



Legislative UPDATE

May 6, 2016
Number 18

***BCCA Appeal Group, Inc. v. City of Houston:* Texas Supreme Court Rules Against Cities Again**

A couple of weeks ago, the Texas Supreme Court took away city immunity on certain contracts, this week it was their environmental authority. In its new opinion in [*BCCA Appeal Group, Inc. v. City of Houston*](#), the Texas Supreme Court held that the Texas Clean Air Act (Act) and its enforcement mechanisms (contained in the Texas Water Code) preempt a City of Houston air-quality ordinance. As a result, the ordinance, and likely most city ordinances like it, are invalid.

The BCCA Appeal Group, Inc. (BCCA), an organization formed to represent the litigation interests of Houston-area refineries and petrochemical companies, challenged the City of Houston ordinance that regulates air emissions. BCCA claimed that the ordinance is preempted by state law.

The city ordinance parallels the Texas Commission on Environmental Quality (TCEQ) rules and regulations. The ordinance was adopted because of the city's frustration with the slow pace of progress by the TCEQ to control the city's notoriously poor air quality. The ordinance allows the city to more easily enforce violations by bringing suit in municipal criminal court instead of having to file a civil suit with the TCEQ joined as a necessary party.

BCCA asserted a preemption claim based on the allegation that the Texas Legislature exclusively delegated regulatory authority over the sources in question to the TCEQ. In support of that claim, BCCA relied upon the Act and the Texas Water Code.

After analyzing the enforcement options under the Act, the Texas Supreme Court concluded that the legislature expressed its clear intent to have the TCEQ determine the appropriate remedy in *every* case. Thus, the prosecution provisions in the ordinance are invalid. Further, the court held that the ordinance's requirement that a facility must register in order to lawfully operate in the city effectively moots the requirement of a TCEQ permit that has been issued and allows a facility to operate lawfully. Given the Act's very specific limitation on a city's ability to regulate

only certain portions of air-quality control, the registration requirement was held to be inconsistent with the Act.

One justice [dissented](#), arguing that the prosecution provisions in the ordinance are not preempted. The dissent argued that the majority deviated from its own precedent, noting that a court should attempt reasonable construction to allow two laws to co-exist without preemption. However, the majority disagreed with that analysis.

BCCA Appeal Group is just one example of several significant defeats cities have endured at the Texas Supreme Court in the last few years, which makes one wonder . . . is this a trend? As mentioned above, the Court recently decided a case that impacts city liability under contracts. In [Wasson Interests v. City of Jacksonville](#), the Texas Supreme Court concluded that the governmental-proprietary distinction found in the Texas Tort Claims Act applies to contractual claims against a city. In doing so, the court created a waiver of governmental immunity. The consequences of this decision were soon highlighted in [Wheelabrator v. City of San Antonio](#), which involved a dispute over a contract for the design and construction of a coal-fired power station owned and operated by CPS Energy, San Antonio's electric and gas utility. CPS Energy claimed that it had governmental immunity, which would have insulated it from an award of attorney's fees regardless of the outcome of the lawsuit. Wheelabrator argued that CPS Energy had no immunity from their claim for attorney's fees because it was performing a proprietary function in its dealings with Wheelabrator. The Texas Supreme Court reaffirmed its decision in the *Wasson* case: the governmental-proprietary distinction applies to breach of contract claims against cities. Because the court held that Wheelabrator's attorney fees claim stems directly from a proprietary function, CPS Energy does not have governmental immunity as to those claims.

In another bad case for Texas cities in 2015, [Harris County Flood Control District v. Kerr](#), the Court sided with more than 400 homeowners who brought takings claims against local governmental entities. The homeowners claimed that the governmental entities "approved private development in the White Oak Bayou watershed without mitigating its consequences, being substantially certain the unmitigated development would bring flooding with it." The court concluded that the case could proceed, finding "a fact question exists as to each element of the homeowners' takings claim." The court has granted a rehearing of the case; however, it has not withdrawn its original opinion. Depending on the results of the rehearing, the case may fundamentally expand takings law and fundamentally limit governmental immunity.

Like *BCCA*, [Southern Crushed Concrete, LLC v. City of Houston](#) represented a crossroads for the court to provide guidance as to when a city ordinance is preempted by state law. In this 2013 Texas Supreme Court case, the court held that a City of Houston ordinance limiting the location of a concrete crushing facility (a land use ordinance) was preempted by the Texas Clean Air Act under which the operator was issued a permit by the TCEQ. And, like *BCCA*, the opinion signifies a departure from our state's previous preemption law.

Taken together, these cases suggest the Texas Supreme Court's willingness to expose cities to ever-increasing liability. What remains to be seen is whether this is truly a trend of growing hostility by the court toward cities.

