RECENT STATE CASES OF INTEREST TO CITIES

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TEXAS CITY ATTORNEYS ASSOCIATION
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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
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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.

Special thanks to Amelia "Lame Duck Law Clerk" Harnagel. As one of her final duties at TML before she escaped to start her legal career, Ms. Harnagel helped write and organize this paper. No small task for a new law school graduate.

Table of Authorities

RECENT STATE CASES
November 2011- May 2012

ELECTIONS

***City of San Antonio v Headwaters Coalition, Inc.*, No. 04–11–00344–CV, 2012 WL 1429879 (Tex. App.—San Antonio Apr. 25, 2012).**

This appeal involved a dispute over the location of San Antonio's proposed drainage project. In 2007, San Antonio enacted an ordinance ordering a bond election on a "Drainage Improvements Proposition." In the bond election the city stated the money would be used to make drainage improvements and then stated the money would be used for improvements "with respect to" the Broadway Corridor. Prior to the election, the city held a public hearing. Testimony indicated that the plan would involve placing drains under Broadway to alleviate flooding on Broadway from Davis Court to Carnahan. In the May 2007 election, voters approved the proposition.

After the election, San Antonio hired an engineering firm to study the drainage issue and design a drainage system for the project. From the study, the engineers formulated a plan. The study indicated that the pipes, drains, and curb inlets should be placed under Hildebrand, instead of Broadway, because of the natural flow of the water.

The San Antonio City Council enacted an ordinance authorizing the execution of the construction contract for the drainage project. The day before, Headwaters Coalition requested a temporary restraining order to prevent the council from voting on this issue. After the trial court denied the request, the Coalition then filed an amended petition seeking a declaratory judgment and injunction to prohibit the city from using general obligation bond funds for the project. The trial court granted the temporary injunction.

The coalition argued that the city breached its contract with the voters when it changed the street on which the improvements would actually be made. A city violates its contract with the voters if it uses voter approved tax proceeds in a way the voters did not approved. *Putnam v. City of Irving*, 331 S.W.3d 869, 878 (Tex. App.—Dallas 2011, pet. denied). The court held that while the city may have misrepresented where the improvements would take place, there was not a certain location promised in the bond ordinance, and therefore the city's use of the money was authorized. Procedurally, the court denied the coalitions temporary injunction and sent the case back to the trial court.

***Cook v. Tom Brown Ministries,* No. 08-11-00367-CV, 2012 WL 525451 (Tex. App.—El Paso Feb. 17, 2012).**

In this case involving the recall of a mayor and city council-members, the court concluded—among other things—that: (1) a corporation is prohibited by Texas Election Code Section 253.094 from making a political contribution in connection with a recall election, including the circulation and submission of a petition to call an election; and (2) the Election Code has not and does not prohibit any and all corporate contributions in connection with recall elections—it

merely prescribes the parameters under which contributions may be made—and is thus in line with the U.S. Supreme Court's ruling in *Citizens United. Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

ECONOMIC DEVELOPMENT

City of Houston v. Hotels.com, L.P., 357 S.W.3d 706 (Tex. App.—Houston [14th Dist] Oct. 25, 2011) (mem. op.).

In 2007, the City of Houston ("city") and the Harris County-Houston Sports Authority ("authority") sued several online travel companies ("OTCs") to recover unpaid hotel occupancy taxes due on the difference between the amount consumers paid to OTCs and the lesser amount that OTCs paid to hotels. Both the city and the authority also alleged that the OTCs conspired to evade hotel occupancy taxes and converted taxes that they actually collected. With regard to the city's claims, the OTCs moved for summary judgment on the grounds that the city's ordinance only provided for the taxation of those amounts actually paid to the hotels, and the city had no evidence that the taxes on those amounts had not been remitted. The trial court granted summary judgment, and the city appealed.

In its first issue on appeal, the city argued that local hotel occupancy taxes apply to the full amount paid by the OTCs' customers. The court examined the language of the ordinance authorizing a hotel occupancy tax to be charged by the city, which provided as follows: "There is hereby levied within the corporate limits of the city a tax upon the cost of occupancy of any room furnished by any hotel where such cost of occupancy is at the rate of $2.00 or more per day, such tax to be equal to seven percent of the consideration paid by the occupant of such room to such hotel." HOUSTON, TEX., CODE OF ORDINANCES § 44-102 (1991). Any ambiguous tax statute must be strictly interpreted against the taxing authority and liberally in favor of the entities sought to be taxed. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 & n.23 (Tex. 2008). After reviewing the city's hotel tax ordinance, the court concluded that, the phrase "cost of occupancy" meant the discounted rate paid by the OTCs to the hotel instead of the higher rate the consumer paid to the OTCs. There was no evidence that this lesser amount was not remitted.

The court of appeals held that the OTCs also held the disputed amount of hotel taxes lawfully (the difference in funds between the amount that would have been paid for the full room rate paid by the consumer versus the lesser discounted rate). There was no "conversion" as argued by the city because the OTCs did not owe the money under the city's ordinance.

GOVERNMENT IMMUNITY

City of Houston v. Jenkins, No. 14-11-00091-CV, 2012 WL 456950 (Tex. App.—Houston [14th Dist.] Feb. 14, 2012, pet. filed).

This case began when officers were pursuing suspects with a police dog, Rudy. A sheriff deputy, Jenkins, was bitten by Rudy after both suspects had been apprehended and the dog was being transported back to the police car. Jenkins sued the city and the officer who was in command of the dog for the negligent use of personal property (the dog) under the Tort Claims Act. The city

argued that it was immune from suit because: (1) the plaintiff sued both the city and the employee; and (2) the officer was entitled to official immunity.

The first issue, of election of remedies between the city and the employee, was decided under the recent decision of *Amadi v. City of Houston* and others, which held that a city consents to suit when its actions fall under the Tort Claims Act. No. 14-10-01216-CV, 2011 WL 5099184 (Tex. App.—Houston [14th Dist.] Oct. 27, 2011, pet. filed). As to the second issue of official immunity, the question is whether the officer was performing a discretionary or ministerial act, and if discretionary, whether the act was done in good faith. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000). The court of appeals held that the city failed to prove in its summary judgment motion that the transport of the dog away from a search site was a discretionary duty. The court specifically held that being a police dog did not make all activity done by or to the dog automatically a discretionary duty; depending on the activity, the action could be ministerial. Factors that help determine whether an act is discretionary or ministerial include who performs the act, and the nature and importance of the function. *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994). Pursuing a suspect is discretionary function. *City of Lancaster v. Chambers*, 883 S.W.2d 650,6 55 (Tex. 1994). The city did not prove that the searching was the activity that caused the injury and did not show that there was a discretionary reason why the dog was not securely restrained.

The court affirmed the trial court's denial of the plea to the jurisdiction (election of remedies) and reversed the grant of summary judgment on the official immunity issue. The case was remanded to the trial court.

***De Leon v. City of El Paso*, 353 S.W.3d 285 (Tex. App.—El Paso Oct. 26, 2011).**

In this case, several men sued the City of El Paso ("City"), seeking declaratory and injunctive relief stemming from an incident in which an El Paso police officer threatened to arrest two of the men for kissing at a restaurant, stating that homosexuality was illegal. The men sued the City, alleging violations of Texas Constitution Article 1, Section 3, titled "Equal Rights." They argued that the officer violated their rights under the Constitution by publicly humiliating them based on their sexual orientation, by threatening to arrest them under Texas Penal Code Section 21.06, which the United States Supreme Court had declared unconstitutional (see *Lawrence v. Texas*, 539 U.S. 558 (2003)), by failing to enforce the City's own anti-discrimination ordinance, and by refusing to file a police report of the incident at the restaurant. They further argued that the City violated their rights under Article I, Section 3 by choosing not to train city police officers regarding the City's anti-discrimination ordinance or regarding the fact that Texas Penal Code 21.06 had been declared unconstitutional, and that this training failure led to the officer's behavior. The City argued that the men did not have standing, as they experienced no concrete, particularized injury; that the allegations amounted to a negligence claim, for which there was no waiver of constitutional immunity; and that the controversy was not ripe.

The trial court granted the City's pleas to the jurisdiction, but filed no conclusions of law. The court of appeals held that because the men's claims stemmed from violations of the Texas Constitution, a suit for equitable relief for such violations would not be barred by governmental immunity. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *City of El Paso*

v. Bustillos, 324 S.W.3d 200, 205 (Tex. App.—El Paso 2010, no pet.). Thus, the court reversed the order of the trial court granting the city's pleas to the jurisdiction and remanded the case to the trial court for further proceedings.

***Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756 (Tex. Oct. 21, 2011) (per curiam).**

This decision from the Supreme Court of Texas supported the decision of the lower court, holding that the groundwater district's claim for damages against the City, which included past due fees, penalties, and costs based on water transferred from the district to the City, would result in the payment of retroactive monetary damages by the City and thus governmental immunity barred the claim. The Supreme Court granted the petition for review and affirmed the court of appeal's judgment without hearing oral argument.

***Tirado v. City of El Paso,* 361 S.W.3d 191 (Tex. App.—El Paso Jan. 11, 2012).**

The court held that the city was liable for an accident that was caused by an obstructed stop sign, a condition of tangible personal property of the city. The court also held that the city could not shift liability to property owners with an ordinance that required easement maintenance by the abutting property owners.

***City of Fort Worth v. Chattha,* No. 02-11-00342-CV, 2012 WL 503223 (Tex. App.—Fort Worth Feb. 16, 2012) (mem. op.).**

The court held that an officer's physical takedown of the plaintiff constituted an intentional tort of battery, and therefore the city's plea to the jurisdiction should be granted under the Tort Claims Act.

