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Local Government Law

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I. Access to Government Information

The United States Supreme Court, lower federal courts, Texas courts, and the Texas attorney general all rendered decisions during the survey period that significantly affected the public's access to government information. The United States Supreme Court further articulated the emerging first amendment right of access to government information in a criminal trial. The Texas Court of Criminal Appeals decided a case based on article I, section 8 of the Texas Constitution, declaring that the press and public had certain rights of access broader than any previously articulated first amendment rights. Several cases involved the State Open Meetings Act, and one case construed the state Open Records Act. In addition, the attorney general responded to numerous inquiries as to whether government information must be divulged. Generally, the rights of the press and public to government information expanded during the survey period.

A. Courtrooms

In Globe Newspaper v. Superior Court the United States Supreme Court struck down a Massachusetts statute that barred the public from juvenile proceedings involving sex crimes. Boston Globe reporters had been excluded from several preliminary proceedings in the trial of a man accused of committing forcible rape and forced unnatural rape against three minors. Before trial the Globe moved the trial court to permit members of the press and public to attend the trial and related proceedings. Pursuant to the statute, the court refused and excluded the public and press from the entire trial. At an emergency appellate hearing the Commonwealth of 
Massachusetts, on behalf of the alleged victims, waived any right of the state or the victims to exclude the press from the trial. The Massachusetts Supreme Judicial Court construed the statute as requiring closure only during the testimony of the minor victims, and left further closure to the trial court's sound discretion. The United States Supreme Court vacated the Massachusetts court's opinion and remanded the case for reconsideration in light of Richmond Newspapers, Inc. v. Commonwealth.

On remand the Supreme Judicial Court reaffirmed its prior opinion and distinguished Richmond Newspapers on the ground that cases involving sex offenses against minors constitute an exception to the open trial provision. The United States Supreme Court reversed and held that the mandatory closure rule in section 16A violated the first amendment. The Court adopted the following test for closures of the type at issue in the case: "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."

In Texas the court of criminal appeals examined the right of public access to a criminal proceeding in Houston Chronicle Publishing Co. v. Shaver. In that case Antonio Nathaniel Bonham, on trial for capital mur-

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5. 448 U.S. 555 (1980). In Richmond Newspapers the Supreme Court recognized for the first time that the first amendment guarantees a right of public access to criminal trials. Id. at 580. At a fourth trial on murder charges, the court closed the trial to the public on the defendant's motion. A newspaper and two reporters sought to vacate the order, arguing that the court should ascertain whether the defendant's rights could adequately be protected in any other way before ordering closure. The trial court denied the motion to vacate, and the Virginia Supreme Court dismissed petitions for writs of mandamus and prohibition. The United States Supreme Court reversed. Id. at 581. In a plurality opinion Justice Burger stated that the public had a right under the first and fourteenth amendments to attend criminal trials. Id. at 580. This right of attendance could be outweighed by overriding interests as articulated by the trial court. As to closure in this case, however, no findings were made concerning whether closure was a necessary step to protect these other interests. Id. at 580-81.
7. 102 S. Ct. at 2622, 73 L. Ed. 2d at 260. Justice Brennan, writing for the majority, stated that "to the extent that the first amendment embraced a right of access to criminal trials, it is to ensure that the constitutionally protected 'discussion of governmental affairs' is an informed one." Id. at 2619, 73 L. Ed. 2d at 256. The Court also found that the first amendment properly affords protection to the right of access to criminal trials in particular, both because such trials have historically been open to the press and public and because such right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole. Id. at 2620, 73 L. Ed. 2d at 256. In a concurring opinion Justice O'Connor emphasized that the Court's opinion should not be interpreted as extending beyond the right of access to criminal trials. Id. at 2623, 73 L. Ed. 2d at 260. Chief Justice Burger, joined by Justice Rehnquist, dissented, arguing that the weight of historical practice evidenced a clear exception to the rule of public access in cases involving sexual assaults on minors. Id. at 2623, 73 L. Ed. 2d at 262 (Rehnquist, J., dissenting). Justice Stevens dissented on procedural grounds, arguing that the Court had rendered an advisory opinion. Id. at 2627, 73 L. Ed. 2d at 267.
8. Id. at 2620, 73 L. Ed. 2d at 257.
9. 630 S.W.2d 927 (Tex. Crim. App. 1982) (en banc). The Texas Court of Criminal Appeals had decided in 1980 that a district court habeas corpus proceeding could not be
der, was accused of the kidnapping, rape, and murder of a Houston teacher. The Houston Chronicle and Houston Post assigned reporters to cover Bonham's trial. During trial the state sought to introduce Bonham's written confession in accordance with a state statute[^10] and the United States Supreme Court's decision in *Jackson v. Denno.*[^11] The court dismissed the jury for the day, so that the court could conduct a hearing to determine the voluntariness of the confession. During the hearing Bonham's attorney expressed concern that the jurors might hear or read media accounts of the proceedings. The court then conducted a closed hearing in chambers. After the jury found Bonham guilty, the court released to reporters a transcript of the closed portion of the hearing. The newspapers asserted rights under a Texas statute[^12] and two provisions of the Texas Constitution.[^13] The Texas Court of Criminal Appeals found that the statute carried constitutional implications and mandamus with a proper remedy.[^14] The court concluded: "[W]e find that this respondent [the trial judge] was not authorized effectively to close out the public and media from the proceeding that our State Law commands shall be open. Article 1, §§ 8 and 10; Article 1.24."[^15] Thus, the court found an affirmative right of public access to trials and proceedings constitutionally grounded in article 1, sections 8 and 10 of the state constitution and statutorily provided for in article 1.24.

The trial of *United States v. Chagra*[^16] generated several conflicts between the press and the court with respect to access to the criminal proceedings. Chagra and others were on trial for conspiring to murder United States District Judge John Wood in San Antonio, Texas. In April 1982 three news organizations objected to an order of the United States Magistrate closing portions of a hearing on Joseph Chagra's motion for bail reduction. The court, relying on *Gannett Co. v. DePasquale,*[^17] ruled that public dissemination of the information in the closed hearing would "in

[^10]: TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon 1979).
[^11]: 378 U.S. 368 (1964). In *Jackson v. Denno* the United States Supreme Court reversed a denial of writ of habeas corpus and held that New York procedure violated the due process clause of the fourteenth amendment by submitting the question of a confession's voluntariness (on which conflicting evidence existed) directly to the jury along with the other issues of a criminal case. The Court found that due process entitled the defendant to an evidentiary hearing resolving the conflicting factual assertions about the confession, as well as the confession's voluntariness. *Id.* at 395-96.
[^12]: TEX. CODE CRIM. PROC. ANN. art. 1.24 (Vernon 1977) provides, "The proceedings and trials in all courts shall be public." *Id.*
[^13]: TEX. CONST. art. 1, §§ 8, 10.
[^14]: 630 S.W.2d at 933-34.
[^15]: *Id.*
[^16]: 669 F.2d 241 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 102, 74 L. Ed. 2d 92 (1983).
reasonable likelihood create a serious threat to the fair trial rights of defendant Joseph Chagra and co-defendants."\(^{18}\)

Relying on local rule 500-2 of the United States District Court for the Western District of Texas, Judge Sessions prohibited any news reporters from interviewing jurors after they had finished their deliberations with respect to some of Chagra's co-defendants. Rule 500-2 provides that "no person shall interview . . . any juror, relative, friend or associate . . . with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown."\(^{19}\) That rule was the subject of a first amendment attack and, after the survey period closed, the Fifth Circuit declared it unconstitutional.\(^{20}\)

The United States Supreme Court continued its interest in the first amendment right of access by granting review of the fourth such case in five terms.\(^{21}\) In *Press Enterprise Co. v. Superior Court*\(^{22}\) a California trial court closed voir dire in a rape-murder trial and denied access to a transcript of the voir dire. A California appeals court summarily denied the newspaper's petition for a writ of mandate and the California Supreme Court denied a request for a hearing. The United States Supreme Court has granted a writ of certiorari.\(^{23}\)

**B. The Texas Open Meetings Act**

In *Garcia v. City of Kingsville*\(^{24}\) the plaintiff claimed that the city wrongfully dismissed him as Kingsville's city manager because his discharge was conducted at a session held in violation of the Open Meetings Act.\(^{25}\) The Kingsville City Commission had convened and passed a final resolution dismissing the plaintiff as city manager approximately fifty hours after notice of the meeting was posted. After Garcia filed suit, the defendants, the mayor of Kingsville and two commissioners, filed a motion for summary

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\(^{18}\) Unreported opinion at 3 (SA-82-CR-57) (May 4, 1982).
\(^{19}\) TEX. (W.D.) LOCAL R. 500-2.
\(^{20}\) *In re The Express-News Corp.*, 695 F.2d 807 (5th Cir. 1983). In *In re The Express-News Corp.*, a newspaper and its reporter filed a petition for a writ of mandamus with the Fifth Circuit following the federal district court's refusal to allow the newspaper to interview members of a jury after the conclusion of a criminal trial. The Federal Court for the Western District of Texas had applied its local rule 500-2. The Fifth Circuit recognized that countervailing circumstances in some cases may justify a restriction on the journalist's first amendment rights to gather news. *Id.* at 809. The application of any such restriction, however, must be "narrowly tailored to prevent a substantial threat to the administration of justice. . . . Neither the district court's rule nor its order applying the rule have been so fashioned." *Id.* at 810 (citation omitted). As to the requirement of rule 500-2 that the party seeking the interview show good cause, the court stated: "[T]he first amendment right to gather news is 'good cause' enough. If that right is to be restricted, the Government must carry the burden of demonstrating the need for curtailment." *Id.*


\(^{22}\) 51 U.S.L.W. 3545 (U.S. Jan. 25, 1983) (No. 82-556).

