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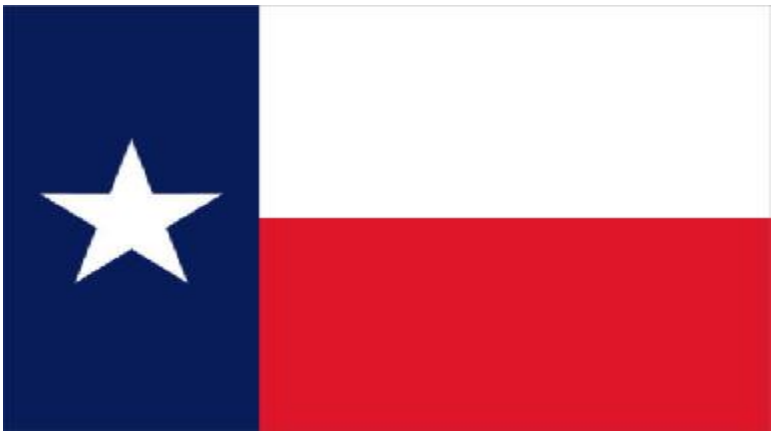

OLSON & OLSON L.L.P.

Attorneys At Law

Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019
Telephone: (713) 533-3800
Telecopier: (713) 533-3888

www.OlsonOlson.com

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Annexation and ETJ

***In re Spiritas Ranch Enterprises, L.L.P.*, --- S.W.3d ---, 2007 WL 865824 (Tex. App. – Fort Worth, March 22, 2007)**

The Town of Little Elm sought to annex 1,103 acres of non-residential properties located within its ETJ using the fast track annexation procedures applicable to the annexation of an area that includes "fewer than 100 separate tracts on which one or more residential dwellings are located". The plaintiff contended that the proposed annexation did not meet the requirements for a fast track annexation. The plaintiff petitioned the City to include the area including its property within the City's three-year annexation plan and the City declined. The Plaintiff then filed a formal request that the City arbitrate the issue of whether the proposed annexation met the requirements for fast track annexation. When it appeared that the City might complete the annexation before acting on the request for arbitration, the Plaintiff sought injunctive relief, first from the trial court and then from the court of appeals on petition for mandamus, to prevent the City from passing the annexation ordinance. The court of appeals granted the request for injunctive relief concluding that: a) a property owner has a statutory right to arbitrate a dispute over whether the fast track annexation procedures apply to a proposed annexation; b) that right includes the right to arbitrate the dispute before the City passes an annexation ordinance; c) although the passage of an annexation ordinance is a legislative act, the constitutional principle of separation of powers does not prevent a court from enjoining the passage of an annexation ordinance to preserve a landowner's statutory right to arbitration.

***City of Port Isabel v Pinnell*, 207 S.W.3d 394 (Tex. App. – Corpus Christi, Oct. 12, 2006, reh. denied)**

The City of Port Isabel sought to annex territory on South Padre Island through a series of annexations. The property owner and the Town of South Padre Island challenged the validity of the annexations. The trial court entered an order invalidating the challenged annexations and enjoining Port Isabel from attempting to annex the Pinnell's property or any areas located entirely in the Laguna Madre in the future. The court of appeals affirmed the judgment invalidating the challenged annexations but reversed the portion of the judgment enjoining future annexation attempts. The opinion holds that: (1) the definition of ETJ contained in the state subdivision regulation statute (which gives 5 mile ETJ rights to cities in counties bordering on the Rio Grande River) is for the purpose of extending subdivision regulatory authority only and is not applicable for annexation purposes; (2) a party who has standing to challenge one annexation ordinance has standing to challenge any other ordinance upon which the first ordinance is dependent; and (3) it is improper for a court to enjoin a prospective annexation ordinance unless the mere enactment of the ordinance will cause irreparable harm.

***Karm v City of Castroville*, --- S.W.3d ---, 2006 WL 3297330 (Tex. App. – San Antonio, Nov. 15, 2006)**

The plaintiff landowner petitioned the City of Castroville to annex his property. After the City initiated the annexation process but before it was completed, the plaintiff withdrew his consent to the annexation. The City completed the annexation despite the withdrawal of consent. After the annexation a dispute arose over the plaintiff's development plans and he sued the City arguing, among other things, that the annexation was void because the City did not act to grant his petition for annexation within the 30 day window provided by the statute. The City argued

that calling a hearing on the annexation of the property within 30 days of receipt of the petition was sufficient. The court of appeals rejected the City's argument reasoning that the setting of hearing dates, "without any indication of a deliberative or an affirmative action as to the petition" was insufficient to constitute acceptance of the petition within the meaning of the statute.

***Hall v. City of Bryan*, ---S.W.3d ---, 2006 WL 3438537 (Tex. App. – Waco, Jan. 9, 2006, pet. denied)**

The plaintiff landowner sued the City of Bryan seeking disannexation for failure to comply with the municipal services plan applicable when annexed in 1999. The plan provided that the City would follow its standard procedures for extending utility lines to the annexed areas. Those procedures did not provide a general right of free extension of utilities to unserved areas. After the trial court granted the City's motion for summary judgment, the plaintiff appealed. On appeal the only issue was whether the City's failure to extend water lines, sewer lines, and fire hydrants to the annexed area, without cost to the residents, could constitute a failure to provide full municipal services within the meaning of the Municipal Annexation Act. The court of appeals concluded that the City had demonstrated in its summary judgment evidence that it made utility extensions available to the annexed area on the same basis as to other areas of the City as described in its service plan.

***City of Cresson v. City of Granbury*, --- S.W.3d ---, 2007 WL 1168444 (Tex. App. – Fort Worth, April 19, 2007)**

The City of Granbury passed a resolution stating its intent to pass a series of five annexations of property located along a state highway. The first of the series of annexations was to include property that was currently in the City's ETJ. The four subsequent annexations were to occur sequentially, with each extending into the area added to the City's ETJ by the addition of territory accomplished by the immediately preceding annexation. The neighboring City of Cresson sought to frustrate Granbury's annexation plans by adding territory to its own ETJ by petition of landowners. Cresson completed the additions to its ETJ after Granbury had adopted its annexation resolution, but before Granbury adopted any annexation ordinances. Cresson sued Granbury seeking a determination that the four annexations into territory that was not within Granbury's ETJ at the time of the adoption of the annexation resolution were void because the tracts were already in Cresson's ETJ at the time of the purported annexation. The court of appeals reversed a trial court decision in Granbury's favor. In doing so, the court of appeals rejected Granbury's contention that under the common law "first-in-time" rule it gained control over the disputed ETJ when it passed the initial annexation resolution. Instead, the Court found that the Municipal Annexation Act governed the resolution of competing ETJ claims and left no room for the operation of the common law rule.

Eminent Domain and Takings

***City of Sugar Land v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503 (Tex. App. – Eastland, Jan. 18 2007, pet. filed Mar. 20, 2007)**

The City of Sugar Land sought to condemn a 1.8 acre tract of land for a regional stormwater detention facility. The tract included an existing detention facility comprising 0.7 acres previously built by the landowner to comply with the City's drainage requirements. The landowner's appraisal testimony at trial included an opinion of the highest and best use of the

property that assumed that the *entire* 1.8 acre tract was available for use, despite the existence of a 0.7 acre detention area already constructed to comply with City regulations. The City objected to the admissibility of this evidence because the four factors to determine a property's highest and best use are legal permissibility, physical possibility, financial feasibility and maximum productivity. The City also argued that an analysis of highest and best use may not include uses that are purely speculative and unavailable. The court of appeals held that the trial court did not err in admitting the landowner's appraisal testimony. In so doing, the court relied on the fact that the City itself offered appraisal testimony that did not remove the 0.7 acre detention area from its consideration. The City's expert also expressly testified that the 0.7 acre tract of land did not constitute an economic unit separate and distinct from the rest of the tract.

***City of McKinney v. Eldorado Park, LTD.*, 206 S.W.3d 185 (Tex. App. – Eastland 2006, pet. filed Jan. 18, 2007)**

The City of McKinney sought to acquire land in connection with a roadway project. At the Special Commissioners' Hearing, both parties introduced testimony related to the value of the property. The Special Commissioners entered an award to the landowner and the City appealed. At trial, the City introduced evidence and witnesses it had not presented at the hearing before the Special Commissioners. Specifically, the City relied on a 2001 Master Drainage Study performed for the City that indicated that a great portion of the property was in the flood plain. The landowner filed a plea to the jurisdiction arguing that the City made a "material change" to the issues before the trial court as opposed to those tried to the Special Commissioners. In support of its plea, the landowners argued similarities with *State v. P.R. Investments and Specialty Retailers*, 180 S.W.3d 654, in which the condemnor changed its condemnation plan between the Special Commissioners' Hearing and trial.

The Court rejected the landowner's argument. Because an appeal from the award of the Special Commissioners is a trial *de novo* in the trial court, the parties are not limited to the witnesses and evidence introduced before the Special Commissioners. The City did not seek to enlarge the scope of its taking through the additional evidence. Such an issue, the Court reasoned, is evidentiary, not jurisdictional. To consider evidentiary matters "jurisdictional" would open eminent domain proceedings to collateral attack, making uncertain the finality of any condemnation proceedings.