***Medlen v Strickland*, 353 S.W.3d 576 (Tex. App.—Fort Worth Nov. 3, 2011, pet. filed).**

In this case, a City of Fort Worth animal control employee (Strickland) mistakenly euthanized a dog. The owners of the dog sued Strickland, alleging that her negligence proximately caused the dog's death. Because the dog had little to no market value, the owners sued for the "sentimental or intrinsic value" of the dog. The trial judge dismissed the suit and the dog owners appealed.

The only issue on appeal was whether a party can recover sentimental or intrinsic damages for the loss of a dog. The Fort Worth Court of Appeals held that an owner may be awarded damages based on the sentimental value of lost personal property such as a dog, leaving the intermediate appellate courts split on the issue. *Compare id., e.g., with Petco Animal Supplies Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no pet.) (reversing the award of damages for the intrinsic value of a dog).

***City of Wylie v. Taylor*, 362 S.W.3d 855 (Tex. App.—Dallas March 22, 2012).**

The Taylors sued the City of Wylie under the Tort Claims Act after a city owned drainage pipe caused damage to the Taylor's home. The court of appeals held that a drainage pipe problem,

and an allegation that the city failed to follow its own maintenance policy, are not a "special defects" waiving immunity under the Tort Claims Act. The court also held that it was not a premise defect for which the city was liable, because the city had no knowledge of the defect. The court of appeals dismissed the case for lack of jurisdiction as immunity had not been waived.

GOVERNMENTAL IMMUNITY---ELECTION OF REMEDIES UNDER THE TORT CLAIMS ACT

In a series of cases issued this past fall, the Houston Courts of Appeals (First and Fourteenth Districts), held that when an individual sues both the city and a city employee, and then drops the city employee, the city is still liable under the Tort Claims Act, despite the language in Section 101.016 of the Texas Civil Practices and Remedies Code. The courts held that is so because when a city causes damage or injury by an action covered by the Tort Claims Act, they have, in essence, consented to the suit. Below are summaries of those cases.

***Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 WL 5099184 (Tex. App.— Houston [14th Dist] Oct. 27, 2011, pet. filed).**

An en banc court of appeals reviewed the meaning in Section 101.016(b) of the Texas Civil Practices and Remedies Code, part of the Texas Tort Claims Act. Section 101.106(b) states:

> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

The plaintiff in this case sued both the city and the employee who caused her injuries. The trial court held that this meant the city was out of the case and granted the city's plea to the jurisdiction. The court of appeals held that the express waiver of governmental immunity in the Tort Claims Act is the city's "consent" to suit. The court reversed the trial court's order granting the city's plea to the jurisdiction and reversed and remanded the case to the trial court.

***City of Houston v. McMahon*, No. 01-11-01037-CV, 2012 WL 1249567 (Tex. App.—Houston [1st Dist.] Apr. 12, 2012) (mem. op.).**

When a case is filed against a governmental entity and its employee, Section 101.106(e) of the Texas Tort Claims Act results in the plaintiff's involuntary election of the governmental unit as the exclusive defendant. Subsection (b) of the same section (requiring consent of the governmental unit for suits based on the same subject as one brought against its employee) does not provide governmental/sovereign immunity when a claimant sues both a governmental unit and its employee in the same suit. Such a claim would make Subsection (e) merely superfluous. So long as the plaintiff complies with the jurisdictional requirements of the Tort Claims Act, Section 101.106 does not bar claims against the city, her elected defendant.

***City of Houston v. Rodriguez*, No. 14-11-00136-CV, 2011 WL 5244366 (Tex. App.— Houston [14th Dist] Nov. 3, 2011) (substitute op. on reh'g).**

The court of appeals issued a new opinion in this case based on its October decision in *Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 WL 5099184 (Tex. App.—Houston [14th Dist.] Oct. 27, 2011). In *Amadi*, the court held that a city "consents" to suit when it is involved in a Texas Tort Claims Act case. In this way, a plaintiff does not lose his/her right to sue the city under Texas Civil Practice and Remedies Code Section 101.106 simply because both the city and the employee are sued. The court used this reasoning in its new opinion in *Rodriguez* and held that the plaintiff's tort claim could go forward even though she had originally sued both the city and the employee.

***City of Houston v. Washington*, No. 14-11-00305-CV, 2011 WL 6808218 (Tex. App.— Houston [14th Dist.] Dec. 22, 2011) (mem. op.); *City of Houston v. Uribe-Mendoza*, No. 14-11-00647-CV, 2011 WL 6809864 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011) (mem. op.); and *City of Houston v. Marquez*, No. 01-11-00493-CV, 2011 WL 6147772 (Tex. App.— Houston [1st Dist.] Dec. 8, 2011) (mem. op.); *City of Houston v. Gov't Emp. Ins. Co.,* No. 01-11-00173-CV, 2011 WL 6938543 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011); *City of Houston v. Amazquita,* No. 14-11-00087-CV, 2012 WL 19663 (Tex. App.—Houston [14th Dist.] Jan. 5, 2012) (mem. op.).**

In each of these cases, a plaintiff sued both the city and a city employee for negligence in causing a collision with a vehicle occupied by plaintiff. The city responded in each instance with a motion to dismiss its employee pursuant to the election of remedies provision of the Tort Claims Act, Texas Civil Practice and Remedies Code Section 101.106(e). In each case, the plaintiff non-suited the employee. The city argued that it was immune from suit under Civil Practice and Remedies Code Section 101.106(b), which provides that "[t]he filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery . . . against the governmental unit regarding the same subject matter unless the government unit consents." The appellate courts rejected the argument, holding that Section 101.106(b) applies only when the governmental unit has not consented to suit. In each case, the city consented to suit based on the negligent use or operation of a motor-driven vehicle. In other words, the Tort Claims Act itself constitutes consent to suit.

GOVERNMENT IMMUNITY—CONTRACT

***City of Paris v. Abbott*, 360 S.W.3d 567 (Tex. App.—Texarkana Oct. 21, 2011, pet. denied).**

Prior to its annexation by the City, about half of the plaintiff's (Abbott's) property was used as a mobile home and travel trailer park and the other part was vacant. Abbott became interested in purchasing the entire tract with the goal of expanding the mobile home park to encompass the full acreage. After Abbott notified the city of his plans and had consulted with city officials, Carruth penned a May 8, 2008, letter to Abbott, which included the following:

> According to the zoning records of the City of Paris the above-referenced property is currently zoned Commercial (C); however, it is my understanding that there is a mobile home park on the property which has been continuously operated since originally opening several years ago. Unless its use as a mobile home park ceases in its entirety it is considered a non-conforming use by the City.
>
> Notwithstanding any current moratoriums which may affect the property and as long as the property continues to be used as a mobile home park, its non-conforming use will be allowed. Further, this right to non-conforming use will transfer to you if you buy the property, and will be transferable by you to a new owner of the property.
>
> Lastly, your proposed use of the property to construct single or multifamily dwellings from permanent or portable intermodal steel building units will be allowed under the current zoning of the property, assuming the intermodal units comply with applicable building codes.

Abbott believed this letter established a contract between him and the City. In reliance upon the letter, Abbott purchased the property and began planning the expansion of the mobile home park. Abbott sent a preliminary plat to the department, which detailed the proposed locations of roadways, driveways, trailer pads, and utilities. He made arrangements with utility providers for the installation of electrical, water, and sewer services, and also purchased twenty mobile homes in expectation of the plat approval. The planning department told him he must seek a zoning change before his plat would be approved. Abbott also submitted an application to the City for a building permit, which was denied. Abott sued the city for breach of contract based on the city manager's letter and for tort claims. The City and Carruth filed a plea to the jurisdiction, which the trial court granted with respect only to Abbott's claims filed under the Texas Tort Claims Act. The trial court denied the City's plea to jurisdiction relating to Abbott's claims for "inverse condemnation, for violations of procedural and substantive due process and equal protection and for breach of contract and declaratory relief, without prejudice to Defendants' right to reurge their Plea as to these claims."

His suit alleged, among others claims, the breach of contract claim. His suit stems from the department's denial of his building permit, an action which he argues established a breach of Carruth's letter, waiver by conduct. A 1997 Texas Supreme Court opinion contains a footnote which seemingly encourages the possibility of waiver of immunity by conduct. *Federal Sign v. Texas Southern University,* 951 S.W.2d 401, 408 n.1 (Tex.1997) (there could be "circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts."). Citing *Federal Sign*, the argument of waiver of immunity based on conduct was raised in *Little–Tex. Gen. Servs. Comm'n v. Little–Tex Insulation Co., Inc.,* 39 S.W.3d 591, 595. *Little–Tex*, however, expressly rejected the waiver by conduct doctrine because "the situation ha[d] changed" due to the Legislature's enactment of "a dispute-resolution procedure to resolve certain breach-of-contract cases against the State" as codified in Chapter 2260 of the Texas Government Code. *Id.* at 595, 597. That chapter requires alternative dispute resolution as a prerequisite to presenting breach of contract claims in court.

In order to curb the application of *Little–Tex* from foreclosing suit filed by plaintiffs with claims against local governmental entities (who were not included in Chapter 2260's waiver of immunity), the Legislature treated cities somewhat differently, enacting Section 271.151 of the Local Government Code. A local governmental entity authorized by statute or the State constitution to enter into a contract waives governmental immunity to suit for the purpose of adjudicating a claim for breach of a contract subject to the provisions of Chapter 271 of the Texas Local Government Code.

The City asserts that Carruth's letter was not a contract with Paris, there was no consideration for any agreement, and Carruth was not authorized to bind the governmental entity. However, "[t]he relevant inquiry is whether the Agreements entail the provision of 'goods or services' to the" local governmental entity. Although Chapter 271 provides no definition for the term "services," the term is generally "broad enough to encompass a wide array of activities. In ordinary usage the term 'services' has a rather broad and general meaning," and "includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed." However, there must be some obligation to perform. Abbott's pleadings neither suggest that he was obligated to perform any service for the city, nor that he was to provide any goods to the city. Therefore, the court of appeals found that Carruth's letter was not a contract for goods or services.