\(^{23}\) *Id.*

\(^{24}\) 641 S.W.2d 339 (Tex. Ct. App.—Corpus Christi 1982, no writ).

\(^{25}\) TEX. REV. CIV. STAT. ANN. art. 6252—17 (Vernon Supp. 1982).
judgment, contending that the meeting was an emergency meeting, duly noted, and that the Act required only two hours advance notice. The defendants further contended that their determination that an emergency existed was not subject to judicial review. The defendants' motion for summary judgment was granted, and an appeal followed.

The Corpus Christi court of appeals noted that compliance with the Open Meetings Act is mandatory and that any action taken by a governmental body in violation of the statute is subject to judicial reversal in a suit brought by a person the action has adversely affected. The court rejected the defendant's argument that the commission's determination of an emergency was not subject to judicial review. The court also rejected the defendant's contention that the emergency designation had been established as a matter of law and consequently reversed the case and remanded it for trial.

In *University Interscholastic League v. Payne* the parents and teammates of two football players, whom the University Interscholastic League (UIL) has declared ineligible, brought suit against the UIL after the declaration of ineligibility forced the players' schools to forfeit all games in which the two players had participated. After the trial court temporarily enjoined enforcement of the UIL's decision, the UIL gave notice of appeal. The UIL failed, however, to file the requisite appeal bond. Finding no exception exempting the UIL from providing the bond, the court of appeals held that the appeal was not properly perfected and dismissed the case for lack of jurisdiction. In a dictum the court noted that the UIL District Executive Committee's meeting in which the two athletes had been declared ineligible was not held in compliance with the Texas Open Meetings Act. The court, however, reserved the question of whether the UIL is subject to the Open Meetings Act.

26. The defendants were attempting to fall within that part of art. 6252—17, § 3A(h) that provides: “In case of emergency or urgent public necessity, which shall be expressed in the notice, it shall be sufficient if the notice is posted two hours before the meeting is convened.” *Id.* § 3A(h).

27. 641 S.W.2d at 341.

28. *Id.* The court cited Cameron County Good Gov't League v. Ramon, 619 S.W.2d 224 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.), in which the Cameron County Commissioners Court contended that their determination of the necessity of an “emergency” meeting was not subject to judicial review. *Id.* at 230. In *Ramon* the commissioners had held many meetings under the “emergency or urgent public necessity” exception to the statutory 72-hour notice requirement. In rejecting the commissioners' contention that their decision was not subject to judicial review, the *Ramon* court stated that “to contend that a governing body has unbridled power to decide what is an emergency under the Open Meetings Act flies in the teeth of Section 3 (1970) which specifically allows judicial review 'for the purpose of stopping or preventing violations or threatened violations of this Act.'” *Id.* at 231.

29. 641 S.W.2d at 342.


31. The appellant had failed to satisfy the requisites of Tex. R. Civ. P. 354.

32. 635 S.W.2d at 756-57.

33. *Id.* at 758.

34. *Id.* at 758 n.6.
C. Texas Open Records Act

Only one case construed the Texas Open Records Act during the survey period. In Austin v. City of San Antonio the San Antonio Urban Renewal Agency received a request for information concerning the amount of the agency's initial offer to landowners in twenty-one condemnation cases. The agency refused the request on the ground that the information was exempt from disclosure under the Act because it constituted settlement negotiations and interagency or intra-agency memorandums or letters. The petitioner argued that the agency's failure to request a decision from the attorney general as to whether the information requested was exempt from disclosure gave rise to an irrebuttable presumption that the information sought was not exempt and hence should be released as a matter of law. The agency did not request an attorney general's ruling on the ground that existing attorney generals' opinions and judicial decisions on similar subjects supported the agency's determination concerning the confidentiality of settlement negotiations. The court found it unnecessary to reach the question of the necessity of an attorney general's ruling because it found the statutory exceptions the agency had invoked "plainly inapplicable to the information withheld." The court ordered the information disclosed.

36. 630 S.W.2d 391 (Tex. Ct. App.—San Antonio 1982, writ ref’d n.r.e.).
38. See id. § 7(a). The statute provides:
   If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

39. 630 S.W.2d at 393.
D. Attorney General Opinions Concerning the Texas Open Records Act

In ORD-283\(^4\) the attorney general addressed the availability of a Dallas Park Police file to the person who is the subject of the file. The City of Dallas objected to disclosing: (1) criminal history information regarding the requester and members of her family; and (2) responses of her references and former employers to a questionnaire from the Parks Department. The attorney general upheld the claimed exemption under section 3(a)(1) of the Texas Open Records Act with respect to the first type of information.\(^4\) With respect to the second category of information the attorney general ruled the information was public and not subject to exemption under section 3(a)(11), and further found that the requester could not waive the public's right to the information even though she may have waived her own rights.\(^4\)

In ORD-284\(^5\) the attorney general considered the availability to the public of a high school principal's personnel file and an audit report concerning financial irregularities. The attorney general held that disclosure of the information was proper with limited exceptions.\(^4\) Letters of recommendation in the principal's personnel file, written prior to the June 14, 1973, effective date of the Open Records Act and made pursuant to promises of confidentiality, were exempt from disclosure.\(^4\) The attorney general noted this exception avoided the constitutional prohibition against impairment of the obligation of contracts. The attorney general further excepted from disclosure portions of the employee's evaluations by supervisors as well as recommendations for reemployment.\(^4\)

In ORD-285\(^5\) the attorney general determined the availability of investigatory reports concerning misconduct in a city tax office. The attorney general found synopses of witnesses' interviews exempt from disclosure under section 3(a)(1) of the Open Records Act.\(^5\) The allegations and portions of the actual report were not exempt from disclosure; the exemption did apply, however, to the investigator's opinions and recommendations.\(^5\)

ORD-286\(^5\) involved the availability of records maintained by a city fire marshall. The records at issue consisted of a fire investigation report, including an offense report detailing the original incident, a supplementary offense report, and a witness's voluntary statement. The fire marshall


\(^{45}\) Id.

\(^{46}\) Id. ORD-284.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id. ORD-285.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id. ORD-286.
claimed exemption from disclosure of the records under section 3(a)(8)\textsuperscript{54} as records of law enforcement agencies dealing with the detection and investigation of crime. The attorney general held that the fire marshal had properly withheld information since the district attorney had not made a decision concerning the initiation of prosecution.\textsuperscript{55}

In ORD-287\textsuperscript{56} the attorney general was asked to determine whether records of community service divisions of police departments were exempt from disclosure. The requester sought information kept by the Community Services Division of the Dallas Police Department concerning the name and address of the person referred to, comments about her, the name of the social worker assigned to the matter, and the date of the entry of the notation. Finding that the information sought dealt directly with the activity of the Community Services Division of the Dallas Police Department and not with crime detection, the attorney general rejected the police department's claim of exemption under section 3(a)(8).\textsuperscript{57} An objection under section 3(a)(11),\textsuperscript{58} the interagency memorandum exemption, was upheld, however, inasmuch as the private agency that distributed the information to the Dallas Police Department's Community Services Division was operating pursuant to a contract with the Texas Department of Human Resources, the agency responsible for the administration of public welfare programs in Texas.\textsuperscript{59}

ORD-288\textsuperscript{60} dealt with the availability of a report concerning a former high school principal to the current principal under the Open Records Act. The report dealt with the results of an investigation into the manner in which all the district's high school principals handled various revenues entrusted to them and discussed the principal's overall performance. The attorney general's decision turned on whether section 3(a)(2) of the Act\textsuperscript{61} provided a special right of access overriding other exemptions under the Act. The attorney general in ORD-200\textsuperscript{62} took the position that section 3(a)(2) did provide to employees a special right of access entitling them to

\textsuperscript{54} TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(8) (Vernon Supp. 1982-1983) provides an exemption for "records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement."

