RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TEXAS CITY ATTORNEYS ASSOCIATION
FALL CONFERENCE
San Antonio
September 24, 2015

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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law, where she was active in student recruiting, advocacy programs, and the Texas Journal on Civil Liberties and Civil Rights. While in law school, Laura worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006. Laura became Assistant General Counsel in November 2010. Laura was given the TML Employee of the Year Award for 2013. Laura specializes in employment law, sign regulation, and writes amicus briefs for member cities. Besides serving TML member cities, Laura also enjoys spending time with her husband Chris, her two sons, Johnathon and Joshua, and her daughter, Emma.

TML LEGAL DEPARTMENT
Austin, Texas

The TML Legal Department is a ragtag group of attorneys brought together for one purpose, to give city officials general legal information without knowing anything about the controlling facts, city ordinances, or city charter. This advice often conflicts with that given by a city's own attorney (who does have the pertinent information), but the legal department is free so we must be right. From its ivory tower in northeast Austin, the legal department also moonlights as a therapist for city officials and city attorneys. The TML Legal Department also likes to take great papers written by city attorneys and place them on their Web site. Every two years the legal department emerges from its northeastern home to travel to the state legislature to repeat the information given to them by TML lobbyists, like the puppets they are.

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We would like to give a shout out to Ryan Henry, whose timely summaries on all cases of interest to cities makes our job just a little bit easier. If you have not had a chance to sign up to be placed on his free email list for case summaries, you should check it out at www.rshlawfirm.com.

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RECENT STATE CASES

ANNEXATION

Annexation: *City of Dallas v. D.R. Horton-Tex., Ltd.*, No. 05–14–01414–CV, 2015 WL 4162286 (Tex. App.—Dallas July 10, 2015) (mem. op.). In 1971, the City of Dallas annexed a large area of land, of which D.R. Horton owned more than 50 percent. In 2008, D.R. Horton filed a petition with the city requesting that the city disannex the area for failure to provide services that were substantially equivalent to the services provided to similar areas. The city did not act on the petition, and D.R. Horton took no further action. Five years later, a second petition for disannexation was filed. When the city did not act on the petition within 90 days, D.R. Horton filed a suit against the city seeking disannexation. The city filed a plea to the jurisdiction asserting immunity, which the trial court denied. The City of Dallas appealed.

Both parties stipulated that the Municipal Annexation Act of 1963 (Act) applied in this case. The court of appeals concluded that the Act expressly permits a petitioner seeking disannexation to file suit against a city if the city does not timely disannex the area. Therefore, the Act waived the city's governmental immunity.

The City of Dallas argued that D.R. Horton had to file suit within 60 days of the city's failure to act on the first disannexation petition, or the appellee was forever barred from seeking disannexation under the Act. D.R. Horton asserted that it timely filed its suit because the suit was filed within 60 days of the city's failure to grant the second petition for disannexation. The court noted that the statute is silent on whether landowners and voters in the annexed area can bring only one petition for disannexation. Stating that judicial imposition of a restriction on the number of petitions for disannexation would not further the legislature's intent in passing the Act, the court concluded that the statute does not bar landowners and voters from bringing a second petition when suit was not filed under the first petition.

The City of Dallas also contended that appellee's suit was barred because D.R. Horton did not comply with statutory requirements for the petition. Viewing the Act as a whole, the court disagreed with the city's interpretation that the Act required a voter to sign the petition and attach affidavits because this interpretation would make other parts of the Act unworkable. Therefore, the court of appeals affirmed the trial court's order denying the city's plea to the jurisdiction.

Annexation: *City of Richmond v. Pecan Grove Mun. Util. Dist.*, No. 01-14-00932-CV, 2015 WL 4966879 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015) (mem. op.). This is an interlocutory appeal from the plea to the jurisdiction involving the city's annexation of a property noncontiguous with its border. In order to annex the noncontiguous property, the city first annexed a narrow intervening strip of land owned by the Texas Department of Transportation. The Pecan Grove Municipal Utility District sought a declaration that the annexation of both the strip and the property are void because the intervening strip was statutorily too narrow to be annexed without a petition of annexation from the landowner. The city filed a plea to the jurisdiction which was denied.

The sole issue before the appellate court is whether the utility district has standing to challenge the annexation. The utility district alleged that it was harmed as a potential service provider to the annexed area. It also argued that there was an agreement between the city and the district to share sales tax revenue in the city's extraterritorial jurisdiction bordering the district, and the annexation would decrease the revenue received by the district. Finally, the annexation would change the location of the city's extraterritorial jurisdiction, and the district was required to obtain city approval for projects within that extraterritorial jurisdiction.

The Court found that the city conclusively established that the utility district does not have the capacity to service the annexed area and that the agreement between the city and the district did not include the annexed property. Also, the Court held that the change in the location of the city's extraterritorial jurisdiction was a burden on the public in general, not a special burden on the utility district. The Court resolved the issue of standing by holding that the utility district has not a suffered a particular burden or injury from the city's annexation.

ELECTIONS

Elections: *Dacus v. Parker,* No. 13-0047, 2015 WL 3653295 (Tex. June 12, 2015). This case questioned whether ballot language was sufficiently misleading to invalidate an election. Mayor Parker and the City of Houston (city) argued that the language was sufficient to notify voters and that the city did not need to go into additional detail because it is assumed that voters are educated about ballot measures before they come to vote. The Supreme Court of Texas held that the standard for a ballot proposition was whether it submits the question with "definiteness and certainty" and describes the key features of an amendment. The court held that the ballot language in this case was insufficient because it left out the key feature of future drainage charges. The court mentioned TML and TCAA's amicus brief, but held that the arguments were unpersuasive and that it is the Election Code and common law that governs this dispute, not charter language.

Referendum: *In re Woodfill*, No. 14-0667, 2015 WL 4498229 (Tex. July 24, 2015) (per curiam). The City of Houston's charter provides for a petition and referendum process when the citizens wish to rescind an ordinance that the city council has adopted. A group of citizens filed such a petition with the city over the city's equal rights ordinance. The city council rejected the petition on the grounds that it believed the petition was invalid. The citizens appealed this decision and sought a writ of mandamus from the court. The charter has three steps for a referendum: (a) a petition is signed and verified by qualified voters; (b) the city secretary checks the petition and submits a certificate to council; and (c) the council either revokes the ordinance or holds an election. In this case, the city secretary did determine the petition was valid, but the city attorney determined it was not valid. The city council determined that the petition was not valid and the trial court and court of appeals both reviewed the issue. However, the Supreme Court of Texas held that the city council only has a ministerial duty under its charter to hold the election and that the council "cannot independently evaluate the petition as a predicate to its ministerial duty to act . . . ." The Court held that the petitioners did not have an adequate remedy on appeal if they were to get the referendum on the November ballot. The Court also held that mandamus actions can be started in the appellate courts. The Court held that the city council

must repeal the ordinance or hold the election and if it does not do so, then the Court will issue a writ of mandamus.

Referendum: *In re Williams*, No. 15-0581, 2015 WL 4931372 (Tex. Aug. 19, 2015) (per curiam). Another case based on the equal rights ordinance referendum petition by the citizens of Houston. The Court in this mandamus proceeding held that the city has to word the election proposition so that the voters can vote directly for or against the proposition.

GOVERNMENT IMMUNITY

Official Immunity: *William Marsh Rice Univ. v. Thomas*, No. 01-14-00908-CV, 2015 WL 3522915 (Tex. App.—Houston [1st Dist.] June 4, 2015) (mem. op.). This is a false arrest case in which the First District Court of Appeals reversed the denial of summary judgments based on official immunity and rendered judgment for the university defendants. Officer Cash, an officer for the university, received a radio call that a man on campus may be violating a protective order by attempting to contact his wife. Cash encountered Thomas on campus, who informed Cash he was there to see his wife. Cash asked if a protective order was in place and Thomas refused to confirm or deny the existence of such an order. Thomas was detained and his wife confirmed a protective order existed. Thomas was then arrested. However, while being processed officers discovered the order was not a protective order, but a mutual restraining order which did not permit arrest. He was then released. Thomas sued the university, campus police department, and Officer Cash for a variety of claims. The university defendants moved for summary judgment based on official immunity of Cash, which the trial court denied. The court held that in questioning, detaining, and arresting Thomas, Officer Cash was performing a discretionary act under the official immunity standard. When evaluating the evidence presented, the court determined a reasonable officer could have believed probable cause existed to make the arrest. Thomas did not present any evidence to counter this argument. Cash arrested Thomas in the course of his duties as a peace officer assigned to the campus. Therefore, Cash conclusively established he is entitled to official immunity. A slightly trickier analysis occurred for the remaining defendants. Normally, a city or other entity commissioning an officer is entitled to governmental immunity and if an employee is immune, the entity remains immune. However, the university is a private entity. The court ultimately determined that a private employer is entitled to assert any affirmative defenses its employee has to liability. Since Cash was immune, the university was immune.

