2010 APA Texas Conference

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Land Use/Development

Sea Mist Council of Owners v. Board of Adjustment, et al., 2010 WL 2891580 (Tex.App.–Corpus Christi-Edinburg July 22, 2010, no pet.)

Appeal of a Board of Adjustment decision to authorize the issuance of a building permit and occupancy permit to a café under Section 211.010 of the Local Government Code

- *ISSUE:* Was the appeal filed in a timely manner?
- BOA did not have rules in place prescribing the time in which to file an appeal; the appeal must be fi

"within a reasonable time."

What's Reasonable?

- Appeal was filed:
  - 6 months after the building permit was issued, and
  - 4 months after the occupancy permit was issued.
- Court held that the appeal was untimely
- Balancing test = right of a party appealing & permittee's right to have a final permit

Zoning

Trudy's Texas Star, Inc. V. City of Austin,
307 S.W.3d 894 (Tex.App.–Austin 2010, no pet.).

FACTS:

- 2003 - Trudy's remodeled a building & obtained all required building permits
- 2005 - Trudy's began building a patio over a gravel lot in the back.
- In 2003, city inspector told Trudy's that no additional approvals would be necessary to build patio.
- After construction began, the City informed Trudy's that it had violated City Code by constructing the deck without obtaining an approved site plan.

- City sought both criminal and civil charges
- Criminal = guilty & $1 fine
- Civil = Parties entered into a settlement agreement
  - Trudy's could retroactively obtain a site plan
  - City agreed to "reasonably work with" Trudy's to come into compliance

- Site Plan – Trudy's required an additional 22 parking spaces
- No parking available on-site – could they allow for off-site parking? ADA parking
- Based on City's representations, Trudy's leased property at a nearby business for parking
- City rescinded the plan after neighbors protests
- The new deck was not an "existing condition" that could preclude on-site parking because it was built without prior City approval.
- Now required to provide on-site parking, which it could not do without removing the deck.
- Trudy's failed to obtain approvals within the timeline set by the Rule 11 agreement & City reinstated its suit

Equitable Estoppel

- 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:
  - City did not benefit from inducing Trudy's to pursue off-site parking.
  - City's assurances were not deliberately calculated to mislead Trudy's.
  - Trudy's was responsible by its own conduct in constructing the deck without first obtaining City permits & enforcement by the City was a proper governmental function, even if it had discretion to allow Trudy's to retroactively seek a site plan.

Breach of Rule 11

- City breached the Rule 11 agreement to "reasonably work with" Trudy's
- The case was remanded to district court

Impact Fees

- Op. Tex. Att'y Gen. No. GA-0788 (2010).
- Local Government Code Chapter 395 = impact fees
- *QUESTION:* Can a city enter into an agreement with a developer to give credit against impact fees to any specific category of capital improvement?

- AG said yes. Section 395.024 requires 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
- State law does not expressly require the entity to limit the purposes for which a credit for a developer's cost of a capital improvement.

Impact Fees

- Opinion No. GA-0797
- Issued September 20, 2010
- Calculation of impact fees for a platted subdivision

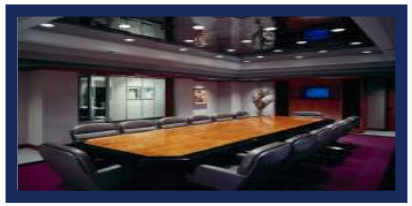
Opinion No. GA-0797

- Does a city have to refund impact fees for a dormant project?
  - NO; statute specifies specific instances when a refund can be issued
- There is a distinction in chapter 395 (Impact Fees) between the *assessment* of an impact fee and the *collection* of an impact fee
- Section 395.017 prohibits the imposition of additional or increased impact fees against a tract after the fees have been assessed unless the number of service units to be developed on the tract increases.

Annexation

- *City of Celina v. City of Pilot Point,* 2009 WL 2750978 (Tex.App.–Fort Worth Aug. 31, 2009, pet. denied).
  - 2 year statute of limitations to challenge annexations found in Tex. Gov't Code § 43.901
  - Celina did not bring its suit until 6 years after the annexation

Open Government



- *City of Richardson v. Gordon*, 316 S.W.3d 758 (Tex.App.–Dallas 2010, no pet.).
  - Did the City violate its charter and the Texas Open Meetings Act by holding closed meetings?
  - 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.

