



DRIPPING SPRINGS
Texas

Recent State Cases of Interest to Texas Cities



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City of Dripping Springs

Economic Development: City of League City v. Jimmy Changas, Inc., 670 S.W.3d 494 (Tex. June 9, 2023).

- Economic Development Agreement is **proprietary**.
 - (1) the city's act of entering into the contract was discretionary;**
 - (2) the contract primarily benefited the city residents and not the general public;**
 - (3) the city was acting on its own behalf and not on the State's behalf when it entered the contract; and**
 - (4) the city's decision to enter into the contract was not related to any governmental function.**

No Immunity for Economic Development Agreements.



**JIMMY
CHANGAS**
FRESH. MEX. FUN.™

Public Purpose ≠
Governmental Use

Winner: City v. Contractor

Eminent Domain: Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1, 669 S.W.3d 178 (Tex. May 19, 2023)

- ▶ Does governmental immunity bar one political subdivision from bringing eminent-domain proceeding against another?
- ▶ Water Improvement District tried to purchase subsurface easement from Irrigation District. When the offer was rejected, WID filed condemnation action against ID.
- ▶ ***Supreme Court held that governmental immunity does not apply in eminent-domain proceedings.***



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Winner: Stalemate? Except it helped my city win

Eminent Domain: City of Dripping Springs v. Lazy W Conservation Dist., No. 03-22-00296-CV May 31, 2024.



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- ▶ Cities Rule, MUDs drool (technically all political subdivisions drool under this opinion as it relates to governmental immunity and eminent domain but we need the win)
- ▶ Paramount Public Purpose is not a jurisdictional issue
- ▶ Political subdivisions do not have governmental immunity from Eminent Domain.
 - ▶ ***Back to the Trial Court . . .***

Winner: City!!!!!!!!!!

Employment Discrimination: Tex. Tech Univ. Health Scis. Ctr. – El Paso v. Niehay, 671 S.W.3d 929 (Tex. Jun. 30, 2023).

- Is morbid obesity (BMI > 40) an impairment under the Texas Commission on Human Rights Act (TCHRA)?
- Hecht in Majority uses analysis of federal law to add require of “physical impairment” to find a disability that can be protected including ill-informed language related to obesity
- Courts all over the country are divided but plaintiffs still have multiple avenues as it relates to physical impairments



Winner: Employee v. State

Employment: City of Houston v. Carter, No. 01-22-00453-CV, 2023 WL 3632788 (Tex. App.—Houston [1st Dist.] May 25, 2023) (mem. op.)

- ▶ Continuation of Sexual Harassment no longer being a viable cause of action in Texas
- ▶ Multiple inappropriate text messages and one instance of inappropriate touching is not enough because employee did not feel “threatened” or “unsafe”
- ▶ Court of Appeal’s mem. op.: no prima facie case of sexual harassment.



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Winner: Employee v. City

Employment: Moliere v. City of Buffalo, No. 10-22-00391-CV, 2023 WL 6307992 (Tex. App.—Waco Sept. 28, 2023)

- ▶ Police officer reprimanded by police chief but then fired by City Council for same activity.
- ▶ Officer sues city and mayor, challenging authority as Type-A general-law city to terminate his employment.
- ▶ Authority to fire police officer is fact issue under LGC Section 341.001
 - ▶ Ordinance authorized City Council to hire officers
 - ▶ Police Policy & Procedure Manual states Police Chief determines disciplinary action related to officers but can be appealed to Mayor
 - ▶ Employee Manual says the “City” has the ability to terminate but does not clearly authorize the City Council to do so



Remanded to Trial Court to figure out what it all means.

Winner: Employee v. City

Employment: Tex. Woman's Univ. v. Casper, No. 02-23-00384-CV, 2024 WL 1561061, (Tex. App.—Fort Worth Apr. 11, 2024, pet. filed).

