

2017  
SHORT ANSWERS TO  
COMMON QUESTIONS

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# Short Answers to Common Questions

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# BINGO, RAFFLES, GAMING ROOMS AND OTHER GAMBLING ISSUES UNDER TEXAS LAW

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The  symbol indicates sections that have been updated since the previous publication.

## Introduction

This publication addresses certain of the exceptions to the general prohibition against gambling set out in Chapter 47 of the Texas Penal Code, including game rooms, charitable raffles, local option bingo, and pari-mutuel wagering on horse and dog racing as authorized under the Texas Racing Act.

## GENERAL

### 1. Is gambling generally legal in Texas?

Article III, Section 47(a) of the Texas Constitution requires the Legislature to pass laws prohibiting “lotteries and gift enterprises.” Section 47.02 of the Penal Code provides that a person commits an offense if he or she makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest, makes a bet on the result of a political nomination, appointment, or election or the success of a nominee, appointee, or candidate, or plays or bets for money or another thing of value at any game played with cards, dice, balls, or any other gambling device. A violation of Section 47.02 is a Class C misdemeanor.

### 2. What are exceptions to this general rule?

Under Section 47.02(b) of the Penal Code, it is a defense to prosecution that the actor engaged in gambling in a private place, no person received any economic benefit other than personal winnings, and except for the advantage of skill or luck, the risks of losing

or winning were equal for all participants. It is also a defense that the person played for something other than money using an electronic, electromechanical or magnetic contrivance excluded from the definition of a gambling device.

### **3. What is a “bet” under Texas law?**

As defined in Section 47.01(1) of the Penal Code, a bet is an agreement to win or lose something of value solely or partially by chance. A bet does not include contracts of indemnity or guaranty, or life, health, property or accident insurance, nor does a bet include an offer of a prize, award, or compensation to the contestants in a bona fide contest for the determination of skill, speed, strength, or endurance.

## **FANTASY SPORTS**

Fantasy sports have grown from the familiar league organized in an office or among friends to an industry of online daily fantasy sports leagues awarding huge cash prizes to players. As fantasy sports have become commercialized, questions have arisen as to whether they violate state gaming prohibitions.

### **1. What are fantasy sports?**

Fantasy sports “allow individuals to simulate being a sports team owner or manager. Generally, an individual assembles a team, or lineup, often under a salary limit or budget, comprising actual players from the various teams in the particular sports league, i.e., National Football League, National Basketball League, or National Hockey League. Points are garnered for the individual’s “team” based on the actual game performance of the selected player’s performance in the game where actual performance statistics or measures are transformed into fantasy points. Each participant owner competes against other owners in the fantasy league.” KP-0057 at pg. 1-2.

### **2. Are fantasy sports permissible under Texas law?**

It depends. In a recent opinion, the attorney general made a distinction between paid daily fantasy sports leagues and traditional fantasy sports leagues. The opinion suggests paid daily fantasy sports leagues would likely be determined to be illegal gambling under Texas law because they constitute betting on the performance of a participant in a game as opposed to being a contest of skill. Because the organizing gaming site takes a portion of the money collected from players as a fee, the defense to prosecution for illegal gambling that no person received a benefit other than personal

winnings is not available. In contrast, in traditional fantasy sports leagues, the organizer or “commissioner” might not take a fee from the collected money. If so, the above defense to prosecution may be available. KP-0057 (2016).

## **GAME ROOMS**

There is no general prohibition against game rooms in Texas, so long as they do not have illegal gambling devices as defined in Section 47.01(4) of the Penal Code. The Legislature has carved out the so-called “fuzzy animal exception” exception to the definition of gambling device for electronic, electromechanical, or mechanical contrivances designed, made, or adapted solely for amusement purposes if players are rewarded exclusively with non-cash merchandise prizes, toys, or novelties that have a wholesale value available from a single play of not more than 10 times the amount charged to play the game or \$5, whichever is less. Tex. Penal Code §47.01(4)(B). Many game room establishments purport to operate under this “fuzzy animal” exception.

### **1. What is a game room?**

A game room is a for-profit business located in a building or place that contains six or more amusement redemption machines or electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made or adopted solely for bona fide amusement purposes.<sup>1</sup> The game rooms often feature eight liner machines which have the appearance of electronic slot machines.

### **2. What is an eight liner machine?**

An “eight liner machine” is an “electronic device, resembling a slot machine, on which a person wins by matching symbols in one of eight lines—three horizontal, three vertical, and two diagonal.” Tex. Att’y Gen. Op. No. GA-0527 (2007).

### **3. May a commissioners court regulate game rooms within the county?**

Only certain counties under current law may regulate game rooms. The Texas Legislature has granted this authority to: (1) a county that has a population of four million or more (Harris); (2) a county with a population of less than 25,000 adjacent to

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<sup>1</sup> Section 234.131 of the Local Government Code



the Gulf of Mexico and within 50 miles of an international border (Willacy); (3) a county that is adjacent to a county with a population of four million or more and to the Gulf of Mexico (Brazoria, Galveston, and Chambers); (4) a county located on the Mexico border with a population less than 300,000 containing a municipality with a population of 200,000 or more (Webb); and (5) a county with a population of 550,000 or more and adjacent to a county with a population of four million or more (Fort Bend); (6) a county that is located in the Permian Basin within 25 miles of this state's border with another state of the United States and has a population of more than 130,000 (Ector); (7) a county that is located on this state's border with Louisiana, has a population of more than 65,000, and is within 50 miles of a municipality in Louisiana with a population of more than 150,000 (Harrison); (8) a county that has a population of more than 200,000 and less than 220,000 (Hays); and (9) a county that has a population of more than 1.8 million and that is adjacent to a county with a population of more than 2.2 million (Tarrant). Local Gov't Code §234.132.<sup>2</sup>

The counties which have been authorized to regulate game rooms may restrict their locations to specified areas of the county, prohibit locations within a distance prescribed by the commissioners court to a school, place of worship, or residential neighborhood, or restrict the number of game rooms that may operate within a specified area of the county. Local Gov't Code §234.133.

**4. May a county require the owner or operator of a gaming room to obtain a license and pay a fee?**

Counties that are authorized to regulate gaming rooms may adopt regulations requiring a license or permit. Local Gov't Code §234.134. The county may also impose a fee not to exceed \$1,000 for a license or license renewal. Local Gov't Code §234.135. However, the fee must be based on the cost of processing the application and investigating the applicant.

**5. May a county inspect gaming rooms located in the county?**

Yes. A peace officer or county employee may inspect a business in the county to determine how many amusement redemption machines subject to regulation are located on the premises and if the business is in compliance with state law and local regulations. Local Gov't Code §234.136.

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<sup>2</sup> Added by [HB 3453](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017.

**6. Are there other types of gambling devices that may be used in a game?**

A “gambling device” is broadly defined in Section 47.01(4) of the Penal Code as:

any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.

**7. What is the “fuzzy animal” exception?**

Added to the Penal Code in 2013, the exception in the definition of gambling devices for those that solely reward players with noncash merchandise prizes and toys worth not more than 10 times the amount charged to play the game or \$5 whichever is less, is commonly called the “fuzzy animal” exception. Tex. Penal Code §47.01(4)(B).

**8. Does an eight-liner which dispenses bingo tickets violate state prohibitions against gambling?**

Yes. The Attorney General determined that a gambling machine or eight-liner which dispenses bingo cards, card-minding devices, or pull-tab bingo or gift certificates, is effectively encouraging players to play other bingo games. To the extent the machines were designed, made, and adopted for the purpose of encouraging play, they are not solely for amusement and do not qualify for the exception to the prohibition against

gambling devices for devices made *solely* for bona fide amusement purposes. Tex. Att’y Gen. Op. No. GA-0812 (2010).

**9. Does an eight-liner that provides the winner with a gift certificate or stored value card violate state prohibitions against gambling?**

Yes. The Attorney General reviewed a gambling machine or eight-liner which required a player to create an electronic account and provided the player a stored-value card in the amount of his or her accumulated winnings from which merchandise could be purchased. Tex. Att’y Gen. Op. No. GA-0527 (2007). The Attorney General determined that a stored-value card, like a gift certificate, is a money equivalent and does not fall under the non-cash merchandise prizes exemption in Section 47.02(e) of the Penal Code.

**10. Does the county have enforcement authority to prohibit a violation?**

Yes, the county may sue in district court for an injunction and also seek a civil penalty of not more than \$10,000 for each violation. Local Gov’t Code §234.137. A person who intentionally or knowingly operates a game room in violation of county regulation is also subject to prosecution for a Class A misdemeanor. Local Gov’t Code §234.138.

**11. How may a county dispose of seized gambling equipment?**

The Attorney General was asked to opine on whether seized eight-liner slot machines could be disposed of by sale to private investors by means other than through a private auction. The rationale for the request was that this method would allow the county to ensure the devices did not remain in the county or were not removed to another location where their use was illegal. The Attorney General determined the method of disposal depended in part on the court’s order of forfeiture. If, under the order, the county was the owner of the equipment, it could qualify as salvage under Chapter 263 of the Local Government Code. The Attorney General also concluded the county could require bidders to contractually agree to take the equipment to a jurisdiction where its use is not illegal. Op. Att’y Gen. GA-0533 (2007).

**RAFFLES**

In 1989, Texas voters amended the state constitution in order to permit the Legislature to pass laws authorizing charitable raffles. Tex. Const. art. III, §47(d). This activity is regulated under Chapter 2002 of the Occupations Code which is also known as the

Charitable Raffle Enabling Act (“Act”). The Act allows qualified organizations to operate a number of raffles during a calendar year for charitable purposes.

In November 2015, an amendment to the Texas Constitution was approved that authorizes a professional sports team’s charitable foundation to conduct charitable raffles as of January 1, 2016. This activity is regulated under Chapter 2004 of the Occupations Code.

**1. What is a raffle?**

For purposes of the Act, a raffle is defined in Section 2002.002, Occupations Code, as the award of one or more prizes by chance at a single occasion among a single pool or group of persons who have paid or promised a thing of value for a ticket that represents a chance to win a prize.



The Attorney General opined that a nonprofit charitable organization qualified to conduct a raffle under the Act may award bottles of donated alcohol as a raffle prize. Tex. Att’y Gen. Op. No. KP-0153 (2017)

**2. What, if anything, must the raffle operators file with the county?**

Generally, there is no filing requirement with the county. However, if the raffle organizers do not have the prize in their possession, they are required to post a bond with the county clerk of the county in which the raffle will be held for the full amount of the prize’s money value. Tex. Occupations Code §2002.065(d).

**3. Does the county attorney have authority to enjoin unauthorized raffles?**

The county attorney (in addition to the district attorney, criminal district attorney, or attorney general) has authority to bring action in county or district court for a permanent or temporary injunction to prohibit an unauthorized raffle that violates state law. Tex. Occupations Code §2002.058 and Tex. Occupations Code §2004.010.

**BINGO**

Texas voters approved an amendment to the Texas Constitution in 1989, authorizing the Legislature to allow and regulate bingo games conducted by churches, synagogues, religious societies, volunteer fire departments, fraternal organizations and certain non-profit organizations. The law to be enacted by the legislature was required to contain a local option component for counties, justice precincts, and municipalities. Tex. Const. art.

III, §47. The Texas Legislature adopted Chapter 2001 of the Occupations Code, the Bingo Enabling Act, including provisions setting out the local option process.

**1. What is the process to legalize or prohibit bingo within a county or justice of the peace precinct?**

The commissioners court on its own authority may order a bingo local option election. Occupations Code §2001.651. Additionally, upon receipt of a petition signed by registered voters of the county equaling at least 10% of the vote for governor in the county at the preceding gubernatorial election, the commissioners court is *required* to order a bingo local option election, either legalizing or prohibiting bingo. Occupations Code §2001.652. The election may be held countywide or within a justice precinct.

If the election is the result of a petition, the commissioners court must forward the petition to the county clerk (or elections administrator) for review no later than the 5<sup>th</sup> day after the date of filing. Occupations Code §2001.653. The county clerk then has 30 days to verify the petition and certify to the commissioners court whether or not it has the requisite number of valid signatures.

If the petition is valid, the commissioners court orders an election to be held within the county or justice precinct on a uniform election date not later than the 60<sup>th</sup> day after the certification of the petition. Occupations Code §2001.654. If no uniform election date falls within the 60-day period, the election will be held on the next uniform election date. The commissioners court must forward notice to the Texas Lottery Commission that a bingo election has been ordered.

If a majority of qualified voters voting at the legalization election vote in favor of legalization, bingo is legalized within the applicable political subdivision beginning on the 14<sup>th</sup> day after the date of the canvass. Occupations Code §2001.656. If a majority of qualified voters voting at the election in a prohibition election vote in favor of prohibiting bingo, the prohibition takes effect on the 14<sup>th</sup> day after the date of the canvass. If a majority of the voters at a legalization election do not vote in favor of legalization, the election has no effect on status in the applicable political subdivision. The same is true if a majority of voters do not vote in favor of prohibition - the status of the applicable political subdivision is not impacted by the election result.

- 2. If two bingo local option authorization elections are held simultaneously in a municipality and a justice of the peace precinct containing territory within the municipality and the election is successful in the justice of the peace precinct but fails in the municipality, what is the local option status of the portion of the municipality that lies within the justice precinct?**

Ordinarily, the status of a municipality prevails over a contrary status determined in a justice precinct or countywide election. Occupations Code §2001.657. However, the failure of the bingo legalization election in a municipality does not confer a status on the municipality. An affirmative vote for legalization or prohibition is required to confer status. Therefore, in this scenario, the area of the municipality within a justice precinct that approved a local option election legalizing bingo shares the status of the justice precinct. Tex. Sec’y State Op. No. DAD-58 (1982).

- 3. What is the effect of annexation on local option bingo status in a municipality?**

Territory annexed by a municipality after the municipality’s bingo status has been established gains the municipality’s status. Territory that is disannexed assumes the status the territory would have had if it had never been part of the municipality. Occupations Code §2001.657(e).

- 4. Which bingo status prevails between a justice precinct and a different county-wide status?**

A justice precinct’s status prevails over a differing county status. Occupations Code §2001.657. Similarly, if two or more local option elections held at the justice precinct level would impact the same territory, the most recent election prevails.

- 5. What is the county share of bingo proceeds?**

A county is entitled to 50% of the fee collected on a prize awarded at a bingo game conducted inside the county if the county imposed a gross receipts tax on conduct of bingo as of January 1, 1993. If a municipality imposed a gross receipts tax on the conduct of bingo as of January 1, 1993, the municipality is entitled to 50% of the fee collected on a prize awarded at a game conducted within its boundaries. If both the county and municipality are entitled to a percentage of the fees, the county is entitled to 25% of the fee on a prize awarded at a game conducted in the county, and the municipality is entitled to 25% of the fee on a prize awarded at a game conducted in the municipality. Occupations Code §2001.503.

**6. Are there limits or guidelines on the use of the county's share of the bingo fees received from the Lottery Commission?**

The county's share may be used for any purpose for which the county's general funds may be used. Occupations Code §2001.507.

**7. When must a new bingo license holder notify the county?**

Upon receiving a license from the Lottery Commission, the license holder is required to notify the sheriff within 10 days of issuance if bingo will be conducted in the county outside the boundaries of a municipality. Occupations Code §2001.305(c).

**8. May the commissioners court review records of a bingo establishment?**

Yes. The commissioners court has authority to examine or cause to be examined the records of a licensed bingo organization on issues related to the maintenance, control, and disposition of net proceeds derived from bingo. Occupations Code §2001.560. It may also examine a manager, officer, director, agent, member, or employee of the organization under oath concerning the use of the premises, the conduct of the bingo, and the disposition of the proceeds.

**9. May the commissioners court seek injunctive relief against bingo parlor operators?**

Yes. The commissioners court has authority to petition for injunctive relief if the court believes there has been or is about to be a violation of a provision of the Bingo Enabling Act. Occupations Code §2001.558. Proper venue is in Travis County district court. If the reviewing court determines the chapter has been knowingly violated, the court shall order all proceeds from the illegal bingo to be forfeited to the appropriate governing body.

**10. What authority does the sheriff or other county peace officers have to inspect bingo facilities?**

A county peace officer may enter and inspect premises where bingo is being conducted or intended to be conducted or equipment for conducting bingo is found. Occupations Code §2001.557.

## **11. What are the penalties for violating the provisions of the Bingo Enabling Act?**

Generally, it is a third degree felony to conduct, promote, or administer bingo without a license. Occupations Code §2001.551. Unsurprisingly, the Legislature has provided a number of exceptions, including: (1) the game is conducted at a home for amusement, no more than 15 players are involved, and the prizes are nominal; (2) the game is operated on behalf of a senior citizens organization, a senior citizens community center program operated or funded by a governmental entity, patients in a nursing home or hospital or retirement home, or patients at a military hospital or Veterans Administration medical center solely for their amusement with nominal prizes; or (3) a business is conducting the game for advertising through a media outlet as long as participation is open to the general public, playing materials are furnished without charge, and players are not required to furnish anything of value to participate.

It is also a third degree felony to knowingly participate in the award of prizes to players in a manner disregarding to any extent the random selection of numbers or symbols. Occupations Code §2001.552.

A person who sells or attempts to sell bingo equipment without a license commits a Class A misdemeanor. Occupations Code §2001.553.

Finally, it is a Class C misdemeanor to (1) make false statements in an application for a bingo license; (2) fail to maintain required records; or (3) divert some of the net bingo proceeds for other than a lawful purpose. Occupations Code §2001.554. If a person has been convicted of a violation of this section previously, further violations are Class B misdemeanors.

## **12. May eight liner machines be used at a bingo hall to provide gift certificates redeemable only at the hall?**

No. Section 47.01(4)(B) of the Penal Code contains an exemption to the general prohibition if the device “rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.” However, the Attorney General concluded eight-liner machines that would provide winners with gift certificates redeemable only at a bingo hall did not fall under the exception because gift certificates effectively operate the same as cash at the

establishment and therefore do not qualify as non-cash merchandise prize, toy or novelty items. Tex. Att’y Gen. Op. No. GA-0913 (2012).

## **HORSE AND GREYHOUND RACING (PARI-MUTUEL)**

The Texas Racing Act was enacted in 1986 with a provision that required voter approval in a statewide referendum. Tex. Rev. Civ. Stat. Ann. Art. 179e. In November 1987, Texas voters voted in favor of authorizing horse and greyhound racing in the state on a county by county local option basis.

### **1. What does “pari-mutuel” mean?**

Pari-mutuel is a term describing the form of betting in which winners who backed the first three places split the losers’ stakes minus the share taken by the operator and the government.

### **2. What is the process to legalize pari-mutuel gambling in a county?**

Article 16 of the Texas Racing Act sets out the local option process. A racetrack license may not be issued until the county certifies approval of legalization election to the secretary of state. Tex. Rev. Civ. Stat. Ann. Art. 179e, §16.01. The commissioners court may order the election on its own and must do so after receipt of a petition signed by at least 5% of the number of votes cast in the county for all candidates for governor in the most recent gubernatorial election. Tex. Rev. Civ. Stat. Ann. Art. 179e, §16.02.

The petition process is similar to the process for a local option liquor election. The county clerk (or elections administrator) issues a petition on receipt of an application signed by 10 or more registered voters of the county. Tex. Rev. Civ. Stat. Ann. Art. 179e, §16.03. The completed petition must be filed with the county clerk not later than the 30<sup>th</sup> day after the date of issuance. Tex. Rev. Civ. Stat. Ann. Art. 179e, §16.07. Once filed, the clerk has 40 days to review the petition, excluding weekends and legal holidays. Tex. Rev. Civ. Stat. Ann. Art. 179e, §16.08. On request of any person, the clerk shall check each name but the requestor must pay the clerk a sum equal to 20 cents per name before clerk begins review.

**3. What notice to the state is required after the election is held?**

If the election is successful, commissioners must certify result to Secretary of State not later than 10<sup>th</sup> day of canvass. Tex. Rev. Civ. Stat. Ann. Art. 179e, §16.12. The timing component of the certification is directory. Tex. Att’y Gen Op. No. GA-0286 (2004).

**4. After an election under the Racing Act, is there an interval before another election may be held?**

Yes. In general, Section 16.12 of the Texas Racing Act provides that no election may be held in the county under the Racing Act until five years have elapsed from the date of the preceding election. However, under Section 16.18 of the Texas Racing Act, an election to rescind approval of legalization of racing may not be held earlier than two years after the date of the approval election.

**5. What is the county’s portion of the proceeds?**

A commissioners court may collect admission fees not to exceed 15 cents from a licensed racetrack in the county. Tex. Rev. Civ. Stat. Ann. Art. 179e, §6.17. If the track is not located within an incorporated city, the court may collect an additional 15 cent fee for allocation among the incorporated cities of the county. The county may not impose additional fees on admissions to or wagers placed at a licensed racetrack. The commissioners court shall collect the additional fee on request of the governing bodies of a majority of the incorporated cities and towns of the county and allocation must be based on the population of the cities and towns.

If the racetrack is a Class 1 track, which may operate only in a county with a 1.3 million or more population, the commissioners court of each county adjacent to the county in which the track is located may also collect the fee. Tex. Rev. Civ. Stat. Ann. Art. 179e , §6.17.

**6. Is there a limit on how the county uses the fees?**

No. Prior law had required the funds to be used to enforce the provisions of the Texas Racing Act, but a county may now use the collected funds at its discretion.

