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LOCAL GOVERNMENT LAW

by

Joseph W. Geary*
David Mark Davenport**
Raymond V. Jobe***

1. ZONING AND PLANNING

A. Texas Supreme Court

The Texas Supreme Court rendered an important decision in the area of zoning and planning during the survey period, holding that a city ordinance requiring that a developer either dedicate land or contribute money for the creation of neighborhood parks does not constitute a taking of private property for a public purpose without just compensation in violation of the Texas Constitution. In *City of College Station v. Turtle Rock Corp.* the court of appeals affirmed a grant of summary judgment in favor of a developer on the grounds that the local ordinance at issue violated the Texas Constitution and certain other Texas statutes. The ordinance provided that a developer must either dedicate land for park purposes or contribute cash, in lieu thereof, as a condition precedent to subdivision plat approval.

In reversing the court of appeals, the supreme court first addressed the constitutionality of the local ordinance, noting that although section 17 of

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1. TEX. CONST. art. I, § 17 prohibits the taking of private property for a public purpose without adequate compensation unless the taking is accomplished pursuant to a reasonable and proper exercise of the state's police power. See Lombardo v. City of Dallas, 124 Tex. 1, 9-10, 73 S.W.2d 475, 478-79 (1934) (city not required to make compensation for losses occasioned by valid exercise of police power); accord Edge v. City of Bellaire, 200 S.W.2d 224, 226 (Tex. Civ. App.—Galveston 1947, writ ref'd).
3. 666 S.W.2d 318, 219 (Tex. App.—Houston [14th Dist.] 1984); see supra note 1. The court of appeals in *Turtle Rock* also affirmed the grant of summary judgment in favor of the developer on the basis of TEX. REV. CIV. STAT. ANN. art. 1175 (Vernon 1963 & Supp. 1984), and TEX. REV. CIV. STAT. ANN. art. 6081e (Vernon 1970). 666 S.W.2d at 320-21. Article 1175, § 15 empowers home rule cities to appropriate, as necessary, private property for public purposes and to take private property within or without the city limits for various purposes including parks. Article 6081e applies to general law cities and provides that any incorporated city may acquire by gift, devise, purchase or condemnation proceedings, lands for use as public parks.

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the Texas Constitution requires that adequate compensation be paid to the landowner when private property is taken for a public purpose, all private property is held subject to the valid exercise of the state's police power. Whether an exercise of the state's police power constitutes a taking for which constitutional compensation is required is definitely a question of law in Texas now, and the determination is made by the court only after a thorough and careful analysis of all the facts. The court examined two factors in Turtle Rock in considering whether the ordinance was a valid exercise of the state's police powers. First, the ordinance must be substantially related to the public health, safety, and welfare and be adopted to accomplish a legitimate goal. Second, the regulation must be reasonable and cannot be arbitrary. Cognizant of the presumption of reasonableness and validity attributed to a city ordinance and the extraordinary burden resting upon the party seeking to overcome that presumption, the court quoted its opinion in Hunt v. City of San Antonio: "If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare . . . the ordinance must stand as a valid exercise of the city's policy power." Concluding that reasonable minds could differ as to whether the College Station ordinance was substantially related to the public health, safety, and general welfare, the court held that the court of appeals had erred in holding the ordinance unconstitutional as a matter of law. In support of its decision the court cited several cases from other jurisdictions interpreting similar statutes.

4. TEX. CONST. art. I, § 17.
6. See Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971); Dupuy v. City of Waco, 396 S.W.2d 103, 110 (Tex. 1965); City of Bellaire v. Lamkin, 159 Tex. 141, 143, 317 S.W.2d 43, 45 (1958).
7. 28 Tex. Sup. Ct. J. at 104 (citing City of Austin v. Teague, 570 S.W.2d 389, 392 (Tex. 1978) (no one test and no single rule for determination of valid exercise of police power)).
8. 28 Tex. Sup. Ct. J. at 105; see also City of Waxahachie v. Watkins, 154 Tex. 206, 212, 275 S.W.2d 477, 481 (1955) (regulation is valid exercise of police power if reasonable minds can differ as to whether it has a substantial relationship to public health, safety, morals, or general welfare); Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475, 481 (1934) (regulation must be reasonable and fairly related to the need to protect public health, morals, safety, or general welfare).
9. 28 Tex. Sup. Ct. J. at 105; see also City of University Park v. Benners, 485 S.W.2d 773, 778 (Tex. 1972) (ordinance must be reasonable); Lombardo v. City of Dallas, 124 Tex. 1, 11, 73 S.W.2d 475, 479 (1934) (ordinance must be reasonable in its operation).
10. 462 S.W.2d 536, 539 (Tex. 1971) (extraordinary burden rests on party attacking city ordinance).
11. 28 Tex. Sup. Ct. J. at 105 (quoting Hunt, 462 S.W.2d at 539).
12. 28 Tex. Sup. Ct. J. at 106. The court compared the donation of park land to requiring donation of land for streets, which must increase proportionately with the concentration of population. The court reasoned that the local ordinance was nothing more than "a regulatory response to the needs created by the developer's use of the land. Id.
13. Id. at 105 (citing Associated Home Builders of the Great East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 645, 484 P.2d 606, 616, 94 Cal. Rptr. 630, 640 (high density developers may be required to dedicate more open space), appeal dismissed, 404 U.S. 878 (1971); Home Builders Ass'n of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) (requirement for dedication of park land can be reasonable); Billings Proper-
In reaching its decision in *Turtle Rock*, the court of appeals had relied on its earlier decision in *Berg Development Co. v. City of Missouri City*. The court of appeals interpreted the *Berg* decision as standing for the proposition that the ultimate use of the dedicated property or cash contribution in lieu of dedication must benefit the general public to be substantially related to the public health, safety, morals, and general welfare. The supreme court disagreed with the court of appeals' conclusion that the College Station ordinance did not benefit the community and further distinguished the instant ordinance from the *Berg* ordinance because in *Turtle Rock* the city was required ultimately to use the cash contribution to provide neighborhood parks. The supreme court, therefore, found that the ordinance in question was at least constitutional on its face.

The supreme court also reversed the court of appeals' invalidation of the College Station ordinance on statutory grounds. The lower court concluded that article 1175 limited the power of College Station, as a home rule city, to appropriating and taking private property for a public purpose and that the statutory use of such terms implied that some form of payment or compensation for the property should be made. The lower court had reasoned that the College Station ordinance was inconsistent with the provisions of article 1175 because it did not provide for compensation to the developer and was thus invalid. Citing the rule announced in its opinion in...
Lower Colorado River Authority v. City of San Marcos,\textsuperscript{21} the supreme court concluded that neither article 1175 nor article 608 limits with unmistakable clarity the power of a home rule city to enact an ordinance similar to the College Station ordinance and, therefore, the court of appeals' interpretation of the statutes was incorrect.\textsuperscript{22} Having decided that the College Station ordinance was not unconstitutional on its face and that the city was not precluded from enacting the ordinance by legislative limitation, the supreme court reversed the decision of the court of appeals and remanded the cause to the trial court for a determination of whether the application of the ordinance would be unduly harsh or create a disproportionate burden on the appellee and thereby become unconstitutional in its application.\textsuperscript{23}

In Sharpstown Civic Association v. Pickett\textsuperscript{24} the Texas supreme court reviewed the enforceability of certain deed restrictions and held that the non-residential use of one lot in a subdivision did not constitute a waiver of the right to enforce a residential use restriction on an adjoining lot.\textsuperscript{25} The predecessor in title to the appellee had purchased two lots in 1969 and erected a building on lot one. The building was used as an office for over ten years. Lot two was occasionally used as parking space for several vehicles. The appellee purchased lot one and lot two together in 1979 and erected a sign stating that the lots would be the future site of a car wash. Appellant sought to enforce the residential deed restrictions on both lots by enjoining the use of such lots for any purpose other than residential use. Appellee argued that any right to enforce the restrictions on either lot had been waived because of the undisputed ten years of nonresidential usage of lot one, which had no discernible boundary from lot two. The court reasoned that the lack of a discernible boundary between lot one and lot two and the apparent common usage of both was irrelevant to the issue of waiver because each lot was separate and distinct from the other according to the recorded subdivision plat.\textsuperscript{26} Furthermore, waiver of deed restrictions can only be determined on the basis of the use made of each separate lot.\textsuperscript{27} The court also held that although the right to enforce the residential restrictions on lot one had been waived with respect to its use as a small office building, that waiver did not extend to the property's usage as a car wash.\textsuperscript{28} The court stated that the waiver of deed restrictions as to a particular use of property does not waive

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  \item \textsuperscript{21} 523 S.W.2d 641, 645 (Tex. 1975).
  \item \textsuperscript{22} 28 Tex. Sup. Ct. J. at 107.
  \item \textsuperscript{23} Id. at 106. In determining whether the ordinance was arbitrary or unreasonable, on remand the trial court was directed to consider evidence of the size of the lots in the proposed subdivision, the economic impact of the application of the ordinance of the subdivision, and the amount of open lands consumed by the proposed development. The supreme court stated that the trial court should consider this evidence in light of the need for a park in the development area and the benefit that would flow to the residents of the specific development from the creation of the park. \textit{Id.}
  \item \textsuperscript{24} 28 Tex. Sup. Ct. J. 44 (Oct. 20, 1984).
  \item \textsuperscript{25} Id. at 45.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id. (citing Wade v. Magee, 641 S.W.2d 321, 323 (Tex. App.—El Paso 1982, writ ref'd n.r.e.) (plat controls divisions between lots)).
  \item \textsuperscript{28} 28 Tex. Sup. Ct. J. at 45.
\end{itemize}
the right to enforce those restrictions against a use of the property that is substantially different from the one that has been waived.\textsuperscript{29} Accordingly, the court granted an injunction prohibiting the use of lot one and lot two as a car wash.\textsuperscript{30}

**B. Fifth Circuit**

In a landmark decision having far-reaching consequences in the zoning and constitutional areas of Texas law, the Fifth Circuit Court of Appeals held in *Cleburne Living Center, Inc. v. City of Cleburne*\textsuperscript{31} that mentally retarded persons are a quasi-suspect classification for purposes of constitutional analysis of state laws.\textsuperscript{32} The court held that it would apply an intermediate level of scrutiny in examining zoning regulations that discriminate against such persons by requiring the issuance of a special use permit to locate a group home for mentally retarded persons in an area zoned for apartment houses.\textsuperscript{33} The court reasoned that mentally retarded persons share enough characteristics with those of a suspect class\textsuperscript{34} to warrant heightened scrutiny.\textsuperscript{35} Such characteristics include historical prejudices, political powerlessness, and immutability or inability to cure the condition that is responsible for the classification.\textsuperscript{36} The court cited several cases from other jurisdictions holding that mentally retarded persons are a quasi-suspect class and that an intermediate level of scrutiny\textsuperscript{37} should, therefore, be

\textsuperscript{29} Id. (citing Arrington v. Cleveland, 242 S.W.2d 400, 401 (Tex. Civ. App.—Fort Worth 1951, writ ref'd); Wilson Co. v. Gordon, 224 S.W. 703, 706 (Tex. Civ. App.—Galveston 1920, writ dism'd)).

\textsuperscript{30} Tex. Sup. Ct. J. at 45. The appellee also considered using the lots for a strip shopping center and at the time of trial was using them as a car lot. The court enjoined appellee from using the lots for either of these purposes. Id.

\textsuperscript{31} 726 F.2d 191 (5th Cir.), cert. granted, 105 S. Ct. 427, 83 L. Ed. 2d 786, 801 (1984).

\textsuperscript{32} 726 F.2d at 198.

\textsuperscript{33} Id. at 196-98. The ordinance in question specifically sanctioned the existence of "[hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts]." Id. at 193-94 (emphasis in original).

\textsuperscript{34} The term “suspect class” refers to a particular classification given to a certain group of persons that receive special treatment in determining whether a statute or regulation discriminates against them in violation of the fourteenth amendment to the U.S. Constitution, which provides that no person shall be denied due process of or equal protection under the laws of the United States. If the statute or regulation has as its subject a suspect class then the court will employ a standard of strict scrutiny in examining the statute to determine whether it discriminates against the subject class, and the statute will fall unless the government can demonstrate that the statute or regulation has been carefully and narrowly tailored to serve a compelling interest. Plyer v. Doe, 102 S. Ct. 2382, 2396, 72 L. Ed. 2d 786, 801 (1982) (children of illegal immigrants are suspect class); see also Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage is suspect class); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (race is suspect class); Oyama v. California, 332 U.S. 633, 640 (1948) (national origin is suspect class).

\textsuperscript{35} 726 F.2d at 197.

\textsuperscript{36} Id. at 196-98. The court also stated that the denial of an important benefit such as the capability of mentally retarded persons to assimilate into the community and overcome local prejudice is a factor to be considered in determining the level of scrutiny to be employed. Id. at 199; see Plyer v. Doe, 102 S. Ct. 2382, 2398, 72 L. Ed. 2d 786, 803 (1982) (in determining the rationality of statute, court may take into account the costs to the nation and to innocent victims.)

\textsuperscript{37} The intermediate level of scrutiny is higher than the rational basis test and lower than strict scrutiny. Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473,
applied in reviewing statutes that discriminate against such persons.\textsuperscript{38} To satisfy intermediate scrutiny the classification must be substantially related to a legitimate state objective and closely tailored to fit that objective; otherwise, the classification is unconstitutional.\textsuperscript{39} The court assumed that the objectives cited by the city in support of the ordinance were legitimate, but found that the means of accomplishing the state's objectives were vastly overbroad and underinclusive.\textsuperscript{40} Accordingly, the court held that the requirement for a special use permit for group home housing of mentally retarded persons violated the equal protection clause of the fourteenth amendment\textsuperscript{41} and, therefore, was invalid.\textsuperscript{42}

C. Texas Courts of Appeals

In \textit{City of Rusk v. Cox}\textsuperscript{43} the court of appeals affirmed the judgment of the trial court voiding an ordinance that rezoned a 2.7-acre tract of land from single-family residential use to general business use on the basis that the ordinance amounted to unlawful spot zoning.\textsuperscript{44} The area north and west of the 2.7-acre tract was zoned for general business use, and south of the property was a large residential area. The appellee alleged that the amendatory zoning ordinance adversely affected the value of his adjoining property and that no substantial change in conditions surrounding the subject property had occurred, so the present usage was not worthless or of no benefit to the

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\textsuperscript{39} 726 F.2d at 196; see Trimble v. Gordon, 430 U.S. 762, 766 (1977) (statutory classification must serve a legitimate state purpose); Craig v. Boren, 429 U.S. 190, 197 (1976) (intermediate scrutiny requires that statute must serve important state objective and have a close fit between the legitimate state objective and the statutory means of achieving it). See generally L. Tribe, \textit{American Constitutional Law} 1083 n.10 (1978) (for discussion of levels of scrutiny).

