TCAA FALL CONFERENCE
RECENT STATE CASES
June 2009-September 2009

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I. ANNEXATION

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Five Land filed a mandamus action against the City to enforce the service plan and requesting an extension of sewer lines or services over annexed land in the City. The City annexed the land in 1998 and enacted a service plan for municipal services pursuant to TEX. LOC. GOV'T CODE §43.056. Five Land purchased 238 acres of the land in 2002 and by 2006 the City had not extended the service plan to the annexed area. The City filed a plea to the jurisdiction alleging Five Land did not have standing to sue because the statute in effect at the time of the annexation required that only persons "residing" on the annexed area have the right to petition for mandamus, not "landowners." The Legislature later amended the statute to allow "non resident landowners" to petition for mandamus.

The issue the Court of Appeals addressed was whether the change by the Legislature applies to the property owned by Five Land annexed before the effective date of the legislative change. The Court held that Five Land did not have standing to petition for mandamus because under TEX. LOC. GOV'T CODE §43.056, which was in effect at the time of the annexation, as Five Land was not a "resident" prior under the old law. The Legislature did not intend for the changes to apply to completed annexations.

City of Celina v. City of Pilot Point and Talley Ranch Management, Ltd.*, 2009 WL 2750978, No. 2-08-230-CV (Tex. App.—Fort Worth August 31, 2009){** TA \l "City of Celina v. City of Pilot Point and Talley Ranch Management, Ltd.*, 2009 WL 2750978, No. 2-08-230-CV (Tex. App.—Fort Worth August 31, 2009)**" \s "City of Celina v. City of Pilot Point and Talley Ranch Management, Ltd., 2009 WL 2750978, No. 2-08-230-CV (Tex. App.—Fort Worth August 31, 2009)" \c 1 **}**

The City of Pilot Point annexed a right of way from their eastern city limits to the Denton-Collin County line in 2000. Talley Ranch and Pilot Point entered into development agreements several years later and Pilot Point also adopted a Resolution accepting 3,545 acres of Talley Ranch's property into its extraterritorial jurisdiction (ETJ). The City of Celina brought suit against Pilot Point seeking a declaratory judgment that Pilot Point's 2000 annexation was void because (1) it extended into Celina's existing ETJ; (2) it was a prohibited "strip annexation"; and (3) it annexed land outside Pilot Point's ETJ. Celina also argued any actions taken on that annexation and the development agreements were void. Talley Ranch intervened and both Pilot Point and Talley Ranch moved for summary judgment based on the grounds that suit was filed

more than two years after the annexation and was barred by §43.901 of the TEX. LOC. GOV'T CODE, which states annexation is considered adopted with the consent of all involved persons if more than two years have expired since the annexation's adoption. Celina argued that even if consent was presumed under §43.901, there was no way to cure the other two substantive defects: the annexed land outside the ETJ; and that the land was less than 1,000 feet at its narrowest point. The trial court granted summary judgment for Pilot Point and Talley Ranch.

Celina argued on appeal their consent cannot be presumed and §43.901 does not cure any other defect except lack of consent and does not bar other challenges that allege other defects. *See City of Murphy v. City of Parker*, 932 S.W.2d 479 (Tex. 1996). Celina relied on *Murphy* to argue they could challenge the annexation past the two year limit because of Pilot Point's strip annexation and extension of the ETJ beyond what was allowed by statute. However, the court disagreed and held the Legislature intended a broad application of §43.901, holding "at a certain point in time, defects in annexation must yield to the interests of stability." *Id.* at 482. Celina waited until six (6) years after the annexation to challenge its validity; as such, the appellate court held the passage of time presumes Celina consented to the annexation and they were barred from challenging any aspect of the annexation.

Celina also argued the trial court erred in denying their motion to dismiss Talley Ranch's intervention. The Court of Appeals held Talley Ranch's intervention was based on a challenge to Pilot Point's actions. The Court noted a party may intervene if they have a justicable interest in a pending suit. The Court held Talley Ranch's justicable interest was based on Celina's challenges to voiding their development agreements with Pilot Point, a real justicable interest; the Court of Appeals held the trial court did not err in denying Celina's motion to dismiss Talley Ranch's intervention.

II. EMINENT DOMAIN

Block House Municipal Utility District v. City of Leander*, 2009 WL 1981427, No. 03-08-00551-CV (Tex. App—Austin July 10, 2009){** TA \l "Block House Municipal Utility District v. City of Leander*, 2009 WL 1981427, No. 03-08-00551-CV (Tex. App—Austin, July 10, 2009)**" \s "Block House Municipal Utility District v. City of Leander, 2009 WL 1981427, No. 03-08-00551-CV (Tex. App—Austin, July 10, 2009)" \c 1 **}**

Block House filed suit against the City after the City approved a condemnation of an easement for a wastewater line through parkland owned by Block House. Block House argued there was a feasible and prudent alternative for placing of the wastewater line and as such, the City could not initiate the condemnation of the property for the parkland. The district court granted summary judgment in favor of the City and Block House appealed.

The Court of Appeals held there was no reasonable and prudent alternative to the use or taking of the parkland, the City did not act in a fraudulent manner and it was not a willful and unreasonable action in terms of the facts and circumstances. The Court of Appeals upheld the summary judgment in favor of the City.

City of Dallas v. Pacifico Partners, Ltd*., 289 S.W.3d 371 (Tex. App.—Dallas 2009) (no pet.){** TA \l "City of Dallas v. Pacifico Partners, Ltd*., 289 S.W.3d 371 (Tex. App.—Dallas 2009) (no pet.)**" \s "City of Dallas v. Pacifico Partners, Ltd., 289 S.W.3d 371 (Tex. App.—Dallas 2009) (no pet.)" \c 1 **}**

The City of Dallas filed suit against Pacifico Partners to condemn property for an easement. The county court found in favor of the City and condemned the easement.

In this case, the City acquired a pedestrian easement across the side of a valet parking lot owned by Pacifico in downtown Dallas. Pacifico argued the City acted beyond the scope of the Resolution authorizing the taking by condemning air rights, subsurface rights, and fixtures in addition to the walkway. Pacifico also contended that the City's written offer to acquire the easement for the amount of $27,600 did not include an amount for fixtures and air and subsurface rights as required.

The special commissioners who heard the case awarded Pacifico $65,750 at an administrative hearing. Pacifico filed objections to the award in the trial court, and the trial judge determined the City had the right to take the easement. A jury then determined that the value of the easement was $123,000. The trial judge found Pacifico was entitled to $47,629 for fees and expenses, plus pre-and post-judgment interest.

On appeal, Pacifico argued the trial court's judgment was void for lack of jurisdiction because the City failed to show strict compliance with statutory condemnation procedures. Specifically, Pacifico contended that, because the Resolution and offer did not mention taking existing fixtures or the air and subsurface rights needed to add improvements in the easement space, the City was barred from including those rights in its condemnation and its authorized taking was limited to a simple ingress/egress right to walk across the surface area.

Pacifico argued *Whittington v. City of Austin* for the proposition that the City must prove its governing body "expressly" found the property rights were necessary for a public use and "expressly" authorized condemnation of the property sought. Based on the testimony of a city employee who stated (based on various documents in evidence) that the walkway would include "special paving, lighting, landscaping, awnings that kind of yielded or sheltered from the sun," the Court of Appeals disagreed. The City's intended use of the condemned property to construct a pedestrian walkway was stated in the Resolution and repeated in the City's condemnation petition. The Court of Appeals held that there was legally and factually sufficient evidence to support the trial judge's findings of fact and conclusions of law regarding the air and subsurface rights and fixtures. "Under Texas condemnation law, the Resolution is sufficient to support the

presumption that the Dallas City Council 'actually made a determination that the particular taking was necessary to advance the ostensible public use.'"

In addition, Pacifico argued the City's pre-suit offer to purchase the easement did not satisfy the statutory prerequisite to filing suit; i.e., that the parties were "unable to agree" on damages for the proposed taking based on *Hubenak v. San Jacinto Gas Transmission Co*. case. Pacifico argued that the offer was insufficient because it did not expressly offer to purchase fixtures or air and subsurface rights. The Court of Appeals disagreed, noting that *Hubenak* holds that "exact symmetry" between a purchase offer and final condemnation judgment is not required and would be impractical "because a contract and a judgment are different animals" and could hinder the condemnation process. *Hubenak* rejected a bright-line "mirror image" rule and adopted the following standard:

> Generally, it is sufficient that the parties negotiated for the *same physical property and same general use that became the subject* of the later eminent domain proceeding, even if the more intangible rights sought in the purchase negotiations did not exactly mirror those sought or obtainable by condemnation.

