTED TO A CLEAR ABUSE OF AUTHORITY.

A Grand Prairie fire department captain exposed himself in front of another firefighter, and was demoted by two ranks. A hearing on the City's recommendation was conducted before a hearing examiner. The hearing examiner rendered his decision that insufficient evidence supported the allegation that the employee exposed himself, but determined that the employee was involved in "inappropriate behavior" and imposed a thirty-day suspension without pay. The employee appealed the examiner's decision to the trial court, pleading that the hearing examiner's decision to reject the recommended demotion was correct, but that the examiner exceeded his jurisdiction by imposing the suspension. The trial court granted the City's motion for summary judgment. The City appealed and the Court of Appeals reversed the trial court's judgment, rendering judgment that the hearing examiner's order of suspension be set aside.

Tarris Woods v. City of Galveston et al., No. 14-06-01022-CV 2008 WL 2520802 (Tex. App.—Houston [14th Dist.] June 24, 2008).

PLAINTIFF COULD NOT ESTABLISH PRIMA FACIE CLAIM OF RACIAL DISCRIMINATION RESULTING IN GRANTING OF MOTION OF SUMMARY JUDGMENT

Woods, a firefighter, requested disability retirement. His employment was terminated, but he received disability retirement benefits from the City of Galveston. The City received notice that his disability had ended, and quit paying disability benefits. Woods tried to be reinstated by the City, but did not get recertified by the Texas Commission on Fire Protection after being instructed to do so by the City. Woods sued the City arguing racial discrimination (African-American) because of the City's refusal to reinstate his employment. The trial court dismissed Woods' claims because he did not establish a prima facie case of discrimination. The Court of Appeals affirmed.

City of Waco v. Lopez, 259 S.W.3d 147 (Tex. 2008).

THE TCHRA AFFORDS PUBLIC EMPLOYEES A SPECIFIC AND TAILORED ANTI-RETALIATION REMEDY, AND HE WAS OBLIGED TO USE IT.

Based on complaints about Lopez's attitude, the City transferred him from his position as chief plumbing inspector to a position in the plumbing code enforcement division. Lopez filed a grievance with the City's equal employment opportunity (EEO) officer. The grievance complained that the transfer was based on his age and race in violation of the City's EEO policy. Although he was transferred back to his original position, the City later terminated Lopez for taking a City vehicle from Waco to Austin without prior approval from the City. Lopez proceeded to sue the City under the Whistleblower Act, claiming the termination of his employment was a prohibited retaliation.

The City filed a plea to the jurisdiction, arguing that the Texas Commission of Human Rights Act (TCHRA) was the exclusive remedy

for Lopez's retaliatory discharge claim, that he did not meet the Whistleblower Act's requirements because the EEO policy did not constitute a "law;" and that he did not report the alleged violation to the "appropriate law enforcement authority." Lopez countered that: ((1) the Whistleblower Act is the only statute that afforded him any protection for having reported the EEO policy violation because he never filed a TCHRA complaint or otherwise invoked the TCHRA; ((2) the EEO policy qualifies as a "law" under the Whistleblower Act because it was adopted by the City through a resolution; and (3) the EEO officer was the appropriate law enforcement authority to which to report an alleged violation of the EEO policy. The trial court denied the City's plea to the jurisdiction and the Court of Appeals affirmed that d

The Supreme Court reversed the court of appeal's judgment and dismissed the case. The Supreme Court declined to address whether Lopez had an actionable claim under the Whistleblower Act.

The Supreme Court held that the TCHRA makes it unlawful for an employer to retaliate "against a person who, under this chapter: ((1) opposes a discriminatory practice; ((2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner or in an investigation, proceeding, or hearing." Tex. Lab. Code § 21.055. City employees are covered by the TCHRA. The discriminatory practices made unlawful under the TCHRA include adverse employment decisions based on race, color, disability, religion, sex, national origin, or age. *Id*. § 21.051.

Although Lopez never pled a TCHRA claim, he claimed that his internal grievance with the City complaining of age and race discrimination and his related retaliation claim implicate the TCHRA's anti-retaliation provision (Section 21.055 of the Labor Code). In addition, Lopez contended that the TCHRA is not an impediment to his claim under the Whistleblower Act, according to Tex. Gov't Code § 554.0029(a). The Whistleblower Act and the TCHRA have different procedural requirements and provide incompatible remedies. Because of this – and the fact that the TCHRA is focused precisely on combating the discrimination-rooted retaliation of which Lopez complains – Lopez claimed that the more specific and comprehensive anti-retaliation remedy in the TCHRA forecloses relief under the more general Whistleblower Act.

The Supreme Court of Texas held that Lopez's claim for retaliation falls squarely under the TCHRA, which is the exclusive state statutory remedy. Because the Court found that the TCHRA is the exclusive remedy and that Lopez failed to plead a cause of action under the TCHRA.

Hotel/Motel Tax:

City of Eagle Pass et al. v. Wheeler, No. 04-07-00817-CV 2008 WL 2434228 (Tex. App.—San Antonio June 18, 2008).

BECAUSE PLAINTIFF'S DECLARATORY JUDGMENT CLAIM AGAINST THE CITY MERELY RECASTS THE INTENTIONAL TORT CLAIMS FROM WHICH THE CITY RETAINS IMMUNITY FROM SUIT, THE TRIAL COURT LACKED JURISDICTION AND ERRED IN DENYING THE CITY'S PLEA.

Alejandro Wheeler secured approval from the City of Eagle Pass to use hotel/motel tax money to promote an upcoming boxing match and subsequently submitted six documents to the City's finance department. The City suspected that at least one of the documents had been altered and submitted fraudulently. Wheeler was charged with a felony for intending to defraud the City. Wheeler subsequently sued the City and others, asserting claims for malicious prosecution and defamation. The trial court denied the City's pleas. The Court of Appeals held that the City was immune from the Wheeler's claims.

