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LOCAL GOVERNMENT

by

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THERE were more than seventy-five decisions in the local government field during the survey period. Obviously, only a small portion of those decisions can be discussed here. The effort has been to include only those cases which fall within at least one of the following categories: (1) cases of lasting significance, either re-affirming important old, but newly-challenged rules, or establishing new rules for the future; (2) cases of special statewide interest; (3) cases which reflect the Texas position where there is a conflict of authority on important issues; (4) cases which build upon an important series of decisions on heavily litigated points; or (5) new developments in cases discussed in a previous *Survey*. Notably absent this year is a discussion of cases dealing with tort liability. There were no cases of great significance in this area, and it is too early to attempt an evaluation of the impact of the new Texas Tort Claims Act.[1]

I. TAXATION

The United States Supreme Court has finally put to rest any doubt concerning the constitutionality of exempting from taxation realty owned by religious organizations and used for religious purposes. In *Walz v. Tax Commission*[2] a New York property owner sought to enjoin the New York City Tax Commission from granting such exemptions. Chief Justice Burger, writing for the majority,[3] not only upheld the exemption but seemed to cast some doubt upon the constitutionality of taxing church property. Emphasizing the historical fact of "two centuries of uninterrupted freedom from taxation,"[4] the Chief Justice found that neither the purpose nor effect of the exemption was to advance or sponsor religion. Rather, he stated that the Government merely "abstains from demanding that the Church support the state."[5] While recognizing the "indirect economic benefit"[6] to religion, the Court found more compelling the argument that tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation

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[1] *See* the discussion in Bickley, *Local Government, Annual Survey of Texas Law*, 24 Sw. L.J. 199 (1970).

[2] 397 U.S. 664 (1970).

[3] There were only eight members on the Court at the time. Mr. Justice Brennan and Mr. Justice Harlan wrote special concurring opinions. *Id.* at 680 & 694. Mr. Justice Douglas dissented, contending that "a tax exemption is a subsidy," *id.* at 704, and that "one of the best ways to 'establish' one or more religions is to subsidize them." *Id.* at 701.

[4] *Id.* at 678.

[5] *Id.* at 675.

[6] *Id.* at 674.

insulating each from the other."[7] Thus, tax exemption actually causes "far less" involvement between church and state than would taxation.[8]

In light of the strong stand taken by the United States Supreme Court, the Texas supreme court in *McCreless v. City of San Antonio*[9] appears to have adopted the better view of the Texas exemption provisions. A court of civil appeals had held unconstitutional article 7150b, which exempts property used as a dwelling place for the clergy "whether they are assigned to a local church parish . . . or to some larger unit of the church organization and whether they perform administrative functions or not."[10] Stating that it was required to give strict construction to tax exemption provisions, the civil appeals court concluded that the statute violated article VIII, section 2 of the Texas Constitution, which restricts such church-related exemptions to "property owned by a church . . . for the exclusive use as a dwelling place for the ministry of such church."[11] The court of civil appeals noted that prior to the enactment of the statute in question, the dwelling place of an "educational minister" had been held not exempt.[12] This holding was seen as a clear indication that the constitutional provision was intended to apply only to the residence of individual church ministers, and the legislature could not overcome such a constitutional ruling by statute. Thus, the Methodist Church's contention that tax exemption should be granted to property used by it as the dwelling place for the District Superintendent of the San Antonio District was rejected. In reversing, and overruling the earlier case relied on by the court of civil appeals, the Texas supreme court emphasized that since the legislature has the general power to exempt property used "as a dwelling place for the ministry" of the church, it also has the implied power to determine "who, and what activities, shall constitute the ministry of a church."[13] The court stated that article 7150b is a valid exercise of that legislative power, and under that statute, the residence in question is exempt from taxation.

Another clause of article VIII, section 2 of the Texas Constitution exempts from taxation "institutions of purely public charity."[14] Beginning in 1905, the Legislature has, from time to time, enlarged the definition of that term through article 7150, and section 20 of that article provides in part for exemption of "any non-profit organization chartered or incorporated under the Texas Statutes for the purpose of preserving historical buildings."[15] The city of San Antonio assessed ad valorem taxes against property known as the Navarro House, owned by the San Antonio Con-

[7] *Id.* at 676.

[8] "The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.*

[9] 454 S.W.2d 393 (Tex. 1970).

[10] TEX. REV. CIV. STAT. ANN. art. 7150b (Supp. 1970). The civil appeals decision is City of San Antonio v. McCreless, 448 S.W.2d 518 (Tex. Civ. App.—San Antonio 1969).

[11] TEX. CONST. art. VIII, § 2.

[12] *See* City of Houston v. South Park Baptist Church, 393 S.W.2d 354 (Tex. Civ. App.—Houston 1965), *error ref.*

[13] 454 S.W.2d at 395.