The Court of Appeals affirmed the condemnation and rendered a take nothing judgment against Pacifico.

III. EMPLOYMENT

City of Elsa v. Gonzalez*, 2009 WL 1975380, No. 13-07-0555-CV (Tex. App.—Corpus Christi July 9, 2009){** TA \l "City of Elsa v. Gonzalez*, 2009 WL 1975380, No. 13-07-0555-CV (Tex. App.—Corpus Christi July 9, 2009)**" \s "City of Elsa v. Gonzalez, 2009 WL 1975380, No. 13-07-0555-CV (Tex. App.—Corpus Christi July 9, 2009)" \c 1 **}**

Gonzalez, the city manager for the City of Elsa along with the City Council, discovered a potential conflict of interest concerning the City's Mayor and his employment as an assistant director of the Hidalgo County Urban County Program. The city attorney issued an opinion concluding there was in fact a conflict of interest which the City Council discussed at a properly posted meeting where they voted to accept the Mayor's resignation and relinquishment of his office. The opinion letter opined the Mayor's concurrent employment violated the Texas Constitution's doctrine of incompatibility. The Council discussed the matter at a properly posted meeting and directed City Manager Gonzalez to advise various county authorities of the results of the meeting and Gonzalez delivered the opinion to various county officials. In July 2003, Council terminated City Manager Gonzalez despite the fact he had advised them they violated the open meetings act by failing to post notice 72 hours prior to the meeting. After appealing this decision, the Council denied his appeal. Gonzalez filed suit based on his termination alleging violations of the whistleblower act, public information act, and open meetings act and requesting injunctive relief. The City filed a plea to the jurisdiction based on the fact the Court did not have jurisdiction for the various claims and challenging the injunctive

relief, which the Court denied. Gonzalez filed a motion for summary judgment which the Court granted. After trial, a final judgment was entered on behalf of Gonzalez; the City requested a motion for new trial and this appeal ensued.

The City claimed Gonzalez failed to plea sufficient facts to confer jurisdiction because the action he reported was not a violation of the law for the whistleblower act and he did not report it to the proper law enforcement authorities. The Court of Appeals held that the City waived its immunity and the trial court had subject matter jurisdiction because Gonzalez was a public employee and he had sufficiently plead facts that the termination was based on a good faith report to the appropriate authorities of the City's conduct which violated the law.

The City also challenged the trial court granting Gonzalez's motion for summary judgment as they disputed whether Gonzalez's actions reported by him were violations of the law and were reported to the appropriate law enforcement entities. The Court of Appeals held Gonzalez made a good faith violation report to the appropriate law enforcement authorities when he informed the county judge and district attorney of the Mayor's conflict of interest and by reporting directly to the City Council of the open meetings violations. The Court of Appeals held these issues were questions of law and based on the evidence presented to the trial court on summary judgment, upheld the trial court's grant of summary judgment that Gonzalez made a good faith report to the law enforcement officials in accordance with TEX. GOV'T CODE §554.005(a)-(b).

They Court also held Gonzalez was entitled to attorney's fees for prevailing on his whistleblower claim pursuant to TEX. GOV'T CODE §554.003(a)(4), which states "a public employee who is terminated in violation of §554.0025 is entitled to sue…for reasonable attorney's fees." The Court reasoned by prevailing on his motion for summary judgment, Gonzalez established he was terminated based on his good faith report of a violation of law under the Texas Whistleblower Act.

Garcia v. Corpus Christi Civil Service Board*, 2009 WL 2058892, No. 13-07-00585-CV (Tex. App.—Corpus Christi July 16, 2009)**{ TA \l "Garcia v. Corpus Christi Civil Service Board*, 2009 WL 2058892, No. 13-07-00585-CV (Tex. App.—Corpus Christi July 16, 2009)" \s "Garcia v. Corpus Christi Civil Service Board, 2009 WL 2058892, No. 13-07-00585-CV (Tex. App.—Corpus Christi July 16, 2009)" \c 1 **}**

Mr. Garcia tested positive for cocaine and was fired from his job with Corpus Christi's Gas Department (City). He appealed his termination with the Corpus Christi Civil Service Board who upheld the termination; he then appealed to the district court. The District Court granted summary judgment in favor of the City. Garcia appealed and challenged the district court because the civil service board lacked sufficient evidence in his termination and the decision was arbitrary and capricious.

The Board argued the district court did not have jurisdiction over Garcia's claims because he sought monetary damages as well as equitable relief for his constitutional claims. The Court of Appeals held that regardless of whether Garcia was claiming both equitable

relief and monetary damages for constitutional claims does not automatically remove the case from the jurisdiction of the trial court. The Board also attempted to argue that the appellate court did not have jurisdiction over Garcia's claims because he did not demonstrate a "clear and unambiguous" waiver of sovereign immunity; however, the Court of Appeals held there is no sovereign immunity to avoid claims where due process claims were alleged.

Garcia first argued the Board's decision to uphold his termination was not supported by substantial evidence. The Court of Appeals held testimony given by City employees and a medical review officer that revealed Garcia's several violations of City personnel policies, including testing positive for cocaine and driving a City vehicle while under the influence, satisfied the standard that "reasonable minds could have reached the conclusion it reached in order to justify its action." *See Tex. Health Facilities Comm'n v. Charter Medical-Dallas, Inc*., 665 S.W.2d 446, 453 (Tex. 1992). Garcia also challenged the Board's decision arguing it was arbitrary and capricious and violated his due process rights. However, the Court of Appeals held the City gave proper notice for the hearing and the City was not required to add additional administrative and fiscal burdens to ensure a "more fair" hearing. The Court of Appeals overruled both of Garcia's challenges and upheld summary judgment in favor of the City.

IV. EMPLOYMENT-CIVIL SERVICE

City of DeSoto v. White*, 2009 WL 1712796, No. 07-1031 (Tex. June 19, 2009){** TA \l "City of DeSoto v. White*, 2009 WL 1712796, No. 07-1031 (Tex. June 19, 2009)**" \s "City of DeSoto v. White, 2009 WL 1712796, No. 07-1031 (Tex. June 19, 2009)" \c 1 **}**

Justin White, a DeSoto Police Officer, was suspended after two internal investigations revealing improper conduct. The City sent a letter to White that met almost all of the requirements of the TEX. LOC. GOV'T CODE §143 regarding the disciplinary process by which a municipality may suspend an officer and how to appeal that suspension. The Civil Service Code requires that a letter of disciplinary action sent to a suspended officer states they have the opportunity to elect to appeal to an independent third party instead of appealing to the commission within ten (10) days of receipt. TEX. LOC. GOV'T CODE §143.057(a), (c), and (j). The letter must also state that if an officer appeals to a hearing examiner, the officer waives the subsequent review by a district court. *Id*. §143.057(c). The letter sent by the City did not inform White of the limitations to seek review by a district court.

White elected to appeal his suspension with the hearing examiner. At the beginning of the hearing, White complained that the hearing examiner did not have jurisdiction to hear the appeal because of the missing notifications in his suspension letter as required by the Code. The examiner attempted to remedy the omission by offering an abatement, continuance and an opportunity to change his election, but White refused. The hearing took place and the examiner upheld White's suspension.

Subsequently, White filed suit in district court arguing the hearing examiner did not have jurisdiction to hear his appeal pursuant to §143.057(j). The district court granted summary judgment in favor of White and ordered the City to reinstate White and pay attorney's fees. The Court of Appeals affirmed the determination that the notice requirements under the Code were jurisdictional and failure to substantially comply would not suffice. The City of DeSoto appealed to the Texas Supreme Court.

The issue on appeal before the Supreme Court was whether the omission in the disciplinary letter deprived the hearing examiner of jurisdiction to hear the appeal, and a determination of the proper remedy because of the City's failure to comply under the statute. The Court's analysis regarding jurisdiction of the hearings examiner was based on the fact that, absent clear legislative intent, the statutory provision should not be considered jurisdictional because it would leave the decisions and judgments of the hearing examiner subject to future attack. *See Igal v. Brightstar Info. Tech. Group, Inc*., 250 S.W.3d 78, 83 (Tex. 2008).

The Court held that although the notice provision of §143.057(a) is mandatory; compliance with that requirement does not necessarily imply that non-compliance is jurisdictional. There is nothing specific within §143.057(a) suggesting that the notice requirement is jurisdictional and there are no provisions providing for a specific consequence for non-compliance compared with other provisions of the Code that require dismissal for non-compliance. The Court argued the consequences of interpreting the dismissal of the action and reinstatement in this situation would be troublesome given the important role of police officers and firefighters in the community and the need to maintain public trust.

