

TCAA NEWS

May 2011

Volume 6, Issue 4

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Join us for the TCAA South Padre Conference to be held on June 8-10, 2011, at the Isla Grand Beach Resort! Earn up to 10 Hours of MCLE Credit, Including 1.5 Ethics Hour. Topics include:

- Ethics: Social Media and Legal Ethics Update
- Title VII and the Guidelines: Promotional Exams and Recent Trends
- How to Write a Prosecutor Friendly Ordinance
- Making Public/Private Partnerships Work
- "Sinful Activities" Regulation and the First Amendment
- Budget Pitfalls
- Recent Federal Cases of Interest to Cities
- Recent State Cases of Interest to Cities

- Advanced Employment Law Pitfalls – Dos and Don'ts
- Legislative Update
- Billboard and Sign Regulation: Recent Cases and Trends
- Top Ten Construction Procurement Mistakes
- Effective Communications with the Police Department
- Real Estate Issues: Dealing with Liens and Other Issues

Special Note on Seminar Materials: TCAA no longer provides binders for speaker papers or printed materials of any kind. Instead, TCAA puts all speaker papers on the TCAA Web site under "speaker materials" for attendees to download in advance, if they so desire. No written materials are provided at the seminar location.

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TCAA Speakers and Topics Needed!

The TCAA Fall Seminar in conjunction with the TML Annual Conference is tentatively scheduled for October 13, 2011, in Houston. The TCAA Board will choose speakers for that agenda at its June 8, 2011, meeting. If you are interested in presenting, or just have a topic you would like someone else to cover, please send your submission to Scott Houston at shouston@tml.org by May 27, 2011.

2011 Salary Survey:

The **TCAA Salary Survey** is now available on the front page of the TCAA Web site at www.texascityattorneys.org. In addition to the brief, informal survey, you can link to much more detailed information from the Texas Municipal League's Salary Survey, as well.

Municipal Attorney Job Openings: For the most recent Texas Municipal League classifieds postings, please click [here](#).

ARTICLES

Texas Supreme Court Says No Clear Waiver of Immunity for Retaliation Under the Texas Anti-Retaliation Law (Workers' Compensation), For Now

Travis Central Appraisal District v. Diane Lee Norman
No. 09-0100 (Tex. Apr. 29, 2011)
Lori Gillespie
Staff Attorney III
Texas Municipal League Intergovernmental Risk Pool

The Political Subdivisions Law, Texas Labor Code chapter 504, adopts various parts of the Workers' Compensation Act to be applied to political subdivisions. The Anti-Retaliation Law, Texas Labor Code chapter 451, was added to those provisions that apply to political subdivisions in 1981. Under *City of LaPorte v. Barfield*, 898 S.W.2d 288 (Tex. 1995), the Court held that this was a clear and unambiguous waiver of immunity.

Last month, the Texas Supreme Court, in *Travis Central Appraisal District v. Norman*, held that the 2005 amendment to Texas Labor Code section 504.053 has clouded the Legislature's intent to waive immunity. Without a clear intent, there is no waiver.

Diane Lee Norman (Norman) was terminated during her probationary period as an employee for the Travis Central Appraisal District (District). Her termination came shortly after filing a workers' compensation claim, and she sued for retaliatory discharge under Chapter 451 of the Labor Code. After

filing a general denial, the District filed a plea to the jurisdiction for failure to exhaust her administrative remedies. Norman argued that Chapter 451 does not require an exhaustion of remedies, and the trial court denied the District's plea. On appeal, the District added the argument that governmental immunity had not been waived. The court of appeals affirmed the trial court's order denying the District's plea.

In reviewing the case, the Supreme Court looked to changes to the relevant statutes since the *Barfield* case was decided in 1995. It found that the 2005 amendment to the Political Subdivisions Act, specifically Texas Labor Code section 504.053(e), added a new section that states "[n]othing in this chapter waives sovereign immunity or creates a new cause of action." Finding that the new section clearly applies to the entire chapter, the Court concluded that the provision "considerably clouds" the government's intent to waive immunity. Reiterating that the waiver of governmental immunity must be clear and unambiguous, the Court found that immunity is no longer waived, and the underlying claim was dismissed.

The legislature may review this in the future, so governmental entities should continue to be cautious and fair when dealing with their employees, and document any personnel actions.

The opinion of the Court is available at www.supreme.courts.state.tx.us/historical/2011/apr/090100.htm.

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.

