Local Government Law

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I. Access to Government Information

The United States Supreme Court, lower federal courts, Texas courts, and the state attorney general all rendered decisions during the survey period that significantly affect the public's access to government information. Supreme Court judgments defined the right to observe a criminal trial and eliminated the constitutional barrier to cameras in the courtroom. Courts in Texas struggled not only with the question of when a citizen may enter a courtroom, but also what he may copy from the evidence introduced at trial. The attorney general responded to numerous inquiries as to whether government information must be divulged. All things considered, the public's rights expanded during the period.

Courtrooms. The press and the public eagerly anticipated the hearing on an application for writ of habeas corpus in Ex parte McManus. At issue was the scope of the right of access to court proceedings. The proceedings in question involved the conduct of the attorneys and witnesses, but ultimately they bore upon the fairness of the defendant's trial. The defense attorney was accused of having an affair with McManus's wife during trial. Subsequently he married her. McManus further alleged that one of the prosecutors was having an affair with a key state witness during the trial and suborned perjury of that witness. The court of criminal appeals later characterized these claims as allegations of "extracurricular activities of lawyers and witnesses during the trial." Without motion from any party and over the objection of all parties, the district court determined that the "extracurricular activities" should be aired in a hearing closed to the press and public. The ruling of the trial judge was based in part upon the United States Supreme Court's decision in Gannett Co. v. DePasquale, in which the Court upheld the closure of a pretrial suppression hearing. In McManus the Houston Chronicle and one of its reporters, the Houston Post,
Channel 2 Television, and KPRC Radio petitioned the district court to open the habeas corpus proceedings. The judge denied their motion. The press representatives then petitioned the Texas Court of Criminal Appeals for a writ of mandamus or a writ of prohibition.

In *Houston Chronicle Publishing Co. v. McMaster* the Texas Court of Criminal Appeals ruled that the trial judge should not have closed the habeas corpus proceeding. The court relied upon the Texas Code of Criminal Procedure, stating that article 1.247 plainly and unequivocally requires that "the proceedings and trials in all courts shall be public." Judge Clinton's majority opinion stated that a hearing on an application for writ of habeas corpus clearly was a "proceeding" under the statute's purview and, thus, the trial court was not authorized to close the hearing. The court further ruled that in this case the district court had no authority even to hold a habeas corpus hearing because McManus's pending appeal in the United States Supreme Court, from his conviction on the merits, supplanted the trial court's role. The court of criminal appeals, thus, denied the petition for a writ of mandamus or a writ of prohibition.

Concurring in part and dissenting in part, Judge Dally, joined by Presiding Judge Onion and Judge Douglas, chided the majority for issuing what they called a declaratory judgment. Judge Dally objected to the court's needless decision as to whether proceedings properly brought under the provisions of article 11.07 could be closed to the public. The concurring opinion agreed with the majority that the trial court had no authority to close the habeas corpus proceeding, but it objected to the majority's entering of an advisory opinion when it was clear that the trial court had no authority to conduct the proceeding.

The court of criminal appeals expressly declined to decide whether the press had any right under the state or federal constitutions to attend the habeas corpus proceedings. Because the issue was not raised, the court also did not decide whether opening the proceeding would jeopardize the defendant's constitutional right to due process or a fair trial. At the time of the hearing, McManus had joined the press and the prosecutor in seeking to conduct the proceedings in public.

The United States Supreme Court addressed the issue of access to courtrooms in *Richmond Newspapers, Inc. v. Virginia*. During the prior term
the Court had decided *Gannett Co. v. DePasquale*, which upheld a New York trial judge’s exclusion of the press and the public from a pretrial suppression hearing in a murder case. Justice Stewart’s majority opinion in *Gannett* had created confusion and controversy in the courts below. The Court had held that a judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity and that “closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ” to fulfill that duty. According to the Court, the sixth amendment’s provision that the accused shall enjoy the right to a speedy and public trial benefits the defendant, not the press or the public. The Court pointed out, however, that the defendant does not enjoy a sixth amendment right to compel a closed trial. Assuming, without deciding, that the first amendment grants the public and press a qualified right of access to pretrial hearings, the Court stated that the trial judge below had given appropriate deference to that right. The Court did not decide whether a state constitution could prohibit closure of pretrial suppression hearings.

In the five-month period following the *Gannett* decision, the Reporters’ Committee for Freedom of the Press identified 109 efforts to close courtrooms. According to the committee, some closure was granted in sixty-one of the cases. The efforts were not confined to pretrial suppression hearings, but included trials and posttrial proceedings as in *McManus*.

Almost immediately, the United States Supreme Court agreed to review *Richmond Newspapers, Inc. v. Virginia*, a case involving the criminal trial of a man accused of murdering a motel clerk in 1975. The defendant was convicted of the crime in July 1976, but the Virginia Supreme Court reversed his conviction. Two mistrials followed. Prior to the fourth trial, the defendant’s attorney moved to close the entire proceeding to the public and the press, citing potential prejudicial publicity. Without a hearing, the trial court granted the motion. The case went to trial and the accused was acquitted. Two Richmond reporters, however, had objected to the closure and appealed the court’s ruling. The United States Supreme Court reversed in a seven-to-one decision.

Chief Justice Burger’s majority opinion for the first time found an express right of access to government proceedings, including trials, rooted in the first amendment speech, press, and assembly clauses. The Chief Jus-
tice cautioned, however, that the first amendment rights of the public and the press are not absolute and he reserved judgment as to whether a first amendment right to attend civil trials exists. In a concurring opinion, however, Justice Stevens called Richmond Newspapers a “watershed case.”

"Never before," he wrote, had the Court held “that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.” To the contrary, prior decisions had suggested that the press clause provided no greater right of access for the press than the general public. Future litigation likely will determine whether the first amendment right of access is confined solely to criminal trials or whether it is extended to other government proceedings and facilities.

Courtroom Evidence. During the survey period, the United States Justice Department procured a number of indictments against elected officials and others pursuant to the ABSCAM and Brilab investigations. The latter investigation resulted in the indictment of the Speaker of the Texas House of Representatives, Billy Clayton, along with three nongovernment individuals. Representative Clayton was indicted and charged with wire fraud, conspiracy, use of interstate commerce in aid of racketeering enterprises, and conspiracy to commit extortion. He was charged with an additional count of attempted extortion, and the other defendants were accused of aiding and abetting that offense. The government’s exhibits included audiotape recordings purportedly indicating that Clayton had committed the offenses. The recordings were introduced into evidence at the criminal trial. During the trial, Belo Broadcasting Corporation, licensee of television station WFAA in Dallas, filed suit to obtain contemporaneous access to the tapes that had been introduced into evidence. Following the trial, a second Dallas station, KDFW Television, and a KDFW reporter petitioned the court to permit them to inspect and copy the tapes. District Judge Robert O’Conor, Jr. denied the requests, basing this refusal upon two grounds: (1) the press had been afforded preferential access to the Clayton trial, had heard the tapes, and had been permitted to review and retain transcripts of the taped conversations; and (2) release of the tapes would prejudice the right of the yet-to-be tried severed defendant to a fair trial and to due process of law. Both broadcasting stations appealed this

30. Id. at 2829 n.17, 65 L. Ed. 2d at 992 n.17.
31. Id. at 2830, 65 L. Ed. 2d at 993.
32. Id.
34. A jury subsequently found Representative Clayton and two other defendants innocent. The fourth defendant had been severed from the trial.
ruling. The Fifth Circuit has granted expedited review of the question. Judge O'Conor's ruling is at odds with the approach taken by the Second Circuit with respect to access to the ABSCAM videotapes. There the court found a presumptive common law right to inspect and copy judicial records, thus affirming the lower court's permission to the television networks to do so with the ABSCAM videotapes. The court disagreed that the ABSCAM defendants shown on the tapes who were awaiting trial would be prejudiced by publication of the tapes.

Access to Governmental Records. During the survey period, no court cases construing the Texas Open Records Act were decided, but the attorney general handed down several important decisions. An interesting question presented in ORD-246 was whether the city of Dallas could disclose tax information involving approximately 60,000 persons to whom confidentiality had been promised. The Dallas Times Herald sought access to certain summary information contained in the city of Dallas's "business, personal property tax returns." On the face of those returns was a promise of confidentiality to the taxpayers. However, unless the records are exempt from disclosure under the Open Records Act, the promise of confidentiality carries with it no force and effect under Texas law.

The city recognized this fact, but argued that the tax returns might contain certain trade secrets or proprietary information. Dallas suggested that the individual businesses should be notified so that, if they desired, they could make a showing of competitive harm to the attorney general and, thus, demonstrate the applicability of one of the Act's exemptions. The Times Herald took the position that the Open Records Act prohibits notification to


39. Id., slip op. at 5957, 5962-63.

40. Id. at 5965.


43. The Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1980-1981), exempts disclosure of trade secrets and commercial or financial information made confidential by statute or judicial decision. See id. § 3(a)(10). The attorney general has ruled, however, that this exemption is no broader than the exemption in § 3(a)(1), which exempts information deemed confidential by law, be it constitutional or statutory, or by judicial opinion. See TEX. ATT'Y GEN. ORD-233 (1980). The attorney general also has held, in that same opinion, that the exemption in § 3(a)(10) is considerably more narrow than its counterpart in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1976). See TEX. ATT'Y GEN. ORD-233 (1980).
the taxpayer or his waiver of objection as a condition precedent to the release of the information. Section 14(b) provides that "[t]his Act does not authorize the withholding of information or limit the availability of public records to the public, except as expressly so provided." The Act provides for no notification program.

In ORD-246 the attorney general ruled that the city of Dallas must release the business property tax rendition forms as they were not exempted from disclosure under any portion of the Open Records Act. The attorney general further ruled that, assuming that an affected party, such as a taxpayer, had a right to object to the release of the information, the right had been waived in this case because supposedly identical tax information had been provided to a coordinate taxing authority, Dallas County. The county tax assessor-collector did not receive the information upon a promise of confidentiality and had freely disseminated the information to any requesting party under the Open Records Act.

It is, thus, unclear what rights, if any, a party affected by release of information has under the Open Records Act. In parallel situations, courts have held that an affected party has no standing to object to the release of information. That was the conclusion of the United States Supreme Court when it construed the federal Freedom of Information Act in Chrysler Corp. v. Brown. A similar construction has been placed on the California Public Record Act. The custodian of the sought-after records, however, may assert objections to disclosure. That was the conclusion of the Texas Supreme Court in Industrial Foundation v. Texas Industrial Accident Board, where the court held that the custodian could raise the privacy interest of a party mentioned in the records even though the custodian would not have standing to do so in a normal lawsuit.

The attorney general issued several other opinions under the Open Records Act during the survey period. In ORD-228 the attorney general ruled that records of the North Texas Commission are public under the Open Records Act because the commission receives funds from several public entities and has entered into contract with these entities. In another opinion the University of Houston claimed that the federal Family Educational Rights and Privacy Act prohibited a student from obtaining

45. TEX. ATT’Y GEN. ORD-246 (1980).
46. Id. at 3.
47. Id. at 2-3.
48. 441 U.S. 281, 292-93 (1979). The United States Supreme Court held that a party wishing to contest release of information could challenge the federal agency’s action under the Administrative Procedure Act. See generally Note, Reverse FOIA Suits After Chrysler: A New Direction, 48 FORDHAM L. REV. 185 (1979).
50. 540 S.W.2d 668 (Tex. 1976).
51. Id. at 678.
52. TEX. ATT’Y GEN. ORD-228 (1979).
53. Id. at 2.
direct access to his or her medical records under the Texas Open Records Act. The attorney general in ORD-229 disagreed and ruled that the Open Records Act did not conflict with the Family Educational Rights and Privacy Act, and furthermore that section 14(e) of the Texas Act did not exempt this information from disclosure.

The Fort Worth Star-Telegram published a series of articles charging misapplication of services and materials by certain administrative employees of the Fort Worth Independent School District. As a result of these charges, the school board directed its attorneys to conduct an extensive investigation into the matter. The attorneys, after interviewing witnesses and obtaining statements and affidavits, submitted a report to the school board. Following receipt of the report, the board made the statement that "there is no evidence to support the charges and allegations made by a Star-Telegram reporter regarding the serious misuse of Fort Worth Independent School District materials and employees for personal benefit." The executive editor of the Star-Telegram filed an Open Records Act request seeking a number of items including the written report by the attorneys and copies of the tapes and written statements of the witnesses. The attorney general ruled in ORD-230 that the factual report of the attorney, the affidavits of four administrators whose conduct was at issue, and copies of checks held by the school district as payment for supplies and labor were public and should be disclosed. The attorney general further stated that the tapes, transcripts, affidavits, and sworn statements of persons other than those on whom the investigation was focused were excepted from public disclosure under section 3(a)(1) of the Act. This is the so-called "informer's" privilege, "encouraging persons to report possible misconduct without their identity being disclosed.

In ORD-231 the Texas Department of Human Resources sought to determine whether production of computer-output-microfilm could be done more economically by the state rather than by an independent contractor. The study concluded that in-house production would be more economical. The corporation that had been providing the services sought to see the feasibility study. The attorney general concluded that the report contained factual information and, thus, was not entitled to protection under the intra-agency memorandum exemption of section 3(a)(1). Further, the attorney general stated that the report was not made privileged or

55. TEX. ATT'Y GEN. ORD-229 (1979).
57. TEX. ATT'Y GEN. ORD-229, at 3.
60. Id. at 5.
62. TEX. ATT'Y GEN. ORD-230, at 5. The informer's privilege generally is confined to law enforcement agencies. This attorney general opinion represents an extension of the privilege to a nonlaw enforcement context.
63. TEX. ATT'Y GEN. ORD-231 (1979).
64. Id. at 2-3; TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(11) (Vernon Supp. 1980-1981).
confidential by statute or judicial decision. Some of the information in the report had come from a private corporation that had given the Department of Human Resources the report in confidence; nevertheless, the attorney general held that the information must be disclosed.

In ORD-232 four firms submitted bids on a general construction contract to build the Gibbons Creek Steam Electric Station. The successful bidder and one other bidder sought to review the various proposals submitted to the Texas Municipal Power Agency. One of the bidders objected to the agency’s production of the materials. It claimed that exemptions 3(a)(4) and 3(a)(10) prohibited disclosure of the information. The attorney general ruled that the information was not a trade secret and that there had been no showing of harm to competitive position; accordingly, it ordered production of the material.

Similarly, in ORD-233 the attorney general decided that monthly rental figures paid by car rental agencies at the city airport in Lubbock, Texas were not exempted under sections 3(a)(4) or 3(a)(10) of the Act.

The attorney general ruled in ORD-234 that so long as good faith negotiations by the city of Lubbock regarding purchase of a particular tract of property were incomplete, the city could withhold proposed plans, locations, and cost estimates relating to a proposed reservoir and water line project under section 3(a)(5) of that Act.

In ORD-235 the attorney general concluded that the identity of a named employing unit and the partners in such employing unit, information that is obtained under the authority of the Texas Unemployment Compensation Act, is not exempt from disclosure under the Open Records Act.

