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LOCAL GOVERNMENT LAW

by

Joseph W. Geary, David Mark Davenport,** and William J. Minick, III****

I. ZONING AND PLANNING

A. United States Supreme Court

IN a landmark United States Supreme Court opinion, a divided court rejected a 1984 Fifth Circuit decision[1] to the extent that it defined mentally retarded persons as a quasi-suspect classification for purposes of equal protection analysis under the fourteenth amendment to the United States Constitution.[2] At issue in *City of Cleburne v. Cleburne Living Center*[3]

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1. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984); *see* Gary, Davenport & Jobe, *Local Government Law, Annual Survey of Texas Law*, 39 SW. L.J. 567, 571-72 (1985) [hereinafter cited as Geary, Davenport & Jobe, *1985 Annual Survey*] (discussion of Fifth Circuit decision in *Cleburne*).

2. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws ' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (quoting U.S. CONST. amend. XIV).

In analyzing the protection afforded persons under the equal protection clause, the United States Supreme Court has announced three different levels of review. If the class of persons to which the legislation pertains is a suspect class, then the court will employ a standard of strict scrutiny in analyzing the legislation to determine whether it is narrowly tailored to serve a compelling state interest. Plyler v. Doe, 457 U.S. 202, 216-18 (1982) (children of illegal immigrants are suspect class); Mills v. Habluetzel, 456 U.S. 91, 97-101 (1982) (illegitimate children are suspect class); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage is suspect class); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (race is suspect class); Oyama v. California, 332 U.S. 633, 640 (1948) (national origin is suspect class). If the class of persons the subject of the legislation is a quasi-suspect class, the Court will analyze the statute with intermediate or heightened scrutiny to determine whether it is substantially related to a legitimate state or governmental objective and closely tailored to fit that objective. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-27 (1982); Trimble v. Gordon, 430 U.S. 762, 766 (1977) (statutory classification must relate to a legitimate state purpose); Craig v. Boren, 429 U.S. 190, 197 (1976) (intermediate scrutiny requires that statute must serve important state objective and have a close fit between the legitimate state objective and the statutory means of achieving it). When the legislation has no suspect or quasi-suspect class as its subject, it will be presumed valid and will be sustained if it has any rational basis for its enactment. *See* Schweiker v. Wilson, 450 U.S. 221, 234 (1981). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1083 n.10 (1978) (discussion of levels of scrutiny).

3. 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

was an ordinance requiring a special use permit for the operation of a group home for the mentally retarded.[4] The circuit court reviewed the ordinance with an intermediate level of scrutiny and held it invalid on its face, because it did not "substantially further any important governmental interest."[5] Concluding that lawmakers' current widespread attention to the mentally retarded obviated the need for the special treatment that the judiciary has given to legislation involving suspect to quasi-suspect classes, the Supreme Court initially rejected the Fifth Circuit's application of intermediate scrutiny and applied the rational basis test to the ordinance.[6] The majority in *Cleburne* reasoned that increased legislative attention to the plight of the mentally retarded was a key factor in refusing to classify the mentally retarded as a suspect or quasi-suspect class. Justice Marshall, in dissent, however, properly noted that it was the extension of similiar legislative protections to women that led the Court, in part, to extend heightened scrutiny to gender-based classifications.[7] The Justice noted that the Court's thorough examination of the status of the mentally retarded in the community and under the law was the type of careful inquiry associated with heightened scrutiny. He suggested that the Court should perhaps term the technique it used "second order" rational basis review rather than height-

4. The city of Cleburne took the position that a group home for the retarded was a hospital for the feebleminded, and as such, its operation within an area zoned as an "Apartment House District" required a special use permit. *Id.* at 3252, 87 L. Ed. 2d at 317-18. A special use permit allows the operation of a use that would otherwise be prohibited under the existing zoning classification.

5. 726 F.2d at 200.

6. "Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation." 105 S. Ct. at 3256, 87 L. Ed. 2d at 322; *see* 20 U.S.C. § 1412(5)(B) (1982) (conditions federal education funds on a state's fair treatment of the mentally retarded); 29 U.S.C. 794 (1982) (outlaws discrimination against the mentally retarded in federally funded programs); 42 U.S.C. § 6010(1), (2) (1982) (ensures the right to receive "appropriate treatment, services and rehabilitation" in a setting "least restrictive of [their] personal liberty"); 5 C.F.R. § 213.3102(t) (1984) (facilitates the hiring of the mentally retarded into the federal civil service by exempting them from the requirement of competitive examination); TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1986) (confers certain rights upon the mentally retarded such as the right to live in a group home). "That a civilized and decent society expects and approves such legislation indicates that governmental consideration of these [undeniable differences between the mentally retarded and others] in the vast majority of situations is not only legitimate but desirable." 105 S. Ct. at 3257, 87 L. Ed. 2d at 323. This attention by the legislatures is also said to negate "any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers." *Id.* The concurring opinion in *Cleburne* by Justice Stevens, joined by Chief Justice Burger, objected to the manner in which the majority's discussion tended to delineate the three well-defined standards of review. 105 S. Ct. at 3260, 87 L. Ed. 2d at 327 (Stevens, J., concurring) (preferring analysis upon a "continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other." *Id.* at 3261, 87 L. Ed. 2d at 328).

7. *Id.* at 3269, 87 L. Ed. 2d at 336 (Marshall, J., concurring in part and dissenting in part); *see* Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973): "[O]ver the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications [citing examples]. Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."

ened scrutiny.[8]

Although the Court refused to apply an increased level of scrutiny to the mentally retarded as a class, it found no rational basis for a distinction between the permit requirements for homes of the mentally retarded and those for the city's other special care and multiple-dwelling facilities.[9] Rather than holding the ordinance itself void, however, the *Cleburne* majority held that the ordinance in question was unconstitutional only to the limited extent that it applied to the respondent's home.[10] Consequently, although *Cleburne* clearly stands for the proposition that the law does not entitle the mentally retarded to increased equal protection scrutiny, the opinion is of little utility to local legislators. The Court's holding that the ordinance was not facially invalid, but only unconstitutional as applied, hinders legislators attempting to draft ordinances or regulations dealing with the mentally retarded as a special class of persons.[11]

B. Fifth Circuit Court of Appeals

In *Mayes v. City of Dallas*[12] the plaintiff brought suit for damages and to enjoin the city's application of a historic preservation zoning ordinance that the city had used to deny him permission to paint his brick home and to construct a walkway across his front lawn.[13] In affirming the decisions of the lower courts, the Fifth Circuit first noted that a municipality possesses the constitutional authority to zone private property in order to preserve historic sites.[14] The plaintiff did not attack the power of the legislature to enact historic preservation legislation, but rather challenged the ordinance's

8. 105 S. Ct. at 3264, 87 L. Ed. 2d at 332 (Marshall, J., concurring in part and dissenting in part).

9. *Id.* at 3258-60, 87 L. Ed. 2d at 324-27. Although the *Cleburne* majority rejected the application of heightened scrutiny, it nevertheless held that the ordinance's application in the instant case failed the rational basis test. Consequently, *Cleburne* is important as the only case to the authors' knowledge in which local legislation has failed to pass the rational basis test.

10. *Id.* The dissent pointed out that this "as applied" approach to an equal protection challenge has never been utilized by the Court in the past. *Id.* at 3274, 87 L. Ed. 2d at 343 (Marshall, J., dissenting in part). For cases in which the preferred course of adjudication was to strike the entire statute down as opposed only to its instant application, see Caban v. Mohammed, 441 U.S. 380 (1979); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). The majority's apparent reasoning for its limited holding was that when an ordinance may be held invalid as applied to a particular person, such an approach "enables courts to avoid making unnecessarily broad constitutional judgments." 105 S. Ct. at 3258, 87 L. Ed. 2d at 325.

11. Justice Marshall's dissent chastises the majority for utilizing this "as applied" approach, stating that "the city should not be allowed to keep its ordinance on the books intact and thereby shift to the courts the responsibility to confront the complex empirical and policy questions involved in updating statutes affecting the mentally retarded." *Id.* at 3273, 87 L. Ed. 2d at 343 (Marshall, J., dissenting in part).

12. 747 F.2d 323 (5th Cir. 1984).

13. Dallas, Tex., Code § 51-4.501(b)(1) provides that a person "shall not alter an exterior feature of a historic landmark that is governed by this section or an ordinance establishing a historic overlay district" without first complying with a certificate of appropriateness procedure. 747 F.2d at 324. The plaintiff's home was located within a historic preservation district created by an ordinance of the city of Dallas and he was denied permission to make the requested improvement.

14. 747 F.2d at 324; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132-34 (1978).

alleged lack of specific standards. Such standards, urged the plaintiff, prevent arbitrary actions by agencies that approve certificates of appropriateness.[15] The court disagreed with the plaintiff's argument that the city must draw historic preservations guidelines narrowly to pass constitutional muster and upheld the reviewing commission's right to exercise reasonable administrative discretion in disallowing cosmetic and structural changes to buildings within the historic district.[16]

C. *Texas Supreme Court*

The Texas Supreme Court decided one important case during the Survey period in the zoning and planning area. In *City of Round Rock v. Smith*[17] a group of homeowners brought suit against the city of Round Rock for flood damages. The homeowners claimed that the city had acted negligently in originally approving a subdivision plat that allowed the developer to fill the natural watercourses that provided drainage for the area.[18] On appeal from the trial court's dismissal for failure to state a cause of action, the supreme court considered whether subdivision plat approval is a proprietary function for which the city has liability for damages, or a governmental function that leaves it immune from damage suits.[19] In its determination of the type of function associated with plat approval, the court acknowledged the statutory mandate that a city approve or disapprove a proposed plat and that the primary purpose of subdivision plat approval is to promote the health, safety,

15. 747 F.2d at 324-25. The specific subjective requirements complained of by appellant required the colors of a building to "*harmonize* with the structure's facade as well as *complement* the overall character of the District," and required that walkways be "*compatible with . . . walkways of surrounding structures.*" *Id.* at 325 (quoting Dallas, Tex., Code §§ 5.1 & 5.2) (emphasis added). The plaintiff's argument was that the breadth and vagueness of these standards operated in violation of his due process guarantees under the fourteenth amendment to the United States Constitution. 747 F.2d at 324.

16. 747 F.2d at 324. Although the court of appeals upheld the ordinance in *Mayes* on the authority of a municipality to regulate historic preservation districts, the decision is supported by the court's having taken notice of the fact that qualified, professional personnel were involved in the regulatory process, the guideline principals had been applied consistently, and "an elaborate decisionmaking and appeal process provide[d] for ultimate review by the City Council." *Id.* at 326; *see* Maher v. City of New Orleans, 516 F.2d 1051, 1060-64 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

17. 687 S.W.2d 300 (Tex. 1985).

18. The city approved the subdivision plat proposed by the developer of the raw land, the developer sold the lots to a builder, and the improved lots were then sold to the plaintiff-homeowners.

19. The general common law rule regarding municipal liability is that the municipality is immune from damages suffered by proprietary acts of the local governing body, but will be liable for damages resulting from its performance of governmental functions. City of Galveston v. Posnainsksy, 62 Tex. 118, 127 (1884) (this landmark case was a suit for injury resulting from a fall into a neglected drain bordering a city sidewalk). Proprietary functions are performed in the exercise of powers "voluntarily assumed—powers intended for the private advantage and benefit of the locality and its inhabitants." *Id.* The court in *Smith* referred to proprietary functions generally, as "ministerial acts which could be performed by a private subcontractor." 687 S.W.2d at 303. Governmental functions are performed in the exercise of "powers conferred on them for purposes essentially public—purposes pertaining to the administration of general laws made to enforce the general policy of the State." *Posnainsksy*, 62 Tex. at 127. "An individual or private corporation cannot exercise the same power." *Smith*, 687 S.W.2d at 303.

and morals of the general public.[20] Furthermore, the court recognized that the planning commission, in approving subdivision plats, must consider the city plan, applicable ordinances, and state laws. The court found that plat approval or disapproval constituted a discretionary function appropriate for a governmental body.[21] Having determined that approval of a subdivision plat is a governmental function, the supreme court held that the doctrine of governmental immunity barred the homeowners' claim for negligent plat approval.[22] The court then addressed the homeowners' alternative contention that plat approval amounted to inverse condemnation of their property.[23] The court denied the alternative claim on the basis that the original developer who had filled the watercourses and submitted the plats for approval was the current owner of all property affected by the action.[24] The court consequently found that the original developer had expressly consented to the act that the homeowners alleged constituted a taking without just compensation.[25] The court noted that the Texas Constitution does not prohibit the taking of private property when the property owner consents to such action.[26] The action did not entitle the homeowners to damages, therefore, since they claimed title from the developer and, thus, were bound by the consent of their predecessor in title.[27]

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20. TEX. REV. CIV. STAT. ANN. art. 974(a), § 4 (Vernon 1963) provides (emphasis added):

> If such plan or plat, or replat shall conform to the general plan of said city and its streets, alleys, parks, playgrounds and public utility facilities, . . . and if same shall conform to such general rules and regulations, if any, governing plats and subdivisions of land falling within its jurisdiction as the governing body of such city may adopt and promulgate to *promote the health, safety, morals or general welfare of the community, . . . then it shall be the duty of said City Planning Commission or of the governing body of such city, as the case may be, to endorse approval upon the plan, plat or replat submitted to it.*

Interestingly, the *Smith* court, in effect, admitted that the city had failed to effectuate the health, safety, and morals purpose of art. 974(a) when it stated that "[p]lat approval protects future purchasers from . . . inadequate drainage." 687 S.W.2d at 302. Clearly, in light of the flood damage suffered, the plaintiffs had not been afforded this protection.

21. 687 S.W.2d at 302-03. The *Smith* court compared the exercise of planning approval to the exercise of zoning approval, which is widely recognized as a police power. *See* Lombardo v. City of Dallas, 124 Tex. 1, 9, 73 S.W.2d 475, 478 (1934); Edge v. City of Bellaire, 200 S.W.2d 224, 226 (Tex. Civ. App.—Galveston 1947, writ ref'd); Hunt v. City of San Antonio, 462 S.W.2d 436, 539 (Tex. 1971). "Plat approval, like zoning, is an exercise of the police power." *Smith*, 687 S.W.2d at 302.

22. 687 S.W.2d at 303; *see* Ellis v. City of West Univ. Place, 141 Tex. 608, 610, 175 S.W.2d 396, 397 (1943) (city not liable for damages resulting from attempt to enforce ordinance); Presley v. City of Odessa, 263 S.W.2d 293, 295 (Tex. Civ. App.—El Paso 1952, writ ref'd n.r.e.) (city generally not liable for negligent operation of traffic lights).

23. Inverse condemnation is a cause of action pleaded by a landowner claiming that the condemning governmental authority has damaged or taken his property for a public purpose without expressly taking the property by eminent domain proceedings and providing just compensation for that loss as required by TEX. CONST. art. I, § 17, and U.S. CONST. amend. V. In essence, the homeowners in *Smith* claimed that the city's approval of the plat resulted in the flooding of their property, which rendered it unusable to the appellants, thereby entitling them to just compensation.

24. 687 S.W.2d at 303.

25. *Id.*

26. *Id.*

27. *Id.* Following *Smith*, it may be argued that a developer has no incentive in Texas to

D. Texas Courts of Appeals

The courts of appeals decided several significant zoning and planning cases during the Survey period. Perhaps the most important of these was *Strong v. City of Grand Prairie*.[28] The *Strong* case provides the first judicial interpretation of Texas Revised Civil Statutes article 1011e[29] since amended,[30] which provides:

> In case, however, of a written protest against such change, signed by the owners of 20 per cent or more either of the area of the lots or land included in such proposed change, or of the lots or land immediately adjoining the same and extending 200 feet therefrom, such amendment shall not become effective except by the favorable vote of three-fourths of all members of the legislative body of such municipality.[31]

In *Strong* the city council of Grand Prairie denied a landowner's request for a zoning change to permit the use of his property as a cemetery because the change did not receive the required three-quarters favorable vote. The landowner brought suit seeking injunctive and declaratory relief. Appealing the denial of relief from the trial court, the appellant argued that the lower court had erred in not including city streets in the formula for determining whether the required twenty percent of the specified property owners had signed the protest petition.[32] The Fort Worth court of appeals rejected the appellant's argument as ignoring the intent of the legislature to permit protests only by owners of real property as reflected by the most recent city tax roll.[33] The court reasoned that this requirement obviously excluded tax-exempt municipalities from the calculation of the affected property owners allowed to vote on the proposition.[34]

Possibly recognizing the computational difficulties the *Strong* decision created,[35] the legislature amended article 1011e during the Survey period to

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protect future homeowners from the type of harm suffered by plaintiffs. In Texas, only renters of real property are protected by an implied warranty of habitability. *See* TEX. PROP. CODE ANN. § 92.052 (Vernon 1984).

28. 679 S.W.2d 767 (Tex. App.—Fort Worth 1984, no writ).

29. *See* Act of May 24, 1985, ch. 201, § 1, 1985 Tex. Sess. Law Serv. 1067 (Vernon) (codified as amended at TEX. REV. CIV. STAT. ANN. art. 1011e (Vernon Supp. 1986)).

30. *See infra* notes 32-33 and accompanying text.

31. *Id.* The *Strong* court stated:

> It is perceived that this statute creates two classes or categories of protests against zoning changes by adjoining property owners: (1) by the owners of 20% or more of the lots or land within the proposed zoning charge area itself; and, (2) by the owners of 20% or more of the lots or land immediately adjoining such area and extending 200 feet therefrom.

679 S.W.2d at 769.

32. *Id.* Had the streets been included in the computation, then less than 20% of the required property owners would have signed the petition because the city had not signed it.

33. *Id.* at 770 (citing TEX. REV. CIV. STAT. ANN. art. 1011f (Vernon Supp. 1984)).

34. 679 S.W.2d at 770. The reasoning of the court is that, obviously, the city owning the streets does not pay taxes and, therefore, does not appear on the city tax roll. *Id.*

35. In determining which landowners are eligible to protest a zoning change and whether those who have protested are sufficient in number to force a super-majority city council vote, apparently no method short of a professional (and costly) land survey would ensure accuracy if streets and alleys were excluded. The method currently employed by many Texas cities is to identify the landowners eligible to protest by simply drawing a circle on a map with a compass

provide expressly for the *inclusion* of streets and alleys in the protest area computation.[36]

In *City of Webster v. Signad, Inc.*[37] the owner of several billboards damaged in a hurricane successfully challenged the constitutionality of a municipal ordinance prohibiting the repair of roadway signs that had suffered substantial damage.[38] The trial court granted summary judgment in favor of the appellee on grounds that the ordinance violated the due process provisions of the Texas and United States Constitutions.[39] In affirming the order of the trial court, the appeals court stated that citizens of average intelligence were left to speculate on the meaning of that section of the ordinance that prohibited substantial repairs.[40] The court held that the city must implement further guidelines to define damage to substantial parts in economic, physical, and functional terms in order to comply with constitutional due process

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(or palimeter) around the area for which rezoning is sought. *See* Dallas, Tex., Development Code § 51-4.701 (specifically provides for the inclusion of streets and alleys). Note also that the legislature's rationale in including city streets in the appropriate computations may be equally applicable to the inclusion of city parks and other publicly owned land.

