Lloyd Gosselink
ATTORNEYS AT LAW

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THE LONE STAR CURRENT

A Publication of Lloyd Gosselink Rochelle & Townsend, P.C., for the Benefit of Its Clients & Friends

PHASES AND STAGES: PAUL GOSSELINK

As we begin 2018, we celebrate the retirement of firm co-founder, Paul Gosselink. Paul and Robin Lloyd began Lloyd Gosselink 34 years ago as a five-lawyer start up, which is now recognized as one of the most respected environmental, utility and related litigation firms in Texas and one the 100 Best Companies to Work for in Texas for the past seven years. Paul's contributions to both our reputation for high quality legal representation and the Firm's culture is visible daily.

Paul began his forty-year collaboration with Robin when Robin hired him away from the Texas Attorney General's Office in 1978 to join the law firm where Robin was then a partner. Six years later, they took a calculated risk, leaving that firm to create the first iteration of Lloyd Gosselink.

Paul has represented clients in all aspects of environmental law, including major federal and state superfund litigation, securing reservoir permits, permitting a grassroots oil refinery in Texas (a rare accomplishment), securing and opposing permits for electric generating facilities, permitting wastewater treatment facilities and then representing those cities in construction contract litigation regarding those same facilities, defending companies and cities in federal and state enforcement actions, and securing permits for many of the solid waste facilities in Texas – an arena he has specialized in. Paul has also been an author of the Solid Waste Chapter in the Texas Environmental Law Series. He has been a member of the Board of Directors of the Texas Chapter of the Solid Waste Association of North America (TxSWANA) for 24 years and was the seventh person in TxSWANA's 37-year history to have received its highest honor for service. Paul has received the highest rating, AV, from Martindale Hubbell, has been selected as a Texas SuperLawyer in Environmental Law since 2009, has been named a Best Lawyer in Texas since 2013, and has been consistently recognized by Chambers, the International Rating Agency, in both environmental and administrative law.

Additionally, Paul has been instrumental in creating and maintaining our Firm's culture and spirit, chairing our Firm's Culture Club, a committee focused on opportunities to give back to our community and to build camaraderie within the Firm. Lastly, but not insignificantly, Paul has led our firm softball team to multiple championships.

Paul's legal savvy and pragmatism for finding solutions for clients and others will be missed here at the Firm. However, it will come as no surprise that Paul has already put in place a transition process that will be seamless. To this end, effective January 1, 2018, Duncan Norton has been elected as the new Chair of the Firm's Air and Waste Practice Group.

What are Paul's plans? It's an evolving process. He will still be in the office intermittently over the next few months, while taking time to travel with his wife of 42 years, Twinkle, see their grandkids, and reconnect with old friends!

Paul, we appreciate all that you have done, and we know your clients feel the same way. Best wishes in all of your new journeys.

IN THIS ISSUE

Lloyd Gosselink
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THE LONE STAR CURRENT

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Lloyd Gosselink Rochelle & Townsend, P.C., provides legal services and specialized assistance in the areas of municipal, environmental, regulatory, administrative and utility law, litigation and transactions, and labor and employment law, as well as legislative and other state government relations services.

Based in Austin, the Firm's attorneys represent clients before major utility and environmental agencies, in arbitration proceedings, in all levels of state and federal courts, and before the Legislature. The Firm's clients include private businesses, individuals, associations, municipalities, and other political subdivisions.

The Lone Star Current reviews items of interest in the areas of environmental, utility, municipal, construction, and employment law. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

To receive an electronic version of The Lone Star Current *via e-mail, please contact Jeanne Rials at 512.322.5833 or jrials@lglawfirm.com. You can also access* The Lone Star Current *on the Firm's website at www.lglawfirm.com.*

FIRM NEWS

Tricia "TJ" Jackson has joined the Firm's Air and Waste Practice Group as an Associate. TJ's practice focuses on representing businesses and governmental entities in air and waste permitting, compliance, and enforcement; site remediation; and environmental due diligence in real estate transactions. She represents clients before the Texas Commission on Environmental Quality in permitting and enforcement actions, as well as negotiating agreements with opposing parties on environmental issues. TJ received her doctor of jurisprudence and her bachelor's degree from the University of Texas at Austin.

Georgia Crump will discuss "Small Cell Nodes: Understanding City Authority" at a workshop presented by TML, TCCFUI, and TCAA on February 9 in Austin.

David Klein will present "Public Utility Commission: What's Happening Now?" at the Changing Face of Water Law 19th Annual Conference TexasBar CLE on February 23 in San Antonio.

Ashleigh Acevedo will discuss "Interbasin Transfers" at the Oklahoma Water Law 10th Anniversary Conference on February 23 in Oklahoma City.

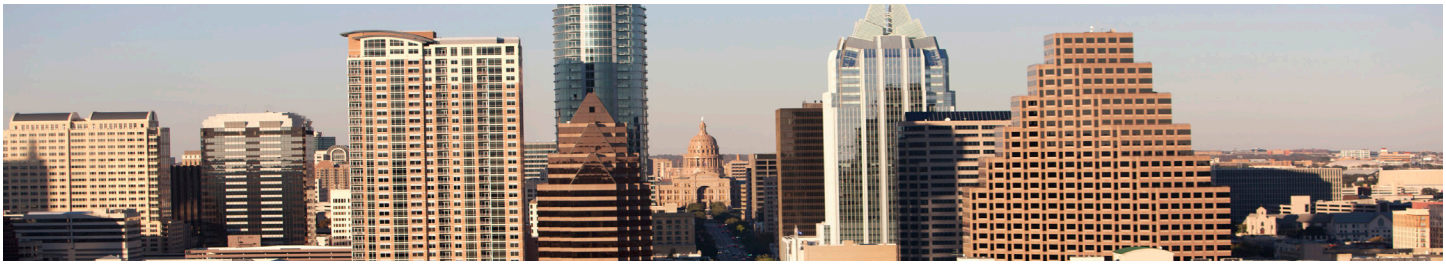
Sheila Gladstone will present "A 2018 Manager's Guide to Public Workplace Law" at the Sam Houston State University Texas Certified Public Manager Program on March 2 in Huntsville.

Sheila Gladstone will discuss "Workplace Law and Legal Liabilities" at the New Chiefs Conference on April 12 in Huntsville.

Austin has had a cold winter so far this year and every child should have a warm coat to wear. The Junior League of Austin, along with its partners Jack Brown Cleaners, KVET, and KVUE, held the 31st annual Coats for Kids drive in December 2017. Once again, our office was happy to collect and donate coats to this cause, as well as volunteering to sort thousands of coats for children in Central Texas on Distribution Day.

Lloyd Gosselink recently played Santa for two Austin-area families. Our team generously donated, wrapped, and delivered gifts as part of Operation Blue Santa here in Central Texas. Austin Police Operation Blue Santa is a 501(c)(3) – non-profit, community-based corporation, organized by the Austin Police Department, with support from the Austin Fire Department, Austin Energy, Austin Water Utilities and the Texas National Guard.

MUNICIPAL CORNER



A municipal utility district is not authorized to use "surplus funds" to repair or replace mailbox facilities within its boundaries absent a showing of statutory or constitutional authorization to do so or demonstrating the connection of such repairs with the broader accomplishment of one of the district's purposes. Tex. Att'y Gen. Op. KP-0169 (2017).

The Texas Attorney General ("AG") was asked whether the board of directors of a Texas municipal utility district ("MUD") could authorize the expenditure of the MUD's "surplus funds" — such funds derived from the collection of property taxes and fees for the provision of utility services—to repair or replace a mailbox cluster within the MUD's boundaries. The AG observes initially that MUDs operate pursuant to Chapters 49 and 54 of the Texas Water Code and derive their constitutional authority from Article XVI, Section 59 of the Texas Constitution for the "conservation and development of all of the natural resources of this State," particularly water. The AG importantly notes that water districts in Texas, including MUDs, may "exercise any powers within 'the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the legislature.'" *Bexar Metro. Water Dist. v. City of San Antonio*, 228 S.W.3d 887, 890 (Tex. App. —Austin 2007, no pet.).

The AG cites to specific purposes for which a MUD may be created as provided in Texas Water Code § 54.012, noting also that § 54.201(a) broadly provides MUDs with "the functions, powers, authority, rights, and duties which will permit accomplishment" of those specific purposes. For instance, a MUD is authorized under the Texas Water Code "to purchase, construct, acquire, own, operate, maintain, repair, improve, or extend ... any and all works, improvements, facilities, plants, equipment, and appliances necessary to accomplish" authorized purposes of the MUD. MUDs are further authorized to take any actions that are "incident, helpful, or necessary" to engage in the specifically enumerated powers contained in § 54.201(b), which lists powers related to water supply, transport, and diversion, irrigation, or the provision of parks and recreational facilities.

However, despite the broad statutory authority provided to MUDs under the Texas Water Code, the AG concludes that it found no direct statutory or constitutional authorization to repair or replace mailbox facilities; nor did the MUD identify how such repair or replacement would permit the broader accomplishment of one of the purposes for which the MUD was created. Therefore, the MUD may not use surplus funds to repair or replace cluster-type mailbox facilities that serve residences within the boundaries of the MUD.

