

TEXAS TECH ADMINISTRATIVE LAW JOURNAL

Volume 16, Book 2



Summer 2015

Sponsored by Administrative and Public Law Section
State Bar of Texas

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TEXAS TECH UNIVERSITY
School of Law™

THE STARS AT NIGHT: LOCAL REGULATION AND ENFORCEMENT OF OUTDOOR LIGHTING STANDARDS (DEEP IN THE HEART OF TEXAS)

by Alan J. Bojorquez* and Ryan Kellus Turner**

Acknowledgments: Thanks to Michelle Fischer, the City of Dripping Springs, Robert Wood, City of West Lake Hills, Donald G. Vandives, Robby Chapman, Bonnie Goldstein, Hope Lochridge, David Newell, Lawrence Provins, Wesley Stidham, and Stephanie Turner.

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I. INTRODUCTION

It is common for municipalities to include lighting restrictions among the many aspects of building and construction regulations to which property owners must conform.¹ However, as science expands our knowledge of the health and ecological effects of artificial lighting, and energy conservation becomes a priority, regulations are taking on an importance beyond just aesthetics or annoyances.² It is incumbent on regulatory agencies to address evolving community standards and advances in the technology of creating

1. See *infra* Part VIII.A.

2. See *infra* Part VI.

artificial light.³ This article is a guide for those crafting, amending, administering, or enforcing outdoor lighting regulations.⁴ The lawyers offering practical tips in this article have guided cities through this regulatory endeavor.⁵

II. POLICY FORMATION

A. Problem Identification

When drafting regulations, it is wise to begin with problem identification.⁶ Establish the nature of the problem when drafting to prevent the negative and to encourage the positive.⁷ When it comes to writing outdoor lighting ordinances, it is prudent to spend time documenting the adverse effects of light pollution and stating the policy objectives a drafter seeks to accomplish.⁸ Are there examples of bad lighting in the community that citizens are well aware of or to which neighbors share an aversion? Or conversely, are there positive examples of the benefits of dark skies that the community wants to preserve? For example, affording the continued opportunity for stargazing, encouraging uniform aesthetics, attracting shoppers, and reducing hazards to motorists and pedestrians are all legitimate reasons for municipalities to enact land use regulations.⁹ There is a possibility of resistance from property owners with strong emotional views on the security aspect of outdoor lighting, or political opinions about the proper role of government in regulating private property.¹⁰

B. Expert Statements

Absent specific factual situations documented locally, when creating regulations it is prudent to draw upon the published opinions of experts in the field.¹¹ Articles, papers, and presentations are worthwhile sources.¹² Not every municipality has the time or resources to retain a consultant, but many of those educational materials are available online and can be incorporated

3. See *infra* Part VIII.

4. See *infra* Parts II–XI.

5. See *infra* Part II.B.

6. See *infra* Part V.

7. See *infra* Part V.

8. See *infra* Part V.

9. Lamar Corp. v. City of Longview, 270 S.W.3d 609, 616 (Tex. App.—Texarkana 2008, no pet.) (citing Murrur Corp. v. Bd. of Adjustment of City of Dallas, 718 S.W.2d 790, 794 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)).

10. *Id.*

11. See *infra* Part V.

12. See *infra* Part V.

by reference into the file.¹³ Aside from the merits of star gazing, the comfort of dark skies, and the threats to vehicular and pedestrian safety, ample documentation exists on the negative impact of artificial light used at night on the health of humans and other living things.¹⁴

C. Comprehensive Plan

Ideally, the municipality's comprehensive plan will mention the subjective value statements about the benefits of dark skies.¹⁵ The first step in the land use regulatory process is often the preparation of a comprehensive plan.¹⁶ "Comprehensive planning" is a process by which a community assesses what it had, what it has, what it wants, how to achieve what it wants, and finally, how to implement those objectives.¹⁷ The comprehensive plan is the philosophical, rational, and vision-based foundation upon which municipalities base its rules.¹⁸

III. AUTHORITY

In Texas, some grants of authority differ based on the classification of the city, while other sources of regulatory power are generally available to all cities, towns, and villages.¹⁹

A. Type of Municipality

Once a municipality identifies a need for the regulation, the next step is to locate the municipality's legal ability to regulate.²⁰ The basis of authority for regulating an activity can vary depending on the type of municipality.²¹

Home-rule municipalities have the full power of local self-government.²² Generally a home-rule municipality may exercise any power

13. See *infra* Part V.

14. Rob Chepesiuk, *Missing the Dark: Health Effects of Light Pollution*, NCBI (Jan. 2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2627884/>, archived at <http://perma.cc/v8ag-kq99>.

15. TEX. LOC. GOV'T CODE ANN. § 211.004 (West 2012).

16. *Id.*

17. Office of Rural Community Affairs, *Comprehensive Planning for Small Texas Cities*, TEX. EMERGING COMMUNITIES 1–2 (2002), available at <http://www.texasemergingcommunities.org/resources/SmallTownCompPlanning.pdf>, archived at <http://perma.cc/64SN-P4T5>; *A Guide to Urban Planning in Texas Communities in 2013*, AM. PLAN. ASS'N IN TEX. CHAMBER 6 (2013), <http://txplanningguide-ojs-utexas.tdl.org/txplanningguide/index.php/tpg/article/view/41129>, archived at <http://perma.cc/tdu3-z8gh>.

18. LOC. GOV'T § 211.004.

19. Laura Mueller, *Alphabet Soup: Types of Texas Cities*, TEX. CITY ATT'YS 7–10 (Feb. 13, 2009), http://texascityattorneys.org/2009speaker_papers/typescities.pdf, archived at <http://perma.cc/ck8d-z4ep>.

20. *Id.*

21. *Id.* at 5–6.

22. LOC. GOV'T § 51.072.

not prohibited by the Constitution or laws of the State of Texas, which is lawfully conferred by its charter.²³

General-law municipalities look not to charters, but to state statutes as sources of regulatory authority.²⁴ They may enact a regulation “that (1) is for the good government, peace, or order of the municipality . . . ; and (2) is necessary or proper for carrying out a power granted by law to the municipality or to an office . . . of the municipality” (provided the regulation is not contrary to the constitution or state law).²⁵

Type A general-law municipalities “may adopt . . . ordinance[s], act[s], law[s], or regulation[s], not inconsistent with state law, that [are] necessary for the government, interest, welfare, or good order of the municipality as a body politic.”²⁶

Type B general-law municipalities may adopt ordinances that are not inconsistent with the laws and Constitution of Texas, as it deems proper for the government of the municipality.²⁷ Type B municipalities can prescribe the fine for the violation of an ordinance.²⁸ Type B municipalities can “take any other action necessary to carry out a provision of [the Texas Local Government Code] applicable to the municipality.”²⁹

Type C general-law municipalities of 201 to 500 inhabitants have all authority and duties as conferred upon the city council of a Type B municipality, unless the authority or duty conflicts with provisions of the Texas Local Government Code relating specifically to Type C municipalities.³⁰ The city council of Type C municipalities of 501 to 4,999 inhabitants have all authority and duties as conferred upon the city council of a Type A municipality, unless the authority or duty conflicts with provisions of the Texas Local Government Code relating specifically to Type C municipalities.³¹

B. Zoning

All municipalities have the power to enact zoning regulations “for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.”³² Pursuant to its zoning authority, a municipality may:

23. *Bland v. City of Taylor*, 37 S.W.2d 291, 292 (Tex. Civ. App.—Austin 1931, writ granted).

24. *See* LOC. GOV'T §§ 51.011, 51.031, 51.051.

25. LOC. GOV'T § 51.001.

26. *Id.* § 51.012.

27. *Id.* § 51.032(a).

28. *Id.* § 54.001(b).

29. *Id.* § 51.032(b).

30. *Id.* § 51.051(b).

31. *Id.* § 51.051(a).

32. *Id.* § 211.001.

