1982

Local Government Law

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I. Access to Government Information

A number of important decisions were rendered during the survey period in both the federal and Texas state courts. A bid to amend the Code of Judicial Ethics to permit cameras in the courtroom was resoundingly defeated and the 67th Legislature passed a number of laws requiring certain government information to be confidential. Amendments to the Open Meetings Act were vetoed by Governor Clements and the attorney general responded to numerous inquiries as to whether government information must be divulged. Generally, the public's rights to government information were restricted during the survey period.

Courtroom Evidence. The previous survey of local government law reported that Judge Robert O'Connor, Jr. of the United States District Court for the Southern District of Texas had denied the application of two Dallas television stations to obtain contemporaneous access, or in the alternative, access after trial, to certain audiotapes that had been introduced into evidence by the government in its prosecution of Billy Clayton, Speaker of the Texas House of Representatives.1 Judge O'Connor denied permission to copy the tapes during trial and again after the trial because an additional defendant, L.G. Moore, had been severed from the main trial.2 Moore's voice appeared on virtually all of the tapes and the court held that release of the tapes to the electronic media would prejudice Moore's rights to a fair trial.3 Both television stations appealed and the Fifth Circuit granted expedited review of the question.4 Although Moore did not, at any time, object to the release of the tapes, and although none of the appellants filed briefs on the merits or appeared at oral argument, the Fifth Circuit affirmed the district court.5

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3. Id. at 2.
5. Id. at 434.
The Fifth Circuit held that there was no right of access to the audiotapes grounded in the first amendment to the United States Constitution. The court recognized that there was a common law right of access for the public and the press to inspect and copy documents introduced into evidence which predated the Constitution, but ruled that whether to give effect to that common law right was within the discretion of the trial judge. The court finding that Judge O'Connor had not abused his discretion in weighing a perceived threat to Moore's fair trial rights more heavily than the right to access, stated:

The broadcasters' argument that the concern for defendant Moore's fair trial rights was exaggerated beyond proper proportion is addressed to an audience in perhaps the worst possible position to make that judgment: appellate courts are far removed in time and space from the events in the course of criminal trials. And while distance may allow us to escape the smoke and heat generated in those proceedings, our distance from the flame robs us as well of the light cast thereby.

What the Fifth Circuit fails to mention is that there was no fire in the court below—only smoke. Nowhere at any time did Moore allege that his fair trial rights would be implicated by the copying of the tapes. The government never opposed the right of the television stations to copy the material, nor did the defendants who were tried and acquitted with Representative Clayton. The only reference in the record that conceivably could support objection by any party was Representative Clayton's attorney's acknowledgement, in a response to Judge O'Connor's observation that Mr. Moore remained to be tried. Although none of the appellees, including Moore, filed briefs, Clayton's attorney did file a letter with the court prior to oral argument which stated: "It has been our position that the Court was correct in its ruling since L.G. Moore was yet to be tried. But, we do not feel any reason to make an appearance in this matter either by filing a brief or by oral argument." Shortly before oral argument, the United States Attorney's Office for the Southern District of Texas sent a letter to the court stating:

As per our earlier telephone discussions, I have endeavored to communicate with the attorneys of the other parties herein and advise you of their intentions. Messrs. Minton, Burton and Fitzgerald of Austin, Texas; Messrs. Levey and Goldstein of San Antonio, Texas; and Messrs. Pape and Mallett of Houston, Texas, represented the parties to the prosecution other than L.G. Moore. They have all been acquitted. Mr. Michael Ramsey of Houston, Texas, represents L.G. Moore, who was severed and not tried. The indictment remains pending as to

6. Id. at 427-28.
7. Id. at 429.
8. Id. at 431.
him. It appears that none of these parties are [sic] now interested in defending the judge's (O'Connor) order, or intend to file briefs herein. It thus appears that the case will be submitted on appellant's briefs only and that no one will appear for oral argument on the side of the appellee. While I hesitate to formally suggest mootness or any particularly summary action in the absence of any direct statements from these other parties to the Court, I feel called upon to advise you of the situation, in order that the Court may take action as it deems appropriate.11

The broadcasters argued that even if the court sua sponte considered Moore's fair trial rights, nevertheless the abuse of discretion standard was inappropriate because there was a presumption in favor of access. The Third Circuit in In re Application of National Broadcasting Co. found that a decision on release of Abscam videotapes "is not accorded the review reserved for discretionary decisions based on first hand observations" of the trial judge.12 In addition, the Second and D.C. Circuits held that the presumption of access to courtroom evidence could be overcome for only the most compelling reasons.13 The Fifth Circuit declined to follow these cases, stating that there was no support for their holdings and that they had misread pertinent United States Supreme Court precedents.14 The Fifth Circuit read the Supreme Court case of Nixon v. Warner Communications15 as recognizing that a number of factors may militate against public access. The court relied primarily upon the footnotes in Justice Powell's majority opinion in Warner in which Justice Powell tracked the history of the common law right of access to courtroom evidence and chronicled various situations in which access had been denied.16

One of the themes of the Fifth Circuit's opinion in Clark was that both the print and electronic media had been permitted to attend the trial and had been given written transcripts of the tape recordings.17 Following the Fifth Circuit's opinion, United States District Judge Norman W. Black of the Southern District of Texas ordered the parties to a criminal prosecution not to turn over even the transcripts of potential evidence.18 The court, citing Clark, stated that release of transcripts would deny the defendant the right to a fair trial, potentially might deny rights guaranteed by the fourth and fifth amendments to the Constitution, and would hamper the court in selecting a fair and impartial jury.19

Courtrooms. In Richmond Newspapers v. Virginia the United States

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14. 654 F.2d at 431.
16. 654 F.2d at 428.
17. Id. at 427, 432.
19. Id.
Supreme Court held that there was a first amendment right to attend criminal trials. The Supreme Court also recently granted a petition for certiorari to review the constitutionality of a Massachusetts state statute barring the public from juvenile proceedings involving sex crimes.

In Texas, access to both civil and criminal proceedings is also constitutionally mandated. Article I, § 13, provides: "All courts shall be open . . . ." This provision has never been construed by a Texas court in a courtroom access case, but "[t]he uniform interpretation of the 'all courts shall be open' language [in other state constitutions] is that the language confers an independent right of the public to attend court proceedings." Several recent Texas cases, however, have dealt with the right to access.

In *Cox Enterprises, Inc. v. Vascocu* the Lufkin News and its editor filed a petition for writ of mandamus in the Texas Supreme Court attempting to require a district judge to open pretrial civil proceedings. The district judge had closed the proceedings in a shareholders' derivative action brought against the directors of Texas National Bank seeking damages for mismanagement and other relief. The proceedings in question were closed pursuant to the bank directors' motion urging that "the cause at hand involves sensitive and confidential matters impinging upon the operation and reputation of a national bank association and the potential for damages to a national bank arising from the mere airing of such charges . . . ." The Lufkin News and its editor objected when the district court granted the motion, and asked that the proceedings be open to the public. The court denied the newspaper's request stating that the newspaper and the editor lacked standing to challenge the order because they owned no stock in the bank. Furthermore, the judge did not believe the public would be interested in nor would it understand the pretrial proceedings. The Texas Supreme Court refused to file the petition for writ of mandamus, and the Lufkin News appealed to the United States Supreme Court.

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22. TEX. CONST. art. I, § 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person, for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law."
23. KFGO v. Rothe, 298 N.W.2d 505, 511 (N.D. 1980).
27. Record at 29, *Cox Enterprises*.
Access to Records. The Bryan-College Station Eagle requested from Texas A&M University the names of candidates being considered for the presidency of the university. The school refused to disclose the names claiming an exemption from disclosure under the Texas Open Records Act. Pursuant to the Act, the school applied to the attorney general for an opinion on whether the information had to be disclosed.

The attorney general upheld the claim of exemption under section 3(a)(11) of the Act with respect to the recommendations of a Search Advisory Committee, but held that the list of candidates considered must be disclosed. The attorney general also ruled that a committee created by the Board of Regents to search for a new president may make recommendations to the board, and submit a list of candidates without fear of public disclosure. The university refused to comply with the attorney general's decision, and the Eagle filed a mandamus action in state district court to compel disclosure. Following a trial, a writ of mandamus was issued ordering the defendants to disclose the names. The case is currently on appeal.

No other reported cases during the survey period construed the Open Records Act. The attorney general, however, issued twenty-six opinions on various aspects of the Act. These opinions are summarized below.

Attorney General Opinions. In 1979 the Urban Planning Department of the City of Dallas conducted a job market survey to determine whether salaries paid to city photographers and darkroom technicians were competitive with private industry jobs. Among the information collected were salary figures from several private employers. A set of longhand notes written by a city employee reflecting the wage rate information obtained from the private employers was the subject of ORD-256. The attorney general held that the longhand notes were excepted from disclosure by section 3(a)(10) of the Open Records Act. In addition, the attorney general held that a memorandum summarizing the results of the survey with conclusions and recommendations was exempted from disclosure under section 3(a)(11) of the Act except for factual information contained in the memo-

32. Id. at 3.
36. TEX. ATT'Y GEN. ORD-256 (1980).
37. Id. at 2; TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(10) (Vernon Supp. 1982).
random which did not identify individual companies, but merely related to the average low range and average high range of various positions.\(^3\)

In 1979 the attorney general ruled in ORD-223 that the Open Records Act did not require the disclosure of applicants for school superintendent if the applicant could demonstrate that release of his name was likely to have an adverse effect on his current employment.\(^3\) The decision was based upon a lower level Florida appellate decision.\(^4\) That appellate decision was subsequently reversed by the Florida Supreme Court.\(^4\) The attorney general, therefore was asked in ORD 257, to reconsider his decision in ORD 223.\(^4\)

ORD-257 involved a request for information from both the Austin Independent School District and the City of Plano, Texas. The Austin American Statesman was seeking the names of unsuccessful applicants for the position of school superintendent of the Austin Independent School District. Plano was asked to disclose a list of finalists for the position of chief of police. The attorney general ruled that there were three types of "privacy" interests protected under the Open Records Act.\(^4\) The first, constitutional privacy, is available only if the subject matter relates to marriage, procreation, contraception, family relationships, or child rearing and education.\(^4\) The second, common law privacy, relates to information which contains highly intimate or embarrassing facts that would be highly objectionable to a reasonable person if published and, in addition, the information must be of no legitimate concern to the public.\(^4\) The third type of privacy interest, recognized specifically by the Open Records Act, is information in personnel files which, if released, would constitute a clearly unwarranted invasion of personal privacy.\(^4\) ORD-223 relied upon the third type of privacy interest. The attorney general determined that the names of applicants for superintendent of schools of the Austin Independent School District and for chief of police of Plano were not excepted from disclosure under any provision of the Open Records Act.\(^4\) In reaching this result the attorney general specifically overruled ORD-223.\(^4\) The Austin Independent School District challenged the attorney general's opinion in state district court.\(^4\)

In ORD-258 the attorney general determined whether incident reports

\(^{38}\) TEX. ATT'Y GEN. ORD-256, at 2.
\(^{39}\) Id. ORD-223 (1979).
\(^{40}\) Id. See Byron, Harless, Schaffer, Reid & Assocs., Inc. v. State, 360 So. 2d 83 (Fla. Dist. Ct. App. 1978).
\(^{41}\) Schevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633 (Fla. 1980).
\(^{42}\) TEX. ATT'Y GEN. ORD-257 (1980).
\(^{43}\) Id. at 2.
\(^{44}\) Id.
\(^{45}\) Id.
\(^{46}\) Id.
\(^{47}\) Id. at 3.
\(^{48}\) Id.
\(^{49}\) See Cox Enterprises, Inc. v. Austin Indep. School Dist., No. 309534 (Dist. Ct. of Travis County, 200th Judicial Dist. of Texas, Jan. 6, 1982) (declining to enjoin school district upon district's promise to obey law in future).
filed by employees of the City of Irving Fire Department relating to trans-
portation of patients by a city operated medical service were excepted from
disclosure by reason of either a common law or constitutional right of pri-
vacy.\textsuperscript{50} The reports identified the patient, provided a physical description of him, and described emergency treatment administered. The attorney
general held that the reports were not per se exempted from disclosure, but
directed the City of Irving to insure, before disclosure, that no report con-
tained information of a highly intimate or embarrassing nature of any in-
formation that would be highly objectionable to a person of ordinary
sensibilities.\textsuperscript{51} The attorney general listed as examples of intimate, embar-
rassing, or objectionable information treatment for childbirth, venereal
disease, female complaints, psychiatric conditions, or suicide attempts.\textsuperscript{52}
The attorney general refrained from specifically holding these would be
excepted under a privacy analysis, but stated they might raise an issue of a
common law or constitutional right of privacy.\textsuperscript{53}

ORD-259\textsuperscript{54} involved an anonymous pledge of a substantial sum of
money to the City of Fort Neches to build a library. The entire donation
was to be paid in cash on or before February 1, 1981, but the donor re-
quested that his pledge agreement be withheld from public disclosure. The
city attorney of Fort Neches requested an opinion from the attorney gen-
eral with respect to whether the donor's identity could be kept confidential
in light of the Open Records Act. Because the donor was not going to pay
the money until February 1, 1981, the attorney general construed the cir-
cumstances of the gift as "still under negotiation," and held that since the
public could not be at a meeting to discuss the gift under section 2(f) of the
Open Meetings Act,\textsuperscript{55} allowing the identity of the owner to be disclosed
pursuant to the Open Records Act would be anomalous.\textsuperscript{56} Construing sec-
tion 2(f) of the Open Meetings Act as a law creating, confidential informa-
tion, the attorney general ruled that the City of Fort Neches need not
disclose the pledge agreement relating to the gift until the entire amount of
the gift was paid or not later than February 1, 1981.\textsuperscript{57} Although the result
of the opinion is not surprising, the effect of the decision is to incorporate
the various exceptions to the Open Meetings Act into the Open Records
Act. Hopefully, the attorney general will resist similar opportunities in the
future and confine ORD-259 to its facts.