- ▶ Employee filed claim in federal court and then filed the same claim in state court under TCHRA.
- ▶ Employee abandoned the federal claim.
- ▶ Employer argued that the prior federal claim, though never resolved, barred state law claim under election of remedies.
- ▶ Court of Appeals agreed -- ***initiation of federal suit bars state suit for duplicative complaint.***



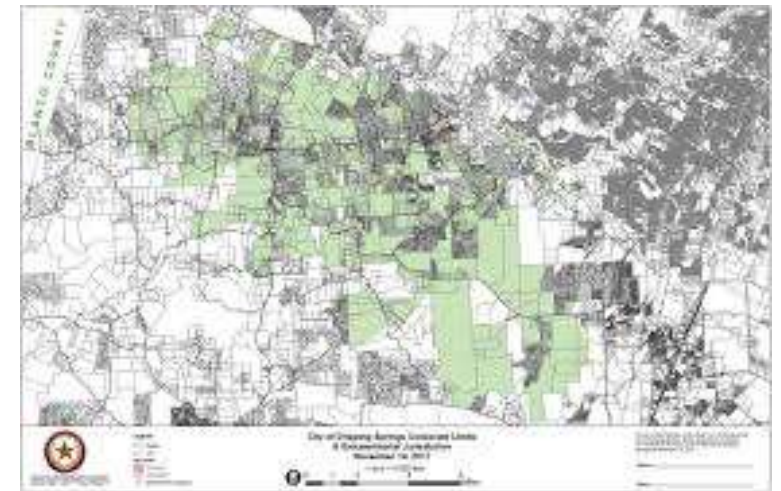
Sec. 21.211. ELECTION OF REMEDIES. A person who has initiated an action in a court of competent jurisdiction or who has an action pending before an administrative agency under other law or an order or ordinance of a political subdivision of this state based on an act that would be an unlawful employment practice under this chapter may not file a complaint under this subchapter for the same grievance.

Winner: *Employee* v. University

Extraterritorial Jurisdiction: Elliott v. City of Coll. Station, 674 S.W.3d 653 (Tex. App.—Texarkana Aug. 31, 2023)

- ▶ Two plaintiffs challenge the concept of regulation by cities of ETJs generally – based on the “republican form of government” guarantee in Art. 1, Sec. 2 of the Texas Constitution.
- ▶ Court of Appeals notes “longstanding Texas Supreme Court rulings in this field” while concluding that issue presented is a nonjusticiable political question.
- ▶ Lengthy history lesson on the genesis and evolution of local government authority in Texas and a primer on ETJ regulation.

Legislature determines city authority including authority in the ETJ so the fact that voters in the ETJ do not vote in City elections does not matter



Winner: Citizen v. City

More Fun with Wasson: Proprietary v. Governmental Functions

- ***City of Dallas v. Ahrens***, No. 10-23-00315-CV, 2024 WL 1573388 (Tex. App.—Waco Apr. 11, 2024 (mem. op.)). – Agreement with charitable organization to distribute donations to families of officers killed in the line of duty was **proprietary**.
- ***City of Huntsville v. Valentine***, No. 13-22-00528-CV, 2023 WL 5282954 (Tex. App.—Corpus Christi–Edinburg Aug. 17, 2023) (mem. op.). – Issuing building permits is a **governmental function**.
- ***City of Canton v. Lewis First Monday, Inc.***, No. 06-23-00027-CV, 2023 WL 4945085 (Tex. App.—Texarkana Aug. 3, 2023) (mem. op.) – Traffic control is a **governmental function**.

Immunity: City of Canton v. Lewis First Monday, Inc., No. 06-23-00027-CV, 2023 WL 4945085 (Tex. App.—Texarkana Aug. 3, 2023) (mem. op.)

