RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TCAA Summer Conference
San Antonio, Texas
June 14-16, 2023

Presented by:
LAURA MUELLER, CITY ATTORNEY
CITY OF DRIPPING SPRINGS

Paper by:
Legal Staff, Texas Municipal League
Ryan Henry, Law Offices of Ryan Henry
Laura Mueller, City Attorney, City of Dripping Springs
Michelle Farris, Law Clerk, City of Dripping Springs

LAURA MUELLER
CITY ATTORNEY
City of Dripping Springs, Texas

Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law and worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office while there. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006. Laura became Assistant General Counsel in November 2010. Laura joined the Bojorquez Law Firm as an associate in April 2016, and became City Attorney for the City of Dripping Springs in January 2020. Laura specializes in employment law, sign regulation, land use, and open government.

TML LEGAL DEPARTMENT
Austin, Texas

The Texas Municipal League (TML) Legal Services Department provides legal assistance to TML member cities. The attorneys answer general questions, participate in educational seminars, prepare handbooks, magazine articles, and written materials, including legal opinions and amicus briefs, and provide support services for the Legislative Department. The Staff also assists with trainings and the TCAA newsletter which contains articles and the case summaries presented in this paper.

RYAN HENRY
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 215
San Antonio, Texas 78232
Phone: 210-257-6357 • Fax: 210-569-6494
www.rshlawfirm.com

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

ELECTIONS

City of Floresville v. Nissen, No. 04-21-00042-CV, 2022 WL 2334542 (Tex. App.—San Antonio June 29, 2022, pet. denied). In 2011, Floresville, a home rule city, adopted a resolution moving its elections to November from May pursuant to Election Code Section 41.0052 despite its charter providing for elections in May. Then in 2019, after the provision in the Election Code had expired, the city council passed a resolution repealing the 2011 resolution to move its elections back to May. Some residents sued the city, councilmembers, and city secretary on the grounds that the 2019 resolution was passed in violation of the Election Code. After the first appeal on the denial of the city's plea to the jurisdiction, the appellate court dissolved the temporary injunction against the city and instructed the trial court to determine whether the election date change violated the Election Code. On remand, the trial court granted the residents' motion for summary judgment on the grounds that the city violated the Election Code. The city appealed.

The appellate court found: (1) that the plain language of section 41.0052 says home-rule cities were not permitted to change their general election date to the November uniform election date after December 31, 2016; and (2) the statute had no similar limitation on a home rule city to change the election date from November to May. Therefore, the appellate court found city had the authority to change its election date from November to May, reversed the trial court, and rendered judgment that the residents take nothing from the city.

In re Guillotte, No. 10-22-00331-CV, 2022 WL 10893236 (Tex. App.—Waco Oct. 18, 2022, no pet.) (mem. op.). This is a petition for writ of mandamus related to a residency issue.

Guillotte filed an application for a place on the ballot for trustee of the Coolidge Independent School District ("CISD") located in Limestone County. The secretary of the CISD board declared him ineligible to be on the ballot, asserting that he was not a resident of the CISD geographic boundaries based on testimony he had provided under oath at another public entity's meeting that he was a resident of Tarrant County and a public document indicating he had filed a homestead exemption for a property located in Tarrant County. Guillotte countered by providing a printout from the Texas Secretary of State voter registration website, which showed his address in Coolidge and that he is registered to vote in Limestone County, Texas.

The appellate court concluded that the public records that secretary referenced did not conclusively establish Guillotte's ineligibility as a candidate for the CISD Board of Trustees. Accordingly, the writ was granted, and the secretary ordered to certify Guillotte's name as a candidate in the general election.

In re Cnty. of Hidalgo, No. 13-22-00510-CV, 2022 WL 14787073 (Tex. App.—Corpus Christi–Edinburg Oct. 26, 2022, no pet.) The City of Penitas filed suit against Hidalgo County to stop the county from proceeding with early voting without opening the Penitas Public Library as a polling location. At an *ex parte* hearing, the trial court granted a temporary restraining order that ordered the county to add the public library as a polling location. The county appealed, arguing that the cause was moot and that the restraining order was deficient.

The appellate court overruled the trial court, holding that (1) because the statutory deadlines for adding a polling place had passed before the city sought relief, the case was moot; and (2) the restraining order was deficient because the trial court did not explain why it was issued without notice to the county and did not adequately explain its conclusion that the city would suffer irreparable harm without the temporary restraining order.

In re Morris, No. 23-0111, 663 S.W.3d 589 (Tex. Mar. 17, 2023). This is a petition for writ of mandamus related to a citizen-led initiative to amend the city's charter in which the Supreme Court denied the petition.

Advocacy organizations in San Antonio collected sufficient signatures to place a proposed charter amendment before the voters on the city's May 2023 election ballot. If adopted, the proposed charter amendment would prohibit local enforcement of certain state laws related to marijuana possession, theft offenses, and abortion, ban no-knock warrants and chokeholds, replace warrants for certain nonviolent offenses with citations, and create the position of a "Justice Director" to implement and enforce its prohibitions. The city ordered the proposed amendments be placed on the ballot as part of the May general election.

A prospective voter and advocacy organization filed a writ of mandamus arguing that the proposed amendment violates a state law requiring that citizen-initiated charter amendments be confined to a single subject. Specifically, they sought pre-election relief directly from the court to: (1) move the vote on the proposition from the May to the November election; (2) compel the city clerk and city council to separate the proposed amendment into single-subject parts; and (3) order alterations to the ballot language.

The Supreme Court denied the petition, holding that: (1) city council's failure to call an election on the proposed amendment within 78 days of the May election was not a reason to grant pre-election mandamus relief enjoining the vote on the amendment from being held in May; (2) the inability of city's voters to amend the charter for another two years if the allegedly void election on the proposed amendment were held was not a reason to grant pre-election mandamus relief enjoining the vote on the amendment from being held in May; (3) pre-election mandamus relief was not available to have city clerk or council ordered to separate the proposed amendment into "single issue" amendments; and (4) pre-election mandamus relief to order modification of the allegedly misleading ballot language was not available.

Hotze v. Turner, No. 21-1037, 2023 WL 3027869 (Tex. Apr. 21, 2023). On a single ballot, voters considered two proposed amendments to the City of Houston's charter, one submitted at the behest of the city council and the other initiated by local citizens. The election ordinance included a "primacy clause" stating that the council's proposition would prevail over the citizen-initiated proposition if voters approved the council's proposition by more votes than the citizens' proposed amendment.

At the election, voters approved both charter amendments with the council's proposed amendment garnering more votes than the citizen-initiated amendment. After the court of appeals compelled it to do so in separate litigation, the city adopted both charter amendments. However, the city, relying on the primary clause, claimed that the citizen-initiated amendment did not become

effective upon its adoption and that it may delay the effectiveness of an amendment at its discretion. The city further argued that it cannot give effect to both amendments because they irreconcilably conflict.

Several citizens who proposed the citizen-initiated amendment sued the city, seeking the amendment's enforcement. They argue that the primacy clause violates a state law requiring cities to adopt proposed charter amendments when voters approve of them by a majority vote. They further claim that the city can and must harmonize the two propositions because voters approved both. The trial court concluded that the two propositions could be harmonized. Relying on the primacy clause, however, the court granted summary judgment in favor of the city. A divided court of appeals affirmed.

The Supreme Court found that because the city's primacy clause requires more than a majority vote to give effect to the citizen-initiated amendment, it conflicts with state law requiring that a city adopt a charter amendment upon its approval by a majority vote. Thus, the city may not rely on the primacy clause to avoid complying with the citizen-imitated proposition. Accordingly, the court reversed and remanded the case to the trial court to determine the extent to which the two propositions may be harmonized under the city's existing charter provision governing reconciliation of conflicting amendments, and to consider the effect of the citizen-initiated amendment's severability clause for those provisions that conflict.

King v. Goodwin, No. 03-21-00293-CV, 2022 WL 7727906 (Tex. App. Oct. 14, 2022). Appellee Bill Goodwin (Goodwin) was serving a two-year term of office as an elected member of city council when his fellow councilmembers unanimously voted to remove him from office for alleged violations of Bee Cave's home-rule city charter (City Charter). Goodwin sued Appellants (the City, it's mayor, and the council members) in Travis County district court, arguing that (1) when "properly construed," the City Charter does not authorize his removal; (2) the provisions relied upon for his removal are facially unconstitutional and unconstitutional as applied; (3) the removal violated his right to due process; and (4) his removal constitutes arbitrary and capricious governmental action. The district court ruled in favor of Goodwin and enjoined the city officials from "interfering" with the remainder of his term. Appellants appealed. Goodwin filed a motion to dismiss for want of jurisdiction, arguing that there is no final judgment and a motion to expedite. Appellants filed a motion to dismiss, arguing that Goodwin's claims became moot at the expiration of his term.

The city officials filed a plea to the jurisdiction, arguing that Goodwin could not overcome governmental immunity and argued that once Goodwin's replacement took office, the relief Goodwin sought could only be afforded through quo warranto. The city officials also filed a "plea to res judicata," arguing that the dispute had been resolved in the earlier-filed lawsuit, which at that point was still pending before this Court, and a motion to dismiss under the Texas Tort Claims Act (TTCA), TEX. CIV. PRAC. & REM. CODE § 101.106(e). The court of appeals determined the issues in this case were "properly before this Court" because the district court's treatment of the issues merged into the final judgment from which the City and its officials timely appealed. *See H.B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963) (per curiam); *cf. Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999). The district court's final judgment issued a permanent injunction expressly prohibiting the city officials from

"interfering" with Goodwin's purported rights as a council member, and therefore the judgment directly affected the City, and that the City's grievance would be redressed by the requested relief (a reversal of the final judgment). The court of appeals determined that the City had standing to appeal, despite Goodwin's argument to the contrary.

Appellants filed a motion to dismiss arguing that the appeal was moot. The city argued Goodwin's appeal became moot at the expiration of his term mooted his claim because he no longer had a legally cognizable interest in the council seat. The court agreed. Goodwin argued that there was still a live controversy because of the possibility that the same action could occur again if he were to run for office in the future. He argued that he continued to suffer "collateral consequences" due to the publicity of his removal from the office and two exceptions to the mootness doctrine. *See Marshall v. Housing Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006). The court stated that the "capable of repetition yet evading review" exception "applies only in rare circumstances." *Williams*, 52 S.W.3d at 184 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). To invoke the exception, the plaintiff must prove two elements: (1) that "the challenged action was too short in duration to be litigated fully before the action ceased or expired," and (2) that "a reasonable expectation exists that the same complaining party will be subjected to the same action again." *Id.* The court found that Goodwin's argument that the council would be likely vote for his removal based on his conduct in previous terms of office was mere speculation and was insufficient to satisfy the second element of the exception. Goodwin also argued that he was stigmatized and asserted that without judicial intervention "voters may not vote for [him] in the future." The court disagreed. The court concluded that the expiration of Goodwin's term in office rendered this case moot and that no exception to mootness applied, and therefore the court must vacate the previous judgment and dismiss the case for want of jurisdiction. *Heckman*, 369 S.W.3d at 162. At this point, the court determined that the remaining issues needed no review. *See* TEX. R. APP. P. 47. As such, the court of appeals denied Goodwin's motion to dismiss for want of appellate jurisdiction, granted the City's motion to dismiss, vacated the district court's judgment, and dismissed the case for want of jurisdiction. *See id.* R. 43.2(e).

EMERGENCY MANAGEMENT

***Prestonwood Estates W. Homeowners Ass'n v. City of Arlington,* No. 02-21-00362-CV, 2022 WL 3097374 (Tex. App.—Fort Worth Aug. 4, 2022) (mem. op.).** This case stems from an inverse condemnation and tort claims act suit for an intentional breach of a dam by the city pursuant to a local disaster declaration.

A homeowners association and its members (collectively, Homeowners) sued the city for inverse condemnation and under the Texas Tort Claims Act (TTCA) for an intentional breach by the city of the Prestonwood Lake Dam and alleged resulting damage to residential lots along Prestonwood Lake, which is upstream from the dam. The breach was pursuant to a mayoral emergency order issued in response to severe weather and flooding that threatened injury and property damage due to the possibility of a dam breach on Prestonwood Lake. The city filed a plea to the jurisdiction, arguing that the Homeowners had failed to plead and cannot establish facts to support a viable takings claim because: (1) the city's breaching the dam was an exercise of its police and emergency powers under the "doctrine of necessity" and was thus not a taking for public use under the city's eminent-domain authority; (2) the city lacked the requisite intent; and (3) the city's actions did not

proximately cause the Homeowners' damages. The trial court granted the plea, and the Homeowners appealed.

The appellate court determined that: (1) it was improper for the city to raise the "necessity doctrine" in its jurisdictional plea because it is a defense that the city must prove; (2) the Homeowners pled sufficient facts to allege that when the city intentionally breached the damage, it knew that the damage to the Homeowners' property was substantially certain to result from the act; and (3) the Homeowners did not plead sufficient facts to allege that the city's deliberately breaching the dam was the cause in fact of their damages. Accordingly, the court reversed the trial court's order with the exception of proximate causation, and remanded to the trial court to allow the Homeowners the opportunity to replead.

Abbott v. Cnty. of Fort Bend, No. 01-21-00453-CV, 2022 WL 7180371 (Tex. App.---Houston [1st Dist.] Oct. 13, 2022). The County of Fort Bend sued the Governor's office when the Governor attempted to overrule the County's disaster orders. This suit addresses who has standing and who is the appropriate party to dispute an executive order that prohibits a political subdivision from requiring face masks in certain settings. The Governor came into conflict with a County Government over interpretation of the Texas Disaster Act and the Texas Constitution as it relates to local authority. The trial court denied the Governor's plea to the jurisdiction and the Governor appealed.

Governmental immunity does not bar a suit against a state officer who has acted outside his authority. *Hous. Belt & Terminal Ry. v. City of Hous.*, 487 S.W.3d 154, 161 (Tex. 2016). *Ultra vires* suits seek to enforce existing policy by compelling a government official to comply with the law, whether a statutory provision or a constitutional one. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). A plaintiff making an *ultra vires* claim alleges that the officer acted outside legal authority (or failed to perform a ministerial act). *See id.* A government official who has discretion to interpret and apply a law may act without legal authority—and thus *ultra vires*—if he exceeds the limits of his granted authority or his acts conflict with the law. The Governor's Executive Order GA-38, 46 Tex. Reg. 4913, 4915 (2021). GA-38 provided that "No governmental entity … may require any person to wear a face covering or to mandate that another person wear a face covering ...." The order stated that it superseded any conflicting order issued by a local official and imposed a fine of up to $1,000 to any local government that did not comply.

The County argued that the Governor acted *ultra vires* when the Governor issued GA-38 overruling the disaster orders of political subdivisions. The Governor argued that the order was not *ultra vires* because the county's disaster authority flows from the Governor's powers under state law. The County argued that its powers flow directly from the state constitution, not through the Governor, and that it has statutory authority to address disasters on a local level and that the Governor's actions trying to modify the County's orders was *ultra vires.* The court of appeals stated that the arguments on appeal involved statutory interpretation and stated that statute must be considered as a whole and not take isolated provisions out of context. The court of appeals found that "when liberally construed" the facts were sufficient to show that the Governor acted without authority in issuing GA-38 to the extent that GA-38 prohibited the County and its officials from implementing masking requirements in certain places. Due to the findings by the court of

appeals that the County had proven the elements of an *ultra vires* claim, the court of appeals also upheld the temporary injunction granted in favor of the County.

In addition, the court of appeals found that the County had standing to sue the Governor because the county had an injury that was traceable to the challenged action of the Governor and could be redressed by the requested relief. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).; *Harris Cnty.*, 641 S.W.3d at 521–22; *City of San Antonio*, 648 S.W.3d at 512–13. The court of appeals held that the County suffered an actual injury and the relief sought would redress the injury, and that the County did have standing to sue the Governor.

The court of appeals affirmed the trial court's ruling that it had subject-matter jurisdiction over the dispute, and that the trial court did not abuse its discretion by granting the temporary injunction.

***Abbott v. City of El Paso*,** No. 08-21-00149-CV, 2023 WL 2265168 (Tex. App.—El Paso Feb. 28, 2023, pet. filed). On July 29, 2021, the Governor of Texas issued GA-38, an executive order prohibiting local governments from mandating face coverings during the COVID-19 pandemic. El Paso filed a lawsuit against the Governor, arguing that GA-38 was outside his authority under the Texas Disaster Act and violated the Texas Constitution. The trial court granted a temporary injunction against enforcing parts of GA-38, leading to this interlocutory appeal. In his appeal, the Governor asserted that the trial court abused its discretion by granting El Paso's request to temporarily enjoin enforcement of GA-38. He argued that his authority under the Texas Disaster Act allows him to prohibit local governments from implementing face-covering mandates and that his orders preempt local orders. The court disagreed, stating that the Disaster Act does not provide clear guidance on how to resolve conflicts between the Governor's orders and orders of local authorities. Ultimately, the court concluded that the Governor's orders do not automatically supersede local orders. Regarding the Governor's argument that he can suspend local health and safety laws under the Texas Disaster Act, the court also disagreed, stating that the statutes he attempted to suspend are not "regulatory" but rather "grant-of-authority" statutes, which the Governor is not authorized to suspend. Furthermore, the Disaster Act distinguishes between state and local matters, and the court found that the Governor acted *ultra vires* in suspending various health and safety laws, and the trial court did not err in finding that he acted illegally. Finally, the court pointed out that if it Disaster Act allows the Governor to suspend any and all laws that authorize a city to impose a mask requirement, then the statute itself would violate the Separation of Powers and Suspension Clauses of the Texas Constitution. Because of the foregoing, the appellate court affirmed the trial court's order granting El Paso a temporary injunction and denial of the Governor's plea to the jurisdiction.

EMPLOYMENT

***Tex. Health & Human Services Comm'n v. Pope*, No. 20-0999, 2023 WL 3267606 (Tex. May 5, 2023).** This case concerns when a public employee "reports a violation of law by an employing governmental entity or another public employee" under the Texas Whistleblower Act.

Former public employees of the Health and Human Services Commission (HHSC) brought action against HHC under the Texas Whistleblower Act alleging that they were terminated in retaliation for their good-faith reports about violations of law by HHSC to various law enforcement agencies.

The district court denied HHSC's plea to the jurisdiction and motion for summary judgment. On appeal, the Austin Court of Appeals affirmed.

The Supreme Court granted the petition for review. The court reversed finding that the employees did not expressly report any legal violations by HHSC that could have led to their terminations, and at most voiced disagreement regarding enforcement policies that were within the discretion of HHSC management. As such, their conduct was not protected by the Whistleblower Act.

The City of San Antonio Fire Fighters' and Police Officers' Civil Service Commission; City of San Antonio v. Gabriel Saenz, 04-22-00347-CV, 2023 WL 3103852 (Tex. App.–San Antonio, April 27, 2023). This is a civil service/employment dispute where the San Antonio Court of Appeals determined a fire fighter applicant could not appeal a disqualification to district court.

Saenz applied to be a firefighter with the City of San Antonio, but his application was disqualified. After Saenz appealed and lost before the San Antonio Civil Service Commission, he appealed to district court. The Commission filed a plea to the jurisdiction which was denied by the trial court. The Commissioned appealed.

Saenz appealed pursuant to Section 143.015 of the Texas Local Government Code which states that if a fire fighter is dissatisfied with any commission decision, the fire fighter may file a petition in district court asking that the decision be set aside. The Commission asserted Saenz was not a "fire fighter" for purposes of protection since he was merely an applicant. Further, the Commission asserted such an appeal was also untimely. "Fire fighter" is defined in Chapter 143, in relevant part, as "a member of a fire department who was appointed in substantial compliance with this chapter . . . ." Saenz is a member of the City of Canyon Lake Fire Department, appointed in compliance with Chapter 143. However, the question is whether Saenz is a "fire fighter" with respect to the San Antonio Fire Department. After going through a statutory construction analysis, the court held, within the context of Chapter 143, "a member of a fire department," under Section 143.003(4), means a member of the fire department for the particular municipality that has adopted Chapter 143 and under the specific commission whose decision is being appealed. As a result, the plea should have been granted.

City of Edinburg v. Torres, No. 13-21-00320-CV, 2022 WL 2513512 (Tex. App.—Corpus Christi–Edinburg July 7, 2022) (mem. op.). Torres sued the City of Edinburgh under the Whistleblower Act, claiming he was terminated from his job as Chief of Police by Garza (the city manager) in retaliation for notifying the FBI about an internal affairs investigation involving another officer, and that he experienced various other retaliatory adverse employment actions. The city filed a plea to the jurisdiction, claiming that Torres's claim was filed more than ninety days after the complained-of adverse action and was therefore outside the ninety-day deadline imposed by the Whistleblower Act. The trial court denied the city's motion and the city appealed.

The appellate court affirmed, holding that the ninety-day deadline does not begin to run until a retaliatory action is alleged, so that any adverse action taken before Garza was made aware that Torres had notified the FBI about the internal investigation of the other officer could not have been retaliatory and therefore did not trigger the ninety-day deadline. Because it was not clear from the

pleadings which, if any, of the complained-of adverse employment actions took place inside of the ninety-day window, the court remanded the case to allow Torres to amend his pleadings.

Pruett v. City of Galena Park, No. 01-20-00521-CV, 2022 WL 2673238 (Tex. App.—Houston [1st Dist.] July 12, 2022, no pet.) (mem. op.). Pruett, a long-time employee of the City of Galena Park, sought severance pay after he resigned his position, relying on a 2015 city ordinance that provided for severance benefits to certain long-term employees. The city filed a motion for summary judgment, arguing that the ordinance did not by itself create a contract for severance pay. The trial court granted the city's motion and Pruett appealed.

The appellate court affirmed, agreeing with the trial court that the ordinance did not entitle an employee to severance benefits, but instead required a separate agreement between the city and an employee. Because the agreement between Pruett and the city was void and unenforceable, Pruett was not entitled to severance benefits.