[14] TEX. CONST. art. VIII, § 2.

[15] TEX. REV. CIV. STAT. ANN. art. 7150, § 20 (1960).

servation Society, and sued to recover the taxes when the Society failed to pay. On appeal from the trial court's judgment against the city, a court of civil appeals declared the exemption of historical buildings and sites unconstitutional.[16] The Texas supreme court reversed, stating: "Charity need not be universal to be public. It is public when it affects all the people of a community or state, by assuming, to a material extent, that which otherwise might become the obligation or duty of the community or the state."[17] Applying this test to the property in question, the court found that in view of the numerous constitutional and statutory provisions imposing a duty upon the state "to preserve the evidences of Texas' historical heritage,"[18] the Society here "has assumed, to a material extent, that which otherwise might become the obligation or duty of the community or the state."[19]

In another taxation opinion, the Texas supreme court affirmed a court of civil appeals decision discussed in last year's *Survey*. Conlee Seed Company had moved out of the Waco taxing jurisdiction but had left a small amount of seed at its former location within the district. The seed remaining was alleged to have a fair market value of $5,000-$6,000, but was assessed at a taxable value of $41,000. This assessment was based on a market value of approximately $81,000 which the city had placed on the company's property the year prior to the move.[20] The trial judge refused to allow evidence of grossly excessive valuation because the company had failed to apply to the board of equalization for relief. The refusal of this evidence was held to be reversible error by the court of civil appeals.[21] In affirming,[22] the Texas supreme court emphasized that cases involving allegations of grossly excessive valuation must be distinguished from those where the attack is based on merely excessive valuation. Where

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[16] It cannot be said that the restoration and maintenance of an historical site, however laudable and worthwhile an undertaking, comes within the legislative or judicial definition of an institution of purely public charity. Nor can it be said that the Legislature was empowered by Sec. 2, Art. VIII of the Constitution to exempt from taxation as a purely public charity an historical site. Such purpose is not within the recognized concept of a purely public charity.

City of San Antonio v. San Antonio Conservation Soc'y, Inc., 448 S.W.2d 528, 531 (Tex. Civ. App.—San Antonio 1969).

[17] San Antonio Conservation Soc'y, Inc. v. City of San Antonio, 455 S.W.2d 743, 746 (Tex. 1970). It is interesting to note that the rule as stated by the court was taken from City of Houston v. Scottish Rite Benevolent Ass'n, 111 Tex. 191, 230 S.W. 978 (1921), and had been quoted as support for the court's opinion in River Oaks Garden Club v. City of Houston, 370 S.W.2d 851 (Tex. 1963), which was the case principally relied on by the court of civil appeals. *See* City of San Antonio v. San Antonio Conservation Soc'y, Inc., 448 S.W.2d 528, 530-31 (Tex. Civ. App.—San Antonio 1969). The Texas supreme court emphasized that in the *River Oaks* case its decision had not rested on the proposition that only "almsgiving"-type charities could be exempted, but had turned on the point that "the benefits of the Garden Club were no more than benefits" to its members and any other persons who care to attend its meetings. 455 S.W.2d at 745-46.

[18] 455 S.W.2d at 746-47, citing, *e.g.*, TEX. CONST. art. XVI, §§ 39, 45; TEX. REV. CIV. STAT. ANN. arts. 678m (1964), 5434-46 (1958), 6081s (1970).

[19] 455 S.W.2d at 748. The Court noted that "Jose Navarro was a native Texas hero before, during, and after the Texas Revolution and served Texas as one of its great public figures for many years." *Id.* at 744, footnoting specific details concerning Navarro's place in Texas history.

[20] The company had not rendered the property or returned the forms which the city had sent for rendition.

[21] Conlee Seed Co. v. City of Waco, 434 S.W.2d 214 (Tex. Civ. App.—Waco 1968). For discussion, see Bickley, *supra* note 1, at 214.

[22] City of Waco v. Conlee Seed Co., 449 S.W.2d 29 (Tex. 1969).

a grossly excessive valuation is alleged, the complainant is allowed to introduce evidence to support such an allegation despite his failure to exhaust administrative remedies.