The Open Records Act does not apply to the judiciary. In ORD-236 the attorney general was asked to decide whether files indicating whether probationers are complying with the terms of their probation are judicial records. The attorney general decided that because probation officers are employed by a district judge and subject to his supervision and control, the officers’ records are records of the judiciary and are not subject to the

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66. Id.
70. Id. at 4.
72. Id. at 2.
77. Id. at 2.
Open Records Act.\textsuperscript{80} A member of the legislature filed a request for records of the Emergency Medical Service system of the El Paso city-county health unit. The requested records related to emergency medical treatment and transportation to a hospital of persons who had given birth under the care of lay midwives. The legislator asked that the names of the patients not be deleted. In ORD-237\textsuperscript{81} the attorney general ruled that this information was protected by a common law or constitutional right of privacy and, thus, was exempt from disclosure.\textsuperscript{82} Deciding that the special right of access afforded legislators by sections 3(b) and 14(c)\textsuperscript{83} did not extend to information excepted from disclosure by statute or common law, the attorney general denied disclosure.\textsuperscript{84}

In ORD-238\textsuperscript{85} information disclosing the specific location of registered bee yards in a county was excepted from required public disclosure. The attorney general ruled that the names and addresses of those persons who registered their bee yards in a particular county should be disclosed, but agreed that the location of the bee yards was a trade secret.\textsuperscript{86} The attorney general reasoned that disclosure would impair the ability of the state entomologist to obtain information on a voluntary basis, which is necessary to carry out his inspection program of bee yards.\textsuperscript{87}

In ORD-239\textsuperscript{88} the attorney general decided that a college president's recommendations to the board of regents regarding faculty tenure are excepted from disclosure under the intra-agency memorandum section of the Act.\textsuperscript{89} This exception was also employed to compel disclosure in ORD-240.\textsuperscript{90} The department of banking was investigating allegations that a member of the legislature had been involved in the manipulation of securities pledged as collateral for a bank loan. The attorney general, however, ruled that one document, a letter from the department to the legislator, assuring him that he was not the subject of an investigation by the state banking board or the department of banking, should be disclosed.\textsuperscript{91}

ORD-241\textsuperscript{92} built upon the important decision in ORD-212.\textsuperscript{93} Both requests involved disclosure of information gathered by the Governor regarding potential nominees for public office. ORD-212 concluded that documents disclosing the identity of a person who has recommended an-

\begin{itemize}
  \item 80. Id. at 2.
  \item 82. Id. at 1.
  \item 84. Tex. Att'y Gen. ORD-237, at 2.
  \item 85. Tex. Att'y Gen. ORD-238 (1980).
  \item 86. Id. at 3-4.
  \item 87. Id.
  \item 88. Tex. Att'y Gen. ORD-239 (1980).
  \item 90. Tex. Att'y Gen. ORD-240 (1980).
  \item 91. Id. at 2.
  \item 92. Tex. Att'y Gen. ORD-241 (1980).
\end{itemize}
other for appointment by the Governor, or documents reflecting that a person has recommended himself for appointment, are not excepted from disclosure per se. In ORD-241 the attorney general considered two requests, one of which asked for "copies of all correspondence, telegrams, telephone memorandum, etc., that pertain to recommendations to fill expected vacancies on the Supreme Court of Texas." The second request sought memos of telephone calls in which persons were recommended for a vacancy on the public utilities commission as well as other records of communications regarding prospective nominees. The attorney general reiterated his decision that records maintained by the Governor that reveal recommendations of persons for appointment to public office are not excepted from disclosure per se. He went on to rule that documents that contain derogatory, largely unverified information contained in informal background checks of prospective appointees are not required to be revealed. The attorney general held, however, that neither a memorandum to the file listing names of persons recommended for appointment to particular positions by other persons, nor an application from an individual listing a number of appointive positions he would accept is exempt from disclosure. The filing consisted of two letters from persons applying for appointment to particular positions. The attorney general concluded that whether any particular document is required to be released will be determined in light of the test established by the Texas Supreme Court; that is, whether the information disclosed includes highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and in which the public has no legitimate interest.

In ORD-242 the student newspaper at Texas A&M University submitted a list of parking permit numbers and requested that the university furnish names of the students to whom the numbers were assigned. The university contended that it was precluded from releasing this information under the federal Family Educational Rights and Privacy Act. The attorney general agreed that the federal law applied, but found that an exception was provided for "directory information." Consequently, he classified the requested information as "directory information" and ordered disclosure, stating that "[a]ny student record which could be treated as directory information under federal law must be accorded that status unless its release would as a matter of law constitute an invasion of any

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94. Id. at 4.
96. Id.
97. Id. at 3.
98. Id. at 4.
99. Id. at 3.
100. Id. at 4; see Industrial Foundation v. Texas Indus. Accident Bd., 540 S.W.2d 668, 684-85 (Tex. 1976).
person's right of privacy."\textsuperscript{104} The Family Educational Rights and Privacy Act\textsuperscript{105} also was at issue in ORD-244.\textsuperscript{106} There the requestor sought names of each student enrolled in certain courses currently offered at Ranger Junior College. The attorney general concluded that the information requested reasonably could constitute "directory information" and, thus, was disclosable under the Open Records Act.\textsuperscript{107}

In ORD-243\textsuperscript{108} the requestor sought certain lists of persons arrested and convicted of prostitution and public lewdness. The Dallas city attorney stated that the Dallas Police Department did not maintain such lists. The attorney general stated that the well-established rule is that an agency is not required to compile or extract information if it can be made available by allowing the requestor access to the existing records.\textsuperscript{109} Because all this information was available from the daily police blotter and court records, the attorney general ruled that the police were not required to organize the data.\textsuperscript{110}

In ORD-245\textsuperscript{111} the attorney general concluded that the terms of a settlement agreement on an equal employment claim were available under the Open Records Act.\textsuperscript{112} The ruling rejected the contention that the settlement agreement was deemed confidential by law.\textsuperscript{113} It also declined to find the information exempt under the personnel files exception\textsuperscript{114} or the litigation exception\textsuperscript{115} to the Open Records Act.

In ORD-247\textsuperscript{116} the attorney general decided whether the names and addresses of retired appellate judges should be available to the public. He concluded that this information was made confidential by statutory law.\textsuperscript{117}

In ORD-248\textsuperscript{118} the city attorney of Dallas contended that draft documents of proposed municipal ordinances and resolutions prepared by the city's staff study group were exempt from disclosure. The attorney general agreed, applying section 3(a)(6) of the Open Records Act, which exempts "drafts and working papers involved in the preparation of proposed legislation."\textsuperscript{119}

In ORD-249\textsuperscript{120} the attorney general decided whether a ranking of per-

\textsuperscript{104} TEX. ATT'Y GEN. ORD-242, at 2.
\textsuperscript{106} TEX. ATT'Y GEN. ORD-244 (1980).
\textsuperscript{107} \textit{Id.} at 2.
\textsuperscript{108} TEX. ATT'Y GEN. ORD-243 (1980).
\textsuperscript{109} \textit{Id.} at 1.
\textsuperscript{110} \textit{Id.} at 1-2.
\textsuperscript{111} TEX. ATT'Y GEN. ORD-245 (1980).
\textsuperscript{112} \textit{Id.} at 2.
\textsuperscript{113} \textit{Id.} at 1-2.
\textsuperscript{115} \textit{Id.} § 3(a)(3).
\textsuperscript{116} TEX. ATT'Y GEN. ORD-245, at 2.
\textsuperscript{117} \textit{Id.} at 2.
\textsuperscript{118} TEX. ATT'Y GEN. ORD-247 (1980).
\textsuperscript{119} \textit{Id.} at 2; \textit{see} TEX. REV. CIV. STAT. ANN. art. 6228k, § 7 (Vernon Supp. 1980-1981).
\textsuperscript{120} TEX. ATT'Y GEN. ORD-248 (1980).
\textsuperscript{121} \textit{Id.} at 2; TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(6) (Vernon Supp. 1980-1981).
sons recommended for employment by a city is public information. The information requested was used in selecting persons to fill vacancies in the various departments of municipal government. The requestor informed the attorney general that he was particularly interested in determining whether members of minority groups had applied for any of the city positions. The attorney general ruled that the completed “appointment and promotion request” ranking the top applicants is excepted from disclosure; however, where the form reflects the fact that no members of minority groups have applied for a position, the requestor is entitled to examine that portion of the form. 122

Information pertaining to the sale of hospitals owned by county hospital authorities was requested in ORD-250. 123 The Texas Commissioner of Health contended that article 4437f, section 15 124 made the information requested confidential. The attorney general ruled that the disclosure should be made as to whether any hospital owned by a county hospital authority had been sold to a proprietary hospital company, but that the identity of the authority selling the hospital should not be revealed. 125

In ORD-251 126 the attorney general was asked whether accident reports prepared by the Texas Department of Public Safety (DPS) as part of its internal investigation of accidents involving DPS vehicles were public under the Act. Applying the exemption contained in section 3(a)(11), 127 the attorney general concluded that if the information would not be obtainable in discovery in civil litigation then it must be exempted from disclosure under the Act. 128 After consideration of rule 167 of the Texas Rules of Civil Procedure, he ruled that the information requested would not be discoverable in a civil suit and, therefore, was exempt. 129

ORD-252 130 considered whether closed investigation files in murder cases are available to the public. The attorney general concluded that the names and statements of witnesses in the case could be withheld where disclosure might subject them to harassment or harm their cooperation with law enforcement officers. 131 The attorney general ruled, however, that the balance of the files should be released. 132

In ORD-253 133 the attorney general concluded that a list of the amount of teacher retirement funds paid to individual employees should be made available for the use of the legislature so long as the information disclosed

122. Id. at 2.
129. Id. at 3-4.
131. Id. at 4-5.
132. Id. at 5.
does not furnish a basis for identification of the individual retirees. In another brief ruling, the attorney general decided that the county clerk was required to disclose information on applications for marriage licenses, including the applicants' full names, addresses, social security numbers, and dates and places of birth, as no exemption to disclosure existed. Finally, in ORD-255 proposals submitted by consultants seeking a contract with a government body were ruled to be available under the Act. Although the attorney general stated that lists of customers contained in the bid proposals may be withheld, he ruled that the balance of the proposals were public.

Open Meetings Act. Only one case decided during the survey period construed the Texas Open Meetings Act. In *Bowen v. Calallen Independent School District* the Corpus Christi court of civil appeals considered whether the Act prohibited a school board's dismissal of a teacher when the action was taken in executive session. The court noted that the Texas Open Meetings Act unqualifiedly prohibited the school board from discussing a teacher's dismissal in closed session over that teacher's objection. In this case, however, because the teacher did not object to the executive session, the court held that he waived his rights under the Open Meetings Act to have his employment status discussed in public.

Cameras in the Courtroom. Texas currently provides for audio or visual recording of appellate proceedings with the consent of the presiding judge, and, in certain limited instances, provides for the similar recording of trial proceedings with the consent of the parties. More than half of the states have some legislation permitting the recording of trials, including criminal proceedings. Perhaps the leading jurisdiction is Florida, which has initiated a pilot program for televising trials. During the survey period, the United States Supreme Court agreed to consider whether the presence of electronic media in the courtroom violates a criminal defendant's right to a fair and impartial trial. The case, *Chandler v. Florida*, concerned two former Miami policemen who were convicted of burglarizing a restaurant. A Florida appellate court affirmed their convictions, holding that no evidence existed to show that the defendants had been

134. *Id.* at 2.
135. *Id.*.
136. *Id.* at 3.
137. *Id.*.
138. *Id.* at 1 (1980).
139. *Id.*.
140. *Id.*; *Id.* at 3.
141. *Id.* at 236.
142. *Id.*
143. *Id.*.
144. *Id.* at 2.
145. *Id.*.
hampered by the televising of the proceeding.\textsuperscript{146} The Florida Supreme Court refused to hear the appeal,\textsuperscript{147} noting that it had fully considered the constitutional questions surrounding camera coverage when it adopted new court rules in April 1979.\textsuperscript{148} The United States Supreme Court, in an eight-to-zero decision,\textsuperscript{149} held that televising these proceedings did not violate the Constitution in view of the defendants' failure to show prejudice to their fair trial rights.\textsuperscript{150}

II. Election Law

The Voting Rights Act and Constitutional Litigation. In \textit{United States v. Uvalde Consolidated Independent School District}\textsuperscript{151} the Fifth Circuit decided two important questions under the federal Voting Rights Act.\textsuperscript{152} First, it held that following a 1975 amendment, section 2 of the Act\textsuperscript{153} covers purposeful discrimination in at-large election schemes.\textsuperscript{154} Secondly, it decided that the term "state or political subdivision," as used in section 2, includes a school board.\textsuperscript{155} The court expressly chose not to address a third question, whether section 2 now forbids vote dilution in at-large election schemes when no allegation or evidence of purposeful discrimination is presented.\textsuperscript{156}

The attorney general brought suit against the Uvalde school district under the Act, alleging that the at-large system of electing representatives to the local school board was implemented with the intent and purpose of causing irreparable injury to Mexican-American voters by effectively and purposefully precluding them from meaningful access to the political process. The district court dismissed the suit for failure to state a claim, holding that section 2 does not itself prohibit at-large school board elections.\textsuperscript{157} On appeal the school district urged a second ground for sustaining the trial

\textsuperscript{146} 366 So. 2d 64, 71 (Fla. Dist. Ct. App. 1978).
\textsuperscript{147} 376 So. 2d 1157, 1157 (Fla. 1979).
\textsuperscript{148} \textit{Id.}; see Petition of the Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 781-82 (Fla 1979).
\textsuperscript{149} Justice Stevens did not participate in the decision.
\textsuperscript{150} 49 U.S.L.W. at 4147. It was a Texas case that originally led to the banning of television cameras from the courtroom. In 1964 the United States Supreme Court ruled that Billy Sol Estes had been deprived of a fair trial by the presence of cameras while his case was being heard. \textit{See} Estes v. Texas, 381 U.S. 532 (1965).
\textsuperscript{151} 625 F.2d 547 (5th Cir. 1980).
\textsuperscript{153} Section 2 of the Voting Rights Act provides:
No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(5)(2) [which prohibits any denial or abridgment of the right to vote because the voter is a member of a language minority group].
\textsuperscript{154} 625 F.2d at 554.
\textsuperscript{155} \textit{Id}. at 556.
\textsuperscript{156} \textit{Id}. at 554 n.12.
court, arguing that a school board is not a "state or political subdivision" within the meaning of section 2.

The school board also argued that section 2 does not cover the dilution of voting rights even when a claim of discriminatory purpose is made. The board contended that section 2 does not deal with every voting standard, practice, or procedure, but rather is limited to voting procedures that deny someone the right to vote. The school board relied heavily upon the United States Supreme Court's plurality opinion in *City of Mobile v. Bolden.* In that case the Court reversed the Fifth Circuit and held that Mobile, Alabama's at-large system of elections did not operate to discriminate against black voters in violation of the fourteenth and fifteenth amendments. Six Justices wrote opinions in *Bolden,* and the Fifth Circuit in the *Uvalde* decision characterized the plurality opinion as ambiguous. Nevertheless, the appellate court concluded that when all the *Bolden* dissenting and concurring opinions were considered as a whole, "it is clear that a majority of the court believes that a fifteenth amendment claim can be made out against vote-diluting at-large districting if discriminatory purpose is proved." Accordingly, in *Uvalde* the Fifth Circuit wrote that "at-large districting may result in substantial dilution of a minority vote and therefore constitute unconstitutional infringement of the right to vote if discriminatory purpose is shown." The court reversed and remanded the case, holding that a section 2 claim had been stated by the government.

The Fifth Circuit also rejected the school district's claim that it was not a "state or political subdivision" within the meaning of the Act. In doing so, the court harmonized an apparent conflict between two recent United States Supreme Court decisions. In *United States v. Board of Commissioners* the Court held that section 5 of the Voting Rights Act, which requires a "state or political subdivision" to clear voting changes with the Justice Department prior to their implementation, applied to Sheffield, Alabama, a municipality that did not register voters and, therefore, was not a state, county, or registration unit. Under section 14(c)(2) of the Act, the term "political subdivision" means "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." The school dis-

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159. *Id.* at 61-65.
160. 625 F.2d at 552.
161. *Id.* at 552 n.8.
162. *Id.* at 552.
163. *Id.* at 556.
164. *Id.*
167. 435 U.S. at 135.
169. *Id.*
strict claimed that because it was not a county and did not register voters, it was not a political subdivision as defined by section 14(c)(2). The Court in *United States v. Board of Commissioners* rejected that type of argument for section 5 purposes. In *City of Rome v. United States*, however, the Court concluded that the provisions of section 4(a) of the Act, which permit a state or political subdivision to avoid provisions of the Act by bringing a suit to establish that it has not discriminated in the past, do not apply to a municipality. The Fifth Circuit, thus, was faced with the task of deciding whether “state or political subdivision” as used in section 2 should be used broadly as in *United States v. Board of Commissioners*, or whether a narrow reading was required as in *Rome*. Relying upon legislative intent, the Fifth Circuit held that “[i]n our opinion Congress intended to forbid racial, color and language minority discrimination in all of the myriad elections reached by section 2.” The Court concluded that a school board is a political subdivision for section 2 purposes.