\textsuperscript{55} TEX. ATT'Y GEN. ORD-286 (1981).

\textsuperscript{56} Id. ORD-287.

\textsuperscript{57} Id.; see TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(8) (Vernon Supp. 1982-1983).

\textsuperscript{58} TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(11) (Vernon Supp. 1982-1983) provides an exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency."

\textsuperscript{59} TEX. ATT'Y GEN. ORD-287 (1981).

\textsuperscript{60} Id. ORD-288.

\textsuperscript{61} TEX. REV. CIV. STAT. ANN. art. 6252—17a, § 3(a)(2) (Vernon Supp. 1982-1983) provides an exemption for information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; provided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

\textsuperscript{62} TEX. ATT'Y GEN. ORD-200 (1978).
personnel information otherwise exempted from disclosure. The attorney general stated in ORD-288, however, that "we are no longer prepared to accept the view that the 3(a)(2) proviso overrides the 3(a)(3) exemption. 3(a)(3) prevents governmental entities from possibly having to compromise their position in pending or anticipated litigation or in settlement negotiations by having to divulge information relating thereto." Thus, the attorney general overruled ORD-200 to the extent that it could be read to permit section 3(a)(2) to override the section 3(a)(3) exemption.

In ORD-290 the attorney general considered whether the public should have access to psychologists' licensing files. The request specifically asked for documents involving complaints, charges, and actions taken in disciplinary hearings involving licensees of the Texas State Board of Examiners of Psychologists. A Texas statute, article 4512c, section 23(e), provides that "[a]ll charges, complaints, notices, orders, records, and publications authorized or required by the terms of this Act shall be privileged." The board of examiners argued that the term "privileged" contained in the Act made records confidential by law and, therefore, exempt under section 3(a)(1). The attorney general found that the exemption did not apply and stated: "We must conclude that, whatever the legislature intended the term 'privilege' to mean, it did not intend that it should be construed to mean 'confidential.'"

In ORD-292 the Lower Colorado River Authority (LCRA) was asked for a copy of a contract in its possession between the Texland Electric Cooperative and the Shell Oil Company. Shell had agreed to provide the LCRA with the contract only upon an express promise of confidentiality. The attorney general ruled the information exempt from disclosure, relying on the exemption contained in section 3(a)(1) as well as the case of National Parks & Conservation Association v. Morton.

63. Id.
64. Id. ORD-288 (1981); TEX. REV. CIV. STAT. ANN. art. 6252–17a, § 3(a)(3) (Vernon Supp. 1982–1983) provides an exemption for information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.
66. Id. ORD-290.
67. TEX. REV. CIV. STAT. ANN. art. 4512c, § 23(e) (Vernon Supp. 1982).
69. Id. ORD-292.
70. Id.
71. 498 F.2d 765 (D.C. Cir. 1974). In National Parks the plaintiff sought to inspect and copy certain agency records pertaining to the National Park Service's concession operations. The Department of the Interior refused, and the plaintiff brought suit under the Freedom of Information Act. The district court granted the defendant's motion for summary judgment on the basis of a commercial or financial information exemption. Id. at 766. The court of appeals reversed and remanded, formulating a standard by which the confidentiality of commercial or financial information is to be judged: [C]ommercial or financial matter is 'confidential' for purposes of the exemp-
In ORD-294 the University of Texas was asked to provide copies of all wire, cable, and teletype traffic between the International Office of the University and the Government of Bahrain. The attorney general overruled the university's claim that the doctrine of sovereign immunity protected the information. Instead, the attorney general ruled that the information should be released with an exception; information relating to student records that, while not identifying individual students by name, related only to a small number of students could not be released. Since, in a small sampling, identification of individuals may be a relatively simple task, the exemption contained in section 3(a)(14) was applicable.

In ORD-295 the requester sought a draft plan that the Division of Special Studies and System Planning of the Texas Parks and Wildlife Department had prepared concerning Matagora Island and submitted to the executive director of that department. The director refused to disclose the study to the requester. The attorney general upheld the director's claimed exemption under section 3(a)(11), ruling that the small amount of factual information disclosable in the report was so intertwined with the exempted opinions and recommendations that it was not reasonably severable.

In ORD-296 the two newspaper reporters asked for certain information in the possession of the Dallas Environmental Health and Conservation Department concerning lead pollution or poisoning in the city, as well as certain information the R.S.R. Corporation had sent to the city. The attorney general held that the city could withhold information that tends to identify those making complaints to the city concerning lead pollution or poisoning. The city further sought to withhold information based on trade secrets claimed by R.S.R. The attorney general held that the information sought did, indeed, contain trade secrets and should, therefore, be withheld.

In ORD-300 the requester sought a list of all corporations filing
franchise tax returns under the county-assessed-value method of taxation from the Comptroller of Public Accounts. The attorney general held that the information was not public, but was exempt from disclosure under section 3(a)(1) because a Texas statute provided that “all information secured, derived, or obtained from any record, instrument or copy thereof required to be furnished under the terms of this Chapter shall be and shall remain confidential and not open to public inspection.”

II. ZONING

A. Adult Theaters

In Basiardanes v. City of Galveston the Fifth Circuit, reversing the United States District Court, struck down as violative of the first amendment a City of Galveston zoning ordinance that restricted the operation of adult theaters to certain defined areas. Basiardanes leased a building he owned for the showing of adult films. Shortly thereafter, Galveston passed a zoning ordinance that clearly prohibited use of his building for such a purpose. The ordinance keyed its definition of adult motion picture theaters to Texas law, which provides that an adult theater is one “from which, under the laws of the State of Texas, minors are excluded by virtue of age unless accompanied by a consenting parent, guardian or spouse.” The definition in the ordinance, however, was not limited to theaters showing obscene or blatantly sexual movies. The ordinance restricted adult theaters to three zoning districts. Within those areas the ordinance required dispersal of adult theaters in such a way that they were excluded from eighty to ninety percent of the areas in which they were not totally banned. The remaining areas where they could be located were economically and physically unsuitable. The ordinance also regulated any ad-

84. 682 F.2d 1203 (5th Cir. 1982).
85. 514 F. Supp. 975 (S.D. Tex. 1981). The district court found that the plaintiff lacked standing under certain provisions of the ordinance, id. at 977-79, and upheld the ordinance against both first and fourteenth amendment challenges. Id. at 981-83.
86. For the text of the Galveston ordinance, see Appendix "A" of the district court's opinion. Id. at 983-85.
87. Id. at 984. TEX. PENAL CODE ANN. § 43.24 (Vernon 1974) deals with the sale, distribution, or display of harmful material to a minor and provides that a person commits an offense under this section if he knowingly exhibits "harmful" material to a person under the age of 17 years. Material is "harmful" if its "dominant theme taken as a whole: (A) appeals to the prurient interest of a minor, in sex, nudity, or excretion; (B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (C) is utterly without redeeming social value for minors." For a recent discussion of obscenity laws in Texas, see Comment, Changing Standards of Obscenity in Texas, 34 Sw. L.J. 1201 (1981).
88. Adult theaters were essentially limited to areas zoned for light and heavy industry, as the dispersal requirements effectively banned their location within the central business district.
89. 682 F.2d at 1209.
vertising or displays for adult book stores or theaters that were visible to the public from any street, sidewalk, or public place. The court held that Basiardanes had no standing to challenge the ordinance for vagueness, but because he suffered out-of-pocket injuries, he did have standing to challenge its location restrictions. Basiardanes maintained that the zoning restriction was "tantamount to a total ban of additional adult theaters in Galveston in breach of the First Amendment." While recognizing that a zoning regulation will generally be sustained if it is rationally related to a legitimate state interest and does not extinguish all practicable uses of the property, the court noted that different judicial attitudes come into play when zoning schemes intrude upon activity the first amendment protects. The court found that Galveston had not limited application of its ordinance to theaters peddling obscene materials, which are outside the protection of the first amendment. Instead, the city attempted to regulate, to the point of banning, theaters regularly showing any film that under Texas law could not be viewed by minors unaccompanied by an adult. The court rejected Galveston's argument that the ordinance was merely a time, place, and manner of operation regulation of adult theaters on the ground that the ordinance substantially excluded adult theaters from the city. The court concluded that the Galveston ordinance was "neither motivated by a sufficient governmental interest, nor narrowly tailored so as to satisfy the First Amendment." Galveston had claimed a legitimate governmental interest based on the nexus between crime and adult theaters. The court found, however, that this purported nexus was based solely on the speculation of city officials and was not supported in the record. In addition, the city stated that the ordinance was necessary to further its goal of upgrading the downtown area. The court concluded, however, that the ordinance

