APPEALS INVOLVING THE GOVERNMENT

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INTRODUCTION

Appeals involving governmental entities are unique. The purpose of this paper is to highlight some of the issues that are peculiar to appeals involving governmental entities by reviewing the procedural differences and by analyzing recent and pending Texas Supreme Court cases involving governmental entities.

PART 1: PROCEDURAL ISSUES UNIQUE TO APPEALS INVOLVING A GOVERNMENTAL ENTITY.

There are two primary procedural issues that are specific to appeals involving a governmental entity: 1) suspending the enforcement of judgments and interlocutory orders, and 2) in certain cases involving governmental entities, administrative direct appeals that allow parties to bypass a district court determination and proceed directly to the court of appeals.

I. SUPERSEDEAS ISSUES WHEN A GOVERNMENTAL ENTITY IS A PARTY[1]

A. General rules

A judgment is not suspended by the filing of a notice of appeal and enforcement may proceed unless the procedures for superseding in Rule 24 are followed or the appellant is entitled to suspend enforcement without posting security by filing a notice of appeal. TEX. R. APP. P. 25.1(g). Similarly, for interlocutory appeals, perfecting an appeal of an order granting interlocutory relief does not suspend enforcement of the order unless the appellant supersedes the order or the appellant may supersede without security by filing a notice of appeal. TEX. R. APP. P. 29.1.

Governmental entities can supersede a judgment or appealable interlocutory order against it by filing a notice of appeal, without filing a bond. TEX. CIV. PRAC. & REM. CODE ANN. §§6.001-003 (West 2002)[2]; *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 485 (Tex. 1964); *In re Tarrant County*, 16 S.W.3d 914, 918 (Tex. App.—Fort Worth 2000) (orig. proceeding); *State ex rel. State Highway & Pub. Transp. Comm'n v. Schless*, 815 S.W.3d 373, 375 (Tex. App.—Austin 1991) (orig. proceeding).

For a judgment or an interlocutory order in favor of a governmental entity, the opposing party may suspend enforcement of the judgment without security. TEX. R. APP. P. 24.2(a)(5). In addition, with a judgment or interlocutory order against a governmental entity, in certain situations, the opposing party may request that suspension of enforcement be denied. *Id.* Rule 24.2(a)(3). While Rule 24.2(a)(3) is not limited to governmental entities, because litigation with governmental entities often seeks to control government action, its application is particularly relevant to appeals involving the government.

B. Final judgments

1. Judgments in favor of a governmental entity

When a governmental entity obtains a favorable judgment in its governmental capacity, and if the entity has no pecuniary interest in the judgment, an appellant may request that the trial court in its discretion allow it to suspend the judgment, with or without security, during the appeal. TEX. R. APP. P. 24.2(a)(5); *see In re South Texas College of Law*, 4 S.W.3d 219, 220 (Tex. 1999)(orig. proceeding) (Hecht, J. dissenting opinion from denial of petition for writ of mandamus) (Rule 24.2(a)(5) gives trial court discretion to consider public's interest in enforcing a judgment pending appeal and appellant's interest in suspending enforcement.) If the government has a pecuniary interest, security is limited to the governmental entity's actual damages that result from the judgment being suspended. TEX. R. APP. P. 24.2(a)(5).

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[1] This discussion is intended to highlight only the supersedeas issues when a governmental entity is a party. For a complete discussion and analysis of supersedeas issues *see* Elaine A. Carlson, *Reshuffling the Deck: Enforcing & Superseding Civil Judgments on Appeal After HB4*, 18th Annual Advanced Civil Appellate Practice Course (State Bar of Texas 2004).

[2] Sections 6.001-.003 identify many governmental entities that can supersede a judgment or order by filing a notice of appeal without filing a bond. TEX. CIV. PRAC. & REM. CODE ANN. §§6.001-003 (West 2002) (state, department of the state, heads of departments of the state, counties, incorporated cities or towns, municipalities, various types of water districts and drainage districts). In addition, several federal entities are also exempt from filing a supersedeas bond: Federal Housing Administration, Federal National Mortgage Association, Government National Mortgage Association, the Veterans' Administration and the administrator of veteran's affairs, any national mortgage s&l and the FDIC when acting as a receiver. *Id*. §6.001(b)(5-11) (West 2002).

Other statutory provisions give various governmental entities the right to suspend the enforcement of a judgment without posting bond. *See* TEX. TAX CODE ANN. §42.28 (Tex. 2001) (appeal bond not required for appraisal districts' chief appraisers, county, comptroller or commissioners court); §33.49(a) (West 2001) (taxing units not required to post security for costs in suits to collect delinquent tax); TEX. CIV. PRAC. & REM. CODE ANN. §102.005 (West 2005) (local governments sued under TTCA not required to post security or give bond on appeal); TEX. TRANSP. CODE ANN. §452.054(b) (West 1999) (regional transportation authority not required to file cost bond).

An appellant's motion to suspend the judgment without security should track the requirements in Rule 24.2(a)(5) and allege that: (1) the government has no pecuniary interest in the judgment; (2) appellant will be harmed if enforcement of the judgment is not suspended; and (3) that there is no harm to the governmental entity if enforcement of the judgment is suspended.

If dissatisfied with the trial court's ruling on its Rule 24.2(a)(5) motion, an appellant should file a motion with the court of appeals to review the trial court's order. TEX. R. APP. P. 24.4(a); *see City of Fort Worth v. Johnson*, 71 S.W.3d 470, 471 (Tex. App.—Fort Worth 2002, no pet.) (complaint regarding trial court's ruling on a Rule 24.2(a)(3) motion is to file motion with the court of appeals under Rule 24.4.). A trial court's ruling on a Rule 24.2(a)(5) motion is reviewed for abuse of discretion. *See Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996) (orig. proceeding).

An appellant may also seek temporary orders from the court of appeals as necessary to preserve the parties' rights. TEX. R. APP. P. 24.4 (c). The court of appeals must act on a motion made under Rule 24.4 at the earliest possible time. TEX. R. APP. P. 24.4(d). The court of appeals can require additional security and may require "other changes in the trial court order." *Id.* 24.4(d). The appellate court may also remand to the trial court with instructions to enter findings of fact or to consider evidence. *Id.* The court of appeals may suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. *Id.*

For example, if a city obtained a permanent injunction against the operation of an adult theater in a particular location based on a city ordinance, the owner could request the trial court to exercise its discretion and allow it to suspend enforcement of the judgment without security. *Id.* Rule 24.2(a)(5). The owner would argue that to deny suspension of the judgment would cause significant harm because it would force its business to close pending an appellate determination. If necessary, the business owner could then request that the court of appeals issue a temporary order to preserve the parties' rights pending appeal. *Id.* Rule 24.4(c).

2. Judgments against a governmental entity

a. Money judgments against a governmental entity

With a monetary judgment, a governmental entity's notice of appeal suspends enforcement of the judgment. A judgment creditor cannot execute on the judgment and has no ability to enforce the judgment against a governmental entity. *City of Victoria v. C.M. Hoffman*, 809 S.W.2d 603, 604 (Tex. App.—Corpus Christi 1991, writ denied).

b. Non-monetary judgments against a governmental entity

With a non-monetary judgment against a governmental entity, that is, one that controls a governmental entity's conduct by enjoining an action or ordering an action, a governmental entity's notice of appeal suspends enforcement of the judgment. TEX. R. APP. P. 25.1(g)(2); *City of Fort Worth v. Johnson*, 71 S.W.3d at 473. The appellant, however, can request that suspension be denied.

