RECENT STATE CASES OF INTEREST TO CITIES

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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law, where she was active in student recruiting, advocacy programs, and the Texas Journal on Civil Liberties and Civil Rights. While in law school, Laura worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006 and became Assistant General Counsel in November 2010.

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.

Table of Authorities

RECENT STATE CASES
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ANIMALS

***Strickland v. Medlen*, 2013 WL 1366033 No. 12-0047 (Tex. January 10, 2013).** A dog escaped from its owner and was picked up by animal control. The owner notified the shelter and a "hold for owner" tag was placed on the dog, Strickland euthanized the dog even though it had been tagged otherwise. The owners sued Strickland, seeking "sentimental or intrinsic value" damages for the dog. The court of appeals held that such damages were recoverable for the loss of the pet, the first Texas court to do so. The Supreme Court reversed in a very sentimental opinion, holding that: "[r]elational attachment is unquestionable. But it is also uncompensable."

***Patterson v. City of Bellmead*, 2013 WL 1188929, No. 10-12-0037-CV (Tex. App.—Waco March 21, 2013).** The city enacted an ordinance that limits the number of dogs and cats an individual property owner can have without having a city kennel license. A breeder, Patterson, was given a notice of violation for having too many animals and no kennel license. Instead of paying for the kennel license, the breeder sued the city. The breeder argued that the ordinance is unconstitutional on its face because it does not have a rational basis and because it violates equal protection.

The court of appeals held that there is a rational basis for the city's ordinance because such animal ordinances could limit "[l]arge concentration of dogs [which] can be dangerous and unsanitary." *Koorn v. Lacey Township*, 78 Fed. Appx. 199, 203 (3rd Cir. 2003). *See also Whitfield v. City of Paris*¸ 19 S.W. 566, 567 (1892). One of a city's most legitimate governmental interests is to protect the health and safety of its residents, which this ordinance arguably does. Next the court of appeals addressed the equal protection claim. The court of appeals dismissed this claim as well because: (1) there is no fundamental right to be dog and cat owners; or (2) that they are "part of a suspect or quasi-suspect class subject to invidious discrimination." The court of appeals affirmed the trial court's grant of the city's motion for summary judgment.

ECONOMIC DEVELOPMENT

***City of Freeport v. Briarwood Holdings, L.L.C.*, No. 01-11-01108-CV, 2013 WL 1136576 (Tex. App—Houston [1st Dist.] March 19, 2013) (mem. op.).** The city, the economic development corporation, and Freeport Waterfront Properties (FWP), had a plan to develop some land into a marina. As part of the plan, the city agreed to obtain a particular tract of land for FWP and then convey the land to FWP. Briarwood later became affiliated with the project. The EDC instituted eminent domain proceedings and was able to obtain the particular land that was needed for the marina at the cost of $900,000. The EDC also entered into an agreement with Briarwood related to the marina project and the EDC sent an email to Briarwood telling them that Briarwood had to buy the tract of land for $200,000. The EDC board then voted to sell the land to Briarwood. But instead of selling the land to Briarwood, the EDC sold the land to the city. Briarwood then sued the city and the EDC.

The city argued that its governmental immunity had not been waived and asked that Briarwood's claims against it be dismissed. There were three main arguments regarding the city's waiver of immunity: (1) that the city waived its immunity by conduct; (2) that its immunity was waived through breach of contract under Chapter 271 of the Local Government Code; and (3) that even if Briarwood and the city did not have a contract, Briarwood was a third party beneficiary to a contract the city did have. The court of appeals held that the city did not waive its immunity by conduct because the city did not receive anything of benefit from Briarwood and because it never promised Briarwood anything. *See Tex. S. Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893 (Tex. App.—Houston [1st Dist.] 2007, pet. Denied); *Sharyland Water Supp. Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex. 2011). The court of appeals also held that, because there was no written contract between the city and Briarwood, the city's immunity was not waived under Chapter 271 of the Local Government Code. Finally, the court of appeals held that the third party beneficiary argument might be a good one, but Briarwood would have to actually plead it to advance the argument. Therefore, the court of appeals sent the case back to the trial court so that Briarwood could replead.

GOVERNMENT IMMUNITY

***City of Watauga v. Gordon*, 389 S.W.3d 604 (Tex. App.—Fort Worth November 21, 2012) (pet. filed).** Gordon sued the city after his hands were allegedly injured by a city police officer's use of handcuffs. He argued that this use of tangible personal property waived the city's governmental immunity. The city argued that the city's immunity was not waived because the use of the handcuffs was an intentional tort under Section 101.057 of the Civil Practices and Remedies Code. The court of appeals held that the facts showed that the officer's use of the handcuffs was not intended to cause injury and was not excessive force, and thus not an intentional tort. It thus affirmed the trial court's denial of the city's plea to the jurisdiction.

