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LOCAL GOVERNMENT LAW

by

Joseph W. Geary* and David Mark Davenport**

I. ZONING AND PLANNING

A. Texas Supreme Court

THE Texas Supreme Court decided two important zoning cases during the survey period. The most significant was *Teer v. Duddleston*,¹ in which two homeowners sought a declaratory judgment that two zoning ordinances passed by the city of Bellaire were invalid. The homeowners first challenged the general validity of the city's zoning classification known as the Planned Development District (PDD).² The home-

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1. 26 Tex. Sup. Ct. J. 544 (July 20, 1983). Immediately prior to this Article's going to press, the Texas Supreme Court granted a motion for rehearing of cause in *Teer v. Duddleston*. 27 Tex. Sup. Ct. J. 246 (Feb. 22, 1984). The supreme court vacated and withdrew its original opinion and substituted a new opinion in its place. The new opinion in *Teer* adopts the position of the dissent in the original opinion. In that opinion, Justice Ray, joined by Justice McGee, argued that the court should dismiss the appeal for want of jurisdiction. Justice Ray's argument was based on the fact that the trial court judgment purported to grant summary judgment relief to the defendant city of Bellaire when the city failed to file a motion requesting such relief or to produce evidence showing itself entitled to such relief. Consequently, the dissent concluded that although the majority's conclusion as to the merits of the case was correct, the trial court's order was not final and, therefore, nonappealable. 26 Tex. Sup. Ct. J. at 550. The majority, however, rejected this argument because the issue in *Teer* was the validity of the two zoning ordinances. Having concluded that the disputed ordinances were valid, the majority reasoned that the trial court had disposed of all material issues in the case and that the declaratory judgment order was appealable. *Id.*

In the court's new opinion the dissent's position in the original opinion was adopted as the majority position, and the case was remanded for trial as to the city of Bellaire. The supreme court held that the trial court should have granted a partial summary judgment in favor of the defendant-developers but not the city of Bellaire. 27 Tex. Sup. Ct. J. at 248. Justice Robertson, joined by Justice Kilgarlin, dissented in the new opinion on the basis of the original majority opinion and argued that a remand would needlessly waste the time and efforts of the trial court and the party litigants. *Id.* at 249.

Due to substantial time constraints and the fact that the original dissent in *Teer* agreed with the original majority decision as to the merits of the case, the authors have made the conscious decision to leave the textual discussion of *Teer* intact. The authors feel that because the majority and the dissent were in agreement as to the merits of the case, the majority's discussion of the law in the original opinion is still worthy of discussion and should offer some instruction to the attorney practicing in the area of zoning law in Texas.

2. A Planned Development District is a unique method of zoning that allows the city to defer a decision on how particular property may be used until such time as the property owner presents plans to the city outlining the manner in which he proposes to develop the property. This method allows the city considerable flexibility in developing a pattern of

owners also challenged a second ordinance amending the PDD to allow the specific use proposed by Duddlesten.

Duddlesten sought approval of development plans for a thirty-eight-acre tract of land abutting Teer's property. Because the land in question was zoned PDD, Duddlesten made application to the city requesting an amendment to the PDD ordinance allowing him to construct an office, hotel, and restaurant complex in accordance with certain site plans and specifications. Duddlesten's plans, however, failed to comply with a number of general city building standards and regulations, such as minimum setback, building height, and parking space requirements. The city council approved Duddlesten's request, suspended the conflicting regulations insofar as they applied to his property, and passed the amended ordinance authorizing the particular use sought. In return for city approval of his plans, Duddlesten agreed to dedicate ten acres of the tract as "Passive Open Space."

Teer contended that use of the PDD was not authorized by and, moreover, was in conflict with the Texas Zoning Enabling Act.³ The court recognized the issue as one of first impression in Texas,⁴ and then discussed the advantages of flexibility afforded both the city and the developer by use of the PDD.⁵ In response to Teer's first argument that PDDs were not specifically authorized by the Act, the court stated that the language in the Act authorizing local governments "to create 'districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act'" was sufficient to confer authority on the city to use the PDD.⁶ The court rejected Teer's contention that certain provisions of the Act requiring uniform regulations and restrictions inside each district conflicted with the use of a PDD, because the height and setback requirements within the PDD applied equally to all development inside the district.⁷

growth since it permits several different uses of property in the same general area. Typically, the developer will present site plans and specifications regarding his proposed use of the property to the local governing body and request that such governing body amend the PDD ordinance to allow the particular use. *Id.* at 545.

3. TEX. REV. CIV. STAT. ANN. arts. 1011a-1011m (Vernon 1963 & Pam. Supp. 1963-1983).

4. 26 Tex. Sup. Ct. J. at 547. The court cited cases construing the requirements of a PDD, but stated that none had raised the fundamental question concerning its general validity. *See, e.g.*, *Charleston Homeowners Ass'n, Inc. v. LaCoke*, 507 S.W.2d 876 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (upholding PDD for single-family attached dwellings); *Rhodes v. Shapiro*, 494 S.W.2d 248 (Tex. Civ. App.—Waco 1973, no writ) (holding city planning commission had no authority to make issuance of building permit conditional); *Nichols v. City of Dallas*, 347 S.W.2d 326 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (upholding validity of zoning hearings); *Clesi v. Northwest Dallas Imp. Ass'n*, 263 S.W.2d 820 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.) (upholding zoning amendment allowing apartment construction).

5. 26 Tex. Sup. Ct. J. at 547. Specifically, the court noted that the use of a PDD could serve as a buffer zone between two dissimilar zoning districts and thereby achieve a more harmonious blend between the two districts rather than a stark contrast. The same argument would apply to two different districts where one contained very old, rundown portions of a city and the other contained new development. *Id.*

6. *Id.* at 548 (quoting TEX. REV. CIV. STAT. ANN. art. 1011b (Vernon 1963)).

7. 26 Tex. Sup. Ct. J. at 548. Article 1011b requires that regulations and restrictions

Teer also alleged that PDDs amounted to spot zoning.⁸ The court dismissed the argument, stating that the single most determinative factor in ascertaining the existence of spot zoning is whether the tract of land zoned is large enough to sustain self-contained development.⁹ The thirty-eight acre tract of land in *Duddlesten* clearly met the test.

Teer's second major argument was that the amended ordinance was specially tailored to meet Duddlesten's site plans and, therefore, amounted to illegal contract zoning. Teer based this argument on grounds that (1) Duddlesten's tract of land was exempt from all future statutory amendments regarding the erection of signs; (2) the city was obligated to reimburse Duddlesten partially for its share of public improvements made by him; (3) all rights and privileges granted to Duddlesten by the amended ordinance were personal to Duddlesten and could not be transferred without city approval; and (4) final approval of Duddlesten's site plans was expressly conditioned upon his executing an Acceptance Agreement whereby he accepted certain conditions required by the city in return for granting his zoning request. The city's approval of Duddlesten's site plans provided that if he failed to execute the Acceptance Agreement within ninety days, then the approval would become null and void. Finally, Duddlesten was required to offer the city a right of first refusal to purchase the area dedicated as Passive Open Space should he ever attempt to sell the same or have it rezoned.

The court initially distinguished contract zoning and conditional zoning. Contract zoning is a bilateral agreement where the city binds itself to rezone land in return for the landowner's promise to use or not use his land in a certain manner.¹⁰ Conditional zoning, on the other hand, is when the city unilaterally requires a landowner to accept certain restrictions on his land without a prior commitment to rezone the land as requested.¹¹ The court held that the amended ordinance in *Duddlesten* amounted to illegal contract zoning, and stated:

This attempt to tie the zoning change to Duddlesten individually

within each particular zoning district be uniform, but such regulations and restrictions may vary from district to district. TEX. REV. CIV. STAT. ANN. art. 1011b (Vernon 1963).

8. Spot zoning occurs when a particular tract of land is singled out for different treatment than surrounding tracts of land within the same district. Because the Zoning Enabling Act requires uniformity of zoning, spot zoning is an impermissible manner of planning development. See *City of Pharr v. Tippitt*, 616 S.W.2d 173, 177 (Tex. 1981); *Hunt v. City of San Antonio*, 462 S.W.2d 536, 540 (Tex. 1971); *Weaver v. Ham*, 149 Tex. 309, 318, 232 S.W.2d 704, 709 (1950).

9. 26 Tex. Sup. Ct. J. at 548; see *City of Pharr v. Tippitt*, 616 S.W.2d 173, 177 (Tex. 1981).

10. *Id.* The principal objection to contract zoning is that zoning is a legislative function and a city cannot contract its legislative power away or surrender its power to make future changes in the zoning laws. *Id.*; see *Nairn v. Bean*, 121 Tex. 355, 361, 48 S.W.2d 584, 586 (1932); *Bowers v. City of Taylor*, 16 S.W.2d 520, 521-22 (Tex. Comm'n App. 1929, holding approved); *Fidelity Land & Trust Co. v. City of West Univ. Place*, 496 S.W.2d 116, 117 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 291 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.); *Urso v. City of Dallas*, 221 S.W.2d 869, 872 (Tex. Civ. App.—Dallas 1949, writ ref'd).

11. 26 Tex. Sup. Ct. J. at 549.

directly contravenes the fundamental principle that a zoning body regulates the use of land and not the person who owns it. . . . Zoning determinations should be based solely upon the real estate and its use, and not in any way turn on who owns or intends to occupy it. Consequently, courts disfavor stipulations of this type in zoning ordinances which make the legislation personal to the applicant.¹²

The Texas Supreme Court's other important decision during the survey period was *Marriott v. City of Dallas*.¹³ The court held that a drafting error on a zoning map indicating that a tract of land was zoned temporary agricultural did not change the city's Comprehensive Zoning Plan ordinance, which had zoned the property permanent agricultural.¹⁴ In 1965 the city of Dallas, pursuant to its Comprehensive Zoning Plan, zoned Marriott's property as permanent agricultural. The Marriott property, however, appeared on the city's zoning map as temporary agricultural. In 1977 the Marriotts hired a contractor to begin construction of a catfish farm, a use permitted under the agricultural zoning classification. The contractor excavated a substantial amount of sand and gravel from the property, leaving a pit twenty-one feet deep.

The city of Dallas alleged that the activity went beyond the mere construction of a catfish farm and became a large-scale mining operation, a use prohibited under the agricultural classification. The city obtained an order permanently enjoining the Marriotts from excavating stone, sand, and gravel from their property without a special use permit.¹⁵ The Marriotts appealed the order, arguing that the temporary classification had lasted for sixteen years, thereby rendering the general ordinance invalid due to the unreasonable length of time the property had been subject to the temporary classification. The Marriotts contended, therefore, that no zoning at all covered the property.

The supreme court held that the unauthorized and mistaken designation appearing on the zoning map did not change the land's permanent agricultural classification as shown in the city's Comprehensive Zoning Plan.¹⁶ Quoting from its opinion in *City of Hutchins v. Prasifka*,¹⁷ the court stated that "[w]hile the method, or lack of it, of the City of Hutchins with regard to its zoning ordinances, regulations, and maps, leaves a great deal to be desired, the zoning laws of a city may not be changed by unauthorized

12. *Id.* at 549-50; see *Huntington v. Zoning Bd. of Appeals*, 428 N.E.2d 826, 830 (Mass. App. Ct. 1981); *Vlahos Realty Co. v. Little Boar's Head Dist.*, 101 N.H. 460, 146 A.2d 257, 260 (1958); *Dexter v. Town Bd.*, 36 N.Y.2d 102, 105, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 508 (1975); *Fox v. Shriver-Allison Co.*, 28 Ohio App. 2d 175, 181, 275 N.E.2d 637, 641 (1971). See generally Strine, *The Use of Conditions in Land-Use Control*, 67 DICK. L. REV. 109 (1963).

13. 644 S.W.2d 469 (Tex. 1983).