When the governmental entity's notice of appeal operates to suspend enforcement of a judgment, the trial court has discretion to deny the suspension if the judgment creditor posts security. TEX. R. APP. P. 24.2(a)(3). The trial court has discretion to suspend enforcement by ordering the judgment creditor to post security that will secure the judgment debtor (governmental entity) against any loss or damage caused by the relief granted to the judgment creditor if it is finally determined that that relief was improper. *Id.*; *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998) (interpreting predecessor to Rule 24.2(a)(3), Court concluded that real parties in interest could have avoided supersedeas by posting security protecting relator from damage caused by erroneous ruling); *In re Long*, 984 S.W.2d 623, 626 (Tex. 1999)(orig. proceeding) (party could have requested trial court to deny suspension of judgment); *Schless*, 815 S.W.2d at 375 (interpreting predecessor to Rule 24.2(a)(3) and concluding that trial court has discretion to suspend judgment that does not involve money or property).

If seeking to avoid suspension of a non-monetary judgment against a governmental entity, an appellee should file a motion with the trial court requesting that the trial court set a security amount for the appellee/judgment creditor and then post the required security. TEX. R. APP. P. 24.2(a)(3). If an appellee is not satisfied with the trial court's ruling on its Rule 24.2(a)(3) motion, an appellee should file a motion pursuant to Rule 24.4, as described above under I.B.1. *City of Fort Worth*, 71 S.W.3d at 471.

For example, in *City of Fort Worth v. Johnson*, the trial court granted Johnson a final judgment ordering the City to reinstate him. 71 S.W.3d at 471. The City contended its notice of appeal suspended enforcement of the judgment and refused to allow Johnson to return to work. Johnson argued that the City had no right to supersede a non-monetary judgment.

The court of appeals concluded that the trial court had no discretion to deny enforcement of suspension of the judgment when no bond was required. *Id.* at 473. As allowed in §6.002(b) of the Civil Practice and Remedies Code, a city may appeal without giving bond (West 2002). *Id.* at 472. Thus, the City's notice of appeal automatically suspended enforcement of the judgment. *Id.*

The court of appeals specifically noted that it was *not* addressing the issue of a trial court's discretion to suspend enforcement if the trial court had set security and Johnson had posted the security. *Id.*; TEX. R. APP. P. 24.2(a)(3). An appellee with a non-monetary judgment against a governmental entity may request that the trial court exercise its discretion to deny supersedeas by allowing the judgment creditor to post security. *Id.* at 472, n.2; *In re Dallas Area Rapid Transit*, 967 S.W.2d at 360; *Schless*, 815 S.W.2d at 375. And, if necessary, seek appellate review under Rule 24.4.

C. Appealable interlocutory orders

Suits involving governmental entities are often subject to interlocutory appeals. Section 51.014 provides that the following interlocutory orders involving governmental entities may be appealed: orders that deny a motion for summary judgment that is based on immunity by an individual who is an officer or employee of the state or a political subdivision of the state, and orders that grant or deny a plea to the jurisdiction filed by a governmental entity as defined in §101.001. TEX CIV. PRAC. & REM CODE §51.014(a)(5), (8) (West Supp. 2004).[3]

1. Interlocutory orders in favor of a governmental entity

With an appealable interlocutory order in the government's favor, an appellant may request that enforcement be suspended pending appeal. TEX. R. APP. P. 29.2 and 24.2(2)(5). If the trial court refuses to allow the suspension, the appellant may request appellate review. *Id.* Rule 29.2.

After an appeal is perfected, a party may request the court of appeals to issue temporary orders to preserve the parties' rights pending disposition of the appeal. TEX. R. APP. P. 29.3; *Monsanto Co. v. Davis*, 110 S.W.3d 28, 29 (Tex. App.—Waco 2002, no pet.) (interlocutory appeal of denial of motion for protective order, appellate court ordered document sealed during pendency of appeal); *In re Autonation, Inc.*, No. 14-05-00362-CV, 2005 WL 914182 (Tex. App.—Houston [14th Dist.] April 15, 2005) (orig. proceeding) (not designated for publication) (recognizing Rule 29.3 authorizes appellate court to stay trial pending disposition of an interlocutory appeal); *Dahl v. City of Houston*, No. 14-03-00122-CV, 2003 WL 1832260 (Tex. App.—Houston [14th Dist.] April 10, 2003, no pet.) (not designated for publication) (court stayed temporary injunction that ordered appellant to stop business operation and remove equipment).

An appellant seeking temporary relief under Rule 29.3 must file a motion that clearly shows entitlement to relief. *Lamar Builders, Inc. v. Guardian Savs. & Loan Ass'n*, 786 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1990, no writ). The motion must provide all verified facts and evidence necessary to support the relief requested and include a sworn copy of the order of which complaint is made. *Id.*

If the court of appeals issues a temporary order during the pendency of an interlocutory appeal, only the court of appeals may enforce the trial court's order. TEX. R. APP. P. 29.4; *In re Sheshtawy*, 154 S.W.3d 114, 121 (Tex. 2004)(orig. proceeding). The court of appeals may refer any enforcement proceeding to the trial court to hear evidence, making findings and a recommendation to the court of appeals. TEX R. APP. P. 29.4.

While an interlocutory appeal is pending, the trial court retains jurisdiction and may make further orders, including dissolving the order subject of the interlocutory appeal. TEX. R. APP. P. 29.5. However, the trial court must not make any orders inconsistent with a temporary order issued by the court of appeals or that interfere with the court of appeals' jurisdiction or the relief sought or that may be granted on appeal. *Id.*; *McAllen Medical Center, Inc. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001) (trial court could not sever party out of the case in which interlocutory appeal was pending).

For example, if a city obtained a temporary injunction closing an adult theater based on a city ordinance and the owner filed an interlocutory appeal, the owner could request the trial court to suspend enforcement of the order pending consideration of the interlocutory appeal. TEX. R. APP. P. 29.2; 24.2(a)(5); *see supra* I.B.1 discussion of Rule 24.2(a)(5). The trial court's order can be reviewed by the court of appeals. TEX. R. APP. P. 29.2. In addition, once the appeal has been perfected, the owner could request the court of appeals to issue temporary orders to preserve the parties' rights. *Id.* Rule 29.3.

2. Interlocutory orders against a governmental entity

While a notice of appeal filed by a governmental entity from an appealable interlocutory order suspends enforcement, an appellee may request temporary relief

[3] Section 51.014 also provides that for both of these governmental entity-related interlocutory appeals, commencement of trial and all other proceedings are stayed pending consideration of an appeal. *Id.* §51.014(b) (West Supp. 2004). However, the automatic stay applies so long as the motion or plea to the jurisdiction was filed and set for submission or hearing not later than the later of: a scheduling order deadline for filing such motion or the 180th day after the date the defendant files its original answer, the first other responsive pleading to plaintiff's petition or if the plaintiff raises in an amended pleading a new cause of action to which a defendant can raise a defense under (a)(5) or (8), the date the responsive pleading is filed that raises that defense. *Id.* §51.014(c).

to preserve the parties' rights. TEX. R. APP. P. 29.1(b); 29.3.

In *City of Dallas v. North by West Entertainment, Ltd.*, the trial court granted a temporary injunction enjoining the City of Dallas from preventing North by West from operating a sexually-oriented business. 24 S.W.3d 917, 918 (Tex. App.—Dallas 2000, no pet.). The City filed an interlocutory appeal. *Id.*; TEX. CIV. PRAC. & REM. CODE §51.014(a)(4). The trial court granted North by West's motion to deny suspension of the temporary order. The City filed an emergency motion in the court of appeals to stay and vacate the trial court' order.

