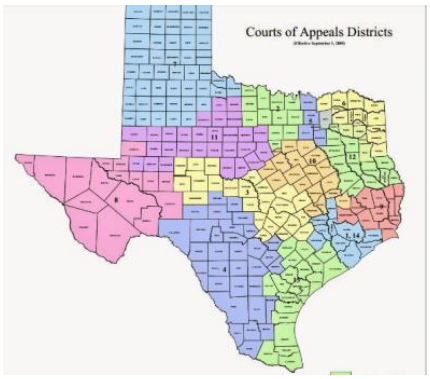

RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TEXAS CITY ATTORNEYS ASSOCIATION
SUMMER CONFERENCE
Bastrop
October 5, 2016

Presented by:
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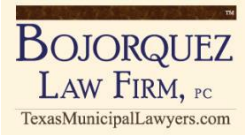

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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law, and worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office while there. 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 became an associate of the Bojorquez Law Firm in April 2016. Laura specializes in employment law, sign regulation, and open government. Besides serving Texas 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 everyone's 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.

Table of Authorities

ANIMAL CONTROL 4
CONDEMNATION 4
ELECTIONS 5
GOVERNMENTAL IMMUNITY- CONTRACTS 6
GOVERNMENTAL IMMUNITY- TORTS 7
LAND USE 12
MUNICIPAL FEES 14
PERSONNEL 16
PUBLIC INFORMATION ACT 22
PUBLIC SAFETY 23
TAKINGS 26
TAXES 30
UTILITIES 31
WATER 33
ZONING 34

RECENT STATE CASES

ANIMAL CONTROL

***Lira v. Greater Houston German Shepherd Dog Rescue, Inc., No.* 14-0964, 2016 WL 1267745 (Tex. April 1, 2016)**. This case involved a dog that escaped from its owner's home with no collar or microchip. The dog ended up in the City of Houston's animal control facility. After the "hold period" in the city's ordinance, the dog was transferred to a rescue organization. The organization then placed the dog within a foster home. Sometime later, the original owner learned that the dog was in foster care, and asked the rescue organization to return the dog to her. When the organization refused, she sued to get her dog back. The court concluded that "[p]utting an animal down is arguably an act so inconsistent with the rights of the owner as to imply a divestment of ownership, but that…did not apply because [this dog] was picked up without tags and was not euthanized." Such a statement appears to indicate that the court may question the practice of euthanasia of stray animals in the custody of a city, especially absent clear ordinance language divesting the ownership rights to the animal.

CONDEMNATION

***In re Lazy W District No. 1.*, No. 15-0117, 2016 WL 3157559 (Tex. May 27, 2016)**. This original mandamus proceeding involves two governmental entities, one of which petitioned for condemnation of a water pipeline easement across the other entity's land. The Tarrant Regional Water District (water district) supplies water to some two million Texans across 11 counties. The water district and the City of Dallas agreed to build a 150-mile pipeline to transport water owned by the city in Lake Palestine. Lazy W District No. 1 (Lazy W) is a municipal utility district which owns land over which an easement is necessary to run the pipeline. The water district petitioned for condemnation for the easement over the Lazy W's property in the district court. The district court appointed three special commissioners to determine the value of the proposed easement. When the Lazy W learned of the order, it filed a plea to the jurisdiction, asserting its immunity as a governmental entity and requesting that the appointments be vacated and the petition dismissed. Normally, a trial court cannot interfere in the condemnation commissioners' proceedings and does not become involved in the condemnation case again until the commissioners file their award. The district court vacated its appointment of the commissioners and declined to proceed with anything else before hearing and ruling on the plea. The water district sought mandamus relief in the court of appeals. That court of appeals held that "the trial court was without jurisdiction to refuse to appoint special commissioners." Lazy W appealed.

The Supreme Court of Texas went through Chapter 21 of the Property Code regarding condemnation and the procedures, noting the administrative nature of the commission and the judicial appeal aspects of the court. The water district contended that the trial court cannot rule on the Lazy W's plea to the jurisdiction until the commissioners issue their award. However, the court disagreed holding "Section 21.014 is certainly mandatory, but it is not restrictive. It requires the court to appoint commissioners, but it does not forbid any other action." The court went through different instances where it is proper to challenge the jurisdiction of the trial court to appoint commissioners. "Courts always have jurisdiction to determine their own jurisdiction." "We have never held that a trial court in a condemnation case is powerless to determine its own subject matter

jurisdiction before appointing commissioners." "We do not hold that a trial court must make an early ruling in every situation, only that the trial court did not abuse its discretion in determining to do so here." However, the court was quick to add it expressed no view on whether the Lazy W is immune from suit and expressly declined to address that issue here.

***Wedgeworth v. City of Amarillo*, No. 07-15-00301-CV, 2016 WL 2941123 (Tex. App.—Amarillo May 17, 2016) (mem. op.)**. This is a structural standards case where the Amarillo Court of Appeals reversed the trial court's granting of a plea to the jurisdiction. Wedgeworth owned a house damaged by fire. The property was vacated and two years later the city informed Wedgeworth she had two months to repair the structure. The city posted the property for condemnation. The city council conducted a hearing (at which Wedgeworth appeared) and declared the structure a public nuisance. The city demolished the structure three months later. After demolition, Wedgworth sued alleging a takings claim. The city filed a plea to the jurisdiction asserting Wedgeworth did not appeal the demolition resolution to district court within 30 days as she was entitled to, therefore she did not exhaust her administrative remedies. The trial court granted the city's plea and Wedgeworth appealed.

First, the court of appeals determined its own jurisdiction, holding that the order granting the plea to the jurisdiction was final and appealable. Next, even under a takings claim, immunity from suit is not waived by a governmental unit until a claimant complies with all statutory prerequisites to suit. *See* TEX. GOV'T CODE § 311.034. However, the 30 day window to file suit and challenge the council's determination is created by ordinance and does not qualify as a statutory prerequisite. Therefore, the trial court was not deprived of its jurisdiction and the plea should not have been granted as to those defendants who had entered an appearance.

ELECTIONS

***City of Cleveland v. Keep Cleveland Safe*, No. 09-15-00076-CV, 2016 WL 4040121 (Tex. App—Beaumont July 28, 2016)**. Plaintiff, Keep Cleveland Safe (KCS) filed a petition attempting to stop the city from placing an issue on the ballot for the May 2014 election regarding photographic traffic signal enforcement systems or red light cameras. The trial court permanently enjoined the city and the city appealed.

The City of Cleveland is a home-rule city which passed an ordinance authorizing and implementing a photographic traffic signal enforcement program. The city received a petition to ban all red light cameras from a group of citizens. The city council accepted the Red Light Ban Petition and placed the measure on the ballot as part of a charter amendment. KCS filed this lawsuit in response. KCS argued the Texas Transportation Code vests exclusive control over red light cameras with the "governing body," making the subject outside the scope of permissible referendums and initiatives. After a bench trial the trial court issued a permanent injunction prohibiting the city from ever considering an initiative or referendum on red light cameras.

The legislature may remove, by general law, a subject matter from the initiatory process. However, the claims cannot be moot at the time of trial or appeal. The city asserts even though the May 2014 election has passed, the injunction prohibits it from ever holding such an election. KCS asserts the claim is not moot because others can still submit another initiative to ban the cameras and the subject could evade judicial review. However, the court held the mere possibility someone else

could bring an initiative on the same grounds does not mean the matter is excepted from the mootness doctrine. KCS failed to demonstrate how there is a reasonable expectation that the city will be subjected to the same action again. Additionally, even if the matter was not moot, there is no justiciable question. "It is well settled that separation of powers and the judiciary's deference to the legislative branch require that judicial power not be invoked to interfere with the elective process."

The trial court lacked subject matter jurisdiction to issue a permanent injunction that enjoined the election process. "Being lawfully clothed with legislative power, the City should be allowed to exercise that power and to the dictates of its legislative judgment, regardless of whether or not any particular enactment may be valid or invalid." Finally, a court should not "declare rights on facts which have not arisen or adjudicate matters which are contingent, uncertain, or rest in the future." As a result, the court dissolved the permanent injunction and dismissed the case.

GOVERNMENTAL IMMUNITY- CONTRACTS

***County of Galveston v. Triple B Services, LLP,* No. 01-15-00565-CV, 2016 WL 3025261 (Tex. App.—Houston [1st Dist.] May 26, 2016)**. This is a contractual immunity case involving a road construction project where the First District Court of Appeals affirmed-in-part and reversed-in-part the denial of a plea to the jurisdiction. Triple B Services, LLP, filed a lawsuit against Galveston County in a dispute over a road-expansion project. Under the contract, the county was responsible for moving certain utilities. Although Triple B's plans for the construction project anticipated that the county would move the utilities by a particular date, the county did not move the utilities until almost a year later. Triple B contends that it incurred additional costs to timely complete the project as a direct result of the county's alleged delay in moving the utilities. After completing the expansion on time, Triple B sued the county for breach of contract. The county filed a plea to the jurisdiction which the trial court denied. The county appealed.

The legislature has provided a limited waiver of immunity for breach-of-construction-contract lawsuits against a county. TEX. LOC. GOV'T CODE § 262.007. Although Triple B's expert testified to costs that Triple B incurred "as a direct result of County-caused delays in completing utility adjustments," he explicitly denied that the damages were "delay damages" as understood in construction law. He distinguished between "delay" damages and "disruption" damages. The county contends that the phrase "owner-caused delays" in Section 262.007(b)(1) of the Texas Local Government Code limits the statute's application to "delay damages," and, therefore, does not include "disruption damages." And, because Triple B's expert testified that Triple B was not seeking "delay damages," the county asserts it remains immune. Further, the county asserts the damages Triple B alleges are consequential damages, for which immunity is not waived. However, the court disagreed and held Section 262.007 allows a claim for disruption damages against a county if the disruption damages directly result from the county's delay in performing its contractual obligations.

Based on the limited record, the court held the alleged damages could also be the "direct result" of the county's failure to timely act. Further, the Texas Prompt Pay Act (PPA) applies solely to contracts between a vendor and a government entity. Based on the plain text of Section 262.007, a county may be sued for late payment and "interest as allowed by law." The interest sought by Triple B is "interest allowed by law"—namely, allowed by the PPA—for which immunity is

waived. Finally, while Chapter 262 waives immunity for attorney's fees, Triple B failed to properly plead a basis for receiving such fees. The statute is a waiver of immunity and not a basis for a substantive claim for attorney's fees. As such the plea should have been granted as to such fees.

GOVERNMENTAL IMMUNITY- TORTS

***Sampson v. University of Tex*., No. 14-0745, 2016 WL 3212996 (Tex. June 10, 2016)**. This is Texas Tort Claims Act (TTCA) case, where the Texas Supreme Court held an extension cord which causes a trip and fall is to be analyzed under a "premise defect" analysis instead of a "tangible personal property" analysis. As Sampson was walking to his office on a sidewalk adjacent to a University of Texas (UT) tailgate party, he tripped over an extension cord strung across a pedestrian walkway. Sampson sued under the TTCA under both a negligent condition or use of tangible personal property claim and a premise defect claim. UT filed a plea to the jurisdiction which was denied. The Third Court of Appeals reversed the denial and dismissed the claim. Sampson appealed.

Under the TTCA, a different standard of care applies to a premise defect claim than a claim based on the negligent condition or use of tangible personal property. Citing to prior precedent, the court held ". . . a plaintiff cannot plead around the heightened standard for premises defects, which requires proof of additional elements such as actual knowledge, by casting his claim instead as one for a condition or use of tangible personal property." After going through an extensive history and definition analysis the court held "[t]his determination turns on whether the contemporaneous 'action or service' (use) or 'state of being' (condition) of the tangible personal property itself caused the injury, or whether the tangible personal property created the dangerous real-property condition, making it a premises defect." Here ". . . [t]he dangerous condition was the way the extension cord was positioned over the concrete retaining wall, resulting in a gap between the ground and the cord. The injury did not result from the use of tangible personal property because a UT employee was not putting or bringing the cord into action or service at the time of the injury." Nor was the gap between the ground and the cord a condition of tangible personal property because it was not the defective state of the actual cord that resulted in the injury. This is a premise defect case, and under that standard, Sampson was unable to produce evidence UT had actual knowledge of the danger. "Hypothetical knowledge will not suffice." An inference is not reasonable if premised on mere suspicion. After going through the evidence presented, the court held that ". . . while UT may have known the extension cord was capable of being pulled off of the ground, this amounts to constructive knowledge, which is not the same as actual knowledge of a dangerous condition." The court affirmed the dismissal of the claims against UT.

