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## **Chickens, Signs, and Other Hot Topics**

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## 1. INTRODUCTION

This *loosely-strewn-together* collection of subjects is offered, not as certification of emerging trends, but as a source of background materials on non-traditional land use and development topics many Texas cities have confronted in recent years. The authors are not advocating for particular regulations in these areas of law, but rather sharing insights garnered lately in their roles as municipal lawyers representing Texas cities. The decision of what to include in this paper was influenced by an increasing tension between the efforts of some property owners to *Go Green*, and classic municipal regulations involving such routine standards as height, setbacks, and impervious cover. Some cities have been forced to rethink their standards when faced with a resident's desire to crack open that *backyard-fresh-egg*, or operate their hot tub with a personal rainwater collection system, wind turbine, and solar panel.

## 2. YARD BIRDS<sup>1</sup>

There are cities across the nation reconsidering their policy stances on the issue of prohibiting poultry in residential areas for domestic use. According to one informal survey, approximately *half* the cities polled allow chickens to be kept on single-family residential lots. Of those that allow backyard birds, about 40% require a permit from the city. Originally, restrictions on backyard poultry were premised on public health, safety and welfare concerns, including: Noise, fecal waste, rodents, odors, disease (avian flu), and attraction of predators (bears, foxes, possum, coyotes and raccoons).

The reversal in the regulations can be attributed (at least in part) to the varying national movements in favor of eating locally-produced foods, coupled with the trend toward organic, free-range poultry products. There are plentiful resources for those looking to raise their own chickens, such as [www.backyardchickens.com](http://www.backyardchickens.com).

For cities still engaged in regulating poultry in residential areas, the common aspects of the regulations include: (1) Requiring a Conditional Use Permit be obtained verifying minimum lot size and setback requirements are satisfied; (2) Permit to Raise Fowl subject to annual inspections; (3) Permit Fee; and (4) Sanitary conditions including bleaching of coop annually.

## 3. GARDENS

Do municipal land use regulations foster or thwart eating locally-grown produce? As many health experts encourage home gardens and farmers markets, city leaders are challenged to reconsider such fundamental land use tools as setbacks, landscaping mandates, and prohibitions of certain activities in front yards or side yards.

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<sup>1</sup> This segment of the paper borrows heavily from a presentation by Marianne Landers Banks of Springfield, Missouri, "When the Rooster Crows: Urban Chickens and other Food-Producing 'Pets'", IMLA 2011 Code Enforcement Conference, Chicago, Illinois (September 11, 2011).

## **A. Farmers Market & Community Gardens**

Farmers markets have been an important source of food for consumers for many years. Markets, such as the “certified” markets in Los Angeles, are a safe and healthy food source everyone can depend upon. These markets help local economies — and local people seeking healthier options — enabling all to benefit by building a healthy and economically thriving food system for all local residents. As long as a healthy and sustainable food system exists, farmers can continue to work and consumers can continue to have healthy options to eat.<sup>2</sup>

Three California cities (San Francisco, San Diego, and Los Angeles) have taken the lead in creating a set of local food policies that are helping to define and shape a regional food infrastructure in their foodshed planning effort.<sup>3</sup> A foodshed has been described as the area of land and waters within a region from which food is produced in order to deliver nutrition to a population base. Its size depends on the size of the market within the region that needs the food and the capacity of the producers surrounding it to supply that market.<sup>4</sup> For example, San Francisco defines its foodshed as an area within a 100-mile radius of the city because the city could theoretically sustain itself with food produced in this area (i.e., by farmland, urban gardens, fishing, food production, and water resources).

## **B. Challenges**

A roundtable of farmers, food producers, consumers, business owners, environmental activists, and health advocates within a foodshed discuss local food policies to recommend to their local governments. They are concerned with how to preserve farmland from encroaching urban and housing developments in order to prevent the disappearance of irrigated cropland.<sup>5</sup> By these urban and rural communities partnering, they are able to advocate for the local food economy’s direct markets like farmers markets and local restaurants.

## **C. Land Use Policies**

Addressing city land-use policies can help alleviate potential barriers preventing rural and urban growers from direct marketing to consumers. City Planners can help by: (1) coordinating and integrating comprehensive land-use planning efforts and policies that will help break down the silos between other disciplines; (2) strengthening comprehensive plans by including food and agriculture systems; (3) creating zoning codes that can help manage urban growth and afford better access to direct markets; (4) providing geographic data that is crucial to understanding a region's foodshed; and (5) serving as a resource for data gathered for foodshed assessments.<sup>6</sup> Through foodshed planning, the bridge between urban residents and those living in peri-urban (adjacent to the city) and rural communities can become stronger and longer-lasting.

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<sup>2</sup> Bobbie Peyton, *Find Your Foodshed: California leads the way in a new type of planning*, Jan. 2012, available at <http://www.planning.org/planning/2012/jan/foodgroupsside.htm>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

#### D. School Gardens<sup>7</sup>

These days, sustainable foodsheds also include gardens maintained by children while at school. Los Angeles has over 100 campus school gardens which are often a joint effort with community organizations. Because over 70% of the children in Los Angeles's public schools live below the poverty line, school gardens "can be the first step in linking low-income families to a localized, sustainable food system".<sup>8</sup>

#### E. Urban Farmers

Urban farmers are challenging city halls across the country to rewrite ordinances that govern residential gardens. The challenge for cities is to balance the potential to grow green businesses with the concerns of neighbors who don't want a thriving, for-profit enterprise next door, never mind the noise and smells that come from compost and small livestock.<sup>9</sup> Old zoning laws have prevented these urban farmers from producing and selling livestock and agriculture. However, the recent Food and Flowers Freedom Act allowed urban farmers to lawfully grow and sell fruit and flowers.<sup>10</sup> To streamline urban farming issues and efforts, some suggest cities set up a one-stop-shop for urban farms, like they have for small business development, so that city farmers can deal with zoning, home business regulations and nuisance laws all in one place.<sup>11</sup>

#### F. Links<sup>12</sup>

- Texas Organic Farmers & Gardeners Association (TOFGA): <http://tofga.org/>
- The Texas Department of Agriculture / Go Texan online Certified Farmers Market Application: <http://www.gotexan.org/Portals/1/doc/pdf/FMApplication.pdf>
- Central Texas Foodshed Assessment [http://www.sustainablefoodcenter.org/about/Central%20Texas%20Foodshed%20Assessment\\_English.pdf](http://www.sustainablefoodcenter.org/about/Central%20Texas%20Foodshed%20Assessment_English.pdf)

## 4. WILDFIRES & DROUGHTS

Some municipalities are evaluating their land use and development regulations and policies to determine what can be done to reduce the risk of loss of lives and property to wildfires. There are also municipalities assessing their approaches to landscaping in the face of the long-term drought.

According to the Texas Forest Service, "as many as **a half-billion trees** died [in 2011] across Texas from the drought persisting across much of the state."<sup>13</sup> The three areas hardest hit:

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<sup>7</sup> Gabriela Worrel, *Food Groups: LA expands its menu of food policies and choices*, American Planning Association Magazine, Jan. 2012, at 23.

