

**RECENT STATE CASES  
OF INTEREST TO CITIES**

TEXAS CITY ATTORNEYS ASSOCIATION  
Semi-Annual Meeting  
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## **Biography**

Emily W. Rogers

Emily represents municipalities, river authorities, water districts, school districts, and private entities, primarily in the areas of environmental law, water quality, water and wastewater utilities, and water rights. Her practice focuses on client counseling and administrative hearings before state and federal agencies and in state court. Prior to joining Bickerstaff, Heath, Pollan & Caroom, L.L.P., Emily was a staff attorney at the Texas Natural Resources Conservation Commission (predecessor agency to the Texas Commission on Environmental Quality). Emily is board certified in Administrative Law by the Texas Board of Legal Specialization.

Bradley B. Young

Brad provides general counsel and litigation services to cities in employment, real estate, constitutional rights, open government, and general civil matters. He represents clients before state, federal and municipal courts. He received his J.D. from the University of Texas School of Law in 2000 and his B.A. from Lyon College (Batesville, Arkansas) in 1997.

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## Recent State Cases of Interest to Cities

by Emily W. Rogers  
and Bradley B. Young

### Annexation

*JNC Partners Denton, LLC v. City of Denton*, 190 S.W.3d 790 (Tex. App. – Fort Worth 2006, pet. filed.). Plaintiff sought temporary injunction to prevent annexation. Section 43.052 of Texas Local Government Code requires cities to include areas slated for annexation in three-year annexation plan unless certain exceptions apply. One such exception is for areas that include fewer than 100 residential tracts. The statute also permits a property owner in an area proposed for annexation to petition for inclusion in annexation plan and to request arbitration if: (1) proposed annexation includes areas that city has artificially divided contrary to generally accepted municipal planning principles for annexation in order to avoid 100 rooftop requirement; and (2) municipality “fails to take action on petition.” Plaintiff submitted petition for inclusion in annexation plan, which city denied on basis that area proposed for annexation fell within 100 rooftop exception. Plaintiff then sought to compel arbitration. Disagreeing with the decision in *Hughes v. City of Rockwall*, 153 S.W.3d 709 (Tex. App. – Dallas 2005, pet. granted), the court held that landowner had not established probable right to arbitration under 43.052(i) where: (1) undisputed facts show that area contained fewer than 100 rooftops; and (2) city “took action on petition” for annexation by denying it.

### City Utility Cases (Electric, Water, Sewer, Gas)

*Bexar Metropolitan Water District v.*

*Texas Commission on Environmental Quality*, 185 S.W.3d 546 (Tex. App. - Austin, 2006, pet. filed). The City of Bulverde filed an application for a water certificate of convenience and necessity (CCN). Bulverde contracted with the Guadalupe-Blanco River Authority (GBRA) to design, construct, finance, operate and maintain the water distribution system. Bulverde also obtained its wholesale treated water supply from GBRA. Bexar Met filed a competing application for much of the same territory that Bulverde sought to certificate. After a contested case hearing, the Administrative Law Judge (ALJ) recommended denial of Bulverde’s application because Bulverde did not have on its own the technical, managerial, and financial capabilities needed to have CCN. The Commission disagreed and held that a city could acquire the requisite capabilities through contracts with GBRA. Bexar Met sought judicial review of this decision. The court agreed with the Commission. A municipality may acquire the capabilities needed to obtain a CCN through contracts and interlocal agreements.

*Public Utility Counsel v. Public Utility Commission*, 185 S.W.3d 555 (Tex. App. - Austin 2006, pet. filed). Retail electric providers affiliated with larger electric utilities filed applications seeking approval of projected fuel expenses in connection with discounted rate, price to beat, at which the retail electric providers were required to sell electricity to residential and small commercial customers. The PUC approved the rates, and the Office of the Public Utility Counsel, several cities, and the steering committee

representing the cities sought judicial review. The court held that the PUC properly included the challenged expenses in determining the fuel factors, that most of the challenged costs, with the exception of the uniform, system-wide unaccounted for energy expense, were supported by substantial evidence, and that the plaintiffs failed to show any harmful procedural error. The case was remanded back to the PUC for further proceedings relating to the inclusion of the uniform, system-wide unaccounted for energy expense.

*City of Port Neches v. Railroad Commission of Texas*, \_\_\_ S.W.3d \_\_\_, No. 03-05-00777-CV, 2006 WL 2190400 (Tex.App. - Austin, 2006, no pet. h.). This case is an appeal of the district court's affirmation of a final order of the RRC awarding an increase in Texas Gas Service Company's (TGS's) gas rates in the Cities of Port Neches, Nederland, and Groves. On appeal, the Cities raised two issues arguing that the awarded rate increase was too high, while TGS raised two contrary issues arguing that the awarded rate increase was too low. Specifically, the cities argued that (1) the awarded rate increase was in excess of the jurisdictional limits of the RRC because the RRC improperly considered the expenses of the Southern Union acquisition as a known and measurable change, and (2) the rate calculation should have included as a known and measurable change the increased revenues that TGS would collect from Port Arthur pursuant to a settlement agreement. TGS conversely argued (1) the rate calculation should not have included as revenues a certain amount of forfeited discount revenues that TGS may collect from Port Arthur, and (2) the RRC should have awarded rate case expenses for the cost of consultants who prepared data and testified for TGS.

The Court held that the RRC properly

included expenses resulting from the acquisition of Southern Union as known and measurable changes. The Court found that because the settlement revenues from Port Arthur were speculative and outside the scope of the test year, the RRC's decision to exclude them was not arbitrary and capricious. However, the Court found that the RRC improperly included the Port Arthur forfeited discount revenues because, like the settlement revenues, these revenues were outside the test year and would result in under-recovery to TGS. Finally, the Court found that the RRC acted within its discretion to exclude as rate case expenses certain consulting work because that work was not independently required in order to pursue the rate proceeding and because many of TGS's rate case expenses were unreasonably incurred due to the confusion TGS created by its multiple, readjusted filings.

### **Contract and Tort Cases**

*Schwartz v. City of San Antonio, by and through City Public Service Board of San Antonio*, 2006 WL 285989 (Tex.App.- San Antonio Feb. 8, 2006, pet. denied). (memorandum opinion). Plaintiff brought a negligence action against the City after sustaining injuries when a downed city electric wire electrified a chain link fence with which the plaintiff came into contact. To establish negligence, a plaintiff must show (1) the defendant owed a legal duty to the plaintiff, (2) he breached this duty, and (3) damages proximately resulted from the breach. Expert testimony is necessary to establish the applicable standard of care when the alleged negligence is of such a nature as not to be within the experience of a layman. Determining whether electrical services were negligently provided, particularly whether the downed wires were improperly re-energized, requires specialized knowledge. Because the

plaintiff did not provide expert testimony, there was no evidence of the standard of care.