Appellate Procedure

City of Reno v. Todd Stephens d/b/a Stephens and Sons, No. 06-08-00049-CV, 2008 WL 2437560 (Tex. App.—Texarkana June 17, 2008).

APPELLATE JURISDICTION OVER INTERLOCUTORY APPEALS IS LIMITED TO THOSE MATTERS ALLOWED BY STATUTE

Stephens conducted a business within the corporate limits of the City wherein he was removing and transporting dirt. The City obtained a temporary restraining order to prohibit this practice on the basis that the operation was in violation of a City ordinance. After successfully obtaining a temporary restraining order the City filed a motion for summary judgment which included relief in the form of a permanent injunction.

The motion for summary judgment acknowledged that the City had previously been granted a temporary restraining order following a hearing and stated that the City had filed an amended motion thereafter seeking another temporary restraining order and a temporary injunction. That petition also sought a permanent injunction against Stephens.

The trial court denied that motion and an appeal from that denial followed. In an unusual twist for such an order, the trial court denied the City's motion for summary judgment, but then made findings of fact and conclusions of law on the issues that had been raised by Stephens's pleadings, finding in favor of Stephens on all grounds. The case involved the application of a City ordinance to Stephens's business, and whether the operation of the business as a nonconforming use was permitted to continue in operation of that use.

The Court of Appeals held that because order denying the motion for summary judgment did not specifically deny the issuance of an injunction and, because it did not finally dispose of the issues involved, it is was not a final judgment. What the court denied was a motion claiming that the party was entitled to summary relief as a matter of law.

With the exception of the limited circumstances mentioned above, the denial of such relief pursuant to a motion for summary judgment does not create a final, appealable judgment. It leaves the matter before the court, to be determined by trial on the merits.

Open Meetings Act:

Love Terminal Partners, L.P. et al. v. City of Dallas et al., 256 S.W.3d 893 (Tex. App.—Dallas 2008).

PRE-AGREEMENT CONDUCT BY CITY, MAYOR, AND CITY COUNCIL ALLEGEDLY IN VIOLATION OF THE OPEN MEETINGS ACT DID NOT RENDER THE RESULTING AIRPORT AGREEMENT VOID, BUT RATHER POTENTIALLY VOIDABLE.

Airport terminal lessees brought an action against the City and City officials for declaratory and injunctive relief concerning Open Meetings Act violations arising from closed-door negotiations prior to an agreement to limit passenger air traffic at the airport.

The trial court held that the passage of the Wright Amendment Reform Act of 2006, which incorporated the airport agreement, rendered the Open Meetings Act action moot.

The Court of Appeals found that the mootness doctrine dictates that courts avoid rendering advisory opinions by only deciding issues that present a “live” controversy at the time of the decision. An issue becomes moot when ((1) it appears that one seeks to obtain a judgment on some controversy, which in reality does not exist or ((2) 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.

Court of Appeals held that any decision by the trial court on the validity of the Love Field Agreement would have been advisory and, thus, improper.

Rogers v. City of McAllen, No. 13-07-00278-CV, 2008 WL 3867679, (Tex. App.-Corpus Christi August 21, 2008)

ATTORNEYS FEES PROPERLY AWARDED WHEN PLAINTIFF ALLEGED OPEN MEETINGS VIOLATION DURING WHICH HE WAS TERMINATED

At the September 22, 2003 City Commission meeting, the City commissioners considered the issue of Rogers's employment with the City. The commissioners held an executive session, then returned to an open session and gave Rogers an opportunity to speak regarding his job performance and employment. Subsequently, the City Manager recommended that Rogers' employment be terminated, and the commissioners unanimously approved the recommendation.

On May 5, 2004, Rogers sued the City, seeking a declaratory judgment that the City failed to comply with the notice requirements provided in the Texas Open Meetings Act, and requesting attorney's fees. See Tex. Civ. Prac. & Rem. Code Ann. § 37.004; Tex. Gov't Code Ann. §

551.142. Specifically, Rogers contended that the notice provided by the City of the agenda for the September 22, 2003 meeting did not expressly state that the Commission would consider terminating his employment. On May 24, 2004, the City filed an original answer and counterclaim for declaratory judgment, seeking a declaration that its notice complied with the provisions of the Open Meetings Act and requesting attorney's fees.

The trial courts found that the notice "plainly states that the Commission would consider and possibly act upon Rogers'[s] employment[,] ... plainly communicates to the public [that] the subject matter of the discussion would be Rogers'[s] employment as Fire Chief ... [and] clearly implicates the issue of possible termination of that employment." The Court of Appeals concluded that there was legally sufficient evidence to support the trial court's findings of fact and that its conclusions of law were not erroneous.

The Court of Appeals held that the agenda notice of "possible action regarding Fire Chief Rogers' job performance and employment" was sufficient under the Open Meetings Act to discuss and terminate Chief Rogers's employment.

City of Austin v. Savetownlake.Org No. 03-07-00410-CV 2008 WL 3877683 (Tex. App.-Austin August 22, 2008)

THE OPEN MEETINGS ACT EXPRESSLY WAIVES SOVEREIGN IMMUNITY TO ALLOW INTERESTED PERSONS, INCLUDING SAVETOWNLAKE, TO BRING SUIT AGAINST A GOVERNMENTAL BODY TO REVERSE A PRIOR VIOLATION OF THE ACT

Savetownlake claimed that the meeting agenda posted by the City in 1999 violated the Open Meetings Act because it failed to properly list the items to be discussed during the meeting. Specifically, Savetownlake contended that the agenda listed the 1999 recodification as a non-substantive, plain English, recodification of the City's Land Development Code, when, in fact, the City made substantive revisions to the code, including the repeal and elimination of height restrictions in the Water Overlay District and rights of appeal to the Planning Commission and City Council.

