State Cases of Interest to Cities
TCAA Summer Conference 2011

Sarah Gardner-Cox
Deputy City Attorney
Temple, Texas

Table of Contents

1. *Texas Department of Criminal Justice v. Kirk Wayne McBride, Sr.,* Tex., 08-0832, June 11, 2010. 4

2. *Quarterman v. Hampton*, No. 01-09-01061, Tex. App.—Houston [1st Dist], Aug. 26 2010..... 4

3. *Multi-County Water Supply Corporation v. City of Hamilton*, No. 14-09-00333-CV, Tex. App.—Houston [14th Dist.], Aug. 31, 2010.......... 4

4. *City of Elsa v. Gonzalez*, No. 09-0834, Tex., Oct. 1, 2010.......... 5

5. *City of Dallas v. Carbajal, No.* 09-0427, Tex., May 7, 2010.......... 5

6. *City of El Paso v. Bustillos*, No. 08-08-00255-CV., Tex. App.—El Paso, May 19, 2010. 6

7. *City of Richardson v. Justus*, No. 05-10-00185-CV, Tex. App.—Dallas, Nov. 16, 2010.......... 6

8. *Smith v. Galveston County*, No. 01-08-01011-CV, Tex. App.—Houston [1st Dist.], Oct. 7, 2010. 7

9. *City of Dallas v. Gatlin*, No. 05-09-01425-CV, Tex. App.—Dallas, Dec. 6, 2010. 7

10. *City of Dallas v. Jones*, No. 05-09-01379, Tex. App.—Dallas, July 21, 2010.......... 7

11. *Wight Realty Interest, Ltd. v. City of Friendswood*, No. 01-10-00442-CV, Tex. App.—Houston [1st Dist.], Dec. 23, 2010. Rehearing En Ban Overruled Feb. 9, 2011.......... 8

12. *Webber v. Harris County Toll Road Authority*, No. 14-09-00513-CV, Tex. App.—Houston [14th Dist.], Oct. 14, 2010. 8

13. *City of Carrollton v. HEB Parkway South, Ltd.*, Fort Worth Court of Appeals, 2-09-179-CV, June 17, 2010. 9

14. *State v. Gaylor Investment Trust Partnership*, Tex. App.—Houston [14th Dist.], Aug. 31, 2010. 9

15. *In re State of Texas*, No. 03-10-00260-CV, Tex. App.—Austin, Nov. 12, 2010.......... 10

16. *Edinburg v. A.P.I. Pipe and Supply, LLC,* No. 13-09-00159-CV, Tex. App.—Corpus Christi-Edinburg, Aug. 26, 2010.......... 10

17. *Shumaker Enterprises, Inc., v. City of Austin*, No. 03-09-00613-CV, Tex. App.—Austin, Nov. 2, 2010. 11

18. *The City of Round Rock, Texas, v Rodriguez*, Court of Appeal of Texas, Austin, No. 01-09-00546-CV, July 21, 2010.......... 11

19. *City of Fort Worth v. Davidsaver*, Tex. App.—Fort Worth, No. 2-09-458-CV, July 29, 2010.. 12

20. *Cooke v. City of Alice*, No. 04-09-00731-CV, Tex. App.—San Antonio, Sept. 29, 2010. 13

21. *Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, Tex., No. 08-1003, Aug. 27, 2010. 14

22. *Pryor v. Dolgener*, No. 08-09-00284-CV, Tex. App.—El Paso, April 14, 2010. 14

23. *In re Bouse.* No. 10-10-00263-CV,Tex. App.—Waco, Aug. 17, 2010. 15

24. *Dallas v. Dallas Morning News*, No. 05-09-00924-CV, Tex. App.—Dallas, Dec. 30, 2010. 15

25. *8100 North Freeway Ltd., v. City of Houston*, No. 14-09-00220-CV, Tex. App.—Houston [14th Dist.], Dec. 1, 2010. 15

26. Gilbert v. City of El Paso, No. 08-08-00282-CV, Tex. App.—El Paso. Oct. 13, 2010............... 16

27. *Slavin v City of San Antonio,* No. 04-09-00601-CV, Tex. App.—San Antonio, Oct. 17, 2010. 16

28. *Putnam v. City of Irving*, No. 05-10-01269-CV, Tex. App.—Dallas, Jan. 27, 2011. 17

29. *City of Houston v. Guthrie*, No.01-08-00712-CV, Tex. App.—Houston [1st Dist.], Dec. 31, 2009. 18

30. *Wind Mountain Ranch, LLC v. City of Temple*, No. 09-0026, Tex., Dec. 3, 2010. 19

Immunity

***Texas Department of Criminal Justice v. Kirk Wayne McBride, Sr.,* Tex., 08-0832, June 11, 2010.**

An inmate brought an action against the Department of Criminal Justice to recover damages for a violation of due process caused by their failing to provide him a copy of their administrative decision. The Department generally denied his allegations, asserted sovereign immunity, and asked to recover attorney's fees associated with the cost of defending the case. Defendant argued that by asking to recover attorney's fees, the Department waived sovereign immunity. Supreme Court held in *Reata Construction Corp v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), that while certain actions can affect governmental immunity; immunity is only waived when the government entity asserts affirmative claims for monetary recovery. This case differs in that the Department did not file suit and its only intention was to recover costs associated with defending the suit, thus immunity was not waived.

***Quarterman v. Hampton*, No. 01-09-01061, Tex. App.—Houston [1st Dist], Aug. 26 2010.**

An inmate sued five Texas Department of Criminal Justice (TDCJ) employees in their individual and official capacities to recover for theft and federal and state constitutional claims for unlawful taking and denial of due process. This case involved the appeal of the employees' motion for summary judgment which was dismissed by the trial court level. Though it was not a party to the suit, the TDCJ also filed a motion to dismiss under Section 101.106(e) of the Texas Civil Practice and Remedies Code.

Section 101.106 deals with three kinds of dismissals or prohibitions of lawsuits against government employees. This case focused on Section 101.106(e) which states, "if suit is filed under this chapter against both a governmental unit and any of its employees shall immediately be dismissed on the filing of a motion by the governmental unit." Even though the TDCJ was not named, the employees argued that Section 101.106(e) requires a dismissal of the suit against them in their individual capacities. Citing *City of Hempstead v. Kmiec*, the employees contend that a claim against a person in his official capacity is no different than a lawsuit against the governmental entity that employed the person. *See* 902 S.W.2d 118, 122 (Tex. App.-Houston [1st Dist] 119, no writ). In this case, the employees argued that the Legislature used the term "governmental unit" in Section 101.106(e) to include all lawsuits against employees in their "official capacity." The court disagreed and held that Section 101.106(e) only refers to a dismissal of employees on a motion of the governmental unit that is party to the lawsuit, which the TDCJ is not here. Court affirmed trial court's denial of motion to dismiss.