***City of Texas City v. Suarez*, No. 01-12-00848-CV, 2013 WL 867428 (Tex. App— Houston [1st Dist.] March 7, 2013) (mem. op.).** Ms. Suarez sued the city after her twin daughters and husband drowned at the dike in Galveston Bay. The recreational area including the dike, had been affected by Hurricane Ike and the warning signs surrounding the dike had been destroyed and the dike was closed for two years for repairs. During the repairs the city replaced two of the signs, one warning where not to swim and one warning of undertow from passing ships. Suarez alleged that the city was liable for the drowning because the city had actual knowledge of the dangerous conditions surrounding the beach where the individuals drowned. Her allegation was based on the fact that the city had, in the past, had warning signs at the beach based on past incidents but that no such signs were re-erected during the repairs following the hurricane. The city argued that its governmental immunity had not been waived by the Wrongful Death Statute (Texas Civil Practices and Remedies Code Section 71.002(b)) or by the Tort Claims Act (Texas Civil Practices and Remedies Code Chapter 101) based on the Recreational Use Statute.

The court of appeals held that the city's immunity was not waived by the Wrongful Death Statute. The Wrongful Death Statute does apply to municipal corporations, but only if the individuals would have been able to sue the city had the individuals lived. In this case, the plaintiff would have had to show an additional waiver of city's immunity and the plaintiff did not. The court further held that the provision of the park facility was a governmental function, and a recreational facility in this case, so the city's immunity was protected under the Tort Claims Act and the Recreational Use Statute. Finally, the court held that the plaintiff had no proof that the city acted with gross negligence or malicious intent because the city did not have actual knowledge of the specific perilous conditions of the dike as it was after the hurricane, and thus it retained its immunity. The court dismissed the plaintiff's case.

City of Houston v. Cogburn, **2013 WL 1136553 No. 01-11-00318-CV (Tex. App—Houston [1st Dist.] March 19, 2013) (mem. op.).** The plaintiff tripped over some tree roots and "other corruption excavated" at the site and fell into a parking meter for a parking space that he was using at the time. He broke his femur and had other injuries, from which "[h]e will never recover totally". The plaintiff sued the city for premises liability and negligence in maintaining the area. The city argued that its immunity had not been waived because: (1) it was not liable regardless of whether the plaintiff was an invitee or lessee; (2) the individual was a lessee not an invitee, lowering the standard of care; and (3) another party was responsible for tree maintenance in that area and tree maintenance is a discretionary act by cities.

The court of appeals held that the city was open to suit under the theory of a "special defect". *See* TEX. CIV. PRAC. & REM. CODE § 101.022. First, the court held that under the theory of special defect, the city was still open to liability regardless of whether the individual was an invitee or a lessee, and also defeated any argument about a discretionary act. The court also noted that the city did not present sufficient evidence that it did not know or should not have known about the tree root problem. The city was held to have possession and control of the premises even though: (1) the city only had an easement and not a fee simple in the property; (2) someone else was responsible for the tree maintenance in that area; and (3) the city did not require payment for use of anything but the parking space (which was not where the individual injured himself). Finally, the court held that the injury was not proven to be caused by a "naturally occurring condition" because there was no telling how those roots had gotten there, whether through nature or through a city excavation. The court sent the case back to the trial court for a trial on the merits.

GOVERNMENT IMMUNITY—CONTRACT

City of McAllen v. Casso, **No. 13-11-00749-CV, 2013 WL 1281992 (Tex. App.—Corpus Christi March 28, 2013)(mem. op.).** In this case, Casso an employee of the city threatened the city with litigation based on allegations that the condition of the building in which she worked caused her medical condition to worsen. She left city employment in 1999. To avoid litigation, the city entered into an agreement with Casso that she would not bring any litigation related to her employment with the city if the city agreed to: (1) pay her $50,000; (2) insure her until June 2002; and (3) pay her the city's contributions to her TMRS account which she would ordinarily not be entitled to for another year. Casso also claimed that the city had an implied duty to allow her to continue her health insurance, though she paid the premiums, until she reached Medicare age. The city fulfilled all of the written requirements of the agreement. The city paid her insurance through June 2002, and Casso then started paying premiums through COBRA for 18 months. The city then discontinued her access to the health insurance plan. Casso sued the city for continuation of access to the city's health insurance based on the implied duty in the written agreement. The trial court held for Casso, allowing evidence outside the written agreement, and allowing damages for health bills and lost profits, and ordering that the city continue to give Casso access to the city's health insurance plan.

The city argued that the agreement was unambiguous as a matter of law, and therefore the court could not consider outside evidence when determining Casso's rights under the contract. The written agreement did not have any requirement that the city continue to give Casso access to the health plan. The city also disputed the damages and the specific performance order. The court of appeals held that the written agreement was ambiguous because it was unclear how the city could continue to pay for Casso's health benefits after she left employment but before June 2002. Due to this ambiguity in the contract, the court held that the trial court could review outside evidence and determine that the city must continue to provide Casso insurance as a "retiree". The court of appeals held that the parol evidence rule did not prohibit this result because of the ambiguity in the agreement. The court of appeals also allowed the lost profits, past medical costs, and future medical costs damages. The court of appeals overturned the trial court's order requiring that the city continue Casso's health insurance benefits, because the city had already been ordered to pay future medical costs, which would result in a double recovery.

