

# ORDINANCES

## LOCAL GOVERNANCE AT ITS FINEST



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# **GENERAL LEGAL OVERVIEW**

## I. INTRODUCTION

This presentation will familiarize you with the basic statutory and local requirements relative to zoning ordinances, housing codes, nuisance abatement and health and safety violations. The training is designed to provide a general understanding of the legal requirements relative to investigation, compliance, and preparation for prosecution or abatement proceedings. In addition, guidance in the preparation and execution of administrative search warrants, investigative techniques and court testimony will be provided. This presentation is intended to be a practical legal overview to code enforcement and a general understanding of your role in the legal process.

## II. GENERAL JURISDICTION

### A. MUNICIPAL COURT<sup>1</sup>

1. Court of record versus Court of no record
  - a. no transcript – court of no record
  - b. appeal
2. Exclusive Original Jurisdiction within municipality's territorial limits in all criminal cases that:
  - a. arise under the City's ordinances; and
  - b. are punishable by fine only, not to exceed
    - (1) \$ 2,000.00 in all cases arising under municipal ordinances governing fire safety, zoning and public health and sanitation (including dumping of refuse)<sup>2</sup>; or
    - (2) \$500.00 in all other cases<sup>3</sup>
      - (a) judge sets fine amount
3. Concurrent Jurisdiction with Justice Court<sup>4</sup> of a precinct in municipality, in all criminal cases arising under state law that:
  - a. arise within territorial city limits; and
  - b. are punishable only by fine not to exceed \$ 500.00

### B. APPEAL TO COUNTY COURT OF MUNICIPAL COURT JUDGMENT

1. Only by Defendant within 10 days of judgment

2. Trial De Novo – Court of No Record
3. Court of Record

### **III. WARRANTS – INVESTIGATIVE OPTIONS**

#### **A. PARAMETERS OF RIGHT TO PRIVACY: WARRANTLESS SEARCHES**

1. Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Art. I, Section 9 of the Texas Constitution similarly states:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

3. Reasonableness has two elements:

- a. must be supported by probable cause; and
- b. search must be made under the authority of a search or arrest warrant, or conducted under circumstances which dispense with the warrant requirements.

4. Probable Cause

- a. Probable cause exists where

- (1) facts and circumstances;
- (2) within knowledge of arresting officer;
- (3) and of which he has reasonably trustworthy information;
- (4) which would warrant a reasonable and prudent man;
- (5) in believing that a particular person has committed or is committing a crime.<sup>5</sup>

- b. Is also defined as
  - (1) reasonable ground of suspicion;
  - (2) supported by circumstances sufficiently strong in themselves;
  - (3) to warrant a cautious man to believe;
  - (4) that the person accused is guilty of the offense for which he is charged.<sup>6</sup>
  
- 5. Search. A search is defined as an intrusion into an area covered by a reasonable expectation of privacy. Private areas are generally held to include houses, offices, rooms, cars, lockers, purses or a person's body. *Areas such as public streets and walkways, public areas or common areas, a person's physical characteristics, open fields and woods are not reasonably considered private.*
  
- 6. Scope of search. If officers obtain a warrant for a house, under the concept of "*curtilage*," they are entitled to search all outbuildings, vehicles and structures considered within the immediate area of the house.
  
- 7. Two Questions Should be Asked:
  - a. Is the search itself lawful; and
  - b. If lawful, is the search carried out in an objectively reasonable manner?
  
- 8. Exceptions to Search Warrant Requirement:
  - a. Exigent Circumstances. Where officer is faced with an emergency or believes evidence may be destroyed, he or she may conduct a warrantless search or take precautionary measures to prevent the destruction of evidence.
  - b. Consent. The person consenting must have actual authority to consent *i.e.*, . . . car owner and not passenger must give consent for search.
  - c. Plain View. If an officer is in a place where he or she has a right to be, and if the officer sees or finds something connected to a crime, then the officer may seize the evidence. This exception is based upon the idea that if anyone could have seen the evidence, then

there is no violation of any privacy interests by the officer seeing that same evidence.

9. Specific Inquiries:

a. If you don't see the incident, how do you issue the citation or register a complaint?

(1) Citizen must file a complaint

b. What right do you have to go on to private property or down a private road to determine an offense?

(1) Plain View Doctrine:

(a) Can go everywhere that the general public can go.

(b) Can't peek through fence but can stand on back of truck and take pictures of violation.

(c) Can't enter a fenced back yard.

c. If you see it from the street but the violation is on private property, can the officer go on to the property to obtain the evidence?

(1) no deviation from usual path<sup>7</sup>

B. CODE-RELATED WARRANTS

1. Historical Background

a. Prior to 1967, it was generally thought permissible to allow warrantless administrative searches for purposes of conducting routine health and safety inspections to ensure compliance with city codes sought to be enforced.<sup>8</sup> Permissible warrantless searches included area inspections as well as particular structures.

b. In 1967, the United States Supreme Court in *Camara*<sup>9</sup> balanced the individual right to privacy and the fundamental prohibition of unreasonable searches against the very real need to protect the public health and safety from violations of minimum standards for fire, health and housing codes. The Court held that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."<sup>10</sup> The USSC held that such an inspection must be reasonable and based upon probable cause to pass constitutional muster. *Camara* was decided in the



context of criminal charges being filed for refusing to permit the inspections without warrant.<sup>11</sup>

- c. In a companion case, the Supreme Court reviewed a challenge to criminal conviction for the failure to permit the inspection of a locked commercial warehouse without a warrant or probable cause to believe a violation of the fire code existed.<sup>12</sup> The Court, while holding that administrative entry, without consent, upon the portions of commercial premises not open to the public may only be compelled through prosecution or the warrant procedure, distinguished between accepted regulatory techniques, such as licensing programs, which require inspections prior to operating a business or marketing a product.

2. General Rule: Absent exceptional circumstances, a warrant is required for administrative searches conducted by health officers.

3. Exceptions:

a. Regulatory Searches:

Courts have recognized that the Fourth Amendment requirements may not apply to licensed or pervasively regulated businesses, such as liquor industry, pharmacies, nursing homes, hospitals, clinics and massage parlors.<sup>13</sup> A fact question may remain as to whether a particular industry is pervasively regulated.

In *Pollard v. Cockrell*<sup>14</sup> the court addressed a challenge to the constitutionality of a city massage parlor ordinance, which authorized in part, warrantless administrative searches on a periodic basis to ensure the safety of the structure and adequacy of plumbing, ventilation, heating and illumination. The court held that the provision was not facially unconstitutional, did not authorize unreasonable searches and the court could not presume that the administrative search provisions would be unreasonably applied.

In another Texas case, city residents brought an action challenging the constitutionality of a city ordinance governing the keeping of animals on residential premises that provided for inspections of areas where animals were kept, and the making of an application constituted consent to enter and inspect any such premises except dwelling places.<sup>15</sup> The Court in upholding the reasonableness of the ordinance noted that the citizens never applied for a permit, no inspection had been conducted and no impoundment of the animals had been attempted; therefore, the Court did not opine on whether the ordinance would be enforced in an unconstitutional manner.

b. Voluntary Consent to Search

An exception to the administrative search warrant requirement exists for voluntary consent to search. The consent must be reasonably close in time to the search to be constitutionally permissible.

In *Dearmore v. City of Garland*<sup>16</sup>, the court held that the City's ordinance went too far in requiring owner consent to permit warrantless administrative searches of unoccupied rental properties in order to obtain a rental permit. The court determined that any consent under the circumstances was involuntary as the alternatives presented to the owner under the ordinance were consent in advance to warrantless administrative searches or face criminal penalties or denial of a rental permit. The court found that there was no reason that the City, with a "modicum of effort", seek and obtain an administrative search warrant to inspect any property that may pose a danger to the public.

In *Jean Pierre, Inc. v. State*,<sup>17</sup> where a bakery proprietor's consent to search was deemed tacit or implied, it was nonetheless deemed to be valid and the inspection conducted lawful. Samples and photographs taken as a result of the lawful search were admissible.

c. Open Fields

The open fields exception to the Fourth Amendment, allowing the warrantless search and seizure of evidence visible to an official from a location where they are lawfully allowed or from where it is observable by the general public.

4. Fourth Amendment Seizure – the *Freeman* case

Under an ordinance adopted in accordance to Chapter 214 of the Texas Local Government Code, after a hearing and an opportunity to be heard, a municipality may order that the owner demolish a structure or upon the failure to do so, the municipality may take the appropriate action. In 1999, the Fifth Circuit had an opportunity to review and rule upon an ordinance adopted under Chapter 214 in *Freeman v. City of Dallas*<sup>18</sup>, a case involving the demolition of substandard structures. The Court, as a threshold determination, acknowledged that the demolition of a structure constituted a "seizure" of property within the purview of the Fourth Amendment. However, the Fourth Amendment does not state that there shall be no seizure without a warrant; rather, the Fourth Amendment prohibition is couched in terms that there shall be no "unreasonable" searches or seizures. The next inquiry for the Court was whether the seizure was "unreasonable."

To determine the reasonableness of the seizure the Court examined the procedures under state law and the City of Dallas' ordinances. That process provided for "reasonable notice to and time limits upon landowners' actions, multiple hearing possibilities, flexible remedies, and judicial review in state court . . ." <sup>19</sup> The Court determined that the process, along with the defined standards in the municipal code for finding that a structure is a nuisance, offered greater protection against unreasonable actions than an application for a warrant before a judge (which is usually done without notice to the landowner or the opportunity to participate). <sup>20</sup>

5. Statute: Warrants for Fire, Health and Code Inspections <sup>21</sup>

a. may be issued to a fire marshal, health officer or code enforcement officer:

(1) for the purpose of allowing the inspection of any specified premises;

(2) to determine the presence of a fire or health hazard or unsafe building condition or a violation of any fire, health or building regulation, statute, or ordinance. <sup>22</sup>

Each City may designate one or more code enforcement officials for the purpose of being issued an administrative search warrant. <sup>23</sup>

b. may only be issued upon the presentation of evidence of probable cause to believe that such a condition is present, on the premises sought to be inspected. <sup>24</sup>

c. Probable cause may be based upon

(1) age and general condition of the premises;

(2) previous violations or hazards at same location;

(3) type of premises;

(4) purposes for which premises are used; and

(5) presence of hazards or violations in and the general condition of premises near the location sought to be inspected. <sup>25</sup>

d. A City may designate one code enforcement official for the purpose of being issued a search warrant. <sup>26</sup>

6. Administrative Warrants

- a. A home rule city can enact an ordinance providing for administrative search warrants to ensure compliance with enforcement of city codes enacted to protect the health, safety, and welfare of its inhabitants.
- b. Such administrative search warrants may be issued only upon sworn affidavit supported by probable cause and may authorize inspection of premises to determine the presence of any code violations.
- c. Such an ordinance is in compliance with Article 18.05 of the Code of Criminal Procedure.
- d. The Attorney General wrote that the issuance of an administrative search warrant by a home rule city to be a reasonable exercise of its general police powers to protect the public health, safety and welfare.<sup>27</sup>
- e. An administrative search warrant differs from an evidentiary search warrant, because the former can only be issued for the purpose of allowing an inspection of specific premises to determine the presence of hazardous conditions prohibited by law.
- f. Differs from a criminal search warrant which may be issued only upon a finding of probable cause supported by affidavit that a criminal offense has been committed and that certain specified property is therefore subject to seizure. A criminal search warrant may also order the arrest of the suspected offender.

## 7. Practice Pointers

- a. Challenges to Evidence:
  - i. Administrative search warrants, under Texas law, are search only, not seizure warrants. Any evidence obtained is subject to an admissibility challenge.
  - ii. Failure to object to the introduction of evidence may result in a finding that it is constitutional and legal for failure to preserve error.
- b. Consent or Open Fields
  - i. Consent to search as it relates to the time of the search may be questioned as to whether it is reasonable or negates consent.
  - ii. Authority to consent: Tenant versus Landlord

- iii. Location challenged as one where the person was lawfully allowed to go or whether it was observable by the general public.
  - c. There is no seizure authority under Article 18.05 for administrative search warrants. Any seizure must be consistent with other constitutional safeguards or exceptions, such as the plain view doctrine.<sup>28</sup>
    - i. May photographs/video be taken without a seizure warrant?
    - ii. May samples be taken without a seizure warrant?
  - d. There is no guidance as to time frame on execution of warrants or filing of the return. To avoid a possible challenge it is recommended that the time frame of 3 days be utilized consistent with provisions applicable to search and seizure warrants. Similarly, for purposes of reasonableness, it is prudent to adhere to the general filing requirements of the warrant return.

#### **IV. POST CONVICTION OPTIONS**

##### **A. DEFERRED DISPOSITION**

Deferred Disposition can be utilized as a very creative tool to achieve compliance. A sample form is attached hereto for your use and modification. One court puts the individual on a 6-month deferred program and requires a monthly appearance to ensure progress. The court reduces the fine in the hopes that the monies will be used to abate the nuisance. Failure to comply with the terms or conditions, after a show cause hearing, the remaining balance of the fines may be imposed as a penalty.

##### **B. REQUIRED COURT APPEARANCE FOR HABITUAL VIOLATORS**

Code Enforcement Officers issue subsequent offense notifications. Any violator who has a subsequent offense is required to appear in court and cannot simply pay the set window fine.

##### **C. ENHANCED PENALTIES**

The court has increased the window fines for subsequent offenses up to the maximum amount as an additional deterrent to continued violations.

##### **D. DAILY CITATIONS**

Most ordinances allow for citations to be issued for every day that a violation exists or occurs. In one case, a citation was issued for each balloon that a car dealership flew in violation of the City's sign ordinance. The dealership had made payment of the fine part of their advertising cost. The City got their

attention when the \$114.00 check was returned and over \$5,000.00 demanded for the fines.

Generally the Penal Code, Section 3.04(a) gives a defendant the option of severing offenses for the purposes of trial; this could mean a separate trial for each offense, even if it is the same offense. However, Texas Local Government Code, Section 54.006 provides for non-severability of certain consolidated offenses, if the ordinances are described by Section 54.012 (zoning, health and safety, substandard structures), punishable by fine only, and tried in municipal court.

#### E. MANDATORY PRETRIALS WITH PROSECUTOR

Code Enforcement is present at these meetings and the judge is available to rule on a motion or issue any orders. The prosecution makes available to the defendant all evidence of the violation and the defendant has an opportunity to discuss the issues with city staff in the hope of gaining cooperation in the elimination of the nuisance situation.

#### F. PLEAS AND PAYMENT WITHOUT COMPLIANCE

What can be done to a defendant who pleads guilty and pays the window fine? Does the judge have to accept the plea and assess the window fine? May the prosecutor put on evidence to enhance the window fine penalty? After a jury is impaneled, or waived by the defendant, the defendant may plead guilty or no contest.<sup>29</sup> However, proof of the offense may be heard upon the plea and punishment assessed by the Court.<sup>30</sup>

### V. CIVIL RIGHTS LIABILITY

#### A. OFFICIAL IMMUNITY (state actions)/QUALIFIED IMMUNITY (federal actions)

1. Official immunity attaches when a government employee carries out his discretionary duties in good faith and within the scope of employment.
2. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.<sup>31</sup> The standard is objective reasonableness of an official's conduct as measured by reference to clearly established law.<sup>32</sup>
3. Courts construe reasonableness on a case-by-case basis.

## B. LIABILITY

You may be held liable if sued in your individual capacity if your acts are deemed to be unconstitutional and violative of well-established law. Your immunity, if any, is based upon objective conduct, not subjective state of mind.<sup>33</sup> You are expected to know the law governing your conduct.

## C. RAMIFICATIONS OF LAWSUIT

1. Potential individual liability if qualified or official immunity is not found
2. Embroiled in lawsuit, potentially for years, being subjected to depositions, attorneys and trial.

## VI. CIVIL JURISDICTION

Municipal courts may be granted limited civil abatement or administrative authority by a City Council under authority of state law; for example, the authority to abate junked vehicles has often been given to municipal courts. Other, relatively recent, statutory provisions have the potential effect of expanding a municipal court's civil jurisdiction.

### A. TEX. GOV'T CODE, §30.00005.

Section 30.00005 of the Government Code grants additional authority to municipal courts of record relative to health and safety and nuisance abatement ordinances. Specifically, a municipality may, **by ordinance**, provide that its municipal court of record has civil jurisdiction<sup>34</sup> for purposes of enforcing municipal ordinances enacted under Chapter 214 of the Texas Local Government Code (substandard structures) and Chapter 683 of the Texas Transportation Code (junked vehicles). Further, the statute now provides that a municipal court of record has concurrent jurisdiction with a district court or county court at law under Subchapter B, Chapter 54 of the Texas Local Government Code within the corporate city limits and the ETJ for purposes of enforcing health and safety and nuisance abatement ordinances. Finally, municipal courts of record were granted authority to issue search warrants for the purpose of investigating a health and safety or nuisance abatement ordinance violations and seizure warrants for the purpose of securing, removing or demolishing property and removing the debris.