Governmental Immunity: *City of Brazoria v. Ellis*, No. 14-14-00322-CV, 2015 WL 3424732 (Tex. App.—Houston [14th Dist.] May 28, 2015) (mem. op.). In 2012, Officer Nicholas Dayton of the City of Brazoria police department was involved in a traffic collision with Walter Ellis. Dayton was responding to a call for emergency assistance when his patrol car crashed into the driver's side door of Ellis's vehicle. Ellis filed a negligence suit against the city. The city filed a plea to the jurisdiction, arguing that the trial court lacked jurisdiction over the claims because it had not waived its governmental immunity because: (1) Officer Dayton's official immunity preserved the city's governmental immunity; and (2) the emergency exception in the Texas Tort Claims Act (Act) barred any possible waiver of its governmental immunity. The trial court denied the city's plea to the jurisdiction, and the city appealed.

On appeal, the city contends that because Officer Dayton retained his official immunity by responding to the emergency call in good faith, that he could not be personally liable to the clamant under Texas law, and therefore the city's governmental immunity was not waived under the Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B). To address this question, the court analyzed whether the city met its burden to conclusively prove Officer Dayton's "good faith." The court held that the city's evidence of good faith was inconclusive because the city failed to mention the officer's blocked field of vision as he entered the intersection, and there was conflicting evidence about whether Officer Dayton was using his siren prior to the collision. As a result, the trial court did not err when it denied the city's plea to the jurisdiction asserting that the city's immunity had not been waived under the Act. The above considerations also raise a fact issue as to whether Officer Dayton's conduct could be considered reckless. Accordingly, the court of appeals held that the trial court correctly denied the city's plea to the jurisdiction based emergency exception to the Act's waiver of immunity.

Governmental Immunity-Tort: *Suarez v. City of Texas City,* No. 13-0947, 2015 WL 3802865 (Tex. June 19, 2015). This case concerns a wrongful death suit brought under the Texas Tort Claims Act (TTCA) by the mother and widow of three family members who drowned in water off a man-made beach in Texas City. In October 2010, Edith Suarez, with her husband, twin daughters, and other family and friends, went to a picnic area located upon the Texas City Dike, a man-made dike over 100 years old and used as a public recreational area since 1963. The children drowned after being caught in an undertow in knee-deep water; their father drowned while trying to save them. Hurricane Ike had caused major damage to the dike in 2008, and the city closed the dike for repairs until September 2010. Mrs. Suarez claimed that the city was negligent in not posting adequate signage to warn recreational users of dangerous swimming conditions when reopening the area to the public. The trial court denied the city's plea to jurisdiction and motion for summary judgment on grounds of immunity, and the city filed an interlocutory appeal. The court of appeals reversed the decision of the trial court and the complaint was dismissed for lack of subject matter jurisdiction. The court held that the city retained immunity from suit under the recreational use statute, because Suarez failed to bring a valid gross-negligence claim as required by that statute.

In reviewing the case, the Supreme Court acknowledged that the city, prior to Hurricane Ike, had additional signs posted warning of rip currents and undertows, implying that the city had an understanding of the dangers near the dike. However, Suarez was found to have failed to produce evidence of gross negligence by the city required to invoke the waiver of immunity from suit allowed under the TTCA, given the family's recreational use of the facility. *See City of Bellmead v. Torres*, 89 S.W.3d 611, 614 (Tex.2002). The court of appeals' judgment in favor of the city was affirmed.

Governmental Immunity: *Canadian River Mun. Water Auth. v. Hayhook, Ltd.,* No. 07-15-00064-CV, 2015 WL 3979941 (Tex. App.—Amarillo June 30, 2015). This is an appeal from the denial of a plea to the jurisdiction filed by Canadian River Municipal Water Authority (CRMWA). Hayhook, Ltd. (Hayhook) sued CRMWA to enforce a settlement agreement entered into between the parties. CRMWA claimed that its sovereign immunity deprived the trial court of jurisdiction to entertain the suit.

Relying in part on the reasoning in a previous Texas Supreme Court case, *Texas A & M Univ.—Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), the appellate court concluded that immunity does not bar the prosecution of a claim founded upon the breach of a settlement agreement when the agreement encompassed resolution of a claim against which the State had no immunity. Thus, the trial court's order was affirmed.

Tort Claims Act: *City of Laredo v. Reyna*, No. 04–15–00147–CV, 2015 WL 4479834 (Tex. App.—San Antonio July 22, 2015) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act (TTCA) case where the San Antonio Court of Appeals reversed the denial and dismissed the plaintiff's claims. Reyna was arrested by Officer Rodriguez of the Laredo Police Department. During the arrest, Rodriguez and Reyna got into a scuffle which resulted in Reyna needing medical attention. Reyna sued the city under the TTCA alleging Rodriguez used a baton (i.e. tangible personal property) to negligently inflict injury. He further alleged the use of the county jail was the utilization of real property and the city negligently supervised and trained Rodriguez. The city filed a plea to the jurisdiction which was denied and the city appealed. The court first held the TTCA does not apply to a claim "arising out of assault, battery, false imprisonment, or any other intentional tort." As a result, no waiver of governmental immunity exists for the scuffle. As to the false imprisonment by using the jail, the use of real or tangible personal property to accomplish an intentional tort "is encompassed within the exclusion of claims arising from intentional torts." The use of the baton and the jail were done intentionally, not negligently, therefore the TTCA does not apply. Additionally, because Reyna's allegations of negligent hiring, retention, training, and supervision of Officer Rodriguez involve the transfer and receipt of information and not the use of tangible personal property or real property, they do not demonstrate a valid waiver of immunity. And because the facts alleged demonstrate an absence of a waiver of immunity, the issue of official immunity need not be addressed. All of Reyna's claims were dismissed with prejudice.

Personal Injury: *City of Brownsville v. Ahumada*, No. 13-14-00265-CV, 2015 WL 4116731 (Tex. App.—Corpus Christi July 2, 2015) (mem. op.). Julio Ahumada brought a personal injury suit against the City of Brownsville for damages arising out of a traffic accident involving a city bus. The trial court granted judgment on a jury verdict awarding Ahumada $218,982.44 in damages, and the city appealed.

On appeal, the city contended that the trial court abused its discretion when it prohibited the city's expert witness from opining as to the final resting place of Ahumada's vehicle after the accident. The court pointed out that the rules regarding expert witness designations required the city to fully disclose the subject matter of their expert witness's testimony. The city's expert witness stated in his report and during his deposition that he would not be performing an accident reconstruction. As a result, the city's expert could not be used at trial to rebut Ahumada's testimony regarding post-accident vehicle positioning, and the trial court's ruling limiting the expert witness testimony to the opinions disclosed in his report was not an abuse of discretion.

Additionally, the city argued on appeal that the trial court placed damage issues with no evidentiary support before the jury. More specifically, the city contended that there was no evidence of the following damages: (1) future pain and mental anguish; (2) physical impairment in the past and future; (3) disfigurement in the past and future; and (4) medical expenses in the

future. The trial court analyzed the record for evidence on each of the types of damages that were awarded, and in all instances found that there was more than a scintilla of evidence to warrant a submission of the damage question in the jury charge. The court affirmed the judgment of the trial court.

Tort Claims Act: *City of Austin v. Cherry*, No. 03–14–00212–CV, 2015 WL 4508819 (Tex. App.—Austin July 21, 2015) (mem. op.). This is an interlocutory appeal in a Texas Tort Claims Act case in which the Austin Court of Appeals reversed the denial of a plea to the jurisdiction, but remanded to allow the plaintiff to replead. Cherry was using a free pass to evaluate using the Montopolis Recreation Center to determine if he wanted to become a paid member for gym use. While working out, a bar fell from the weight machine he was using and struck Cherry on the forehead, injuring him. He originally sued for premise defect, but later amended his pleadings alleging a defective weight machine caused the injuries. The city filed a plea to the jurisdiction which the trial court denied, and the city appealed. The plea, however, was filed prior to the amendment and the arguments originally centered on the premise defect condition. The court noted that to properly allege a claim against the city for a defective machine Cherry must assert it lacked an integral safety component. Cherry's pleadings make no such allegation and are therefore defective. However, even though the pleadings are defective, the facts alleged do not demonstrate an incurable defect and Cherry should be given the right to replead. As a result, the case was remanded.