Time to Process Open Records Request

- *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010).
  - City of Dallas received a Public Information Act Request
  - 6 days later, City asked for clarification of that request
  - City requested an attorney general opinion requesting to withhold the information
  - AG concluded that the City's request was untimely
  - Court held City's request for an attorney general decision was timely and the materials it withheld are excepted from disclosure.
  - City must act in good faith

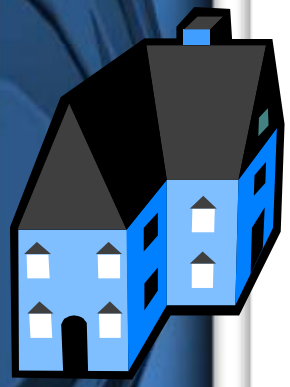
Police Power

- Sexually Oriented Businesses
- *A.H.D Houston, Inc., et al., v. City of Houston*, 316 S.W.3d 312 (Tex.App.—Houston [14th Dist.] 2010, no pet.).
- 1997, Houston enacted an ordinance restricting the locations of sexually oriented businesses.
- Amortization period of 180 days in order to recoup their investment, and could appeal for additional time
- Appellants' administrative hearings were denied
- Appellants challenged the lack of findings of fact from the hearing officers.
- Court found that there is requirement for an entry of findings of fact, unless an ordinance or statute requires them.

- Constitutional claims:
  - Separation of powers clause of the Texas Constitution: officers from the vice squad were also the hearing officers
  - Lack of detailed findings resulted in violation of due process & due course of law rights
- Both claims failed.
  - Separation of powers provision of the Texas Constitution applies only to branches of state, not local government
  - No requirement for fact findings

Code Ordinances and Violations

- *Carlson v. City of Houston*, 309 S.W.3d 579 (Tex.App.–Houston [14th Dist.] 2010, no pet.).
  - Houston hired a structural engineer to examine a condo complex & found corrosion of the beams = an immediate danger.
  - The City issued an order to vacate the condos.
  - Condo owners filed for an administrative hearing & City affirmed the order to vacate.
  - Which rules apply – the City Code or Local Government Code?
  - Court found that the judicial review process in the Local Government Code applies.



Building

- *City of San Antonio v. D'Hanis State Bank,* No. 04-10-00181-CV (Tex. App.—San Antonio August 18, 2010) (mem. op.).
  - Bank could argue it was an "innocent lender for value similar to a bona fide purchaser" against a city demolition order under Chapter 214 of the Local Government Code.

Takings/Eminent Domain

- *Sweed v. El Paso*, 2010 WL 1055897 (Tex.App.–El Paso 2010, pet. denied).
  - City had brought suit for recovery of delinquent property taxes on a building owned by Sweed
  - Foreclosed & deeded to the city, which later demolished the building as it posed a hazard to the public health and safety
  - Sweed did not have standing to sue for an unconstitutional taking.

Failure To Correct Drainage

- *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.
- Was the City liable? *NO*
- To be successful Plaintiff had to show:
  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.

- 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.

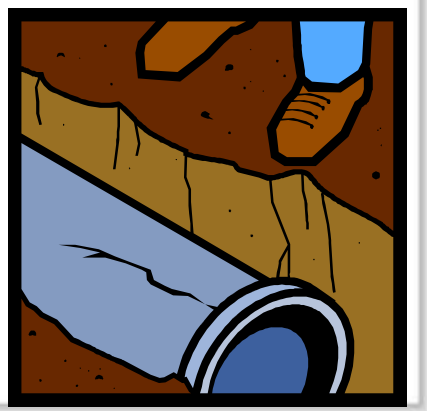
Air Traffic

- *Alewine v. City of Houston*, 309 S.W.3d 771 (Tex.App.–Houston [14th Dist.] 2010, pet. filed).
  - City constructed a new runway at Bush Intercontinental Airport
  - *Can increased air traffic result in a taking of someone's 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

Eminent Domain - Dueling judgments

- *City of Edinburg v. A.P.I. Pipe & Supply, LLC, et al.*, No. 13-09-00159-CV (Tex. App.—Corpus Christi-Edinburg August 26, 2010).
  - City of Edinburg filed a petition for condemnation
  - "2003 Judgment" vested fee title in the city
  - "2004 Judgment" granted the city a right-of-way easement over the property instead of fee title & that it superseded the prior judgment.