\textsuperscript{50} Tex. Att'y Gen. ORD-258 (1980).
\textsuperscript{51} Id. at 1-2.
\textsuperscript{52} Id. at 2.
\textsuperscript{53} Id.
\textsuperscript{54} Tex. Att'y Gen. ORD-259 (1980).
The public may be excluded from that portion of a meeting during which a
discussion is had with respect to the purchase, exchange, lease, or value of real
property, negotiated contracts for prospective gifts or donations to the state or
the governmental body, when such discussion would have a detrimental effect
on the negotiating position of the governmental body as between such body
and a third person, firm, or corporation.
\textsuperscript{57} Id.
In ORD-260\textsuperscript{58} the City of Irving appealed to the attorney general for an opinion regarding whether certain information relating to a worker's compensation claim against the City of Irving was available to the public. The attorney general held that that portion of the record concerning the employee's alleged injury, the potential injuries of other employees, and information relating to the possible dangers of a particular chemical used by the City could be withheld from public inspection in light of pending litigation pursuant to exemption 3(a)(3).\textsuperscript{59} The remainder of the record consisted of information regarding the employee's prior injuries and the City's Safety Review Board accident sheets and personnel status change sheets regarding other injuries which the City contended should be withheld under the privacy exceptions. The attorney general overruled this contention.\textsuperscript{60}

When the Texas Department of Banking forwards a report of examination to a state chartered bank, it includes for return a form acknowledgement indicating that the bank's directors have received and reviewed the report. If special comments are included as part of the report, a sentence is stamped across the face of the acknowledgement indicating, "each of the undersigned has read or caused to be read the letter of transmittal attached hereto." Thus, the presence or absence of language stamped across the acknowledgement letter indicates some of the conclusions reached by the Department of Banking in its examination. After receiving a request for this information, the Department of Banking sought an opinion from the attorney general on whether the information should be disclosed. The attorney general applied section 3(a)(12) of the Open Records Act and held that the information was exempt from disclosure.\textsuperscript{61}

In ORD-262\textsuperscript{62} the attorney general determined whether certain information contained in reports filed by a municipally operated emergency medical service was available to the public. The request sought disclosure of data in four categories: (1) incident information such as date, pickup location, type of run, person requesting ambulance, number of miles traveled, and location where the patient was delivered; (2) patient information including name, address, gender and age; (3) the names of the driver and attendant and their respective level of training; and (4) a brief description of the injury or illness with a check list indicating the probable cause and type of injury and/or the suspected illness and the part of the body affected. The attorney general held that all this information must be disclosed under the Open Records Act with the exception of certain types of illnesses that are protected under a common law right of privacy.\textsuperscript{63}

ORD-263\textsuperscript{64} involved an effort by the City of San Marcos to restrict ac-
cess to financial disclosure statements of certain city officials by enacting an ordinance. The ordinance prohibited duplication of the financial statements, and stated that “no publication shall be allowed” of the financial statements. In order to inspect the file, the ordinance required that “a sworn statement that gives reasonable details of why he or she believes a certain employee or officer has a conflict of interest.” The ordinance also required that certain city officials be present during the examination of the file. The attorney general held that these provisions violated the Open Records Act and would therefore be of no effect.\(^6\)

The attorney general in ORD-264, held that the names, addresses, and qualifications of applications for the position of city director of public safety were available to the public.\(^6\) Claimed exemptions under sections 3(a)(1), 3(a)(2), 3(a)(14), and 3(a)(17) were overruled except that the addresses of police officer applicants were held to be exempt from disclosure.\(^6\) This opinion represented the first time that the attorney general specifically held that the qualifications of applicants for public employment must be disclosed. The attorney general said that applicant qualifications could not be deemed to infringe upon the applicant’s right of privacy whether constitutional, common law, or employment related under section 3(a)(2) of the Act.\(^6\)

ORD-265\(^6\) involved the question of whether information regarding the site for a waste treatment facility was excepted from disclosure under the Act. The attorney general ruled that a resolution at the Gulf Coast Disposal Authority that revealed the proposed location of a waste treatment plant was excepted from disclosure by section 3(a)(5) of the Open Records Act until purchase of the site had been completed.\(^7\)

In ORD-266\(^7\) the attorney general considered whether two investigative reports prepared by the San Antonio Fire Department concerning the termination of a probationary firefighter were exempt from disclosure. The firefighter had filed a complaint of discrimination with the Federal Equal Employment Opportunity Commission. San Antonio sought to withhold the investigative reports pursuant to section 3(a)(3) because the information related to litigation. The attorney general held that there was a reasonable probability of litigation with respect to the terminated probationary firefighter and, therefore, withholding the investigative reports was reasonable.\(^7\)

The Contra Valley Council of Governments sought to withhold an annual report regarding an affirmative action plan. The attorney general rejected the claimed exemption in ORD-267 under section 3(a)(2), but stated

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\(^{65}\) Id. at 2.  
\(^{67}\) Id.  
\(^{68}\) Id. at 2.  
\(^{70}\) Id. at 2.  
\(^{72}\) Id. at 1-2.
that interoffice communications consisting of advice, opinions, and recommendations could be withheld.\textsuperscript{73}

Three types of information were requested from the Seguin Housing Authority: (1) a listing of the addresses of housing units operated by private landlords who participated in a housing subsidy program from January, 1979 through October, 1980; (2) a listing of the owners and managers of these units; and (3) the total amounts paid by the authority to the owner or manager from January, 1979 through October, 1980. The Seguin Housing authority operated two types of programs. In the first, the authority acted as landlord and manager of apartment units. In the other program the authority paid a monthly subsidy to private owners of apartment units on behalf of tenants who met the income requirements established by the Federal Department of Housing and Urban Development.

In opposing the request, Seguin first contended that the housing authority was not a “governmental body” within the meaning of the Open Records Act, and the information was therefore exempt from disclosure. The attorney general rejected this argument in ORD-268, even though the housing authority received no revenues from the State of Texas, Guadalupe County, the City of Seguin, or any other local taxing authority.\textsuperscript{74} The money the housing authority collected from rentals, according to the attorney general, assumed “the character of public monies as soon as they are paid to the authority.”\textsuperscript{75} Seguin next contended that the information requested was exempt as information deemed confidential by law. The attorney general also rejected this contention and held that the constitutional right of privacy was not implicated, and reaffirmed the oftstated principal that “the scope of common law privacy is narrow indeed.”\textsuperscript{76}

The Dallas Times Herald requested the University of Texas Health Science Center at Dallas and the associate comptroller of the University of Texas system to release information relating to the resignation of an individual who was suspected of tampering with public monies. The governing body sought an attorney general’s opinion as to whether the privacy exception of the Act shielded the requested information from disclosure. The attorney general, in ORD-269, noted that section 3(a)(2) had been applied to permit withholding of information from the public concerning the circumstances involved in termination of employment.\textsuperscript{77} Distinguishing those previous cases on the grounds that most of the information involved in the instant situation related to the handling of public funds, the attorney general ruled that the information must be disclosed.\textsuperscript{78}

In ORD-270 the requesting party sought an affidavit taken in connection with an investigative session of the Federal Equal Employment Opportunity Commission. Apparently, the affidavit came into the possession

\textsuperscript{73}TEX. ATT'Y GEN. ORD-267 (1981).
\textsuperscript{74}TEX. ATT'Y GEN. ORD-268, at 2 (1981).
\textsuperscript{75}Id.
\textsuperscript{76}Id.
\textsuperscript{77}TEX. ATT'Y GEN. ORD-269 (1981).
\textsuperscript{78}Id.
of the city, that claimed the litigation exception of section 3(a)(3) and applied for an opinion from the attorney general. The attorney general found that there was a reasonable likelihood of litigation, and that withholding the affidavit therefore was reasonable.\textsuperscript{79}

The Texas Department of Labor and Standards promulgated regulations requiring contracts between promoters and boxers to be filed with the department. A request was made for certain of these contracts, and in ORD-271 the attorney general held that these contracts were public information.\textsuperscript{80} The attorney general overruled contentions that the information was exempted under sections 3(a)(4) and 3(a)(10) of the Act.\textsuperscript{81}

In ORD-272\textsuperscript{82} the attorney general considered whether the results of a blood alcohol test conducted on an injured Fort Worth police officer was public information. The police officer was shot in the line of duty, taken to a hospital, and given a blood alcohol test. He died the following day. The contention that section 3(a)(1) applied on the grounds that the right of privacy lapses upon death of the individual whose privacy is allegedly being protected was overruled by the attorney general.\textsuperscript{83} The attorney general also overruled the contention that the test was exempted under 3(a)(8) as a record of a law enforcement agency because an internal investigation into the death of the officer by the Fort Worth Police Department had been concluded.\textsuperscript{84} The attorney general, therefore, ordered the test disclosed.\textsuperscript{85}

The Wichita Falls' city attorney requested an opinion from the attorney general in ORD-274\textsuperscript{86} as to whether traffic summonses and complaints issued by the police department must be made available to the public under the Open Records Act. The attorney general ruled that disclosure could not be compelled under the Act because, in Wichita Falls, the requested records were kept by the judiciary, and the Open Records Act was not applicable to the judiciary.\textsuperscript{87} The attorney general noted, however, that there was both a statutory\textsuperscript{88} and common law right of inspection of public records applicable to the documents requested and, therefore, complaints issued by the police department and filed with the clerk of the Municipal Court should be made available to the public.\textsuperscript{89}

\textsuperscript{79} 79. TEX. ATT'Y GEN. ORD-270 (1981).
\textsuperscript{80} 80. TEX. ATT'Y GEN. ORD-271 (1981).
\textsuperscript{81} 81. Id. at 2.
\textsuperscript{82} 82. TEX. ATT'Y GEN. ORD-272 (1981).
\textsuperscript{83} 83. Id.
\textsuperscript{84} 84. Id. at 2.
\textsuperscript{85} 85. Id.
\textsuperscript{86} 86. TEX. ATT'Y GEN. ORD-274 (1981).
\textsuperscript{87} 87. Id. at 1.
\textsuperscript{88} 88. TEX. REV. CIV. STAT. ANN., art. 1945 (Vernon 1964 & Pam. Supp. 1982) provides:

The clerk shall keep such other dockets, books and indexes as may be required by law; and all books, records and filed papers belonging to the office of county clerks shall at all reasonable times be open to the inspection and examination of any citizen, who shall have the right to make copies of the same.

\textsuperscript{89} 89. TEX. ATT'Y GEN. ORD-274, at 2 (1981).
In ORD-275 the attorney general determined whether information regarding health maintenance organizations (HMO) filed with the State Board of Insurance should be made available to the public. The attorney general noted that article 20A.27 of the Texas Insurance Code specifically made the information requested public and, thus, all information contained in an application for certificate of authority to operate a health maintenance organization and copies of federal HMO reports filed with the State Board of Insurance constituted public information.91

The Texas State Board of Dental Examiners conducted an investigation in 1976 with regard to a licensee of the board concerning difficulties with alcohol and drug abuse. In ORD-276,92 the attorney general held that pursuant to article 4550,93 the records and files of the Texas State Board of Dental Examiners, including that investigation, were public records and open to inspection at reasonable times.94 Article 4550 also provides that investigation files are confidential until such time as the investigation is complete or has been inactive for sixty days, at which time the files are open to inspection.95 The attorney general noted that the Open Records Act specifically makes public any information currently regarded by agency policy as open to the public, and therefore ordered that the information be turned over to the requesting party.96

In ORD-277, the attorney general built upon prior decisions97 holding that qualifications of applicants for government jobs were public and not exempt from disclosure under the Open Records Act.98 ORD-277 involved the qualifications of applicants for Commissioner of the Texas Department of Human Resources. The attorney general ruled that such qualifications must be released to the requesting party.99

In 1975 the attorney general issued ORD-68 holding that a letter of resignation was excepted from disclosure under section 3(a)(2) of the Open Records Act as “information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”100 ORD-68 was subsequently cited for the proposition that an employee’s letter of resignation was excepted per se, but ORD-278 drastically limited that interpretation. The attorney general stated that “it is our opinion that the decision should no longer be cited for the proposition that an employee’s letter of resignation is excepted per se from public disclosure. Disclosure of certain information contained in the particular letter of resig-

91. Id. at 2. See TEX. INS. CODE ANN. art. 20A.27 (Vernon 1963).
93. TEX. REV. CIV. STAT. ANN. art. 4550 (Vernon 1969).
97. TEX. ATT’Y GEN. ORD-257 (1980); Id. ORD-264 (1981).
100. TEX. ATT’Y GEN. ORD-68 (1975).
nation might constitute a 'clearly unwarranted invasion of personal pri-

vacy' but in the usual instance, we do not believe it will do so."101 The

attorney general ruled that two letters of resignation to the Odessa city

attorney should be turned over to the requesting party.102

In ORD-279 the attorney general once again construed and upheld the

"informer's privilege."103 The decision upheld the Irving city attorney's

refusal to disclose the identity of a person who reported a zoning ordi-
nance violation.104 The attorney general noted that although the privilege

was usually involved in the context of a criminal case, it also applied to

administrative officials having a duty of inspection or of law enforcement

within their particular spheres.105 To insure free flow of information to the
government, the Open Records Act, has been construed by the attorney
general to exempt from disclosure the identity of individuals giving infor-
mation to an administrative or law enforcement agency.106

In ORD-280107 the plaintiff in a pending action against the Director of
the Texas Veterinary Medical Diagnostic Laboratory sought information
relating to the funding, authorization, and publication of research and the
actual research for an article entitled "Antibody and Impro, a Commercial
Whey Antibody Blend." The attorney general ruled that the information
was exempted from disclosure because of the pending civil litigation and
because of the government attorney's reasonable determination that the
information should be withheld.108

ORD-281109 involved a request for reports relating to the dismissal of a
former employee of the Texas Department of Mental Health and Mental
Retardation. The dismissed employee filed a complaint with the Federal
Equal Employment Opportunity Commission; therefore, the attorney gen-

eral ruled that the information sought was excluded under the litigation
exception to the Open Records Act.110 The attorney representing the gov-

dernment employer and the assistant attorney general representing the gov-
dernment department both determined that the information should be

withheld from disclosure and the attorney general held that that determi-
nation was reasonable.111 Similarly, in ORD-282 the attorney general also

applied the litigation exception.112 Internal reports of the Texas Depart-
ment of Mental Health and Mental Retardation relating to inspection of
certain of its facilities were found to be exempted from disclosure in light

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102. Id.
104. Id. at 2.
105. Id.
106. Id.
108. Id. at 2.
110. Id.
111. Id.
Open Meetings Act. The 67th Legislature passed significant amendments to the Open Meetings Act in H.B. No. 1555. Although the bill passed

113. Id.

114. The proposed amendments to the Open Meetings Act read:

AN ACT

relating to notice requirements, violations, and the requirement to keep minutes under the open meetings law.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 271, Acts of the 60th Legislature, Regular Session, 1967, as amended (Article 6252-17, Vernon's Texas Civil Statutes), is amended by amending Section 3 and by adding Section 3B to read as follows:

Section 3. (a) Any interested person, including bona fide members of the news media, may commence an action either by mandamus or injunction for the purpose of stopping, or preventing, or reversing violations or threatened violations of this Act by members of a governing body. An action taken by a governmental body in violation of this Act is voidable.

(b) A court may assess against a governmental body reasonable attorney's fees and other costs of litigation reasonably incurred in an action under this section in which the plaintiff has substantially prevailed. In exercising its discretion, the court shall consider whether the governmental body's conduct had a reasonable basis in law.

Sec. 3B. A governmental body shall prepare and retain minutes of each of its meetings. The minutes shall state the subject matter of each deliberation and shall indicate each vote, order, decision, or other action taken by the governmental body. The minutes prepared under this section are public records and shall be made available for public inspection and copying on request to the chief administrative officer of the governmental body.

SECTION 2. Subsections (a) and (h), Section 3A, Chapter 271, Acts of the 60th Legislature, Regular Session, 1967, as amended (Article 6252-17, Vernon's Texas Civil Statutes), are amended to read as follows:

(a) Written notice of the date, hour, place, and subject of each meeting held by a governmental body shall be given before the meeting as prescribed by this section [, and any action taken by a governmental body at a meeting on a subject which was not stated on the agenda in the notice posted for such meeting is voidable]. The requirement for notice prescribed by this section does not apply to matters about which specific factual information or a recitation of existing policy is furnished in response to an inquiry made at such meeting, whether such inquiry is made by a member of the general public or by a member of the governmental body. Any deliberation, discussion, or decision with respect to the subject about which inquiry was made shall be limited to a proposal to place such subject on the agenda for a subsequent meeting of such governmental body for which notice has been provided in compliance with this Act.

(h) Notice of a meeting must be posted in a place readily accessible to the general public at all times for at least 72 hours preceding the scheduled time of the meeting, except that notice of a meeting of a state board, commission, department, or officer having statewide jurisdiction, other than the Industrial Accident Board or the governing board of an institution of higher education, must be posted by the Secretary of State for at least seven days preceding the day of the meeting. In case of emergency or urgent public necessity, which shall be clearly identified [expressed] in the notice, it shall be sufficient if the notice is posted two hours before the meeting is convened. Cases of emergency and urgent public necessity are limited to imminent threats to public health and safety and unforeseeable situations requiring immediate action by the governmental body. Provided further, that where a meeting has been called with notice thereof posted in accordance with this subsection, additional subjects may be added to the agenda for such meeting by posting a supplemental notice, in
the house and senate, the measure was vetoed by Governor Clements on June 18, 1981. Notwithstanding the vetoed legislation, the 67th Legislature did pass some amendments to the Open Meetings Act. Subsection 3(A)(e) was amended to read:

A school district shall have a notice posted on a bulletin board located at a place convenient to the public in its central administrative office and shall give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the school district in providing special notice.