Justice Lehrmann filed a dissent, arguing that there was sufficient evidence of actual notice of a defect by the University of Texas to overcome the plea to the jurisdiction.

***City of Dallas v. Sanchez*, No. 15-0094, 2016 WL 3568055 (Tex. July 1, 2016)**. This is a Texas Tort Claims Act (TTCA) case where the Texas Supreme Court holds immunity is not waived due to an alleged malfunction with a dispatch system. Dallas dispatch received two 9-1-1 emergency calls at the same apartment complex requesting assistance with helping drug-overdosed victims. The city erroneously concluded that the two closely timed 9-1-1 calls concerning overdose victims at the same locale were redundant. One was helped, while Sanchez died. In a wrongful-death suit against the City of Dallas, Sanchez's parents allege the 9-1-1 telephone system

malfunctioned and disconnected Sanchez's call before the responders could establish the overdose reports were not duplicative. The city filed a Texas Rules of Civil Procedure Rule 91a jurisdictional challenge which the trial court denied and the court of appeals affirmed. The city appealed.

The court reviews the "merits of a Rule 91a motion de novo because the availability of a remedy under the facts alleged is a question of law and the rule's factual-plausibility standard is akin to a legal-sufficiency review." For immunity to be waived under Texas Civil Practices and Remedies Code Section 101.021(2) of the Texas Tort Claims Act, "personal injury or death must be proximately caused by a condition or use of tangible personal or real property." When a condition or use of property merely furnishes a circumstance "that makes the injury possible," the condition or use is not a substantial factor in causing the injury. After analyzing the pleadings, the court held the alleged telephone system malfunction was not a proximate cause of Sanchez's death. "Between the alleged malfunction and Sanchez's death, emergency responders erroneously concluded separate 9-1-1 calls were redundant and left the apartment complex without checking the specific apartment unit the dispatcher had provided to them. Moreover, approximately six hours passed between the phone malfunction and Sanchez's death, further attenuating the causal connection. Although disconnection of the telephone call may have contributed to circumstances that delayed potentially life-saving assistance, the malfunction was too attenuated from the cause of Sanchez's death—a drug overdose—to be a proximate cause." "Sanchez's death was caused by drugs, the passage of time, and misinterpretation of information." The court rendered judgment and dismissed Sanchez's claims.

***William Marsh Rice Univ. v. Refaey*, No. 14-13-00235-CV, 2016 WL 2935729 (Tex. App.—Houston [14th Dist.] May 17, 2016)**. A man arrested by a private-university peace officer sued the officer and the university asserting various tort claims, but the court of appeals determined the officer (and by extension the university) established entitlement to official immunity.

Gary Spears is a licensed law enforcement officer. On the night in question, Spears was on duty working for the university as a police officer. Spears saw two cars, one behind the other, one block from campus. Rasheed Refaey was in the driver's seat of the second vehicle. Officer Spears believed that the vehicles were obstructing the roadway because the lane in which the vehicles were stopped was impassable. When Spears approached, the traffic light facing Refaey's car turned green, but Refaey did not depart. Spears initiated a traffic stop, but that is when Refaey drove onto Main Street. According to Refaey, about one mile into this drive, he realized that the police officer was following him. Nonetheless, Refaey did not pull over. Refaey's position is that since the university is private, their police have no business pulling him over, especially because he was never technically on university property. When Refaey finally did pull over he had a heated debate with Spears. During this argument, Officer Spears noticed Refaey's eyes were red and watery and that he had a strong odor of alcohol on his breath. Officer Spears placed Refaey in handcuffs and arrested him on suspicion of having committed the offenses of evading arrest and driving while intoxicated. Later, all charges against Refaey were dropped. He sued the university and Spears asserting negligence, false-imprisonment, assault, and intentional-infliction-of-emotional-distress claims based on his allegedly unlawful arrest and detention. Officer Spears and the university (the Rice Parties) moved for summary judgment based on official immunity. The trial court denied the motion, and the Rice Parties appealed.

This case originally went up to the Supreme Court of Texas which held licensed police officers could be entitled to official immunity while working for private universities, and remanded the case for a determination if it should apply in this case. The Fourteenth Court of Appeals first determined that private universities may employ state licensed police officers under the Texas Education Code. The summary-judgment evidence proves as a matter of law Officer Spears was performing duties assigned to him by the university and that these duties were performed in Harris County, Texas, a county in which the university has land. To be entitled to official immunity, such actions, however, must be consistent with the university's educational mission. The statute does not require that the duties assigned be "consistent with the mission statement of the institution," nor does the statute require that the duties be "listed in the mission statement of the institution."

It is uncontested the university's mission statement does not address patrolling on public streets. However, the university submitted testimony that when one of its officers investigates possible traffic violations the officer is ensuring the health and welfare of the students, faculty, staff, and visitors on campus, which furthers the university's educational mission. Refaey's car was stopped across the street from part of the campus. Refaey did not submit any evidence to contradict that such patrols and investigations were contrary to the university's educational mission. Further, after analyzing the testimony, the court held the evidence proves that a reasonably prudent officer, under the same or similar circumstances, could have believed that Spears's conduct was justified based on the information Spears had at the time. As a result, Spears established entitlement to official immunity. The university, by extension, also established immunity. The summary judgment should have been granted.

***City of Houston v. Roman, No.* 01-15-01042-CV, 2016 WL 3748851 (Tex. App.—Houston [1st Dist.] July 12, 2016) (mem. op.)**. This is a Texas Tort Claims Act (TTCA) case involving a police dog bite. The First Court of Appeals held the pleadings accurately invoked a waiver of immunity and affirmed the denial of the city's plea to the jurisdiction.

Roman's son (G.R.) was walking with a friend to play soccer in a nearby park. Roman's petition alleged as they walked down a back street, a police car approached them. An officer got out of the car's passenger side door and started running toward the boys. The driver also exited the car, walked to the back of the car, and opened a door, letting a dog out. When the youths saw the dog running toward them, they fled, jumping a fence into an adjacent backyard. When the dog caught up to G.R. it attacked, biting his right arm and lacerating an artery that required surgery. In the plea, the city asserted the officers observed two youths trying to enter a back yard. They chased the boys through several yards before calling for K-9 backup. When the boys did not respond to commands to stop, the officers released Jake, the officer's dog. The city contends that the K-9 officer acted intentionally when he deployed Jake and used him to track G.R. through the back yards; thus, it contends, G.R.'s injuries are the result of an intentional tort. After a hearing the trial court denied the plea to the jurisdiction and the city appealed.

The court first held the actions of the K-9 officer sound in negligence. A defendant may be liable for negligence in handling an animal if he fails to exercise reasonable care to prevent the animal from injuring others. "Intentional conduct may give rise to liability for negligence when the actor does not exercise reasonable care; thus, while Schmidt may have intended to use Jake to locate G.R., a claim may sound in negligence if G.R. was injured by the failure to use reasonable care in

controlling Jake during the search." Roman alleges and has adduced some evidence that the K-9 officer failed to exercise reasonable care in controlling Jake. The record does not establish that the K-9 officer intended to use Jake to injure G.R., but only to locate him. As a result, Roman properly plead a negligence claim. Next, the city asserts Roman admitted his claim was a failure to leash Jake so is a non-use of property claim for which immunity remains. However, the panel asserted it previously observed that "the police dog's purpose was to assist in the officer's performance of his police duties, which the officer was carrying out [at the time of the attack.]" Jake was assisting the officer in his duties by helping to track and locate G.R. As a result, this is not a non-use case but a case alleging the negligent use of property, i.e. Jake the dog. The trial court properly denied the plea.

***Rodriguez v. Fort Worth Transp. Auth*., No. 02-14-00340-CV, 2016 WL 3453183 (Tex. App.— Fort Worth June 23, 2016) (mem. op.)**. This is a Texas Tort Claims Act (TTCA) case where a plaintiff in a wrongful death case sued multiple entities trying to exceed the TTCA's statutory cap on damages. The Fort Worth Court of Appeals held each individual entity is liable up to the statutory caps.

Fort Worth Transportation Authority (FWTA), McDonald Transit, Inc. (MTI), McDonald Transit Associates, Inc. (MTA), and LeShawn Vaughn (collectively the Transit Defendants) were sued by plaintiff whose mother was killed when struck by a bus driven by Vaughn. Vaughn is an employee of MTI. MTI and MTA are both independent contractors of FWTA. The procedural case became overly complex, but the center elements for this opinion focus on whether the TTCA statutory cap of $100,000 applies to all defendants collectively, or each defendant individually. The trial court granted the Transit Defendants' motion to dismiss Vaughn and that the $100,000 cap applies to all defendants collectively. The maximum recovery by the plaintiff is, therefore, $100,000, not $300,000. Rodriguez appealed.

The court first held the TTCA provision for employees' dismissal from suits applies only to employees of a governmental unit and not to employees of the governmental unit's independent contractor. Next, as to the limits of FWTA, MTI, and MTA, Texas Transportation Code Sections 452.701–.720 provide that independent contractors of a transit authority are liable for damages only to the extent the authority is liable under the TTCA. After analyzing the statutory language and a litany of cases it held "[u]nder the TTCA, no matter how many parts of a particular government unit a plaintiff sues, that unit cannot be held liable for an amount in excess of the cap for that unit. On the other hand, when a plaintiff sues multiple entities, each with liability limited by the TTCA, the plaintiff may recover separately from each defendant up to the amount of the cap that applies to each respective entity." As a result, Rodriguez's potential damages under the TTCA are limited to $300,000.

***Torres v. City of Corpus Christi,* No. 13-14-00506-CV, 2016 WL 4578392 (Tex. App— Corpus Christi Sept. 1, 2016) (mem. op.)**. This is a Texas Tort Claims Act (TTCA) case involving a car accident with a police officer. The Thirteenth Court of Appeals affirmed the granting of the city's plea to the jurisdiction. A city police officer, Robert Walker, was responding to a fleeing stolen vehicle. He responded and activated his emergency lights and sirens. On his way to an intercept location in order to set up road spikes, he rounded an "S" curve in the road and lost control. Officer Walker admitted he was traveling faster than the posted speed limit. He explained that his police

cruiser's brakes did not respond as he expected and he lost traction as he entered the curve. He slid sideways into oncoming traffic and Walker's and Torres's vehicles collided. Torres sued. The city filed a plea to the jurisdiction which was granted. Torres appealed.

The court first held that a TTCA claim may not be brought against the governmental entity when the claim arises from an employee responding to an emergency call or reacting to an emergency situation, unless the action was taken with conscious indifference or reckless disregard for the safety of others. This is an objective, not a subject standard. Officer Walker's subjective belief that he was or was not driving in a reasonable and prudent manner does not change the nature of the call to which he was responding. After analyzing the evidence and testimony, Torres was not able to dispute Walker was responding to an emergency call. Section 546.001(3) allows emergency vehicle operators to exceed a maximum speed limit so long as the operator does not endanger life or property. Torres offered no evidence showing Officer Walker's speed before he entered the curve and immediately before the accident. Moreover, Officer Walker testified that he did slow down once he entered the curve, though not enough to avoid entering Torres's lane. So he was not consciously indifferent to the situation. Officer Walker testified that he activated his vehicle's lights and sirens. He explained that he recognized his speed was too fast for the curve and attempted to slow the vehicle. The cruiser did not respond to Officer Walker's braking efforts as anticipated and he was unable to effectively control his vehicle. The accident report indicated that both vehicles drove away from the accident. Torres's airbag did not deploy as a result of the accident and she did not request an ambulance after the collision. There is no evidence or expert testimony estimating the speed of the vehicles prior to the collision based on the amount of damage each vehicle sustained. Given that Torres presented no evidence to create a fact issue as to what Walker did and why, there is no evidence of recklessness. As a result, the plea was properly granted.