City Asks Texas Supreme Court to Reconsider Contracts Liability Opinion

A previous edition of the *Legislative Update* [summarized](#) a Texas Supreme Court decision that will affect certain city contracts. In [Wasson Interests v. City of Jacksonville](#), the Texas Supreme Court created a judicial, non-legislative waiver of governmental immunity where none had existed for decades. At issue was whether the governmental-proprietary distinction found in the Texas Tort Claims Act applies to contractual claims against a city. The Court held that it does, without any hint from the Texas Legislature that it ought to.

Yesterday, the City of Jacksonville filed a “motion for rehearing” with the Court. The motion asks the court to re-examine its opinion, which many city attorneys see as incorrect. The brief argues that the governmental-proprietary distinction was created to remedy the unfairness that total immunity created in the tort context. Over 100 years ago, the Court decided that immunity should not apply to *torts* arising from proprietary functions. That holding was based on the fact that a tort is committed on an *innocent victim*, and that victim would have no recourse but for the city’s choice to perform a proprietary function.

Contracts are different than torts. A contracting party is assumed to freely enter into the agreement. As such, that party cannot be compared to the innocent tort victim. The contracting party does not need protection from his voluntary choice. Certainty and protecting taxpayer dollars should be paramount.

The League will participate as *amicus* on the motion and will report on further developments.

Lt. Governor Appoints Senators to Joint Interim Committee on Advertising Public Notices

Lt. Governor Patrick announced the appointment of five senators to the Joint Interim Committee on Advertising Public Notices. The joint committee (created by [H.C.R. 96](#) in 2015) will study issues related to the advertising of public notices, focusing on the use of internet websites for public notices as an alternative to newspaper publication. The senate appointees are:

- Sen. Konni Burton (R – Colleyville), Chair
- Sen. Kirk Watson (D – Austin), Vice Chair
- Sen. Kelly Hancock (R – North Richland Hills)
- Sen. Charles Perry (R – Lubbock)
- Sen. Jose Rodriguez (D – El Paso)

The League will monitor the committee hearings and participate if allowed.

Texas Ethics Commission: **House Bill 1295 Rules Available for Comment**

The Texas Ethics Commission (Commission) is accepting comments on proposed amendments to the implementing rules for House Bill 1295.

In 2015, the Texas Legislature adopted H.B. 1295, which added Section 2252.908 to the Government Code. The new law states that a city, among other entities, may not enter into certain contracts with a business entity unless the business entity submits a disclosure of interested parties. The law applies only to a city contract that either: (1) requires an action or vote by the city council before the contract may be signed; or (2) has a value of at least \$1 million.

The text of the proposed rule amendments is available [here](#). Of particular interest to cities are: (1) the proposed definitions for the terms “contract” and “value” of a contract; (2) the clarification that Form 1295 applies not only to goods and services, but also to real property transactions; and (3) amendments regarding the timing of notification to the commission that a city has received a completed Form 1295.

Member cities should: (1) file comments; or (2) communicate issues and concerns to Christy Drake-Adams, TML assistant general counsel, at christy@tml.org so that she can coordinate efforts to communicate with the Commission. To ensure they are given full consideration, TML recommends filing comments by May 23, 2016. The next regularly-scheduled Commission meeting is June 1, 2016, in Austin.

Senate Property Tax Committee Meetings Continue: **Next Stop is May 10 in Houston**

The next meeting of the Senate Select Committee on Property Tax Reform and Relief will be at the University of Houston Student Center Ballroom at 9:00 a.m. on Tuesday, May 10, 2016, in Room 210. The Center is located at 4455 University Dr., Houston, TX, 77204.

The agenda is available [here](#).

The Committee will hear invited, resource, and public testimony on the following interim charges: (1) study the property tax process, including the appraisal system; (2) recommend ways to promote transparency, simplicity, and accountability by all taxing entities; and (3) examine and develop options to further reduce the tax burden on property owners. It is widely believed that one goal of these hearings is to begin the push for harmful revenue caps heading into the 2017 legislative session.

It is imperative that the Committee hear from city officials about the detrimental effects of revenue caps. Please plan to attend the hearing in Houston, and note that remarks will be limited to three minutes. If you prepare written testimony, please bring 20 copies to the hearing. The League has prepared [talking points](#) to assist your preparation. In addition, a recent [article](#) in the

TML *Legislative Update* points out the flaws in the Committee's deceptive comparison between total city property taxes and median household income. (See the charts linked in the article for a better comparison.) Also, you can watch short videos of testimony by city witnesses, [one from a large city](#) and [another from a smaller city](#), at previous Committee hearings. These videos give a flavor of what questions witnesses can expect, as they are fairly consistent at each hearing.

Please contact Shanna Igo, the League's Director of Legislative Services, at sigo@tml.org if you plan to testify and/or have questions.

TML member cities may use the material herein for any purpose. No other person or entity may reproduce, duplicate, or distribute any part of this document without the written authorization of the Texas Municipal League.