Governmental Immunity—Tort: *Carolyn Northcutt, as Personal Representative of the Estate of James H. Bell v. City of Hearne*, 10-14-00012-CV, 2015 WL 4727197 (Tex. App. Waco – July 30, 2015). This is an appeal from the granting of a plea to the jurisdiction in a vehicle accident case. The Waco Court of Appeals affirmed the granting of the plea citing a lack of evidence supporting a nexus.

James Bell died in a motorcycle accident when he swerved to avoid a Hearne PD patrol car which had just initiated its lights to pursue another vehicle. Northcutt asserted a negligence cause of action against the City and sought wrongful death and survival damages. The City filed a plea to the jurisdiction which the trial court granted. Northcutt appealed.

Under Tex. Civ. Prac. & Rem. Code Ann. § 101.021 sovereign immunity is waived for and accident which "arises from the operation or use of a motor-driven vehicle…" The term "arises from," as used in the TTCA, requires a nexus between an injury negligently caused by a governmental employee and the operation or use of a motor driven vehicle and requires more than simply the involvement of property. Essentially, the question before this Court is whether the evidence creates a fact question on the nexus between turning on the lights and pursuing a vehicle and Bell's accident. The court noted the investigative report in the record was objected to as hearsay and the objection was sustained. Additionally, Northcutt did not file a formal objection to the plea and did not submit any other evidence. The affidavit of the officer involved (Sullivan), described the accident. Nothing indicated he was negligent in triggering his lights and pursuing another vehicle or acted negligently in any other way. The evidence does not support a nexus and therefore there is no waiver of immunity.

The dissent believes the evidence was sufficient to create a fact question. Justice Davis actually quoted the majority of the affidavit testimony and portions of the investigative report and did a bullet point listing of the evidence he felt created the fact issue. However, the majority was not convinced the inferences made created a fact issue on nexus.

GOVERNMENT IMMUNITY – CONTRACT

Governmental Immunity: *Douglas v. City of Kemp*, No. 05-14-00475-CV, 2015 WL 3561621 (Tex. App.—Dallas June 9, 2015) (mem. op.). Lloyd Douglas built a nursing facility in the City of Kemp. He claimed that before he started construction the mayor and city manager negotiated terms of a property tax abatement agreement with him as an incentive for constructing the facility in the city. After the facility was built, Douglas received a tax statement reflecting a full assessment of taxes, with no abatement. Douglas sued the city for negligent misrepresentation, fraudulent inducement, and breach of contract. The city answered and argued that Douglas's claims were barred by governmental immunity. The trial court granted the city's plea to the jurisdiction, and Douglas appealed.

The Dallas Court of Appeals stated that assessment and collection of taxes is a governmental function. Under the Texas Tort Claims Act, there is no waiver of immunity for tort claims arising in connection with the assessment or collection of taxes by a governmental unit. Therefore, the court concluded that the trial court did not err when granting the city's plea to the jurisdiction with respect to Douglas's negligent misrepresentation and fraudulent inducement claims.

The Dallas Court of Appeals refrained from weighing in on whether the governmental/proprietary dichotomy applies to Douglas's breach of contact claim. Instead, the court stated that it already concluded that Douglas's claim implicates a governmental function for which immunity is not waived. The city also argued that a tax abatement agreement is not an agreement for goods or services. Because Douglas did not challenge this independent ground that could support the trial court's ruling, the Dallas Court of Appeals affirmed the dismissal of the breach of contract claim.

Governmental Immunity: *City of San Antonio v. Casey Indus., Inc.*, No. 04-14-00429-CV, 2015 WL 4002221 (Tex. App.—San Antonio July 1, 2015). Casey Industrial (Casey) sued CPS Energy (city) for breach of contract, among other causes of action. The claims stem from a contract the city entered into with Casey and Wheelebrator Air Pollution Control to add pollution control systems to one of the city's coal-fired power stations. Disputes between the parties led to Casey suing the City San Antonio for breach of contract. After the trial court granted Casey's motion for summary judgment, the court of appeals reversed and remanded the case to the trial court. On remand, the city filed a motion to dismiss the claim for lack of jurisdiction. The city asserted Casey's claims are outside the contract and its immunity from suit is not waived for an "extra-contractual" claim. The trial court disagreed and denied the motion. The city then filed this appeal asserting that the trial court erred in denying its motion to dismiss.

The city argued that the claims and additional compensation sought by Casey did not fall within the waiver of governmental immunity provided in Local Government Code Sections 271.152 and 271.153. As a result, Casey's claims should be dismissed for lack of jurisdiction. The San

Antonio Court of Appeals cited the decision of the Texas Supreme Court in *Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98 (Tex. 2014), in concluding that in order for the trial court to have jurisdiction over a contract claim asserted against a governmental entity, the claimant must establish the existence of a specific type of contract under Section 271.152 of the Local Government Code and a demand for certain kinds of damages that are allowed under Section 271.153.

In analyzing the damages owed to Casey, the court looked at the limits provided in Section 271.153 of the Local Government Code for breach of contract: "(1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration; (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract." The court noted that the parties to the contract acknowledged that the contract itself provides a mechanism by which Casey could seek additional compensation, so compensation owed to Casey for delays caused by a third party does not fall within Subsection 271.153(1).

The court noted that "change order" as it is used in Local Government Code Subsection 271.153(2) should be narrowly construed to mean only a change order as that phrase is defined in the contract. The court looked at the contract in question and concluded that Casey did not raise a fact issue on whether a change order was submitted, in accordance with the contract. Lastly, the court concluded that Casey was not directed to perform any additional work by the City of San Antonio. Therefore, the court reversed the trial court's order and rendered a dismissal of Casey's claims against the city.

Governmental Immunity-Annexation Agreement: ***JNC Land Co., Inc. v. City of El Paso*****, No. 08–13–00165–CV, 2015 WL 3952680 (Tex. App.—El Paso June 26, 2015).** This is an appeal from an order granting a plea to the jurisdiction filed by JNC Land Company, Inc. (JNC). JNC and the City of El Paso (city) entered into an annexation agreement. JNC subsequently constructed two streets and sought reimbursement from the city for excess-width paving of the streets. The city refused to pay. JNC filed suit against the city for breach of contract. The city filed a plea to the jurisdiction asserting its immunity had not been waived. The trial court granted the plea and dismissed the suit. JNC appealed.

JNC argued it should be reimbursed under Section 19.28.040 (which deals with excess-width paving) of the Municipal Code. The city argued this was an attempt to import an external term into the agreement. Because the agreement required the property be developed in accordance with Title 19 of the Municipal Code, including Section 19.28.040, the court concluded that Section 19.28.040 was part of (not external to) the agreement.

Next, the court analyzed whether an annexation agreement is a contract for goods or services to the city under Local Government Code Section 271.152. The city argues it is not because any benefit to the city is indirect and attenuated. The court disagreed reasoning that once JNC proceeded with the development, the city had the right under the agreement to compel JNC to develop the property in accordance with certain regulations. For instance, the agreement and

ordinances that make up the agreement required that JNC improve certain rights of way and dedicate them to the city.

The city also argued that any breach of claim was not ripe because JNC failed to present its claim to the city council as required by the city's charter. Instead, JNC had sent a demand letter addressed to the city manager. The court rejected this argument; the face of the letter reflected that it was received in the mayor's office.

After disposing of some final arguments as to why there was no further basis upon which the trial court's order could be properly sustained, the appellate court reversed and remanded the case back to the trial court.

Contractual Immunity: *Partners Dewatering Int'l, L.C. v. City of Rio Hondo*, No. 13-13-00340-CV, 2015 WL 3637853 (Tex. App.—Corpus Christi June 11, 2015) (mem. op.). This is an interlocutory appeal from the granting of a plea to the jurisdiction in a contract case which the Thirteenth Court of Appeals reversed and remanded.

