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TABLE OF AUTHORITIES

I. Code Enforcement – Judicial Review

***Carlson v. City of Houston*, Houston [14th] Court of Appeals, No. 14-08-01044-CV, February 18, 2010.** The City issued an order, based on the report of a structural engineer the City retained, requiring the residents of a condominium complex to vacate the buildings based on structural issues. The City asserted that it had acted pursuant to Section 214.216 of the Local Government Code, which was enacted in 2006 and which adopts the 2003 International Building Code "as a municipal commercial building code in this state." That statute also empowers a municipality to establish procedures for the "administration and enforcement" of the International Building Code.

The issue presented was whether the judicial review provisions of Section 214.0012 apply to an order "condemning" a substandard building under 214.216, or if its applicability is limited to such orders issued under 214.001. Section 214.0012 provides that an aggrieved party may seek review of "an order . . . issued under Section 214.001." The appellate court held that harmonizing the three statutes leads to the conclusion that an order requiring occupants to vacate a substandard building may be appealed to district court under 214.0012, even if the order is issued under a statute other than 214.001. The district court order dismissing the appeals for want of jurisdiction was reversed, and the cause remanded for further proceedings.

II. Dangerous Dogs

***Loban v. City of Grapevine*, Fort Worth Court of Appeals, No. 12-08-00159-CV, December 31, 2009.** The City's animal control officer declared two of Loban's dogs "dangerous animals" under a city ordinance. Upon review, the municipal court affirmed the finding of dangerousness. The City and Loban jointly sought a writ of mandamus from the Court of Appeals in 2008 requiring the county court at law to hear an appeal of the municipal court determination, which request was denied. When the City informed Loban that the dogs would be destroyed unless he obtained insurance and paid the $10,000 in fees and charges that had accrued, Loban filed another suit seeking injunctive relief. A TRO was granted, and after the temporary injunction hearing the court issued a "Final Judgment" (1) ordering the dogs to be returned, and (2) entering a judgment against Loban for $10,670.20 for the accrued fees.

Unimpressed by the trial court's attempt to do equity to all parties, the Court of Appeals reversed the money judgment on the grounds that the City had not pleaded for any monetary relief, thus there was no jurisdiction to award the damages.

III. Elections

***Hotze v. White*, Houston [1st] Court of Appeals, No. 01-08-00016-CV, April 15, 2010.** Hotze sued the Mayor of the City of Houston to challenge the results of a City election. The suit missed the deadline for an election contest, so the appellate court examined the pleadings to determine if there were any claims that were properly preserved outside an election contest. Because there were some claims – that the implementation of the

adopted proposition was improper or illegal – the court applied the usual test for standing to those claims. The plaintiff claimed standing on the basis that he was an active opponent of the proposition. The court held that was inadequate to show a legally cognizable interest. However, the court remanded the case to permit the plaintiff to replead. The dissent asserted that the lawsuit was entitled an election contest, was in substantial part an election contest, and therefore the entire suit should be dismissed as untimely filed.

IV. Employment – Civil Service

***City of Waco v. Kelley*, Texas Supreme Court, 07-0485, February 19, 2010.** Nine years ago, the Assistant Police Chief of the City of Waco was arrested for driving while intoxicated. The Chief of Police determined that the violation of civil service rules represented by the arrest (intoxication while off duty) merited termination, so he was "indefinitely suspended," which is the term the Texas Civil Service Law uses instead of "terminated." The assistant chief appealed his termination to a hearings examiner. The hearings examiner found the charges true, but the punishment excessive. The examiner reduced the suspension to 180 days, demoted the assistant chief to sergeant, and required back pay (for the time the employee was suspended in excess of 180 days). The Texas Supreme Court, this year, finally held that the hearings examiner exceeded the jurisdiction granted by the statute. First, the examiner may either sustain the termination or suspend the officer, but only for a maximum of 15 days. Second, the examiner may not restore benefits for the time of the suspension, but may for the time suspended in excess of the reduced suspension. Third, the examiner may not demote the officer, but only restore the officer to the rank held immediately prior to the appointment as an assistant chief. Fourth, the trial court could not award attorney's fees to the officer for an unsuccessful appeal by the city. Fifth, because the examiner determined that the offense merited less punishment than termination, but more than the next alternative available, the matter had to be remanded for rehearing before an examiner. So, nine years later, they get to start at the beginning.

***Alexander v. City of Austin*, Austin Court of Appeals, 03-08-00594-CV, November 20, 2009.**
***City of Austin v. Alexander*, Austin Court of Appeals, 03-08-00423-CV, November 20, 2009.**
A number of firefighters sued the city seeking back pay, injunctive relief, and a declaratory judgment that the City of Austin had improperly adopted a civil service rule that prevented a firefighter from receiving supplemental pay **both** for receiving firefighter certification and for completing college courses. The City appealed the denial of its plea to the jurisdiction. The firefighters appealed the trial court's summary judgment. The appeals were jointly considered. The appellate court found the City's appeal to be moot, because it found that summary judgment on the merits was proper. The statute states that the City "may authorize . . . pay" for certification or education. Because the language in statute is permissive, the firefighters have no basis for insisting that if some get it, all must get it.

***Miller v. City of Houston*, Houston [14th] Court of Appeals, No. 14-08-01018-CV, March 23, 2010.** Miller was indefinitely suspended by the Chief of Police for untruthfulness during an investigation. Miller chose to appeal the indefinite suspension to a hearings examiner. The hearings examiner noted that it found much of the evidence in support of the suspension unconvincing (the polygraph results), vacated the indefinite suspension, but did not order back pay. The officer appealed.

The Court of Appeals found the case to be controlled by the Texas Supreme Court decision in *City of Waco v. Kelley*. Although the examiner did not explicitly determine the charges to be true, as the examiner did in *Kelley*, the choice to not award back pay indicated that some subset of the charges were found valid by the examiner. Accordingly, as the net result of the vacated dismissal and the lack of back pay was the imposition of a 92-day suspension. A suspension of in excess of 90 days was, under *Kelley*, outside the jurisdiction of the examiner. Accordingly, because the district court had jurisdiction to review the examiner's action, the City's plea to the jurisdiction should have been denied.

V. Employment – Discrimination

***City of San Antonio v. Gonzalez*, San Antonio Court of Appeals, 04-08-00829-CV, December 23, 2009.** Gonzalez was being disciplined when he inadvertently discovered his supervisor's documentation of his disciplinary action on the computer server. He printed the document, read it, and informed a co-worker (who was also being disciplined) of the availability of the documents. The co-worker accessed the folder, but did not review the document concerning her disciplinary action. The co-worker also reported the security flaw to her supervisor. Gonzalez was terminated for his actions while his co-worker was not. Gonzalez sued for discrimination based on gender.

Following the Texas Supreme Court's decision in *Ysleta Independent School District v. Monarrez*, 177 S.W.3d 915 (Tex. 2005), the appellate court reviewed the evidence of the two workers, identified differences in their situations, and determined that the workers were not similarly situated. The standard is that "[e]mployees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct." *Monarrez*, at 917. Presumably, if an appellate court can identify differences, a jury's determination that the employees are similarly situated is entitled to little weight, if any. Petition for Review was filed March 10, 2010.