The Open Meetings Act expressly waives sovereign immunity to allow interested persons, including Savetownlake, to bring suit against a governmental body to reverse a prior violation of the act. See Tex. Gov't Code Ann. § 551.142. The Court concluded that the City's sovereign immunity had been waived by the Open Meetings Act, and the trial court properly denied the City's plea to the jurisdiction.

Property Taxes:

21st Century Home Mortgage v. City of El Paso, --- S.W.3d ----, 2008 WL 2174432 (Tex. App.-El Paso, 2008 May 22, 2008).

DEFAULT JUDGMENT AGAINST MORTGAGEE UPHELD WHEN COURT

FOUND MORTGAGEE ACTED WITH CONSCIOUS INDIFFERENCE IN FAILING TO ANSWER

The City of El Paso brought tax delinquency suit against a lienholder after the lienholder repossessed property on which back property taxes were owed. The trial court entered a default judgment against the lienholder and denied the lienholder's motion for a new trial. The lienholder appealed. The Court of Appeals affirmed the trial court's default judgment, holding that the lienholder was unable to show that it was unaware of the suit.

F-Star Socorro, L.P. v City of El Paso, ---S.W.3d----, No. 08-06-00009-CV. 2008 WL 2718480 (Tex. App.-El Paso July 3, 2008)

DELINQUENT TAX STATEMENT WAS ADMISSIBLE.

The Court of Appeals affirmed judgment in favor of Plaintiff City in its suit to recover unpaid property taxes from Defendant; it rejected Defendant's multiple arguments, including its argument that the certified tax statement introduced by Plaintiff was inadmissible hearsay because it was prepared for the sole purpose of litigation and does not meet the self-authentication requirements of Rule 902.

Gallagher Headquarters Ranch Dev. Ltd., Christopher Hill, and Julie Hooper v. City of San Antonio, --- S.W.3d ----, No. 04-07-00325-CV 2008 WL 2828718 (Tex. App.—San Antonio July 23, 2008)

NO VIOLATION OF "CONTRACT WITH THE VOTRS" WHEN CITY ALLOWED ITS ELECTRIC COMPLANY TO BUILD POWER LINE ACROSS PARK PURCHASED THRU VENUE TAX.

This case involved a venue tax adopted to fund the City's purchase of land for use as parks. Venue taxes are a series of different taxes that a city is authorized to levy within the City to fund "a venue project," such as a park, under Chapter 334 of the Local Government Code. In this case, the venue tax was a sales and use tax of one-eighth of one percent. Like all venue taxes, this tax was adopted through an election. The City used the funds from the tax to acquire land for use as parks.

The issues in the case arose when the City granted an easement to its own electric company to place an electrical transmission line across the venue project park land. Christopher Hill and others sued the City after the City granted the easement, arguing that the City breached its "contract with the voters" by allowing a use that was inconsistent with the venue project "parkland" the voters approved.

The "contract with the voters" doctrine has two parts: ((1) spending tax funds for a particular purpose; and ((2) the continued use of the project for the approved purpose. The "contract with the voters" doctrine analysis begins with Article I, Section 16, of the Texas Constitution, which prohibits laws impairing the obligation of contracts. The contractual obligation doctrine was extended to tax elections by the

Texas Supreme Court in *San Saba County v. McCraw*¸ 108 S.W.2d 200 (1937). In *San Saba County*, the court held that "the vital conditions and safeguards surrounding the tax voted at the time of the election" became part of the election and the "contract with the voters." Any law that violates those voters' rights would violate the constitutional contractual obligation provision. The Texas Attorney General also recognized this doctrine. *See* Tex. Att'y Gen. Op. Nos. GA-0156 (2004); GA-0049 (2003); JC-0400 (200(1).

Plaintiff Hill lost in the trial court and was forced to pay $884,332.00 in attorneys' fees to the City. On appeal, he continued to argue that the City breached its contract with the voters by misusing the property. The City argued that even if it had allowed a use that was inconsistent with its "contract with the voters," it had the authority under Texas Local Government Code § 334.041(b) to grant an easement for its electrical company to place transmission lines over the park property. Section 334.041(b) states that a city: may acquire, sell, lease, convey, or otherwise properly dispose of property or an interest in property, including an approved venue project, under terms and conditions determined by the municipality.

The City argued that this provision gave them authority to convey the property and that this statute superseded any Article I, Section 16, "contract with the voters" claim. Hill argued that Chapter 334 is "subject to" the common law constitutional claim. The court held that the plain language of Section 334.041 gives the City the broad authority to make decisions regarding the use of venue project land and that:

If the legislature had intended to restrict a municipality's broad grant of power to dispose of an interest in a venue project by making it 'subject to' the continuous use of the project for the dedicated purpose, it could have easily so provided.

The court affirmed the trial court's summary judgment in favor of the City.

State of Texas, City of Houston, et al. v. Steve Crawford, --- S.W.3d ----, No. 03-07-00622-CV 2008 WL 3877689 (Tex. App.—Austin Aug 21, 2008).

IN STATUTE PROVIDING THAT RESPONSIBLE PERSONS COULD BE PERSONALLY LIABLE FOR COLLECTED BUT UNREMITTED SALES TAXES, "WILFULLY" ENCOMPASSED BOTH ACTUAL KNOWLEDGE AND RECKLESS DISREGARD

The Court of Appeals held that the sales tax defendants who collected the taxes but failed to remit payment to the State, did not act with "knowledge" and "reckless disregard" in not paying their sales tax under Chapter 111 of the Tax Code, and therefore were not subject to individual liability.