The legislature also amended article 1269 by adding section 13a that provides that a housing authority may not authorize the construction of a project unless a public meeting about the proposed project is held before the construction site is approved. The meeting is to be held as close as possible to the proposed site. A majority of the housing commissioners which the emergency or urgent public necessity requiring consideration of such additional subjects is expressed. In the event of an emergency meeting, or in the event any subject is added to the agenda in a supplemental notice posted for a meeting other than an emergency meeting, it shall be sufficient if the notice or supplemental notice is posted two hours before the meeting is convened, and the presiding officer or the member calling such emergency meeting or posting supplemental notice to the agenda for any other meeting shall, if request therefor containing all pertinent information has previously been filed at the headquarters of the governmental body, give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the governmental body in providing such special notice. The notice provisions for legislative committee meetings shall be as provided by the rules of the house and senate.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

President of the Senate
I certify that H.B. No. 1555 was passed by the House on May 30, 1981, by a non-record vote.

Speaker of the House
I certify that H.B. No. 1555 was passed by the Senate on May 31, 1981, by the following vote: Yeas 30, Nays 0.

Chief Clerk of the House

Secretary of the Senate

APPROVED:

Date

Governor


116. TEX. REV. CIV. STAT. ANN. art. 6252—17, § 3A(e) (Vernon Supp. 1982).
117. TEX. REV. CIV. STAT. ANN. art. 1269 (Vernon 1963).
118. TEX. REV. CIV. STAT. ANN. art. 1269k, § 13a (Vernon Supp. 1982).
119. Id. § 13a(a).
must attend the meeting, and any person who owns or leases real property within a one-fourth mile radius of the site of the proposed project must be given the opportunity to comment on the proposal.\footnote{120}{Id.} In addition, the housing commissioners must post notice of the date, hour, place, and subject of the meeting at least thirty days before the scheduled day of the meeting at the county courthouse of the county in which the proposed project is to be located, and at the city hall if the proposed project is to be located within the boundaries of an incorporated city.\footnote{121}{Id.} A copy of the notice must be published in a newspaper or newspapers that provide general circulation to the county in which the proposed project is to be located.\footnote{122}{Id.} Actual notice must be mailed to any person who owns real property within one-fourth of a mile radius of the site of the proposed project.\footnote{123}{Id.} At the site of the proposed project a sign must be posted having dimensions no smaller than four feet by four feet, which states “Site of Proposed Housing Project.”\footnote{124}{Id.} If the notice provisions are not complied with, the Act prohibits an incorporated city or town or other political subdivision from issuing a permit, certificate, or other authorization for the construction or occupancy of a housing project under the Act.\footnote{125}{Id.}

During the 1981-1982 interim of the 67th Legislature, the Speaker of the House directed the Judiciary Committee to make an interim study of the Open Meetings Act. The committee, consisting of Representatives Adkisson, Bush, Coleman, and Rangel, met during 1982 to consider revisions to the Open Meetings Act.

Although several judicial interpretations of the Open Meetings Act were made during the survey period, the Texas Supreme Court had only one occasion to deal with the Act. In Railroad Commission of Texas v. Continental Bus System, Inc.\footnote{126}{616 S.W.2d 179 (Tex. 1981).} the court was presented with an odd situation. On April 25, 1975, the Railroad Commission issued an order pursuant to proceedings that concededly did not comply with the notice requirements of the Open Meetings Act. An appeal was taken from that order. On August 6, 1975, after notice and compliance with the Open Meetings Act, the Railroad Commission issued another order granting the same relief although an additional party was added. The supreme court reiterated the rule that the Railroad Commission may not change an order after it loses jurisdiction by appeal.\footnote{127}{Id. at 179 (Tex. 1981).} The court found, however, that the rule did not apply if the commission had not yet acted upon the application from which the appeal was taken.\footnote{128}{Id.} Concluding that the notice on the August 6, 1975 order was sufficient, that the commission had jurisdiction to enter the August 6, 1975 order, and finally, that the order was supported by sub-
The interpretation of the Open Meetings Act was also the subject of several decisions of other Texas courts. *Porth v. Morgan* involved the issue of whether a municipal body could ratify an action taken in violation of the Open Meetings Act. At a meeting closed to the public, in violation of article 6252—17, the Texas Open Meetings Act, the Houston County Hospital Authority Board elected a director. On February 1, 1980, the board conducted an open meeting wherein the individual was elected as vice chairman of the board. The court held that the initial action was invalid, and therefore could not be ratified by the later meeting.

*Coates v. Windham* involved an effort by property owners and taxpayers to permanently enjoin directors of the Department of Corrections from erecting a state prison in Grimes County, Texas. One of the plaintiffs' contentions was that action by the government was taken in violation of the Open Meetings Act. The attack involved the adequacy of notice of the meeting, and the failure of the presiding officer at that meeting to identify the statutory section authorizing a closed meeting. The appellees contended that local notoriety or general newspaper publicity of the proceedings was sufficient to supply the notice required by the Act. The court squarely held that such newspaper publicity was not adequate notice under the Act. Nevertheless, the court found that the notice that had stated only that the board would consider a report of the site selection committee, substantially complied with the notice provisions of section 3A of article 6252—17 of the Act. The court noted, however, that the words "skirt the very edge of sufficiency." With respect to the presiding officer's failure to identify why the meeting was being closed, the court held that the board violated section 2(a) of the statute, but that the enforcement provision of section 3A, making actions voidable, could not apply. The court stated that the enforcement provision only applied to a public body's failure to give sufficient notice of an intended meeting and did not apply to the failure of a presiding officer to identify the section that authorized a closed meeting. Inexplicably, the court stated that it did not need to decide whether any of the other enforcement provisions of the Texas Open Meetings Act would be applicable to this omission.

In *Rogers v. State Board of Optometry*, the court was asked to decide whether the Open Meetings Act required a governmental body to list, as

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129. Id. at 183-84.
130. 622 S.W.2d 470 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).
131. Id. at 475-76.
133. Id. at 577.
134. TEX. REV. CIV. STAT. ANN. art. 6252—17, § 3A (Vernon Supp. 1982) requires that written notice of the date, hour, place, and subject of governmental meetings be posted.
135. Id.
136. Id.
137. Id.
138. Id.
an agenda item, an executive session that is called for the purpose of seeking an attorney’s advice with respect to pending litigation. The court held that the written notice requirements of section 3A of article 6252—17, did not apply to such an executive session. The court also found no other requirement in the Texas Open Meetings Act that required the listing of such a session as an agenda item on the notice posted for an open meeting.

In Cameron County Good Government League v. Ramon one of the issues was whether the Cameron County Commissioners’ Court was systematically violating the Open Meetings Act by improperly calling emergency meetings when there was in fact no emergency. The trial court granted judgment for the defendants at the close of plaintiffs’ case. On the appellate level, the defendants asserted that the plaintiffs had no standing to enforce the Open Meetings Act and that the question of “emergency” or “urgent public necessity” was not a proper subject of judicial review. The Beaumont court found that the plaintiffs had standing to enforce the Act. The court noted that “[i]t is difficult to see how the Legislature could broaden the class of ‘any interested person’” entitled to enforce the Act. The court also rejected the contention that a governing body has “unbridled power to decide what is an emergency under the Open Meetings Act.” Such a holding, the court said, would emasculate the meaning of the Act.

Cameras in the Courtroom. As noted in the last survey of Local Government Law, the United States Supreme Court decided in Chandler v. Florida that televising criminal judicial proceedings did not per se violate the constitutional rights of a criminal defendant. Following this decision, the Texas State Bar formed a “State Bar Committee on Cameras in the Courtroom.” The committee proposed an amendment to canon 3A(7) of the Texas Code of Judicial Conduct, which provided:

A judge may authorize broadcasting, recording, or photographing in the courtroom and areas immediately adjacent thereto during sessions

140.  Id. at 606.
141.  Id.
143.  Id. at 230.
144.  Id.
145.  Id. at 231.
of the court, recesses between sessions, and on other occasions, provided that:

(a) The participants will not be distracted nor will the dignity of the proceedings be impaired;

(b) The broadcasting, recording or photographing of any court proceedings will be in compliance with guidelines adopted by the Supreme Court of Texas.\(^{150}\)

In addition to the amendment, the committee also proposed guidelines and a rule regarding extended media coverage of judicial proceedings.\(^{151}\)

The committee formally presented the proposals to the Texas Supreme Court,\(^{152}\) and the court then presented the guidelines and related information to the annual Judicial Section Conference in Corpus Christi in September, 1981.\(^{153}\)

Following presentations, the judiciary was polled and the proposal was defeated 182 to 36.\(^{154}\) The Texas Supreme Court then, by unanimous vote, turned down the plan to allow cameras in the courtroom.\(^{155}\) Chief Justice Joe Greenhill indicated that the court would not reconsider the matter any time in the near future.\(^{156}\)

**Legislative Developments.** The Texas Legislature passed several laws regarding government information. Six statutes made certain government records confidential,\(^{157}\) while other new laws made information specific-

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151. Id. at 394-97.


153. The conference included presentations by the National Association of Broadcasters and by the Chief Justices of the Alabama and Florida Supreme Courts, courts that allow photographic coverage. Austin attorney Roy Minton, who represented Representative Billy Clayton in the Brilab prosecution, spoke against the proposal. Id.

154. Id.

155. Id.

156. Id.

157. The following information was made confidential by the Legislature: TEX. TAX. CODE ANN. § 111.006(a)(2) (Vernon Pam. 1981) now makes confidential:

all information secured, derived or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, sources of income, profits, losses, or expenditures of the taxpayer.

In addition, the Act provides that "[a]ll information made confidential in this title may not be subject to subpoena directed to the comptroller or attorney general except in a judicial or administrative proceeding in which this state, another state, or the federal government is a party." Id. § 111.006(c). TEX. REV. CIV. STAT. ANN. art. 419a (Vernon Supp. 1982), concerning the identification of persons operating railroad locomotives, was amended to provide that:

If a person operating a railroad locomotive is involved in an accident with another train or a motor vehicle or is arrested for violation of a law relating to the person's operation of a locomotive, the number or other identifying information about the person's, operator's, commercial operator's, or chauffer's driver's license may not be included in any report of the accident or violation,
II. INCORPORATION

One case during the survey period considered incorporation issues. In *State v. Town of Hudson Oaks* the State, acting through the Parker County District Attorney on relation of the City of Weatherford, brought a quo warranto proceeding to declare the incorporation of the town of Hudson Oaks invalid. The trial court rendered a summary judgment uphold-

and the person's involvement in the accident or violation may not be recorded in the person's individual driving record maintained by the Department of Public Safety.

Article 5547-202 was amended by adding a new section 2.27 which provides:

For the purpose of confidentiality of client records, the facilities of the department and all community centers for mental health and mental retardation services created pursuant to Article 3 of the Texas Mental Health and Mental Retardation Act, as amended (Article 5547-203, Vernon's Texas Civil Statutes), will be considered as component parts of one service delivery system within which client records may be exchanged without the consent of the client.

TEX. REV. CIV. STAT. ANN. art. 5547-202, § 2.27 (Vernon Supp. 1982). The Legislature also passed an act relating to the confidentiality of information and records relating to known or suspected cases of sexually transmissible diseases by amending article 4445, § 8. The amendment provides:

All information and records held by the Texas Department of Health and its agents relating to known or suspected cases of sexually transmissible diseases shall be strictly confidential. Such information shall not be released or made public upon subpoena or otherwise, except that release may be made under the following circumstances (involving medical or epidemiological information) . . . .

*Id.* (Vernon Supp. 1982).

The Legislature made confidential information specifying the location of any site or item declared to be a state archeological landmark by amending TEX. NAT. RES. CODE ANN. § 191.004 (Vernon Supp. 1982).

Finally, the legislature passed an act relating to the purchase, care, and disposition of certain items made of crafted precious metal. TEX. REV. CIV. STAT. ANN. art. 9009a (Vernon Supp. 1982) provides for a dealer engaging in the business of purchasing and selling crafted precious metals to maintain certain records and keep them open for inspection by police officers during regular business hours. In addition, the Act provides that "information obtained under this Section is confidential except for use in a criminal investigation or prosecution or a civil court proceeding." *Id.*

158. The legislature passed an act relating to the creation and funding of a child support collection office under the Juvenile Board of Smith County. The act amended article 5139E-1, § 2, and provides that

the child support office shall keep an accurate and complete record of its receipts and disbursements of support payment funds. The record is open to inspection by the public. It is the duty of the County Auditor or other duly authorized person in the county to inspect and examine the records and audit the accounts quarterly and to report his findings and recommendations to the judges.


Finally, an act was passed by the 67th Legislature relating to the record identifying persons who request access to certain financial information filed with the secretary of state by state officers and employees. Financial statements and affidavits filed under TEX. REV. CIV. STAT. ANN. art. 6252—9b (Vernon Supp. 1982) are public records. *Id.* § 9(a). Anyone requesting to see these public records, however, is required to state his name, address, whom the person represents, and the date of the request. This information is also public. *Id.*

159. 610 S.W.2d 550 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).
ing the validity of the incorporation, but on appeal the Eastland Court of Civil Appeals reversed and remanded. Hudson Oaks' position was that the summary judgment was properly granted because the quo warranto proceeding was not brought within thirty days after the return date of the election, as allegedly required by articles 9.03 and 9.30 of the Texas Election Code. The court of civil appeals, however, determined that the statutory thirty-day notice provision applicable to election contests did not apply because the State's quo warranto proceeding was not an "election contest." The court defined election contests as involving challenges to the election process itself, and said that in the case at bar the State did not challenge the election process but only sought to determine whether Hudson Oaks had proper authority to seek incorporation.

III. POLICE POWER

Three cases of interest discussing the police power of local governments were decided during the survey period. In *Comeau v. City of Brookside Village* plaintiffs, owners of a four acre lot in the city of Brookside Village, challenged two city ordinances that prohibited them from moving a mobile home onto their property. The ordinances allowed parking of mobile homes in Brookside Village only in mobile home parks. The court of civil appeals reversed the trial judge and rendered judgment that the ordinances were invalid. The court stated that the police power could restrict a citizen's right to use his property as he chose only if such use "threatens the public health, the public safety, the public comfort or welfare." Stating that Brookside Village had not substantiated its contention that the ordinances were justified by public health considerations, the court found the challenged ordinances an unreasonable exercise of the police power.

A challenge to the City of Burkburnett's power to regulate the drilling and operation of oil wells within its city limits met a different fate in *Helton v. City of Burkburnett*. Helton refused to obtain a permit to drill an oil well, but the court held that the city was justified in regulating oil well drilling by the interest proposed by the city was a danger to public health caused by too many septic tanks. The evidence showed, however, that if the plaintiffs had built an on-site house, which was allowed, the same septic system would have been necessary as with a mobile home. Thus, the court found no justification for the distinction the ordinances drew between mobile and stationary homes. *Id.*

160. *Id.* at 550.
161. *Id.* at 550-51 n.2. TEX. ELEC. CODE ANN. arts. 9.03, 9.30 (Vernon 1967).
162. 610 S.W.2d at 550. The court was not swayed by the contrary language in State v. City of Azle, 588 S.W.2d 666 (Tex. Civ. App.—Fort Worth 1979, no writ) ("In the instant case even if State had raised the matter of population as an issue for trial it would come too late—for there was no contest of validity of the election within thirty (30) days after the return date of the Azle election. We hold the provision as to time to be mandatory and jurisdictional.").
163. 610 S.W.2d at 551.
165. *Id.* at 335.
166. *Id.* at 334 (citing Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 515 (1921)).
167. 616 S.W.2d at 334-35. The interest proposed by the city was a danger to public health caused by too many septic tanks. The evidence showed, however, that if the plaintiffs had built an on-site house, which was allowed, the same septic system would have been necessary as with a mobile home. Thus, the court found no justification for the distinction the ordinances drew between mobile and stationary homes. *Id.*
168. 619 S.W.2d 23 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).
well on a lease he owned, as required by ordinance no. 375 of the City of Burkburnett. Ordinance no. 375 regulated oil well drilling in several respects, and authorized the City Commissioners to refuse a permit to drill a well when drilling might be injurious to the city or its citizens. Burkburnett obtained a permanent injunction prohibiting Helton from drilling until he obtained a permit. Helton appealed this ruling to the Fort Worth Court of Civil Appeals, asserting that ordinance no. 375 violated his due process and equal protection constitutional rights. Primarily, Helton argued that the ordinance went beyond the legitimate use of the city's police power by allowing a total prohibition of drilling. The court disagreed, and held that the ordinance was a legitimate exercise of Burkburnett's police power. The court stated that an ordinance passed pursuant to the city's police power carried a presumption of validity, and that "[f]or a challenge to be successful the ordinance must clearly appear to be unreasonable and arbitrary." The court ruled that ordinance no. 375 did not violate due process, but rather "merely provides rules facilitating the orderly and harmonious development of both oil exploration and city growth."