The Supreme Court held the City's failure to provide the mandatory notice under §143.057(a) did not deprive the hearing examiner of jurisdiction to adjudicate White's appeal. The Court further held that the proper remedy for the City's failure to comply with the notice omission is abatement. This would give White notice of his appellate rights without dismissing the case of a potentially unfit officer and affords White an opportunity to make an appellate election with the full knowledge of the consequences of his choices.

Steubing v. City of Killeen*, 2009 WL 1981419, No. 03-08-00227-CV (Tex. App.—Austin July 10, 2009, no pet.)**{ TA \l "Steubing v. City of Killeen*, 2009 WL 1981419, No. 03-08-00227-CV (Tex. App.—Austin, July 10, 2009, no pet.)**" \s "Steubing v. City of Killeen, 2009 WL 1981419, No. 03-08-00227-CV (Tex. App.—Austin, July 10, 2009, no pet.)" \c 1 **}**

Officer Juneth Steubing was suspended from her job as a police officer for the City of Killeen indefinitely and appealed her suspension under TEX. LOC. GOV'T CODE §143.057. The hearing examiner held Steubing should not be reinstated. Steubing appealed to the district court and filed a motion for summary judgment. Steubing's motion was granted in part and remanded back to the examiner.

The hearing examiner concluded Steubing should not be reinstated and her termination was justified. In his decision, the hearing examiner admitted he sua sponte considered various psychological and empirical studies not admitted into evidence by either party to the hearing. There is no dispute that the hearing examiner's decision was procured by unlawful means. *See* TEX. LOC. GOV'T CODE §143.010(g). The issue on appeal involves whether the district court erred by remanding the case back to the hearing examiner instead of reinstatement and the Court's failure to award her attorney's fees.

Steubing relies on two cases to support her arguments that the district court should have reinstated her. In *City of Pasadena v. Richardson*, 523 S.W. 2d 506, 509 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e) the Court of Appeals interpreted a Supreme Court order to effectively require reinstatement where evidence was submitted and considered after the hearing was closed and did not remand the case for further proceedings. Steubing also relies on *Firemen's & Policemen's Civil Serv. Comm'n v. Bonds*, 666 S.W.2d 242, 244(Tex. App.—Houston [14th Dist] 1984, writ dism'd), where one of the commissioners improperly asked a municipality for documents involving misconduct to review before the hearing. However, the Court of Appeals held Steubing's arguments were misplaced.

The Court reasoned there is nothing in the language of either opinion which limits or precludes district courts from fashioning other types of relief or remedies other than reinstatement when setting aside orders by hearing examiners, nor does either opinion expressly prohibit district courts from ordering other types of relief. The Court notes that the language of TEX. LOC. GOV'T CODE §143.015(b) does not foreclose utilization of other remedies and permits district courts to do the same. Rather, the Court states the Legislature provided wide discretion for district courts to grant appropriate legal or equitable relief; reinstatement is only one type of relief, but not mandated. The court also reasoned that the use of the word "may" in the statute suggests district courts have discretion in determining reinstatement. The Court also noted the discretion afforded a district court is broad enough to allow for remands if appropriate under TEX. LOC. GOV'T CODE §143.015(b). The court did not abuse its discretion in remanding the case to the examiner.

Finally, the Court held the TEX. LOC. GOV'T CODE §143.015(c) does not require the award of attorney's fees and the trial court did not abuse its discretion in failing to award Steubing attorney's fees; the City was not aware of and did not offer up the evidence improperly considered by the hearing examiner. The Court of Appeals affirmed the ruling of the district court.

City of Pasadena v. Smith*, 2009 WL 2667599, No. 06-0948 (Tex. August 28, 2009){** TA \l "City of Pasadena v. Smith*, 2009 WL 2667599, No. 06-0948 (Tex. August 28, 2009)**" \s "City of Pasadena v. Smith, 2009 WL 2667599, No. 06-0948 (Tex. August 28, 2009)" \c 1 **}**

The City of Pasadena Police Chief suspended Officer Richard Smith indefinitely. Smith appealed his suspension to a third party hearing examiner. At the hearing, the Chief did

not appear; the City was ready to proceed, however, Smith argued the Chief's absence was sufficient for reinstatement. The hearing examiner agreed and dismissed the case without any evidence being heard. The City appealed the hearing examiner's decision to the district court and Smith filed a plea to the jurisdiction arguing the City's appeal was not timely. The trial court sustained Smith's plea to the jurisdiction and the City appealed; the appellate court held the district court had no jurisdiction over the case under TEX. LOC. GOV'T CODE §143.051(j) and the Supreme Court granted the City's petition for review.

The hearing examiner misplaced his sole ground for the ruling based on TEX. LOC. GOV'T CODE §143.1015(k), which is applicable only to Houston. TEX. LOC. GOV'T CODE §143.057 is the appropriate statute to apply in Smith's case, which applies to all cities, and a city may appeal a hearing examiner's ruling based on this provision. The statute states "a district court may hear an appeal of a hearing examiner's award only on the grounds…panel was without or exceeded jurisdiction or the order was procured by fraud, collusion or other unlawful means." Among several factors in considering the construction of the Act, the Supreme Court turned to the one factor involving whether the hearing examiner's actions are subject to meaningful review by a state agency or other branch of state government- because of the direct implication of §143.057(j). *Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1997).

The City argued the hearing examiner exceeded his jurisdiction under §143.057(j); the Act requires a hearing examiner to outline definite standards for reaching decisions; if not, they will become policy makers, not simply independent arbiters. Thus, the interpretation of the statutory language must be done so in a way that is constitutional if possible. The Act requires that a hearing shall be conducted fairly and impartially and mandates decisions be made on evidence submitted at the hearing. The court held that it clearly exceeds a hearing examiner's jurisdiction to refuse to hear evidence before making a determination on the appropriateness of a police officer's discipline.

The Supreme Court then set out this test for determining whether a hearing examiner exceeds its jurisdiction: his acts are not authorized by the Act; his acts are contrary to the Act; or when the acts invade the policy setting realm protected by the non delegation doctrine. The Court of Appeals also held the City's appeal was timely and reversed the decision of the appeals court and remanding the case back to the district court.

V. GOVERNMENTAL IMMUNITY-CONTRACT

City of Corinth v. Nurock Dev., Inc, et. al.*, 2009 WL 2356931, No. 2-07-422-CV (Tex. App.—Fort Worth July 30, 2009){** TA \l "City of Corinth v. Nurock Dev., Inc, et. al.*, 2009 WL 2356931, No. 2-07-422-CV (Tex. App.—Fort Worth July 30, 2009)**" \s "City of Corinth v. Nurock Dev., Inc, et. al., 2009 WL 2356931, No. 2-07-422-CV (Tex. App.—Fort Worth July 30, 2009)" \c 1 **}**

This case arises from the City's alleged breach of a settlement agreement from a prior federal lawsuit between the City and NuRock. The settlement reached in April of 2005 provided NuRock would construct affordable housing apartments to certain specifications, the City would acquire rights of ways on a specific road to which NuRock would make improvements, NuRock would place $120,000 in escrow for the improvements and the City would pay NuRock $120,000.

In April 2006, the City sued NuRock for breach of the settlement agreement for failure to place funds in escrow. NuRock filed counterclaims against the City alleging the City breached the settlement agreement, the City was interfering with and delaying construction of the apartments. The state trial court entered a temporary injunction for NuRock in 2006, which the City did not appeal. In 2007, the City filed a plea to the jurisdiction claiming sovereign immunity, which the trial court denied. This appeal ensued.

In its plea to the jurisdiction, the City asserts it had immunity from NuRock's claims for breach of the settlement agreement. The court addressed this issue by discussing *Texas A&M University-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), in which the Supreme Court held that when a governmental entity settles a claim and immunity has been waived, they cannot nullify that waiver of immunity by settling a claim with an agreement on which it cannot be sued. The City argued the *Lawson* case did not apply because NuRock did not plead any state law claims in the breach of the Federal action in which immunity was waived under state law. The Court of Appeals held that although a state may have immunity from federal claims according to the Eleventh Amendment, it does not afford the City the same immunity for these claims and the breach of settlement agreement claims.

The Court then turns its analysis to whether the trial court had jurisdiction over NuRock's inverse condemnation claims. The City argued the trial court did not have jurisdiction because NuRock agreed to improve the street which was at issue in the inverse condemnation claims. NuRock argued the trial court had jurisdiction because the settlement agreement was breached before the improvements were made and the requirements to complete them by the City was a taking. The City argued there was no jurisdiction because they accepted the improvements by NuRock under the contract, not by way of eminent domain. The Court of Appeals agreed with the City and held the trial court had no jurisdiction.