Vested Rights:

Brooks Hardee et al. v. City of San Antonio, No. 04-07-00740-CV

2008 WL 2116251 (Tex. App.—San Antonio May 21, 2008).

DEVELOPERS CLAIMS NOT RIPE WHEN THEY FAILED TO APPLY FOR A PERMIT PURSUANT TO CITY ORDINANCE

The underlying dispute is whether Developers (Brooks Hardee) are entitled to vested rights with regard to the development of several tracts of land. In their petition, the developers requested an injunction to prevent the City from enforcing "any of the development ordinances" against the property. In its plea to the jurisdiction, the City asserted that the developers' claims were not ripe for judicial consideration because the City had not made a decision regarding the application of the various ordinances to the development of the property. The trial court granted the attorney's plea to the jurisdiction and the developers appealed. The Court of Appeals affirmed the trial court's ripeness order because the City had not made a determination as to which land use regulations would apply to the developers' property.

Takings:

City of Dallas v. VRC LLC, 260 S.W.3d 60 (Tex. App—Dallas 2008).

CITY DID NOT WAIVE IMMUNITY BY REQUESTING ATTORNEY'S FEES IN THE TRIAL COURT; CEILING ON NONCONSENT TOWING FEES DID NOT CONSTITUTE A REGULATORY TAKING UNDER THE STATE CONSTITUTION

VRC LLC, a towing company, sued the City of Dallas for injunctive and declaratory relief and damages, alleging that the City-regulated price of non-consent tows was below a price that was fair and reasonable in violation of the state and federal constitutions. The City filed a plea to the jurisdiction, alleging that the court lacked subject matter jurisdiction over the company's state and federal takings claims. The trial court denied the plea and the City appealed.

The Court of Appeals reversed the trial court's order denying the City's plea to the jurisdiction and rendered judgment dismissing VRC's takings claims, holding that a ceiling on nonconsent tow fees did not constitute a regulatory taking under the state or federal constitution.

City of El Paso v. Maddox, --- S.W.3d ----, 2008 WL 4181166 (Tex. App.-El Paso, September 11, 2008)

LANDOWNERS' CLAIM WAS NOT RIPE, AND THEY HAD NOT DEMONSTRATED FUTILITY OF SUBMITTING THEIR DEVELOPMENT PLAN OR APPLYING FOR VARIANCE

Landowners brought regulatory takings claim against City, alleging City ordinances resulted in denial of access to their property and a loss of value.

Appellees filed suit against the City in 1992, alleging that the amendment to the 1974 Subdivision Ordinance and its retroactive application to Park West Unit 3 constituted a taking because their property had been rendered unsaleable and of no value.

Dr. Maddox and Edwards own three tracts of property totaling 15.229 acres (referred to collectively as the Property) on the west side of El Paso. Dr. Maddox acquired the first tract consisting of 12.5315 acres in 1972 (the Surplus Property), the second tract consisting of .5505 acre in 1978 (the Trade Property), and the third tract consisting of 2.147 acres in 1979 (the Abutting Property). He purchased the tracts for the purpose of commercial, office, and residential development. One of the tracts abuts Park West Unit 3 on which Sunland Park Mall was built.

When Dr. Maddox acquired the Surplus Property in 1972, it did not have access to any public street or right of way or, in other words, it was landlocked. The following year at Dr. Maddox's request, the City re-zoned the Surplus Property to Apartment/Office (A/O). Three years later, on October 15, 1976, Mesa Hills Mall Company L.P. acquired the 79.168 acre tract which was platted into Park West Unit 3, a single lot subdivision with no interior streets. Dr. Maddox acquired the Abutting Property in 1979 with the knowledge that Mesa Hills Mall Company had purchased the 79.168 acre tract for the purpose of shopping center development, but he denied having knowledge that the property had been platted into Park West Unit 3. He expected that his acquisition of the Abutting Property would ensure that his landlocked property would eventually gain access to a public street through Park West Unit 3. He based this belief on a 1974 Subdivision Ordinance and City policy which required a subdivider to provide access to adjoining unplatted areas. Appellees allege in their petition that neither Mesa Hills Mall Company nor the City disclosed during the subdivision platting process between 1978 and 1987 that Mesa Hills intended to sell lots in Park West Unit 3 without street frontage.

Upon learning that the Property would not be provided street access via the Park West Unit 3 development, Appellees unsuccess-fully attempted to negotiate access with Mesa Hills Mall Company and the other Simon Defendants. In 1992, the Appellees asked the City to enforce the 1974 ordinance against Mesa Hills Mall Company, and the City Council instructed the City Attorney to do so. Shortly thereafter, the City rescinded its prior order and amended the 1974 ordinance to eliminate the requirement for public streets in a shopping center with internal lots so long as access between lots was provided with reciprocal easements.

The Court of Appeals concluded that the City had not been given an opportunity to make a final decision on Appellees' access to its property and Appellees have not presented evidence establishing that submitting a development plan or seeking a variance would have been futile. Accordingly, the Court of Appeals reversed the order of the trial court denying the City's plea to the jurisdiction and we rendered judgment dismissing Appellees' taking claims without prejudice.

City of Sherman v. James Wayne, --- S.W.3d ----, 2008 WL 3823981 No. 05-06-00420-CV (Tex. App.—Dallas Aug. 18, 2008 no pet.).

COURT HELD LANDOWNER CAN RECOVER COMPENSATION FOR REGULATORY TAKING BASED ON APPLICATION OF THE CITY'S RESIDENTIAL ZONING ORDINANCE.