***City of Austin v. Frame,* No. 03-15-00292-CV, 2016 WL 3068379 (Tex. App.—Austin May 27, 2016) (mem. op.)**. This is a recreational use personal injury case where the court of appeals reversed the denial of the city's plea to the jurisdiction and dismissed the case.

Rosales jumped the curb and drove onto a hike-and-bike trail. In so doing, his vehicle and debris struck and killed Colonel Griffith and injured Pulido. The appellees (the estate and Pulido) sued the city for, among other things, failure to construct a guardrail or barrier for a known danger, which was allegedly a failure to carry out a ministerial act. The city filed a plea to the jurisdiction, which was denied. The city appealed.

The sole issue on appeal is whether the appellees' allegations concern discretionary roadway design, as the city contends, or a negligent failure to implement a previously formulated policy, as the appellees contend. Texas courts have generally found that actions and decisions implicating social, economic, or political considerations are discretionary while those that do not involve these concerns are operational- or maintenance-level. The court analyzed the facts and policies alleged. It held that even if the city had a policy to fix identified hazards, ". . . it does not necessarily follow that the City's failure to address this particular hazard was negligent policy implementation for which immunity is waived. The policy that the appellees describe does not mandate the construction of a guardrail or barrier with sufficient precision to make that action nondiscretionary. . . . Rather, it requires the City to balance social and economic concerns and devise a plan to

address each specific identified hazard. This demands a level of judgment . . .” which equates to discretionary actions. Further, even if the city had made a specific decision to modify the area, “. . . immunity does not vanish where a governmental entity has decided to change the design of a public work but has not yet implemented that change.” The plea should have been granted.

LAND USE

***City of Helotes v. Continental Homes of Texas, LP,* No. 04-15-00571-CV, 2016 WL 3085924 (Tex. App.—San Antonio June 1, 2016) (mem op.)**. Continental Homes (Continental) purchased a tract of land in order to develop a subdivision (Wildhorse Subdivision). The land was within the City of San Antonio’s extraterritorial jurisdiction (ETJ). San Antonio released a portion of its ETJ to the City of Helotes. The City of Helotes then adopted and codified Section 18-1 of its Building Code, titled “Applicability of Building Regulations in Extraterritorial Jurisdiction.” In this section, Ordinance 503A, enacted April 2013, it provides that the City of Helotes may enforce its building regulations within its ETJ. Ordinance 505, enacted June 2013, expanded the ETJ boundary of the City of Helotes to include the land released by San Antonio which encompassed Wildhorse Subdivision. Following the adoption of these city ordinances, the city demanded that Continental obtain and pay for building permits and inspections of any construction. Continental complied under protest and then filed suit against the city on November 5, 2013.

Under state law, a city’s ETJ can be up to one mile from the city’s corporate boundary. The city’s ordinance attempted to include portions of Continental’s property that was more than one mile from the city’s corporate limits. The trial court rendered this ordinance void and ordered the city to immediately cease and desist from enforcing or attempting to enforce any city regulations (including building regulations) within the portions of property more than one mile from the city’s corporate limits. The court ordered the city to return to Continental over $200,000 in fees improperly collected for building permits and inspections.

Continental alleged that, under state law, a city’s authority to regulate property development in its ETJ is limited to the platting and subdivision of land which does not include the payment of fees and permits and inspections. The trial court granted Continental’s multiple-ground motion for summary judgment on its remaining requested declaratory and injunctive relief and denied the multiple-ground motion for summary judgment filed by the city. The trial court’s final judgment did not specify the reasons or grounds upon which it granted Continental’s motion nor did the court supply grounds for denying the city’s motion. The court ordered the city to pay Continental’s specified attorney’s fees and litigation expenses and awarded injunctive relief precluding the city from enforcing its building code regulations against Continental’s property.

The city’s appeal contends that Section 51.003 of the Local Government Code bars Continental’s suit regarding Ordinance 503A and 505 because they were amendments to Ordinances 83 and 83A, enacted more than 20 years ago. The validation statute acts as a statute of limitation to the filing of a suit challenging the validity of a city ordinance if the ordinance has been in effect for three years and a lawsuit has not yet been filed challenging the ordinance. The San Antonio Court of Appeals concluded that the validation statute does not bar Continental’s suit because Ordinance 503A was enacted in April 2013, Ordinance 505 was enacted in June 2013, and the suit was filed November 5, 2013, within the three year limit. The city did not provide any support to its assertion

that challenges to an ordinance relate back to the enactment of the originating ordinance, thereby prohibiting challenges to an amendment that occur after three years.

The city argued that Continental failed to meet its burden of proof to satisfy summary judgment because it did not show the court that its attorney's fees were equitable and just. The court of appeals overruled the city's challenge to the trial court's final judgment regarding attorney's fees because the city failed to preserve the complaint for appellate review. The city did not challenge the trial court's award as inequitable and unjust, nor did it present this challenge in its post-judgment motion, the city only argued that Continental was not entitled to attorney's fees because its arguments lacked merit.
The city did not challenge the trial court's finding that Ordinance 505 was invalid. The court of appeals was therefore bound by and followed the trial court's ruling that Ordinance 505, extending the city's ETJ further than one mile from its corporate boundary, was void.

The court of appeals did not determine the issue of the city's statutory authority to enforce its building regulations within its ETJ. Due to the trial court's determination that the ETJ can only extend one mile from a city's corporate boundary, and because the city did not challenge this determination, Continental Homes no longer has any property within the ETJ of the city. Therefore, the court of appeals ruled the city's statutory authority to enforce its building ordinances within its ETJ was an issue that no longer existed between the parties and overruled the issue as moot.

***Laredo Merchants Assoc. v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627 (Tex. App.—San Antonio Aug. 17, 2016) (mem. op.)**. This is a statutory construction case concerning solid waste management, where the Fourth District Court of Appeals reversed the trial court's grant of summary judgment in favor of the City of Laredo against a challenge to a city ordinance that restricted the use of paper and plastic checkout bags.

As part of the City of Laredo's strategic plan to create a "trash-free city," the city adopted an ordinance making it unlawful for commercial establishments to provide any plastic or paper one-time-use carryout bags. The ordinance included a list of exceptions and provided that a violation would subject retailers to a fine of up to $2,000 per violation. The Laredo Merchants Association (merchants) filed suit against the city one month before the ordinance was to take effect, seeking declaratory and injunctive relief to declare the ordinance unenforceable because it is preempted by the Solid Waste Disposal Act (Act). The merchants also sought a temporary restraining order to enjoin the city from enforcing the ordinance. The city filed for summary judgment, arguing that the Act does not clearly prohibit a city from banning checkout bags, that it is authorized to regulate checkout bags under the Local Government Code, and that the ordinance is a valid exercise of the city's police power.

The merchants filed a cross-motion for partial summary judgment, arguing that the ordinance is inconsistent with the Act (Texas Health and Safety Code Section 361.0961) and, therefore, preempted. The merchants also argued that whether the ordinance is within the city's authority under the Local Government Code or within its police power is irrelevant to the issue of preemption. The trial court, declaring that there exists a reasonable interpretation under which the

Act does not preempt the ordinance, granted summary judgment in favor of the city and denied the merchants' motion. The merchants appealed.

Section 361.0961 provides, in relevant part, that "[a] local government . . . may not adopt an ordinance, . . . to: (1) prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law; . . . ." TEX. HEALTH & SAFETY CODE § 361.0961. The appellate court held that, based on its plain meaning, a "checkout bag" is a type of "container" or "package" within the meaning of Section 361.0961. And though the ordinance's stated purpose is to regulate litter, the court considered both the purpose and actual effect of the ordinance. Here, because litter is itself a form of solid waste, the actual effect of the ordinance is to manage solid waste in a way inconsistent with Section 361.0961. The court of appeals reversed the trial court's grant of summary judgment and rendered judgment that the ordinance is preempted by Section 361.0961 of the Act.

MUNICIPAL FEES

***Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, No. 03-15-00370-CV, 2016 WL 3390850 (Tex. App.—Austin June 15, 2016)**. This is an appeal by Reagan National Advertising (Reagan) following the trial court ruling that the City of Austin's (city) billboard assessment was a constitutional regulatory fee and that Reagan's claims for billboard fees paid in August of 2009 and March of 2010 were time-barred.

Reagan owns and operates billboards in the Austin area. The city regulates these billboards and requires them to be registered. After amending its regulations in 2009, the city collected an assessment of $200 per billboard per year. In 2012, the city lowered the assessment to $190 per year. Reagan paid the $200 billboard assessment each year from 2009 to 2012 and the $190 assessment each year for 2013 and 2014.

In April 2010, Reagan sued the city in federal district court. The federal judge concluded that the city's billboard assessment was a "tax" for purposes of the Tax Injunction Act (TIA) and, therefore, the court lacked subject matter jurisdiction. Under the TIA, federal courts lack subject-matter jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The judge issued a final judgment dismissing the suit without prejudice. On December 29, 2011, the city filed a motion for new trial, which the judge denied by an order signed on February 6, 2012.

On April 25, 2012, Reagan filed suit in the Travis County District Court. The trial court ordered that Reagan take nothing on its claims. The court found that the city's billboard fee was reasonable and constitutional, that Reagan's claims for fees paid in August of 2009 and March of 2010 were time-barred, and that the federal district court's finding that the billboard fee was a tax under the TIA did not bar the trial court from re-litigating the matter and finding that the assessment is a regulatory fee.

Reagan appealed the trial court's judgment. The Austin Court of Appeals found that Reagan's claims are governed by a two-year statute of limitations, but a savings clause tolled the statute of limitations. The savings clause is satisfied in this case because (1) Reagan filed its federal action

within the limitations period which was dismissed for lack of subject matter jurisdiction; and (2) Reagan then filed this suit in state court within 60 days from the time the federal court's judgment dismissing Reagan's claims for lack of jurisdiction became final. TEX. CIV. PRAC. & REM. CODE § 16.064(a). The Court found that the federal court's dismissal became final following the court's denial of the city's motion for a new trial on February 6, 2012.

Reagan argued that the trial court erred in deciding that the federal court's conclusion that the billboard assessment is a tax did not preclude re-litigation of the issue and in holding that the assessment is a constitutional regulatory fee. Issue preclusion applies only if four conditions are met: (1) the issue under consideration in a subsequent action must be identical to the issue litigated in a prior action; (2) the issue must have been fully and vigorously litigated in the prior action; (3) the issue must have been necessary to support the judgment in the prior case; (4) there must be no special circumstance that would render preclusion inappropriate or unfair. *State Farm Mut. Auto. Ins. Co. v. LogistiCare Sols., LLC*, 751 F.3d 684, 689 (5th Cir. 2014).

The court of appeals found that the federal court's determination that the billboard fee was a tax under the TIA involved an issue of fact or law identical to the question of whether the assessment is a tax under the Texas Constitution. In determining whether the assessment is a tax under the TIA, the critical factor focuses on the purpose of the assessment and the ultimate use of the funds. The federal court determined that the assessment was a tax, not a fee, because the assessments were deposited into the city's general-revenue fund and the evidence on whether the assessment was revenue-neutral was conflicting. The record lacked any indication of the city's purpose for increasing the assessment so the court determined that the assessment benefitted the entire community rather than only defraying the city's reasonable cost of registering billboards.

In order to determine whether the assessment is a tax under the Constitution, courts consider whether the primary purpose of the assessment was for regulation or raising revenue. Therefore, the court found that the federal court's determination that the billboard assessment raised revenue in excess of the reasonable cost of registering billboards and benefitted the entire community is identical to a determination that the assessment is a tax under the Texas Constitution. The court found no dispute that the federal judge conducted a bench trial, which included the presentation of expert testimony concerning the cost of the billboard registration program. Thus, the issue was fully and vigorously litigated in the prior action.

