

Recent State Cases of Interest to Cities

by
Ronald D. Stutes
Potter Minton
Tyler, Texas

May 25, 2007

Trends

- Fleshing out Contractual Immunity
- Employment/Civil Service
- Notice of Tort Claims

Contract Immunity

- Chapter 271, Subchapter I
- Contract for goods or services
- Balance due under the contract

Contract Immunity

- *McKinney & Moore, Inc. v. City of Longview* – 14-08-00628-CV
 - Water supply project with cost overruns
 - Two reasons for overruns:
 - Lake levels unusually high
 - Subsurface condition not revealed by pre-bid tests
 - Contract provided for recovery by contractor if damaged by neglect, omission or default of City or other City contractor

Contract Immunity

- *McKinney & Moore, Inc. v. City of Longview* – 14-08-00628-CV
 - So recovery for negligence in performing subsurface test is actually recovery under the contract
 - But another provision of contract provides that acceptance of final payment barred any claims

Contract Immunity

- *Berkman v. City of Keene*, 10-08-0073-CV
 - Agreement to provide water & wastewater service for free in exchange for providing home for needy children
 - Is this a contract for services to the city?
- Court criticizes other decisions that broadly interpret “services to city” as “benefit to city.”
- Court decides it is not a service to city, so city retains immunity.

Contract Immunity

- *City of Midlothian v. ECOM Real Estate Management*
 - City obtained sewer line easement in exchange for promise of free taps and agreement that landowner could provide own water
 - Landowner argues that this is, in effect, a settlement of a threatened condemnation suit so no immunity under *Lawson*
 - Court refuses to follow *Singer* (232 SW3d 790) and determines *not* a settlement of lawsuit
 - Strategies to resolve this issue?

Civil Service Appeals, or Kafka on Civil Procedure

- *Waco v. Kelley*, Texas Supreme Court, 07-0485
 - In 2001, Assistant Police Chief is arrested for DWI
 - Civil Service Rules prohibit intoxication off duty
 - Chief of Police suspends indefinitely (Civil-service-speak for “terminated”)
 - Appeal to Hearings Examiner under Civil Service Law

Civil Service Appeals, or Kafka on Civil Procedure

- *Waco v. Kelley*, Texas Supreme Court, 07-0485
 - Examiner found charges “true,” punishment excessive
 - Reduced suspension to 180 days
 - Demoted to sergeant
 - Ordered back pay (for suspension in excess of 180 days)

Civil Service Appeals, or Kafka on Civil Procedure

- *Waco v. Kelley*, Texas Supreme Court, 07-0485
 - Actions are beyond the jurisdiction of the Hearings Examiner
 - Either sustain permanent suspension or suspend up to 15 days
 - Can only restore to rank before elevation to assistant chief
 - District Court cannot award attorney’s fees to employee
 - Must be remanded to Hearings Examiner

Civil Service Appeals, or Kafka on Civil Procedure

- *Miller v City of Houston*, 14-08-01018-CV
 - Indefinite suspension due to untruthfulness during investigation (polygraph)
 - Found to be controlled by *Kelley*
 - No explicit determination that charges were true
 - Hearings examiner reduced suspension but denied back pay
 - Effect of back pay denial was 92-day suspension, beyond jurisdiction of hearings examiner

Public Information Act

- *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010). [corrected citation]
 - Request for public information, followed by request for clarification
 - Does request for clarification toll time period to request opinion, or reset the clock?
 - Alternate argument: attorney-client privilege is a “compelling” reason to withhold, even if deadline is missed.
 - Court holds (6-2) that request for clarification resets the clock.
 - Statutory amendment forthcoming?