**7. Are there provisions in the law for racing at county fairs and expositions?**

Yes. A race meeting in connection with livestock shows or exhibits may not exceed 16 racing days. Tex. Rev. Civ. Stat. Ann. Art. 179e, §12.01. A county fair in a county with a Class 4 racetrack license may conduct an annual race in connection with a livestock show or exhibition not to exceed 5 racing days. Tex. Rev. Civ. Stat. Ann. Art. 179e, §12.03. The race must be conducted on one of the fair days. A county may contract with an agent to conduct race. Tex. Rev. Civ. Stat. Ann. Art. 179e, §12.03.

# **BURN BAN, REGULATION OF FIREWORKS, AND DECLARATION OF LOCAL DISASTER**

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The  symbol indicates sections that have been updated since the previous publication.

## **Introduction**

This publication attempts to answer frequently asked questions about the county's authority to take action to prevent fires and respond to other disasters. Due to a lack of rainfall in many parts of the state, it may be appropriate for the commissioners court to restrict or ban outdoor burning or other activity that could ignite a fire. In drought conditions, it may also be advisable for the commissioners court to regulate the use of fireworks in unincorporated areas of the county during those times of the year when use of fireworks is most common.

## **BURN BAN**

### **1. When can the commissioners court order a burn ban?**

Local Government Code §352.081 authorizes two alternative methods to determine when circumstances warrant adoption of a burn ban by the commissioners court. Either: (1) the Texas Forest Service, at the request of the commissioners court, makes a determination that drought conditions, as defined by the Keetch-Byram Drought Index, exist in all or part of the county; or (2) the commissioners court makes a finding that circumstances present in all or part of the unincorporated areas of the county create a public safety hazard that would be exacerbated by outdoor burning.

## **2. What is the Keetch-Byram Drought Index?**

The Keetch-Byram Drought Index is an index used in determining forest fire potential. The drought index is based on a daily water balance, where a drought factor is balanced with precipitation and soil moisture measurements. The drought index ranges from 0 to 800, where a drought index of 0 represents no moisture depletion, and an index of 800 represents absolutely dry conditions.<sup>1</sup>

## **3. How can a county obtain a Texas Forest Service drought determination?**

To obtain a determination from the Texas Forest Service, you may visit the Texas Interagency Coordination Center website at <http://www.tamu.edu/ticc/> or contact Tom Spencer at (979) 458-7331. On the website you will find new drought web links to assist a county in monitoring drought conditions more closely.

## **4. Are there limits on the kinds of burning the commissioners court can ban?**

Yes. Local Government Code §352.081(f) does not permit restrictions against outdoor burning activities related to public health and safety that are authorized by the Texas Commission on Environmental Quality for: (1) firefighter training; (2) public utility, natural gas pipeline or mining operations; (3) planting or harvesting of agricultural crops; (4) burns that are conducted by a prescribed burn manager certified under Natural Resources Code §153.048 and meet the standards of Natural Resources Code §153.047; or (5) burns that are conducted by the members of a prescribed burning organization under the conditions provided by §153.049, Natural Resources Code, and meet the standards of §152.047, Natural Resources Code.<sup>2</sup>

If conditions would make it hazardous to permit these outdoor burning activities, the county judge may choose to issue a disaster declaration as authorized by Government Code §418.108. See the *Declaration of Local Disaster* section, beginning on page 7.

## **5. Can the court ban burning of some substances but not others?**

Except as discussed in Question 4 above, the commissioners court has the authority to limit the type of outdoor burning. Restrictions against outdoor burning can be

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<sup>1</sup> See <http://twc.tamu.edu/kbdi>

general or limited to a particular type of burning, such as trash, brush or open campfires.

The Attorney General has ruled that the commissioners court is generally authorized to adopt a burn ban, including restrictions, limitations, or exemptions. Tex. Att’y Gen. Op. No. GA-0930 (2012). An example of an exemption might be burning for agricultural purposes, when the wind is below 10 miles per hour, the humidity is above 25 percent, and the Volunteer Fire Department is on standby.

**6. Can a burn ban restrict the use of fireworks?**

No. The burn ban statute, Local Government Code §352.081, does not mention fireworks. There is a specific fireworks statute, Local Government Code §352.051, which only authorizes the commissioners court to regulate the use of fireworks under limited circumstances. See the *Fireworks Regulation* section, beginning on page 5. However, the county judge has the authority to restrict the use of fireworks in a declaration of local disaster. See the *Declaration of Local Disaster* section, beginning on page 7.

**7. Can a burn ban prohibit outdoor burning in some unincorporated areas of the county but not others?**

Yes. The commissioners court has the authority to apply restrictions against outdoor burning to all the unincorporated areas of the county or certain portions of those areas of the county. The commissioners court does not have authority to ban burning in the incorporated areas of the county.

**8. Are there specific requirements for an order enacting a burn ban?**

Yes. In adopting the order, the commissioners court is required to determine whether: (1) outdoor burning is prohibited or restricted; (2) all or only particular types of outdoor burning are affected; and (3) all or only specific parts of the unincorporated area of the county are affected. The order must also state the duration of the ban. The order should also include a statement that the Texas Forest Service has declared a drought in the affected area or a statement that the commissioners court finds circumstances are present in the unincorporated area covered by the ban which create a public safety hazard that would be exacerbated by outdoor burning. A sample order can be found on TAC’s website at [county.org/fireworks](http://county.org/fireworks).

**9. When does a burn ban expire or end?**

Local Government Code §352.081(d) and (e) provide that the court's order will expire at the earliest of: (1) 90 days from the date of adoption; (2) the date of a determination by the Texas Forest Service that drought conditions no longer exist; or (3) the date of a determination by the commissioners court or, if authorized by the commissioners court, the county judge or county fire marshal, that a public safety hazard no longer exists.

**10. What are the options if drought conditions still exist 90 days after adoption of a burn ban?**

Under Local Government Code §352.081(d), the commissioners court may adopt another order prohibiting or restricting burning that takes effect at the expiration of a previous order by following the same procedures.

**11. How would the county end a burn ban?**

Under Local Government Code §352.081(e), the commissioners court may rescind its order adopting a burn ban at any time if drought conditions or hazardous circumstances no longer exist. In a burn ban order, the court may also authorize the county judge or the county fire marshal to determine if drought conditions or hazardous circumstances no longer exist. The order would automatically expire as soon as such a determination is made.

**12. What kind of penalties can be imposed for violating a burn ban?**

A knowing or intentional violation of the court's order prohibiting or restricting outdoor burning is a Class C misdemeanor, punishable by a fine not to exceed \$500. *See* Local Government Code §352.081(h).

**13. Does the public have a right to petition to initiate or repeal a burn ban?**

No. However, Local Government Code §352.081(g) allows any person to obtain an injunction to prevent the violation or threatened violation of the court's order prohibiting or restricting outdoor burning.

## FIREWORKS REGULATION

### 1. When can fireworks legally be sold?

Occupations Code §2154.202 states that fireworks can legally be sold to the public in Texas only during six holiday periods each year: (1) Texas Independence Day (from February 25 through March 2 in a county that has approved the sale of fireworks during the period); (2) San Jacinto Day (from April 16 through April 21 in a county that has approved the sale of fireworks during the period); (3) Cinco de Mayo (from May 1 through May 5 and only at a location that is not more than 100 miles from the Texas-Mexico border in a county that has approved the sale of fireworks during the period); (4) Memorial Day (from the Wednesday before the last Monday in May through the last Monday in May in a county that has approved the sale of fireworks during the period); (5) Fourth of July (from June 24 through July 4); and (5) Christmas and New Year's Day (from December 20 through January 1).

### 2. When can the commissioners court regulate fireworks?

For the Fourth of July (June 24-July 4), and Christmas and New Year's Day (December 20-January 1) periods, fireworks sales are permitted unless the commissioners court prohibits sales based on drought conditions in the county. Local Government Code §352.051 authorizes the commissioners court to adopt an order regulating certain fireworks in the unincorporated areas of the county under drought conditions. The statute provides that the order must be adopted **before** April 25 of each year for the Cinco de Mayo fireworks season (for counties within 100 miles of the Mexican border), **before** June 15 of each year for Fourth of July fireworks season and **before** December 15 of each year for the Christmas and New Year's Day fireworks season. See Question 3 in the *Burn Ban* section, beginning on page 1 on how to obtain a drought determination from the Texas Forest Service.

For the Texas Independence Day (between February 25 and midnight March 2), San Jacinto Day (between April 16 and midnight April 21), Cinco de Mayo (between May 1 and midnight May 5), and Memorial Day (between the Wednesday before the last Monday in May and midnight on the last Monday in May) periods, the commissioners court has complete discretion as to whether or not fireworks sales will be allowed. If the commissioners court chooses to authorize fireworks sales during these periods, under Local Government Code §352.051, the authorization order must be adopted before February 15 for Texas Independence Day, before April

1 for San Jacinto Day, before April 25 for Cinco de Mayo, and before May 15 for Memorial Day.

**3. What kinds of restrictions can the commissioners court impose on the sale or use of fireworks?**

If the court decides to adopt an order, the order may prohibit or restrict the sale or use of “restricted fireworks,” which are defined as “skyrockets with sticks” and “missiles with fins” in 49 Code of Federal Regulations, §173.100(r)(2) in effect on October 1, 1986.

In addition, during the December fireworks season, the commissioners court may make a determination under Local Government Code §352.051(c) that conditions on rural acreage not under cultivation for at least 12 months are extremely hazardous for the danger of fire because of high grass or dry vegetation and adopt an order to prohibit or restrict the sale or use of restricted fireworks in specified areas of the county. An order issued by the commissioners court based on its determination of extreme hazard for the danger of fire will expire on the date established in the order.

**4. As part of the regulation of fireworks, can the commissioners court permit public displays of fireworks during certain times and at certain locations?**

Yes. Under Local Government Code §352.051(f), the county may designate one or more “safe” areas where the use of restricted fireworks is not prohibited. It appears that the county may also designate a specific date or dates on which fireworks are permitted in the “safe” areas. In determining if an area may be considered “safe” the court should take into account whether adequate public safety and fire protection services are provided to the area.

**5. When does an order regulating fireworks expire or end?**

Under Local Government Code §352.051(e), an order issued by the commissioners court based on a Texas Forest Service determination will expire on the date specified in the order or when the Texas Forest Service finds that the county is no longer in a drought condition, whichever is earlier.

**6. What kind of penalties can be imposed for violating an order restricting the sale or use of fireworks?**

A violation of the order is a Class C misdemeanor, punishable by a fine not to exceed \$500. *See* Local Government Code §352.051(i).

**7. Does the public have the right to petition to implement or repeal regulation of fireworks?**

No. However, a citizen can file suit for an injunction to prevent a violation or threatened violation of the order restricting the sale or use of fireworks. *See* Local Government Code §352.051(h).

## **DECLARATION OF LOCAL DISASTER**

**1. What is a local disaster?**

A “Disaster” is defined under Government Code §418.004(1) as:

... the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.

**2. Who can declare a local disaster?**

Government Code §418.108 gives the county judge the power to declare a local disaster within the county under any of the circumstances described in the definition of a disaster. *See* Question 1 above. The declaration may include regulations necessary to protect public health and safety.

**3. What are the requirements to adopt a declaration of local disaster?**

The county judge issues the declaration and files it promptly with the county clerk. The declaration is to be given prompt and general publicity. Once the county judge has issued a disaster declaration, the procedure to ratify it may involve two steps. The commissioners court must take action to consent to the continuance or renewal of a local disaster declaration within seven days after its issuance or it expires.

Additionally, if a disaster declaration includes a restriction on fireworks that exceeds the restrictions authorized by Local Government Code §352.051, the county judge

must request and obtain authorization from the governor as discussed in Question 5 below. The authorizations by the commissioners court and the governor are independent of one another – the county judge may request approval from the governor immediately upon issuance of the disaster declaration and before the commissioners court has met to take action on the matter.

**4. Can a declaration of local disaster restrict the use of fireworks?**

Yes. A declaration issued under Government Code §418.108 may include a prohibition or restriction on the sale or use of all fireworks within the county. This specific grant of authority to the county judge is broader than, and independent of, the commissioners court's authority under Local Government Code §352.051 to restrict or prohibit certain fireworks during designated fireworks seasons. For example, a disaster declaration may be issued at any time. In addition, a disaster declaration may restrict or prohibit all types of fireworks.

**5. What are the requirements for a disaster declaration that includes a restriction on use of fireworks that exceeds the commissioners court's regular authority?**

If a disaster declaration includes a restriction on fireworks that exceeds the restrictions authorized by Local Government Code §352.051, under Government Code §418.108(i), the county judge must request and obtain authorization from the governor within 60 hours of its issuance or the broader restriction on fireworks will automatically expire.

**6. How can the county judge obtain authorization from the governor's office to restrict the use of fireworks during a local disaster?**

The request to the governor should be sent via email to the State Operations Center at [soc@dps.texas.gov](mailto:soc@dps.texas.gov). The county judge should contact the Texas Division of Emergency Management District Coordinator for further assistance. See Question 13 below.

**7. How is a declaration of local disaster different from a burn ban?**

A declaration of local disaster may be enacted by the county judge acting alone, subject to approval by the commissioners court within seven days after it is put in place. Additionally, a declaration of local disaster may restrict the use of fireworks more broadly than the commissioners court's ordinary authority and may prohibit outdoor burning that is usually exempt from county regulation. A burn ban

requires commissioners court approval and may not restrict certain types of outdoor burning.

**8. When the county declares a local disaster, does the judge have authority over incorporated areas of the county?**

Yes, but only for limited purposes. The county judge's jurisdiction to issue an order of evacuation includes the incorporated areas of the county if the judge considers it necessary for the preservation of life or other disaster mitigation, response or recovery. The county judge may also control ingress to and egress from a disaster area in an incorporated area of the county and control the movement of people and occupancy of buildings within the disaster area. In a disaster, to the extent there is a conflict on questions of evacuation and ingress and egress to the declared disaster area between the county judge and the mayor of an incorporated area, the decision of the county judge prevails. Additionally, a restriction on the sale or use of fireworks in a disaster declaration applies in the incorporated areas of the county during the duration of the disaster.

**9. Can a declaration of local disaster restrict outdoor burning that would otherwise be allowed under Local Government Code §352.081(f)?**

Probably. A declaration issued under Government Code §418.108 may include a prohibition or restriction on outdoor burning within the county. This specific grant of authority to the county judge is broader than, and independent of, the commissioners court's authority under Local Government Code §352.081. However, Natural Resources Code §153.004 authorizes a certified and insured prescribed burn manager to conduct a burn in a county that is covered by a state of emergency declared by the governor or president of the United States unless the declaration specifically prohibits all outdoor burning.

**10. Can the commissioners court overturn the judge's imposition of a declaration of local disaster?**

Yes. The commissioners court may refuse to consent to the continuation or renewal of a declaration of local disaster. If the court refuses to continue the declaration, it expires after 7 days. The commissioners court may also rescind a declaration after it is authorized.

**11. What kind of penalties can the commissioners court impose for violating a declaration of local emergency?**

The commissioners court may adopt a disaster plan that includes a penalty or a fine not to exceed \$1,000 or confinement in jail for a term not to exceed 180 days for a failure to comply with a disaster declaration, but only if the county's emergency management plan includes a provision establishing an offense under Government Code §418.173. If the court wants the penalty to be enforced, its emergency management plan should provide that a failure to comply with the plan or a rule or order adopted under the plan is punishable as authorized in Government Code §418.173.

## **12. What is an emergency management plan?**

Under Government Code §418.102 each county must maintain an emergency management plan or participate in a local emergency management program with jurisdiction over the entire county or interjurisdictional area. Government Code §418.106(b) requires the county's plan to provide for wage and price controls, curfews, restrictions on utility usage, and rules governing access to the affected area. The commissioners court may also adopt a plan for continuity of functions that provides for: (1) delegation of administrative duties; (2) orders of succession for performing essential functions; and (3) meeting procedures for the commissioners court.

Under Government Code §418.101(b), the county judge is required to notify the Texas Division of Emergency Management of the county's emergency management plan. Under Government Code §418.105, the county must appoint a liaison officer to coordinate state and local preparedness and relief.

## **13. Does the state have emergency management resources?**

Yes, the Texas Division of Emergency Management at the Texas Department of Public Safety coordinates disaster preparedness state-wide and can provide information on disaster planning and recovery. The Division Chief is W. Nim Kidd, (512) 424-2436. [txdps.state.tx.us/dem/index.htm](http://txdps.state.tx.us/dem/index.htm)

## CAMPAIGN SIGNS ON ROADS

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The  symbol indicates sections that have been updated since the previous publication.

### Introduction

As each election day approaches, we receive questions concerning the laws and procedures governing placement of campaign signs on county road and state highway rights of way. Below are answers to some of the more frequently asked questions on these issues.

**1. May campaign signs be placed in state highway right-of-way?**

No. It is a Class C misdemeanor (fine not to exceed \$500) to put a sign in the right-of-way of a state highway. Tex. Trans. Code, §392.032.

**2. May campaign signs be placed in public road right-of-way?**

No. With some exceptions, it is a Class C misdemeanor to place a sign on a public road right-of-way. Tex. Trans. Code, §393.002.

**3. May a County or a City (within its boundaries) adopt additional regulations?**

Certain urban counties may adopt regulations on use of off-premise portable signs (signs on a trailer) in unincorporated areas of the county. Tex. Trans. Code §394.061. Ordinances more restrictive than the general prohibition against signs in the state highway right of way supersede state law. Tex. Trans. Code §392.038.

A city may regulate sign placement on rights-of-way maintained by the municipality that are not part of the state highway system. Tex. Trans. Code §393.0025. For campaign signs, these restrictions often set a first day for placement and require removal by a certain point after election day. Contact your city to see if it has adopted any sign regulations.

**4. May campaign signs be placed on private property visible from a rural road?**

Yes. Campaign signs visible from the main-traveled way of a rural road are acceptable if they are placed on private property and are erected solely for a public election. The signs may be placed no earlier than the 90<sup>th</sup> day before the election, removed no later than the 10<sup>th</sup> day after the election, and must meet certain size and material provisions. See Tex. Trans. Code, §394.003.

**5. Is there specific language that must be included on a campaign sign or poster that is intended to be visible from a road or highway?**

Yes. The Texas Election Code, §255.007, **requires** the following notice be printed on each political advertising sign:

**NOTICE: IT IS A VIOLATION OF STATE LAW (CHAPTERS 392 AND 393, TRANSPORTATION CODE), TO PLACE THIS SIGN IN THE RIGHT-OF-WAY OF A HIGHWAY.**

**6. Who may remove a campaign sign that has been impermissibly placed in a right of way?**

The Texas Highway Commission has authority to remove a sign placed in the right of way of a state highway without notice to the owner and may recover removal costs from the owner. Tex. Trans. Code, §§392.033, 392.035.

For a sign placed in a rural road right of way, the sheriff or constable may remove the sign. (Note that the county commissioners court may also designate volunteers to remove illegally placed signs.) Tex. Trans. Code §393.003.

**7. How does a county dispose of illegally posted signs that are confiscated?**

Signs with a value less than \$25 may be discarded without giving the owner any notice. This would apply to most political campaign signs.

For signs worth more than \$25, generally the county has to give the owner an opportunity to reclaim the sign by providing notice either by certified mail or in the local newspaper. The owner has 21 days after notice to reclaim the sign.

The commissioners court also may issue an order exempting certain types of signs, such as campaign signs, from the notice requirements by determining they are unlikely to be reclaimed. Once such a determination is made, signs may be discarded after 21 days. Tex. Trans. Code, Chapter 393.

**8. May a candidate be prosecuted or sued for placing campaign signs in a right of way?**

Yes. However, it is a defense to prosecution or suit that the candidate was running for elective public office and the sign was placed in connection with the campaign by a person other than the candidate. Tex. Trans. Code §§392.036, 393.006.

**9. Are there civil penalties for placing campaign signs in a highway or rural road right of way?**

Yes. A district or county attorney or a municipal attorney in the jurisdiction in which the placement allegedly occurred may sue to collect a civil penalty. (For signs placed in a state highway right of way, the attorney general also has jurisdiction.) The penalty range is not less than \$500 or more than \$1000 for each violation. The amount assessed is determined based on the seriousness of the violation and whether the person has previously violated the prohibitions against placing signs in rights of way.

A separate penalty may be collected for each day a continuing violation occurs, with the funds deposited to the county road and bridge fund if collected by the district or county attorney, the general fund of the municipality if collected by a municipal attorney, or to the state highway fund if collected by the attorney general. A district, county, or municipal attorney may recover reasonable attorney's fees. Tex. Trans. Code §§392.0355 and 393.007.

## CEMETERIES AND PAUPER BURIAL

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### Introduction

This publication attempts to answer frequently asked questions about the commissioners court's authority to establish, operate, and maintain cemeteries in the county and the county's responsibilities for burial of paupers. Because operation of a cemetery is not considered a governmental purpose, the county has limited authority related to cemeteries. However, the county has a longstanding responsibility to provide for the burial of paupers. Additionally, the county has limited authority related to burial grounds for indigent, honorably discharged veterans.

### CEMETERIES

#### 1. May a county own and operate a cemetery using public funds?

Only under very limited circumstances may public funds be used to operate a cemetery. In fact, Health and Safety Code (Code) §713.026(a) prohibits the commissioners court or other elected county officer from paying or using public funds or county employees, equipment or property to maintain a neglected or unkept public or private cemetery except as specifically authorized. See also Question 4 below.

**2. Is the county required to provide a cemetery for burial of paupers who die in the county?**

No, but the commissioners court has discretion to do so. Under Code §694.002, which requires the county to dispose of the body of a deceased pauper, the commissioners court has implied authority to purchase and maintain land for the exclusive interment of deceased paupers.<sup>1</sup> Under certain circumstances, the commissioners court may also purchase burial grounds to be used exclusively by veterans who may also be paupers.<sup>2</sup> See also Question 30 below.