<sup>8</sup> *Id.*

<sup>9</sup> Raquel Maria Dillon, *Urban gardeners versus zoning laws: Urban green thumbs who want to raise livestock or grow vegetables for sale are being thwarted by unhappy neighbors and zoning laws*, Feb. 16, 2010, available at <http://www.csmonitor.com/The-Culture/Gardening/2010/0216/Urban-gardeners-versus-zoning-laws>.

<sup>10</sup> See [http://laist.com/2010/03/25/fruit\\_flowers\\_go\\_legit\\_ordinance\\_on.php](http://laist.com/2010/03/25/fruit_flowers_go_legit_ordinance_on.php).

<sup>11</sup> *Id.*

<sup>12</sup> Thanks to Jo Ann Touchstone, City Secretary of the City of Dripping Springs, TX.

<sup>13</sup> See <http://www.chron.com/news/article/Up-to-500-million-Texas-trees-died-from-drought-2413045.php>.

- Sutton, Crockett, Kimble and Pecos counties in West Texas saw an extensive die-off of Ashe junipers.
- Harris, Montgomery, Grimes, Madison and Leon counties of Southeast Texas saw a big die-off of loblolly pines.
- Bastrop and Caldwell counties in Central Texas saw big losses of cedars and post oaks.

As of December 2011, Texas Forest Service is still not declaring an end to the wildfire season that started November 15, 2010.

### A. Alleviating Potential Fires

Cities seeking to reduce the threat of wildfires are considering the following:

- Landscaping with native and drought tolerant plants like pinon, juniper, aspen, and serviceberry will aid in water conservation and erosion control of slopes.<sup>14</sup>
- Evaluate expedited permitting process / variance process for tree / brush removal in Fire Safety situations.
- Mandate or provide incentives for creation of firebreaks / fire safety buffer zones in certain strategic areas (i.e., around propane tanks, areas between homes, etc.).
  - A firebreak is a continuous area of land which is cleared or otherwise treated to slow or stop the spread of fire.<sup>15</sup>
- Require or promote routine removal of dead brush.<sup>16</sup>
- Require fire sprinklers in homes.
  - **Recent legislation** prohibiting municipalities from requiring fire sprinklers in new residential homes:
    - **SB 1410** by M. Jackson; Sponsored by Gutierrez (Effective September 1, 2009 with some provisions effective June 1, 2010)<sup>17</sup>, provides that, among other things, a municipality is prohibited from requiring the installation of a multipurpose residential fire protection sprinkler system or any other fire sprinkler protection system in a new or existing one- or two-family dwelling.

### B. Fire Response

- Ensure that all fire hydrants produce sufficient fire-flow for effective fire-fighting.
  - **Texas Health and Safety Code**<sup>18</sup>
    1. The owner of any device having the appearance of a fire hydrant that is located in a place that an entity responsible for providing fire suppression services in a fire emergency would expect a fire hydrant to typically be located shall paint the device black if the device is nonfunctioning or otherwise unavailable for use by the entity providing fire suppression services in a fire emergency. The owner may

<sup>14</sup> See <http://www.essortment.com/landscaping-native-drought-tolerant-plants-texas-southwest-55179.html>.

<sup>15</sup> See <http://www.battle-creek.net/docs/fire/FireHazardAbatementOrdinance.pdf>.

<sup>16</sup> In 2011, the City of West Lake Hills, TX spent \$257,000 providing residents free city-wide brush pickup, plus \$50,000 for clearing of the public-right-of-way.

<sup>17</sup> See <http://www.tdi.texas.gov/reports/leg/81bills/billsummary.html>.

<sup>18</sup> Tex. Health & Safety Code § 341.0357 (2011).

place a black tarp over the device instead of painting the device black as required under this section if the device is temporarily nonfunctioning, or temporarily unavailable for use in a fire emergency, for a period not to exceed seven days.

2. For purposes of this section, a device is considered to be nonfunctioning if the device pumps less than 250 gallons of water per minute.
  - Note: this law was originally House Bill 1717, which became effective on June 15, 2007.<sup>19</sup>

## 5. MOBILE VENDORS<sup>20</sup>

A mobile vendor has been described as any vendor of merchandise of food that occupies a specific location on a parcel or lot for more than one hour.<sup>21</sup> Urban and rural municipalities are evaluating whether they are concerned about goods being sold out of the back of a truck or van, and if so what the issues are, and what to do about it (if anything).

### A. Mobile Food Vendors

Unless you've been living under a trailer, you've noticed yesterday's roach coach has become today's hip food truck. Austin celebrates its top food truck chefs with gourmet show-and-tell fundraisers<sup>22</sup> and the Food Network recognizes America's recent appetite for mobile food vendors with its TV special *The Great Food Truck Race*.<sup>23</sup> But food trucks in some areas have had difficulty receiving the same kind of warm reception. One such city, El Paso, TX, has recently relaxed its once stringent food truck regulations.<sup>24</sup> Street vendors had to conduct business outside of a thousand-yard zone where brick-and-mortar restaurants operated, a scheme that the city admitted had no basis in safety or health concerns.<sup>25</sup> The local restaurant association pushed for the zoning restrictions as a way to protect their businesses, and the city responded by virtually outlawing mobile vendors from operating where potential consumers are.<sup>26</sup> The zoning restriction was repealed after the Institute for Justice filed lawsuits challenging their constitutionality.

### B. Health benefits to Food Trucks

Experts say that "food deserts" - areas of the city where healthy, affordable food is difficult to obtain - negatively impact cities, and that urban planners and other policy makers can utilize food trucks to make sure that everyone has physical and financial access to good

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<sup>19</sup> See <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=80R&Bill=HB1717>.

<sup>20</sup> The authors acknowledge the contributions to this area of the law by Deborah F. McAbee, of the Houston City Attorney's Office, whose materials on Mobile Food Vendors were presented at this conference in 2011.

<sup>21</sup> See [http://fortworthtexas.gov/uploadedFiles/Development/Frequently\\_Requested\\_Data/Moblie%20Vendor%20Customer%20Handout.pdf](http://fortworthtexas.gov/uploadedFiles/Development/Frequently_Requested_Data/Moblie%20Vendor%20Customer%20Handout.pdf).

<sup>22</sup> See <http://roccomedia.com/dinnerbythebite/>; thanks to Jo Ann Touchstone City Secretary of the City of Dripping Springs, TX.

<sup>23</sup> See <http://www.foodnetwork.com/shows/great-food-race-trucks/pictures/index.html>.