A Type A general-law municipality does not have the authority to collect member dues on behalf of an HOA via monthly utility bills to residents of the HOA. Tex. Att'y Gen. Op. KP-0171 (2017).

The AG was asked whether or not a Type A general-law municipality could collect residential dues on behalf of two local homeowner associations ("HOAs"), specifically through monthly water utility bills sent by the municipality to the homeowners within the HOAs. Upon receipt of monthly payments, the city then disburses such dues to the HOAs, who then in turn pay the city for a portion of the city's accounting software maintenance and service costs. This accounting software is used for and related to collection of utility bills, and is used purely for the collection of the HOA dues.

The AG first discusses the nature of HOAs and associated dues, citing to pertinent sections in Chapter 209 of the Texas Property Code authorizing such associations and noting that any member dues collected by an HOA must be "designated for use by the [HOA] for the benefit of the residential subdivision as provided by" the restrictive covenants and other governing documents of the HOA, effectively creating a contractual relationship between each homeowner and an HOA. This language regarding the purposes for which collected dues may be used is critical to the AG's conclusion, as the AG then turns to an analysis of the authority of general-law municipalities in Texas.

First, the AG notes that such cities are political subdivisions created by the State of Texas and therefore "possess those powers and privileges that the State expressly confers upon them." *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex. 2004); TEX. CONST. art. XI, § 4. Then, relying on guidance from a recent Texas Supreme Court decision, the AG states that such a statutory grant of authority does include certain implied powers, but only those "as are reasonably necessary to make effective the powers expressly granted. That is to say, such as are indispensable to the declared objects of the [municipalities] and the accomplishment of the purposes of [their] creation." *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016). As such,

Texas courts will "strictly construe" the authority of general-law municipalities, and "[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipality], and the power is denied." Id.

The AG observes that while Chapter 51 of the Texas Local Government Code allows general-law municipalities to adopt ordinances that are necessary "for the government, interest, welfare, or good order of the municipality as a body politic," no statute expressly grants a Type A general-law municipality authority to provide debt collection services to a private entity such as an HOA. The AG rebuts arguments briefed by the city that collection of HOA dues serves the welfare and good order of the municipality because such dues and the collection thereof are unrelated to the city's provision of utility services or any other municipal function or purpose, and instead are to be used for the direct benefit of individual property owners as provided by the Texas Property Code. Therefore, a Texas court would likely conclude that a Type A general-law municipality exceeds its statutorily-derived authority by collecting fees for an HOA, because such authority is not "indispensable" or "necessary for the government, interest, welfare, or good order of the municipality as a body politic." See Tex. Loc. Gov't Code § 51.012; *Bizios*, 493 S.W.3d at 536.

Municipal Corner *is prepared by Troupe Brewer, an Associate in the Firm's Water, Litigation, and Districts Practice Groups. If you would like additional information or have any questions related to these or other matters, please contact Troupe at 512.322.5858 or tbrewer@lglawfirm.com.*

VIDEOCONFERENCING AT OPEN MEETINGS – IS IT AS EASY AS IT SOUNDS?

by David J. Klein and Maris M. Chambers

Have any of you used Skype or FaceTime to communicate with a friend or family member, such as with your child when you are out of town? These twenty-first century videoconferencing innovations have broken down logistical barriers, where everyone can be "present," even when they are not physically there. The scope of use of these videoconferencing applications has been spanning beyond casual conversations. In particular, over the past year, the question we have been hearing more and more is, "Can a governmental entity use videoconferencing at an open meeting of board of directors or city council?"

While the short answer is that the Texas Open Meetings Act ("TOMA"), Texas Government Code, Chapter 551, permits a governmental body to hold an open (or closed) meeting by videoconference, the TOMA and Attorney General's regulations implementing such laws establish rigid requirements for the instances and manner in which videoconferencing can be used. Before trying to hold an open meeting by videoconference, a governmental entity should evaluate these requirements and determine whether videoconferencing is practical or just too onerous. In other words, what's good for the small governmental entity isn't always good for the larger one, and vice versa. This article highlights some of these glaring legal requirements, but if you are considering whether to implement videoconferencing at your open meeting, a closer look at these laws and regulations is a must, as violations of the TOMA could result in making the action taken by a governmental body voidable, or, as to an official, committing a misdemeanor.

A governmental body seeking to add videoconferencing capabilities to its open meetings repertoire need to look no further for statutory guidance than Subchapter F of the TOMA. As a threshold issue, § 551.127(b) dictates that an open meeting may be held by videoconference only if a quorum of the governmental body is physically present at one location of the meeting. Thus, videoconferencing is not a vehicle for all officials to stay at home, but rather for an official who cannot attend the meeting at the usual location.

Next, both the video and audio feed of the remote official's participation must be broadcasted live at the meeting location of the quorum. In the case of the open portion of a meeting, the videoconference stream must be visible and audible to the public at the location of the quorum at all times. The Texas Department of Information's rules (1 Tex. Admin. Code, Chapter 209) also place regulations on the minimum size of the video equipment and quality of the audio/video stream. So, in a large auditorium or meeting room where there is no suitable audio and video equipment, complying with the TOMA can require a large expenditure of public funds.

At its core, videoconferencing for governmental entities is about two-way audio and video communication. For example, the face of each participant in the videoconference, while that participant

is speaking, must be clearly visible, and the voice audible, to the other participants, and during any open portion of the meeting, to the members of the public in attendance at the physical location of the meeting where the quorum is present. In fact, the audio and video signals perceptible by members of the public must be of sufficient quality for one to observe the demeanor and hear the voice of each participant in the open portion of the meeting. The technical standards necessary to achieve this quality of two-way communication have been implemented by the Department of Information Resources ("DIR"), and such standards are robust.

Perhaps the biggest risk a governmental entity takes in utilizing videoconferencing is managing the situation when the audio or visual signal is lost, when the officials have important, time-sensitive matters to discuss and potentially act on at that meeting. Under the TOMA, if the audio or visual signal is lost, then the meeting must be recessed until the problem is resolved. So, if there is an open meeting where a time-sensitive matter must be addressed, a glitch in the videoconference stream can bring the meeting to a halt and the item is never addressed.

Procedurally, a meeting held by videoconference call is substantially similar to any other public meeting. For example, the remotely participating party is to be counted as present at the meeting for all purposes and the meeting is subject to the same notice requirements applicable to other public meetings. That being said, the notice of a meeting to be held by videoconference call must also specify as a location of the meeting the location where a quorum of the governmental body will be physically present and specify the intent to have a quorum present at that location. Additionally, a remotely participating party must be considered absent from any portion of the meeting during which audio or video communication with that party is lost or disconnected. Unlike a typical open meeting, the governmental body must also create (at the primary meeting site) and make available to the public an audio recording of the meeting.

Given this regulatory framework, the feasibility of videoconferencing can vary greatly from one governmental entity to another. Videoconferencing may be a viable option for smaller entities whose open meetings are rarely or sparsely attended by the public. However, for open meetings widely attended by the public, videoconferencing may present more problems than solutions. Higher public attendance necessitates more energy and expense to allow audience members to observe the demeanor and hear the voice of each participant in the open portion of the meeting. Moreover, an entirely different set of rules exists under TOMA for large governmental bodies extending into three or more counties. It is therefore essential to explore whether or not implementing a videoconferencing procedure is truly in the best interests of each particular governmental body.

David Klein is a Principal and Maris Chambers is an Associate in the Frm's Water and Districts Practice Groups. If you or your governmental entity is considering the use of videoconferencing at its open meetings, do not hesitate to contact David at 512.322.5818 or dklein@lglawfirm.com, or Maris at 512.322.5804 or mchambers@lglawfirm.com.

TO PROTECT AND TO SERVE: POLICING YOUR INTELLECTUAL PROPERTY

by Lauren E. Sprouse

Earlier this year, the Arlington Police Department ("APD") learned that the logo displayed on its police cars had been imported into the Grand Theft Auto V video game. Apparently, a third-party graphics company had uploaded APD's vehicle graphics and badges into the game and users could customize their vehicles to make them look like actual APD police cars. Users could then upload videos of themselves playing the game as APD police officers onto YouTube.

APD was understandably alarmed about the fact that someone could upload their graphics onto a virtual police car and then post a video of that police car or police officer doing any number of things – many of them illegal in the real world. Thankfully, APD had filed for trademark and copyright protection of its graphics and was able to send a cease-and-desist letter to the graphics designers, who pulled the images from the game.

Whether they know it or not, many other police department graphics have been uploaded into the game. On YouTube, there are clips showing renderings of Dallas and Fort Worth police vehicles in gameplay. With the ubiquitous use of third party graphics designers, there is almost no limit to what a user can upload into the game and post on the internet. Without trademark or copyright protection, it can be difficult to protect and control the use of yours or your client's proprietary information. Federal trademark and copyright protection gives you the legal teeth needed to police the unauthorized use of intellectual property, and if necessary, take offenders to court and recover significant statutory penalties.

