

TCAA NEWS

November 2011

News and Updates

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Inside this issue:

- News and Updates
- TCAA Legal Defense Program
- Municipal Attorney Job Openings
- Recent Texas Cases of Interest to Cities
- Recent Attorney General Opinions of Interest to Cities



Lori Gillespie, a staff attorney for the Texas Municipal League Inter-governmental Risk Pool and a great friend to city attorneys all over the state, passed away on Friday, October 28, 2011, after a hard-fought battle with cancer. Lori obtained her undergraduate degree from the University of Texas, and worked at the League as a paralegal before serving as a Sergeant in the Judge Advocate General's Corp of the Texas Army National Guard and going on to earn her J.D. from the University of Houston Law Center. While attending law school, Lori was an intern for Justice Jack Hightower of the Texas Supreme Court. She was involved in the community through her service with Bastrop County Victim Services and was particularly fulfilled by her involvement with the deaf and hard of hearing, including providing legal translation services for members of Austin's deaf community. A memorial service was held Wednesday, November 2, 2011, at First Presbyterian Church in Luling, Texas. Donations can be made to the American Cancer Society or to Hospice Austin at 4107 Spicewood Springs Road, Suite 100, Austin, Texas 78759. Lori was a great attorney, work colleague, and mentor, but above all she was a great friend. She will truly be missed.



Need CLE Hours? The 2011 TCAA Fall Conference Seminar Materials and Videos Available Online

To view the 2011 TCAA Fall Conference Video, go to <http://www.tcaaseminars.org/>. (Use the case-sensitive password "FreeCLE" to view the sessions.) For seminar materials, including papers on such topics as group home regulation, redistricting, and more, visit the Texas City Attorneys Association Web site at www.texascityattorneys.org, click on "Seminar Materials," and then click on "Fall Conference 2011." Videos and materials from past TCAA conferences are also available on the site.



As a supplement to TCAA News, please check the TML Legislative Update Newsletter at: http://www.tml.org/legis_update_current.asp and TML's Connect News Service at: <http://www.connectnews.org/>



Speakers needed for TCAA's 2012 South Padre Island Conference to be held on June 6-8, 2012: Please submit your ideas by e-mail to shouston@tml.org by December 30, 2011.

Legal Defense Program

TCAA, in conjunction with the Texas Municipal League, files amicus briefs in support of cities on many different cases. To keep up to date with the status of those briefs, 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>.



Riley Fletcher Basic Municipal Law Seminar to be Live Streamed!

As another benefit to TCAA members, the 2012 Riley Fletcher Basic Municipal Law Seminar will be live streamed. The seminar will take place on February 24, 2012, at the Texas Municipal Center in Austin, Texas. But you will also be able to view it online if you cannot make it down to Austin. Look for more information in next month's newsletter.



Julie Fort Elected as Chair of the Government Law Section of the State Bar of Texas

Julie Fort, a TCAA member, was recently elected to serve as Chair of the Government Law Section of the State Bar of Texas for the 2011-2012 year. More than 8,000 lawyers in Texas self-identify themselves to the State Bar of Texas as practicing government law. Membership in the section continues to grow as benefits of membership increase. To learn more, please visit www.txgovernmentlaw.org.

"More than most other areas of the law, practicing government law is a calling and a public service and I am proud to serve as the Chair of the Government Law Section," says Ms. Fort. "The purpose of the Government Law Section is to enhance the role and skills of lawyers who serve federal, state, and local governments and are concerned with providing services to the public generally rather than to a single client."

Ms. Fort's municipal law practice is based in the Richardson, Texas office of McKamie Krueger, LLP. She has been practicing law for 16 years. Other recent accomplishments include being named by *D Magazine* as one of the Best Land Use Law attorneys in Dallas in 2011 and 2009.

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

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

LisTCAA

Need an easy way to reach out to other municipal attorneys and tap into their experience and expertise? Join List TCAA by going to www.texascityattorneys.org.

LisTCAA is a Web-based communication system that is intended to facilitate the direct exchange of information between member attorneys. It should be used to ask questions, share information, and collaborate on municipal law issues.

We encourage you and others to join this complimentary service and participate – whether you have a question, an answer, or just want to stay connected.

For questions or assistance in signing up, please contact Scott Houston at shouston@tml.org or 512-231-7464.