***McKinney Independent School District v. Carlisle Grace, LTD.*, --- S.W.3d. ---, 2007 WL 1192245 (Tex. App. – Dallas, Apr. 24, 2007)**

The school district sought to acquire a 56 acre tract of land for use as a high school. The landowner had purchased the property and two other contiguous tracts, for a total of 90 acres, in three separate transactions. Even though the school district considered the acquisition of the 56 acre tract a whole taking, the landowner argued that the school district's acquisition of this tract damaged the other two tracts making up what it considered to be the 90 acre total.

The landowner argued that the 90 acres should be considered as a whole because the highest and best use of the property was to develop the entire acreage as one project. The school district countered, however, that the landowner's proposed use was not permitted within the property's current zoning classification. In rejecting the school's arguments, the court examined the unity of use doctrine applicable to separate, but contiguous, tracts under common ownership. The Court reiterated the law that "[p]roperty has a unity of use if the tracts are 'devoted to an integrated unitary use or if the possibility of their being so combined for a unified use in the

reasonably near future is such as to affect market value,'" *citing Southern Pipe Line Corporation v. Deitch* 451 S.W.2d 814 (Tex.Civ.App. – Corpus Christi 1970, writ ref'd n.r.e.). Additionally, the Court reasoned that the law does not require that a specific use of a property already be approved for it to be considered the highest and best use of the property; rather, the property must be adaptable to the use suggested.

***Falls County Water Control and Improvement District No. 1 v. Haak*, --- S.W.3d ---, 2007 WL 416330, (Tex. App. – Waco Feb. 7, 2007)**

The condemning authority filed a petition for condemnation. Thereafter, it filed an amended petition seeking to enlarge the taking from its original petition. The landowner filed a plea to the jurisdiction contending that the condemning authority failed to enter into meaningful negotiations regarding the increased take in its amended petition. In its plea to the jurisdiction, the landowner also asked that the Court award them attorney's fees and expenses.

The trial court granted the landowner's plea to the jurisdiction and, more than 30 days later, the landowner filed a motion to recover attorney's fees. The water district argued that the court had lost its plenary power since more than 30 days had elapsed since it entered its order granting the landowner's plea to the jurisdiction. In granting the landowner's request for a hearing on its motion for attorneys' fees and expenses, the Court noted that the order granting the plea to jurisdiction had addressed the landowner's request for attorneys' fees and, therefore, did not constitute a final judgment of the Court.

Employment

***Del Mar College Dist. v. Vela*, --- S.W.3d ---, 2007 WL 851280 (Tex. App.—Corpus Christi Mar. 22, 2007)**

This is a state law sex and hostile work environment case. Vela claimed she was verbally assaulted and harassed by a male Equipment Manager on several occasions. Vela testified in her deposition that the verbal assault alleged in her petition did not occur on March 27, 2003, as stated in her charge of discrimination, but on February 17, 2003. Vela also stated that after she was transferred, she did not physically come into contact with the alleged harasser again, but that he appeared on two occasions at the time clock when she was there. Vela testified that on the first occasion in September of 2003, he stared at her for fifteen minutes and did not say anything. A second occurrence at the time clock occurred approximately a week after the first incident, when the alleged harasser was walking with "one of the guys" and said something like "it's a wonderful day."

Del Mar asserted that the court lacked jurisdiction over Vela's claim because she failed to comply with the mandatory 180-day limitations period established by section 21.202 of the Texas Labor Code. Vela responded with an affidavit in which she stated that she was verbally assaulted on February 27, 2003. She also stated that the two other time clock incidents occurred in March 2003 and were harassment that occurred within the 180-day period prior to her complaint. The trial court denied Del Mar's motion.

Del Mar argued that the Court should not consider Vela's affidavit because it contradicted her own deposition testimony. The court of appeals disagreed. The Court cited *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex.1988), as in *Larson v. Family Violence and Sexual Assault Prevention Ctr. of S. Tex.*, 64 S.W.3d 506 (Tex. App.—Corpus Christi 2001, pet. denied), and concluded that, as a general rule, if conflicting inferences may be drawn from a

deposition and from an affidavit filed by the same party in opposition to a motion for summary judgment, a fact issue is presented, and the affidavit is not regarded as a sham. In a footnote: "Nevertheless, this Court has determined that the sham affidavit doctrine does have some limited viability or application where (1) the affidavit is executed after the deposition; (2) there is a clear contradiction on (3) a material point; and (4) without explanation."

***Waffle House, Inc. v. Williams*, 216 S.W.3d 342 (Tex. App.—Fort Worth 2007)**

Waffle House appeals from a jury verdict finding that its employee sexually harassed Cathie Williams, a former employee, that Waffle House was negligent in "supervising and/or retaining" the employee, and that Waffle House constructively discharged Williams. The court of appeals affirmed the jury verdict.

Within Williams' first week of work, employee Eddie Davis, a cook, began making sexual comments to her. Davis looked her up and down and then told her that she "looked like [his] baby's mama" and made numerous other sexual statements. Williams also alleged unwelcome physical contact including one occasion when Davis came up behind her, held her arms, held his whole body against her close enough to breathe on her neck, and said to her customers, "Isn't she great? Isn't she wonderful?"

Williams complained of this conduct to the store manager who allegedly laughed and told her "it doesn't sound like Eddie." Williams also discussed the issue with District Manager Marshall. Marshall spoke to Davis about Williams' allegations, and Davis denied them. Waffle House provides an employee complaint hotline as part of its sexual harassment policy. The hotline allows employees to report complaints to corporate management without going through lower-level managers. Marshall attempted to call the hotline for Williams, who said that she had tried to use the hotline before but worried she had not dialed correctly. Williams alleges that she reported the allegations up the chain of command, but Waffle House corporate management denied receiving Williams' complaint. Finally, Williams' husband called Waffle House and resigned for her.

The jury found Waffle House liable for negligence in supervising Davis and in retaining him, and that Waffle House had constructively discharged Williams. The jury awarded her $400,000 in past compensatory damages, $25,000 in future compensatory damages, and $3,460,000 in punitive damages. The court of appeals affirmed the jury verdict finding that Waffle House did not conduct a sufficient investigation given the gravity of Williams' complaints, did not follow its own procedures for investigating such complaints, did not take reasonable precautions to prevent interaction between Williams and Davis in the restaurant, and retained an employee it had reason to know was unfit.

***Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672 (Tex. App.—Houston [14 Dist.] 2007, pet. denied)**

Donald Dias challenges the summary judgment granted in favor of his employer, Goodman Manufacturing Company. Dias argues that he was discharged in violation of the Texas Commission on Human Rights Act because (a) his mother had filed an age discrimination complaint; (b) Goodman perceived Dias as assisting his mother in prosecuting her claim or as a potential witness on her behalf; or (c) Dias actually assisted his mother with her age discrimination claim. The court of appeals affirmed, concluding that Goodman had not engaged in protected conduct and that Texas Labor Code section 21.055 does not recognize a cause of action for retaliation against a person who has not personally engaged in a protected activity.

***Niu v. Revcor Molded Products Co.*, 206 S.W.3d 723 (Tex. App.—Fort Worth 2006)**

A former employee brought action alleging employment discrimination on the basis of race, intentional infliction of emotional distress, racial harassment, and retaliation. The trial court granted the defendants' traditional summary judgment that included affidavits and excerpts from depositions showing that in 2001, Revcor suffered revenue losses and was forced to lay off fifty employees. In 2002, despite turning a small profit, Revcor laid off five more employees. Ultimately, Niu was terminated because an integration process had been completed and his skills were geared toward preparing and developing new products.

Niu's response included Niu's own affidavit. According to Niu's affidavit, his Chinese accent was ridiculed throughout his employment with Revcor. Niu stated under oath, that when he complained about the comments, management responded by telling him "to speak standard English" and "to not speak like a Negro." Niu also averred that he received a written warning for "combating his associates." Then Niu received two written warnings, one for comments made to a subordinate employee and one for unprofessional conduct during meetings. Niu stated in his affidavit that immediately after the reprimands he again complained to management and human resources that he was treated differently than other employees. According to Niu, there was no response to the allegation.

The court of appeals found that the reprimands did not support Niu's retaliation claim. The Court cited the new *Burlington* standard and found that Niu presented no evidence that the reprimands were related to his termination. The Court stated that, taken by themselves, the reprimands do not rise to the level of adverse employment action because, when viewed objectively, they are not "materially adverse;" that is, we cannot say that they well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

***City of Houston v. Williams*, 216 S.W.3d 827 (Tex. Feb. 23, 2007)**

Retired firefighters alleged that Houston improperly deducted previously-paid overtime amounts from their termination pay and that termination pay should have included premium salary. State law requires that Houston firefighters receive lump-sum payments of accumulated vacation and sick leave upon termination. Tex. Local Gov't Code § § 143.115, 143.116. The firefighters allege the City improperly calculated these payments, and that the City improperly deducted alleged overpayments of overtime. The trial court denied the city's plea to the jurisdiction, and granted the firefighters partial summary judgment. After the court of appeals affirmed, the City sought review by the Supreme Court. The Supreme Court, without hearing oral argument, reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings consistent with the opinion. The Supreme Court held that the suit, while characterized as seeking declaratory judgment, was a suit for money damages, for purposes of governmental immunity from suit.

