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# Zoning and Land Use

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JUDICIAL opinions on land use typically impact a single landowner party's use or development of a tract he owns or controls. While opinions in these cases have precedential impact for other landowners, developers, and builders, their impact is usually somewhat ameliorated. During the Survey period, the Texas Supreme Court issued an opinion directly affecting thousands, if not millions, of people who own property adjacent to or visit beaches along the Gulf Coast.[1] The opinion strengthened private property owner rights at the expense of those claiming public beach access. This Texas Supreme Court opinion falls right on the heels of a United States Supreme Court opinion regarding beaches and private property rights involving Gulf-front land in Florida.[2]

Many land use opinions rendered during the Survey period concerned landowners' and developers' ability to name a governmental entity as a party in breach of development contract or ordinance and statutory construction cases. Developers often enter into agreements with cities or counties constructing infrastructure and defining development rights for

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1. Severance v. Patterson, No. 09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010).

2. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).

particular tracts of property. The construction and enforceability of an ordinance, plat, zoning, or other documents necessitate naming the governmental entity as a party in many land use disputes. Local governmental entity defendants often use sovereign immunity as a defense to being named as a party, much less ever reaching the merits of a case. Numerous appellate courts struggled with the extent of the immunity doctrine during the survey period.

In addition to these two major judicial trends, many other opinions on land use matters were handed down during the survey period. All in all, this was one of the most active years in memory.

## I. PUBLIC BEACH ACCESS

The Texas Gulf Coast contains over 367 miles of shoreline. Historically, there was tension between owners of property adjacent to beach areas and public access to the ocean. According to the Texas Open Beaches Act (OBA), a statutory "rolling easement" assured public beach access without compensating adjoining landowners.[3] Under the OBA, a public beach's boundaries extend from the lowest waterline inward to the vegetation line where plants naturally take root.[4] The line of vegetation frequently moves due to winds, waves, tides, storms, and hurricanes. Because of storm events, erosion, and changing tide patterns, the public access easement to the beach constantly changes.

### A. TEXAS CASE LAW

In *Severance v. Patterson*, the Texas Supreme Court upheld a landowner's challenge to portions of the OBA.[5] Severance purchased property on Galveston Island in 2005. Hurricane Rita moved the vegetation line so that her house was entirely seaward of the vegetation line.[6] The state viewed her house as now being on a public beach. The Texas General Land Office then sent notice that her house could be condemned under the OBA because it was on the public access portion of the beach. Severance filed suit in federal court, and the Fifth Circuit sent the following three certified questions to the Texas Supreme Court: (1) does Texas recognize a "rolling" beach easement; (2) if a rolling beach easement exists, does it come from common law or the OBA; and (3) to what extent may a property owner receive compensation for landward migration of the rolling easement?[7]

The supreme court differentiated between a "wet" and "dry" beach.[8] A wet beach is under tidal waters at some time during the day, owned by the state, and clearly entitled to public use. A dry beach exists from high

3. TEX. NAT. RES. CODE ANN. § 61.011 (West 2011).
4. *Id.*
5. *Severance*, 2010 WL 4371438, at *24.
6. *Id.* at *2.
7. *Id.* at *1.
8. *Id.* at *4.

tide to the vegetation line, is often privately owned, and the right to public use is not preserved under the OBA. A dry beach can be a public beach if public access was previously established by a written document or continuous use similar to a prescriptive easement.[9] The question before the supreme court was whether the movement of the vegetation line seaward "rolls" the public easement into Severance's property.[10]

The supreme court acknowledged property boundaries along coastal waters are dynamic and adjust because of both erosion and accretion (the enlargement of land).[11] Avulsion, on the other hand, is a sudden and perceptible change that does not affect property boundaries.[12] The majority opinion held that while accretion can add to a private property owner's land, the state cannot add to a public beach through avulsion.[13]

As to the first certified question, the supreme court held the State does not have a right to use private property unless an easement was legally created.[14] The supreme court could not find any record of such an easement ever being established on Severance's tract.[15] While losing land to the public as it becomes a wet beach is an expected risk, it was unreasonable to hold a public easement would encumber additional portions of the landowner's tract.[16] The supreme court addressed the first question by answering that a public beachfront easement does not "roll."[17] Thus, there was no need to answer the second certified question.

As to the third question, the supreme court found enforcing a rolling easement, as requested by the state, would constitutionally deprive the private property owner of a protected property right.[18] If the state enforces the rolling easement, then the private property owner is entitled to just compensation.[19]

Justice Medina, in a dissent joined by Justice Lehrmann, argued the majority opinion would have major repercussions on Texas coastal property ownership.[20] As to the first certified question regarding whether Texas historically recognizes "rolling" easements, Justice Medina responded in the affirmative.[21] He cites numerous appellate courts' holdings, supporting the fact that there is an implied easement of use of the beaches for 200 years, and the long-standing enforcement of the OBA.[22]

As to the second certified question, the dissent argued that while the OBA is consistent with common law, the source of public beachfront