14. *Id.* at 471-72.

15. A special use permit is issued by the local Board of Adjustment. It authorizes the recipient to use the property inside the zoning district in a manner not expressly authorized by the applicable ordinance.

16. *Id.* at 472.

17. 450 S.W.2d 829 (Tex. 1970).

resolution or by the unauthorized changing of zoning maps.'"¹⁸ The injunction was, therefore, appropriate under the circumstances.¹⁹

B. Courts of Appeals

The courts of appeals decided several zoning cases during the survey period. In *Austin Neighborhoods Council, Inc. v. Board of Adjustment*²⁰ the appellants challenged the local building department's issuance of a building permit for construction of an office building in downtown Austin.²¹ The appellants appealed to the local board of adjustment, which upheld issuance of the permit. Appellants then appealed to the district court, which affirmed the decision of the board. The court of appeals affirmed the district court decision.²²

The recipient of the building permit joined the action and objected at every stage of the proceedings to appellants' lack of standing to appeal the original issuance of the building permit. Under article 1011g(d) of the Zoning Enabling Act, "[a]ppeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer."²³ The court of appeals agreed that Neighborhoods Council lacked standing under the statute to appeal to the board of adjustment²⁴ and quoted from the Texas Supreme Court's opinion in *Scott v. Board of Adjustment*.²⁵ In *Scott* the supreme court interpreted article 1011g(d) to mean that "[w]here the statute requires that the person be interested, affected, or aggrieved . . . the plaintiff must allege and show how he had been injured or damaged other than as a member of the general public . . ."²⁶ Neighborhoods Council could not show any specific injury and therefore could not meet the standing requirement.²⁷

In the alternative, the appellants contended that since a member of the Austin city council joined as a plaintiff in the action they had the requisite

18. 644 S.W.2d at 472 (quoting 450 S.W.2d at 836).

19. 644 S.W.2d at 472. In the alternative the Marriotts argued that if the zoning map error had not classified their property as temporary agricultural for an unreasonable length of time, then the city's Comprehensive Zoning Plan had done so. This argument was based upon certain language in the comprehensive ordinance purporting to zone newly annexed territories as temporary agricultural. Because the property in question was annexed in 1962, the Marriotts contended that the temporary agricultural classification, as applied to newly annexed territories, had applied to their property since 1962. In overruling this final point of error the court held that the ordinance provision applied only to areas newly annexed after the passage of the 1965 Comprehensive Zoning Plan, and since the Marriot property was annexed in 1962, the 1965 ordinance permanently zoned the Marriot's property as agricultural. *Id.* at 472-73.

20. 644 S.W.2d 560 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

21. Appellants included the Austin Neighborhoods Council, Inc., a nonprofit corporation, its president, and a member of the city council.

22. 644 S.W.2d at 561-62.

23. TEX. REV. CIV. STAT. ANN. art. 1011g(d) (Vernon Pam. Supp. 1963-1983).

24. 644 S.W.2d at 563.

25. 405 S.W.2d 55 (Tex. 1966).

26. 644 S.W.2d at 563 (quoting 405 S.W.2d at 56).

27. 644 S.W.2d at 563.

standing because of the councilman's status as an officer of the city.²⁸ The court held that under Texas law an individual may act as an officer of a municipality only when (1) his acts are within the scope of his authority or (2) his acts are ratified or adopted by the municipality.²⁹ Expressing disagreement with the appellant's contention that actual authority is unnecessary and finding no such authority or municipal ratification in the record, the court dismissed the appellant's alternative argument.³⁰ Finally, the appellants argued that even if they did not have the requisite standing to appeal to the board of adjustment, they nevertheless had standing to appeal to the trial court under section (j) of article 1011g, because at least two of the appellants were individual taxpayers.³¹ The court held that standing to appeal to the board of adjustment was a prerequisite to standing to appeal to a court of record as provided in section (j) of article 1011g.³² Since the appellants lacked standing to appeal in the first instance, they necessarily lacked standing to appeal to the trial court.

In *Texans to Save the Capital, Inc. v. Board of Adjustment*,³³ a case very similar to *Austin Neighborhoods Council*, the Austin court of appeals affirmed the board of adjustment's interpretation of a local zoning ordinance establishing maximum height limitations for buildings constructed in downtown Austin. The ordinance provided that each building could exceed the maximum height limitations by three feet for every one foot it was set back from the streetline.³⁴ The court gave great weight to the board of adjustment's construction of the admittedly ambiguous ordinance and agreed that a setback was an imaginary plane running parallel to the building from the streetline, rising vertically upward to the sky.³⁵ The

28. *Id.* at 564. Article 1011g provides for appeal by "any officer . . . of the municipality affected by any decision." TEX. REV. CIV. STAT. ANN. art. 1011g(d) (Vernon Pam. Supp. 1963-1983).

29. 644 S.W.2d at 564; see *Foster v. City of Waco*, 113 Tex. 352, 355, 255 S.W. 1104, 1106 (1923); *Hallman v. City of Pampa*, 147 S.W.2d 543, 546 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

30. 644 S.W.2d at 564-65.

31. TEX. REV. CIV. STAT. ANN. art. 1011g(j) (Vernon Pam. Supp. 1963-1983) provides that "[a]ny person . . . aggrieved by any decision of the Board of Adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may present to a court of record a petition . . . setting forth that such decision is illegal . . ." (Emphasis added.) It is important to note that standing under this provision includes a taxpayer while art. 1011g(d) does not.

32. 644 S.W.2d at 563.

33. 647 S.W.2d 773 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The appellants in *Texans to Save the Capital* contested a building permit issued to the same party as in *Austin Neighborhoods Council*, but covering an adjacent piece of property. Because of its holding in *Austin Neighborhoods Council* the court seriously doubted that the appellants had standing to bring the instant appeal, but decided to proceed to the merits in "an overabundance of caution." *Id.* at 775.

34. The ordinance reads as follows: "HEIGHT. No building shall exceed a height of two hundred feet on the streetline, provided, that the height of the building may be increased above two hundred feet by increasing the height three feet for each foot setback from the streetline." *Id.* (emphasis supplied by court).

35. *Id.* at 776. Texas case law holds that where a statute or ordinance is ambiguous or unclear, the administrative agency's interpretation of that statute or ordinance is to be accorded great weight. See *Calvert v. Kadane*, 427 S.W.2d 605, 608 (Tex. 1968); *State v. Aran-*

court disagreed with the appellant's contention that the ordinance contemplated only one setback per building, which was at street level, and emphasized that the board's interpretation "allows a 'wedding cake' or 'pyramid-like' structure to rise above the 200 feet limitation . . . by employing the . . . three-for-one bonus exception."³⁶

In *Eudaly v. City of Coffeyville*³⁷ the appellant sought to invalidate four amended zoning ordinances, claiming that certain meetings held prior to passage of the ordinances were in violation of various state statutes, city ordinances, and the general city charter. Appellee-intervenors had attempted to secure rezoning of four tracts of land in Coffeyville. They first met with the city's planning and zoning commission at a regular session workshop to discuss certain concerns the commission had regarding the rezoning. Afterward the commission held a public hearing and recommended approval of the rezoning to the city council. The city council then held three public hearings and an emergency meeting before voting to approve the rezoning.

Appellant contended that the workshop session and the emergency meeting violated articles 1011f³⁸ and 1011d³⁹ of the Texas Zoning Enabling Act. Appellant also alleged that both meetings were in violation of certain city ordinances. The court concluded that the provisions of articles 1011f and 1011d did not apply to the meetings in question because neither meeting was a public hearing within the meaning of the statute.⁴⁰ The court stated that "the term 'public hearing' contemplates the opening of the floor for public comment by anyone desiring to speak on the issue of concern. . . . Comments by the public at large were neither solicited nor heard."⁴¹ The court dismissed the appellants' points of error regarding the city ordinance and charter for failure to raise such points at the trial level, and affirmed the trial court's decision in all respects.⁴²

In *Fountain Gate Ministries, Inc. v. City of Plano*⁴³ the city of Plano obtained an injunction prohibiting a religious organization from conducting certain activities related to operating a college. Fountain Gate Ministries, Inc. owned twenty-one acres of land in an area zoned single family with

sas Dock & Channel Co., 365 S.W.2d 220, 224 (Tex. Civ. App.—San Antonio 1963, writ ref'd); cf. Citizens Nat'l Bank v. Calvert, 527 S.W.2d 175, 180 (Tex. 1975) (administrative interpretation disregarded when it conflicts with statute's plain meaning).

36. 647 S.W.2d at 776.

37. 642 S.W.2d 75 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

38. TEX. REV. CIV. STAT. ANN. art. 1011f(b) (Vernon Pam. Supp. 1963-1983) provides that public hearings before a home rule city's zoning commission shall be preceded by written notice to all property owners located within 200 feet of the property being rezoned. Such notice shall be received within 10 days of the proposed public hearings.

39. *Id.* art. 1011d (Vernon 1963) provides that a municipality may provide for its own manner of zoning on the condition that any action taken by the municipality be preceded by (1) a public hearing and (2) at least 15-days' notice stating the time and place of such hearing.

40. 642 S.W.2d at 77.

41. *Id.*

42. *Id.* at 77-78.

43. 654 S.W.2d 841 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

special use exceptions for a church and a school, public or parochial. The ordinance specifically prohibited the use of land "for a boarding house, rooming house, child care center, and college or university."⁴⁴ After the city denied appellant's application for a special use permit allowing it to operate a college or university, Fountain Gate declared that such a permit was unnecessary because the church and college activities were so closely related that the latter fell within the ordinance's special use exception for the church. The trial court disagreed with the appellant's position and issued the order of injunction from which Fountain Gate appealed.

On appeal, Fountain Gate argued that not only did the college activities in question fall within the church use exception, but the injunction was also inappropriate because it infringed upon the church's right of religious freedom guaranteed by the first amendment to the United States Constitution. The court of appeals held that operation of a college was not an activity protected under the first amendment and that the zoning ordinance limiting the activities of Fountain Gate was a legitimate exercise of the state's police power.⁴⁵ The court further held that the ordinance's special use exception for the church could not be extended to include the operation of the college simply because the activities of the two were closely related and the college activities consisted, to some degree, of worship.⁴⁶

II. EMINENT DOMAIN AND CONDEMNATION

Although the Texas Supreme Court rendered no noteworthy decisions regarding proceedings in eminent domain or condemnation during the survey period, several interesting decisions were announced by the Texas courts of appeals and the Fifth Circuit Court of Appeals.

A. Texas Courts of Appeals

In *City of Austin v. Casiraghi*⁴⁷ the Austin court of appeals held that the appellee-landowner could not be awarded damages for the loss of his restaurant business independently of the award for the realty upon which the business was located, without pleading a cause of action in inverse condemnation.⁴⁸ In *Casiraghi* the city of Austin condemned three lots upon which the appellee-landowner operated a very profitable restaurant business. The parties stipulated at trial that the total market value of the three

44. *Id.* at 842.

45. *Id.* at 844.

46. *Id.* at 845; see *Heard v. City of Dallas*, 456 S.W.2d 440, 444 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (day-care center properly prohibited notwithstanding fact that it was located within rectory of Episcopal vicar); *Coe v. City of Dallas*, 266 S.W.2d 181, 183 (Tex. Civ. App.—El Paso 1953, no writ) (proposed building consisting of 2400 square feet of space for prayer and healing rooms and 600 square feet for church was not church and, therefore, properly prohibited by zoning ordinance).

47. 656 S.W.2d 576 (Tex. App.—Austin 1983, no writ).

48. Inverse condemnation is a cause of action pleaded by a landowner claiming that the condemning governmental authority has damaged or taken his property for a public purpose without providing just compensation for that loss as required by TEX. CONST. art. I, § 17, and U.S. CONST. amend. V. 656 S.W.2d at 580.

lots including improvements was \$55,000. The appellee-landowner, however, over appellant's objection, introduced expert testimony to show that the intangible value of his restaurant business alone was \$130,000. The jury responded to the trial court's instruction on the issue by awarding the appellee \$130,000 for loss of his business in addition to the \$55,000 awarded for the value of the land and improvements.