Exactions

- *City of Carrollton v. RIHR Inc.*, 05-08-01715-CV
 - School district owns 6 lots; builds retaining wall on 2 lots; sells all but 1 lot, including lots with retaining wall
 - Construction of residences begins on 2 lots, neither of which have retaining wall
 - Retaining wall collapses
 - City requires construction to cease due to safety threat

Exactions

- *City of Carrollton v. RIHR Inc.*, 05-08-01715-CV
 - Building permit denied to new owner
 - City performs repair, places lien on all 6 lots
 - City engineer finds collapsed wall affects all 6 lots
 - City memo: only hope of recovering cost of repair is from the 2 lots where construction has begun

Exactions

- *City of Carrollton v. RIHR Inc.*, 05-08-01715-CV
 - Court finds that collapsed wall does not affect lots with partially constructed houses
 - Therefore, attempt to recover is an improper exaction
 - Compliance after injunction doesn't cure exaction
 - But improper to join declaratory judgment action to get attorney's fees

Standing

- *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin 2010, pet. filed). [updated citation]
 - Challenge to 2 development agreements between city and developers
 - SOS is an environmental group that seeks to limit development in the Barton Springs Aquifer recharge zone
 - Suit under declaratory judgment act
 - Trial court grants summary judgment on Open Meetings claim; plea to jurisdiction on all other claims based on lack of standing

Standing

- *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin 2010, pet. filed). [updated citation]
 - Distinguish case law on associational standing
 - State cases granting associational/recreational standing also had some property right implicated; none here.
 - Some members have property rights, but those rights aren't those within interest of SOS (excess light, congestion, traffic)
 - Some members who have property rights within the interest of SOS (well water) failed to show that harm was imminent, not conjectural
 - Taxpayer standing based on agreement to participate in defense of agreement insufficient, especially since developer promises to reimburse city's expenses

Standing

- *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin 2010, pet. filed). [updated citation]
 - Distinguish case law on associational standing
 - Federal cases granting associational/recreational standing also had some statutory cause of action; none here.
 - Open meetings notice held adequate – notice was clearly sufficient under precedent of *Texas Turnpike*
 - \$86,200 attorney's fees awarded to developer - upheld

Standing

- *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin 2010, pet. filed). [updated citation]
 - Two justices dissent to denial of motion for rehearing *en banc*
 - Finds that the decision conflicts with previous authority
 - One of the panel is no longer on the court
 - One of the dissenting judges did not run for reelection

The Labyrinth

- *Trudy's Texas Star v. City of Austin*, 03-07-0373-CV
 - Trudy's opens a new restaurant, fails to seek building permit before building new deck covering most of on-site parking
 - Criminal complaint results in conviction, \$1 fine
 - Civil action seeking declaratory judgment and injunction

The Labyrinth

- *Trudy's Texas Star v. City of Austin*, 03-07-0373-CV
 - Rule 11 agreement prior to TRO hearing
 - Temporary cessation of use of deck
 - Stipulated penalties for any violations
 - 8-month timetable to get approval
 - City will "reasonably work with" Trudy's to get approval

The Labyrinth

- *Trudy's Texas Star v. City of Austin*, 03-07-0373-CV
 - Key issue on getting approval: offsite disabled parking
 - Permitted only if existing conditions preclude
 - Do "existing conditions" include illegal deck?
 - Although other sites were considered by staff, at last minute (at urging of opponents), it is decided that offsite disabled parking is impermissible

The Labyrinth

- *Trudy's Texas Star v. City of Austin*, 03-07-0373-CV
 - Litigation is resumed after deadline is missed
 - Counterclaim that City failed to "reasonably work with" Trudy's; promissory estoppel
 - Summary judgment in favor of City ordering demolition

The Labyrinth

- *Trudy's Texas Star v. City of Austin*, 03-07-0373-CV
 - Court of Appeals finds no estoppel, because factors weigh both ways, and estoppel requires "exceptional circumstances."
 - However, there is a fact issue on whether City reasonably worked with landowner
 - No motion for rehearing or petition for review suggests settlement

Don't mess with the City Attorney

- *Castro v. McNabb*, 08-07-0074-CV
 - Vendetta of councilmember against city attorney
 - City Attorney represents city, not individual councilmember
 - City Councilmember's request for documents not governed by Public Information Act
 - City Attorney is entitled to recover attorney's fees

Understatement of the Year Award

- *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919 (Tex. App.—Austin 2010, no pet. hist.)
 - Suit challenging ordinances regulating vendors serving river tubers
 - “It has not been unknown for many tubers to enjoy alcoholic beverages while floating along.”