9. *Id.*
10. *Id.*
11. *Id.* at *10.
12. *Id.*
13. *Id.* at *11.
14. *Id.* at *8.
15. *Id.* at *13.
16. *Id.* at *10.
17. *Id.* at *13.
18. *Id.*
19. *Id.* at *14.
20. *Id.* at *17 (Medina, J., dissenting).
21. *Id.*
22. *Id.* at *17–21.

easements is common law.[23] The OBA does not create, but merely enforces these easements.[24] As to the third certified question, Justice Medina argued compensation is not due to private landowners whose property becomes subject to the "rolling" easement.[25] For property purchased after 1986, landowners were warned of the preexisting public easement of a dry beach in their closing documents. Therefore, these landowners have no investment-backed expectations. For property purchased before 1986, the state simply enforces the common law as a single easement with dynamic boundaries.[26] Similarly, the landowner is not entitled to compensation under Texas regulatory takings law.[27]

The *Severance* holding will curtail the OBA's reach and create uncertainty regarding the public beach access boundaries. There is a possibility of more disputes between public beach users and property owners and an increase in litigation over the location of property lines and public beach.

### B. Federal Case Law

About five months before the Texas Supreme Court issued its opinion in *Severance*, the U.S. Supreme Court ruled against property owners adjacent to the Florida beach. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Supreme Court decided Florida Gulf-front property owners were not entitled to compensation under the Takings Clause of the Fifth Amendment when a state beach restoration project separated their private property from the water's edge.[28] The facts in this case are different than those in *Severance* because Florida attempted to add sand to the public beach.[29]

The City of Destin and Walton County sought permits to add sand along the shoreline. A group of beachfront-property owners objected on the ground that the new beach area would be open to the public and would redefine boundaries of their property.[30]

The Florida Supreme Court held the landowners never had the right to use the beach in front of their homes once it was renourished under Florida law and thus no compensation was due.[31] It described the right to accretion as a future contingent interest with no private property rights to contact with the ocean.[32] The landowners challenged the Florida court's decision on the grounds that the court reinterpreted established state law so that the judicial decision itself constituted a taking.[33]

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23. *Id.* at *21.
24. *Id.*
25. *Id.* at *22.
26. *Id.*
27. *Id.* at *23.
28. 130 S. Ct. 2592, 2612–13 (2010).
29. *Id.*
30. *Id.* at 2600.
31. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105, 1118 (Fla. 2008).
32. *Id.* at 1112.
33. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2600.

The Court explained all property in Florida seaward of the Gulf of Mexico's mean high-water line belongs to the state, while Gulf-front property owners ordinarily own the land or beach between that line and their homes.[34] Florida case law held the state owned the wet beach and therefore had the right to fill it.[35] If an avulsion further exposed previously submerged land, that land belongs to the state even if it keeps the adjoining private property owner from contacting the sea water.[36] Because the Florida Supreme Court's decision was consistent with prior case law, Florida did not violate the Fifth or Fourteenth Amendments.[37]

In a separate opinion, Justice Scalia, joined by Chief Justice Roberts and Justices Alito and Thomas, argued the Court should declare the Takings Clause applicable not only to legislative and executive actions, but also to judicial actions.[38] Justice Kennedy, joined by Justice Sotomayor, argued the Constitution's Due Process Clause adequately protects property owners from judicial elimination of existing property rights and therefore no new judicial doctrine was needed.[39] Justice Breyer, joined by Justice Ginsburg, concluded no taking had occurred and questions surrounding judicial takings need not be addressed.[40]

The *Renourishment* opinion signifies a potential expansion of the federal judiciary's protection of constitutionally protected property interests when the court considers its next major land use case.

## II. SOVEREIGN IMMUNITY

Governmental immunity defeats a trial court's jurisdiction and is usually raised in a plea to the jurisdiction.[41] But governmental entities do not enjoy immunity from suits for constitutional violations.[42] For all other causes of action, they enjoy governmental immunity unless a statute expressly waives their immunity.[43] Immunity is often used as a shield to dispose of litigation without ever reaching the merits of a case.

### A. Breach of Contract

Governmental entities such as water districts often contract with private developers to build facilities, which are then conveyed to the public. Cities that contract with developers to build infrastructure will be subsequently reimbursed out of impact fee or other accounts. In 2005, the Texas Legislature provided for an express waiver of immunity in these breach of contract claims.

34. *Id.* at 2597–98.
35. *Id.* at 2611.
36. *Id.*
37. *Id.* at 2613.
38. *Id.* at 2601.
39. *Id.* at 2616.
40. *Id.* at 2619.
41. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 225–26 (Tex. 2004).
42. City of Dallas v. Blanton, 200 S.W.3d 266, 271 (Tex. App.—Dallas 2006, no pet.).
43. Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374–75 (Tex. 2006).

*1. Chapter 271, Texas Local Government Code*

Section 271.152 of the Local Government Code contains an express waiver of immunity from suit as to certain breach-of-contract claims:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.[44]

A "contract subject to this subchapter" is defined as a "written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity."[45]

Thus, for an entity to waive immunity from suit as to contract claims under section 271.152, the following statutory criteria must be satisfied:

(1) The entity must be "[a] local governmental entity that is authorized by statute or the constitution to enter into a contract."

