



1968

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Recommended Citation

Harvey Wingo, *Municipal Corporations*, 22 Sw L.J. 200 (1968)
<https://scholar.smu.edu/smulr/vol22/iss1/17>

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MUNICIPAL CORPORATIONS

by

Harvey Wingo*

I. CHANGE OF BOUNDARIES—CONSOLIDATION

WHERE citizens of two or more cities which are “adjoining and contiguous” and are “in the same county” desire consolidation, article 1189 of the civil statutes applies, providing as follows:

Whenever as many as one hundred qualified voters of each of said cities shall petition the governing body of their respective cities to order an election for the purpose of voting on the consolidation of such cities into one city, said bodies *may*, at their next regular meeting *order an election to be held at the usual voting places in the cities, on the same day*, not less than thirty days after such order is made. If said petitions be signed respectively, however, by qualified electors equal to fifteen per cent of the total vote cast at the last preceding general election for city officials in each of said cities, next preceding the filing of said petitions, the respective governing bodies *shall*, within ten days after the receipt thereof, *order an election to be held.*²

In a case of first impression under this article, a petition meeting the fifteen per cent requirement necessary to make mandatory the ordering of an election was filed with the governing body of the city of Bedford with a view to consolidation with the city of Eules. The Bedford city officials refused to order an election, and a mandamus suit was brought by electors of that city to compel the mayor and other city officials to issue the order. The trial court granted mandamus over objections by the city officials, who attempted to raise questions as to the validity of corresponding activities in the city of Eules. A Texas court of civil appeals affirmed, holding that “the validity and effectiveness of a petition to the governing body of one city to order such an election would not in any way depend upon the validity and effectiveness of a petition to the governing body of the city with which a consolidation was proposed.”³ In so holding, the court specifically noted that it was not required to determine whether an election by only one city would be improper under the statutory provision in question, or whether elections in the two cities must be held on the same day as is required under the provision *permitting* elections to be called upon petition by “as many as one hundred qualified voters.”

II. POLICE POWER

Acting under an ordinance requiring that distributors of milk within the city “make at least three deliveries” each week, the home rule city of Mt. Pleasant refused to renew the permit of a dairy which would not com-

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¹ TEX. REV. CIV. STAT. ANN. art. 1188 (1964).

² *Id.* art. 1189 (emphasis added).

³ Wolf v. Petty, 414 S.W.2d 539, 541 (Tex. Civ. App. 1967).

ply with the ordinance. The dairy sought a permanent injunction to prohibit the city from enforcing the milk delivery ordinance, contending that it was inconsistent with a state statute governing grading and labeling of milk⁴ and regulations promulgated thereunder. The trial court held for the city and refused injunctive relief. The city conceded preemption by the state in the field of grading and labeling milk, but it argued that delivery of milk was not included in that subject and that the ordinance complemented rather than conflicted with the state statute and regulations. It was readily agreed by the city, however, that the purpose of the ordinance was an attempt to insure distribution of fresher milk within the city. There was evidence that prior to enactment of the ordinance in question, tests conducted on samples of milk distributed by dairies making only two deliveries per week showed they had a substantially higher bacterial count than milk delivered by dairies making three deliveries a week.⁵ Concluding that the effect of the ordinance was to impose on milk standards of freshness not required under the state statute and regulations, a Texas court of civil appeals held that the city had attempted to enter a field "occupied exclusively by the state statutes and regulations" and, therefore, was permanently enjoined from enforcing the milk delivery provisions of the ordinance.⁶

In another civil appeals case,⁷ a Houston ordinance, prohibiting as a "common and public nuisance" all fireworks within the jurisdiction of the city, was held to be valid and not in conflict with a statute prohibiting the sale or use of all fireworks *except* "ICC Class C Common Fireworks."⁸ A licensed distributor of permissible fireworks under the statute sought to prevent enforcement of the ordinance. Citing a number of previous Texas decisions,⁹ the court held that the city of Houston was acting within the constitution and laws of Texas in prohibiting all fireworks within the city by declaring them to be a nuisance and directing summary abatement. Turning to the statute in question, the court recognized that all of the cases cited to uphold the ordinance had been decided prior to enactment of the statute. However, the court pointed out that one section of the

⁴ TEX. REV. CIV. STAT. ANN. art. 165-3 (1964), subsequently amended with an emergency effective date of June 18, 1967, TEX. REV. CIV. STAT. ANN. art. 165-3 (Supp. 1967).