In *Sanchez v. McDaniel* the Fifth Circuit held that a proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than a court-ordered plan merely because it is the product of litigation conducted in a federal forum. Legislative plans under the Voting Rights Act must be submitted for clearance to the Justice Department in certain situations; however, court-ordered plans need not obtain clearance. In 1968 the United States District Court in Kleburg County, Texas, determined that the county apportionment plan violated the constitutional principle of one man, one vote. The Kleburg County commissioners' court was ordered to submit a proposed reapportionment plan to the district court. Following this order, the commissioners' court employed a consultant to formulate a plan that subsequently was adopted by and submitted to the district court. The district court reviewed the proposed reapportionment plan and approved it for use in the 1980 primary and general elections. Under these facts, the Fifth Circuit held that the proposed reapportionment plan submitted to the district court was subject to the clearance provisions of section 5 of the Voting Rights Act. It therefore vacated the decision of the district court, which had considered,

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170. 446 U.S. 156 (1980).
172. 446 U.S. at 167.
173. 435 U.S. 110, 117-18 (1978). See also Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 43-47 (1978) (county board of education is a “political subdivision” within purview of section 5 of the Voting Rights Act, even though it does not conduct elections, because it “has the power to affect candidate participation in . . . elections”).
174. 625 F.2d at 556.
175. Id.
176. 615 F.2d 1023 (5th Cir. 1980).
177. Id. at 1024.
179. See 615 F.2d at 1024.
180. See id.
181. See id.
on its own, the constitutionality of the proposed plan.\textsuperscript{183}

\textit{Watson v. Commissioners Court}\textsuperscript{184} involved an unusual situation in which an election was to be held pursuant to a 1965 reapportionment plan that all parties seemed to agree was unconstitutional. The trial court had ruled, however, that it would be impracticable to reapportion until after the 1980 census had been completed.\textsuperscript{185} Thus, the district court refused to enjoin a May 30, 1980 primary election of members of the commissioners' court.\textsuperscript{186} It ordered a reapportionment plan to be submitted to the court within 180 days of receipt of the official results of the 1980 population census.\textsuperscript{187} The Fifth Circuit reversed, holding that the equitable powers of the court should have been invoked to enjoin the primary election and to formulate an equitable apportionment plan.\textsuperscript{188} The court ordered that result.\textsuperscript{189}

Two district court cases decided during the survey period considered whether the seeking of elective office could result in a dismissal or forced resignation from government employment. In \textit{Stone v. City of Wichita Falls}\textsuperscript{190} the plaintiff, Stone, a Wichita Falls fireman, became a candidate for county commissioner in Archer County. Stone was dismissed for violating a city service rule and the city charter, which stated that any "employee of the City who shall become a candidate for election to any office shall forfeit the office or employment held under the City."\textsuperscript{191} The court invalidated the city charter provision, holding that it conflicted with state statutory and constitutional law and the first amendment to the Constitution.\textsuperscript{192}

In \textit{Fashing v. Moore}\textsuperscript{193} the court considered a challenge to the constitutionality of article III, section 19\textsuperscript{194} and article XVI, section 65\textsuperscript{195} of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{183} 615 F.2d at 1024.
\item \textsuperscript{184} 616 F.2d 105 (5th Cir. 1980).
\item \textsuperscript{185} \textit{id}. at 105-06.
\item \textsuperscript{186} \textit{id}. at 106.
\item \textsuperscript{187} \textit{id}. at 107.
\item \textsuperscript{188} \textit{id}. at 107.
\item \textsuperscript{189} \textit{id}. at 107.
\item \textsuperscript{190} 477 F. Supp. 581 (N.D. Tex. 1979).
\item \textsuperscript{191} \textit{id}. at 583 n.2.
\item \textsuperscript{192} \textit{id}. at 585.
\item \textsuperscript{193} 489 F. Supp. 471 (W.D. Tex. 1980).
\item \textsuperscript{194} \textsc{Tex. Const.} art. III, § 19 provides:
\begin{quote}
No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term of which he is elected or appointed, be eligible to the Legislature.
\end{quote}
\item \textsuperscript{195} \textsc{Tex. Const.} art. XVI, § 65 provides:
\begin{quote}
[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.
\end{quote}
\end{itemize}
\end{footnotesize}
Texas Constitution. The district court held that article XVI, section 65 violates the equal protection clause of the fourteenth amendment.\textsuperscript{196} While conceding that important government interests were served by the provision, the court concluded that the classification embodied in section 65 was not reasonably necessary to vindicate those interests.\textsuperscript{197} It also found the classifications in article III, section 19 to be invidiously discriminatory.\textsuperscript{198} The court concluded that both provisions were unconstitutional.\textsuperscript{199}

\textit{Gamza v. Aguirre}\textsuperscript{200} involved a dispute between two candidates for a position on the board of the El Paso school district. Aguirre won the election, but his opponent, Gamza, later learned of possible voting irregularities that, if corrected, would result in the latter's victory. Gamza challenged the election in both state and federal courts. The state suit was dismissed for failure to give statutory notice within the prescribed time period.\textsuperscript{201} The federal case proceeded on the theory that the voting irregularities were of constitutional dimension. The trial court granted judgment for the plaintiff and ordered that Gamza be installed as a member of the school board.\textsuperscript{202} The trial court's decision was based upon a finding that the voting irregularities were the product of "scienter, bad faith and flagrant disregard for an existing court order."\textsuperscript{203} The Fifth Circuit noted that the Constitution protects the right of all qualified citizens to vote, and that qualified voters have a right to have their votes counted.\textsuperscript{204} In this case, however, the appellate court drew a distinction between state laws and patterns of state action that systematically deny equality in voting and "episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote."\textsuperscript{205} The court concluded that a plaintiff must show an element of intentional or purposeful discrimination in order to challenge the unlawful administration by state officers of a nondiscriminatory state law.\textsuperscript{206} Believing that the conduct found by the trial court to support its judgment was insufficient to sustain a finding of constitutional violation, the Fifth Circuit reversed and remanded with instructions to dismiss the complaint.\textsuperscript{207}

Two other cases decided during the survey period are of interest. In

\begin{thebibliography}{99}
\bibitem{196} 489 F. Supp. at 474.
\bibitem{197} 474-75.
\bibitem{198} 475.
\bibitem{199} 476.
\bibitem{200} 619 F.2d 449 (5th Cir. 1980).
\bibitem{201} 451.
\bibitem{202} 452.
\bibitem{203} 453.
\bibitem{204} 454.
\bibitem{205} 455.
\bibitem{206} 456.
\bibitem{207} The court reminded the plaintiff that he had a remedy for the improprieties at issue under the Texas Election Code, and that he had forfeited that remedy by not giving his opponent the proper notice of an election contest. \textit{Id}; see \textit{TEx. ELEC. CODE ANN.} art. 9.03 (Vernon 1967).
\end{thebibliography}
Garza v. Gates\(^{208}\) a three-judge federal panel ruled that the United States Attorney General had failed to file an objection to a 1973 redistricting plan submitted by Atascosa County within the sixty-day period required by the Voting Rights Act.\(^{209}\) The court, thus, denied a motion for a preliminary injunction to prevent the 1980 election of county commissioners.\(^{210}\) In Rodgers v. Commissioners Court\(^{211}\) the court accepted a reapportionment plan submitted by the defendants and denied the plaintiff's request for a special election.\(^{212}\)

**The Texas Election Code and Other State Statutes.** On August 1, 1978, a federal grand jury indicted Hidalgo County Criminal District Attorney Oscar McInnis for perjury and conspiracy to commit murder. McInnis, however, was reelected and returned to office for a term beginning January 1, 1979. The State of Texas, acting through the Texas Prosecutors Coordinating Council brought suit under article 332d\(^{213}\) to remove McInnis from office. The case was dismissed with prejudice upon the authority of article 5986,\(^{214}\) which precludes the removal of a criminal district attorney for acts of misconduct that occur prior to reelection. The court of civil appeals reversed,\(^{215}\) holding what while article 5986 was applicable, the statute prohibited removal from office for acts of misconduct for which the voters had forgiven the officeholder.\(^{216}\) The record was unclear as to whether the voters knew of McInnis's acts of misconduct when they reelected him to office and, thus, whether they had forgiven him. Upon application for a writ of error, the Texas Supreme Court in a per curiam opinion wrote that article 5986 precluded McInnis's removal from office.\(^{217}\) Upon motion for rehearing, however, the Texas Supreme Court withdrew its per curiam opinion and reached a contrary result over four dissents.\(^{218}\) The court held that article 332d, which provides for the reprimand, disqualification, or removal of prosecuting attorneys, preempted the field with respect to the regulation of prosecuting attorneys.\(^{219}\) Thus, the court ruled that the passage of article 322b in 1977 impliedly repealed article 5986.\(^{220}\) The dissent, on the other hand, argued that although the removal provisions of article 322b define the nature of misconduct that constitutes grounds for removal, they are silent on when the misconduct must occur.\(^{221}\) The dissent contended that legislation with respect to timing was provided by article

\(^{208}\) 482 F. Supp. 1211 (W.D. Tex. 1980) (per curiam).
\(^{209}\) Id. at 1213; see 42 U.S.C. § 1973c (1976).
\(^{210}\) 482 F. Supp. at 1213.
\(^{212}\) Id. at 782.
\(^{214}\) Id. art. 5986 (Vernon 1962).
\(^{216}\) Id. at 895.
\(^{217}\) See McInnis v. State, 603 S.W.2d 179, 180 (Tex. 1980).
\(^{218}\) Id.
\(^{219}\) Id.
\(^{220}\) Id. at 183.
\(^{221}\) Id. at 184.
The dissent could find no legislative history to support the conclusion that the legislature was repealing article 5986 when it enacted article 332b.

Garcia v. Avila concerned an election contest in Zavala County. The trial court declared the election of five officers in the 1978 general elections void and ordered a new election. The court of civil appeals affirmed on the basis that the trial court's order to impound election material was violated and, therefore, it was impossible to ascertain the true results of the election. Article 9.15 of the Texas Election Code provides that when it is impossible to ascertain the true results of the election, the court shall adjudge such election void. The appellants also contended that the trial court erred in allowing the inspection of impounded election materials. They argued that before a trial court in an election contest can properly order the ballot boxes to be opened, there must be a showing of fraud or illegality. The appellate court overruled this contention, noting that as a result of the amendment to article 8.15 in 1977, "[i]t follows that the sacredness of the secret ballot is no longer threatened by an inspection of printed ballots. Consequently, a concern for the secrecy of the ballots is no longer a valid consideration in determining whether ballot boxes should be opened in a contest of a general election." In so ruling, the court distinguished earlier cases on the basis that they were decided prior to the 1977 amendment.

In Pierce v. Peters the San Antonio court of civil appeals granted a writ of mandamus and required the removal of the name of a state legislative candidate from the ballot. The candidate had filed as a candidate for the Democratic nomination for the office of state representative by attempting to comply with article 13.08(d) of the Texas Election Code. That section allows a candidate, in lieu of the payment of a $400 filing fee, to file a petition signed by eligible voters equal in number to at least two percent of the number of votes cast within that district for the Democratic Party's candidate for governor in the 1978 gubernatorial general election. It was contended that the petition was insufficient because it did not reflect the city in which the parties signing the petition resided.

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222. Id. at 185.
223. Id. at 184.
225. Id. at 403.
226. Id. at 406.
229. 597 S.W.2d at 405 n.2.
233. Id.
234. See also Shields v. Upham, 597 S.W.2d 502 (Tex. Civ. App.—El Paso 1980, no writ) (per curiam) (nominating petition that did not show street address in particular city within district and did not show county that issued registration did not comply with requirements
The court of appeals agreed, holding that "address" has more than one meaning and that the term is not necessarily synonymous with "residence" or "domicile." Under article 13.08(d), however, the court believed that address refers to the residence of the voter and not merely to the place, such as a post office box, where he receives his mail. Accordingly, the court held that address must include a street address if residing in a city, and the person's rural route address if not residing in a city. It also required that the city be listed.

The San Antonio court of civil appeals also granted a writ of mandamus ordering the removal from the official ballot of the name of a candidate for trustee of the San Antonio Independent School District. Under article 13.12(e) of the Texas Election Code, an application for a place on the ballot shall be considered filed if it is sent to the proper chairman at his post office address by registered or certified mail "not later than the day on which the filing deadline falls." In Hernandez the candidate had mailed his application prior to the filing deadline; it was not sent by certified or registered mail, however, and was received after the date for filing. The court ruled that, assuming the Election Code applied to this type of election, the candidate had not complied with article 13.12. The court did express doubt, however, that the Election Code even applied, stating that the manner of applying for a place on the ballot is governed by section 23.03 of the Texas Education Code. The court implied that if the Education Code rather than the Election Code applied, the general rule that an "instrument is not 'filed' until it is received by the person with whom it is required to be filed" would be applicable.

In Yapor v. McConnell the El Paso court of civil appeals concluded that a loyalty affidavit required pursuant to articles 13.12(b) and 6.02 of the Election Code was not void even though the applicant had failed to fill in his name, failed to supply the county of his residence, and failed to state the office he was seeking. His loyalty oath, however, was signed at the bottom of the form and properly notarized and acknowledged. The court ruled that the failure to provide the information in the affidavit was not fatal and it granted a writ of mandamus requiring that the candidate's
name be placed on the ballot.248

In *Taxpayers' Political Action Committee v. City of Houston*249 the petitioner sought to compel the Houston city council to call an election on a tax limitation amendment to the city charter. Upon presentation of the amendment, the council, in compliance with article 1170,250 called an election for the purpose of submitting certain proposed amendments to the city charter, including the tax amendment. Before the election could be held, however, a suit was filed in federal court seeking to enjoin the election as violative of section 5 of the Voting Rights Act.251 Houston was able to comply with the Voting Rights Act with respect to one proposed amendment dealing with the method of electing councilmembers. That proposition was put to the voters, and the election was certified by the secretary of state. Article 1165252 and the Texas Constitution253 prohibit amendments to a city charter more often than once every two years. As a result, the court of civil appeals found that the Houston city council had no clear legal duty to call an election on petitioner's proposed amendment.254

III. ZONING

Sexually Related Businesses. In *Stansberry v. Holmes*255 the United States District Court had permanently enjoined the enforcement of certain county regulations dealing with zoning of certain sexually-oriented commercial enterprises.256 The Fifth Circuit reversed the case and remanded, holding that the regulations were not invalid as violative of constitutional rights of free speech and that the regulations were not unconstitutionally vague and overbroad.257 The appellate court noted that the case did not involve a first amendment question because the zoning regulations did not attempt to zone businesses such as bookstores or movie theatres that are protected by the first amendment's free speech and press clauses.258 Rather, the court agreed with the appellants that the regulations must be measured by traditional zoning standards: whether the regulations are arbitrary and unreasonable, having no rational relationship to legitimate governmental interests.259 The court concluded that the instant regulations clearly met this standard and that the definitions contained in the regulations were sufficiently clear to provide adequate warnings of proscribed conduct.260

248. *Id.* at 556.
249. 596 S.W.2d 147 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).
254. 596 S.W.2d at 150.
255. 613 F.2d 1285 (5th Cir. 1980).
256. *Id.* at 1287.
257. *Id.* at 1290.
258. *Id.* at 1288.
259. *Id.* at 1289.
260. *Id.* at 1289-90.
Harris County’s comprehensive regulations concerning massage parlors were attacked in Harper v. Lindsay.\textsuperscript{261} The trial court had found that the regulations’ prohibition of massage by the opposite sex\textsuperscript{262} exceeded the scope of authority the legislature had delegated to the county commissioners’ court.\textsuperscript{263} In all other respects the trial court upheld the validity of the regulations. On appeal, the trial court’s invalidation of the transsexual massage provisions was not at issue. Rather the one unconstitutional provision found by the Fifth Circuit was a requirement that a six-inch by six-inch unobstructed opening on all interior doors of a massage parlor had no rational basis.\textsuperscript{264}