Plaintiff also alleged that the City's negligence could be inferred under the doctrine of *res ipsa loquitur*. This doctrine is applicable only if (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence, and (2) the instrumentality causing the injury was under the exclusive management and control of the defendant. The doctrine is not a cause of action separate and apart from negligence. Rather it is an evidentiary rule by which negligence may be inferred by a jury. In some of these cases, a plaintiff may rely on general knowledge to prove that the accident in question is of the type that does not ordinarily happen in the absence of negligence. The court held, however, that this case was not one of those cases.

*City of Brownsville v. Golden Spread Elec. Coop., Inc.*, 192 S.W.3d 876 (Tex.App. - Dallas, 2006, pet. filed). The City of Brownsville, Oklahoma Municipal Power Authority, and AEP Texas Central Company (TCC) co-owned an electrical generation facility. The agreement governing the relationship included a right of first refusal. TCC entered into an agreement with Golden Spread for the sale of TCC's interest in the facility. Brownsville sent notice of its intent to exercise its option to purchase TCC's share under the same terms as Golden Spread.

Golden Spread sought a declaratory judgment that its agreement with TCC was valid and enforceable and sought damages for alleged tortious interference with its contract. The trial court agreed.

In its reversal of the trial court, the Court of Appeals found that Brownsville's exercise of the option to purchase TCC's

interest was positive, unconditional, and unequivocal. The indemnity provision in the City's agreement with TCC did not make the City's acceptance of the terms by which Golden Spread was to purchase the facility conditional. The court held that the law does not require equivalent enforceability of a contract for a right of first refusal to be valid.

## **Employment**

### Whistleblower

*City of Houston v. Levingston*, No. 01-03-00678-CV, 2006 WL 2076034 (Tex. App. – Houston [1<sup>st</sup> Dist.] Jul. 27, 2006, no pet. h.). (memorandum opinion). City veterinarian alleged that he was terminated in retaliation for reporting alleged animal abuse to division manager in city's Health and Human Services Department. The court held that plaintiff's complaints of inhumane treatment were complaints about "violations of law" within the meaning of the Whistleblower Act. The court also held that plaintiff's supervisor to whom plaintiff reported the alleged abuse was an "appropriate law enforcement authority" under the Act. However, the court modified the jury's award of \$365,500 in prejudgment interest to \$116,500. The court sustained the trial court's award to plaintiff of approximately \$200,000 in attorney's fees.

*Scott v. City of Houston*, No. 13-05-461-CV, 2006 WL 1766340 (Tex. App. – Corpus Christi Jun 29, 2006, no pet.) (memorandum opinion). Former employee had a ten-year history of documented performance deficiencies. Eventually, employee requested investigation into city's allegedly unlawful hiring practices. Employee subsequently received disciplinary action for "making inappropriate gestures" at co-worker. Because summary judgment evidence

established that city would have imposed same discipline regardless of employee's protected action, the court held that the city was entitled to summary judgment on plaintiff's whistleblower claim.

*Flores v. Town of Combes*, No. 13-04-626-CV, 2006 WL 949960 (Tex. App. – Corpus Christi Apr. 13, 2006, no pet.) (memorandum opinion). Police chief alleged that city terminated him in retaliation for reporting to local, state and federal law enforcement authorities alleged violations of law committed by the mayor and city secretary. City raised affirmative defense under whistleblower statute that it would have terminated police chief in absence of chief's protected action. The court held that the city was not entitled to summary judgment based on affirmative defense.

#### Americans with Disabilities Act

*Davis v. City of Grapevine*, 188 S.W.3d 748 (Tex. App. – Fort Worth 2006, pet. filed). Firefighter who suffered from multiple sclerosis alleged employer forced him to resign based on his disability. The court held that "running" was a "major life activity" within the meaning of the Americans with Disabilities Act. In addition, the court held that the city was not entitled to summary judgment on plaintiff's constructive discharge claim because record reflected that city's personnel director told plaintiff that "it was in his best interest to resign rather than be terminated."

#### Workers' Compensation

*State Office of Risk Mgmt. v. Herrera*, 189 S.W.3d 405 (Tex. App. – Amarillo 2006, no pet.). Beneficiaries of city police officer who was killed while responding to call from

county sheriff's department sought to recover workers' compensation benefits. The State Office of Risk Management sought to deny benefits. The court held that the issue of whether officer was killed while working for state or city was issue of compensability rather than coverage and, therefore, the trial court had jurisdiction.

*Nunn v. City of Vernon Employee Benefit Trust*, No. 07-05-0212-CV, 2006 WL 461138 (Tex. App. – Amarillo Feb. 27, 2006, no pet.) (memorandum opinion). Employee suffered injury while working at off-duty job. Off-duty employer did not carry workers' compensation insurance. The court held that city was not entitled to summary judgment on issue of whether city health plan, which was risk pool authorized by statute, excluded coverage.

#### **Franchise Fees, Municipal Fees, Taxes**

*City of Dallas v. Lowenberg*, 187 S.W.3d 777 (Tex. App. - Eastland 2006, pet. filed). The owners of commercial buildings brought a class action suit against the city seeking a declaration that a fire safety registration fee assessed against the owners was an unconstitutional occupation tax. Whether a particular fee imposed by a city constitutes an occupation tax or a license fee depends upon the primary purpose of the fee. If the primary purpose is to raise revenues, then the exaction is an occupation tax. Because the primary purpose of the fire safety registration fee was to raise revenues, it was an illegal occupation tax. Nevertheless, because the owner voluntarily paid the fee, the owners were not entitled to repayment of the fee.

*Magic Valley Elec. Coop. v. City of Edcough*, No. 13-05-202-CV, 2006 WL 733960 (Tex.App. - Corpus Christi May 23,

2006, pet. filed). The City, on its own behalf and on the behalf of 26 other cities, brought a class action claim against Magic Valley, alleging various franchise fees paid to the City by Magic were consistently underpaid. Magic challenged the City's case on several basis: (1) the City did not have standing to bring the case because it did not have a written contract with Magic; (2) the City failed to establish the threshold criteria<sup>1</sup> (numerosity, typicality, commonality, and adequacy) necessary to bring a class action suit; and (3) the City failed to show that common issues of law or fact predominate over questions affecting individual members of the class and that a class action is a superior method of adjudication.<sup>2</sup> The court disagreed and found that the parties had a valid oral agreement and therefore the City had standing, and that the City had satisfied the threshold requirements of TRCP 42(a). The court also held that a class certification was a superior method of adjudication to joinder of all other cities or separate trials for each.

*Citizens National Bank v. City of Rhome*, \_\_\_ S.W.3d \_\_\_, No. 2-05-337-CV, 2006 WL 2310034 (Tex.App. - Fort Worth Aug. 10, 2006, no pet. h.). Weratich Investments, Inc. had become delinquent in its ad valorem taxes, and the City of Rhome, Wise County, and the Northwest ISD obtained a tax warrant on the property, commonly referred to as the Rhome Texaco. The Citizens National Bank (CNB) had a security interest and first position lien on the same property through a note with Weratich. Weratich had defaulted on the note.