Article IX, section 9 of the Texas Constitution provides in part that hospital districts are to have "full responsibility for providing medical and hospital care for its needy inhabitants," and that, from the time of creation of a hospital district, "no other municipality or political subdivision shall have the power to levy taxes or issue bonds or other obligations for hospital purposes or for providing medical care within the boundaries of the district."[23] At the time Edna Hospital District was created in Jackson County, the county had for approximately twenty-one years owned and operated a county hospital which was located outside the boundaries of the Edna Hospital District. The county continued to maintain and support this hospital with tax revenues from the general fund, and, thus, continued to tax on a county-wide basis for the support and maintenance of the hospital. Taxpayers residing within the hospital district brought suit, contending, *inter alia*,[24] that they were being subjected to double taxation in violation of article IX, section 9 of the Texas Constitution. A court of civil appeals rejected this contention, stressing the need for legislative flexibility in this type of situation: "when the legislature wants to exclude a county from taxing within a hospital district it so provides in the Enabling Act for the hospital district."[25] Without such a proviso, the county is not precluded from taxing within the hospital district for the maintenance and support of a hospital located outside of the district. The court interpreted the constitutional provision as prohibiting only a county's levying of taxes to be used within the boundaries of the district for hospital or medical purposes. To interpret the provision as urged by the complainants, the court stated it would be required to rewrite it to provide that "no other municipality or political subdivision shall have the power to levy taxes 'within the boundaries of the District' for hospital purposes or for providing medical care."[26]

II. ANNEXATION

Cases interpreting the Municipal Annexation Act[27] provided one particularly significant decision. Before enactment of the Act in 1963, home-rule cities had virtually unlimited authority to annex, restricted only by requirements that the annexed area be "adjacent to the city and not included within the boundaries of any other municipality."[28] However,

[23] TEX. CONST. art. IX, § 9.

[24] On another interesting issue raised in this case, the court of civil appeals held that the act creating the hospital district was not an unconstitutional local or special law. The court emphasized particularly that "Art. IX, Sec. 9, Texas Constitution does not limit the Legislature to either general or special laws in the creation of hospital districts." Moore v. Edna Hosp. Dist., 449 S.W.2d 508, 513 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.* For full discussion of this point, see *id.* at 512-16.

[25] *Id.* at 525.

[26] *Id.* at 526.

[27] TEX. REV. CIV. STAT. ANN. art. 970a (1963).

[28] State *ex rel.* Pan American Prod. Co. v. Texas City, 303 S.W.2d 780, 782 (Tex. 1957).

since 1875, general-law cities have been governed by article 974, which provides for approval of the annexation by a vote of the inhabitants of the annexed area.[29] The Municipal Annexation Act is specifically made applicable to *any* municipality in the state.[30] After setting forth the formula for determining a city's "extraterritorial jurisdiction,"[31] the Act limits a city's annexation powers to areas within this jurisdiction.[32] In addition, the Act limits a city's annual annexation to "territory equivalent in size to ten per cent (10%) of the total corporate area of such city."[33] However, the Act specifies that the annexing city, in computing the amount of territory annexed by it for purposes of the statutory quota, may exclude from its computations any area annexed at the request of the majority of voters residing within that area.[34] These provisions of the Act, taken together, had been popularly assumed to mean that general-law cities could now annex territory without the consent of the voters involved, but would have to include such annexed areas in determining whether their statutory quota had been reached for a given year.[35] Thus, it came as something of a surprise when the Texas supreme court in *Sitton v. City of Lindale*[36] rejected this interpretation and held that nothing in the Municipal Annexation Act grants to general-law cities the power of annexation without consent of the inhabitants of the annexed area. General-law cities still derive their annexation power from article 974.[37] The Municipal Annexation Act simply places further restrictions on this power by limiting *all* cities to areas within their extraterritorial jurisdiction.

The court's opinion in *Sitton* fails to explain why the legislature would impose a statutory annexation quota—apparently intended to be applicable to general-law cities—and then exclude for purposes of that quota *any* territory lawfully annexed by general-law cities. It does seem clear that *all* territory annexed pursuant to article 974 will be excluded in computing the amount of territory that may be annexed during a particular year, since under that statute the consent of the area's inhabitants is required.[38] Another argument against the decision in *Sitton* is that article 974 does not specifically require a vote in every case. It merely sets out the procedure

[29] When a majority of the inhabitants qualified to vote for members of the State legislature of any territory adjoining the limits of any city incorporated under, or accepting the provisions of, this title, to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, any three of them may make affidavit to the fact to be filed before the mayor, who shall certify the same to the city council of said city. The said city council may, by ordinance, receive them as part of said city; from thenceforth the territory so received shall be a part of said city; and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens, and bound by the acts and ordinances made in conformity thereto and passed in pursuance of this title.

TEX. REV. CIV. STAT. ANN. art. 974 (1963).

[30] *See id.* art. 970a, § 2A.

[31] *Id.* § 3A.

[32] *Id.* § 7A.

[33] *Id.* § 7B.

[34] *Id.*

[35] *See, e.g.*, Chapman, *The Texas Municipal Annexation Act*, 29 TEX. B.J. 165 (1966).

[36] 455 S.W.2d 939 (Tex. 1970), *reversing* 446 S.W.2d 703 (Tex. Civ. App.—Tyler 1969).