City of Houston v. Garner, No. 14-20-00688-CV, 2022 WL 2678850 (Tex. App.—Houston [14th Dist.] July 12, 2022, pet. denied) (mem. op.). Madison Garner was hired as a cadet with the Houston Fire Department and was later terminated during his probationary period for allegedly showing a pattern of failure during the evaluation process. Garner sued the City of Houston (Houston) alleging racial discrimination and a hostile work environment. Houston responded with a motion for summary judgment arguing immunity and that, for several reasons, Garner failed to state a prima facie case for either racial discrimination or a hostile work environment. Houston's motion was denied by the trial court, which Houston appealed. To establish a prima facie case of race discrimination, an employee must show, among other things, that they (1) are a member of a protected class and (2) were either replaced by someone outside the protected class, or that others outside the protected class were treated more favorably. Garner did not allege facts that he was replaced by someone outside his protected class and failed to raise a fact issue regarding the treatment of others outside his class. The appellate court also analyzed the elements of a hostile work environment, finally concluding that the conduct Garner complained of was neither extreme nor did it affect the terms and conditions of his employment; therefore, the appellate court reversed the trial court's order and rendered judgment granting Houston's motion for summary judgment.

City of Houston v. Houston Firefighters' Relief & Ret. Fund, No. 01-20-00710-CV, 2022 WL 3722140 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, pet. denied). The Houston Firefighters' Relief and Retirement Fund sued the City of Houston for a declaratory judgment that S.B. 2190, a 2017 legislative amendment to the statute that created and governs the Fund, violated the Texas Constitution. The legislation provided certain actuarial assumptions and processes for calculating the contributions required from the city and from the Fund, and the Fund claimed that the legislation was unconstitutional as applied because the Constitution grants exclusive jurisdiction over those actuarial methods to the Fund's board of directors.

The city filed a plea to the jurisdiction, claiming that governmental immunity was not waived because although the city is not entitled to governmental immunity from a suit to declare a statute unconstitutional, the Fund had not stated a facially valid constitutional claim. Both parties filed a motion for summary judgment. The trial court denied the city's plea, denied the city's motion for summary judgment, and granted the Fund's motion for summary judgment.

The appellate court reversed, holding that the provision in Article XVI, Section 67(f) that states that the board "shall… select… an actuary and adopt sound actuarial assumptions to be used by the system or program…" does not provide the board exclusive jurisdiction over the process used to calculate the contributions. Therefore, the Fund's claim was not a facially valid constitutional challenge and the city's governmental immunity was not waived.

City of Pharr v. Bautista, No. 13-22-00278-CV, 2022 WL 17844214 (Tex. App.—Corpus Christi–Edinburg Dec. 22, 2022, no pet.) (mem. op.). Bautista sued the City of Pharr under the Whistleblower Act, claiming his termination was in retaliation for a report he made to the Texas Commission on Environmental Quality. The city filed a plea to the jurisdiction, arguing that Bautista had not filed his suit within the 90-day statutory limitations period after exhausting his administrative remedies with the city. The trial court denied the plea and the city appealed.

The appellate court affirmed, holding that because a letter from the city stating that Bautista's appeal of his termination did not conclusively deny the appeal but merely stated the appeal's deficiencies, a fact issue remained as to whether that letter constituted a final decision on appeal.

City of Fort Worth v. Birchett, No. 05-22-01170-CV, 2023 WL 1501596 (Tex. App.—Dallas Feb. 3, 2023, pet. filed) (mem. op.). William Birchett sued the city of Fort Worth under the Texas Whistleblower Act (Government Code Section 554.002) claiming he was wrongfully terminated after he reported cybersecurity violations the city failed to remedy to law enforcement agencies. In its first plea to the jurisdiction, the city argued, among other things, that Birchett did not sufficiently allege a causal connection between his reporting the violations and his termination. The court of appeals, in denying the city's first plea, explained that Birchett was not required to present evidence that his supervisor, Kevin Gunn, knew of his reports when Gunn terminated him, instead the city was required to present evidence rebutting the presumption of causation under section 554.004(a). The city subsequently filed a second plea to the jurisdiction providing proof that Gunn had no knowledge of Birchett's reports and that Birchett was instead terminated for other reasons. Concluding that the second plea to the jurisdiction amounted to a motion to reconsider because it also addressed the sufficiency of the evidence on causation which had already been determined in the first plea, the appellate court lacked jurisdiction and dismissed the second plea.

City of Fort Worth v. Fitzgerald**,** No. 05-22-00327-CV, 2023 WL 1813525 (Tex. App.—Dallas Feb. 8, 2023). Joel Fitzgerald, Sr. sued the City of Fort Worth after being terminated as the City's Chief of Police. Fitzgerald alleged that he was denied due process. The City contended that the trial court erred in denying its plea to jurisdiction because Fitzgerald "did not and could not plead facts" sufficient to show that his termination denied him any due process or due course of law. The trial court denied the City's plea to the jurisdiction and the City appealed.

When Fitzgerald was terminated from his position, the city released a termination memo to the press, in which the City criticized Fitzgerald's "increasing lack of good judgment" as police chief and "track record of making decisions that are more focused on [his own] best interest." Unlike the cases where a "badge of infamy" was found, however, none of the City's criticisms impugned Fitzgerald's character for honesty or accused him of any crime. Additionally, Fitzgerald alleged that the City called a press conference to announce that Fitzgerald had been terminated. Fitzgerald

argued that the City "disparaged [his] character." Fitzgerald alleged that the mayor also made a separate statement where she announced that she supported Fitzgerald's termination and that Fitzgerald lacked qualities the City "deserved" in a leader. The court of appeals held that the City's statements in the termination memo did not constitute a "badge of infamy" implicating Fitzgerald's liberty interest *See Town of Shady Shores v Swanson*, 544 S.W.3d 426, 442 (Tex. App.—Fort Worth 2018), *rev'd in part on other grounds*, 590 S.W.3d 544 (Tex. 2019).

For a due process claim, an employee must have a cognizable property interest in continued employment. An at-will employment relationship does not create such an interest. *See, e.g., Moreno v. Tex. Dep't of Transp.*, 440 S.W.3d 889, 897 (Tex. App.—El Paso 2013, pet. denied); *Coté v. Rivera*, 894 S.W.2d 536, 542 (Tex. App.—Austin 1995, no writ). Fitzgerald argued that a "general discharge" on the F-5 form indicates that he was not an at-will employee, because the wording on the form under the "General Discharge" category stated that his termination "was not because of ... an at-will employment decision." The court of appeals disagreed, holding that an F-5 form addresses discharges not terms of employment. *Id.* (citing *Midland Judicial Dist. Cmty. Supervision & Corrs. Dep't v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002) (per curiam)). The court of appeals also dismissed Fitzgerald's civil service claim for reinstatement because there was no evidence that he held a lower rank in the department before he was terminated. TEX. LOC. GOV'T CODE § 143.013(c). The court of appeals held that Fitzgerald's public policy argument for treating him as having a right to his employment failed because there was no specific agreement changing his at will status. *See Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998); *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 723 (Tex. 1990).

The court concluded the trial court lacked jurisdiction over Fitzgerald's claim that the City violated his property interest in his employment under Article 1, Section 19 of the Texas Constitution and rendered judgment in favor of the City.

El Paso Cnty. Water Improvement Dist. No. 1 v. Trevizo, No. 08-21-00206-CV, 2023 WL 1069706 (Tex. App.—El Paso Jan. 27, 2023). Rogelio Trevizo worked as an equipment operator for the El Paso County Water Improvement District No. 1 (District) for over a decade operating heavy equipment and performing a variety of manual labor. He developed a blood clot in his foot which led to numbness in his left leg, causing him to have to take time away from his job. Trevizo returned to light duty and then to full duty, and alleged that after returning to full duty, he was given more physically demanding work to do and older, broken equipment to do it with. He complained to his supervisors and to the EEOC, and after several incidents, his employment with the district was terminated. Trevizo filed a lawsuit against the District alleging discrimination based on age and disability, retaliation and creating a hostile work environment. The District filed a plea to the jurisdiction and a motion for summary judgment based on a lack of jurisdiction. The trial court denied the plea and the motion, and the District appealed that order. After consideration of the alleged facts, the appellate court held that Trevizo failed to properly state a case for age or disability discrimination, retaliation, and hostile work environment. The court dismissed most of the claims but remanded the case to the trial court to allow Trevizo to replead facts related to his age discrimination claims.

McGarry v. Houston Firefighters' Relief & Ret. Fund, No. 01-21-00624-CV, 2023 WL 2415595 (Tex. App.—Houston [1st Dist.] Mar. 9, 2023, no pet.). McGarry sued the Houston Firefighters'

Relief and Retirement Fund to receive the pension of her husband under her informal marriage to him. The Fund requires evidence of the informal marriage, but before McGarry submitted the requested documentation, the board changed its policies regarding informal marriages such that McGarry was no longer eligible to receive the pension. The trial court granted the Fund's jurisdictional pleadings and dismissed McGarry's claims.

The appellate court reversed and remanded, holding that: (1) the trial court had jurisdiction to hear McGarry's claim that the members acted beyond its authority by refusing to process and render a decision granting or denying her application for survivor's benefits; (2) the trial court had jurisdiction to hear McGarry's claim that the board acted beyond its authority by applying the revised policies and procedures concerning proof of an informal marriage to her application for benefits; and (3) the trial court had jurisdiction to hear McGarry's claim that the Fund's enabling statute is unconstitutional to the extent it authorizes the board to refuse to process her application or apply the revised policies to her application for benefits.

United Indep. Sch. Dist. v. Mayers, No. 04-22-00424-CV, 2023 WL 2004407 (Tex. App.—San Antonio Feb. 15, 2023, no pet.). The plaintiff sued her employer, the school district, for discrimination based on sex, national origin, and age and claimed her employer retaliated against her. In her second amended petition, she sued under the Texas Commission on Human Rights Act, the Age Discrimination in Employment Act of 1967, and Title VII of the Civil Rights Act of 1964. The school district filed a plea to the jurisdiction on the grounds that the plaintiff: (1) filed her state law TCHRA claims after the expiration of the applicable two-year statute of limitations; (2) failed to comply with exhaustion of remedies requirements applicable to her TCHRA, Title VII, and ADEA claims; and (3) did not adequately plead her Title VII and ADEA claims until after the expiration of a deadline imposed by federal law. The trial court denied it and the school district appealed.

On appeal, the court found that: (1) the TCHRA were time-barred as a matter of law; (2) the plaintiff filed her Title VII sex discrimination and retaliation claims within 90 days of receiving her right-to-sue letter from the EEOC; and (3) the plaintiff failed to exhaust her administrative remedies for her federal national origin and age discrimination claims. The appellate court reversed and rendered judgment on the plaintiff's TCHRA, age discrimination, and national origin claims. The appellate court affirmed the denial on the plea for the plaintiff's claims of sex discrimination and retaliation under Title VII.

Cnty. of El Paso v. Flores, No. 08-22-00060-CV, 2023 WL 2435669 (Tex. App.—El Paso Mar. 9, 2023, no pet.). Flores, a Veterans Assistance Manager, sued the County for discrimination based on sex and disability after his termination in February 2017. The trial court denied the County's plea to the jurisdiction, leading to an interlocutory appeal. The appellate court determined that Flores met the jurisdictional deadline and found evidence supporting his disability discrimination claim. However, it concluded that he failed to establish a prima facie case for his sex-discrimination claim and retaliation claim based on a complaint in January 2017. The court affirmed the trial court's order denying the County's plea to the jurisdiction for Flores's disability discrimination claim, but reversed and dismissed the sex-discrimination and retaliation claims.

City of Houston v. Houston Prof'l Fire Fighters' Ass'n, Local 341, No. 21-0518, 2023 WL 2719477 (Tex. Mar. 31, 2023). When the city firefighters' union (Firefighter Union) and the City of Houston reached a collective-bargaining impasse, the Firefighter Union filed suit against the city claiming that the city violated the Fire and Police Employee Relations Act, codified in Chapter 174 of the Local Government Code (Chapter 174) by failing to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. The Firefighter Union also requested a declaration of compensation and conditions of employment for one year pursuant to Chapter 174. The city responded by challenging Chapter 174's judicial-enforcement provisions, claiming that such enforcement violates the Texas Constitution's separation of powers clause. The city also claimed it was immune from suit.

While the suit was pending, city voters approved an amendment to the city charter (the pay-parity amendment) that would require the city to set firefighter compensation commensurate with police officer compensation at similar ranks. Upon the amendment's passage, the Houston Police Officer's Union (Police Union) sued the Firefighter Union, seeking a declaration that Chapter 174's state-law compensation standards and collective-bargaining process preempt the pay-parity amendment, rendering it unenforceable. The city joined the Police Union's claim against the Firefighter Union in the second suit.

In the first suit, the trial court rejected the city's constitutional and immunity challenges, and the court of appeals affirmed. In the second suit, the trial court ruled that Chapter 174 preempts the pay-parity amendment, and the court of appeals reversed, concluding that state law does not preempt the local amendment.

The Supreme Court held that: (1) Chapter 174 establishes reasonable standards for judicial enforcement such that it does not violate the constitutional separation of powers; (2) the Firefighter Union met all prerequisites for seeking Chapter 174 enforcement and thus, Chapter 174 waives the city's immunity from suit for Chapter 174 compensation; and (3) Chapter 174 preempts the pay-parity amendment, finding that local law may not supplant Chapter 174's rule of decision by requiring an inconsistent compensation measurement. Accordingly, the court remanded to the trial for further proceedings to establish whether the city has complied with Chapter 174's compensation standards, and if not, to set appropriate firefighter compensation.

Tex. Health & Human Services v. Sepulveda, No. 08-22-00043-CV, 2023 WL 2529747 (Tex. App.—El Paso Mar. 15, 2023, no pet.). David Sepulveda sued the El Paso State Supported Living Center and Texas Health and Human Services (collectively, "THHS"), alleging age and gender discrimination and retaliation after being denied a promotion multiple times. The trial court granted a partial plea to the jurisdiction in favor of the defendants, dismissing ten claims and leaving one age discrimination claim and two retaliation claims. THHS appealed the partial denial, arguing that Sepulveda failed to provide sufficient jurisdictional facts to support the three remaining claims under the Texas Commission on Human Rights Act (TCHRA).

Governmental units, such as cities and state agencies, have immunity from lawsuits, except when the Legislature waives this immunity. The Texas Labor Code provides a limited waiver of immunity for claims against governmental units alleging violations of the TCHRA. The waiver

applies only to suits where the pleadings state a prima facie claim for a TCHRA violation; otherwise, the governmental unit retains immunity. The TCHRA prohibits employment discrimination based on specific characteristics and protects employees from retaliation for reporting discrimination. Texas courts recognize two methods of proof for TCHRA claims: direct evidence and the McDonnell-Douglas burden-shifting framework.

In this case, THHS argued that Sepulveda failed to provide sufficient jurisdictional facts for his retaliation claims and that the trial court made an error in denying their plea. The court applied the McDonnell-Douglas burden-shifting framework to assess Sepulveda's retaliation claims under the TCHRA. For a valid retaliation claim, an employee must show engagement in a protected activity, experiencing a material adverse employment action, and a causal link between the two. In the first retaliation claim, while Sepulveda was not selected for a certain position, the court concluded that he could not establish a causal link between a Texas Workforce Commission complaint he had filed and the failure to be selected for the position. In the second retaliation claim, Sepulveda again argued that he was not selected for a position due to his previous complaints, and again the court concluded that he failed to provide sufficient evidence to support the claim. The court did find, however, that Sepulveda did state a prima facie case for age discrimination. Ultimately, the trial court's order denying THHS' plea to the jurisdiction for Sepulveda's age-discrimination claim was affirmed, while the orders denying the pleas for the retaliation claims were reversed, and those claims were dismissed.

City of Houston v. Garcia, No. 14-22-00024-CV, 2023 WL 2603759 (Tex. App.—Houston [14th Dist.] Mar. 23, 2023, no pet.). Plaintiff Monica Garcia alleged that the City of Houston violated the Texas Whistleblower Act by terminating her employment during her probationary period in retaliation for reporting concerns about the Houston's oversight of policies during the COVID-19 pandemic. Houston appealed the trial court's denial of the city's plea to the jurisdiction, based on Garcia's failure to initiate a grievance with the city. The Texas Whistleblower Act (TWA) protects public employees who report violations of law by their employers or other public employees to appropriate law enforcement authorities. Governmental entities cannot take adverse personnel action against such employees. If an employer retaliates against an employee for making such a report, the employee may sue the employer; however, the employee must first initiate action under the grievance or appeal procedures of the employing state or local governmental entity. The court concluded that Houston has no formal grievance or appeal procedures for probationary employees like Garcia; however, Garcia was still required to give the city some pre-suit notice that she wanted to administratively challenge her termination, even in the absence of an applicable formal grievance or appeal procedure. The court reversed the trial court's ruling and rendered judgment for Houston.

City of San Antonio Fire Fighters' & Police Officers' Civil Serv. Comm'n v. Saenz, No. 04-22-00347-CV, 2023 WL 3103852 (Tex. App.—San Antonio Apr. 27, 2023). Saenz, a Canyon Lake firefighter, sued when he applied to be a firefighter in San Antonio and his application was disqualified, claiming he was entitled to appeal under Section 143.015 of the Local Government Code. The San Antonio civil service commission filed a plea to the jurisdiction on the grounds that Saenz was not a firefighter entitled to civil service protections and he filed his appeal beyond the 10-day deadline. The trial court denied the plea and the civil service commission appealed.

On appeal, the court determined that Saenz was not a firefighter of the San Antonio fire fighters' civil service commission and his membership to the Canyon Lake civil service commission did not entitle him to the right to appeal the San Antonio civil service commission's decision. The court reversed the trial court order denying the plea and rendered judgment dismissing the claims.

Vice v. E. Tex. Mun. Util. Dist., No. 12-21-00225-CV, 2023 WL 3033146 (Tex. App.—Tyler Apr. 20, 2023) (mem. op.). Tommy Vice, former general manager of the East Texas Municipal Utility District (ETMUD), appealed a trial court ruling in favor of ETMUD, which denied his claim for more than $1,000,000 in compensation through 2028 after his resignation. The court reviewed both parties' motions for summary judgment, affirming that Vice had materially breached his contract, thus excusing ETMUD's continued performance. Vice disputed the court's decision, arguing that the amended employment agreement lacked consideration. However, the court found the agreement to be illusory due to its terms that would obligate ETMUD to pay Vice even if he resigned. Additionally, the court confirmed Vice's material breach of contract through workplace misconduct and destruction of company data, thereby justifying ETMUD's termination of performance upon discovering these breaches. Therefore, the trial court's decision to grant ETMUD's motion for summary judgment and deny Vice's claim was upheld.

GOVERNMENTAL IMMUNITY-CONTRACTS

A Status Constr. LLC v. City of Bellaire, No. 01-21-00326-CV, 2022 WL 2919934 (Tex. App.—Houston [1st Dist.] July 26, 2022, no pet.) (mem. op.). The City of Bellaire hired A Status Construction (ASC) to repair and improve two city streets. After delays caused by faulty engineering reports provided by the city, ASC sued for damages under the Local Government Contract Claims Act. The city filed a plea to the jurisdiction, claiming governmental immunity and the trial court granted the plea. ASC appealed.

The appellate court reversed and remanded the case for further proceedings, holding that: (1) because ASC had alleged a breach of contract and was suing for damages under the contract, the LGCCA waived the city's immunity to suit; (2) ASC's claim under the Prompt Payment of Claims Act was not barred because although the act does not waive immunity to suit, it does waive immunity to liability; and (3) even though the city provided faulty engineering reports

Triple B Services, LLP v. City of Conroe, No. 09-21-00096-CV, 2022 WL 2720451 (Tex. App.—Beaumont July 14, 2022, no pet.) (mem. op.). Triple B Services sued the City of Conroe for breach of contract and violations of the Texas Public Prompt Pay Act, alleging contract damages due to conditions that were different from what was described in the bid documents on a project to construct and widen a city road. The city filed a plea to the jurisdiction, claiming that its governmental immunity was not waived for the claim because the claim was not for damages owed under the contract and therefore did not meet the limitations set forth in the Local Government Contract Claims Act (LGCCA). The trial court granted the city's plea and Triple B appealed, arguing that the trial court's admission of evidence and testimony in a purely jurisdictional hearing was in error.

The appellate court affirmed, holding that because the LGCCA limits the type of damage claims for which governmental immunity is waived, the trial court's consideration of evidence and testimony to determine the type of damages sought was proper

Merrell v. City of Sealy, No. 01-21-00347-CV, 2022 WL 3970078 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022, no pet.) (mem. op.). After resigning as city manager from the City of Sealy, Merrell sued the city, claiming that that the actions of the city council and mayor amounted to a termination, which entitled Merrell to certain benefits under the contract governing his service as city manager. The city filed a plea to the jurisdiction claiming governmental immunity and a Rule 91a motion to dismiss. The trial court granted both the plea and the motion, and Merrell appealed.

The trial court affirmed, holding that: (1) governmental immunity was not waived for Merrell's breach of contract claim because his resignation was voluntary and therefore he could not show that there was a balance due and owed to him under the contract; (2) Merrell's claim for declaratory relief was not cognizable because it was simply a recharacterization of his breach of contract claim; and (3) the facts alleged by Merrell did not assert an ultra vires claim.

Sai Monahans Brother Hosp., LLC v. Monahans Econ. Dev. Corp., No. 08-21-00060-CV, 2022 WL 3646957 (Tex. App.—El Paso Aug. 24, 2022, no pet.). The Monahans Economic Development Corporation (MEDC) sold property to Sai Monahans Brother Hospitality, LLC (Sai) for $280,000. The deed contained an option contract giving the MEDC the option to repurchase the property for $280,000 if Sai failed to meet several development and construction deadlines. Sai failed to meet the deadlines, and the MEDC notified Sai that it was exercising its repurchase option. Sai sued the MEDC and the City of Monahans (Monahans) asserting numerous claims basically seeking a declaration that it would be unjust and unfair to enforce the terms of the deed and the option contract. Monahans and the MEDC filed a plea to the jurisdiction with the city claiming governmental immunity and the MEDC claiming "derivative immunity." Subject to its plea to the jurisdiction, the MEDC also countersued Sai for specific performance of the option contract. The trial court granted the pleas, and Sai appealed. Generally, a city is shielded from lawsuit by governmental immunity when performing governmental functions, unless that immunity has been waived by statute or the constitution. In this case, no allegations were made that the Monahans was a party to any of the agreements between Sai and MEDC; furthermore, Sai failed to allege any action on the part of the city that would overcome the city's governmental immunity. Consequently, the appellate court upheld the trial court's grant of Monahans's plea, subject to Sai's ability to replead facts related to jurisdiction. The appellate court, however, reversed the trial court regarding the MEDC's "derivative immunity" plea. The MEDC is not a political subdivision, so it does not automatically enjoy the same governmental immunity protections as a city. That said, MEDC made a novel argument that it should be protected by "derivative immunity," a legal theory that has never existed in Texas. Under a "derivative immunity" theory, MEDC argued that because it acts on behalf of the city, Monahan's governmental immunity should extend to the MEDC. Ultimately, the level of control Monahans exerts over the MEDC was not sufficient to entitle the MEDC to derivative immunity, and the appellate court overruled the trial court's grant of the MEDC's plea to the jurisdiction.

