



Legislative UPDATE

December 10, 2009

Number 26

TEXAS NEWSPAPERS LASH OUT AT CITY OFFICIALS

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Introduction

In October of 2004, a member of the city council in Alpine, Texas, sent an e-mail to other councilmembers asking if they wanted to place a particular item on a future council agenda. The following day, one of the other councilmembers responded to recipients of the first e-mail, stating that she agreed that the item should be discussed. The local district attorney decided that this e-mail exchange violated the Texas Open Meetings Act (TOMA) because the e-mails ultimately involved a quorum of the city council. As a result, two of the councilmembers were criminally indicted by a grand jury.

These two Alpine councilmembers, who were volunteering to serve their city, were merely trying to get an item on a future agenda for a public discussion by the entire city council. For doing so, they now have an arrest record and could have been convicted of a crime and sent to jail for up to six months.

Although the indictments were later dismissed, the two councilmembers sued in federal court claiming that the criminal provisions of TOMA violate their free speech rights under the First Amendment to the U.S. Constitution. While that lawsuit has been dismissed, a new legal action is planned.

In a related action, city officials in attendance at the 2009 TML Annual Conference in October approved a resolution, submitted by the City of Sugar Land, that calls upon the Texas Legislature to ease the imprisonment penalties in TOMA.

In response to these actions by city officials, newspapers around Texas have abandoned all pretenses of fairness and balance and have launched a campaign of criticism against city officials.

The Empire Strikes Back

Led by the Texas Daily Newspaper Association (TDNA), a powerful Austin-based lobbying organization, newspapers across the state have vilified city officials on a daily basis. Almost without exception, the newspaper editorials have been short on facts and balance but long on hysteria and distrust of city officials.

The lawsuit has been described as “outrageous”, “wacky”, “silly”, and “pointless”; the resolution as “disingenuous” and “duplicitous.” One editorial argued that TOMA’s imprisonment penalty is needed “to prevent rogue elected officials from thumbing their noses at the statute.” Another went so far as to suggest that without the threat of jail time, Texas would return to the days when local governments “routinely conducted public meetings as staged events” after “the real business was done in some backroom or roadside café.”

Another TDNA representative said that the imprisonment penalty is needed as a “stick.” The obvious implication is that local elected officials, left to their own devices, would immediately violate the law and betray voters.

According to our daily newspapers, local elected officials are guided by such evil tendencies that they can be controlled only by the threat of imprisonment or a few whacks with a stick.

In an obvious effort to deceive and confuse readers, most daily newspapers have reported simply that the lawsuit brought by the two Alpine councilmembers was dismissed. They cleverly fail to mention that the suit was dismissed only because the plaintiffs’ terms in office had come to an end due to term limits, and the court ruled they no longer had standing. The newspapers also make no mention of the fact that prior to the dismissal, a three-judge panel of the Fifth U.S. Circuit Court ruled that TOMA should be subject to “strict scrutiny” because it regulates speech. (A court that applies that scrutiny would likely strike down the punishment of imprisonment.)

The source of this animosity toward city officials is obvious. In the tortured thinking of the TDNA, no person is allowed to have a view of the open meetings act that differs in the slightest degree from the newspapers’ view. To do so is proof positive that one is a scoundrel and an enemy of the people.

The most astonishing editorial of all was written by Bill Hobby, a former lieutenant governor of Texas. In newspapers across the state, he opined that “governing bodies must conduct the people’s business in public or else face some serious penalties.” He went on to say that the open meetings act has a basic premise: “public bodies should deliberate in public.”

No one respects Bill Hobby more than I do, but I must point out that for 18 years he presided over the Texas Senate, a governing body which long ago *exempted itself* from the Texas Open Meetings Act and which has regularly met in secret and behind closed doors for hours on end. Yet Mr. Hobby holds forth on the reasons that TOMA should send *local* officials to jail. Not a single newspaper mentioned or commented on the obvious irony.

The goal of the press, of course is to create the impression among citizens and legislators that there is no honesty among city officials, but there is fear of jail, and that’s all that ensures open government.

The TML Reaction

The Texas Municipal League has opted not to respond with letters to the editor or op-ed pieces. There are two reasons for this decision.

First, editorial pages are owned by the same newspapers that have been disparaging city officials almost every day. The newspaper lobby can use those pages whenever it wishes; TML can have access only when the newspaper bosses allow. It is a virtual certainty that any newspaper that would print a TML op-ed piece would respond by launching another attack against city officials in the following days.