Relying on Rule 29, the court of appeals granted the City's request for emergency relief and ordered the trial court to vacate its order denying suspension of enforcement of the temporary injunction. *City of Dallas*, 24 S.W.3d at 919. According to the court of appeals, the city could supersede the order by filing a notice of appeal without filing security. *Id.*; TEX CIV. PRAC. & REM. CODE §6.002. The court rejected North by West's argument that Rule 24.2 granted the trial court discretion to deny the city's ability to suspend enforcement. The court reasoned that Rule 24 is a general rule applicable to final judgments, where Rule 29 applies to interlocutory orders. 24 S.W.3d at 919.

After an appeal has been perfected, an appellee in North by West's position could have requested temporary orders from the appellate court under Rule 29.3 to preserve the parties' right pending disposition of the appeal. Without a temporary order from the court of appeals, the governmental entity obtains the remedy—preventing a business from obtaining a license—that the trial court specifically denied, simply by filing a notice of appeal. An appellee in North by West's position would argue that its rights were not protected if suspension were permitted.

D. Injunctive relief from the court of appeals

It may be necessary to request injunctive relief in the court of appeals to protect the court of appeals' jurisdiction when supersedeas is not available. *See* TEX. GOV'T CODE ANN. §22.221(a); *In re Health Discovery Corp.*, 148 S.W.3d 163, 164 (Tex. App.—Waco 2004) (orig. proceeding); *EMW Manufacturing Co. v. Lemons*, 724 S.W.2d 425, 426 (Tex. App.—Fort Worth 1987) (orig. proceeding). This is relevant in appeals involving governmental entities when a governmental entity is ordered to act or refrain from acting and the entity stays the judgment by filing a notice of appeal.

A party seeking injunctive relief from the court of appeals would file a notice of appeal and an original proceeding seeking injunctive relief. The party must show there is no other available remedy, that is, there is no ability to supersede the judgment, and the court of appeals' jurisdiction must be protected. An appellate court cannot issue an injunction simply to preserve the status quo or to prevent loss or damage to a party during the appeal. *In re Gruebel*, 153 S.W.3d 686, 689 (Tex. App.—Tyler 2005) (orig. proceeding).

For example, in *In re Health Discovery*, the trial court denied relator's request for a temporary injunction to enjoin respondents from selling shares of relator corporation. Relator then sought the same injunctive relief from the court of appeals pending the court of appeals' determination of its interlocutory appeal of the trial court's order. 148 S.W.3d at 164. The court of appeals acknowledged the limits on its injunctive powers, however, recognized that an injunction could issue to preserve its jurisdiction and to preserve the subject matter of the appeal. *Id.* at 164-65. Relator alleged that the sale of its shares would destroy its ability to obtain effective relief in the trial court. *Id.* at 165. The court of appeals granted injunctive relief to preserve its jurisdiction and the subject matter of the pending interlocutory appeal while it decided the merits. *Id.*

II. ADMINISTRATIVE DIRECT APPEALS

Some cases involving the Public Utilities Commission and the Motor Vehicle Board may bypass a district court determination and originate in the court of appeals. For appeals brought pursuant to the Administrative Procedures Act, litigants may request the court of appeals to allow them to bypass the district court and proceed directly to the appellate court.

A. Public Utilities Regulatory Act

Cases involving the validity of competition rules are not filed in district court and must be filed in the Third Court of Appeals. Such cases "shall be commenced in the Court of Appeals for the Third Court of Appeals District and shall be limited to the commission's rulemaking record." TEX. UTIL. CODE ANN. §39.001(e) (West Supp. 2004). A district court has no jurisdiction over validity challenges. *City of Alvin v. Public Utility Comm'n*, 143 S.W.3d 872, 880 (Tex. App.—Austin 2004, no pet.). The court of appeals has no discretion to refuse to file a PUC direct appeal.

The PURA also contains its own appellate procedural provisions for cases filed in the court of appeals. TEX. UTIL. CODE ANN. §39.001(f) (West Supp. 2004) (rules of appellate procedure apply to the extent they are not inconsistent with §39.0001(f)). Specifically, the PURA contains deadlines for filing the notice of appeal and agency record, as well as its own briefing schedule. *Id.* §39.001(f) (notice of appeal due not later than fifteen days after the rule is published in the Texas Register; record due not later than thirty days after the commission is served with the notice of appeal; appellant's brief due 30 days after record is filed and appellees' 60 days after appellant's

brief is filed). The fifteen-day deadline in section 39.001(f) is mandatory and exclusive. *City of Alvin*, 143 S.W.3d at 880 (affirmed dismissal for failure to timely file in court of appeals). In addition, a direct appeal filed pursuant to section 39.001 is to be considered "as expeditiously as possible with lawful precedence over other matters." *Id.*

B. Occupational Code – Motor Vehicle Board

Parties appealing certain decisions of the Motor Vehicle Board may seek judicial review either in district court or in the court of appeals. Decisions by the Board brought under chapter 2301 [Sale or Lease of Motor Vehicles] can be filed directly in the Third Court of Appeals or in a Travis County district court and then removed to the Third Court of Appeals. TEX. OCC. CODE ANN. §2301.751(a), (b) (West 2004); *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd.*, 156 S.W.3d 91, 98 (Tex. App.—Austin 2004, pet. filed) (filed in district court and removed to Third Court of Appeals). Similar to the PURA, the option of bypassing the district court is not controlled by the court of appeals.

The statute provides little procedural guidance for cases filed directly in the court of appeals, other than stating that the proceeding is to be initiated as provided in chapter 2001 of the Government Code and that "[j]udicial review in the court of appeals . . . is governed by the applicable rules of appellate procedure." *Id.* §2301.751(c). Section 2001.176 of the Government Code sets out the procedures for filing a lawsuit for judicial review of agency decisions. TEX. GOV'T CODE ANN. §2001.176 (West 2000). The court of appeals is required to issue citation. *Id.*§ 2301.752(b) (West 2004). The appellate court may also remand to district court for additional evidence. *Id.* § 2301.753.

C. Administrative Procedures Act

The Administrative Procedures Act also contains two provisions that allow cases to proceed to the court of appeals without a district court judgment. However, unlike the PURA and Occupation Code relating to Motor Vehicle Board decisions, the APA's direct appeal provision is permissive.

The ability to file an administrative direct appeal under the APA is ultimately determined by the court of appeals. For judicial review of agency decisions filed in Travis County, a party or the district court may request transfer of the action to the Third Court of Appeals. TEX. GOV'T CODE ANN. §2001.176(c) (West 2000). The request for transfer is conditioned on the district court finding that "the public interest requires a prompt, authoritative determination of the legal issues in the case and the case would ordinarily be appealed." *Id.* The court of appeals may decline the transfer if it does not agree with the district court that the matter requires prompt, authoritative determination. *Id.*

The statute directs that the agency record and district court record shall be filed in the court of appeals. *Id.* If the case is transferred, the court of appeals may order the district court to conduct any necessary evidentiary hearings. *Id; see also* TEX. R. APP. P. 36.

The APA contains a virtually identical provision for seeking a transfer to the Third Court of Appeals for declaratory judgment actions brought pursuant to section 2001.038 (West 2000). *Id.* §2001.038(f). That provision allows the validity or applicability of an agency rule to be determined by declaratory judgment if the rule's application or threatened application "interferes with or impairs or threatens to interfere with or impair, a legal right or privilege of the plaintiff." *Id.* §2001.038(a).