**3. What if a county already owns a cemetery?**

A county that owned a cemetery from September 1, 1976 through January 1, 1979 or that used county funds, employees, equipment, or property to maintain a county-owned cemetery during 1976 may continue to use public funds, employees and property to maintain the cemetery.<sup>3</sup> However, the county must file a certified copy of the commissioners court's order certifying that it qualifies to own or maintain a cemetery with the secretary of state to maintain its ability to own or provide maintenance for the cemetery.<sup>4</sup>

**4. Are there different rules for a small county?**

Yes. Code §713.027 permits a county with a population of 8,200 or less to own, operate, and maintain a cemetery and to sell the right of burial in the cemetery.<sup>5</sup> The commissioners court serves as the county cemetery board and manages the cemetery property.

The commissioners court may use general revenue funds to maintain the cemetery and may dedicate not more than one-eighth of the maximum allowable tax levy for that purpose. Additionally, revenue from the sale of burial plots may be used to purchase additional land for cemetery purposes and for maintenance.

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<sup>1</sup> Tex. Att'y Gen. Op. No. GA-0235 (2004)

<sup>2</sup> Code §713.029.

<sup>3</sup> Code §713.026(b)

<sup>4</sup> Code §713.026(c). The Registry of County-owned and County-operated Cemeteries has records from six counties - Andrews County, Brazos County, Culberson County, Gillespie County, Travis County, and Wichita County.

<sup>5</sup> There are currently 75 Texas counties with a population of 8,200 or less, according to the U.S. Census Bureau.

**5. What about an historical cemetery in the county?**

Under certain circumstances, for the purposes of historical preservation or public health, safety, or welfare, the commissioners court is authorized to use public funds, county employees, county inmate labor, and county equipment to maintain a cemetery that has a grave maker more than 50 years old.<sup>6</sup> However, county property may not be used to maintain a perpetual care cemetery or one maintained by a religious or fraternal organization, even if the cemetery contains an historical grave marker.<sup>7</sup>

**6. What if the historical cemetery is managed by a nonprofit corporation authorized by the district court?**

If a nonprofit corporation has petitioned for the right to restore, operate, and maintain an historical cemetery, the county has discretion to assist with the maintenance of the cemetery, but is not required to. The county auditor acts as the trustee for the trust fund established by the nonprofit corporation and receives monthly reports verifying the funds deposited and income disbursed. If the county auditor resigns the position of trustee or fails to act, the district court must appoint a successor trustee.<sup>8</sup>

**7. May the county use public property to open and close graves in an historical cemetery?**

Yes. At the discretion of the commissioners court, public funds, labor, and equipment may be used to open and close a grave in an historical cemetery with a grave marker more than 50 years old.<sup>9</sup> This means that the commissioners court as a whole must authorize the use.

**8. What about opening and closing graves in other types of cemeteries?**

The commissioners court may not use county funds, labor, or equipment to open and close graves in privately owned cemeteries.<sup>10</sup>

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<sup>6</sup> Code §713.028

<sup>7</sup> Code §713.028(b)

<sup>8</sup> See Code Chap. 715

<sup>9</sup> Code §713.028

<sup>10</sup> Code §713.026(a); Tex. Att'y Gen. Op. No. JC-0329 (2001)

**9. Must the county maintain a road leading to a cemetery if the road is not in the county road system?**

The county is prohibited from abandoning a county road leading to a cemetery.<sup>11</sup> However, a county's decision as to the frequency of maintenance of any particular county road is a matter for the discretion of the commissioners court.<sup>12</sup>

**10. Does the public have a right to visit a cemetery located on private property?**

Yes. The relatives of a deceased person have the right to reasonable access to the deceased person's gravesite.<sup>13</sup> A court that considered this issue ruled that reasonable access is a once-a month-visit for a four-hour period.<sup>14</sup>

**11. May the county establish a fund for maintenance of a neglected or unkept cemetery?**

Yes. The commissioners court may adopt a resolution establishing a perpetual trust fund to provide maintenance for a neglected or unkept public or private cemetery.<sup>15</sup>

**12. Who is authorized to act as the trustee for the cemetery trust fund?**

The commissioners court must appoint the county judge as trustee for the fund. However, if the county judge vacates the position or renounces the trust, the district judge must appoint someone who is not a county commissioner as the successor trustee for the fund.<sup>16</sup> The trustee has the authority to establish reasonable rules for donations, accept gifts, and invest the fund in interest-bearing bonds or government-issued securities.

**13. May the commissioners court use county funds to fund the cemetery trust?**

No. The trustee may accept a gift or grant from any source, including one attached to a particular cemetery. If the trustee accepts a gift, he or she must instruct the county treasurer to issue a certificate to the donor stating the amount and purpose of

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<sup>11</sup> Transportation Code §251.057

<sup>12</sup> Tex. Att'y Gen. Op. No. GA-0128 (2003)

<sup>13</sup> Code §711.041

<sup>14</sup> Davis v. May, 135 S.W.3d 747 (Tex.App. – San Antonio 2003, pet. denied)

<sup>15</sup> Code §713.021

<sup>16</sup> Code §713.024

the gift and any other information determined by the trustee.<sup>17</sup> Only the income or revenue of the trust fund may be used for maintenance of a neglected or unkept public or private cemetery in the county.

**14. May the county require that a private cemetery be maintained by the property owner?**

The district attorney can file suit in district court against the owners of a cemetery that is maintained, located, or used in a way that constitutes a public nuisance, provided that the cemetery is not located within five miles from a city with a population of more than 25,000.<sup>18</sup> The court will then decide whether the cemetery nuisance must be abated by repair and restoration or whether the cemetery should be removed.

**15. What if someone wants to establish a family cemetery on their own property?**

Provided that a family complies with deed restrictions and other legal requirements, such as flood plain regulation, a family may establish a cemetery on its land. The cemetery plot must be surveyed and the survey, including a declaration of dedication, filed with the county clerk. However, there are restrictions on the location of a cemetery based on proximity to a city and the population of the city.<sup>19</sup> More information on the laws governing family cemeteries is available on the Texas Funeral Services Commission website at [www.tfsc.state.tx.us](http://www.tfsc.state.tx.us) under the Consumer Information menu.

**16. May the county prevent a person from establishing a cemetery on the person's property?**

Yes, under the following circumstances. The district attorney may file suit to prevent the establishment of a cemetery if its location would be a public nuisance or a threat to public health and safety or if its location would violate the restrictions on the location of a cemetery near a city, based on the city's population.<sup>20</sup>

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<sup>17</sup> Code §713.022(d).

<sup>18</sup> Code §711.007.

<sup>19</sup> Code §711.008.

<sup>20</sup> Code §711.008.

 **17. What is an abandoned cemetery?**

An abandoned cemetery is a cemetery, regardless of whether it appears on a map or in deed records, that is not owned or operated by a cemetery organization, does not have another person legally responsible for its care, and is not maintained by any person.<sup>21</sup>

 **18. What is an unknown cemetery?**

An unknown cemetery is an abandoned cemetery evidenced by the presence of marked or unmarked graves that does not appear on a map or in deed records.<sup>22</sup>

**19. What if someone finds an unknown or abandoned cemetery in the county?**

The person who discovers the cemetery must file notice with the county clerk within 10 days after the date of the discovery.<sup>23</sup> The county clerk must file the notice in the deed records, indexed to the land the cemetery is located on, and send a copy to the Texas Historical Commission. The clerk may not charge a fee for filing this notice. The property owner may not construct improvements on the property that will disturb the cemetery until the human remains are removed.<sup>24</sup>

**20. May the county close an abandoned cemetery?**

A district court in a county of at least 525,000 may authorize the removal and re-internment of the bodies in an abandoned and neglected cemetery for which no perpetual care and endowment fund has been established if the cemetery has been abated as a nuisance.<sup>25</sup>

 **21. What is an unverified cemetery?**

An unverified cemetery is a location having some evidence of internment including one or more unmarked graves that have not been verified by a cemetery keeper, licensed funeral director, medical examiner, coroner, professional archeologist or Texas Historical Commission.<sup>26</sup>

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<sup>21</sup> Code §711.001(1); [SB 1630](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017;

<sup>22</sup> Code §711.001(36); [SB 1630](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017

<sup>23</sup> Code §711.011.

<sup>24</sup> Code §711.010.

<sup>25</sup> Code §714.004; *see also* Code §711.004.

<sup>26</sup> Code §711.001(38); [SB 1630](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017



**22. What if someone finds an unverified cemetery?**

The person who finds an unverified cemetery must file notice and evidence of the discovery with the Texas Historical Commission on a form provided by the Commission and must concurrently provide a copy of the notice to the landowner on record in the county appraisal district on whose land the unverified cemetery is located. The landowner may send a response or comments to the Texas Historical Commission concerning the notice not later than the 30<sup>th</sup> day after receiving the notice. If the Texas Historical Commission determines that a cemetery exists the Commission must inform the landowner and may file notice with the county clerk. If the Texas Historical Commission determines that a cemetery does not exist, the Commission must inform the land owner and ensure any notice filed with the county clerk is corrected.<sup>27</sup>



**23. Can anyone investigate unmarked graves in an abandoned, unknown or unverified cemetery?**

Yes. A justice of the piece acting as a coroner or medical examiner or a cemetery keeper, a licensed funeral director, a medical examiner, a coroner, or a professional archeologist may investigate or remove remains found in an unmarked grave without written order of the state registrar.<sup>28</sup>

**24. Are there any other limits on closing a cemetery?**

Property dedicated as a cemetery must be used as a cemetery unless the dedication is removed in an action under an applicable Code provision.<sup>29</sup>

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<sup>27</sup> Code §711.0111; [SB 1630](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017

<sup>28</sup> Code §711.004(f-1); [SB 1630](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017

<sup>29</sup> Code §§711.010, 711.036 or 711.007. Tex. Att’y Gen. Op. No. JC-0355 (2001). *See also* Tex. Att’y Gen. Op. No. JC-0235 (2000).

## PAUPER'S BURIAL

### 1. What are a county's responsibilities related to the burial of a pauper?

The commissioners court is required to provide for the disposition of a "deceased pauper."<sup>30</sup> The commissioners court may adopt rules to implement the statute.

### 2. Is the county responsible for the burial of all paupers who die in the county, or only those who are also residents of the county?

The statute does not reference residency and there is no legal guidance on how to determine the appropriate county for disposition. Without further clarification, it appears that the county in which the pauper died is responsible for his or her burial.

### 3. Are there any special procedures that the county must follow?

Yes. The county should first determine if there is a person with a duty to bury the deceased pauper under Code §711.002 and if the deceased has left direction in writing for the disposition of his or her remains. However, the county is not required to follow the deceased's direction and need only incur the usual cost of burial if there is no relative or other person responsible who takes responsibility for cost of the burial.<sup>31</sup>

Additionally, the county must notify the Anatomical Board of the State of Texas that it has the remains of a deceased pauper and deliver the body to the board if it receives written notification from the board to do so.<sup>32</sup> A body that is not claimed for burial within 48 hours after a relative receives notification shall be delivered as soon as possible to the board.<sup>33</sup> If the board does not request delivery of the remains, the county is responsible for all costs of preparation for burial.

### 4. How does a county dispose of a deceased pauper?

The commissioners court has the discretion to determine how to dispose of the remains of a deceased pauper. The commissioners court may adopt rules related to

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<sup>30</sup> Code §694.002(a); Tex. Att'y Gen. Op. No. GA-0235 (2004).

<sup>31</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000).

<sup>32</sup> Code §691.023.

<sup>33</sup> Code §691.025.

how the county disposes of the body. Disposition may be by donation to a medical facility, burial, or cremation.<sup>34</sup>

**5. Is the county responsible for the cost associated with transporting a body of someone who is not a deceased pauper from an autopsy ordered by a justice of the peace to its final destination?**

No. The commissioners court is authorized to pay the cost of transporting a body to its final destination following an autopsy ordered by a justice of the peace only if the body is not claimed for burial or is to be buried at public expense.<sup>35</sup>

**6. Even though the county is paying, can a deceased pauper's family dictate how the body is disposed of?**

No. However, in disposing of a deceased pauper, the commissioners court is required to consider any information provided by a person listed in Code §771.002, including the religious affiliation of the deceased.<sup>36</sup> The county need only incur the usual disposition costs and may adopt a policy requiring contributions if the deceased pauper's relatives object to the less expensive options.<sup>37</sup>

**7. Are there limits on how a county pays for a pauper's burial?**

The commissioners court must provide for the cost of pauper burial in the county's annual budget. The county may accept a donation toward the costs of pauper burial. Donations may be made either toward the expenses of disposing of a particular deceased pauper or to the county to be used as necessary.<sup>38</sup>

**8. May the county require a deceased pauper's family to pay for burial expenses?**

No. The county has the primary responsibility for the cost of burial of a pauper and may not require the relatives or other persons identified in Code §711.002 to contribute to the costs. Additionally, the assets of the deceased person may not be seized to cover the county's costs.<sup>39</sup> However, see also Question 9 below.

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<sup>34</sup> Code §694.002; Tex. Att'y Gen. Op. No. JC-0228 (2000); Tex. Att'y Gen. Op. No. GA-0301 (2005).

<sup>35</sup> Tex. Att'y Gen. Op. No. KP-0083 (2016).

<sup>36</sup> Code §694.002(b).

<sup>37</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000).

<sup>38</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000).

<sup>39</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000).

**9. What if the pauper has some cash when they die?**

The county may use any cash found with a deceased pauper for the person's actual burial expenses and deposit any remaining funds in a trust account to be claimed within one year. If the funds are not claimed, they may be used to pay for the expense of other pauper burial in the county.<sup>40</sup>

**10. What if a local church or charity offers to pay for the burial of a deceased pauper?**

The county must comply with the Texas Department of Health regulations adopted under Code §694.001 related to the disposal and transportation of dead bodies. The church or charity would need to obtain the proper authorization to transfer the body to a licensed funeral home or crematorium before it could take action toward burial. Otherwise, the county remains responsible for disposition of the deceased pauper.

**11. What if the county finds unidentified remains?**

The county may dispose of the unidentified remains in the same manner as pauper burial under Code §716.101.

**12. May the county acquire property to establish a cemetery for the burial of paupers?**

Yes, see Question 2 above.

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<sup>40</sup> Code §694.002.

## VETERAN'S BURIAL

### **1. May the county establish a cemetery for veterans?**

Yes. The commissioners court is authorized to purchase burial grounds to be used exclusively for honorably discharged veterans who have served during a war and die without leaving sufficient means to pay funeral expenses, but only if there is not a national military cemetery or other military plot in the county where veterans may be buried free of charge.<sup>41</sup>

### **2. May the county assist with the costs of burial for an honorably discharged veteran?**

A veteran who dies without leaving sufficient means to pay funeral expenses may be buried by the county under the same circumstances as any other deceased pauper. There does not appear to be any authority, in Code §713.029 or elsewhere, for the commissioners court to provide additional services based on a deceased person's status as an honorably discharged veteran.

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<sup>41</sup> Code §713.029.

## DISCLOSURE REQUIREMENTS FOR COUNTY OFFICIALS

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The  symbol indicates sections that have been updated since the previous publication.

### Introduction

Chapter 176 of the Local Government Code governs the disclosure by certain county officers of employment, business and familial relationships with vendors. Disclosure forms are prescribed by the Texas Ethics Commission.

#### **1. Who must file a conflicts disclosure statement and who must file a conflict of interest questionnaire?**

Texas Local Government Code, Chapter 176, requires local government officers to file conflicts disclosure statements. Additionally, certain county vendors are also required to file a conflict of interest questionnaire.<sup>1</sup>

#### **2. Who are local government officers in a county?**

Chapter 176 of the Local Government Code defines a local government officer as a member of the governing body or an agent of a local government who exercises discretion in the planning, recommending, selecting, or contracting of a vendor. Therefore, under Chapter 176, a county judge, county commissioner or a county purchasing agent may be required to file conflicts disclosure statements in certain circumstances.<sup>2</sup>

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<sup>1</sup> Local Government Code §176.003(a); §176.001(4)(a)

<sup>2</sup> Local Government Code §176.001(4)

**3. Under what circumstances does a member of commissioners court or a purchasing agent have to file a conflicts disclosure statement? <sup>3</sup>**

A member of commissioners court or a purchasing agent must file a conflicts disclosure statement with respect to a vendor when the vendor enters into a contract with the county or the county is considering entering into a contract with the vendor; and:

- (1) the vendor has an employment or other business relationship with a member of commissioners court or a purchasing agent or a family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the 12 month period preceding the date that the officer becomes aware that a contract between the county and vendor has been executed or the county is considering entering into a contract with the vendor; or
- (2) the vendor has given a member of commissioners court or a purchasing agent or a family member a gift<sup>4</sup> or gifts that have an aggregate value of more than \$100 in the 12 month period preceding the date the officer becomes aware that a contract between the county and the vendor has been executed or the county is considering entering into a contract with the vendor; or
- (3) the vendor has a family relationship with a member of commissioners court or a purchasing agent. A family relationship is defined as relationship between a person and another person within the third degree of consanguinity or the second degree by affinity. <sup>5</sup>

**4. Are there any exceptions to the Chapter 176 filing requirements?**

Yes. A member of commissioners court or a purchasing agent is not required to file a conflicts disclosure statement for a gift received from vendors if the gift is:

- (1) a political contribution as defined by Title 15, Election Code;
- (2) food accepted as a guest; or

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<sup>3</sup> Local Government Code §176.003

<sup>4</sup> Local Government Code §176.001 defines gift as a benefit offered by a person, including food, lodging, transportation, and entertainment accepted as a guest. The term does not include a benefit offered on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient.

<sup>5</sup> Local Government Code §176.001(2-a). The third degree by consanguinity includes a child, parent, grandchild, sister, brother, grandparent, great-grandchild, niece, nephew, aunt, uncle, or great-grandparent. The second degree of affinity includes a spouse, mother-in-law, father-in-law, son-in-law, or daughter-in-law.

(3) the local governmental entity or vendor is an administrative agency created pursuant to the Interlocal Cooperation Act.<sup>6</sup>

**5. Where and when does a member of commissioners court or a purchasing agent file a conflicts disclosure statement in a county?**

A member of commissioners court or a purchasing agent must file the conflicts disclosure statement with the county clerk not later than 5 p.m. on the seventh business day after the vendor enters into a contract with the county or the county is considering entering into a contract with a vendor from whom the member of commissioners court or a purchasing agent has received taxable income or a gift, or to whom the filer has a family relationship as set forth in Question 3.

**6. What information must be included in a conflicts disclosure statement? <sup>7</sup>**

A conflicts disclosure statement must include the following:

- (1) A description of the nature and extent of the employment or business relationship between the local government officer or family member and the vendor;
- (2) Gifts accepted by the local government officer and any family member from a vendor as set forth in Question 3;
- (3) An acknowledgement from the local government officer that the disclosure applies to each family member;
- (4) The statement covers the 12-month period described in Question 3 above; and
- (5) The signature of the local government officer acknowledging that the statement is made under oath under penalty of perjury.

**7. If a member of commissioners court files a conflicts disclosure statement as required by Chapter 176, Local Government Code, does that member of commissioners court have to abstain from voting or participating on the matter involving the conflict?**

No. Chapter 176 does not contain an abstention provision. However, Chapter 171, Local Government Code, requires a member of commissioners court to abstain from voting or participating on a matter involving a business entity or real property in which the official has a substantial interest. <sup>8</sup>

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<sup>6</sup> Local Government Code §176.003 (2)(C)(a-1)

<sup>7</sup> Local Government Code §176.003(e)

<sup>8</sup> Local Government Code §171.002

Generally, an officer is considered to have a “substantial interest” under Chapter 171, if the person:

- (1) owns 10 percent or more of the voting stock or shares of the business entity;
- (2) owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity;
- (3) receives funds from the business entity that exceed 10 percent of the person’s gross income for the preceding year; or
- (4) has an equitable or legal ownership interest with a fair market value of \$2,500 or more in real property.

Please consult with your county or district attorney regarding the affidavit requirements and criminal penalties set forth in Chapter 171.

**8. Under what circumstances do vendors have to file a conflict of interest questionnaire?**

A vendor must file a completed conflict of interest questionnaire if the vendor has a business relationship with a county and has an employment or business relationship with a member of commissioners court or a vendor or family member, has given a gift with a value in excess of \$100 to a member of commissioners court or purchasing agent or to their family member, or has a family relationship with the local government officer as set forth above in Question 3. <sup>9</sup>

**9. Where and when do vendors file a conflict of interest questionnaire?<sup>10</sup>**

A vendor must file a conflict of interest questionnaire in the county clerk’s office not later than the seventh business day after the later of the date the vendor:

- (1) begins discussions or negotiations to enter into a contract with the county, or submits to the county an application, response to a request for proposals or bids, correspondence, or another writing related to a potential contract with the county; or
- (2) after the date the vendor becomes aware of an employment relationship or other business relationship with a member of commissioners court or purchasing agent;
- (3) the vendor has given one or more gifts as set forth in Question 3; or
- (4) becomes aware of a family relationship as set forth in Question 3.

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<sup>9</sup> Local Government Code §176.006

<sup>10</sup> Local Government Code §176.006(a-1)

**10. What information must be included in a conflict of interest questionnaire for vendors? <sup>11</sup>**

A vendor conflict of interest questionnaire must contain:

- (1) Describe each employment or business relationship the vendor has with each member of commissioners court or purchasing agent or family member;<sup>12</sup>
- (2) Identify each employment or business relationship that results in a member of commissioners court of a purchasing agent receiving taxable income, other than investment income, from the vendor;
- (3) Identify each employment or business relationship between a member of commissioners court or purchasing agent and a vendor that results in the local government officer paying taxable income, other than investment income, to the vendor. This does not include money received from the county; and
- (4) Identify each employment or business relationship in which a member of commissioners court or a purchasing agent serves as an officer or director of the vendor corporation; or holds an ownership interest of one percent or more.

