Local Government and Municipal Law

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Recommended Citation
Monica L. Coffey, Local Government and Municipal Law, 60 SMU L. Rev. 1169 (2007)
https://scholar.smu.edu/smulr/vol60/iss3/20
I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION

The central issue in City of Port Isabel v. HP Pinnell\(^1\) is the existence of a municipality as it relates to its powers of annexation. The City of Port Isabel, Texas ("CPI"), sought to annex certain territory in a neighboring area, including property owned by HP Pinnell ("Pinnell"), trustee of Pinnell Trust. CPI issued a series of annexation ordinances designed to annex five-mile tracts located in the Laguna Madre, an area adjacent to CPI. The annexation ordinances were soon followed by a series of re-annexation ordinances after protests arose concerning the validity of the original ordinances. The re-annexation ordinances sought to re-annex the area in one-mile increments instead of five-mile increments.\(^2\)

Upon receipt of notice from CPI that it intended to annex Pinnell's property, Pinnell requested that the City of San Padre Island ("SPI") expand its extraterritorial jurisdiction ("ETJ") to include the Pinnell property, which SPI did via an ordinance.\(^3\) CPI, in the meantime, held a series of hearings in connection with ordinances authorizing for the annexation and re-annexation of certain property, including an ordinance which brought the Pinnell property within CPI's ETJ.\(^4\)

In response, Pinnell filed suit seeking declaratory and injunctive relief against CPI. Pinnell sought to have CPI's annexation ordinances declared void and the Pinnell property to be declared part of SPI's ETJ and thus not subject to annexation by CPI.\(^5\) SPI also joined the suit as an intervener.\(^6\)

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\(^*\) B.S., Georgetown University; M.B.A., University of California, Berkeley; J.D., University of California, Berkeley.

1. City of Port Isabel v. HP Pinnell, 207 S.W.3d 394, 398 (Tex. App.—Corpus Christi 2006, no pet.).

2. See id. at 399 ("None of the parties dispute that a controversy arose over whether CPI's 5-mile annexations were valid. To quiet these claims of invalidity, CPI decided to re-annex the total area annexed by ordinance Nos. 627,628, and 633 in 1-mile increments.").

3. Id.
4. Id.
5. Id.
6. Id. at 400.
On appeal from a bench trial in favor of SPI and Pinnell, CPI alleged that neither Pinnell nor SPI had standing to challenge the ordinance pertaining to territory near the south end of the island, as Pinnell did not own property in that area, and the area was outside of SPI's ETJ. The Corpus Christi Court of Appeals noted that none of the ordinances at issue encroached upon SPI's ETJ and that they were contiguous to CPI's ETJ as extended first by a valid ordinance (No. 625) and then by a contested ordinance (No. 637). The court noted that a party may be allowed to challenge "ordinances upon which an offending ordinance is dependent." The court acknowledged that while ordinance No. 656 was "clearly dependent upon the validity of No. 637, it ha[d] no bearing upon whether or not No. 657 survive[d] as a valid ordinance, and No. 656 [was] not in the northward-extending chain of annexation or re-annexation ordinances." The court thus sustained CPI's point of error with respect to ordinance No. 656 only. The court rejected CPI's argument that SPI and Pinnell had no standing to challenge the ordinances pertaining to territory on the island's north end based on the analysis it applied to the south-end ordinances.

CPI also complained that the trial court erred in issuing a permanent injunction that, among other things, would prohibit CPI from enacting future annexation ordinances. CPI argued that a prospective injunction against it would be a violation of the separation of powers doctrine under the Texas Constitution. The court of appeals acknowledged that our system of government is based upon three separate branches with no one branch being able to interfere in the domain of the other. Consequently, even a void ordinance should not, under normal circumstances, be enjoined unless the mere passage of the ordinance would cause irreparable harm. The court found that in this instance, there existed no alleged irreparable harm other than the "likely passage of future ordinances." As such, the court of appeals held that the trial court erred in enjoining the future passage of annexation ordinances by CPI. The court overruled all of CPI's remaining claims pertaining to standing.

7. Id. at 402.
8. Id. at 403.
9. Id.
10. Id. at 404.
11. Id.
12. Id. at 416.
13. Id. at 417.
14. See id. ("Because our system of government is crafted to have three separately defined branches of government, 'no one of them, and least of all the judicial department, should attempt to exceed the limits set about it and invade by such interference the domain of another.'") (citation omitted).
15. See id. ("It is well settled ... that the enactment of a void ordinance will not be enjoined, although its invalidity clearly appears, unless it also appears that the mere enactment of the ordinance of itself will work irreparable injury without the intervention of some wrongful act under its authority.").
16. Id. at 419.
17. Id.
and procedural defects.\textsuperscript{18}

II. GOVERNMENTAL POWERS

In \textit{DeSoto Wildwood Development, Inc. v. City of Lewisville}, DeSoto Wildwood Development, Inc. ("DeSoto") appealed the dismissal of its lawsuit against the City of Lewisville, Texas ("City").\textsuperscript{19} DeSoto sought to develop and improve a thirty-five-acre tract in the City which required the expansion of a boulevard adjacent to the new development.\textsuperscript{20} The regulations of the subdivision required DeSoto to "dedicate the expanding roadway area to the City and pay for all public improvements, including pavement, drainage, sidewalks, and traffic control equipment . . . ."\textsuperscript{21} DeSoto paid the City $132,988 in fees, but the City failed to construct any of the contemplated capital improvements.\textsuperscript{22} DeSoto's request for a refund of the fees was rejected by the City through its city attorney, leading DeSoto to file suit against the City for a refund of the impact fees. DeSoto alleged a breach by the city of the agreement regarding payment of fees and state and federal takings claims, and requested the return of the fees because they were excessive.\textsuperscript{23} The trial court granted the City's amended plea to the jurisdiction, and DeSoto appealed.