D. Issues relating to direct administrative appeals

1. Additional Appellate Rules may be necessary for administrative direct appeals.

While the current statutory administrative direct appeals are limited to two agencies and cases brought under the APA, these appeals may become more prevalent. The legislature could expand administrative direct appeals to other agencies and/or remove the Third Court of Appeals' ability to decline an APA case transfer. Moreover, while APA, Occupations Code and PURA contemplate that an administrative direct appeal will be to the "Third Court of Appeals," local rules by the Third Court of Appeals will not address these issues. With the supreme court's ability to transfer for docket equalization, other courts of appeals may find administrative law cases on their dockets. *See* TEX. GOV'T CODE ANN. §73.001-.003 (West 2005).

For example, an appellate rule could address how the Third Court of Appeals makes a determination on whether to accept the direct appeal - en banc, by panel or a single justice. *See* TEX. R. APP. P. 10.4(a), (b). Also, should the parties be able to support their request for a transfer with briefs or oral argument? What if the Third Court of Appeals accepted a direct appeal, but the case is transferred for docket equalization. Could the transferee court reconsider the decision to accept the direct appeal? Should administrative direct appeals be exempted from docket equalization transfers?

Additional appellate rules could also apply to PURA, Motor Vehicle Board or other direct administrative appeals if expanded by the legislature. For PURA appeals involving competition rules, there are often numerous issues and parties, many of whom may have similar positions on certain issues. An appellate rule could require issue statements or

statements of position and require parties to file joint briefs, for example. For Motor Vehicle Board appeals, the statute is silent on the deadline for filing the administrative record.

2. Considerations in bypassing a district court judgment.

There are practical considerations in deciding whether to bypass a district court determination and proceed directly to the court of appeals. Obviously, a primary consideration for most clients is cost. Avoiding a district court proceeding should save a layer of expense. However, at least with a permissive appeal under the APA, there will be cost associated with attempting to persuade the district court and court of appeals to accept the transfer. And, given that the Third Court of Appeals has not been accepting many of these cases, is it worth the cost of trying to obtain a direct appeal?

Any cost savings should be balanced with the idea that many cases benefit by a district court determination. Going to the district court provides two bites at the apple. Having a district court hear the arguments and obtaining a trial judge's reaction will likely assist in culling arguments and allowing a better presentation at the court of appeals.

PART 2: RECENT SUPREME COURT OF TEXAS OPINIONS AND PENDING CASES INVOLVING GOVERNMENTAL ENTITIES.

I. ADMINISTRATIVE LAW

***Texas Dept. of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170 (Tex. 2004).**

The Court addressed two issues: whether the APA provides an independent right to judicial review and whether the APA provides a waiver of sovereign immunity.

After TDPRS revoked Mega Child Care's license, Mega Child sought judicial review. TDPRS filed a plea to the jurisdiction, arguing that no statutory provision allowed for judicial review. The trial court granted the plea to the jurisdiction, but the court of appeals reversed and remanded, finding that Mega Child Care had exhausted all administrative remedies and was entitled to judicial review under section 2001.171 of the Administrative Procedures Act. The supreme court affirmed.

Section 2001.171 provides that a person who has exhausted all administrative remedies and who is aggrieved by a final agency decision is entitled to judicial review. The Court held that section 2001.171 of the APA creates an independent right to judicial review when an agency-enabling statute neither specifically authorizes nor prohibits judicial review. In addition, because the Legislature has allowed judicial review under the APA, sovereign immunity has been waived for that purpose.

Justice Owen concurred. According to Justice Owen, Human Resources Code §42.072 provides a right to judicial review for a license revocation.

***In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004).**

The Court addressed two issues: can a trial court's interference with an agency's exclusive jurisdiction be corrected by mandamus and did the PUC have exclusive jurisdiction over a dispute between ratepayers and Entergy for Entergy's failure to comply with a merger agreement. The trial court denied Entergy's motion to dismiss for want of jurisdiction. The court of appeals denied mandamus. The supreme court reversed.

The Court concluded that mandamus review was warranted because if, as Entergy alleged, the PUC had exclusive jurisdiction, to allow the trial court to proceed would interfere with an important legislatively mandated function and purpose of the PUC. Moreover, the trial court's appropriation of agency authority would be a clear disruption of the "orderly processes of government." Finally, the Court recognized that the delay associated with appellate review imposed a hardship on Entergy.

On the exclusive jurisdiction issue, the PURA provides that the PUC has "exclusive original jurisdiction" over rates, operations and services and regulates all aspects of the utility business, even accounting practices of energy companies. According to the Court, the presence of a pervasive regulatory scheme indicates legislative intent for an administrative process to the exclusive remedy.

The Court's analysis goes beyond the PURA and statute's with "exclusive jurisdiction" language and provides guidance to questions of exclusive jurisdiction when a statutory provision does not have such specific language.

***Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351 (Tex. 2005).**

This case raises the issue of whether a school district can establish its own jurisdictional deadlines.

McCarty sued the District alleging that he was terminated in retaliation for filing a workers' compensation claim. Although McCarty failed to comply with the District's deadlines, the school board heard the merits of his grievance but denied it based on his failure to timely notify the board. The District filed a plea to the jurisdiction, arguing that because McCarty failed to comply with the District's policy regarding notifying it of a claim, he had not exhausted his administrative remedies. The trial court denied the

plea. The court of appeals affirmed, concluding that the District waived a complaint about exhaustion of administrative remedies by hearing the merits of McCarty's grievance. The supreme court reversed and dismissed.

According to the court, subject matter jurisdiction cannot be conferred by waiver. The board's decision to hear the merits of the grievance and reserve a ruling on timeliness did not amount to a waiver of compliance with the deadlines. McCarty failed to timely notify the board and thus the trial court was without jurisdiction.

Justice O'Neill dissented. According to Justice O'Neill, a non-statutory deadline cannot be a jurisdictional prerequisite for filing suit. Justice O'Neill concluded that the school district lacked authority either in the Labor Code or the Education Code to establish jurisdictional deadlines. Under the dissent's analysis, McCarty exhausted his administrative remedies and the district court had subject matter jurisdiction over his retaliatory discharge lawsuit.

***University of Texas Medical Branch v. Barrett*, 159 S.W.3d 631 (Tex. 2005).**

The issue in this case is what is the proper remedy if a public employee prematurely files a whistleblower lawsuit before the 60-day grievance period has expired. Dr. Barrett timely initiated the grievance procedure and also sued UTMB only 27 days after initiating the grievance process. UTMB filed plea to the jurisdiction alleging that the 60-day deadline in Government Code §554.006 is jurisdictional and that failure to wait the entire period deprive the court of jurisdiction. The trial court denied the plea and the court of appeals affirmed. The supreme court affirmed.

According to the supreme court, §554.006 does not require that the grievance procedures be exhausted before filing suit. The complainant must timely initiate a grievance. The Court did not decide the 60-day requirement is jurisdictional. The Court concluded that whether the statute is intended to be jurisdictional or to allow informal resolution before suit is filed, the statute's purpose is protected by abating the lawsuit, not dismissing, to allow the 60 days to run or until a final decision is rendered, whichever is first, as long as the grievance procedure was timely initiated. The Court disapproved of cases from the Waco, Houston First, Corpus Christi and San Antonio Courts of Appeals that had held the 60-day requirement was jurisdictional.

II. IMMUNITY

A. Texas Tort Claims Act

***Harris County v. Sykes*, 136 S.W.3d 635 (Tex. 2004).**

The Court addressed the issues of whether an order granting a plea to the jurisdiction should be with or without prejudice and whether a dismissal is a judgment for purposes of derivative immunity.

