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LOCAL GOVERNMENT

by

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I. ELECTIONS

REFLECTING the fact that 1972 was an important election year, the survey period had a large number of important cases dealing with aspects of the election process. *Bullock v. Carter*,[1] decided by the United States Supreme Court, declared filing fees required of candidates desiring to run in party primaries to be unconstitutional. The State of Texas argued that the purposes of such fees, as imposed by state law,[2] were to minimize the number of candidates for any given office and to pay for the primaries in order that the state would not have to bear that expense. The opinion is especially interesting because the Court distinguished between the right of a candidate to run and the right of a voter to vote for a particular candidate. The Court decided that a "close scrutiny" would be made of the state law, meaning that Texas would have to show that the law was "reasonably necessary to the accomplishment of legitimate state objectives"[3] in order to justify the effect upon a voter's right to vote for a particular candidate. The Court said very little in its opinion about the right to be a candidate. In closely scrutinizing the Texas statute, the Court decided that while the state has a legitimate objective in avoiding overcrowded ballots, the same objective could be attained by other means. The Court rejected the state's argument that the filing fee had the effect of allowing only serious candidates on the ballot by noting that the plaintiff-candidates alleged that they were not unwilling, but were unable, to pay the filing fees. Also rejected was the argument that the cost and expense of party primaries should not have to be borne by the taxpayers of Texas. The Court noted that "a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth."[4] The result was that a special session of the Texas Legislature was called to design a means of financing party primaries of 1972. The next legislature will be forced to find a permanent means of financing party primaries, and other changes in the primary system may be adopted at the same time.

In *Dunn v. Blumstein*[5] the United States Supreme Court struck down a Tennessee requirement that a citizen must have been a resident of the state for a year and a resident of his county for three months before he would be allowed to vote. The Court acknowledged that a state had a definite interest

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[1] 405 U.S. 134 (1972).

[2] TEX. ELECTION CODE ANN. arts. 13.07a, 13.08, 13.08a, 13.15, 13.16 (1967).

[3] 405 U.S. at 144.

[4] *Id.* at 148.

[5] 405 U.S. 330 (1972); *see* Comment, *The Demise of the Durational Residence Requirement*, 26 SW. L.J. 538 (1972).

in allowing only bona fide residents the right to cast a ballot. However, the Court noted that a statute requiring a durational residence requirement separated residents into two classes: old residents who were allowed to vote; and new residents who were not. The state was discriminating against new residents, and the issue was whether it could do so. The Court said that it would look to three factors: the character of the classification; the individual interests of the new residents; and the state's interests asserted in support of the classification.

The Court noted that classification on the basis of length of residence was likely to affect the right of interstate travel, and, therefore, was a "suspect" classification. The Court also noted that the individual interest of the law professor involved, *i.e.*, the right to vote, was a "fundamental right." Both the suspect classification and the fundamental right required that the law involved be subjected to close scrutiny; the law could stand only if the state showed a compelling state interest. Tennessee asserted that the residence requirement was necessary to "insure the purity of the ballot box" and to "provide for knowledgeable voters."[6] The purity of the ballot box could be protected by less drastic means, *e.g.*, communication with the new resident's prior voting registration authorities, and there were likely to be some voters of long residence who could not be called knowledgeable. The Court ruled that any durational residence requirement longer than thirty days was unconstitutional; thus, by implication, Texas' similar statute[7] is now also invalid.

Graves v. Barnes[8] is a case which should be read in its entirety in order to be appreciated. It involved the redistricting plan for the Texas Senate and House of Representatives. Basically, its result was that the multi-member districts of Dallas and Bexar Counties were broken down into single-member districts based upon a plan approved by the court. The court gave indications that it expected the 1973 Texas Legislature to adopt a plan which would have only single-member election districts throughout the state. The suit, which was based on the equal protection clause, was heard by a three-judge federal court. The court emphasized that while multi-member districts are not unconstitutional per se, in this situation they were unconstitutional because of the manner in which they minimized the voting power of Negroes in Dallas County and Mexican-Americans in Bexar County. However, the court refused a claim by the Republicans that the senatorial districts in Bexar County were gerrymandered for the purpose of minimizing Republican voting strength.

The question of the requirement in the Texas Constitution[9] that voters in school bond elections own property and duly render it for taxation arose again in *Carter v. Fort Worth*.[10] The case had originally been filed in a state court, which denied the non-property owners' motion for summary judgment and granted that of the defendant. However, after the date that the state court sent out a letter to this effect, but before entering its formal order eight days

[6] 405 U.S. at 345.