36. *See* Act of May 24, 1985, ch. 201, § 1, 1985 Tex. Sess. Law Serv. 1067 (Vernon) (codified as amended at TEX. REV. CIV. STAT. ANN. art. 1011e (Vernon Supp. 1986)). The potential for municipal misconduct as a result of the amendment of art. 1011(e) is evident. Take the situation where a zoning change is requested and subsequently opposed by the city's planning department. In such a case, the city attorney may file a written protest and alone, or (depending on how much street or alley is involved in the computation) in conjunction with less than 20% of the other surrounding property owners, force a three-quarters (rather than majority) vote on the requested change. This, in effect, allows the municipality to defeat certain zoning change requests even though over 80% of the adjoining private property owner-citizens may not oppose the change.

37. 682 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

38. The court quoted Webster, Tex., Code of Ordinances ch. 3, § 10H(2) as providing that:

> When any outdoor advertising sign, billboard, spectacular sign, business sign, or business directory sign *which would be unlawful or non-conforming hereunder,* but for the fact that such sign was lawfully in existence on the date of passage of this section, or *any substantial parts thereof* is blown down or destroyed or taken down or removed for any purpose other than routine maintenance operations or for changing the lettering, symbols, or other matter on such signs, it shall not be reerected, reconstructed, rebuilt, or relocated except in conformity with the provisions of this section.

682 S.W.2d at 645-46 (emphasis added). The clear intent of ordinances similar to the one in *Signad, Inc.* is to terminate the nonconforming use of a sign that doesn't comply with existing city ordinances after it suffers substantial damage.

39. TEX. CONST. art. 1, § 19 provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." The United States Constitution, in the fifth and fourteenth amendments, also provides protection against deprivation of life, liberty or property without due process of law. U.S. CONST. amends. V & XIV.

40. 682 S.W.2d at 648. The *Signad* court reasoned that the use of the term "substantial" was too vague to require the public to interpret and, thus, violated the due process requirements of the Texas and the United States Constitution. *Id.*; *see* Texas Antiguities Comm. v. Dallas County Community College Dist., 554 S.W.2d 924, 928 (Tex. 1977) (holding the term "of historical interest" to be unconstitutionally vague); *cf.* Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980) (regulatory statutes need to provide only a "reasonable degree of certainty" to persons governed thereby and such "[s]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether marginal offenses fall within their language").

requirements.[41]

In *Collins v. City of El Campo*[42] the city and certain residents brought suit against a landowner to enjoin the use of his property as a residence for four unrelated, mentally retarded men and their supervising houseparents. The trial court enjoined the appellant's current use of the home based upon its conclusion that such use did not comply with the applicable zoning ordinance restricting the property to a single-family dwelling.[43] The critical issue in *Collins* was the trial court's interpretation of the ordinance in question as restricting the use of the appellant's property to occupancy by a single, related family, as opposed to a group of unrelated persons. In focusing on the legislative intention of the city in restricting the use of the property,[44] the court rejected the city's argument that only those dwellings designed for or occupied by one family could come within the purview of the ordinance.[45] Furthermore, because the zoning ordinance did not define "family" in terms of relation by blood or marriage, the house's mentally retarded occupants and their houseparents could properly be considered a single family unit.[46]

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41. 682 S.W.2d at 647-48. Without reference to a percentage of value, particular parts of a sign, or the purposes served by billboards, "each successive city engineer must select his own standard for determining what is a 'substantial part' of a sign. Operators of outdoor advertising signs receive no fair and adequate notice from . . . the Ordinance as to what sign repairs are permitted or prohibited." *Id.* at 648. One dissenting justice found the ordinance to provide a reasonable degree of certainty, thus satisfying due process requirements. *Id.* (Doyle, J., dissenting). Justice Doyle first analogized to other uses of the word "substantial" as a "standard of measurement in our jurisprudence." *Id.* at 649 (citing Lewis v. Metropolitan Sav. & Loan Ass'n, 550 S.W.2d 11, 13 (Tex. 1977) (substantial evidence); Warren v. Denison, 563 S.W.2d 299, 303 (Tex. Civ. App.—Amarillo 1978, no writ) (substantial performance)). Justice Doyle found the latitude in interpretation necessary "[g]iven the 'untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government. . . .' " *Id.* at 648 (quoting Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980)); *see* D——— F——— v. State, 525 S.W.2d 933, 941 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (statute that allowed termination of parental rights as determined by the "best interests" of child upheld); Houston Compressed Steel Corp. v. State, 456 S.W.2d 768, 774 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (statute upheld that defined air pollution as presence in the atmosphere of contaminants in such concentration and of such duration as "may tend to be injurious to or to adversely affect human health or welfare").

42. 684 S.W.2d 756 (Tex. App.—Corpus Christi 1984, no writ).

43. The zoning ordinance in question provided:

> Part II. DISTRICT USE AND AREA REGULATIONS
>
> Section 6. "R-1" Single-Family Residence District
>
> 6-1. The regulations set forth in this section or set forth elsewhere in this ordinance when referred to in this section, are the regulations in the "R-1" Single-Family Reidence (sic) District.
>
> *Use regulations*: A building or premise shall be used only for the following purposes:
>
> A. One Family Dwelling.
>
> . . . .
>
> *2-15. Dwelling, Single-Family*: A building designed for *or* occupied exclusively by one (1) family.

Id. at 758-59 (emphasis added by the court).

44. *Id.* at 759 (discussing rules regarding judicial construction of municipal ordinances).

45. *Id.*

46. *Id.* at 759-60. On the same grounds, the court also held that the appellant was not in violation of a private deed restriction that prohibited use of the subject property for any purpose other than as a "single-family dwelling." *Id.* at 760-62.

Subdivision Plat Approval. In *Cowbody Country Estates v. Ellis County*[47] the appellant owned 100 acres of land that it had begun to develop into a mobile home park for rental to the public.[48] Ellis County successfully enjoined further development and operation of the appellant's property on grounds that its use for the leasing of mobile homes failed to comply with county subdivision rules and regulations requiring the filing of an approval plat showing appropriate boundaries and streets prior to any subdividing of lots for sale. The appellant initially argued that the leasing of mobile home spaces could not be considered a sale of the lots, and, thus, the mobile home project was not a subdivision requiring plat approval.[49] The court of appeals, however, rejected this argument, citing the primary objective of subdivision plat approval as the protection of public interests in health, sanitation, drainage, and county road maintenance rather than simple regulation of lot sales.[50] The court further reasoned that because public policy concerns are of no less relevance to mobile home parks, which are leased rather than sold, the present use of the project for rental was sufficiently analogous to a sale to cause the ordinance in question to be applicable to this case.[51]

The court also rejected the appellant's alternative contention that the county subdivision rules and regulations pertaining to public roads were inapplicable because the appellant had not dedicated any roads in the project to public use.[52] Citing evidence that supported the apparent findings of fact by the trial court concerning the elements of an implied dedication,[53] the court held that the roads within the mobile home project were subject to public regulation because the appellant had impliedly dedicated them to public use.[54]

City of Weslaco v. Carpenter[55] involved facts very similar to those in *Country Cowboy Estates.* In *Carpenter* a landowner had subdivided and improved a fairly large tract of land for the purpose of renting mobile homes

47. 692 S.W.2d 882 (Tex. App.—Waco 1985, no writ).

48. The appellant's current use of the mobile home park for rental to the public was made known to the county only after it submitted to the commissioners court a subdivision plan for sale of the lots. The commissioners court denied approval. *Id.* at 884-85.

49. *Id.* at 886.

50. *Id.*

51. *Id.* at 886-87. In reaching this conclusion the court relied upon evidence that rented mobile homes, like houses, are seldom relocated, that tenants were subject to applicable deed restrictions and that, in addition, tenants had responsibility for maintenance of the lot that their mobile home occupied. *Id.* at 886.

52. *Id.* at 887-88. The roads had been built slightly narrower than required by the county rules for public roads.

53. The court noted that the appellant had contemplated sale of the lots for some time and had made no provision for an operable gate or security office at the park's entrance. The facts supported the inference that the appellant intended to dedicate the roads in the project to public use. *Id.* An implied dedication of a private road occurs when a party can show that (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) the landowner was competent to dedicate the land, because he had the capacity and fee simple title; (3) the public relied on such acts and will benefit from the dedication; and (4) the dedication was accepted. *Id.* at 888; *see* O'Connor v. Gragg, 324 S.W.2d 294, 296 (Tex. Civ. App.—Eastland 1959), *reformed*, 161 Tex. 273, 339 S.W.2d 878 (1960).

54. 692 S.W.2d at 887-88.

55. 694 S.W.2d 601 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

and recreational vehicles. The city sought to enjoin further development until the defendant complied with city code standards applicable to subdivision of land. The *Carpenter* court also found no basis for distinguishing between the sale and rental of individual lots given that the overriding purpose for subdivision regulation is to protect public health, safety, morals, and general welfare.[56] The court, however, went to slightly greater lengths than the court in *Cowboy Country Estates* to emphasize that the key element of a subdivision is the division of one parcel of land into two or more subdivided parts. The court reasoned that it is this division of land that triggers regulation of the applicable platting statutes and ordinances and not the act of selling or leasing the divided parts.[57] The one aspect of the *Carpenter* case that expands the holding in *Cowboy Country Estates* is the court's holding that the city ordinance governing subdivision platting extended past the corporate municipal limits to property within the city's extraterritorial jurisdiction.[58]

II. CONDEMNATION

A. United States Supreme Court

The United States Supreme Court rendered one significant condemnation decision during the Survey period affecting Texas municipalities.[59] *United*

56. *Id.* at 604. The *Carpenter* decision was announced two months after *Cowboy Country Estates*.

57. *Id.* at 603-04.

58. Extraterritorial jurisdiction is an area beyond the physical limits of a city, state, or country to which its juridical power extends. BLACK'S LAW DICTIONARY 528 (5th ed. 1979). The Texas statute defining the extent of extraterritorial jurisdiction is TEX. REV. CIV. STAT. ANN. art. 970a, § 3 (Vernon 1963) (extraterritorial jurisdiction varies according to population of the city). *See also id.* art. 970a, § 4 (authority granted to cities to extend their subdivision ordinances to extraterritorial jurisdiction).

In another zoning and planning case of lesser significance decided during the Survey period, the Tyler court of appeals held that the city of Austin had no right to declare "arbitrarily, finally and in advance" by city ordinance that the construction, operation, and use of a particular waste burning device was a nuisance per se. Air Curtain Destructor Corp. v. City of Austin, 675 S.W.2d 615, 618 (Tex. App.—Tyler 1984, writ ref'd n.r.e.). By enforcing the ordinance without regard to the attendant facts and circumstances surrounding the use of the waste burning device, the plaintiffs had been deprived of a vested property right without due process of law. *Id.*

59. The procedure for exercising the power of eminent domain, as authorized in both federal and state constitutions, is commonly referred to as "condemnation." The federal government generally uses one of two methods to appropriate private property for a public use. First, it acts under the Declaration of Taking Act, 40 U.S.C. § 258(a) (1982), which vests title to the property in the United States immediately upon the filing of a declaration and deposit with the court of an amount determined by the government to be an appropriate award for the property. If the amount deposited is less than the exact value determined in subsequent judicial proceedings, the owner is awarded the difference. This section is generally limited to use in cases of sudden emergency. Second, it proceeds in straight condemnation by filing a complaint in condemnation pursuant to 40 U.S.C. § 257 (1982), whereby a panel determines the offering price for the landowner's property, but title does not vest in the United States until the government subsequently deposits this amount into the registry of the court. *See* Kirby Forest Indus. v. United States, 104 S. Ct. 2187, 2190-91, 81 L. Ed. 2d 1, 6-7 (1984). In extreme emergencies, Congress may exercise a third method of condemnation by appropriating the property immediately and vesting title in the United States. This method is referred to as a legislative taking and is authorized pursuant to 16 U.S.C. § 79e(b) (1982). *See generally* Geary, Davenport & Jobe, *1985 Annual Survey, supra* note 1, at 576-82.

States v. 50 Acres of Land[60] involved a determination of the proper method of compensation for a landfill facility owned by the city of Duncanville, Texas, and condemned by the federal government as part of a flood control project. Following the condemnation, the city acquired another site as a replacement for the condemned facility and developed it into a larger and more efficient landfill. The Fifth Circuit[61] agreed with the city of Duncanville that when a public authority could demonstrate that it was under an obligation to replace the condemned facility,[62] the general rule that fair market value was just compensation[63] was inapplicable and the proper measure of damages for the taking was the replacement cost of the new facility.[64] In holding for the city of Duncanville, the circuit court cited the Supreme Court case of *United States v. Brown*,[65] and concluded that the award should be the reasonable cost of an equivalent facility,[66] discounted to account for any increased capacity or superior quality of the substitute facility.[67]

The Supreme Court rejected the Fifth Circuit's method of compensation and emphasized that the *Brown* case had involved peculiar facts and had made no statement regarding the proper measure of monetary compensation.[68] The Court stated that *Brown* had recognized the right of the govern-

60. 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984). The federal government initiated this condemnation proceeding by filing a declaration of taking pursuant to 40 U.S.C. § 258(a) (1982). 105 S. Ct. at 453 n.3, 83 L. Ed. 2d at 380 n.3.

61. United States v. 50 Acres of Land, 706 F.2d 1356 (5th Cir. 1983). The decision of the Fifth Circuit is discussed at length in Geary & Davenport, *Local Government Law, Annual Survey of Texas Law*, 38 SW. L.J. 463, 476-77 (1984) [hereinafter cited as Geary & Davenport, *1984 Annual Survey*].

62. Neither party disputed that the city of Duncanville was under an obligation to replace the condemned facility.

63. *See* United States v. 3,727.91 Acres of Land, 563 F.2d 357, 360-61 (8th Cir. 1977); California v. United States, 395 F.2d 261, 265-66 (9th Cir. 1968). *But see* United States v. Certain Property, 403 F.2d 800, 802-03 (2d Cir. 1968) (necessity could require use of substitute measure despite presence of ascertainable market value).

64. 706 F.2d at 1363-64.

65. 263 U.S. 78 (1923). In *Brown* the government constructed a reservoir, which necessarily resulted in the flooding of a small town. As just compensation, the Court sustained the government's efforts to relocate the entire town to a nearby area. *Id.* at 81.

66. 706 F.2d at 1359. This measure of damages rather than fair market value has sometimes been called the "substitute facilities doctrine." Generally, the substitute facilities doctrine applies to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot be determined. *See, e.g.*, United States v. Streets, Alleys & Public Ways, 531 F.2d 882, 886 (8th Cir. 1976) (streets); *United States v. Certain Property*, 403 F.2d 800, 803-04 (2d Cir. 1968) (substitute facilities doctrine applies to condemnation of public bath and recreation buildings); Town of Clarksville v. United States, 198 F.2d 238, 244-45 (4th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953) (sewer); County of Sarpy v. United States, 386 F.2d 453, 459 (Ct. Cl. 1967) (county road and bridge). "When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken." *Certain Property*, 403 F.2d at 803; *accord* United States v. Certain Land, 346 F.2d 690, 694 (2d Cir. 1965) (market value rule abandoned when nature of property or uses produce wide discrepancy between value to owner and price another would pay); United States v. Board of Educ., 253 F.2d 760, 763 (4th Cir. 1958).

67. 706 F.2d at 1359. The Fifth Circuit reasoned that the discounting of the amount of replacement cost attributable to a higher quality facility is necessary to prevent a windfall to the city. *Id.* at 1360.

68. 105 S. Ct. at 454, 83 L. Ed. 2d at 381-82.

ment to relocate an entire town if it were condemned.[69] In the instant case the Court reasoned that the substitute facilities doctrine applied in *Brown*, as opposed to the traditionally recognized award of the fair market value of the condemned property, would only make the valuation process more complex without improving it.[70] The Court concluded that the circuit court's approach may have been a circuitous method of determining the market value of the condemned facility.[71] Finding no basis for distinguishing between condemned public property and condemned private property, the Court emphasized that in many cases the owner of condemned private property must replace its condemned facility although it may have no legal obligation to do so.[72] The Court rejected application of the substitute facilities doctrine, except in cases such as *Brown* when the government actually provides the substitute facility itself, and held that in assessing a monetary award the fair market value of the condemned property will be the controlling consideration.[73]

B. Texas Supreme Court

In *Amason v. Natural Gas Pipeline Co.*[74] the Texas Supreme Court considered the issue of whether the landowner-condemnee bears the burden of going forward with evidence at trial when the government-condemnor is satisfied with the award of the special commissioners, but the condemnee challenges the authority to condemn[75] and does not withdraw the commissioners' award from the court registry.[76] As the court noted, once the con-

69. *Id.*

70.. 105 S. Ct. at 456, 83 L. Ed. 2d at 386. *Brown* involved the government's relocation of an entire city rather than a single lump sum monetary award for the taking.

71. *Id.* at 458, 83 L. Ed. 2d at 386.

72. *Id.* at 457, 83 L. Ed. 2d at 385. "Even though most private condemnees are not legally obligated to replace property taken by the Government, economic circumstances often force them to do so. When a home is condemned, for example, its owner must find another place to live." *Id.* The Court also expressed some concern that the substitute facilities doctrine would confuse the jury. *Id.*

73. 105 S. Ct. at 458, 83 L. Ed. 2d at 386. Justice O'Connor, with whom Justice Powell joined in a concurring opinion, pointed out that limiting compensation to fair market value will be inappropriate "[w]hen a local governmental entity can prove that the market value of its property deviates significantly from the make-whole remedy intended by the Just Compensation Clause and that a substitute facility must be acquired to continue to provide an essential service . . . ." *Id.* at 459, 83 L. Ed. 2d at 387 (O'Connor, J., concurring).

74. 682 S.W.2d 240 (Tex. 1984).

75. The Texas Supreme Court recognized that the special commissioners are appointed only to assess damages and then file an award pursuant to TEX. PROP. CODE ANN. §§ 21.014-.016 (Vernon 1984) and "are powerless to decide whether the condemnor possesses the right to condemn the property." 682 S.W.2d at 242; *accord* Lower Nueces River Water Supply Dist. v. Cartwright, 160 Tex. 239, 241, 328 S.W.2d 752, 754 (1959); Pearson v. State, 159 Tex. 66, 70-71, 315 S.W.2d 935, 936-37 (1958) (the commission's actions are purely administrative in nature).