***Multi-County Water Supply Corporation v. City of Hamilton*, No. 14-09-00333-CV, Tex. App.—Houston [14th Dist.], Aug. 31, 2010.**

In 1989, Multi-County Water Supply Corporation (Multi-County) entered into a long-term contract to purchase treated water from Hamilton. At that time, the city purchased raw water from the Upper Leon River Municipal Water District (District), and then treated it themselves. In 2006, the city stopped operating the water treatment plant and the District purchased their transmission lines, from that point forward the city purchased treated water from the District. In 2007, the city changed the water rates it charged Multi-County.

The contract between the city and Multi-County stated that water rates could be modified

annually based on the cost to the city to purchase water from the District. Multi-County wanted the court to interpret the term rate to mean the cost for raw water only and grant an injunction to prevent the city from including "operation and maintenance expenses" in the rates charged to Multi-County.

The city and the district filed a plea to the jurisdiction seeking governmental immunity which the trial court granted the appellate court upheld. Multi-County argued that the city and District were not immune from suit, because rather than request money damages, Multi-County was asking the court to determine a contract's validity and determine the various parties rights and duties. While the court acknowledged that generally interested parties to a written contract may bring a declaratory-judgment for contract interpretations, it held that a government entity does not waive immunity to suit simply by entering into a contract. Tex. Civ. Prac. & Rem. Code Ann. §37.04 (a) (Vernon 2008); *Tooke v. City of Mexia*, 197 S.W. 3d 325, 332 (Tex. 2006).

***City of Elsa v. Gonzalez*, No. 09-0834, Tex., Oct. 1, 2010.**

Former city manager sued the city alleging he was unlawfully terminated in violation of the Texas Whistleblower Act. The Whistleblower Act provides that "a state or local governmental entity may not suspend or terminate the employment of…a public employee who in good faith reports a violation of law…to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a). Gonzalez argued he was terminated for 1) having reported to area authorities the Mayor's resignation and 2) for having objected to a meeting due to a violation of the open meetings act.

Background. Then acting mayor of the city was appointed assistant director with the Hidalgo County Urban Community Program, city attorney advised the council that the mayor could not hold both positions at once, had resigned ipso factor by accepting a position as assistant director. The council voted to accept the mayor's resignation and the city manager then delivered to notice of the resignation to several area organizations and the news.

City manager unsuccessfully argued retaliation for reporting that the mayor violated the law by continuing to act as mayor after his acceptance of the job with the Hidalgo County Urban Community Program. The court held that his distributing the city attorney's letter not establish that he was reporting a violation of law.

City manager also claimed he was terminated for reporting an open meetings act violation. Whistleblower Act requires that a violation be reported to a law enforcement authority that is "part of a state or local governmental entity…that the employee in good-faith believes is authorized to: 1) regulate under or enforce the law alleged to be violated in the report; or 2) investigate or prosecute a violation of criminal law." *Tex. Dep't. of Transp. v Needham*, 82 S.W.3d 314, 320 (Tex. 2002). The appropriate authority does not include an entity whose power does not extend beyond its ability to comply with the law. By reporting his concerns to the city council, the city manager did not report his concerns to an appropriate authority, and did not meet the jurisdictional requirement of a whistleblower case.

***City of Dallas v. Carbajal, No.* 09-0427, Tex., May 7, 2010.**

Carbajal sustained injuries when she drove her car onto an excavated city street which was not properly barricaded. The officer who arrived on the scene noted on the accident report that there were no barricades blocking the gap in the road.

The Texas Tort Claims Act requires a governmental entity to have actual notice of the injury sustained by the claimant. See Tex. Civ. Prac. and Rem. Code § 101.101(c). Carbajal argued that the police report provided the city with notice of the claim. The Texas Supreme Court previously held that an investigation into an accident, such as an officer writing an accident report on scene, does not provide a governmental unit actual notice. *Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338, 343-48 (Tex. 2004). While both parties agreed that the road was not properly blocked, the report did not imply or state that the city was at fault. It merely pointed out that the barricades were missing, not who failed to place them properly. Therefore, the city was not given actual notice of Carbajal's injuries.

***City of El Paso v. Bustillos*, No. 08-08-00255-CV., Tex. App.—El Paso, May 19, 2010.**
Residents of an El Paso subdivision were bought out of their houses after the neighborhood flooded. Owners and residents were offered relocation assistance if they were able to prove ownership of the house or a tenant/landlord relationship. A year after the assistance was initially offered, Bustillos and Campus applied for relocation assistance and both were denied due to lack of proof of a landlord/tenant relationship; both only had oral leases. During the course of the lapsed year the landlord of their rentals had claimed for assistance as a homestead.

The plaintiffs sued alleging due process and equal protection violations and requested seven different points of relief. The city filed a plea to the jurisdiction, arguing that this suit was disguised as a suit for monetary damages (i.e. the lump sum relocation costs). The court disagreed stating that the plaintiffs only wished a declaration that their rights were violated and the opportunity for review. While this review may result in payment of damages, the court held that "suits requiring compliance with statutory or constitutional provisions are not prohibited by immunity even if the compliance involves the payment of money." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 371 (Tex. 2009). Because plaintiffs properly pled a violation of their constitutional rights, this suit is not barred by governmental immunity. *Steel v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980); *City of Beaumont v. Boullion*, 896 S.W.2d 143, 149 (Tex.1995).

***City of Richardson v. Justus*, No. 05-10-00185-CV, Tex. App.—Dallas, Nov. 16, 2010.**
Justus fell while walking in her neighborhood on a portion of the sidewalk which was raised and uneven. She sued the Richardson alleging premises defect, special defect and negligence. The city responded with a plea to the jurisdiction asserting the trial court lacked subject matter jurisdiction because her claim did not fall within the limited waiver of immunity afforded under the Texas Tort Claims Act. Under the Act, the immunity is expressly waived for damage claims caused by the operation or use of publicly owned vehicles or equipment; or condition or use of tangible personal or real property. Tex. Civ. Prac. & Rem. Code. Ann §§ 101.021 (1)(A)&(2).