[7] TEX. ELECTION CODE ANN. art. 5.02 (1967), which requires residence in the state for one year and in the county for six months in order to vote.

[8] 343 F. Supp. 704 (W.D. Tex.), *prob. juris. noted*, 405 U.S. 1201 (1972).

[9] TEX. CONST. art. VI, § 3.

[10] 456 F.2d 572 (5th Cir. 1972).

later, the plaintiffs filed a lawsuit on the same matter in federal court, asking for a hearing by a three-judge court. The latter dismissed for lack of jurisdiction, remanding the case for hearing by a district judge, who also dismissed for the same reason. This appeal followed, and the Fifth Circuit affirmed the district court's dismissal for lack of jurisdiction, on the ground that no appeal by the plaintiffs had been taken in the state courts after the granting of the defendant city's motion for summary judgment. The court saw the issues and parties in the state and federal court suits as being basically the same, so that the rule of res judicata applied. The court took the view that the federal courts were not to be used as forums for direct review of state court proceedings in which the plaintiffs had failed to secure appropriate and timely appellate review. But the court noted that the issue was still open for decision by the federal courts and the court was not foreclosing the right of others to file an appropriate action in the federal system if the occasion should arise. The court indicated that it was aware of *Montgomery Independent School District v. Martin*,[11] in which the Texas Supreme Court upheld the provision in the Texas Constitution requiring that a voter in a bond election be a property owner. In *Martin* the court distinguished the situation from others in which the United States Supreme Court had overruled such qualifications on the ground that those decisions[12] had turned on ownership of real property, while in Texas a resident could own either real or personal property and, upon rendering it for taxation, would be entitled to vote.

The question of property ownership also arose in the area of the right to run as a candidate for city office in *Socialist Workers Party v. Welch*.[13] Members of the Socialist Workers Party of Houston brought suit under the Civil Rights Act of 1871,[14] alleging deprivation of federal constitutional rights, especially the denial of equal protection. First, the plaintiffs attacked the one-year residence requirement imposed on candidates for city office as being violative of their constitutional right of interstate travel. However, the court held that this point was moot inasmuch as all the plaintiffs had lived in Houston more than a year.[15] The second ground of attack was on the requirement of real property ownership. The city of Houston argued that since the mayor and city council also sit as the City Board of Assessment to equalize the valuation of real property, the holders of those offices should own real property. In addition, the city argued that real property ownership indicated stability and community attachment. The court noted that ownership of real property per se does not guarantee those qualities, and lack of property ownership does not necessarily indicate that such qualities are absent. Thus, the court struck down the property ownership requirement. Finally, the court struck down the registration fees involved on the ground that to so limit the number of candi-

[11] 464 S.W.2d 638 (Tex. 1971).

[12] Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[13] 334 F. Supp. 179 (S.D. Tex. 1971).

[14] 42 U.S.C. § 1983 (1970).

[15] *Query*: Might not the state's argument of "involvement in the community," which was ineffective with respect to the right to vote in Dunn v. Blumstein, 405 U.S. 330, 354-60 (1972), show a compelling state interest when the issue is the right to run for elective office?

dates would infringe the right to vote of the citizens of the city. *Austin v. Welch*[16] involved an attack on the city of Houston's home rule charter provision that a vacancy on the city council shall be filled by a majority vote of the remaining councilmen. First, the provision was challenged as being in violation of the provision in the Texas Constitution[17] that qualified electors should have the right to vote for city officers. The court denied this attack on the ground that since the Texas Supreme Court had upheld the legislature's power to delegate to the Governor the power to appoint city commissioners as not violative of this provision,[18] then, by analogy, the Houston voters could also delegate appointive powers to the city council. The problem with such reasoning, however, is that the Houston voters had not made a blanket delegation of appointive power to the city council, but had done so only when a vacancy should occur.[19] The court also rejected the plaintiff's equal protection challenge, citing *Fortson v. Morris*,[20] in which the Supreme Court upheld the power of the Georgia Legislature to elect the Governor from the two persons having the highest number of votes in an election in which no one got a majority of the votes.

Two cases involved the question of the right of a county commissioner to continue holding office after a realignment of the county's precinct boundary lines. *Dollinger v. Jefferson County Commissioners Court*[21] involved a voter's complaint that after the redrawing of the boundary lines, the voters had been deprived of equal protection of the laws, since a number of voters were added to precincts which were not scheduled to elect new commissioners for three years and, thus, their right to vote for their commissioner had been abridged. The complaint did not challenge the Texas Constitution's requirement that the commissioners be elected for staggered terms of four years.[22] The crux of the problem was that after the reapportionment less than fifty percent of the residents in one new precinct had been there originally and had had the opportunity to vote for the current commissioner. In a second new precinct over eighty-five percent of the residents had been included in the precinct represented by the current commissioner. The court concluded that the equities dictated ordering a new election in the first precinct but not in the second precinct. The court did not indicate what the equities would dictate in a situation where more than fifty percent but less than eighty-five percent of the old residents reside in the new precinct.