***City of Laredo v. Negrete*, San Antonio Court of Appeals, No. 04-08-00737-CV, February 10, 2010.** This is a sexual harassment suit. The evidence was strong that Negrete's supervisor engaged in a pattern of inappropriate and unacceptable conduct. The City's defense, effectively, was that the supervisor was suspended without pay for 30 days when Negrete complained, and although she was transferred to a new position in a different department, there was no reduction in pay, and the new position offered even greater opportunity for advancement. The jury awarded $250,000 in past compensatory damages, $250,000 in future compensatory damages, and $225,000 in attorney's fees.

The attorney's fee award was reduced on remittitur to $215,400, but the trial court added $10,000 in conditional appellate attorney's fees.

Because the harassment was perpetrated by a supervisor, "failure to take remedial action" is not an element of the claim. Further, the City needed to show that it (1) exercised reasonable care to prevent, and promptly corrected, and sexually harassing behavior; **and** (b) the employee failed to take advantage of any preventative or corrective opportunities provided. Because the employee did take advantage of the city's policy for reporting such conduct, the court held that the city failed to prove the second part of its affirmative defense.

The question raised by this opinion is that if, as the opinion suggests, the employee has been removed from the offending party into a job that is economically equal or better, what is the evidence supporting a half million dollars in compensatory damages? The opinion does not mention any challenge to the sufficiency of the evidence supporting those damages, and the City has not made that claim in its Petition for Review. The petition for review argues that the 8-month delay in reporting the abusive behavior to the City is proof of the second part of its affirmative defense.

City of Corpus Christi v. Portella, **Corpus Christi Court of Appeals, No. 13-09-00660-CV, March 25, 2010.** Portella complained about harassment and gender discrimination by her male supervisor. Three months later, Portella was discharged when a citizen complaint was received regarding Portella kissing and behaving inappropriately on City time by a city vehicle. Portella filed an administrative complaint, but failed to timely respond to inquiries by the EEOC regarding her claim. The EEOC issued a right-to-sue letter, and Portella sued.

The City argued that by failing to cooperate with the EEOC investigation, Portella failed to exhaust her administrative remedies before filing suit against the City. The City cited some federal case law imposing such a requirement, but the appellate court noted that there was conflicting federal authority. The plea to the jurisdiction was, therefore, properly denied. The City has filed a petition for review.

VI. Employment - Whistleblower Act

Dallas Area Rapid Transit v. Carr, **Dallas Court of Appeals, 05-09-00786-CV, April 6, 2010.** A bus driver was dissatisfied and complained about the transit police response to an assault on the bus she was driving. After another incident 8 months later where she was involved in a physical confrontation with a passenger, she was terminated. Although her termination was reversed in the employee grievance process, she sued under the Texas Whistleblower Act, Texas Government Code Chapter 554. The court held that the decision to ticket, and not arrest, the original suspect was not a violation of law which brought the driver's report under the Act's protection.

Moore v. City of Wylie, **El Paso Court of Appeals, No. 08-08-00039-CV, February 17, 2010.** Moore, after resigning his position with the City, sued under the Texas

Whistleblower Act, and sued his former supervisor for assault and intentional infliction of emotional distress. The trial court granted a no-evidence motion for summary judgment filed by the City.

The Court of Appeals first found that the appellate brief failed to address the point in the no-evidence summary judgment that he failed to show damages, and thus the summary judgment was affirmed on this basis. Although it would appear that this ground would be sufficient to support affirmance, the court went forward to find that the employee failed to present any evidence in support of one or more elements of his claims for assault (no showing of bodily injury or an intentional, knowing threat of bodily injury) and intentional infliction of emotional distress (no showing of outrageous conduct).

With regard to the Whistleblower Act, Moore claimed that he had reported to his supervisor that a fellow building inspector had failed to document some code violations. While the court generously conceded that there was at least some evidence that Moore had the actual belief that this was a violation of law, there was no evidence that such belief was reasonable or that a report to a supervisor was the "appropriate law enforcement authority."

***Torres v. City of Corpus Christi*, Corpus Christi Court of Appeals, No. 13-08-00700-CV, March 11, 2010.** Torres filed a whistleblower complaint against the City. The City claimed he had failed to exhaust his administrative procedures at the City as required by the statute. The Court of Appeals found that the grievance procedure specifically applicable to whistleblower complaints was unclear, but interpreted it to mean that the City Manager was to designate an alternative to the Chief of Police, because the complaint was against the Chief of Police. When the City Manager failed to follow those procedures, the grievance was effectively denied, and the exhaustion requirement had been met. The order dismissing for want of jurisdiction was reversed. A petition for review would be due May 24, 2010.

VII. Employment – Worker's Compensation

***Goldminz v. City of Dallas*, Dallas Court of Appeals, No. 05-08-01420-CV, February 26, 2010.** Goldminz was a volunteer reserve officer with the City of Dallas Police Department. In 2000, he was injured when performing his duties as a reserve officer. The City voluntarily paid $38,000 in medical bills he incurred, but when he filed a worker's compensation claim, the City successfully claimed he was not an employee under the Worker's Compensation Act. The Act finds that person not paid on an hourly, daily, weekly, monthly, or annual basis is not an employee, although a city "may" cover volunteer officers. The ordinance provides that a reserve officer receives no play, but "may" receive hospital and medical assistance in the same manner as regular officers for injuries sustained on the job.

There was no evidence showing the City ever intended to cover the volunteer with worker's compensation coverage. The resolution authorizing payment of expenses said

nothing about such coverage or any employee status. Summary judgment for the City was, therefore, affirmed.

VIII. Governmental Immunity - Contract

***Baker v. City of Robinson*, 305 S.W.3d 783 (Tex. App.—Waco 2009, pet. filed).** Plaintiff purchased an improved piece of property from the City. Plaintiff began renovation of the property (an empty nursing home) into apartments for senior citizens. When he sought a certificate of occupancy, the City informed him that the property was zoned single-family residential, and that rezoning was necessary. Although the application to rezone was granted, Plaintiff sued for breach of contract and statutory fraud under the Business and Commerce Code. The trial court granted the City's Motion for Summary Judgment.

The appellate court held that Plaintiff's partnership had no standing to sue, because that entity had been formed after the transaction with the City. The court held, however, that the City failed to challenge the individual's capacity to recover damages in a verified pleading (to support the City's claim that the damages had been incurred by the partnership that was now the owner). It seems possible that if this case is remanded, a verified denial might be permitted to be filed, thus reviving this issue.

The key issue appears to have been whether the sale of the property was a governmental function or a proprietary function. The building was acquired by the City through a donation, but it turned out to be not cost-effective to use it for office space. It was being sold, therefore, essentially as surplus. The fact that the City had to comply with statutory procedures to complete the disposition of the property was not sufficient to make the sale a governmental function. Because the sale of the surplus property (which was never used for municipal purposes) was not "conclusively establish[ed]" by the City to be a governmental function, the claim did not come within the ambit of the Tort Claims Act, and there is no governmental immunity for the act.

The court went forward to determine other issues on the summary judgment. Baker argued that the court improperly required evidence of "intent to deceive" in response to the no-evidence motion for summary judgment. However, under Section 27.01 of the Business & Commerce Code, statutory fraud is proven by showing (1) a false misrepresentation of a material fact; (2) made to induce a person to enter a contract, that is (3) relied on by that person in entering the contract. No intent to deceive is required to be shown. There was conflicting evidence about whether a misrepresentation was made or whether Baker relied on it. However, summary judgment was not appropriate given the conflicting evidence.