Tex. Mun. League Intergovernmental Risk Pool v. City of Hidalgo, No. 13-22-00250-CV, 2022 WL 3651986 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op.). The City

of Hidalgo sued the Texas Municipal League Intergovernmental Risk Pool for the denial of a claim for property damage arising from a hurricane. The Risk Pool filed a plea to the jurisdiction, claiming that governmental immunity was not waived under Chapter 271 of the Local Government Code because by failing to file suit in Travis County as the contract between the parties required, the city had not abided by the adjudicative processes as required by Chapter 271. The trial court denied the Risk Pool's plea and the Risk Pool appealed.

The appellate court affirmed, holding that the contract's requirement that a party sue in a particular county in Texas was a venue selection clause rather than a forum selection clause and therefore unenforceable.

City of Weslaco v. De Leon, No. 13-20-00561-CV, 2022 WL 3652501 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op.). De Leon sued the City of Weslaco for breach of contract after the city's termination of De Leon's lease of an airport hangar. The city filed a plea to the jurisdiction claiming immunity from suit, and the trial court denied the plea. The city appealed.

The appellate court reversed and rendered, holding that: (1) a lease is not a contract for goods and services, so the waiver of immunity in Chapter 271, Local Government Code, did not apply; (2) the airport director's actions in filing trespass charges against De Leon were not ultra vires; and (3) the city's defensive declaratory judgment claim did not operate to waive the city's immunity to suit.

City of San Antonio v. DHL Express (USA), Inc., No. 04-22-00603-CV, 2023 WL 380341 (Tex. App.—San Antonio Jan. 25, 2023, no pet.) (mem. op.). This is a contractual immunity case in relation to a lease at the San Antonio Airport. The Fourth Court of Appeals held entering into the lease agreement does not waive the City's immunity.

DHL executed a five-year lease agreement for property at the eastern edge of the San Antonio International Airport. The agreement restricted the leased airport property to "only be used for aeronautical activities or those that directly support the aeronautical activities." The City later declared DHL in default. The City claimed that DHL had stopped receiving air freight from flights landing in San Antonio. Instead, DHL's flights landed at Austin-Bergstrom International Airport and then the freight was trucked to San Antonio International Airport for processing and distribution. DHL sought a declaratory judgment to determine whether it was in violation of the lease. The City filed a plea to the jurisdiction which was denied. The City appealed.

Immunity is waived for written contracts entered to provide goods and services to the local governmental entity. TEX. LOC. GOV'T CODE § 271.151. DHL asserted it was providing services to the City and therefore immunity had been waived. But "[w]hen a party has no right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity." The Texas Legislature has determined that "the planning, acquisition, establishment, construction, improvement, equipping, maintenance, operation, regulation, protection, and policing of an airport" is a governmental function. TEX. LOC. GOV'T CODE § 22.002(a). As a result, the lease was a governmental function. DHL asserted it was providing services to the City by constructing improvements. However, under

the lease, DHL had the right to erect or modify buildings on the leased premises, subject to the City's approval, but no language required DHL to do so. While DHL argued it was also to maintain and repair the leased premises. However, nothing in the lease required DHL to deliver goods or services to the City. The lease merely requires DHL to not degrade the premises it has leased from the City or any improvements to the premises that DHL may choose to make. As a result, the lease was not for goods or services.

The court of appeals rendered judgment in favor of the City because the contract in question was not a contract for goods and services and thus immunity was not waived under Chapter 271 of the Local Government Code.

***The City of Houston v. James Constr. Group, LLC*, No. 14-21-00322-CV, 2023 WL 3301739 (Tex. App.—Houston [14th Dist.] May 8, 2023, no pet.) (mem. op.).** The City of Houston entered into contracts with James Construction Group, LLC (JCG) in 2016 for repairs at Bush Intercontinental Airport, totaling $64,445,036.30. After setbacks, the city terminated the contracts for its own convenience. JCG sought payment for services rendered and termination expenses. After payments totaling $2,081,365.63 from the city, JCG claimed it was still owed $13,416,633. The city moved for summary judgment on res judicata grounds and asserted its immunity. The trial court denied both motions, and the city appealed.

A city cannot be sued without a waiver of its governmental immunity. The Local Government Contract Claims Act can create such a waiver when a city enters into a contract. In this case, the contracts' provisions required resolution of certain disputes by the City Engineer. The court considered whether the City Engineer was guilty of fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment when resolving the disputes. Because the court found no such malfeasance by the City Engineer, the city's immunity was not waived. Additionally, the appellate court lacked jurisdiction to review the denial of summary judgment as it was not based on a jurisdictional challenge. The trial court's order denying the plea to the jurisdiction was reversed, and the remainder of the City's appeal was dismissed due to lack of jurisdiction.

GOVERNMENTAL IMMUNITY-TORT

City of Houston v. Gilbert, 656 S.W.3d 603 (Tex. App.—Houston [14th Dist.] 2022), *rev. denied* (Mar. 31, 2023). In this case, the families of two children and a grandparent sued the City under the Tort Claims Act after the children and grandparent were electrocuted while the children were participating in little league softball on a City field. The trial court held in favor of all plaintiffs and the City appealed.

In *Gilbert*, a little league baseball team was practicing softball in a city league at a city owned park when three individuals were injured, two children who were practicing softball, and one of the children's grandparent. All three were electrocuted, the grandparent being electrocuted when he tried to assist the children. The grandparent and the children's family sued the City based on negligent activity, premises liability, negligence, negligence per se, and gross negligence, and bystander liability. The City argued that it retained immunity because all plaintiffs were licensees

to which the City only owed a minimum duty of care to the plaintiffs. Plaintiffs claim that they were invitees, and therefore were owed a greater duty of care.

Whether governmental immunity is waived in premises liability cases is partially based on whether the individual who is injured is an invitee, licensee, or trespasser as it relates to the duty of the City. The legislature has waived the immunity of governmental units as to personal injury *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021(1)(B), (2), 101.025. "[I]f a claim arises from a premises defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises." *ID.* § 101.022(a). If the plaintiff pays to use the premises, then the duty of the governmental entity is one of an invitee, meaning using reasonable care to correct or warn an invitee about dangerous conditions where the owner knows or should have known of the danger. For a licensee, the governmental entity owning the property "not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." *See Sampson v. Univ. of Tex. at Austin,* 500 S.W.3d 380, 384 (Tex. 2016); *City of Houston v. Ayala,* 628 S.W.3d 615, 619 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

The court of appeals held that the grandparent, as a spectator, was a licensee since there is no evidence that he paid to use the field. The grandparent needed to prove that the city had actual knowledge of the danger or was grossly negligent in not preventing the danger and no evidence was presented that the city knew of the danger. The court of appeals further held that the City was not grossly negligent. As to the children, the court of appeals held that they were invitees because the children's families paid the league for the privilege of playing softball on the fields, and the league in turn paid the City for the privilege of using the fields. The City argued that because the families did not pay the City directly, they were not invitees. The court of appeals held that payments made indirectly to a city municipality through an intermediary can be sufficient evidence to raise a fact issue on invitee status. Therefore, the Court of Appeals affirmed the District Court's ruling that the children were invitees and therefore the City owed a higher duty of care. Further, the court of appeals held that the premises defect claims as it relates to invitee status were valid.

The court of appeals held in favor of the children plaintiffs because they were invitees through their pay for the use of city property, even indirectly (as through a little league), and the City is not immune in this case. However, the grandparent who did not pay, a spectator, will be classified as a licensee, and the city only owes the minimum standard of duty of care in preventing injuries.

Fraley v. Texas A&M Univ. Sys., 664 S.W.3d 91 (Tex. 2023). Petitioner ("Fraley") sued Texas A&M (the "University") for injuries sustained when Fraley drove through a T-shaped intersection and ended up in a shallow ditch on a road maintained by the University. The trial court ruled in favor of Fraley, the Court of Appeals reversed in favor of the University, the Supreme Court of Texas affirmed the Court of Appeals judgment, holding that: 1) the ditch was not a "special defect" and thus did not support application of the Act's exception to governmental immunity for discretionary decisions about design and signage, 2) the University's decision to redesign the road and place a yield sign, rather than a stop sign or some other signal, was discretionary and thus subject to governmental immunity under the Act, and 3) that the Court of Appeals properly ordered action dismissed rather than remanded for re-pleading, and affirmed the decision.

The plaintiff was injured on a road that the University had recently converted from a four-way intersection to a 3-way, T-shaped intersection, and the conversion resulted in a sloped ditch adjacent to the original roadway. A yield sign was present. No other signs or control devices were present at the intersection. Fraley argued that governmental immunity should not apply because the condition should qualify as a "special defect" under the Tort Claims Act, and the University therefore had a duty to warn of the defect thus waiving the immunity under the Act.

The Tort Claims Act waives immunity for claims alleging that an unreasonably dangerous condition on the defendant's property caused the plaintiff's injuries. TEX. CIV. PRAC. & REM. CODE § 101.060(c). Discretionary acts of a governmental entity does not waive immunity. *ID.* Factors used to determine whether a premises condition is a special defect include the condition's size, whether the condition unexpectedly impairs a vehicle's ability to travel on the road, or whether it presents an unexpected and unusual danger to ordinary users of the roadway. Fraley's argument that the ditch constituted a special default failed because he did not distinguish how the ditch he ended up in was any different from similar ditches that are adjacent to similar roads across the State of Texas. It is not special defect if ordinary users would not be affected by the defect when following the correct course of the road. *See Texas Department of Transportation v. Perches.* 388 S.W.3d 652 (Tex. 2012). Further, omission of safety features does not waive immunity because the decision to place or not place features is a discretionary decision that does not waive immunity. *Texas Dep't of Transp. v. Ramirez,* 74 S.W.3d 864 (Tex. 2002).

The Supreme Court held that since the ditch did not constitute a special defect, and that signage and barriers are erected (or not) at the discretion of the University, governmental immunity under the Tort Claims Act applied. As such, the court affirmed the Court of Appeals' decision to reverse the trial court's ruling.

Varner v. City of Andrews, 657 S.W.3d 658 (Tex. App.—El Paso 2022), *rev. denied* (Jan. 13, 2023). Jessica Varner (Appellant) brought personal injury action against the City of Andrews (the City), alleging that the City was liable for injuries incurred when she was attacked by a pack of dogs while walking in the City. The trial court granted the City's plea to the jurisdiction and Appellant appealed. The Court of Appeals held that Appellant's complaints about the City's animal control policies and procedures to mayor and police chief were insufficient to put the City on notice as required by the City's charter and of the Texas Tort Claims Act (TTCA); and that the lack of pleadings affirmatively established a waiver of immunity.

Appellant was attacked by a pack of dogs that had escaped their owner's property. Appellant was treated at the hospital for at "at least 19 distinct dog bites," and later needed surgery due to nerve damage that resulted from the attack. Two days after the attack, Appellant met with the City's Mayor and Police Chief, wherein she verbally provided notice of when, where, and how her injury occurred, and expressed her dissatisfaction with the number of dogs roaming freely due to the City's failure to euthanize animals in accordance with City ordinances. Three days after that, Appellant turned in a written statement about the incident the Police Department.

In a lawsuit against a governmental entity, the plaintiff bears the initial burden of alleging facts to demonstrate the trial court's subject-matter jurisdiction. *Worsdale v. City of Killeen*, 578 S.W.3d

57, 59 (Tex. 2019). The Texas Tort Claims Act waives governmental immunity for property damage, personal injury, or death, but only in limited circumstances, and only if the claimant gives notice as prescribed by law. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.101. A claimant must give the governmental entity notice within six months of the incident that gives rise to the claim. The City's charter states that notice of claims for personal injury must be made in writing to the City Manager or the City Secretary within 90 days of the damage or injury. CITY OF ANDREWS HOME RULE CHARTER, art. I, § 5. It was undisputed that the City's charter shortened the notice, and that Appellant did not provide formal, written notice of her claim to the appropriate City officials until she filed suit nearly two years after the incident. Appellant's argument to notice relies on her physical meeting the Mayor and Police Chief two days after the incident. The court of appeals reasoned that Appellant saying that the City's representatives had notice of the claim "does not make it so". The purpose of the Act's notice requirement is not served "if a governmental unit is not subjectively aware that its alleged acts or omissions contributed to or produced injuries in the way the claimant ultimately alleges." *Worsdale*, 578 S.W.3d at 64. The court of appeals affirmed the trial court's ruling regarding lack of notice.

Because the court held that the Appellant did not provide actual notice of her claim, the court did not need to rule on Appellant's second issue of whether the Act waives the City's immunity in this case. The trial court's judgment was affirmed by the court of appeals.

Watson v. City of San Marcos, No. 03-22-00307-CV, 2023 WL 3010938 (Tex. App.—Austin Apr. 20, 2023). Watson sued the city of San Marcos alleging tortious interference with a contract and unjust enrichment after he was unable to close on a real estate transaction due to the city's requirement that liens on the property be paid prior to closing. In response, the city filed a plea to the jurisdiction asserting governmental immunity. After the trial court granted the city's motion, Watson appealed. In affirming the trial court's order, the court of appeals concluded, among other things, that governmental immunity could not be waived for intentional torts, such as tortious interference with a contract. In addition, because unjust enrichment was not an independent cause of action, Watson's second claim could not support a waiver of governmental immunity.

City of Houston v. Meka**,** No. 01-22-00002-CV, 2023 WL 3063397 (Tex. App.—Houston [1st Dist.] Apr. 25, 2023, no pet.). Meka sued the City of Houston for injuries she sustained in a car accident involving a vehicle driven by a city employee. The city moved for summary judgment, claiming that because Meka had not served the city with notice of the suit before the expiration of the statute of limitations, the trial court had no jurisdiction over the suit. The trial court denied the motion.

The appellate court affirmed the judgment of the trial court, holding that service of process is not a jurisdictional prerequisite to suit under the TTCA.

Gulf Coast Center v Curry, 658 S.W.3d 281 (Tex. December 30, 2022). In this Texas Tort Claims Act ("TTCA") case, the Supreme Court of Texas held the statutory caps on damages are not only jurisdictional but are the plaintiff's burden to establish as part of establishing a waiver of immunity from suit.

The Gulf Coast Center provides services for individuals with intellectual disabilities, including bus services. Curry was crossing the street when he was hit by such a bus driven by a Gulf Coast employee. Curry sued Gulf Coast for his resulting injuries. Following a trial, the jury found Gulf Coast negligent and awarded Curry $216,000. Curry sought judgment for the full amount. Gulf Coast objected asserting it was a "unit" of local government with a cap of $100,000.00. The trial court issued a judgment for the full amount. The First District Court of Appeals held the cap amounts were affirmative defenses and it was Gulf Coast's obligation to establish which type of entity it was, and which cap applied. Since Gulf Coast did not ask for a jury question on the subject, Curry was entitled to the full judgment amount. Gulf Coast appealed.

Section 101.023 of the TTCA limits the amount of a government's liability by its statutory terms. The cap is different depending on the type of entity. Curry interprets this to mean that the damages caps relate solely to immunity from liability and not immunity from suit. However, Section 101.025 states that immunity from suit is waived to the extent of liability created by the chapter. The Court held Section 101.023's limitations of liability are not an affirmative defense but, rather, implicate the trial court's jurisdiction by virtue of their incorporation in Section 101.025's waiver of immunity from suit. Thus, a trial court must ascertain, as part of determining its jurisdiction, whether and to what extent the Tort Claims Act waives immunity from suit. Because the damages caps implicate jurisdiction, the Court concluded that the plaintiff has the burden to establish which cap applies. Curry did not satisfy his burden to prove that the $250,000 cap applies in this case as there was no evidence Gulf Coast was either a municipality or the state. Further, the Court held only the court can decide which cap applies, not the jury. There was also uncontroverted evidence that Gulf Coast was a community center and a unit of local government. Courts lack jurisdiction to render a judgment that exceeds the applicable damages cap under Section 101.023, and a plaintiff seeking recovery under the Tort Claims Act has the burden to prove which cap applies. *Rivera v. City of Houston*, No. 01-19-00629-CV, 2022 WL 2163025 (Tex. App.—Houston [1st Dist.] June 16, 2022) (mem. op.). Rivera sued the City of Houston for injuries he received from a vehicle collision with Officer Romero, which occurred while Romero was heading to the police station to pick up her partner, after which she intended to respond to a "priority-two" call. The city claimed governmental immunity from suit, arguing that the waiver of immunity in the TTCA did not apply because: (1) Officer Romero would not have been personally liable to Rivera due to her official immunity, so the claim did not fall under the TTCA's waiver of immunity for claims arising from the negligent operation of a motor vehicle by a government employee; and (2) Officer Romero was responding to an emergency at the time of the collision, so the emergency-response exception to the TTCA's waiver of immunity applied. The trial court granted the city's motion for summary judgment.

The appellate court held that Rivera had raised a genuine issue of fact as to whether Officer Romero was performing a discretionary act at the time of the collision, which would entitle her to official immunity, or a ministerial act, in which case she may have been personally liable for negligence. The appellate court also held that a genuine issue of fact existed as to whether Romero driving to the police station to pick up her partner with the intention of responding to a call afterward qualifies as emergency response for the purpose of the emergency-response exception to the waiver of governmental immunity in the TTCA. The appellate court reversed and remanded the case.

City of Houston v. Sukhta, No. 01-21-00703-CV, 2022 WL 2203657 (Tex. App.—Houston [1st Dist.] June 21, 2022, pet. denied) (mem. op.). Sukhta filed suit against the City of Houston for injuries he received in a car accident with a city police officer. The city's charter requires that notice of suit be provided to the city within 90 days. The 90th day was a Sunday, and Sukhta provided notice the following day. The city filed a plea to the jurisdiction, claiming that Sukhta did not provide notice of his lawsuit to the city in the 90-day limit required by the city charter. The trial court denied the plea, and the city appealed.

The appellate court upheld the trial court's ruling, holding that Rule 4 of the Texas Rules of Civil Procedure, which extended the deadline by one day, prevails over a conflicting provision in the city charter.

City of Houston v. Giron, No. 01-21-00486-CV, 2022 WL 2347745 (Tex. App.—Houston [1st Dist.] June 30, 2022, pet. denied) (mem. op.). Giron sued the City of Houston for injuries he received in a car crash with Officer Lindsay when Officer Lindsay was driving to assist another officer who was holding two suspects alone at gunpoint. The city moved for summary judgment, claiming that the city was entitled to governmental immunity because Officer Lindsay would not have been personally liable to Giron due to his official immunity, so the case would not fall into the TTCA's waiver of immunity for negligent operation of a motor vehicle by a government employee. The trial court denied the city's motion and the city appealed.

The appellate court reversed, holding that Officer Lindsay would not have been personally liable to Giron because in responding to an emergency, he was performing his discretionary duties in good faith and would therefore be entitled to official immunity. Therefore, Giron's claims did not fall into the TTCA's limited waiver of governmental immunity for claims arising from the negligent operation of a motor vehicle by a government employee and the city was entitled to immunity.

City of Dallas v. Peltier, No. 05-21-00760-CV, 2022 WL 2167800 (Tex. App.—Dallas June 16, 2022, pet. denied) (mem. op.). Lynn Peltier sued the City of Dallas and a city garbage truck driver under the TTCA after a garbage truck caught fire and caused damage to her property. Her suit initially alleged the city was negligent in maintaining the garbage truck and the driver acted negligently, but her suit was later amended to include only the driver's negligence claim. At a preliminary hearing on the city's plea to the jurisdiction, Peltier raised an issue of fact about whether the driver was negligent after failing to follow city-prescribed safety protocols that included: (1) pulling the truck over to a safe location, (2) immediately turning off the engine, and (3) grabbing a fire extinguisher before inspecting the truck. As a result, the trial court denied the city's plea, and the city appealed. In its appeal, the city alleged Peltier's claims did not arise out of the driver's operation of the garbage truck, rather the claims and damage was a result of the fire. However, in upholding the trial court's order denying the city's plea to the jurisdiction, the appellate court concluded Peltier's claims were based on the driver negligently operating the garbage truck before discovering the fire. Additionally, the court stated that because the city's training required employees to shut off the engine and grab a fire extinguisher before investigating a truck malfunction, the driver should have known there was a risk of fire.

City of Brownsville v. Nezzer, No. 13-21-00150-CV, 2022 WL 2251818 (Tex. App.—Corpus Christi–Edinburg June 23, 2022, pet. filed) (mem. op.). Lili Nezzer sued the City of Brownsville when a metal structure marking the start of a city-sponsored foot race fell and struck her. The city filed a plea to the jurisdiction, claiming immunity to suit under the TTCA. The trial court denied the city's plea, and the city appealed.

The appellate court reversed, holding that: (1) sponsoring the foot race was a governmental as opposed to proprietary function, so the TTCA applied to Nezzer's claims; and (2) Nezzer failed to plead facts that would support a premises defect claim, so the waiver of governmental immunity for claims based on a premises defect did not apply.

City of Houston v. Musyimi, No. 01-21-00670-CV, 2022 WL 2919724 (Tex. App.—Houston [1st Dist.] July 26, 2022, no pet.) (mem. op.). Musiyimi sued the City of Houston for personal injury after a city police cruiser struck the vehicle he was driving was struck from behind. The city filed a plea to the jurisdiction, claiming that because Musiyimi had not complied with the notice requirements of Section 101.101 of the Texas Tort Claims Act, governmental immunity had not been waived. The trial court denied the city's motion and the city appealed.

The appellate court reversed and rendered judgment in favor the city, holding that: (1) because Musiyimi did not provide formal notice by the deadline provided in the TTCA, the city would have had to have actual notice of his personal injury claim for governmental immunity to be waived under the act; (2) the city's knowledge of Musiyimi's property damage claim was not sufficient to constitute actual notice of his personal injury claim.