Recent Texas Cases of Interest to Cities

Hotel Occupancy Tax: *City of Houston v. Hotels.com L.P.*, No. 14-10-00349-CV (Tex. App.—Houston [14th Dist] October 25, 2011) (mem. op.). In 2007, the City of Houston (“city”) and the Harris County-Houston Sports Authority (“authority”) sued several online travel companies (“OTCs”) to recover unpaid hotel occupancy taxes due on the difference between the amount consumers paid to OTCs and the lesser amount that OTCs paid to hotels. Both the city and the authority also alleged that the OTCs conspired to evade hotel occupancy taxes and converted taxes that they actually collected. With regard to the city’s claims, the OTCs moved for summary judgment on the grounds that the city’s ordinance only provided for the taxation of those amounts actually paid to the hotels, and the city had no evidence that the taxes on those amounts had not been remitted. The trial court granted summary judgment, and the city appealed.

In its first issue on appeal, the city argued that local hotel occupancy taxes apply to the full amount paid by the OTCs’ customers. The court examined the language of the ordinance authorizing a hotel occupancy tax to be charged by the city, which provided as follows: “There is hereby levied within the corporate limits of the city a tax upon the cost of occupancy of any room furnished by any hotel where such cost of occupancy is at the rate of \$2.00 or more per day, such tax to be equal to seven percent of the consideration paid by the occupant of such room to such hotel.” HOUS., TEX., CODE OF ORDINANCES §44-102 (1991). The court wrote that it must construe any ambiguous tax statute strictly against the taxing authority and liberally in favor of the entities sought to be taxed. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 & n.23 (Tex. 2008). After evaluating the language used in the ordinance, the court determined that one can reasonably interpret the ordinance as imposing a tax on the amount paid to the hotel on the occupant’s behalf for the right to use a room ordinarily used for sleeping. Specifically, the court concluded that, in the context of the case, the phrase “cost of occupancy” in the city’s ordinance meant the discounted rate paid by the OTCs to the hotel instead of the higher rate the consumer paid to the OTCs. Because the city did not produce evidence that the local hotel occupancy taxes on the discounted rate paid by the OTCs to the hotel were not remitted, the court overruled the city’s first issue, affirming the trial court’s judgment.

In its second issue on appeal, the city contended that material fact issues precluded summary judgment. The court of appeals disagreed. In its motion for summary judgment on the conversion cause of action, the OTCs asserted that the city presented no evidence that it was entitled to possession of the disputed funds, that the OTCs exercised unlawful and unauthorized control over such funds, and that the city demanded such funds, as must be shown with a conversion claim. *See Hunt v. Baldwin*, 68 S.W.3d 117, 131 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The city didn’t respond to this portion of the OTCs’ motion for summary judgment, and because the court of appeals held that the disputed funds were not subject to local hotel occupancy taxes, the city was therefore not entitled to possess the disputed funds. Consequently, the court determined that the OTCs’ control of the funds was not unlawful, and it affirmed the summary judgment as to the city’s conversion claim.

Governmental Immunity: *De Leon v. City of El Paso*, No. 08-10-00348-CV (Tex. App.—El Paso October 26, 2011). In this case, several men sued the City of El Paso (“City”), seeking declaratory and injunctive relief stemming from an incident in which an El Paso police officer threatened to arrest two of the men for kissing at a restaurant, stating that homosexuality was illegal. The men sued the City, alleging violations of Texas Constitution Article 1, Section 3, titled “Equal Rights.” They argued that the officer violated their rights under the Constitution by publicly humiliating them based on their sexual orientation, by threatening to arrest them under Texas Penal Code Section 21.06, which the United States Supreme Court had declared unconstitutional (see *Lawrence v. Texas*, 539 U.S. 558 (2003)), by failing to enforce the City’s own anti-discrimination ordinance, and by refusing to file a police report of the incident at the restaurant. They further argued that the City violated their rights under Article I, Section 3 by choosing not to train city police officers regarding the City’s anti-discrimination ordinance or regarding the fact that Texas Penal Code 21.06 had been declared unconstitutional, and that this training failure led to the officer’s behavior. The City argued that the men did not have standing, as they experienced no concrete, particularized injury; that the allegations amounted to a negligence claim, for which there was no waiver of constitutional immunity; and that the controversy was not ripe.

The trial court granted the City's pleas to the jurisdiction, but filed no conclusions of law. The court found that because the men's claims stemmed from violations of the Texas Constitution, a suit for equitable relief for such violations would not be barred by governmental immunity. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *City of El Paso v. Bustillos*, 324 S.W.3d 200, 205 (Tex. App.—El Paso 2010, no pet.). Thus, the court reversed the order of the trial court granting the city's pleas to the jurisdiction and remanded the case to the trial court for further proceedings.

