



# THE TEXAS MUNICIPAL LAWYER<sup>TM</sup>

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## CONSTITUTIONAL CHALLENGES OF ORDINANCES MUST BE RAISED AT TRIAL

In a recent case (*Karenev v. State*), the Texas Court of Criminal Appeals held that a facial constitutional challenge to a penal statute may not be raised for the first time on appeal. It must be raised at trial in order to preserve error. As a result of this ruling, any constitutional complaint about an ordinance should be brought in a municipal court of record or it is waived.

In the underlying case, an ex-husband was convicted at trial for violating Penal Code § 42.07 (a)(1) by sending harassing emails to his ex-wife with the intent to harass, annoy, alarm, abuse, torment, and/or embarrass her. He appealed his conviction to the (Fort Worth) Court of Appeals, stating the statute was unconstitutionally vague. The Court of Appeals agreed and held that the statute was void. The Court also stated that a claim that a statute is unconstitutional on its face may be raised for the first time on appeal, despite the general rule that a challenge to the constitutionality of a statute as applied to a particular defendant must be raised at trial in order to preserve error. The State appealed the Court of Appeals' ruling to the Texas Court of Criminal Appeals.

In its majority opinion, the Court of Criminal Appeals stated that the (Fort Worth) Court of Appeals re-

lied on bad case law to reach its finding. It also stated that a facial challenge to the constitutionality of a statute is a right that can be forfeited, and that the State should not be required to anticipate that a statute may later be held to be unconstitutional.

Though agreeing with the result of the majority opinion, the concurring opinion noted that facial attacks on penal statutes can always be reviewed, because a facial attack is completely divorced from the specific facts of the crime. However, in the *Karener* case, the ex-husband's complaint was more about the sufficiency of evidence rather than a facial constitutional void-for vagueness complaint.

## INTEGRITY AT CITY HALL

**Q** Can an attorney communicate with non-lawyers in an administrative agency that has decision making authority over a particular matter pending before the agency?

**A** Lawyers should deal with lawyers. In a recent decision published by the Professional Ethics Committee of the State Bar of Texas, the Committee ruled that *ex parte* communications by attorneys with certain non-attorney personnel within the administrative agency who may influence the opinion of a decision maker over the matter pending is

strictly prohibited. (Opinion No. 587). A matter is "pending" before the administrative agency if the agency has been selected to determine the matter or it is reasonably foreseeable that the agency will be the selected avenue for the matter.

The prohibition against *ex parte* communications applies to direct or indirect communications with the decision maker within the agency or an individual in a supervisory role over the decision maker, (i.e. administrative law judges, hearing officers, and executives in charge of the agency). The prohibition begins before the filing of the matter before the agency and exists during the time the matter is pending.

## EDUCATIONAL OPPORTUNITIES

- **July 1:** Alan speaks on *Foreign Nationals and Immigration Issues* at the Municipal Prosecutor's Conference in Austin, sponsored by the Texas Municipal Courts Education Center.
- **July 17:** Alan conducts Open Government Training at the Newly-Elected Officials Workshop in Waco, sponsored by the Heart of Texas Council of Governments (HOT-COG).
- **July 31:** City of Nolanville hosts educational seminar for city officials featuring Alan on Open Government and Land Use.

**ROGER GORDON NAMED SENIOR ASSOCIATE**



Roger Gordon has been named senior associate. After three years of service to the firm, we are proud to bestow this honor.

Roger heads our firm’s litigation efforts. His practice primarily involves trial and appellate advocacy. Roger is the firm’s lead attorney in administrative hearings, having successfully represented municipal clients before SOAH, TCLEOSE, TCEQ, RRC, and TWC. He also serves as municipal prosecutor for several clients and has vast experience in adjudicating Code Enforcement matters.

Prior to joining the Firm, Roger’s litigation experience included personal injury law, open records litigation, and, most recently, environmental litigation involving the United States Navy. While earning his Juris Doctorate from Baylor Law School, Roger performed extensive research work for the Texas State Senate regarding redistricting efforts in Texas, including attending oral arguments for the *Vieth v. Jubelirer* appeal to the U.S. Supreme

Court. Roger also interned at the State Office of Administrative Hearings. Prior to attending law school, Roger received his degree in Management from Texas A&M University in College Station.

**CLIENT NEWS: WEST LAKE HILLS**

On June 5, Jim Stearman officially retired from the City of West Lake Hills. The city honored Mr. Stearman with a retirement lunch and Mayor Dave Claunch presented Mr. Stearman with a special award plaque in recognition of his 11 years of service to West Lake Hills as City Inspector.



Mayor Claunch presents Jim Stearman with a retirement appreciation award.

As City Inspector, Mr. Stearman’s primary duties included code enforcement of building and maintenance codes, supervising public works projects,

and serving as the city’s building official and flood plain manager. We wish him the best of luck. *Happy travels, Jim!*

**LEGAL Q & A**

**Q** What are easements?

**A** An easement is a right to specific use of someone else’s land, or a right to prevent certain uses of someone else’s land. Because it is a property interest, it should be in writing, although a prescriptive easement can be acquired on private property in certain situations. Since it is not an ownership interest, the notice and bidding provisions of the Local Government Code do not apply to cities seeking to buy or sell. Easements vary widely in their terms and conditions. Some common easements used by cities include: utilities (construction, maintenance, and repair); drainage (owner may not block water flow); rights-of-way (streets, alleys, and sidewalks); access (temporary access for construction or permanent access to a lake, park, or other public space).

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