

**RECENT STATE CASES  
OF INTEREST TO CITIES**

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## **Biography**

### **CINDY J. CROSBY**

Ms. Crosby's legal career has centered on various municipal issues from both the public and private perspective. After graduation from Texas Tech School of Law in 1999, she joined the El Paso City Attorney's office. Ms. Crosby's primary area of expertise is related to land use issues, including annexation, development agreements, vested rights, transportation, and drafting of subdivision and zoning regulations.

In 2006, Ms. Crosby joined the law firm of Bickerstaff Heath Delgado Acosta, LLP. In addition to being the City Attorney for Wimberley, Texas, she advises a variety of public entities on issues ranging from charter amendments, election law, purchasing, open government, social media issues and enforcement matters. In 2007, Ms. Crosby successfully defended the City of El Paso's Zoning Board of Adjustment in district court when sued by a neighbor unhappy with a building official's decision (Cause No. 2007-4401, 346<sup>th</sup> District Court), and assisted the city in the creation of its first public improvement district.

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Josh practices in the areas of environmental law, administrative law, water law, electric utility regulation, and related litigation. He represents municipalities, river authorities, water districts, and private entities before state and federal agencies and in state and federal court. He received his J.D. from the University of Houston Law Center in 2005 and his B.A. from Rice University in 2001.

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## Recent State Cases of Interest to Cities

By: Cindy J. Crosby and Joshua D. Katz

### I. CITY UTILITY CASES (ELECTRIC, WATER, SEWER, GAS)

*AEP Texas North Co. v. Public Utility Commission of Texas*, 297 S.W.3d 435 (Tex.App.–Austin 2009, pet. denied). AEP Texas North Company (“TNC”) filed a petition with the PUC for reconciliation of its eligible fuel expenses and revenues for the period from July 1, 2000 to December 31, 2001, which is the period immediately before deregulation of the electric retail market began. The cities of Abilene, Ballinger, San Angelo, and Vernon (“Cities”) intervened and recommended various disallowances to TNC’s petition. Both TNC and the Cities appealed the decision of the PUC to district court, which affirmed the final order in all respects.

On appeal, the Cities raised four issues with the district court’s decision. The Court affirmed the lower court’s decision on each. The Cities first alleged that TNC purchased much of its natural gas on the spot market at higher prices than it could have under long-term fixed-price contracts, resulting in fuel charges that should be disallowed. The Court held that the PUC’s determination that TNC properly mixed spot and long term gas contracts was supported by substantial evidence. Next, the Cities argued that the PUC applied the wrong standard of review by using cost comparisons to other utilities when analyzing the prudence of TNC’s gas purchases. However, the Court found that it is reasonable and prudent for the PUC to do so as part of its analysis of market conditions. The Cities’ third and fourth challenges relate to the operations of TNC’s Oklahoma coal-

-fired power plant. The Cities first complained that the plant’s capacity factor (which measures a plant’s actual output compared to its capability) was low and resulted in higher than necessary fuel costs; the Court found that the PUC properly determined that the plant’s capacity factor over the entire reconciliation period was prudent. The Cities also alleged that the plant’s planned maintenance outage in 2001 could have taken place in 2002 post-deregulation, thus forcing ratepayers to cover costs that prepared the plant for competition. The Court held that the planned maintenance was reasonable and necessary in 2001 as part of the plant’s planned maintenance schedule.

*Public Utility Commission of Texas v. Harlingen et al.*, 311 S.W.3d 610 (Tex.App.–Austin 2010, no pet.). The cities of Harlingen, McAllen, Mission, Port Lavaca, Rockport, and Victoria (“Cities”), the State of Texas, and Texas Industrial Energy Consumers intervened and challenged an order approving the application of Electronic Transmission Texas, LLC (“ETT”) for regulatory approval of its formation, its initial rates, and the transfer to it of another utility’s CCN and transmission equipment.

The district court held that the PUC exceeded its authority by granting a CCN to ETT and that the Commission also erred by denying the Cities that had intervened any of their rate case expenses, ordering a remand to the PUC to determine the Cities’ reasonable expenses.

The Cities alleged that the PUC exceeded its statutory authority in

transferring the CCN to ETT, because 1) a utility that has no certificated area cannot obtain a CCN; and 2) the Cities' due process rights were violated because ETT's application and briefing requested a CCN under the provision of PURA governing the granting of a CCN while the PUC granted it under the provision for CCN transfers. The Court reversed the district court's decision, holding that the PUC did have authority to order the transfer of the CCN to ETT.

The Court upheld the district court's holding that the PUC exceeded its statutory authority in denying the Cities their reasonable rate case expenses pursuant to PURA § 33.023. Under this provision, an intervening municipality may have its reasonable ratemaking proceeding expenses reimbursed. The PUC based its denial of the Cities' expenses on their interpretation that this statute only applies to rate cases where rates for retail services within the city are set, but the Cities here have no jurisdiction to set wholesale transmission rates like those that were determined in ETT's application. The Court held that a plain reading of the statute allows Cities to recover their reasonable expenses from ratemaking proceedings, including this one, which involved transmission rates. Thus, the Court upheld the district court's remand to the PUC to determine whether the Cities should be reimbursed for reasonable rate case expenses.

## II. CONTRACT AND TORT CASES

*Jones v. City of Houston*, 294 S.W.3d 917 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Plaintiffs are two siblings. The siblings and their mother received a call from the fire department reporting only that their brother had fallen into a drainage ditch and could not be located. The siblings drove to the culvert

where, an hour later, their brother's body surfaced in the bayou. The siblings observed emergency workers attempt to resuscitate him before placing him in an ambulance, where he was taken to the hospital and pronounced dead. The siblings sued the City of Houston for gross negligence in creating and maintaining the culvert, seeking recovery for their mental and emotional damages as bystanders.

A three-factor test determines whether a plaintiff can recover for mental injuries suffered as a bystander. The plaintiff must show 1) that he was located near the scene of the accident; 2) that he suffered shock as a result of the "sensory and contemporaneous observance of the accident," as opposed to learning of the accident from others after its occurrence, and 3) he and the victim must have been closely related. Plaintiffs' bystander claims thus failed on the first two factors, as they were not at the scene of the accident when it occurred, but rather drove to it after being informed by phone.