Trademark Protection

Trademark protection covers "words, names, symbols, sounds or colors" to distinguish from goods or services manufactured or sold by others and to indicate the source of the goods or services. This means that you can register a trademark with the United States Patent and Trademark Office ("USPTO") to cover a business name, slogan, logo or other items that distinguish your goods or services from others. In the case of the APD, it registered a trademark for its vehicle graphics. But trademark protection can extend to almost anything that relates to "branding."

Federally registering your trademark is a

somewhat involved process that includes filing an application with the USPTO and providing a trademark specimen (usually, a photograph of your mark in use). Once your application is filed, it will be examined by a USPTO trademark agent and (hopefully) approved for publication in the Gazette – a sort of public notice to all comers that your mark is now in effect. It is not the quickest process, and timelines for approval of even the simplest and most unique marks can take up to a year. However, registration of your trademark with the USPTO confers a number of benefits. It gives you the right to use the mark nationwide and enables you to bring an infringement suit in federal court against a party that is using your mark without your authorization. You can seek treble damages, attorneys' fees, injunctions, percentage of any profits made off your mark, and other statutory remedies that only apply if a mark is federally registered.

If you're concerned about the potential unauthorized use of your proprietary information, we can help you decide if registering for a trademark is the right option for you. We can also help you put a monitoring plan in place to identify any potential unauthorized uses of your information.

Copyright Protection

Copyrights protect original "literary, dramatic, musical, and artistic" works. This can include commissioned studies, reports, publications, policy manuals, and the like. Unlike trademarks, copyrights attach at the moment of creation. For example, once you finish your "great American novel," it is considered copyrighted. What matters for enforcement of your copyright, however, is federal registration of your copyright with the U.S. Copyright Office. It is a fairly simple registration process that involves filling out a form, paying a small fee, and providing a copy of the work to be copyrighted.

Without federally registering your copyright, you cannot bring an infringement suit against unauthorized uses of your material, and you can only recover damages from the date of registration. As with trademarks, there are significant statutory penalties that apply for infringement of federally registered copyrights.

If you're concerned about the potential unauthorized use of your copyrighted material, or if you are unsure of whether you have federally registered your copyright, then we can help answer your questions and devise strategies to ensure you are in the best legal position to protect yourself against potential infringers and unauthorized uses of your material.

By federally registering its trademarks and copyrights, APD put itself in the best position to protect its proprietary information and effectively police unauthorized use. The trademark and copyright processes can be difficult to navigate and understand, but as they say, an ounce of prevention is worth a pound of cure. Please contact our office if you need help getting started.

Lauren Sprouse is an Associate in the Firm's Litigation and Employment Law Practice Groups. Lauren is a registered patent attorney who represents clients in all phases of litigation. If you would like additional information or have questions related to this article, please contact Lauren at 512.322.5808 or lsprouse@lglawfirm.com.

PREVENTING AND RESPONDING TO WORKPLACE SEXUAL HARASSMENT IN THE #METOO ERA

by Sheila B. Gladstone and Ashley D. Thomas

Unless you were hiding under a rock in 2017, you must be aware of the tidal wave of allegations of sexual harassment by celebrities and other high-powered public figures that have resulted in firings, resignations, and public outcry to change attitudes as to what is considered acceptable behavior in the workplace. The #MeToo internet phenomenon emerged in its wake, serving as a call-out to victims of sexual harassment to raise awareness by sharing their stories on social media using the viral hashtag.

Given the renewed focus on workplace harassment, employers should be ready to prevent and respond to complaints in a swift and thorough manner, not only because it is the right thing to do, but also because all employers with 15 or more employees have a legal responsibility under Title VII of the Civil Rights Act to provide their employees with a workplace free of harassment and retaliation. Workplace sexual harassment has high monetary costs through charges and litigation (the Equal Employment Opportunity Commission collected over $40 million from employers in 2016 just on sexual harassment claims!), as well as significant indirect costs to the health and productivity of your employees, your turnover rate, and the reputation of your organization. The following is brief guidance on how to prevent workplace sexual harassment and how to respond when you receive a complaint:

1. Review your anti-harassment policy to ensure it has a strong statement against workplace harassment and clear reporting procedures.

Your organization should have an anti-harassment policy that includes a clear statement that sexual harassment is prohibited and that such conduct is unlawful. The statement should inform employees that if they engage in harassment, whether a manager, supervisor, or employee, they will be subject to disciplinary action, up to and including termination.

The policy should define sexual harassment as (i) unwelcome sexual advances; (ii) requests for sexual favors; and/or (iii) other verbal or physical conduct of a sexual nature when submission to the conduct is a term or condition of employment, is used as a basis for employment decisions, interferes with the employee's work performance, or creates an intimidating, hostile, or offensive

work environment. The policy should provide examples of verbal, physical, and visual conduct that constitutes sexual harassment, while cautioning employees that the examples are not all inclusive. The policy must inform employees that they will not be retaliated against for complaining of harassment, reporting harassing behavior, or for participating in an investigation regarding a harassment claim.

In addition, the policy must include a procedure for employees to report harassment, including multiple avenues to report if reporting to a direct supervisor or manager is insufficient or the offender is the individual's direct supervisor or manager. The procedure should assure employees that reports will be investigated promptly and thoroughly, will be kept as confidential as possible, and that the organization will take swift action if it is determined that harassment occurred. A benefit of a reporting procedure is that an employer can assert a defense against liability if they can show they had a policy against harassment with a reporting procedure but that the employee unreasonably failed to use the reporting procedure.

2. Remind employees of the anti-harassment policy and reporting procedures to reinforce that your workplace is one where employees should feel comfortable speaking out, and so any current issues can be addressed as soon as possible.

Whether you think your organization has a current issue or not, now is a good time to remind employees of your anti-harassment policy and reporting procedures. You can send out an email with a copy of the policy and procedure and let employees know where the policy can be found in your handbook. Assure employees that their complaints will be kept as confidential as possible and that your organization has an open-door policy, takes complaints seriously, and will address reports promptly and thoroughly. Learning about harassment complaints early, or while they are still minor, can allow resolution before things get out of control.

3. Train all employees, including supervisors and management, on your organization's anti-harassment policies and reporting procedures.

Training is a valuable tool for preventing harassment from occurring in the workplace and for increasing the likelihood that any harassing behavior will be reported so it can be addressed before the situation escalates. The training should provide management and employees with a clear and uniform understanding of what type of behavior is prohibited, how to report harassing conduct, how the organization will investigate complaints, and that retaliation is forbidden. Managers and supervisors should also be trained on how to respond to complaints from employees, no matter how minor, to foster a workplace environment that is professional and respectful, and on guidelines for discipline of harassers. Managers should also be reminded that any romantic or sexual advances toward subordinate employees violate the anti-harassment policy and place them and the organization at legal and reputational risk.

4. Respond to complaints by investigating seriously, thoroughly, and promptly.

Upon receipt of a complaint, respond immediately to address the situation. A swift response not only reduces your legal liability, but it also shows employees that your organization does not just pay lip service to its anti-harassment policy and reporting procedures, and that it takes harassment complaints seriously. Investigations should be conducted by a neutral party, whether that is HR, management, or outside consultants and/or legal counsel. The complainant should be interviewed and the discussion documented with details as to who engaged in the conduct, how the accuser has been affected, what the conduct consisted of, when the conduct occurred, and where it occurred. It should be determined whether anyone else has information that can assist in the investigation, and if so, those individuals should be interviewed as well. The person accused should be interviewed with a full opportunity to respond to the charges and provide other witnesses. Any written evidence, such as phone records, texts and posts, should be gathered and preserved. Based on the information gathered, each party's credibility should be weighed along with the facts presented to determine whether the conduct complained of occurred. The standard is not so high that it must be determined beyond a reasonable doubt that the conduct occurred, only that the employer has a reasonable belief, based on the information presented, that the harassing conduct occurred. If the results are inconclusive, the complainant should be informed of the results and the situation should continue to be monitored.

Sheila Gladstone is the Chair of the Firm's Employment Law Practice Group and Ashley Thomas is an Associate in the Employment Law Practice Group. If you have any questions related to this article, would like the Employment Law Practice Group to conduct anti-harassment training, conduct an investigation, review your policies, or advise you on anti-harassment matters; or have questions related to other employment law matters, contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com, or Ashley at 512.322.5881 or athomas@lglawfirm.com.

SHARYLAND DISTRIBUTION CUSTOMERS SET TO BEGIN TRANSITION TO ONCOR

by Cody Faulk

Long-time electric distribution customers of Sharyland Utilities will enjoy a new year with lower rates—some by as much as 40%—and have new smart meters on their way. All of this is the result of an agreement reached by Sharyland and Oncor in which the two utilities will exchange certain assets with each other, resulting in all of Sharyland Utilities' existing retail-electric-delivery customers becoming Oncor's retail-electric-delivery customers with Sharyland Utilities serving only as a transmission-service provider. This transaction was approved by the Public Utility Commission of Texas ("PUC") on October 13, 2017, and the agreement between the utilities closed shortly after on November 9, 2017.