The court concluded that the federal court's determination that the billboard assessment raised revenue in excess of the reasonable cost of registering billboards was necessary to support the judgment that the assessment was a tax and that the court lacked subject-matter jurisdiction.

Finally, the court found no special circumstance that would render preclusion inappropriate or unfair in this instance. Nothing in the record indicates that the city was treated unfairly in the federal-court litigation. Accordingly, the federal court's determination that the city's billboard assessment was a tax invokes issue preclusion, and the trial court did, in fact, err in re-litigating the matter. Because the city's billboard assessment constitutes a tax on billboards under article VIII, section 1(f) of the Texas Constitution, it may not exceed half of the tax levied by the state on outdoor advertising. Texas levies no tax on billboards, so the city's billboard assessment violates the Texas Constitution and is void.

***Bazaldua v. City of Lyford*, No. 13-16-00004-CV, 2016 WL 4578409 (Tex. App— Corpus Christi Sept. 1, 2016) (mem. op.)**. This is an age-discrimination case where the Thirteenth Court of Appeals affirmed the granting of the city's plea to the jurisdiction. Bazaldua was a forty-nine-year-old laborer employed in the city's public works department. After the city purchased a new leaf blower, Bazaldua filled it with gasoline but failed to include the oil mixture. This destroyed the blower. Bazaldua's supervisor, Javier Lopez, issued a written reprimand and informed Bazaldua he would have to pay for a replacement. Bazaldua refused and then was terminated. Bazaldua filed suit for age discrimination. The city filed a plea to the jurisdiction asserting he was replaced with an older employee and the trial court granted the plea. Bazaldua appealed.

Bazaldua asserts he provided direct evidence of age discrimination in his affidavit where he avers Lopez would routinely address him as "viejo" which means "old man" in Spanish. In a true replacement case, to establish a prima facie case of age discrimination, the plaintiff must show that he was: (1) a member of the protected class; (2) qualified for his employment position; (3) terminated by the employer; and (4) replaced by someone younger. A plaintiff who is replaced by someone older is unable to meet the fourth element. In order to avoid this burden shifting framework, a plaintiff can provide direct evidence of discrimination. Direct evidence of discrimination "is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." "If an inference is required for the evidence to be probative as to the employer's discriminatory animus in making the [adverse] employment decision, the evidence is circumstantial, not direct." Statements and remarks may serve as direct evidence if, among other things not relevant here, the remarks are close in time to the employment decision and related to the employment decision at issue. Bazaldua has provided no evidence that the use of the term "viejo" was proximate in time to his firing or related to the employment decision at issue. He provided no direct evidence and since he was replaced by an older employee, he cannot satisfy the *McDonnell Douglas* framework. The plea was properly granted.

***Jordan v. Tarrant Cnty. Hosp. Dist.*, No. 07-16-00034-CV, 2016 WL 4135219 (Tex. App— Amarillo Aug. 2, 2016) (mem. op.)**. This is an employment discrimination case where the Amarillo Court of Appeals affirmed the granting of the hospital district's summary judgment motion. Jordan alleges Tarrant County Hospital District d/b/a JPS Health Network (JPS) failed to hire him for the position of senior psychiatric tech because of age, race, and disability. He brought claims only under federal law. The case was in state court in the Tarrant County District Court, but was transferred to the Amarillo Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts under Texas Government Code Section 73.001. The trial court in Tarrant County granted JPS' motion for summary judgment and Jordan appealed.

As to race discrimination, Jordan asserts he established a prima facie case by showing the position he applied for remained open and JPS continued to seek applicants for some time. JPS contends that Jordan is required to show proof the position was filled by a person not in Jordan's protected class. The court held that while a prima facie case can be made when a position remains open, it cannot be said that an employer's employment decisions were racially motivated when, as here, the employer eventually hired a qualified person from the same protected group of which plaintiff is a member. The trial court properly granted summary judgment as to race discrimination. With

regard to the disability discrimination claim, Jordan suffered a broken ankle while working for JPS that "kept [him] off work" until December of 2011. However, due to Jordan's exhaustion of personal and Family Medical Leave Act leave, JPS terminated him before his release to return to work. "While this evidence establishes that Jordan sustained an injury, it is not evidence of whether he is currently disabled within the meaning of the ADA." As to the age discrimination claim, the only evidence provided by Jordan is that JPS filled the position with a forty-five-year-old while he was fifty-nine at the time. Jordan has to present some evidence to support his claim of age discrimination and this is not sufficient to establish a "but for" discriminatory motive. As a result, the trial court properly granted JPS' summary judgment motion.

***Swanson v. Town of Shady Shores*, Nos. 02-15-00351-CV and 02-15-00356-CV, 2016 WL 4395779 (Tex. App.—Fort Worth Aug. 18, 2016) (mem. op.)**. This is a Texas Whistleblower Act, Texas Open Meetings Act, due process, free speech and *Sabine Pilot* case, but the main thrust of the appeal is litigation/appellate procedure. So, this case will be of primary focus to litigators.

Swanson is the former town secretary. She brought claims asserting she was wrongfully discharged. The town filed a plea to the jurisdiction on the *Sabine Pilot* and Whistleblower Act claims. After Swanson amended, the town filed traditional and no-evidence summary judgment motions for the remaining claims. The trial court granted the town's plea to the jurisdiction and Swanson did not file an interlocutory appeal. In separate orders, the trial court denied the town's traditional and no-evidence motions for summary judgment. The town filed an interlocutory appeal and asserted the automatic stay was in place. On October 30, 2015, the town filed a motion requesting the trial court to enter an order acknowledging that all of the trial court proceedings had been stayed since Swanson was continuing to file motions and request hearings. According to the town, during one hearing, the trial court granted Swanson leave to file a motion for a permissive interlocutory appeal. When Swanson attempted to hold further proceedings and obtain an order on the permissive appeal, the town filed a separate mandamus action (which was consolidated for purposes of appeal). The San Antonio Court of Appeals stayed all proceedings during the appeal.

In its mandamus petition, the town asks this court to direct the trial court to stay the underlying proceedings and to enter an order voiding all actions taken in the trial court since the town filed its notice of interlocutory appeal. The town is appealing the denial of the summary judgment motions on immunity grounds. As a result, the automatic stay applies. The automatic stay is only available, however, if the jurisdictional motion was filed and a hearing requested within a defined timeframe. The scheduling order required all dispositive motions be filed and heard by October 1, 2015. The town filed its motions for summary judgment and a hearing was set for September 23, 2015. Even though the motions were not heard until October 21, the motions were filed and a hearing was requested prior to October 1. Thus, the automatic stay was triggered. The trial court abused its discretion in conducting hearings in violation of the automatic stay. However, the trial court did not sign any orders. Therefore, there is nothing in the record indicating any relief can be granted, even though a violation occurred in this case. The mandamus is therefore denied.

Swanson claims that regardless of the fact she filed her appeal over forty days after the order granting the town's plea to the jurisdiction was signed, her appeal is timely under Rule 26.1(d), which provides that "if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal,

whichever is later." Swanson asserts that she filed her notice of appeal (for the plea to the jurisdiction) within 14 days of the town's notice of appeal for the summary judgments. However, Swanson cites no cases nor did the court find any authority supporting her contention that she can utilize Rule 26.1(d) in this way. As a result, her appeal is untimely. Swanson also filed a petition for permission to appeal, but it did not contain an order signed by the trial court granting her permission to appeal (mainly because the court of appeals stayed any further proceedings). Swanson failed to comply with the requirements for bringing a permissive appeal from an interlocutory order because she failed to obtain a written order granting permission to appeal.

***Fort Worth Indep. Sch. Dist. v. Palazzolo*, No. 02-14-00262-CV, 2016 WL 3667867 (Tex. App.—Fort Worth July 7, 2016)**. Fort Worth Independent School District (FWISD) terminated Assistant Principal Joseph Palazzolo (Palazzolo) for various allegations of wrongful conduct. Palazzolo, before the report accusing him of the wrongful conduct, had reported FWISD to the Texas Education Agency concerning some illegal practices being done at the same high school that he was an assistant principal, such as altering students' attendance records. Palazzolo sued FWISD alleging violation of the Texas Whistleblowers Act (TWA). During the trial, FWISD asserted Government Code Section 554.004(b), the affirmative defense within the TWA that states, "it is an affirmative defense to suit under this chapter that the employing state or local government entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under the [TWA]." FWISD submitted evidence that it terminated Palazzolo for the reason in the report and not as retaliation for the report to TEA. The trial court denied FWISD's inclusion of the affirmative defense jury charge.

The Second Court of Appeals reviewed whether the trial court erred in not allowing FWISD to present its affirmative defense jury charge to the jury. It first looked at whether FWISD tendered the written question concerning the affirmative defense. It determined that it did by showing it had submitted the affirmative defense question with the pretrial charges and by objecting to the non-inclusion of the affirmative defense during the trial.

Next, the court distinguished an affirmative defense from an inferential rebuttal issue. It explained that an inferential rebuttal defense operated to rebut an essential element of the plaintiff's case by proof of other facts, where as an affirmative defense is a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's claim even if all the allegations in the plaintiff's petition are true. Even though both of the Houston courts of appeal have construed TWA's affirmative defense as an inferential rebuttal issue, this court said that when construing a statute, the primary objective of the court is to determine and to give effect to the legislature's intent as expressed by the language of the statute. This court went through the meaning of "affirmative defense" stating that the legislature knows what it means and it was not the court's job to second guess the legislature's clear and unambiguous language. Also, the burden of proof is on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings. The court stated that the TWA's affirmative defense operates as an affirmative defense just as the legislature intended it to and that FWISD did preserve the error of the trial court for appellate review.

Lastly, the court looked at the merits of the issue. It stated that the affirmative defense cannot be effectively incorporated in the charges, but that it should be set out in clear and conspicuous terms leaving no doubt that the charge properly conveyed the defense for the jury to consider. Therefore, the court determined that there was enough evidence presented by the plaintiff and defendant to allow for the inclusion of the affirmative defense and that the trial court abused its discretion by not including it and reversed and remanded to the trial court for a new trial.

***Paske v. Fitzgerald*, No. 01-15-00631-CV, 2016 WL 3459217 (Tex. App.—Houston [1st Dist.] June 23, 2016)**. This is a police officer wrongful termination case for alleged violations of Texas Government Code chapter 614 where the First District Court of Appeals affirmed the granting of the city's summary judgment motion. Paske was a sergeant with the Missouri City Police Department (department) when Chief Fitzgerald was appointed. Chief Fitzgerald found Paske to have been insubordinate on different occasions and subsequently issued Paske a performance improvement plan (PIP) which required an independent evaluation through the city's employee assistance program (EAP).

After the initial EAP evaluations, the EAP therapist found several "red flags" for potential steroid use so Paske was ordered to take a drug test. When Paske arrived for his appointment and was told to take a drug test (which was not nearby) he advised his babysitter (mother-in-law) had been struck by a car earlier in the day and the children were home alone, but he felt it was alright if he only had to go to the EAP appointment. He could not drive to the drug testing facility which was some ways away. Chief Fitzgerald called Paske and ordered him to report to the department's headquarters within one hour. Paske refused. Paske did not go to headquarters that day, but he arranged for a drug exam issued by an accredited third-party. This exam did not test for steroids, but Paske's results were negative for other substances. Chief Fitzgerald terminated Paske by a letter that listed several violations of the department's code of conduct stemming from his failure to report for the drug test. Paske sued alleging, among other things, he was terminated in violation of Texas Government Code Section 614.021 which requires a written complaint be provided to a peace officer before termination. The city filed a plea to the jurisdiction and motion for summary judgment asserting Chapter 614 does not apply when the chief of an agency discharges a subordinate based on failure to follow a lawful direct order. The trial court granted the city's motion and Paske appealed.

