

TML/TCAA LEGAL DEFENSE PROGRAM AMICUS BRIEF UPDATE
(Includes Briefs Filed Through October 10, 2017)

PENDING

Governmental Immunity: *City of Waco v. Citizens to Save Lake Waco*, No. 10-17-00202-CV, in the Tenth Court of Appeals of Texas. TML and TCAA filed an amicus brief in support of the City of Waco. Citizens to Save Lake Waco filed suit against the City of Waco for breaching a settlement agreement regarding the placement of a city landfill. The city filed a plea to the jurisdiction on the basis that it is immune from suit under the doctrine of governmental immunity. The district court denied the city's plea, and the city filed this appeal. Our brief argued that the City of Waco is immune from the breach of contract claim. Specifically, (1) failure for the city to raise the issue of immunity during the trial proceeding before entering into the settlement agreement does not waive a city's governmental immunity; and (2) filing a permit application with the Texas Commission on Environmental Quality does not waive a city's governmental immunity. The brief was filed October 9, 2017.

Billboard Height: Texas Department of Transportation Proposed Commercial Sign Rules – *Section 21.189, Billboard Height*. TML filed comments in this proposed rulemaking due to concerns with a specific provision that is being enacted pursuant to Senate Bill 312, the 2017 Texas Department of Transportation “sunset bill.” The proposed rules and explanations can be read to allow all billboards in existence on March 1, 2017, to be raised as high as 85 feet in height. As Senators Nichols and Watson state in their comment letter, that was not their intent with the passage of S.B. 312. In fact, they discussed the issue on the Senate floor and entered that discussion into the Senate journal as a statement of intent. The League opposes any language that could be read to increase the height of an existing sign without appropriate regulatory oversight and suggest a new subsection to clarify that a city ordinance can impose more stringent provisions than the rules within that city or its extraterritorial jurisdiction. The comments were submitted on September 24, 2017.

Plastic Bag Ban: *Laredo Merchants Assoc. v. City of Laredo*, No. 16-0748, in the Supreme Court of Texas. In this case, the appellate court was asked to reverse the trial court's determination that the city's plastic bag ordinance was not preempted by Section 361.0961, Texas Health and Safety Code. Texas Municipal League (TML) and Texas City Attorneys Association (TCAA) argued that the appellate court should affirm the decision of the trial court because: (1) nothing in the Solid Waste Disposal Act limits with unmistakable clarity the authority of the City of Laredo to enact the ordinance; (2) a checkout bag is not a “container” or “package” as those terms are used in Section 361.0961; (3) cities may regulate checkout bags for purposes other than solid waste management; and (4) the city's ordinance was adopted in a manner authorized by state law. TML and TCAA filed their brief in the appeals court on April 11, 2016. Oral argument was heard on June 28, 2016. On August 17, 2016, the court struck down the City of Laredo's plastic bag ban ordinance, concluding that it is preempted by state law. On November 7, 2016, the city filed a petition for review with the Texas Supreme Court, and TML and TCAA once again filed an amicus brief on December 30, 2016, making

essentially the same arguments. The Supreme Court granted the petition for review on September 1, 2017, and oral argument is set for January 11, 2018.

Referendum: *City of Plano v. Carruth*, No. 17-0405 in the Supreme Court of Texas. In this case, a citizens group filed a referendum petition under the city's charter to repeal the city's comprehensive plan. The Texas Municipal League, Texas City Attorneys Association, Texas Chapter – American Planning Association, and International Municipal Lawyers Association argued in support of the city's interlocutory appeal on its plea to the jurisdiction that the adoption of a comprehensive plan is not subject to referendum because a statutory adoption process must be followed. Amici filed their brief on August 16, 2016. Oral argument was held on November 8, 2016.

On February 23, 2017, the court issued a memorandum opinion concluding that the Plano city charter does not give the city secretary any discretion to determine whether the subject matter of a referendum petition has been withdrawn from the referendum power by general law or the charter. “We will not imply such discretion absent express language in the charter supporting its existence [and Carruth]...alleged facts supporting a claim for mandamus relief against the city secretary under the ultra vires exception to governmental immunity.”

In so holding, the court held that the City's argument that comprehensive plans have been removed from the referendum power confuses the merits of whether mandamus should be issued with whether the trial court has subject matter jurisdiction to consider a petition for mandamus. “Whether the trial court should ultimately grant or deny the petition for mandamus is not the issue before us; the issue is whether the trial court has jurisdiction to consider the petition.” The cases cited by the city were decided *on the merits* of whether the writ of mandamus should issue, indicating the courts had subject matter jurisdiction to rule on the merits.

Based on those conclusions, the court agreed with the city that the claims against the city council were not ripe because the council had yet to decide how to act on a petition that hadn't been submitted to it. “What the City Council will do when presented with a referendum petition is unknown and appellees merely speculate the council will refuse to act.” The city filed a petition for review with the Texas Supreme Court, and TML et al. plan to file an amicus brief shortly.

Governmental Immunity: *City of Dallas v. Trinity East Energy*, Cause No. 17-0370, Supreme Court of Texas. This case involves a dispute between the City of Dallas (“City”) and Trinity East Energy (“Trinity”) over an oil and gas lease on City-owned lands. After Trinity was denied a special use permit to drill on City parkland, Trinity filed suit asserting that the permit denial was a taking. The trial court granted the City's pleas to the jurisdiction on all but one claim. Both, the City and Trinity appealed the trial court's decision. The appellate court held that the City's engaging in a mineral lease on parkland is a proprietary function and no waiver of immunity was required for Trinity's claims.

In support of the City's petition for review, the Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) argue that the Supreme Court has provided that the Tort Claims Act should be relied on when determining whether a contract is governmental or proprietary. Thus, because the Tort Claims Act lists "parks" as a governmental function, the City is protected from Trinity's claims by governmental immunity. TML and TCAA filed this brief on August 8, 2017.

F.C.C. Preemption: WT Docket No. 17-79: *Notice of Proposed Rulemaking and Notice of Inquiry* (Wireless Infrastructure NPRM) at the Federal Communications Commission. The Texas Municipal League argued that, in relation to the installation of wireless facilities in city rights-of-way, a one-size-fits-all mandate simply won't work because there are so many unique Texas cities with unique right-of-way needs. TML supported the comments submitted by the National League of Cities (NLC), and joined NLC in opposing federal preemption, deemed granted remedies, and further federal restrictions on aesthetic requirements and negotiations. TML argued that it's clear that locally-elected officials, rather than administrative officials in Washington, D.C., know what is best for their community. The comments were submitted on July 17, 2017.

Utility Relocation: *Oncor Elec. Delivery v. Richardson*, No. 15-1008 in the Supreme Court of Texas. The issue in this case is whether Oncor should be responsible for the cost of relocating poles and equipment to accommodate a public improvement to widen alleys in the City of Richardson. While some of the arguments made by both parties are specific to the language in the City of Richardson's franchise and right-of-way ordinance, two arguments apply to all cities: (1) both the Public Utility Regulatory Act and Texas common law require utilities such as Oncor to bear certain relocation costs; and (2) a utility's tariff cannot shift the burden of relocation costs away from the utility to the city. The Steering Committee of Cities Served by Oncor and the Texas Municipal League, in this joint brief, urged the court to find that both Texas common law and the Texas Legislature require utilities such as Oncor to bear relocation costs. The brief was filed on March 16, 2015. Oral argument was heard on May 6, 2015. On August 11, 2015, the court of appeals held that the city is responsible for paying for the relocation of Oncor's electric poles and equipment because the city agreed to do so. The city appealed to the Texas Supreme Court, and TML and the steering committee once again filed an amicus brief on August 18, 2016. On June 30, the Court granted the petition and oral argument was held on September 8, 2017.

Contractual Immunity: *Wasson Interests v. City of Jacksonville*; No. 14-0645, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City of Jacksonville. Wasson Interests filed suit against the City of Jacksonville asserting breach of contract related to a lease agreement the city entered into with Wasson Interests. The trial court granted the City of Jacksonville's plea to the jurisdiction, and the appeals court affirmed that decision. Wasson filed a petition to the Supreme Court of Texas, which was granted. Our brief provides the policy and legal basis for the legislature's waiver of governmental immunity in the limited circumstance of a written contract. We argue that the proprietary-governmental dichotomy found in the Texas Tort Claims Act does not apply to waiver of immunity claims in the contract setting. Additionally, a lease agreement is not a contract that is subject to the Chapter 271 waiver. The brief was filed

on January 11, 2016. Oral argument was held on January 14, 2016. The court issued a unanimous opinion on April 1 holding that the governmental-proprietary distinction in the Tort Claims act should be “superimposed” into the contracts realm. The City of Jacksonville filed a Motion for Rehearing on May 6, 2016. TML and TCAA filed an amicus letter brief in support on the same day. The motion for rehearing was denied on June 3, 2016. The city subsequently prevailed in the trial court by showing that the lease in question is a governmental function for which immunity is retained. Wasson appealed that decision, and the case is now pending at the Texas Supreme Court as No. 17-0198. On September 8, 2017, TML and TCAA once again filed an amicus brief in the new cause, arguing that the lease of the lake property is a governmental function related to the city’s water supply.

F.C.C. Preemption: WC Docket No. 16-421, *In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling* at the Federal Communications Commission. This action relates to a petition alleging that municipal right-of-way management regulations and rental fees are an impediment to broadband deployment. The Texas Municipal League filed reply comments at the Federal Communications Commission (FCC) to explain the use of municipal rights-of-way in Texas. The comments also include specific Texas examples of clear, non-discriminatory legal and administrative processes of Texas cities. The comments were filed on March 8, 2017. Reply comments were filed on April 7, 2017.

General Law Sex Offender Residency Restrictions: *City of Krum v. Taylor Rice*, No. 17-0081 in the Supreme Court of Texas. In 2015, Texas Voices for Reason and Justice (TVRJ), a “statewide criminal-justice advocacy group,” asked by letter that the 49 general law cities with sex offender residency restriction repeal their ordinance or face a lawsuit. This is one of 13 lawsuits filed so far against cities that refused to do so. The substance of sex offender’s claim in this suit – that a general law city has no authority to enact such an ordinance – is largely based on a March 2007 opinion from the Texas attorney general’s office. The petition alleges that, because it is incorporated under the general laws, and no general law expressly delegates the authority to enact a sex offender residency restriction ordinance, the defendant city is not authorized to enact one. Of course, attorney general opinions are not binding on courts. Moreover, the three-sentence conclusion in GA-0526 should be treated as *dicta* because the purpose of the opinion wasn’t to opine on general law authority, and it provides essentially no analysis as to the question of general law authority to enact sex offender residency restrictions. The Texas Municipal League and the Texas City Attorneys Association argue that a general law city *can* enact a sex offender residency restriction because Sections 51.001 and 51.012 of the Local government Code provide the express privilege to enact an “ordinance, act, law, or regulation” necessary for public welfare and “good order.” The brief was filed on February 24, 2016, and oral argument was held on March 1, 2016. On December 15, the Fort Worth Court of Appeals decided that a registered sex offender’s lawsuit against the City of Krum’s residency restrictions can move forward. In *City of Krum v. Taylor Rice*, the court issued a one-page order stating that the trial court properly denied the general law city’s claim that the court is without jurisdiction to hear the case. (A dissenting

opinion argued that the case is moot because the sex offender in question is prohibited by his probation conditions from residing within 1,000 feet of places where children commonly gather.) On January 30, 2017, the city filed a petition for review with the Texas Supreme Court. TML and TCAA once again filed amicus support, arguing that Rice's claim for relief is moot because: (1) he does nothing more than make a vague assertion that he wants to live somewhere within the distance prohibited by the ordinance; and (2) a civil court is not the proper forum to attack a criminal ordinance. The letter was filed on March 2, 2017. The Court requested a response from Taylor Rice on March 10, 2017, and briefing on the merits was requested on June 9, 2017.

Ultra Vires Waiver: *Andy Meyers, v. JDC Firethorne, Ltd.*, No. 17-0105 in the Texas Supreme Court. The issue in this case is who is the proper party against whom an *ultra vires* claim should be made. TML, along with the Texas Association of Counties, and the Conference of Urban Counties, argued that the *ultra vires* doctrine must be narrowly applied as an exception to governmental immunity. The plaintiff in this case asserts that he was injured by the failure of a county engineer and county commissioners court to process and approve his plat applications. He acknowledges that Meyers, an individual county commissioner, lacks the authority to provide a remedy, but alleges that Meyers exerted influence over the county engineer by "instructing" him to "hold" the plats indefinitely. It is undisputed that the applicable statute and local regulations only assign nondiscretionary duties to the county commissioners court, acting as a body, and to the county engineer. Simply put, Meyers in his individual capacity has no authority on which plaintiff's claims are based. Consequently, the plaintiff cannot obtain injunctive and mandamus relief from the county commissioner to remedy its alleged injuries. The brief was filed on February 21, 2017.

Municipal Zoning/PUC Jurisdiction: *Appeal of Brazos Electric Cooperative, Inc. and Denton County Electric Cooperative, Inc. D/B/A CoServ Electric from an Ordinance of The Colony, Texas, and, in the alternative, Application for a Declaratory Order*, PUC Docket No. 45175. In this docket, electric cooperatives appeal a city's denial of a specific use permit for an electric substation. The cooperative's claim that the PUC has jurisdiction to overturn the city's zoning ordinance as it applies to them. TML argued that the PUC has no jurisdiction over a generally-applicable police power ordinance, like that complained of here. The comments were filed on July 8, 2016. SOAH asserted jurisdiction on August 2, 2016, and TML filed a second comment at the PUC level arguing that the commission should find in favor of the city on the merits. The city is currently pursuing separate and concurrent litigation in district court.

Certificates of Convenience and Necessity: *Application of the City of Cibolo for Single Certification in an Incorporated Area and to Decertify Portions of Green Valley SUD's Sewer Certificate of Convenience and Necessity in Guadalupe County*, PUC Docket No. 45702. The Public Utility Commission of Texas (Commission). The Texas Municipal League filed comments regarding the Public Utility Commission of Texas Order Requesting Briefing on the question of "May the Commission deny a municipality's application seeking single certification under TWC § 13.255 solely on the basis that a retail public utility that holds a CCN for all or part of the requested service area is also a

holder of a federal loan made under section 1926(a) of the Federal Consolidated Farm and Rural Development Act? In answering this issue, please address whether the Commission has authority to determine whether a federal statute preempts state law.” TML argued that the Commission has no authority in relation to this application to determine whether Section 13.255 is preempted by 7 U.S.C. 1926(b). That decision is one for the judicial branch to decide. The Commission’s mandate is to comply with state law as prescribed by the legislature. The League filed comments in support of the City of Cibolo on June 14, 2016.

Right-of-Way Fees: *Public Utilities Commission Docket No. 45280, Complaint of Extenet Network Sys., Inc. against the City of Houston for imposition of fees for use of public right-of-way.* In this proceeding at the Public Utility Commission (PUC), a certificated telecommunications provider is asking the PUC to allow it to place wireless telecommunications equipment in a city’s rights-of-way without paying compensation to the city. TML, along with the Texas Coalition of Cities for Utility Issues, filed an amicus reply brief arguing that Chapter 283 of the Local Government Code does not contemplate free use by wireless providers. Amici argue that a city’s control over its rights-of-ways necessitates a separate agreement for such placement, and state law prohibits doing so without adequate compensation. The brief was filed on February 17, 2016. A prehearing conference was held on April 20, 2016, and a proposal for decision against the city was issued by the ALJs in February 2017. Oral argument before the PUC was held on March 24, 2017, and the ALJs proposal was adopted by the PUC. The order is not yet final, and may be appealed by the city, depending on the outcome of legislation moving through the legislature. On June 7, the City of Houston filed a motion for rehearing. On June 8, AT&T filed a motion to intervene.

DECIDED

Electric Transmission Line Routing: *Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for the Proposed Leander to Round Rock 138-Kv Transmission Line in Williamson County*; PUC Docket No. 45866. This application relates to the location of a major electric transmission line. The Texas Municipal League submitted comments on what constitutes “community values.” TML argued that the Public Utility Commission need not make the determination largely on questionnaires and emails sent only to those directly in the path of proposed transmission lines. Those people can’t be representative of an entire city and its extraterritorial jurisdiction. Rather, the Commission should rely on the comprehensive planning processes of the affected cities. The Cities of Cedar Park, Leander, and Round Rock have pre-prepared explanations of community values in the form of their comprehensive plans, and those plans should form the basis of the Commission’s decisions. The comment was filed on December 19, 2016. On June 6, 2017, the PUC ultimately adopted a different route than that requested by the cities, and concluded that the agreement of the cities based on their comprehensive plans doesn’t represent community values. The cities filed a motion for rehearing, and TML filed comments in support of the rehearing on July 24, 2017. The PUC ultimately ignored the city’s request and chose a different route.

Payday Lending Ordinance: *The State of Texas v. The Money Store, LP*, Cause No. C-1-CR-17-100026 and *The State of Texas v. ASCO of Texas, LP*, Cause No. C-1-CR-17-100025, in Travis County Court at Law Number Two. In two City of Austin municipal court orders issued on March 1, 2017, the municipal court granted separate motions to quash on the grounds that the city’s payday ordinance was preempted by Section 393.602(b) of the Texas Finance Code. The City appealed to county court. The Texas Municipal League (TML) (joined by the cities of Amarillo, Garland, and Waco) argued that the municipal court misapplied state preemption law and explained both the policy and practical consequences of judicial preemption. TML also argued there exists a reasonable construction that leaves both Section 4-12-22(D) of the Austin City Code and Texas Finance Code Section 393.602(b) in effect. The statute provides that a fee is to be calculated on a daily, biweekly, monthly, or on another periodic basis, while the ordinance requires repayment in no more than four installment payments without regard for the basis upon which the fees are calculated. TML filed its brief on August 1, 2017, and on September 21, 2017, a Travis County Court issued two opinions reversing the City of Austin municipal court orders that Austin’s payday and auto-title lending ordinance was preempted by state statute. The court held that the city’s ordinance is not preempted by state law because there is a reasonable construction by which the ordinance and state statute governing credit access businesses can both be given effect.

Tree Preservation: *RQ-0154-KP*, Constitutionality of municipal tree preservation ordinances. John Echeverria, Professor of Law at the Vermont Law School and a nationally-recognized takings law expert, submitted a comment letter to the attorney general’s office. He argued that it is “exceedingly unlikely” that the City of Austin or

City of Colleyville ordinances could work a taking that requires compensation. His legal research across the country, including recent U.S. Supreme Court precedent, showed that to be the case. Professor Echeverria submitted the letter on July 7, 2017. The attorney general issued opinion number KP-0155 in one month and four days. It concluded that, if a municipal tree preservation ordinance operates to deny a property owner all economically beneficial or productive use of land, the ordinance will result in a taking that requires just compensation under article I, section 17 of the Texas Constitution. Furthermore, it concluded that a court is likely to find a regulatory taking if a municipal tree preservation ordinance, as applied to a specific property, imposes restrictions that unreasonably interfere with landowners' rights to use and enjoy their property. In analyzing whether the interference is unreasonable, the court will consider all relevant circumstances, including: (1) the economic impact of the ordinance; (2) the extent to which the ordinance interferes with distinct investment-backed expectations; and (3) the character of the governmental action. On July 14, 2017, the attorney general issued opinion no. KP-0155. The opinion concluded that “[i]f a municipal tree preservation ordinance operates to deny a property owner all economically beneficial or productive use of land, the ordinance will result in a taking that requires just compensation under article I, section 17 of the Texas Constitution. Furthermore, a court is likely to find a regulatory taking if a municipal tree preservation ordinance, as applied to a specific property, imposes restrictions that unreasonably interfere with landowners' rights to use and enjoy their property. In analyzing whether the interference is unreasonable, the court will consider all relevant circumstances, including: (1) the economic impact of the ordinance; (2) the extent to which the ordinance interferes with distinct investment-backed expectations; and (3) the character of the governmental action.”

Governmental Immunity: *Port of Houston Authority v. Zachry Construction Corporation*, No. 17-0066 in the Texas Supreme Court. The Port of Houston Authority filed a petition for review asking the Court to clarify two issues related to governmental immunity. The first involves a contractual provision requiring notice to the Port of Houston if Zachry believes the Port interpreted the contract in a way that would change or breach the contract. The second involves governmental immunity in pass-through claims. TML and TCAA filed an amicus letter in support of the Port of Houston Authority arguing that: (1) Section 271.0154 of the Local Government Code applies and allows this type of notice provision in governmental contracts; and (2) governmental immunity applies to a pass-through claim on behalf of a subcontractor that does not have a contract with a governmental entity. The letter was filed on February 27, 2017. The petition for review was denied on September 1, 2017.

Police Complaints: *City of Plainview v Ferguson*, No. 16-0880 in the Texas Supreme Court. The issue in this appeal is whether reinstatement of a police officer is a viable remedy when the officer's termination did not meet the technical notice requirements of the Subchapter B of the Texas Government Code Chapter 614. TML, as amicus, argued that the lower court overstepped its statutory authority by ordering that a terminated police officer be reinstated. The consequence of reinstatement in this case is that a known (or strongly suspected) assailant regains a position of authority in the community. This sends messages that would be poor at any time, but are especially troublesome given

the current state of national anxiety with the police service. The brief was filed on November 18, 2016. The Court requested a response from Ferguson on December 9, 2016. On February 17, 2017, the petition for review was denied. On March 6, the city filed a motion for rehearing that was denied on June 23, 2017.

Spousal Benefits: *Jack Pidgeon and Larry Hicks, v. Mayor Sylvester Turner and City of Houston*, No. 15-0688 in the Texas Supreme Court. The issue in this case is whether the City of Houston can offer spousal benefits to a spouse in a same-sex marriage. TML and the International Municipal Lawyer’s Association argues that the state’s attempt to limit the autonomy and authority of cities to make decisions about the health and welfare of their citizenry should be met with skepticism when such limitations are declared unconstitutional by the U.S. Supreme Court. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) instructs that a same-sex marriage is on equal legal footing with a traditional marriage. There is no permissible basis for distinguishing the two—they are both legal marriages, on the same terms and conditions, entitled to equal dignity and respect under the law. No constitutionally permissible limitation prevents the City of Houston, or any other Texas city, from extending employment benefits to spouses of *all* married employees. The brief was filed on February 16, 2017, and oral argument was held on March 1, 2017. On June 30, the court disagreed reversed and remanded, stating that “Pidgeon and the Mayor, like many other litigants throughout the country, must now assist the courts in fully exploring *Obergefell’s* reach and ramifications, and are entitled to the opportunity to do so.”

Preemption: *City of New Braunfels v. Stop the Ordinances Please*, No. 03-14-00198-CV in the Third Court of Appeals at Austin. This is an appeal by the City of New Braunfels from a determination that its ordinance banning disposal beverage containers on rivers within the city limits. The City of Austin, joined by the Texas Municipal League and the Texas City Attorneys Association, argued that the ordinance is not preempted by the state law relating to container packaging. The brief was filed on March 10, 2015. Oral argument was heard on March 11, 2015. On May 18, 2017, the court reversed the trial court and rendered judgment in favor of the city because the court lacked subject matter jurisdiction.