- (1) regulate and restrict "the height, number of stories, and size of buildings and other structures;"
- (2) regulate "the percentage of a lot that may be occupied;"
- (3) regulate "the size of [the] yards, courts, and other open spaces;"
- (4) regulate the density of population;
- (5) regulate the location and use of buildings, structures, and land for trade, industry, residence, or other purposes;
- (6) regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures in designated places and areas of historic and cultural importance.³³

The regulation of outdoor lighting is a reasonable application of this authority.³⁴ It is also reasonable for a municipality to address outdoor lighting in the course of creating a Planned Development District (Planned Unit Development) and as an added term imposed as a condition of rezoning (or a zoning overlay).³⁵ The municipal Board of Adjustment could also place conditions on outdoor lighting by granting a variance (depending on the nature of the variance sought) or a mutually-negotiated aspect of development agreement applying to land in the extraterritorial jurisdiction.³⁶

C. Building Codes

Municipalities have the authority to adopt and amend several standard (national or international) building codes (e.g. electrical codes, rehabilitation codes, plumbing codes, fire codes, property maintenance codes, and energy conservation codes).³⁷ The regulations of lighting related to buildings and structures is a reasonable extension of this authority.³⁸

D. Signs

Municipalities have the authority "to provide for the relocation, reconstruction, or removal of" signs in the city limits and the extraterritorial jurisdiction (ETJ), including the establishment of procedures for doing so.³⁹ The regulations of lighting related to signage fall under this authority.⁴⁰ Internal illumination, external illumination, up-lighting, and down-lighting are common topics for discussion.⁴¹

33. *Id.* § 211.003(a)(1), (b) (emphasis added).

34. *See id.* § 211.003.

35. *Id.*

36. *See id.* § 212.003.

37. *See id.* § 214.212.

38. *See id.*

39. *Id.* § 216.001(a).

40. *See id.* § 216.001.

41. *See infra* Part VIII.A.

E. Historic Preservation

A statutory attribute of zoning in Texas is the protection and preservation of "places and areas of historical, cultural, or architectural importance and significance."⁴² The United States Supreme Court has recognized that historic preservation is a legitimate government purpose, and that restrictions on alteration and demolition are an appropriate way to carry out historic preservation goals.⁴³ Restrictions on outdoor lighting fit within the larger regulatory effort to protect historic structures and places.⁴⁴

F. Development Agreements

Municipalities have broad authority to enter into written contracts with the owners of land in the ETJ to address a wide variety of development-related issues, including use and construction.⁴⁵ Although not expressly enumerated, the parties can mutually agree to matters concerning the installation and operation of the outdoor lighting.⁴⁶

G. Nuisance

Municipalities have the authority to define and abate nuisances.⁴⁷ There is ample documentation available to support the declaration that municipalities, pursuant to their grant of authority, can regulate certain types of light trespass and light pollution that constitute public nuisances.⁴⁸

IV. COMMON LAW NUISANCE

Absent municipal regulations, property owners burdened by a neighbor's unrestricted lighting choices must turn to the courts and rely upon common law court decisions.⁴⁹ Here is a sampling of cases:

- (1) Water towers near plaintiffs' home had lights that shined into plaintiffs' bedroom, disturbing their sleep.⁵⁰ The court concluded glaring light to be a nuisance.⁵¹

42. LOC. GOV'T § 211.001.

43. See Pa. Cent. Transp. Co. v. City of New York 438 U.S. 104, 118 (1978).

44. See *id.*

45. LOC. GOV'T § 212.172.

46. See *id.*

47. *Id.* § 217.002.

48. See *id.*

49. See *infra* Part IV.

50. City of River Oaks v. Moore, 272 S.W.2d 389, 390 (Tex. Civ. App.—Fort Worth 1954, writ *ref'd n.r.e.*).

51. *Id.*

- (2) A company relocated a cotton gin near plaintiff's home.⁵² The gin had bright floodlights that would shine onto plaintiff's premises.⁵³ The court concluded that erection and operation of the gin at the proposed site adjoining plaintiff's home was unreasonable, constituting a nuisance as a matter of law.⁵⁴
- (3) Landowners brought a light and noise nuisance claim against owner of a 126-foot cellular telephone tower.⁵⁵ The tower had two floodlights that were on all night and illuminated the landowners' backyard so that one could read and write on their patio at night.⁵⁶ The court found the light to be a nuisance and awarded monetary damages for past nuisance damages; the court expressly excluded future damages.⁵⁷
- (4) Landowners brought nuisance action against the Port Authority under the Texas Tort Claims Act, alleging that the Port Authority's operation of marine container terminal caused "excessive noise, light, and chemical pollution that interfere[d] with [landowners'] use and enjoyment of their homes"⁵⁸ The court found the injuries to property were in common with the community and resulted from the operation of a public work.⁵⁹ In that case, a governmental entity had immunity and had not compensated the landowners.⁶⁰ In this case, the court concluded "it makes no difference whether the conditions alleged are characterized as a nuisance in fact or nuisance per se. In either circumstance, the Port Authority retains its immunity . . . for [nuisance] damages"⁶¹
- (5) Plaintiffs claimed defendant's use of household lights amounted to light trespass.⁶² Plaintiffs claimed defendant's "driveway [lights were] illuminated from early afternoon hours until the next morning and [were] intentionally and maliciously focused upon Plaintiffs' master bedroom windows"⁶³ The trial court's judgment found

52. *Lamesa Coop. Gin v. Peltier*, 342 S.W.2d 613, 614 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

53. *Id.* at 616.

54. *Id.*

55. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 623 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

56. *Id.* at 606.

57. *Id.* at 623.

58. *Port of Houst. Auth. v. Aaron*, 415 S.W.3d 355, 358–59 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

59. *Id.* at 362.

60. *Id.* at 363.

61. *Id.* at 364.

62. *Brozynski v. Kerney*, No. 10-05-00300-CV, 2006 WL 2160841, at *2 (Tex. App.—Waco Aug. 2, 2006, pet. denied).

63. *Id.* at *2.

- that the claim was “not warranted by existing law and not supported by any reasonable request for the extension, modification, or reversal of existing law.”⁶⁴ The appellate court reversed.⁶⁵
- (6) Neighbors to a high school object to the construction of a new stadium because the lights would cause a trespass.⁶⁶ The court concluded “there is no substantial evidence in the record showing the Project’s lighting elements may have a significant effect on the environment.”⁶⁷ Further, the court stated, “the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons.”⁶⁸ The court determined no significant environmental impact from the following findings: “lighting’s limited hours of operation, limited number of evening events, landscaping features, and limited number of residences affected by light trespass.”⁶⁹
- (7) “In Residence Districts the source of any lighting located out-of-doors on any lot shall not be visible from any other lot”⁷⁰ The Court concluded this language in the zoning ordinance was not unconstitutionally vague and supported the city’s denial of the outdoor lights installation on a football field in a residential neighborhood.⁷¹
- (8) Property owners in the unincorporated community of Henly, Texas, and up to two miles away from the ballpark, complained about the glaring lights from the Field of Dreams.⁷² One property owner said, “We avoid going on the porch at night because it’s unbearable.”⁷³ In addition to light nuisance, property owners nearby complained of trash, traffic, and trespassers.⁷⁴ Kenneth and Susan Troppy sought \$200,000 in damages for trespassers wandering on their property,

64. *Id.* at *4.

65. *Id.* at *6.

66. Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist., 215 Cal. App. 4th 1015, 1038 (2013).

67. *Id.* at 1040.

68. *Id.* at 1042 (quoting Miramar Mobile City v. City of Oceanside, 119 Cal. App. 4th 477, 492 (2004)).

69. *Id.* at 1041.

70. Stephen Renny Mem’l Fund v. Town of Old Saybrook, 492 A.2d 533, 534 (Conn. App. Ct. 1985) (quoting OLD SAYBROOK, CONN., ZONING REGULATIONS § 61.6 (1985)).

71. *Id.* at 536.

72. *A Cautionary Tale—Field of Dreams of Henly*, WESTLAKE NEIGHBORHOOD ALLIANCE (Dec. 10, 2013), <http://www.nottherightsite.com/455/a-cautionary-tale-field-of-dreams-of-henly>, archived at <http://perma.cc/hn24-lw24>.

73. Plaintiff’s Original Petition, Troppy v. Cent. Tex. Field of Dreams, LP, No. 13-1645 (428th Dist. Ct., Hays County, Tex. July 30, 2013).

74. *A Cautionary Tale—Field of Dreams of Henly*, *supra* note 72 (discussing the lawsuit filed in July 2013 by Kenneth and Susan Troppy who live adjacent to the ballpark).

property devaluation, and for light and noise nuisances.⁷⁵ This article also indicates that Henly residents hosted a town hall meeting to discuss incorporation.⁷⁶

The Field of Dreams is an eighteen acre parcel of flat land situated in the unincorporated town of Henly. It consists of [nine] [b]aseball/[s]oftball fields, [b]atting [c]ages, and [c]oncessions constructed and covering property/lot line to property/lot line. It is owned principally by Austin Select Baseball [Chief Executive Officer] John Martin and [Chief Operating Officer] Sean Kinkaid but has an additional 13-15 private investors.

Of those [nine] fields, [eight] are for youth aged [s]elect players, and [one] is for senior aged [s]elect players with [n]o [a]dult usage. All fields are lighted. The total number of [forty feet] tall lighted poles is [twenty-three]. They use 170 fixtures of 1,500 watt high density discharge sports lights for a total aggregate of 255,000 watts of unshielded light emitted when all fields are lighted.