(2) The entity must enter into a "contract subject to this subchapter."

(3) The claim must be for breach of contract.[46]

In *Ben Bolt-Palito Blanco Consolidated Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund*,[47] a school district filed a declaratory judgment action against a self-insurance fund composed of ninety-two local government entities.[48] The school district sought a declaration that a loss it sustained was a "covered occurrence" under its insurance policy with the fund.[49] The fund asserted governmental immunity.[50] After determining the fund enjoyed governmental immunity in its own right, the Texas Supreme Court addressed whether, in section 271.152, the Legislature waived the fund's immunity from suit as to the declaratory judgment action.[51] The fund asserted section 271.152 did not waive immunity because the agreement at issue in the case—the insurance policy—did not involve the provision of goods or services *to* the fund; rather, the fund argued the school district simply paid the fund for insurance coverage.[52] The supreme court rejected this argument, noting that although the school district was a consumer of insurance that the fund offered, the relationship was not an ordinary consumer/seller relationship because the fund's members (including the school district) elected a governing board and a board subcommittee that resolved claims disputes.[53] The supreme court concluded that, by partici-

44. TEX. LOC. GOV'T CODE ANN. § 271.152 (Vernon Supp. 2010).
45. *Id.* § 271.151(2).
46. *See id.* § 271.152.
47. 212 S.W.3d 320 (Tex. 2006).
48. *Id.* at 322–23.
49. *Id.* at 323.
50. *Id.*
51. *Id.* at 326–27.
52. *Id.* at 327.
53. *See id.*

pating in the election of the fund's governing board, the school district "provide[d] services to the Fund."[54] The supreme court also noted, "by enacting section 271.152, the Legislature intended to loosen the immunity bar so 'that *all* local governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts.'"[55] Even though the essence of the agreement (an insurance policy) appeared to be an insurance transaction where the only thing provided to the fund was money, the *Ben Bolt* court concluded the agreement fell within the scope of the statute because the school district was a member of the fund and the fund's members elected the fund's governing board.[56]

### 2. *Kirby Lake*

Recently, the Supreme Court delivered its opinion in *Kirby Lake Development Ltd., v. Clear Lake Water Authority*, holding section 271.152 waived immunity from suit in a breach of development agreement.[57] In *Kirby Lake*, residential developers entered into an agreement (entitled "Sales Agreement and Lease of Facilities") with a water authority, whereby "the Developers would build water and sewer facilities according to the Authority's specifications, and that the Developers would lease the facilities to the Authority free of charge until the Authority purchased them."[58] "The Authority agreed to reimburse the Developers 70% of their construction costs once it received voter-approved bond funds, but "the Authority was not obligated to reimburse the Developers until a bond sale was approved in an election."[59] The Developers brought suit against the Authority alleging it "breached its agreement to include a reimbursement provision in the bond election," and the Authority claimed it was immune from suit.[60]

The written agreement between the Developer and the Authority met the definitional requirement for a contract.[61] The supreme court stated that the relevant inquiry was "whether the Agreements entailed the provision of 'goods or services' to the Authority."[62] The supreme court noted the agreements at issue were "written contracts stating their essential terms," and "basic obligations are clearly outlined."[63] Although chapter 271 provided no definition for "services," generally, "the term is

54. *Id.*
55. *Id.* (citing HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S. (2005)).
56. *Id.*
57. 320 S.W.3d 829 (Tex. 2010).
58. *Id.* at 832.
59. *Id.* at 832–33.
60. *Id.* at 834.
61. *Id.* at 838.
62. *Id.* at 839.
63. *Id.*

broad enough to encompass a wide array of activities."[64]

The supreme court acknowledged that in *Ben Bolt* it had "liberally construed [the] government-pooled insurance policy as encompassing 'services.'"[65] The supreme court also stated that the "services provided thus need not be the primary purpose of the agreement."[66] The supreme court concluded that the agreements at issue "entail[ed] services" provided directly to the Authority: "*The Developers contracted to construct, develop, lease, and bear all risk of loss or damage to the facilities, obligations far more concrete than those at issue in Ben Bolt.* We therefore hold that the Agreements contemplate the provision of services under the statute."[67]

If the development agreement did not require the hiring of third parties, waiver of immunity occurs even when the developer is merely *authorized* to hire third parties.[68] In the *MCR* case, MCR entered into a contract with the authority where "MCR agreed to construct water distribution lines, sewer lines, and drainage facilities to service a nine-acre residential subdivision proposed to be built on land owned by MCR, and to construct certain street improvements."[69] The authority was to repay MCR out of bond proceeds but never did so.[70] When MCR sued the authority for breach of contract, the authority asserted immunity.[71] Noticeably absent from MCR's contract with the authority was an express provision that MCR was obligated to hire third parties.[72] The First Court of Appeals nevertheless relied on the Fourteenth Court of Appeals' decision in *Clear Lake*, and held the authority's immunity was waived under section 271.152.[73] The appellate court stated the mere fact "that the Agreement *authorized* MCR to contract with third parties for the construction of the Facilities along with streets, roads, and bridges, [was] sufficient to constitute the provision of services to the Authority within the meaning of 271.152."[74]

In accord is *Wight Realty Interests, Ltd. v. City of Friendswood.*[75] Wight entered into a contract with the city to construct recreational facili-

64. *Id.* at 838 (citing Van Zandt v. Fort Worth Press, 359 S.W.2d 893, 895 (Tex. 1962) ("In ordinary usage the term 'services' has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed.")).