***Wight Realty Interests, LTD v. City of Friendswood*¸ No. 01-11-01075-CV, 2013 WL 1341216 (Tex. App.—Houston [1st Dist.] April 4, 2013)**. The city and Wight Realty entered into a contract where Wight would develop some property into a park. Wight already owned some of the property, but also had to purchase some of the property. In the agreement, the city stated that it would either buy the property and improvements from Wight when they were completed, or if the city did not buy the property, it would pay for any costs incurred by Wight. The city terminated the contract after Wight had already obtained the property and began development and also refused to pay for the improvements. Wight sued the city on the contract. The first time this case came around, the court of appeals held that the contract was subject to Chapter 271 of the Local Government Code because it was for "services". *Wight Realty Interests, LTD v. City of Friendswood*, 333 S.W.3d 792 (Tex. App.—Houston [1st Dist.] 2010, no pet.). After remand, the city argued in the trial court that the contract is invalid because it violates a statutory prohibition on city parks being outside county limits and because the city violated competitive bidding laws when it approved the contract.

As for the first issue related to owning property outside the county, sections 273.001 and 331.001 of the Local Government Code prohibit a "municipality" from buying or developing park land that is outside the county where the city is located. The park land in question is outside the counties where the city is located. Wight argued that because the city is home rule, it is not bound by these state statutes. The court of appeals disagreed, holding that home rule cities are constrained by state law and that "municipality" in those statutes applied to all municipalities, not just general law cities. But the court did hold that despite this, the contract was still valid because Wight requested damages, not specific performance for the city to purchase the property. (There appeared to be a missing step in the analysis at this point in the opinion. Either the contract is valid or not, but the court just looked at the damages).

Next, the court reviewed whether the city violated competitive bidding laws when contracting with Wight. The court held that under Section 252.022(a)(2) of the Local Government Code, the "public health and safety" exception to bidding, this contract was excepted from bidding because youth recreational facilities are for public health and safety. Also, the contract included planning and engineering services which are also excepted from competitive bidding. *Id.* § 252.022(a)(4). The court sent the case back the trial court for review.

LAND USE

***Lindig v. City of Johnson City*, 2012 WL 5834855, No. 03-11-00660-CV (Tex. App.—Austin Nov. 14, 2012).** In this appeal, the Lindigs challenged the constitutionality of Johnson City's building permit fee ordinance on vagueness grounds. After inspection, Johnson City's building official concluded that the remodel the Lindigs were performing on a residence should be treated as "new construction" under the building permit fee ordinance because it involved "substantial work." The Lindigs refused to pay the $1,000 building permit fee required for new construction, so the city sought and obtained a permanent injunction in district court. The Austin appeals court, however, concluded the building permit fee ordinance was unconstitutionally vague as constructed and applied, reversed the trial court, and rendered judgment in favor of the Lindigs.

***Southern Crushed Concrete, LLC v. City of Houston*, NO. 11-0270 (Tex. Feb. 15, 2013).** The question in this case is whether the Texas Clean Air Act preempts a city ordinance. Southern Crushed Concrete (SCC) received a permit for its facility from the Texas Commission on Environmental Quality based on the Texas Clean Air Act. The Texas Clean Air Act states that an "ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized" by the Act. The City of Houston has an ordinance that requires that facilities, like SCC, receive a permit from the city before starting operations. SCC sued the City after the City denied its permit under its ordinance. The Supreme Court of Texas held that the City's ordinance is preempted by the plain language of the Texas Clean Air Act, Health and Safety Code Section 382.113(b).

***LIT HW 1, L.P. v. Town of Flower Mound*, No. 02-12-00070-CV, 2013 WL 362760 (Tex. App.—Fort Worth Jan. 31, 2013)**. LIT owns a warehouse in the Town of Flower Mound (city) and leased the warehouse to ERI. ERI filed an application with the city for a certificate of occupancy. The city's building inspector interpreted the city's building code to require heating in that part of the warehouse where the employees worked and thus, denied the certificate of occupancy when no such heating existed. LIT appealed that decision to the city's board of adjustment, which denied the appeal. LIT filed a petition in the trial court alleging that the board's decision was a clear abuse of discretion. The trial court granted the city's motion for summary judgment and dismissed. LIT appealed.

The appellate court explained that "[t]he test for abuse of discretion is whether a board acted 'without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable.'" LIT argued that the board failed to apply the proper standard of review. The ordinance required the board to make an "order, requirement, decision[,] or determination in the board's opinion, as ought to be made." The board's attorney had advised, however, that the board had to decide whether LIT had met its burden of proof that the building official had interpreted the code incorrectly. Because the board of adjustment applied a burden of proof that was different than that set out in the ordinance, the appellate court found that the board did abuse its discretion.

The appellate court held that the application of the wrong standard of review did not mean that the board acted with gross negligence, in bad faith, or with malice, which arguably would have entitled LIT to be awarded costs. Likewise, the board did not act with gross negligence, in bad faith or with malice by having heard statements of the building official which LIT claimed were irrelevant and prejudicial. In response to issues raised by LIT regarding the proper parties to the case, the appellate court held summary judgment was proper as to the building official, the city, and the individual board members. The appellate court found that the only necessary or proper party to the suit was the board of adjustment.