Sharyland Utilities is currently a transmission-distribution utility serving approximately 54,000 metered and unmetered accounts in a service territory that includes 29 counties and 4 noncontiguous, geographically diverse divisions. Sharyland's distribution service area includes the cities of McAllen, Mission, Midland, Big Spring, Colorado City, Stanton, Brady, and Celeste.

Sharyland has historically had the highest retail distribution rates in Texas, a point of contention amongst regulators. The proposed transaction will provide significant rate relief to Sharyland Utilities' current retail-electric-delivery customers in the Stanton, Brady, and Celeste divisions. In addition, the originally-proposed rate increase for Sharyland Utilities' retail-electric-delivery customers in the McAllen division will be avoided.

All of Sharyland's 54,000 distribution customers will now be customers of Oncor. Oncor owns and operates facilities used to transmit and distribute electricity in northeast, central, and west Texas, including the Dallas-Fort Worth Metroplex area. Oncor delivers electricity to more than 3.4 million wholesale and retail customers in over 400 cities and over 90 counties in Texas through one of the largest integrated electric systems in the United States and the largest in Texas.

Oncor's existing customers will not be on the hook for the effectuation of this transaction, as Oncor has committed that none of the fees and expenses—or any of the other transaction costs of the proposed transaction—will be borne by Oncor's customers. This commitment does not exempt existing Oncor customers from seeing a slight increase in rates as a result of Oncor taking on Sharyland's retail distribution customers. As part of the regulatory approvals associated with the asset swap, Oncor was granted a base-rate revenue requirement increase of 3.4 percent in PUC Docket No. 46957, which will go into effect post closing.

The transition began on December 11, 2017. Sharyland customers will be transitioned to Oncor in groups on a rolling basis, based upon their monthly scheduled meter reading date occurring between December 11, 2017 and January 9, 2018. The bill based on the meter reading during this timeframe will be the final electric bill calculated with Sharyland rates. All customers were transitioned by January 9, 2018. Approximately 30 days after the customers' actual transition date, customers will receive their first electric bill calculated with new, lower Oncor rates. The entire process is intended to be seamless for customers and will be handled between Sharyland, Oncor, and other market participants, such as Retail Electric Providers (REPs). The PUC has authorized Oncor to deploy advanced meters over the coming year, and Oncor is in the process of developing its deployment plan.

Cody Faulk is an Associate in the Firm's Energy and Utility Practice Group, and his practice focuses on a wide range of utility regulatory and ratemaking matters. If you would like any additional information or have questions related to this article or other matters, please contact Cody at 512.322.5817 or cfaulk@ lglawfirm.com.

ASK SHEILA

Are parking garage injuries covered under workers' compensation?

Dear Readers:

For this issue, I'm going to make it a bit personal and answer my own question. I recently got the wonderful opportunity to experience an injury from the "employee side", when I broke my ankle in our building's parking garage after work on the way to my car. It was 6:30 in the evening. Because I had left work for the day, and because my firm does not own or have exclusive use of the parking garage, it didn't occur to me that the injury might be covered by workers' compensation. I was wrong.

It turns out, although commuting is not in the course and scope of employment, once you enter a parking lot that your employer arranges for you to park in, the commute is over. And your commute home doesn't start until you leave that lot, even if the employer only leases the lot and has no real control over its upkeep. An employer still is found to be "exercising control" over the lot if employees are directed to park there. If the parking garage is several blocks away, then injuries sustained while walking on city streets to get there are also covered workplace injuries.

There are some limitations. Because I am an exempt employee,

as long as I was leaving work, it doesn't matter how late it was. But what if I first left the building on foot, went to dinner and a show downtown, and then went to my car in the garage hours later? That broken ankle now wouldn't be covered under workers' comp, because I was using the lot only for my own benefit at that time and not the firm's. In other words, I had left the "course and scope" of my employment with the side trip. What if the dinner was to entertain a client? Now the injury would be covered. Are you seeing the pattern here?

If your employees park on the street or arrange for their own lots, then their parking lot injuries probably aren't covered before and after work. But if you send them to their car on a work-related errand mid-day, or you ask them to stop at the bank on the way home, then all that travel time—from the office, to the car, and to the bank—would likely be work time for workers' compensation purposes, even if the employee has clocked out for the day. If the bank is not on the employee's normal route home, the employee would be covered after leaving the bank, until rejoining her normal route home.

Most of the time spent traveling for an employer is covered as work time, even after the work day is over, such as going to dinner near the hotel. But if the employee travels way off the route for personal reasons and gets hurt, such as going to a famous restaurant 30 miles away from the hotel, the injury is usually not covered. Once he gets back on the normal route, he's back under workers' comp protection. There are definitely some grey areas here.

Being injured while driving a company vehicle doesn't necessarily make the injury covered under workers' comp. Obviously, driving on company business is covered, but what if the employee takes the vehicle home each night? Are injuries incurred during the commute covered? It depends on whether taking the vehicle home is for the employer's or employee's benefit. If the vehicle is provided as a perk to the employee, then the commute is not covered. If the employer needs the employee to have the vehicle at home for emergency response, then at least some courts would find the commute to be in the course and scope of employment, and any injury covered, because taking the vehicle home was for the employer's benefit.

One last scenario. An employee stops for breakfast tacos on the way to a work meeting and buys tacos for the whole group. She hits her head on the taco truck and needs stitches. Covered? Probably not. But if it was her "turn" to bring the food, and she was expected to do so by her supervisor, then likely the injury would be covered.

As you can see, there are often a few fact issues for workers' comp providers and courts to hash out and decide if an off-site injury occurred in the "course and scope of employment." It is a good idea, when reviewing workplace safety, to immediately inform the owners of building common areas and parking lots of any safety concerns, as the employer's workers' comp carrier will often be on the hook for employee injuries in those areas.

"Ask Sheila" *is prepared by Sheila Gladstone, the Chair of the Firm's Employment Law Practice Group. If you would like additional information or have questions related to this article or other matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com.*

IN THE COURTS

Water Cases

Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians, 849 F.3d 1262 (9th Cir. 2017), cert. denied 2017 WL 2909254 (U.S. Nov. 27, 2017) (No. 17-40) and 2017 WL 2909267 (U.S. Nov. 27, 2017) (No. 17-42).

In 2013, the Agua Caliente Band of Cahuilla Indians (the "Band") filed an action for declaratory and injunctive relief against the Coachella Valley Water District ("CVWD") and the Desert Water Agency ("DWA") (collectively the "Water Agencies"), seeking a declaration that it had a federally reserved and aboriginal right to the groundwater underlying its reservation. The United States District Court for the Central District of California held that "the reserved rights doctrine applied to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation." This is because the reserved rights doctrine holds that any rights not specifically addressed in a treaty (here, the treaty establishing the reservation) are reserved to the Band. The Water Agencies then appealed to

Ninth Circuit Court of Appeals, which held that: (1) the United States impliedly reserved a water right when establishing the Agua Caliente Reservation; (2) the Band's implied federal reserved water right extended to groundwater; and (3) the Band's state water entitlements to groundwater did not disqualify its implied federal reserved water right. On November 27, 2017, the United States Supreme Court denied *certiorari* to the Water Agencies, announcing that it would not review the Ninth Circuit's decision. As a result, the decision from the Ninth Circuit, granting reserved rights to groundwater to the Tribe, will remain in effect. However, the parties stipulated to divide the litigation into three phases, agreeing not to quantify any identified groundwater rights until Phase III, which has yet to be decided.

Crystal Clear Spec. Util. Dist. v. Marquez, et al., No. 1:17-CV-254-LY, 2017 WL 5509996 (W.D. Tex. Nov. 17, 2017).

In July of 2016, Las Colinas San Marcos Phase I, LLC ("Las Colinas") filed a petition for expedited release from the water certificate of convenience and necessity ("CCN") of Crystal Clear Special Utility District (the "District"), which the Public Utility Commission of Texas ("PUC") granted on September 28, 2016. The District then filed an appeal of the order in state court, seeking declaratory relief based on claims of preemption and *ultra vires* acts by the PUC. The District also filed suit in federal court arguing that decertification under Texas Water Code ("TWC") §§ 13.254(a-5) and (a-6) (the latter of which expressly forbids the PUC from denying a petition for expedited release based on the fact that a CCN holder is a borrower under a federal loan program) is preempted by 7 United States Code ("U.S.C.") § 1926(b), which protects a utility that is a recipient of federal loans from curtailment of its service area, and are therefore unconstitutional. Both the PUC and Las Colinas filed motions to dismiss, alleging that (1) the Anti-Injunction Act bars the District's claims, and (2) the court should abstain from deciding this case under various abstention doctrines. However, in a Report and Recommendation to the United States District Judge, United States Magistrate Judge Andrew W. Austin recommended that the federal District Court deny the motions to dismiss, concluding that the District's § 1926(b) claims were not barred by the Anti-Injunction Act and that the court need not abstain from deciding the case. As a result, the issue of whether or not 7 U.S.C. § 1926(b) preempts TWC §§ 13.254(a-5) and (a-6) survives to be decided by the federal district court.

Aderholt v. Bureau of Land Mgmt., No. 7:15-cv-00162-O (N.D. Tex. Nov. 8, 2017).