\textsuperscript{40} 726 F.2d at 200.

\textsuperscript{41} U.S. CONST. amend. XIV.

\textsuperscript{42} 726 F.2d at 201. The appellants had also alleged that the ordinance violated the Revenue Sharing Act, which prohibits discrimination against “otherwise qualified” handicapped people. 31 U.S.C. § 6716 (1983). The court declined to hold that the actions of the city council in determining the location of group homes, and necessarily the ability of such homes to receive federal grants, constituted a program or activity subject to the Revenue Sharing Act. 726 F.2d at 195.

\textsuperscript{43} 665 S.W.2d 233 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

public. The appellee argued that the ordinance was, therefore, arbitrary and unreasonable and amounted to an unconstitutional exercise of the police power.\textsuperscript{45} The city argued that the rezoning ordinance was not arbitrary and unreasonable because it was merely extending an existing business zone. The court noted that cases regarding spot zoning must be decided by an independent examination of all of the relevant facts in the particular case\textsuperscript{46} and concluded that, in the instant case, the lack of changed conditions surrounding the property was sufficient to support the city’s rezoning of that property.\textsuperscript{47}

In addition to finding the city ordinance void, the trial court had also permanently enjoined the city from taking any future action that would result in the rezoning of the property until the conditions and circumstances so changed as to warrant a change in the zoning.\textsuperscript{48} The court of appeals held this portion of the trial court’s order to be error because courts may not enjoin municipalities from conducting public hearings to consider changes in existing zoning laws.\textsuperscript{49} The appellate court concluded that although zoning ordinances are subject to judicial review and enforcement of an existing ordinance found void may be enjoined,\textsuperscript{50} a court cannot interfere with the legislative function until the illegal ordinance has been passed and judicial review triggered.\textsuperscript{51}

In Zoning Board of Adjustment v. Graham & Associates\textsuperscript{52} the Amarillo court of appeals held that when a homeowner delays appealing the issuance of a building permit for six months after its issuance, and the recipient of the permit has relied to its detriment on the permit’s validity, the homeowner’s right to appeal the issuance of the building permit is barred as a matter of law.\textsuperscript{53} The appellee had received a building permit to reconstruct a destroyed nightclub that had operated for some time as a nonconforming use.\textsuperscript{54}

\textsuperscript{45} See City of Pharr v. Tippitt, 616 S.W.2d 173, 176 (Tex. 1981) (arbitrary and unreasonable rezoning ordinance is unconstitutional exercise of public power). In Tippitt the Texas Supreme Court recognized that amendatory ordinances rezoning a single city lot are almost always improper absent a significant change in condition or other unusual circumstances. Id. at 177-78.

\textsuperscript{46} 665 S.W.2d at 235 (citing McWhorter v. City of Winnebago, 525 S.W.2d 701, 703 (Tex. Civ. App.—Tyler 1975, writ ref’d n.r.e.) (spot zoning determined on a case-by-case basis with regard to the particular facts of each case)).

\textsuperscript{47} 665 S.W.2d at 236.

\textsuperscript{48} Id. at 238.

\textsuperscript{49} Id. at 237; see City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 291 (Tex. Civ. App.—Dallas 1968, writ ref’d n.r.e.) (courts have no authority to interfere with city’s exercise of legislative zoning function unless such exercise is arbitrary and unreasonable); see also City of Bellaire v. Lamkin, 159 Tex. 141, 143-44, 317 S.W.2d 43, 45-46 (1958) (courts reluctant to disturb decision made under police power by city).

\textsuperscript{50} 665 S.W.2d at 237; see Thompson v. City of Palestine, 510 S.W.2d 579, 582-83 (Tex. 1974) (enforcement of void ordinance enjoined); Hunt v. City of San Antonio, 462 S.W.2d 536, 537 (Tex. 1971) (city enjoined from issuing permit for construction or use of property for any purpose other than as allowed by original ordinance).

\textsuperscript{51} 665 S.W.2d at 237.

\textsuperscript{52} 664 S.W.2d 430 (Tex. App.—Amarillo 1983, no writ).

\textsuperscript{53} Id. at 435. TEX. REV. CIV. STAT. ANN. art. 1011g(d) (Vernon Pam. Supp. 1962-1983) requires that the issuance of a building permit be appealed within a reasonable time to the board of adjustment. No specific time period for appeal is set forth in the statute.

\textsuperscript{54} A nonconforming use refers to a usage of property that is existing at the time a zoning
The board of adjustment subsequently revoked the permit on the basis that the costs of restoration exceeded seventy-five percent of the replacement cost of the building.55 Because the building owner had spent approximately $50,000 reconstructing the building during the interim between the issuance of the permit and the filing of the appeal, he petitioned the district court for a writ of certiorari requesting reinstatement of the building permit and an order enjoining the board from revoking the permit.56 The court of appeals affirmed the district court order reinstating the permit and granting the injunction on the authority of Gala Homes, Inc. v. Board of Adjustment.57 In Gala Homes a fourteen-month delay in appealing the issuance of a building permit was held to be an unreasonable time for appeal as a matter of law.58 Having concluded that the homeowner waived its right to appeal the issuance of the building permit, the court in Graham & Associates held that the board of adjustment was without jurisdiction to revoke the permit.59

Several other courts of appeals decisions were rendered during the survey period that do not necessitate lengthy discussion but, nonetheless, are worthy of brief mention in an article addressing zoning and planning law. In Develo-Cepts, Inc. v. City of Galveston60 the Houston court of appeals held that a prospective corporate lessee had an insufficient interest in the property at issue to confer standing to bring an action for damages against the city for denial of a permit for the use of property.61 The appellate court held that

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55. A local ordinance of the City of Lubbock provides that improvements used in connection with a nonconforming use may not be rebuilt and operated in the nonconforming style if the costs of restoration exceed 75% of the replacement cost of the improvements. 664 S.W.2d at 432.

56. TEX. REV. CIV. STAT. ANN. art. 1011g (Vernon Pam. Supp. 1963-1983) sanctions an appeal to the district court from an adverse decision of the board of adjustment.

57. 405 S.W.2d 165 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

58. Id. at 167. The court in Graham & Associates found it intolerable to place the burden on the recipient of a building permit either to proceed at its peril, to spend money on construction, or to await the outcome of an appeal for an unreasonable period of time. 664 S.W.2d at 435.

59. 664 S.W.2d at 437. The court reversed that portion of the lower court's decision enjoining the revocation of the permit because the appellee had presented no evidence that the board intended to disregard or interfere with the trial court's judgment. Id. at 436; see Sterrett v. Bell, 240 S.W.2d 516, 519 (Tex. Civ. App.—Dallas 1951, no writ) (the judicial branch should exercise caution in restraining the legislative branch from the performance of its duties); Southwestern Bell Tel. Co. v. Gohmert, 222 S.W.2d 644, 646 (Tex. Civ. App.—San Antonio 1949, no writ) (absence of evidence of intent to act in a manner injurious to party seeking injunction requires denial of injunctive relief).

60. 668 S.W.2d 790 (Tex. App.—Houston [14th Dist] 1984, no writ).

61. Id. at 794. The standing requirement is met only when the plaintiff has a justiciable interest in the subject matter in litigation either personally or in a representative capacity. Housing Auth. v. State ex rel. Velasquez, 539 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). According to State ex rel. Velasquez, as a general rule a person has standing to sue if:
because appellant lacked standing to sue the city for damages in connection with its denial of the permit, the trial court was correct in refusing to allow the appellant to amend its pleadings, and the order dismissing the cause was affirmed.

In *Board of Adjustment v. McBride* the court of appeals affirmed the trial court's holding that the board of adjustment had abused its discretion in not granting a variance to a homeowner who had expended $75,000 on the construction of a house that encroached into one of the city's building setback lines. The court held that because the undisputed evidence showed that the appellee would suffer hardship by virtue of having to demolish a portion of his house, and since no public interest was adversely affected by the grant of a variance, the board of adjustment erred in refusing to grant the variance requested. In *Kircus v. London* the court of appeals held that the appellant lacked standing to challenge the constitutionality of a Texas statute that required approval of a plat application by two-thirds of the adjoining property owners. The court concluded that the appellant lacked

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1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; 2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; 3) he has a personal stake in the controversy; 4) the challenged action has caused the plaintiff some injury in fact, either economic, ethic, recreational, environmental, or otherwise; or 5) he is an appropriate party to assert the public's interest in the matter, as well as his own interest.

Id. at 913-14.

62. 668 S.W.2d at 792-93. The court drew a sharp distinction between a lack of standing and a lack of capacity to sue. Id. at 793. The court pointed to the case of Bluebonnet Farms, Inc. v. Gibraltar Sav. Ass'n, 618 S.W.2d 81 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.), in which a corporation lacked capacity and standing to sue because it had not paid franchise taxes and, therefore, lost its existence. The shareholders, however, could have cured the incapacity to sue by amending the pleadings. 668 S.W.2d at 793.

63. 668 S.W.2d at 792. Although the appellant cited the case of Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d at 195, for the proposition that a corporate challenger has standing to litigate its Revenue Sharing Act anti-discrimination claims, it did not assert that the statute requiring a special use permit for group homes housing the mentally retarded was unconstitutional. See *supra* notes 31-42 and accompanying text. The court distinguished *Cleburne* because the challenger in that case had a leasehold interest in the property affected by the denial of the special use permit and the appellant in the instant case had only a verbal agreement. 668 S.W.2d at 795.

64. 676 S.W.2d 705 (Tex. App.--Corpus Christi 1984, no writ).

65. Pursuant to TEX. REV. CIV. STAT. ANN. art. 1011(g)(3) (Vernon Pam. Supp. 1963-1983) the board of adjustment is authorized to vary zoning regulations when hardship exists and the variance would not be contrary to the public interest.

66. Building setback lines generally prohibit the erection of improvements within a certain distance of a right-of-way and are typically established by a municipality for purposes of uniform appearance in a residential area, safety, and preserving future areas to be acquired through condemnation proceedings for additional right-of-way property.

67. 668 S.W.2d at 795.

68. 660 S.W.2d 869 (Tex. App.--Austin 1983).

69. The *Kircus* court raised the issue of standing sua sponte and mentioned in a footnote that although appellee did not object to the appellant's lack of standing at trial, standing cannot be waived when a public interest is at stake and may be adversely affected. Id. at 872 n.3 (citing Texas Indus. Traffic League v. Railroad Comm'n, 633 S.W.2d 821, 823 (Tex. 1982)).

70. 660 S.W.2d at 872; see TEX. REV. CIV. STAT. ANN. art. 974a, § 5(c) (Vernon Pam. Supp. 1963-1983). The statute provides that certain property owners surrounding the property subject to the plat application in certain situations must be given actual notice of a hearing.
standing because he had not yet been injured by the statute's application.\textsuperscript{71}

In \textit{Troth v. City of Dallas}\textsuperscript{72} Dallas and its board of adjustment sought to compel a landowner to remove from his property a chain link fence that violated zoned height restrictions. The landowner failed to appeal to the district court from an unfavorable decision by the board of adjustment within ten days following filing of the decision as required by statute.\textsuperscript{73} The trial court granted summary judgment against the landowner based on his failure to perfect a timely appeal, and the appellate court affirmed the judgment, citing \textit{City of Lubbock v. Boundns},\textsuperscript{74} which held that timely filing is necessary to activate the trial court's jurisdiction.\textsuperscript{75}

\section*{II. EMINENT DOMAIN AND PUBLIC DEDICATION}

\subsection*{A. Eminent Domain}

The United States Supreme Court rendered a significant decision during the survey period concerning the law of eminent domain. In \textit{Kirby Forest Industries, Inc. v. United States}\textsuperscript{76} the Supreme Court affirmed the Fifth Circuit's holding that the date of taking in a straight condemnation proceeding\textsuperscript{77} is the date that the government deposits the award for the condemned property into the court registry.\textsuperscript{78} Consequently, no interest accrues on the amount deposited for the period from the filing of the condemnation petition to the date of the deposit.\textsuperscript{79} The United States sought to acquire a 2,175.86-

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  \item concerning the plat approval. If a petition protesting the approval of such plat signed by over 20% of such property owners is presented to the city, then the city shall not approve the plat application without the approval of 66 1/2% of such property owners. \textit{Id.}
  \item 660 S.W.2d at 872.
  \item 667 S.W.2d 152 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).
  \item 623 S.W.2d 752, 755 (Tex. App.—Amarillo 1981, no writ).
  \item 667 S.W.2d at 156.
  \item 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984).
  \item The government generally uses one of two methods to appropriate private property for a public purpose: (1) it acts under the Declaration of Taking Act, 40 U.S.C. \textsection{258(a)} (1982), which vests title to the property in the United States immediately upon a filing of declaration and deposit with the court of an amount determined to be an appropriate award for the property; or (2) it proceeds in straight condemnation by filing a complaint in condemnation pursuant to 40 U.S.C. \textsection{257} (1982), whereby a panel determines the offering price for the landowner's property but title does not vest in the United States until the government decides to acquire the property and deposits the determined amount into the court. Because title vests in the United States automatically when a declaration is filed under \textsection{258(a)}, the government is generally limited to using this section in cases of sudden emergency. \textit{Kirby}, 104 S. Ct. at 2190-91, 81 L. Ed. 2d at 6-7; \textit{see also} United States v. 329.73 Acres of Land, 704 F.2d 800, 801-12 (5th Cir. 1983) (just compensation held to be fair market value at date of taking plus interest). In extreme emergencies Congress may exercise a third method of condemnation by appropriating the property immediately and vesting title in the United States. This method is referred to as a legislative taking and is authorized pursuant to 16 U.S.C. \textsection{79e(b)} (1982).
  \item United States v. 2,175.86 Acres of Land, 696 F.2d 351 (5th Cir. 1983).
  \item \textit{Id.} at 357. \textit{But see} United States v. 15.65 Acres of Land, 689 F.2d 1329 (9th Cir. 1982) (condemnation of unimproved property under 40 U.S.C. \textsection{257} (1982) entitles landowner to interest on award for period prior to the date award is paid and the date title passes to government because landowner is denied economic use of land), \textit{cert. denied}, 460 U.S. 1041 (1983); \textit{see also} United States v. 156.81 Acres of Land, 671 F.2d 336, 340 (9th Cir.) (making the date of judgment the date of taking encourages government to act promptly since interest begins to accrue at that date), \textit{cert. denied}, 459 U.S. 1086 (1982).}
\end{itemize}
acre tract of land from the appellant as part of the Big Thicket National Park in eastern Texas by filing a complaint in condemnation pursuant to statute.