Because of the size and maximum use of space, this development can host up to [eighty] teams per week and is marketing itself as a [s]elect athletic destination in order to host regional, state, and national events. It sits off of a [two] lane[,] straight country road with informal parking and has had as many as 300-400 vehicles, including RV's, on a busy day, which translates roughly into 700-800 people in foot traffic on the site.⁷⁷

There are also cases involving municipal regulations, and municipal oversight:

First, in *Abramowitz v. Zoning Board of Appeals of New Canaan*, the Abramowitz's complained to the city that their neighbors, the Marvin's, were violating the exterior lighting provisions of the Zoning Code.⁷⁸ The Marvin's lowered the wattages and put on shields.⁷⁹ The Abramowitz's still claimed the Marvin's lights reflected off of their garage causing a glare into their home.⁸⁰ The Abramowitz's sued, claiming the zoning board should require them to put the lights on a timer and that the board's decision was inconsistent with the purpose of the zoning regulations.⁸¹ In part, the regulations read:

All exterior lights and sign illumination shall be designed, located, installed and directed in such a manner as to: (a) prevent direct or objectionable glare or light trespass, (b) be shielded to the extent possible, (c) employ soft,

75. Plaintiff's Original Petition, Troppy, No. 13-1645, *supra* note 73.

76. *A Cautionary Tale—Field of Dreams of Henly*, *supra* note 72.

77. *Id.*

78. *Abramowitz v. Zoning Bd. of Appeals of New Canaan*, No. FSTCV106006012S, 2011 WL 4908361, at *1 (Conn. Super. Ct. Sept. 16, 2011).

79. *Id.*

80. *Id.*

81. *Id.* at *4.

transitional light levels which are consistent from area to area, (d) minimize contrast between light sources, lit areas, and dark surroundings, and (e) be confined within the target area.⁸²

The court found for the city because the zoning board did not err in applying the code.⁸³

Second, *Shaw v. Redding Zoning Bd. of Appeals* addresses grandfathering for lights.⁸⁴ The plaintiffs argued that a country club had illegal lights according to the code and that the city never permitted the use of lights.⁸⁵ The court found that a “special permit for the [c]ountry [c]lub specifically authorized outdoor lighting.”⁸⁶ Also, “[t]he [c]ountry [c]lub was not required to obtain approval for its existing lights because such lights were permitted under the regulations in existence at the time they were installed.”⁸⁷

V. PROCEDURES

Municipalities wishing to successfully enact outdoor lighting regulations should spend time at the outset considering the policy formation process.⁸⁸ How does the municipality want to approach enacting, amending, or expanding its ordinance?⁸⁹ Considering the technical aspects, legal intricacies, and possible political controversies, it is wise to lay out a plan for formulation, consideration, and adoption.⁹⁰

If relying upon its zoning authority to enact the regulations, state law requires public notices and hearings.⁹¹ Beyond that, there may be home-rule charter requirements that influence the process.⁹² Regardless of state law mandates, a municipality should determine upfront how it wants to facilitate public input and public education.⁹³ Decision-makers (the city council) might benefit from workshops at which they can become more comfortable with the terminology and technical standards.⁹⁴ It might be helpful for the

82. *Id.* at *5 (quoting NEW CANAAN, CONN. ZONING REGULATIONS § 6.11.B1 (2010)).

83. *Id.* at *9.

84. *See Shaw v. Redding Zoning Bd. of Appeals*, No. 316140, 1995 WL 139555 (Conn. Super. Ct. Mar. 20, 1995).

85. *Id.* at *1.

86. *Id.* at *5.

87. *Id.*

88. *See* TEX. LOC. GOV'T CODE ANN. § 211.003 (West 2008).

89. *See id.*

90. *See id.*

91. *See* LOC. GOV'T ch. 211.

92. *Id.*

93. *Id.*

94. *See id.*

mayor to designate a city council subcommittee to help shepherd the outdoor lighting regulations through the process.⁹⁵

VI. SCIENCE

To knowingly enact reasonable regulations and effective standards, it is important that the city council understand the technology behind watts, lumens, luminaires, hooded lights, shielded lights, and full cut-off fixtures.⁹⁶ The city council should spend time understanding what these words mean and how they will affect homeowners, business owners, and citizens at-large.⁹⁷ It would also be wise to engage the city's engineer or hire a lighting consultant.⁹⁸

VII. SCOPE & APPLICABILITY

A crucial decision for would-be municipal regulators is the scope of the outdoor lighting ordinance and its application.⁹⁹

A. Zoning Districts

Municipal regulators should determine early on whether the regulations will apply solely to non-residential (i.e., commercial, retail, and industrial) properties, or whether they also apply to residential, recreational, and government properties.¹⁰⁰

B. Existing Versus New Construction

There are some municipalities that apply the new regulations to existing structures, while others limit the tougher standards only to new construction.¹⁰¹ A vital question to answer is whether the new rules will apply to additions or expansions of existing buildings on outdoor facilities.¹⁰²

95. See generally *id.* (explaining outdoor lighting regulation).

96. Kristen M. Ploetz, *Light Pollution in the United States: An Overview of the Inadequacies of the Common Law and State and Local Regulation*, 36 NEW ENG. L. REV. 985 (2002).

97. See *Glossary of Basic Terms*, INT'L DARK-SKY ASS'N, <http://www.darksky.org/outdoorlighting/guidance/37-ida/education/98-glossary-of-basic-terms> (last visited Mar. 15, 2015), archived at <http://perma.cc/t6yz-ly7k>.

98. See generally *Simple Guidelines for Small Communities, Urban Neighborhoods, and Subdivisions*, INT'L DARK-SKY ASS'N, <http://www.darksky.org/lighting-codes/simple-guidelines-to-lighting-regulations> (last visited Mar. 15, 2015), archived at <http://perma.cc/ut47-adfx> [hereinafter *Simple Guidelines for Small Communities*] (providing background information on lighting regulations).

99. LOC. GOV'T § 51.051.

100. *Id.* § 212.044.

101. See *id.* § 212.045.

102. See *id.*

C. Areas Illuminated

Once the municipality has identified the types of property and projects to whom the outdoor lighting regulations will apply, city leaders must choose the areas on a building, structure, or parcel that the ordinance will address.¹⁰³ Commonly addressed areas include the following: entrances (doors and windows); landscaping (porches, playscapes, trees, and shrubbery); sports courts (tennis and basketball); swimming pools; driveways and walkways; parking lots; security lighting; and signs.¹⁰⁴

D. Model Ordinance

Early in the process of considering enacting (or amending) an outdoor lighting ordinance, city officials should consider the merits of structuring the regulations in accordance with the Model Lighting Ordinance.¹⁰⁵ Other examples include those enacted by the cities of Dripping Springs and West Lake Hills.¹⁰⁶

VIII. STANDARDS

A. Common Standards

While the terminology may be difficult for some to master, outdoor lighting regulations do not have to be complex.¹⁰⁷ The goal should be to establish requirements that are understandable, and that are enforceable.¹⁰⁸ Typical aspects of outdoor lighting standards include lumens, hooding and shielding, height, and timing (timers and curfews).¹⁰⁹

103. See *Simple Guidelines for Small Communities*, *supra* note 98.

104. See *id.*

105. See *Model Lighting Ordinances*, INT'L DARK-SKY ASS'N, <http://www.darksky.org/lighting-codes/simple-guidelines-to-lighting-regulations/35-ida/outdoor-lighting/79-mlo> (last visited Feb. 13, 2015) (prepared by the International Dark-Sky Association (IDA) and Illuminating Engineering Society of North America (IESNA)). *Model Lighting Ordinance (MLO) with Users Guide*, ILLUMINATING ENGINEERING SOC'Y & INT'L DARK-SKY ASS'N (June 25, 2011), available at http://www.ies.org/PDF/MLO/MLO_FINAL_June2011.pdf, archived at <http://perma.cc/2439-r4de>.

106. See DRIPPING SPRINGS, TEX., CODE OF ORDINANCE art. 24.06 (2014); WEST LAKE HILLS, TEX., CODE OF ORDINANCE art. 24.03 (2014).

107. See generally *Model Lighting Ordinance (MLO) with Users Guides*, *supra* note 105 (providing definitions to terms related to outdoor lighting regulations).

