

TCAA NEWS

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TCAA Fall Conference 2011

Save the Date! The TCAA Fall Seminar in conjunction with the TML Annual Conference is scheduled for October 13, 2011, in Houston. A link to registration and hotel information is available at www.texascityattorneys.org.



Outstanding Government Lawyer Award

Charles E. Zech, partner at Denton, Navarro, Rocha & Bernal and TCAA president, received the 2011 Outstanding Government Lawyer Award from the State Bar's Government Lawyers Section. The award was presented at the recent Suing and Defending Governmental Entities Conference in Austin. Congratulations to Charlie!

FREE CLE! The 2011 TCAA Summer Conference Available Online:

TCAA Online Seminars is a FREE SERVICE that allows TCAA members who are city attorneys, assistant city attorneys, or attorneys who regularly practice municipal law to view a video of past seminars in a single-session format. Viewing of the session allows attorneys to receive participatory CLE credit with the State Bar. To view available seminars, please go to www.texascityattorneys.org and click on the "TCAA Online Seminars" link. (Use the password "FreeCLE" to gain access to the sessions.)

TCAA to Fill Board Position on October 13, 2011

Those interested in applying for a place on the Board should fill out an application and return it via e-mail to Scott Houston at legalgovt@tml.org. Application forms are available on the front page of TCAA's Web site at www.texascityattorneys.org and must be received by 5:00 p.m. on September 23, 2011.

Legal Defense Program

TCAA files amicus briefs in support of cities on many different cases. To keep up to date with the Texas Municipal League and the status of those briefs filed, go to http://www.tml.org/legal_pdf/AmicusBrief.pdf.

Municipal Attorney Job Openings

For the most recent Texas Municipal League classifieds postings, please go to <http://tml.associationcareernetwork.com/JobSeeker/Jobs.aspx?abbr=TML>.

Articles

Fourteenth Court of Appeals in Houston Holds that Violations of the Tort Claims Act Equal Consent to Suit by a City

Amadi v. City of Houston, No 14-10-01216-CV
Fourteenth Court of Appeals—July 7, 2011
Laura Mueller
Assistant General Counsel
Texas Municipal League

This month, the Fourteenth Court of Appeals in Houston reviewed when a plaintiff must choose between the city official and the city itself when bringing a Tort Claims Act claim. The court issued four opinions on the issue, including: *Amadi v. City of Houston*, No. 14-10-01216-CV (Tex. App.—Houston [14th Dist.] July 7, 2011); *City of Houston v. Rodriguez*, No 14-11-00136-CV (Tex. App.—Houston [14th Dist.] July 12, 2011); *City of Houston v. Johnson*, No. 14-11-00220-CV (Tex. App.—Houston [14th Dist.] July 28, 2011) (mem. op.); *City of Houston v. Cooper*, No. 14-11-00092-CV (Tex. App.—Houston [14th Dist.] July 28, 2011) (mem. op.). In these opinions, the court held that a city has consented to suit for any claim under the Tort Claims Act. Therefore, even if the plaintiff improperly sues the employee under the Tort Claims Act, the plaintiff's claims against the city are not barred.

Sections 101.106(b) and (e) of the Texas Civil Practices and Remedies Code states that:

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

* * *

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

These Tort Claims Act provisions are commonly referred to as the election-of-remedies provisions of the Act.

The Supreme Court of Texas has weighed in on the election-of-remedies issue. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008). In *Garcia*, the Court held:

Under the Tort Claims Act's election scheme, recovery against an individual employee is barred and may be sought against the governmental unit only in three instances: (1) when suit is filed against the governmental unit only, *id.* § 101.106(a); (2) when suit is filed against both the governmental unit and its employee, *id.* § 101.106(e); or (3) when suit is filed against an employee whose conduct was within the scope of his or her employment and the suit could have been brought against the governmental unit, *id.* § 101.106(f). When suit is filed against the employee, recovery against the governmental unit regarding the same subject matter is barred unless the governmental unit consents to suit. *Id.* § 101.106(b).