In 2001, James Wayne purchased 9.3 acres of property in the City of Sherman from the Texas National Guard through a bid process. The property contained mostly undeveloped land, but also contained an armory, a vehicle storage building, and a parking lot. The armory and vehicle storage building were operated by the Texas National Guard from 1958 through 1999. That use continued after 1964 despite the fact that, in that year, the City passed an R-1 (one- and two-family residential district) zoning ordinance on the property that prohibited all commercial and industrial uses. Wayne purchased the property for $126,307.92 under the assumption that he could continue to use the buildings for commercial purposes. He believed that because the structures on the property were built and used prior to the enactment of the zoning ordinance, and the property was "grandfathered" and therefore not subject to the ordinance. Upon learning of the City's intentions to enforce the residential zoning ordinance, Wayne applied to change the designation to C-2 (commercial general purpose). His application was denied by the City, and Wayne filed a regulatory taking lawsuit.

At trial, the jury found that the market value of the property when the residential zoning ordinance was enforced was zero, and without the ordinance enforced the value was $250,000. Upon Wayne's movement for judgment on the verdict, the trial court found that the regulatory taking claim was ripe for judicial determination and that the application of the residential zoning ordinance to Wayne's property was a compensable regulatory taking. Wayne was awarded damages of $250,000 plus prejudgment interest.

On appeal, the City claimed that the application of the zoning ordinance did not constitute a regulatory taking because it did not deprive Wayne of all economically viable uses of the property. The United States Supreme Court has established that when a property owner is "called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (199(2).

Here, the City claimed that the property maintained some value, making a regulatory taking under the *Lucas* decision impossible. Although the City points to two appraisals of the property at issue to show that the property did have some value, the Court of Appeals viewed these appraisals as opinions based on several assumptions, and in accordance with previous rulings by the Texas Supreme Court, determined that "opinion is at best something of a speculation, and the

question of market value is peculiarly one for the fact finding body." See *Texas Pipe Line Co. v. Hunt,* 149 Tex. 33, 41, 228 S.W.2d 151, 156 (1950). Accordingly, the Court of Appeals held that the trial court's determination that the property had no economically viable use when the zoning ordinance applied to it was supported by the jury's finding that the market value of the property was zero under the strictures of the zoning ordinance.

The City also argued that the evidence presented at trial was legally and factually insufficient to support the finding that the market value of the property at issue was reduced to zero when the zoning ordinance applied. But the Court of Appeals concluded that the evidence was legally sufficient to support the jury's determination of market value, as the evidence was not so weak as to render the finding clearly wrong and unjust.

In support of its holding that sufficient evidence was presented, the Court of Appeals pointed to expert testimony that Wayne's property was worthless when the zoning ordinance applied and removal costs for the structures on the property, which both contained asbestos and lead, were factored in. The Court of Appeals also recounted Wayne's argument that there was no evidence in the record to show that other bidders for the property in 2001 were willing to purchase the property if they knew that it was zoned residential, and that tax appraisals were not indicative of market value because they rarely reflected the true market value of a property.

Lastly, the City filed a motion to modify the trial court's judgment to vest title to the property in the City upon satisfaction of the judgment, which was overruled at the trial level. On appeal, the Court of Appeals held that the natural result of Wayne's lawsuit would require title to pass to the City upon payment of just compensation. As a result, on the satisfaction of the judgment, the right, title, and interest of Wayne in the property was held to pass to the City. The City Council has preliminarily decided not to appeal the opinion.

Condemnation

AVM-HOU, Ltd., v. Capital Met. Trans. Auth., --- S.W.3d ----, No. 03-07-00566-CV 2008 WL 3984369 (Tex. App.—Austin Aug. 29, 2008).

COMMERCIAL TENANT WHICH HAD OPERATED ADULT-ORIENTED BOOKSTORE ON PROPERTY CONDEMNED DID NOT HAVE A CAUSE OF ACTION AGAINST TRANSPORTATION AUTHORITY FOR INVERSE CONDEMNATION TO RECOVER FOR THE LOSS OF THE BUSINESS

This case involves a condemnation award for an adult business lessee where the condemned property was specially zoned for adult businesses. Capital Metropolitan Transportation Authority (Cap Metro) condemned real property owned by the adult business, AVM-HOU, Ltd. (AVM), located in Austin. AVM had operated a business on the property as a

lessee. After the property was condemned, the property owner and AVM (as lessee) received an award that was apportioned between the two parties.

AVM then filed suit in the trial court against Cap Metro, seeking compensation for the taking of its business, based on the theory that because AVM was unable to relocate its business due to the lack of adult business zoned property in the area, the taking of the real property resulted in a taking of the business.

The Texas Constitution prohibits a governmental entity from taking private property without paying adequate compensation.

To establish an inverse takings claim, a plaintiff must prove that a governmental entity intentionally performed certain acts that resulted in a "taking" of property for public use. *Gen. Servs. Comm'n v. Little-Tex Insulation Co*., 39 S.W.3d 591, 598 (Tex.200(1); "Just compensation***where an entire property is taken, is the market value of the property, and where a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part for the purpose proposed." *Reeves v. City of Dallas*, 195 S.W.2d 575, 582 (Tex. Civ. App. 1946)). In a condemnation action, lost profits for a business located on the property are not recoverable as a separate item of damages over and above the fair market value of the land, but can be included in calculating the condemnation award. *State v. Travis,* 722 S.W.2d 698, 698-99 (Tex. 1987); *State v. Sungrowth VI, Cal., Ltd.*, 713 S.W.2d 175, 177 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

Both Cap Metro and AVM filed traditional motions for summary judgment on whether AVM could establish its inverse condemnation claim. Cap Metro argued that AVM was not entitled to any additional compensation under an inverse condemnation claim because: ((1) inverse condemnation occurs when a land owner seeks compensation for property taken for public use without formal condemnation proceedings having been instituted, and in this case both the land owner and the lessee were involved in formal condemnation proceedings and were compensated; ((2) there is no cause of action in Texas for a lessee to recover lost profits of a business located upon property that was acquired, in its entirety, for public use by eminent domain; (3) even if such a cause of action existed, AVM never established or operated its planned adult business at the location; and (4) the formal condemnation award included a premium for the sexually-oriented business zoning.