**11. Does a member of commissioners court, purchasing agent or vendor commit a criminal offense for failing to timely file a conflicts disclosure statement or conflict of interest questionnaire? <sup>13</sup>**

Yes. If a member of commissioners court, purchasing agent or vendor knowingly fails to file the required conflicts disclosure statement or conflict of interest questionnaire with the county clerk later than 5 p.m. on the seventh business day after the day the officer or vendor becomes aware of the facts that require filing the statement or questionnaire, the officer or vendor commits the following offenses:

- (1) a Class C misdemeanor if the contract amount is less than \$1 million or if there is no contract amount;
- (2) a Class B misdemeanor if the contract amount is more than \$1 million but less than \$5 million; or
- (3) a Class A misdemeanor if the contract amount is at least \$5 million.

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<sup>11</sup> Local Government Code §176.006(c)

<sup>12</sup> Local Government Code §176.001(2) Defines a family member as a person related to another person within the first degree by consanguinity (child or parent) or affinity (spouse, mother-in-law, father-in-law, son-in-law, or daughter-in-law).

<sup>13</sup> Local Government Code §176.013

**12. If the vendor fails to file the required conflict of interest questionnaire, is the contract between the vendor and the county automatically void?**

No. However, the county commissioners court may, at its discretion, declare a contract void if the commissioners court determines that the vendor failed to file the required questionnaire. <sup>14</sup>

**13. Does the public have access to the statements and questionnaires?**

Yes. A county clerk must maintain and make available to the public, a list of members of commissioners courts, purchasing agents and vendors who may be required to file a conflicts disclosure statement or conflict of interest questionnaire. The clerk must also maintain the statements and questionnaires that are filed with the clerk in accordance with the county's record retention schedule.

A county that maintains an Internet website must provide access to the statements and questionnaires on the website. <sup>15</sup>

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<sup>14</sup> Local Government Code §176.013(e)

<sup>15</sup> Local Government Code §176.009

**KEEPING THE COUNTY SCENIC:  
JUNKYARDS, VISUAL AESTHETIC STANDARDS, PUBLIC NUISANCE, GRAFFITI,  
LITTER, AND AMATEUR RADIO ANTENNAS**

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## **Introduction**

In general, Texas counties have only the powers expressly delegated to them by the Legislature and the implied authority to exercise powers necessary to accomplish the county's assigned duties.<sup>1</sup> The Legislature has provided counties with certain powers to preserve the visual appeal of unincorporated areas of the county. The following document provides information on county authority over junkyards, public nuisance, litter, graffiti, visual aesthetic standards, and amateur radio antennas. Enforcement of the orders or ordinances adopted by counties generally requires written or public notice to the affected property owner. For any information on additional ordinance authority, please contact the TAC Legal Department at 1-888-275-8224.

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<sup>1</sup> *City of San Antonio v. City of Boerne*, 111 S.W. 3d 22 (Tex. 2003).

## JUNKYARDS

While municipalities have ordinance authority over junkyards and auto salvage yards within their boundaries and the state has general authority over their regulation, Chapter 396 of the Transportation Code gives counties limited powers over junkyards and salvage yards that are situated in their unincorporated areas.

### 1. May a county require a junkyard or auto salvage yard to be licensed?

Yes, the county may require a license to operate a junkyard or automotive wrecking or salvage yard not in operation before June 1, 1987.<sup>2</sup> Under §396.041 of the Transportation Code, a county may pass an ordinance to require a junkyard or automotive wrecking and salvage yard to be licensed by the county. In most counties, the ordinance may impose a fee of \$25 for issuance or renewal of the license. In counties with a population of 250,000 or more the county may impose a fee of \$150 for issuance or renewal of a license. In a county with a population of 3.3 million or more, the county may impose a fee of \$500.<sup>3</sup> The ordinance may also condition the license on the operation of the junkyard or automotive wrecking and salvage yard at a location approved by the commissioners court or a county employee designated by the commissioners court.<sup>4</sup> License fees are deposited in the county general fund.



### 2. What notice is required before the ordinance is implemented?

Before the ordinance is adopted, the commissioners court is required to hold a public hearing. Notice of the hearing must be published in a newspaper of general circulation in the county at least once a week for three weeks preceding the date of the hearing and posted for ten days preceding the date of the hearing. Tex. Trans. Code Ann. §§396.042, 396.043 (Vernon Supp. 2013).

### 3. May a county require an individual property owner to erect a fence or some other type of screening on the property to camouflage a junked vehicle from public view?

No. The county may abate and remove as a public nuisance a junked vehicle that is visible from public or private property, but does not have authority to require a particular type of camouflage to render the vehicle non-visible. Op. Att’y Gen. No. GA-0034 (2003).

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<sup>2</sup> Junkyards in existence prior to June 1, 1987 are not subject to county licensing provisions or screening requirements.

<sup>3</sup> The Legislature has created a number of exceptions or greater regulatory authority for Harris County. Here, Chapter 397 applies to junk/salvage yards established as of September 1, 1983 and contains location, fencing, and screening requirements that are more restrictive than those for other counties.

<sup>4</sup> Texas Transportation Code §396.041(c). Added by [HB 4114](#), 85<sup>th</sup> Leg. Effective September 1, 2017.

## VISUAL AESTHETIC STANDARDS FOR CERTAIN OUTDOOR BUSINESSES

### **1. Does a county have any authority to control the appearance of outdoor businesses such as junkyards or flea markets?**

Yes. The county has authority to apply visual standards to certain outdoor businesses. Under §234.002 of the Local Government Code, the commissioners court may establish visual aesthetic standards for automotive wrecking and salvage yards, junkyards, recycling businesses, flea markets, demolition businesses and outdoor resale businesses in the unincorporated areas of the county. The screening requirements for automotive wrecking and salvage yards or junkyards may not be more restrictive than the requirements under Chapter 396 of the Transportation Code.

Section 396.021(b) of the Transportation Code requires a junkyard or an automotive wrecking and salvage yard to screen the business with a solid barrier fence at least eight feet high, with the fence painted a natural earth tone coloring and no sign on its surface other than a sign with the business name. Section 396.021(c) of the Transportation Code requires a junkyard or automotive wrecking and salvage yard located in a county with a population of 200,000 or less to be screened with a fence, natural objects, or plants to at least six feet in height along the portion of the junkyard or automotive wrecking and salvage yard that faces a public road or residence.

The county must provide a reasonable period of time not to exceed 12 months for a business that was in operation on the effective date of the order to comply with the new visual standards.

### **2. Is there a penalty for violating the standards?**

Yes. A business that violates the adopted visual aesthetic standards may be subject to a civil penalty, filed by the attorney representing the county in civil cases, not to exceed \$50 each day for the first 10 days of the violation, \$100 each day for the next ten days, \$250 each day for the following 10 days and \$1000 for each subsequent day. Tex. Loc. Gov't Code Ann. §234.004. Penalties recovered under this section are deposited to the general fund. There are no criminal penalties for violating the standards.

## PUBLIC NUISANCE

The county has authority to enter onto private property to abate a public nuisance, as long as proper notice is given to the property owner. The county also has the ability to recover the cost of abating the public nuisance.

### 1. Under what authority may a county regulate public nuisances?

The county may adopt abatement procedures consistent with the general purposes of Chapter 343 of the Health and Safety Code. The procedures may provide for the county to abate a nuisance by demolition or removal, by controlling access to the premises, or by installing a cover to a swimming pool that cannot be opened by a child or draining or filling the swimming pool, or by removing, storing, transporting, or otherwise disposing of refuse that has been placed on unauthorized property. Health and Safety Code §343.021.

### 2. What is a public nuisance?

Under Section 343.011(c), Health and Safety Code, a public nuisance is defined as:

- (1) Keeping, storing, or accumulating refuse on premises in a neighborhood unless the refuse is entirely contained in a closed receptacle;
- (2) keeping, storing, or accumulating rubbish, including newspapers, abandoned vehicles, refrigerators, stoves, furniture, tires, and cans, on premises in a neighborhood or within 300 feet of a public street for 10 days or more, unless the rubbish or object is completely enclosed in a building or is not visible from a public street;
- (3) Maintaining premises in a manner that creates an unsanitary condition likely to attract or harbor mosquitoes, rodents, vermin, or disease-carrying pests;
- (4) Allowing weeds to grow on premises in a neighborhood if the weeds are located within 300 feet of another residence or commercial establishment;
- (5) maintaining a building in a manner that is structurally unsafe or constitutes a hazard to safety, health, or public welfare because of inadequate maintenance, unsanitary conditions, dilapidation, obsolescence, disaster, damage, or abandonment or because it constitutes a fire hazard;
- (6) Maintaining on abandoned and unoccupied property in a neighborhood a swimming pool that is not protected with:
  - (A) a fence that is at least four feet high and that has a latched and locked gate;and

- (B) a cover over the entire swimming pool that cannot be removed by a child;
- (7) Maintaining on any property in a neighborhood in a county with a population of more than 1.1 million a swimming pool that is not protected with:
  - (A) A fence that is at least four feet high and that has a latched gate that cannot be opened by a child; or
  - (B) A cover over the entire swimming pool that cannot be removed by a child;
- (8) Maintaining a flea market in a manner that constitutes a fire hazard;
- (9) Discarding refuse or creating a hazardous visual obstruction on:
  - (A) county-owned land; or
  - (B) Land or easements owned or held by a special district that has the commissioners court of the county as its governing body;
- (10) Discarding refuse on the smaller of:
  - (A) The area that spans 20 feet on each side of a utility line; or
  - (B) The actual span of the utility easement;
- (11) filling or blocking a drainage easement, failing to maintain a drainage easement, maintaining a drainage easement in a manner that allows the easement to be clogged with debris, sediment, or vegetation, or violating an agreement with the county to improve or maintain a drainage easement;
- (12) Discarding refuse on property that is not authorized for that activity; and
- (13) Surface discharge from an on-site sewage disposal system as defined by Section 366.022 of the Health and Safety Code<sup>5</sup>.

Under §343.011(d-1) of the Code, a public nuisance also includes undeveloped land<sup>6</sup> in the county for which: (1) the conditions described above by (c)(3) and (4) exist, (2) the conditions have been found to cause a public nuisance in the preceding year, and (3) a

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<sup>5</sup> "On-site sewage disposal system" means one or more systems of treatment devices and disposal facilities that:(A) produce not more than 5,000 gallons of waste each day; and (B) are used only for disposal of sewage produced on a site on which any part of the system is located.

<sup>6</sup> Defined as land in a natural, primitive state that lacks improvements, infrastructure, or utilities that is located in an unincorporated area at least 5000 feet outside the boundaries of a home-rule municipality.

finding of public nuisance could have been applied to the condition when it first occurred. Section 343.011(d-1) applies only to a county with a population of 3.3 million or more and in an unincorporated area in the county at least 5000 feet outside the boundary of a home-rule municipality.

### **3. May the county grant exceptions or variances for public nuisances?**

Yes. Section 343.0111 of the Health and Safety Code authorizes the commissioners court to describe in an order the circumstances under which a special exception to the prohibition against public nuisances may be granted and then grant the exception in specific cases so long as it is not contrary to the public interest. The commissioners court may also grant an exception or variance to the prohibition against public nuisance in a specific case, even if it does not fall within one of the described special circumstances, if the court determines a literal enforcement of Section 343.011 would result in an unnecessary hardship.

### **4. Must notice be given to the owner or person in charge of the premises prior to abatement?**

Yes. Under §343.022(c) of the Health and Safety Code, the written notice must: (1) state the specific condition that constitutes a nuisance; (2) require the person receiving the notice to abate the nuisance before the 31<sup>st</sup> day after the date the notice is served (if the first notice) or the 10<sup>th</sup> business day after the date the notice is served (if previous notices have been served concerning the public nuisance); (3) state that the failure to abate the nuisance may result in abatement by the county; (4) state that failure to abate may result in assessment of costs to the person responsible for causing the nuisance if he or she can be identified; (5) state that a lien may be placed against the property if the person responsible for causing the nuisance has an interest in the property; (6) state that the county may prohibit or control access to the property; and (7) state that the person receiving notice may request a hearing before the 31<sup>st</sup> day after the date on which the notice was served (if the first notice) or the 10<sup>th</sup> business day after the date the notice was served (if previous notices have been served regarding the public nuisance).

The notice must be given by service in person or by registered or certified mail, with return receipt requested; or if the address of the responsible party is unknown or personal service cannot be obtained, the county may post a copy of the notice on the premises and publish a copy in a newspaper of general circulation in the county two times within 10 consecutive days.

### **5. How is a public nuisance hearing conducted?**

The hearing may be conducted by the commissioners court or by any other board, commission, or official as designated by the commissioners court. The county may take action to abate a dangerous swimming pool by prohibiting access or controlling access to the disputed property and by placing a cover over the pool prior to the hearing. Health and Safety Code §343.022(e) and (f).

## **6. How may the county recover the costs of abating a public nuisance?**

The county may recover the costs of abating the nuisance, the cost of providing notice, and an administrative fee of \$100. The assessment of costs may not be made unless the owner or owner's agent received notice of the abatement. To obtain a lien against the property, the commissioners court may file with the county clerk a statement of costs coupled with a legal description of the property and the name of the owner. The county is entitled to interest at the rate of 10% a year beginning on the 31<sup>st</sup> day after the date of the assessment against the property. Health and Safety Code §343.021.

## **7. What is the criminal penalty for causing, permitting, or allowing a public nuisance?**

Under §343.012 of the Health and Safety Code, the penalty for causing, permitting, or allowing a public nuisance is a misdemeanor punishable by fine of not less than \$50 or more than \$200. If shown at trial that the defendant has been previously convicted of an offense under Section 343.012, the penalty increases to a fine of not less than \$200 or more than \$1000, or confinement in jail for not more than six months, or both. Each day the violation occurs is a separate offense.

## **8. Do the public nuisance prohibitions apply to agricultural land?**

No. The prohibitions against public nuisances do not apply to open-space land or land primarily used for agriculture that qualifies for tax appraisal under Subchapter C or D, of Chapter 23 of the Tax Code. Health and Safety Code §343.011(d)(2).

## **GRAFFITI**

While graffiti may be generally described as markings, writing, or drawing on a sidewalk, wall of a building, or other public surface, the term is not expressly defined in Chapter 250 of the Local Government Code.<sup>7</sup> In the absence of a statutory definition, a county should be consistent in how it defines graffiti for purposes of §250.006 of the Local Government Code.

### **1. May a county order private land owners to remove graffiti from their property?**

Yes. Under §250.006 of the Local Government Code, a county by order or ordinance may require property owners within the county's jurisdiction to remove graffiti from the owner's property on receipt of a notice from the county. Prior to sending the graffiti removal notice, the county must first offer to remove the graffiti free of charge and the owner must have refused the offer.

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<sup>7</sup> "graffiti," Dictionary.com (2014), at <http://dictionary.reference.com/browse/graffiti?s=t>.

**2. Must a county provide a private land owner with notice before initiating action to remove graffiti?**

Yes. The county's order or ordinance must require notice to be given personally to the owner in writing, or be sent by certified mail addressed to the owner at the owner's address as reflected in appraisal records, or—if the first two methods are not available—either by publication in a newspaper of general circulation in the county, posting notice on or near the front door of the buildings to which the notice relates, or being placed on a placard attached to a stake driven into the ground on the appropriate property. Loc. Gov't Code §250.006(d).

**3. May a county enter on to private property to remove graffiti?**

Yes. The county's graffiti order or ordinance must require property owners to remove the graffiti on or before the 15<sup>th</sup> day after receipt of the notice. If the owner does remove the graffiti by the deadline, the county may enter the property and remove the graffiti.

**4. Is there a way for the county to recover the unpaid costs of graffiti removal from a particular property?**

Yes. The commissioners court may file a statement of expenses with the county clerk to obtain a lien against the property. The lien attaches to the property on the date the statement is filed in the real property records of the county in which the property is located. The lien is subordinate to any previously recorded lien and the rights of a purchaser or lender for value who acquires an interest in the property before the statement of expenses was filed with the county clerk. Local Gov't Code §250.006(f) & (g).

**5. Are there exceptions to the land owner's requirement to remove the graffiti from the owner's property?**

Yes. The county graffiti order or ordinance is required to contain an exception to the requirement if the graffiti is located on "transportation infrastructure" and the removal would create a hazard for the person performing the removal. Local Gov't Code §250.006(h). While not defined in the Code, we would suggest that transportation infrastructure is a term that includes, but is not limited to, roads, bridges, culverts, retaining walls, and signage.

## LITTER

Counties may receive many calls from residents complaining about litter in unincorporated areas and demanding that the litter be removed. Chapter 365 of the Health and Safety Code gives the county authority to adopt regulations prohibiting litter and authorizing county personnel to go onto certain areas of private property to remove it.

### **1. May a county adopt litter regulations?**

Yes. A county may adopt regulations to control the disposal of litter and removal of illegally dumped litter in unincorporated areas of the county. Under §365.017 of the Health and Safety Code, the commissioners court must make a finding that the proposed regulations are necessary to promote the public health, safety, and welfare of residents of the county. The regulations may require the property owner of record to pay for the cost of removal after the owner has been given 30 days written notice to remove the illegally dumped litter.

The definition of “illegally dumped litter” for these purposes is litter dumped anywhere other than at an approved solid waste site. Litter also has the meaning set out in §365.011 of the Health and Safety Code, except that the term does not include equipment used for agricultural purposes. Section 365.011(6), Health and Safety Code, defines litter as:

(A) decayable waste from a public or private establishment, residence, or restaurant, including animal and vegetable waste material from a market or storage facility handling or storing produce or other food products, or the handling, preparation, cooking, or consumption of food, but not including sewage, body wastes, or industrial by-products; or

(B) Nondecayable solid waste, except ashes, that consists of:

(i) combustible waste material, including paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, or similar materials;

(ii) noncombustible waste material, including glass, crockery, tin or aluminum cans, metal furniture, and similar materials that do not burn at ordinary incinerator temperatures of 1800 degrees Fahrenheit or less; and

(iii) discarded or worn-out manufactured materials and machinery, including motor vehicles and parts of motor vehicles, tires, aircraft, farm implements, building or construction materials, appliances, and scrap metal.

### **2. May the county enter private property to remove litter?**

Yes, under certain circumstances. Section 365.034 of the Health and Safety Code authorizes the commissioners court to issue an order prohibiting accumulation of litter for more than 30 days

on a person's property located within 50 feet of a public highway in the county, provide for removal and disposition of litter accumulated near a highway in violation of the order, and provide for assessment of removal costs against the property owner.

The commissioners court is required to send the record owner of the property a notice by certified mail before taking any action. No action to remove or dispose of the litter or to assess costs against the record property owner may be taken until the 30<sup>th</sup> day after the date the notice was sent to the owner. A violation of the order is a Class C misdemeanor.

**3. Is there a way for the county to recover the unpaid costs of litter removal?**

Yes. A lien in favor of the county attaches to the property if a person assessed costs does not pay within 60 days of the date of assessment. The commissioners court files a record of the lien with the county clerk.

**4. May a county contract with a private non-profit entity and expend public funds for an education campaign against littering?**

Yes, if the commissioners court identifies a public purpose in the campaign to abate litter. Op. Tex. Att'y Gen. No. JM-324 (1985).

**AMATEUR RADIO ANTENNAS**

**1. How may the county regulate the placement of amateur radio antennas?**

Under Local Government Code §250.002, any county orders regulating amateur radio antennas must comply with FCC regulations. The FCC regulations on antennas are available [here](#).

Any order the county adopts involving placement screening or height of antennas based on health, safety, or aesthetics, must reasonably accommodate amateur communications and represent the minimal required regulation to accomplish the purpose. The county may take action to preserve historical sites in the county.

**CAMPAIGN SIGNS ON COUNTY ROADS**

For information on this topic, please see our separate publication *Campaign Signs on County Roads* available on the TAC website.

## MASS GATHERINGS

**THIS PUBLICATION IS A RESEARCH TOOL AND NOT THE COUNSEL OF AN ATTORNEY. THIS PUBLICATION IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY. It is provided without warranty of any kind and, as with any research tool, should be double checked against relevant statutes, case law, attorney general opinions and advice of legal counsel e.g., your county attorney. Any question should be directed to competent legal counsel for a written opinion.**

The  symbol indicates sections that have been updated since the previous publication.

### Introduction

Throughout the year, many groups organize festivals, concerts, and other public events to be held in unincorporated areas of the county. Below are answers to a few questions on the different types of events that qualify as mass gatherings, the applicable regulations and issues arising from mass gatherings, including a county's authority to require an event promoter to obtain a permit, hold required hearings, charge fees, and impose penalties.

### TYPES OF MASS GATHERINGS

#### 1. What is a mass gathering?

Generally, under §751.002 of the Health and Safety Code (Code), a mass gathering is a gathering held outside the limits of a municipality that attracts or is expected to attract: (1) more than 2,500 persons; or (2) more than 500 persons if 51% or more of those persons may be under 21 years of age and the selling or consumption of alcoholic beverages is planned or may reasonably be expected to occur. To come within the definition, the gathering must be one at which the attendees will remain for more than five continuous hours or for any amount of time during the period between 10 p.m. and 4 a.m. Under Code §751.0021, horse or greyhound racing that is not held at a location where pari-mutuel wagering is authorized under the Texas Racing Act that attracts or is expected to attract at least 100 persons is also subject to the Texas Mass Gathering Act. Health and Safety Code Chap. 751. The **county judge**

makes the determination on whether to issue a permit for a mass gathering under Code Chapter 751.