The district court appointed a commission to determine the award to be paid to appellant and, thereafter, entered judgment awarding the appellant the amount recommended by the commission plus interest at the rate of six percent from the date of filing the complaint to the date that the government deposited the award with the court. The district court stated that the institution of condemnation proceedings had denied the appellant any economic use of its property and, therefore, a taking had occurred as of that date.

In determining what constitutes just compensation for a taking of private property as required by the fifth amendment to the United States Constitution, the Supreme Court stated that identifying the time that a taking of a tract of land occurs is crucial. The Court held that, absent a substantial interference with appellant's property interest, the date upon which the government tenders payment for the condemned property is the date upon which a taking occurs under the statute. The Court emphasized that pursuant to Federal Rules of Civil Procedure 71A(i)(2) and 71A(i)(3) the United States may dismiss condemnation proceedings after the valuation hearing. The Court also stated that withdrawal by the government would be difficult to explain if the taking were deemed to occur at the point suggested by the trial court.

The Court agreed with petitioner, however, that an award based on the valuation of the property as of the date the complaint is filed does not adequately compensate the landowner and, therefore, violates the fifth amendment when a substantial delay occurs between the date of valuation and the date the award is deposited with the court. The Court affirmed the judg-

81. Section 257 provides that after the complaint is filed by the government, the district court shall appoint a commission to hold a valuation hearing for purposes of ascertaining the value of the property to be condemned and, correspondingly, the amount to be awarded to the landowner. Id.
82. 104 S. Ct. at 2194, 81 L. Ed. 2d at 11.
83. Id. at 2195, 81 L. Ed. 2d at 12; see supra note 77. The Court reasoned that substantial interference had not occurred because the government had not forbidden the petitioner from cutting trees or selling the property. Id. The Court recognized that the attractiveness of the property to a prospective buyer was substantially reduced, but stated that impairment of the market value of private property as a result of otherwise legitimate governmental action does not constitute a taking that requires constitutional compensation. Id.; see, e.g., Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) ("Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership"); Danforth v. United States, 308 U.S. 271, 284 (1939) (mere legislative enactment does not constitute a taking because such legislation may be repealed or modified). See generally Geary & Davenport, Local Government Law, Annual Survey of Texas Law, 38 Sw. L.J. 463, 475-76 (1984) (discussing Danforth v. United States).
84. Fed. R. Civ. P. 71A(i)(2), (3).
85. 104 S. Ct. at 2195 n.18, 81 L. Ed. 2d at 12 n.18.
86. Id. at 2195, 81 L. Ed. 2d at 12.
87. Id. at 2196-97, 81 L. Ed. 2d at 12-13. The commission's evaluation was given as of March 6, 1979, the date the complaint was filed, and the date of the deposit was March 26, 1982.
ment of the court of appeals with instructions on remand to the district court to permit the petitioner to present evidence pertaining to any appreciation in the market value of the property between the date of valuation and the date of the taking.  

In *Perry v. Texas Municipal Power Agency* the Houston court of appeals held that the appellant's removal of funds deposited into the court registry as a condemnation award estopped him from challenging the right and authority of the appellee to condemn his property. Citing the Texas Supreme Court decision in *Coastal Industrial Water Authority v. Celanese Corp.*, the court held that when a landowner accepts the award in a condemnation proceeding, he cannot later challenge the right of the condemnor to take the land. The appellant next challenged the sufficiency of the condemnation award. The appellant argued that his testimony concerning allegedly substantial lignite deposits on the condemned property, which greatly enhanced its value, should not have been excluded. The court held that the trial court had properly ruled that appellant lacked the necessary qualifications to offer such testimony as an expert commenting on market value. The appellant also had no personal knowledge of the amount or value of the deposits because his opinions were based on third-party hearsay statements.

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88. *Id.* at 2198, 81 L. Ed. 2d at 15-16. The Court stated that Fed. R. Civ. P. 60(b) "empowers a federal court, upon motion of a party, to withdraw or amend a final order for 'any . . . reason justifying relief from the operation of the judgment'. This provision seems to us expansive enough to encompass a motion, by the owner of condemned land, to amend a condemnation award." 104 S. Ct. at 2198, 81 L. Ed. 2d at 16.

89. 667 S.W.2d 259 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

90. *Id.* at 262. Texas Municipal Power Agency had deposited the sum of $98,000 into the court as an award to be paid to appellant on passage of title to the agency. This sum was the amount found by a special valuation commission to be the value of appellant's condemned land. The court emphasized that the appellant had the unrestricted benefit of the use of the deposited award. *Id.*

91. 592 S.W.2d 597 (Tex. 1979). In *Coastal Indus. Water Auth.* the Texas Supreme Court held that although the appellee had timely objected to the award, the removal of the award deposited with the court prevented appellee from litigating the authority's right to take the property but not its right to contest the sufficiency of the award. *Id.* at 599-600; see also *State v. Jackson*, 388 S.W.2d 924, 927 (Tex. 1965) (withdrawal of award for condemnation constitutes consent to taking); *Luby v. City of Dallas*, 396 S.W.2d 192, 195 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) (withdrawal of money paid into court by condemnor implies consent to taking).

92. 667 S.W.2d at 262. The court also held that appellant's filing of a general denial failed to raise the issue of appellee's right to condemn the property. *Id.* at 263; see *Tex. R. Civ. P. 279.*

93. 667 S.W.2d at 264-65. Expert testimony is admissible when the witness has been qualified as an expert by knowledge, skill, experience, training, or education and is shown to possess a higher degree of knowledge as to the matter in issue than the jurors themselves possess. *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966) (stating experts are considered to have a special knowledge not generally possessed by jurors); *Ervia v. Gulf States, Inc.*, 594 S.W.2d 134, 137 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (experts are allowed to testify as to their opinions because they possess a special knowledge); see also *36 Tex. Jur. 3d Evidence* § 622 (1984) (discussing the qualifications of expert witnesses).

94. Testimony offered for the truth of the matter asserted is properly excluded as hearsay when based on the statements or actions of a third party not available for cross examination. *Biddle v. National Old Time Ins. Co.*, 513 S.W.2d 135, 139-40 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); see *Unif. R. Evid.* § 63. The court in *Biddle* held that even if a portion of appellant's testimony was based on non-hearsay, no error was made in excluding the entire testi-
In *Fort Worth & Denver Railway v. City of Houston*\(^9\) the appellant alleged that the city had no authority to condemn its right-of-way property because such condemnation would destroy the property's existing use. The court stated that: "[a]n authority seeking to condemn property already devoted to public use may not do so if the effect would be practically to destroy its existing use unless it shows that its intended use is of paramount public importance and that its purpose cannot be otherwise accomplished."\(^9\) The court, however, held that appellant had failed to carry its burden of showing that the condemnation would destroy the property's use as a railroad car holding area and affirmed the trial court's grant of the easement to the city.\(^9\)

The court of appeals rendered two other noteworthy decisions regarding the condemnation of private property for pipeline easements operated by private corporations. In *Loesch v. Oasis Pipeline Co.*\(^9\) the appellant argued that Oasis was not a gas utility as defined by statute\(^9\) and, therefore, did not possess the constitutional authority to exercise the power of eminent domain.\(^10\) The Texas Constitution provides that private property may only be condemned for a public use.\(^10\) Appellant argued that because Oasis was a private corporation selling gas to other private corporations, the proposed taking was unconstitutional. The court cited the Texas Supreme Court case of *Borden v. Trespalacios Rice & Immigration Co.*\(^10\) for the proposition that condemnation of private property for a public use is constitutional if the corporation is given the power of eminent domain by statute and is "charged with public duties."\(^10\) The court concluded that, by the very exercise of the power of eminent domain, Oasis had acknowledged that it was a public corporation having power of eminent domain and thereby submitted itself to the onerous statutory provisions regulating public utilities in Texas.\(^10\) The court held that because Oasis had submitted itself to regulation as a public utility, it was properly charged with duties to the public and, therefore, its

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\(^9\) 672 S.W.2d 299 (Tex. App.—Tyler 1984, writ ref'd n.r.e.). The opinion reported was substituted by the court for an earlier withdrawn opinion.

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\(^10\) 665 S.W.2d at 596. \(^11\) TEX. REV. CIV. STAT. ANN. art. 6050 (Vernon Supp. 1984) provides that the regulatory provisions of articles 6050-6066 pertaining to a public utility, gas utility, or a utility apply to a corporation owning or leasing pipelines in Texas for the transportation of natural gas, whether for public hire or not, if any part of the right-of-way line has been acquired by eminent domain.
exercise of the power of eminent domain was constitutional.\textsuperscript{105}

In \textit{Delhi Gas Pipeline Corp. v. Richards} the appellant complained that the trial court's admission of a hypothetical subdivision plat into evidence was error and that a jury finding of $1,125 per acre as the value of the portion of land not being condemned was without support in the evidence because the highest value testified to was $1,050 per acre. The court first let stand the jury valuation of the remaining uncondemned property because the jury is restricted only by the lowest figure testified to and is allowed to use its own opinion with respect to evidence presented and matters of common knowledge. The court held that the admission of the hypothetical plat came within an exception to the rule forbidding use of hypotheticals for condemned raw land valuation; the exception allows the use of hypothetical plats only for the limited purpose of proving an outstanding issue in the case. The use of the plat was held admissible to prove the allegation of appellee that the land was adaptable to subdivision development and that such use was its highest and best use. Concluding that a portion of the uncondemned property had not been damaged by the taking, the court affirmed the trial court's holding, but reformed the judgment conditioned upon the filing of a remittitur for the excess award presented by the undamaged property.\textsuperscript{110}

\begin{itemize}
\item[105] 665 S.W.2d at 599. The effect of the court's holding is that if a corporation is successful in condemning property for a pipeline easement used in connection with the transportation of natural gas, it becomes subject to public utility regulation and, consequently, is charged with public duties. This reasoning may be somewhat circular in that the corporation becomes charged with public duties to the public only as a result of its successful condemnation of private property.
\item[106] 659 S.W.2d 861 (Tex. App.—Tyler 1984, no writ).
\item[107] \textit{Id.} at 865-87; see \textit{Maddux v. Gulf, Colorado & Sante Fe Ry.}, 293 S.W.2d 499, 506-07 (Tex. Civ. App.—Forth Worth 1956, writ ref'd n.r.e.) (jury award limited only by lowest value testified to).
\item[108] 659 S.W.2d 866; see \textit{Roberts v. State}, 350 S.W.2d 388, 391 (Tex. Civ. App.—Dallas 1961, no writ) (jury may accept or reject opinion evidence or form its own opinion from the evidence and by using its own experience in matters of common knowledge).
\item[109] 659 S.W.2d at 864. The general rule is that evidence of a hypothetical plat of a nonexistent subdivision is not admissible to show that raw acreage may have speculative development value. \textit{Kaufman N.W., Inc. v. Bi-Stone Fuel Co.}, 529 S.W.2d 281, 288 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (stating that admitting into evidence a hypothetical plat when condemned land is raw acreage is improper); \textit{Lower Nueces River Water Supply Dist. v. Collins}, 357 S.W.2d 449, 452 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.) (stating evidence of hypothetical plat is inadmissible when subdivisions are nonexistent). An exception to the general rule is recognized, however, when the hypothetical plat is relevant to prove some issue in the case, such as adaptability of a party's land to subdivision development. \textit{Id.}
\item[110] 659 S.W.2d at 864. The value of land is generally determined for purposes of a condemnation award solely on the basis of its actual use unless additional evidence shows its adaptability to another use of greater value. \textit{Calvert v. City of Denton}, 375 S.W.2d 522, 525 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.) (value of property may be affected by use to which it is readily convertible); 35 TEX. JUR. 3d \textit{Eminent Domain} § 173 (1984).
\item[111] 659 S.W.2d at 867. Remittitur is a method often used in condemnation cases as a means of reducing the award, in lieu of granting a new trial, when the award is found excessive. \textit{M. Rayburn, Texas Law of Condemnation} § 226 (1960). \textit{Tex. R. Civ. P. 440 sanctions} affirmation of a judgment conditioned upon the filing of remittitur. If no remittitur is made, the court of appeals may reverse the judgment. \textit{Adams v. Houston Lighting & Power Co.}, 158 Tex. 551, 314 S.W.2d 826, 830 (1958) (stating there is no rule that the trial court must
B. Public Dedication and Abandonment