Second, we hold ourselves to a higher standard. We may disagree with the newspaper lobbyists' views on TOMA issues, but we recognize their right to hold those views. I am confident that the important issues will ultimately be decided (favorably for cities) in courts of law. Thus, there is no reason for TML to follow the descent of TDNA into a mud-wrestling event. It is tempting to do so, but accomplishes nothing.

On the other hand, the tactics—and, indeed, the very existence—of a newspaper lobby group raise an important question. Does the eagerness of the newspapers to influence state policy and to deny city officials their day in court prevent them from fairly and objectively reporting and commenting on those issues? Unfortunately for the ever-diminishing ranks of newspaper readers, that's apparently the case.

WILL THE P.U.C. SEEK LIMITS ON MUNICIPAL ACCESS LINE FEES?

Many cities rely on revenue generated by renting municipal rights-of-way to utility providers. Telecommunications companies collect and remit a significant portion of that revenue.

For many years, rent was collected under franchise agreements with individual telecommunications providers. In 1999, those agreements were replaced with a new system of compensation based on "access lines." That year, the legislature enacted Chapter 283 of the Local Government Code. To ensure that the changes made by Chapter 283 were revenue-neutral, the chapter provides that each city was to receive a "base amount." In overly-simplistic terms, the base amount includes total compensation received from all certified telecommunications providers in calendar year 1998. The base amount is then divided by the number of lines in the city to determine the per-access-line fee for each of three categories established by rule issued by the Public Utility Commission. (The number of lines essentially consists of residential, business, and point-to-point lines).

Chapter 283 envisions that changes in technology, facilities, or competitive or market conditions may justify a modification in the categories of access lines. The chapter requires the commission to consider such changes at least once every three years.

On September 24, 2009, the commission staff presented a proposed rulemaking to the commission at an open meeting. The commission voted to publish a proposed rule for public comment that would make certain "tweaks" to the various categories. The proposed rules were published in the Texas Register on December 4, 2009, and are available at <http://www.puc.state.tx.us/rules/rulemake/37498/37498.cfm>.

The notice is routine in that it asks for comments on the technical aspects of the proposed rules. The League, along with the Texas Coalition of Cities for Utility Issues, will monitor and participate as necessary. Interested cities may submit comments before January 4, 2010.

The notice is not routine, however, in that it asks an additional, troubling, and unrelated question:

“The commission invites specific comments on the commission’s jurisdiction to affect the total amount that a municipality collects as access line fees.”

The question was posed pursuant to a commissioner’s statements regarding the fees at the September 24 meeting. The commissioner discussed her concern with the “outrageous” level of fees and stated her opinion that the fees are a “hidden tax...that is coming through [the commission].” Her comments indicated that she may want to reduce the total amount of revenue to cities from the fees.

The commissioner’s statements, combined with the above question, are cause for concern and raise a much larger issue than the current proposed rules. Over the years, some have incorrectly argued that the compensation for the use of a city’s rights-of-way is a “tax” on telecommunications providers or consumers. In fact, right-of-way fees are a value-based rental for the use of public property.

The fact that right-of-way fees are a value-based rental for the use of city property comports with over 100 years of legal precedent. Any characterization of right-of-way compensation as a “tax” is wrong. The compensation that telecommunications providers pay is simply a cost of doing business, just like leasing property for an office or other facility. In fact, the Texas Constitution prohibits a city from allowing the private use of its property for free, and to reduce the fee would provide an unconstitutional public subsidy to private business.

The League’s position is that the commission does not have the authority through a rulemaking to reduce or cap the amount of rent that cities receive. It is likely that the issue will come up in the 2011 legislative session as well. League staff plans to comment on the proposal and keep the membership informed of future developments.

MUNICIPAL COST INFLATION REMAINS STEADY

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, make informed government contract decisions, and facilitate sound budget planning.

According to *American City and County* magazine, the MCI for November was 206.5, the same as last month’s MCI, but still a decline of 3.8 percent over the previous 12 months. The November 2008 MCI was 214.6.

ENFORCEMENT OF FTC IDENTITY THEFT RULES IS DELAYED AGAIN

The enforcement date of the Federal Trade Commission (FTC) rules requiring cities to adopt identity theft programs (pursuant to the Fair and Accurate Credit Transactions [FACT] Act of 2003) has been extended from November 1, 2009, to June 1, 2010. (See the FTC Web site for information on this

latest deadline extension: <http://www.ftc.gov/opa/2009/10/redflags.shtm>. City officials should contact their city attorney or the TML Legal Department with any questions regarding adoption and implementation of a program. Contact Laura Mueller at the TML Legal Department at 512-231-7400 or by email at laura@tml.org.