On appeal, the court held that the trial court erred in issuing the special instruction regarding the value of appellee's business, and reformed the trial court's judgment to reflect a total award of \$55,000, the value of the land and improvements alone.⁴⁹ The court reasoned that damages awarded in a condemnation proceeding are limited by statute to those damages resulting from a taking of the specific property described in the condemning authority's petition.⁵⁰ The court did acknowledge that at least one other Texas case had allowed a landowner to recover damages in a condemnation proceeding for the depreciated value of his business,⁵¹ but distinguished that case from the instant one. In the prior case the landowner had introduced evidence of the value of his business solely as it related to the value of the real property being condemned, and not as a separate and independent item of damage.⁵²

The *Casiraghi* court further held that the general profitability of a business is not a proper item of damages in a condemnation proceeding if (1) such damages represent only goodwill or a going concern value of the landowner's business,⁵³ or (2) the landowner's property is condemned in whole rather than in part.⁵⁴ Finally, the court held that because the award for loss of appellee's business was not authorized by the statute under which the condemnation proceedings had been initiated, the award could be sustained only in a cause of action alleging inverse condemnation,

49. 656 S.W.2d at 581-83.

50. *Id.* at 582. TEX. REV. CIV. STAT. ANN. art. 3264 (Vernon 1968) provides that the condemning authority shall file a petition in the appropriate court describing the property to be condemned. In *Casiraghi* the property description included only the three particular lots on which the appellee's business was situated and did not include the intangible value of the restaurant business located thereon. 656 S.W.2d at 579; see *Queen City Land Co. v. State*, 601 S.W.2d 527, 528 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (award of fee simple title to state in eminent domain proceeding is error where petition in condemnation sought only an easement).

51. *Milam County v. Akers*, 181 S.W.2d 719 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.) (allowed request of damages for loss of cattle business in partial taking where such damages were alleged to affect market value of farm being condemned).

52. 656 S.W.2d at 580-81. Compare *City of Dallas v. Priolo*, 150 Tex. 423, 242 S.W.2d 176 (1951) (trial court did not err in excluding evidence of depreciated market value of grocery and liquor business as separate items of damage); with *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194 (1936) (error to instruct jury to consider special items of damage as affecting remainder of property in partial taking).

53. 656 S.W.2d at 851; see *State v. Zaruba*, 418 S.W.2d 499, 502 (Tex. 1967) (landowner's testimony as to value of business included improper elements of goodwill and going-concern value).

54. 656 S.W.2d at 581; see *Herndon v. Housing Auth.*, 261 S.W.2d 221, 222-23 (Tex. Civ. App.—Dallas 1953, writ ref'd) (evidence of profitability of landowner's business properly excluded by trial court, even though offered as evidence of the market value of the real estate, where whole of landowner's property taken by condemnor).

which the appellee failed to plead.⁵⁵ Accordingly, the court sustained the appellant's point of error and held that the trial court's award for the lost value of appellee's business was not adequately supported by the pleadings.⁵⁶

*Zinsmeyer v. State*⁵⁷ involved a dispute over the proper amount of damages in a condemnation proceeding. The San Antonio court of appeals held that the trial court's failure to instruct the jury fully as to the appellant-landowner's loss of a water easement required reversal.⁵⁸ In *Zinsmeyer* the State of Texas and Medina County jointly condemned property conveyed to Zinsmeyer by his father. The property conveyed included an easement for Zinsmeyer's use of a water well located on his father's remaining property. The state had already condemned the father's fee estate, including the water well, and had appropriately compensated him for it. The trial court, over the appellant's objection, refused to instruct the jury (1) to ignore the previous award to the father, and (2) that appellant's water easement was a valuable property right, separate from the fee estate, that deserved compensation. Zinsmeyer contended on appeal that such refusal constituted reversible error.

The court of appeals acknowledged that the holder of an easement deserves just compensation when that easement is extinguished by public condemnation. It held that the trial court erred in not fully instructing the jury as to the nature of the appellant's rights as holder of the water easement, as distinguished from the father's rights as fee owner of the servient estate.⁵⁹ Quoting from its opinion in *Ruble v. City of San Antonio*,⁶⁰ the court stated:

[W]e think it equally important in a case where the fee being taken is incumbered by an easement, that appropriate instructions be also given by the court as to the nature of the easement to which the property is subject, setting forth in some detail the rights, privileges and limitations of both the landowner and the easement holder⁶¹

In *Tenngasco Gas Gathering Co. v. Fischer*⁶² the appellee moved for summary dismissal of appellant's condemnation petition on the basis of a jury finding that appellant's proposed use of the property was not a public one and, therefore, it had no authority to bring the action. The trial court disregarded the jury's finding and awarded appellee damages for the taking of his land. In upholding the trial court's refusal to follow the jury's

55. 656 S.W.2d at 580. Contrary to the majority's opinion in *Casiraghi*, the dissent forcefully argued that the appellees had, in fact, pleaded the unique quality of their property; and, even if they had not, the issue was tried by consent. *Id.* at 584 (Phillips, C.J., dissenting).

56. *Id.* at 583.

57. 646 S.W.2d 626 (Tex. App.—San Antonio 1983, no writ).

58. *Id.* at 629.

59. *Id.* at 628-29; see *Harris County Flood Control Dist. v. Shell Pipeline Corp.*, 578 S.W.2d 495, 497 (Tex. Civ. App.—Houston [1st Dist.]), *aff'd*, 591 S.W.2d 798 (Tex. 1979).

60. 479 S.W.2d 86 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

61. 646 S.W.2d at 629 (quoting 479 S.W.2d at 89).

62. 653 S.W.2d 469 (Tex. App.—Corpus Christi 1983, no writ).

finding, the court of appeals cited several Texas cases holding that whether a given set of facts constitutes a public or private use is a question of law, not one of fact.⁶³

The court stated that the test for determining whether a particular use is public is whether "there results to the public some definite right or use in the business or undertaking to which the property is devoted."⁶⁴ Accordingly, the court concluded that there was a public use by virtue of the company's statutory obligation to refrain from discriminating in price or service in its sales to individual members of the public.⁶⁵ The court also noted that the Texas Legislature had delegated its power of condemnation to the company, recognizing that use as public; such a declaration by the legislature is binding on the courts unless it is manifestly wrong or unreasonable.⁶⁶ The court held that the company had authority to condemn the appellee's property because the use in question was public and the delegation of power by the legislature not manifestly wrong or unreasonable.⁶⁷

In *City of Houston v. Blackbird*⁶⁸ the city, at the appellee's request, had dismissed its suit to condemn the appellee's property. The trial court then awarded attorneys' fees plus interest to the appellee. The city contended that an award of attorneys' fees was inappropriate because the action was dismissed at the request of the appellee, and appellee's property had greatly increased in value during the proceedings. The court of appeals rejected the city's position, holding that the language of article 3265, section 6 was mandatory.⁶⁹ Thus, the court must award the landowner reasonable costs and attorneys' fees whenever the condemning authority, on its own motion, dismisses or abandons the condemnation proceedings, notwithstanding the fact that such motion is made at the landowner's request.⁷⁰

63. *Id.* at 474 (citing *DuPuy v. City of Waco*, 396 S.W.2d 103, 110 (Tex. 1965); *Housing Auth. v. Higginbotham*, 135 Tex. 158, 165, 143 S.W.2d 79, 83 (1940); *Dallas Cotton Mills v. Industrial Co.*, 296 S.W. 503, 505 (Tex. Comm'n App. 1927, judgment adopted)).

64. 653 S.W.2d at 475 (quoting *Coastal States Gas Producing Co. v. Pate*, 158 Tex. 171, 179, 309 S.W.2d 828, 833 (1958)); *accord* *Davis v. City of Lubbock*, 160 Tex. 38, 45-46, 326 S.W.2d 699, 704-06 (1959).

65. 653 S.W.2d at 476; *see* TEX. REV. CIV. STAT. ANN. art. 1438 (Vernon 1980).

66. 653 S.W.2d at 476; *see* TEX. REV. CIV. STAT. ANN. art. 1436 (Vernon 1980) (providing that corporations who sell gas to public have power to condemn private property for pipeline easements). The delegation of the legislature's power of eminent domain is given great weight in determining whether the particular use sanctioned by the legislature is in fact private rather than public. *See* *Davis v. City of Lubbock*, 160 Tex. 38, 45, 326 S.W.2d 699, 704 (1959); *Housing Auth. v. Higginbotham*, 135 Tex. 158, 165, 143 S.W.2d 79, 83 (1940).

67. 653 S.W.2d at 476.

68. 658 S.W.2d 269 (Tex. App.—Houston [1st Dist.] 1983, no writ).

69. *Id.* at 271-72. TEX. REV. CIV. STAT. ANN. art. 3265, § 6 (Vernon Supp. 1984) provides:

Where a plaintiff after filing a petition in condemnation, desires to dismiss or abandon the proceedings, said plaintiff shall by a motion filed to the judge of the court be heard thereon, and the court hearing the same shall make an allowance to the landowner for all necessary and reasonable attorneys', appraisers', and photographers' fees and all other expenses incurred to the date of such hearing on said motion

70. 658 S.W.2d at 271-72; *see also* *McCullough v. Producers Gas Co.*, 616 S.W.2d 702

B. Fifth Circuit Court of Appeals

One of the more controversial cases decided by the Fifth Circuit during the survey period was *United States v. 329.73 Acres of Land*.⁷¹ The court considered the issue of whether a private party can recover attorneys' fees and litigation by expenses from the United States in a condemnation proceeding brought pursuant to the Equal Access to Justice Act (EAJA).⁷² The appellees had appealed an unfavorable ruling by the district court on their motion for attorneys' fees under the EAJA, which provides that any court exercising jurisdiction over any nontort civil action brought by or against the United States shall award attorneys' fees and litigation expenses to a prevailing party other than the United States unless the court finds that the position of the United States was substantially justified.⁷³ The United States contended that the prefatory language "[e]xcept as otherwise specifically provided by statute"⁷⁴ indicates the congressional intent to exempt eminent domain cases from coverage under the EAJA. Support for this position came from the fact that Congress had already authorized an award of attorneys' fees to a private litigant in condemnation cases brought by the United States when (1) the action was dismissed prior to judgment as not authorized, or (2) the government had abandoned its case.⁷⁵ In overruling this contention, the court thoroughly examined the legislative history of the EAJA, recognizing the intent of Congress to provide a private litigant with sufficient incentive to contest unreasonable government actions. The court cited such congressional intent as evidence that the legislature intended the provision for attorneys' fees under the EAJA to supplement, rather than restrict, other statutory provisions authorizing an award of attorneys' fees in a condemnation proceeding in-

(Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.) (allowing award of attorney's fees and other expenses under art. 3265, § 6).

71. 704 F.2d 800 (5th Cir. 1983).

72. 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981). See generally Robertson & Fowler, *Recovering Attorneys' Fees From the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903 (1982) (background and effect of EAJA).

73. 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981). The statute provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id.