In *Sign Supplies, Inc. v. McConn* various individuals and businesses engaged in renting, leasing, and manufacturing portable signs challenged three ordinances of the City of Houston regulating the size, height, location, and construction of signs and billboards within Houston's city limits. The ordinances, among other things, restricted the future use of portable signs on off-premise locations. The plaintiffs contended that the ordinances (1) amounted to a taking of property without just compensation and without due process of law; (2) were unconstitutionally vague; (3) infringed their right to engage in a legitimate business; (4) constituted a prior restraint on freedom of speech; (5) impaired contract rights; (6) denied equal protection; and (7) conflicted with state and federal law. Houston defended the ordinances as a legitimate exercise of its police power and the district court agreed. First, the court noted that Houston was specifically authorized by statute to regulate signs and billboards, and that the regulation of outdoor advertising was "a reasonable and proper exercise of the police power." Further, the court found that the ordinances set forth a reasonable, comprehensive scheme for regulating outdoor advertising and that its provisions bore a substantial relationship to the public health, safety, and general welfare.

169. *Id.* at 24.
170. *Id.* (citing *Zahn v. Board of Public Works*, 274 U.S. 325 (1927)).
171. *Id.* The court also rejected Helton's equal protection challenge. *Id.* at 24-25.
173. 517 F. Supp. at 780.
175. *Id.* at 782.
176. *Id.* The court found that (1) the ordinances, though perhaps reducing the value of plaintiffs' businesses, did not totally prohibit the use of portable signs and did not constitute a "taking" of plaintiffs' property, and that the ordinances would be upheld even if a "taking" were found, because the ordinances were shown to bear a real relation to the public interest; (2) the ordinances were not unconstitutionally vague; (3) the equal protection clause was not violated by the differing treatment of on-premise and off-premise advertising because Hous-
The courts considered many challenges to local government action during the survey period that are not easily categorized. Some of the more interesting are discussed herein.\footnote{177}

The Texas Supreme Court considered free speech issues in *Iranian Muslim Organization v. City of San Antonio.*\footnote{178} In December 1979, members of the Iranian Muslim Organization applied to the City of San Antonio for parade permits for two downtown demonstrations against the presence at a nearby air force base of the former Shah of Iran, Reza Pahlavi. The Ku Klux Klan then filed an application to demonstrate at the same time and place. On December 4, the city manager denied the applications. The Iranians then filed suit to enjoin San Antonio from interfering with their rights of free speech and assembly, and to require San Antonio to grant their parade permit. The district court denied a temporary restraining order. On December 5, Iranians on a hunger strike at the San Antonio City Hall were taken into protective custody when threatened by an angry crowd. The San Antonio City Council, on December 11, upheld the city manager's denial of the Iranians' application for a permit and also banned parades or demonstrations by others “pro or con in the Iranian ques-

\footnotesize{\textit{Id.} at 782-86.}

\footnote{177} For other interesting cases, see Stone v. City of Wichita Falls, 646 F.2d 1085 (5th Cir. 1981) (Wichita Falls City Charter provision providing that any appointed officer of Wichita Falls who becomes a candidate for elected office shall forfeit his position with the city was void because it was inconsistent with \textsc{Tex. Rev. Civ. Stat. Ann. art. 1269m, § 22 (Vernon Supp. 1982)}, which imposes certain restrictions on political activities of fire and police officers but does not prohibit fireman's attempt to seek elective office); Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980) (Houston ordinance regulating sound amplification equipment unconstitutional in several respects because unduly restrictive as to time, place and manner of use, and unduly vague as to prohibited language); City of Waco v. Roddey, 613 S.W.2d 360 (Tex. Civ. App.—Waco 1981, writ dism'd) (awarding damages resulting from partial demolition by Waco of vacant house owned by plaintiff; lack of due process existed even though Waco complied with the notice provisions of its ordinance by giving publication notice because plaintiff had no actual notice and plaintiff was known and could easily have been notified); Moncrief v. Gurley, 609 S.W.2d 863 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.) (office of county treasurer found to be a constitutional office that could not be abolished without constitutional authorization; because no such authorization found, the legislature acted unconstitutionally when it authorized an election to abolish the office of County Treasurer of Tarrant County); City of Houston v. Glenshannon Townhouse Community Ass'n, Inc., 607 S.W.2d 930 (Tex. Civ. App.—Houston [1st Dist.], no writ) (equal protection clause violated by allowing other townhouse associations to participate in a garbage costs reimbursement program but rejecting plaintiff's application to participate; as a result Houston was responsible for the association's damages pursuant to 42 U.S.C. § 1983 (1976 & Supp. III 1979)); City of Wichita Falls v. Streetman, 607 S.W.2d 644 (Tex. Civ. App.—Fort Worth 1980, no writ) (declaring void a city ordinance regulating location of mobile homes because there was no published notice of the ordinance prior to or after its passage, in violation of statutory and city charter requirements).

\footnote{178} 615 S.W.2d 202 (Tex. 1981).
tion.” On December 17, the trial court denied a temporary injunction, which was affirmed on appeal. In a 5-4 decision, the supreme court reversed, finding that San Antonio had not met its “‘heavy burden’ to justify the imposition of a prior restraint on the exercise of free speech.”

The court stressed San Antonio’s failure to make any effort to resolve the perceived problem of violence directed at the Iranian demonstrations by regulation of the demonstrations’ time, place, and manner.

The Dallas Court of Civil Appeals in *Banknote Club v. City of Dallas* considered the extent to which municipalities can regulate establishments selling alcoholic beverages under permits granted by the Texas Alcoholic Beverage Commission. The Banknote Club, which allowed dancing, and Stan’s Boilermaker, which provided live entertainment, held such permits. The City of Dallas asserted the right to regulate the two businesses, and to assess fees against them, pursuant to ordinances governing dance halls and theaters. The two clubs argued that under article XI, section 5 of the Texas Constitution, Dallas could not by ordinance act inconsistently with the Texas Alcoholic Beverage Code, and that the Code preempted the field of regulation of Alcoholic Beverage Commission permittees. The court disagreed, finding that the Alcoholic Beverage Code proscribed local governments from regulating the occupation of dispensing legal beverages, and from setting up conditions for engaging in that occupation, but did not prohibit local governments from enforcing regulations or collecting fees in connection with the performance of other occupations in which a person with an Alcoholic Beverage Commission permit might wish to engage simultaneously. The court found that the Dallas ordinances regulating dance halls and theaters were not inconsistent with the Code, and affirmed the trial court’s judgment for Dallas.

Two federal court decisions dealt with attempts by Texas cities to regulate adult theaters. In *Spiegel v. City of Houston* owners of a substantial portion of the adult movie theaters in the City of Houston filed suit against Houston, the Houston Police Department, the Harris County District Attorney, and individuals working for these entities, alleging a conspiracy to drive the theaters out of business. The district court granted a preliminary injunction forbidding the Houston Police Department from forcing patrons of adult theaters to give their names and addresses and from arresting theater employees when the arrest would tend to close the theater.

179. *Id.* at 205.
181. 615 S.W.2d at 208.
182. *Id.* at 207.
183. 608 S.W.2d 716 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.)
184. TEX. CONST. art. XI, § 5 provides that “no charter or any ordinance passed under said charter shall contain any provision inconsistent with . . . the general laws enacted by the Legislature.”
185. 608 S.W.2d at 718.
186. *Id.* at 718-19.
187. 636 F.2d 997 (5th Cir. 1981).
188. *Id.* at 998.
On appeal, the Fifth Circuit affirmed the granting of the injunction, but remanded the case to the district court to narrow the scope of the injunction. The court determined that the district court had not abused its discretion in finding: (1) that the theater owners would probably prevail on the merits of their claim that the police had no legitimate explanation for their activities and in fact were simply harassing the theaters; (2) that there was a substantial likelihood of irreparable harm in the permanent loss of theater customers; and (3) that the public interest was not damaged by the injunction when the taking of names was not shown to be of any use and the employees' arrests occurred prior to a determination that the motion pictures being shown were obscene. The circuit court made clear, however, that enjoining good faith efforts to obtain witnesses in an investigation or for trial, or enjoining arrests where significant law enforcement efforts were involved was not be proper, and remanded to the district court for correction of the injunction.

Galveston's efforts to use zoning to restrict the location of adult theaters was considered in Basiardanes v. City of Galveston. The plaintiff owned a building in Galveston that he began to convert into an adult movie theater. The Galveston City Council then enacted an ordinance amending the Galveston zoning ordinance to restrict the operation of adult theaters to areas which did not include the location of plaintiff's property. The plaintiff brought suit, alleging that the definition of adult theater in the ordinance was unconstitutionally vague, and that the prohibited area was unreasonably restrictive and in effect a suppression of free speech. The court determined that the ordinance's definition of "adult motion picture theater," though perhaps imprecise, relied upon United States Supreme Court cases attempting to define obscenity and was not unconstitutionally vague. More interestingly, the court construed Young v. American Mini Theatres, Inc., the seminal United States Supreme Court decision allowing restrictive zoning of adult theaters in certain circumstances. The plaintiff argued that only fifteen to twenty per cent of Galveston's land area could be used for adult theaters under the ordinance, and that these areas were not commercially viable. The court, however, construed Mini Theatres as not guaranteeing that adult theaters would be "selectively exempt from the reasonable economic burden that befalls some activity in every land use program." The court added that "the ordinance strikes at the pocket book not at the Constitution" if the ordinance leaves an ample area for exhibition of adult movies even though the area is not com-

189. Id. at 1003.
190. Id. at 1001-02.
191. Id. at 1002-03.
192. Id. at 1003.
194. Id. at 979-81.
196. See 514 F. Supp. at 981-82.
197. Id. at 982.
pletely advantageous. In light of these principles, the court held that the Galveston ordinance did not so impact upon free speech as to be violative of the Constitution.

In Aladdin's Castle, Inc. v. City of Mesquite the Fifth Circuit overturned a Mesquite ordinance aimed at a coin operated amusement center to be operated by Aladdin's Castle, Inc. After first encouraging Aladdin's to locate in Mesquite, the city began a determined effort to keep Aladdin's out of the city, apparently believing that Aladdin's had ties to the mafia. As the case reached the circuit court, Aladdin's was challenging a Mesquite ordinance that prohibited the issuance of licenses for coin operated amusement centers to anyone having a "connection with criminal elements," and that prohibited children under the age of seventeen from playing coin operated games. The Fifth Circuit agreed with the district court that the ordinance's "connection with criminal elements" language was unconstitutionally vague and therefore void, and also found that the age prohibition had no rational basis and unconstitutionally infringed on the rights of minors to freely associate.

V. Tort Liability

The current survey period again contained many examples of the struggle between plaintiffs asserting claims for damages resulting from governmental action and governments seeking shelter within the protective walls of governmental immunity. This section discusses decisions considering notice requirements for claims made against municipalities resulting from their performance of "proprietary" functions, decisions considering the Texas Tort Claims Act, and recent federal cases interpreting the federal cause of action under 42 U.S.C. § 1983.

Municipality Notice Requirements. Claimants suing municipalities for "proprietary" torts have often found their claims foreclosed by failure to comply strictly with the notice requirements found in many city charters. The Texas Supreme Court, however, recently delivered an important decision that somewhat ameliorates the harshness of the notice rules. In Artco-Bell Corp. v. City of Temple Artco-Bell sued the city of Temple

198. Id.
199. Id. at 982-83.
201. 630 F.2d at 1037-38.
202. Id. at 1038-44.
203. For an outline of the scope of Texas governmental immunity, see Babcock & Collins, supra note 1, at 452.
204. Municipalities have long been responsible for torts committed in the performance of "proprietary" as opposed to "governmental" functions. Id. at 453.
206. See, e.g., LaBove v. City of Groves, 602 S.W.2d 395 (Tex. Civ. App.—Beaumont), writ ref'd n.r.e. per curiam, 608 S.W.2d 162 (Tex. 1980); Bowling v. City of Fort Arthur, 522 S.W.2d 270 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.)
207. 616 S.W.2d 190 (Tex. 1981).
for damages to its truck caused by the truck's collision with a tree limb overhanging a city street. The issue for the supreme court was whether the Austin Court of Civil Appeals had properly sustained the trial court's summary judgment for Temple on the basis of Artco-Bell's failure to send a verified notice of its claim to the city as required in the Temple City Charter. The supreme court noted that as a home rule city, Temple's power to enact the notice provision derived from article 1175, paragraph 6, which provides that a home rule city, among its other powers, may "provide for the exemption from liability on account of any claim for any damages to any person or property, or . . . fix such rules and regulations governing the city's liability as may be deemed advisable."208 The court did not quarrel with the proposition that notice requirements serve useful purposes,209 and noted that under the Texas Constitution home rule cities have full powers of self government, except when the legislature places limitations on those powers.210 The court held, however, that the legislature in article 1175 had restricted a home rule city to enacting only reasonable rules and regulations governing the city's liability; the court found this limitation in the "as may be deemed advisable" language of paragraph 6.211

Applying this reasonableness test, the supreme court found Temple's verification requirement unreasonable and declared it invalid.212 Chastising Temple for delaying its rejection of Artco-Bell's claim until after the time for giving notice had passed, and noting that in other cases cities had conducted themselves similarly, the supreme court stated that "the verification requirement placed in home-rule city charters . . . is unreasonable in that, rather than to aid in the administration of justice by preventing spurious and unfounded claims, the verification notice in fact places an obstacle in the path of citizens pursuing a legitimate redress for wrongs committed by public entities."213 The court distinguished lower court cases precluding actions against municipalities because of claimants' failure to comply with verified notice requirements, saying that in those cases the question of whether the verification requirement without an amendment procedure represented an unreasonable extension of the powers allowed in article 1175, paragraph 6, was not presented.214

208. TEX. REV. CIV. STAT. ANN. art. 1175, para. 6 (Vernon 1963).
209. 616 S.W.2d at 192.
210. Id. at 193.
211. Id.
212. Id. at 193-94. The court reversed the judgment of the court of civil appeals and remanded the cause for trial on the merits. Id. at 194.
213. Id. at 193. Although the court criticizes Temple severely, worse behavior could be imagined. Upon receiving Artco-Bell's unverified notice shortly after the accident, the Temple city attorney wrote Artco-Bell stating that upon receipt of a proper notice Artco-Bell's claim would be processed. The city attorney enclosed with this letter a copy of the provision of the Temple City Charter which required a verified notice. Artco-Bell then, on the last day for filing notice, by its attorney mailed a second unverified claim. Id. at 191; see also fact discussion in court of civil appeals decision, 603 S.W.2d 384 (Tex. Civ. App.—Austin 1980). Artco-Bell, a corporation represented by counsel and supplied with the charter requirements by the city, was not the unwary citizen the supreme court depicted as the victim of clever municipal lawyers.
214. 616 S.W.2d at 194.
Two Texas Supreme Court decisions rendered after *Artco-Bell* indicate that all city charter verification requirements (without amendment procedures) applicable to proprietary tort claims are invalid, but that the supreme court will strictly apply other notice requirements that it considers reasonable. In *Walker v. City of Houston* Walker sued the City of Houston for damages sustained when Walker’s automobile ran into a hole dug in a city street by the city water department. Houston’s defense was that Walker’s written notice of her claim was unverified. The supreme court said that in *Artco-Bell* “we held that the requirement of verification of the notice of claim against a city represents an unreasonable limitation on a city’s liability and is invalid as it is contrary to the limitation of authority placed upon home rule cities by Article 1175, Para. 6.” Without further discussion, the court affirmed the trial court’s judgment for Walker.

