



Legislative UPDATE

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FIFTH CIRCUIT DISMISSES TEXAS OPEN MEETINGS ACT CHALLENGE

Previous editions of the *TML Legislative Update* have reported on the progress of the Alpine Open Meetings Act lawsuit (*Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas v. Frank D. Brown, 83rd Judicial District Attorney, and the State of Texas*).

The core question presented in the case was whether a local government official's speech, made pursuant to official duties, has the same constitutional protections that the First Amendment grants to other types of speech.

In 2006, a federal district court upheld the law. On appeal earlier this year, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit issued an opinion that failed to directly answer the question. Instead, the panel returned the case to the trial court for further proceedings based on a tougher legal standard of review. Under that standard, the state would have had to prove that the criminal provision of the Open Meetings Act (Act) is not unconstitutional.

Shortly after the opinion was issued, both sides filed for a rehearing by the court *en banc*. An *en banc* rehearing is one that is conducted by all of the court's seventeen judges. The State of Texas argued that the panel's decision should be overturned. The plaintiffs argued that no additional trial proceedings were necessary, and that the court should have simply declared the criminal provision of the Act to be unconstitutional.

TML, along with the Texas City Attorneys Association, the Illinois Municipal League, the South Dakota Municipal League, the National League of Cities, and the International Municipal Lawyers Association, filed an amicus brief in the case in support of the plaintiff's position.

The court granted the motions, and was set to hear oral arguments this month. But in a surprise move, the court dismissed the case on September 10 by a 16-1 decision without the benefit of hearing oral arguments.

The case was dismissed due to a lack of "standing." The plaintiff is no longer a city official (he was term-limited as a councilmember), and the court thus deemed the case moot. "Standing" is a prerequisite to bringing suit, and the doctrine generally requires a "live controversy." However, in the case of a statute like the Act, the law allows a case to proceed if there is a "credible threat of present or future prosecution" or if the case is "capable of repetition but evading review." Because the criminal statute of limitations under the Act is two years, the plaintiff could still be prosecuted even though no longer in office. In addition, thousands of elected and appointed officials are still subject to criminal prosecution under the Act.

The lone dissenting justice wrote a scathing rebuke in which he lambasted the other members of the court for essentially taking the easy way out. The decisive vote, and other indications from the court, seems to indicate that further appeals of the original case may be futile.

Because of that, several city officials may file an entirely new lawsuit based on the same legal principles as the Alpine case, at the federal district court level. If you are an official who is subject to the Act, and are interested in being a plaintiff in that case, please contact Rod Ponton, Alpine's city attorney, at rod_ponton@yahoo.com.

Contrary to what some media reports and attorney general press releases may imply, it is important to remember that neither the League nor any other entity is opposed to open government. Quite the contrary. This case was simply arguing that the threat of jail time is not the least restrictive means of achieving that goal.

PERRY MAKING USE OF STIMULUS BOOST

by R.G. Ratcliffe

AUSTIN - Gov. Rick Perry rallied opposition to federal stimulus spending, but he now is the manager of one of the biggest pots of federal gold in Texas: crime grants to local law enforcement agencies.

And those grants have become an integral part of Perry's political machine.

Perry in the past has decided what law enforcement agencies receive about \$23 million a year in Edward Byrne Memorial Justice Assistance grants. Now, because of the American Recovery and Reinvestment Act, Perry will have an additional \$90 million to hand out.

While Perry's office is the conduit for the federal money, the governor chooses which agencies receive the money and how it is spent. The political payoff has been great.

About \$6 million in Byrne grants helped Perry win the endorsement of border sheriffs in 2006. Perry last year held a news conference to promote \$557,000 in grant money he was giving to the San Antonio Police Department to target transnational gangs.

Every time Perry doles out the federal Byrne grants, he sounds like the money is his.

"Texas is tough on crime and remains dedicated to equipping our law enforcement with the resources necessary to protect our citizens and ensure the safety of our communities," the governor said while handing out \$2 million of the federal money to East Texas communities last year.

Perry created a controversy this year when he rejected \$550 million in federal unemployment compensation funds, saying it had too many "strings attached," but he later accepted more than \$12 billion in stimulus funds to balance the state's budget.