City of Houston v. Villafuerte, No. 01-21-00517-CV, 2022 WL 2976233 (Tex. App.—Houston [1st Dist.] July 28, 2022, pet. filed) (mem. op.). The Villafuertes sued the City of Houston for injuries they received during a four-car pileup that occurred after an ambulance driven by a city employee struck another vehicle. The Villafuertes did not provide their formal notice until after the 90-day notice period required by the city charter and the Texas Tort Claims Act. The city moved for summary judgment, claiming that governmental immunity was not waived because the Villafuertes had not complied with the requirements of Section 101.101 of the TTCA and the city did not have actual notice of the Villafuertes' injuries. The trial court denied summary judgment and the city appealed.

The appellate court reversed and rendered judgment in favor of the city, holding that: (1) the time to serve the city with notice under the charter and the TTCA began to run at the time the injury occurred, not at the time the plaintiff sought treatment for the injury; (2) the Villafuertes' statement to the ambulance driver that they were injured did not constitute actual notice in the absence of evidence that the driver was an agent or representative of the city with a duty to investigate; and (3) the city's knowledge of the Villafuertes' property damage claim was not sufficient to constitute actual notice of their personal injury claim.

City of El Paso v. Pina, No. 08-20-00159-CV, 2022 WL 3161947 (Tex. App.—El Paso Aug. 8, 2022, no pet.). Maria Pina sued the City of El Paso (El Paso) alleging she sustained personal injuries when an automatic gate on city property closed on her vehicle as she was attempting to drive through. El Paso filed a plea to the jurisdiction based on governmental immunity, which was

denied by the trial court. El Paso appealed. Texas cities enjoy immunity from liability and lawsuit for personal injuries unless immunity has waived by statute. The Texas Tort Claims Act contains immunity waivers for premises liability cases where a claimant can prove that the city acted with (1) willful, wanton or grossly negligent conduct, or (2) had actual knowledge of an unreasonably dangerous condition and failed to either correct the condition or warn the claimant of the condition. In this case, Ms. Pina failed to provide evidence that the automatic gate created an unreasonably dangerous condition, so the appellate court reversed the trial court's order, granted El Paso's plea to the jurisdiction, and dismissed the case.

City of Houston v. Sauls, No. 14-20-00485-CV, 2022 WL 3009469 (Tex. App.—Houston [14th Dist.] July 29, 2022, pet. filed). Dwayne Foreman was killed while riding a bicycle when he was struck by a City of Houston (Houston) police vehicle. Mr. Foreman's mother, Catrennia Sauls, sued the Houston, and Houston responded by filing a motion for summary judgment arguing immunity from suit. Houston contended that because the officer was protected by official immunity, Houston would, in turn, be protected by governmental immunity. Additionally, Houston argued that because the officer was responding to an emergency, the emergency exception to the Texas Tort Claims Act barred any immunity waiver. The trial court denied Houston's motion, and Houston appealed. Because Houston's immunity rested on the officer's immunity, the appellate court analyzed whether the officer driving the vehicle acted in good faith during the performance of his duties. After a lengthy analysis of good faith, the court concluded that Houston failed to demonstrate good faith, based in large part on the officer's failure to turn on his sirens and lights while driving 20+ miles over the speed limit. The court also overruled Houston's assertion of the emergency exception. The facts which had been alleged surrounding the handing of the call by dispatched as well as the officers' conduct after receiving the call showed that material fact questions exist regarding whether this call was, in fact, an emergency. Ultimately, the appellate court affirmed the trial court's order denying Houston's motion for summary judgment.

City of Houston v. Denby, No. 01-21-00422-CV, 2022 WL 3588753 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022, no pet.) (mem. op.). Denby sued the City of Houston for wrongful death after his mother suffered fatal injuries when EMTs dropped the stretcher on which she was being transported. The city filed a plea to the jurisdiction, claiming governmental immunity, and the trial court denied the plea. The city appealed.

The appellate court reversed, holding that Denby's claim fell under the emergency services exception to the TTCA and therefore the city's governmental immunity was not waived.

City of Houston v. Branch, No. 01-21-00255-CV, 2022 WL 3970208 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022, no pet.) (mem. op.). Branch sued the City of Houston after he was injured when a privately owned golf cart used to transport a Houston city council member moved forward unexpectedly while it was parked and struck him. Branch claimed that governmental immunity was waived under the TTCA because the council member's failure to engage the emergency brake or ensure the golf cart did not move constitute the negligent operation of a motor vehicle. The city moved for summary judgment, claiming governmental immunity, and the trial court denied the motion.

The appellate court reversed, holding that: (1) the waiver of immunity for claims arising from the negligent operation of a motor vehicle does not extend to privately owned vehicles; and (2) the motor vehicle exception did not apply because by sitting in the passenger seat, the council member was not "operating" the golf cart at the time of the accident.

Valdez v. City of Houston, No. 01-21-00070-CV, 2022 WL 3970066 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022, no pet.) (mem. op.). Valdez sued the City of Houston for negligence after an unmarked police car driven by Houston police officer Martinez struck his vehicle from the rear. The city filed a motion for summary judgment, claiming governmental immunity. The trail court granted the city's motion, and Valdez appealed.

The appellate court affirmed, holding that because in listening to the police radio while driving home after having finished work, Officer Martinez was not acting within the scope of her employment, and therefore the TTCA's limited waiver of immunity was not triggered.

City of Houston v. Arellano, No. 14-21-00117-CV, 2022 WL 3268152 (Tex. App.—Houston [14th Dist.] August 11, 2022, pet. filed). Roberto Arellano sued the City of Houston (Houston) for personal injuries sustained when the vehicle he was travelling in was struck by a Houston employee driving to a fire station to perform HVAC repairs. Houston filed a motion for summary judgment asserting immunity to the claims, which was denied by the trial court. Houston appealed. Generally, cities are protected by governmental immunity from personal injury lawsuits. The Texas Tort Claims Act (TTCA) provides a limited waiver of immunity for damages arising from the operation of a motor-driven vehicle. In this case, Houston first argued its employee was not acting within the scope of his employment rendering the TTCA waiver of immunity ineffective. Because the employee had already clocked in, swapped his personal vehicle for a city vehicle and was responding to the call for service when the collision occurred, the court held that the employee was acting within the scope of his employment and rejected Houston's argument. Additionally, the TTCA has an "emergency exception" which can negate the TTCA waiver of immunity for damages that occur when an employee is responding to an emergency call. After analyzing the facts surrounding the need for the HVAC service, the court ruled that the emergency exception did not apply and ultimately affirmed the trial court's denial of Houston's motion for summary judgment.

***City of Houston v. Gilbert, et al.*,** No. 14-21-00604-CV, 656 S.W.3d 603 (Tex. App.—Houston [14th Dist.] August 23, 2022, pet. denied). In this appeal from a trial court's denial of the city's plea to the jurisdiction based on multiple tort claims for multiple claimants, the Fourteenth Court of Appeals affirmed in part and reversed and rendered in part. Affirmed for participants because a fact question was raised related to two plaintiffs whose status as invitees under the Texas Tort Claims Act and as to bystander claims. The claims related to the remaining claimants were dismissed because the facts did not show actual knowledge or gross negligence as it relates to the claims against the city.

The plaintiffs sued the city after two girls were electrocuted while participating in a softball league when they made contact with an electrical box at the softball field. In addition, a spectator was injured when trying to stop the girls' electrocution. Also, two individuals watching the incident claimed they were traumatized by the electrocution. The plaintiffs sued the city under the Texas

Tort Claims Act, and argued that because the girls paid to use the softball fields, all plaintiffs were entitled to the more protective status of invitee. The city filed a plea to the jurisdiction arguing that (1) the plaintiffs were licenses, not invitees; (2) the city did not have actual knowledge; and (3) the city was not grossly negligent. The trial court denied the city's plea to the jurisdiction and the county appealed.

To plead a tort claim under the Texas Tort Claims Act, as invitees, the plaintiff has to show that as regards the city's premises, the city did not use reasonable care to warn or correct a dangerous condition of which it should have known. TEX. CIV. PRAC. & REM. CODE § 101.022; *City of Houston v. Ayala*, 628 S.W.3d 615, 619 (Tex. App.— Houston [14th Dist.] 2021, no pet.). For licensees, the duty is to either: (1) not be grossly negligent related to the premises; or (2) warn or correct an issue that the entity has actual knowledge of. Id. at 619. To be an invitee, there must be proof that payment was made for use of the premises on which the injury occurred. The Court of Appeals held that paying to participate in a city softball league gave invitee status to the participants in the league, but does not give the same status to spectators or bystanders who are licensees. There was no evidence that the city was grossly negligent or had knowledge of the premises defect related to the electrocution, so the claims brought by the licensees, the spectator and the bystanders, were dismissed. However, there was still an issue of fact of whether the girls were invitees and that issue needed to be determined by the trial court as a fact issue. The Court of Appeals reversed and rendered on the trial court's denial on the plea to the jurisdiction as to the licensees, and affirmed the denial and remanded the issue of the invitees to the trial court.

The court of appeals affirmed in part and reversed in part the trial court's denial of the plea to the jurisdiction.

Krause v. Mayes, No. 14-21-00656-CV, 2022 WL 3589270 (Tex. App.—Houston [14th Dist.] August 23, 2022, no pet.). Kenneth Mayes sued the City of Houston (Houston) and Houston police officer Bradley Krause for personal injuries sustained when the vehicle he was travelling in struck Krause's police car, which was performing an unexpected U-turn. The Texas Tort Claims Act (TTCA) contains an election of remedies section that bars recovery against an employee when the employer city is sued on the same basis. Following this section of the TTCA, Houston filed a motion to dismiss its employee Krause from the suit. In his response to Houston's motion to dismiss, Mayes non-suited the city. Krause then filed a motion to dismiss the claims against him based on the election of remedies in the TTCA, but the trial court denied Krause's. Krause appealed. The TTCA is clear in its language, and the Texas Supreme Court has been equally clear in its interpretation: the election of remedies under the TTCA is irrevocable. In this case, by suing both Houston and Krause, Mayes made an irrevocable election under the TTCA to pursue a vicarious liability theory against Houston, and Houston's motion to dismiss Krause from the lawsuit triggered Krause's right to be dismissed, regardless of Mayes' later non-suiting of Houston. The appellate court reversed the lower court's denial of Krause's motion to dismiss and remanded the case back to the trial court for further proceedings.

City of Houston v. Breckenridge, No. 14-21-00086-CV, 2022 WL 4103202 (Tex. App.—Houston [14th Dist.] September 8, 2022, no pet.) (mem. op.). Christyn Breckenridge sued the City of Houston (Houston) for personal injuries sustained when she fell into a water utility hole in downtown Houston. Houston filed motions for summary judgment (MSJs) asserting immunity

from the claims, which were denied by the trial court after significant back-and-forth pleading between the parties. Houston appealed. Generally, cities are protected by governmental immunity from personal injury lawsuits. In some cases, the Texas Tort Claims Act (TTCA) provides a limited waiver of governmental immunity for damages arising from premises defects. The TTCA provides different standards for "ordinary" defects and "special" defects. For an ordinary defect, a city owes a duty that a private person owes a licensee: not to injure the licensee by willful, wanton or grossly negligent conduct and to use ordinary care to warn the licensee of a dangerous condition of which the city has actual knowledge. For a special defect, the city would have the same duties a private landowner would have to an invitee, i.e., to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a condition of which the owner should be aware. The appellate court determined that the hole in the sidewalk was a special defect, because it posed an unexpected and unusual danger to ordinary users of the sidewalk; therefore, Houston had a duty to warn pedestrians of the danger. A question of fact exists regarding whether Houston provided sufficient warning; therefore, the trial court's denial of Houston's MSJ was affirmed. Houston also argued that because a Houston employee had placed a cone in the hole, that that employee's official immunity from suit would extend to the city. In some cases, an employee's official immunity can shield a city from liability, but not in the case of a premises defect. Ultimately, the court affirmed the trial court's denial of Houston's MSJs.

City of Houston v. Rodriguez, No. 14-21-00107-CV, 658 S.W.3d 633 (Tex. App.—Houston [14th Dist.] September 8, 2022, no pet.). Ruben Rodriguez and Frederick Okon sued the City of Houston (Houston) for personal injuries sustained when the vehicle they were travelling in was struck by a Houston police officer who was engaged in a high-speed vehicle pursuit. Houston filed a motion for summary judgment asserting immunity to the claims, which was denied by the trial court. Houston appealed. Generally, cities are protected by governmental immunity from personal injury lawsuits. Additionally, a governmental employee is entitled to official immunity for (1) performance of discretionary duties, (2) within the scope of the employee's authority, (3) if the employee is acting in good faith. Governmental and official immunity can be constitutionally or statutorily waived. Under certain circumstances, the Texas Tort Claims Act provides a limited waiver of immunity for damages arising from the operation of a motor-driven vehicle. In a police pursuit the officer acts in good faith if a reasonably prudent officer in similar circumstances could have believed that the need for the officer's actions outweighed a clear risk of harm to the public from those actions. After analyzing the instant fact pattern against good faith and risk factors, the court found that the need to engage in the high-speed pursuit was not reasonable considering the risk to the public and upheld the trial court's ruling.

Leach v. City of Tyler, No. 21-0606, 2022 WL 4283082 (Tex. Sept. 16, 2022). Leondra Leach alleged that an improperly secured board flew from a city truck and struck her and the truck she was driving. Leach's employer, who owned the vehicle Leach was driving, gave timely notice to the city of the $207.19 claim for minor damage to the vehicle, but the notice did not include claims related to personal injuries suffered by Leach individually. The city moved for summary judgment based on Leach's failure to comply with the pre-suit notice requirements found in the Texas Tort Claims Act (TTCA), and the trial court granted the motion. Leach appealed. The appellate court affirmed the trial court's ruling, determining that the notice given by Leach's employer was inadequate to convey to the city its "perceived peril" due to Leach's potential claim and was therefore inadequate notice under the TTCA.

On appeal, the Supreme Court reversed and remanded, holding that: (1) the claims notice form that Leach's employer filed with city was sufficient to satisfy the TTCA pre-suit notice; (2) personal injury action constituted proper notice to city of claim brought by Leach for purposes of the TTCA; and (3) the claims notice form was sufficient to satisfy city charter provision that required notice of tort claims within 30 days.

The City of Arlington v. Evans, No. 02-22-00160-CV, 2022 WL 5240524 (Tex. App.—Fort Worth Oct. 6, 2022, no pet.) (mem. op.). Evans sued the city for property damage and personal injuries that he claims resulted from a collision in which his vehicle was struck by a vehicle owned by the city. The city filed a plea to the jurisdiction in which it argued that the trial court lacked subject-matter jurisdiction because Evans failed to give the city timely formal notice of his claim as required by the Texas Tort Claims Act and because the city also lacked actual awareness that Evans claimed that he was injured in the accident. The trial court denied the city's plea to the jurisdiction.

The appellate court found that Evans did not provide the city with timely notice of his claim. The court determined that Evans's evidence, which he claims should establish actual awareness of his injuries at the time of the accident or when he was later arrested by an Arlington police officer, fails to support the conclusion that the city had timely actual awareness of Evans's injury claim. Additionally, the court found that the city did not have actual, subjective awareness of Evans's personal injury claim. Thus, the court reversed the trial court's order denying the city's plea to the jurisdiction and dismissed solely the portion of Evans's suit seeking personal-injury damages. The court did not dismiss the portion of Evans's suit seeking property damages.

City of Dallas v. Monroy, No. 05-22-00012-CV, 2022 WL 4363836 (Tex. App.—Dallas Sept. 21, 2022, no pet.) (mem. op.) Marco Anthony Monroy sued the city of Dallas after sustaining an injury while walking on a city sidewalk. His claim alleged his injury was caused by a hazardous condition that was a special defect, or alternatively, a premise defect. In response, the city filed a plea to the jurisdiction asserting immunity under the Texas Tort Claims Act (TTCA). After the trial court denied the city's plea, the city appealed the ruling on the grounds that Monroy was a licensee and the city had no prior knowledge of the dangerous condition and that the alleged hazardous conditions were not special defects. Reversing the trial court order denying the city's plea to the jurisdiction, the appellate court reasoned that the conditions—the raised concrete lip and hole on one side of the sidewalk—were not special defects akin to excavations or obstructions contemplated by the TTCA. In addition, Monroy failed to show any evidence the city had actual knowledge of the sidewalk's alleged dangerous condition at the time of his injury. In reversing the order, the appellate court also remanded the case to the trial court to consider Monroy's request for a continuance that had not been addressed at the city's plea to the jurisdiction hearing before the court ruled in his favor.

Cameron Cnty. v. Sossi, No. 13-21-00180-CV, 2022 WL 4374994 (Tex. App.—Corpus Christi–Edinburg Sept. 22, 2022, no pet.) (mem. op.). Sossi filed suit against Cameron County for personal injury and property damage arising from a crash that occurred when a county ranger driving in the bicycle lane struck his vehicle as he was turning left. The county filed a plea to the jurisdiction, claiming governmental immunity under the emergency-response exception to the Texas Tort Claims Act or official immunity. The trial court denied the plea and the county appealed.

The appellate court reversed and rendered, holding that the county was entitled to governmental immunity because the ranger was entitled to official immunity.

City of Houston v. Martha Vogel and Maria Escalante, No. 01-22-00071-CV, 2022 WL 16756378 (Tex. App.—Houston [1st Dist.] Nov. 8, 2022, no pet.) (mem. op.). Vogel and Escalante sued the City of Houston for injuries they received when their truck collided with an ambulance driven by an EMT employed by the city.

The city filed a motion for summary judgment, asserting that because the EMT driving the vehicle was responding to an emergency call, governmental immunity was not waived by the TTCA. The trial court denied the motion and the city appealed.

The appellate court reversed and rendered judgment for the city, holding that because the EMT was proceeding through an intersection with emergency lights and sirens activated in response to an emergency call when the collision occurred, the claim fell within the emergency-response exception to the TTCA's waiver of governmental immunity, so the trial court lacked subject matter jurisdiction over the claims.

City of Gainesville v. Sharp, No. 02-22-00061-CV, 2022 WL 11456903 (Tex. App.—Fort Worth Oct. 20, 2022, no pet.) (mem. op.). This is an interlocutory appeal of a trial court's order denying the City of Gainesville's plea to the jurisdiction on Sharp's premises liability claim.

Sharp sued the city for injuries she sustained on the Gainesville airport tarmac. Sharp and her instructor pilot landed their plane at the Gainesville airport to purchase fuel for the plane. Sharp deplaned onto the tarmac with a dog and began walking toward a grassy area where she allegedly tripped on an unmarked tie-down protruding from a depression in the ground. She fell sustaining serious and disabling injuries requiring surgical intervention.

Sharp brought a premises defect claim against the city under the Texas Tort Claims Act (TTCA). The city then filed a plea to the jurisdiction asserting it was immune from suit because Sharp was a licensee, not an invitee, and as a licensee she was unable to prove that the city had actual knowledge of an unreasonably dangerous condition. Sharp argued that by landing at the airport for the sole purpose of purchasing fuel, she paid for the use of the airport and was therefore an invitee. Sharp also argued that regardless of whether she was an invitee or a licensee, the overwhelming evidence established fact issues as to the challenged elements of her TTCA claim, which required the trial court to deny the city's plea. The trial court denied the city's plea, and the city appealed.

The appellate court held that because Sharp did not pay for the use of the premises, she was not an invitee. However, the court affirmed the trial court's ruling finding that Sharp has shown that there is a disputed material fact regarding whether the condition was unreasonably dangerous.

Morales v. Wilson Cnty., No. 04-21-00338-CV, 2022 WL 14656817 (Tex. App.—San Antonio Oct. 26, 2022, no pet.) (mem. op.). The plaintiff was in an accident with a county employee. The plaintiff sent a letter to the Texas Association of Counties as the insurer and the county notifying them of the accident within the period required by the Texas Tort Claims Act. The county filed a plea, arguing it did not have notice because it had no record of receiving the letter, which the trial

court granted. The appellate court reversed, finding that the county had actual knowledge through imputed knowledge to its liability carrier because the liability carrier had a duty to investigate and contact the county regarding the claim.

City of Houston v. Junior, No. 14-21-00128-CV, 2022 WL 15522096 (Tex. App.—Houston [14th Dist.] Oct. 27, 2022) (mem. op.). Jimmie Lee Jones, Jr. sued the City of Houston after a vehicle he was driving was struck by a vehicle being driven by Sergeant Kim of the Houston Police Department. Sergeant Kim was planning to initiate a traffic stop on another vehicle when he drove through a red light and struck Jones's car. In response to Jones's suit, the city filed a motion for summary judgment arguing that Sergeant Kim was entitled to official immunity. The trial court denied the city's motion, and the city appealed. A government employee is entitled to official immunity for their good faith performance of discretionary duties within the scope of the employee's authority. The city failed to conclusively establish that Sergeant Kim acted in good faith given that he was focused on the car ahead of him, did not look at the traffic light as he entered the intersection, failed to activate his sirens or lights, and did not brake or slow down as he entered the intersection; therefore, the appellate court affirmed the trial court's denial of the city's motion for summary judgment.

City of Houston v. McGriff, No. 01-21-00487-CV, 2022 WL 17684046 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, no pet.) (mem. op.). McGriff sued the City of Houston for negligence after she was injured when a freightliner driven by a city employee drifted into her lane and collided with the bus she was driving. The city filed a plea to the jurisdiction and a motion for summary judgment. The trial court denied both and the city appealed.

The appellate court affirmed, holding that because the emergency response exception to the Texas Tort Claims Act's waiver of immunity does not apply if the emergency may have been caused by the negligence of the person under inquiry, the city could not conclusively establish the sudden-emergency defense, so summary judgment was not appropriate.

City of El Paso Tex. v. Torres, No. 08-22-00058-CV, 2022 WL 17986197 (Tex. App.—El Paso Dec. 29, 2022, pet. filed). Maria Torres owned property on La Senda Drive in El Paso, Texas. The City of El Paso resurfaced an adjacent roadway, and following the road work, Ms. Torres' property flooded during a rainstorm. Water and mud entered her home, which she slipped on, fracturing her arm. She sued the city alleging that her property had been taken, damaged, or destroyed for public use as well as for personal injuries. The city filed a plea to the jurisdiction, asserting that Torres failed to state a viable taking claim and immunity from personal injury liability. The trial court denied the plea in its entirety. To state a viable takings claim, Torres needed to allege (1) an intentional act by the city acting under its lawful authority, (2) which resulted in the taking or damaging of property, (3) for public use. Analyzing the pleadings, the appellate court found that the city's road work was intended to change the flow of water on the roadways, which allegedly increased the intensity of water flowing to the Torres' home and resulted in significant damage to the property. Therefore, the appellate court found a property-pled takings claim and affirmed the trial court's dismissal of the city's plea on this ground. Regarding the city's claim of governmental immunity from the personal injury claims, the appellate court reversed the trial court's order. Torres claimed that the city's alleged negligent act which caused her personal injuries was the city's negligent design of the roadway. The Texas Tort Claims Act does not provide a waiver of

governmental immunity for discretionary design decisions. Because immunity is not waived for these claims, the appellate court reversed the trial court and dismissed the claims for personal injury.