Governmental Immunity-Contract: *Sharyland Water Supply Corporation v. City of Alton*, No. 09-0223 (Tex. October 21, 2011). The City of Alton (City) and Sharyland Water Supply Corporation (Sharyland) entered into a Water Supply Agreement under which Sharyland provided water to the City. Subsequently, the City installed parts of its sewer main parallel to Sharyland's water main. Sharyland sued the City, and its contractors, for negligence and breach of contract because of Sharyland's concerns about the threat of contamination to its potable water supply. In addition, Sharyland requested a declaratory judgment that Texas Administrative Code Chapter 30, Section 317.13—relating to the installation of sewer lines in relation to waterlines—applied to the case. A jury found in favor of Sharyland. The court of appeals disagreed and rendered a take-nothing judgment against Sharyland, except as to its claim against the City for attorney's fees related to its declaratory judgment action. The Texas Supreme Court (Court) held that Sharyland could not recover against the City and that attorney's fees could not be awarded.

Sharyland sought recovery against the City under Local Government Code Chapter 271. Local Government Code Section 271.152 provides a limited waiver of immunity for local governmental entities that enter into certain contracts. Local Government Section 271.153 limits the recoverable damages. Sharyland sought money for the alleged injuries and costs to repair its water system. The Court held that those types of damages were not contemplated in the Water Supply Agreement and were not the type of damages authorized under Section 271.153 at the time the suit was initiated (e.g., Sharyland was not seeking a "balance due and owed" under the contract).

Sharyland also argued that the City had waived its immunity (1) by its counterclaim that the Water Supply Agreement was void; and (2) by its conduct (an equitable waiver). As to the counterclaim, the

Court concluded there was no waiver because the City's counterclaim was gone; it was barred by Section 1926(b) of Title 7 of the United States Code. The Court refused to recognize waiver by conduct in a breach of contract suit against a governmental entity.

Finally, the Court concluded that Sharyland could not recover attorney's fees for the City's breach of contract because damages were not recoverable under Local Government Code Chapter 271. Moreover, Sharyland could not recover attorney's fees on its declaratory judgment claim because the declaratory action was merely a subset of its larger breach of contract claim. *More information about this case will be presented in the next TCAA Newsletter.*

Governmental Immunity-Contract: *City of Paris v. Abbott*, No. 06-11-00065-CV (Tex. App.—Texarkana October 21, 2011). In this case, the court of appeals concludes that a city may not waive its immunity under Chapter 271 of the Local Government Code by conduct alone.

Abbott purchased real property within the City of Paris with the intention of using it as a mobile home park based upon his belief that the city manager, Kevin Carruth, had made a representation that the entire property was approved for nonconforming use, so long as it continued to be used as a mobile home park. Abbott submitted a preliminary plat outlining the locations of new roadways, driveways, trailer pads, and utilities to the City's planning and zoning department, after which the department informed him that he would have to get the property rezoned from a commercial category to single family dwelling No. 3.

Abbott sued the City and Carruth, alleging multiple claims, after which Abbott submitted an application to the City for a building permit, which was denied. The City and Carruth filed a plea to the jurisdiction, which the trial court granted with respect only to Abbott's claims filed under the Texas Tort Claims Act. The trial court denied the City's plea to jurisdiction relating to Abbott's claims for "inverse condemnation, for violations of procedural and substantive due process and equal protection and for breach of contract and declaratory relief, without prejudice to Defendants' right to reurge their Plea as to these claims."

The most important issue in the case is that the court of appeals dismissed Abbott's claim for breach of contract. Prior to its annexation by the City, about half of the property was used as a mobile home and travel trailer park and the other part was vacant. Abbott became interested in purchasing the entire tract with the

goal of expanding the mobile home park to encompass the full acreage. After Abbott notified the city of his plans and had consulted with city officials, Carruth penned a May 8, 2008, letter to Abbott, which included the following:

According to the zoning records of the City of Paris the above-referenced property is currently zoned Commercial (C); however, it is my understanding that there is a mobile home park on the property which has been continuously operated since originally opening several years ago. Unless its use as a mobile home park ceases in its entirety it is considered a non-conforming use by the City.

Notwithstanding any current moratoriums which may affect the property and as long as the property continues to be used as a mobile home park, its non-conforming use will be allowed. Further, this right to non-conforming use will transfer to you if you buy the property, and will be transferable by you to a new owner of the property.