Id. at 656. The Court went on to fully explain that under subsection (b), a claim against the employee “bars *any suit* against the governmental unit regarding the same subject matter, not just suits for which the Tort Claims Act waives immunity or those that allege common-law claims.” *Id.* (emphasis in original). Finally, the Court held that a violation of the Texas Commission on Human Rights Act (TCHRA) constituted consent to suit by a city because the TCHRA specifically waives governmental immunity. *Id.* at 660.

The issue in the four Houston cases is whether Tort Claims Act violations also grants consent to suit by a city. The action in this case is under Section 101.021 of the Texas Civil Practices & Remedies Code, which states that a city's immunity is waived when an injury is caused by the “use of a motor-driven vehicle or motor-driven equipment” by a city employee.

The primary cases are *Amadi v. City of Houston* and *City of Houston v. Rodriguez*. In *Amadi*, the plaintiff sued the city after the city's employee allegedly hit Amadi's vehicle with his car. 2011 WL 2638221 at *1. The plaintiff sued both the city and its employee. *Id.* The city filed a plea to the jurisdiction based on Section 101.016(b) of the Texas Civil Practices and Remedies Code, arguing that suit against the city was barred because the suit was also filed against the employee. *Id.*

(continued on next page)

Tort Claims Act (continued)

The court of appeals reviewed the Tort Claims Act and held that Section 101.021 waived the city's immunity for vehicle accidents. *Id.* at *2. The court then looked at Section 101.106(b). It held that Section 101.106 allows the city to be sued, even if the governmental employee is sued, if the city consents to suit. Thus, because the Tort Claims Act waives immunity, the city has consented to all suits under the Act. *Id.* at *5.

The court did note that the First Court of Appeals in Houston had held that suing both the city and the employee barred the plaintiff's suit, and the Fourteenth Court of Appeals opinion was in opposition to this holding by its sister court. *City of Houston v. Esparza*, 2011 WL 2341250 (Tex. App.—Houston [1st Dist.] June 9, 2011).

Similar facts were presented in *City of Houston v. Rodriguez*, 2011 WL 2683557 (Tex. App.—Houston [14th] July 12, 2011). In *Rodriguez*, Rodriguez sued the city and a city employee, after the employee hit her with a vehicle while he was on city business. *Id.* at *1. The city filed a

motion under Section 101.106(b) to dismiss the employee from the suit. *Id.* Then, after the employee was dismissed, the city filed a plea to the jurisdiction arguing, like in *Amadi*, that Section 101.106(b) protected the city from suit because the plaintiff had sued both the city and the employee. Again, the Fourteenth Court of Appeals held that the simultaneous actions against both the city and the employee did not bar suit, and that the city had consented to suit under the Tort Claims Act. *Id.* at *3.

The court of appeals also held similarly in two memorandum opinions in July in *City of Houston v. Johnson*, 2011 WL 3207964 (Tex. App.—Houston [14th Dist.] July 28, 2011); *City of Houston v. Cooper*, 2011 WL 3207958 (Tex. App.—Houston [14th Dist.] July 28, 2011).

Because the courts of appeals have held differently on an issue of statutory construction, it is likely the Supreme Court of Texas will review these cases if presented with them in the future.

TML/TCAA Legal Defense Program Amicus Brief, Attorney General Opinion, and Administrative Comments Filed

Open Meetings: RQ-0972-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.



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.

Recent Texas Cases of Interest to Cities

Note: Included cases are from the period beginning on the 10th of the previous month through the 10th of the current month.

Zoning—Associational Standing: *City of Laredo v. Rio Grande H2O Guardian*, No. 04-10-00872-CV (Tex. App.—San Antonio July 27, 2011) (mem. op). In 2009, the city amended its zoning map by rezoning two large parcels from R-1 (Single Family Residential) and AG (Agricultural) to M-1 (Light Manufacturing). A little more than two months after the new ordinances were passed, Rio Grande filed a declaratory judgment action against the city challenging the legality of the new zoning ordinances as violative of the city’s comprehensive plan, among other things. In response to Rio Grande’s claims, the city filed a motion for summary judgment. After a hearing, the trial court denied the city’s motion for summary judgment, and the city appealed the denial on the grounds of lack of associational standing, ripeness, and mootness, among others.