- ▶ Plaintiff co-owned property with city where flea market operated.
- ▶ City restricted access to historic main gate to vendors during flea market. Plaintiff sues seeking easement by estoppel and for takings claim.
- ▶ Appellate court finds for City:
 1. No easement interest in a public roadway.
 2. Traffic regulation is a municipal **governmental function**.
 3. No Private Real Property Rights Preservation Act claim because City's act didn't take place in ETJ .
 4. Takings claim can't succeed for acts on City property.



Winner: Citizen v. City

Immunity: Campbellton Rd., Ltd. v. City of San Antonio by & through San Antonio Water Sys., No. 22-0481, 2024 WL 1590000 (Tex. Apr. 12, 2024).

- City entered into utility agreement with developer with a minimum capacity.
- City/SAWS was unable to provide utility service after developer constructed wastewater improvements but waited past the term to start development.
- Breach of Contract – Chapter 271 Local Government Code.
- Was there a contract under Chapter 271?

Because the developer paid towards the wastewater infrastructure project, SAWS benefitted, and a contract under Chapter 271 was created.

- ***Contract for utility services where payment for utility lines equals impact fee credits falls under Chapter 271 of the Texas Local Government Code.***

Impact Fees



Winner: Citizen v. City

Takings: *Selinger v. City of McKinney*, No. 05-23-00180-CV, [2024 WL 260500](#) (Tex. App.—Dallas Jan. 24, 2024) (mem. op.).

- ▶ City's subdivision ordinance required developments in ETJ to connect to the city's water and sewer systems and pay water and sewer impact fees.
- ▶ Developer's tract of land was not served by the city's water and sewer services.
- ▶ Developer planned to construct sewer infrastructure including package treatment plant and contract with special utility district to supply water to subdivision.
- ▶ City denied plat application after declining alternative facilities agreement.
- ▶ Appellate court: impact fees were not compensable taking. City had exclusive right to provide water service to property within its CCN.

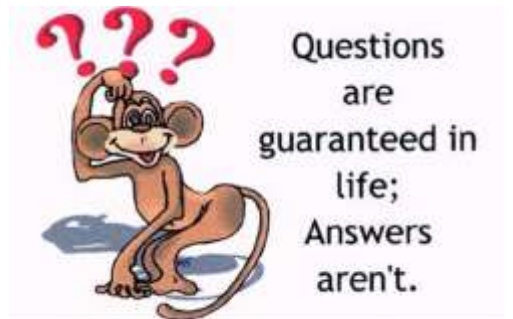


Winner: Developer v. City

Open Government

Public Information Act: *Johnson v. Bastrop Cent. Appraisal Dist.*, No. 07-23-00173-CV, 2023 WL 6389411 (Tex. App.—Amarillo Sept. 29, 2023) (mem. op.).

- **Questions are not proper Public Information Act Requests**
- **Pro Tip: just let the requestor know . . .**



Open Meetings: *In re City of Amarillo*, No. 07-22-00341-CV, 2023 WL 5279473 (Tex. App.—Amarillo Aug. 16, 2023) (mem. op.).

- **Language that did not specify amount, use, and time frame for debt amount was insufficient after failed bond election**
- **Controversial topic requires additional specificity**

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Winner: Citizen v. City

Emergency: Abbott v. Harris Cnty., 672 S.W.3d 1 (Tex. June 30, 2023).

- ▶ GA-38 (in effect until June 2023): “No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering.”
- ▶ “A coherent governmental response to a widespread contagious disease naturally requires coordination across arbitrary local jurisdictional lines, of which viruses are oblivious ... ***We hold that, during a declared disaster, the Governor has the lawful authority to prohibit local officials from imposing mask requirements in response to a contagious disease.***”



Winner: County v. State

Continued: *Abbott v. Harris Cnty.*, 672 S.W.3d 1 (Tex. June 30, 2023).