In *Las Vegas Pecan & Cattle Co. v. Zavala County*\(^{1}\) the trial court and the court of appeals held that the county was vested with legal and equitable title to a right-of-way running over a portion of appellant's property that appellant had attempted to close to public use.\(^{13}\) The supreme court reversed both lower courts and held that although an implied dedication of the road to the county arose, the courts had erred in holding that by virtue of the dedication the county held legal title to the right-of-way property.\(^{14}\) The court also rejected the county's contention that article 6812h,\(^{15}\) which greatly restricts the ability to establish a public interest in a private road by implied dedication or adverse possession, was retroactive and applied to the instant case.\(^{16}\) The court reasoned that because the county had shown an implied dedication of the right-of-way prior to the effective date of article 6812h and because the statute contained no provision for retroactivity, the statute could only have prospective application and was inapplicable to the instant case.\(^{17}\)

In *Spinuzzi v. Town of Corinth*\(^{18}\) the appellants argued that the trial court erred in granting the town's motion for summary judgment on the issue of implied dedication and in issuing an injunction requiring appellant to remove a gate barring access to the disputed roadway. The town contended that the motion was properly granted despite the fact that no evidence was presented that a previous owner of the roadway had ever dedicated it to the public or that such a dedication had ever been accepted. This contention was based on the town's assumption that the case came within the well-settled rule that when the origin of the use of a road by the public and the

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2. 28 Tex. Sup. Ct. J. at 169. An implied dedication of a private road occurs when a party can show that (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) the landowner was competent to dedicate the land, because he had the capacity and fee simple title; (3) the public relied on such acts and will benefit from the dedication; and (4) the dedication was accepted. *Id.; O'Connor v. Gragg,* 324 S.W.2d 294, 296 (Tex. Civ. App.—Eastland 1959), reformed, 161 Tex. 273, 339 S.W.2d 878 (1960).
5. 28 Tex. Sup. Ct. J. at 170; see also *Lindner v. Hill,* 673 S.W.2d 611, 615-16 (Tex. App.—San Antonio 1984, writ granted) (article 6812h held not to have retroactive application and implied dedication prior to the effective date of the article was established by the evidence presented at trial).
6. 665 S.W.2d 530 (Tex. App.—Fort Worth 1983, no writ).
ownership of the land at the time of such use are so shrouded in obscurity that no proof can be adduced to show the intention of the owner when the public use began, the law presumes an intention to dedicate the land to public use.\textsuperscript{119} Although the court agreed that the facts of the case came within the foregoing presumption, it held that summary judgment was improper because conflicting statements were made in the supporting affidavits as to the use and maintenance of the road by the public.\textsuperscript{120} The court further held that the appellant had also raised a fact issue as to whether the public had abandoned its interest in the road, even assuming that a previous implied dedication had occurred.\textsuperscript{121} The cause was, accordingly, remanded to the trial court for a trial on the merits in accordance with the court's opinion.\textsuperscript{122}

III. TORT LIABILITY

A. Texas Tort Claims Act

The Texas courts of appeals rendered a number of significant decisions during the survey period interpreting the Texas Tort Claims Act (TTCA).\textsuperscript{123} In \textit{Green v. City of Dallas}\textsuperscript{124} a widow brought suit against the city alleging that the death of her husband resulted from the city's failure properly to administer cardiovascular treatment after he had suffered a heart attack. Responding to an emergency call from the widow whose husband was experiencing heart pains, two emergency medical technicians of the Dallas Fire Department examined the husband, diagnosed his condition as simple physical overexertion resulting from a basketball game, and declined the widow's request to transport her husband to the hospital. The paramedics were summoned again only five minutes later when the husband experienced a serious heart attack, from which he died en route to the hospital. The appellant sued the City of Dallas under section 3(b) of the TTCA, alleging negligent care in the treatment of her husband.\textsuperscript{125} Section 3(b) of the TTCA has been

\textsuperscript{119} Id. at 532; see, e.g., O'Connor v. Gragg, 161 Tex. 273, 339 S.W.2d 878, 882 (1960); Compton v. Thacker, 474 S.W.2d 570, 572 (Tex. App.—Dallas 1971, writ ref'd n.r.e.); Dunn v. Deussion, 268 S.W.2d 256, 269 (Tex. App.—Fort Worth 1954, writ ref'd n.r.e.).

\textsuperscript{120} 665 S.W.2d at 533; Wesson v. Jefferson Sav. & Loan Ass'n, 641 S.W.2d 903, 905-06 (Tex. 1982) (summary judgment only proper when evidence establishes as a matter of law no genuine issue of material fact as to one or more elements of plaintiff's cause of action); accord Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

\textsuperscript{121} 665 S.W.2d at 533-34.

\textsuperscript{122} Id. at 535. Abandonment of a private road previously dedicated to the public is shown when the use for which the road was originally dedicated is impossible or so improbable as to be practically impossible. Id. at 534; Compton v. Thacker, 474 S.W.2d 570, 573 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.). The \textit{Spinuzzi} court also stated that abandonment is an affirmative defense and the burden of producing evidence of abandonment rests on the party availing itself of such defense. 665 S.W.2d at 533; County of Calhoun v. Wilson, 425 S.W.2d 846, 853 (Tex. Civ. App.—Corpus Christ 1968, writ ref'd n.r.e.); Maples v. Henderson County, 259 S.W.2d 264, 267 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.).


\textsuperscript{124} 665 S.W.2d 567 (Tex. App.—El Paso 1984, no writ).

\textsuperscript{125} TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3(b) (Vernon 1970 & Supp. 1984) provides in part that a governmental unit shall be liable only when an injury is caused by some condition or use of tangible property under circumstances in which such unit of government, if a private person, would be liable to the claimant.
held to waive governmental immunity in three general areas: (1) injuries from use of publicly owned automobiles; (2) injuries from defects in publicly owned premises; and (3) injuries arising out of some conditions or use of public property.\footnote{126} The trial court granted summary judgment in favor of the city, holding that no waiver was made of governmental immunity under the TTCA for a failure to use, rather than to misuse, public property.\footnote{127}

The court of appeals found that the record contained some evidence from which the jury could properly conclude that a negligent use of public property contributed to the husband’s injury.\footnote{128} The court cited the supreme court’s opinion in \textit{Lowe v. Texas Tech University}\footnote{129} as support for its conclusion that when a governmental unit uses or provides use of an item of personal property, injuries resulting from the failure to provide or use an integral component part of the larger unit will support a cause of action under section 3(b) of the TTCA.\footnote{130} Having concluded that the trial court erred in holding as a matter of law that governmental immunity was not waived, the court remanded the cause for trial.\footnote{131}

In \textit{Finnigan v. Blanco County}\footnote{132} a deceased woman’s husband appealed from a grant of summary judgment rendered against him in a negligence suit

\footnote{126. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 31 (Tex. 1983). The third basis of waiver has caused great confusion for Texas courts in recent years. The issue is primarily whether the language extends to negligent use of public property regardless of whether the property contains some defective condition. Chief Justice Greenhill of the Texas Supreme Court stated in his concurring opinion in \textit{Lowe v. Texas Tech Univ.}, 540 S.W.2d 297, 301 (Tex. 1976) (Greenhill, C.J., concurring), that the statutory language “condition or use of property” implies that it should be applied to cases in which the property furnished was in bad or defective condition or was wrongly used. \textit{Id.} at 302. As of this date, the supreme court has held that the language of § 3 does waive governmental immunity for negligent or wrongful use of public property. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d at 32; accord \textit{Lowe v. Texas Tech Univ.}, 540 S.W.2d at 300 (failure to furnish knee brace for football uniform supports cause of action under § 3 of TTCA). \textit{See generally} Geary & Davenport, \textit{Local Government Law, Annual Survey of Texas Law}, 38 Sw. L.J. 463, 487-88, 489 n.185 (1984); Greenhill & Murto, \textit{Governmental Immunity}, 49 Tex. L. Rev. 462, 468 (1971).

127. The majority and the dissent’s interpretation of the theory relied on for relief by the plaintiff in \textit{Green} are inconsistent. The majority relied upon the fact that the record revealed that public property was used, namely a flashlight and a cardiac monitor. The dissent, however, forcefully stated that the theory relied upon by the plaintiff in \textit{Green} was the failure of the city to use, not misuse, the public property.

128. 665 S.W.2d at 570.

129. 540 S.W.2d 297, 300 (Tex. 1976); \textit{see supra} note 126.

130. 665 S.W.2d at 569. Although the majority in \textit{Green} expressly stated that the issue was not a failure to use public property, its holding that the failure of a governmental unit to use or provide an integral component part of a larger unit will support a § 3(b) claim seems to support a contrary conclusion.

131. \textit{Id.} at 570. The dissent in \textit{Green} argued that the case must be viewed as a non-use case. \textit{Id.} (Osborn, J., dissenting). Although the dissent expressed sympathy with the appellant’s argument that no distinction between the negligent use of public property and the failure to use public property should be made, it concluded that the addition of a failure to use public property as a basis for waiver of immunity under § 3(b) is a legislative, not judicial, function. \textit{Id.} at 571. The decision in \textit{Green} appears to add only a newer shade of gray to what is already a confusing area of law concerning when § 3(b) of the TTCA waives sovereign immunity. \textit{See supra} note 126; \textit{see also} Hale v. Sheikholeslam, 724 F.2d 1205, 1208 (5th Cir. 1984) (personal property that causes an injury need not be defective to fall within § 3(b) of the TTCA and allegation of misuse will state a cause of action pursuant to § 3).

132. 670 S.W.2d 313 (Tex. App.—Austin 1984, no writ).}
against Blanco County. The appellant alleged that the wrongful death of his wife resulted from the county sheriff's actions in leaving a police car running near the county jail yard. The car was stolen by an inmate who was involved in a high speed chase that resulted in the wife's death. The appellant argued that the county was negligent in the "operation and use of a motor driven vehicle" and, therefore, sovereign immunity had been waived under section 3(b) of the TTCA.\(^{133}\) The court of appeals held that the operation and use of a motor driven vehicle as contemplated by section 3(b) necessarily included the act of stopping and leaving that vehicle attended.\(^{134}\) Having held that the appellant had stated a cause of action under section 3(b) of the TTCA, the court reversed the summary judgment order on the basis that fact issues of foreseeability and proximate causation were raised by the evidence presented.\(^{135}\)

In *Smith v. University of Texas*\(^{136}\) an unpaid volunteer worker at a university track and field event was struck in the head and seriously injured by a shot thrown during a shot-put competition held at the University of Texas at Austin (UT). The worker alleged that UT failed to supervise properly the shot-put event and that such negligent supervision amounted to a negligent or wrongful use of public property under section 3(b) of the TTCA. The trial court granted summary judgment in favor of UT on the basis that negligent supervision of the use of public property does not constitute the negligent use of property for purposes of immunity waiver under section 3(b). UT argued on appeal that the grant of summary judgment was proper on the following grounds: (1) allegations of negligent supervision over public property do not state a cause of action against a governmental unit under Texas law; (2) the person directly responsible for supervising the shot-put event was not an officer or employee of a governmental unit within the meaning of section 2(3) of the TTCA;\(^ {137}\) and (3) the worker failed to allege that his injuries were the result of some defective condition or use of public property.

The Austin court of appeals held that the worker properly stated a cause

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\(^{133}\) Section 3(b) of the TTCA expressly waives sovereign immunity for injuries resulting from the "operation and use of a motor driven vehicle." TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3(b) (Vernon 1970 & Supp. 1984).

\(^{134}\) 670 S.W.2d at 316. The court cited Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983) in support of its rationale that such a conclusion was mandated by § 13 of the TTCA, which provides that the provisions of the act should be liberally construed.

\(^{135}\) 670 S.W.2d at 318.

\(^{136}\) 664 S.W.2d 180 (Tex. App.—Austin 1984, no writ). The decision was discussed in Geary & Davenport, *Local Government Law, Annual Survey of Texas Law*, 38 Sw. L.J. 487, 489 n.185 (1984). The authors, however, feel a more thorough discussion is warranted herein, due to the significance of the issues raised in *Smith*, and have accordingly chosen to discuss the case again more fully.