*City of Waco v. Kirwan*, 298 S.W.3d 618 (Tex. 2009). Kirwan, individually and as representative of the estate of Brad McGehee, filed a premises liability suit against Waco, alleging McGehee's death was caused by the gross negligence of Waco, waiving its immunity against suit under the Texas Tort Claims Act. McGehee was watching boat races from a municipal park in Waco on a cliff when the rock beneath him gave way and he fell to his death. It was undisputed that the cliff was in a natural, unaltered physical condition and that at the time of collapse, McGehee was past a rock wall meant to keep the public away from the cliff, as well as a sign reading "FOR YOUR SAFETY DO NOT GO BEYOND WALL."

The district court dismissed the case holding that a landowner may not be grossly

negligent for failure to warn of the inherent dangers of nature, but the court of appeals reversed, holding that the recreational use statute (TEX. CIV. PRAC. & REM. CODE § 75.002.) allows defect claims based on natural conditions if that condition is not open and obvious and the plaintiff demonstrates the defendant's gross negligence. At issue, then, is a landowner's duty under the recreational use statute to warn or protect recreational users against the dangers of naturally occurring conditions.

The Supreme Court held that a landowner, under the recreational use statute, does not owe a duty to others to protect or warn against the dangers of natural conditions, and may not be held to be grossly negligent for failing to have done so. Because the cliff had not been modified in any way, and the dangers of a rocky cliff are readily obvious, the City could not be found to be grossly negligent in a way that would waive its immunity.

### **III. EMPLOYMENT**

#### Whistleblower

*Torres v. City of Corpus Christi*, 2010 WL 877568 (Tex.App.–Corpus Christi Mar. 11, 2010, pet. granted, judgment vacated and remanded pursuant to settlement agreement) (not designated for publication). David Torres was a commander in the Corpus Christi Police department. Torres alleges that the department punished him for certain actions he took with regard to promotions within the department, his request for an investigation into a department decision not to investigate an assault case, and his report of a fellow police officer's improper purchase of an impounded vehicle. The department threatened disciplinary action including termination of Torres, demoted him, and issued a letter of

reprimand. Torres filed suit under the Texas Whistleblower Act.

The City alleged that Torres failed to follow the grievance procedure for whistleblower claims as set out in the collective bargaining agreement between the police union and the City, which is a jurisdictional requirement under the Whistleblower Act. The trial court agreed, dismissing the suit. The Court of Appeals reversed, finding that by serving a demand letter on the City manager before filing suit, Torres properly initiated the grievance process under the collective bargaining agreement.

*Moore v. City of Wylie*, \_\_\_ S.W.3d \_\_\_, 2010 WL 543594 (Tex.App.–El Paso Feb. 17, 2010, no pet.). Moore worked as a building inspector for the City of Wylie. Moore informed his supervisor that another building inspector had not “red tagged” violations of the International Residential Code (IRC) and the Residential Construction Information Packet (RCIP). Moore also had a tumultuous relationship with his supervisor; Moore had received verbal warnings and a Performance Improvement Plan, and also pursued criminal charges against his supervisor for assault after his supervisor allegedly poked him in the chest during an argument. Moore resigned from his position and filed suit against his supervisor and the City under the Texas Whistleblower Act.

The elements of a whistleblower claim are (1) that the plaintiff was a public employee, (2) that the defendant was a state agency or local government, (3) that the plaintiff reported in good faith a violation of law, (4) to an appropriate law enforcement agency, and (5) that the plaintiff's report was the but-for cause of the defendant's suspending or firing of the plaintiff. Moore's claim failed for a number of reasons.

The act requires that the plaintiff have both a subjective and objective belief that the facts reported are a violation of law. Moore did show evidence of a subjective belief that the violations of the IRC and RCIP that he reported were violations of law, but presented no evidence that would lead a reasonably prudent employee to conclude that a failure of an inspector to report a code violation has violated a law. Similarly, the act requires the plaintiff to have both subjective and objective belief that he is reporting a violation of law to a “law enforcement agency.” Moore did not have either a subjective or objective belief when he merely reported the other inspector’s failure to issue citations to his supervisor and department, as they are not a law enforcement agency.

#### Americans with Disabilities Act

*Michael v. City of Dallas*, 314 S.W.3d 687 (Tex.App.–Dallas 2010, no pet.). Michael was a white male with a disability hired by the City of Dallas Water Department as an environmental inspector. His department made accommodations for his disability. Michael was an at-will employee during his six month probationary period. During this time, a coworker reported Michael making violent threats against their supervisor and their office. The City had a zero-tolerance policy on threats of violence in the workplace. Following an investigation, Michael was dismissed.

Michael filed suit against the City under the Texas Commission on Human Rights Act, modeled after the federal Americans with Disabilities Act, alleging that he was dismissed because of his race and disability. Michael bore the burden of establishing a prima facie case of discrimination and thus was required to show (1) he was a member of a protected class, (2)

he was qualified for his position, (3) he was subject to an adverse employment decision, and (4) he was replaced by or treated less favorably than someone outside of the protected class. If the plaintiff meets these criteria, the burden shifts to the defendant to show that the termination was for a legitimate, non-discriminatory purpose.

The Court found that Michael failed to establish a prima facie case of discrimination because Michael presented no evidence that he was disciplined differently because of his race or disability, and other employees who violated the City’s policy on workplace violence were similarly disciplined.

#### Workers’ Compensation

*City of Laredo v. Garza*, 293 S.W.3d 625 (Tex.App.–San Antonio 2009, no pet.). Juan Garza was employed by the City of Laredo as a groundskeeper. While loading a heavy carpet into a dumpster, he fell and broke his kneecap and injured his ankle. He also alleges various back injuries as a result of the accident, although he didn’t report any back pain to his doctor until months later.

The issue, on appeal, was whether Garza’s testimony, as a lay person, was legally sufficient to demonstrate that his injuries were caused by his on-the-job accident. The Court held that lay testimony can be used to prove causation in limited cases where the general experience and common sense of laypersons are sufficient to determine that the injury is probably caused by the event, such as that a broken bone was caused by the victim’s car accident. However, medical expert testimony was necessary to prove causation in this case because Garza complained of certain injuries well after his accident despite a doctor’s testimony that the symptoms should have appeared much earlier, his alleged injuries

could have had many other causes, and the injuries were not the kind that laypersons have common knowledge or experience with.