Fodder for primary battle

Republican primary rival U.S. Sen. Kay Bailey Hutchison has been attacking Perry on the stimulus funding, accusing him of hypocrisy. Hutchison voted against the Recovery Act but has said that once it passed Texas should get its fair share of the money.

Under requirements attached to the Byrne stimulus money, 40 percent must go to local governments. The governor's office reports that 425 applications have come in for \$40 million of the money, based on recommendations from regional councils of government.

The other 60 percent of the stimulus money - about \$54 million - can be spent at the discretion of Perry's office.

Perry spokeswoman Katherine Cesinger said the governor believes it is important to get the stimulus-backed Byrne money to law enforcement agencies, as well as the usual grants.

"This funding will support investments in crime prevention, law enforcement, prosecution, corrections, treatment and justice information sharing initiatives," Cesinger said.

She said the Byrne money is different from the unemployment funds because it is for one-time spending, while the unemployment money required a future state-paid expansion of the system.

Tulia controversy

The Byrne grants are named after a New York City police officer murdered in 1988 by gang members who were ordered by a jailed drug lord to kill a police officer.

The Byrne grants got a bad name in the early part of this decade in Texas when they were used to fund regional drug task forces, one of which resulted in the conviction of 39 innocent people in Tulia based on the false testimony of an undercover narcotics agent.

Perry, who was not involved in funding the Tulia task force, pulled the plug on regional task forces and shifted the emphasis in handing out Byrne money to border and homeland security.

Perry in 2005 gave \$6 million in funds to the counties participating in the Texas Border Sheriff's Coalition "to deter illegal immigration and prevent border-related crime." Days before Perry's 2006 re-election victory, the sheriffs made a high-profile trip to Washington with the governor to discuss border crime, and most endorsed Perry.

"I don't think it was a coincidence that the grants roughly correlated with those endorsements," said Democratic political consultant Jason Stanford, who managed the gubernatorial campaign of party nominee Chris Bell.

Scott Henson, former director of the ACLU Police Accountability Project, said some of the Byrne money in Texas is used for prison diversion programs and drug courts in urban counties. But Henson, who blogs about criminal justice, said some of the money Perry gave to the border sheriffs did nothing to deter crime.

"Some of the people he gave the money to turned out to be on the drug lords' payroll," Henson said, referring to former Starr County Sheriff Rey Guerra, who recently was sentenced to 64 months in prison for leaking sensitive law enforcement information to Mexican drug traffickers.

(Note: This article is reprinted with the permission of the Houston Chronicle. It publicizes the availability of federal grant revenue that is being distributed by the governor's office to law enforcement agencies. It also points out a practice that is particularly bothersome to many city officials: when state leaders distribute federal dollars to local governments, they state or imply that the State of Texas is providing the funds. The truth is that the State of Texas provides very little financial aid to cities.)

ATTORNEY GENERAL ISSUES FAVORABLE **ANNEXATION OPINION**

On September 3, the Texas attorney general issued opinion GA-737. The opinion interpreted, among other things, the “100-tracts exemption” to the municipal annexation plan requirement in the Municipal Annexation Act (Chapter 43 of the Local Government Code). It did so in a way that confirms a long-held opinion of city attorneys around the state: it concludes that 1999 legislative changes that apply a complicated, three-year process to annexations of populated areas do not apply to the annexation of sparsely-populated areas.

The issue goes back to the 1999 legislative session, which featured aggressive attacks on municipal annexation authority. Cities were committed to finding some workable solution. League staff met with “annexation reformers” throughout that legislative session because the League was convinced there was a very real risk of losing significant authority to annex if a compromise could not be reached.

Senate Bill 89, which was the compromise enacted that year, was a massive rewrite of Texas annexation laws. League staff and city officials testified numerous times, offered amendments, and worked to eliminate or modify the more onerous provisions. Although the bill changed annexation laws significantly, it included several key provisions that mitigated the more onerous requirements.

One of the key components was that the bill did not apply its more complicated procedures to areas that are not densely populated. Under the bill, every city in Texas was required to adopt an “annexation plan” by December 1, 1999. The plan must identify areas with 100 or more homes that will be annexed by the city, and must provide for a three-year process to complete the annexation. The purpose of the plan is to ensure that built-out areas do not experience a reduction in services after annexation.