Civil Penalties: *Forte v. Wal-Mart Stores, Inc.*, No. 12-40854 in the Fifth Circuit and 15-0146 in the Supreme Court of Texas as a certified question. TML and TCAA joined in this brief with Harris County, Hunt County, and the City of Houston. The case involves a dispute between Wal-Mart and several optometrists regarding violations under the Texas Optometry Act (Act). The Act authorizes both private litigants and the attorney general to recover civil penalties. The Fifth Circuit held that Wal-Mart was liable under the Act, but eliminated the plaintiffs’ civil penalty award. The Fifth Circuit ruled that Chapter 41 of the Texas Civil Practices and Remedies Code (a tort reform statute) applies to civil penalties, meaning that the penalties were punitive damages and could not be recovered unless actual damages were recovered. Because the court’s opinion does not distinguish between private litigants and governmental entities, the opinion could impact a city’s ability to recover civil penalties. This brief explains why the court should modify the panel opinion to make clear that the limitations on

exemplary damages found in Chapter 41 do not apply to civil-penalty cases brought by the government, and the government may recover civil penalties even if it is not awarded actual damages. The motion for leave to file the brief was filed on September 18, 2014. The panel vacated its prior opinion and issued a new opinion on February 20, 2015. The new opinion certifies two questions to the Supreme Court of Texas: (1) whether civil penalties awarded under the Texas Occupations Code are “damages” as the term is used in Texas Civil Practices & Remedies Code Section 41.002(a); and (2) if they are “damages” whether they are “exemplary damages” under Texas Civil Practices & Remedies Code Section 41.004(a) which would preclude their recovery where the plaintiff does not receive damages other than nominal damages. The Supreme Court of Texas has accepted the questions and the new case number in the Supreme Court of Texas is 15-0146. Oral argument at the Supreme Court of Texas was heard on September 23, 2015. TML and TCAA joined various *amici*, including the City of Houston, urging the Texas Supreme Court to make clear in answering the certified questions that: (1) the limitation on exemplary damages found in Texas Civil Practice and Remedies Code Chapter 41 does not apply to civil-penalty cases brought by the government, and (2) that the government can recover civil penalties even if it is not awarded actual damages. On May 20, the court delivered its opinion that Chapter 41 does not apply when a governmental entity is seeking civil penalties. Forte filed a motion for rehearing on July 6, 2016.

Municipal Subdivision Ordinance/Electric Undergrounding: *Appeal of CenterPoint Energy Houston Electric, LLC from an Ordinance of the City of League City, Texas and Application for Declaratory Relief*, PUC Docket No. 45259. In this docket, CenterPoint Energy claims that a city may not, through its subdivision ordinance, require a developer to request undergrounded distribution lines. CenterPoint claims that such a requirement violates its PUC-approved tariff. TML argued that the PUC has no jurisdiction to interpret a city’s subdivision ordinance, and that the requirement that a developer bear the cost of undergrounding does not violate CenterPoint’s tariff. The letter was filed on June 29, 2016. The SOAH judge declared the ordinance void in its application to CenterPoint on January 18, 2017. TML filed comments again at the Commission level on March 1, 2017. On March 9, 2017, the city received a favorable order from the PUC. The commission did not issue a final order. Instead, it remanded the case to the State Office of Administrative Hearings for one final issue determination regarding whether the ordinance impacts transmission lines (it does not). At the hearing, PUC Chair Donna Nelson explained that customer-specific facilities are different than facilities that serve the entire system. Because of that, the ordinance is valid as to customer-specific distribution lines.

State Highway Utility Relocation Cost: *City of Jersey Vill. v. Tex. Transp. Com’n*, No. 15-0874 in the Texas Supreme Court. TML and TCAA filed an amicus brief in support of the City of Jersey Village’s petition for review. The City of Jersey Village (City) was required to move its utility lines because of a state highway expansion project. The State is required to reimburse the City for the entire amount of the relocation cost according to section 203.092 of the Texas Transportation Code. The State declined to pay the replacement easements needed to move the City’s lines. The City filed suit in trial court

where the court ruled the City's replacement easement cost is part of the entire amount for the relocation of its utility lines. The State appealed and the Fourteenth Court of Appeals reversed the trial court stating that the City did have a compensable property interest in the land because of the public utility easements, but the cost of replacement easements are not properly attributable to the relocation and therefore not reimbursable. TML and TCAA argued that replacement easements are attributable to the relocation of utility lines because of a state highway expansion project and to deny the reimbursement of those cost will set a dangerous precedent and place a burden on cities. The brief was filed on February 28, 2017, and the petition for review was denied on March 10, 2017.

Referendum: *City of Plano v. Carruth*, No. 05-16-00573-CV, in the Fifth Court of Appeals. In this case, a citizens group filed a referendum petition under the city's charter to repeal the city's comprehensive plan. The Texas Municipal League, Texas City Attorneys Association, Texas Chapter – American Planning Association, and International Municipal Lawyers Association argued in support of the city's interlocutory appeal on its plea to the jurisdiction that the adoption of a comprehensive plan is not subject to referendum because a statutory adoption process must be followed. Amici filed their brief on August 16, 2016. Oral argument was held on November 8, 2016.

On February 23, 2017, the court issued a memorandum opinion concluding that the Plano city charter does not give the city secretary any discretion to determine whether the subject matter of a referendum petition has been withdrawn from the referendum power by general law or the charter. "We will not imply such discretion absent express language in the charter supporting its existence [and Carruth]...alleged facts supporting a claim for mandamus relief against the city secretary under the ultra vires exception to governmental immunity."

In so holding, the court held that the City's argument that comprehensive plans have been removed from the referendum power confuses the merits of whether mandamus should be issued with whether the trial court has subject matter jurisdiction to consider a petition for mandamus. "Whether the trial court should ultimately grant or deny the petition for mandamus is not the issue before us; the issue is whether the trial court has jurisdiction to consider the petition." The cases cited by the city were decided *on the merits* of whether the writ of mandamus should issue, indicating the courts had subject matter jurisdiction to rule on the merits.

Based on those conclusions, the court agreed with the city that the claims against the city council were not ripe because the council had yet to decide how to act on a petition that hadn't been submitted to it. "What the City Council will do when presented with a referendum petition is unknown and appellees merely speculate the council will refuse to act."

Hotel Occupancy Tax: RQ-0122-KP; *Authority of a municipality to use hotel occupancy tax revenue to fund a feasibility study and the construction, operation, and maintenance of a performing arts center.* This attorney general opinion request asks if the City of Lakeway may "legally expend local hotel occupancy tax revenue to fund a

feasibility study for a performing arts center and the construction, operation, and maintenance of the performing arts center.” The Texas Municipal League and Texas City Attorneys Association argued that: (1) The question of whether or not an expenditure of hotel occupancy tax revenue is permissible is a question of fact that cannot be answered through the opinion process; and (2) should the attorney general’s office decide to undertake a fact-based analysis, it would find that the city’s expenditure of hotel occupancy tax revenue for a feasibility study and the construction, operation, and maintenance of a performing arts center potentially would fit within multiple categories of authorized uses under Section 351.101 of the Tax Code. The comments were filed on August 31, 2016. Opinion No. KP-0131 concluded that, under Section 351.101 of the Tax Code, a city may expend its municipal hotel occupancy tax revenue in the direct promotion of tourism and the convention and hotel industry, provided that the expenditure is for one of the specified uses listed in the statute. It is for the governing body to determine in the first instance whether an expenditure of hotel occupancy tax revenue is proper under Section 351.101.

Public Information Act: *Paxton v. City of Dallas*, Nos. 15-0073 & 15-0238 (Consolidated), in the Texas Supreme Court. The issues before the court are whether the policy supporting the attorney-client privilege and, in the alternative, the avoidance of harm to a city’s bargaining position on a multimillion-dollar long-term transaction are compelling reasons to withhold attorney-client-privileged communications when the city asked for an attorney general ruling after the deadlines in Texas Government Code Section 552.301. The Texas Municipal League, Texas City Attorneys Association, and Texas Association of Counties (Amici) filed an amicus brief in support of the City of Dallas. Amici argued that: (1) the attorney-client privilege, in and of itself, constitutes a compelling reason to withhold information under Section 552.302; and (2) attorney-client privileged information is confidential by law under Section 552.101 and thus, constitutes a compelling reason under Section 552.302. In addition, Amici argued that if the attorney general’s interpretation of the Public Information Act is allowed to stand (1) the attorney-client privilege will be devalued to such an extent that governmental entities will be left legally vulnerable; and (2) individual government officers and employees will be subject to possible prosecution and removal from office. The brief was filed on September 9, 2016. On February 3, 2017, the Texas Supreme court delivered its opinion in *Paxton v. City of Dallas*. The court held that missing the ten-day deadline in the Public Information Act to request an attorney general ruling does not waive the attorney-client privilege.

Licensed Handgun Carry: *RQ-0087-KP*, Requirements for a municipality’s posting of notice regarding the carrying of handguns. The Texas Municipal League submitted to the attorney general’s office a TML paper titled “Cities and Firearms” for that office to use as a resource in opining on the request. The comment was filed on January 26, 2016. Opinion No. KP-0098 (2016) was issued on June 27, 2016 and essentially advised that a city wanting to prohibit licensed carry in the meeting room may do so by temporarily posting the signs at the entrance to the room when a meeting is taking place. However, the opinion also included an analysis related to licensed carry in “closed meetings.” The 2015 legislation prohibiting licensed carry “in the room or rooms where a meeting of a

governmental entity is held and if the meeting is an *open meeting*” was added to clarify that only meetings of bodies governed by the Open Meetings Act are off limits, and only then if a city posts signage. The phrase “open meeting” in that statute clearly means one that is subject to the Open Meetings Act. However, the attorney general’s office reads it literally to not include a “closed meeting (i.e., an executive session).” In other words, the opinion concludes that a city can’t prohibit a person from licensed carrying into an executive session. TML submitted a request for reconsideration of the opinion on July 5, 2016, and no response was ever received by the attorney general.

General Law Sex Offender Residency Restrictions: *City of Krum v. Taylor Rice*, No. 02-15-00342-CV in the Second Court of Appeals at Fort Worth. In 2015, Texas Voices for Reason and Justice (TVRJ), a “statewide criminal-justice advocacy group,” asked by letter that the 49 general law cities with sex offender residency restriction repeal their ordinance or face a lawsuit. This is one of 13 lawsuits filed so far against cities that refused to do so. The substance of sex offender’s claim in this suit – that a general law city has no authority to enact such an ordinance – is largely based on a March 2007 opinion from the Texas attorney general’s office. The petition alleges that, because it is incorporated under the general laws, and no general law expressly delegates the authority to enact a sex offender residency restriction ordinance, the defendant city is not authorized to enact one. Of course, attorney general opinions are not binding on courts. Moreover, the three-sentence conclusion in GA-0526 should be treated as *dicta* because the purpose of the opinion wasn’t to opine on general law authority, and it provides essentially no analysis as to the question of general law authority to enact sex offender residency restrictions. The Texas Municipal League and the Texas City Attorneys Association argue that a general law city *can* enact a sex offender residency restriction because Sections 51.001 and 51.012 of the Local government Code provide the express privilege to enact an “ordinance, act, law, or regulation” necessary for public welfare and “good order.” The brief was filed on February 24, 2016, and oral argument was held on March 1, 2016. On December 15, the Fort Worth Court of Appeals decided that a registered sex offender’s lawsuit against the City of Krum’s residency restrictions can move forward. In *City of Krum v. Taylor Rice*, the court issued a one-page order stating that the trial court properly denied the general law city’s claim that the court is without jurisdiction to hear the case. (A dissenting opinion argued that the case is moot because the sex offender in question is prohibited by his probation conditions from residing within 1,000 feet of places where children commonly gather.)

Tort Claims Act: *Webb County v. Adriana Perez*, No. 15-0666, in the Supreme Court of Texas. TML and TCAA joined the Texas Association of Counties and Texas Association of Counties Risk Management Pool in urging the Texas Supreme Court to grant review of whether a police officer who responds to a domestic violence call on his own initiative is engaging in an “emergency” response covered by the emergency exception of the Texas Tort Claims Act. The brief was filed on April 26, 2016. The petition for review was denied on December 16, 2016.

Sign Regulation: *Auspro Enterprises v. Texas Department of Transportation*, No. 03-14-00375-CV in the Texas Supreme Court. The Texas Highway Beautification Act

essentially bans signs and billboards near state highways, but sets forth a number of exemptions to the ban. For example, election signs are among those exempted. The dispute in *Auspro* related to a store owner placing a political sign supporting Ron Paul for president alongside a state highway. The Texas Department of Transportation (TxDOT) ordered the property owner to remove it because state law allows political signs along state highways only during certain periods before and after an election. Following the recent U.S. Supreme Court holding in *Reed v. Town of Gilbert*, the Texas Supreme Court concluded that the content-based exemption in Act are unconstitutional. The amicus brief in support of TxDOT's motion for rehearing focuses on the remedy. The Texas Supreme Court struck down the entire Act. Amici argue that only the election sign exemption should be struck down, and that the remainder of the Act should be left in place. The brief was filed on October 7, 2016. On December 8, 2016, the court withdrew its original opinion and substituted a new opinion. The Austin Court of Appeals adopted the U.S. Supreme Court's mandate that, if a person has to *read the content of the sign* to determine whether it is subject to regulation, the regulation will usually violate the First Amendment. The substitute opinion held the same way, but struck only certain provisions of the Texas Highway Beautification Act that regulate non-commercial speech. (The original opinion struck down the entire law.)

Excessive Force: *Hunter v. Cole*, No. 16-351, in the U.S. Supreme Court. TML joined TCAA, IMLA, TAC, CLEAT, and the cities of Arlington, Garland, Grand Prairie, and Plano in the attached amicus brief. Amici urge the U.S. Supreme Court to reverse this Fifth Circuit decision. The brief outlines how excessive force claims have been analyzed by the Fifth Circuit and argues that, in this case, the court disregarded its own established standards and judged the officers in a manner contrary to current law. At a bare minimum, the officers should have been entitled to qualified immunity. It then explains that without clear standards it will be difficult for local governments to hire and retain officers. The brief was filed on October 20, 2016. On November 28, 2016, the petition for writ of certiorari was granted, the judgment was vacated, and the case was remanded to the U.S. Court of Appeals for the Fifth Circuit for further consideration in light of *Mullenix v. Luna*, 577 U. S. ____ (2015)(per curiam).

Manufactured Housing: *City of Anahuac v. Morris*, No. 16-0082 in the Supreme Court of Texas. In this case, the court is asked to review two manufactured housing statutes from Chapter 1201 of the Occupations Code to determine whether a city can enforce its manufactured housing ordinances when: (1) the city is in a wind-zoned county; and (2) the ordinance is stricter than state law. Morris moved a manufactured home into the city without applying for a permit as required by ordinance. The city objected and Morris sued. Morris argued that Section 1201.256 that exempts certain mobile homes from state regulation also preempts any city ordinance on mobile homes in a wind-zoned county. The court of appeals agreed, holding that state law and the city's ordinance are in conflict and so the ordinance is preempted. A petition for review was filed by the city on February 1, 2016. In support of that petition, TML and TCAA argue that Sections 1201.008 and 1201.256 of the Occupations Code are not in conflict, but instead provide for state and local regulation of manufactured housing in certain parts of the state. Specifically that, when 1201.008 and 1201.256 of the Occupations Code are read

together, they mean that a person needs to ensure that his mobile home meets state law requirements regarding wind zones and also meet any stricter requirements enacted by a city under Section 1201.008. TML and TCAA filed their brief on February 25, 2016. The petition for review was denied on September 9, 2016.

Vendor Disclosure Requirements: 1 TAC §§ 46.1, 46.3, 46.5, implementing House Bill 1295 (Government Code Section 2252.908). The Texas Municipal League and the Texas Association of School Boards submitted comments to the Texas Ethics Commission urging that the Commission, among other things: (1) clarify that a business entity is not required to file a disclosure form when there is no “interested party”; (2) define what it means for a governing body to “participate in the selection of the business entity”; (3) define “controlling interest” to include only those persons holding more than a 50 percent ownership interest in a business entity; and (4) give business entities and intermediaries the opportunity to protect any proprietary or confidential information prior to having the disclosure form posted on the Commission’s website. The comment was filed on November 13, 2015.

Proposed Amendment – 1 TAC §§ 46.3(d). The Texas Municipal League submitted comments to the Commission indicating its support of the proposed amendment, which clarifies the terms “controlling interest” and “intermediary.” In addition, TML argued that the Commission should consider further amendments to the rules, including: (1) defining how one determines the “value” of a contract; (2) defining the term “contract” to clarify its scope; (3) defining the term “officer” as used in the rules; (3) amending 1 TAC § 46.5(a)(4) to allow the use of some identification mechanism in lieu of a numbering system; (4) amending 1 TAC § 46.5(c) to clarify that a governmental entity is not deemed to have received a disclosure under Government Code § 2252.908(f) until all parties are bound to the contract; and (5) amending Form 1295, Box 6 (the affidavit) to provide as follows: “I swear, or affirm, under penalty of perjury, that to the best of my knowledge the above disclosure is true and correct.” The comment was filed on February 24, 2016.

Proposed Amendments – 1 TAC §§ 46.3, 46.5. The Texas Municipal League submitted comments to the Commission arguing that: (1) the rules should clarify that contracts requiring an action or vote by the governing body must be written agreements; (2) consistent language should be used in Form 1295 and the rules in regard to the types of transactions that trigger the disclosure requirement; and (3) the rules should provide that a governmental entity is deemed to have received a disclosure under Government Code § 2252.908(f) when all parties are bound to the contract. The comment was filed on May 23, 2016.

The Commission has acted on all of the above proposed amendments.

Water Rate Jurisdiction: *Appeal of Water and Sewer Rates Charged by the Town of Woodloch Nos. 12312 and 20141*, PUC Docket No. 42862. The Public Utility Commission of Texas (Commission) has issued an Order Requesting Briefing on the question of “What is the Commission’s jurisdiction on an appeal of a municipality’s water and sewer rates over the rates of the in-town residents of the municipality?” The

Commission has jurisdiction over appeals from the water or sewer rates charged by a municipally owned utility (MOU) to customers outside the city's limits. That has been the case for decades. But the Commission does *not* have jurisdiction over the in-city rates of an MOU. What began as a typical appeal of rates by customers outside the city's limits may turn into an attempt by the Commission to usurp authority over cities. Section 13.042(f) of the Texas Water Code clearly provides that it "does not give the utility commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned corporation, within its corporate limits." Nonetheless, the Commission is seeking comments on the question. The present docket is not the first time the Commission has asked the question. In 1981, the chair of the Commission requested an attorney general opinion on exactly the same question, and the attorney general concluded that "the Texas Public Utility Commission does not have authority to set rates for customers inside the city limits." The League filed comments in support of the City of Woodloch on April 25, 2016, and also filed reply comments on May 5, 2016. The PUC staff apparently decided to leave the order in place without considering any additional comments.

Public Health Service Fee: *Rule Project Number 2015-031-290-AD, Proposed Rulemaking Chapter 290, Public Drinking Water, HB 1: Public Health Service Fee Increase.* The Texas Commission on Environmental Quality (TCEQ) published proposed rules on December 4, 2015, increasing the maximum Public Health Service Fee. With this particular proposed rule, TCEQ seeks to raise the Public Health Service Fee, which is a fee collected from operators of public drinking water systems. The maximum fee for the smallest systems with fewer than 25 connections will increase by \$100. The maximum fee for small systems with 25-160 connections will increase by \$125. The maximum fee for a system with 161 or more connections will almost double, increasing from \$2.15 to \$4.00 per connection. TML filed comments requesting that rather than forcing cities to impose a state tax increase, the legislature provide adequate funding to TCEQ. The comment was filed on December 28, 2015. A hearing on the fee increase was held on January 5, 2016, and the rules will be considered by the TCEQ on May 11. They were finally adopted on May 27, 2016.

Sovereign Immunity: *Engleman Irrigation District v. Shields Brothers, Inc., No. 15-0188, in the Supreme Court of Texas.* TML and TCAA filed an amicus brief in support of the Engleman Irrigation District ("EID"). In 1992, Shields Brothers, Inc. ("Shields") sued EID for breach of an agreement to provide irrigation water. EID pleaded sovereign immunity, which the district court denied. A jury found that EID breached the agreement with Shields and in March 1995, the district court granted judgment against EID for monetary damages. The brief argues that under *Tooke v. City of Mexia*, decided by the Supreme Court of Texas in 2006, a trial court would not have subject-matter jurisdiction over a claim against an irrigation district like the claim asserted by Shields. We argue in the brief that the 1995 judgment is no longer enforceable because it is inconsistent with *Tooke* and HB 2039, passed in 2005 amending chapter 271 of the Local Government Code relating to contractual immunity. We ask the court to grant EID's petition for review and hold that immunity from suit bars the judgment against EID. The brief was filed on May 8, 2015. Briefs on the merits have been requested. The petition was denied on May 27, 2016.

Water: *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572 in the Supreme Court of Texas on petition for review. TML and TCAA filed a brief in this case on February 9, 2016. The issue in this case is whether the oil and gas accommodation doctrine should be applied to groundwater as a severed estate in determining which entity or individual has the greater right to access or use groundwater. TML and TCAA argued that the accommodation doctrine should not be extended to groundwater because: (1) that doctrine has never applied to water; and (2) it would cause uncertainty in the provision and retention of groundwater for cities throughout Texas. The brief asked that the Court affirm the Amarillo Court of Appeals judgment. On May 27, 2016, the Court ruled against the position TML advocated, and extended the accommodation doctrine to severed groundwater estates.

Building Permits in the ETJ: *Town of Lakewood Village v. Harry Bizios*, No. 15-0106 in the Supreme Court of Texas. The Town of Lakewood Village argued that current statutory provisions authorize any city to enforce building codes in its extraterritorial jurisdiction (ETJ). TML and TCAA called the Court's attention to policy considerations related to development in a city's ETJ. Cities will – in many cases – annex areas within their ETJs. (Even in situations in which a city doesn't annex an area, blighted construction in the ETJ still negatively affects the neighboring city.) Because of that, substandard construction in those areas is a liability to the homeowner, the neighboring city, the region, and the State itself. TML and TCAA filed their post-submission brief – urging the Court to hold in favor of the Town – on April 19, 2016. The Court issued its opinion on May 27, 2016, concluding that a general law city has no authority to require building permits in the ETJ.

Employment Law: *City of Houston v. Zamora*, 15-868 (February 2016) in the Supreme Court of the United States. This case concerns the “cat’s paw” theory of liability. The theory gets its name from the fable of a 17th Century French poet, about a monkey who persuaded a cat to pull chestnuts out of the fire, so the cat gets burned and the monkey makes off with the chestnuts. In the workplace context, the employer gets the legal blame even if the actual supervisor who fires or demotes a worker or refuses promotion does not act out of a biased intent, but rather because the bias of another supervisor along the way worked its way into the final decision. The final decision-maker is the cat and the biased supervisor is the monkey. The theory is designed to punish employers who rubber-stamp the illegal animus of their supervisors, but the Fifth Circuit applied it in this case despite the city’s robust and independent investigation process designed to get to the bottom of the underlying incidents. In the case below, the Fifth Circuit reasoned that the law “simply requires that the supervisor’s influence with the decisionmaker be strong enough to actually cause the adverse employment action.” The Texas Municipal League, joined by the Texas Association of Counties and the State of Texas (through the Solicitor General’s Office), argued that thousands of Texas local governmental employers have adopted employee grievance procedures for the purpose of preventing illegal discrimination and retaliation, which gives them a strong interest in the Court’s resolution of the City’s second question in its petition: “whether the ‘cat’s paw’ theory of liability extends to employment actions taken after an

extensive internal review process that considers testimony from nearly two dozen witnesses and provides multiple layers of independent review, including an independent review board with citizen involvement.” The review in this case included an investigation by the Internal Affairs Division, which took statements from some 22 witnesses before determining that Officer Zamora had been untruthful on multiple occasions. Only three of those 22 witness statements came from the supervisors who Zamora alleged to have had a retaliatory motive. The IAD file, with its determination of Zamora’s untruthfulness, was then reviewed in full by HPD’s nine-member Administrative Disciplinary Committee (consisting of five officers and four civilians), which agreed that Zamora had been untruthful and recommended that he be suspended. The ADC’s recommendation was then evaluated by the Chief of Police, who decided to impose a 10-day suspension on Officer Zamora. Essentially, the Amici argued that the city’s disciplinary review system is designed to ensure that any discipline an officer might receive would be based on his own conduct, rather than be unduly influenced by his supervisor. As such, the cat’s paw theory should not be applied here. The brief was filed February 9, 2016, 2016, and the court denied the writ on May 18, 2016.