An issue not dealt with by the courts is the question of the City's liability for an intentional tort. Fraud is an intentional tort. It has been my position that a City cannot be vicariously liable for an intentional tort, because it is by definition *not* within the course and scope of a public employee's duties to commit an intentional tort. However, it is arguable that under the statutory fraud definition, such a limitation is not applicable.

***McKinney & Moore, Inc. v. City of Longview*, Houston [14th] Court of Appeals, 14-08-00628-CV, December 8, 2009.** Plaintiff was the general contractor on a water supply construction project. Part of the bid materials were subsurface test results provided by a third party to the City, but the City included several provisos regarding the use of the information. The project cost more than the bid project for two reasons: lake levels were unusually high, and a subsurface condition not shown by the pre-bid test results was encountered. The trial court granted the City's plea to the jurisdiction and also granted summary judgment.

The court found that Plaintiff's claims that it was entitled to more pay based on the undisclosed subsurface conditions was based on a contract provision, and thus the suit was nothing more than a suit to recover amounts owed under the contract. On the other hand, the claims based on the high lake levels were not in any way the responsibility of the City, so those claims were appropriately dismissed based on immunity.

The Court of Appeals found, however, with respect to the claim that was filed regarding the subsurface conditions, that Plaintiff had accepted final payment from the City. Under the contract, acceptance of the final payment was a bar to all claims. So summary judgment was upheld. A petition for review has been filed.

***Berkman v. City of Keene*, Waco Court of Appeals, 10-08-00073-CV, November 4, 2009.** The City of Keene entered into an agreement with a landowner to provide water and sewer services at no charge in exchange for an agreement to use the property as a home for children who are wards of the state. The Court of Appeals held that this was not a contract for the provision of services to the City of Keene, and thus the waiver of immunity in Section 271.152 of the Local Government Code was not applicable. The Court appeared to criticize other appellate decisions that broadly interpreted what constituted the provision of a "service to" the local government. Other decisions seem to indicate that if the local government receives any benefit, it is within the statute. The Waco court, however, determined that if it follows the direction that waivers of immunity must be clear and unambiguous, it should not apply the waiver when the benefit to the local government "is an indirect, attenuated one."

***City of Midlothian v. ECOM Real Estate Management, Inc.*, Waco Court of Appeals, No. 10-09-00039-CV, January 27, 2010.** The City reached an agreement with ECOM to grant a sewer easement in exchange for five connections and the agreement that it could provide its own water service. After the agreement, the Council adopted an ordinance requiring all sewer service customers to be on City water. When the City sought to apply that requirement, ECOM sued for breach of contract, fraud, fraudulent inducement, and a declaratory judgment. After its plea to the jurisdiction was denied, the City took an interlocutory appeal.

The appellate court held that there was no waiver of immunity for the breach of contract at issue, because the contract was not for the provision of goods or services to the City. The argument that the contract was, in essence, a settlement of a threatened eminent

domain suit was rejected because there had been no suit filed that could be settled. On this point the court determined that the dissent in *City of Carrollton v. Singer*, 232 S.W.3d 790 (Tex. App.—Fort Worth 2007, pet. denied) was more persuasive than the majority opinion. The court also found the claims for fraud and fraudulent inducement should be dismissed for lack of jurisdiction. The underlying suit for inverse condemnation would go forward.

The dissent strongly urges that the decision strips away another protection of landowners. It states that "stories abound that condemning authorities browbeat landowners into settlement agreements by threatening them with a condemnation suit." A petition for review has been filed.

***Trudy's Texas Star v. City of Austin*, Austin Court of Appeals, No. 03-07-0373-CV, March 12, 2010.** Trudy's opened a new restaurant on South Congress Avenue in Austin, at the location of a previously-existing restaurant, and with the intent that it ultimately build a deck on the unbuilt portion of the lot. Because it was an existing restaurant location, Trudy's was exempt from some site plan requirements it would typically have to meet if it were building a new restaurant. However, Trudy's failed to seek a building permit or submit a site plan prior to constructing its deck.

The City brought a criminal action against Trudy's, which resulted in a conviction and a fine, by the jury, of $1. The City also brought a civil action seeking declaratory and injunctive relief – including a permanent injunction requiring removal of the deck. Prior to a TRO hearing, the parties reached a Rule 11 agreement that (1) required temporary cessation of use of the deck other than as employee ingress and egress; (2) set stipulated penalties for violations of that restriction; (3) set an 8-month timetable to get approval of the deck improvements; and (4) provided that the City would "reasonably work with" Trudy's to come into compliance and meet the timetables.

One of the most difficult issues related to off-site parking, necessitated at least in part because the deck filled all open areas on-site which otherwise could have been used for parking. The city's rules required disabled parking to be on-site "unless . . . existing conditions preclude on-site parking." The interpretive issue was, therefore, whether the "existing conditions" were with the deck that was constructed without permission, or without. Numerous communications were sent by the City indicating that off-site parking would be permitted, but at the eleventh-hour (and at the urging of neighborhood opponents of the restaurant), it was determined that the deck would not be considered an existing condition, so that on-site disabled parking would be required.

Because the permit was not issued by the deadline, the City resumed its civil litigation against Trudy's, and added provisions that Trudy's had violated the Rule 11 agreement. Trudy's counterclaimed, asserting that the City violated its obligation under that agreement to "reasonably" work with Trudy's. Trudy's also asserted the defense of promissory estoppel. The trial court issued summary judgment in favor of the City, declaring that Trudy's had no right to use the deck and ordering that Trudy's demolish

the deck within 30 days. The trial court denied the City's request for attorney's fees, finding that it was not "equitable and just" to award them.

The appellate court agreed that the City could not be estopped from enforcing its rules. In a lengthy analysis, it found that the following factors favored the City: (1) the City did not benefit from the promises it made; (2) there was no indication that the misrepresentations were intentionally made to mislead Trudy's; (3) Trudy's has some share of the "blame," as it originally built the improvements without permission; and (4) nothing indicates that the change in position of the City put Trudy's in a substantially worse position – insofar as the site plan is concerned – as it would have been had the City originally required on-site disabled parking. The factors favoring Trudy's include: (1) it was reasonable to rely on the City's representations; (2) the City did not "act quickly" to rectify the error; and (3) Trudy's expended $179,000 trying to implement a site plan that ultimately, according to the City, could not be approved in any circumstance. Because the factors weigh on each side, therefore, the Court of Appeals determined that it was not the "exceptional case" where justice requires the application of estoppel to the City. Summary judgment on that ground, therefore, was upheld.

The Court of Appeals reversed summary judgment for the City, however, because there was a fact issue of whether the approvals were "substantially complete" by the deadline (because the preliminary approval had been obtained, and only the final approval remained, when the reversal of position by the City occurred). The Court of Appeals also found that there was some evidence that the City failed to "reasonably work with" Trudy's. The case was remanded for trial. Surprisingly, it appears that no motion for rehearing or petition for review was filed.

IX. Governmental Immunity – Declaratory Judgments

***City of Tyler, et al. v. Smith*, Tyler Court of Appeals, 12-08-00159-CV, December 14, 2009.** After a sinkhole developed in a parking lot of a coffee shop that was about to open, the landowner sought a declaratory judgment as to whether the City or the State had a drainage easement across the property. The City and State sought to dismiss the suit for want of jurisdiction based on immunity. The trial court's denial of the pleas to the jurisdiction was reversed in this interlocutory appeal. The court held that the declaratory judgment was nothing more than an effort to either establish that there was liability for past damages or to "control the actions of the City." Accordingly, the suit was barred by governmental immunity. A petition for review is pending.