To prevent the seizure of the property

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<sup>1</sup> Texas Rule of Civil Procedure (TRCP) 42(a).

<sup>2</sup> TRCP 42(b).

and its sale to cover the taxes, CNB sought injunctive relief and a declaratory judgment that the fuel dispensers at the Texaco were realty, not personalty, and hence not subject to the tax warrant. Three factors are relevant in determining whether personalty has become a fixture: (1) the mode and sufficiency of annexation, either real or constructive; (3) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty.

The court of appeals, in a reversal of the trial court, found that the fuel dispensers were realty and are not subject to sale pursuant to a tax warrant.

### **Groundwater and Surface Water Rights Cases**

*Edwards Aquifer Authority v. Chemical Lime, Ltd.*, \_\_\_ S.W.3d \_\_\_, No. 03-04-00379-CV, 2006 WL 2631864 (Tex. App. – Austin, Sept. 14, 2006, no pet.h.). In November 1996, Chemical Lime received an application by mail for an initial regular permit from the Edwards Aquifer Authority (EAA). Chemical Lime filed its pumping records that it had filed with the Texas Natural Resource Conservation Commission since 1992 without realizing that the EAA in fact wanted 21 years' worth of back pumping data. After talking to the EAA, Chemical Lime attempted to recover the actual data as requested (as opposed to estimates). On January 17, 1997, Chemical Lime filed its application, although it was incomplete because Chemical Lime had been unable to recover the data. The EAA acknowledged receipt of the application and declared it administratively complete. The EAA began processing the application, conducted its technical review, and issued an Initial Regular Permit to withdraw water subject to final Board action on the

application.

On November 2000, the EAA rejected Chemical Lime's application finding that its declaration of historical use was not filed timely (before December 30, 1996), and that its historical withdrawals were not placed to a beneficial use of irrigation, municipal, or industrial use. Chemical Lime sued on the basis that its application had been timely filed. The court, in a substitute opinion, agreed and held that the EAA's enabling legislation became effective on February 10, 1997, when the Texas Supreme Court's mandate issued in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996). Thus, the deadline for filing applications was six months after that date. Therefore, the EAA exceeded its authority when it set the filing deadline by rule on December 30, 1996. The court affirmed the trial court's decision and award of attorney's fees

*Edwards Aquifer Authority v. Peavy Ranch*, \_\_\_ S.W.3d \_\_\_, No. 04-05-00412-CV, 2006 WL 397959 (Tex. App. - San Antonio, Feb. 22, 2006, no pet.). The Edwards Aquifer Authority (EAA) determined that the application for an initial regular permit filed by the Peavy Ranch was untimely and denied the permit on that basis. The Peavy Ranch filed a petition for review the EAA's decision alleging that due process required individualized notice to Peavy Ranch. The trial court agreed and the EAA appealed claiming that the Peavy Ranch did not have a protected property interest or, if such interest existed, the requisite notice was provided. The appellate court agreed with the EAA and held that the Peavy Ranch received all notice it was constitutionally entitled to receive.

*Guitar Holding Company, L.P. v. Hudspeth*

*County Underground Water Conservation District No. 1*, \_\_\_ S.W.3d \_\_\_, No. 08-04-00296-CV, 2006 WL 2516374 (Tex. App. – El Paso, Aug. 31, 2006, \_\_\_\_\_). Guitar Holdings ("Guitar") owned land, which in the 1960s, was irrigated, but since that time, was primarily used for cattle ranching. On May 14, 2002, Guitar filed an application for validation certificates of the 15 existing wells, and for 52 new well drilling permits. Despite the fact that the application was filed before the May 31, 2002 effective date of the groundwater district's new rules, the district processed Guitar's application under its new rules, which limited the historical use period to 10-1/2 years. (The historical use period is used to allocate production limits).

Guitar challenged the validity of the rules as they applied to transfer permit applications and production-based limitations for validation and operating permits, arguing the rules exceeded the District's statutory authority under Chapter 36 of the Texas Water Code. The court found that the Legislature had provided local groundwater districts with the flexibility to designate historical periods, in relation to their management plans, and impliedly authorized the District to define what constitutes the "historic use" to be protected. The court overruled Guitar's claims regarding production limits and transfer permits. The court also found that the transfer rules did not deprive Guitar of equal protection under the federal or state constitutions.

Guitar also claimed the application of the newly adopted 2002 rules to Guitar's application violated the vested rights statute, Texas Local Government Code Chapter 245. The court found that Chapter 245 is superseded by Chapter 36 of the Water Code because Chapter 245 would require the District to apply old, no-longer valid, rules

and such rules would conflict with provisions in Chapter 36, which require the District to adopt and implement rules that are consistent with the District's management plan. Chapter 36, being the more specific chapter, prevails in cases of conflict. See TEX. WATER CODE § 36.052.

## **Immunity**

### Sovereign Immunity

*Reata Constr. Corp. v. City of Dallas*, \_\_\_ S.W. 3d \_\_\_ No. 02-1031, 2006 WL 1792219 (Tex. Jun. 30, 2006). Owner of building that was damaged by water from punctured water main sued construction company and excavation subcontractor for negligence, and subcontractor brought third-party claim against city. The City claimed sovereign immunity against the subcontractor's third-party claims. At the same time, the city intervened and counter-claimed against subcontractor for negligence. The Court held that the city did not have immunity from subcontractor's claims that were "germane to, connected with, and properly defensive to the City's claims, to the extent Reata's claims offset those asserted by the City." Thus, the City waived its immunity from suit by voluntarily counter-claiming and asserting its own claims for monetary relief. However, the Court also held that "sue and be sued" and "plea and be impleaded" language in section 51.075 of the Local Government Code (relating to home-rule cities) and the city charter *did not* waive the city's immunity for all purposes.

*Tooke v. City of Mexia*, \_\_\_ S.W. 3d \_\_\_, No. 03-0878., 2006 WL 1792223 (Tex. Jun. 30, 2006). Contractor who had formerly provided curbside collection of brush and leaves for home-rule city sued city for breach after city cancelled contract. Plaintiff

claimed that "plead and be impleaded" language in section 51.075 of Local Government Code waived immunity. In considering contractor's argument, the Court also considered similar phrases such as, "sue and be sued," "defend or be defended," "answer and be answered," and "complain and defend." The Court held, "Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they appear, we hold that they do not, in and of themselves, waive immunity from suit." The Court overruled its earlier ruling in *Missouri Pacific Railroad Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (Tex. 1970).

### Texas Tort Claims Act

*City of Laredo v. Saenz*, No. 04-05-000188-CV, 2006 WL 286006 (Tex. App. - San Antonio Feb. 8, 2006, no pet.) (memorandum opinion). An undercover police officer for the City was assigned a 2002 Dodge Ram 1500 pick-up truck for use while engaged in police duties, in undercover duties, and between home and various work assignments. He was not authorized to use the vehicle for personal use. After completing some surveillance work, the officer drove in his city vehicle to a local bar to celebrate a recent promotion. The officer met three women at the bar and after determining he was too intoxicated to drive, the officer allowed one of the women to drive the truck. The truck was hit by another vehicle while attempting to turn around. The passengers in the second vehicle sued the officer, the female driver, and the City. The suit against the City was brought under the Texas Tort Claims Act.