⁵ In fact, the city sanitarian testified that two out of three tests conducted on the "two delivery" milk showed a bacterial count in excess of that allowed under the state regulations. In this regard, it should be noted that when the statute in question was amended (*see note 4 supra*), a provision was added specifically setting out a required procedure for sampling, testing, and inspecting Grade "A" milk and milk products. *See* TEX. REV. CIV. STAT. ANN. art. 165-3, § 7A (Supp. 1967).

⁶ *Jere Dairy, Inc. v. City of Mt. Pleasant*, 417 S.W.2d 872 (Tex. Civ. App. 1967) *error ref. n.r.e.* *See also Prescott v. City of Borger*, 158 S.W.2d 578 (Tex. Civ. App. 1942) *error ref.* Antieau has pointed out "a noticeable inclination on the part of the courts to invalidate municipal restrictions involving milk and dairy products either because the state has occupied the field, or because there is conflict with state law which permits what the municipality would forbid." 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 6.22 (1966), citing the *Borger* case. But he believes that the "better cases permit municipal corporations to complement the milk regulations of the state authorities." *Id.*, citing, *e.g.*, *City of St. Louis v. Klausmeier*, 213 Mo. 119, 112 S.W. 516 (1908).

⁷ *Alpha Enterprises, Inc. v. City of Houston*, 411 S.W.2d 417 (Tex. Civ. App. 1967) *error ref. n.r.e.*

⁸ TEX. PEN. CODE ANN. art. 1725 (Supp. 1967).

⁹ *See, e.g., Stoughton v. City of Fort Worth*, 277 S.W.2d 150 (Tex. Civ. App. 1955); *Cannon v. City of Dallas*, 263 S.W.2d 288 (Tex. Civ. App. 1953) *error ref. n.r.e.*

statute specifically provides that no city ordinance prohibiting fireworks, whether enacted prior or subsequent to the statute, shall be repealed by the act.¹⁰

III. MUNICIPAL PROPERTY—TAXATION

The Texas Constitution, article 8, section 1, provides in part as follows:

Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, *other than municipal*, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.¹¹

Section 4 of article 7150 of the civil statutes provides a specific tax exemption, with certain exceptions, for "all property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof."¹² However, the Texas courts have consistently read into this provision a requirement that, in order to be exempt, city-owned property must be devoted to a public purpose.¹³ This results from reading together with the constitutional and statutory provisions cited above the following provisions of the Texas Constitution, article 8, section 2 and article 11, section 9:

Article 8

Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation *public property used for public purposes*; actual places . . . [of] religious worship, . . . and *all laws exempting property from taxation other than the property above mentioned shall be null and void*.¹⁴

Article 11

Sec. 9. The property of counties, cities and towns, *owned and held only for public purposes*, such as public buildings and the sites therefor . . . public grounds and *all other property devoted exclusively to the use and benefit of the public shall be exempt from . . . taxation*.¹⁵

All of these provisions took on renewed interest and significance in *City of Beaumont v. Fertitta*.¹⁶ At issue was a lease contract made in 1928

¹⁰ Be it further enacted, that any Acts, laws or parts of laws in conflict herewith are hereby repealed to the extent of the conflict. However, this Act shall not repeal or affect any town, city or municipal ordinance which prohibits the sale and use of fireworks within the town, city or municipal boundaries which is in effect before the effective date of this Act, or that may be enacted after the effective date of this Act. Provided, however, that nothing herein shall be construed to limit or restrict the powers of cities, towns or villages as defined and delegated by Title 28, Revised Civil Statutes of Texas, to enact ordinances prohibiting or imposing further regulations on fireworks; and provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above-mentioned Title shall remain in full force and effect until thereafter amended by such city.