Former inmate and inmate's wife brought suit for injuries sustained by inmate while incarcerated, alleging that Harris County was negligent for failing to quarantine an inmate infected with tuberculosis. Borchers, the major of the Harris County jail, was later added. The trial court granted the County's plea to the jurisdiction, finding that the TTCA did not apply. The trial court also granted summary judgment for Borchers on grounds of derivative immunity. The court of appeals affirmed in part and reversed in part, finding that the County's immunity had not been waived but that the trial court could only dismiss the suit without prejudice pursuant to a plea to the jurisdiction. Thus, the trial court concluded that there was no final judgment that would entitle Borchers to derivative immunity. The supreme court modified and rendered judgment that Sykes take nothing.

The Court resolved a conflict among the courts of appeals on the issue of whether dismissal should be with or without prejudice. According to the Court, the dismissal should be with prejudice because a plaintiff should not be able to relitigate jurisdiction once that issue has been finally determined. Sykes had been given the opportunity to amend after the County filed its plea to the jurisdiction but still does not allege facts that would constitute waiver of immunity.

In an issue of first impression, the Court concluded that a dismissal constituted a judgment under TTCA §101.106. Section 101.106 provides that a judgment or settlement of a claim under the TTCA bars any action involving the same subject matter against an employee of the governmental entity. According to the Court, a dismissal constitutes a final determination of the merits of the matters actually decided. In this case, there was a final adjudication that the County had not waived its immunity. Thus, the major was entitled to derivative immunity under §101.106.

Justice Brister, joined by Justice O'Neill, concurred, urging that pleas to the jurisdiction should be replaced with motions for summary judgment and special exceptions, both of which have procedural rules governing their use.

***University of Tex. Southwestern Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004).**

The Court addressed the issue of whether the 6-month notice provision in the TTCA is a jurisdictional prerequisite. The Court held that lack of notice is a complete defense but it does not deprive a court of subject matter jurisdiction.

Loutzenhiser sued UT for causing her son's birth defects. UT filed a plea to the jurisdiction, arguing in part that immunity had not been waived because plaintiff failed to comply with the 6-month notice requirement of §101.101(a) of the TTCA. The trial court denied the Center's plea, and the court of appeals affirmed. The supreme court modified the court of appeals' judgment and affirmed

The Court concluded that the father's telephone call to the medical center was not sufficient to constitute formal or actual notice under section 101.101 of the Act, as explained in *Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004).

Section 101.101(a) states that the governmental entity "is entitled to receive notice of a claim against it . . . not later than six months after the day that the incident giving rise to the claim occurred." The Court reasoned that "is entitled to notice," as opposed to "must" or "shall," does not indicate that notice is a condition precedent to waive of immunity or a jurisdictional prerequisite. The statute's purpose is to allow the governmental entity to gather information, settle claims and prepare for trial. These purposes are not served by allowing the lack of notice to be raised shortly before trial or for the first time on appeal.

Accordingly, the Court concluded that the lack of notice is not jurisdictional, but it is a complete defense to suit. Because the notice requirement is not jurisdictional, the court of appeals did not have interlocutory appellate jurisdiction to affirm on that ground. The Court modified and affirmed the court of appeal's judgment to affirm that portion of the trial court's order refusing to dismiss the case on jurisdictional grounds.

Justice O'Neill, joined by Justices Schneider and Smith, concluded in a concurring opinion that once the Court concluded that the notice requirement is not jurisdictional, the Court had no interlocutory appellate jurisdiction to consider the substantive issues.

***Texas Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004).**

The Court addressed what is "actual notice" in TTCA §101.101(a).

Simons, an inmate, was injured while installing a guardrail. In response to Simons lawsuit, TDCJ filed a plea to the jurisdiction, arguing that it had not received notice within the six-month notice period, as required by §101.101(a). That section provides that a governmental entity is entitled notice of a claim against it within 6 months after the day that the incident giving rise to the claim occurred. Section 101.101(c) provides that the 6-month notice provision does not apply if the governmental entity has "actual notice" of the claimant's injury. The trial court denied TDCJ's plea, and the court of appeals affirmed. The court of appeals reasoned that TDCJ's investigation of the accident provided it with the knowledge required for actual notice under the §101.101(c). The supreme court reversed and dismissed the appeal.

The Court disapproved of several courts of appeals' decisions that had concluded that actual notice is imputed to a governmental entity if it is aware of facts sufficient to put the entity on inquiry that would reveal its alleged fault. The Court concluded that to have actual notice under §101.101(c), the governmental entity must have a subjective awareness that its fault produced or contributed to the claimed injury. According to the Court, it was not sufficient that TDCJ should have investigated.

Applying its holding in *Univ. of Tex. Southwestern Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004), that notice under §101.101 is not jurisdictional and thus an interlocutory appeal from the denial of a plea to the jurisdiction based on lack of such notice is not allowed, the Court reversed and dismissed the appeal.

***Blevins v. Tex. Dep't of Transp.*, 140 S.W.3d 337 (Tex. 2004).**

The Court also addressed the requirement of actual notice in TTCA §101.101(c). Blevins was killed when his truck struck a bridge abutment and guardrail. The surviving children sued TxDOT for wrongful death, alleging that the bridge and guardrail were not properly constructed. TxDOT filed a plea to the jurisdiction, alleging failure to get notice of the claim as required by §101.101. The court of appeals reversed and dismissed. The supreme court dismissed the appeal.

This case was decided contemporaneously with *Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004). Here, because the existence of actual notice could not be determined from the record, the Court dismissed the appeal so that the issue could be further addressed in the trial court.

***City of San Antonio v. Johnson*, 140 S.W.3d 350 (Tex. 2004).**

This case was also decided contemporaneously with *Simons*. Here, the City was sued for contribution arising out of a car accident. The trial court denied the City's plea to the jurisdiction, which was based in part on the City's failure to receive notice of the claim under TTCA §101.101 of the TTCA. The court of appeals affirmed. The supreme court denied the petition.

According to the Court, the court of appeals applied an incorrect standard for determining actual notice. The Court denied review but stated that the

parties were not precluded from obtaining a ruling from a trial court under the proper standard set out in *Simons*.

***Martinez v. Val Verde County Hosp. Dist.*, 140 S.W.3d 370 (Tex. 2004).**

The issue in this case is whether the 6-month notice provision in §101.101(a) of the TTCA is tolled during minority.

Parents bought a medical malpractice action on behalf of their minor child. The hospital filed a plea to the jurisdiction, asserting that it did not receive proper notice under TTCA §101.101(a). The trial court sustained the plea. The court of appeals reversed and remanded. The supreme court affirmed.

The parents acknowledged missing the six-month deadline but argued that the notice period should have been tolled during their daughter's minority. The Court concluded that minors cannot be exempted from the time deadlines without a statutory tolling provision. Here, none existed.

***Texas A&M Univ. v. Bishop*, 156 S.W.3d 580 (Tex. 2005).**

The Court addressed whether the failure to supervise a use of tangible personal property within the TTCA's waiver and whether the play's directors were TAMU employees.

Bishop was accidentally stabbed during a theatrical performance when a student missed the stab pad and brought a personal injury action against TAMU. The play was put on by a drama club, not by a university class. Two faculty members served as advisors to the play. Bishop alleged that TAMU was responsible for the negligence of the faculty advisors and the play's director. The trial court entered a judgment on the jury's verdict for Bishop. The court of appeals affirmed holding that immunity had been waived. The supreme court reversed and dismissed the suit.