Harris County was in court again when its authorities began investigating a modeling studio to determine whether the business was operated for the purpose of prostitution. The trial court granted a temporary injunction ordering Glenn Green and others to abate the nuisance by permitting and allowing no person or persons to use the premises for the purposes of prostitution.\textsuperscript{265} The court found that Green was one of the parties in lawful possession of the modeling studio. Two months later, an undercover police officer went to the studio and he was solicited for an act of prostitution. The state then filed a motion for contempt against Green, alleging that he intentionally and knowingly violated the order of the court by allowing an act of prostitution within the studio. The trial court held Green in contempt.\textsuperscript{266} An application for writ of habeas corpus was filed in the Texas Supreme Court.\textsuperscript{267} Green contended that there was no evidence to support the ruling that he personally disobeyed the temporary injunction. The Texas Supreme Court held that the contempt judgment was void and granted the writ.\textsuperscript{268}

\textit{Spot Zoning}. Spot zoning occurs when a particular tract of land is zoned differently from the surrounding area without regard to a plan or design or without justification by changed conditions. In such a case the zoning ordinance is void.\textsuperscript{269} A zoning ordinance was said to be impermissible as spot zoning in Bernard v. City of Bedford.\textsuperscript{270} Bedford had obtained a land use plan and used it as a guide in enacting a city ordinance in 1968. In

\begin{footnotes}
\footnotetext{261}{616 F.2d 849 (5th Cir. 1980).}
\footnotetext{262}{See id. at 860.}
\footnotetext{263}{Harper v. Lindsay, 454 F. Supp. 597, 600 (S.D. Tex. 1978).}
\footnotetext{264}{616 F.2d at 855. In an opinion by Judge Fay, the appellate court wrote: The case presents a touchy situation, and our decision is likely to rub some of the parties the wrong way. We shall attempt, however, to apply the soothing balm of reason to the knotty issues before us in an effort to ease the tensions that have arisen. We hold that all but one provision of Harris County’s challenged massage parlor regulations are constitutional. Id. at 851 (footnote omitted).}
\footnotetext{265}{See Ex parte Green, 603 S.W.2d 216, 217 (Tex. 1980).}
\footnotetext{266}{See id.}
\footnotetext{267}{Ex parte Green, 603 S.W.2d 216 (Tex. 1980).}
\footnotetext{268}{Id. at 217-18.}
\footnotetext{269}{See TEX. REV. CIV. STAT. ANN. art. 1011c (Vernon 1963).}
\footnotetext{270}{593 S.W.2d 809 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.).}
\end{footnotes}
1970 an additional ordinance was passed rezoning certain property. Adjacent property owners brought suit to have the ordinance declared void. The trial court denied relief and the court of appeals affirmed.\textsuperscript{271} The court agreed that if the ordinance constituted spot zoning it would be void; the judges however, went on to say that the courts have no authority to interfere with zoning decisions unless the ordinance represents a clear abuse of municipal discretion.\textsuperscript{272} The court stated that the burden was on the party challenging the validity of the ordinance to show that no facts existed that would authorize the city to exercise its discretion by enacting the ordinance.\textsuperscript{273} The court of civil appeals thus characterized the appellants' burden as showing that the ordinance deviated from the city's comprehensive plan and that such deviation was without justification.\textsuperscript{274} The court found that the appellants had not met that burden.\textsuperscript{275}

Spot zoning was also at issue in \textit{Tippett v. City of Pharr}.\textsuperscript{276} The Corpus Christi court of civil appeals found that the rezoning of certain property created an island within a greater area that already was zoned for single family residential dwellings and, thus, was spot zoning.\textsuperscript{277} The court observed that the ordinance was not necessitated by changed conditions bearing any substantial relation to the public health, safety, morals, or general welfare of the city.\textsuperscript{278} Accordingly, the trial court's decision to deny relief to the plaintiff was reversed.\textsuperscript{279}

IV. Annexation

\textit{Navigation Territory}. Two cases reported during the survey period involved the annexation of navigation territory pursuant to articles 1183 through 1187.\textsuperscript{280} In \textit{City of Nassau Bay v. City of Webster}\textsuperscript{281} the court of civil appeals held that a home rule city may not use articles 1183 through 1187, the navigable streams annexation statutes, to annex territory within another city's extraterritorial jurisdiction without the consent of the latter city.\textsuperscript{282} In 1977 Nassau Bay passed an ordinance purporting to annex cer-

\textsuperscript{271. Id. at 810.}
\textsuperscript{272. Id. at 811.}
\textsuperscript{273. Id.}
\textsuperscript{274. Id.}
\textsuperscript{275. Id. at 811-12.}
\textsuperscript{276. 600 S.W.2d 951 (Tex. Civ. App.—Corpus Christi 1980, writ granted).}
\textsuperscript{277. Id. at 956.}
\textsuperscript{278. Id. at 957.}
\textsuperscript{279. Id. at 959. The court noted that an ordinance that singles out a small area for treatment different from that accorded to similar surrounding land, without any showing of justifiable changes in conditions, especially when such preferential treatment is given in an amendatory zoning ordinance that is contrary to a long-established comprehensive zoning plan, is condemned as spot zoning. Id. at 955.}
\textsuperscript{280. TEX. REV. CIV. STAT. ANN. arts. 1183-1187 (Vernon 1963). These statutes allow Texas cities located on navigable streams to extend their boundaries for certain limited purposes by 2,500 feet on both sides of such streams for 20 miles.}
\textsuperscript{281. 600 S.W.2d 905(Tex. Civ. App.—Houston [1st Dist.]), \textit{writ ref'd n.r.e. per curiam}, 608 S.W.2d 618 (Tex. 1980).}
\textsuperscript{282. Id. at 909. The court also ruled that it was not necessary for the suit to have been brought by a quo warranto proceeding or that the state be a party, for the reason that Web-
tain property along a navigable bayou, property concededly within the extraterritorial jurisdictions of the city of Webster and the city of Houston. Webster sued and Houston intervened to have the ordinance declared void, to oust Nassau Bay from any claim over the disputed area, and to enjoin Nassau Bay from attempting to exercise authority over the area.

The Municipal Annexation Act\(^2\) requires an annexing city to obtain the consent of an affected city when attempting to annex territory within the affected city's extraterritorial jurisdiction.\(^3\) Nassau Bay argued that the consent requirement was inapplicable when a city annexes territory pursuant to the navigable streams statutes, and cited a "savings clause" in the Act to support this exception.\(^4\) The court rejected this argument and observed that Nassau Bay's interpretation would make it possible for two cities to exercise simultaneous and possibly inconsistent authority over the same area, with one city acting pursuant to its powers over its navigation territory and the other city acting pursuant to its rights with regard to its extraterritorial area.\(^5\) The court read the Municipal Annexation Act and navigable streams annexation statutes to avoid this conflict and concluded that the savings clause in the Act was not meant to allow a city to annex navigation territory already within the extraterritorial jurisdiction of another city, but rather "was meant to exempt navigation areas already annexed from encroachment by another city's extraterritorial jurisdiction and to exempt otherwise valid navigation annexations from the various restrictions imposed by Article 970a."\(^6\) The court, apparently reaching the issue for the first time in Texas, also ruled that the annexation ordinance was void because Nassau Bay as a home rule city could not use the navigable streams annexation procedure in article 1183.\(^7\) The court held that the clear language of article 1183 specifies that it applies to cities "acting under special charters,"\(^8\) and that for purposes of article 1183 the term "special charters" does not include home rule charters.\(^9\) The Texas Supreme Court refused Nassau Bay's application for writ of error, finding no reversible error, and reserved the question of whether articles 1183 through 1187 apply only to cities acting under special charters.\(^10\)

In another navigation territory case, City of Port Arthur v. Jefferson...
County Fresh Water Supply District No. 1292 the Beaumont court of civil appeals held that the 500-foot-width requirement of section 7B-1 of the Municipal Annexation Act293 is inapplicable when a city annexes territory within its navigation territory or within the boundaries of a water district.294 In 1978 Port Arthur annexed all of the territory within Jefferson County Fresh Water Supply District No. 1 and thereafter abolished the water district. The water district challenged this annexation, and in 1979 Port Arthur annexed and abolished the water district a second time. At the time of each attempted annexation, the territory in the southern tip of the water district was less than 500 feet in width at its narrowest point and was within Port Arthur's navigation territory295 but outside its extraterritorial jurisdiction. At the time of the first attempted annexation, the territory in the northern tip of the water district was less than 500 feet wide and was within the city's navigation territory and extraterritorial jurisdiction.

Rejecting the water district's contention that the annexation ordinances were void because of the 500-foot-width requirement of section 7B-1, the court noted that a savings clause in the Act296 provided that the Act did not repeal or affect the navigable streams annexation statutes.297 The court held that the addition of the 500-foot width requirement to the Act in 1973 did not affect this exemption of navigation territory from the provisions of the Act and therefore did not impose a 500-foot minimum width requirement for the annexation of navigation territory.298 The court also held that the 500-foot requirement did not apply to the annexation of a water district,299 and that the annexations were therefore proper because all the area that was annexed was within the water district.300

"Buffer Strip" Annexations. In City of West Orange v. State ex rel. City of Orange301 West Orange sued Orange, seeking a judicial apportionment of the two cities' extraterritorial jurisdictions and claiming that West Orange had established its extraterritorial jurisdiction over certain disputed territory via a 1970 ordinance. The trial court held that the disputed territory was within the extraterritorial jurisdiction of Orange by virtue of a 1960

292. 596 S.W.2d 553 (Tex. Civ. App.—Beaumont 1980, writ ref’d n.r.e.).
293. TEX. REV. CIV. STAT. ANN. art. 970a, § 7B-1 (Vernon Pam. Supp. 1963-1980), provides in part: “No home rule or general law city may annex any area, whether publicly or privately owned, unless the width of such area at its narrowest point is at least 500 feet
294. 596 S.W.2d at 556-557. The court also held that the water district was bound by a portion of the judgment from which it did not appeal and that it must proceed in federal court if it wished to challenge the annexation for noncompliance with the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976 & Supp. III 1979). 596 S.W.2d at 557-58.
295. In 1913 Port Arthur had established a navigation territory pursuant to the forerunner of TEX. REV. CIV. STAT. ANN. arts. 1183-1187 (Vernon 1963). 596 S.W.2d at 554.
296. See note 285 supra.
297. 596 S.W.2d at 556.
298. Id. at 555-56.
300. 596 S.W.2d at 557.
Orange "buffer strip" annexation ordinance. On appeal West Orange contended that the 1960 ordinance was void because (1) the first boundary call could not be located on the ground and (2) the narrow, long strip of territory annexed could not support a legal annexation under the Texas Supreme Court's holding in City of Pasadena v. State ex rel. City of Houston. The court of civil appeals held that, although there was an error in the first call of the land description in Orange's 1960 ordinance, the description was sufficiently certain to ascertain the territory Orange intended to annex and was therefore a legally sufficient description. The court also held that the 1960 ordinance, though probably originally invalid as a "strip ordinance" under the holding of City of Pasadena, had been validated by a 1969 validating act of the legislature. The Texas Supreme Court, however, reversed the judgments of the trial court and the court of civil appeals, holding that the Orange "buffer strip" ordinance was invalid because the strip was not "adjacent" to Orange when the ordinance was passed or at any other time. The supreme court further held that the 1969 validating act did not resurrect the ordinance because the validating act did not specifically state that it validated annexations that lacked the requisite adjacency, and because the ordinance attempted to annex territory within West Orange's extraterritorial jurisdiction. Absent some specific validating statute, therefore, buffer strip ordinances, deficient under City of Pasadena, may be beyond redemption.

Procedure. Article 1175, section 2 gives home rule cities power to annex "according to such rules as may be provided by . . . charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act." In Knapp v. City of El Paso the El Paso court of civil appeals was faced with the problem of reconciling an El Paso City Charter provision with the procedural requirements of the Act. Knapp, a landowner in territory that was annexed by El Paso in 1978, brought suit to enjoin the annexation. The trial court denied his request for an injunction. On appeal Knapp asserted that the annexation ordinance was void because El Paso had not "instituted" annexation proceedings between ten to twenty days after the public hearing on the annexation, as required by section 6 of the Act. The public hearing was held on August 22, 1978. On September 5, 1978, the annexation ordinance was introduced at a city council meeting, and the city clerk was directed to publish the ordinance in

302. Id. at 389.
303. 442 S.W.2d 325 (Tex. 1969).
304. 598 S.W.2d at 390-91.
305. Id. at 391-92; see TEX. REV. CIV. STAT. ANN. art. 974d-13 (Vernon Pam. Supp. 1963-1980).
307. Id. at 196.
308. TEX. REV. CIV. STAT. ANN. art. 1175, § 2 (Vernon 1963).
309. 586 S.W.2d 216 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).
310. Id. at 217.
the city’s official newspaper in accordance with the charter’s requirement that publication precede by more than thirty days any further action on the ordinance. After publication and the running of the thirty-day period, the ordinance was passed on first reading on October 10, 1978, and on second reading on October 17, 1978. Knapp, relying on two Texas Supreme Court cases\textsuperscript{312} holding that passage of an annexation ordinance on first reading constituted the institution of annexation proceedings, argued that El Paso had not “instituted” proceedings within the required ten to twenty days after the public hearing. The court of civil appeals held that passing an ordinance on first reading is not the exclusive method for instituting annexation proceedings, and that El Paso had complied with the Act, and properly harmonized the Act and its charter requirements, by instituting annexation proceedings via the September 5 introduction of the ordinance and direction to the city clerk to make publication.\textsuperscript{313}

V. INCORPORATION

The Texas Supreme Court considered one incorporation case during the survey period, \textit{State ex rel. Needham v. Wilbanks}.\textsuperscript{314} In 1973 the rural community of Hallsburg attempted to incorporate. The incorporated area included only three of the community’s five residences, but consisted of strips 200 to 500 feet in width running over thirty-one miles along county and state roads.\textsuperscript{315} Within the corporate limits were seventy-eight residences, one school, three businesses, two churches, and no public buildings. The city did not provide any municipal services. Residences were scattered, and there was no compact center or nucleus of population. The area was rural in character and appearance, and was not capable of receiving municipal services on any reasonable basis. A quo warranto action was brought by the State of Texas, acting through the district attorney of McLennan County, seeking to have the incorporation declared invalid. After a jury trial, the trial court rendered a judgment upholding the incorporation’s validity, and the Waco court of civil appeals affirmed.\textsuperscript{316}

The supreme court reversed and rendered judgment for the state, holding “as a matter of law that Hallsburg was a rural community immediately prior to incorporation and did not constitute a city or town as those terms are used in the constitutional provision authorizing incorporation.”\textsuperscript{317} Noting that incorporation “contemplates the existence of an ac-

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\item \textsuperscript{312} Fuller Springs \textit{v. State ex rel. City of Lufkin}, 513 S.W.2d 17 (Tex. 1974); City of Duncanville \textit{v. City of Woodland Hills}, 489 S.W.2d 557 (Tex. 1972).
\item \textsuperscript{313} 586 S.W.2d at 218.
\item \textsuperscript{314} 595 S.W.2d 849 (Tex. 1980).
\item \textsuperscript{315} The community’s church and school also were not included in the incorporated city limits. \textit{Id.} at 850.
\item \textsuperscript{316} 583 S.W.2d 914, 917 (Tex. Civ. App.—Waco 1979).
\item \textsuperscript{317} 595 S.W.2d at 853. The constitutional provision referred to is \textit{TEX. CONST. art. XI, § 4}, which provides: “Cities and towns having a population of five thousand or less may be chartered alone by general law.” The enabling legislation, \textit{TEX. REV. CIV. STAT. ANN. art. 966} (Vernon 1963), provides: “Any city or town containing six hundred inhabitants or over
V. CONDEMNATION