Contractual Immunity: *Wheelabrator v. CPS Energy*; No. 15-0029, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City of San Antonio (“CPS Energy”). This is the second iteration of this case. Previously the Texas Supreme Court refused to grant Wheelabrator’s petition after the San Antonio Court Appeals concluded that the proprietary-governmental dichotomy found in the Texas Tort Claims Act did not apply to breach of contract claims. In this claim, Wheelabrator claims they are entitled to attorney’s fees because the underlying claim involves the city performing a proprietary function. Our brief provides the policy and legal basis for the legislature’s waiver of governmental immunity in the limited circumstance of a written contract. We argue that the proprietary-governmental dichotomy does not apply to waiver of immunity claims in the contract setting. Thus, Wheelabrator is not entitled to recover attorney’s fees. The brief was filed on January 12, 2016. Oral arguments were heard on January 14, 2016. On April 15, the opinion was issued. The Court concluded, as it did in *Wasson Interests v. City of Jacksonville*, that the governmental-proprietary distinction found in the Texas Tort Claims Act applies to contractual claims against a city. As such, CPS Energy had no immunity from Wheelabrator’s claim for attorneys’ fees.

Civil Ordinance Enforcement: *City of Dallas v. TCI West End, Inc.*, No. 13-0795, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City of Dallas’s Petition for Review. This case involves the authority of a city to seek damages through legislatively-created civil penalties against those who illegally demolish historic buildings. The majority for the court of appeals undermined this fundamental authority by interpreting Subchapter B of Local Government Code Chapter 54 as being inapplicable to zoning ordinances, thereby severely diminishing the ability of cities to enforce historic and non-historic zoning ordinances alike. The majority opinion’s interpretation of Subchapter B is plainly wrong. Subchapter B expressly lists zoning ordinances as a category of ordinances to which it applies. The brief was filed on November 13, 2013. After several different appeals, the trial court’s award of civil

penalties was ultimately upheld, which means that the city won its case against the landowner for demolishing the structure without getting a permit to do so from the Dallas Landmark Commission.

Regulatory Takings: *Harris Cnty. Flood Control Dist. v. Kerr*, No. 13-0303, in the Supreme Court of Texas. In this case, the flood control district adopted flood control plans that downstream landowners claimed, coupled with upstream development, caused flooding on their property. The appeals court concluded that the district intended to cause the flooding, which led to a successful takings claim by landowners. At the Texas Supreme Court, the Conference of Urban Counties, the Texas Association of Counties, and the Texas Municipal League argued that the takings and nuisance claims should have been dismissed because there is no evidence of the intent element of a takings claim: at the time the flood-control measures at issue were implemented, the district did not know those measures were substantially certain to cause flood damage to landowners' property. The brief in support of the petition for review was filed on July 2, 2013. A response was requested by the Court on August 23, 2013. Briefs on the Merits were requested by the Court on December 13, 2013. Petition for review was granted and oral argument was heard on December 4, 2014. The Supreme Court held that the Kerrs showed sufficient evidence of a taking to go forward with their suit. Justice Willett filed a dissent stating that the Court's holding in *Kerr* will encourage governmental entities to do nothing when it comes to flood control in order to escape liability in the future. Harris County filed a motion for rehearing, and CUC, TAC, and TML filed another amicus brief on that motion. Amici argue that allowing government inaction to support Plaintiffs' theory of the case creates new law and broadens takings liability, which undermines the purpose of government and its ability to function. The majority opinion encourages governments to either do nothing at all to prevent public harm or to over-regulate in order to avoid liability. The brief on motion for rehearing was filed on August 28, 2015. The Supreme Court of Texas granted the motion for rehearing on February 19, 2016.

Child Safety Fee: *RQ-0052-KP, Disposition of revenue collected pursuant to section 502.402 of the Transportation Code, authorizing an optional county fee for child safety.* The Texas Municipal League and the Texas City Attorneys Association argued to the attorney general that counties are required to send proportional fee revenue to the cities within the county. This is required by the language of section 502.403(e) of the Texas Transportation Code: "... After making the deductions provided for by this subsection, the county shall send the remainder of the fee revenue to the municipalities in the county according to their population." The comment was filed on October 29, 2015, and opinion no. KP-0068 was issued on March 8, 2016. The opinion agreed with the comments from TML and TCAA, and concluded that a county must to send the remainder of the fee revenue to the municipalities in the county according to their population.

Inverse Condemnation: *City of Cedar Hill v. Anderton*, No. 15-0214 in the Supreme Court of Texas. This case, on its face, appears to relate solely to an impermissible expansion of a non-conforming use under a city's zoning ordinance. But the court of appeals' opinion implicates much more, specifically the failure to apply the Texas Supreme Court's precedent. The key issue is whether an enforcement action brought by

a city to enforce its ordinances is, by itself, enough to form the basis of an inverse condemnation claim. According to the Supreme Court, the answer is “no.” The Court’s recent opinion in *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014) holds that a court lacks jurisdiction to decide a regulatory takings claim based solely on the effects of a city’s enforcement actions. The letter brief in support of the city’s petition for review was filed on April 7, 2015. A response has been requested by the Court. The petition for review was denied on December 18, 2015.

Concealed Handguns: *RQ-0040-KP*, *The extent to which firearms may be excluded from buildings that contain courts, offices utilized by the courts, and other county officials.* The Texas Municipal League and the Texas City Attorneys Association argued to the attorney general that a handgun license holder is prohibited from carrying anywhere on the premises of any building that houses any courtroom or court office, including those of a municipal court. The comments were filed on July 29, 2015. The Attorney General issued his opinion on December 21, 2015. For purposes of Section 411.209 of the Government Code, the phrase “premises of any government court” used in Penal Code Subsection 46.03(a)(3) generally means either: (1) a structure utilized by a court created by the Texas Constitution or the Legislature, or (2) a portion of such a structure. The premises of a “government court or office utilized by the court” means a government courtroom or those offices essential to the operation of the government court. The responsible authority that would notify license holders of their inability to carry on the respective premises must make the determination of which government courtrooms and offices are essential to the operation of the government court, in consultation with the government court.

Licensed Handgun Carry: *RQ-0051-KP*, **KP-0049** *Questions regarding a notice prohibiting entry with a handgun onto certain premises under section 30.06 of the Penal Code and section 411.209 of the Government Code.* The Texas Municipal League and the Texas City Attorneys Association argued to the attorney general that no civilian may carry a handgun into a building that houses a court or court office without authorization from the court. In lieu of the notice authorized by Texas Penal Code Section 30.06, a better way to notify everyone that carrying is not allowed in a building that houses a court or court offices would be a sign on each entrance to the building stating that: “This building houses courts and court offices. All weapons are prohibited pursuant to Penal Code Section 46.03(a)(3). An offense under that section is a third degree felony.” The comment was filed on October 20, 2015. The Attorney General issued his opinion on December 21, 2015. Pursuant to Opinion KP-0047, it is only the courtrooms, and those offices determined to be essential to their operations, from which Hays County may prohibit concealed handguns without risk of incurring a civil penalty under Section 411.209 of the Government Code. A court would likely conclude that Section 411.209 of the Government Code can be implicated by a governmental entity that seeks to improperly prohibit handguns from a place where handguns may be lawfully carried through oral notice or by a written notice that does not conform to Section 30.06 of the Penal Code. By the terms of Section 30.06 of the Penal Code, a license holder carrying a concealed handgun who refuses, after notice by the governmental entity, to exit premises from which Penal Code Sections 46.03 or 46.035 prohibit handguns commits an offense

punishable as a misdemeanor. Conversely, a licensee who refuses to relinquish any concealed handgun or refuses to exit the building after being given notice by a governmental entity does not commit an offense if the building is not one from which Sections 46.03 and 46.035 prohibit concealed handguns.

Civil Service: *City of Georgetown, et al v. Brown, No. 15-0855* in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City. In this case, a civil service officer had been recently terminated for disciplinary reasons, but had been reinstated by a civil service hearing examiner after the officer used the civil service appeal process. While waiting on the results of the officer's civil service appeal, the district attorney for the county had informed the city's police chief that the district attorney's office would no longer be accepting testimony from the officer based on the disciplinary reasons for the first termination. After the officer was reinstated by the hearing officer and after the district attorney's statement of a lack of confidence in the officer's ability to testify, the police chief again terminated the officer. The officer was not allowed to use the civil service appeal process because the city argued that the second termination was not for disciplinary reasons, but for not being able to perform an essential function of her job, testifying in county or district court. The court of appeals held that the termination was for disciplinary reasons requiring use of the civil service appeal process, and the city appealed. TML's brief argued that the termination for not being able to testify was non-disciplinary and not subject to the civil service appeal process. Being able to testify in front of the county is an essential function of any peace officer's job and a third party examiner should not be able to reinstate an officer when a termination is based on the inability to perform an essential job function. Petition for Review was denied.

Vendor Disclosure Requirements: House Bill 1295 (Government Code Section 2252.908) Proposed Rules – 1 TAC §§ 46.1, 46.3, and 46.5, Disclosure of Interested Parties. The Texas Municipal League and the Texas Association of School Boards argued to the Texas Ethics Commission that the proposed rules should clarify the consequences for a government entity if a business fails to either submit a disclosure or submit an accurate disclosure. In addition, TML and TASB suggested various changes to the rules that work to protect against unnecessary administrative burdens on government entities and those entities with which they do business. The comment was filed on November 13, 2015. At its November 30 meeting, the Texas Ethics Commission adopted rules to implement an important ethics bill, ignoring several suggested improvements submitted by the League. This new requirement will apply to all contracts entered into **after December 31, 2015**, that meet either of the following conditions: (1) the value of the contract is at least \$1 million; or (2) the contract requires an action or vote by the governing body of the governmental entity. Before an affected contract may be executed, the vendor must submit a disclosure form to the Commission. The governmental entity must then confirm with the Commission that it has received the form.

Qualified Immunity: *Mullenix v. Luna, 14-1143 (April 2015)* in the Supreme Court of the United States. This case concerns a shooting by a Texas Department of Public Safety trooper. A fleeing suspect had threatened to kill any police officer he came in

contact with, and the trooper attempted to shoot the suspect's engine and disable the vehicle from a highway overpass. Instead, the trooper accidentally shot and killed the suspect. The court of appeals held that the officer was not entitled to qualified immunity because his actions were objectively unreasonable. The Texas Municipal League, Texas City Attorneys Association, and Texas Association of Counties argued that a suspect's overt threats to shoot and kill officers during a high-speed pursuit represent one of the most grave risks law enforcement officials can face. The court of appeal's opinion does not hold true to precedent and profoundly impacts thousands who put their lives on the line daily. Under the circumstances, the officer's conduct was reasonable, and the fact that traffic was "light" in the court's view, and that the trooper did not first attempt "alternative" or "non-lethal" methods, *i.e.*, road spikes, to potentially stop the speeding car before firing at his engine, did not change that fact. The brief was filed April 20, 2015. The Supreme Court granted the officer qualified immunity after analyzing whether the officer's conduct in trying to immobilize the car with the information that the individual was intoxicated and had threatened officers' lives. It also noted that car chases are a special situation that was not covered in previous Supreme Court cases.

Condemnation: *Trant v. Brazos Valley Solid Waste Management Agency, Inc.*, No. 14-14-00507-CV, in the Fourteenth Court of Appeals of Texas. TML and TCAA filed an amicus brief in support of the Brazos Valley Solid Waste Management Agency ("Agency"). The Trants entered into an option contract for land with the Cities of Bryan and College Station in 2000. The Cities exercised the option to purchase the land, then formed the Brazos Valley Solid Waste Management Agency, Inc., to operate a landfill on the property. Ten years after the purchase of the property, the Cities sought to place a firing range to train police officers on the landfill property. The Trants objected to the placement of the firing range, claiming that using the property for anything other than a landfill violated the option contract. The Trants argued that the sale of land was essentially a condemnation, so Article I, Section 17 of the Texas Constitution waived governmental immunity. Our brief emphasized that a contract for sale is not a condemnation proceeding and asked the court to affirm the trial court's decision that there was no waiver of immunity. Oral argument was heard March 5, 2015. The brief was filed on March 16, 2015. The court of appeals concluded that they did not need to decide whether the contract was a settlement of a condemnation claim because the Trants did not raise a material issue of fact regarding whether the contract was breached. Additionally, the court concluded that the waiver of immunity found in chapter 271 of the Local Government Code did not extend to the Trants' claims because they did not contend that there was a balance "due and owed" from the sale of their property. The court affirmed the judgment of the trial court.

Vehicle Impoundment: RQ-0014-KP, Whether municipalities or local law enforcement agencies are authorized to impound a motor vehicle for lack of proof of insurance or financial responsibility. The Texas Municipal League and the Texas City Attorneys Association argued to the attorney general that cities do have authority to adopt policies pursuant to Chapter 601, Transportation Code, to impound a vehicle for lack of financial responsibility and condition the release on presentation of evidence of financial responsibility. The comments explained that: (1) the Motor Vehicle Safety

Responsibility Act (Act) generally prohibits a person from operating a motor vehicle in this state unless financial responsibility is established for that vehicle; (2) failure to establish responsibility generally leads to the presumption that the vehicle has been operated in violation of the Act, which is an offense; and (3) such an offense may provide the probable cause necessary to arrest an individual and, depending on the totality of the circumstances, to impound a vehicle. The comments also explained that the Act expressly requires the impoundment of a vehicle by a city in some circumstances, and allows release of the vehicle after the presentation of evidence of valid financial responsibility. The comments were filed on March 25, 2015. On August 14, 2015, the attorney general issued Opinion No. KP-0034, which concluded that a law enforcement officer may impound a vehicle for lack of insurance.

Takings: *City of Justin v. Rimrock Enterprises*, No. 15-0488, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City of Justin. Rimrock brought a takings claim against the city after the city expanded and improved a gravel road that ran across Rimrock's property. The city argued that the improvements only extended as far as the city's current easement that had been previously dedicated by implication. Rimrock argued that the road was private, and if it was not private, then the easement only extended as far as the current gravel road. The trial court allowed the jury to decide if the city's use of the area beyond the already graveled road was a taking, and the jury held it was a taking. The court of appeals affirmed. TML and TCAA argued that the city had the right to make improvements for public use on the entire easement previously platted, surveyed, and dedicated to the city without paying for a taking under the Supreme Court of Texas' opinion *State v. NICO-WFI, L.L.C.*, 384 S.W.3d 818 (Tex. 2012). The amici also argued that the court, not the jury, should make the initial takings determination as a matter of law. See *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 240-41 (Tex. 2002). The brief was filed on August 26, 2015. The petition for review was denied on September 4, 2015.

Contractual Immunity: *City of Dallas v. Kenneth Albert*, 13-0940 in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City of Dallas on February 26, 2014. This case raises the same issues as *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011). In both cases, the issue is whether a city's ordinances, charter provisions, and personnel policies can create an employment contract enforceable under Chapter 271 of the Local Government Code. The plaintiffs are trying to enforce the alleged "contract" to receive additional pay they argue was contracted for in the city's ordinances, charter provisions, and personnel policies. TML/TCAA argued that this case can be differentiated from the *City of Houston v. Williams* case (where the Supreme Court of Texas did find a contract created by ordinances and other city documents) because the ordinances and policies in this case were adopted over a series of years and were not meant to be a contract. TML/TCAA also continued to make the same policy argument that was presented in *Williams*, which is that a city should not be saddled with a contract created from such disparate documents and not planned for, nor prepared for, by the city. Briefs on the merits have been requested. Petition for Review was denied by the Court on February 27, 2015. The City of Dallas has requested a Motion for Extension of Time to file Motion for Rehearing and the Court granted its motion. Briefs on Motion

for Rehearing are due on April 15, 2015. The Court has requested a response in the Motion for Rehearing. The Motion for Rehearing was denied on September 11, 2015.

Land Use: *City of Shavano Park v. ARD MOR, Inc.*, No. 04-14-00781-CV, in the Fourth Court of Appeals of Texas. TML and TCAA filed an amicus brief in support of the City of Shavano Park. In 2014, Lockhill Ventures, a developer, entered into a Development and Annexation Agreement with the City of Shavano Park regarding a piece of Lockhill's property. The property is subject to restrictive covenants imposed by the previous owner. The City approved the Development and Annexation agreement, and Lockhill planned to add a gas station to the property. Other landowners who are parties to the restrictive covenants, ARD MOR, then sought an injunction against Lockhill and filed for declaratory judgment against the City. The brief emphasizes that the only basis for ARD MOR's suit against the City is the restrictive covenants, a purely private agreement between the plaintiffs and Lockhill. The City is not a party to the covenant, nor has the City taken any act in regards to it. We argue that ARD MOR has no standing to bring suit against the City, and we ask the court to grant Shavano Park's plea to the jurisdiction. The brief was filed on June 24, 2015. On July 29th, the court held in favor of Lockhill on the annexation agreement, and for the city on the equal protection and the *ultra vires* claim. The case was sent back to the trial court to review the city's annexation agreement.

Type C General Law City Property Tax: RQ-0006-KP, Whether a type C general law city may levy an ad valorem property tax. The Texas Municipal League and the Texas City Attorneys Association argued to the attorney general that a type C general law city may impose a property tax because: (1) the Texas Constitution enables the legislature to authorize a property tax in cities less than 5,000 population; (2) the legislature, through the Tax Code, expressly authorizes type A and B cities to impose a property tax; (3) the "borrowing provision" states that a type C city has the same authority as a type A or B city, depending on population; and (4) the City of Taylor Landing has a population of 228 according to the 2010 census. Thus, according to Section 51.051(b) of the Local Government Code and Section 302.001 of the Tax Code, the city may impose a property tax of up to 25 cents per \$100 valuation. The comments were filed on January 25, 2015. The attorney general opined that a type C city does have the authority to levy a property tax.

Ballot Proposition Standard: *Dacus v. Parker*, No. 13-0047, in the Supreme Court of Texas. This case involves the appropriate standard by which a charter amendment proposition should be measured. TML and TCAA argue that home rule cities, like the City of Houston (City), look first to their charter, not the common law, for the appropriate ballot proposition standard. Accordingly, it is the City of Houston's Charter (Charter) a court should look to for guidance as to the appropriate standard, not the common law. The City's Charter provides that measures related to citizen-initiated legislation shall set forth their nature sufficiently to identify them. The court of appeals properly applied that standard to determine the proposition at issue was sufficient. For those cities whose charter is silent as to the ballot standard, TML and TCAA argue that petitioners' propose a subjective and flawed standard that will result in costly litigation. Amici urge the court

to deny the petition for review. The brief was filed on October 10, 2014. Oral argument was heard on February 24, 2015. The Court held that the ballot language in this case was insufficient because it left out the key feature of future drainage charges. The Court mentioned TML and TCAA's amicus brief, but held that the arguments were unpersuasive and that it is the Election Code and common law that governs this dispute, not charter language.

Electric Rate Case Discovery Limitations: *Public Utilities Commission Docket No. 42330, Rulemaking to propose new procedural rule 22.146, relating to limitations on discovery in rate proceedings.* In this proposed rule, the Texas Public Utility Commission (PUC) proposes discovery limitations that would limit city participation in electric rate cases. Some in the industry argue that the city intervention process is "inefficient," and that the PUC should "streamline" the process. TML argued that city intervention almost always protects consumers by lowering the rate increases sought by electric utilities. TML joined the Cities of Houston and El Paso, the Alliance of Local Regulatory Authorities, the Steering Committee of Cities Served by Oncor, and a number of consumer groups in submitting comments in opposition to the proposed rules. The comments were filed on December 22, 2014. The PUC declined to adopt the proposed rules by the 2015 deadline.

Billboards: *State of Texas v. Clear Channel Outdoor, Inc., No. 13-0053* in the Supreme Court of Texas. TML and TCAA joined this brief written by Former Justice Scott Brister for the City of Houston, Harris County, Scenic Texas, and others. This case involves whether a billboard is personal or real property and how to value a billboard properly. The court of appeals in this case held that the billboards affected by TxDOT's road project were real property and allowed testimony about the billboards' business income, increasing the valuation of the billboards to over \$250,000. This brief argues that billboards are personal property and that they should not be valued based on advertising income, pointing to a 2009 case from the Supreme Court of Texas *State v. Cent. Expwy. Sign Assocs.*, 302 S.W.3d 866, 874 (Tex. 2009). The amicus brief was filed on April 21, 2014. Petition for review was granted and oral argument was heard on September 17, 2014. The Supreme Court held that the billboard in this case was a fixture. Thus, its value would be added to the real property as an increase in the rental value of the property, and it would be valued for its worth as a structure. The Court also held that advertising revenue for the billboard could not be included in the calculation. It remanded the case to the trial court.

Sexual Harassment Retaliation: *San Antonio Water Sys. v. Nicholas, No. 13-0966 in the Supreme Court of Texas.* TML and TCAA filed a brief in this case on January 12, 2015. This case concerns a sexual harassment retaliation claim by Nicholas, a former SAWS employee. Nicholas sued SAWS after she was terminated during a reorganization. She argued that her termination was retaliation for a counseling session she had with an executive regarding possible sexual harassment claims of two other employees three years earlier. The trial court granted a verdict of over one million dollars in Nicholas' favor, including over \$700,000 in future compensatory damages. The court of appeals affirmed. SAWS appealed to the Supreme Court of Texas. SAWS's

main argument at the Supreme Court is that there was legally insufficient evidence of Nicholas' belief that she was dealing with sexual harassment claims when she counseled the executive. The TML and TCAA brief focused on two issues: the need for statutory caps in employment retaliation cases based on the large future compensatory damages award given to Nicholas and whether legal sufficiency can be raised at the appellate level as it arguably was not raised at the trial level and may have not been adequately raised at the appellate level. Oral argument was heard on January 13, 2015. The Supreme Court held for SAWS, holding that: (1) the elements of a retaliation claim are jurisdictional; (2) an appellate court can review the elements at any time in the case; and (3) the lunch invitations in this case did not rise to the level of sexual harassment. The Court did not reach the issue of statutory caps for retaliation claims.

Permit Vesting: *Rogers Shavano Ranch, Ltd. v. City of San Antonio*, No. 14-0237 in the Supreme Court of Texas. This is a Chapter 245 permit vesting case. The question before the court is whether a prevailing developer is entitled to attorneys' fees. The Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) argued that a waiver of immunity, including a waiver for attorneys' fees, is under the purview of the legislature, and that the legislature has not expressly waived immunity in this instance. Cities are formed for the purpose of managing the needs of people who live and work in close quarters. Texas cities provide basic services, including land use regulations, to protect their citizens and foster a better city environment. Some cities, based on the demands of their citizens, enact very stringent and complex regulations, while others do not. Governmental immunity allows cities to perform these functions that benefit citizens, free from the constant threat of defending lawsuits and paying judgments. The Court requested briefing on the merits, and the TML/TCAA amicus brief in opposition to the developer's petition was filed on February 12, 2015. The Supreme Court denied the developer's petition for review on May 1, 2015.

Recreational Use Statute: *University of Texas-Arlington v. Williams*, 13-0338 in the Supreme Court of Texas. The plaintiffs' sued the university after Mrs. Williams was injured at a university sport facility while watching a soccer game. The university filed a plea to the jurisdiction on the issue of immunity based on the recreational use statute. The recreational use statute protects landowners, including governmental entities, from some liability from injuries occurring on their property during recreational activities by lowering a landowner's duty of care when it allows individuals to use their land. The plaintiffs argued that the recreational use statute did not apply in this case because the individual was a "spectator" when she was injured, not a participant in the sports or recreational activity. The trial court denied the university's plea to the jurisdiction and the court of appeals affirmed. TML and TCAA filed an amicus letter brief in the Supreme Court of Texas supporting the university and arguing that the recreational use statute should apply to spectators for policy reasons. Oral argument was heard on October 9, 2014. A plurality of the Court held that recreational use statute did not cover spectating at a competitive sport. The Court looked at subsection (L) of Texas Civil Practices and Remedies Code 75.001, which protects a governmental entity's immunity for "any other activity associated with enjoying nature or the outdoors." The Court held that this subsection should be reviewed narrowly to only include those activities that are

similar to the other listed activities in Section 75.001, examples of which include fishing, hiking, and camping, among others. The Court held that spectating a competitive sport was not similar to the other activities and therefore did not invoke the protections of the recreational use statute. The Supreme Court affirmed the court of appeals' judgment and the trial court's order denying the state's plea to the jurisdiction. This plurality opinion was only joined by three other justices. Justice Guzman filed a concurring opinion, which Justice Willett joined, that stated that the specific activity, waiting for her daughter, was not "recreational" activity, but did not address the issue of spectating. Justice Boyd issued a concurring opinion, referring to the recreational use statute as the Gordian Knot, and stated that spectating does not fit the description in subsection (L) with the further analysis that statutes that relieve a person of a common law right of action must be construed narrowly.