\(^{137}\) TEX. REV. CIV. STAT. ANN. art. 6252-19 § 2(3) (Vernon 1970) provides that an officer, agent, or employee whose negligent acts may result in a waiver of governmental immunity under § 3(b) includes every person who is in the paid services of any unit of government. *Id.* UT argued that if the worker's injuries were a result of negligent supervision over the shot-put event, then the injuries were attributable solely to the negligent supervision of a volunteer agent of the university rather than a paid official and, therefore, a waiver of governmental immunity did not result. 664 S.W.2d at 189.
of action under section 3 of the TTCA by alleging that the failure of UT to supervise properly the use of its real and personal property and to promulgate rules and regulations for the safety of the public with respect to the use of such property resulted in the worker's injuries.\footnote{138} Incidental to that conclusion and based on the strength of the Texas Supreme Court's decision in \textit{Salcedo v. El Paso Hospital District},\footnote{139} the court concluded that appellant's failure to allege that his injuries were the result of some defective condition or use of public property was not fatal to his cause of action.\footnote{140} The court reasoned that UT's negligent supervision over the use of its property constituted a negligent or wrongful use of that property under the \textit{Salcedo} rule.\footnote{141} Finally, the court concluded that UT could not avoid liability under the TTCA by using an unpaid volunteer to supervise activities held on its property, because a claim under section 3(b) can arise through the negligence of an agent duly appointed by the governmental unit to carry out the duties of a paid state employee.\footnote{142}

The Fifth Circuit rendered an interesting decision interpreting the TTCA during the survey period. In \textit{Hale v. Sheikholeslam}\footnote{143} the court held that the plaintiff failed to state a cause of action against a local hospital under section 3(b) of the TTCA in connection with the alleged malpractice of a staff-privileged doctor.\footnote{144} The court reasoned that the hospital could not be liable under section 3(b) because the doctor who committed the malpractice was not an officer or employee of the hospital within the meaning of section 3(b).\footnote{145} Since the doctor was not an officer or employee of the hospital and the doctor's malpractice was the proximate cause of the plaintiff's injuries, the court ordered the judgment against the hospital reversed and

\footnote{138}. 664 S.W.2d at 188-89. 
\footnote{139}. 659 S.W.2d 30 (Tex. 1983) (allegation of defective or inadequate property is not necessary to state cause of action under TTCA when some use of property, rather than condition of property, is alleged to have contributed to injury); \textit{see supra} note 126 and accompanying text. 
\footnote{140}. 664 S.W.2d at 188. 
\footnote{141}. \textit{Id.} at 187-88. 
\footnote{142}. \textit{Id.} A great deal of evidence was presented to show that the volunteer official was acting at the direction of several salaried employees of the university. \textit{Id.} at 190; \textit{see also} \textit{El Paso Laundry Co. v. Gonzales}, 36 S.W.2d 793 (Tex. Civ. App.—El Paso, 1931, writ dism’d) (volunteer worker will have the same status as paid employee when the employer directs the volunteer's duties, has an interest in the volunteer's work, accepts benefits from the volunteer's work, and has a right to replace the volunteer). 
\footnote{143}. 724 F.2d 1205 (5th Cir. 1984). 
\footnote{144}. \textit{Id.} at 1210. 
\footnote{145}. \textit{Id.} at 1208. \textit{Tex. Rev. Civ. Stat. Ann.} art. 6252-19 § 2(3) (Vernon Supp. 1982), in conjunction with § 3(b) of the TTCA, provides that the act or omission resulting in the waiver of sovereign immunity under § 3(b) must be the result of the act or omission of an officer or employee of a governmental unit. \textit{See supra} note 137. In \textit{Hale} the Fifth Circuit concluded that the negligent actions of a doctor with staff privileges would not waive sovereign immunity under the TTCA because he was not an officer or employee of a governmental unit as required by § 3; in \textit{Smith} the court of appeals held that negligent supervision of the use of public property would establish a cause of action under § 3 of the TTCA. A similar argument could have been made in the \textit{Hale} case; that is, the hospital may have been negligent in the supervision of the use of its property by failing to properly supervise the actions of the doctor and such negligent supervision amounted to a negligent use of public property. The court in \textit{Hale} expressly rejected the plaintiff's argument that the hospital's failure to exercise reasonable care in granting staff privileges stated a cause of action under § 3(b) of the TTCA. 724 F.2d at 1209.
B. 42 U.S.C. § 1983

In *Gay Student Services v. Texas A&M University*, one of the more controversial cases decided during the survey period, the Fifth Circuit held that although Texas A&M University (TAMU) had deprived the appellant of its rights under the first amendment to the United States Constitution, the University was immune from a suit for damages brought by appellant under section 1983 by virtue of the eleventh amendment to the United States Constitution. The gay student organization (appellant) sought official campus recognition by TAMU. In a letter from the Vice President for Student Affairs, TAMU denied official recognition to Gay Student Services (GSS) on the basis that the organization was likely to incite illegal homosexual behavior and that the goals of GSS to provide referral services, educational information, and speakers for the students were inconsistent with the philosophy and goals of TAMU, because the provision of such services was uniquely within the domain of the TAMU staff and faculty. GSS then filed suit seeking declaratory, injunctive, and compensatory relief against TAMU.

146. 724 F.2d at 1210. The court also interpreted the Texas Supreme Court's *Salcedo* decision as standing for the proposition that use or misuse of nondefective property will support a claim of waiver under § 3(b) only if such use or misuse is the proximate cause of the injury. *Id.* at 1208.

147. 737 F.2d 1317 (5th Cir. 1984), cert. denied, No. 84-724 (U.S. S. Ct. April 1, 1985) (available April 10, 1985, on WESTLAW, general library, SCt file).

148. U.S. CONST. amend. I. The first amendment to the U.S. Constitution prohibits the states from enacting any law that shall abridge the right of the citizens of the United States to freedom of speech, religion, and assembly. *Id.*


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.

Section 1983 has been interpreted to allow private citizens to sue states and local governing bodies for deprivation of their constitutional rights. The United States Supreme Court held in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), that local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief when the alleged unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers." *Id.* at 690.

150. 737 F.2d at 1333. The eleventh amendment to the United States Constitution provides that a state may not be sued by an individual resident of another state for monetary damages in federal court absent a waiver of immunity by the state. U.S. CONST. amend. XI. The United States Supreme Court has also held that the eleventh amendment bars suits for monetary relief brought by individuals against entities or officials who are so closely related to the state as to make the state the real party in interest. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 338 (1979); *Alabama v. Pugh*, 438 U.S. 781, 781 (1978); *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 747, 747 (1977); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

151. The advantages of official recognition at TAMU included the following: (1) use of campus facilities; (2) campus advertising; (3) availability of students activities' funds; (4) use of office area; (5) assistance in preparing a budget; (6) secretarial services; (7) authorization to hold meetings and functions on campus; (8) free use of university meeting rooms and facilities; (9) free use of banking facilities at the Student Finance Center; and (10) use of an organization mailbox. 737 F.2d at 1319.
under section 1983. The district court upheld the denial of recognition on the strength of its conclusion that GSS was not denied recognition based on the homosexual content of its message but because of TAMU's long standing tradition of not officially recognizing fraternal and social groups whose message was one of mere friendship and personal affinity. The court of appeals reasoned that little or no evidence in the record supported the district court's finding and concluded that the evidence presented at trial clearly established that the sole reason for denying official recognition to GSS was the content of its message and, therefore, GSS's first amendment rights were infringed.

Having found a violation of GSS's constitutional rights, the court next applied the test that it had announced in University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union v. University of Southern Mississippi to determine whether the abridgment of the students' constitutional rights in the instant case was justified. In University of Southern Mississippi the Fifth Circuit stated that students' rights of free expression may be prohibited only if they materially and substantially interfere with the need for appropriate discipline in the operation of the school; any restriction by a school of future speech and activities is tantamount to a prior restraint and carries a heavy presumption against its constitutionality. Recognizing the presumption that TAMU had to overcome, the court examined TAMU's reasons for denying recognition. Supported by the United States Supreme Court opinion in Healy v. James, the court held that the fact that the homosexual nature and philosophy of GSS was at odds with that of TAMU was an insufficient reason to withhold recognition. Second, the court concluded that because no Texas law made it a crime to be a homosexual as opposed to conducting homosexual acts and since no evidence of

152. TAMU argued that for over 100 years it had not included national social fraternities and sororities as part of its program in order to avoid a social caste system and to promote a concept of togetherness. Id. at 1321. The Fifth Circuit held that the conclusion of the district court assumed that the purpose for organizing GSS was to provide a message of friendship and personal affinity that was utterly at odds with the group's stated purpose of providing information on gay issues to gay persons and the general public. Id. at 1322. The court emphasized that not only was the assertion that official recognition was denied on the basis of GSS fraternal message not raised at trial, but such a conclusion was completely in contradiction with the evidence presented at trial. Id. The court pointed out that the Vice President for Student Affairs never mentioned in his letter denying recognition any reason for that denial other than the homosexual nature of the group. Id. In addition, the TAMU Board of Regents passed a resolution in support of the vice president's position, stating that the policy position of TAMU was to defend the lawsuit at all costs because the gay activities ran counter to the traditions and standards of TAMU.

153. Id. at 1324, 1334.

154. 452 F.2d 564, 565 (5th Cir. 1971) (denial of official recognition to Mississippi Civil Liberties Union violated first amendment).

155. Id. at 566 (citing Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 509 (1969)).

156. 408 U.S. 169, 184 (1972) (state college could not withhold recognition from members of local chapter of Students for Democratic Society on the basis that the organization's philosophy was antithetical to school policies).

157. 737 F.2d at 1327.

158. TEX. PENAL CODE ANN. § 21.06 (Vernon 1974) makes it a crime to engage in deviate sexual intercourse with another person of the same sex. The court noted that this statute was
illegal activity resulting from the existence of GSS was available, any claim that recognition was withheld on the basis that GSS would incite such illegal behavior was also insufficient to overcome the presumption that the infringement was unjustified. The court also found TAMU's assertion that the education of students and speeches to the public were better left to the staff and faculty of the university insufficient to justify infringement of constitutional rights.

The court finally turned to the district court's holding that TAMU never created a public forum open to first amendment discourse and, therefore, no first amendment violation had occurred. On the basis of its conclusion that GSS was a social and fraternal group, the district court reasoned that because TAMU had traditionally denied official recognition to such groups, it had never created a public forum to which GSS could be denied access. The court of appeals reasoned that GSS was not a social and fraternal group and, therefore, even if TAMU had not opened a general public forum to all such fraternal groups, it had at least opened a limited public forum to certain groups similar to GSS and it could not deny GSS access to that forum absent a compelling reason. The court failed to find a compelling reason for denial of official recognition to GSS sufficient to justify an abridgment of GSS's constitutional rights and held that although such denial was a constitutional violation entitling it to relief under section 1983, GSS could not recover damages against TAMU because of the application of the eleventh amendment to the instant case.

The court cited Zengraf v. Texas A&M University in holding that TAMU was an alter ego of the state and, therefore, held unconstitutional in Baker v. Wade, 553 F. Supp. 1121, 1144 (N.D. Tex. 1982), and an appeal is presently pending in the Fifth Circuit. 737 F.2d at 1321 n.5.

159. 737 F.2d at 1328; see also Gay Lib v. University of Missouri, 588 F.2d 848, 853, 856 (8th Cir. 1977) (testimony as to recognition of Gay Lib causing probable violations of Missouri sodomy law insufficient to justify infringement of first amendment rights), cert. denied, 434 U.S. 1080, reh'g denied, 435 U.S. 981 (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976) (absence of evidence that gay group was organized to carry out illegal activities defeated argument that group's recognition would increase opportunity for illegal homosexual conduct); Gay Students Org. v. Bonner, 509 F.2d 652, 662 (1st Cir. 1974) (asserted interest in preventing illegal deviate sex acts insufficient to justify impairment of group's first amendment rights).

160. 737 F.2d at 1329.

161. In Perry Educ. Ass'n v. Perry Local Educators Ass'n, 103 S. Ct. 948, 74 L. Ed. 794 (1983), the Supreme Court distinguished public forums from limited public forums. States generally cannot prohibit expression, except for reasonable time, place, and manner restrictions, in public forums. States can restrict a limited public forum to certain groups discussing certain subjects. Id. at 955 n.7, 74 L. Ed. 2d at 805 n.7.

162. 737 F.2d at 1332. The court emphasized that TAMU had recognized certain other service groups similar to GSS and has given them the benefits of recognition, thereby creating at least a limited public forum. Id. at 1332; see also Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) (state-supported university that opens facilities to student groups may not exclude a particular group absent compelling reason); Ysleta Fed'n of Teachers v. Ysleta Indep. School Dist., 720 F.2d 1429, 1432, 1433 (5th Cir. 1983) (internal mailbox system in school district constituted limited public forum and access could not be denied to organizations similar to those given access without compelling reason justifying such denial).

163. 737 F.2d at 1333.

164. 492 F. Supp. 265, 271-72 (S.D. Tex. 1980) (sex discrimination suit against TAMU barred by eleventh amendment because TAMU was alter ego of state).
fore, immune under the eleventh amendment from a suit of damages.\textsuperscript{165} Accordingly, the case was remanded for entry of appropriate declaratory and injunctive relief.\textsuperscript{166}

IV. TAXATION, ANNEXATION, AND INCORPORATION

Few significant cases were decided in this area during the survey period. In American Bank \& Trust Co. v. Dallas County\textsuperscript{167} the court of appeals was asked to decide whether a taxpayer may enjoin the collection of an ad valorem tax assessed on the shares of a banking corporation because the method of assessment was held illegal by the United States Supreme Court.\textsuperscript{168} Disregarding the illegality of the method of assessment, the Dallas court of appeals held that the failure of the taxpayer to present evidence that it had suffered substantial injury from the illegal assessment precluded the issuance of injunctive relief.\textsuperscript{169} The appellants contended that the lower court demonstrated substantial injury by virtue of its conclusion that the proper method of assessment was to tax a percentage of the book value of the bank shares, which would result in a lower tax assessment.\textsuperscript{170} The court of appeals disagreed, reasoning that the applicable statute required the bank shares to be taxed at their actual cash value, which the court interpreted to mean their fair market value rather than book value.\textsuperscript{171} To establish sub-

\textsuperscript{165} 737 F.2d at 1333-34.
\textsuperscript{166} Id. at 1334.
\textsuperscript{167} 679 S.W.2d 566 (Tex. App.—Dallas 1984, no writ). This case was one of several on remand from the United States Supreme Court. The Court overruled a Dallas court of appeals holding that the taxation of shares of a banking corporation for ad valorem tax purposes violated federal law by using the equity capital formula in computing the tax due on such shares. See Bank of Texas v. Childs, 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981), rev'd, 103 S. Ct. 3369, 77 L. Ed. 2d 1072 (1983). 31 U.S.C. 742 (1976), as amended, provides that federal obligations shall be exempt from "[e]very form of [state or local] taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax. . . ." Id. The equity capital formula computes the tax due on bank shares by determining the amount of the bank's capital assets minus its liabilities and value of its real estate holdings, and dividing that figure by the number of bank shares outstanding. The Supreme Court held that the failure of the taxing authorities to deduct from the equity capital formula the amount of federal obligations held by the bank rendered the assessment illegal in violation of § 3701. American Bank \& Trust Co. v. Dallas County, 103 S. Ct. 3369, 3373, 77 L. Ed. 2d 1072, 1077 (1983).
\textsuperscript{168} American Bank \& Trust Co. v. Dallas County, 103 S. Ct. 3369, 77 L. Ed. 2d 1072 (1983). The statute that provided for the imposition of the tax assessment was former TEX. TAX. CODE ANN. art. 7166 (Vernon 1960), repealed and superseded by TEX. TAX CODE ANN. §§ 21.09, 22.06, 23.11, 25.14 (Vernon 1982).
\textsuperscript{169} 679 S.W.2d at 574-75; see City of Arlington v. Cannon, 153 Tex. 566, 271 S.W.2d 414 (1954) (taxpayer not entitled to injunctive relief because he had not shown he would suffer substantial injury as a result of a tax scheme that had been held fundamentally erroneous, arbitrary, and illegal).
\textsuperscript{170} Book value of bank shares is determined by computing the equity capital formula and deducting from that result the amount of federal obligations held by the bank. 679 S.W.2d at 570.
\textsuperscript{171} Id. Repealed article 7166 (Vernon 1960) provided that bank shares should be taxed at their actual cash value, but did not direct how that value should be computed. The court emphasized that the term value as used in TEX. CONST. art. VIII, § 1 and other tax statutes has been held to mean reasonable cash market value. 679 S.W.2d at 570; see, e.g., Whelan v. State, 155 Tex. 14, 282 S.W.2d 378 (1955); Jones v. Hutchinson County, 615 S.W.2d 927 (Tex. Civ. App.—Amarillo 1981, no writ); see also Polk County v. Tenneco, Inc., 554 S.W.2d 772
stantial injury entitling it to injunctive relief, the appellant had to show that a tax assessment based on the fair market value of the shares would be lower than the illegal assessment. Because the taxpayers had not met this burden, the court held that the trial court had properly denied the injunction.