Rattray v. City of Brownsville, No. 20-0975, 2023 WL 2438952 (Tex. Mar. 10, 2023). This is a Texas Tort Claims Act ("TTCA") case regarding property damage arising from the operation or use of motor driven equipment in which the Supreme Court of Texas reversed and remanded.

Homeowners brought a negligence action against the city alleging that the city's negligent use of motor-driven equipment to open and close sluice gates and to pump water resulted in stormwater accumulation that flooded their homes. The trial court denied the city's plea to the jurisdiction and the court of appeals reversed and remanded. The homeowners filed petition for review, which was granted by the Supreme Court of Texas.

The court determined that the gate was used to control water flow in the resaca, the city closed the gate, and it was the use of the gate that immediately preceded and allegedly caused the flooding. As a result, the court held that the sluice gate was put to "operation or use" within meaning of TTCA and the homeowners met their burden at motion to dismiss stage to create a fact issue on whether their property damage arose from city's closure of sluice gate.

Christ v. Tex. Dep't of Transp., No. 21-0728, 2023 WL 1871560 (Tex. Feb. 10, 2023). This is a premise liability case in which the Supreme Court affirmed the Court of Appeals decision.

Motorists injured as result of head-on collision in construction zone brought action against Texas Department of Transportation and others (collectively Department), alleging premises liability based on condition of construction zone. The trial court denied the Department's plea to the jurisdiction and no-evidence motion for summary judgment. The Department filed an interlocutory appeal. The appellate court reversed and dismissed for want of jurisdiction. The motorists' petition for review was granted.

The Supreme Court held that use of painted stripes and buttons to separate opposing lanes of traffic when engineer-sealed traffic control plan called for concrete barriers did not create an unreasonably dangerous condition that would allow the motorists to invoke waiver of sovereign immunity under the Texas Tort Claims Act.

City of Arlington v. Wesson-Pitts, No. 02-22-00326-CV, 2023 WL 415965 (Tex. App.—Fort Worth Jan. 26, 2023, no pet.) (mem. op.). Stacy Wesson-Pitts and Benard Pitts were involved in a car accident with another vehicle near an intersection of two streets. They sued the city alleging that the city was liable for their damages stemming from the car accident because the city had failed to properly maintain a yield sign near the intersection — a yield sign that had previously been located near the intersection but that was missing at the time of the accident. The city filed a plea to the jurisdiction, arguing that it was immune from the lawsuit. Following a hearing, the trial court denied the city's plea to the jurisdiction.

The city appealed, arguing that the trial court erred by denying its plea to the jurisdiction because: (1) its discretionary decisions as to whether and when to install a yield sign do not waive governmental immunity; and (2) it had no obligation to maintain or replace the yield sign because it neither owned nor exercised control over the sign.

The Court of Appeals determined that there was a fact issue as to whether the city had exercised control over the yield sign and knew of the dangerous condition posed by the missing yield sign but did not correct it within a reasonable time after notice. Accordingly, the court affirmed the trial court's ruling.

The City of Austin v. Amy-Marie Howard, No. 03-22-00439-CV, 2023 WL 1869645 (Tex. App.—Austin Feb. 10, 2023). While attempting to restrain a suspect, Dylan Woodburn, Austin Police Department Officer Patrick Spradlin's duty belt malfunctioned and came loose. During this time, the officer attempted to resecure his belt and the suspect escaped to a nearby restaurant and killed Johnathon Aguilar by stabbing him with a freshly sharpened knife a salesman left on the counter. Amy-Marie Howard sued the City of Austin, among others, under the Texas Wrongful Death Act and claimed the city's governmental immunity was waived under the Texas Tort Claims Act (TTCA) because Aguilar's death was proximately caused by the condition or use of tangible personal property, namely the duty belt. The city subsequently filed a plea to the jurisdiction, which the trial court denied. The appellate court, in reversing the trial court's order, concluded that: (1) the use or condition of Officer Spradlin's duty belt was too causally attenuated to Woodburn's stabbing of Aguilar and could not be considered the proximate cause of his death; and (2) it was not reasonably foreseeable that the officer's belt malfunctioning would cause Aguilar to suffer this type of harm.

The City of Edinburg v. Maribel Reyna, No. 13-22-00420-CV, 2023 WL 1831125 (Tex. App.—Corpus Christi–Edinburg Feb. 9, 2023, no pet.) (mem. op.). Reyna sued the City of Edinburg for injuries she received after she tripped and fell on a city-owned sidewalk, claiming the city was negligent in maintaining the sidewalk. The trial court denied the city's plea to the jurisdiction claiming governmental immunity and the city appealed.

The appellate court reversed the trial court's denial of the city's plea to the jurisdiction and dismissed the claim, holding that the TTCA did not waive the city's immunity for the suit because: (1) Reyna had knowledge of the sidewalk's defects; and (2) Reyna did not present evidence that the city had knowledge of the sidewalk's defects.

Pardo v. Iglesias, No. 14-22-00338-CV, 2023 WL 363024 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023, no pet.). Rafael Iglesias sued two police officers for damages stemming from an altercation at a night club. At the time of the incident, the police officers were off duty, but they were still in uniform while working security for the night club. The officers moved to dismiss the claims against them pursuant to the Texas Tort Claims Act (TTCA), but the trial court denied their motion. They appealed. Under the election of remedies section of the TTCA, if a suit for damages is: (1) brought against an employee of a governmental entity, (2) based on conduct within the employee's general scope of employment, and (3) the case could have been brought against the employer, then: (1) the suit is considered to be against the employee in their official capacity only, and (2) the employee must be dismissed from the suit. Police officers have a duty to stop crime

whenever it occurs; therefore, intervening in a fight at a night club would fall within a police officer's general scope of employment, even if the officer is off duty. Because the officers were employees of a city and were stopping a criminal act, they were immune from personal liability and should have been dismissed from the case. The appellate court reversed the trial court's order and dismissed the cases against the two officers.

***City of Wichita Falls v. Preston*, No. 02-22-00265-CV, 2023 WL 2033775 (Tex. App.—Fort Worth Feb. 16, 2023, no pet.) (mem. op.).** This is an interlocutory appeal on a plea to the jurisdiction under the Texas Tort Claims Act (TTCA).

Preston boarded one of the City of Wichita Falls's buses and was on her way to sit down when she fell and broke her right ankle. Preston sued the city for negligence under the TTCA, alleging that the city's bus driver had negligently operated the bus, thereby proximately causing Preston's injuries. The city filed a plea to the jurisdiction, arguing that the city's immunity had not been waived under the TTCA and relying on the recording of the incident by the bus's proprietary surveillance camera system. Preston countered the video with a sworn declaration, and the trial court denied the city's plea. The city filed an accelerated interlocutory appeal on two issues: (1) Preston's declaration failed to raise a fact issue to sufficiently controvert the city's video evidence of causation; and (2) there is no causal nexus between the bus's alleged negligent operation and Preston's injuries, relying on its video to support these arguments.

Because the video does not conclusively show that Preston's injuries were caused by another passenger's act, the court of appeals affirmed the trial court's order and remanded the case for further proceedings.

City of Houston v. Gonzales, No. 14-21-00482-CV, 2023 WL 2259766 (Tex. App.—Houston [14th Dist.] Feb. 28, 2023, no pet.) (mem. op.). In January 2016, while driving with his training officer, Houston Police Department probationary peace officer Daniel Iwai collided with the rear bumper of another vehicle while responding to a priority-two call for assistance. Jonathan Gonzalez, who was in the other vehicle, sued the city for injuries he sustained in the collision and was awarded $250,000 at the conclusion of trial. Houston raised several issues on appeal, but the only one reached by the court was regarding an abuse of discretion by the trial court for not dismissing the case for lack of jurisdiction. Generally, cities have immunity from liability and lawsuits unless that immunity has been waived. The Texas Tort Claims Act provides a limited waiver of governmental immunity for torts committed by city employees "acting within the scope of their employment" arising from the operation or use of motor-driven vehicles under certain circumstances. However, an exception to this waiver exists when a city employee is responding to an emergency. Houston argued that it established the emergency response exception and that Mr. Gonzalez failed to present evidence that Officer Iwai was responding to an emergency. The court agreed, dismissed the case for lack of jurisdiction, and reversed the trial court's judgment.

City of Houston v. Fisher, No. 14-21-00573-CV, 2023 WL 2322971 (Tex. App.—Houston [14th Dist.] Mar. 2, 2023, no pet.) (mem. op.). Officer Pinkney of the Houston Police Department was involved in a car crash with Fisher while on duty. Pinkney admitted the crash was his fault as he was distracted while trying to put on his seatbelt. Fisher filed a lawsuit against the city alleging negligence, negligence per se, and gross negligence. The city claimed governmental immunity,

arguing that Officer Pinkney was not acting within the scope of his employment during the crash. Fisher responded that a limited waiver of immunity applies as Officer Pinkney was an on-duty officer at the time of the collision. The trial court denied the city's plea to the jurisdiction, leading the city to file a timely notice of interlocutory appeal. The Texas Tort Claims Act provides a limited waiver of governmental immunity if certain conditions are met. The city argued that the trial court should have granted its plea to the jurisdiction as Officer Pinkney was not acting within the scope of his employment during the accident since he was returning from lunch and had not yet performed any official duties. The court examined what the police officer was doing and why he was doing it, considering the connection between the employee's job duties and the alleged tortious conduct. As a patrol officer, Pinkney's responsibilities resumed once he got back to his patrol car. The court could not conclude that the city had rebutted the presumption that Officer Pinkney was acting within the scope of his employment at the time of the crash; therefore, the court rejected the City's contentions and affirmed the trial court's order denying the city's plea to the jurisdiction.

***City of Houston v. Houston Metro Sec.*,** No. 01-22-00532-CV, 2023 WL 2602520 (Tex. App.—Houston [1st Dist.] Mar. 23, 2023, no pet.) (mem. op.). Houston Metro Services (HMS), a private security company providing security services in high-crime areas, sued the City of Houston for tortious interference with contract, negligence per se, negligent training and supervision, conspiracy, and ultra vires after HMS lost its contract to provide security at an apartment complex. HMS alleged that the police department wrongfully failed to arrest certain individuals apprehended by HMS and transmitted expunged criminal records of the owner of HMS. The city filed a motion to dismiss, claiming governmental immunity. The trial court denied the motion and the city appealed.

The appellate court reversed, holding that: (1) HMS's various negligence claims did not implicate the TTCA's waiver of immunity; (2) the TTCA does not waive immunity for intentional torts; and (3) an ultra vires claim could be brought only against a government actor in his official capacity, not against the city.

***City of Houston v. Nicolai*,** No. 01-20-00327-CV, 2023 WL 2799067 (Tex. App.—Houston [1st Dist.] Apr. 6, 2023, no pet.) (en banc op.). The Nicolais sued the City of Houston after their daughter was killed in a crash while being transported in a police car to a sobering center with her hands handcuffed and no seatbelt on. The trial court denied the city's motion for summary judgment, and the city appealed. The appellate court held that the officer was entitled to official immunity because in driving Caroline Nicolai to the sobering center, she was acting within the scope of her authority, performing a discretionary duty, and acting in good faith. Because the officer would have been entitled to official immunity, the TTCA does not waive the city's governmental immunity and the trial court lacked subject matter jurisdiction over the claims. The appellate court reversed and rendered judgment for the city, and Nicolais moved for en banc reconsideration.

On *en banc* reconsideration, the appellate court affirmed the judgment of the trial court and reversed the judgment of the appellate court, holding that although choosing to take Caroline to the sobering center was a discretionary act, the act of driving may have been a ministerial act, so the city had not established the officer's official immunity as a matter of law.

***City of Groves v. Lovelace*,** No. 09-21-00281-CV, 2023 WL 2533188 (Tex. App.—Beaumont Mar. 16, 2023) (mem. op.). The Lovelaces sued the City of Groves when a tree fell on Scott Lovelace, injuring him and causing his son, a bystander, shock, and anguish. The tree was in the city's right-of-way on property owned by the Lovelaces' neighbor. The city filed a plea to the jurisdiction claiming governmental immunity. The trial court denied the plea, and the city appealed.

The appellate court reversed, holding that: (1) the claims were properly characterized as a premises defect claim rather than a special defect claim; and (2) the Lovelaces had not established a genuine issue of material fact as to whether the city had actual knowledge of the tree's dangerous condition as required for a waiver of immunity on a premises defect claim.

Garcia v. Guerra, No. 13-21-00166-CV, 2023 WL 2607729 (Tex. App. —Corpus Christi–Edinburg Mar. 23, 2023, no pet.) (mem. op.). Garcia sued Guerra, the city manager of Pharr, Texas, for slander and intentional infliction of emotional distress, and sued the City of Pharr for wrongful termination. The trial court severed the claims against the city from the claims against Guerra, dismissed the claim against the city, and dismissed with prejudice the claims against Guerra individually. Garcia appealed the dismissal of his claims against Guerra.

The appellate court affirmed, holding that because Guerra was acting within the scope of his employment when he made the allegedly slanderous statements, the TTCA forecloses suit against him in his individual capacity.

City of Houston v. Cardenas, No. 14-21-00732-CV, 2023 WL 2808044 (Tex. App.—Houston [14th Dist.] Apr. 6, 2023, no pet.) (mem. op.). Cardenas sued the City of Houston for injuries sustained after falling through an unsecured water meter box opening, alleging negligence and breach of duty of care. The city claimed governmental immunity, arguing they had no prior knowledge of the issue and filed a motion for summary judgement, which the trial court denied. Houston appealed, contending that the trial court wrongly denied its motion for summary judgment, as it did not have any notice of the alleged dangerous condition of the water meter box lid at the time of the incident. Under the Texas Tort Claims Act (TTCA), a governmental unit may be held liable for personal injury or death caused by a condition or use of tangible property if it would be liable as a private person. The parties agree that Houston owed Cardenas the same duty a private person owes to a licensee; therefore, Houston would need to have actual knowledge of the defect to be liable. The city presented evidence that it lacked actual knowledge of any defect or issue with the water meter box or its lid before the incident, which Cardenas argued against. Ultimately the court disagreed with Cardenas, concluding that Cardenas failed to raise a fact question as to whether the City of Houston had actual knowledge of any dangerous condition involving the water meter box at the judgement and rendered judgement dismissing the claims against the city.

City of Cleveland v. Macie Martin LaFrance and Penny Martin, 09-20-00189-CV, 2022 WL 2068858 (Tex. App – Beaumont, June 9, 2022, no pet.) (mem. op.). In this appeal from a trial court's denial of the city's plea to the jurisdiction and no evidence summary judgment, the city appealed that governmental immunity has not been waived because it either did not control the area where the injury occurred or that it did not have knowledge of the defect which caused the

injury. The Ninth Court of Appeals affirmed the trial court's judgment because there was no evidence presented by the City that negated the issues of control or knowledge of defect presented by the plaintiff.

The plaintiff sued the city after the plaintiff was electrocuted by an outlet in a concession stand during the city's livestock show. The plaintiff sued due to an electrical defect in the outlet that caused the injury and argued that the city had knowledge of the defect and that the defect caused an unreasonable risk of harm. The city filed a plea to the jurisdiction and a no evidence motion for summary judgment arguing that: (1) the plaintiff was contributorily negligent; (2) that it did not have control of the concession stand; (3) that the recreational use statute applied; and (4) it had no knowledge of the defect. The trial court denied the city's plea to the jurisdiction and no evidence summary judgment, and the city appealed.

Immunity is waived if a governmental entity causes personal injury or property damage with the use of tangible personal property or through premises defect on the property of the governmental entity. TEX. CIV. PRAC. & REM. CODE § 101.021. The Texas Recreational Use Statute limits an entity's liability as a premises owner if the plaintiff engaged in recreation on the premises at the time of the injury. TEX. CIV. PRAC. & REM. CODE §§ 75.001-.007. To waive governmental immunity for a premises defect, if the recreational use statute does not apply, the plaintiff has to show that: "(1) a condition of the premises created an unreasonable risk of harm to the plaintiff; (2) the governmental unit actually knew of the condition; (3) the plaintiff did not actually know of the condition; (4) the governmental unit failed to exercise ordinary care to protect the plaintiff from danger; and (5) the governmental unit's failure was a proximate cause of the injury to the plaintiff." If the recreational use statute applies, the entity owes the user only the duty to not injure the user willfully, wantonly, or through gross negligence. However, the recreational use statute did not apply in this case because working in a concession stand, even if the concession stand is associated with a recreational activity, is not "recreation" under the definition in the recreational use statute. To prevail on a plea to the jurisdiction, the entity must show as a matter of law that it did not owe a duty of care as a matter of law. *Tirado v. City of El Paso*, 361 S.W.3d 191, 196 (Tex. App. —El Paso 2012, no pet.). To negate jurisdictional facts presented by a plaintiff, the entity must present evidence that negates an essential jurisdictional fact. In this case, the Court of Appeals held that the entity did not adequately prove that it did not owe a duty of care, that it was not in control of the concession stand at the time of injury or that it did not know about the defect, and thus the court upheld the trial court's denial of the plea to the jurisdiction and no evidence summary judgment.

The court of appeals affirmed the trial court's judgment because the entity did not provide evidence negating the jurisdictional facts pled by the plaintiff.

***Brooks County v. Maria Armandina Buensrostro*,** 2022 WL 3638248, No. 04-21-00132-CV (Tex. App.---San Antonio Aug. 24, 2022, no pet.) (mem. op.). In this appeal from a trial court's denial of the county's plea to the jurisdiction based on a tort claim, the San Antonio Court of Appeals reversed and rendered because the plaintiff had not provided sufficient evidence that the injuries sustained during arrest raised a negligence claim under the Texas Tort Claims Act.

The plaintiff sued the county after she sustained injuries during an arrest. During the plaintiff's arrest she claimed she was injured by handcuffs that were placed too tightly and was injured by repeated tazings. The plaintiff sued for negligent use of the taser and handcuffs under the Texas Tort Claims Act. In addition, the plaintiff alleged that the county negligently trained, supervised, and implemented its policies related to these activities. The county filed a plea to the jurisdiction arguing that it was immune from suit because any action was intentional. The trial court denied the county's plea to the jurisdiction and the county appealed.

To plead a tort claim under the Texas Tort Claims Act, the plaintiff has to show that the county (employee) negligently injured the plaintiff with tangible personal property. TEX. CIV. PRAC. & REM. CODE §§ 101.021; 101.057(2). An intentional action, such as an arrest, is exempted from a claim under the Texas Tort Claims Act. *Id.*; *City of Watauga v. Gordon*, 434 S.W.3d 586, 594 (Tex. 2014). In addition, a claim of negligent supervision is not sufficient to raise under a claim under the Torts Claim Act where it is not based on activity that has already waived immunity. *City of Garland v. Rivera*, 146 S.W.3d 334, 337-38 (Tex. App.—Dallas 2004, no pet.); *Strode v. Tex. Dep't. of Crim. Justice*, 261 S.W.3d 387, 391 (Tex. App.—Texarkana 2008, no pet.). The Court of Appeals reversed and rendered on the trial court's denial of the plea to the jurisdiction, and held that the city's immunity was not waived.

The court of appeals reversed the trial court's denial of the plea to the jurisdiction and dismissed the suit for lack of jurisdiction because the county's immunity was not waived.

Renee Kirchoff Chapa, et al. v. Wyatt Ranches of Texas, LLC, No. 04-22-00589-CV, 2023 WL 3328195 (Tex. App.—San Antonio May 10, 2023, no pet.) (mem. op.). Wyatt Ranches sued Chapa, a county commissioner, and the county for trespass, negligence, and inverse condemnation when the county cut down trees on the Ranches' property at the direction of Chapa, contending none of the trees obstructed or otherwise impeded the right-of-way. The county and Chapa filed a plea to the jurisdiction, which the trial court denied.

On appeal, the Court found that: (1) Wyatt Ranches had alleged an injury from the use of motor-driven equipment under the Tort Claims Act by demonstrating proximate cause; (2) Wyatt Ranches' trespass claim was barred by the intentional tort exception; and (3) the inverse condemnation claim failed because Wyatt Ranches failed to allege the county acted with specific intent to take the property for public use.

City of El Paso v. Cangialosi, No. 08-22-00155-CV, 2023 WL 2904594 (Tex. App.—El Paso Apr. 11, 2023, no pet.) (mem. op.). In March 2016, a car driven by suspected burglars Aaron Roacho and Jacob Sanchez, followed by unmarked and marked police vehicles, collided with the car of Joanna Cangialosi at an intersection in El Paso, Texas. The crash resulted in the death of Annette Martinez, and injuries to Cangialosi and her infant daughter. The city of El Paso attempted to argue for governmental immunity, stating that the officers were not personally liable as they were protected by official immunity and that the accident was due to Roacho's actions, not the police pursuit. The trial court denied this plea to jurisdiction, maintaining that there was a sufficient link between the police pursuit and the accident. El Paso filed a second plea, providing officers' affidavits and an expert report arguing that the officers' actions were necessary and reasonable given the circumstances. The trial court denied this plea as well, leading to the current appeal.

El Paso claimed immunity from plaintiffs' claims under the Texas Tort Claims Act (TTCA), arguing that the emergency and intentional tort exceptions applied. The court found that the plaintiffs had raised a fact issue as to whether a city officer violated an El Paso ordinance by speeding in response to an emergency without sounding an audible signal. The officer's decision to speed without a siren in the context of heavy traffic made his actions potentially unreasonable, creating a fact question and preventing dismissal of the case. The court also found the intentional tort exception inapplicable because the plaintiffs' claims stem from alleged negligence, not intentional tortious conduct by the officers. Ultimately, the appellate court affirmed the trial court's denial of El Paso's plea to the jurisdiction.