[37] *See* note 29 *supra.*

[38] *Id.*

to be followed when a majority of the qualified voters in the annexed area vote in favor of the annexation.[39] However, since no other annexation procedure was authorized for general-law cities prior to the Municipal Annexation Act, article 974 had been interpreted to require consent in all instances.[40] Present application of the statute, in conjunction with the Municipal Annexation Act, would seem properly limited to those cases where general-law cities desire to annex territory that will not have to be counted in determining whether the city has reached its statutory quota for a particular year. Finally, the court appears to have frustrated what had been considered one of the desirable results of the Municipal Annexation Act. As one writer observed in examining the authority of general-law cities before and after passage of the Act,

> [g]eneral law cities could annex only by permission of a majority of the landowners or voters involved. This meant that general law cities could not effectively plan for the future or enforce orderly growth of the cities, as annexation could not be planned dependably far into the future for fear that the voters or landowners in the area might object . . . . The Municipal Annexation Act corrects the problems of the old law to a great extent. Home rule city annexation powers are greatly reduced, and general law cities are given the powers they needed but lacked under the old laws.[41]

This interpretation of the Act will hopefully be vindicated by the Texas legislature's amending the Act to re-do what the supreme court has undone.

III. ZONING

One of the zoning cases discussed in last year's *Survey* has since been reversed by the Texas supreme court. The owner of a certain tract of land in the city of Hutchins had purchased the land in reliance on a zoning map indicating that the land was zoned for "heavy manufacturing" purposes. Later, when the city sought to prevent his using the land for such a purpose, the landowner brought an action to enjoin the city from interfering with his use of the land. The court of civil appeals held that although the tract had been illegally re-zoned from residential to heavy manufacturing by mere resolution, a validating act of the state legislature saved the re-zoning from invalidity.[42] The Texas supreme court reversed on this point,[43] emphasizing that the validating act could validate a resolution only as a resolution; it could not transform a resolution into an ordinance. Thus, since a zoning ordinance cannot be amended by a resolu-

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[39] *Id.*

[40] *See, e.g.*, City of West University Place v. State *ex rel.* Kirby, 56 S.W.2d 1081 (Tex. Civ. App.—Galveston 1932). There are other statutory provisions governing annexation of unoccupied land (*see* TEX. REV. CIV. STAT. ANN. arts. 974e to 974e-8 (1963) and annexation of land occupied by less than three voters (TEX. REV. CIV. STAT. ANN. art. 974g (1963)).

[41] Chapman, *supra* note 35, at 166, 217.

[42] City of Hutchins v. Prasifka, 442 S.W.2d 879 (Tex. Civ. App.—Eastland 1969), *discussed in* Bickley, *supra* note 1, at 211. The validating act is TEX. REV. CIV. STAT. ANN. art. 974d-12 (Supp. 1970), and states in part: "[A]ll governmental proceedings performed by the governing bodies of all such cities and towns and all officers thereof since their incorporation or attempted incorporation are hereby in all respects validated as of the date of such proceedings."

[43] City of Hutchins v. Prasifka, 450 S.W.2d 829, 832-33 (Tex. 1970).

tion,[44] the re-zoning in question here was still invalid. To the argument that the city should be estopped in this case because the property owner had purchased the land in reliance on the city's zoning map, the court cited the general rule in Texas that the estoppel doctrine is not applicable in situations where a city is exercising governmental powers.[45] Although there are exceptions to this general rule "where the circumstances clearly demand [estoppel] to prevent manifest injustice,"[46] the court found that this was not an exceptional case.

City of Waxahachie v. Watkins[47] is probably the most frequently cited Texas decision in the zoning field. The *Watkins* principle is that a zoning ordinance—whether it be an original or an amendatory ordinance—is to be upheld if reasonable minds may differ on the question of whether the ordinance bears a substantial relation to the public health, safety, morals or general welfare. Thus, where an amendatory ordinance changed part of a planned development district (restricting the height of buildings to two-and-a-half stories) to a shopping center district, so that the owner of the tract could erect a business building of up to twenty stories, a court of civil appeals turned to *Watkins* for guidance.[48] Although there was a residential district directly to the east of the property in question, the court noted that a buffer strip and a brick wall separated the two areas. In addition, the east side of the proposed office building was to have no windows, so that no lights would be seen from the residential area. Finally, the other three corners of the intersection at which the tract in question was located were all zoned for shopping center use. Thus, the question was at least "fairly debatable" and the amendatory ordinance was upheld.

In another zoning case, the city of Austin reclassified one-half of a city block near the University of Texas campus from "A Residential" to "B Residential" to allow construction of student apartments.[49] The evidence showed that all of the property adjacent to the tract in dispute was zoned "A Residential" for single-family dwellings. However, small apartment houses under a "BB" classification were located west of the property, and south of the property the zoning was "B Residential," although the actual use of the land in that area had been primarily for single-family residences. Looking to the city master plan, and noting that the entire area surrounding the tract in question had been broadly designated "for 'apartment-type' land use," the court in this case also concluded that the *Watkins* principle was applicable and upheld the ordinance amendment.

