

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

A newsletter published by the Bojorquez Law Firm, PLLC ★ December 2009

## ESD VS. CITY SALES TAXES



On November 10, 2009, our firm hosted a meeting at the Texas State Capitol in conjunction with Representative Patrick Rose.

The meeting

included representatives from the cities of Dripping Springs, Buda, the Comptroller's Office, Attorney General's Office, Secretary of State's Office, and several Emergency Services Districts (ESDs). The topic was the effect of ESD sales tax elections on smaller cities that do not provide fire/EMS services. ESDs can adopt a sales tax even if there are other public entities within their jurisdiction that have maxed out the 2% sales tax cap. ESDs can do this by removing from the election (from the tax) areas (such as city limits) where the sales tax is already at 2%. The primary question at the meeting was: *What happens when an excluded city annexes ESD territory?* The consensus reached by the group was is that upon annexation the ESD sales tax will technically go away,

but the Comptroller will withhold from the City the amount that the ESD *would have collected*, and pay that amount to the ESD. This result may be problematic for cities that rely on sales taxes but will be precluded from growing their sales tax base upon annexation. The response to this problem is a legislative one.

## HOLIDAY DISPLAYS ON CITY PROPERTY

'Tis the season to dust off the lights and decorate downtown. However, cities should use caution with religious displays on public property. The Establishment Clause of the U.S. Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The **Separation of Church and State** does not mean cities are completely barred from recognizing holidays or celebrating religious events. Secular images, such as Santa Claus and Christmas trees, will generally survive legal challenge. According to the Supreme Court in *Allegheny County v. Greater Pittsburgh ACLU*, the government may acknowledge Christmas as a cultural phenomenon, but it may not observe it as a Christian holy day praising God

for the birth of Jesus. Thus, it is unclear whether religious symbols, like Nativity scenes and menorahs, can lawfully be displayed by a city or on city property. There are no federal or state statutes covering this topic, and the case law provides few concrete rules.

In 2005, the Supreme Court decided two cases that provide some guidance. Both cases concerned display of the Ten Commandments. The cases applied the same law, but yielded contrary results.

*(continued on the back)*

## EDUCATIONAL OPPORTUNITIES

- **January 11-13, 2010:** Alan presents to the Texas Municipal Clerks Association (TMCA) at the Election Law Seminar in Irving, Texas. Topic: Special Elections, Recount, Cancellations, & DOJ Submissions. For more information, please go to [http://municlerks.unt.edu/seminars/0110/seminar\\_0110.html](http://municlerks.unt.edu/seminars/0110/seminar_0110.html)
- **March 24-26, 2010:** Alan speaks on both *Zoning Procedures*, and *Tree Preservation* at the University of Texas School of Law's annual *Land Use Conference* in Austin, Texas



Ten Commandments display at the Texas Capitol in Austin.

In *Van Orden v. Perry*, the Texas Capitol was allowed to keep a monument bearing the Commandments. On the other hand, in

*McCreary County v. ACLU*, two Kentucky courthouses lost

their framed copies of the Commandments. The different outcomes boiled down to **context** (i.e., Did the presence of the Commandments communicate a religious message or merely show a moral and historical basis for our governments?). The Ten Commandments in Kentucky were paid for by the counties, prominently located, and stood alone. The Commandments in Texas were paid for by a non-profit organization, were passively located, and were surrounded by other monuments.

In general, if a private entity wishes to place a display on public property, it may do so with the city's consent. However, the city should consider disclaiming any endorsement or participation in the views depicted by the display. In addition, a city should not allow one group to place its

religious imagery on public property while denying another group. The best way to ensure safety from litigation is for cities to make sure their holiday displays are nonsectarian in nature. Nonetheless, many cities will decide to include religious imagery as a part of holiday displays. In these instances, remember that these religious symbols should not form the main theme of the display. It is always wise to contact your city attorney to determine if the particular display will run afoul of the Constitution.

**CLIENT NEWS**



Mayor Todd Purcell and City Administrator Michelle Fischer at the HEB groundbreaking ceremony.

**Dripping Springs, Texas**—HEB grocery store has moved into Dripping Springs. The official groundbreaking was on Monday, November 23rd at 10am. Congratulations!

**Salado, Texas**—The Annual Christmas Stroll Parade will be held on Thursday, December 3rd at 5pm.

The parade route will be on Main Street beginning on the corner of Royal and Main Streets and concluding at Brookshire Bros. For more details, please visit [www.salado.com](http://www.salado.com).

**INTEGRITY AT CITY HALL**

**Q:** Does a city council member with a home within 200' of land for which a zoning variance has been requested have a Conflict of Interest?

**A:** Not necessarily. Years ago the Texas Attorney General (A.G.) had an educational publication that indicated ownership of property within 200' of land for which a municipal authorization was being sought created a *per se* Conflict of Interest. The A.G. no longer takes that position, and instead states that specific situations must be evaluated on a case-by-case basis.

**BOJORQUEZ**  
**LAW FIRM, PLLC**  
 TexasMunicipalLawyers.com