X. Governmental Immunity – General

***City of Victoria v. Wayne*, Corpus Christi Court of Appeals, No. 13-09-00695-CV, April 15, 2010.** Wayne owned 14 properties along a street in Victoria where the City reconstructed the curbs, which severely altered Wayne's driveway. Wayne sought a declaratory judgment that his driveway was a legal conforming driveway (and thus grandfathered), that the City be required to restore the curb to its previous condition, and for attorney's fees. The Court of Appeals ruled that the suit, to the extent it sought to

require the City to do certain construction work, was barred by immunity. With regard to 10 of the 14 properties, the Court also ruled that the remaining portion of the suit would be advisory only because the improvements were completed. However, the City's affidavit failed to mention 4 of the locations, so the case was remanded for determination of conforming status of those 4 locations only. The plaintiff would also be permitted to replead.

***Gatesco v. City of Rosenberg*, Houston [14th] Court of Appeals, No. 14-08-01109-CV, April 13, 2010.** Plaintiffs claimed the City was charging improper water and sewer service fees. The City claimed a lack of jurisdiction based on primary jurisdiction at the TCEQ, and based on governmental immunity. The trial court granted the plea to the jurisdiction.

Based on a recent appellate decision, the City conceded that TCEQ does not have exclusive or primary jurisdiction over water rates charged by municipalities. Further, the Court of Appeals held that there was no governmental immunity for the prospective relief sought by the plaintiffs. However, the City raised the failure of the pleadings to allege the necessary elements for the equitable claims for a right to be reimbursed past overcharges. Accordingly, the plaintiff would be given the right to replead. A petition for review would be due on May 28, 2010.

XI. Jurisdiction - Standing

***Save Our Springs Alliance, Inc. v. City of Dripping Springs, et al*¸ Austin Court of Appeals, 03-04-0683-CV, February 11, 2010.** This case narrows the grounds for associational standing, and reaffirms the standards for the specificity of notice under the Open Meetings Act. SOS sued Dripping Springs for entering into 2 development agreements to permit development in the city's ETJ. The 2-judge panel (Chief Justice Law did not participate) distinguished all authority granting associations standing to challenge governmental actions. SOS is an environmental group that seeks to limit development within the Barton Springs Aquifer recharge zone and contributing zone. The court found that state cases dealing with recreational and environmental interests of group members also found specific property rights affected, which were not present in this case. Conversely, the federal cases that found standing based solely on recreational/environmental interests were distinguished because those suits were brought under statutes that granted standing to such persons, while SOS had sued solely under the Declaratory Judgments Act (Chapter 37 of the Civil Practice and Remedies Code). Then the court found that the declaration that the development would adversely affect members' well water was hypothetical or conjectural. To the extent that the suit urged constitutional due-process-type claims, the plaintiffs had failed to show any statute granting standing to its members to challenge such procedural defects. Finally, the claims that related to other environmental issues (light pollution, traffic, etc.) were rejected because the SOS's purpose was strictly related to water quality.

The claim that the open meetings notices were insufficient, because it failed to detail the potential ramifications of the development agreements, was rejected because the *Texas*

Turnpike Authority (554 S.W.2d 675) standard, pointing out that every potential action and the detail of every proposed action need not be spelled out, was easily met by the notice.

More notable, perhaps, is that the Court of Appeals upheld the award of attorney's fees to the developer and the city. There was one dissenting opinion to the denial of *en banc* rehearing, and a petition for review is pending.

***Canty v. City of Nacogdoches*, Tyler Court of Appeals, 12-08-00001-CV, October 14, 2009.** Plaintiffs complained that the City Commission failed to remand a zoning decision to P&Z for further consideration before overruling the P&Z's denial of rezoning. The comprehensive plan had been amended between the P&Z's denial and the City Commission's consideration. Plaintiffs appealed the trial court's judgment in the City's favor issued after the Plaintiffs rested. The appellate court, *sua sponte*, raised the issue of standing, and ruled that the evidence failed to show a particularized injury to the plaintiffs resulting from the rezoning. Relying on *Save Our Springs*, the court determined that hypothetical permitted uses under the new zoning, with no evidence that such uses were planned, was too speculative to constitute the "particularized, legally protected interest that is actually or imminently affected by" the action.

***Lindig v. City of Johnson City*, Austin Court of Appeals, 03-08-00574-CV, October 21, 2009.** This case was reported at length in the paper presented by Clarissa M. Rodriguez at the Fall Conference. After that conference, the Court issued a replacement opinion on rehearing. The only change, however, was the court's addition of another ground for finding no jurisdiction to hear the Lindig's challenge to the ordinance at issue on behalf of all residence. The court pointed out that because the plaintiffs challenged the constitutionality of the ordinance, they were required to serve the Attorney General with the suit and give the Attorney General the opportunity to appear and defend the constitutionality of the ordinance. Accordingly, there was yet another ground for rejecting the challenge to the ordinance.

The Lindigs' claims against the City and its officials for their own injuries, however, were again upheld and remanded for trial.

***City of Houston v. Chemam*, Houston [1st] Court of Appeals, No. 01-08-01005-CV, January 14, 2010.** Plaintiffs were given notice to repair or remove a deteriorating concrete block fence. Originally, repairs began without a permit. Then, upon submission of a permit application, an affidavit that the fence was on the Plaintiffs' property, and a survey confirming the location, a permit was issued. Soon thereafter, when plans were made to improve the adjacent intersection, it was determined that the fence was on the public right of way and had to be removed.

Plaintiffs sued for detrimental reliance, estoppel, negligence, inverse condemnation declaratory judgment, and selective enforcement. The Court of Appeals dismissed the entire suit for want of jurisdiction, finding that there was no pleading supporting estoppel, that there was no showing the tort claims were within the waiver of the Tort Claims Act,

that the selective enforcement claim was barred because there is immunity from suits for damages for constitutional violations, and that the declaratory judgment claim was merely a repeat of the damages claims. Finally, the court held that the County Court at Law in Harris County had exclusive jurisdiction of the inverse condemnation claim.

***City of Dallas v. Woodfield*, Dallas Court of Appeals, No. 05-08-01652-CV, January 29, 2010.** Woodfield was ticketed for riding his bicycle in Dallas without a helmet. He brought suit in civil court challenging the constitutionality of the ordinance requiring helmets, and asserting that the ordinance violated his vested property rights. The City appealed the trial court's denial of its plea to the jurisdiction. In the meantime, the criminal case was dismissed when Woodfield proved that it was his first offense and that he owned or had acquired a helmet. The Court of Appeals held, therefore that the case was moot and should be dismissed.

***Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919 (Tex. App.—Austin 2010, no pet. hist.).** "It has not been unknown for many tubers to enjoy alcoholic beverages while floating along." The City adopted four ordinances in 2006 and 2007 seeking to ameliorate some of the less savory results of these activities. Four companies that rent tubes and coolers to the visitors, an organization formed by such companies, and an individual who was cited for violating one of the ordinances challenged the ordinances in court. The trial court, finding the plaintiffs lacked standing, granted the City's plea to the jurisdiction.