In *City of Houston v. Torres*, however, the supreme court refused to increase the number of escape routes from city charter notice provisions. Torres, a mailman, stepped into a water meter hole covered with grass and weeds while on his route in May, 1974. Torres felt a sharp pain in his back and leg at the time of the accident, and upon completing his route filled out a federal form stating that he had been injured. Torres also saw his family doctor, but continued to work and was not particularly concerned about his back pain. In August of 1974, the pain increased, and in October, 1974, Torres required surgery. The first notice Houston had of the injury was when Torres submitted a verified claim on October 29, 1974. This notice was submitted 171 days after Torres’ injury; the Houston City Charter required written notice to be given within ninety days after the injury. Torres argued that he was excused from giving the 90 day notice because he believed the injury was trivial. The supreme court disagreed. The court found no “good cause” provision in the city charter, and no “good cause” exception in case law. Further, the court said that to rec-

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216. Id. at 674.
217. Id.
218. 621 S.W.2d 588 (Tex. 1981).
219. Id. at 590. In an interesting aside, the court notes that because there was no evidence or contention that Houston had actual notice of Torres’ injury, “it is unnecessary to determine if the actual notice exception of section 16 [of the Texas Tort Claims Act] applies to a proprietary tort.” Id. The actual notice exception of section 16 is probably not directly applicable in proprietary situations. See Hughes, “Notice of Claim” as a Condition Precedent to Suit: Is the Proprietary-Governmental Distinction Important?, 31 BAYLOR L. REV. 427, 438 (1979). Ironically, before the Tort Claims Act was passed claimants could recover from municipalities only for proprietary torts. Recovery for such torts may now be harder than recovery for governmental torts covered by the Act due to section 16’s actual notice exception. The supreme court, however, may be willing to address the issue of actual notice in proprietary situations; by extension from *Artco-Bell* it may be “unreasonable” to require a written notice when the city has available all necessary information and may investigate further if it desires.
220. Id. at 591. The court did recognize two exceptions to the requirement of timely notice: (1) when a city is estopped from asserting noncompliance, and (2) when a person is incapable of giving notice because of physical or mental incapacity or because of minority. Id.
The court concluded that Torres knew of his injury, as evidenced by his filing a notice of injury form with his employer and seeing his doctor, and was not excused from complying with the mandatory notice provision of the city charter. Reversing the judgment of the lower courts, the court rendered judgment that Torres take nothing.

**Texas Tort Claims Act.** The Texas Supreme Court construed the Texas Tort Claims Act in one case during the survey period. In *Duhart v. State* the widow and children of Duhart, a deceased employee of the Texas Department of Highways and Public Transportation, sued the state for exemplary damages due to Duhart’s death while performing bridge maintenance duties. The supreme court stated the rule of Texas law that the state is immune from suit unless the legislature has consented to suit, and noted that the Tort Claims Act provides specifically, in section 3, that the Act’s waiver of immunity “DOES NOT extend to punitive or exemplary damages.” The petitioners argued that the legislature created a cause of action allowing exemplary damages when it provided for worker’s compensation insurance for employees of the State Highway Department. The court rejected this argument, however, relying in part on the express provision in section 3 against exemplary damages, and affirmed the judgments of the lower courts dismissing the suit.

*Duhart* was applied by the Corpus Christi court of civil appeals in *Tamayo v. City of Harlingen*. Tamayo, an employee of the city of Harlingen, was killed by inhalation of a deadly gas while working at a city sewage lift station. The issue on appeal was whether Tamayo’s surviving children were entitled to maintain a suit against Harlingen for exemplary damages. The children relied upon article 16, section 26 of the Texas Constitution, which provides: “Every . . . corporation . . . that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages . . . .” The court rejected the children’s argument that they had a constitutional right to pursue their claim for exemplary damages because Harlingen was a municipal corporation. Finding *Duhart* controlling, the court affirmed the trial court’s granting of summary judgment for Harlingen.

221. *Id.*
222. *Id.* at 591-92.
223. *Id.*
225. 610 S.W.2d 740 (Tex. 1980).
226. *Id.* at 741.
228. 610 S.W.2d at 742 (emphasis in original).
229. *Id.* at 742-43.
231. TEX. CONST. art. XVI, § 26.
232. 618 S.W.2d at 103.
The Texas courts of civil appeals rendered several other decisions of note construing the Tort Claims Act. In City of Galveston v. Shu the court of civil appeals considered section 16, the notice provision of the Act. Shu's automobile was damaged in a collision with a Galveston Police Department van, and Shu did not comply with the claim notice requirements in the Galveston City Charter. Thus the only proper notice Galveston may have received was “actual notice” pursuant to section 16. Shu's petition did not allege that conditions precedent to the cause of action had been performed, or that notice of any sort had been given to Galveston. At trial, the jury found Galveston negligent, and the court entered judgment for Shu. The court of civil appeals affirmed. Because Shu had not adequately alleged actual notice in his petition, the court determined that Shu was not entitled to the notice presumption of Rule 93(m) of the Texas Rules of Civil Procedure. The court, however, decided that Shu had presented sufficient evidence of probative force regarding Galveston's actual notice to withstand a “no evidence” point since the court found that there was circumstantial evidence that an official investigation of the accident was made by Galveston police.

In Palmer v. City of Benbrook the Fort Worth court of civil appeals rejected a claim against the city of Benbrook based on Benbrook's alleged failure to properly design and regulate parking on its streets. For additional cases construing the Tort Claims Act, see Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526 (Tex. Civ. App.—Beaumont 1981, no writ) (section 19A of the Act results in waiver of sovereign immunity against school district only as to injuries and damages resulting from the “use” of motor vehicles; stabbing of student on school bus held not to arise from the use of the bus despite allegations of bus driver negligence in permitting non-students to use the bus, permitting armed persons to enter the bus, and failing to deter or stop violence on board); Cronen v. Nix, 611 S.W.2d 651 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.), aff'd sub nom. Cronen v. City of Galena Park, 102 S. Ct. 132, 70 L. Ed. 2d 112 (1981) (municipality was immune from claim of false imprisonment because operation of police department is a governmental function and because § 14(10) of the Act specifically excluded claims of false imprisonment from the acts allowed against a municipality); State v. Nichols, 609 S.W.2d 571 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (section 3 of the Act established liability for injuries due to “some condition or use of real property,” in this case a huge washout on a state highway, and there was evidence to support the findings of DPS officers' negligence); Duson v. Midland County Indep. School Dist., 627 S.W.2d 428 (Tex. Civ. App.—El Paso 1981) (a school district is a state agency immune from suit while exercising governmental functions except for limited immunity waiver for use of motor vehicles; furnishing of swings for school children on playground is a governmental function).
Palmer and his daughter Karen were injured when they ran head on into another moving car at the crest of a hill in Benbrook. The collision allegedly resulted from the narrowness of the street and Benbrook's parking and traffic policies. The Palmers' cause of action against Benbrook involved three alternative theories: negligence; "special defect" liability under the Tort Claims Act; and nuisance. The court of civil appeals rejected each theory, and affirmed the trial court's summary judgment for Benbrook. With regard to the negligence theory, the court stated that Benbrook had the discretionary right under Texas law to decide the width of its streets, and therefore was protected by governmental immunity. The court stated that the law "is also well settled in Texas that the regulation, by municipalities, of traffic and parking on city streets, pursuant to their police power, is a governmental function." Since the case involved only the claim that Benbrook's regulations caused a hazardous condition, the court rejected the argument that a mixed governmental and proprietary function was involved that would make Benbrook accountable for any negligence by those acting for it. Benbrook, therefore, was immune from any common law liability, because only governmental functions were challenged. The court also rejected Palmer's nuisance claim. Although recognizing that municipalities can be liable under a nuisance theory in certain situations, the court stated that "[b]efore a city can be liable for creating or maintaining a nuisance, there must be something inherently dangerous in the very thing or condition claimed to be the nuisance, and must be a danger beyond that arising from negligence in its maintenance." The court found the real basis for Palmer's claim to be negligence, not nuisance, and held her nuisance allegation unsupportable as a matter of law.

The court of civil appeals also rejected Palmer's Tort Claims Act claims. First, Palmer claimed that Benbrook's decision not to widen the lanes on the street in question brought her within the language of section 3 of the Act providing for liability for "death or personal injuries... caused from some condition or some use of tangible property, real or personal." Palmer relied on *Lowe v. Texas Tech University*, in which the Texas Supreme Court found liability under section 3 for failure to furnish protective items of personal property. *Lowe* creates interpretive difficulties regarding when nonuse of property will result in liability under the Act.

240. *Id.* at 301.
241. *Id.* at 298.
242. *Id.*
243. *Id.*
244. *Id.* at 300.
245. *Id.* (citing Callaway v. City of Odessa, 602 S.W.2d 330 (Tex. Civ. App.—El Paso 1980, no writ)).
246. *Id.* at 300-01.
247. *Id.* at 299-300.
249. 540 S.W.2d 297 (Tex. 1976).
The court of civil appeals in Palmer, however, found no such difficulty. Relying on the discretionary nature of decisions regarding the regulation and control of traffic, the court found no waiver of immunity in section 3's language for a claim based upon the failure to widen traffic lanes. 251 In support of this result the court cited section 14(7) of the Act, 252 stating that that section "exempts governmental units from claims [under the Act] based upon the failure of a unit of government to perform a discretionary act." 253 Section 14(7) may prove a useful tool for governments attempting to avoid the Act's waiver of immunity, although a difficult problem in determining what is a discretionary and what is a ministerial act often may arise. 254

Finally, Palmer argued that a car parked legally on the road in question constituted an unsafe obstruction and was therefore a special defect under sections 14(12) and 18(b) of the Act 255 of which Benbrook failed to give warning. The court indicated that a legally parked car at the crest of a hill is not a special defect under the cited sections. 256 The court held that a legally parked car on a narrow passageway is a hazard normally connected with the use of a roadway, and that under section 14(12), therefore, Benbrook could not be liable for failure to warn of the hazard because the failure to warn was "the result of discretionary actions of said governmental unit." 257

The discretionary act exception of section 14(7) was also construed in a way highly favorable to the governmental unit in University of Texas at Arlington v. Akers. 258 Akers, a student at the University of Texas at Arlington, sued the University for personal injuries sustained when he slipped and fell on an allegedly icy University parking lot. Akers claimed to be a business invitee of the University under section 18(b) of the Act. 259 The jury found that the University had not negligently failed to salt or sand the parking lot, but had negligently failed to cancel classes on the day in question, and Akers received a judgment from which the University appealed. The Fort Worth court of civil appeals reversed, sustaining the

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251. 607 S.W.2d at 299.
252. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 14(7) (Vernon 1970) provides that the provisions of the Act do not apply to:
Any claim based upon the failure of a unit of government to perform any act which said unit of government is not required by law to perform. If the law leaves the performance or nonperformance of an act to the discretion of the unit of government, its decision not to do the act, or its failure to make a decision thereon, shall not form the basis for a claim under this Act.
253. 607 S.W.2d at 299.
254. See Note, The "Policy Decision" Exemption of the Texas Tort Claims Act: State v. Terrell, 32 Baylor L. Rev. 403 (1980). The author concludes that "[i]ronically, the passage of the Texas Tort Claims Act, which was intended to avoid the arbitrary results of the proprietary-governmental distinction, may have introduced a new distinction which will be just as difficult to apply." Id. at 413.
256. 607 S.W.2d at 300.
257. Id. at 300 (citing TEX. REV. CIV. STAT. ANN. art. 6252—19, § 14(12) (Vernon 1970).
258. 607 S.W.2d 283 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.)
259. Id. at 284. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 18(b) (Vernon 1970).
University’s contention that the University was immune from suit because the decision not to cancel classes was a discretionary act and, therefore, was expressly made nonactionable by section 14(7) of the Act.\(^{260}\) *State v. Terrell\(^{261}\)* in which the Texas Supreme Court explained that section 14(7) was designed to avoid judicial review of the wisdom of a government’s exercise of its discretion in making policy decisions was cited by the court.\(^{262}\) The court of civil appeals’ analysis in *Akers*, however, does not appear to follow *Terrell’s* apparent framework allowing liability for the negligent implementation of policy but disallowing liability for the formulation of discretionary policy decisions.\(^{263}\) The court of civil appeals noted that the University had a policy to close classes in extremely bad weather, and that the University gathered the facts on the day in question and then decided not to cancel classes.\(^{264}\) Although the jury found this noncancellation of classes to be negligent, the court, despite the University’s apparent negligent implementation of its policy, said the University was “following its policy” and had the discretion whether to or not to cancel classes.\(^{265}\) The University was thus protected from liability by section 14(7).\(^{266}\)

The fine distinctions between an invitee, a licensee, and a trespasser are discussed in *Rowland v. City of Corpus Christi*.\(^{267}\) Rowland sued the city of Corpus Christi for personal injuries sustained when he dove from a seawall into the marina waters of Corpus Christi Bay. The trial court granted a take nothing judgment to Corpus Christi notwithstanding a jury verdict for Rowland; the Corpus Christi court of civil appeals affirmed.\(^{268}\) First, the court determined that Rowland was not an invitee, because there was no relation of mutual benefit between Corpus Christi and the plaintiff.\(^{269}\) Next, the court decided that Rowland could not recover under the facts, whether he was a licensee or a trespasser.\(^{270}\) If Rowland was a trespasser, Corpus Christi only owed him the duty not to injure him willfully, wantonly or through gross negligence, and Rowland made no allegations of such intent or conduct.\(^{271}\) If Rowland was a licensee, Corpus Christi owed him the duty to warn about or make safe any dangerous conditions about which it had actual knowledge.\(^{272}\) The court found that there was no evi-

\(^{260}\) 607 S.W.2d at 285-86.
\(^{261}\) 588 S.W.2d 784, 787 (Tex. 1979).
\(^{262}\) 607 S.W.2d at 285.
\(^{263}\) See 588 S.W.2d at 788.
\(^{264}\) 607 S.W.2d at 285.
\(^{265}\) Id.
\(^{266}\) Id. at 285-86.
\(^{267}\) 620 S.W.2d 930 (Tex. Civ. App.—Corpus Christi 1981, writ ref’d n.r.e.). This appears to be a proprietary tort case primarily; the court does not reach the only Tort Claims Act issue presented.
\(^{268}\) Id. at 935.
\(^{269}\) Id. at 933. There was no admission charge, and Corpus Christi had not invited plaintiff onto the premises. Id. at 934. If plaintiff was an invitee, Corpus Christi “had a duty to keep the premises in a reasonably safe condition and to inspect the premises to discover any latent defects and to make safe any defect or give adequate warning.” Id. at 933.
\(^{270}\) Id. at 934.
\(^{271}\) Id.
\(^{272}\) Id.
dence that Corpus Christi had actual knowledge of dangerous subsurface conditions or of the dangerous condition on which plaintiff struck his head.\footnote{273. Id. at 934-35.}

**Liability under 42 U.S.C., Section 1983.** During the survey period the courts again dealt with many claims against local governments based upon the federal cause of action brought pursuant to 42 U.S.C., section 1983.\footnote{274. 42 U.S.C. § 1983 (1976 & Supp. III 1979) provides in part:}

\begin{quote}
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.
\end{quote}

\footnote{275. 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). Punitive damages, however, are allowable against an offending official individually. \textit{id.} at 2761.}

\footnote{276. 449 U.S. 24 (1980).}

\footnote{277. 451 U.S. 527 (1981). The Court also apparently holds that § 1983 can reach negligent conduct. \textit{id.} at 1911-13. One writer states that the \textit{Parratt} decision "could lead to a sweeping curtailment of federal civil rights litigation in favor of state courts and remedies," and "ultimately may restrict 14th Amendment due process or equal protection litigation to challenges to official policies or practices directly attributable to the state as an entity, leaving individual acts of official misconduct by state officers to be remedied under state law." \textit{Kirby}, \textit{Demoting 14th Amendment Claims to State Torts}, 68 A.B.A.J. 166, 167 (1982).}

\footnote{278. 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).}

\footnote{279. 449 U.S. 24 (1980).}

\footnote{280. 634 F.2d 900, 912 (5th Cir. 1981).}
ported the jury's finding that a prisoner who allegedly committed suicide should not have been suspected of insanity by his jailers. The jailers, therefore, did not violate a Texas statute requiring that the suspected insane be placed in a padded cell. The court also stated that the mere failure to comply with the Texas statute would not by itself constitute cruel and unusual punishment violative of the Eighth Amendment, absent "deliberate indifference to [the incarcerated's] condition and the likely consequences of that condition."

