

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 will be available soon on the front page of www.texascityattorneys.org. A separate e-mail and printed publicity will be sent to all members when registration is available.



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.)

Thank you to all who attended and sponsored the TCAA South Padre Conference at the Isla Grand Beach Resort!

For MCLE reporting instructions, go to www.texascityattorneys.org; click on speaker papers; Summer Conference 2011; and then MCLE directions.

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.



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

Divided Court Holds that Nuisance Decisions Should Be Made by Courts, Not City Boards

City of Dallas v. Stewart, No. 09-0257
Supreme Court of Texas July 1, 2011

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In *City of Dallas v. Stewart*, No. 09-0257 (Tex. July 1, 2011), the Supreme Court of Texas (Court) held in a 5-4 decision that an appointed city board's determination that a building is a public nuisance should not be given deference by a court, but should be reviewed *de novo* ("from the beginning"). The opinion may mean that appointed city officials may no longer make standard building and other nuisance determinations.

In the case, a person abandoned a house. The house fell into disrepair, had been inhabited by vagrants, and suffered from numerous code enforcement violations. The city building standards board determined that the house was an urban nuisance and ordered its demolition. Before the demolition, the owner appealed the board's decision to the trial court. (The appeal did not stay the demolition, and the house was demolished.)

After the demolition, the owner added due process and taking claims to her suit. The trial court judge affirmed the board's decision to demolish. However, a jury decided that the home was not a public nuisance and awarded the owner damages for the demolition of her home. The city appealed the trial court's decision on the issue of whether the board's decision that the house was a public nuisance precluded a finding of a taking.

Local Government Code Chapter 214 defines a building as a nuisance if it is "dilapidated, substandard, or unfit for human habitation." Local Government Code Chapter 54 authorizes a city to create a board to determine violations of public safety ordinances like those in Chapter 214. Pursuant to Chapter 214, a property owner is entitled to notice and a hearing before the board on the issue of demolition, and is given a limited appeal of a decision to a trial court. That statutory appeal is based on deference to the board's decision under what is known as the "substantial evidence" standard of review. See TEX. LOC. GOV'T CODE §§ 54.039(f); 214.0012(f) (authorizing substantial evidence review of standards boards' decisions). Moreover, some board

or agency determinations are given a preclusive effect in subsequent litigation. See, e.g., *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78 (Tex. 2007). In this case, however, the Court reached the opposite conclusion based on the "takings" clause in the Texas Constitution.

That clause provides that the government may not take a person's property without just compensation. TEX. CONST. art. I, § 17(d). The use of eminent domain is the most common form of taking. Eminent domain contests are entitled to *de novo* review by a trial court after the board (i.e., the special commissioners) makes a decision. TEX. PROP. CODE § 21.018. Another form of taking is an "inverse condemnation." Inverse condemnation occurs when a government regulation deprives an owner of the use of his property. *City of Houston v. Trail Enters., Inc.*, 300 S.W.3d 736 (Tex. 2009).

All takings claims are limited by the rule that the abatement of a public nuisance is not a taking. See *City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923). However, according to the Court a nuisance determination must be made by a court rather than an appointed administrative body. See *City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949); *City of Texarkana v. Reagan*, 247 S.W. 816 (Tex. 1923); *Crossman v. City of Galveston*, 247 S.W. 810 (Tex. 1923); *Stockwell v. State*, 221 S.W. 932 (Tex. 1920). In *City of Houston v. Lurie*, the Court held that "[i]t has been repeatedly held that the question of whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court." *Lurie*, 224 S.W.2d at 874.

The Court also stated that *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001) was not applicable to the present case. In *Freeman*, the federal Fifth Circuit Court of Appeals held that a city need not seek a search warrant before demolishing a building because such a seizure would be reasonable under the Fourth Amendment to the U.S. Constitution if all the city's ordinances and the state statutes are followed. *Id.* at 654. But the Court held that the issue in *Freeman* was not whether an administrative city board's decision should be given deference by a court.

Continued on next page.

Nuisance Decisions continued.

Rather, the Court held that *Freeman* examined only the narrower issue of whether the city had to get a warrant to satisfy due process before permanently abating a nuisance.