The appellate court found that the outfitters stated a cognizable legal interest sufficient to confer standing with regard to one of the ordinances, which prohibited any cooler with a capacity in excess of 16 quarts. The outfitters pointed out that (1) they had a significant amount of personal property (large coolers) that were no longer valuable, and (2) they had to incur the expense of replacing the large coolers with smaller coolers. The other ordinances, to the extent they merely discouraged some percentage of the outfitters' customers from coming at all, were not properly challenged. The organization also had standing commensurate with its members (the cooler ordinance only). Finally, the individual suing based on being cited had no standing, because a constitutional challenge to a penal ordinance by the regulated person must be made directly in response to the criminal case.

***Fleming v. Patterson*, Corpus Christi Court of Appeals, No. 13-08-00199-CV, February 25, 2010.** Fleming filed suit against the State and City, claiming superior title to land on Mustang Island. The court found first that such a case can only be brought as a trespass to try title, not a declaratory judgment proceeding. However, based on 1961 Texas Supreme Court authority, the jurisdictional issues are properly determined based on the merits. First, the suit may be filed only against an officer of the state or city, not the entity itself. Second, judgment is rendered against the plaintiff if the plaintiff fails to show title in itself; the case is dismissed on the plea jurisdiction, however, if the governmental official shows that the state has superior title. *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961).

The court applied the same analysis to the claim against the municipality, so the suit against the City itself was dismissed for want of jurisdiction. The appeal failed to adequately challenge the evidence presented by the state official, so the court affirmed the grant of the plea to the jurisdiction against the Land Commissioner as well. (The Court of Appeals signaled some doubt that the current Texas Supreme Court would uphold the odd procedure set out in *Lain*, but determined it was still constrained by the authority that had not been reversed.)

***City of Crowley v. Ray*, Fort Worth Court of Appeals, No. 2-09-290-CV, March 18, 2010.** Ray sought to subdivide his property located partially within a flood plain. After construction began, Ray was informed that the information and survey the City and its consultant had provided were incorrect. As a result, Ray was required to construct additional improvements, suffered delays, and lost lots. Ray sued the consultant for damages, and sought a declaratory judgment establishing the applicability of certain maps, map revisions, and flood studies to his property. The trial court denied the City's plea to the jurisdiction.

The appellate court held that the declaratory judgment action was not a damages suit in disguise, but sought to settle a controversy or dispute regarding the applicability of various flood plain regulations to the tracts at issue. The City argued that the Declaratory Judgment Act was limited to a claim that an ordinance is ambiguous or invalid under Section 37.004. However, the Court of Appeals pointed out that Section 37.003 specifically states that the enumerations in 37.004 and 37.005 are not limitations, and it distinguished other opinions that may have suggested that the act was limited to suits that plead either ambiguity or invalidity.

XII. Open Meetings/Open Records

***City of Richardson v. Gordon*, Dallas Court of Appeals, 05-09-0532-CV, March 18, 2010.** Richardson had a charter provision requiring all meetings to be open. Gordon sued the city claiming it was violating the charter (and, by extension, the Open Meetings Act) by holding closed sessions that would presumably have been allowed by the Open Meetings Act in the absence of the charter provision. Gordon also sought the certified agendas, tapes, and records from the closed sessions. (The Open Meetings Act, §551.004, does not authorize closed sessions if the charter requires it to be open.) Richardson amended its charter to avoid future problems, then moved to dismiss based on mootness. The appellate court held that Gordon's request for the records and tapes from the meetings that he alleged were improperly closed kept the controversy alive. It also rejected the city's arguments that Gordon had no standing to make the challenge, and that it had immunity from an award of attorney's fees under the Declaratory Judgment Act. A motion for rehearing has been filed.

***Castro v. McNabb*, El Paso Court of Appeals, 08-07-00074-CV, October 28, 2009.** A city council member sued the city attorney. The case stems from a suit against the City by a terminated Assistant City Attorney. Because the City Attorney had supervised the plaintiff in the first suit and thus was potentially a fact witness, he informed the City

Council that he had a potential conflict of interest and would not be involved in the suit unless the former employee and the City Council waived any conflict. The City Council voted unanimously to waive any conflict. The City's outside counsel continued to handle the suit, and the suit was ultimately settled for $500,000. The plaintiff councilmember voted against the settlement.

Plaintiff then demanded an exhaustive set of documents from the City Attorney, along with an acknowledgement that the City Attorney represented the councilmember and had a fiduciary duty to her to disclose all underlying facts about the relationship between the City Attorney and the terminated Assistant City Attorney. Although the councilmember was given several opportunities to review the files, and stated on several occasions that the requests to see the documents were not covered by the Public Information Act, the councilmember filed suit, in her official capacity, against the city attorney, seeking a determination that (1) the city attorney had an attorney-client relationship with the councilmember; (2) that the city attorney had a fiduciary duty to make a "full and complete" disclosure prior to seeking a waiver of the conflict; and (3) that the councilmember had a right to see any and all documents created in connection with the defense of the underlying litigation.

The trial court held that the councilmember was not authorized to file suit by the city council, so the suit was not in her official capacity; that the city attorney could not be sued individually because all actions complained of were in his official capacity; that the councilmember was given, but refused the opportunity to amend; that the petition should be dismissed for lack of jurisdiction; and that the city attorney was entitled to recover his attorney's fees.

The appellate court held that Section 101.106(f) of the Tort Claims Act, which provides that a suit against a public employee based on conduct within the scope of employment must, on motion, be dismissed and replaced with a suit against the governmental unit is inapplicable to a suit for a declaratory judgment. The trial court's judgment on that ground was, therefore, reversed. However, the appellate court found that all of the declarations sought by the Plaintiff were more properly sought against the City, because a declaration against the individual city attorney would be advisory only. (For example, it held that the documents sought to be examined were not the city attorney's documents, they were the city's documents; accordingly, the *city* would not be bound to provide them by an order applicable only to one employee. Finally, the court upheld the award of attorney's fees, in spite of some authority which holds that there a lack of jurisdiction to hear the case under a given statute dictates a lack of jurisdiction to award attorney's fees under that statute. In only one of the cases cited, however, did the court refuse to award attorney's fees to the defendant who prevailed because of the lack of jurisdiction; even in that case, the trial court had ruled for the plaintiff, so there was no award to uphold.

Before a petition for review could be filed, this case reached a settlement.

***City of Dallas v. Abbott,* 309 S.W.3d 380 (Tex. 2010).** The issue before the court was whether the request by a city for clarification of a public information request tolled or

reset the 10-day period for requesting an Attorney General ruling on an exception to the Public Information Act. The second issue was whether attorney-client privilege was a "compelling" reason to withhold the information, even if the deadline is not missed, under Section 552.302 of the Act.

The Texas Supreme Court reversed the practice of the Attorney General's office that the 10-day period was merely tolled. Instead, the 10-day period is reset and begins to run from the date the request is clarified. Because of this ruling, the court did not reach the second issue. Two justices dissented from the court's decision.

XIII. Procedure - Injunctions

***City of Corpus Christi v. Friends of the Coliseum*, Corpus Christi Court of Appeals, No. 13-10-00229-CV, May 6, 2010.** The plaintiffs sued the City for an injunction preventing the City from demolishing the Corpus Christi Memorial Coliseum. The apparent basis for the suit was that the structure was eligible for listing as a state landmark. However, the structure had not been so designated. A temporary injunction was granted, and the City took an accelerated interlocutory appeal.