City of Harlingen v. Lee, 2013 WL 772661 No. 13-12-00213-CV (Tex. App—Corpus Christi February 28, 2013). The city annexed a piece of property, and some of the property owners in the annexed area tried to be disannexed. In July 2010, the city told the landowners that the city would not be disannexing the property although the landowners had filed a petition, posted it, published it, and filed it with the city secretary. In October 2011, the city changed its course and adopted an ordinance disannexing the property for failure to provide services. The property was disannexed effective December 1, 2011. The city changed its course again in January 9, 2012, and rescinded its ordinance allowing the disannexation, and re-annexed the property. The landowners appealed this ruling to the trial court asking that they be disannexed. The city filed a plea to the jurisdiction, arguing that the plaintiffs did not have standing to sue and that the city's governmental immunity had not been waived.

The court of appeals held that the plaintiffs had standing because they had met all of the requirements of Section 43.141(b) of the Local Government Code to bring their case for disannexation. The court also held that the plaintiffs have standing to challenge the re-annexation because cities do not have the power to re-annex and therefore the plaintiffs have standing to argue that the ordinance re-annexing them is void. The court held that the plaintiffs did not have standing to ask for a refund of taxes and fees for third parties not involved in the suit.

***TCI West End, Inc. v. City of Dallas*, NO. 05-11-00582-CV, 2013 WL 1561117 (Tex. App.—Dallas April 15, 2013).** TCI demolished a historic structure and the city and the Texas Historical Commission sued for damages and civil penalties. TCI was originally granted a permit to demolish the structure by the city by mistake. After the permit was issued, but before the demolition of the building, the city realized its mistake and revoked the permit. The city did not send written notice to TCI that the permit had been revoked, but the city did contact TCI's contractor to inform it of the revocation. It also placed a "red tag" at the building site. TCI proceeded with the demolition despite the permit revocation and the city sued. The Texas Historical Commission (THC) intervened in the case. The trial court awarded both the city and THC civil penalties.

Section 315.006 of the Local Government Code required that a city file a document listing all historic buildings in the city in the county records. In the case, the city had not filed anything indicating that the property in question was a historic property. TCI argued that because this filing had not occurred, that neither the city nor the THC could proceed with their claims. The court agreed, holding that the filing under Section 315.006 "is the means by which the rights granted to the municipality and the THC under the section come into being." TCI also argued that the city was not entitled to civil penalties because the city did not provide for such penalties in its ordinances (as authorized by Chapter 211 of the Local Government Code) and it was not entitled to civil penalties under Chapter 54 of the Local Government Code. The court again agreed because Chapter 54 provides civil penalties for violations involving health and safety, which the city failed to show was the purpose of its historic building ordinances. The court of appeals overturned the trial court's award of civil penalties to THC and the city.

***City of Grapevine v. CBS Outdoor, Inc.*, No 02-12-00040-CV, 2013 WL 1830375 (Tex. App.—Fort Worth May 2, 2013)(mem. op.).** The Texas Department of Transportation required a CBS billboard that partially overhung a TxDOT highway project to either be moved or made smaller. Two choices given to CBS by TxDOT were to change the angle the billboard was facing or to remove a 4 ft panel from the billboard. First, CBS asked the city if it could change the angle of the billboard. The city ordinance relating to this issue states that, "[n]o sign, except for signs listed in Section 60, shall be painted, constructed, erected, remodeled, relocated, or expanded until a zoning permit for such sign has been obtained." Also, any "violation of any of the provisions of this Ordinance or violation of any Ordinance of the City of Grapevine with respect to a nonconforming use shall terminate immediately the right to operate such nonconforming use." The city refused to allow CBS to change the angle, and its letter stated that CBS could not move, alter, or adjust the sign. Then CBS removed a four foot panel from the sign without obtaining a permit from the city. The city informed CBS that it had violated city ordinances and their earlier decree and thus the sign had to be removed. CBS appealed this ruling to the Board of Adjustment, and the Board of Adjustment affirmed the city's ruling. CBS then sued the city.

The city argued that CBS had failed to exhaust its administrative remedies because it had failed to timely appeal the original ruling of the city regarding the sign angle change and stating that CBS could not move, alter, or adjust the sign. The court of appeals agreed, and the court overruled the trial court's ruling on that issue. CBS also sued the city for inverse condemnation. The court of appeals held that even though the sign had to be changed due to a TxDOT project, it was the city's ordinances and rulings that caused the "taking" of the billboard owner's property. Thus, CBS was able to go forward with its inverse condemnation claim in the trial court.

MUNICIPAL COURT

***In re Minnfee*, No. 07-12-0441-CV, 2012 WL 5060897 (Tex. App.—Amarillo Oct. 18, 2012) (per curiam).** In this case, Relator complains that the city's municipal court clerk refused to file a document wherein he requests DNA testing. The court concludes that it has no jurisdiction to issue a writ of mandamus against the municipal court clerk and Relator failed to show any authority permitting him to petition for DNA testing through a municipal or small claims court to attack his conviction.

SEXUALLY ORIENTED BUSINESS

***Bryan S. Foster d/b/a Jaguars Gold Club v. City of El Paso*, No. 08-10-00157-CV, 2013 WL 632962 (Tex. App.— El Paso February 20, 2013).** The sexually oriented business (SOB) sued the City of El Paso alleging that the city's sexually oriented business ordinances are unconstitutional. After long study and consideration, and public meeting, the city adopted a sexually oriented business ordinance aimed at the negative secondary effects of sexually oriented businesses. The ordinance required open booths for individuals viewing sexually oriented businesses, overhead lighting fixtures, and that employees working in such establishments be licensed. The SOB sued the city for declaratory relief that the ordinance was unconstitutional as an infringement on free speech, an infringement of equal protection rights, as arbitrary and capricious, and a variety of other reasons. The city argued that the ordinance is a valid regulation of the time, place, and manner in which an SOB can exist in the city.