As is evident, these provisions only apply to municipal courts of record, as opposed to courts of no record where the appeal is *de novo* to a county court. A City must designate the municipal court of record as the proper body to hear an appeal under Chapter 214 as opposed to the City Council or Building & Standards Commission as noted above. This grant of jurisdiction may greatly enhance and expedite the proceedings to abate nuisances but it presents unique problems to the municipal court who is unaccustomed to the civil procedures which must be followed to ensure no unconstitutional taking of property occurs.

B. TEX. LOCAL GOV'T CODE, § 54.044.

An alternative procedure has been created to provide for an administrative hearing under Section 54.044 of the Texas Local Government Code.<sup>35</sup> Under this provision, a city may adopt a procedure for an administrative adjudication hearing under which an administrative penalty could be imposed for enforcement of an ordinance under Section 54.032 or adopted under Section 214.001 of the Local Government Code. The procedure must provide for due process, *i.e.*, a hearing and an opportunity to be heard. Further, the procedure must provide for a time frame within which a hearing is to be held, the appointment of a hearing officer with authority to administer oaths and issue orders compelling the attendance of witnesses and production of documents and the amount and disposition of administrative penalties, costs and fees. A municipal court<sup>36</sup> may enforce the administrative hearing officer's orders for witnesses and documents. The summons or citation<sup>37</sup> must advise the person violating the ordinance of the right to a hearing, the date and time of the hearing. The summons or citation is kept as a City record and is a rebuttable proof of the facts stated therein. The statute further provides that a person charged with violating the ordinance who fails to appear at the hearing is considered to have admitted liability for the violation charged.<sup>38</sup> At the hearing, the administrative hearing officer is to determine and issue an order stating whether the person violated the ordinance and the amount of the penalty, costs and fees to be assessed. The order is to be filed with the City Secretary and may be enforced in a civil collection suit or by obtaining an injunction prohibiting or requiring specific conduct. The decision of the administrative hearing officer is appealable to the municipal court within 31 days of the date the order is filed. The appeal does not stay enforcement and collection, unless a bond is posted with an agency designated for that purpose.<sup>39</sup>



# ORDINANCES IN GENERAL

## **INTRODUCTION**

Municipalities have legislative authority, or police power, to enact ordinances with the full force and effect of law. A municipality's authority under its police power is broad with the ultimate purpose of safeguarding the health and general welfare of its citizenry. It is not, however, without limits – regulations must have a rationale basis and reasonably promote the intended purpose.

There are essentially four types of municipalities: Home Rule Municipalities and General Law Cities, Type A, Type B, or Type C Ordinances are the product of the legislative functions of a City Council generally authorized under state statute or city charter. Municipal courts have exclusive original jurisdiction in all cases that arise under a City's ordinances, as well as have civil abatement authority in some instances. This paper is to familiarize you with the authority underlying ordinances, the basic structure of ordinances and the options available to the courts for attaining compliance.

### **I. AUTHORITY TO CREATE**

#### **A. HOME RULE MUNICIPALITIES**

A home rule city, derives its power from the Texas Constitution, and may adopt an ordinance or charter provision, subject only to limitations imposed by the Legislature. In other words, a home rule city may adopt an ordinance and exercise its general police power to the extent not prohibited by the United States or Texas Constitutions or federal or state law.<sup>40</sup> The state legislature, however, can limit or augment, a home-rule municipality's self governance.<sup>41</sup>

#### **B. GENERAL-LAW MUNICIPALITIES**

General-law municipalities, on the other hand, can exercise police power only as specifically authorized by the general laws of the United States or Texas Constitution or federal or state law.<sup>42</sup> The Legislature has created the distinct forms of governments for each general law city.<sup>43</sup> Inasmuch as a general law municipality can only exercise that power specifically authorized by statute, each such municipality must look to the specific statutory authority relative to its form of government for the nature and extent of its applicable authority.<sup>44</sup>

It is impossible to generalize the authority of each type of municipality; however, Chapter 51 of the Texas Local Government Code provides:

The governing body of a municipality may adopt, publish, amend or repeal an ordinance, rule, or police regulation that:

- (1) is for the good government, peace or order of the municipality or for the trade and commerce of the municipality; and

- (2) is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.<sup>45</sup>

The provisions for the enforcement of municipal ordinances and the range of penalties is found in Chapter 54 of the Local Government Code, specifically:

- (1) The governing body of a municipality may enforce each rule, ordinance, or police regulation of the municipality and may punish a violation of a rule, ordinance, or police regulation.
- (2) A fine or penalty for the violation of a rule, ordinance, or police regulation may not exceed \$500. However, a fine or penalty for the violation of a rule, ordinance, or police regulation that governs fire safety, zoning, or public health and sanitation, including dumping of refuse, may not exceed \$2,000.
- (3) This section applies to a municipality regardless of any contrary provision in a municipal charter.<sup>46</sup>

As a practical matter, the ordinance will stipulate whether a violation of the particular ordinance imposes a maximum fine of \$500.00 or \$2000.00. The judge generally sets a standard window fine and a fine within the range of one dollar to the maximum limit may be imposed at time of trial by the judge or jury.

Notwithstanding the foregoing, a Type B General Law Municipality may prescribe the fine for the violation and if it is a jury trial, the fine may only be imposed upon the jury's verdict.<sup>47</sup> A seemingly forgotten provision from a previous century (1875) provides:

On a two-thirds vote of the members present, the governing body of a Type A general-law municipality may remit a fine or a penalty, or a part of a fine or penalty imposed or incurred under law or under an ordinance or resolution adopted in accordance with law.<sup>48</sup>

## **II. FORMAT OF ORDINANCES**

### **A. WHEREAS PROVISIONS**

The Whereas provisions of an ordinance generally set forth the statutory basis or authority for the ordinance and the legislative findings of Council relative to the need for the ordinance. These provisions generally address the health, safety and welfare concerns sought to be addressed by the ordinance.

B. ADOPTION OF LEGISLATIVE FINDINGS OF COUNCIL

The premises for the adoption of the ordinance are generally adopted in the first section of the ordinance to support its enforceability.

C. TEXT OF ORDINANCE

An ordinance may contain many subparts depending upon the nature and intent of the local legislation. Typical provisions include:

1. the general definitions;
2. description of the offense;
3. assigning responsibility for violations or adherence to a particular standard;
4. outlining procedures for enforcement;
5. assigning an enforcement authority;
6. providing for an appeal; and
7. providing for a penalty.

D. GENERAL PENALTY PROVISIONS

1. Types of Remedies

Ordinances are generally enforced by means of a criminal penalty, civil penalties or injunctive relief. Municipal courts are generally concerned with the criminal penalties; however, state statutes have afforded municipal courts administrative authority and most recently, municipal courts of record may be authorized, if so granted by ordinance, to have concurrent jurisdiction with district courts relative to Chapter 54 injunctive proceedings.<sup>49</sup>

As stated above, the fine that may be assigned for particular ordinances may be a maximum of \$500.00 or \$2000.00. However, if a state statute imposes a fine for conduct the City has also proscribed, the fine imposed by the City cannot exceed the state penalty.<sup>50</sup>

Whether staff seeks criminal penalties or civil abatement or both, is a matter of discretion. The focus of code enforcement and the City's enforcement of ordinances is ultimate compliance. Criminal penalties do not always achieve the desired results; therefore, civil abatement provides an additional hammer to gain compliance. Civil abatement generally requires specific notice, set hearings prior to the abatement whereas criminal procedures do not require notice prior to the issuance of citations. The two can work in tandem to achieve compliance.

2. Culpable Mental State May Not Be Required for Proof of an Offense.

Culpable mental states are generally required for all criminal offenses and if one is not specifically stated or assigned, courts have referred to the general mental state provisions of the Texas Penal Code. Specifically, “[i]f the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required *unless the definition plainly dispenses with any mental element.*”<sup>51</sup> Therefore, many cities attempt to dispense with the culpable mental state requirement by including the following or similar language explicitly in the ordinance:

Unless otherwise specifically set forth herein, or in state law as adopted, allegation and evidence of culpable mental state are not required for the proof of an offense defined by this Ordinance.

If this language is included in an ordinance, any complaint setting forth the elements of the offense would not require the culpable mental state of ‘knowingly,’ ‘intentionally,’ ‘recklessly,’ or ‘criminal negligence.’

E. REPEAL OF CONFLICTING ORDINANCES

Most ordinances contain a provision that allows for the repeal of conflicting ordinances. This tracks with general statutory construction that later statutes, to the extent they conflict, are repealed to the extent of that conflict.

F. SEVERABILITY CLAUSE

Many ordinances contain a severability clause. This clause is intended to allow an ordinance to remain intact and in full force and effect, if one or more sentences, clauses or provisions is found to be unconstitutional.

G. PUBLICATION AND EFFECTIVE DATE

Many ordinances are required to be published in the City’s official newspaper prior to taking effect.<sup>52</sup> Some municipal charters require two readings before an ordinance will have the full force and effect of law. The ordinance will also stipulate when the law will be in effect.

### III. VALIDITY OF ORDINANCES

Chapter 52 of the Texas Local Government Code provides for the general procedures for the adoption of municipal ordinances. Municipal acts are presumed to be valid if no lawsuit to annul or invalidate the act has been filed on or before the third anniversary of the effective date, unless it was void at the time it was enacted or it was pre-empted.<sup>53</sup> It is no easy task to overturn an ordinance for a court may not substitute its judgment for

that of the legislative body -- the City Council. In fact, the Court is required to recognize the presumption of validity accorded such a legislative act.<sup>54</sup>

[O]rdinances are presumed valid. [Citations omitted.] The courts may interfere only if an ordinance is unreasonable and arbitrary. Hence, parties challenging an ordinance bear the “extraordinary burden” of demonstrating that reasonable minds could not differ as to whether the ordinance has a “substantial relationship to the protection of the general health, safety or welfare of the public.” Otherwise, the ordinance will stand. [Citations omitted.] Thus, the Ordinance need only have a possible rational basis; the court will not inquire into its actual purposes. In other words, the court's review is deferential to the City.<sup>55</sup>

Inasmuch as there is a strong presumption of validity of municipal legislation, the burden of proof is on the party seeking invalidation,<sup>56</sup> and the burden is a heavy one.<sup>57</sup>

#### **IV. DOCTRINE OF PREEMPTION**

A municipality may only enact an ordinance that is consistent, and does not conflict, with federal and state law. The Texas Penal Code expressly preempts ordinances relative to criminal offenses, specifically:

No governmental subdivision or agency may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty.<sup>58</sup>

Essentially, municipalities are prohibited from adopting ordinances that are covered by a federal or state statute, or where the legislature intended state law to exclusively occupy the field. However, the mere fact that the legislature has passed a law on a particular subject matter does not mean the subject matter is completely preempted. If any reasonable construction can leave intact both a state statute and local ordinance, preemption does not occur.<sup>59</sup>

However, what constitutes an absolute preemption versus a case of conflict without preemption is generally left to the courts. For example, a comprehensive animal control ordinance, due to its broad application, was not preempted by the state’s “first bite” law.<sup>60</sup> This is likely to still be the case; however, dangerous dog procedures under the Texas Health & Safety Code, §522.001 *et seq.* will likely preempt any procedures related specifically to the classification, determination and disposition of dangerous dogs, as therein defined.

As a general rule of thumb, if a state statute or federal regulation sets forth specific rules, procedures or penalties, the municipality, if it adopts an ordinance, should mirror that rule or procedure or penalty. If the statute does not completely address all issues, the doctrine of preemption will likely allow non-conflicting provisions that may have some overlap.

## Examples

- City cannot pass an ordinance forbidding the killing of all feral pigeons since it is expressly authorized by Parks & Wildlife Code, § 64.002(b).<sup>61</sup>
- Chapter 366 of the Health and Safety Code provides minimum state standards for regulation of on-site sewage facilities. Chapter 366 implicitly repeals Section 342.002 of the Health and Safety Code and Texas Local Gov't, §§ 51.012, 214.012(2), 214.014 and 217.002 to the extent they might regulate such facilities. A municipality may regulate such facilities more stringently, but from experience, it is with permission of the TNRCC.<sup>62</sup> Local standards must not directly conflict with Chapter 366.<sup>63</sup>
- Texas Alcoholic Beverage Code, § 109.57, expressly provides the preemption language that the TABC governs the regulation of alcoholic beverages unless otherwise provided.<sup>64</sup> Recently, the Attorney General opined that a home rule municipality may not prohibit the sale of alcoholic beverages in glass containers within the corporate city limits but it could prohibit the sale of all glass beverage containers within the corporate city limits because the latter is broader in application than Section 109.57.<sup>65</sup>
- Regulation of HUD-Code Manufactured Housing is governed by Chapter 1201 of the Texas Occupations Code (formerly Tex. Rev. Civ. Stat. Ann., art. 5221f). However, a home rule city is not precluded from regulating unoccupied or unsafe manufactured homes that pose a risk to the public health and welfare.<sup>66</sup> Zoning ordinance that referred only to “mobile homes” without addressing distinction between “HUD-Code Manufactured homes” and “mobile homes” failed to comply with the Act requirement that HUD-Code Manufactured housing be allowed and be distinct from mobile homes and therefore could not be enforced against homeowner to move her HUD-Code Manufactured home.<sup>67</sup>
- A home rule city is authorized to adopt an ordinance restricting the location of tobacco product vending machines, or ban them entirely, and by doing so does not run afoul of Chapters 154 and 155 of the Tax Code relative to permits for engaging in business.<sup>68</sup>

## **V. WHO CAN ENFORCE MUNICIPAL ORDINANCES<sup>69</sup>**

Generally, a person cannot claim to be a code enforcement officer or use the title “code enforcement officer” without first holding a certificate of registration or code enforcement officer in training certificate issued by the Texas Department of Health.<sup>70</sup> However, an exemption exists if the person is required to be licensed or registered under another Texas law and engages in code enforcement under that title or registration.<sup>71</sup> A code enforcement officer is defined as an agent of the State of Texas or a political subdivision thereof who engages in code enforcement.<sup>72</sup> In turn, “code enforcement” is defined as the inspection of public and private premises for the purpose of: identifying environmental hazards including fire or health hazards, nuisance violations, unsafe

building conditions, and violations of any fire, health, or building regulation, statute, or ordinance and improving and rehabilitating those premises with regards to those hazards.<sup>73</sup>

In order to receive a certificate of registration, an applicant must: (1) have at least one year of full time experience in the field of code enforcement; (2) pass the examination conducted by the Texas Department of Health or the Department's designee; (3) pay the application, registration, and examination fees; and (4) meet all requirements prescribed by the Act and all Board Rules.<sup>74</sup> Once issued, a certificate of registration is valid for one year and may be renewed annually on payment of the required renewal fee and completion of the annual continuing education requirements.<sup>75</sup> An applicant for a certificate of registration who has less than one year of full-time experience in the field of code enforcement may make an application for a certificate of registration and, on successful completion of the code enforcement examination conducted by the Department of Health and payment of the required fees, the individual is entitled to receive a code enforcement officer in training certificate which is valid for one year after the date of issuance.<sup>76</sup> An individual who possesses a code enforcement officer in training certificate may engage in code enforcement under the supervision of a registered code enforcement officer.<sup>77</sup>

Neither the State of Texas nor any political subdivision thereof, is required to employ a person registered as a code enforcement officer simply because it engages in code enforcement.<sup>78</sup> For example, there is nothing particular about the enforcement of a tree preservation ordinance or high weeds and grass that would require the person to be a certified code enforcement officer. Any city employee, such as a police officer enforcing the ordinance may issue notice of violations, as opposed to issuing code citations, that if ignored or not remedied, could be used as a basis to generate a complaint in municipal court. These notice of violations would be treated much the same as a citizen complaint versus a peace officer citation upon which a warrant could issue. To my knowledge, there is no requirement that citations - or notice of violations - be issued by a certified code enforcement officers.<sup>79</sup> However, a person commits a class C misdemeanor offense if he or she claims to be a code enforcement officer or uses a title that contains the words "code enforcement officer" without holding the required certification.<sup>80</sup>

## **VI. SPECIFIC TYPES OF ORDINANCES**

Municipalities are afforded broad discretion to enact ordinances designed to promote the public safety and welfare. City councils do not have the authority to make an ad hoc determination that a particular activity is detrimental to the public good and assess an ad hoc punishment; rather, police power must be exercised through properly enacted ordinances. The standard of review for a municipal ordinance is whether, as a substantive matter, reasonable minds could differ as to whether the ordinance has a substantial relationship to the protection of the general health, safety or welfare of the public; if the evidence reveals a fact issue the ordinance must be upheld.<sup>81</sup>



## A. NUISANCES

Municipalities have broad based authority to abate nuisances within their jurisdiction. Specifically:

Type A: The City Council may abate and remove a nuisance and punish the person responsible for the nuisance; define and declare what constitutes a nuisance; and abate any nuisance the City Council believes may injure or affect the public health or comfort.<sup>82</sup>

Type B: The City Council may prevent, within the City limits, any nuisance and have the nuisance removed at the expense of the person responsible or the owner of the property where the nuisance exists.<sup>83</sup>

Home Rule: City Council can define and prohibit any nuisance within the City limits and within 5,000 feet outside the limits and may enforce all ordinances necessary to prevent, summarily abate and remove a nuisance.<sup>84</sup> The Attorney General has opined that where a municipality has adopted an ordinance defining and prohibiting a nuisance and grants enforcement authority within the corporate city limits and within 5,000 feet from the city limits, a municipal court has implied jurisdiction over cases arising from violations of the ordinance that occur outside city limits.<sup>85</sup>

The authority of Type C municipalities to broadly define and abate nuisances is not specifically granted; however, under the general provisions, Type C municipalities have the same authority as a Type A municipality unless a conflict exists.<sup>86</sup>

This authority, however, is not without limits. A City Council cannot, by declaration, identify a nuisance, that which is not in fact a nuisance.<sup>87</sup> Generally, acts which constitute nuisances were held to be nuisances at common law unless they constitute nuisances *per se*, *i.e.*, inherent by its very nature. The question as to whether a building or location constitutes a nuisance is a justiciable question for the court or jury.<sup>88</sup>

Examples of nuisance-based ordinances:

- noise ordinances;
- unsightly matters;
- high weeds and grass;
- animal control ordinances relative to the keeping of animals and livestock;

- Texas law characterizes fireworks as public nuisances and vests home-rule cities with the power to regulate public nuisances up to 5,000 feet from the city limits.<sup>89</sup>

- Substandard Structures

In order to utilize this procedure, a municipality is required to adopt an ordinance requiring the vacation, securing and demolition of dilapidated structures.<sup>90</sup> The ordinance must establish minimum standards for the continued use and occupancy of buildings, provide for the giving of proper notice and provide for a public hearing.<sup>91</sup> Codes such as the Uniform Code for the Abatement of Dangerous Buildings, the Uniform Housing Code or the International Building Code, provide useful definitions and are generally adopted in whole or in part to provide the requisite minimum standards.<sup>92</sup>

- Business Regulations

There is no requirement at law, however, that a municipality find that a business or occupation constitutes a nuisance to be subject to a city's legitimate police power regulations. In fact, it is black letter law that "it is not necessary that a business constitute a nuisance to be subject to regulation under the police power."<sup>93</sup> An occupation that might become offensive due to the way it is conducted is "doubtless an appropriate subject for reasonable regulation," even when it is not a nuisance per se.<sup>94</sup>

## B. ZONING<sup>95</sup> AND NON-CONFORMING USES AND STRUCTURES

The powers granted under the zoning authority are 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.<sup>96</sup> In this regard, the municipality may regulate the height, number of stories and size of buildings, lot coverage, size of yards and open spaces, population density, the location and use of buildings.<sup>97</sup> A regulation is not effective until after a public hearing is held, providing parties in interest and citizens to have an opportunity to be heard. The regulations may only apply within the corporate city limits of a municipality.

Recent legislation exempts homes in an approved subdivision plat from appearance and landscaping zoning regulations for a period of two years.<sup>98</sup> The two year grace period does not apply to zoning ordinances dealing with unsafe materials.<sup>99</sup>

The municipality may enact ordinances to enforce its zoning ordinances. The Texas Local Government Code makes it an offense for any person to violate a zoning ordinance adopted under this authority. An offense, as defined by the

governing body, is a misdemeanor punishable by fine, imprisonment or both and may also provide for civil penalties.

“A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist.”<sup>100</sup> In other words, nonconforming status is attributable to a use or structure when

- (1) such use or structure was constructed or operational prior to
  - (a) the annexation of such property into the municipality, or
  - (b) the adoption or amendment of the zoning ordinance; and
- (2) the nonconforming use or structure has continued to exist without subsequent abandonment.

Infrequent or sporadic use of land does not necessarily establish existing use for purposes of nonconformity.<sup>101</sup>

A non-conforming use has no right to exist in perpetuity; however, a balance is struck between legitimate property interests and the interest in the enforcement of the City’s zoning regulations. The right to continue a nonconforming use has its genesis in federal and state constitutional provisions that prohibit the unconstitutional taking of property without just compensation and due process of law.<sup>102</sup> Amortization, termination and abandonment are all methods in which the existence of a non-conforming use or structure may end.

### ***Amortization***

An owner's investment in property, for purposes of calculation, is the recoupment of the landowner's dollar investment, as opposed to the market value or replacement value.<sup>103</sup> The amortization formula may consider past depreciation of the structure,<sup>104</sup> or the value of structures which can be moved to another location.<sup>105</sup> It need not consider appreciation of land value, improvements or profit from an advantageous acquisition.<sup>106</sup>

### ***Termination***

The Texas Supreme Court has recognized the "public need for a fair and reasonable termination of nonconforming property uses ... [and is] in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power."<sup>107</sup> In fact, a zoning regulation may have as a legitimate objective the eventual elimination of nonconforming uses.<sup>108</sup> In this regard, Texas courts have approved the direct and systematic termination of nonconforming uses provided that adequate time is allowed to recoup an owner's investment in the property.<sup>109</sup>

## ***Abandonment***

Abandonment of a nonconforming use may also terminate the privileged status. In *Rosenthal v. City of Dallas*, 211 S.W.2d 279 (Tex. Civ. App. -- Dallas 1948, writ ref'd n.r.e.), the court established the test for abandonment of a nonconforming use; specifically, abandonment requires (1) the intent to abandon and (2) some overt act or failure to act that carries the implication of abandonment.<sup>110</sup> Temporary discontinuance of a nonconforming use is insufficient to show abandonment. Specifically:

‘[t]he mere cessation of the use for a reasonable period does not itself work an abandonment, whether the building is permitted to remain vacant or is temporarily devoted to a conforming use with the intent that the nonconforming use be resumed when opportunity therefor should arise, and periods of interruption due to lack of demand, inability to get a tenant, and financial difficulty do change the character of use.’<sup>111</sup>

In addition, the failure to adhere to registration requirements may effectuate the termination of a nonconforming use.<sup>112</sup>

### **C. SUBDIVISIONS AND PROPERTY DEVELOPMENT<sup>113</sup>**

After a public hearing, a City Council may adopt rules governing plats and subdivisions of land to promote the health, safety, morals or general welfare and the safe, orderly and healthful development of the City.<sup>114</sup> The City Council can extend application of these ordinances to the extraterritorial jurisdiction; however, a fine or criminal penalty prescribed by ordinance does not apply to a violation in the ETJ.<sup>115</sup>

### **D. SIGN REGULATIONS**

Chapter 216, Texas Local Government Code, authorizes a municipality to require the relocation, reconstruction, or removal of any sign within its corporate limits or its extraterritorial jurisdiction.<sup>116</sup> The statute also requires that the owner of the sign be compensated for the relocation, reconstruction or removal of the sign by one of four methods including tax abatement or cash payment.<sup>117</sup> A hearing and opportunity to be heard are also required.<sup>118</sup> Although it would seem appropriate for the Board of Adjustment to hear these cases, the statute specifies the composition of the Board, which includes a member of TxDOT and real estate appraisers.<sup>119</sup> Therefore, if a municipality desires to actively engage in the removal of signs, the statutory procedures must be addressed in significant detail in the ordinance, including but not limited to the creation of a Sign Control Board, the establishment of procedures, including amortization and a designation of the methods of compensation. Please note that compensation for relocation or removal of signs is not applicable to signs erected in violation of local laws

applicable at the time of the erection and signs that become destroyed or dismantled.<sup>120</sup>

During this past legislative session, the process for removing on-premise signs was simplified.<sup>121</sup> More specifically, a city may, without paying compensation, require the removal of an on-premise sign or sign structure, not sooner than the first anniversary date that the person, business or activity identified or advertised, ceases operations on the premises where the sign or sign structure is located.<sup>122</sup> If the premises are leased, removal may not be required sooner than the second anniversary date after the last tenant ceases operations.<sup>123</sup> Removal under these circumstances does not require the appointment of a Board.<sup>124</sup> The owner and city may agree to remove only a portion of the sign or sign structure.<sup>125</sup>

Many municipalities regulate the placement of signs to avoid urban blight and traffic hazards; for example, an ordinance may provide that signs are prohibited in the public right-of-way. Although traffic safety and aesthetics may be significant concerns, the ordinance must be narrowly tailored to achieve the public health and safety goal. Any proposed ordinance should be reviewed to ensure content-neutral regulation of signs for political or protected speech. Location can be regulated; not (political) content, except, to some degree, commercial speech. More specifically, cities may regulate the location, proximity, size, separation, setback and height provisions so long as the ordinance bears a reasonable relationship to the public health, safety or general welfare.<sup>126</sup> A municipality may enforce reasonable time, place and manner restrictions; however, such restrictions must be applied uniformly and in a non-discriminatory manner to all applicants.

The Supreme Court has held that a regulation is content based when the message conveyed determines whether the speech is subject to the restriction.<sup>127</sup> A successful sign ordinance does not seek to restrict the message or viewpoint being communicated; rather, it seeks to restrict the effect or medium of communication. If a government has adopted a regulation because of agreement or disagreement with the message being conveyed, the regulation will be subject to strict scrutiny and is unlikely to be upheld.<sup>128</sup> To be constitutionally palatable sign regulations should be content-neutral and applied evenhandedly to all signs and not reference particular ideas or views.

Recently, the Texas Legislature took a hard look at municipal regulation of political signs. Specifically, the legislature sought to limit municipal authority to prohibit, approve, limit or charge a special fee for removal of political signs on private real property.<sup>129</sup> To be protected, the sign must contain “primarily a political message” and not be temporary and generally available for rent or purchase to carry commercial advertising or other messages not primarily political in nature.<sup>130</sup> The Act does not limit a municipality’s regulation of a sign that has an effective area greater than 36 feet, more than 8 feet high, illuminated or has moving elements or the ability to control the use of real property where it holds an easement or other encumbrance for a public purpose.<sup>131</sup>

Enforcement of a sign regulation that is not content-neutral may be successfully challenged in municipal court as applied to a particular defendant. Further, the enforcement of such regulations could subject the City ordinance to a constitutional challenge. Due to the very serious First Amendment implications involved in the regulation of sign ordinances, your City Attorney should be consulted before implementing these regulations.

#### E. SOLICITATION ORDINANCES<sup>132</sup>

Type A General Law Municipalities may license, tax, suppress, prevent or otherwise regulate hawkers, peddlers and pawnbrokers. Home Rule municipalities are not prohibited from enacting such legislation. As a threshold matter, peddling and soliciting goods from door-to-door may be subject to reasonable police regulation and licensing.<sup>133</sup> These regulations and licensing requirements must be narrowly drawn to serve a legitimate interest of the municipality.<sup>134</sup>

One legitimate interest that may be articulated is public safety, provided the restrictions are reasonable and valid as to time, place and manner. For example, public safety concerns, such as prohibiting solicitation in roadways, from medians or within the public right-of-way, are still valid and permissible. Courts are split, however, as to whether prohibiting solicitation after a specific hour, such as 5:00 p.m, is a valid time, place and manner restriction.<sup>135</sup> A municipality must connect the restriction, such as no solicitation after sunset, to a legitimate governmental interest, such as crime prevention, to provide a more defensible ordinance.

Caution must be exercised in enacting solicitation ordinances to avoid infringing upon First Amendment rights. For example, a permit requirement for the distribution of handbills or pamphlets by religious, political or non-profit organizations may now be considered unconstitutional due to a recent Supreme Court decision.<sup>136</sup> This prohibition would likely extend to any registration requirement, with or without fee, to a religious, political or non-profit organization. Again, this does not prohibit the regulation of general solicitation activities based upon a public safety rationale.

#### F. MISCELLANEOUS ORDINANCES: STATUTORY BASED

1. Public Streets and Highways. Article 311.001 *et seq.* of the Texas Transportation Code provides that a home-rule and Type A General Law municipality have exclusive control and power over public streets, highways and alleys of the City. This provides the base authority for many ordinances relative obstructions, solicitation, parking and signage.
2. Firearms and Explosives.<sup>137</sup> Municipalities may not adopt regulations relating to the transfer, private ownership, keeping, transportation, licensing or registration of firearms, ammunition or firearm supplies; however, a municipality still may regulate the discharge of firearms within

the corporate city limits or the carrying of a firearm by a person other than one licensed to carry a concealed handgun at a public park, public meeting, political rally, parade or official political meeting or nonfirearms-related school, college or professional athletic event.

3. Taxicab.<sup>138</sup> In order to protect the public health, safety and welfare, a municipality, by ordinance, shall license, control and otherwise regulate private passenger vehicles that provide passenger taxicab transportation services for compensation, designed to carry no more than eight passengers and operated within the jurisdiction of the municipality or within property in which the municipality has an interest. The ordinance may include regulations for the entry into the business, including controls, limits or other restrictions on the total number of persons providing the services, regulation of rates, establishment of safety and insurance requirements and any other requirement adopted to ensure safe and reliable passenger transportation services. Subsection (c) provides that in so regulating, the municipality is performing a governmental function and that a municipality may carry out the provisions to the extent deemed necessary and appropriate.
4. Animals at Large.<sup>139</sup> Type A General Law Municipalities may prohibit or otherwise regulate the running at large of horses, mules, cattle, sheep, swine, or goats. This does not mean that another General Law Municipality or Home Rule cannot regulate animals at large; rather, they must do so under the general nuisance provisions.
5. Animal Drives.<sup>140</sup> Type A General Law municipalities may prohibit or otherwise regulate the driving of cattle, horses, or other animals in the municipality.
6. Handicap Parking. Local authorities may designate parking spaces for persons with disabilities provided that such spaces conform to the American National Standards Institute standards and specifications adopted by the Texas Commission of Licensing and Regulation relating to the identification and dimensions of such parking spaces.<sup>141</sup>

## **VII. ORDINANCES WITH CIVIL ABATEMENT OPTIONS**

### **A. JUNKED VEHICLES**

State law outlines the notice requirements, defines the offense and outlines the penalty for the criminal punishment or civil abatement of junked vehicles.<sup>142</sup> Local governments are limited to state law remedies in this instance; however, the local government can determine whether to seek criminal penalties or civil abatement and provide for additional definitions or procedures where state law has not addressed the specific issue.

1. Definition

Junked Vehicle is defined as a vehicle that is self propelled and does not have lawfully attached to it:

an unexpired license plate; *and*<sup>143</sup>

a valid motor vehicle inspection certificate; *and is*

wrecked, dismantled or partially dismantled or discarded; *or*

inoperable and has remained inoperable for more than:

72 consecutive hours, if the vehicle is on public property;

or

30 consecutive days if the vehicle is on private property<sup>144</sup>

This definition is more restrictive than previous statutory definitions because it requires both legal and mechanical inoperability. Under prior statutes, a junked vehicle was one that was legally inoperative, interpreted by many municipalities to be either legally (no valid inspection sticker) or mechanically (wrecked or dismantled) inoperable. Recently, the Texas Legislature added:

An ordinance adopted by a governing body of a municipality may provide for a more inclusive definition of junked vehicle subject to regulation under this subchapter.<sup>145</sup>

The purpose is to provide the authority of municipalities to provide for additional regulations not currently in the statutes.

Recently, the Attorney General opined that a county, pursuant to its authority to abate a remove a junked vehicle as a nuisance, did not have the authority to impose fencing and screening requirements.<sup>146</sup> More specifically, the AG stated that a county could not require a particular kind of camouflage to render the vehicle non-visible.<sup>147</sup> Inasmuch as a county only has that authority granted by statute or state constitution, similar to general law municipalities, this may have been the legislature's attempt to allow municipalities greater latitude under these circumstances. Notwithstanding the foregoing, due to the constant changing fabric of junked vehicle legislation, it is recommended that ordinances track and reference state law and add the caveat "as it may be amended" to avoid repetitious charges to ordinances.

2. Offense



An offense occurs if the junked vehicle constitutes a public nuisance as defined.<sup>148</sup> A junked vehicle is declared to be a public nuisance if:

- the junked vehicle, including a part of the junked vehicle is visible *at any time of the year* from a public place or public right-of-way:
  - is detrimental to the safety and welfare of the public;
  - tends to reduce the value of private property;
  - invites vandalism;
  - creates a fire hazard;
  - is an attractive nuisance creating a hazard to the health and safety of minors;
  - produces urban blight adverse to the maintenance and continuing development of municipalities; and
  - is a public nuisance.<sup>149</sup>(emphasis from HB 1773)

### 3. Exceptions

The abatement procedures or alternative administrative hearings do not apply to a vehicle, or part of a vehicle, which is:

- lawfully enclosed where it is not visible from the street or other public or private property;
- stored or parked in a lawful manner on private property in connection with a licensed junkyard business or an antique or special interest vehicle stored by a collector on their property provided that
  - the vehicle, or part thereof, and the outdoor storage are maintained in an orderly manner so as not to constitute a health hazard; and
  - are screened from ordinary view by means of a fence, rapidly growing trees, shrubbery and other appropriate means.<sup>150</sup> [By ordinance some cities stipulate that covering by a tarp is insufficient as a means to screen from ordinary public view.]