Two months after *Dollinger* was decided, another federal district court reached the opposite conclusion[23] on the basis of *Pate v. El Paso County*.[24] This court rejected the notion of "equities" which the *Dollinger* court used as a basis for its decision. In addition, it pointed to a Texas law on the subject of what happens when there is reapportionment of county commissioners' pre-

[16] 480 S.W.2d 273 (Tex. Civ. App.—Houston [14th Dist.] 1972).
[17] TEX. CONST. art. VI, § 3.
[18] Brown v. City of Galveston, 97 Tex. 1, 75 S.W. 488 (1903).
[19] *But cf.* City of Austin v. Thompson, 147 Tex. 639, 219 S.W.2d 57 (1949).
[20] 385 U.S. 231 (1966).
[21] 335 F. Supp. 340 (E.D. Tex. 1971).
[22] TEX. CONST. art. XVI, § 65; *id.* art. V, § 18.
[23] Carr v. Brazoria County, 341 F. Supp. 155 (S.D. Tex. 1972).
[24] 337 F. Supp. 95 (W.D. Tex.), *aff'd*, 400 U.S. 806 (1970).

cincts.[25] Briefly, that law provides that the incumbent shall not be ousted immediately from office after reapportionment, but rather may continue in office until the next election even if his residence is no longer within the precinct. A state court case[26] focused on the problems inherent in this law when, after reapportionment, not only was the incumbent county commissioner not living in the new precinct, but also none of the voters who had elected him were living in the new precinct which he was to represent. While there are limits to what the equal protection clause requires, which is to say that there may indeed be some minor deprivation of rights until the human element can correct the legal error, at the same time it does seem bad, if not legally wrong, that after reapportionment a duly elected county commissioner will be representing a precinct in which none of the people who elected him reside. At a minimum, representative government should mean some community of interest between an elected official and his constituents.

II. INCORPORATION

Two cases during the survey period considered the discretion of a county judge to order an election for the purpose of incorporating a town or village. *Helton v. Todd*[27] considered whether a county judge may revoke his own order for an election once the order has been entered. Generally, articles 1133-1153a[28] provide that when more than 200 and less than 10,000 inhabitants live together in a collection of inhabited homes in close proximity as a town or village, they may initiate the incorporation process by submitting "satisfactory proof that the town or village contains the requisite number of inhabitants"[29] to the county judge who is then to set a day and place for the purpose of submitting the question to a vote of the people. In *Helton* a petition for an incorporation election, accompanied by a list of the names of 207 purported residents of Corral City (the proposed name of the town), was presented to the county judge on August 20, 1971, and he, "finding that all of the statutory requirements had been fully complied with,"[30] entered an order for the election. Ten days later the county judge entered an order purportedly revoking his original order. The election was held as scheduled, but the county judge refused to canvass the votes and declare the results of the election. A writ of mandamus was sought against the county judge. The trial court made no findings of law, nor was any evidence of the number of inhabitants introduced. The narrow question was "whether or not the County Judge of Denton County had any lawful authority to entertain a proceeding in the nature of a motion for a new trial or a motion for rehearing which would afford to him the right to rescind the order" he had entered earlier.[31] Both the trial court and the Fort Worth court of civil appeals found that the county judge's order calling for an incorporation election, once entered, was final and conclusive. Once

[25] TEX. REV. CIV. STAT. ANN. art. 2351½ (1971).
[26] Villarreal v. Bustamante, 480 S.W.2d 231 (Tex. Civ. App.—San Antonio 1972).
[27] 481 S.W.2d 910 (Tex. Civ. App.—Fort Worth 1972), *error granted.*
[28] TEX. REV. CIV. STAT. ANN. arts. 1133-53a (1963).
[29] *Id.* art. 1136.
[30] 481 S.W.2d at 910.
[31] *Id.* at 911.

satisfactory proof of the requisite number of inhabitants is approved by the county judge, he has no discretion to reexamine his original determination.