The court of appeals first held that the ordinance was not directed at speech, but at combating negative secondary effects, and therefore the analysis is done under intermediate scrutiny, which includes: (1) whether the city had power to adopt the ordinance; (2) whether it furthers a substantial government interest; (3) whether its unrelated to the suppression of free expression; and (4) whether any incidental restriction on free is speech is no greater than necessary to further the substantial government purpose. The court held that this ordinance is constitutional under the four prong test. The SOB also attacked the cities expert witnesses and studies to no avail. The city prevailed and upheld the trial court's grant of the city's motion for summary judgment.

NUISANCE

***Wood v. City of Texas City*, 2013 WL 440569, No. 14-11-00979-CV (Tex. App.—Houston [14th Dist.] Feb. 5, 2013) (mem. op.)**. Appellant Wood appealed from the trial court's judgment finding that two of Wood's residential properties were public nuisances and ordering the city to demolish and remove the structures pursuant to Section 54.018 of the Local Government Code. Wood claimed that insufficient evidence supported the trial court's finding that the structures were public nuisances and the trial court's judgment was an unconstitutional taking. The court of appeals found that the evidence was legally and factually sufficient to support the trial court's judgment, and therefore there was no unconstitutional taking of Wood's property. Further, the trial court did not abuse its discretion in ordering the structures demolished because no alternative courses of action, like installing a chain link fence, would resolve the numerous threats to the public health, safety, and welfare. The court also determined that the city did not abuse its discretion in denying Wood's motion for a new trial alleging changed circumstances due to the installation of a six-foot chain link fence around both properties.

OPEN GOVERNMENT

***Foreman v. City of Junction and The Junction Econ. Dev. Corp.*, 392 S.W.3d 265 (Tex. App.—San Antonio Dec. 12, 2012).** Lynn Foreman and Cesar Vasquez sued the Junction Economic Development Corporation claiming violations of the Texas Open Meetings Act. The trial court granted the Defendant's no-evidence motion, and Foreman and Vasquez appealed, challenging the motions granted by the trial court. The Court of Appeals concluded that the appellants failed to raise a fact question on the element of deliberation. Foreman and Vasquez failed to present any evidence showing that a verbal exchange occurred.

PERSONNEL

***City of Round Rock v. Rodriguez*¸ No. 10-0666, 2013 WL 1365906 (Tex. April 5, 2013)**. This case is about whether a city non-collective bargaining public safety employee has the right to bring a union representative to an "investigatory interview". In this case, Rodriguez was a fire fighter for the City of Round Rock. While employed by the city, Rodriguez took sick time to go get a physical for another job at the City of Austin. Rodriguez was questioned about this, but before the questioning he requested that he be allowed to bring his union representative to the meeting. The city denied this request, and he received a 5-day suspension. Rodriguez then sued the city alleging that he has the right to representation under Section 101.001 of the Labor Code, also termed *Weingarten* rights.

Section 101.001 of the Labor Code states that, "All persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment." The question is whether this statute gives public employees the right to representation. The Supreme Court reviewed the rights given to employees under the National Labor Relations Act (NLRA) and *NLRB v. Weingarten*, 420 U.S. 251 (1975). The Court held that the state statute is different from the NLRA and does not give public employees the right to representation, even though private employees and federal public employees who are covered by the NLRA do have union rights. The Court held that section 101.001 gives employees the right to organize and become members of unions, but nothing further. Chapter 617 of the Government Code gives public sector employees their union rights, which has the right to present grievances, but no right to union representation during investigatory interviews. Because 101.001 is different from the NLRA, *Weingarten* does not apply to the analysis. The Court then suggested that if public employees want these rights, they should ask the Texas Legislature and dismissed the case. Chief Justice Jefferson did file a dissenting opinion.

[As of the writing of this paper, S.B. 1911, giving public employees these very rights, had been filed by Senator Garcia. But it is still pending in Senate State Affairs and is likely dead.]

***City of Beaumont v. Stewart*, No. 09-12-00316-CV, 2012 WL 5364678 (Tex. App.—Beaumont Nov. 1, 2012).** In this case, Stewart sued the city after he was involved in a two-car collision with a vehicle owned by the city and operated by a city employee. At the time of the accident, the city employee was on her lunch break and driving to her home. The trial court denied the city's plea to the jurisdiction. The city appealed, arguing that the trial court lacked subject matter over the suit because the employee was not in the paid service of the city or acting within the scope of her employment at the time of the accident. The city presented an affidavit from the city employee explaining, among other things, that she is not paid for the time she is at lunch and that she is free to go anywhere during lunch; however, if she takes the city vehicle, she must stay in her work area. The appellate court concluded that the city's evidence showed that the employee was not acting within the scope of her employment at the time of the accident. The case was dismissed for lack of jurisdiction.