- ▶ *county judge was Governor's designated agent under Disaster Act;*
- ▶ *executive orders were valid exercise of Governor's authority under Disaster Act;*
- ▶ *Governor can overrule the orders of a County or City related to emergency management*



Emergency Orders: Galovelho LLC v. Abbott, No. 05-21-00965-CV, 2023 WL 5542621 (Tex. App.— Dallas Aug. 29, 2023)

- ▶ Challenge to COVID-19 emergency orders discouraging patrons from dining in restaurants.
- ▶ Claims against state, governor, county judge and city barred by sovereign or governmental immunity
- ▶ Effect of orders was neither a categorical taking nor a taking under *Penn Central* factors.
 - ▶ Emergency orders were temporary and did not destroy all economic value in property
 - ▶ Government action not akin to a physical invasion but regulation that “adjusts the benefits and burdens of economic life to promote the common good.



Winner: Citizen v. State

TORTS!

- Commuting is not within the scope of employment for TTCA purposes. *El Paso Water Utilities Sys.-Pub. Serv. Bd. v. Marivani*, No. 08-23-00071-CV, 2023 WL 4771207 (Tex. App.—El Paso July 26, 2023) (mem. op.)
- Driving to talk to management about health benefits is not within scope of employment for TTCA purposes. *Alief Indep. Sch. Dist. v. Velazquez*, No. 01-22-00444-CV, 2023 WL 3555495 (Tex. App.—Houston [1st Dist.] May 18, 2023) (mem. op.).
- Walking to and from car between classes to run errands is scope of employment for purposes of TTCA. *Barker v. Sam Houston State Univ.*, No. 06-22-00076-CV, 2023 WL 4113275 (Tex. App.—Texarkana June 22, 2023)



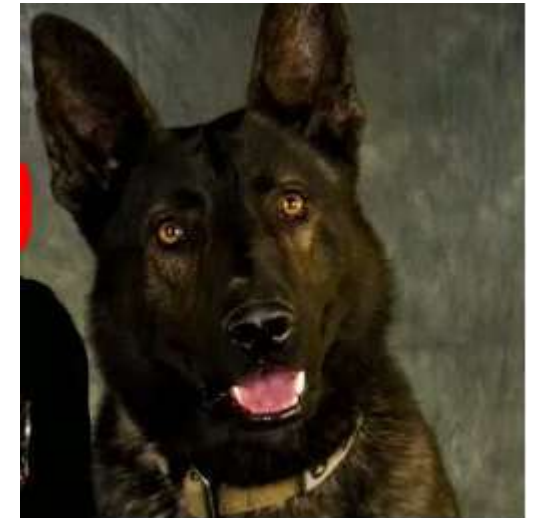
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Winner: Citizen v. City

Dog Bite: *City of Mesquite v. Wagner*, No. 05-22-00826-CV, 2023 WL 3408528 (Tex. App.—Dallas May 12, 2023, pet. filed).

- Kozmo
- Use of tangible personal property – the Dog
- Bit burglary suspect
- Normally use of police dog would be intentional, which would obviate
- Fact issue in this case of whether negligence (Tort Claims Act) or intentional (not Tort Claims Act)
- Emergency Exception?

Officer indication that he did not have control of dog when he bit the suspect raises fact issues of negligence and reckless/conscious indifference that would allow for the plaintiff to move forward on his TTCA claim.



Winner: Citizen v. City

Tort Claims Act: City of Baytown v. Fernandes, 674 S.W.3d 718 (Tex. App.—Houston [1st Dist.] Aug. 3, 2023)

- ▶ Plaintiff was injured on the Mat Racer waterslide at Pirates Bay, city-owned waterpark.
- ▶ City invoked TTCA's recreational use statute based on plaintiff's recreational activity on city-owned land.
- ▶ Appellate court dismissed claims for lack of subject matter jurisdiction:
 1. Riding down a waterslide is recreational use.
 2. No evidence city knew of danger or that waterpark employees acted with conscious indifference to plaintiff's safety.



Winner: Employee v. University

Tort Claims Act: City of Houston v. Bustamante, No. 01-22-00699-CV, 2023 WL 5110982 (Tex. App.—Houston [1st Dist.] Aug. 10, 2023) (mem. op.)