90. The court noted that "no other commercial establishments were similarly regulated." *Id.*
91. *Id.* at 1210-11. The court found that Basiardanes had no standing to challenge the statute as vague, either as himself, as a third party, or as a moviegoer. *Id.*
92. *Id.* at 1212 n.6.
93. *Id.* at 1212.
94. See Agins v. City of Tiburon, 447 U.S. 255, 260-63 (1980) (city zoning ordinance upheld as not in violation of fifth amendment); Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974) (zoning ordinances upheld if reasonable and not arbitrary); Stansberry v. Holmes, 613 F.2d 1285, 1289 (5th Cir. 1980) (proper standard of review is whether zoning ordinance is "arbitrary and capricious").
95. 682 F.2d at 1212 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)).
96. 682 F.2d at 1212-13.
98. 682 F.2d at 1215.
99. *Id.*
100. The court found that this was a proper legislative goal, stating that the "rehabilitation of blighted urban areas and the use of zoning to accomplish urban renewal are legitimate goals for a city." *Id.*
was far more restrictive than necessary to achieve this goal, and therefore, violated the first amendment.\textsuperscript{101} The advertising ban was similarly rejected. Despite evidence of a “strong and legitimate” city interest in shielding its citizens from lurid film advertisements, the court held that the absolute proscription of advertising by adult theaters could not be sustained.\textsuperscript{102}

\section*{B. Mobile Homes}

The Texas Supreme Court upheld the regulation of mobile homes as a valid exercise of a municipality’s police power in \textit{City of Brookside Village v. Comeau}.\textsuperscript{103} Pursuant to two ordinances of the city’s Mobile Home Code,\textsuperscript{104} the city council denied the Comeaus’ application to place a mobile home on their four-acre lot for use as a residence. The Comeaus brought an action against the city contending that the ordinances imposed an arbitrary restriction on property use not related to proper municipal objectives, and hence represented an unconstitutional exercise of police power. They also claimed that the ordinances were invalid as attempts to regulate in an area preempted by state and federal law.\textsuperscript{105} The court listed several factors justifying location regulation of mobile homes, including greater facility for police and fire protection and for provision of necessary services such as water, sewer, and lighting. Additionally, the court noted that encouragement of the most appropriate use of land and conservation of property values likewise warranted the regulation, particularly in view of the transient nature of mobile homes and the impact of their random placement on property values.\textsuperscript{106} Noting that while recent significant changes in the design and construction of mobile homes might justify treatment consistent with that afforded conventional housing, the court determined that the issue was better left to legislative consideration.\textsuperscript{107} The Comeaus’ preemption argument was based on the National Manufactured Housing Construction and Safety Standards Act of 1974,\textsuperscript{108} and the Texas Manufactured Housing Standards Act.\textsuperscript{109} The court found that the Brookside Village location ordinances did not conflict with these federal and

\begin{itemize}
\item \textsuperscript{101} \textit{Id.} at 1216-17.
\item \textsuperscript{102} \textit{Id.} at 1219.
\item \textsuperscript{103} 633 S.W.2d 790 (Tex. 1982).
\item \textsuperscript{104} The two ordinances regulated the operation and maintenance of mobile home parks and prohibited the placement of mobile homes used as residences outside of such parks. \textit{Id.} at 792 n.2.
\item \textsuperscript{105} \textit{Id.} at 792.
\item \textsuperscript{106} \textit{Id.} at 794.
\item \textsuperscript{107} \textit{Id.} at 795. The court deferred to the legislature in view of the constantly changing conditions of urban development and the “judicial acknowledgment of zoning power.” \textit{Id.}; see also \textit{Gorieb v. Fox}, 274 U.S. 603, 608 (1927) (state legislature and city council decision should not be disturbed unless clearly arbitrary and unreasonable).
\item \textsuperscript{109} \textit{TEX. REV. CIV. STAT. ANN.} art. 5221f (Vernon Supp. 1982-1983). In recognition of the various problems related to the manufactured home industry, the Texas legislature felt that the expansion of “various regulatory powers to deal with these problems” was “the most economical and efficient means of dealing with this problem and serving the public interest.” \textit{Id.} art. 5221, \textit{ss} 2.
state regulations and, as such, were not preempted.110

C. Spot Zoning

Spot zoning occurs when an amendatory ordinance treats a small tract of land differently from similar surrounding land without proof of changed condition. Such zoning is uniformly prohibited when it has a substantial adverse impact upon the surrounding land.111 In City of Texarkana v. Howard112 the court of appeals affirmed the trial court’s finding that an ordinance amending the city’s comprehensive zoning plan was invalid as unjustifiable spot zoning.113 In Howard the city annexed certain tracts of land in 1972 into an agricultural zoning district that restricted residential use to single family residences on at least one acre. In 1979 the city adopted an ordinance amending zoning for the annexed tract to allow for construction of an apartment complex. In analyzing the surrounding landholders’ spot zoning claim, the court considered the guidelines the Texas Supreme Court supplied in City of Pharr v. Tippitt.114 The court first noted that although the tract in issue comprised 5.98 acres, it was still considered small in relation to neighboring affected lands that included substantially larger tracts.115 The court also found no evidence of substantially changed conditions in the rezoned area to justify the special zoning.116 Finally, the court looked to the factors laid out in Tippitt and considered the extent of any adverse impact upon neighboring lands, the suitability of the tract for use in accordance with present zoning, and the effect of the amendatory ordinance on public health, safety, morals, or general welfare. The court found that the adverse impact of an apartment complex on neighboring lands would be substantial, that the annexed land was perfectly suited for use in accordance with present zoning, and that the evidence failed to show any benefit to the community from the rezoning.117

110. 633 S.W.2d at 796.
111. See City of Pharr v. Tippitt, 616 S.W.2d 173, 179 (Tex. 1981) (Texas Supreme Court sustained a municipal zoning ordinance against claims that it constituted spot zoning); see also TEX. REV. CIV. STAT. ANN. art. 1011c (Vernon 1963) (requiring zoning regulations to “be made in accordance with a comprehensive plan”).
112. 633 S.W.2d 596 (Tex. Ct. App.—Texarkana 1982, writ re’f n.r.e.).
113. Id. at 598.
115. 633 S.W.2d at 597. The contiguous tracts of land ranged in size from one to twenty acres. Id.
116. Id.; see Thompson v. City of Palestine, 510 S.W.2d 579, 582 (Tex. 1974) (rezoning of 4.1-acre tract for commercial use in a residential area not justified by changes such as street widening, commercial lighting installation, and traffic increase); Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971) (change from one permitted use to another permitted use did not constitute material change of conditions to justify rezoning); Weaver v. Ham, 149 Tex. 309, 317-18, 232 S.W.2d 704, 709 (1950) (arbitrary change of zoning from single family residence to apartment house zone destroyed presumption that amendatory ordinance was valid).
117. 633 S.W.2d at 598.
D. Joint Zoning and Planning Commissions

In *Lacy v. Hoff*\(^\text{118}\) the Houston [14th District] court of appeals reversed the district court's granting of a mandatory injunction that compelled the planning and zoning commission to approve the landowner-plaintiff's subdivision and issue him a building permit.\(^\text{119}\) The commission had denied the plaintiff's submitted lot and construction plan because it conflicted with the city's planning and zoning ordinance.\(^\text{120}\) The plaintiff successfully appealed to the board of adjustment for a variance to the ordinance, but approval of his plat was again denied when he returned to the planning and zoning commission. The trial court ordered the commission to approve the plan because of the board of adjustment's variance decision. The court of appeals reversed, noting that although statutorily one body may serve in a dual capacity as both a planning commission and a zoning commission,\(^\text{121}\) the duties and functions of the two are distinct.\(^\text{122}\) A zoning commission has no ultimate authority; article 1011f authorizes it to act solely in an advisory capacity to the city council in zoning matters.\(^\text{123}\) Article 1011g\(^\text{124}\) empowers a board of adjustment, a quasi-judicial body, to authorize variances consistent with the public interest when literal enforcement of an ordinance will result in unnecessary hardship.\(^\text{125}\) A planning commission, on the other hand, has the general duty of enforcing the platting requirements of article 974a by "refusing to endorse approval on any plat which does not satisfy the minimum requirements of 974a, and the rules and regulations adopted by the City Council governing plats and the subdivision of land."\(^\text{126}\) City ordinances require approval by the planning commission and proper recordation of a plat before a building permit can issue.\(^\text{127}\) The court held that any ordinance that subjected the platting and subdividing responsibilities of a planning commission to a review decision of a board of adjustment was void\(^\text{128}\) since a board has no appellate jurisdiction over a planning commission's subdivision plat approval process.\(^\text{129}\)

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\(^{118}\) 633 S.W.2d 605 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ dism'd).