Partners Dewatering International (PDI) and the city entered into a lease agreement for a liquid waste de-watering facility which was to be located at the city's waste water treatment plant. In 2013, the city voted to terminate the agreement. PDI sued the city. PDI asserted the contract was for goods and services and therefore governmental immunity was waived under Texas Local Government Code Section 271.152. The city filed a plea to the jurisdiction asserting the contract was an operating lease agreement and no special services were part of the contract. The trial court granted the plea and PDI appealed.

The court first analyzed what a "service" means under Section 271.152. PDI asserted it provided services involving the processing and disposal of sludge, the sampling, monitoring, and reporting of effluent, and the controlling of odor. The court first held the "activated sewer sludge" was not a service as it benefited PDI and only indirectly benefited the city. The same went for the effluent sampling and odor control. Further, the providing of improvements, including road and building modifications, were for the benefit of PDI in operating its business, not the city. However, PDI was also to collect, haul, and dispose of all sludge that was generated by the city's waste facility. This was something the city would have had to do if PDI was not located on-site and contracted to perform. It benefited the city directly, however the city was not required to pay PDI for the acts. PDI was solely responsible for the costs. Analyzing the lease agreement, the court determined it was possible (based on the placement of where the paragraph was in the agreement) the monthly rent could have included a partial discount to offset for this service. As a result, it's a service for which immunity is waived.

Governmental Immunity: *Archer Group, LLC v. City of Anahuac*, No. 01-14-00664-CV, 2015 WL 4624249 (Tex. App.—Houston [1st Dist.] Aug. 4, 2015). This case involves an alleged interlocal agreement between various Anahuac entities, including the City of Anahuac, and the Archer Group regarding a grant seeking project. Archer and Anahuac disagreed about whether they had entered into a valid agreement. The city, and others, had paid Archer for services, but then sued Archer for return of the funds and for other causes of action. Archer counterclaimed for additional money under the alleged interlocal agreement. The Anahuac

entities filed a plea to the jurisdiction arguing that they are protected from Archer's claims by governmental immunity and the trial court granted the plea. Archer appealed. The issue is whether, when the Anahuac entities engaged in litigation against Archer, they waived their governmental immunity pursuant to *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). In *Reata*, the Supreme Court of Texas held that a city waives its governmental immunity from suit and from liability up to the amount of any monetary claims it makes against a private party so long as the claims of the city and the private party are germane to one another. The court of appeals held that the city's (and other entities') immunity was waived because the city's claims and Archer's claims were germane to one another and were based on the same transaction—the alleged interlocal agreement. The court of appeals held that the city did not have immunity from suit but may have some immunity from liability depending on the outcome of the case.

LAND USE

Code Enforcement: *Benitez v. City of Dallas*, No. 05-13-01368-CV, 2015 WL 3511476 (Tex. App.—Dallas June 3, 2015) (mem. op.). The City of Dallas filed a petition alleging Benitez was using property illegally for outside salvage and reclamation. The city sought an injunction enjoining the illegal land use. Benitez did not file an answer, and the city filed a motion for default judgment. At the trial court's hearing, a code enforcement officer testified that Benitez did not have a specific use permit, which would have allowed the otherwise illegal use. The trial court entered a default judgment granting the city injunctive relief and awarding civil penalties. Benitez filed a motion to set aside the default judgment. When that was overruled, Benitez appealed. The Dallas Court of Appeals concluded that the evidence was legally and factually sufficient to support the trial court's award, citing the testimony and photographs produced at the hearing. The appeals court affirmed the trial court's judgment.

Zoning: *City of Dallas v. East Village Assoc.*, No. 05–14–01406–CV, 2015 WL 4456214 (Tex. App.—Dallas July 21, 2015) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a case challenging the validity of a city zoning change via ordinance. The city changed its zoning in a particular location to allow for the construction of a Sam's Club store. The City of Dallas Development Code (ordinance) allows a variety of retail uses as a matter of right, but "big box" stores are only allowed with a special use permit, which carries its own requirements for issuance. Contending that they were surprised and upset by the news that a Sam's Club store was coming to their neighborhood, property owners near East Village formed the East Village Association (Association) to challenge the sufficiency of the notice given of the proposed change in zoning. The city filed a plea to the jurisdiction which was denied. The court first determined that the Association has standing to bring suit. The city argued its purpose was to challenge the zoning which is not a proper non-profit purpose. However, the court held protecting the quality of neighborhood living is a civic purpose and qualifies. While the Association does not own property within 200 feet of the zoning change, at least one of its members does live within 200 feet, objected to the zoning, and would be adversely impacted. Next, for jurisdictional purposes, immunity is waived under the Declaratory Judgment Act if a party challenges the validity of an ordinance. Unlike a Texas Tort Claims Act case where jurisdiction is intertwined with the merits, declaratory judgment actions are not interconnected

with the underlying claim. Because lack of sufficient notice is a basis upon which the ordinance would be void, the Association has pleaded a claim. When an ordinance is challenged for lack of sufficient notice as to the scope of the change in zoning, the issue of sufficiency of the notice is not a jurisdictional question, but rather a question as to the merits. Further, the Association presented competing evidence of the sufficiency so a fact question exists anyway. Finally, the Association brings ultra-vires claims seeking an order mandating that any permits already issued under the new zoning change be cancelled. The Association sought permanent injunctive relief for ultra vires conduct predicated on a void ordinance. While the city does maintain immunity from such claims, the city officials do not.

Payday Regulation: ***ACE Cash Express, Inc. v. City of Denton*****, No. 02-14-00146-CV, 2015 WL 3523963 (Tex. App.—Fort Worth June 4, 2015) (mem. op.).** ACE Cash Express, Inc. (ACE) sued the city over its payday lending ordinances. ACE argued that the city's ordinances exceeded its police power, violated due process, and exceeded its constitutional authority. The city filed a plea to the jurisdiction, arguing that the court lacked subject-matter jurisdiction and that the city had not waived its immunity. The trial court granted the city's plea to the jurisdiction. The issue in this case was whether the civil trial court should review the effect of a criminal ordinance. ACE argued that the trial court should review the ordinance because the threat of prosecution kept ACE from testing the ordinance. First, the court noted that it was not the customers who would be criminally liable, only the corporation and its employees, and thus, the argument that this prevented the company from testing the criminal ordinance was invalid. Because customers could not be criminally prosecuted, this case is different from *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W.528 (1894). Next, ACE argued it had no way to test the ordinance in a criminal context because the city had refused to enforce ACE's self-reported violations. The court held that ACE's self-reported violations were not enough to show that the city was not enforcing its ordinances as ACE filed no criminal complaints against itself. Next, ACE argued that the city's ordinances violated the business's vested property rights. The court held that the ordinances did not interfere with a vested property right of the business, cancel previous contracts, or prevent them from operating their business. Instead, the ordinances solely regulated how the business was operated. The court of appeals affirmed the trial court's grant of the city's plea to the jurisdiction.

Nuisance/Trespass: ***Sciscoe v. Enbridge Gathering (North Texas), L.P.*****, No. 07-13-00391-CV, 2015 WL 3463490 (Tex. App.—Amarillo June 1, 2015) (mem. op.).** This is a consolidation of three separate cases with multiple parties and multiple defendants with certain procedural complexities. For the government lawyer, the important thing to take away from the case is the ability of a city to sue for damages (lost tax values) due to nuisance and trespass.

Eighteen property owners and the City of DISH sued six different energy production companies (Energy Defendants) alleging noise, light, odors and chemical particulates emanating from the facilities constituted trespass and a nuisance and a decrease in property value. Essentially, the facilities were natural gas pipeline compressor stations near the outskirts of the city. There appears to be no dispute the Energy Defendants were operating within federal and state regulations for production and emissions. Nevertheless, the city and property owners sued due to the damage in property values and loss of enjoyment of property. The trial court granted various motions ultimately dismissing the claims and the city and property owners appealed.

The Amarillo Court of Appeals spent considerable time explaining why odors and particles may constitute trespass and a nuisance. The court then explained that simply because the Energy Defendants complied with regulations on emissions does not mean they are immune from the consequences those emissions may cause. "Stated another way, just because you are allowed by law to do something, does not mean that you are free from the consequences of your action . . . . Regulatory compliance or licensure is not a license to damage the property interests of others." However, the court also held that diminution in future value or a damage of $1,000 per day is more akin to a penalty or future regulation which is preempted by federal and state law. One Energy Defendant argued the city lacked authority to sue for actions taken outside of its extraterritorial jurisdiction. The court first noted the city has authority to sue for damages. That is different than suit to enforce regulations or to attempt to regulate outside of its boundaries. "Here, DISH does not seek to regulate or abate any of Enterprise's operations but, instead, seeks to recover damages allegedly resulting from lost tax revenues occasioned by the diminution in value of its tax base . . . ." which is permissible. The court made other holdings which were specific to the property owner claims and are not addressed here.