The City argued that it was not liable because of its governmental immunity which was not waived in this case by the Texas Tort

Claims Act because the officer was not driving the vehicle or acting within the scope of his employment as required by the Act. The court agreed. The officer was not within his scope of employment when the accident occurred and therefore any claims the plaintiffs might have had against the City were barred by sovereign immunity.

*City of Austin v. Rangel*, 184 S.W. 3d 377 (Tex. App. - Austin 2006, no pet.). Rangel sued the City after she was injured on a public sidewalk by stepping into an uncovered water meter box. The Appeals Court reversed the lower court and held that Rangel failed to establish a waiver of the City immunity under the Texas Tort Claims Act. The court found that the uncovered meter box was a special defect and thus the City owed a higher duty of use ordinary care to reduce or eliminate an unreasonable risk to harm created by a premises condition of which the City is or reasonably should be aware. To establish liability for a tort arising from a special defect under the Act, a plaintiff must show that (1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or should have known of the condition; (3) the owner failed to exercise ordinary care to protect the invitee from danger; and (4) the owner's failure was a proximate cause of injury to the invitee. Rangel failed to present evidence to controvert the City's evidence that it had no report of the missing box lid and had not way of knowing about it.

*City of Grapevine v. Sipes*, No. 04-0933, 2006 WL 1651945 (Tex. Jun. 16, 2006). Motorist sued city for injuries arising from accident at intersection controlled by temporary stop sign. Under the Texas Tort Claims Act, a city retains immunity for claims based on the absence of a traffic signal unless

the absence is not corrected by the city within a reasonable time after notice. The Court held that the "absence" waiver of immunity under the Tort Claims Act applied to prior presence of a traffic signal but did not apply to the situation in which a city had merely made a decision to install a traffic signal but had not yet done so.

*City of Houston v. Vargas*, 193 S.W.3d 143 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, pet. denied). Family sued city after off-duty police officer who was working security at movie theater shot and killed family member. The court held that city was not entitled to dismissal based on sovereign immunity.

*City of Houston v. Harris*, 192 S.W.3d 167 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, no pet.). Plaintiff sued city under Tort Claims Act after plaintiff's finger was severed when he touched metal elephant at city zoo. Because the elephant statute was bolted to the ground and could not be easily moved, the court held that plaintiff's claim was for a premises defect under the Tort Claims Act. To establish premises defect liability under the Tort Claims Act, plaintiff must plead and prove either willful, wanton or grossly negligent conduct or that defendant had actual knowledge of the condition, the plaintiff did not, and the defendant failed to warn of the condition or make it safe. Because plaintiff failed to meet these pleading requirements, the court held that the city had not waived its immunity and was entitled to dismissal for lack of subject matter jurisdiction.

*City of Houston v. Degner*, No. 01-05-00133-CV, 2006 WL 1351258 (Tex. App. – Houston [1<sup>st</sup> Dist.] May 18, 2006, no pet.) (memorandum opinion). Decedent was involved in automobile crash that caused him to be placed on life support. Decedent's wife decided to end life support measures after

sheriff's department informed wife that during course of 9-1-1 call immediately prior to crash, decedent stated to 9-1-1 operator that he wanted to end his life. Wife later sued city and county after obtaining transcript of 9-1-1 call and learning that decedent never made such a statement. The court held that the city and county were entitled to sovereign immunity because "information" was not tangible personal property under the Texas Tort Claims Act.

*City of Eagle Pass v. Luna*, No. 04-05-00744-CV, 2006 WL 622592 (Tex. App. – San Antonio Mar. 15, 2006, no pet.) (memorandum opinion). Plaintiff sued city after city-owned vehicle driven by city employee who was picking up tacos and drinks for other employees struck plaintiff's car. City argued that employee's job duties as umpire did not include driving a vehicle, employee was not authorized to drive vehicle that struck plaintiff, and employee's leaving to purchase snacks did not, directly or indirectly, further city business. The court held that city was not entitled to dismissal based on sovereign immunity because evidence created a fact issue regarding whether city employee was acting within course and scope of his employment.

*City of San Antonio v. Hartman*, \_\_\_\_\_ S.W.3d \_\_\_\_, 2006 WL 2505981 (Tex. Aug. 31, 2006)(memorandum opinion). In response to very heavy rainfall, the City placed barricades and flares on roads and highways throughout the City. While there was disagreement as to the number and location of the barricades on one of the flooded roads, it appears that at least one barricade faced the motorist eastbound and at least two cars had turned around before the members of the Hartman family drove straight into the flooded portion of the road without slowing and were swept away. All persons in the car drowned.

The Hartmans sued the City under the Texas Tort Claims Act and the City responded with a plea to the jurisdiction asserting immunity. The City asserted that the trial court had no jurisdiction of the case because a statutory exemption for emergencies overrides any waiver of governmental immunity. The question before the court was whether or not the situation constituted an emergency so as to qualify as an exception or exclusion from liability under the Texas Tort Claims Act. The court held that, even if all the fact questions were decided in favor of the Hartmans, there was no doubt that the City was responding to an emergency and covered by the TTCA exceptions. The public is better served by encouraging public employees to take immediate action in an emergency than suing them later for imprudent actions.

#### Official Immunity

*Meroney v. City of Colleyville*, \_\_\_\_\_ S.W. 3d \_\_\_\_\_, No. 2-05-195-CV, 2006 WL 1452103 (Tex. App. – Fort Worth May 25, 2006, no pet. h.). Former firefighter sued city and assistant fire chief for defamation arising from alleged negative job references to potential employers. As to plaintiff's claim for injunctive relief against city only, the court held that the city was immune from plaintiff's claim, in part because the city was not a proper party to such a suit for injunctive relief. The court also held that plaintiff could sue the assistant chief in his individual capacity, despite plaintiff's election to sue city pursuant to section 101.106 of the Civil Practice and Remedies Code (Texas Tort Claims election of remedies statute).

#### Contracts

*Paula Constr., Inc. v. City of Lytle*, \_\_\_\_\_ S.W. 3d \_\_\_\_\_, No. 04-05-00317-CV, 2006 WL 2417199 (Tex. App. — San Antonio

Aug. 23, 2006, no pet. h.). Contractor sued city for breach of contract based on city's alleged failure to pay for services rendered under contract for removal of sludge. The court held that the retroactive clause of section 271.152 of the Texas Local Government Code provided waiver of immunity.

*DeQuire v. City of Dallas*, 192 S.W.3d 663 (Tex. App. – Dallas 2006, no pet.). Plaintiff sued for breach of contract, and city answered and filed plea to the jurisdiction. City's prayer included general request for attorneys' fees and costs. The court held that the city's affirmative request for relief (*i.e.*, request for attorneys fees) waived immunity from suit. [CAUTION: *But see Reata Constr. Corp. v. City of Dallas*, No. 02-1031, 2006 WL 1792219 (Tex. 2006)].