In *Hernandez v. City of Lafayette*, the Fifth Circuit ruled that the mayor of the city of Lafayette was entitled to absolute immunity for acts taken in his legislative capacity, here the veto of an ordinance, and that Lafayette was not entitled to immunity from damages in connection with its zoning regulations. The court concluded that "an action for damages will lie under § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof".

The Fifth Circuit faced the problem of determining whether a battery amounted to a constitutional deprivation in *Shillingford v. Holmes*. A police officer struck the plaintiff, who was photographing four or five policemen apprehending a boy during Mardi Gras. The plaintiff's camera was destroyed and his forehead lacerated. The court noted that not every personal hurt by a state officer constitutes a violation of the fourteenth amendment's guarantee of due process of law, but stated that in this case the officer crossed the constitutional boundary, considering "the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer." The court also noted that punitive damages might be recoverable under these circumstances. The court in *York v. City of Cedartown* also faced the question whether a constitutional violation had been established, but reached a result different from the result in *Shillingford*. Plaintiffs alleged that Cedartown had negligently designed and built a street and drainage system, resulting in water and sewage being deposited on their property during periods of excessive rainfall. The court found that the plaintiffs did not meet the test of *Williams v. Kelly* requiring that a section 1983 plaintiff must prove a depre-

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281. 641 F.2d 239, 241 (5th Cir. 1981).
282. Id. See TEX. REV. CIV. STAT. ANN. art. 5115 (Vernon Supp. 1982).
283. 641 F.2d at 242.
284. 643 F.2d 1188, 1194-97 (5th Cir. 1981). The court cites *Owen v. City of Independence*, 445 U.S. 622 (1980) for the proposition that local legislators are entitled to absolute immunity from suit under § 1983 for conduct in furtherance of their duties. *Id.* at 1193. More importantly, *Owen* established that a municipality can be liable in damages even if the responsible official is immune from liability. *Id.*
285. *Id.* at 1200.
286. 634 F.2d 263 (5th Cir. 1981).
287. *Id.* at 265-66.
288. *Id.* at 265.
289. *Id.* at 266.
290. 648 F.2d 231 (5th Cir. 1981).
291. 624 F.2d 695 (5th Cir. 1980).
vation of a federal constitutional right which resulted from "the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." 292

In Collins v. Thomas the Fifth Circuit held that the trial court had properly awarded attorney fees against Dallas County, even though the county was not a named party.293 The circuit determined that the sheriff's personnel decisions could fairly be said to represent county policy and that no special circumstances rendering such an award unjust existed.294

A directed verdict for the defendant hospital officials was affirmed in Dilmore v. Stubbs.295 A mental patient claimed that the officials had deprived him of his constitutional right to be held in a setting that least restricted his civil rights and liberties. The court held that the defendants were immune from suit under the dual subjective objective qualified immunity test of Wood v. Strickland,296 because the plaintiff did not allege subjective malicious intent to harm him, and the defendants' actions, in view of the state of constitutional law regarding government treatment of mental patients, were not clearly in contravention of the Constitution.297 The officials, therefore, could not have known that plaintiff's constitutional rights might be violated.298

Finally, the Fifth Circuit in Douthit v. Jones,299 on petition for rehearing, considered a Texas sheriff's liability for false imprisonment in light of the holding of Baskin v. Parker300 that a supervisory official cannot be held liable for his subordinates' unlawful actions under section 1983 on the basis of vicarious liability. The court pointed out that a supervisory official may be responsible under section 1983 if a causal connection exists between the official's act and the alleged constitutional violation, and that breach of a duty imposed by state or local law with resulting constitutional injury can establish such a causal connection.301 The circuit determined that a section 1983 action can be based upon violation of article 5116,302 which imposes a duty upon a Texas sheriff to incarcerate only those persons whom he lawfully may imprison.303 A sheriff, however, "may satisfy this duty by adopting reasonable internal procedures to ensure that only those persons are incarcerated for whom the sheriff, or the deputy to whom he delegates such responsibilities, has a good faith belief based upon objective circumstances that he possesses valid legal authority to imprison."304

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292. 648 F.2d at 232 (citing Williams v. Kelly, 624 F.2d 695, 697 (5th Cir. 1980)).
293. 649 F.2d 1203, 1205 (5th Cir. 1981).
294. Id.
295. 636 F.2d 966, 971 (5th Cir. 1981).
297. 636 F.2d at 968-71.
298. Id.
299. 641 F.2d 345 (5th Cir. 1981).
300. 602 F.2d 1205 (5th Cir. 1979).
301. 641 F.2d at 346.
302. TEX. REV. CIV. STAT. ANN. art. 5116 (Vernon 1971).
303. 641 F.2d at 346.
304. Id. at 346-47.
VI. ANNEXATION

The Municipal Annexation Act was amended by the 67th Legislature in several respects. Section VI of the Act was amended to require any city planning to institute annexation proceedings to hold public hearings on the matter not more than forty days not less than twenty days prior to institution of the proceedings. The amendment also provides that any area disannexed under this section shall not be reannexed within five years of such disannexation. Additionally, while repealing the poll tax the Legislature also amended section nine of the Municipal Annexation Act to provide a procedure for petitioning for annexation. The Legislature also passed an act extending junior college district boundaries to include adjacent school district or noncontiguous school districts.

The Texas Supreme Court construed the Municipal Annexation Act in City of West Orange v. State. The case involved a suit by West Orange against Orange requesting judicial apportionment of overlapping extraterritorial jurisdiction between the two cities. Orange filed a cross-action against West Orange concerning the apportionment. Additionally, West Orange challenged an Orange city ordinance creating an industrial buffer strip. Sometime later, Orange brought a quo warranto proceeding challenging a West Orange election amending its city charter and annexing land allegedly within the extraterritorial jurisdiction of Orange. All of these legal proceedings concerned the two cities' right to an industrial buffer strip or zone. The industrial buffer strip created by the city of Orange was fifteen-feet wide and touched the city of Orange for fifteen feet on either end and touched the city of West Orange for approximately 1.8 miles on one side. In addition, it encircled a large industrial area not annexed by any other city.

The trial court upheld the Orange annexation ordinance, that created a fifteen-foot wide buffer strip around a chemical row industrial area. The Texas Supreme Court previously had ruled a similar strip annexation of nonadjacent territory invalid. The court of appeals also upheld the ordinance and distinguished prior Texas Supreme Court authority, based upon a validating statute passed by the Texas Legislature. Similar validation statutes had been passed by the legislature “for years” and provided

306. Id. § 10.
307. Id.
308. Id. § 9.
"in very broad language" that the boundary lines of certain cities and towns, including both the boundary lines covered by the original and corporation proceedings and by any subsequent extension, were validated.\footnote{315}{See 613 S.W.2d at 239.}

In construing the validating statute the supreme court ruled that the legislature repeatedly had limited the extension of any city or town to contiguous and adjacent areas; therefore, in the absence of specific and express provisions in the validating statutes that annexed, land need not be adjacent.\footnote{316}{Id. at 239-40.} The court refused to give the validating statute such a construction.\footnote{317}{Id. at 239.} In addition, the court found that the Municipal Annexation Act provided for extraterritorial jurisdiction and the Act specifically forbade the annexation by one city of land in the extraterritorial jurisdiction of another.\footnote{318}{Id.} The supreme court found the Orange industrial buffer strip ordinance invalid because the strip was neither adjacent to Orange when the ordinance was passed nor adjacent at any subsequent time.\footnote{319}{Id. at 239-40.} Because the supreme court found that apportionment of overlapping extraterritorial areas between towns and cities with conflicting claims was within the province of the trial court it remanded the case to the district court.\footnote{320}{Id. at 240.} The lower court was directed to consider the apportionment of the overlapping extraterritorial jurisdiction of Orange and West Orange.

\section*{VII. Employees and Officers}

Courts during the survey period considered several important issues involving officers and employees of local governments. The cases discussed in this section involve such issues as whether a commissioners court must set a reasonable salary for a constable, the applicability of the Texas nepotism law, a public employee's right to due process before termination, the constitutionality of disciplinary rules, whether deputy sheriffs have the right to bargain collectively, and the immunity from tort liability of Texas officers and employees. Also discussed are several cases construing the Firemen's and Policemen's Civil Service Act.\footnote{321}{TEX. REV. CIV. STAT. ANN. art. 1269m (Vernon 1963 & Supp. 1982).}

\textbf{Constable's Right to Reasonable Salary.} In \textit{Vondy v. Commissioners Court},\footnote{322}{620 S.W.2d 104 (Tex. 1981).} the Texas Supreme Court considered an appeal from a mandamus action against four of the five members of the Uvalde County Commissioners Court brought by Vondy, a duly elected constable in Uvalde County. The trial court entered judgment denying Vondy's request that the commissioners court set a reasonable salary for his office. The Eastland court of civil appeals vacated the trial court's judgment and dismissed the action, holding that the failure to join the fifth commissioner was fun-
damental error because he was an indispensable party to the suit. The supreme court reversed, concluding that under Rule 39 of the Texas Rules of Civil Procedure the fifth commissioner was not an indispensable party to the suit, and that the fact that a mandamus action was involved did not affect this result. Further, the supreme court held that article 16, section 61 of the Texas Constitution "clearly mandates that constables receive a salary." The court stated that the commissioners court must pay Vondy a "reasonable" salary, and remanded to the district court for proceedings consistent with its opinion. The court reasoned that the district court should have granted the mandamus because of the failure of the commissioners court to comply with its duty to set a reasonable salary and because constables, who act in part as process servers, must be paid in order to protect the integrity of the judicial branch of Texas government.

**Nepotism.** The issue in Pena v. Rio Grande City Consolidated Independent School District was whether the superintendent of the school district was subject to the prohibition of article 5996a against official nepotism. The plaintiff alleged that the school district's superintendent, as "chief administrative officer" of the district, appointed his wife to a teaching position in the district in violation of article 5996a. The trial court sustained the defendants' special exception that the superintendent was not subject to article 5996a because he was an employee of the school district rather than an "officer." The Eastland court of civil appeals affirmed, finding that a superintendent was not an officer, but rather an employee. Disagreeing with an opinion of the attorney general, the court applied the test stated by the Texas Supreme Court in *Aldine Independent School District v. Standley.* The *Aldine* test for determining who is a public officer is "whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." A school superintendent, said the court of civil appeals, "merely performs functions delegated to him by the trustees who do not by such delegation abdicate their statutory authority or control," and is therefore not an officer for purposes of the nepotism statutes.

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324. 620 S.W.2d at 105-08.
325. TEX. CONST. art. XVI, § 61.
326. 620 S.W.2d at 108.
327. Id. at 109.
328. Id. at 109-10.
331. 616 S.W.2d at 659. TEX. REV. CIV. STAT. ANN. art. 5996a (Vernon Supp. 1982) prohibits an "officer" of a school district from involvement in the employment of a relative.
332. 616 S.W.2d at 659.
333. TEX. ATT’Y GEN. OP. NO. MW-56 (1979) (a school superintendent may be an officer for purposes of the nepotism statutes when the superintendent de facto controls the hiring of teachers).
334. 280 S.W.2d 578 (Tex. 1955).
335. Id. at 583 (quoting Dunbar v. Brazoria County, 224 S.W.2d 738, 740 (Tex. Civ. App.—Galveston 1949, writ ref’d n.r.e.).
Employee's Right to Due Process Upon Termination. In Snell v. Hidalgo County Water Improvement District No. 2, an employee of the Hidalgo County Water Improvement District, fired for drinking on the job, brought a federal civil rights suit alleging that the district discharged him without according him procedural due process. The employee did not have a written contract with the district, and there were no written rules regarding terms of employment or termination procedures or fixed terms of employment. The district court rendered judgment that plaintiff take nothing, finding that plaintiff had not demonstrated a legitimate claim of entitlement to continued employment. The court concluded that "[i]n the case at bar, neither state law nor any rules or mutual understandings support Plaintiff's contention that he possessed a property interest in his employment." The district court construed section 58.091 of the Texas Water Code as permitting water districts to remove employees at will. Finding no rules or understandings between the plaintiff and the water district that would support a claim of entitlement, the court noted that Texas common law allowed private employees in plaintiff's situation to be discharged at will. Absent any cognizable property interest, the court determined that plaintiff had no actionable right to procedural due process upon termination.

Constitutionality of Disciplinary Rules. Bickel v. Burkhart raised the issue of the constitutionality of certain municipal fire department disciplinary rules. In response to a Garland firemen's pay scale controversy, a meeting was held at which a Garland administrator made a presentation regarding comparative fire department pay scales. Burkhart, chief of the fire department, Bickel, a fireman, and one other fireman were present at the meeting. At the conclusion of the administrator's presentation, questions and comments were invited. Bickel responded with complaints concerning the fire department and some of its equipment. Two months later

336. 616 S.W.2d at 660.
338. The court stated that "procedural due process applies only when the state has deprived a person of a liberty or property interest protected under the Fourteenth Amendment." Id. at 836.
339. Id.
342. Id. at 837.
343. 632 F.2d 1251 (5th Cir. 1980).
344. In the related case of Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) the Fifth Circuit ruled that a sheriff could not demote or remove deputies on the basis of their political affiliations. The court held that regulations prohibiting unauthorized public statements, speaking to reporters on any controversial topic, and discussion of sheriff office policy or procedure with any elected official were facially overbroad and invaded protected free speech, but that regulations prohibiting "conduct subversive of the good order or discipline of the department" and the use of "abusive, insulting or indecent language to a supervisory officer" were facially constitutional. Id. at 1198-99.
Bickel took and passed a civil service examination to obtain a promotion from firefighter to driver engineer, but Burkhart denied the promotion on the grounds that Bickel's conduct at the meeting and his general attitude violated certain fire department rules and regulations. Those regulations included prohibitions against "conduct prejudicial to good order" and "malicious gossip . . . that would tend to disrupt department morale or bring discredit to the department."345

Bickel filed a civil rights suit in federal district court alleging that the rules and regulations cited by Burkhart were unconstitutional facially and as applied to the specific circumstances surrounding the denial of his promotion. The district court held for Bickel, declaring the challenged rules unconstitutional, and finding that Bickel's constitutional rights were violated when his promotion was denied because of his critical comments at the meeting. The district court ruled that Bickel be made whole monetarily and included an award for attorney's fees.