The Court of Appeals found that the temporary injunction failed to meet the requirements that the injunction must "set forth the reason for its issuance" and "be specific in its terms." Further, although an injunction is required to show "precisely why" the plaintiff would be harmed, the injunction in this case simply stated that the demolition of the coliseum would cause "immediate and irreparable harm" to plaintiffs. Accordingly, the temporary injunction was void and without effect.

XIV. Takings - Annexation

***City of Houston v. Guthrie*, Houston Court of Appeals [1st], 01-08-00712-CV, December 31, 2009.** The City of Houston entered into Strategic Partnership Agreements with two MUD's adjacent to the city limits, which permitted limited purpose annexation within certain areas. The areas were to receive enforcement of the City's fire code as a "benefit" provided by the City. Two fireworks retailers that leased their locations on the street that was annexed brought suit challenging the enforcement of the city's ban on fireworks. Two property owners, from which the retailers leased their location, joined the suit.

The court held that three of the plaintiffs had no standing under the Private Real Property Rights Preservation Act (PRPRPA). The retailers were not property owners, so they had no standing. The first landlord failed to allege that their property value had been detrimentally affected enough to show jurisdiction (because the act provides relief for owners of property that have had a value reduction of at least 25%). The second landlord alleged such damages, and thus had standing. The PRPRPA claims against the MUD's were dismissed, because there were no actions of the MUD's within that statute.

Federal constitutional claims were not ripe because the state claims were not yet adjudicated. However, a state statute provides that takings claims in Harris County must be brought in the County Court at Law, so the District Court had no jurisdiction over those claims. The claim for tortious interference with contract was dismissed because the Tort Claims Act does not waive immunity for intentional torts. The general claims for violation of constitutional rights or for "Ultra Vires" actions were barred to the extent that they seek monetary damages.

The claims for declaratory and injunctive relief were, for the most part, also dismissed. The challenge to the Strategic Partnership Agreements is dismissed because the plaintiffs are neither parties to nor intended beneficiaries of the agreements, and therefore have no standing to challenge them. The challenge to the Limited Purpose Annexations is dismissed because unless the challenge is based on a claim that an annexation is void ab initio, such a challenge must be made by the state in a quo warranto proceeding. Finally, a civil court has no jurisdiction to enjoin the enforcement of a penal statute unless the statute interferes with vested property rights, and there is no vested property right to use property in a particular way. (However, because the City's brief only touched on the money damages aspects of the constitutional rights violations and "ultra vires" claims, the court upheld the trial court's denial of the plea to the jurisdiction on the declaratory judgment action on those claims.)

The last ruling held that the seeking of attorney's fees by the defendants did not operate as a waiver of immunity. The case was remanded to allow the first landlord to cure their failure to allege standing under the PRPRPA.

XV. Takings - Exactions

City of Carrollton v. RIHR Incorporated, **Dallas Court of Appeals, 05-08-01715-CV, March 18, 2010.** A school district builds a retaining wall on two of a six-lot group it owns. It then sells all but one of the lots, including the two on which the retaining wall is built. After construction is begun on two of the lots without the retaining wall, the retaining wall collapses. Carrollton finds the collapsed wall a threat to life, safety, and the environment, and requires construction to cease. A new purchaser then acquires the two lots on which construction had begun. Building permits are, however, denied because the wall has not been repaired. The city moves forward and performs the repair work, and places a lien on all 6 of the original lots. Carrollton will not issue building permits unless the new owner pays its share of the repair costs. The new owner sues, claiming that the requirement is an unconstitutional exaction.

It appears that the key fact in this case is the Court's finding that the collapse of the retaining wall affected only the two lots, not the remaining lots. The City's engineer had earlier found that the collapse affected all 6 lots. With the court's finding, however, the requirement that the owner of lots 19 and 20 pay for repairs to lots 17 and 18 was found to be an unconstitutional exaction. The court noted that a city memo stated that only lots 19 and 20 (with partially constructed houses) offered any real hope of recovering the repair costs. Although this statement may have been accurate and practical, it gave the

appearance that the only reason for imposing the lien on lots 19 and 20 was to attempt to recover the city's costs, which were otherwise unrecoverable.

The City argued that no exaction had taken place because it had ultimately issued the building permits without receiving the demanded payment. The court rejected that argument, finding that the demand of a payment unrelated to the development constitutes the exaction. The fact that Carrollton complied with a temporary injunction and granted the permit at a later date was not sufficient to "cure" the improper demand.

Finally, the court held that because the case was properly brought as an inverse condemnation case for which damages could be granted, it was improper to add a declaratory judgment action, with no additional issues, for the sole purpose of awarding attorney's fees. Accordingly, the attorney's fee award was reversed. Carrollton's Petition for Review is due June 10, 2010.

XVI. Takings – Flood control regulations

***City of Houston v. HS Tejas, Ltd.*, 305 S.W.3d 178 (Tex. App.—Houston [1st Dist.], no pet. hist.).**
***City of Houston v. Norcini*, Houston [1st] Court of Appeals, 01-09-00426-CV, November 19, 2009.**
***City of Houston v. Mack*, Houston [1st] Court of Appeals, 01-09-00427-CV. December 22, 2009.**
***City of Houston v. Student Aid Foundation Enterprises*, Houston [14th] Court of Appeals, No. 14-09-00236-CV, May 4, 2010.**

The four landowners all sued the City of Houston for unconstitutionally taking their property as a result of the enactment of a new flood ordinance in 2006, in the wake of Hurricane Alicia. The City's plea to the jurisdiction was denied at the trial level, and the City took an interlocutory appeal. The trial court reversed and remanded in the *HS Tejas* and *Student Aid Foundation* cases, and affirmed in the *Norcini* and *Mack* cases.

The issue was whether the landowners' claims were ripe for adjudication as none of the landowners had applied for, and been denied, building permits. Norcini stated in his affidavit, however, that he had been repeatedly told by the City officials that no permit would be issued. In addition, he had constructed (through his company) residences on adjacent lots, and had taken affirmative steps to sell the property. Similarly, the Macks had entered into an agreement with a broker to sell the property. HS Tejas, however, had just purchased the property and had taken no steps to actually develop the property that were frustrated by the City's ordinance. (However, as the same court explicitly recounted the acts taken by Norcini and Mack that met the test for ripeness, the remand to the trial court to permit amendment of the pleadings is accompanied by a rather explicit instruction for how to plead jurisdiction in this sort of case.) Finally, in *Student Aid Foundation*, the appellate court found that the property was being held for long-term investment, and that there had been no efforts to market the property or develop it. Accordingly, that case was dismissed for lack of jurisdiction.

A petition for review was filed in the *Norcini* case.

XVII. Takings – Inverse Condemnation

***AN Collision Center of Addison, Inc. v. Town of Addison*, Dallas Court of Appeals, 05-09-00272-CV, April 12, 2010.** A landowner adjacent to the Addison Airport claimed that the City intentionally diverted floodwater onto its property, causing 8 flood events in a 38-month period. There was no evidence provided, however, that Addison had done anything to change drainage off the airport in the 33 years it had owned the airport. The court found that evidence that Addison had studied the drainage problems and had taken no action to alleviate them did not constitute any evidence of an intentional act necessary for liability as inverse condemnation, so the no-evidence motion for summary judgment of the Town was upheld. Petition for Review due May 27, 2010.