The first question addressed by the Fort Worth Court of Appeals was whether the fees paid by DeSoto were statutory "impact fees," since Chapter 395 of the Local Government Code ("Chapter 395"), under which DeSoto claimed a refund of the unused fees was due, only applied if the fees were impact fees.\textsuperscript{24} An impact fee is defined as a "charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development."\textsuperscript{25} Chapter 395 carves out an exception to the definition of "impact fees" for fees related to the construction and dedication of streets, sidewalks, curbs, etc.\textsuperscript{26} An ordinance assessing an impact fee must also comply with the notice and hearing procedures outlined in

\textsuperscript{18} \textit{Id.} at 420.
\textsuperscript{19} \textit{DeSoto Wildwood Dev., Inc. v. City of Lewisville}, 184 S.W.3d 814, 818 (Tex. App.—Fort Worth 2006, no pet.).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 819.
\textsuperscript{24} \textit{See id.} at 819–20 ("DeSoto asserts that it is entitled to a refund of the paid, but unused impact fees pursuant to section 395.025 of the Local Government Code. The City responds that the trial court lacked jurisdiction because DeSoto did not have standing to demand return or refund of the fees because they were not statutory impact fees.").
\textsuperscript{25} \textit{Id.} at 820 (citing \textit{TEX. Loc. GOV'T CODE ANN. § 395.001(4) (Vernon 2005)}).
\textsuperscript{26} \textit{See id.} ("An impact fee does not, however, include 'dedication of rights-of-way or easements or construction or dedication of on-site or off-site water distribution, wastewater collection or drainage facilities, or streets, side-walks [sic], or curbs if the dedication or construction is required by a valid ordinance and is necessitated by and attributable to the new development.'") (citing \textit{TEX. Loc. GOV'T CODE ANN. § 395.001(4)(B)}).
Chapter 395 in order to be valid.\textsuperscript{27} In holding that the fees paid by DeSoto were "impact fees" under Chapter 395, the court relied upon: the plain language of the statutory definition; the language of a proposed (but rejected) amendment to Chapter 395 (which added express language that certain fees would be "payments in lieu of dedication," indicating the legislature's willingness, when appropriate or necessary, to expressly state that a fee is not an impact fee); and an opinion of the Attorney General stating that a fee was not an impact fee because of the stated intent of the bill's author.\textsuperscript{28}

The court explained that even if the fees sought by DeSoto were impact fees, DeSoto was required to have standing to bring its lawsuit against the City. Standing comprises an essential part of the analysis of whether a court has subject matter jurisdiction over a case and is thus analyzed in the same matter as subject matter jurisdiction generally.\textsuperscript{29} Since the language of Chapter 395 reads, "On the request of the owner of property on which an impact fee has been paid, the political subdivision shall refund the impact fee . . . .\textsuperscript{30} the court held that DeSoto must be a present owner of property in order to have standing.\textsuperscript{31} Upon analysis, DeSoto was held not to be a current owner of real property in the area, and, thus, DeSoto lacked standing to sue for a refund of the unused fees.\textsuperscript{32} The court also found that DeSoto lacked standing to bring a lawsuit based on a claim that the fees were excessive, since it did not show that the impact fee it paid was more than ten percent of the maximum fee, as required by section 395.074 of the Local Government Code.\textsuperscript{33}

The court next held that the "plead and be impleaded" language of Section 51.075 of the Local Government Code constituted a waiver of the City's governmental immunity.\textsuperscript{34} The court also held that DeSoto did not meet Chapter 395's requirement that it exhaust its administrative remedies prior to filing suit, as it did not present its claim directly to the city council.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id. at 821.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. (emphasis in original).
\item \textsuperscript{31} Id. at 821–22.
\item \textsuperscript{32} See id. at 822 ("In the instant case, according to Gary Baker, President of DeSoto . . . DeSoto did not own ‘any real property in [the relevant area].’ Also DeSoto admitted in response to the City’s request for admission that it currently owned no real property in this area. . . . Because the plaintiff is not the current property owner, the plaintiff does not have standing and is not entitled to a refund of any impact fee.").
\item \textsuperscript{33} See id. at 824 ("[A]ccepting DeSoto’s allegations in its amended petition as true, construing them in DeSoto’s favor, and considering the jurisdictional evidence presented to the trial court, we hold that DeSoto has not shown that its claim falls under the scope of section 395.074. Accordingly, DeSoto has not established standing to challenge the excessive fees that section 395.074 aims to eradicate.").
\item \textsuperscript{34} See id. at 825 ("[W]e hold that the language in section 51.075 of the Local Government Code allows this breach of contract suit against the City.” The court also noted that "plead and be impleaded" was no different than "sue and be sued" language. Note that this decision was prior to Took v. Mexia, 197 S.W.3d 325 (Tex. 2006). See infra Section VII.
\item \textsuperscript{35} Id. at 826.
\end{itemize}
Such failure to exhaust administrative remedies also caused DeSoto’s state takings claim under article I, section 17 of the Texas Constitution to not be ripe; however, the court held that the takings claims and the breach of contract claims should have been abated by the trial court to allow DeSoto to cure the jurisdictional defect by exhausting its administrative remedies.

The court affirmed the trial court’s judgment as to the return and refund of impact fee claims, reversed the trial court’s judgment as to the contract and state takings claims, and remanded the contract and state takings claims to the trial court with instructions that the trial court abate its proceedings to afford DeSoto a reasonable opportunity to exhaust its administrative remedies.

