Municipal Regulation of Outdoor Lighting

by Alan Bojorquez

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The Bojorquez Law firm represents cities across the state as either City Attorney or Special Counsel. Before going into private practice, Alan was a staff attorney for the Texas Municipal League. He graduated from Texas Tech University with a Bachelor of Arts in English, Master of Public Administration, and Doctor of Jurisprudence. Alan is on the Board of Directors of the Texas City Attorneys Association, and is Texas Chairperson for the International Municipal Lawyers Association. He authors the TEXAS MUNICIPAL LAW & PROCEDURE MANUAL (5th Ed.).

Alan has the privilege of serving as City Attorney for the municipalities of Dripping Springs, and West Lake Hills – both of which have enacted outdoor lighting regulations.

A. POLICY

1. **Problem Identification.** When drafting regulations, it is wise to begin with Problem Identification. Establish the nature of the *negative* to be prevented, or the *positive* to be encouraged. 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 sought to be accomplished. Are there examples of bad lighting in the community that citizens are well-aware of or share an aversion to? Or conversely, are there positive examples of the benefits of dark skies that the community wants to preserve? For example, encouraging uniform aesthetics, attracting shoppers and reducing hazards to motorists and pedestrians have all been found to be legitimate reasons for municipalities to enact land use regulations.[1]

2. **Expert Statements.** Absent specific factual situations documented locally, it is prudent to draw upon the published opinions of experts in the field. Articles, papers and presentations are worthwhile sources. 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 by reference into the file. Aside from the merits of star gazing, the comfort of dark skies, and the threats to vehicular and pedestrian safety, there is also ample documentation on the negative impact of artificial light at night on the health of humans and other living things.

3. **Comp Plan.** Ideally, the subjective value statements about the benefits of dark skies will be mentioned in the municipality's comprehensive plan.[2] The first step in the land use regulatory process is often the preparation of a comprehensive plan. 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.

B. AUTHORITY

1. **Type of Municipality.** Once a need for the regulation has been identified, the next step is to locate the municipality's legal ability to regulate.

   Home-Rule municipalities have the full power of local self-government.[3] Generally a home-rule municipality may exercise any power not prohibited by the Constitution or laws of the State of Texas, which is lawfully conferred by its charter.[4]

   General-Law municipalities look not to charters, but to state statutes as sources of regulatory authority.[5] They may enact a regulation that is for the good government, peace or order of the municipality, and is necessary or proper for carrying out a power

[1] *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 616 (Tex. App.--Texarkana 2008, no pet.), citing *Murmur 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.).
[2] Tex. Loc. Gov't Code §211.004.
[3] Tex. Loc. Gov't Code §51.072.
[4] *Bland v. City of Taylor*, 37 S.W.2d 291, (Tex. Civ. App. - Austin 1931) affirmed 67 S.W.2d 1033, (Tex. 1934).
[5] Brooks, David, "Municipal Law and Practice," Texas Practice §3.03 (p. 205).

granted to the municipality or to an officer of the municipality (provided the regulation is not contrary to the constitution or state law).[6]

Type A general-law municipalities may adopt ordinances, acts, laws, or regulations, not inconsistent with state law, that are necessary for the government, interest, welfare, or good order of the municipality as a body politic.[7]

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.[8] Type B municipalities can prescribe the fine for the violation of an ordinance.[9] Type B municipalities can take any other action necessary to carry out a provision of the Texas Local Government Code applicable to the municipality.[10]

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.[11] 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.[12]

2. **Zoning.** 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.[13] Pursuant to its zoning authority, a municipality may:

   (a) Regulate and restrict the height, number of stories, and size of buildings and other structures.

   (b) Regulate the percentage of a lot that may be occupied.

   (c) Regulate the size of the yards, courts, and other open spaces.

   (d) Regulate the density of population.

   (e) Regulate the location and **use** of buildings, structures, and land for trade, industry, residence, or other purposes.

[6] Tex. Loc. Gov't Code §51.001.
[7] Tex. Loc. Gov't Code §51.012.
[8] Tex. Loc. Gov't Code §51.032(a).
[9] Tex. Loc. Gov't Code §54.002.
[10] Tex. Loc. Gov't Code §51.032(b).
[11] Tex. Loc. Gov't Code §51.051(b).
[12] Tex. Loc. Gov't Code §51.051(a).
[13] Tex. Loc. Gov't Code §211.001.