\(^{119}\) *Id.* at 611.

\(^{120}\) Because the plats did not comply with the statutory requirements of *Tex. Rev. Civ. Stat. Ann.* art. 974a (Vernon 1963 & Supp. 1982-1983), regulating subdivision development, the court held they could not be recorded. 633 S.W.2d at 611.


\(^{122}\) 633 S.W.2d at 606.


\(^{125}\) 633 S.W.2d at 607.

\(^{126}\) *Id.* at 608.

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 609.

\(^{129}\) *Id.* at 610.
E. Enforcement

In Marriott v. City of Dallas\textsuperscript{130} the city succeeded in obtaining a permanent injunction to prevent Marriott from excavating further without the special permit required by a zoning ordinance. The landowner appealed, arguing that the city was estopped from enforcing the injunction on the basis of a city inspector's report, which followed personal inspection of the excavated property. The report indicated that Marriott had not violated the zoning ordinance. The court of appeals, however, rejected this argument and held that the city was neither bound by the reports, nor estopped to deny the inspector's conclusions.\textsuperscript{131} The court reasoned that inasmuch as the city discharges a governmental function in enforcing its zoning ordinances, the equitable doctrines of estoppel and laches are not available against it.\textsuperscript{132}

F. School Districts

In City of Addison v. Dallas Independent School District\textsuperscript{133} the Dallas court of appeals held that “the zoning authority of a municipality is subservient to the reasonable exercise of school district authority.”\textsuperscript{134} The Dallas Independent School District had proposed to use certain Addison property it owned as a bus parking facility. The city of Addison brought suit against the school district, contending that because the land in question was zoned residential, the use of the property to park buses violated its zoning ordinance. During the litigation Addison also passed a nuisance ordinance applicable to the creation of the bus facility. The court of appeals upheld the district court's decision to enjoin enforcement of the zoning and nuisance ordinances against the school district.\textsuperscript{135} In doing so, the court rejected the city's narrow interpretation of Austin Independent School District v. City of Sunset Valley.\textsuperscript{136} The city of Addison argued that Sunset Valley applies only when a municipality totally prohibits a school district from constructing facilities within the city's boundaries.\textsuperscript{137} Instead, the court interpreted Sunset Valley as establishing that a “school district's authority to locate school facilities overrides the police power of municipalities to zone them out in order that the legislative purpose in delegating this authority to the school district might not be frustrated.”\textsuperscript{138} As to the nuisance ordinance,\textsuperscript{139} the court determined that the authorized acts of a

\textsuperscript{130} 635 S.W.2d 561 (Tex. Ct. App.—Dallas 1982, no writ).
\textsuperscript{131} Id. at 564.
\textsuperscript{132} Id.
\textsuperscript{133} 632 S.W.2d 771 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).
\textsuperscript{134} Id. at 772.
\textsuperscript{135} Id. at 774.
\textsuperscript{136} 502 S.W.2d 670 (Tex. 1973). The Texas Supreme Court in Sunset Valley held that a city, through its zoning power, can not “wholly exclude from within its boundaries school facilities reasonably located.” Id. at 672.
\textsuperscript{137} 632 S.W.2d at 772.
\textsuperscript{138} Id. at 773.
\textsuperscript{139} The city of Addison contended that the overnight parking of buses and trucks in an area zoned residential constituted a nuisance in violation of this ordinance. Id.
school district can neither be nuisances per se nor be declared nuisances by
the city.\textsuperscript{140} Nuisance will only be actionable when it “is established by
evidence that the governmental function is conducted in an unreasonable
manner.”\textsuperscript{141} According to the court, inasmuch as the jury had determined
that the bus facility had not become a nuisance by reason of its locality,
surroundings, or manner in which it was conducted, further inquiry was
foreclosed.\textsuperscript{142}

\textbf{G. Oil Wells}

In \textit{Unger v. State}\textsuperscript{143} the Fort Worth court of appeals upheld the author-
ity of a city acting under its police power to both regulate and prohibit the
drilling of oil wells within city limits.\textsuperscript{144} The court held that the legislative
delegation to the railroad commission of the right to regulate the oil and
gas business in Texas did not in any way conflict with municipal authority
also to regulate in that area for legitimate purposes.\textsuperscript{145}

\textbf{III. Condemnation}

\textit{A. Zoning Conflicts}

The Texas Supreme Court addressed only one condemnation case wor-
thy of note during the survey period. In \textit{City of Lubbock v. Austin}\textsuperscript{146} con-
demnation of part of a residential lot for street widening left the lot with
less than the minimum width required by zoning ordinances. The Austins
defended the condemnation action by contending that the city abused its
discretion in exercising its eminent domain power in derogation of one of
its zoning ordinances.\textsuperscript{147} In determining whether a city was bound by its
zoning ordinances when exercising its power of eminent domain, the court
analogized to its previous decision in \textit{Austin Independent School District v.
City of Sunset Valley}.\textsuperscript{148} The court in \textit{Sunset Valley} allowed the school
district to construct facilities in a location that violated city zoning ordi-
nances. Based on this decision the court in \textit{City of Lubbock} held that in

\begin{itemize}
  \item 140. \textit{Id.}
  \item 141. \textit{Id.}
  \item 142. \textit{Id.} at 774. Such a category of nuisance is not subject to municipal ordinance, but
rather requires a judicial determination that the activity has become a nuisance by virtue of
these various factors. \textit{Id.} at 773.
  \item 143. 629 S.W.2d 811 (Tex. Ct. App.—Fort Worth 1982, writ ref'd).
  \item 144. \textit{Id.} at 812.
  \item 145. \textit{Id.} at 813. The court cited Klepak v. Humble Oil & Ref. Co., 177 S.W.2d 215, 218
(Tex. Civ. App.—Galveston 1944, writ ref'd n.r.e.), which held that in delegating such au-
thority the legislature did not intend to “repeal the fundamental law” that a municipality
has the police power to regulate the drilling and production of oil “when acting for the
protection of their citizens and the property within their limits, looking to the preservation
of good government, peace, and order therein.” \textit{Id.} (citations omitted).
  \item 146. 628 S.W.2d 49 (Tex. 1982).
  \item 147. The court expressly declined to decide whether the city would be estopped from
bringing any action against the Austins for violation of the zoning ordinance. It did, how-
ever, assume that this would be the case. \textit{Id.} at 49 n.1; \textit{see Black & Daniel, The Texas Rule
of Estoppel in Zoning Cases, 33 Baylor L. Rev. 241 (1981).}
  \item 148. 502 S.W.2d 670 (Tex. 1973); \textit{see supra} notes 136-38 and accompanying text.
\end{itemize}
exercising its power of eminent domain, a city is not bound by its own zoning ordinances absent a showing that the condemnation is unreasonable or arbitrary.\textsuperscript{149} The court further determined that the question of the reasonableness or arbitrariness of a proposed action is one of law to be decided by the court.\textsuperscript{150}

B. Procedure

In \textit{Peak Pipeline Corp. v. Norton}\textsuperscript{151} the Tyler court of appeals held that a condemnor has an absolute right to proceed with its condemnation action, despite the prior filing of a condemnee's wrongful trespass action.\textsuperscript{152} Without permission of the landowners and without condemning the land in question, Peak constructed a pipeline across Norton's property. Norton filed suit for damages alleging wrongful trespass and Peak subsequently brought a condemnation action. The trial court granted the condemnee's plea in abatement because of the pending trespass action and dismissed the condemnation suit. The court of appeals reversed, finding that as condemnation proceedings are purely statutory in nature,\textsuperscript{153} the trial court was without jurisdiction to interfere in any respect unless the condemnation commission itself was without jurisdiction.\textsuperscript{154} Norton argued that the rule did not apply in his case because he, in essence, had filed an inverse condemnation action. The court rejected this argument, holding that it is the absolute duty of the presiding district judge to appoint a special commission once a petition for condemnation has been filed, and that the court thereafter lacked jurisdiction to dismiss the condemnation action under a plea in abatement.\textsuperscript{155}

A related point was discussed in \textit{Matador Pipelines, Inc. v. Watson}\textsuperscript{156} in

\textsuperscript{149} 628 S.W.2d at 50. The court found this standard to be consistent with that used in review of zoning changes. See \textit{supra} notes 111-17 and accompanying text for survey period cases dealing with this standard in the spot zoning context.

\textsuperscript{150} 628 S.W.2d at 50. In the trial court the jury found that the city had clearly abused its discretion, but the trial judge disregarded these findings. The supreme court upheld that trial court decision as one of law stating: "To hold otherwise would tend to substitute the land use preferences of a jury for those of a governing body acting under statutory authority, presumably with a special expertise in the area." \textit{Id.}

\textsuperscript{151} 629 S.W.2d 185 (Tex. Ct. App.—Tyler 1982, no writ).