4. Proceedings

a. Criminal Proceedings

- Fines: \$200 limit.<sup>151</sup>
- Court shall order abatement and removal of the nuisance upon conviction.<sup>152</sup>

b. Civil

No notice is required unless abatement procedures are involved.

- Notice of the nature of the nuisance must provide not less than ten (10) days
  - By certified mail return receipt with a 5 day return
  - personally delivered
  - delivered by U.S. Postal Service with signature confirmation<sup>153</sup>
    - notice may be placed on the junked vehicle if the last known registered owner's address is unknown
  - to the last-known registered owner of the junked vehicle, any lienholder of record *and* the owner/occupant of the premises on which the public nuisance exists
    - if on a public right-of-way, the adjacent property owner/occupant shall be notified
- Notice shall state
  - the nature of the public nuisance;
  - that it must be abated within the 10 day notice period as calculated from the date of receipt; and
  - that a request for hearing must be made before the expiration of the 10 day period.<sup>154</sup> In S.B. 350, the 80<sup>th</sup> Legislature clarified that the hearing must be requested by the person receiving notice not later than the date by which the nuisance must be abated and removed.

- If the notice is returned undelivered, the abatement action must be continued until not earlier than the eleventh day after the return date.

5. Hearing

A hearing shall be held upon the timely written request of any person receiving such notice. The ordinance should provide who shall conduct the hearing; oft times it is the municipal court which has the authority to issue orders necessary to enforce the procedures.<sup>155</sup>

6. Right of Entry

Persons authorized to administer this section may enter upon private property to examine and identify a junked motor vehicle and remove or cause to be removed a junked motor vehicle declared to be a nuisance.<sup>156</sup> Only regular, salaried, full-time employees of the City may administer the abatement and removal procedure; however, any authorized person may remove the nuisance.<sup>157</sup>

7. Presumption

It is presumed that the junked motor vehicle is inoperable unless demonstrated otherwise by the owner.<sup>158</sup>

8. Recommended Documentation

- photographs, before, at time of notice and at time of citation
- log of contacts
- actual inspection or registration tag
  - may need police officer assistance
- computer checks on registration of vehicle
  - will need police officer assistance
- upon receipt of notice of removal, the department shall cancel the certificate of title.

## B. HIGH WEEDS AND GRASS AND UNSIGHTLY/UNSANITARY MATTER

The City Council may:

- require the filling, draining, and regulating of any place in the municipality that is unwholesome, contains stagnant water, or is in any other condition that may produce disease;<sup>159</sup>
- require the inspection of all premises;<sup>160</sup>
- impose fines of the owner of premises on which stagnant water is found;<sup>161</sup>
- require the owner of a lot in the municipality to keep the lot free from weeds, rubbish, brush, and other objectionable, unsightly, or unsanitary matter.<sup>162</sup>
  - The City may abate, without notice, weeds that have grown higher than 48 inches and constitute an immediate danger to the health and safety of any person. The City must give the property owner notice, within 10 days of the abatement. The City must also, upon written request by the owner filed within 30 days of the abatement, conduct an administrative hearing regarding the abatement.<sup>163</sup>
- regulate the cleaning of a building, establishment, or ground from filth, carrion, or other impure or unwholesome matter.<sup>164</sup>

State law gives the parameters of what the municipality can regulate without specifics or specific violations; therefore, the City Council has more discretion in creating the ordinance. The ordinance may define the elements of the offense, for example:

### a. Prohibited Conduct Regarding High Weeds and Grass

It shall be unlawful for any person owning, claiming, occupying or having supervision or control of any real property, occupied or unoccupied

- includes record owner and any tenant
- within corporate city limits
- to permit weeds, brush or any objectionable or unsightly matter to grow to a height greater than 12 inches upon such real property

### Presumption

All vegetation which exceeds 12 inches in height is presumed to be objectionable and unsightly; except regularly cultivated crops, as provided by ordinance.<sup>165</sup>

- within 150 feet of any property line which abuts street rights-of-way, alleys, utility easements, subdivided additions, developed property or any buildings or other structures.<sup>166</sup>

The person also has a duty to keep the area from the line of his property

- to the curblines next adjacent to it, if there is a curblines; and, if not, then
- to the center line of the adjacent unpaved street; or
- to the edge of the pavement

cleared of the above-referenced matter.<sup>167</sup>

#### b. Prohibited Conduct Regarding Unsanitary Conditions

It is unlawful and declared a nuisance for any person owning, claiming, occupying or having supervision or control of any real property, occupied or unoccupied,

- includes record owner or tenant
- within the corporate city limits
- to permit or allow
- any stagnant or unwholesome water, sinks, refuse, filth, carrion, weeds, rubbish, brush and refuse, trash, debris, junk, garbage, impure or unwholesome matter of any kind or objectionable or unsightly matter of whatever nature to accumulate or remain upon such real property or within any public easement on or across such real property or upon any adjacent public street or alley right-of-way between the property line of such real property and where the paved surface of the street or alley begins.<sup>168</sup>

It is further unlawful and declared a nuisance for any person to dump or permit to be dumped, throw upon or along any drain, gutter, alley, sidewalk, street, park, right-of-way or vacant lot into or adjacent to water, or any public or private property, within the corporate limits, any unwholesome water, refuse, rubbish, trash, debris, filth, carrion, weeds,

brush, junk, garbage, impure or unwholesome matter of any kind or other objectionable or unsightly matter of any kind.<sup>169</sup>

A City Council may also make it an affirmative duty to clean premises, for which failure to comply may be an offense. For example:

It shall be the duty of any person owning, claiming, occupying or having supervision or control of any real property to remove, drain and/or fill all prohibited matter or conditions and to cut and remove all weeds, brush, vegetative growth and other objectionable or unsightly vegetation as often as may be necessary to comply with the above and use every precaution to prevent the same from occurring or growing on such property.<sup>170</sup>

\* \* \*

State law dictates the requisite notice for abatement of a nuisance defined under these provisions. Specifically:

Any person failing to comply must be given notice

- personally to the owner in writing
- by letter addressed to owner at post office address as recorded in the appraisal district records
  - does not require certified mail
- If the above cannot be accomplished, then by
  - publication at least once
  - posting notice on or near the front door of each building on the property; or
  - posting the notice on a placard attached to a stake driven into the ground on the property, if there are no buildings.<sup>171</sup>

If notice is mailed in accordance with the above, and the Postal Service returns the notice as “refused” or “unclaimed,” the notice is considered valid and delivered.<sup>172</sup>

If the person fails or refuses to comply within 7 days after the date of notification, the City may go upon the property and do or cause to be done the work necessary to achieve compliance.<sup>173</sup> State law provides for a one-year notice provision; specifically

- the City, in the notice, may inform the owner by regular mail and a posting on the property, or by personal delivery that if the owner commits another violation of the same kind or nature that poses a danger to the public health and safety on or before the first anniversary of the date of the notice that the City, without further notice, may correct the violation at the owner's expense and assess the expense against the property.<sup>174</sup> If a violation covered by a notice occurs within the one-year period, and the City has not been informed in writing by the owner of an ownership change, then the City, without notice, may take any corrective action and assess its expenses.<sup>175</sup>

If a violation covered by a notice occurs within the one-year period, and the City has not been informed in writing by the owner of an ownership change, then the City, without notice, may take any corrective action and assess its expenses.

There is no abatement hearing required unless due to serious health and safety concerns abatement came before notice; however, some courts utilize the deferred disposition procedures to require abatement in exchange for a reduced fine. In some cases, a hearing may be recommended to abate a nuisance, such as for the abatement of a swimming pool, where draining the pool might cause serious damage.

- c. Administrative Hearing. Municipalities are authorized to provide for an alternative administrative procedures, by ordinance, to follow Section 54.044 of the Local Government Code, under which administrative penalties may be imposed for the enforcement of said ordinance.<sup>176</sup> A city may now adopt a procedure for an administrative adjudication hearing under which an administrative penalty could be imposed for enforcement of an ordinance under Section 54.032 or adopted under Section 214.001 of the Local Government Code. The procedure must provide for due process, *i.e.*, a hearing and an opportunity to be heard. Further, the procedure must provide for a time frame within which a hearing is to be held, the appointment of a hearing officer with authority to administer oaths and issue orders compelling the attendance of witnesses and production of documents and the amount and disposition of administrative penalties, costs and fees. A municipal court<sup>177</sup> may enforce the administrative hearing officer's orders for witnesses and documents. The summons or citation<sup>178</sup> must advise the person violating the ordinance of the right to a hearing, the date and time of the hearing. The summons or citation is kept as a City record and is a rebuttable proof of the facts stated therein. The statute further provides that a person charged with violating the ordinance who fails to appear at the hearing is considered to have admitted liability for the violation charged.<sup>179</sup> At the hearing, the administrative hearing officer is to determine and issue an order stating

whether the person violated the ordinance and the amount of the penalty, costs and fees to be assessed. The order is to be filed with the City Secretary and may be enforced in a civil collection suit or by obtaining an injunction prohibiting or requiring specific conduct.<sup>180</sup> The decision of the administrative hearing officer is appealable to the municipal court within 31 days of the date the order is filed.<sup>181</sup> The appeal does not stay enforcement and collection, unless a bond is posted with an agency designated for that purpose.<sup>182</sup>

d. Recommended Documentation

- (1) photographs
  - (a) at time of initial investigation
  - (b) at time citation issued
  - (c) after 10 days has lapsed
- (2) contact logs, personal and telephonic
- (3) any documents reflecting how notice was issued

### **VIII. GENERAL NOTICE: PRESUMPTION**

If the City is required by statute, rule, regulation or ordinance to send notice to an owner of real property for the purpose of enforcing a City ordinance, the City may include the following statement in the notice to establish a presumption that the person is the record owner for purposes of enforcement.

"According to the real property records of \_\_\_\_\_ County, you own the real property described in this notice. If you no longer own the property, you must execute an affidavit stating that you no longer own the property and stating the name and last known address of the person who acquired the property from you. The affidavit must be delivered in person or by certified mail, return receipt requested, to this office not later than the 20th day after the date you receive this notice. If you do not send the affidavit, it will be presumed that you own the property described in this notice, even if you do not."<sup>183</sup>

The notice, with a form affidavit, must be sent certified mail, return receipt requested.<sup>184</sup> If the City sends the notice to the property owner, as shown, by the County Real Property Records, and the record owner no longer owns the property, the record owner must execute the affidavit stating he/she no longer owns the property and provide the name and last known address of the person who acquired the property from the record owner.<sup>185</sup>

The Affidavit must be delivered in person or by certified mail, return receipt requested within 20 days of receipt of the notice.<sup>186</sup>



If the City receives such Affidavit, it shall send the appropriate notice to the new owner reflected in the Affidavit, along with the aforementioned statement and Affidavit.<sup>187</sup>

The City shall maintain the Affidavit for at least 2 years after receipt and deliver a copy to the chief appraiser of the appraisal district in which the property is located.<sup>188</sup>

The City will be considered to have provided the requisite notice, if no affidavit, as set forth above, is received.<sup>189</sup>

## **IX. CHALLENGES TO ORDINANCES**

A party attacking the validity of a municipal ordinance bears an extraordinary burden to establish that no conclusive or even controversial or issuable fact existed that authorized the enactment of the ordinance.<sup>190</sup> Moreover, it is well established that a court of equity may not enjoin a penal ordinance unless: (1) the ordinance is unconstitutional or otherwise void; (2) the complainant has a vested property right affected by the ordinance; and (3) the enforcement of the ordinance causes irreparable injury to a vested property right.<sup>191</sup>

### **A. CONSTITUTIONAL CHALLENGES**

Constitutional challenges to an ordinance can run the gamut from facial invalidity to substantive due process to procedural due process to equal protection to taking of property, to name a few. The nature of this paper precludes a full blown discussion of each challenge; however, I have attempted to provide a brief summary of each to familiarize you with the basic concepts as applied to ordinances.

The Texas Civil Practice and Remedies Code provides, in pertinent part, that if a “statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must . . . be served with a copy of the proceedings and is entitled to be heard.”<sup>192</sup> If a plaintiff challenges the constitutionality of a municipal ordinance or state statute, he is required to serve the Attorney General with a copy of his petition to maintain his constitutional challenge to the ordinance or statute.

A court is without jurisdiction to grant either declaratory or injunctive relief until such time as the Attorney General has been served, and has been given an opportunity to enter an appearance and to be heard by the court. Indeed, the failure to serve the Attorney General within a reasonable time dictates dismissal of a plaintiff’s action.<sup>193</sup>

#### **1. Facial Invalidity**

It is unlikely a municipal court would ever see a facial challenge to an ordinance because any constitutional challenge will likely be “as applied” to a particular defendant in a particular instance.

A statute, or an ordinance, may be challenged on the basis that it is invalid on its face. “[A] holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner.”<sup>194</sup> “A ‘facial challenge’ means a claim that the law is ‘invalid in toto -- and therefore incapable of any valid application.’”<sup>195</sup> Where a decision turns on the meaning of words in a statute or regulation, a legal question is presented for the court to decide.<sup>196</sup>

Thus, “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”<sup>197</sup> “For a facial challenge, the remedy is the striking down of the regulation.”<sup>198</sup> “[W]hen a landowner makes a facial challenge, he or she argues that any application of the regulation is unconstitutional; for an as applied challenge, the landowner is attacking only the decision that applied the regulation to his or her property, not the regulation in general.”<sup>199</sup>

## 2. Substantive Due Process

Unless a fundamental right is involved, the doctrine of substantive due process, both under the federal and Texas Constitutions, requires only that a governmental decision be rationally related to a legitimate governmental purpose and that there be a reasonable fit between the governmental purpose and the means chosen to advance that purpose.<sup>200</sup>

### a. Rational Basis Test

A court should not set aside a governmental decision for a substantive due process violation unless the decision “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, morals, the public safety or the public welfare in its proper sense.”<sup>201</sup> Economic and public safety legislation, will survive a substantive due process challenge if it is designed to accomplish an objective within the government’s police power and if a rational relationship exists between the legislation and its purpose.<sup>202</sup> This deferential inquiry does not focus on the ultimate effectiveness of the decision, but on whether the enacting body could have rationally believed at the time of the enactment of the legislation that it would promote its objective.<sup>203</sup> If it is at least fairly debatable that the decision was rationally related to a legitimate governmental interest, the decision must be upheld.<sup>204</sup>

b. Property Interests

As a threshold matter to any challenge under the substantive due process clause, as well as the majority of constitutional challenges, a plaintiff must show that he has been deprived of a constitutional or statutory right.<sup>205</sup> As noted by the United States Supreme Court<sup>206</sup> “[t]o have a property interest in a benefit, a person . . . must have more than a unilateral expectation of it.” Property interests “are defined by existing rules or understandings that stem from an independent source such as state law . . . rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>207</sup>

c. Legislative Presumption of Validity

Notwithstanding the protections of the Due Process Clause, it is well-established that government remains free to adjust the burdens and benefits of economic life as long as it does so in a manner that is neither arbitrary nor irrational.<sup>208</sup> In cases where it is clear that no fundamental right is implicated, the due process clause, of its own force, requires at a minimum that state action be supported by some legitimate goal and that the means chosen for its achievement be rational, *i.e.*, it is of no consequence that the state’s method is over-inclusive or under-inclusive, so long as its legitimate goal may be attained by the means chosen.<sup>209</sup>

3. Procedural Due Process

Generally, if an individual is deprived of a property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process.<sup>210</sup> This general rule does not apply, however, when a governmental body enacts generally applicable legislation since there are no constitutional limitations on the procedures by which government enacts legislation.