(f) Regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures in designated places and areas of historic and cultural importance.[14]

The regulation of outdoor lighting is a reasonable application of this authority. It is also reasonable for a municipality to address outdoor lighting in the course of creating a Planned Development District (aka, "Planned Unit Development"), and as an added term imposed as a condition of rezoning (or a zoning overlay). Restricting outdoor lighting could also be a condition placed upon the granting of a variance (depending on the nature of the variance sought).

3. **Building Codes.** Municipalities have the authority to adopt, ***and amend*** several standard (national or international) building codes (electrical codes, rehabilitation codes, plumbing codes, fire codes, property maintenance codes and energy conservation codes.[15] The regulations of lighting related to buildings and structures is a reasonable extension of this authority.

4. **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.[16] The regulations of lighting related to signage falls under this authority.

5. **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.[17] 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.[18] Restrictions on outdoor lighting fits within the larger regulatory effort to protect historic structures and place.

6. **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.[19] Although not expressly enumerated, the parties can mutually agree to how outdoor lighting will be installed and operated.

7. **Nuisance.** Municipalities have the authority to define and abate nuisances.[20] There is ample documentation available to support the declaration that certain types of light trespass and / or light pollution constitute public nuisances, which can be regulated pursuant to this grant of authority.

[14] Tex. Loc. Gov't Code Ch. 212 [emphasis added].
[15] Tex. Loc. Gov't Code Ch. 214.
[16] Tex. Loc. Gov't Code Ch. 216.
[17] Tex. Loc. Gov't Code §211.001.
[18] *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).
[19] Tex. Loc. Gov't Code 212.171, *et. seq*.
[20] Tex. Loc. Gov't Code Ch. 217.

C. 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. Here is a sampling of cases:

- Water towers near plaintiffs home had lights that shined into plaintiff's bedroom, disturbing their sleep. The Court concluded glaring light to be a nuisance.[21]

- A cotton gin re-located near Plaintiff's home. The gin had bright floodlights that would shine onto plaintiff's premises. The Court concluded that erection and operation of the gin at the proposed site adjoining plaintiff's home was unreasonable and constituted a nuisance as a matter of law.[22]

- Landowners brought a light and noise nuisance claim against owner of 126–foot cellular telephone tower. The tower had two floodlights that were on all night and that illuminated the Landowner's backyard so that one could read and write on their patio at night. The Court found the light to be a nuisance and awarded monetary damages for past nuisance damages, future damages expressly excluded.[23]

- Landowners brought nuisance action against port authority under Texas Tort Claims Act, alleging that port authority's operation of marine container terminal caused excessive noise, light, and chemical pollution that interfered with landowners' use and enjoyment of their homes. The Court found the injuries to property were in common with the community, and resulted from the operation of a public work. In that case a governmental entity has immunity and the landowners were not compensated. 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.[24]

- Plaintiff's claimed defendant's use of household lights amounted to light trespass. Plaintiff's claimed defendants' driveway lights were illuminated from early afternoon hours until the next morning and are *intentionally and maliciously* focused upon Plaintiffs' bedroom windows. The trial court's judgment found 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." The appellate court affirmed.[25]

- Neighbors to a high school object to the construction of a new stadium because the lights will cause a trespass. The Court concludes there is no substantial evidence in the record showing the Project's lighting elements *may have a significant effect on the environment*. Further, the Court stated, "the question is whether a project will affect the environment of

[21] *City of River Oaks v. Moore*, 272 S.W.2d 389, 390 (Tex.Civ.App.—Fort Worth 1954, writ ref'd n.r.e.).
[22] *Lamesa Co-op. Gin v. Peltier*, 342 S.W.2d 613, 616 (Tex. Civ. App. 1961).
[23] *GTE Mobilnet of S. Texas Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 606 (Tex. App. 2001).
[24] *Port of Houston Auth. v. Aaron*, 415 S.W.3d 355 (Tex. App. 2013).
[25] *Brozynski v. Kerney*, 10-05-00300-CV, 2006 WL 2160841 (Tex. App. Aug. 2, 2006). UNPUBLISHED

persons in general, not whether a project will affect particular persons." 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.[26]

- "In Residence Districts the source of any lighting located out-of-doors on any lot shall not be visible from any other lot." Court concluded this language in the zoning ordinance was not unconstitutionally vague, and supported the city's denial of the outdoor lights to be installed on a football field in a residential neighborhood.[27]