First, the court noted Paske has alleged that Chief Fitzgerald failed to perform a necessary ministerial act by failing to provide him with a signed complaint pursuant to the Government Code, i.e. an ultra vires act. The trial court has jurisdiction over the claims relating to Chief Fitzgerald, but not the same declaratory judgment claims over the city. The city is immune from claims seeking a declaration to construe the meaning of the statute. Next, Chief Fitzgerald argued that the trial court properly granted him summary judgment because there was no "complaint" in this case, and instead he acted upon employee misconduct that he personally witnessed in his official role as chief. The court analyzed the meaning of the word "complaint" and determined that procedure is not imposed as a precondition to every adverse employment action that may be taken against a law enforcement officer. Specifically, when conduct is personally witnessed by an agency chief, the language would be superfluous. As a result, the trial court properly granted summary judgment for Chief Fitzgerald.

***City of Plainview v. Ferguson*, No. 07-14-00405-CV, 2016 WL 3522129 (Tex. App.—Amarillo June 23, 2016) (mem. op.)**. This is a police disciplinary case under Chapter 614 of the Texas Government Code. Ferguson was a police officer for the city. He was terminated based on an investigation stemming from a citizen complaint. Amber Washington requested assistance with a domestic matter. When Ferguson spoke with her in the police station lobby he asserts she was angry, cursed at him, and was uncooperative. He asked her to leave the station; she refused. As a result, he arrested her for disorderly conduct. The confrontation was recorded on video. The next day, Washington made a verbal then written complaint. Lieutenant Guerra investigated the complaint and requested Ferguson provide a written explanation; however, Ferguson was not given a copy of the Washington complaint at that time.

Officers of the department met with Ferguson on March 3, March 9, and March 11, and testified Ferguson was permitted to make a copy of Washington's complaint at the March 3 meeting. Ferguson testified he saw the complaint at that meeting, "read it and started kind of skimming through it[,]" but was not then given a copy. On March 9, Ferguson was terminated. Ferguson filed suit. After a trial, the court ordered reinstatement. The city appealed. The city did not contest the trial court's findings of fact noting Ferguson did not receive a copy of the complaint within a reasonable time after receipt by the city. The consequence is the city does not contest it violated Section 614.023 (requiring a written complaint be provided an officer within a reasonable time). Instead, the city asserts reinstatement is not a relief which can be granted for non-compliance.

The city pointed to numerous pieces of evidence showing Ferguson was unfit to be a police officer. But while such testimony exists, so does evidence supporting the remedy of reinstatement. "A trial court does not abuse its discretion if it bases its decision on conflicting evidence and some evidence supports its decision." As a result, the order of reinstatement was not an abuse of discretion. The trial court judgment was affirmed.

***McEnery v. City of San Antonio*, No. 04-15-00097-CV, 2016 WL 3085923 (Tex. App.—San Antonio June 1, 2016) (mem.** op.). This is an appeal from a trial court's order confirming an arbitration award that denied McEnery's grievance against the City of San Antonio. The court determined the matter was moot.

McEnery took a civil service promotional exam for district chief that consisted of a written exam and practical exam. McEnery passed the written examination but only part of the practical. McEnery filed a grievance, alleging the assessment center portion of the exam was not given in accordance with Chapters 143 and 174 of the Texas Local Government Code and the collective bargaining agreement (CBA). Thereafter, McEnery's grievance was arbitrated and the arbitrator denied McEnery's relief, finding "there was no convincing evidence or testimony that the test given was faulty or flawed. . . ." McEnery then filed suit. After a bench trial, the trial court rendered judgment denying all of McEnery's relief.

The San Antonio Court of Appeals held a case is moot when a court's action on the matter would not have any practical legal effect on the controversy. McEnery asked the trial court to vacate the arbitration award and order of the city to permit him to retake the assessment center portion of the exam. However, it is undisputed McEnery was promoted to district chief during the pendency of

this suit. McEnery's case no longer presents a live controversy as a result of his promotion. McEnery argued his promotion to district chief does not moot the appeal because his request to allow his colleagues to retake the exam and his request for back-pay are still pending and justiciable. However, a review of the record demonstrated that neither were sought by McEnery during arbitration. Those were added in the litigation. The limited scope of the judicial review does not permit such relief. The case is therefore moot.

City of Houston v. Houston Firefighters' Relief & Retirement Fund, No. 14-14-00437-CV, 2016 WL 4705928 (Tex. App—Houston [14th Dist.] Sept. 8, 2016). The City of Houston sued the Houston Firefighters' Relief and Retirement Fund (fund) seeking a declaration that the statute establishing the current pension system for the city's firefighters is unconstitutional. The city appealed the trial court's grant of the fund's motion for summary judgment. The Houston Court of Appeals affirmed, holding that the statute is constitutional.

The opinion outlines the history of the city's pension system for firefighters through 1997, when the legislature enacted Texas Revised Civil Statute Article 6243e.2 (1), establishing a "Firefighters' relief and retirement fund" in each incorporated city with a population of at least 1.6 million and a fully paid fire department. Based on the defined population, the statute currently applies only to the City of Houston. The city filed suit in 2014, seeking a declaratory judgment that the statute violates four provisions of the Texas Constitution: (1) the separation-of-powers principle; (2) the prohibition against special and local laws; (3) the constitutional requirement that cities have a choice in their pension systems; and (4) the requirement that pension benefits be reasonably related to a participant's contributions. The trial court granted the fund's motion for summary judgment. The city appealed.

The court of appeals examined the city's four grounds separately. The legislature may delegate powers to municipal and state agencies so long as it establishes "reasonable standards" to guide the agency. *See Texas Boll Weevil Eradication Found., Inc. v. Llewellyn*, 952 S.W.2d 454, 467 (Tex. 1997). The city argued that the fund is not a public entity and, even if it is public, the legislature failed to set forth reasonable standards for guidance. The court of appeals found that the fund is a public entity because it is expressly authorized in the Texas Constitution, because its board is comprised of public employees, because it is treated like a governmental body for other purposes, and because other courts have found municipal pension systems to be public entities. Furthermore, the standards set forth by statute are reasonable because the statute does not give the board arbitrary power and it limits the board's procedures and powers are "not inconsistent with the Act."

The court of appeals also found that the statute does not violate the constitutional prohibition against special and local laws. "The primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class." *Rodriguez v. Gonzales*, 227 S.W.2d 791, 793 (Tex. 1950). Because the city is larger and more industrialized than even other large Texas cities, there is a reason to treat firefighters in the City of Houston differently than those in other cities with respect to benefits.

The city also argued that Article XVI, Section 67(c) of the Texas Constitution permits the city to choose the pension system for its firefighters and thus, the statute imposed on the city by the legislature is unconstitutional. The court of appeals instead agreed with the fund that Section 67(c) was not intended to make pension systems exclusive for cities and counties and that it does not invalidate legislature-imposed pension systems.

Finally, the court found that the city could not show that the statute violates the constitutional requirement that pension benefits be reasonably related to a participant's contributions. The requirement, found in Article XVI, Section 67(c)(2), applies to pension systems created by a city or county or a statewide system in which a city or county may choose to participate. However, the statute was not established under Section (c)(2), but (a)(1) – the provision granting the legislature power to enact general laws establishing systems for retirement benefits.

PUBLIC INFORMATION ACT

***Okwo v. Harris Cnty. Dist. Attorney*, No. 14-15-00289-CV, 2016 WL 2974443 (Tex. App.—Houston [14th Dist.] May 19, 2016) (mem. op.)**. This is a Public Information Act (PIA) case involving the Harris County District Attorney's Office (DA). Okwo was charged and pled guilty to assault. After he completed his deferred adjudication, he made an oral request to the DA's office for the prosecutor's file. The DA produced non-privileged information. Okwo later called, then sent an email, asking why statements from the complainant were not present. He was told the notes taken regarding meetings with the complainant were prosecutor work product and confidential. No other statements exist. Five months later, Okwo submitted a written PIA request for the complainant's statement along with some other information. The DA called, then wrote, Okwo seeking a clarification as to whether he was seeking additional information from his original oral request. Okwo responded he was seeking the same information but wanted to require the DA to seek an attorney general's (AG) opinion. The DA submitted an opinion request. The AG opined the witness notes were prosecutor work product and protected from disclosure. Okwo brought this mandamus action to compel production. Both sides submitted summary judgment motions. The trial court ruled for the DA.

The court first determined the oral request did not trigger the PIA. Okwo asserted the oral request did not trigger the requirements but the DA's voluntary response brought it under the PIA. The court disagreed. Next, Okwo asserted the DA did not seek clarification in good faith but for delay purposes. The court analyzed all of the communication and uncontroverted evidence and determined the DA made a good faith request for clarification. Therefore, the 10-day deadline for the district attorney to seek an opinion from the attorney general started to run from receipt of Okwo's clarification. Next, the court analyzed the information and determined the notes were prosecutor work product and protected from disclosure. As a result, the trial court properly ruled the information was excepted from disclosure.

***City of Houston v. Kallinen*, No. 01-12-00050-CV, 2016 WL 4409099 (Tex. App.—Houston [1st Dist.] Aug. 18, 2016)**. This is a Public Information Act (PIA) case concerning mootness, governmental immunity, and awarding of attorney's fees. Randall Kallinen (Kallinen) made a PIA request to the city regarding a traffic-light camera study that was commissioned by the city. The city granted part of the request and asked for a ruling from the attorney general regarding the remainder of the information. The case had already gone to the Texas Supreme Court, which

remanded the case back to the court of appeals. The Texas Supreme court agreed with the trial court's decision that overturned the city's plea to the jurisdiction (plaintiff filed mandamus suit before receiving ruling from the attorney general), granted Kallinen's motion for summary judgment, ordered disclosure of the withheld documents, and awarded Kallinen attorney's fees. On remand, to the court of appeals the issues were whether: (1) the case was moot before the trial court entered its order; (2) Kallinen's claims were barred by governmental immunity; and (3) the trial court abused its discretion in awarding attorney's fees.

The court reviewed the city's claim that the case was moot because the city released the documents. However, the city did not release the documents voluntarily, but argued they did it by court order and continued to argue the trial court lacked jurisdiction. Because the city continued to make the argument, the court of appeals found that the controversy was not moot. Next, the court addressed the issue of governmental immunity. The city stated that Kallinen's claims were barred by governmental immunity because he did not direct the suit to the public information officer but instead to the governmental body. Based on the changes to the PIA to clear up this jurisdictional problem and various cases, the court rejected the city's contention that the PIA requires the requestor to name the public information officer as the respondent or face dismissal for lack of jurisdiction and, therefore, governmental immunity does not apply.

Next, the court examined whether the trial court abused its discretion in awarding attorney's fees. The court considered whether the trial court: (1) had sufficient evidence upon which to exercise its discretion; and (2) erred in its application of that discretion. Government Code Section 552.323 does provide for reasonable attorney's fees if the plaintiff substantially prevails. The city argued that the claimed fees did not account for the fact that some of the plaintiff's claims were dismissed from the case. However, Kallinen submitted a supplemental submission that explained the break-down of the fees and the trial court took that into account when it modified the final judgment. The city then claimed that the fees were not reasonable. The court determined there was sufficient evidence to determine the fees charged were reasonable based on the record that showed that Kallinen's counsel documented that the case was time, labor, and document intensive. Therefore, the court determined that the trial court did not abuse its discretion in awarding attorney's fees and affirmed the trial court's judgment.

PUBLIC SAFETY

***State of Texas v. One (1) 2004 Lincoln Navigator,* No. 14-0692, 2016 WL 3212490 (Tex. June, 10, 2016)**. In this civil-forfeiture case, police officers arrested Miguel Herrera and seized his Lincoln Navigator. After finding drugs during an inventory search of the vehicle, the state filed a notice of seizure and intended forfeiture under Chapter 59 of the Code of Criminal Procedure, claiming that the vehicle was "contraband" under the statute. Herrera argued that the stop leading up to the arrest was unlawful and therefore any evidence obtained pursuant to the subsequent search should be excluded in the civil-forfeiture proceeding. The trial court agreed, finding the vehicle search to be illegal and "denying the seizure."