The Court ultimately held that a city board's decision that a piece of property is a "nuisance" should not be given deference, but should be reviewed *de novo* by a court similar to condemnation and inverse condemnation takings cases. The Court stated:

Because we believe that unelected municipal agencies cannot be effective bulwarks against constitutional violations, we hold that the URSB's nuisance determination, and the trial court's affirmation of that determination under a substantial evidence standard, were not entitled to preclusive effect in Stewart's takings case, and the trial court correctly considered the issue *de novo*.

In other words, the judicial determination is required because the nuisance determination is really a determination that destroying the property is not a taking because – as a "nuisance" – the property has no value at all.

Four justices dissented to Chief Justice Jefferson's majority opinion. Those four justices joined in two dissenting opinions by Justices Johnson and Guzman. Justice Johnson argued that the statutory provisions alboard to make a nuisance determination were a significant enough safeguard to warrant giving deference to the board's decision. (In his dissent, he details the statutory procedure that protects the property owner's rights in a

nuisance case.) Justice Guzman argued that due process is sufficient under the current statutory scheme and also makes policy arguments regarding a city's need to be able to make nuisance determinations under the statutory procedures.

Multiple cities and the attorney general filed briefs in support of the City of Dallas, to no avail. The City of Dallas has indicated that it will seek a rehearing, and the League will provide amicus support in that effort.

Until the rehearing is decided, many cities have brought their substandard structure and other nuisance ordinance enforcement to a halt. And many city attorneys have asked the Texas Municipal League for guidance. At this point, there is little guidance to provide. Perhaps the safest course of action, which is completely impractical, would be to have an elected judge bless every nuisance action that could be considered a taking. In any case, the League will monitor and participate in the rehearing process. If that process results in a favorable opinion, the issue may once again be settled. If not, the issue will certainly go through the League's legislative policy development process, and may even require a constitutional amendment to fix.

To read the entire opinion go to: <http://www.supreme.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=2001733>

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

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 conclusion 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.

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.

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. This double issue includes cases from May 11th through July 10th.

Annexation/ETJ: *City of San Juan v. City of Pharr, No. 13-09-00422-CV (Tex. App.—Corpus Christi May 26, 2011) (mem.op.)*. The cities of San Juan and Pharr are adjacent cities in the Texas Rio Grande Valley. In 1983, San Juan and Pharr entered into an agreement governing the expansion of the cities' extraterritorial jurisdictions (ETJs). The agreement provided that I Road, a major thoroughfare that runs north and south between the cities, would serve as the boundary between San Juan's and Pharr's ETJs. The agreement allegedly contained an automatic ten-year renewal provision.

The parties agree that the agreement governed the boundaries of the cities' ETJs until at least 1993. The parties dispute whether the agreement was renewed at that point.

In 1994, 1996, 1997, and 1998, San Juan passed a series of seven ordinances annexing various parcels of land to its south. Each of the seven annexation ordinances expanded the corporate boundaries of San Juan. If valid and effective, the annexations would have extended San Juan's ETJ west of I Road. It was undisputed by the parties that Pharr raised no objection or challenge to San Juan's 1990s annexation ordinances.

In 2002 and 2003, Pharr passed a series of four annexation ordinances. Each of the 2002–2003 ordinances annexed property west of I Road. In 2008, Pharr passed further ordinances annexing land to the east of I Road. San Juan challenged each of the annexation ordinances. The effect of Pharr's ordinances was both parties attempting to assert their annexation rights within ETJ claimed by the other.

In October 2006, San Juan filed suit against Pharr seeking declaratory judgment to, among other things: (1) void Pharr's 2002–2003 annexation ordinances and any Pharr ordinances annexing land east of I Road; and (2) validate San Juan's 1990s annexation ordinances. The trial court ordered that San Juan take nothing by its suit. However, in December 2007, the trial court granted San Juan's motion for new trial.

San Juan and Pharr then filed new motions for summary judgment. In June 2009, the trial court granted Pharr's motion for summary judgment and denied San Juan's. In doing so, the trial court entered an order declaring that: (1) the 1983 agreement expired by its own terms in 1993 and "no other legally valid and operational written agreement exists between [the cities] regarding their respective rights to [ETJ]"; (2) Pharr's current ETJ "extends to three and one-half (3.5) miles from its city limits"; (3) Pharr's current ETJ "extends east of 'I Road'"; and (4) Pharr "may rightfully annex property within its [ETJ]" subject to the Local Government Code. This appeal followed.