The court of appeals concluded that the Supreme Court of Texas has "consistently deferred to the Legislature to waive . . . immunity from suit, because this allows the Legislature to protect its policymaking function." *Tooke*, 197 S.W.3d at 332. Following the logic in *Little–Tex*, Chapter 217 also prevents waiver of governmental immunity through conduct.

***Multi-County Water Supply Corp. v. City of Hamilton,* No. 10-11-00037-CV, 2012 WL 579554 (Tex. App.—Waco Feb. 22, 2012, pet. filed) (mem. op.).**

The City of Hamilton supplied whole-sale water to Multi-County Supply Corporation for customers living outside the city limits. A contract between the two provided the City would purchase and treat raw water for resale to Multi-County. However, the City purchased already treated water for resale to Multi-County. Multi-County originally sued the City regarding this contract in 2007. The City filed, and the trial court granted, a plea to the jurisdiction in that case. On appeal, the court of appeals interpreted Multi-County's claims as a contract action. Since the City enjoyed governmental immunity from this type of action, the appeals court affirmed the trial court's decision. The court of appeals also held that the city had not performed an action violative of the Tort Claims Act, since this was a breach of contract case, and so immunity was not waived for this reason.

Multi-County also argued that its pleadings alleged ultra vires acts of the city officials, so the trial court should not have granted the city officials' plea to the jurisdiction. To fall within this exception, the suit must allege that the city official acted without legal authority or failed to perform a purely ministerial act as required by a statute or the Constitution. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Since the proper defendant in an ultra vires action is an official, the City remained immune from the suit. *Id.* at 372–73. The court recognized that

Multi-County did not allege that the officials did not have the authority to take action. Instead, Multi-County argued that the officials acted contrary to the contract. The court concluded at most the actions of the city officials were in error, which does not give rise to a suit against a government official based on ultra vires acts.

The court concluded that Multi-County's suit was not an ultra vires action. Rather, it was simply a breach of contract suit to enforce its interpretation of the contract it had with the City. As such, the suit was barred by governmental immunity. The court of appeals affirmed the trial court's order granting the City's and the City officials' plea to the jurisdiction.

***Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. Oct. 21, 2011).**

The City of Alton (City) and Sharyland Water Supply Corporation (Sharyland) entered into a Water Supply Agreement under which Sharyland provided water to the City. Subsequently, the City installed parts of its sewer main parallel to Sharyland's water main. Sharyland sued the City, and its contractors, for negligence and breach of contract because of Sharyland's concerns about the threat of contamination to its potable water supply. In addition, Sharyland requested a declaratory judgment that Texas Administrative Code Chapter 30, Section 317.13—relating to the installation of sewer lines in relation to waterlines—applied to the case. A jury found in favor of Sharyland. The court of appeals disagreed and rendered a take-nothing judgment against Sharyland, except as to its claim against the City for attorney's fees related to its declaratory judgment action. The Supreme Court of Texas held that Sharyland could not recover against the City and that attorney's fees could not be awarded.

Sharyland sought recovery against the City under Local Government Code Chapter 271. Local Government Code Section 271.152 provides a limited waiver of immunity for local governmental entities that enter into certain contracts. Local Government Section 271.153 limits the recoverable damages. Sharyland sought money for the alleged injuries and costs to repair its water system. The Court held that those types of damages were not contemplated in the Water Supply Agreement and were not the type of damages authorized under Section 271.153 at the time the suit was initiated (e.g, Sharyland was not seeking a "balance due and owed" under the contract).

Sharyland also argued that the City had waived its immunity (1) by its counterclaim that the Water Supply Agreement was void; and (2) by its conduct (an equitable waiver). As to the counterclaim, the Court concluded there was no waiver because the City's counterclaim was gone; it was barred by Section 1926(b) of Title 7 of the United States Code. The Court refused to recognize waiver by conduct in a breach of contract suit against a governmental entity.

Finally, the Court concluded that Sharyland could not recover attorney's fees for the City's breach of contract because damages were not recoverable under Local Government Code Chapter 271. Moreover, Sharyland could not recover attorney's fees on its declaratory judgment claim because the declaratory action was merely a subset of its larger breach of contract claim.

LAND USE

***Town of Flower Mound v. Rembert Enterprises, Inc.,* No. 02-10-00408-CV, 2012 WL 662455 (Tex. App.—Fort Worth Mar. 1, 2012, pet. filed).**

After denying a motion for rehearing, the court withdrew its previous opinion of December 8, 2011, and substituted this opinion. Rembert is the developer of a residential subdivision in Flower Mound. When Rembert applied to Flower Mound for approval of its development permits, Flower Mound required Rembert to construct Auburn Drive on the property and other land Rembert did not initially own as a condition of approval. Rembert and Flower Mound thereafter entered into three separate development agreements, and Rembert constructed Auburn Drive as set forth in those agreements.

The city's primary argument is that the trial court does not have subject matter jurisdiction over Rembert's breach of contract claim because a development agreement does not involve the provision of goods and services as required for a waiver of immunity under Local Government Code Chapter 271. The court held, that Flower Mound's immunity from suit is waived with regard to the agreement because the agreement is a contract for the provision of services to Flower Mound within the meaning of that statute.

Rembert also claimed that the Declaratory Judgment Act waived the city's immunity. He attempted to distinguish his declaratory judgment claim from his breach of contract claim by arguing that a judicial interpretation of the Impact Fee Act and Flower Mound ordinances is required to determine whether Flower Mound is required to reimburse Rembert fifty or one hundred percent of the cost of constructing Auburn Drive. But in every suit against a governmental entity for money damages, a court must first determine the parties' contract or statutory rights; if the sole purpose of such a declaration is to obtain a money judgment, immunity is not waived. The court held that—although the Declaratory Judgments Act typically waives immunity when the construction of a statute or ordinance is involved—the trial court in this case must construe the Impact Fee Act, Flower Mound's ordinances, and the Agreement to determine whether Flower Mound breached the Agreement. Thus, Rembert's declaratory judgment claim is merely a recast of its breach of contract claim, and immunity has not been waived.

Finally, the court held that Rembert should be permitted to proceed on its inverse condemnation claim.

***Mira Mar Dev. Corp. v. City of Coppell*, No. 05–10–00283–CV, 2012 WL 1005005 (Tex. App.—Dallas Mar. 23, 2012).**

In this case, Mira Mar Development Corporation appealed exaction claims originally decided by the Coppell City Council. An exaction occurs if a governmental entity requires an action by a landowner as a condition to the approval of the requested land development. Mira Mar purchased land in Coppell with plans to develop a residential subdivision. Mira Mar experienced

conflicts and delays with the city in obtaining approval of the development, which the corporation claimed increased its costs and reduced the sale price of the lots. The Coppell City Council held a hearing concerning Mira Mar's grievances, pursuant to Local Government Code Section 212.904. This section provides limits to the amount the developer may be required to pay for improvements to a city's infrastructure when bearing the cost is a condition for approval of a development project. The section also provides procedures for a developer to follow if he or she wants to contest the amount. After the hearing, the city awarded Mira Mar monetary damages.

Mira Mar appealed the city council's decision in district court. The trial court agreed that the city council denied Mira Mar due process in the hearing and ordered the city council to conduct another hearing. At the subsequent hearing, the city awarded additional monetary damages and attorney's fees to the corporation. Mira Mar again appealed the council's decision. The trial court held a hearing and awarded an additional sum of money to Mira Mar. The trial court also granted the city's motion for summary judgment and rendered judgment awarding the company the amount awarded by the city at the second hearing plus what the court awarded the corporation.

On appeal, the court of appeals stated that the standard of review to be used in determining the appeal of the governing body's decision under Local Government Code Section 212.904 is the "trial de novo" standard of review, rather than the "substantial evidence" standard that the trial court used. The court also determined that Mira Mar was entitled to a jury trial on compensation, if any, to which the corporation was entitled. The court of appeals reversed the trial court's decision and rendered judgment on five of the exaction claims that were appealed and reversed and remanded the other five exaction claims

SEXUALLY ORIENTED BUSINESS

***RCI Entm't, Inc. v. City of San Antonio,* No. 04-11-00045-CV, 2012 WL 392930 (Tex. App.—San Antonio Feb. 8, 2012).**

In December 2009, the San Antonio Police Department appeared at two cabaret-type establishments that offer live nude entertainment to conduct inspections pursuant to a city ordinance that prohibits nudity and semi-nudity in public places and requires permits for "human display establishments." At both businesses, city police officers arrested entertainers for appearing in a state of nudity in a public place and managers for allowing the entertainers to appear in a state of nudity in a human display establishment. The businesses sued the city seeking declaratory and injunctive relief on the grounds that the Texas Penal Code and Business and Commerce Code preempted the city ordinance, and alternatively, that the ordinance was an unreasonable limitation on constitutionally-protected activities, thereby constituting a prior restraint and "chilling effect" on protected speech. The city counterclaimed to permanently enjoin the businesses from further violations of the ordinance. The trial court rendered judgment in favor of the city by permanently enjoining businesses from violating the city ordinance and denied all claims for relief asserted by the businesses. The businesses appealed.

On appeal, the businesses first contended that the city ordinance was preempted by the Texas Penal Code. More specifically, the businesses argued that the city ordinance attempted to regulate the same conduct that is regulated by Penal Code Sections 21.07, 21.08, 42.01, and 43.23, which criminalize public lewdness, indecent exposure, disorderly conduct, and public indecency, respectively. Relying on case law providing that, generally, ordinances that supplement or address a different subject matter than a state statute are not inconsistent with the statute, unless the state has explicitly provided that localities cannot further regulate a given area, the court found that the city's ordinance regulated different conduct than is regulated by the Penal Code. *See In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002). According to the court, Sections 21.07, 21.08, and 43.23 of the Penal Code were all aimed at conduct that contains a sexual or obscene element, while the ordinance was directed only at the act of appearing in a public place in a state of nudity. Meanwhile, because Penal Code Section 42.01 prohibits a person from exposing himself or herself with a reckless disregard for another person who is present, and the ordinance is directed at the act of appearing in a public place in a state of nudity, regardless of whether anyone else may be present to witness the nudity, the ordinance was also not determined to be inconsistent with this section.