65. *Id.* at 839.

66. *Id.* (citing Clear Lake City Water Auth. v. Friendswood Dev. Co., Ltd., 256 S.W.3d 735, 746 n.13 (Tex. App.–Houston [14th Dist.] 2008, pet. dism'd)).

67. *Id.* (emphasis added).

68. *See* Clear Lake City Water Auth. v. MCR Corp., No. 01-08-00955-CV, 2010 WL 1053057 (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, pet. denied) (mem. op.).

69. *Id.* at *1.

70. *See id.*

71. *Id.* at *2.

72. *See id.* at *6–7.

73. *Id.*

74. *Id.* at *9 (emphasis added).

75. No. 01-10-0042-CV, 2010 WL 5187740 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.).

ties and convey these facilities and real property to the city.[76] After Wight bought the land and constructed the facilities, the city cancelled the contract. Wight brought suit for breach of contract, and the city filed a plea to the jurisdiction based on immunity.[77] Wight's contract involved acquisition of land and construction of improvements. The First Court of Appeals, citing *Kirby Lake* and *MCR*, held the contract was not just for the sale of real property and was governed by section 271.152.[78]

*Kirby Lake* and other related opinions during the Survey period expand the ability of contracting parties to file suit enforcing their agreements with governmental entities. It is now clear that governmental entities do not enjoy immunity from suit for breach of contracts meeting the requirement of section 271.152.

### B. Declaratory Judgment Actions

In suits involving causes of action other than constitutional violations and breach of contract, courts are often asked to invalidate or construe the language of ordinances, statutes, plats, zoning ordinances, and other documents. The courts have held there is an express waiver of immunity when an ordinance is asked to be declared void under section 37.006(b) of the Texas Civil Practice and Remedies Code, known as the Uniform Declaratory Judgment Act ("UDJA").[79] This statute expressly states a city must be made a party to a suit seeking to invalidate an ordinance.[80] There was a difference of opinion among the appellate courts during the survey period as to whether the UDJA waives immunity when an ordinance is asked to be construed rather than voided.

#### *1. Cases Holding No Waiver Under UDJA*

The Dallas Court of Appeals held the UDJA does not waive immunity in an ordinance construction case.[81] This case involved a dispute between neighboring property owners and the City of Dallas regarding land shown to be later dedicated for a street on a 1973 plat. Language in the plat, city ordinances, and statutes was asked to be construed by the trial court.[82] After the trial court denied its plea to the jurisdiction, the city filed an interlocutory appeal.[83]

The Dallas Court of Appeals reversed for several reasons. First, the appellate court found that section 37.004(a), which gives the court jurisdiction to interpret ordinances, did not expressly require the city to be

76. *Id.* at *1.
77. *Id.* at *2.
78. *Id.* at *4.
79. Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (Vernon Supp. 2010).
80. *Id.*
81. City of Dallas v. Turley, 316 S.W.3d 762, 770–71 (Tex. App.—Dallas 2010, pet. filed).
82. *Id.* at 766.
83. *Id.*

named a party.[84] This was distinguished from the language in section 37.006(b).[85]

Second, the appellate court cited to a recent Texas Supreme Court opinion that immunity would only be waived under the UDJA in an *ultra vires* action.[86] In *Texas Department of Insurance v. Reconveyance Services, Inc.*, the supreme court held the UDJA must be brought against governmental officials in *ultra vires* actions.[87]

The Dallas Court of Appeals also cites to *State v. BP America Production Co.* for the proposition that the city has immunity unless appellees' claims challenge the validity of city ordinances.[88] It is important to note this case is pending before the supreme court, which requested briefs from both parties on their respective petitions for review. BP brought declaratory judgment causes of action asking the court of appeals to construe language in the parties' deeds and leases.[89] None of these causes of action involved the construction of an ordinance or statute with a municipal party defendant.

The court of appeals did not address the language in section 37.004(a), which states a governmental entity whose pronouncements are declared pursuant to the UDJA must be made a party to the litigation if the city has an interest in the outcome.[90] Here, the city's interest was in the court's interpretation of city documents and ordinances. Several courts of appeals disagree with the holdings in *Turley*.