The City argued the trial court should have dismissed NuRock's declaratory and injunctive relief claims. Here, the Court reasoned the Declaratory Judgment Act permits waiver of immunity against governmental entities from claims involving a declaration of rights under a statute or regulation as opposed to a claim for relief cast as a claim for monetary damages in which there is no waiver of immunity. The Court held there was no waiver of immunity by the City because NuRock was claiming declaratory relief under the settlement agreement, which is a contract, and not a statute or ordinance.

Finally, NuRock requested injunctive relief against the City to "cease and desist from arbitrarily and capriciously applying ordinances and variances" for certificates of occupancy for the apartments being built. The Court held the possibility of future arbitrary and capricious conduct was too remote to support NuRock's request for a permanent injunction and their claim was not ripe for review.

VI. GOVERNMENAL IMMUNITY: MONETARY DAMAGES

Town of Double Oak v. McDaniel*, 2009 WL 2579613, No. 2-09-046-CV (Tex. App.—Fort Worth August 20, 2009) (mem. op.){** TA \l "Town of Double Oak v. McDaniel*, 2009 WL 2579613, No. 2-09-046-CV (Tex. App.—Fort Worth August 20, 2009) (mem. op.)**" \s "Town of Double Oak v. McDaniel, 2009 WL 2579613, No. 2-09-046-CV (Tex. App.—Fort Worth August 20, 2009) (mem. op.)" \c 1 **}**

Mr. McDaniel sued the Town of Double Oak for overcharges on sewer connection fees and building permit fees and requesting a refund for the overcharges. The Court of Appeals held Mr. McDaniel could not sue for retrospective monetary damages as they are barred by immunity. Further, the Court held Mr. McDaniel did not allege any express legislative permission to sue for such damages because overpayment of the fees to finish his project do not rise to the level of duress. The Court reversed the trial court's denial of the Town of Double Oak's plea to the jurisdiction.

Linbeck Construction Corp. v. City of Grand Prairie*, 2009 WL 2437097, No. 05-08-00650-CV (Tex. App.—Dallas August 11, 2009){** TA \l "Linbeck Construction Corp. v. City of Grand Prairie*, 2009 WL 2437097, No. 05-08-00650-CV (Tex. App.—Dallas August 11, 2009)**" \s "Linbeck Construction Corp. v. City of Grand Prairie, 2009 WL 2437097, No. 05-08-00650-CV (Tex. App.—Dallas August 11, 2009)" \c 1 **}**

Linbeck brought suit against the City for judicial foreclosure on mechanic's lien on an entertainment facility owned by the City. The City filed a plea to the jurisdiction and the trial court granted the plea on the claims for foreclosure of mechanic's, materialmen's lien, declaratory judgment and attorney's fees.

At issue in this case is whether governmental immunity protects the government from lawsuits to foreclose on city-owned property. The Court held the filing of a counterclaim by the City against Linbeck that it later non-suited does not waive the City's governmental immunity. The Court further held Linbeck's injury was in the past and his only plausible remedy was an award of monetary damages; as such, his declaratory judgment action is barred by the City's immunity from suit.

VII. GOVERNMENTAL IMMUNITY-TORT

City of San Antonio v. Riley*, 2009 WL 2045231, No. 04-09-00162-CV (Tex. App.—San Antonio July 15, 2009) (mem. op.){** TA \l "City of San Antonio v. Riley*, 2009 WL**

2045231, No. 04-09-00162-CV (Tex. App.—San Antonio, July 15, 2009) (mem. op.)" \s "City of San Antonio v. Riley, 2009 WL 2045231, No. 04-09-00162-CV (Tex. App.—San Antonio, July 15, 2009) (mem. op.)" \c 1 **}**

The Court of Appeals held the plaintiff did not raise a genuine issue of material fact as to whether an EMS officer was "reckless" in responding to an emergency; rather, the affidavit presented only raised an issue as to whether the officer was "negligent." The Court held the City maintained its governmental immunity under the emergency exception of the Texas Tort Claims Act; TEX. CIV. PRAC. & REM. CODE §101.055.

City of Laredo v. Reyes*, 2009 WL 2882935, No. 04-09-00132-CV (Tex. App.—San Antonio September 9, 2009) (mem. op.){** TA \l "City of Laredo v. Reyes*, 2009 WL 2882935, No. 04-09-00132-CV (Tex. App.—San Antonio, September 9, 2009) (mem. op.)**" \s "City of Laredo v. Reyes, 2009 WL 2882935, No. 04-09-00132-CV (Tex. App.—San Antonio, September 9, 2009) (mem. op.)" \c 1 **}**

Plaintiff Maria Alejandro Reyes sued the City of Laredo individually and as representative of the Estate of Karen Reyes. Karen Reyes drowned to death while trying to drive and cross flood waters along Century Boulevard in Laredo. Reyes claimed the City waived its immunity because the condition was a special or premise defect and the City failed to warn of the condition. The City filed a plea to the jurisdiction because the road was not a premise or special defect and the design and installation of the road was a discretionary function which entitled the City to immunity. The trial court granted the plea and Reyes appealed.

Reyes presented direct evidence in the form of an affidavit from a neighbor who called 911 several times the evening of Karen Reyes' death to advise the police of the rising water. Although the neighbor did not state he actually saw the rising water, it was sufficient circumstantial evidence to establish actual knowledge by reasonable inference. *See City of Corsicana v. Stewart*, 249 S.W. 3d 412, 415 (Tex. 2008). The court held this direct evidence was sufficient proof to create a fact issue as to whether the City had actual knowledge of the flooding on the evening of the incident.

The Court next addressed whether the water on the road was a special defect. The court held that although there was water on the road, it did not present an "unexpected and unusual danger." The court reasoned that water accumulating on the road is not unusual to ordinary users of the road and did not liken itself to excavations or obstructions that exist on the road. As such, the court held the water on the road was not a special defect.

Finally, the Court also held decisions about installing safety features are discretionary in nature and regardless of the City's responsibility to be able to respond, they were still entitled to immunity. The court reversed the district court's decision on the denial of the plea to the jurisdiction for the City.

City of Plano v. Homoky*, 2009 WL 2596194, No. 05-08-01461 (Tex. App.—Dallas August 25, 2009){** TA \l "City of Plano v. Homoky*, 2009 WL 2596194, No. 05-08-01461 (Tex. App.—Dallas August 25, 2009)**" \s "City of Plano v. Homoky, 2009 WL 2596194, No. 05-08-01461 (Tex. App.—Dallas August 25, 2009)" \c 1 **}**

The Court of Appeals reversed the denial of a plea to the jurisdiction for the City of Plano. The court held the City's operation of a golf course is considered a governmental function and the golf clubhouse is interrelated to the governmental function. The court also held the City did not waive its immunity under the recreational use statute solely because Homoky was walking towards the exit and not engaged in "recreation"; it also includes when one is on the "premises" journeying to and from recreational area. The court held the City did not violate a duty under the recreational use statute.

Hunnicutt v. Dallas/Fort Worth Int'l Airport Bd.*, 2009 WL 2356858, No. 2-08-297-CV (Tex. App.—Fort Worth July 30, 2009) (mem. op.){** TA \l "Hunnicutt v. Dallas/Fort Worth Int'l Airport Bd.*, 2009 WL 2356858, No. 2-08-297-CV (Tex. App.—Fort Worth July 30, 2009) (mem. op.)**" \s "Hunnicutt v. Dallas/Fort Worth Int'l Airport Bd., 2009 WL 2356858, No. 2-08-297-CV (Tex. App.—Fort Worth July 30, 2009) (mem. op.)" \c 1 **}**

Hunnicutt sued DFW for premises liability when she sustained injuries and fell while riding an escalator. The trial court granted summary judgment in favor of DFW as a political subdivision on the premises liability cause of action.

The Court of Appeals held Hunnicutt did not provide evidence to raise a fact issue as to whether DFW had constructive knowledge of the condition that caused her injuries and upheld summary judgment in favor of DFW.