Interestingly enough, a writ of error has been granted in *Helton*,[32] even though the only case relied upon by the county judge involved the overlapping jurisdiction of the area in question by the city of Dallas, which was seeking to annex the area at the same time that other parties were seeking to incorporate the area as a separate town.[33]

Reagan v. Beck[34] involved the question whether a county judge has discretionary power to find that certain territory included in the proposed town was not intended to be used for town purposes and that no town in fact existed, and thus deny the petition for an incorporation election. There was no question that the area contained the requisite 200 inhabitants. Again the county judge introduced no evidence, but simply argued that the writ of mandamus could not issue against him when he was exercising discretionary powers under the statute. The Tyler court of civil appeals affirmed the writ of mandamus issued against the county judge, noting that the Texas Supreme Court in an earlier case[35] had held that a county judge's only discretion in such matters is on the issue of satisfactory proof that the area has the requisite number of inhabitants. The court of civil appeals noted that an incorporation election is essentially a political matter which the legislature has determined should be decided by the people. The courts, however, may later correct a situation in a quo warranto proceeding attacking the validity of the incorporation.

III. EMINENT DOMAIN

In the area of eminent domain, the most important decision of the survey period was *City of Pearland v. Alexander*.[36] The city of Pearland acquired a surface tract of ten acres as a site for a sewage disposal plant from a landowner. The award of damages for the ten-acre site was not in issue; rather, at issue was the manner in which the award of severance damages of $143,000 to the remainder tract of 810 acres was reached. The supreme court reversed the trial court judgment for the landowner which had been affirmed by the court of civil appeals. The city complained that it was not allowed to show the "actual uses of the ten-acre site which at the time of the taking were reasonably foreseeable and probable,"[37] either by direct examination of its own witnesses or by cross-examination of the witnesses for the landowner. In other words, the city could not show the probable uses of the ten-acre site while the landowner was allowed to show the possible uses of the land.

The court acknowledged that the trial court had applied the correct "willing-seller, willing-buyer" method of determining market value in the assessment of severance damages, including "all circumstances which tend to increase or

[32] 16 Tex. Sup. Ct. J. 51 (1972).
[33] Bever v. Templeton, 208 S.W.2d 692 (Tex. Civ. App.—Dallas 1947), *aff'd*, 147 Tex. 94, 212 S.W.2d 134 (1948).
[34] 474 S.W.2d 935 (Tex. Civ. App.—Tyler 1971), *error ref. n.r.e.*
[35] Perkins v. Ingalsbe, 162 Tex. 456, 347 S.W.2d 926 (1961).
[36] 483 S.W.2d 244 (Tex. 1972).
[37] *Id.* at 246.

diminish the present market value."[38] However, the court noted that evidence was competent for admission in a condemnation trial only if it was based on reasonable probabilities, not on possibilities. Evidence for the landowner included photographs of sewage disposal plants with a capacity of thirty million gallons of sewage a day, which would fully occupy a ten-acre site such as had been condemned in this case. However, the capacity of the city's plant which had actually been built was one-thirtieth of that size. The problem in the case, as perceived by the supreme court, was that the city was not permitted to enter this information on the actual use being made of the ten-acre site. In other words, the court inferred that a plant with one-thirtieth the capacity of the plant in the photograph would not cause such great severance damages as were awarded by the jury. The court noted in passing that the city would not be permitted to have its witnesses testify that the present plant would never be expanded in the future; rather, the court viewed the city's claim as the "right to show the reasonably foreseeable and probable uses of the ten-acre site which at the time of taking would be required in accomplishing the municipal purposes for which it was taken."[39] The supreme court reversed and remanded for a trial conforming to its opinion.

Justice McGee, joined by Chief Justice Calvert and Justice Greenhill, dissented, taking the view that the city should not be allowed to enter evidence which would show that the city had little or no intention of ever covering the full ten-acre site with a sewage disposal plant. The dissent was unwilling to let the city's witnesses testify that the city would not make full use of the ten acres for a sewage disposal plant because such testimony would have the obvious effect of minimizing any severance damages to the remainder of the owner's property. The point was that the city did have the right, once it acquired the property in question, to use it in any manner which it saw fit, including using the full ten acres for a sewage disposal plant.