### 2. *Cases Holding UDJA Waives Immunity*

One of the opinions controverted by the holdings in *Turley* is the Fort Worth Court of Appeals' opinion in *City of Crowley v. Ray*.[91] Similar to the City of Dallas, Crowley argued immunity was not waived because "Ray did not plead that a statute or ordinance is ambiguous or invalid."[92] Instead, Ray asked the trial court to make declarations about various floodplain documents. The court of appeals held the list of documents construed in section 37.004 is not exhaustive; this was the type of case envisioned for declaratory relief and the city was a necessary party.[93]

The *Ray* court points out that sections 37.002(b) and 37.003(c) of the UDJA provide additional support for the proposition that the UDJA

84. *Id.* at 768–69.
85. *Id.* at 768.
86. Id. at 770.
87. *Id.* (citing Tex. Dep't of Ins. v. Reconveyance Servs., Inc., 306 S.W.3d 256 (Tex. 2010)).
88. *Id.* at 768 (citing State v. BP Am. Prod. Co., 290 S.W.3d 345 (Tex. App. Austin—2009, pet. filed).
89. *BP Am. Prod. Co.*, 290 S.W.3d at 359.
90. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (Vernon Supp. 2010).
91. No. 2-09-290-CV, 2010 WL 1006278 (Tex. App.—Fort Worth Mar. 18, 2010, no pet.) (mem. op.).
92. *Id.* at *2.
93. *Id.* at *5–6.

waives immunity.[94] Construing the UDJA in its entirety, the Fort Worth Court of Appeals held because Ray's request for declaratory relief did not seek monetary damages and would remove uncertainties as to City documents, Crowley's immunity was deemed waived.[95]

The El Paso Court of Appeals similarly held immunity did not apply to a declaratory judgment cause of action requesting construction of the Uniform Relocation Act.[96] The appellees did not ask that an ordinance or statute be invalidated. Instead, they asked the appellate court for a declaration that their constitutional rights had been violated. The court of appeals held that "suits requiring compliance with statutory or constitutional provisions are not prohibited by immunity even if the compliance involves the payment of money."[97]

Immunity was also deemed waived in a suit seeking a declaration of rights (not invalidation) under an ordinance regarding the construction of driveways.[98] Wayne asked the appellate court to declare his driveway grandfathered under the ordinance, and the Corpus Christi Court of Appeals held the city's immunity had been waived.[99] Wayne did not seek monetary damages and did not ask to invalidate an ordinance.

A city's plea to the jurisdiction based on immunity was similarly denied in *Gatesco v. City of Rosenberg*.[100] Gatesco filed suit to challenge the city's water and sewer charges, which Gatesco claimed violated city ordinances. Gatesco did not ask that a city ordinance be declared invalid. The court of appeals affirmed the rule that governmental entities do not enjoy governmental immunity as to declaratory relief in an ordinance construction case unless money damages are being requested.[101] In accord is the Amarillo Court of Appeals opinion in *Potter County v. Tuckness*.[102] The Amarillo Court of Appeals held that "governmental immunity is not a bar to suits seeking a declaration of a party's rights under a statute or regulation."[103] It appears the Texas Supreme Court will ultimately make the decision on this issue.

## III. COUNTY AND EXTRATERRITORIAL JURISDICTION

Most land use litigation involves a municipality because counties generally do not have zoning authority.[104] In addition, home rule cities have

94. *Id.* at *5.
95. *Id.* at *6.
96. City of El Paso v. Bustillos, 324 S.W.3d 200, 207 (Tex. App.—El Paso 2010, no pet.).
97. *Id.*
98. City of Victoria v. Wayne, No. 13-09-00695-CV, 2010 WL 1509566, at *3 (Tex. App.–Corpus Christi Apr. 15, 2010, no pet.) (mem. op.).
99. *Id.* at *1, *3.
100. 312 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 2010, no pet.).
101. *Id.*
102. 308 S.W.3d 425 (Tex. App.—Amarillo 2010, no pet.).
103. *Id.* at 429.
104. *Compare* TEX. LOC. GOV'T CODE ANN. § 211.003 (West 2007) (granting zoning authority to municipalities) *with* TEX. LOC. GOV'T CODE ANN §§ 231.001–.257 (West 2007) (granting zoning authority in limited circumstances).

independent police powers outside of limited statutory authority that is unavailable to counties.[105] Because significant land area is located outside of municipal boundaries, there were repeated attempts to broaden county land use regulatory authority by statute.[106] Whether these suggested statutory changes will be approved during what is anticipated to be a tumultuous 2011 session remains to be seen.

Despite the statutory limitation, several opinions were issued involving counties and cities with extraterritorial jurisdiction authority during the survey period. County platting authority was addressed in *Mattox v. Grimes County Commissioners Court.*[107] Appellants purchased lots in a platted subdivision and then "learned that a portion of an unpaved dedicated roadway encroached upon the lots."[108] They filed an application with the county commissioners court to cancel the dedication under section 232.008(e).

During the public hearing, the appellants presented evidence that their application met the statutory requirements for cancellation, thus county approval of their application was mandatory and nondiscretionary.[109] In response, the county and adjoining landowner argued the county had discretion to deny the cancellation application if it "will prevent the proposed interconnection of infrastructure to pending or existing development."[110] The adjoining landowner stated at the hearing that the subject road was necessary to allow future subdivision of the adjoining property. The appellate court denied the application, and appellants filed a petition for writ of mandamus with the district court.[111]

Both sides presented motions for summary judgment on the issues of whether there was a proposed roadway interconnector between the two landowners or whether there was pending and existing development on the adjoining property. The trial court granted the county's motion, which was later reversed by the court of appeals.