On the issue of waiver of immunity, the Court concluded that §101.021(2) waives immunity for the use of personal property only when the governmental unit is itself the user of the property. A governmental unit does not use personal property by allowing someone else to use it and nothing more. Here, the faculty advisors did not use the knife. In addition, negligent supervision without more is not a "use" of tangible personal property. The Court also concluded that use and non-use (failure to provide a more effective safety feature) does not effect a waiver of immunity. Thus, the faculty advisors did not waive TAMU's immunity.

Finally, the play's director was an independent contractor. The director performed a specialized task, directed the play, was paid by the job, furnished props, had no contract, and was not on TAMU's tax rolls. Accordingly, TAMU could not be held liable for the director's alleged negligence.

B. Other Immunity

1. Official Immunity

***Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417 (Tex. 2004).**

The Court addressed the issue of whether an individual member of a city's board of adjustment is afforded official immunity for state law claims arising from their actions as board members.

Champion Builders, Inc. sued the individual members of the City of Terrell Hills Board of Adjustment (BOA) for negligence, gross negligence, and intentional interference of contract arising from BOA's revocation of Champion's permit to construct an apartment building. Although the jury returned a verdict in favor of Champion, the trial court granted a JNOV on official immunity. The court of appeals reversed, holding that more than a scintilla of evidence supported the jury's finding that the good faith prong of the affirmative defense of official immunity had not been proven. The supreme court reversed and rendered.

The Court began its analysis by noting that official immunity applies to public officials when performing discretionary duties, in good faith and within the scope of their authority. According to the Court, the rationale for official immunity is based on the need for public officials to act in the public interest with confidence and without hesitation that the threat of their judgment being questioned through litigation. The primary dispute was whether the BOA acted in good faith. The Court concluded that the standard of good faith for official immunity is whether a reasonably prudent official under the same or similar circumstances could have believed that her conduct was justified in light of the information known when the conduct occurred. That is, the test "does not inquire into 'what a reasonable person *would have done*,' but into 'what a reasonable [person] *could have believed.*'"

The Court explained that when a public official has two courses of action that reasonably could be believed to be justified, and chooses one, the good faith element of official immunity is satisfied as a matter of law. The Court held, as a matter of law, BOA members established official immunity at trial.

Justice O'Neill, joined by Justice Hecht and Chief Justice Jefferson, concurred. According to the concurrence, Champion's challenge based on negligence was inappropriate since the challenge alleged intentional conduct.

2. Legislative Immunity

***Joe v. Two Thirty-Nine Joint Venture*, 145 S.W.3d 150 (Tex. 2004).**

The primary issue in this case is whether an attorney acting in a legislative capacity as a member of a city council is entitled to legislative immunity.

Joe worked for a private law firm and also served on a city council. As part of his duties on the city council, Joe voted for an ordinance that adversely affected a firm client. The client sued the attorney and his firm for malpractice. The trial court granted summary judgment for Joe and his firm. The court of appeals reversed and remanded. The supreme court reversed and rendered.

According to the Court, legislative immunity shields attorneys acting in a legislative capacity at the federal, state, regional and local level if the attorney is performing a legitimate legislative function. This immunity shields an attorney from claims of conflict of interest. The client also argued that Joe and the firm failed to inform it of the city council meeting at which the election occurred. The Court rejected the client's argument noting that neither Joe nor his firm had been hired by the client for legislative representation and that they had no duty to client beyond the scope of the representation.

Finally, because Joe was immune, his firm also could not be liable.

3. Eleventh Amendment immunity

***Hoff v. Nueces County*, 153 S.W.3d 45 (Tex. 2004).**

The issue in this case was whether the 11th Amendment provides immunity for a county sued in state court for federal claims brought under the Fair Labor Standards Act.

Current and former employees sued the Nueces County Sheriff's Department in state court for alleged violations of the Fair Labor Standards Act. The trial court denied the County's plea to the jurisdiction. The court of appeals reversed and remanded. The supreme court reversed and remanded.

The Court noted that the 11th Amendment protects non-consenting states and state agencies that are arms of the state from being sued in state court for federal law claims. According to the Court, state law determines the nature of a public entity's independence from the state under the 11th Amendment. Here, counties can sue, collect taxes, pay debts, buy and sell property and issue bonds. The Court reasoned that these are sufficient indicia of independence from the state and concluded that the county was not entitled to 11th Amendment immunity.

III. REAL PROPERTY

A. Condemnation

***County of Bexar v. Santikos*, 144 S.W.3d 455 (Tex. 2004).**

The issue in this condemnation case is whether lost market value of the remaining property is compensable because it is below the grade of the frontage road. County condemned 0.485 acres of Sankitos' unimproved 27-acre tract as part of a road project to widen Loop 1604. The project will raise the frontage road and use the 0.485 parcel as a sloping embankment. The trial court instructed the jury to consider "diminished market perception" and "unsafe access" but could not consider "diminished visibility" or "diminished access." The trial court entered judgment on the verdict and the court of appeals affirmed. The supreme court reversed and remanded.

County argued that the trial court erred because "unsafe access" and "diminished market perception" were not compensable. As the Court noted, for condemned property, a property owner must be adequately compensated for the part taken and for any resulting damage to the remainder. The Court explained that impaired access to the remainder is compensable only if as a matter of law the impairment is material and substantial. The remainder property here was raw land and had not been developed. Because reasonable access to the remainder existed, the Court held that damages related to access were not compensable.

Although acknowledging that the term "diminished market perception" was malleable, the Court characterized it as including: diminished access, diminished visibility, loss of view and loss of "curb appeal." The Court had previously concluded diminished access was not compensable. Moreover, Santikos did not allege diminished visibility. Santikos offered no evidence of loss of view and because the land was undeveloped, he had no loss of curb appeal, as that term had been defined in earlier opinions. Because the verdict included both compensable and non-compensable damage, the Court reversed and remanded for new trial.

B. Inverse Condemnation

***City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004).**

Homeowners sued the City after the City's sewer main backed up and flooded their home with raw sewage. Homeowners alleged nuisance and unconstitutional taking. The trial court granted the

City's motion based on governmental immunity. The court of appeals reversed.

The supreme court addressed two issues: 1) was there an unconstitutional taking, and 2) was the City was immune. On the first issue, the dispute focused on the intent needed to give rise to a taking. The Court held that a governmental entity that physically damages private property to confer a public benefit may be liable under Article I, section 17 if it "(1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action . . . ." According to the Court, there was no evidence that the City knew when it unclogged the sewer main that flooding damage would occur. Thus, there was no intentional taking.

On the immunity issue, the Court noted that the operation of a sewer system is a governmental function and thus the City would be immune absent a clear waiver. The Court recognized that immunity for nuisance claims could be waived by the Tort Claims Act or waived if the nuisance constitutes a taking. Here, because the Court concluded the City's conduct was not a taking and because homeowners did not assert any other basis for waiver of immunity, the Court concluded that the City was immune from the homeowner's nuisance claim.

***City of Arlington v. State Farm Lloyds*, 145 S.W.3d 165 (Tex. 2004).**

The supreme court addressed a sufficiency of briefing issue and also whether a homeowner could maintain a nuisance and unconstitutional takings claim against a city for damages caused by a backup in a city-operated sewer line.

State Farm brought a subrogation action against the City of Arlington to recover compensation for a sewer backup that damaged an insured's home. State Farm alleged that city's operation of the sewer lines constituted a nuisance and a taking. The trial court entered judgment on the jury verdict for State Farm. The court of appeals affirmed concluding that the city waived its issues on appeal because of inadequate record references in its brief. The supreme court reversed and rendered judgment for the City.