IV. ANNEXATION

In a per curiam decision the Texas Supreme Court affirmed the principle that an attack upon an annexation ordinance must ordinarily be made by the state in an action of quo warranto; that is, private parties do not have a good cause of action to attack the validity of an annexation ordinance.[40] However, the court did note that there is an exception to this rule in that an annexation ordinance may be attacked collaterally if the private party suffers some "burden peculiar to" himself.[41] A similar case, *West Lake Hills v. State ex rel. Austin*,[42] noted that such a burden peculiar to a private party might be the imposition of a tax. In another case decided in the survey period,[43] the San Antonio court of civil appeals held that the determination of a state officer to bring such a quo warranto action is discretionary, and that the involve-

[38] *Id.* at 247.
[39] *Id.* at 249.
[40] Hoffman v. Elliott, 476 S.W.2d 845 (Tex. 1972).
[41] *Id.* at 846.
[42] 466 S.W.2d 722 (Tex. 1971).
[43] State *ex rel.* Engle v. San Antonio, 474 S.W.2d 28 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e.*

ment of a state officer cannot be effected by involuntary joinder of a district attorney in a suit on behalf of private parties. However, in still another case,[44] the Waco court of civil appeals indicated that a city could have a good cause of action to challenge another city's annexation ordinance without joinder of the state in a quo warranto proceeding.

"Spoke" ordinances continued to be a source of litigation in Texas. *May v. City of McKinney*[45] involved "spoke" ordinances of the city of McKinney which annexed land 10 feet in width and one to three miles in length "running out in all directions from the city of McKinney 'like a long-legged spider or octopus.' "[46] Each strip of land constituted a part of the right of way of public roads or highways. The question was whether such annexation strips of land "lie adjacent" to the city. The Municipal Annexation Act provides that a city may annex territory only within the confines of its extraterritorial jurisdiction.[47] The very same matter had been presented in *Fox Development Co. v. City of San Antonio*,[48] which was discussed in the 1972 *Survey*.[49] The court of civil appeals here followed the lead of the Texas Supreme Court in the *Fox Development* case and held the "spoke" ordinances of annexation valid. Principal reliance in both cases was placed upon a case which is becoming the "granddaddy" of all such cases, *State ex rel. Pan American Production Co. v. Texas City*, in which the Texas Supreme Court decided that the legislature had intended the work "adjacent" to mean "contiguous" and "in the neighborhood of or in the vicinity of."[50] In *Texas City* the land in question was land submerged in water surrounded by upland which was also being annexed; and the Supreme Court held such to be "adjacent" to the city and thus a proper subject for annexation. But the converse situation was presented in *May* and *Fox Development*, since large tracts of land were being excluded and only narrow slivers of land included in the "spoke" annexation ordinance. It is this factual distinction between *Texas City* and the latter two cases which the courts have failed to perceive.

V. POLICE POWER

City of Breckenridge v. Cozart[51] involved the suspension of water supply to a homeowner for failure to pay the city's $2.50 monthly city garbage collection charge, which was challenged as a taking of the homeowner's property without due process of law. The trial court upheld the homeowner's attack, but the Eastland court of civil appeals reversed and upheld the city's power to do so. The city had acted pursuant to its home rule power, but after the trial, a new law, the County Solid Waste Control Act,[52] took effect which expressly

[44] City of Duncanville v. Woodland Hills, 484 S.W.2d 111 (Tex. Civ. App.—Waco 1972), *error ref. n.r.e.* The plaintiff city complained that the defendant city was annexing land within the extraterritorial jurisdiction of the plaintiff city.

[45] 479 S.W.2d 114 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

[46] *Id.* at 116.

[47] TEX. REV. CIV. STAT. ANN. arts. 970a, 1175 (1963).

[48] 468 S.W.2d 338 (Tex. 1971).

[49] Nichols, *Local Government, Annual Survey of Texas Law*, 26 SW. L.J. 213, 214 (1972).

[50] 157 Tex. 450, 456, 303 S.W.2d 780, 784 (1957).

[51] 478 S.W.2d 162 (Tex. Civ. App.—Eastland 1972), *error ref. n.r.e.*

[52] TEX. REV. CIV. STAT. ANN. art. 4477-8 (1966).

provides for such action by cities. The court decided the matter under the city's police power without reference to the new statute. Basically, the court saw garbage disposal as a very necessary element of health which is clearly a proper objective of the police power. The court also saw enough of a connection between garbage disposal and water supply to justify the suspension of the latter for failure to pay the monthly charge for the former. With the addition of the above statute to the books, there should be no question of a city's power in this matter in the future.

Houston sought to regulate automobile wrecking yards by requiring that wrecking yards be surrounded by a solid fence or wall. In *City of Houston v. Johnny Frank's Auto Parts Co.*[53] the trial court ruled in favor of the owner of the auto yard, but the court of civil appeals reversed and held for the city. The auto yard owner argued that the ordinance was passed for "purely aesthetic" reasons, which are not a proper subject for exercise of the police power, citing the famous case of *Spann v. City of Dallas.*[54] The court of civil appeals, while acknowledging that the ordinance in question was not part of a zoning ordinance, nevertheless upheld it on the ground that such automobiles might be dangerous to children who would be attracted to them if not restrained by a fence or wall.