San Juan contended that there were two versions of the agreement: one that was signed by the mayors of both cities (the first version), and another that was included in the minutes of the Pharr city council meeting at which the agreement was approved by the council (the second version).

The court concluded that only one version was signed by the mayors of both cities. The re-printing of the agreement in the Pharr council meeting minutes did not create a separate or competing document. And it was undisputed that neither city took any action to renew the agreement in 1993. Thus, the court concluded that the agreement expired in 1993, and the cities' annexation powers became governed solely by statute from that point forward.

The court then reviewed Local Government Code Section 43.901 (consent presumption) as it existed in 1993, and concluded that a city's *annexation* into another city's existing ETJ is conclusively presumed to be valid absent any action by the other city to challenge the annexation within two years. (Note that Section 43.901 was amended later to exempt cities from presumed consent.) Here, however, it was undisputed that Pharr did not take any action to challenge the *annexations* accomplished by San Juan's 1990s ordinances. As a result, Pharr is barred from challenging those *annexations* today. San Juan asked the court to enlarge that presumption, and resulting limitations bar, to an annexation ordinance's expansion of the annexing city's ETJ. The court refused to do so because the statutory scheme governing ETJ discourages such a result.

Substandard Structures: *Como v. City of Beaumont*, No. 09-10-00192-CV (Tex. App.—Beaumont June 2, 2011). In this case, the City of Beaumont declared Yvonne Como’s commercial building a public nuisance and condemned the property. Como did not challenge the condemnation by filing a writ of certiorari, but she sued the city more than one year after the city demolished the building. The trial court granted the city’s plea to the jurisdiction. On appeal, Como contended that the trial court erred in dismissing her claims.

In December 2006, the city notified Como that the commercial structure on her property was vacant, neglected, deteriorated, and dilapidated. The city warned that unless Como enrolled the structure in a work program, the structure might be demolished in accordance with a city ordinance. After a lengthy procedural history, the city council deferred action on her property by a March 2007 ordinance for 45 days.

After additional communications, on May 29, 2007, the city council passed an ordinance declaring 88 structures to be public nuisances and condemning them. Como’s structure was included, and the city completed the demolition in 2008.

Como contended, among many other things, that the demolition created a valid claim for inverse condemnation under both the Texas and U.S. Constitutions. The court disagreed. The city demolished the structure on Como’s property pursuant to a properly enacted ordinance, and Como did not seek a substantial evidence review of that ordinance under Local Government Code Section 214.0012. Because the city demolished the structure based on a valid exercise of its police power, and Como could have – but did not – avail herself of her right to challenge the city’s decision, the court concluded that Como’s did not valid a “takings” claim. (Note: see article above relating to *City of Dallas v. Stewart*, a Supreme Court of Texas case decided after this opinion and reaching the opposite conclusion.)

Economic Development: *Ex Parte City of Irving*, No. 05-11-00036-CV (Tex. App.—Dallas, May 20, 2011). The City of Irving adopted a capital improvement plan for the expansion of its convention center, which would include an entertainment center and a hotel. The city proposed to issue bonds not to exceed \$200 million to fund the project. The proposed bonds would be secured with rebates

of the state sales and use and hotel occupancy taxes, as well as both the state and city’s portion of the mixed beverage tax.

The city sought a declaratory judgment stating that the proposed bonds and pledges of revenue are valid. The attorney general objected to the city’s proposal on the grounds that the city did not include a statement that the revenue sources were subject to biennial appropriation by the state legislature and that the city had no authority to pledge the state’s portion of the mixed beverage tax. The trial court found in favor of the city. The attorney general appealed.

In the first issue on appeal, the attorney general argued that the trial court erred by concluding that the state taxes (sales and use tax and hotel occupancy tax) and the city’s portion of the mixed beverage taxes are not subject to biennial appropriation. According to the attorney general, because these taxes are all required to be deposited in the state’s general revenue fund, and because Article VII, Section 6, of the Texas Constitution prohibits appropriations from the state treasury for more than two years, the city’s proposal to pledge these tax revenues for ten years is unconstitutional.