See the section on Permits for Mass Gatherings for more information.

## 2. What is a beach mass gathering?

Natural Resources Code §61.252 authorizes the **commissioners court** of a county bordering the Gulf of Mexico or its tidewater limits<sup>1</sup> to regulate mass gatherings on beaches in the county's unincorporated areas. For these purposes, a mass gathering is defined as a gathering that attracts or expects to attract more than 200 individuals who will remain at the beach location for more than two consecutive hours.

If the **commissioners court** requires a permit, it must adopt local procedures governing the permit application process. The **commissioners court** may require the permit holder to take reasonable specified actions to protect public health, safety, and welfare. The county may seek injunctive relief to prevent a violation or threatened violation of its order. Nat. Res. Code §61.253. A violation of an order adopted by the **commissioners court** is a Class B misdemeanor. Nat. Res. Code §61.254.

## 3. What is an outdoor music festival?

An outdoor music festival is defined under Occupations Code §2104.001 as a live music event taking place on two or more consecutive days or any two days during a three-day period if: (1) more than 5,000 people attend any performance; (2) either the performer or audience is not within a permanent structure; and (3) the performance takes place outside the boundaries of a municipality. The **commissioners court** makes the determination on whether to issue a permit for an outdoor music festival under Occupations Code Chapter 2104.

See the section on Outdoor Music Festival for more information.

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<sup>1</sup> Aransas, Brazoria, Calhoun, Cameron, Chambers, Galveston, Harris, Jackson, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, Orange, Refugio, San Patricio, Victoria, and Willacy counties.

## PERMITS FOR MASS GATHERINGS

### 1. How is the mass gathering permit process initiated?

Code §751.004(a) requires the event promoter to apply for a permit from the **county judge** no later than the 45<sup>th</sup> day before the date the event is scheduled to take place. The elements required by the application are set out in Code §751.004(b), and include adequate protection for traffic control and public health and safety.

### 2. For a mass gathering, how does the promoter or the county make a determination that 51 percent or more of the persons attending the event may reasonably be expected to be younger than 21 and it is planned or expected that alcohol will be sold, served, or consumed?

There is no formula, but the key word is “reasonable.”

For example, an Australian children’s group is coming to the county to hold an afternoon concert and expects a crowd between 1,000 and 2,000 to attend. While it is reasonable to assume that more than 51% of the attendees will be less than 21 years of age, it is also unlikely that alcohol will be served or consumed at the event. This event would not fit within the definition of a mass gathering. Note that the music concert does not fall under the definition of an outdoor music festival because it takes place on a single day and fewer than 5,000 attendees are expected.

On the other hand, if the event was instead for an Australian rock band with the same anticipated attendance numbers, it would be reasonable to expect that 51% of the attendees would be under 21 and also that alcohol would be present and consumed. This event would be considered a mass gathering requiring a county permit. Again, it would not be considered an outdoor music festival.

### 3. May the county judge delegate authority to issue a permit?

Yes. The **county judge** may file a written order with the **commissioners court** designating a county officer to exercise his or her authority to hear applications for mass gathering permits under Code Chapter 751. The judge may revoke the delegation at any time, either in general or in relation to a particular permit application.

For example, the **county judge** in a particular county has long transferred the authority to hear mass gathering permits to the sheriff. However, the county has just

received a petition to hold a racing event that will attract hundreds of thousands of attendees, a gathering by an order of magnitude larger than any the county has ever held before. The **county judge** may decide to make the determination on this particular event and withdraw the delegation from the sheriff for the one specific permit application.

**4. Once the county judge receives the application, what is the process the county must follow before the hearing?**

After receiving the application, the **county judge** must send a copy to the county health authority, the sheriff, and the county fire marshal (or person designated by the **commissioners court** if there is no county fire marshal). Each of these three authorities must review the preparations for the mass gathering and submit reports to the **county judge** stating whether he or she believes the minimum standards of health and sanitation, public safety and order, or fire safety and order, respectively, will be maintained for the mass gathering. The health and sanitation minimum standards are set by administrative rule by the Department of State Health Services and available at 25 Tex. Admin. Code Ann. §265.3. The public safety minimum standards are set by administrative rule by the Department of Public Safety and available at 37 Tex. Admin Code Ann. §1.161. The reports must be received by the **county judge** at least five days before the hearing is scheduled to be held.

**5. When must the hearing be held?**

Under Code §751.006, the hearing must be held not later than 10 days before the scheduled date of the mass gathering. The **county judge** sets the date and time of the hearing and provides notice to the promoter and each person with an interest in whether or not the permit should be granted. The Code does not provide guidance on how to determine when a person has an “interest.” The county health authority, sheriff, and county fire marshal (or designee) must be present at the hearing to give testimony relating to their reports. At the hearing, any person may appear and testify for or against granting the permit.

**6. Under what circumstances may the county judge reject a permit?**

Under Code §751.007(b), the **county judge** may deny the permit if the judge finds the application is inadequate or contains false information, the promoter's financial backing is insufficient, the location selected for the mass gathering is inadequate, the preparations to limit the number of persons attending the mass gathering or to provide adequate supervision for minors attending the mass gathering are

inadequate, the promoter does not have assurance that the scheduled performers will appear, the promoter cannot ensure minimum standards of sanitation and health, the preparations do not ensure the mass gathering will be conducted in an orderly manner and that the physical safety of persons attending will be protected, adequate arrangements for traffic control have not been provided, or if adequate medical and nursing care will not be available.

**7. May the county judge's decision be appealed?**

Yes. The promoter or a person affected by granting or denying the application may appeal the decision to a district court having jurisdiction in the county in which the mass gathering will be held. Health & Safety Code §751.009.

**8. May the county judge revoke a permit after it has been granted?**

Yes. Under §751.008, the **county judge** may revoke the permit if he or she determines preparations for the event will not be complete by the scheduled date or the permit was obtained through fraud or misrepresentation. The county must provide at least 24 hours' notice before the revocation to the promoter. At the promoter's request, the **county judge** must hold a hearing on the revocation. The permit revocation may be appealed to district court by the promoter or a person affected by the revocation.

**9. Does the county have any authority over the mass gathering once it has begun?**

Yes. Under Code §751.012, the county health authority, sheriff, and county fire marshal (or the person granted the marshal's authority) may inspect the mass gathering during the gathering to ensure the minimum health and safety and public safety standards are being maintained. If it is determined that a violation of the standards is occurring, the health authority, the sheriff, or the fire marshal (or designee) may order the promoter to correct the violation. Failure to comply with an order issued by one of these authorities is a Class C misdemeanor.

**10. May the county charge permit or inspection fees for a mass gathering?**

There is no provision in Code Chapter 751 for the county to charge a general permit fee. However, the **commissioners court** may establish and collect fees necessary to defray inspection costs incurred by the county health authority, the sheriff or the county fire marshal (or designee) for inspections conducted during the mass gathering. The fees are deposited into the county's general fund. The **commissioners**

**court** may use the collected inspection fees to reimburse the county department or state agency (if a state agency was used to perform an inspection) for the actual cost of performing the inspection. Health & Safety Code §751.013.

**11. Is there a penalty for a promoter’s failure to acquire a permit for a mass gathering?**

Yes. Under Code §751.011 a person who holds a mass gathering without a permit commits a misdemeanor punishable by a fine not to exceed \$1,000, confinement in the county jail for not more than 90 days, or both a fine and confinement.

**12. May a county judge issue a single mass gathering permit for multiple events?**

No. The attorney general has opined that Code Chapter 751 does not authorize the **county judge** to issue a single permit to cover more than one event. Tex. Att’y Gen. Op. GA-0582 (2007).

## **OUTDOOR MUSIC FESTIVALS**

**1. How is the outdoor music festival permit process initiated?**

Occupations Code §2104.051 requires a promoter of an outdoor music festival to register with the county clerk of the county in which the festival will be held. The registration must be verified by the promoter, be accompanied by a \$5 registration fee, and include the promoter’s name and address, a list of associates and employees, and a statement indicating whether the promoter, associates or employees have been convicted of crimes involving misappropriation of funds, theft, robbery or burglary.

Before the 60<sup>th</sup> day before the date of the outdoor music festival, the promoter must also file an application with the county clerk of the county in which the festival is to be held. The application must be verified by the promoter and accompanied by a \$5 filing fee. The application must contain the information provided on the promoter’s registration and also include information about the maximum number of persons the promoter will allow to attend the festival, crowd control plans, health and safety preparations, and the agreements between the promoter and the scheduled performers.

## 2. Once the county clerk receives the application, what is required?

The county clerk must forward a copy of the application to the county health department or county health authority, as appropriate, who must make a written report to the **commissioners court** indicating whether the preparations described in the application would be sufficient to protect the community and attendees and avoid a violation of Health and Safety Code Chapter 341 (Minimum Standards of Sanitation and Health Protection Measures). The report must be filed before the second day before the date of the hearing on the permit application. The county health authority (or a representative of the county health department) must be present at the hearing on the permit application to testify if asked.

The **commissioners court** must hold the hearing at least 15 days after the application was filed and before the 30<sup>th</sup> day before the first scheduled performance at the festival. The **commissioners court** must give the promoter at least 10 days notice of the hearing. Occupations Code §2104.103(d) provides that any person may appear at the hearing and testify for or against the grant of the permit.

## 3. Under what circumstances may the commissioners court deny a permit application?

Under Occupations Code §2104.104, the **commissioners court** shall grant the permit unless, by majority vote, the court determines by a preponderance of the evidence presented at the hearing that: (1) the application was insufficient or contained false or misleading information; (2) required information is omitted from the application; (3) the promoter does not have sufficient financial backing or stability to carry out the preparations described or ensure the performance of the agreements; (4) the preparations are insufficient to protect the community or avoid violations of the sanitation and health provisions of the Health and Safety Code; (5) the times and location of the festival create a substantial danger of congestion and disruption of other activities in the immediate vicinity; (6) the preparations are insufficient to limit the number of attendees to the maximum number stated in the application; or (7) the promoter does not have adequate agreements with performers to ensure with reasonable certainty that advertised performers will appear.

## 4. May the commissioners court revoke the permit after it has been granted?

Yes. The **commissioners court** may revoke the permit at any time before the fifth day before the date of the first performance, if the court gives reasonable notice to the promoter and holds a hearing. The **commissioners court** must find that the

preparations for the event will not be completed in time for the first performance and the failure to complete the preparations would result in a threat to the health of the community or persons attending the festival to support revocation of a permit. A permit may not be revoked during the period beginning on the fifth day before the first performance of the festival and ending on the final day of the festival.

**5. May the commissioners court's decision be appealed?**

Yes. A person affected by the grant, denial, or revocation of an outdoor music festival application or permit may appeal the **commissioners court's** action in state district court in the county in which the **commissioners court** presides. An appeal does not suspend the **commissioners court's** action unless the district court orders a suspension.

**6. Other than the registration fee and the application filing fee, can the county charge any additional fees?**

No. There is no provision in Occupations Code Chapter 2104 for the county to charge additional fees related to the outdoor music festival.

**7. Is there a penalty for a promoter's failure to acquire a permit for an outdoor music festival?**

Yes. A person may not act as a promoter of an outdoor music festival unless the person registers with the county clerk nor direct or control a festival without a permit. Under Occupations Code §2104.151, each of these prohibited acts is a misdemeanor punishable by a fine not to exceed \$1,000, confinement in the county jail for a term not to exceed 30 days, or both a fine and confinement.

**8. Does the county have any authority over an outdoor music festival once it has begun?**

Although the Occupations Code does not specifically address the county's authority while an outdoor music festival is in progress, the county is not prohibited from taking necessary action under its general authority to protect public health and safety.

For example, an outdoor music festival has been going on for two days when the weather unexpectedly changes. Standing water from the rain affects sanitation at the site and there is flash flooding on the grounds and a danger of lightning strikes. In

this situation, the **county judge** would be able to intervene and halt the festival under the county judge's authority to declare a local disaster under Government Code §418.108.

## COMMON ROAD AND BRIDGE QUESTIONS

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The  symbol indicates sections that have been updated since the previous publication.

### OPENING AND CLOSING ROADS

**1. May a commissioners court open a new road on its own motion, or is a landowner petition required?**

A commissioners court may open a new road on its own motion or upon application by members of the public.<sup>1</sup> §251.051 Tex. Transp. Code provides general authority for a commissioners court to lay out and open new roads, and §251.052 Tex. Transp. Code authorizes the commissioners court to open a new road on petition by eight landowners in a precinct and sets out what information must be included in the petition.

**2. Is a unanimous vote of the commissioners court required to open a new road?**

No. A unanimous vote of the commissioners court is required to close, abandon, or vacate a public road, or alter a public road, except to shorten it from end to end. A unanimous vote is not required to open or discontinue a road. Tex. Transp. Code §251.051.

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<sup>1</sup> Whether a commissioners court had authority to open a new road on its own motion or only upon application by private citizens was settled by the Texas Supreme Court in *Robison et al. v. Whaley Farm Corporation*, 120 Tex. 633 (1931). See also, *Parkey v. Archer County*, 61 S.W.2d at 179 (Tex. App. – Fort Worth, 1933, reh'g denied).

**3. Which roads may a commissioners court discontinue, close or abandon?**

A commissioners court may not discontinue, close, or abandon an entire first-class or second-class road unless the road has been vacated or unused for at least three years. Tex. Transp. Code §251.051(d). There is no “wait-period” to discontinue, close, or abandon a third-class road or a portion or portions of a first-class or second-class road under the Transportation Code.

A commissioners court may not discontinue, close or abandon a road to a cemetery, unless (1) the road is a cemetery road and the landowner whose property adjoins the road has not filed notice with the county clerk that the landowner will provide access to the cemetery as provided in Section 711.041 Health & Safety Code; or (2) the fenced road is necessary to reach adjoining property.

**4. If a commissioners court closes, abandons, discontinues or vacates a road, must an alternate route be provided?**

It depends. “Discontinuing” a road means to cease maintaining the road. Tex. Transp. Code § 251.001(2). A commissioners court may not discontinue a road before a new road designated by the court is ready to replace it. Tex. Transp. Code §251.051(c).

There is no statutory requirement to provide a new, alternate route when a commissioners court closes, abandons, or vacates a road. *See* Tex. Att’y Gen. Op. GA-0088, discussing, in theory, the commissioners court’s ability to close, abandon, or vacate a road without providing an alternate route.

**5. Can the commissioners court close, abandon, or vacate a road over the objection of abutting landowners?**

No. An abutting landowner acquires a property interest in the use and access to an abutting roadway. A commissioners court may not close the road over the abutting landowners’ objection, but it may discontinue maintenance and supervision of the road. Tex. Transp. Code §251.058. *See also, Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986) (citing cases).

## RIGHT-OF-WAY MAINTENANCE

### **1. Is there a minimum amount of maintenance that must be performed on a county road or right-of-way?**

No. There is no express requirement to maintain a county road or right-of-way other than the requirement that the rights-of-way be kept free of obstructions. Tex. Transp. Code §251.008. However, if a county road becomes so degraded that its condition poses a “special defect” and the county knows about it, the county could be liable for personal injuries or death resulting from the condition of the road. A discussion of what constitutes a “special defect” is beyond the scope of this publication.

### **2. May the commissioners court simply divide the funds allocated for road and bridge work for the year equally among the county’s precincts?**

No. While the commissioners court has broad discretion about how and when to maintain the county roads and how to budget for road maintenance expenditures,<sup>2</sup> an appeals court has ruled that a commissioners court’s order distributing road and bridge funds equally among the county’s four precincts without considering the condition of roads, traffic, or the amount of taxes collected in each precinct for road and bridge purposes was an abuse of discretion.<sup>3</sup>

### **3. May the commissioners court remove or order the removal of fencing that poses a hazard to public users of the road?**

Yes, subject to judicial review. Tex. Transp. Code §251.008(1) requires public roads of all classes to be free of all obstructions, and Tex. Transp. Code §251.003(a)(1) authorizes the commissioners court to make and enforce all necessary rules and orders for the construction and maintenance of public roads. Based on the authority provided in the Transportation Code, the Texas Attorney General’s Office opined that a commissioners court may remove or order the removal of fencing that creates a safety hazard to the public users of the road. *See* Tex. Att’y Gen. Op. GA-0703 (2009).

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<sup>2</sup> Tex. Transp. Code §251.016 states, “The commissioners court of a county may exercise general control over all roads, highways, and bridges in the county.” Tex. Transp. Code §251.003 states, “The commissioners court of a county may make and enforce all necessary rules and orders for the construction and maintenance of public roads.”

<sup>3</sup> *Garland et al. v. Sanders et al.*, 114 S.W.2d 302 (Civ.App—Dallas, 1938).

**4. May the commissioners court remove or order the removal of trees and shrubs that pose a hazard to the public's use of the county's right-of-way?**

Yes, subject to judicial review. Tex. Transp. Code §251.008(1) requires public roads of all classes to be free of all obstructions, and Tex. Transp. Code §251.003(a)(1) authorizes the commissioners court to make an enforce all necessary rules and orders for the construction and maintenance of public roads. Based on the authority provided in the Transportation Code, the Texas Attorney General's Office opined that a commissioners court may remove or order the removal of trees and shrubs in the right of way that create a safety hazard to the public users of the road. *See* Tex. Att'y Gen. Op. JM-1241 (1990).

**5. May the commissioners court sell or otherwise dispose of trees, shrubs, or timber cut down or removed from the right-of-way?**

Yes, subject to judicial review. Tex. Transp. Code §251.008(1) requires public roads of all classes to be free of all obstructions, and Tex. Transp. Code §251.003(a)(1) authorizes the commissioners court to make an enforce all necessary rules and orders for the construction and maintenance of public roads. Based on the authority provided in the Transportation Code, the Texas Attorney General's Office opined that a commissioners court may sell or otherwise dispose of trees, shrubs, or timber growing in the public's right-of-way. *See* Tex. Att'y Gen. Op. JM-1241 (1990).

**6. May the commissioners court order a private landowner to allow the county to enter upon private land to cut or trim trees or shrubs interfering with the public right-of-way?**

No. There is no statutory authority authorizing the commissioners court to demand access to private land in order to maintain the public's right of way. However, the commissioners court may seek the landowner's consent to enter private property. It is advised that the landowner's consent be in writing and accompanied by a written waiver of liability.

**7. May a landowner put a fence across a third class road?**

Yes, conditioned on the following: Texas Transp. Code §251.010 authorizes a person, including a neighborhood association, who owns or controls real property on which a third-class road or a neighborhood road (see Question 9 below) is located for which the right-of-way was obtained without cost to the county to erect a gate across the road "when necessary" and with commissioners court approval. The

Attorney General has opined that a landowner must remove a gate across a third-class road if the commissioners court has constructed a cattle guard to replace it. Tex. Att’y Gen. Op., LO-98-120.

**8. May a commissioners court accept private donations for road maintenance and repair?**

Yes. Counties are statutorily authorized to accept donations for the purpose of road maintenance and repairs. Counties operating under the road commissioner or superintendent systems may accept donations of labor, money, or other property to aid in building or maintaining county roads under Tex. Transp. Code §§252.109 and 252.214. Under §81.032 of the Local Government Code, counties operating under the ex officio road system may accept gifts, grants or donations for the purpose of performing a function conferred by law on the county – in this case, road construction and maintenance. There is no specific statute authorizing counties under the unit system to accept donations for road maintenance and repair, but donations for road maintenance and repair in a unit system county can be accepted under the general grant of authority in §81.032 of the Local Government Code.

**9. How wide is the county’s easement or right-of-way?**

While Tex. Transp. Code §251.007 lists the minimum and maximum widths for first and second-class roads and the minimum width for third-class roads, there is no statute that defines the width of an easement. The width of an easement will depend on what was dedicated, condemned, purchased, or acquired by prescription. Reference to maps, plats, deeds, surveys, or commissioners court minutes may indicate the width of an easement.

**10. May a county perform maintenance work on private property?**

Generally, a county may not repair or maintain a private road or property, subject to a few exceptions:

***Counties with a population under 7,500***

A constitutional amendment authorizes counties with a population of 7,500 or less to construct or repair private roads if the county charges a reasonable amount for the work. Revenue received from private road work may be used only for the construction, including right-of-way acquisition, or maintenance of public roads.<sup>4</sup>

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<sup>4</sup> Tex. Const. Article III, section 52f

### ***Neighborhood Roads***

Chapter 253 of the Transportation Code authorizes a procedure for improving private subdivision roads “to comply with county standards for roads” where the condition of the roads impacts the public’s health, safety or welfare. If the commissioners court determines that improvement of a road in a subdivision or of an access road to a subdivision is necessary for the public health, safety, or welfare of the residents of the county, the commissioners court may propose to (1) improve the road to comply with county standards for roads; and (2) assess all or part of the costs of the improvement pro rata against the record owners of the property.<sup>5</sup>

The commissioners court must publish notice of the proposed improvement and assessment at least twice in a newspaper of general circulation in the county, and the notice must state the date the commissioners court will hold a public hearing to consider the proposed improvement and assessment.<sup>6</sup> The commissioners court must hold a public hearing on the proposed improvement and assessment on or after the 31<sup>st</sup> day after the first required notice is published.<sup>7</sup> Within 10 days of the public hearing, the commissioners court must send a ballot and an addressed stamped envelope via certified mail to each record owner of real property in the subdivision or part of the subdivision to be assessed.<sup>8</sup> The ballot must state the maximum assessment that could be made against each property.