The city first argued that the trial court erred in finding Rio Grande had associational standing to bring suit regarding the zoning issues. “When a plea to the jurisdiction challenges the existence of facts alleged by the pleader to establish the trial court’s subject matter jurisdiction, as occurred in this case, the trial court must consider relevant evidence submitted by the parties.” Here, Rio Grande alleged it is a nonprofit corporation composed of members who are Laredo residents. Rio Grande admits its status as a nonprofit corporation requires that it must establish associational standing. The test for associational standing was established by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Comm’n*, and adopted by the Texas Supreme Court in *Tex. Ass’n of Bus. v. Tex. Air Control Bd.* Under this test, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

As to the first prong, the court concluded that it is undisputed that the contested ordinances have been passed, changing the area in question from residential and agricultural to light manufacturing. It is also undisputed that some Rio Grande members own real property within 200 feet of the rezoned areas. Rio Grande alleged these members, as well as members who own property along the Rio

Grande River, whose waters Rio Grande alleges are threatened by potential pollution due to the rezoning, will be adversely affected by the pollution, litter, noise, light, traffic, dust, and other disturbances likely to result from the rezoned areas. Although the court agreed that – from the record – it does not appear that manufacturing has begun or that any of the risks asserted by Rio Grande on behalf of its members have come to fruition, the record does establish the city’s intention to allow light manufacturing in the rezoned areas. This subjects certain members of Rio Grande to at least a “substantial risk of injury,” i.e., diminishment of property enjoyment and property values, satisfying the first prong of the *Hunt* test.

As to the second prong, Rio Grande pled that among its goals are “preserving and enhancing the water quality of the Rio Grande and its local tributaries,” and “preservation of ... low-density residential area near the Rio Grande.” These are some of the very interests Rio Grande contends will be damaged by the city’s decision to rezone. Thus, the court held the interests Rio Grande seeks to protect through its lawsuit are germane to its organizational purpose.

As to the third prong, the court noted that the Texas Supreme Court has interpreted the prong to mean that whether an association has standing to invoke the court’s remedial powers on behalf of its individual members depends substantially on the nature of the relief sought. If an association seeks a declaration, injunctive, or some other type of prospective relief, the court can assume the remedy sought, if granted, will benefit the association members who are injured by the alleged harms.

The court next addressed the city’s claim that the case is not ripe for adjudication. “We examine the ripeness of Rio Grande’s claims in light of the principles stated above.” Rio Grande alleged the city improperly passed two zoning ordinances in violation of its comprehensive plan, rezoning the property in question from residential and agricultural to light manufacturing. Rio Grande also claimed that one or more of its members own real property immediately adjacent to the Rio Grande River, which is threatened by pollution due to activities authorized by the passage of the zoning ordinances, threatening members use of the river for recreational purposes, including

fishing and bird watching. The city argued these alleged injuries are merely potential or hypothetical injuries, dependent upon further government approvals, rendering the Rio Grande claims unripe. Rio Grande cites numerous cases in which a city passed ordinances in violation of established and mandatory procedures, and those claims were not dismissed on the ground they did not give rise to ripe, justiciable controversies. Accordingly, the court held that Rio Grande's claims are ripe and the trial court did not err in denying the city's plea to the jurisdiction on the ground that Rio Grande's claims were not ripe.

In its final issue, the city argued the trial court lacked jurisdiction over Rio Grande's claim that the passage of the zoning ordinances is contrary to the comprehensive plan because such claim is moot. The city's mootness argument is based on the fact that, after Rio Grande filed the instant suit, the city modified the comprehensive plan as permitted by its charter to allow rezoning of the property in question. The court noted that Section 211.004(a) of the Local Government Code provides that zoning regulations must be adopted in accordance with a city's comprehensive plan if one exists. If a city fails to adopt zoning ordinances in accordance with its comprehensive plan, such ordinances are void *ab initio*. Thus, the court agreed with Rio Grande that, because the ordinances were never valid, the city could not revive them by subsequently amending the comprehensive plan.

Takings: *City of Dallas v. CKS Asset Management, Inc.*, No. 05-10-01010-CV (Tex. App—Dallas July 7, 2011). CKS sued the city for inverse condemnation, arguing that the city had built a performing arts center on land CKS owned. The court of appeals dismissed CKS's claim holding that the city had adequately shown it had an interest in the property sufficient to defeat any intent by the city to act as a condemnor of property owned by another.

