

TML/TCAA LEGAL DEFENSE PROGRAM AMICUS BRIEF UPDATE  
(Includes Briefs Filed Through January 12, 2012)

PENDING

**Americans with Disabilities Act:** *Richard Frame v. City of Arlington*, Nos. 08-10630, 08-10631 (5th Cir. 2009). This Americans with Disabilities Act of 1990 (“ADA”) case involves implementation of the Act’s accessibility requirements. TML and IMLA argued that the Fifth Circuit decision incorrectly attempts to apply the program accessibility standard to all facilities, including streets, sidewalks and parking lots. The Fifth Circuit in this case held that a physical sidewalk and parking lot (and, by implication, every public building, structure and right of way) is a “program” for purposes of enforcing Title II of the ADA and Section 504 of the Rehabilitation Act. The decision may require that the City of Arlington, and every other public entity, make all facilities accessible immediately. The amici argued that this is contrary to the statutory language and regulations at issue and imposes on public entities an extraordinary financial burden not contemplated by Congress or articulated in the statute. This brief was filed on July 24, 2009. On August 23, 2010, the Fifth Circuit held that curbs, sidewalks, and parking lots do not constitute a “service, program, or activity” within the meaning of Title II of the ADA. Thus, plaintiffs can only establish claims under Title II to the extent they can allege that a noncompliant sidewalk, curb, or parking lot denies them access to a program, service, or activity that does fall within the meaning of Title II. On September 15, 2011, an en banc Fifth Circuit Court of Appeals held that newly-built or altered sidewalks must be made accessible if it would not be unreasonably burdensome on the city. The court also held that the statute of limitations does not begin to run until an individual knew or should have known that a sidewalk is inaccessible to him or her. The City filed a petition for writ of certiorari with the U.S. Supreme Court on December 16, 2011, *City of Arlington v. Frame*, No. 11-746. TML and TCAA, joined by the League of California Cities, the National League of Cities, the City of Dallas, the International City/County Management Association, the U.S. Conference of Mayors, the Texas Association of Counties, and the National Association of Counties, submitted a brief in support of the petition. Amici argued that sidewalks are “facilities” rather than “services, programs, or activities.” The brief was filed on January 11, 2012.

**Recreational Use Statute:** *Sullivan v. City of Fort Worth*, No. 11-0478 in the Texas Supreme Court. TML filed a brief in support of the city’s petition for review to the Texas Supreme Court. In this Recreational Use Statute case, TML argued that the legislature’s broad definition of “recreation” in Section 75.001(3)(L) of the Texas Civil Practices and Remedies Code should be analyzed objectively. Thus, a city should be able to avail itself of the protections afforded by the act when a woman who was injured while at a wedding in a city park sued the city. Even though the woman was walking in a city park at the time of her injury, the court of appeals incorrectly characterized her action as a state of being—“being a guest at a wedding”—which considered one, but only one, of the multiple reasons for why she had been in the park, rather than focusing on what she was doing in the park when she stumbled and fell, which was walking down stairs. The brief was filed on December 19, 2011.

**Fourth Amendment-Strip Searches:** *Florence v. Bd. of Chosen Freeholders*, No. 10-945, in the U.S. Supreme Court. TML joined the Texas Municipal League Intergovernmental Risk Pool, Texas Association of Counties, Texas Conference of Urban Counties, and the Texas Chief Deputies Association in this brief to the U.S. Supreme Court. The principal issue in the case is whether strip searches performed on inmates entering a jail facility violate the Fourth Amendment to the U.S. Constitution. Amici argued that: (1) safety concerns related to jail staff outweigh an inmates privacy interests; (2) the security of jail personnel is compromised by easily-concealable items like weapons, drugs, and other contraband that can be hidden in body cavities; (3) alternatives to strip searches are not feasible; and (4) the American Corrections Association's standards relating to searches are not binding. The brief was filed on August 26, 2011, and oral arguments were heard on October 12, 2011.

**Property Tax:** RQ-1026-GA, Taxation of pollution control property under Section 11.31, Tax Code. TML and TCAA submitted comments to the Attorney General arguing that under Texas Tax Code Section 11.31 and Texas Commission on Environmental Quality (TCEQ) administrative rules, the so-called "Prop 2" pollution control property tax exemption only applies to pollution control equipment installed to reduce pollution at an industrial or manufacturing facility, and was not intended to apply to entities that use equipment to produce end products that control or reduce pollution. Consequently, TCEQ does not have the authority to exempt from taxation equipment that provides no environmental benefit at the site of the facility.

**Standing:** *Spicewood Springs Rd. Tunnel Coal. v. City of Austin*, No. 03-11-00260-CV in the Austin Court of Appeals. TML and TCAA filed a letter brief on October 21, 2011, as amici curiae supporting the city's position that a litigant must meet the "particularized injury" test in order to have standing to seek judicial review of a city council's decision under Chapter 26 of the Parks and Wildlife Code. The district court granted the city's plea to the jurisdiction; TML and TCAA urged the appellate court to affirm the district court's order. This case is set for oral argument on January 25, 2012.

**Municipal Barriers to Broadband Deployment:** WC Docket No. 11-59, *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*. The Federal Communications Commission (FCC) released a "Notice of Inquiry (NOI)" regarding local right-of-way regulations and franchise fees and how the agency can "work with" cities "to improve policies for access to rights-of-way and for wireless facility siting." Specifically, the NOI seeks information and data regarding challenges, best practices, and educational efforts to help the FCC accurately determine the need for policy and rules surrounding broadband deployment. TML, The Texas Coalition of Cities for Utility Issues, the coalition of cities, and the City of Houston (collectively, "the coalition") filed comments that: (1) the NOI is based on the false premise that local right of way regulations are "barriers" to wireline broadband deployment; (2) local wireline right of way regulations and policies are not "barriers" to broadband deployment; (3) the FCC has limited or no jurisdiction over local right of way regulations and compensation; and (4) the coalition's recommendations to the FCC

regarding the NOI. The coalition's comments were filed on July 18, 2011. Reply comments were filed on September 30, 2011. The reply comments state that: (1) industry comments fail to show that broadband deployment faces systemic barriers in the form of local rights-of-way regulations or polices in Texas; (2) industry comments fail to refute both national and Texas broadband deployment studies showing that broadband deployment is not lower in cities, but generally higher in the very area the industry claims presents unreasonable barriers to broadband deployment; and (3) industry comments failed to provide specifics about Texas local government policies that impede broadband deployment.

**Open Meetings Act:** *Asgeirsson v. Abbott and the State of Texas*, 11-50441 (5th Cir.). This is the continuation of the challenge to the constitutionality of the criminal closed meeting provisions in the Texas Open Meetings Act (TOMA). The Texas Municipal League, the South Dakota Municipal League, the National League of Cities, and the International Municipal Lawyers Association, as amici, argued that many individuals across this nation volunteer their time and expertise to serve their local communities as elected and appointed officials. In doing so, these individuals come to understand the requirements of applicable open government laws. Amici do not take exception to the policies underlying open government laws, and our members understand the importance of and support open government. Open government laws should not, however, impinge on the First Amendment rights afforded to speech by officials made pursuant to their official duties and, certainly should not restrict their political expression. In order to maintain public officials' First Amendment protections, open government laws that restrict and criminalize their speech must be measured against the proper standard. In regard to TOMA's criminal provisions, that means a court must apply strict scrutiny analysis. The brief was filed on August 17, 2011.

**Substandard Buildings:** *City of Dallas v. Stewart*, No. 09-0257 in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the city's motion for rehearing, arguing that the Texas Supreme Court's opinion could: (1) be interpreted to require every administrative public health and safety abatement decision to be subject to de novo review; (2) be interpreted to require every administrative regulatory determination that involves property interests be subject to de novo review; and (3) expose cities to takings claims for every abatement or regulatory decision made in the past 10 years. TML and TCAA argued that the Court should reverse its previous opinion or, in the alternative, narrow the opinion to provide sufficient guidance for cities to carry out nuisance abatement programs. The brief was filed on August 23, 2011. The Supreme Court requested a response to the city's motion for rehearing; respondent filed a response on October 31, 2011.

**Property Development and Moratoria:** *City of Lorena v. BMTP Holdings, L.P.*, No. 11-0554 in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the city's petition for review. In this case, BMTP argued that the city did not have a right to enforce its sewer tap moratorium that it instituted under Chapter 212 of the Texas Local Government Code, after the threat of an enforcement action by TCEQ because the city's wastewater plant was overtaxed. The lower court held that by filing a plat and

having it approved, BMTP was exempted from the moratorium under the Chapter 212 definition of “property development.” Amici argued that the lower court’s interpretation was overbroad and placed the wishes of developers ahead of the protection of public health. The brief was filed on August 22, 2011. Briefs on the merits were requested on October 21, 2011.

**Storm water:** *Comments on Proposed Preliminary Draft General Permit for Small MS4s (TXR040000)*. TML filed comments thanking the TCEQ for their hard work and for being conscientious about including cities and other stakeholders in the process, and encouraged TCEQ staff to take the substantive and technical comments of cities into account when drafting the general permit language to be taken to the Environmental Protection Agency (EPA) for review. TML asked in particular that TCEQ staff remain mindful of issues of practicality, effectiveness, and cost in carrying out the requirements of any new language.

**Eminent Domain:** *Enbridge v. Avinger*, No. 10-0950, in the Supreme Court of Texas. The Texas Pipeline Association (TPA) and TML filed a joint *amicus curiae* letter brief in support of Petitioner. TPA and TML argued that the market value rules and appraisal methodology approved in the underlying case exceed the indemnification principle of Article I, Section 17, of the Texas Constitution and jeopardize the financial viability of public infrastructure projects in the State of Texas. Additionally, TPA and TML argued that – if allowed to stand – the appellate court’s approval of the landowner’s convoluted compensation analysis as proper methodology will greatly increase the burden of litigating market value in condemnation cases. The letter brief was filed March 31, 2011.