- City granted an easement over the property to TxDOT
- A.P.I. filed an inverse condemnation suit against the city and TxDOT for the taking of soil located within the drainage channel.



- A.P.I. had no constructive notice of the city's claim to the property in fee simple because nothing in the county property records revealed that the 2004 Judgment was void due to issuance outside of the trial court's plenary power.
- A.P.I. was not required to inquire as to the effect or validity of the 2004 Judgment, and therefore could rely on it as a good faith purchaser for value.

- What was the scope of the easement granted in the 2004 Judgment?
- Court of appeals held that because the city only bargained for an easement it was not entitled to ownership of the extracted soil.
- A.P.I. had a sufficient property interest in the soil to maintain an action for inverse condemnation.

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).
  - 1997, Trust sold a 15 acre tract of to the City of Del Rio that is adjacent to its own property
  - Deed to the City included a reservation of all water rights associated with the tract.
  - 3 years after purchasing the tract, the City commenced drilling and testing a test well
  - Trust sues City, City files a counterclaim

- Court concluded that the Trust's water rights reservation was valid and enforceable.
- Groundwater is the exclusive property of the owner of the surface estate.
- City could not rely on the rule of capture because it never obtained ownership of the groundwater as it was reserved by the Deed.
- Trust could access the groundwater beneath the tract from its adjacent ranch.

Water

- *City of Galveston v. Flagship Hotel, LTD.*, No. 03-10-00094-CV (Tex. App.— Austin August 27, 2010).
  - Does the TCEQ have jurisdiction over a dispute between a city and its customers regarding disconnection of water services and refusal to refund fees?
  - NO.

Water

- *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex.App.-San Antonio 2008, pet. granted).
  - The Days owned property that contained an aquifer well.
  - EAAA creates a permit system that gives preference to existing users.
  - Days sought 700 acre-feet of water from the Edwards Aquifer to irrigate crops.
  - Historically land irrigated by a lake on the property.
  - Granted a permit for 14 acre-feet.

- Was water taken from the lake was state water or groundwater?
- The trial court found for the Applicants; San Antonio Court of Appeals reversed
- *Was there a takings?*
- Court: "[b]ecause Applicants have some ownership rights in the groundwater, they have a vested interest therein.“
- Supreme Court granted EAA’s petition for review. Oral argument has been presented, and a ruling is expected this year.

Surface Water Cases

- *Kothmann v. Rothwell*, 280 S.W.3d 877 (Tex.App.-Amarillo 2009, no pet.).
  - City of Lubbock required Rothwell to obtain, in the City's name, 5 drainage easements on an adjacent property
  - ISSUE: Is the City liable if waters that drained into the easements strayed from the boundaries of that easement?
  - NO. 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.
  - There was no restriction that the waters could not flow outside the boundaries of the easements.

Surface Water

- *City of Borger v. Garcia*, 290 S.W.3d 325 (Tex.App.-Amarillio 2009, pet. denied).
  - Several Homeowners' houses were damaged by flooding in 2006.
  - Months prior to the flood, the City of Borger had rerouted the drainage system serving the area and installed larger drain pipes.
  - Was there a taking? NO.
  - 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'

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.).
  - City had consistently charged a monthly rate of 8 times the minimum rate for water and sewer service.
  - Court found that the TCEQ does not have exclusive or primary appellate jurisdiction over challenges to water rates charged by municipalities.
  - Governmental immunity? Court remanded to allow plaintiffs to amend its pleadings.