<sup>24</sup> See <http://mobilefoodfranchises.com/mobilefoodnewscom/food-truck-wars-victory-for-mobile-vendors-in-el-paso-video>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

food.<sup>27</sup>

Additionally, they say that food trucks enable “food equality” by connecting the sustainable agriculture communities to “food justice communities”.<sup>28</sup> Food trucks have been reinvented from “roach coach” into a pop culture phenomenon where even “food truck courts”, a congregation of trucks, will offer a variety of foods. Brick-and-mortar establishments have complained of losing walk-in business to food trucks, and city health departments, such as in Los Angeles, have required food trucks to abide by stricter health standards (e.g., provide restrooms for customers). However, most agree that eating local, food truck or not, is a win-win for everyone.<sup>29</sup>

### C. Examples of U.S. cities with mobile vendor regulations

- **Austin, TX:**
  - has incorporated into their code regulations regarding all mobile vendors, especially mobile food vendors.<sup>30</sup>
- **San Marcos, TX:**
  - has 13 requirements for mobile food vendors listed on their website (e.g., all employees must have a valid Food Handler’s Training Certificate; all foods must be from an approved source (labeled)).<sup>31</sup>
- **Wimberley, TX:**
  - has no mobile vendor ordinance yet; currently mobile food vendors are governed under the City’s food ordinance.<sup>32</sup>
- **Los Angeles, CA:**
  - mobile vendors may operate on public streets, including metered parking spots; may make agreements with private property owners; City is considering increasing fines on drivers who don’t carry valid health and safety permits or who park within 200 feet of a city park or within 500 feet of a school.<sup>33</sup>
- **Boston, MA:**
  - the City has expanded the number of mobile food truck neighborhood permit locations; vendors interested in applying for a permit are required to offer a specific amount of vegetables, fruits and whole grained food options; City has coordinated with several other city agencies to develop a single application process for obtaining a food truck permit.<sup>34</sup>

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<sup>27</sup> Worrel, *supra* note 7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See [http://www.amlegal.com/nxt/gateway.dll/Texas/austin/thecodeofthecityofaustintexas?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:austin\\_tx\\$anc=](http://www.amlegal.com/nxt/gateway.dll/Texas/austin/thecodeofthecityofaustintexas?f=templates$fn=default.htm$3.0$vid=amlegal:austin_tx$anc=).

<sup>31</sup> See <http://www.ci.san-marcos.tx.us/departments/health/FoodEstablishmentRequirements.htm#Mobil Vendor>.

<sup>32</sup> Thanks to Don Ferguson, City Administrator of the City of Wimberley, TX.

<sup>33</sup> See <http://www.thirteen.org/metrofocus/news/2011/08/truck-you-the-travails-of-mobile-food-vendors/>.

<sup>34</sup> *Id.*



- **Portland, OR:**
  - mobile food vendors rent out spaces in private parking spots where they offer seating and can operate in the same location for hours at a time.<sup>35</sup>
- **Baltimore, MD:**
  - City has a controversial policy allowing parking zones for food trucks, and it lifted parking restrictions in its downtown district.<sup>36</sup>
- **Seattle, WA:**
  - City allows food trucks to operate from the street, instead of being limited to private lots; food trucks are required to pay \$2.25 per hour to sell from a parking spot — but they can only operate four hours per week and they have to be at least 50 feet from another food-service operation and at least 1,000 feet away from schools.<sup>37</sup>
- **Detroit, MI:**
  - it is difficult to receive a permit to sell anything other than hot dogs, soda, popcorn or ice cream; the mobile food vendor must be at least 100 feet away from a restaurant selling the same product; the ordinances governing mobile food vendors date back to the '40s.<sup>38</sup>

#### D. Mobile Veterinarians

How does a city regulate mobile businesses such as mobile vets? A Central Texas mayor has stated concern about a mobile vet parked at Walgreens under-cutting the solid, traditional vets who have been active in the community for years and support FFA/4H, etc. No Texas city appears to have mobile vet regulations. The State regulations through the Texas State Board of Veterinary Medical Examiners regulate the Vet only, not the business.<sup>39</sup> The board said the State only requires the vets: (1) be licensed; and (2) give the board 48 hours' notice prior to going to a mobile location to perform vet work. The mobile vet also must fill out a form which stays on file for 1 year with the board in case a consumer makes a complaint.

Thus, currently, there are no State regulations on: (1) how close a mobile vet can be to an established brick-and-mortar vet, (2) disposals, (3) length of time, etc. However, a mobile vet setting up in a shopping center on a regular basis violates the temporary use portion of the city's ordinance and may also violate the ordinance for an outside display.<sup>40</sup> If the mobile vet provides the service at a residence, there is a difference on how the city would regulate that use. Consider: do existing water / sewer regulations or ordinances cover any waste? Also, if you regulate a mobile vet practice, consider what to do about mobile carpet cleaners, lawn fertilizing companies, disaster clean up companies, pet groomers, etc.<sup>41</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See <http://www.tbvme.state.tx.us/>.

<sup>40</sup> Municipal law attorney, Dorothy "Dottie" Palumbo, Of Counsel, Bojorquez Law Firm, PLLC.

<sup>41</sup> Thanks to Abigail Elias, Chief Assistant City Attorney of the City of Ann Arbor, MI.

## 6. WIND TURBINES

Wind turbines are becoming an increasingly popular method for creating energy, from single family residences to large wind farms. While some cities have already planned for the rise in wind energy demand by adopting ordinances, some cities are still wrestling with ordinance drafts, and some cities have yet to begin this journey. Despite which stage a city's wind turbine ordinance may or may not be in, the debates are similar: how to foster a new renewable energy technology while shielding residents from safety concerns, potential negative effects on property values, and noise and visual nuisances, while not sacrificing a community's character and aesthetics.<sup>42</sup>

### A. Local Control vs. State/Federal

To the extent that local governments design ordinances to fit their own needs to protect things such as neighborhood character and aesthetics, there's a strong case for local control.<sup>43</sup> This leads some to suggest that wind turbines and wind farms should be designed by design teams with architects or landscape architects as the lead contractors, not engineers.<sup>44</sup> But on some technical aspects of wind turbine regulation on which local officials might not have expertise - issues such as safety, structural standards for turbines and the feasibility of a private residential project to actually capture wind energy - it may not make sense to do everything community-by-community.<sup>45</sup>

### B. Aesthetics vs. Productivity

Some advocates of green energy are already suggesting ways in which federal rules could be toughened to minimize the importance of local aesthetic objections. For example, there's an argument that rules on wind farms in the National Environmental Policy Act should be rewritten to give greater weight to regional environmental benefits than to local aesthetic preferences.<sup>46</sup> Adding "popular visual aesthetic preferences are the primary obstacle to obtaining the emission reductions and other benefits wind power offers. It is easy for the layperson to see how large offshore wind farms in the ocean will alter local ocean viewscapes, whereas, emission reductions are difficult even for the energy analyst or transmission engineer to pinpoint. Thus, those who value emission reductions and other benefits of wind power above aesthetics are at a great disadvantage in NEPA review."<sup>47</sup> However, many feel that is unfair to ask them to bear the burdens of sound and visual

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<sup>42</sup> Jim Anderson, *Afton joins list of cities regulating wind turbines*, Star Tribune, July 24, 2010, available at <http://www.startribune.com/local/east/99182779.html>.

<sup>43</sup> *Id.*

<sup>44</sup> Steven Litt, *Cleveland proposes ordinance to regulate aesthetics and safety of wind turbines*, April 15, 2009, available at [http://blog.cleveland.com/architecture/2009/04/if\\_wind\\_farms\\_come\\_to\\_cleveland.html](http://blog.cleveland.com/architecture/2009/04/if_wind_farms_come_to_cleveland.html).

<sup>45</sup> *Id.*

<sup>46</sup> Dorothy W. Bisbee, *Coastal Wind Energy Generation: Conflict And Capacitie: Symposium Article: NEPA Review of Offshore Wind Farms: Ensuring Emission Reduction Benefits Outweigh Visual Impacts*, 2004, 31 B.C. Envtl. Aff. L. Rev. 349.