As to the first element, the court of appeals stated the term "proposed" meant "intended."[112] Because the parties presented controverting evidence on whether the interconnecting roadway was intended to link the two properties, the appellate court found there was a material fact issue and summary judgment could not be granted for either party at this point. The court of appeals also found controverting evidence was introduced on the second issue and summary judgment should not have been granted

105. TEX. CONST. art. XI, § 5; Texas v. Portillo, 314 S.W.3d 210, 214 (Tex. App.—El Paso 2010, no pet.).

106. Capital Area Council of Gov'ts, *County Land Use Authority in Texas*, 17 (Nov. 2009), *available at* http://www.capcog.org/information-clearinghouse/publications/ (follow "Adobe PDF" hyperlink under "County Land Use Authority in Texas" heading).

107. 305 S.W.3d 375 (Tex. App.–Houston [14th Dist.] 2010, pet. denied).

108. *Id.* at 377.

109. *Id.* at 378.

110. *Id.*

111. *Id.*

112. *Id.* at 384.

for either party.[113]

In her dissent, Justice Frost reached the same result as the court of appeals but on different grounds. She would have held section 232.008 only authorized cancellation of an entire subdivision, not cancellation of an easement or roadway only.[114] Because Mattox sought relief unavailable under the statute, she believed the commissioners court was not mandated to approve the application.[115]

In *In re Bouse*, an area in the extraterritorial jurisdiction of the City of College Station (known as Wellborn) filed an initiative petition with the city secretary seeking consent that College Station allow Wellborn to incorporate as its own municipality.[116] The city secretary ruled the petitions defective under section 42.041 of the Local Government Code.

The city's charter provided for an initiative process where refusal of city council to adopt a resolution required a matter to be put up for electorate vote. The city council refused to certify the petition and called an election.

The Texas Municipal League and the Texas City Attorneys Association submitted amicus briefs supporting the city's position.[117] There were two questions for the appellate court to answer. First, is the initiative referendum process consistent with incorporation election procedures in section 42.041? Second, did the city fail to perform a ministerial duty to certify the sufficiency of the initiative petition and call the incorporation election?

Answering the first question in the negative, the appellate court did not reach the second question. The appellate court analogized the incorporation process to the annexation/disannexation process because they both address municipal boundaries.[118] Previous case law held the initiative process cannot be used in an annexation or disannexation context.[119] In holding the initiative process was inapplicable, the appellate court did not reach the issue of whether the petition met the technical requirements of the charter.[120]

In a lengthy dissent, Justice Gray argued that "the right to proceed by an initiative election should be liberally construed in favor of" those seeking to exercise that right.[121] The dissent pointed out chapter 42 of the Local Government Code was not intended to be exhaustive and further pointed out any reliance on the annexation procedures in chapter 43 was

113. *Id.* at 385.
114. *Id.* at 391 (Frost, J., dissenting).
115. *Id.* (Frost, J., dissenting).
116. 324 S.W.3d 240, 242 (Tex. App.—Waco 2010, pet. denied).
117. *Id.*
118. *See id.* at 244.
119. *See, e.g.*, Vara v. City of Houston, 583 S.W.2d 935, 938–39 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); Hitchcock v. City of Longmire, 572 S.W.2d 122, 127 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e).
120. *In re* Bouse, 324 S.W.3d at 244.
121. *Id.* at 244 (Gray, J., dissenting).

irrelevant.[122]

The case makes clear that the consent of a municipality in whose extraterritorial jurisdiction lies in an area seeking separate incorporation is required, but this consent is not compelled through an initiative election even if such a process is provided for in the city charter. In other words, a city has virtually sole discretion to allow an area in its extraterritorial jurisdiction to incorporate.

In *Shumaker Enterprises, Inc. v. City of Austin*, a sand and gravel mining business sought to develop a 470-acre tract just outside of Austin.[123] When the development process began, Shumaker filed a required mining permit application with the county. Prior to this permit being approved, a portion of the Shumaker property was brought into the city's extraterritorial jurisdiction. The county later approved the permit only for that portion located outside of extraterritorial jurisdiction.[124] Shumaker claimed that having filed its permit with the county, the city was prevented from requiring it to file a permit with the city as well under chapter 245 of the Local Government Code. This statute protects development projects by "locking in" the effective ordinances at the time the first permit application for a project is filed.

The appellate court held for the City of Austin, however, reasoning chapter 245 operates only to lock in place the requirements of a particular regulatory regime.[125] Because the city requirements could not apply until Shumaker's property was in the extraterritorial jurisdiction, Shumaker could not trigger the protections of chapter 245 against the city by submitting a permit application with the county.