108. See TEX. GOV'T CODE § 311.002 (West 2013).

109. See generally *id.* (providing typical lighting standards).

B. Specificity

Due process demands that municipal ordinances (just like federal or state statutes) must have an understandable meaning and establish a legal standard capable of application.¹¹⁰ Ordinances are subject to the same constitutional requirements and construction canons as statutes.¹¹¹ To determine whether a statute is unconstitutionally vague, we begin by presuming that the statute is constitutional.¹¹² “[T]he party challenging the constitutionality of a statute bears the burden of showing that the enactment fails to meet constitutional requirements.”¹¹³ A statute or ordinance is unconstitutionally vague if it exposes the persons regulated by it to risk or detriment without fair warning, or if the statute or ordinance invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement.¹¹⁴ Implicit in this constitutional safeguard is the idea that laws must have an understandable meaning and must set legal standards that are capable of application.¹¹⁵ A law fails to meet the standards of due process if it is so vague and standardless as to leave a governing body free to decide, without any legally fixed guidelines, what the law prohibits in each particular case.¹¹⁶ The law violates due process and is invalid if it compels “persons of common intelligence are compelled to guess at a law’s meaning and applicability”¹¹⁷

“A law is not unconstitutionally vague merely because it does not define words or phrases.”¹¹⁸ The law requires only a reasonable degree of certainty,¹¹⁹ and the reasonable-certainty requirement “does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.”¹²⁰ Moreover, “the mere fact that the

110. See *Model Lighting Ordinance (MLO) with Users Guide*, *supra* note 105.

111. *Mills v. Brown*, 159 Tex. 110, 114, 316 S.W.2d 720, 723 (Tex. 1958) (“The same rules apply to the construction of municipal ordinances as to the construction of statutes.”); *cf.* *Tex. Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970) (“A rule or order promulgated by an administrative agency acting within its delegated authority should be considered under the same principles as if it were the act of the [l]egislature.”).

112. *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003); see *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 934 (Tex. 1996).

113. *Walker*, 111 S.W.3d at 66.

114. *Id.*; *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985).

115. See *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998); *Attic Club*, 457 S.W.2d at 45; *Webster v. Signad, Inc.*, 682 S.W.2d 644, 646 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).

116. *Mesquite v. Aladdin’s Castle, Inc.*, 559 S.W.2d 92, 94 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.), 570 S.W.2d 377 (Tex. 1978) (per curiam).

117. *Signad*, 682 S.W.2d at 646.

118. *Vista Healthcare, Inc. v. Tex. Mut. Ins. Co.*, 324 S.W.3d 264, 273 (Tex. App.—Austin 2010, pet. denied).

119. *Id.*

120. *Signad*, 682 S.W.2d at 646–47 (quoting *Sproles v. Binford*, 286 U.S. 374, 393 (1932)).

parties disagree as to [an ordinance's] meaning does not mean we must necessarily guess at its meaning."¹²¹ Municipal outdoor lighting regulations ought to define those terms that the general public does not understand.¹²²

One court concluded that the "absence of reasonable guidelines or standards rendered the term 'substantial work' unconstitutionally vague as applied . . . regardless of who is making that determination" (i.e., a building official or the Board of Adjustment).¹²³ "Although courts recognize that myriad factual situations may arise, such that statutes can and should be worded with flexibility, the public must be provided fair notice of what is required or prohibited."¹²⁴

IX. PRE-EXISTING

A. *Nonconforming*

A major issue to resolve (from administrative, political, and legal perspectives) is how to deal with pre-existing and grandfathered lighting.¹²⁵ Municipalities often intend for outdated, inconsistent light fixtures, contrary to the new regulations, eventually go away (one way or the other).¹²⁶ "A nonconforming use is [one that] lawfully existed [on the land] prior to the enactment of a[n] ordinance" and continues to exist out of compliance with the ordinance after the effective date.¹²⁷

Some outdoor lighting experts, including the authors of the model ordinance, have concluded that most outdoor lighting will fully depreciate at the end of ten years (if not sooner).¹²⁸

Generally, courts have found it is reasonable for municipalities to terminate a use that does not meet the zoning standard (e.g., terminating an

121. See *Mills v. Fletcher*, 229 S.W.3d 765, 770 (Tex. App.—San Antonio 2007, no pet.). See *Vista Healthcare*, 324 S.W.3d at 273; see also *Signad*, 682 S.W.2d at 645–46 (describing rules of construction of undefined terms).

122. See *Glossary of Basic Terms*, *supra* note 97; *Model Lighting Ordinances*, *supra* note 105.

123. *Lindig v. Johnson City*, No. 03-11-00660-CV, 2012 Tex. App. LEXIS 9563, 2012 WL 5834855 (Tex. App.—Austin Nov. 14, 2012) (The ordinance did not clearly specify what amount of building permit fee (if any) applied to a residential remodeling project; nonetheless, the building official assessed a fine and issued Stop Work Orders because (in part) the property owner refused to pay the fee.). See *Tex. Antiquities Comm. v. Dallas Cnty. Cmty. Coll.*, 554 S.W.2d 924, 928 (Tex. 1977) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109–10 (1972))).

124. *Lindig*, 2012 Tex. App. LEXIS 9563, 2012 WL 5834855 at 18–19.

125. See *Abramowitz v. Zoning Bd. of Appeals*, 2011 WL 4908361, 2011 Conn. Super. LEXIS 2429 (Conn. Super. Ct. Sept. 16, 2011).

126. See *generally id.* (describing a phasing out of outdated fixtures).

127. Patricia E. Salkin, *AMERICAN LAW OF ZONING* § 12:1 (5th ed. 2014). See *Univ. Park v. Benners*, 485 S.W.2d 773, 773 (Tex. 1972); *Rhod-A-Zalea v. Snohomish Cnty.*, 136 Wn.2d 1, 3 (Wash. 1998).

128. *Glossary of Basic Terms*, *supra* note 97, at 22.

apartment building in an area zoned for single-family use).¹²⁹ However, the reasonableness standard only gives the landowner the opportunity to recoup his actual investment in the nonconforming use.¹³⁰ Thus, if a municipality opts not to apply the ordinance prospectively (i.e., it will apply to pre-existing buildings, structures, etc.), municipalities should consider amortization periods.¹³¹

B. Amortization

Municipalities must allow enough time for recoupment of the actual investment of the nonconforming structure.¹³² There is no way to get around a case-by-case analysis.¹³³ It is wise to set a reasonable amortization period and then allow a property owner to appeal that decision within the city.¹³⁴ That way, the property owner must prove the actual investment has not yet recouped.¹³⁵ The Fort Worth Court of Appeals upheld such a regulatory structure.¹³⁶ Also, the Texas Supreme Court determined in the hallmark amortization case, *City of University Park v. Benners*, that the involuntary termination of a nonconforming use through amortization that allows for recoupment of the investment does not amount to a constitutional taking.¹³⁷ Additionally, if the city can show that the light trespass is a nuisance and a safety concern, case law suggests that a shorter amortization period would withstand challenge.¹³⁸

C. Modifications or Destruction

It is common in municipal zoning regulations for change in the use or alteration of the premises to trigger new regulations.¹³⁹ The model ordinance suggests applying new regulations “[w]henever there is a new use of a

129. *Dyer v. Bd. of Adjustment of City of Dallas*, No. 05-94-00093-CV, 1995 WL 23637 at *3 (Tex. App.—Dallas 1995, writ denied).

130. *Id.* at *3.

131. *Id.* See *Model Lighting Ordinance (MLO) with Users Guide*, *supra* note 105.

132. See generally *Model Lighting Ordinance (MLO) with Users Guide*, *supra* note 105 (describing recoupments for municipalities).

133. *Id.*

134. See, e.g., *City of Univ. Park v. Benners*, 485 S.W.2d 773, 779 (Tex. 1972).

135. See generally *id.* (describing investments which the property owner must prove).

136. *Coyel v. City of Kennedale*, No. 2-04-391-CV, 2006 WL 19604 (Tex. App.—Fort Worth 2006, pet. denied).

137. *Benners*, 485 S.W.2d 777, 78.

138. See *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 616 (Tex. App.—Texarkana 2008, no pet.).

139. *Model Lighting Ordinance (MLO) with Users Guide*, *supra* note 105, at 8.

property (zoning or variance change) or the use of the property is changed
¹⁴⁰

D. Abandonment

Municipalities have terminated nonconforming uses due to abandonment or discontinued use.¹⁴¹ Under Texas law, a discontinuance of a prior nonconforming use for fixed time, such as six months, will not itself constitute abandonment.¹⁴² Courts have established a two-part test to determine whether the discontinuance of a nonconforming use constitutes abandonment.¹⁴³ “The test requires: . . . an intent to abandon[] and . . . some overt act or failure to act [which] carries the implication of abandonment.”¹⁴⁴ However, a municipality, by ordinance, may have the ability to avoid the impact of this common law precedent by providing that discontinuance of the use of nonconforming light fixtures for a fixed time constitutes abandonment.¹⁴⁵ Some municipalities have legislatively created a rebuttable presumption of the intent to abandon a use if its operation ceases for a specific period of time.¹⁴⁶

E. Uniformity of Requirements

Often referred to as “grandfathering” or “vested rights,” pursuant to chapter 245 of the Texas Local Government Code, a municipality must consider “the approval, disapproval, or conditional approval of an application for a permit solely on the basis of . . . regulations . . . in effect at the time: . . . the original application for the permit is filed . . . or . . . a plan for development . . . or plat application is filed”¹⁴⁷ This statutory freeze on regulations might encompass outdoor lighting rules.¹⁴⁸

140. *Id.* at 22.