The trial court granted Cap Metro's motion for summary judgment and dismissed all of AVM's claims. TML and TCAA filed an amicus brief that argued, among other things, that the trial court should be affirmed because business value damages are not appropriate where the entire piece of real property is condemned and the fair market value is awarded.

The Court of Appeals affirmed the trial court's judgment that there is no cause of action in Texas for compensation for the lost business profits.

City of Dallas v. Peary A. Zetterlund, --- S.W.3d ----, No. 05-07-01378-CV, 2008 WL 3580773 (Tex. App.—Dallas Aug. 15, 2008).

LANDOWNER ALLEGED SUFFICIENT FACTS WITH RESPECT TO HIS INVERSE CONDEMNATION CLAIM, SEEKING COMPENSATION FOR CITY'S INVASION AND USE OF HIS PROPERTY AS STAGING SITE FOR CONSTRUCTION OF NEW WATER PIPELINE, SO AS TO SURVIVE A PLEA TO THE JURISDICTION BY CITY

The Court of Appeals held that the City was liable for inverse condemnation for the actual invasion of the property because the City knew it was on the property and the use of the property benefited a City project. The court held that the City was not liable for impairment of access to the property because the City's use of the property did not impede access to the landowner's property.

Burris v. Metropolitan Transit Authority of Harris County --- S.W.3d ----, 2008 WL 3522249 (Tex.App.-Houston [1 Dist.] Aug. 14, 2008)

CLOSURE OF DRIVEWAY AND NEW CONFIGURATION OF ACCESS TO PROPERTY DID NOT AMOUNT TO A COMPENSABLE TAKING.

Burris owns a 17,000 square foot parcel of land at 4905 San Jacinto (the "Property") at the corner of Wichita Street in Houston, Texas. The Property is improved with a 6,860 square foot commercial building where WSE sells wheelchairs and motorized scooters to disabled persons. WSE and its sole owner, Burris, have operated on the Property since 1993.

In 2002, METRO began construction of a light rail line (METRORail) on San Jacinto. Before construction of METRORail, WSE had two driveways where customers could enter and exit the Property by vehicle from San Jacinto. After construction, METRO had to close one driveway into WSE from San Jacinto, and the other driveway was converted into an exit-only drive. Now, the only entrance into WSE is from the side street, Wichita.

Burris filed suit against METRO for trespass and inverse condemnation based on the allegations that METRO had damaged the Property by materially and substantially impairing access to it and that METRO had permanently taken a portion of the Property without payment of just compensation.

In upholding the trial court's decision, the Court of Appeals found that closure of a driveway and new configuration for access to property owner's business property, which was caused by county transit authority's installation of light rail, did not materially and substantially impair access to the property so as

to be a compensable taking under the state constitution, even if the former configuration was more convenient, where owner retained full access to the property via one remaining driveway

Sign Regulation:

City of Argyle v. David Pierce et al., 258 S.W.3d 674 (Tex. App.—Fort Worth, 2008).

OWNER AND COMPANY DID NOT HAVE A PROPERTY INTEREST THAT COULD BE TAKEN BY THE CITY IN AN INVERSE CONDEMNATION, AS REQUIRED IN ORDER TO AVOID CITY'S PLEA TO THE JURISDICTION

A property owner and outdoor sign company brought a declaratory judgment and inverse condemnation action against the City when the City tried to enforce its sign ordinance prohibiting off-premises outdoor advertising in its extraterritorial jurisdiction. The trial court denied the City's plea to the jurisdiction and the City appealed. The Court of Appeals reversed the trial court's order denying the City's plea to the jurisdiction with regard to the inverse condemnation and deprivation of property claims, holding that the owner and company did not have a property interest that could be taken by the City in an inverse condemnation claim. The Court of Appeals affirmed the trial court's order denying the City's plea to the jurisdiction with regard to the declaratory judgment claims, and held that the sign regulation was not a penal statute that could only be challenged during a criminal prosecution.

Land Use:

City of Seguin v. Robert L. Worth, No. 04-06-00551-CV (Tex. App.—San Antonio July 23, 2008) (mem. op).

***ROCKWALL* UPHELD**

Following the ruling by the Texas Supreme Court in *City of Rockwall v. Hughes*, 246 S.W.3d 621, (Tex. 2008) an individual has no private right to object to an annexation proceeding so long as the City acts on the individual's request for arbitration.

Ryan Services, Inc. v. Spenrath, No. 13-08-00105-CV, 2008 WL 3971667 (Tex. App.-Corpus Christi, August 28, 2008)

PLEA TO THE JURISDICTION GRANTED WHERE PLAINTIFF'S SOUGHT TO COMPEL THE CITY TO EITHER REVOKE THREE ANNEXATION ORDINANCES OR SUBMIT THEM TO A CITY-WIDE VOTE

The El Campo City Council passed four annexation ordinances on December 11, 2007. On January 10, 2008, pursuant to section 7.03 of the El Campo City Charter, citizens of the City filed three petitions asking the City Council to reconsider three of the annexation ordinances and, if the City Council chose not to repeal them, to submit the ordinances to a popular referendum vote. Section 7.03 of the City Charter, entitled "Referendum," provides that:

Qualified voters of the City of El Campo may require that any ordinance or resolution passed by the City Council be submitted to the voters of the City for approval or disapproval, by submitting a petition for this purpose within thirty (30) days after final passage of said ordinance or resolution, or within thirty (30) days after its publication.... Thereupon the City Council shall immediately reconsider such ordinance or resolution and; if it does not entirely repeal the same, shall submit it to popular vote as provided in section 6.07 of this Charter. Pending the holding of such election, such ordinance or resolution shall be suspended from taking effect and shall not later take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.