The difference in special and ordinary defects is the duty owed by the governmental entity. Tex. Civ. Prac. & Rem. Code Ann. § 101.022. An ordinary defect requires that an unreasonable risk of harm existed, the city knew of the risk, the person did not know of the risk, the city failed to exercise ordinary care, and the danger was the proximate cause of the person's injury. *State Dept. of Hwys. v. Payne*, 838 S.W.2d 235, 236 (Tex. 1992). Though the city argued they lacked actual knowledge of the sidewalk condition, the court disagreed because the sidewalk was identified on a sidewalk repair list.

Thus, this court denied the city's plea to jurisdiction based on an ordinary premises defect.

***Smith v. Galveston County*, No. 01-08-01011-CV, Tex. App.—Houston [1st Dist.], Oct. 7, 2010.**

Smith sued Galveston County after having slipped in the jail shower and sustained an injury. Smith alleged negligence on the part of the county for not placing a nonskid floor covering on the shower floor. The county filed a plea to the jurisdiction alleging immunity. The county asserted sovereign immunity based on the fact Smith did not state a claim within the Texas Tort Claims Act. Smith argues the county knew of the slippery floor but did nothing to fix it. Trial court granted the county's plea to the jurisdiction.

Section 101.061 of the Texas Tort Claim Act provides that "immunity is not waived for claims based on an act or omission that occurred before Jan 1, 1970," meaning that the county is entitled to immunity if it can prove that the structure was built prior to 1970 and it has remained unchanged. Smith unsuccessfully argued that even though the structure was built pre-1970, the government unit waived immunity by failing to correct a dangerous condition.

Finally, Smith argued that the county was required to place non-skid flooring in all showers because they did place some in the medical unit. Courts have held that "installation of safety features are discretionary," for which a governmental unit is immune. *State v. San Miguel*, 2 S.W.3d 249, 251 (Tex. 1999). Court dismissed Smith's claims, and held that the Tort Claims act does not waive the county's immunity.

***City of Dallas v. Gatlin*, No. 05-09-01425-CV, Tex. App.—Dallas, Dec. 6, 2010.**

City employee, Gatlin, died from injuries he sustained while at work. City paid workers' compensation to Gatlin's wife, but not to his two adult children. Gatlin's wife and two daughters sued the city alleging gross negligence seeking punitive damages. They argued the city waived its governmental immunity under section 408.001 (b) of the Texas Labor Code and article XVI, section 26 of the Texas Constitution. City subsequently filed a plea to the jurisdiction, which trial court denied.

Section 408.001 (b) of the Texas Labor Code provides that though the recovery of workers' compensation benefits is generally the exclusive remedy for an employee or employee's beneficiary, exemplary damages may be sought by the surviving spouse or heirs if the death was caused by the employer's gross negligence, notwithstanding the fact that worker's compensation benefits were paid. However, section 408.001(b) of the Texas Labor Code "does not provide a basis for appelles to recover damages against the city and does not waive the city's immunity from suit." Tex. Civ. Prac. & Rem. Code Ann. §101.024; Tex. Lab. Code Ann. §504.001(3).

The court reversed the trial court's order denying the city's plea to the jurisdiction, and ordered the cause dismissed for want of jurisdiction.

***City of Dallas v. Jones*, No. 05-09-01379, Tex. App.—Dallas, July 21, 2010.**

The Jones' purchased a lot intending to build a house, but during construction found there to be a 60-inch storm drainage pipe and a 15-inch sanitary sewer line running through the center of their property. The city subsequently suspended the Jones' building permit. The Jones' sued the city seeking to quiet title and brought a claim for inverse condemnation. City filed a plea to the

jurisdiction asserting immunity, trial court denied and Supreme Court upheld. Upon remand, the Jones' added claims for negligence and equal protection, the city again filed a plea to the jurisdiction, which the trail court again denied. On appeal, the court found that since the Texas Tort Claims Act does not apply to acts or omissions that occurred before January 1, 1970, the court must consider the city's immunity under common law. *See* Tex. Civ. Prac. & Rem. Code Ann. §101.061; *City of Tyler v. Likes*, 962 S.W.2d 489,500-01.

Under common law, a city is not immune if the act or omission was proprietary or if the city was acting in its "private capacity for the benefit of only those within its corporate limits." *See Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992, 993 (1949). If on the other hand, the city was using its "discretionary powers of a public nature involving judicial or legislative functions," the city would be immune. *See Likes,* 962, S.W.2d at 501. Under common law, construction activities are considered proprietary. *See Dilley*, 222 S.W.2d at 994. However, the court held that the city used its discretionary powers in planning and designing the sewer system, including choosing where the lines would be located, and thus was protected by immunity. Planning, designing and "acquiring interest in land for public use is a governmental function protected by immunity." *See Likes*, 962 S.W.3d at 501, Leeco Gas & Oil Co. v. Nueces County, 736 S.W.2d 629,630 (Tex. 1987). The court found that the trial court erred in denying the city's plea to the jurisdiction.

The Jones' filed an equal protection case as well, alleging that by placing the sewer lines going through the middle of their property, the city was treating them differently than the rest of the residents of the Dallas. However, the court stated this was the wrong way of reviewing. Instead, the court must consider if the Jones' were treated any differently than other landowners who had sewer pipes similarly situated on their property. The court found that the trial court erred in denying the city's plea to the jurisdiction.

***Wight Realty Interest, Ltd. v. City of Friendswood*, No. 01-10-00442-CV, Tex. App.—Houston [1st Dist.], Dec. 23, 2010. Rehearing En Ban Overruled Feb. 9, 2011.**

Friendswood contracted with Wight Realty to acquire two tracts adjoining a tract of land already owned by Wight Realty and then develop a youth recreational sports facility on all three tracts. After Wight purchased the 2 tracts of land and built the sports facilities the city terminated the contract refusing to pay Wight they money for the land and the expenditures for the sports facilities. Wight sued and the city filed a plea to the jurisdiction. Section 271.152 of the Texas Local Government Code waives a city's immunity from suit "for the purpose of adjudicating a claim for breach of a contract claim," specifically for "a written contract for goods or services." Tex. Loc. Gov't Code §271.151 (2).

While the contract between the city and Wight involved the sale of real property to the city, the court found that it plainly qualified as a contract for services as Wight was not only acquiring the land but also building facilities on that land. Therefore, the city's immunity was waived by statute.