A settlement has been reached in the case between the Bureau of Land Management ("BLM") and Texas landowners ("Plaintiffs"), ending the debate over the southern boundary of the Red River. In 2009, the BLM published surveys in the Federal Register indicating that the southern boundary of the Red River lay about a mile south of its actual banks. The BLM based this position on the 1923 Supreme Court decision in *Oklahoma v. Texas*, 260 U.S. 606 (1923), claiming that the river's boundaries were meant to be "relatively permanent." However, the course of the Red River had shifted significantly northward since the 1923 *Oklahoma v. Texas* decision, which meant that the BLM was claiming federal ownership of thousands of acres of now-dry land on the Texas side of the river. As a result, Plaintiffs filed suit in 2015, alleging that the BLM had committed an "unconstitutional and arbitrary seizure" of their property. Under the November 8, 2017 Settlement Agreement ("Agreement"), the parties agreed that (1) the northern boundary of private property along the Red River within Wilbarger, Wichita and Clay Counties, Texas is governed by the *Oklahoma v. Texas* decision and the gradient boundary methodology laid out therein; (2) the geographic location of this boundary may change due to erosion and accretion; (3) where the boundary bank is changed by those processes, the private or public boundary follows the change; and (4) "the south bank of the Red River is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed." While the Agreement has closed the case for the parties involved, several questions remain unanswered. It does not, for example, comprise the parties' resolution of the geographic location of the southern boundary of the Red River. Instead, the BLM is free to initiate new surveys (as long as those surveys follow the procedures and standards set forth by the Agreement in (1) through (4) above), which could give rise to further law suits.

R.E. Janes Gravel Co. v. Tex. Comm'n on Envtl. Quality No. 14–15–00031–CV, 522 S.W.3d 506 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, pet. pending).

The City of Lubbock has been authorized since 1983 to reuse surface water-based effluent imported from the Canadian River Basin. The City applied for authorization in 2004 under § 11.042(c) of the Texas Water Code to convey effluent it began discharging a year prior down a tributary of the Brazos River for diversion and reuse. The Texas Commission on Environmental Quality ("TCEQ") granted the Application.

Janes Gravel, the holder of a downstream water right issued in 1968, protested the decision. The 419th District Court in Travis County affirmed the Commission's decision. Janes Gravel appealed the trial court's ruling to the Texas Court of Appeals. Janes Gravel argued, among other things, that if discharges of effluent had already commenced, then the TCEQ could not grant a bed and banks authorization without either (1) subordinating the authorization to Janes Gravel, or (2) determining that the bed and banks authorization would not adversely affect senior rights downstream. The Court of Appeals also affirmed the TCEQ's order, basing its decision upon the fact that the City's effluent had originated as imported water. Janes Gravel appealed to the Texas Supreme Court, which has requested a briefing on the merits without granting the Petition for Review.

Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Tex., No.03-16-00796-CV, 2017 WL 5078034 (Tex. App.—Austin [3rd Dist.] Nov. 2, 2017, no pet. h.).

On January 30, 2015, the City of Midlothian (the "City") filed a petition (the "Petition") with the PUC for expedited release of a portion of its property from the water

CCN service area of Mountain Peak Special Utility District (the "District"). The City filed its Petition pursuant to TWC § 13.254(a-5), which allows "the owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service" to petition the PUC for expedited release of the qualifying land from another's CCN.

On May 1, 2015, the PUC granted the City's Petition and amended the District's CCN to remove the City's property. The District then filed suit for judicial review of the PUC's order, arguing that (1) the property the City sought to have decertified was in fact "receiving water service," (2) the City illegally excluded a 6.7–acre piece of property that it owned within the District's CCN from its request for expedited release, and (3) as a borrower under a federal loan program, federal law (7 United States Code § 1926(b)) preempted the decertification of any of the District's certificated service area. Both the trial court and the Court of Appeals in Austin affirmed the PUC's order approving the City's request. In affirming the trial court's decision, the Court of Appeals reiterated that the existence of water lines on or near property to be released from a CCN does not necessarily mean the property is "receiving water service." Here, the District had not performed any act, furnished any service, or used any facilities or lines for, or committed them to, providing water service to the property at issue. In upholding the PUC's order, the Court of Appeals also clarified that no "all or nothing" requirement exists under § 13.254(a-5) to prevent a landowner from choosing to seek expedited release of some, but not all, of its property located within a CCN, and that TWC § 13.254(a-6) expressly forbids the PUC from denying a petition for expedited release based on the fact that a CCN holder is a borrower under a federal loan program.

Bexar—Medina—Atascosa Counties Water Control & Improvement Dist. No. 1 v. Bandera Cty. River Auth. & Groundwater Dist., No. 04-16-00536-CV, 2017 WL 4014703 (Tex. App.—San Antonio [4th Dist.] Sept. 13, 2017, pet. filed).

The Bandera County River Authority and Groundwater District (the "Groundwater District") filed suit against Bexar—Medina—Atascosa Counties Water Control and Improvement District ("WCID") No. 1 ("BMA") in January 2016, challenging BMA's claim of jurisdiction in Bandera County and seeking declaratory judgment that BMA lacks the authority to (1) inspect water wells; (2) enforce jurisdiction or rules over groundwater or surface water; (3) investigate water well violations; (4) promulgate groundwater rules; and/or (5) exercise rights as a WCID in Bandera County. Relying on the fact that BMA's legislatively-created borders do not extend beyond Bexar, Medina, and Atascosa Counties, the trial court agreed with the Groundwater District and ruled that BMA lacked jurisdiction in Bandera County. The trial court, however, also denied the Groundwater District's request for attorney's fees, and both parties appealed. On appeal, BMA raised the issue (for the first time) of whether it is immune from the Groundwater District's declaratory judgment claims. Specifically, BMA argued that the Uniform Declaratory Judgment Act ("UDJA") only waives immunity for challenges to the validity of a statute, as opposed to claims seeking an interpretation or declaration of what rights are granted to a party thereby or for actions taken in violation of a statute. The Texas Court of Appeals in San Antonio upheld BMA's assertion of immunity under the UDJA and remanded the case back to the trial court to allow the Groundwater District to amend its pleading. The appellate court also noted that claims seeking declaration that a governmental entity acted without authority should be brought as an *ultra vires* action, rather than an action under the UDJA.

Waller v. Sabine River Auth. of Tex., No. B160341-C (163rd Dist. Ct. Orange County, Tex. Oct. 27, 2017).

Following a heavy rainstorm in March 2016, Plaintiffs (individuals owning property on or near the Sabine River, downstream from Toledo Bend Dam) filed suit against the Sabine River Authority of Texas ("SRA") for alleged property damage caused by flooding. Plaintiffs alleged SRA caused the flooding by improperly and intentionally opening dam spillway gates that released an unreasonably high volume of water into the Sabine River, and asserted state law claims of (1) inverse condemnation, (2) trespass, and (3) nuisance. In response, SRA filed a plea to the jurisdiction, which was granted by an Orange County district court on October 27, 2017. The district court found that Plaintiffs' claims were not only preempted by federal law, but that Plaintiffs had also failed to meet their burden of proving intent and causation, both necessary elements of an inverse condemnation claim.

Governmental Immunity Cases

San Antonio River Auth. v. Austin Bridge & Road, L.P., No. 04-16-00535-CV, 2017 WL 3430897 (Tex. App.—San Antonio Aug. 9, 2017, pet. filed).

It makes sense, but we needed a court to say it—whether a governmental entity is immune to a claim is a question to be determined by a court, not an arbitrator.

San Antonio River Authority ("SARA") contracted with Austin Bridge & Road ("Austin Bridge") to repair Medina Lake Dam. The contract between Austin Bridge and SARA contained an arbitration provision. When the cost of labor and materials ran over budget, Austin Bridge invoiced SARA for the increased cost; SARA refused to pay the invoice.

Austin Bridge initiated an arbitration proceeding against SARA. In response, SARA filed suit for declaratory judgment in district court seeking a declaration that Austin Bridge's arbitration claim was barred by governmental immunity. In addition, SARA argued that the arbitration agreement was ineffective because it cannot enter into a binding arbitration agreement under Texas Government Code ("TGC") § 2009.005.

The Texas Court of Appeals in San Antonio concluded that the question of whether a governmental entity has waived immunity is a question for the court, not an arbitrator. Deciding that question, the court found SARA's immunity to be waived under the Local Government Contract Claims Act because it was a suit to recover

an amount due and owed on a contract that provided goods or services to the governmental entity.

Finally, the court rejected SARA's claim that § 2009.005 barred arbitration agreements by governmental entities. Subsection 2009.005(c) provides that "[n]othing in this chapter authorizes binding arbitration as a method of alternative dispute resolution." In the context of the rest of the section, the court concluded that subsection (c) merely provides that the section does not waive governmental immunity if a governmental entity chooses to engage in binding arbitration. The court therefore enforced the arbitration agreement between the parties.

Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc., 529 S.W.3d 569 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

Another arbitration case—this one originally filed in 2010—reflects just how long an arbitration can go when a claim of governmental immunity is interjected.