141. *See, e.g.,* Zoning Bd. of Adjustment of San Antonio v. Lawrence, 309 S.W.2d 883, 884 (Tex. Civ. App.—Fort Worth 1958, writ ref’d n.r.e.).

142. Rosenthal v. City of Dallas, 211 S.W.2d 279, 284 (Tex. Civ. App.—Dallas 1948, writ ref’d n.r.e.).

143. *Id.* at 284.

144. 1-8 TEX. MUN. ZONING LAW § 8.300. *See* TEX. LOC. GOV’T CODE ANN. § 21.003; Highland Park v. Marshall, 235 S.W.2d 658, 658 (Tex. App.—Dallas 1950 writ ref’d n.r.e.).

145. *See generally id.* (discussing nonconforming light fixtures).

146. *Id.*; Alan J. Bojorquez, *Grandfathering and Dealing with Nonconformities*, TEX. MUN. LAWS. (March 21, 2013), http://www.texasmunicipality.com/files/presentations/grandfathering_ncus_cutlu_3-21-2013j.pdf, archived at <http://perma.cc/ut3q-67ts>.

147. TEX. LOC. GOV’T CODE ANN. § 245.002(a) (West 2012).

148. *See, e.g.,* City of San Antonio v. Greater San Antonio Builder’s Ass’n, 419 S.W.3d 597, 601 (Tex. App.—San Antonio 2013, pet. denied).

F. Continuation of Land Use

With regard to pre-existing uses subject to annexations, the state statutes do not support amortization.¹⁴⁹ A municipality “[cannot] prohibit the continued use of land after annexation if the use legally existed prior to annexation.”¹⁵⁰ Once the landowner proves the use pre-dating the annexation, a municipality must grandfather the use unless the use meets a public safety or welfare exception.¹⁵¹ The law is unclear on whether the term “use” in this context would include a tangible specification such as light fixtures (but the author asserts the better argument is against such an interpretation).¹⁵²

X. ADMINISTRATION

As with any regulation, it is wise to consider rule implementations before the adoption of the rules.¹⁵³ With outdoor lighting ordinances, key questions may include the following:

- (1) Will the installation for all new fixtures require luminaires?
- (2) Must lighting plans submitted for approval address the entire property?
- (3) Will the city engage plan reviewers and inspectors trained in lighting regulations?
- (4) Are the city standards imposed by the city measureable?¹⁵⁴

The enactment of outdoor lighting regulations can elicit opinions from recognized experts, and even lay experts, on issues such as whether light meters accurately measure lumens.¹⁵⁵

149. See LOC. GOV'T § 43.002(a).

150. Julie Y. Fort, *Annexation of Nonconforming Uses*, TEX. MUN. LEAGUE 1, 5 (Nov. 2007), https://www.tml.org/legal_pdf/2007Annexation_PriorUse.pdf, archived at <http://perma.cc/jg6g-9w5q>.

151. *Id.*

152. *Id.*

153. See *A Guide to the Rulemaking Process*, OFFICE OF THE FED. REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Mar. 7, 2015), archived at <http://perma.cc/f2ha-4rrz>.

154. *Glossary of Basic Terms*, *supra* note 97 (discussing additional practice considerations).

155. See, e.g., *Mission and Vision of Texas IDA*, INT'L DARK-SKY ASS'N, <http://www.texasida.org> (last visited Mar. 13, 2015), archived at <http://perma.cc/2w8a-n8uf>.

XI. ENFORCEMENT

A. Enforcement Avenues

In Texas, a municipal government that chooses to promulgate a lighting ordinance has a number of avenues for enforcement.¹⁵⁶ Each has distinct advantages and disadvantages.¹⁵⁷ In simplest terms, enforcement is “[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement.”¹⁵⁸

Enforcement is not a singular construct.¹⁵⁹ Rather, it is an overarching concept that encompasses varying components and meanings.¹⁶⁰ Extrajudicial enforcement entails attempting to redress a perceived wrong by one’s own actions rather than through a normal legal process.¹⁶¹ This avenue of enforcement allows for collaboration.¹⁶² Public information, education campaigns, incentives, and assistance are all examples of extrajudicial enforcement.¹⁶³

On the other end of the enforcement spectrum is law enforcement: “the detection and punishment of violations of the law.”¹⁶⁴ Despite its common association with police work, law enforcement is not limited to the enforcement of criminal laws.¹⁶⁵ In contrast to collaboration, the preeminent feature of this enforcement avenue is confrontation within the parameters of an adversarial legal system.¹⁶⁶ Criminal enforcement and civil enforcement are both examples of law enforcement.¹⁶⁷

156. See, e.g., *Planning and Development Review Department*, CITY OF AUSTIN, <http://www.austin.texas.gov/department/planning/codes-and-regulations> (last visited Mar. 13, 2015), archived at <http://perma.cc/9bxy-zz4l>.

157. *Id.*

158. BLACK’S LAW DICTIONARY 645 (8th ed. 2004).

159. See generally *id.* (stating enforcement is a process).

160. See *id.*

161. See *id.*

162. See *id.*

163. See generally Leide McCoy, *Developing Innovative Campaigns to Enhance Public Awareness of Government Initiatives*, THE REPUTATION GROUP (Feb. 2009) (listing examples of extra judicial enforcement).

164. BLACK’S LAW DICTIONARY 1017 (10th ed. 2014).

165. See BUREAU OF JUSTICE STATISTICS, *Law Enforcement*, <https://www.bjs.gov/index.cfm?ty=tp&tid=7> (last visited Mar. 9, 2015), archived at <http://perma.cc/mne3-pve3>.

166. See *id.*

167. U.S. DEP’T JUSTICE, *Addressing Police Misconduct Laws Enforced by the Department of Justice*, <http://www.justice.gov/crt/about/spl/documents/polmis.php> (last visited Mar. 12, 2015), archived at <http://perma.cc/zmg5-puds>.

1. Criminal Enforcement¹⁶⁸

While a Texas home-rule municipality, by virtue of its home-rule status, may adopt a lighting ordinance without reference to state statutes, it may adopt a lighting ordinance by a general law pursuant to the Texas Local Government Code authorization of ordinances pertaining to zoning (chapter 51), building codes (chapter 214), signs (chapter 216), municipal regulation of subdivisions and property development (chapter 212), and nuisance abatement (chapter 217).¹⁶⁹ Such ordinances can contain offenses punishable by the imposition of a fine (i.e., Class C misdemeanors).¹⁷⁰ Generally, the Texas Penal Code prescribes the maximum punishment for a Class C misdemeanor as a fine not to exceed \$500.¹⁷¹ Notably, however, all convictions not obtained from a prosecution under the Texas Penal Code have classification of a "Class C misdemeanor" if the offense is punishable by fine only.¹⁷² Thus, a defendant convicted of violating a lighting regulation that is part of a municipal zoning ordinance could face a fine as high as \$2,000 per offense.¹⁷³

A municipal court, including a municipal court of record, has exclusive original jurisdiction within the municipality's territorial limits and property owned by the municipality located in the municipality's extraterritorial jurisdiction in all criminal cases that arise under a lighting ordinance of the municipality.¹⁷⁴

Whether or not to adopt a lighting ordinance is generally a decision for the city council.¹⁷⁵ Texas law provides some notable exceptions.¹⁷⁶ A municipality located in a county, any part of which is located within fifty-seven miles of a major astronomical observatory, the McDonald Observatory, *shall* adopt ordinances regulating outdoor lighting, including in subdivisions.¹⁷⁷ An offense under the subchapter is a Class C misdemeanor (punishable by a fine not to exceed \$500).¹⁷⁸ In addition to criminal prosecution, a municipality may also sue in any court to enjoin a violation.¹⁷⁹

168. The following section is drawn largely from a work by one of the authors, which is published in Ryan Kellus Turner, *Blinded by the Light: The Enforcement of Outdoor Municipal Lighting Ordinances in Texas* 24, THE RECORDER 17-25 (2015), available at http://tmccc.com/files/6314/2297/9431/Recorder_Vol24_No2_WEB.pdf, archived at <http://perma.cc/ez8k-fehd>.