On appeal the Fifth Circuit reversed the district court's conclusions that the fire department's rules were unconstitutional,346 but affirmed the court's holding that Bickel's criticisms were the cause of his promotion denial, and that those criticisms were constitutionally protected.347 Using the Pickering v. Board of Education348 balancing test, the court found that Bickel's first amendment rights outweighed the city's interest in promoting efficient public services, since Bickel's criticisms were directed at the department as an institution rather than any individual and were made in response to the invitation to comment.349 The court also found that the criticisms created no actual interference with the operation of the fire department.350

Collective Bargaining for Deputy Sheriffs. The Fire and Police Employees Relation Act351 provides a system of arbitration between police and fire department employees and their public employers, and prohibits strikes and lockouts. The Act becomes applicable after a popular vote in "cities, towns, or other political subdivisions."352 When a petition for such a vote is presented to the governing body an election must be called.353

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345. 632 F.2d at 1253.
346. Id. at 1254-55. The court cited Davis v. Williams, 617 F.2d 1100 (5th Cir. 1980) for the proposition that the "conduct prejudicial to good order" regulation was constitutional. 632 F.2d at 1254-55. The court's conclusion upholding the constitutionality of the "malicious gossip" rule was accompanied by language limiting the rule to false statements made knowingly or with reckless disregard of the truth. Id. at 1255.
347. 632 F.2d at 1256.
348. 391 U.S. 563 (1968). The Court articulated the balancing test as follows: "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568.
349. 632 F.2d at 1256-57.
350. Id. at 1258.
352. Id. § 4.
353. Id. § 5(b).
After being presented with a technically correct petition, the El Paso Commissioners Court refused to hold an election on whether to permit the El Paso County Sheriff’s Deputies Association to bargain collectively on behalf of the deputies. In *Commissioners’ Court v. El Paso County Sheriffs Deputies Association* the district court issued a writ of mandamus ordering the commissioners’ court to hold the election. The issues on appeal to the El Paso court of civil appeals were whether the Act applied to county deputy sheriffs and whether the trial court erred in admitting the testimony of a state representative concerning legislative intent. The court held that the Act does apply to counties, and that the admission of the legislator’s testimony was harmless error. Accordingly, the court affirmed the trial court.

**Immunity from Tort Liability.** Texas law in the area of the individual immunity of government officers and employees from tort liability is relatively undeveloped, and what law does exist fails to provide clear guidelines. In the present survey period, several courts struggled with immunity issues.

One of the more instructive efforts is the San Antonio court of civil appeals decision of *Baker v. Story*, a medical malpractice action. Baker was shot in the leg, and after experiencing pain for several months he was examined by a Dr. Miller, a resident at the University of Texas Health Science Center, a part of the University of Texas Medical School. The defendant, Dr. Story, was head of the neurological-surgery department of the medical school facility. Dr. Miller performed a surgical procedure on Baker involving the excision of a nerve section; Baker presented evidence that upon instructions from Dr. Story, Dr. Miller cut Baker’s right ureter rather than the nerve. The mistake was immediately identified, the nerve excision then correctly performed, and an attempt made to repair the ureter damage. Nevertheless, Baker developed urological problems requiring rehospitalization. Baker first filed a state court suit against Miller and Story. He then filed suit in federal court under the Federal Tort Claims Act against Miller, who was an active member of the United States Air Force practicing as a resident at the hospital under an exchange program. The federal court concluded that Baker had failed to establish Miller’s negligence, and Baker did not appeal from a take nothing judgment. The state court then rendered a summary judgment for Story and Miller on the ground that the federal court had determined conclusively the issue of Miller’s negligence against Baker. On a first appeal,
court of civil appeals affirmed as to Dr. Miller, but remanded for trial on
the merits as to Dr. Story's alleged negligence.\textsuperscript{361} On remand, the trial
court instructed a verdict in favor of Dr. Story.\textsuperscript{362}

On appeal again, the court of civil appeals reversed and remanded.\textsuperscript{363} The court adhered to its earlier ruling that Baker was not collaterally es-
topped from proceeding against Dr. Story.\textsuperscript{364} Furthermore, the court
ruled that there was more than a scintilla of evidence of the standard of
care applicable to Dr. Story and of a deviation from such standard.\textsuperscript{365}

The court of civil appeals also held that the instructed verdict could not
be upheld based upon the doctrine of sovereign immunity.\textsuperscript{366} Dr. Story
asserted that the evidence established that he was an employee of the State
of Texas, that he was working within the course and scope of his employ-
ment, and that the action against him individually was barred by the doc-
trine of sovereign immunity. Initially, the court noted that Dr. Story had
his terms wrong.\textsuperscript{367} Sovereign immunity shields the sovereign from liabil-
ity; therefore when the “question concerns the liability of a governmental
officer or employee, rather than the liability of the sovereign itself, the
problem is one of official immunity, not of sovereign immunity.”\textsuperscript{368} Fur-
ther, the question of sovereign immunity, the court said, is a separate and
distinct question from the question of the immunity of public servants
from liability for their torts.\textsuperscript{369} The court then noted that “Texas courts, in
granting immunity, have distinguished between judicial officers, quasi-ju-
dicial personnel and ministerial functionaries.”\textsuperscript{370} A judge has absolute
immunity for acts within his jurisdiction; a quasi-judicial public servant
enjoys immunity “as long as he acts in good faith within the scope of his
authority.”\textsuperscript{371} If the public servant has a “mere ministerial” post, however,
“he is liable for his tortious conduct to the same extent as a person who
holds no government position.”\textsuperscript{372} The court recognized, though, that the
identification of categories only starts the inquiry and in fact that these
categories do not provide a satisfactory framework for analysis:

The distinction between ‘quasi-judicial’ and ‘ministerial’ duties is not
only a finespun distinction; it is, for practical purposes, unworkable.
It is said that ‘quasi-judicial’ acts are ‘discretionary’ in character, re-
quiring personal deliberation, decision and judgment, while ‘ministe-
rial’ acts require only obedience to orders, or the performance of a
duty as to which the actor is left no choice of his own. “It seems
almost impossible to draw any clear and definite line, since the dis-

\textsuperscript{362} 621 S.W.2d at 640.
\textsuperscript{363} Id. at 646.
\textsuperscript{364} Id. at 641-42.
\textsuperscript{365} Id. at 642-43.
\textsuperscript{366} Id. at 643.
\textsuperscript{367} Id.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Id. at 644.
\textsuperscript{371} Id.
\textsuperscript{372} Id. at 645.
tinction, if it exists, can be at most one of degree. 'It would be difficult
to conceive of any official act, no matter how directly ministerial, that
did not admit of some discretion in the manner of its performance,
even if it involved only the driving of a nail.' "373

Applying its analysis to the case before it, the court rejected, as obviously
overbroad, the language of one Texas court that public officers are not liable to individuals for acts done within the scope of their public duties.374 Considering the liability of a teacher-public employee, the court said that in the absence of a statute to the contrary Texas law appears to hold teachers liable for injuries caused by their negligence.375 The court found that the evidence did not establish as a matter of law the nature and extent of Dr. Story's duties or whether his duties were of a nature that must be classified as "quasi-judicial."376 Neither did the evidence establish that Dr. Story's duties differed "from those of an ordinary teacher who, in the absence of statutory provisions to the contrary, will be held liable for injuries resulting from his negligence."377 The court noted that it was not holding that medical malpractice actions definitely could be brought against doctors employed by state medical facilities stating: "We do no more than hold that, under the evidence in this case, it was not conclusively established that Dr. Story was entitled to immunity as an employee of the State of Texas."378

The liability of a public school teacher also was considered in O'Haver v. Blair,379 in which the court of civil appeals construed the immunity section of the Texas Educational Code, section 21.912(b).380 Shawn O'Haver was a fifteen-year old high school student playing football on the high school practice football field on a Sunday afternoon. Football coaches attending a coaches meeting at the school told the players to leave, but they refused. A coach named Blair pushed O'Haver, the two struggled and Blair struck O'Haver in the mouth, knocking out two of his teeth. O'Haver sued Blair for actual and exemplary damages. The trial court sustained Blair's motion for summary judgment on the ground that he was immune from liability under section 21.912(b). The court of civil appeals reversed and remanded, finding that the summary judgment proof did not establish any of the following essential elements necessary to sustain a section 21.912(b)

373. Id. (citation omitted).
374. Id. The court discussed and quoted Morris v. Nowotny, 323 S.W.2d 301, 311 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).
375. 621 S.W.2d at 644-45.
376. Id. at 645.
377. Id.
378. Id. at 646.
380. TEX. EDUC. CODE ANN. § 21.912(b) (Vernon Supp. 1982) provides:
No professional employee of any school district within this state shall be personally liable for any act incident to or within the scope of the duties of his position of employment, and which act involves the exercise of judgment or discretion on the part of the employee, except in circumstances where professional employees use excessive force in the discipline of students or negligence resulting in bodily injury to students.
immunity defense: (1) that Blair "was acting incident to or within the scope of the duties of his position;" (2) that the questioned acts "involved the exercise of judgment or discretion;" and (3) that Blair "was not disciplining" O'Haver.  

The Amarillo court of civil appeals faced a different type of immunity issue in *Steele v. Barbian.* In 1976, Amarillo widened a street necessitating the relocation of fire hydrants. In 1977, a house near one of the relocated hydrants owned by Ross Bell and leased by Kathy Steele caught fire. Responding firemen found water was not supplied to the hydrant. Evidence later showed that the water valve was closed. By the time water was secured, the house was destroyed. Steele and Bell filed suit against the city of Amarillo and others. Amarillo secured a summary judgment based upon its governmental immunity from suit for the performance of fire protection, a governmental function; this summary judgment was not appealed. After nonsuiting the other defendants in the original suit, Steele and Bell brought a separate suit against Barbian, the city's water distribution supervisor, alleging various negligent acts. The trial court granted Barbian's motion for summary judgment based upon governmental immunity, res judicata, collateral estoppel and estoppel by judgment. The Amarillo court of civil appeals affirmed. The court rejected Steele and Bell's assertion that Barbian's negligence in the performance of his duties related to the waterworks system, a proprietary function, and therefore raised an issue not involved in the first case. Finding that the two suits involved the same subject matter, the negligent failure to provide water to the fire hydrant, the court found the action against Barbian barred by section 12(a) of the Texas Tort Claims Act. Further, the court found that Barbian would be immune from suit even if the statutory bar did not apply. The court stated that the summary judgment proof all bore on Barbian's actions relating to Amarillo's fire protection function, which was a governmental function. The court pointed out that Amarillo was not liable for the performance by its officers and employees of a governmental function, and stated that "the individual performing the governmental function of providing fire protection can be charged with no greater responsibility than that imposed on the city."  

The responsibility of Texas sheriffs for the acts of their deputies was

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381. 619 S.W.2d at 468.
383. *Id.* at 876-77. The res judicata, collateral estoppel, and estoppel by judgment points were based primarily on *Tex. Rev. Civ. Stat. Ann.* art. 6252—19, § 12(a) (Vernon 1970), which provides: "The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the subject matter, against the employee of a unit of government whose act or omission gave rise to the claim."
384. 620 S.W.2d at 878.
385. *Id.* at 877.
387. 620 S.W.2d at 877-78.
388. *Id.* at 878.
389. *Id.* The approach taken by the *Steele* court appears to differ from that taken by the court in *Baker v. Story,* 621 S.W.2d 639, 643 (Tex. Civ. App.—San Antonio 1981, writ ref'd
considered by a federal district court in *Williams v. Thomas*, in which a jail inmate brought a federal civil rights assault and battery claim against Dallas County sheriff’s deputies and against Sheriff Carl Thomas. The jury found that one deputy had used excessive force against the inmate, and the district court entered judgment for the inmate. The claim against Sheriff Thomas was dismissed because there was no evidence that Thomas participated in, authorized or ratified the assault and battery, or that he was negligent in his administration of the jail or his hiring or supervision of deputies. The inmate urged, however, that Texas law made Thomas absolutely accountable for the actions of his deputies, citing articles 5116 and 6870. The district court, although recognizing “the language of absolute liability present in these statutes,” concluded on the basis of Texas and federal case law that when a deputy is found to have committed an unlawful act, the deputy’s sheriff was liable only when the sheriff authorized, participated in, or ratified the deputy’s unlawful acts. Accordingly, the court refused to reconsider its dismissal of Thomas.

*Firemen’s and Policemen’s Civil Service Act.* The Firemen’s and Policemen’s Civil Service Act again provided considerable grist for the courts’ mills. The Texas Supreme Court, in fact, considered issues related to the Act in three significant cases. In the first case, *Taylor v. Firemen’s and Policemen’s Civil Service Commission*, the supreme court, in connection with a dispute over the calculation of grades on promotional exams, construed the meaning of the term “seniority” in section 14 of the Act. The plaintiffs, police officers of the city of Lubbock, took promotional examinations for the position of police corporal in 1978. The officers had served...
previously with the Lubbock police department before being rehired in October 1977 at the lowest rank in the department. Grades on the promotional exam were determined by three factors: (1) score on the written exam; (2) departmental efficiency ratings; and (3) statutory seniority points. When their grades first were computed, the plaintiffs received credit for their earlier service with the department, and ranked first and fifth on the promotion list. The grades were recomputed, however, eliminating seniority points for their prior noncontinuous service, and the plaintiffs fell to tenth and sixth on the promotion list. The officers sued the civil service commission to restore their original positions, and won in the trial court. The court of civil appeals reversed, however, holding that the term "seniority" as used in section 14 meant the last continuous year of service.399 The supreme court reversed and affirmed the judgment of the trial court, holding that the term seniority as used in the Act "means years of service, whether interrupted or uninterrupted, and not merely the last continuous period of service."400

The supreme court considered another promotional dispute in International Association of Firefighters, Local Union No. 936 v. Townsend.401 In 1978, three persons passed an eligibility exam for the position of fire captain in the Corpus Christi Fire Department; at the time there were nine authorized fire captain vacancies. The Fire Chief, however, promoted only one of the three to the position of fire captain, acting pursuant to a local rule of the Corpus Christi Civil Service Commission that allowed him not to request the remaining two names to be submitted to him by the commission for promotion. The supreme court rendered judgment for the two employees ordering them to be promoted to the rank of fire captain.402 The court determined that section 14E of the Act mandated that the fire chief fill the fire captain vacancies with the two employees.403

An indefinite suspension was challenged in Firemen's and Policemen's Civil Service Commission v. Lockhart.404 In 1979, the Fort Worth Chief of Police advised the commission that he had indefinitely suspended Lockhart, filing a letter setting out in detail Lockhart's misconduct. The letter also stated that the indefinite suspension was "in consideration of his record for the past six months."405 The issue before the Texas Supreme Court was whether the reference to Lockhart's record for the past six months rendered the suspension totally defective. Reversing the court of civil appeals,406 the court held that the police chief had sufficiently complied with section 16 of the Act, which requires that the letter of suspension apprise the officer of the charges against him and the facts relied upon to prove

400. 616 S.W.2d at 190.
401. 622 S.W.2d 562 (Tex. 1981).
402. Id. at 563.
403. Id. See TEX. REV. CIV. STAT. ANN. art. 1269m, § 14E (Vernon Supp. 1982).
404. 626 S.W.2d 492 (Tex. 1981).
405. Id. at 493.
those charges. The supreme court stated that the reference to Lockhart's record did not render the suspension invalid because (1) the reference was in connection with the assessment of the proper penalty, (2) the testimony before the commission was limited to the two specifically alleged violations, and (3) there was substantial evidence to support the two specifically alleged violations, which standing alone would support the suspension.