Following Hurricane Ike, the Clear Creek Independent School District ("CCISD") contracted with Cotton Commercial USA ("Cotton") for restoration services of some of its facilities. After the work was substantially completed, the school district discovered that Cotton USA had fabricated some of its invoices. The school district filed suit, alleging fraud and seeking refund of some of the money it had paid Cotton. Cotton counterclaimed for the balance owed to it on the work it had performed, and moved to compel arbitration.

The arbitrator awarded Cotton $669,122.60 in damages against the school district. When Cotton moved to confirm the award in court, the school district asserted governmental immunity. Specifically, the school district asserted that the Local Government Contract Claims Act did not apply because the parties' contract lacked an essential term because it did not identify the scope of work.

As in *SARA v. Austin Bridge & Road, L.P.*, the court concluded that the school district's immunity was a question to be resolved by the court, not the arbitrator.

Evaluating that question, the court observed that immunity is only waived for suits on contracts that are in writing and "state the essential terms of the agreement." There is no statutory definition of "essential terms," and each contract must be reviewed on a case-by-case basis.

In this case, the contract described the parties' basic obligations: restoration services and related removal and disposal services in exchange for valuable consideration. The agreement afforded Cotton significant discretion to identify tasks necessary to restore and reopen the school facilities. Under these circumstances, the court concluded that the agreement contained enough detail to enable it to determine the parties' obligations, and hence contained the essential functions. Accordingly, the court found the agreement to be within the scope of the Contract Claims Act, and the school district's immunity to therefore be waived.

The *SARA* and *CCISD* cases underscore some longstanding concerns about arbitration agreements with public entities. Two of the primary purposes of arbitration are speed and confidentiality. But as these two cases reflect, arbitration involving claims against a public entity will often not be speedy because the public entity always retains the ability to assert its immunity in court. Moreover, because of the Texas Public Information Act, the objective of confidentiality of arbitration awards can never be fulfilled when one party is a public entity.

We would thus counsel caution in entering into an arbitration agreement when one party is a public entity, as it may lead to more problems than it solves.

Kilgore Indep. Sch. Dist. v. Axberg, ---S.W.3d ---, 2017 WL 4542865 (Tex. App.—Texarkana Oct. 12, 2017, no pet. hist.).

Governmental immunity can turn lawyers into contortionists—requiring them to shape their claim to fit the scope of the court's limited jurisdiction over public entities. But as Kilgore ISD demonstrates, the right suit to challenge an unconstitutional action is a simple suit against the public entity itself.

The Kilgore ISD voted to repeal the local option homestead exemption in 2015. A subsequent constitutional amendment prohibited any local taxing authority from repealing a homestead exemption that was in place in 2014 before 2020. Nonetheless, Kilgore ISD continued collecting taxes based on the repeal of the homestead exemption. Three taxpayers sued seeking declaratory judgment, a permanent injunction, and a tax refund alleging that Kilgore ISD's board of trustees and superintendent had acted *ultra vires* in the continued assessment and collection of taxes that would have been avoided by the homestead exemption.

Governmental entities are generally immune from suit in the absence of a legislative waiver. But immunity does not prohibit suits against a state official in his/her official capacity who acts outside his/her authority (i.e., *ultra vires*).

Applying those concepts, the court held that the actions of the board and superintendent were not *ultra vires*. With respect to the superintendent, the court held that an *ultra vires* claim against a government actor must be confined to that defendant's conduct. In other words, a plaintiff cannot bring an *ultra vires* suit against an apex representative who had nothing personally to do with the allegedly *ultra vires* action. The superintendent did nothing more than follow board directives, which was within the scope of her authority. Accordingly, the court dismissed the claims against the superintendent.

With respect to the board, the court observed that the core responsibility of a trustee is to vote on propositions that come before the board. A vote or nonvote of a trustee, by definition, cannot be an *ultra vires* act. And when acting as a body, the actions of the board are the actions

of the school district, which is immune to suit. Thus, the trustees could not be sued for an *ultra vires* act.

Notwithstanding the dismissal of the *ultra vires* claims, the suit against the school district itself could go forward, because immunity does not apply when a suit challenges the constitutionality or validity of a statute and seeks only equitable relief. In this case, the taxpayers allege that the repeal of the homestead exemption was unconstitutional. Their suit for refund of overpaid taxes paid under duress, moreover, did not seek monetary damages, but rather constituted equitable relief.

Air and Waste Cases

Truck Trailer Mfrs. Ass'n, Inc. v. Envtl. Prot. Agency, No. 16-1430 (D.C. Cir. Oct. 27, 2017).

On October 27, 2017, the D.C. Circuit Court of Appeals granted a motion brought by a truck trailer manufacturers' trade group to stay the final rule relating to truck trailer emissions adopted by the Environmental Protection Agency ("EPA") and the National Highway and Traffic Safety Administration, which would establish greenhouse gas emissions and fuel efficiency standards for medium and heavy duty engine vehicles. The trade group argued that the Clean Air Act allows the EPA to proscribe emissions and fuel efficiency standards for "self-propelled vehicles," and that the final rule could not be interpreted to regulate truck trailers because they are not "self-propelled." The Court held that the trade group had met its burden, proving that the rule should be stayed insofar as it purports to regulate truck trailer emissions and fuel efficiency standards. The court granted the trade group's motion to stay the rule until administrative proceedings were complete, and required both parties to the lawsuit to file status reports every 90 days.

Sierra Club. v. Pruitt, No. 1:17-cv-02174 (D.D.C. Oct. 19, 2017).

On October 19, 2017, the Sierra Club filed a lawsuit against the EPA to compel production of reports regarding the Renewable Fuel Standard Program's (the "Program") environmental and resource impacts on air quality. The Program requires transportation fuel sold in the United States to contain a minimum volume of renewable fuels. The Program required the EPA to complete an "anti-backsliding" study in 2016 to determine whether the program adversely affects air quality. The Sierra Club asserted that EPA failed to perform its non-discretionary duties under the Clean Air and Energy Independence Security Acts by missing the deadline to submit the reports to Congress.

City of Laredo v. Laredo Merchants Ass'n, 2016 WL 4376627 (Tex. App—San Antonio 2016, pet. granted (Sept. 1, 2017)).

On September 1, 2017, the Supreme Court of Texas granted review of the *City of Laredo vs. Laredo Merchants Association* case. In response to a suit filed against it by the Laredo Merchants Association ("Merchants"), the City of Laredo ("City") defended the City's ordinance prohibiting commercial establishments from providing plastic bags at checkout as a valid exercise of the City's power. Specifically, the City argued that it is authorized to pass and enforce such an ordinance under Texas Local Government Code § 551.002, which provides that a home-rule municipality may prohibit pollution and protect watersheds. However, the Court of Appeals rendered judgment in favor of the Merchants, holding that a "checkout bag" fell within the definition of "container" or "package." The Court further held that the City ordinance regulating the use of such materials was preempted by the Solid Waste Disposal Act § 361.0961, which generally precludes the City from adopting an ordinance that prohibits or restricts the sale or use of a container or package. Oral arguments were held on January 11, 2018.

In the Courts *is prepared by Maris Chambers in the Firm's Districts and Water Practice Groups, James Parker in the Firm's Litigation Practice Group, and Tricia Jackson in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact Maris at 521.322.5804 or mchambers@lglawfirm.com, James at 512.322.5878 or jparker@lglawfirm.com, or Tricia at 512.322.5825 or tjackson@lglawfirm.com.*

AGENCY HIGHLIGHTS

White House Council on Environmental Quality

Kathleen Hartnett White is now a Senate vote away from leading the White House Council on Environmental Quality. On October 13, 2017, President Donald Trump nominated the former Texas Commission on Environmental Quality ("TCEQ") Chairwoman to chair the White House Council on Environmental Quality. On November 29, 2017, a U.S. Senate committee voted to advance White's nomination to the full Senate, putting her one step away from coordinating environmental policy for the Trump Administration. Prior to her nomination, White served as Chairwoman and Commissioner of the TCEQ from 2001 to 2007. White has also served as a Director of both the Lower Colorado River Authority and the Texas Water Development Board.

United States Environmental Protection Agency ("EPA")

EPA and the Army Corps of Engineers propose to amend the effective date of the 2015 rule defining "waters of the United States." On November 16, 2017, the EPA and the U.S. Army Corps of Engineers ("USACE") proposed to amend the effective date of the 2015 rule defining "waters of the United States" (the "2015 WOTUS Rule") for purposes of jurisdiction under the Clean Water Act ("CWA"). Under the above-mentioned proposal, the 2015 WOTUS Rule—currently stayed in pending litigation—would not go into effect until two years after extension of the effective date is finalized and published in the Federal Register. The delay would give the agencies the time needed to reconsider and redevelop the definition of "waters of the United States." The 2015 WOTUS Rule, which redefined the scope of CWA jurisdiction, had an original effective date of August 28, 2015. Although implementation of the 2015 WOTUS Rule is currently on hold as a result of the Sixth Circuit's nationwide stay of the 2015 WOTUS Rule while litigation is pending as well as a stay imposed by a North Dakota District Court on related litigation, it is uncertain how long those stays will be in place. Though the comment deadline for this expedited rulemaking has closed, EPA and the USACE have taken this action in an effort to provide certainty and consistency to the regulated community. This proposal to amend the effective date of the rule is separate from the two-step process the agencies are currently undertaking in order to repeal and replace the 2015 WOTUS Rule.