74. *Id.*

75. 42 U.S.C. § 4654(a) (1976) provides:

The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

volving the United States.⁷⁶

The government argued in the alternative that because the EAJA only authorized an award of attorneys' fees to the prevailing party at suit, the statute did not apply to the instant action. The government contended that it had successfully condemned the appellee's property and therefore was the prevailing party. The only remaining dispute, the government argued, concerned the amount of the condemnation award. The Fifth Circuit rejected the government's position and held that any landowner who obtains a higher award for his property at trial than the government originally offered is the prevailing party for purposes of awarding attorneys' fees under the EAJA.⁷⁷ Having determined that the EAJA authorizes an award of attorneys' fees against the government in condemnation proceedings, the court remanded the case to the district court for determination of whether the government's position in contesting the award was substantially justified.⁷⁸

In *United States v. 2,175.86 Acres of Land*⁷⁹ the Fifth Circuit held that where the government appropriates property pursuant to a straight condemnation proceeding, the taking occurs as of the date payment is actually made by the United States to the landowner and therefore the landowner is entitled to interest from that date only.⁸⁰ In the instant case the government sought to condemn the landowner's property as part of the Big Thicket National Preserve, which was established by an act of Congress. The landowners argued that the date of taking, for purposes of determining the amount of interest due on the award, was either the date the government had established the preserve or, alternatively, the date of trial.

(2) the proceeding is abandoned by the United States.

76. 704 F.2d at 807.

77. *Id.* at 809; *see also* *Government of Virgin Islands v. 19,623 Acres of Land*, 602 F.2d 1130, 1135 (3d Cir. 1979) (construing FED. R. Civ. P. 71A(1) as not preventing award of attorney's fees to landowner because he is prevailing party in contest for greater compensation).

78. 704 F.2d at 811. The court also found that the 6% delay damages provided by the Declaration of Taking Act, 40 U.S.C. § 258a (1976), and other federal condemnation statutes set a floor, rather than a ceiling, on the rate of interest payable on the amount a landowner receives in excess of the amount tendered by the government. 704 F.2d at 812; *see* *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464-65 (9th Cir. 1980) (interest fixed at rate a reasonably prudent person investing funds for reasonable return would receive); *United States v. Blankinship*, 543 F.2d 1272, 1275 (9th Cir. 1976) (just compensation includes interest at a proper rate); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980) (6% held minimum acceptable rate).

79. 696 F.2d 351 (5th Cir. 1983).

80. *Id.* at 357. The government generally uses one of two methods to appropriate private property for a public purpose: (1) it acts under the Declaration of Taking Act, 40 U.S.C. § 258(c) (1976), which vests title to the property in the United States immediately upon a filing of declaration and deposit with the court of an amount determined to be an appropriate award; or (2) it proceeds in straight condemnation by filing a complaint in condemnation pursuant to 40 U.S.C. § 257 (1976), whereby a panel determines the offering price for the landowner's property but title does not vest in the United States immediately. Since title vests in the United States automatically when a declaration is filed under 40 U.S.C. § 258(c) (1976), the government is generally limited to its use in cases of sudden emergency. 704 F.2d at 353-54.

The court relied on *Danforth v. United States*⁸¹ and *Agins v. City of Tiburon*⁸² to support its holding that the landowners were not entitled to interest on the award.⁸³

In *Danforth* the United States Supreme Court reasoned that mere legislative enactment does not constitute a taking because such legislation may be repealed or modified.⁸⁴ In *Tiburon* the Supreme Court held that unless the United States enters into actual possession of the landowner's property during the condemnation proceedings, the initiation of such proceedings is insufficient interference with the landowner's usage of his property to constitute a taking of that property.⁸⁵ The Fifth Circuit failed to find that the government had taken possession of the property or substantially interfered with the landowner's use of the property during the condemnation proceedings. Therefore, the taking occurred when the government rendered payment, and the trial court consequently erred in granting interest on the landowner's award.⁸⁶

In *United States v. 50 Acres of Land*⁸⁷ the Fifth Circuit held that just compensation as mandated by the fifth amendment of the United States Constitution required the government to pay the costs of a functionally equivalent substitute for a condemned landfill facility.⁸⁸ The government had condemned a sanitary landfill facility owned and operated by the city of Duncanville, Texas, and claimed that the proper amount of compensation was the property's fair market value. The city argued that the proper amount of compensation should be the costs of acquiring a functionally equivalent substitute facility.⁸⁹

Specifically, the government contended that if the condemned property's fair market value is ascertainable, the valuation must be based on fair market value rather than the cost of substitute facilities.⁹⁰ The court indicated

81. 308 U.S. 271 (1939).

82. 447 U.S. 255 (1980).

83. 696 F.2d at 354-57.

84. 308 U.S. at 286.

85. 447 U.S. at 263 n.9. In *Tiburon* the Supreme Court also held that fluctuations in a landowner's property value resulting from the condemnation proceedings or a landowner's restricted ability to sell his property during such proceedings are not the sort of substantial interference that will constitute an actual taking by the United States. "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'" *Id.*

86. 696 F.2d at 357.

87. 706 F.2d 1356 (5th Cir. 1983).

88. *Id.* at 1357.

89. The substitute facilities doctrine generally applies to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot be determined. *See, e.g., United States v. Streets, Alleys & Public Ways in Village of Stouts-ville*, 531 F.2d 882 (8th Cir. 1976) (streets); *Town of Clarksville v. United States*, 198 F.2d 238 (4th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953) (sewer); *City of Fort Worth v. United States*, 188 F.2d 217 (5th Cir. 1951) (street and highway); *County of Sarpy v. United States*, 386 F.2d 453 (Ct. Cl. 1967) (county road and bridge).

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

that the government's statement of the law was normally correct, but not in cases where a public entity is obligated to replace the condemned property.⁹¹ The court reasoned that because the law required Duncanville to maintain facilities for the collection and disposal of waste and garbage, the city was legally obligated to replace the condemned landfill property; therefore, regardless of whether the fair market value of the property was readily ascertainable, the proper amount of compensation due to Duncanville was the reasonable cost of acquiring a functionally equivalent substitute facility.⁹²

III. TAXATION AND ASSESSMENTS

A. Taxation by Independent School Districts

In *Missouri Pacific Railroad v. Midland Independent School District*⁹³ the El Paso court of appeals held improper a taxing authority's use of comparable sales of vacant adjacent property as its only method for determining the market value of a railroad right-of-way on the ground that such practice constitutes an illegal, arbitrary, and fundamentally erroneous method of appraising land value for ad valorem tax purposes.⁹⁴ The tax assessor testified that his appraisal of the right-of-way property was based solely on comparison with recent sales of vacant property lying adjacent to the railroad's property. On the authority of the Texas Supreme Court's decisions in *Polk County v. Tenneco, Inc.*⁹⁵ and *Missouri-Kansas Texas Railroad v. City of Dallas*,⁹⁶ the court held that the taxing authorities erred in basing their appraisal of appellant's right-of-way property on the recent comparable sales method: the cost to value and income to value approaches should have been employed.⁹⁷ In *Tenneco* and *City of Dallas* the supreme court reasoned that in cases involving pipeline and railroad rights-of-way the

91. 706 F.2d at 1360; see *United States v. Certain Property in Borough of Manhattan*, 403 F.2d 800, 803-04 (2d Cir. 1968) (substitute facilities doctrine applies to condemnation of public bath and recreation building). "When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken." 403 F.2d at 803-04; accord *United States v. Certain Property in Borough of Brooklyn*, 346 F.2d 690, 694 (2d Cir. 1965) (market value rule abandoned when nature of property or uses produce wide discrepancy between value to owner and price another would pay).

92. 706 F.2d at 1360. The collection and disposal of garbage by a municipality is a governmental function imposed by law. See *City of Fort Worth v. George*, 108 S.W.2d 929, 931 (Tex. Civ. App.—Forth Worth 1937, writ ref'd). Solid waste disposal and sanitary landfills are regulated under TEX. REV. CIV. STAT. ANN. art. 4477 (Vernon Supp. 1984).

93. 647 S.W.2d 62 (Tex. App.—El Paso 1983, writ ref'd n.r.e.).

94. *Id.* at 64-65.

95. 554 S.W.2d 918 (Tex. 1977).

96. 623 S.W.2d 296 (Tex. 1981).

97. 647 S.W.2d at 64-65. Market value of real property is generally determined in one of three ways: cost, income, or market approach. Under the market approach, the appraiser simply assesses a market value for the condemned property based upon recent sales of comparable pieces of property in the same area and bearing the same characteristics. The income approach basically involves ascertaining the present value of future income to be generated by a piece of property. The cost approach is based on estimates of the current replacement cost of the property with an adjustment for total depreciation, to derive a present market value.

comparable sales method offers little help in appraising market values because there are few sales of such properties upon which to base a valuation.⁹⁸ The court in *Midland* therefore concluded that the cost and income approaches should have been utilized in the instant case and reversed the trial court, remanding the case.⁹⁹

In *Hays Consolidated Independent School District v. Valero Transmission Co.*¹⁰⁰ a procedural error prevented a taxpayer from being relieved of paying his delinquent ad valorem taxes. The taxpayer failed to allege the illegality of a taxation scheme as an affirmative defense in a suit for delinquent taxes. The Austin court of appeals held that such failure precluded the district court from granting judgment in the taxpayer's favor on the basis of the illegality.¹⁰¹ The lower court had held that the school district adopted an unconstitutional, illegal, and therefore void scheme of taxation for the year in question and entered a take-nothing judgment based upon the taxpayer's general denial. The court of appeals cited the Texas Supreme Court's decision in *Alamo Barge Lines, Inc. v. City of Houston*¹⁰² for the proposition that a defense to a suit for delinquent taxes alleging that the tax scheme is illegal or excessive is in the nature of an affirmative defense and must be specifically pleaded.¹⁰³ Accordingly, the court held that the trial court erred in rendering judgment for the taxpayer based on a general denial.¹⁰⁴

In *Manges v. Freer Independent School District*¹⁰⁵ the appellant challenged the authority of a newly created independent school district to levy ad valorem taxes without conducting a proper election pursuant to article VII, section 3 of the Texas Constitution.¹⁰⁶ The San Antonio court of appeals agreed with the appellant and held that a school district has no inherent or implied power to levy taxes for the maintenance of its schools;

98. 623 S.W.2d at 300; 554 S.W.2d at 921.

99. 647 S.W.2d at 65.

100. 645 S.W.2d 542 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

101. *Id.* at 549.

102. 453 S.W.2d 132 (Tex. 1970), cited in 645 S.W.2d at 546-47. The law in effect for the tax year in question was TEX. REV. CIV. STAT. ANN. art. 7329 (Vernon 1960), repealed by Act of June 13, 1979, ch. 841, § 6(a)(1), 1979 Tex. Gen. Laws 2217, 2329 (effective Jan. 1, 1982). The applicable portion states: "There shall be no defense to a suit for collection of delinquent taxes . . . except . . . [t]hat the taxes sued for are in excess of the limit allowed by law, but this defense shall apply only to such excess." *Id.*

103. TEX. R. CIV. P. 94 requires an affirmative defense to be specifically pleaded.

104. 645 S.W.2d at 550. The *Valero* court also reversed the trial court's judgment because the taxpayer had not sustained his burden by offering evidence as to the amount of the assessed tax that he alleged represented excess. *Id.* at 549-50. The court held that in addition to proving that the method employed to value the taxpayer's property was arbitrary and illegal, where the taxpayer delays his attack on the assessed valuation of his property until the taxing authority sues to recover the tax as delinquent, he must prove the extent to which the tax is excessive. *Id.*; see *State v. Federal Land Bank*, 160 Tex. 282, 287, 329 S.W.2d 847, 850 (1957); *City of Arlington v. Cannon*, 153 Tex. 566, 572-73, 271 S.W.2d 414, 418 (1954).

105. 653 S.W.2d 553 (Tex. App.—San Antonio 1983, no writ).

106. TEX. CONST. art. VII, § 3 provides that a school district may levy ad valorem taxes for the maintenance of public schools when legislative funds are insufficient, provided that such taxes are approved by a majority of qualified voters residing within the district at an election held for that purpose.

article VII, section 3 is the exclusive source of authority to levy such taxes.¹⁰⁷ The court concluded that an election under section 3 is mandatory and any attempt to assess an ad valorem tax without holding such an election is void.¹⁰⁸ The fact that such an election had not been held by the newly created school district was undisputed.