The businesses also argued that the ordinance was preempted by Business and Commerce Code, which contains a provision imposing a fee on a sexually-oriented business in an amount equal to $5 per customer who is admitted to the business. *See* TEX. BUS. & COM. CODE § 102.052(a). The crux of the businesses' argument was that the state legislature recognized that nude entertainment was lawful when enacting this statute, and the city's ordinance, deprives the state of the authorized fee by making illegal that which is legal and taxable under state law. *See City of Fort Worth v. McDonald*, 293 S.W.2d 256 (Tex.Civ.App.—Fort Worth, 1956, writ ref'd n.r.e.). However, because Local Government Code Section 243.001 specifically grants cities the authority to regulate sexually-oriented businesses, Business and Commerce Code Section 102.052 does not preempt the city ordinance.

The court next addressed the businesses' argument that the ordinance prohibits nude dancing specifically because of its communicative attributes, thereby rendering the ordinance an unconstitutional content-based restriction. The businesses argued that the ordinance was content-based because it only subjected dancers, managers, and owners of human display establishments to criminal and civil liability and because the ordinance allowed an exception to liability based on content of the speech for any "person engaged in expressing a matter of serious literary, artistic, scientific, political, or social value." SAN ANTONIO, TEX., CODE § 21-207(c)(1). In determining that the city ordinance was content neutral, the court reasoned that the ordinance makes it unlawful for any individual to appear in a state of nudity in all public locations, not just in human display establishments. Further, the court held that the ordinance is properly evaluated as a content-neutral restriction, because it was not aimed at any expressive content of appearing nude but at the secondary effects of appearing nude in public. *See Combs v. Tex. Entm't Assn*, 347 S.W.3d 277, 286 (Tex. 2011*); Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000). As a result, the city's ordinance would be subject to an intermediate scrutiny analysis under the U.S. and Texas Constitutions. Because the ordinance imposed no greater incidental restriction on protected speech than is essential to the furtherance of the governmental interest at which the ordinance is aimed (being partly clothed while dancing as opposed to completely nude involves a de minimus impact on the ability to express eroticism), the court held that the ordinance withstood

intermediate scrutiny. The ordinance was not held to be an unconstitutional prior restraint on speech because it was deemed to be content-neutral.

Lastly, the businesses challenge the broad scope of the trial court's injunction. The court held that because the injunction restrained all appearances in a state of nudity, the injunction did not definitely and precisely inform businesses of the acts they are restrained from doing without calling upon businesses for inferences or conclusions about which persons might well differ. *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 284 (Tex.App.—Dallas 2009, no pet.). The injunction did not account for the exception to the ordinance for persons engaged in expressing "a matter of serious literary, artistic, scientific, political, or social value," and therefore was too broad in enjoining businesses from activities that are lawful and proper under the ordinance. In addition, the court held that the trial court's injunction was overly broad on the grounds that it applied to the "representatives and contractors" of the businesses, thus violating Texas Rule of Civil Procedure 683, which provides that every order granting an injunction is binding only upon the parties to the action and certain specified officers and agents of the parties.

The court reversed the permanent injunction in part and remanded the case to the trial court with instructions to modify the scope of the injunction order. The trial court's judgment of the trial court was affirmed in all other respects.

***8100 North Freeway, LTD. v. City of Houston,* No. 14-11-00301-CV, 2012 WL 749812 (Tex. App.—Houston [14th Dist.] Mar. 8, 2012).**

The city brought suit against an "adult arcade" to stop its operation because the arcade did not meet the City of Houston's ordinance provision requiring a direct line of sight between the manager's desk and the arcade viewing rooms. The arcade tried to get around this ordinance provision by: (1) installing cameras in all of the rooms; (2) showing other content, such as *Bambi*, so they would not meet the sexually oriented business definition; and (3) arguing that the city's ordinance was an unconstitutional regulation of free speech. The business questioned a Houston police officer during a hearing about the city's interpretation of the ordinance where the officer stated that the ordinance applied to any business showing any videos. The business pointed out that there are no negative secondary effects to showing *Bambi* or other non-sexually-explicit content. The court first determined that the police officer's incorrect interpretation of the ordinance had no bearing on the matter at issue. Next, the court held that any challenge to the constitutionality of the ordinance was barred by the holding in *N.W. Enters., Inc. v. City of Houston*, where the Fifth Circuit held that the ordinance was not unconstitutional on its face. 352 F.3d 162, 176-77 (5th Cir. 2003). The court also held that the ordinance was not unconstitutional as applied because it did not give the police chief "unfettered discretion" in the permit application process to run an adult arcade. Cameras do not equal a direct line of sight according to the definition under the city ordinance and the police chief was following that ordinance when he made his decision. The court finished by holding that this arcade could not be in business until it received a permit under the city's ordinance.

Sanchez v. Bd. of Adjustment for the City of San Antonio,* No. 08-10-00200-CV, 2012 WL 560861 (Tex. App.—El Paso Feb. 22, 2012, pet. filed); *E. Cent. Indep. Sch. Dist. v. Bd. of

***Adjustment for the City of San Antonio,* No. 08-10-00201-CV, 2012 WL 560888 (Tex. App.—El Paso Feb. 22, 2012, pet. filed).**

The court held that the board of adjustment's minutes were filed for purposes of Local Government Code Section 211.011 when they were approved by the board.

***S. Dev. of Miss., Inc. v. Zoning Bd. of City of Marshall*, No. 06-11-00083-CV, 2012 WL 1563906 (Tex. App.—Texarkana May 4, 2012).**

When considering an appeal from a zoning board decision, the only question before the court is whether the order is legal or not. "The appealing party must establish that the board could have reasonably reached only on decision" *Id.* at *3. The zoning board's stop construction order was based on an ordinance that refers to lot lines, but their decision refers to "zone lines." This distinction means only one decision could have been reached, and the board's decision was illegal and a clear abuse of discretion.

NUISANCE

City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012).

On January 27, the Texas Supreme Court issued a new opinion in the substandard building case of *City of Dallas v. Stewart*. In response to a motion by the City of Dallas for a rehearing (a request that the court reconsider its first opinion), the Supreme Court of Texas withdrew its original opinion (meaning that it is no longer legal authority) and substituted this new opinion. The Court essentially confirmed its original opinion:

Today we hold that a system that permits constitutional issues of this importance to be decided by an administrative board, whose decisions are essentially conclusive, does not correctly balance the need to abate nuisances against the rights accorded to property owners under our constitution. In the context of a property owner's appeal of an administrative nuisance determination, independent court review is a constitutional necessity.

The lawsuit started when Stewart's house fell into disrepair, had been inhabited by vagrants, and suffered from numerous code violations. The city building standards board determined that the house was a nuisance and ordered its demolition. Before the demolition, the owner appealed the board's decision to district court. (The appeal did not stay the demolition, and the house was demolished.) After the demolition, the owner added a takings claim to her suit. A jury decided that the home was not a public nuisance, that the demolition worked a "taking" by the city of the property, and awarded the owner damages. The city appealed the issue of whether the board's decision that the house was a public nuisance precluded a finding of a taking, and the Court concluded that an appointed board's decision is not entitled to deference by a court. The City of Dallas sought a rehearing of the case, and TML and many cities provided amicus support in that effort.

In its second opinion, the Court attempted to soften the blow of the case by stating that "property owners rarely invoke the right to appeal." It further stated that a takings "review is required only when a nuisance determination is appealed…Thus, the city need not institute court proceedings

to abate every nuisance. Rather, the city must defend appeals of nuisance determinations and takings claims asserted in court by property owners who lost before the agency."

The potentially good news in the second opinion is that the Court recognized that state law provides a "narrow thirty-day window for seeking review." This may mean that a city could continue to use the city council or building and standards commission abatement process, and simply wait until the time for appeal has passed before demolishing a structure. However, not all city attorneys are in agreement that such is the case.

City of Beaumont v. Starvin Marvin's Bar & Grill, L.L.C., No. 09-11-00229-CV, 2011 WL 6748506 (Tex. App.—Beaumont Dec. 22, 2011) (mem. op.).

Starvin Marvin's Bar & Grill is a restaurant that offers an outside patio where customers can enjoy food and live music. The property, leased by the restaurant, is located within the City of Beaumont's General Commercial Multiple-Family Dwelling District. Prior to opening, Starvin Marvin made a substantial investment to upgrade and renovate the property, including renovations to the outside patio and stage. Starvin Marvin obtained all necessary permits from the city, including all electrical permits necessary for an expansion to the outdoor patio, which was electrically wired for sound and lighting with a stage built for live band performances.

Shortly after opening the neighbors complained of the noise coming from Starvin Marvin's outdoor patio. In response, Beaumont Police Department conducted a sound test in Starvin Marvin's parking lot and thereafter issued a citation for violating the city's noise ordinance.

The owner of the restaurant, Marvin Atwood, complained to the city that the officer had improperly conducted the sound test from the property line and not "at the nearest residential line in a permanent residential zone" as stated in the zoning ordinance. The city dismissed the citation. It was undisputed that Starvin Marvin's use of the property complies with the permitted uses of a GC-MD zone and the zoning ordinance's noise performance standards.

The city later amended its noise ordinance. The revised noise ordinance ("Ordinance 11-025") established allowable decibel levels and provides that any sound exceeding those levels is a violation of the chapter. The ordinance further provided that "[e]xterior noise levels shall be measured at the property line of an offended person."