***Webber v. Harris County Toll Road Authority*, No. 14-09-00513-CV, Tex. App.—Houston [14th Dist.], Oct. 14, 2010.**

Authority invoked the liquidated damages clause because the contractor failed to finish construction by the time outlined in the contract. As of the date of the contracts, the authority had

not fully secured all of the necessary rights of way, and Webber attributed the delay in construction to this fact. Construction contractor, Webber, then filed suit against county toll road authority for breach of contract and quantum merit.

The authority filed a plea to the jurisdiction which the court upheld. On appeal, Webber argued that the authority waived governmental immunity through "waiver by conduct." There are generally two ways immunity is waived; 1) a governmental entity can waive *immunity from liability* when the entity enters into a contract; and 2) governmental *immunity from suit* can be waived by Legislature. *Tooke v City of Mexia*, 197 S.W.3d 325, 332 (Tex.2006). While the Supreme Court may have at one time recognized waiver of immunity from suit by conduct, it no longer does.

The Supreme Court has held that a government entity does not waive its immunity from suit by "adjusting the contract price pursuant to a liquidated-damages clause," even if the price adjustment is at issue. *Travis County v. Pelzel & Associs., Inc*. 77 S.W.3d 246, 252 (Tex. 2002). In *Pelzel*, Travis County withheld payment and because the contractor failed to complete the project, pursued liquidated damages. *Id.* at 247, 251. The cases being virtually similar, the court held that the authority did not waive its immunity from suit by invoking the liquidated damages clause.

Eminent Domain

City of Carrollton v. HEB Parkway South, Ltd., Fort Worth Court of Appeals, 2-09-179-CV, June 17, 2010.

The plaintiff property owner, HEB Parkway South, Ltd., submitted a preliminary development plat for a single family subdivision in 2000 which the city accepted with the stipulation that a homeowners association would be required to enter into a perpetual maintenance agreement with the city for a floodplain area located in the middle of the HEB property. Due to cost concerns, HEB spent the better part of a year trying to amend the city's storm water ordinance in such a way that the ordinance would not apply to their property. In 2001, the mayor responded that an ordinance amendment was not warranted at the present time. In 2002, a development agreement was reached through which the city would pay for a portion of the improvements and the developer would bear the remaining costs. The plaintiff then completed the improvements and filed suit alleging breach of contract and inverse condemnation. The city argues that the court lacked subject matter jurisdiction due to the case not being ripe.

The court ruled in favor of the city due to the fact that HEB had not followed the proper procedure in asking for a variance, relying on staff recommendations only and not asking P&Z for a variance. Due to the fact that the improvements have already been constructed, and it is now too late to obtain a variance in order to avoid constructing the improvements, the issue can never become ripe.

State v. Gaylor Investment Trust Partnership, Tex. App.—Houston [14th Dist.], Aug. 31, 2010.

State initiated condemnation proceedings to acquire 0.5256 acres of land for use in widening IH-10. The State appealed the $2,890,367 award arguing the trial court abused its discretion by not allowing the State to call two additional experts to testify to errors and deficiencies in the methodology and opinions of the land owner's expert. Upon the landowner resting its case-in-chief, the trial court ruled that two of the three experts retained by the State would not be allowed to testify, partially due to their assumption that if the State called three witnesses, the Landowner would want to call

three witnesses and this would only result in a longer more costly trial. Under Rule 611 of the Texas Rules of Evidence, the trial court "shall exercise reasonable control of the mode and order of the interrogating witnesses and presenting evidence so as to 1) make the interrogation and presentation effective for the ascertainment of truth 2) avoid needless consumption of time, and 3) protect witnesses from harassment or undue embarrassment." Tex.R. Evid. 611(a). Trial courts have the discretion to limit both sides to one expert witness, and thus did not abuse its discretion in this case.

***In re State of Texas*, No. 03-10-00260-CV, Tex. App.—Austin, Nov. 12, 2010.**

The State wanted to acquire property from the LeGuins for the expansion of IH-35. After starting the eminent domain proceedings, the trial court appointed three special commissioners to "assess the damages to the owner of the property being condemned." *See* Tex. Prop. Code Ann. § 21.014. Prior to the hearing before the commissioners, the LeGuins asked the State to produce various appraisals and documents containing design plans and market values under the Texas Property Code § 21.024. The State objected, but the trial court ultimately granted the LeGuins motion to compel production. State then filed this petition for writ of mandamus.

A writ of mandamus is appropriate when there is no adequate remedy at law. The issue at hand is whether the State is required to disclose certain information during the administrative portion of an eminent domain proceeding. If as the State argues, they are required to disclose this information, they could potentially be harmed by releasing the information since once released it cannot be recovered.

The court held that the trial court abused its discretion by requiring the State to provide the LeGuins the requested information. The Property Code gives a distinction between those governmental entities that are authorized by law to engage in eminent domain and those that have an express or inherent powers of eminent domain, such as the State, thus the State is not governed by the requirements in Section 21.024 of the Texas Property Code.

***Edinburg v. A.P.I. Pipe and Supply, LLC,* No. 13-09-00159-CV, Tex. App.—Corpus Christi-Edinburg, Aug. 26, 2010.**

In 2003, the city filed a petition for condemnation to acquire in fee 9.869 acres for the purpose constructing, maintaining and operating right-of-way for US Highway 281 drainage ditches. At a special commissioners hearing, landowner was awarded $224,249 as adequate compensation for the property, and the court entered a Judgment in Absences of Objection ("2003 Judgment"), vesting title in the city. Then in 2004, the court entered a *judgment nunc pro tunc* ("2004 Judgment") giving the city a right of way easement only, and holding that this decision supersedes the pervious judgment.

Later in 2004, API purchased 34 acres from the original land owner including the 9.869 acres the city had condemned. In 2005, the city granted an easement over the property to TxDOT. In 2006, API filed against the city and TxDOT claiming inverse condemnation for the taking of the soil in the drainage channel. The city and TxDOT filed a plea to the jurisdiction which the court denied.

On appeal, the city argued that API lacked standing to sue because they did not have an interest in the property. While, the court held that the 2004 Judgment was void and the 2003 judgment granted the city fee to the land, it also

questioned if API had an interest in the property as good faith purchaser. It is undisputed that both the 2003 and 2004 Judgments were recorded and that API had actual notice. The court considering all of the above held that API was not required to inquire into the 2004 Judgment validity, was entitled to rely on the Judgment as good faith purchasers, and did have a compensable interest in the property.

