

# TCAA NEWS

October 2011

## News and Updates

Volume 6, Issue 8

### *Inside this issue:*

- News and Updates
- TCAA Fall Meeting
- Article: Fifth Circuit Decides that Sidewalks Are Services Under the ADA and the Rehabilitation Act
- TCAA Legal Defense Program
- Recent Texas Cases of Interest to Cities

### **Geoffrey M. Gay Earns IMLA's Prestigious Marvin J. Glink Award**

Mr. Gay, a principal in the firm of Lloyd Gosselink and Chair of the Firm's Energy and Utility Practice Group, received the International Municipal Lawyers Association's prestigious Marvin J. Glink Private Practice Local Government Attorney Award in honor of his commitment to helping Texas cities through effective negotiations and by saving Texas cities millions of dollars. The award was presented at the 76<sup>th</sup> Annual IMLA Conference in Chicago on September 13.

### **Jeanene McIntyre Earns IMLA's Prestigious Joseph Mulligan Award**

Ms. McIntyre, assistant city attorney for the City of Arlington, received the International Municipal Lawyers Association's prestigious Joseph Mulligan Award for Outstanding Service by a Local Government Attorney Award in honor of her significant and surpassing achievements in the field of local government law as a public service attorney. The award was presented at the 76<sup>th</sup> Annual IMLA Conference in Chicago on September 13.

**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](mailto:shouston@tml.org) by December 30, 2011.



### **New TCAA Board Members and Officers Installed at Fall Meeting**



Charlie Zech passed the gavel to the new TCAA Board President Marcus Norris, city attorney for the City of Amarillo, at the TCAA Fall Meeting. Paige Mims, assistant city attorney for the City of Plano, was also elected to be a new director for the TCAA board at the meeting. Anita Burgess, city attorney for the City of Denton, was appointed to be the TML Board Representative from TCAA, filling out the remainder of the seat vacated by Charles Anderson, city attorney for the City of Irving.

### **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](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>.



### The 2011 TCAA Fall Conference Seminar Materials Available Online

To view the 2011 TCAA Fall Conference 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](http://www.texascityattorneys.org), click on "Seminar Materials" and then click on Fall Conference 2011. (Materials from past TCAA conferences are also available on the site.)

**2012 Riley Fletcher Basic Municipal Law Seminar to be held in Austin at the Texas Municipal Center:** The Thirteenth Annual Riley Fletcher Basic Municipal Law Seminar will be held in Austin on February 24, 2012. Details are forthcoming!

## Article

### *Fifth Circuit Decides that Sidewalks Are Services Under the ADA and the Rehabilitation Act*

*Richard Frame v. City of Arlington*  
No. 08-10630

Fifth Circuit Court of Appeals  
September 15, 2011

Laura Mueller, Assistant General Counsel  
Texas Municipal League

After a winding path through a district court decision, and two opposing panel decisions, an en banc Fifth Circuit Court of Appeals has come to a "concrete" decision on the issue of sidewalks and the ADA. The en banc court has decided that: (1) city sidewalks are "services" under the ADA and the Rehabilitation Act, and that they must be made accessible when newly-built or altered (a private right of action could accrue to disabled individuals); and (2) the two-year statute of limitations begins when the plaintiffs knew or should have known that the sidewalks were inaccessible to them.

The suit began when individuals who rely on motorized wheelchairs for mobility sued the City of Arlington in 2005, alleging that the city's newly-built or altered sidewalks were not accessible to them and presented difficulties and danger when they tried to use these sidewalks. The plaintiffs argued that the city's sidewalks violated the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504). The city argued that: (1) the plaintiffs did not have a private cause of action because the sidewalks were not "services"

under either law and that, if a private cause of action did exist, the statute of limitations had run on these claims.

#### *Previous Decisions*

The district court held that the statute of limitations had run on the plaintiffs' cases because the plaintiffs' claims accrued when the city finished building or altering the sidewalks. The court requested that the plaintiffs provide evidence that the sidewalks were built or altered within the two year statute of limitations and the plaintiffs failed to do so. The court dismissed the plaintiffs' cases and the plaintiffs appealed. A Fifth Circuit panel first held that a sidewalk was a "service," but that the city had the burden of proof on the issue of the statute of limitations. The panel then issued a revised opinion holding that sidewalks were not a service under the ADA and that the statute of limitations did not start to run until the plaintiffs knew or should have known about the inaccessibility of the sidewalks.

Both the city and the plaintiffs appealed that decision, resulting in the current en banc decision. TML and International Municipal Lawyers Association filed an amicus brief arguing that requiring a city to make all sidewalks accessible would be unreasonably burdensome to those cities.