- Property owners in Henly, and up to two miles away from the ballpark, complain about the glaring lights from the Field of Dreams. One property owner says, "we avoid going on the porch at night because it's unbearable." In addition to light nuisance, property owners nearby complain of trash, traffic, and trespassers. This article discusses the lawsuit filed in July 2013 by Kenneth and Susan Troppy who live adjacent to the ballpark (See info on lawsuit below). They are seeking $200,000 in damages for trespassers wandering on their property, property devaluation, and for light and noise nuisances. This article also indicates that Henly residents hosted a town hall meeting to discuss incorporation.[28]

    - The Field of Dreams is an 18 acre parcel of flat land situated in the unincorporated town of Henly. It consists of 9 Baseball/Softball Fields, Batting Cages, and Concessions constructed and covering property/lot line to property/lot line. It is owned principally by Austin Select Baseball CEO John Martin and COO Sean Kinkaid but has an additional 13-15 private investors.

    - Of those 9 fields, 8 are for youth aged Select players, and 1 is for senior aged Select players with No Adult usage. All fields are lighted. The total number of 40ft. tall lighted poles is 23. 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 80 teams per week and is marketing itself as an a Select athletic destination in order to host regional, state, and national events. It sits off of a 2 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.

And there are cases involving municipal regulations, and municipal oversight:

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[26] *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, 215 Cal. App. 4th 1013, 1040, 156 Cal. Rptr. 3d 449, 469-70 (2013), reh'g denied (Apr. 25, 2013).

[27] *Stephen Reney Saybrook*. 4 Conn. App. 111, 113, 492 A.2d 533, 534 (1985).

[28] *Troppy v. Central Texas Field of Dreams, LP*, Cause No. 13-1645, 428th District Court, Hays County. Case is pending.

- Neighbors, the Abramowitz's, complained to the City that their neighbors, the Marvin's, were violating the exterior lighting provisions of the Zoning Code. The Marvin's lowered the wattages and put on shields. The Abramowitz's still claimed the Marvin's lights reflected off of their garage causing a glare into their home. The Abramowitz's sued claiming the Zoning Board should require them to put on a timer, and that the Board's decision was inconsistent with the purpose of the zoning regulations. 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, 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. The Court found for the City because the Zoning Board did not err in applying the Code.[29]

- This case addresses grandfathering for lights. The plaintiffs argued that a Country Club had illegal lights according to the Code and that the lights were never permitted by the City. The court finds that a special permit for the Country Club specifically authorized outdoor lighting. Also, the Country Club 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.[30]

D. PROCEDURES

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

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

E. SCIENCE

In order to knowingly enact reasonable regulations and effective standards, it is important that the city council understand the technology. Watts v Lumens? Lumens v. Luminaires. Hooded v. Shielded? Full Cut-Off Fixtures? Time should be spent understanding what these words

[29] *Abramowitz v. Zoning Bd. of Appeals of Town of New Canaan*, FSTCV106006012S, 2011 WL 4908361 (Conn. Super. Ct. Sept. 16, 2011). UNPUBLISHED.

[30] *Shaw v. Redding Zoning Bd. of Appeals*, 31 61 40, 1995 WL 139555 (Conn. Super. Ct. Mar. 20, 1995) UNPUBLISHED.

mean, and how they will affect homeowners, business owners, and citizens at-large. It would also be wise to engage the city's engineer, or hire a lighting consultant.

F. SCOPE & APPLICABILITY

A crucial decision for would-be municipal regulators is the scope of the outdoor lighting ordinance. How broadly will it be applied?

1. **Zoning Districts.** It should be determined early on whether the regulations will be applied to just Non-Residential (i.e., Commercial / Retail / Industrial) properties, or will they also apply to Residential, Recreational, Government properties?

2. **Existing v. New Construction.** There are some municipalities that apply the new regulations to existing structures, while others limit the tougher standards only to new construction.

3. **Areas Illuminated.** Once the municipality has identified the types of property and projects the outdoor lighting regulations will apply to, city leaders must choose the areas on a building, structure or parcel that will be addressed by the ordinance. Commonly-addressed areas include the following:

   (a) Entrances (Doors, Windows).
   (b) Landscaping (Porches, Playscapes, Trees, Shrubbery).
   (c) Sports Courts (Tennis, Basketball).
   (d) Swimming Pools.
   (e) Driveways / Walkways.
   (f) Parking Lots.
   (g) Security Lighting.
   (h) Signs.