76. The general rule is that a withdrawl of the condemnation award from the registry of the court will constitute a waiver of the right to challenge the condemnor's authority, or to seek further recovery on appeal, and has the effect of estopping the condemnee from asserting a contrary position. 682 S.W.2d at 242; *see also* Coastal Indus. Water Auth. v. Celanese Corp., 592 S.W.2d 597, 599 (Tex. 1979); Carle v. Carle, 149 Tex. 469, 472, 234 S.W.2d 1002, 1004 (Tex. 1950); Perry v. Texas Mun. Power Agency, 667 S.W.2d 259, 262 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). An exception to the general rule stated in *Perry* and *Ce-*

demnee files objects, the special commissioners' award is vacated and the landowner becomes the defendant in a cause of action to condemn his property.[77] Nevertheless, the condemnee is still responsible for service of process on the government-condemnor, and if he fails to do so, the court reinstates the commissioners' award.[78] Once the condemnee accomplishes service on the condemnor the court cannot reinstate the commissioners' award, and the burden of going forward with evidence at trial rests with the condemnor-plaintiff.[79] Because the landowner had made proper service and the condemnor-plaintiff had failed to go forward with evidence at trial, the Texas Supreme Court held the dismissal of the entire condemnation proceeding appropriate.[80]

In *City of Austin v. Avenue Corp.*[81] the appellant-city appealed an award of damages resulting from construction work in front of the appellee's restaurant. The court of appeals had upheld the award on the appellee's theory of inverse condemnation.[82] The supreme court held that the partial, temporary restriction of access to the appellee's restaurant did not constitute an inverse condemnation entitling the appellee to damages.[83]

C. *Texas Courts of Appeals*

The Texas courts of appeals decided several significant cases in the area of condemnation during the Survey period. In *Dyer v. Texas Electric Service*

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lanese Corp. occurs when the condemnee withdraws the award and on appeal seeking further recovery accept "only that which appellee [condemnor] concedes, or is bound to concede, to be due him under the judgment." *Carle*, 149 Tex. at 472, 234 S.W.2d at 1004. This exception was at issue (and found inapplicable) in Couch v. State, 688 S.W.2d 154 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.), decided during the Survey period. In *Couch* the State of Texas had taken possession of the condemnee's property following the trial court's verdict in its favor, filed no motion for new trial, and deposited the amount of the judgment into the register of the court, which the condemnee later withdrew. *Id.* at 155. The *Couch* majority held that the appellant had waived its right to appeal the judgment; however, the dissent forcefully decried the inconsistency in current law that allows a condemnee to withdraw the commissioners' award and then appeal, but generally disallows such action at the trial court level. *Id.* at 156 (Burgess, J., dissenting).

77. 682 S.W.2d at 242; *see* Denton County v. Brammer, 361 S.W.2d 198, 200 (Tex. 1962); TEX. PROP. CODE ANN. § 21.018(b) (Vernon 1984).

78. *Amason*, 682 S.W.2d at 242; *accord* Hilburn v. Brazos Elec. Power Coop., 683 S.W.2d 58 (Tex. App.—Eastland 1984, writ ref'd n.r.e.). Interestingly, the Texas Supreme Court in *Amason* and the court of appeals in *Hilburn* apparently interpret TEX. PROP. CODE ANN. § 21.018 (Vernon 1984), which reads, "the court shall cite the adverse party," as requiring the dissatisfied condemnee to cite the condemnor. *Amason*, 682 S.W.2d at 242; *see Hilburn*, 683 S.W.2d at 60.

79. *Amason*, 682 S.W.2d at 242 (citing Denton County v. Brammer, 361 S.W.2d 198, 200-01 (Tex. 1962)).

80. 682 S.W.2d at 242.

81. 704 S.W.2d 11 (Tex. 1986).

82. 685 S.W.2d 453, 455 (Tex. App.—Austin 1985), *rev'd*, 704 S.W.2d 11 (Tex. 1986). The court of appeals had noted that "[i]nverse condemnation is an indirect taking of one's property, although the governmental entity's eminent domain power has not been exercised." *Id.*

83. 704 S.W.2d at 13. The court stated that in order to recover for interference of access to property, the restriction must be (1) total but temporary, (2) partial but permanent, or (3) partial and temporary, but caused by an illegal activity or an activity negligently performed. *Id.*

Co.[84] the appellant challenged the legal and factual sufficiency of the evidence establishing that the condemnation of his property for an electric power line easement by a private utility company was for a public use as required by the Texas Constitution.[85] Answering affirmatively the question of whether condemnation of private property for an electric tap line to serve only one customer was a public use, the court of appeals cited *Tenngasco Gas Gathering Co. v. Fischer*.[86] In *Fischer* the Corpus Christi court of appeals stated that "[t]he test for determining whether a given use is public is to see if there results to the public some definite right or use in the business or undertaking to which the property is devoted.[87] The *Dyer* court applied what it conceded to be a liberal view of a public use,[88] and upheld the condemnation by rationalizing that the electric power line could benefit the public by raising the land occupier's level of oil production.[89]

In *City of Houston v. Southern Water Corp.*[90] the city appealed from a temporary injunction restraining it from pursuing the condemnation of a subdivision's public sanitary sewer and water supply systems. In affirming the trial court's grant of injunctive relief, the court of appeals relied upon the well-settled rule of law that only real property, and not property of a subsisting public utility associated with the business and distribution system,[91] may be appropriated unless the city can provide adequate assurance that the loss will be offset.[92] The court of appeals found no such assurance in any statute or charter provision cited by the city of Houston and refused to dissolve the temporary injunction.[93]

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84. 680 S.W.2d 883 (Tex. App.—El Paso 1984, no writ).

85. *Id.* at 884. TEX. CONST. art. 1, § 17 requires all condemnations of private property to be for a public use.

86. 653 S.W.2d 469 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); *see* Geary & Davenport, *1984 Annual Survey, supra* note 61, at 472-73 (thorough discussion of *Fischer* case).

87. 653 S.W.2d at 475 (quoting the Texas Supreme Court in Coastal States Gas Producing Co. v. Pate, 158 Tex. 171, 179, 309 S.W.2d 828, 833 (1958)); *accord* Davis v. City of Lubbock, 160 Tex. 38, 45-46, 326 S.W.2d 699, 704-06 (1959).

88. 680 S.W.2d at 885.

89. *Id.* Furthermore, the *Dyer* court stated that "[t]he mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of its public character." *Id.* at 885 (quoting West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd)); *see also* Housing Auth. v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 84 (1940); *cf.* Borden v. Trespalacios Rice & Irrigation Co., 98 Tex. 494, 86 S.W. 11 (1905) which held as follows:

> [This court is] not inclined to accept that liberal definition of the phrase "public use" adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain.

Id. at 509, 86 S.W. at 14.

90. 678 S.W.2d 570 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

91. *Id.* at 572 (quoting Lone Star Gas Co. v. City of Fort Worth, 128 Tex. 392, 401, 98 S.W.2d 799, 803 (1936) (attempt by city to condemn entire business constituting gas utility enjoined)).

92. 678 S.W.2d at 572. The appellees alleged that the proposed condemnation would result in damage to their business (*i.e.*, depreciation, goodwill, etc.) for which the city was not contemplating appropriate compensation.

93. *Id.* The opinion offers no guidance as to what form of statute or charter provision would have provided the reasonable assurance required by the court. The city's appropriation

In *City of Austin v. Avenue Corp.*[94] the appellant-city appealed the trial court's award of damages resulting from construction work in front of the appellee's restaurant. The appellee had pleaded its cause of action as one of inverse condemnation.[95] After the appellee presented evidence that it had lost thousands of customers due to problems of access, discomfort, and noise generated by the city's construction, the court awarded the appellee approximately $82,000 in compensatory damages. In sustaining the damage award, the court of appeals held that an action for damages will lie even when the city's construction does not disrupt all suitable access if the construction does materially and substantially impair access.[96] Upon appeal to the Texas Supreme Court,[97] however, "material and substantial" interference with access to one's property was limited to three situations: "a total but temporary restriction of access; or a partial but permanent restriction of access; or a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed."[98] Because the impairment of access to the appellee's restaurant was only a temporary limited restriction caused by legal, workmanlike and timely city construction, the court reversed the award of damages stating that such temporary obstructions are a part of city life and must be endured.[99]

III. ANNEXATION

The courts of appeals decided two significant cases regarding the validation of previous annexation procedures during the Survey period. In State *ex rel.* Danner v. City of Watauga[100] the Fort Worth court of appeals upheld the constitutionality of the Validation Act,[101] which validates, in all re-

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of the funds to be deposited in the registry of the court did not, in itself, provide reasonable assurance that the utilities would be adequately compensated for the property condemned.

94. 685 S.W.2d 453 (Tex. App.—Austin 1985), *rev'd*, 704 S.W.2d 11 (Tex. 1986).

95. "Inverse condemnation is an indirect governmental taking of one's property, although the governmental entity's eminent domain power has not been exercised." *Id.* at 455.

96. *Id.* (citing City of Waco v. Texland Corp., 446 S.W.2d 1, 2 (Tex. 1969) (damages awarded to property owners for city's construction of viaduct making it difficult to park and maneuver transport vehicles at owners' commercial establishments)). Although the court of appeals sustained the condemnation award to the appellee, it denied the request for prejudgment interest on grounds that it was unsupported by the pleadings, damages had not been established as of a definite time, and the amount of damages sought by appellee were not definitely determinable. 685 S.W.2d at 456. *See* Schoenberg v. Forrest, 253 S.W.2d 331, 334 (Tex. Civ. App.—San Antonio 1952, no writ) (to establish definite liquidated claim of lost profits plaintiff must bring forward convincing evidence).

97. 704 S.W.2d 11 (Tex. 1986).

98. *Id.* at 13.

99. *Id.* at 12 (citing L.M.S., Inc. v. Blackwell, 149 Tex. 348, 233 S.W.2d 286 (1950)).

100. 676 S.W.2d 721 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

101. TEX. REV. CIV. STAT. ANN. art. 974d-28 (Vernon Pam. Supp. 1986). Section 4 of this article provides:

> Sec. 4 (a) The original boundary lines of each municipality covered by this Act and any extension of those boundaries adopted before January 1, 1975, are validated in all respects, even though the action adopting the original boundaries or an extension of them was not in accordance with law.
>
> (b) Without limiting the generality of Subsection (a) of this section, it is expressly provided that an attempted annexation that occurred before

spects, the incorporation of any Texas municipality and their original boundary lines, and any extensions thereof, adopted prior to January 1, 1975, even if the original boundaries or a subsequent extension were not lawfully adopted.[102] The court initially rejected the plaintiff's argument that the legislature was without the power to enact validating legislation, noting that "what the Legislature has the power to authorize, it has the power to ratify."[103] In addition, the court rejected the argument that the statute was unconstitutional as a retroactive taking or impairing of property rights and held that a property owner has no constitutional right concerning a municipality's location.[104]

In *City of The Colony v. City of Frisco*[105] the appellant appealed the ruling of the trial court that the Validation Act validated an annexation ordinance of the city of Frisco, Texas.[106] In 1966, the city of Frisco had enacted an ordinance for the annexation of approximately eighty-seven square miles, although its extraterritorial jurisdiction (ETJ) extended only one-half mile beyond the city limits[107] The parties did not dispute that the original annexation was clearly invalid under a provision in the Municipal Annexation Act (MAA) which sanctions annexations only within a municipality's ETJ.[108] Although the annexation itself was clearly contrary to the express provisions of the MAA, the court of appeals held that the unambiguous language of the validation statute superseded the otherwise invalid Frisco annexation.[109]

> January 1, 1975, may not be held invalid because it did not comply with the Municipal Annexation Act, as amended (Article 970a, Vernon's Texas Civil Statutes), or any other applicable law, or because the territory the municipality attempted to annex was not contiguous or adjacent to the then existing boundaries of the municipality, or because the municipality was not petitioned for annexation by the owners or residents of the annexed territory.

Id. art. 974d-28, § 4.

102. *Id.* The court emphasized the breadth of this language: "In other words, no matter what the alleged factual insufficiency or alleged violation of the Municipal Annexation Act or Article 974, the validation statute expressly addresses it in approving and validating all prior annexations . . . ." 676 S.W.2d at 723; *see* TEX. REV. CIV. STAT. ANN. art. 970a (Vernon 1963 & Pam. Supp. 1986) (Municipal Annexation Act).

103. 676 S.W.2d at 724 (quoting Perkins v. State, 367 S.W.2d 140, 145 (Tex. 1963), in which the Texas Supreme Court recognized the legislature's power to ratify the incorporation of a town carved out of a much larger unincorporated community); *cf.* City of Waco v. City of McGregor, 523 S.W.2d 649, 653 (Tex. 1975) (relied upon legislature's intent in denying application of the Validation Act to an invalid annexation of noncontinguous and nonadjacent territory).

104. 676 S.W.2d at 724; *see* Hunter v. City of Pittsburgh, 207 U.S. 161, 177 (1907); Superior Oil Co. v. City of Port Arthur, 628 S.W.2d 94, 97 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.), *appeal dismissed*, 459 U.S. 802 (1982).

105. 686 S.W.2d 379 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

106. *See supra* note 101.

107. TEX. REV. CIV. STAT. ANN. art. 970a, § 3(A)(1) (Vernon 1963) provides a one-half mile ETJ for cities with populations of less than 5,000.

108. *Id.* art. 970a, § 7(A) allows annexation only within a municipality's ETJ. *See also* Act of June 14, 1985, ch. 649, § 1(a), 1985 Tex. Sess. Law Serv. 4953 (Vernon) (generally requires annexed area to be continguous to corporate limits of a city).

109. 686 S.W.2d at 381. Although it approved the application of the validating statute to the previously invalid annexation, the court declined to rule on the question of whether the validating statute also applied to previously invalid ordinances establishing ETJ. *Id.* at 382.

In *Woodruff v. City of Laredo*[110] the court rejected the plaintiffs' argument that the failure of the city of Laredo to submit an annexation proposal to a vote of the residents within the territory that the city proposed to annex made the ordinance void. The appellants complained that because the city had not submitted the annexation proposal in question to the citizens within its corporate limits, it had prevented the citizens of the annexed area from voting on the proposal as Texas Revised Civil Statutes article 1182(a) requires.[111] Acknowledging that the city of Laredo was a home rule city, the court cited the well-settled rule of law that home rule cities may enact their own laws and charters so long as they do not conflict with the general laws of the state or the Texas Constitution.[112] Emphasizing that nothing in statutory or case law expressly prohibited Laredo from implementing its own charter annexation proceedings without a vote of its citizens, the court rejected the appellants' argument that the law requires the city to submit the proposal to the residents of Laredo and, consequently, to the residents of the area that the city was annexing by virtue of article 1182(a).[113]

Carpenter v. City of Austin[114] involved the first direct challenge in the Texas courts to the increasingly popular land use planning procedure known as limited purpose annexation. Limited purpose annexation allows a city to annex land for a limited purpose, such as wharfage, navigation, schools, planning or zoning, without incurring the corresponding obligation to extend municipal services and major capital improvements to the annexed area that the NAA requires.[115] The city of Austin has amended its city charter

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110. 686 S.W.2d 692 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)

111. The plaintiffs relied upon TEX. REV. CIV. STAT. ANN. art. 1182a, §§ 1-3 (Vernon 1963), which provides that if a municipality submits a proposed annexation to the residents within its corporate limits then it must also submit the proposal to the residents within the area that is the subject of the proposed annexation. Section 4 of 1182(a) states that this requirement is not mandatory for cities with populations over 100,000. The plaintiffs in *Woodruff* contended that, by implication, an election of this sort is mandatory for cities of less than 100,000. The plaintiffs' argument that they were entitled to vote was directly contingent upon the success of their argument that the residents of Laredo were entitled to vote on the proposal. 686 S.W.2d at 695.

112. TEX. CONST. art. XI, § 5 and TEX. REV. CIV. STAT. ANN. art. 1175(2) (Vernon 1963) governs the creation of home rule cities.

> The home rule city in exercising legislative power to annex adjacent territory is restrained only to the extent that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."

686 S.W.2d at 694 (quoting City of Irving v. Dallas County Flood Control Dist., 383 S.W.2d 571, 575 (Tex. 1964)).

113. 686 S.W.2d at 695. Laredo's city charter expressly permitted annexation by ordinance alone without a vote of its citizens. *See* Sitton v. City of Lindale, 455 S.W.2d 939, 940 (Tex. 1970).

114. No. 371,492 (Dist. of Travis County, 331st Judicial Dist. of Texas, June 10, 1985). A thorough analysis of this case may be found in Heath & Scott, *Limited Purpose Annexation: An Extension of Land Use Planning*, STATE BAR OF TEX. ENVTL. L.J. July 1985, at 1 [hereinafter cited as ENVTL L.J.].

115. TEX. REV. CIV. STAT. ANN. art. 970a, § 10 (Vernon Pam. Supp. 1986) requires that the annexing city provides municipal service (*e.g.*, utilities, police and fire protection, maintenance of public facilities) to the area being annexed within 60 days of annexation. The city must initiate a program for acquisition and construction of necessary capital improvements (*e.g.* roads) within two and one-half years from the annexation.

authorizing the use of limited purpose annexation in order to subject surrounding areas undergoing tremendous development and growth to its zoning and planning regulations. At the same time, the city expressly provided for no expenditure on the annexed areas except in connection with the limited purpose for which it was annexing them.[116]

The central issue in *Carpenter* was whether the MAA allows an exemption from its service provision requirements when a municipality utilizes the method of limited purpose annexation. The city of Austin argued that, as a home rule city, it had the constitutional power[117] to annex territory for a limited purpose as long as the procedure did not violate or conflict with the general laws of Texas or the Texas Constitution.[118] The city claimed that MAA section 10(C) should be interpreted as providing an exemption from the service provision requirements for limited purpose annexation.[119]

In contrast, the appellants argued that the service provisions of the MAA were applicable to limited purpose annexation and also "that the City's annexations created a territory where the county was prohibited by state law from exercising its authority, while the City was prohibited by its charter from expending funds for services, leaving a governmental 'no-man's land.' "[120] Initially, the court agreed with the city's interpretation that section 10(C) of the MAA was not intended to limit the power of a city to use limited purpose annexation.[121] With regard to the latter contention, the court held that state laws prohibiting services by counties in areas within a city's corporate limits apply only to those areas within a city's full purpose boundaries and, therefore, the counties were not relieved from their duty to

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116. The city charter was amended to provide that

> In addition to the power to annex additional territory for all purposes, the City shall have the power, by ordinance, to fix, alter and extend the corporate boundaries of the City for limited purposes of "Planning and Zoning" and "Sanitation and Health Protection" . . . . The City shall have no power to levy any tax for municipal purposes on either the property or the inhabitants of territory annexed for limited . . . purposes, and no funds . . . shall be spent in such territory except . . . for the accomplishment of the limited purpose . . . for which the territory is annexed.