The Texas Supreme Court decided two condemnation cases during the survey period, although neither case appears to consider issues of broad significance. In *Harris County Flood Control District v. Shell Pipe Line Corp.* the supreme court considered an inverse condemnation suit brought by Shell to recover the cost of lowering its pipeline so that a flood control drainage ditch could be enlarged. In 1929 Shell had obtained a pipeline easement in a Harris County roadway for the fee owner of the property, subject only to the prior dedication of the roadway for road and street purposes. Shell maintained pipelines in the roadway until 1975 when it was required to lower the pipeline by the Harris County Flood Control District. In a nonjury case the trial court required the district to pay Shell the costs of lowering the pipeline; the court of civil appeals affirmed. The supreme court affirmed the lower courts, finding: (1) that there was evidence to support the trial court’s finding that the work performed on the drainage ditch was not a use of the roadway for “road and street” purposes; (2) that “enlarging a drainage ditch to accommodate a drainage district is not a public purpose for which the road was dedicated”; (3) that Shell, having obtained its easements from the fee owner eight years before the district was created, had a right to maintain its pipelines within the easement, which was dominant to the right of the district to cross the roadway; and (4) that Shell was entitled to compensation for the taking or damaging of its easement.

may be incorporated as such, with all the powers, rights, immunities and privileges mentioned and described in the provisions of this title relating to cities and towns . . . .” 318. 595 S.W.2d at 851. 319. TEX. REV. CIV. STAT. ANN. art. 974d—21 (Vernon Pam. Supp. 1963-1980). 320. 595 S.W.2d at 854. 321. 591 S.W.2d 798 (Tex. 1979). 322. 578 S.W.2d 495, 498 (Tex. Civ. App.—Houston [1st Dist.] 1979). 323. 591 S.W.2d at 799. 324. Id. The court noted that the uses to which a road may be dedicated generally include “travel, transportation of persons and property and communication.” Id. (citing Hill Farm v. Hill County, 436 S.W.2d 320 (Tex. 1969)). The court held that an outfall ditch carrying storm water runoff and constructed pursuant to the enlargement of the drainage ditch was not a mode of transportation. 591 S.W.2d at 799. 325. 591 S.W.2d at 799-800. The court indicated that the result might have been different if Shell had occupied the status of a tenant, licensee, or franchisee rather than an easement owner. Id. at 800. 326. Id. at 800.
In *Coastal Industrial Water Authority v. Celanese Corp.* the supreme court declared that a condemnor seeking to condemn an unlimited easement need only specify in general terms in the pleadings those property rights the condemnor is attempting to appropriate. The Coastal Industrial Water Authority, pursuant to the general eminent domain statutes, brought a condemnation proceeding to condemn a water line easement on land owned by Celanese. In its condemnor’s statement the authority sought to condemn a “permanent water line easement in, on, upon, along, under, over and across” a tract of land located by metes and bounds. Special commissioners appointed to assess damages awarded Celanese $29,000. The authority deposited this award in the registry of the county court and constructed an underground water pipeline. Celanese objected to the award and requested a trial in county court; because Celanese withdrew the $29,000 from the registry, however, the trial court held that it was thereby prevented from litigating the authority's right to take the property, though it could litigate the issue of compensation. Celanese filed special exceptions to the authority's condemnor's statement, which the trial court sustained. The authority refused to amend the statement, and the trial court dismissed the suit. The court of civil appeals affirmed, holding that the statement failed to allege the specific rights and uses taken by the authority. The supreme court reversed and remanded the cause to the trial court, holding that the special exceptions had been incorrectly sustained. The court noted that the authority sought an unlimited water line easement and rejected Celanese's argument that the statement failed to give adequate notice of the damages attributable to the taking, impaired the trial court's ability to judge properly the admissibility of evidence, and adversely affected the court's ability to charge the jury. The court reasoned that an unlimited easement carries with it all rights reasonably necessary for enjoyment consistent with the intended use, and that the facts surrounding the particular easement sought would guide the trial court in charging the jury and determining what evidence was admissible.

Several decisions from the courts of civil appeals considered condemnation issues. In an inverse condemnation case, *State Department of High-
ways & Public Transportation v. Elkins Lake Municipal Utility District, a municipal utility district sought and received from the trial court the unusual relief of an injunction requiring the Department of Highways to file condemnation proceedings relating to land owned by the district. The Department of Highways had done road and bridge construction work near the district's property with the result, the district contended, that large amounts of dirt, sand, and silt were washed onto the district's property. The district filed suit, alleging a taking without compensation, and sought money damages and a temporary injunction enjoining construction. At a hearing on the temporary injunction, the district obtained an order requiring the department to file a condemnation action to condemn part of the district's property for the purpose of a flow easement, purportedly pursuant to authority granted by article 3269. On appeal from this order, the court of civil appeals held that article 3269 did not authorize an order to file a condemnation suit, but rather was designed to allow the condemnor to seek alternative and inconsistent remedies in the same action. The court also found several other reasons for reversing the trial court, including the impropriety of issuing an injunction when an adequate remedy at law, an inverse condemnation action, was available.

In a case involving the relative rights of a landowner and a city in a street dedicated to the public, the Amarillo court of civil appeals held in Pittman v. City of Amarillo that, where a street had been dedicated to the city of Amarillo without restriction, the use of a private sewer line crossing the dedicated road was secondary and inferior to the public use and control of the street. Thus, the court found that there was no taking for which the city was required to pay compensation when the paving of the street required the destruction of the private sewer line.

The right of a county to condemn a fee simple for road and drainage purposes was at issue in Gordon v. Harris County. The landowners had filed objections to an award of $28,000 made by special commissioners pursuant to Harris County's condemnation of certain land for road and drainage purposes. The county placed the $28,000 in the registry of the court and entered upon the land to begin construction. The trial court denied the temporary injunction sought by the landowners to halt construction. On appeal, the court of civil appeals reversed and rendered the temporary injunction prayed for. The court held that article 6789a

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338. Id. at 402.
340. 593 S.W.2d at 402.
341. Id. at 403.
342. 598 S.W.2d 941 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).
343. Id. at 944.
344. 603 S.W.2d 294 (Tex. Civ. App.—Houston [14th Dist.] 1980). [Editor's Note: After this Article went to print, the supreme court reversed and remanded the case. 24 Tex. Sup. Ct. J. 328 (Apr. 8, 1981). This decision will be discussed in next year's Survey.]
345. 603 S.W.2d at 295.
346. TEX. REV. CIV. STAT. ANN. art. 6789a (Vernon 1960).
and articles 3264 through 3271 did not authorize the county to condemn a fee simple estate for drainage purposes, and that, as a result, the condemnation proceedings were void and the denial of the temporary injunction was an abuse of discretion.

A suit attempting to set aside a condemnation judgment that had been entered approximately eight years earlier was unsuccessful for a number of reasons. In Hogan v. City of Tyler the landowners claimed that a condemnation judgment was void because the city of Tyler had improperly attempted to acquire, and the condemnation judgment did in fact grant, a fee simple title to the condemned land in contravention of article 3270. The trial court disagreed and rendered judgment for the city. The court of civil appeals affirmed, holding that a challenge could not be made to the lawfulness of the taking because the original landowner had accepted the award of the special commissioners by withdrawing the award deposited in the registry of court. Alternatively, the court found that the statement initiating the condemnation did not request a fee simple title and that the condemnation judgment did not grant such an estate. Finally, the court ruled that the suit was barred by article 5529, a four-year statute of limitation.

VII. Employees

A number of decisions during the survey period involved the relationship between a local government and its employees. Cases resolving whether a local government may replace civil service positions with an independent contractor system, whether the requirements of the Texas Municipal Retirement System result in prohibited age discrimination, and whether rules prohibiting "conduct prejudicial to good order" may constitutionally support disciplinary action were decided, as well as cases related to the Firemen's and Policemen's Civil Service Act.

Abolition of Civil Service Positions: A Texas local government must act in good faith when abolishing a civil service position. In Moncrief v.

348. 603 S.W.2d at 295.
349. 602 S.W.2d 555 (Tex. Civ. App.—Tyler 1980, writ ref’d n.r.e.).
350. TEX. REV. CIV. STAT. ANN. art. 3270 (Vernon 1968) (prohibits the acquisition of a fee simple estate except when expressly allowed by law).
351. 602 S.W.2d at 555.
352. Id. at 557. The court cites the holding and rationale of State v. Jackson, 388 S.W.2d 924 (Tex. 1965), 602 S.W.2d at 557.
353. 602 S.W.2d at 558.
355. 602 S.W.2d at 559-60.
356. See City of San Antonio v. Wallace, 161 Tex. 41, 338 S.W.2d 153 (1960), in which the supreme court ruled that courts may determine whether a local government abused its discretion in abolishing civil service positions. In Wallace the court determined that San Antonio had not acted in good faith in abolishing certain civil service positions when San Antonio previously had attempted to destroy the positions by transferring employees to a non-civil service department, when the services performed by the employees were still neces-
the Texas Supreme Court refined the meaning of "good faith." Tarrant County adopted an independent contractor system to provide the county's custodial services and discharged janitorial workers who were civil service employees. Some of these employees brought suit, requesting a declaration that the county's actions were a nullity and that they should be reinstated with back pay. The employees argued that the decision was made in bad faith on the grounds that their employee merit system should be free from political control, that the county had ample funds to continue their employment, and that no termination was justified in the absence of a "functional change" in their work. The court of civil appeals affirmed the trial court's judgment granting the plaintiffs the requested relief. The court of civil appeals held that the trial court had not abused its discretion in finding that the county had acted in bad faith, despite evidence that the county had based its actions on studies showing that the change to the independent contractor system would save the county approximately $220,000 over a two-year period. The supreme court reversed and rendered a judgment that the plaintiffs take nothing. The court found it irrelevant that the county was in good financial condition and could afford to pay the discharged workers; rather, the court emphasized the economies that the new system was supposed to achieve, and held that the record did not support the finding that the county had acted in bad faith. Thus Moncrief stands for the proposition that a local government, even if it is able to bear the higher cost of a service rendered by civil service employees, will normally be entitled to terminate those employees to achieve economies and will not be considered to be acting in bad faith.

Age Discrimination in Retirement Plans. Alford v. City of Lubbock creates the possibility that cities participating in the Texas Municipal Retirement System (TMRS) will be required to make significant back payments on behalf of employees hired after they reached fifty years of age who were prohibited by the statute because of their age from being enrolled in TMRS. The plaintiffs in Alford were employees of the city of Lubbock who had been hired after they had reached fifty years of age and who were retired when they reached sixty-five. During the entire period of the plaintiffs' employment, the city did not deduct from the plaintiffs' paychecks the five percent employee contribution required by TMRS, nor did the city contribute the ten percent required of the city-employer, be-
cause TMRS did not allow participation by employees who began employment after age fifty. Plaintiffs claimed that this treatment constituted age discrimination in violation of the federal Age Discrimination in Employment Act (ADEA), the state statutory policy against age discrimination, and the equal protection clauses of the United States and Texas Constitutions. The court found that, although relief was not warranted under Texas statutory law or under the ADEA, the refusal to allow plaintiffs to participate in TMRS had no rational basis, was clearly discriminatory in that those hired after they reached fifty received fewer benefits than those hired before they reached fifty, and was therefore a violation of plaintiffs' rights under the equal protection clause of the fourteenth amendment. The court ordered the plaintiffs and the city to pay to TMRS the amounts they would have paid had the plaintiffs been enrolled in TMRS and ordered benefits to be paid to the plaintiffs in accordance with the total of these amounts. The court limited its holding to the facts of the case, but the decision calls into question any attempt to deny TMRS benefits on the basis of age.

Constitutionality of Disciplinary Rules. In Davis v. Williams, the Fifth Circuit considered the constitutionality of an Irving fire department rule and a city ordinance, both of which prohibited "conduct prejudicial to good order." In connection with a dispute over the fire department's provision of ambulance service, Davis, a fireman and the head of the Irving fire fighters' association, made negative comments about the Irving fire chief that were reported in a newspaper. The fire chief suspended Davis indefinitely, citing the two rules permitting suspension for "conduct prejudicial to good order," and a general regulation prohibiting "derogatory statements" regarding the department's policies or officers. Davis brought suit in federal district court, alleging that the three regulations relied upon were vague, overbroad, and facially unconstitutional under the

367. Tex. Rev. Civ. Stat. Ann. art. 6252—14, § 1 (Vernon 1970) provides that no person shall be denied the right to work, to earn a living, and to support himself and his family solely because of his age.
369. 484 F. Supp. at 1005.
370. Id. at 1007. The court rejected Lubbock's contentions that a rational basis for the plaintiffs' treatment existed. Lubbock had argued that: (1) a pension would not be meaningful to an employee unless contributions had built up over a significant period of time; (2) the 15-year service requirement constituted a reward to an employee for long service; (3) the inclusion of those over 50 in TMRS would reduce benefits to all city employees; (4) the TMRS restrictions were of legislative determination; and (5) the inclusion of those over 50 would result in additional and prohibitive administrative expenses. Id. at 1006-07.
371. Id. at 1007.
372. Id.
373. Id. at 1007-08.
374. 617 F.2d 1100 (5th Cir. 1980) (en banc).
375. Id. at 1101.
376. Id.; see note 378 infra.
first and fourteenth amendments. The district court agreed, enjoined the enforcement of the regulations, and ordered Davis reinstated.\textsuperscript{377} On appeal Irving did not attack the district court's ruling that the "derogatory statements" regulation was invalid.\textsuperscript{378} Instead, the city only questioned the holding that the fire department rule and the city ordinance prohibiting "conduct prejudicial to good order" were facially unconstitutional. The circuit court reversed the district court and found the rule and ordinance facially valid.\textsuperscript{379} The court noted that the catchall "conduct prejudicial to good order" prohibition lost some of its offending nature with the deletion of the "derogatory statements" regulation.\textsuperscript{380} Further, the court construed the catchall phrase to apply only to undesirable conduct of the same general kind as that forbidden by other more specific Irving rules.\textsuperscript{381} As so limited, the court concluded that the catchall provision gave the only notice that can practically be given of an employer's intention to impose punishments on grounds not set out with particularity.\textsuperscript{382} The court noted cases out of the United States Supreme Court sustaining punishments under similarly broad provisions\textsuperscript{383} and considered itself bound by these decisions not to hold the Irving rule and ordinance invalid, always and however applied.\textsuperscript{384} A strong dissent argued that, even as restricted, the Irving catchall rule could cover communicative behavior shielded by the first amendment and was vague in defining what type of conduct was prohibited.\textsuperscript{385}

\begin{itemize}
  \item \textit{Firemen's and Policemen's Civil Service Act.} The Firemen's and Policemen's Civil Service Act\textsuperscript{386} and related statutes spawned a number of decisions during the survey period. In \textit{City of Houston v. Cook}\textsuperscript{387} the court of civil appeals reversed the trial court's judgment that the plaintiff, a former assistant fire chief for the city of Houston, receive over $28,000 in overtime pay, and rendered judgment that the plaintiff take nothing. The court held
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  \item \textsuperscript{377} 617 F.2d at 1102.
  \item \textsuperscript{378} The enjoined and unappealed regulation provided that members of the fire department:

\begin{quote}
Refrain from being a party to any malicious gossip, report, or activity that would tend to disrupt department morale or bring discredit to the department or any member thereof; or making derogatory statements or adversely criticizing department policy, activities, or officers, except by written report to the Chief of the Department, through channels.
\end{quote}

\textit{Id.} at 1101.
  \item \textsuperscript{379} \textit{Id.} at 1105.
  \item \textsuperscript{380} \textit{Id.} at 1103. The court stated that the "derogatory statements" regulation could not be enforced as a specific prohibition, nor could it be enforced as subsumed within the "conduct prejudicial to good order" provision. \textit{Id.}
  \item \textsuperscript{381} \textit{Id.}
  \item \textsuperscript{382} \textit{Id.}
  \item \textsuperscript{383} See, e.g., Parker v. Levy, 417 U.S. 733 (1974) (upholding a "disorders and neglects to the prejudice of good order" dismissal standard); Arnett v. Kennedy, 416 U.S. 134 (1974) (upholding a "such cause as will promote the efficiency of the service" dismissal standard).
  \item \textsuperscript{384} 617 F.2d at 1105.
  \item \textsuperscript{385} \textit{Id.} at 1105-08 (Rubin, J., dissenting).
  \item \textsuperscript{386} \textbf{TEX. REV. CIV. STAT. ANN. art. 1269m} (Vernon 1963 & Supp. 1980-1981).
  \item \textsuperscript{387} 596 S.W.2d 298 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).
\end{itemize}
that article 1269p, section 6, which provides that certain personnel in fire departments in cities having more than 10,000 inhabitants are not to work more than the normal hours worked by other city employees generally, does not apply to employees in supervisory or management positions like the position held by the plaintiff. The court said that it was "unreasonable to believe that the Legislature intended to limit to forty hours the time management personnel may expend in the operation of a fire department." In Fincher v. City of Texarkana the Texarkana court of civil appeals held that the trial court had never acquired jurisdiction over an appeal from a Texarkana Civil Service Commission order sustaining the Texarkana police chief's indefinite suspension of the appellant policeman, Fincher. The court stated that the commission's order was not a final, appealable order under section 16 of the Act because the commission had not ordered a dismissal, a reinstatement, or a definite time of suspension. The court ordered the cause of action dismissed in the district court, which left the proceeding pending before the civil service commission for entry of a final order.