The San Antonio court of appeals held in *Trevino v. Starr County* that the trial court erred in granting the appellee's motion to appoint a receiver over 4,800 acres of land to execute oil and gas leases. Starr County contended that the language of article 2293 providing for appointment of a receiver by a creditor to subject any property or fund to his claim was sufficient authority for granting its motion. The court of appeals disagreed with the appellees' position and cited the Texas Supreme Court's opinion in *Carter v. Hightower*. In *Hightower* the supreme court limited the application of article 2293 to property or a fund of a debtor upon which a creditor has a specific lien. The *Trevino* court vacated the trial court's receivership because the appellee had offered no evidence to establish its lien for delinquent taxes with respect to the property.

The Fifth Circuit Court of Appeals held in *Superior Oil Co. v. City of Port Arthur* that a prior state proceeding that established that the city's annexation of the subject property was not unconstitutional operated as res judicata as to a subsequent federal court action asserting the unconstitutionality of the annexation. By a series of annexation ordinances, the city had annexed certain oil and gas properties leased by the appellant from the state and located approximately ten and one-half miles into the Gulf of Mexico. The annexations resulted in an annual ad valorem tax on the appellant of about $775,000 a year. The appellant claimed that the annexation constituted a taking of its property without due process because the act resulted in a tax with no corresponding municipal benefits. The district court agreed with the appellant and held that the prior state court proceedings had been in error when it failed to find the annexation unconstitutional.

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(Tex. Civ. App.—El Paso 1935, writ dism'd) (book value is improper measure of taxable value when evidence shows it is different from market value).

172. 679 S.W.2d at 574. The court expressly stated that not only did the appellant have the burden of proving the illegal assessment, which they had done, but appellant also was required to show that the proper method of assessing the shares at market value would have been fair less than the assessment. *Id.* The court also noted that the Supreme Court had not held the statute in question unconstitutional, but only the method of its application. *Id.*

173. *Id.* at 574-75. Although appellant was denied injunctive relief in the instant case, the court modified the judgment of the trial court by ruling that the tax assessment for which it denied relief from collection was, in fact, illegal and arbitrary. *Id.* at 575.


175. TEX. REV. CIV. STAT. ANN. art. 2293 (Vernon 1971).

176. *Id.*

177. 79 Tex. 135, 15 S.W. 223 (1890); accord *Pelton v. First Nat'l Bank*, 400 S.W.2d 398 (Tex. Civ. App.—Houston [1st Dist.] 1966, no writ).

178. 726 F.2d 203 (5th Cir. 1984).

179. 660 S.W.2d at 142.

no res judicata effect on the federal court proceedings.\textsuperscript{183}

The Fifth Circuit reversed the judgment of the district court and held that pursuant to the Full Faith and Credit Act\textsuperscript{184} the district court was bound to give effect to the prior state court judgments if a state court would give such effect to the judgment.\textsuperscript{185} Citing the rule announced by the United States Supreme Court in \textit{Kremer v. Chemical Construction Corp.},\textsuperscript{186} the court sought to determine whether Texas law would give the same preclusive effect to the prior state court proceeding.\textsuperscript{187} Emphasizing that a Texas judge had relied on the prior judgment in affirming a collateral state court summary judgment proceeding,\textsuperscript{188} the Fifth Circuit held that the prior judgment in the quo warranto action barred the relief sought by the appellant on the grounds of res judicata.\textsuperscript{189}

In \textit{City of Heath v. King}\textsuperscript{190} several voters brought suit to compel disannexation of five tracts of land from the appellant city.\textsuperscript{191} The jury found that the city had failed to furnish certain services to the subject property that were comparable to the services furnished to other portions of the city. The city argued that, because section 10(A) of article 970(a) had been amended in 1981 and the provisions of the earlier statute upon which the appellees relied were omitted, the appellees' remedy to compel disannexations had been repealed. The court rejected this contention because the caption of the bill from which the amendment was derived failed to mention that it affected the rights of the state citizens with respect to disannexation privileges or that it was designed to repeal a part of the prior statute by omission.\textsuperscript{192} In addition, the court interpreted the prefatory phrase "[f]rom and after the effective date" of the 1981 amendment to evidence a legislative intent that the prior statute be given full force and effect with respect to disannexations

\begin{itemize}
  \item \textsuperscript{183} 535 F. Supp. 916, 921 (E.D. Tex. 1982).
  \item \textsuperscript{184} 28 U.S.C. § 1738 (1982) provides that state "judicial proceedings \ldots shall have the same full faith and credit in every court within the United States \ldots as they have by law or usage in the courts of such State \ldots from which they are taken."
  \item \textsuperscript{185} 726 F.2d at 206.
  \item \textsuperscript{186} 456 U.S. 461 (1982). In \textit{Kremer} the Supreme Court held that 28 U.S.C. § 1738 (1982) requires federal courts to give res judicata effect to a state court judgment if the state courts would give such effect to the judgment. 456 U.S. at 466.
  \item \textsuperscript{187} 726 F.2d at 206.
  \item \textsuperscript{188} In Superior Oil Co. v. City of Port Arthur, 628 S.W.2d 94 (Tex. App.—Beaumont 1981), \textit{appeal dismissed}, 459 U.S. 802 (1982), the court of appeals affirmed the summary judgment order issued by the state district court in favor of the City of Port Arthur with respect to its state court action challenging the constitutionality of the annexation. 628 S.W.2d at 98.
  \item \textsuperscript{189} 726 F.2d at 206-07.
  \item \textsuperscript{190} 665 S.W.2d 133 (Tex App.—Dallas 1983, no writ).
  \item \textsuperscript{191} \textit{TEX. REV. CIV. STAT. ANN.} art. 970(a), § 10 (1962) provides the procedure under which voters may seek to compel disannexation from a municipal corporation that has failed to act on a properly presented petition for disannexation.
  \item \textsuperscript{192} \textit{TEX. CONST.} art. III, § 35 provides that no bill shall contain a subject that is not expressed in its title. The caption of the instant amendment read as follows: "An act relating to annexation of providing services to, and disannexation of certain areas." 665 S.W.2d at 135. See Stauffer v. City of San Antonio, 162 Tex. 13, 344 S.W.2d 158 (1961), and Oakley v. Kent, 181 S.W.2d 919 (Tex. App.—Eastland 1944, no writ), in which statutes were held invalid due to their captions' failure to give notice that they affected a change in existing substantive law. \textit{Cf.} Globe Indem. Co. v. Barnes, 280 S.W.2d 275 (Tex. App.—Amarillo 1926, no writ) (statute held invalid for failure to give notice in caption that it repealed current law).}
\end{itemize}
V. ELECTIONS AND ELECTED OFFICIALS

In *State ex rel. Hightower v. Smith* 196 the Texas Supreme Court held that the state's allegations, that the sheriff of Smith County had appropriated county gasoline and patrol cars for his own use in connection with the exchange of security services for a rent-free apartment, gave the sheriff sufficient notice of the charges against him to comply with the requirements of the removal statute for official misconduct. 197 The court of appeals reversed the order of the district court removing the sheriff from office on the basis of a jury finding that the sheriff had misappropriated county property. 198 The court of appeals held that the pleadings and issues were not specific enough to apprise the defendant of the charges against him. 199 Smith contended that because removal from office is a quasi-criminal proceeding, strict construction of the statutes was required.

The supreme court held that specifying particular dates upon which the particular acts of misconduct occurred was unnecessary to sufficiently inform the sheriff of the distinct cause for his removal and that the allegation that such acts occurred on numerous occasions gave fair and adequate notice as required by the statute. 200 The court accordingly reversed the decision of the court of appeals and remanded the cause to consider the sheriff's challenge of the factual insufficiency of the evidence. 201

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193. 665 S.W.2d at 136.
194. *Id.*; see Robinson v. Hill, 507 S.W.2d 521 (Tex. 1974) (statute should be interpreted so as to render it constitutional whenever possible).
195. 665 S.W.2d at 137.
196. 671 S.W.2d 32 (Tex. 1984).
197. *Id.* at 34. *Tex. Penal Code Ann.* § 39.01(a)(5) (Vernon 1974) prohibits taking or misapplying anything of value belonging to the government. *Tex. Rev. Civ. Stat. Ann.* art. 5977 (Vernon 1962) provides that a removal petition for removal of a public official for misappropriation of public property “shall set forth in plain and intelligible words the causes alleged as the grounds of removal, giving of each instance, with as much certainty as the nature of the case will admit of, the time and place of occurrence of the alleged acts . . . .” Article 5978 provides that the trial judge shall instruct the jury to state which cause for removal is true and correct as determined by the evidence. *Id.* art. 5978.
199. 671 S.W.2d at 50.
200. 671 S.W.2d at 34-35.
201. *Id.* at 36. The cause was remanded to consider Smith’s challenge to the evidence supporting the jury’s finding of willfulness on the issue of misconduct. *Id.* The court of appeals has exclusive jurisdiction over this issue. *Tex. Const.* art. V, § 6; see also Hurst v. Sears, Roebuck & Co., 647 S.W.2d 249 (Tex. 1983) (requiring remand to determine sufficiency of evidence). In considering Smith’s challenge on remand, the Tyler court of appeals found that the record contained sufficient evidence to support the jury’s finding that the sheriff’s misconduct was willful. 673 S.W.2d 704, 705 (Tex. App.—Tyler 1984, no writ).
In Painter v. Shaner\textsuperscript{202} the appellant was denied a place on the ballot because the county party chairman had been unavailable to accept appellant's otherwise timely and properly filed application.\textsuperscript{203} The court of appeals held that the appellant's name could not be placed on the ballot because "[t]he election statutes pertaining to candidates are mandatory and strict compliance is required."\textsuperscript{204} The supreme court reversed, reasoning that to deny a candidate a place on the ballot as a result of a third party's absence from the designated place for filing could result in abuse of the system and frustrate the general policy of fair elections.\textsuperscript{205} The supreme court, therefore, ordered that the appellant's name be placed on the ballot.\textsuperscript{206}

The Corpus Christi court of appeals held in Dodd v. Wyatt\textsuperscript{207} that the provisions of the Texas Election Code with respect to candidates are mandatory.\textsuperscript{208} A write-in Democratic candidate for county judge was, therefore, properly defeated when voters marked a straight Democratic ticket but also wrote in the appellant's name.\textsuperscript{209} The applicable statute stated that if two or more names are upon the same ballot, but only one person is to be elected to the office, such ballot shall not be counted.\textsuperscript{210}

\textsuperscript{202} 667 S.W.2d 123 (Tex. 1984).

\textsuperscript{203} The appellant personally delivered his application to the office of the county chairman 45 minutes prior to the deadline. Upon being informed that the chairman was at his business location, the appellant delivered the application at that location two hours after the filing deadline. The secretary of state had advised the chairman that the late application failed to comply with Texas law and, consequently, the chairman chose not to place the appellant's name on the ballot. \textit{Id.} at 124.

\textsuperscript{204} 667 S.W.2d 356, 357 (Tex. App.—El Paso), rev'd, 667 S.W.2d 123 (Tex. 1984). Provisions of the Texas Election Code relating to voters are to be liberally construed as directory only, but those provisions relating to the requirements of a candidate for office are mandatory and require strict compliance. \textit{See, e.g.,} Brown v. Walker, 377 S.W.2d 630, 632 (Tex. 1964) (candidate who sent his assessment by first class mail rather than certified or registered mail properly denied slot on ballot); Shields v. Upham, 597 S.W.2d 502, 503 (Tex. Civ. App.—El Paso 1980, no writ) (failure of nominating petition to show street address or county in which voter was registered to show street address or county in which voter was registered to vote held insufficient compliance); Geiger v. Debusk, 534 S.W.2d 437, 438 (Tex. Civ. App.—Dallas 1976, no writ) (failure to attach affidavit in lieu of filing fee resulted in withdrawal of name from ballot); McWaters v. Tucker, 249 S.W.2d 80, 82 (Tex. Civ. App.—Galveston 1952, no writ) (failure to accompany request to be placed on ballot with a loyalty affidavit not fatal).

\textsuperscript{205} 667 S.W.2d at 125.

\textsuperscript{206} \textit{Id.}; see also Bayne v. Glisson, 300 So. 2d 79, 83 (Fla. Dist. Ct. App. 1974) (the denial of a candidate's place on the ballot when the applicant has otherwise exercised due diligence but is delayed beyond deadline through no fault of his own is improper and has the effect of shortening the filing deadline).

\textsuperscript{207} 656 S.W.2d 564 (Tex. App.—Corpus Christi 1983, writ dism'd).

\textsuperscript{208} \textit{Id.} at 565.

\textsuperscript{209} \textit{Id.} at 566.