## **Land Use/Development**

### Easements

*City of Laredo v. Duarte*, No. 04-06-00226-CV, 2006 WL 1895482 (Tex. App. – San Antonio Jul. 12, 2006, no pet.) (memorandum opinion). Plaintiff purchased property that was subject to utility easement. Plaintiff subsequently submitted site plan to city, and city required modifications to accommodate the easement. After plaintiff began construction, city issued stop work order because structure continued to encroach on easement. Plaintiff sued, alleging a taking. The court held that the enforcement of an existing easement is not a taking.

*Kothmann v. City of Lubbock*, No. 07-04-0532-CV, 2006 WL 756368 (Tex. App. – Amarillo March 24, 2006, no pet.) (memorandum opinion). Landowner sued city for private nuisance takings, challenging drainage easement that city received from landowner's predecessor in title. The court

held that city was entitled to summary judgment because summary judgment evidence established that landowner had consented to drainage easement.

### Zoning

*City of Dallas v. Vanesko*, 189 S.W.3d 769 (Tex. 2006). City issued building permit for homeowners' remodeling project. City later determined that roof of remodeled home was too high in violation of zoning ordinance. Rather than issue stop work order, inspector suggested that homeowners request variance. BOA denied the variance. The Court held that the BOA did not abuse its discretion.

*City of White Settlement v. Super Wash, Inc.*, \_\_\_\_\_ S.W. 3d \_\_\_\_\_, No. 04-0340, 2006 WL 508628 (Tex. March 3, 2006). Zoning ordinance required owner of commercial property to construct continuous fence along one side of property to minimize vehicular traffic in adjacent residential neighborhood. Unaware of the fence requirement, commercial property owner submitted site plan that did not include fence. City building official mistakenly approved site plan, and property owner began construction. City subsequently required property owner to rebuild portion of property that did not comply with zoning ordinance. Property owner sued, alleging that city was estopped from reversing the building official's initial approval. The Court held that city could not be estopped from exercising its governmental functions (*i.e.*, enforcement of its zoning ordinances) based on mistake of government agent. The Court also held that facts did not rise to level of "when justice requires" exception to general rule barring estoppel against cities.

*City of Corpus Christi v. Azoulay*, No. 13-04-592-CV, 2006 WL 1172330 (Tex. App. — Corpus Christi May 4, 2006, pet. filed)

(memorandum opinion). Business owner appealed city's denial of permit to build three-dimensional shark structure in front of his business. The city based its denial, in part, on construction of city's sign ordinance that classified three-dimensional shark as a "sign" that exceeded size limits under ordinance. The court held that the BOA abused its discretion in its interpretation of ordinance.

*Coyel v. City of Kennedale*, No. 2-04-391-CV, 2006 WL 19604 (Tex. App. – Fort Worth Jan. 26, 2006, pet. denied) (memorandum opinion). Salvage yard owner appealed decision of zoning board of adjustment that owner was not entitled to extension of non-conforming use status. City ordinance allowed property owner to appeal to BOA for extension of initial three-year period of non-conforming use upon showing that property owner had not yet recouped the owner's investment in the non-conforming building or use. The court held that the BOA did not abuse its discretion under ordinance by considering owner's investment in the non-conforming building or use, but not the cost of the land, in making its determination.

#### Impact Fees

*DeSoto Wildwood Dev., Inc. v. City of Lewisville*, 184 S.W.3d 814 (Tex. App. – Fort Worth 2006, no pet.). City's subdivision regulations required developer to pay for roadway and related improvements. At city's request, developer placed \$132,988 into escrow to pay for improvements. Developer subsequently sold off property in subdivision. Developer later sued city to recover escrowed fees. The court held that developer lacked standing to seek return of impact fees because developer was no longer an "owner of the property" within meaning of section 395.025 of the Local Government Code. The court also held that developer's claims were not ripe

because developer had failed to exhaust his administrative remedies by appealing to the city council for return of fees.

#### Law Enforcement

*City of Houston v. Clark*, No. 04-0930, 2006 WL 1791698 (Tex. Jun. 30, 2006). City sought review of independent hearing examiner's decision granting fire alarm dispatcher's motion to dismiss his suspension. The Court held that Chapter 143 of the Local Government Code (the Fire Fighter and Police Officer Civil Service Act) authorizes municipalities to appeal adverse decisions of independent hearing examiners.

*Young v. City of Corpus Christi*, No. 13-03-00559-CV, 2006 WL 1360842 (Tex. App. – Corpus Christi May 18, 2006, no pet.) (memorandum opinion). Group of police officers sued city under Fair Labor Standards Act in federal district court, and city prevailed. Police officers subsequently sued city in state court, alleging that city failed to properly calculate pay for the purpose of determining proper overtime compensation and comp-time rates. The court held that claims of twenty-one officers who were parties to federal suit were barred by doctrine of res judicata. However, the court reversed the trial court's summary judgment as to remaining 222 plaintiffs.

*McElroy v. City of Temple*, No. 03-03-00741-CV, 2006 WL 664160 (Tex. App. – Austin Mar. 16, 2006, pet. denied) (memorandum opinion). Police officer argued that he should have received permanent promotion within police department following more senior officer's recall into active military duty, pursuant to section 143.072 of the Local Government Code. That statute provides procedures for staffing of positions held by police officers or fire fighters who enter the

military. The court held that the statute did not apply to an officer who was *recalled* to military leave, as opposed to an officer who *enters* the military. The court also held that officer was not entitled to promotion under section 143.036 of the Code.

### **Open Government**

*Houston Municipal Employees Pension System v. Abbott*, 192 S.W.3d 862 (Tex.App.- Texarkana, 2006, pet. filed). A television station asked the Houston Municipal Employees Pension System (HMEPS) for information about income, salaries, benefits, and bonuses provided to the executive director and members of the Pension Board. HMEPS provided some of the information but sought an Attorney General opinion about the remaining information. The Attorney General declared that Section 26 of the Pension Statute did not remove information relating to the pension fund participants from the scope of the Public Information Act (PIA) and informed HMEPS that it was required to release a number of items, some redacted and some complete, and that it could withhold some of the items. With respect to the unredacted items – records showing pay and bonuses of HMEPS employees who are also HMEPS participants, and schedules disclosing pension payments to individual HMEPS participants, participants’ requests for disability benefits, participants’ payments to HMEPS for increased benefits, and participants’ requests to change or commence participation in programs or groups offered by the fund – HMEPS sought a declaratory judgment.

HMEPS argued that the language in the Pension Statute is clear that records in the custody of the pension system concerning individual members are not public information under the PIA. The court agreed. The court

reasoned that, while some of the information, such as salary and bonus records, are discoverable under the PIA when they are public information, the Pension Statute specifically made documents within the custody of the pension system *not* public information.