Taking the position that annexation ordinances were not subject to the referendum provision of the City Charter, the City Council took no action on the three petitions.

In the instant case, appellants assert that the following "multiple instances of misconduct" rendered the annexation ordinances void:

a) An appellee, Cindy Cerny provided inaccurate information to appellants concerning the number of voters in the last election for purposes of calculating the number of signatures needed for the referendum petition.

b) The City did not "immediately" consider the petitions.

c) An unelected city attorney held the city council hostage, and no discussion was ever held regarding the petitions.

d) The City Council did not vote to either revoke the annexation ordinances or call for a vote.

e) The City did not suspend the annexation ordinances upon receipt of the petitions.

f) No public vote took place as required by section 7.03 of the City Charter.

g) No vote took place in the annexed areas as required by the Local Government Code.

h) The City failed to provide the citizens of the affected area the right to vote.

The Court of Appeals found that the alleged irregularities, even if true, constitute procedural irregularities and did not attack the City's authority to annex and thus did not confer standing on appellants. The Court of Appeals also held that multiple, cumulative procedural irregularities **do not** render an Ordinance void.

County of Reeves v. Texas Comm'n on Envtl. Quality, et al., --- S.W.3d ---, 2008 WL 3984367 No. 03-07-00427-CV (Tex.App.—Austin August 28, 2008).

FAILURE OF PETITION CONTESTING MUNICIPAL-OWNED UTILITY'S WATER RATE CHANGE TO STATE OLD AND NEW RATES AS REQUIRED BY TCEQ RULE DID NOT ALLOW DISMISSAL OF PETITION

The Town of Pecos City's water utility, which provided service to areas outside the city limits, adopted an ordinance setting higher water and wastewater rates. Pursuant to Texas Water Code Section 13.043(i), the city sent individual written notice of the rate increase to each ratepayer outside the city limits. The ratepayers who lived outside the city limits (known as "outside ratepayers"), including Reeves County, initiated an appeal of the rate increase by filing a petition for review with the Texas Commission on Environmental Quality (TCEQ) including signatures of at least ten percent of eligible outside ratepayers, as authorized by Texas Water Code Section 13.043(b)(3). The TCEQ rejected the group's first petition as incomplete, and finally rejected a second petition by citing a failure to conform to 30 Tex. Admin. Code §291.42.

The rules created by the TCEQ in order to carry out the requirements of Chapter 13 of the Texas Water Code include specific requirements of a petition seeking a review by the TCEQ of rates. 30 TEX. ADMIN. CODE §291.42. The rule requires on each page of the petition, among other information: ((1) a "clear and concise statement" that the petition is an appeal of a water or sewer utility rate change; (2) a "concise description and date of that rate action"; (3) the name, telephone number, and street address of each signer; and (4) any other information the TCEQ may require. The case in question centers mainly on what the "concise description… of [the] rate action" required on each page by the rule must be defined as in practice. A pamphlet published by the TCEQ entitled "Appealing a Rate Change Decision Made by a Board of Directors, a City Council, or County Commissioners" includes a sample petition. This "sample petition" lists both the old rates and the new rates.

In this case, the outside ratepayers failed to include on each page of either petition submitted to the agency a listing of both the old rates and the new rates, which the TCEQ argued was a necessary part of the agency's interpretation of the rule language requiring "a concise description of the rate action." The petitions did, however, include language specifically stating that the petition was in response to a change in water rates by the city-owned water utility, and the old and new rates were attached. The second petition included all the address and phone number information required, but the pagination was irregular, and each page did not include the language sought by the TCEQ regarding the rate changes.

The TCEQ stated that without the new and old rates clearly described in the manner laid out in the sample petition, it would be difficult or impossible to ascertain if the signatures were from affected outside ratepayers, especially considering that some petitions included thousands of signatures. The agency also argued that requiring a statement of old and new rates on any page with signatures enables the TCEQ to ensure that the signatories knew what they were

signing when they signed the petition.

The Court of Appeals reviewed the TCEQ's decision in this case under the substantial evidence rule, which includes the review of agency fact findings for support by substantial evidence, the review of legal conclusions for errors of law, and then decided whether, in the light of the evidence, reasonable minds could have reached the same conclusion as the agency. If not, the court must find that the agency acted in an arbitrary manner, and reverse and remand the decision.

The of Court of Appeals held that because the city is required to notify all outside ratepayers of a tax increase with an individual written notice, the legislature necessarily contemplated that the utility would know or should be able to find out which of the outside ratepayers were affected by the rate change, what their new rates were, and their mailing addresses. The TCEQ had a list of all outside taxpayers affected by the rate change, created by the city's utility in order to send the individual notice required by Texas Water Code 13.143. In light of this, the court found that the agency's argument that it could not confirm that the ratepayers on the petition were affected by the rate change without the description of the rate change laid out on each signature page was not reasonable.

The Court of Appeals found that there is no particular consequence for not complying with Rule 291.42, particularly not a sanction of dismissal for "failure to prosecute," and that the second petition was in compliance with the enabling legislation by having signatures of more than ten percent of outside ratepayers whose rates were changed. TEX. WATER CODE §13.043(b), 30 TEX. ADMIN. CODE §291.42. The court held that the agency's interpretation and application of the rule and subsequent dismissal of the outside ratepayers' case for failing to include information that was ultimately unnecessary to reach the goal for which the information was required fell far below the substantial evidence standard. This interpretation, the court stated, subverted the legislature's intent and deprived the outside ratepayers of their statutory rights. In light of the fact that the petition met the statutory requirements of Texas Water Code 13.043, a fact the court felt was easily confirmed with information the TCEQ had available, the Court of Appeals reversed the decision of the trial court, remanding the case to the TCEQ for further deliberation.