\textsuperscript{152} \textit{Id.} at 187.


\textsuperscript{154} 629 S.W.2d at 186; \textit{see, e.g.}, Tarrant County v. Shannon, 129 Tex. 264, 274, 104 S.W.2d 4, 9-10 (1937) (district court prohibited from issuing injunction to prevent county from instituting valid condemnation proceedings for highway easement); Coastal Indus. Water Auth. v. Houston Lighting & Power Co., 564 S.W.2d 389, 391 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (district court held to lack jurisdiction to enjoin condemnation proceedings validly instituted in county court, even though such proceedings began after filing of suit for equitable relief); Trinity River Auth. v. Southland Paper Mills, Inc., 448 S.W.2d 516 (Tex. Civ. App.—Beaumont 1969, no writ) (condemnee held to have adequate remedy in right of appeal from condemnation proceeding; granting of temporary injunction was therefore beyond jurisdiction of district court).

\textsuperscript{155} 629 S.W.2d at 187. The court suggested that once an appeal of the commission's award has been made to the district court, the trial court could determine that the condemnation and trespass actions should be consolidated so as to avoid a multiplicity of suits. \textit{Id.}

\textsuperscript{156} 626 S.W.2d 139 (Tex.Ct. App.—Waco 1981, writ ref'd n.r.e.).
which the Waco court of appeals upheld an award of actual and punitive damages in a trespass action against a pipeline company.\textsuperscript{157} The pipeline company instituted condemnation proceedings, and the presiding judge appointed three special commissioners in the cause. The hearing, however, was held by three different commissioners who heard the condemnation action and made an award.\textsuperscript{158} The appeals court held that condemnation proceedings require strict adherence to statutory requirements for the protection of the landowner; thus the condemnation at bar was void since it was heard not by the legally appointed commissioners, but by three "interlopers."\textsuperscript{159}

C. Taking by Regulation

In \textit{National Western Life Insurance Co. v. Commodore Cove Improvement District}\textsuperscript{160} the Fifth Circuit upheld, against due process and equal protection challenges, a waterfront subdivision regulation prohibiting the transfer of lots lacking bulkheads.\textsuperscript{161} The plaintiff was the owner of 133 residential waterfront lots when the Commodore Cove Improvement District adopted a regulation making it unlawful to build on or convey any waterfront lot in the district lacking a bulkhead.\textsuperscript{162} The purpose of the regulation was "to protect the navigability of the State waters within [the] District."\textsuperscript{163} After complying with the requirements of the ordinance, the plaintiff brought action seeking a declaratory judgment that the regulation was unconstitutional, a permanent injunction against its enforcement, and damages for the costs of installing the required bulkheads. The plaintiff contended that the regulation was an unreasonable means of achieving its stated end, and that the regulation effected a taking without just compensation. The court initially rejected the plaintiff's argument that the right to freely alienate real property was fundamental and called for strict scrutiny.\textsuperscript{164} Applying the rational basis standard of review instead, the court found that the plaintiff had failed to meet its burden of proving the regulation wholly arbitrary and totally without value in furthering a legitimate governmental interest.\textsuperscript{165} The court recognized that the Commodore Cove Improvement District could reasonably have concluded that the regulation would promote the legitimate goal of aiding navigation.\textsuperscript{166} As to the

\begin{footnotesize}
\begin{enumerate}
\item[157.] \textit{Id.} at 141. The company had built and put into operation a pipeline across Watson's property.
\item[158.] Watson was not present at this hearing. \textit{Id.}
\item[159.] \textit{Id.} at 140-41. The pipeline, therefore, had been built and put into operation in violation of due process. This justified the plaintiff's damage award. \textit{Id.} at 141.
\item[160.] 678 F.2d 24 (5th Cir. 1982).
\item[161.] \textit{Id.} at 29.
\item[162.] \textit{Id.} at 26 n.2.
\item[163.] \textit{Id.} at 26. This stated purpose was included in the regulation itself. \textit{Id.}
\item[164.] \textit{Id.} (citing Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 149 n.6 (5th Cir. 1981)).
\item[165.] 678 F.2d at 27. National Western argued that regulation 3 was irrational because it designated "the happening of a purely random event—the transfer of title to unbulkheaded property—as a condition precedent for the installation of bulkheading." \textit{Id.} at 26.
\item[166.] \textit{Id.} at 27.
\end{enumerate}
\end{footnotesize}
plaintiff's argument that the regulation constituted a taking without just compensation, the court found that the regulation did not diminish the available use of the property and, indeed, the plaintiff used the property for the very purpose for which it was intended. The plaintiff, therefore, had failed to show that the regulation was either confiscatory or inordinately burdensome or that it denied economically viable use of the property.

Finally, the plaintiff claimed an equal protection violation in that the ordinance burdened only one class of property owners, those who sought to transfer title to their property. Again applying the rational basis standard of review, the court held that the plaintiff failed to meet its burden of establishing that the classification of property owners was wholly arbitrary or did not "teleologically relate to a permissible government objective."

D. Compensation Awards

The Fifth Circuit addressed the issue of proper calculation of compensation awards in condemnation cases in *United States v. 8.41 Acres of Land.* The Department of Energy filed a declaration of taking for a pipeline easement on three adjacent tracts of land that adjoined an existing pipeline corridor. At trial, witnesses for the parties testified as to different methods of valuation resulting in dramatically different award recommendations. The three-person condemnation commission based its award on the landowners' rather unorthodox theory of easement valuation that treated the easement as separate from the remaining acreage. On this basis the commission determined that the highest and best use of the condemned strip was for a pipeline right of way. The district court adopted the commission's finding and based its award figure on comparable sales of pipeline easements in the area. On the government's appeal, the Fifth Circuit reversed the district court's awards, holding that in federal court, at least in the Fifth Circuit, the appropriate measure of damages in a partial taking case is the difference between the value after the taking;
that is, the difference between the market value of the land with and without the property subject to the easement. The court considered three factors in rejecting the district court's finding that the condemned strip constituted a separate parent tract because it had been severed from the remaining acreage of each of the landowners. These factors included physical contiguity, unity of ownership, and unity of use. Applying a clearly erroneous standard of review, the court determined that the condemned strip of land in each instance had an integrated use with the parent tract, was physically contiguous therewith, and was subject to the same ownership. The court therefore concluded that the "before and after" method of valuation was mandatory.

In addressing the issue of market value, the court acknowledged a presumption in favor of the existing use, which may be overcome only by a showing that at the time of the taking the property was adaptable and needed or likely to be needed in the near future for another use. The landowners here failed to meet this burden of proof, in that the only evidence on point was the government witnesses' testimony that the highest and best use was for industrial plant sites. Accordingly, the court assessed the market value based on evidence of five comparable sales of industrial property in the area at the time of the taking.

IV. ANNEXATION

A. For Taxation Purposes Only

In Superior Oil Co. v. City of Port Arthur the Superior Oil Company challenged the validity of a sequential annexation ordinance of the city of Port Arthur that resulted in annexation of an area extending three leagues into the Gulf of Mexico and encompassing certain production facilities and mineral leases the oil company owned. The court of appeals upheld the ordinance against challenge that it was void because it was created solely for the purpose of taxation and violated the due process clause of the

after valuation technique. See United States v. 158.24 Acres of Land, 515 F.2d 230, 232 (5th Cir. 1975); Transwestern Pipeline Co. v. O'Brien, 418 F.2d 15, 21 (5th Cir. 1969).

176. 680 F.2d at 392.
177. Id. at 393.
178. Id. at 393-94.
179. Id. at 394. The court of appeals remanded the case to the district court so that the commission could recompute an award based on this method. Id. at 395.
180. Id. at 394-95.
181. Id. at 395. The burden of proving the market value of the property taken by eminent domain is on the landowner. United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 273 (1943).
182. 680 F.2d at 395. The court found no evidence that the highest and best use was for a pipeline right-of-way; therefore, the commission's decision and the district court's adoption of that decision based on this uncorroborated use was clearly erroneous. Id.
183. Id. The court held that the best evidence of market value was comparable sales. See United States v. Trout, 386 F.2d 216, 222-23 (5th Cir. 1967); United States v. 60.14 Acres of Land, 362 F.2d 660, 665 (3d Cir. 1966); United States v. Whitehurst, 337 F.2d 765, 775 (4th Cir. 1964); Baetjer v. United States, 143 F.2d 391, 397 (1st Cir. 1944).
184. 628 S.W.2d 94 (Tex. Ct. App.—Beaumont 1981, writ ref'd n.r.e.).
The court cited a United States Supreme Court decision, *Hunter v. City of Pittsburg*, for the proposition that annexation of a territory by a political subdivision of a state does not present a justiciable matter under the fourteenth amendment, and that the only remedy for those aggrieved by annexation is in the state legislature. In so concluding, the court declined to consider the purposes behind the city's annexation because determination of a municipality's boundaries is ordinarily a political function vested entirely within the power of the state legislature. The court noted that this proposition is true even when the city provides no municipal services to the annexed territory.