Additionally, the city tried to argue that API was not claiming inverse condemnation, but instead trespass to try title from which the city was immune. The court rejected this argument because if true, no property owner whose ownership was challenged by a governmental entity could recover because they would be barred by sovereign immunity. *City of Sunset Valley*, 146 S.W.3d at 644.

Finally, the court considered the scope of the easement. While several courts have held that in highway excavation cases the State is allowed to keep the removed soil. The court distinguishes this case because the highway cases typically deal of the removal of soil above grade, not below as in this case. The court held that API does have a property interested in the below grade soil, and therefore have an action of inverse condemnation to which the city does not have immunity.

Zoning

***Shumaker Enterprises, Inc., v. City of Austin*, No. 03-09-00613-CV, Tex. App.—Austin, Nov. 2, 2010.**

Landowner, Shumaker owns 470 acres in Travis County where he planned on conducting sand and gravel mining operations. On July 1, 2005, when Shumaker applied for a permit from the county the front tract of the property was in Austin's ETJ, but the middle and back tract were not. On December 1, 2005, prior to the county ruling on his permit application, the city's ETJ expanded encompassing the middle tract. Later the county approved the permit on the back tract only, and required Shumaker to obtain a city permit, or waiver, for the front two tracts.

Shumaker received a permit from the city on the front tract and asked for a determination that no permit was necessary on the middle tract because it was not a part of the city's ETJ when application was made to the county. The city rejected his request. Shumaker sued relying on chapter 245 of the Local Government Code which regulated the issuance of local permits. Section 245.002(a)(1) of the Local Government Code requires agencies to process permits under the law in effect when the permit was filed. Because Shumaker did not file a permit with the city, until after the ETJ was expanded, the court held that the city had the right to require him to apply for a permit.

Employment-Collective Bargaining

***The City of Round Rock, Texas, v Rodriguez*, Court of Appeal of Texas, Austin, No. 01-09-00546-CV, July 21, 2010.**

Rodriguez sued Round Rock when he was denied association representation at an internal investigatory interview. The Round Rock Fire Fighters Association also sued the city to gain the right to represent fire fighters at investigations. The city argued that: (1) the fire fighter and association did not have standing; and that (2) Section 101.001 of the Labor Code does not provide "Weingarten Rights" since the city is a public employer.

The city argued that the fire fighter and the Association did not have standing because: (1) the case is moot because the fire fighter accepted the discipline that resulted from the hearing; (2) the fire fighter failed to exhaust his

administrative remedies; and (3) the association does not have associational standing.

Mootness and Exhaustion of Administrative Remedies. The court held that the fire fighter's case is not moot because it is "capable of repletion yet evading review." *See Blum v. Lanier,* 997 S.W.2d 259, 264 (Tex. 1999); *Lakey v. Taylor*, 278 S.W.3d 6, 12-13 (Tex. App.—Austin 2008, no pet.). Because the city would deny representation at the hearing and then the hearing would go forward, all of the cases would become moot prior to review. Additionally, the court held that the fire fighter was not objecting to the discipline he received, but instead due to his lack of representation, thus there were no other administrative remedies to exhaust.

Associational standing. An association, such as the Round Rock Fire Fighters Association has standing to sue if: (1) its members have an individual right to sue; (2) the interests the individual seeks to protect are part of the association's purpose; and (3) the association's claim and relief request does not require the participation of individual members to the lawsuit. *Tex. Asso'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993). The court held that the individual fire fighter in this case had standing. Representing members at investigatory hearings is something the association is designed to do. Thus, the association has standing.

Representation at investigatory hearings. The city argued that the individual fire fighter does not have the right to representation at investigatory hearings because: (1) the city was not a collective bargaining city; and (2) Section 101.001 does not provide the right to representation, known as a "Weingarten right."

In 1975, the Supreme Court held that an employee has a right to union representation when involved in an interview that may lead to discipline under Section 7 of the National Labor Relations Act. *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251. However, the National Labor Relations Act does not apply to public employees.

The issue in this case became whether Section 101.001 of the Texas Labor Code gives the same or similar rights as Section 7 of the National Labor Relations Act *to both public and private employees*. The court held that Section 101.001 applies to public employees because the plain language of the statute says "all persons;" the legislature did not distinguish between private and public employees in the statute.

The right to representation at investigatory hearings is available to all public employees, and this right exists despite the lack of a collective bargaining agreement.

Employment-Civil Service

***City of Fort Worth v. Davidsaver*, Tex. App.—Fort Worth, No. 2-09-458-CV, July 29, 2010.** When Officer Davidsaver sat for the promotion exam, the exam contained a notice that said bonus points would be added for seniority pursuant to the guidelines of the Local Government Code. Instead, seniority points were added according to the procedures contained in the Meet and Confer Agreement between the city and Police Officer Association. Officer Davidsaver complained to the Police Officer Association and the Association forwarded his complaint to the dispute resolution committee for review. Prior to that review being conducted the officer sued the city, the Police Officers Civil Service Commission and the Police Officer Association requesting a judgment declaring the provisions of the local government code and not the collective bargaining agreement between the city and the Police Officers' Association applied to his promotional exam among other things.

Chapter 143 allows cities of a certain size to exercise local control over terms and conditions of police employment, but only those conditions which the city and an association who has been recognized as the sole and exclusive bargaining agent agree. In 2007 Fort Worth recognized the Fort Worth Police Officers Association as such exclusive bargaining agent. In late 2008 the city and the Association signed a Meet and Confer Agreement which specifically addresses additional points added to a candidate's promotional score. The city argued that Officer Davidsaver didn't have standing to sue under the agreement since he was not a party to the agreement. The Court of Appeals agreed with the city that Officer Davidsaver did not have standing to sue since he was not party to the agreement.

Finally, the court also failed to see that the Association had breached its duty of fair representation in the handling of his grievance. The decision to escalate the Officer's complaint was within the Association's discretion and not enough to establish that the Association's conduct was arbitrary, discriminatory or in bad faith.

***Cooke v. City of Alice*, No. 04-09-00731-CV, Tex. App.—San Antonio, Sept. 29, 2010.**
Alice as a home rule city adopted the Texas Civil Service Act, of which Sections 143.045 and 143.046 govern the accrual and use of sick and vacation leave for police officers and firefighters. Tex. Loc. Gov't Code Ann. §§ 143.001-.363 (West 2008 and Supp.2010). Sections 143.045 and 143.046 allow each civil service worker to accumulate a minimum of 15 days of paid sick or vacation leave a year respectively.