Governmental Immunity—Contract: *City of Brownsville v. AEP Texas Central Company*, No. 05-09-00808-CV (Tex. App.—Dallas July 15, 2011). The court of appeals reviewed a release agreement based on a property sale involving the City of Brownsville and AEP Texas Central Company (TCC). The trial court held that all of the city's claims against TCC were barred by the release agreement. The court of appeals held that there was still sufficient evidence that some of the city's claims were still valid to overcome TCC's motion for summary judgment.

Takings: *Battista v. City of Alpine*, No. 08-09-0021-CV (Tex. App—El Paso July 20, 2011). The Battistas sued the city for an unconstitutional taking of their property, alleging that the city's construction of two culverts diverted runoff onto their property. The court of appeals held that the Battistas did not adequately allege that the city's taking was for a public use, a required element of a constitutional taking claim.

Worker's Compensation: *City of Houston v. Rhule*, No. 01-09-01079-CV (Tex. App—Houston [1st Dist.] July 21, 2011). Rhule, a former Houston firefighter, sued the city after it allegedly breached a worker's compensation settlement agreement with Rhule. In the suit, the jury awarded \$127,500 in favor of Rhule. The city appealed, arguing that the award exceeded what is allowed under the worker's compensation act. The court of appeals held that the city's governmental immunity was waived: (1) by entering into the settlement agreement, the city had waived its immunity from liability; and (2) by the worker's compensation act, which waives the city's immunity from suit. Thus, there was no statutory limitation on damages, but damages were limited by what is allowed in breach of contract cases.

Property Tax Exemption: *Comunidad Balboa, LLC v. City of Nassau Bay*, No. 14-10-00167-CV (Tex. App—Houston [14th Dist.] July 21, 2011). Comunidad Balboa sued the city arguing it was entitled to a community housing development organizations tax exemption under Tax Code Section 11.182. The court of appeals held that there is sufficient evidence to go to trial that Comunidad Balboa owned the property eligible for the exemption at the time the exemption was requested.

Substandard Buildings: *City of Fort Worth v. Park*, No. 07-10-0279-CV (Tex. App—Amarillo July 26, 2011) (mem. op.). The court of appeals held that the property owner had been given adequate due process on the city's substandard building claims, and reversed the trial court's summary judgment in favor of the property owner.

Governmental Immunity—Tort: *City of Beaumont v. Lathan*, No. 09-11-00110-CV (Tex. App—Beaumont July 28, 2011). The issue in this case is whether a pile of debris stacked next to a roadway constitutes a "special defect" under the Tort Claims Act, Texas Civil Practices and Remedies Code § 101.022. The court of appeals held that it was not a special defect because the pile was not unexpected or unusual, but was open and obvious.

Attorney General Opinions of Interest to Cities

Note: Included opinions are from the period beginning on the 10th of the previous month through the 10th of the current month.

Opinion No. GA-0868 (Disability Insurance): Concludes that the tax freezes and exemptions authorized by article VIII, section 1-b of the Texas Constitution are available for residence homesteads of persons who are under a disability for purposes of payment of disability insurance benefits under Federal Old-Age, Survivors, and Disability Insurance. Whether a person falls within the definition of "disability" under the Americans with Disabilities Act is not relevant to the analysis.

Opinion No. GA-0874 (Police Chief): Concludes that, under the facts presented, a school district chief of police is not a "schoolteacher" for purposes of article XVI, section 40 (b) of the Texas Constitution. Accordingly, he may not be compensated for his service on a city council.

Opinion No. GA-0870 (Recall Election): Concludes that Texas law does not authorize a county judge to order a municipal recall election. We believe that a city charter provision imposing a duty upon a county judge to perform an act that the county judge has no authority under Texas law to perform is inherently inconsistent with Texas law and unenforceable.

We advise you that appellate courts have determined that similar municipal charter provisions impose upon a city council the ministerial duty, subject to compulsion by mandamus, to order the recall election.

For the full text of Attorney General Opinions, go to: <https://www.oag.state.tx.us/opin/opindex.shtml>.



Legislative UPDATE



*As a supplement to TCAA News,
please check the TML Legislative
Update Newsletter at:
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legis_update_current.asp](http://www.tml.org/legis_update_current.asp)*

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