***Alcala-Garcia v. City of La Marque*, 2012 WL 5378118, No. 14-12-00175-CV (Tex. App.—Houston [14th Dist.] Nov. 1, 2012) (mem. op.).** In June 2010, city employees Lydia Alcala-Garcia and Janet Solis were terminated by the city council for the stated reason of using city equipment to work on a political campaign and failing to follow the directives of the city manager. The employees filed a suit against the city pursuant to the Texas Whistleblower Act (Act) alleging that they were actually terminated because they discussed with the district attorney numerous instances of possible state law violations by the city manager. The court of appeals affirmed the trial court's order granting the city's motion for summary judgment, holding that the employees failed to first "initiate action under the grievance or appeal procedures" of the city, as required by Texas Government Code Section 54.006(a). Among other arguments, the employees claimed that they did not go through the grievance procedure spelled out in the city's employee handbook because the mayor informed them that it was not necessary, and because invoking the grievance procedure would have been futile since the appeal would be to the city council, who already voted to terminate the employees. Citing to cases establishing that jurisdiction cannot be conferred by estoppel, the court held that the employees could not claim to have satisfied the Act's jurisdictional requirements by availing themselves of the mayor's faulty advice. *See Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294 (Tex. 2001). Further, the court declined to recognize a "futility exception" to the Act since no such exception exists in the statute.

***Soto v. City of Edinburg*, 2013 WL 593846, No. 13-12-00419-CV (Tex. App.—Corpus Christi-Edinburg Feb. 14, 2013)**. Soto, a corporal with the Edinburg Police Department, challenged the plea to the jurisdiction granted in favor of the city on Soto's claim for backpay for work he performed above his classification when his sergeant did not report for duty. Soto argued that the city's immunity from his backpay claims was expressly waived by Local Government Code Section 180.006. Because the existing pleadings did not affirmatively demonstrate that the city's immunity had been waived under Section 180.006, the court of appeals could not conclude that Soto alleged facts that established the trial court's jurisdiction over his claims. But the court also could not conclude that Soto's pleadings affirmatively negate the existence of jurisdiction. The court held that Soto should be afforded an opportunity to amend, so it reversed the trial court's judgment and remanded the case to the trial court.

***Reyes. v. City of Laredo*, 2012 WL 6553636, 04-11-00886-CV (Tex. App.—San Antonio Dec. 14, 2012) (mem. op.).** In this case, a patrolman with the City of Laredo's Police Department, Jorge Reyes, was suspended indefinitely after a citizen's complaint about his conduct. Reyes appealed the suspension order to the Police Officers' Civil Service Commission, which sustained the order. Reyes appealed the commission's decision to the district court. The district court affirmed the commission's decision. Reyes then appealed the district court's decision, claiming the trial court erred in admitting the commission hearing transcript which was not developed under the Texas Rules of Evidence. The Court of Appeals held that Reyes had the burden to prove that the commission's decision was not supported by substantial evidence. In asking the trial court to admit the commission hearing transcript, Reyes waived his objection to the court considering it. Therefore, the district court acted within its discretion in admitting and considering the transcript.

***Booker v. City of Austin*, No. 03-09-00088-CV, 2013 WL 1149559 (Tex. App—Austin March 13, 2013) (mem. op.).** Booker was a new firefighter who was on probation when she was terminated from the Austin Fire Department. After termination, she sued the city for racial and gender discrimination and retaliation. Booker was an African-American female who was specifically recruited through a program that targeted minorities and females. She entered the recruit program even though she lied about a criminal conviction on her application because the chief wanted her in the program due to her minority status. She failed at many of the tests and skills she was supposed to complete. Her direct supervisors voted to terminate her, but the chief kept her. Then she failed as a probationary fire fighter in even more of the skills and tests. Once again supervisors recommended her termination and the chief terminated her. Then she sued the city for gender and race discrimination and retaliation under the Texas Commission on Human Rights Act, Labor Code Chapter 21.

The city argued that Booker had not presented her retaliation claim to the EEOC through her application so that claim was not available due to lack of exhaustion of administrative remedies. The court agreed. Then the court reviewed whether summary judgment for the city on her other claims was appropriate. The court of appeals granted the city's summary judgment because booker did not present adequate evidence that she was treated differently to similarly situated employees, especially because she admitted to having performance problems. She then argued that she may have had performance problems but the city had a mixed motive in terminating her. The court overruled this argument, stating that the same individual hired and fired her, originally hiring her because of her race and gender, which is evidence of a lack of discriminatory intent. She tried to blame her firing on other individuals, but in the end the chief fired her and she could not show that other similarly situated individuals were treated any differently. The court of appeals dismissed all of her claims.

***Lanier v. City of Laredo and the Firefighters' and Police Officers' Civil Service Comm'n*, No. 04-12-00191-CV, 2013 WL 1760616 (Tex. App.—San Antonio April 24, 2013) (mem. op.).** Lanier sued the city and the civil service commission after he received a demotion. He argued that he did not receive required notice for his civil service hearing under Section 143.054. The court of appeals held that the city and commission had shown that they had hand delivered notice to Lanier of the civil service hearing at the appropriate time and thus Lanier's claim was without merit.