<sup>47</sup> *Id.* at 350.

pollution, as well as the potential impacts to migrating birds and wildlife, in the name of global warming and energy security.<sup>48</sup>

### C. Turbines of Varying Sizes

One could argue the notion of capturing any meaningful energy with a smaller tower is insignificant, and that you're really just talking about a wind sculpture at that point. The argument is the physics of capturing wind energy in most areas requires a tower at least 100 feet tall, suggesting solar energy is usually a more viable alternative in urban and suburban residential areas.<sup>49</sup> Despite this school of thought, some cities have a 40 foot height limit in their ordinance<sup>50</sup>, and many cities allow wind turbines mounted on the roofs of homes.<sup>51</sup>

In Cleveland, OH's proposed ordinance, the City aimed at controlling smaller-scale turbines in neighborhoods, not the gigantic towers that could appear in Lake Erie.<sup>52</sup> The basic thrust was to restrict the heights of turbines in residential districts to those of adjacent houses, and to require setbacks slightly bigger than the height of a turbine. For example, a 35-foot-high turbine would be set back 38.5 feet, or 1.1 times its height, from the nearest property line, ensuring a neighbor's property would be clear of the fallzone. Such language would ensure that commercial-scale turbines would effectively be barred from residential neighborhoods.<sup>53</sup>

On a larger scale, some cities are concerned how the collection of large wind turbines making up wind farms will look. According to wind turbine expert Frode Birk Nielsen, key qualities of well-designed wind farms include "creating rhythm and order" so that a group of turbines appear as a "clear coherent unit" separated by significant space from other turbines in the area.<sup>54</sup> In Cleveland, OH, some believe if engineers design the commercial size wind turbines, the City would be in trouble. The belief is engineers have designed everything from highways to railroads, only scarring the City with ugly physical barriers blocking access to the City's lakefront and river. "We shouldn't allow that pattern to continue when renewable energy comes to town."<sup>55</sup>

### D. Examples of varying U.S. cities' regulations on wind energy systems

- **Wimberley, TX:**
  - currently has prohibited all forms of wind turbines because in order for wind turbines to be effective, their height would violate Wimberley's height ordinance.<sup>56</sup>
- **San Marcos, TX:**
  - allows wind turbines to be placed on roofs;

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<sup>48</sup> Litt, *supra* note 44.

<sup>49</sup> Anderson, *supra* note 42.

<sup>50</sup> See

<http://www.nmls.lib.tx.us/Home/Departments/Development+Services/Planning/Wind+Energy+Ordinance.htm>.

<sup>51</sup> See <http://www.sanmarcostx.gov/departments/electric/docs/COSMREnewableEnergyOrdinance.pdf>.

<sup>52</sup> Litt, *supra* note 44.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* quoting Frode Birk Nielsen, *Wind Turbines & the Landscape: Architecture & Aesthetics*, 1996.

<sup>55</sup> *Id.*

<sup>56</sup> Thanks to Don Ferguson, City Administrator, City of Wimberley, Texas.

- requires a setback equal to the height of the wind turbine;
- has no height limit for a wind turbine on properties of one acre or more.<sup>57</sup>
- **Parker, TX:**
  - allows wind turbines to be mounted on roofs;
  - has a setback 1.25 times the height of the wind turbines.<sup>58</sup>
- **Garland, TX:**
  - has a 40 feet maximum height limit;
  - requires a site plan of the proposed wind turbines accompanied with the building permit application.<sup>59</sup>
- **Sweetwater, TX:**
  - has no ordinance, but does not allow a tower within the City to exceed 60 feet, depending on the base zone it is located.<sup>60</sup>
- **Lubbock, TX:**
  - does not have an ordinance or policy in place yet regarding wind turbines.<sup>61</sup>
- **Portland, OR:**
  - has an ordinance regulating only small wind turbines; large wind turbines and utility-scale wind turbines are regulated by the base zones;
  - the height of small wind turbines may not increase more than 50 percent above the base zone height regulation;
  - in Residential zones, the maximum rotor swept area is 50 square feet;
  - in Commercial zones, the maximum rotor swept area is 150 square feet;
  - may be mounted on buildings.<sup>62</sup>

## 7. SOLAR ARRAYS

Solar arrays, or solar panels, have been heating up structures like homes and offices more and more lately. One reason for the use increase is the price of solar electric systems has fallen rapidly in recent years. *However, it's still not cheap.* An average-size home (about 2,000 square feet) generally requires a 5-kilowatt system -- approximately a \$31,000 investment.<sup>63</sup> Ways to cut costs include: state and federal solar energy rebates<sup>64</sup>, enter a net metering agreement with

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<sup>57</sup> See <http://www.sanmarcostx.gov/departments/electric/docs/COSMREnewableEnergyOrdinance.pdf>.

<sup>58</sup> See [http://www.amlegal.com/nxt/gateway.dll/Texas/parker\\_tx/cityofparkertexascodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:parker\\_tx](http://www.amlegal.com/nxt/gateway.dll/Texas/parker_tx/cityofparkertexascodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:parker_tx).

<sup>59</sup> See <http://www.nmls.lib.tx.us/Home/Departments/Development+Services/Planning/Wind+Energy+Ordinance.htm>; thanks to Brad Neighbor, City Attorney for City of Garland, TX.

<sup>60</sup> Thanks to Linda Hart, City of Lubbock, Assistant to the City Secretary.

<sup>61</sup> *Id.*

<sup>62</sup> See <http://www.portlandonline.com/bps/index.cfm?a=297911&c=34561>.

<sup>63</sup> Denise DiFulco, *The Sun Rises on Solar Power*, Jan. 19, 2012, MSN, available at [http://www.bing.com/fordelectric/home-and-lifestyle/article-the-sun-rises-on-solar-power.aspx?WT.mc\\_id=msn](http://www.bing.com/fordelectric/home-and-lifestyle/article-the-sun-rises-on-solar-power.aspx?WT.mc_id=msn).

<sup>64</sup> Database of State Incentives for Renewables and Efficiency, available at <http://www.dsireusa.org/>.

your utility company<sup>65</sup>, or even leasing.<sup>66</sup> However, even if it's affordable, complying with city solar ordinances may be tricky.

### **A. Challenges facing Solar Arrays**

Many U.S. cities have already begun the process of adopting ordinances to regulate solar energy. Recurring issues are aesthetics, safety issues, impacts on property values, glares produced by the panels, prohibitions on panel advertising, and determining whether the state or local governments have authority.

### **B. Authority, Aesthetics**

For example, solar arrays are regulated by the state in Illinois, but in Missouri, where the state lacks uniform standards, municipalities have both the authority to regulate, but the task of crafting and adopting solar ordinances.<sup>67</sup> In a recently proposed Clarkson Valley, MO solar ordinance, the debate was not whether to permit solar panels, but exactly how to regulate them. In an attempt to regulate the growing solar industry and adhere to good aesthetics principles, the proposed ordinance sought to ban solar panels on front roofs.<sup>68</sup> But some homeowners' roofs receive most of the potential solar-generating sunlight on the front.