For more information please see “FTC Requires Businesses to Adopt Identity Theft Programs” in the [August 21, 2008](#), edition of the *TML Legislative Update*; “FTC Identity Theft Rules” in the [October 9, 2008](#), edition of the *TML Legislative Update*; and “The FTC Releases Guide on Implementation of Identity Theft Rules” in the [July 2, 2009](#), edition of the *TML Legislative Update* at tml.org.

INTERIM STUDY CHARGES

In accordance with charges issued by Texas House Speaker Joe Straus, committees of the Texas House of Representatives will be examining the following issues of interest to cities during this legislative interim. TML will closely monitor the process.

House Committee on County Affairs

- Examine how local governments can better inform the public about local government debts.

House Committee on Elections

- Examine the prevalence of fraud in Texas elections. Study new laws in other states regarding voter identification and recommend statutory changes necessary to ensure that only eligible voters can vote in Texas elections.

House Committee on Energy Resources

- Survey current local ordinances governing surface use of property in oil and gas development.
- Recommend changes, if any, to the authority of the Railroad Commission to regulate the operation of oil and gas industries in urban areas of the state, particularly the Barnett Shale.
- Consider the establishment of uniform statutes and codes relating to liquid petroleum gas permitting and operations as a means to resolve conflicts of interpretation between state and local jurisdictions.

House Committee on General Investigating and Ethics

- Review state law in light of the effects of Texas Ethics Commission Advisory Opinion No. 484 relating to acceptance of benefits provided to officeholders. Recommend any necessary legislative changes.
- Review the definition of “political advertising” and determine whether the definition should be expanded to include content contained in blogs and other types of Internet communications.

House Committee on Land and Resource Management

- Examine unresolved issues relating to eminent domain legislation introduced during the 81st Legislative Session. Monitor any pending litigation.

House Committee on Natural Resources

- Evaluate groundwater regulations and permitting processes throughout the state, including the role of state agencies in groundwater management, the development of desired future conditions, and the adoption of groundwater management plans in relation to regional and state water planning.

- Monitor the effects of current and proposed federal initiatives that could impact the implementation of the State Water Plan. Evaluate the policies and investments developed by other states dealing with water issues similar to the State of Texas.
- Monitor ongoing drought conditions and initiatives to promote water conservation through the review of the following: state requirements for the submittal of water conservation plans and annual reporting; the “trigger” for use of drought contingency plans; recommendations by state agencies and the Water Conservation Advisory Council; and progress toward the development of recycled water resources and desalination projects.
- Evaluate the regulatory model for investor-owned water and sewer utilities, including rate case process and timing, consultant fee recovery, overall cost reductions, and more effective consumer participation.

House Committee on State Affairs

- Review state compliance with federal law regarding undocumented immigrants. Evaluate the costs of services and benefits provided to undocumented immigrants by state agencies and local governments.

House Committee on Transportation

- Review federal, state, and local programs to promote traffic light signalization, improve traffic flow, and reduce congestion.

House Committee on Ways and Means

- Examine the state's major tax exemptions to determine how the current costs and benefits compare with the original legislative objectives. Make recommendations for adjustments as needed.
- Study methods for improving the quality and uniformity of, and communications to taxpayers about, property tax appraisals.
- Study the tax structure as applied to cable versus satellite service to determine if any unfair competition results from state tax policies.
- Monitor the implementation of property tax appraisal and alternative valuation appeal reforms enacted by the 81st Legislature.

FCC ISSUES CELL TOWER ORDER

In July of 2008, CTIA, the national association of cell phone providers, filed a “petition for declaratory ruling” with the Federal Communications Commission (FCC). The petition asked the FCC to preempt local zoning of wireless phone tower locations.

CTIA complained that local zoning procedures have the effect of limiting competition in the provision of wireless phone service. Specifically, CTIA requested that the FCC: (1) impose a 45-day or 75-day “shot clock” on local zoning decisions regarding wireless towers; (2) interpret the federal Telecommunications Act (Act) as barring any local zoning decision that prevents a wireless provider from offering service in an area where another wireless carrier is already providing service; and (3) interpret the Act as preempting any local zoning that would require a wireless tower to comply with a zoning variance process.