The court recognized the statutory authority for state sales and use taxes and state hotel occupancy taxes to be deposited into the state’s general fund. *See* TEX. TAX CODE §§ 151.801 (state sales and use taxes); 156.251(a) (state hotel occupancy taxes). The attorney general contended that because the city’s mixed beverage statute contains appropriation language, city mixed beverage taxes are subject to biennial appropriations as well. *See* TEX. TAX CODE §183.051(b). The court disagreed with the attorney general and determined the city’s project falls within a constitutional exception to the biennial appropriation requirement. Article III, Section 52-a, of the Texas Constitution provides an exception to the prohibition on the lending of public credit by providing that programs fostering economic growth serve a public purpose. Relying on past case law, the court held that Article III, Section 52-a, was passed to provide an exception to the biennial appropriation requirement for funds that are held in the general revenue fund and that meet that section’s requirement for programs to encourage economic development. *See Friedman v. Am. Surety Co. of New York*, 151 S.W.2d 570, 578-80 (Tex. 1941); *Manion v. Lockhart*, 114 S.W.2d 216, 218-19 (Tex. 1938). The legislature, acting under its constitutional authority, has enacted statutes creating programs to encourage economic development by offering, among other things, the ability for cities to utilize tax incentives. For these

reasons, the court concluded that Article III, Section 52-a, applies to the state sales and use tax and state hotel occupancy tax, and the legislature was not limited by Article VIII, Section 6, when it created an economic development program for qualified hotel projects and authorized the rebate of certain state taxes for a period of ten years.

In its second issue, the attorney general argued that the city's proposal to pledge the state's portion of the mixed beverage taxes is not authorized by statute. State statute provides that the state imposes a 14-percent tax on mixed beverages and refunds to a city up to 10.7143 percent of the amount of taxes collected within the city limits. TEX. TAX CODE §§ 183.021; 183.051(b). In this instance, the city proposed to pledge both its portion of the mixed beverage tax – and the state's portion – to secure payment of the bonds pursuant to authority in the Texas Enterprise Zone Act in Chapter 2303 of the Government Code. The court of appeals agreed with the attorney general that the city lacked the authority to assign state mixed beverage tax revenues. Unlike other statutory provisions providing that a city is entitled to certain tax rebates, the Texas Enterprise Zone Act states only that a governmental body “may agree” to refund the eligible taxable proceeds to the owner of a qualified hotel project. See TEX. GOV'T CODE § 2305.5055. Because the state did not agree to refund its portion of the mixed beverage tax to the city, the trial court erred by concluding that the city was entitled to pledge the state's portion of the mixed beverage tax.

The court reversed and remanded the portion of the judgment validating the state's portion of the mixed beverage taxes as a valid revenue source to be pledged for the proposed bonds, and affirmed the rest of the trial court's judgment.

Property Tax: *Houston I.S.D. v. Morris*, 01-10-00043-CV (Tex. App.—Houston [1st Dist.] May 19, 2011). A group of taxing units in Harris County, including the City of Houston, filed suit against a group of taxpayers to collect taxes unpaid on 10.34 acres for the years 1983 through 2003. Of the 10.34 acres, 9.38 acres were actually owned by the taxpayers, while .96 acres, it turns out, were not properly included in the appraisal roll. The taxpayers responded with a general denial and affirmative defenses, including arguments that the petition failed to comply with the Tax Code, that the taxing units did not properly notify the taxpayers of the delinquency, that the assessment of taxes was erroneous based upon the description of the property,

and that the designated parties to the suit have no ownership interest in the properties.

Ultimately, the taxpayers paid the taxes under protest to stop further penalties and interest from accruing and to avoid foreclosure of the properties. The taxpayers then filed a counterclaim for a refund of the taxes, penalties, and interest they paid on the property. After receiving payment, the taxing units nonsuited their claims for delinquent taxes, and the district court realigned the parties, designating the taxpayers as plaintiffs. The taxing units filed a plea to the jurisdiction asserting the district court lacked jurisdiction because the taxpayers failed to exhaust their administrative remedies as required by the Tax Code. The court denied the plea, and the taxing units appealed.

The Supreme Court of Texas has held that “a taxpayer's failure to pursue an appraisal review board proceeding deprives the courts of jurisdiction to decide most matters relating to ad valorem taxes.” *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006). Further, Section 42.09 of the Tax Code provides that the remedies allowed by the Tax Code are exclusive: “Except as provided in Subsection (b) of this section, procedures prescribed by this title for adjudication of the grounds of protest authorized by this title are exclusive, and a property owner may not raise any of those grounds: (1) in defense to a suit to enforce collection of delinquent taxes; or (2) as a basis of a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid.”