The court of appeals had found it significant that the trial court expressly reserved any determination of money damages for a later date. The Supreme Court stated that governmental immunity does not spring into existence when a damages award is made; it shields governments from the costs of any litigation leading up to that goal. The Supreme Court concluded that in every suit against a governmental entity for money damages, a court must first determine the parties' contract or statutory rights; if the sole purpose of such a declaration is to obtain a money judgment, immunity is not waived.

***City of Sweetwater v. Waddell,* --- S.W.3d ----, 2007 WL 704927, 50 Tex. Sup. Ct. J. 545 (Tex. 2007)**

Firefighters and firefighters association sued city for failure to promote firefighter to fire marshal and to pay each firefighter the same base salary. The trial court granted the city's plea to jurisdiction and dismissed case with prejudice. Plaintiffs appealed. The Supreme Court held that city charter provision stating that city could sue and be sued did not waive immunity from suit.

***Bell v. City of Grand Prairie,* --- S.W.3d ----, 2007 WL 1153459 (Tex. App.—Dallas, Apr. 19, 2007)**

Firefighters for the City of Grand Prairie sued the City alleging a violation of their seniority pay rights under Chapter 143 of the Texas Local Government Code. They sought: (1) a declaration that the City violated § 143.041 by not paying them the same as similarly situated firefighters; (2) a permanent injunction barring the City from failing to pay them correctly; (3) an award of backpay and benefits; and (4) attorney's fees and costs.

The City filed a plea to the jurisdiction asserting immunity from suit. The trial court granted the plea. The employees appealed, arguing that (1) Chapter 143 of the Texas Local Government Code waived the City's immunity from suit, and (2) if the City was immune from suit, then the trial court erred in dismissing their claims with prejudice.

The court of appeals concluded that governmental immunity did not bar the appellants' declaratory judgment action to the extent it sought a declaratory judgment concerning future violations of section 143.041 and did not seek an award of money damages. The court of appeals also held that appellants' claim for back pay was a suit for monetary damages barred by governmental immunity, absent legislative consent.

***City of Dallas v. Albert,* 214 S.W.3d 631 (Tex. App.—Dallas Dec. 21, 2006, pet. filed Apr. 27, 2007)**

Firefighters brought action seeking unpaid back wages allegedly due pursuant to ordinance. The City filed counterclaims for alleged overpayments of salaries. The trial court denied the city's plea to jurisdiction. The firefighters appealed and city cross-appealed. The court of appeals held that: (1) neither the city's charter nor the section of the Texas Local Government Code providing that municipalities may plead and be impleaded waived city's immunity; (2) to the extent city had waived its immunity by filing counterclaims, city reinstated its immunity when it dismissed its counterclaims; (3) remand was required so trial court could allow firefighters the opportunity to argue that legislature waived city's immunity from suit by enacting new statutory provisions; and (4) although sovereign immunity did not protect city from firefighters' request for a declaratory judgment construing wage ordinance, Declaratory Judgments Act did not waive city's immunity from suits for money damages.

***City of Dallas v. Martin,* 214 S.W.3d 638 (Tex. App.—Dallas, Dec. 21, 2006, pet. filed Apr. 27, 2007)**

The city's public safety employees filed action against the city seeking a declaration that: (1) a city ordinance amended their alleged employment contracts to add a requirement that city maintain percentage pay differential between the grades in all future salary adjustments; and (2) that the city breached its contracts with them by raising pay of highest ranking officers without making corresponding increases to the salaries received by the lower ranks. City filed

counterclaims alleging overpayments of salaries. The trial court, denied the city's plea to the jurisdiction, and city appealed.

The court of appeals held that: (1) neither the local government code nor the city's charter waived the city's immunity from suit; (2) to the extent the city may have waived its immunity from suit by filing counterclaims, the city reinstated its immunity when it dismissed its counterclaims; and (3) the Declaratory Judgments Act waived the city's immunity to the extent the employees sought declaration of the rights, status, and legal relations of the parties under the ordinance.

***Cassidy, et al. v. City of Balch Springs, et al.,* ---S.W.3d ---, 2007 WL 882484 (Tex. App.—Dallas, March 26, 2007)**

Cassidy and other police officers sued the City of Balch Springs and its City Manager, alleging that the City failed to pay them in compliance with the civil service provisions of the Texas Local Government Code. The trial court granted the City's plea to the jurisdiction, finding that the City and the City Manager were immune based on sovereign immunity from suit.

On appeal, the officers argued that the City's immunity was waived by the "plead and be impleaded" language in Tex. Loc. Gov't Code §51.075 and similar language in the City Charter. In rejecting the Appellants argument, the court held that under *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) and *City of Houston v. Williams*, 216 S.W.3d 827, 2007 WL 549745 (Tex. Feb. 23, 2007) (per curiam), the "plead and be impleaded" language and the civil service statutes were insufficient to waive immunity. However, the Court opined that governmental immunity from claims under the civil service statutes is not generally supported either by historic precedent or the legislature's stated purpose for the statutes— the protection of employees from unfettered local authority. The court of appeals complained about the *Williams* decision noting that the case did not address the numerous opinions it had issued in the past, as well as those issued by various other courts of appeals, in which the courts asserted general jurisdiction over claims made under the civil service statutes and, in many cases, awarded the plaintiffs back pay. The court noted that the Supreme Court had repeatedly held that immunity should not be found if to do so would defeat legislative intent and the true purpose of the law opining that, "to deny employees of the fire and police departments recourse in cases where the municipality violates these statutes would eviscerate the statutes' expressly stated purpose." Despite these reservations, the court of appeals affirmed the Defendants' immunity on the basis of *Williams*.

***Medical Arts Hosp. v. Robison*, 216 S.W.3d 38 (Tex. App.—Eastland 2006)**

Former hospital employee brought action against county hospital district, hospital, and several hospital employees alleging fraud, wrongful termination, and a violation of the Texas Whistleblower Act. The hospital filed a plea to the jurisdiction and appealed when the trial court denied it.

Robison worked as a registered nurse for Medical Arts. Medical Arts provides medical personnel to a local state prison unit where they assigned Robison. Robison alleged that she observed illegal activities at the unit, reported them to the Texas Labor Board, and was terminated for doing so. Medical Arts argued that it has a grievance procedure, which required Robison to file a written grievance with her supervisor, and that she failed to do so. Robison provided Charles Butts, the hospital's administrator, with letters of recommendation on her behalf, but did not file a written grievance nor otherwise provide written notice of her intention

to pursue a whistleblower claim. Medical Arts filed a plea to the jurisdiction challenging the trial court's jurisdiction over Robison's whistleblower claim. The trial court denied the plea.

The Whistleblower Act requires a claimant to timely initiate "grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing." The statute provides the claimant with the discretion to exhaust any applicable grievance proceedings prior to filing suit or to terminate the proceedings and file suit after sixty days have elapsed.

The court of appeals held that: (1) the Whistleblower Act requirement that a complaining employee initiate a grievance and provide a governmental entity with at least 60 days to address the grievance was a jurisdictional requirement; (2) the employee's failure to strictly comply with the hospital's process for grieving a termination did not, by itself, deprive the district court of jurisdiction to hear an employee's whistleblower claim; and (3) the employee did not initiate a grievance process as required by the notice provisions of the Whistleblower Act, depriving the district court of jurisdiction.

***Pavelka v. Texas Workforce Com'n*, 2006 WL 2852507 (Tex. App.—Austin, Oct. 3, 2006) (mem. op.)**

In December 1994, Pavelka was arrested for unlawful carrying of a weapon in Dallas County. In April 1995, Pavelka's attorney entered a plea of *nolo contendere* on Pavelka's behalf, and the trial court placed Pavelka on deferred adjudication community supervision for twelve months. Pavelka completed his community supervision in April 1996. In February 2001, the City of Austin Aviation Department hired Pavelka and assigned him to work at the local airport. The City's employment application included the following question: "Have you been convicted of a crime or have you pled *nolo contendere* or been granted deferred adjudication within the last ten years?" Despite his 1995 plea, Pavelka checked the "No" box in response to the question. When the City discovered that Pavelka had received deferred adjudication, the City terminated him because he was no longer eligible for unescorted access to the Security Identification Display Area at the airport, a requirement for his job duties, and because he had falsified his employment application. Pavelka applied for unemployment benefits. The Commission denied his application based on its determination that the City discharged Pavelka from his position for falsifying his employment application, which constitutes misconduct under the Act. The district court affirmed the Commission's decision, and Pavelka appealed. Because Pavelka failed to establish that the Commission's decision was not supported by substantial evidence, the court of appeals affirmed the district court's judgment.