So there are cities in Missouri and California that allow variances to their solar ordinances in attempts to support the renewable energy: in Town and Country, MO, city officials eventually approved a variance for a *ground-mounted* solar array after the homeowner agreed to screen it with trees<sup>69</sup>; though Frontenac, MO's ordinance only permits solar panels on the back sides of roofs, the City allowed a couple to put panels on a side roof because it faced south – the direction for more effective sunlight<sup>70</sup>; and though the City of Santa Monica, CA requires installation of solar equipment in the location that is least visible from the street, the measure provides exceptions for when energy production would be decreased by more than 10% or the cost would go up significantly.<sup>71</sup> Opponents argued that the measure violated California law by regulating solar panels based on aesthetics, not health or safety, but the city's attorney found the measure was consistent with state law.<sup>72</sup>

### **C. Safety**

Ordinances in Hoboken / Hudson County, N.J. and Clarkson Valley, MO both address the concerns of emergency management services.<sup>73</sup> Fire departments were concerned with the

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<sup>65</sup> See [http://www.entergy-texas.com/your\\_home/net\\_metering.aspx](http://www.entergy-texas.com/your_home/net_metering.aspx).

<sup>66</sup> DiFulco, *supra* note 63.

<sup>67</sup> Mary Shapiro, *Solar energy heating up Clarkson Valley council chambers*, Dec. 12, 2011, available at [http://www.stltoday.com/suburban-journals/metro/news/solar-energy-heating-up-clarkson-valley-council-chambers/article\\_159afdc3-374f-5342-a2a9-122a7d039a4a.html#ixzz1n22ohJN4](http://www.stltoday.com/suburban-journals/metro/news/solar-energy-heating-up-clarkson-valley-council-chambers/article_159afdc3-374f-5342-a2a9-122a7d039a4a.html#ixzz1n22ohJN4).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Amy Littlefield, *Discreetly green: Santa Monica wants property owners to hide solar panels*, July 2, 2009, available at <http://latimesblogs.latimes.com/greenspace/2009/07/ugly-solar-panels.html>.

<sup>72</sup> *Id.*

<sup>73</sup> E. Assata Wright, *Council to weigh ordinance on solar panels*, Nov 14, 2010, available at

potential problems rooftop solar panels could create for firefighters. First, if they are too large they can prevent firefighters from gaining rooftop access using a ladder from the ground.<sup>74</sup> Also, solar panels store energy and heat, which can complicate a fire emergency and create hazards for firefighters.<sup>75</sup> When responding to a fire emergency firefighters need to know ahead of time whether a building has solar panels and, if so, how to deactivate them.<sup>76</sup> For firefighters' safety and proper roof ventilation, Clarkson Valley's ordinance requires panels to be located at least three feet below the roofline.<sup>77</sup> The Hoboken solar ordinance states: (1) any rooftop that can be accessed by a ladder from the street can only have solar panels if the arrays are setback at least 10 feet from the roof's edge; (2) the Fire Department will be guaranteed "a clear area of passage, front to back, and around any egress openings or access points"; and (3) that buildings with panels must have clear signs alerting firefighters of their presence and how they can be deactivated.<sup>78</sup>

#### D. Approval Process

In some cities, the approval process to install solar panels can be cumbersome and expensive. In Hoboken, the City Council adopted an ordinance to streamline its former process. Prior to the ordinance, solar panels had not been a permitted use in any of the zones in the City, thus requiring approval from the Zoning Board of Adjustments (ZBA) for a "use variance."<sup>79</sup> By adopting the ordinance, the City standardized the approval process.<sup>80</sup>

#### E. Glares

Solar panels emitting glares onto adjoining properties and roadways is a problem addressed in Ramsey, N.J.'s proposed ordinance.<sup>81</sup> To alleviate this concern, the ordinance would require a 50-foot setback from the nearest residential property line, but only a 25-foot setback from the property lines in *other* zones.<sup>82</sup> In addition, panels installed in the ground in non-residential zones would be prohibited from front yards, not exceed 14 feet in height, and not exceed 50 percent of the principal building floor area.<sup>83</sup>

## 8. RAINWATER COLLECTION

How do elevated rainwater cisterns fit into municipal restrictions on height and setbacks? Is there a connection between municipal landscaping requirements and the mandate to irrigate

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Hudson Reporter - Field of 'green' Council to weigh ordinance on solar panels.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Shapiro, *supra* note 67.

<sup>78</sup> Wright, *supra* note 73.

<sup>79</sup> *Id.*

<sup>80</sup> See <http://www.ecode360.com/documents/HO0741/source/430525.pdf#search=solar>.

<sup>81</sup> Samantha Feller, *Ramsey council introduces ordinance to regulate solar panel installations*, Feb. 15, 2012, available at

[http://www.northjersey.com/community/events/139420408\\_Governing\\_body\\_plans\\_to\\_regulate\\_solar\\_panel\\_installations.html](http://www.northjersey.com/community/events/139420408_Governing_body_plans_to_regulate_solar_panel_installations.html).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

vegetation on residential and non-residential properties? These questions are worthy of addressing in the face of the record-setting Texas drought, and the growing interest in rainwater collection.

To celebrate this timeless conservation practice, rainwater collection professionals and enthusiasts converged just outside of Austin (in Dripping Springs) on October 8, 2011, for the *2nd Annual Rainwater Revival*. The festive day featured presentations by professionals and users of rainwater, water conservation-related business vendor booths, rainwater system displays, expert guidance, food booth, shopping, and live music.<sup>84</sup>

### A. Background

Rainwater harvesting is the practice of using rainwater caught from hard surfaces. The water is usually collected in tanks or cisterns and used for many different purposes, such as irrigation.<sup>85</sup> It is an age-old technology that is growing in popularity as people look for ways to use water resources more wisely.<sup>86</sup> Cities' rainwater collection rules vary because regulation of water resources falls largely to states and local water authorities.<sup>87</sup>

San Francisco, CA is one of a small but growing number of communities that promotes rainwater harvesting and has clarified city rules to permit capture of the resource for non-potable use.<sup>88</sup> The mayor signed a memorandum of understanding with the City's Public Utilities Commission, the Department of Public Health and the Department of Building Inspection clarifying standards for permissible rainwater harvesting and use of rainwater without treatment for outdoor gardening, toilet flushing indoors and purposes that do not involve drinking or other consumption.<sup>89</sup> A drought inspired Santa Fe, N.M. to *require* rainwater capture systems for new residential construction of 2,500 square feet or larger and for commercial buildings.<sup>90</sup>

### B. Reasons to Harvest Rainwater<sup>91</sup>

- Reduce peak storm flows; flash flooding.
- Reduce costs of treated city water.
  - Reduces amount of water needing treatment by using non-potable water for non-potable uses (i.e., landscaping).
  - Reduces costs for stormwater management.
- Provide chlorine-free water for plants and soils.
- Improve urban stream water quality.

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<sup>84</sup> See [www.rainwaterrevival.com](http://www.rainwaterrevival.com).

<sup>85</sup> See <http://sfwater.org/index.aspx?page=178>.

<sup>86</sup> *Id.*

<sup>87</sup> GreenerBuildings Staff, *San Francisco Rolls Out Rainwater Harvesting Drive*, Oct. 9, 2008, available at <http://www.greenbiz.com/news/2008/10/09/san-francisco-rolls-out-rainwater-harvesting-drive>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See <http://www.scribd.com/doc/34733023/Rainwater-Harvesting-Demonstration-Project-Corvallis-OR-USA>.