Massey v. El Paso, Tex. City Attorney's Office, No. 08-22-00090-CV, 2023 WL 3138087 (Tex. App.—El Paso Apr. 27, 2023, no pet.) (mem. op.). Gus Massey Jr. filed a *pro se* complaint against the El Paso City Attorney's Office in small claims court, alleging a civil rights violation and the loss of $19,250 worth of items due to an encounter with a police officer. The city challenged his standing to sue and his failure to demonstrate a waiver of immunity, also claiming Massey failed to comply with pre-suit notice requirements. The initial trial court upheld the city's plea. Massey then appealed to the County Court, which also ruled it did not have jurisdiction, leading to the dismissal of Massey's claim. Once again, Massey appealed, arguing that the city's immunity was waived under the Texas Tort Claims Act (TTCA). The TTCA permits claimants to sue the state or other government units through a limited waiver of governmental immunity. However, Massey did not cite the TTCA or explain how governmental immunity was waived. Instead, his pleadings only allege an intentional tort of assault, which the Act does not cover. Consequently, the trial court's ruling was affirmed.

LAND USE

City of Jarrell v. BET E. P'ship No. 3, Ltd., No. 03-21-00651-CV, 2023 WL 2588567 (Tex. App.—Austin Mar. 22, 2023). BET sued the City after it failed to provide services within the time frame provided in a development agreement. The City filed a plea to the jurisdiction and the trial court denied the plea. The City appealed.

The City of Jarrell (the "City") and Be Theon East Partnership ("BET") entered into a Development Agreement (the "Agreement") concerning undeveloped property that BET owned near the intersection of Ronald Reagan Boulevard and Interstate 35 (I-35) in Williamson County (the "Project"). BET agreed to voluntarily annex the property to the City, and the City agreed to provide water and wastewater services to the property (the "Provision"), and to waive its governmental immunity regarding the Agreement. The Agreement stated that, "In the event the doctrine of governmental immunity is ever held to apply… such governmental immunity is expressly waived." Pursuant to the Provision, the City agreed to provide services within three years of the Project. The City did not provide the services and BET sued the City. BET sought specific performance of the Agreement or, alternatively, damages. BET also sought declaratory judgment under chapter 245 of the Texas Local Government Code to establish the City's obligations under the Agreement. *See* TEX. LOC. GOV'T CODE §§ 245.001–.006. BET argued that the project had been completed for over three years and that the City had breached the Agreement by not complying with the Provision or, alternatively, that the City's promises in that provision were enforceable by promissory estoppel. The City answered and filed a plea to the jurisdiction, arguing

that BET's claims were: (1) barred by immunity, (2) that providing water and wastewater services were discretionary governmental functions, (3) that chapter 245's waiver of immunity did not apply to BET's claims, that promissory estoppel did not apply, and (4) that BET's claims were not yet ripe.

The court of appeals held that there was insufficient evidence of the court's jurisdiction for BET's Chapter 245 claim. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004), The court of appeals further held that there was sufficient evidence to waive governmental immunity on the contract claim because the development agreement is a contract for goods or services under Chapter 212 of the Texas Local Government Code. TEX. LOC. GOV'T CODE § 212.172. Consistent with the waiver of immunity in section 212.172, the court ruled that the Agreement included the City's express agreement that its governmental immunity was waived. As far as BET's promissory estoppel claim, BET argued that it relied on the Agreement to its detriment and injustice could only be avoided by enforcing the City's promise. BET argued that it had an alternative option (annexing to a different municipality), but instead BET voluntarily annexed the property to the City relying on the Agreement that the City would comply with the Water and Wastewater Provision. The Court ruled that these allegations were sufficient to invoke the promissory estoppel claim. As such, the court overruled the trial court's judgment on the issue of promissory estoppel. Finally, the court of appeals held that the claim was ripe because there was sufficient information that the injury was likely to occur. *Patterson v. Planned Parenthood of Hous. & Se. Tex.*, 971 S.W.2d 439, 442 (Tex. 1998). (quoting *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000).

The court of appeals reversed and remanded the portion of the trial court's order denying the City's plea to the jurisdiction as to BET's claim that it brought under chapter 245 of the Texas Local Government Code. The court affirmed the remainder of the trial court's order denying the plea to the jurisdiction as to the other claims.

The City of Dallas v. Millwee-Jackson Joint Venture and Stephen M. Millwee, No. 05-20-00611-CV, 2023 WL 1813499 (Tex. App.—Dallas Feb. 8, 2023). Stephen M. Millwee sued the city of Dallas after it began development of an arena project, which included abandoning and demolishing a street (Alamo Street) in which Millwee had an easement and construction that resulted in blocking access to and occupying portions of his property. In his lawsuit, Millwee sought an injunction pursuant to Civil Practice and Remedies Code Section 65.015 for the city's street closure, a declaratory judgment, and claims for inverse condemnation. Following a bench trial, the court denied Millwee's inverse condemnation claim and combined his declaratory judgment claim with its final judgment granting relief on his section 65.015 claim. In its final judgment, the court ordered the city to either open the street at issue and maintain it as a public street or compensate Millwee through a condemnation suit for the taking of his property rights caused by the city's abandonment of the street.

The city appealed, challenging: (1) the court's subject matter jurisdiction to enter the permanent injunction, claiming Millwee lacked standing where evidence was insufficient to show a concrete injury; (2) the legal basis for the permanent injunction where Millwee failed to show evidence of a wrongful act by the city; and (3) the court's granting of a partial summary judgment on the

declaratory judgment claim under Local Government Code Section 245.0002(a), which concluded that the boundaries drawn in a 2001 FEMA 100-year floodplain applied to Millwee's property.

Affirming the trial court's judgment, the court of appeals first addressed the city's subject matter jurisdiction concluding that because Millwee properly alleged that he owned land abutting Alamo Street, the city closed the street, and as a result, his property could no longer be developed, and he did not acquiesce or receive compensation from the city, Millwee had standing under Civil Practice and Remedies Code Section 65.015. Additionally, the court determined that the evidence at trial was sufficient to show Alamo Street remained closed and the city failed to offer Millwee compensation constituting a wrongful act, which supported the trial court's decision in granting injunctive relief. Lastly, the court agreed that Millwee, by offering substantial evidence of an original 1983 application for a permit to develop the property commercially, was entitled to a summary judgment order declaring which floodplain map would govern the development of his property pursuant to Local Government Code Section 245.0006(a) and thereby determining which regulations would guide the measure of damages if any were to be awarded.

Regarding Millwee's cross appeal challenging the trial court's denial of his inverse condemnation claim, the court of appeals declined to address the substantive merits reasoning that Millwee had already been granted a superior recovery by the trial court in ordering the city to either reopen and maintain the street at issue or to initiate a condemnation suit to compensate him for the street closure.

City of Corpus Christi v. City of Ingleside, No. 13-20-00513-CV, 2022 WL 2163878 (Tex. App.—Corpus Christi–Edinburg June 16, 2022, pet. denied) (mem. op.). The City of Ingleside sued the City of Corpus Christi for a declaratory judgment that Ingleside was permitted to exercise jurisdiction over and tax wharves, piers, docks, and similar man-made structures that: (1) originate on certain land which is either within Ingleside's city limits or is within its extra territorial jurisdiction; and (2) project into adjacent waters of Nueces Bay and Corpus Christi Bay. The trial court granted Ingleside's motion for summary judgment and Corpus Christi appealed.

The appellate court affirmed, holding that because the structures are connected to the mainland located in Ingleside, they are under Ingleside's jurisdiction.

City of Dallas v. Trinity E. Energy, LLC, No. 05-20-00550-CV, 2022 WL 3030995 (Tex. App.—Dallas Aug. 1, 2022, pet. filed) (mem. op.). The city of Dallas appealed a judgment that awarded Trinity East Energy damages because of the city failing to approve special use permits (SUPs) necessary for drilling gas wells in the city resulting in a regulatory taking of its rights to produce minerals under oil and gas leases within the city. The city argued the evidence at trial was insufficient to support a finding of a regulatory taking because although the city denied Trinity's SUPs, this did not deprive Trinity of all beneficial use of its property as it had other drill sites from which it could have accessed. In addition, Trinity could have drilled on sites that it already had SUPs for or sought SUPs for other sites within the city. However, the court of appeals affirmed the trial court's judgment reasoning that the evidence presented could have led a factfinder to reasonably believe that none of the other drill sites were viable or feasible for economically developing Trinity's mineral property. In addition, the court concluded the evidence supported the jury's finding of the fair market value of Trinity's property before and after the denial of the SUPs.

Laza v. City of Palestine, No. 06-18-00051-CV, 2022 WL 3449819 (Tex. App.—Texarkana Aug. 18, 2022, pet. reh'g filed) (mem. op.). The city sued Laza for violating various city ordinances, including substandard building and junked vehicle ordinances, and a jury found in favor of the city. Laza appealed pro se. The appellate court affirmed the trial court's and jury's findings and rejected Laza's arguments because: (1) the trial court had jurisdiction to enter judgment and post-judgment orders; (2) the trial court did not err in denying Laza's Rule 12 motion to show authority; (3) Laza procedurally waived any complaints regarding the trial court's denial of his special exceptions; (4) Laza failed to preserve his claimed jury charge error; (5) the motion to recuse was properly denied; and (6) there was no basis on which to vacate the judgment.

Diamond Envtl. Mgmt., L.P. v. City of San Antonio, No. 04-21-00058-CV, 2022 WL 4359085 (Tex. App.—San Antonio Sept. 21, 2022, pet. filed) (mem. op.). The appellate court previously decided this case but withdrew its prior opinion and adopted this one. In 2013, the city entered into a development agreement with Diamond for Diamond to delay annexation. In 2019, the city: (1) notified Diamond that it had breached the agreement; (2) notified the relevant emergency services districts that also served Diamond's property; and (3) passed an ordinance to annex Diamond's property. The emergency services districts and Diamond sued the city, and the city filed a plea to the jurisdiction, which the trial court granted.

In affirming the grant of the plea, the appellate court: (1) found Diamond lacked standing; (2) found that the city's pre-annexation notice to the emergency services district satisfied the statute's requirements; (3) rejected the emergency services districts' argument that the development agreement or the ordinance created a permit because the ordinance is exempted from the state law governing permits and the development agreements did not freeze any land use regulations; (4) rejected the argument that even if the landowners breached the development agreements, the development agreements are void because the city failed to offer development agreements in compliance with state law; and (5) rejected the emergency services districts' argument that the Uniform Declaratory Judgment Act waived the city's immunity.

Shannon v. Blair, No. 04-21-00257-CV, 2022 WL 4492801 (Tex. App.—San Antonio Sept. 28, 2022, no pet.) (mem. op.). The plaintiff sued the city in a class action seeking a declaratory judgment that the city's ordinance requiring property owners to keep their properties and abutting alleys free of garbage and overgrown brush was invalid and that she is not an "owner" of the alley. The city filed a plea to the jurisdiction on the grounds of governmental immunity and lack of standing, which the trial court denied. The city appealed.

In reversing the trial court, the appellate court found that: (1) the city did not provide sufficient evidence to show that the plaintiff did not have standing; (2) the city did not provide sufficient evidence that the claim was unripe; (3) the city's broad discretion in enforcement of its ordinance was protected by governmental immunity against the plaintiff's declaratory claim based on ultra vires actions of sending notices that it may enforce its ordinance requiring maintenance of the alleys; and (4) the plaintiff's claims that she is not the owner of the alley was a restatement of her other ultra vires claim against the city and the city maintained its governmental immunity. The appellate court denied the plaintiff's request to replead because the city would be entitled to governmental immunity even if plaintiff was given the opportunity.

Blue Window Cap., LLC v. City of Dallas, No. 05-22-00042-CV, 2022 WL 9765467 (Tex. App.—Dallas Oct. 17, 2022, no pet.) (mem. op.). The city of Dallas sued Blue Window Capital, LLC (Blue Window) after issuing public health and safety ordinance violations at three properties owned by Blue Window. After Blue Window failed to make necessary repairs in compliance with city ordinances, the city sought temporary and permanent injunctions, civil penalties, and requested that the court appoint a receiver to take control of the properties. After appointing a court representative to assist Blue Window in remedying the infractions and ordering Blue Window to deposit funds into an escrow account to fund the required materials and repairs, Blue Window failed to comply with the court's orders. The court then granted the city's motion for supplemental receivership authority, appointing a receiver under Chapter 64 of the Texas Civil Practice and Remedies Code and Local Government Code Section 214.003. In its order, the court determined the receiver was necessary because "Blue Window (1) failed to abate Dallas City Code violations, (2) failed to implement reasonable security measures on the properties, (3) violated the court's orders of November 20, 2020, February 3, 2021, May 3, 2021, and June 30, 2021, and (4) lacked sufficient funds to operate the property legally." Blue Window subsequently filed a motion to set aside the order, but it was later denied. Blue Window appealed arguing the court abused its discretion by appointing a receiver based on reports of crime at the properties. Rejecting this claim, the appellate court concluded that an increase in crime was not the reason for appointing a receiver. Rather, the trial court's ruling was based on Blue Window's failure over three years to comply with court orders, pay for repairs, complete necessary maintenance, and to install security cameras. As a result, the appellate court affirmed the trial court's order appointing a receiver for the properties.

City of El Paso v. Varela, No. 08-21-00116-CV, 2022 WL 14485863 (Tex. App.—El Paso Oct. 25, 2022, pet. filed). Luis Varela owned a property in El Paso that had been damaged by fire. The City of El Paso through its Building and Standards Commission held a hearing, finding the structure to be a dangerous structure that constituted a health hazard, and ordering the building to be secured and remediated by Mr. Varela. This Demolition Order also ordered demolition of the structure by the city if the other requirements were not met. Ultimately, Mr. Varela failed to remediate the structure according to the order, and the city notified him of its intent to demolish the structure. Mr. Varela filed suit to enjoin the demolition, among other things, and the trial court issued a temporary restraining order ("TRO"). The city responded with a plea to the jurisdiction and a motion to dissolve the TRO. The trial court denied the city's plea, issued a TRO, ordered the city to issue a building permit to allow remediation to begin, and set a trial date. The city appealed. As a threshold issue in its appeal, the city argued that Mr. Vela failed to demonstrate that the trial court had jurisdiction over the case at all, because he failed to appeal the Demolition Order within 30 days, as required by Texas statute. Without timely appealing the underlying order, Mr. Vela's present suit was an unpermitted collateral attack on the Demolition Order, which he failed to directly appeal. Ultimately, the appellate court ruled that the trial court had no jurisdiction over the case and reversed the trial court's order.

City of Patton Vill. v. Concerned Citizens Against Wrongful Annexation by Patton Vill., No. 09-21-00368-CV, 2022 WL 16640620 (Tex. App.—Beaumont Nov. 3, 2022, pet. denied.) (mem. op.). Concerned Citizens, a coalition of property owners, sued the City of Patton Village challenging the validity of two ordinances annexing territory that included the property they now own, one from 1992 and one from 2004. Concerned Citizens argued that the ordinances were void and that

the city's imposition of taxes and fees on the property constituted a constitutional and statutory taking. The city filed a plea to the jurisdiction which the trial court denied, and the city filed an interlocutory appeal.

The appellate court reversed the denial of the city's plea to the jurisdiction and rendered judgment dismissing the case. The court held that the ordinances were not void because the law does not require the territory annexed to be described by metes and bounds and that the evidence showed that, contrary to Concerned Citizens' claim, the described boundaries of the annexed territory formed a closure. Because the ordinances were not void, Concerned Citizens' claims were barred by various applicable statutes of limitation. Further, the jurisdictional evidence showed that Concerned Citizens failed to establish that the legislature waived the city's immunity on their takings claim. Finally, because none of the plaintiffs owned their property at the time the ordinances were passed, they all lacked standing to sue.

5826 Interests, Ltd. v. City of Houston, No. 14-21-00682-CV, 2022 WL 16645503 (Tex. App.—Houston [14th Dist.] Nov. 3, 2022, no pet.) (mem. op.). 5826 Interests, Ltd. operated an unpermitted sexually oriented business ("Bunny's") at a 6213 Richmond Avenue in Houston, Texas. The city received many complaints of criminal activity around the Bunny's location. After investigating Bunny's, the city filed suit seeking a declaration that no one could receive a permit to operate a sexually oriented business at that location due to its proximity to schools and churches. The city also sought a temporary restraining order against the owners from operating any business at this location. The trial court issued the TRO, and the owners appealed. The appellate court held that the trial court did not abuse its discretion when issuing the TRO and affirmed the lower court's ruling.

Torres v. Cameron Cnty., No. 13-20-00568-CV, 2022 WL 17844210 (Tex. App.—Corpus Christi–Edinburg Dec. 22, 2022, pet. denied) (mem. op.). Torres built a fence within a couple of feet of a Harris County road, and the county sued for a declaration that the fence obstructed the road. The trial court declared that the road was properly in the area that had been expressly dedicated to the county and ordered Torres to remove all obstructions with the county's 60-foot right-of-way. Torres appealed, claiming judgment not in conformity with the pleadings and legal and factual insufficiency.

The appellate court affirmed, holding that: (1) the written judgment controls over prior oral statements by the judge and the written judgment was in conformity; and (2) the county did present legally and factually significant evidence that the area had been expressly dedicated to the county.

Jarnail Sihota and GTHCC, Inc. v. City of Midland, No. 11-21-00171-CV, 2022 WL 17996996 (Tex. App.—Eastland Dec. 30, 2022,) (mem. op.). After the city of Midland issued an order declaring Jarnail Sihota's building to be substandard and requiring abatement action, Sihota obtained a building permit to begin making repairs. Several months later, the building repairs had not been completed so the city notified Sihota of its intent to demolish the building in accordance with the abatement order. As a result, Sihota sought emergency relief pursuant to the Texas Uniform Declaratory Judgment Act, and the city filed a plea to the jurisdiction claiming Sihota failed to timely appeal the abatement order as required by Local Government Code Section 214.0014 and claiming governmental immunity. Following a hearing, the trial court granted the

city's plea, and Sihota appealed, arguing the court should have invoked its equitable jurisdiction and estopped the city from the demolition because Sihota believed he had more than thirty days to complete the repairs and had invested $1.8 million on the project. In affirming the trial court's order, the appellate court concluded that because Sihota failed to timely appeal the abatement order, the trial court was precluded from reaching a determination on the estoppel argument because it lacked subject matter jurisdiction.

Creative Chateau, LLC v. City of Houston, No. 01-21-00327-CV, 2023 WL 162741 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023.) (mem. op.). The City of Houston sued Creative Chateau after Creative Chateau operated a photography business out of a property in violation of the applicable deed restrictions. The trial court granted the city's motion for summary judgment and granted a permanent injunction to prohibit Creative Chateau from operating the business out of the property, and Creative Chateau appealed.

The appellate court affirmed the trial court's grant of the city's motion for summary judgment, holding that: (1) because Creative Chateau's evidence was filed with the court by a non-attorney, it was incompetent and could not be considered by the trial court; (2) where the deed restrictions expressly prohibited the operation of a business out of the property, operating the photography business was a substantial violation of the deed restrictions; and (3) a change in circumstances after the trial court's initial order does not qualify as newly discovered evidence to support a motion for a new trial.

Martinez v. Northern., No. 01-22-00435-CV, 2023 WL 162743 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023.) (mem. op.). Martinez and two neighborhood associations sued various city officials and entities, including the City of Houston, the City of Houston Housing Authority, and the City of Houston Planning Commission to enjoin the development of certain affordable housing, alleging that the city granted zoning variances to the affordable housing development in violation of the city's zoning ordinances. The trial court granted the city's plea to the jurisdiction and Martinez appealed.

The appellate court affirmed the trial court's judgment of dismissal, holding that the city and city officials were protected by governmental immunity because: (1) the waiver of immunity in the Uniform Declaratory Judgment Act did not apply because the claims did not challenge the validity of Houston's zoning ordinance; and (2) the city officials had not acted ultra vires because the grant or denial of a variance was within their discretion.

Benser v. Dallas Cnty., **No. 05-21-00725-CV, 2023 WL 2661255 (Tex. App.—Dallas Mar. 28, 2023) (mem. op.).** Apex Financial Corporation (Apex) owned a piece of property with a vacant structure in the city of Dallas. When the structure fell into disrepair and the property was unkept, the city assessed maintenance liens and sought a court order requiring Apex to address the substandard building. After a public hearing, the court ordered Apex to demolish the structure within 30 days. When Apex failed to do so, the city obtained an order permitting the city to demolish the structure, which it later did. During this time, Apex's property taxes became delinquent, and Dallas County and the city (the taxing authorities) sued to collect the accrued taxes and to foreclose on maintenance liens for the cost of upkeeping the property and demolition of the vacant structure. In 2016, the court entered a default judgment against Apex, but the taxing

authorities later discovered an error with the last known address for Apex. As a result, they obtained an order for nonsuit, and the delinquent taxes continued to accrue. Then, in 2018, the taxing authorities initiated a new lawsuit including the delinquent taxes and additional maintenance liens that accrued after 2016. Apex filed a counterclaim seeking damages for the city's wrongful demolition of its structure and removal of any accrued interest assessed after 2016 because Apex did not properly receive notice of the 2016 proceeding. The trial court ruled in favor of the taxing authorities and denied Apex's counterclaim. Apex subsequently appealed.

In affirming the trial court's rulings, the court of appeals held that Apex was not entitled to equitable relief in the form of vacatur of the penalties and interest that accrued after the 2016 judgment. The court stated that "[w]hen a party seeks equitable relief, it must offer and prove its willingness to do equity." Although Apex claimed that had they been notified properly of the 2016 proceeding, it would have planned to pay the judgement therefore avoiding the additional penalties and interest, the court found no evidence in the record showing Apex had attempted to pay any of its delinquent property taxes. The court of appeals further concluded that Apex was not entitled to damages because: (1) the city complied with the notice requirements under Section 214.001 of the Local Government Code; (2) Apex had actual knowledge of the demolition according to the record; and (3) Apex failed to timely appeal the demolition lien. As to Apex's claim that some of the maintenance liens fell outside the statute of limitations, the court agreed with the taxing authorities that political subdivisions of the state, including cities, are exempted from statute of limitations defenses regarding the foreclosure of maintenance liens under Texas Civil Practice & Remedies Code Section 16.061(a).