Starvin Marvin retained an industrial hygienist to conduct sound testing at its location to determine if it complied with the new ordinance. The tests indicated any use of its outside patio, with or without music, would be a prima facie violation of the new ordinance. Thereafter, Starvin Marvin initiated this lawsuit seeking a declaratory judgment that Ordinance 11-025 is void or not enforceable against Starvin Marvin.

The city filed a plea to the jurisdiction. After an extensive hearing, the trial court denied the city's plea and granted Starvin Marvin's temporary injunction based on the doctrine of equitable estoppel, and in so doing, enjoined the city from enforcing Ordinance 11-025 against Starvin Marvin. The city filed this appeal.

The city argued that the trial court, as a court of equity, lacks jurisdiction to enjoin the enforcement of a penal ordinance or to declare the ordinance unconstitutional. Generally, a court of equity will not enjoin the enforcement of criminal law. However, if the penal ordinance is unconstitutional or void, and its enforcement threatens irreparable injury to vested property rights, then equity may intervene to protect those property rights.

The court first considered whether Starvin Marvin has a "vested property right." The Texas Supreme Court has held that "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made." *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex.1972). Further, a lessee's rights do not exceed those of the property owners; as such, lessees do not have a constitutionally protected right to use property in a certain way, without restriction. Thus, the court concluded the use of the leased property as a restaurant with outdoor music is not a constitutionally protected vested property right.

Starvin Marvin did not show that enforcement of the ordinance would cause an irreparable injury to a vested property right. As such, the court held that the trial court did not have jurisdiction to hear Starvin Marvin's causes of action for declaratory relief or its cause for relief based on equitable estoppel. In like manner, the court held that it did not have jurisdiction over those causes on this appeal.

***Secure Properties v. City of Houston,* No. 14-11-00051-CV, 2012 WL 113070 (Tex. App.—Houston [14th Dist.] Jan. 12, 2012) (mem. op.).**

Secure Properties, Inc. (SPI) owns rental property consisting of two buildings in Houston. In January 2010, the City gave written notice to SPI that its Building and Standards Commission would hold a public hearing concerning alleged violations of the Houston Code of Ordinances of these two buildings.

At the hearing, Christopher Hageney, SPI president, appeared on behalf of the company. Hageney confirmed that he had received notice of the hearing and requested a continuance. His request was denied. In its final order, the Commission found that notice was properly given, both buildings were in violation of numerous Code of Ordinances provisions, adopted the City's recommendation for the repair and demolition of one of the buildings, and gave SPI 15 days to obtain repair permits and 60 days to repair Building 2.

SPI petitioned the district court for judicial review of the Commission's decision. The City filed a summary judgment motion, which was granted by the district court. SPI appealed. In its appeal, SPI argued four issues: (1) the district court's judgment was erroneous because it applied the wrong standard of review to SPI's procedural due process challenge, (2) the City did not show that it was entitled to a ruling as a matter of law, that the Commission's actions did not violate SPI's due process rights, and the evidence established a due process violation, (3) the Commission's factual findings were not supported by substantial evidence, and (4) SPI was entitled to a *de novo* hearing in the district court so SPI's due process violation was not remedied by the City's offer to agree to a proposed judgment remanding the case for rehearing.

The Court of Appeals acknowledged that the right to appeal an administrative hearing decision exists if (1) such right is statutorily created, or (2) the action violates a person's constitutional rights. *See Firemen's & Policemen's Civil Serv. Comm'n of City of Ft. Worth v. Kennedy,* 514 S.W.2d 237, 239 (Tex. 1974). In this case, the court recognized that both types of judicial review were authorized, and each type involved a separate inquiry governed by a separate standard of review. *See* TEX. LOC. GOV'T ANN. § 54.039 (authorizing appeal to district court for judicial review of Commission decisions under the substantial evidence rule); *Lewis v. Metro Sav. & Loan Ass'n*, 550 S.W.2d 11, 15-16 (Tex. 1977) (holding that a reviewing court's conclusion that administrative body's factual findings are supported by substantial evidence does not preclude separate inquiry into whether administrative body acted so arbitrarily as to violate a party's right to due process).

The Court overruled SPI's Issue 1, stating in a footnote that nothing in the record of the district court proceedings indicated that the district court applied an incorrect standard of review. The Court also overruled SPI's Issue 2, concluding that the City's legal arguments to the district court were sufficient to find the Commission's actions did not violate SPI's procedural due process rights. Specifically, the City presented the district court with relevant authority, which was supported by undisputed facts that SPI's President received written notice, appeared at the hearing, and had a chance to be heard, cross-examine witnesses, and present evidence. Additionally, the Court recognized that the denial of a requested continuance at the hearing did not reveal a procedural due process violation. Because the Court concluded that no procedural due process violation occurred, the Court also overruled Issue 4.

For Issue 3, the Court concluded that the record from the administrative hearing contained more than a scintilla of evidence that the buildings were in violation of some of the alleged ordinances. On one ordinance in particular, however, the Court concluded that the Commission had not heard evidence regarding whether SPI was in violation of a particular ordinance. The Court reversed the district court's summary judgment on the issue of whether substantial evidence supported the Commission's finding on the one ordinance and remanded this to the district court while affirming the district court's summary judgment in all other respects.

OPEN GOVERNMENT

***Bonner v. City of Burleson*, No. 10-11-00060-CV, 2011 WL 5221258 (Tex. App.—Waco Nov. 2, 2011) (mem. op. on reh'g).**

The court of appeals held that Bonner was not a "requestor" under the Public Information Act under Texas Government Code Section 552.028 because he is a prisoner and the other person who made the request was not his attorney.

PERSONNEL

***City of San Antonio v. Diehl*, No. 08–10–00204–CV, 2012 WL 1421877 (Tex. App.—San Antonio Apr. 25, 2012).**

This case analyzed how workers compensation benefits align with benefits provided for by civil service requirements, specifically line of duty pay. A civil service police officer was injured on the job and was entitled to workers compensation benefits and civil service line of duty pay. *See* TEX. LOC. GOV'T CODE § 143.073. The workers compensation benefits are 70% of pre-injury wages. TEX. LAB. CODE § 408.103. Section 143.073 of the Local Government Code requires that the city pay an employee their full salary when they suffer on the job injuries. Section 504.051 of the Texas Labor Code states that workers compensation benefits should be offset by amounts paid under chapter 143, but the offset cannot occur until the benefits, such as those provided by chapter 143, are received by the injured employee. In *City of San Antonio v. Vakey*, the court of appeals had held that the offset should be taken out of the chapter 143 amounts, not the workers compensation benefits. 123 S.W.3d 493, 500 (Tex. App.—San Antonio 2003, no pet.). The court of appeals also held in *Vakery* that any overpayments could be taken out of an officer's later pay under the statute because it states what to do "if benefits are offset" indicating that there may be instances where overpayments would be made, but paid back later. In this case, the court held that the city could recoup overpayments from the officer's pay for any payments over and above his normal salary. The court also noted that the city had chosen to do the officers a favor by paying the extra benefits while the individual was on leave, and then recoup later, because the city could have just paid benefits equal to his normal salary. Paying this amount could have negatively affected an officer's pensions due to deductions such as child support payments. Also, worthy of noting, the officer admitted that the city did him a favor by overpaying him at the time and that he knew he would have to repay an amount.

***Crystal City v. Palacios*, No. 04–11–00381–CV, 2012 WL 1431354 (Tex. App.—San Antonio Apr. 25, 2012).**

This case involved what provisions of an employee handbook, do or do not, create an employment contract. The city of Crystal City terminated its city manager, Palacios, due to lack of confidence. Palacios did not have a written contract, but argue that the personnel handbook created an employment contract. The Supreme Court of Texas has previously held that a contract can be created if an "employer promises an employee certain benefits in exchange for the employee's performance, and the employee performs." *City of Houston v. Williams*, 353 S.W.3d 128, 136 (Tex. 2011). The court held that the general provisions of the city's charter and personnel policies describing pay types and directing the city manager to only terminate individuals for just cause, did not contain the kind of detailed specific compensation provisions required to create a contract. Also, the provision in the manual that listed reasons that a person could be terminated was broadened by the caveat that the reasons for termination were "not limited" to the listed reasons. The court quoted the Supreme Court of Texas again stating that: "[g]eneral comments that an employee will not be discharged as long as his work is satisfactory do not in themselves manifest such an intent [to create a binding employment contract]." *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). The court held that no contract was formed.

***Mata v. City of San Antonio*, No. 04–11–00311–CV, 2012 WL 1364594 (Tex. App.—San Antonio Apr. 18, 2012) (mem. op.).**

Mata, a San Antonio fire fighter, tested positive for cocaine under collective bargaining agreement (CBA) testing. San Antonio terminated (indefinite suspension) Mata. After the termination agreement was signed by the city and Mata, the city offered Mata his job back based on certain conditions including non-random drug testing and that he would not use coke anymore through a "last chance agreement." Last chance agreements were in use before the collective bargaining agreement was originally signed. Mata was subsequently drug tested and tested positive for cocaine. He was terminated through the hearing examiner process. Mata did not dispute the use of cocaine, but argued that the collective bargaining agreement (CBA) did not allow for non-random drug testing. The court upheld the termination because even if the non-random drug testing was not allowed under the CBA, he would have been terminated without the agreement allowing the drug testing and the last chance agreement was not contrary to the CBA because the CBA specifically allowed maintenance of prior practices, which would include "last chance agreements."