VI. ASSESSMENTS AND TAXATION

The Texas Supreme Court considered the question of whether the legislature could, pursuant to the Texas Constitution, validly exempt the property of a nonprofit water supply corporation from taxation in *Leander Independent School District v. Cedar Park Water Supply Corp.*[55] The constitution provides that the "legislature may, by general laws, exempt from taxation public property used for public purposes."[56] There was no question that the property was being used for a public purpose, but because of previous conflicting opinions of the court, the meaning of the term "public property" was uncertain. The court decided that "public property" meant "public ownership,"[57] and thus disallowed the tax exemption. Although denying that it had any effect on its decision, the court noted that a proposed constitutional amendment providing for such a property tax exemption for nonprofit water supply corporations had been rejected by the voters of Texas in an August 1969 election.

The same constitutional provision was also at issue in *Amarillo Lodge No. 731, A.F. & A.M. v. City of Amarillo,*[58] with its further provision that the "legislature may, by general laws, exempt from taxation . . . institutions of purely public charity."[59] The legislature has implemented this constitutional provision in sections 7 and 22 of article 7150.[60] The lodges made the argu-

[53] 480 S.W.2d 774 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*

[54] 111 Tex. 350, 235 S.W. 513 (1921). *Spann* had disapproved Dallas' attempt at zoning regulation five years before the Supreme Court decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[55] 479 S.W.2d 908 (Tex. 1972).

[56] TEX. CONST. art. VIII, § 2.

[57] 479 S.W.2d at 912.

[58] 473 S.W.2d 264 (Tex. Civ. App.—Amarillo 1971), *error granted.*

[59] TEX. CONST. art. VII, § 2.

[60] TEX. REV. CIV. STAT. ANN. art. 7150, §§ 7, 22 (Supp. 1972-73).

ment that they qualified for the property tax exemption because they were associated with Grand Lodges whose charters express charitable and benevolent purposes. It was stipulated that the lodges were also used for conducting lodge meetings, initiations, and ceremonies incident to the work of the lodges. The question was whether such incidental uses of the lodges took the buildings out of the constitutional term "institutions of purely public charity." The trial court held that it did, but the Amarillo court of civil appeals reversed, granting the tax exemption. The court approached the question as one of first impression under Texas law, on the ground that never before had a Texas court considered the precise question of exemption of a building being used for lodge purposes only, with no part thereof leased to private parties. The court adopted the criteria used by the Texas Supreme Court in *San Antonio Conservation Society, Inc. v. San Antonio*, in which the test applied was whether the institution in question "relieved the government of burdens it would otherwise be obligated to bear."[61] The court then decided that use of property *incidental* to the primary purpose of charity does not defeat the exemption. The supreme court has granted a writ of error in the Amarillo case.[62] *San Antonio Conservation Society, Inc.* did not involve the element of activities "incidental" to the primary purpose of charity. Thus, if the Texas Supreme Court were to affirm this case, it would completely emasculate the term "purely" in "institutions of purely public charity." Based upon its rationale in *Leander*, it is unlikely to do so.

Klitgaard v. Gaines[63] involved the provision of the Texas Constitution which establishes a standard of assessment other than market value, for ad valorem tax purposes for land designated for agricultural use.[64] The main issue was whether the defendant's business of farming was his primary occupation and source of income. The Austin court of civil appeals decided in favor of the defendant, putting emphasis on the "occupation" aspect, and not just on the "source of income" aspect of the test as the city of Austin had argued. The defendant had received, in addition to his income from the farm, which he himself worked daily, income from occasional land sales, interest and principal on a note from a land sale to irrevocable trusts for his children, and income from commercial property acquired under his mother's will. The court decided in the defendant's favor, saying that the "appellees are not land speculators or subdividers, nor are they weekend dilettantes."[65]

In *Clements v. Corpus Christi*[66] the court of civil appeals for Corpus Christi considered the question of the meaning of the term "abut" for the purpose of determining whether the plaintiff landowner's land could be assessed for the street paving which had been done. The crux of the case was that the landowner could not secure ingress or egress to the paved road in question from his land because of a condition imposed upon the plat when the Zoning and Planning Commission had approved the land for light industrial use. While