III. OFFICERS, AGENTS, AND EMPLOYEES

During the Survey period, one case involving officers, agents, and employees dealt with the process of becoming a public official; the other case pertained to the process of termination of public employment. In re Carlisle involved an employee of Amarillo ISD, Annette Carlisle, who applied to be a candidate in the Republican primary for State Representative for the 87th District. Carlisle’s application was rejected by the chair of the Republican Party of Texas on the basis that Ms. Carlisle held a “lucrative office” as defined under article III, section 19 of the Texas Constitution. Article III, section 19 of the Texas Constitution provides that “no . . . person holding a lucrative office under the United States or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.” A “lucrative office” is defined as one in which the holder “received a salary, fees or other compensation.” As a board member of Amarillo ISD, Ms. Carlisle was eligible to receive reimbursement for work-related meals without providing a receipt therefore. The Texas Supreme Court rejected the notion that such reimbursement was akin to “salary, fees or other compensation,” noting the difference between reimbursement for meals, even without a receipt, and compensation for services. The supreme

36. Id. at 826–27.
37. Id. at 828.
38. Id.
40. Id.
41. TEX. CONST. art. III, § 19.
42. In re Carlisle, 209 S.W.3d at 96 (citing Whitehead v. Julian, 476 S.W.2d 844, 945 (Tex. 1972)).
43. See id. at 94 (“The written reimbursement policy [sic] of Amarillo ISD allows board members to be reimbursed for ‘reasonable expenses incurred in carrying out Board business at the Board’s request and for reasonable expenses incurred while attending meetings and conventions as official representatives of the Board.’ To receive reimbursement, board members are required to submit ‘receipts for all expenses, except meals.’”).
44. See id. at 96 (“Although no receipts are required to collect reimbursement for meals, there is nothing to suggest that the reimbursement is compensation for services performed by Carlisle.”).
court conditionally granted Ms. Carlisle's petition for writ of mandamus directing the chair of the Republican Party to certify Ms. Carlisle as a candidate for District 87 of the Texas House of Representatives.

While *Carlisle* involved the pursuit of public office, the case of *University of Texas Medical Branch at Galveston v. Barrett* involved an employee who sought to file suit under the Texas Whistleblower Act ("Act"), following termination of his employment at the University of Texas Medical Branch at Galveston ("UTMB"). Before initiating a lawsuit under the Act, a public employee must begin his grievance or appeal procedures in a timely fashion. If a final decision has not been rendered by the sixty-first day after the grievance procedure was initiated, an employee may elect to:

1. exhaust the applicable procedures . . . , in which event the employee must not sue later than the 30th day after the date those procedures are exhausted to obtain relief under this chapter; or
2. terminate procedures . . . , in which event the employee must sue within the time remaining under Section 554.005 to obtain relief under this chapter.45

Dr. Barrett filed suit against his former employer only twenty-seven days after initiating formal grievance procedures, and, consequently, upon notice of the lawsuit, UTMB filed a plea to the court's jurisdiction.46 The trial court denied the plea, and the court of appeals affirmed the trial court's denial. The Texas Supreme Court affirmed the judgment of the court of appeals, holding that the Act does not require that the grievance process be completed before initiating suit.47 Should legal action be initiated prior to the lapse of sixty days, the lawsuit may simply be abated until "the end of the sixty-day period, provided that the procedures have been timely initiated and can continue for the required sixty days or until a final decision is rendered, whichever occurs first."48

IV. PROPERTY—EMINENT DOMAIN, INVERSE CONDEMNATION, AND TAKING

In the Survey period, the Texas Supreme Court addressed the issue of certain defenses to a claim of taking made by a party against a local government. In *Lowenberg v. City of Dallas*, the supreme court analyzed when the statute of limitations begins to run for a takings claim based

45. See Univ. of Tex. Med. Branch at Galveston v. Barrett, 159 S.W.3d 631, 632 (Tex. 2005) ("Before suing under the Texas Whistleblower Act, a public employee must timely initiate his employer's grievance or appeal procedures relating to employee discipline.") (referring to TEX. GOV'T CODE ANN. § 554.006 (a)-(c)).
46. See id.
47. See id. ("Section 554.006 does not require that grievance or appeal procedures be exhausted before suit can be filed; rather, it requires that such procedures be timely initiated and that the grievance or appeal authority have 60 days in which to render a final decision.").
48. Id. at 633.
upon an illegal fee.\textsuperscript{49} The City of Dallas once charged a “fire registration fee” of commercial property owners; the amount of the fee was dependent upon the square footage of the commercial property. Jim Lowenberg owned commercial property in the City of Dallas but refused to pay the fee for years 1995 and 1996. In April 1997, the City issued a citation against Lowenberg and sought to assess a fine of $2,000 for failure to pay the fees. Lowenberg paid the fees but filed a class action in federal court alleging that the fee was unconstitutional. The federal district court dismissed Lowenberg’s claims for lack of subject-matter jurisdiction, after which Lowenberg refiled his class action in state district court. The state district court found that the fee was an illegal occupation tax, granting the class’s motion for summary judgment. The City of Dallas asserted a statute-of-limitations defense, which was rejected by the state district court, as it considered the date of accrual to be the date Lowenberg paid the fee. The Eastland Court of Appeals reversed and issued a take-nothing judgment against the class, holding that the statute began to run from the date that the City passed the fee ordinance.\textsuperscript{50}

The supreme court noted that “the cause of action accrues when payment to the county is made because that is when the injury occurs, not when the claim has been presented to and rejected by the commissioners’ court.”\textsuperscript{51} In reversing the decision of the court of appeals, the supreme court noted the lower court’s reliance upon cases involving regulatory takings. The differences between regulatory takings and physical takings, such as the one at issue in Lowenberg, extend to the accrual date for the purpose of statute of limitations. In a regulatory taking, “it is passage of the ordinance that injures a property’s value or usefulness. But a physical taking causes injury when the property itself is taken.”\textsuperscript{52}