Alice through its Civil Service Commission created rules governing the accrual and use of sick and vacation days. The city's rules stated that police officers would accrue a day of sick land a day of vacation eave every eight (8) hours worked, however they would use sick or vacation leave based on the actual number of hours missed.

Cooke worked four 10-hour shifts a week; other officers worked five 8-hour shifts a week. Cook on behalf of himself and the Alice Police Officers' Association sued the city complaining that he was being treated unequal to the officers who worked 8-hour days. Though both groups of officers earned the same number of vacation hours a year, those who worked 10-hour shifts only earned 12 days of vacation while those who worked 8-hour shifts eared 15 days of vacation. He argued that by defining a working day as 8-hours the city had violated §§143.045 and 143.046.

The Texas Civil Service Act does not define the term working day. The court considered the ordinary meaning within the context of the statute, the purpose of the Civil Service Act itself, and the consequences of various interpretations. In doing so, they arrived at the decision that if a working day was defined as Cooke suggests, he would be receiving an extra 30 hours of annual leave above and beyond those officers who worked 8-hour shifts, which would result in unequal treatment of officers which the court contends the Legislature could not have intended when drafting the Civil Service Act. *See Barshop v. Medina County Underground Water Covservation Dist*., 925 S.W.2d 618, 629 (Tex. 1996). Therefore, the city's definition of a working day being 8-hours in length for purposes of leave accrual does not violate the Civil Service Act.

Contract Interpretation

***Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, Tex., No. 08-1003, Aug. 27, 2010.**

The developer, Kirby Lake Development, entered into an agreement with Clear Lake City Water Authority to build water and sewer facilities that the developers would pay for and lease to the authority free of charge. In the event that voters approved a bond for financing, the authority would then reimburse the developers for 70% of their development costs.

Two different bond elections were held in 1998 and 2004. The first failed, and the second did not include the language regarding the reimbursement of the developers. In 2004, the developers sued the authority, arguing that the agreement required it to place the bond authorization on every election ballot the authority called until the proposition passed.

The authority argued that: (1) it had governmental immunity from suit; (2) the agreement required only that the authority include the bond authorization on one ballot; and (3) the agreement was invalid under the reserved powers doctrine if it required that the bond authorization be included on every election ballot.

Governmental Immunity. While water authorities are generally immune from suit, the court held Section 271.152 of the Local Government Code waives immunity for breach of contract suits related to valid contracts for "goods and services." While the term service is not defined for the purposes of Chapter 271, the court held that the "service" was "to construct, develop, lease, and bear all risk of loss or damage to the facilities . . . ."

Contract Interpretation. The authority argued that "any" in the agreement meant that the authority had to place the bond authorization on at least one bond election. But the developers argued that the intent of the agreement was that the authority would continue to have the bond authorization on all elections until the proposition passed. The court held that "any" can be interpreted in either way but that the intent in this case suggested that "any" should be interpreted as "every" and thus the authority breached its agreement when it left the proposition off one of its election ballots.

Reserved Powers Doctrine. The authority argued that requiring it to place the bond authorization on all future bond elections violates the reserved powers doctrine because it is "attempting to bind future boards to include certain propositions in a future election." The court held that the agreement did not contract away any future power or cause an impediment to the Authority's governmental obligations because did not limit the Authority's ability to choose the time, place, order, number of propositions, or whether to hold an election at all, it was simply an agreement to pay a debt.

Elections

***Pryor v. Dolgener*, No. 08-09-00284-CV, Tex. App.—El Paso, April 14, 2010.**

The Pryors filed an election contest arguing that an error or omission on a voter's registration application invalidates that registration. They contend that over ninety votes were illegally cast in a local election due to defective voter registration applications. The defects found included omissions of complete signatures, failure to indicate citizenship status among others. However, each claim was based on facially defective registration applications, not any specific qualifications. Because the Pryors never disputed that any of these voters were not actually qualified to vote, but instead just failed to fill out the application properly, the trial court granted and appellate court upheld a summary judgment against the Pryors.

In re Bouse. **No. 10-10-00263-CV,Tex. App.—Waco, Aug. 17, 2010.**
Wellborn, an unincorporated area in the extraterritorial jurisdiction of College Station, requested consent to incorporate from the city council of College Station. Additionally a group of realtors submitted an initiative petition and proposed an ordinance granting consent to the citizens of Wellborn for an election on the proposition on incorporation. The city secretary of College Station determined that the petition was insufficient because it lacked the affidavit of the circulator nor did it contain the full text of the ordinance, no plat was attached. Additionally, the city attorney explained that the city charter allows for the filing of an initiative petition in the following circumstances: "zoning or rezoning, appropriating money, authorizing the issuance of bonds, or authorizing the levy of taxes." College Station, Tex., City Charter art. X, § 83. Thus, the city states that initiative petition is not the proper way to ask for incorporation, and that in order to incorporate Wellborn must follow the procedures outlined in section 42.041 of the Local Government Code.

The Realtors argue that the city is attempting to block the petition by not performing a ministerial duty. The court held that residents of Wellborn must follow the process outlined in Texas Local Government Code Section 42.041.

Open Records

Dallas v. Dallas Morning News**, No. 05-09-00924-CV, Tex. App.—Dallas, Dec. 30, 2010.**
Two Dallas Morning news reporters requested emails from city employees under the Texas Public Information Act. The Attorney General both allowed and disallowed exceptions the city claimed under the act. Cross suits were filed, and eventually the trail court granted summary judgment to the News requiring release of non-excepted information and awarded attorney's fees. On remand the city argued the trial court lacked jurisdiction because 1) the News did not request information under the Act, only the reporters did; 2) the News lacked standing to bring a declaratory judgment action; 3) declaratory relief was not available when the News had already asserted a claim for mandamus relief.

The court held that the reporters acting as an agent of the Newspaper, thus the newspaper is a requestor under section Tex. Gov't Code Ann § 552.321. In the second issue the news originally sought a writ of mandamus requiring the city to release the requested emails, then in an amended petition sought declaratory judgment that the emails were public information and no exception existed. The court held that the News had no need for declaratory relief on the issue because it had already placed the issue before the trail court for writ of mandamus. Finally this court held that the trial court did not err in awarding attorney's fees because the Act provides the "court shall assess costs of litigation and reasonable attorney's fees incurred by a plaintiff who substantially prevails in an action brought under section 552.321" of the Texas Government Code.