#### **IV. Franchise Fees, Municipal Fees, Taxes**

*Seiflein v. City of Houston*, 2010 WL 376048 (Tex.App.–Houston [1<sup>st</sup> Dist.] Feb. 4, 2010, no pet.) (mem. op., not designated for publication). Phil Seiflein purchased property in Houston in 1993. In 2003, the taxing authorities sued to collect ad valorem taxes that had accrued from 1983 to 2002 on the property. At trial, tax statements from 1983 to 2007 were presented. The tax authorities sought a personal judgment against Seiflein for the years he personally owned the property, and a judgment in rem for the years prior to his purchase. Seiflein objected to the introduction of the tax statements, as they reflected the previous owner of the property and not him. However, the Court found that additional evidence was introduced demonstrating Seiflein's ownership, such as the quitclaim deed by which he obtained the property, and the personal and in rem ad valorem taxes on the property were upheld.

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

##### Groundwater Cases

*City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex.App.—San Antonio 2008, pet. denied). The Clayton Sam Colt Hamilton Trust (the "Trust") owned 3,200 acres in Val Verde County. Part of the Edwards-Trinity (Plateau) Aquifer lies under part of the land. In 1997, the Trust sold a 15 acre tract to the City of Del Rio (the "City") that is adjacent to its

own property. The Trust's deed to the City included a reservation of all water rights associated with the tract. However, the deed lacked a specific grant to the Trust of any right to use the surface tract for exploring, drilling or producing groundwater.

Three years after purchasing the tract, the City commenced drilling and testing a test well on the tract in order to develop a well for its municipal drinking water supply. The City also drilled four other wells on the tract, each capable of producing several thousand gallons of groundwater per minute. The Trust then filed suit against the City, seeking a declaratory judgment that it owned the groundwater beneath the tract, that the City lacked an ownership interest, and seeking monetary damages for a constitutional taking and trespass. The City filed a counterclaim that included a declaratory judgment action seeking a declaration that the Trust lacked any right to the groundwater pumped by the City.

The trial court concluded that the Trust's water rights reservation was valid and enforceable, that the City's contention that groundwater, until captured, cannot be the subject of ownership was incorrect, and that ownership rights to the groundwater beneath the tract belonged to the Trust.

The trial court's ruling was affirmed by the San Antonio Court of Appeals. Noting a long line of Texas Supreme Court cases holding that groundwater is the exclusive property of the owner of the surface estate, the Court held for the Trust, stating that "under the absolute ownership theory, the Trust is entitled to sever the groundwater from the surface estate by reservation when it conveyed the surface estate to the City of Del Rio." *Id.* The city could not rely on the rule of capture because it never obtained ownership of the groundwater as it was reserved by the Deed.



The Court also considered the issue of the Trust's lack of access to the surface estate for the purpose of accessing the groundwater. The Court found that, because the Trust can access the groundwater beneath the tract from its adjacent ranch, its relinquishment of the right to enter the surface estate of the tract was not a relinquishment of its groundwater rights reservation.

The Supreme Court denied the City's petition for review on September 23, 2009.

*Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex.App.-San Antonio 2008, pet. granted). Burrell Day and Joel McDaniel (the "Applicants") purchased a tract containing an aquifer well. The Edwards Aquifer Authority's (the "EAA") enabling legislation (the "Edwards Aquifer Authority Act" or the "EAAA") creates a permit system that gives preference to existing users who can demonstrate that they withdrew and beneficially used groundwater during the "historical period" between June 1, 1972 and May 31, 1993. The Act entitles these existing users to apply for an initial regular permit ("IRP") in the amount of two acre-feet per year for each acre of land the user actually irrigated in any one calendar year during the historical period.

The Applicants sought 700 acre-feet of water from the Edwards Aquifer to irrigate crops. The Applicants did not themselves use the well during the historical period, but asserted that their predecessors-in-interest used the well during the historical use period to irrigate their land.

The matter was referred to a contested case hearing. There, evidence was introduced indicating that most of the irrigation of the property occurred from a 50 acre lake on the Applicants' property. The Applicants argued that the water in the lake flowed from the well to the lake via a ditch,

then was put to irrigation purposes. However, the lake was also fed by a creek and by rainwater. The ALJ found that all irrigation that occurred from the lake used surface water and could not be used as the basis for an IRP. The ALJ recommended that an IRP of 14 acre-feet should be issued because only 7 acres of the Applicants' land had been irrigated during the historical period by the damming and flooding of groundwater in the ditch. On March 11, 2003, the Authority issued a final order granting Applicants an IRP of 14 acre-feet.

The Applicants challenged the final order in district court. Both the Applicants and the EAA filed motions for summary judgment on the issue of whether water taken from the lake was state water or groundwater. The trial court found for the Applicants, holding that lakes were not watercourses and that the water placed in them from the well for irrigation was still groundwater. The court remanded the matter to the EAA to rescind the IRP issued, and grant an IRP in an amount based on 150 acres of historical period irrigation. The trial court also granted the EAA's motion for partial summary judgment with regard to Applicants' constitutional claims.

The San Antonio Court of Appeals reversed, finding that the lake was a state watercourse, and therefore holding that water pumped from the well became state water as soon as it entered the lake. Groundwater placed into a state watercourse becomes state water, which is subject to the jurisdiction of the TCEQ.

The Applicants also appealed the trial court's denial of their claim that the EAA's final order created a taking of their water rights without just compensation in violation of Texas Constitution article I, section 17. The Court, relying on the recently decided Del Rio case, *See* 269 S.W. 3d at 617, noted that "[b]ecause Applicants have some

ownership rights in the groundwater, they have a vested interest therein." *Id.* at 756. This vested right is entitled to constitutional protection. *Id.* The Court therefore reversed and remanded the Applicants' takings claim.

The Supreme Court granted EAA's petition for review. Oral argument has been presented, and a ruling is expected this year.