On appeal, the parties dispute the applicability of Tax Code Section 42.09 because of the term “property owners.” The taxpayers contend that the exhaustion requirement in that statute is inapplicable to the taxpayers because they do not own some of the property in question, namely the .96 acres improperly included in the appraisal roll. Another section of the Tax Code provides that “[a] property owner is entitled to protest before the appraisal review board the ... determination that the property owner is the owner of the property” TEX. TAX CODE § 41.41(a)(7). The court pointed out that, if this section were read literally as the taxpayers would like, a protest of a determination would be allowed only if the determination is correct and the party challenging the tax is the party who is legally obligated to pay for it. Instead, the court determined that the term “property owner” means the person listed as the property owner in the tax appraisal rolls, and based that determination on prior case law. See *Robstown Independent School District v. Anderson*, 706 S.W.2d 952, 953 (Tex. 1986). Therefore, the court

concluded that the taxpayers were indeed the “property owners” for purposes of Tax Code Section 42.09, and because the taxpayers failed to timely exercise their administrative challenge under that section, the district court never acquired jurisdiction over their claim for a refund unless the exception in Tax Code 42.09(b) applied.

Tax Code Section 42.09(b) allows a person who has not exhausted his administrative remedies to assert an “affirmative defense” that the person did not own the property on which the tax was imposed. The taxpayers claim that because they asserted an affirmative defense of non-ownership, the trial court had jurisdiction over the case because the taxpayers complied with Tax Code Section 42.09. However, the court of appeals held that because the taxing units nonsuited their claims against the taxpayers, the taxpayers’ present lawsuit is a claim for affirmative relief with them as plaintiffs. Thus, the court determined that the district court lacks jurisdiction because the taxpayers did not assert an affirmative defense of non-ownership as required by the Tax Code.

The court of appeals reversed the order of the district court and rendered judgment granting the taxing units’ plea to the jurisdiction.

Governmental Immunity-Tort: *Sullivan v. City of Fort Worth*, No. 02-10-00223-CV, 2011 WL 1902018 (Tex. App.—Fort Worth May 19, 2011). Plaintiff broke her ankle at the Fort Worth Botanic Gardens while attending a wedding. The Plaintiff claimed that the city failed to properly construct, install, inspect, maintain, repair, and light the pathways in the garden; failed to provide handrails or adequate lighting; and failed to warn wedding guests of the nature and condition of the stairs.

The city filed a plea to the jurisdiction, arguing that the Plaintiff’s premises liability cause of action was not an actionable claim because Plaintiff alleged the city was negligent for discretionary decisions for which there is no waiver. Alternatively, the city argued the Plaintiff was engaged in a recreational activity covered by the Recreational Use Statute, under which the city owed the Plaintiff a very limited duty. The trial court granted the city’s plea to the jurisdiction. Plaintiff appealed, arguing she properly alleged a premises liability cause of action under the Tort Claims Act and that the Recreational Use Statute did not apply.

Premises Liability Claim

The Tort Claims Act waives governmental immunity for personal injury caused by a condition or use of real property if the governmental unity would, were it a private person, be liable. TEX. CIV. PRAC. & REM. CODE § 101.021. The Act preserves immunity for claims based on: (1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or (2) a governmental unit’s decision not to perform an action or its failure to make a decision on the performance or nonperformance of an act if the law leaves it to the discretion of the governmental unit. *Id.* § 101.056. With this in mind, the appellate court analyzed each of Plaintiff’s claims:

As to Plaintiff’s claim that the city failed to maintain the Garden, the appellate court held that foliage trimming is a maintenance decision (“operational decision”) for which courts have repeatedly held that governmental immunity is waived under the Tort Claims Act.

As to Plaintiff’s claim that the city failed to install adequate lighting, the appellate court held the city immune for its decision about whether to install lights and where and how many lights to place in the Garden (design decisions). However, the city was not immune from liability for its “operational decisions,” such as the wattage of the bulbs or failure to inspect and replace burned out bulbs.

As to Plaintiff’s claim that the city failed to install safety measures, such as handrails, the appellate court held the city was immune because these claims relate to decisions about the design of the Garden. The city also retained immunity against Plaintiff’s claims that the city failed to provide temporary and portable lighting because those were claims challenging the city’s policy decisions or failure to act where no law requires actions.