The court of appeals affirmed, holding that: (1) Article 59.03(b), Code of Criminal Procedure, precludes the state from initiating a civil-forfeiture proceeding based on an illegal search; (2) the stop leading up to the arrest was unlawful because the officers did not have reasonable suspicion;

and (3) Herrera was entitled to relief because, after exclusion of the evidence found in the vehicle, the state was left with no evidence that the vehicle was contraband.

The Texas Supreme Court granted review to decide whether an illegal seizure requires exclusion in a Chapter 59 civil-forfeiture proceeding. The court held that it does not and reversed and remanded the case back to the trial court. The court went through the Fourth Amendment, the Texas statute exclusionary law and the Texas constitutional exclusionary law and analyzed whether these laws impact Chapter 59 of the Code of Criminal Procedure. The court stated that, based on case law, the exclusionary law only applies to criminal proceeding as deterrence in a way that bars the prosecution from introducing evidence obtained by way of a constitutional violation. The civil forfeiture statute is a civil proceeding that the legislature intended to be remedial in nature and not a form of punishment. The civil forfeiture proceeding does not require a determination that a person committed a crime, but only requires that the state prove by a preponderance of the evidence that the property is contraband.

Also, the court stated that the civil forfeiture statute does not effectively import an exclusionary rule. Even though the Code of Criminal Procedure does contain an exclusionary rule, it only applies to criminal proceedings. If the legislature intend for the exclusionary rule to apply to the civil forfeiture statute, the legislature could have done so. Therefore, the court held that neither the Fourth Amendment nor Chapter 59 of the Code of Criminal Procedure provides for exclusion in Chapter 59 civil forfeiture proceedings. Nor does Chapter 59 require the state show lawful seizure as a procedural prerequisite to commencing a Chapter 59 proceeding.

***2009 Black Infiniti v. State*, No. 02-14-00342-CV, 2016 WL 4538553 (Tex. App.—Fort Worth Aug. 31, 2016) (mem. op.)**. Appellant was stopped by the City of Wichita Falls Police Department because she abruptly exited the freeway after seeing that there was a drug checkpoint ahead, failed to completely stop at the next intersection, and turned without signaling. The officer stated that the appellant was extremely nervous and the passenger smelled of burnt marijuana. Appellant declined to allow the police to search the car, so a K9 officer performed an open-sniff of the car and indicated drugs to the passenger side door. Officers saw a backpack on the passenger side floorboard and found a marijuana pipe and zippered pouch containing crystal methamphetamine. After a search of the car and finding other evidence, the appellant and passenger were arrested for manufacture/delivery of methamphetamine and seized the car. The grand jury no billed the indictment and the charges were dismissed against the appellant. However, the State proceeded with the forfeiture proceedings and awarded the possession of the vehicle to the police department.

The appellant contended that the State failed to prove that the vehicle was contraband and that the trial court's rejection of her innocent-owner affirmative defense was against the great weight and preponderance of the evidence. The court looked at the legal sufficiency of the evidence to support the contraband finding by the trial court. According to Chapter 59 of the Code of Criminal Procedure, the State must establish by a preponderance of the evidence a substantial nexus or connection between the property to be forfeited and the statutorily-defined criminal activity. However, there is an affirmative defense within the civil forfeiture statute. Article 59.02(c)(1) states that the trial court may not forfeit an owner's interest in property if the owner proves by a preponderance of the evidence that: (1) the owner acquired and perfected an interest in the property before or during the act or omission giving rise to the forfeiture; and (2) the owner did

not know or should not reasonably have known (a) of the act or omission giving rise to the forfeiture or (b) that it was likely to occur at or before the time of acquiring and perfecting the interest.

The court found that because there was enough methamphetamine found in the car to be charged with a second degree felony and that a possession-only felony can establish a car as contraband, there was enough of a preponderance of the evidence for the trial court to establish legal sufficiency of the car being contraband. The appellant argued that the passenger's possession of narcotics should not be used to make the car contraband. The court countered stating Chapter 59 does not require any proof that a person committed a crime, it only requires that the state prove by a preponderance of the evidence that the property is contraband.

As for the innocent-owner affirmative defense issue, the court stated that in order for the appellant to use the affirmative defense, the appellant had to actually plead the affirmative defense. Affirmative defenses are waived unless pled or trial by consent is established. A trial by consent is when evidence regarding a party's unpled issue is developed under circumstances indicating both parties understood the issue was in the case, and the other party failed to make an appropriate complaint. Also, when evidence relevant to both a pled and unpled issue has been admitted without objection, the doctrine of trial by consent should generally not be applied. The court saw no dispute about the ownership of the car and the appellant did deny knowing about the drugs but, this evidence was also relevant to whether the car was contraband, therefore a trial by consent was not established and the appellant did not plead the affirmative defense. With that being the case, the court determined that the appellant waived her affirmative defense, overruled her innocent owner affirmative defense issue, and affirmed the trial court's ruling.

***Gish v. City of Austin*, No. 03-14-00017-CV, 2016 WL 2907918 (Tex. App.—Austin May 11, 2016) (mem. op.)**. This is a Civil Service Act (Chapter 143 of the Texas Local Government Code) case where the Third Court of Appeals reversed the granting of the city's plea to the jurisdiction and remanded the case. Michelle Gish was indefinitely suspended from her job with the City of Austin Police Department (APD). She was one of several officers who secured a suspect to a gurney following a chase and struggle. The suspect spat on Gish, she slapped the suspect, and APD officer Jose Robledo pulled Gish away. Gish was suspended after an inquiry. Robledo was also suspended for being untruthful during the investigation into Gish. Gish appealed that decision to a hearing examiner. The examiner issued an opinion in Robledo's case after Gish's hearing (but before issuing an opinion for Gish), and the city discussed and attached the Robledo opinion to its post-submission brief for the hearing examiner in Gish's case. The hearing examiner then affirmed Gish's suspension. She appealed to the district court, which granted the City of Austin's plea to the jurisdiction and dismissed her case.

By choosing a hearing examiner, Gish waived her right to appeal to the judicial system unless the hearing examiner "was without jurisdiction or exceeded [his] jurisdiction or [] the order was procured by fraud, collusion, or other unlawful means." The Third Court of Appeals has determined that a hearing examiner or commission's consideration or acceptance of evidence outside of the hearing shows procurement of the decision by "unlawful means." *Steubing v. City of Killeen*, 298 S.W.3d 673, 674-75 (Tex. App.—Austin 2009, pet. denied). The court held that "[a]ny evidence received outside the bounds set by the statute is illegal, and destroys any

presumption that the commission's order is valid." The city contends the hearing examiner's *Robledo* opinion was presented to the examiner as legal precedent or authority in Gish's case, not as evidence. However, the city recounted testimony citing the treatment of Robledo and did so "to rebut evidence that Gish received disparate treatment, not simply as legal precedent." Further, the failure of Gish to object to the submission of the Robledo opinion during the hearing did not resolve any controversy over its post-hearing submission, so the issue is not moot. By submitting the Robledo opinion in a post-submission brief to the hearing examiner, the city created a fact issue on whether the examiner's opinion was obtained through unlawful means. This fact issue renders the granting of the plea invalid. The case is remanded for further proceedings.

TAKINGS

***Harris Cnty. Flood Control Dist. v. Kerr*, No. 13-0303, 2016 WL 3418246 (Tex. June 17, 2016)**. In this substituted opinion on motion for rehearing, the Supreme Court of Texas reversed itself and held that property owners could not sue the county for a taking for merely permitting private development on land which eventually flooded their downstream property. In June of 2015, the Texas Supreme Court issued its original 5-4 opinion holding that property owners could sue the county for permitting development to occur on upstream property which eventually flooded their lands. After a motion for rehearing and various amici briefs, the Texas Supreme Court withdrew its original opinion and issued this 5-4 opinion with Justice Guzman being the swing vote. The primary facts are simply that the county issued permits for private developers upstream to develop their properties increasing impervious cover. The county had several studies in its possession noting that unless development is reduced, the properties downstream would be flooded. The county utilized additional studies noting the reduction of development was not as high as originally feared. However, when the county continued to issue permits under the slightly modified regulations, private upstream property owners continued to develop. The downstream property owners suffered flooding and sued asserting the changes were insufficient and the county under-regulated.

Generally, plaintiffs seeking recovery for a taking must prove the government "intentionally took or damaged their property for public use, or was substantially certain that would be the result." A takings claim cannot be established by proof of mere negligent conduct by the government. Only affirmative conduct by the government will support a takings claim, but granting a permit can qualify if all other elements are met. In addition, a specificity element runs in the case law and indicates that in order to form the requisite intent, the government ordinarily knows which property it is taking.

The Texas Supreme Court has "not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction." With regards to a public use element, merely granting permits to a private citizen is not enough. When a regulatory body does nothing more than allow, under its own regulations, a private person to develop their own private land, the public use element is not triggered. In this case, there was no evidence that the county ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control measures. The only elements allegedly causing the flooding was private development on private land. Because inaction cannot give rise to a taking, the court held it "cannot consider any alleged

failure to take further steps to control flooding, such as the failure to complete . . .” a proposed regulation plan which was not adopted. Additionally, the court held “[b]ecause a taking cannot be premised on negligent conduct, we must limit our consideration to affirmative conduct the County was substantially certain would cause flooding to the homeowners’ properties and that would not have taken place otherwise. The only affirmative conduct on which the homeowners rely is the approval of private development. Further, the homeowners offered no proof that the County was substantially certain that the homeowners’ particular properties would flood if the County approved new housing developments.” “This is not a case where the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood control dam knowing that certain properties will be flooded by the resulting reservoir.” “The homeowners’ theory of takings liability would vastly and unwisely expand the liability of governmental entities, a view shared by the many public and private amicus curiae who have urged rehearing of this cause. The theory lacks any discernible limiting principle and would appear to cover many scenarios where the government has no designs on a particular plaintiff’s property, but only knows that somewhere, someday, its routine governmental operations will likely cause damage to some as yet unidentified private property.” That is not a taking. As a result, the plea should have been granted. The case is reversed and rendered.

The concurring opinion by Justice Lehrmann focused on the possibility that a private person could, potentially have a proper takings claim, even if no “public use” is present. However, that is not the case here so she concurred. The dissent simply recast the original 5-4 opinion with near identical analysis.

***City of Magnolia v. Smedley*, No. 09-15-00334-CV, 2016 WL 4045501 (Tex. App—Beaumont July 28, 2016) (mem. op.)**. This is a flooding case where the Beaumont Court of Appeals dismissed the plaintiff’s claims against the city under a plea to the jurisdiction. Smedley sued the city and the city’s economic development corporations and contracted entities alleging that the defendants caused Smedley’s property to flood and retain standing water, causing damages. Smedley alleged that until 2004, water drained off of his properties easily. In 2004, Chicken Express constructed a parking lot on the northeast side of Smedley’s property, and thereafter, in 2011, the city completed construction of the “Magnolia Stroll,” which included a walkway adjacent to the northern edge of Smedley’s property. Smedley alleged the city violated Texas Water Code Section 11.086, and that “the Defendants City of Magnolia and Chicken Express, Inc., diverted the natural flow of diffuse surface water across the land owned by them, allowing and causing the water to stream onto and over the plaintiff’s property.” Smedley alleged the city’s actions constituted a taking without just compensation. Smedley also alleged a claim against the city under the Texas Tort Claims Act (TTCA) stating that the city and its employees were negligent in “the operation of motor driven equipment during the construction of the Magnolia Stroll resulting in property damage” and that the city is liable under the Texas Tort Claims Act because “[t]he City was performing a proprietary function by a municipality, i.e., the construction and design of a street . . . .” The city filed a plea to the jurisdiction which was granted-in-part and denied-in-part.