**Municipal Advisors:** SEC Release No. 34-63576, File No. S7-45-10; *Registration of Municipal Advisors*. TML filed comments with the Securities and Exchange Commission (SEC) opposing the proposed rule on the grounds that it would require appointed board members of municipal entities that issue municipal securities or that invest public funds to register as “municipal advisors” with the SEC and Municipal Securities Rulemaking Board. Those appointed board or commission members required to register would incur annual registration fees, be subject to accompanying record-keeping and administrative compliance requirements, and be subject to a heightened fiduciary standard of care. The comments were filed with the SEC on January 30, 2011.

**Federal Preemption:** *Texas Central Business Lines Corporation v. City of Midlothian*, No. 10-11041 (5th Cir. 2010). TML, the National League of Cities, and the Texas Chapter of the American Planning Association joined in filing an amicus brief in the United State Court of Appeals for the Fifth Circuit supporting the City of Midlothian’s request for reversal. Amici argued that the district court articulated a novel and an unacceptably low standard when it held that, so long as the activity of a third-party agent or contractor of a rail carrier acts with the “support of” the rail carrier, the third-party falls within the Interstate Commerce Commission Termination Act’s (ICCTA) preemption provision. Amici also argued that the district court failed to properly apply the presumption against federal preemption. ICCTA preemption does not extend to local health and safety regulations when those regulations do not unreasonably interfere with

rail transportation. When presented with city health and safety regulations, the district court failed to make the necessary factual findings and failed to impose on the third-party provider the burden of proving that compliance interfered with rail transportation. The brief was filed with the Fifth Circuit on December 30, 2010. Oral argument was heard on August 30, 2011.

**Employee Rights:** *City of Round Rock and Fire Chief Larry Hodge v. Rodriguez and Round Rock Fire Fighters Association*, No. 10-0666 (Tex. 2010). The issue in this case is whether a city employee has the right to have a representative at an investigatory interview under Labor Code Section 101.001. Section 101.001 of the Labor Code provides to employees the right to associate in order to protect their employment. Other statutes involving public employees and their labor rights are found in the Local Government and Government Codes. Those statutes regulate the ability of public employees to protect their employment, to associate through collective bargaining, civil service, specific discipline procedures, and other associational rights. The rights specified in the statutes specific to public employers conflict with those provided by the Labor Code Section 101.001. The Amici argued that the public employer statutes should prevail over the general Labor Code provisions that are applicable to all employees. TML, TCAA, the Texas Association of School Boards, and the Texas Association of Counties filed the amicus brief on October 25, 2010. Briefing on the merits has been requested by the court. The Petition for Review was granted on August 26, 2011. Oral argument was heard on December 8, 2011. Doug Alexander presented argument for the City of Round Rock with the first ever PowerPoint at the Supreme Court of Texas.

**Eminent Domain:** *City of Austin v. Harry M. Whittington, et al.*, No. 10-0316 (Tex. 2010). The issues in this case are whether there is a bad faith defense to condemnation, and if so, whether an e-mail by a city employee would be adequate to prove bad faith on the part of the city. TCAA and TML argued in their brief that there is no basis for a bad faith defense to condemnation in the Texas Constitution, state statutes, or applicable case law, and that such an exception is not in line with current case law that gives great weight to the legislative decisions of the city council with regard to condemnation. The brief also argued that, even if a bad faith exception is considered, an e-mail by a city employee should not be considered in the determination of bad faith because all decisions regarding condemnation belong to the city council and may not be delegated. The petition for review was filed on May 10, 2010, and the petition for review was granted on April 15, 2011. Oral argument was heard on December 6, 2011.

**Qualified Immunity:** *Lorena Vera, et al. v. Gino Ruatta, et al.*, No. 08-41135, on appeal to the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing. TML and TCAA, on behalf of the City of Pasadena, urged the court to grant rehearing. TML and TCAA argued that the appellants should be able to present their qualified immunity defense after the court dismissed the case *sua sponte*. The brief was filed on March 12, 2009.

DECIDED

**Sovereign Immunity:** *Keith Lowell v. City of Baytown*, No. 07-1011 (Tex. Dec. 16, 2011) (per curiam). Amici argued that 2007 legislation overturning governmental immunity for back pay claims (codified in Local Government Code Section 180.006) was intended to apply prospectively only and has no effect on cases filed prior to the effective date of the law (June 15, 2007). The Texas Supreme Court remanded the case to the trial court so that the firefighters could amend their pleadings (1) to argue that the legislature, through its enactment of Local Government Code Sections 271.151-.160, has authorized retrospective relief, such as the back pay and related damages sought by the firefighters; and (2) to seek prospective declaratory and injunctive relief against specific city officials rather than the city.

**Open Meetings:** RQ-0977-GA, *Whether certain kinds of electronic communication among members of the board of directors of a river authority constitute a violation of the Open Meetings Act, Chapter 551, Government Code*. TML and TCAA filed comments arguing that the Act is not intended to hamper the ability of individual elected officials to discuss and learn about issues, and our belief has always been that elected officials should be free to consult among themselves in a candid and unrestrained manner to resolve issues. TML and TCAA argued that there is no need in the attorney general's response for anything more than a survey of current law. Whether any particular e-mail exchange violates the Act is a fact question that must be reviewed in light of the definition of a "meeting" and relevant judicial precedent. Opinion Number GA-0896 concluded that electronic communications could, depending on the facts of a particular case, constitute a deliberation and a meeting for purposes of the Texas Open Meetings Act.

**Emergency Detention:** RQ-0952-GA; *Law enforcement responsibility for an individual who is the subject of an emergency detention order*. TML, TCAA, and TPCA concurred in the City of Texarkana's argument that a county, not a city, bears the responsibility for supervision, oversight, and custodial security of a person who is the subject of an emergency detention order both before and after a court signs the detention order. In the alternative, TML, TCAA, and TPCA argued that neither chapter 573 nor chapter 574 of the Health and Safety Code require that a peace officer retain custody of and responsibility for an individual after the individual is transported to a mental health facility. Opinion Number GA-0877 concluded that: (1) there is no provision in chapter 573 that expressly requires a particular law enforcement agency to oversee a mentally ill person once the person is transported to a facility pursuant to a section 573.002 emergency detention order; and (2) a sheriff's office must transport a person subject to court-order mental health services under chapter 574 within a reasonable amount of time and without delay.

**Civil Service:** RQ-0972-GA: TML and TCAA filed comments arguing that civil service cities can have a reserve police force separate from their regular civil service police force. The statutes allowing for civil service and reserve police forces lead to the construction that this is the best outcome for the city and the officers. Cities can do so through Chapter 341 or through a meet and confer agreement. Opinion Number GA-0893 concluded that a city can have both a reserve police force and a civil service police force.

**Regulatory Takings:** *City of Houston v. Maguire Oil*, 11-0486 (Supreme Court of Texas). This appeal is part of protracted litigation between the City of Houston and an oil company that has been ongoing for decades. TML and TCAA argued that a regulatory taking claim cannot be based on an invalid or inapplicable land use regulation because the takings clause of the Texas Constitution has no application to the enforcement of an invalid or inapplicable regulation. Where a regulation is invalid or inapplicable, a property owner has a remedy by way of an official capacity lawsuit against the local officials who seek to enforce the regulation. The brief was filed on August 17, 2011. The petition for review was denied on September 30, 2011.

**Workers' Compensation:** *Ins. Co. of the State of Pennsylvania v. Muro*, No. 09-0340, in the Supreme Court of Texas. TML, TCAA, and TML Intergovernmental Risk Pool filed a joint amicus curiae brief in support of the Petitioner. The amici argue that the Supreme Court of Texas should hold that Labor Code Section 408.161(b) requires proof of an injury to the affected body part in question to establish the total loss of use of that body part. Any contrary interpretation of section 408.161(b) will have an immediate and adverse effect upon the ability of Texas cities to operate their workers' compensation programs at an affordable cost to the taxpayer. The Supreme Court held that the individual did not prove that he had suffered a total loss of the body parts in question and was therefore not eligible for a lifetime award of benefits.

**Permit Vesting:** *Harper Park Two v. City of Austin*, No. 03-10-00506-CV, in the Third Court of Appeals. The principal issue in this case is whether a plat, filed in 1985 for an office project, vests development regulations in place at that time. The plat clearly vests the development regulations for that project. However, in 2007, the developer submitted new information that showed his intent to place a hotel on the property. TML and TCAA argued that, while Texas law protects the rights of landowners and developers, it is not meant to secure vested rights in twenty-five-year-old development regulations by relying on a plat that does not include a currently-proposed project. Oral argument was heard on April 13, 2011. The court of appeals held that a developer who files a preliminary plan may change the uses contemplated within the plan under the vesting statute once the first permit is filed. A motion for rehearing was filed on September 12, 2011.

**RLUIPA:** *The Elijah Group v. City of Leon Valley*, No. 10-50035 (5<sup>th</sup> Cir. 2009). This case involves the Religious Land Use and Institutionalized Persons Act (RLUIPA). TML, as amicus curiae, argued that religious institutions should not be wholly exempt from legitimate zoning ordinances. Such a finding would contravene the intent, purpose, and effect of RLUIPA. So long as legitimate regulatory purposes exist to support a zoning ordinance, and comparable religious and secular assemblies are treated the same, cities should be authorized to enforce their ordinances. The brief was filed on July 16, 2010. The case was heard in oral argument on December 8, 2010. The Fifth Circuit Court of Appeals held that the city's zoning ordinance treated religious and secular assemblies differently and remanded the case to the trial court for further review.