F.C.C. Preemption: WCB Docket No. 14-115, Wilson, North Carolina; WCB Docket No. 14-116, Electric Power Board of Chattanooga, Tennessee, *Petitions Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition* at the Federal Communications Commission. The Texas Municipal League, the Texas Coalition of Cities for Utility Issues, and the Coalition of Texas Cities filed reply comments at the Federal Communications Commission (FCC) to correct erroneous references to Texas law in the Advanced Communications Law and Policy Institute (ACLPI) at New York Law School comments. ACLPI erroneously mischaracterized Texas law as having an "outright" ban prohibiting Texas cities from providing Internet broadband access. Texas has no such restrictions, and that fact is discussed in detail in the comments. While Texas cities are prohibited from providing directly or indirectly a "telecommunications service" to the public, Texas cities are not prohibited from providing Internet connectivity, as that is a federally classified as an "information service," and not a "telecommunications service." The reply comments seek to correct the FCC record to minimize any challenge to Texas cities as a result of a company relying on ACLPI's mistaken characterization as a basis for such a challenge. The comments were filed on September 14, 2014. On February 26, 2015, the FCC issued an order preempting state laws prohibiting municipal broadband.

Employment Law: *Thompson v. City of Waco*, No. 13-50718 in the Fifth Circuit. TML and TCAA filed this amicus brief in support of the city's motion for rehearing *en banc*. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fail to hire or to discharge an individual or otherwise discriminate against such individual "with respect to his [or her] compensation, terms, conditions, or privileges of employment" because of a protected characteristic, including race. To establish a claim of discrimination under Title VII, an individual must first show that he was subject to an "adverse employment action." Amici argue that the Fifth Circuit recognizes only "ultimate" employment decisions as actionable adverse employment actions for Title VII discrimination claims, and that changes in duties don't rise to that level. Accordingly, consideration by the full court is necessary to clarify the standard that applies to ultimate employment decisions. The brief was filed September 23, 2014. The Fifth Circuit denied the city's petition for rehearing *en banc* with four judges dissenting.

Gas Rate Case Reimbursement/Expenses: Gas Utilities Docket No. 41622, New rules regarding rate case expenses and discovery, 1.86 and 1.87 (see also 7.5530). The purpose of this rulemaking is to modify municipal participation in gas ratemaking proceedings. The Texas Municipal League filed comments, arguing that: (1) cities play a key role in utility ratemaking in Texas; (2) city participation is not a “problem” that needs to be fixed; and (3) the legislature has clearly spoken that city participation in gas ratemaking proceedings should continue. The comments were filed on August 25, 2014. Final rules were adopted on December 26, 2014. The rules are available here: <http://www.sos.state.tx.us/texreg/archive/December262014/Adopted%20Rules/16.ECONOMIC%20REGULATION.html#250>

Contractual Immunity: *Zachry Construction Corp. v. Port of Houston Auth.*, No. 12-0772, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the Port of Houston Authority’s Motion for Rehearing. In a 5-4 decision, the Supreme Court of Texas reversed the court of appeals’ judgment and remanded the case for further consideration. The Court held that Zachry’s claim for delay damages was not barred by immunity or by the no-damages-for-delay provision of the contract. The TML/TCAA brief urged the court to reconsider the majority’s broad interpretation that the “balance due and owed...under the contract” includes any damages available at common law. Motion for Rehearing was denied December 19, 2014.

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) describe 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 policies 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. The FCC report and order was issued on October 21, 2014.

Municipal Barriers to Wireless Tower Facilities: *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 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, Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers, 2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), WT Docket No. 13-32, Notice of Proposed Rulemaking, 28 FCC Rcd 14238 (Sept. 26, 2013). The Federal Communications Commission released a "Notice of Proposed Rulemaking" regarding, generally, municipal barriers to the collocation of wireless antenna on existing structures. TML, the coalition of cities, and the City of Houston filed reply comments stating, among other things, that: (1) the U.S. Constitution does not allow municipal property to be taken without adequate compensation; (2) mandatory collocation regulations should not be applied to city-owned facilities (e.g., cities acting in a proprietary function); and (3) local safety and development regulations should remain intact. The reply comments were filed on March 5, 2014.

Public Information Act: *Greg Abbott v. City of Dallas*; Cause No. 03-13-00686-CV in the Third Court of Appeals in Austin. This case deals with the interplay between the Public Information Act and the attorney-client privilege. The issue is whether a city's failure to timely raise the attorney-client privilege as an exception to disclosure waives the privilege. The Texas Municipal League, along with a number of other amici, argue that it does not because: (1) long-established and well-recognized policy supporting the attorney-client privilege is a compelling reason to withhold confidential attorney-client communications from public disclosure under Texas Government Code section 552.302; (2) the harm that will predictably result to governmental entities, public officials, and public employees is a profoundly compelling reason to withhold information consisting of confidential attorney-client communications from public disclosure; (3) determination of whether specific information remains subject to attorney-client protection must be made solely by the client and the client's legal representative, not by an arbitrary statutory deadline imposed without consideration of the facts surrounding possible intentional waiver of the privilege, nor by the office of the attorney general; and (4) the city is an entity that acts through the persons who serve as its officials and employees, and each of those officials and employees are entitled to protections of the attorney-client privilege, and those protections cannot be and are not waived by acts or omissions of the governmental body and its designees. The brief was filed on July 11, 2014. Oral argument was heard at 9:00 a.m. on September 24th. The court of appeals held that Section 552.101 exempts from disclosure information that is protected by the attorney-client privilege and that the City of Dallas established that the information is protected by the attorney-client privilege. The court affirmed the trial court's judgment protecting the City of Dallas' information.

Excessive Force: *Luna v. Mullenix*, No. 13-10899 (5th Circuit), filed September 18, 2014. This excessive force case began when a peace officer shot at a vehicle containing a fleeing suspect who had threatened to shoot any peace officer he saw. After the officer

shot at the vehicle, the vehicle crashed, the suspect died and was found not to have a weapon with him. The trial court held that there was insufficient evidence for summary judgment on the issue of qualified immunity for the officer. A panel of the Fifth Circuit Court of Appeals held that the officer was not protected by qualified immunity as a matter of law because the suspect's threat to shoot any peace officer he saw was not sufficient to show he posed an immediate risk of harm to others. The panel held that the motion for summary judgment filed by the officer was correctly denied by the trial court. TML, TCAA, and the Texas Association of Counties filed a brief on September 18, 2014 asking that the Fifth Circuit accept the case en banc and reverse the decision of the panel because the panel's decision increased the showing an officer would have to make before he or she could use deadly force. The brief argued that the panel's decision changes the Supreme Court's objectively reasonable analysis as well as the requirements for "clearly established law", making the official immunity defense unusable in most cases. The court withdrew its opinion and issued a new opinion that held that: (1) there was sufficient evidence that the officer's use of force was objectively unreasonable; and (2) the law is clearly established that deadly force is only allowed when there is a sufficient substantial and immediate threat. The court of appeals affirmed the trial court's denial of summary judgment.

State Agency Fiscal Notes: Railroad Commission Gas Utilities Docket No. 10288, *Pipeline Safety Fee Increase*. The Texas Municipal League comment pointed out that the fiscal note in this docket determined that an Railroad Commission fee increase may cause a *de minimis* fiscal impact on cities, but also states that cities "are authorized to recover their costs by imposing an annual surcharge upon their customers." The disturbing fiscal note lead to a false conclusion: no government action will ever impose a negative fiscal impact on any other unit of government. When the federal government places an unfunded mandate on the RRC, there is no fiscal note because the RRC would simply increase fees, as it is now doing. If Congress places an unfunded mandate on the Texas Legislature, there would be no fiscal note because the legislature would simply raise taxes or fees paid by Texans. The League submitted that the purpose of a fiscal note is to quantify the amount of revenue that an affected unit of government (cities) would be forced to generate as a result of the proposed action.

Contractual Immunity: *Lower Colorado River Authority v. City of Boerne, and City of Seguin v. Lower Colorado River Authority*; Cause Nos. 14-0079 and 14-0158 (Tex. Jan. 28, 2014). TML and TCAA filed an amicus brief in support of the cities of Boerne and Seguin. Both Boerne and Seguin notified LCRA that it had breached their wholesale power agreement by charging customers cheaper rates and not offering those rates to Boerne and Seguin. Instead of curing the breach, LCRA filed a lawsuit against the cities. Since LCRA did not cure the breach, Boerne and Seguin provided LCRA with written notice that their contracts were terminated. LCRA then amended its petition in each suit to add a breach-of-contract claim. Boerne and Seguin each filed a Plea to the Jurisdiction, asserting governmental immunity. The trial court in Kendall County granted Boerne's Plea to the Jurisdiction, which the Fourth Court of Appeals affirmed. The trial court in Travis County, however, denied Seguin's Plea to the Jurisdiction, which the

Third Court of Appeals confirmed. The LCRA filed a petition for review in the *Boerne* case, and the City of Seguin filed a petition for review in the *Seguin* case.

Our brief focused the Supreme Court's attention on four key points: (1) public policy favors governmental immunity; (2) the Texas Legislature has provided a limited waiver of governmental immunity in the contractual setting; (3) this Court should resolve the growing split among courts of appeal; and (4) the governmental/proprietary dichotomy is unworkable in the absence of legislative guidance. The brief was filed on September 9, 2014. The case was dismissed on December 19, 2014 based on a settlement.

Standing: *Duarte v. City of Lewisville*; Cause No. 13-40806 (5th Cir. July 22, 2014). TML and TCAA filed an amicus letter brief in support of the City of Lewisville. Aurelio Duarte, his wife, and two children filed suit attacking the constitutionality of the City of Lewisville's sex offender residency restriction ordinance seeking damages, declaratory and injunctive relief for alleged civil rights violations under 42 U.S.C. § 1983. The District Court concluded that A. Duarte and his family lacked standing. The case was appealed to a Fifth Circuit Panel consisting of Circuit Judges Prado, Smith and Wiener, who reversed and remanded the District Court's orders on the grounds that both A. Duarte and the Family Appellants had standing because they had an injury in fact. The City of Lewisville filed a Petition for Rehearing En Banc. TML and TCAA's brief in support was filed on August 12, 2014. Court denied petition for rehearing en banc on October 9, 2014.

Municipal Drainage Fees: RQ-1192-GA; *Regarding the relationship between school districts and municipal drainage fees adopted under Chapter 552 of the Local Government Code*. This attorney general opinion request asks: (1) whether or not the [Municipal Drainage Utility System] Act can be presumed to be a tax, in which school districts are exempt from paying; and (2) whether or not Chapter 552, Subchapter C, exempts school districts from paying the municipal drainage fee or if it is a decision reserved for the discretion of the City. The Texas Municipal League and Texas City Attorneys Association argued that: (1) The drainage fee is not intended to raise general revenue but is a special assessment used to provide drainage service that benefits properties in cities that choose to adopt the fee; and (2) a school district (other than a district in the City of El Paso) is not exempt from paying a municipal drainage fee. The comments were filed on April 22, 2014. The attorney general agreed, stating that a court would likely conclude that a city has the discretion to decide whether to grant an exemption from a drainage fee under the Act and that a reasonable drainage charge is not a tax from which a school district is exempt.

Substandard Structure Nuisance Abatement: *City of San Antonio v. Wu*, No. 13-0755, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the City of San Antonio's petition for review. This case involves the timeframe in which a property owner may bring a takings claim as the result of an administrative nuisance determination. TML and TCAA argued that a takings claim must be asserted on appeal from the administrative nuisance determination, not at any point in the same "proceeding" as held by the Fourth Court of Appeals. Amici explained that the Fourth

Court's approach to this issue leaves cities and taxpayers exposed to financial hardship and uncertainty because they could be subjected to takings claims in relation to long-concluded nuisance abatements. The brief was filed on December 17, 2013. Briefs on the merits have been requested. The petition for review was denied.

Videoconferencing: GA-1079 (2014); *Regarding the ability of members of a governmental body to participate in a meeting by videoconference call under Section 551.127 of the Texas Government Code.* This attorney general opinion requests asks various questions about a local governmental body's ability to conduct and a member's ability to participate in a meeting conducted by videoconference. Texas Municipal League and Texas City Attorneys Association argued that: (1) under Subsection 551.127(c), a governmental body does not have to extend into three or more counties in order to hold a videoconference meeting without a quorum physically present; and (2) members of a governmental body who participate in a videoconference meeting remotely may participate from locations outside of the geographic jurisdiction of the governmental body they serve, including locations outside of the State of Texas. The comments were filed on April 4, 2014. The Attorney General concluded that an in-person meeting of an open-enrollment charter school's governing board must be physically accessible to the public to comply with the Open Meetings Act. Because accessibility depends on particular facts, we cannot conclude that an open-enrollment charter school's governing board may conduct such a meeting in compliance with the Act beyond its geographic service area.

An open-enrollment charter school's governing board may conduct an open meeting by videoconference call as provided by Section 551.127 of the Government Code. Provided that the member of the board of the open-enrollment charter school presiding over the meeting is present at a physical location open to the public in or within a reasonable distance of the charter school's geographic territory, other members of the board may participate in a videoconference call meeting from remote locations outside of the geographic service area, including areas outside of the state.

Plastic Bag Ban: GA-1078 (2014); *Does Section 361.0961, Texas Health and Safety Code, prohibit cities from adopting ordinances that ban plastic bags and charge related fees?* This attorney general opinion request asks about the legality of several city ordinances that ban plastic bags and impose related fees. Texas Municipal League (TML) and Texas City Attorneys Association (TCAA) argued that: this issue should be left to local communities to decide; the issue presented in the request is inappropriate for the attorney general process; and the attorney general should not opine on the scope and meaning of Section 361.0961, Health and Safety Code. TML and TCAA alternatively argued that a plastic bag is not a "container" or "package" under Section 361.0961; legislators do not read Section 361.0961 as a ban on plastic bag ordinances, as evidenced by bills filed in recent legislative sessions; cities may regulate plastic bags for purposes other than solid waste management; and Subsection 361.0961(a)(1) only requires that ordinances be adopted in the manner provided by state law. The comments were filed on March 24, 2014. Supplemental comments were filed on May 7, 2014 related to pending litigation involving this same issue. The opinion GA-1078 concluded that a single-use

plastic bag is likely a “container or package” within the meaning of this statute. As a result, the attorney general opined that: (1) an ordinance prohibiting the use of single-use plastic bags may run afoul of state law if the city adopts it for solid waste management purposes; and (2) a city is likely prohibited from assessing a fee on the sale or use of a replacement bag.

Electric Rate Case Reimbursement/Expenses: Public Utility Commission (PUC) Project No. 41622, Rulemaking to Propose New Substantive Rule 25.245, Relating to Recovery of Expenses for Ratemaking Proceedings. The purpose of this rulemaking is to revise procedures for reviewing requests for rate case expenses incurred by utilities and municipalities in electric ratemaking proceedings. The Texas Municipal League filed reply comments, arguing that: (1) cities play a key role in utility ratemaking in Texas; (2) cities should not be penalized for reasonably responding to utilities’ requests for rate increases; (3) the PUC should allocate municipal rate case expenses to all customers, not just a sub-set of customers; (4) cities should not be penalized for conducting the amount of discovery needed to meaningfully review a utility’s case; (5) utility shareholders should bear some of the costs for seeking increases in the utility’s rates; and (6) cities should be allowed to recover estimated rate case expenses for the costs of appeals. The comment was filed on March 21, 2014. The final rule was adopted on July 10, 2014. The rule and the explanation from the PUC is located here: <https://www.puc.texas.gov/agency/rulesnlaws/subrules/electric/25.245/41622adt.pdf>.

Contractual Immunity: *Gay v. City of Wichita Falls*, No. 08-13-00028-CV, in the Eighth Court of Appeals. TML and TCAA filed an amicus letter brief in support of the City of Wichita Falls. Plaintiffs Christopher Gay and Steven Carroll filed suit against the City of Wichita Falls asserting breach of contract and tort claims related to a denial of long-term disability benefits by city’s benefit provider, Sun Life Assurance Company. The trial court granted the City of Wichita Falls’ plea to the jurisdiction prompting plaintiffs to file this appeal. Our brief provides the policy and legal basis for the legislature’s waiver of governmental immunity in the limited circumstance of a written contract. We argue that the proprietary-governmental dichotomy found in the Texas Tort Claims Act does not apply to Chapter 271 waiver of immunity claims. The brief was filed on October 4, 2013. Oral argument was heard January 9, 2014. The court of appeals agreed and held that the proprietary-governmental dichotomy does not apply to contract cases under Chapter 271 as the legislature could have added this to the statute if it had intended that to be a factor.

Contractual Immunity: *City of Austin v. Met Center*; Cause No. 14-0162 (Tex. Mar. 3, 2014). TML and TCAA filed an amicus letter brief in support of the City of Austin. MET Center constructed a specialized conduit system known as an “underground duct bank system” to carry high levels of electric service required by technology-based users on Austin Energy’s electric distribution lines. MET Center filed suit against the City of Austin asserting breach of contract over the use of the duct bank. The City filed a plea to the jurisdiction in the trial court asserting that: (1) it is immune from MET Center’s breach of contract claim because section 271.152 of the Local Government Code, which provides a limited waiver of immunity for certain contracts the City enters into, does not

apply to the contract in this case, and (2) MET Center's claims for declaratory relief are merely an attempt to circumvent the City's immunity to the breach of contract claims. The trial court denied the City's plea to the jurisdiction, and the City appealed that decision.

The Austin Court of Appeals confirmed its prior decision in *City of Georgetown v. Lower Colorado River Authority*, that the governmental/proprietary dichotomy applies in the contractual setting. The court concluded that the City was acting in its proprietary capacity when it agreed with MET Center on the underground duct bank electrical system. Therefore, the court concluded that the City of Austin has no governmental immunity from MET Center's claims. Our brief focused the Supreme Court's attention on four key points: (1) public policy favors governmental immunity; (2) the Texas Legislature has provided a limited waiver of governmental immunity in the contractual setting; (3) this Court should resolve the growing split among courts of appeal; and (4) the governmental/proprietary dichotomy is unworkable in the absence of legislative guidance. The brief was filed on June 6, 2014. Petition for Review was dismissed on August 22, 2014 based on an agreed motion to dismiss.

Holdover Doctrine: *Richard Bianchi v. State of Texas*; Cause No. 13-14-00303-CV in the Thirteenth Court of Appeals in Tyler. This case deals with the interplay between the “resign to run” provision in Article XVI, Section 65, of the Texas Constitution, and the “holdover” provision in Article XVI, Section 17. A county attorney automatically resigned under the “resign to run” provision because he announced his candidacy for another office with more than one year and 30 days remaining in his term. The commissioners court took no action, allowing him to hold over in office. The district attorney brought a quo warranto proceeding to remove the county attorney (i.e., to stop him from holding over). The trial court issued an order removing the county attorney. TML, along with the Texas Association of Counties, and the Texas Conference of Urban Counties, argued that – since the enactment of the provisions over 100 years ago – the attorney general and local government attorneys have properly advised that the holdover provision applies to the scenario in the case. The reasoning is that continuity in government is paramount. The brief was filed on June 30, 2014. The Thirteenth Court of Appeals held that the county commissioners court did not violate any law by not appointing a new county attorney. The court of appeals referenced our brief and held that this, plus the other entities it heard from including the Elections Division, convinced the court to allow the commissioners court decision to stand. It stated: “Such decisions [whether to replace officials affected by resign-to-run] are best left to locally-elected public officials who are in the best position to judge the needs of these particular issues and to exercise sound discretion in addressing them.” The court of appeals dismissed the district attorney's case as moot.

Contractual Immunity: *Zachry Construction Corp. v. Port of Houston Auth.*, No. 12-0772, in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the Port of Houston Authority. The court of appeals reversed the trial court's judgment and held that the application of a no-damages-for-delay provision of the contract between the Port and Zachry precluded Zachry's claim for delay damages. The

Supreme Court of Texas granted Zachry's Petition for Review on August 23, 2013. Our brief provides the policy and legal basis for the legislature's waiver of governmental immunity in the limited circumstance of a written contract. We argue that Chapter 271 of the Local Government Code provides a limit on damages that a party may be awarded and that a governmental entity must direct additional work in order for a party to recover. The brief was filed on October 1, 2013. Oral argument was heard at 9:00 a.m., November 6, 2013. In a 5-4 decision, the Supreme Court of Texas reversed the court of appeals' judgment and remanded the case for further consideration. The Court held that Zachry's claim for delay damages was not barred by immunity or by the no-damages-for-delay provision of the contract.

This is a particularly interesting case, as it may give us insight into how the court will decide the *LCRA v. Boerne/Seguin* case. The four dissenters were Boyd, Johnson, Willett, and Lehrmann...from the dissent: "Respectful of the Legislature's prerogative to decide whether, when, and how to waive the State's immunity, and mindful of our obligation to find waivers only in 'clear and unambiguous language' that leaves 'no doubt,' we must carefully and strictly construe and apply these statutory limitations."

Public Information – Private Electronic Communications: *Adkisson v. Abbott*, No. 03-12-00535-CV, in the Third Court of Appeals. In this case, Bexar County and County Commissioner Tommy Adkisson challenge the attorney general's ruling that certain of Adkisson's private electronic communications (communications sent from or received on his personal e-mail accounts) are public information subject to the Public Information Act (Act). The League, the Texas City Attorneys Association, and the Association of Mayors, Councilmembers, and Commissioners wrote to the court to explain how the attorney general's (AG) interpretation of the Act in regard to private electronic communications has significant negative consequences for both city staff and officials. The AG's interpretation of the Act imposes on an Officer for Public Information (PIO) requirements with which they are likely unable to comply, putting their jobs at risk and exposing them to possible criminal penalties. As to local officials, the AG's interpretation infringes on their privacy rights, and may chill communication, discourage people from public service, transfer power to staff, and make unrealistic demands on busy, part-time local legislators. The brief was filed on February 14, 2013. Oral argument was heard on October 9, 2013, at 1:30 p.m. The court concluded that: (1) a county commissioner's emails about public business that were sent and received on his private account are public information; and (2) the emails are owned by and held for the county. The court also held that, under the Local Government Records Act and the county's record retention policies, the county owns the emails. Significant to the court's decision is the fact that the county commissioner "is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by" his office.

Contractual Immunity: *Wasson Interests v. City of Jacksonville*; Cause No. 12-13-00262-CV (Tex. App.—Tyler, Feb. 5, 2014). TML and TCAA filed an amicus letter brief in support of the City of Jacksonville. Wasson Interests filed suit against the City of Jacksonville asserting breach of contract related to a lease agreement the city entered into

with Wasson Interests. The trial court granted the City of Jacksonville's plea to the jurisdiction prompting this appeal. Our brief provides the policy and legal basis for the legislature's waiver of governmental immunity in the limited circumstance of a written contract. We argue that the proprietary-governmental dichotomy found in the Texas Tort Claims Act does not apply to waiver of immunity claims in the contract setting. The brief was filed on February 5, 2014. Oral argument was heard on May 14, 2013 at 8:30 a.m. The court did not fully address the proprietary-governmental dichotomy because the real estate lease was not "goods or services" under Chapter 271 of the Local Government Code. However, the court of appeals did note that it would fall on the side of no dichotomy until the Supreme Court rules otherwise or the Texas Legislature addresses the issue. The court affirmed the judgment of the trial court.