Many city ordinances, pursuant to state law, require various notices and hearings to determine whether a particular location is appropriate for a wireless tower. Because of that, the League wrote a letter to Senator Kay Bailey Hutchison in September of 2008 asking for her assistance on the matter, and

copied the letter to the FCC as our comments. A number of individual cities, including Dallas, Arlington, Houston, and others, filed comments as well.

Last month, the FCC unanimously adopted an order on CTIA's petition. The order is similar to previous orders regarding cable franchises, which essentially preempted city authority in states that don't have a state-issued franchise. While not as burdensome as some feared, the order does the following:

- Sets presumptive deadlines of 90 days (for co-location applications) and 150 days (for all other wireless siting applications) within which a city must act on wireless applications. (Note: the order contains different procedures for currently pending applications.)
- Concludes that a city that denies a tower-siting application solely because "one or more carriers serve a given geographic market" has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services," within the meaning of the Act. In other words, the fact that another carrier or carriers provide service to an area is an inadequate defense to denying a new carrier's application.
- Rejects CTIA's request that the FCC preempt any variance procedure under a city's ordinance. The FCC concluded that whether a variance procedure is too burdensome depends on the city's actual process.

The order is troubling because it preempts certain aspects of local zoning authority and to some extent makes the FCC a "national zoning board." It is effective immediately. Thus, city officials should consult with local legal counsel to ensure that local procedures conform to the order.

National organizations representing cities may decide to appeal the order on the grounds that the FCC lacked the jurisdiction to issue it.

GRANT MONEY AVAILABLE FOR FIRE DEPARTMENTS

The SAFER (Staffing for Adequate Fire and Emergency Response) Grant program is a federal initiative created to provide funding directly to fire departments and volunteer fire departments in order to help them increase the number of trained, "front-line" firefighters available in their communities. Paid, or "career," fire departments may apply for the portion of the SAFER grant that may be used to hire new firefighters and, in some cases, rehire firefighters who were recently laid off by the department. Volunteer fire departments may apply for this grant money as well, or for grant money to assist with the recruitment and retention of volunteer firefighters, or both.

The application period for this grant ends on December 18, 2009. For more information and to apply, please visit the FEMA Web site for this grant at <http://www.firegrantsupport.com/safer/>.

TRANSPORTATION REINVESTMENT ZONES SURVEY

A statute passed in 2007 (Senate Bill 1266) provides Texas cities the authority to create zones for transportation infrastructure investment. Specifically addressed in the bill, Transportation Reinvestment Zones are a relatively new method of funding transportation projects by capturing a part of the property tax revenue from increased property values resulting from the creation of a new road. To date, only the City of El Paso and Hidalgo County have created transportation projects using this funding method, and the City of Forney is currently in the process of doing so. (S.B. 1266 is codified in Subchapter E, Chapter 222 of the Texas Transportation Code.)

The Texas Transportation Institute is currently conducting a research project to enhance the implementation of the provisions of S.B. 1266. Goals of this research are to enhance cities' knowledge of the law, make recommendations for changes, and recommend procedures for the effective execution of this statute. To begin this research process, the department is surveying Texas cities in an effort to gain general information about cities' knowledge of S.B. 1266 and the nature of cities' Transportation Reinvestment Zones. To participate in this survey, please go to www.TRZSurvey.org and complete the short questionnaire.

TRANSPARENCY LEADERSHIP CIRCLE PROGRAM LAUNCHED

Texas Comptroller Susan Combs is pleased to announce the launch of the [Leadership Circle Program](#) to recognize local governments across Texas for setting the standard for financial transparency online. The Leadership Circle program recognizes three levels of financial transparency: gold, silver and bronze. Local government entities in Texas can apply for one of the designations through a self-scoring evaluation form. The three levels of designation are designed to positively recognize the efforts of local governments and to support and encourage further development of transparency.

As a kick-off for the new program, Comptroller Combs recently recognized the City of Tyler, Smith County, and the Tyler Independent School District (ISD) with a gold Leadership Circle designation; Arp ISD, Chapel Hill ISD, and Lindale ISD received the bronze designation.

The Comptroller's office is encouraging local governments across the state to complete the online self-scoring form to claim their Leadership Circle designation. The self-scoring form, details, and instructions are available on the [Texas Transparency Check-Up Web site](#) at <http://www.window.state.tx.us/comptrol/checkup/>.

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