4. **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*** (prepared by the International Dark-Sky Association (IDA) and Illuminating Engineering Society of North America (IESNA).[31] Other examples include those enacted by the cities of Dripping Springs,[32] and West Lake Hills,[33] both of which are available online from Franklin Legal Publishing.[34]

G. STANDARDS

1. **Common Standards.** While the terminology may be difficult for some to master, outdoor lighting regulations do not have to be complex. The goal should be to establish requirements that can be understood, and that are *enforceable*. Typical aspects of outdoor lighting standards include:

[31] http://www.darksky.org/assets/documents/MLO/MLO_FINAL_June2011
[32] Dripping Springs, Tx, Code of Ordinances, Article 24.06.
[33] West Lake Hills, Tx, Code of Ordinances, Article 24.03.
[34] http://www.franklinlegal.net

(a) Lumens.
(b) Hooding / Shielding.
(c) Height.
(d) Timing (Timers, Curfews).

2. 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. Ordinances are subject to the same constitutional requirements and construction canons as statutes.[35] To determine whether a statute is unconstitutionally vague, we begin by presuming that the statute is constitutional.[36] The party challenging the statute's constitutionality has the burden of showing that the statute fails to meet constitutional requirements.[37] A statute or ordinance is unconstitutionally vague if the persons regulated by it are exposed to risk or detriment *without fair warning* or if it invites *arbitrary and discriminatory* enforcement by its lack of guidance for those charged with its enforcement.[38] 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.[39] 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 is prohibited in each particular case.[40] Due process is violated and a law is invalid if persons of common intelligence are compelled to *guess* at a law's meaning and applicability.[41]

A law is not unconstitutionally vague merely because it does not define words or phrases.[42] Only a reasonable degree of certainty is required,[43] 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.[44] Moreover, the mere fact that the parties disagree as to an ordinance's meaning does not mean we must necessarily guess at its meaning.[45] That being said, it is recommended that municipal outdoor lighting regulations define those terms that are not commonly understood in the general public.

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[35] *Mills v. Brown*, 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. *Texas 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 Legislature.").

[36] *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003).

[37] Id.

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

[39] *City of 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).

[40] Id.

[41] *Attic Club*, 457 S.W.2d at 45; *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980); *Signad*, 682 S.W.2d at 646.

[42] *Vista Healthcare, Inc. v. Texas Mut. Ins. Co.*, 324 S.W.3d 264, 273 (Tex. App.--Austin 2010, pet. denied).

[43] Id. (citing *Pennington*, 606 S.W.2d at 689).

[44] *Signad*, 682 S.W.2d at 646-47 (quoting *Sproles v. Binford*, 286 U.S. 374, 393 (1932)).

[45] *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 *City of Webster v. Signad, Inc*., 682 S.W.2d at 645-46.

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).[46] 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.[47]

H. PRE-EXISTING

1. **Nonconforming.** A major issue to resolve (from administrative, political and legal perspectives) is how to deal with pre-existing and grandfathered lighting. Municipalities often intend that outdated, inconsistent, light fixtures contrary to the new regulations go away, eventually (one way or the other). A "nonconforming use" is one that lawfully existed on the land prior to the enactment of an ordinance, and continues to exist out of compliance with the ordinance after the effective date.[48]

   Some outdoor lighting experts, including the authors of the model ordinance, have concluded that most outdoor lighting will be fully depreciated at the end of 10 years (if not sooner).

   Generally, courts have found it is reasonable for municipalities to terminate a use that does not meet the zoning standard (e.g., terminating an apartment building in an area zoned for single-family use).[49] However, the reasonableness standard only gives the landowner the opportunity to recoup his actual investment in the nonconforming use.[50] 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.

2. **Amortization.** Municipalities must allow enough time for recoupment of the actual investment of the nonconforming structure. There is no way to get around a case-by-case analysis. It is wise to set a reasonable amortization period, then allow a property owner to appeal that decision within the city. That way, the property owner must prove the actual investment has not yet been recouped. The Fort Worth Court of Appeals upheld such a regulatory structure.[51] Also, the Texas Supreme Court determined in the hallmark amortization case, *City of University Park v. Benners*, that the involuntary termination of a

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[46] *William L. Lindig v. City of Johnson City*, Cause Number 03-11-00660-CV, November 15, 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 also *Texas 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 attended [sic] dangers of arbitrary and discriminatory applications." (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

[47] *Vista Healthcare*, 324 S.W.3d at 273.