Austin, Texas, Charter, art. 1, § 7 (1981). The City of Austin contended that limited purpose annexation was the only method available to prevent the burdensome development in the areas outside Austin that was damaging its internal water supply and other resources. The city argued that it could not possibly meet the timing requirements of the MAA with respect to full municipal services associated with full purpose annexation. *See supra* note 115.

117. TEX. CONST. art. XI, § 5 grants home rule cities the power of self-government. *See supra* note 112.

118. *See* City of Irving v. Dallas County Flood Control Dist., 383 S.W.2d 571, 575 (Tex. 1964); Woodruff v. City of Laredo, 686 S.W.2d 692, 694 (Tex. App.—Corpus Christi 1985, no writ); *see supra* note 112.

119. "Nothing in this Act shall be construed to limit or repeal home-rule charter provisions providing for annexation for limited purposes other than ad valorem taxation." TEX. REV. CIV. STAT. ANN. art. 970a, § 10(C) (Vernon Pam. Supp. 1986).

120. ENVTL. L.J., *supra* note 114, at 3; *see, e.g.*, TEX. REV. CIV. STAT. ANN. arts. 2351a-5, -6 (Vernon 1971 & Supp. 1986). The plaintiffs also contended that limited purpose annexation violated § 11 of the MAA, TEX. REV. CIV. STAT. ANN. art. 970a, § 11 (Vernon Pam. Supp. 1986), which obligated the annexing authority to assume all debts of a Water Control and Improvement District. The city's charter expressly prohibited such assumption.

121. ENVTL. L.J., *supra* note 114, at 4.

provide services that the city did not provide to such areas.[122] Finally, the court rejected the plaintiffs' last contention that the city charter provision limiting the voting right of residents within the limited annexation area to city council and charter amendment elections was unconstitutional, and held that the substantially lesser degree of regulation to which such citizens were subject rationally justified limited voting privileges.[123]

Interestingly, the legislature amended the MAA section that authorized limited purpose annexation[124] the day before the *Carpenter* case went to trial to prohibit expressly the addition of limited purpose annexation provisions to city charters for a two-year period.[125] Accordingly, the issue of limited purpose annexation is certain to be a subject of heated debate in the next two legislative sessions.

IV. TAXATION AND ASSESSMENTS

The courts of appeals decided several significant taxation cases during the Survey period. In *Charles Schreiner Bank v. Kerrville Independent School District*[126] several banks and their shareholders sought an injunction against the school district and the city alleging that the taxing authorities had failed to exclude tax-exempt federal government obligations in determining the taxable value of shares of stock in the banks. The banks argued that the resulting assessment based on that determination was illegal.[127] In computing the taxable value of the banks' stock, the taxing authorities had used the equity capital formula, which simply takes the total amount of a bank's capital assets minus its liabilities and the assessed value of its real estate holdings and divides that figure by the number of outstanding shares of the bank. The trial court acknowledged that this method of assessment was illegal, but denied the plaintiffs the relief sought because they failed to show that they had suffered substantial injury from the illegal assessment as required by *City of Arlington v. Cannon*.[128]

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122. *See, e.g.*, TEX. REV. CIV. STAT. ANN. arts. 2351a-6, 2352 (Vernon 1971 & Supp. 1986) (county authority to tax and to organize rural fire prevention districts); *id.* art. 6702-1 (Vernon Supp. 1986) (County Road and Bridge Act).

123. ENVTL. L.J., *supra* note 114, at 4.

124. *See supra* note 119.

125. Act of June 14, 1985, ch. 649, § 2(C)(2), 1985 Tex. Sess. Law Serv. 4954 (Vernon).

126. 683 S.W.2d 466 (Tex. App.—San Antonio 1984, no writ).

127. 31 U.S.C. § 3124 (1982) provides that federal obligations shall be exempt from "each form of [state or local] taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax . . . ." *Id.* The Supreme Court has held that the failure of the taxing authorities to deduct from the "equity capital formula" the amount of federal obligations held by a bank will render any resulting assessment illegal in violation of this statute. *See* American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 860 (1983). For additional discussion of the same issue raised in the instant case, see Geary, Davenport & Jobe, *1985 Annual Survey, supra* note 1, at 589-90 (discussing the companion case of American Bank & Trust Co. v. Dallas County, 679 S.W.2d 566 (Tex. App.—Dallas 1984, no writ)).

128. 153 Tex. 566, 570-71, 271 S.W.2d 414, 417 (1954) (taxpayer not entitled to injunctive relief because he had not shown he would suffer substantial injury as a result of a tax scheme that had been held fundamentally erroneous, arbitrary, and illegal). The court in American Bank & Trust Co. v. Dallas County, 679 S.W.2d 566 (Tex. App.—Dallas 1984, no writ), rejected the taxpayers' request for injunctive relief from collection of an assessment determined

In overruling the trial court's denial of injunctive relief, the appeals court in *Charles Schreiner Bank* emphasized that the substantial injury requirement stated in *Cannon* effectively allows taxation of exempt property unless the tax imposed thereon is substantial.[129] The court chastised the Texas judiciary for "adjusting the judicial blindfold" in order to justify unlawful taxing schemes by taxing agencies.[130]

The appellees also contended, alternatively, that the court should deny the appellants' request for injunctive relief because they filed suit after the assessment board had certified the tax rolls and, thus, the request was untimely.[131] The court rejected this argument on grounds that it may not be possible to obtain a hearing in front of the Board of Equalization prior to approval of the tax rolls and, furthermore, to require the plaintiffs to challenge the taxing authority's methods before the actual assessment is made would require them to ignore the presumption that public authorities act lawfully.[132]

In *Smith v. City of Houston*[133] the Houston court of appeals held that a paving assessment was unconstitutional and void[134] because it was applied uniformly without regard to the special benefits requirement of section 7 of *Texas Revised Civil Statutes* article 1105b.[135] The appellants argued that the

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by the Supreme Court of the United States to be illegal on the strength of the Texas Supreme Court's holding in *Cannon*. *Id.* at 575.

129. 683 S.W.2d at 470. In addition, the court pointed out that what may be an insubstantial amount as to one taxpayer may amount to quite a substantial sum, in the aggregate, when collected from all parties being taxed under the illegal assessment. *Id.* at 470-71. This circumstance may make a class action suit appropriate for cases premised on the erroneous use of the equity capital formula.

130. *Id.* at 471. The court cited the example of punishing those taxpayers who do not act diligently and timely in challenging an illegal taxation scheme as one possible justification for the substantial injury requirement. *See Cannon*, 153 Tex. at 571-72, 271 S.W.2d at 416-17 (substantial injury requirement was imposed as penalty taxpayer had to pay for sitting idly by while taxing authorities put into effect a discriminatory plan of taxation).

131. 683 S.W.2d at 471.

132. *Id.* at 472. A tax plan is not actually formulated until the governing body of the city or school district determines the amount of money required to finance its operations and sets a tax rate in reliance upon the assessment rolls. Thus, "[i]t should be sufficient if the suit is filed before the governing body sets the tax rate . . . ." *Id.* The court in *Charles Schreiner* seems to imply that after that time, the substantial injury requirement may be defensible. The overall tenor of the opinion suggests, however, that anytime a party proves that the assessment rolls involve the taxation of exempt property, the San Antonio court would apparently refuse to reward "the wrongdoer" by imposing on the taxpayer the burden of proving substantial injury. *Id.* at 470-72.

133. 693 S.W.2d 753 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

134. *See* Haynes v. City of Abilene, 659 S.W.2d 638, 641 (Tex. 1983) (assessments greater than benefits conferred renders ordinance in violation of Texas Constitution); City of Houston v. Alnoa G. Corp., 638 S.W.2d 515, 517 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (failure to include special benefits analysis in calculation rendered assessment constitutionally void as arbitrary and capricious); TEX. CONST. art. 1, § 17 (prohibits taking of private property for public use without just compensation).

135. TEX. REV. CIV. STAT. ANN. art. 1105b, § 7 (Vernon Supp. 1986) provides (emphasis added):

> The part of the cost of improvements on each portion of highway ordered improved which may be assessed against abutting property and owners thereof shall be apportioned among the parcels of abutting property and owners thereof, *in accordance with the Front Foot Plan or Rule provided that if the application of this rule would, in the opinion of the Governing Body, in particular cases, result in injustice or inequality, it shall be the duty of said Body to apportion and assess*

city ordinance providing that "each front foot of an abutting owner's lots may be assessed a portion of the total cost of improvements which is equal to the portion of the assessment levied against each front foot of property of other abutting owners along the improved segment of the road" violated the provisions of article 1105b.[136] The city ordinance had expressly failed to assess costs with regard to any special benefits as required by article 1105b, and therefore, the assessment was constitutionally impermissible.[137] Accordingly, because the ordinance in question assessed property owners equally and without imposing heavier burdens on property owners receiving special benefits, it was held unconstitutional and void.[138] In addition, the court overruled the trial court's holding that the plaintiffs' suit was barred by the fifteen-day statutory time period for appeal of an assessment,[139] and held that because the ordinance in question was constitutionally void, the fifteen-day limit was irrelevant and inapplicable.[140]

In *Arnold v. Crockett Independent School District*[141] a landowner appealed from the trial court's judgment in favor of the school district for delinquent property taxes. On motion for rehearing, the court first corrected its own prior error in assessing court costs against the school district, which is clearly contrary to section 33.49(a) of the Texas Tax Code,[142] and then considered the primary issue of whether the property assessed had been properly

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> *said costs in such proportion as it may deem just and equitable, having in view the special benefits in enhanced value to be received by such parcels of property and owners thereof,* the equities of such owners, and the adjustment of such apportionment so as to produce a substantial equality of benefits received and burdens imposed. Any parcel of land abutting the highway proposed for assessment is subject, in its entirety as a parcel, to the assessment when the assessment is imposed by ordinance, irrespective of subdivision or partial sale after the date of mailing of the notice if the city has delivered to the county clerk for recording a notice of the proposed assessment that describes each such abutting parcel in the notice or by reference.

The front foot plan essentially calculates the total cost of the improvements and divides that cost by the sum total of each foot of land abutting the roadway. Each owner is then assessed based on the amount of land he owns that abuts the improved road.

136. 693 S.W.2d at 754 (quoting Foxworth-Galbraith Lumber Co. v. Realty Trust Co., 110 S.W.2d 1164, 1167 (Tex. Civ. App.—Amarillo 1937, writ dism'd)).

137. 693 S.W.2d at 755. In City of Houston v. Alnoa G. Corp., 638 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.), the same ordinance was declared arbitrary, capricious, and illegal on the same grounds as in *Smith*, but only as to the complaining landowner in that case. *Id.* at 517. In *Smith*, the court held that the ordinance could not properly be applied to any landowner. 693 S.W.2d at 755.

138. *See* TEX. REV. CIV. STAT. ANN. art. 1105b, § 9 (Vernon Supp. 1986) (prescribes the 15-day limit for appeal of an assessment).

139. 693 S.W.2d at 755; *see* Elmendorf v. City of San Antonio, 242 S.W. 185, 188 (Tex. Comm'n App. 1922, judgment adopted). The court in *Smith*, 693 S.W.2d at 755, also questioned the constitutionality of the time limit as perhaps unreasonable in light of the court of appeals decision in Fitts v. City of Beaumont, 688 S.W.2d 182, 184-85 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.), discussed *infra* at notes 234-39 and accompanying text.

140. 693 S.W.2d at 755.

141. 688 S.W.2d 884 (Tex. App.—Tyler 1985, no writ).

142. TEX. TAX CODE ANN. § 33.49(a) (Vernon 1982) states: "Except as provided by Subsection (b) of this section, a taxing unit is not liable in a suit to collect taxes for court costs . . . and may not be required to post security for the costs." An independent school district is included within the definition of "taxing unit." TEX. TAX CODE ANN. § 1.04(12) (Vernon 1982).

valued for purposes of taxation. The court noted the general rule that when the taxing authority offers no evidence as to value of the property, the taxpayer bears the heavy burden of establishing that the value assessed on each tract was exhorbitant and, therefore, unreasonable and confiscatory, thereby establishing that fraud attended the assessments.[143] The *Arnold* court, however, held that the taxpayer had only to show a gross difference between the assessed value and the market value[144] of the subject property in order to establish the requisite element of fraud.

In reviewing the record, the court of appeals noted that the trial court, with one exception, adopted values for the subject property almost identical to the district's assessment values.[145] The only evidence contrary to the district's assessment consisted of the much lower values testified to by the landowner's qualified expert appraiser. Having concluded that the trial court's findings of market value were contrary to the great weight and preponderance of the evidence,[146] the court of appeals remanded to the trial court for a determination of whether the assessed valuations were grossly excessive.[147]

In *Board of Appraisal Review v. Protestant Episcopal Church Council*[148] the appellees had successfully set aside a board order that denied the diocese's application for exemption from ad valorem taxation with respect to certain undeveloped land surrounding the school it owned and operated. All buildings and other improvements associated with the school were located exclusively on a 207-acre portion of a larger 392-acre tract of land owned by the diocese. The controversy dealt with the appraisal board's denial of tax exempt status to the remaining 185 acres, which it contended the diocese was not operating exclusively in connection with the school.[149] The case hinged on the court's interpretation of Texas statutes that exempt school buildings reasonably necessary for the operation of the school[150] from ad valorem taxation and define what land is included within the definition of a

143. 688 S.W.2d at 886.

144. A gross difference must be shown "because a difference in value which reflects a mere difference of opinion or an honest mistake in judgment on the part of the Board of Equalization as to the true value will not justify a court in striking down the Board's assessments." *Id.* (citing State v. Whittenburg, 153 Tex. 205, 210, 265 S.W.2d 569, 573 (1954)).

145. 688 S.W.2d at 886.

146. *Id.* at 887.

147. *Id.* Remanding the case to the trial court, the court of appeals did not mention any specific error committed by the trial court but simply directed it to make another attempt at valuation. *Cf.* Stedman v. Georgetown Sav. & Loan Ass'n, 595 S.W.2d 486, 488 (Tex. 1979) (writing on whether the evidence supported the findings of the lower courts, the Texas Supreme Court held it to be fundamental that the fact findings be upheld if more than a scintilla of evidence supported them).

148. 676 S.W.2d 616 (Tex. App.—Austin 1984, writ dism'd).

149. *Id.* at 618. The Board drew the dividing line between these two portions of the tract solely in relation to the improvements thereon. The line bore no relationship to any existing or former ownership boundaries.

150. TEX. TAX CODE ANN. § 11.21(a)(3) (Vernon 1982) provides: "(a) A person is entitled to an exemption from taxation of the buildings and tangible personal property that he owns and that are used for a school that is qualified . . . if: . . . (3) the buildings and tangible personal property are reasonably necessary for the operation of the school."

building.[151] The diocese presented evidence at trial that the surrounding 185 acres provided a buffer zone from the outside commercial community necessary to implement and foster the autonomous and individual spirit that was part of the church's teachings and that the diocese also used the land to take advantage of the vast rural setting for outdoor class instructions and athletics.[152] The diocese argued that the statutory term "necessary" should encompass all land required to implement their unique educational philosophy.[153] Although the court found persuasive the board's argument that the appellee's interpretation was far too broad and might allow schools unilaterally to adopt educational philosophies that enable them to avoid taxation, it nevertheless found the church's evidence compelling and granted the exemption.[154] In addition, the court recognized that the goals of both private and public education go far beyond mere formal instruction and individual education styles may properly be considered in determining what lands are " 'reasonably necessary' for the operation of the school."[155]

In *Ripley v. Stephens*[156] the court of appeals reversed the decision of the district court and held that the Stephenses did not qualify for the $10,000 statutory homestead exemption from ad valorem school taxation for persons over sixty-five years of age.[157] The parties agreed that, on the date of the assessment, the husband was under age sixty-five and the wife was over age sixty-five and that the requested exemption was based upon the wife's age. Accordingly, the court of appeals disallowed the exemption because the house was the separate property of the under-aged husband and the statute plainly states that the exemption applies only to homesteads "*owned* by any person age 65 years or older."[158] Thus, even though the Stephenses' home might have qualified as a homstead for other constitutional purposes,[159] the property did not qualify for this exemption from taxation.

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151. *Id.* § 11.21(e) provides: "In this section, 'building' includes the land that is reasonably necessary for use of, access to, and ornamentation of the building."

152. 676 S.W.2d at 621.

153. The diocese contended that a crucial element of its teaching and faith was in the area of self-government and independence, which could only be taught effectively if the school were isolated from the outside commercial community. *Id.* 621-22 n.2.

154. *Id.* at 622. The board relied upon the case of St. Edwards' College v. Morris, 82 Tex. 1, 5, 17 S.W. 512, 513 (1891), which denied tax exempt status to land used to grow produce and stock for the boarding school and was contiguous with that used exclusively for school purposes. The court reasoned, however, that *St. Edwards'* seemed to focus more upon whether the land was used exclusively for school purposes rather than upon the concept of necessity. 676 S.W.2d at 620.

155. 676 S.W.2d at 622-23. The court listed certain goals of public education recognized in the State of Texas, including instruction in the democratic process and self-government that do not directly relate to formal instruction but that are, nevertheless, recognized as legitimate. Such goals included instilling behavior patterns that would make 'students responsible members of society' and developing the skills necessary to creative and responsible use of leisure time. *Id.*

156. 686 S.W.2d 757 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

157. TEX. TAX CODE ANN. § 11.13(c) (Vernon 1982), enacted pursuant to TEX. CONST. art. VIII, § 1-a, provides an exemption from ad valorem school taxation for $10,000 of the market value of a residential homestead owned by any person age 65 or older.

158. 686 S.W.2d at 758 (emphasis by the court).

159. *E.g.*, exemption from forced sale and partition under TEX. CONST. art. XVI, § 50.

V. ELECTED OFFICIALS AND ELECTIONS

A. Federal Courts

The federal courts decided two cases during the Survey period that involved challenges to at-large voting[160] in Texas school board elections. In *McCarty v. Henson*[161] the Fifth Circuit rejected the claim of a group of black voters that the at-large system diluted their vote in violation of the fourteenth and fifteenth amendments to the United States Constitution.[162] In denying the plaintiffs' relief on their constitutional claims, the court held that the plaintiffs' failure to show that the city had implemented and maintained the at-large system with a discriminatory motive,[163] or that the system had a discriminatory impact on the electoral process, could not support a claim that the election scheme was unconstitutional.[164] Unable to find a discriminatory motive or uncover evidence of discriminatory impact such as hindrance to the candidacy of black persons for the board or unresponsiveness by the school board to black persons, the court of appeals upheld the election scheme as lacking both discriminatory intent and impact.[165]

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160. An at-large system is a system by which all voters in the city elect a certain number of members to the city council without regard to the district in which the voter resides. Both McCarty v. Henson, 749 F.2d 1134 (5th Cir. 1984) (discussed *infra* notes 161-65) and Sierra v. El Paso Indep. School Dist., 591 F. Supp. 802 (W.D. Tex. 1984) (discussed *infra* notes 166-78), involved allegations that this procedure had the effect of diluting the minority vote from districts that were predominantly occupied by minorities.