TEX. PEN. CODE ANN. art. 1725, § 14 (Supp. 1967).

¹¹ TEX. CONST. art. 8, § 1 (emphasis added).

¹² TEX. REV. CIV. STAT. ANN. art. 7150, § 4 (1964).

¹³ See, e.g., *A. & M. Consol. Ind. School Dist. v. City of Bryan*, 143 Tex. 348, 184 S.W.2d 914 (1945); *City of Abilene v. State*, 113 S.W.2d 631 (Tex. Civ. App. 1937) *error dismissed*.

¹⁴ TEX. CONST. art. 8, § 2 (emphasis added).

¹⁵ *Id.* art. 11, § 9 (emphasis added).

¹⁶ 415 S.W.2d 902 (Tex. 1967). For further discussion, see Harding, *Contracts*, this *Survey*, at footnote 1.

between the city of Beaumont and one Fertitta, under which the latter leased city-owned property to be used by him for private commercial purposes. Under one clause of the lease, the lessee agreed "that if said property is subject to taxation by the State and County, he will pay as they accrue all taxes assessable against said property by said State and County." In 1935, the lease was amended, and the requirement that the lessee pay any taxes due to the State and County on the property was eliminated. One issue, then, as stated by the Texas Supreme Court, was "whether or not the amendment of 1935 [was] invalid because it amounted to a commutation or exemption of taxes on the leasehold estate held by respondents."¹⁷

Article 7173 of the civil statutes provides in part:

Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, *or that is exempt by law from taxation in the hands of the owner thereof*, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law.¹⁸

Under article 7174, taxable leasehold estates are to be "valued at such a price as they would bring at a fair voluntary sale for cash."¹⁹ To support its argument that the 1935 amendment to the lease was invalid and must be canceled, the city contended that article 7173 was applicable to the leasehold held by Fertitta, since the property would be exempt from taxation "in the hands of the owner," the city. The Texas Supreme Court agreed that the property in question was exempt from taxation despite the fact that it was not being used for a public purpose and thus was not exempt under article 11, section 9 of the constitution.²⁰ Under article 8, section 1 of the constitution,²¹ said the court, the legislature is *authorized* to exempt all city-owned property regardless of the purpose to which it is being put, and it has exercised this authority in section 4 of article 7150.²² The court recognized that the Texas cases at least appear to impose a public purpose requirement, but it pointed out that until now no case has actually required an answer to the specific question of whether municipal property not being used for a public purpose is taxable.²³ As to article 8, section 2

¹⁷ *Id.* at 907. The other major issue in the case as to whether the 1935 amendment and another amendment made in 1933 were supported by a new and valuable consideration is not here discussed. See *id.* at 906-07.

¹⁸ TEX. REV. CIV. STAT. ANN. art. 7173 (1964) (emphasis added).

¹⁹ *Id.* art. 7174.

²⁰ See text accompanying note 15 *supra*.

²¹ See text accompanying note 11 *supra*.

²² See text accompanying note 12 *supra*.

²³ In making our holding that Article 7150, Section 4, V.A.T.S., provides for the exemption of municipal property regardless of the use to which it is put or the purpose for which it is held, we are not unmindful of the fact that although a number of cases have reached the appellate courts wherein the taxation of municipal property has been involved, no such court has so construed said statutory provision. On the other hand, no appellate court has ever been confronted with the question as we have it presented to us, that is, whether or not municipal property not held or used for public purposes is taxable. There have been cases where the property could have been held to be exempt under Article 7150, Section 4, but the courts have found other grounds under our constitutional and statutory provisions for exempting the property in question in the particular case.