***Edwards Aquifer Authority v. Chemical Lime, Ltd.***, 291 S.W.3d 392 (Tex. 2009). The primary issue in this case was a determination of when the Edwards Aquifer Authority Act (the "EAAA" or the "Act"), the enabling statute of the Edwards Aquifer Authority (the "EAA") became effective.

In 1993, the Legislature passed the EAAA, which provided that the EAA would commence operations on September 1, 1993. However, the implementation of the EAAA was delayed, first by the refusal of the United States Department of Justice to grant administrative preclearance for the EAA under the Voting Rights Act of 1965. After the Legislature amended the EAA to meet the Justice Department's objections, a group of landowners sued for a declaration that the EAAA was unconstitutional, which again delayed the commencement of operations by the EAA? The Supreme Court in *Barshop v. Medina Underground Water Conservation District*, 925 S.W.2d 618 (Tex.1996) declared the EAAA constitutional.

The EAA began operations the day the *Barshop* opinion was issued. The Authority then issued proposed rules to govern the process of filing for a historical use permit, setting a deadline to file of exactly six months from the date of the *Barshop* opinion. Chemical Lime, Ltd.'s predecessor in interest completed its permit application after this deadline. The Authority later informed Chemical Lime that

its application would be denied because it was filed after the deadline.

Chemical Lime sued the EAA, seeking a declaration that the application deadline should have been no sooner than six months from the Supreme Court's denial of a rehearing in *Barshop*, not six months from the date of the *Barshop* ruling, which would make its application timely. In the alternative, Chemical Lime sought a declaration that it had substantially complied with the EAAA's permit requirements. The trial court concluded that the EAAA became effective on the date rehearing was denied in *Barshop*, and that Chemical Lime's application was therefore timely filed.

The Court of Appeals affirmed, but concluded that the permit application deadline should be six months from issuance of the mandate in *Barshop*.

The Supreme Court reversed and held for the EAA. The Court found that *Barshop's* approach to resetting the filing deadline was pragmatic, not based on a procedural occurrence in the case but on the practical reality that the Authority was prepared to commence operations on the day *Barshop* was decided, and subsequently did so. The Court held that the Authority permissibly set its permit application deadline six months after the date it became operational, which was the date of the *Barshop* ruling.

Furthermore, by missing its filing deadline, Chemical Lime did not substantially comply with the permit application process, as specified by the EAAA, which does not allow for extensions.

#### Surface Water Cases

***Kothmann v. Rothwell***, 280 S.W.3d 877 (Tex.App.-Amarillo 2009, no pet.). In order to develop a subdivision, the City of Lubbock (the "City") required Rothwell to

obtain, in the City's name, five drainage easements on an adjacent property. Kothmann subsequently acquired the property that was burdened by these easements, and filed suit challenging the rights granted to the City under the drainage easements and claiming damages from water that flowed from the easements onto his land. Kothmann also requested a declaratory judgment that waters that drained into the easements could not leave the boundaries of that easement.

The trial court found for the City, holding that the surface water could flow onto Kothmann's property beyond the boundaries of the easements.

The Amarillo Court of Appeals affirmed, holding that the easements merely define the locations where the City's maintenance access and activities may occur, where structures may be located, and where the City is allowed determine the drainage grade and direction of the water flow. However, contrary to Kothmann's claims, there is no restriction that the waters could not flow outside the boundaries of the easements.

*City of Borger v. Garcia*, 290 S.W.3d 325 (Tex.App.-Amarillo 2009, pet. denied).

Several Homeowners' houses were damaged by flooding in 2006. Several months prior to the flood, the City of Borger (the "City") had rerouted the drainage system serving the area and installed larger drain pipes. The homeowners filed claims against the City for damage to their property without just compensation under the takings clause of Texas Constitution article I, section 17, alleging their damages were caused by the City's alteration of the pipes. The City filed a plea to the jurisdiction, alleging that the homeowners' claims did not state facts sufficient to invoke the court's jurisdiction.

The trial court denied the City's plea, which then filed an interlocutory appeal.

Before the Court of Appeals, the City argued that the homeowners failed to plead that their property was taken or applied for a public use. The homeowners argued that their property was taken for a public use because the damage was incident to a public work that protected others from flooding.

The Court stated that the key consideration in determining whether a taking was for a public use is whether the public bore a cost for which it received a benefit. The Court held that the homeowners failed to plead facts establishing that the property damage they suffered arose out of a public work. The homeowners did not allege facts supporting their conclusion that the new drainage system contributed to their flooding, while the City's only duty in constructing the drainage system was to not increase the flow of surface water across the homeowners' property. The Court reversed the trial court's order denying the plea to the jurisdiction and dismissed the homeowners' suit.

## **VI. Immunity**

### **Sovereign Immunity/Texas Tort Claims Act**

*City of Dallas v. Hillis*, 308 S.W.3d 526 (Tex.App.-Dallas 2010, pet. filed). The estate of Taylor Hillis filed suit against the City of Dallas asserting wrongful-death and survival claims alleging, variously, that Dallas negligently caused Hillis' death by its conduct and by negligently hiring, supervising, and entrusting a police officer with a patrol car. During a routine traffic stop, Hillis led the officer on a high speed pursuit on his motorcycle, despite the Dallas police department's "no chase" policy. The pursuit ended when Hillis, well ahead of the officer, crashed on a freeway ramp and fell to

his death. The City filed a plea to the jurisdiction asserting a defense of governmental immunity, which was granted with regard to Hillis' negligent hiring and supervision claims, but denied with regard to Hillis' wrongful death and negligent implementation of policy claims.

The Court of Appeals reversed and held that governmental immunity precluded all of Hillis' claims. Hillis first argued that the Texas Tort Claims Act provided an independent waiver of immunity for damages arising from governmental functions, including police services, a contention that was rejected by the Court. Hillis' other arguments hinged on the waiver of governmental immunity if injury or death "arises from the operation or use of a motor-driven vehicle." TEX. GOV'T CODE § 101.021(1)(A). However, causation is key here, and the Court found insufficient causation as Hillis' injuries were caused not by use of the officer's vehicle, but by Hillis' own decision to resist arrest and flee at a high rate of speed. Lacking the causal nexus between the use of the official vehicle and Hillis' injuries, the Court reversed and granted the City's plea to the jurisdiction with respect to all of Hillis' claims.