PROCEDURAL

City of New Braunfels v. Stop the Ordinances Please, et al., 2013 WL 692446 No. 03-12-00528-CV (Tex. App—Austin February 21, 2013) (mem. op.). The ordinances in question in this case surround the use of the rivers surrounding New Braunfels and how the alcohol and tubing combination should be regulated. This is the second case surrounding these ordinances (STOP II). In both cases, the issue is the standing of the plaintiffs. STOP is an unincorporated association of business owners who do business on the rivers. In STOP I, the court of appeals held that the plaintiffs did not have standing for most of their claims, but that the plaintiffs had standing under one of the ordinances banning large coolers because the plaintiffs rented these banned large coolers and could no longer do so under the ordinance. While that case was still pending, the City of New Braunfels passed a new ordinance banning disposable containers on the river, affectionately known as the "can ban". The plaintiffs amended their remaining pleadings to include this ordinance, and a new group of plaintiffs hopped into the water as well, challenging the new ordinances. The city argued that none of the plaintiffs had standing to assert their claims related to the "can ban". The district court overruled the city's arguments, holding that the plaintiffs did have standing, and the city filed this appeal.

The plaintiffs' arguments are: (1) that they have a "particularized injury" because they sell food and beverages that fall under the "can ban"; and (2) that they have taxpayer standing. The court of appeals held that the plaintiffs had standing under the "particularized injury" analysis, but that the taxpayer standing argument did not hold up because there was insufficient proof that the city had spent money enforcing the ordinance.

PROPERTY TAX

***Brazos Cnty. Appraisal Dist. v. Bryan-College Station Reg'l Ass'n of Realtors, Inc.*, No. 10-11-00438-CV, 2013 WL 1694801 (Tex. App.—Waco April 18, 2013).** This case deals with whether an association of realtors engages in a public charitable function such that its property is exempt from taxation. The appraisal district argued that the Tax Code provision (Tax Code section 11.231) relied upon by the association is unconstitutional, and that the association produced no summary judgment evidence to prove that it qualified for the exemption.

The appellate court held that that the phrase "public charitable function" includes, at a minimum, everything that the Supreme Court considered in *Boyd v. Frost Nat'l Bank*, 196 S.W.2d 497 (Tex. 1946) to be a "charitable purpose." Accordingly, the court held that section 11.231 of the Tax Code does not violate article VIII, section 2(a) of the Texas Constitution. The appellate court also held that the association of realtors proved that it met the requirements of article VIII, section 2(a).

TAKINGS

***El Dorado Land Co., L.P. v. City of McKinney*, No. 11-0834, 2013 WL 1276045 (Tex. March 29, 2013)**. The property owner in this case sold land to the city, but with the option to repurchase should the land be used for anything but a park. The city built a library on part of the property, and the former property owner tried to invoke its right to repurchase the property. The city did not respond. The property owner sued for a taking of its interest and the city argued that the interest was not sufficient to be treated as a taking. The Supreme Court of Texas held that a reversionary interest is a sufficient property interest that can be the subject of a takings suit if the interest is not respected by a city, regardless of whether the city obtained the original property through eminent domain or purchase.

***In re City of Houston*, No. 14-12-00861-CV, 2013 WL 85097, (Tex. App.— Houston [14th Dist.] Jan. 4, 2013) (mem. op.)**. The city filed a petition for writ of mandamus seeking relief from an order denying discovery of information concerning the development and/or sale of the real property at issue in an underlying suit where Memorial Estate Builders (MEB) sued the city alleging damages for inverse condemnation through a regulatory taking. The court held that the trial court clearly abused its discretion in denying the motion, as the actual sale income of the property in question was critical to calculating the net profits that MEB alleged that it lost as a result of the city's actions. The city was deemed to be entitled to mandamus relief to compel disclosure.

***City of Houston v. Song*, No. 14-11-00903-CV, 2013 WL 269036 (Tex. App.— Houston [14th Dist.] Jan 24, 2013, pet. filed) (mem. op.)**. Song filed an inverse condemnation claim against the city on the grounds that the city's construction of medians within a public roadway near Song's business caused restriction of access to the property resulting in a taking of private property for a public purpose without compensation. Song also sought relief on the grounds that the city action was a nuisance and sought injunctive relief. The court of appeals cited to legal precedent providing that access to property is not materially and substantially impaired merely because the remaining access points are less convenient than before. *See State v. Heal*, 917 S.W.2d 6 (Tex. 1996). Song did not allege the intended access to property was rendered unreasonably deficient as a result of the city's construction of medians. Because Song failed to allege facts that constitute an inverse condemnation, the city retained its immunity from the nuisance claim and claim for injunctive relief. The trial court's order denying the city's plea to the jurisdiction was reversed, and judgment was rendered dismissing Song's suit for lack of jurisdiction.

***Carl & Terry Wells v. City of Corsicana*, No. 10-11-00100-CV, 2013 WL 387605 (Tex. App.— Waco Jan. 31, 2013) (mem. op.)**. Carl and Terry Wells sued the city asserting an inverse condemnation claim because the city paved a private road easement along the edge of their lot and installed a drainage culvert. Because the Wellses consented to any taking as indicated on the plat for subdivision and survey showing the city's private road easement, the trial court granted the city's plea to the jurisdiction and motion to dismiss. The appellate court affirmed the trial court's judgment.