161. 749 F.2d 1134 (5th Cir. 1984).

162. U.S. CONST. amend. XIV provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." *Id.* amend. XV provides in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

163. 749 F.2d at 1137. The United States Supreme Court has recently held that a plaintiff must show that the governing body enacting the challenged legislation acted with a discriminatory purpose in order to support a finding of unconstitutional voting dilution under either the 14th or 15th amendments to the U.S. Constitution. *See* Rogers v. Lodge, 458 U.S 613, 618-19 (1982); City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); *see also* Personnel Admin. v. Feeney, 442 U.S. 256, 275-76 (1979) (disproportionate impact of civil service exam requirement will not support equal protection claim without showing of discriminatory motive); Washington v. Davis, 426 U.S. 229, 246 (1976) (discriminatory result of language test insufficient to establish equal protection violation in absence of discriminatory motive); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (denial of rezoning for low-income housing did not involve racial discrimination, but rather protection of land values); *cf.* Voting Rights Act, 42 U.S.C. § 1973 (1983), as amended (objective indicia showing that the election scheme has discriminatory impact may establish claim of violation of Voting Rights Act).

164. 749 F.2d at 1137. Both discriminatory intent *and* discriminatory impact must be proven to establish a denial of constitutional rights under the 14th or 15th amendments. Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (objective criteria could be used to show intent to discriminate); *accord* Rogers v. Lodge, 458 U.S. 613, 618-19 (1982); City of Mobile v. Bolden, 446 U.S. 55, 62 (1980).

165. Having failed to show any denial or abridgement of their right to vote (no discriminatory impact), the *McCarty* court also rejected plaintiffs' claim that the election scheme violated the Voting Rights Act, 42 U.S.C. § 1973 (1983), which provides that a state or political subdivision cannot deny, on account of race or color, a citizen's right to vote. Such a denial occurs when certain classes have less opportunity than other citizens to elect representatives of their choice. That discriminatory intent does not have to be shown to establish a violation of the Voting Rights Act is well settled. *See* Jones v. City of Lubbock, 727 F.2d 364, 373-75 (5th Cir.

In a similar voting dilution case, the plaintiffs brought a class action suit on behalf of all Mexican-American voters residing in the El Paso Independent School District eligible to vote for members of the district's board of trustees. In *Sierra v. El Paso Independent School District*[166] the plaintiffs alleged that the ordinance in question violated the fourteenth and fifteenth amendments to the United States Constitution and the Voting Rights Act.[167] The plaintiffs alleged that the at-large, by-place, majority runoff, nonpartisan election system unconstitutionally diluted the voting strength of Mexican-Americans and made it difficult for them to elect representatives of their choice to the school board.[168] With respect to the plaintiffs' constitutional challenge, the court held that, as in *McCarty*, the failure to present evidence that any feature of the then-existing election system had been enacted with discriminatory intent was fatal to the plaintiffs' cause of action.[169]

With respect to the plaintiffs' alternative challenge that the scheme violated the Voting Rights Act, the district court relied upon the Fifth Circuit's decision in *Jones v. City of Lubbock*.[170] In *Jones* the Fifth Circuit affirmed the constitutionality of the 1983 amendment to section 2 of the Voting Rights Act, which provided that objective criteria could be used to show that a challenged election scheme had a discriminatory impact, and further, held that it was unnecessary to show a discriminatory motive for a violation of the Voting Rights Act.[171] In analyzing certain objective factors enumerated in the legislative history to the 1983 amendment,[172] the *Sierra* court considered whether the plaintiffs had demonstrated that the El Paso election system had the discriminatory result required to establish a violation of the Voting Rights Act. First, the court determined that the repealed poll tax, together with, until recently, the printing of ballots exclusively in English constituted past discriminatory practices that continued to contribute to the lower voting rates of Mexican-Americans when compared to Anglo vot-

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1984) (upholding constitutionality of 1982 amendment to Voting Rights Act and rejecting argument that a showing of subjective discriminatory intent is required to establish a violation of its provisions).

166. 591 F. Supp. 802 (W.D. Tex. 1984).

167. *See supra* notes 162-63.

168. 591 F. Supp. at 804. A "by-place" system elects members to the board by numbered positions. *Id.* Over 50% of those who resided within the El Paso Independent School District were Mexican-Americans and 70% of the students enrolled in district schools were Mexican-Americans, but only 43% of the registered voters within the district were Mexican-Americans.

169. *Id.* at 805.

170. 727 F.2d 364 (5th Cir. 1984), discussed in Geary, Davenport & Jobe, *1985 Annual Survey, supra* note 1, at 594.

171. 727 F.2d at 373-75 (1983 amendment to Voting Rights Act was legitimate exercise of congressional power). Section 2 of the Voting Rights Act was enacted to overrule the United States Supreme Court's opinion in City of Mobile v. Bolden, 446 U.S. 55 (1980), which had overruled the Fifth Circuit's decision in Zimmer v. McKeithan, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parrish School Bd. v. Marshall, 424 U.S. 636 (1976) (allowing objective criteria to establish a discriminatory motive in voting legislation). In *Zimmer* the Fifth Circuit had substituted the "results test," which required only objective criteria showing that the legislation had a discriminatory impact, for the prior requirement that discriminatory purpose or intent be shown in order to constitute a violation of the Voting Rights Act. 485 F.2d at 1304-05.

172. 591 F. Supp. at 806-07.

ers.[173] Furthermore, based on expert testimony, the court concluded that the voting pattern in the district's school board elections had a high degree of racial polarization and that the ethnicity of a candidate was a very important consideration with respect to voter preference.[174] Taking into account the totality of facts and circumstances surrounding the challenged voting scheme,[175] the district court concluded that the election system for the El Paso School Board of Trustees had resulted in "a denial or abridgment of the right"[176] of Mexican-Americans to vote as prohibited by the Voting Rights Act.[177] Accordingly, the court entered judgment in favor of plaintiffs and ordered the defendants to implement a single-member district system of voting in place of the at-large scheme.[178]

B. Texas Courts of Appeals

In *Miller v. Lesher*[179] the relator-plaintiff sought a writ of mandamus[180] to compel the respondent-judge to grant his motion to set a supersedeas bond pending the outcome of a contested election.[181] The voters had elected the relator in *Miller* sheriff of Brazos County, but his opponent brought a subsequent election contest that resulted in the judge's declaring the election void. The judge had refused to allow Miller, the newly elected sheriff, to file a supersedeas bond, which would have suspended the judgment, stating that "the interest of justice will be best served if the judgment of this Court is not suspended during an appeal of the cause . . . ."[182] Instead, the judge signed an order granting the contestant's motion to post a bond under Texas Rule of Civil Procedure 364(f), which allows a plaintiff, as opposed to a defendant, to post a bond and prevent the judgment from being suspended.[183] The

173. *Id.* at 807.

174. *Id.* at 807-08. In addition, the court determined that the vast size of the district, its large population, staggered terms for trustees, filing by numbered positions, majority runoff, and the absence of any subdistrict residency requirement were all elements of the existing election system that enhanced the opportunity for discrimination. *Id.*

175. "The Voting Rights Act requires that the totality of the circumstances be considered in determining whether a particular system of electing public officials results in the denial to a particular class of citizens of equal opportunity to participate in the political process and to elect representatives of their choice." *Id.* at 811.

176. 42 U.S.C. § 1973 (1983).

177. 591 F. Supp. at 812.

178. *Id.*

179. 694 S.W.2d 193 (Tex. App.—Houston [14th Dist.] 1985, no writ).

180. The three requisite elements of mandamus relief are: (1) a legal duty to perform a nondiscretionary act; (2) a demand for performance of the nondiscretionary act; and (3) a refusal to perform the nondiscretionary act after demand. Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979); Bantuelle v. Renfroe, 620 S.W.2d 635, 639 (Tex. Civ. App.—Dallas 1981, no writ).

181. A supersedeas bond filed with the registry of the court pursuant to TEX. R. CIV. P. 364(a) has the general effect of suspending a judgment and maintaining the status quo. The trial judge in *Miller* refused to allow the newly elected sheriff to post a supersedeas bond under rule 364(a), but granted the contestant's motion for bond under rule 364(f). *See infra* note 183.

182. 694 S.W.2d at 195.

183. TEX. R. CIV. P. 364(f) provides:

> When the judgment is for other than money or property or foreclosure, the bond or deposit shall be in such amount to be fixed by the said court below as will secure the plaintiff in judgment in any loss or damage occasioned by the delay

court of appeals held that each party has the right to an opportunity to supersede the judgment,[184] and that the trial court's grant of the bond under rule 364(f) cannot be used to usurp the jurisdiction of the appeals court.[185] The court reasoned that the trial court had abused its discretion by refusing to suspend the judgment because the effect of such refusal is to remove the sheriff from office pending a new election. The Texas Election Code does not sanction this temporary removal from office and, furthermore, this removal prevents the party appealing the outcome of the election contest from exercising his right to appeal that decision.[186]

VI. OPEN MEETINGS ACT

The Texas courts of appeals decided two significant cases during the Survey period interpreting provisions of the Open Meetings Act.[187] In *Thornton v. Smith County*[188] individuals owning land adjacent to a county road that had been partially deeded by the Smith County commissioners court to a private pipeline corporation sought a declaratory judgment cancelling the deed and an injunction prohibiting the county from closing the road.[189] The critical issue in *Thornton* was whether the posting of public notice of the commissioners court meeting, which was being held to vote on the closing of the road in question, contravened section 3(A) of the Act requiring that such notice be "posted in a place readily accessible to the general public at all times for at least 72 hours preceding the . . . meeting."[190] The notice was

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> on appeal, but the court may decline to permit the judgment to be suspended on filing by the plaintiff of a bond or deposit to be fixed by the court in such an amount as will secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper.

184. 694 S.W.2d at 195. The court of appeals held that the trial court has no jurisdiction to deny a plaintiff's right to supersede a judgment by posting a bond under rule 364(a). *Id.*; *see* Houtchens v. Mercer, 119 Tex. 244, 248, 27 S.W.2d 795, 796 (1930); Alvarez v. Laughlin, 362 S.W.2d 915, 916 (Tex. Civ. App.—San Antonio 1962, no writ).

185. 694 S.W.2d at 195.

186. The court stated:

> There is no provision in the Election Code or in Texas case law that provides for the removal of an elected official from office following an election contest where the election is declared void. For that period of time between the judgment that the election was void and the time a new election is held, the previously elected official should continue to hold office.

Id.

187. TEX. REV. CIV. STAT. ANN. art. 6252-17, §§ 1-5 (Vernon 1970 & Supp. 1985).

188. 690 S.W.2d 949 (Tex. App.—Tyler 1985, writ ref'd n.r.e.)

189. The county sought to close the portion of the road that had been deeded to the pipeline corporation.

190. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(h) (Vernon Supp. 1986) provides that notice of a meeting that is subject to its provisions, other than an emergency meeting, must be posted for at least 72 hours preceding the scheduled time of the meeting. The history of the notice requirement under the Act is worth noting. The original Act simply required three days' notice preceding the day of a meeting. *Id.* § 3A(f) (Vernon 1970). In 1975 the notice provision was made more specific by requiring 72 hours. Act of 1975, ch. 367, § 1, 1975 Tex. Sess. Law Serv. 968 (Vernon). Then, in 1981, the Amarillo court of appeals, in Lipscomb Indep. School Dist. v. County School Trustees, 498 S.W.2d 364 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.), held that notice posted for 72 hours preceding a meeting was in substantial compliance with § 3A(h) even when the courthouse where the notice was posted re-

posted at 9:00 a.m. on the Friday preceding the 10:00 a.m. Monday morning meeting. Smith County contended that evidence presented at trial showing that the area of the courthouse where notice was posted was accessible to the public through the sheriff's office over the weekend established that the notice posted was in substantial compliance with the provisions of the Act.[191] Although the court was cognizant of the precedent that holds substantial compliance with the Act sufficient,[192] it concluded that the Texas Legislature's continuing amendments to the notice requirements of section 3(A) of the Act[193] left no room for judicial interpretation.[194] Accordingly, the court held that the notice was not posted in a place readily accessible to the public and, therefore, the county violated section 3(A) of the Act.[195]

In *Board of Trustees v. Cox Enterprises, Inc.*[196] the Texarkana court of appeals held that members of the news media who had been expressly provided the right to bring actions by mandamus or injunction to prevent a violation of the Open Meetings Act could also seek declaratory relief for a violation of the Act.[197] The principal issues in *Cox Enterprises* involved the interpretation of key provisions of the Act that distinguish between local government action that must occur in sessions open to the public and action that may be transacted in closed executive sessions.[198]

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mained locked for at least two-thirds of the 72 hours. *Id.* at 366-67. The attorney general criticized the *Lipscomb* decision and predicted that the Texas Supreme Court would hold otherwise if squarely confronted with the *Lipscomb* notice question. *See* Op. Tex. Att'y Gen. No. H-419 (1974). Then, in 1981, the legislature apparently rejected the substantial compliance doctrine set forth in *Lipscomb* and amended the Act to require that notices be "posted in a place *readily accessible to the general public at all times* for at least 72 hours preceding the scheduled time of the meeting . . . ." TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(h) (Vernon Supp. 1986) (emphasis added).

191. 690 S.W.2d at 952.

192. *See, e.g.*, McConnell v. Alamo Heights Indep. School Dist., 576 S.W.2d 470, 474 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Santos v. Guerro, 570 S.W.2d 437, 440 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Stelzer v. Huddleston, 526 S.W.2d 710, 713 (Tex. Civ. App.—Tyler 1975, writ dism'd); Lipscomb Indep. School Dist. v. County School Trustees, 498 S.W.2d 364, 367 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); Toyah Indep. School Dist. v. Pecos-Barstow Indep. School Dist., 466 S.W.2d 377, 380 (Tex. Civ. App.—San Antonio 1971, no writ); *cf.* Cameron County Good Gov't League v. Ramon, 619 S.W.2d 224, 231 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (in dictum court states that literal, not substantial, compliance is required).

193. *See supra* note 190.

194. 690 S.W.2d at 953.

195. *Id.* The decision in *Thornton* is the first in Texas expressly to overrule the substantial compliance doctrine and hold that literal compliance with the notice requirements of the Act is required.

196. 679 S.W.2d 86 (Tex. App.—Texarkana 1984, writ granted).

197. *Id.* at 88. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3 (Vernon Supp. 1986) provides that "any interested person, *including bona fide members of the news media*" has standing to sue for violations of the Act (emphasis added). In addition, the *Cox Enterprises* court held that the news media's standing to bring such actions is not dependent upon a showing of special interest apart from that of the general public. 679 S.W.2d at 88.

198. Section 2(*l*) of the Act provides:

> Whenever any deliberations or any portion of a meeting are closed to the public as permitted by this Act, no final action, decision, or vote with regard to any matter considered in the closed meeting shall be made except in a meeting which is open to the public and in compliance with the requirements of Section 3A of this Act.

Section 2(*l*) of the Act provides that "no final action, decision, or vote" shall take place except in a meeting open to the public in accordance with the Act.[199] The Austin School District Board of Trustees argued that preliminary decisions can be made in private executive session as long as the final vote or report is made or disclosed in a public meeting. In emphasizing the legislative policy to allow citizens to participate in the decision-making process before a final action is taken, the court chose to ignore the semantics of the school board's proposal and held that the appellant had violated the Act by conducting a private straw vote to determine support among the members of the school board for a particular candidate for president.[200] The court reasoned that when the school board took a split straw vote and subsequently announced in a public meeting a unanimous vote, it violated the spirit and letter of the Act by misleadingly allowing board members to appear unanimous.[201] The court stressed that its decision was not intended to prevent debate or expression of opinion in a closed executive session.[202] When, however, expression of opinion crosses the line between debate and the formation of a clear consensus on an issue, the court stated, the Act is violated.[203] In contrast to *Thornton*, the court in *Cox Enterprises* held that the appellant's posting of a notice setting forth the general terms and subject matter of executive session meetings was in substantial compliance with the notice provisions of the Act and, consequently, decisions made in those closed sessions were not voidable.[204]

VII. TORT LIABILITY

A. Fifth Circuit Court of Appeals

In *Grandstaff v. City of Borger*[205] the plaintiff brought a wrongful death

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TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(l) (Vernon Supp. 1986).

199. *Id.*

200. 679 S.W.2d at 89. The court expressly acknowledged the difficulty of determining when a final decision has been made in private but later reported in public.

> We recognize that enforcement of the provision as here interpreted may be difficult. A group could defeat the purpose of the Act by expressing their opinions in the private session and then confirming the majority position by unanimous vote in the open meeting. Difficulty of enforcement, however, is not a proper canon for interpretation of a statute as long as the meaning of the legislature can be ascertained. Moreover, such a practice can usually be detected and brought to light.

Id. at 89 n.4.

201. *Id.* The court also held that the appellants' decision in executive session to hire an independent consultant should have been made in public. *Id.* at 91; *cf.* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(g) (Vernon Supp. 1986), which provides that decisions with respect to the hiring of employees, as opposed to independent contractors, may take place in executive session.

202. 679 S.W.2d at 89.

203. *Id.*

204. *Id.* at 91-92. In contrast to the particular notice requirements for open sessions or meetings, the notice requirements for closed sessions are less stringent. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(a) (Vernon Supp. 1986) (notice content requirements); *see also supra* note 190.

205. 767 F.2d 161 (5th Cir. 1985).

action and claim under 42 U.S.C. section 1983,[206] alleging a constitutional violation of the plaintiff's civil rights against the city of Borger and several of its individual police officers after the officers shot and killed an innocent man whom they believed to be a fleeing fugitive. The jury found that the officers in question had killed an innocent citizen without justification, had acted in conscious disregard of a substantial risk, and had used deadly force in a wanton, malicious, and oppressive manner. The court first acknowledged that these findings were the basis for holding the defendants liable for wrongful death and violation of the plaintiff's civil rights.[207] Cognizant of the city's governmental immunity from the wrongful death claim,[208] the court then stated that the liability of the city for the reckless acts of the police officers depended upon the scope of section 1983: "There is no respondeat superior liability of a municipality for the negligence, gross or ordinary, of an officer. There must be (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subject to a deprivation of constitutional right."[209] Having established a constitutional deprivation and finding that the city police chief was the sole policymaker, the remaining inquiry for the court was whether some policy of the police chief had caused the death in question.[210]

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206. 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 has been interpreted to allow private citizens to sue states and local governing bodies for deprivation of their constitutional rights. The United States Supreme Court held in Monell v. Department of Social Serv., 436 U.S. 658 (1978), that local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief when the alleged unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690.