of the constitution,²⁴ the court stated that the "public property" there mentioned does not include municipal property but was intended to apply to privately owned property made public in nature because of the purpose for which it is used. Thus, that constitutional provision does not place a public purpose requirement on municipal property as a condition for tax exemption. Finally, the prohibition against laws exempting property other than the property listed in article 8, section 2 of the constitution was intended to apply only to that property which is *required* to be taxed under article 8, section 1. City-owned property is specifically excluded from the requirements of that section.²⁵

Three justices dissented, emphasizing that the courts in this state "have consistently proceeded on the theory that municipal property cannot escape taxation unless it is held or used for a public purpose," and pointing out that if the majority view is correct, "the Texas courts have been wasting their time all these years in considering whether municipal property was used or held for a public purpose . . ." when they could have been "availing themselves of this easy solution . . ."²⁶

IV. ZONING

Despite a recommendation by the Planning and Zoning Commission that a requested zone change be denied, the Lubbock City Council unanimously enacted an ordinance authorizing a specific use permit for a twelve-story apartment building in an area formerly zoned for commercial enterprises such as bowling alleys, laundrettes, movie theaters, pool halls and the like. The private apartment project was designed primarily to serve male students at Texas Tech, which is located across the street from one end of the zone change area. On appeal from a judgment of the trial court holding the amending ordinance unconstitutional and invalid, a Texas court of civil appeals reversed.²⁷ Although there had been some testimony that the

²⁴ See text accompanying note 14 *supra*.

²⁵ Having found that the property was "exempt by law from taxation in the hands of the owner" under article 7173, the court nevertheless concluded that the 1935 amendment was not invalid as amounting to a commutation of taxes on the *leasehold estate*. It reasoned that the original lease provision concerning taxes did "not deal with taxes which may be assessable against the leasehold," but only "with taxes which may be assessable against the property covered by the lease." Accordingly, since the court had found that there was a new and valuable consideration as to the 1935 amendment (see note 17 *supra*), that amendment was upheld. The court's discussion of this point is at 415 S.W.2d at 912-13.

²⁶ 415 S.W.2d at 914, where the dissenters cite *A. & M. Consol. Ind. School Dist. v. City of Bryan*, 143 Tex. 348, 184 S.W.2d 914 (1945); *City of Abilene v. State*, 113 S.W.2d 631 (Tex. Civ. App. 1937) *error dismissed*; and other cases which had been distinguished in the majority opinion. See note 23 *supra*. Compare the discussion of these cases in the majority opinion, 415 S.W.2d at 911-12 with the dissent's consideration of the same cases, 415 S.W.2d at 914-15.

²⁷ *City of Lubbock v. Whitacre*, 414 S.W.2d 497 (Tex. Civ. App. 1967) *error ref. n.r.e.* The trial court had found that the action of the city council constituted "an arbitrary and unreasonable abuse of the city's discretion . . . detrimental to the private interest of the parties surrounding the areas" and bearing "no substantial relationship to the general health, safety, morals or general welfare of the community." *Id.* at 499. The opinion of the court of civil appeals is noteworthy for bringing together and reaffirming in "1-2-3-" fashion the following principles of zoning law:

1. 'Courts should not interfere with such actions of the city council unless it appears that the ordinance represents a clear abuse of discretion, and an extra-ordinary burden rests on the one attacking the ordinance . . . to show that no *conclusive*, or even *controversial* or issuable, facts or conditions existed which would authorize

building of the apartment project would devalue property in the area, other testimony indicated that the apartment would increase the value and, in fact, that at least one lot formerly offered for \$2,000 had sold for \$5,000 after word began to spread as to the possibility the apartment might be built. This same lot had even later sold for \$10,000.²⁸ Noting the need for additional housing for students at Texas Tech in the face of a rapidly expanding enrollment, the additional taxes the apartment would provide, the nature of the surrounding area,²⁹ and the attractiveness of the proposed apartment compared with the commercial property already in the area, the court concluded that "reasonable minds could differ"³⁰ on the question of whether the ordinance as amended served the interests of the public health, safety, morals, or welfare, and thus the rezoning was not arbitrary and unreasonable. Finally, the court distinguished *Weaver v. Ham*³¹ and held that the rezoning in the instant case was not illegal "spot zoning."³²

In another zoning case,³³ a Wichita Falls ordinance prohibiting the sale of "spirituous, vinous or malt liquors within the city's limits, except for areas described," had been amended to provide as follows:

In recognition of the principle of non-conforming use, when an area is annexed to the City limits of the City of Wichita Falls, Texas, that contains

the governing board of the municipality to exercise the discretion confided to it.' *City of Waxahachie v. Watkins*, 154 Tex. 206, 275 S.W.2d 477 (1955).