Wolf v. City of Port Arthur, No. 09-21-00371-CV, 2023 WL 2802254 (Tex. App.—Beaumont Apr. 6, 2023) (mem. op.). The Wolfs sued the City of Port Arthur in a justice of the peace court after the city demolished a building on their land that had been found to be substandard. At the time the case was filed, a district court had granted the city's plea to the jurisdiction and motion for summary judgment over the same subject matter. The Wolfs claimed that the current case was a different cause of action. The trial court granted the city's plea to the jurisdiction and motion for summary judgment, and the Wolfs appealed.

The appellate court held that because the district court had made a final determination on the merits of the claim, the suit was between the same two parties as the district court case, and the present suit was based on the same claims as those that were or could have been raised in the first action, the Wolfs' suit was barred by res judicata.

MUNICIPAL COURT

Ryerson v. City of Plano, **No. 05-21-00344-CV, 2022 WL 2680613 (Tex. App.—Dallas July 12, 2022) (mem. op.).** After the city of Plano seized Helen Ryerson's pets and a municipal court judge denied her motion for redemption of the impounded animals divesting her interest in them, she appealed the decision to the county court at law, which affirmed the municipal court's order. In her appeal, among other arguments, she claimed the municipal court lacked jurisdiction over the dispute, and the county court at law, by failing to state the reasons for his ruling against her, violated Government Code Section 30.00014(a). The court of appeals concluded that because the city had an ordinance addressing animals, which it took judicial notice of, the municipal court of

record of the city of Plano possessed jurisdiction pursuant to Government Code Sec. 30.00005(d)(2). However, because Government Code Section 30.00014(a) does require the county court to "set forth the reasons for its decision" and did not, the court reversed the judgment and remanded the case to the trial court.

Felts v. State, No. 01-21-00545-CR, 2022 WL 14989706 (Tex. App.—Houston [1st Dist.] Oct. 27, 2022.) Felts pleaded no contest to misdemeanor theft of property in the Pearland Municipal Court, a court of record, and the court assessed a fine of $200. The court deferred the imposition of the fine pending Felts's successful completion of the agreed terms of the deferral, and the court subsequently revoked Felts's deferred disposition and imposed the fine. On appeal, the county court at law affirmed the trial court's imposition of the fine, and Felts appealed to the First Court of Appeals.

The appellate court overruled Felts' 12 points of error and affirmed the county court's affirmance of the trial court. The appellate court held the following:

- The court of appeals had jurisdiction over Felts's appeal from the county court's review of the trial court's disposition of the case;
- The failure of the trial court to create a court reporter's record was not a denial of Felts's due process rights because Felts never requested a court reporter;
- The absence of a record made it impossible for Felts to make the required showing to support his ineffective assistance of counsel claim;
- Because it was an adjudication of guilt after deferred disposition, Felts was not entitled to the same notice to which a defendant is entitled for revocation of community supervision or deferred adjudication community supervision;
- The absence of a record made it impossible for Felts to support his claim of legal insufficiency of the evidence;
- Felts was not harmed by the court's action in holding the show-cause hearing before the expiration of the deferral period;

Felts could not challenge the condition of his deferred disposition agreement that provided that he could not be charged with any criminal offense during the deferral period because he had voluntarily entered into the agreement; and

Felts had waived his point of error that the trial court had abused its discretion by failing to raise it in his motion for new trial in the trial court.

Gaddi v. City of Tex. City, No. 14-20-00655-CV, 2022 WL 11551168 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022). Mr. and Ms. Gaddi owned a commercial building in Texas City that needed repairs. The city started abatement proceedings, and ultimately Mr. Gaddi entered an agreed order in municipal court giving the Gaddis 180 days to make needed repairs. After 180 days, the city could demolish the building if the Gaddis failed to make the agreed repairs. Ms. Gaddi was not a party to the municipal court case. Ultimately, the Gaddis failed to make the repairs agreed by Mr. Gaddi within 180 days, and when Ms. Gaddi learned that the city was planning to demolish the building, she filed the present suit. She argued that while the municipal court order could be effective against Mr. Gaddi, judgment was never taken against her ownership interest in the

building. She made state constitutional due process, equal protection, and takings claims, and raised issues related to impossibility of performance due to city inaction on permits as well as violations of the city's COVID-19 emergency order. The city filed a plea to the jurisdiction, including arguments that Ms. Gaddi had failed to timely appeal the court order, res judicata, and governmental immunity. The trial court granted the city's plea, and Ms. Gaddi appealed. Because Ms. Gaddi was not a party to the municipal court's agreed order, her suit collaterally attacking that order did not require her to appeal that order. Additionally, res judicata is a defense rather than a basis for a plea to the jurisdiction, and the city failed to properly plead and argue a res judicata defense. Finally, the appellate court determined that the city failed to properly plead governmental immunity regarding all Ms. Gaddi's claims and appeared to have abandoned the immunity arguments altogether in the appellate filings. Ultimately, the appellate court reversed the trial court's order and remanded the case for further proceedings.

Jaramillo v. City of Odessa Animal Control, No. 11-23-00012-CV, 2023 WL 1826753 (Tex. App.—Eastland Feb. 9, 2023) (mem. op.). After animal control officials with the city of Odessa determined her dogs were dangerous, Allie Jaramillo filed a pro se notice of appeal with the court of appeals citing to Health and Safety Code § 822.0421 and claiming the court had jurisdiction to review interlocutory orders and judgments in violation of her due process rights. Dismissing the appeal for lack of jurisdiction, the court of appeals concluded that: (1) a municipal court judgment in this case would have to be appealed to the county courts at law of Ector County that have criminal appellate jurisdiction pursuant to Section 30.00771 of the Government Code; (2) no specific statutory authority permits the appellate court to hear interlocutory appeals from municipal court orders; and (3) the Health and Safety Code does not authorize a direct appeal to the court of appeals, but instead provides that a party may appeal the decision to a county court or county court at law in the county in which municipal court is located.

Bellamy v. City of Brownsville, No. 13-22-00087-CV, 2023 WL 413583 (Tex. App.—Corpus Christi–Edinburg Jan. 26, 2023.) (mem. op.). Bellamy sued the City of Brownsville for a temporary injunction requiring the city to reappoint him to his office as municipal judge after the city declined to reappoint him after the expiration of his term arguing that because more than ninety days had elapsed since the expiration of his term, he was reappointed as a matter of law. The trial court denied the temporary injunction and Bellamy appealed.

The appellate court affirmed, holding that Bellamy was not entitled to a temporary injunction because he had failed to show an irreparable injury because his claim amounted to a wrongful termination claim, for which damages would be available.

OPEN GOVERNMENT

Groba v. City of Galena Park, No. 05-21-00305-CV, 2022 WL 16549068 (Tex. App.—Dallas Oct. 31, 2022). Groba ("Appellant") sued the City after a permit for a quadruplex on his property was rejected by the City due to a new ordinance preventing multi-unit dwellings from being built on Appellant's property. Appellant argued that the City's ordinances were unconstitutional and invalid and requested a writ of mandamus compelling the City to respond to the request for information regardless of whether the ordinances in question were available on the City's website

pursuant to the Public Information Act. The City filed a no-evidence motion for summary judgment and the trial court granted the motion.

Under the Texas Public Information Act, a "governmental body" must promptly produce "public information" upon request unless the body timely asserts an applicable exception from disclosure. *See Fallon v. Univ. of Tex. MD Anderson Cancer Ctr.*, 586 S.W.3d 37, 47 (Tex. App.—Houston [1st Dist.] 2019, no pet.). To withhold information, the governmental body must ask for the attorney general's decision within a reasonable time "but not later than the 10th business day after the date of receiving the written request." *Id.* § 552.301(b). The PIA specifically authorizes persons who have requested information from a governmental body to file suit for a writ of mandamus compelling the governmental body to make the information available for public inspection if the information requested is not excepted from disclosure. *Id.* § 552.321(a).

Appellant argued that evidence showed that City made "a completely inadequate response" to Appellant's request for information, and that the City failed to respond even after the attorney general ordered the City to do so. The court of appeals of found that Appellant raised a genuine fact issue as to the City's violation of TPIA because the City neither produced the requested ordinances nor "timely requested an attorney-general decision." The court found that though the city did respond (as the City alleged), the response did not include any of the information requested by Appellant. Next, the City argued that Appellant's position should fail because "all City ordinances and codes are available on library.municode.com." The court of appeals found that this fact did not excuse the City from providing Appellant with the information, nor did the City provide any evidence proving the website was a reliable source of information about its ordinances. In addition, the City's argument that the request for information was unclear failed because the City provided no evidence that it requested clarification from Appellant as required by the PIA.

The court of appeals upheld the City's argument that the information provided by the Appellant was inadequate to show that it had followed all other city ordinances and requirements that would have allowed a granting of the permit to allow the multi-unit complex regardless of the new zoning requirements.

The court concluded that Appellant raised a genuine issue of material fact as to his claim that the City violated the TPIA. The court of appeals reversed the trial court's summary-judgment order regarding Appellant's writ of mandamus against the City for its violation of the TPIA and affirmed all other parts of the trial court's judgment. The case was remanded back to the trial court for further proceedings "consistent with this opinion."

City of Denton v. Grim, No. 05-20-00945-CV, 2022 WL 3714517 (Tex. App.—Dallas Aug. 29, 2022, pet. filed) (mem. op.). Michael Grim and Jim Maynard sued the city of Denton on claims arising under the Texas Whistleblower Act after being terminated in retaliation for reporting Open Meetings Act (TOMA) and Public Information Act (TPIA) violations to the city attorney that related to the release of confidential information by a councilmember. After a jury rendered a verdict in favor of Grim and Maynard and the court entered a final judgment against the city, the city moved for a new trial on the grounds that evidence presented at trial was legally and factually insufficient to support the jury's findings. The trial court denied the city's motion for a new trial, and the city appealed, raising four issues including: (1) that the Whistleblower Act does not apply as a matter of law because the reported violation was committed by a councilmember acting in a

personal capacity who is not the employing governmental entity; (2) the evidence did not support the findings that Grim's and Maynard's reports caused their terminations; (3) Grim and Maynard did not have a good faith belief the conduct they reported was a violation of law; and (4) the reporting should have been made to an appropriate law enforcement authority rather than the city attorney.

In affirming the denial, the appellate court concluded: (1) the councilmember's actions, from the record, related to public interest and were not purely personal; (2) a reasonable jury could have determined Grim and Maynard had a good faith belief the councilmember violated the TOMA and TPIA by disclosing confidential competitive public power utility information to the Denton Record-Chronicle newspaper; and (3) that although the terminations occurred ten months after reporting the incident, once the makeup of the city council changed in line with the councilmember who was reported, Grim and Maynard were treated differently than other similarly situated employees and their terminations would not have occurred but for their reporting the councilmember. Because the issue was not properly preserved, the court declined to decide the city's issue on whether the city attorney was "an appropriate law enforcement authority" for purposes of the Whistleblower Act. As a result, the appellate court affirmed the trial court's judgment.

TAKINGS

***Texas Dep't of Transportation v. Robert Dixon Tips Properties, LLC*,** No. 04-21-00430-CV, 2023 WL 2396807 (Tex. App.—San Antonio Mar. 8, 2023). A property owner sued the Texas Department of Transportation (TxDOT) for a taking of their property during the expansion of a portion of U.S. Highway 281 that abuts their property. The issue is whether the property used for the expansion was owned by the property owner or was dedicated to public use as a public roadway. TxDOT filed a motion to dismiss which was denied by the trial court. TxDOT Appealed.

"It is fundamental that, to recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken." *Tex. Dep't of Transp.v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004). Once land is dedicated as public, the owner no longer has rights that are incompatible with the enjoyment of the public. There are four elements needed to establish public dedication, whether express or implied: (1) the person making the dedication must have the ability to do so (fee simple to title), (2) there must be a public purpose served by the dedication, (3) the person must make an express or implied offer, and (4) there must be an acceptance of that offer. An express dedication is generally conveyed by deed or other written document. The dispute in this case hangs on the third and fourth elements.

In this case, TxDOT argues that the property subject to the alleged taking was dedicated as public at the time the subdivision was created by plat in 1966. The property owner argued that the claimed the disputed property of Northwind Boulevard was a private roadway and asserted that the clause providing, "for public use and for the use of the adjoining property owners…" in the declaration was neither formally accepted by any governmental body nor by public use. The court found that the deed to the disputed property contained express language, "the owners do this by this instrument *dedicate for public use* and for the use of the adjoining property owners the Streets shown on said plat," and that the accompanying affidavit constituted acceptance. When the current property owner acquired fee title to the land in question, the title also stated, "Conveyance is made

and accepted *subject to all restrictions, reservations, covenants, and exceptions* appear of record in the Official Public Records of Real Property…" Furthermore, when considering whether the roadway clause constitutes an express offer, the court relied on *McLennan County v. Taylor*, 96 S.W.2d. 997, (Tex. Civ. App. – Waco 1936 write dism'd).

The Court of Appeals held that the plat records in question validated the public use clause and that the property owner's other arguments related to taxes, use, and maintenance were invalid.

The Court of Appeals reversed the trial court's order denying TxDOT's motion to dismiss and dismissed all of the property owner's claims and requests with prejudice.

City of Webster v. The Moto Kobayashi Trust, No. 01-22-00628-CV, 2023 WL 3311470 (Tex. App.—Houston [1st Dist.] May 9, 2023.) (mem. op.). The Moto Kobayashi Trust and Misutaro Kobayashi Westside Properties, LP (owners) filed suit against the City of Webster in a Harris County district court, alleging that the city's ordinance requiring removal or demolition of their properties as a public nuisance was an unconstitutional taking. The city moved to dismiss the claims and the trial court denied the motion.

The appellate court reversed and dismissed the inverse condemnation claim without prejudice, holding that property in Harris County is subject to a provision in the Government Code that grants exclusive jurisdiction over constitutional inverse condemnation claims to the Harris County civil courts at law.

City of Port Arthur v. Thomas, No. 09-21-00111-CV, 2022 WL 3868106 (Tex. App.—Beaumont Aug. 31, 2022). Thomas sued the City of Port Arthur to enjoin enforcement of two ordinances that prevented heavy trucks from accessing the service Thomas provided on his property, which was the disposal of water-based drilling mud. Thomas claimed tortious interference with his business, violations of the Equal Protection Clause, and regulatory taking. Thomas claimed that the city's actions were ultra vires because the ordinances were preempted by Section 81.0523, Natural Resources Code, which provides the state with exclusive jurisdiction over certain oil and gas operations. The city filed a plea to the jurisdiction claiming governmental immunity. The trial court denied the city's plea and the city appealed.

The appellate court held that: (1) fact issues existed as to whether the city's actions were ultra vires and affirmed the trial court's denial of the city's plea to the jurisdiction claiming governmental immunity; and (2) Thomas's claim under the UDJA for a declaratory judgment against the city and his claims against the city for alleged Equal Protection Clause violations, inverse condemnation, and regulatory takings were barred by governmental immunity.

Pate v. City of Rusk, No. 12-22-00118-CV, 2022 WL 3754714 (Tex. App.—Tyler Aug. 30, 2022). Pate was hired to demolish a residential structure, and as part of the consideration for this work, he was entitled to receive any building materials he was able to salvage. Pate received a demolition permit from the City of Rusk (Rusk) and began demolishing the building and salvaging materials. A few months later, with the demolition still unfinished, Rusk sent a crew to complete the work and dispose of the building materials. Rusk then sent Pate an invoice for the cost of demolition. Pate sued Rusk for a taking and a declaratory judgment that he was not liable for the cost of demolition, and Rusk filed a plea to the jurisdiction. The trial court granted Rusk's plea and

dismissed all Pate's claims, and Pate appealed. The Texas Constitution contains an unambiguous waiver of governmental immunity from suit for inverse condemnation or takings claims. In this case, Rusk argued that Pate did not properly state a takings claim, because he was not the owner of the property at issue (the salvaged building materials) and therefore lacks standing to bring an inverse condemnation case. To have standing, a party must have a vested right to the property at issue at the time of the alleged taking.

The appellate court analyzed when Pate would have been entitled to salvage the property, ultimately reversing the trial court's dismissal of Pate's takings claims and allowing for further proceedings in the trial court to clarify any jurisdictional questions. The appellate court affirmed the trial court's dismissal of Pate's declaratory judgment claims against Rusk because he had failed to exhaust all administrative remedies before petitioning the court.

City of Pflugerville v. 735 Henna, LLC, No. 03-21-00374-CV, 2022 WL 16841702 (Tex. App.—Austin Nov. 10, 2022) (mem. op.). The city of Pflugerville sought to condemn a portion of property owned by 735 Henna, LLC (Henna) for roadway improvements under Property Code Section 21.012, at which time the court appointed special commissioners to determine the value of the land the city was seeking to condemn. After the commissioners valued the property at $365,000, the city objected to the award as excessive and requested the case be set for trial. During this time, Henna subdivided the land which included the tract the city was seeking to condemn. As a result, the city sued Henna pursuant to Local Government Code § 212.018, seeking damages for the cost of condemning the tract it was seeking to condemn. The city and Henna subsequently came to a Rule 11 Agreement through mediation in which they agreed that all claims and controversies were settled and agreed settlement for the property at issue was $360,000. After the settlement was signed by the court in the first lawsuit, the city filed a motion for summary judgment in the court in the second lawsuit. The city argued that it was entitled to the full $360,000 settlement amount as well as attorneys' fees and costs, as a matter of law, for having to institute condemnation proceedings rather than receiving a dedication of a right of way it would have been entitled to if Henna had not illegally subdivided the property. Henna subsequently filed a motion for summary judgment arguing the city forfeited its claim for damages in the second lawsuit after signing the Rule 11 Agreement. The trial court granted Henna's motion for summary judgment concluding the city released its claims brought in the second lawsuit, and the city appealed.

Affirming the trial court, the appellate court agreed that the Rule 11 Agreement released "any and all claims between the parties regarding the condemnation matter." Although the Agreement did not specifically refer to the second lawsuit, the Texas Supreme Court has previously indicated that a claim does not need to be specifically enumerated to fall within the scope of a release. As a result, the Agreement between the city and Henna included the city's claims in the second lawsuit.

City of Houston v. Commons of Lake Houston, Ltd., No. 01-21-00369-CV, 2023 WL 162737 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023). This was an inverse condemnation suit brought by the Commons of Lake Houston (The Commons) against the City of Houston (The City). The Commons sued the City arguing that the City's 2018 amendment to the floodplain plan constituted a taking because the amendment limited the Commons' development rights on their property. The City filed a plea to jurisdiction and the trial court ruled in favor of the Commons. The City appealed

arguing that the takings claim was barred by the City's governmental immunity and that the plea was not ripe for adjudication.

The Commons claimed that the new floodplain ordinance "destroyed all value of entitlements secured and improvements made towards the original development plan," and unreasonably interfered with its investment-backed expectations for its property. The Commons alleged that the City's actions constituted a taking, without adequate compensation in violation of Article I, Section 17 of the Texas Constitution.

If the government physically appropriates or invades the property, or unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development, without paying adequate compensation, the owner may bring an inverse condemnation claim to recover the resulting damages. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex.1992). To successfully plead a condemnation claim and establish waiver of immunity under the takings clause, a plaintiff must show that the governmental entity: (1) intentionally performed certain acts in the exercise of its lawful authority (2) those acts resulted in taking, damaging, or destroying the plaintiff's property (3) and the taking was for public use. There is no governmental immunity from a valid takings claim. The City argued that the claim was barred by governmental immunity because as a matter of law because the local laws were consistent with federal law requirements and that when conclusively that reasonable minds could conclude that such requirements were adopted to accomplish legitimate goals, were substantially related to the public's health, safety, or general welfare, and were reasonable, a takings claim will fail. The City asserted that, in the alternative, The Commons had conceded that it did not suffer a total destruction of its property and, thus, it did not suffer a valid *Lucas* claim. The City relied on a Fifth Circuit's holding in support of its argument that neither compliance with federal FEMA/NFIP requirements nor local companion regulations can result in a taking as matter of law. *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732 (5th Cir. 1988) at 733. The City asserted that the Ordinance's elevation requirements could not constitute a taking as a matter of law because reasonable minds could conclude that the ordinance was adopted to accomplish a legitimate goal, and was substantially related to health, safety, or general welfare of the people and was reasonable.

"A city may enact reasonable regulations to promote the health, safety, and general welfare of its people." *Turtle Rock Corp.*, 680 S.W.2d at 805; *Lombardo v. City of Dall.*, 73 S.W.2d 475, 478 (Tex. 1934). "First, the regulation must be adopted to accomplish a legitimate goal; it must be 'substantially related' to the health, safety, or general welfare of the people." *Id.*; *Lombardo*, 73 S.W.2d at 479. "Second, the regulation must be reasonable; it cannot be arbitrary." *Turtle Rock Corp.*, 680 S.W.2d at 805; *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972). A city is not required to make compensation for losses caused by the proper and reasonable exercise of its police power. *Turtle Rock Corp.*, 680 S.W.2d at 804. "If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare ... the ordinance must stand as a valid exercise of the city's police power." *Id.* The appeals court found that the amended ordinance was substantially related to the public health, safety, and general welfare of the City's citizens and that the ordinance was "presumed to be a valid exercise of the police power absent a contrary showing by the plaintiff on the basis of which reasonable minds could not differ." The court stated that because reasonable minds could conclude that the amended ordinance's elevation requirements are substantially related to the health, safety, or general welfare of the citizens and are reasonable, the ordinance

"must stand as a valid exercise of the city's police power" and did not constitute a taking. *Turtle Rock Corp.*, 680 S.W.2d at 805.

The court of appeals held that the Commons' regulatory takings claim was barred by governmental immunity and that the trial court erred in denying the City's plea to the jurisdiction.

MISCELLANEOUS

Midland Firemen's Relief & Ret. Fund v. Midland Cent. Appraisal Dist., No. 11-20-00204-CV, 2022 WL 2252654 (Tex. App.—Eastland June 23, 2022) (mem. op.). Midland Central Appraisal District (MCAD) brought a suit to recover delinquent property taxes for properties acquired by the Midland Firemen's Relief and Retirement Fund (retirement fund). After the retirement fund failed to appear, the trial court entered a default judgment against the retirement fund in the amount of $39,740.48 for delinquent property tax, interest, and attorney's fees. The retirement fund subsequently filed a restricted appeal alleging error in the judgment was apparent on the face of the record because the retirement fund is a statutorily created retirement system entitled to governmental immunity from suit. The appellate court reasoned that because the retirement fund was a statutorily created pension system for the benefit of the City of Midland's municipal firefighters, the court could judicially notice that it was a governmental entity entitled to governmental immunity. As such, because MCAD did not plead a waiver of the fund's governmental immunity, the appellate court reversed the judgment and remanded the case to the trial court.