***Kirkland v. City of Austin*, No. 03-10-00130-CV, 2012 WL 1149288 (Tex. App.—Austin Apr. 5, 2012) (mem. op.).**

In response to the City's no-evidence summary judgment motion under the Texas Whistleblower Act, the plaintiff, Mr. Kirkland, has the burden to show that "the person who took the adverse employment action knew of the employee's report of illegal contact." *Harris County v. Vernagallo*, 181 S.W.3d 17, 25 (Tex. App.—Houston [14th Dist.] 2005). The Act does allow for a presumption of such knowledge if the report and adverse personnel action occur within 90 days of each other. TEX. GOV'T CODE § 554.004(a). In this case, over a year passed between Kirkland's report and losing his job, but he pointed to two other "adverse personnel actions" that would qualify him for the statutory presumption of causation. The court, however, found these actions resulted in no concrete change to the plaintiff's employment status, and therefore no personnel action that could be considered adverse and allow for a presumption of causation.

***City of Fort Worth v. Lane,* No. 02-11-00048-CV, 2011 WL 6415161 (Tex. App.—Fort Worth Dec. 22, 2011) (mem. op.).**

The issue in this case is whether Lane (plaintiff), an attorney working in the city's internal audit department, established waiver of immunity under the Texas Whistleblower Act by making a good faith report of a violation of law. Plaintiff called the city's fraud hotline, filed a complaint with the employee relations department, and contacted the FBI regarding the city auditor's handling of a request for proposal (RFP). Plaintiff believed that the RFP was subject to the competitive procurement laws. The court held that a reasonably prudent employee in plaintiff's situation would have believed that the city was required to comply with the competitive procurement laws and that plaintiff's report was made in good faith. The court thus affirmed the trial court's order denying, in part, the city's plea to the jurisdiction.

***Leyva v. Crystal City*, 357 S.W.3d 93 (Tex. App.—San Antonio Oct. 12, 2011).**

The court of appeals held that a former employee does not have to initiate a grievance before filing a whistleblower claim if the city does not have a post employment grievance policy in

place. The court remanded the case to the trial court to make the determination of whether the city's grievance policy applied to former employees.

***City of Laredo v. Mojica,* No. 04-11-00389-CV, 2012 WL 135280 (Tex. App.—San Antonio Jan. 18, 2012).**

The court held that so long as an arbitration award is within the scope of the arbitration agreement, even if it is wrong on the facts or the law, it will be upheld. In this case, the court upheld the arbitrator's decision to read a good faith standard into the discretionary decision of the city to stop paying for sick leave pay.

***Johnson v. City of Bellaire*, 352 S.W.3d 260 (Tex. App.—Houston [14th Dist] Oct. 13, 2011, pet. filed).**

The court of appeals held that Johnson could bring a tort claim against the city because there is insufficient proof that he was covered by the city's worker's compensation policy and therefore it was unclear whether his claim was barred by the exclusive remedy provision of the worker's compensation statutes.

***Lowell v. City of Baytown,* 356 S.W.3d 499 (Tex. Dec. 16, 2011) (per curiam).**

In this case, firefighters sued the city seeking declaratory and injunctive relief, in addition to lost pay and benefits resulting from the city's alleged failure to pay them properly during temporary assignment of higher-classified duties. The trial court granted the city's jurisdictional plea asserting government immunity. The court of appeals affirmed in part and reversed in part. The Supreme Court of Texas remanded the case to the trial court so that the firefighters could amend their pleadings (1) to argue that the legislature, through its enactment of Local Government Code Sections 271.151-.160, has authorized retrospective relief, such as the back pay and related damages sought by the firefighters; and (2) to seek prospective declaratory and injunctive relief against specific city officials rather than the city.

***City of Dallas v. Dallas Black Fire Fighters Ass'n*, 353 S.W.3d 547 (Tex. App.—Dallas Oct. 20, 2011).**

The court of appeals held that Rule 202 of the Code of Civil Procedure does not by itself waive a city's governmental immunity, but that the underlying claim on which the rule is trying to be used must be reviewed. In this case, the issue was whether a potential breach of a meet and confer agreement might be sufficient to waive governmental immunity. The court held that the plaintiffs had not given sufficient information to show that the city's governmental immunity was waived by the meet and confer agreement or under Local Government Code Section 147.007, and thus remanded the case to the trial court so the plaintiffs could amend their petition.

PROCEDURAL

***City of Dallas v. Herz*, No. 05–11–00785–CV, 2012 WL 927055 (Tex. App.—Dallas Mar. 20, 2012).**

In this case, a fire fighter was injured in a car accident with a citizen while the fire fighter was on duty. The fire fighter received workers compensation benefits from the city. Then the fire fighter sued the citizen, from whom he recovered $100,000 in settlement. When an individual receiving workers compensation receives a settlement from a third party for the covered injury, the individual must reimburse the payor of the workers compensation benefits. TEX. LAB. CODE § 417.002. However, the payor, must take the reimbursement subject to the reasonable fee in proportionate share of the injured employee's attorney. *Id.* § 417.003. In this case, the individual's attorney asked that the city pay its proportionate share of her fee when the city, as payor, asked to receive its share of the settlement. The city refused and the attorney sued the city for a declaration of the amount of attorney fee that the city owed her. The issue became whether the city had immunity from suit on the issue of whether it owed any attorneys fees to the individual fire fighter's attorney. The court held that the city did have immunity from suit, and the city did not have to pay its proportionate share of the attorney's fee, despite the attorney's arguments that this would keep future plaintiffs from settling claims since there would be no way to ensure their attorney was paid.

City of New Braunfels v. WWGAF, Inc., 11-10-000009-CV, 2012 WL 423919 (Tex. App.—Eastland Feb. 2, 2012, pet. filed) (mem. op.).

The tube companies sued the City of New Braunfels based on the city's ordinance requiring a fee for use of the rivers. The tube companies argued that the city's 2001 ordinance was not approved by the city attorney and was therefore void under the city charter. The court of appeals held that the city did not produce adequate facts or defenses to the contrary at the time the trial court made its summary judgment opinion, and therefore the ordinance was void despite Section 51.003 of the Local Government Code which would have validated the ordinance. The court of appeals also held that the city had produced enough evidence to raise an issue as to what amount the city owed in back fees based on the voided ordinance. The city argued that it only owed the amount collected the two years prior to the tube companies refund request. The court of appeals sent the fees issue back to the trial court for review.

***M-E Engineers, Inc. v. City of Temple*, No. 03-11-00334-CV, 2012 WL 1289010 (Tex. App.—Austin Apr. 11, 2012).**

M-E Engineers claim that the case against them should be dismissed because the city's sworn certificate of merit did not meet the requirements of Chapter 150 of the Civil Practices and Remedies Code. Section 150.002 requires that a certificate of merit be filed in a case such as this one, against a professional engineer. This certificate of merit outlines the "errors and omissions"

of the defendant upon which the claim is based, and must be prepared by someone of the same professional field as the defendant. The court of appeals held that the standard the professional must testify to (regarding the defendant's "knowledge, skill, experience, education, training, and practice") is not the same high standard as that which the Rules of Evidence require for expert testimony.

***City of China Grove v Morris*, No. 04-10-00763-CV, 2011 WL 5869629 (Tex. App.—San Antonio Nov. 23, 2011) (mem. op.).**

The court of appeals held that the trial court was correct in giving Morris attorney's fees against the city because a declaratory judgment action, which allows for attorney's fees, was the appropriate cause of action when trying to determine the validity of a public easement, not a trespass to try title suit as argued by the city.

***Larry v. City of Prairie View Bd. of Adjustment*, No. 01-10-00943-CV, 2011 WL 6306666 (Tex. App.—Houston [1st Dist.] Dec. 15, 2011) (mem. op.).**

The issue in the case is whether the trial court erred by failing to award Larry (plaintiff) damages. The appellate court affirmed the trial court's judgment, reasoning that the plaintiff did not request and failed to provide any evidence of lost profit damages at the default judgment hearing or with supporting affidavits.

***City of Beaumont Police Dep't. v. Klein Investigations & Consulting*, No. 09-11-00614-CV, 2012 WL 403865 (Tex. App.—Beaumont Feb. 9, 2012) (mem. op.).**

The court held that a criminal ordinance should not be reviewed in a civil proceeding when the defendant has an adequate remedy in criminal court.

***City of Laredo v. Montano,* No. 04-10-00401-CV, 2012 WL 131407 (Tex. App.—San Antonio Jan. 18, 2012) (mem. op.).**

The court held that appellate attorney's fees are not allowed in a condemnation action when they occur after the dismissal hearing.

PROPERTY TAX

***City of Clarksville v. Drilltech, Inc.*, 353 S.W.3d 183 (Tex. App.—Texarkana Nov. 15, 2011).**

The court of appeals held that a tax certificate showing the amount of property taxes owed during a sale under Texas Tax Code Section 31.080 foreclosed any future suit for additional taxes owed for the same time frame.

TAKINGS

***Zumalt, et. al. v. City of San Antonio, acting by and through its San Antonio Water System Board of Trustees*, 2012 WL 1810962 (Tex. App.—Austin May 17, 2012) (mem. op.).**

This case surrounds the fighting of the fire at the Helotes dump site, operated by Zumalt, and taking place in 2006. Because of the extent of the fire, and its location over the Edwards Aquifer, TCEQ got involved. TCEQ contracted with the San Antonio Water System (SAWS) to provide water for the fire fighting efforts. The aquifer was threatened by the enormous amount of water being placed on the fire and so SAWS stopped supplying water for 29 days. During this time, Zuwalt could use its own water but was receiving no water from SAWS. Then SAWS allowed water to be used for certain fire fighting activities but not directly on the debris pile. The fire burned until March 2007. TCEQ then sued Zuwalt for its fire fighting costs, and Zuwalt joined SAWS seeking apportionment of the liability under Texas Health & Safety Code Section 361.343. Zuwalt argued that the negligence of TCEQ and SAWS increased the cost of the fire. Through its stopping, starting, and limiting the supply and use of its water supply, SAWS effectively controlled the cause of the contamination and the operation of the fire fighting efforts, thereby making SAWS a "person responsible" for the solid waste debris pile under Section 361.271 of the Texas Health & Safety Code. SAWS filed a plea to the jurisdiction against Zuwalt.