The appellate court found the applicant did not provide "fair notice" of his project to the city by only filing an application with the county.[126] Finally, the appellate court analyzed section 242.001(c) of the Local Government Code, which states a city's extraterritorial jurisdiction expansion over property subject to a preliminary or final plat does not affect any rights accrued under chapter 245. Because the section refers to subdivisions and not mining operations, the appellate court held the vested rights protections of chapter 245 did not apply.[127]

## IV. REGULATORY TAKINGS

In *City of Carrollton v. RIHR Inc.*, the city refused to issue building permits unless the applicant provided funding for remediation of a retaining wall.[128] The plaintiff purchased several lots in a previously constructed subdivision containing the retaining wall. After the wall

122. *Id.* at 254–55 (Gray, J., dissenting).
123. 325 S.W.3d 812, 813 (Tex. App.—Austin 2010, no pet.).
124. *Id.* at 813.
125. *Id.* at 813, 816.
126. *Id.*
127. *Id.* at 815.
128. 308 S.W.3d 444, 447 (Tex. App.—Dallas 2010, pet. denied).

collapsed, Carrollton notified the developer it was a threat to public safety. The city further refused to issue building permits until the owner fixed the wall.[129]

RIHR purchased two lots in the subdivision out of foreclosure, neither of which was adjacent to the wall. The city refused to issue the building permits for the two lots. After Carrollton repaired the wall at the city's costs, it informed RIHR that the permits would be released if RIHR paid one-third of the remediation cost to the city. RIHR then filed an inverse condemnation suit. The trial court signed an order for a temporary injunction, holding "that the collapsed retaining wall was not on and did not affect" RIHR's lots, and compelled RIHR to issue the permits.[130] RIHR subsequently built the two houses.[131]

After trial, RIHR was awarded damages and attorneys' fees. The test for a land use exaction is set forth in *Town of Flower Mound v. Stafford Estates, LP.*[132] The city argued that no exaction occurred because the remediation fee was never actually paid.

The appellate court held that merely holding up the permits issuance constituted an exaction.[133] It stated "[e]ven if the collapsed wall presented a condition adverse to the public safety . . . there [was] no connection between remediation of the collapsed wall and Carrollton's exaction."[134] The trial court held RIHR was harmed due to the project's delay caused by the city. RIHR was entitled to recover its out-of-pocket expenses.[135]

In *2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, an appellate held owners of land in a Planned Unit Development (PUD) did not have a legitimate takings or spot zoning claim against the city when the city created new PUDs on adjacent lands.[136] The city and developer entered into an agreement requiring developer consent to any major zoning changes to PUD 39. After new developers sought to amend PUD 39 adding multi-family units, the city asked the plaintiffs to consent. After they refused to consent, the new developers filed application to create new PUD's later granted by the city.[137] The owners brought suit against the city for violation of the agreement, inverse condemnation, spot zoning, violation of their substantive due process rights, and promissory estoppel. The appellate court determined the creation and zoning of the new PUDs was valid and did not violate the development agreement. Because zoning is a legislative function that the city cannot relinquish by prior agreement, it would "surrender its authority to determine proper

129. *Id.*
130. *Id.* at 448.
131. *Id.*
132. 71 S.W.3d 18, 30 (Tex. App.—Fort Worth 2002) *aff'd* 135 S.W.3d 620 (Tex. 2004).
133. *City of Carollton*, 308 S.W.3d at 451.
134. *Id.*
135. *Id.* at 453.
136. No. 03-08-00790-CV, 2010 Tex. App. LEXIS 243, at *8, *25–26, *29 (Tex. App.—Austin Jan. 12, 2010, no pet.) (mem. op.).
137. *Id.* at *4.

land use by contract."[138]

On the inverse condemnation claim, the appellate court used the test set out in *Penn Central Transportation Company v. New York City* that examines "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with the reasonable investment-backed expectations; and (3) the character of the government action."[139] First, the appellate court found the owners' property value was reduced by $2.7 million. While a significant amount of money in absolute terms, the appellate court found it to be a *de minimis* reduction of only 4%.[140]

The appellate court then determined that "the Owners' reasonable investment-backed expectations are no greater than any other land owner subject to 'conventional' municipal zoning" and that the creation of the new PUDs did not "alter[ ] the existing or permitted uses of the Owner's property" or their primary expectation.[141] Finally, as to the character of the governmental order, "the new PUDs were crafted to 'create a more modern pedestrian-friendly and urban environment.' "[142] The city did not specifically target the owners but created the new PUDs and zoning as expected in growing communities. The appellate court held the rezoning did not go "too far" and there were no takings.[143]

## V. BOARD OF ADJUSTMENT

In most cases, it is difficult to judicially override a board of adjustment decision under the abuse of discretion standard the courts utilize to review the record.[144] A recent Corpus Christi Court of Appeals opinion confirmed that virtually any evidence introduced at a board hearing can be used to justify the board's decision. In *Sea Mist Council of Owners v. Town of South Padre Island Board of Adjustments*, a letter from a town official was held to constitute sufficient evidence to uphold the board's building permits allowing a condominium unit to be remodeled for a cafe selling alcoholic beverages.[145] The issue in the case was whether this use was allowed in the "B" business district.