207. 767 F.2d at 167. "[T]he Fourteenth Amendment protection against deprivation of life without due process of law is violated when police officers using deadly force, in *conscious disregard* of substantial risk of harm to innocent parties, kill an innocent third party." *Id.* (emphasis by the court); *see* Tennessee v. Garner, 105 S. Ct. 1694, 1700, 85 L. Ed. 2d 1, 8 (1985) ("fundamental interest in [one's] own life need not be elaborated upon").

208. 767 F.2d at 168. A state or local government cannot be sued without its consent. Hansen v. Blackmon, 169 S.W.2d 955, 957 (Tex. Civ. App.—El Paso 1942), *aff'd*, 140 Tex. 536, 169 S.W.2d 962 (1943). "Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." 767 F.2d at 172 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)). Accordingly, the circuit court in *Grandstaff* overturned the lower court's award of damages against the city based on plaintiff's claim for negligent infliction of emotional distress because such award was predicated on a state common law tort. 767 F.2d at 172. *But see* TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970 & Supp. 1985), commonly known as the Texas Tort Claims Act, which provides a governmental waiver of immunity under certain circumstances, but provided no waiver applicable to the facts of *Grandstaff*.

209. 767 F.2d at 169 (citing Monell v. Department of Social Serv., 436 U.S. 658 (1978); Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 3476, 87 L. Ed. 2d 612 (1985); Webster v. City of Houston, 735 F.2d 838 (5th Cir.) (en banc), *rev'd on other grounds*, 739 F.2d 993 (5th Cir. 1984) (en banc)).

210. "The policy must be 'the moving force of the constitutional violation.' " 767 F.2d at 169 (quoting Monell v. Department of Social Serv., 436 U.S. 658, 694 (1978). The court

Throughout the opinion in *Grandstaff* the court revealed an obvious tone of rebuke for the callous disregard for innocent life shown by the city of Borger police force both before and after the incident. Interestingly, the court admitted that no evidence had been introduced to show a pattern of prior misconduct and thereby establish a policy of the city to use deadly force without justification; instead the court concluded that the city's actions following the shooting demonstrated the policy that was the causal link to the plaintiff's death:

> The disposition of the policymaker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. . . . [T]he subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy.[211]

Consequently, the court affirmed the decision of the district court with respect to the liability of the city of Borger under 42 U.S.C. section 1983.[212]

B. Texas Supreme Court

In 1985 the Texas Legislature repealed the Texas Tort Claims Act

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pointed out that proof of inadequate training usually will not satisfy the policy-cause requirement for liability under § 1983. The court voiced doubt that a finding of gross negligence in police training would always result in municipal liability. 767 F.2d at 170; *accord* Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2435-36, 85 L. Ed. 2d 791, 803-04 (1985) (plaintiff did not prove that inadequate training constituted a "policy" under *Monell* without evidence that policymakers consciously chose an inadequate training program). *But see* Turpin v. Mailet, 619 F.2d 196, 201-02 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980); Reeves v. City of Jackson, 608 F.2d 644, 652-53 (5th Cir. 1979); Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

211. 767 F.2d at 171; *cf.* Anderson v. United States, 417 U.S. 211, 219 (1974) (subsequent acts tended to prove the nature of a prior conspiracy); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (subsequent conduct proved discriminatory motive in a prior employment decision).

212. The reaction of the United States Supreme Court to the Fifth Circuit's opinion in *City of Borger* is awaited with interest. Although the facts of the case are so shocking as to cause one to feel emotionally that the city should bear the liability for its grossly negligent police officers, the establishment of an official city policy based upon acts occurring subsequent to the shooting greatly expands previous holdings with regard to 42 U.S.C. § 1983. In fact this inference of a policy was "too big a leap" for the dissenting Justice Garwood. He would have required some actual proof of authorization or approval of the officer's recklessness: "What we are really doing is punishing the City, not for wrongfully or unconstitutionally bringing about this tragedy, but for its post-event callousness. That is not actionable under section 1983 . . . ." *Id.* at 173 (Garwood, J., dissenting). As the majority pointed out, however, the circumstantial inference of the policy may be necessary as "[a]n injured plaintiff is not likely to document proof of a policy or disposition, either of the policymaker or throughout the police force, that disregards human life and safety." *Id.* at 171. Certainly such an expansion of the scope of 42 U.S.C. § 1983 will, in the future, cause municipal authorities within the Fifth Circuit's jurisdiction to rebuke their employees quickly and publicly for alleged negligent conduct.

(TTCA) and codified it under the new Civil Practice and Remedies Code.[213] While the general effect of this revised version of the TTCA remains to be seen, some decisions by Texas courts during the Survey period under the old version remain significant after the codification because they construe provisions that remain substantively unchanged. In *Black v. Nueces County Rural Fire Prevention District No. 2*[214] a volunteer fireman sought damages from the appellee-district and the city of Corpus Christi for injuries sustained after being struck by a fire truck as it backed into position at the scene of a fire. The trial court found that the facts of the case fell within old section 3(b) of the TTCA, which waives governmental immunity in situations where injury results from the "use of a motor-driven vehicle . . . under circumstances where [the] officer or employee . . . would be personally liable to the claimant in accordance with the law of this state. . . ."[215] The court of appeals reversed the trial court and held that section 14(8) applied to the instant case which excepts the municipality from the section 4 waiver of immunity with regard to "[a]ny claim arising out of the action of an officer, agent or employee while responding to emergency calls or reacting to emergency situations when such action is in compliance with the laws and ordinances applicable to emergency action."[216]

The supreme court reversed the appeals court and held that a governmental unit could take advantage of this exemption only when laws and ordinances addressing emergency situations have been previously enacted with respect to the emergency situation resulting in the injuries in question.[217] The supreme court disagreed with the Nueces County court of appeals' interpretation of section 14 as requiring only that no law or ordinance have been violated during the emergency procedure.[218] The court reasoned that the plain language of the statute required that the appellant, in order to be eligible for the exemption, comply with laws during such procedure that appellant admitted did not exist.[219] In contrast to the majortiy in *Black*, Chief Justice Hill, writing for the dissent,[220] rejected the majority's construction as placing an unreasonable burden on governing bodies to promulgate comprehensive laws and ordinances covering every emergency situation in order take advantage of the exemption; he cited the legislative intent of providing

213. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon Pam. 1986). The TTCA previously was listed under TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970, as amended), *repealed by* Act of June 16, 1985, ch. 959, § 9(1), 1985 Tex. Sess. Law Serv. (Vernon).

214. 695 S.W.2d 562 (Tex. 1985).

215. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3(b) (Vernon 1970, as amended) (repealed 1985); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A) & (B) (Vernon Pam. 1986) (new codification retains essentially the same language).

216. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14(8) (Vernon 1970, as amended) (repealed 1985); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (Vernon Pam. 1986) (new codification contains no substantive change).

217. 695 S.W.2d at 563.

218. *Id.*

219. The holding in *Black* was said to be in accord with the Act's mandate of liberal construction of its provisions. *Id.*

220. Chief Justice Hill was joined by Justices McGee and Gonzalez. *Id.*

an exemption for emergencies except when the conduct violates laws and ordinances.[221]

In *Alvarado v. City of Lubbock*[222] the plaintiffs appealed a ruling of the appeals court affirming the trial court's grant of summary judgment in favor of the city of Lubbock on the basis that the city owed no duty to the plaintiff. The Alvarado family brought suit against the city and others, alleging the wrongful death of a family member in an automobile accident. Specifically, the plaintiffs alleged that the failure of the city to replace a fifty-five mile per hour speed limit sign when the city had earlier lowered the speed limit within the area in question to fifty miles per hour amounted to negligence on the part of the city.[223] The city denied any obligation to replace the sign, relying partially upon a 1973 telephone conversation between its traffic engineering director and a district engineer for the State Highway Commission in which they agreed that the state would assume the maintenance of all speed limit signs on state highways in Lubbock. The Texas Supreme Court reasoned that although a municipal governing body and the State Highway commission had the statutory authority to reach agreements regarding state highway maintenance,[224] the oral agreement between the two engineers was insufficient to relieve the city of its statutory responsibilities.[225]

Alternatively, the city claimed that Texas statutes mandate exclusive state control over speed limit sign maintenance[226] and that the city had not waived its governmental immunity under the TTCA.[227] With respect to the city's first contention, the court held that speed limit sign control is not always exclusive because cities are entitled by statute to alter speed limits within city limits.[228] In addition, because the city had failed to establish an effective agreement with the state, it failed to show conclusively that it owed no duty to the deceased with respect to the sign and, therefore, summary judgment was inappropriate.[229] The supreme court also rejected the city's latter contention that it had not waived governmental immunity under the

221. *Id.* at 563-64. Although the dissent's argument may somewhat overstate the task in light of the broad language that may be used in drafting such laws, it would seem that because of the significant split in the court and the likelihood that other suits involving emergency situations will be brought under this provision, some clarifying legislative pronouncement would be appropriate.

222. 685 S.W.2d 646 (Tex. 1985).

223. TEX. REV. CIV. STAT. ANN. art. 6701d, § 169(b) (Vernon 1977) provides: "The governing body of an incorporated city . . . with respect to any highway . . . within its corporate limits, shall have the same authority by city ordinance to alter maximum prima facie speed limits . . . as that delegated to the State Highway Commission . . . ." The speed limit in question was changed pursuant to this statute.

224. 685 S.W.2d at 648.

225. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 6673(b) (Vernon 1977); *cf.* Hale v. City of Dallas, 335 S.W.2d 785, 792 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.) (city effectively shifted all responsibility for maintenance of a highway to the state).

226. *See* TEX. REV. CIV. STAT. ANN. art. 6701d, § 30 (Vernon 1977) (authorizing State Highway Commission to place and maintain or provide for such placement and maintenance of traffic-control devices); *id.* art. 6701f (directing the State Highway Commission to erect and maintain speed signs).

227. *See supra* note 213.

228. TEX. REV. CIV. STAT. ANN. art. 6701d, § 169(b) (Vernon 1983).

229. 685 S.W.2d at 648.

TTCA,[230] stating that "[s]ection 14(12) excepts from the Act's ambit [a]ny claim arising from the absence, condition, or malfunction of any traffic or road sign, signal, or warning device unless such absence, condition or malfunction shall not be corrected by the governmental unit responsible within a reasonable time after notice."[231] The court held that because the accident involved the "absence of or condition of a traffic sign" a fact question existed as to whether the city had notice of the erroneous sign and had failed to correct the same within a reasonable period of time.[232] Accordingly, the court reversed the court of appeals and remanded the case to the trial court for trial on the merits.[233]

C. *Texas Courts of Appeals*

In *Fitts v. City of Beaumont*[234] the Beaumont court of appeals struck down a city charter provision of the city of Beaumont requiring that the city council receive notice of a claim for personal injuries within sixty days of the injury as being in violation of the open courts provision of the Texas Constitution.[235] The parties stipulated that the plaintiff in *Fitts* had been injured in a fall on city property and that the plaintiff gave notice of a claim against the city sixty-six days after the injury. Initially, the court rejected the plaintiff's contention that the city charter's notice provision violated the Texas Constitution on the basis that it denied her the general two-year period of limitations provided for personal injury cases.[236] The court stated that notice of claim provisions are premised upon the reasonable need of the city to investi-

230. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 4 (Vernon 1970) (repealed 1985) (prescribes the extent of the waiver of sovereign immunity); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.023-.025 (Vernon Pam. 1986) (new codification regarding extent of waiver).

231. 685 S.W.2d at 648-49 (citing TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14(12) (Vernon 1970) (repealed 1985)); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(a)(2) (Vernon Pam. 1986) (codification of § 4 retains essentially same language).

232. 685 S.W.2d at 648-49. In addition, the supreme court concluded that fact issues were presented as to whether the city owed a duty to the plaintiff and whether it had received proper notice from the plaintiffs of the pending action as required by § 16 of the old TTCA. *Id.* Section 16 provides that "[e]xcept where there is actual notice on the part of the governmental unit that death has occurred, . . . any person making a claim hereunder shall give notice of the same to the governmental unit against which such claim in made, . . . within six months from the date of the incident." TEX. REV. CIV. STAT. ANN. art. 6252-19, § 16 (Vernon 1970) (repealed 1985); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (Vernon Pam. 1986) (new codification retains same notice requirement). The court also felt that the notice requirement might not be applicable because certain of the plaintiffs were under age sixteen. 685 S.W.2d at 649; *see* City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981) (minority being considered an excusing disability; also recognizes other physical or mental incapacity as an acceptable reason for failing to meet the notice requirements established in the TTCA or city charters).

233. 685 S.W.2d at 649.

234. 688 S.W.2d 182 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

235. TEX. CONST. art. 1, § 13, provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." This language is popularly known as the "open courts" provision of the Texas Constitution pursuant to which all citizens are guaranteed access to the courts of the state.

236. TEX. CONST. art. XI, § 5, provides that city charter provisions shall not be enacted so as to conflict with the Texas Constitution or the general laws of the State of Texas.

gate a claim "while facts are fresh and conditions remain substantially the same . . . ."[237]

Having disposed of the appellant's first point of error, the court turned to the alternative contention that the sixty-day notice requirement violated the open courts provision of the Texas Constitution. Though no Texas court had specifically addressed the issue of whether a specific time period for notice of a claim conflicts with the open courts provision, the court relied upon previous Texas cases holding that the open courts clause prohibits unreasonable limitation provisions.[238] In striking down the Beaumont charter provision as an unreasonable limitation on an injured party's right to seek redress in the courts of the state, the court noted that the sixty-day limit was arbitrarily established by the city and found the six-month time limit for notice of claims under the TTCA to be persuasive evidence as to what period for giving notice of claim should be considered reasonable.[239]

In *City of Houston v. Arney*[240] the plaintiff brought an action for damages against the city of Houston under the TTCA, alleging that the city health clinic's failure to inform the plaintiff of a precancerous condition revealed by a Pap smear later caused her to have to undergo a complete hysterectomy. After finding that the default judgment taken against the city had the effect of establishing its liability,[241] the court considered whether the trial court's award of $502,500 in damages to the plaintiff was contrary to the TTCA's express limitation of liability to $100,000 per occurrence per person.[242] The trial court had ruled favorably on the plaintiff's contention that the legislature's passage of the Medical Liability and Insurance Improvement Act[243] had the effect of waiving the damage limitations set forth in the TTCA because it insured hospitals in excess of $100,000. The appellee also argued that just as the default judgment had the effect of admitting liability on behalf of the city, it also had the effect of admitting and establishing the damage award, and, therefore, the city could not contest the award on appeal.[244] The court held that although the city had expressly waived governmental

237. 688 S.W.2d at 184. In addition, the court recognized that notice of claim provisions aid and encourage settlement of litigation and preparation for trial. *Id.* (citing City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981)).

238. 688 S.W.2d at 184; *see* Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984) (TEX. INS. CODE ANN. art. 5.82, § 4 (repealed 1977) violative of art. I, § 13, because absolute limitation period established instead of accrual period); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (limitations period of TEX. INS. CODE ANN. art. 5.82, § 4 (repealed 1977) held violative of art. I, § 13, as applied to minors).

239. *See supra* note 213.

240. 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ).

241. *Id.* at 874 ("The default judgment against the City as to liability had the effect of admitting that the plaintiff had a viable cause of action under the waiver provisions of the TTCA."). The plaintiff in *Arney* was granted a default judgment as a result of the city's failure to timely respond to requested interrogatories.

242. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3(b) (Vernon 1970, as amended) (repealed 1985) (liability of governmental unit for negligence under the TTCA is limited to $100,000 per person injured); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (Vernon Pam. 1986) (provides, in addition, $300,000 limit for each single occurrence of bodily injury or death).

243. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1986).

244. 680 S.W.2d at 874.

immunity under the TTCA,[245] it had not waived the limitation of liability and no such waiver could be inferred or implied either by its taking of a default judgment against it or by the provisions of a supplemental statute not expressly waiving the limitation.[246]

In *City of Denton v. Page*[247] the plaintiffs had rented a house near a barn used by the landowner for storage that had been set on fire by arsonists on several occasions. On each occasion the local Denton Fire Department was summoned and the fire marshall made inspections of the premises. The barn was set aflame for yet a fourth time, and as a result the plaintiff-lessee suffered severe burns. Further inspection revealed that several full gasoline cans had been left in the barn. The plaintiff-lessee and his wife sued the city of Denton,[248] alleging, among other grounds, that the city was negligent for failing to establish adequate procedures to prevent future fires and failing to conduct an adequate inspection of the barn.[249] The court of appeals rejected the first ground for relief alleged by the plaintiffs because it failed to come within a specific waiver provision of the TTCA.[250] The court reasoned that procedures for fire prevention were policy decisions, and "if the negligence causing an injury lies in the formulating of policy . . . the government remains immune from liability."[251]

Although it rejected the plaintiff's first contention, the court found that the plaintiff's various allegations as to the city's failure to inspect and guard adequately against the dangerous condition of the barn properly stated a cause of action under section (3)(b)(3) of the TTCA, which waived immunity for "injuries so caused from some condition or some use of tangible property" as a result of the gasoline cans left in the barn.[252] The court em-

245. The court found that the plaintiff's allegations stated a claim under § 3 of the TTCA, which provides for waiver of governmental immunity when a plaintiff is injured by a use of, or condition of, property. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (Vernon 1970) (repealed 1985). The allegations were a negligent use of books and records and failure to inform the patient. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon Pam. 1986) (new codification of § 3).

246. 680 S.W.2d at 875. "A sovereign does not waive the $100,000.00 limit of liability . . . by failure to plead and urge it." *Id.* at 874 (citing City of Dallas v. Smith, 130 Tex. 225, 237, 107 S.W.2d 872, 877 (1937); Bryant v. Mission Mun. Hosp., 575 S.W.2d 136, 137 (Tex. Civ. App.—Corpus Christi 1978, no writ)); *see also* Sam Bassett Lumber Co. v. City of Houston, 145 Tex. 492, 496, 198 S.W.2d 879, 881 (1947) (general provisions of law must yield to specific provisions).

247. 683 S.W.2d 180 (Tex. App.—Fort Worth 1985, writ granted and dism'd).

248. The plaintiff also sued the landowner alleging, among other grounds, that the city had failed to comply with the laws of the city of Denton and had failed to warn plaintiffs adequately of a dangerous condition.