2. 'The presumption of validity accorded original comprehensive zoning applies as well to an amendatory ordinance.' *City of Waxahachie v. Watkins*, *supra*. See also *Weaver v. Ham*, 149 Tex. 309, 232 S.W.2d 704 (1950); *Clesi v. Northwest Dallas Imp. Ass'n*, 263 S.W.2d 820 (Tex. Civ. App. 1953) *error ref. n.r.e.*

3. 'In either case the courts have no authority to interfere unless the change is clearly unreasonable and arbitrary.' *City of Waxahachie v. Watkins*, *supra*.

4. 'If the question is fairly debatable as to whether the zoning ordinance is arbitrary and unreasonable and has no substantial relation to public health, safety, morals, or general welfare, the court will not interfere.' *City of Corpus Christi v. Jones*, 144 S.W.2d 388, 398 (Tex. Civ. App. 1940) *error dismissed*.

5. 'Since it is an exercise of the legislative power of the city's council, the ordinance must be presumed to be valid.' *City of Waxahachie v. Watkins*, *supra*.

6. Whether appellees met their burden to show there were no controversial or issuable facts which would authorize a city council to exercise its discretion in the manner here complained of presents a question of law, not of fact, and in deciding it the court should have due regard 'to all circumstances of the city, the object sought to be attained and the necessity existing for the ordinance.' *City of Waxahachie v. Watkins*, *supra*.

7. '[I]f there is an issuable fact as to whether the ordinance makes for the good of the community, the fact that it may be detrimental to some private interest is not material.' *City of Waxahachie v. Watkins*, *supra*, citing *Edge v. City of Bellaire*, 200 S.W.2d 224, 227 (Tex. Civ. App. 1947) *error refused* (emphasis added).

414 S.W.2d at 500.

²⁸ *Id.* at 501.

²⁹ The court pointed out that to the east the property is commercial for several miles. To the west are a few residences, but just beyond them lie an apartment project, a hospital, and parking lots. See *id.* at 501.

³⁰ *Id.* at 502.

³¹ 149 Tex. 309, 232 S.W.2d 704 (1950).

³² In *Weaver v. Ham*, 149 Tex. 309, 232 S.W.2d 704 (1950), a lot 150 by 300 feet surrounded by residences had been rezoned commercial. The court stressed that in the instant case a great deal of the property in the area of the zone change was already commercial, and it added: "there is not shown by the facts in that case [*Weaver*] as valid a necessity existing for the zone change as in our case, 'all the circumstances of the city, the object sought to be attained' being considered." 414 S.W.2d at 502.

³³ *City of Wichita Falls v. Evans*, 410 S.W.2d 311 (Tex. Civ. App. 1966).

businesses which have been operating in said area for a period of no less than 12 months . . . those businesses which have existed for such period of time shall be allowed to continue in the same location.³⁴

A liquor store being operated within the provisions of the amended ordinance was located on a lot in such a position that a completely new building could be constructed on the same lot without first removing the existing building. While the new building was under construction, the business continued to operate in the other; there was no break in carrying on the business upon completion of the new building and transfer of the goods to that building followed by removal of the old building from the lot. The new structure was somewhat larger than the old and was situated approximately a foot from the site of the old building. A Texas court of civil appeals held that the business was being conducted in the "same location" within the meaning of the amended ordinance. As to the question of enlargement of the non-conforming use, the court declared that if there was an enlargement, it was only "in the amount of business transacted" which "is not a proper subject of zoning ordinances" and was not covered under the ordinance in question.³⁵