**Discharge of Firearms:** RQ-0937-GA; *Authority of a type A general law municipality to adopt and enforce a firearm discharge ban on property located within its corporate limits.* TML and TCAA argued that the City of Wimberley, or any incorporated city for that matter, has full authority to regulate or prohibit the discharge of firearms within the city's originally-incorporated limits. Opinion Number GA-0862 concluded that Section 229.002 of the Texas Local Government Code does not prohibit a Type A general law city from regulating the discharge of a firearm or other weapon in an area that is within the city's original city limits.

**Eminent Domain:** *Reid Road MUD v. Speedy Stop Food Stores*, No. 09-0396 in the Supreme Court of Texas. TML, TCAA, the Texas Association of Counties, the Texas Conference of Urban Counties, and the Texas Association of School Boards Legal Assistance Fund joined in an amicus in support of a motion for rehearing. Amici argued that the testimony and report of an appraisal expert witness offered at a special commissioners' hearing in a condemnation case should not be admissible in *de novo* trial proceedings as the adoptive admission of a party, and without the need to designate the witness as an expert in response to discovery requests. The brief was filed on May 13, 2011. Rehearing was denied on June 10, 2011.

**Property Taxation of Stored Natural Gas:** *Harrison Central Appraisal District v. The Peoples Gas, Light and Coke Co.*, 10-896 (Jan. 2011) in the Supreme Court of the United States. This case concerns when goods are constitutionally protected from property taxation under the Commerce Clause of the United States Constitution. U.S. CONST., Art. I, § 8, cls. 1 & 3. Specifically, the question presented is whether the Commerce Clause prohibits the taxation of natural gas that is stored in one state before being transferred to another state for final distribution. TML, TCAA, the National League of Cities, the International Municipal Lawyers Association, and other state and national leagues filed a brief arguing that natural gas that is stored, even in a tank connected to an interstate pipeline, is constitutionally taxed by local entities because the gas enjoys the benefits of local governments. (TML also joined an amicus brief by the Texas Association of School Boards in a similar case filed at the same time, *Midland Central Appraisal District v. BP American Production Co.*, 10-890 (Jan. 2011).) The Supreme Court of the United States denied the Petition for writ of certiorari.

**Infrastructure:** RQ-0923-GA; *Whether the Eagle Pass Independent School District is subject to a municipal ordinance that requires the district to expend funds for certain kinds of infrastructure.* TML and TCAA argued that the attorney general has previously concluded that development regulations imposed by cities on school districts are permissible. The attorney general concluded that, pursuant to Local Government Code Subsection 395.022(b), if it is determined that a City of Eagle Pass ordinance imposes an impact fee under Chapter 395, the Eagle Pass Independent School District is not required to pay that fee in the absence of an agreement to do so. The district's trustees must determine whether the expenditure for a waterline is "necessary in the conduct of public schools" and therefore permitted under Education Code Section 45.105. To the extent that the city ordinance at issue imposes unilateral action, Education Code Section 11.168 is inapplicable to the issue of whether the district must comply with the city ordinance. If

the district determines that paying for city-requested infrastructure accomplishes a public purpose of the district and that it otherwise meets the requirements established by the Texas Supreme Court, the district's expenditure of funds for city-mandated infrastructure will not violate Article III, Section 52, of the Texas Constitution.

**Official Newspaper:** Opinion No. GA-0838, *Proper compliance of a publication with the provisions of section 2051.044, Government Code, in order to be considered the official newspaper of a municipality.* TML filed a comment seeking that the Attorney General issue an opinion finding that the *Coastal Bend Herald* properly complied with Government Code 2051.044 in order to be considered the official newspaper of the City of Ingleside, arguing that the requirement that a newspaper be entered as second-class postal matter in the county where published should include the *Coastal Bend Herald* within its definition. The Attorney General stated that 2051.044(a)(3) requires only that the newspaper “be entered as second-class postal matter in the county where published.” TEX. GOV'T CODE § 2051.044(a)(3). Ingleside is located in San Patricio County, while the designated newspaper does have a second-class postal permit in Aransas County, the county where the newspaper itself is published. As a matter of plain language, the Attorney General held that this satisfied the requirement. The Attorney General declined to answer whether the City's publication of sample ballots was in compliance with its charter.

**Harassment:** *Negrete v. City of Laredo*, No. 10-0185 (Tex. 2010). TML, TCAA, the Texas Municipal League Intergovernmental Risk Pool, the Texas Association of Counties, and the Texas Council Risk Management Fund argued that the Supreme Court of Texas should establish the following principles in workplace harassment cases arising under the Texas Commission on Human Rights Act: (1) where an employee has endured her supervisor's mounting insults and unwelcome advances for a lengthy period without availing herself of the established procedure for complaining to higher management, such delay is unreasonable as a matter of law unless the evidence warrants a reasonable belief that such complaint would have been futile; and (2) whether the plaintiff has made a *prima facie* showing of harassment severe or pervasive enough to create an *objectively* hostile work environment is a question of law for the court to determine in the first instance, in light of the established body of federal and Texas case law. The petition for review was filed on May 7, 2010, and briefing on the merits was requested on August 23, 2010. A supplemental amicus brief was filed on December 2, 2010. Petition for review was denied.

**Civil Service:** RQ-0869-GA *Whether a citizen advisory committee to a police chief may review information contained in a police personnel file maintained under Local Government Code, Section 143.089(g).* TML and TCAA filed a brief arguing that a citizen advisory committee should be considered part of the “department,” allowing committee members to review civil service police officer (g) files. Opinion No. GA-0818 concluded that whether a civilian advisory committee may review information maintained in a police department personnel file under Texas Local Government Code section 143.089(g) will depend on specific facts establishing the committee as part of the department and limiting the committee's use of the files to department purposes only.

**Fair Housing Act:** *NAACP, et al. v. City of Kyle, Texas*, No. 09-50352 (5<sup>th</sup> Cir. 2009). The City of Kyle homebuilder discrimination case continues at the Fifth Circuit. The NAACP and the national and local homebuilders associations claim that the City of Kyle's zoning regulations lock minorities out of the home buying market. The city won at the trial court, and the homebuilders appealed. TML joined other cities and the brick association (one of the city's requirements was a required percentage of masonry) in this amicus brief. The amici argue that the NAACP and other plaintiffs failed to prove standing, and that the plaintiffs failed to adequately prove through their statistics that the zoning ordinances have a significant discriminatory effect on the availability of housing for minorities. The brief was filed on November 24, 2009. Oral argument was heard on April 27, 2010. On November 11, 2010, the court held that the associations do not have standing and dismissed the case.

**Reserved Powers Doctrine:** *Kirby Lake Dev. LTD., et al. v. Clear Lake City Water Auth.*, No. 08-1003 (Tex. 2010). The issue in this case is whether a political subdivision can bind itself in such a way as to indefinitely restrict its legislative discretion to choose what propositions are included in its bond elections. TCAA and TML argued in their brief that construing the Clear Lake Water Authority's contracts to require the authority to indefinitely place issues on bond elections would forever deprive the local government of its legislative discretion to set the ballot for its future bond elections. The brief argued that the contract should not be interpreted to deprive the authority of future legislative discretion. The brief was filed February 11, 2010. The Court issued its opinion on August 27, 2010, and held that the agreement required that the Authority continue to place the bond authorization on all future bond elections.

**Incorporation in the ETJ:** *In Re Louis F. Brouse*, No. 10-10-00263-CV (Tex. App.—Waco 2010). Petition for Emergency Writ of Mandamus. The issue in this case is whether the citizens of a home rule city, through a charter initiative petition, can force the city council to grant consent to a community to incorporate in the city's extraterritorial jurisdiction. The Relator argues that the city's charter allows for an initiative election regarding the city's boundaries. TML and TCAA argued that multiple courts have held that municipal boundaries are not the proper subject of an initiative election. The amicus brief was filed on July 30, 2009. On August 17, 2010, the Waco Court of Appeals dismissed the petition for mandamus and held that a city's borders are not a permitted use of the initiative election process. The case was appealed to the Supreme Court of Texas on August 24, and the Court denied the petition on the same day.

**Development Agreements/Referendum:** *In re Hollis*, No. 10-0183 (Tex. 2010). The issue in this case is whether or not an amendment to a development agreement is subject to a referendum election. In this case, the City of Buda adopted an amendment to an existing development agreement that would allow for light industrial use on a piece of property in the city's extraterritorial jurisdiction. A group of citizens submitted a petition to submit the approved amendment to a referendum election pursuant to the city charter. The city determined that a referendum election was not permitted by state law and city charter in this instance, and declined to order the election. Two citizens sought a writ of mandamus to order the election, and were denied at the appellate level. This decision

was appealed to the Supreme Court of Texas. TML and TCAA argued that the referendum election was not allowed because the action taken was not legislative in nature and was precluded by the city charter. The brief was filed on May 18, 2010. The petition for mandamus was denied on June 11, 2010.

**Tort Claims Act:** *City of Dallas v. Carbajal*, No. 09-0427 (Tex. 2009). The issue in this case is what constitutes “actual notice” to a city under the Tort Claims Act. In this case, a woman was injured when she drove her car into a ditch in a street that wasn't properly barricaded. She sued the City of Dallas, and the city claimed that the trial court did not have jurisdiction because she never gave proper notice to the city prior to filing the suit. The woman claimed that the police report documenting the incident gave the city actual notice of its fault. TML and TCAA argued that a basic police report alone cannot give a city a subjective awareness of its fault under the Tort Claims Act. The Supreme Court of Texas issued a per curiam opinion on May 7, 2010, holding that the police report at issue represented nothing more than a routine safety investigation, which was insufficient to provide actual notice to the city. Because the police report did not indicate that the city was at fault, the city had no incentive to investigate its potential liability in the matter.