As to Plaintiff’s claim that the city failed to warn guests of the condition or nature of the stairs, the appellate court held these claims merely recast the other claims because the Plaintiff did not allege the steps were damaged or in a state of disrepair.

Applicability of Recreational Use Statute

Under the Recreational Use Statute, a landowner who gives a person permission to enter for recreation does not ensure that the premises are safe for that purpose, does not owe the person a greater degree of care than is owed a trespasser, and does not assume responsibility or incur liability for an injury caused by any act of the person allowed on the premises. *Id.* § 75.002(c).

The city argued the Recreational Use Statute applied because: (1) the Garden is a city park; (2) the wedding reception involved a meal and, thus, constituted “picnicking”; and (3) an outdoor wedding is itself a recreation—“an activity associated with enjoying nature or the outdoors.”

The appellate court rejected the city’s arguments, explaining that: (1) under the Recreational Use Statute, the court considers what the actor is doing at the time of the injury rather than the landowner’s intent for the land; (2) the reception did not mutate the event into a picnic; and (3) a wedding is not like the sports and hobbies listed in the definition of “recreation.”

Duty Owed as to Premises Liability Claim

Thus, the appellate court was left with the issue of what duty the city owed to Plaintiff. The appellate court found that Plaintiff paid for use of the premises and thus, was an invitee. As a result, Plaintiff only had to show the city knew or should have known of the risk from the low lighting conditions. The city waived any complaint as to this issue because the City never argued that Plaintiff failed to allege a premises liability cause of action under the invitee standard.

Conclusion

The appellate court affirmed the plea to the jurisdiction in regard to those claims challenging the design of the garden. And, because the Plaintiff’s claim that the city knew or should have known of the risk from the low lighting was uncontested, the appellate court remanded the case to the trial court for further proceedings as to those claims that involved the operational decisions of the city.

Administrative Hearings: *City of Waco v. Texas Commission on Environmental Quality, No. 03-09-00005-CV (Tex. App.—Austin)*. In this case, the City of Waco appealed a district court ruling that upheld an order by the Texas Commission on Environmental Quality (TCEQ). The TCEQ order granted an amendment to a permit authorizing the expansion of an existing concentrated animal feeding operation (CAFO) permit to the O-Kee Dairy, located in the North Bosque River watershed. It also denied the city’s request for a contested-case hearing on the question.

In this type of permit case, the TCEQ is authorized to grant a contested-case hearing request only when the request is made by certain parties, including an “affected person.” This term is defined as a person with a “personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.” TEX. WATER. CODE § 5.115. The TCEQ also created factors to be considered when determining “affected person” status, including: (1) whether a reasonable relationship exists between the interest claimed and the activity regulated; (2) likely impact of the regulated activity on the health and safety of the person, and on the use of the property of the person (a term that includes a city under the Code Construction Act); (3) the likely impact of the regulated activity on use of the impacted natural resource by the person; and (4) for governmental entities, their statutory authority over or interest in the issues relevant to the application. 30 TEX. ADMIN. CODE § 55.203(c); TEX. GOV’T CODE § 311.005(2) (defining “person” as including a “government or governmental subdivision or agency.”) Governmental entities with authority over issues raised by the application may also be considered “affected persons” under the agency’s guidelines. 30 TEX. ADMIN. CODE § 55.203 (b).

The city filed a hearing request invoking the right of an “affected person” to request a contested-case hearing both on its own behalf and as *parens patriae* for its citizens, which it believed “identif[ied] the person’s personal justiciable interest affected by the application.” 30 TEX. ADMIN. CODE § 55.201(d)(2), (4). The city asserted, among other issues, concerns about the increasing cost and difficulty of treating lake water for odor and taste before use as drinking water due to algal blooms that the city believed were related to CAFO pollution upstream.

TCEQ's executive director disputed the City's status as an "affected person," but conceded that: (1) the city had raised several disputed and material issues or sets of issues that would be referable to the State Office of Administrative Hearings (SOAH); (2) the city has an interest in maintaining water quality in Lake Waco; and (3) there was a reasonable relationship between the interest the city claimed in its request and the activity regulated. *Id.* § 55.203(c)(1). The executive director also argued that the city's claim to affected-person status would imply that "any city in Texas can challenge any permit upstream of their drinking water supply, without regard to distance, through the [contested-case hearing] process." The TCEQ did not grant the city's hearing request, and approved the permit amendment. The city sought judicial review, the district court affirmed the TCEQ's order in full and the city appealed.