First, with regards to the development corporations, the court noted that while a jurisdictional issue can be raised for the first time on appeal, the court of appeals interlocutory

jurisdiction must still be properly triggered. Since the development corporations filed their own pleas to the jurisdiction, got them partially denied, then filed summary judgments which were denied on the same grounds, they did not timely appeal the issues. The city did properly trigger interlocutory jurisdiction. To defeat the city's plea to the jurisdiction, Smedley must raise a fact issue as to intent, causation, and public use. In a takings case, "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." It is not enough that the act causing the harm be intentional—there must also be knowledge to a substantial certainty that the harm will occur. A taking cannot rest on the mere negligence of the government. Smedley's evidence did not allege or portray the grade level of the easement prior to or at the time of the construction of the Magnolia Stroll, nor do they provide legally sufficient evidence that the city was substantially certain that the construction of the Stroll would cause flooding to Smedley's property. As a result, he failed to raise a factual dispute so the plea should have been granted as to the takings claim. Further, the court affirmed the granting of the plea as to the TTCA and Water Code negligence claims as no waiver of immunity was properly alleged.

***City of Laredo v. Northtown Development, Inc.*, No. 04-15-00736-CV, 2016 WL 4211825 (Tex. App—San Antonio Aug. 10, 2016) (mem. op.)**. This is a takings case based on an alleged reverter in public property where the Fourth Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the case. Northtown Development, Inc. and Gateway Centennial Development Co. (Northtown) conveyed land to a utility district to build a wastewater treatment plan. It contained a reverter that if the property ever stopped being used for a public purpose, the property would revert back to Northtown. The utility district was eventually annexed by the city which assumed the waste water treatment plant and the property with the reverter. By 2011, the city had constructed a new wastewater treatment plant on the property. The original plant was built on the western side of the property, while the new plant was built on the eastern side. Northtown took the position the city had abandoned the old plant on the western side which therefore reverted back to Northtown. The city asserted it had a force main, transmission lines, and other facilities still on the western side, it has plans to build a bigger plant by 2030 on the western side to accommodate growth, and that the reverter language was only triggered if the entire parcel was abandoned. Northtown sued for declaratory judgment and for a taking under the Texas Constitution. The city filed a plea to the jurisdiction which was denied. The city appealed.

The court first held Northtown's declaratory judgment claim was nothing more than a recasting of its takings claim. A plaintiff cannot circumvent immunity by recasting a claim for monetary value as a declaratory judgment. Because Northtown's sole purpose for obtaining a declaration that the possibility of reverter in the deed was triggered was to obtain a money judgment, the city's immunity is not waived. Next, the court focused on only one of four arguments made by the city – that the reverter language is only triggered by complete abandonment of the property. The court analyzed the language within the deed carefully. Reading the plain language of the deed, the possibility of reverter addresses the use of the "tract" of land and upon the expiration of the use as to the "tract" of land, the determinable fee terminates and "title to the entirety" of the "tract" reverts to Northtown. The court held the deed only provides for a possibility of reverter of the "entirety" of the property in the event none of the property is used for purposes of operating a wastewater treatment plant or public purpose. Since it is undisputed the eastern portion of the property

operates the new plant, Northtown's takings claim fails as a matter of law. The trial court should have granted the plea. The order is reversed and the court rendered judgment for the city.

***Lamar Advantage Holding Co. v. City of Stephenville*, No. 11-14-00133-CV, 2016 WL 3573931 (Tex. App—Eastland June 9, 2016) (mem. op.)**. This is a trespass to try title suit filed against the City of Stephenville and Mark Kaiser, in his official capacity as city administrator. The city owns a tract of property upon which Lamar Advantage Holding Company (Lamar) maintains billboards. Lamar contends that it has a right to possess the property where the billboards are located by virtue of a ten-year lease it executed in 2007. The city contends Lamar's leasehold interest expired in 2011. Lamar filed a declaratory judgment action against the city seeking a declaration of the parties' rights under the 2007 lease. Lamar subsequently amended its pleadings to include a claim for trespass to try title claim. The city defendants filed a plea to the jurisdiction which the trial court granted.

The trespass to try title claim was brought against the city administrator in his official capacity and not truly against the city. [Comment: The city maintains immunity for a trespass to try title claim normally.] The key to Lamar's claim is that the successor deed reserved the right to lease billboards within the deed itself, thereby granting superior title to the leasehold. After analyzing the deed language, the court held " . . . that this reference . . . to a single lease does not constitute a reservation of future leasing rights." Nowhere does the deed purport to reserve from the conveyance any future right to lease the property for billboard purposes. The deed is controlled by the parties' objective intent as expressed in the document, not their subjective intent. Given this interpretation, as a matter of law, the city defendants conclusively established superior title and the right to possess the property, thereby negating the jurisdictional basis for Lamar's claim. The plea was properly granted.

***City of Justin v. Wesolak*, No. 02-15-00379-CV, 2016 WL 2989568 (Tex. App. Fort Worth—May 19, 2016) (mem. op.)**. This is a declaratory judgment and takings claim case where the Fort Worth Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the claims. Wesolak owns two adjoining tracts of land in the city, and built a fence that crossed both. Due to platting and ordinance restrictions the city opposed the fence. Wesolak built the fence anyway. The city issued eight citations, primarily asserting the fence was a "building" and in a prohibited location. Wesolak ultimately pled no contest to the citations and paid $6,528.00 in fines. Wesolak sued for a declaratory judgment that the fence did not violate any ordinances and brought a takings claim. The city filed a plea to the jurisdiction which was denied. The city appealed.

The court first determined that since no party was challenging the constitutionality of an ordinance or statute, the Texas Attorney General was not required to be served under Texas Civil Practice and Remedies Code Section 37.006(b). Wesolak was not seeking to hold the ordinance unconstitutional, but was instead arguing the fence is not a "building" under the code definition. Next, under a declaratory judgment action, it is "…not enough for a litigant to challenge the actions of a governmental entity under a statute, ordinance, contract, or franchise; the validity of the statute, ordinance, contract, or franchise itself must be challenged for governmental immunity to be waived." Since Wesolak's true intent was to have the city follow a certain definition under the ordinance, he should have brought an ultra vires suit against an official. The city remains immune. Additionally, in a footnote, the court holds the officials could not be sued either since Wesolak

pled guilty to the criminal charges. "A civil court simply has no jurisdiction to render naked declarations of rights, status, or other legal relationships arising under a penal ordinance." As to the takings claim, Wesolak's takings-claim paragraph fails to allege that the city intentionally performed any acts in the exercise of lawful authority or that the city's alleged taking was for public use. "To the contrary, Wesolak contends that the City was acting outside of its lawful authority and that the City's taking led to a private—i.e., not public—easement being imposed on his land." Such pleadings negate jurisdiction. The plea should have been granted.

TAXES

***Heritage Operating, L.P. v. Barbers Hill Indep. Sch. Dist*., No. 14-14-00187-CV, 2016 WL 3365330 (Tex. App.—Houston [14th Dist.] June 16, 2016) (op. on reh'g)**. This opinion replaces one originally summarized in the July 2015 TCAA newsletter. Heritage owned 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 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 provide adequate notice within two years in accordance with Tax Code provisions. The trial court ultimately granted the taxing units' motion for summary judgment, and Heritage appealed.

In its initial opinion, the court of appeals concluded that Heritage received the tax bill in 2007, which included notice of the 2004 delinquency, and was required to exhaust its administrative remedies in order to raise this issue to defeat a summary judgment. Because Heritage did not, 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. The court of appeals later granted Heritage's motion for rehearing, and withdrew its memorandum opinion issued in July of 2015.

The court went back and reexamined the question of whether Heritage's failure to challenge the appraisal before the appraisal review board deprived the trial court of jurisdiction to consider Heritage's defense. A critical issue on rehearing was the fact that Tax Code Section 41.44(c-3), which would have given Heritage a viable remedy through the appraisal review board to handle the tax protest, went into effect on January 1, 2008. If Heritage first received written notice of the 2004 taxes for the first time in May 2007, then it could not fail to exhaust its administrative remedies for the lack of notice because no such remedy existed at the time. The court concluded that sufficient evidence exists to show that Heritage first received notice of the 2004 taxes in May of 2007, and the taxing units failed to raise a question of fact as to whether the initial notice was delivered at some other time. Therefore the trial court was not deprived of its jurisdiction over Heritage's defense. The original judgment in favor of the taxing unit was reversed and the matter was remanded to the trial court.

***AKAL IX Mgmt., LLC v. City of McKinney*, No. 05-15-01242-CV, 2016 WL 3902734 (Tex. App.—Dallas July 14, 2016) (mem. op.)**. This an appeal by AKAL IX Management, LLC (AKAL) following the trial court granting the City of McKinney's motion for partial summary judgment. As an owner of a hotel located in McKinney, Texas, AKAL is required to pay the city a tax on its revenues. On October 4, 2012, AKAL filed a petition for reorganization under the

United States Bankruptcy Code (code). AKAL listed the city in its schedules as holding a claim a in the amount of $37,251 in unpaid hotel taxes.

In August 2013, the city objected to the amount in AKAL's schedules and asserted a claim in the amount of $97,302.15. AKAL included this amount in its Amended Plan of Reorganization, September 9, 2013. On October 23, 2013, the bankruptcy court confirmed AKAL's plan and the plan became effective on November 23, 2013. The city then filed suit against AKAL seeking to recover unpaid hotel taxes from June 1, 2013 through November 25, 2013 (the post–petition, pre–confirmation taxes) and taxes due after November 25, 2013 (the post–bankruptcy taxes). The city filed a motion for summary judgment on all of its claims except the amount of attorney's fees.

AKAL also filed for summary judgment asserting that the city's claim for post-petition, pre-confirmation taxes and penalties were discharged in AKAL's bankruptcy petition. AKAL argued that the city failed to assert the post-petition, pre-confirmation claim in the bankruptcy proceeding and therefore the claim was not allowed under the plan and was discharged by confirmation of the plan. The trial court granted the city's motion and ordered the city recover $87,776.59 for unpaid hotel occupancy tax from June 1, 2013 through April 30, 2015, plus reasonable attorney's fees and tax penalties. AKAL's bankruptcy plan itself provided that the holder of an administrative expense claim for a liability incurred in the ordinary course of AKAL's business did not have to file a notice of the claim. The city's claim for post–petition, pre–confirmation taxes and penalties related to a tax is an allowed administrative expense under the code and was for a liability incurred by AKAL in the ordinary course of its business.

Under both the code and AKAL's plan, the city had no obligation to file a further proof of claim or a formal request for payment in order for its claim to be allowed under the plan. If the city were required to conduct daily audits and file constantly updated claims in anticipation of a confirmable order, the bankruptcy and tax systems would rapidly grind to a halt. Because the city's claim for post–petition, pre–confirmation taxes, penalties, and audit fees was an allowed administrative expense under both the code and the plan, the court of appeals concluded that it was not discharged in AKAL's bankruptcy proceeding.

UTILITIES

***Railroad Comm'n of Texas v. Gulf Coast Coalition of Cities*, No. 03-14-00302-CV, 2016 WL 3136897 (Tex. App.—Austin May 31, 2016) (mem. op.)**. This is an appeal by the Texas Railroad Commission (Commission) and CenterPoint Energy (CenterPoint) following the district court's decision to reverse and remand the Commission's final order, significantly reducing Gulf Coast Coalition of Cities' (Coalition) rate-case expenses. The Coalition is comprised of cities that exercise original jurisdiction over the rates and charges of retail gas utilities, including CenterPoint.

The case arises out of CenterPoint's 2011 COSA-2 (Cost of Service Adjustment tariff) filings. Centerpoint is required, per an agreement with the Coalition, to annually propose adjustments to its customer charges for natural-gas distribution services in the Texas Coast Division by making calculations according to the COSA-2 tariff. The Commission approved CenterPoint's 2011 proposed adjustments to the rates, a system-wide increase in revenue of over $800,000. The new

COSA-2 rate became effective August 1, 2011 for areas under the Commission's original jurisdiction.

The Coalition denied CenterPoint's 2011 proposed adjustments. CenterPoint filed a petition for review with the Commission, which has appellate jurisdiction over the orders and ordinances of cities exercising original jurisdiction. In its final order, the Commission approved CenterPoint's requested COSA-2 adjustments and awarded rate-case expenses to both CenterPoint and the Coalition.