TCEQ Construction General Permit Definitions: Upon the request of member cities, TML submitted a written request for clarification from TCEQ on definitions in the recently issued Construction General Permit. Under the previous permit, cities were typically considered "primary" operators. However, when the permit was reissued, the definitions of "primary" and "secondary" operator were revised. This revision led many cities to believe that they would be considered "secondary" operators under the new permit. Since cities have been receiving conflicting answers on which category they fall into from TCEQ field staff, they requested TML ask for written clarification. Submitted July 26, 2013.

Specifically, cities seek guidance on proper classification of the city in these three scenarios:

1. A city owns the property; consultant designs the construction plans; contractor builds the structure and is responsible for implementing the SWPPP plan.
2. A city owns the property; city employees design the construction plans; contractor builds the structure and is responsible for implementing the SWPPP plan.
3. A city owns the property; city employees design the construction plans; city employees build the structure and are responsible for implementing the SWPPP plan.

In response to TML's request, the TCEQ issued revised guidance on Primary/Secondary Operators. This is available at http://www.tceq.texas.gov/publications/rg/rg-468.html/at_download/file.

Contractual Liability Exclusion: *Ewing Constr. v. Amerisure Ins.*, No. 12-0661, in the Supreme Court of Texas. In this case, Ewing Construction Company entered a contract with Tulošo–Midway Independent School District under which Ewing agreed to construct tennis courts at a school in Corpus Christi. Soon after Ewing completed the tennis courts, the district complained that the courts were cracking and flaking. The district sought damages for defective construction, naming Ewing as a defendant. Ewing tendered defense of the underlying lawsuit to Amerisure Insurance Company under a

commercial general liability policy. Amerisure denied coverage based on the “contractual liability exclusion” doctrine. The exclusion in this case was based on a coverage provision that “excluded from coverage property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” The appeals court concluded that its upholding of the contractual liability exclusion “preserves the longstanding principle that a commercial general liability policy is not protection for the insured’s poor performance of a contract. TML, along with numerous other amici, argued that commercial general liability policies would be rendered meaningless if the contractual liability exclusion is read as broadly as the appeals court does in its opinion. The brief was filed on February 11, 2013. Oral argument was heard on February 27, 2013. The Supreme Court answered the first certified question no, holding that agreeing to perform construction work in a good and workmanlike manner, without more, does not oblige the contractor to “assume liability” arising out of the defective work so as to trigger a Contractual Liability Exclusion. The Supreme Court did not answer the second certified question as it was contingent on the answer to the first question being yes.

Stormwater: *General Permit for Small MS4s (TXR040000)*. The Texas Commission on Environmental Quality (“TCEQ”) renewed the general permit for regulated small municipal separate storm sewer systems to discharge under the Texas Pollutant Discharge Elimination System on December 13, 2013. TML filed comments during the comment period thanking the TCEQ for their hard work and for being conscientious about including cities and other stakeholders in the process, and encouraged TCEQ staff to take the substantive and technical comments of cities into account when drafting the general permit language to be taken to the Environmental Protection Agency (EPA) for review. TML asked that TCEQ staff remain mindful of issues of practicality, effectiveness, and cost in carrying out the requirements of any new language. This newly adopted general permit will expire on December 13, 2018.

International Property Maintenance Code and City Ordinances: *State of Texas v. Cooper*, No. PD-0001-13 & PD-0202-13, in the Texas Court of Criminal Appeals. The City of Plano adopted the 2003 International Property Maintenance Code (IPMC) as part of its local property maintenance code and argued in this case that the city’s municipal code creates two offenses: one contained in the IPMC and one created by Plano. The one created by Plano did not require notice of a violation before prosecution. In this case, the court looked at whether the appellee, Jay Cooper, was entitled to notice of violations of the IPMC before his subsequent violations of the code could result in convictions. The brief filed by TML, along with IMLA and TCAA, supported the City of Plano’s interpretation and emphasized how the court of appeals decision would affect other cities with a similar legislative scheme. However, the Court of Criminal Appeals ruled against the City of Plano holding that Cooper was entitled to notice of violations and added that if the City intended to eliminate the required notice, then the City should have deleted the requirement.

Civil Service: RQ-1130-GA; *May a municipality that has approved appointment of assistant chiefs, under Texas Local Gov’t Code 143.014, authorize appointment of more*

assistant chiefs than existed on January 1, 1983 plus one? This request asks whether a civil service city that has approved appointment of individuals “to the classification immediately below that of department head” under Texas Local Government Code Section 143.014 can only appoint “assistant chiefs” or can appoint any individual who meets the “classification immediately below that of department head” requirement. TML argued that the plain language of the statute should prevail that states that any individual immediately below the classification of department head is counted for this statute, not just assistant chiefs. Filed on June 25, 2013. The Attorney General stated in GA-1029 that the title of the individual does not matter when counting positions for the purpose of 143.014, only that they meet the definition of “classification immediately below that of department head.”

Regulatory Takings: *City of McAllen v. Ramirez*, No. 13-09-00067-CV, in the Thirteenth Court of Appeals. This is a regulatory takings case based on a city’s refusal to renew a conditional use permit for the operation of a bar. Among other reasons, the city denied the renewal because of repeated noise complaints, which violated the terms of the original permit. The Texas Municipal League, the Texas City Attorneys Association, and the Cities of Corpus Christi and Brownsville submitted an amicus letter in support of the city’s motion for rehearing *en banc*. The essential reasoning behind *amici’s* policy arguments is that “[t]he takings clause ... does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government’s duty to underwrite this risk as an extension of obligations under the takings clause.” From both a policy and a legal perspective, the Court’s *Penn Central* analysis is flawed. *Amici* addressed three of the most important flaws in the opinion that, from a policy and legal perspective, would negatively affect all cities: (1) the conditional use permit as a basis for a *Penn Central* taking; (2) the fact that money spent in furtherance of a conditional permit does not meet the investment-backed expectations component in *Penn Central*; and (3) the impermissible recovery of damages related to property not actually taken. The brief was filed on September 10, 2013. The appeal was abated on October 4, 2013 for settlement negotiations. The case settled. On November 7, 2013, the court of appeals granted the parties’ unopposed motion to withdraw the opinion, vacate the judgment, and remand to the trial court for rendition of judgment in accordance with the agreement.

Civil Service: *City of Mission v. Gonzalez*, No. 12-0828, in the Supreme Court of Texas). TML and the City of Houston filed an amicus brief in support of the city’s Motion for Rehearing. The court of appeals upheld a decision of an independent hearing examiner that the city and we argued was outside his authority. The Supreme Court of Texas denied the city’s Petition for Review. The hearing examiner held that violations of personnel rules committed by a fire fighter were not sufficient to warrant an indefinite suspension based on criteria that was not present in the rules or state civil service law. Our argument is that the hearing examiner did not have the authority to make new rules or set new criteria for what is a punishable violation, but can only make decisions on what rule was violated and the fact of whether the violation occurred. The brief was filed on September 24, 2013. The Court denied the motion for rehearing on October 18, 2013.

Zoning: *Town of Bartonville Planning and Zoning Board of Adjustments v. Bartonville Water Supply Corporation*; Cause No. 04-12-00483-CV, in the Fourth Court of Appeals. In this case, a city's board of adjustment denied a special use permit for a water supply corporation's 160-foot tall water tower in a residential area. The trial court concluded that the city may not regulate the water supply corporation's facilities. TML argued that: (1) a substantive ruling on the underlying propriety of a city's ordinance is beyond a court's authority in a writ of certiorari from a board of adjustment decision; and (2) a city's authority to apply reasonable zoning regulations has not been preempted or limited with respect to a water supply corporation. The brief was filed on March 4, 2013, and oral argument was heard on March 8, 2013. The court of appeals held that the trial court exceeded the scope of its limited review of the board of adjustment's decision and reversed the trial court's judgment on March 27, 2013.

Property Development and Moratoria: *City of Lorena v. BMTP Holdings, L.P.*, No. 11-0554 in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the city's petition for review. In this case, BMTP argued that the city did not have a right to enforce its sewer tap moratorium that it instituted under Chapter 212 of the Texas Local Government Code, after the threat of an enforcement action by TCEQ because the city's wastewater plant was overtaxed. The lower court held that by filing a plat and having it approved, BMTP was exempted from the moratorium under the Chapter 212 definition of "property development." Amici argued that the lower court's interpretation was overbroad and placed the wishes of developers ahead of the protection of public health. The brief was filed on August 22, 2011. Briefs on the merits were requested on October 21, 2011. The Petition for Review was granted on March 30, 2012. Oral argument was heard on November 6, 2012. The Supreme Court of Texas held that once property is approved for subdivision, the property cannot be the subject of a moratorium. The Court also held that there may be sufficient evidence of an inverse condemnation claim that should be reviewed by the trial court.

Regulatory Takings: *Kopplow Dev. Inc. v. City of San Antonio*, No. 11-0104, in the Supreme Court of Texas. In this case, the City of San Antonio built flood mitigation measures near Kopplow's property. Kopplow claimed that the measures caused flooding on his property. TML argued in its amicus on the motion for rehearing that – in awarding money damages to Kopplow – the Court improperly created a new class of regulatory takings, which the court called "thwarting of approved development." While the Court did not use the term "regulatory taking" to identify the claim, it is implied because, according to the Court: (1) the claim pertains to *development* and not flooding or an increase in the flood plain; and (2) there has been no physical occupation of Petitioner's property. The brief was filed on May 8, 2013. The Court denied the motion for rehearing on June 21, 2013.

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. Oral argument was heard on January 25, 2012. The Third Court of Appeals held in a memorandum opinion that the plaintiff alleged particularized injuries separate from the general public and that associational standing need only have one member to have individual standing in order to grant such standing to the association. The court reversed and remanded to the trial court for further proceedings.

Sales Tax – Sale for Resale: *Combs v. Healthcare Services Corporation*, Nos. 11-0283 and 11-0652, in the Supreme Court of Texas. In this case, a company sought a refund of state and local sales taxes it paid on items purchased to fulfill a federal contract. The comptroller, based partially on the appeals court opinion, has ordered at least one city to refund those sales taxes to the federal defense contractor and not to collect them going forward (the comptroller is refunding the state's share). The case and the comptroller's refund order are based on the "sale for resale" provision in the Texas Tax Code. Contractors claim that they purchase items – office supplies, office equipment, furniture, software, utilities, and so forth – that ultimately belong to the federal government. Thus, the contractors' position (and the opinion of the court of appeals) is that the items are sold for resale and thus exempt from sales tax. The legal arguments as to why that is not the case are somewhat obscure, and TML, along with the Cities of Greenville and Corsicana, argued that the Supreme Court should provide guidance for taxpayers and the comptroller by adopting a test for what constitutes a sale in the "normal course of business" as applied to the sale for resale provision. The brief was filed on February 13, 2013. Oral argument was heard on February 27, 2013. The Supreme Court held that the Healthcare Services Corporation was eligible for sales tax refunds for everything but the leases of tangible personal property.

Open Meetings Act: *Asgeirsson v. Abbott and the State of Texas*, 11-50441 (5th Cir.); 12-763 (U.S. Supreme Court). This is the continuation of the challenge to the constitutionality of the criminal closed meeting provisions in the Texas Open Meetings Act (TOMA). The Texas Municipal League, the South Dakota Municipal League, the National League of Cities, and the International Municipal Lawyers Association, as amici, argued that many individuals across this nation volunteer their time and expertise to serve their local communities as elected and appointed officials. In doing so, these individuals come to understand the requirements of applicable open government laws. Amici do not take exception to the policies underlying open government laws, and our members understand the importance of and support open government. Open government laws should not, however, impinge on the First Amendment rights afforded to speech by officials made pursuant to their official duties and, certainly should not restrict their political expression. In order to maintain public officials' First Amendment protections, open government laws that restrict and criminalize their speech must be measured against the proper standard. In regard to TOMA's criminal provisions, that means a court must apply strict scrutiny analysis. The brief was filed on August 17, 2011. Oral argument was heard on April 5, 2012. The court held that TOMA is valid because it regulates the negative secondary effects of speech, not the speech itself. The city officials appealed the

case to the United States Supreme Court. TML, along with the National League of Cities, filed an amicus brief with the Supreme Court. The brief argues three key points:

- The various courts that have ruled on the substantive issues raised in this case can agree on almost nothing, leaving tens of thousands of Texas officials in a state of confusion as to how to comply with the Act. The decisions conflict in regard to the First Amendment rights of local officials, the standard of review applicable to political speech, and the manner in which the Act operates.
- Open meetings laws, like the Act, are content-based restrictions on political speech and are thus subject to strict scrutiny. The Fifth Circuit incorrectly applies the secondary effects doctrine to the Act. The secondary effects doctrine affords less protection than strict scrutiny and should not be used in regard to political speech, which is at the heart of the First Amendment.
- The Fifth Circuit refuses to recognize the reach of the Act and, in doing so, fails to protect the core function of public officers—engaging in political speech. Under the Act, a local official can be held strictly liable for a crime by attending a candidate forum. That fact alone shows that Section 551.144 is unconstitutionally overbroad.

Essentially, the amicus brief argues that local officials in Texas and across this country need the Court to clarify the appropriate balance between governmental transparency and the First Amendment rights of local officials. The Supreme Court of the United States denied the petition.

Municipal Advisors: SEC Release No. 34-63576, File No. S7-45-10; *Registration of Municipal Advisors*. TML filed comments with the Securities and Exchange Commission (SEC) opposing the proposed rule on the grounds that it would require appointed board members of municipal entities that issue municipal securities or that invest public funds to register as “municipal advisors” with the SEC and Municipal Securities Rulemaking Board. Those appointed board or commission members required to register would incur annual registration fees, be subject to accompanying record-keeping and administrative compliance requirements, and be subject to a heightened fiduciary standard of care. The comments were filed with the SEC on January 30, 2011. The final rule was published in September 2013 <http://www.sec.gov/rules/interim/2013/34-70468.pdf>.

Employee Rights: *City of Round Rock and Fire Chief Larry Hodge v. Rodriguez and Round Rock Fire Fighters Association*, No. 10-0666 (Tex. 2010). The issue in this case is whether a city employee has the right to have a representative at an investigatory interview under Labor Code Section 101.001. This section provides employees with the right to associate in order to protect their employment. Other statutes involving public employees and their labor rights are found in the Local Government and Government Codes. Those statutes regulate the ability of public employees to protect their employment, to associate through collective bargaining, civil service, specific discipline procedures, and other associational rights. The rights specified in the statutes specific to public employers conflict with those provided by the Labor Code Section 101.001. The

Amici argued that the public employer statutes should prevail over the general Labor Code provisions that are applicable to all employees. TML, TCAA, the Texas Association of School Boards, and the Texas Association of Counties filed the amicus brief on October 25, 2010. Briefing on the merits has been requested by the court. The Petition for Review was granted on August 26, 2011. Oral argument was heard on December 8, 2011. Doug Alexander presented argument for the City of Round Rock with the first ever PowerPoint at the Supreme Court of Texas. The Supreme Court held that current state law does not provide a right to representation in investigatory interviews for public employees.

Animal Law: *Strickland v. Medlen*, No. 12-0047, in the Supreme Court of Texas. TML and TCAA, along with the City of Arlington, argued that Texas law does not recognize “sentimental” damages for death of a human being. While animal injuries are tragic, they should not be compensable at law beyond market value. The second court of appeal’s new rule has real and substantial impact on cities, veterinarians, and other service providers. The Supreme Court established the standard for damages for the death of a dog in *Heiligmann v. Rose*, 81 Tex. 222, 16 S.W. 931 (1891), and said nothing about allowing “sentimental” or “intrinsic” damages for dogs. To the contrary, the Supreme Court held the “true rule” for assessing damages is “either a market value, if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog.” The brief was filed on March 1, 2012. The petition for review was granted and oral argument has been set for January 10, 2013. The Supreme Court of Texas reaffirmed the longstanding principle that there is no sentimental or intrinsic value damages for the loss of a pet.

Immunity Waiver: *City of Watauga v. Gordon*, No. 13-0012, in the Supreme Court of Texas. TML, along with the Texas Association of Counties, argued, among other things, that the use of handcuffs on a detainee should not waive immunity because officers do so intentionally. The case represents a growing trend of some of the lower appellate courts to recognize claims for negligence on the theory that the arresting officer inflicted an unintended injury while intentionally using a device to effect an arrest, restrain movement, or maintain order, such as leg shackles, batons, tear gas, tasers, and, of course, firearms. Unless disapproved, this line of cases will open the floodgates to a new species of tort claims that the intentional tort exemption was intended to preclude: suits against governmental entities for the “negligent” use of these devices. The brief was filed on January 16, 2013. The Supreme Court has requested a response to the petition for review. The court of appeals held that the facts showed that the officer’s use of the handcuffs was not intended to cause injury and was not excessive force, and thus not an intentional tort. It affirmed the trial court’s denial of the city’s plea to the jurisdiction.

Local Preemption under the Texas Clean Air Act: *Southern Crushed Concrete, L.L.C. v. City of Houston*, No. 11-0270, in the Supreme Court of Texas. The City’s Brief on the Merits does an excellent job of explaining why the City’s land use regulations are not preempted by Section 382.065 of the Texas Clean Air Act. The TML and TCAA brief works to emphasize two related issues. First, a holding against the City in this case upends the balance between local and state government that is inherent in our state

preemption law, and rejects our state's philosophy that citizens and their local governments are in the best position to make decisions impacting their community. Second, preemption of the City's land use regulatory authority in this case leaves inhabitants vulnerable to the health and safety hazards associated with being too closely located to an industrial site. The TML and TCAA brief in support of the City was filed on September 5, 2012. Oral argument was heard on October 15, 2012. The Supreme Court of Texas held that the city's ordinance is preempted by the plain language of the Texas Clean Air Act, Health and Safety Code § 382.113(b).

Municipal Standing: *City of Hugo v. Tom Buchanan*, No. 11-852 in the U.S. Supreme Court. TML, TCAA, and IMLA argued that cities need standing to challenge unconstitutional state action. Otherwise they are rendered powerless to seek redress against unlawful state regulations that violate the U.S. Constitution. The Tenth Circuit's holding in *City of Hugo v. Nichols* (that an Oklahoma city lacks standing to sue its parent state) contravenes the very purpose of the Commerce Clause by allowing states to infringe upon interstate commerce unfettered by federal judicial oversight. The amici argued that the Tenth Circuit has stripped away a crucial check on state governmental power that will impede local governance, and that the U.S. Supreme Court should reverse that court's decision. The brief was filed on February 9, 2012. The Supreme Court denied the city's writ of certiorari on March 19, 2012.

Taxes: RQ-1078-GA, The opinion request asks whether the Texas comptroller may interpret Chapter 43 of the Texas Local Government Code and Chapter 321 of the Texas Tax Code as to disallow the collection of a city's sales tax in a special purpose district pursuant to a limited purpose annexation under a strategic partnership agreement (SPA). TML argued that the plain meaning of Local Government Code Section 43.0751 clearly authorizes the collection of any city sales tax in a special district pursuant to an SPA. Moreover, the comptroller's office expressly recognizes the authority to collect city-related sales taxes pursuant to an SPA. The comment was filed on September 6, 2012. The attorney general concluded that, because the comptroller is the agency charged with administration, collection, and enforcement of the taxes authorized by chapter 321, the comptroller's reasonable interpretation would likely be shown deference by the courts.

Permit Vesting: RQ-1070-GA, Whether a "project duration ordinance" adopted by the City of Austin contravenes Section 245.005 of the Local Government Code. This request asks two questions relating to Chapter 245 of the Local Government Code and its application to the City of Austin's "Project Duration Ordinance." TML argued that nothing in Chapter 245 prohibits a city from imposing a permit expiration date that is consistent with the statute. Doing so is entirely consistent with Chapter 245. Filed on August 10, 2012. The attorney general's office concluded that the City of Austin's ordinance would likely be considered void to the extent that it conflicts with Chapter 245.

Property Tax: RQ-1026-GA, Taxation of pollution control property under Section 11.31, Tax Code. TML and TCAA submitted comments to the Attorney General arguing that under Texas Tax Code Section 11.31 and Texas Commission on Environmental Quality (TCEQ) administrative rules, the so-called "Prop 2" pollution control property

tax exemption only applies to pollution control equipment installed to reduce pollution at an industrial or manufacturing facility. The rule was not intended to apply to entities that use equipment to produce end products that control or reduce pollution. Consequently, TCEQ does not have the authority to exempt from taxation equipment that provides no environmental benefit at the site of the facility. This request was withdrawn.

ADA Pool Regulations: *Americans with Disabilities Act, Title II Regulations: Nondiscrimination on the Basis of Disability by Public Accommodations, State and Local Government Services Six-Month Extension.* Filed a comment letter with the Department of Justice on April 9, 2012. TML filed a comment letter with the Department of Justice supporting the proposed six month compliance extension date. The ADA regulations on swimming pools were set to go into effect March 15, 2012. However, the DOJ extended the date for compliance with the sections of the 2010 ADA Standards for Accessible Design relating to swimming pools, wading pools, and spas for a period of 60 days. On that same day, the Attorney General also signed a Notice of Proposed Rulemaking (NPRM) seeking public comment on whether a longer period of time would be appropriate to allow pool owners and operators to meet their compliance obligations.

Open Meetings Act: RQ-1042-GA; *Application of the Open Meetings Act, Chapter 551, Government Code, to a coordinated county transportation authority created under Chapter 460, Transportation Code, and to its committees.* This request asks several questions relating to the Texas Open Meetings Act (TOMA) and its application to committees of a governmental body. TML and TCAA argued that the way the TOMA is currently written and interpreted with regard to committees can be nonsensical. Duplicative postings of both a committee and the governmental body itself, when all that is actually taking place is a committee meeting, are confusing and needless. The attorney general's office should thus conclude that a notice on committee agendas (e.g., that a quorum of the parent governmental body may attend but will not participate in any discussion or take any action) is more than adequate. Filed on April 2, 2012. The attorney general's office stated that the legislature's definition of "meeting" in Government Code section 551.001(4), if a quorum of the governmental body attends a committee meeting at which deliberation takes place regarding public business or public policy over which the governmental body has supervision or control, the committee meeting will constitute a meeting of the governmental body under the TOMA. In this circumstance, TOMA requires that a public notice be posted announcing a meeting of the governmental body. A court would likely conclude that a notice posted for a committee meeting that indicates a quorum of the governmental body may attend is sufficient to notify the public of such a meeting, as long as the other requirements of TOMA are satisfied.

Eminent Domain: *City of Austin v. Harry M. Whittington, et al.*, No. 10-0316 (Tex. 2010). The issues in this case are whether there is a bad faith defense to condemnation, and if so, whether an e-mail by a city employee would be adequate to prove bad faith on the part of the city. TCAA and TML argued in their brief that there is no basis for a bad faith defense to condemnation in the Texas Constitution, state statutes, or applicable case law, and that such an exception is not in line with current case law that gives great weight

to the legislative decisions of the city council with regard to condemnation. The brief also argued that, even if a bad faith exception is considered, an e-mail by a city employee should not be considered in the determination of bad faith because all decisions regarding condemnation belong to the city council and may not be delegated. The petition for review was filed on May 10, 2010, and the petition for review was granted on April 15, 2011. Oral argument was heard on December 6, 2011. The Supreme Court of Texas held that the city was not in bad faith when it took the land for a parking lot, which is a public use. The Court also held that both the parking lot, and the cooling plant, that were built on the property were public uses and did not fall into the economic development exception to the use of eminent domain.

