

TML/TCAA LEGAL DEFENSE PROGRAM AMICUS BRIEF UPDATE
(Includes Briefs Filed Through November 10, 2009)

PENDING

Governmental Immunity: *Linda Sanders-Burns v. City of Plano and Joseph Cabezuela*, No. 08-40459 (5th 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 officials 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.

Election: *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.

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.

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.

Sovereign Immunity: *Keith Lowell v. City of Baytown*, No. 07-1011, in the Supreme Court of Texas. 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).

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. This case was set for oral argument on October 9, 2009.

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."

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.

DECIDED

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.

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. McGuire 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.