On the question of adequacy of the city's record references, the Court concluded the city did not waive its issues. Here, the city's record references in its statement of facts and not in the argument portion of the brief were sufficient. The Court also held that the city's citation to the "entire record" to support its no-evidence points did not waive its no-evidence issues. The Court noted that had the city challenged specific evidence as being insufficient, it would have been required to cite the relevant parts of the record. A reference to "entire record" was sufficient because the city claimed there was a complete lack of evidence in the record.

On the merits issues, relying on *City of Dallas v. Jennings*, the Court held that to prove up a takings claim, the complaining party must demonstrate that the governmental entity knows a specific act is causing identifiable harm or knows that the specific property damage is substantially certain to result from an authorized government action. State Farm presented no evidence of intent. On the nuisance issue, relying on *Jennings* the Court concluded that the city did not waive its immunity.

***City of Keller v. Wilson*, 28 Tex. S. Ct.J. 848, 2005 WL 1366509 (Tex. June 10, 2005).**

Property owners sued for inverse condemnation. The City approved developers' plans that did not include a drainage ditch across property owner's property. Following development, property owners experienced increased flooding on their property. The trial court signed a judgment on the jury's verdict in favor of property owners. The court of appeals found legally sufficient evidence that the City knew increased flooding was substantially certain to occur and affirmed. The supreme court reversed.

The primary issue was the appropriate application of the court of appeal's legal sufficiency review. Following a lengthy discussion of whether a legal sufficiency review should consider all the evidence or only part of the evidence, the supreme court concluded that the standards are the same. According to the Court, the test for legal sufficiency is whether the evidence would enable a reasonable jury to reach the verdict. "Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."

On the merits, inverse condemnation requires the property owner to prove that the City took or damaged property for public use or was substantially certain the damage would result. Applying the standard, the Court concluded there was no legally sufficient evidence of the City's knowledge. Property owners had to prove that the City knew flooding was substantially certain. The court of appeals only considered the property owners' evidence and disregarded the City's evidence that several engineers had determined that the ditch across property owners' property was not necessary and that the developer's plan would not increase flooding. Considering all favorable evidence that a reasonable jury could have believed and disregarding contrary evidence except that which the jury could not ignore, the Court concluded that there was no evidence that the City knew that the plans it approved would

increase flooding. Accordingly, the Court held that there was no evidence the City's approval was an intentional taking.

Justice O'Neill, joined by Justice Medina, concurred. The concurrence believed that evidence of the City's intent was conflicting and was a credibility issue for the jury. Because they concluded that the City's approval of a private development plan did not result in a taking for public use, the concurring justices agreed with the Court's judgment in favor of the City.

***Tarrant Regional Water District v. Gragg,* 151 S.W.3d 546 (Tex. 2004).**

The primary issues in this inverse condemnation case were whether Gragg presented legally sufficient evidence that the water district's releases from a reservoir caused flood damage to Gragg's Ranch and whether the damages constituted a taking. Gragg alleged that the water district's releases caused recurrent and permanent damage to the Gragg Ranch. The trial court held that the district had inversely condemned a flood easement on the ranch and submitted the compensation issue to the jury. The trial court also awarded the district a permanent and perpetual easement over the property. The court of appeals affirmed. The supreme court affirmed.

On the evidentiary issues, the district argued that Gragg presented no evidence that the reservoir's operation caused flood damage, and if it did, the district was merely negligent. In its review of the evidence, the Court concluded that legally sufficient evidence supported the trial court's finding that the reservoir's operation caused flood damage to the ranch.

On the takings issue, the Court held that the requisite intent for a taking is present when the governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to occur. Recurrence is probative in determining the extent of the taking and whether it is necessarily incident to authorized governmental activity and thus substantially certain to occur. Here, the evidence demonstrated that the reservoir's operation changed the character of the flooding to Gragg's ranch and produced unnatural surges of water. Thus, the Court held that the evidence supported the trial court's finding that the damage was the inevitable result of the reservoir's operation.

***Texas Dep't of Transp. v. City of Sunset Valley,* 146 S.W.3d 637 (Tex. 2004).**

The Court addressed whether a city could be considered a state agency and whether §203.058(a) of the Transportation Code waives immunity.

TxDOT destroyed a portion of Jones Road located in the City of Sunset Valley to expand Highway 290. City constructed an alternate street and sued TxDOT to recover its costs. City alleged it could recover its costs based on Texas Transportation Code §203.058(a), common-law nuisance or as an unconstitutional taking. The trial court held TxDOT liable to the City for its costs of construction, pre-judgment interest and attorney's fees. The court of appeals affirmed on the statutory claim but reversed and remanded for the GLO to determine the amount of compensation owed. The supreme court reversed and rendered judgment for TxDOT.

In support of its statutory claim, City contended that §203.058(a) waived immunity and provided a remedy against TxDOT. Section 203.058(a) provides that:

> [i]f the acquisition of real property, property rights, or material by the department from a state agency under this subchapter will deprive the agency of a thing of value to the agency in the exercise of its functions, adequate compensation for the real property, property rights, or material shall be made.

TEX. TRANSP. CODE ANN. §203.058(a). City argued that it was a state agency and that the language provides a right of judicial recovery against TxDOT. The supreme court disagreed and concluded that a municipality is not a state agency. The Court further concluded that §203.058(a) did not waive TxDOT's immunity. Accordingly, City had no statutory right to seek compensation from TxDOT. Because §203.058(a) does not waive immunity, City could not maintain a common-law nuisance claim against TxDOT.

On City's taking claim, the Court concluded that because City did not own the road, it could not recover for an unconstitutional taking as a matter of law. According to the Court, City owns the road in trust with legal title belonging to the State.

C. Property Tax

***Matagorda County Appraisal Dist. v. Coastal Liquids Partners, L.P.,* 165 S.W.3d 329 (Tex. 2005).**

This case presented the issue of how an appraisal district may list underground storage facilities for ad valorem tax purposes.

The appraisal district listed the underground caverns apart from the overlaying land as a separate category of real property. Coastal contended that to list them separately subjected the caverns to unlawful multiple appraisal. The trial court rendered judgment for the appraisal district. The court of appeals reversed and concluded that the caverns must be listed and appraised as part of the surface land. The supreme

court reversed and remanded the remaining issues to the court of appeals.

Although the Court agreed that many aspects of property cannot be separately assessed from the value of the surface land, without stating a precise rule, the Court held that, in this instance, the caverns rented by Coastal are subject to separate listing, appraisal and taxation. In addition, the Court held that the caverns, which are manmade, could be classified and taxed as "improvements."

IV. PENDING CASES INVOLVING GOVERNMENTAL ENTITIES

A. Texas Torts Claims Act

***Reata Constr. Corp. v. City of Dallas*, 47 Tex. Sup. Ct. J. 408, 2004 WL 726906 (Tex. 2004). [02-1031]**

The issue in this case is whether a city waives immunity from suit by intervening in a lawsuit to assert claims for affirmative relief. The City issued a license to Dynamic to install fiber optic cable. Dynamic subcontracted the drilling to Reata. Reata inadvertently drilled into a water main causing damage to a residential building. The building owner and tenants sued Dynamic and Reata for damages. Reata third-partied in the City for misidentifying the location of the water main. The City asserted the claims were not within the Tort Claims Act waiver and intervened against both Dynamic and Reata for damages. The trial court denied the City's plea to the jurisdiction. The court of appeals reversed and dismissed Reata's claims against the City concluding that by intervening the City did not waive immunity from suit. Without hearing oral argument, the supreme court reversed and remanded.