*City of Balch Springs v. Austin*, 315 S.W.3d 219 (Tex.App.—Dallas 2010, no pet.). An off-duty City of Balch Springs police officer checked out a City patrol car to drive to his off-duty job as a security officer at a retail store. While en route to the store in the patrol car, the officer struck an individual driving a riding lawnmower in the lane, who later died of his injuries. The officer was speeding at the time of the incident. The Estate of the deceased sued the City under the Section 101.021(1) of the Texas Torts Claim Act, which waives sovereign immunity from suit for injuries caused by the operation of city-owned

vehicles by a city employee in the scope of his or her employment. The City filed a plea to the jurisdiction asserting immunity from suit, which was denied by the trial court.

Appellee asserted that the officer was acting within the scope of his employment for the City at the time of the accident because a provision of the City's Police Department General Order mandates that City police officers are "on-duty" twenty four hours a day, whenever their services are required, while within the City.

The Court reversed and granted the City's plea to the jurisdiction. The fact that an off-duty officer is subject to being called for service twenty four hours a day doesn't mean he's acting within the scope of government employment at all times while off duty; he must be engaged in the affairs or business of his employer to be in the scope of his employment. Because the officer was returning to the location of his off-duty job, and not responding to any police duty, he was not engaged as a law enforcement officer, and being in a patrol car does not alone indicate that an officer is on-duty.

*Dallas v. Carbajal*, \_\_ S.W.3d \_\_, 2010 WL 1818439 (Tex. May 7, 2010). Carbajal sustained injuries when she drove onto a section of excavated roadway that allegedly was not blocked by barricades. She sued the City for damages under the Texas Torts Claims Act. Carbajal failed to provide formal notice of her suit to the City as required under Section 101.101(c) of the Act. She contends that the police report of the incident that was provided to the City describing the lack of barricades provided subjective awareness of the claim.

The Court held that merely investigating an accident is insufficient to provide actual, subjective notice of its fault as required by the Act. It was more than a routine safety investigation, and did not state

or imply that the City was in any way at fault. The suit against the City was therefore dismissed for lack of subject matter jurisdiction.

*City of Wichita Falls v. Romm*, 2010 WL 598678 (Tex.App.–Fort Worth Feb. 18, 2010, no pet.) (mem. op., not designated for publication). Romm sued the City under the Texas Torts Claims Act alleging that the City’s failure to maintain road signs warning of a dangerous condition led to her accident and injury.

The Act requires a plaintiff to first prove the existence and violation of a legal duty owed to him by the defendant. It also waives governmental immunity for the absence or condition of road signs if that absence or condition is not corrected by the responsible governmental entity. Romm’s claim failed as a matter of law because the uncontroverted evidence in the case demonstrated that the road and its signs were exclusively owned and controlled by the Texas Department of Transportation, not the City.

#### Official Immunity

*McLennan County v. Veazey*, 314 S.W.3d 456 (Tex.App.–Waco 2010, pet. filed). The Veazeys owned a home that was being moved along a McLennan County road when it became blocked by trees. County Commissioner Ray Meadows led efforts to clear the house from the road. Following Meadows’ instructions, a wrecker company attempted to remove the house, resulting in the house’s destruction. The Veazeys sued the County and Meadows in both his individual and official capacity pursuant to the Texas Tort Claims Act.

An individual sued in his official capacity, as was Meadows, can raise any defense available to his employer, including

governmental immunity. The Tort Claims Act provides a limited waiver of governmental immunity for property damage caused by the negligence of an employee acting within the scope of his employment if the damage arises from the operation of a motor vehicle. TEX. CIV. PRAC. & REM. CODE § 101.021(1). However, because Meadows did not actually operate the vehicle causing the property damage, the government and official did not come within the statutory waiver.

Further, governmental immunity is not waived because Meadows is not personally liable to the Veazeys. An official is not personally liable if the duty owed to the injured party arises solely from the relationship between the government and the person. Whatever decisions Meadows made were made by him in his capacity as a county commissioner to clear the roadway. He was engaged in a discretionary decision as a public official, not merely as a member of the public, and therefore did not owe a duty to the Veazeys. Official immunity was therefore not waived.

#### Contracts

*Berkman v. Keene*, 311 S.W.3d 523 (Tex.App.–Waco 2009, pet.denied). Berkman filed suit against the City of Keene alleging breach of contract. The City had contractually agreed to provide free water and sewer services to Berkman’s predecessor in title, who operated the property as a State children’s home. Berkman asserted that the City had waived its governmental immunity per Local Government Code Sections 271.152 and 271.151, which waive immunity from suit for breach of contract claims arising from contracts to provide goods or services to the local government entity.

This waiver of liability does not apply if the benefit the local government receives under the contract is an “indirect, attenuated one.” *Id.* at 527. The Court here concluded that the benefit to the City was just that; the operation of the property as a State children’s home directly benefitted the State, and not the City; and Berkman’s filing of a petition for annexation by the City was only an indirect benefit to the City’s tax base. Therefore, the City had not waived immunity to Berkman’s breach of contract suit.

***McKinney & Moore, Inc. v. City of Longview***, 2009 WL 4577348 (Tex.App.–Houston [14<sup>th</sup> Dist.] Dec. 8, 2009, pet. denied) (mem. op., not designated for publication). The City of Longview awarded MMI a contract to construct a water intake structure. MMI completed the work but, due to high lake levels and a layer of iron ore not revealed in the geological report provided by the City’s contractor, MMI sought additional costs it incurred due to unexpected difficulties. Longview paid only the amount originally owed under the contract. MMI sued the City seeking recovery for these expenses.

The City asserted immunity from suit under Local Government Code Sections 271.152 and 271.153, alleging that MMI’s claims sounded in tort rather than contract and impermissibly sought consequential rather than direct contract damages.

The Court found that MMI failed to demonstrate that any of its losses relating to lake levels were the result of the City’s breach of contract, and thus the City’s plea to the jurisdiction dismissing this claim was affirmed. However, because the contract between the City and MMI stated that MMI could rely on the City’s geological testing as part of the benefit of the bargain struck in the contract, which was deficient, the City’s plea to the jurisdiction that MMI’s claims related

to the undiscovered iron ore sounded in tort rather than contract and were thus barred by the Local Government Code was denied.