V. SPECIAL ASSESSMENTS—NOTICE TO LANDOWNERS

In *City of Houston v. Fore*³⁶ the Texas Supreme Court considered section 9 of article 1105b, which formerly allowed notice to property owners as to hearings on the assessment of costs for street improvements to be "by advertisement inserted at least three (3) times in some newspaper published in the city where such special assessment tax is to be imposed . . ."³⁷ After enacting an ordinance approving an estimate of costs and a proposed rate of assessment for certain planned improvements on Delz Street in Houston, the city council of that city caused notice to be published in full accord with the above cited provision of article 1105b. However, the evidence showed that Fore, who owned abutting property on Delz Street, did not read the advertisement, did not in fact have any knowledge of the hearings, had lived on Delz Street for twenty-four years, and had previously received correspondence from the city at his Delz Street address, which was on the tax rolls. In the city's suit to recover the amount of two paving assessments and to foreclose the lien thereof, the jury re-

³⁴ *Id.* at 313, citing amendment to Wichita Falls City Ordinance No. 1416 (emphasis in original).

³⁵ *Id.* at 314.

³⁶ 412 S.W.2d 35 (Tex. 1967). For further discussion, see FitzGerald, *Administrative Law*, this *Survey*, at footnote 1.

³⁷ TEX. REV. CIV. STAT. ANN. art. 1105b, § 9 (1963). The full text of that portion of the statute which was applicable in this case is as follows:

Sec. 9. No assessment herein provided for shall be made against any abutting property or its owners . . . until after notice and opportunity for hearing as herein provided, and no assessment shall be made against any abutting property or owners thereof in excess of the special benefits of such property, and its owners in the enhanced value thereof by means of such improvements as determined at such hearing. Such notice shall be by advertisement inserted at least three (3) times in some newspaper published in the city where such special assessment tax is to be imposed, if there be such a paper; if not, then the nearest to such city of general circulation in the county in which such city is located.

See note 48 *infra* and accompanying text for the 1967 amendment of this section.

turned a verdict for the city, but the trial court sustained the property owner's motion for a judgment notwithstanding the verdict, and this was upheld by a Texas court of civil appeals.³⁸ The Texas Supreme Court affirmed and held that, as to this particular property owner, the notice provisions of article 1105b failed to satisfy due process requirements under the fourteenth amendment to the Constitution of the United States. While acknowledging that notice by publication such as prescribed in article 1105b has generally been thought to meet the due process requirements,³⁹ the court relied on a series of cases decided by the United States Supreme Court to the effect that such notice falls short of due process where names and addresses are known to the city.⁴⁰

One of the leading authorities on municipal corporation law has stated:

Constructive notice was once thought adequate to support special assessment proceedings. Nevertheless, publication notice alone is inadequate and acutely unfair to the property owner. Notice by mail to the last known address of the owner should always be added, and the courts can well become more realistic about what is reasonably calculated to apprise the owner of the land that he will be subjected to assessment.⁴¹

This "more realistic" attitude now required by the Texas Supreme Court concerning special assessment proceedings had its genesis in a United States Supreme Court case involving notice by publication to beneficiaries of a common trust fund that the trust company was petitioning for judicial settlement of its accounts. In *Mullane v. Central Hanover Bank & Trust Co.*⁴² the Supreme Court held that such notice was insufficient "as to known present beneficiaries of known place of residence."⁴³

In *Walker v. City of Hutchinson*⁴⁴ the United States Supreme Court cited *Mullane* and held that the principle enunciated in that case was also applicable to condemnation proceedings.

One week after the *Walker* decision, the Supreme Court entered an order in the case of *Wisconsin Electric Power Company v. City of Milwaukee*,⁴⁵ in which the constitutionality of notice by publication with regard to special assessment proceedings was in issue. The Supreme Court's order remanded the case for consideration in light of the *Walker* case, and on the remand the Wisconsin Supreme Court, citing *Mullane* and *Walker*, held that "the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process."⁴⁶

³⁸ *City of Houston v. Fore*, 401 S.W.2d 921 (Tex. Civ. App. 1966), *aff'd*, 412 S.W.2d 35 (1967).