In \textit{Tyler v. Beck}, the Texas Supreme Court held that, so long as the purposes of formal citation were satisfied during the condemnation proceedings, actual citation did not need to occur.\textsuperscript{53} The supreme court noted that “[t]he Texas eminent-domain scheme is a two-part process that begins with an administrative proceeding followed, if necessary, by a judicial one.”\textsuperscript{54} The administrative portion of the proceeding consists of the condemning entity filing a petition in the proper court. The court will then appoint three special commissioners to conduct a hearing and determine just compensation. The special commissioners’ award may be challenged by either party’s filing objections in the same court. At that moment, the administrative proceeding converts into a judicial one.\textsuperscript{55}

\textsuperscript{49} Lowenberg v. City of Dallas, 168 S.W.3d 800, 802 (Tex. 2005).
\textsuperscript{50} City of Dallas v. Lowenberg, 144 S.W.3d 46, 50 (Tex. App.—Eastland 2004), rev’d, 168 S.W.3d 800 (Tex. 2005).
\textsuperscript{51} Lowenberg, 168 S.W.3d at 801 (citing Lubbock County v. Trammel’s Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002)).
\textsuperscript{52} \textit{Id.} at 802 (citation omitted).
\textsuperscript{53} Tyler v. Beck, 196 S.W.3d 784, 786 (Tex. 2006).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{See id.} (“Upon the filing of objections, the award is vacated and the administrative proceeding converts into a judicial proceeding.”).
Under the Property Code, upon the filing of an objection to a condemnation award, the objecting party must issue formal service of citation upon all other parties. Because both parties filed objections in the Tyler case, the supreme court noted that the purpose of the notice of citation requirement, to provide the court a means of acquiring jurisdiction over the party receiving citation, was accomplished.

V. REGULATION

A. STREETS AND OTHER PUBLIC WAYS

In each of the cases presented in this section relating to a municipality's ability to regulate streets and other public ways, the issue was whether the city's exercise of its powers constituted an unconstitutional taking. In Gar Associates III, L.P. v. State, Gar Associates III, L.P. ("GAR") brought suit against the City of Houston ("City"), the Metropolitan Transit Authority ("METRO") and the state of Texas, acting by and through the Texas Department of Transportation ("TxDOT"). In its petition, GAR complained that, as the owner of a number of units in a condominium complex located in the City, GAR and its tenants, guests, contractors, etc., had historically used an alley between the condominium complex and a section of an interstate highway in order to gain access to the complex's restaurant space and a public parking area. In 2004, METRO erected steel posts in one of the entrances to the alley and later installed fencing in the alley and the parking area. In January 2005, GAR leased the restaurant space to a tenant, and the lease was contingent, in part, upon the availability of, and access to, the parking area.

The alley and surrounding area in question were subject to a Master Agreement between the City and the State. The Master Agreement allowed the City to engage in the "construction, maintenance, and operation of public off-street parking facilities and to permit other appropriate uses within such city, under all existing and future freeways where long elevated sections exist or will exist."

GAR alleged that TxDOT, METRO, and the City committed a taking in violation of article 1, section 17 of the Texas Constitution when access to the alley and parking area were blocked by the steel posts and fencing. TxDOT filed a plea to the jurisdiction, citing sovereign immunity, and further averred that GAR did not have a property interest, nor an easement, in the alley and parking area.

The Houston Court of Appeals held that the defense of sovereign immunity does not apply to an inverse-condemnation claim brought under

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57. See Tyler, 196 S.W.3d at 787.
59. Id. at *2.
60. Id.
61. Id.
article I, section 17 of the Texas Constitution.62 The elements of an inverse condemnation claim are: "(1) the State or other governmental entity intentionally performed certain acts, (2) that resulted in the taking, damaging, or destruction of its property, (3) for public use."63 A direct impact upon a particular parcel of property is not required for a successful claim of inverse condemnation.64 Such a claim could be based upon a wrongful taking of an easement of access, which is automatically the property of every abutting property owner.65 While noting that GAR could be thought to have such an easement of access to the parking area and alley, the court also noted that the State was the unrestricted property owner of the land on which the parking area and alley were located.66 Consequently, the State was within its rights when it granted METRO "the exclusive use of its property, exercising the right of termination it reserved in its agreement with the City and terminating what can only be described as GAR's and the public's prior 'temporary permissive use.'"67

In Concerned Community Involved Development, Inc. v. City of Houston, the issue of inverse condemnation served to deny standing to the plaintiff.68 The plaintiff, Concerned Community Involved Development, Inc. ("CCID"), which was comprised of homeowners in a particular area, sought temporary and permanent injunctions against the City of Houston, Candlelight Development Joint Venture, and various other entities to prevent the construction of a bridge across a drainage ditch in the community. The City filed a plea to the jurisdiction, asserting an immunity defense that it felt applied since the homeowners did not suffer a taking under the Texas Constitution.