169. *Id.*; TEX. LOC. GOV'T CODE ANN. §§ 51, 212, 214, 216, 217 (West 2013).

170. Turner, *supra* note 168; LOC. GOV'T §§ 51, 212, 214, 216, 217.

171. TEX. PENAL CODE ANN. § 12.23 (West 2013).

172. *Id.*

173. LOC. GOV'T § 54.001(b).

174. *Id.* § 29.003.

175. *Id.* § 229.052.

176. *Id.* § 229.052.

177. *Id.* § 229.052(a).

178. *Id.* § 229.055(b).

179. *Id.* § 229.052(a).

Similarly, state law mandates that counties within fifty-seven miles of a major astronomical observatory at the McDonald Observatory shall adopt ordinances regulating outdoor lighting.¹⁸⁰ The subchapter has prospective application to the George Observatory, the Stephen F. Austin Observatory,¹⁸¹ and to certain counties with at least five military bases, and to adjacent counties.¹⁸² It also provides certain exceptions.¹⁸³ An offense under the subchapter is a Class C misdemeanor.¹⁸⁴ In addition to criminal prosecution, a county or district attorney may also sue in a district court to enjoin a violation of the subchapter.¹⁸⁵ Other than in the limited geographic scope of subchapter B, chapter 240 of the Texas Local Government Code, Texas counties have limited authority to regulate land use and structures.¹⁸⁵

2. Civil Enforcement

A municipality may bring a civil action for the enforcement of an ordinance for the preservation of either public safety relating to the materials or methods used to construct a building or other structure or improvement, including electrical wiring or apparatus.¹⁸⁶ It may also bring a civil action for enforcement of an ordinance relating to the preservation of either public health or to fire safety including provisions relating to materials, types of construction or design, interior configuration, and illumination.¹⁸⁷

Jurisdiction and venue of such a civil action are in the district court or the county court at law of the county in which the municipality bringing the action resides.¹⁸⁸ On a showing of substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant, the municipality may obtain against the owner or owner's representative with control over the premises an injunction that prohibits specific conduct that violates the ordinance and requires specific conduct that is necessary for compliance with the ordinance.¹⁸⁹ It is not necessary for the municipality to prove that another adequate remedy or penalty for a violation does not exist or to show that prosecution in a criminal action has occurred or attempted.¹⁹⁰

180. *Id.* § 240.032(a).

181. *Id.* § 240.032(b).

182. *Id.* § 229.055(b).

183. *Id.* § 229.055(b).

184. *Id.* § 229.055(b).

185. *Id.* tit. 7.

186. *Id.* § 54.012(1).

187. *Id.* § 54.012(2).

188. *Id.* § 54.013.

189. *Id.* § 54.016(a).

190. *Id.* § 54.016(b).

In a suit against the owner or the owner's representative with control over the premises, the municipality may recover a civil penalty if it proves that the defendant was actually notified of the provisions of the ordinance and after the defendant received notice of the ordinance provisions, the defendant committed acts in violation of the ordinance or failed to take action necessary in compliance with the ordinance.¹⁹¹ A civil penalty may not exceed \$1,000 a day for a violation of an ordinance.¹⁹² However, a person is not subject to personal attachment or imprisonment for the failure to pay a civil penalty.¹⁹³ A person may, however, be in contempt of valid court order and the municipality may utilize remedies and procedures for the collection of a judgment assessing civil penalties.¹⁹⁴

3. *Quasi-Judicial Enforcement of Health and Safety Ordinances*

Quasi-judicial enforcement of health and safety ordinances requires a municipality, by ordinance, to implement the provisions of subchapter C of chapter 54 of the Texas Local Government Code.¹⁹⁵ Scope of such quasi-judicial enforcement has limited scope, but like section 54.012 of the Texas Local Government Code, it encompasses preservation of public safety pertaining to construction, including electrical wiring or apparatus and to building code or appearance of property in a municipality.¹⁹⁶ The city council may provide for the appointment of a building and standards commission, a quasi-judicial commission consisting of at least five members, to hear and determine cases concerning alleged violations of ordinances.¹⁹⁷ A majority of the commission members adopt the rules for hearings before quasi-judicial commissions and must provide an opportunity for parties appearing before the commission to offer evidence and to present their own testimony.¹⁹⁸ Notice is necessary.¹⁹⁹ A commission panel may issue orders or directives to any peace officer to enforce and carryout the lawful orders or directives of a commission panel and determine the amount and duration of a civil penalty as provided by section 54.017 of the Texas Local Government Code.²⁰⁰

A determination is final and binding and constitutes prima facie evidence of the penalty in any court of competent jurisdiction in a civil suit brought by the municipality for final judgment in accordance with the

191. *Id.* § 54.016(b).

192. *Id.* § 54.017.

193. *Id.* § 54.019(a).

194. *Id.* § 54.019(b).

195. *Id.* § 54.031.

196. *Id.* § 54.032.

197. *Id.* § 54.033.

198. *Id.* § 54.034.

199. *Id.* § 54.035.

200. *Id.* § 54.036.

established penalty.²⁰¹ A court may enforce a final judgment by issuing an abstract against all parties found to be the owners of the subject property or in possession of that property.²⁰² Any owner, lienholder, or mortgagee of record jointly or severally aggrieved by any decision of a commission panel may, within thirty days after delivery of the final decision, present a petition to a district court, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality.²⁰³ While section 54.039(f) of the Local Government Code states that district court's review shall be limited to a hearing under the substantial evidence rule,²⁰⁴ in *City of Dallas v. Stewart*, the Texas Supreme Court held that de novo judicial review is a requirement for all administrative decisions regulating public nuisances.²⁰⁵ In the context of quasi-judicial enforcement for the use of a building and standards commission, concerns about due process and the lack of judicial review has led commentators to conclude that *Stewart* has all but directly overturned the substantial evidence standard.²⁰⁶

Another twist on quasi-judicial enforcement is that “[a] municipality by ordinance may adopt a civil adjudication process, as an alternative to the quasi-judicial commission process”²⁰⁷ The civil adjudication process is “for the enforcement of ordinances described by section 54.032” of the Texas Local Government Code.²⁰⁸ “The alternative process must contain provisions relating to notice, the conduct of proceedings, permissible orders, penalties, and judicial review that are similar to the provisions of this” quasi-judicial commission process.²⁰⁹ State law provides a template for alternative procedures and for conducting the administrative procedures.²¹⁰

Neither the quasi-judicial commission nor the civil adjudication process affects the jurisdiction of the municipal court.²¹¹ The Texas legislature, however, may not have intended for a municipal court to conduct the civil adjudication process, as it is the municipal court's role to “enforce an order of a hearing officer compelling the attendance of a witness or the production of a document.”²¹² While bestowing administrative functions on the

201. *Id.* § 54.037(a).

202. *Id.* § 54.040(a).

203. *Id.* § 54.039(a).

204. *Id.* § 54.039(f); *City of Dallas v. Stewart* 361 S.W.3d 569, 599 (Tex. 2012).

205. *City of Dallas v. Stewart*, 361 S.W.3d 562, 580–81 (Tex. 2012).

206. Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 ST. MARY'S L. J. 619, 650 (2012).

207. LOC. GOV'T § 54.043.

208. *Id.* §§ 54.032, 54.043.

209. *Id.* § 54.043.

210. *See id.* § 54.044.

211. *Id.* § 54.042.

212. *Id.* § 54.044(c).

municipal court may be appealing to city attorneys and decision makers at city hall, it may also pose legal and ethical problems.²¹³

B. Areas of Enforcement

1. Territorial and Extraterritorial Jurisdiction of a Municipality²¹⁴

A municipality may generally exercise its police powers only within the city's corporate or territorial limits (also known as "city limits") unless such powers are expressly or implicitly extended by the Texas Constitution or by a statute to apply to areas outside the limits.²¹⁵

It is the policy of the State of Texas to designate certain areas as the extraterritorial jurisdiction (ETJ) of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.²¹⁶ The ETJ of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located:

- (1) within one-half mile of those boundaries, in the case of a municipality with fewer than 5,000 inhabitants;
- (2) within one mile of those boundaries, in the case of a municipality with 5,000 inhabitants to 24,999 inhabitants;
- (3) within two miles of those boundaries, in the case of a municipality with 25,000 to 49,999 inhabitants;
- (4) within [three and one-half] miles of those boundaries, in the case of a municipality with 50,000 to 99,999 inhabitants; or
- (5) within five miles of those boundaries, in the case of a municipality with 100,000 or more inhabitants.²¹⁷

Texas appellate courts have used the following four factors to determine whether a municipality can criminally enforce violations of ordinances

213. Cathy Riedel, *Civil Jurisdiction in Municipal Courts: Evolving or Mutating?* THE RECORDER (June 2012), 12 (June 2012), <http://www.tncec.com/public/files/File/The%20Recorder/2012/Recorder%20Vol.%2021%20No.%203.pdf>, archived at <http://perma.cc/hf6x-zvwm>.