VIII. LAND USE

Rhino Real Estate Investments, Inc., et. al. v. City of Runaway Bay*, 2009 WL 2196131, No. 2-08-340-CV (Tex. App.—Fort Worth, July 23, 2009) (mem. op.){** TA \l "Rhino Real Estate Investments, Inc., et. al. v. City of Runaway Bay*, 2009 WL 2196131, No. 2-08-340-CV (Tex. App.—Fort Worth, July 23, 2009) (mem. op.)**" \s "Rhino Real Estate Investments, Inc., et. al. v. City of Runaway Bay, 2009 WL 2196131, No. 2-08-340-CV (Tex. App.—Fort Worth, July 23, 2009) (mem. op.)" \c 1 **}**

Runaway Bay is a general law city where Rhino Group owns twelve lots located within the City's extraterritorial jurisdiction. The plats for the lots were approved prior to Rhino purchasing them and prior to the City incorporating. The City adopted an ordinance providing for subdivision regulation within the city limits pursuant to TEX. LOC. GOV'T CODE §212.002. In addition, the City also adopted an ordinance extending the subdivision regulations to the ETJ. The City filed suit against Rhino seeking a temporary restraining order, temporary injunction and permanent injunction seeking Rhino's compliance by obtaining building permits, paying inspection fees, and meeting all the

requirements of the subdivision ordinance prior to building on the lots. The trial court ruled in favor of the City and Rhino filed an appeal.

The primary issue on appeal in this case is whether the City extended the building permit requirements to the ETJ. The City argued TEX. LOC. GOV'T CODE §212.003 -"Extension of Rules to Extraterritorial Jurisdiction" permits them to extend application of building permits and inspections for subdivision development to the ETJ. The court reversed the trial court's declaratory judgment in favor of the City.

The Court reasoned the subdivision ordinance requirements were not applicable to the ETJ because the plain meaning of the subdivision ordinance did not apply to subdivisions created after the final approval of the ordinance; Rhino's plats were approved prior to the ordinance. In addition, the court held the plain meaning of the ordinance only sets fees for building permits and inspections in the ETJ; it does not extend the whole building code into the City's ETJ. See TEX. LOC. GOV'T CODE §311.011. The Court also reasoned, considering the object sought to be obtained, the preamble of the ordinance extending the regulations had no language to extend the building code to the City's ETJ. As such, the court held the building and permitting ordinance did not extend the building requirements to the City's ETJ.

Berkman v. City of Keene*, 2009 WL 2136502, No. 10-08-00073-CV (Tex. App.—Waco July 15, 2009){** TA \l "Berkman v. City of Keene*, 2009 WL 2136502, No. 10-08-00073-CV (Tex. App.—Waco July 15, 2009)**" \s "Berkman v. City of Keene, 2009 WL 2136502, No. 10-08-00073-CV (Tex. App.—Waco July 15, 2009)" \c 1 **}**

Berkman filed suit against the City alleging they were obligated to provide water and sewer services under an agreement with the City and his predecessors in title. The trial court granted a motion for summary judgment for the City; Berkman appealed. Berkman contends the court erred because (1) it did not recognize the mandatory nature of the successors and assigns clause of the agreement; (2) it failed to recognize that the agreement created a covenant running with the land; and (3) it considered parol evidence to interpret an unambiguous contract.

The appellate court first addressed whether the agreement created a beneficial covenant running with the land as asserted by Berkman. A covenant runs with the land if (1) it touches and concerns the land; (2) relates to a thing in existence or specifically binds the parties and their assigns; (3) it is intended to run with the land by the original parties; and (4) any successor to the burden has notice. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987). The parties focus on the first and third of the requirements. The City contends even if there is a covenant running with the land, Berkman and his predecessors abandoned the covenant. According to the Restatement on Real Property, covenants running with the land involve both a benefit and a burden; the benefit touches and concerns the land if the performance affects the use and enjoyment of the property. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT§16.1 cmt. b. Thus, the Court held the City's promise to provide water and

sewer "affected the use and enjoyment of their property" and the agreement touched and concerned Berkman's land.

The Court of Appeals then turned to the intent of the parties and looked to the entire language of the covenant agreement. The Court reasoned the intent may be explicitly expressed in the words of the agreement; or if not explicitly, it must be found by inference from the circumstances in how the words were used. The Court held parol evidence may be used, even if deed language is unambiguous, as long as the deed is not varied or contradicted by the evidence.

The City argued the agreement language solely set out the consideration for the agreement; however, the language required the City to provide the water and sewer for a specific amount of time determined by the specific use of the property. The City also argued the agreement benefits the successors and assigns only "where permitted by the agreement."

The City also argued the circumstances of the transaction and the City's intent illustrated the City did not intend a covenant running with the land. First, a promise to provide benefits of sewer and water services did not touch and concern the City's land; further the City argued the actual intent of the parties from original owner's affidavit indicating she did not intend for the covenant to run with the land, illustrated the intent of the parties was for the covenant not to run with the land. The Court of Appeals held the language and circumstances as argued by the City did not conclusively establish the parties did not intend for the covenant to run with the land.

Finally, the City argued Berkman and his predecessors abandoned their rights by failing to enforce the covenant for almost 10 years. However, the Court held this conduct, even for a lengthy period, is not sufficient to determine abandonment has occurred. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §7.4 cmt. a. The Court reversed the granting of the summary judgment on behalf of the City and held the City failed to conclusively establish the agreement did not crated a covenant running with the land and Berkman did not abandon his rights under the agreement.

Boswell v. Board of Adjustment and Town of South Padre Island*, 2009 WL 2058914, No. 13-08-642-CV (Tex. App.—Corpus Christi July 16, 2009) (mem. op.)**{ TA \l "Boswell v. Board of Adjustment and Town of South Padre Island*, 2009 WL 2058914, No. 13-08-642-CV (Tex. App.—Corpus Christi July 16, 2009) (mem. op.)**" \s "Boswell v. Board of Adjustment and Town of South Padre Island, 2009 WL 2058914, No. 13-08-642-CV (Tex. App.—Corpus Christi July 16, 2009) (mem. op.)" \c 1 **}**

Plaintiffs filed a petition for certiorari against the Board of Adjustment's decision to grant variances to a developer in South Padre Island. The Board filed a motion to dismiss for lack of jurisdiction based on the fact that the petition was not filed within ten days after the date of the decision as required by TEX. LOC. GOV'T CODE §211.011(b). The trial court granted the Board's motion to dismiss and Boswell appealed. Boswell argued §211.011(b) requirements for challenging a zoning decision are directory and not

jurisdictional and he also argued the Board should be equitably estopped from asserting that Plaintiffs failed to comply with §211.011(b) because the Board materially misled them regarding the variance determination.

The Court of Appeals first turns its attention to whether the ten day deadline set forth in §211.011(b) is directory and procedural rather than mandatory and jurisdictional. Boswell argued he did not have proper notice the Board had filed its decision. The code specifically states the petition *must* be presented within ten days after the decision is filed in the board's office. *See* TEX. LOC. GOV'T CODE §211.011(b) (emphasis added). The "must" provision suggests the ten day requirement is jurisdictional. *See Tellez v. City of Soccoro*, 226 S.W.3d 413 (Tex. 2007). Once the petition is filed, a court has subject matter jurisdiction; the language of the statute leaves little room for any other interpretation. The Court of Appeals held the ten day deadline is jurisdictional and non-compliance results in the failure of an action.

The Court then turned to whether the Board should be estopped from asserting Boswell's failure to comply with §211.011(b) because they materially misled the owners as to notice of when the Board made a determination on the variances. The Court of Appeals held estoppel cannot be used to acquire jurisdiction. The Court of Appeals upheld the motion to dismiss on both the jurisdictional and estoppel issues in favor of the Board.

IX. MISCELLANEOUS

Building Permits

Lindig v. City of Johnson City, et. al.*, 2009 WL 2476669, No. 03-08-00574-CV (Tex. App.—Austin August 11, 2009) (mem. op.)**{ TA \l "Lindig v. City of Johnson City, et. al.*, 2009 WL 2476669, No. 03-08-00574-CV (Tex. App.—Austin August 11, 2009) (mem. op.)**" \s "Lindig v. City of Johnson City, et. al., 2009 WL 2476669, No. 03-08-00574-CV (Tex. App.—Austin August 11, 2009) (mem. op.)" \c 1 **}**

The Lindig's applied for a building permit with the City of Blanco and was told by the City he could begin his project. After the application was reviewed, the City assessed a $1,000 fee for the construction which the Lindig's refused to pay. Consequently, the City issued a stop work order. The City proceeded with a suit against the Lindigs seeking a temporary restraining order and temporary and permanent injunctive relief to cease construction pursuant to TEX. LOC. GOV'T CODE §54.012 and sought civil penalties pursuant to TEX. LOC. GOV'T CODE §54.017 for violation of the stop work order.