"It is an established constitutional principle that procedural due process attaches only to administrative or adjudicatory action by the state, and not to legislative action."<sup>211</sup> Consequently, the procedural protections of due process do not extend to all deprivations of otherwise protected property interests. Deprivations which occur as a result of a legislative act are not subject to the procedural requirements of due process.<sup>212</sup>

4. Equal Protection

The equal protection clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which essentially is a direction that all persons

similarly situated should be treated alike.<sup>213</sup> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.<sup>214</sup> When social or economic legislation is at issue, the equal protection clause allows the states wide latitude,<sup>215</sup> and the Constitution presumes that even improvident decisions eventually will be rectified by the democratic process.<sup>216</sup>

## 5. Strict Scrutiny vs. Rational Basis

The general rule gives way, however, when a statute or ordinance classifies by race, alienage or national origin. These laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.<sup>217</sup>

An ordinance or other legislative enactment that does not burden a suspect class or a fundamental interest should not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [governing body's] actions were irrational."<sup>218</sup> The same requirements are applied to equal protection challenges under the Texas Constitution as those under the United States Constitution.<sup>219</sup> An as-applied equal protection claim requires that the government treat the claimant different from other similarly situated persons without any reasonable basis.<sup>220</sup>

### a. Standard of Review

If no suspect class or fundamental right is involved, the same deferential standard that was previously discussed regarding substantive due process claims is equally applicable to an equal protection claim

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for [government] action, "our inquiry is at an end." This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent

some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”<sup>221</sup>

Those attacking the rationality of a legislative classification have the burden to negate every conceivable basis which might support the classification.<sup>222</sup> The governing body is not even required to articulate the reasons for such legislation since it is entirely irrelevant for constitutional purposes whether the conceived reason for the ordinance actually motivated the governing body.<sup>223</sup> Moreover, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”<sup>224</sup>

b. Solution Need Not be Perfect One

Additionally, the equal protection clause does not prohibit government from enacting legislation that is aimed at only one particular actor or group of actors as long as that classification meets the minimum standards of constitutional rationality.

[L]egislators may enact generally applicable legislation as a prophylactic to the danger posed by one particular actor as long as the end of the legislation is legitimate and, assuming the legislation does not distinguish between classes on bases susceptible to intermediate or strict scrutiny, the means are rationally related to the end. In other words, the fairness of which [the plaintiff] speaks [in its equal protection challenge] is always determined, in cases of low-level scrutiny, by the rationality of the state action, whether the questioned action is the enactment of an ordinance or the enforcement of it.<sup>225</sup>

6. Taking of Property

Regulatory legislation is often challenged as an unconstitutional taking of property. A successful takings claim, however, does not invalidate the legislation. The Constitution does not prohibit takings; rather, it requires that the government compensate the persons whose property was taken.

a. Private Real Property Rights Preservation Act<sup>226</sup>

The Act has set forth a statutory definition of a taking that encompasses any action (with several specified exceptions) taken by particular governmental entities that results in a 25% or more devaluation of a person's private real property.

The taking analysis, however, cannot stop with the Act. Both the Texas and United States Constitutions prohibit the taking of property without just compensation.

b. Federal Takings

In any taking analysis, the initial inquiry is whether the challenged governmental action advances a legitimate public interest.<sup>227</sup> The second step in a taking analysis examines whether the challenged governmental action denies an owner the economically viable use of his property.<sup>228</sup> In reviewing this part of the taking analysis, it is important to note that the Fifth Amendment's prohibition against taking without compensation does not guarantee the most profitable use of property,<sup>229</sup> and a diminution in value, standing alone, does not establish a taking.<sup>230</sup> Taking issues must be resolved by focusing not on the uses regulations deny, but rather on the uses that regulations permit.<sup>231</sup> As stated:<sup>232</sup>

By its nature, zoning "interferes" significantly with owners' uses of property. It is hornbook law that "[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or entitle him to a variance or rezoning."<sup>233</sup>

Under federal law, a land use regulation generally does not constitute a taking unless it deprives the property owner of all use of the property.<sup>234</sup>

Although the Supreme Court has yet to define the meaning of the term "economically viable use," the term appears to have nothing to do with whether a landowner realizes a profit on his investment.<sup>235</sup> The Supreme Court discussed the "economically viable use" concept with reference to the defendant's evidence that, because of prior investments in the property, it would not be profitable to develop the land with the 67 dwelling units the Planning Commission was willing to approve.<sup>236</sup> The Supreme Court refused to equate the concept of "economic feasibility" with the concept of "profitability."

c. State Takings

While the above discussion gives a broad overview of the possible avenues of attack against government regulations under both the Texas and Federal Constitution, the Texas Supreme Court's recent decision in *Mayhew*,<sup>237</sup> is worthy of a closer look, given that it is the Texas Supreme Court's latest and most exhaustive discussion of these constitutional concepts.

The Texas Supreme Court in *Mayhew*, relying extensively on federal cases with respect to land-use constitutional claims<sup>238</sup> indicated that in any taking analysis, the initial inquiry is whether the challenged governmental action substantially advances a legitimate public interest. The second step in the taking analysis examines whether the challenged governmental action denied the property owner all economically viable use of its land.<sup>239</sup>

The legitimacy prong of a regulatory takings analysis requires a court to identify whether the challenged regulation substantially advances a legitimate governmental interest. The *Mayhew* Court indicated that "a broad range of governmental purposes and regulations" will pass this constitutional muster given the variety of legitimate state interests available to governmental entities, including protecting residents from the "ill-effects of urbanization," "enhancing the quality of life," "precluding the conversion of open-space land to urban uses," "preserving desirable aesthetic features," and "controlling both the rate and character of community growth."<sup>240</sup>

The *Mayhew* Court held that even if a governmental action substantially advances a legitimate state interest, that "[a] compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property."<sup>241</sup> In determining whether a restriction denies a landowner of all economically viable use of the property, a court must determine whether the restriction renders the property valueless or, in other words, whether any value remains in the property after the governmental action.<sup>242</sup>

To determine whether the government has unreasonably interfered with the landowner's rights to use and enjoy property, the Court noted the importance of two factors: "the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations."<sup>243</sup> In analyzing the first factor, the economic impact of the regulation, the Court indicated

that it was appropriate to compare "the value that has been taken from the property with the value that remains in the property."<sup>244</sup> The Court admonished, however, that "[t]he loss of anticipated gains or potential future profits is not usually considered in analyzing this factor."<sup>245</sup> The *Mayhew* Court's analysis is consistent with federal law in this area.

7. Test for Constitutionality

In determining the constitutionality of an ordinance or other legislative act, a court is guided by the rational basis test under both the due process and equal protection clauses to the United States Constitution.<sup>246</sup> Ordinances may be held unconstitutional only if they are shown to bear no possible relationship to the state's interest in securing the health, safety, morals or general welfare of the public and are clearly arbitrary and capricious.<sup>247</sup>

8. Test: Arbitrary and Capricious

In determining whether the ordinance is arbitrary and capricious, and thus violative of the due process and equal protection clauses to the United States and Texas Constitutions, the court must inquire whether there was a conceivable or even hypothesized factual basis for the City's enactment of the ordinance.<sup>248</sup> The court is **not** to determine whether the City's decision was the best course for the community, which effect would be to move the decisionmaking function from the City Council to the court.<sup>249</sup> Justice Higginbotham, writing for an *en banc* court, specifically disapproved of judicial inquiries into legislative or executive motivation.

By sharply cutting the deference due state decisions, it would inject federal courts into matters historically the business of states and subject to their police power. It would, more specifically, alter the decisional processes for zoning issues. The difference between an inquiry into whether there was any possible rational basis for legislation and inquiry into the actual basis of legislation is significant. A court's assumption of the power to decide between competing legislative proposals or to require the state to prove the validity of its choice is quickly the right to change the legislative process itself. . . .

We hold that the outside limit upon a state's exercise of its police power . . . is that they must have a rational basis. . . . Aware of no good reason to alter settled constitutional law, we decline to set out on the path proposed by the dissent.<sup>250</sup>



Justice Higginbotham further cautioned that the court did “not suggest that a [municipal] decision can be justified by mouthing an irrational basis for an otherwise arbitrary decision. A denial of a building permit on the King Ranch because of inadequate parking might fall into this category. The key inquiry is whether the question is ‘at least debatable.’”<sup>251</sup>

#### 9. Fourth Amendment Seizure

Under an ordinance adopted in accordance to Chapter 214 of the Texas Local Government Code, after a hearing and an opportunity to be heard, a municipality may order that the owner demolish a structure or upon the failure to do so, the municipality may take the appropriate action. In 1999, the Fifth Circuit had an opportunity to review and rule upon an ordinance adopted under Chapter 214 in *Freeman v. City of Dallas*<sup>252</sup>, a case involving the demolition of substandard structures. The Court, as a threshold determination, acknowledged that the demolition of a structure constituted a “seizure” of property within the purview of the Fourth Amendment. However, the Fourth Amendment does not state that there shall be no seizure without a warrant; rather, the Fourth Amendment prohibition is couched in terms that there shall be no “unreasonable” searches or seizures. The next inquiry for the Court was whether the seizure was “unreasonable.”

To determine the reasonableness of the seizure the Court examined the procedures under state law and the City of Dallas’ ordinances. That process provided for “reasonable notice to and time limits upon landowners’ actions, multiple hearing possibilities, flexible remedies, and judicial review in state court . . .”<sup>253</sup> The Court determined that the process, along with the defined standards in the municipal code for finding that a structure is a nuisance, offered greater protection against unreasonable actions than an application for a warrant before a judge (which is usually done without notice to the landowner or the opportunity to participate).<sup>254</sup>

#### B. LACK OF A CULPABLE MENTAL STATE

An ordinance that does not express a culpable mental state is not necessarily unconstitutionally vague. The Penal Code provision, Section 6.02 will provide the appropriate culpable mental state unless the ordinance clearly dispenses with it.<sup>255</sup> If enforced without a culpable mental state, it would be unconstitutional, again, unless the ordinance clearly dispenses with the requirement.<sup>256</sup>

#### C. VAGUENESS: OFFENSE NOT DEFINED

An ordinance that proscribes certain conduct must be sufficiently definite to give person of ordinary intelligence fair notice that contemplated conduct is prohibited.<sup>257</sup> It does not require mathematical precision, rather, the ordinance

must give *fair warning* of the proscribed conduct in light of common understanding and practice.<sup>258</sup> An ordinance may be declared void for vagueness if it fails to give fair notice of the proscribed conduct and if its application causes arbitrary and erratic arrests or convictions.<sup>259</sup> For example, an ordinance was unconstitutionally vague and overbroad to the extent it made it unlawful for a person to be in or about private or public buildings at nighttime, where the individual had no right or permission to be, under suspicious circumstances and “without being able to give satisfactory account of same” because the last provision gave unrestrained and unguided discretion to an officer of whether an answer was satisfactory.<sup>260</sup> However, an ordinance is not necessarily unconstitutionally vague merely because words or terms are not specifically defined. An ordinance making it unlawful for any person to keep or harbor any dog which makes frequent or long continued noise which is disturbing to persons of normal nervous sensibilities was not unconstitutionally vague for lack of defined terms. The terms could be defined by use of a dictionary and the provision did not reach constitutionally protected conduct.<sup>261</sup>

### **CONCLUSION**

In sum, given its exclusive jurisdiction, a municipal court is likely to see many ordinance violations pertaining to a multitude of public health and safety concerns. A creative effort to resolve the compliance issues, utilizing all the tools available, will ensure a safer and healthier community.

# **RESEARCH TOOLS AND SOURCES**

**MUNICIPAL RESEARCH & SERVICES CENTER OF WASHINGTON**

[www.mrsc.org](http://www.mrsc.org)

Sample Ordinances, Policies and Municipal Forms

**TEXAS ATTORNEY GENERAL:** [www.oag.state.tx.us](http://www.oag.state.tx.us)

**Publications/Handbooks**

*Nuisance Abatement Manual (14<sup>th</sup> Edition 2005)*  
*Private Real property Rights Preservation Act Guidelines*  
*Public Information Act Handbook*

**Opinions of the Attorney General: Search Engine**

**TEXAS SECRETARY OF STATE CORPORATIONS DIVISION:** [www.sos.state.tx.us](http://www.sos.state.tx.us)

**Search for business documents online**

**TEXAS MUNICIPAL LEAGUE:** [www.tml.org](http://www.tml.org)

Updates on City issues  
Legislative Updates  
Publications and Papers

# FORMS

In Re: § MUNICIPAL COURT  
 §  
 [Address] §  
 [Owner's Name] §  
 §  
 Abatement of Junked Vehicles § [ ] COUNTY, TEXAS

**ADMINISTRATIVE DETERMINATION AND ORDER**

On or about \_\_\_\_\_, 200\_\_, came onto be heard, before the Municipal Court for the \_\_\_\_\_, an administrative proceeding for the abatement of specified identified junked vehicles as determined by the \_\_\_\_\_ Code Enforcement officers. Upon presentation of the evidence, and hearing of argument, the Court makes the following findings and orders:

1. On or about \_\_\_\_\_, Code Enforcement Officers conducted an inspection of the premises at \_\_\_\_\_, being Lot \_\_, Block \_\_, \_\_\_\_\_ Addition, within the corporate city limits of the \_\_\_\_\_, relative to complaints that junked vehicles were being stored on the property. The City determined such junked vehicles constituted a public nuisance as defined by Section \_\_\_\_\_ of the Code of Ordinances and should be abated.
2. \_\_\_\_\_ is the owner of the property located at \_\_\_\_\_ and is the responsible party for the keeping of junked vehicles on the premises.
3. On-going inspections conducted to date have determined that the junked vehicles continue to be stored on the property in violation of City ordinance, to wit: Section \_\_\_\_ of Chapter \_\_\_\_\_. Specifically, on or about \_\_\_\_\_, 200\_\_, officers entered upon the property for the purpose of identifying junked vehicles. The inspection revealed a multitude of junked vehicles located on the property, identified as follows:

[Identify Vehicle by License Plate Number, Vehicle type, make, model, color and/or VIN)

4. On or about \_\_\_\_\_, 200\_\_, Mr. \_\_\_\_\_ was notified via certified mail, return receipt requested, and regular mail, of the nuisance, and that said nuisance must be abated and removed not later than 10 days from the date on which notice was mailed.
5. On or about \_\_\_\_\_ 200\_\_, Mr. \_\_\_\_\_ was sent notification of hearing before the Municipal Court, by certified mail return receipt requested and regular mail, to consider the possible removal of junked vehicles and used vehicle components from the property, in accordance with Section \_\_\_\_\_ of Chapter \_\_\_\_\_ of the Code of Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-referenced vehicles are junked vehicles as defined by Section \_\_\_\_\_ of the Code of Ordinances; and

It is further ORDERED that the above-referenced junked vehicles be abated and removed from the property; and

It is further ORDERED that the above-referenced junked vehicles shall not be reconstructed or made operable after removal; and

It is further ORDERED that the City provide the requisite notice identifying the vehicle or part of the vehicle to the Department of Public Safety not later than the fifth day after the date of removal, requesting that the Department immediately cancel the certificate of title issued for said vehicle; and

It is further ORDERED that the City may dispose of the junked vehicles, or parts thereof, to a scrap yard, motor vehicle demolisher or a suitable site operated by the City or County.

SO ORDERED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

---

Judge of the Municipal Court

THE STATE OF TEXAS  
  
COUNTY OF \_\_\_\_\_

§  
§  
§  
§

A PROPERTY LOCATED AT:  
[property address]  
  
\_\_\_\_\_ COUNTY, TEXAS

**JUDICIAL WARRANT**

The State of Texas, to any peace officer of \_\_\_\_\_ County, State of Texas:

WHEREAS, the Affiant whose name appears on the attached affidavit is the [Affiant's title] for the [Department name], City of \_\_\_\_\_, \_\_\_\_\_ County, Texas, and did heretofore this day submit said Affidavit to me (which said Affidavit is by this reference incorporated herein for all purposes), and whereas I find that the verified facts stated by Affiant in said Affidavit show that the Affiant has probable cause for the belief [he/she] expresses therein and establishes the existence of proper grounds for the issuance of this Warrant.

NOW THEREFORE, you are commanded to enter upon [Address], \_\_\_\_\_ County, Texas and seize the structure located on this property by demolition.

NOW THEREFORE, you are ordered to execute this Warrant.

ISSUED THIS THE \_\_\_\_\_ day of \_\_\_\_\_, A.D., 200\_\_, at \_\_\_\_\_ o'clock \_\_.m. to certify which witness my hand this day.

\_\_\_\_\_  
Magistrate, \_\_\_\_\_ County, Texas



THE STATE OF TEXAS

§  
§  
§  
§

A PROPERTY LOCATED AT:  
[property address]

COUNTY OF \_\_\_\_\_

\_\_\_\_\_ COUNTY, TEXAS

**RETURN OF WARRANT**

The undersigned Affiant, being a peace officer of \_\_\_\_\_ County, State of Texas, on oath certifies that the foregoing warrant came to hand on the day it was issued and that it was executed on the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, by seizing the structure located at [Address], \_\_\_\_\_, \_\_\_\_\_ County, Texas by demolition.

\_\_\_\_\_  
[Affiant], [Title]

SUBSCRIBED AND SWORN TO BEFORE ME, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 200\_\_ at \_\_\_\_\_ o'clock \_\_.m. to certify which witness my hand and official seal.