Initially the appellees argued that the tax in question was authorized by article 1027, which allows a municipality to levy taxes for free public schools and educational institutions within the city limits.¹⁰⁹ The appellees alternatively urged the court to uphold the levy as validated by article 7057(g), which was designed to validate all otherwise unenforceable tax levies assessed prior to its passage.¹¹⁰ Appellees based their final contention in support of the levy upon article VII, section 3-b of the Texas Constitution.¹¹¹ Under that section a school district may levy taxes and assessments on property that is newly annexed as part of the district territory without holding a new election specifically to authorize such new and additional assessments.

The court held inapplicable the statutory authority relied on by the appellees in their first contention, because the appellant's property was in a portion of the new district that lay outside the city limits.¹¹² The second argument was without merit because the legislature cannot validate an unconstitutional act.¹¹³ In *Manges* the district imposed the tax levy without holding the constitutionally required election. Finally, the court held that section 3-b of article VII applied only to situations in which the district had previously held the constitutionally required election prior to annexing the new area, and was inapplicable when the district had never held

107. 653 S.W.2d at 558. The court cited several cases in support of its holding. *See, e.g.*, *Crabb v. Celeste Indep. School Dist.*, 105 Tex. 194, 146 S.W. 528 (1912) (exclusive authority for independent school district's levy of ad valorem taxes is article VII, § 3 of Texas Constitution); *City of Fort Worth v. Davis*, 57 Tex. 225 (1882) (authority to levy taxes must arise from affirmative grant of power by legislature); *Wingate v. Whitney Indep. School Dist.*, 129 S.W.2d 385 (Tex. Civ. App.—Waco 1939, no writ) (independent school district has no inherent or implied power to levy taxes for maintenance of public schools).

108. 653 S.W.2d at 558.

109. TEX. REV. CIV. STAT. ANN. art. 1027 (Vernon 1963). The appellee also urged the court to read article XI, § 4 of the Texas Constitution, delegating to cities legislative power to levy ad valorem taxes, and TEX. REV. CIV. STAT. ANN. art. 1027 (Vernon 1963), authorizing cities to levy taxes for maintenance of public schools within city limits, in conjunction as supplying the school district with authority to levy ad valorem taxes on property coextensive with city boundaries to its public school system. 653 S.W.2d at 559-60.

110. TEX. REV. CIV. STAT. ANN. art. 7057(g) (Vernon 1980).

111. TEX. CONST. art. VII, § 3-b provides:

No tax for the maintenance of public free schools voted in any independent school district . . . nor any bonds voted in any such district, but unissued, shall be abrogated, cancelled or invalidated by change of any kind in the boundaries thereof. After any change in boundaries, the governing body of any such district, without the necessity of an additional election, shall have the power to assess, levy and collect ad valorem taxes on all taxable property within the boundaries of the district as changed

112. 653 S.W.2d at 560.

113. *Id.* at 562; *see Bigfoot Indep. School Dist. v. Genard*, 116 S.W.2d 804, 806 (Tex. Civ. App.—San Antonio 1938), *aff'd*, 133 Tex. 368, 129 S.W.2d 1213 (1939).

the constitutionally required election.¹¹⁴

During the survey period, two interesting cases arose involving the taxation of religious organizations. In *Highland Church of Christ v. Powell*¹¹⁵ the Eastland court of appeals held that thirty-five percent of a religious facility used exclusively as a place of religious worship was exempt from ad valorem taxation and the remaining sixty-five percent, being leased to commercial tenants, was subject to taxation.¹¹⁶ The court rejected the appellee's position that the entire religious facility must be used exclusively for religious worship to qualify for the statutory exemption from ad valorem taxation.¹¹⁷

The case of *Christian Jew Foundation v. State*¹¹⁸ held that the Texas Employment Commission's (TEC) interpretation of article 5221b—17(g)(5)(E)¹¹⁹ was without merit. The statute provides an exemption from contributions to the Unemployment Compensation Fund for those services "performed in the employ of a church."¹²⁰ The TEC argued that because the Christian Jew Foundation did not adhere to a recognized and distinct creed, had no regular place of worship, consisted of only twelve members, and conducted no regular services other than Bible study, it did not come within the meaning of the word "church" as provided in the statute and therefore the exemption was unavailable to it.¹²¹

The Austin court of appeals held that the TEC's order denying the exemption to the appellant on the basis that the foundation was not a body of Christian believers sharing the same creed was flagrantly unconstitutional.¹²² The court viewed the TEC's reasoning as so violative of the first amendment to the United States Constitution that it assumed the statements were unintentional.¹²³ Accordingly, the court reversed the trial court's judgment affirming the order of the TEC and held that the exemp-

114. 653 S.W.2d at 561.

115. 644 S.W.2d 177 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

116. *Id.* at 180-81. Section 11.20 of the Property Tax Code provides:

(a) An organization that qualifies as a religious organization as provided by Subsection (c) of this section is entitled to an exemption from taxation of:

(1) the real property that is owned by the religious organization, is used *primarily as a place of regular religious worship*, and is reasonably necessary for engaging in religious worship;

(e) For the purpose of this section, "religious worship" means individual or group ceremony or meditation, education, and fellowship, the purpose of which is to manifest or develop reverence, homage, and commitment in behalf of a religious faith.

TEX. TAX CODE ANN. § 11.20 (Vernon 1982) (emphasis added).

117. 644 S.W.2d at 180.

118. 653 S.W.2d 607 (Tex. App.—Austin 1983, no writ).

119. TEX. REV. CIV. STAT. ANN. art. 5221b—17(g)(5)(E) (Vernon Supp. 1984).

120. *Id.*

121. The Christian Jew Foundation, formerly the Christian Jew Hour, devotes most of its time to publishing literature and conducting radio broadcasts for the purpose of informing the public of its faith.

122. 653 S.W.2d at 615.

123. *Id.*

tion was available to the appellant.¹²⁴

B. Paving Assessments

The Texas Supreme Court rendered an extremely significant decision regarding paving assessments shortly after the end of the survey period. In *Haynes v. City of Abilene*¹²⁵ the appellants contested the city's paving assessment of \$13.94 per square foot of property abutting a recently paved local street. Although the appellants' properties did abut the improved road in the strict physical sense, there was no direct access to the road due to a large plaster wall that ran the length of the abutting portion of the properties. In determining the assessment amount, the city council had heard testimony from a certified real estate appraiser that all property abutting the recently paved street would be enhanced in value by at least \$14.94 per square foot. The council acted accordingly, assessing each owner of abutting property \$13.94 per front foot of property abutting the improved road.¹²⁶ The appellants argued that assessing their properties based on a valuation using the front foot plan was inequitable because they received no special benefits from the city's decision to repave the road.¹²⁷

The supreme court agreed with the landowners' position and reversed the appellate court, holding the paving assessments void and unenforceable.¹²⁸ Although the improved road did increase all local property values, the court held that the article 1105(b) concept of special benefits required that assessed property receive some additional special benefit over and above the general benefit of increased neighborhood property values.¹²⁹ The court consequently held that the assessment in question was materially greater than the benefits conferred by the improvements; therefore the assessment violated article I, section 17 of the Texas Consti-

124. *Id.* at 617.

125. 659 S.W.2d 638 (Tex. 1983).

126. The actual assessment was reduced by \$1.00 from the amount actually authorized because the appellants' lots abutted the street from the rear rather than the front.

127. TEX. REV. CIV. STAT. ANN. art. 1105(b), § 7 (Vernon 1963) provides:

The part of the cost of improvements on each portion of highway ordered improved which may be assessed against abutting property and owners thereof shall be apportioned among the parcels of abutting property and owners thereof, in accordance with the Front Foot Plan or Rule provided that if the application of this rule would, in the opinion of the Governing Body, in particular cases, result in injustice or inequality, *it shall be the duty of said Body to apportion and assess said costs in such proportion as it may deem just and equitable, having in view the special benefits in enhanced value to be received by such parcels of property* and owners thereof, the equities of such owners, and the adjustment of such apportionment so as to produce a substantial equality of benefits received and burdens imposed. (Emphasis added.)

The front foot plan calculates each individual property owner's assessment as the product of the total amount of assessments for the improvements multiplied by a fraction, the numerator of which is the total square feet of such owner's property that abuts the improved road and the denominator of which is the total amount of square feet of all property abutting the improved road.

128. 659 S.W.2d at 642, *rev'g* 645 S.W.2d 928 (Tex. App.—Eastland 1983).

129. 659 S.W.2d at 641.

tution, which prohibits the taking of private property for a public use without just compensation.¹³⁰

The Houston court of appeals in *City of Houston v. Alnoa G. Corp.*¹³¹ held that the city's application of the front foot plan¹³² to the appellee's irregularly shaped lots was arbitrary and capricious. Any paving assessment based on the use of that plan was therefore unenforceable.¹³³ The court affirmed the trial court's holding that the assessment was constitutionally impermissible because: (1) the improvements benefitted the public generally and did not provide any special benefits to the appellee; (2) the appellee's lots were substantially different in character and not properly subject to assessment on the basis of the front foot plan; and (3) the city had not produced any evidence regarding the fair market value of the appellee's property before and after implementation of the improvements for which the assessments were made.¹³⁴

In *Cook v. City of Addison*¹³⁵ various property owners sought to set aside paving assessments levied by a home rule city, claiming that the city paid the contractor out of general revenue funds and subsequently levied assessments on the appellees' property to reimburse the city's general revenue account. The court acknowledged that a home rule city has full power of self-government, subject only to limitations promulgated by the Texas and United States Constitutions and the general laws of Texas that appear with "unmistakable clarity."¹³⁶ The court found nothing in article 1105b, section 9 limiting a home rule city's power to levy paving assessments and reimburse its general revenue account.¹³⁷ Moreover, the court concluded that the statute specifically contemplates such action by the city and actually prohibits the city's collection of any assessments until after the project is completed and accepted.¹³⁸ Consequently, the paving assessments were

130. *Id.*; see *City of Houston v. Blackbird*, 394 S.W.2d 159, 162 (Tex. 1965); *Hutcheson v. Storrie*, 92 Tex. 685, 690, 51 S.W. 848, 851 (1899); see also *Village of Norwood v. Baker*, 172 U.S. 269 (1898) (Ohio village assessment without consideration of special benefits violates 14th amendment due process).

131. 638 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

132. The front foot plan is described *supra* note 127.

133. 638 S.W.2d at 517.

134. *Id.* Although the court denied the appellee damages for the loss of ability to sell the property while the invalid assessment lien was pending, it implied that such damages may be recoverable if the property owner presents adequate evidence that actual damages resulted from an invalid assessment. See *id.* at 518.

135. 656 S.W.2d 650 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

136. *Id.* at 653-54; see *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975) (only legislative limitations that appear with "unmistakable clarity" limit power of a home rule city).

137. 656 S.W.2d at 654. TEX. REV. CIV. STAT. ANN. art. 1105b, § 9 (Vernon 1963) provides:

[T]he governing body shall have power to . . . determine the amounts of assessments and all other matters necessary, and by ordinance to close such hearing and levy such assessments before, during or after the construction of such improvements, but no part of any assessment shall be made to mature prior to acceptance by the city of the improvements for which assessment is levied.