*Shields v. Delta Lake Irrigation District*, No. 13-01-622-CV, 2006 WL 1280863 (Tex.App.-Corpus Christi, May 11, 2006, pet. filed) (memorandum opinion). This case arises out of dispute regarding the right to lease real property owned by the District. In 1978, the District entered into a lease agreement which provided that the Boatnickers the right to sublease individual lots owned by the District to third parties for recreational purposes. In 1996, the Boatnickers failed to timely remit rent payments and the Board of the District voted to terminate the agreement. In one of the issues on appeal, the Boatnickers claimed that the District’s action to terminate the contract was invalid because the notice of the meeting in which the Board took action on the contract required a higher degree of specificity and notice given was insufficiently specific and thus violated the Open Meetings Act. The notice stated “Consider and act on lease of south bank of Reservoir No. 1 to Delta Lake Boatnickers, Inc., and future of the leased property.”

The court noted that the Open Meetings Act is a not a legislative scheme for service of process and it has no due process implications. Rather, its purpose is to provide “openness at every stage of [a governmental body’s] deliberations.” The court found that the notice informed the readers that the District’s board was considering the future of the agreement, and the location of the land affected; therefore, the court concluded the notices were sufficiently specific to satisfy the

public interest and did not violate the Act.

*Abbott v. North East Independent School District*, \_\_\_ S.W.3d \_\_\_, No. 03-04-00744-CV, 2006 WL 1293545 (Tex.App. - Austin May 12, 2006, no pet.). North East ISD received a request under the PIA for all records concerning an NEISD teacher. The District released all but one document, a memorandum from a school principal to a teacher concerning complaints about the teacher and directing corrective action. The District sought an Attorney General opinion asserting that the memo was a “document evaluating the performance of a teacher” and thus confidential by law.<sup>3</sup> The AG issued an opinion that the memo was not a “document evaluating the performance of a teacher” and therefore not confidential. The trial court disagreed with the AG and the AG appealed.

The AG argued that the memo was merely a reprimand and only recited allegations and metes out discipline but contained no evaluative information. In response, the NEISD asserted that distinguishing between “evaluations” and “reprimands” is an empty distinction. The court, agreeing with the District, found the documents to be confidential because, in the document, the principal memorializes a meeting with the teacher concerning performance, reports additional information the principal had received after the meeting concerning the same performance issues, and gave performance directives.

*City of Waco v. Abbott*, \_\_\_ S.W.3d \_\_\_, No. 07-05-00067-CV, 2006 WL 1490540 (Tex.App.- Amarillo May 31, 2006, no pet.). City filed a suit for declaratory relief and writ of mandamus directing the Attorney General to withdraw his opinion that arrest warrant

affidavits could not be withheld from disclosure under the Public Information Act. The arrest warrant affidavits were filed by a former city police detective in child abuse and neglect cases and contained identifying information about the child victim, which the City claimed was confidential by law.

The court of appeals, in upholding the trial court’s decision, disagreed with the City. While the court agreed that the State has a compelling interest in protection of confidentiality of such information, arrest warrant affidavits were not reports or documents created under the Texas Family Code Chapter 261. Additionally, arrest warrants and supporting documents are public court records and releasing them would not bring about an absurd result.

*Houston Chronicle Publishing, Inc. v. Thomas*, 196 S.W.3d 396 (Tex.App. - Houston [1<sup>st</sup>] 2006, no pet.). A reporter for the Houston Chronicle requested an autopsy report of a man who had been shot to death by a Harris County Deputy Sheriff during an early morning traffic stop. This was the second suspect that the deputy sheriff’s officer had shot in an eight-day span. The Sheriff’s department sought an AG opinion to determine whether an exception to the PIA applied. The Sheriff’s department contended that the release of the information would interfere with detection, investigation, and prosecution of a crime because the information related to a pending homicide investigation. The AG agreed, and the Houston Chronicle sued the Sheriff in District Court. Several months passed, and with the Sheriff’s department still refusing to release the autopsy, the Chronicle filed a motion for summary judgment. Just before filing its own motion for summary judgment, the Sheriff’s department released the information. In his motion, the Sheriff argued that because the

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<sup>3</sup> See Tex. Educ. Code Ann. § 21.355.

information had been released, the Chronicle's motion should be denied. The trial court denied both motions as moot and the Chronicle appealed.

In its first point of error, the Chronicle argued that the court erred in dismissing its claims as moot because the "public interest" exception to the mootness applies in this case. The court noted that the Texas Supreme Court has not yet recognized the public interest exception to the mootness doctrine, and thus, the court held that unless and until the Supreme Court recognizes the doctrine, it is not a viable legal theory in 1<sup>st</sup> Court of Appeals. In its second point of error, the Chronicle argued that the trial court erred when it did not determine the parties' rights under the Uniform Declaratory Judgment Act and therefore the court should construe the PIA in relation to whether the Chronicle is legally entitled to the particular autopsy report and whether, as a general proposition, autopsy reports of persons who die in the custody of law enforcement are public information not subject to any statutory exception. The court of appeals did not agree because the Chronicle had received the report so there was no need to determine if it was legally entitled to the report. Any other action would have constituted an impermissible advisory opinion. In its final point of error, the Chronicle claimed the trial court erred in denying its motion with respect to its claims for mandamus to compel the Sheriff to release the autopsy. Because the autopsy had been released there was nothing left for the court to review.

*Abbott v. Texas Department of Mental Health and Mental Retardation*, \_\_\_ S.W.3d \_\_\_, No. 03-04-00743-CV, 2006 WL 2504417 (Tex. App. - Austin Aug. 30, 2006, no pet. h.). The Department received a request for information under the PIA asking for statistics

regarding alleged incidents of abuse and sexual assault occurring at facilities operated by the Department. The Department requested an AG opinion regarding whether releasing the requested statistical information from individual facilities would violate HIPAA and federal rules implementing HIPAA. The Department contended that because the information asked for names of individual facilities where alleged incidents occurred, it was prohibited from disclosing the information because it is "individually identifiable health information." The AG disagreed and found that the information must be released. The Department appealed and the trial court agreed with the Department. The AG appealed.

The court of appeals reserved the trial court and held that the PIA was not preempted by HIPAA, and that the information requested was not confidential and therefore is subject to release under the PIA.

### **Police Power**

#### **Sexually Oriented Businesses**

*Fantasy Ranch, Inc. v. City of Arlington*, 193 S.W.3d 605 (Tex. App. – Fort Worth 2006, pet. denied). City ordinance prohibited one sexually oriented business (SOB) from operating within 1000 feet of another SOB. The ordinance further provided that if more than one SOB was located within 1000 feet of another SOB in otherwise permissible location, then ordinance provided that the SOB that was first established was conforming and the other was non-conforming. A non-conforming SOB could apply for annual license renewal under "good neighbor" exemption in ordinance. Fantasy Ranch, Inc. filed suit for declaratory judgment that it, and not competitor, was the conforming SOB under ordinance. The court

construed the ordinance to determine that competitor was conforming use.