- The first flush of rainfall runoff that flows off roofs and pavements carries unwanted toxins, etc. throughout the watershed and flows directly into rivers.
- Improve groundwater recharge.
  - The increase in impervious surfaces (buildings and pavement) blocks the infiltration of rainwater into the soils. By using collected rainwater for irrigation, the water that runs off rooftops or pavement can be saved and ultimately discharged into the soil. Less municipal or groundwater will therefore be consumed and greater rainwater will be discharged into the soil.

### C. Methods to Alleviate Effects of Drought

A 12-page report released by the Texas comptroller's office offers a wide-ranging look at the effects of the record drought that is still gripping Texas.<sup>92</sup> The report, "The Impact of the 2011 Drought and Beyond," contains few new figures for drought losses but offers graphics that depict the breadth of the problem, which hurt crops, threatens electricity production and forced 55 communities to ban outdoor watering.<sup>93</sup> The report mentions needs for creative solutions such as *rainwater collection* for use on lawns.

Other creative methods to alleviate the effects of the drought include the sales tax exemptions authorized under Tax Code Section 151.355.<sup>94</sup> The exemption applies to equipment, supplies and services used solely for certain types of water conservation. Among those listed is tangible personal property used solely for capturing and storing rainwater for subsequent use, such as rainwater filtration and purification equipment and supplies. Examples of qualifying rainwater harvesting equipment include: rain barrels; gutters used solely to route the water into rain barrels or rainwater collection systems; tanks and cisterns; roof washers used in a harvesting systems; screens and filters for the gutters, barrels, tanks, cisterns and roof washers; and a collection surface area that is not used as a roof of a structure or storage area.<sup>95</sup> For a guide to building rainwater collection systems, visit [www.tceq.texas.gov/publications/gi/gi-404.html/at\\_download/file](http://www.tceq.texas.gov/publications/gi/gi-404.html/at_download/file) - 2012-01-05.<sup>96</sup>

## 9. DIGITAL / ELECTRONIC SIGNS

### A. City of Houston

Houston prohibits the erection of new off-premise electronic signs. Electronic signs are forbidden unless (1) the sign is on the premises, (2) the frequency of an image change occurs no more than once during a five minute interval, and (3) there is only one electronic sign on the premises.<sup>97</sup> In hopes of creating a better looking city, Houston's city council passed a sign ordinance that reduced the size and height of most signs, and would only allow one

<sup>92</sup> Larry Mowry, Kate Galbraith, *2011 Drought Impact Report*, Feb. 8, 2012, available at <http://dfw.cbslocal.com/2012/02/08/2011-drought-impact-report/>.

<sup>93</sup> See <http://www.window.state.tx.us/specialrpt/drought/pdf/96-1704-Drought.pdf>

<sup>94</sup> Tex. Tax Code § 151.355 (2012).

<sup>95</sup> See <http://window.state.tx.us/taxinfo/taxpnw/tpn2011/tpn1106.html>.

<sup>96</sup> Dana O. Porter, Russell A. Persyn and Valeen A. Silvy, *Rainwater Harvesting*, available at [www.tceq.texas.gov/publications/gi/gi-404.html/at\\_download/file](http://www.tceq.texas.gov/publications/gi/gi-404.html/at_download/file) - 2012-01-05.

<sup>97</sup> See <http://library.municode.com/index.aspx?clientId=10123>.



changeable electronic sign per business.<sup>98</sup> Additionally, no changeable signs would be allowed on neighborhood streets.<sup>99</sup> The neighborhood streets clause would mean many churches and area schools with electronic signs in neighborhoods would no longer be allowed to add new changeable signs.<sup>100</sup>

## B. LED Signs

New technology, such as LED signs, can present challenges for municipalities wishing to regulate signage. LED stands for “Light Emitting Diodes.” Diodes are electronic components that let electricity pass in only one direction, so when electricity is applied visible light is emitted, similar to a light bulb.<sup>101</sup> When many LEDs are side-by-side, they can create pictures and movable text. LED signs can be very distracting to drivers and are a frequent source of light pollution.

To distinguish LED signs from other lighted signs, the City of Dripping Springs, Texas, uses the following definition in its sign ordinance:

***Electrical Sign:*** Any sign for which the text, letters, numbers, pictures, or symbols forming the informational portion of the sign consists of flashing, intermittent, or moving lights, including any LED screen or any other type of video display. This definition does not include signs that have internal or indirect illumination that is kept stationary or constant in intensity and color at all times when such sign is in use. This definition excludes open / closed signs and any sign located within the right-of-way that functions as a traffic control device and that is described and identified in the Texas Manual on Uniform Traffic Control Devices (TMUTCD).<sup>102</sup>

## C. Amortization

The specification of a reasonable amortization period can be a means of forcing nonconforming signs to come into compliance, or be removed, without constituting a compensable taking of property.<sup>103</sup> Houston reached a settlement with Clear Channel (formally Eller Media) in an action regarding the media company’s off premises non-conforming advertising signs. Clear Channel agreed to remove approximately 1,200 of them because the signs were contributing to blight in low to moderate income neighborhoods. However, the sign owner was permitted to keep close to 400 of the signs for 20 years. By amortizing the signs, both parties were able to compromise, allowing the city to eventually have all of the off-premise signs removed, and the owner still able to enjoy the benefits of the

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<sup>98</sup> Houston ABC News - KTRK, *Houston passes new sign ordinance*, June 30, 2009, available at <http://abclocal.go.com/ktrk/story?section=news/local&id=6892296>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Definition for LED*, About.com, <http://saveenergy.about.com/od/efficientlighting/g/LED.htm>, accessed on September 13, 2010.

<sup>102</sup> City of Dripping Springs Code of Ordinances Sec. 26.01.005(b).

<sup>103</sup> *Eller Media Company v. City of Houston*, 101 S.W.3d 668 (Tex. App.—Houston (1st) 2003) (The amortization periods of 17 years and 21 ½ years permitted by the city’s sign code were deemed sufficient for the sign company to recoup its investment).

signs.<sup>104</sup> Through patience by the city, signs disappear over time because of attrition and because leases end.

#### **D. Regulating Aesthetics**

In a 2009 A.G. opinion, the A.G. indicated that case law supports a city's authority to regulate aesthetics.<sup>105</sup> The A.G. also stated that Chapters 211 and 216 of the Local Government Code constitute a portion of a municipality's statutory police power to regulate aesthetics.<sup>106</sup> The A.G. stated "[t]he City may enforce reasonable zoning and building ordinances against the District on the bases of aesthetics and the maintenance of property values. Sections 54.004 and 211.005 of the Local Government Code establish the primacy of a municipality in enforcing its building and zoning regulations." Thus, because a sign's aesthetics, as well as effect on property values, could affect the public's welfare, a city could potentially regulate a school district's sign.

### **10. LIGHTING REGULATIONS<sup>107</sup>**

Being able to see the stars in the night sky and to not have a neighbor's or store's outside lights trespass on adjacent property are hot topics among many Americans. For example, in Houston, TX, there is a grass roots effort taking place where people can visit a website to sign a petition requesting the City to adopt a lighting ordinance to improve the negative effects of lighting.<sup>108</sup> This light pollution often results from dated inefficient lighting fixtures that allow excess light to escape into the skies or onto unintended places.<sup>109</sup> Some of the benefits of a lighting ordinance include: cost savings for inefficient lighting that wastes energy and excess light; reduction in light pollution allowing for a darker sky and less light trespass from stores, neighbors and city street lamps; eventual replacement of outdated inefficient streetlights with efficient lighting sources; and of course - happy astronomers.<sup>110</sup>

#### **A. Light Trespass (Nuisance)**

If you can see the source of the light from another property then the light in question is trespassing. Merely seeing the resulting illumination is not light trespass. Seeing the light from the bulb itself or a refractive lens constitutes light trespass.<sup>111</sup> A "nuisance" is a condition that substantially interferes with the use and enjoyment of land, by causing

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<sup>104</sup> Thanks to Houston Senior Assistant City Attorney Larry Schenk.