The court then rejected an equal protection argument grounded on the city's decision to annex the appellant's property rather than offer the company an industrial district contract. The court found that the city had the power either to annex or to create an industrial district, and that absent a showing that appellant was refused such a contract, it had no standing to challenge the failure of the city to enter into such a contract.

### B. Procedure

In *San Diego Independent School District v. Central Education Agency* the Austin court of appeals considered the validity of the annexation by the Freer Municipal Independent School District (FMISD) of territory previously part of the San Diego Independent School District (SDISD).

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185. *Id.* at 97. The ad valorem tax was the basis for the company's due process challenge. In upholding the tax the court distinguished between special taxes benefiting specific property or persons within the district, *see* Myles Salt Co., Ltd. v. Board of Comm'r's, 239 U.S. 478, 485 (1916) (declaring such action unconstitutional), and ad valorem taxes that benefit the entire community and are constitutionally sound. *See* State ex rel. Pan American Prod. Co. v. Texas City, 157 Tex. 450, 454, 303 S.W.2d 780, 783 (1957) ("constitutionality sufficient if taxes are uniform and are for public purpose"), *dism'd* per curiam, 355 U.S. 603 (1958).

186. 207 U.S. 161, 174 (1907) (upholding Pennsylvania annexation statute, the Court held that determination of municipal boundaries is a matter "peculiarly within the jurisdiction of the State").


188. 628 S.W.2d at 97.

189. *Id.*

190. *Id.* The statutory remedy of disannexation is set out in *Tex. Rev. Civ. Stat. Ann.* art. 970a, § 10 (Vernon Supp. 1982-1983). The court declined to speak on the recent amendment of this article as it was not relevant to the case at bar. 628 S.W.2d at 97.

191. 628 S.W.2d at 98. The power of a city to enter into industrial contracts granting limited immunity from annexation is given in *Tex. Rev. Civ. Stat. Ann.* art. 970a, § 3 (Vernon 1963).

192. 628 S.W.2d at 98.

The trial court had denied SDISD's request for a temporary injunction against the annexation. SDISD asserted that the annexation was void because a majority vote of the SDISD trustees approving the annexation was never obtained. The dispute centered around two provisions of the Texas Education Code that provide for arguably inconsistent procedural prerequisites for annexation of additional school district territory. The court found that because FMISD is a municipal school district, it is obliged to follow only the requirements of section 19.164 of the Education Code, which specifically addresses annexation by municipal school districts. SDISD, however, based its action on the requirements of section 19.261, which on its face is not limited in its application and which calls for a majority of the district trustees to sign the petition as a prerequisite to annexation. The court noted that independent school districts possess no vested right in their territorial boundaries as originally established. The court then concluded that the appellant failed to meet its burden of demonstrating a probable right to recover, and that the trial court, therefore, did not abuse its discretion in denying the temporary injunction.

V. Tort Liability

Several important developments concerning the tort liability of local governments resulted from decisions during the current survey period. This section reviews decisions considering the Texas Tort Claims Act and the federal cause of action under section 1983 of title 42.

A. Texas Tort Claims Act

In Lorig v. City of Mission Lorig sued the city for damages to his truck, claiming that the city's failure to clear branches and trees obstructing a stop sign caused the driver of his truck to run the stop sign and collide with another vehicle. The Corpus Christi court of appeals affirmed the trial court's summary judgment for the city. The court stated that keeping a stop sign unobstructed is a proprietary function of a municipality; Lorig's claim was barred because he had failed to give written notice of his claim as the Mission City Charter required. The supreme court reversed the court of appeals in a decision illustrating the fine lines that must
be drawn as a result of the still important governmental function/proprietary function distinction. While expressing awareness that Texas courts have held that the negligent erection or maintenance of traffic signs warning of construction or improvements to streets involved a municipality's proprietary function, the court ruled that maintenance of a stop sign was entirely different and involved solely the governmental function of traffic regulation.

The court held that Lorig's claim could be brought under the Act because "[a] stop sign's obstruction from view by trees or branches is a ‘condition’ of that sign within the meaning of article 6252-19, section 14(12)." Reversing and remanding for trial on the merits, the court noted that material issues of fact existed including whether Mission had received actual notice of the injury pursuant to section 16 of the Act.

Two decisions from the courts of appeals struggled with section 14(7), which contains an important but difficult to construe discretionary act exemption upon which local governments often have relied to excuse them

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204. Proprietary function torts were cognizable against municipalities under Texas law prior to the Tort Claims Act; the Act waived the previously existing immunity for torts based upon performance of governmental functions but did not affect the law concerning proprietary torts. The distinction remains important because the notice requirements under the Act may be more lenient than those under court developed law relating to proprietary torts. See Babcock & Collins, Local Government Law, Annual Survey of Texas Law, 36 Sw. L.J. 471, 498 n.219 (1982). For a recent decision distinguishing governmental and proprietary functions, see Williams v. City of Dallas, 636 S.W.2d 222 (Tex. Ct. App.—El Paso 1982, no writ) (operation of storm sewer system is proprietary function and therefore Tort Claims Act does not apply; under common law liability for performance of proprietary functions, however, instructed verdict for Dallas reversed because proof of absence of drain cover for four months sufficient to create fact issue regarding Dallas's negligence in failing to discover and remedy the defect).

205. 629 S.W.2d at 701.

206. Id. The Texas Tort Claims Act does not apply to:

(12) Any claim arising from the absence, condition, or malfunction of any traffic or road sign, signal, or warning device unless such absence, condition, or malfunction shall not be corrected by the governmental unit responsible within a reasonable time after notice, or any claim arising from the removal or destruction of such signs, signals or devices by third parties except on failure of the unit of government to correct the same within such reasonable time, after actual notice. Nothing herein shall give rise to liability arising from the failure of any unit of government to initially place any of the above signs, signals, or devices when such failure is the result of discretionary actions of said governmental unit. The signs, signals and warning devices enumerated above are those used in connection with hazards normally connected with the use of the roadway, and this section shall not apply to the duty to warn of special defects such as excavations or roadway obstructions.


207. 629 S.W.2d at 701; see TEX. REV. CIV. STAT. ANN. art. 6252—19, § 16 (Vernon Supp. 1982-1983) (unless governmental unit has actual notice of injury or death, claimant must give notice within six months of the incident).

208. TEX. REV. CIV. STAT. ANN. art. 6252—19, § 14(7) (Vernon 1970) provides that the provisions of the Act shall 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.
from liability. The two courts gave section 14(7) limiting interpretations that may be useful to other Texas courts, although the precise limits of the exemption will probably require a more accurate definition by the Texas Supreme Court in the future. In Christilles v. Southwest Texas State University Christilles, a student, sued the University for personal injuries sustained when a drinking glass he was using as a prop in a drama production shattered during a fall at dress rehearsal, lodging a large fragment of glass in his hand. The play's director, a University faculty member, purposely had decided to use a real drinking glass rather than a glass substitute often used in theatrical productions, which does not break into sharp fragments. The trial judge rendered a take-nothing judgment after Christilles rested his case. On appeal, the Austin court of appeals considered two difficult issues under the Act. First, the court considered whether the alleged negligent use of the real drinking glass created liability under section 3, which waives governmental immunity when the plaintiff's injury arises from “some condition or some use” of property. The lower courts have struggled with this language, which, broadly interpreted, waives the immunity of local governments in virtually every personal injury action brought against them. The Austin court of appeals read Texas precedent as construing section 3 to create liability when “property supplied by the state is defective or inappropriate for the purpose for which it is used,” and ruled that Christilles's claim was cognizable under section 3 because a jury could conclude that the ordinary drinking glass was inappropriate under the circumstances. The University, however, sought to sustain its take-nothing verdict by a cross-point that raised a second difficult issue for the court: how is section 14(7) of the Act, which exempts a government's discretionary acts, to be interpreted? The University claimed the play's director was solely in charge of the play and that in the exercise of his discretion the director decided to use a real drinking glass, given the type of play, the proximity of the audience to the stage, and similar matters. Recognizing that almost all acts of government employees and agents involve some element of discretion, the court looked for a principle that would make section 14(7) narrower than a blanket exemption from liability. The court rejected the federally developed planning-operational
and adopted an analysis limiting the Act's discretionary function exemption to the exercise of governmental discretion and excluding from immunity the exercise of nongovernmental professional or occupational discretion. A government should remain liable under the Act, according to the court, unless "a particular matter of discretion is one committed to the executive or legislative branches of government which the courts should not second-guess." Applying its analysis, the court ruled that the decision to use one kind of glass rather than another clearly was the exercise of the professor's professional or occupational discretion, and not "a determination of governmental policy of the type the legislature, the governor, or other state executive officials make." Accordingly, the court of appeals reversed the trial court's take-nothing judgment and remanded the case for trial.