[61] 455 S.W.2d 264, 270 (Tex. 1970).
[62] 488 S.W.2d 69 (Tex. 1972).
[63] 479 S.W.2d 765 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*
[64] TEX. CONST. art. VIII, § 1-d.
[65] 479 S.W.2d at 770.
[66] 471 S.W.2d 83 (Tex. Civ. App.—Corpus Christi 1971), *error ref. n.r.e.*

admitting that his land in fact touched the road, the landowner argued that "abut" should be interpreted to imply "access," and that, since he had no access to the road from his land, he could not be assessed for the paving of such road. However, the court followed the lead of the Texas Supreme Court in *State v. Fuller*, which held that the term "abutting owner" ordinarily refers to "one whose land actually adjoins the way, although it is sometimes used loosely without implying more than a close proximity."[67]

VII. ZONING

In *Benners v. University Park*[68] the Waco court of civil appeals considered the matter of amortization of nonconforming uses under a municipal zoning ordinance. The court of appeals held for the landowner even though she had been given twenty-five years in which to discontinue the nonconforming use. In 1926 the original owner had bought the lots on which were located retail business buildings. Three years later, in 1929, the city of University Park adopted its first zoning ordinance. That ordinance placed the property in question in a district for retail business use, for which it remained zoned until September 1940. In that year, and also in 1952, the city adopted comprehensive amendatory zoning ordinances, each of which classified the property as being in a two-family dwelling district. Both ordinances contained the following provision: "All buildings located in the . . . Two-Family Dwelling District . . . that are used as nonconforming use for commercial or industrial purposes at the time of the passage of this ordinance shall be removed or converted and their premises thereafter devoted to uses permitted in the District in which they are located prior to the first day of January, 1965."[69] On January 6, 1965, the city's building inspector ordered the plaintiff to discontinue the business use of the property, pursuant to the 1952 zoning ordinance.

In the trial court the plaintiff sought to have the ordinances of 1940 and 1952 declared invalid and to have the city permanently enjoined from enforcing them, insofar as she might be required to remove the buildings or discontinue using her property for retail business. The trial court granted the city's motion for summary judgment. The court of civil appeals reversed. Attorneys for the two sides very neatly framed the issues to their own advantage: the plaintiff stated that the predominant issue was "the validity of the City's zoning amendment requiring the discontinuance of the business use of appellant's building"; while the city said the fundamental issue was: "Can a city, by adopting a reasonable and fair zoning ordinance, require the discontinuance of a nonconforming use after 25 years' notice thereof?"[70] The court of civil appeals acknowledged that a primary purpose of zoning is to reduce nonconformance as speedily as possible with due regard to the legitimate interests of all concerned, including giving the nonconforming user a period of grace during which he is entitled to continue the use and amortize his investment, after which he is required to discontinue the nonconforming use. The court

[67] 407 S.W.2d 215, 220-21 (Tex. 1966).
[68] 477 S.W.2d 326 (Tex. Civ. App.—Waco), *rev'd*, 485 S.W.2d 773 (Tex. 1972).
[69] *Id.* at 327-28.
[70] *Id.* at 328.

noted that the Texas courts hold that provisions in zoning ordinances for amortization of nonconforming uses are valid if they are reasonable and fair in operation. Factors to be considered include the character of the neighborhood in general, the amount an owner has invested in the property, the amount of his recoupment during the grace period, protection afforded to the public, whether the zoning classification and use of nearby property values are adversely affected by the nonconforming use, and the amount of loss that would be suffered by the owner upon termination of the use.[71] The court also noted that since zoning is an exercise of municipal legislative power, any zoning ordinance is presumed to be valid, and the burden rests on one attacking the ordinance to show affirmatively that it is invalid.

The court decided that the 1952 zoning ordinance as applied to plaintiff's property was oppressive and confiscatory and, thus, an unreasonable exercise of the city's police power, which constituted a taking of plaintiff's property without just compensation in violation of article I, section 17, of the Texas Constitution.[72] The evidence proved that removal of the nonconforming structures would cause a reduction in value of the property from its present approximate value, between $75,000 and $104,000, to a new approximate value, between $12,000 and $14,000. Also established was the fact that the cumulative net income earned by the property during the years of its nonconformance was $80,000, while the 1926 purchase price of the property was only $35,000. The court apparently based its decision on its opinion that "any protection offered the public by the elimination of the nonconforming use would be uncertain or at least inconsiderable when compared to the loss that would be borne by plaintiff."[73]

The Texas Supreme Court reversed,[74] recognizing that while there is a division of opinion in other jurisdictions over the power of a municipality to terminate nonconforming uses through the amortization technique, the majority approach, and, more importantly, Texas' approach, is to approve the technique as a valid exercise of the police power. The court saw the basic rationale as resting on the principle that there is not "a legally significant difference between existing and prospective uses in land; and that the required termination of a pre-existing land use, with allowance for recoupment, is no different in kind from restrictions upon future land use alternatives."[75] In fact, the court noted that strong policy arguments lie on the side of amortization since nonconforming property uses most often do not disappear, but tend to thrive, since they normally enjoy a monopolistic position in the community. The court agreed that property owners do not acquire a constitutionally protected vested right in property uses once commenced; otherwise, lawful exercise of the police power by the city would be precluded. On the question whether the property owner had sustained her very high burden of showing that no debatable facts or conditions in support of the exercise of the police power existed, the court said she had not.