Jurisdiction

***Hallco Texas, Inc. v. McMullen County*, --- S.W.3d ----, 2006 WL 3825298, 50 Tex. Sup. Ct. J. 314 (Tex. 2006, pet. reh'g filed Jan. 18, 2007)**

This is a takings case arising out of McMullen County's attempts to stop the development of a landfill. Shortly after the plaintiff bought property in the County and announced its intention of using it as the site for a landfill, the County adopted a resolution declaring its opposition to the proposed landfill. More than a year later, and after the landowner had applied to the State for a landfill permit, the County passed an ordinance prohibiting landfills within a specified distance of Choke Canyon Lake. The landowner challenged the County's ordinance in federal court on substantive due process, equal protection, and Fifth Amendment takings grounds while filing a parallel proceeding in state court. The federal court found the ordinance to be rationally related to a legitimate governmental purpose and dismissed the substantive due process and equal protection claims with prejudice. The federal court dismissed the federal takings claim on ripeness grounds concluding that the plaintiff must pursue available state court remedies before pursuing any federal takings claim. The County then moved for summary judgment in the parallel state court proceedings arguing that the property owner had no constitutionally protected interest in using its property as a landfill. The trial court granted the County's motion and the court of appeals affirmed the decision. Hallco did not seek review by the Texas Supreme Court. A few years later, Hallco submitted a request for a variance to the County and, when the County failed to grant the variance, filed a new lawsuit in state court arguing that the denial of the variance request constituted a taking of its property in violation of the state and federal constitutions. The County moved for summary judgment arguing, among other things, that the property owner's claims were barred by res judicata because the takings claims were or could have been brought in the original state court proceedings. The trial court granted the County's motion and the court of appeals affirmed. In a sharply divided opinion the Supreme Court affirmed. The principle holdings of the Court were: 1) the County's rejection of Hallco's variance request did not resurrect claims Hallco could have made in the original state court proceedings; and 2) the resolution of Hallco's state law taking claims were res judicata as to their similar federal takings claims, despite Hallco's attempt to reserve those claims for later resolution in federal court.

***South Texas Water Authority v. Lomas and Citizens for Water Acquired Through Equal Rates*, --- S.W.3d ---, 2007 WL 1225221 (Tex. April 27, 2007)**

STWA entered into a contract with the City of Kingsville to furnish treated water to the City. Lomas and WATER sued for declaratory judgment and damages for discrimination, asserting standing as third-party beneficiaries to the water supply contract. The court held that city residents were not intended third-party beneficiaries of the city's contract with STWA, and that both the residents and WATER lacked standing. The court found that STWA's enabling legislation created no more than an incidental benefit to the public at large, which was insufficient to confer third-party-beneficiary status on the plaintiffs. The court also found that the plaintiffs could not sue under general standing principles because they could not demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.

***Nivens v. City of League City*, ---S.W.3d ---, 2007 WL 1018306 (Tex. App. – Houston [1st Dist.] April 5, 2007)**

In 1981 the City of League City consented to the creation of several in-city municipal utility districts for the South Shore Harbor development. The City executed contracts with each MUD for acquisition and construction of water, sewer and drainage systems. Each agreement provided that the City and MUD would levy and collect ad valorem taxes on the taxable property and the City would allocate 40% of the taxes it collected from the residents to the respective MUD. The allocation percentage was modified in 1988.

Taxpayers who resided in the MUDs sued the City, and the MUDs, to recover damages equal to the taxes that they had paid on their property. The taxpayers asserted claims against the City for money had and received, breach of contract, and mistake, alleging that the City collected ad valorem taxes in excess of the amount that it was permitted to collect pursuant to Texas Water Code § 54.016(f). The Water Code provides that a city/mud contract must contain "an allocation agreement to assure that the total ad valorem taxes collected by [th City] and the [MUDs] from the taxable property within the [municipal utility] district does not exceed an amount greater than the city's ad valorem taxes on such property". The trial court dismissed the taxpayers' claims for lack of jurisdiction, and on appeal, the Houston First Court finds that actions barred by governmental immunity.

***City of Seabrook v. Port of Houston Authority*, 199 S.W.3d 403 (Tex. App. - Houston [1st Dist.] 2006, pet. granted April 27, 2007)**

The Port of Houston Authority sued two private landowners, seeking to condemn a portion of their property in connection with its development of a voter-approved expansion to the Port. The property to be condemned lay within the City of Seabrook. Pursuant to statute, the trial court appointed special commissioners who appraised the damages for the property's taking. The property owner objected to the award, asserting that the Port lacked the power to condemn the property because it failed to obtain the City's consent. The City subsequently intervened in the lawsuit, claiming, among other things, it had standing to intervene based on an applicable Water Code provision that requires the City's consent to right-of-way condemnations within its boundaries. Ultimately, the property owner and the City jointly filed a plea to the trial court's jurisdiction asserting that a Water Code provision requires the City's consent to the condemnation; that the City had not consented; and thus, that the trial court lacked subject-matter jurisdiction over the Port's condemnation proceeding. The trial court denied both pleas and the City appealed. The court of appeals held that statute at issue was not a jurisdictional prerequisite to the Port's filing suit against a private landowner. In so holding, the Court relied on *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000) and its progeny, which provide that a statutory requirement is jurisdictional, as opposed to substantive, only when the Legislature's intent so indicates. The Supreme Court has granted the City and landowner's petition for review.

***City of La Marque v. Braskey*, 216 S.W.3d 861 (Tex. App.-Houston [1st Dist.] 2007, pet. denied)**

Braskey operated a cat shelter. The City of La Marque passed an ordinance prohibiting the keeping of large numbers of cats and dogs within 500 feet of a dwelling. Braskey's shelter was located within 100 feet of three residences. After charges were filed in municipal court, Braskey filed suit in state district court seeking an injunction against the City because enforcement of the ordinance would cause her cat house to close, the death of cats housed at the shelter, and the potential imposition of fines or confinement. The Texas Supreme Court has grouped cases into four categories for purposes of determining if a party may challenge the

constitutionality of a criminal statute in district court: (1) the statute is enforced and the party is being prosecuted; (2)the statute is enforced and the threat of prosecution is imminent; (3) there is no actual or threatened enforcement of the statute and the party does not seek an injunction against its enforcement; and (4) there is no actual or threatened enforcement of the statute and no complaint of specific conduct remediable by injunction. *State v. Morales*, 869 S.W.2d 941 (Tex. 1994).

Categories (1) and (2) provide a court of equity with jurisdiction only if a vested property right is at issue in the enforcement of the statute. The court of appeals recognized Braskey's property right in the facility. It held, however that her use of the facility as a cat house was not a vested property right because Braskey did not have a constitutionally protected right to use her property as such. The damages she faced if the shelter were closed concerned a particular use of her property, and not the right to use the property. Consequently the district court was without jurisdiction to hear Braskey's suit.

***Morrow v. Truckload Fireworks, Inc.*, --- S.W.3d ----, 2007 WL 865810 (Tex. App.-Eastland, March 22, 2007, Rule 53.7(f) motion filed May 1, 2007)**

On June 15, 2006 the Midland County Judge Morrow issued a Declaration of Disaster and order banning the outdoor use of fireworks in Midland County. A district court of equity enjoined the County from enforcing the order against Truckload Fireworks. Without determining whether the County had authority to issue the ban, the Eastland Court follows the lead of the First Court of Houston in ***Braskey*** and finds that, although the ban unquestionably impacted Truckload's business, Truckload did not have a vested property right to conduct a fireworks business in Midland County. Consequently the district court was without jurisdiction to hear Truckload's suit.

***City of Mont Belvieu v. Enterprise Products Operating, LP*, --- S.W.3d ---, 2007 WL 582309 (Tex. App.-Houston [14 Dist.] February 27, 2007)**

The City of Mont Belvieu is located on top of the Barbers Hill salt dome that contains numerous caverns used as storage reservoirs for hydrocarbon products. In January 2005 the Texas Railroad Commission (TRRC) granted Enterprise a permit to "create, operate and maintain an underground hydrocarbon storage facility" after a lengthy process in which the City participated. After Enterprise began work on drilling a well within the City to access the underground storage facility authorized by the TRRC permit, the City sued Enterprise to enjoin its drilling operation until it secured a drilling permit from the City. The trial court dismissed the City's suit for want of jurisdiction based upon Enterprise's argument that Texas Natural Resources Code § 211 preempted the City's attempted regulation. The court of appeals reversed, holding that the Texas Legislature has not given TRRC "exclusive" authority over salt dome facilities because, in part, the statute provides that it "does not reduce, limit or impair the authority provided by law to any municipality except as to "safety standards or practices (such as installation and testing of safety devices, emergency notification procedures, fire prevention and response procedures, and safety training for employees/workers on the operation of the facility) applicable to hazardous liquid salt formation storage facilities."

***Villarreal v. Harris County, et. al.*, --- S.W.3d ---, 2006 WL 3751414 (Tex. App. – Houston [1st Dist.] Dec. 21, 2006)**

The homeowner in this case brought suit in district court against the taxing jurisdictions in which his home was located alleging an unconstitutional taking of his property when it was sold at a tax foreclosure sale. The taxing authorities filed a plea to the jurisdiction based on the provisions of Section 25.1032(c) of the Texas Government Code, which provides that county civil courts at law have the "exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy."