Injunction

8100 North Freeway Ltd., v. City of Houston**, No. 14-09-00220-CV, Tex. App.—Houston [14th Dist.], Dec. 1, 2010.**
Houston required sexually oriented businesses to meet certain criteria and obtain an operating permit. Part of the city's ordinance dealt with minimum light levels within a booth and for the booths to be within the line of sight of the manager. The 8100 instead placed video cameras in the booths. The city denied their permit request and their action was up held in court. 8100 then decided to change their

operating plan by adding condoms, oils, lingerie, costumes and adult novelties, they also expanded the video arcade in an effort avoid the need for a permit. The city sued 8100 for operating without a permit and sought injunctive relief. The city received a temporary injunction on March 5, 2009 and caused 8100 to cease its operations. 8100 filed an appeal, but no injunction hearing has been held.

8100 argued that the trial court erred in issuing a temporary injunction because the city's ordinance was only applicable to those stores whose primary business was to provide sexual stimulation or if its inventory of movies is over 50%. The court disagrees, stating that primary business analysis doesn't matter because adult video arcade is in the list of categorical SOBs, thus the trial court did not abuse its discretion when issuing its temporary injunction.

8100 also contended that injunctive relief was improper because it goes beyond preserving status quo. However, the court held a business cannot stay in operation if the status quo allows a party to continue violating the law.

Finally, 8100 argued abuse of discretion based on restraint of their 1st Amendment right. However, the city was not attempting to prohibit them from operating, but instead required them to comply with local ordinance. 8100 was free to continue operating and showing videos, so long as they abided by city regulations. The trial court did not abuse its authority by issuing a temporary injunction.

<u>Litigation Costs</u>

Gilbert v. City of El Paso, No. 08-08-00282-CV, Tex. App.—El Paso. Oct. 13, 2010.
El Paso created a Public Service Board (PSB) as a department of the city. The PSB had authority over the management of the water system and plant. In 2008 they established storm water drainage fees. Gilbert and two other resident users sued the city seeking 1) injunctive relief from imposing and collecting the storm water fees and other rules and regulations established by the PSB; and 2) for declaratory relief to conclude that the fees and rules and regulations were invalid on the basis that the city lacked authority to delegate powers or fee making authority to the PSB. The city counterclaimed for declaratory judgment. The parties ended up entering into a Rule 11 agreement agreeing to submit cross-claims for summary judgment. The court granted the motion for summary judgment and awarded the city attorney's fees in the amount of $25,000, if the plaintiffs appealed the judgment to an appellate court, and $15,000 if they appealed to the Supreme Court.

Upon further review of the trail court's action, the appellate court denied the award of attorney's fees at the trial court level because they worried about the "chilling effect" it may have in the future against individuals who wish to sue the city. While the awarding of attorney's fees is within the trial courts authority, an award of appellate attorney's fees must be "conditioned on the appeal being unsuccessful." *In re Ford Motor Co.,* 988 S.W.2d 714, 721 (Tex 1998) (orig. proceeding). Additionally, the court held that the award of attorney's fees must be supported by evidence, none of which were established at the trial court level.

<u>Dangerous Buildings</u>

***Slavin v City of San Antonio,* No. 04-09-00601-CV, Tex. App.—San Antonio, Oct. 17, 2010.**
San Antonio's Dangerous Structure Determination Board ("the Board") issued a repair and demolition order. After the Board issued its decision the Slavins appealed to district court on due process grounds, based on the fact that the Board was made up of city

employees, doing whatever the city recommended, limiting the number of witnesses allowed to testify at the board meeting, and that in 99.9% of the cases the board ruled 6 to zero.

On appeal, this must be considered under a pure substantial evidence review, considering only what was presented to the Board. The record of the hearing before the board does not have indication of due process violations. The transcript does not support the claims of the Slavins that they were prevented from asking witness questions or testifying, and they did not attempt to enter any evidence. The court in this case does not agree that the Slavins due process rights were violated just because the board was made up of city employees versus citizens.

The final issue on appeal is that the city argues the trial court improperly remanded back to the Board an issue of notice for Slavin Sr. The city mailed notice to Slavin Sr., but received no indication that it was received, or was unclaimed. Since the city did not receive confirmation, the validity of the notice was not established and should have been remanded for confirmation.

<u>Taxes</u>

***Putnam v. City of Irving*, No. 05-10-01269-CV, Tex. App.—Dallas, Jan. 27, 2011.**
In 2007 Irving held an election to determine whether or not the city should impose new taxes and build a new entertainment center. The measure passed and ordinances were established which imposed event admissions and parking taxes. The city wished to issue $200 million dollars in debt to construct the entertainment center and proposed to repay the bond debt from the following sources among others: state sales and use taxes, mixed beverage taxes, and hotel occupancy taxes. Joe Putnam and a group of citizens, Irving Taxpayers Opposed to Illegal and Wasteful Use of Tax Money, collectively the "Taxpayers," opposed the issuance of bonds and filed a temporary injunction. The city requested that the court require the Taxpayers to post security for any damages the city might have incurred due to the delay caused by the Taxpayers lawsuit. The court did so, and when the Taxpayers failed to post security dismissed the case. Upon review, the appellate court must consider whether or not the Taxpayers established they were entitled to a temporary injunction.

The Taxpayers first contend that the entertainment center project is not a "hotel project," and thus the city cannot pledge the State's portion of the hotel occupancy tax and sales and use tax to repay the bonds. The court found the project did meet the definition of hotel, found in the tax code, and while the hotel and entertainment center were a part of the same project, city presented evidence that the entertainment center was ancillary to the hotel, thus allowing the use of hotel tax to repay the bonds.

The city also proposed repaying the bond debt by pledging newly passed admissions and parking taxes. The Taxpayers argued these new taxes were illegal because they were passed at a special city council meeting versus a regular meeting as required by the Irving city charter. There were also arguments regarding whether the term "order" as it was used at the special council meeting was the same as "ordinance." While the appellate court questioned the use of those terms, they determined that the Taxpayers had no basis for an injunction because even if the taxes were not passed legally, the city could re-authorize the resolutions establishing the new taxes at the next general meeting to eliminate any question of them not being properly imposed.