Brownsville Irrigation Dist et al. v. Tex. Comm'n on Envtl. Quality, et al., --- S.W.3d ----, 2008 WL 3984226 No. 03-06-00690-CV (Tex. App.—Austin Aug. 28, 2008).

WHEN THERE ARE ASPECTS OF THE APPLICATION OF A REGULATION THAT ARE POLICY DETERMINATIONS, APPELLATE COURTS WILL DEFER TO THE AGENCY'S POLICY DETERMINATIONS AS TO THOSE ASPECTS OF THE APPLICATION OF THE REGULATION UNLESS THEY ARE PLAINLY

ERRONEOUS, INCONSISTENT WITH THE LANGUAGE OF THE RULE, INCONSISTENT WITH STATUTE, OR A VIOLATION OF THE CONSTITUTION

The court held that the Texas Commission on Environmental Quality (TCEQ) properly allowed a party authorized to divert water from the Rio Grande River to change the location of and the purpose for that diversion of water because neither the Texas Water Code nor the applicable rules define what constitutes "an applicable conversion factor." The TCEQ may exercise discretion in deciding what kind of conversion factor to apply in each case.

City of Fort Worth v. Linda J. Shilling, 2008 WL 3877234, No. 2-07-410-CV (Tex. App.—Fort Worth August. 21, 2008).

HAVING INITIATED ADMINISTRATIVE PROCEEDINGS WITH CITY REGARDING RETALIATION CLAIM ARISING FROM REPORT OF CITY'S REACTION TO CONDUCT INVOLVING ANOTHER EMPLOYEE, THE LABOR CODE PROHIBITED FORMER CITY EMPLOYEE FROM CONTEMPORANEOUSLY PURSUING HER COMPLAINT UNDER THE TCHRA BASED ON THE SAME GRIEVANCE INVOLVING THE OTHER EMPLOYEE

The court held that whether a grievance procedure is "initiated" under the Whistleblower Act is a fact question and that an individual cannot bring a Texas Commission on Human Rights Act complaint about a grievance on which a Whistleblower Act complaint has already been filed.

Civil Rights

City of Dallas v. Saucedo-Falls--- S.W.3d ----, No. 05-08-00029-CV 2008 WL 3823999 (Tex. App.-Dallas August 18, 2008)

A PLEA TO THE JURISDICTION IS THE PROPER PROCEDURE FOR A SECTION 1983 CLAIM THAT FAILS TO ALLEGE A VESTED PROPERTY RIGHT

In February 2002, a coalition of police officers and firefighters presented the City with a signed petition seeking a special election on a pay increase for the City's sworn police officers and firefighters equal to 17% of their base salary. The City Secretary approved the petition and submitted it to the City Council. Negotiations for a salary increase between the City and representatives of the police and fire departments failed, and the City Council called for a special election on the pay increase for May 4, 2002. In the meantime, on March 20, 2002, the City Council passed Resolution No. 02-0982 (the March 2002 Pay Resolution), which approved a 5% pay increase in the base salary of each sworn employee of the police and fire departments for fiscal year (FY) 2002-03, with a similar pay increase for the next two fiscal years. The March 2002 Pay Resolution provided that it would become effective on October 1, 2002 if the voters did not approve the 17% pay increase in the May special election. The voters did not approve the pay increase. On September 30, 2002, one day before the March 2002 Pay

Resolution was to become effective, the City Council passed another resolution; this one authorized a 5% pay increase for uniformed employees below the rank of deputy chief only, not for all sworn employees, and was to become effective October 29, 2002 (the September 2002 Pay Resolution). The City Council passed an appropriations ordinance adopting the FY 2002-03 budget containing the revised pay increase approved in the September 2002 Pay Resolution.

Appellees are City police officers and firefighters currently or formerly employed in the ranks of deputy chief or above who did not receive a pay increase pursuant to the September 2002 Pay Resolution. They sued the City for back pay and benefits they contend were required by the March 2002 Pay Resolution. The City filed a plea to the jurisdiction, which the trial court denied. The City appealed. Relying on *Reata Construction Corp. v. City of Dallas*, No. 02-1031, 2004 WL 726906 (Tex. Apr.2, 2004) (per curiam), withdrawn on reh'g, 197 S.W.3d 371 (Tex.2006), the Court of Appeals affirmed the denial of the plea to the jurisdiction, concluding that the City waived its immunity from suit by asserting a counterclaim for attorney's fees. *City of Dallas v. Saucedo-Falls*, 172 S.W.3d 703, 709 (Tex. App.-Dallas 2005), rev'd on other grounds, 218 S.W.3d 79 (Tex.2007). The City filed a petition for review in the Texas Supreme Court. While the petition was pending, the Texas Supreme Court granted rehearing in *Reata*, withdrew its original opinion, and substituted a new opinion in its place. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex.2006). The Texas Supreme Court noted that our opinion in this case relied on the withdrawn and replaced *Reata* opinion. *See City of Dallas v. Saucedo-Falls*, 218 S.W.3d 79, 79 (Tex.2007). As a result, the court granted the City's petition for review, reversed its judgment, and remanded this case to the trial court for further proceedings.

The Court of Appeals held:

(1) “taking” claims were not ripe;

(2) city was not federal actor subject to Due Process Clause of Fifth Amendment;

(3) plaintiffs did not have property interest in pay raises set forth in language in Resolution that was never adopted by city; and

(4) ordinance did not create property right in specific pay increases; but

(5) plaintiffs were entitled to opportunity to replead to cure defect in Fourteenth Amendment due process claim.