Not later than the 30<sup>th</sup> day after the date of the public hearing, the county clerk shall tally the returned ballots and declare the results to the commissioners court. If a majority of ballots are in favor of the improvement and assessment, the commissioners court shall order the improvements and assess the costs of the improvements against the real property owners of the of the subdivision.<sup>9</sup>

A private subdivision road improved under Chapter 253 becomes a county road.<sup>10</sup>

### ***Driveways and Culverts***

There is limited authority to clear drainage ditches and culverts on private property in counties with a population of less than 100,000 that have established a drainage system under Chapter 254 of the Transportation Code. The private ditch or culvert

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<sup>5</sup> Tex. Transp. Code §253.003

<sup>6</sup> Tex. Transp. Code §253.004

<sup>7</sup> Tex. Transp. Code §253.005

<sup>88</sup> Tex. Transp. Code §253.006

<sup>9</sup> Tex. Transp. Code §253.007

<sup>10</sup> Tex. Transp. Code §253.011

must connect with a drainage ditch constructed or maintained by the county. Before removing blockage in a private ditch, the commissioners court must provide 20 days notice by certified mail to the record owners of the property that they are in violation of an order adopted under Chapter 254 of the Transportation Code.<sup>11</sup>

**11. May the commissioners court charge a fee for cutting a road for cable installation, utilities, or other purposes?**

To provide funds for the future inspection, repair, and maintenance of a cut road, a county may impose a fee for each cut of a county road during or as an incident to the installation, maintenance, or repair of any facilities or properties of the person or entity.<sup>12</sup> The fee may not exceed \$500, may be imposed either before or after the cutting of the road; and is in addition to any other charge the county is authorized to impose to repair damage to the road because of the cut.

This fee does not apply in relation to a person or other entity that has entered into an agreement with the county that provides for fees to be paid by the person or entity for the use of the county roads; or is a utility that is not required under Chapter 181, Utilities Code, to provide notice to a commissioners court of a county.

A county may impose the §240.907 fee for the activities of excavating or cutting the surface of a county road, but not for activities that bore or tunnel under a county road without cutting the road surface.<sup>13</sup>

**12. Can a county deny the installation of public utilities in the right of way?**

The county has no authority to deny the excavation of the right-of-way for installation of a public utility. However, the county has the ability to designate the location of the placement of some public utility lines within the right-of-way.<sup>14</sup>

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<sup>11</sup> Tex. Transp. Code §254.008

<sup>12</sup> Loc. Gov't Code §240.907

<sup>13</sup> Tex. Att'y Gen. No. GA-0722 (2009)

<sup>14</sup> See Tex. Utilities Code §§181.024, 181.044

## TRAFFIC CONTROL

### 1. May a commissioners court limit truck traffic on a county road?

The Attorney General has opined that a commissioners court may forbid all truck traffic on a county road by posting a “No Thru Truck Traffic” on a road.<sup>15</sup>

### 2. May the commissioner court set speed limits on county roads?

The commissioners court of a county, by order entered on the minutes of the court, may determine and set a maximum reasonable and prudent speed for a vehicle travelling on any segment of a county road. In determining the maximum reasonable and prudent speed, the commissioners court shall consider all circumstances on the affected segment of the road, including the width and condition of the road surface and the usual traffic on the road.

A speed limit set by the commissioners court is effective when appropriate signs giving notice of the speed limit are installed on the affected segment of the county road.<sup>16</sup>

### 3. May the commissioners court adjust the speed limit on a county road?

The commissioners court may modify a speed limit by an order entered on its records.

The commissioners court has authority to **increase speed limits** based on the results of an engineering and traffic investigation.<sup>17</sup> The commissioners court may not establish a speed limit of more than 70 miles per hour.<sup>18</sup>

The commissioners court of a county may declare a **lower speed limit** of not less than 30 miles per hour on a county road or highway if the commissioners court determines that the speed limit is unreasonable or unsafe, or 20 miles per hour in a residence district, unless the roadway has been designated as a major thoroughfare by a city planning commission. An engineering and traffic investigation is not required if a commissioners court is lowering a speed limit to 30 miles per hour on a

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<sup>15</sup> Tex. Att’y Gen. No. GA-0088 (2003)

<sup>16</sup> Tex. Transp. Code §251.154

<sup>17</sup> Transp. Code §545.355(a)

<sup>18</sup> Transp. Code §545.355(c)

county road or highway or 20 miles per hour on a county road within a residence district.<sup>19</sup>

The commissioners court of a county with a population of more than 2.8 million may establish, based on the results of an engineering and traffic investigation, a speed limit of not more than 75 miles per hour on any part of a highway of that county that is a limited-access or controlled-access highway, regardless of the location of the part of the highway.<sup>20</sup>

#### **4. What traffic-control devices can a county install on their roads?**

The commissioners court of a county may adopt regulations establishing a system of traffic control devices in restricted traffic zones on a county road. A system of traffic control devices must conform to the Texas Department of Transportation's Manual on Uniform Traffic Control Devices for Streets and Highways. The commissioners court by order entered on its minutes may install and maintain any traffic signal light, stop sign, or no-parking sign that the court considers necessary for public safety.<sup>21</sup>

The Attorney General has opined that center stripes and speed bumps, if they are used to regulate, warn, or guide traffic, are traffic-control devices that a county may install. Center stripes must conform to standards set out in the Manual. A county may install a speed bump on a county road only if it has received permission to do so from the Texas Department of Transportation.<sup>22</sup>

#### **5. May a county extend traffic rules to roads in a private subdivision?**

A county commissioners court may extend all or some of the traffic rules applicable to county roads to roads in a private subdivision under certain conditions<sup>23</sup>:

- The subdivision must be located in the unincorporated area of a county with a population of 500,000 or less.
- On petition of 25 percent of the property owners residing in a subdivision in which the roads are privately maintained or on the request of the governing

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<sup>19</sup> Tex. Att'y Gen. Op. JC-0079 (1999)

<sup>20</sup> Transp. Code 545.355(e)

<sup>21</sup> Tex. Transp. Code §251.155

<sup>22</sup> Tex. Att'y Gen. No. JC-0175 (2000)

<sup>23</sup> Tex. Transp. Code §542.007(b)

body of the entity that maintains those roads, the commissioners court of the county by order may extend any traffic rules that apply to a county road to the roads of the subdivision if the commissioners court finds the order in the interest of the county generally.

- The petition must specify the traffic rules that are sought to be extended. The court order may extend any or all of the requested traffic rules.

## **REGULATION OF OVERWEIGHT AND OVERSIZE VEHICLES**

### **1. May a commissioners court establish load limits on a county road or bridge?**

Yes. Tex. Transp. Code §251.153 authorizes a commissioners court to establish load limits for any road or bridge in the manner prescribed by §621.301 of the Transportation Code. Concurrence from the Texas Department of Transportation (TxDOT) is required. A load limit is deemed concurred with by TxDOT 30 days after the county submits the load limit accompanied by supporting documentation and calculations reviewed and sealed by an engineer licensed in Texas. However, TxDOT may withdraw concurrence any time after the 30-day period. Counties petition TxDOT for concurrence by submitting a request to the TxDOT district engineer.

### **2. May a commissioners court require a permit for an overweight vehicle?**

Yes, subject to limitations. Tex. Transp. Code §623.018(a) authorizes the county judge to issue a temporary permit for 90 days for the transportation of an overweight, oversize, or overlength commodity that cannot be reasonably dismantled on county roads that are not part of the state highway system. The commissioners court (and not the county judge) may require bond sufficient to compensate the county for damage to the road.

However, if a vehicle has been permitted to operate in the county by the State under §623.011, the county may not impose an additional fee, bond or permit requirement.

### **3. Does a county have the authority to enforce weight limits?**

Yes. A commissioners court may authorize a county traffic officer to enforce weight limits. Tex. Transp. Code 251.153(b).

A sheriff and deputy sheriffs may enforce weight limits. Tex. Transp. Code §621.401(3).

A constable and deputy constables in certain counties described in Tex. Transp. Code §621.4015 may enforce weight limits.

#### **4. May a county prohibit use of a road?**

Yes, subject to limitations and right of appeal to the county judge. Tex. Transp. Code § 251.157 authorizes a “road supervisor” to prohibit or restrict use of a road if a road or bridge is unsafe, or if, because of wet weather or recent construction, the road cannot be used without probable serious damage to the road after posting notice of the terms and duration of the prohibition and providing a detour. A vehicle owner or operator may appeal to the road use prohibition to the county judge, whose decision to revoke, sustain, or modify the road supervisor’s decision on the prohibition or restriction is final.

Tex. Transp. Code §251.1575 was added by the Legislature in 2013 and authorizes counties to designate an alternate route for heavy vehicles exceeding 60,000 pounds. Notice must be posted at locations that enable drivers to detour to avoid the restricted road.

#### **5. What is the maximum weight for a vehicle or load in Texas?**

Generally, 80,000 pounds is the maximum weight for a vehicle load in Texas. However, there are many exceptions, and the State grants overweight permits. New legislation, S.B. 1383, effective January 1, 2018, and H.B. 2319, effective September 1, 2017 authorize overweight milk trucks up to 90,000 pounds, natural gas powered vehicles up to 82,000 pounds, and vehicles transporting “intermodal shipping containers” up to 93,000 pounds in certain counties. These new overweight permits are in addition to the long list of vehicles and products excepted from the 80,000 pound limit under existing state law.

#### **6. Can a county require a permit and fee for installing an access point to a county road?**

Yes. The commissioners court, under its general authority to make and enforce all necessary rules and orders for the construction and maintenance of public roads and to exercise general control over the roads, may require a permit for the construction of an access point to a county road. Under the specific authority in Tex. Transp.

Code §251.017, the commissioners court may set a reasonable fee related to the impact the access points will have on county roads. Tex. Att'y Gen. Op. GA-1013 (2013).

## SALARY GRIEVANCE COMMITTEE

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### Introduction

Chapter 152 of the Local Government Code (the “Code”) creates a salary grievance process for elected county and precinct officials to challenge their salaries, expenses, and allowances as set out in the proposed budget. Under Section 152.013 of the Code, notice must be published in a newspaper of general circulation in the county at least 10 days prior to any meeting at which proposed increases in salaries, expenses or allowances will be discussed. Written notice must also be provided to each elected county and precinct officer detailing the salary and personal expenses to be included in the budget. An elected county or precinct officer who disagrees with the salary or personal expenses provided in the proposed budget may request a hearing before the salary grievance committee before the budget’s final approval. Tex. Loc. Gov’t Code §152.016.

The nine-member salary grievance committee generally consists of the county judge, sheriff, tax assessor-collector, treasurer, county clerk, district clerk, county attorney or criminal district attorney, and the number of members of the public necessary to provide nine voting members. The county judge is chair of the committee but is not entitled to vote. As an alternative, the commissioners court may vote to have the committee consist of nine public members, which is also chaired by the county judge. Tex. Loc. Gov’t Code §152.014.

The public members of the committee are selected at a meeting of the commissioners court at any time but no later than the 15<sup>th</sup> day after a hearing request has been made. To select the public members of the committee, the county clerk places the names of each person who served on a grand jury during the preceding calendar year on separate slips

of paper. The slips are placed in a container, and the county judge draws the appropriate number of names to select the public members of the salary grievance committee. The county judge may repeat the process and draw for a list of alternates. Public member vacancies are filled for the unexpired term by appointment from the list of alternates. If there is no alternates list or the list has been exhausted, replacements are filled by random selection of the remaining slips at a commissioners court meeting. Tex. Loc. Gov't Code §152.015(a)(2).

Public members of the committee serve until the later of the end of the fiscal year in which the person was appointed or the time the committee takes a final vote on the last grievance for which a public hearing was held. Tex. Loc. Gov't Code §152.015(c).

**1. May the salary grievance committee recommend an increase for an elected officer who did not request an increase in writing?**

No. Under §152.016 of the Code, the request for a hearing of the salary grievance committee must be from the elected officer in writing, delivered to the committee chair within five days after the officer receives notice of the salary or expenses, and state the desired salary or expenses. The committee's authority to review the elected officer's salary stems from the written request. Tex. Att'y Gen. Op. No. H-1238 (1978).

**2. What recourse does an elected official have if he or she did not receive the proper notice of a proposed change in salary and the deadline to challenge the salary change has passed?**

If the commissioners court fails to give the appropriate written notice to elected officials of a proposed reduction in salary before adopting the final budget, the officials' salaries remain fixed at the prior year's amount. Tex. Att'y Gen. Op. No. GA-620 (2008). If the county attempted to enforce the adopted lower salary, the aggrieved public officials could file a mandamus action to compel the county to pay them the higher salary.

**3. Do non-elected county employees have access to the salary grievance process?**

No. The salary grievance committee process is specifically for elected county and precinct officials. Tex. Att'y Gen. Op. No. H-1238 (1978).

**4. Is the salary grievance committee subject to the Open Meetings Act?**

Yes. The committee has rule-making or quasi-judicial authority and therefore is a governmental body under the Act. Action taken at a meeting that is not properly noticed is voidable. Tex. Att’y Gen. Op. No. H-1281 (1978).

**5. May the salary grievance committee meet in closed session?**

No. There are no provisions for the committee to meet other than in open session. Any votes or actions taken in closed session would be voidable. Tex. Att’y Gen. Op. No. JM-1007 (1989).

**6. May the salary grievance committee recommend a pay increase to an elected official greater than the one requested by the official?**

Yes. Under §152.016(c), Local Government Code, if six or more of the members vote to recommend an increase in salary or personal expenses, the committee submits its recommendation to the commissioners court in writing.

If six to eight members of the committee vote to recommend an increase, the commissioners court shall **consider** the recommendation at its next meeting.

If all nine members of the committee vote to recommend the increase and sign the recommendation, the commissioners court shall **include** the increase in the budget before the budget is filed and the increase takes effect in the next budget year.

The committee is not limited to the officer’s request in making its determination. Tex. Att’y Gen. Op. No. MW-366 (1981).

**7. Is the county required to publish notice of the salary increase for a county judge when the increase is a result of a state supplement?**

No. The notice is not required because the supplemental increase in the judge’s salary is not an act of the commissioners court. Tex. Att’y Gen. Op. No. GA-426 (2006).

**8. May a member of the salary grievance committee vote on his or her grievance?**

Yes. Members of the committee are not barred from voting on their own salary by Chapter 171, Local Government Code. Tex. Att’y Gen. LO-98-97 (1997).

**9. Are public members of the salary grievance committee paid for their services?**

No. Although the public members are pulled from the grand jury list, there is no provision under law for them to be paid in the same manner as grand jurors. Tex. Att’y Gen. Op. No. MW-309 (1981).

**10. May an elected official appeal the decision and request a second meeting of the committee if dissatisfied with the result of the first meeting?**

No. An elected official is entitled to one appeal per budget cycle. Once finalized, the officer’s next opportunity to request a salary review will be the next budgetary cycle. Tex. Att’y Gen. Op. No. MW-309 (1981).

**11. May the salary grievance committee meet after the beginning of the new fiscal year?**

No. The committee is intended to work during the regular budget process between the filing of the proposed budget with the county clerk and the adoption of the final budget by the commissioners court. The committee may not meet after the adoption of the final budget. Tex. Att’y Gen. Op. No. DM-405 (1996).

**12. May the salary grievance committee set general policy for county salaries?**

No. The committee only has authority to review the salaries of county or precinct officers. It may not set policy or add new items to the budget. Tex. Loc. Gov’t Code §152.016(d).

**13. If the county passes a final budget without providing the statutory notice of a salary change to the impacted elected officials, what is the effect on the salary?**

The individual notice is mandatory. If the commissioners court fails to provide the required notice, the officeholder’s salary remains fixed at the prior year’s amount. This is the case whether the final budget would have increased or decreased the officer’s salary. Tex. Att’y Gen. Op. No. GA-0620 (2008).

**14. May the salary grievance committee meet without every member present?**

Yes. There is no requirement for each member to be present at the meeting in order for the salary grievance committee's actions to be valid. The attorney general has addressed in two opinions the absence of the county judge and a member who attempted to participate by telephone. In both instances, the absence was held not to affect the validity of the meeting. Tex. Att'y Gen. Op. JM-1007 (1989); Tex. Att'y Gen. LO-94-031 (1994).

**15. May members of the salary grievance committee be compelled to attend its meetings?**

There is no provision in the law that suggests members of the salary grievance committee may be compelled to attend a meeting. If a county or precinct officer wishes to have the committee unanimously approve his or her salary request, the officer should encourage all members of the committee to attend the meeting.

**16. Section 152.017 of the Local Government Code provides that the salary grievance procedure does not apply to a judge of a court of record or to a presiding judge of a commissioners court in a county with a population of 3.3 million or more. Does a county judge in a county with a smaller population have recourse to the salary grievance procedure despite the fact that he or she presides over a court of record?**

Yes. In reviewing the predecessor statute to §152.107, the attorney general determined that in addition to serving as the presiding judge of the county court (which is a court of record), the county judge also serves as the presiding judge of the commissioners court. The salary grievance procedure is applicable to the county judge in the latter role. Tex. Att'y Gen. Op. No. MW-110 (1979).

**17. If a commissioners court removes salary increases for county officials at the final budget hearing, do elected officials have recourse to the salary grievance process?**

In Tex. Att'y Gen. Op. No. GA-929 (2012), the attorney general determined that removing a proposed salary increase at the final budget hearing without giving additional notice to elected officials and allowing them a chance to seek redress from the salary grievance committee renders impossible the requirements of §152.016,

Local Government Code. Once the budget is final, there is no authorization for the salary grievance committee to meet. An aggrieved elected official could seek judicial review of the commissioners court's action.

**18. May a county fax notice of the proposed salary to the elected officials? What if an elected official does not receive the notice?**

Yes, the salary notice may be faxed to comply with §152.013 of the Local Government Code, which requires each elected county and precinct officer to be notified of the officer's salary and personal expenses in the proposed budget. If the notice is not immediately received by the official, the five day period to submit a grievance begins on the date the notice is actually received. Tex. Att'y Gen. Op. No. JC-471 (2002).

## REGULATION OF SEXUALLY ORIENTED BUSINESSES

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### **1. What is a sexually oriented business?**

Local Government Code Chapter 243 defines a sexually oriented business as a sex parlor, nude studio, modeling studio, love parlor, adult bookstore, adult movie theater, adult video store, adult motel, or other commercial enterprise, which has as its primary business the offering of a service or selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.<sup>1</sup>

### **2. What entities are specifically exempted from regulation under Local Government Code Chapter 243?**

The statute exempts two types of businesses from regulation as a sexually oriented business: (a) a bookstore, movie theater, or video store, as distinguished from the adult version of such a business; and (b) a business operated by or employing a licensed psychologist, licensed physical therapist, licensed athletic trainer, licensed cosmetologist or licensed barber performing functions authorized under their license.<sup>2</sup>

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<sup>1</sup> Local Government Code §243.002

<sup>2</sup> Local Government Code §243.004

### **3. Does a county have the authority to regulate sexually oriented businesses?**

Yes. Chapter 243 of the Local Government Code notes that the unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety and welfare, and that the purpose of the chapter is to provide local governments a means of remedying this problem.<sup>3</sup> The statute specifically provides that Chapter 243 does not diminish the authority of a local government to regulate sexually oriented businesses with regard to any matters.<sup>4</sup> A court of appeals has stated "... it is apparent that the Legislature intended to provide a broad framework for regulation of certain "sexually oriented businesses" while authorizing municipalities and counties to enact ordinances within that framework."<sup>5</sup>

### **4. What types of location restrictions are allowed?**

A county may restrict a sexually oriented business to a particular area, or prohibit a sexually oriented business from being located within a certain distance of a school, regular place of religious worship, residential neighborhood, or other location the commissioners court finds is inconsistent with the operation of a sexually oriented business. The commissioners court may also restrict the number of sexually oriented businesses that operate in a specified area. The commissioners court must take into account First Amendment and other state and federal constitutional considerations. The specific distances that a county may require sexually oriented businesses to be located from other land uses is a fact-sensitive determination.<sup>6</sup>

### **5. Does a sexually oriented business have to be licensed?**

A county may require the owner or operator of a sexually oriented business to get a license or permit if the county has adopted regulations.<sup>7</sup> A county may charge a fee for the license or permit. The fee must be based on the cost of processing the applications and investigating the applicant.<sup>8</sup> The county's adopted regulations may provide for denial, suspension or revocation of the license or permit. An owner

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<sup>3</sup> Local Government Code §243.001(a)

<sup>4</sup> Local Government Code §243.001(b)

<sup>5</sup> State v. Chacon, 273 S.W.3d 375, 379 (Tex. App. 2008)

<sup>6</sup> Tex. Att'y Gen. Op. No. GA-658 (2008)

<sup>7</sup> Local Government Code §243.007

<sup>8</sup> Local Government Code §243.009

or operator can file suit in district court to contest the denial, suspension or revocation of the permit or license.<sup>9</sup>

## **6. How can the county enforce its regulation of a sexually oriented business?**

The county can apply for an injunction in district court to prohibit the violation of a regulation. A person who violates a regulation is also subject to Class A misdemeanor charges.<sup>10</sup> A county can also inspect a sexually oriented business to determine whether the business is complying with Chapter 243 of the Local Government Code and the county regulations.<sup>11</sup>

## **7. Is a sexually oriented business required to post a sign?**

Yes. A person who intends to operate a sexually oriented business in a county that does not regulate sexually oriented businesses is required to erect an outdoor sign stating that a sexually oriented business is intended to be located on the premises, and giving the name and business address of the operator. The sign must be affixed by the 60<sup>th</sup> day before the intended date of commencement of operation.<sup>12</sup>

In a county that regulates sexually oriented businesses, an applicant for a license must erect an outdoor sign stating that a sexually oriented business is intended to be located on the premises. The sign must also state the name and business address of the applicant. The sign must be affixed at least 60 days before the date of the application for a license or permit.<sup>13</sup>

In both regulated and unregulated counties, the sign must measure at least 24 inches by 36 inches, with letters at least 2 inches in size. A county may require the sign to be in both English and a language other than English, if it is likely that a substantial number of residents in the area speak a language other than English.<sup>14</sup>

## **8. How old does a person have to be to work at a sexually oriented business?**

Pursuant to Labor Code §51.016, a person must be at least 18 years of age to work at a sexually oriented business (this requirement does not apply to an independent

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<sup>9</sup> Local Government Code §243.007

<sup>10</sup> Local Government Code §243.010

<sup>11</sup> Local Government Code §243.008

<sup>12</sup> Local Government Code §243.0075(b)

<sup>13</sup> Local Government Code §243.0075(a)

<sup>14</sup> Local Government Code §243.0075(c)

contractor who performs repair, maintenance or construction services at the sexually oriented business). The sexually oriented business is required to keep paperwork showing proof of age for all employees for at least 2 years after the person leaves employment with the sexually oriented business. The sheriff is authorized to check the paperwork if there is good reason to believe an underage person was hired within the two years preceding the date of the inspection. Failure to maintain a record or intentionally or knowingly hindering an inspection is an offense. An offense under Chapter 51 of the Labor Code is a Class B misdemeanor.<sup>15</sup>

**9. May a sex offender be affiliated with a sexually oriented business?**

No. A sex offender may not own or partly own a sexually oriented business or serve as a director, officer, operator, manager or employee of a sexually oriented business.<sup>16</sup> A sexually oriented business, if it knows a person is a sex offender, may not contract with the person to operate or manage the business or employ the person as an officer, operator, manager or other employee.<sup>17</sup>

**10. May a sexually oriented business obtain an alcoholic beverage permit?**

Yes, under certain circumstances. The Texas Alcoholic Beverage Commission or its administrator must hold a hearing before granting or denying an original application for a mixed beverage permit, private club registration permit, wine and beer retailer's permit or retail dealer's on-premise license if a sexually oriented business is to be operated on the premises to be covered by the license. The commission and the administrator are required to give due consideration to the recommendations of the county judge. The commission and the administrator may also give consideration to a written recommendation by the commissioners court. A hearing must be held on a renewal permit if a petition signed by 50% of the residents who live within 300 feet of the sexually oriented business is presented to the commission.<sup>18</sup>

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<sup>15</sup> Labor Code §51.031

<sup>16</sup> Business and Commerce Code §102.002

<sup>17</sup> Business and Commerce Code §102.003

<sup>18</sup> Alcoholic Beverage Code § 11.43(c)

## STOCK LAW

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### Introduction

Throughout Texas history, ranging constraints on domesticated animals have been a source of argument and debate, even to the point of violence in the 19<sup>th</sup> century cattle range wars. Ranchers who had been used to allowing their livestock to freely graze over wide areas were confronted by farmers or smaller ranchers fencing off their property. Over the years, laws have been developed to provide local control over these restrictions and to create a process for dealing with stray animals.