Eminent Domain: *Enbridge v. Avinger*, No. 10-0950, in the Supreme Court of Texas. The Texas Pipeline Association (TPA) and TML filed a joint *amicus curiae* letter brief in support of Petitioner. TPA and TML argued that the market value rules and appraisal methodology approved in the underlying case exceed the indemnification principle of Article I, Section 17, of the Texas Constitution and jeopardize the financial viability of public infrastructure projects in the State of Texas. Additionally, TPA and TML argued that – if allowed to stand – the appellate court’s approval of the landowner’s convoluted compensation analysis as proper methodology will greatly increase the burden of litigating market value in condemnation cases. The letter brief was filed March 31, 2011. The Petition for Review was granted by the Supreme Court and oral argument was heard on February 27, 2012. The Supreme Court of Texas held that the proper way to value land was the value to the landowner, not the condemnor, and that the trial court abused its discretion when it allowed expert testimony that included impermissible evidence of the value of the land to the condemnor and included the value of the improvements.

ADA Pool Requirements: *2010 ADA Standards for Accessible Design*. TML submitted comments to the Department of Justice (DOJ) supporting the proposed compliance extension date. On May 18, 2012, the Department of Justice announced that it was adopting a final rule extending the compliance date for the sections of the 2010 *Americans with Disabilities Act (ADA) Standards for Accessible Design* that relate to *existing* swimming pools, wading pools, and spas (those built before March 15, 2012). Under the ADA standards, all public swimming pools with 300 or more linear feet of pool wall must have at least two accessible means of entry, with at least one of the means of entry being either a pool lift or a sloped entry to the pool (other accessible means of entry include transfer walls, transfer systems, and accessible pool stairs). (Note: public swimming pools with less than 300 linear feet of pool wall must have at least one accessible means of entry that is either a pool lift or a sloped entry.) These provisions for existing pools will now take effect on **January 31, 2013**.

Dog or Cat Breeders Program: On January 25, 2012, TML and TCAA submitted comments on the rules proposed by the Texas Department of Licensing and Regulation regarding the licensing and regulation of certain dog and cat breeders as published in the Texas Register on January 20, 2012. 37 Tex. Reg. 164 (2012). First, TML and TCAA asked that the Department expressly provide in the rules that the term “dog or cat breeder” excludes an “animal control agency.” Second, TML and TCAA requested

clarification as to the capacity in which an employee of a local law enforcement agency or fire department may serve as a third-party inspector. If it is not an outside employment position, they urged the Department to require that an applicant for an inspector registration submit proof that the governing body, agency, and department of the employing entity have knowledge of and consent to the employee's service as a third-party inspector. In response to the comments that TML and TCAA submitted on the rules proposed by TDLR regarding the licensing and regulation of certain dog and cat breeders as published in the Texas Register, the Department stated it had insufficient to agree or disagree. Since the definitions that were the subject of our comments were found in statute, changes in the statutory definitions is beyond the authority of the Department through the rule-making process. On April 11, 2012, these newly-adopted rules were filed with the Secretary of State. The new rules are found in the Texas Occupations Code § 802.201(b)(2)-(13).

Fourth Amendment-Strip Searches: *Florence v. Bd. of Chosen Freeholders*, No. 10-945, in the U.S. Supreme Court. TML joined the Texas Municipal League Intergovernmental Risk Pool, Texas Association of Counties, Texas Conference of Urban Counties, and the Texas Chief Deputies Association in this brief to the U.S. Supreme Court. The principal issue in the case is whether strip searches performed on inmates entering a jail facility violate the Fourth Amendment to the U.S. Constitution. Amici argued that: (1) safety concerns related to jail staff outweigh an inmates privacy interests; (2) the security of jail personnel is compromised by easily-concealable items like weapons, drugs, and other contraband that can be hidden in body cavities; (3) alternatives to strip searches are not feasible; and (4) the American Corrections Association's standards relating to searches are not binding. The brief was filed on August 26, 2011, and oral arguments were heard on October 12, 2011. On April 2, the United States Supreme Court held that the search procedure in question was constitutional because it met the necessary balance between inmate privacy and the needs of the jails.

Americans with Disabilities Act: *Richard Frame v. City of Arlington*, Nos. 08-10630, 08-10631 (5th Cir. 2009). This Americans with Disabilities Act of 1990 ("ADA") case involves implementation of the Act's accessibility requirements. TML and IMLA argued that the Fifth Circuit decision incorrectly attempts to apply the program accessibility standard to all facilities, including streets, sidewalks and parking lots. The Fifth Circuit in this case held that a physical sidewalk and parking lot (and, by implication, every public building, structure and right of way) is a "program" for purposes of enforcing Title II of the ADA and Section 504 of the Rehabilitation Act. The decision may require that the City of Arlington, and every other public entity, make all facilities accessible immediately. The amici argued that this is contrary to the statutory language and regulations at issue and imposes on public entities an extraordinary financial burden not contemplated by Congress or articulated in the statute. This brief was filed on July 24, 2009. On August 23, 2010, the Fifth Circuit held that curbs, sidewalks, and parking lots do not constitute a "service, program, or activity" within the meaning of Title II of the ADA. Thus, plaintiffs can only establish claims under Title II to the extent they can allege that a noncompliant sidewalk, curb, or parking lot denies them access to a program, service, or activity that does fall within the meaning of Title II. On September

15, 2011, an en banc Fifth Circuit Court of Appeals held that newly-built or altered sidewalks must be made accessible if it would not be unreasonably burdensome on the city. The court also held that the statute of limitations does not begin to run until an individual knew or should have known that a sidewalk is inaccessible to him or her. The City filed a petition for writ of certiorari with the U.S. Supreme Court on December 16, 2011, *City of Arlington v. Frame*, No. 11-746. TML and TCAA, joined by the League of California Cities, the National League of Cities, the City of Dallas, the International City/County Management Association, the U.S. Conference of Mayors, the Texas Association of Counties, and the National Association of Counties, submitted a brief in support of the petition. Amici argued that sidewalks are “facilities” rather than “services, programs, or activities.” The brief was filed on January 11, 2012. The United States Supreme Court denied the writ on February 22, 2012.

Substandard Buildings: *City of Dallas v. Stewart*, No. 09-0257 in the Supreme Court of Texas. TML and TCAA filed an amicus brief in support of the city’s motion for rehearing, arguing that the Texas Supreme Court’s opinion could: (1) be interpreted to require every administrative public health and safety abatement decision to be subject to de novo review; (2) be interpreted to require every administrative regulatory determination that involves property interests be subject to de novo review; and (3) expose cities to takings claims for every abatement or regulatory decision made in the past 10 years. TML and TCAA argued that the Court should reverse its previous opinion or, in the alternative, narrow the opinion to provide sufficient guidance for cities to carry out nuisance abatement programs. The brief was filed on August 23, 2011. The Supreme Court requested a response to the city’s motion for rehearing; respondent filed a response on October 31, 2011. The Court denied the motion for rehearing on January 27., 2012, withdrew its first opinion, and issued a second opinion holding that unelected city agencies are not effective against possible constitutional violations, and that the board’s nuisance determination, and the trial court’s affirmance of that determination under a substantial evidence standard, are not entitled to preclusive effect in Stewart’s takings case.

Federal Preemption: *Texas Central Business Lines Corporation v. City of Midlothian*, No. 10-11041 (5th Cir. 2012). A three-judge panel of the Fifth Circuit issued an opinion on February 1, 2012. The court explained that the Interstate Commerce Commission Termination Act (ICCTA) preempts a state or local law if it: (1) regulates transportation; and (2) that transportation is conducted by a rail carrier. The court concluded that the term transportation encompasses transloading, and Texas Central Business Lines Corporation (TCB) was sufficiently involved in the transloading to meet the second prong of the test. The court—rejecting the argument that the city’s regulations were exempt from preemption under a health and safety exception—determined that the regulations at issue had the effect of managing or governing rail transportation and thus, were expressly preempted. The court refused to extend its holding to TCB’s entire 243-acre lease, and rejected any conclusion by the district court that all third-party transloaders of TCB were within the jurisdiction of the Surface Transportation Board.

Recreational Use Statute: *Sullivan v. City of Fort Worth*, No. 11-0478 in the Texas Supreme Court. TML filed a brief in support of the city’s petition for review to the Texas Supreme Court. In this Recreational Use Statute case, TML argued that the legislature’s broad definition of “recreation” in Section 75.001(3)(L) of the Texas Civil Practices and Remedies Code should be analyzed objectively. Thus, a city should be able to avail itself of the protections afforded by the act when a woman who was injured while at a wedding in a city park sued the city. Even though the woman was walking in a city park at the time of her injury, the court of appeals incorrectly characterized her action as a state of being—“being a guest at a wedding”—which considered one, but only one, of the multiple reasons for why she had been in the park, rather than focusing on what she was doing in the park when she stumbled and fell, which was walking down stairs. The brief was filed on December 19, 2011. The Petition for Review was denied by the Supreme Court.

Sovereign Immunity: *Keith Lowell v. City of Baytown*, No. 07-1011 (Tex. Dec. 16, 2011) (per curiam). Amici argued that 2007 legislation overturning governmental immunity for back pay claims (codified in Local Government Code Section 180.006) was intended to apply prospectively only and has no effect on cases filed prior to the effective date of the law (June 15, 2007). The Texas Supreme Court remanded the case to the trial court so that the firefighters could amend their pleadings (1) to argue that the legislature, through its enactment of Local Government Code Sections 271.151-.160, has authorized retrospective relief, such as the back pay and related damages sought by the firefighters; and (2) to seek prospective declaratory and injunctive relief against specific city officials rather than the city.

Open Meetings: RQ-0977-GA, *Whether certain kinds of electronic communication among members of the board of directors of a river authority constitute a violation of the Open Meetings Act, Chapter 551, Government Code*. TML and TCAA filed comments arguing that the Act is not intended to hamper the ability of individual elected officials to discuss and learn about issues, and our belief has always been that elected officials should be free to consult among themselves in a candid and unrestrained manner to resolve issues. TML and TCAA argued that there is no need in the attorney general’s response for anything more than a survey of current law. Whether any particular e-mail exchange violates the Act is a fact question that must be reviewed in light of the definition of a “meeting” and relevant judicial precedent. Opinion Number GA-0896 concluded that electronic communications could, depending on the facts of a particular case, constitute a deliberation and a meeting for purposes of the Texas Open Meetings Act.

Emergency Detention: RQ-0952-GA; *Law enforcement responsibility for an individual who is the subject of an emergency detention order*. TML, TCAA, and TPCA concurred in the City of Texarkana’s argument that a county, not a city, bears the responsibility for supervision, oversight, and custodial security of a person who is the subject of an emergency detention order both before and after a court signs the detention order. In the alternative, TML, TCAA, and TPCA argued that neither chapter 573 nor chapter 574 of the Health and Safety Code require that a peace officer retain custody of and

responsibility for an individual after the individual is transported to a mental health facility. Opinion Number GA-0877 concluded that: (1) there is no provision in chapter 573 that expressly requires a particular law enforcement agency to oversee a mentally ill person once the person is transported to a facility pursuant to a section 573.002 emergency detention order; and (2) a sheriff's office must transport a person subject to court-order mental health services under chapter 574 within a reasonable amount of time and without delay.

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 construction 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. Opinion Number GA-0893 concluded that a city can have both a reserve police force and a civil service police force.

Regulatory Takings: *City of Houston v. Maguire Oil*, 11-0486 (Supreme Court of Texas). This appeal is part of protracted litigation between the City of Houston and an oil company that has been ongoing for decades. TML and TCAA argued that a regulatory taking claim cannot be based on an invalid or inapplicable land use regulation because the takings clause of the Texas Constitution has no application to the enforcement of an invalid or inapplicable regulation. Where a regulation is invalid or inapplicable, a property owner has a remedy by way of an official capacity lawsuit against the local officials who seek to enforce the regulation. The brief was filed on August 17, 2011. The petition for review was denied on September 30, 2011.

Workers' Compensation: *Ins. Co. of the State of Pennsylvania v. Muro*, No. 09-0340, in the Supreme Court of Texas. TML, TCAA, and TML Intergovernmental Risk Pool filed a joint amicus curiae brief in support of the Petitioner. The amici argue that the Supreme Court of Texas should hold that Labor Code Section 408.161(b) requires proof of an injury to the affected body part in question to establish the total loss of use of that body part. Any contrary interpretation of section 408.161(b) will have an immediate and adverse effect upon the ability of Texas cities to operate their workers' compensation programs at an affordable cost to the taxpayer. The Supreme Court held that the individual did not prove that he had suffered a total loss of the body parts in question and was therefore not eligible for a lifetime award of benefits.

Permit Vesting: *Harper Park Two v. City of Austin*, No. 03-10-00506-CV, in the Third Court of Appeals. The principal issue in this case is whether a plat, filed in 1985 for an office project, vests development regulations in place at that time. The plat clearly vests the development regulations for that project. However, in 2007, the developer submitted new information that showed his intent to place a hotel on the property. TML and TCAA argued that, while Texas law protects the rights of landowners and developers, it is not meant to secure vested rights in twenty-five-year-old development regulations by relying on a plat that does not include a currently-proposed project. Oral argument was heard on April 13, 2011. The court of appeals held that a developer who files a preliminary plan

may change the uses contemplated within the plan under the vesting statute once the first permit is filed. A motion for rehearing was filed on September 12, 2011.

RLUIPA: *The Elijah Group v. City of Leon Valley*, No. 10-50035 (5th Cir. 2009). This case involves the Religious Land Use and Institutionalized Persons Act (RLUIPA). TML, as amicus curiae, argued that religious institutions should not be wholly exempt from legitimate zoning ordinances. Such a finding would contravene the intent, purpose, and effect of RLUIPA. So long as legitimate regulatory purposes exist to support a zoning ordinance, and comparable religious and secular assemblies are treated the same, cities should be authorized to enforce their ordinances. The brief was filed on July 16, 2010. The case was heard in oral argument on December 8, 2010. The Fifth Circuit Court of Appeals held that the city's zoning ordinance treated religious and secular assemblies differently and remanded the case to the trial court for further review.

Discharge of Firearms: RQ-0937-GA; *Authority of a type A general law municipality to adopt and enforce a firearm discharge ban on property located within its corporate limits*. TML and TCAA argued that the City of Wimberley, or any incorporated city for that matter, has full authority to regulate or prohibit the discharge of firearms within the city's originally-incorporated limits. Opinion Number GA-0862 concluded that Section 229.002 of the Texas Local Government Code does not prohibit a Type A general law city from regulating the discharge of a firearm or other weapon in an area that is within the city's original city limits.

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. Rehearing was denied on June 10, 2011.

Property Taxation of Stored Natural Gas: *Harrison Central Appraisal District v. The Peoples Gas, Light and Coke Co.*, 10-896 (Jan. 2011) in the Supreme Court of the United States. This case concerns when goods are constitutionally protected from property taxation under the Commerce Clause of the United States Constitution. U.S. CONST., Art. I, § 8, cls. 1 & 3. Specifically, the question presented is whether the Commerce Clause prohibits the taxation of natural gas that is stored in one state before being transferred to another state for final distribution. TML, TCAA, the National League of Cities, the International Municipal Lawyers Association, and other state and national leagues filed a brief arguing that natural gas that is stored, even in a tank connected to an interstate pipeline, is constitutionally taxed by local entities because the gas enjoys the benefits of local governments. (TML also joined an amicus brief by the Texas Association of School Boards in a similar case filed at the same time, *Midland Central Appraisal*

District v. BP American Production Co., 10-890 (Jan. 2011).) The Supreme Court of the United States denied the Petition for writ of certiorari.

Infrastructure: RQ-0923-GA; *Whether the Eagle Pass Independent School District is subject to a municipal ordinance that requires the district to expend funds for certain kinds of infrastructure.* TML and TCAA argued that the attorney general has previously concluded that development regulations imposed by cities on school districts are permissible. The attorney general concluded that, pursuant to Local Government Code Subsection 395.022(b), if it is determined that a City of Eagle Pass ordinance imposes an impact fee under Chapter 395, the Eagle Pass Independent School District is not required to pay that fee in the absence of an agreement to do so. The district's trustees must determine whether the expenditure for a waterline is "necessary in the conduct of public schools" and therefore permitted under Education Code Section 45.105. To the extent that the city ordinance at issue imposes unilateral action, Education Code Section 11.168 is inapplicable to the issue of whether the district must comply with the city ordinance. If the district determines that paying for city-requested infrastructure accomplishes a public purpose of the district and that it otherwise meets the requirements established by the Texas Supreme Court, the district's expenditure of funds for city-mandated infrastructure will not violate Article III, Section 52, of the Texas Constitution.

Official Newspaper: Opinion No. GA-0838, *Proper compliance of a publication with the provisions of section 2051.044, Government Code, in order to be considered the official newspaper of a municipality.* TML filed a comment seeking that the Attorney General issue an opinion finding that the *Coastal Bend Herald* properly complied with Government Code 2051.044 in order to be considered the official newspaper of the City of Ingleside, arguing that the requirement that a newspaper be entered as second-class postal matter in the county where published should include the *Coastal Bend Herald* within its definition. The Attorney General stated that 2051.044(a)(3) requires only that the newspaper "be entered as second-class postal matter in the county where published." TEX. GOV'T CODE § 2051.044(a)(3). Ingleside is located in San Patricio County, while the designated newspaper does have a second-class postal permit in Aransas County, the county where the newspaper itself is published. As a matter of plain language, the Attorney General held that this satisfied the requirement. The Attorney General declined to answer whether the City's publication of sample ballots was in compliance with its charter.

Harassment: *Negrete v. City of Laredo*, No. 10-0185 (Tex. 2010). TML, TCAA, the Texas Municipal League Intergovernmental Risk Pool, the Texas Association of Counties, and the Texas Council Risk Management Fund argued that the Supreme Court of Texas should establish the following principles in workplace harassment cases arising under the Texas Commission on Human Rights Act: (1) where an employee has endured her supervisor's mounting insults and unwelcome advances for a lengthy period without availing herself of the established procedure for complaining to higher management, such delay is unreasonable as a matter of law unless the evidence warrants a reasonable belief that such complaint would have been futile; and (2) whether the plaintiff has made a *prima facie* showing of harassment severe or pervasive enough to create an *objectively*

hostile work environment is a question of law for the court to determine in the first instance, in light of the established body of federal and Texas case law. The petition for review was filed on May 7, 2010, and briefing on the merits was requested on August 23, 2010. A supplemental amicus brief was filed on December 2, 2010. Petition for review was denied.

Civil Service: RQ-0869-GA *Whether a citizen advisory committee to a police chief may review information contained in a police personnel file maintained under Local Government Code, Section 143.089(g)*. TML and TCAA filed a brief arguing that a citizen advisory committee should be considered part of the “department,” allowing committee members to review civil service police officer (g) files. Opinion No. GA-0818 concluded that whether a civilian advisory committee may review information maintained in a police department personnel file under Texas Local Government Code section 143.089(g) will depend on specific facts establishing the committee as part of the department and limiting the committee's use of the files to department purposes only.

Fair Housing Act: *NAACP, et al. v. City of Kyle, Texas*, No. 09-50352 (5th Cir. 2009). The City of Kyle homebuilder discrimination case continues at the Fifth Circuit. The NAACP and the national and local homebuilders associations claim that the City of Kyle’s zoning regulations lock minorities out of the home buying market. The city won at the trial court, and the homebuilders appealed. TML joined other cities and the brick association (one of the city’s requirements was a required percentage of masonry) in this amicus brief. The amici argue that the NAACP and other plaintiffs failed to prove standing, and that the plaintiffs failed to adequately prove through their statistics that the zoning ordinances have a significant discriminatory effect on the availability of housing for minorities. The brief was filed on November 24, 2009. Oral argument was heard on April 27, 2010. On November 11, 2010, the court held that the associations do not have standing and dismissed the case.

Reserved Powers Doctrine: *Kirby Lake Dev. LTD., et al. v. Clear Lake City Water Auth.*, No. 08-1003 (Tex. 2010). The issue in this case is whether a political subdivision can bind itself in such a way as to indefinitely restrict its legislative discretion to choose what propositions are included in its bond elections. TCAA and TML argued in their brief that construing the Clear Lake Water Authority’s contracts to require the authority to indefinitely place issues on bond elections would forever deprive the local government of its legislative discretion to set the ballot for its future bond elections. The brief argued that the contract should not be interpreted to deprive the authority of future legislative discretion. The brief was filed February 11, 2010. The Court issued its opinion on August 27, 2010, and held that the agreement required that the Authority continue to place the bond authorization on all future bond elections.

Incorporation in the ETJ: *In Re Louis F. Brouse*, No. 10-10-00263-CV (Tex. App.—Waco 2010). Petition for Emergency Writ of Mandamus. The issue in this case is whether the citizens of a home rule city, through a charter initiative petition, can force the city council to grant consent to a community to incorporate in the city’s extraterritorial jurisdiction. The Relator argues that the city’s charter allows for an initiative election

regarding the city's boundaries. TML and TCAA argued that multiple courts have held that municipal boundaries are not the proper subject of an initiative election. The amicus brief was filed on July 30, 2009. On August 17, 2010, the Waco Court of Appeals dismissed the petition for mandamus and held that a city's borders are not a permitted use of the initiative election process. The case was appealed to the Supreme Court of Texas on August 24, and the Court denied the petition on the same day.

Development Agreements/Referendum: *In re Hollis*, No. 10-0183 (Tex. 2010). The issue in this case is whether or not an amendment to a development agreement is subject to a referendum election. In this case, the City of Buda adopted an amendment to an existing development agreement that would allow for light industrial use on a piece of property in the city's extraterritorial jurisdiction. A group of citizens submitted a petition to submit the approved amendment to a referendum election pursuant to the city charter. The city determined that a referendum election was not permitted by state law and city charter in this instance, and declined to order the election. Two citizens sought a writ of mandamus to order the election, and were denied at the appellate level. This decision was appealed to the Supreme Court of Texas. TML and TCAA argued that the referendum election was not allowed because the action taken was not legislative in nature and was precluded by the city charter. The brief was filed on May 18, 2010. The petition for mandamus was denied on June 11, 2010.

Tort Claims Act: *City of Dallas v. Carbajal*, No. 09-0427 (Tex. 2009). The issue in this case is what constitutes "actual notice" to a city under the Tort Claims Act. In this case, a woman was injured when she drove her car into a ditch in a street that wasn't properly barricaded. She sued the City of Dallas, and the city claimed that the trial court did not have jurisdiction because she never gave proper notice to the city prior to filing the suit. The woman claimed that the police report documenting the incident gave the city actual notice of its fault. TML and TCAA argued that a basic police report alone cannot give a city a subjective awareness of its fault under the Tort Claims Act. The Supreme Court of Texas issued a per curiam opinion on May 7, 2010, holding that the police report at issue represented nothing more than a routine safety investigation, which was insufficient to provide actual notice to the city. Because the police report did not indicate that the city was at fault, the city had no incentive to investigate its potential liability in the matter.

Building: RQ-0832-GA; *Municipal responsibility for enforcing laws that affect the practice of engineering.* This request asked, among other things, whether the Texas Board of Professional Engineers (TBPE) has authority over cities and whether a city or its officials are immune from TBPE penalties. TML, TCAA, and the Building Officials Association of Texas (BOAT) argued that the TBPE was created to regulate individuals, not cities. TML, TCAA, and BOAT also argued that even if the TBPE had regulatory authority over a city, a city would be immune from any administrative penalties. The request was received by the Attorney General on October 19, 2009. On March 4, the attorney general declined to issue an opinion on Representative Keffer's request "because the opinion process cannot be used to appeal an agreed board order between a municipality and the [TBPE]..."

Public Information Act: *City of Dallas v. Gregg Abbott*, No. 07-0931 in the Supreme Court of Texas. TML and TCAA joined a brief of the Texas Association of School Board's Legal Assistance Fund and argued that the attorney-client privilege is a compelling reason for withholding information under the Public Information Act, even when a governmental body misses the ten-day deadline to request an attorney general opinion. The brief was filed on December 13, 2007, and briefing on the merits has been requested. The petition was granted on June 27, 2008 and oral argument was heard on October 16, 2008. The Court held that the ten business day period ran from the date of the requestor's clarification, and did not reach the city's argument that the attorney-client privilege was a compelling reason for non-disclosure that could be raised after the statutory deadline has passed.