In response, the Lindigs alleged the City was barred from enforcing the building permit ordinance against them under the concepts of estoppel and waiver and argued the City waived enforcement of the building permit because of their knowledge of other similar violations. In addition, the Lindigs counterclaimed for various issues including: (1) declarations the building permit fee ordinance was invalid, void, unenforceable, and

unconstitutional, (2) building permit fees paid illegally to the City should be refunded; and (3) the City's stop work order was void, illegal and unenforceable. The Lindigs also requested injunctions against the City for charging and procuring illegal permit fees. The trial court dismissed all of the Lindigs claims.

On appeal, the City argued the Lindigs did not have standing to dispute the validity of the building code under the declaratory judgment act since they did not serve the Attorney General. The Texas declaratory judgment act provides that a person whose rights, status, or other legal relations are affected by a statute may have determined any question of construction or validity arising under the statute and may obtain a declaration of rights, status, or other legal relations. TEX. CIV. PRAC. & REM.CODE § 37.004(a). The Court stated an action for declaratory judgment cannot extend a court's jurisdiction by itself. *Tex. Natural Res. Conservation Comm'n v. IT- Davy*, 74 S.W.3d 849, 855 (Tex. 2002). The declaratory judgment act also provides that in challenges to city ordinances, the city and the Attorney General must be served and given a chance to be heard. TEX. CIV. PRAC. & REM.CODE §A37.006(b). Failure to serve either party deprives the Court of jurisdiction. *See Commerce Indep. Sch. Dist. v. Hampton*, 577 S.W.2d 740, 741 (Tex. Civ. App.—Eastland 1979, no writ). The Lindigs did not serve the Attorney General with their suit challenging the validity of the City's ordinances, as such, the Court held they did not have standing to challenge its validity.

Next, the court turned its analysis to whether the Lindigs had standing to argue that all of the residential building permit fees should be paid back to all of the other residents in the city who had ever paid them. Unless standing is conferred by statute, a person seeking to enjoin the actions of a governmental body must allege and illustrate his damages or injuries other than as a member of the general public. *Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966); *Walker v. City of Georgetown*, 86 S.W.3d 249, 253 (Tex. App.—Austin 2002, pet. denied). Here, the Lindigs did not have standing because they did not argue that the city's practice of charging these fees to other citizens has resulted in any injury to them personally. Nor did the Lindigs show they had a personal stake in reimbursement of all the unlawfully charged fees or that they were the appropriate parties to assert the challenge on behalf of the City.

With regard to the building permit fees charged to the Lindigs, the City argued they did not have standing to dispute the charge since they did not pay it. There are many situations where plaintiffs are required to pay the tax or fee under protest before bringing suit to challenge its validity, however such procedures are mandatory only where it is expressly stated by statute. *See Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 879 (Tex. 2005) (citing TEX. TAX CODE §31.115; TEX. TAX CODE §112.051; TEX. TAX CODE §403.202. The City did not establish there was a statutory scheme by which the Lindigs claim requires them to pay the building permit fee prior to challenging it; consequently, the Court held the City failed to show the Lindigs lacked standing to pursue this claim.

The City also argued that the Lindigs did not have standing to dispute the building fee ordinance or fee at issue because they did not exhaust their administrative remedies under

the City's ordinances and their challenges were brought pursuant to statutory review procedures under TEX. LOC. GOV'T CODE §211.011 which states "a person aggrieved by a decision of the board [of adjustment]" to "present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality." The Lindigs argued the record illustrates the Board of Adjustment's decision is final, although it was not at the time they originally challenged the fee and ordinance, they cured any jurisdictional defect with the subsequent exhaustion of administrative remedies pursuant to the writ or certiorari. Consequently, the Lindigs had standing to bring their claims.

The City also challenged the trial court's jurisdiction over the Lindigs takings claims because an appeal had not been taken to the Board of Adjustment pursuant to TEX. LOC. GOV'T CODE §211.011. However, the Court held the trial court had jurisdiction over the takings claims because the Lindigs filed their writ of certiorari, which was granted, and the Board of Adjustment finalized its decision assessing the permit fees.

Finally, the Court turned its discussion to the trial court's determination to dismiss the Lindig's estoppel and waiver claims from enforcing the building and permit fee ordinance. The Court held these issues were not a "claim" over which a trial court must have jurisdiction, they upheld the Lindig's issues on estoppel and waiver. The Lindigs' valid claims were remanded to the trial court.

Libel & Defamation-City Official

Brock v. Tandy,* 2009 WL 1905130, No. 2-08-400-CV (Tex. App.—Fort Worth July 2, 2009) (mem. op.){** TA \l "Brock v. Tandy,* 2009 WL 1905130, No. 2-08-400-CV (Tex. App.—Fort Worth July 2, 2009) (mem. op.)**" \s "Brock v. Tandy, 2009 WL 1905130, No. 2-08-400-CV (Tex. App.—Fort Worth July 2, 2009) (mem. op.)" \c 1 **}**

Jack Brock ran an advertisement eight days before the mayoral election in the local Keller newspaper blaming the Mayor, Julie Tandy, and "a corrupt city hall" for ruining his property and accused the mayor of fraudulently falsifying legal documents. The Mayor lost and filed this defamation and libel per se claim against Brock. Brock filed a motion for summary judgment, which the trial court denied. Brock filed this appeal.

Tandy claimed Brock's printed words in the ad were so hurtful there was no proof necessary to illustrate their injurious nature to make them actionable. The Court first turned to whether the advertisement had a defamatory meaning to a reasonable person, specifically for a public official, which the words, if true, would have subjected her to removal from office, criminal charges, or imputation of official dishonesty or corruption. *See Bentley v. Bunton*, 94 S.W.3d 561, 582 (Tex. 2002). The Court held a reasonable person could view the advertisement to impeach Tandy's honesty and expose her to hatred, contempt or ridicule by the public.

The Court also considered whether Brock placed the ad with actual malice. Based on the deposition testimony of Brock, who admitted he did not need to research the facts in the advertisement and deposition testimony of a Council member who stated that Brock, among other things, never asked whether the Mayor's signature was backdated. The Court held Tandy presented evidence of genuine issue of material fact that Brock acted with lack of care with regard to the truth or falsity of his statements and upheld the trial court's denial of summary judgment.

Procedure

Green v. State, et. al.*, 2009 WL 2837670 (Tex. App.—Austin August 31,2 009) (mem. op.){** TA \l "Green v. State, et. al.*, 2009 WL 2837670 (Tex. App.—Austin August 31,2 009) (mem. op.)**" \s "Green v. State, et. al., 2009 WL 2837670 (Tex. App.—Austin August 31,2 009) (mem. op.)" \c 1 **}**

The State of Texas and the Cities of Waxahachie and Red Oak filed suit against Green for delinquent state and local sales taxes. The trial court granted summary judgment in favor of the State and the cities. Green argues the court erred because he failed to receive notice of the hearing on summary judgment. The Court of Appeals upheld the summary judgment because notice was sent to Green's address where he resided at the time when he filed his answer and he did not provide sufficient evidence that he failed to receive notice.

Torts

Jones v. City of Houston*, 2009 WL 2634226, No. 01-08-00905-CV (Tex. App.—Houston [1st Dist.] August 27, 2009) (mem.op.){** TA \l "Jones v. City of Houston*, 2009 WL 2634226, No. 01-08-00905-CV (Tex. App.—Houston [1st Dist.] August 27, 2009) (mem.op.)**" \s "Jones v. City of Houston, 2009 WL 2634226, No. 01-08-00905-CV (Tex. App.—Houston [1st Dist.] August 27, 2009) (mem.op.)" \c 1 **}**

The Jones siblings filed suit against the City of Houston for bystander mental anguish and emotional damages for the wrongful death of their brother. Their brother drowned after being sucked into an underwater culvert owned by the City and the siblings were on site when their brother's body was recovered. The trial court granted the City's summary judgment.

The Court held the Jones siblings were not entitled to bystander damages for their brother's drowning and reasoned they did not contemporaneously witness the incident, rather, they were informed of the accident, went to the scene and saw the effects of the accident. *See United Servs. Auto Ass'n v. Keith*, 970 S.W.2d 540 (Tex. 1998). The Court of Appeals also upheld the trial court's summary judgment decision in favor of the City.