**Building: RQ-0832-GA;** *Municipal responsibility for enforcing laws that affect the practice of engineering.* This request asked, among other things, whether the Texas Board of Professional Engineers (TBPE) has authority over cities and whether a city or its officials are immune from TBPE penalties. TML, TCAA, and the Building Officials Association of Texas (BOAT) argued that the TBPE was created to regulate individuals, not cities. TML, TCAA, and BOAT also argued that even if the TBPE had regulatory authority over a city, a city would be immune from any administrative penalties. The request was received by the Attorney General on October 19, 2009. On March 4, the attorney general declined to issue an opinion on Representative Keffer's request “because the opinion process cannot be used to appeal an agreed board order between a municipality and the [TBPE]...”

**Public Information Act:** *City of Dallas v. Gregg Abbott*, No. 07-0931 in the Supreme Court of Texas. TML and TCAA joined a brief of the Texas Association of School Board's Legal Assistance Fund and argued that the attorney-client privilege is a compelling reason for withholding information under the Public Information Act, even when a governmental body misses the ten-day deadline to request an attorney general opinion. The brief was filed on December 13, 2007, and briefing on the merits has been requested. The petition was granted on June 27, 2008 and oral argument was heard on October 16, 2008. The Court held that the that the ten business day period ran from the date of the requestor's clarification, and did not reach the city's argument that the attorney-client privilege was a compelling reason for non-disclosure that could be raised after the statutory deadline has passed.

**Takings:** *City of Midland v. Jud Walton*, No. 09-0155 (Tex. 2009). In this case, Walton filed a takings claim based on his allegation that the City of Midland's municipal effluent disposal system contaminated his groundwater. TML and TCAA supported the city's position that, to establish a takings claim under Article I, Section 17, of the Texas

Constitution, a landowner must prove that the city intentionally performed certain acts that resulted in a taking of property for public use. The city's intent must be examined at the time it made its decision to construct the effluent disposal system, not after years of hindsight. Establishing intent at any subsequent time implicates negligence, not a taking. Absent intent at the time of the planning and construction of the effluent disposal plant, there is no basis from which to infer a taking. The brief was filed on January 25, 2010. Petition for review was denied on January 15, 2010. Motion for rehearing was denied on March 5, 2010.

**Annexation:** *City of Ovilla v. Triumph Development Co.*, No. 14-08-00593-CV, in the Fourteenth Court of Appeals. TML and TCAA argued that: (1) a city's annexation is not invalid merely because it is prohibited by law from providing water and wastewater service to an annexed area; and (2) a person who has been annexed has no standing to directly challenge the contents of a city's service plan. Due to a settlement, the appeal was abated on February 11, 2010.

**Elections:** *City of Granite Shoals, et. al, v. Ted Winder*, No. 09-0368 (Tex. 2009). In this case, the Respondents missed the Election Code's statutory deadline when filing their challenge to the City of Granite Shoals' population determination for its charter election. Also, the State of Texas did not bring suit in a quo warranto proceeding. TML and TCAA argued that, because the Respondents did not meet either of these procedural requirements in filing their election challenge, the challenge was not properly before the courts and should have been dismissed. This brief was filed on August 11, 2009. Briefing on the merits was requested on September 25, 2009. The petition for review was denied on February 12, 2010.

**Cell Tower Siting:** WT Docket No. 08-165, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Petition for Declaratory Ruling*. CTIA, the wireless association, is seeking FCC preemption over local zoning of wireless phone tower locations. CTIA complains that local zoning procedures have the effect of limiting competition in the provision of wireless phone service. Specifically, CTIA is requesting that the FCC: (1) impose a 45-day or 75-day "shot clock" on local zoning decisions regarding wireless towers; (2) interpret Section 332(c)(7) of 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 Section 253 of the Act as preempting any local zoning that would, for example, require a wireless tower to comply with a zoning variance process. TML argued – among other things – that CTIA's request ignores the wishes of city residents and would have the effect of making the FCC a "national zoning board." In November of 2009, 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.

**Governmental Immunity-Tort:** *City of Waco v. Debra Kirwan*, No. 08-0121, in the Supreme Court of Texas. Ms. Kirwan sued the City of Waco for wrongful death due to a premises defect when her son was killed after falling from a cliff within a city park. TML and TCAA filed a brief in favor of the city arguing that the Recreational Use Statute favors the approach of “leaving wild lands as they are and trusting visitors to use reasonable caution.” The statute expressly adopts a trespasser standard of care for recreational users of property, and that standard, which is a creature of the common law, must derive its meaning from the common law. The Supreme Court of Texas held that a landowner generally does not owe a duty to warn others against the dangers of natural conditions, such as a cliff. The court also noted that the city had posted signs warning of the danger of being on the cliff showing that the city did not show a “conscious indifference to the rights, safety, or welfare” of users of the park. The court held the city was immune from suit and dismissed the case.

**Governmental Immunity:** *Linda Sanders-Burns v. City of Plano and Joseph Cabezuela*, No. 08-40459 (5<sup>th</sup> Cir. 2009). TCAA, TML, and TMPA joined others in filing an amicus brief in the United States Court of Appeals for the Fifth Circuit supporting the City of Plano’s request for rehearing *en banc*. Amici argued that a plaintiff should not be able to sue a governmental official in his or her individual capacity after the statute of limitations has expired and after most discovery deadlines have passed, even if the official was previously-named in his official capacity. Amici argued that strong policy arguments work against the panel’s holding, including the fact that the panel’s decision will force local governments and governmental official’s to guess – at their peril – whether officials are being sued in an official capacity, individual capacity, or both. Also, plaintiffs should be required to clearly state whether the suit is brought against an individual in his or her individual versus official capacity. The brief was accepted by the Fifth Circuit on September 17, 2009. The court held that the city was not liable because the plaintiff failed to demonstrate a causal connection between Plano’s training policies and Sanders’s death, but reversed the district court’s grant of the governmental official’s motion to dismiss.

**Regulatory Takings:** *City of Houston v. Trail Enterprises*, No. 08-0413 in the Supreme Court of Texas. This case arose from a City of Houston ordinance regulating oil and gas exploration around Lake Houston. TML and TCAA, along with the International Municipal Lawyers Association, U.S Conference of Mayors, and the National League of Cities, argued that a takings claim is not ripe for adjudication if the claimant has not filed a single development application or taken any other affirmative step to obtain a final and authoritative determination from the governmental defendant about the type and intensity of development legally permitted under an ordinance. Briefing on the merits was requested on September 26, 2008, and a decision on the petition is pending. On October 30, 2009, the Court held that because the trial court relied only on the jurisdictional ripeness issue in disposing of the case, it was improper for the court of appeals to render judgment based on the jury verdict. Without hearing oral argument, the Court reversed the court of appeals' rendition of judgment, and remanded to the trial court for further proceedings.

**Sign Regulation:** *RTM Media, L.L.C. v. City of Houston*, No. 08-20701, on appeal to the United States Court of Appeals for the Fifth Circuit. TML supports the city's argument that its ordinances regulating and prohibiting off-site commercial signs or billboards is constitutional and should be upheld. The brief was filed March 7, 2009. Oral argument was heard on July 7, 2009. The Fifth Circuit issued an opinion on September 28, 2009, that the Houston Sign Code does not violate the first amendment.

**Open Meetings Act:** *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas v. Frank D. Brown, 83rd Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas*, C.A. No. P-05-CV-75 in the United States District Court for the Western District of Texas. TCAA argued that, while city attorneys are committed to openness in government, the criminal provisions of the Texas Open Meetings Act are written such that it is almost impossible to properly advise city officials on discussion outside of formal meetings. As such, city attorneys seek more guidance as to how to advise city officials in regards to that provision. The suit was filed on September 26, 2005, and on November 7, 2006, the court held that the Texas Open Meetings Act provisions in question are constitutional because the speech at issue was uttered in the speaker's capacity as a councilmember, and that the Act's provisions are neither overbroad nor vague. The decision was appealed to the Fifth Circuit in April of 2007, and a decision is pending. The case number in the Fifth Circuit is 06-51587 and oral argument was heard on January 29, 2008. The Fifth Circuit issued an opinion on April 24, 2009. It held that the criminal provision of the Act is subject to strict scrutiny review. For more information on this case see:

[http://www.tml.org/leg\\_updates/legis\\_update043009a\\_openmeet.html](http://www.tml.org/leg_updates/legis_update043009a_openmeet.html).

Both parties filed for rehearing en banc. TML, along with other state and national municipal organizations, filed a brief in support of the appellants. TML argued that the panel of the Fifth Circuit made the correct decision, and that jail time is not the least

restrictive means of promoting open government. On September 10, 2009 the Fifth Circuit dismissed the case as moot with Judge Dennis dissenting emphatically.

**Civil Service:** *City of Pasadena v. Richard Smith*, No. 06-0948, on Motion for Rehearing in the Supreme Court of Texas. TML and TCAA, on behalf of the City of Pasadena, urged the court to grant review to determine the appropriate standard of review in a Section 143.057(j) appeal from a hearing examiner's decision. The brief was filed on April 8, 2008, and the motion for rehearing was granted on May 16, 2008. Oral argument was heard on September 10, 2008. On August 28, 2009 the Supreme Court of Texas held that the hearing examiner exceeded his authority by not hearing the city's evidence and ruling solely on the fact that the hearing examiner was not present at the hearing (a ruling based on a statute that did not apply to the city). The Court held that: "it clearly exceeds a hearing examiner's jurisdiction to refuse to hear evidence before deciding that a police officer was improperly disciplined. . . ." 2009 WL 2667599 at \*4. The test for determining whether a hearing examiner exceeds his jurisdiction is when: (1) his acts are not authorized by the Civil Service Act; (2) his acts are contrary to the Civil Service Act; or (3) his acts "invade the policy-setting realm protected by the nondelegation doctrine." *Id.* The Court also held that the city's cause of action was timely, reversing the judgment of the court of appeals and remanding the case to the district court.