## Nuisances

*Wu v. City of San Antonio*, \_\_\_ S.W.3d \_\_\_, No. 04-05-00847-CV, 2006 WL 1748603 (Tex. App. – San Antonio Jun. 28, 2006, no pet.). Following failure of property owner to have property repaired and brought into compliance with city codes, city determined that property was nuisance and issued demolition order. Property owner appealed and sought temporary injunction. The court held that the city did not abuse its discretion when it determined that property was a nuisance and, therefore, property owner had not established likelihood of success on the merits and was not entitled to temporary injunction.

*Davenport v. City of Dallas*, \_\_\_ S.W. 3d \_\_\_, No. 05-05-00211-CV, 2006 WL 762844 (Tex. App. – Dallas Mar. 27, 2006, no pet.) (memorandum opinion). City obtained permanent injunction against owner of carwash, claiming property was public and common nuisance. By its terms, injunction expired on November 18, 2005. Therefore, the court held that property owner's appeal was moot.

## Code Violations

*Teague v. City of Jacksboro*, 190 S.W.3d 813 (Tex. App. – Fort Worth 2006, pet. filed). Plaintiff appealed order of city council requiring plaintiff to demolish structure on plaintiff's property if plaintiff did not abate all unhealthy and unsafe conditions within thirty days. The court held that city was not entitled to dismissal based on lack of subject matter jurisdiction because plaintiff had substantially complied with procedural requirements for appealing demolition order under section

214.001 of the Texas Local Government Code.

*Lee v. City of Houston*, No. 14-05-00366-CV, 2006 WL 2254401 (Tex. App. – Houston [14<sup>th</sup> Dist.] Aug. 8, 2006, no pet. h. (memorandum opinion). Following notice and hearing, city ordered property owner to correct numerous dangerous building code violations or demolish building. Plaintiff appealed, alleging that city's requirement that plaintiff obtain certificate of compliance, which the hearing officer advised plaintiff could require plaintiff to complete additional repairs to address code violations not apparent during hearing, violated plaintiff's right to substantive and procedural due process. The court held that the city's order did not violate due process because city adhered to all procedural safeguards in its substandard building ordinance.

*Herman v. City of Dallas*, No. 05-05-00875-CV, 2006 WL 933350 (Tex. App. – Dallas Apr. 12, 2006, no pet.) (memorandum opinion). Pro se plaintiff brought facial challenge to city's towing policy after city towed and impounded vehicle parked on public street in front of plaintiff's home. The court held that the city was entitled to summary judgment based on the expiration of the applicable two-year statute of limitations.

## State Agency Cases Affecting Cities

Texas Commission on Environmental Quality

*City of Marshall v. City of Uncertain*, \_\_\_ S.W.3d \_\_\_, No. 03-1111, 2006 WL 1565012 (Tex. June 9, 2006). The City of Marshall received a state water right allowing it to use up to 16,000 acre-feet (AF) of water

from Cypress Creek for municipal purposes. The City applied to the Texas Commission on Environmental Quality (TCEQ) to add industrial uses as a permitted use. The City of Uncertain and others opposed the application and sought a contested case hearing. The TCEQ's executive director concluded that state law mandated approval of the amendment without a hearing because, under the full use assumption doctrine,<sup>4</sup> the TCEQ is required to assess the impact of a proposed amendment on other water rights and on in-stream uses based upon the full amount of water permitted under the existing water right irregardless of the amount that the permit holder has actually used. Therefore, any change in use alone would not affect other water rights.

The Supreme Court concluded that the Texas Water Code does not mandate the issuance of Marshall's application without the assessment of other substantive criteria imposed in the Water Code.<sup>5</sup> The Supreme Court further stated that a person is affected by the substantive criteria and thus entitled to a hearing, or that the Commission could determine that the criteria are not impacted and a hearing is unnecessary. The Commission should make this determination.

*City of College Station v. Wellborn Special Utility District*, No. 10-04-00306-CV, 2006 WL 2067887 (Tex. App. - Waco July 26, 2006, no pet.) (memorandum opinion). The City of College Station and Wellborn SUD entered into agreement which provided that as College Station annexed territory within Wellborn's CCN, Wellborn would relinquish the territory to the City. Pursuant to that agreement, the City of College Station

annexed land within Wellborn SUD's retail service area. Wellborn SUD filed a cease and desist action before the TCEQ requesting an order from the TCEQ requiring College Station to cease and desist from providing retail water service to the area. The City filed suit in district court against Wellborn for breach of contract. Wellborn filed a plea to the jurisdiction which claimed that the TCEQ had exclusive jurisdiction over contract between the two entities. The trial court and the appellate court agreed that because the TCEQ has authority over CCNs, a city may not serve an annexed area that is in the CCN of another utility, and any agreements between retail public utilities concerning territory is valid and enforceable if approved by the TCEQ.

Interestingly, the TCEQ, in the cease and desist action, noted that it did not have jurisdiction over contractual disputes. Additionally, the decision of the Waco Court of Appeals is in conflict with that of the San Antonio Court of Appeals in *City of San Antonio v. BSR Water Co.*, 190 S.W.3d 747, 755-757 (Tex.App. - San Antonio, Dec. 28, 2005, judgment vacated by 2006 WL 542813) and *BCY Water Supply Corp. v. Residential Inv., Inc.*, 170 S.W.3d 596 (Tex. App. - Tyler, 2006, pet. denied).

#### Railroad Commission

*Centerpoint Energy Entex v. Railroad Commission of Texas*, \_\_\_ S.W.3d \_\_\_, No. 03-04-00731-CV, 2006 WL 1865439 (Tex.App.- Austin Jul. 7, 2006, pet. filed). Centerpoint, a gas utility subject to the Gas Utility Regulatory Act, purchased gas that supplied customers in the City of Tyler. The rates charged the customers of Tyler were approved by the City and included a "Purchased Gas Adjustment Provision," an automatic escalator mechanism devised by

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<sup>4</sup> Tex. Water Code Ann. § 11.122(b).

<sup>5</sup> *Id.* 11.134(b).

utility regulators to deal with rapid fluctuations in the cost of natural gas. The City reviewed Entex's gas charges and had "concerns" about the manner by which Entex purchased gas for resale to its customers. Specifically, the City believed Entex's purchases resulted in overcharges of about \$39,000,000 to residential and small commercial customers.

Entex sued the City in district court. The parties agreed to dismiss the action and submit the issues to the Railroad Commission. The petition was sent to a hearing on the merits before RRC hearing examiners. On appeal of the RRC's decision, Entex claimed the RRC lacked authority to conduct a retroactive prudence review of gas purchases and the City was not entitled to its expenses because the proceeding was not a ratemaking proceeding.

The court concluded that the RRC does have authority to conduct reviews of Entex's past gas purchases when the costs associated with those purchases were passed through to Entex's customers and the RRC has the power to order refunds if it determines the purchases were imprudent. However, a prudence review is not a ratemaking proceeding and, therefore, the City is not entitled to its expenses.