In order to overcome the City's sovereign immunity defense, CCID first would have to demonstrate that it had standing to bring such a claim against the City. The Houston Court of Appeals found that CCID lacked standing to sue.69 Standing is based upon a showing by a plaintiff that he has an interest in the matter at issue apart from that of the general public, and the defendant's actions have caused the plaintiff some particular

62. See id. at *4 ("Although sovereign immunity generally protects the State from lawsuits for monetary damages, it offers no shield against an inverse condemnation claim brought under article I, section 17 of the Texas Constitution, which waives immunity for the taking, damaging or destruction of property for public use and authorizes compensation for such destruction.").
63. Id. (citations omitted).
64. Id.
65. See id. ("An abutting property owner possesses an easement of access which is a property right; ... this easement is not limited to a right of access to the system of public roads; and ... diminishment in the value of property resulting from a loss of access constitutes damage [compensable under article I, section 17 of the Texas Constitution.]") (citations omitted).
66. Id. at *6.
67. Id.
68. Concerned Cmty. Involved Dev., Inc. v. City of Houston, 209 S.W.3d 666, 669 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
69. Id. at 670.
harm.\textsuperscript{70} In this instance, CCID conceded that it would suffer no compensable injury due to the construction of the bridge.\textsuperscript{71} Nonetheless, CCID claimed it was entitled to injunctive relief because its property rights, while not eliminated by the City, would be adversely affected by construction of the bridge; the property owners suffered irreparable harm by the City's denial of due process; and the property owners had no adequate remedy at law.\textsuperscript{72}

The court explained that, while CCID might be inconvenienced by the bridge's construction, such inconvenience did not amount to a compensable injury.\textsuperscript{73} As there was "no evidence that the bridge will be constructed on the land of any private person; that any property owner will be denied access to his property; or that any property owner will be restricted in the use of his property,"\textsuperscript{74} there could be no claim of personal harm suffered by CCID. CCID denied that its claim was based upon an unconstitutional taking by the City, but the court could find no other "cognizable property interest that might be impacted by the City," which meant that CCID had no particular injury on which to sue and no standing.\textsuperscript{75}

\section*{B. Housing}

Mootness was the central issue in \textit{Marshall v. Housing Authority of the City of San Antonio}, which involved a forcible detainer and subsequent actions in response thereto.\textsuperscript{76} In this case, Marshall leased an apartment from the Housing Authority of the City of San Antonio (the "Housing Authority") and received a rent subsidy from a federal housing assistance program. Following a shooting incident at the apartment, the Housing Authority successfully sought to terminate Ms. Marshall's right to occupy the apartment through a forcible detainer action. One week following the court's judgment in favor of the Housing Authority, Ms. Marshall filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. The next day, Ms. Marshall filed a notice of appeal, and approximately one week later, vacated the apartment before a writ of possession was ever issued. After the expiration of Ms. Marshall's lease, she filed her brief in the San Antonio Court of Appeals asking that the trial court's decision be overturned.

\begin{footnotes}
\item[70.] \textit{Id.} (citing \textit{Williams v. Lara}, 52 S.W.3d 171, 178–79 (Tex. 2001); \textit{Hunt v. Bass}, 664 S.W.2d 323, 324 (Tex. 1984)).
\item[71.] \textit{Id.} at 671.
\item[72.] \textit{Id.}
\item[73.] \textit{See id.} at 671–72 ("All enhancements, whether public or private, are rarely achieved without some inconvenience. . . . Thus, a landowner suffers no compensable injury where the government has not physically appropriated, denied access to, or otherwise directly restricted the use of the landowner's property.").
\item[74.] \textit{Id.} at 672.
\item[75.] \textit{Id.}
\item[76.] \textit{Marshall v. Hous. Auth. of the City of San Antonio}, 198 S.W.3d 782, 784 (Tex. 2006).
\end{footnotes}
The court held that Ms. Marshall's appeal was moot, not because she voluntarily vacated the apartment that was the subject of the appeal, but because her lease expired, leaving her with no continuing right to occupy the premises. 77

C. PARKS AND PUBLIC SQUARES

An unwritten city policy allowing police officers to ban citizens from the city's parks was held unconstitutional by the Texarkana Court of Appeals in Anthony v. State. 78 Lamar Anthony was banned from a local city park and was later arrested for criminal trespass upon his return to the park. At trial, Anthony was found guilty of criminal trespass, and he filed an appeal alleging that the city's trespass policy violated the Due Process Clause and the First Amendment of the United States Constitution. 79

The City of Henderson ("City") had an unwritten policy which gave "to individual officers the authority to issue warnings, banning individuals from the park." 80 In order to determine whether the City's policy violated Mr. Anthony's substantive or procedural due process rights, the court first had to determine whether there existed "a protected liberty or property interest to be deprived by state action." 81 The court concluded that Mr. Anthony held a liberty interest in the park, although such an interest was not a fundamental right. 82 In the absence of a fundamental right, the court was only required to apply the rational-basis test to the substantive due process analysis. 83 The rational basis for the policy was the state's need to maintain order in a public park, and such need was rationally related to the policy of excluding individuals who breached the peace in the park. 84 Thus, the court held that there was no substantive due process violation. 85

However, the court held that the policy was unconstitutionally vague. In order to beat a challenge of unconstitutional vagueness, "the statute or regulation must provide adequate notice of the required or prohibited conduct." 86 The court found that the City's unwritten policy did not pro-

77. See id. at 787 ("In light of her timely appeal, Marshall's action in giving up possession did not moot her appeal so long as appellate relief was not futile; that is, so long as she held and asserted a potentially meritorious claim of right to current, actual possession of the apartment. But, her lease expired on January 31, 2003, and she presents no basis for claiming a right to possession after that date.").
79. Id. at 301.
80. Id. at 303.
81. Id. at 304.
82. Id.
83. See id. at 305 ("Anthony argues that the policy denies a fundamental right. Denial of a fundamental right would require a compelling governmental interest. However, if there is no fundamental right, substantive due process merely requires a rational relationship between the regulation and the right being destroyed.").
84. See id. at 306 ("Maintenance of order in a public park is a legitimate state objective, and there is a rational relationship between a policy allowing exclusion from the park of individuals who breach the peace and the maintenance of order in a public park.").
85. Id.
86. Id.
vide such notice to the public. The policy’s vague nature also made it subject to being applied in a discriminatory manner.