Finally, the Taxpayers stated that four out of the seven proposed ways to pay the bonds were already existing taxes previously pledged to repay other bonds. Therefore, the Taxpayers argued that the city violated its "contract" with voters on how such debts should be repaid. In this situation, the voters voted for or against the construction of this project as well as three new taxes. The ballot did not contend that these three taxes were the only taxes contemplated to be used to repay the debt. Therefore, the court found the city's use of taxes to be consistent with the voter's approval.

In finding that the trial court did not abuse its discretion, the appellate court held that the Taxpayers were not entitled to an injunction against the issuance of bonds and were required to post security prior to their continued participation in the proceeding.

Annexation-Takings

***City of Houston v. Guthrie*, No.01-08-00712-CV, Tex. App.—Houston [1st Dist.], Dec. 31, 2009.**

In 2008, Houston entered into strategic partnerships with MUDs 152, 157, and 132. The strategic partnership and a Limited Purpose Annexation ("LPA") allowed the city to annex the roadways along which property was located, but did not actually annex the real property itself. This allowed the city to collect two percent sales tax and the MUDs to benefit from city services such as fire protection. The city began implementing the city's Fire Code which included a ban on fireworks.

The Fireworks Operators and Property Owners filed suit against the city and MUDs 135,157 and 132 alleging unlawful extension of the city's ordinances. Additionally, the Firework's Operators and Property Owners claimed the city's action constituted an unconstitutional taking and an unconstitutional exercise of police power. They allege the taking claims under the Texas Private Real Property Rights Preservation Act ("PRPRPA") for unlawful takings without just and due compensation. The Fireworks Operators and Property Owners sought a temporary injunction and declaratory judgment.

The city and MUDs filed pleas to the jurisdiction arguing that 1) the Fireworks Operators and the Property Owners failed to properly plead jurisdictional facts (standing), and 2) Their actions did not waive governmental immunity under PRPRPA. The trial court denied. On appeal, the city and MUDs argued that the Firework Operators and Property Owners did not have standing under the PRPRPA and that the Firework Operators and Property Owners did not plead any facts which established the city or the MUDs waived their immunity under PRPRPA's.

Standing under PRPRPA. The court found that the Fireworks Operators did not have standing because they did not have legal title to any of the real property. On the other hand, Metro Church did have a property interested which established their standing, however they must also establish a taking under PRPRPA. There are two ways to establish this. The first was that the "government intentionally performed acts, which resulted in a physical or regulatory taking of the property for public use." *General Servs. Comm'n v. Little-Tex Insulation Co., Inc.,* 39 S.W. 3d 591, 598 (Tex.2001). The Church was unable to prove that they had loss all economic use for the property. In additional to the sale of fireworks, the Church receives income from other operations, therefore the city and MUDs have not deprived them all economic use of their land. The second question is whether or not the government unreasonably interfered with their enjoyment of the property. The court found that the Church did not plead significant facts to allege sufficient facts under this interpretation;

there was no argument of economic impact including market value. The only property to property allege facts to establish standing under PRPRPA. This property owner-Gulf Coast Avenue C, LLC not only owned property in the area, but also realized 40% property devaluation.

Waiver of Immunity Under PRPRPA. The PRPRPA waives immunity for governmental entities that "enact an ordinance, rule, regulation or plan that does not impose identical requirements or restrictions on the entire extraterritorial jurisdiction of the municipality." Tex. Gov't. Code §2007.003(a)(3). By regulating fireworks in only certain areas of the extraterritorial jurisdiction, the city waives its immunity. The MUDs however retain their immunity because they did not take any actions, such as the regulations of fireworks by the city, which would waive their immunity. The court held that the city's immunity was waived, but the MUDs was not.

Takings Claims, Tortious Interference, Deprivation of Constitutional Rights. Federal constitutional claims for taking were not ripe because the state claims were not yet settled. At the state level, a state statute provides that takings claims in Harris County must be brought in the County Court at Law, therefore 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. See Tex. Civ. Pract & Rem. Code Ann §101.023; Ethio Express Shuttle Serv., Inc. v. City of Houston, 164 S.W. 3d 751, 758 (Tex. App.-Houston [14th Dist] 2005, no pet.). The city and MUDs were immune from the general claims for violation of constitutional rights and *ultra vires* because the plaintiffs sought monetary damages.

Declaratory and Injunctive Relief. 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.

Bankruptcy

***Wind Mountain Ranch, LLC v. City of Temple*, No. 09-0026, Tex., Dec. 3, 2010.**

Robert K. Utley, as trustee, signed a note, set to mature in 1993, secured by a deed of trust encumbering 6.16 acres of land in Bell County, Texas. The property was later conveyed to Centex Investments who agreed to assume all of the obligations under the note and deed of trust. In 1992, Centex commenced voluntary Chapter 11 proceedings in the Central District of California. A lis pendens referencing the ongoing Chapter 11 proceeding was recorded in the real-property records of Bell County. The bankruptcy court confirmed Centex's

reorganization plan and issued an order in 1994. The reorganization plan extended the note's 1993 maturity date to 1999. Neither Centex's reorganization plan, nor the bankruptcy court's confirmation order were filed in Bell County.

Temple, alleging numerous municipal code violations, filed suit against Centex in 2002. The city obtained a judgment against Centex for $936,250 in December 2002, and recorded an abstract of its judgment on May 22, 2003. On July 3, 2003, the note and deed of trust were assigned to Wind Mountain Ranch. Wind Mountain then acquired the 6.16 acres securing the note at a non-judicial foreclosure sale.

Following Wind Mountain's acquisition, the city brought claims of fraudulent transfer, wrongful foreclosure, and conspiracy. The city also sought a declaration that, because the foreclosure occurred after the four-year statute of limitations lapsed, Wind Mountain's foreclosure was invalid. The city further contends that the extension of the maturity date was never recorded in Bell County, and is therefore void. The city presumes that the bankruptcy order, and its extension of the maturity date, was effectively an extension agreement subject to section 16.037's recording requirements.

Generally, real property liens must be foreclosed on within four years of the date mature of the note, however parties can “suspend the statute of limitations by executing a written extension agreement. Tex. Civ. Prac. & Rem. Code §§16.035 (a) 16.036 (a). These agreements must be filed with the county clerk and has no effect on a bona fide purchaser who had not notice of the agreement. *Id*. §16.037. The court looking at the plain language of the statue found that only the agreement needs to be recorded and that the Bankruptcy Court’s order need not be recorded to extend the note’s maturity date.