***City of Houston v. Trail Enterprises, Inc.*, 300 S.W.3d 736 (Tex. 2009).** After a jury verdict was returned awarding $16.8 million in damages to the landowner in an inverse condemnation suit (for an ordinance prohibiting oil drilling), the trial court dismissed the claim as unripe. The Court of Appeals found the claims to be ripe, so rendered judgment on the verdict. The Texas Supreme Court, while upholding the determination that the question was ripe, found that it was error to preempt post-verdict determinations by the trial court, so that the case was properly remanded to the trial court.

***City of San Antonio v. De Miguel*, San Antonio Court of Appeals, NO. 04-09-00289-CV, February 3, 2010.** Plaintiffs sued in 1989 for negligence that caused flooding to their residence. The City paid a judgment of $25,000. Sixteen years later, plaintiffs again sued the City for inverse condemnation and nuisance based on the same flooding problem that still occurred. The court granted summary judgment on inverse condemnation in 2007 on unspecified grounds. The trial court denied, in 2009, the plea to the jurisdiction on the nuisance case.

The City argued that the summary judgment on inverse condemnation necessarily required dismissal of the nuisance claim because it required a conclusion that it had no intent to damage the plaintiffs' property. The court held, however, that there were other grounds (such as res judicata and limitations) that could support the summary judgment. However, the court found that the plaintiffs had failed to plead or show any act by the City that it did an intentional act to cause the flooding problem. Instead, the only evidence of an intentional act by the city was its failure to fix the problem, which is insufficient to show liability under the non-negligent nuisance claim. The court, therefore, rendered judgment dismissing the claims.

***Sweed v. City of El Paso*, El Paso Court of Appeals, No. 08-09-00076-CV, March 24, 2010.** Sweed's property was foreclosed for unpaid taxes, and struck off at the Sheriff's sale to the City. Finding the property to be a hazard, the City demolished it. Sweed sued for unconstitutionally destroying his property. Finding that Sweed had no interest remaining in the property, the Court of Appeals ruled that he had no standing to

complaint of the city's action. The dismissal for lack of jurisdiction was, therefore, affirmed. A petition for review would be due June 1, 2010.

***Alewine v. City of Houston,* Houston [14th] Court of Appeals, No. 14-08-00472-CV, April 8, 2010.** Plaintiffs were homeowners under the flight path of a newly-opened runway at the Bush Intercontinental Airport. Plaintiffs alleged the taking of their property as a result of the increase in overflights. In reviewing precedent, the court determined the standard for overflight takings to be limited to those cases where "the property's is rendered unusable for its intended purpose." Because the plaintiffs, while making substantial and convincing complaints of inconvenience, unpleasantness, and disturbance, never complained that the home was no longer usable, the trial court's summary judgment in favor of the City was upheld. A motion to extend the time to file a petition for review was granted on May 21, 2010.

XVIII. Takings – Open Beaches

***Brannan v. State*¸ Houston [1st] Court of Appeals, No. 01-08-00179-CV, February 4, 2010.** This is a challenge to the Open Beaches Act and the acts of the State and the Village of Surfside to remove houses that are, due to the erosion of beach from multiple hurricanes, now on the seaward side of the vegetation line and thus within the public beach easement. During the course of the litigation, 11 of 14 houses at issue were removed by natural forces. The three remaining owners seek a determination that their houses may be allowed to remain within the easement, or that their required removal constitutes a taking under the constitution.

The Village sought and obtained summary judgment on the claims against it in 2007. Other issues remained, such as the state's counterclaim seeking an order requiring removal of the houses. The Court of Appeals found that earlier case law, which found that the restrictions on usage of the beach did not constitute a taking, equally applied to the situation at hand where the easement comes to houses that were originally constructed on lots not subject to the public easement. The court held that the taking resulted from natural forces, not the action of the state, and thus no compensation was due. A petition for review has been filed.

XIX. Takings – Public Use

***City of Austin v. Whittington*, Austin Court of Appeals, No. 03-07-00729-CV, February 18, 2010.** The City condemned a city block owned by defendants and built a parking garage and chilling plant on the block. At trial, the jury found that the condemnation was not necessary to advance or achieve a public use, and was "arbitrary and capricious, made in bad faith, or fraudulent." The trial court disregarded the first finding, holding that the condemnation was necessary for a public use as a matter of law, but upheld judgment for the landowner based on the second finding.

When the governing board of the condemnor makes the determination that the condemnation is necessary to advance a public use, a reviewing court presumes that the

determination is correct, and the presumption is conclusive absent a showing of fraud, bad faith, or arbitrariness. Whether the use is public is a question of law for the court. The City argued, therefore, that when the court ruled as a matter of law that the taking was "necessary to advance or achieve a public use," the jury's finding of fraud, bad faith, or arbitrariness became immaterial. The appellate court held that only the question of whether the use is public is a question of law, while the question of whether the taking is necessary for that use is a fact question for the jury, and the question of bad faith is relevant to that question.

In this case, there was a memo from the project manager stating that "the new [chilling] plant is not absolutely necessary," but the City continued to assert that it *was* necessary in its final offer letter to the landowner. This "knowing representation" is evidence of bad faith sufficient to support the verdict. Judgment against the City for $674,481.57 was affirmed. A petition for review was filed.

XX. Tort Claims Act - Notice

***City of Dallas v. Carbajal*, Texas Supreme Court, 09-0427, May 7, 2010.** This case revolves around whether notice under the Tort Claims Act is given to the City by inclusion, in the police report regarding an accident, of the facts underlying the plaintiff's claim of negligence. The plaintiff claimed Dallas was negligent by failing to erect barricades to prevent drivers from driving onto an excavated road. The police accident report stated that the road "was not properly blocked." Thus, Carbajal asserted that Dallas had actual notice of the facts giving rise to the claim, even though formal notice under the Tort Claims Act had not been given. The Court noted that there is no responsibility for placement or maintenance of the barricades in the police report (in fact the City claimed the State was responsible), so the actual notice in the police report was not sufficient to give the City notice of the potential claim. The trial and appellate courts were reversed and the case dismissed.

***City of Wichita Falls v. Romm*, Fort Worth Court of Appeals, No. 2-09-237-CV, February 18, 2010.** Romm was exiting a highway on her motorcycle when a car suddenly, and without warning, entered and merged into the lane in which Romm was traveling and struck the motorcycle. Naturally, Romm sued the City.

Romm complained that the road signs at the exit ramp were insufficient to properly direct traffic, and that the inadequate signage was a premises defect within the waiver of immunity under the Tort Claims Act. The City produced evidence, however, that the signs were placed and maintained by the state, not the city. The argument that a statute gave the city authority to maintain or improve the signage was insufficient, as the City had to have actually exercised that control to come within the Tort Claims Act, not just have the right to do so. The appellate court reversed and rendered judgment dismissing the suit for want of jurisdiction.

***City of Wichita Falls v. Jenkins*, Fort Worth Court of Appeals, No. 2-09-337-CV, March 4, 2010.** A city-owned and operated vehicle rear-ended Jenkins' vehicle. The

Wichita Falls City Code requires notice of a claim within the Tort Claims Act within 45 days of the incident. A letter was received from counsel for Jenkins, stating that the attorney had been retained "with regard to personal injuries and other damages that they sustained in the above-referenced loss." The letter described the day, time, and location of the accident. In addition, the City had approved a $4,000 claim for damages to the vehicle. The Court of Appeals found that the notice was adequate under the Tort Claims Act, even though the injuries were not described with particularity. The City has requested an extension of time to file a petition for review.