- ▶ Plaintiff and her family were injured in collision with city emergency vehicle when it entered intersection without slowing and struck plaintiff's vehicle.
- ▶ Plaintiff gave notice of her claim five months after incident.
- ▶ City filed for summary judgment claiming governmental immunity and that plaintiff failed to provide notice of claim within 90 days as required by city charter.
- ▶ Appellate court held that, although plaintiff had not provided timely notice, city may have had actual notice of a possible claim since it investigated the incident and had necessary information to alert it of its potential liability.



Winner: Citizen v. City

Tort Claims Act: Ferebee v. Law Office of Frank Powell, No. 01-22-00681-CV, [2023 WL 5918110](#) (Tex. App.— Houston [1st Dist.] Sept. 12, 2023) (mem. op. on re'hg.)

- ▶ Powell, a lawyer, sued the city attorney for the City of Shenandoah for slander following comments made about him and his law practice during a public city council meeting.
- ▶ City attorney noted that Powell had been sanctioned by several courts and was subject of petition by Commission for Lawyer Discipline.
- ▶ Appellate court held that Powell's pleadings affirmatively demonstrated that the city attorney was acting within the scope of his employment.
- ▶ Since claim could have been brought against city, the claim against the city attorney could be dismissed under the TCA's election-of-remedies provision.
- ▶ But if this hadn't worked he had queued up a TPCA claim.



Winner: Citizen v. City

Immunity: City of Austin v. Quinlan, 669 S.W.3d 813 (Tex. June 2, 2023)

- ▶ City of Austin issued Guero's Taco Bar a permit for use and maintenance of city street/sidewalk.
- ▶ Restaurant patron injured ankle falling from sidewalk to the street
- ▶ Patron brought premises liability action against City and restaurant.
- ▶ Supreme Court held sidewalk café maintenance agreement did not impose a nondiscretionary duty on city, so no “discretionary function” exception to waiver of immunity under Texas Tort Claims Act.



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“we hold that the City had discretion to enforce or monitor the restaurant's compliance—but was not required to do so”

Winner: Citizen v. City

City (Entity) Wins

City of Huntsville v. Valentine

City of Austin v. Quinlan

El Paso Water Utilities Sys.-Pub. Serv. Bd. v. Marivani

Stone v. Harris County

City of Lake Jackson v. Adaway (on Tort Claims Act)

Rivera v. San Antonio Water Sys.

Harris Cnty. v. Deary, (on Tort Claims Act)

City of Austin v. Kalamarides

Rebeca Garcia v. The City of Austin

City of Dallas v. McKeller

Alief Indep. Sch. Dist. v. Velazquez

Barker v. Sam Houston State Univ

CPS Energy v. Elec. Reliability Council of Tex

Town of Little Elm v. Climer

City of Dallas v. McKeller

City of Baytown v. Fernandes

City of Corpus Christi v. Nickerson

City of Corpus Christi v. Rios

City of Dallas v. Holmquist

City of Fredericksburg v. Boyer

City of Hidalgo–Tex. Mun. Facilities Corp. v. Rodriguez

City of Houston v. Bustamante

City of Houston v. Edwards

City of Houston v. Green

City of Houston v. Salazar

City of Houston v. Walker

City of Houston v. Wilson

City of Houston v. Wilson

City of Laredo v. Torres

Franz and South Texas Elderly Services, Inc., v. Interim Police Chief Romero Rodriguez and City of Hidalgo

Hous. Auth. of City of Austin v. Garza

Martin v. Vill. of Surfside Beach

Trevino v. City of San Antonio

Wheeler v. Law Office of Frank Powell

Wilson v. City of Houston

Voorhies v. Town of Hollywood Park

Plaintiff's Case Moves Forward/Wins

City of Alvin v. Fields

City of Dallas v. Ahrens

Suarez v. Silvas

City of Houston v. Taylor

City of Houston v. Caro

City of Springtown v. Ashenfelter

City of Houston v. Manning

City of Mission v. Aaron Cervantes

City of Houston v. Branch

City of Houston v. Cruz

City of Houston v. Flores-Garcia

City of Houston v. Gomez

City of Houston v. Gonzales

City of Mesquite v. Wagner

City of Uvalde v. Pargas

Hall v. City of Jersey Vill.