Section 17 of S.B. 89, which is codified as statutory notes that follow various sections of Chapter 43 of the Local Government Code, provides that most of the changes made by the bill apply only to “plan” annexations. Certain types of areas are exempt from the plan requirement. For example, if an area contains “fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract,” that area need not be included in an annexation plan. That language is often referred to as the “100-tracts exemption.” (Note that many cities will have a one-page plan stating that they do not intend to annex any area for which an annexation plan is required. GA-737 concluded that the failure to adopt a plan at all is not fatal to an annexation that is made outside of the plan requirement.)

In the request for GA-737, a county attorney questioned the application of the 100-tracts exemption. He argued that, for the exemption to apply, every lot in an area must contain a dwelling. The attorney general rejected that argument, stating that “while the statute would benefit from legislative clarification, we conclude that Section 43.052(h)(1) of the

Local Government Code does not require that a residence be located on each tract of the area proposed for annexation.”

The opinion supports the proposition that a city may annex an area so long as there are fewer than 100 homes in the area. Because of the exemption, it is probably fair to say that most annexations will still not be required to be in an annexation plan. Of course, the 100-tracts exemption is generally relevant only to home rule cities that annex sparsely-populated land unilaterally.

TEXAS CITIES RECLAIM ABANDONED PROPERTY

Texas law provides that businesses, financial institutions, and government entities may retrieve abandoned and unclaimed property held by the Texas comptroller. Any financial asset, including but not limited to dividends, payroll or cashier’s checks, stocks and bonds, and insurance proceeds that have been abandoned by the owner for one or more years, may be reclaimed by the owner. In order to find unclaimed property, owners may search for such property on the comptroller’s Web site. In addition to the owner’s search, the agency, through postings on the agency’s Web site, direct mail notices and annual newspaper advertising, attempts to find the rightful owners of abandoned and unclaimed property. The owners reclaiming property must then provide the Texas comptroller’s office sufficient proof of ownership, subject to the agency’s discretion.

Since May 2009, the comptroller’s office has attempted to return unclaimed property to 395 local governments. The agency is still waiting for 150 of these claims to be returned and accepted by the cities. Both large and small cities are involved in this reclaiming process. The properties include claims concerning cashier’s or vendor checks, utility deposits, accounts receivable credit balances, refunds and rebates, and accounts payable. The agency’s staff continues to work diligently to allow Texas cities to reclaim their abandoned property.

The agency provides further information on the unclaimed property search procedure, reclaiming procedure, and appropriate fees for reclaiming property. Please visit the comptroller’s Web site at www.window.state.tx.us/up for additional information.

MUNICIPAL COST INFLATION **CONTINUES TO DECLINE**

The Municipal Cost Index (MCI), developed exclusively by *American City and County* magazine, shows the effect of inflation on the cost of providing municipal services. The MCI is used to study price trends, help control price increases for commodities, make informed government contract decisions, and facilitate sound budget planning.

According to *American City and County* magazine, the MCI for September was 205.4, a decline of 0.4 percent from last month's MCI, and a decline of 4.3 percent during the previous 12 months. The September 2008 MCI was 214.7.

E-VERIFY REQUIRED FOR FEDERAL **CONTRACTS BEGINNING SEPTEMBER 8**

Starting September 8, 2009, federal contractors, including cities that enter into certain federal contracts, must use E-Verify for their new hires and all employees assigned to any work on an eligible federal contract. E-Verify is an Internet-based system operated by the U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of citizenship.

(For more information please see "E-verify Required for Federal Contracts" in the [March 12, 2009](#) [http://www.tml.org/leg_updates/legis_update031209a_everify.asp], edition of the *TML Legislative Update*, and the U.S. Citizenship and Immigration Services Web site at: <http://www.uscis.gov>.)

DON'T FORGET: CURFEW ORDINANCES **NEED REVIEW**

Section 370.002 of the Local Government Code requires that after a city adopts a juvenile curfew ordinance, the city must review and readopt the ordinance **every three years**. The statute requires that a city:

1. review the ordinance's effects on the community and on problems the ordinance was intended to remedy;
2. conduct public hearings on the need to continue the ordinance; and
3. abolish, continue, or modify the ordinance.