\_\_\_\_\_  
Notary Public in and for the State of Texas

My Commission Expires:

\_\_\_\_\_

THE STATE OF TEXAS

§  
§  
§  
§

A PROPERTY LOCATED AT:  
[property address]

COUNTY OF \_\_\_\_\_

\_\_\_\_\_ COUNTY, TEXAS

**AFFIDAVIT OF INSPECTION**

BEFORE ME, the undersigned authority, this day personally appeared the undersigned affiant, a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

1. My name is [affiant]. I am a [title] for the [Department name], City of \_\_\_\_\_, \_\_\_\_\_ County, Texas.
2. On [Date], I reinspected the property located at [address] and found that the structure had not been demolished and no repairs had been made.
3. I affirm that this information is true and correct on this \_\_\_\_\_ day of \_\_\_\_\_, A.D., 200\_\_.

\_\_\_\_\_  
[Affiant], [Title]

Before me, [Name] subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

SUBSCRIBED AND SWORN TO BEFORE ME, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 200\_\_ at \_\_\_\_\_ o'clock \_\_\_\_m. to certify which witness my hand and official seal.

\_\_\_\_\_  
Notary Public in and for the State of Texas

My Commission Expires:

\_\_\_\_\_

THE STATE OF TEXAS

§  
§  
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§  
§

A SINGLE FAMILY RESIDENCE  
LOCATED AT:

COUNTY OF \_\_\_\_\_

\_\_\_\_\_,  
\_\_\_\_\_ COUNTY, TEXAS

**ADMINISTRATIVE SEARCH WARRANT**

THE STATE OF TEXAS to the Sheriff or any Peace Officer of \_\_\_\_\_ County, or the State of Texas, and/or Code Enforcement Official of the City of \_\_\_\_\_.

GREETINGS:

WHEREAS, the Affiant, whose signature is affixed to the Affidavit attached hereto (which said Affidavit is by this reference incorporated herein for all purposes), is a person duly authorized by law to make inspections of premises for the purpose of enforcing health, fire, or building regulations, statutes or ordinances, and did heretofore this day subscribe and swear to said Affidavit before me.

WHEREAS, I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the belief he expresses therein and establishes the existence of proper grounds for the issuance of this Warrant;

NOW, THEREFORE, you are hereby commanded to enter the location set forth in the Affidavit as the location of the single family dwelling premises located at \_\_\_\_\_, \_\_\_\_\_ County, Texas, said premises being described as \_\_\_\_\_ and search and inspect said premises to determine the existence of any violation of health, fire or building regulations, ordinances, or statutes.

WITNESS my signature on this the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 20\_\_ at \_\_\_\_\_ o'clock \_\_ .m.

\_\_\_\_\_  
MAGISTRATE, \_\_\_\_\_ COUNTY, TEXAS

**RETURN**

THE STATE OF TEXAS

§  
§  
§  
§  
§

A SINGLE FAMILY RESIDENCE  
LOCATED AT:

COUNTY OF \_\_\_\_\_

\_\_\_\_\_,  
\_\_\_\_\_ COUNTY, TEXAS

The undersigned Affiant, being a Peace Officer/Code Enforcement Official under the laws of Texas and being fully sworn, under oath certifies that it was executed on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, by making the search directed therein at the said premises to determine the existence of any violation of health, fire, or building regulations, ordinances or statutes.

\_\_\_\_\_  
AFFIANT

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS

**PROBABLE CAUSE AFFIDAVIT**

CAME UNTO me this day, \_\_\_\_\_, a person known to me and upon oath swears as follows:

“My name is \_\_\_\_\_. I am over the age of 18, have personal knowledge of the facts asserted below, and am competent to testify to those facts:

- give description of property, property owner and how you came by that information;
- give chronology of events;
- give reasons you believe inspection required;
- state what you are looking for and where you believe it may be found.

\_\_\_\_\_  
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, to certify which witness my hand and official seal.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS

\_\_\_\_\_  
(Print or Type Name)

My Commission Expires:  
\_\_\_\_\_

**CAUSE NUMBER (See Listed Citations)**

**THE STATE OF TEXAS** § **IN THE MUNICIPAL COURT**  
**VS.** § **CITY OF \_\_\_\_\_**  
\_\_\_\_\_ § \_\_\_\_\_ **COUNTY, TEXAS**

**DEFERRED DISPOSITION ORDER**

The court finds that \_\_\_\_\_, Defendant, having plead guilty/no contest to the following offenses on the following citations and that the punishment has been set at the indicated and corresponding fine amounts:

Citation No.	Fine Amount	Description of Offense
_____	_____	_____
_____	_____	_____

However, under the authority of Art. 45.54, Code of Criminal Procedure, the court orders that the imposition of the fine is suspended until the \_\_\_ **day of** \_\_\_\_\_, **200**\_\_.

**DEFERRAL PERIOD:** \_\_\_\_\_, **200**\_\_ **UNTIL** \_\_\_\_\_, **200**\_\_.

**CONDITIONS OF DEFERRED PROBATION**

1. Payment of the total amount \$ \_\_\_\_\_ must be paid on or before the first day of the deferred period.
2. Junked vehicle, L.P. \_\_\_\_\_ must be removed within thirty (30) days of commencement of deferred period. Failure of the Defendant to do so, the City may go on to the property and remove the junked vehicle without further court order.
3. If junked vehicle is removed and all terms and conditions satisfied, remaining citations will be dismissed after deferred period.
4. Failure to satisfy all terms and conditions set forth herein will cause the imposition of the remaining balance of the fines as follows:

Citation No.	Fine Amount	Description of Offense
_____	_____	_____
_____	_____	_____

5. Defendant shall NOT be subsequently convicted of any non-traffic, Class C misdemeanor of the same nature as the deferred offense during the above stated deferral period, regardless of final conviction date;

6. Defendant must obtain the final inspection of the [\_\_\_\_\_] which is the subject of the citations, on or before \_\_\_\_\_.
7. Defendant must permit code enforcement officers employed by the City to inspect \_\_\_\_\_ located at \_\_\_\_\_ for code enforcement violations upon demand from said code enforcement officers
8. Defendant must take the following further actions:  
\_\_\_\_\_  
\_\_\_\_\_.
9. \_\_\_\_\_ agrees and represents that he is the authorized representative for \_\_\_\_\_ and waives, on behalf of said limited partnership, any additional processes or challenges to deficiency of service upon said corporation, *if any*.
10. If Defendant successfully complies with the conditions of the agreement, then the pending offense(s) shall be DISMISSED by the court and shall NOT be reported as a final conviction. Failure to comply shall cause said offense(s) to be reported as a final conviction(s) as required by law.

**The Court further Orders** that if, at the conclusion of this deferral, Defendant presents satisfactory evidence of compliance with the conditions imposed, the complaint will be dismissed and a special expense fee of \$\_\_\_\_\_ will be imposed. This amount may not exceed the set fine.

**A COPY OF THIS ORDER WAS DELIVERED TO THE DEFENDANT ON THIS DATE.**

Agreed to and signed this the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Defendant's Signature

\_\_\_\_\_  
Municipal Court Judge  
City of \_\_\_\_\_

**Summons for Corporate Defendant**

**CAUSE NUMBER:** \_\_\_\_\_

**STATE OF TEXAS**

§

**IN THE MUNICIPAL COURT**

**VS.**

§

**CITY OF \_\_\_\_\_**

\_\_\_\_\_

§

**\_\_\_\_\_ COUNTY, TEXAS**

**TO ANY PEACE OFFICER OF THE STATE OF TEXAS – GREETINGS:**

**YOU ARE HEREBY COMMANDED TO SUMMON** Defendant \_\_\_\_\_ LLC, \_\_\_\_\_, \_\_\_\_\_, Texas 7\_\_\_\_\_, to appear before the Municipal Court of the City of \_\_\_\_\_, \_\_\_\_\_ County, Texas at or before 10:00 a.m. of the Monday next after the expiration of 20 days after it is served with summons, then and there to answer to the State of Texas by and through the City of \_\_\_\_\_ for a misdemeanor offense committed against the laws of the State of Texas (an ordinance of the said city), to wit: \_\_\_\_\_, of which offense he/she is accused by written complaint, under oath by \_\_\_\_\_:

*A defendant corporation or association appears through counsel Tex. Code of Criminal Procedure, art. 17A.07(a). Failure to appear in response to this summons, or an appearance but failure to plead, may result in the corporation being deemed to be present in person for all purposes; and the court shall enter a plea of not guilty in its behalf; and the court may proceed with trial, judgment and sentencing. Tex. Code of Criminal Procedure, art. 17A.07(b).*

**HEREIN FAIL NOT** but of this Writ make due return, showing how you have executed same.

**WITNESS** my official signature this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_\_.

\_\_\_\_\_  
(Magistrate) Judge, Municipal Court

City of \_\_\_\_\_

\_\_\_\_\_ County, Texas

**OFFICER’S RETURN**

Came to hand the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_\_, at \_\_\_\_\_ o’clock \_\_\_\_\_m., and executed the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_ at \_\_\_\_\_ o’clock \_\_\_\_\_m. by  Delivering a copy of this Summons, with a certified copy of the complaint to the Defendant, to a high managerial agent at any place where business of the association is conducted  Delivering a copy of this Summons, with a certified copy of the complaint, to any employee of suitable age and discretion at any place where business of the association is regularly conducted  Delivering a copy of this Summons, with a certified copy of the complaint, to any member of the association.

Address:

\_\_\_\_\_  
Peace Officer  
\_\_\_\_\_



# The Adjudication of Corporate Defendants in Municipal and Justice Court

Ryan Kellus Turner  
General Counsel  
TMCEC  
February 23, 2005  
*Reprinted with Permission*

## I. Texas Penal Code and General Principles of Criminal Responsibility of Corporations, Associations, Individuals, and Agents; Responsibility for Conduct of Another

### A. § 7.21. Definitions

In this subchapter:

- (1) "Agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association.
- (2) "High managerial agent" means:
  - (A) a partner in a partnership;
  - (B) an officer of a corporation or association;
  - (C) an agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.

### B. § 7.22. Criminal Responsibility of Corporation or Association

(a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment, the corporation or association is criminally responsible for an offense defined:

- (1) in this code where corporations and associations are made subject thereto;
- (2) by law other than this code in which a legislative purpose to impose criminal responsibility on corporations or associations plainly appears; or
- (3) by law other than this code for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations or associations plainly appears.

(b) A corporation or association is criminally responsible for a felony offense only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by:

- (1) a majority of the governing board acting in behalf of the corporation or association; or
- (2) a high managerial agent acting in behalf of the corporation or association and within the scope of his office or employment.

### Observations:

- The Texas Penal Code defines "Association" as a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest. See, Sec. 1.07(6).

“Corporation” includes nonprofit corporations, professional associations created pursuant to statute, and joint stock companies. See, Sec. 1.07(13).

- Few Texas cases have dealt with the corporate defendants. One of the most recent and most detailed is *Vaughn & Sons Inc. v. State* 737 S.W.2d 805 (Tex.Crim.App.1988) (holding that a corporation can commit criminal negligent homicide)

### **C. § 7.23. Criminal Responsibility of Person for Conduct in Behalf of Corporation or Association**

(a) An individual is criminally responsible for conduct that he performs in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf.

(b) An agent having primary responsibility for the discharge of a duty to act imposed by law on a corporation or association is criminally responsible for omission to discharge the duty to the same extent as if the duty were imposed by law directly on him.

(c) If an individual is convicted of conduct constituting an offense performed in the name of or on behalf of a corporation or association, he is subject to the sentence authorized by law for an individual convicted of the offense.

#### **Observations:**

- Statute imposing criminal liability on corporate agents, who fail to discharge duties imposed by law on corporation, if agent has "primary responsibility" for discharge of such duty, is not unconstitutionally vague. *Sabine Consol., Inc. v. State*, 816 S.W.2d 784 (Tex.App.-Austin 1999).
- The pursuit of administrative penalties against a corporation does not bar criminal prosecution of individual employees regardless if the prosecution stems from the same acts as committed by the corporation. *Ex parte Canady*, 140 S.W.3d 845 (Tex.App. 14<sup>th</sup> [Houston] 2004).

### **D. § 7.24. Defense to Criminal Responsibility of Corporation or Association**

It is an affirmative defense to prosecution of a corporation or association under Section 7.22(a)(1) or (a)(2) that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

#### **Observation: “ High managerial agent”**

In prosecution of corporation for criminally negligent homicide, trial court properly allowed jury to determine whether corporate employee was "high managerial agent" for purposes of applying affirmative defense that such an agent having supervisory responsibility over subject matter of offense employed due diligence to prevent its commission. *Vaughn & Son v. State*, 750 S.W.2d 17 (Tex.App. – Texarkana 1988).

## **II. Texas Criminal Procedure Relating to Summoning or Serving a Corporation or Association**

### **A. Art. 17A.01. Application and definitions**

(a) This chapter sets out some of the procedural rules applicable to the criminal responsibility of corporations and associations. Where not in conflict with this chapter, the other chapters of this code apply to corporations and associations.

(b) In this code, unless the context requires a different definition:

(1) "Agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association.

(2) "Association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest.

(3) "High managerial agent" means:

(A) an officer of a corporation or association;

(B) a partner in a partnership; or

(C) an agent of a corporation or association who has duties of such responsibility that his conduct may reasonably be assumed to represent the policy of the corporation or association.

(4) "Person," "he," and "him" include corporation and association.

#### **B. Art. 17A.02. Allegation of name**

(a) In alleging the name of a defendant corporation, it is sufficient to state in the complaint, indictment, or information the corporate name, or to state any name or designation by which the corporation is known or may be identified. It is not necessary to allege that the defendant was lawfully incorporated.

(b) In alleging the name of a defendant association it is sufficient to state in the complaint, indictment, or information the association's name, or to state any name or designation by which the association is known or may be identified, or to state the name or names of one or more members of the association, referring to the unnamed members as "others." It is not necessary to allege the legal form of the association.

#### **C. Art. 17A.03. Summoning corporation or association**

(a) When a complaint is filed or an indictment or information presented against a corporation or association, the court or clerk shall issue a summons to the corporation or association. The summons shall be in the same form as a *capias* except that:

(1) it shall summon the corporation or association to appear before the court named at the place stated in the summons; and

(2) it shall be accompanied by a certified copy of the complaint, indictment, or information; and

(3) it shall provide that the corporation or association appear before the court named at or before 10 a.m. of the Monday next after the expiration of 20 days after it is served with summons, except when service is made upon the secretary of state or the Commissioner of Insurance, in which instance the summons shall provide that the corporation or association appear before the court named at or before 10 a.m. of the Monday next after the expiration of 30 days after the secretary of state or the Commissioner of Insurance is served with summons.

(b) No individual may be arrested upon a complaint, indictment, information, judgment, or sentence against a corporation or association.

**Observation:** Because corporations and associations cannot be arrested, they are not entitled to expunction regardless of the outcome of the criminal case

#### **D. Art. 17A.04. Service on corporation**

(a) Except as provided in Paragraph (d) of this article, a peace officer shall serve a summons on a corporation by personally delivering a copy of it to the corporation's registered agent. However, if a registered agent has not been designated, or cannot with reasonable diligence be found at the registered office, then the peace officer shall serve the summons by personally delivering a copy of it to the president or a vice-president of the corporation.

(b) If the peace officer certifies on the return that he diligently but unsuccessfully attempted to effect service under Paragraph (a) of this article, or if the corporation is a foreign corporation that has no certificate of authority, then he shall serve the summons on the secretary of state by personally delivering a copy of it to him, or to the assistant secretary of state, or to any clerk in charge of the corporation department of his office. On receipt of the summons copy, the secretary of state shall immediately forward it by certified or registered mail, return receipt requested, addressed to the defendant corporation at its registered or principal office in the state or country under whose law it was incorporated.

(c) The secretary of state shall keep a permanent record of the date and time of receipt and his disposition of each summons served under Paragraph (b) of this article together with the return receipt.

(d) The method of service on a corporation regulated under the Insurance Code is governed by that code.

#### **E. Art. 17A.05. Service on association**

(a) Except as provided in Paragraph (b) of this article, a peace officer shall serve a summons on an association by personally delivering a copy of it:

(1) to a high managerial agent at any place where business of the association is regularly conducted; or

(2) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a high managerial agent, to any employee of suitable age and discretion at any place where business of the association is regularly conducted; or

(3) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a high managerial agent, or employee of suitable age and discretion, to any member of the association.

(b) The method of service on an association regulated under the Insurance Code is governed by that code.

### **III. Texas Criminal Procedure Relating to Appearance and Representation by Counsel**

#### **A. Art. 17A.06. Appearance**

(a) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a district or county-level court:

(1) appearance is for the purpose of arraignment;

(2) the corporation or association has 10 full days after the day the arraignment takes place and before the day the trial begins to file written pleadings.

(b) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a justice court or corporation court:

(1) appearance is for the purpose of entering a plea; and

(2) 10 full days must elapse after the day of appearance before the corporation or association may be tried.

#### **B. Art. 17A.07. Presence of corporation or association**

(a) A defendant corporation or association appears through counsel.