The city's zoning ordinance did not specifically allow the sale of alcoholic beverages in the "B" business district governing the building.[146] A letter from the building official was introduced stating the city routinely allowed restaurants in the "B" district to sell alcoholic beverages. This

138. *Id.* at *6, *35 (internal citation and quotation omitted).
139. *Id.* at *10.
140. *Id.* at *14.
141. *Id.* at *16–19.
142. *Id.* at *20.
143. *Id.* at *21, *25.
144. *See* Sea Mist Council of Owners v. Town of S. Padre Island Bd. of Adjustments, No. 13-10-011-CV, 2010 WL 2784081, at *1 (Tex. App.—Corpus Christi July 15, 2010, no pet.) (mem. op.).
145. *Id.* at *3.
146. *See id.* at *2.

evidence was sufficient to ratify the board's decision to uphold the building official's granting of the permit.

A similar approach is found in *Christopher Columbus Street Market LLC v. Zoning Board of Adjustments of the City of Galveston.*[147] The building in this case was located in Galveston's East End Historical District. The main structure was built in 1880 and two additions were built in 1920. Although the city staff granted the property owner's permit request demolishing the two additions due to its unsafe condition, the city's Landmark Commission denied the owner's permit demolishing the entire structure.[148]

Both the property owner and the city introduced expert reports from structural engineers. The city's expert opined demolishing the addition was feasible and care should be taken to avoid damage to the main structure. The property owners appealed to the Zoning Board of Adjustments, which voted 4-1 "to deny the Property Owner's appeal and uphold the Landmark Commission's decision."[149]

The court of appeals held that as long as the record contained "some evidence of substantive and probative character to justify the . . . decision" there was no abuse of discretion.[150] The property owners argued the city's expert report did not address the condition of the main structure and the only competent evidence therefore was the property owners' expert report that argued the main structure was not feasibly salvageable.[151] An expert structural engineer for the city orally testified, however, that the main structure was salvageable. Because the property owner failed to meet its burden proving the board could have reached but one decision and not the one it made, the court of appeals upheld the city's denial of the demolition permit application.[152]

## VI. PREEMPTION

The issue of preemption of local land use regulations and state statute was addressed in *Southern Crushed Concrete, LLC v. City of Houston.*[153] "In October 2003, Southern applied to the [Texas Natural Resource Conservation Commission (TNRCC)] for a permit to move a portable concrete-crushing facility to property . . . in Houston."[154] Before action was taken on the application, the Presbyterian School Outdoor Education Center located near this property. In addition, the Houston City Council approved an "ordinance prohibiting concrete-crushing operations . . . within 1500 feet" of a tract, which various uses, including a school, are

147. 302 S.W.3d 408 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
148. *Id.* at 411.
149. *Id.* at 412.
150. *Id.* at 416.
151. *Id.* at 417–18.
152. *Id.* at 418–19.
153. No. 14-09-00873-CV, 2010 WL 4638417, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2010, no pet. h.).
154. *Id.* at *2.

located.[155] "Because the school had not been built at the time Southern applied for a permit," the TNRCC granted the permit.[156] But the city denied Southern's application due to the municipal regulations on location.[157]

The court of appeals disagreed with Southern's argument that the Texas Clean Air Act preempted the local ordinance.[158] Southern argued the city required a bigger buffer zone than the standard set forth in the statute. According to the appellate court, however, simply because "the legislature has enacted a law addressing a subject does not mean the subject matter is completely preempted."[159]

The court of appeals found Houston's ordinance and state statute were consistent.[160] The stated purpose of the Texas Clean Air Act is to protect the state's air. Houston's ordinance, on the other hand, serves a different purpose: separation of potentially incompatible land uses.[161] As a result, the court of appeals held the ordinance was consistent and valid.[162]

In his dissent, Justice Brown states the intent in passing the ordinance is irrelevant.[163] The dissent defines "inconsistent" as a "local enactment that attempts to regulate in a more or less restrictive way the same activity a statute already directly regulates."[164] Because the city's distance requirements were inconsistent and more restrictive than the statute, the dissent would have held the city's ordinance to be unconstitutional.[165]

## VII. CONCLUSION

A number of major land use decisions were rendered during the survey period. On the whole, the general trend of these decisions was to expand protection of private property rights at the expense of governmental regulation of land. The *Severance* opinion indicates the Texas Supreme Court's willingness to override statutes such as the OBA if viewed as infringing on constitutionally protected property rights.[166] In *Kirby Lake*, the court empowered developers to file suit in breach of development suits.[167] A major question remains as to whether immunity is waived in declaratory judgment actions. While private parties do not always prevail in the appellate courts, the courts generally ruled on the side of private parties at the government's expense.

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at *7.
159. *Id.* at *4 (Internal citation and quotation omitted).
160. *Id.* at *6.
161. *Id.*
162. *Id.*
163. *Id.* at *9 (Brown, J. dissenting).
164. *Id.* at *10 (Brown, J., dissenting).
165. *Id.*
166. *See generally*, Severance v. Patterson, No.09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010).
167. *See generally*, Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth., 320 S.W.3d 829 (Tex. 2010).