Utilities

AEP Texas North Company//Cities of Abilene, Ballinger, San Angelo and Vernon v. Public Utilities Comm'n of Texas,* No. 03-05-00644-CV (Tex. App.—Austin August 31, 2009){** TA \l "AEP Texas North Company//Cities of Abilene, Ballinger, San Angelo and Vernon v. Public Utilities Comm'n of Texas,* No. 03-05-00644-CV (Tex. App.—Austin August 31, 2009)**" \s "AEP Texas North Company//Cities of Abilene, Ballinger, San Angelo and Vernon v. Public Utilities Comm'n of Texas, No. 03-05-00644-CV (Tex. App.—Austin August 31, 2009)" \c 1 **}**

AEP Texas North Company (TNC), field a petition with the Public Utility Commission of Texas (PUC) to reconcile its eligible fuel expenses and revenues for July 1, 2000 to December 31, 2001. The cities of Abilene, Ballinger, San Angelo, and Vernon and other entities intervened, requesting disallowances to the petition filed by TNC. TNC appealed the final decision issued by the PUC in favor of the intervenors. In 1999, the Legislature deregulated the retail electricity market. Prior to the 1999 deregulation of the electric utilities, the electricity market operated as a monopoly with rates regulated by the Public Utility Commission of Texas (PUC). The PUC set rates for TNC but applied a "fuel factor" that allowed TNC to charge rates high enough to recover its projected fuel costs expected to be incurred. Periodically, the TNC had to reconcile the revenues actually received with actual expenses, and then either refund its customers for over-recovery or recoup its losses through additional surcharges. This case results from TNC's final fuel reconciliation application, in which TNC sought to recover about $23 million, plus $3 million in interest, as its under-recovered fuel balance.

In this appeal, the cities raise four issues concerning the PUC's final order regarding TNC's final fuel reconciliation application: (1) the PUC erred in finding that TNC's natural gas purchases were prudent and reconcilable; (2) the PUC applied the wrong standard of review when examining TNC's natural gas purchases; (3) the PUC erred by determining that the Oklaunion coal-fired generating unit operated in a manner that incurred reasonable fuel costs; and (4) the PUC allowed ratepayers to subsidize TNC's unregulated generation company in violation of the Public Utility Regulatory Act (PURA).

The PURA empowers the PUC to regulate electric utilities. *See* TEX. UTIL. CODE §§ 11.001-66.016. Electric utilities were deregulated in 1999 and split into: (1) generation companies; (2) transmission and distribution companies; and (3) retail electric service providers. TEX. UTIL. CODE §39.001; TEX. UTIL. CODE §39.051. One aspect of electric deregulation was that each utility file a final fuel reconciliation application. § 39.202. The fuel charges that were a part of the fuel reconciliation are required to be prudently incurred with a reasonable rate of return. *City of El Paso v. El Paso Elec. Co*., 851 S.W.2d 896, 898 (Tex. App.—Austin 1993, writ denied. The PUC then reviews the application, and any determination of the PUC is given deference as the agency responsible for enforcing the statutes and rules. *See City of El Paso*, 851 S.W.2d at 898; *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984); TEX. LOC. GOV'T CODE § 2001.174.

The appellate court agreed with the PUC on all four issues. The Court agreed with the PUC's finding that TNC's overall natural gas costs compared favorably with the average cost of other Texas investor-owned utilities, and that the PUC employed an acceptable standard of review to make this determination. The Court also upheld the PUC's contention that the Oklaunion power plant's level of performance was reasonable when viewed over the entirety of the reconciliation period. Finally, the court upheld the PUC's finding that a planned outage of the Oklaunion power plant fell within the maintenance guidelines and did not impose an unreasonable burden on ratepayers.

In addition, the Court of Appeals overruled TNC's arguments that the PUC did not follow proper reconciliation methodology to determine its final recovery order. The Court gave considerable deference to the holdings of the PUC and reaffirmed the district court's judgment upholding the PUC's final order on the reconciliation issues.

X. OPEN GOVERNMENT

Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 2009 WL 1896070, No. 03-04-00683-CV (Tex. App.—Austin July 3, 2009)**{ TA \l "Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 2009 WL 1896070, No. 03-04-00683-CV (Tex. App.—Austin July 3, 2009)**" \s "Save Our Springs Alliance, Inc. v. City of Dripping Springs, 2009 WL 1896070, No. 03-04-00683-CV (Tex. App.—Austin July 3, 2009)" \c 1 **}**

Save our Springs brought suit against the City challenging their authority to enter into agreements with landowners to develop a particular tract of property. SOS also challenged the public notice of the Council meetings where the agreements were approved. The district court granted summary judgment to the City for the Open Meetings Act claims and also granted peas to the jurisdiction on the other claims. SOS appealed.

The Court of Appeals held SOS did not having standing for its environmental pollution case because none of the challengers owned property in the affected area or had any concrete injury or redress from the development agreements being challenged. The Court of Appeals also held the City's notices for the meetings were sufficient and did not violate the Open Meetings Act because they contained the proper information on the parties to the agreement, the statutory basis of the agreements, and the specific development agreements that were to be discussed.

XI. TAKINGS

City of Carrollton v. McPhee*, 2009 WL 2596145, No. 05-08-01018-CV (Tex. App.—Dallas August 25, 2009) (mem. op.)**{ TA \l "City of Carrollton v. McPhee*, 2009 WL 2596145, No. 05-08-01018-CV (Tex. App.—Dallas August 25, 2009) (mem. op.)**" \s

"City of Carrollton v. McPhee, 2009 WL 2596145, No. 05-08-01018-CV (Tex. App.—Dallas August 25, 2009) (mem. op.)" \c 1 **}**

McPhee filed an inverse condemnation claim against the City for issuing a stop-work order on his remodeling project. The Court of Appeals upheld the trial court's holding the City did not have immunity from suit because McPhee's allegations asserted valid takings claims for inverse condemnation; a public use is not necessary for a regulatory taking. The court further held McPhee created a fact issue for whether the City had an administrative appeal process and there was no evidence the City met its burden to show McPhee failed to exhaust his administrative remedies.

Fox v. City of El Paso,* 2009 WL 2171045, No. 08-08-00093-CV (Tex. App.—El Paso, July 22, 2009){** TA \l "Fox v. City of El Paso,* 2009 WL 2171045, No. 08-08-00093-CV (Tex. App.—El Paso, July 22, 2009)**" \s "Fox v. City of El Paso, 2009 WL 2171045, No. 08-08-00093-CV (Tex. App.—El Paso, July 22, 2009)" \c 1 **}**

Fox filed suit against the City of El Paso for retaliating against him by instituting a condemnation proceeding against him in an earlier proceeding. The court held there was no legal authority or legal analysis cited within the brief that was sufficient to attack the court's determination it did not have subject matter jurisdiction. The Court of Appeals affirmed the plea to the jurisdiction in favor of the City.

Angela Mae Brannan, et al. v. State of Texas, Village of Surfside Beach,* et al., No. 01-08-00179-CV (Tex. App.—Houston [1st Dist.] Aug. 28, 2009){** TA \l "Angela Mae Brannan, et al. v. State of Texas, Village of Surfside Beach,* et al., No. 01-08-00179-CV (Tex. App.—Houston [1st Dist.] Aug. 28, 2009)**" \s "Angela Mae Brannan, et al. v. State of Texas, Village of Surfside Beach, et al., No. 01-08-00179-CV (Tex. App.—Houston [1st Dist.] Aug. 28, 2009)" \c 1 **}**.

This case concerns the Texas Open Beaches Act and several homes that, due to erosion and the natural shift of shorelines, became located within the area of the public beach in the Village of Surfside Beach. TEX. NAT. RES.. Over multiple years, weather events caused the vegetation line of the beach, which marks what is public beach and what is private, to change position and cause various homes in the Village to allegedly become encroachments on the public beaches. A series of lawsuits and counterclaims followed, with this appeal being the final judgment in the case. The issues involved in this case were: (1) whether the Open Beaches Act created a public beach easement; (2) whether the beach easement should be imposed on the homes that were built on private property but were now encroachments; and (3) whether enforcement of the easement results in a taking of the owners' property that would require just compensation.

History of the Lawsuits Underlying the Case

This suit stems from prior lawsuits due to weather events in the village area that were deemed encroachments on the public beach. While the houses were not required to be removed, the Village refused from that point onward to issue permits to allow the owners

to repair septic systems and cut off water to some of the affected properties. The trial court held for the state and issued an injunction requiring the removal of the homes, which the homeowners appealed. The General Land Office then suspended for two years the order to remove the homes pursuant to Section 61.0185 of the Open Beaches Act. The second round started when another weather event caused further beach erosion and the State tried again to have the houses removed. Upon appeal to the district court in that case, the court disagreed with the owners' argument that the action was a regulatory taking because the Open Beaches Act did not create a property right and thus deprive the landowners of the use of their property. Rather, the court in that case held the Open Beaches Act enforced the public's existing right to the public beach easement. The fact that the homes were not originally built on the beach, but were caught by a "rolling easement" that had moved to include the homes in question, did not exempt the homes from being an illegal encroachment upon a public easement and subject to removal. Most of the homes in question were destroyed by Hurricane Ike, making their cases moot, but four homes remained in the suit.