The language of the contract also stated that damages to MMI resulting from the mistake or omission of the City’s contractors would be reimbursed. Therefore, MMI’s damages resulting from the failure of the City contractor to disclose the iron ore layer were direct damages, not consequential damages barred by Section 271.153(a)(1).

However, MMI still lost on summary judgment. The contract called for the City to submit a final payment to MMI under the terms of the contract. The City did, stating that 100% of the contract balance was being paid, and MMI accepted the payment before sending the City a letter requesting additional payment for its damages. By the terms of the contract, MMI could either refuse the payment and assert its additional claims for costs, or accept the payment and waive those claims. The Court found that it had done the latter, and MMI’s contract claims were barred.

## **VII. Land Use/Development**

### **Annexation**

***City of Celina v. City of Pilot Point***, 2009 WL 2750978 (Tex.App.–Fort Worth Aug. 31, 2009, pet. denied) (mem. op., not designated for publication). In 2000, Pilot Point passed an ordinance to annex a right-of-way tract of property from a ranch. Five years later, Pilot Point passed a resolution and entered into a development agreement to accept the majority of the ranch into its ETJ. The only portion of the ranch not accepted was already part of the ETJ of neighboring City of Celina. In 2006, Celina sued Pilot Point and the ranch, challenging the 2000 annexation as well as the development

agreements, alleging that the annexation extended into Celina's ETJ and was a prohibited "strip annexation" of land that was less than 1,000 feet at its narrowest point. However, Celina did not bring its suit until 6 years after the annexation, well after the two year statute of limitations to challenge annexations found in TEX. GOV'T CODE § 43.901.

*Sea Mist Council of Owners v. Board of Adjustment, et al.*, 2010 WL 2891580 (Tex.App.–Corpus Christi-Edinburg July 22, 2010, no pet.) (mem. op., not designated for publication). A condo association appealed issuance by the South Padre Island Board of Adjustments of a building permit and occupancy permit to a café under Section 211.010 of the Local Government Code, which allows a party to challenge the decision of a Board of Adjustments in district court. The South Padre Board of Adjustments did not have rules in place prescribing the time in which to file an appeal; therefore, the appeal must be filed "within a reasonable time." The Court determined that the appeal was untimely under common law because it came six months after the building permit was issued, and four months after the occupancy permit was issued. The right of a party to appeal must be balanced with the permittee's right to have a permit that is finally determined.

### Zoning

*Trudy's Texas Star, Inc. v. City of Austin*, 307 S.W.3d 894 (Tex.App.–Austin 2010, no pet.). Restaurant operator Trudy's has had a long and tumultuous permitting and zoning battle with the City of Austin regarding a deck constructed at its restaurant South Congress Café. In 2003, Trudy's remodeled a building to open its new restaurant, obtaining the building permits

necessary. Two years later, Trudy's began building a patio over a gravel lot in the back. During the earlier remodeling, a city inspector told Trudy's that no additional approvals would be necessary to later build patio behind the restaurant, and therefore Trudy's did not file a site plan.

However, this information was erroneous. After construction began, the City informed Trudy's that it had violated City Code by constructing the deck without obtaining an approved site plan. The City pursued both criminal and civil charges against Trudy's for violation of the zoning ordinance requiring a site plan; the criminal charges resulted in a guilty finding, but with a punishment of \$1. In the civil suit, the City sought declaratory and injunctive relief, including the tearing down of the deck if Trudy's could not obtain the required permits in an allotted timeframe.

Thus, the civil suit allowed Trudy's to retroactively obtain a site plan to meet City Code, a common practice by the City. Trudy's and the City reached a Rule 11 agreement allowing Trudy's time to obtain the site plan, with the City agreeing not to pursue its suit against Trudy's and to "reasonably work with" Trudy's to come into compliance.

Because Trudy's added square footage with its deck, it triggered a requirement in the City Code to add 22 parking spaces plus one handicapped space. The deck took up the only room on Trudy's lot to add spaces. This spot must be located on-site unless the director of the Watershed Protection and Development Review Department determines that "existing conditions preclude" on-site parking. Trudy's first parking location was rejected because the lot was not paved; next it leased property at a nearby business, as long as Trudy's only opened the deck at times when said parking was available. With this

arrangement, the City approved Trudy's site plan. But the City did not release the plan. After lobbying efforts by neighbors, the City in fact rescinded the plan (despite the Code not authorizing it to do so), taking the position that the new deck was not an "existing condition" that could preclude on-site parking because it was built without prior City approval. Thus, Trudy's was now required to provide on-site parking handicapped, which it could not do without removing the deck. Trudy's thus failed to obtain approvals within the timeline set by the Rule 11 agreement, and the City reinstated its suit, and was granted summary judgment on its claims against Trudy's.

On appeal, Trudy's first asserted a claim of equitable estoppel – that the City induced Trudy's to engage in the Rule 11 based on a false representation of facts with the intention that the City would act on that representation to the detriment of Trudy's. As a general rule, a municipality cannot be estopped while in the exercise of its governmental functions, except where justice requires and there is no interference with the exercise of governmental functions. Trudy's estoppel claim failed based on a balancing of equitable factors; the City did not benefit from inducing Trudy's to pursue off-site parking, nor were its assurances deliberately calculated to mislead Trudy's. Similarly, Trudy's was responsible by its own conduct in constructing the deck without first obtaining City permits, and enforcement by the City was a proper governmental function, even if it had discretion to allow Trudy's to retroactively seek a site plan.

The Court did find, however, that Trudy's presented evidence that the City breached the Rule 11 agreement to "reasonably work with" Trudy's to come into compliance. Therefore, summary judgment on Trudy's counterclaim for breach of the agreement was not appropriate,

and Trudy's is also entitled to assert the City's material breach as an affirmative defense. The case was therefore remanded to district court on these issues.