The Court examined the homeowner's pleadings to determine if a claim for inverse condemnation under Article I, Section 17 of the Texas Constitution had, in fact, been pled by the homeowner. Noting that the pleadings contained the essential elements for an inverse condemnation claim (i.e. that "(1) a property owner seeks (2) compensation for (3) property taken for public use (4) without process or a proper condemnation proceeding.", the appellate held that exclusive jurisdiction of the homeowner's claim in this case was vested in the Harris County civil courts at law.

The *Villarreal* Court also noted that the improper use of taxing power is not a use of the taxing power at all, and taking of property through such an improper use is an exercise of a governing body's power of eminent domain, giving rise to a potential cause of action for inverse condemnation.

Land Use

***City of Laredo v. Webb County*, --- S.W.3d ---, 2007 WL 1028851 (Tex. App.-Austin, Apr. 4, 2007)**

There are four international toll bridges in the Laredo area providing for access to Mexico, all owned by the City. The City and the County got into a competition with each other to partner with Mexico to build a fifth bridge through the City of Laredo. After the Texas Department of Transportation approved the applications of both the City and the County to build the fifth bridge in the City, the County sued the City for declaratory judgment that the County was authorized to construct a toll bridge within the municipal limits of Laredo despite the City's objections and without the City's consent. The trial court granted the County's requested relief.

The Austin Court of Appeals finds that the City of Laredo, as a home-rule city 1) has removed the power of the County to lay out and regulate roads within the City (*Harrison County v. City of Marshall*, 253 S.W.2d 67 (Tex.Civ.App.-Fort Worth 1952), and 2) has "exclusive control over and under the public highways, streets, and alleys of the municipality (Texas Transportation Code § 311.001(a)). Moreover a county's authority over roads and bridges within a municipality expressly requires "the approval of the governing body of a municipality" before a county may "finance the construction … of a street or alley … that is located in the municipality, including the provision of … bridges." Texas Transportation Code § 251.012. Accordingly, absent legislation to the contrary, the County is required to have the consent of the City to construct an international bridge and related roadway within the City.

***Howeth Investments, Inc. v. White*, --- S.W.3d --- 2007 WL 529924 (Tex. App.-Houston [1st Dist.] February 22, 2007, no pet.)**

Developer Howeth contracted to purchase two properties in the City of Hedwig Village and sought to subdivide each piece of property into two sub-lots, with one of the subdivided lots on each piece of property having a "flag" configuration. After Howeth submitted to the City plat applications in June for the proposed flag lots, the Commission deferred action on the matter until its August meeting for further review and research. In July, Howeth sought certificates of "no action" from the Commission under Texas Local Government Code Section 212.009(a). ("The municipal authority shall act on a plat within 30 days after the date the plat is filed.") The City's Attorney denied the request asserted that the statute did not control because the June plat applications were mere preliminary applications not subject to the statute.

At the August Commission meeting, a divided Commission voted against approving the June plat applications. After Howeth submitted another set of proposed plats, again a divided Commission voted against approving the second set of proposed plats. Howeth sued the City, the Commission, and the individual members of the Commission who voted against the plats in Harris County Court at Law (which has exclusive jurisdiction of takings claims in Harris County) asserting a takings claim under the Texas Constitution and attempting to reserve a federal takings claim against all the defendants for later assertion in federal court.

The trial court dismissed and severed Howeth's claims against the individual defendants. On appeal, the First Court of Appeals, without ruling on Howeth's attempt to reserve a federal takings claim, held that Howeth in effect abandoned his state law takings claim against the individual members of the Commission, and modified the trial court's judgment to dismiss Howeth's claim against the individuals "without prejudice".

***City of San Antonio v. En Seguido, Ltd.*, --- S.W.3d ---, 2007 WL 748658 (Tex. App.— San Antonio, March 14, 2007)**

In 1971, a developer plats with the City's approval 27 acres called Windcrest Heights Subdivision. In 1999, City Public Service confirms that the subdivision can receive gas and electric supply lines. In 2000, the City issues a Development Rights Period permit for the subdivision. Also in 2000 the San Antonio River Authority acknowledged that it would provide wastewater service for the subdivision. In 2004, the developer sold the property to En Seguido, which paid $113,405 in impact fees for sewer connections to 154 lots in the subdivision. After a dispute arose between En Seguido and the City with regard to applicability of the 1971 land use regulations, En Seguido filed a declaratory judgment action.

The trial court entered a summary judgment for En Seguido finding that the regulations in effect at the time the 1971 subdivision plat controlled the development of the property. On appeal, the San Antonio Court remands the matter to the trial court because there are fact issues precluding summary judgment under Texas Local Government Code Chapter 245 "Issuance of Permits", aka the vested rights statute. In particular, the San Antonio court finds that: (1) there is a fact issue whether the El Seguido seeks to pursue a change from the "project" envisioned by the 1971 plat; and (2) there is a fact issue whether the original "project" was abandoned by failure to "progress toward completion."

***Schecter v. Wildwood Developers, LLC,* 214 S.W.3d 117 (Tex. App.-El Paso 2006)**

In 2004 the City's Planning Commission approved Wildwood's subdivision plat for development. Schecter, whose home is located within 300 feet of the subdivision, filed suit against the City seeking to halt the project because it did not comply with the City's subdivision ordinances. Additionally, Schecter sought a declaratory judgment that: 1) the subdivision application did not meet the City's design criteria, and 2) that the Commission's approval of Wildwood's subdivision was void because it was based upon Wildwood's fraudulent and false statements.

After Wildwood intervened, the trial court dismissed Schecter's complaints against the City for lack of standing and jurisdiction. Schecter appealed without posting a security for a stay. On appeal, the El Paso Court finds that Schecter fails to establish standing under the Declaratory Judgment Act, Texas Civil Practice and Remedies Code Chapter 37, because his claims were not based upon his "rights, status, or legal relationship under a statute, municipal ordinance, contract or franchise."

***Sanders v. City of Grapevine, et al,* --- S.W.3d --- 2007 WL 291014 (Tex. App.-Fort Worth Feb. 1, 2007, pet. filed Apr. 16, 2007)**

The Sanders bought a home in a David Weekley Homes development, in Grapevine, Texas, because a sales consultant for Weekley had assured them that Weekley intended for the subdivision to have a wooded, country atmosphere, that Weekly would take care to preserve the trees, and the City of Grapevine had "an extremely tough tree ordinance." After they moved in, it became clear that Weekley Homes did not intend to comply with, and the City did not intend to enforce, the tree ordinance. According to the Sanders after the Sanders wrote City Council and attended City Council meetings, Weekley Home's employees and the City began a systematic plan of harassing them.

The Sanders sued Weekley Homes for breach of contract and DTPA violations, and sued Weekley Homes, the City and their employees for fraud, negligence, and negligent misrepresentation. Additionally, the Sanders sought a declaratory judgment as to "the rights, status and other legal relations" among the parties with regard to the sales contract and the City's tree preservation ordinance. The trial court ordered the arbitration of the Sanders' claims against Weekley Homes, and dismissed the Sanders' claims against the City based upon governmental immunity. On appeal, the Fort Worth Court of Appeals affirms the trial court's dismissal of the claims for money damages against the City, but remanded the Sanders' declaratory judgment action against the City back to the trial court so that the Sanders may clarify the specific declaratory relief sought.

***City of San Antonio v. TPLP Office Park Properties*, --- S.W.3d ---, 2007 WL 431048, 50 Tex. Sup.Ct.J. 393 (Tex. 2007)**

In 1971, the City of San Antonio approved an amendment to its zoning ordinance allowing the development of a commercial business development known as Park Ten Business Park near the intersection of I-10 and 410. The amendment provided that there was be "no access to Freiling Drive (a residential street abutting the development) from the Commercial Zones." In 1975 and again in 1989, the city's Planning and Zoning Commission approved plats providing driveway access from the Park Ten to Frieling Drive. In 1999, the property owner of Park Ten sued the City for injunctive and declaratory relief to keep the driveway access open. In

June 2001, the City council passed an ordinance that directed the City Attorney to "take any and all necessary action to close" Park Ten's driveway access to Freiling.

In November 2001, after an evidentiary hearing, the trial court found that the attempted closure of the Frieling Drive driveway would be an unreasonable exercise of the City's police power, that the closure of the driveway access would constitute a taking that the City was estopped from closing the driveway, and that Park Ten was entitled to attorney's fees. On appeal, the San Antonio Court affirmed. Without oral argument, the Texas Supreme Court reversed finding in part that:

(1) Park Ten's suit constitutes a challenge to the City's exercise of its police powers over its streets. As a substantive due process challenge, the judicial standard of review of the city's action is whether the city's actions limiting vehicular access to Frieling Drive via the driveway were rational, i.e., whether the evidence in the record shows it to be at least fairly debatable that the decisions were rationally related to a legitimate government interest, *citing City Mayhew v. Town of Sunnyvale,* 964 S.W.2d, 922 (Tex. 1998). As a question of law, this appellate court reviews the matter without deference to the lower court's conclusions. Because the City articulated at least two governmental interests (safety and separating commercial traffic from a residential neighborhood) supported by evidence in the record, the City had authority to close the driveway access to Frieling Drive.