OPEN GOVERNMENT

Public Information Act: *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264 (Tex. June 19, 2015). Boeing sued the Texas Attorney General's (AG) office after an AG letter ruling stated that a governmental entity had to release Boeing's information because the information did not meet the requirements of Texas Government Code Section 552.104 of the Public Information Act (PIA). Section 552.104 allows information to be withheld under the PIA if the information, "if released, would give advantage to a competitor or bidder." The statute and the PIA allow either a city or a company to send information to the AG's office if the city or entity wishes to keep this type of information private. Boeing argued to the AG that the information in question should be protected under Section 552.104. The AG argued that the section only protects a governmental entity's rights, not the rights of any third party. Boeing argued that it does have the right to benefit from Section 552.104 because it has the right to object to the release of the information under the statute. The Supreme Court of Texas agreed, and held that both the government and private parties can invoke Section 552.104 and protect their privacy. The Court also held that Boeing had sufficiently shown that the information in question met the requirements of Section 552.104 and held that the information could be withheld by the governmental entity.

Public Information Act: *Greater Houston P'ship v. Paxton*, No. 13-0745, 2015 WL 3978138 (Tex. June 26, 2015). In this case, the Supreme Court of Texas reviewed when a private company becomes a governmental body for purposes of the Public Information Act (PIA). Section 552.003 of the Government Code extends the PIA to any entity, or part of an entity, that is "supported in whole or in part by public funds." The Greater Houston Partnership (GHP) is a nonprofit corporation that provides services to the city under a contract. The court held that GHP is not a governmental entity because it is not funded wholly or in part by public funds. Some of the factors the court used to make its decision included: (1) GHP has over 2,000 members and only four are cities, a few clients among many; (2) GHP could run without public funds; and (3) other courts exclude companies who receive public funds pursuant to "quid pro

quo agreements." The court determined GHP is not a governmental body under the PIA under this test. However, if an entity needs public funds to exist, then it would be a governmental entity.

PERSONNEL

Whistleblower Act: *City of Bertram v. Reinhardt*, No. 03-14-00296-CV, 2015 WL 4899946 (Tex. App.—Austin Aug. 12, 2015) (mem. op.). The issue in this case is whether the city can raise for the first time on appeal that an employee failed to initiate a grievance procedure as required by the Whistleblower Act prior to filing suit. Reinhardt, a former employee, sued the city for a claim under the Whistleblower Act. At the trial court, the city raised issues related to Reinhardt's allegations but did not raise the issue of failure to initiate the grievance procedures. The district court allowed the case to go forward. At the appellate court level, the city raised the claim of failure to initiate the grievance procedure. The court of appeals held that it could look at that issue because it was a jurisdictional prerequisite under the Whistleblower Act. The court of appeals cited *Rusk State Hospital v. Black* for the proposition that a court can consider any jurisdictional arguments, even if the arguments were not raised in the trial court. 392 S.W.3d 88, 94-97 (Tex. 2012). The court of appeals held that the jurisdictional argument was valid, and then remanded the case to the court of appeals to allow Reinhardt to replead to fix the jurisdictional problem.

Personnel Arbitration: *City of Arlington v. Kovacs*, No. 02-14-00281-CV, 2015 WL 4776100 (Tex. App.—Fort Worth Aug. 13, 2015). This case involves whether an arbitrator exceeded his authority when reviewing post-termination evidence in contravention of the city's personnel policies in the firing of Kovacs. Kovacs was placed on administrative leave and then fired for sexually assaulting someone he had picked up for driving erratically, sexually assaulting his girlfriend, physically assaulting his girlfriend, and for retaliatory comments he made about other officers involved in his criminal arrests. The personnel policies he violated that lead to his termination were: (1) unbecoming conduct for the assault and family violence and for the retaliation charges; (2) conformance to laws for his family violence arrest; and (3) judgment for allowing an individual who was suspected of driving under the influence to ride in the front seat of his car and then sexually assaulting her. After the termination, Kovacs was no billed on all of the charges against him. Kovacs appealed his termination to an arbitrator. The arbitrator used the no bills in the criminal charges in his decision to order Kovac's reinstatement, and referenced the no bills in his written statement. The court of appeals emphasized in its opinion the strong favor given to arbitration decisions, but held that the arbitrator did exceed his authority when he used the evidence of the no bills in his decision to reinstate Kovacs. The city's personnel manual limited the arbitrator's authority to determining whether the employee violated the personnel rules, as charged.

Retaliation: *Taylor v. State*, No. 11-13-00207-CV, 2015 WL 4522871 (Tex. App.—Eastland July 23, 2015) (mem. op.). This is a retaliation case brought under the Texas Labor Code in which the Eastland Court of Appeals affirmed the granting of the Department of Criminal Justice's plea to the jurisdiction. Taylor resigned her position with the Department of Criminal Justice (Department) and originally brought discrimination charges centered on a particular

supervisor. However, she did not pursue the charges to conclusion. When she discovered the supervisor was retiring she reapplied for her position as a sociologist. The supervisor was on the hiring panel and wrote a comment attacking her integrity and honesty. However, Taylor did not discover the comment until a year after she was told she would not be rehired. She brought suit for retaliation and the Department filed a plea to the jurisdiction which was granted.

To exhaust her administrative remedies, Taylor would have had to file her retaliation charge within 180 days of the alleged wrongful practice. Taylor argued the discovery rule applied to this deadline. The court noted no case law supported that assertion, however, even if they were to assume the discovery rule applied, Taylor still failed to properly follow the procedure. The issue is not when she learned of the alleged acts, but when she "knew of facts, conditions, or circumstances that would cause a reasonable person to make inquiry leading to discovery of her cause of action." She learned she was not to be rehired in 2010, but waited until almost a year later to file a Public Information Act request which led to her discovery of the supervisor's comments. She knew, or should have known, of facts that in the exercise of reasonable diligence would have led to the discovery of her injury, (i.e. the decision not to rehire her). As a result, she failed to exhaust her administrative remedies. Finally, the court held the trial court is not required to make findings of fact and conclusions of law in a case such as this based on a plea to the jurisdiction.

Law Enforcement Employment: ***Marc Staff v. Colorado County, Texas and Sheriff R. H. "Curly " Wied,*** **01-14-00323-CV (Tex. App. – Houston [1st Dist.], August 18, 2015).** This is a law enforcement employment case where the First District Court of Appeals reversed the granting of a summary judgment for the county regarding whether it properly informed a deputy of an investigation prior to termination.

Staff was a Colorado County Sheriff deputy. Lieutenant Troy Neisner began an investigation of Staff for unprofessional conduct at a traffic stop, and he ultimately informed Staff that the Sheriff's Department was terminating his employment. Staff filed an administrative appeal with Sheriff Wied which was denied. The Sheriff argued Staff was an employee at will and his termination was not based on a single incident or any complaint. Staff sued seeking a declaration that Colorado County and Sheriff Wied had violated Government Code §614.022, which requires complaints against peace officers to be in writing and signed by the person making the complaint, and §614.023, which requires a copy of the complaint to be provided to the officer. Both parties filed opposing summary judgments. The trial court granted Sheriff Wied's motion and denied Staff. Staff appealed.

Government Code Chapter 614 addresses a narrow category of circumstances in which a complaint is made against a peace officer or fire fighter, and it requires a specified procedure to be followed before the employee may be terminated. Thus, the fact that a county is an at-will employer does not preclude application of the chapter. Analyzing various cases and comparing §§614.022 and .023 to civil service law comparisons, the court determined the notice provided to Staff after the investigation was not a "complaint." The "victim" of the traffic stop orally complained, but never signed a written complaint. It was not Lieutenant Neisner who was complaining since the complaint and conduct originated outside of the department. The court noted there would be a difference if the complaint had originated inside the department. Further,

the notice of violation was provided to Staff on the same day as his termination, which did not give him time or the opportunity to respond. These statutory provisions prevent the impairment of a peace officer's ability to investigate or defend against the complaints of misconduct made against him and protects peace officers from disciplinary action based on unsubstantiated allegations of misconduct. The Sheriff violated these provisions and therefore the trial court erred in granting summary judgment for the Sheriff. The court rendered as to Staff's liability claim and remanded for a determination of attorney's fees for Staff.