### Impact Fees

**Op. Tex. Att'y Gen. No. GA-0788 (2010).** Local Government Code Chapter 395 governs the imposition of impact fees by cities and other political subdivisions in order to recoup the costs of capital improvements or facility expansions necessitated by a new development. The City of Baytown entered into an agreement with a developer to give credit for impact fees otherwise due from a new development for the costs incurred for oversizing a water line. However, the developer asked for credit for not only its water impact fees, but also its wastewater impact fees. At issue is whether a political subdivision can agree to a credit against impact fees to any specific category of capital improvement. The Attorney General examined Section 395.024 of the Local Government Code and found that it requires, for accounting purposes, a governmental entity to identify the category of capital improvement to which impact fee revenues relate and limit the expenditure of impact fee revenues to the purposes for which the fees were imposed, but does not expressly require the entity to limit the purposes for a credit of a developer's cost of a capital improvement. Nor did the Attorney General find that there was any clear legislative intent behind Chapter 395 to do so.

### Regulatory Takings/Inverse Condemnation

***City of San Antonio v. De Miguel*, 311 S.W.3d 22 (Tex.App.–San Antonio 2010, no pet.).** De Miguel sued the City of San Antonio for inverse condemnation and nuisance, alleging that heavy rains divert



flood waters onto their property via a City-owned storm water drainage channel. Plaintiffs alleged that the City knew of the condition and had considered a project to correct it. Because there was no statutory waiver of nuisance liability by the City, the Court held that the City could only be liable for a non-negligent nuisance that rises to the level of a constitutional taking. In order to assert such a claim, a party must plead and show three elements: (1) the governmental entity intentionally performed an act in the exercise of its lawful authority; (2) that resulted in the taking, damaging, or destruction of the party's property; (3) for public use.

The Court held that a city has no duty to provide drainage adequate for all floods that might occur as long as it does nothing to increase the flow of surface water across the land in question. The fact that the City had considered but did not construct a drainage project to address the issue cannot convert any negligence on the part of the City into an intentional taking; as "mere negligence that eventually contributes to the destruction of property is not a taking." *Id.* at 28.

*Sweed v. El Paso*, \_\_\_ S.W.3d \_\_\_, 2010 WL 1055897 (Tex. App.–El Paso Mar. 24, 2010, pet. denied). As part of a series of litigation, Sweed brought suit against the City of El Paso for unconstitutionally taking and destroying his property for public use without just compensation. The City had brought suit for recovery of delinquent property taxes on a building owned by Sweed. The court authorized foreclosure. After the building failed to receive any bids at a tax sale, the property was deeded to the city, which later demolished the building as it posed a hazard to the public health and safety.

Because Sweed did not pay the lien rendered against the building or attempt restitution following the tax sale, sole ownership of the property was vested in the City. Consequently, Sweed lacked any interest in the property and therefore lacked standing to sue for an unconstitutional taking.

*Alewine v. City of Houston*, 309 S.W.3d 771 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2010, pet. filed). A group of homeowners filed suit against the City of Houston alleging that the construction of a new runway at Bush Intercontinental Airport resulted in increased air traffic over a portion of their subdivision. Homeowners sued the City alleging intentional nuisance and inverse condemnation. In an inverse condemnation action such as Alewine's suit, the owner alleges his property has already been taken outside of a proper condemnation proceeding and without condemnation.

Under Texas law, in order to demonstrate a compensable taking as a result of overflight effects on a property, plaintiffs must prove that the overflights directly, immediately, and substantially impact the land so as to render the property unusable for its intended purpose as a residence - ie, uninhabitable. *Id.* at 778. However, while the plaintiffs produced evidence that the increase in overflights made their neighborhood a less desirable place to live, this alone does not arise to the level of a compensable taking, and homeowners did not allege or produce evidence that their homes were uninhabitable as a result of the increased overflights.

### **VIII. Law Enforcement**

*Flores v. City of Liberty*, \_\_\_ S.W.3d \_\_\_, 2010 WL 3037805 (Tex.App.–Beaumont Aug. 5, 2010, no pet.). Flores was

terminated from his employment as a detective with the City of Liberty Police Department. Flores filed suit alleging that he was terminated because of his national origin and also a whistleblower claim after reporting misconduct of other officers. The trial court granted summary judgment to the City on all of Flores' claims, and the Court of Appeals affirmed.

Flores' discrimination claim under the Texas Commission on Human Rights Act required a prima facie showing that he is a member of a protected class who suffered an adverse employment action while non-protected class employees were treated similarly. The evidence in the record demonstrated that Flores was terminated after a long series of complaints, disciplinary action, and negative performance evaluations; and that other similarly situated employees had also been dismissed. Therefore, Flores did not present a prima facie case of discrimination.

Flores' Whistleblower Act claim also failed as a matter of law. He asserted that his firing coincided with reporting criminal activity by fellow officers - one of whom claimed to be in court while actually at home, and one who allegedly committed animal cruelty by killing a cat. However, the first complaint resulted in an investigation of the other officer; there is no evidence he was dismissed for raising the issue; and the second complaint regarding animal cruelty was not based on an objectively reasonable belief that a violation of law had been committed.

## **IX. Open Government**

*City of Richardson v. Gordon*, 316 S.W.3d 758 (Tex.App.–Dallas 2010, no pet). Gordon filed a declaratory judgment suit asserting that the City council violated its charter and the Texas Open Meetings Act by holding closed meetings. Gordon also

sought an order enjoining the City from engaging in any projects, contracts, or activities discussed in closed meetings, an order requiring the City to produce records of the closed meetings, and attorney's fees. The charter did not contain a provision allowing closed session meetings at the time of the suit; the City subsequently amended its charter to allow closed session meetings as permitted by the Open Meetings Act. All of Gordon's claims were dismissed on summary judgment except for those for declaratory and injunctive relief.

These remaining claims were rendered moot when the City amended its charter, because any decision determining whether the City held meetings in the past that violated an obsolete opinion would be advisory only. Because declaratory and injunctive relief was not available, he was not entitled to recover his attorney's fees under the Declaratory Judgments Act.

*City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010). The City of Dallas received a Public Information Act Request. Six days later, it responded, seeking clarification of that request. After receiving that clarification, the City identified two documents which it considered protected from disclosure by attorney-client privilege, and requested an attorney general opinion regarding application of that privilege pursuant to Texas Government Code Section 552.301(a). The Attorney General concluded that the City's request was untimely, as it came more than 10 business days after the time of the original written request for information, and therefore a legal presumption arose that the withheld documents are public (which the City can overcome only by showing a compelling reason to withhold them). The City argued that its 10 days to request an attorney general's opinion begin to toll only after

receiving the requester's clarification, and therefore its request was timely. The issue, then, is what effect a request for clarification or narrowing has on the ten-day deadline; Government Code Section 552.222(b) is silent on the issue.