Takings: *City of Houston v. Maguire Oil Co., No. 14-09-00701-CV (Tex. App. — Houston May 3, 2011) (op.)*. This case is in inverse condemnation relating to the City of Houston's regulation of oil and gas drilling around Lake Houston. The City acquired surface rights to land in the 1940s that eventually was inundated to create Lake Houston. The City adopted an ordinance in 1965 that generally proscribed pollution in the "control area" of Lake Houston. The City amended the ordinance in 1967 to restrict drilling in the Lake Houston control area.

Between 1953 and 1991, Maguire acquired oil and gas leases covering five tracts near Lake Houston known collectively as the "Scanlan Deep Prospect." Maguire began to investigate drilling a gas well in the Scanlan Deep Prospect in the late 1980s. Maguire initially drilled outside the city limits. After the failure of a vertical well, Maguire attempted to drill directionally. This attempt also failed. These efforts cost several million dollars. Maguire then decided to drill a vertical well inside the city limits approximately 300 feet west of Lake Houston. Maguire filed appropriate documents and asked the City to issue a drilling permit in 1991.

The City approved a permit to drill at the chosen location. That same day, the City also wrote Maguire a letter stating that its drilling permit had been issued in error and was being revoked immediately because the city's code of ordinances prohibited wells within 1,000 feet of Lake Houston. Maguire sued for, among other things, inverse condemnation.

The History

After a complex procedural history spanning almost 20 years, in which the case was removed to and returned from federal court, the Texarkana Court of Appeals in "Maguire I" rejected the City's argument that Maguire's inverse condemnation claim was barred by the statute of limitations.

Following remand to the district court in *Maguire I*, Maguire re-filed its inverse condemnation claim in the County Civil Court at Law Number Four. That court determined that the dispute between the City and Maguire was ripe for adjudication because a final decision had been rendered by the proper governmental decision-maker designated under the applicable ordinances, and that any further action on Maguire's part would have been futile. That decision was appealed to the Fourteenth Court of Appeals, which determined that the identity of the final decision-maker was a question of

identity of the final decision-maker was a question of law based on interpretation of the City's code of ordinances. The court concluded that "the director is the only person with authority to grant a drilling permit, and the director" is the relevant decision maker.

After the Texas Supreme Court denied the City's petition for review in *Maguire II*, the case proceeded to trial in the County Civil Court at Law Number Four on March 16, 2009. The trial court heard arguments from both sides on the takings claim and ruled as a matter of law that Maguire suffered a compensable regulatory taking "[b]ased on the City of Houston's unreasonable interference with the landowner's right to use and enjoy its property and on that theory of law."

The Present Case

In two issues, the City asked the Fourteenth Court of Appeals to reverse the trial court's judgment in favor of Maguire and render judgment in favor of the City.

Seizing on the trial court's determination that the 1991 permit revocation and stop work order "were not authorized by the Ordinance," the City contends that a taking judgment is warranted because: (1) unauthorized acts of a government employee do not result in a taking of property by the governmental entity for which the employee works; and (2) the City did not intend to take Maguire's mineral interests for public use by enacting an ordinance that did not apply to Maguire's well, regardless of whether the ordinance was in fact invoked erroneously to preclude drilling.

After a thorough discussion of the law of regulatory takings, the court stated the key inquiry in this case: *Does interference with Maguire's property rights constitute a regulatory taking for which compensation is required under the factors identified in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), and Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 671-672 (Tex. 2004).*

Unauthorized Acts

Maguire contended that compensation is warranted as a regulatory taking under the three factors identified in *Penn Cent. Transp. Co.* and *Sheffield*. (As in *Sheffield*, Maguire does not assert a separate claim under the Takings Clause of the Fifth Amendment to the United States Constitution. Maguire invoked only Article I, Sections 17 and 19 of the Texas Constitution in its pleadings.)

The court rejected the City's first contention that a regulatory takings claim is foreclosed because the City employees who shut down Maguire's operations acted without authorization. The court noted that the City did not

raise its “unauthorized acts” argument in the trial court. In any event, the court concluded that the city’s unauthorized acts argument is inapplicable because it relies upon case law addressing waiver of sovereign immunity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401 (Tex. 1997). The City relied heavily upon the following sentence from *Heinrich*: “A state official’s illegal or unauthorized actions are not the acts of the State.” *Heinrich*, 284 S.W.3d 370 (quoting *Fed. Sign*, 951 S.W.2d at 404). By like token, the City contended that: (1) unauthorized acts by City decision-makers are not the acts of the City itself; and (2) the drilling prohibition was “unauthorized” because the ordinance did not apply. Therefore, according to the City, “*Heinrich* and the numerous cases that preceded it established that an inverse condemnation claim was not the proper remedy for addressing the unauthorized application of the 1,000 foot prohibition to Maguire’s proposed drill site.”