EPA awards $600,000 grant to TCEQ to help restore Texas coast. The EPA awarded $600,000 to the Texas Commission on Environmental Quality ("TCEQ") on November 28, 2017 to help restore coastal habitats in Texas. The funds will support the Galveston Bay Estuary Program's Comprehensive Conservation and Management Plan. Established in 1989, the Galveston Bay Estuary Program is one of two estuary programs in Texas, one of twenty-eight National Estuary Programs in the United States, and is administered by the TCEQ. According to EPA Administrator Scott Pruitt, "[t]his project will support vital and diverse initiatives in the Galveston Bay Estuary and throughout the region, especially as the area recovers from the impacts of Hurricane Harvey." The project focuses on the implementation of the Comprehensive Conservation and Management Plan's restoration of disappearing coastal habitats of the estuary through applied research components that address restoration from an economic and ecological perspective.

On December 11, 2017, EPA Administrator Scott Pruitt announced the appointment of Anne Idsal as Region 6 Administrator. Anne Idsal officially joined the EPA on December 18, 2017, having most recently served as Chief Clerk and Deputy Land Commissioner for the Texas General Land Office ("GLO"). Idsal received her B.A. in Politics from Washington and Lee University in 2005 and her J.D. from Baylor Law School in 2010.

EPA issues a decision for Superfund cleanup in the San Jacinto River Waste Pits. In October 2017, the EPA issued a Record of Decision ("ROD") regarding the San Jacinto River Waste Pits Superfund site located in Channelview, Texas. An ROD is a public document issued after the EPA holds a public notice and comment period on the proposed decision explaining the remediation plan for the cleanup of a Superfund Site. In the San Jacinto River Waste Pits ROD, the EPA identified both International Paper and McGinnes Industrial Maintenance Corp. as potentially responsible parties ("PRPs"). The ROD requires the PRPs to excavate 160,000 cubic yards of contaminated waste that was generated during the process of bleaching wood in order to make paper. The two companies previously installed a protective cap on the waste pits, but the site was impacted by Hurricane Harvey, requiring the companies to repair the cap in September 2017. The EPA stated that excavation of the cap and full removal of the waste is necessary to protect the public health or welfare from releases of hazardous substances. The PRPs and EPA are currently developing a plan to implement the remaining ROD requirements.

Revised Clean Air Act ("CAA") Section 608 Refrigerant Management Regulations will take effect January 1, 2018. Starting on January 1, 2018, the revised provisions of Section 608 of the CAA regarding refrigerant management regulations

will go into effect. Section 608 of the CAA prohibits the knowing release of refrigerant during maintenance, service, or disposal of air conditioning and refrigeration equipment. The revised rules will include new recordkeeping requirements for the disposal of appliances containing five to fifty pounds of refrigerant, and a requirement to recover 80–90% of not only ozone-depleting substances, but also any substitute refrigerant from appliances using certified recovery and/or recycling equipment. The revised rules also require facilities to maintain records of recovery or recycling of refrigerant for three years.

EPA proposes rule to repeal Clean Power Plan, 82 Fed. Reg. 48035 (Oct. 16, 2017). On December 16, 2017, EPA issued a Notice of Proposed Rulemaking, proposing to repeal the Clean Power Plan ("Plan") on the grounds that it was not consistent with the CAA. The Plan was adopted in 2015 and aimed at fighting climate change by reducing carbon emissions. However, in 2016, the U.S. Supreme Court halted implementation of the Plan. Following an overwhelming public response to the proposed repeal, the EPA announced that it would schedule additional public listening sessions and extend the public comment period to January 16, 2018. Comments should be identified by Docket ID No. EPA-HQ-OAR-2017-0355 and may be submitted electronically at: https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-0002.

EPA issues regional haze final rule, 82 Fed. Reg. 45481 (Sept. 29, 2017). EPA issued a final rule, effective on September 29, 2017, allowing Texas coal plants to participate in an intrastate sulfur dioxide emissions trading program instead of installing costly pollution controls. This rule established an alternative to the Best Available Retrofit Technology ("BART") standard required by the previous federal implementation plan and state regional haze rules. The BART rule requires coal industry leaders with the highest levels of sulfur dioxide emissions to install costly pollution control systems. Affected utilities argued that the installation of the pollution controls could put them out of business, but the new rules will allow Texas coal plants to avoid such costs. However, environmental advocacy groups argue that the new rule will not facilitate the goal of reducing sulfur dioxide emissions in Texas. The National Parks Conservation Association and Sierra Club filed a petition for review of the final rule in the D.C. Circuit Court of Appeals on November 28, 2017, and the petition is currently still under review.

Federal Communications Commission ("FCC")

On December 14, 2017, the FCC reversed its prior decision in 2015 to regulate broadband internet access service as a telecommunications service. The reversal removes internet access service providers from the restrictions against showing favoritism to websites, or from charging extra fees for faster service. The 200-plus page Declaratory Ruling and Order also rejected some of the FCC's own authority over the broadband industry, in what critics claim is a politicization of what had traditionally been a bipartisan policy to protect consumers' use of online platforms. The FCC's decision is a major policy shift for the agency and has been criticized by consumer groups and tech companies as opening the door for pricing schemes that would steer consumers toward specific content. Supporters of the decision claim the internet will continue to work as it always has, and consumers' daily internet experiences will not change. Legal challenges are being threatened, and legislation is already being introduced to attempt to settle the issue.

Texas Commission on Environmental Quality ("TCEQ")

Texas' Multi-Year Implementation Plan for RESTORE grants accepted. Millions of dollars in grant funds under the federal RESTORE Act, the law created to respond to the 2010 Deepwater Horizon blowout and oil spill, are coming to Texas. Texas' Multi-Year Implementation Plan ("MIP") was accepted by the U.S. Department of Treasury on December 17, 2017. The plan lays out how funds for Texas under the federal RESTORE Act will be distributed. Twenty-six projects are included in the MIP, with an estimated total cost of $114.2 million. Currently, approximately $85.6 million is available to Texas with projects directly affecting twelve coastal counties, in compliance with the RESTORE Act requirement that activities directly benefit the coastal area. While planning for these funds began long before Hurricane Harvey developed and are not necessarily related to hurricane relief, many areas devastated by the storm will also benefit from the receipt of these funds.

Caroline Sweeney steps down as Deputy Director of the TCEQ's Office of Legal Services ("OLS"). Effective December 1, 2017, Sweeney returned to the OLS Remediation Section as a part-time attorney. The Deputy Director role has been filled by Margi Ligarde, who brings a wealth of knowledge and experience to the position. Most recently, Ligarde served as the Special Counsel to the OLS Deputy Director. However, Ligarde has more than twenty-one years of experience in various other roles within OLS and worked in the private sector as an environmental attorney prior to joining the OLS. Ligarde is a graduate of the University of Texas and received her law degree from St. Mary's University.

TCEQ will require registration for air permits-by-rule ("PBRs") and standard permits ("STDP") to be submitted via ePermits. In its Interoffice Memorandum dated August 8, 2017, the TCEQ announced that as of February 1, 2018, the Air Permits Division will require all applicants to submit registrations for PBRs and STDPs through the agency's ePermits system. The agency reasoned that the change will facilitate more efficient, effective, and environmentally friendly processing of air permits. The requirement will not immediately apply to concrete batch plants, rock and concrete crushers, hot mix asphalt plants, polyphosphate blenders, or portables, because submission of these types of permits is not yet available through the system.

TCEQ proposes rules to consolidate public notice for certain air permits, 42 Tex. Reg. 6676 (Dec. 1, 2017). On November 15, 2017, the TCEQ published proposed rules regarding the consolidation of public notice for certain case-by-case air permit applications. The proposed rules implement Senate Bill 1045 from the 2017 Texas legislative session and amend 30 Texas Administrative Code ("TAC") Chapter 39 regarding Public Notice and Chapter

55 regarding Requests for Reconsideration and Contested Case Hearings. The proposed rules require individuals applying for a new permit, or amending an existing permit, under 30 TAC Chapter 116, Subchapters B or G (New Source Review Permits and Flexible Permits), to publish one consolidated notice, rather than two: Notice of Receipt of Application and Intent to Obtain Permit, and Notice of Application and Preliminary Decision. This consolidated notice is required only when the TCEQ declares the application administratively and technically complete, and the executive director prepares a draft permit, all within fifteen days of receipt of the application. The public comment period for this proposed rule ended on January 3, 2018.