A juvenile curfew ordinance expires if a city does not review and readopt it every three years.

For more information on this issue, please contact the TML Legal Department at (512) 231-7400 or legal@tml.org.

NEW LAW CHANGES EMERGENCY MANAGEMENT RE-ENTRY AND EVACUATION AUTHORITY

House Bill 1831, passed in 2009, allows a mayor to enforce mandatory evacuation orders against individuals who refuse to leave a mandatory evacuation area. It also imposes civil liability on individuals who cause damage or injuries to others who must rescue them from a mandatory evacuation area as a result of their refusal to evacuate. The new law requires the state to make rules regarding uniform reentry procedures and credentialing after a mandatory evacuation. However, an affected city must be considered when the state makes the rules, and the city can adjust the rules if needed. The new law also requires a city to provide a post-disaster evaluation to the state division of emergency management not later than the 90th day after requested to do so by the division. For more information on city authority and duties in emergencies and disasters please see Emergency Authority for Local Officials [http://www.tml.org/legal_pdf/EmergencyAuthLocalOfficials.pdf].

Please contact the TML Legal Department with any questions at (512) 231-7400 or email legal@tml.org.

RECOVERY FUND RECIPIENTS ENCOURAGED TO REGISTER

by Carolyn Coleman

The American Recovery and Reinvestment Act of 2009 (Recovery Act) calls for all recipients of recovery funds to report on the use of these funds to the Recovery Accountability and Transparency Board (Recovery Board) by October 10. Registration for recipients is well under way on FederalReporting.gov, with nearly 22,000 already registered. However, the Recovery Board strongly encourages those not yet registered to do so immediately to ensure that, when actual reporting occurs between October 1 and October 10, recipients will be able to maximize the efficacy of the reporting system.

The Recovery Board was created by the Recovery Act to oversee the expenditure of recovery funds and bring transparency and accountability to the process. The board consists of a chairman, Earl E. Devaney, and 12 federal inspector generals. The board runs the recovery.gov Web site, which provides information on the recovery initiatives and spearheads an accountability effort that involves both federal and state investigators and enforcement officials.

The Recovery Board recently launched the 2.0 version of the recovery.gov Web site. The redesigned Web site will be both user-friendly and highly interactive and will provide all Americans with an historic level of transparency on their government's spending. The board decided to launch the redesigned version of recovery.gov earlier than the reporting deadline to allow time for users to become familiar with the Web site's many new features, particularly its enhanced mapping capacity.

The Recovery Act allows recipients and agencies of the federal government to conduct quality reviews of the submitted data between October 11 and October 29. After considerable outreach to recipients and other affected stakeholders, the board is announcing the following schedule and process for displaying recipient data on recovery.gov:

- All reported data associated with recovery contracts awarded directly by federal agencies will be displayed by October 15.
- All reported data associated with recovery grants, loans, and other forms of assistance will be displayed on October 30.
- All data changes made by recipients between October 11 and October 29 will be carefully tracked, chronicled, and made available on recovery.gov shortly after November 1.

According to Devaney, “[T]his release schedule mitigates the board’s concern that large amounts of uncorrected data could actually harm transparency rather than enhance it.”

Recipients of funds received under the Recovery Act may register at www.federalreporting.gov. For additional information regarding the registrations process, go to www.recovery.gov.

(Note: This article has been reprinted with the permission of the *National League of Cities*.)

FEDERAL STIMULUS PACKAGE UPDATES

As a way to keep its membership informed in a timely manner, TML has created a Web page that details many of the city-related portions of the American Recovery and Reinvestment Act (Recovery Act). The page can be accessed at www.tml.org, by clicking on “Legislative” and then clicking on “Federal Stimulus Information.”

When the League receives information of interest to city officials, the page will be updated immediately. Since publication of the last *TML Legislative Update*, the following information on the page has been updated:

Environment, Energy, and Telecommunications –the State Energy Conservation Office (SECO) has posted the Request for Applications (RFA) for the Alternative Fuels Project, which is part of the larger State Energy Program. Applications for funding under this project are due at 2:00 pm (CT) on Monday, October 19, 2009. To access the RFA, please visit <http://www.seco.cpa.state.tx.us/arra/sep/transportation/index.php>.