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[44] *Id.* at 832.

[45] The court cited various cases, including Harvey v. City of Seymour, 14 S.W.2d 901 (Tex. Civ. App.—Eastland 1929), which the court noted "bears factual similarity to this case." 450 S.W.2d at 835.

[46] 450 S.W.2d at 836.

[47] 275 S.W.2d 477 (Tex. 1955).

[48] Baccus v. City of Dallas, 450 S.W.2d 389 (Tex. Civ. App.—Dallas 1970).

[49] Darnall v. City of Austin, 451 S.W.2d 275, 276 (Tex. Civ. App.—Austin 1970).

IV. EMINENT DOMAIN

In three cases during the survey period the Texas supreme court dealt with impairment of the right of access to property resulting from construction of public improvements. In *DuPuy v. City of Waco*, decided in 1965, the court had limited the awarding of compensation for impairment of the right of access to cases where a property owner has no "reasonable access" to his property upon completion of the public improvement.[50] This rule was modified in *City of Waco v. Texland Corp.* to require only that the property owner show that "access is materially and substantially impaired even though there has not been a deprivation of *all* reasonable access."[51] In *Texland* a viaduct had been constructed over the street providing the primary means of access to the complainant's property; a number of piers—each five feet in diameter—had been built to support the viaduct. Three of these piers were raised alongside the complainant's property, and the evidence showed "serious interference"[52] in approaching the property because of the piers. The court concluded that the property owner had established "a material and substantial impairment of access" to the property in question.[53]

To be contrasted with the type of impairment discussed in *Texland* is the inconvenience caused by diversion of traffic resulting from construction of the public improvement. In *City of Beaumont v. Marks*[54] a lessee claimed diminution in value of his leasehold interest from impairment of the right to access caused by construction of a railroad grade-separation project. Prior to the project, the property in question (a corner lot) fronted on a one-way street running north and south and on a two-way street running east and west, both of which had been sixty feet wide. In the center of the two-way street was a single railroad track. As a result of the project, there were two railroad tracks on a higher grade protected by a curb, making it impossible for northbound traffic on the one-way street to cross the two-way street at the corner on which the complainant's property was located, and leaving only a ten-foot wide traffic lane on the two-way street between the complainant's property and the railroad track curb. In addition, an underpass was constructed on the other side of the one-way street to allow the northbound traffic on that street to proceed under the two-way street and the new railroad tracks. This underpass became, in effect, a part of the one-way street and caused almost all traffic on the one-way street to by-pass the complainant's property. Another result of the underpass was a reduction of sixty to fourteen feet in road space at the entrance to that portion

[50] 396 S.W.2d 103, 109 (Tex. 1965).
[51] 446 S.W.2d 1, 2 (Tex. 1969) (emphasis added).
[52] *Id.* at 4.
[53] *Id.* Three justices dissented. Justice McGee wrote a special concurring opinion in which he expressed his view that not even a "substantial and material" impairment need be shown: "today's introduction of a 'substantial and material' standard limiting compensation is to my mind not only not in keeping with the intent of the Constitution but also a needless and unnecessary complication of the Article 1, Sec. 17 provision giving a cause of action to a landowner for damage to his property caused by construction of a public improvement." *Id.* at 5.
[54] 443 S.W.2d 253 (Tex. 1969).

of the one-way street which still passed the complainant's property, and traffic proceeding along this portion of the street could not cross the two-way street but had to turn right into the ten-foot wide traffic lane running beside the complainant's property on the two-way street. There was evidence that large trucks were unable to make the turn.[55] An automotive supply company had sub-leased the property prior to the project but moved while the project was in progress. There had been no tenant since completion of the project, although the complainant gave the automotive supply company permission to use the building without charge as a temporary warehouse. At trial, evidence of the diversion of traffic and the necessity for using circuitous routes to reach the complainant's property was admitted over the city's objection, and a judgment was rendered for the complainant for $46,000 based on the jury's findings concerning the value of the leasehold before and after the project. This judgment was affirmed by the court of civil appeals.[56] The Texas supreme court reversed and remanded, holding that "diversion of traffic resulting in the necessity of using circuitous routes is not compensable."[57] However, in its initial opinion, the court stated that under the circumstances of this case, the better course of action by the trial court would have been not a refusal of evidence concerning the changes in the streets, but admission of that evidence with special instructions to the jury that diversion of traffic "cannot constitute a deprivation of reasonable access."[58] It is interesting to note that this portion of the court's original opinion was retracted on motion for rehearing.[59]