City of Conroe v. Attorney Gen. of Tex., No. 03-21-00137-CV, 2022 WL 2898445 (Tex. App.—Austin July 22, 2022). The San Jacinto River Authority (SJRA) had contracts to sell water to the cities of Conroe, Magnolia, and Splendora (the cities) and used the proceeds from those contracts to pay off its bonds. The contracts were the result of a groundwater reduction plan initiated by the legislature called Lone Star, which required groundwater-usage cutbacks by large-volume groundwater users. After the cutbacks took effect, cities challenged them as unconstitutional and outside the scope of Lone Star's statutory authority. They adopted resolutions accusing SJRA of overcharging for water in violation of the contract, questioning the SJRA's authority to set rates and the rate order, and refusing to make payments to SJRA under the contract. In response, the SJRA sought declaratory judgments under Texas Government Code Sections 1205.001-.151, the Expedited Declaratory Judgment Act (EDJA), which allows issuers of bonds and other public securities to resolve disputes in an expedited manner. After the district court rendered judgment in favor of SJRA, the cities appealed the order arguing the court lacked jurisdiction to make the requested declarations because "SJRA's claims did not seek declarations as to the 'legality and validity' of a 'public security authorization,' but instead sought to litigate what were essentially suits on contracts and were, therefore, beyond the scope of the EDJA." On appeal, the court of appeals affirmed that the groundwater reduction plan contracts were legally and validly executed by SJRA, but denied SJRA's declaratory relief claim that SJRA has contractual authority to issue rate orders because declaratory judgments under the EDJA are limited to the legality and validity of a contract as a matter of law, not conclusions about the meaning or general effect of any of the contract terms.

Weatherford Int'l, LLC v. City of Midland, No. 11-20-00255-CV, 2022 WL 3904001 (Tex. App.—Eastland Aug. 31, 2022). Weatherford International, LLC and Weatherford U.S., L.P. (Weatherford) sued the city of Midland, seeking contribution under the Solid Waste Disposal Act (SWDA) for "past and future response costs incurred to remediate the contamination of well water" on Weatherford's property. The city subsequently filed a plea to the jurisdiction based on governmental immunity and the trial court granted the motion. Weatherford appealed, arguing the SWDA waives the city's governmental immunity, and, therefore, the trial court erred when granting the city's plea to the jurisdiction and dismissing its cost-recovery claims for lack of subject matter jurisdiction. However, because the language under the SWDA is unambiguous and the cost-recovery provision is only applicable when a governmental entity is responsible for the solid waste, the court affirmed the trial court's order reasoning that the claims were not as a result of the city's disposal of solid waste, but instead were limited to the city's operation of a domestic sewer system that "collects domestic sewage for conveyance and subsequent treatment."

Post Oak Clean Green, Inc. v. Guadalupe Cnty. Groundwater Conservation Dist., No. 04-21-00087-CV, 2022 WL 6815191 (Tex. App.—San Antonio Oct. 12, 2022). In 2019, the Groundwater Conservation District filed suit against Post Oak seeking a declaratory judgment that District Rule 8.1 prohibited construction and operation of a landfill at the proposed site. Post Oak and TCEQ filed pleas to the jurisdiction alleging the trial court lacked subject matter jurisdiction because TCEQ has exclusive jurisdiction over the siting and permitting of municipal solid waste landfills. Post Oak and TCEQ also asserted the trial court lacked jurisdiction because the District must first exhaust its administrative remedies and its declaratory judgment action sought substantially the same relief as its administrative appeal of the permit order and was therefore barred by the redundant remedies doctrine. The trial court denied the pleas to the jurisdiction and rendered judgment. Post Oak and TCEQ appealed.

TCEQ and Post Oak argued the trial court erred in denying their pleas to the jurisdiction because the District's UDJA claim was barred by the "redundant remedies" doctrine. "Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 79 (Tex. 2015). Under the Solid Waste Disposal Act (SWDA), the Legislature provided a statutory remedy of judicial review of a TCEQ final order on a permit application for a municipal solid waste landfill in a contested case. TEX. HEALTH & SAFETY CODE § 361.321(a); *see* TEX. WATER CODE § 5.351 (authorizing judicial review of acts by TCEQ); *see also* TEX. GOV'T CODE § 2001.171 (authorizing an aggrieved party who has exhausted all administrative remedies within a state agency to seek judicial review of a final decision in the administrative appeal is pending).

In its UDJA suit, the District sought a declaration that Post Oak's operation of the permitted landfill at the proposed site would violate District Rule 8.1 – because the landfill site is over an aquifer recharge zone. On appeal, the District asserted the two proceedings are not redundant because the administrative appeal is directed at the findings of fact and conclusions of law underlying TCEQ's permit order, while the declaratory judgment action merely seeks a judicial interpretation of Rule 8.1 for purposes of later enforcement. *See* TEX. WATER CODE § 36.102(a). In addition, the District did not expressly request injunctive relief from the trial court based on its interpretation of Rule 8.1.

The court of appeals found that the District's UDJA claim seeking a declaration that Rule 8.1 prohibited operation of the landfill ultimately sought "substantively the same relief" as its administrative appeal, reversing TCEQ's order and blocking Post Oak's operation of a solid waste landfill at the proposed site. The court of appeals held that the District's UDJA action is redundant of its administrative appeal; therefore, the trial court lacks jurisdiction over the UDJA suit. *See SWEPI LP v. R.R. Comm'n*, 314 S.W.3d 253, 268 (Tex. App.—Austin 2010, pet. denied).

The court of Appeals reversed the trial court's order denying the pleas to the jurisdiction filed by Post Oak and TCEQ, and rendered judgment dismissing the District's UDJA lawsuit.

City of El Paso v. Pickett, No. 08-21-00147-CV, 2022 WL 17974630 (Tex. App.—El Paso Dec. 28, 2022). Joseph Pickett sued the City of El Paso after the city increased the "environmental franchise fee" (EFF) charged to customers of El Paso Water. The ordinance creating the fee stated that it was charged to reimburse the city for the wear and tear on city streets caused by solid waste utility vehicles. In the city's 2020 budget, EFF funds were allocated not only for street repair but for fire department vehicles and police department major capital equipment. Pickett petitioned the court for a declaratory judgment construing the city's ordinances and whether the city could obtain funds for street maintenance and public safety equipment through a fee for solid waste disposal services. The city filed a plea to the jurisdiction claiming Pickett (1) lacked standing and (2) failed to plead a waiver of government immunity. The trial court denied the city's plea, and the city appealed. To have standing, an individual must be able to show that (1) they are a taxpayer, and (2) public funds have been spent on an allegedly illegal activity. Being a property owner in the city, Pickett was a taxpayer, and because his allegations were related the validity of the city expenditure rather than validity of the EFF itself, the court found he satisfied the standing requirements. Regarding the city's claim of immunity, the Uniform Declaratory Judgment Act contains a clear waiver of immunity for an action involving a municipal ordinance, so the appellate court overruled the city's second issue as well.

Brown v. City of Houston, No. 22-0256, 2023 WL 1486228 (Tex. Feb. 3, 2023) (mem. op.). In this case of first impression, the Supreme Court answers a certified question from the Fifth Circuit Court of Appeals related to compensation for wrongful imprisonment under the Tim Cole Act (Act).

Brown, a former prisoner, brought a Section 1983 action against the city, county, police detective, and police officers seeking compensation for imprisonment for wrongful conviction for capital murder of a police officer during a robbery. While the action was pending, Brown received compensation under the Act through a state administrative process. The United States District Court for the Southern District of Texas granted summary judgment to the city as to the Section 1983 claim. Brown appealed. The Fifth Circuit Court of Appeals certified a question of state law to the Texas Supreme Court on whether the Act, which does not allow a person who receives compensation under the Act to "bring any action involving the same subject matter … against any governmental unit or an employee of the governmental unit" bars a person from maintaining a suit after receiving compensation under the Act.

The Supreme Court affirmatively certified the question, finding that the Act bars maintenance of a lawsuit involving the same subject matter against any governmental units or employees that was filed before the claimant received compensation under the Act.

San Antonio Water Sys. v. Matiraan, Ltd., No. 04-22-00138-CV, 2023 WL 2290301 (Tex. App.—San Antonio Mar. 1, 2023). This case involves a piece of property for which the San Antonio Water System (SAWS) had a conservation easement because the property was on an Edwards Aquifer recharge zone. The city subsequently annexed the property. A company later purchased the property and petitioned to rezone the property to allow for quarrying. The company claimed it had no knowledge of the conservation easement. The city refused the zoning application based on the conservation easement. The company filed a petition to terminate the conservation easement and SAWS filed a plea to the jurisdiction, which the trial court denied.

On appeal, the court analyzed the Wasson factors and found in SAWS's favor. The court found that when entering into the easement: (1) SAWS was acting in a discretionary capacity, weighing in favor of the company; (2) the easement benefited the public, weighing in SAWS's favor; (3) SAWS was acting on behalf of the state, weighing in SAWS's favor; and (4) SAWS was performing an enumerated governmental function of reservoirs. The appellate court reversed the denial of the plea to the jurisdiction and ordered the trial court to dismiss the case but also to determine any relief for which SAWS may be entitled, including attorneys' fees and costs.

Town of Anthony v. Lopez, No. 08-22-00052-CV, 2023 WL 2189504 (Tex. App.—El Paso Feb. 23, 2023). In an eviction action, the Town of Anthony, Texas, filed a suit against Robert Lopez for allegedly failing to pay rent on a leased property. The justice court ruled in favor of the town, but Lopez appealed to the county court, claiming that the justice court lacked jurisdiction as he had exercised his purchase option under the lease/purchase agreement. The county court agreed with Lopez, stating that a title issue must be resolved before determining possession of the property. The town appealed the decision. The appellate court found that there was sufficient evidence to suggest a question of equitable title, with the lease/purchase agreement, Lopez's "Down Payment" check, and his payments exceeding the lease amount. As a result, the justice court could not presume jurisdiction. The court overruled the town's sole issue on appeal and affirmed the county court's order granting Lopez's plea to the jurisdiction.

Sundial Owner's Ass'n, Inc. v. Nueces County, No. 13-21-00069-CV, 2023 WL 2414898 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2023) (mem. op.). Sundial Owner's Association paid property tax on behalf of the owners of the units comprising the condominium and subsequently requested a refund from each taxing unit for the years 2010-2015, arguing that it was not the owner of the condominiums and therefore not liable for the tax. The trial court granted summary judgment in favor of the taxing units for tax years 2010, 2011, and 2012 based on Sundial's failure to timely request a refund and for tax years 2013 and 2014 based on Sundial's failure to show the tax was paid erroneously.

The appellate court affirmed the judgement in part and reversed in part, holding that: (1) the plain language of statute provides that a right to a refund is waived if a refund request is not made within three years of payment of the tax; and (2) Sundial paid the taxes voluntarily and did not submit

evidence to show the payment was "erroneous" as required by statute. The appellate court remanded for further proceedings as to tax year 2012.

AIM Media Tex., LLC v. City of Odessa, No. 11-22-00052-CV, 2023 WL 2530283 (Tex. App.—Eastland Mar. 16, 2023). AIM Media (AIM), a newspaper company, sued the City of Odessa for mandamus relief under the TPIA, asserting that the city failed to timely produce basic information it requested about arrests and crimes that had occurred in the city. The city filed a plea to the jurisdiction alleging that AIM had not adequately pleaded a cause of action for mandamus relief under the TPIA, which was denied by trial court. The court of appeals, in holding that AIM Media had pled the minimum jurisdictional requirements, affirmed the trial court's denial of the city's plea. The city subsequently filed a second plea to the jurisdiction claiming that AIM's cause of action was moot because the city had already produced the responsive documents relevant to AIM's request related to this lawsuit. As a result, the trial court granted the city's second plea to the jurisdiction and denied AIM's motion for summary judgment.

In this second appeal, AIM argued that: (1) because the case fell within two exceptions to the mootness rule, the release of the requested information during the pendency of the lawsuit did not render the controversy moot; (2) it had a right to request prospective mandamus relief compelling the ongoing, timely production of all future requests for basic information under the TPIA; and (3) the court of appeals should remand the case to the trial court for consideration of its request for attorneys' fees. Affirming the trial court's ruling, the court of appeals held that: (1) both the voluntary-cessation doctrine and the review-evasion doctrine did not apply in this case; (2) AIM's request for prospective relief was barred by governmental immunity; and (3) because AIM did not "substantially prevail" in the case even though the city voluntarily released the requested information, the court could not assess reasonable attorneys' fees under the TPIA.

City of Austin Dev. Services Dep't v. Austin Nightlife, LLC, No. 03-22-00637-CV, 2023 WL 3010766 (Tex. App.—Austin Apr. 20, 2023). After receiving various noise violation citations, Austin Nightlife, which operates a roof-top lounge in downtown Austin, sued city officials for ultra vires conduct when the Austin city officials: (1) failed to recognize its lounge as a warehouse district venue; (2) required the lounge to apply for a temporary modification of its permit and sound-impact plan during the spring festival season; and (3) for issuing citations when not properly designated as "accountable officials" in Austin's noise ordinances. In response, city officials filed a plea to the jurisdiction asserting that governmental immunity barred Austin Nightlife's suit. After the trial court denied the city officials' plea, the city officials appealed.

Reversing the trial court's order with respect to Austin Nightlife's first and third issue, the court explained that for a successful ultra vires claim, Austin Nightlife would have to prove Austin city officials acted without legal authority or discretion. Reviewing the record, the court of appeals reasoned that because Austin's ordinance regarding district boundaries was not unambiguous, the city officials had discretion to construe the boundaries of the warehouse district as not including Austin Nightlife's roof-top lounge. In addition, the court concluded that nothing in Austin's noise ordinance suggested that only an "accountable official" could enforce violations, such as the issuance of citations. However, as to Austin Nightlife's second issue, the court affirmed the trial court's order stating Austin's ordinance regarding spring festival season did not allow for the exercise of discretion by the city officials because it automatically allowed most venues, including

Austin Nightlife's roof-top lounge, to operate at higher decibels during the spring festival season. Therefore, Austin Nightlife's pleadings were sufficient to give the trial court jurisdiction over this claim when the city officials acted ultra vires in requiring Austin Nightlife to obtain a temporary modification of its permit during the spring festival season.

Michael R. Nevarez, as Tr. of the 1010 S. Oregon Family Tr., in rem only, et. al., v. The City of El Paso, No. 08-22-00061-CV, 2023 WL 3325197 (Tex. App.—El Paso May 9, 2023) (mem. op.). The City of El Paso sued to recover delinquent taxes, penalties, interest, attorney's fees, and costs for three tracts of land in El Paso County, Texas. The city claimed it was owed a total of $41,842.34 for the years specified, including special assessment liens on two of the tracts. The defendants claimed they had not been notified about the delinquent taxes or appraised property values and provided multiple defenses. The city then moved for a summary judgment against the defendants and default judgment against those who did not answer or appear. The court granted the city's motions and awarded a total of $53,029.59. Additionally, the court ordered foreclosure of the liens against the properties. On appeal, the defendants challenged the trial court's grant of the city's combined motion for summary judgment on ten issues. They argued that the city's no-evidence motion was conclusory and did not challenge specific elements of the defendants' defenses. They also claimed that the city failed to prove all elements of a delinquent tax claim and that they had evidence of a genuine issue of material fact on the defense of notice, which would preclude a traditional summary judgment.

The court determined that while the city's no-evidence motion did not meet the specificity requirements to challenge the appellants' defenses, the city was successful in its traditional motion for summary judgment. It proved there was no genuine issue of material fact, and it was entitled to judgment as a matter of law regarding its delinquent tax claim. The court further concluded that the defendants could not raise their notice defenses for failure to exhaust their administrative remedies. Additionally, seven of defendants' issues were dismissed due to insufficient briefing, which lacked citations to legal authorities and the record, violating briefing requirements, resulting in a waiver of these issues. Finally, the defendants lacked standing to argue that the trial court erred in granting default judgment to other named parties, because they failed to show how the default judgement against other parties prejudiced their interests. Ultimately, the court affirmed the judgment of the trial court, rejecting all of the defendants' issues.

Montgomery Cnty. v. Mission Air Support, Inc., No. 09-22-00063-CV, 2023 WL 3101508 (Tex. App.—Beaumont Apr. 27, 2023.) (mem. op.). The City of Conroe, among several other political subdivisions of this state, sued Mission Air Support to recover delinquent property taxes. The city filed a plea to the jurisdiction claiming that the trial court lacked jurisdiction over Mission's three affirmative defenses because Mission had failed to exhaust the administrative remedies provided under the Tax Code and was therefore barred from raising them at trial. Mission responded by asserting that its affirmative defenses were exceptions to the requirement that a taxpayer exhaust its administrative because: (1) it was asserting that it did not own the property on which the tax was imposed; and (2) the property was not located in the taxing unit when the tax was imposed. The trial court denied the city's plea.

The appellate court reversed the judgment of the trial court, holding that Mission's affirmative defenses did not fall into the Tax Code's exceptions to the exhaustion of administrative remedies

requirement because: (1) the suit was in rem and not for personal liability, so Mission could not assert that it was not the owner of the property on which the tax was imposed; and (2) the lien was on personal rather than real property, so Mission could not assert that the property was not located in the taxing unit.

City of Harlingen v. Sun Valley Aviation, Inc., No. 13-21-00182-CV, 2023 WL 3238983 (Tex. App.—Corpus Christi–Edinburg May 4, 2023.) (mem. op.). Sun Valley Aviation (SVA) sued the City of Harlingen for breach of contract arising from an optional provision in a lease of airport land owned by the city, claiming that the city's immunity was waived under the Public Property Finance Act. The lease provided that SVA had the option to lease an additional area subject to terms within the lease. When SVA sought to exercise its option, SVA and the city could not agree on the rent or lease term, and SVA sued. The city filed a plea to the jurisdiction claiming governmental immunity, and the trial court denied the plea.

The appellate court reversed the trial court's order and rendered judgment for the city, holding that because rent and the term of the lease were essential terms of the contract and those terms had been expressly left open for future negotiation, the city's immunity to suit had not been waived.

City of Schertz v. Tex. Comm'n on Envtl. Quality, No. 07-20-00167-CV, 2022 WL 3708134 (Tex. App.—Amarillo Aug. 26, 2022). This case involves a dispute over a permit for a wastewater treatment plant. The city and Cibolo Creek Municipal Authority (CCMA) opposed a Texas Pollutant Discharge Elimination System (TPDES) permit for a wastewater treatment facility by Green Valley at the Texas Commission on Environmental Quality (TCEQ) on the grounds that the plant was located within CCMA's exclusive regional area. After an administrative hearing, TCEQ granted Green Valley's TPDES permit and the district court affirmed.

The appellate court affirmed the grant of the TPDES permit, finding: (1) CCMA and the city made no argument about how their substantial rights had been violated by TCEQ's findings and conclusions; (2) the Commission did not err by concluding that Green Valley's proposed discharge point was not within the CCMA's regional area because the regional area includes all of the listed cities and the air force base, not just one city in the area; and (3) TCEQ did not violate its policy promoting regionalization of waste treatment in Texas because the policy presumes it's met if there is not an existing plant within three miles of a proposed plant, and the Green Valley plant is more than five miles from CCMA's proposed plant.

Texas Comm'n on Env't Quality v. Save Our Springs All., Inc., No. 08-20-00239-CV, 2022 WL 17659907, (Tex. App.—El Paso Dec. 13, 2022). Save Our Springs sued the Texas Commission on Environmental Quality (TCEQ) in an attempt to overturn an approved discharge permit of the City of Dripping Spring (the City). Save Our Springs Alliance, Inc. (SOS) successfully challenged the decision in a Travis County district court. The district court reversed the TCEQ's order and enjoined the City and the TCEQ from taking actions in reliance on that order. Subsequently, the TCEQ and the City appealed. The issues on appeal were whether the TCEQ permit violated any state or federal water quality standards by approving a discharge permit that would (1) lower the water quality of the creek, or (2) would impact the existing uses of the creek. The SOS argued that the permit did not follow the Tier 1 or Tier 2 antidegradation rules. The SOS also argued that the proposed permit did not sufficiently identify the location of the proposed discharge point of the

treated wastewater to the public. The city argued that (1) the TCEQ applied the appropriate standards of analysis, and (2) the administrative record supported issuance of the permit. The district court ruled in favor of the SOS on all three issues. On appeal, the Court of Appeals found that the district court erred on all three of those points.

The "test is not whether the agency made the correct conclusion in our view, but whether some reasonable basis exists in the record for the agency's action." Slay v. Texas Comm'n on Envt'l Quality, 351 S.W.3d 532, 549 (Tex.App.--Austin 2011, pet. denied), citing Railroad Comm'n of *Texas v. Pend Oreille Oil & Gas Co., Inc.*, 817 S.W.2d 36, 41 (Tex. 1991). When reviewing a TCEQ order, a court "may not set aside an agency decision because testimony was conflicting or disputed or because it did not compel the agency's decision." Sanchez v. Texas State Bd. of Med. Examiners, 229 S.W.3d 498, 511 (Tex.App.--Austin 2007, no pet.), citing Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1984). In the issues regarding the Tier 1 and Tier 2 antidegradation rules, the Court of Appeals concluded that TCEQ followed the relevant statutes as well as its own rules and procedures. Additionally, the court also found that the TCEQ employs, "a qualitative standard to measure the potential decreases in water quality." The court ruled that since the procedures were carried out in the manner dictated by the applicable statutes, internal procedures were followed, and that the procedures were neither arbitrary nor unreasonable, the SOS's argument for the antidegradation concerns was not valid.

On the public notice issue, the complaint of the SOS was that the notice was not specific enough. It was argued that the permit was vague on where the wastewater would be deposited. The court stated that, "First, the Code only requires a 'general description' of the location of the discharge point, and there is nothing in the Code, or in any other rules or regulations, requiring an applicant to include the address, GPS coordinates, or cross streets of the discharge point in a public notice." This was especially true considering the waterways in question did not have an address, nor were there any nearby cross streets at the time. Furthermore, the GPS coordinates of the point of discharge were included on the permit application and were also provided to an employee of the United States Fish and Wildlife Service upon request.

The Court of Appeals reversed the judgment of the district court, dissolved the injunction, and affirmed the order of the Executive Director approving the permit.