Takings: *City of Midland v. Jud Walton*, No. 09-0155 (Tex. 2009). In this case, Walton filed a takings claim based on his allegation that the City of Midland's municipal effluent disposal system contaminated his groundwater. TML and TCAA supported the city's position that, to establish a takings claim under Article I, Section 17, of the Texas Constitution, a landowner must prove that the city intentionally performed certain acts that resulted in a taking of property for public use. The city's intent must be examined at the time it made its decision to construct the effluent disposal system, not after years of hindsight. Establishing intent at any subsequent time implicates negligence, not a taking. Absent intent at the time of the planning and construction of the effluent disposal plant, there is no basis from which to infer a taking. The brief was filed on January 25, 2010. Petition for review was denied on January 15, 2010. Motion for rehearing was denied on March 5, 2010.

Annexation: *City of Ovilla v. Triumph Development Co.*, No. 14-08-00593-CV, in the Fourteenth Court of Appeals. TML and TCAA argued that: (1) a city's annexation is not invalid merely because it is prohibited by law from providing water and wastewater service to an annexed area; and (2) a person who has been annexed has no standing to directly challenge the contents of a city's service plan. Due to a settlement, the appeal was abated on February 11, 2010.

Elections: *City of Granite Shoals, et. al, v. Ted Winder*, No. 09-0368 (Tex. 2009). In this case, the Respondents missed the Election Code's statutory deadline when filing their challenge to the City of Granite Shoals' population determination for its charter election. Also, the State of Texas did not bring suit in a quo warranto proceeding. TML and TCAA argued that, because the Respondents did not meet either of these procedural requirements in filing their election challenge, the challenge was not properly before the courts and should have been dismissed. This brief was filed on August 11, 2009. Briefing on the merits was requested on September 25, 2009. The petition for review was denied on February 12, 2010.

Cell Tower Siting: WT Docket No. 08-165, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Petition for Declaratory Ruling*. CTIA, the wireless association, is seeking FCC preemption over local zoning of wireless phone

tower locations. CTIA complains that local zoning procedures have the effect of limiting competition in the provision of wireless phone service. Specifically, CTIA is requesting that the FCC: (1) impose a 45-day or 75-day “shot clock” on local zoning decisions regarding wireless towers; (2) interpret Section 332(c)(7) of the federal Telecommunications Act (Act) as barring any local zoning decision that prevents a wireless provider from offering service in an area where another wireless carrier is already providing service; and (3) interpret Section 253 of the Act as preempting any local zoning that would, for example, require a wireless tower to comply with a zoning variance process. TML argued – among other things – that CTIA’s request ignores the wishes of city residents and would have the effect of making the FCC a “national zoning board.” In November of 2009, the FCC unanimously adopted an order on CTIA’s petition. The order is similar to previous orders regarding cable franchises, which essentially preempted city authority in states that don’t have a state-issued franchise. While not as burdensome as some feared, the order does the following:

- Sets presumptive deadlines of 90 days (for co-location applications) and 150 days (for all other wireless siting applications) within which a city must act on wireless applications. (Note: the order contains different procedures for currently pending applications.)
- Concludes that a city that denies a tower-siting application solely because “one or more carriers serve a given geographic market” has engaged in unlawful regulation that “prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,” within the meaning of the Act. In other words, the fact that another carrier or carriers provide service to an area is an inadequate defense to denying a new carrier’s application.
- Rejects CTIA’s request that the FCC preempt any variance procedure under a city’s ordinance. The FCC concluded that whether a variance procedure is too burdensome depends on the city’s actual process.

Governmental Immunity-Tort: *City of Waco v. Debra Kirwan*, No. 08-0121, in the Supreme Court of Texas. Ms. Kirwan sued the City of Waco for wrongful death due to a premises defect when her son was killed after falling from a cliff within a city park. TML and TCAA filed a brief in favor of the city arguing that the Recreational Use Statute favors the approach of “leaving wild lands as they are and trusting visitors to use reasonable caution.” The statute expressly adopts a trespasser standard of care for recreational users of property, and that standard, which is a creature of the common law, must derive its meaning from the common law. The Supreme Court of Texas held that a landowner generally does not owe a duty to warn others against the dangers of natural conditions, such as a cliff. The court also noted that the city had posted signs warning of the danger of being on the cliff showing that the city did not show a “conscious indifference to the rights, safety, or welfare” of users of the park. The court held the city was immune from suit and dismissed the case.

Governmental Immunity: *Linda Sanders-Burns v. City of Plano and Joseph Cabezuela*, No. 08-40459 (5th Cir. 2009). TCAA, TML, and TMPA joined others in

filing an amicus brief in the United States Court of Appeals for the Fifth Circuit supporting the City of Plano's request for rehearing *en banc*. Amici argued that a plaintiff should not be able to sue a governmental official in his or her individual capacity after the statute of limitations has expired and after most discovery deadlines have passed, even if the official was previously-named in his official capacity. Amici argued that strong policy arguments work against the panel's holding, including the fact that the panel's decision will force local governments and governmental officials to guess – at their peril – whether officials are being sued in an official capacity, individual capacity, or both. Also, plaintiffs should be required to clearly state whether the suit is brought against an individual in his or her individual versus official capacity. The brief was accepted by the Fifth Circuit on September 17, 2009. The court held that the city was not liable because the plaintiff failed to demonstrate a causal connection between Plano's training policies and Sanders's death, but reversed the district court's grant of the governmental official's motion to dismiss.

Regulatory Takings: *City of Houston v. Trail Enterprises*, No. 08-0413 in the Supreme Court of Texas. This case arose from a City of Houston ordinance regulating oil and gas exploration around Lake Houston. TML and TCAA, along with the International Municipal Lawyers Association, U.S Conference of Mayors, and the National League of Cities, argued that a takings claim is not ripe for adjudication if the claimant has not filed a single development application or taken any other affirmative step to obtain a final and authoritative determination from the governmental defendant about the type and intensity of development legally permitted under an ordinance. Briefing on the merits was requested on September 26, 2008, and a decision on the petition is pending. On October 30, 2009, the Court held that because the trial court relied only on the jurisdictional ripeness issue in disposing of the case, it was improper for the court of appeals to render judgment based on the jury verdict. Without hearing oral argument, the Court reversed the court of appeals' rendition of judgment, and remanded to the trial court for further proceedings.

Qualified Immunity: *Lorena Vera, et al. v. Gino Ruatta, et al.*, No. 08-41135, on appeal to the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing. TML and TCAA, on behalf of the City of Pasadena, urged the court to grant rehearing. TML and TCAA argued that the appellants should be able to present their qualified immunity defense after the court dismissed the case *sua sponte*. The brief was filed on March 12, 2009. Dismissed with prejudice on August 27, 2009.

Sign Regulation: *RTM Media, L.L.C. v. City of Houston*, No. 08-20701, on appeal to the United States Court of Appeals for the Fifth Circuit. TML supports the city's argument that its ordinances regulating and prohibiting off-site commercial signs or billboards is constitutional and should be upheld. The brief was filed March 7, 2009. Oral argument was heard on July 7, 2009. The Fifth Circuit issued an opinion on September 28, 2009, that the Houston Sign Code does not violate the first amendment.

Open Meetings Act: *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas v. Frank D. Brown, 83rd Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas*, C.A. No. P-05-CV-75 in the United States District Court for the Western District of Texas. TCAA argued that, while city attorneys are committed to openness in government, the criminal provisions of the Texas Open Meetings Act are written such that it is almost impossible to properly advise city officials on discussion outside of formal meetings. As such, city attorneys seek more guidance as to how to advise city officials in regards to that provision. The suit was filed on September 26, 2005, and on November 7, 2006, the court held that the Texas Open Meetings Act provisions in question are constitutional because the speech at issue was uttered in the speaker's capacity as a councilmember, and that the Act's provisions are neither overbroad nor vague. The decision was appealed to the Fifth Circuit in April of 2007, and a decision is pending. The case number in the Fifth Circuit is 06-51587 and oral argument was heard on January 29, 2008. The Fifth Circuit issued an opinion on April 24, 2009. It held that the criminal provision of the Act is subject to strict scrutiny review. For more information on this case see:

http://www.tml.org/leg_updates/legis_update043009a_openmeet.html.

Both parties filed for rehearing en banc. TML, along with other state and national municipal organizations, filed a brief in support of the appellants. TML argued that the panel of the Fifth Circuit made the correct decision, and that jail time is not the least restrictive means of promoting open government. On September 10, 2009 the Fifth Circuit dismissed the case as moot with Judge Dennis dissenting emphatically.

Civil Service: *City of Pasadena v. Richard Smith*, No. 06-0948, on Motion for Rehearing in the Supreme Court of Texas. TML and TCAA, on behalf of the City of Pasadena, urged the court to grant review to determine the appropriate standard of review in a Section 143.057(j) appeal from a hearing examiner's decision. The brief was filed on April 8, 2008, and the motion for rehearing was granted on May 16, 2008. Oral argument was heard on September 10, 2008. On August 28, 2009 the Supreme Court of Texas held that the hearing examiner exceeded his authority by not hearing the city's evidence and ruling solely on the fact that the hearing examiner was not present at the hearing (a ruling based on a statute that did not apply to the city). The Court held that: "it clearly exceeds a hearing examiner's jurisdiction to refuse to hear evidence before deciding that a police officer was improperly disciplined. . . ." 2009 WL 2667599 at *4. The test for determining whether a hearing examiner exceeds his jurisdiction is when: (1) his acts are not authorized by the Civil Service Act; (2) his acts are contrary to the Civil Service Act; or (3) his acts "invade the policy-setting realm protected by the nondelegation doctrine." *Id.* The Court also held that the city's cause of action was timely, reversing the judgment of the court of appeals and remanding the case to the district court.

Vested Rights/Extraterritorial Authority: *City of San Antonio v. Continental Homes of Texas*, No. 08-0786, before the Supreme Court of Texas. TML and TCAA joined the City of Austin in arguing that: (1) regulations for the preservation of trees "promote the

health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality” and a city may apply them in its extraterritorial jurisdiction pursuant to Chapter 212 of the Local Government Code; and (2) Chapter 245 of the Local Government Code does not allow a developer to ignore a city ordinance requirement to file an application simply because a different application covering the same land was filed before the city adopted the ordinance. The brief was filed on April 29, 2009. Petition for review was denied on August 21, 2009.

Building Permits: RQ-0775-GA; *Authority of the Department of State Health Services to enforce state asbestos regulations against municipalities.* This request asks, among other things, whether the Department of State Health Services (DSHS) may impose administrative penalties against a city that fails to confirm an asbestos study prior to issuing a building permit. TML and the Building Officials Association of Texas (BOAT) argued that the Texas Asbestos Health Protection Act is a state-level program that is designed to regulate asbestos rather than cities. TML and BOAT stated that their resources are available to DSHS to educate city officials on the asbestos requirements, and that education would surely be a better way to deal with the issue than administrative penalties. The attorney general concluded that the term “person” in the Texas Asbestos Health Protection Act, Chapter 1954 of the Occupations Code, includes a municipality. However, the attorney general noted that it is unlikely that a court would conclude that if the definition of person includes a city that this would constitute a clear and unambiguous waiver of immunity from suit for a violation of section 1954.259(b). Even if governmental immunity is retained, it does not mean that every enforcement action is necessarily barred.

Annexation: RQ-0745-GA; Opinion No. GA-0737: *Whether a municipality engaged in the process of annexing territory may use Section 43.052(h)(1), Local Government Code, under various circumstances.* This request asks, among other things, whether Section 43.052(h)(1) of the Texas Local Government Code [the “100 tracts exemption”] can be utilized by a city engaged in an annexation process even if there is not a residence on each tract in the area proposed for annexation. TML and TCAA argued that the 100 tracts exemption provides that an area is exempt from the annexation plan requirement if it has any number of tracts, so long as a residential dwelling is located on no more than 99 of the tracts. The attorney general concluded that Section 43.052(h)(1) of the Local Government Code does not require that a residence be located on each tract of the area proposed for annexation. An annexation undertaken pursuant to section 43.052(h) is not void if the municipality fails to adopt a three-year annexation plan. Whether a service plan requires a landowner to fund a capital improvement in a manner inconsistent with Local Government Code chapter 395 requires the resolution of questions of fact that cannot be determined in an attorney general opinion.

Open Meetings: RQ-0763-GA; *Validity of a city charter provision that permits a majority of councilmembers to call a public meeting.* This request asks whether “a majority of the councilmembers call, without deliberating at a publicly noticed meeting, for a special meeting of the city council without violating the Open Meetings Act?” TML and TCAA argued that the key element of the definition of a meeting is that the

information concerns “public business or public policy.” The attorney general’s office should conclude that a communication between councilmembers concerning only whether to have a meeting does not concern substantive public business or public policy. In other words, simply asking whether a meeting should be held does not constitute a “meeting” under the Act’s definitions. So long as councilmembers are not conspiring to circumvent the Act, the communication is permitted.

TCEQ Water Quality Standards: TML recently submitted a letter to Mark Vickery, the deputy executive director of the Texas Commission on Environmental Quality (TCEQ), regarding the agency’s possible limitation of total maximum daily loads (TMDLs) for bacteria. TCEQ has never issued bacteria TMDLs before, and the current water quality standards for contact recreation, when used to create these TMDLs, may create a standard that is difficult, if not impossible, to meet. TML asked the agency to delay the TMDL process until the contact recreation water quality standards can be reevaluated in light of the specific water uses and issues present in the state.

Animal Euthanasia: *Department of State Health Services (DSHS) Proposed Rules.* TML filed comments with the Department of State Health Services (DSHS) urging that the department clarify its proposed rules regarding microchip scanning machines. The proposed rules stated that a shelter “should” scan all animals for microchips before moving forward with the euthanasia process. TML submitted comments including suggested additional language to clarify the fact that a shelter that does not already own a microchip scanning machine would not be required to buy one in order to comply with the rule. DSHS staff indicated that they would include this language in the final rule. Unfortunately, the Texas Health and Human Services Commission, which has final review authority over DSHS rules, removed the provision. DSHS staff believes that the rule language, since it uses the word “should” rather than “must,” will have the same effect as it would with the TML language included; namely, that a city that does not own a machine will not have to purchase one in order to comply. The final rule, without the TML language, appeared in the July 3 issue of the Texas Register.

Takings: *The State of Texas v. Central Expressway Sign Assoc., et al.*, No. 08-0061 in the Supreme Court of Texas. This case involves valuing land for condemnation purposes when there is a billboard on the site. In this case, the state desired to condemn property that included a billboard. When valuing the land, the sign company argued that the future income of the billboard should be considered in valuing the property and the court of appeals agreed. TML and TCAA joined an amicus brief that argues that, among other things, the court of appeals should be reversed because the state did not acquire the billboard business so the future revenues should not be considered in the condemnation award. Briefing on the merits was requested on May 19, 2008. Oral argument was heard on January 13, 2009. The Court held that the state’s expert witness testimony, which did not include billboard income, reflected an accepted and reliable method of appraising the condemned easement and should not have been excluded. The Court also held that excluding this testimony was reversible error because the testimony was directly related to the central issue in the case, the value of the condemned property.

Civil service: *Jackson v. City of Texas City*, No. 08-0723, before the Supreme Court of Texas. Civil service fire-fighters Jackson and Nunez sued the city after they were terminated for failure to maintain their EMT certification. Jackson and Nunez argued that their terminations were appealable under the Texas municipal civil service act as disciplinary terminations. Amici argued that the terminations were non-disciplinary and fell outside of the scope of the civil service act, and within the city's collective bargaining agreement, because the fire-fighters were terminated for violating conditions in their contracts of employment. Petition for review was denied on April 17, 2009.

Easements: *Brookshire Katy Drainage District v. The Lily Gardens, LLP*, No. 01-07-00431-CV, in the First Court of Appeals. Lily Gardens placed a covered bridge over the district's drainage easement. Amici (TML, TCAA, and the Texas Water Conservation Association) collectively argued that whether the structure is an impediment to flow is irrelevant. The placement of the structure interferes with the district's full enjoyment and use of its easement rights by impeding its access and ability to conduct operational functions, including maintenance and repairs to the easement. Oral argument was denied on February 3, 2009. The parties went to mediation on February 27, 2009. The case was abated on April 16, 2009.

Annexation: *Village of Salado v. Lone Star Trailer II, Ltd. and Lone Star Storage Trailer*, No. 03-06-00572-CV in the Third Court of Appeals in Austin. Lone Star Trailer sued the Village of Salado regarding an annexation of Lone Star's land, arguing that the Village's annexation ordinance is void under Local Government Code Section 43.025 (voluntary annexation for type B city) because the Village did not receive consent from the sole contiguous landowner. TML and TCAA argued that, under Section 43.025: (1) "contiguous area" means the entire area to be annexed, not just those tracts that directly border the city; (2) the entire contiguous area can be annexed as a unified tract; and (3) the plain language of the voluntary annexation statute does not require the consent of each bordering landowner. Oral argument was held on May 9, 2007. The court of appeals held that the Village's annexation ordinance is valid and enforceable based on the procedure for the entire area that was annexed. The court remanded the case back to the trial court to make a determination on attorney's fees.

Civil Service: RQ-0678-GA; Application of subsection 143.014(c) of the Texas Local Government Code. This request asks whether the last sentence of Subsection 143.014(c) nullifies assistant fire chief appointments made prior to the election date of collective bargaining. TML and TCAA filed comments and argued that the last sentence of Subsection (c) acts to lift the restriction on the number of assistant chiefs that may be appointed after a city adopts collective bargaining, and does not invalidate a police or fire chief's authority to continue appointing assistant chiefs after collective bargaining is adopted.

Attorneys Fees: *The City of Garland v. Roy Dearmore, et al.*, No. 07-1527, in the Supreme Court of the United States on petition for writ of certiorari. This case involves the proper construction of the term "prevailing party" in establishing whether a plaintiff is eligible for attorney's fees under 42 U.S.C. § 1988(b). Dearmore argued that the term

includes a party that has gained a preliminary injunction, regardless of whether there is ever a final decision on the merits. The Fifth Circuit allowed attorney's fees based on this argument, holding that a preliminary injunction was "based upon an unambiguous indication of probably success on the merits." TML and TCAA, joined by the National League of Cities and the International Municipal Lawyers Association, filed an amicus brief that argued that: (1) a plaintiff who obtains a preliminary injunction without a final decision is not a prevailing party; (2) a preliminary injunction is not a meritorious judgment for attorney's fees purposes; and (3) the "catalyst theory" is not a permissible basis for awarding attorney's fees. The amicus brief was filed on July 7, 2008 and the court denied the petition for a writ of certiorari on October 6, 2008.

Cell Tower Siting: *Sprint v. County of San Diego*, Nos. 05-56076, 05-56435 in the United States Court of Appeals for the Ninth Circuit. TML and TCAA joined a brief filed by the National League of Cities in support of the County of San Diego, and argued that: (1) right-of-way use regulation of a county ordinance, which could be preempted by Section 253(a) of the federal Telecommunications Act, should be separately analyzed from the zoning aspect of the ordinance, which cannot be preempted by Section 253(a); and (2) the county ordinance was not preempted by Section 253(a). A motion for rehearing en banc was filed on July 9, 2007 and granted on May 14, 2008. On September 11, 2008, the Ninth Circuit held that the county's ordinance was valid because it not an outright ban on wireless facilities and did not effectively prohibit the provision of wireless facilities in violation of the Telecommunications Act.

Takings: *AVM-HOU, Ltd. v. Capital Metro. Transp. Auth.*, No. 03-07-00566-CV, in the Third Court of Appeals. This case involves a condemnation award for an adult business lessee where the condemned property was specially zoned for adult businesses. The adult business argued that it could not move its business due to zoning and various other issues and that the condemnor owed both the value of the lease and business value damages for the life of the lease. The trial court dismissed the adult business' request for business value damages and the business appealed. TML and TCAA filed an amicus brief that argued, among other things, that the trial court should be affirmed because business value damages are not appropriate where the entire piece of real property is condemned and the fair market value is awarded. The amicus brief was filed on April 25, 2008, and oral argument was heard on May 21, 2008. The court of appeals held that there is no cause of action for lost profits once full compensation has been paid in a formal condemnation proceeding.

ETJ Regulations: RQ-0664-GA; *Authority of a county and/or a municipality to impose and enforce density regulations*. This request asked about the authority of a city or a county to "regulate density/zone through platting" in the ETJ or unincorporated areas. TML and TCAA requested that the attorney general's office decline to answer the request, and defer to a finder of fact as to whether the city or county regulations at issue are permissible. The request arises out of a specific dispute that appears to involve numerous questions of fact, and should thus be resolved between the parties.

Whistleblower Act: *City of Waco v. Robert Lopez*, No. 06-0089 in the Supreme Court of Texas. TML and TCAA argued that the reporting of a violation of an internal city policy to a supervisor by an employee should not trigger the protections of the Texas Whistleblower Act. The petition for review was granted and the case has been set for oral argument on September 27, 2007. The case was decided on July 11, 2008. The Supreme Court of Texas held that the employee should have brought his claim under the Texas Commission on Human Rights Act instead of the Whistleblower Act, and dismissed the case.

Tort Liability: *City of Dallas v. Kenneth Reed*, No. 07-0469, on Petition for Review in the Supreme Court of Texas. TML and TCAA argued on behalf of the City of Dallas that a slight difference in elevation between lanes on a roadway is not a special defect as a matter of law because it is not a condition that is of the same kind or class as an excavation or roadway obstruction, and because it does not create an unexpected and unusual danger to users of a roadway. The brief was filed on November 20, 2007. The court reversed the court of appeal's judgment, which held that: (1) variance in elevation in roadway was not a "special defect"; and (2) city did not know that of the roadway's allegedly dangerous condition sufficiently to warn of the danger.

Regulatory Takings: *City of Houston v. McGuire Oil*, No. 08-0159 in the Supreme Court of Texas. This case arose from a City of Houston ordinance regulating oil and gas exploration around Lake Houston. The city revoked a permit, and a drilling company sought over \$100 million in damages. TML and TCAA argued that a city should not be liable for a regulatory taking if the claimant has not sought and obtained from the city's policy-making body a final decision regarding the application of a regulation to his property. The petition for review was filed on February 25, 2007, and was denied on June 20, 2008.

Utility Relocation: *Southwestern Bell Telephone, L.P., d/b/a AT&T Texas v. City of Houston*, No. 07-20320, U.S. Court of Appeals for the Fifth Circuit. TCAA and TML filed a brief in support of the City of Houston, arguing that the Federal Telecommunications Act (FTA) does not provide a private right of action for telecommunications companies. TCAA and TML also argued that the FTA does not preempt a city's ability to require a telecommunications provider to pay to move its infrastructure when the city has a right-of-way construction project, and that any state issues involved in this question should be resolved at the state level. The amicus brief was filed on September 11, 2007, and oral argument was heard on March 3, 2008. The Fifth Circuit held that there is no private cause of action for a telecommunications company under the Federal Telecommunications Act, and dismissed the case.

Billboards: TML recently submitted a letter to John Campbell, Director of the Right of Way Division of the Texas Department of Transportation (TxDOT), regarding the agency's proposed rules governing electronic billboards on state highways. The proposed rules appear to give cities control over whether electronic billboards may be placed within their jurisdiction, but the rules are not entirely clear. TML asked the agency to clarify the rules so that, before a billboard may be upgraded to an electronic

billboard, the owner must demonstrate: (1) the original sign was legally conforming under city ordinance; and (2) the sign owner acquired a new permit or permission from the city for the sign to become an electronic sign. A hearing was held on December 6, 2007, and the Texas Transportation Commission adopted the rules on February 28, 2008. The rules included changes designed to clarify a city's authority in regulating electronic billboards. The rules will become effective on June 1, 2008.