In addition to being unconstitutionally vague, the court of appeals held that the City’s unwritten policy violated Anthony’s procedural due process rights. The court noted that the policy contained no definitive guidelines for its administration, nor any guidelines for an appeal under the policy. Both defects made the policy “procedurally deficient and [a denial of] due process.” In addition, the policy allowed a person to be banned from a park without any chance to present evidence in his or her favor, which was evidence of a violation of procedural due process. Because the City’s unwritten policy was unconstitutionally vague and violated procedural due process, the court held the ban and subsequent arrest of Mr. Anthony for criminal trespass was without authority.

VI. FISCAL MATTERS

The statutory nature of a local government’s right to tax was a central issue in Jim Wells County v. El Paso Production Oil and Gas Co. That case involved a suit brought by the appellant counties and school districts (collectively referred to as the “Taxing Units”) for fraud and related causes of action against the appellees (collectively, the “Oil Companies”). The Taxing Units alleged that, in an effort to manipulate the oil and gas markets and underpay their ad valorem taxes, the “Oil Companies were conducting ‘sham sales of gas’ amongst each other as well as reselling the gas all in an attempt to devalue their property for ad valorem tax purposes.” In response, the Oil Companies filed pleas to the jurisdiction, stating that the trial court lacked jurisdiction because the Tax Code provided that a claim before the Appraisal Review Board was the exclusive remedy for any alleged violations thereunder.

87. See id. (“The unwritten policy at issue here is not premised on a violation of specific park rules. . . . A reasonable person would not have fair warning of what conduct would violate that regulation.”).
88. Id.
89. See id. at 307 (“Here, the City’s unwritten policy includes no guidelines to the police officer in exercising his or her discretion to ban a person from the park, and it contains no guidelines or procedures for the ‘appeal’ process.”).
90. Id.
91. See id. (“Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules.”).
92. See id. at 310–11 (“Although the City’s unwritten policy does not violate substantive due process, the policy clearly violated procedural due process and is unconstitutionally vague. . . . Because the unwritten policy relied on by [the arresting officer] is unconstitutional, [the arresting officer] lacked authority to ban Anthony from Yates Park under such policy. The evidence, therefore, is legally insufficient to support a conviction for criminal trespass.”).
94. Id. at 867.
95. See id. (“The pleas to the jurisdiction] argued that the trial court lacked jurisdiction over the ‘Taxing Units’ suits because (1) the Tax Code provides that an Appraisal Review Board has exclusive jurisdiction over challenges to the value of the Oil Companies’
The Houston Court of Appeals began its analysis of the Taxing Units' claims with a review of a decision by the Amarillo Court of Appeals in a very similar case, *In re Exxon Mobil Corp.* In *Exxon Mobil*, the Amarillo Court of Appeals outlined two threshold questions which must be addressed before analyzing the substance of the claims presented. The first question was whether the case was an ad valorem tax case or a fraud and conspiracy case. The *Exxon Mobil* court concluded that "a suit to recover damages measured by the ad valorem taxes not received by a taxing unit because of undervaluation necessarily involves substituting the district court's determination of the proper value of the property for that determined by the appraisal district and approved by the appraisal review board." The second threshold question was whether the Tax Code provided a remedy for the Taxing Units, and the *Exxon Mobil* court concluded that it did, as the chief appraiser had a duty to add to the tax rolls any real property omitted in any one of five preceding years. The Tax Code also provided a remedy in the event that the chief appraiser failed to address "the allegedly fraudulent activity." The *Exxon Mobil* court next turned its attention to whether the Tax Code's remedies were the exclusive remedies available to address alleged fraud in the appraisal process. The *Exxon Mobil* court held that the purpose of the Tax Code would be defeated if the appraisal review board were denied the opportunity to address alleged fraud affecting the appraised value of certain mineral interests. In concluding that the remedy provided by the Tax Code was an exclusive one, the *Exxon Mobil* court also inferred, based upon the structure and provisions of the Tax Code, the legislature's intent to create an exclusive remedy therein.

In applying the analysis set forth by the *Exxon Mobil* court to the facts at issue, the court of appeals first noted that municipalities have no common law right to tax, and thus no common law right to sue for damages based on a claim of lost tax revenues. As such, the next question was property. (2) the remedies for the Taxing Units' claims are exclusive and are contained in the Tax Code, (3) the Taxing Units have not exhausted their administrative remedies under the Tax Code, and (4) the counties lack standing to bring this lawsuit.").

96. *Id.* (citing *In re Exxon Mobil Corp.*, 153 S.W.3d 605, 619 (Tex. App—Amarillo 2004, no pet.)).
97. *Exxon Mobil*, 153 S.W.3d at 612.
98. *Jim Wells County*, 189 S.W.3d at 868 (citing *Exxon Mobil*, 153 S.W.3d at 612).
99. *Id.*
100. *Id.*
101. *Id.* at 868–69.
102. *Id.* at 869.
103. *Id.* (citing *Exxon Mobil*, 153 S.W.3d at 615–16).
104. *See id.* Despite the absence from the Tax Code of specific language so providing, the nature of the governmental function exercised through the Tax Code, the constitutional mandates it implements, its comprehensive and detailed provisions concerning appraisal of property, and its provision of remedies combine to require the conclusion that the Legislature intended the Code procedures to be exclusive means through which the taxing units may seek a remedy for the injuries caused them by the tortuous conduct alleged here. *Id.*
105. *See id.* at 870 ("A municipal corporation's power to tax property is derived solely by virtue of authority delegated to them by the state.").
whether the statutory remedy provided by the Tax Code is the exclusive remedy. An indication that there is an exclusive remedy exists when the agency exists as a part of a "pervasive regulatory scheme."