***City of Pharr v. Aguillon*, Corpus Christi Court of Appeals, No. 12-09-00011-CV, March 25, 2010.** Aguillon was injured when she was struck by a car as she was crossing the street. Originally, she sued the driver, claiming that he was on his cell phone and inattentive. Later, she amended her claims to add the City, arguing that the pedestrian signals were improperly set so as to give her insufficient time to cross the street. Although formal notice was not given within 180 days as required by the Tort Claims Act, Aguillon claimed the City was aware of the accident and her injuries as a result of the City's investigation, and that the City's subsequent inspection of the pedestrian signals indicated that they were subjectively aware of the City's potential liability. However, the City's employee indicated that it did such inspections routinely when accidents occur, and it had no reason to suspect that Aguillon asserted liability of the City. The court reversed the denial of the plea to the jurisdiction.

XXI. Tort Claims Act – Scope of Liability

***City of Irving v. Seppy*, Dallas Court of Appeals, 05-09-0017-CV, November 23, 2009.** The issue in this case is whether the tort claims act waives immunity from liability for Seppy's death, after falling from a catwalk in a city-owned performing arts center. The city's argument was that the allegation of the plaintiff was that the catwalk had been negligently designed and constructed, thus shifting responsibility to the designer and constructor. However, the court found the alternative pleadings, that the catwalk had been inadequately maintained, were sufficient to bring the claim within the tort claims act's waiver of immunity. Further, though the duty to a licensee is only to protect from premises defects of which the city has actual knowledge, it found that the "punch list" that was given to the city after construction showed there were some issues with the condition of the catwalk, and there was nothing in the record to show that those issues were resolved.

***City of Fort Worth v. Robinson*, Fort Worth Court of Appeals, 02-09-0075-CV, November 12, 2009.** Plaintiff was accidentally shot by Fort Worth police when the officers attempted to detain Plaintiff and the driver of the car Plaintiff was in. Plaintiff failed to state the statutory basis for her suit, simply claiming governmental immunity was waived by the Legislature for claims if the employee would be liable under Texas law. In this case, official immunity of the employee is based on the employee's performance of discretionary duties, within the scope of the employee's authority, that are performed in good faith. Reading the facts in the light most favorable to Plaintiff, the

City met its burden of showing that a reasonably prudent officer, under similar circumstances, could have believed that the officer's conduct was justified.

The Plaintiff failed to meet the burden that was thus shifted to show that no reasonable officer could have believed the facts justified the conduct. First, the analysis does not weigh the risk of public harm, because that test is inapplicable to a claim regarding injuries sustained when the officer is performing an arrest. Second, an allegation that department policy was violated is insufficient to meet the plaintiff's burden. There were several assertions by the officers (that the other party was using narcotics, refused to exit the car, and refused to turn the car off) that were not contradicted by the plaintiff, which were sufficient to establish good faith official immunity.

***Salinas v. City of Brownsville,* Corpus Christi Court of Appeals, No. 13-08-00146-CV, February 25, 2010.** Plaintiff was a victim of a house fire. She was being treated for smoke inhalation when the EMT's seated her on a washing machine. When they left her momentarily, she fainted, fell off the washing machine, and was injured. (The opinion noted that the record was silent on why the washing machine was at the curb, or who owned it.) She sued the City.

The issue presented is whether the plaintiff stated claims within the waiver of jurisdiction in the Tort Claims Act. The trial court granted the City's plea to the jurisdiction. Plaintiff claimed that the use of the ambulance to come to the location, the use of the treating equipment, and the use of the washing machine to have her sit on, caused her injuries. The court rejected this argument and affirmed the dismissal.

***City of Dallas v. Hillis*, Dallas Court of Appeals, No. 05-08-01644, March 30, 2010.** The plaintiffs' son died when his motorcycle crashed while fleeing a police car. Although the motorcycle's speed was not definitively established, the pursuing police car exceeded 100 miles per hour, and the motorcycle seemed to be getting away before it crashed. Citing a violation of the City's own high-speed pursuit policy, the plaintiffs brought suit claiming (1) wrongful death; (2) negligent implementation of policy; (3) negligent entrustment; (4) negligent hiring, retention, and assignment; (5) negligent supervision, training, and direction; and (6) negligent failure to discipline. The trial court denied the City's plea to the jurisdiction on the first three claims, and granted it with regard to the fourth through sixth claims.

The Court of Appeals held that, although there was no Texas case law directly on point, this fact situation led to the conclusion that whatever negligence may have been found in the officer's actions, or in the City's actions in training, disciplining, or assigning the officer, the officer's use of the patrol car was too attenuated from the decedent's conduct to constitute a cause of his injuries. The pleas to the jurisdiction should, therefore, have been granted. A petition for review would be due by June 14, 2010.

XXII. Tort Liability – Recreational Use Statute

***City of Waco v. Kirwan*, Texas Supreme Court, 08-0121, November 20, 2009.** The court analyzed the landowner's duties under the recreational use statute (Civil Practice & Remedies Code §75.002(c)). The decedent was on a cliff in a city park when the rock he was on gave way. He fell to his death. There was a barrier in front of the cliff top, and a sign warning of danger. First, while declining to institute an absolute rule against landowner liability for "naturally-occurring dangers," the exception was defined as those dangers that are hidden, that the landowner is aware of, that have resulted in injuries or deaths to others, and which a reasonable recreational user would not expect to encounter. Further, the court held that a barrier and a warning sign "generally will be sufficient to avoid a showing of 'conscious indifference to the rights, safety, and welfare of others' under the [recreational use] statute.

XXIII. Utilities – Gas

***City of Allen, et al. v. Railroad Commission of Texas, et al.*, Austin Court of Appeals, No. 03-06-00691-CV, February 5, 2010.** This is the challenge by 51 cities to the Railroad Commission's rules regarding the GRIP program. The GRIP rules were adopted as a result of a statutory change to allow gas utilities to increase their rates in the interim between general rate cases, with full review of the prudence of the additional investments done at the next general rate case.

The primary complaint of the cities was that the rules did not provide for a contested case hearing at the Commission. The trial court found that the Commission's rules were generally valid, but held that the statute did not envision any appeal from a city's exercise of its regulatory jurisdiction. Under the statute, the filings are subject only to a ministerial review, and can be rejected only if they fail to comply with the statutory filing requirements.

XXIV. Zoning – Contract Zoning

***2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, Austin Court of Appeals, No. 03-08-00790-CV, January 12, 2010.** Plaintiffs purchased apartment complexes within a Planned Unit Development (PUD). The PUD provided for a maximum of 900 apartment units, and 777 had been constructed. There was arguably a provision in an associated development agreement that required the consent of all owners within the PUD to any major changes in the PUD's requirements. When the developer wanted to develop more apartments, consent was not obtained. As a result, rather than amending the PUD, the City created two new PUD's from are within the existing PUD.

The court held that if there was an agreement to not amend the PUD without consent, it would not be valid because the city cannot contract away its police power. Further, the assumption by Plaintiffs that they could veto any change in the PUD was not reasonable, so that could not be part of their "reasonable investment-backed expectations." The court held that although the Plaintiffs' property had decreased in value by almost $3 million,

that represented only about a 4% reduction, which weighed heavily against their claims. Finally, the fact that the change in zoning was on property in the vicinity, rather than to the property owned by Plaintiffs themselves, strongly militated against their inverse condemnation claim.

The court also rejected the Plaintiffs' claims that the City's act constituted impermissible spot zoning, the claim that the City could be subject to promissory estoppel, and its substantive due process claim.