Lastly, your proposed use of the property to construct single or multifamily dwellings from permanent or portable intermodal steel building units will be allowed under the current zoning of the property, assuming the intermodal units comply with applicable building codes.

The letter was signed “Kevin Carruth City Manager.” Abbott believed this letter established a contract between him and the City. In reliance upon the letter, Abbott purchased the property and began planning the expansion of the mobile home park. Abbott sent a preliminary plat to the department, which detailed the proposed locations of roadways, driveways, trailer pads, and utilities. He made arrangements with utility providers for the installation of electrical, water, and sewer services, and also purchased twenty mobile homes in expectation of the plat approval.

His suit alleged, among others claims, the breach of contract claim. His suit stems from the department's denial of his building permit, an action which he argues established a breach of Carruth's letter. In other words, Abbott's pleadings contained statements that the city waived immunity through its conduct. A 1997 Texas Supreme Court opinion entitled *Federal Sign v. Texas Southern University*,

, contains a footnote which seemingly encourages the possibility of waiver of immunity by conduct. 951 S.W.2d 401, 408 n. 1 (Tex.1997). There, the court wrote that there could be “circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts.” *Id.* Citing *Federal Sign* and various courts of appeals opinions that followed, the argument of waiver of immunity from suit based on conduct was raised in *Little-Tex*. *Little-Tex*, 39 S.W.3d at 595. *Little-Tex* acknowledged *Federal Sign* and its progeny, but expressly rejected the waiver by conduct doctrine because “the situation ha[d] changed” due to the Legislature's enactment of “a dispute-resolution procedure to resolve certain breach-of-contract cases against the State” as codified in Chapter 2260 of the Texas Government Code. *Id.* at 595, 597. That chapter requires alternative dispute resolution as a prerequisite to presenting breach of contract claims in court.

While the State's sovereign immunity was at issue in *Little-Tex*, the city's governmental immunity is at issue in this case. In order to curb the application of *Little-Tex* from foreclosing suit filed by plaintiffs with claims against local governmental entities (who were not included in Chapter 2260's waiver of immunity), the Legislature treated cities somewhat differently, enacting Section 271.151 of the Texas Local Government Code “to loosen the immunity bar.” Whereas, under *Little-Tex*, 39 S.W.3d at 598, “the State does not waive its immunity from a breach-of-contract action by accepting the benefits of a contract,” a local governmental entity authorized by statute or the State constitution to enter into a contract waives governmental immunity to suit for the purpose of adjudicating a claim for breach of a contract subject to the provisions of Chapter 271 of the Texas Local Government Code.

The City asserts that Carruth's letter was not a contract with Paris, there was no consideration for any agreement, and Carruth was not authorized to bind the governmental entity. However, “[t]he relevant inquiry is whether the Agreements entail the provision of ‘goods or services’ to the” local governmental entity. Although Chapter 271 provides no definition for the term “services,” the term is generally “broad enough to encompass a wide array of activities. In ordinary usage the term ‘services’ has a rather broad and general

meaning,” and “[i]t includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed.” However, there must be some obligation to perform. Abbott's pleadings neither suggest that he was obligated to perform any service for the city, nor that he was to provide any goods to the city. Therefore, the court of appeals found that Caruth's letter was not a contract for goods or services.

The court of appeals concluded that the Texas Supreme Court has “consistently deferred to the Legislature to waive ... immunity from suit, because this allows the Legislature to protect its policymaking function.” *Tooke*, 197 S.W.3d at 332. Following the logic in *Little-Tex*, Chapter 217 also prevents waiver of governmental immunity through conduct.

Takings: *Millwee-Jackson Joint Venture v. Dallas Area Rapid Transit*, No. 05-08-01164-CV (Tex. App.—Dallas October 31, 2011). This case is – in essence – an inverse condemnation claim. Those with a keen interest in the law of inverse condemnation should carefully review the opinion. Much of the trial court’s judgment in favor of the Dallas Area Rapid Transit Authority (DART) was reversed by the court of appeals. Of note, the court of appeals reviewed items related to the limitations period for a claim of inverse condemnation and the fact that the disposition of a landowner's investment-backed expectations takings claims is not contingent upon a favorable ruling on impairment of access takings claim. While those items were remanded to the trial court, the court of appeals concluded that Millwee did not suffer a material and substantial deprivation of access to property as a result of DART’s activities.

Millwee is a landowner who brought takings and nuisance action against DART, alleging he was entitled to compensation based on interference with his right to develop property. The case arose out of Millwee’s 1981 purchase of property in Dallas. Millwee had a billboard on the property, but intended to build a hotel or office building at some point.