[71] *Id.* at 329, citing 63 TEX. JUR. 2D *Zoning* § 28 (1965); Note, 44 TEXAS L. REV. 368, 371 (1965).
[72] TEX. CONST. art. I, § 17.
[73] 477 S.W.2d at 330.
[74] University Park v. Benners, 485 S.W.2d 773 (Tex. 1972).
[75] *Id.* at 777.

Crucial to this judgment was the court's decision that the reasonableness of the "allowance for recoupment" is to be judged "at the time the existing use is declared nonconforming,"[76] not at the time of the expiration of the recoupment period. The court concluded that the original owners had been given sufficient time in which to recoup any loss in property value occasioned by the reclassification of the lots from commercial use to residential use in 1940.[77]

Interestingly, in another case[78] only a one-year period for amortization of a nonconforming use was allowed. The initial investment was $3,000, which was balanced against a year's profit of almost $6,000. The court noted that an ordinance requiring termination of even a legal nonconforming use is valid if a reasonable time is allowed for recovery of the investment. The supreme court has refused a writ of error in this case,[79] and thus, it seems that no municipality can be sure that any given time period is proper for amortization of a nonconforming use, but will instead have to rely on the standard of "reasonable time for allowance of recoupment" of investment in the nonconforming property.

Appolo Development, Inc. v. City of Garland[80] is interesting not so much for what it decided but for the guidelines for action by cities which it implies. The main issue was whether a zoning ordinance before the city council of Garland needed to have been passed by a majority vote or by a three-fourths vote. A majority vote is required if the city council's action is viewed as determining *ab initio* the boundaries of zoning districts;[81] but a three-fourths approval vote may be required if the city council's action is viewed as a "change" of the boundaries of the zoning district. The key is that while the city council can act by a majority approval vote in either situation, in the second situation owners of twenty percent of the area of the lots included in the proposed change, or of those immediately adjacent in the rear for 200 feet, or of those directly opposite, extending 200 feet from the street frontage of the opposite lots, can trigger a requirement of three-fourths approval vote by the city council.[82] The problem was that the city of Garland, like so many municipalities in Texas, had an ordinance providing for temporary zoning of territory annexed to the city until the city could establish permanent zoning. Appolo, which had land which was annexed, and thus automatically zoned, sought commercial zoning of its land for use as a park for mobile homes. The requisite twenty percent of area owners objected, invoking the three-fourths voting requirement. The city council voted five to four to grant Appolo's requested zoning. The Dallas court of civil appeals decided that only a majority approval vote was required "because of the City's failure to observe the express, mandatory provisions of article 1011d with respect to zoning the property in question at any

[76] *Id.* at 779.

[77] *Query*: What if the price paid by the original owner were higher than the sum of the present value and the amount of money recouped over the amortization period? Is the city then put in the position of having to wait until the owner recoups his original investment, in effect becoming an insurer of a property owner's business success without regard to the owner's own business acumen or efforts?

[78] City of Garland v. Valley Oil Co., 482 S.W.2d 342 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

[79] 16 Tex. Sup. Ct. J. 60 (1972).

[80] 476 S.W.2d 365 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

[81] TEX. REV. CIV. STAT. ANN. art. 1011d (1963).

[82] *Id.* art. 1011e.

time prior to appellant's request for zoning."[83] In its annexation ordinance, the city had failed to hold a public hearing and had published notice for only eleven days, instead of the required fifteen days. The court of civil appeals noted that the requirements of zoning enabling statutes must be strictly complied with in order to validate zoning ordinances.

The problem in this case is that the court decided, in effect, that the "zoning-automatic-upon-annexation" ordinance of the city had not taken effect, and that there was no zoning for the land which had been annexed. Strictly speaking, if the owner of the land had established a nonconforming use upon such land which the city might seek to terminate, the owner could argue that there had been no zoning at the time of the annexation unless, in passing the annexation ordinance, the city takes special care to comply with the statutory requirements of the zoning enabling statute, article 1011d.

[83] 476 S.W.2d at 368.