The only issue in this case was TCEQ's failure to grant the city status as an "affected person." An agency's determination of statutory language is ordinarily given deference. To be an "affected person" for purposes of a contested-case hearing, a city has to meet the constitutional requirements for standing. See TEX. WATER CODE § 5.115(a); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990); *State v. Young*, 265 S.W.3d 697, 705–707 (Tex.App.—Austin 2008, pet. denied). Standing is established by showing: (1) an "injury in fact" from the issuance of the proposed permit of a "legally protected interest" that is both "concrete and particularized" and "actual or imminent"; (2) that the injury would be "fairly traceable" to the issuance of the permit as proposed; and (3) that it is likely, and not merely speculative, that the injury would be redressed by a ruling favorable to the city regarding the permit. See *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (quoting *Raines v. Byrd*, 521 U.S. 811, 818–819 (1997), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

The court held that the city has standing as an "affected person." The city showed an injury in fact through a legally protected interest in the escalating

costs of treating the water affected by the permit. The court rejected TCEQ's argument that, because the city can externalize the increasing cost of water treatment through higher taxes and utility rates, its economic interests were the same as that of the general public. The court also held that the factors created by the TCEQ rule did not narrow or redefine the definition of an "affected person" under Water Code Section 5.115(a), but were merely factors to be *considered* when determining whether the Water Code's requirements have been met. See 30 TEX. ADMIN. CODE § 55.203(a), (c). The only relevant question is whether there would be some impact based on the permit on the city's personal justiciable interest. See *United Copper*, 17 S.W.3d at 802-804; *HEAT*, 962 S.W.2d at 295. Thus, if the TCEQ denied the city's hearing request based on one of its own factors created by rule, it acted arbitrarily by relying on a factor irrelevant to the city's standing to request a hearing. See *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994); *State Farm Lloyds*, 260 S.W.3d at 246.

Most importantly, the court held that the TCEQ abused its discretion in denying the city's hearing request based on an implied determination of some of the same fact disputes on which the city, if an affected person, would be entitled to a contested-case hearing. The Supreme Court of Texas has concluded that, where disputed jurisdictional facts overlap with the merits of claims or defenses, a trial court's discretion to dismiss a claim at a preliminary stage (unless there is conclusive or undisputed evidence negating the challenged jurisdictional fact) is severely limited. See *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–228. Likening the TCEQ's discretion to that of a trial court, the court held that the TCEQ's discretion would also be limited where questions relevant to standing and the merits of a permit application overlap. Under *Miranda's* reasoning, the court concludes, if "affected person" status depends on the same disputed facts as the merits of the permit application in question, the disputed facts must be determined at a contested-case hearing. In this case, there was no uncontroverted or conclusive evidence presented by the TCEQ, and thus the agency abused its discretion in deciding the disputed facts that overlapped between the city's affected-person status and the merits of the permit amendment without a contested-case hearing.

The court reversed and remanded the case to the TCEQ for further proceedings consistent with the opinion.

Governmental Immunity: *City of Laredo v. Varela*, No. 04-10-00619-CV (Tex. App.—San Antonio May 11, 2011) (mem.op.). The court of appeals dismissed the case for lack of subject matter jurisdiction because there was no evidence that the officer's actions in the vehicle accident showed a conscious indifference or reckless disregard for the safety of others.

Takings: *Garrett Operators, Inc. v. City of Houston*, No. 01-09-00946-CV (Tex. App.—Houston [1st Dist.] May 12, 2011). The court of appeals denied the sign owner's takings claim because not allowing an action to be taken without a permit is not sufficient to show a takings claim.

Governmental Immunity-Tort: *City of Denton v. Paper*, No. 02-10-00239-CV (Tex. App.—Fort Worth May 19, 2011) (mem.op.). The court of appeals held that a premises defect of a pencil length deep sunken area of a street caused by an excavation by the city is a special defect and therefore is proof of possible city liability under the Tort Claims Act.