One court of civil appeals decision construing the Act is of interest. The court in *Firemen's & Policemen's Civil Service Commission v. Campbell* faced the problem of reconciling apparently variant decisions by the civil service commission and an arbitrator. Campbell, a Corpus Christi fireman, violated a rule of the fire department requiring that certain clothing be worn while exercising on duty; Campbell also was insubordinate to his superior when reminded of the rule. Shortly thereafter, Campbell was passed over for promotion to the rank of fire captain; in fact, the Fire Chief recommended that he be demoted. In January 1979, the civil service commission upheld the demotion. In November 1979, however, an arbitrator ruled that Campbell should be promoted to the position of fire captain retroactively to November 1978. The district court, on appeal from both decisions, found that there was substantial evidence to support both orders. Before the court of civil appeals, the commission unsuccessfully claimed that the arbitrator was barred by the doctrines of collateral estoppel and res judicata from relitigating issues determined by the commission at its demotion hearing. The court determined that the commission's decision was not necessarily based upon the same criteria that formed the basis of the arbitration award; the arbitrator had accepted as undisputed the facts regarding the improper dress incident, but had determined that nonetheless Campbell should not have been bypassed for promotion. The court did, however, agree that the arbitrator acted improperly in promot-

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408. Id. at 494-95.
409. See also Stone v. Wichita Falls, 646 F.2d 1085 (5th Cir. 1981) (city charter provision providing that fireman would forfeit his position if he ran for elective office inconsistent with section 22 of the Act, which prohibits certain political activities but not the activity in which fireman sought to engage; as a result city charter provision held void); City of San Antonio v. Flores, 619 S.W.2d 601 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (no substantial evidence in record to support civil service commission's indefinite suspension and dismissal of fireman); City of Austin v. Gregory, 616 S.W.2d 329 (Tex. Civ. App.—Texarkana 1981, no writ) (writ of mandamus issued by trial court reinstating police officer affirmed against attack that mandamus improper because police officer could have taken direct appeal; there was evidence to support conclusion that civil service commission had not rendered a written decision within thirty days of hearing the officer's appeal, a prerequisite to appeal to district court); Vick v. City of Waco, 614 S.W.2d 861 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.) (plaintiff's indefinite suspension from Waco Police Department upheld against various challenges); City of Lubbock v. Goodwin, 608 S.W.2d 835 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.) (when fireman was injured in line of duty and subsequent disability was result of such injury, and not result of an independent injury, fireman was entitled to benefits of section 26 of the Act for injuries received "in the line of duty").
411. Id. at 425.
412. Id. at 425-26.
ing Campbell retroactively because that would in effect overrule the prior commission order. The court therefore modified the trial court's judgment to provide that Campbell be promoted effective on the date of the arbitrator's award.

VIII. CONDEMNATION

Texas courts considered numerous condemnation cases during the survey period, and the Texas Legislature amended the eminent domain statutes to specify the proper court for bringing a condemnation proceeding. The Texas Supreme Court dealt with condemnation issues in three cases. In *Harris County v. Gordon*, the supreme court held that a temporary injunction prohibiting Harris County from entering the landowners' property to begin construction on a drainage project had been improperly granted by the court of civil appeals. The court of civil appeals had held that because counties were not authorized to condemn a fee simple estate for drainage purposes, the condemnation proceeding instituted by Harris County was void, and a temporary injunction should issue. Without reaching the issue of a county's authority to condemn a fee simple, the supreme court ruled that the temporary injunction should not have issued because the landowners had an adequate remedy at law pursuant to article 3268(3), which provided that a landowner could recover damages for the use of his land if it was finally determined that the condemnor did not have the right to condemn.

The supreme court also determined that the injunction was not warranted on any other basis. The landowners argued that the county had not complied with the requirement in article 3268(1) that money deposited in the registry of the court as a part of the condemnation proceeding be "subject to the order of the defendant," arguing that the money deposited by Harris County was not apportioned among the various landowners so as to be available for withdrawal by any one landowner. The supreme court reasoned that Harris County had complied literally with article 3268 by depositing the money into the registry, that no case authority supported the landowners, and that the landowners apparently had not tried to withdraw their funds or agree with the other landowners on withdrawal. Citing *Brazos River Conservation & Reclamation District v. Allen* for the

413. *Id.* at 426.
414. *Id.*
418. 616 S.W.2d at 168-69.
419. *Id.* at 169-70.
420. *TEX. REV. CIV. STAT. ANN.* art. 3268(1) (Vernon 1968) requires that the condemnor pay the amount of the commissioners' award into the registry of the court, if the condemnor wants to enter the land prior to completion of litigation.
421. 616 S.W.2d at 169.
422. 171 S.W.2d 842 (1943).
proposition that the landowners had an adequate remedy at law by appeal, the court also rejected the landowners’ other grounds for a temporary injunction: (1) that the county’s petition misnamed a party; (2) that the county’s notice did not attach a copy of the petition; (3) that one special commissioner was improperly appointed; (4) that the county did not make a good faith effort to agree on market value before commencing condemnation proceedings; and (5) that the county’s original petition did not admit title in the landowners. The supreme court reversed the court of civil appeals, holding that it had abused its discretion in granting the temporary injunction, and remanded to the trial court for proceedings on the merits.

In PGP Gas Products, Inc. v. Fariss, PGP Gas Products sought to condemn a right-of-way easement for the construction and operation of a natural gas pipeline across the Farisses’ land. The Farisses objected to the commissioners’ award of $6,000, but received a judgment of only $4,703 in district court. On appeal by the Farisses, the Austin court of civil appeals reversed for lack of evidence in the trial record that the commissioners had taken the oath required by article 3264. The Texas Supreme Court reversed and affirmed the judgment of the trial court, holding that the Farisses had waived their complaint regarding the oath. The supreme court stated that “[p]rocedural irregularities in proceedings before the special commissioners can only be challenged on direct appeal . . . and are waived if not properly preserved for appellate review.” The Farisses had made general objections to PGP’s failure to prove strict compliance with condemnation procedures, but had not specifically directed the trial court to the issue of the commissioners’ oath. This general objection, the supreme court said, was insufficient to preserve the issue for appeal because it did not adequately apprise the trial court of the deficiency attacked.

In Allison v. Arkansas Louisiana Gas Co., the supreme court held that an action in trespass for damages occurring after the taking may properly be joined and tried in a condemnation suit. Arkansas Louisiana Gas Company brought a condemnation proceeding to acquire a gas pipeline right-of-way across the Allisons’ timber land, and appealed the commissioners’ award to the trial court. The Allisons, in response, asserted a trespass claim seeking additional damages resulting from Arkansas’s clearing an additional ten-foot strip and pushing debris off the right-of-way and onto the Allisons’ land. The trial court entered judgment on a jury verdict for the Allisons in the amounts of $1,000 on the trespass claim and $18,000 as

423. 616 S.W.2d at 169-70.
424. Id. at 170.
427. 620 S.W.2d at 560-61.
428. Id. at 561.
429. Id. at 560.
430. 624 S.W.2d 566, 568 (Tex. 1981).
condemnation damages. The court of civil appeals reversed, holding that Texas law did not allow a tort action for damages occurring after the taking to be tried with the condemnation suit. The supreme court reformed the judgment of the court of civil appeals so as to affirm the trial court's judgment awarding trespass damages. The supreme court held that "the present rule allowing joinder of claims is dispositive of the matter and that an action in tort for damages after the taking may be maintained in a condemnation suit."

The only legislative action during the survey period was the Texas Legislature's 1981 amendment of article 3266a of the eminent domain statutes. Article 3266a clarifies which court has jurisdiction over an eminent domain case and establishes the following:

1. When a county has no county court at law with jurisdiction over eminent domain proceedings and there is one district court, the district court has jurisdiction.

2. When a county has no county court at law with jurisdiction and there are two or more district courts, the district clerk assigns eminent domain proceedings to the district court in rotation.

3. When there is one county court at law with jurisdiction, it has jurisdiction of eminent domain proceedings.

4. When there are two or more county courts at law with jurisdiction, the county clerk assigns eminent domain proceedings to the county courts at law in rotation.

The court of civil appeals considered a number of condemnation cases during the survey period. The Dallas court of civil appeals considered...
an inverse condemnation case in *City of Dallas v. Ludwick*. Ludwick owned six lots within the city of Dallas that together formed a somewhat rectangular tract. In 1971 Ludwick learned that Dallas planned to widen a street adjoining this tract; the necessary right-of-way required a building offset line restricting the use of Ludwick's property. In 1974 Ludwick submitted an application to the city for a permit to construct an 80' x 220' building on all six lots of the tract. This application was denied because the building would be in the proposed right-of-way. Ludwick resubmitted the application, changing the dimensions of the building to 80' x 180', received the city's approval, and constructed the building. Ludwick learned in 1977 that Dallas had abandoned its plans to widen the adjoining street. Ludwick filed an inverse condemnation suit alleging that Dallas's denial of his application to build the larger building constituted a taking under article 1, section 17 of the Texas Constitution. The trial court rendered judgment for damages on a jury verdict for Ludwick. The Dallas court of civil appeals reversed and rendered. For Ludwick to recover, the court stated that he "must show that the city denied his application for a building permit in contemplation of taking his land in the future for public use and that such denial was the proximate cause of his alleged damages." The court held that there was no evidence that Dallas's denial of the application was the proximate cause of any damage to Ludwick, because the evidence showed conclusively that Ludwick could have relocated the 80' x 220' building on his tract of land without suffering any inconvenience or diminished utility as a result.

Houston's attempt to condemn land already devoted to a public use was at issue in *City of Houston v. Fort Worth & Denver Railway Co.* The city
of Houston filed suit against the Fort Worth & Denver Railway Company seeking a writ of possession or, alternatively, condemnation for street purposes, of land owned in fee by the railroad and used for tracks and railroad yards. After a jury trial the trial court entered judgment awarding Houston an easement and the railroad $84,770 for expenses it would incur as a result of the easement. Both parties appealed. The court of civil appeals held that: (1) Houston was required to condemn the easement and was not entitled to seek a writ of possession; 444 (2) the railroad's recovery could only be for the “diminished value for railroad purposes of the [r]ailroad's exclusive use of land taken caused by its use for street purposes,” and that therefore it was error to allow recovery for actual expenses incurred by the railroad as a result of the easement, which expenses would have to be borne by the railroad; 445 and (3) Houston had not violated the Commerce Clause. 446 The court also discussed the conditions under which a condemning authority could condemn property already devoted to public use: “Plainly stated, if a condemning authority seeks to condemn property already devoted to a public use, it may not do so if the effect of the taking would be to practically destroy the existing use, (1) unless the condemnor shows that its use is of paramount importance to the public, and (2) that its purpose cannot be accomplished in any other practical way.” 447 Houston obtained a jury finding that its use was of “paramount importance,” but the jury also found that there was another practical way to accomplish the proposed street crossing. The railroad, however, only obtained a jury finding that the taking would “materially impair” the existing use by the railroad; the court found that this finding did not satisfy the requirement that to avoid the taking, the condemnee must prove that the existing use would be “practically destroyed.” 448 The court held that neither party was entitled to judgment. 449

In McCullough v. Producers Gas Co. 450 the issue was whether the condemnees could recover attorney's fees, appraiser's fees, and other expenses after the condemnor dismissed its original condemnation proceedings and then refiled condemnation proceedings covering the identical lands. The Producers Gas Company filed condemnation proceedings in the summer of 1979, and commissioners' awards were entered after hearings at which the condemnees did not appear, allegedly because of inadequate notice. The condemnees then sought to enjoin Producers from entering their property. In response, Producers filed new condemnation proceedings on the identical lands, and later dismissed the original condemnation proceedings. The condemnees asked the district court to award them attorney's fees, appraiser's fees and other expenses pursuant to article 3265, subdivi-

444. Id. at 236.
445. Id.
446. Id. at 238.
447. Id. at 237.
448. Id.
449. The court therefore reversed the judgment and remanded. Id. at 238.
450. 616 S.W.2d 702 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).
A settlement was reached granting Producers an easement, and as a part of the settlement the new condemnation proceedings also were dismissed. The condemnees, however, pursued their claims for fees and expenses in district court. The district court denied any relief, but on appeal the Waco court of civil appeals reversed and remanded. The court of civil appeals read subdivision 6 of article 3265, as amended effective May 17, 1979, as providing "that where a condemnor after filing a petition in condemnation desires to and does dismiss or abandon the proceedings, upon motion filed to the judge of the court, the court upon hearing thereupon shall make an allowance for certain necessary and reasonable expenses." The court noted that the 1979 amendment made the award of expenses mandatory rather than discretionary, and held that since the elements of the statute were fulfilled in the case at bar, the trial court was obliged to make some award to condemnees.

The Fort Worth court of civil appeals rejected the condemnor's objections to an allegedly excessive judgment in City of Fort Worth v. Beaupre. The city of Fort Worth condemned a fee simple of approximately one-third of a vacant lot zoned for commercial use but subject to deed restrictions limiting its use to single family dwellings. The commissioners awarded $18,800 as compensation for the taking. The condemnees filed their objections, and the trial court rendered judgment upon jury findings that the condemnees recover $85,157.42 minus the $18,800. The Fort Worth court of civil appeals affirmed, holding that (1) the trial court's instruction on market value was proper; (2) although the admission into evidence of sales of improved properties by condemnees' expert as "comparable sales" was error because the condemned land was unimproved, the error was not reversible because four sales of unimproved property were also admitted; (3) although it was error to admit testimony about an unaccepted oral offer for the subject property, no reversible error was committed because the offer did not form the primary basis for the testimony of the witness regarding value; and (4) evidence was presented to support the jury's verdict on damages and that other points of error were invalid.

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452. 616 S.W.2d at 706.
453. Id. at 705.
454. Id. at 705-06. The court expressed no opinion as to whether the condemnees were entitled to treble recovery under the statute. Id. at 706.
455. 617 S.W.2d 828 (Tex. Civ. App.—Fort Worth 1981, writ ref’d n.r.e.).
456. Id. at 830-31. Fort Worth requested instructions emphasizing the effect of the deed restrictions on the value of the property. Id. at 830. The trial court submitted the language approved in City of Austin v. Cannizzo, 267 S.W.2d 808 (Tex. 1954), and the court of civil appeals stated that such language "apprised the jury that consideration should not only be given to the presently existing deed restrictions but consideration should also be given to the reasonable probability, if any, that the subject property would become available for commercial use in the reasonable future." 617 S.W.2d at 830-31.
457. 617 S.W.2d at 831.
458. Id.
459. Id. at 831-33.
Finally, the important question of the relationship between a city's zoning and condemnation powers was considered in *Austin v. City of Lubbock*. In March 1977, the city of Lubbock instituted condemnation proceedings to acquire portions of the Austins' lot on which their home was located in order to improve a heavily traveled intersection in an area zoned for single family dwellings. Lubbock's zoning provisions required a side yard with a minimum width of ten feet; the strip condemned by Lubbock left the Austins a side yard four and three-tenths feet wide. The trial court awarded title to the condemned land to Lubbock and $8,650 in compensation to the Austins. On appeal, the Austins argued that the taking was impermissible because it was in violation of Lubbock's own zoning ordinance. The Amarillo court of civil appeals held that under the facts Lubbock had improperly exercised its eminent domain power. The court stated the threshold question to be one never before resolved in Texas: "whether a city can ignore its zoning ordinance when exercising its eminent domain power." The court determined that the proper rule was that "a city exercising its eminent domain power in derogation of its zoning ordinance is not prohibited from doing so unless the objecting party can show that the action is unreasonable or arbitrary." The court noted that the jury specifically found that Lubbock abused its discretion in taking the Austins' property, and held that the trial court erred in disregarding this finding. The court of civil appeals reversed and remanded for adjudication of the Austins' claims regarding attorney's fees and damages.

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460. 618 S.W.2d 552 (Tex. Civ. App.—Amarillo 1981). In the course of the printing of this article the Texas Supreme Court reversed the court of civil appeals and affirmed the judgment of the trial court, 25 Tex. Sup. Ct. J. 167 (February 6, 1982). The supreme court stated that "a city exercising its eminent domain power is not bound by its own zoning ordinance unless the objecting party can show that the condemnation is unreasonable or arbitrary." Id. at 167. The determination of reasonableness or arbitrariness was held by the court to be a question of law. Id. at 168.
461. 618 S.W.2d at 555.
462. Id. at 554.
463. Id. at 555.
464. Id.
465. Id. at 556.