The *Marks* case was cited with approval in *City of Houston v. Fox*,[60] decided on the same day as *Texland*. In *Fox* the court applied its new standard governing impairment of access to hold that the mere act of narrowing a street does not require compensation "unless the street is so narrowed or altered as to *materially and substantially impair* the landowner's access."[61] Nor was damage resulting from changing a two-way street into a one-way street compensable, since "this action . . . was a result of the lawful exercise of the City's police power."[62]

V. Police Power

In the 1912 case of *Eubanks v. City of Richmond* the United States Supreme Court held unconstitutional an ordinance allowing "the owners of two thirds of property abutting on any street" to require the setting of a building line "on the side of the square on which their property fronts."[63] The fatal flaw in the ordinance was that it permitted arbitrary

[55] For maps showing the street situation before and after the project, see *id.* at 258-59.
[56] City of Beaumont v. Marks, 427 S.W.2d 111 (Tex. Civ. App.—Beaumont 1968).
[57] City of Beaumont v. Marks, 443 S.W.2d 253, 257 (Tex. 1969).
[58] *Id.*
[59] *Id.* at 259.
[60] 444 S.W.2d 591 (Tex. 1969).
[61] *Id.* at 593 (emphasis added).
[62] *Id.* For the facts in this case and relevant maps, see City of Houston v. Fox, 412 S.W.2d 745 (Tex. Civ. App.—Houston 1967).
[63] 226 U.S. 137, 141 (1912).

and capricious action on the part of some property owners to the detriment of other property owners on the same block.[64] In 1916, however, *Eubanks* was distinguished in *Thomas Cusack Co. v. City of Chicago*,[65] where the Supreme Court upheld an ordinance prohibiting the erection of billboards in certain residential areas without the written consent of the majority of nearby property owners. The Court stated that the type of ordinance involved in *Eubanks* "permits two-thirds of the lot owners to impose restrictions," while the ordinance in *Cusack* "permits one half of the lot owners to remove a restriction from the other property owners."[66] Despite the obvious weakness in this distinguishing characteristic, *i.e.*, in either case the consenting lot owners could exercise their discretion arbitrarily and capriciously, the *Cusack* case remained intact until the 1928 decision in *Washington ex rel. Seattle Trust Co. v. Roberge*.[67] There, a Seattle ordinance allowed philanthropic homes for children or elderly persons in first-residence zones only with the written consent of the owners of two-thirds of the property within 400 feet of the proposed home. Refusing to apply *Cusack* to this situation, the Supreme Court invalidated the ordinance with this comment:

> The facts found [in *Cusack*] were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts . . . . It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person. The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive.[68]

Since *Roberge*, some cases have continued to apply *Cusack* where the land use which is prohibited unless neighboring property owners consent would be considered a nuisance at the location in question.[69] In Texas, however, the prohibition against these neighbor-consent ordinances appears to be absolute. In the 1921 case of *Spann v. City of Dallas*,[70] the Texas supreme court held invalid an ordinance requiring the consent of three-fourths of the property owners of a residential district for construction of a business house in the district. *Cusack* was interpreted as a case which simply recognized the harmful effects of billboards in residential districts. The court found it difficult to see how a particular structure determined to be harmful in certain areas could be considered less harmful merely because a portion of the neighboring property owners consented to its presence. In fact, inclusion of the consent provision was a clear indication

[64] *Id.* at 143-44.
[65] 242 U.S. 526 (1916).
[66] *Id.* at 531.
[67] 278 U.S. 116 (1928).
[68] *Id.* at 122.
[69] *See, e.g.*, Appeal of Perrin, 305 Pa. 42, 156 A. 305 (1931). There is a split of authority on the entire question of neighbor-consent ordinances. *See* the cases cited in Williams v. Whitten, 451 S.W.2d 535, 538 (Tex. Civ. App.—Tyler 1970).
[70] 111 Tex. 350, 235 S.W. 513 (1921).

to the court in *Spann* that the object of the ordinance was "not to protect the public health, safety or welfare . . . but to satisfy a sentiment against the mere presence of a store in a residence part of the City."[71]

Citing *Roberge* and *Spann*, a court of civil appeals during the survey period struck down an ordinance of the city of Nacogdoches which required that the boundaries of all mobile parks be "at least two hundred (200) feet from any property outside the park, unless all the property owners within said two hundred (200) feet consent in writing to the establishment of the park."[72] The court stated its holding quite broadly, declaring the ordinance "invalid because it attempts to delegate the police power to the adjoining property owners."[73] The question of whether the mobile park would be a nuisance was discussed, but it was apparently not considered relevant to the validity of the ordinance's neighbor-consent provision.[74]

VI. Regulation of the Public Schools

In *Tinker v. Des Moines Community School District* the United States Supreme Court upheld the right of junior and senior high school students to express their opposition to the war in Vietnam by wearing black armbands, where the school board's action prohibiting the armbands was based solely upon the "fear of a disturbance."[75] However, Justice Fortas' majority opinion in the case did emphasize that conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"[76] may be legitimately prohibited by school authorities. In *Tinker* the majority simply found no evidence that school authorities had reason to believe that such disruption would result from the wearing of the armbands.