(2) Although a landowner is entitled to compensation if access to property is materially and substantially impaired, closing an access point and merely causing diversion of traffic or circuitry of travel does not result in compensable taking. Again, as a question of law this matter is reviewed without deference to the lower court's conclusions. Because at least six points of egress and ingress for Part Ten remain along the I-10 access road, there was no compensable taking.

(3) Although in exceptional cases a city may be estopped from taking certain actions where circumstances demand application of the doctrine to prevent manifest injustice, the courts will not apply the doctrine if doing so interferes with a city's ability to perform its governmental function, *citing City of White Settlement v. Super Wash, Inc.* 198 S.W.3d, 770 (Tex. 2006). The City presented evidence that the City elected to close the access to Freiling Drive only after its other attempts to regulate traffic "arguably did not achieve their goal". The Supreme Court opined that courts may not "second guess" a governmental entity's decision as to how it performs its governmental function of regulating traffic by imposing an estopped theory under circumstances such as those presented by this record.

Open Government

***Fiske v. City of Dallas,* --- S.W.3d ---, 2007 WL 1028921 (Tex. App.— Texarkana, April 6, 2007)**

Fiske sued the City of Dallas seeking reinstatement to her prior position as a municipal judge after the City Council declared municipal judge positions vacant and a Judicial Nomination Commission failed to recommend her for appointment to a new term. Fiske argued that the City had violated the Open Meetings Act that because the commission failed to give proper specific notice of the meetings at which it considered its recommendations and failed to make and preserve written meetings or tape recordings at the proceedings at such meetings. The court held that the commission was not a governmental body subject to TOMA because (1) it was not a part of the city council, (2) it was not a committee of the city council, (3) its members

were not members of the city council, (3) the members were not appointed by the city council or by the mayor, (4) the committee had no decision making authority, but could only recommend candidates for judgeships to city council.

***City of Laredo v. Martha Escamilla, et. al.*, --- S.W.3d ---, 2006 WL 3085607 (Tex. App.— San Antonio, November 1, 2006, pet. filed Feb. 1, 2007)**

Escamilla and others sued the City of Laredo for violations of the Texas Open Meetings Act, alleging that the city violated TOMA when it had a closed meeting regarding a real estate transaction involving the purchase of real estate from the United Independent School District. The Court found that City Council was not entitled to meet in closed session to discuss the proposed purchase under the real estate exception because the City had already made an offer to the school district to purchase the real estate, the school district had already accepted the city's offer, the City had received the school district's resolution approving the sale and warranty deed before it posted notice for the meeting in question, and an open discussion of the purchase would not have impeded the City's negotiations with the school district.

***Olympic Waste Services v. City of Grand Saline*, 204 S.W.3d 496 (Tex. App.— Tyler 2006, no pet.)**

A solid waste removal company under contract with the City sued seeking to have the City's contract with a competitor declared void due to violations of TOMA. During a closed session convened under the consultation with attorney exception, the City Council had discussed the legal ramifications of terminating the existing contract as well as bids from prospective waste removal vendors. The court held that the City was not authorized to discuss the merits of a proposed contract, financial considerations, or other nonlegal matters related to the contract just because its attorney was present. However, the Court declined to declare the contract award void because the action to enter into the contract was taken in open session.

***Odessa Texas Sheriff's Posse, Inc. v. Ector County*, 215 S.W.3d 458 (Tex. App.— Eastland 2006, pet. denied).**

The Odessa Texas Sheriff's Posse, formerly the Ector County Sheriff's Posse, had leased land from Ector County for a number of years. Ector County ordered the Posse to vacate the property so that the County could extend an airport runway, and in response the Posse filed an inverse condemnation claim and a claim under TOMA. The Posse argued that the meeting notices for two Commissioners' Court meetings concerning the purported lease and notice to vacate were inadequate and that the County's subsequent decision to evict it was void. The first disputed meeting notice read: "To consider and discuss concerns from the *Ector County Sheriff's Posse*,- Jerry D. Caddel, County Judge." The record established that the Commissioners' Court vote concerned the *Odessa Texas Sheriff's Posse*, not the Ector County Sheriff's Posse. Therefore, the court found the notice did not satisfy TOMA because the notice did not indicate that action might be taken against the entity actually occupying the land. However, the court reaffirmed that a notice need not indicate specifically that a governmental body might vote.

The second disputed meeting notice correctly identified the Odessa Texas Sheriff's Posse, specifically referred to the pending litigation, indicated that the commissioners would meet with counsel in executive session to discuss the litigation and, in open session, might take

any and all action necessary concerning that litigation. Subsequently, the county authorized counsel to send an eviction notice following the meeting. The Posse argued that the eviction notice was void because it constituted new, rather than pending, litigation. In rejecting this argument, the Court noted that it is not necessary to provide notice of all of the consequences that might flow from consideration of a subject and that the eviction notice was rationally related to the litigation.

Sovereign Immunity

***City of Galveston v. State of Texas*, 217 S.W.3d 466 (Tex. 2007)**

The State of Texas sued the City of Galveston for damages to Texas Department of Transportation facilities caused by the rupture of a city water line. The City filed a plea to the jurisdiction arguing that it was protected by sovereign immunity. The trial court granted the jurisdictional plea, but the court of appeals reversed, holding that a city does not have immunity from suit by the state. The Supreme Court reversed the court of appeals noting a heavy presumption in favor of immunity in the absence of a clear and ambiguous waiver on the part of the Legislature. The Court explained that this high standard is especially true for home-rule cities, which derive their powers from the Texas Constitution. Because the State was unable to assert a statute that unambiguously and unmistakably authorized the State to sue for money damages, the Court found the State had no authority to sue the City. Finally, the Court noted that allowing the State to sue cites would "certainly open a can of worms".

***State v. Holland*, --- S.W.3d ---, 2007 WL 1163699 (Tex., Apr. 20, 2007)**

Herbert Holland developed a process by which oil-contaminated bilge water could be cleaned in a cost-effective manner. The State of Texas contracted with two companies that were either owned or managed by Holland to abate pollution resulting from commercial fishing boats. The contracts executed by the State with these two companies both required the use of Holland's cleaning process.

After the execution of these contracts, Holland applied for and received a patent on the process being used by the State pursuant to these contracts. Upon receiving the patent, Holland, in his individual capacity, made a demand against the State seeking payment for use of his patented technology. When the State refused, Holland filed suit claiming that the State was using his patented technology without authorization, constituting a taking under Article I, Section 17 of the Texas Constitution.

To establish an inverse condemnation claim under Article I, Section 17, the governmental actor must be shown to have acted intentionally to take or damage property for a public use. The Court ruled that when the government acts pursuant to colorable contract rights, lacks the necessary intent to take under its eminent-domain powers, thereby retaining its immunity from suit. Even though the evidence in this case was uncontroverted that the State did not have an express written contract with Holland individually, Holland still provided the patented process and design assistance voluntarily through the contracts with his two companies. The Court declined to rule on whether an implied contract was created between the State and Holland individually, relying instead on the fact that the State acted under color of its contracts with Holland's two companies. As such, the State lacked the requisite intent to take Holland's patented process by its powers of eminent domain.

***City of Houston v. Southern Electrical Services, Inc. and Caddell Construction Co., Inc.*, 2007 WL 1228549 (Tex. App.—Houston [1st Dist.], April 26, 2007) (mem. op.)**

Caddell entered into an agreement with the City for improvements to George Bush Intercontinental Airport. Caddell then requested bids for subcontractors for the work. The City provided documents certifying the applicable prevailing wage rate, which subcontractors were required to pay their workers because federal funds were involved. SES prepared a bid using the City's wage documents and was awarded a contract by Caddell. SES later learned that the City's published wage rate was lower than the true prevailing wage rate and, as a result, incurred almost $1.5 million in damages for the underpayment of the prevailing wage rate. SES sued the City for breach of contract and, in the alternative, quantum meruit. Among other defenses, the City asserted that its immunity from suit was not waived by the "plead and be impleaded" language in section 51.075 of the Local Government Code or by the "sue and be sued" language in the City's Charter. The court of appeals agreed, but held that recently enacted Tex. Loc. Gov't Code §§ 271.151-271.160 waived immunity from suit for contract claims against most local governmental entities and applied retroactively. The court remanded the case to the trial court for further development regarding the issue of the statute's application.

***City of Dallas v. John Bargman, as trustee of the Ann T. Bovis Property Trust*, 207 S.W.3d 926 (Tex. App.—Dallas 2006)**

The Trust sued the City of Dallas for trespassing on the Trust's property by installing sewers, water lines, and other utilities. The City filed counterclaims against the Trust, including a suit to quiet title and a claim for breach of warranty. Part of the City's prayer for relief included "judgment awarding the City its actual damages arising from Plaintiff's casting a cloud on the City's title to and use and enjoyment of the Easement and/or breaching its warranty to defend the City's title to the easement…." The trial court denied the City's plea to the jurisdiction and the City filed an interlocutory appeal. The court of appeals affirmed the trial court's order denying the City's plea to the jurisdiction, holding that the city had waived immunity for any suit that was connected with its counterclaim under the Supreme Court of Texas' recent decision in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The court explained that, under *Reata*, when the government enters into the litigation process by asserting its own affirmative claims for monetary relief, it waives sovereign immunity to the extent of allowing opposing parties to assert as an offset any claims relevant to, connected with, and properly defensive to those asserted by the governmental entity. The court concluded that the Trust's claim that the City had abandoned the easement was relevant to, connected with, and properly defensive of the City's counterclaims for actual damages from the Trust's "casting a cloud on the City's title to and use and enjoyment of the easement" and breaching the warranty to defend the City's title to the easement.