The Court examined the legislative history behind the Public Information Act and held that when a governmental entity, acting in good faith, requests clarification of an unclear or overbroad request for public information, the ten-business-day period to request an attorney general opinion is measured from the date the request is clarified or narrowed. *Id.* at 384. Therefore, the City's request for an attorney general decision was timely and the materials it withheld are excepted from disclosure.

## **X. Police Power**

### Sexually Oriented Businesses

*A.H.D Houston, Inc., et al., v. City of Houston*, 316 S.W.3d 212 (Tex.App.—Houston [14th Dist.] 2010, no pet.). In 1997, Houston enacted an ordinance restricting the locations of sexually oriented businesses. Ten owners of such businesses, who had permits to operate, could no longer do so in their current location under the new ordinance. The ordinance allowed them to remain in place for 180 days in order to recoup their investment, and to appeal for additional time to hearing officers. Appellants' administrative hearings were denied, and sought judicial appeal in state court as well as a constitutional challenge to the ordinance in federal court.

Appellants argued that the district court should have applied a de novo standard of review rather than the substantial evidence standard because the ordinance did not specify the standard of judicial review. However, the Court found that because the

case involves a permit/licensing situation rather than a taking of property, substantial evidence was the proper standard.

Appellants also challenged the lack of findings of fact from the hearing officers. The Court found that, although the ordinance provided for judicial review that alone does not require the entry of findings of fact in the absence of an ordinance or statute requiring them.

Finally, Appellants asserted two constitutional claims - that the separation of powers clause of the Texas Constitution prohibits officers from the vice squad - who were the hearing officers - from usurping a judicial function, and that the lack of detailed findings from the hearing officers violated their due process and due course of law rights. Both claims were barred by res judicata as they were facial constitutional challenges that could have been brought in Appellants' federal litigation. But both claims would have failed on the merits as well; the separation of powers provision of the Texas Constitution applies only to branches of state, not local government, and the denial of a request for fact findings, which were not required under the ordinance, cannot constitute a due process violation.

### Code Ordinances and Violations

*Carlson v. City of Houston*, 309 S.W.3d 579 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2010, no pet.). The City of Houston hired a structural engineer to examine a condo complex. The engineer found that corrosion of the beams compromised the structural integrity of some of the buildings, posing an immediate danger. The City issued an order to vacate the condos. Under the City of Houston Building Code, condo owners were entitled to an administrative hearing to contest the order to vacate. Following the

hearing, the City affirmed the order to vacate. A group of condo owners sought judicial appeal of this order under TEX. LOCAL GOV'T CODE § 214.0012(a), which provides for judicial review of a municipality's administrative order to vacate a building unfit for human habitation.

The City filed a plea to the jurisdiction challenging the court's jurisdiction to consider a judicial review, arguing that the order to vacate was under the City Building Code (which does not provide for judicial review), and not the Local Government Code (which does). The Court found that the judicial review process in the Local Government Code applies to the City's decision to issue the order to vacate under its Building Code because the provisions of both are *in pari materia* – that is, they involve the same subject matter and general purpose. The Court found that the condo owners properly invoked the trial court's jurisdiction and remanded for further proceedings.

## **XI. State Agency Cases Affecting Cities**

### **Texas Commission on Environmental Quality**

*Gatesco, Inc. Ltd., et al., v. City of Rosenberg*, 312 S.W.3d 140 (Tex.App.–Houston [14th Dist.] 2010, no pet.). Property owners realized that home-rule City of Rosenberg, authorized to provide water and sewer services, had consistently charged it a monthly rate of eight times the minimum rate for water and sewer service. Owners sued for declaratory relief, prospective injunctive relief, and reimbursement of overpayments with interest. The City filed a plea to the jurisdiction challenging that only the Texas Commission on Environmental Quality (TCEQ) has primary or exclusive appellate jurisdiction over water and sewer

rates, and that sovereign immunity barred the property owners' claims for equitable reimbursement.

The Court found that the TCEQ does not have exclusive or primary appellate jurisdiction over challenges to water rates charged by municipalities. The City, conceding this point, argued in its brief that the property owners' claims are still barred by governmental immunity, alleging that they had not pleaded adequately to establish that fraud, mutual mistake of fact or duress prevent the overcharges they paid from becoming the City's property; thus, the claim is barred by sovereign immunity. However, because the property owners had not had the opportunity to amend its pleadings to respond to the City's new governmental immunity claim, the Court remanded to allow them to do so.

### **Public Utilities Commission**

*Cities of Corpus Christi, et al., v. Public Utility Commission of Texas, et al.*, 2010 WL 2330366 (Tex.App.–Austin June 11, 2010, no pet.) (mem. op., not designated for publication). A group of eighty three cities raised an administrative appeal challenging an order of the PUC approving the application of AEP Texas Central Company (TCC), a transmission and distribution utility serving the cities, to increase its base rates and terminate “merger savings” and “rate reduction” riders in its tariff. Following the merger that created TCC, TCC was required under a PUC-approved agreement to provide certain rate credits for six years. These credits were designed to pass on to customers some of the savings achieved from the merger, and were to continue until base rates were changed. After the six years elapsed, TCC applied for and was granted an interim rate increase and terminated the two riders.

The cities challenged two costs TCC was allowed to recover in the rate case. First, the Public Utilities Regulatory Act (PURA) requires electric utilities to provide incentives for retail electric providers to achieve energy efficiency measures. TCC did not meet its 2006 energy efficiency goal, and thus the cities alleged that TCC should not be allowed to recover the costs it expended on those measures. The Court held that PURA's plain language allows the utility to recover all funds expended to achieve energy efficiency goals, regardless of whether they were achieved.

The cities also challenged the manner in which TCC applied its tax savings from its merger, which was approved by the Commission during the rate case. TCC used actual taxable income information rather than proxy information that was used in previous years for this calculation, which the Court found to be consistent with previous PUC dockets and was supported by substantial evidence in the administrative record.