(b) If a corporation or association does not appear in response to summons, or appears but fails or refuses to plead:

(1) it is deemed to be present in person for all purposes; and

(2) the court shall enter a plea of not guilty in its behalf; and

(3) the court may proceed with trial, judgment, and sentencing.

(c) If, having appeared and entered a plea in response to summons, a corporation or association is absent without good cause at any time during later proceedings:

(1) it is deemed to be present in person for all purposes; and

(2) the court may proceed with trial, judgment, or sentencing.

#### **IV. Punishment, Notification, and Enforcement**

##### **A. Penal Code § 12.51. Authorized Punishments for Corporations and Associations**

(a) If a corporation or association is adjudged guilty of an offense that provides a penalty consisting of a fine only, a court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed the fine provided by the offense.

(b) If a corporation or association is adjudged guilty of an offense that provides a penalty including imprisonment, or that provides no specific penalty, a court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed:

(1) \$20,000 if the offense is a felony of any category;

(2) \$10,000 if the offense is a Class A or Class B misdemeanor;

(3) \$2,000 if the offense is a Class C misdemeanor; or

(4) \$50,000 if, as a result of an offense classified as a felony or Class A misdemeanor, an individual suffers serious bodily injury or death.

(c) In lieu of the fines authorized by Subsections (a), (b)(1), (b)(2), and (b)(4), if a court finds that the corporation or association gained money or property or caused personal injury or death, property damage, or other loss through the commission of a felony or Class A or Class B misdemeanor, the court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed double the amount gained or caused by the corporation or association to be lost or damaged, whichever is greater.

(d) In addition to any sentence that may be imposed by this section, a corporation or association that has been adjudged guilty of an offense may be ordered by the court to give notice of the conviction to any person the court deems appropriate.

(e) On conviction of a corporation or association, the court shall notify the attorney general of that fact.

##### **Observation:**

The fact that a corporation could not be imprisoned was a rational basis for imposing different standards of punishment for individuals and corporations for offense of illegally disposing of used oil on land, and thus, statute that only imposed fines for corporations committing the offense, but allowed imprisonment as well as fines as applied to individuals did not violate defendant's right to equal protection. *Tarlton v. State*, 93. S.W.3d 168 (Tex.App. 14<sup>th</sup> [Houston] 2002).

**B. Code of Criminal Procedure:**

**(1) Art. 17A.08. Probation**

The benefits of the adult probation laws shall not be available to corporations and associations.

**(2) Art. 17A.09. Notifying attorney general of corporation's conviction**

If a corporation is convicted of an offense, or if a high managerial agent is convicted of an offense committed in the conduct of the affairs of the corporation, the court shall notify the attorney general in writing of the conviction when it becomes final and unappealable. The notice shall include:

- (1) the corporation's name, and the name of the corporation's registered agent and the address of the registered office, or the high managerial agent's name and address, or both; and
- (2) certified copies of the judgment and sentence and of the complaint, information, or indictment on which the judgment and sentence were based.

**(3) Art. 43.01. Discharging judgment for fine**

(a) When the sentence against an individual defendant is for fine and costs, he shall be discharged from the same:

- (1) when the amount thereof has been fully paid;
- (2) when remitted by the proper authority;
- (3) when he has remained in custody for the time required by law to satisfy the amount thereof; or
- (4) when the defendant has discharged the amount of fines and costs in any other manner permitted by this code.

(b) When the sentence against a defendant corporation or association is for fine and costs, it shall be discharged from same:

- (1) when the amount thereof has been fully paid;
- (2) when the execution against the corporation or association has been fully satisfied; or
- (3) when the judgment has been fully satisfied in any other manner.

## ENDNOTES

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<sup>1</sup> Tex. Gov't. Code, § 29.003; Tex. Code Crim. Proc. art. 4.14.

<sup>2</sup> Tex. Local Gov't Code, § 54.001(b).

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

<sup>4</sup> Tex. Code Crim. Proc. art. 4.11.

<sup>5</sup> *Lewis v. State*, 598 S.W.2d 280 (Tex. Cr. App., 1980).

<sup>6</sup> *Thomas v. State*, 288 S.W.2d 791 (Tex. Cr. App., 1956).

<sup>7</sup> *Nored v. State*, 875 S.W.2d 392 (Tex. App. -- Dallas 1994, petition for discretionary review ref'd).

<sup>8</sup> *Frank v. Maryland*, 359 U.S. 360 (1959); *Eaton v. Price*, 364 U.S. 263 (\_\_\_\_). (overruled to the extent permits warrantless administrative searches by *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967).

<sup>9</sup> *Camara*, 387 U.S. 523, *infra*.

<sup>10</sup> *Id.* at 528-29.

<sup>11</sup> *See also See v. Seattle*, 387 U.S. 541 (1967)(constitutional challenge to regulatory techniques such as licensing programs which require inspections prior to operating business or marketing product must be resolved on a case by case basis – distinguishing business premises from private homes).

<sup>12</sup> *See v. Seattle*, 387 U.S. 541 (1967).

<sup>13</sup> Zelin, Judy E., *Propriety of state and local government health officer's warrantless search – post camara cases*, 53 A.L.R. 4<sup>th</sup> 1168.

<sup>14</sup> 578 F.2d 1002 (5<sup>th</sup> Cir. 1978).

<sup>15</sup> *Harkey v. de Wetter*, 443 F.2d 828 (5<sup>th</sup> Cir. 1971), *cert. denied*, 404 U.S. 858 (1971).

<sup>16</sup> 400 F.Supp. 894 (N.D. Tex. 2005).

<sup>17</sup> 635 S.W.2d 548 (Tex. Crim. App. 1982).

<sup>18</sup> *Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999), *rehearing en banc granted*, 200 F.3d 884 (5th Cir. 2000), *on rehearing*, 242 F.3d 642 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 47 (2001).

<sup>19</sup> *Freeman*, 242 F.3d at 653.

<sup>20</sup> Four judges dissented. Three found only a warrant requirement, while the fourth (who wrote the dissent) thought that the process provided by the City was insufficient in and of itself.

<sup>21</sup> Tex. Code Crim. Proc. art. 18.05. *See State v. Haley*, 811 S.W.2d 597 (Tex. Cr. App., 1991); *Haley v. State*, 811 S.W.2d 600 (Tex. Cr. App., 1991).

<sup>22</sup> Tex. Code Crim. Proc. § 18.05(a).

<sup>23</sup> S.B. 3558, 80<sup>th</sup> Legislature (2007).

<sup>24</sup> Tex. Code Crim. Proc. § 18.05(b).

<sup>25</sup> Tex. Code Crim. Proc. § 18.05(c).

<sup>26</sup> Tex. Code Crim. Proc. 18.05(d).

<sup>27</sup> MW-228 (1980).

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<sup>28</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)(evidence of criminal activity discovered during course of valid administrative search warrant may be seized under ‘plain view’ doctrine.

<sup>29</sup> Tex. Code Crim. Pro. Art 45.023.

<sup>30</sup> Tex. Code Crim. Pro., art. 45.022.

<sup>31</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>32</sup> *Id.*

<sup>33</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>34</sup> This may well be a clarification in that the current Section 214.001(p) provides that a hearing may be held by a civil municipal court without distinguishing between a court of record and a court of no record.

<sup>35</sup> Section 54.043 provided for civil adjudicative processes without the detail provided by the new legislation.

<sup>36</sup> There is no distinction made between a municipal court of record and a municipal court of no record.

<sup>37</sup> It is likely this notice should be formatted as a notice of violation, outlining the nature of the violation, referencing the statute or ordinance, and providing the requisite right to a hearing, date and time information.

<sup>38</sup> While this might pass constitutional muster in the administrative proceeding, it would not in a criminal prosecution.

<sup>39</sup> The ordinance should specify when an order is filed for purposes of an appeal, generally recommended to be a notation placed on the order itself, as well as designating an agency for purposes of posting a bond. The statute does not specify the requisite amount of the bond for purposes of staying collection on the judgment; however, under generally civil principles, the amount of the judgment is generally sufficient.

<sup>40</sup> See TEX. CONST. Art. XI, § 5. See also Tex. Local Gov’t Code, § 51.072 (has full power of local self government).

<sup>41</sup> *Wilson v. Andrews*, 10 S.W.3d 663 (Tex. 1999).

<sup>42</sup> TEX. CONST. Art. XI § 4.

<sup>43</sup> See generally Tex. Local Gov’t Code, Chapter 5, Organization of Municipal Government and Chapters 6 and 22 (Type A), Chapters 7 and 23 (Type B) and Chapters 8 and 24 (Type C).

<sup>44</sup> See generally Tex. Local Gov’t Code, §§ 51.011, 51.032 and 51.051(governing body may adopt ordinance, not inconsistent with state law, deemed proper for municipal government).

<sup>45</sup> Tex. Local Gov’t Code, § 51.001 (West 1999).

<sup>46</sup> Tex. Local Gov’t Code, § 54.001 (West 1999).

<sup>47</sup> See Tex. Local Gov’t Code, § 54.002 (West 1999).

<sup>48</sup> Tex. Local Gov’t Code, § 54.003 (West 1999). This provision, if enforced, may implicate the separation of powers doctrine.

<sup>49</sup> See HB 2270.

<sup>50</sup> *Ex Parte Farley*, 144 S.W. 530 (Tex. Crim. App. 1912); *Ex Parte Goldberg*, 200 S.W. 386, 387 (Tex. Crim. App. 1918).



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<sup>51</sup> Tex. Penal Code, § 6.02(c)(West 1994)(emphasis added).

<sup>52</sup> See generally Tex. Local Government Code, Chapter 52.

<sup>53</sup> Tex. Local Government Code, § 51.003 (West Supp. 2001). *Texas River Barges v. City of San Antonio*, 21 S.W.3d 347 (Tex. Civ. App. – San Antonio 2000, rehearing overruled, and review denied, and reh'g of petition for review denied).

<sup>54</sup> *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any set of facts either known or which could be reasonably assumed affords support for it).

<sup>55</sup> *Brewster v. City of Dallas*, 703 F.Supp. 1260, 1263-64 (N.D. Tex. 1988) (emphasis in original); see also *Price v. City of Junction*, 711 F.2d 582 (5th Cir. 1983) (if reasonable minds may differ as to whether ordinance has substantial relationship to general health, safety and welfare, an issuable fact exists and the ordinance must stand).

<sup>56</sup> *Haynes v. City of Abilene*, 659 S.W.2d 638 (Tex. 1983).

<sup>57</sup> *City of Pharr v. Tippitt*, 616 S.W.2d 173 (Tex. 1981).

<sup>58</sup> Tex. Penal Code, § 1.08 (West 1994).

<sup>59</sup> *Fair v. City of Galveston*, 915 F. Supp. 873 (S.D. Tex.), *aff'd*, 100 F.3d 953 (5<sup>th</sup> Cir 1996).

<sup>60</sup> *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17 (Tex. 1990).

<sup>61</sup> Tex. Att'y Gen. Op. No. JC-0048 (1999).

<sup>62</sup> Tex. Att'y Gen. Op. No. DM-343 (1995).

<sup>63</sup> Tex. Att'y Gen. Op. No. JM-1278 (1990).

<sup>64</sup> See *Dallas Merchant's & Concessionaire's Assn v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993).

<sup>65</sup> Tex. Att'y Gen. Op. No. GA-0110

<sup>66</sup> Tex. Att'y Gen. Op. No. LO-09-093.

<sup>67</sup> *Freeport v. Vandergriff*, 28 S.W.3d 680 (Tex.App.—Corpus Christi 2000, review denied).

<sup>68</sup> Tex. Att'y Gen. Op. No. DM-433 (1997).

<sup>69</sup> Art. 4447bb is repealed effective June 1, 2003 and regulations associated with code enforcement may be found in Chapter 1952 of the Texas Occupations Code and in 25 TAC 130.

<sup>70</sup> Tex. Occupations Code, §1952.101 (2003).

<sup>71</sup> Tex. Occupations Code, §1952.002 (2003).

<sup>72</sup> Tex. Occupations Code, §1952.001(3) (2003).

<sup>73</sup> Tex. Occupations Code, §1952.001(2)(2003).

<sup>74</sup> Tex. Occupations Code, §1952.102 (2003).

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<sup>75</sup> Tex. Occupations Code, §1952.105 (2003) and 25 TAC §130.20.

<sup>76</sup> Tex. Occupations Code, §1952.103 (2003).

<sup>77</sup> *Id.*

<sup>78</sup> Tex. Occupations Code, §1952.003

<sup>79</sup> As an aside, TML has never supported the idea that code enforcement officers could issue citations upon which warrants could issue. Warrants for code citations should not be issued on failure to appear on the citation; rather, warrants should be issued based upon failure to appear on court summons.

<sup>80</sup> Tex. Occupations Code, §1952.201 (2003).

<sup>81</sup> *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998).

<sup>82</sup> Tex. Local Gov't Code, § 217.002.

<sup>83</sup> Tex. Local Gov't Code, § 217.022.

<sup>84</sup> Tex. Local Gov't Code, § 217.042.

<sup>85</sup> Tex. Atty. Gen. Opinion No. JC-0025 (1999).

<sup>86</sup> Tex. Local Gov't Code § 51.051.

<sup>87</sup> *Hart v. City of Dallas*, 565 S.W.2d 373 (Tex. Civ. App. -- Tyler 1978, no writ).

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

<sup>89</sup> *PPC Enters., Inc. v. Texas City, Texas*, 76 F.Supp. 2d 750, 756-757 (S.D. Tex. 1999).

<sup>90</sup> TEX. LOCAL GOV'T CODE, § 214.001 (West Supp. 2001).

<sup>91</sup> *Id.*

<sup>92</sup> *See* HB 2270.

<sup>93</sup> *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 780 (Tex.Civ.App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

<sup>94</sup> *Ex Parte Harris*, 261 S.W.2d 1050 (Tex.Crim.App. 1924); *King v. Guerra*, 1 S.W.2d 373, 375 (Tex.Civ.App.-San Antonio 1927, writ dism'd); *Sitterle v. Victoria Cold Storage Co.*, 33 S.W.2d 546, 550 (Tex.Civ.App.-San Antonio 1930, writ dism'd).

<sup>95</sup> Chapter 211, Texas Local Gov't Code.

<sup>96</sup> Tex. Local Gov't Code, § 211.001.

<sup>97</sup> Tex. Local Gov't Code, § 211.003.

<sup>98</sup> HB 1207, adding Section 211.016, to the Texas Local Government Code.

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

<sup>100</sup> *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972), *app. dism'd*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1973); *Town of Highland Village v. Marshall*, 235 S.W.2d 658, 662-63 (Tex. Civ. App. -- Dallas

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1950, writ ref'd n.r.e.) (the use of a garage apartment pre-dated the zoning ordinance; therefore, although the garage apartment violated the single-family district regulations, the privileged status or exemption applied).

<sup>101</sup> See generally *Silsbee v. Herron*, 484 S.W.2d 154 (Tex. Civ. App. -- Beaumont 1972, writ ref'd n.r.e.).

<sup>102</sup> *Eckert v. Jacobs*, 142 S.W.2d 374, 378 (Tex. Civ. App. -- Austin 1940, no writ).

<sup>103</sup> *Murmur Corp. v. Board of Adjustment, City of Dallas*, 718 S.W.2d 790, 795-97 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.).

<sup>104</sup> *Neighborhood Comm. on Lead Pollution v. Board of Adjustment, City of Dallas*, 728 S.W.2d 64, 70 (Tex. App. -- Dallas 1987, writ ref'd n.r.e.)

<sup>105</sup> *Board of Adjustment, City of Dallas v. Winkles*, 832 S.W.2d 803, 807 (Tex. App. -- Dallas 1992, writ denied).

<sup>106</sup> *Winkles*, 832 S.W.2d at 806.

<sup>107</sup> *Benners*, 485 S.W.2d at 778; *White v. Dallas*, 517 S.W.2d 344 (Tex. Civ. App. -- Dallas 1974, no writ)

(termination of wrecking yard within one year not unreasonable or arbitrary); See also *Fifley, supra*.

<sup>108</sup> *City of Garland v. Valley Oil Co.*, 482 S.W.2d 342, 346 (Tex. Civ. App. -- Dallas 1972, writ ref'd n.r.e.), *cert. denied*, 411 U.S. 933 (1973).

<sup>109</sup> *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 735 (Tex. Civ. App. -- Dallas 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 277, *reh'g denied*, 397 U.S. 977 (1970) (twenty-five years sufficient for amortization and discontinuance of nonconforming uses). In *Benners*, the court held that termination of nonconforming uses is not a "taking in the eminent domain sense"; rather it is a legitimate exercise of the police power. 485 S.W.2d at 777-78. The court upheld the constitutionality of a twenty-five year amortization provision terminating pre-existing nonconforming uses. See also *Valley Oil Co.*, 482 S.W.2d at 345-46 (ordinance requiring owner of property to discontinue use as gasoline station within one year not unreasonable and arbitrary given the equipment was removable and could be used at other stations and the owner had recouped the initial investment).