[48] *City of Univ. Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

[49] *Dyer v. Bd. of Adjustment of City of Dallas*, 05-94-00093-CV, 1995 WL 23637 (Tex. App.--Dallas 1995, writ denied).

[50] *Id*. at 3.

[51] *Coyel v. City of Kennedale*, 2-04-391-CV, 2006 WL 19604 (Tex. App.—Fort Worth Jan. 5, 2006, pet. denied).

nonconforming use through amortization that allows for recoupment of the investment does not amount to a constitutional taking.[52]

Additionally, if the City can show that the light trespass is a nuisance and a safety concern, case law exists to suggest that a shorter amortization period would withstand challenge.[53]

3. **Modifications or Destruction.** It's common in municipal zoning regulations for new regulations to be triggered upon a change in the use or alteration of the premises. The model ordinance suggests new regulations applying:

   "Whenever there is a new use of a property (zoning or variance change) or the use of the property is changed…."[54]

4. **Abandonment.** Municipalities have terminated nonconforming uses due to abandonment or discontinued use. Under Texas law, a discontinuance of a prior nonconforming use for fixed time such as six months will not of itself constitute abandonment. Courts have established a two-part test to determine whether the discontinuance of a nonconforming use constitutes abandonment. The test requires:

   (a) an intent to abandon; and

   (b) some overt act or failure to act which carries the implication of abandonment. [55]

   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. 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.

5. **Uniformity of Requirements.** Often referred to as "grandfathering" or "vested rights," pursuant to Chapter 245, 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.[56] This statutory *freeze* on regulations might encompass outdoor lighting rules.

6. **Continuation of Land Use.** With regard to pre-existing uses subject to annexations, the state statutes do not support amortization. A municipality *cannot prohibit* the continued use of land after annexation if the use legally existed prior to annexation.[57] Once the landowner proves the use pre-dated the annexation, a municipality is bound to grandfather the use,

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[52] *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).
[53] See *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 616 (Tex. App.—Texarkana 2008, no pet.).
[54] Model Lighting Ordinance, International Dark-Sky Association (IDA) and Illuminating Engineering Society of North America (IESNA) §VII.B (June 14, 2011).
[55] *Rosenthal v. City of Dallas*, 211 S.W.2d 279, 284 (Tex. Civ. App.--Dallas 1948, writ ref'd n.r.e.).
[56] Tex. Loc. Gov't Code §245.002(a).
[57] Tex. Loc. Gov't Code §43.002(a).

unless the use meets a public safety / welfare exception. The law is unclear at this point 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).

I. ADMINISTRATION

As with any regulation, it is wise to consider how the rules will be implemented before you adopt the rules. With outdoor lighting ordinances, key questions are:

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

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.

J. ENFORCEMENT

1. **Options Generally.** Municipalities have many options for achieving compliance with outdoor lighting regulations: voluntary compliance, administrative remedies, municipal court, and civil court. Municipalities also have many sources of authority for enforcement of its ordinances. State law provides general enforcement authority and procedures for enforcing health and safety ordinances through a quasi-judicial building and standards commission.[58] State law also provides for enforcement through the use of civil actions and for alternative administrative hearing procedure before a hearing officer appointed pursuant to ordinance with appeal to the municipal court.

2. **Criminal Enforcement.** A municipality may provide by ordinance for a fine of up to $500 for violation of any ordinances and up to $2,000 for violation of ordinances governing zoning, and certain other matters.[59] These higher limits apply to a municipality regardless of any contrary provision in a city charter.

3. **Civil Enforcement.** Any municipality may bring a civil suit to enforce certain ordinances concerning public safety in building construction, fire safety, zoning and subdivision requirements.[60]

K. PUBLIC EDUCATION

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. In an ideal situation, public education activities will occur throughout the process, rather than at the final public meeting at which the ordinance will be adopted.

[58] Tex. Loc. Gov't Code Chapter 54.
[59] Tex. Loc. Gov't Code §54.001.
[60] Tex. Loc. Gov't Code §54.012.

Outdoor lighting ordinances can implicate strong sentiments regarding private property rights, safety, and the proper role of government. 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.

Municipalities exercising regulatory control over outdoor lighting should anticipate these human factors, 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.

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

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