The court of appeals held that SAWS was not a "person responsible" or "operator" of the debris site as defined in the Texas Health & Safety Code, because SAWS its activities had an effect on the fire but did show control over the operation of the debris. *See United States v*. Bestfoods, 524 U.S. 51, 66-67 (1998); *Edward Hines Lumber Co. v. Vulcan Materials Co.,* 861 F.2d 155, 157 (7th Cir. 1988). The court noted that if a governmental entity could become an "operator" and responsible for a waste site simply for helping with cleanup or providing goods or services then the true owner of the waste site would always have a defense to suit under the Health & Safety Code simply because the government decided to step in and help. The court of appeals also overruled Zumalt's procedural issues. The court of appeals affirmed the trial court's order dismissing the case.

***Strother v. City of Rockwall,* 358 S.W.3d 462 (Tex. App.—Dallas Jan. 27, 2012).**

Appellant, Cathy Strother, owned two acres of real property in Rockwall on which she leased three commercial buildings. A portion of this property is located within the one-hundred-year flood plain, according to the FEMA Flood Insurance Rate Map.

Strother entered into a contract to sell the property to a third party. However, after city officials informed the buyers the property was in the flood plain, no changes could ever be made to the property, and it would never again issue certificates of occupancy for the property, the buyers

terminated the contract. Strother sought a declaration from the trial court that the City's actions violated her rights under the Texas Constitution and constituted a taking of her property.

The City of Rockwall filed a plea to the jurisdiction, asserting that the appellant failed to overcome the City's governmental immunity. The City argued that Strother's claims were based on a determination by FEMA, but these actions by FEMA did not result in a taking. Additionally, the City took no action to take Strother's property, nor did it provide Strother with any notice to stop the property's existing use. The trial court granted the City's plea to the jurisdiction, traditional motion for summary judgment, and no-evidence motion for summary judgment. Strother appealed.

The court addressed whether an inverse condemnation had occurred through a physical taking or regulatory taking, in violation of article 1, section 17 of the Texas Constitution. First, the court concluded that no physical taking had occurred.

Next, the court looked at whether Strother produced evidence of a regulatory taking. Strother claimed that Rockwall's conduct and regulations rendered her property unusable. In Strother's affidavit, however, she indicated that she is continuing to receive income from tenants of the buildings on her property. Additionally, the court noted that Strother had not made any request to the City for an application, permit, or use for her property that was denied. Strother further argued that the City unreasonably interfered with her use and enjoyment because as a result of the property being placed in the flood plain, a contract for sale of the property fell through. Because Strother failed to provide any evidence of an impact making her property unusable for its intended purpose; therefore, no regulatory taking had occurred.

Because the Court concluded that the trial court properly granted the City's no-evidence summary judgment motion, the Court did not address the City's traditional motion for summary judgment. In addition, because Strother failed to allege a valid inverse condemnation claim, the Court stated that governmental immunity applied in this case. Therefore, the Court concluded that the trial court properly granted the City's plea to the jurisdiction.

***Millwee-Jackson Joint Venture v. Dallas Area Rapid Transit*, 350 S.W.3d 772 (Tex. App.—Dallas Oct. 31, 2011).**

Millwee is a landowner who brought takings and nuisance action against DART, alleging he was entitled to compensation based on interference with his right to develop property. The case arose out of Millwee's 1981 purchase of property in Dallas. Millwee had a billboard on the property.

In 2002, DART began construction activities near Millwee's property that resulted in a dirt embankment that, Millwee claimed, blocked access to his property. According to Millwee, DART prevented physical or legal access from the property to a public street. Vehicles and pedestrians were required to trespass on adjacent properties to access Millwee's property. Although Millwee acknowledged that an access easement was executed at the City's behest, Millwee claimed "safe and reasonable access" was not available to his property. Following an evidentiary hearing, the trial court entered final judgment ordering that Millwee take nothing on his inverse condemnation claims.

Millwee argued that the trial court erred in granting DART's motion for summary judgment. Specifically, he argued that fact issues existed regarding the extent and length of time DART restricted access to his property. He claimed access was totally blocked in November 2002, April–June 2004, April 2007, and October–November 2007. Whether access to property has been materially and substantially impaired is a threshold question of law reviewed de novo. In determining whether diminished value due to impaired access is compensable, the court first looked to whether other access points remain after the taking and whether those access points are reasonable.

The Supreme Court of Texas has rejected impairment of access claims based on speculative or hypothetical uses of remainder property. "While condemned property may be appraised at its highest and best use, remaining property on which there are no improvements and to which reasonable access remains is not damaged simply because hypothetical development plans may have to be modified." *State v. Delany*, 197 S.W.3d 297, 300 (Tex. 2006). Restrictions on access that result only in increased circuity of travel are not compensable. Moreover, access is not materially and substantially impaired merely because other access points are significantly less convenient.

A partial, temporary disruption of access to property is not sufficiently "material and substantial" to constitute a compensable taking. Here, the evidence showed the property at issue had been used for the placement of billboards since Millwee purchased the property. The record shows the billboard companies were always able to service their billboards, though for some period of time they had to enter adjoining property to access Millwee's property. Based on that evidence, the court of appeals concluded that the evidence failed to establish, as a matter of law, that Millwee suffered a material and substantial deprivation of access to his property.

***City of Abilene v. Carter,* No. 11-11-00137-CV, 2012 WL 1579786 (Tex. App.—Eastland May 3, 2012) (mem. op.).**

A property owner sued the city for takings after the city charged the property owner for water it argued it did not use. Originally, the city and the property owner found a leak at the property, and so the city turned off the water at the meter. The property owner continued to receive bills and the city stated that someone must be using the water at the property. The property owner saw new pipeline at her property and the city admitted it installed the pipeline because of the leak. The property owner refused to pay the bill and the city turned off water to all of her properties. The property owner argued that the city committed a taking because it was arguably the city's leak, which the city repaired, from which the water they charged her for was leaking. The court of appeals held it was not a taking because the city did not intentionally cause the leak, but at most negligently allowed a leak to be at her property.

***City of Cibolo v Koehler*, No. 04-11-00209-CV, 2011 WL 5869683 (Tex. App.—San Antonio Nov. 23, 2011) (mem. op.).**

Property owners, the Koehlers, sued the city after the city allegedly violated an easement agreement between the parties. The Koehlers argued that the city's violation of the agreement resulted in the agreement being void, and therefore the use the city made of the Koehlers' property was a taking. The city argued that because there was an agreement, the Koehlers' consented to the city's action, and therefore there could be no taking. The city pursued a dismissal in the trial court based on this argument, but the trial court denied the city's plea to the jurisdiction and the city appealed. The court of appeals held that the trial court needed to make the determination of whether the agreement was void or not before a determination of whether the Koehlers consented to the city's actions could be made.

***Kuykendall v. City of San Antonio*, 360 S.W.3d 670 (Tex. App.—El Paso Feb. 1, 2012).**

The court held that notice for the condemnation hearing was sufficient under Chapter 54 of the Local Government Code because the city mailed the notice properly, even if the property owner never actually received the notice.

UTILITIES

***Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156 (Tex. Nov. 18, 2011).**

The Gas Reliability Infrastructure Program (GRIP) statute permits a gas utility to file a new tariff adjusting its base rates to recover the costs of new capital investment made in the preceding calendar year, without the necessity of filing a rate case. Only a utility that has had a rate case within the preceding two years may utilize the GRIP statute. TEX. UTIL. CODE § 104.301(a). When several utilities filed interim rate adjustments under GRIP, fifty-one cities (Cities) denied those filings for non-ministerial reasons. The dispute before the Supreme Court of Texas concerns the appellate jurisdiction of the Commission to review the Cities' decisions on the utilities' interim rate adjustments and the breadth of that jurisdiction.

A city has original jurisdiction over a rate filing if the utility's customers are within municipal boundaries, or the Commission has original jurisdiction over the filing if the utility's customers are outside municipal boundaries. After passage of the GRIP statute, Atmos Energy Corporation (Atmos) filed interim rate adjustments, or GRIP filings, with the Commission and several cities to charge adjusted rates. The Commission approved Atmos' GRIP filings, but numerous cities denied Atmos' filings. (The Cities found the proposed rate increases to be unjust and unreasonable.)

Atmos appealed the Cities' denials to the Commission, which exercised appellate authority under section 102.001(b). The Cities then sought to intervene in the appeals to the Commission and to require the Commission to hold contested case proceedings in the appeals. The Commission denied their interventions and requests for evidentiary hearings on the ground that neither the GRIP statute nor the GRIP rule authorizes contested case proceedings in connection with GRIP filings.

Fifty-one Texas cities then pursued a declaratory judgment action in district court against the Commission, challenging the validity of Commission Rule 7.7101, the GRIP rule. The Cities

argued that the GRIP rule was void because it does not provide for an adjudicatory hearing in a utility's appeal of a city's denial of the utility's GRIP filing. The Cities argued that the Commission created a rule that allows the Commission to issue a final order approving interim rate adjustments without providing the city an opportunity to respond and present evidence, exceeding the statutory authority delegated to it by the GRIP statute. Atmos, CenterPoint Energy Resources Corporation, and Texas Gas Service Company intervened in support of the validity of the Commission's rule.

The trial court issued a final judgment denying the Cities' request for declaratory relief, but issued findings of fact and conclusions of law stating that subsections 7.7101(g)(2)(B) and (g)(2)(C) of the Commission's GRIP rule were void. The trial court held that the legislature did not intend to authorize cities to conduct a substantive review of GRIP filings, only a "ministerial review of the compliance with basic requirements." However, the trial court also held that a utility does not have the authority to appeal an improper denial to the Commission because the legislature did not provide an appellate mechanism in the GRIP statute (section 104.301(a)), and the Commission does not have the authority to apply its Rule 7.7101 to the action of a city.