249. 683 S.W.2d at 187.

250. *Id.* at 188.

251. *Id.* (citing State v. Terrell, 588 S.W.2d 784, 788 (Tex. 1979)). The court also relied upon TEX. REV. CIV. STAT. ANN. art. 6252-19, § 14(9) (Vernon 1970) (repealed 1985) in denying plaintiff relief on its first ground. "The provisions of this Act shall not apply to: . . . [a]ny claim based on an injury or death connected with any act or omission . . . arising out of the failure to provide, or the method of providing, police or fire protection." *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.055(3) (Vernon Pam. 1986).

252. 683 S.W.2d at 188; *see* TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3(b) (Vernon 1970, as amended). This provision is now codified in the Civil Practices and Remedies Code and states that "[a] governmental unit in the state is liable for: . . . (2) personal injury and

phasized that despite the earlier inspections by the fire marshall, the plaintiffs had not been warned of the presence of this dangerous condition, and the city did not correct it after its discovery. In applying the liberal construction mandated by section 13 of the TTCA,[253] the court rejected the city's interpretation that the governmental unit must own, occupy, or control the property from which the injuries result in order to be liable under section 3(b) of the TTCA.[254] The court reasoned that because private citizens have been held liable for failing to correct dangerous conditions,[255] the portion of the statute stating that a governmental unit may be held liable for injuries caused "under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state" established that the city was subject to liability under section 3(b).[256]

The court next found sufficient evidence to support the jury's finding that the lessee was an invitee and that the city, as an independent contractor, had a duty of reasonable care to inspect the barn and warn him of the dangerous condition.[257] The evidence indicated that the fire marshall was negligent in that he knew or should have known in the exercise of ordinary care, about the gasoline stored in the barn.[258] Finally, the court rejected the city's claim that the trial court erred in awarding the lessee $100,000 in addition to a $31,000 award to his wife, in apparent contravention of the provisions of the

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death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon Pam. 1986).

The Supreme Court of Texas has interpreted § 3(b) of the TTCA as waiving governmental immunity for injuries arising out of three general areas: (1) use of publicly owned vehicles; (2) premises defects; and (3) injuries from some condition or use of the property. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 31 (Tex. 1983); *see generally* Geary & Davenport, *1984 Annual Survey, supra* note 61, at 487-88.

In *Page*, the court rejected the city's characterization of the plaintiffs' claim as based upon a premises defect. The presence of the gasoline cans clearly represented a dangerous condition and was so characterized by the plaintiffs' pleadings. 683 S.W.2d at 188.

253. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 13 (Vernon 1970) (repealed 1985) (this provision is not included in the new Texas Civil Practice and Remedies Code).

254. 683 S.W.2d at 189. The city of Denton alleged that it could be liable only if it (1) negligently furnished or used some item of tangible property or (2) was the owner, occupier, or furnisher of defective property. *Id.* at 188.

255. Strakos v. Chering, 360 S.W.2d 787, 796 (Tex. 1962); Gundolf v. Massman-Johnson, 473 S.W.2d 70, 73 (Tex. App.—Beaumont 1971), *writ ref'd n.r.e., per curiam*, 484 S.W.2d 585 (Tex. 1972) (defendants liable for failure to correct dangerous condition).

256. 683 S.W.2d at 190; *see* TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3(b) (Vernon 1970, as amended) (repealed 1985) (recodified in TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon Pam. 1986)).

257. 683 S.W.2d at 194; *see* Thomas v. Oil & Gas Bldg., Inc., 582 S.W.2d 873, 879 (Tex Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (independent contractor owes a duty to invitees).

258. 683 S.W.2d at 197. The court held that the landowner's and the fire marshall's admissions that further fires were likely, the implied invitation from the landowner to the lessee extending to the inside of the barn, and the fact that the fire marshall conducted investigations with a view to future fires, all pointed to the foreseeability of the fire and the lessee's presence in the barn at the time of the fire, and thereby established the proximate cause of the plaintiff's injuries. *Id.* at 201.

TTCA expressly limiting a city's liability to $100,000.[259] The court reasoned that the wife's recovery was predicated upon her own mental anguish, loss of consortium, and loss of services suffered.[260]

VIII. PROCEDURAL MATTERS

A. *Civil Service Commissions*

In *Patton v. City of Grand Prairie*[261] the Texas Supreme Court considered whether a city's civil service commission may reduce the indefinite suspension of a police officer, as ordered by a police chief, to a disciplinary (temporary) suspension of fifteen days or less, thereby foreclosing the affected officer's right to appeal either decision to a district court. Pursuant to the Fireman's and Policeman's Civil Service Act[262] an officer has the right to appeal to a district court an indefinite suspension that the civil service commission imposes on its own or by affirming a police chief's decision.[263] In 1979, however, the supreme court had ruled in *Firemen's & Policemen's Civil Service Commission v. Blanchard*[264] that disciplinary suspensions under the Act were not subject to judicial review.[265] The supreme court in *Patton* ruled that *Blanchard* was no longer controlling due to the 1977 and 1979 amendments to the Act that provide for judicial review of any commission decision, whether it involved an indefinite or only a temporary suspension.[266]

In *Horrocks v. City of Grand Prairie*[267] the supreme court considered the procedural rights of a suspended police officer in appealing a decision of a civil service commission that the commission had not reduced to writing as

259. *Id.* at 206; *see supra* note 242 and accompanying text.

260. 683 S.W.2d at 206-07. As her claim for loss of household services was derivative (based upon the lessee's injuries), the appeals court reduced the amount awarded by the trial court by the degree of the lessee's comparative negligence, just as the trial court had done to the award for the loss of consortium.

261. 686 S.W.2d 108 (Tex. 1985).

262. TEX. REV. CIV. STAT. ANN. art. 1269m (Vernon 1963 & Pam. Supp. 1986).

263. *Id.* § 18 (Vernon Pam. Supp. 1986).

264. 582 S.W.2d 778 (Tex. 1979).

265. *Id.* at 779. This authority is the same as that the court of appeals in *Patton* relied upon in holding that the district court had no jurisdiction to hear the officer's appeal of the commission's order. Patton v. City of Grand Prairie, 675 S.W.2d 794, 796 (Tex. App.—Dallas), *rev'd*, 686 S.W.2d 108 (Tex. 1985). The appellate court held that in determining whether the suspension was indefinite or temporary, the sanction the employer ultimately imposed was important, whether it was the police chief's decision, or the civil service commission's appellate decision. *Id.* at 796.

266. 686 S.W.2d at 109-10. TEX. REV. CIV. STAT. ANN. art. 1269m, § 18 (Vernon Pam. Supp. 1986) (emphasis added), provides: "In the event any . . . police officer is dissatisfied with *any* decision of the Commission, he may . . . file a petition in the District Court . . . ." The emphasized word was substituted for "the" by amendment in 1977. In 1979 the legislature amended the Act to provide that "the commission shall, on appeal of the suspended officer or employee, hold a public hearing as prescribed by Section 17 of this Act." *Id.* § 16b(a). Note that the 1977 amendment was already in force at the time of the *Blanchard* decision, and the 1979 amendment does not appear to have had any direct impact on this issue. In reality, the supreme court appears within six years to have made an about-face and now accepts the literal language of the Act, which allows an appeal regardless of the duration of the suspension.

267. 704 S.W.2d 17 (Tex. 1986).

the relevant statute required.[268] Citing *Patton v. City of Grand Prairie*, the court held that the officer could properly appeal the commission's decision to the district court.[269] The court once again recognized that any decision of the civil service commission may be appealed.[270]

In *Downs v. City of Fort Worth*,[271] in an issue of first impression, the court of appeals rejected an indefinitely suspended police officer's contention that the police chief or department head implementing the suspension must inform the suspended party not only of his right to a hearing before the civil service commission, but also of his right to an independent third-party examiner in lieu of a commission hearing.[272] The court further ruled that if a suspended party requests a hearing by an independent examiner, he must do so within the ten-day period generally prescribed for notice of appeals to the civil service commission.[273] Although the statute granting an independent hearing does not place a time limit within which, a claimant must request such a hearing[274] the court ruled that to not apply the ten-day limit rule to suspension hearings would result in undue administrative delay.[275]

City of Pasadena v. Cunningham[276] involved a civil service commission's decision to deny seniority points for the time a police officer worked for the city as a police academy cadet and as a probationary patrolman. The statute at issue provided that a police officer would receive one point for each year served as a classified police officer in his or her department, with a ten-point limit.[277] The statute further required city council ordinances to provide classifications for police officers.[278] Pursuant to this authority, Pasadena enacted an ordinance that prescribed six classifications, one of which was "Cadet," and another "Patrolman, Probationary." In light of these classifications the court of appeals concluded that the civil service commis-

268. TEX. REV. CIV. STAT. ANN. art. 1269m, § 16(b) (Vernon Pam. Supp. 1986). In a similar case decided during the Survey period, City of Plano Firefighters' & Police Officers' Civil Serv. Comm'n v. Maxam, 685 S.W.2d 125 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), the court of appeals emphasized the need to adhere to the procedural rules for appealing a police officer's suspension to a civil service commission. *Id.* at 125. The court held that the letter from the suspended police officer's attorney, addressed to the commission, which simply restated the charges against her and that she wished to appeal, did not amount to any of the alternative required statements of (1) denying the charges' truth, (2) excepting to the charges' legal sufficiency, and/or (3) alleging that the action recommended is not commensurate with the offense charged. *Id.* at 127; *see* Firemen's and Policemen's Civil Service Act, TEX. REV. CIV. STAT. ANN. art. 1269m, § 17 (Vernon Pam. Supp. 1986) (procedure for appeal to civil service commission).

269. 704 S.W.2d at 17.

270. *Id.*

271. 692 S.W.2d 209 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

272. *Id.* at 211; *see* TEX. REV. CIV. STAT. ANN. art. 1269m, §§ 16b(b), 16c(a) (Vernon Pam. Supp. 1986) (requiring suspended party to be informed of right to appeal to commission and setting forth the right to a hearing by an independent third party examiner).

273. 692 S.W.2d at 212; *see* TEX. REV. CIV. STAT. ANN. art. 1269m, § 16b(b) (Vernon Pam. Supp. 1985) (10-day notice requirement for appeals to the civil service commission).

274. TEX. REV. CIV. STAT. ANN. art. 1269m, § 16c(a) (Vernon Pam. Supp. 1986).

275. 692 S.W.2d at 213; *cf. supra* note 270.

276. 693 S.W.2d 751 (Tex. App.—Houston [14th Dist.] 1985, no writ).

277. TEX. REV. CIV. STAT. ANN. art. 1269m, § 14B (Vernon Pam. Supp. 1986) (establishing the seniority point system for promotion purposes).

278. *Id.* § 8A(a).

sion had improperly denied seniority points for time the officer had worked in those capacities.[279] had the ordinance omitted the "Cadet" and "Patrolman, Probationary" classifications, the commission apparently could have withheld the seniority points.

B. Term Contract Nonrenewal Act

In *Seifert v. Lingleville Independent School District*[280] the defendant school district had established eighteen reasons for nonrenewal of school teacher contracts pursuant to the Term Contract Nonrenewal Act (TCNA).[281] The Texas Supreme Court upheld the plaintiff's claim that the reason given for nonrenewal of her contract, a "community feeling of incompetence," could not be the basis for dismissal since the school's policy allowed for nonrenewal in the event of "incompetence."[282] The court ruled that the school district must act strictly within the policies that the legislature had prescribed.[283] The court refused to consider the school district's assertion that actual incompetence was the reason for the nonrenewal of plaintiff's contract since the notice of nonrenewal given to a teacher must state the specific reason therefor, not just provide fair notice.[284]

In *Grounds v. Tolar Independent School District*[285] the school district sought a determination of its rights in the nonrenewal of a coach's employment contract. The primary issue was whether the defendant teacher was a probationary employee, which would allow the district to deny him the procedural rights to evaluations, notices, and hearings that the district afforded other teachers in the nonrenewal of their employment contracts.[286] The

279. 693 S.W.2d at 753. The issue of whether to credit a police officer seniority points for time as a cadet was not actually before the court of appeals. *Id.* at 752 n.1. The analysis set forth, however, apparently applies to any classification a city council ordinance establishes for police officers and firefighters.

280. 692 S.W.2d 461 (Tex. 1985).

281. TEX. EDUC. CODE ANN. §§ 21.201-.211 (Vernon Supp. 1986). This Act changed former law that allowed nonrenewal of school teacher contracts without any reason or hearing. 692 S.W.2d at 462.

282. 692 S.W.2d at 463.

283. *Id.*

284. *Id.* The court relied upon TEX. EDUC. CODE ANN. § 21.204(c) (Vernon Supp. 1986), which requires a renewal notice to specify all reasons for nonrenewal. *Id.*

285. 694 S.W.2d 241 (Tex. App.—Fort Worth 1985, writ granted).

286. *See* TEX. EDUC. CODE ANN. § 21.209 (Vernon Supp. 1986) (allowing probationary period during which rest of subchapter inapplicable). When the school district denied the defendant's request for a hearing, he appealed the decision to the State Commissioner of Education. The commissioner held that the school district could not consider the defendant a probationary employee and order that the district hold a hearing on the nonrenewal of the defendant's teaching contract. The school district then filed the action in the Hood County district court. After the district court held in favor of the school district, the defendant argued on appeal that the school district's only avenue of redress was to appeal the education commissioner's decision to the Travis County district court as specifically provided by TEX. EDUC. CODE ANN. §§ 11.13(c) & 21.207 (Vernon Supp. 1986). The court of appeals pointed out, however, that parties need not exhaust administrative remedies in matters involving pure questions of law in the administration of school law. 694 S.W.2d at 243, (citing Calvin V. Koltermann, Inc. v. Underream Piling Co., 563 S.W.2d 950, 955 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.)). The court of appeals held that the procedural issues before the court were questions of law and "[t]he Commissioner of Education does not exercise judi-

TCNA authorizes school districts to adopt written policies of probation denying the Act's rights to any teacher in the first two years of employment.[287] Since the school district in this case had adopted a probationary employee policy well after the effective date of the defendant's second one-year contract term, the court ruled that the district could not apply the policy retroactively to govern the rights of the defendant.[288] Thus, the defendant was entitled to the procedural rights afforded other teachers in the nonrenewal of employment contracts.[289] The court of appeals also rejected the trial court's holding that the defendant had consented to probationary status by initialing a teacher evaluation form that indicated such status on its face.[290] The court reasoned that this act acknowledged only the evaluation, and not the probationary status.[291]

The notice of nonrenewal sent to the defendant did not state the reasons for nonrenewal. Under such circumstance the TCNA mandates that the school district offer the defendant employment in the same professional capacity for an additional year.[292] Since the district, in an attempt to settle the case, had offered a contract to teach without coaching duties, the court then considered whether a teacher and a coach were within the same professional capacity.[293] The Texas Education Code does not create a separate classification for coaches.[294] The court concluded, therefore, that unless a coach's contract expressly limits the coach's duties, the district may reassign him to other teaching positions if it so chooses.[295] Since the defendant's contract expressly reserved to the district the right of reassignment, and since he had rejected the offered teaching contract that excluded coaching duties, the court ruled that he had voluntarily ended his employment.[296]

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cial power to determine the legality of contracts or the legal rights of parties thereto." 694 S.W.2d at 244 (citing Board of Trustees v. Briggs, 486 S.W.2d 829, 835 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.)). Thus, the district had appropriately filed the case in the Hood County district court.

287. TEX. EDUC. CODE ANN. § 21.209 (Vernon Supp. 1986).

288. 694 S.W.2d at 244. The district's attempt to apply the new probation policy retroactively to the defendant's first two years of employment ran afoul of the well-settled principle that certainty in the law requires that contracting parties know their obligations under their contracts. *Id.* (citing Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W.2d 309, 315 (Tex. 1965); Estate of Griffin v. Sumner, 604 S.W.2d 221, 230 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.)).

289. 694 S.W.2d at 244.

290. *Id.*

291. *Id.*

292. TEX. EDUC. CODE ANN. § 21.204(b) (Vernon Supp. 1986) provides: "In the event of failure to give such notice of proposed nonrenewal within the time herein specified, the board of trustees shall thereby elect to employ such employee in the same professional capacity for the succeeding school year."

293. 694 S.W.2d at 245.

294. "Teacher" is defined as "a superintendent, principal, supervisor, classroom teacher, counselor, or other full-time professional employee, except paraprofessional personnel, who is required to hold a valid certificate or teaching permit." TEX. EDUC. CODE ANN. § 21.201(1) (Vernon Supp. 1986).

295. 694 S.W.2d at 245.

296. *Id.*

C. Miscellaneous Procedural Matters

In *Harrison v. City of San Antonio*[297] several police officers sued the city and the police officer's association, asserting that their promotion examination deviated from the criteria established in a collective bargaining agreement.[298] The agreement between the city and the police officer's association provided for an Assessment Center Examination, which consisted, among other things, of a structured, three-member board interview.[299] The city, the association's president, and several members of the association's board of directors, relying upon the advice of a psychologist regarding the effectiveness of various testing procedures, subsequently agreed to use a five-member testing board and to substitute an oral examination for the structured interview.[300] Drawing upon corporate law principles,[301] the court ruled in favor of the police officers and refused to give effect to the subsequent changes in the testing procedure.[302] Since the alterations to the collective bargaining agreement were not routine matters, they represented a "deviation that required specific authority from the [Police Officer's Association] membership or, if authorized by the membership, the Board of Directors [of the Association]."[303] Thus, the alterations to the collective bargaining agreement and the examinations administered in conformity therewith were void.[304] Furthermore, as two different groups underwent the oral examination over a two-day period, the court found a violation of the Civil Service Act's mandate that each applicant receive an identical examination in the presence of all other applicants.[305]

297. 695 S.W.2d 271 (Tex. App.—San Antonio 1985, no writ).

298. *Id.* at 273. The city had adopted the Firemen's and Policemen's Civil Service Act. TEX. REV. CIV. STAT. ANN. art. 1269m (Vernon 1982 & Pam. Supp. 1986) and the Fire and Police Employee Relations Act, TEX. REV. CIV. STAT. ANN. art. 5154c-1 (Vernon Supp. 1986). The court stated that the latter Act "grants the City and the police department the right to negotiate collective bargaining agreements. When a contract has been negotiated by representatives of the City and the Association, it is then approved by the City, and submitted to the membership of the Association for its approval." 695 S.W.2d at 273.

299. The structured interview was to involve questions and answers in an exchange between the candidate and the examiners outside of the presence of the other candidates covering topics the examiners had given the candidates in advance. It might have lasted between twelve and twenty minutes. 695 S.W.2d at 275.