³⁹ See the Texas cases cited by the court in the instant case at 412 S.W.2d at 38 and cases cited at 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 14.13 n.11 (1967).

⁴⁰ *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948 (1956); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁴¹ 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 14.13 (1967).

⁴² 339 U.S. 306 (1950).

⁴³ *Id.* at 318.

⁴⁴ 352 U.S. 112 (1956).

⁴⁵ 352 U.S. 948 (1956), *amended*, 352 U.S. 958 (1957).

⁴⁶ *Wisconsin Elec. Power Co. v. City of Milwaukee*, 275 Wis. 121, 122, 81 N.W.2d 298, 299 (Wis. 1957).

After tracing the development of the *Mullane* doctrine as set out above, the Texas Supreme Court properly concluded that, since in the instant case the landowner's "name and address were known to the city, and he could have been readily notified by mail . . . the publication did not constitute adequate notice to respondent."⁴⁷

As a result of this decision, section 9 of article 1105b was subsequently amended by adding a requirement that fourteen days written notice of hearings be mailed to the addresses shown on current tax rolls of the city.⁴⁸ Query whether the principles enunciated in the *Fore* case may in the future be applied in other areas, *e.g.*, hearings relating to petitions for changes and amendments to zoning ordinances.⁴⁹

VI. PUBLIC UTILITIES AND SERVICES

A Texas court of civil appeals stated "We think not" in answer to the question of whether there had been a taking of property without due process of law in *Johnson v. Benbrook Water & Sewer Authority*.⁵⁰ At issue was a policy requirement by a sewer and water authority that all builders, subdividers, and developers pay the entire cost of extending water and sewer service into new areas. Upon completion of the work, title to the extension was to vest in the Authority, and all maintenance and replacement costs would thereafter be borne by the Authority. It was established that the subdivider had previously obtained extensions of water and sewer service into a number of other developments within the Authority's boundaries under the same conditions now challenged. It was further shown that he had recovered in the sale price of tracts already sold a "pro rata share of the total cost . . . allocable to each of said tracts," and he testified that the remaining cost would be recovered upon sale of all tracts within the development.⁵¹ The court supported its terse opinion by citing another civil appeals case holding that a city's annexation of a subdivision, including sewer lines which had been recently installed at the expense of the developer, did not amount to a taking of property without just compensation.⁵²

VII. TORT LIABILITY

In *Ramundo v. City of San Antonio*⁵³ the plaintiff was injured when

⁴⁷ *City of Houston v. Fore*, 412 S.W.2d 35, 39 (Tex. 1967).

⁴⁸ [A]dditional written notice of the hearing shall be given by depositing in the United States mail, at least fourteen (14) days before the date of the hearing, written notice of such hearing, postage prepaid, in an envelope addressed to the owners of the respective properties abutting such highway, highways or portion or portions thereof to be improved, as the names of such owners are shown on the then current rendered tax rolls of the city at the addresses so shown

TEX. REV. CIV. STAT. ANN. art. 1105b, § 9 (Supp. 1967).

⁴⁹ See, *e.g.*, 3 DALLAS, TEXAS, REV. CIV. & CRIM. CODE §§ 32-102, 32-103 (1965), where written notice is required to all owners of real property lying within 200 feet of the property on which the change is requested, but notice by publication only is required as to all other interested property owners.

⁵⁰ 410 S.W.2d 644 (Tex. Civ. App. 1966).

⁵¹ *Id.* at 646.