#### *Sidewalks as Services*

Title II, Section 12132 of the ADA states that:

. . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a

public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 states that an individual with a disability should not be “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. . . .” 29 U.S.C. § 794. These two statutes are normally read and interpreted together. 42 U.S.C. § 12201.

The court held that a sidewalk itself, and the building or altering of a sidewalk, are both “services” of the local government:

Either way, when a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city unnecessarily denies disabled individuals the benefits of its services in violation of Title II.

*Frame v. City of Arlington*, 2011 WL 4089778 \*4 (5<sup>th</sup> Cir. 2011). Because sidewalks are a service, a city needs to ensure that its newly-built or altered sidewalks are accessible, so long as the changes can be made through reasonable measures. See 28 C.F.R. §§ 35.149-.151. The court held that if a city does not make newly built or altered sidewalks accessible, then individuals with disabilities who are affected may have a private cause of action.

#### *Statute of Limitations*

Neither Title II of the ADA, nor the Rehabilitation Act, provide for a statute of limitations. In such a case, the court looks to federal and state law for a statute of limitat-

tions that is analogous to the action in question. In this case, the statute of limitations is two years, based on a state law claim of personal injury. The issue then becomes when the clock starts to run: “. . . it is the standard rule that [accrual occurs] when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief. . . .” *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citations and quotations omitted). The court held that the cause or claim does not accrue until the individual knows or should have known they were being “denied the benefits of a service, program, or activity of a public entity.” *Frame*, 2011 WL 4089778 at \*13. The court clarified how the statute of limitations works:

A city acts wrongfully when it builds an inaccessible sidewalk without adequate justification, but a disabled individual is not injured until he is actually deterred from using that sidewalk.

*Id.* The court held that there are issues of fact as to whether the plaintiffs met the statute of limitations in this case, and thus remanded the case to the district court to make that decision.

#### *Conclusion*

Under the en banc opinions, individuals with disabilities have a private right of action in regards to city sidewalks that are inaccessible, and the statute of limitations does not begin to run until the individual knows or should have known of the inaccessibility of a sidewalk the individual would use.

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

**Municipal Barriers to Broadband Deployment:** WC Docket No. 11-59, *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*. The Federal Communications Commission (FCC) released a “Notice of Inquiry (NOI)” regarding local right-of-way regulations and franchise fees and how the agency can “work with” cities “to improve policies for access to rights-of-way and for wireless facility siting.” Specifically, the NOI seeks information and data regarding challenges, best practices, and educational efforts to help the FCC accurately determine the need for policy and rules surrounding broadband deployment. TML, The Texas Coalition of Cities for Utility Issues, the coalition of cities, and the City of Houston (collectively, “the coalition”) filed comments that: (1) the NOI is based on the false premise that local right of way regulations are “barriers” to wireline broadband deployment; (2) local wireline right of way regulations and policies are not “barriers” to broadband deployment; (3) the FCC has limited or no jurisdiction over local right of way regulations and compensation; and (4) the coalition’s recommendations to the FCC regarding the NOI. The coalition’s comments were filed on July 18, 2011. Reply comments were filed on September 30, 2011. The reply comments state that: (1) industry comments fail to show that broadband deployment faces systemic barriers in the form of local rights-of-way regulations or polices in Texas; (2) industry comments fail to refute both national and Texas broadband deployment studies showing that broadband deployment is not lower in cities, but generally higher in the very area the industry claims presents unreasonable barriers to broadband deployment; and (3) industry comments failed to provide specifics about Texas local government policies that impede broadband deployment.

## Recent Texas Cases of Interest to Cities

**Electric Utilities and Generation:** *Public Utility Comm'n of Tex., et al. v. Constellation Energy Commodities Group, Inc.*, No. 03-09-00417-CV (Tex. App.—Austin September 28, 2011). In this case, Constellation Energy Commodities Group (Constellation), a wholesale energy provider, challenged the protocols used by the Energy Reliability Council of Texas (ERCOT) to charge system participants for shortfalls in their power scheduling. Constellation originally challenged the ERCOT protocols before the State Office of Administrative Hearings (SOAH), arguing that the protocols were “contradictory and inconsistent,” and that Constellation had thus been improperly charged for its under-scheduling under those protocols. The administrative law judge (ALJ) at SOAH agreed with Constellation, but the Public Utility Commission (PUC) rejected the ALJ’s decision, finding that the protocols were consistent and that Constellation had thus been properly charged. Constellation sought judicial review, and the district court reversed the PUC’s decision. The following appeal by the PUC is the current case.