300. The oral examination involved an extemporaneous speech not to exceed ten minutes in length, covering topics given one hour in advance, in the presence of the other promotion candidates. *Id.*

301. The San Antonio Police Department was incorporated and subject at the time of trial to the Texas Non-Profit Corporation Act, TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 to -11.01 (Vernon 1982).

302. 695 S.W.2d at 277.

303. *Id.* at 276.

304. The alterations also failed to comply with the statute of frauds. TEX. BUS. & COM. CODE ANN. § 26.01(a) (Vernon 1968) (agreement not to be performed within one year requires writing), and the agreement's express provisions requiring all modifications to be in writing. 695 S.W.2d at 276. The parties never reduced the changes to writing, other than in the form of a "Memorandum of Agreement and Understanding" signed by the association's president and the city manager. *Id.* at 274.

305. 695 S.W.2d at 277; *see* TEX. REV. CIV. STAT. ANN. art. 1269m, § 14D (Vernon Pam. Supp. 1986); *see also id.* art. 5154c-1, § 20(b) (Vernon Supp. 1986) (valid collective bargaining agreement controls over contrary provisions of the Fire and Police Employee Relations Act).

In *Television Cable Service, Inc. v. Bryant*[306] an Abilene resident sought to require the local television cable franchisee to extend service to his home on the outskirts of the city limits. Following the trial court's entry of judgment in favor of the plaintiff, the city of Abilene filed a petition in intervention, claiming that it was an indispensable party to the interpretation of the franchise agreement.[307] The court of appeals agreed with the city and held that the trial court had erred in denying the primary jurisdiction of the Abilene city council and in not requiring the plaintiff to exhaust his administrative remedies.[308] The plaintiff had alleged a franchise complaint, claiming that the franchisee was bound by its agreement with the city to extend cable service to him. In the court's view, such a complaint was not a judicial matter.[309]

In *City of Houston v. Jones*[310] certain builders sought judicial review of the city's decision to halt construction in progress pursuant to a commercial building permit. In affirming the city's action, the court of appeals relied upon the plaintiffs' failure to file a certified copy of the deed restrictions governing the use of the property.[311] The dissent in this case argued, however, that the plaintiffs were entitled to judicial review with an eye toward possible changed circumstances that justified uses contrary to old deed restrictions.[312] Since no complaints of nonconforming uses existed, the dissenting justice would have held that the restrictive covenants were no longer of value in that they had been either modified or waived.[313] The majority's decision implies that considerations of enforceability will be relevant only in a judicial review of the refusal to issue a commercial building permit for which a party has made proper application.

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306. 684 S.W.2d 196 (Tex. App.—Eastland 1984, no writ).

307. *Id.* at 198. The franchise agreement between the city and the defendant provided: "The City reserves the right to determine and fix charges and fares and to regulate the kind of service to be rendered . . . ." *Id.*

308. *Id.* at 198-99.

309. *Id.* at 199. The court stated that the city council had the power to act upon the plaintiff's complaint, and that such action was within its conferred powers. *Id.*

310. 679 S.W.2d 557 (Tex. App.—Houston [14th Dist.] 1984, no writ).

311. *Id.* at 559; *see* TEX. REV. CIV. STAT. ANN. art. 974a-2, § 3(a) (Vernon Supp. 1986):

> A person who desires a commercial building permit shall file with his application a certified copy of any instrument which contains a restriction on the use of or construction on the property described in the application, together with a certified copy of any amendment, judgment, or other document affecting the use of the property.

312. 679 S.W.2d at 560-62 (Sears, J., dissenting); *see* TEX. REV. CIV. STAT. ANN. art. 974a-2, § 7 (Vernon Supp. 1986): "In the event of changed conditions within a subdivision or any other legally sufficient reason that restrictions should be modified a person refused a commercial building permit can petition a court of appropriate jurisdiction to alter the restrictions to better conform with present conditions."

313. 679 S.W.2d at 562 (Sears, J., dissenting); *see* New Jerusalem Baptist Church, Inc. v. City of Houston, 598 S.W.2d 666, 669 (Tex. App.—Houston [14th Dist.] 1980, no writ) (setting forth standard in waiver of deed restriction case); City of Houston v. Emmanuel United Pentecostal Church, Inc., 429 S.W.2d 679, 682 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (restrictive covenants of no value not enforceable).

IX. INTERPRETATIONS OF VARIOUS CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

Several cases decided during the Survey period defy easy categorization. They are nevertheless worthy of some discussion in this article. *Mabe v. City of Galveston*[314] represents a victory for citizen's rights groups under the first amendment to the United States Constitution.[315] The defendant, a Galveston Beach businessman, successfully appealed the imposition of a temporary injunction prohibiting him from distributing a pamphlet that listed the names and phone numbers of Galveston city council and park board members. The pamphlet's purpose was to aid interested parties in contacting those responsible for the lack of public restroom facilities on the beachfront.[316] The sole issue before the court of appeals was whether the temporary injunction operated as a prior restraint in violation of the defendant's first amendment right to freedom of speech.[317] Although Texas courts recognized a right to privacy, the court in *Mabe* was reluctant to permit prior restraint on speech merely to protect an alleged threat to the limited right to privacy of public officials.[318] Since the names and phone numbers appeared in public phone books and documents, and since the pamphlets bore a direct relationship to a public interest, the court set aside the injunction against distribution of the pamphlets.[319]

In *Olsham Demolishing Co. v. Angleton Independent School District*[320] the plaintiff sought additional compensation from the school district on a contract for the demolition of a building when it discovered the unexpected existence of three additional concrete slabs that required removal. The school district argued that the Texas Constitution prohibited the payment of

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314. 687 S.W.2d 769 (Tex. App.—Houston [1st Dist.] 1985, writ dism'd).

315. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." This provision was made applicable to the states by U.S. CONST. amend. XIV, § 1.

316. 687 S.W.2d at 771. The defendant resorted to this tactic only after making several appearances before, and complaints to, the city council and park board. *Id.* The pamphlet resulted in the council and board members' receiving numerous phone calls at their homes during all times of the day and night complaining of the absence of beachfront restrooms. *Id.*

317. *Id.* A prior restraint, in constitutional law, generally refers to the imposition of a restraint before the actual publication of material protected by the first amendment to the United States Constitution. Schenck v. United States, 249 U.S. 47, 51-52 (1919). It may also refer, as in this case, to an infringement upon the constitutional right to disseminate materials that the first amendment ordinarily protects without a prior judicial determination that the material qualifies for first amendment protection. State v. I, A Woman—Part II, 53 Wis. 2d 102, 191 N.W.2d 897, 902-03 (1971).

318. 687 S.W.2d at 771-72; *see* Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (public officials' right to privacy is outweighed by citizens' right to criticize public business and express matters of public concern); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (prior restraints against distribution of pamphlets bear a heavy presumption of invalidity).

319. 687 S.W.2d at 772. The court based its rationale allowing distribution of the pamphlets in part upon the fact that the defendant did not act solely to harass the public officials, and that the officials apparently could have opted for unlisted telephone numbers. *Id.* The court did not consider as significant the question of whether the particular public officials could take corrective action in connection with the defendant's complaint. *Id.*

320. 684 S.W.2d 179 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

any amount in excess of the agreed and authorized contract sum.[321] The court, however, held that the plaintiff was entitled to additional compensation since the demolition contract provided that the parties should equitably adjust the authorized contract sum in the event of a concealed condition.[322] Thus, the contract provided for a change in the agreed compensation for removal of the slabs, without triggering a constitutional prohibition.[323]

In *Daniels v. Morris*[324] two Texas children sought damages under the Civil Rights Act,[325] claiming that a denial of procedural due process had occurred when, after they had moved out of their former school district, the school principal unilaterally refused to allow them to continue studying at their former school without paying tuition. The Fifth Circuit Court of Appeals examined the relevant provisions of the Texas Education Code, which state that a child "shall be permitted to attend the public free schools of the district in which he resides or in which his parent . . . resides at the time he applies for admission."[326] The court rejected the plaintiffs' contention that the statute necessarily implies that the time of application for admission determines the right to attend a particular school for the entire school year.[327] Resorting solely to the words of the statute, the court found that the statute's purpose was to protect schoolchildren's rights to attend the public free school in the district in which they currently reside.[328] The court also held that the school principal had not exceeded his authority in unilaterally denying tuition-free admission to the children[329] and found nothing that would entitle the children to a property right requiring procedural due process.[330]

In *Pumpkin Air, Inc. v. City of Addison*[331] various aviation-related entities sued the city and the municipal airport and its operators, alleging conspiratorial anticompetitive conduct aimed at preventing them from selling fuel and leasing space at the airport. The defendants moved for summary judgment in reliance upon the defense of state action immunity.[332] This defense

321. TEX. CONST. art. III, § 53 prohibits counties and municipalities from paying additional compensation to contractors for services previously rendered or on contracts previously entered into and performed in whole or in part.

322. 684 S.W.2d at 185.

323. *Id.*

324. 746 F.2d 271 (5th Cir. 1984).

325. 42 U.S.C. § 1983 (1982).

326. 746 F.2d at 274; *see* TEX. EDUC. CODE ANN. § 21.031(b) (Vernon Supp. 1986).

327. 746 F.2d at 276. The plaintiffs offered, in support of their reading of the statute, the case of Brownsville Indep. School Dist. v. Gamboa, 498 S.W.2d 448 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). In that case, the court denied tuition-free admission to a public school to a child whose residence "at the beginning of the . . . school year . . . was vague and temporary." *Id.* at 451. The court in *Daniels* rejected the contention that this wording implied that the child would have been entitled to attend school tuition-free for the entire school year had her residence been clear at the beginning of the year. 746 F.2d at 276.

328. 746 F.2d at 277.

329. *Id.* The court stated that "Texas courts will abrogate school district policies only when they clearly violate statutory provisions." *Id.*

330. *Id.* This holding comports with the United States Supreme Court's holding in Plyler v. Doe, 457 U.S. 202 (1982), wherein the Court stated that "[p]ublic education is not a 'right' granted to individuals by the Constitution." *Id.* at 221.

331. 608 F. Supp. 787 (N.D. Tex. 1985).

332. *Id.* at 790. This defense was first articulated in Parker v. Brown, 317 U.S. 341, 350-52

allows a local government to engage in anticompetitive activities if done "in furtherance or implementation of clearly articulated and affirmatively expressed state policy."[333] The federal district court, however, in examining provisions of the Texas Municipal Airports Act (TMAA),[334] found no such articulated policy or authorization or other direct reference to the competitive aspects of operating a municipal airport.[335] The court instead relied upon a provision of the TMAA that federal and state laws override any municipal ordinances adopted pursuant to the TMAA.[336] The court reasoned that even though the Texas Legislature has enacted no laws governing the anticompetitive abuses alleged by the plaintiffs, the TMAA's provisions were, at least with respect to such abuses, subordinate to the commands of federal law, namely, the Sherman Act.[337] The court concluded that the legislature simply did not contemplate municipalities instituting anticompetitive ordinances with regard to airport operations.[338] The defendants, therefore, were unable to rely upon the defense of state action immunity and the court dismissed their motion for summary judgment on that basis.[339]

In *Heard v. Houston Post Co.*[340] a court granted a permanent injunction ordering the Harris County sheriff to make available to the plaintiff newspaper access to, or a copy of, offense reports whenever requested pursuant to the Texas Open Records Act.[341] The trial court ordered that these reports

(1943). The Sherman Act, 15 U.S.C. §§ 1-7 (1982), prohibits any unreasonable interference, by contract or combination, or conspiracy, with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade. The United States Supreme Court in *Parker* held that the Sherman Act does not restrain a state from anticompetitive activities directed by its legislature. 317 U.S. at 350. The Supreme Court extended this ruling to municipalities in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978). Federal courts have made state action immunity available to individuals when they have acted pursuant to state authorization or approval. Hoover v. Ronwin, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590, 607 (1984); North Carolina *ex rel.* Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274, 277 (4th Cir. 1984) (no requirement that the state compel the activities), *cert. denied*, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985).

333. 608 F. Supp. at 790; *see* Community Communication Co. v. City of Boulder, 455 U.S. 40, 48-51 (1982).

334. TEX. REV. CIV. STAT. ANN. art. 46d-1 (Vernon 1969).

335. 608 F. Supp. at 790-91.

336. *Id.* at 791; *see* TEX. REV. CIV. STAT. ANN. art. 46d-7 (Vernon Supp. 1986).

337. 608 F. Supp. at 792; *cf. supra* note 332 (setting forth relation of Sherman Act to state action immunity).

338. 608 F. Supp. at 791 (quoting Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (exclusive airport taxicab franchise)). The court went on to grant the defendant's motion for summary judgment on the plaintiff's claim under 49 U.S.C. § 1349(a) (1982), which provides that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended." Adopting the case of Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667, 673 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984), the court held that no private cause of action exists for violation of that statute. 608 F. Supp. at 794. Also, the court rejected the plaintiffs' claim under 42 U.S.C. § 1983 (1982) for alleged due process violations because "[t]he law does not recognize a right under the due process clause to be free from 'anticompetitive injury.' " 608 F. Supp. at 794.

339. 608 F. Supp. at 794.

340. 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

341. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1986). The requested offense report in this case was filed against a person who, according to the newspaper, sheriff's deputies had brutalized.

must contain virtually all of the facts and circumstances of an alleged offense.[342] The court of appeals affirmed the trial court's order and held that none of the information ordered disclosed was outside the Texas Supreme Court's definition of public information in *Houston Chronicle Publishing Co. v. City of Houston*.[343] Although the sheriff argued that the release of an offense report would result in harm to the individual charged, the court emphasized the event's newsworthiness, and held that the right to privacy is not absolute.[344]

In *City of Dallas v. Gates*[345] a city employee and his wife sought to recover unpaid health benefits owed them by the city. After agreeing to the entry of a partial summary judgment in favor of the plaintiffs for the unpaid benefits, the city appealed the trial court's award of attorney's fees to the plaintiffs.[346] The court of appeals agreed with the city in ruling that the word corporation, as used in the Texas statutes allowing recovery of attorneys' fees from an opponent, does not allow such recovery from a municipal corporation.[347] The court also rejected the plaintiffs' contention that the trial court erred in not awarding penalties and interest against the city pursuant to the Texas Insurance Code.[348] In applying a strict construction, the court held that the Insurance Code's authorization of such a recovery against health insurance companies does not extend to recovery against a municipal corporation that administers a self-insurance plan.[349]

City of Farmers Branch v. City of Addison[350] involved a contract requiring Farmers Branch to construct a sanitary sewer line to which Addison could attach its sewer lines. The contract gave Addison the right to connect its lines at such times, present or future, and at such locations as that city deemed desirable. Further, Addison had the right to deposit an unlimited

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342. The trial court

> signed a permanent injunction ordering the Sheriff to provide the [newspaper , within three hours of its request, a copy of the Sheriff's Department offense report containing the following information: 1) the offense committed; 2) the location of the crime; 3) the premises involved; 4) the time of the occurrence; 5) the property involved; 6) the vehicles involved; 7) the description of the weather; 8) a detailed description of the offense in question; and, 9) the names of the investigating officers.

684 S.W.2d at 211.

343. *Id.* at 212; *see* Houston Chronicle Publishing co. v. City of Houston, 631 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

344. 684 S.W.2d at 213; *cf. supra* note 218 and accompanying text (discussing limits of right to privacy). The court did recognize, however, that on occasions when some harm may result from the release of a complainant's identity, the sheriff may seek a remedy by relating the harm to a court of competent jurisdiction. 684 S.W.2d at 214.

345. 684 S.W.2d 792 (Tex. App.—Eastland 1985, writ granted).

346. Fees were awarded pursuant to TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1986) and TEX. INS. CODE ANN. art. 1.14-1, § 7 (Vernon 1981).

347. 684 S.W.2d at 794. "[W]hen a statute uses the word 'corporation,' the statute 'is construed to apply only to private corporations and does not include municipal corporations, unless the statute expressly so provides.' " *Id.* (quoting State v. Central Power & Light Co., 139 Tex. 51, 55, 161 S.W.2d 766, 768 (1942)).

348. 684 S.W.2d at 794; *see* TEX. INS. CODE ANN. art. 3.62 (Vernon 1981) (penalty for delay in payment of losses).

349. 684 S.W.2d at 794.

350. 694 S.W.2d 94 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

quantity of sewage from a designated area within Addison into the Farmers Branch sewer line. The court determined the contract to be a "surrender of a consequential part of control and regulation of the system."[351] Since the operation and maintenance of a sanitary sewer system is a governmental function,[352] and since the contract was in derogation of that function, the court held it unenforceable.[353] The court recognized that municipalities have the authority to extend their sewer service outside their city limits,[354] but this authority did not validate a sewer service contract that permitted another party effectively to control the city's exercise of that governmental power.[355]

In *City of Houston v. Nelius*[356] a police officer ordered to pay the attorneys' fees incurred by the city in his unsuccessful appeal of a temporary suspension, petitioned for a temporary injunction to prohibit the city from withholding his paychecks to satisfy the order. The trial court granted the injunction, and the city appealed, claiming that a contractual dispute was in issue between an employer who owed wages and an employee who owed a legally enforceable debt that he refused to pay.[357] Pursuant to charter and code of ordinance provisions, the city appeared entitled to withhold the paychecks.[358] The court of appeals, however, found these provisions to conflict with constitutional provisions prohibiting the garnishment of wages except in connection with payments of child support.[359] The court also examined whether Nelius consented to the withholding.[360] The court refused to consider the police officer's appeal as an implied consent to the garnishment of his wages, and upheld the injunction prohibiting the city from withholding the officer's paychecks.[361]

351. *Id.* at 96.

352. Dilley v. City of Houston, 148 Tex. 191, 194, 222 S.W.2d 992, 993 (1949); Pittman v. City of Amarillo, 598 S.W.2d 941, 945 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); *see supra* note 19.

353. 694 S.W.2d at 95.

354. *See* TEX. REV. CIV. STAT. ANN. art. 1108(3) (Vernon 1963).

355. 694 S.W.2d at 96.

356. 693 S.W.2d 567 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd).

357. *Id.* at 569.

358. Houston City Charter art. VIII, § 3 and City Code of Ordinances § 2-111(b) mandated the withholding of payments to any person indebted to the city until the payment of the debt. 693 S.W.2d at 569-70.

359. 693 S.W.2d at 570; *see* TEX. CONST. art. XVI, § 28.

360. 693 S.W.2d at 569; *see* Benton v. Wilmer-Hutchins Indep. School Dist., 662 S.W.2d 696, 699 (Tex. App.—Dallas 1983, writ dism'd). The *Nelius* court adopted *Benton* and referred to TEX. PROP. CODE ANN. §§ 42.001(a), .002 (Vernon 1984), which exempt current wages for personal services from attachment, execution, and seizure for the satisfaction of debt. 693 S.W.2d at 569.

361. 693 S.W.2d at 569.