In City of Austin v. Villegas the Beaumont court of civil appeals reversed the trial court and rendered judgment for the city of Austin, upholding the indefinite suspension of a city police officer for insubordination. The court ruled that the Austin police chief had sufficiently complied with the Texas Supreme Court's suggestion in City of San Antonio v. Poulos that an order disciplining an officer consider separately each rule allegedly violated and state the precise factual basis for each violation. The court of civil appeals found that the charge in question sufficiently alleged that the officer had willfully disobeyed a lawful order and set out factual allegations supporting the charge.

389. 596 S.W.2d at 299.
390. Id.
391. 598 S.W.2d 22 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).
392. Id. at 23-24.
393. TEX. REV. CIV. STAT. ANN. art. 1269m, § 16 (Vernon 1963) provides in part: "The Commission shall hold a hearing and render a decision in writing within thirty (30) days after it receives said notice of appeal. Said decision shall state whether or not the suspended officer or employee shall be permanently or temporarily dismissed or be restored to his former position . . . ."
394. 598 S.W.2d at 23-24.
395. Id. at 24.
396. 603 S.W.2d 282 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).
397. Id. at 285.
398. 422 S.W.2d 140 (Tex. 1967).
399. 603 S.W.2d at 284; see TEX. REV. CIV. STAT. ANN. art. 1269m, § 16 (Vernon 1963), which provides in part that the written reasons for a suspension "shall not only point out the civil service rule alleged to have been violated by the suspended employee, but shall contain the alleged acts of the employee which the department head contends are in violation of the civil service rules."
400. 603 S.W.2d at 284.
which had dismissed for want of jurisdiction an attempted appeal from an order of the Houston Firemen's and Policemen's Civil Service Commission sustaining two consecutive disciplinary suspensions of fifteen days each. The affected police officer argued that the 1977 amendment to article 1269m, section 18 of the Act allowed appeals of disciplinary suspensions of fifteen days or less. The court found Firemen's & Policemen's Civil Service Commission v. Blanchard controlling and rejected the officer's argument. The court further ruled that the suspensions should not be considered as indefinite suspensions because they were to run consecutively. Finally, the court ruled that the trial court did not have jurisdiction under the Uniform Declaratory Judgments Act to consider the officer's complaints; the court held that the suspensions gave rise to no cause of action independent of the Civil Service Act and that the officer could not circumvent that Act, which denied an appeal to the courts under the facts, by filing an action for a declaratory judgment.

Another covered employee given a disciplinary suspension was denied access to the courts in Duckett v. Civil Service Commission on similar grounds.

A promotional decision was questioned by a passed over applicant in Matheson v. Firemen's & Policemen's Civil Service Commission. Matheson, a Denton city policeman who had made the highest grade on an examination for the vacant position of assistant chief, appealed to the Denton Civil Service Commission when the Denton chief of police appointed another candidate. Matheson argued that the chief of police gave no valid reason for not picking Matheson in his report to the commission, as required by article 1269m, section 14E of the Act. The commission heard evidence reflecting the lesser fitness of Matheson and sustained the

402. Id. at 892.
404. 582 S.W.2d 778 (Tex. 1979) (Firemen's and Policemen's Civil Service Act does not authorize appeals of disciplinary suspensions of 15 days or less unless the order violates a constitutional right or adversely affects a vested property right).
405. 600 S.W.2d at 893.
406. Id. at 893-94. The suspensions were based on unrelated incidents and were issued in separate orders. Id. at 892.
408. 600 S.W.2d at 894-95.
409. 598 S.W.2d 640 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).
410. Id. at 642. The court also found that TEX. REV. CIV. STAT. ANN. art. 1269m, § 20 (Vernon 1963), which provides for disciplinary suspensions, is not unconstitutionally void for vagueness. 598 S.W.2d at 641 (citing Texas Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41 (Tex. 1970)).
412. TEX. REV. CIV. STAT. ANN. art. 1269m, § 14E (Vernon 1963) provides in part:

[The Head of such Department shall appoint the person having the highest grade, except where such Head of the Department shall have a valid reason for not appointing such highest name, and in such cases he shall, before such appointment, file his reasons in writing, for rejection of the higher name or names, with the Commission, which reasons shall be valid and subject to review by the Commission upon the application of such rejected person.

The Denton Police Chief's report merely stated that the man appointed was the best qualified applicant and that his advancement would be in the best interests of the continuing efficiency of the department. 587 S.W.2d at 796.
decision of the chief of police. A judgment of the trial court in favor of the commission was sustained by the Fort Worth court of civil appeals, which found (1) that the chief of police’s report to the commission was adequate, though it never commented negatively on Matheson, and (2) that, in any case, there was substantial evidence received by the commission supporting the decision not to promote Matheson.\textsuperscript{413}

In \textit{City of Plano v. Acker}\textsuperscript{414} employees of the Plano police and fire departments challenged ordinances providing pay increases over the basic pay rates established for each job classification (\textit{e.g.}, patrolman, sergeant, lieutenant) based upon the employee’s rank and length of service. The employees asserted that the manner in which these increases were made available\textsuperscript{415} conflicted with article 1269m, section 8 of the Act, which requires that all firemen and policemen within the same classification “be paid the same salary.”\textsuperscript{416} The Dallas court of civil appeals reversed the trial court and rendered summary judgment for Plano, holding that the “classifications” referred to in section 8 are the ranks provided by the ordinances of the city and that the provisions for pay increments represent “longevity” or “seniority” pay not regulated by the statute.\textsuperscript{417}

Finally, in three cases decided the same day and presenting the same legal issue, one of the Houston courts of civil appeals held that the City of Houston airport police,\textsuperscript{418} city marshalls,\textsuperscript{419} and park police\textsuperscript{420} were not “policemen” within the meaning of section 2 of the Act,\textsuperscript{421} and were therefore not entitled to the benefits of the Act.

\section*{VIII. Police Power}

In \textit{Berg Development Co. v. City of Missouri City},\textsuperscript{422} a case of first impression in Texas, the court explored the limits of a city’s power to regulate the development of a residential subdivision. Berg Development Com-

\textsuperscript{413} 587 S.W.2d at 797.
\textsuperscript{414} 601 S.W.2d 68 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).
\textsuperscript{415} The ordinances in question provided that advancements within the salary structure would be allowed only at six-month intervals based upon the city’s fiscal year; to advance from one six-month plateau to another, an employee had to complete a required number of service months prior to an advancement date. The employees complained that the result of these rules was that an employee hired one day before a fiscal year ended could advance a service plateau in the middle of the next fiscal year, while an employee hired one day after the fiscal year ended would not advance a plateau and therefore would be paid less. \textit{Id.} at 69-70.
\textsuperscript{417} 601 S.W.2d at 71. The court recognized that its reasoning might conflict with the holding in \textit{Nichols v. Houston Police Officers' Pension Bd.}, 335 S.W.2d 261 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.). 601 S.W.2d at 71.
\textsuperscript{418} \textit{Jackson v. City of Houston}, 595 S.W.2d 907, 908 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).
\textsuperscript{419} \textit{Wolfe v. City of Houston}, 595 S.W.2d 909, 909 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).
\textsuperscript{420} \textit{Scott v. City of Houston}, 595 S.W.2d 909, 910 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.).
\textsuperscript{422} 603 S.W.2d 273 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).
pany, a real estate developer seeking to plat a new project, was informed by Missouri City that the plat would be approved only when Berg complied with Missouri City's park dedication ordinance. This ordinance required a developer of a residential subdivision to dedicate land within the subdivision for public park purposes, or, at Missouri City's option, to pay the fair market value of the land to the city in cash. Berg refused to comply and brought suit claiming that the city had exceeded its power as a municipality and had violated the United States and Texas Constitutions. Missouri City then elected to receive money, calculated at $22,462.50, in lieu of property, and Berg deposited this sum in an escrow account. Cross motions for summary judgment were filed with the trial court, which granted the city's motion. The court of civil appeals reversed and rendered judgment for Berg, holding that the ordinance was not a valid exercise of the city's police power and constituted a taking without compensation in violation of article 1, section 17 of the Texas Constitution. The court stated that the ordinance did not merely regulate the use of Berg's property but rather involved a property loss to Berg not common to the general public that could not be accomplished without compensation. The court further indicated that the ordinance would be void even if the "cash in lieu of realty" provision was not a part of the ordinance; the court believed that the dedication of property for recreational purposes did not bear a substantial relation to the safety and health of the community, but rather constituted too intrusive an encroachment on personal property rights to be allowed without compensation.

IX. MISCELLANEOUS CHALLENGES TO LOCAL GOVERNMENT ACTION

The courts considered a variety of challenges to the actions of local governments during the survey period that are not easily categorized. Three of the more interesting are discussed herein.

County Police Protection. Weber v. City of Sachse involved a challenge to the actions of the Dallas County commissioners' court and the Dallas

423. Id. at 274. There was no provision in the ordinance requiring that cash so acquired be used to purchase new park areas or that any such areas purchased be located in or near the subdivision. Id.
424. The plaintiff asserted violations of U.S. CONST. amends. V, XIV, and TEX. CONST. art. I, § 17. 603 S.W.2d at 274.
425. 603 S.W.2d at 273.
426. Id. at 275.
427. Id. The court applied the general principle stated in City of Austin v. Teague, 570 S.W.2d 389, 392 (Tex. 1978), in which the Texas Supreme Court said:
We held that a government's correction of something that is a "detriment to the public" or a mere "regulation" indicates that compensation should not be allowed. DuPuy stated, on the other hand, that proof of a "taking," or of property loss to the owner "not common to the general public," indicates that the government should pay for the owner's loss.
Id. (citing DuPuy v. City of Waco, 396 S.W.2d 103, 107 (Tex. 1965)).
428. 603 S.W.2d at 275.
County sheriff in ending the routine patrolling of incorporated areas of the county by sheriff's deputies. The commissioners' court terminated funding for twenty sheriff's deputies, who the sheriff had said were necessary to patrol the incorporated areas of Dallas County. Several Dallas County municipalities then obtained an order in district court permanently enjoining the sheriff's department from reducing the number of deputies patrolling within their boundaries and requiring the commissioners' court to fund these patrols. The Dallas court of civil appeals reversed and vacated the injunction, holding: (1) that the district court could not compel the commissioners' court to fund certain deputy positions because this would invade the discretion of the commissioners' court to determine how county funds are to be expended; (2) that the commissioners had complied with article 6869d, which the court interpreted as requiring the commissioners to fund a county police force of not less than six patrolmen devoted entirely to patrolling those parts of the county outside the county seat, but as not requiring any particular level of funding to provide a certain level of protection; (3) that a sheriff's decisions as to the deployment of officers within a county are discretionary, that a sheriff has no mandatory duty to supply a certain level of law enforcement to municipalities, and that the district court erred in requiring that a certain level of law enforcement be supplied; and (4) that the district court erred in requiring the defendants to provide the same law enforcement to the plaintiffs as was provided to unincorporated areas of Dallas County, because a rational basis existed for this division of service. The court reasoned that the commissioners could reasonably determine that the law enforcement budget must be cut, and that the commissioners and sheriff then could reasonably determine that service to municipalities, which could tax their citizens to provide their own protection, be curtailed when implementing the budget cut.

School Services to the Handicapped. The Fifth Circuit read liberally the duty of a school district receiving federal funds to provide services to handicapped children in an important decision, Tatro v. State of Texas. Amber Tatro, a four-year-old child, suffered from spina bifida, a congeni-

430. Id. at 565.
431. Id. at 565-66. The court relied on the rule that though a district court may enjoin an illegal or unconstitutional act, Sterrett v. Gibson, 168 S.W. 16, 18 (Tex. Civ. App.—San Antonio 1914, no writ), it may not direct a public official how to perform a discretionary act. Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 575 (Tex. 1971). 591 S.W.2d at 566.
432. TEX. REV. CIV. STAT. ANN. art. 6869d (Vernon 1960) mandates a county police force of at least six patrolmen in counties of 210,000 or more population.
433. 591 S.W.2d at 566-67.
434. Id. at 567.
435. Id. at 567-68. Thus the court found that the plaintiffs were not denied the equal protection of the laws and the defendants had not abused their discretion in fulfilling the law enforcement duty imposed upon them by TEX. CODE CRIM. PROC. ANN. art. 2.17 (Vernon 1977). 591 S.W.2d at 567-68.
436. 591 S.W.2d at 567-68. The court also noted that sheriff's deputies would still answer calls by the citizens of the plaintiff municipalities. Id. at 568.
437. 625 F.2d 557 (5th Cir. 1980).
tal defect that prevented her from being able to empty her bladder voluntarily and caused orthopedic and speech handicaps. As a result of the bladder problem Amber had to be catheterized every three to four hours. In 1979 Amber became eligible for participation in the early childhood development program of the Irving Independent School District. The school district was bound by the requirements of the Education for All Handicapped Children Act (EAHCA).\(^438\) Pursuant to the EAHCA, the school district developed an individualized education plan\(^439\) for Amber. The plan stipulated that Amber would receive physical and speech therapy, but did not provide that she would receive treatment for the bladder problem even though a relatively simple procedure, Clean Intermittent Catheterization (CIC), was available to perform the needed catheterization.\(^440\) After exhausting state remedies,\(^441\) Amber's parents brought suit in federal district court, contending that the school district had violated the EAHCA as well as section 504 of the Rehabilitation Act of 1973.\(^442\) The district court denied the plaintiffs' motion for a preliminary injunction to require the school district to provide CIC, and the plaintiffs appealed.\(^443\) The Fifth Circuit vacated the denial of the injunction and remanded the case, holding that the district court had erred, but at the same time stating that the circuit's ruling did not mean that school districts had to provide any and all services needed by a handicapped child to allow the child to be educated with children who are not handicapped.\(^444\) In the court's view the legal issue, whether CIC was a "related service" that the school district was required to provide Amber,\(^445\) hinged on whether CIC was a "supportive service" necessary to assist a handicapped child to benefit from special education.\(^446\) The district court had held that CIC was not a "re-

\(^440\) The trial court had not made findings of fact, and the circuit's discussion was predicated upon the proposed stipulation of facts presented to the trial court by the plaintiffs. The district court was to make appropriate findings on remand and apply the legal framework outlined by the circuit. 625 F.2d at 558 n.1. On remand, the district court, in an interim order, ruled that Amber was entitled to have Irving provide CIC. Tatro v. Texas, No. 79-1281-G (N.D. Tex. Jan. 16, 1980).
\(^441\) State remedies required by the Act are detailed at 20 U.S.C. §§ 1415(a)-(c) (1976).
\(^443\) 625 F.2d at 560.
\(^444\) Id. at 562-63.
\(^445\) Id. at 561-62. 20 U.S.C. § 1412 (1976), provides in part that: "In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met: (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education." Id. § 1401(18) defines "free appropriate public education" as:

special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

\(^446\) 625 F.2d at 562. 20 U.S.C. § 1401(17) (1976) defines "related services" as: transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physi-
lated service,” concluding that a literal reading of the statute would require a school district to provide every life support system necessary to keep a handicapped child in school.\[^{447}\] The circuit court pointed out that the statute itself limited the types of life support services that are required as related services.\[^{448}\] For example, the court noted that a school district did not have to provide life support services that could be performed before or after school hours, or that must be performed by a physician.\[^{449}\] The court emphasized, moreover, that Congress had mandated that handicapped children should be educated in regular classrooms to the maximum extent possible, and held that the EAHCA statutory language “‘supportive services . . . as may be required to assist a handicapped child to benefit from special education’ must be read literally to include the provision of CIC to Amber Tatro.”\[^{450}\] The court also held that section 504 of the Rehabilitation Act of 1973\[^{451}\] required the school district to provide CIC to Amber Tatro.\[^{452}\] Citing its decision in Camenisch v. University of Texas,\[^{453}\] the circuit distinguished the United States Supreme Court’s decision in Southeastern Community College v. Davis\[^{454}\] by saying that Southeastern Community College held “‘only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual’s handicap precludes him from ever realizing the principal benefits of the training.’”\[^{455}\] With the provision of CIC, Amber would be able to perform well in school; without it she would be unable to participate. This exclusion, the court said, is expressly condemned by section 504.\[^{456}\]