The court held that the City’s unauthorized acts argument fails because the City erroneously attempted to “graft standards from an entirely different context addressing an entirely different issue — waiver of sovereign immunity — onto the takings inquiry at issue here.” It therefore rejected the City’s unauthorized acts contention as a basis for arguing that the factors identified in *Penn Central* and *Sheffield* do not apply.

Intent

The City also contended that “to recover on an inverse condemnation claim, a plaintiff must establish a governmental entity acted with the intent to invoke its power of eminent domain — *i.e.*, the intent to take, damage, or destroy private property for application to public use,” and that that such specific intent was lacking here because the City did not intend to take, damage, or destroy Maguire’s well by means of an ordinance that did not apply to Maguire’s well site in 1991.

Rejecting the City’s argument, the court held that “[w]e cannot reflexively borrow inverse condemnation precedents from a non-regulatory context and apply them to a dispute arising from an asserted regulatory taking. We decline the City’s invitation to blur the distinction between regulatory and physical takings in this manner, being mindful of the Texas Supreme Court’s admonition to exercise care about mechanical application to a regulatory taking situation of precepts from cases addressing physical taking.”

The court did not decide the extent to which intent must be established in a regulatory taking context as distinguished from a physical taking context. “Assuming that some level of governmental intent to act must be established in this regulatory context, any such requirement is satisfied on this record by the demonstrated and unequivocal intent of the City’s final decision-maker to enforce the ordinance against Maguire to further the City’s goal of protecting Lake Houston. This conduct amounts to an “intentional governmental act” regardless of whether the intentional act rested on an erroneous understanding of the ordinance by the final decision-maker who enforced it.” The court concluded that Maguire’s rights were no less interfered with because the City’s intentional act was based on an erroneous interpretation of its own ordinance.

Conclusion

The court overruled the City’s issues and affirmed the trial court’s final judgment.

Development Agreements: *City of North Richland Hills v. Home Town Urban Partners, Ltd.*, No. 02-10-00224-CV, No 02-10-00236-CV (Tex. App — Fort Worth April 28, 2011) (op. on rehearing).

Home Town Urban Partners owns property in an area within the city that is the subject of a development agreement. After construction had commenced on the development, the city rezoned property within the area covered by the agreement to limit multi-family projects. Because they could no longer build multi-family projects in the area, Home Town Urban Partners alleged claims against the city for – among other things – breach of the development agreement ultimately a contract for the conveyance of real property. The court disagreed. Citing to *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex. 2010), the court concluded that “section 271.152 waives the City’s immunity from suit with regard to the Development Agreement because the Development Agreement is a contract for the provision of services to the City within the meaning of that statute.” (Because this appeal concerned only the issue of immunity itself, the court refused to consider the city’s arguments relating to damages available under Chapter 271.)

Failure of city to provide notice of zoning amendment

It is undisputed that the city did not provide the notice required by Local Government Code Section 211.007(c), but the city contended that Urban Partners lacked standing to challenge the zoning ordinance amendment based on lack of statutorily required notice because the alleged lack of notice is a

mere procedural and inverse condemnation. The city filed partial pleas to the jurisdiction, and the trial court denied the city's pleas. This interlocutory appeal followed.

Contractual immunity waiver

To invoke the trial court's subject matter jurisdiction over a claim arising out of a governmental entity's contractual obligations, the plaintiff must allege a valid waiver of immunity from suit and plead sufficient facts demonstrating the trial court's jurisdiction. The city argued that the development agreement is not a contract for "goods or services" that waives its immunity under Local Government Code Chapter 271, Subchapter I, because the agreement is ultimately a contract for the conveyance of real property. The court disagreed. Citing to *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex. 2010), the court concluded that "section 271.152 waives the City's immunity from suit with regard to the Development Agreement because the Development Agreement is a contract for the provision of services to the City within the meaning of that statute." (Because this appeal concerned only the issue of immunity itself, the court refused to consider the city's arguments relating to damages available under Chapter 271.)