Whistleblower: ***Travis County, Texas; and Sheriff Greg Hamilton, in his Official Capacity v. Rick Rogers*****, 03-14-00186-CV (Tex. App.–Austin, July 29, 2015).** This is an appeal from the denial of the County and Sheriff's plea to the jurisdiction in a case alleging a breach of a settlement agreement in an employment-related dispute.

Rodgers was a patrol officer for the Sheriff. Rogers filed numerous complaints against the Sheriff and County asserting his observations of harassment, favoritism, and illegal activity by other deputies. Rodgers was later terminated and threatened suit. As part of a settlement agreement Rodgers was rehired as a Cadet Corrections Officer. The agreement stated he would not be discriminated against or treated worse because he previously filed complaints. Five years later Rodgers was refused a transfer request to the Patrol Division. He asserted the hiring board "graded him down" based on prohibited reasons under the agreement. The County Defendants filed a plea to the jurisdiction asserting sovereign immunity is not waived for settlement contracts. The trial court denied the plea and the County Defendants appealed.

Rodgers' claims could have fallen under the waiver of sovereign immunity contained within the Texas Whistleblower's Act. According to the County, filing a suit alleging facts meeting the elements of a claim under the Whistleblower Act is a statutory prerequisite to suit which Rogers failed to comply with since he never filed suit and did not complete the administrative prerequisites. However, at the time of the settlement the limitations period had not expired and Rodgers could have completed the administrative process, but for his settlement. Citing the plurality opinion in the Texas Supreme Court case of *Texas A & M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), the court held when "a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued." As a result, the denial of the plea was proper.

Texas Whistleblower Act: ***City of Houston v. Smith*****, No. 01-14-00789-CV, 2015 WL 4967020 (Tex. App. —Houston [1st Dist.] Aug. 20, 2015) (mem. op.).** This is an interlocutory appeal from the denial of the City of Houston's motion for summary judgment in a Texas Whistleblower Act suit. The petitioner, Smith, became acting administrator of the Identification Division of the Houston Police Department (HPD) in January 2010. In September 2010, he wrote a memorandum regarding various problems with RS & A, an entity hired by HPD to handle parts of the fingerprinting identification process. Smith alleges that his reassignment a month later to the Property Division of HPD was an adverse personnel action in violation of the Texas Whistleblower Act.

The Texas Whistleblower Act requires that the violation of law exposed by the public employee be one made by either the employing governmental entity or another public employee.

Independent contractors are excluded from the definition of public employee. Smith reported violations specifically by RS & A, and the issue is whether RS & A qualifies as a public employee. The Appellate Court held that RS & A is instead an independent contractor, rather than an employee of HPD.

Factors considered by the court included RS & A's right to control the progress of the work, RS & A's obligations to furnish materials to perform the job, the time for which RS & A was employed, and the method of payment. Summary judgment evidence demonstrated that RS & A had control over decisions regarding staffing, which cases to prioritize, and the creation and implementation of its training program. On the other hand, RS & A furnished only some of the materials used in the fingerprint lab. Regarding time of employment, RS & A was initially hired for a two-year term, which was extended through a two-year option. It was paid a flat rate for the contract term.

The court found that the factors of control, time of employment, and method of payment weighed heavily in favor of RS & A being an independent contractor. A violation of the Texas Whistleblower Act therefore did not exist, and the court granted the city's motion for summary judgment as a matter of law.

PROCEDURAL

Regulation: ***Patel v. Texas Dep't of Licensing & Regulation,*** **No. 12-0657, 2015 WL 3982687 (Tex. June 26, 2015).** In this case, the Supreme Court of Texas held that the state regulation for licensing of eyebrow threaders is not rationally related to health and safety. The importance of this case to local governments is the analysis of the extent to which any governmental regulation must be tied to its governmental purpose.

Eyebrow threading involves the removal of eyebrow hair and shaping of eyebrows with cotton thread. In 2011, commercial threading became regulated under Texas Occupations Code Section 1602.002 as a cosmetology practice. An operator must complete between 750 and 1,500 hours of instruction and pass a test (depending on the type of license) to be licensed to thread. The plaintiffs (Threaders) sought a declaration that the state regulations are unconstitutional because the regulations place "senseless burdens on eyebrow threaders and threading businesses without any actual benefit to public health and safety." For example, out of the required hours, substantial time must be spent on topics such as makeup, management, cleansing, and aromatherapy. The tests required do not normally have questions regarding threading. The state filed a plea to the jurisdiction and traditional summary judgment. The trial court denied the plea, but granted the state's motion for summary judgment and denied the Threader's motion for summary judgment.

The court first determined that the declaratory judgment claims triggered jurisdiction. It carefully carved out an explanation that the case is not one about *ultra vires* actions, because such claims are to prevent officials from acting unlawfully. Instead, it is a claim directly challenging the constitutionality of a statute/regulation. The state is therefore a proper party, not simply the officials. The Threaders had standing to make the challenge, although the court only

focused on the two who were issued notices of violations. The cases are ripe because administrative enforcement, although not yet underway, is more than simply speculative. Additionally, because the relief available on administrative appeal is more limited than the relief sought in the present suit, the doctrine of redundant remedies (preventing UDJA actions on the same subjects as other avenues of relief) does not apply. Further, because the Threaders could not challenge the constitutionality of the rule under the administrative process, the doctrine likewise does not apply. The court then held that Article I, section 19 of the Texas Constitution (due course of law provision) affords more protection than the federal constitution, so the federal "rational basis" standard is not applicable.

After a detailed analysis of the proper standard to review a due course of law challenge, the court ultimately held that to overcome the presumption a statute is constitutional "the proponent of an as-applied challenge to an economic regulation statute under § 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." Under this standard, the court did hold that the general regulation of threading is proper as some health concerns are associated with improper threading techniques. However the court held 42% of the training required had nothing to do with public health and safety relating to threading. The percentage is not as important if the hours are low in number, however, the cost and burden increase the larger the number of hours. "In the case of the Threaders, however, the large number of hours not arguably related to the actual practice of threading, the associated costs of those hours in out-of-pocket expenses, and the delayed employment opportunities while taking the hours makes the number highly relevant to whether the licensing requirements as a whole reach the level of being so burdensome that they are oppressive."

The dissent by Chief Justice Hecht took great issue with the new "oppressive" standard adopted by the majority. He would have held the federal "rational basis" test is all that is needed and if the regulations are rationally related to the objective, then the regulation is proper. The majority's opinion was simply legislating from the bench and created a very impractical standard. Justice Guzman also dissented and emphasizes the impracticality of the new standard as well as the assertion the majority is legislating.

Separation of Powers: ***City of Ingleside v. City of Corpus Christi*****, No. 14-0548, 2015 WL 4498005 (Tex. July 24, 2015) (per curiam).** This boundary dispute involves the interpretation of an ordinance establishing a "shoreline" as a common border and whether the answer to where a border is can be decided by a court or is a political question that is non-justiciable. The Supreme Court of Texas in this case held that interpreting the city's ordinance was a justiciable question and did not require the Court to decide on the non-justiciable issue of where the border actually is. The Court discussed separation of powers and the determination of boundary disputes. The Court sent the question of whether the shoreline could be changed by artificial and natural fixtures to the court of appeals.

Solid Waste Permitting: ***Texas Comm'n on Envtl. Quality v. City of Aledo*****, No. 03–13–00113–CV, 2015 WL 4196408 (Tex. App.—Austin July 8, 2015) (mem. op.).** The cities of Aledo and Willow Park sought judicial review of the Texas Commission on Environmental

Quality's (TCEQ) final order issuing a permit to construct and operate a new municipal solid waste transfer station to Republic Waste Services. At a preliminary hearing conducted by the State Office of Administrative Hearings (SOAH), the cities were denied party status in the contested case to consider issuance of the permit. In their district court suit, the cities asserted that they were improperly denied party status and the TCEQ's issuance of the permit was reversible error. The trial court agreed and reversed the TCEQ's final order, vacated the issued permit, and remanded the matter to TCEQ. Both the TCEQ and Republic brought this appeal of the trial court's decision.