<sup>110</sup> *Id.* at 284; *Turcuit v. City of Galveston*, 658 S.W.2d 832, 834 (Tex. App. -- Houston [1st Dist.] 1983, no writ) (discontinued use for 6 months not abandonment).

<sup>111</sup> *Marshall*, 235 S.W.2d at 664 (citations omitted).

<sup>112</sup> *Board of Adjustment, City of San Antonio v. Nelson*, 577 S.W.2d 783 (Tex. Civ. App. -- San Antonio 1979, writ ref'd n.r.e.).

<sup>113</sup> Chapter 212 Texas Local Gov't Code.

<sup>114</sup> Tex. Local Gov't Code § 212.002.

<sup>115</sup> Tex. Local Gov't Code, §212.003.

<sup>116</sup> Section 216.003, Tex. Local Gov't Code.

<sup>117</sup> Tex. Local Gov't Code, §§216.003 and 216.010.

<sup>118</sup> Tex. Local Gov't Code, § 216.005.

<sup>119</sup> Tex. Local Gov't Code, § 216.004.

<sup>120</sup> Tex. Local Gov't Code, § 216.013.

<sup>121</sup> SB 656.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

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<sup>126</sup> *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 939 (Tex.Civ.App.–Amarillo 1978, writ ref'd n.r.e.), cert. denied, 444 U.S. 833 (1979).

<sup>127</sup> *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1516-17 (1993).

<sup>128</sup> See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>129</sup> HB 212, relative to Section 216.903 of the Texas Local Government Code.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Tex. Local Gov't Code, § 215.031.

<sup>133</sup> See e.g. *International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas*, 689 F.2d 541 (5<sup>th</sup> Cir. 1982).

<sup>134</sup> *Id.*

<sup>135</sup> . See, e.g., *Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*, 743 F.2d 182 (3d Cir. 1984) (ordinance prohibiting solicitation after 5 p.m. constitutional); *Westfall v. Board of Commissioners of Clayton County*, 477 F. Supp. 862 (N.D. Ga. 1979) (ordinance prohibiting solicitation after 6 p.m. constitutional); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986) (ordinance prohibiting solicitation after 5 p.m. not a valid time, place, and manner restriction); *ACORN v. City of Frontenac*, 714 F.2d 813 (8th Cir. 1983) (ordinance prohibiting solicitation after 6:00 p.m. not sufficiently tailored to avoid conflict with First Amendment); *Citizens for a Better Environment v. Village of Olympia*, 511 F. Supp. 104 (E.D. Ill. 1980) (ordinances prohibiting solicitation after 5:00 p.m. and/or after sunset void); *Conn. Citizens Action Group v. Town of Southington*, 508 F.Supp. 43 (D. Conn. 1980) (ordinance prohibiting solicitation after 6:00 p.m. unreasonable burden on free speech rights).

<sup>136</sup> See generally, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S.Ct. 2080 (2002)(Court held that a permit requirement for canvassers who distributed handbills or pamphlets promoting any cause was unconstitutional as applied to non-commercial speech).

<sup>137</sup> Tex. Local Gov't Code, § 215.001.

<sup>138</sup> Tex. Local Gov't Code, § 215.004.

<sup>139</sup> Tex. Local Gov't Code, § 215.026.

<sup>140</sup> Tex. Local Gov't Code, § 215.025.

<sup>141</sup> Tex. Transp. Code, § 681.009 and Article 9102 Section 5(i), Revised Statutes.

<sup>142</sup> HB 1773 may affect junked vehicle ordinances by permitting municipalities from providing a more inclusive definition of junked vehicle subject to regulation.

<sup>143</sup> SB 350, 80<sup>th</sup> Legislature.

<sup>144</sup> Tex. Transp. Code, § 683.071.

<sup>145</sup> HB 1773, creating a new Section 683.0711.

<sup>146</sup> Tex. Att'y Gen. Op. GA-0034 (March 13, 2003).

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<sup>147</sup> *Id.*

<sup>148</sup> Tex. Transp. Code, § 683.073.

<sup>149</sup> Tex. Transp. Code, § 673.072.

<sup>150</sup> Tex. Transp. Code, § 683.077.

<sup>151</sup> Tex. Transp. Code, § 683.073(b).

<sup>152</sup> Tex. Transp. Code, § 680.073(c).

<sup>153</sup> S.B. 351, 80<sup>th</sup> Legislature

<sup>154</sup> Tex. Transp. Code, § 683.075.

<sup>155</sup> Tex. Transp. Code, § 683.076.

<sup>156</sup> Tex. Transp Code, § 683.074(e).

<sup>157</sup> Tex. Transp. Code § 683.074(d).

<sup>158</sup> Tex. Transp. Code, § 683.076(c).

<sup>159</sup> Tex. Health & Safety Code, § 342.001.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Tex. Health & Safety Code, § 342.004.

<sup>163</sup> Tex. Health & Safety Code, § 342.008.

<sup>164</sup> Tex. Health & Safety Code, § 342.003.

<sup>165</sup> McKinney Code, § 20-63(a)

<sup>166</sup> McKinney Code, § 20-63(a)

<sup>167</sup> *Id.*

<sup>168</sup> McKinney Code, § 20-62(a)

<sup>169</sup> McKinney Code, § 20-62(b)

<sup>170</sup> McKinney Code, § 20-65

<sup>171</sup> McKinney Code, § 20-65; *See* Tex. Health & Safety Code, § 342.006(b) and (d)(allows for personal delivery and posting of notice on property regardless of whether there is a building on the property.).

<sup>172</sup> Tex. Health & Safety Code, § 342.006(c).

<sup>173</sup> *Id.*

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<sup>174</sup> Tex. Health & Safety Code, § 342.006(b).

<sup>175</sup> Id.

<sup>176</sup> Tex. Transp. Code, § 683.0765; Section 54.043 also provided for civil adjudicative processes.

<sup>177</sup> There is no distinction made between a municipal court of record and a municipal court of no record.

<sup>178</sup> It is likely this notice should be formatted as a notice of violation, outlining the nature of the violation, referencing the statute or ordinance, and providing the requisite right to a hearing, date and time information.

<sup>179</sup> While this might pass constitutional muster in the administrative proceeding, it would not in a criminal prosecution.

<sup>180</sup> Issue: Would this then require a separate Chapter 54 proceeding.

<sup>181</sup> This is novel in that appeals from administrative officer's decisions generally go before the Zoning Board of Adjustment.

<sup>182</sup> The ordinance should specify when an order is filed for purposes of an appeal, generally recommended to be a notation placed on the order itself, as well as designating an agency for purposes of posting a bond. The statute does not specify the requisite amount of the bond for purposes of staying collection on the judgment; however, under generally civil principles, the amount of the judgment is generally sufficient.

<sup>183</sup> Tex. Local Gov't Code, § 54.005.

<sup>184</sup> Tex. Local Gov't Code, § 54.005(a).

<sup>185</sup> Tex. Local Gov't Code, § 54.005(b).

<sup>186</sup> Tex. Local Gov't Code, § 54.005(c).

<sup>187</sup> Tex. Local Gov't Code, § 54.005(d).

<sup>188</sup> Tex. Local Gov't Code, § 54.005(e)(1-2).

<sup>189</sup> Tex. Local Gov't Code, § 54.005(f).

<sup>190</sup> *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998).

<sup>191</sup> *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994); *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969); *City of Richardson v. Kaplan*, 438 S.W.2d 366 (Tex. 1969); *State v. Shoppers World, Inc.*, 380 S.W.2d 107, 110 (Tex. 1964); *Grothues v. City of Helotes*, 928 S.W.2d 725, 728 n.3 (Tex.App.-San Antonio, 1996, no writ); *Hang On III, Inc. v. Gregg County*, 893 S.W.2d 724, 726 (Tex.App.-Texarkana 1995, writ dismissed by agr.); *Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 489 (Tex.App.-Houston [1st Dist.] 1993, writ denied); *Smith v. Copeland*, 787 S.W.2d 420, 421 (Tex.App.-San Antonio 1990, no writ); *City of Houston v. MEF Enterprises, Inc.*, 730 S.W.2d 62, 63 (Tex.App.-Houston [14th Dist.] 1987, no writ); *City of Houston v. Cascades, Inc.*, 730 S.W.2d 59, 61 (Tex.App.-Houston [14th Dist.] 1987, writ dismissed); *City of Houston v. Cascades, Inc.*, 730 S.W.2d 59, 61 (Tex.App.-Houston [14th Dist.] 1987, no writ); *Air Curtain Destructor Corp. v. City of Austin*, 675 S.W.2d 615, 617 (Tex.App.-Tyler 1984, writ refused n.r.e.); *City of Hutchins v. Jenkins*, 628 S.W.2d 492, 493 (Tex.App.-Texarkana 1982, no writ); *City of San Antonio v. Bee-Jay Enterprises, Inc.*, 626 S.W.2d 802, 804 (Tex.App.-San Antonio 1981, no writ); *City of Dallas v. Dallas County Housemovers Ass'n*, 555 S.W.2d 212, 214 (Tex.Civ.App.-Dallas 1977, no writ); *City of Dallas v. Rogers*, 257 S.W.2d 117, 122 (Tex.Civ.App.-Dallas 1953, mand. overr.).

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<sup>192</sup> Tex. Civ. Prac. & Rem. Code 37.006(b). *See also Estate of Ross*, 672 S.W.2d 315, 317 (Tex.App.-Eastland 1984, writ ref'd n.r.e.) (when a litigant alleges and seeks a declaration that a state statute is unconstitutional, the Attorney General must be served with a copy of the proceedings and is entitled to be heard); *Commissioners Court of Harris County v. Peoples Nat'l Util. Co.*, 538 S.W.2d 228, 229 (Tex.Civ.App.-Houston [14th Dist.] 1976, writ ref'd n.r.e.) (failure to serve Attorney General with notice of action divests trial court of jurisdiction over the suit).

<sup>193</sup> *See Peoples Nat'l Util. Co.*, 538 S.W.2d at 229; *Travis Heights Improvement Ass'n v. Sewell*, 662 S.W.2d 406, 413 (Tex.App.-Austin 1986, no writ).

<sup>194</sup> *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-8 (1984).

<sup>195</sup> *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982).

<sup>196</sup> *Bingham's Trust v. Commissioner of Internal Revenue*, 325 U.S. 365, 371 (1945).

<sup>197</sup> *United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>198</sup> *Eide v. Sarasota County*, 908 F.2d 716, 723 (11th Cir. 1990) (citing *Weissman v. Fruchtmann*, 700 F.Supp. 746, 753 (S.D.N.Y. 1988)).

<sup>199</sup> *Id.* at 724 n.14 (emphasis in original).

<sup>200</sup> *See, e.g., Reno v. Flores*, 507 U.S. 292, 302-05 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039 (5th Cir. 1980), *rev'd in part on other grounds*, 455 U.S. 283 (1982).

<sup>201</sup> *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). *See also, Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998), *cert. denied*, \_\_\_ U.S. \_\_\_, 119 S.Ct. 2018 (1999).

<sup>202</sup> *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996); *Mayhew*, 964 S.W.2d at 938.

<sup>203</sup> *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955).

<sup>204</sup> *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *FM Properties*, 93 F.3d at 175; *Mayhew*, 964 S.W.2d at 938.

<sup>205</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984).

<sup>206</sup> *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>207</sup> *Id.*; *See also, Samuel v. Holmes*, 138 F.3d 173, 176 (5th Cir. 1998).

<sup>208</sup> *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 476-77 (1985).

<sup>209</sup> *Martin v. Memorial Hosp. at Gulfport*, 130 F.3d 1143, 1149 (5th Cir. 1997).

<sup>210</sup> *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mayhew*, 964 S.W.2d at 939.

<sup>211</sup> *Development in the Law - Zoning*, 91 Harv. L. Rev. 1427, 1508 (1978) (emphasis added). *See also, Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 167 (1951) ("[W]hen decisions of administrative officials in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution").

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<sup>212</sup> See *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1074-76 (5th Cir. 1989); *Couf v. DeBlaker*, 652 F.2d 585, 590 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

<sup>213</sup> *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

<sup>214</sup> *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>215</sup> *United States Railroad Retirement Bd.*, 449 U.S. at 174; *Dukes*, 427 U.S. at 303

<sup>216</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

<sup>217</sup> See *Cleburne Living Center*, 473 U.S. at 441; *Mayhew*, 964 S.W.2d at 939.

<sup>218</sup> *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance*, 440 U.S. at 97).

<sup>219</sup> *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1089 (5th Cir. 1992).

<sup>220</sup> *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991); *Mayhew*, 964 S.W.2d at 939.

<sup>221</sup> *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (citations omitted).

<sup>222</sup> *Beach Communications*, 508 U.S. at 314-15; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

<sup>223</sup> *Id.* at 315.

<sup>224</sup> *Id.*

<sup>225</sup> *Pro-Eco*, 57 F.3d at 515. See also, *New York City Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 533 (S.D. N.Y. 1995) (“A law will not fail to pass constitutional muster under equal protection merely because it contains classifications which are underinclusive – that is, which ‘do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end.’”) (quoting L. Tribe, *American Constitutional Law* § 6-14 at 1447 (1988)).

<sup>226</sup> Tex. Gov’t Code, Chapter 2007.

<sup>227</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

<sup>228</sup> *Agins*, 447 U.S. at 260.

<sup>229</sup> *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962)

<sup>230</sup> See *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (restriction that devalued property by approximately 90%, from \$800,000 to \$60,000, upheld); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 384 (1926) (zoning regulation sustained even though the restriction reduced the value of the property by 75%); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (reduction in value from \$495,600 to \$52,000 held not a taking); *Pompa Constr. Corp. v. Saratoga Springs*, 706 F.2d 418, 420 n.2 (2d Cir. 1983) (use restriction which devalued property by approximately 77% was not a taking). *Penn Central*, 438 U.S. at 131.

<sup>231</sup> *Id.*



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<sup>232</sup> *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976) (citations omitted).

<sup>233</sup> *See also, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 638 F. Supp. 126, 134 (D. Nev. 1986) ("A zoning regulation is not made invalid merely because of loss of value to the property affected, even if that loss is substantial").

<sup>234</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080-82 (5th Cir. 1989); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 677 (3d Cir. 1991); *Pace Resources*, 808 F.2d at 1031.

<sup>235</sup> *See Agins*, 447 U.S. at 262-63.

<sup>236</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>237</sup> *supra*

<sup>238</sup> In *Mayhew*, the Court assumed, without deciding, that the state and federal guarantees in respect to land use constitutional claims were coextensive, and the Court analyzed all of the *Mayhew* plaintiffs' claims under federal standards. In that case, however, the plaintiffs asserted both state and federal claims, and all parties to that litigation agreed that the federal analysis was appropriate to resolve the state constitutional claims. *Id.* at 932.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 934.

<sup>241</sup> *Id.* at 935.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 936.

<sup>246</sup> *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973). *See also Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986).

<sup>247</sup> *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Shelton v. City of College Station*, 780 F.2d 475, 479-80 (5th Cir.) (*en banc*), *cert. denied*, 477 U.S. 905 (1986).

<sup>248</sup> *See Shelton*, 780 F.2d at 480.

<sup>249</sup> *Id.* at 480.

<sup>250</sup> *Id.* at 481-82 (citations omitted).

<sup>251</sup> *Id.* 780 F.2d at 483.

<sup>252</sup> *Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999), *rehearing en banc granted*, 200 F.3d 884 (5th Cir. 2000), *on rehearing*, 242 F.3d 642 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 47 (2001).

<sup>253</sup> *Freeman*, 242 F.3d at 653.

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<sup>254</sup>Four judges dissented. Three found only a warrant requirement, while the fourth (who wrote the dissent) thought that the process provided by the City was insufficient in and of itself.

<sup>255</sup> See generally *Kaczmarek v. State*, 986 S.W.2d 287 (Tex. Civ. App.-- Waco 1999).

<sup>256</sup> *Pollard v. State*, 687 S.W.2d 373 (Tex. App.—Dallas 1985, review ref'd).

<sup>257</sup> *Stansberry v. Holmes*, 613 F.2d 1285 (5th Cir.), *reh'g denied* 616 F.2d 568, *cert denied* 449 U.S. 886 (1980)

<sup>258</sup> *Id.*

<sup>259</sup> *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268, *reh'g denied* 841 F.2d 107, *cert. denied sub nom M.E.F. Enters, Inc. v. City of Houston*, 489 U.S. 1052 (1989).

<sup>260</sup> *Howard v. State*, 617 S.W.2d 191 (Tex. Crim. App. 1979).

<sup>261</sup> *Lear v. State*, 753 S.W.2d 737 (Tex. App.—Austin 1988 no writ).