<sup>105</sup> See Tex. Att'y Gen. Op. No. GA-697 (2009) referencing, among others, *City of Pharr v. Pena*, 853 S.W.2d 56, 61 (Tex. App.-Corpus Christi 1993, writ denied) (considerations of aesthetics as well as surrounding property values "represent a legitimate goal [and] were substantially related to the public welfare").

<sup>106</sup> *Id.*

<sup>107</sup> Thanks to Cindy Luongo Cassidy of Green Earth Lighting LLC, [www.GreenEarthLighting.com](http://www.GreenEarthLighting.com), for her many contributions to this section.

<sup>108</sup> See <http://www.change.org/petitions/city-of-houston-adopt-a-lighting-ordinance-to-reduce-light-pollution-in-houston-tx>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See <http://www.lrc.rpi.edu/programs/NLPIP/lightingAnswers/lightPollution/lightTrespass.asp>.

unreasonable discomfort or annoyance to persons of ordinary sensibilities.<sup>112</sup> There is no question that foul odors, dust, noise, and bright lights - if sufficiently extreme - may constitute a nuisance.<sup>113</sup> Thus, light trespass is a nuisance, and is actionable in court.

## **B. Texas State Codes regulating lighting**<sup>114</sup>

### **1. Texas Transportation Code Chapter 315. Municipal Streets-Artificial Lighting**<sup>115</sup>

- Authorizes municipalities, but **NOT** unincorporated areas in counties, to regulate outdoor lighting.
- Regulates the process for how new street lighting is to be installed using public funds.
- Contains enforcement and ownership clauses for the municipality.

### **2. Texas Health and Safety Code Chapter 425: Light Pollution-Outdoor Lighting**<sup>116</sup>

- Provides that all new or replacement state-funded outdoor lighting must be from cutoff luminaries if the rated output of the fixtures is greater than 1,800 lumens.<sup>117</sup>
  - For example, if a state-funded university installs a new parking lot, the parking lot lighting comes under these regulations.
  - Note: the definition of “outdoor lighting fixture” in the code includes a list of fixed or movable lighting equipment that is designed or used for illumination outdoors.

## **C. Texas Entities with recent Lighting Regulations**

- **Kimble County, TX, Resolution, Dec. 13, 2011**<sup>118</sup>

In this resolution supporting efforts to preserve the night sky, the County declares it “encourages outdoor lighting fixtures and practices that follow up-to-date suggested guidelines and use available technologies for efficient cost-effective, non-intrusive lighting and will work with its partners to educate and encourage landowners, businesses, residential communities and public entities to join this commitment to reduce energy consumption, save money and reduce money and reduce light trespass.”<sup>119</sup>

- **La Grange, TX, Resolution, Dec. 12, 2011**<sup>120</sup> The City declares it will promote outdoor lighting fixtures and practices that follow guidelines for efficient, non-intrusive lighting because dark night skies have rapidly been eroding, and generations are growing up never having seen the wonders of the Milky Way; that the influx of people into the region over the years and accompanying light trespass from area lighting fixtures has been steadily on the rise impacting the natural environment and the quality of life of the people of the city;

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<sup>112</sup> See *Schneider National Carriers Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004).

<sup>113</sup> *Id.*

<sup>114</sup> See <http://texasida.org/>.

<sup>115</sup> Tex. Transp. Code, Ch. 315 (2012).

<sup>116</sup> Tex. Health & Safety Code, Ch. 425 (2012).

<sup>117</sup> Legislative History available at

<http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=76R&Bill=HB916>.

<sup>118</sup> See <http://www.hillcountryalliance.org/uploads/HCA/NightSkiesResKendallCounty.pdf>.

<sup>119</sup> See <http://www.hillcountryalliance.org/uploads/HCA/NightSkiesResKendallCounty.pdf>.

<sup>120</sup> See <http://www.cityoflg.com/>.

and there are now fixtures designed to distribute light efficiently and effectively using lower wattage bulbs, and to direct this light where it is wanted.

- **Perdenales Elect. Co-op. (PED), Resolution, August 15, 2011**<sup>121</sup>
  - “[T]he Cooperative is committed to protecting the beauty of the night skies...”
  - In mid-2001, PEC complied with Federal mandates and removed Mercury Vapor fixtures from its list of approved fixtures.
  - Along with this, PEC began purchasing flat-glass cobra style light fixtures, considered to be more environmentally friendly, to show sensitivity to light pollution and light trespass.
  - Recently, PEC has also added the use of shields on its light fixtures to continue its efforts towards efficient and environmentally friendly area lighting practices.

#### **D. Current Outdoor Lighting Ordinances in Texas**

This is a partial list of entities in Texas where Outdoor Lighting Ordinances or restrictions have been passed, listed in order by date of the regulation.

Flower Mound (1997)	El Paso (2005)
Plano (2000)	Blanco (2006)
Alpine (2000)	Austin (2007)
Dripping Springs (2000) Updated (2011)	Midland (2007)
Frisco (2000)	Boerne (2008)
Marfa (2000)	Bexar County (2008)
Glen Rose (2001)	San Antonio (2008)
Village of Wimberley (2001)	Helotes (2009)
Harker Heights (2002)	Port Aransas (2009)
Jeff Davis County (2002)	
Bulverde (2003)	
Fort Bend Co.– Gge Observatory (2004)	

#### **E. Sunset Clauses**

Outdoor lighting has a limited life span. By including sunset clauses, a city will further achieve the purposes of the outdoor lighting ordinances and will make it easier for the city or county to verify which lighting fixtures must be in compliance. Dripping Springs’ Outdoor Lighting Ordinance includes a list of triggers to cause the whole site to be under the new ordinance.<sup>122</sup> Austin<sup>123</sup> and El Paso<sup>124</sup> have included sunset clauses. Austin requires compliance by January 1, 2015, which will be 8 years from the initial ordinance. El Paso requires compliance by May 7, 2015, which will be 10 years from the initial ordinance.

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<sup>121</sup> See

<http://www.pec.coop/Home/LocalInvolvement/Newsroom/PressReleases/PressReleaseDetails.aspx?Id=87e7c191-4fb6-46dc-8b59-979fec5e1636>.

<sup>122</sup> See <http://z2.franklinlegal.net/drippingsprings-flp/>.

<sup>123</sup> See [http://amlegal.com/austin\\_tx/](http://amlegal.com/austin_tx/).

<sup>124</sup> See <http://library.municode.com/index.aspx?clientId=16180&stateId=43&stateName=Texas>.