A contrary conclusion was reached during the survey period by the United States District Court for the Northern District of Texas in *Butts v. Dallas Independent School District*.[77] On October 15, 1969, a date that had been chosen by anti-war groups as a national moratorium day, a number of students wore black armbands to various Dallas schools. Acting

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[71] *Id.* at 516.

[72] Williams v. Whitten, 451 S.W.2d 535, 536 n.1 (Tex. Civ. App.—Tyler 1970).

[73] *Id.* at 538.

[74] In this respect, the case is similar to City of Dallas v. Urbish, 252 S.W. 258 (Tex. Civ. App.—Dallas 1923), *error dismissed*, where the court first held that a "picture show . . . is not per se a nuisance," but then went on to say:

> Aside from any consideration of this nature, we do not think the board of appeals can put into operation the police power of the city to prevent the erection of a picture show in the midst of other business buildings in a part of the city declared to be a residential section merely because the establishment of it at such place does not conform to the desires of certain other property owners in the vicinity, and, at the same time, authorize the construction and operation of a picture show at a place situated and located with reference to residences and other property in a precisely similar way, no objection by adjacent property owners being made in the latter instance.

Id. at 261.

[75] 393 U.S. 503, 508 (1969). For discussion of the case, see Note, *Freedom of Expression in the Public Schools*, 23 Sw. L.J. 929 (1969).

[76] 393 U.S. at 513.

[77] 306 F. Supp. 488 (N.D. Tex. 1969).

under a general policy prohibiting students from wearing "attire of a disruptive nature,"[78] school officials asked the students to remove the armbands, and those students who refused to do so were ordered to leave the school until they were ready to return without the armbands. Parents of a number of these students brought an action to enjoin the school board from applying the disruptive attire policy to the wearing of black armbands. Refusing to issue a temporary injunction, Judge Taylor emphasized that each case must be handled on an individual basis. While the wearing of armbands under the circumstances of the *Tinker* case may have been "entirely divorced from *actually or potentially disruptive* conduct by those participating,"[79] the same was not found to be true in *Butts*. Of particular significance to the court were the following facts: (1) violence and unrest in other parts of the country in connection with plans for the national moratorium day; (2) campus riots caused partially or primarily by anti-war sentiment; (3) a showing that all students wearing the armbands intended to and did attend a moratorium ceremony on the afternoon of October 15; (4) evidence that these same students circulated a paper bearing the peace symbol and encouraging a boycott of classes; (5) an actual demonstration across the street from one of the schools in question on the morning of October 15; (6) warnings communicated to one assistant principal concerning the chance of boycott and demonstrations at the school; and (7) a bomb threat at one of the schools which appeared to be related to the moratorium activities.[80] The court seemed to find particular significance in the fact that the demonstration that occurred at one school had created "substantial disruption before school began," and the bomb threat at another school had resulted in the presence of a policeman, which caused "a considerable amount of tension and uneasiness."[81] The court found that school officials in this instance "reasonably anticipated that the armband wearing might be just the spark that would cause substantial disruption."[82] Another distinguishing characteristic was cited by the court in its refusal to find the *Tinker* case controlling. In *Tinker* one of the findings was that school authorities had prohibited the armbands because they were opposed to "the principle of the demonstration itself."[83] That this was untrue in the Dallas case, according to the court, was evident from the fact that "there were days set aside for students to discuss the Vietnam conflict in class because the District and its administrators strongly believed that the expressing of ideas and opinions on current issues is an important part of the educational process."[84] The court then concluded that in all its actions the school district here had

[78] *Id.* at 489.

[79] Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 505 (1969), *quoted in* Butts v. Dallas Ind. School Dist., 306 F. Supp. 488, 489 (N.D. Tex. 1969) (emphasis supplied by the district court opinion).

[80] For a discussion of these factors, see 306 F. Supp. at 490.

[81] *Id.*

[82] *Id.*

[83] 393 U.S. at 509 n.3.

[84] 306 F. Supp. at 491.

simply "acted in the interest of its duty to educate those who were seeking an education."[85]

In reversing *Butts* on appeal, the United States Court of Appeals for the Fifth Circuit noted that there had been in fact "no substantial disruption . . . either before or after the removal of the black armband wearers."[86] While acknowledging that school officials need not wait until actual disruption occurs, the court refused to hold that "a likely contingency"[87] of disruption necessarily rendered the *Tinker* decision inapplicable. Pointing out that it would be "a kind of 'guilt by association' " to assume that all students who wore black armbands could be identified with those planning disruptive activities, the court emphasized that there must have been at least "a determination, based on fact, not intuition" that disruption would be *caused by* the wearing of the armbands and that prohibiting the exercise of this constitutional right "would tend to make the expected disruption substantially less probable or less severe."[88] This, the court felt, had not been established.