The court of appeals held that the Tax Code is "precisely the type of comprehensive legislative scheme that courts, including the Exxon Mobil court, routinely hold to be exclusive and . . . the Supreme Court of Texas has already concluded that the Tax Code's detailed provisions for adjudicating tax disputes represent a 'comprehensive tax scheme.'" After determining that the Tax Code provides the Taxing Units with two possible remedies, the court of appeals affirmed the trial court's order dismissing the causes of action filed by the Taxing Units.

VII. ACTIONS

The doctrine of governmental immunity provides that a governmental entity is immune from liability (thus prohibiting enforcement of any judgment against such an entity) and also immune from suit (thus barring any lawsuit against such an entity). When a governmental entity enters into a contract, it automatically waives its immunity from liability, but not from suit. It has long been understood that a waiver of immunity from suit must come from the legislature. As such, a statutory waiver of immunity must be clear and unambiguous.

Since the 1970 decision by the Texas Supreme Court in Missouri Pacific Railroad Co. v. Brownsville Navigation District, the rule in Texas had been that statutory language allowing a governmental entity to "sue and be sued" represented a clear and unambiguous waiver of immunity from suit.

A. TOOE V. MEXIA

In Tooke v. Mexia, the Texas Supreme Court overruled its previous decision in Missouri Pacific and held that the statutory language "sue and

106. See id. at 871. "An agency has exclusive jurisdiction when 'a pervasive regulatory scheme indicates that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.'" Id. (citing In re Entergy Corp., 142 S.W.3d 316, 322 (Tex. 2004)).

107. Id.

108. See id. ("Alternatively, the Taxing Units argue that the Legislature has not given them a remedy. We disagree. In fact, the Tax Code provides at least two remedies for any alleged fraud by taxpayers which results in undervaluation of property.").

109. Id.


111. Id. (citations omitted).

112. Id. (citing Tex. Natural Res. Conservation Comm’n v. IT-Davy, 74 S.W.3d 849, 854 (Tex. 2002) (citing Hosner v. DeYoung, 1 Tex. 764, 769 (1847))).

113. Id. at 333.


be sued” does not represent a clear and unambiguous waiver of immunity from suit.116 Tooke involved a breach of contract suit brought against the home-rule city of Mexia (“City”) by Judy Tooke and her husband. The Tookes had been hired by the City through a competitive bidding process to clear the City’s curbsides of brush and leaves. The contract’s term was for three years, and the contract was “automatically renewable at the end of the first year and on the anniversary of each year thereafter, unless each party furnishes written notice to the other party at least sixty (60) days prior to said actual anniversary.”117 Approximately fourteen months after entering into the contract, the City provided the Tookes with sixty days notice that the City’s budget was exhausted, and the Tookes’ services were no longer needed.

The Tookes brought a breach of contract claim against the City, claiming that they had purchased equipment in reliance upon the contract’s stated three-year term. The trial court held that the City was not immune from suit and rendered judgment on the verdict in favor of the Tookes, plus prejudgment interest. The City filed an appeal, asserting its immunity from suit. In response, the Tookes argued that the language in section 51.075 of the Local Government Code, providing that home-rule municipalities may “plead and be impleaded in any court,”118 constituted a waiver of immunity for such home-rule municipalities. The court of appeals held that the language “plead and be impleaded” was ambiguous at best and did not constitute a waiver of immunity from suit.119

Upon appeal to the Texas Supreme Court by the Tookes, the supreme court explained why it is best to leave the question of governmental immunity from suit to the legislature:

- “the handling of contract claims against the government involves policy choices more complex than simply waiver of immunity,” including whether to reply on administrative processes and what remedies to allow;
- the government should not be kept from responding to changing conditions for the public welfare by prior policy decisions reflected in long-term or ill-considered obligations;
- the claims process is tied to the appropriations process, and the priorities that guide the latter should also inform the former; and
- the legislature is able to deal not only with these policy concerns but also with individual situations in deciding whether to waive immunity by resolution, case, or by statute.120

116. Tooke, 197 S.W.3d. at 328-29.
117. Id. at 330.
118. TEX. LOC. GOV’T CODE ANN. § 51.075.
The Texas Supreme Court began its analysis of the intention of the legislature with respect to statutory language with a historical overview of section 51.075 of the Local Government Code, beginning with the statute's earliest antecedent in 1858. The phrase "plead and be impleaded" was not a waiver of governmental immunity but, rather, a reference to the capacity of such an entity to be involved in litigation. The supreme court also rejected the idea that the phrase "plead and be impleaded" was intended by the legislature to mean anything different than "sue and be sued," even when used in the same statute. The supreme court acknowledged that in different organic statutes, the phrase "sue and be sued" has different meanings: the phrase is sometimes connected to a clear waiver of immunity; other times, the phrase is used in statutes which expressly reject any waiver of immunity; and in other contexts, "sue and be sued" or "plead and be impleaded" "have nothing to do with immunity at all." Finally, in deciding to overrule its decision in Missouri Pacific, the court noted that the decision's inconsistency with "the Legislature's more recent limited waivers of immunity from suit on contract claims against the State and units of state government, counties, and local government entities."
The Texas Supreme Court concluded that, far from being clear and unambiguous, the phrase “sue and be sued” had different meanings in the context of different statutes, and, as such, the Legislature did not intend to create an automatic waiver of immunity by the use of such words.\textsuperscript{128} The court also extended its holding to “similar clauses, like ’plead and be impleaded.’”\textsuperscript{129}

B. \textit{Ben Bolt-Palito Blanco CISD v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund}

The Texas Supreme Court relied on a limited waiver of immunity created by the Texas Legislature in The Texas Interlocal Cooperation Act to hold that the Texas Property/Casualty Joint Self-Insurance Fund was immune from suit in \textit{Ben Bolt-Palito Blanco CISD v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund}.\textsuperscript{130}