**Vested Rights/Extraterritorial Authority:** *City of San Antonio v. Continental Homes of Texas*, No. 08-0786, before the Supreme Court of Texas. TML and TCAA joined the City of Austin in arguing that: (1) regulations for the preservation of trees "promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality" and a city may apply them in its extraterritorial jurisdiction pursuant to Chapter 212 of the Local Government Code; and (2) Chapter 245 of the Local Government Code does not allow a developer to ignore a city ordinance requirement to file an application simply because a different application covering the same land was filed before the city adopted the ordinance. The brief was filed on April 29, 2009. Petition for review was denied on August 21, 2009.

**Building Permits:** RQ-0775-GA; *Authority of the Department of State Health Services to enforce state asbestos regulations against municipalities*. This request asks, among other things, whether the Department of State Health Services (DSHS) may impose administrative penalties against a city that fails to confirm an asbestos study prior to issuing a building permit. TML and the Building Officials Association of Texas (BOAT) argued that the Texas Asbestos Health Protection Act is a state-level program that is designed to regulate asbestos rather than cities. TML and BOAT stated that their resources are available to DSHS to educate city officials on the asbestos requirements, and that education would surely be a better way to deal with the issue than administrative penalties. The attorney general concluded that the term "person" in the Texas Asbestos Health Protection Act, Chapter 1954 of the Occupations Code, includes a municipality. However, the attorney general noted that it is unlikely that a court would conclude that if the definition of person includes a city that this would constitute a clear and unambiguous waiver of immunity from suit for a violation of section 1954.259(b). Even if

governmental immunity is retained, it does not mean that every enforcement action is necessarily barred.

**Annexation:** RQ-0745-GA; Opinion No. GA-0737: *Whether a municipality engaged in the process of annexing territory may use Section 43.052(h)(1), Local Government Code, under various circumstances.* This request asks, among other things, whether Section 43.052(h)(1) of the Texas Local Government Code [the “100 tracts exemption”] can be utilized by a city engaged in an annexation process even if there is not a residence on each tract in the area proposed for annexation. TML and TCAA argued that the 100 tracts exemption provides that an area is exempt from the annexation plan requirement if it has any number of tracts, so long as a residential dwelling is located on no more than 99 of the tracts. The attorney general concluded 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. An annexation undertaken pursuant to section 43.052(h) is not void if the municipality fails to adopt a three-year annexation plan. Whether a service plan requires a landowner to fund a capital improvement in a manner inconsistent with Local Government Code chapter 395 requires the resolution of questions of fact that cannot be determined in an attorney general opinion.

**Open Meetings:** RQ-0763-GA; *Validity of a city charter provision that permits a majority of councilmembers to call a public meeting.* This request asks whether “a majority of the councilmembers call, without deliberating at a publicly noticed meeting, for a special meeting of the city council without violating the Open Meetings Act?” TML and TCAA argued that the key element of the definition of a meeting is that the information concerns “public business or public policy.” The attorney general’s office should conclude that a communication between councilmembers concerning only whether to have a meeting does not concern substantive public business or public policy. In other words, simply asking whether a meeting should be held does not constitute a “meeting” under the Act’s definitions. So long as councilmembers are not conspiring to circumvent the Act, the communication is permitted.

**TCEQ Water Quality Standards:** TML recently submitted a letter to Mark Vickery, the deputy executive director of the Texas Commission on Environmental Quality (TCEQ), regarding the agency’s possible limitation of total maximum daily loads (TMDLs) for bacteria. TCEQ has never issued bacteria TMDLs before, and the current water quality standards for contact recreation, when used to create these TMDLs, may create a standard that is difficult, if not impossible, to meet. TML asked the agency to delay the TMDL process until the contact recreation water quality standards can be reevaluated in light of the specific water uses and issues present in the state.

**Animal Euthanasia:** *Department of State Health Services (DSHS) Proposed Rules.* TML filed comments with the Department of State Health Services (DSHS) urging that the department clarify its proposed rules regarding microchip scanning machines. The proposed rules stated that a shelter “should” scan all animals for microchips before moving forward with the euthanasia process. TML submitted comments including suggested additional language to clarify the fact that a shelter that does not already own a

microchip scanning machine would not be required to buy one in order to comply with the rule. DSHS staff indicated that they would include this language in the final rule. Unfortunately, the Texas Health and Human Services Commission, which has final review authority over DSHS rules, removed the provision. DSHS staff believes that the rule language, since it uses the word “should” rather than “must,” will have the same effect as it would with the TML language included; namely, that a city that does not own a machine will not have to purchase one in order to comply. The final rule, without the TML language, appeared in the July 3 issue of the Texas Register.

**Takings:** *The State of Texas v. Central Expressway Sign Assoc., et al.*, No. 08-0061 in the Supreme Court of Texas. This case involves valuing land for condemnation purposes when there is a billboard on the site. In this case, the state desired to condemn property that included a billboard. When valuing the land, the sign company argued that the future income of the billboard should be considered in valuing the property and the court of appeals agreed. TML and TCAA joined an amicus brief that argues that, among other things, the court of appeals should be reversed because the state did not acquire the billboard business so the future revenues should not be considered in the condemnation award. Briefing on the merits was requested on May 19, 2008. Oral argument was heard on January 13, 2009. The Court held that the state’s expert witness testimony, which did not include billboard income, reflected an accepted and reliable method of appraising the condemned easement and should not have been excluded. The Court also held that excluding this testimony was reversible error because the testimony was directly related to the central issue in the case, the value of the condemned property.

**Civil service:** *Jackson v. City of Texas City*, No. 08-0723, before the Supreme Court of Texas. Civil service fire-fighters Jackson and Nunez sued the city after they were terminated for failure to maintain their EMT certification. Jackson and Nunez argued that their terminations were appealable under the Texas municipal civil service act as disciplinary terminations. Amici argued that the terminations were non-disciplinary and fell outside of the scope of the civil service act, and within the city’s collective bargaining agreement, because the fire-fighters were terminated for violating conditions in their contracts of employment. Petition for review was denied on April 17, 2009.

**Easements:** *Brookshire Katy Drainage District v. The Lily Gardens, LLP*, No. 01-07-00431-CV, in the First Court of Appeals. Lily Gardens placed a covered bridge over the district’s drainage easement. Amici (TML, TCAA, and the Texas Water Conservation Association) collectively argued that whether the structure is an impediment to flow is irrelevant. The placement of the structure interferes with the district’s full enjoyment and use of its easement rights by impeding its access and ability to conduct operational functions, including maintenance and repairs to the easement. Oral argument was denied on February 3, 2009. The parties went to mediation on February 27, 2009. The case was abated on April 16, 2009.

**Annexation:** *Village of Salado v. Lone Star Trailer II, Ltd. and Lone Star Storage Trailer*, No. 03-06-00572-CV in the Third Court of Appeals in Austin. Lone Star Trailer sued the Village of Salado regarding an annexation of Lone Star’s land, arguing that the

Village's annexation ordinance is void under Local Government Code Section 43.025 (voluntary annexation for type B city) because the Village did not receive consent from the sole contiguous landowner. TML and TCAA argued that, under Section 43.025: (1) "contiguous area" means the entire area to be annexed, not just those tracts that directly border the city; (2) the entire contiguous area can be annexed as a unified tract; and (3) the plain language of the voluntary annexation statute does not require the consent of each bordering landowner. Oral argument was held on May 9, 2007. The court of appeals held that the Village's annexation ordinance is valid and enforceable based on the procedure for the entire area that was annexed. The court remanded the case back to the trial court to make a determination on attorney's fees.

**Civil Service:** RQ-0678-GA; Application of subsection 143.014(c) of the Texas Local Government Code. This request asks whether the last sentence of Subsection 143.014(c) nullifies assistant fire chief appointments made prior to the election date of collective bargaining. TML and TCAA filed comments and argued that the last sentence of Subsection (c) acts to lift the restriction on the number of assistant chiefs that may be appointed after a city adopts collective bargaining, and does not invalidate a police or fire chief's authority to continue appointing assistant chiefs after collective bargaining is adopted.

**Attorneys Fees:** *The City of Garland v. Roy Dearmore, et al.*, No. 07-1527, in the Supreme Court of the United States on petition for writ of certiorari. This case involves the proper construction of the term "prevailing party" in establishing whether a plaintiff is eligible for attorney's fees under 42 U.S.C. § 1988(b). Dearmore argued that the term includes a party that has gained a preliminary injunction, regardless of whether there is ever a final decision on the merits. The Fifth Circuit allowed attorney's fees based on this argument, holding that a preliminary injunction was "based upon an unambiguous indication of probably success on the merits." TML and TCAA, joined by the National League of Cities and the International Municipal Lawyers Association, filed an amicus brief that argued that: (1) a plaintiff who obtains a preliminary injunction without a final decision is not a prevailing party; (2) a preliminary injunction is not a meritorious judgment for attorney's fees purposes; and (3) the "catalyst theory" is not a permissible basis for awarding attorney's fees. The amicus brief was filed on July 7, 2008 and the court denied the petition for a writ of certiorari on October 6, 2008.

**Cell Tower Siting:** *Sprint v. County of San Diego*, Nos. 05-56076, 05-56435 in the United States Court of Appeals for the Ninth Circuit. TML and TCAA joined a brief filed by the National League of Cities in support of the County of San Diego, and argued that: (1) right-of-way use regulation of a county ordinance, which could be preempted by Section 253(a) of the federal Telecommunications Act, should be separately analyzed from the zoning aspect of the ordinance, which cannot be preempted by Section 253(a); and (2) the county ordinance was not preempted by Section 253(a). A motion for rehearing en banc was filed on July 9, 2007 and granted on May 14, 2008. On September 11, 2008, the Ninth Circuit held that the county's ordinance was valid because it not an outright ban on wireless facilities and did not effectively prohibit the provision of wireless facilities in violation of the Telecommunications Act.