In the continuation of a case discussed in the 1969 *Survey*,[89] a court of civil appeals upheld a Texas penal statute[90] prohibiting fraternities and sororities in public schools below the college level.[91] Also upheld was a Fort Worth Independent School District regulation requiring the parents of all junior and senior high school students to sign a statement certifying that the student is not presently a member of a fraternity, sorority, or secret society prohibited by the statute and will not "join nor participate in any way in the activities of such a club or organization."[92] Failure to furnish the signed statement would appear to be grounds for denial of enrollment to the student in question.[93] After refusing earlier to rule on the constitutionality of the penal law,[94] the court of civil appeals had been directed by the Texas supreme court to make the determination because there was no other effective way for complainants to challenge the statute's constitutionality.[95] In upholding the statute and the school district's implementing regulation, the court found sufficient evidence to support

[85] *Id.*

[86] Butts v. Dallas Ind. School Dist., No. 29281, at 7 (5th Cir., Jan. 14, 1971).

[87] *Id.* at 9.

[88] *Id.* at 8-9.

[89] *See* Wingo, *Local Government, Annual Survey of Texas Law*, 23 Sw. L.J. 194, 205 (1969).

[90] TEX. PEN. CODE ANN. art. 301d (1952).

[91] Passel v. Fort Worth Ind. School Dist., 453 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

[92] For the full text of the form, see Passel v. Fort Worth Ind. School Dist., 440 S.W.2d 61, 62-63 (Tex. 1969).

[93] The Texas supreme court pointed out that "[a]lthough defendants argue that no one has been denied the right to attend school, there is nothing in the present record to warrant the belief that a pupil who refused to furnish the statement would be permitted to enroll." *Id.* at 64.

[94] *See* Wingo, *supra* note 89, at 205.

[95] Passel v. Fort Worth Ind. School Dist., 440 S.W.2d 61, 64 (Tex. 1969), where the Texas supreme court stated: "Apparently no prosecution is threatened or even contemplated. Injunctive relief is sought to prevent administrative enforcement of an administrative regulation adopted for the purpose of implementing the statute . . . . The criminal courts cannot determine the meaning and validity of the statute unless a prosecution is instituted, and plaintiffs have no way to attack the rule except by an administrative appeal or a civil action." The opinion of the Texas supreme court is also important for its recognition of the power in courts of equity to enjoin the enforcement of a criminal statute to protect personal rights. *Id.* at 63. *See also* the discussion of this question in Wingo, *supra* note 89, at 205-06.

a conclusion that the activities of the prohibited organizations "have substantially and materially disrupted and affected the orderly operation" of Fort Worth schools.[96] The court, relying heavily on decisions from other jurisdictions, emphasized that "there has long been a feeling in this country that this question [of disruption by fraternities and sororities] requires an affirmative answer."[97]

It is interesting to observe that Justice Smith of the Texas supreme court has taken the view that the statute was intended only as a regulation of "organizations which are 'in' the public school system by reason of sponsorship or support," which, of course, would exclude from the statute's application any organization which meets "entirely off school premises and during hours when school is not in session."[98] If the statute is interpreted as applying to these "off-campus" organizations, Justice Smith has taken what appears to be a sound position in asserting that the statute violates the first amendment right to freedom of association made applicable to the states through the fourteenth amendment.[99]

[96] Passel v. Fort Worth Ind. School Dist., 453 S.W.2d 888, 890 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*

[97] *Id.* at 892, quoting from Satan Fraternity v. Board of Pub. Instruction, 156 Fla. 222, 22 So. 2d 892 (1945).

[98] Passel v. Fort Worth Ind. School Dist., 440 S.W.2d 61, 67 (Tex. 1969) (Smith, J. dissenting). Justice Smith dissented because he believed the case was one in which the court should "promptly determine whether or not the application of the statute and rule adopted by the school board constitutes an unwarranted interference with the constitutionally protected right of free and private association by the members of the clubs . . . ." *Id.*

[99] *Id.* at 68. Even if the court of civil appeals is correct in its conclusion that the penal statute is constitutional, there is still room for the argument advanced in the 1969 *Survey* that "to deny a student enrollment in the public schools solely because his parents refuse to sign the form—an act over which the student himself has virtually no control—seems to establish an arbitrary classification having no reasonable relationship to the state's interest in providing an effective and efficient school system." Wingo, *supra* note 89, at 207. It should, however, be noted that writ of error has been refused by the Texas supreme court in this case.