Sovereign Immunity

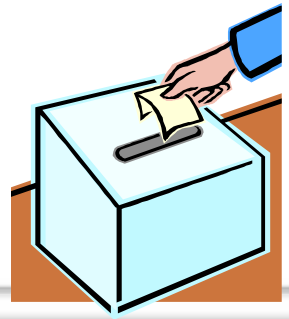
- *City of Wichita Falls v. Romm*, 2010 WL 598678 (Tex.App.–Fort Worth 2010, pet. no pet.).
  - Is a City liable for failing to maintain road signs warning of a dangerous condition?
  - Claim failed because the road and its signs were exclusively owned and controlled by TxDOT, not the City

Governmental Immunity-Contract

- *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, No. 08-1003 (Tex. Aug. 27, 2010).
  - Authority and developer entered into an agreement for Developer to pay to build water infrastructure & Authority would partially reimburse if a favorable bond election.
  - Agreement stated that the Authority would have the use of the infrastructure rent free until a successful bond election was held.
  - Two failed bond elections; 3rd bond election that did not include the financing for the infrastructure.

- *Intent of Agreement*
  - Court held that “any” can be interpreted in either way but that the intent in this case suggested that “any” should be interpreted as “every” and thus the Authority breached its agreement when it left the proposition off one of its election ballots.
- *Reserved Powers Doctrine*
  - Court held that the agreement did not contract away any future power or cause an impediment to the Authority’s governmental obligations.

- *Takings*
  - The developers argued that the Authority's continued use of the facilities, rent free, was a taking. The Court held that the developers consented to this use in the contract
  - The agreement is valid and requires that the Authority place the bond proposition to reimburse the developers on all future election ballots

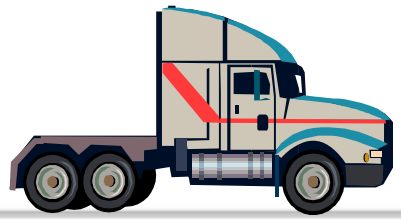


Official Immunity

- *McLennan County v. Veazey,* 314 S.W.3d 456 (Tex.App.–Waco 2010, pet. filed).
  - 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 & instructed the wrecker company attempted to remove the house, resulting in the house's destruction.
  - Meadows did not actually operate the vehicle causing the property damage, the government and official did not come within the statutory waiver.

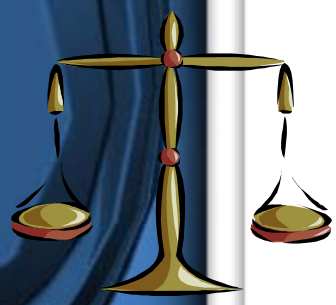
Official Immunity

- *McLennan County v. Veazey, cont'd*
  - Governmental immunity is not waived because Meadows is not personally liable to the Veazeys.
  - 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.



Governmental Immunity-Tort

- *Shawn Hudson v. City of Houston,* No. 01-07-00939-CV (Tex. App.—Houston [1st Dist.] August 12, 2010).
  - The court held that it is a proprietary function of a city to provide a defense and indemnity to its employees, thus limiting a city's immunity.
  - However, the employee had to provide notice of the suit and a need for defense and indemnity to invoke the city's duty, even if the city had actual knowledge of the suit.



Contracts

- *Berkman v. Keene*, 311 S.W.3d 523 (Tex.App.–Waco 2009, pet. denied).
  - 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.
  - Waiver of 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?
  - NO. This waiver of liability does not apply if the benefit the local government receives under the contract is an "indirect, attenuated one."

- *McKinney & Moore, Inc. v. City of Longview*, 2009 WL 4577348 (Tex.App.–Houston [14th Dist.] Dec. 8, 2009, pet. denied).
  - Payment dispute between the City and contractor after completion of construction of water intake structure.
  - Is the City immune from suit?

- Contractor failed to show that any losses were the result of the City's breach of contract.
- But…Contract provided that the contractor could rely on the City's geological testing as part of the benefit of the bargain struck in the contract, which was deficient.

- Contractor still lost because it accepted the final payment from the City & waived any future claims

Resources

- Texas Municipal League
  - www.tml.org
- Texas City Attorneys Association
  - www.texascityattorneys.org
- Legal Information Institute
  - www.law.cornell.edu
- Bickerstaff Heath Degado Acosta LLP
  - www.bickerstaff.com

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