The Commission reduced the Coalition's requested rate-case expenses based on its determination that 40% of the adjustments to CenterPoint's 2011 request, proposed by the Coalition, were "irrelevant" and "unnecessary." The Commission found that the Coalition had presented ten issues that required an adjustment and that four were unnecessary because CenterPoint's cost-of-service calculation no longer included costs associated with those issues. The Commission used three different ways to calculate unnecessary expenses; all three indicated that 40% of time spent by the Coalition's attorneys was on issues no longer relevant to the proceeding. Accordingly, the Commission reduced the Coalition's rate-case expenses by 40% of the Coalition's total actual expenses. The Commission found that CenterPoint incurred 20% of its expenses in litigating the four irrelevant issues. Accordingly, the Commission also reduced the Coalition's rate-case expenses by 20% of CenterPoint's total actual expenses. The Coalition sued for judicial review of the Commission's final order regarding the reduction in the Coalition's rate-case expenses alleging that the Commission acted arbitrarily and capriciously by reducing the Coalition's rate-case expenses.

The district court found that the Commission acted within its authority to disallow the Coalition's rate-case expenses. But the court reversed and remanded the issue of the amount of the disallowance to the Commission for further proceedings. The Commission and CenterPoint appealed, contending that that Commission acted within its discretion to disallow expenses for duplicative issues that were irrelevant and unnecessary and that evidence supports the Commission's decision to reduce the Coalition's rate-case expenses by the amount determined in its original, final order.

The Austin Court of Appeals stated the Commission, as an administrative agency, has broad discretion. The court presumes that the Commission makes decisions supported by substantial evidence. So, the Coalition has the burden of proving otherwise, a very heavy burden that the Coalition did not meet. The Commission has promulgated a rule that addresses its evaluation of rate-case expenses. The court concluded that the Commission followed its rule, reviewed the evidence on both sides, and made a determination that the Coalition incurred expenses unnecessary and irrelevant to the proceeding. The Commission further provided substantial evidence supporting the Commission's reduction in the Coalition's rate-case expenses by an exact percentage. The court concluded that the Commission acted within its discretion by disallowing 40% of the Coalition's rate-case expenses. Accordingly, the appellate court reversed the district court's judgment on the rate-case-expense issue and rendered judgment reinstating the Commission's full final order.

***Amarillo v. Railroad Comm'n of Texas*, No. 08-14-00193-CV, 2016 WL 3020304 (Tex. App.—El Paso May 25, 2016)**. In this case, the Cities of Amarillo, Channing, Dalhart, and Lubbock (Lubbock and Amarillo) sought judicial review of the Texas Railroad Commission's (commission) decision to set gas rates on a system-wide basis.

Atmos Energy sells gas to various cities in the Texas Panhandle; Atmos refers to the areas as its "West Texas Division." In 2012, Atmos sought a rate increase. The commission preemptively decided that it would set rates on a system-wide basis rather than to set them in three smaller rate jurisdictions (subsets of the West Texas Division), as the commission had historically done.

Once the commission issued a final order, Lubbock and Amarillo appealed on three issues: (1) whether the commission violated the Administrative Procedures Act in denying them the right to present evidence on a contested issue (the issue of setting rates on system-wide basis); (2) whether the finding made by the commission germane to system-wide rates was supported by substantial evidence; and (3) whether the commission must (but failed to) provide a reasoned basis for changing its prior practice of allocating costs to the three smaller rate jurisdictions. The commission and other interested parties argue Lubbock and Amarillo have no standing to pursue the appeal.

The court concludes that it cannot set a gas utility's rate, nor ultimately decide whether system-wide rates are, or are not, appropriate. It could only reverse the decision below and remand the matter back to the commission for a new hearing before the commission. However, settlement agreements reached by the interested parties would preclude any charge back for past revenues and future revenue based on agreed rates. These settlement agreements, along with ordinances adopted by Amarillo and Lubbock approving a new rate structure, rendered the dispute moot. The court held that the exception to the mootness doctrine that this is a "claim capable of repetition yet evading review" did not apply. In addition, the court held that the issues are not ripe because any decision the court reaches on the procedural fairness of the rate design in the final order would only be relevant to a future rate case, and only if the case was handled in the same fashion as here. Finally, without the potential for prospective relief, the court held that Amarillo and Lubbock lacked standing to assert their claims. All three issues were dismissed for want of jurisdiction.

WATER

***United States Army Corp of Engineers v. Hawkes Co., Inc.*, No. 15–290, 2016 WL 3041052 (May 31, 2016)**. In this case, the United States Supreme Court ruled unanimously that an approved jurisdictional determination that property contains "waters of the United States" may be immediately reviewed in court. Per the Clean Water Act, "waters of the United States" (WOTUS) are federally regulated. Property owners may seek an approved jurisdictional determination (JD) from the U.S. Army Corp of Engineers definitively stating whether such waters are present or absent on a particular parcel of land. Per the Administrative Procedures Act judicial review may be sought only from final agency actions. Per *Bennett v. Spear*, 520 U.S. 154 (1997), agency action is final when it marks the consummation of the agency's decision making process and when legal consequences flow from the action. The Court concluded that an approved JD is a final agency action subject to court review because it meets both conditions laid out in *Bennett*. The Corp didn't argue that an approved JD is tentative; its regulations describe approved JDs as "final agency action" valid for five years. Approved JDs give rise to "direct and appreciable legal consequences,"

the Court reasoned, because the Corp and the EPA (through a long standing agreement) are bound by them for five years. So per an approved JD the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, practically speaking, grant or deny a property owner a five-year safe harbor from such proceedings.

ZONING

***Trainer v. City of Port Arthur*, No. 13-15-00459-CV, 2016 WL 3911202 (Tex. App.—Corpus Christi July 14, 2016) (mem. op.)**. Reginald Trainer and other citizens (Trainer) sued the City of Port Arthur seeking to invalidate a city zoning ordinance that re-zoned a certain property to zoning classification PD-36 so the property could be sold by the school district to a developer of townhomes and apartments. Specifically, Trainer argued that the ordinance did not receive the approval of a supermajority of council as required by Local Government Code Section 211.006(d).

Following the filing of the suit, Trainer appeared at the city's board of adjustment meeting and presented his argument that the ordinance was invalid. The board of adjustment issued a decision agreeing that the ordinance was invalid. The city later issued a permit to the developer to construct 39 duplexes and a community center on the property in question, still under zoning classification PD-36. The trial court ultimately granted the city's plea to the jurisdiction because the decision to move forward with duplex construction instead of multi-family construction rendered the initial ordinance moot, and because Trainer failed to exhaust all administrative remedies under the city's zoning ordinance regarding the issuance of the permit for duplex construction. Trainer appealed.

On appeal, Trainer contended that his claim was not moot because the initial ordinance was not repealed and a permit was issued in accordance with the initial zoning classification. The city argued that the board of adjustment's decision that the ordinance was invalid fully and finally resolved the issue raised by Trainer in the original petition. The court held that even though the board of adjustment declared the ordinance invalid, the ordinance was never formally repealed by the city council. In other words, according to the court, the city treated the property as if the initial ordinance were valid and in effect. Further, the court noted that there is no authority for the board of adjustment to invalidate a city ordinance.

On Trainer's second claim on appeal, the court held that because Trainer did not exhaust his administrative remedies regarding his claim that the building permit issued was improper, the trial court lacked jurisdiction over that claim. The court remanded the mootness claim to the trial court for further proceedings.

***FLCT, Ltd. v. City of Frisco*, No. 02-14-00335-CV, 2016 WL 3029514 (Tex. App.—Fort Worth May 26, 2016)**. FLCT, Ltd. (FLCT) and Field Street Development I, Ltd. (Field) are two partnerships that own adjacent property in Frisco. FLCT's tract is located on the corner; Field's tract is located directly east of FLCT's. In both 2006 and 2007, the city's zoning ordinance permitted property owners in the C-1 district to sell beer and wine "by right." However, no public school was located within three hundred feet. After FLCT and Field submitted a preliminary site plan for an expanded facility, Frisco Independent School District (Frisco ISD) began negotiating with them to purchase the southernmost part of FLCT's and Field's tracts for an elementary school. Before they closed on the sale to Frisco ISD in 2009, they filed an amended preliminary site plan application with the city. The city council then amended the zoning ordinance. FLCT and Field

(owners) then sold a portion of the property to 7-Eleven which conditioned the sale on the ability to obtain all permits (including selling beer and wine). The city asserted 7-Eleven could not sell alcohol at that location. The city then went through several ordinance amendments to adjust and prohibit alcohol sales near churches, schools, and hospitals. Eventually, 7-Eleven sued under Section 11.37(d), Texas Alcoholic Beverage Code, seeking an order requiring the city secretary to make the statutory certification. TEX. ALCO. BEV. CODE § 11.37(d). The city secretary certified the area was in a dry region. Owners submitted a vested rights petition to the city under Chapter 245 of the Texas Local Government Code asserting they began developing the property at a time when alcohol sales were permitted so their rights vested at that moment to forever be able to sell alcohol at that location. The trial court granted the city's plea to the jurisdiction and the owners appealed.

First, the court held Chapter 245 provides the authority for a declaratory judgment action to enforce a landowner's rights. Owners are seeking a determination of the existence and extent of their rights to develop and use the property. As a result, the plea should not have been granted as to the Chapter 245 claims. Next, the court analyzed the Texas Alcoholic Beverage Code (Code) and held not only does it permit a city to enact distance regulations, it also allows the city to grant variances as to enforcement of those distance requirements. Accordingly, the code does not pre-empt the city's enactment and enforcement of the distance requirements, which means the owners are not limited to the relief under the Alcoholic Beverage Code. Here, owners have raised both a constitutional claim and a vested property rights claim in the form of a declaratory judgment, which is specifically authorized by statute. They are not seeking to appeal any action by the Texas Alcoholic Beverage Commission or any action in connection with a pending permit, so again, no pre-emption. The Code does not provide the exclusive remedy for owners' claims based on the city's enforcement of the distance requirements with respect to the property. Next, the owners contend the city's zoning changes are void as they did not provide individual notice to property owners. However, such notice is only applicable for changes in zoning classifications, not other types of zoning changes. The court analyzed the term "classification" and held the legislature intended that if a city (either through its zoning commission or city government) wishes to consider a zoning district or boundary change to a discrete piece of property, it is to ensure that owners of surrounding properties that would be affected by the change have notice and an opportunity to participate in any hearing regarding that change.

Here, the city's December 2012 zoning ordinance purported to place restrictions on the types and places where businesses could sell alcohol within five different districts where alcohol sales were then permitted. Thus, this was not a rezoning of classification applicable only to the property itself; the property was still included in the C-1 district after the passage of the ordinance. In other words, the city's interpretation is correct and this was not a "classification" change requiring individual notice. Next, the city contended that it could not issue a "permit" for alcohol so no vested right applies to its sale. However, Chapter 245 also applies to certificates. The certificate required by the city secretary qualifies. Further, the owner's claims are not predicated on the continued operation of a particular type of business but on use restrictions and, thus, they are not excluded on that basis from Section 245.001's definition of project.

The court agreed with owners' contention that the amended ordinance affected the C-1 district by imposing additional restrictions on alcohol sales that had not previously been imposed. Accordingly, the owners' pleadings and evidentiary facts show that the exemption in Section

245.004(2)(i.e. no vested right for certain zoning classifications) does not preclude their remaining Chapter 245 claims. Next the court concluded that the preliminary site plan originally applied for contained sufficient notice it intended to include alcohol sales. Further, a regulatory taking can occur when government action unreasonably interferes with a landowner's use and enjoyment of the property. After analyzing the facts and a detailed analysis of the legal standards, the court held facts were sufficiently pled and established to confer jurisdiction for a regulatory taking claim. As a result, the trial court order granting the plea is affirmed-in-part, reversed-in-part and remanded.