***Texas Southern University v. State Street Bank and Trust Company*, 212 S.W.3d 893 (Tex. App.— Houston [1st Dist.] 2007, pet. filed Apr. 5, 2007)**

TSU solicited bids for "comprehensive energy conservation services," including an energy audit, certain staffing requirements and evaluations, and equipment, services, and financing". After soliciting bids for the project, TSU awarded the contract to Viron, an energy corporation. As part of the energy audit, Viron and TSU executed a "Performance Based Energy Savings Agreement" designed to carry out the corrective measures discussed in the energy audit. The Agreement called for six projects for the improvement of TSU's physical plant. TSU agreed

to pay for a portion of these costs in cash with the remaining portion to be funded by a lease between TSU and Viron. After accepting equipment related to the project, TSU defaulted on its payments. Viron subsequently assigned its right to receive payments from TSU to State Street Bank, which provided financing for the project. Viron and the Bank brought several causes of action against TSU, including claims for inverse condemnation, breach of contract, and a request for declaratory relief. TSU's plea to the jurisdiction was denied and an interlocutory appeal followed. After noting that Viron faced a multi-million dollar loss and finding that Viron had standing to assert its contract claims, the court of appeals found that TSU had waived its sovereign immunity by its conduct. The court accepted Viron's allegation that TSU officials "lured" Viron into the Agreement "with false promises that the contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that the contract was not valid after all." Therefore, the Court concluded that sovereign immunity did not defeat the trial court's subject-matter jurisdiction over Viron's claims for breach of contract. However, the Court rejected Viron and State Street's request for declaratory judgment, finding that the Legislature did not intend to sustain suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities. Finally, with regard to the Plaintiffs' inverse condemnation claim, the Court found that TSU's possession of the equipment was by virtue of the Agreement, and not by virtue of a taking within the meaning of the Texas Constitution.

***San Patricio County v. Nueces County,* 214 S.W. 3d 536 (Tex. App. – Corpus Christi 2006, pet. filed Mar. 2, 2007)**

San Patricio County prevailed in a boundary dispute and sued Nueces County for property taxes it collected on property determined to be in San Patricio County. Nueces County asserted governmental immunity from suit. The court held that the County was immune from suit only for activities within its boundaries, not for tax collections outside its boundaries.

***Sweeny Community Hospital v. Mendez,* --- S.W.3d ---, 2007 WL 274188 (Tex. App. – Houston [1st Dist.] Feb. 1, 2007, no pet.)**

The Hospital sued Dr. Mendez for breach of contract. Dr. Mendez counterclaimed for breach of contract, fraud, tortious interference, defamation, and retaliation. The Hospital moved for dismissal on the basis of immunity for the claims of tortious interference, defamation and retaliation. The Hospital argued that under *Reata II (Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006)), Dr. Mendez's counterclaims were not germane to, connected with, and properly defensive to the Hospital's breach of contract claim.

The court held that although the elements of the various claims differed, the core facts were the same, and determining whether the Hospital and Mendez met their contractual obligations was necessary to the claims asserted by both the Hospital and Mendez. Thus, the court concluded that the issues that arose in Mendez's counterclaims were germane to and connected with the Hospital's breach of contract claim.

In response to the Hospital's argument that *Reata II* mandated dismissal of the claims of tortious interference, defamation and retaliation because they were far in excess of any offset to the claims initiated by the Hospital, the court stated that Mendez should be given an opportunity to amend his petition to seek no more damages than the Hospital may be awarded upon final trial if the defect is a jurisdictional defect as argued by the Hospital.

The court also determined that the Legislature did not manifest a clear legislative intent to waive governmental immunity for retaliation claims brought under § 161.135 of the Texas Health and Safety Code. The court concluded that Mendez could sue the hospital for damages for retaliation and for tortious interference and defamation only to the extent of the limited immunity to suit set out in *Reata II*, i.e. to the extent of an offset.

Torts

***City of Del Rio v. Dwayne Felton and Gracie Felton,* 2007 WL 247655 (Tex. App.—San Antonio, January 31, 2007) (mem. op.)**

The Feltons sued the city for damages to their property, claiming that the City improperly and/or negligently watered an adjoining park, allegedly resulting in the super saturating of the earth and thereby leading to the deterioration of the Feltons' building. More specifically, the Feltons argued that the damages arose from the City's "proprietary functions." The trial court denied the City's plea to the jurisdiction. The court of appeals reversed, holding that the maintenance and irrigation of a park is not a proprietary function, and therefore the City's governmental immunity had not been waived. The Court reasoned that these activities are similar to the operation and maintenance of storm sewers, waterworks, and water and sewer service, which are classified by statute as governmental functions. The Court also found that the Feltons had not pled sufficient facts under the Texas Tort Claims Act to demonstrate the City waived its immunity because they did not allege that the property damage arose from the operation or use of a motor-driven vehicle or motor-driven equipment.

***In re Texas Department of Transportation,* 50 Tex. Sup. Ct. J. 546, 2007 WL 704584 (Tex. March 9, 2007) (per curiam)**

This was a mandamus proceeding seeking a change in venue based on TEX. CIV. PRAC. & REM. CODE §101.102(a). Plaintiffs' son, a passenger in a car, was killed in an accident in Gillespie County when the car slid off a roadway through a gap between the guardrail of a bridge and the adjacent embankment and into the river. Plaintiffs sued TxDOT and Gillespie County in Travis County probate court. The Plaintiffs alleged that venue in Travis County was proper as to TxDOT because TxDOT maintained offices in Travis County and entered into, and negligently performed their contract and job duties in Travis County, which resulted in the defective roadway and approach to the bridge where the accident occurred.

The Supreme Court concluded that mandamus would issue. It held that the only claims that could be properly pled against TxDOT were claims for which sovereign immunity had been waived: premises defect and special defect claims. Plaintiffs' allegations that TxDOT failed to use ordinary care in designing, inspecting, maintaining, and employing others to inspect and maintain the bridge and surrounding roadway were not allegations of contemporaneous (with the occurrence) negligent activities in Travis County. "[Such] negligent activities would be causes of the conditions at the scene of the accident, but not contemporaneous activities causing the accident." Thus, Plaintiffs failed to "properly plead" a negligence cause of action for which Travis County would be a proper venue.

Further, the Court noted that TEX. CIV. PRAC. & REM. CODE 101.060 did not create a cause of action separate and apart from a premises defect cause of action. Rather, it acted only as a limitation on the government's waiver of immunity.

Finally, the Court held that Plaintiffs' pleading that TxDOT was liable pursuant to a "joint enterprise" theory did not properly plead a negligent activity cause of action. "The allegations address actions antecedent to the accident, but do not change the nature of [Plaintiffs'] claims from claims for premises or special defects liability."

***City of Dallas v. Thompson,* 210 S.W. 3d 601, 50 Tex. Sup. Ct. J. 189 (Tex. 2006) (per curiam)**

This is an appeal from a plea to the jurisdiction based on governmental immunity in a premises liability case. The suit arose out of a trip and fall at the airport. Plaintiff alleged that while walking through the airport, she tripped on the lip of an improperly secured, metal expansion-joint coverplate that protruded from the floor. The evidence showed that tripping had occurred in this location, but not for the three years preceding the accident; that City employees had been in the area of the coverplate and had probably walked on it, but no one had reported the protruding coverplate; and that the City knew that the coverplate could become loose and raise with ordinary wear and tear, and when it did, employees would tighten it.

The Supreme Court reiterated that actual knowledge of the dangerous condition at the time of the accident was required for liability, not just knowledge of the possibility that a dangerous condition can develop over time. Further, without knowledge of how long the alleged protrusion had existed, the proximity of employees to the scene was no evidence of actual knowledge. And, finally, there was no evidence that a coverplate without the additional screw was dangerous when properly tightened.

***University of Pan American v. Aguilar,* 2007 WL 610731 (Tex. App. – Corpus Christi, March 1, 2007, no pet.)(mem.op.)**

The case involves an interlocutory appeal of the denial of a plea to the jurisdiction and no-evidence motion for summary judgment in a premises defect case. Plaintiff, a student who suffered from polio, tripped on a water hose that was stretched across a campus sidewalk. The court affirmed the denial of the plea because fact questions needed to be resolved: (1) did stretching the water hose across a sidewalk pose an unreasonable risk of harm; and (2) did the University have actual or constructive knowledge of the condition.