In Norton v. Brazos County Norton sued Brazos County for injuries he received while incarcerated in the Brazos County jail. Norton claimed that, while working in the jail kitchen, a bacon slicing machine severely injured his hand because the county had negligently failed to secure the machine, to provide a safety guard on the machine, and to maintain the machine in proper repair. The trial court granted the county's plea in abatement, in which the county contended Norton had not stated a cause of action under the Tort Claims Act. On appeal the county conceded that section 3 of the Act waived the county's governmental immunity for negligence associated with the condition or use of personal property, but argued that sections 14(7) and 14(9) of the Act exempted it from liability. The
government unit does choose to perform an act which it is not required to perform, and does that act negligently, § 14(7) seemingly does not apply and the unit is subject to liability." Id. (emphasis in original).

The discretionary function exception is limited to the exercise of governmental discretion and does not apply to the exercise of nongovernmental discretion such as professional or occupational discretion. The driver of a mail truck makes many discretionary decisions but they are not within the exception because they involve driving discretion, not governmental discretion. The physician at the veterans' hospital exercises professional discretion in deciding whether or not to operate, but he combines professional discretion with governmental discretion when he decides that budgetary restrictions require non-use of an especially expensive treatment in absence of specified conditions. The government's bank examiners subject the government to liability for their failure to discover corruption that would be discovered by standard methods of examination but not for deciding what the frequency or intensity of the bank examinations should be. The government is liable for its agent's departure from policies made by his superiors but not for harm done by the agent's adherence to those policies even if they turn out to cause harm.

639 S.W.2d at 42.
219. 639 S.W.2d at 42.
220. Id. at 43 (emphasis in original).
221. Id.
court first addressed the section 14(9) exemption, which provides immunity from any claim based on methods of providing police or fire protection.\(^{223}\) Citing two of its own decisions excluding acts of negligence "incidental to the policy of police protection" from section 14(a) immunity,\(^{224}\) the court concluded that the "particular method of providing [for] the care and feeding of inmates, including the maintenance of kitchen equipment, is only incidental to, and not an integral part of, the rehabilitation of criminals."\(^{225}\)

The court of appeals found section 14(7) equally inapplicable. Citing *State v. Terrell*,\(^{226}\) the court noted that sections 14(7) and 14(9) both serve to avoid judicial review of the government's use of discretion in making policy decisions. The court then reiterated that the negligence Norton alleged did not involve any policy decision, but rather involved only the procedure for carrying out the policy of operating a jail kitchen.\(^{227}\) Again using its incidental-to-policy formulation, the court said that once the county decides to operate a kitchen in the jail, decisions pertaining to the daily operation and maintenance of kitchen equipment are incidental to the discretionary policy decision of operating the kitchen and are not exempt under section 14(7).\(^{228}\) The court therefore reversed and remanded.\(^{229}\) The Houston [14th District] court of appeal's incidental-to-policy formulation produces a result not unlike the result reached by the Austin court of appeals in *Christilles*: both courts applied principles not evident in the statutory language to limit the broad language of section 14(7).

B. Liability Under 42 U.S.C. § 1983\(^{230}\)

In *Patsy v. Board of Regents*\(^{231}\) the United States Supreme Court considered the important question of whether the exhaustion of state administrative remedies is a prerequisite to an action under section 1983. Patsy filed


\(^{224}\) 640 S.W.2d at 692 (emphasis in original); see Cuddy v. Texas Dep't of Corrections, 578 S.W.2d 522 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (action instituted against Texas Department of Corrections by prisoner for injuries sustained while engaged in a work project for the prison); Jenkins v. State, 570 S.W.2d 175 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (prisoner brings suit for injuries sustained from allegedly improper and negligent medical treatment received while incarcerated).

\(^{225}\) Id. at 692-93.

\(^{226}\) 588 S.W.2d 784 (Tex. 1979).

\(^{227}\) 640 S.W.2d at 693.

\(^{228}\) Id.

\(^{229}\) Id. at 694.


> 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.

\(^{231}\) 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).
suit against her university employer alleging that she had been denied employment opportunities because of her race and sex. The district court granted a motion to dismiss because Patsy had not exhausted the available state administrative remedies. The Fifth Circuit vacated the dismissal and remanded the case, holding that a section 1983 plaintiff could be required to exhaust administrative remedies under certain circumstances. The Supreme Court reversed, holding simply that section 1983 does not require exhaustion of state administrative remedies.

During the survey period the Fifth Circuit construed section 1983 in *Webster v. City of Houston.* Seventeen-year-old Randy Webster stole a van, and Houston police officers spotted and chased him. After Webster lost control of the van and the van came to a rest, the police officers ordered Webster out of the van. Webster came out of the van with his hands in the air and was knocked to the ground by the police officers. Although he offered no resistance, one officer shot Webster in the head and killed him. The officers used a “throw-down” gun to make it appear the shooting had been in self-defense. The Houston Police Department conducted what the Fifth Circuit described as a cover-up, and Webster’s parents brought suit under section 1983 against six police officers and the city of Houston for the death of their son. The jury awarded substantial damages against the individual officers, and Houston appealed from the award against it of $2,548.73 in actual damages for funeral and medical expenses and $200,000.00 in punitive damages. The city of Houston claimed that it should not be liable because it did not as a matter of policy or custom deprive citizens of their constitutional right to be free from excessive force. Additionally, the city claimed that the police officers’ actions did not amount to excessive force. The key issue before the court regarding the city’s liability arose from the United States Supreme Court’s ruling in *Mo- nell v. Department of Social Services.* In that case the Supreme Court ruled that although municipalities may be liable under section 1983, they cannot be liable purely on a respondeat superior theory. Rather, the deprivation must be the result of an official policy or custom. Thus, in *Webster* the question was whether the evidence was sufficient to sustain a finding that throw-down guns were a policy or custom of the city of Houston. The court found evidence of the universal use of throw-downs by city police, of surreptitious teaching of the throw-down practice at the city's police academy, and of the police department's training and policy. The evidence was sufficient to sustain a finding that the city of Houston was liable under section 1983.

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233. 102 S. Ct. at 2568, 73 L. Ed. 2d at 188.
234. 689 F.2d 1220 (5th Cir. 1982).
235. A throw-down gun is a weapon police officers, having shot an unarmed suspect, put at the suspect's side to justify the shooting. *Id.* at 1222.
236. *Id.* at 1223.
238. *Id.* at 694.
239. 689 F.2d at 1225; *see also* Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982) (judgment against city of Fort Worth sustained when unlawful arrest of plaintiff resulted from police officers' carrying out the policies and procedures of the Fort Worth Police Department); Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982) (district court correctly directed verdict for municipality when actions of police chief in using excessive force in making
Houston Police Academy, and of a cover-up sufficient to sustain the finding that throw-downs were a part of the Houston Police Department’s official policy.\textsuperscript{240} The court, however, reversed the punitive damages award,\textsuperscript{241} relying on City of Newport v. Fact Concerts, Inc.,\textsuperscript{242} in which the Supreme Court held that municipalities are not responsible under section 1983 for punitive damages.\textsuperscript{243} The Fifth Circuit remanded for a new trial on damages, however, finding that the jury erred in awarding no damages for violation of Webster’s constitutional rights. The court held that the violation of these rights was worth at least nominal damages.\textsuperscript{244}

The Fifth Circuit also ruled on a limitation of section 1983 actions in connection with state-provided tort remedies and denial of due process claims. In 1981 the United States Supreme Court ruled in Parratt v. Taylor\textsuperscript{245} that when a state provides tort remedies for wrongful governmental conduct, the injured party cannot bring a section 1983 action for deprivation of rights without due process of law if the action is based upon the same conduct covered by the state remedy.\textsuperscript{246} This potentially far-reaching principle was applied by the Fifth Circuit in Loftin v. Thomas.\textsuperscript{247} The court held that Loftin, a prisoner at the Dallas County Jail, could not successfully sustain a section 1983 action based upon allegations that the jail had lost $108.38 worth of his clothing.\textsuperscript{248} Loftin based his claim on the theory that the jail had negligently deprived him of his property without due process of law. Since Texas offered an adequate remedy for Loftin’s alleged damages through three state statutes,\textsuperscript{249} however, the court found no denial of due process and no basis for the section 1983 suit.\textsuperscript{250