Texas Water Development Board ("TWDB")

The Texas Water Development Board approves amendments to Intended Use Plans making $90 million available for disaster recovery. On October 17, 2017, TWDB approved amendments to the State Fiscal Year 2018 State Revolving Funds Intended Use Plans, making $90 million in financial assistance available for disaster recovery. The approval will enable the TWDB to provide immediate funding options to communities impacted by Hurricane Harvey. The changes will make $12 million available in principal forgiveness and $78 million available in zero-interest loans through the Clean and Drinking Water State Revolving Funds for emergency relief and urgent needs projects. A total of 20% of the zero-interest loans and 50% of the principal forgiveness will be reserved for disadvantaged, small, and rural communities. Water supply facilities that suffered damage from flood or other catastrophic events are eligible for funding through the Drinking Water State Revolving Fund. Projects eligible for financial assistance through the Clean Water State Revolving Fund include wastewater and stormwater management facilities. To apply for assistance, facilities must complete and submit a Project Information Form, which can be found at http://www.twdb.texas.gov/financial/programs/pif.asp.

Bech Bruun, Chairman of the TWDB, resigns. On Thursday, December 7, 2017, in a letter written to Governor Greg Abbott, Bruun explained: "Recent events, namely the impacts of Hurricane Harvey, have led my family and me to the belief that the time has come for me to focus my passion for public service closer to home." Bruun will run as a Republican for Texas' 27th Congressional District, which includes the Corpus Christi area where he grew up. District 27 is currently represented by House Republican Blake Farenthold. Bruun, based in Austin, previously held jobs under former Governor Rick Perry and state Representative Todd Hunter, before becoming a member of the TWDB in 2013. He was later appointed to chair the TWDB by Governor Abbott in 2015.

Public Utility Commission ("PUC")

Governor Abbott Appoints Arthur D'Andrea as PUC Commissioner. On November 14, 2017, Governor Greg Abbott appointed Arthur D'Andrea as Commissioner of the Public Utility Commission with a term set to expire September 1, 2023. Before his appointment, D'Andrea served as assistant general counsel for the Office of Governor Abbott, and previously served as an assistant solicitor general for the Office of the Attorney General of Texas. He is a member of the State Bar of Texas and is an officer for the Kealing Middle School PTA. D'Andrea received a Bachelor of Science from The University of Texas at Austin and a Juris Doctor degree from The University of Texas School of Law. D'Andrea first sat as Commissioner at the PUC's November 17, 2017 Open Meeting.

Docket No. 46831, *Application of El Paso Electric Company to Change Rates*. On December 14, 2017, the PUC approved the Final Order addressing the application of El Paso Electric Company ("EPEC") for authority to change rates. An uncontested agreement was executed that resolves all of the issues between the parties to this proceeding. Consistent with the agreement and the PUC's Final Order, the application was approved.

The agreement provides that EPEC should receive an overall increase of $14.5 million in Texas-base-rate and other revenues, effective for electricity consumed on and after July 18, 2017. Notably, the agreement also provides a mechanism to capture a reduction in the federal income-tax rates for corporations. If the federal income-tax rate for corporations is decreased before EPEC files its next base rate case, then EPEC will record, as a regulatory liability, taking into account changes in billing determinants, the difference between (a) the amount of federal income-tax expense that EPEC collects through the revenue requirement approved in this proceeding and reflected in its rates and (b) the amount of federal income-tax expense calculated using the new federal income-tax rate, taking into account any other federal corporate-tax changes, such as the deductibility of interest costs.

Docket No. 47898, *Petition of East Texas Electric Cooperative to Transfer 35 MW Load to ERCOT*. On December 21, 2017, East Texas Electric Cooperative ("ETEC") filed a petition to transfer 35 megawatts ("MW") of load into the Electric Reliability Council of Texas ("ERCOT"). ETEC's service territory in east Texas is uniquely located along the seams of three Regional Transmission Organization ("RTO") markets, which include ERCOT, Southwest Power Pool ("SPP"), and the Midcontinent Independent System Operator ("MISO"). Currently, the east Texas cooperatives serve approximately 1,000 MW of load in SPP, approximately 450 MW of load in MISO, and approximately 150 MW of load in ERCOT. This proposed transfer would increase ETEC's load in ERCOT to about 185 MW in total.

Specifically, ETEC requests authority to transfer two wholesale delivery points, consisting of approximately 35 MW of load, out of SPP and into ERCOT. The transfer is expected to benefit ETEC's cooperative members and ultimately the retail customers by reducing power costs and better balancing ETEC's load amongst the three RTOs, thereby diversifying ETEC's exposure to each market. This transfer is expected to result in energy savings for each of the 330,000 member consumers served by ETEC's distribution cooperative members.

This requested transfer was made possible by Oncor Electric Delivery Company's plan to rebuild its 138 kilovolt Jewett-Lufkin

transmission line. This line is in close proximity to ETEC's load and offers ETEC the opportunity to transfer load into ERCOT at minimal cost. In fact, the total estimated construction cost for the transfer and the work at the two delivery points is estimated to be approximately $2.5 to $3.0 million.

Docket No. 47472, *Commission Staff's Petition to Determine Requirements for Smart Meter Texas*. In August 2017, the PUC opened a proceeding to determine the new requirements for Smart Meter Texas ("SMT") 2.0. SMT 1.0 is an interoperable, web-based information system that stores electric usage data and provides access to advanced meter usage data for premises served by advanced meters for customers, Retail Electric Providers ("REPs"), and authorized third parties. SMT is operated by several transmission and distribution utilities ("TDU") (Oncor, CenterPoint Energy Houston Electric, LLC ("CenterPoint Energy"), American Electric Power ("AEP"), and Texas New Mexico Power Company) that have entered into a Joint Development and Operations Agreement ("JDOA"), which provides for the joint ownership, development, operation, and maintenance of SMT. SMT was created in 2008 to provide a standard web portal and data repository for meter usage data regardless of utility service territory, consistent with the requirements of the Public Utility Regulatory Act and the PUC's substantive rules. SMT provides a single point of access for customers without the need to develop individual TDU web portals.

However, participation in SMT 1.0 is very low. There are 100,695 residential accounts, representing approximately 1.4% of active meters in SMT. There are approximately 5,260 small business accounts, representing approximately 0.007% of active meters in SMT. And the costs have been significant. Through the end of 2016, Oncor and CenterPoint Energy areas alone have paid over $96 million for SMT costs. This new proceeding was opened to determine which requirements should be revised, deleted, or kept as the Joint TDUs bid out a new contract for SMT 2.0. Several parties intervened and filed testimony. Parties spent two days in hearings litigating the proceeding. However, parties have been working hard to settle this proceeding and identify what attributes customers need and want for a lower cost to ratepayers. Briefs were due January 5, 2018.

Docket No. 47199, *Project to Assess Price-Formation Rules in ERCOT's Energy-Only Market*. In response to a lengthy report submitted by NRG Energy, Inc. ("NRG") and Calpine Corporation ("Calpine"), the PUC has opened a project to assess price-formation rules in ERCOT's energy-only market. The report proposes a number of significant changes to ERCOT's market design, and to the way that wires utilities collect revenue from large commercial and industrial customers. The PUC held a workshop on August 10, 2017, where the authors of the report submitted by NRG and Calpine gave a presentation to the Commissioners and stakeholders on their recommendations for changes to ERCOT's energy-only market.

The authors of the report discussed their list of recommendations, noting the level of difficulty each would present to implement. These recommendations include: (1) making adjustments to the operating reserve demand curve to address reliability impacts of changes in the generation supply mix and price impacts of reliability deployments; (2) including the marginal costs of transmission losses in market pricing; (3) introducing Local Scarcity Pricing to provide a market solution to properly set prices when there are limited generating reserves in a local region; and (4) adopting market-oriented policies for transmission investment as a replacement for Texas' socialized transmission planning, and development of alternatives for transmission cost recovery.

Dr. David Patton from the MISO Independent Market Monitor ("IMM") also presented his proposals for improving the design of the ERCOT market, but focused on the value of co-optimization. Dr. Patton believes the benefits of co-optimization clearly exceed the costs and should be implemented as soon as possible. ERCOT also gave a presentation, after Dr. Patton, and claimed that it would cost approximately $40 million and take four to five years to implement co-optimization technology into the market.

Commissioners and stakeholders had the opportunity to ask questions of the presenters. The Commissioners ultimately decided that this was the first of many workshops to discuss these proposals and asked for stakeholder comments on the report. ERCOT and other stakeholders filed comments on the proposals on December 1, 2017 and reply comments on December 22, 2017. The Commission will likely determine next steps in early 2018.

Railroad Commission of Texas ("RRC")

GUD No. 10669, Statement of Intent of CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas to Increase Rates in the South Texas Division. On November 16, 2017, CenterPoint Energy Entex and CenterPoint Energy Texas Gas ("CenterPoint") filed a Statement of Intent to change gas rates in its South Texas service territory. Within its South Texas Division, CenterPoint provides service to 142,288 customers (132,129 residential customers). CenterPoint is requesting a rate increase of $540,000, which is a 1.0% increase in revenues, excluding gas costs. CenterPoint is also asking for a $0.39 surcharge related to Hurricane Harvey. Together, these increases will raise the average residential bill by $1.13.

Two different coalitions of cities have intervened, along with RRC Staff. The first Prehearing Conference was held December 7, 2017. Parties are currently engaging in discovery.

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