Millwee entered into a purchase contract with a developer, who intended to build a 300–room hotel on the property; however, the purchase did not close. He claimed that he “missed the development cycle to construct a commercial building” on the property and was “forced to put [his] development plans on hold.” In 2002, DART began construction activities near Millwee's property that resulted in a dirt embankment that, Millwee claimed, blocked access to his property. According to Millwee, DART prevented physical or legal access from the property to a public

street. Vehicles and pedestrians were required to trespass on adjacent properties to access Millwee's property. Although Millwee acknowledged that an access easement was executed at the City's behest, Millwee claimed “safe and reasonable access” was not available to his property. Following an evidentiary hearing, the trial court entered final judgment ordering that Millwee take nothing on his inverse condemnation claims.

Millwee argued that the trial court erred in granting DART's motion for summary judgment. Specifically, he argued that fact issues existed regarding the extent and length of time DART restricted his access to his property. He claimed his access was totally blocked in November 2002, April–June 2004, April 2007, and October–November 2007. Whether access to property has been materially and substantially impaired is a threshold question of law reviewed de novo. In determining whether diminished value due to impaired access is compensable, the court first looked to whether other access points remain after the taking and whether those access points are reasonable.

The Supreme Court of Texas has rejected impairment of access claims based on speculative or hypothetical uses of remainder property. “While condemned property may be appraised at its highest and best use, remaining property on which there are no improvements and to which reasonable access remains is not damaged simply because hypothetical development plans may have to be modified.” Restrictions on access that result only in increased circuitry of travel are not compensable. Moreover, access is not materially and substantially impaired merely because other access points are significantly less convenient.

A partial, temporary disruption of access to property is not sufficiently “material and substantial” to constitute a compensable taking. Here, the evidence showed the property at issue had been used for the placement of billboards since Millwee purchased the property. The record shows the billboard companies were always able to service their billboards, though for some period of time they had to enter adjoining property to access Millwee's property. Based on that evidence, the court of appeals concluded that the evidence failed to establish, as a matter of law, that Millwee suffered a material and substantial deprivation of access to his property.

Governmental Immunity—Tort: *Amadi v. City of Houston*, No. 14-10-01216-CV (Tex. App—Houston [14th Dist] October 27, 2011)(on reconsideration en banc). An en banc court of appeals reviewed the meaning in Section 101.016(b) of the Texas Civil Practices and Remedies Code, part of the Texas Tort Claims Act. Section 101.106(b) states:

(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.

The plaintiff in this case sued both the city and the employee who caused her injuries. The trial court held that this meant the city was out of the case and granted the city's plea to the jurisdiction. The court of appeals held that the express waiver of governmental immunity in the Tort Claims Act is the city's "consent" to suit. The court reversed the trial court's order granting the city's plea to the jurisdiction and reversed and remanded the case to the trial court.

Governmental Immunity-Tort: *City of Houston v. Rodriguez*, No. 14-11-00136-CV (Tex. App—Houston [14th Dist] November 3, 2011) (substitute op. on reh'g). The court of appeals issued a new opinion in this case based on its October decision in *Amadi v. City of Houston*, No 14-10-01216-CV (Tex. App.—Houston [14th Dist.] October 27, 2011). In *Amadi*, the court held that a city "consents" to suit when it is involved in a Texas Tort Claims Act case. In this way, a plaintiff does not lose his/her right to sue the city under Texas Civil Practice and Remedies Code Section 101.106 simply because both the city and the employee are sued. The court used this reasoning in its new opinion in *Rodriguez* and held that the plaintiff's tort claim could go forward even though she had originally sued both the city and the employee.

Public Information Act: *Bonner v. City of Burleson*, No. 10-11-00060-CV (Tex. App—Waco November 2, 2011) (mem. op. on reh'g). The court of appeals held that Bonner was not a "requestor" under the Public Information Act under Texas Government Code Section 552.028 because he is a prisoner and the other person who made the request was not his attorney.

Employment Discrimination: *Wright v. City of Houston*, No. 01-10-00941-CV (Tex. App—Houston [1st Dist] October 27, 2011) (mem. op.). The court of appeals upheld the trial court's grant of the city's motion for summary judgment because the plaintiff did not attack all independent grounds for the city's summary judgment.