Failure of city to provide notice of zoning amendment

It is undisputed that the city did not provide the notice required by Local Government Code Section 211.007 (c), but, the city contended that Urban Partners lacked standing to challenge the zoning ordinance amendment based on lack of statutorily required notice because the alleged lack of notice is a mere procedural irregularity that can only be brought by the State in a quo warranto proceeding. The court analyzed the city's proffered cases relating to annexation notice, but disagreed that they apply to zoning cases.

Inverse condemnation claim

Home Town Urban Partners alleged that the city deprived them of their reasonable investment-backed expectations, and they contended that they had a reasonable expectation--based on seventy-percent of the development being constructed in accordance with the zoning, plats, building permits, development agreement, and TIF financing documents and all of which having been in place for several years--that the remainder would be developed in accordance with those documents. "These allegations are sufficient to allege a regulatory taking that unreasonably interfered with Appellees' investment-backed expectations" pursuant to *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238 (Tex. App.--San Antonio 2006, pet. denied).

Red Light Cameras: *Edwards v City of Tomball*, No. 14-10-00284-CV (Tex. App.—Houston May 3, 2011).

The issue in this case is whether an individual who has received red light camera civil violation notices may sue the city because of alleged improper notice or improper implementation of the red light camera program. Lady Edwards sued the City of Tomball after she received multiple red light camera citations. She argued that: (1) the city did not do the required traffic study before implementing the red light camera program; and (2) the city did not put the proper notices on the citations. The city argued that it had governmental immunity from suit and that only the municipal court had jurisdiction over these claims under the statutes that created the red light camera program.

Jurisdiction

Chapter 707 of the Transportation Code allows a city to adopt a red light photo enforcement program if the city follows certain procedural and notice requirements. TEX. TRANSP. CODE ch. 707. Chapter 707 also provides an appeal process for red light camera citations. *Id.* §§ 707.014; 707.016. Section 707.014 states:

A person who receives a notice of violation under this chapter may contest the imposition of the civil penalty specified in the notice of violation by filing a written request for an administrative adjudication hearing. The request for a hearing must be filed on or before the date specified in the notice of violation, which may not be earlier than the 30th day after the date the notice of violation was mailed.

TEX. TRANSP. CODE § 707.014. Section 707.016 provides the method of appeal:

The owner of a motor vehicle determined by a hearing officer to be liable for a civil penalty may appeal that determination to a judge by filing an appeal petition with the clerk of the court. The petition must be filed with:

* * *

- (2) if the local authority is a municipality, the municipal court of the municipality.
- (b) The petition must be:
 - (1) filed before the 31st day after the date on which the administrative adjudication hearing officer entered the finding of liability for the civil penalty;

Id. § 707.016. Tomball's ordinance reflects these statutory administrative proceedings. When a

statute conveys exclusive jurisdiction on another court or administrative agency, a district court does not have jurisdiction. *In re S.W. Bell Tel.*, 235 S.W.3d 619, 624 (Tex. 2007). A pervasive regulatory scheme gives an administrative agency exclusive jurisdiction and the only remedy for claims arising from the regulatory scheme. *Id.* at 624-25. Also, an administrative agency has exclusive jurisdiction when a statute grants it the sole authority to make an initial determination and the regulatory scheme indicates that it is the exclusive means for remedying the issue. *Blue Cross Blue Shield of Tex., Inc. v. Duenez*, 201 S.W.3d 674, 675-76 (Tex. 2006). This exclusive jurisdiction takes away the jurisdiction of the district court.

The court of appeals held that Chapter 707 provides a regulatory scheme that precludes the jurisdiction of the district court. When Edwards failed to appeal the red light camera complaints through the statutory and ordinance procedures, she lost her ability to contest the tickets, whether on grounds of improper notice or improper adoption of the ordinance. The court held that the district court did not have jurisdiction.

Voidability

Edwards also argued that the ordinance was void on adoption because the city failed to perform a traffic study before implementing its ordinance. *See* TEX. TRANSP. CODE § 707.003. An act is void only if it is apparent that the entity taking the act had no jurisdiction or capacity to act. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990). A simple violation of a statute, or statutory equivalent, renders an act voidable, not void. *Id.*

The court of appeals held that the city's alleged failure to not perform a traffic study made its ordinance voidable, not void. The voidability of the city's ordinance could only be contested through the administrative procedures provide by ordinance and statute. The court of appeals upheld the trial court's dismissal based on the city's pleas to the jurisdiction.