In this case, the PUC argued that the district court erred by failing to defer to the PUC’s construction of the protocols, with the recognition that ERCOT protocols are subject to PUC oversight and review. Several entities regulated by ERCOT, including two municipally-owned electric utilities, joined the appeal as joint intervenors. Reviewing the PUC’s decision with deference to the agency’s interpretation of its own rules, the court found that the PUC’s interpretation was consistent with the plain language of the protocols and that the protocols were not, as Constellation argued, in irreconcilable conflict. The court ultimately overturned the district court’s decision, reversing and rendering judgment in favor of the PUC.

**Governmental Immunity-Tort:** *City of Austin v. David Saverse*, No. 03-11-00330-CV (Tex. App.—Austin September 30, 2011) (mem. op.). The court of appeals held that the city’s immunity was protected by the Tort Claims Act and the Recreational Use Statute because the plaintiff failed to show the city engaged in gross negligence in its treatment of the tree that injured the plaintiff.

**Workers Compensation:** *City of Port Arthur v. Brown*, No. 09-10-00539-CV (Tex. App.—Beaumont September 29, 2011) (mem. op.). The court of appeals upheld the jury verdict that it was not a rear-end collision that caused the injury resulting in an employee’s workers’ compensation claim.

**Texas Whistleblower Act:** *City of El Paso v. Parsons*, No. 08-10-00143-CV (Tex. App.—El Paso October 5, 2011). The court of appeals upheld the trial court’s decision against the city because: (1) there was sufficient evidence to show that there was a link between the fire chief plaintiff’s report to the Texas Commission on Fire Protection and the city’s adverse personnel action against him; and (2) there was sufficient evidence to show that the chief’s change in duties constituted an adverse employment action under the Whistleblower Act.

**Real Property:** *Texas Valla Real Estat I, Inc. v. City of Houston*, No. 14-10-00496-CV (Tex. App.—Houston [14<sup>th</sup> Dist.] September 27, 2011) (mem. op.). The court of appeals upheld the trial court’s judgment that all of the plaintiff’s claims were untimely filed or barred by the statute of limitations.

**Workers’ Compensation:** *Robert Smith v. City of Lubbock and St. Paul Fire and Marie Insurance Company*, No. 07-10-0466-CV (Tex. App.—Amarillo September 26, 2011). The court of appeals held that an employee could not sue the city for lack of adequate auto liability insurance because the Workers’ Compensation Act is the only valid avenue of recovery when an employee is injured.

**Governmental Immunity:** *Solis v. City of Laredo*, No. 04-10-00751-CV (Tex. App.—San Antonio September 21, 2011). The court of appeals held that the plaintiff did not have a contract claim because he did not accept the bid award and therefore never actually entered into a contract with the city as required to waive the city’s immunity under Section 271.152 of the Local Government Code.

**Condemnation:** *Laidley v City of San Marcos*, No. 03-10-00326-CV (Tex. App.—Austin September 21, 2011) (mem. op.). The court of appeals held that the plaintiffs failed to follow “reasonable diligence” in serving the city with citation in its condemnation case and therefore the trial court was correct in reinstating the special commissioners’ award.

**Condemnation:** *Wills V. City of San Marcos*, No. 03-10-00325-CV (Tex. App.—Austin September 21, 2011) (mem. op.). The court of appeals followed the reasoning in *Laidley v. City of San Marcos*, to hold that the plaintiff’s failure to timely serve the city with citation in its condemnation case and therefore the trial court was correct in reinstating the special commissioners’ award.



### 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](http://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](mailto:shouston@tml.org) or 512-231-7464.

### Need Some CLE or Want to Catch Up on Municipal Issues? Check Out TCAA Online Seminars!

Online Seminars allow TCAA members who are city attorneys, assistant city attorneys, or attorneys who regularly practice municipal law, to purchase and view a video of past seminars in a single-session format. The viewing of the session allows attorneys to receive participatory CLE credit with the State Bar. These online seminars can be viewed at <http://www.tcaaseminars.org/>. (Use the case-sensitive password “FreeCLE” to view the sessions).



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

and TML's Connect News Service at:  
<http://www.connectnews.org/>

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

TCAA members may use the information herein for any purpose. No other person may reproduce, duplicate, or distribute any part of this document without the written authorization of the Texas City Attorneys Association.

Texas City Attorneys Association  
1821 Rutherford Lane, Suite 400  
Austin, Texas 78754  
[www.texascityattorneys.org](http://www.texascityattorneys.org)