**Takings:** *AVM-HOU, Ltd. v. Capital Metro. Transp. Auth.*, No. 03-07-00566-CV, in the Third Court of Appeals. This case involves a condemnation award for an adult business lessee where the condemned property was specially zoned for adult businesses. The adult business argued that it could not move its business due to zoning and various other issues and that the condemnor owed both the value of the lease and business value damages for the life of the lease. The trial court dismissed the adult business' request for business value damages and the business appealed. TML and TCAA filed an amicus brief that argued, among other things, that the trial court should be affirmed because business value damages are not appropriate where the entire piece of real property is condemned and the fair market value is awarded. The amicus brief was filed on April 25, 2008, and oral argument was heard on May 21, 2008. The court of appeals held that there is no cause of action for lost profits once full compensation has been paid in a formal condemnation proceeding.

**ETJ Regulations:** RQ-0664-GA; *Authority of a county and/or a municipality to impose and enforce density regulations*. This request asked about the authority of a city or a county to "regulate density/zone through platting" in the ETJ or unincorporated areas. TML and TCAA requested that the attorney general's office decline to answer the request, and defer to a finder of fact as to whether the city or county regulations at issue are permissible. The request arises out of a specific dispute that appears to involve numerous questions of fact, and should thus be resolved between the parties.

**Whistleblower Act:** *City of Waco v. Robert Lopez*, No. 06-0089 in the Supreme Court of Texas. TML and TCAA argued that the reporting of a violation of an internal city policy to a supervisor by an employee should not trigger the protections of the Texas Whistleblower Act. The petition for review was granted and the case has been set for oral argument on September 27, 2007. The case was decided on July 11, 2008. The Supreme Court of Texas held that the employee should have brought his claim under the Texas Commission on Human Rights Act instead of the Whistleblower Act, and dismissed the case.

**Tort Liability:** *City of Dallas v. Kenneth Reed*, No. 07-0469, on Petition for Review in the Supreme Court of Texas. TML and TCAA argued on behalf of the City of Dallas that a slight difference in elevation between lanes on a roadway is not a special defect as a matter of law because it is not a condition that is of the same kind or class as an excavation or roadway obstruction, and because it does not create an unexpected and unusual danger to users of a roadway. The brief was filed on November 20, 2007. The court reversed the court of appeal's judgment, which held that: (1) variance in elevation in roadway was not a "special defect"; and (2) city did not know that of the roadway's allegedly dangerous condition sufficiently to warn of the danger.

**Regulatory Takings:** *City of Houston v. MaGuire Oil*, No. 08-0159 in the Supreme Court of Texas. This case arose from a City of Houston ordinance regulating oil and gas exploration around Lake Houston. The city revoked a permit, and a drilling company sought over \$100 million in damages. TML and TCAA argued that a city should not be

liable for a regulatory taking if the claimant has not sought and obtained from the city's policy-making body a final decision regarding the application of a regulation to his property. The petition for review was filed on February 25, 2007, and was denied on June 20, 2008.

**Utility Relocation:** *Southwestern Bell Telephone, L.P., d/b/a AT&T Texas v. City of Houston*, No. 07-20320, U.S. Court of Appeals for the Fifth Circuit. TCAA and TML filed a brief in support of the City of Houston, arguing that the Federal Telecommunications Act (FTA) does not provide a private right of action for telecommunications companies. TCAA and TML also argued that the FTA does not preempt a city's ability to require a telecommunications provider to pay to move its infrastructure when the city has a right-of-way construction project, and that any state issues involved in this question should be resolved at the state level. The amicus brief was filed on September 11, 2007, and oral argument was heard on March 3, 2008. The Fifth Circuit held that there is no private cause of action for a telecommunications company under the Federal Telecommunications Act, and dismissed the case.

**Billboards:** TML recently submitted a letter to John Campbell, Director of the Right of Way Division of the Texas Department of Transportation (TxDOT), regarding the agency's proposed rules governing electronic billboards on state highways. The proposed rules appear to give cities control over whether electronic billboards may be placed within their jurisdiction, but the rules are not entirely clear. TML asked the agency to clarify the rules so that, before a billboard may be upgraded to an electronic billboard, the owner must demonstrate: (1) the original sign was legally conforming under city ordinance; and (2) the sign owner acquired a new permit or permission from the city for the sign to become an electronic sign. A hearing was held on December 6, 2007, and the Texas Transportation Commission adopted the rules on February 28, 2008. The rules included changes designed to clarify a city's authority in regulating electronic billboards. The rules will become effective on June 1, 2008.

**Contract City Attorneys IRS Status:** In 2007, TML and TCAA filed a letter in an Internal Revenue Service (IRS) appeal by David Brown, the contract city attorney of Henderson, Texas. The International Municipal Lawyers Association also prepared a letter. The IRS had ruled that the city attorney, as a statutorily-created "city office," was not an independent contractor for purposes of various taxes, but rather a city employee. TML and TCAA explained that city attorneys often have many clients (including the city or cities), and that in such cases they are truly independent contractors (just as they are when hired by any other client). The letter urged the IRS to continue to make determinations of independent contractor status based on the tests in place, and to remove from its analysis of such cases as a determining factor whether there is a statutorily created office of "city attorney" in Texas state law. Last week, the IRS sent a letter to Mr. Brown stating that "[b]ased on the hazards of litigation, [IRS] Appeals settled the case by recommending to the Government that it concede the issue in full." Mr. Brown's hard-fought win may be a mixed blessing. While the hard work and determination of Mr. Brown and the City of Henderson led them to ultimately prevail, the letter does not

appear to set any precedent for future IRS actions. As such, contract city attorneys should remain aware of the issue.

**Texas Open Meetings Act:** *The City of Galveston, Texas; BP Energy Company, Intervenor; Board of Trustees of the Galveston Wharves v. Nancy Saint-Paul*, No. 01-06-00580-CV in the First Court of Appeals in Houston. Saint-Paul filed suit against the City of Galveston alleging that the city posted inadequate notice on an agenda item relating to a lease agreement. The trial court held for Saint-Paul, and the city appealed. TML and TCAA argued that the notice was sufficient under the Open Meetings Act because it included the: (1) parties to the proposed agreement, (2) type of agreement, (3) subject of the agreement, (4) parties to the underlying lease agreement, and (5) location and size of the property at issue. The city's appeal was filed on June 20, 2006, and oral argument was heard on December 11, 2007. On February 14, 2008, the court of appeals held that the city's meeting notice was sufficient, and remanded the case back to the trial court for a determination of attorney's fees.

**Annexation:** *Hughes v. City of Rockwall*, No. 05-0126 in the Supreme Court of Texas. Amici argued that a city's rejection of a landowner's petition to join areas for annexation under an annexation plan pursuant to Section 43.052(i) of the Local Government Code was procedural in nature. Thus, the only remedy against the city for an alleged violation would be state-sponsored quo warranto. On January 20, 2005, the court decided against the city and remanded to require arbitration and grant a temporary injunction against Rockwall. The city filed a petition for review with the Supreme Court of Texas on February 23, 2005. Petition for review was granted on December 9, 2005. Oral argument was heard on January 25, 2006. The Supreme Court of Texas held that the city was only required to consider arbitration under the plain language of the statute, and that the only appropriate proceeding was a *quo warranto* proceeding.

**Political Advertising:** TML argued on behalf of Texas cities to the Texas Ethics Commission that proposed agency rules setting a "bright-line" test for prohibited political advertising based on the number of photographs of and personal references to city officials in city newsletters were unnecessary and potentially confusing in light of the simple test in Election Code Section 255.003 that prohibits advocating a position for elections on measures. The commission adopted the rules as proposed on December 11, 2007.

**Whistleblower Act:** *Montgomery County v. Park*, No. 05-1023 in the Supreme Court of Texas. Amici argued that simply removing unpaid duties from an employee does not constitute an actionable, adverse personnel action under the Texas Whistleblower Act. The Court denied the county's petition for review in August of 2006, and this brief, filed September 7, 2006, is in support of the county's motion for rehearing. On December 15, 2006 the county's motion for rehearing was granted. Oral argument was heard on March 30, 2007. The Supreme Court of Texas held that removing unpaid duties from an employee does not constitute an adverse personnel action under the Whistleblower Act, because the action in this case would be unlikely to "dissuade a reasonable, similarly situated worker from making a report under the Act."

**National Cable Franchising:** *In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Docket No. MB 05-311 (Further Notice of Proposed Rulemaking – Effect of Order on Existing Cable Franchises), at the Federal Communications Commission. TML and TCAA commented that the Texas legislature has streamlined the cable franchising process in Texas, and provides for an almost immediate grant of authority to provide service. If the Federal Communications Commission intends to establish new standards or requirements for incumbent cable franchises, TML and TCAA requested that those changes do not undercut or diminish the standards set out in Texas’ hard-fought S.B. 5. The original order in this rulemaking was issued in March of 2007, and generally does not apply to Texas due to the provisions of S.B. 5. However, a further notice of proposed rulemaking was issued at that time as well. A second order was issued in November of 2007, and applied certain provisions from the first order to existing franchises.

**Regulatory Takings:** *City of San Antonio v. El Dorado Amusement Company*, No. 06-0481 in the Supreme Court of Texas. TML and TCAA argued that the City of San Antonio was within its authority to modify the zoning of a tract to prohibit the sale of alcoholic beverages, and that any loss in value to the owner was not sufficient to constitute a taking under applicable federal and state precedent. The Petition for Review was filed on June 12, 2006, briefing on the merits was submitted by both parties, and the petition for review was denied on June 1, 2007. A motion for rehearing was filed by the city on June 18, 2007, and the Supreme Court denied the motion for rehearing on October 12, 2007.