**Powers of County Auditors Vis-à-Vis Commissioners’ Courts.** The often complicated relationship between Texas county officials was highlighted in Commissioners Court v. Fullerton,\[^{457}\] a case involving the relative powers

\[^{447}\] 625 F.2d at 562.
\[^{448}\] Id.
\[^{449}\] Id. at 563.
\[^{450}\] Id. at 564.
\[^{451}\] 29 U.S.C. § 794 (Supp. III 1979) provides: “No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”
\[^{452}\] 625 F.2d at 564.
\[^{453}\] 616 F.2d 127 (5th Cir. 1980) (requiring the university to provide a deaf graduate student sign language interpreter services).
\[^{455}\] 625 F.2d at 564.
\[^{456}\] Id. The court was careful to note the limitations on this rule: (1) section 504 does not require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals; (2) section 504 “possibly” does not require the provision of services that would impose undue financial and administrative burdens upon the service provider. Id. at 564-65 n.19.
\[^{457}\] 596 S.W.2d 572 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e).
of the county auditor, the commissioners' court and the district judges. In 1977 the Harris County auditor, as required by state law, requested the Harris County commissioners' court to solicit and approve bids for certain improvements and equipment for a computer used by the auditor. This request and a similar request made in 1978 were never granted. In 1978 Harris County completed a new administration building to which the auditor moved his offices. The auditor requested that the commissioners' court entertain bids to transfer his computer to the new offices, and the commissioners' court responded by ordering the auditor to sell the computer and send his computer operations to a separate department of Harris County controlled solely by the commissioners' court. The auditor did not comply with the order, and his computer remained at his old offices. Next, the auditor's 1979 budget was approved by the district judges of Harris County and was submitted to the commissioner's court, which reduced the budget by $380,324 and deleted from the budget equipment that included several computer-related items. The county auditor again requested the disputed services and equipment, and the commissioners' court responded by ordering the termination of certain contracts and services involving the auditor's computer. Shortly thereafter the auditor brought suit against the commissioners' court for mandamus and injunctive relief as well as for a declaratory judgment to determine his autonomy vis-à-vis the commissioners' court. The trial court directed a verdict for the auditor, and the court of civil appeals affirmed. 458 The court of civil appeals noted that county auditors are invested by law with important independent administrative duties and held that articles 1650, 1656, and 1656a specifically grant auditors authority to decide upon a system for keeping the county accounts and to provide themselves with the necessary equipment. 460 The court concluded:

We think it is clear that when the county auditor presents his budget to commissioners court enumerating equipment which he deems necessary for the operation of his office, the commissioners court can review and reject his budget only to the extent that the specific cost of an enumerated item is excessive or unreasonable in its monetary demands upon county funds, available or to become available, subject to any abuse of discretion. Commissioners court cannot prescribe the system of accounting nor what equipment the county auditor must use in the operation of his office. 461

The court examined the record and found no evidence that the auditor's requests for equipment had been unreasonable. 462 Of interest is the court's holding that the commissioners' court's actions designed to transfer auditing functions to another county department were an improper intrusion on

458. Id. at 579.
460. 596 S.W.2d at 577.
461. Id.
462. Id. at 578.
the auditor's office, powers, and duties, despite evidence that central computer systems in Dallas and Tarrant Counties had saved money.463

X. TORT LIABILITY

At common law persons injured as a result of government actions were normally precluded from recovery, but the walls of this governmental immunity have slowly crumbled through the years.464 In Texas, while the walls still stand, they do so considerably less majestically. It has long been the rule that a municipality is liable for torts occurring in the performance of a "proprietary" as opposed to a "governmental" function.465 Courts have found an express waiver of governmental immunity in article I, section 17 of the Texas Constitution,466 which provides that no person's property shall be taken, damaged, or destroyed for a public purpose without adequate compensation.467 In some instances too, public employees and officers may be individually liable at state law.468 A major blow to governmental immunity was delivered in 1970 by the enactment of the Texas Tort Claims Act,469 which waived the immunity in certain specified circumstances. Further, the federal cause of action under 42 U.S.C. § 1983 is now widely employed by plaintiffs asserting violations of their federal rights by local governments and their employees.470 Many unanswered questions remain in each of these areas, and one can expect a constant struggle between the inventive plaintiff's lawyer and the government attorney attempting to hide behind what remains of the immunity. The current survey period witnessed several examples of this struggle, and various cases pointed to the need for extreme care by the plaintiff's attorney attempting to negotiate this convoluted area of law.

Municipal Liability for Performance of Proprietary Functions. In Jezek v. City of Midland471 the Texas Supreme Court considered a situation within

463. Id. at 579. The court affirmed the judgment for the auditor but did not agree that the approval of the auditor's equipment budget by the district judges was required by law. Id. at 580.


465. See City of Trenton v. New Jersey, 262 U.S. 182, 191-92 (1923); Dilley v. City of Houston, 148 Tex. 191, 193, 222 S.W.2d 992, 993 (1949); City of Houston v. Quinones, 142 Tex. 282, 285-86, 177 S.W.2d 259, 261 (1944); City of Tyler v. Ingram, 139 Tex. 600, 605, 164 S.W.2d 516, 519 (1942); Treadaway v. Whitney Independent School Dist., 205 S.W.2d 97, 99 (Tex. Civ. App.—Waco 1947, no writ).

466. TEX. CONST. art. I, § 17.


471. 605 S.W.2d 544 (Tex. 1980). See also City of Wichita Falls v. Ramos, 596 S.W.2d 654, 657 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (city of Wichita Falls had a duty to an employee who was inspecting property to exercise ordinary care to discover the unsafe condition of an uncovered water meter box in a public way into which the employee stepped).
the proprietary branch of the "proprietary-governmental" function dichotomy. The court extended the "close proximity rule" to allow recovery by an injured person when a city knowingly maintains an intersection right-of-way in a manner that dangerously obstructs the vision of motorists using the street and fails to warn of this danger or to make safe the dangerous condition. Jezek, driving north on a street in the city of Midland, drove a few feet into the east-west road at an intersection to see if cars were approaching, because his vision was impaired by thick growth of trees and brush on the unimproved portion of the intersection. Jezek was hit by a vehicle driving east, and his minor son, a passenger, sustained injuries that resulted in irreversible brain damage. There was testimony that Midland knew of the hazard, but had done nothing to rectify it because it believed the streets in question were not dedicated to public use. Despite jury findings favorable to Jezek, the trial court rendered a take-nothing judgment. The court of civil appeals affirmed, relying on the holding of Ynsfram v. Burkhart that a governmental entity owes no duty to remove visual obstructions existing on an unimproved portion of a street.

The supreme court reversed, noting the well-established rule that the safe maintenance of streets is a proprietary function and that a city is liable for its negligence in performing this function. The court noted further that the duty of safe maintenance is not limited to the traveled portion of the street, but by the close proximity rule extends also to the prevention of defects outside the traveled or improved portion if the defect's proximity to the traveled portion makes it probable that the defect will injure those using the improved portion. The court declared that there was no rational basis for distinguishing between physical obstructions, which were covered by the close proximity rule, and visual obstructions, which the court of civil appeals had decided were not covered by the rule. The court carefully pointed out, however, that a city must have notice of the danger and negligently fail to act before liability attaches, and that the court's decision would not affect the duties of counties, which perform no proprietary functions under Texas law.

Torts Based on the Texas Constitution. Two interesting cases decided during the survey period involved the question of the nature of torts based directly on article I, section 17 of the Texas Constitution. In Steele v.
City of Houston the Texas Supreme Court addressed the no "destruction" without compensation clause of article I, section 17, and for the first time definitively outlined the elements of a cause of action for the destruction of property. The owner and the tenants of a house in Houston sued the city for damages sustained when Houston police officers destroyed the house and their belongings while attempting to recapture three escaped convicts who had taken refuge in the house. The claim was brought under the Tort Claims Act, as a nuisance and as a destruction of property compensable under article I, section 17. The trial court sustained Houston's motion for summary judgment, and the court of civil appeals affirmed. The supreme court reversed and remanded for trial, holding that the plaintiffs had stated a cause of action for the destruction of their property under article I, section 17. The court reviewed the history of article I, section 17, noting that the provision's requirement that a person's property not be "damaged" without compensation constituted an expansion of governmental duty when added to the Constitution in 1876; the language forbidding the "destruction" of property without compensation was added at the same time. Previously the Constitution had forbidden only a "taking" without compensation. The court examined the sparse case authority considering the "destruction clause" and then stated the requirements for the "destruction of property" action in the case before it: (1) Houston, acting through its officers with authority or color of authority; (2) must have intentionally set the house on fire or prevented the fire's extinguishment; and (3) the destruction must have been "for or applied to public use." The court said that the "for public use" element distinguished the "destruction of property" action from a negligence action and further said that the destruction would be for the public use if Houston ordered the destruction because of a real or supposed emergency to apprehend dangerous armed men. The court rejected Houston's invocation of governmental immunity as well as its claim that the police power excused its action. It did recognize the possibility that Houston might establish a defense based upon proof of "great public necessity," but held out little hope that under the facts such a defense would succeed.

A plaintiff caught in the snares of governmental immunity made a valiant effort to escape, including making a claim for nuisance under article I,

damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ."

483. 603 S.W.2d 786 (Tex. 1980).
485. 603 S.W.2d at 793.
486. Id. at 790.
487. See, e.g., TEX. CONST. art. I, § 14 (1845).
488. 603 S.W.2d at 791-92.
489. Id. at 792.
490. Id. at 791. The court stated that the Texas Constitution itself authorizes compensation for the destruction of property and is "a waiver of governmental immunity for the taking, damaging or destruction of property for public use." Id.
491. Id. at 792-93.
492. Id. at 792.
section 17, but ultimately failed in *Bragg v. City of Dallas*. Bragg sued the city of Dallas for damages to his airplane that occurred when he was on a taxiway at Dallas Love Field, a municipal airport. On appeal from a summary judgment granted Dallas by the trial court, the Dallas court of civil appeals held that Bragg was foreclosed from suing Dallas based upon a breach of a proprietary duty because the maintenance of a municipal airport is a governmental function protected by the governmental immunity to tort liability. In search of a cause of action Bragg alleged a nuisance, which in certain circumstances has been held to be an exception to the rule of immunity for acts done in furtherance of a governmental function. The court's review of the law revealed only two exceptions to this immunity rule: (1) the Tort Claims Act expressly waives the immunity in certain circumstances, and (2) article I, section 17 also waives the immunity where a person's property is taken, damaged, or destroyed for a public purpose without compensation. Although Bragg made his nuisance claim under article I, section 17, the court nevertheless found the constitutional waiver to apply to nuisances only in the sense of "maintenance of facilities or conditions on municipal property which interfere with the enjoyment of neighboring land, as by a sewage disposal plant or refuse dump which produces offensive odors." The court concluded that a condition on municipal land that is dangerous to persons coming on the land is not a "nuisance" so as to provide an exception to governmental immunity, and decided that the same rule should apply to a condition hazardous or dangerous to vehicles coming on municipal land. Bragg therefore had no cause of action.

**Texas Tort Claims Act.** The Texas Supreme Court delivered one decision construing the Tort Claims Act during the survey period. In *Turvey v. City of Houston* the plaintiff brought suit to recover damages for personal injuries sustained when the vehicle he was operating struck a hole in a Houston street. The maintenance of streets is a proprietary function of a city, which, if negligently performed, will sustain a common law cause of action for resulting damages. Turvey was barred from making this claim, however, because he had failed to give the notice required by the Houston City Charter. He therefore sought to bring his action under the Tort Claims Act. Turvey based his claim on section 18(b) of the Act, which provides that a "unit of government" shall owe a claimant a "duty

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494. *Id.* at 671. TEX. REV. CIV. STAT. ANN. art. 46d—15 (Vernon 1969) declares the maintenance and operation of municipal airports to be governmental functions.
496. TEX. CONST. art. I, § 17.
497. 605 S.W.2d at 671.
498. *Id.*
499. *Id.* at 672.
501. 602 S.W.2d 517 (Tex. 1980).
502. *Id.* at 518-19 (citing City of Austin v. Daniels, 160 Tex. 628, 335 S.W.2d 753 (1960)).
to warn of special defects such as excavations or obstructions on highways, roads or streets . . . ."503 The Act's definition of "unit of government" includes cities,504 but the supreme court, relying upon section 18(a) of the Act,505 which provides that the Act "shall not apply to any proprietary function of a municipality," held that Houston was not liable under the Act for negligent acts arising out of its proprietary functions, such as the street maintenance defect Turvey challenged.506 The court distinguished County of Harris v. Eaton,507 in which it had held a county responsible for an abnormally large hole under the "special defect" language of section 18(b), on the ground that Eaton involved a county, which performs no proprietary functions and therefore would not be liable at common law for street defects.508 The Turvey court was careful to point out that its holding in no way affected a municipality's continued common law liability for proprietary functions.509

Turvey highlights the continuing importance of the distinction between proprietary functions and governmental functions where municipalities are involved, particularly with regard to the different procedural steps necessary to present common law claims and claims under the Act. Careful lawyers will pay close attention to this distinction, as well as to the notice requirements of the city (normally contained in the city charter), when an action against a municipality is contemplated.

Decisions from the courts of civil appeals illustrate the significance of the Turvey result and the possible pitfalls the attorney representing a claimant must avoid. In LaBove v. City of Groves510 the plaintiffs brought suit for property damage and personal injuries sustained when their automobile struck a partially open manhole in the city of Groves. The Groves City Charter made the submission of a verified notice within sixty days of an accident a condition precedent to city liability.511 Plaintiffs' counsel timely notified the Groves city manager by letter, but the letter was unverified and did not contain all the required information. Nonetheless, the city was on actual notice because, in addition to the letter, numerous city personnel arrived at the accident scene shortly after the accident occurred. The plaintiffs made claims under the common law and under the Tort Claims Act. The Beaumont court of civil appeals affirmed the trial court's summary judgment for Groves, citing Turvey.512 for the proposition that no

503. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 18(b) (Vernon 1970).
504. Id. § 2(1).
505. Id. § 18(a).
506. 602 S.W.2d at 519-20.
507. 573 S.W.2d 177 (Tex. 1978).
508. 602 S.W.2d at 519-20.
509. Id. at 520.
510. 602 S.W.2d 395 (Tex. Civ. App.—Beaumont), writ ref'd n.r.e. per curiam, 608 S.W.2d 162 (Tex. 1980).
511. Id. at 396. The notice also was required to include the names of witnesses, the extent of the injury, and other information. Id.
512. See notes 501-09 supra and accompanying text. The court cited Turvey's holding that a city is not liable under the Act for the negligent performance of a proprietary function such as street maintenance. 602 S.W.2d at 396-97.
claim could arise under the Act. The court further held that strict compliance with the city charter notice provision was required to support the common law claim, and that neither the unverified notice of the accident nor the city’s actual knowledge of the accident were sufficient.