Republic argued that because the cities were not "parties" to the contested-case proceeding, they were not entitled to judicial review. However, the court agreed with the cities that Section 5.351 of the Water Code governs jurisdiction over their administrative appeal and concluded that the district court did have subject-matter jurisdiction over the cities' petition for judicial review.

The court of appeals analyzed the record of the testimony of both Aledo and Willow Park's mayors and concluded that each mayor made a minimal showing that the cities' justiciable interests were not common to members of the general public. Therefore, the court held that the administrative law judge at SOAH did not act arbitrarily or abuse his discretion in concluding that neither city had a justiciable interest. The court then reversed the district court's judgment and rendered judgment affirming TCEQ's final order and issuance of permit to Republic.

TAKINGS

Zoning: *City of Leon Valley v. Wm. Rancher Estates Joint Venture*, No. 04-14-00542-CV, 2015 WL 2405475 (Tex. App.—San Antonio May 20, 2015) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction arising from the denial of a zoning change. Appellees own varying interest in land within the city and filed an application to change the zoning to better sell the property. A city councilwoman (Baldridge) who is a real estate broker allegedly contacted appellees stating she had a client who wanted to purchase the property and threatened to use her power on the city council to block any zoning changes if they did not accept her client's offer. Appellees did not accept and the city denied the zoning change request. Appellees also asserted the city trespassed on the property to dig a trench that altered the natural flow of water resulting in flooding. They sued the city and named and unnamed city employees.

The city defendants filed a plea to the jurisdiction which the trial court denied. The city appealed. The court first held that the individual defendants were sued in their individual capacity. "A person sued only in her individual capacity does not have sovereign or governmental immunity from suit." Texas Civil Practice and Remedies Code Section 51.014 (the statute authorizing interlocutory appeals) provides that the courts of appeal have jurisdiction for an interlocutory appeal for an official if the official is appealing a motion for summary judgment. The court holds individual immunities are affirmative defenses, not jurisdictional defenses. The officials are appealing the denial of a plea to the jurisdiction; that is not authorized under Section 51.014(a)(5), so their appeal is dismissed.

The court then determined there was no waiver of immunity as to the city for the asserted claims under the Water Code, Health & Safety Code, Natural Resources Code, Penal Code, and Property Code, as asserted by the appellees. Therefore the trial court should have granted the plea as to those claims. The city asserted the appellees' claims under the Texas Open Meetings Act (TOMA) are not proper because they seek monetary damages for such claims. The city also asserts the pleadings do not indicate TOMA claims against the collective body, only against individuals. The court determined that the assertion of immunity from monetary damages is a claim of immunity from liability, not immunity from suit. Therefore, it is improper to raise in a plea to the jurisdiction. TOMA waives immunity for claims brought to compel compliance or to void actions taken in violation of the Act. The closed meeting allegations involving individuals are still attributable to the city. The court then noted that some evidence existed (when taken in the light most favorable to the non-movant) that the city failed to properly take minutes of the meetings and did not accurately reflect what occurred. As a result, the trial court has jurisdiction to hear the TOMA claims raised.

The court held the arguments regarding a lack of evidence to establish a conflict of interest were not raised sufficiently to give the other side a fair opportunity to respond, therefore they are remanded. The city contends the minutes and agenda for meeting show the city council's vote on appellees' zoning request was unanimous. However, the minutes do not conclusively establish the other city council members would have voted the same way had Baldridge abstained, so the plea was properly denied. The court did hold the city is immune from trespass claims. The court next chided the city, holding "[w]ithout reference to any of appellees' specific requests for declaratory relief, the City argues the trial court erred by denying its plea to the jurisdiction because there is no waiver of immunity 'for monetary damage relief or relief for interpretation of statutory rights' under the Declaratory Judgment Act." Since the court already determined declaratory rights were proper to seek under TOMA, the plea was properly denied as to the declaratory judgment.

Takings: *Harris Cnty. Flood Control Dist. v. Kerr*, No. 13-0303, 2015 WL 3641517 (Tex. June 12, 2015). The Kerrs sued the county and the flood control district (the entities) when their property flooded due to overdevelopment and arguably faulty flood planning and implementation. The Kerrs brought a takings claim, arguing that the entities' approval of new development without adding additional flood control measures caused their home to flood. The entities argued that there is no evidence that their intent in flood planning or development approval was to damage the Kerr's property for a public purpose. Both the trial court and the court of appeals denied the entities plea to the jurisdiction. To move forward with their case, the Kerrs were required to show that the governmental entities intended to take their property, that the entities caused the taking, and that the taking was for public use. The Supreme Court of Texas held that the Kerrs had raised a fact issue as to these three elements. The court noted that the Kerrs did not argue that the entities had a duty to stop all flooding, but only that once the entities knew that flooding was substantially certain to occur, that they should not have approved the new development as they did, and that they adopted incorrect flood plans. The court held that the approval of new development and the adoption of flood control measures was for the public.

The dissent by Justice Willett points out that, after this case, governmental entities will be better off not doing anything about planning or preventing flooding because they have liability for damages if they do anything at all.

Takings: *Church v. City of Alvin,* No. 01-13-00865-CV, 2015 WL 3916708 (Tex. App.—Houston [1st Dist.] June 25, 2015)(mem. op.). Church filed a takings claim against the city after the city agreed to allow the Texas Department of Transportation (TxDOT) to rebuild a city bridge which impaired access to Church's property, destroyed some trees, and changed the drainage to his property. Church argued that the city is also liable under the Tort Claims Act because motor-driven equipment was used to build the bridge. First, the court of appeals dismissed Church's takings claim because Church's access was not materially or substantially impaired. The court determined that his driveway was not completely or permanently obstructed and he still had reasonable access to his driveway. The court of appeals then reviewed whether the city's agreement to allow TxDOT to undertake the bridge project led to the drainage issues and destruction of the trees. The court held that the city's agreement with TxDOT did not show an intent or certainty that damage would occur to Church's property, two requirements of a takings claim. Finally, the court of appeals reviewed Church's third argument that the city's immunity was waived under the Tort Claims Act because motor-driven equipment caused the tree destruction and drainage problems. The court dismissed this argument because no city employee was involved in the project in the use of motor-driven equipment; the city had only agreed to allow TxDOT to undertake the project. The court of appeals upheld the trial court's grant of the plea to the jurisdiction.

TAXES

Delinquent Property Taxes: *Heritage Operating, L.P. v. Barber Hill Indep. Sch. Dist.*, No. 14-14-00187-CV, 2015 WL 4051971 (Tex. App.—Houston [14th Dist] July 2, 2015) (mem. op.). Heritage owed a storage facility in the City of Mont Belvieu. Heritage paid property taxes on the property for the 2003-2007 tax years, with the exception of 2004, when Heritage claimed it did not receive notice of appraisal. The city, county, and school district ("taxing units") sued Heritage for the over $800,000 in delinquent property taxes, penalties, and interest for the 2004 tax year. Heritage filed a counterclaim seeking a declaration that the 2004 tax was void due to the taxing units' failure to comply with Tax Code provisions. The trial court ultimately granted the taxing units' motion for summary judgment, and Heritage appealed.

On appeal, Heritage argued that the trial court erred by granting the taxing units' motion for summary judgment because Heritage did not receive notice of appraised value from the chief appraiser as required by Tax Code Section 25.19. The court disagreed with Heritage, finding that Heritage did receive the tax bill in 2007, and was required to exhaust its administrative remedies in order to raise this issue to defeat a summary judgment. Tax Code Section 42.09 establishes a detailed set of exclusive procedures which property owners must exhaust before raising grounds of protest in defense of the suit to collect delinquent taxes. As a result, the taxing units conclusively established that they were entitled to summary judgment. The court overruled Heritage's sole issue and affirmed the judgment of the trial court.

Tax Foreclosure: *Roal Global Corp. v. City of Dallas*, No. 05-14-01049-CV, 2015 WL 2407827 (Tex. App.—Dallas May 21, 2015) (mem. op.). This is an interlocutory appeal from the granting of the city's plea to the jurisdiction in a case involving an interpretation of the Tax Code which the court of appeals affirmed. The main issue is whether the declaratory judgment claims are permitted since no challenge to an ordinance or statute exists. Roal Global alleges it purchased two properties from the city which the city acquired through tax foreclosure, but the city subsequently asserted Roal Global owed the outstanding property taxes. Roal Global sued the city which responded with a plea to the jurisdiction. The trial court granted the plea and Roal Global appealed. Roal Global was essentially seeking a declaration of its rights and status under sections of the Tax Code by asserting the city should have applied the sale proceeds to the back taxes. However, the Uniform Declaratory Judgment Act does not waive the government's immunity from a suit seeking a declaration of rights under a statute or that government actors violated the law, only that a statute or ordinance is invalid. As a result, the plea was properly granted. And since this is an interlocutory order and other parties remain, once the stay under Texas Civil Practices & Remedies Code Section 51.014(b) is lifted, Roal Global can add ultra-vires claims if it wishes, but there is no need to allow suit against the entity to continue and no need to allow them to re-plead against such entity.