**Court Fees:** *Whether the optional juvenile case manager fee is unconstitutional*, RQ-0579-GA. TML and TCAA argued, among other things, that optional misdemeanor court costs should not be viewed as punishment and should not be considered unconstitutional under equal protection or due process, even if optional court costs cause the fees for misdemeanor convictions to be higher in some county or municipal courts. This request was withdrawn and no opinion was issued.

**Drainage Fees:** *Greater New Braunfels Home Builders Association, David Pfeuffer, Oakwood Estates Development Co., and Larry Koehler v. City of New Braunfels*, No. 03-06-00241-CV in the Austin Court of Appeals. Amici argued that the Municipal Drainage Utility Systems Act (Act) is meant to grant cities additional means to establish and finance municipal drainage utility systems for the purpose of protecting the public health and safety from loss of life and property caused by surface water overflows, stagnation, and pollution. The Act was never meant to preempt the authority of a home rule city to adopt other, legal development fees. An appeal was filed on April 26, 2006, oral argument was heard on February 14, 2007. The court of appeals held that, since the City had adopted the provisions of chapter 402 of the Local Government Code, and the fees fit the definition of a drainage charge under the statutory scheme, the stormwater connection fee and the stormwater development fee are drainage charges under chapter 402. The court of appeals also held that the City failed to follow the statutory requirements

imposed by chapter 402, including publishing notices, holding hearings, assessing the charges against all property owners within the service area, and exempting lots on which no structure exists. The court of appeals reversed the trial court's judgment and rendered judgment declaring that the complained-of portions of the City's stormwater fee ordinances were invalid as improperly adopted chapter 402 drainage charges.

**Substandard Buildings:** *City of Jacksboro, Texas v. Perry Teague*, No. 06-0389 in the Supreme Court of Texas. The principal issue in this case is whether a district court lawsuit contesting a city's substandard building demolition order should be considered as a petition for a writ of certiorari, as required under Texas Local Government Code Section 214.0012. The position of the city, which was supported by an amicus brief from TML and TCAA, as well as the Texas attorney general's office, is that a district court lawsuit does not act as a proper plea to the jurisdiction, as the lower court held. The city's petition for review was denied on June 22, 2007. A motion for rehearing was filed on July 6, 2007 and a decision is pending.

**Gas Rate Cases:** *City of Tyler v. CenterPoint Energy Entex*, No. 06-0735 in the Supreme Court of Texas. TML and TCAA argued that the City of Tyler is entitled to reimbursement for costs associated with a prudence review of CenterPoint's rates under a purchased gas adjustment clause. The city's petition for review was filed on August 21, 2006. The Supreme Court of Texas dismissed the appeal as moot on June 1, 2007.

**Building Codes:** *Duty of a municipality to adopt the International Residential Code and the International Building Code*, RQ-0567-GA. TML and TCAA (along with the Building Officials Association of Texas) argued, among other things, that a city may amend its building codes to meet local concerns, and whether to amend life safety provisions is arguably not advisable, but also arguably legally permissible. This request was withdrawn July 2, 2007.

**Public Information Act:** *Disclosure of e-mail protected by the attorney-client privilege*, Request Identification No. 275919. TML and TCAA argued that the attorney general has clearly stated the elements used to determine whether a communication between an attorney and his or her client is protected from disclosure, and urged the attorney general to reject the false assertion by the requestor that the disclosure (or nondisclosure) of a communication made between an attorney and the governmental body that he or she represents is governed in any way by Section 551.129 of the Open Meetings Act (authorizing an "out-house" attorney to attend an executive session via telephone or Internet communications).

**Vested Rights:** *City of San Antonio v. En Seguido, Ltd.*, No. 04-06-00206-CV in the San Antonio Court of Appeals. TML and TCAA filed a letter brief as amici curiae, supporting the city's position that a vague, one-lot plat filed in 1971 does not constitute the same "project" under Texas Local Government Code Chapter 245 as a currently-contemplated one hundred home subdivision, and therefore should not be allowed to maintain vested rights from that 1971 filing. The city's appeal was filed on March 31,

2006, oral argument was heard on February 13, 2007. The court of appeals reversed the summary judgment and remanded to the trial court, stating that the record did not contain enough evidence to conclusively establish that the project did not change between the filing of the plat in 1971 and the beginning of work (more than thirty years later), and also whether actions taken by En Seguido constituted “progress toward completion” of the project.

**Tax Abatements:** *Circumstances under which a county may opt out of an agreement made under chapter 312, Tax Code, the Property Redevelopment and Tax Abatement Act*, RQ-0514-GA, Texas attorney general’s office. TML argued that economic development grant agreements may be tied to property taxes collected from a business prospect without complying with the provisions of the property tax abatement statute, Chapter 312 of the Texas Tax Code. The request was withdrawn and the file has been closed.

**Disability:** *City of Grapevine v. James B. Davis*, No. 06-0318 in the Supreme Court of Texas. Amici argued that running is not a major life activity under the Texas Commission on Human Rights Act (TCHRA) and that the burden-shifting test of McDonnell Douglas applies to a disability claim under the TCHRA. The city's petition for review was filed on May 8, 2006. Motion for Rehearing was denied on March 9, 2007.

**Impact Fees Imposed on School Districts:** *Whether section 11.168, Education Code, prohibits a municipality from imposing impact fees on a school district to help fund additional infrastructure made necessary by proposed new school district facilities*, RQ-0506 Texas attorney general’s office. TML argued that the provisions of H.B. 1826 (2005) do not prohibit a city from assessing impact fees against a school district. In Opinion No. GA-496, the attorney general concluded that Education Code Section 11.168 does not prohibit an independent school district from paying impact fees imposed by a municipal corporation on the district for the district's new school development.

**Tax Increment Financing:** *Whether a municipality may designate an area as a “reinvestment zone” in which the financing plan does not include the issuance of bonds on notes*, RQ-0442-GA, Texas attorney general’s office. TML argued that tax increment financing is not limited to projects that are financed by bonds. The requestor had implied that because the Texas Constitutional enabling provision for tax increment financing mentions the issuance of bonds for purpose of redevelopment, bonds would be the only method of increment financing. TML pointed out that pay-as-you-go tax increment financing need not rely on the Texas Constitution for authorization, since full taxes are paid, and therefore bonds are not necessary. In Opinion GA-0514, the attorney general concluded that a city may not designate an area as a reinvestment zone unless the area is "unproductive, underdeveloped, or blighted" within the meaning of article VIII, section 1-g(b) of the Texas Constitution, even if the area's plan of tax increment financing does not include issuance of bonds or notes.

**Open Meetings Act:** *Whether a governmental body may selectively admit members of the public into an executive session under the Open Meetings Act*, RQ-0496-GA, Texas

attorney general's office. TML and TCAA argued that: (1) notice of an executive session is adequate if it is sufficient to apprise the general public of the subject matter of the meeting; (2) no specific deliberation is required when deciding who may attend an executive session; and (3) improperly allowing a third party into an executive session does not constitute a crime. In Opinion No. GA-0511, the attorney general concluded that the Open Meetings Act does not permit a governmental body to admit members of the public to a closed meeting to give input regarding a public officer or employee.

***Cities Competing with Private Business:*** *Whether a municipality may operate a commercial compost/mulch business that sells its products outside municipal boundaries,* RQ-0508-GA, Texas attorney general's office. TML and TCAA argued that a city is not prohibited from selling mulch in competition with private businesses. In Opinion No. GA-506, the attorney general concluded that, because a home rule city's sale of compost products to persons outside the city limits does not generally appear to contravene constitutional or statutory law, and because the Legislature has not with unmistakable clarity forbidden a home rule city from selling compost products outside its city limits, a home-rule city may sell compost products outside its city limits.

***National Cable Franchising:*** *In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Docket No. MB 05-311, at the Federal Communications Division. TML and TCAA argued that the Texas legislature has streamlined the cable franchising process in Texas, and provides for an almost immediate grant of authority to provide cable service in the state. If the Federal Communications Commission intends to establish new standards or requirements for cable franchises, TML and TCAA requested that those changes do not undercut or diminish the standards set out in Texas' hard-fought S.B. 5. In fact, TML and TCAA submit that, if anything, the standards and requirements in S.B. 5 be used as a model for any federal-level changes. Finally, TML and TCAA argued that the Commission does not have the authority to enact national cable franchising rules. In December of 2006, the FCC adopted an order in the case, and concluded that the Texas state-issued video franchise is generally excluded from the provisions of the order.

***Annexation:*** *Authority of a type A general law municipality to annex land outside its territorial jurisdiction,* RQ-0480-GA, Texas attorney general's office. TML and TCAA argued that Local Government Code Sections 53.001 and 43.901 worked to validate an annexation by a general law city that extended beyond the city's extraterritorial jurisdiction, and that the courts are the proper forum to challenge the validity of an annexation. In Opinion No. GA-478, the attorney general concluded that a type A general law city with fewer than 5,000 inhabitants is authorized to annex territory it does not own only if the territory is in the city's one-half mile extraterritorial jurisdiction.

***Annexation:*** *Karen Hall v. City of Bryan,* No. 10-05-00417-CV in the Waco Court of Appeals. Amici argued that the only means to challenge the contents of an annexation service plan is through a quo warranto proceeding brought on behalf of the state. In addition, Amici argued that, so long as a city provides services in accordance with the

terms of its annexation service plan, disannexation is an improper remedy. The brief was filed on September 5, 2006, and oral argument was held on September 20, 2006. On November 29, 2006 the court of appeals held that Local Government Code Section 43.141 only provides for disannexation if the city fails to perform its obligations under the service plan, not if it fails to provide all services desired by the residents of the annexed area under Section 43.056.