214. The following is drawn largely from a work by one of the authors, which is published in Ryan Kellus Turner, *Blinded by the Light: The Enforcement of Outdoor Municipal Lighting Ordinances in Texas*, 24 THE RECORDER 17-25 (2015), http://tmcec.com/files/6214/2567/8002/00-Turner_BINDER_Blinded_by_the_Light.pdf, archived at <http://perma.cc/ez8k-fehd>. "citation with page numbers."

215. Lawrence Provins, *For City Attorneys: Enforcing Municipal Ordinance Violations in the Extraterritorial Jurisdiction by Prosecution in Municipal*, MUNICIPAL COURT REPORTER, (July 2006) (citing *City of Austin v. Jamail*, 662 S.W.2d 779, 782 (Tex. App.—Austin 1983, writ dismissed); *City of Westlake Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 686 (Tex. Civ. App.—Waco 1980, no writ); *City of Sweetwater v. Hammer*, 259 S.W. 191, 195, (Tex. Civ. App.—Fort Worth 1923, writ dismissed).

216. LOC. GOV'T § 42.001.

217. LOC. GOV'T § 42.021.

occurring in the ETJ in a municipal court: (1) the [type] of municipality, (2) the type of ordinance alleged to have been violated [(subject matter)], (3) jurisdiction, and (4) venue.²¹⁸ Whether a municipality may criminally enforce a lighting ordinance in municipal court cannot be answered in the abstract but requires similar analysis in light of specific facts.²¹⁹

2. Unincorporated Areas

In “count[ies] that [have] any . . . territory located within 150 miles of an international boundary,” the commissioners court may “provide . . . street lights along a county road located in a subdivision” in the unincorporated area of the county.²²⁰ As previously stated, other than in the limited geographic scope of subchapter B, chapter 240 of the Local Government Code, Texas counties, in comparison to municipalities, have limited authority to regulate land use and structures.²²¹ Nevertheless, advocates for dark skies should view county governments as critical partnerships for engaging in public information and education campaigns.²²²

Issues pertaining to outdoor lighting in unincorporated areas of Texas are generally private disputes (often between neighbors).²²³ When one interferes with the property of another, a landowner may pursue a cause of action, rooted in common law, alleging a private nuisance.²²⁴ In Texas, a private nuisance is “a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.”²²⁵ Private nuisance is distinct from trespass in that it does not require actual entry onto land or interference, but rather protects the owners use and enjoyment of land.²²⁶ Critics claim that despite growing public awareness and actual harm to the nature and quality of life, such common law solutions provide no certain answers for organizations, communities, or landowners seeking a darker sky.²²⁷ Meanwhile, commentators assert that in *Schneider National Carriers, Inc., v. Bates*, the Texas Supreme Court “usher[ed] in a new era of nuisance law, one which will deprive many injured property owners of their day in court. The major consequences of [*Schneider*] are: (1) it announces a

218. Provins, *supra* note 215.

219. *See id.*

220. TEX. TRANSP. CODE ANN. § 280.003 (West 2012).

221. LOC. GOV'T tit. 7 (West 2012); *see* discussion *infra* Part III.F.

222. *See* Ploetz, *supra* note 96.

223. *See id.*

224. RESTATEMENT (SECOND) OF TORTS § 821D cmt. a (1979).

225. *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003).

226. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1979).

227. Ploetz, *supra* note 96 (calling for the passage of a federal legislation and to deal with light pollution in a manner similar to federal law governing air and water pollution).

rule [that] is difficult to apply prospectively; (2) it makes recovery more difficult in any case involving a permanent source; and (3) it bars the consideration of abatability as a factor."²²⁸

C. Evidentiary and Proof Issues

Among the advantages of extrajudicial enforcement of dark sky principles is the avoidance of evidentiary and proof issues.²²⁹ Regardless of the chosen enforcement avenue, either criminal or civil, regardless of whether a local government or private party brings the cause of action, enforcement of the law, poses numerous challenges.²³⁰ As evidenced in the United Kingdom's passage of the Clean Neighbourhoods and Environment Act of 2005, the challenges of enforcement matches, if not surpasses drafting comprehensive legislation pertaining to regulating exterior lighting.²³¹ The challenges appear particularly acute in criminal enforcement.²³²

1. Witnesses

Witness testimony is the most common form of evidence in the American legal system.²³³ Regardless if a witness is a member of the public at large, a sympathetic or unsympathetic neighbor, or the complainant, a witness may not testify to a matter unless a party introduces evidence that the witness has personal knowledge.²³⁴ Under what circumstances will such witnesses have material personal knowledge of light trespass?²³⁵ Similar to noise ordinance cases involving barking dogs, in the absence of expert witness testimony adjudicated disputes over lighting can easily become he said—she said matters.²³⁶

Watts versus lumens?²³⁷ Lumens versus luminaires?²³⁸ Hooded versus shielded?²³⁹ These concepts are difficult for city councils and juries alike to

228. Brandon Archer, *Shoo, Odors and Pollutants! Don't Bother Me! The Impact of Schneider National Carriers, Inc., v. Bates on Private Nuisance in Texas*, 59 BAYLOR L. REV. 171, 184 (2007); *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004).

229. Martin Morgan Taylor, *Light Pollution and Nuisance: The Enforcement Guidance for Light as Statutory Nuisance*, J. OF PLAN. & ENVTL. L. (Aug. 2006), archived at <http://perma.cc/962g-uxms>.

230. *Id.*

231. *Id.*

232. *Id.*

233. WEST'S ENCYCLOPEDIA OF AMERICAN LAW, <http://www.encyclopedia.com/topic/evidence.aspx> (last visited Mar. 10, 2015), archived at <http://perma.cc/kls4-x93d>.

234. TEX. R. EVID. 602.

235. Ploetz, *supra* note 96.

236. See TEX. R. EVID. 702.

237. Ploetz, *supra* note 96.

238. *Id.*

239. TEX. LOC. GOV'T CODE ANN. § 229.053 (West 2014).

understand.²⁴⁰ The scientific and technical nature of laws regulating exterior lighting introduces immense complications.²⁴¹ This factor adds to the already difficult burden of the party with the burden of proof.²⁴² If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness “qualified as an expert by knowledge, skill, experience, or education may testify in the form of an opinion”²⁴³ Does the court consider lighting consultants or city staff expert witnesses in civil or criminal litigation?²⁴⁴

For municipalities, the outcome of a litigated dispute involving exterior lighting is likely to hinge on advance planning.²⁴⁵ Coordinating city staff paper work violations (e.g., failure to submit plans or evidence of compliance) will require sponsoring witnesses for documents and records. Similarly, performance standard violations (e.g., non-conforming light fixtures) will require a sponsoring witness to introduce photographs, recordings, and other admissible evidence.²⁴⁶

2. Admissibility

In terms of free speech, implications of lighting regulations have received much documentation in the context of Christmas lights and “light art.”²⁴⁷ What has received less attention are the Fourth Amendment implications of instances where inspection of a light fixture requires entry upon property.²⁴⁸ In *Camara v. Municipal Court for the City and County of San Francisco*, the Supreme Court of United States held that nonconsensual administrative inspections of private residences amount to a significant intrusion upon interests protected by the Fourth Amendment.²⁴⁹ Authorities must have a search warrant to engage in a home inspection.²⁵⁰ Evidence

240. See Ploetz, *supra* note 96.

241. See *id.*

242. *Id.*

243. TEX. R. EVID. 702.

244. See *id.*; see also Turner, *supra* note 168, at 19.

245. See Martin Morgan Taylor, *Lighting Pollution and Nuisance: The Enforcement Guidance for Light as Statutory Nuisance*, J. PLAN. & ENVTL. L. 1114, 1119–20 (Aug. 2006) available at http://www.britastro.org/dark-skies/pdfs/JPEL2006_08.pdf, archived at <http://perma.cc/my2h-6h5b>; see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

246. Turner, *supra* note 168.

247. See Taylor, *supra* note 228, at 1118–19; see also Turner, *supra* note 168, at 20 (providing an overview of lighting regulations for municipalities in Texas).