Governmental Immunity—Tort: *City of Webster v. Myers*, No. 01-10-01015-CV (Tex. App—Houston [1st Dist.] October 27, 2011). The court of appeals held that the plaintiff had sued both the city and its employees for the same claims under the Tort Claims Act, and therefore the trial court should grant the city's motion to dismiss the employees from the suit under Texas Civil Practices and Remedies Code Section 101.106(e).

Civil Service: *City of Laredo v. Buenrostro*, No. 04-10-00890-CV (Tex. App—San Antonio October 26, 2011). The court of appeals upheld the civil service commission's decision in favor of the city because there was substantial evidence to back up the commission's decision.

Governmental Immunity: *Rolling Plains Groundwater Conservation District v. City of Aspermont*, No 08-0591 (Tex. October 21, 2011) (per curiam). This decision from the Supreme Court of Texas supported the decision of the lower court, holding that the groundwater district's claim for damages against the City, which included past due fees, penalties, and costs based on water transferred from the district to the City, would result in the payment of retroactive monetary damages by the City and thus governmental immunity barred the claim. The Supreme Court granted the petition for review and affirmed the court of appeal's judgment without hearing oral argument.

Governmental Immunity: *City of Dallas v. Dallas Black Fire Fighters Association*, No. 05-11-00165-CV (Tex. App—Dallas October 20, 2011). The court of appeals held that Rule 202 of the Code of Civil Procedure does not by itself waive a city's governmental immunity, but that the underlying claim on which the rule is trying to be used must be reviewed. In this case, the issue was whether a potential breach of a meet and confer agreement might be sufficient to waive governmental immunity. The court held that the plaintiffs had not given sufficient information to show that the city's governmental immunity was

waived by the meet and confer agreement or under Local Government Code Section 147.007, and thus remanded the case to the trial court so the plaintiffs could amend their petition.

Drug Paraphernalia Regulation: *City of Corpus Christi v. Maldonado*, No. 13-11-00171-CV (Tex. App—Corpus Christi October 20, 2011). The court of appeals held that: (1) the plaintiffs did have subject matter jurisdiction to bring suit against a criminal ordinance regulating synthetic marijuana and paraphernalia because it was potentially unconstitutional and dealt with a vested property right; and (2) the temporary injunction against the ordinance should be dissolved because the trial court did not show how the enforcement of the ordinance would cause irreparable harm to the plaintiffs.

Personnel: *City of Galveston v. Galveston Municipal Police Association*, No. 14-11-00192-CV (Tex. App—Houston [14th Dist] October 18, 2011) (mem. op.). The court of appeals held that the plaintiffs' labor claims were moot because the issue in question had been decided, the person whose threats had been the basis of the plaintiffs' complaints had retired from the city, and new threats had not been made.

Worker's Compensation: *Johnson v. City of Belaire*, No. 14-10-00757-CV (Tex. App—Houston [14th Dist] October 13, 2011). The court of appeals held that Johnson could bring a tort claim against the city because there is insufficient proof that he was covered by the city's worker's compensation policy and therefore it was unclear whether his claim was barred by the exclusive remedy provision of the worker's compensation statutes.

Jurisdiction: *Town of Flower Mound v. Mockingbird Pipeline, L.P.*, No. 02-10-00069-CV (Tex. App—Fort Worth October 13, 2011). The court of appeals held that there cannot be interlocutory appeals from statutory probate courts under Section 51.014(a) of the Texas Civil Practices and Remedies Code.

Whistleblower's Act: *Leyva v. Crystal City*, No. 04-11-00113-CV (Tex. App—San Antonio October 12, 2011). The court of appeals held that a former employee does not have to initiate a grievance before filing a whistleblower claim if the city does not have a post employment grievance policy in place. The court remanded the case to the trial court to make the determination of whether the city's grievance policy applied to former employees. *More information regarding this case will be presented in the next TCAA Newsletter.*

Recent 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-0887 (Housing): Concludes that Local Government Code subsection 392.005(b) authorizes, but does not itself require, a housing authority to agree to reimburse a municipality, county, or political subdivision for the improvements, services, or facilities provided to the housing authority. The Attorney General's office declined to answer whether a housing authority may be required to do so under a separate law or contractual arrangement.

Opinion No. GA-0890 (Property Tax): Concludes that under section 11.231, Texas Tax Code, an entity that is engaged primarily in performing one of the section's listed economic development functions, as determined by the chief tax appraiser, is a "nonprofit community business organization" that qualifies for the property tax exemption set forth in the section.

Please contact Scott Houston, TCAA General Counsel, with your news, questions, and/or comments by e-mail at legalgovt@tml.org or by phone at 512-231-7400.

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