⁵² See *City of Snyder v. Bass*, 360 S.W.2d 426 (Tex. Civ. App. 1962) *error ref. n.r.e.*

⁵³ 416 S.W.2d 395 (Tex. 1967).

a city bus on which he was riding stopped suddenly, causing him to be thrown to the floor of the bus. As a prerequisite to any liability by the city, the San Antonio City Charter requires that written notice—to be filed with the city within ninety days after personal injuries have been sustained—must include, among other things, a statement of “when, where and how” the injuries were suffered. In this case, the plaintiff filed timely notice, stating that his injuries were caused by the negligence of the bus driver in abruptly stopping the bus. At the trial the city asserted in an amended answer that a policeman on a motorcycle had stopped suddenly in front of the bus making it necessary for the bus driver to come to the stop that caused the plaintiff’s fall. Judgment at the trial level was for the plaintiff and was based on the jury’s findings that the conduct of the policeman and not of the bus driver was the proximate cause of the plaintiff’s injuries. A Texas court of civil appeals, one justice dissenting, reversed on the ground that the plaintiff’s notice failed to meet the charter requirements. The variance between the plaintiff’s notice and the proof adduced at trial, said the court, was such that “plaintiff is now seeking to support a judgment based on a cause of action to which a particular defense might have been successfully interposed had the municipality been reasonably alerted to the nature of plaintiff’s claim, while the notice to the city described a claim based on facts setting forth a cause of action to which the omitted defense was not applicable.”⁵⁴ In this regard, it should be noted that the city did not initially plead the doctrine of governmental immunity and was not allowed by the trial court to amend its pleadings and interpose this defense at the conclusion of the evidence.

The Texas Supreme Court refused application for writ of error, but in a *per curiam* opinion it rejected without reasons the rationale of the court of civil appeals. It held instead that there could be no recovery because “all of the issues upon which Petitioner relied for recovery were found against him,” and recovery was based on findings resulting from a defensive issue raised by the city.⁵⁵ The exact reason for the supreme court’s disagreement with the rationale of the majority opinion of the court of civil appeals cannot, of course, be known. The civil appeals opinion relies heavily on the traditional but unworkable governmental/proprietary theory of municipal tort liability in concluding that the variance between notice and proof at trial was fatal in this case.⁵⁶ There

⁵⁴ *City of San Antonio v. Ramundo*, 411 S.W.2d 428, 432 (Tex. Civ. App. 1966) *error ref. n.r.c.*

⁵⁵ *Ramundo v. City of San Antonio*, 416 S.W.2d 395 (Tex. 1967). The supreme court cited as the basis for its rationale TEX. R. CIV. P. 279.

⁵⁶ It must be assumed . . . that a Texas municipal attorney, when confronted with a claim based on the asserted negligence of a city policeman, would not, in protecting the interests of his client, ignore the defense of governmental immunity. The City’s failure to plead such defense in this case, as well as its failure to come forward with the proof necessary to support it, is not surprising in view of the fact that plaintiff’s notice, as well as his pleadings, asserted a claim not subject to such defense. Plaintiff now seeks to recover on a cause of action which the City, relying on his notice, was not prepared to, and did not, defend. Under these circumstances, the variance must be held to be fatal.

City of San Antonio v. Ramundo, 411 S.W.2d 428, 431 (Tex. Civ. App. 1966) *error ref.*

have been hints in the past that the Texas Supreme Court may be becoming disenchanted with this troublesome doctrine.⁵⁷ However, it is likely that the court in the instant case merely felt that the plaintiff's notice did meet the requirements of the city charter, since it did state to the best of his knowledge at that time how his injuries were sustained.

There were few cases of compelling significance in the municipal corporation field during the survey period. Attention has here been focused upon those decisions which are felt to be either of some lasting importance or, hopefully, of more than passing interest.

⁵⁷ See *Dancer v. City of Houston*, 384 S.W.2d 340 (Tex. 1964); *City of Austin v. Daniels*, 335 S.W.2d 753 (Tex. 1960); *Crow v. City of San Antonio*, 301 S.W.2d 628 (Tex. 1957). But see the discussion in last year's *Survey* article, Webster & FitzGerald, *Municipal Corporations*, *Annual Survey of Texas Law*, 21 Sw. L.J. 221, 229-30 (1967).