In addition, SECO is in the process of mailing to each Texas city with a population of less than 35,000 a letter detailing the amount of money each city can choose to receive under the Energy Efficiency and Conservation Block Grant Program. For more information on this program, please visit <http://www.seco.cpa.state.tx.us/arra/eecbg/index.php>.

ETHICS OPINION COULD AFFECT ELECTED CITY OFFICIALS

A recent advisory opinion issued by the Texas Ethics Commission, Opinion No. 484, calls into question whether elected officials, including elected city officials, may have their transportation, meals, and lodging expenses paid or reimbursed by a corporation or labor organization in return for addressing an audience or participating in a seminar.

The opinion first concludes that such expenses are often permissible under the Penal Code’s prohibition against illegal gifts and under state lobbying laws, provided the speaking opportunity is more than merely perfunctory. This was established law.

What is new about the opinion is that it raises the question of whether such payments of expenses by a corporation or labor organization might be a violation of state campaign finance laws. The opinion concludes that such payments are violations of campaign finance laws if the elected official’s services are “in connection with” his or her duties or activities as an officeholder.

Here’s a hypothetical example: Acme Corporation invites Mayor Smith to speak at Acme’s annual convention and offers to pay the mayor’s hotel and mileage expenses. If

the purpose of the speech is found to be in connection with the mayor's duties (which will often be the case), the payment may be an illegal campaign contribution despite the fact that it would otherwise be legal under the gifting and lobbying statutes.

City officials that are offered free or reduced transportation, meals, and lodging for any purpose are strongly advised to consult with local counsel and/or contact the Texas Ethics Commission directly prior to accepting those offers.

PROPOSED AMERICANS WITH DISABILITIES ACT **(ADA) RULES ISSUED BY EQUAL EMPLOYMENT** **OPPORTUNITY COMMISSION**

The ADA Amendments Act of 2008 (ADAAA) was signed into law on September 25, 2008, and became effective on January 1, 2009. The ADAAA overturned many court cases that narrowly defined a disability under the act. Under the ADAAA, disability is defined broadly and mitigating measures (like medication or eyeglasses) generally cannot be used to challenge the disability of a person using the measures. The ADAAA has the effect of making many additional employees "disabled" under the act and requires city employers to provide reasonable accommodations to more employees.

On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) proposed rules based on the ADAAA. These rules reflect the broad scope of "disability" under the new Act. The proposed rules go into more detail than previous rules on what is a disability, how mitigating measures are used, and the definition of major life activities, major bodily functions, and what "substantially limits" means. The proposed rules provide examples of these terms that broaden past interpretations of the ADA and provide helpful examples to employers on disability-related employment situations. The proposed rules also specifically state that only prescription eyewear can be considered as a mitigating measure in determining a disability and that employers cannot use eyesight as a factor in hiring or other job placement situations unless this factor is shown to be job-related and consistent with business necessity. The proposed rules clarify that a reasonable accommodation is not required when an individual is merely "regarded as" having a disability. The EEOC is accepting comments on this rulemaking until November 23, 2009. For more information on these proposed rules, including information on how and where to file comments, go to the EEOC's Web site at <http://edocket.access.gpo.gov/2009/E9-22840.htm>.

Please contact the TML Legal Department with any questions at (512) 231-7400 or send an email to legal@tml.org.

EPA TO HOLD BROWNFIELDS CONFERENCE **IN NEW ORLEANS**

The annual Brownfields 2009 Conference, co-sponsored by the U.S. Environmental Protection Agency (EPA) and the International City/County Management Association (ICMA), will take place in New Orleans on November 16-18. The National Brownfields Conference is the largest, most comprehensive conference focused on cleaning up and redeveloping abandoned, underutilized, and potentially contaminated properties in the nation. Registration is free, and the program offers more than 150 educational and learning opportunities, plenary sessions, 200 exhibitors, networking events, special training sessions, film screenings, book signings, and more. The conference attracts more than 6,000 registrants and hundreds of exhibitors. Information presented will be appropriate for both newcomers to the world of economic and environmental redevelopment as well as seasoned professionals looking to make new connections. Visit www.brownfields2009.org for more information or contact Tonia Biggs, Brownfields Conference Coordinator at (214) 665-8851 or biggs.tonia@epa.gov.

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