\textsuperscript{210} \textit{Tex. Elec. Code Ann.} art. 8.21 (Vernon 1967 & Supp. 1985); see Duncan v. Willis, 157 Tex. 316, 302 S.W.2d 627 (1957); Mollins v. Powell 273 S.W.2d 633 (Tex. Civ. App.—San Antonio 1954, no writ); \textit{see also} Johnson v. Peters, 260 S.W. 911, 914 (Tex. Civ. App.—San Antonio 1924, no writ) (predecessor statute held to require that a ballot cannot be counted if it contains a vote for two persons and only one office); Wright v. Marquis 255 S.W. 637, 638-39 (Tex. Civ. App.—San Antonio 1923, no writ) (ballot shall not be counted when two names are written in for same office). In a similar strict compliance case, the Fort Worth court of appeals held that although the Texas Election Code does not specify to whom or to what entity a candidate's filing fee check should be made payable, a check made payable to the State Democratic Executive Primary Committee instead of the local county Democratic party did not constitute strict compliance with the Code; requiring that the candidate's name be placed
In Jones v. City of Lubbock\textsuperscript{211} the Fifth Circuit held that the City of Lubbock's "at large" voting scheme\textsuperscript{212} used in electing the mayor and the city council did not violate the fifteenth amendment to the United States Constitution,\textsuperscript{213} but did violate the recently amended Voting Rights Act.\textsuperscript{214} The Fifth Circuit had returned Jones to the district court\textsuperscript{215} for reconsideration in light of the Supreme Court's opinion in Rogers v. Lodge.\textsuperscript{216} On remand the district court concluded that, based on evidence presented at trial, the City of Lubbock had established a voting system originally motivated by purposeful discrimination and that resulted in a denial of equal access of minority groups to the political process, thereby violating the fifteenth amendment and the Voting Rights Act.\textsuperscript{217} On appeal the Fifth Circuit held that although a violation of the Voting Rights Act may be established upon a showing that a voting scheme has a discriminatory result, a violation of the fifteenth amendment required a showing of purposeful discrimination in establishing the system.\textsuperscript{218} The court held that evidence that a member of the

\footnotesize{\textsuperscript{211} 727 F.2d 364 (5th Cir. 1984).}

\footnotesize{\textsuperscript{212} An at large system is a system by which all voters in the city elect a certain number of members to the city council without regard to the district in which the voter resides. Appellant alleged that this procedure had the effect of diluting the minority vote from districts that were predominantly occupied by minorities. Id. at 367.}

\footnotesize{\textsuperscript{213} U.S. CONST. amend. XV. The fifteenth amendment forbids the states from denying or abridging the right of a U.S. citizen to exercise his privilege to vote. Id.}

\footnotesize{\textsuperscript{214} 727 F.2d at 386-87. See Voting Rights Act, 42 U.S.C. § 1973 (1982), which provides that a state or political subdivision cannot deny, on account of race or color, a citizen's right to vote. Such a denial occurs when certain classes have less opportunity than other citizens to elect representatives of their choice. Id.}

\footnotesize{\textsuperscript{215} 640 F.2d 777 (5th Cir. 1981). The district court originally found that, although the evidence showed discriminatory effect from the application of the at large system, the responsiveness of the city to minority needs along with other factors supported a holding in favor of the city. The Fifth Circuit originally remanded the case to the district court for reconsideration in light of the Supreme Court's opinion in Mobile v. Bolden, 446 U.S. 55 (1980), which reversed the Fifth Circuit and held that a denial of access to the political process claim brought by a minority required a showing of an intent to discriminate. Id. at 66-71. This holding repudiated the previous view of the Fifth Circuit that objective indicia could be used to show intentional voting dilution. See Nevette v. Sides, 571 F.2d 209, 217-29 (5th Cir. 1978). The Fifth Circuit withdrew its original mandate pending the outcome of another voting dilution case, Rogers v. Lodge, 458 U.S. 613 (1982).}

\footnotesize{\textsuperscript{216} 458 U.S. 613 (1982). In Rogers the Supreme Court upheld the requirement that voting dilution claims required a showing of intent, but concluded that intent could be shown by objective indicia of discrimination. Id. at 622-27.}

\footnotesize{\textsuperscript{217} While the district court was reconsidering the Jones case on remand from the Fifth Circuit, Congress amended the Voting Rights Act to overrule the Supreme Court's holding in Mobile v. Bolden, 446 U.S. 55 (1980), and to provide expressly that objective indicia of discrimination can be used to establish a violation of the Voting Rights Act.}

\footnotesize{\textsuperscript{218} 727 F.2d at 369 (citing Mobile v. Bolden, 446 U.S. 55 (1980)); see also Personnel Admin. v. Feeney, 442 U.S. 256, 275-76 (1979) (disproportionate impact of civil service exam requirement will not support equal protection claim without showing of discriminatory motive); Washington v. Davis, 426 U.S. 229, 246 (1976) (discriminatory result of language test insufficient to establish equal protection violation in absence of discriminatory motive); accord Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 (1977). The Fifth Circuit stated that the Supreme Court in Rogers v. Lodge, 458 U.S. 613 (1982), had expressly indicated that the issue of whether a violation of the fifteenth amendment requires the same showing of purposeful discrimination as a fourteenth amendment violation was un-
original commission enacting the city's at large system was the editor of a local paper that ran a series of vile racial slurs was too remote and tenuous to support the inference that the entire original commission was biased and, consequently, the original voting scheme was enacted with a discriminatory motive.219

With respect to the Voting Rights Act, the court initially held that the 1983 amendment was a legitimate exercise of congressional power and, thus, not unconstitutional.220 After tracing the history of case law interpreting the fourteenth and fifteenth amendments with respect to discrimination claims,221 the court rejected the appellant's claim that the 1983 amendment to the Voting Rights Act required an actual showing of subjective discriminatory motive to establish a violation of its provisions.222 The court concluded that the 1983 amendment clearly requires only a showing of discriminatory result to prove that a voting scheme violates the Voting Rights Act, but that a violation of the fifteenth amendment requires a showing of discriminatory motive.223 The Fifth Circuit affirmed the district court's decision as to the violation of the Voting Rights Act, but reversed the lower court insofar as the decision found the at large system violative of the fifteenth amendment.224

VI. OPEN RECORDS ACT AND OPEN MEETINGS ACT

Only one significant case interpreting the Texas Open Records Act225 was clear, but its opinion rested on the assumption that the standard for a violation of either amendment was purposeful discrimination. 727 F.2d at 370.

219. 727 F.2d at 371, 372.

220. Id. at 373-75. The court rejected a challenge that the standards set forth in the Voting Rights Act were unconstitutionally vague on the basis that the concept of a statute being void for vagueness applies only to the effect a statute has on conduct. Id. at 373; see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The court reasoned that the amendment did not have the effect of regulating conduct but only defining what acts would suffice to show a violation under the Voting Rights Act. 727 F.2d at 372-73. The court also rejected the contention that the amendment constituted an unconstitutional exercise of legislative power by interpreting the constitution, a function exclusively within the province of the judiciary. Id. at 374. The court held that the amendment could be justified on grounds that Congress was acting to enforce the provisions of the fourteenth and fifteenth amendments. Id. at 375; see City of Rome v. United States, 446 U.S. 173 (1980).

221. 727 F.2d at 376, 380. The court's discussion treats the case law in three distinct stages: (1) pre-Bolden law that required a showing of only discriminatory effect; (2) Bolden, which required a showing of discriminatory motive; and (3) the amendment to the Voting Rights Act, which overruled Bolden and reinstated the pre-Bolden status quo.

222. Id. at 375. The Court relied on the inclusion within the amendment of many of the objective factors listed in the Fifth Circuit opinion of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1974). In Zimmer the court held that objective criteria could be used to show intent to discriminate. Id. at 1305.

223. 727 F.2d at 375.

224. Id. at 387. The court left intact the district court's redistricting plan as a remedy for the city's Voting Rights Act violation. The district court had ordered that the city establish and implement a voting scheme whereby the voters would elect council members from six different districts. Id. at 386.

225. TEX. REV. CIV. STAT. ANN. art. 6252-17(a), §§ 1-15 (Vernon Supp. 1985). Section 3(a) of the Act provides that "[a]ll information collected, assembled, or maintained by governmental bodies" shall be available for public inspection unless expressly exempted for the coverage of the statute. Id. § 3(a).
decided during the survey period. In City of Houston v. Houston Chronicle Publishing Co., the appellant sought to compel the Houston police department, by writ of mandamus, to produce certain records pertaining to its operation of the local city jail. The city argued that a writ of mandamus was improper and premature because it had agreed to comply with the request, subject to its prior review and editing of exempted information under the Act. The city also contended that the action was premature because the city was awaiting a response from the office of the attorney general as to whether the requested information was subject to the applicable exemption under the Act.

The court rejected the city’s argument and held that mandamus was a proper remedy because the city was not entitled to request an opinion of the attorney general in this instance and the city’s offer to supply the information subject to edit and review failed to comply with the provisions of the Act. In support of its conclusion, the court found that the city failed to produce promptly the records or to designate a specific date and hour when the records would be made available, as required by section 4 of the Act. This failure amounted to a refusal to disclose public information that entitled the requesting party to seek a remedy of mandamus. Second, the city was not entitled to seek an opinion of the attorney general’s office as to the availability of an exemption for the requested information because it had already been found to be public information subject to disclosure in an earlier case. The court, therefore, modified the trial court’s judgment to ex-

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226. 673 S.W.2d 316 (Tex. App.—Houston [1st Dist.] 1984, no writ).
227. If a public governmental unit refuses to disclose information that is subject to disclosure under the Open Records Act, then a petition for writ of mandamus may be sought to compel disclosure of such information. Tex. Rev. Civ. Stat. Ann. art. 6252-17(a), § 8 (Vernon Supp. 1985).
228. The city argued that the portion of the material requested that related to an individual’s personal history and arrest record was exempt from disclosure under § 3(a)(8) of the Act, which pertains to information obtained and used in connection with the detection and investigation of a crime. See Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 184-85 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.). The city also argued that the requested information contained exempt material under § 3(a)(1) of the Act, which pertains to information deemed confidential by law.
229. Section 7 of the Act allows the governmental unit that receives a request for disclosure of public information to request an opinion of the attorney general of the state as to whether the information is subject to an exemption under the Act or must be disclosed as requested. Tex. Rev. Civ. Stat. Ann. art. 6252-17(a), § 7 (Vernon Supp. 1985). Section 3(a) of the Act provides eight categories of information that are excepted from disclosure. Id. § 3(a). The city argued that the requested information was exempt from disclosure under either § 3(a)(1) or (8) of the Act.
230. 673 S.W.2d at 318-19. The thrust of the city’s argument was that a § 8 writ of mandamus is predicated on a refusal to supply the requested information and the city had not refused the request but actually had agreed to supply subject to edit and review and the receipt of an opinion from the attorney general.
231. Id. at 319.
232. Id. Section 4 requires the custodian to produce the requested information promptly; if the requested information is not immediately available, the custodian must certify that fact and set a date and hour within a reasonable time from the request when the information will be made available. Tex. Rev. Civ. Stat. Ann. art. 6252-17(a), § 4 (Vernon Supp. 1985).
233. 673 S.W.2d at 319.
234. Id. at 318; see Tex. Att’y Gen. ORD-133 (1982). The court stated that a custodian is
clude only a portion of the information previously determined nondisclosable and otherwise affirmed the issuance of the writ of mandamus.\textsuperscript{235}

In \textit{Common Cause v. Metropolitan Transit Authority}\textsuperscript{236} the Houston court of appeals reversed a grant of summary judgment in favor of the appellee because the evidence raised a fact issue as to whether the provision of the Open Meetings Act that requires advance notice for all non-emergency meetings\textsuperscript{237} had been substantially complied with.\textsuperscript{238} The Texas Legislature's 1975 amendment to the Act required that the notice be posted for a seventy-two hour period in a place "readily accessible to the general public at all times."\textsuperscript{239} The court held that although appellee produced evidence that the notice had been posted for the statutory period, summary judgment was improper because the notice was not shown to have been posted in a readily accessible place as required by the Act.\textsuperscript{240}

\begin{itemize}
\item \textsuperscript{235} 673 S.W.2d at 318.
\item \textsuperscript{236} 666 S.W.2d at 318.
\item \textsuperscript{237} 666 S.W.2d at 612.
\item \textsuperscript{238} 666 S.W.2d at 612.
\item \textsuperscript{239} 666 S.W.2d at 612.
\item \textsuperscript{240} 666 S.W.2d at 612.
\end{itemize}
One of the more interesting Fifth Circuit decisions rendered during the survey period was *Affiliated Capital Corp. v. City of Houston*,241 in which the appellant alleged that the mayor of Houston and several successful applicants for cable television franchise permits had engaged in an unlawful conspiracy in violation of the Sherman Antitrust Act.242 The mayor and the City of Houston allowed the major cable operators to carve up the local territory and present to the city a franchise distribution plan already agreed to among themselves, rather than to submit to a competitive bidding process.243 A report prepared by a neutral third-party cable consultant criticized the city's method of allowing the competitors amicably to divide up the local market and recommended the rejection of three of the five successful applicants. Affiliated submitted its bid to the city shortly after the local market had been divided between the successful applicants and was told by the city council to work something out with the already successful applicants. When the appellant could not reach agreement with the successful applicants, it filed suit in district court alleging an unlawful conspiracy in unreasonable restraint of trade.