According to the Court, the City waived immunity from suit by intervening and seeking damages against Reata. The Court did not decide if the City also waived immunity from liability. When a governmental entity files suit against a party, the entity waived immunity from suit for counterclaims. In addition, by filing suit, the governmental entity also waives immunity from suit for any claim incident to, arising from or connected with or that is germane to the suit or controversy brought by the entity. According to the Court, for purposes of waiver of immunity from suit, there is no reason to differentiate between a governmental entity as a plaintiff or as a plaintiff-intervenor. Thus, by intervening against Reata, the City waived immunity from suit for Reata's claims germane to the matters in controversy.

The Court granted a motion for rehearing and heard oral argument in December 2004.

***State v. Shumake*, 131 S.W.3d 66 (Tex. App—Austin 2003, pet. granted) [04-0514]**

The case presents two primary issues: 1) does immunity preclude a claim brought under the recreational use statute and 2) what is the appropriate duty owed under the recreational use statute for known trespassers.

Parents sued the Department of Parks and Wildlife following the death of their child in a manmade culvert. Parents alleged attractive nuisance, breach of both invitee and trespasser duties for failing to warn or to correct the danger. The trial court denied the Department's plea to the jurisdiction. The court of appeals reversed and rendered on the nuisance claim, but affirmed on the premises defect claim.

The Department argued that Recreational Use Statute applied and reduced the duty of care owed by landowners to the public to that of trespassers. Parents argued that because the Department charged a fee for entrance into the park, the Department owed the duty of care for an invitee. According to the court of appeals, the Recreational Use Statute applied regardless of the fee charged and thus concluded that the Department only owed them the duty owed to a trespasser.

The court of appeals also concluded that the recreational use statute does not bar all premises defect claims. While landowners who open their lands for recreational use know people are entering their land, the legislature has only imposed the trespasser duty of care on such owners. However, landowners cannot commit gross negligence against the public. The court of appeals imposed a "higher duty of care to known trespassers injured by artificial conditions that pose a risk of serious bodily harm of which the landowner knows or should know." Parents alleged that the Department knew the public swam in the river and that the manmade culvert had threatened the lives of other park-goers before the child's death. Thus, parents established waiver of immunity by alleging facts that if proven establish gross negligence under the standard of care for known trespassers.

After the supreme court issued *Texas Department of Parks & Wildlife v Miranda*, 133 S.W.3d 217 (Tex. 2004), the court of appeals issued a supplemental opinion and concluded that its analysis comported with the directives in *Miranda*.

The Court heard oral argument in April 2005.

***Tooke v. City of Mexia*, 115 S.W.3d 618 (Tex. App.—Waco 2003, pet. granted) [03-0878]**

The issue in this case is whether Local Government Code section 51.075, which provides that a home-rule municipality "may plead and be impleaded in any court," waives immunity from suit. The City contracted with Tooke to collect brush and leaves in the city. After the City terminated the contract, Tooke

sued for breach of contract. The trial court denied the City's plea to the jurisdiction. A jury found that the City breached the contract and awarded damages. The court of appeals reversed and dismissed for want of jurisdiction.

The courts of appeals are split on this issue. In this case, the court of appeals concluded the phrase "plead and be impleaded" does not constitute a clear and unambiguous waiver of immunity from suit. The court reasoned that if "plead and be impleaded" has the same meaning as "sue and be sued" it violates the principle of statutory construction that every word is presumed to be used for a purpose. "Sue and be sued" has been construed as a waiver of immunity from suit. "Plead and be impleaded" means that a municipality can file pleadings and be named in adverse pleadings in suits where immunity from suit has already been waived.

Relying on supreme court precedence, the court of appeals also rejected Tooke's argument that the City waived immunity by performing under the contract.

The Court heard oral argument in April 2004.

B. Real Property

1. Inverse Condemnation

***Hallco Texas, Inc. v. McMullen County*, 94 S.W.3d 735 (Tex. App.—San Antonio 2002, pet. granted) [02-1176].**

The issue in this case inverse condemnation case is whether a property owner has been subjected to an unconstitutional taking when a county adopts an ordinance restricting landfills and in refusing to grant a variance when the property owner did not have a landfill permit when the ordinance was enacted.

Hallco purchased land in McMullen County near Choke Canyon Lake and informed the County of its intent to use the land for nonhazardous industrial waste disposal. After Hallco applied to the TNRCC for a permit but before the draft permit was issued, the County passed an ordinance prohibiting disposal of solid waste in the County within three miles of the lake, which included Hallco's property. The County refused to act on Hallco's request for a variance. Hallco filed an as-applied regulatory takings challenge. The trial court granted summary judgment for the County and the court of appeals affirmed.

According to the court of appeals, determining whether the government has unreasonably interfered with a property owner's right to use and enjoy property requires consideration of: 1) the economic impact of the regulation and 2) the regulation's interference with the reasonable investment-backed expectation. The court of appeals concluded that because Hallco never obtained a permit, Hallco did not have an investment-backed expectation that it could use the property for solid waste disposal. Thus, Hallco did not have a takings claim as a matter of law.

The Court granted Hallco's petition and heard argument in January 2005.

2. Zoning Variance

***City of Dallas v. Vanesko*, 127 S.W.3d 220 (Tex. App.—Dallas 2003, pet. granted) [04-0263].**

This is a zoning variance case involving homeowners' request for a variance on the height of their house. Homeowners' building permit was mistakenly approved by the City. Near the end of construction, City notified homeowners that their house was too tall. The Board of Adjustment denied homeowners' request for a height variance. The trial court reversed concluding that the board abused is discretion.

The court of appeals affirmed, one justice dissenting. The court explained that a zoning variance is justified if it relates to the property itself, that is, a condition unique, oppressive and not common to other property. The hardship must not be self-imposed or financial. According to the court of appeals, once construction on the house began the nature of the realty was affected because building materials were affixed to the property. For the board to withdraw its authorization subjected the Vanesko's property to a unique oppressive condition because it would require the Vaneskos to remove the existing roof and replace it with a lower-pitched roof which would cause it to stand out in the neighborhood. Accordingly, the hardship was not personal to the Vaneskos but was linked to the real property.

According to the dissent, the Vaneskos' house as designed violated the height restriction therefore the hardship was self-imposed. Further, the dissent observed that because the height of the house had nothing to do with the condition of the land, the hardship was personal to the Vaneskos. Thus, the dissent concluded the board did not abuse its discretion.

The Court heard argument in February 2005.

PART 3: SELECTED RECENT LEGISLATION INVOLVING GOVERNMENTAL ENTITIES [APPENDIX]

HB 2988: Amending Government Code §311.034 – Waiver of Sovereign Immunity

Section 311.034 is amended and states that, "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."

HB 2039: Amending Local Government Code chapter 271 to add subchapter I – Adjudication of Claims Arising under Written Contracts with Local Governmental Entities

Section 271.152 is added and provides that, "[a] local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purposes of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter."

The new subchapter, among other matters, defines the local governmental entities and provides for limits on the adjudication award. In addition, the new subchapter expressly states that it does not waive immunity for negligence or intentional torts. The provision also bars awards of attorney's fees "unless the local governmental entity has entered a written agreement that expressly authorizes the prevailing party in the adjudication to recover its reasonable and necessary attorney's fees by specific reference to this section." Section 271.159.

APPENDIX