As an example of the sunset language, Austin's is in Chapter 25-2 Subchapter E: Design Standards and Mixed Use, Article 2 Site Development Standards Section 2.5.2 F states: "All outdoor lighting fixtures lawfully installed prior to and operable on the effective date of this Subchapter are exempt from all requirements of this Subchapter until January 1, 2015, at which time they shall become subject to this Subchapter, and shall be considered nonconforming if they do not comply with the requirements of this Subchapter."<sup>125</sup>

#### F. Other Indicators of Interest in Lighting Restrictions

- LEEDs (Leadership in Energy and Environmental Design) Credits are given when the site does NOT create light trespass.<sup>126</sup>
- The Sustainable Sites Initiative gives credits to a site to avoid off-site lighting and night-sky pollution. Calculations are done based on lumens.<sup>127</sup>

## 11. PUBLIC IMPROVEMENT DISTRICTS (PIDs)

When it comes to funding infrastructure (roads, drainage, utilities, parks) for new subdivisions, Texas is familiar with Municipal Utility Districts (MUDs). However, with the economic downturn of recent years and the accompanying decline in the availability of capital for horizontal development (as opposed to home construction), there is a renewed interest in PIDs.<sup>128</sup>

#### A. Introduction<sup>129</sup>

Like counties, municipalities have the statutory power under LGC Chapter 372 to authorize creation of a Public Improvement District (PID). Municipalities may undertake an improvement project under the guise of a PID that covers a special benefit on a definable part of the municipality or the municipality's extraterritorial jurisdiction (ETJ) if the municipality "finds that it promotes the interests of the municipality." This chapter summarizes the formal procedural steps a municipality would have to take if it decides to form the PID and the issues raised by the owner's PID proposal.

#### B. Procedures for PID Formation

To create the PID, the municipality must proceed under the following procedures set forth in LGC Chapter 372:

- (1) **Petition.** The owners of the property must submit a "petition for the establishment of a public improvement district." The petition must include:

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<sup>125</sup> *Supra* note 107.

<sup>126</sup> See [http://www.dyplastproducts.com/resources\\_LEEDs\\_credits.htm](http://www.dyplastproducts.com/resources_LEEDs_credits.htm).

<sup>127</sup> See <http://www.sustainablesites.org/>.

<sup>128</sup> The authors wish to thank Steven C. Metcalfe of Metcalfe Wolff Stuart & Williams, LLP (Austin), and Richard Rosenberg of DPGF (Austin) for sharing their expert insights on PIDs.

<sup>129</sup> Reprinted in part from the Texas Municipal Law and Procedure Manual, 5th Edition, Chapter 33. The authors recognize and thank Susan Zachos, attorney at law, for her contribution to this section.

- (a) boundaries of the proposed district;
  - (b) estimated cost of improvements;
  - (c) method of assessment to pay for the improvements or bonds and the operation of the district;
  - (d) description of the management structure of the PID (i.e., whether it will be managed entirely by the municipality, by the private sector, or through a partnership between the city and private interests); and
  - (e) proposed apportionment of costs between the municipality and the PID.\*
- (2) **Findings on Advisability.** Once a petition meeting these requirements is filed, the city council “may make findings by resolution” as to the advisability of the proposed improvement, the estimated cost, the assessment method and the apportionment of costs between the municipality and the PID. But the municipality is not required to take any action on a petition.\*
- (3) **Feasibility Report.** The municipality may use municipal resources to prepare a feasibility report to evaluate whether the improvement, as proposed, should be undertaken. The municipality also may require a preliminary cost estimate for the proposed improvements. Presumably, the municipality also may ask the Developer or other private interests to fund the feasibility report.
- (4) **Advisory Body.** After receiving the petition, the municipality may appoint an advisory body to develop and recommend an improvement plan to the municipality. LGC §372.008(b) contains specific requirements for the make-up of the advisory body.
- (5) **Formal Hearings.** A PID may only be established after the municipality holds a public hearing on “the advisability of the improvement,” to consider among other things, each of the required elements of the petition. The hearing may extend over days, weeks or months, and may be adjourned from time to time.
- (6) **Formation of the District.** The PID can only be formed through a resolution of the city council authorizing the district “in accordance with its finding as to the advisability of the improvement.” The resolution must be issued within 6 months after the hearing is finally adjourned. The authorization takes effect after publication of notice of the resolution authorizing the PID’s formation.
- (7) **Service Plan.** The PID must have a five-year service plan, to be prepared by the advisory body or, if the municipality has not created an advisory body, by an entity chosen by the municipality. The service plan must include an “assessment plan” and must be reviewed and updated annually.

\* LGC §372.005(b) specifically identifies the ownership interests that must sign a petition in order for the petition to be valid.

### C. Not a Taxing Authority

A PID is not a taxing authority, although it does have the power to levy “assessments” against the property, and is required to prepare the proposed assessment roll after the total cost of each PID improvement is determined. The assessment is subject to notice and hearing and, after hearing all objections, the municipality may levy the assessment.

\* **CAUTION:** The statute is vague on what, if any, binding effect such a “findings” resolution in the initial stages may have on the municipality’s final decision regarding PID formation.

\* **CAUTION:** It is unknown how (*if at all*) a PID’s performance affects a municipality’s bond rating.

### D. New legislation (Effective September 1, 2011)

**H.B. 1400 (Elkins/West) – Public Improvement Districts:** provides that a:

- (1) public improvement project may include the payment of expenses relating to the operation and maintenance of mass transportation facilities;
- (2) city council may defer an assessment associated with a public improvement district until a date the governing body specifies by ordinance or order; and
- (3) city that defers a public improvement district assessment must estimate the appraised value of taxable real property liable for assessment in the district and the cost of the improvement before holding a hearing as required by state law.<sup>130</sup>

### E. PID vs. MUD as Financing Vehicle for Horizontal Development<sup>131</sup>

A PID is a method for a developer to raise money to build the horizontal portion of development (i.e., the infrastructure - drainage, sewage, streets, etc.). A *traditional* PID is different than a *pure* PID model. Funds for a traditional PID come from the property owners in a district who pay assessment fees. A pure PID model is funded after the city issues bonds and escrows the money upfront that is necessary for the project’s infrastructure. Bond buyers are only looking at the value of the land, are not looking at what is going to be built, thus, projections of future development are not part of the equation.

The bond holders, not the city taxpayers, are taking the risk because the bonds are secured by the value of the land, not the city tax base. This differs from a municipal utility district (MUD) which uses the city tax base as security. The city's bonding capacity or credit rating isn't affected by a PID. The city, in effect, is a financial partner. It escrows the bonds and reimburses the developer as it completes the work.

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<sup>130</sup> See <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB1400>.

<sup>131</sup> Laylan Copelin, *MUDs or PIDs? City leaders, experts debate merits of development vehicles*, statesman.com (Dec. 24, 2011), available at [http://www.statesman.com/news/local/muds-or-pids-city-leaders-experts-debate-merits-2054285.html?cxttype=rss\\_news](http://www.statesman.com/news/local/muds-or-pids-city-leaders-experts-debate-merits-2054285.html?cxttype=rss_news).

Some believe this pure PID model poses a problem: *What if the land values plummet?* To prepare for this possibility, land values are valued 2.5 times greater than the principal amount of the bonds.

This creates a cushion in case the property values do decrease. Proponents for MUDs point out that a MUD's rate is usually cheaper than PIDs for the city. In today's economy with low interest rates, MUDs are an even cheaper deal for the city than usual.

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**Sample ordinances and the slide presentation accompanying this paper are available for viewing and download at: *TexasMunicipalLawyers.com***