### GENERAL PROVISIONS

**1. In the absence of locally determined range provisions, what is the general rule on animals roaming or running at large?**

Texas is by default a free range (or “run at large”) state. In the absence of locally determined (generally by petition and election) range restrictions or statutory prohibitions, livestock is not required to be fenced in and may range freely.

**2. What is the process for enacting range restrictions?**

Texas law authorizes a petition and election process that provides for local control on the issue of whether certain animals will be permitted to run at large in the county or an area within the county. The Texas Agriculture Code (“Code”) contains four types of authorized local option elections: (1) limited free range for hogs; (2) prohibition against cattle running at large; (3) prohibition against domestic turkeys

from running at large; and (4) local option to prevent “certain animals” from running at large (horses, mules, jacks, jennets, donkeys, hogs, sheep, or goats).<sup>1</sup>

**3. What is the petition process for an election to determine whether horses, mules, jacks, jennets, donkeys, hogs, sheep, or goats may be permitted to run at large in the county or an area of the county?**

Landowners wanting to prohibit certain animals from running at large must submit a petition to the commissioners court that clearly states each class of animal the petitioners seek to prohibit from running at large, describe the boundaries of the area in which the election is to be held if it is less than countywide, and complies with other Election Code petition requirements.<sup>2</sup> The Code sets out ballot language for the election, allowing voters to vote for or against “Letting \_\_\_ run at large,” with the county including the name of each animal designated in the election order in the blank space.<sup>3</sup> To vote in the election, the Code requires a person to be a freeholder and qualified voter. After the commissioners court canvasses the election, the county judge posts a proclamation at the courthouse door declaring the result.<sup>4</sup> If a majority of votes cast in the election were cast against the proposition, the prohibition is adopted and takes effect 30 days after the canvass.<sup>5</sup>

**4. What is a “freeholder”?**

A “freeholder” is generally defined as a person who has title to real property.<sup>6</sup> For purposes of the local option petitions authorized under Chapter 143 of the Code, there is a strong inference that the “freeholder” definition also includes residence within the applicable county or area.

As far as voting in a local option stock election is concerned, while there are no cases or opinions directly addressing the land ownership question, we note that other provisions requiring property ownership in order to vote generally have been held unenforceable.<sup>7</sup>

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<sup>1</sup> Tex. Ag. Code §143.021,

<sup>2</sup> Tex. Ag. Code §143.021, §143.021

<sup>3</sup> Tex. Ag. Code §143.023(d)

<sup>4</sup> Tex. Ag. Code §§143.023(c), (d), (e)

<sup>5</sup> Tex. Ag. Code §143.024

<sup>6</sup> *Atkins v. Davis*, 291 S.W. 2d 968 (Tex. Civ. App.-Amarillo 1927, writ dismissed w.o.j.)

<sup>7</sup> *Hill v. Stone* 421 U.S. 289, 95 S.Ct. 1637 (1975)

**6. May multiple petitions for stock law elections be combined into one?**

Yes, so long as the petition language is clear that it applies to two separate propositions and the county properly orders the election with separate propositions on the ballot.<sup>8</sup>

**7. May multiple free range propositions be combined into a single ballot statement?**

No. Chapter 143 provides specific ballot language which may not be altered by the county in ordering the election. However, an election on multiple issues may take place to allow voters to vote on both free range cattle and free range horses, for example.<sup>9</sup>

**8. May hogs be free range during the fall-winter season?**

Chapter 143, Subchapter C, authorizes a local option election on limited free range of hogs in a county that has already adopted the provisions of Subchapter B, either countywide or for areas within the county, to prohibit hogs from running at large. Upon receipt of a petition signed by at least 50 freeholders (for a countywide election) or at least 20 freeholders in a less than countywide area (if the area has less than 50 freeholders total, the petition instead may be signed by a majority of the freeholders in the area), the county must order an election on the limited free range of hogs, which if approved will allow the hogs to run free at large during certain times of the year.<sup>10</sup>

For example, freeholders of a less than countywide area wish to adopt the same limited free range of hogs for their part of the county. There are 20 freeholders in the area. The petition would need to be signed by a majority of 11 freeholders. On the other hand, if there were 40 or more freeholders in the designated area, the petitioners presumably would submit a petition with 20 signatures since the simple majority would be greater than 20.

The provisions for ordering the election are set forth in the Code.<sup>11</sup> Please note that the local election provisions must be read in conjunction with requirements set out

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<sup>8</sup> *Lock v. Morris* 287 S.W.2d 500 TEX. (1956)

<sup>9</sup> Tex. Att’y Gen. Op. No. GA-0093 (2003)

<sup>10</sup> Tex. Ag. Code §143.051

<sup>11</sup> Tex. Ag. Code §§143.052, 143.053

in the Texas Election Code regarding the deadline to order an election and the period for publishing notice of an election.

If a majority of votes cast in the election are in favor of the limited period of free range for hogs, a person may permit hogs to run at large in the county or the area in which the election was held during the period beginning on November 15 of each year through February 15 of the following year.

## **9. May cattle be prevented from running at large?**

Freeholders of a county (or a designated area within the county) may petition the commissioners court for an election on the issue of whether cattle may be prevented from running at large in the county (or in the designated area).

If the petition is for a countywide election, at least 35 freeholders must sign.<sup>12</sup> If the petition is to hold the election within a designated area of the county, generally at least 15 freeholders must sign.

The petition for an election in a designated area of the county may be signed by a simple majority of freeholders of the area rather than the 15 freeholders if the area: (1) has fewer than 50 freeholders and (2) is between two areas of the county that have previously adopted the restrictions. For example, freeholders of an area that lies between two parts of the county that previously adopted the cattle restrictions wish to adopt the same restriction for their part of the county. There are 16 freeholders in the area. The petition would need to be signed by a majority of 9 freeholders. On the other hand, if there were 30 or more freeholders in the designated area, the petitioners presumably would submit a petition with 15 signatures since the simple majority would be greater than 15.<sup>13</sup>

If the majority of votes cast at the election are for the proposition, after the 30<sup>th</sup> day following the date of the canvass, a person may not permit cattle to run at large in the county or area in which the election was held.<sup>14</sup>

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<sup>12</sup> Tex. Ag. Code §143.071(c)

<sup>13</sup> Tex. Ag. Code §143.071(d)

<sup>14</sup> Tex. Ag. Code §143.074

Note that certain counties may not hold a countywide election on cattle running at large.<sup>15</sup>

#### **10. May domestic turkeys run at large?**

Generally yes. However, freeholders of political subdivisions of ten specific counties may petition the commissioners court to hold an election on the question of whether domestic turkeys will be permitted to run at large within the political subdivision. The counties are: Bastrop, Blanco, Clay, Collin, DeWitt, Gonzales, Gillespie, Guadalupe, Parker and Wise. The petition must be signed by at least 25 freeholders.<sup>16</sup>

If the majority of votes cast at the election are for the proposition, after the 30<sup>th</sup> day following the date of the canvass, a person may not permit domestic turkeys to run at large within the political subdivision of the county for which the election was held.<sup>17</sup>

#### **11. May a commissioners court on its own authority adopt a prohibition against animals running at large, without a petition and election?**

No. There are no provisions in state law for the commissioners court unilaterally to adopt the prohibition against animals running at large. In certain situations, the court may expand a previously adopted prohibition to adjacent areas (see Question 12).

#### **12. May the prohibition against animals running at large be repealed after it has been adopted in an election?**

Yes. The commissioners court may be petitioned to repeal the prohibition against animals running at large. A repeal election may not be held earlier than two years after the date of the last election in the applicable county or area. The procedure for ordering the election and election notice is the same as for the adoption election. If a majority of votes cast at the election are in favor of repeal, the prohibition is repealed 180 days after the canvass.<sup>18</sup>

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<sup>15</sup> These counties are: Andrews, Coke, Culberson, Hardin, Hemphill, Hudspeth, Jasper, Jefferson, Kenedy, Kinney, LaSalle, Loving, Motley, Newton, Presidio, Roberts, Schleicher, Terry, Tyler, Upton, Wharton, and Yoakum.

<sup>16</sup> Tex. Ag. Code §143.071

<sup>17</sup> Tex. Ag. Code §143.074

<sup>18</sup> Tex. Ag. Code §143.026

**13. May the prohibitions against cattle or domestic turkeys running at large be repealed?**

Yes. Under Code §143.076, the freeholders of the county or area in which the prohibition has been adopted may petition the commissioners court to hold a repeal election. A petition for a countywide repeal election must be signed by at least 200 freeholders, which must include 24 signatures from each justice precinct. A petition for repeal in an area within the county must be signed by at least 50 freeholders of the area. If the prohibition has been adopted countywide, it may not be repealed for an area within the county unless two-thirds of the votes cast at the countywide election within the area favor repeal.

**14. May the free range of hogs be repealed?**

Yes. After adoption, an election for the purpose of repealing the limited period of free range for hogs may not be held countywide or in an area within the county for two years after the date of the election. If a majority of votes cast at a subsequent election are cast against limited free range, the limited period of free range is repealed, effective the 11<sup>th</sup> day after the commissioners court canvasses the election and posts the required proclamation.<sup>19</sup>

**15. Is there a way for an area adjacent to an area that has adopted the prohibition against animals running at large to extend the prohibition without going through the petition/election process?**

Yes. If there are fewer than 20 freeholders in the adjacent area and a majority of them petition the commissioners court to extend the prohibition against animals running at large to their area; or (2) there are no freeholders in the adjacent area (here “freeholder” appears to refer to “residents”) but the landowners in the adjacent area petition the commissioners court to extend the prohibition; or (3) there is an individual landowner whose property abuts territory in which the prohibition has been adopted and he or she petitions the commissioners court to extend the prohibition, the court may extend the prohibition against animals running at large to include the landowner’s property.<sup>20</sup>

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<sup>19</sup> Tex. Ag. Code §143.055

<sup>20</sup> Tex. Ag. Code §143.027

**16. If elections have been held both countywide and in an area of the county on the same issue to contrary results, which prevails?**

The more specific provision would prevail. For example, if a countywide election on the limited free range period for hogs failed, a petition could be circulated and election held within an area of the county on the same issue. If voters then voted in favor of the limited free range for hogs, it would go into effect within the specified area.

## ENFORCEMENT

**1. What is the penalty for allowing a prohibited animal to run at large?**

It is a Class C misdemeanor to knowingly allow an animal to trespass on another person's land in a county or area in which the animal is prohibited from running at large.<sup>21</sup>

**2. Is an animal owner liable for damage caused to a vehicle by an accident on a farm-to-market road in an area where running at large prohibitions have not been adopted?**

No. On a farm-to-market road, in the absence of the adoption of a local stock law, there is no statutory or common-law duty for a person who owns or is responsible for livestock to prevent it from roaming on the farm-to-market road.<sup>22</sup>

**3. Is an animal owner liable for damage caused to a vehicle on a state or federal highway?**

It depends. The animal owner's liability would likely hinge on whether the owner consciously allowed the animal to traverse the highway.<sup>23</sup> The law provides that a person who owns or has responsibility for control of a horse, mule, donkey, cow, bull, steer, hog, sheep, or goat, may not *knowingly* allow the animal to cross or roam at large on the right of way of a highway. A violation is a Class C misdemeanor with a separate offense for each day the animal is allowed to roam at large.<sup>24</sup>

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<sup>21</sup> Tex. Ag. Code §§143.034; 143.082; 143.108

<sup>22</sup> *Gibbs v. Jackson*, 990 S.W. 2d 745 (Tex. 1999)

<sup>23</sup> Tex. Ag. Code §143.102

<sup>24</sup> Tex. Ag. Code §143.108(c)

**4. Is a driver responsible for damage to an animal the driver injures or kills on a highway?**

Generally not. A person whose vehicle strikes an unattended animal on a highway is not liable for damages absent a finding of gross negligence in the operation of the vehicle or willful intent to strike, kill, injure, or damage the animal.<sup>25</sup>

**5. How is the prohibition against animals running at large on the highway enforced?**

State highway patrolmen and county or local law enforcement enforce the at large restrictions and may do so without the use of a written warrant.<sup>26</sup>

**6. Does a county have the duty to enforce stock law prohibitions within the boundaries of a home-rule municipality?**

Yes. The attorney general has determined that the county's enforcement power is not limited to areas outside municipal boundaries.<sup>27</sup>

## FENCING

**1. Is a landowner required to fence property against animals that are not permitted to run at large?**

No. A person is not required to fence against animals that are not permitted to run at large.<sup>28</sup>

**2. Is a landowner required to fence property against animals that are permitted to run at large?**

A landowner is required to fence his or her property in a sufficient manner to keep out ordinary livestock that are permitted to run at large in order to preserve the landowner's ability to recover for damage to property or crops.<sup>29</sup>

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<sup>25</sup> Tex. Ag. Code §143.103

<sup>26</sup> Tex. Ag. Code §143.106

<sup>27</sup> Tex. Att'y Gen. Op. No. MW-588 (1982)

<sup>28</sup> Tex. Ag. Code §143.028

<sup>29</sup> Tex. Ag. Code §143.028

**3. In a county or an area in which a prohibition against an animal running at large is in effect, does the owner of an affected animal have a duty to prevent the animal from running at large?**

Yes. While there is not an explicit fencing requirement, the owner of the designated class of livestock is required to prevent the livestock from running at large in the county.<sup>30</sup>

**4. What is a “sufficient” fence in general?**

Except in areas in which a stock law has been adopted, generally a sufficient fence is one that is at least five feet high and will prevent hogs from passing through.<sup>31</sup>

**5. What is considered a sufficient fence in a county or an area within a county that has adopted a prohibition against horses, mules, jacks, jennets, donkeys, hogs, sheep, or goats running at large?**

A “sufficient” fence is defined as being at least 4 feet high. If the fence is barbed wire, it must consist of 3 wires on posts no more than 30 feet apart with one or more stays (vertical wires mounted between posts to help hold the horizontal barbed wires in place) between every two posts. If the fence is a picket fence, the pickets must be no more than 6 inches apart. If the fence is a board fence, the boards must consist of three boards not less than 5 inches wide and one inch thick. A rail fence must have at least 4 rails.<sup>32</sup>

An election may be held on the issue of whether three barbed wires without a board constitute a sufficient fence in the county or designated area.<sup>33</sup>

A person whose fence is “insufficient” is liable to the owner of a mule, jack, jennet, horse, or head of cattle for damages if the person maims, wounds, or kills or procures the maiming, wounding, or killing of the animal.<sup>34</sup>

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<sup>30</sup> Tex. Att’y Gen. LO-92-31 (1992)

<sup>31</sup> Tex. Ag. §143.001

<sup>32</sup> Tex. Ag. Code §143.028

<sup>33</sup> Tex. Ag. Code §143.028(c)

<sup>34</sup> Tex. Ag. Code §143.033

## ESTRAYS

### 1. What is an “estray”?

An “estray” is stray livestock, stray exotic livestock, or stray exotic fowl. Exotic livestock is defined as either non-indigenous grass-eating or plant-eating, single or cloven-hoofed mammals that are not considered game or fur-bearing animals under the Parks and Wildlife Code or indigenous mammals regulated by the Parks and Wildlife Department as endangered or threatened species. Buffalo is an example of exotic livestock. Exotic fowl is defined as either non-indigenous avian species that are not considered game birds as defined under the Parks and Wildlife Code or indigenous birds regulated by the Parks and Wildlife Department as endangered or threatened species. Ostriches and peacocks are examples of exotic fowl.<sup>35</sup>

### 2. Which county officer is responsible for estrays?

The sheriff. After receiving a report from a private property owner or a custodian of public property, the sheriff shall notify the estray’s owner, if known, that the animal’s location has been reported. If the estray’s owner does not immediately remove the animal, the sheriff may then capture and impound the animal. If the sheriff determines the animal is dangerous, the sheriff may immediately capture and impound the animal without notifying the owner.<sup>36</sup> The sheriff’s duty to impound estrays includes territory within municipal boundaries.<sup>37</sup>

### 3. What are the impoundment procedures for estrays?

The sheriff or sheriff’s designee shall impound an estray if the owner is unknown, cannot be contacted, or the estray is dangerous to the public. After impounding the estray, the sheriff shall prepare a notice of estray with the name and address of the person who reported the estray, the location at which it was captured, the location at which the animal will be held until disposition, and a detailed description of the animal. The notice is filed with the county clerk.

The sheriff is required to make “a diligent search” for the identity of the owner if not known, which includes a search of the county register of recorded brands if the animal is branded. The register is maintained by the county clerk and consists of a

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<sup>35</sup> Tex. Ag. Code §142.001

<sup>36</sup> Tex. Ag. Code §142.003

<sup>37</sup> Tex. Att’y Gen. Op. No. MW-588 (1982)

brand book containing the marks, brands, or tattoos filed by owners of cattle, hogs, sheep, or goats.<sup>38</sup> The brand book has historically been a physical document in the clerk's office, though the legislature has recently authorized counties to accept electronic registrations and record the brands electronically.

If the search is unsuccessful, the sheriff posts an impoundment notice on the county's bulletin board and publishes notice either in a newspaper of general circulation in the county at least twice during the 15 days after the date of impoundment or on the county's website for at least 15 days after the date the estray was impounded.<sup>39</sup>

**4. Is the sheriff entitled to a fee?**

Yes. The sheriff is entitled to a collection fee in an amount not to exceed \$25 if the sheriff or sheriff's designee is present at the time the estray is collected. A dispute of the fee by the estray's owner is resolved in justice court.<sup>40</sup>

**5. Is the owner on whose property the estray was found entitled to a fee or payment?**

Yes. A property owner is entitled to payment of a reasonable amount for damages and maintenance if the sheriff was notified of the estray not later than the fifth day after the date the estray was discovered. The property owner may accept payment from the owner of the estray in an agreed amount. If they cannot agree, the dispute may be resolved in the appropriate justice court.<sup>41</sup>

**6. How does the county dispose of unclaimed estrays?**

The county gains title to an estray if ownership is not determined before the third day after the final advertisement (see Question 2, this section) or the estray is not redeemed before the 18<sup>th</sup> day after the date of impoundment. The sheriff may then sell the estray at auction unless a determination is made that the animal's sale is unlikely to cover expenses, in which case the sheriff may donate it to a nonprofit organization or retain the estray and use it for county purposes.