Governmental Immunity-Tort: *City of McAllen v. Corpus*, No. 13-10-00670-CV (Tex. App.—Corpus Christi May 19, 2011) (mem.op.). The court of appeals held that opening a car door and allowing bees to fly in and sting someone is not a "use" of motor driven equipment sufficient to invoke the Tort Claims Act.

Land Use: *Stephens v. City of Reno*, No. 06-10-00113-CV (Tex. App.—Texarkana May 26, 2011). The court of appeals held that the zoning provisions of the City of Reno could reasonably be held to apply to a dirt mining business because the owner had not provided sufficient evidence that the business existed before the ordinance was enacted.

Procedural: *City of McAllen v. McAllen Police Officers' Union*, No. 13-10-00609-CV (Tex. App.—Corpus Christi June 2, 2011) (mem.op.). The court of appeals held that a temporary restraining order was void because no trial date was set as required by Texas Rule of Civil Procedure Rule 683.

Land Use: *BMTP Holdings, L.P. v. City of Lorena*, No. 10-09-00146-CV (Tex. App.—Waco June 3, 2011) (op. on rehearing). The court of appeals held that Local Government Code Chapter 212 moratoriums do not apply to development or lots if the development was approved for development by the city before the moratorium took effect.

Personnel: *Cooper v. Texas Workforce Commission and City of Dallas*, No. 05-10-00513-CV (Tex. App.—Dallas June 8, 2011). The court of appeals held that the former employee was not eligible for unemployment benefits because he was receiving pension benefits that disqualified him for unemployment benefits.

Governmental Immunity-Tort: *City of Houston v. Esparza*, No. 01-11-00046-CV (Tex. App.—Houston ([1st Dist.] June 9, 2011) (mem.op.). The court of appeals held that the city could not be sued for a tort after the employee had been sued under the election of remedies provision, Texas Civil Practices and Remedies Code Section 101.016, of the Tort Claims Act.

Governmental Immunity-Tort: *City of Dallas v. Hughes*, No. 05-10-00511-CV (Tex. App.—Dallas June 14, 2011). The court of appeals held that the plaintiff, who was injured by a wooden city trail, had not made his claim under the Tort Claims Act and the Recreational Use Statute because: (1) picking the wood was a discretionary decision and there was no evidence that it was a defective choice; (2) the city did not have notice of a dangerous condition; (3) there was no evidence of an extreme degree of risk that the city ignored; and (4) the city did not need recreational use warning signs.

Sexually Oriented Business: *D. Houston, Inc. v. City of Houston*, No. 14-10-00384-CV (Tex. App.—Houston [14th Dist.] June 28, 2011) (mem.op.). The court of appeals upheld the hearing examiner's finding not to extend the sexually oriented business's amortization schedule because the city presented substantial evidence that an extension was not warranted under the city's SOB ordinance.

Governmental Immunity-Tort: *City of Austin v. Albarran*, No. 03-10-00328-CV (Tex. App.—Austin June 23, 2011) (mem. op.). The court of appeals held that there was a question of whether an officer's decision on whether to use lights or sirens is a discretionary or ministerial decision under the official immunity doctrine, potentially subjecting the city to liability.

Utilities: *City of El Paso v. Public Utility Commission of Texas*, No. 03-08-00577-CV (Tex. App.—Austin July 1, 2011) (op.). The court of appeals upheld the trial court's decision capacity costs because its decisions were reasonable as based on interpretation of administrative rules and statutes.

Personnel: *City of San Antonio v. Caruso, et al.*, No. 04-10-00894-CV (Tex. App.—San Antonio June 15, 2011). The court of appeals held that Texas Government Code Section 180.006 waives immunity for any monetary damages allowed by Chapters 141, 142, and 143 of the Local Government Code, even if the provision in one of those chapters does not specifically mention back pay.

Takings: *City of Dallas v. VSC, LLC*, No. 08-0265 (Tex. July 1, 2011). The Supreme Court held that a property owner does not have a takings claim where a statutory remedy is available to the person. A person who has an interest in property seized by the police or other government official has a remedy under Chapter 47 of the Texas Code of Criminal Procedure.

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. This double issue will include opinions issued between May 11th and July 10th.

Opinion No. GA-0862 (Firearm Discharge): Concludes that Section 229.002 of the Texas Local Government Code does not prohibit a Type A general-law municipal ordinance from regulating the discharge of a firearm or other weapon in an area that is within the municipality's original city limits.

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



Legislative UPDATE



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