138. 656 S.W.2d at 654.

valid and enforceable.¹³⁹

IV. ELECTIONS AND ELECTED OFFICIALS

A. Bond Elections

In *Ex parte Progresso Independent School District*¹⁴⁰ the court of appeals held that a school bond election was valid even though conducted pursuant to an unconstitutional election statute. The appellants contended that section 20.04 of the Texas Education Code, which requires that issuance of school bonds be approved by a majority of voters who own taxable property submitted for taxation,¹⁴¹ denied equal protection to otherwise qualified voters. Based upon several United States Supreme Court cases holding that property ownership is an invalid prerequisite to the exercise of voting rights,¹⁴² the court held the Texas statute unconstitutional as denying equal protection to those who did not render their property for taxation.¹⁴³ The court also held, however, that the election itself was valid since the school district had not enforced the unconstitutional provisions of the statute, and accordingly struck down the property-rendering requirements of the statute, but held the remainder of the statute valid.¹⁴⁴

B. Elected Officials

Two cases decided during the survey period dealt with the requirement that a candidate for elected office in Texas be in strict compliance with the Texas Election Code.¹⁴⁵ In *Sparks v. Busby*¹⁴⁶ the Tyler court of appeals

139. The *Cook* court also rejected the appellant's contention that the city's use of the front foot plan, without consideration of the irregular dimensions and present use of the appellant's property, was arbitrary and capricious and, therefore, void. The court declined to follow the holding of *City of Houston v. Alnoa G. Corp.*, 638 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), to the extent that it stood for the proposition that use of the front foot plan was impermissible based solely on evidence that the assessed property had irregular dimensions. 656 S.W.2d at 656. The court concluded that the "mere showing of . . . a difference in size, shape or square footage of tracts abutting a street is insufficient" to show that the use of the front foot plan would result in injustice or inequality and thereby render the assessment invalid. *Id.* at 656.

140. 650 S.W.2d 158 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

141. TEX. EDUC. CODE ANN. § 20.04(a) (Vernon 1972) provides:

No such bonds shall be issued and none of the aforesaid taxes shall be levied unless authorized by a majority of the resident, qualified electors of the district, *who own taxable property therein and who have duly rendered the same for taxation*, voting at an election held for such purpose

(Emphasis added.)

142. See, e.g., *Hill v. Stone*, 421 U.S. 289 (1975) (Texas law giving greater weight to property-owning taxpayers in library bond election unconstitutional); *City of Phoenix v. Kolodziejki*, 399 U.S. 204 (1970) (property ownership as prerequisite to general bond election unconstitutional); *Cipriano v. City of Houma*, 395 U.S. 702 (1969) (bond election restricted to property taxpayers unconstitutional); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (eligibility to vote for school board members limited to property owners or parents of children enrolled in local public school unconstitutional).

143. 650 S.W.2d at 162.

144. *Id.* at 163.

145. Provisions of the Texas Election Code relating to voters are to be liberally construed as directory only, but those provisions relating to the requirements of a candidate for office are mandatory and require strict compliance. See, e.g., *McWaters v. Tucker*, 249 S.W.2d 80,

affirmed the trial court's order granting an injunction prohibiting the county clerk from placing the appellant's name on the ballot as an independent candidate for county judge. The court held that the provisions of the Election Code relating to a candidate's eligibility for office are mandatory and require strict compliance.¹⁴⁷ Because several of the signatures on the appellant's petition for a place on the ballot were invalid due to procedural technicalities, the appellant lacked the minimum number of signatures to qualify and an injunction was appropriate under the circumstances.¹⁴⁸

In *Branau v. Patrick*¹⁴⁹ the appellant alleged that the appellee violated the Texas Election Code by accepting a campaign contribution and making a campaign expenditure prior to filing the name of his campaign treasurer with the appropriate authorities.¹⁵⁰ One week before appointing his campaign treasurer, appellee loaned his campaign \$400 and used that sum to pay the required filing fee. The court held that although the statutory provision requiring appointment of a campaign treasurer was mandatory, the time for such appointment was only directory.¹⁵¹ The court concluded that the appellee had substantially complied with the statutory requirements.¹⁵²

82 (Tex. Civ. App.—Galveston 1952, no writ); *see also* *Shields v. Upham*, 597 S.W.2d 502 (Tex. Civ. App.—El Paso 1980, no writ) (failure of nominating petition to show street address or county in which registered to vote held insufficient compliance); *Geiger v. Debusk*, 534 S.W.2d 437 (Tex. Civ. App.—Dallas 1976, no writ) (failure to attach affidavit in lieu of filing fee resulted in withdrawal of name from ballot).

146. 639 S.W.2d 713 (Tex. App.—Tyler 1982, no writ).

147. *Id.* at 717; *see also* *Shields v. Upham*, 597 S.W.2d 502 (Tex. Civ. App.—El Paso 1980, no writ) (candidate denied place on ballot because only seven of 211 voters signing petition had listed city of their residence as required by statute); *Brown v. Walker*, 377 S.W.2d 630 (Tex. 1964) (candidate who sent his assessment by first class mail rather than certified or registered mail denied slot on ballot).

148. 639 S.W.2d at 718. In contrast to the *Sparks* case the Houston court of appeals held that (1) a candidate's application for a place on the ballot is not invalid merely because certain voters failed to identify the city of their residence and (2) TEX. ELEC. CODE ANN. art. 13.50 (Vernon Supp. 1984), prohibiting an independent candidate's petition for a place on the ballot from being circulated until the day after a primary runoff election, has no application where no primary runoff is held for that year. *Hoot v. Brewer*, 640 S.W.2d 758, 761 (Tex. App.—Houston [1st Dist.] 1982, no writ).

149. 643 S.W.2d 745 (Tex. App.—San Antonio 1982, no writ).

150. TEX. ELEC. CODE ANN. art. 14.02(F)(1) (Vernon Supp. 1984) provides:

Except as expressly permitted in this chapter, no contribution as defined in Section 237(D)(1) shall be *accepted nor any expenditure*, as defined in Section 237(E)(1), *including the paying of any filing fee*, made by an individual until he has filed the name of his campaign treasurer with the appropriate authority.

(Emphasis added.) Specifically, the appellant, a candidate, sought civil damages from another candidate under art. 14.04 of the Political Funds and Reporting Disclosure Act of 1975, *id.* art. 14.04 (Vernon Supp. 1984). The Act makes a candidate liable to any opposing candidate for knowingly making an unlawful campaign expenditure. The amount of liability is twice the value of the expenditure. *Id.*

151. 643 S.W.2d at 751; *accord* *Hoeneke v. Lehman*, 542 S.W.2d 728, 731 (Tex. Civ. App.—San Antonio 1976, no writ) (filing of campaign expense statement is mandatory, but time of filing is directory).

152. 643 S.W.2d at 751; *accord* *Butchofsky v. Crawford*, 269 S.W.2d 536 (Tex. Civ. App.—El Paso 1954, no writ) (substantial compliance with Election Code requirement of statement showing gifts received is sufficient if irregularity did not affect result of election).

In one of the more interesting election cases occurring during the survey period, the United States District Court for the Northern District of Texas ruled that the holding of the United States Supreme Court in *Clements v. Fashing*¹⁵³ applied retroactively. In *Smith v. Dean*¹⁵⁴ the appellant resigned his office as mayor of Mesquite, Texas, and announced his candidacy for the Texas Legislature while the *Clements* case was on appeal to the Supreme Court. The Supreme Court ultimately reversed the district court's decision in *Clements*, which held unconstitutional article III, section 19 of the Texas Constitution.¹⁵⁵ The provision requires that a person holding a lucrative office wait until his respective term expires before running for the Texas Legislature.¹⁵⁶ The Texas secretary of state, acting on the authority of the Supreme Court's decision, informed Smith that he was ineligible to be a candidate for the legislature because he held a lucrative office and his term had not yet expired at the time he resigned from office. His name was therefore withdrawn from the ballot. Smith sued to enjoin the secretary from interfering with his candidacy, contending that the Supreme Court decision did not apply to his candidacy because he had announced his intention to run for the legislature at a time when the statute had been held unconstitutional.

The district court held that the appellant's salary of \$100 per month clearly made his position a lucrative office and that the circumstances of the case failed to establish that the *Clements* decision should not apply retroactively.¹⁵⁷ Under the balancing test for determining nonretroactivity, a party must show that the new decision either (1) establishes a new principle of law or (2) overrules clear past precedent.¹⁵⁸ Finding that the overruled district court and Fifth Circuit decisions in *Clements* failed to establish clear past precedent, the court concluded that "[o]ne who relies on a case that is pending on appeal assumes the risk that the case may be reversed and that his reliance may be misplaced."¹⁵⁹

V. ANNEXATION AND INCORPORATION

The Texas Supreme Court decided only one significant case concerning

153. 457 U.S. 957 (1982). In *Fashing v. Moore*, 489 F. Supp. 471 (W.D. Tex. 1980), the district court held unconstitutional certain provisions of the Texas Election Code and the Texas Constitution that (1) prohibited persons holding specified offices, as well as lucrative offices, from running for the Texas Legislature prior to expiration of their original term of office and (2) provided that certain other persons holding office were deemed to have automatically resigned their present office when they announced candidacy for another office. The provisions were held violative of the equal protection clause of the fourteenth amendment and, therefore, unconstitutional. *Id.* at 475. The Fifth Circuit affirmed without opinion. *Fashing v. Moore*, 631 F.2d 731 (5th Cir. 1980). The United States Supreme Court reversed, holding that such legislative provisions bore a rational relationship to certain legitimate state objectives and therefore were constitutional. 457 U.S. at 968-69.

154. 554 F. Supp. 29 (N.D. Tex. 1982).

155. 457 U.S. at 968-69.

156. TEX. CONST. art. III, § 19.

157. 554 F. Supp. at 31.

158. *Id.*; see *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

159. 554 F. Supp. at 31.

annexation during the survey period. In *City of Longview v. State of Texas ex rel. Spring Hill Utility District*¹⁶⁰ the supreme court reversed the Tyler court of appeals and held that a water district may be annexed in its entirety by a series of ordinances rather than a single ordinance.¹⁶¹ The Spring Hill Water District was located on three separate tracts of land. Only one tract was adjacent to the city of Longview and came within its three and one-half mile extraterritorial jurisdiction.¹⁶² The city annexed the adjacent tract by one ordinance, then annexed a narrow strip of land leading to the other two smaller strips by a second ordinance. by the third and fourth ordinances the city annexed the final two tracts of the water district, thereby annexing the entire water district as required by statute.¹⁶³

The state brought a quo warranto action alleging that the annexation was void. The trial court rendered judgment validating the annexation, and the court of appeals reversed, holding that article 970a required the entire district to be annexed in a single ordinance.¹⁶⁴ The court of appeals reasoned that because the city had not complied with the statute in the first ordinance, the final three ordinances were also invalid.¹⁶⁵

The supreme court noted that article 970a, section 3(C) states that when a city annexes additional territory the city's extraterritorial jurisdiction expands to conform with the annexed area.¹⁶⁶ Consequently, the court concluded that the final two tracts came within the city's extraterritorial jurisdiction as a result of its having validly annexed the first tract.¹⁶⁷ Since the entire district was annexed by the city within the proper time frame, the court affirmed the judgment of the trial court and reversed the court of appeals.¹⁶⁸

In *Town of Hudson Oaks v. State ex rel. City of Weatherford*¹⁶⁹ the Fort Worth court of appeals was asked to decide whether a town that attempted to incorporate, but held its incorporation election on a date not authorized by statute,¹⁷⁰ was rendered duly incorporated by a validating act of the

160. 657 S.W.2d 430 (Tex. 1983).

161. *Id.* at 431. TEX. REV. CIV. STAT. ANN. art. 970a, § 11(B) (Vernon Pam. Supp. 1963-1983) requires that a water district be annexed in its entirety if at all. See *infra* notes 163 (text of statute).

162. Article 1175 limits a home rule city's power to annex territory to property located adjacent to the city's territory. TEX. REV. CIV. STAT. ANN. art. 1175 (Vernon 1963). *Id.* art. 970a, § 7 (Vernon Pam. Supp. 1963-1983) further limits a city's power to annex territory to property within the city's extraterritorial jurisdiction.

163. *Id.* art. 970a, § 11(B) (Vernon Pam. Supp. 1963-1983) provides: "A city may not annex territory within the boundaries of a water or sewer district unless it annexes the entire portion of the district that is outside the city's boundaries."