Although the jury found that the mayor, the city, and one of the successful applicants had engaged in a conspiracy in unreasonable restraint of trade and such conspiracy caused injury to the plaintiff, the district court granted judgment notwithstanding the verdict in favor of the defendants on the basis of the jury's finding that the private agreements to divide the local market did not constitute an unlawful conspiracy.244 The court of appeals initially held that the granting of the judgment n.o.v. was improper because the evidence presented in favor of the defendants was not so overwhelming that reasonable men could not arrive at the verdict reached by the jury.245 The court found that the appellant had presented substantial circumstantial evidence from which a reasonable inference could be drawn to support the jury's findings that the conspiracy between the mayor, the city, and one of the successful applicants was the proximate cause of appellant's failure to be awarded a franchise and, therefore, judgment n.o.v. was improper as to

241. 735 F.2d 1555 (5th Cir. 1984).
242. 15 U.S.C. § 1 (1982). The Act states that "[e]very contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Id.
243. The court emphasized that the applicants were not selected on the merit of their proposals, but the political strength of the businessmen backing them. 735 F.2d at 1557.
244. 519 F. Supp. 991, 997-98 (E.D. Tex. 1981). The trial judge apparently reasoned that plaintiff's injury was solely attributable to the boundary line agreements made between the various applicants and not the conspiracy entered into between the mayor, the city, and the successful applicants. Id. at 1009.
245. 735 F.2d at 1563; see Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (when facts and inferences point so strongly in favor of one party that reasonable men could not arrive at a contrary verdict, judgment n.o.v. is proper; if substantial evidence is contrary to motion for judgment n.o.v. such that reasonable men in the exercise of impartial judgment might reach different conclusions, the motion should be denied); accord Bazile v. Bisso Marine Co., 606 F.2d 101, 104 (5th Cir. 1979), cert. denied, 449 U.S. 829 (1980).
The court also determined that the Noerr-Pennington Doctrine, providing an exemption from the antitrust liability when the alleged conspiracy is the result of a private citizen’s genuine good faith attempt to influence government, was inapplicable to the instant case. The Noerr-Pennington Doctrine embodies the concept that private citizens may petition government in support of their own interests. Such petitioning in itself may result in an elimination of competition from the market place, but the doctrine is inapplicable when the public official being petitioned is found to be a part of the conspiracy. The court determined that although the mayor, the city, and one of the successful applicants had engaged in a conspiracy in unreasonable restraint of trade that caused the appellant injury, the mayor was entitled to qualified immunity under the standard established by the United States Supreme Court in *Harlow v. Fitzgerald.* The Fifth Circuit reasoned that because at the time of the conspiracy public officials were not necessarily held liable for antitrust violations when they allowed noncompetitive franchising to take place, the mayor could not be liable for damages as a result of such conduct. The court reversed the judgment n.o.v. with directions that the district court enter judgment only against the applicant that was a co-conspirator.

In *Cortez v. State Bar of Texas* the trial court granted the State Bar’s motion for judgment notwithstanding the verdict and permanently enjoined Cortez from engaging in acts and practices constituting the unauthorized practice of law. In a case of first impression in Texas, the trial court concluded that Cortez’s actions in assisting immigrants to obtain permanent residency within the United States constituted the unauthorized practice of law as a matter of law and, therefore, judgment n.o.v. was appropriate. The

246. 735 F.2d at 1564-65. The court reasoned that "[t]he exclusive nature of the conspiracy itself and Affiliated's failure to obtain a franchise is circumstantial evidence from which the jury could infer that the conspiracy operated to exclude Affiliated, a non-conspirator who was very likely to have received a franchise through competition on the merits." *Id.* at 1564; see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 118 (1969) (trial judge may properly infer damages from circumstantial evidence in antitrust conspiracy); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962) (jury may properly infer the necessary causal connection between antitrust violations and plaintiff's injury).


248. 735 F.2d at 1566.


250. 735 F.2d at 1566.

251. *Id.* at 1568-69.

252. 457 U.S. 800 (1982). In *Harlow* the court stated that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would be aware of. *Id.* at 814-15.

253. 735 F.2d at 1569-70.

254. *Id.* at 1570.

255. 674 S.W.2d 803 (Tex. App.—Dallas 1984, writ granted).

256. *TEX. REV. CIV. STAT. ANN.* art. 320a-1 (Vernon Supp. 1985) provides that the state bar association of Texas may seek an injunction preventing persons or entities from engaging in the unauthorized practice of law.
testimony at trial revealed that Cortez’s assistance was limited to advising immigrants as to which set of forms to fill out to obtain a preferential status in the consideration for permanent residency within the United States.

The court of appeals determined that the critical issue was whether the determination of what acts and practices constituted the unauthorized practice of law was a question of fact within the province of the jury or a question of law to be answered by the court. The court of appeals concluded that because the undisputed evidence in the case was insufficient to permit a holding as a matter of law that Cortez’s acts amounted to the unauthorized practice of law, the question was properly one for the jury. The court also rejected the appellee’s contention that under article 320(a)(1), section 19(a), the judge must determine as a matter of law whether the acts in a particular case constitute the unauthorized practice of law. The court interpreted the reference in the cited statute to the “judicial branch” having the authority to determine what constitutes the practice of law as applying to both judge and jury. The court held that the facts of the particular case prevented a finding as a matter of law and dissolved the permanent injunction.

In Hawthorne v. La-Man Constructors, Inc. La-Man sought a writ of mandamus ordering the Port Arthur Housing Authority to raise revenues to satisfy a $135,000 judgment that La-Man had obtained against the housing authority in June 1980. Concluding that the authority was under a clear duty to satisfy the judgment after it became final, the court reasoned that the

257. In Davies v. State Bar of Texas, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref’d n.r.e.), the court stated that: The practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court, and includes the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined. Id. at 593; see also TEX. REV. CIV. STAT. ANN. art. 320a-1, § 19(a) (Vernon Supp. 1985) (defining the practice of law).

258. 674 S.W.2d at 806.

259. Id. Although the court held that in the instant case the determination of what constitutes the unauthorized practice of law was a question for the jury, it stated that “[w]e do not hold that there may never be a case in which the undisputed evidence shows as a matter of law that a person was engaged in the practice of law”. Id. at 807.

260. TEX. REV. CIV. STAT. ANN. art. 320a-1, § 19(a) (Vernon. Supp. 1985). This section uses the definition in Davies v. State Bar of Texas for setting forth what acts constitute the unauthorized practice of law. See supra note 257. The statute further provides that “[t]his definition is not exclusive and does not deprive the judicial branch of the power and authority both under this Act and the adjudicated cases to determine whether other services and acts not enumerated in this Act may constitute the practice of law.” TEX. REV. CIV. STAT. ANN. art. 320a-1, § 19(a) (Vernon Supp. 1985).

261. 674 S.W.2d at 806.

262. Id.

263. Id. at 808.

264. 672 S.W.2d 255 (Tex. App.—Beaumont 1984, no writ).

265. The three requisite elements of mandamus relief are: (1) a legal duty to perform a non-discretionary act; (2) a demand for performance of the non-discretionary act; and (3) a refusal to perform the non-discretionary act after demand. Stoner v. Massey, 586 S.W.2d 843 (Tex. 1979); Bantuelle v. Renfroe, 620 S.W.2d 635 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.).
remedy of mandamus or the appointment of a receiver were the only remedies available to La-Man to collect its judgment.\textsuperscript{266} Although mandamus is generally an improper remedy when the action sought to be compelled is within the discretion of a public official, the court found that an exception to this general rule was applicable here, since the housing authority had abused its discretion in failing to pay the outstanding judgment and La-Man had no other adequate remedy at law.\textsuperscript{267} The court also found that the trial court's order to raise revenues for purposes of satisfying the judgment\textsuperscript{268} was clear enough to support a motion for contempt if the housing authority failed to comply.\textsuperscript{269}

Several Texas retail merchants sued the state in \textit{State v. Revco D.S., Inc.},\textsuperscript{270} challenging the constitutionality of the state's "Blue Law,"\textsuperscript{271} which prevents certain merchants from opening for business on consecutive Saturdays and Sundays and selling certain merchandise on specified dates.\textsuperscript{272} The Dallas court of appeals reversed a grant of summary judgment in favor of the retail merchants and remanded the cause for trial.\textsuperscript{273} The court found that an expert's affidavit stating the negative effects of the Blue Law was insufficient to meet the plaintiff's burden of establishing the unconstitutionality of the statute as a matter of law, because the affidavit did not show "that there is no reasonable relation between the law and the health, recreation, and welfare of the people of the state."\textsuperscript{274}

In \textit{Otten v. Town of China Grove}\textsuperscript{275} the trial court granted an injunction prohibiting the operation of a horse-racing enterprise on appellant's private property. China Grove argued that the injunction was proper because the operation of the track constituted a public nuisance in violation of a town ordinance prohibiting the racing of vehicles or animals and a state statute declaring habitual gambling resorts a common nuisance.\textsuperscript{276} The court held

\begin{itemize}
\item\textsuperscript{266} 672 S.W.2d at 258. A public corporation of the nature of the Port Arthur Housing Authority is exempt from execution to satisfy a judgment rendered against it. \textit{Id.}
\item\textsuperscript{267} \textit{Id.} at 259; see \textit{Hereford v. Farrar}, 469 S.W.2d 16 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.) (mandamus appropriate to require performance of discretionary act when abuse of discretion not to perform and petitioner has no adequate remedy at law).
\item\textsuperscript{268} The court mentioned that the Authority could raise revenues through the issuance and sale of bonds pursuant to \textbf{TEX. REV. CIV. STAT. ANN. art. 1269K (Vernon 1963)}. 672 S.W.2d at 251-62.
\item\textsuperscript{269} 672 S.W.2d at 259; see \textit{Ex parte Brooks}, 604 S.W.2d 463 (Tex. Civ. App.—Tyler 1980, no writ) (contempt order appropriate for disobeying court decree that is clear, specific, and unambiguous).
\item\textsuperscript{270} 675 S.W.2d 219 (Tex. App.—Dallas 1984, no writ).
\item\textsuperscript{271} \textbf{TEX. REV. CIV. STAT. ANN. art. 9001 (Vernon Supp. 1985)}.
\item\textsuperscript{272} \textit{Id.}
\item\textsuperscript{273} 675 S.W.2d at 221. \textit{But see Gibson Distrib. Co. v. Downtown Dev. Ass'n of El Paso, Inc.}, 572 S.W.2d 334 (Tex.), \textit{appeal dismissed}, 439 U.S. 1000 (1978) (constitutionality of Texas Blue Law upheld).
\item\textsuperscript{274} 675 S.W.2d at 221; \textit{see also State v. Spartan's Indus., Inc.}, 447 S.W.2d 407, 414 (Tex. 1969) (stating that court will declare statute unconstitutional only when it is clearly not within the police power), \textit{appeal dismissed}, 397 U.S. 590 (1970).
\item\textsuperscript{275} 660 S.W.2d 565 (Tex. App.—San Antonio 1983, writ dism'd).
\item\textsuperscript{276} \textbf{TEX. REV. CIV. STAT. ANN. art. 4664 (Vernon Supp. 1985)} provides that any facility at which the public shall "commonly resort . . . or where persons habitually resort for the purpose of prostitution or to gamble . . . is hereby declared to be a common nuisance." \textit{Id}.}
\end{itemize}
that because the legislature had never declared horse racing to be a nuisance per se, the ordinance was void.\textsuperscript{277} Although evidence was presented at trial establishing the presence of gambling on the appellant's premises, the court held that such evidence was insufficient to establish that the property was used habitually for gambling and, therefore, the injunction was improper.\textsuperscript{278}

In \textit{Safe Water Foundation of Texas v. City of Houston}\textsuperscript{279} the Houston court of appeals held that appellant's failure to overcome the presumed validity of an ordinance providing for the injection of fluoridation into the city water supply precluded injunctive relief prohibiting application of the ordinance.\textsuperscript{280} The court found that the city council had the duty to pass such laws and ordinances as are in furtherance of the public health, safety, and welfare.\textsuperscript{281} The trial court's denial of injunctive relief was upheld because the evidence did not indicate that the city had abused its discretion and acted arbitrarily, unreasonably, and capriciously in exercising its police power to enact the ordinance.\textsuperscript{282}

\textsuperscript{277} 660 S.W.2d at 567. Although TEX. REV. CIV. STAT. ANN. art. 1015, §§ 11, 28 (Vernon 1963) vest municipalities with the power to abate all nuisances affecting the public health and "[t]o prevent, prohibit and suppress horse racing . . . in the streets," the court did not find a statute that defines horse racing as a nuisance. 660 S.W.2d at 567; see Crossman v. City of Galveston, 112 Tex. 303, 247 S.W.810 (Tex. 1923) (absent legislative sanction, city is without authority to declare a nuisance that is not a nuisance either per se or at common law); Sitterle v. Victoria, 33 S.W.2d 546 (Tex. Civ. App.—San Antonio 1930, writ dism'd) (municipal ordinance that declares and denounces a nuisance that is not such per se or at common law is invalid).

\textsuperscript{278} 660 S.W.2d at 568-69. The court held that evidence of occasion acts of gambling was insufficient to show habitual use as defined in article 4667. See Lara v. State, 153 Tex. Crim. 84, 85, 217 S.W.2d 853, 854 (1949) (two acts of intercourse with another man's wife insufficient to show habitual intercourse necessary to sustain adultery conviction).

\textsuperscript{279} 661 S.W.2d 190 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

\textsuperscript{280} \textit{Id.} at 192. Local ordinance cases are presumed valid unless the passing of an ordinance is shown to be an arbitrary and unreasonable exercise of police power and, therefore, an abuse of discretion. Town of Ascarte v. Villalobos, 148 Tex. 254, 223 S.W.2d 945 (1949); City of Clute v. Linscomb, 446 S.W.2d 377 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

\textsuperscript{281} 661 S.W.2d at 192. TEX. CONST. art. XI, § 5 vests municipalities with authority to enact laws and ordinances that are in furtherance of the public health, safety, and welfare.

\textsuperscript{282} 661 S.W.2d at 192. The court rejected the city's cross point that the appellants lacked standing to maintain the action and held that the appellants had standing on the basis that they were paying residents and consumers of the City of Houston's water supply. \textit{Id.} at 193; see Texas Indus. Traffic League v. Railroad Comm'n, 628 S.W.2d 187 (Tex. App.—Austin), rev'd on other grounds, 633 S.W.2d 821 (Tex. 1982), in which Justice Powers gave an excellent review of the background and present status of the law of standing in Texas.