248. See generally *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the government must obtain a search warrant if it is using a device not used by the general public to search a home).

249. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534 (1967); see also Turner, *supra* note 168 (discussing an overview of lighting regulations for municipalities in Texas).

250. See *Camara, v. Mun. Court of S.F.*, 387 U.S. at 534; see also Turner, *supra* note 168 (discussing lighting regulations for municipalities in Texas).

seized in violation of the Fourth Amendment is inadmissible.²⁵¹ In Texas, the exclusion of such evidence is possible even if a private citizen obtains the evidence or if officials obtain a search warrant predicated on information illegally obtained by an independent third party.²⁵² Even where there is no physical entry onto the property of an owner, when officials use technology to procure the suspicion or proof of illegal conduct from a distance, there is a potential Fourth Amendment challenge.²⁵³ In *Kyllo v. United States*, the Supreme Court invalidated the use of a thermal scanner to measure heat emissions from the home of a person suspected of growing marijuana in the basement of his home.²⁵⁴ The Court held that if the government uses a device that is not in general public use to explore details of a private home that would be unknown without physical intrusion, the surveillance is a Fourth Amendment search and is presumptively unreasonable without a warrant.²⁵⁵ Thermal imaging disclosures cannot form the basis of a valid search warrant of a home without additional evidence to support probable cause.²⁵⁶

A related question pertains to the admissibility of evidence regarding light measurements, because individuals perceive light differently.²⁵⁷ Photometry is "the measurement of visible light based on the response of the average human observer."²⁵⁸ How that definition translates into technically correct quantification methods is no simple matter.²⁵⁹ A photometer is an instrument used to make photometric measurements, which measure brightness.²⁶⁰ A number of industries use a type of photometer known as a luminance meter to test the brightness of displays, instrument panels, and lamp sources.²⁶¹ No Texas appellate court has had the opportunity to

251. *Camara*, 387 U.S. at 534; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

252. *State v. Johnson*, 939 S.W.2d 586, 588 (Tex. Crim. App. 1996); *see also* Turner, *supra* note 168 (discussing providing an overview of lighting regulations for municipalities in Texas).

253. *See Kyllo v. United States*, 533 U.S. at 34; *see also* Turner, *supra* note 168 (establishing lighting regulations for municipalities in Texas).

254. *See Kyllo v. United States*, 533 U.S. at 34; *see also* Turner, *supra* note 168 (summarizing the lighting regulations for municipalities in Texas).

255. *See Kyllo v. United States*, 533 U.S. at 40; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

256. *See Kyllo v. United States*, 533 U.S. at 40; *see also* Turner, *supra* note 168 (summarizing lighting regulations for municipalities in Texas).

257. *See The Answer to How Light Is Perceived*, PHOTO RES. INC., <http://www.photonics.com/EDU/Handbook.aspx?AID=25119> (last visited Mar. 10, 2015), *archived at* <http://perma.cc/gw3w-52u8>; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

258. *See Photometry*, HOW STUFF WORKS, <http://science.howstuffworks.com/photometry-info.htm> (last visited Mar. 10, 2015), *archived at* <http://perma.cc/ua8f-uvys>; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

259. *See The Answer to How Light Is Perceived*, *supra* note 257; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

260. *See Photometry*, *supra* note 258; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

261. Turner, *supra* note 168.

consider the propriety of a trial court taking judicial notice of photometry.²⁶² There is no case law governing the admissibility of measurements made using a luminance meter.²⁶³ This poses evidentiary issues similar to the admissibility of radar speed readings.²⁶⁴ Paraphrasing from case law pertaining to speed measurement, it is up to the party with the burden of proof to show that he had some reasonable basis for believing that the technology, properly applied, can give him reliable information and that the person using the technology in fact applied the technology properly when making the measurement.²⁶⁵ In absence of training standards or an accepted protocol for the "use of a luminance meter, other than showing compliance with the manufacturer's instructions, how are prosecutor[s] to show that the testifying witness applied the technology properly when making the measurement?"²⁶⁶ If the prosecutor this cannot be established, it is possible that a luminance meter is trustworthy, like a portable breath test is in a DWI case, the luminance meter may be more useful in negotiations than at trial.²⁶⁷

3. Burden of Proof

The person who has the burden of proof at trial may also influence how municipalities attempt to enforce outdoor lighting ordinances.²⁶⁸

The prosecution bears the burden of proof in a criminal case.²⁶⁹ The prosecution must establish the offense alleged against the accused by proof beyond a reasonable doubt.²⁷⁰ The judge or jury presumes the defendant is innocent until proven guilty.²⁷¹

The presumption of innocence means three things: (1) the defendant has no burden of proof whatsoever; (2) the prosecution must prove each and every

262. *Id.*; "Once a scientific principle is generally accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial Daubert/Kelly hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings." *Hernandez v. State*, 116 S.W.3d 26, 29 (Tex. Crim. App. 2003).

263. *Turner, supra* note 168.

264. *See Hall v. State*, 297 S.W. 3d 294, 301 (Tex. Crim. App. 2009) (Price, J. concurring); *see also Turner, supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

265. *Turner, supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

266. *See generally Hall v. State*, 297 S.W.3d at 298 (stating that courts must apply *Kelly* when determining if the evidence from the technology is trustworthy enough to provide probable cause).

267. *Turner, supra* note 168.

268. *Id.*

269. BLACK'S LAW DICTIONARY 645 (10th ed. 2014); *see also Turner, supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

270. *Id.*

271. BLACK'S LAW DICTIONARY 645 (10th ed. 2014); *see also Turner, supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

element of the criminal offense beyond a reasonable doubt; (3) neither a judge or jury may draw any inferences from the fact that the defendant is accused of a crime or fails to testify in his or her own defense.²⁷²

In civil cases, the plaintiff has the burden of proof and must convince the trier of fact (whether judge or jury) of the plaintiff's entitlement to the relief sought.²⁷³ This means that the plaintiff must prove each element of the cause of action by a preponderance of the evidence.²⁷⁴

XII. PUBLIC EDUCATION

Local officials should not make the decision to adopt and enforce lighting regulations lightly.²⁷⁵ Rather, it requires careful consideration by local officials and an assessment of local values.²⁷⁶ The adoption of a lighting ordinance is not a one-size-fits-all proposition.²⁷⁷ Once city leaders have determined the scope and nature of the outdoor lighting rules, the crucial next step is explaining the law and technology to property owners, residents, and the business community.²⁷⁸ In an ideal situation, public education activities will occur throughout the process rather than at the final public meeting at which citizens will adopt the ordinance.²⁷⁹

Outdoor lighting ordinances can implicate strong sentiments regarding private property rights, safety, and the proper role of government.²⁸⁰ Public debates about exterior illumination can give rise to emotions on both sides regarding aesthetics, security, and notions about what it means to be a good neighbor.²⁸¹ Lighting regulations also give rise to fundamental questions about the role of government.²⁸² In absence of public education, collabo-

272. Turner, *supra* note 168.

273. See BLACK'S LAW DICTIONARY 645 (10th ed. 2014); see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

274. See BLACK'S LAW DICTIONARY 209 (8th ed. 2004); see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

275. See *supra* Parts V, X.; see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

276. See *supra* Part V; see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

277. See *supra* Parts V, VII; see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

278. See McCoy, *supra* note 163, at 2-3; see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

279. See *supra* Part V; see also Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

280. See *supra* Part II.A; see also Turner, *supra* note 168 (providing discussing an overview of lighting regulations for municipalities in Texas).

281. See *supra* Part II.A; see also Turner, *supra* note 168 (summarizing lighting regulations for municipalities in Texas).

282. See generally, Paul Larking, *Regulation, Prohibitions, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 41 HOFSTRA L. REV. 745 (2014) (examining the role government

ration, and consensus building, citizens may obscure the merits of a lighting ordinance and castigate it as governmental overreach in the guise of over-criminalization.²⁸³

Municipalities exercising regulatory control over outdoor lighting should anticipate these issues, attempt to educate the citizenry on the city's objectives, the state of modern technology, and how the new regulations will affect people's property and lifestyles.²⁸⁴

Outdoor lighting demonstrations, photographs, examples of fixtures, and websites can all be useful educational tools that put the new regulation into proper perspective.²⁸⁵

plays in determining what it considers criminal conduct); *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

283. *See generally*, Larking, *supra* note 281 (explaining how the government misuses the criminal law to punish conduct that traditionally has not been criminal); *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

284. McCoy, *supra* note 163, at 2-3; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).

285. McCoy, *supra* note 163, at 1; *see also* Turner, *supra* note 168 (providing an overview of lighting regulations for municipalities in Texas).