164. 642 S.W.2d 544 (Tex. App.—Tyler 1982), *rev'd*, 657 S.W.2d 430 (Tex. 1983).

165. 642 S.W.2d at 550.

166. 657 S.W.2d at 631; see TEX. REV. CIV. STAT. ANN. art. 970a, § 3(C) (Vernon 1963).

167. 657 S.W.2d at 631; see *May v. City of McKinney*, 479 S.W.2d 114 (Tex. Civ. App.—Dallas 1972, writ *ref'd* n.r.e.).

168. 657 S.W.2d at 431. Article 970a, § 6 provides that the annexation of a territory shall be complete within 90 days or it is null and void. TEX. REV. CIV. STAT. ANN. art. 970a, § 6 (Vernon Pam. Supp. 1963-1983).

169. 646 S.W.2d 610 (Tex. App.—Fort Worth 1983, writ *ref'd* n.r.e.).

170. TEX. ELEC. CODE ANN. art. 2.01(b) (Vernon Supp. 1984) specifies the dates on which incorporation elections may be held.

legislature. Article 974d—30 declares all those towns that attempted to incorporate or functioned as incorporated towns but were not actually incorporated due to procedural technicalities validly incorporated.¹⁷¹ The court placed special emphasis on language in article 974d—30 stating that the incorporation proceedings would not be invalidated merely because the city failed to comply with the legal procedures.¹⁷² The court concluded that although the two statutes were in direct conflict, the validating statute controlled; therefore Hudson Oaks became incorporated as of the date of its invalid election.¹⁷³

VI. TORT LIABILITY

The Texas courts decided several significant cases regarding municipal and governmental tort liability during the survey period. In *Salcedo v. El Paso Hospital District*¹⁷⁴ the Texas Supreme Court held that a plaintiff states a cause of action under the Texas Tort Claims Act (TTCA)¹⁷⁵ when he or she alleges that a public hospital employee wrongfully and negligently misread and misinterpreted graph charts from an electrocardiogram test and that such negligence caused the patient's death. In *Salcedo* the plaintiff's husband entered the hospital complaining of severe chest pains. Although the results of the electrocardiogram test showed a classic case of myocardial infarction (heart attack), Mr. Salcedo was released from the hospital shortly afterward. He collapsed and died shortly after returning home. Mrs. Salcedo sued the El Paso Hospital District and the doctor who treated her husband for negligence. The trial court held that Mrs. Salcedo's cause of action failed to come within the provisions of the TTCA waiving sovereign immunity. The court of appeals affirmed the holding of the trial court.¹⁷⁶ Section 3 of the TTCA provides for waiver of sovereign immunity when the injury results from: (1) use of publicly owned vehicles, (2) defects in publicly owned premises, or (3) some condition or use of

171. TEX. REV. CIV. STAT. ANN. art. 974d—30 (Vernon Pam. Supp. 1963-1983).

172. 646 S.W.2d at 611.

173. *Id.* at 612.

174. 659 S.W.2d 30 (Tex. 1983).

175. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 3(b) (Vernon Supp. 1984) reads:

Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act of omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state. (Emphasis added.)

176. 647 S.W.2d 51 (Tex. App.—El Paso 1983).

public property.¹⁷⁷ Mrs. Salcedo asserted that her claim fell within the last exception, but the trial court dismissed the claim for failure to allege that the property itself (the electrocardiogram machine) was in a defective condition.

The supreme court reversed both lower court rulings, holding that a cause of action is stated under the TTCA if the plaintiff alleges that some use rather than some condition of the property was a contributing factor to the injury in question.¹⁷⁸ The court emphasized that the Texas Legislature had not bothered to amend the waiver provision of the TTCA since the court's decision in *Lowe v. Texas Tech University*.¹⁷⁹ In *Lowe* Chief Justice Greenhill stated in his concurring opinion that because of the ambiguous language of section 3, allegations of either defective or nondefective property could invoke the waiver provisions of the TTCA.¹⁸⁰ The *Salcedo* court reasoned that because the legislature had failed to express its intent more clearly since the *Lowe* decision, the court was bound to give a liberal construction to the statute.¹⁸¹ Consequently, Mrs. Salcedo's allegation of wrongful use of the property sufficiently stated a cause of action under the TTCA.

In *Genzer v. City of Mission*¹⁸² the appellant sought damages from the city pursuant to the TTCA for injuries sustained in connection with the allegedly negligent operation of a fireworks display. Although the display was sponsored by the Catholic War Veterans Post, the evidence showed that (1) volunteer members of the city's fire department conducted the display; (2) paid members of the city's fire and police department supervised local traffic, as well as the display itself; and (3) the display was conducted on city-owned property. Based upon this evidence, the jury found that the city was responsible for the display and was negligent in failing to keep the crowds at a safe distance from the fireworks and in setting the fireworks mortars at an angle toward the crowd.

The court of appeals held that the city had exercised a governmental function by supervising and conducting the display. The city was therefore liable for the negligent operation of the fireworks display under the TTCA.¹⁸³ The court failed, however, to specify the particular waiver provision of the TTCA¹⁸⁴ upon which the appellant's claim was based. Arguably the court concluded that since the city had negligently conducted the display on city-owned property, the claim fell within that provision

177. 659 S.W.2d at 31; see Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462, 468 (1971).

178. 659 S.W.2d at 32.

179. 540 S.W.2d 297 (Tex. 1976).

180. *Id.* at 302. "The statutory language 'condition or use' of property implies that such property was furnished, was in bad or defective condition or was wrongly used." *Id.*

181. 659 S.W.2d at 32. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 13 (Vernon 1970) provides: "The provisions of this Act shall be liberally construed to achieve the purposes hereof."

182. No. 2561CV (May 26, 1983).

183. *Id.*, slip op. at 4.

184. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 3 (Vernon Supp. 1984).

waiving immunity for injuries arising out of conditions or use of public property.¹⁸⁵

The Amarillo court of appeals held that the city of Amarillo was liable for damages under 42 U.S.C. section 1983¹⁸⁶ and the TTCA when plaintiffs presented sufficient evidence demonstrating that use of excessive force by the local police amounted to an implementation of official departmental policy. In *City of Amarillo v. Langley*¹⁸⁷ the Langley brothers were riding their motorcycles through downtown Amarillo when they ran a red light. A local police officer began chasing them and radioed ahead to other officers informing them of his pursuit. Another officer who heard the call

185. *See id.* Although the reasoning in *Genzer* is far from clear, the decision may be reconciled with the supreme court's opinion in *Salcedo* four months later. In light of the *Salcedo* opinion one may read *Genzer* as standing for the proposition that the city of Mission had negligently used city property by conducting and supervising the fireworks display in a negligent manner on that property. Thus, the claim, when construed in light of the *Salcedo* case, would fall within the § 3 waiver provision of the TTCA. The apparent reasoning employed by the *Genzer* court is that negligent supervision of activities occurring on publicly owned property constitutes the negligent use of that property. This conclusion is supported by the more recent case of *Smith v. University of Tex.*, 665 S.W.2d 180 (Tex. App.—Austin 1984, no writ). In that case the plaintiff was injured when he was struck in the head by a shot during a shot put competition held in connection with a track and field meet conducted at the University of Texas in Austin. The *Smith* court cited *Salcedo* in support of its holding that the TTCA waives sovereign immunity whenever a state university negligently supervises a track and field meet conducted on university property. Although it is clear that *Salcedo* removes the necessity of pleading that plaintiff's injuries resulted from a defective physical condition of public property as opposed to a negligent use of nondefective property, it is not clear that the supreme court intended to extend its holding in *Salcedo* to situations where the only negligence attributable to the municipality is in the form of negligent supervision of public property. It would appear that unless the Texas Legislature or the Texas Supreme Court clarifies the holding of *Salcedo* there may be a multitude of suits brought against local government bodies alleging that an injury suffered in connection with an event held on publicly owned property was the direct result of the local body's failure to properly supervise that event. This possibility threatens to eliminate whatever is left of the doctrine of sovereign immunity in Texas and should certainly chill the incentive of local governments to sponsor or allow activities for the benefit of the public at large to be held on publicly owned property.

In addition to the *Genzer* and *Salcedo* decisions, the Houston court of appeals held that the Texas Department of Corrections was liable under the TTCA for supplying an inmate with a defective tool belt for use in performing certain electric lineman functions at the prison. *Texas Dep't of Corrections v. Jackson*, 661 S.W.2d 154 (Tex. App.—Houston [1st Dist.] 1983, no writ).

186. 42 U.S.C. § 1983 (Supp. V 1981) provides:

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

This statute has been interpreted to allow private citizens to sue states and local governing bodies for deprivation of their constitutional rights. The United States Supreme Court held in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), that “[l]ocal governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.” *Id.* at 690 (footnote omitted).

187. 651 S.W.2d 906 (Tex. App.—Amarillo 1983, no writ).

placed his patrol car in the middle of the street on which the Langleys were travelling, creating a barricade. A violent crash ensued. The Langleys were severely injured and filed suit against the city of Amarillo under section 1983 and the TTCA. They alleged that the use of the barricade constituted excessive force, resulted in a deprivation of their constitutional rights, and constituted official departmental policy. The court initially discussed the test for determining municipal liability under section 1983, as announced by the United States Supreme Court in *Monell v. Department of Social Services*.¹⁸⁸ According to the court of appeals, under *Monell* the proper inquiries are "whether (1) there was a municipal policy or custom that, (2) when executed or implemented, (3) produced a constitutional tort, (4) causing injury to the plaintiff."¹⁸⁹ The court first recognized that the exercise of excessive force by a police officer was a constitutional violation.¹⁹⁰ The court then concluded that the plaintiff had presented sufficient evidence from which the jury could conclude that such excessive force (the use of barricades) was a form of official police department policy, and that such policy's implementation by the officer directly resulted in injury to the Langleys.¹⁹¹

The *Langley* court also held that the plaintiffs had stated a proper cause of action under the TTCA. The city contended that it was immune from suit under the circumstances by virtue of subsections 14(9) and (10) of the TTCA, which exempt municipalities from coverage under the TTCA if the underlying claim arises from any act or omission resulting from civil disobedience or an act constituting an intentional tort.¹⁹² The court rejected the city's contention because, as a matter of law, a riot under subsection 14(9) pertained to disturbances involving a mass of people acting together unlawfully,¹⁹³ and, further, there had not been a jury finding that the ex-

188. 436 U.S. 658 (1978).

189. 651 S.W.2d at 913.

190. *Id.*; see *Screws v. United States*, 325 U.S. 91 (1945); *Clark v. Ziedonis*, 513 F.2d 79 (7th Cir. 1975); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970).

191. 651 S.W.2d at 913-14. In another § 1983 case decided during the survey period, the Fifth Circuit held that where a city employee is denied a merit wage increase in retaliation for his filing a complaint with the Equal Employment Opportunity Commission, the employee may have a cause of action under title VII of the federal Civil Rights Act; however, absent evidence that such retaliation was a form of official departmental custom or policy, the employee has no cause of action under § 1983. *Lopez v. City of Austin*, 710 F.2d 196 (5th Cir. 1983).

192. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 14(9)-(10) (Vernon 1970) provides that the provisions of the TTCA shall not apply to:

(9) Any claim based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection or rebellion or arising out of the failure to provide, or the method of providing, police or fire protection.

(10) Any claim arising out of assault, battery, false imprisonment, or any other intentional tort including, but not limited to, disciplinary action by school authorities.