Governmental Immunity-Tort: *City of El Paso v. Elizabeth Hernandez*, No. 08-09-00149-CV (Tex. App.—El Paso April 20, 2011). The court of appeals dismissed Ms. Hernandez's personal injury claims because she did not follow the required pre-suit notices required under Tort Claims Act.

Declaratory Judgment: *Hotze v. City of Houston*, No. 03-10-00423-CV, 03-10-00433-CV, 03-10-00497-CV (Tex. App.—Austin April 22, 2011) (op.). The court of appeals held that the intervenors in the case, started by the city to determine its ability to raise rates, must file a security bond before the district court would be able to allow them into the case.

Governmental Immunity- Tort: *Teague v. City of Dallas*, No. 05-10-01163-CV (Tex. App. — Dallas May 4, 2011) (op.). Teague sued the city after she sustained injuries while a passenger in a car involved in a high speed chase with police. The court of appeals held that the operation of the police officer's vehicle was too attenuated to be the cause of the accident under the Tort Claims Act and thus, the city retained its immunity from suit.

Property Tax: *Rameses School, Inc. v City of San Antonio*, No. 14-10-00320-CV (Tex. App — Houston April 7, 2011) (mem.op). The Rameses School sued the city after the city sold the school's property at a tax sale due to delinquent taxes. The court of appeals held that the school's suit was outside the statute of limitations because the school waited five years after the sheriff's deed was entered to file suit.

Governmental Immunity-Tort: *City of Corpus Christi v. Eby*, No 13-09-00205-CV (Tex. App.—Corpus Christi April 14, 2011) (mem.op.). Eby sued the city and a police officer for money damages after his car was impounded. Because Eby's claims were for intentional torts, the city retained its immunity under the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.057(2). Eby's claim that the impoundment was an ultra vires act failed because such claims may not be brought for monetary damages. *City of Laredo v. Nuno*, 94 S.W.3d 786, 789-90 (Tex. App.—San Antonio 2002, no pet.). Eby argued that the city's immunity was waived when the city's police officer filed a defamation suit against Eby for stating that the officer stole his car. The court of appeals held that a suit filed by an employee does not waive the city's immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375-76 (Tex. 2006). Finally, the court of appeals held that the police officer should have been dismissed from the case based on the election of remedies provision in the Tort Claims Act. TEX. TRANSP. CODE § 101.106.

Utilities: *University of North Texas v. City of Denton*, No. 02-09-00395-CV (Tex. App.—Fort Worth April 14, 2011). The court of appeals held that the University of North Texas' sovereign immunity was not waived under the declaratory judgment act on the issue of whether Texas Utilities Code Section 36.351 still gave the university a discounted city electric rate. The court of appeals remanded the case to the trial court.

Directed Verdict: *Wilt v. City of Greenville Police Dept.*, No. 06-10-00107-CV (Tex. App.—Texarkana April 29, 2011) (mem.op.). The court of appeals held that there was sufficient evidence to defeat a directed verdict that Wilt's car was improperly towed because there was evidence that the city did not have probable cause to tow the vehicle.

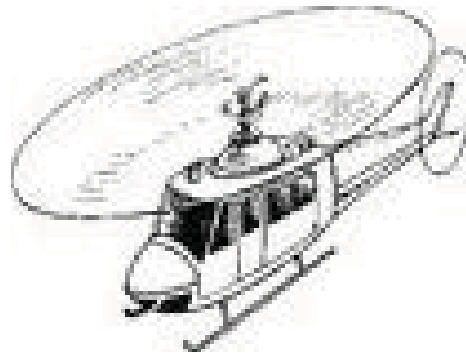
Attorney General Opinions of Interest to Cities

Note: Included opinions are from the period beginning on the 10th of the previous month through the 10th of the current month. This issue will include opinions from April 11th until May 10th.

Opinion No. GA-0859 (Law Enforcement): Concluded that the helicopter pilot, rather than a fire department or sheriff's office, has the final say on where to land a helicopter for the purpose of transporting patients from a motor vehicle accident.

Opinion No. GA-0856 (Newspaper Publication): Concluded that a paper used for the publication of a political subdivision's notices must satisfy the requirements of section 2051.044, Government Code. We cannot advise you that the City's proposal to use a paper that does not satisfy section 2051.044 would be lawful. Beyond the express publication alternatives provided in section 2051.048, Government Code, and other particular notice statutes, the Legislature may provide additional publication methods.

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



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