Open Beaches Act

The Texas Open Beaches Act states that the public should have "free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or . . . the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico." TEX. NAT. RES. CODE § 61.011(a). Under the Act, a public beach is the "area extending from the line of mean low tide to the line of vegetation." *Id*. TEX. NAT. RES. CODE §A61.012. The statute does not create a public beach easement but allows for enforcement of a public beach easement acquired by use of the beach by the public. *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App.—Austin 1989, writ denied), *cert. denied*, 493 U.S. 1073 (1990). An easement under the Open Beaches Act can be created by: (1) prescription; (2) dedication; or (3) continuous right. TEX. NAT. RES. CODE § 61.011; *Arrington*, 767 S.W.2d at 958. Once a public easement to the vegetation line is established under TEX. NAT. RES. CODE §61.011 and TEX. NAT. RES. CODE §61.012 through use of the beach, the easement shifts as the line of mean high tide and the vegetation line itself shifts, creating a "rolling easement." *Feinman v. State*, 717 S.W.2d 106, 115 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

TEX. NAT. RES. CODE §61.018 requires a county attorney, district attorney, criminal district attorney, or the attorney general to file for removal of encroachments on public beaches.

Easement Created

The four remaining owners from the prior lawsuits argued that no easement was created under the Open Beaches Act. The state's evidence included statements that the public had been using the beach without asking permission of the landowners for years. The Court of Appeals held that the evidence of public use of the property was sufficient to prove that the public acquired an easement or right of use by implied dedication.

Encroachments

The four remaining homeowners also argued that their homes had preexisted the reach to their homes of the "rolling easement," and, therefore, their homes should not be removed. The homeowners assert that their houses are not "encroachments" under the Act because their houses were not built on the easement, but became part of the easement due to weather. The Court of Appeals interpreted the statute to meet the purpose stated in Section 61.011 of protecting the public's right to use the public beaches of Texas. Specifically, the Court held that the homes were subject to removal under Section 61.018 of the Act because that section requires: "*removal* or prevention of *any* improvement, maintenance, obstruction, barrier or other encroachment on a public beach." Also, a rule adopted by the General Land Office that allows a city to grant repair permits to houses that become encroachments through a rolling easement as long as the houses were originally built on private property, implies that a building is an encroachment even if the building originally was built on private property. *See* 31 TEX. ADMIN. CODE § 15.11(a). The Court further noted that the owners' interpretation would defeat the purpose of the act.

Takings Claims

The four remaining homeowners claimed that removal of their houses under the Act and the Village's refusal to allow access to their properties or work on the utilities resulted in regulatory takings. To prevail on a takings claim, a landowner has to show that the government intentionally took a lawful action that resulted in a taking for a public use. TEX. CONST. ART. I, § 17; *Villarreal v. Harris County*, 226 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A regulatory taking occurs when a regulation "denies all economically beneficial or productive use of land." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004). The Open Beaches Act does not create an easement allowing the government to take a person's land or building, but rather enforces a common law easement that has been established through public use. *Arrington*, 767 S.W.2d at 958.

The Court of Appeals held that removal of a building due to the Open Beaches Act is not a taking. *See Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923, 930 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). The Court further held, as a matter of first impression, it does not matter whether the building was built on the public easement or becomes part of the easement later due to weather or any other factor. Either way, a restriction on land imposed by common law cannot be the cause of a government taking.

The Court of Appeals also held that the government's enforcement of the public's existing beach easement was not a taking of property without just compensation. Thus, the City was not liable for damages for denying utility service and repair permits to the properties in question. The Court of Appeals affirmed the judgment of the trial court in favor of the City.

XII. TAXES: SALES & PROPERTY

Stoker v. City of Fort Worth, et. al.*, 2009 WL 2138951, No. 2-08-103-CV (Tex. App.—Fort Worth July 16, 2009) (mem. op.){** TA \l "Stoker v. City of Fort Worth, et. al.*, 2009 WL 2138951, No. 2-08-103-CV (Tex. App.—Fort Worth July 16, 2009) (mem. op.)**" \s "Stoker v. City of Fort Worth, et. al., 2009 WL 2138951, No. 2-08-103-CV (Tex. App.—Fort Worth July 16, 2009) (mem. op.)" \c 1 **}**

The City of Fort Worth and other taxing authorities filed a suit to recover property taxes *in rem* against a property owner's heir and sought judgment against the property rather than the heir. The heir argued he did not own the property at the time the taxes were assessed, there was no jurisdiction by the trial court and his constitutional rights were violated. The trial court held in favor of the City and the other taxing authorities foreclosing on the tax liens against his property and ordering that it be sold to satisfy the liens. The Court of Appeals held because the judgment was against the property and not the individual, the trial court had jurisdiction, and the heir failed to illustrate any violation of his constitutional rights.

Goffney v. Houston Independent School District, City of Houston, et. al.*, 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.){** TA \l "Goffney v. Houston Independent School District, City of Houston, et. al.*, 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.)**" \s "Goffney v. Houston Independent School District, City of Houston, et. al., 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.)" \c 1 **}**

The City of Houston and various other taxing entities in Houston and Harris County filed suit for special assessments for demolition and delinquent ad valorem taxes against the Goffneys. The trial court found in favor of the City and taxing entities and the Goffney's appealed. The Goffneys owned several apartments in Houston which were subject to a dangerous building hearing with the City in which the an order was issued for the Goffney's to comply with the City's minimum requirements for the Houston Comprehensive Urban Rehabilitation and building Minimum Standards Code (CURB) or face demolition. The Goffneys did not comply with the order and the apartments were demolished by the City. The City then requested emergency hearings on the demolitions one week after the apartments were demolished and orders were entered in which the apartments were also declared dangerous and to demolish the apartments. The City then sued for special assessments to recover for the demolition of the apartments and the other taxing entities joint with the City to sue for delinquent ad valorem taxes.

The Court of Appeals first addressed the City's and other taxing entities contention the Goffney's did not have standing to bring the appeal because they did not own title to the property at the time of the emergency hearing or at the time the apartments were demolished. The Court held regardless of legal title at the time of the City's hearing, demolition and assessment of costs, the Goffney's were personally aggrieved as a result

of the judgment entered against them for costs based on the City's actions and had standing to sue.

The Goffney's challenged the constitutionality and argued the emergency hearing and the City's CURB procedures deprived them of due process based on the lack of notice for the emergency hearing and the mechanism for imposing costs under the CURB ordinance. However, the Court of Appeals held the Goffney's waived these arguments on appeal because they did not present these issues or evidence of these issues at the trial court level and their due process arguments raised on appeal were different than the ones they attempted to raise in the trial court level. As such, the Court of Appeals held their error was not preserved and upheld the trial court's judgment in favor of the City.

Tierra Sol Joint Venture and Samuel & Company, Inc. v. City of El Paso*, 2009 WL 2709377, No. 08-07000612-CV (Tex. App.—El Paso August 28, 2009){** TA \l "Tierra Sol Joint Venture and Samuel & Company, Inc. v. City of El Paso*, 2009 WL 2709377, No. 08-07000612-CV (Tex. App.—El Paso August 28, 2009)**" \s "Tierra Sol Joint Venture and Samuel & Company, Inc. v. City of El Paso, 2009 WL 2709377, No. 08-07000612-CV (Tex. App.—El Paso August 28, 2009)" \c 1 **}**

The City of El Paso filed suit against Tierra Sol for delinquent taxes. The trial court entered a judgment in favor of the City and this appeal ensued. Tierra Sol challenged the in personam judgment against Samuel & Company and argued it was invalid because the entity was not a party to the suit at the time of trial nor did it own either of the tracts at issue. The City released Samuel & Company from personal liability under the judgment and indicated it would proceed *in rem* only against the tract by foreclosing on the lien that existed against the property at issue. As such, the Court held the issue of the *in personam* judgment was moot.

The Court of Appeals turned its analysis to whether the evidence was legally and factually sufficient and upheld the trial court's judgment in the City's favor because Tierra Sol had not provided sufficient evidence the City did not comply with the previous court order for the findings.

Finally Tierra Sol also challenged the trial court sustaining the City's special exceptions to their counterclaim for declaratory judgment because it prevented them from compelling the City to comply with the original judgment from a prior lawsuit. Tierra Sol also argued that it was their only remedy to have the City apply payments made on previous payments. The Court of Appeals held that by the time the court ruled on the special exceptions, the trial court had already made a determination on Tierra Sol's defense as to whether prior payments could be applied to prior tax years. The Court sustained the trial court sustaining the City's special exceptions.