A similar result was reached in Arco-Bell Corp. v. City of Temple. Arco-Bell sued the city of Temple for damages to its truck caused by the truck’s collision with a tree limb overhanging a city street. Temple filed a motion for summary judgment on the ground that Arco-Bell had failed to comply with the city charter by not filing with the city manager a verified notice of the property damage and by not giving notice of any kind to the mayor or city manager that a dangerous condition existed. Timely letters were sent by Arco-Bell’s president and its lawyer to the city, notifying the city manager of the collision, but the letters were not verified. The trial court granted the motion for summary judgment, and the Austin court of civil appeals affirmed. Arco-Bell argued that the overhanging tree limb was a special defect within section 14(12) of the Act and that therefore the actual notice received by Temple was sufficient. Citing Turvey, the court held that the Act notice provisions had no applicability to Arco-Bell’s claim, because the claim related to a proprietary function of the city. The court also held that the notice to the city had to be verified in order to be effective, and that Temple had not waived and was not estopped from asserting the lack of verification, although Temple’s attorney had responded to Arco-Bell’s notification letters with his own letter stating that he would place Arco-Bell’s claim before the city com-

513. 602 S.W.2d at 396-97.
514. Id. at 397. The court distinguished McDonald v. City of Houston, 577 S.W.2d 800 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.), as involving a situation in which the only deficiency in the notice was a lack of verification. 602 S.W.2d at 397. However, the Labove court also appears to question McDonald in that the Act’s actual notice exception appears to be utilized in a proprietary case. Id. McDonald seems to conflict with the majority of Texas decisions considering the question of notice in a proprietary case, and it remains to be seen whether other Texas courts will follow its more liberal approach. See Hughes, “Notice of Claim” as a Condition Precedent to Suit: Is the Proprietary-Governmental Distinction Important?, 31 BAYLOR L. REV. 427, 436-41 (1979).
515. 602 S.W.2d at 397.
516. Id. at 396-97.
518. Id. at 388.
520. Id. § 16 (Vernon Supp. 1980-1981) provides:

Except where there is actual notice on the part of the governmental unit that death has occurred or that the claimant has received some injury or that property of the claimant has been damaged, any person making a claim hereunder shall give notice of the same to the governmental unit against which such claim is made, reasonably describing the damage or injury claimed and the time, manner and place of the incident from which it arose, within six months from the date of the incident. Provided, however, except where there is such actual notice, charter and ordinance provisions of cities requiring notice within a charter period permitted by law are hereby expressly ratified and approved.
521. See notes 501-09 supra and accompanying text.
522. 603 S.W.2d at 387.
523. Id.
mission upon receipt of a proper claim form.\textsuperscript{524}

The plaintiffs were more fortunate in \textit{City of Houston v. Deshotel}.\textsuperscript{525} An accident caused by a city of Houston garbage truck resulted in injuries to the plaintiffs. Though the Houston City Charter required the plaintiffs to give the city a verified notice of the injury, the plaintiffs' attorney sent an unverified notice to the city apprising it of the injury. The trial court entered judgment for the plaintiffs, but the court of civil appeals reversed.\textsuperscript{526} The court stated that it was well settled in Texas that the Houston verification requirement was a condition precedent to a suit based on negligence in performing a proprietary function and that the "actual notice" exception provided by the Tort Claims Act\textsuperscript{527} did not apply where a proprietary function was involved.\textsuperscript{528} The parties had stipulated that the action involved a proprietary function. Fortunately for the plaintiffs, however, the court appears to have given them a second chance by remanding the case for a new trial.\textsuperscript{529} The court pointed out that the disposal of garbage is a governmental rather than a proprietary function and stated that the stipulation regarding proprietary function was not binding on the parties or the court because it amounted to a stipulation of a legal conclusion.\textsuperscript{530}

In a case involving the "actual notice" exception of the Act,\textsuperscript{531} the court in \textit{Collier v. City of Texas City}\textsuperscript{532} reversed the trial court's grant of Texas City's motion for summary judgment, which had been based on the absence of any formal written notice to the city of the plaintiff's accident.\textsuperscript{533} The plaintiff, a Texas City employee, was injured while attempting to free a compactor stuck in the Texas City landfill. Because a governmental function was involved,\textsuperscript{534} the court of civil appeals considered whether Texas City had "actual knowledge" of the injury pursuant to section 16 of the Act;\textsuperscript{535} that Texas City had received no written notice was conceded. The court followed other courts in interpreting the actual notice exception to require that the local government have information "reasonably describing the damage or injury claimed and the time, manner and place of the incident from which it arose."\textsuperscript{536} Applying this standard, the court found Texas City's actual knowledge more than sufficient: city employees, including the director of public works, actually witnessed the accident and

\textsuperscript{524} Id. at 387-88. The court found that the city's attorney had no duty to point out defects in a claim. Id. at 388.
\textsuperscript{525} 585 S.W.2d 846 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).
\textsuperscript{526} Id. at 851.
\textsuperscript{527} TEX. REV. CIV. STAT. ANN. art. 6252—19, § 16 (Vernon Supp. 1980-1981); see note 520 supra.
\textsuperscript{528} 585 S.W.2d at 849.
\textsuperscript{529} Id. at 851.
\textsuperscript{530} Id. at 849.
\textsuperscript{531} See note 520 supra.
\textsuperscript{532} 598 S.W.2d 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).
\textsuperscript{533} Id. at 357.
\textsuperscript{534} As indicated in City of Houston v. Deshotel, 585 S.W.2d 846, 849 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ), the disposal of garbage is a governmental function.
\textsuperscript{535} See note 520 supra.
\textsuperscript{536} 598 S.W.2d at 358.
were aware that the plaintiff was missing work and receiving medical treatment.\(^5\)

The courts of civil appeals considered certain other Act issues during the survey period. Three of the more important cases are summarized herein.\(^6\) *Forbus v. City of Denton*\(^7\) involved an application of the distinction between formulation of policy and implementation of policy established by the Texas Supreme Court in *State v. Terrell*.\(^8\) The family members of a prisoner named Forbus sued the city of Denton and others for wrongful death allegedly caused by Denton’s failure to search and supervise Forbus properly and to provide Forbus a fire retardant mattress. Forbus had set the mattress in his cell on fire and died several days later from the burns he received and the toxic fumes he inhaled. Denton received a summary judgment from the trial court on the sole ground that sovereign immunity had not been waived by the Act because of the exemption provided by section 14(9) of the Act.\(^9\) Based on section 14(9), Denton had argued that the claims of the Forbus family (1) were connected with an act of civil disobedience and (2) arose out of the “method of providing” police protection. The court of civil appeals reversed and remanded for trial and held that the “civil disobedience” exception was inapplicable because the incident in question was the act of Forbus alone and did not involve “a large number of persons acting unlawfully in concert.”\(^10\) With regard to the “method of providing police protection” exception, the court applied the *Terrell* test,\(^11\) which provides that the exception maintains governmental immunity for negligence related to the formulation of policy but not for negligence related to the implementation of policy.\(^12\) The court held that Denton’s decision as to which type of mattress to use related to the implementation of policy and that Denton was therefore not immune from a negligence attack.\(^13\)

In *Callaway v. City of Odessa*\(^14\) the El Paso court of civil appeals considered a claim by the Callaways against the city of Odessa for damages resulting from the backup of sewage into their home. After previous problems, at which times Odessa had been notified, a major backup flooded the Callaways’ entire home with two to three inches of sewage,

\(^{537}\) Id. at 358-59.

\(^{538}\) See also *Keiffer v. Southern Pac. Transp. Co.*, 486 F. Supp. 798 (E.D. Tex. 1980) (federal district court has ancillary jurisdiction over third-party claim for contribution under Tort Claims Act, even though claim was not brought in the federal district in which the cause of action arose).

\(^{539}\) 595 S.W.2d 621 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.).

\(^{540}\) 588 S.W.2d 784 (Tex. 1979).

\(^{541}\) 595 S.W.2d at 622. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 14(9) (Vernon 1970) provides that the provisions of the Act shall not apply to "[a]ny claim based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection or rebellion or arising out of the failure to provide, or the method of providing, police or fire protection."

\(^{542}\) 595 S.W.2d at 623.

\(^{543}\) 588 S.W.2d at 788.

\(^{544}\) 595 S.W.2d at 623.

\(^{545}\) Id.

causing considerable property damage, annoyance, and discomfort. The trial court rendered a take nothing verdict for Odessa notwithstanding a jury verdict for the Callaways; the jury found that Odessa had negligently maintained the sewer line and that the sewer line was a nuisance. The court of civil appeals affirmed, holding that the plaintiffs had demonstrated no compensable nuisance because the gravamen of the Callaways' complaint was negligence and there had been no showing that the sewer pipe was inherently dangerous. The court further held that the Callaways could not recover damages as a result of any waiver of governmental immunity provided by the Tort Claims Act. The court noted that damages to property could not be recovered under a provision providing waiver of immunity for death or personal injuries arising out of the condition or use of property, and held that the annoyance and discomfort suffered by the Callaways was not compensable as a personal injury.

Billstrom v. Memorial Medical Center involved the difficult distinction under the Act between a defective or negligent "condition or use of tangible property" and a "premise defect." The distinction is important because the liability established by the provision in section 3 of the Act, that a government is responsible as if it were a private person for death or personal injuries caused by "some condition or some use of tangible property, real or personal," is subject to certain exceptions. One such exception is contained in section 18(b), which provides that as to a "premise defect" a government will only owe a claimant the duty a private person would owe a licensee on private property, unless payment has been made by the claimant for the use of the premises. The person injured by a "premise defect" will therefore be owed a lesser duty than a person injured by a defective or negligent condition or use of property.

In Billstrom the plaintiff alleged that her legal ward, a mentally disturbed patient, who was being kept in a seventh-floor security room at the defendant medical center's psychiatric unit, was able to remove a security screen from an unlocked window, and fell while attempting to leave the hospital, sustaining permanent physical and mental injuries. The plaintiff

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547. Id. at 331.
548. Id. at 332-33. The court engages in an interesting discussion of the "nuisance" exception to governmental immunity without mentioning a constitutional basis for the exception. Id. at 333. It may be useful to compare the Dallas court of civil appeals' discussion in Bragg v. City of Dallas, 605 S.W.2d 669 (Tex. Civ. App.—Dallas 1980, no writ), in which the nuisance exception is described in more narrow terms. Id. at 671-72.
549. 602 S.W.2d at 334. The court also rejected the Callaways' claim that because some rain water entered the sewer system the system was used in a proprietary function of government. Id. at 333. The court noted that the city's sanitary sewer and storm sewer systems were separate and distinct. Id. The Callaways' argument reflects the artificialities of the governmental/proprietary distinction; in Texas a sanitary sewer system is a governmental function but a storm sewer system is a proprietary function.
551. 602 S.W.2d at 334.
552. 598 S.W.2d 642 (Tex. Civ. App.—Corpus Christi 1980, no writ).
554. Id. § 18(b) (Vernon 1970).
further alleged that the window and security screen involved were defective, harmful, and not properly installed and maintained, and that the medical center should have known and foreseen that such an accident might occur. Plaintiff specifically sought recovery for negligence in connection with the "condition and use of personal or real property." The medical center moved for summary judgment on the ground that the action was in reality based upon premises defects and that there was no allegation or showing that the hospital had breached any duty that a licensee would have to the patient. The trial court granted the motion for summary judgment, but the Corpus Christi court of civil appeals reversed. The court concluded that the window and screen would be considered premises defects within both the common and legal definitions of the words, in that the plaintiff's allegations dealt "with a defect in an appurtenance to a room itself, rather than a defect in a distinct piece of equipment, irrespective of whether or not that piece of equipment is classified as a fixture." The court found, however, that the granting of the motion for summary judgment was improper because: (1) the plaintiff should have been given an opportunity to replead; (2) a fact issue was raised by deposition testimony indicating that the hospital may have had actual prior knowledge of the screen's defective condition, in which case a licensor would have a duty under Texas law to warn the licensee of the defect or make the condition reasonably safe; and (3) there may have been a fact issue as to whether the hospital intended to treat the patient as a paying patient or whether the patient was indigent, in which case the section 18(b) exception might not apply.

Liability under 42 U.S.C., Section 1983. Many of the claims that local governments face in federal court are brought pursuant to 42 U.S.C., section 1983, which provides in part:

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

In *Dean v. Gladney*, the Fifth Circuit decided that the limitations placed on a section 1983 action by *Monell v. Department of Social Services* could not be avoided by bringing a *Bivens*-type action directly

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555. 598 S.W.2d at 644-45.
556. Id. at 648.
557. Id. at 646-47.
558. Id. at 647-48. On motion for rehearing, the court discussed the difficult question of when nonuse of property will support a suit otherwise barred by governmental immunity. Id. at 648-49. There is little doubt that future litigation will explore this question.
560. 621 F.2d 1331 (5th Cir. 1980).
561. 436 U.S. 658 (1978) (local governing bodies cannot be liable under §1983 on a
under the United States Constitution and 28 U.S.C., section 1331. The court also interpreted section 1988, the Civil Rights Attorney's Fees Awards Act, which permits a district court to award attorneys' fees to a "prevailing party" as part of the costs of suit in actions brought pursuant to sections 1981 through 1986.

In Dean the plaintiffs were arrested and jailed on charges of disorderly conduct or public intoxication after a confrontation between beachgoers and the police in Brazoria County. The plaintiffs filed suit under section 1983 and directly under the Constitution and section 1331, alleging violations of their rights under the first, fourth, eighth, and fourteenth amendments. The defendants included the law enforcement officers involved in the arrests, Brazoria County, the Brazoria County sheriff and his deputy, and the cities of Angleton, Clute, and Freeport. A jury found that certain of the officers at the scene of the confrontation had violated certain plaintiffs' constitutional rights in bad faith and awarded compensatory and punitive damages. The district court found as a matter of law that the two officers against whom damages were awarded were joint tortfeasors and accordingly entered judgment against them. The court found no direct involvement in the challenged actions by the Brazoria County sheriff and dismissed the cause of action against him. The district court also found that sovereign immunity protected the county and cities from suit. Finally, the court awarded attorneys' fees of $8,445 against the two deputies against whom judgments were entered. The plaintiffs appealed, alleging that the district court erred (1) by failing to find the county and cities liable for their employees' actions, (2) by failing to impose liability for attorneys' fees on the county and cities, and (3) by failing to consider whether the attorneys' fees were fixed or contingent, as allegedly required by Johnson v. Georgia Highway Express, Inc. One of the officers cross-appealed, claiming that the district court erred in holding him jointly and severally liable for certain damages.

Relying upon decisions in other circuits, matters of fiscal policy, and its analysis of Bivens and Monell, the Fifth Circuit held that municipal or county liability on the basis of respondeat superior in a Bivens-type action
was not available to the plaintiffs. As the court recognized, some victims of official misconduct might be foreclosed from an effective opportunity to secure compensation for their damages because they will be forced to sue individual government employees rather than "deep-pocketed" counties and cities. The court also held that attorneys' fees could not be awarded against the cities and county since these entities had properly been dismissed from the suit, that the trial judge had considered all the necessary factors when awarding attorneys' fees and had not abused his discretion in failing to give any weight to an alleged contingent fee factor, and that there was no proper basis for awarding damages against the officers jointly and severally, because the injuries shown were individual to the particular plaintiffs and could be apportioned with reasonable certainty between the officers.

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570. 621 F.2d at 1334-37. This result accords with the circuit's decision in Hearth, Inc. v. Department of Pub. Welfare, 617 F.2d 381 (5th Cir. 1980), another Texas case, in which the court held that it would not imply a Bivens-type action when it appeared that it was possible to bring the action under § 1983. Id. at 382-83. In Hearth the court stated: "It adds nothing to appellant's case to assume that a suit under § 1983 would be subject to defenses unique to the agency and its officials, for such defenses would also be available in the hypothetical implied Fourteenth Amendment cause of action." Id. at 383. Though the circuit in Dean leaves open the possibility that the full contours of a Bivens-type action and a § 1983 action might not be identical, the result augurs ill for a potential claimant against a local government who would seek an advantage in one or the other. See 621 F.2d at 1336-37.

571. 621 F.2d at 1337 n.15.

572. Id. at 1337-40.