TXDOT v. Sonefeld



Recall Elections: In re Gerdes, No. 11-23-00283-CV, 2024 WL 187234 (Tex. App.—Eastland Jan. 18, 2024) (mem. op.).

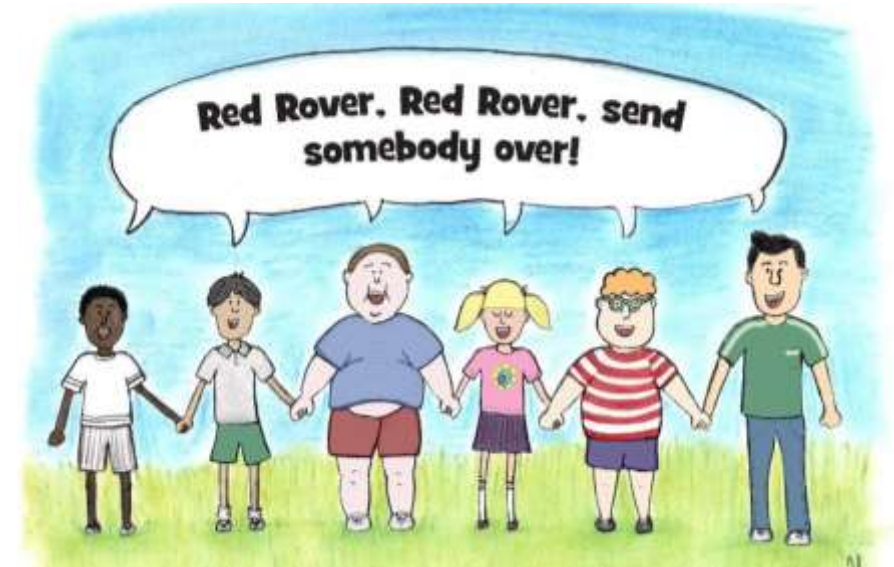
- ▶ Petition to recall two “unelected” city commissioners:
 - ▶ One ran unopposed, so her election was cancelled.
 - ▶ One was appointed to vacant seat
- ▶ City charter requires at least one-fifth of voters who sign period to indicate that they “voted” for the officer at an election.
- ▶ Commission determined they could not be subject to recall because nobody voted for them; refused to call election.
- ▶ Court disagreed and ordered city to schedule a special election on the recall not less than 15 and not more than 30 days from ruling.



Winner: Citizen v. City

Mediation Procedure: *In re City of McAllen*, 677 S.W.3d 746 (Tex. App.—Corpus Christi–Edinburg Sept. 18, 2023)

- ▶ Trial court ordered mayor and a councilmember to personally attend mediation in inverse condemnation suit.
- ▶ Appellate court reversed: while trial court can require parties to send representatives with full authority to settle case, it can't choose which representatives must attend.



Winner: Citizen v. City

Immunity: CPS Energy v. Elec. Reliability Council of Tex., 671 S.W.3d 605 (Tex. June 23, 2023)

- ▶ Municipally-owned electric utility sues Electric Reliability Council of Texas (ERCOT) for claims related to Winter Storm Uri.
- ▶ ERCOT files plea to jurisdiction based in part on sovereign immunity.
- ▶ Supreme Court determined that:
 1. ERCOT is a governmental unit,
 2. Public Utility Commission has exclusive jurisdiction over plaintiffs' claims;
 3. ERCOT is entitled to sovereign immunity. (4 justices disagreed)



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Winner: State Agency v. City-owned utility