### **Takings/Eminent Domain**

*City of Tyler v. Beck*, \_\_\_\_\_ S.W. 3d \_\_\_\_\_, No. 04-0813, 2006 WL 1792063 (Tex. Jun. 30, 2006). City initiated condemnation proceedings in which special commissioners entered award to property owners. Both parties filed objections to the award and sent copies to opposing counsel, but neither party issued formal service of citation as required by section 21.018(b) of the Property Code. The

court of appeals held that the parties' failure to properly serve citation amounted to a failure to prosecute. The Supreme Court disagreed, holding that judicial condemnation proceedings commence when an objection to the award is filed. If service of citation is not timely secured, the award is subject to reinstatement. In this case, however, the Court held that the purposes of the formal citation requirement were met.

*City of Seabrook v. Port of Houston Authority*, \_\_\_\_\_, S.W. 3d \_\_\_\_\_, No. 01-04-00925-CV, 2006 WL 1350909 (Tex. App. – Houston [1<sup>st</sup> Dist.] May 18, 2006, pet. filed). City intervened in condemnation suit in which port authority sought to condemn property within city limits. Section 62.106 of the Water Code provides that a water district cannot condemn right-of-way through any part of an incorporated city or town without the consent of the lawful authorities of the city or town. The city argued that 62.106 was a statutory prerequisite to port authority's condemnation, and, therefore, was jurisdictional. The court held that the trial court had subject matter jurisdiction and that the city could protect its interests, if any, through intervention.

### **Regulatory Takings/Inverse Condemnation**

*City of Dallas v. Blanton*, \_\_\_\_\_, S.W. 3d \_\_\_\_\_, No. 05-05-00736-CV, 2006 WL 2361325 (Tex. App. – Dallas Aug. 16, 2006, no pet. h.). As part of plan to replace old, substandard sewer mains, city required owners of commercial properties to reroute their plumbing at owners' expense to connect to new sewer mains in city's right-of-way. Property owners alleged that requirement was a regulatory taking. Because property owners only showed a 10 percent impact on the market value of some of their properties as the result of the re-routing, the court held that

there was no severe economic harm within the meaning of the case law. In addition, the court held that there was no compensable damage to the owners' investment-backed expectations, because the old sewer mains that the city replaced were substandard and deteriorating. Therefore, the court held that plaintiffs had not alleged a valid takings claim.

*City of Anson v. Harper*, \_\_\_\_\_ S.W.3d \_\_\_\_\_, No. 11-05-00398-CV, 2006 WL 1914611 (Tex. App. – Eastland Jul. 13, 2006, no pet.). Plaintiffs sued city based on city's plans to build municipal solid waste landfill on land where plaintiffs owned mineral rights. The court held that plaintiff's had adequately stated a takings claim because, even though the landfill permit was still at the Texas Commission for Environmental Quality, the city had already begun dirt work on the property. However, the court held that plaintiffs' related claims regarding the parties' rights if a permit was granted by TCEQ were not ripe.

*City of El Paso v. Gomez-Parra*, 198 S.W.3d 364, No. 08-05-00057-CV, 2006 WL 1932207 (Tex. App. – El Paso Jul. 13, 2006 no pet.) . Car buyers obtained vehicle from city at police auction and were subsequently stopped at border when customs officials discovered 27 pounds of marijuana in the vehicle. Car buyers sued city for intentional tort. The court held that the city was entitled to immunity because the sale of the vehicle at auction was an extension of the city's police and fire protection functions and as such, was not subject to waiver of immunity under the Texas Tort Claims Act.

*Dallas, Garland & Northeast R.R. v. Hunt County*, 195 S.W. 3d 818, No. 05-05-00488-CV, 2006 WL 1738264 (Tex. App. – Dallas Jun. 27, 2006, no pet.). County road

crew performed road maintenance work on a county road where it crossed plaintiff's tracks. While filling in thinning areas of the road with surface rock, the crew left four inches of base material covering the tracks. The excess base material on the tracks later caused train to derail. Plaintiff sued, claiming, among other things, inverse condemnation. The county argued that there was no requisite intent to effect a taking because, although county authorized employees to repair road, it did not authorize employees to place road-base material on the tracks. The court agreed, holding that there was no taking because the county did not intend for the base material to end up on the tracks.

*City of Dallas v. VSC, LLC*, \_\_\_\_\_, S.W. 3d \_\_\_\_\_, No. 05-05-01227-CV, 2006 WL 1688440 (Tex. App. – Dallas Jun. 21, 2006, no pet.). City seized allegedly stolen vehicles from licensed vehicle storage facility. Owner of facility alleged that seizure constituted a taking under article I, section 17 of Texas Constitution. Specifically, owner argued that its "garagemen's lien" on seized vehicles was compensable property interest. The court agreed, holding that city was not entitled to dismissal based on lack of jurisdiction because lien was property that could be taken by government.

*Sweed v. City of El Paso*, 194 S.W.3d 684 (Tex. App. – El Paso 2006, no pet.). Pro se plaintiff alleged that city's foreclosure of plaintiff's property based on delinquent property taxes constituted taking of private property for a public purpose without just compensation. The court upheld the trial court's dismissal for lack of jurisdiction because plaintiff failed to properly brief his arguments and comply with other requirements of the Texas Rules of Appellate Procedure.

*City of San Antonio v. El Dorado Amusement Co., Inc.*, 195 S.W.3d 238 (Tex. App. – San Antonio 2006, pet. filed). City rezoned property on which property owner operated bar to prohibit sale of alcoholic beverages. City subsequently denied property owner's application for non-conforming use permit. The court held that city's action was compensable regulatory taking because it had severe economic impact on property owner's business and unreasonably interfered with owner's investment-backed expectations.

the city might take in the future. The court held that the city was not entitled to a dismissal based on lack of jurisdiction.

*Wiegand Hermanos, Perforadores, S.A. v. City of Lockhart*, No. 03-05-00311-CV, 2006 WL 1358484, (Tex. App. – Austin May 19, 2006, no pet.) (memorandum opinion). City sued defendant over unauthorized subdivision of real property, and defendant counter-claimed, alleging unconstitutional taking based on city's removal of dirt and rock fill when the city installed a wastewater line across defendant's property. Defendant had granted easement to city for installation of water line. The easement agreement required the city to remove any trash and debris that resulted from the installation of the line. The court held that by entering into the agreement and receiving compensation from the city pursuant to the agreement, defendant consented to city's actions. Therefore, there was no taking.

*City of Amarillo v. Dyer*, No. 07-05-0325-CV, 2006 WL 957708 (Tex. App. – Amarillo Apr. 13, 2006, no pet.) (memorandum opinion). Plaintiffs alleged that city wastewater plant's alleged contamination of groundwater used by plaintiffs for household and agricultural purposes constituted a taking. The city argued that plaintiffs' claim was not ripe because the alleged injury was contingent on actions that