**Annexation and Prior Use:** *Olan Karm and Marc Payne v. City of Castroville*, No. 04-05-00512 CV in the Fourth Court of Appeals, San Antonio. TML and TCAA argued that the filing of a subdivision plat does not “vest” the use of property subsequent to annexation pursuant to Section 43.002 of the Texas Local Government Code. Nor does the filing of a subdivision plat vest a landowner’s right to use property in a certain way after annexation pursuant to Chapter 245 of Local Government Code. Oral argument was held on May 3. The court of appeals held on November 15, 2006, that the land was not properly annexed by the city because the city did not grant the landowner’s petition for voluntary annexation within the time required by Texas Local Government Code Section 43.028. The court did not rule on the other issues involving possible vested rights after annexation.

**Collective Bargaining:** *Whether a municipality violates Section 617.002, Government Code, by reorganizing and meeting with a labor organization as the sole representative of a designated group of employees*, RQ-0520-GA, Texas attorney general’s office. TML argued that a city is prohibited from entering into a collective bargaining agreement by the Texas Government Code, and that specific legislation is required to authorize such an agreement. On, October 13, 2006, Representative Krusee withdrew his request for the opinion.

**Premise Liability:** *State of Texas and the Texas Parks and Wildlife Department v. Ricky Shumake et al.*, No. 04-0460 in the Supreme Court of Texas. Amici argued that the court should look at the Legislature’s intent based on existing common law at the time they passed the Recreational Use Statute and not subsequent common law principles. Amici further argued that the Legislature did not intend to adopt the duty to warn when it passed the Recreational Use Statute. On June 23, 2006, the Court held for the Shumakes, stating that under the Recreational Use Statute, a premise owner has no duty to warn users, but can be liable for gross negligence in maintaining the property. A motion for rehearing was denied on September 22, 2006.

**Restrictive Covenants:** *City of Heath v. Mark Duncan et al.*, No. 05-0139 in the Supreme Court of Texas. Amici argued on behalf of the City of Heath that landowners in a residential subdivision do not have a compensable interest in restrictive covenants when a city takes property for public use. The appeals court held against the city on September 23, 2004, and a motion for rehearing was denied on January 13, 2005. The city filed a petition for review with the Supreme Court of Texas on February 25, 2005, and TML filed an amicus letter brief on May 5, 2005. Briefing on the merits was requested on June 6, 2005, and the Court denied the petition on June 16, 2006. A motion for rehearing was denied on August, 11 2006.

**Sovereign Immunity:** *City of Midland v. Roger Goerlitz, D/B/A American Wood Waste Recycling*, No. 03-0185 in the Supreme Court of Texas. Amici argued that the Midland City Charter and Local Government Code § 51.075 provisions allowing the city to “sue and be sued” do not, by themselves, waive sovereign immunity. According to Government Code § 311.034, the legislature intended to preserve the state’s interest in managing fiscal matters by not construing a statute as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. Nothing in the Local Government Code or the Midland City Charter indicated any legislative intent to unambiguously waive sovereign immunity. The city appealed the Eighth Court of Appeals’ decision. The petition for review was filed on February 24, 2003. Briefing on the merits was requested on June 16, 2003. The petition is still pending. An opinion was issued on August 31st, 2006.

**Conflicts Disclosure:** *Conflict of interest disclosure requirements for local government officers and persons who contract with local governmental entities*, RQ-0451-GA, Texas attorney general's office. State Representatives Beverly Woolley and John Smithee and Texas Education Agency Commissioner Shirley Neeley requested an opinion from the Attorney General regarding the interpretation and compliance with H.B. 914, which enacted Chapter 176 of the Local Government Code. TML submitted comments and suggestions on various problems with interpretation and logistical compliance, and Opinion No. GA-446 was issued on August 2nd, 2006.

**Civil Service:** *City of Houston v. Clark*, No. 04-0930 in the Supreme Court of Texas. Amici argued on behalf of the city that express language in the civil service laws granting employee appeals of civil service disciplinary decisions does not necessarily preclude a city from appealing in the interim. Failure to allow cities any appellate process would create a disincentive to engage in disciplinary arbitration. On June 30, 2006, the Court held for the City, stating that a city, as well as an employee, may appeal the decision of an independent hearing examiner.

**Annexation:** *Meaning of the term “service plan” under Sections 43.056 and 43.141, Local Government Code*, for purposes of a petition to disannex submitted by the voters of an annexed area of a municipality, RQ-0447-GA, Texas attorney general’s office. TML and TCAA respectfully requested that the attorney general’s office decline to answer the request because it involves a fact issue that cannot be resolved in the opinion process. TML’s and TCAA’s position is that, for every annexation, a city must adopt a service plan that is “legally compliant,” which means that the plan must conform to the requirements of Section 43.056, which is up to each individual city to determine based on the advice of local legal counsel. A court is the proper forum to answer this question. On June 22, 2006, the Attorney General’s Office declined to issue an opinion on the request.

**Sovereign Immunity:** *Sipes v. City of Grapevine*, No. 04-0933 in the Supreme Court of Texas. Amici argued that a city’s implementation of the decision to install a traffic signal was a discretionary act. Therefore, Section 101.060(a)(1) of the Texas Civil Practices & Remedies Code applied, granting the city sovereign immunity against tort claims during the period between the decision to install the traffic signal and the installation of the

traffic signal. On June 16, 2006, the Supreme Court held for the City, finding that there was duty to maintain a traffic signal that had not yet been installed.

**Statewide Cable Franchises:** *Texas and Kansas City Cable Partners, L.P., d/b/a Time Warner Cable v. City of West University Place, Burt Ballanfant, and Michael Ross*, No. H-05-4177 in the Federal District Court for the Southern District of Texas, Houston Division. TML and TCAA, as amici curiae, argued that that the one percent PEG fee that a cable provider must pay pursuant to Chapter 66 of the Texas Utilities Code (added by S.B. 5, 2005) is not preempted by the federal Cable Act. A scheduling conference was held on April 12, 2006. No date has been set for trial. A notice for dismissal was filed on June 5, 2006. An order dismissing the case was issued June 7, 2006.

**Gas Ratemaking:** *Alliance of CenterPoint Cities v. CenterPoint Energy*, Texas Railroad Commission Docket No. 9630. The issue in this docket arose from improper notice to the public of a proposed rate increase. The Gas Utilities Regulatory Act (GURA) mandates notice to the public of any proposed rate increase. CenterPoint Energy argued that the refusal of the Alliance of CenterPoint Cities (ACM cities) to approve or deny the rate increase created a delay that led to an enactment of the increase by operation of law. The ACM cities and TML (as amicus curiae) disagreed, and argued that without proper notice, the ACM cities cannot make an appealable final decision. Thus, the Railroad Commission (RRC) does not have jurisdiction to rule on the rates in question. On March 14, 2006, the RRC voted to defer the decision on jurisdiction pending receipt of further information on the notice issue. On April 21, 2006, both parties filed a joint motion to dismiss. On May 11, 2006, the RRC granted the dismissal.

**Eminent Domain Procedures:** *City of Austin v. Harry M. Whittington, et al.*, No. 05-0912 in the Supreme Court of Texas. Amici argued that the procedures for eminent domain found in Chapter 21 of the Texas Property Code do not require that a “necessity finding” be noted in an eminent domain resolution adopted by the council. In addition, amici argued that the additional “necessity” determination required by the appeals court is vague and needs clarification from the Court. A motion for rehearing was denied on March 17, 2006.

**Development Codes:** *City of Dallas v. Vanesko*, No. 04-0263 in the Supreme Court of Texas. Amici argued on behalf of the city that the Dallas board of adjustment did not abuse its discretion in denying a variance on the grounds that the requested variance did not pertain to a condition involving “a restrictive area, shape, or slope,” as the Dallas development code requires. Petition for review was filed by Dallas on May 3, 2004. On April 7, 2006, the Court opined that the board of adjustment did not abuse its discretion in denying the variance, thus concluding that a city may enforce a zoning ordinance against a property owner whose substantially completed new home was built in violation of the ordinance, even though the city gave preliminary approval to the owner’s building plans.

**Voluntary Payment Rule:** *Dallas County Community College District v. Bolton.*, No. 02-1110 in the Supreme Court of Texas. Amici argued that the Court’s discussion of the

“voluntary payment rule” should allow a city to keep already paid taxes or fees that are later held to be illegal. Amici argued that dicta in the case stating that the mere threat of a fine would make a payment to a governmental entity involuntary, and thus require a rebate, is in contravention to precedent that holds that mere threat of a fine is not sufficient to require a rebate. A motion for rehearing was filed on December 19, 2005. The Court denied the motion on February 24, 2006.

**380 Agreements:** *Village of Bee Cave v. Save Our Springs Alliance*, No. 03-05-00148-CV in the Third Court of Appeals, Austin. Amici argued on behalf of the village that article III, sec. 52 of the Texas Constitution authorize economic development programs such as long-term Chapter 380 agreements. Amici further argued that long-term 380 agreements are best practices and protect taxpayer dollars. The court issued a memorandum opinion on January 13, 2006, granting a joint motion to dismiss and rendered judgment pursuant to the parties’ settlement agreement.

**Gas Rate Cases:** *CenterPoint Energy Entex v. Railroad Commission of Texas, Victor G. Carillo, Charles R. Mathews, Michael L. Williams, City of Tyler, and State of Texas*, No. 03-04-00731-CV in the Third Court of Appeals, Austin. Amici argued on behalf of the City of Tyler that: (1) the Texas Railroad Commission (Commission) has the authority to conduct a gas cost prudence review under a purchased gas adjustment (PGA) clause; and (2) a PGA clause prudence review is eligible for municipal reimbursement. The court ruled on February 24, 2006, that: (1) the Commission does have the authority to conduct a gas cost prudence review under a PGA clause; and (2) the Commission has the power to order refunds if it determines that the company’s gas purchase was imprudent. However, the court reversed the lower court’s judgment concerning reimbursement of expenses to the City.