***Smith v. City of Blanco*, 03-11-00091-CV, 2013 WL 491022 (Tex. App. —Austin Feb. 1, 2013) (mem. op.).** This appeal results from an agreement Dorsey Smith and the City of Blanco entered into in the 1960s, in which Smith agreed to have part of his property flooded for the purpose of creating a drinking reservoir for the City. Smith's property was damaged due to the flooding. Smith originally sued the City in the 1970s. In that case, the district court ordered the City to repair and maintain the damaged parts of the property, as long as the property was used as a drinking reservoir. Another flood occurred in 2004, and Smith again sued the City for failing to repair the property. When the district court granted the City's plea to the jurisdiction, Smith appealed. Subsequent to the disposition of his appeal, Smith filed the law suit that is the subject of this appeal. The district court granted the City's motion for summary judgment, asserting the affirmative defense of *res judicata,* and imposed attorney's fees on Smith as a sanction. The Court of Appeals affirmed the district court's entry of summary judgment, concluding that the claims presented in the current suit arise from the same subject matter of the prior suit and could have been litigated in that suit. However, the Court reversed the district court's entry of summary judgment in favor of the City regarding Smith's contempt claim and sanctions and remanded the case.

***Kopplow Development v. City of San Antonio,* No. 11-0104, 2013 WL 854320 (Tex. March 8, 2013).** The issue in this case was whether a landowner plaintiff has a valid claim for inverse condemnation if their property is placed in a flood plain after they have already received permits but before starting development and before a flood has occurred. The landowner's property had been modified so that the majority of the property was not in a flood plain when it obtained a city vested rights permit to develop its property. The permit insulated the land from future ordinances' effects on the property, but did not insulate it from floodplain regulations. *See* TEX. LOC. GOV'T CODE §§ 245.002; 245.004(9). After the permit was issued, the city constructed a facility that placed the landowner's property in the 100 year flood plain. After the construction of the city facility, and the adoption of a new floodplain ordinance, the landowner would be required to make substantial changes to its property before being allowed to develop the property. The landowner sued the city for inverse condemnation and the jury awarded damages. The court of appeals reversed, holding that the inverse condemnation claim was premature because the property had not yet flooded. The landowner appealed.

At the Supreme Court of Texas, the city argued that the landowner's claim is not yet ripe. The Court held that the claim was ripe because the landowner had presented evidence that the city knew that its facility would cause flooding—the city intentionally took the landowner's property. Also, while there had been no flood, the landowner could not now develop its property without obtaining another permit from the city and making additional substantial improvements to its property. The Court remanded the case back to the court of appeals.

UTILITIES

***City of Houston v. Centerpoint Energy Houston Elec., LLC,* 2012 WL 6644982, No. 01-11-00885-CV (Tex. App—Houston [1st Dist.] December 20, 2012) (mem. op.).** The City of Houston sued Centerpoint over a contract (Centerpoint Tariff for Retail Delivery Services) it had with Centerpoint regarding the provision and maintenance of street lights. The City filed suit against Centerpoint alleging that there were less streetlights than what Centerpoint was charging them for and that Centerpoint was not adequately maintaining the street lights. Centerpoint argued that the district court did not have jurisdiction and that only the Public Utility Commission (PUC) could review the issue under the Public Utility Regulatory Act (PURA). The City argued that this was a contract dispute not a regulatory dispute. The court of appeals held that PURA is "comprehensive and pervasive," and because this issue involved "rates" and "services" as defined by the Act, the PUC has exclusive jurisdiction, and the City was required to exhaust its administrative remedies before filing suit in the trial court. The court upheld the district court's dismissal of the City's case for lack of subject matter jurisdiction.

MISCELLANEOUS

***Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886 (Tex. App.—Waco, May 2, 2013).** Ramsey is the former city prosecutor for the City of Ovilla. Lynch filed a written complaint against a former mayor of the city alleging violations of the city's code of ethics. Included in the written complaint was an allegation that the former mayor and Ramsey were involved in "fixing code enforcement citations for certain Ovilla residents." Ramsey filed suit against Lynch for defamation based upon statements made in the complaint.

The trial court dismissed the suit under the Texas Citizen's Participation Act (TCPA), finding the suit was based solely upon Lynch's written complaint. TEX. CIV. PRAC. & REM. CODE § 27.001 *et seq*.

The appellate court affirmed the trial court's judgment. The appellate court explained that the purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Id*. § 27.002. "If a legal action is based on, relates to, or is in response to a party's exercise of the right to free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." *Id*. § 27.003. The appellate court found that Lynch's complaint concerned the mayor's performance as a public official, which is a matter of public concern. Ramsey's lawsuit against Lynch for defamation was based upon the statements in the written complaint, and thus, the court found the TCPA was applicable.

Looking to section 27.005 of the TCPA, the court held that Ramsey was required to establish by clear and specific evidence a prima facie case for each element of his defamation claim. To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a false statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. Ramsey did not challenge the finding that he was a public official and thus, was required to show Lynch's complaint was made with actual malice. The appellate court found that Ramsey did not present any evidence that: (1) Lynch's complaint was a false representation of the statements made by third parties, (2) Lynch knew the allegations were false, or (3) the allegations were made with two or more persons to accomplish a wrongful act or improper purpose.

Because the court dismissed the cause of action, court costs and attorney's fees were properly awarded to defendant Lynch. *Id*. § 27.009.