Plaintiff argued he was an invitee because he paid for use of the property through his tuition. Because of its disposition, the court did not reach that argument. The court noted that the determination of whether a particular condition poses an unreasonable risk of harm such that a person using ordinary care could not encounter such condition with safety is generally fact specific. The court stated that the University's own safety manual, which warned against tripping hazards, obstructions, and flexible cords in egress areas and paths of travel, "creates a fact issue regarding its knowledge of the danger posed by placing an object …across a walkway." The court also held that Plaintiff's circumstantial evidence created a fact issue on the element of actual knowledge of the dangerous condition: (1) the University's Assistant Director for Facilities, Operations, and Maintenance knew that grounds keepers used water hoses to hand-water some areas on the campus and that it was possible that plumbing crews and preventative maintenance crews could have used a hose in the area where Plaintiff tripped; and (2) the University's Director of Health and Safety testified that he was aware that ground crews stretched water hoses across walkways.

***Texas Department of Agriculture v. Calderon*, --- S.W.3d ---, 2007 WL 1217410 (Tex. App. – Corpus Christi April 26, 2006, no pet.) (opinion)**

This is an appeal of a denial of a plea to the jurisdiction. The cause of action arose out of an auto accident between Plaintiffs and a TDA employee. Plaintiffs filed suit against the TDA employee, Daniel. Daniel filed a motion to dismiss under TCPRC §101.106(f), which was granted. Plaintiffs obtained reinstatement of the suit in order to be given an opportunity to amend their petition in accordance with §101.106(f). They then amended the suit, naming both Daniel and the TDA. Daniel again filed a motion to dismiss on the basis of §101.106(f), which was granted. Plaintiffs amended a second time, naming only the TDA as a defendant. The TDA moved to dismiss on the basis of §101.106(b), which the trial court denied.

The appeals court reversed the trial court and rendered judgment dismissing Plaintiffs' claims against the TDA for lack of subject matter jurisdiction. The court reasoned that once Plaintiffs filed suit against the employee instead of the TDA, §101.106(b) became operative and unequivocally granted immunity to the TDA. The court then reasoned that §101.106(f) conferred immunity on the employee since she met its conditions (alleged conduct occurred in the scope of her employment and suit could have been brought against the entity under the Act). Had the Plaintiffs followed the requirements of §101.106(f) and just substituted in the entity, the TDA would have lost its §101.106(b) immunity. However, because the Plaintiffs did not comply, but instead, amended the petition to include both the employee and the TDA, the employee would be dismissed anyway under §101.106(f), and the TDA retained its §101.106(b) immunity.

***Breckenridge Independent School District v. Valdez,* 211 S.W.3d 402 (Tex. App. – Eastland 2006, no. pet.)**

This is an appeal of a denial of a plea to jurisdiction. The cause of action arose out of a negligence claim against the school district. The bus driver picked up a four-year-old, severely disabled, non-verbal, wheel-chair bound child for attendance at a special needs class. The child was the only passenger. The driver then bypassed the school, drove to the bus barn, and parked the bus, leaving the child inside alone for two hours. The bus driver then returned, took the child home, and did not tell her mother what had happened. The mother learned from the teacher that her daughter had not been in school that day. The incident was uncovered, and the child was treated for heat prostration.

The court held that the claim did not arise from the operation or use of a motor-driven vehicle as required for a waiver of immunity. Instead, the injuries arose from a failure to supervise the child, not an "operation" or "use" of the school bus. The appellate court reversed and rendered judgment dismissing the cause with prejudice.

***Tarrant County v. Morales,* 207 S.W.3d 870 (Tex. App. – Fort Worth 2006, no. pet.)**

This is an appeal of a denial of a plea to the jurisdiction on a negligence and premises defect claim. A prisoner was injured when she reported to a facility to obtain her work assignment for the day. While in a room containing a row of stadium seating, she put her hand on one of the seats when she bent down, and the row of chairs fell on her. The County asserted that it was immune from suit under TEX. CODE CRIM. PROC. art. 42.20, which, in connection with a community service or work program, grants immunity to governmental entities for acts, or failure to act, performed in an official capacity without conscious indifference to the safety of others.

The court held that Plaintiff's allegations stated a cause of action for a premises defect claim, that the County performed an act or omission involving an extreme risk to others, that the County had actual awareness of the risk, and that the County proceeded with knowledge that the harm was a highly probable consequence of its alleged failure to act.

***City of Waco v. Williams,* 209 S.W.3d 216 (Tex. App. – Waco 2006, pet. denied)**

Plaintiff sued the City for a wrongful death allegedly arising out of police officers' negligent use of a Taser. The court held that Plaintiff's negligence claims arose out of an intentional tort, for which immunity was not waived. The court concluded that under the *Petta* line of cases, the Plaintiff's pleadings alleged the intentional tort of assault. Further, under the *Reed Tool/Durbin* line of cases, the court inferred from the act of Tasering an intent to cause an injury that was more than offensive touching.

***City of San Antonio v. Estrada,* --- S.W.3d. ---, 2006 WL 3085751 (Tex. App. – San Antonio Nov. 1, 2006, no pet.)**

Plaintiff's cause of action against the City arose out of a fall from a fire pole. Plaintiff, along with several other women, was visiting a fire station in the wee hours of the morning at the invitation of an off-duty firefighter. After socializing and alcohol consumption, Plaintiff successfully slid down the fire pole several times. On her last ride down, she attempted to climb onto the back of an on-duty firefighter while he was on the pole in order to ride down the pole in tandem with him. As he began to slide down, she lost her grip and fell 10 to 12 feet to the ground.

Plaintiff alleged that her injury arose out of "negligent activity" – the firefighter's use/misuse of the fire pole. The City alleged that her injury instead arose out of a premises defect for which she did not plead a waiver of immunity, i.e., that the pole or station was defective. The court held that Plaintiff's pleadings and jurisdictional evidence suggested that she was injured as a contemporaneous result of the firefighter's descent down the fire pole, rather than by a condition of the premises. Thus, Plaintiff alleged an actionable "negligent activity" claim under the TTCA. The plea to the jurisdiction was properly denied.

***Martinez v. City of San Antonio,* --- S.W.3d. ---, 2006 WL 3497250 (Tex. App. – San Antonio Dec. 6, 2006, no. pet.)**

The court held that the City's program to curb gang violence ("Gang Rehabilitation Assessment and Services Program") was a function of law enforcement and a valid governmental use of police power. Thus, Plaintiff was required to follow the provisions of the Texas Tort Claims Act in order to bring a suit against the City. Because she did not comply with the notice provisions of the TTCA, her claim was barred.

***Texas State Technical College v. Beavers,* --- S.W.3d. ---, 2007 WL 621817 (Tex. App. – Texarkana March 2, 2007, no pet.)**

Plaintiff, a high school student enrolled in a course at Texas State Technical College (TSTC), injured his hand when he and another student attempted to flip over a diesel engine by using a hydraulic hoist furnished by TSTC. Plaintiff pled that his injuries were caused by a condition or use of tangible personal property. TSTC argued that it was immune from suit because the injury was not caused by a state employee's use of tangible personal property. The Plaintiff produced expert testimony that the hoist's boom length was set at the incorrect position

and that the three-foot chain attached to the end of the boom was not the proper rigging equipment for lifting a 650-pound engine.

The court distinguished *Tex. A&M Univ. v. Bishop,* 156 S.W.3d 580 (Tex. 2005) and *San Antonio State Hosp. v. Cowan,* 128 S.W.3d 244 (Tex. 2004) in finding that "when a governmental unit does more than merely allow another access to personal property, but also negligently equips the property [improper configuration for lifting and turning 650-pound engine], intentionally puts it into service for use by another with full knowledge of its intended use, and instructs the manner of its use, and when the personal property so supplied is in fact used in the manner and for the purposes the governmental unit intended and such use of the tangible personal property is a proximate cause of injury, the government has used tangible personal property in such a manner as to waive immunity under the TTCA."

***Cypress Creek Emergency Medical Services, Inc. v. Cosby,* 2007 WL 685569 (Tex. App.—Beaumont Mar. 8, 2007) (mem. op.)**

Steven Cosby sued Cypress Creek EMS for personal injuries sustained by Cosby, a guest during a party at the home of co-defendant Eugene Williams. Williams detonated a "noise flash diversionary device" ("NFDD"), in close proximity to Cosby injuring him and ultimately resulting in the amputation of Cosby's right foot. Williams was special operations coordinator for Cypress Creek. His job included conducting training exercises for various EMS personnel during which NFDD's were used. Williams was entrusted with Cypress Creek's supply of NFDD's, and was one of two Cypress Creek employees authorized to purchase NFDD's.

Cypress Creek filed its plea to the jurisdiction arguing that it was immune from suit because Williams, although an employee of Cypress Creek was not acting within the course and scope of his employment with Cypress Creek when he detonated the explosive device that injured Cosby. Cosby opposed the plea to the jurisdiction arguing that Cypress Creek is not a governmental unit as it does not meet the statutory definition of "emergency service organization" under section 101.001(1) of the Tort Claims Act. Cosby argued that when Cypress Creek EMS members became peace officers and operated "in the dual roles of medic and police officer" they failed to modify its articles of incorporation to include law enforcement services. Cosby contended because this material change was made without notice to the state, it was no longer a "governmental unit" as defined by the Texas Tort Claims Act. Although the trial court denied the plea, the court of appeals found that Cypress Creek EMS is a governmental unit, and that Cosby failed to establish a waiver of immunity or a consent to suit by Cypress Creek.