The \textit{Ben Bolt-Palito} case involved a school-district member of the Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund (“Fund”), who brought a declaratory action suit against the Fund after the Fund denied its claim for insurance benefits. The Fund asserted a defense of immunity, which the trial court denied. Upon appeal by the Fund, the San Antonio Court of Appeals held that the Fund was entitled to governmental immunity and reversed and dismissed the case for want of jurisdiction.\textsuperscript{131}

The supreme court first determined that the Fund’s “‘nature, purposes and powers’ demonstrate legislative intent that it exist as a distinct governmental entity entitled to assert immunity in its own right for the performance of a governmental function.”\textsuperscript{132}

Once it was clear that the Fund had the legal status required to assert an immunity defense, the supreme court noted that the Fund would be immune from suit absent a legislative waiver from immunity.\textsuperscript{133} The supreme court cited \textit{Tooke} in explaining the reason that the legislature must initiate any waivers of governmental immunity: “Because immunity from suit protects the public coffers, ‘the claims process is tied to the appropriations process, and the priorities that guide the latter should also inform the former.’”\textsuperscript{134}

\textsuperscript{128} \textit{See id.} (“[T]he holding of Missouri Pacific must be, and now is, overruled. . . . [T]he holding of Missouri Pacific that ‘sue and be sued,’ by itself, in an organic statute always waives immunity from suit is simply incorrect. . . . Because the phrase means different things in different statutes, it cannot be said to be clear and unambiguous.”).

\textsuperscript{129} \textit{Id.}


\textsuperscript{131} \textit{Id.} at 323.

\textsuperscript{132} \textit{Id.} at 326.

\textsuperscript{133} \textit{See id.} (“With the Fund’s governmental immunity shield, Ben Bolt’s claims are barred absent a waiver of that immunity. It is the province of the Legislature to consent to a suit against a governmental entity.”) (citation omitted).

\textsuperscript{134} \textit{Id.} (citing \textit{Tooke}, 197 S.W.3d at 332).
The supreme court noted that the legislature provided a clear and unambiguous waiver of immunity in the relevant statute, section 271.152 of the Local Government Code:

A local government 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.

Neither party disputed that the waiver was clear and unambiguous, leaving, as the only remaining question, whether the waiver applied to the Fund or its insurance agreements. The supreme court held that the waiver did apply and reversed the court of appeals' judgment and remanded the matter to the trial court for further proceedings.

C. Reata Construction Corporation v. City of Dallas

Despite the acknowledgment by the Texas Supreme Court of the premiere role of the legislature in creating a waiver of immunity, the supreme court, in Reata Construction Corporation v. City of Dallas, outlined the possible role of the judiciary in the creation of such a waiver. Reata involved a series of lawsuits, all filed in relation to alleged damages caused by drilling by Reata Construction Corporation into a water main, which flooded a nearby building owned by Southwest Properties Group, Inc. Reata was a subcontractor to Dynamic Cable Construction Corporation, Inc., who had been hired by the City of Dallas to install fiber optic cable in the City. When Southwest's building was flooded, it brought suit against Reata and Dynamic. Reata filed a third-party claim of negligence against the City, alleging that the City negligently misidentified the water main's location. Before answering Reata’s claim of negligence, the City intervened in Southwest's suit against Reata and Dynamic, asserting negligence claims against Dynamic. The City then answered Reata’s negligence petition, asserting a defense that there existed no waiver of immunity under the Texas Tort Claims Act. The City later filed an amended plea in intervention, asserting claims of negligence against Reata and simultaneously asserting a plea to the jurisdiction, citing its governmental immunity from suit.

The trial court denied the City’s plea to the jurisdiction and the City undertook an interlocutory appeal. The Dallas Court of Appeals reversed and dismissed Reata’s claims against the City based upon the City’s immunity, holding that even when a governmental entity intervenes in a lawsuit, it is still protected by governmental immunity.

135. Id. at 327 (citing Tex. Loc. Gov't Code Ann. § 271.152).
136. Id. at 328.
The supreme court began its analysis by acknowledging its historic deference to the legislature in creating a waiver of governmental immunity. The supreme court discussed ways in which immunity may be waived other than by the legislature. In noting its past decisions that a governmental entity may waive its immunity by its own actions, the supreme court acknowledged the inherent tension between that principle and two well-settled rules of law: first, that only the legislature may waive governmental immunity; and second, that a court's lack of subject-matter jurisdiction generally may not be waived. The role of the judiciary, according to the Texas Supreme Court, is not to waive governmental immunity but to define the boundaries of such immunity, determining whether and when it is to exist in the first place.

The supreme court asserted its power to shape the common-law doctrine of governmental immunity, holding that where a governmental entity has inserted itself in the midst of litigation, it may not claim immunity against any claims "germane to, connected with and properly defensive to those asserted by the governmental entity." After carving out that limited waiver of immunity, the supreme court held that neither the Texas Tort Claims Act nor the Local Government Code or City Charter provided any additional waiver of immunity from suit.

138. See id. at 375 ("We have consistently deferred to the Legislature to waive such [sovereign] immunity.") (emphasis in original).
139. See id. ("[T]here is tension between the concept of a governmental entity waiving its immunity from suit by some action independent from the Legislature's waiving immunity and the principle that only the Legislature can waive sovereign immunity. There is also tension between the concept of a governmental entity waiving its immunity from suit and the principle that a court's lack of subject-matter jurisdiction generally cannot be waived.") (citations omitted).
140. See id. ("Recognizing that sovereign immunity is a common-law doctrine, we have not foreclosed the possibility that the judiciary may modify or abrogate such immunity by modifying the common law. ... Therefore, it remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance.").
141. Id. at 376–77; see also City of Dallas v. Bargman, 207 S.W.3d 926, 930 (Tex. App.—Dallas 2006, no pet.).