193. 651 S.W.2d at 918 (citing *Forbus v. City of Denton*, 595 S.W.2d 621, 623 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.)); see *State v. Terrell*, 588 S.W.2d 784, 786-87 (Tex. 1979).

cessive force in question constituted an intentional tort.¹⁹⁴

VII. OPEN RECORDS ACT

Two interesting cases were decided during the survey period interpreting the Texas Open Records Act.¹⁹⁵ In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*¹⁹⁶ the newspaper requested disclosure of the names and qualifications of persons being considered for the position of president at Texas A&M University. The appellant, pursuant to his role as executive director of the search advisory committee, requested an opinion from the Texas attorney general regarding disclosure of the materials requested. The attorney general ruled that the information must be disclosed. When the appellant continued to withhold the information, the newspaper obtained a writ of mandamus from the district court to compel disclosure. The Austin court of appeals, in affirming the issuance of the writ, rejected the appellant's position that the information requested was exempt from disclosure as confidential or, alternatively, that the materials were personnel files containing information subject to privacy restrictions.¹⁹⁷ The appellant urged the court to interpret the act's invasion of privacy exception by using a balancing test, weighing the person's right to privacy against the public's interest in disclosure.¹⁹⁸ The court rejected this contention, holding that application of the privacy exception should be guided by the Texas Supreme Court's decision in *Industrial Foundation of the South v. Texas Industrial Accident Board*.¹⁹⁹ In *Industrial Foundation* the supreme court held that the legislature intended the confidential information exemption to cover information that (1) contains very intimate or embarrassing facts whose publication would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public.²⁰⁰ The appellant contended that the court should treat the invasion of privacy exemption differently from the confidential information exemption by using the balancing test. The court disagreed, holding that the standard announced in

194. 651 S.W.2d at 918.

195. TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a) (Vernon Supp. 1984) provides that "[a]ll information collected, assembled, or maintained by governmental bodies" shall be available for public inspection unless expressly exempted from coverage by the statute.

196. 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

197. *Id.* at 549. Section 3(a) of the Open Records Act exempts the following from its coverage: "(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision; (2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . ." TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(1)-(2) (Vernon Supp. 1984).

198. The federal Freedom of Information Act provides that requested material is exempt from disclosure if disclosure would amount to a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552b(c)(6) (1982). The federal courts balance the competing interests of the individual's right of privacy against the public's interest in gaining access to the information. *See, e.g.*, Department of the Air Force v. Rose, 425 U.S. 352 (1976) (permitting access to summaries of honor board hearings); Campbell v. United States Civil Serv. Comm'n, 539 F.2d 58 (10th Cir. 1976) (exempting report on agency inspection of personnel management).

199. 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 941 (1977).

200. 540 S.W.2d at 685.

Industrial Foundation was equally applicable to the invasion of privacy exemption.²⁰¹ The court concluded that the information requested was not highly objectionable, was the subject of legitimate public concern, and therefore was subject to disclosure.²⁰²

In *Calvert v. Employees Retirement System*²⁰³ the appellant requested disclosure of the names and addresses of all retired appellate court judges in the State of Texas. The attorney general ruled that state statutes deemed the information confidential and therefore exempt from disclosure.²⁰⁴ The appellant sought a declaratory judgment that the records were subject to disclosure and a writ of mandamus compelling such disclosure. The appellee argued that the records in question came within the confidential information exemption of the Act because they were specifically deemed confidential by applicable retirement statutes. The appellant contended that because the retirement statutes also labeled the records as personnel records they would be exempt only if they contained information that, if disclosed, would clearly be an unwarranted invasion of privacy.²⁰⁵ The court agreed with the appellant, concluding that disclosure of the names and addresses of the judges would not constitute a clearly unwarranted invasion of privacy, and accordingly ordered the records disclosed.²⁰⁶

VIII. MISCELLANEOUS

Several cases decided during the survey period are not capable of being easily categorized. They are nevertheless worthy of some discussion in an article addressing local government law. The cases are broadly subdivided into the general areas of (1) procedural matters and (2) interpretation of local statutes, regulations, or ordinances.

A. Procedural Matters

Texas courts decided two significant cases regarding procedural matters during the survey period. In *Firemen's & Policemen's Civil Service Commission v. Martinez*²⁰⁷ the Texas Supreme Court, without hearing oral arguments, reversed a court of appeals decision and upheld the indefinite suspension of a police officer. The lower court had held that the suspen-

201. 652 S.W.2d at 550-51. Justice Powers, in his dissent, stated that the exemption on its face required a balancing test. "The plain meaning of the term 'clearly unwarranted' implies in the strongest possible terms that the decision to disclose the information depends upon a balancing test . . ." *Id.* at 559 n.4.

202. *Id.* at 551.

203. 648 S.W.2d 418 (Tex. App.—Austin 1983, writ ref'd. n.r.e.).

204. TEX. REV. CIV. STAT. ANN. tit. 110B, § 13.402 (Vernon 1981) (formerly art. 6228k) provides that records kept in the custody of statewide retirement systems shall be considered personnel records and confidential information. The Open Records Act treats the two classifications as separate exemptions. See *supra* note 197. The *Hubert* court, however, held that the same standard should apply to both exemptions. 652 S.W.2d at 550-51.

205. See TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(2) (Vernon Supp. 1984).

206. 648 S.W.2d at 420-21.

207. 645 S.W.2d 431 (Tex. 1983).

sion violated the Civil Service Act for Firemen and Policemen because it was not preceded by written notice referring to and quoting the particular civil service rule allegedly violated.²⁰⁸ The supreme court held that the notice was sufficient because it substantially complied with the statute, regardless of its failure to meet the strict technical requirements.²⁰⁹

In *District Judges v. Gregg County*²¹⁰ the court of appeals concluded that if the legislature fails to provide for a county-funded court administration system,²¹¹ the judges of that county may have inherent power to order the county to fund expenditures proven essential to the proper administration of justice.²¹² Although the judges in *Gregg County* had the power to compel the county to fund a computer system and salaried personnel to run it, the court held that such expenditures were not shown to be essential to the proper administration of justice. Accordingly, the court denied a writ of mandamus seeking to compel the county to fund the expenditures.²¹³

R. Interpretations of Statutes, Regulations, and Ordinances

In *University of Texas Health Science Center v. Babb*²¹⁴ the court held that a school's curriculum catalog constitutes a written contract between the educational institution and the student where entrance is gained under its terms.²¹⁵ The appellee entered and temporarily withdrew from the university in the fall of 1979, then re-entered in the spring of 1980. Under the new catalog in effect at the time of re-entry, the university had a new restriction regarding grades that disqualified the appellee from continuing her education at the university. The trial court issued an injunction prohibiting the university from interfering with the appellee's education.

208. TEX. REV. CIV. STAT. ANN. art. 1269m, § 16 (Vernon 1963) requires the chief of the police department, whenever he suspends an officer, to file a written statement of notice stating the particular rule alleged to have been violated and detailing the acts constituting the violation of such rule.

209. 645 S.W.2d at 432. The court cited a previous decision on the same issue and stated that "substantial compliance is had . . . when the letter of suspension sufficiently apprises the officer of the charges against him and the facts relied upon to prove those charges. . . . [T]he charges need not meet the precision or technicality of a criminal indictment." *Id.* (quoting *Firemen's & Policemen's Civil Serv. Comm'n v. Lockhart*, 626 S.W.2d 492, 494 (Tex. 1981)). During the survey period the Texas Supreme Court, again without hearing oral arguments, overruled another appellate court's decision on identical grounds. *See City of Laredo v. Guerrero*, 649 S.W.2d 296, 297 (Tex. 1983).

210. 657 S.W.2d 908 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.).

211. Many counties in Texas have a court administration system that is funded by the county pursuant to TEX. REV. CIV. STAT. ANN. art. 1918a (Vernon Supp. 1984).

212. 657 S.W.2d at 910; *see also Vondy v. Commissioners Court*, 620 S.W.2d 104 (Tex. 1981) (duty to set reasonable salary for constable).

213. 657 S.W.2d at 910. The court reasoned that although the burden of proof is on the party challenging judicial expenditures when the judicial branch has been given authority by the legislature to make such expenditures, the burden shifts when the judiciary seeks to use its inherent power to spend. In the latter situation the judicial branch must show that the expenditures are essential to the proper administration of justice. *Id.*; *see also In re Salary of Juvenile Director*, 87 Wash. 2d 232, 552 P.2d 163 (1976) (holding improper a court order increasing salary for juvenile director).

214. 646 S.W.2d 502 (Tex. App.—Houston [1st Dist.] 1982, no writ).

215. *Id.* at 506.

The court of appeals, in upholding the order, concluded that the appellee was entitled to rely on the old catalog under which she originally entered the university and that the school was bound by the terms and conditions of that catalog.²¹⁶

In *Board of Regents v. Denton Construction Co.*²¹⁷ the appellee-contractor received consent from the Texas Legislature to sue North Texas State University for the alleged breach of a construction contract. The trial court awarded the appellee exemplary as well as compensatory damages. The court of appeals held that legislative consent to sue, though interpreted broadly, only authorized recovery of the actual damages suffered by appellee and did not authorize recovery for lost profits or exemplary damages against the university.²¹⁸

The Dallas court of appeals was asked to decide whether a statutory requirement that public contracts be awarded to the lowest bidder precluded a housekeeping contract from being awarded to the third lowest bidder.²¹⁹ In *Corbin v. Collin County Commissioners Court*²²⁰ the appellee awarded a housekeeping contract to the third lowest bidder because of its superior equipment, skill, and experience. The court held that since the county had reserved its statutory right to reject any and all bids,²²¹ the awarding of the contract to a party other than the lowest bidder did not violate the statute.²²²

In *Benbrook Water & Sewer Authority v. City of Benbrook*²²³ the Fort Worth court of appeals held that the water and sewer authority was obligated to pay for relocation of water and sewer mains necessitated by the city's reconstruction and improvement of local streets.²²⁴ The authority argued that since it had the power to condemn private property for a public purpose, its dominion over local streets was equivalent to that of the city and therefore it was not obligated to pay for the relocation costs.²²⁵ The court rejected this argument and concluded that the authority's do-

216. *Id.*

217. 652 S.W.2d 588 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

218. *Id.* at 591-93. One other case involving legislative consent to sue the state occurred during the survey period. The Austin court of appeals held that legislative consent to sue the state for overpayment of taxes did not suspend the effect of TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Supp. 1984) providing for post-judgment interest. The appellee was therefore entitled to post-judgment interest on its overpayment. *State v. Allstate Ins. Co.*, 654 S.W.2d 45, 47-48 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

219. TEX. REV. CIV. STAT. ANN. art. 2368a, § 2 (Vernon Supp. 1984) requires that public contracts be given to the lowest bidder.

220. 651 S.W.2d 55 (Tex. App.—Dallas 1983, no writ).

221. TEX. REV. CIV. STAT. ANN. art. 2368a, § 2(b) (Vernon Supp. 1984) provides that the city "shall have the right to reject any and all bids." *See A & A Constr. Co. v. City of Corpus Christi*, 527 S.W.2d 833 (Tex. Civ. App.—Corpus Christi 1975, no writ) (city had statutory right to reject lowest bid on construction contract).

222. 651 S.W.2d at 56-57.

223. 653 S.W.2d 320 (Tex. App.—Fort Worth 1983, no writ).

224. *Id.* at 324.

225. TEX. REV. CIV. STAT. ANN. art. 1433 (Vernon 1980) allows a water authority to condemn private property with the consent of the local governing body.

minion over local streets was subservient to the city's and, consequently, the authority should pay for the relocation of water and sewage facilities.²²⁶

226. 653 S.W.2d at 323-24; *see* TEX. REV. CIV. STAT. ANN. art. 1433 (Vernon 1980) (use of streets by water corporations is subject to the consent of local governing body); TEX. REV. CIV. STAT. ANN. art. 1016 (Vernon Supp. 1984) (general law city has exclusive control over its streets and thoroughfares); *see also* *City of San Antonio v. Bexar Metropolitan Water Dist.*, 309 S.W.2d 491 (Tex. Civ. App.—San Antonio 1958, writ *ref'd*) (water district required to conform water mains to street improvements made by city).