MISCELLANEOUS

Water: *Navarro Cnty. Wholesale Ratepayers v. Covar*, No. 01-14-00102-CV, 2015 WL 3916249 (Tex. App.—Houston [1st Dist.] June 25, 2015) (mem. op.). The City of Corsicana (city) sells water to both residential and wholesale customers, and the city's rates treat residential and wholesale customers the same. As the amount of water a customer uses increases, the cost per 1,000 gallons of water increases, making wholesalers pay much more for the majority of their water compared to residential customers. The wholesale customers argued that the city's rates affected the public interest as defined by the Texas Administrative Code, and brought this argument to the Texas Commission on Environmental Quality (TCEQ) for a hearing. The case was heard by the State Office of Administrative Hearings (SOAH) and the judge found that the rate did not adversely affect the public interest. TCEQ and the district court agreed with the judge. The wholesale ratepayers brought four arguments to the court of appeals: (1) rate discrimination must be considered in a public interested hearing; (2) TCEQ's agency rules are invalid if TCEQ can interpret the public interest rules as not allowing the consideration of rate discrimination; (3) a wastewater subsidy is not a "cost of service" under the rules; and (4) a utility fund is not a "changed condition" under agency rules.

Texas Water Code Sections 11.036 and 11.041 prohibit discrimination in the prices and terms of water contracts. Case law and TCEQ rules state that TCEQ can only change a rate if the rate "adversely affect[s] the public interest." *See Texas Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 335 (Tex. App.—Austin 1994, writ denied). TCEQ's rules require that the TCEQ determine that the rates affect the public interest before it can review the rates themselves. The court of appeals noted that just because a rate is more than the cost of providing the service does not mean the rate is adversely affecting the public interest. The court held that the rules governing whether a rate adversely affects the public interest does not take into account any differences between how retail and wholesale ratepayers are treated. Also, the ratepayers in this

case were all paying the same rates. The court then held that the rules were valid and did take into account discrimination, just not possible discrimination based on a difference between how retail and wholesale ratepayers are treated. Because the court of appeals held that there was no proof that the city's rates adversely affected the public interest, the court then declined to review the ratepayers other two issues which were based on a review of the rates themselves (cost of service and wastewater subsidy). The court of appeals upheld the trial court's judgment for the city.

Zoning: *City of Shavano Park v. Ard Mor, Inc.*, No. 04–14–00781–CV, 2015 WL 4554524 (Tex. App.—San Antonio July 29, 2015) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction involving a challenge to an adjacent development agreement and zoning change. The San Antonio Court of Appeals reversed in part and affirmed in part. Ard Mor operates a child care facility. Lockhill Ventures, LLC, owns two lots of land adjacent to the childcare facility, which is subject to deed restrictions. Lockhill Ventures intends to build a gas station and gas storage tanks next to Ard Mor's facility. The city's zoning does not list "gas station" as a permitted use. However, the Lockhill property is subject to a development agreement in which, once annexed, Lockhill is permitted a project which includes a convenience store with gas station. Ard Mor sued the city and Lockhill. The city filed a plea to the jurisdiction, which was denied after the court heard four days of testimony in a temporary injunction hearing. The trial court enjoined Lockhill, but not the city. The city remained a party to suit. Ard Mor's numerous requests for declaratory relief against the city fall into four requests for relief: construe various city ordinances, declare the agreement void, declare the annexation ordinance void, and declare the actions of the city and its officials to be ultra vires acts which violated their due process rights. The court first addressed Ard Mor's request to invalidate the agreement as being contract zoning. The court held that since the city did not set its plea to the jurisdiction for a hearing, but merely urged it during the temporary injunction, Ard Mor did not have the ability to develop the record to establish its jurisdictional basis. Therefore, remand on this claim is proper. Ard Mor's claims challenging the annexation ordinance are not attacks on procedural irregularities (which can only be brought in a quo warranto proceeding) but an assertion that contract zoning makes the ordinance void. This is a permissible challenge under the Declaratory Judgment Act. However, Ard Mor failed to allege a proper due process claim, mainly because it did not allege it was treated differently than someone else. Additionally, Ard Mor brought ultra-vires claims against the city, not its officials. Such claims can only be brought against officials and therefore the claims against the city are improper. Finally, the court held the city did not properly challenge the claims to interpret its zoning ordinances, so it will not address them on appeal. As a result, the court affirmed in part, reversed in part, and remanded for further proceedings.

Utilities: *Oncor Elec. Del. Co. v. City of Richardson*¸No. 05-14-00843-CV, 2015 WL 4736827 (Tex. App.—Dallas Aug. 11, 2015). In this case, the court overturned a trial court ruling that had affirmed municipal authority to require private utilities to relocate their facilities for public projects. The dispute began in 2010 when, pursuant to franchise terms, the city requested that Oncor relocate its utility poles in 32 alleys for reconstruction and widening. Even though the franchise required the relocation of Oncor's facilities – at Oncor's cost – when required for city construction projects, Oncor refused to do so. In 2012, the city filed suit in state district court in Dallas to enforce the franchise provisions and – alternatively – to enforce the common law rule

on relocation. The common law rule has come from court opinions over the years that have concluded that the public's right to use streets is paramount to a private company's.

In 2014, the trial court ordered summary judgment in favor of the city on all issues. The appeals court reversed and rendered judgment in favor of Oncor. The court of appeals used documents that were not reviewed by the trial court to make its decision under the doctrine of "judicial notice." During the period in which the dispute occurred, Oncor had filed a rate case with the Public Utility Commission (PUC) seeking changes in its rates, operations, and services as set forth in its "tariff." The PUC defines "tariff" as "the schedule of a utility…containing all the rates and charges stated separately by type of service, the rules and regulations of the utility, and any contracts that affect rates, charges, terms or conditions of service."

In 2011, Oncor and the city reached a settlement on the rate changes, and the city enacted an ordinance accepting a proposed settlement with new tariff rates. There was a dispute at the trial court about whether the tariff documents were properly in evidence. The appeals court concluded that they were, and that the city had agreed to the tariff in the 2011 settlement ordinance. Those issues were the deciding factors in the case because the tariff had a standard term providing that "the *entity requesting* such removal or relocation, *shall pay* to Company the total cost of removing or relocating such Delivery System facilities." The court of appeals reversed the trial court and held in favor of Oncor.

Economic Development: *City of Dallas v. City of Corsicana, Navarro County, et al.*, No. 10-14-00090-CV, 2015 WL 4985935 (Tex. App.—Waco Aug. 20, 2015). This case centers around tax abatement agreements between Home Depot and competing governmental entities. Home Depot entered into a tax abatement agreement to move its warehouse facility in Corsicana to Dallas while still in a tax abatement agreement with Corsicana and other taxing entities in Navarro County (Corsicana). Home Depot then shuttered its warehouse in Corsicana and moved it to Dallas. Corsicana sued Home Depot for liquidated damages under its tax abatement agreements, and that suit settled. Then Corsicana sued Dallas for tortious interference with tax-abatement agreements. Dallas filed a plea to the jurisdiction, arguing that tax abatement agreement negotiations are a governmental function. Corsicana argued that the activity in question was a proprietary act. The trial court denied Dallas' plea to the jurisdiction. Dallas appealed that decision to the Waco Court of Appeals. The court of appeals analyzed the differences between governmental functions and proprietary functions. The court held that the governmental nature of the negotiation of the tax abatement agreement was not pertinent to this case, as the action that caused liability was business recruiting--tortiously interfering with Corsicana's agreement--not negotiating the agreement. The court then held that business recruiting is a proprietary function, benefitting only the citizens of a certain governmental entity, and thus could open a governmental entity up to liability. The court of appeals affirmed the denial of the plea to the jurisdiction and sent the case back to the trial court. The court also allowed Rule 202 depositions between Corsicana and Dallas to go forward.