Contract City Attorneys IRS Status: In 2007, TML and TCAA filed a letter in an Internal Revenue Service (IRS) appeal by David Brown, the contract city attorney of Henderson, Texas. The International Municipal Lawyers Association also prepared a letter. The IRS had ruled that the city attorney, as a statutorily-created "city office," was not an independent contractor for purposes of various taxes, but rather a city employee. TML and TCAA explained that city attorneys often have many clients (including the city or cities), and that in such cases they are truly independent contractors (just as they are when hired by any other client). The letter urged the IRS to continue to make determinations of independent contractor status based on the tests in place, and to remove from its analysis of such cases as a determining factor whether there is a statutorily created office of "city attorney" in Texas state law. Last week, the IRS sent a letter to Mr. Brown stating that "[b]ased on the hazards of litigation, [IRS] Appeals settled the case by recommending to the Government that it concede the issue in full." Mr. Brown's hard-fought win may be a mixed blessing. While the hard work and determination of Mr. Brown and the City of Henderson led them to ultimately prevail, the letter does not appear to set any precedent for future IRS actions. As such, contract city attorneys should remain aware of the issue.

Texas Open Meetings Act: *The City of Galveston, Texas; BP Energy Company, Intervenor; Board of Trustees of the Galveston Wharves v. Nancy Saint-Paul*, No. 01-06-00580-CV in the First Court of Appeals in Houston. Saint-Paul filed suit against the City of Galveston alleging that the city posted inadequate notice on an agenda item relating to a lease agreement. The trial court held for Saint-Paul, and the city appealed. TML and TCAA argued that the notice was sufficient under the Open Meetings Act because it included the: (1) parties to the proposed agreement, (2) type of agreement, (3) subject of the agreement, (4) parties to the underlying lease agreement, and (5) location and size of the property at issue. The city's appeal was filed on June 20, 2006, and oral argument was heard on December 11, 2007. On February 14, 2008, the court of appeals held that the city's meeting notice was sufficient, and remanded the case back to the trial court for a determination of attorney's fees.

Annexation: *Hughes v. City of Rockwall*, No. 05-0126 in the Supreme Court of Texas. Amici argued that a city's rejection of a landowner's petition to join areas for annexation under an annexation plan pursuant to Section 43.052(i) of the Local Government Code was procedural in nature. Thus, the only remedy against the city for an alleged violation would be state-sponsored quo warranto. On January 20, 2005, the court decided against the city and remanded to require arbitration and grant a temporary injunction against Rockwall. The city filed a petition for review with the Supreme Court of Texas on February 23, 2005. Petition for review was granted on December 9, 2005. Oral argument

was heard on January 25, 2006. The Supreme Court of Texas held that the city was only required to consider arbitration under the plain language of the statute, and that the only appropriate proceeding was a *quo warranto* proceeding.

Political Advertising: TML argued on behalf of Texas cities to the Texas Ethics Commission that proposed agency rules setting a "bright-line" test for prohibited political advertising based on the number of photographs of and personal references to city officials in city newsletters were unnecessary and potentially confusing in light of the simple test in Election Code Section 255.003 that prohibits advocating a position for elections on measures. The commission adopted the rules as proposed on December 11, 2007.

Whistleblower Act: *Montgomery County v. Park*, No. 05-1023 in the Supreme Court of Texas. Amici argued that simply removing unpaid duties from an employee does not constitute an actionable, adverse personnel action under the Texas Whistleblower Act. The Court denied the county's petition for review in August of 2006, and this brief, filed September 7, 2006, is in support of the county's motion for rehearing. On December 15, 2006 the county's motion for rehearing was granted. Oral argument was heard on March 30, 2007. The Supreme Court of Texas held that removing unpaid duties from an employee does not constitute an adverse personnel action under the Whistleblower Act, because the action in this case would be unlikely to "dissuade a reasonable, similarly situated worker from making a report under the Act."

National Cable Franchising: *In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Docket No. MB 05-311 (Further Notice of Proposed Rulemaking – Effect of Order on Existing Cable Franchises), at the Federal Communications Commission. TML and TCAA commented that the Texas legislature has streamlined the cable franchising process in Texas, and provides for an almost immediate grant of authority to provide service. If the Federal Communications Commission intends to establish new standards or requirements for incumbent cable franchises, TML and TCAA requested that those changes do not undercut or diminish the standards set out in Texas' hard-fought S.B. 5. The original order in this rulemaking was issued in March of 2007, and generally does not apply to Texas due to the provisions of S.B. 5. However, a further notice of proposed rulemaking was issued at that time as well. A second order was issued in November of 2007, and applied certain provisions from the first order to existing franchises.

Regulatory Takings: *City of San Antonio v. El Dorado Amusement Company*, No. 06-0481 in the Supreme Court of Texas. TML and TCAA argued that the City of San Antonio was within its authority to modify the zoning of a tract to prohibit the sale of alcoholic beverages, and that any loss in value to the owner was not sufficient to constitute a taking under applicable federal and state precedent. The Petition for Review was filed on June 12, 2006, briefing on the merits was submitted by both parties, and the petition for review was denied on June 1, 2007. A motion for rehearing was filed by the

city on June 18, 2007, and the Supreme Court denied the motion for rehearing on October 12, 2007.

Court Fees: *Whether the optional juvenile case manager fee is unconstitutional*, RQ-0579-GA. TML and TCAA argued, among other things, that optional misdemeanor court costs should not be viewed as punishment and should not be considered unconstitutional under equal protection or due process, even if optional court costs cause the fees for misdemeanor convictions to be higher in some county or municipal courts. This request was withdrawn and no opinion was issued.

Drainage Fees: *Greater New Braunfels Home Builders Association, David Pfeuffer, Oakwood Estates Development Co., and Larry Koehler v. City of New Braunfels*, No. 03-06-00241-CV in the Austin Court of Appeals. Amici argued that the Municipal Drainage Utility Systems Act (Act) is meant to grant cities additional means to establish and finance municipal drainage utility systems for the purpose of protecting the public health and safety from loss of life and property caused by surface water overflows, stagnation, and pollution. The Act was never meant to preempt the authority of a home rule city to adopt other, legal development fees. An appeal was filed on April 26, 2006, oral argument was heard on February 14, 2007. The court of appeals held that, since the City had adopted the provisions of chapter 402 of the Local Government Code, and the fees fit the definition of a drainage charge under the statutory scheme, the stormwater connection fee and the stormwater development fee are drainage charges under chapter 402. The court of appeals also held that the City failed to follow the statutory requirements imposed by chapter 402, including publishing notices, holding hearings, assessing the charges against all property owners within the service area, and exempting lots on which no structure exists. The court of appeals reversed the trial court's judgment and rendered judgment declaring that the complained-of portions of the City's stormwater fee ordinances were invalid as improperly adopted chapter 402 drainage charges.

Substandard Buildings: *City of Jacksboro, Texas v. Perry Teague*, No. 06-0389 in the Supreme Court of Texas. The principal issue in this case is whether a district court lawsuit contesting a city's substandard building demolition order should be considered as a petition for a writ of certiorari, as required under Texas Local Government Code Section 214.0012. The position of the city, which was supported by an amicus brief from TML and TCAA, as well as the Texas attorney general's office, is that a district court lawsuit does not act as a proper plea to the jurisdiction, as the lower court held. The city's petition for review was denied on June 22, 2007. A motion for rehearing was filed on July 6, 2007 and a decision is pending.

Gas Rate Cases: *City of Tyler v. CenterPoint Energy Entex*, No. 06-0735 in the Supreme Court of Texas. TML and TCAA argued that the City of Tyler is entitled to reimbursement for costs associated with a prudence review of CenterPoint's rates under a purchased gas adjustment clause. The city's petition for review was filed on August 21, 2006. The Supreme Court of Texas dismissed the appeal as moot on June 1, 2007.

Building Codes: *Duty of a municipality to adopt the International Residential Code and the International Building Code*, RQ-0567-GA. TML and TCAA (along with the Building Officials Association of Texas) argued, among other things, that a city may amend its building codes to meet local concerns, and whether to amend life safety provisions is arguably not advisable, but also arguably legally permissible. This request was withdrawn July 2, 2007.

Public Information Act: *Disclosure of e-mail protected by the attorney-client privilege*, Request Identification No. 275919. TML and TCAA argued that the attorney general has clearly stated the elements used to determine whether a communication between an attorney and his or her client is protected from disclosure, and urged the attorney general to reject the false assertion by the requestor that the disclosure (or nondisclosure) of a communication made between an attorney and the governmental body that he or she represents is governed in any way by Section 551.129 of the Open Meetings Act (authorizing an “out-house” attorney to attend an executive session via telephone or Internet communications).

Vested Rights: *City of San Antonio v. En Seguido, Ltd.*, No. 04-06-00206-CV in the San Antonio Court of Appeals. TML and TCAA filed a letter brief as amici curiae, supporting the city’s position that a vague, one-lot plat filed in 1971 does not constitute the same “project” under Texas Local Government Code Chapter 245 as a currently-contemplated one hundred home subdivision, and therefore should not be allowed to maintain vested rights from that 1971 filing. The city’s appeal was filed on March 31, 2006, oral argument was heard on February 13, 2007. The court of appeals reversed the summary judgment and remanded to the trial court, stating that the record did not contain enough evidence to conclusively establish that the project did not change between the filing of the plat in 1971 and the beginning of work (more than thirty years later), and also whether actions taken by En Seguido constituted “progress toward completion” of the project.

Tax Abatements: *Circumstances under which a county may opt out of an agreement made under chapter 312, Tax Code, the Property Redevelopment and Tax Abatement Act*, RQ-0514-GA, Texas attorney general’s office. TML argued that economic development grant agreements may be tied to property taxes collected from a business prospect without complying with the provisions of the property tax abatement statute, Chapter 312 of the Texas Tax Code. The request was withdrawn and the file has been closed.

Disability: *City of Grapevine v. James B. Davis*, No. 06-0318 in the Supreme Court of Texas. Amici argued that running is not a major life activity under the Texas Commission on Human Rights Act (TCHRA) and that the burden-shifting test of McDonnell Douglas applies to a disability claim under the TCHRA. The city's petition for review was filed on May 8, 2006. Motion for Rehearing was denied on March 9, 2007.

Impact Fees Imposed on School Districts: *Whether section 11.168, Education Code, prohibits a municipality from imposing impact fees on a school district to help fund*

additional infrastructure made necessary by proposed new school district facilities, RQ-0506 Texas attorney general's office. TML argued that the provisions of H.B. 1826 (2005) do not prohibit a city from assessing impact fees against a school district. In Opinion No. GA-496, the attorney general concluded that Education Code Section 11.168 does not prohibit an independent school district from paying impact fees imposed by a municipal corporation on the district for the district's new school development.

Tax Increment Financing: *Whether a municipality may designate an area as a "reinvestment zone" in which the financing plan does not include the issuance of bonds on notes, RQ-0442-GA, Texas attorney general's office. TML argued that tax increment financing is not limited to projects that are financed by bonds. The requestor had implied that because the Texas Constitutional enabling provision for tax increment financing mentions the issuance of bonds for purpose of redevelopment, bonds would be the only method of increment financing. TML pointed out that pay-as-you-go tax increment financing need not rely on the Texas Constitution for authorization, since full taxes are paid, and therefore bonds are not necessary. In Opinion GA-0514, the attorney general concluded that a city may not designate an area as a reinvestment zone unless the area is "unproductive, underdeveloped, or blighted" within the meaning of article VIII, section 1-g(b) of the Texas Constitution, even if the area's plan of tax increment financing does not include issuance of bonds or notes.*

Open Meetings Act: *Whether a governmental body may selectively admit members of the public into an executive session under the Open Meetings Act, RQ-0496-GA, Texas attorney general's office. TML and TCAA argued that: (1) notice of an executive session is adequate if it is sufficient to apprise the general public of the subject matter of the meeting; (2) no specific deliberation is required when deciding who may attend an executive session; and (3) improperly allowing a third party into an executive session does not constitute a crime. In Opinion No. GA-0511, the attorney general concluded that the Open Meetings Act does not permit a governmental body to admit members of the public to a closed meeting to give input regarding a public officer or employee.*

Cities Competing with Private Business: *Whether a municipality may operate a commercial compost/mulch business that sells its products outside municipal boundaries, RQ-0508-GA, Texas attorney general's office. TML and TCAA argued that a city is not prohibited from selling mulch in competition with private businesses. In Opinion No. GA-506, the attorney general concluded that, because a home rule city's sale of compost products to persons outside the city limits does not generally appear to contravene constitutional or statutory law, and because the Legislature has not with unmistakable clarity forbidden a home rule city from selling compost products outside its city limits, a home-rule city may sell compost products outside its city limits.*

National Cable Franchising: *In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Docket No. MB 05-311, at the Federal Communications Division. TML and TCAA argued that the Texas legislature has streamlined the cable franchising process in Texas, and provides for an almost immediate*

grant of authority to provide cable service in the state. If the Federal Communications Commission intends to establish new standards or requirements for cable franchises, TML and TCAA requested that those changes do not undercut or diminish the standards set out in Texas' hard-fought S.B. 5. In fact, TML and TCAA submit that, if anything, the standards and requirements in S.B. 5 be used as a model for any federal-level changes. Finally, TML and TCAA argued that the Commission does not have the authority to enact national cable franchising rules. In December of 2006, the FCC adopted an order in the case, and concluded that the Texas state-issued video franchise is generally excluded from the provisions of the order.

Annexation: *Authority of a type A general law municipality to annex land outside its territorial jurisdiction*, RQ-0480-GA, Texas attorney general's office. TML and TCAA argued that Local Government Code Sections 53.001 and 43.901 worked to validate an annexation by a general law city that extended beyond the city's extraterritorial jurisdiction, and that the courts are the proper forum to challenge the validity of an annexation. In Opinion No. GA-478, the attorney general concluded that a type A general law city with fewer than 5,000 inhabitants is authorized to annex territory it does not own only if the territory is in the city's one-half mile extraterritorial jurisdiction.

Annexation: *Karen Hall v. City of Bryan*, No. 10-05-00417-CV in the Waco Court of Appeals. Amici argued that the only means to challenge the contents of an annexation service plan is through a quo warranto proceeding brought on behalf of the state. In addition, Amici argued that, so long as a city provides services in accordance with the terms of its annexation service plan, disannexation is an improper remedy. The brief was filed on September 5, 2006, and oral argument was held on September 20, 2006. On November 29, 2006 the court of appeals held that Local Government Code Section 43.141 only provides for disannexation if the city fails to perform its obligations under the service plan, not if it fails to provide all services desired by the residents of the annexed area under Section 43.056.

Annexation and Prior Use: *Olan Karm and Marc Payne v. City of Castroville*, No. 04-05-00512 CV in the Fourth Court of Appeals, San Antonio. TML and TCAA argued that the filing of a subdivision plat does not "vest" the use of property subsequent to annexation pursuant to Section 43.002 of the Texas Local Government Code. Nor does the filing of a subdivision plat vest a landowner's right to use property in a certain way after annexation pursuant to Chapter 245 of Local Government Code. Oral argument was held on May 3. The court of appeals held on November 15, 2006, that the land was not properly annexed by the city because the city did not grant the landowner's petition for voluntary annexation within the time required by Texas Local Government Code Section 43.028. The court did not rule on the other issues involving possible vested rights after annexation.

Collective Bargaining: *Whether a municipality violates Section 617.002, Government Code, by reorganizing and meeting with a labor organization as the sole representative of a designated group of employees*, RQ-0520-GA, Texas attorney general's office. TML argued that a city is prohibited from entering into a collective bargaining agreement by

the Texas Government Code, and that specific legislation is required to authorize such an agreement. On, October 13, 2006, Representative Krusee withdrew his request for the opinion.

Premise Liability: *State of Texas and the Texas Parks and Wildlife Department v. Ricky Shumake et al.*, No. 04-0460 in the Supreme Court of Texas. Amici argued that the court should look at the Legislature's intent based on existing common law at the time they passed the Recreational Use Statute and not subsequent common law principles. Amici further argued that the Legislature did not intend to adopt the duty to warn when it passed the Recreational Use Statute. On June 23, 2006, the Court held for the Shumakes, stating that under the Recreational Use Statute, a premise owner has no duty to warn users, but can be liable for gross negligence in maintaining the property. A motion for rehearing was denied on September 22, 2006.

Restrictive Covenants: *City of Heath v. Mark Duncan et al.*, No. 05-0139 in the Supreme Court of Texas. Amici argued on behalf of the City of Heath that landowners in a residential subdivision do not have a compensable interest in restrictive covenants when a city takes property for public use. The appeals court held against the city on September 23, 2004, and a motion for rehearing was denied on January 13, 2005. The city filed a petition for review with the Supreme Court of Texas on February 25, 2005, and TML filed an amicus letter brief on May 5, 2005. Briefing on the merits was requested on June 6, 2005, and the Court denied the petition on June 16, 2006. A motion for rehearing was denied on August, 11 2006.

Sovereign Immunity: *City of Midland v. Roger Goerlitz, D/B/A American Wood Waste Recycling*, No. 03-0185 in the Supreme Court of Texas. Amici argued that the Midland City Charter and Local Government Code § 51.075 provisions allowing the city to "sue and be sued" do not, by themselves, waive sovereign immunity. According to Government Code § 311.034, the legislature intended to preserve the state's interest in managing fiscal matters by not construing a statute as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. Nothing in the Local Government Code or the Midland City Charter indicated any legislative intent to unambiguously waive sovereign immunity. The city appealed the Eighth Court of Appeals' decision. The petition for review was filed on February 24, 2003. Briefing on the merits was requested on June 16, 2003. The petition is still pending. An opinion was issued on August 31st, 2006.

Conflicts Disclosure: *Conflict of interest disclosure requirements for local government officers and persons who contract with local governmental entities*, RQ-0451-GA, Texas attorney general's office. State Representatives Beverly Woolley and John Smithee and Texas Education Agency Commissioner Shirley Neeley requested an opinion from the Attorney General regarding the interpretation and compliance with H.B. 914, which enacted Chapter 176 of the Local Government Code. TML submitted comments and suggestions on various problems with interpretation and logistical compliance, and Opinion No. GA-446 was issued on August 2nd, 2006.

Civil Service: *City of Houston v. Clark*, No. 04-0930 in the Supreme Court of Texas. Amici argued on behalf of the city that express language in the civil service laws granting employee appeals of civil service disciplinary decisions does not necessarily preclude a city from appealing in the interim. Failure to allow cities any appellate process would create a disincentive to engage in disciplinary arbitration. On June 30, 2006, the Court held for the City, stating that a city, as well as an employee, may appeal the decision of an independent hearing examiner.

Annexation: *Meaning of the term "service plan" under Sections 43.056 and 43.141, Local Government Code*, for purposes of a petition to disannex submitted by the voters of an annexed area of a municipality, RQ-0447-GA, Texas attorney general's office. TML and TCAA respectfully requested that the attorney general's office decline to answer the request because it involves a fact issue that cannot be resolved in the opinion process. TML's and TCAA's position is that, for every annexation, a city must adopt a service plan that is "legally compliant," which means that the plan must conform to the requirements of Section 43.056, which is up to each individual city to determine based on the advice of local legal counsel. A court is the proper forum to answer this question. On June 22, 2006, the Attorney General's Office declined to issue an opinion on the request.

Sovereign Immunity: *Sipes v. City of Grapevine*, No. 04-0933 in the Supreme Court of Texas. Amici argued that a city's implementation of the decision to install a traffic signal was a discretionary act. Therefore, Section 101.060(a)(1) of the Texas Civil Practices & Remedies Code applied, granting the city sovereign immunity against tort claims during the period between the decision to install the traffic signal and the installation of the traffic signal. On June 16, 2006, the Supreme Court held for the City, finding that there was duty to maintain a traffic signal that had not yet been installed.

Statewide Cable Franchises: *Texas and Kansas City Cable Partners, L.P., d/b/a Time Warner Cable v. City of West University Place, Burt Ballanfant, and Michael Ross*, No. H-05-4177 in the Federal District Court for the Southern District of Texas, Houston Division. TML and TCAA, as amici curiae, argued that that the one percent PEG fee that a cable provider must pay pursuant to Chapter 66 of the Texas Utilities Code (added by S.B. 5, 2005) is not preempted by the federal Cable Act. A scheduling conference was held on April 12, 2006. No date has been set for trial. A notice for dismissal was filed on June 5, 2006. An order dismissing the case was issued June 7, 2006.

Gas Ratemaking: *Alliance of CenterPoint Cities v. CenterPoint Energy*, Texas Railroad Commission Docket No. 9630. The issue in this docket arose from improper notice to the public of a proposed rate increase. The Gas Utilities Regulatory Act (GURA) mandates notice to the public of any proposed rate increase. CenterPoint Energy argued that the refusal of the Alliance of CenterPoint Cities (ACM cities) to approve or deny the rate increase created a delay that led to an enactment of the increase by operation of law. The ACM cities and TML (as amicus curiae) disagreed, and argued that without proper notice, the ACM cities cannot make an appealable final decision. Thus, the Railroad Commission (RRC) does not have jurisdiction to rule on the rates in question. On March 14, 2006, the RRC voted to defer the decision on jurisdiction pending receipt of further

information on the notice issue. On April 21, 2006, both parties filed a joint motion to dismiss. On May 11, 2006, the RRC granted the dismissal.

Eminent Domain Procedures: *City of Austin v. Harry M. Whittington, et al.*, No. 05-0912 in the Supreme Court of Texas. Amici argued that the procedures for eminent domain found in Chapter 21 of the Texas Property Code do not require that a “necessity finding” be noted in an eminent domain resolution adopted by the council. In addition, amici argued that the additional “necessity” determination required by the appeals court is vague and needs clarification from the Court. A motion for rehearing was denied on March 17, 2006.

Development Codes: *City of Dallas v. Vanesko*, No. 04-0263 in the Supreme Court of Texas. Amici argued on behalf of the city that the Dallas board of adjustment did not abuse its discretion in denying a variance on the grounds that the requested variance did not pertain to a condition involving “a restrictive area, shape, or slope,” as the Dallas development code requires. Petition for review was filed by Dallas on May 3, 2004. On April 7, 2006, the Court opined that the board of adjustment did not abuse its discretion in denying the variance, thus concluding that a city may enforce a zoning ordinance against a property owner whose substantially completed new home was built in violation of the ordinance, even though the city gave preliminary approval to the owner’s building plans.

Voluntary Payment Rule: *Dallas County Community College District v. Bolton.*, No. 02-1110 in the Supreme Court of Texas. Amici argued that the Court’s discussion of the “voluntary payment rule” should allow a city to keep already paid taxes or fees that are later held to be illegal. Amici argued that dicta in the case stating that the mere threat of a fine would make a payment to a governmental entity involuntary, and thus require a rebate, is in contravention to precedent that holds that mere threat of a fine is not sufficient to require a rebate. A motion for rehearing was filed on December 19, 2005. The Court denied the motion on February 24, 2006.

380 Agreements: *Village of Bee Cave v. Save Our Springs Alliance*, No. 03-05-00148-CV in the Third Court of Appeals, Austin. Amici argued on behalf of the village that article III, sec. 52 of the Texas Constitution authorize economic development programs such as long-term Chapter 380 agreements. Amici further argued that long-term 380 agreements are best practices and protect taxpayer dollars. The court issued a memorandum opinion on January 13, 2006, granting a joint motion to dismiss and rendered judgment pursuant to the parties’ settlement agreement.

Gas Rate Cases: *CenterPoint Energy Entex v. Railroad Commission of Texas, Victor G. Carillo, Charles R. Mathews, Michael L. Williams, City of Tyler, and State of Texas*, No. 03-04-00731-CV in the Third Court of Appeals, Austin. Amici argued on behalf of the City of Tyler that: (1) the Texas Railroad Commission (Commission) has the authority to conduct a gas cost prudence review under a purchased gas adjustment (PGA) clause; and (2) a PGA clause prudence review is eligible for municipal reimbursement. The court ruled on February 24, 2006, that: (1) the Commission does have the authority to conduct

a gas cost prudence review under a PGA clause; and (2) the Commission has the power to order refunds if it determines that the company's gas purchase was imprudent. However, the court reversed the lower court's judgment concerning reimbursement of expenses to the City.