Based on its stated deference to the district court's conclusions of law, the Commission began to decline jurisdiction over appeals brought by the utilities after cities denied their GRIP filings. The court of appeals affirmed the judgment of the trial court, holding that a ministerial review for compliance "is all that is required." Additionally, the court of appeals held that appellate review by the Commission is "not available when a municipality denies a GRIP filing after conducting. a ministerial review for compliance with the statute" because there is "no indication that a municipality's denial of a GRIP filing for failure to comply with the statutory requirements is considered 'an order or ordinance of a municipality' as contemplated by section 102.001."

Atmos and the gas company intervenors appealed to the Supreme Court of Texas, which held that the view that the legislature had withheld appellate jurisdiction in this case from the Commission could frustrate GRIP's purpose. The court cites legislative testimony to conclude that the legislature designed GRIP to incentivize gas utilities to expand infrastructure and empowered them to file interim rate adjustments in between rate cases. Thus, the Cities' position is rebutted by the language of section 102.001(b) and is inconsistent with the legislature's objective of expediting recovery of such investments as a means of encouraging infrastructure investment. The Supreme Court reversed the court of appeals on this point, concluding that the Commission has appellate jurisdiction over interim rate adjustments under section 102.001(b).

The second issue presented to the Supreme Court is the breadth of the Commission's appellate jurisdiction under section 102.001(b). The Commission and the utilities argue that GRIP does not provide for evidentiary hearings, and that a substantive review of the interim rate adjustment is reserved instead for the next rate case.

The Supreme Court concluded that it would invade the legislature's province if we were to take the Cities' invitation to create an evidentiary hearing supported by neither the text nor the purpose of the GRIP statute. According to the Court, the legislature "implemented protections for the ratepayers when a utility makes a GRIP filing. A utility may not avail itself of the interim rate adjustment unless that utility brought a rate case pursuant to Chapter 104, Subchapter C,

within the two years prior to its GRIP filing. TEX. UTIL. CODE § 104.301(a)." Further, the Court notes that "a gas utility seeking to implement an interim rate adjustment must electronically file with the Commission an annual earnings monitoring report as part of the application describing the investment projects completed and placed in service. *Id.* § 104.301(e). This report includes a statement of the reasons the rates are not unreasonable or in violation of law."

Under GURA, a city retains authority to institute a proceeding, either on its own or at the complaint of a party, to determine if a utility's rates are unreasonable or in violation of the law. *Id.* §§ 104.301(I), 104.151. Therefore, the Court held, a city could file a rate case on its own motion whenever it perceives the need after a GRIP filing. *Id.* § 104.151. "These protections further reinforce our view that the interim GRIP filings are subject only to a ministerial review of the statutory requirements by the Commission."

***Michael McDaniel v. Town of Double Oak,* No. 02-10-00452-CV, 2012 WL 662367 (Tex. App.—Waco Mar. 1, 2012, pet. filed) (mem. op.).**

Michael McDaniel owned property in the Town of Double Oak ("city") that he wanted to use for a self-storage facility. Disputes arose between the city and McDaniel over a building permit to erect a monument sign on the property, the sewer tap fees he was required to pay, and the cost of the building permit fees. McDaniel paid all required fees, and then filed a lawsuit against the city to both recoup fees that were alleged to be improperly charged and to receive a declaration that he could erect the monument sign even though the city refused to grant him a building permit for the sign. The trial court ultimately signed an order of dismissal finding that it lacked jurisdiction. On appeal, McDaniel claimed that the trial court erred by determining that it lacked jurisdiction over his claims, while the city argued that it possessed immunity from all claims.

The court of appeals first addressed the city's alternate theories that, regardless of the propriety of the trial court's ruling on the city's plea to the jurisdiction, the trial court properly dismissed all of McDaniel's claims because: (1) McDaniel lost standing when he sold the property during litigation; (2) McDaniel did not challenge the validity of the sewer tap fee ordinance or the building permit fee ordinance; and (3) the trial court found that McDaniel voluntarily paid the fees without protest and without duress. Because McDaniel owned the property at the time he paid the building permit fees and sewer tap fees he later claimed were improperly calculated, owned the property when the city denied his application to erect a monument sign on his property, and pleaded and proved for jurisdictional purposes that he suffered a particularized injury distinct from any injury suffered by the general public, the court determined that McDaniel possessed standing regardless of any subsequent sale of the property. *See Vial v. Gas Solutions, Ltd.*, 187 S.W.3d 220, 226–27 (Tex.App.—Texarkana 2006, no pet.).

The court similarly rejected the city's argument that McDaniel failed to challenge the validity of the ordinance at issue, finding that McDaniel challenged the ordinances to the extent he challenged the way they were applied to him and that nothing more is required when a plaintiff challenges the legality or constitutionality of fees. Finally, on the third alternate theory presented by the city, the court of appeals found that the record conclusively established that McDaniel's payment of fees was *not* voluntary because payment was necessary to avoid committing a Class

C misdemeanor, to preserve his property, to protect his business interest, and to avoid forfeiting his right to do business as a self-storage facility.

With regard to McDaniel's issues on appeal, the court of appeals found that the trial court erred when it determined that it did not possess jurisdiction over McDaniel's claims. First, the court addressed McDaniel's claim that the sewer tap and building fees were miscalculated (with the city effectively charging $36,930 more than entitled for the building permit) and that he was entitled to reimbursement. The court relied on past cases providing that a person who pays government fees and taxes under business compulsion, duress, or implied duress has a valid claim for their repayment. *Dallas Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 877 (Tex. 2005). Further, governmental immunity will not apply if the taxpayer alleges that payments were made as a result of fraud, mutual mistake of fact, or duress, whether express or implied. *Id*. at 876–79. Because McDaniel offered conclusive evidence that he paid the invalid, illegal portion of the sewer tap fees and building permits fees under business compulsion, duress, or implied duress, and because the city concedes it overcharged McDaniel on both fees, that sovereign immunity would not bar McDaniel's declaratory judgment action and suit for their recoupment. The court also sustained McDaniel's issue regarding his declaratory judgment action to erect the monument sign on the grounds that the city conceded that it did not possess sovereign immunity and offered no evidence at trial concerning the claim.

The court reversed the trial court's order dismissing all of McDaniel's claims, and remanded to the trial court for further proceedings.

MISCELLANEOUS

Drug Paraphernalia Regulation: *City of Corpus Christi v. Maldonado*, No. 13-11-00171-CV, 2011 WL 4993365 (Tex. App.—Corpus Christi Oct. 20, 2011).

The court of appeals held that: (1) the plaintiffs did have subject matter jurisdiction to bring suit against a criminal ordinance regulating synthetic marijuana and paraphernalia because it was potentially unconstitutional and dealt with a vested property right; and (2) the temporary injunction against the ordinance should be dissolved because the trial court did not show how the enforcement of the ordinance would cause irreparable harm to the plaintiffs.

Ultra Vires: *Lazarides v. Farris*, No. 14-11-00404-CV, 2012 WL 1301235 (Tex. App.—Houston [14th Dist.] Apr. 17, 2012).

Plaintiff (Farris) alleged claims against a city building official (Lazarides), in his official capacity. Plaintiff claimed, among other things, that the building official: (1) violated his duty to enforce the city's zoning regulations; (2) exceeded his authority by enforcing compliance with a particular drainage rule; (3) should be enjoined from enforcing the drainage rule; and (4) should be required to perform his ministerial duty of enforcing the city's zoning ordinance.

The appellate court held that plaintiff failed to exhaust his administrative remedies by not appealing the building official's decision to the board of adjustment. Plaintiff's failure deprived the trial court of subject-matter jurisdiction over all claims, except the ultra vires claims. The

appellate court explained that "[e]xhaustion of administrative remedies is not required for ultra vires claims." *Id*. at *4.

"An ultra vires action is one in which the plaintiff seeks relief in an official-capacity suit against a government actor who allegedly has violated statutory or constitutional provisions by acting without legal authority or by failing to perform a purely ministerial act." *Id*. at *7. The only remedies available for such a claim are prospective declaratory and injunctive relief. *Id*. Because plaintiff did not properly plead these claims and did not state facts sufficient to demonstrate that the claims are ripe and not moot, the trial court's order was reversed and the claims remanded back to the trial court.

Ultra Vires: *Parker v. Hunegnaw*, No. 14-11-00353-CV, 2012 WL 1009694 (Tex. App.—Houston [14th Dist.] Mar. 27, 2012).

Plaintiff landowner (Hunengnaw) brought a quiet title action against the mayor of the City of Houston (Parker) in her official capacity, seeking declaratory and injunctive relief. The appellate court begins its analysis by clarifying that plaintiff effectively seeks an adjudication of a trespass-to-try-title claim against the mayor in her official capacity. This is an important preliminary matter because of its impact on the mayor's plea to the jurisdiction.

In *State v. Lain*, 349 S.W.2d 579 (Tex. 1961), the court held that "a plea of sovereign immunity by government officials will not be sustained in a suit by the owner of land with right of possession when the governmental entity has neither title nor right of possession." *Id*. at 581. Subsequent opinions suggest that, in this way, a plea to the jurisdiction in a trespass-to-try-title action is analogous to an ultra vires suit. *Parker*. at *7.

The appellate court held that *Lain* remains binding precedent and is applicable to the case at hand. The court concluded that plaintiff's claim was not barred by immunity and plaintiff was not required to plead a waiver of immunity or separate ultra vires action. "[T]he trial court correctly ruled that it has jurisdiction under *Lain* to adjudicate the merits of [plaintiff's] claim." *Id*. at *10.