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<sup>38</sup> Tex. Ag. Code §144.041

<sup>39</sup> Tex. Ag. Code §142.009

<sup>40</sup> Tex. Ag. Code §142.005

<sup>41</sup> Tex. Ag. Code §142.006

If the estray is sold at auction, the proceeds are allocated to cover the expenses of the sale, the sheriff's impoundment fee and other charges, and maintenance expenses or damages due the owners of the property from which the estray was impounded. Any leftover balance from the sale is paid to the estray's owner, if known. If the owner is unknown, the balance is placed in the county's jury fund, subject to claim from the estray's original owner, not later than 180 days after the date of sale. Finally, the sheriff files a report of the estray sale with the county clerk.<sup>42</sup>

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<sup>42</sup> Tex. Ag. Code §§142.013, 142.014

## VACANCIES

**THIS PUBLICATION IS A RESEARCH TOOL AND NOT THE COUNSEL OF AN ATTORNEY. THIS PUBLICATION IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY. It is provided without warranty of any kind and, as with any research tool, should be double checked against relevant statutes, case law, attorney general opinions and advice of legal counsel e.g., your county attorney. Any question should be directed to competent legal counsel for a written opinion.**

The  symbol indicates sections that have been updated since the previous publication.

### Introduction

Please remember that the circumstances creating a vacancy are highly fact-specific. The information below is intended as a broad guide to vacancy issues. If there is a question as to whether a vacancy exists in a particular office, you may wish to contact for guidance either the secretary of state, the attorney general, or this office. The attorney general has compiled a useful list of holdover and resign-to-run opinions in the cumulative subject index section of its website.

### CONSTITUTIONAL PROVISIONS

#### 1. What is the definition of a “vacancy”?

A vacancy is created in an elective public office when prior to the expiration of the current term of office, the officer dies, resigns, abandons office, is judicially removed, or accepts another office that lawfully cannot be simultaneously held with the current office. For certain county and district offices, an automatic resignation occurs when the officer announces or becomes a candidate for a different office while more than a year and 30 days remains on the current term. Tex. Elec. Code, Chapter 201; Tex. Const. Art. XVI, §65.

## **2. What is the definition of a “holdover officer”?**

To maintain the functioning of government, Article XVI, Section 17 of the Texas Constitution provides that an elected public official continues to perform the duties of office (or “hold over”) until his or her successor takes office. While a holdover, the resigned officer retains all the duties and responsibilities of office and continues to receive the same salary and benefits.

## **3. What is “resign to run”?**

For most county offices, Article XVI, §65 of the Texas Constitution provides that it is an automatic resignation for an officeholder to announce candidacy or to file for a public office other than the one currently held if more than a year and 30 days remain in the term.

For example, during the primary filing season, a county attorney makes a last minute decision to run for district attorney. He goes to the county chair’s office and submits an application for a place on the primary ballot. If there is more than a year and 30 days to go in the county attorney’s term at the moment the application is filed, the county attorney has just automatically resigned his office. Note that the county attorney cannot cure the automatic resignation by withdrawing his application, nor would the fact that the county attorney is later found to be ineligible for the primary ballot have an impact on the resignation. Tex. Att’y Gen LO-94-059 (1994); Tex. Att’y Gen. Op. JM-132 (1984).

## **4. What does it mean to “announce” candidacy for purposes of “resign to run”?**

According to the attorney general, a public officer may trigger an automatic resignation by making “certain and public” announcements on candidacy such that a reasonable person would conclude the officer without qualification intends to be a candidate for an office other than the one currently held. Tex. Att’y Gen. Op. No. GA-210 (2004); Tex. Att’y Gen. LO-95-071 (1995).

For example, a county commissioner with more than a year and 30 days on her term tells a friend on the phone that she is thinking about running for an unnamed different office. The friend then tells a third party about the conversation. This would not constitute an announcement. On the other hand, the same commissioner would have made a certain and public announcement if, at a commissioners court meeting, she told the audience unequivocally that she was going to be a candidate for district attorney.

**5. If an elected officer enters active military duty, does he or she vacate office?**

Not necessarily. In 2003, the Texas Constitution was amended to create a procedure designed for public elected or appointed officers who enter active military duty in the armed forces of the United States as a result of being called up, drafted, or activated. Tex. Const. Article XVI, Section 72.

Here “armed forces of the United States” is defined as the United States Army, Navy, Air Force, Marine Corps, Coast Guard, any reserve or auxiliary component of those services, or the National Guard.

If the officer will be on active duty for longer than 30 days, the authority that would normally appoint to fill a vacancy in that office may appoint a “temporary acting officer”.

The officer who is going on active duty may recommend the name of a person to temporarily fill his or her office. The temporary acting officer shall be appointed to begin service on the date specified in writing by the leaving officer as the date he or she will enter active military service.

The temporary acting officer has all the powers and duties of the office while serving and is entitled to the same compensation “payable in the same manner and from the same source” as the replaced officer. Whether the replaced officer remains entitled to his or her compensation while the temporary acting officer is serving is an issue that has not yet been addressed by attorney general opinion. The temporary acting officer serves for the term of the active military service of the replaced officer or the term of office of the replaced officer, whichever is shorter.

## **HOLDOVER**

- 1. An elected county official has accepted appointment to another public office. After taking the oath of office for the new position, does the officer remain in the old office as a holdover until a successor qualifies, in effect holding both offices at the same time?**

Likely not. If two offices may not lawfully be held by the same person, the holdover provision does not apply. *Pruitt v. Glen Rose Independent School District No. 1*, 84 S.W. 2d 1004, 1007 (Tex. 1935); Tex. Att’y Gen. Op. No. M-627 (1970).

If a justice of the peace were appointed to fill a vacancy on the commissioners court, for example, the justice would not holdover after joining the court. The attorney general has determined the two offices to be incompatible in part because of the commissioners court's budgetary authority over justices of the peace. Tex. Att'y Gen Op. No. V-1192 (1951). Because the two offices are incompatible, the appointed commissioner would not retain holdover status as justice of the peace after taking the oath of office to join the commissioners court.

**2. If a county officer is removed from office, is the officer nevertheless a holdover until his or her successor is qualified?**

It appears the answer is no. A 2003 case, *Willmann v. City of San Antonio*, 123 S.W. 3d 469 (Tex. App.-San Antonio 2003) states the constitutional right to holdover does not reside in a person who has been removed from office.

One example of this principle stems from a municipal recall election at which a majority of the city council was recalled. Citing *Willmann*, the attorney general determined the recalled council members did not holdover until their successors were elected at a following election because to allow otherwise would thwart the will of the voters. Tex. Att'y Gen. Op. No. GA-175 (2004).

Another situation would arise if a county treasurer were convicted of a misdemeanor involving official misconduct and removed from office by operation of Section 87.031, Local Government Code. The court includes an order in the judgment removing the treasurer, and the treasurer does not appeal. In this scenario, per *Willmann*, the county treasurer is not a holdover and is no longer entitled to salary and other benefits of the office.

**3. Does an elected county officer who has triggered an automatic resignation under Article XVI, Section 65 of the Texas Constitution by announcing or filing for a different office with more than a year and 30 days remaining in the term remain in office as a holdover?**

Yes. An elected officer who resigns under Tex. Const. art. XVI, §65 remains in office as a holdover until a successor qualifies for the office. Tex. Att'y Gen. Op. No. DM-377(1996); *Bianchi v. State*, 444 S.W. 3d 231 (Tex. App.—Corpus Christi 2014).

**4. Is a holdover who declines to discharge the duties of office entitled to continue to receive his or her salary and benefits?**

As noted above, vacancy situations are very fact specific. In a recent opinion, the attorney general states that a holdover's right to salary and other benefits are subject to Article III, Section 52(a) of the Texas Constitution, which prohibits political subdivisions from the gratuitous expenditure of public funds, and cites a Texas Supreme Court created three-part test<sup>1</sup> to determine whether an expenditure qualifies under the constitutional provision. Tex. Att'y Gen. Op. No. KP-0007(2015). The determination of whether payment of the holdover's salary and benefits achieves a public purpose under the three-part test is left to the commissioners court, subject to judicial review.

## RESIGNATION

### 1. Must a resignation be in writing?

Yes. To be effective, the resignation must be signed, in writing, and delivered to the appropriate authority for acting on the resignation. Tex. Elec. Code §201.001.

### 2. May a resignation of a county office be set to take effect at a future date?

Yes. It is important to note the date a resignation is effective is not necessarily the same as the date the vacancy is effective. A resignation letter may indicate the vacancy will occur at a future date. For purposes of filling the vacancy, the authority with whom the resignation was filed may appoint upon receipt and acceptance of the resignation and the newly appointed officer may take office on or after the designated resignation date. Tex. Elec. Code §201.023.

For example, in April the county clerk submits a signed letter to the commissioners court indicating she will leave office effective June 1 of that year. The commissioners may make an appointment once the vacancy is effective (see Question 10), but the

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<sup>1</sup> "Article III, section 52(a) prohibits a political subdivision's gratuitous grant of public money or a thing of value in aid of, or to any individual. TEX. CONST. art. III, § 52(a); see Tex. Mun. League Intergov 'tl Risk Pool v. Tex. Workers' Comp. Comm'n, 74 S.W.3d 377, 383 (Tex. 2002) (stating that article III, section 52(a) prohibits the gratuitous expenditure of public funds). The Texas Supreme Court has enumerated a three-part test by which to determine whether a grant of money or thing of value is prohibited as gratuitous. Id. at 384 (stating that an entity making a public expenditure must: (1) ensure the expenditure's "predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit")." Tex. Att'y Gen. Op. No. KP-0007 (2015), pg. 2.

newly appointed officer may not take office until June 1, when the clerk actually leaves office.

### 3. Is it possible to withdraw a resignation?

A resignation may be withdrawn *before* it becomes effective. A resignation may not be withdrawn after it becomes effective (see Question 10). Tex. Att’y Gen. Op. No. DM-406 (1996).

An example of a timely withdrawal: a county attorney expects to move out of the county for a new job and on a Wednesday submits a signed letter of resignation with the county judge. The commissioners court is scheduled to meet the following Monday. On Thursday, the county attorney learns he actually did not get the job. Friday, the county attorney hands the county judge a letter rescinding his resignation. The commissioners court has not yet met to formally accept the resignation, nor have eight days passed since the first letter was submitted to the county judge, so the resignation is not yet effective. This would be a timely withdrawal.

On the other hand, if the county attorney only discovered he did not get the new job on Tuesday after the commissioners court met to accept his resignation, it would be too late. Once accepted by the court, the resignation is effective and may not be withdrawn.

## APPOINTMENTS

### 1. Who/what entity has authority to appoint a person to fill a vacancy in a particular county office?

The **commissioners court** may fill vacancies in the following offices: county judge; county clerk; district and county clerk; sheriff; county attorney; county treasurer; county surveyor; county tax assessor-collector; justice of the peace; and constable. Tex. Loc. Gov’t Code §87.041. The **county judge** may fill county commissioner vacancies. Tex. Loc. Gov’t Code §87.042. A district clerk vacancy may be filled by the district judge or by agreement of the **district judges** in a county with two or more district courts. Tex. Gov’t Code §51.301. A vacancy in the office of county auditor is filled by the district judge (or judges in a county with two or more district judges). Tex. Loc. Gov’t Code §84.002.



**2. When is it appropriate for the appointing entity to appoint a person to fill a vacancy?**

The appointment may be made once the vacancy is effective. For a resigning officer, a vacancy is effective on the date a written and signed letter of resignation is accepted by the commissioners court (or the county judge for a commissioner resignation) or on the eighth day after the date of the letter's receipt, whichever is earlier. Tex. Elec. Code §201.023. If the officer dies, the vacancy is effective on the date of death. Tex. Elec. Code §201.022. If the officer is removed from office or declared ineligible by a court or other tribunal, the vacancy is effective on the final judgment date. Tex. Elec. Code §§201.024, 201.026. If the officer accepts another office that may not be held simultaneously, a vacancy in the first office is effective on the date the person qualifies for the second office. Tex. Elec. Code §201.025. (See Question 7). If the officer has automatically resigned under the constitutional "resign to run" provision, the vacancy is effective on the date the officer filed for office or announced his or her candidacy. Tex. Const. Art. XVI, §65.

**3. When is it appropriate to fill a vacancy in a newly-created office?**

The general rule is that a vacancy in a new office is created on the effective date of the legislative act creating the office or on the date the order creating the office is adopted. Tex. Elec. Code §201.027. It is important to closely read the legislation as it will often contain language impacting the effective date or the first election for the office.

**4. Is there a statutorily mandated process for making an appointment?**

No. The commissioners court, county judge, or district judge, as appropriate, may devise the appointment process.

Some counties, for example, publish a notice of the vacancy in the newspaper with a time period for interested persons to apply. Other counties ask potential appointees to fill out an application to establish their eligibility for the office. Neither is a required practice.



For appointment of the county auditor, a procedure is set out for the meeting of the district judges in Tex. Loc. Gov't Code §84.003 .

**5. Is there a requirement to appoint the candidate who came in second in the most recent election for the office to fill the vacancy?**

No. The person appointed by the commissioners court, county judge, or district judge, as appropriate, must meet the qualifications for the office at the time of appointment, including being a registered voter of the territory from which the office is elected. Tex. Elec. Code §141.001.

**6. May a sitting member of the commissioners court be appointed by the court to fill a vacancy?**

No. Members of the commissioners court are not eligible to appoint themselves (“self-appointing”) to offices to which they (or the body) have authority to make appointments. To be eligible to be appointed by the commissioners court to fill a vacant office, a county commissioner would have to resign and his or her successor would have to have qualified for office (to cure the holdover issue). Tex. Att’y Gen. Op. No. C-452 (1965).

For example, a county judge resigns because of illness and creates a vacancy. The commissioners court has authority to appoint a county judge to serve until the next general election under §87.041 of the Texas Local Government Code. One local businessman and one of the sitting commissioners want to be considered for the appointment. The commissioners court may not appoint the current commissioner because of the self-appointment doctrine. The commissioner understands this two-step process and submits a resignation letter to the court. Even resigning office does not immediately solve the problem because the commissioner remains a holdover. She can attend and vote at meetings and continues to draw a salary. Only after the commissioners court has appointed her replacement and the new commissioner has qualified and taken office, is the now-former county commissioner eligible to be considered for appointment as county judge.

**7. May an appointing entity appoint an “interim” or “temporary” officer in the event of a vacancy?**

Generally not (see Question 10). However, the first assistant or chief deputy of a public office in which a physical vacancy occurs shall conduct the affairs of the office until a successor qualifies for the office. Tex. Gov’t Code §601.002.

## 9. What is the term of office for an appointee?

The length of time the appointee serves depends on when the vacancy occurs.

If the vacancy occurs early enough for the office to be placed on the November general election for state and county officers ballot (on or before the 74<sup>th</sup> day before the general election) held in the next to last even-numbered year of the term of office, the remainder of the unexpired term is filled at a special election held in conjunction with the general election for state and county officers. Tex. Elec. Code §202.002(a). The appointee serves until the candidate who won at the general election takes the oath of office after the election canvass.

For example, a county clerk passed away in July 2016. The clerk's office is next regularly scheduled to be on the ballot in 2018. In 2016, the 74<sup>th</sup> day before the November general election was August 26, 2016, and so the vacant office would have gone on the ballot for the unexpired term. The commissioners may make an appointment, but the appointee would have served only until the candidate elected at the November 2016 election took office shortly after the election results were canvassed.

If the vacancy had occurred after the 74<sup>th</sup> day before the date of the November 2016 general election, the appointee would have served the remainder of the unexpired term. Tex. Elec. Code §202.002(b).

So if the clerk died on September 1, 2016, the vacancy would have occurred too late to go on the November 2016 general election ballot. The appointee will serve the remainder of the term, until January 1, 2019 or when the candidate elected at the November 2018 general election for state and county officers takes the oath of office, whichever is later. Tex. Gov't Code §601.003(b).

**10. How are party nominees selected for the November election if the vacancy in an office not regularly scheduled to appear on the ballot occurred too late for the primary?**

Section 202.006 of the Texas Election Code provides that a nomination for an unexpired term may be made by a political party's county or precinct executive committee, as appropriate for the office, if the vacancy occurs after the fifth day before the date of the regular deadline for candidates to file applications for a place on the ballot for the general primary election. Tex. Elec. Code §202.006 The nomination is made by the precinct chairs elected at the primary election who take office on the 20<sup>th</sup> day after the date of the primary runoff election. Texas Elec. Code §§145.036(e); 171.022. For purposes of the nomination process, a majority of the committee membership constitutes a quorum and the nominee must receive a favorable vote of a majority of the members present. Tex. Elec. Code §145.036(d). The name of the nominee must be certified in writing to the county clerk/elections administrator no later than 5 p.m. of the 71<sup>st</sup> day before the date of the general election for state and county officers. Tex. Elec. Code §§ 202.006(b); 145.037(e).

For minor parties that nominate by convention, such as the Libertarians and the Greens, the appropriate executive committee may nominate a candidate if the vacancy occurs on or before the fourth day before the date the convention having the power to make a nomination for the office convenes. Tex. Elec. Code §202.005. The nominating process is determined by party rule.

If a justice of the peace vacancy, for example, occurred in February of an even-numbered year, which would be too late for the office to go on the primary ballot, but early enough for the November general election, all the parties could nominate candidates for the November ballot. For the two major parties, the nomination will be made by the new chairs of the justice precinct elected at that year's primary election. By the February timing of the vacancy, the minor parties would be able to nominate their candidates at their county convention.

If a current county or precinct officeholder such as a constable wanted to be considered for the justice of the peace nomination, the act of asking to be considered would not itself be an announcement of candidacy that would trigger the "resign to run" provision (see Question 4). Tex. Att'y Gen. Op. JC-249 (2000).

However, if the constable accepted a party nomination for justice of the peace at a time when he or she had more than year and 30 days left in the term, that act would trigger an automatic resignation. If the constable office was not itself on the ballot,

depending on the timing, the office would be placed on the November ballot for the unexpired term and the parties would make nominations in the above manner.

**11. When does the person appointed to fill a vacancy take office?**

Once appointed, the new officer must take the statement of appointed officer (anti-bribery statement) and oath of office. Tex. Const. Article XVI, §1. For county offices, the statement of appointed officer is retained with the official records of the office. Depending on the office, the new officer also may have to take an additional oath and/or complete a bond. For more information, please review TAC's Outline of Official Oath and Bond Requirements. Once the oath of office, the statement of appointed officer, and any other oath or bond requirements have been completed, the new officer has qualified and assumes office.

**12. When does a person elected to fill an unexpired term take office?**

Under Section 601.004 of the Government Code, a person elected to an unexpired term of an office is entitled to qualify and assume the duties of the office immediately upon receipt of the certificate of election after the canvass. Tex. Gov't Code §601.004; Tex. Att'y Gen. Op. KP-13 (2015).

**13. May the commissioners court create a vacancy if it believes the officeholder is no longer eligible to remain in office; for example, if the officeholder has moved or otherwise become ineligible?**

No. The commissioners court does not have authority to remove an elected officeholder. An action in quo warranto, which may be brought in state district court by the county or district attorney (the attorney general also has authority to file a quo warranto), is the proper method to remove an ineligible person from office. Tex. Civ. Prac. & Remedies Code, Chapter 66. In addition, Chapter 87 of the Texas Local Government Code has procedures to remove a county or district officer on the grounds of incompetency, official misconduct, or intoxication. Tex. Loc. Gov't Code §87.011, et seq.

**14. Does the commissioners court or county judge, as appropriate, have authority to order a special election to fill a vacancy to be held on a date other than the November general election for state and county officers rather than fill the vacancy by appointment?**

No. The Texas Local Government Code provides authority for the commissioners or the county judge, in commissioner vacancies, to appoint a replacement to hold office until the next general election. Tex. Loc. Gov't Code §87.041, et seq. There are no provisions in state law for a special election to fill a vacancy to be held on a date other than the general election for state and county officers.

## WEBSITE POSTING REQUIREMENTS FOR COUNTIES

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The  symbol indicates sections that have been updated since the previous publication.

### Introduction

The following is a list of the county website posting requirements of which the Texas Association of Counties (TAC) is presently aware. Also included are citations to the statutes that contain these requirements and a summary of each requirement. These statutes do not create a duty on a county to establish a website. Rather, they impose electronic posting requirements on a county that maintains a website.

### BUDGET

1. Proposed County Budget  
Local Government Code §111.006(b) (counties with population under 225,000); Local Government Code §111.037 (counties with population over 225,000)

The county clerk shall take action to ensure that the proposed budget is posted on the county's Internet website.

2. Final Approved Budget  
Local Government Code §111.009(b) (population 225,000 or less);  
Local Government Code §111.040 (population over 225,000);

Local Government Code §111.069 (alternate method of budget preparation in counties of population more than 125,000)

The commissioners court shall ensure that a copy of the adopted budget, along with the statutorily required cover sheet, is posted on the county's Internet website at least until the first anniversary of the date the budget is adopted.

## ELECTION NOTICE REQUIREMENTS

1. Notice of Debt Obligation Election

Election Code §4.003(f)(3)

A debt obligation election order shall be posted on the county's Internet website during the 21 days before the election along with the election notice and contents of the proposition.

2. Notice of Voter Identification Requirements

Election Code §31.012(a)

The voter registrar shall provide notice of the voter identification requirements on the county's Internet website in each language in which voter registration materials are required to be available.

3. Notice of Polling Place Location Changes

Election Code §43.061(c)(2)

The county clerk shall post notice of a change in polling place location on any Internet website maintained by the county clerk to provide election information.

4. Notice of Early Voting Dates and Times

Election Code §85.007

The county must post the dates and times for early voting periods on the county's website if the county maintains a website.



5. Notice of Accepting Voters with Certain Disabilities  
Election Code §63.0013<sup>1</sup>

The following notice regarding the priority given at the polling place to persons with mobility problems must be posted on each internet website relating to elections maintained by the county:

“Pursuant to Section 63.0013, Election Code, an election officer may give voting order priority to individuals with a mobility problem that substantially impairs the person’s ability to move around. A person assisting an individual with a mobility problem may also, at the individual’s request, be given voting order priority. Disabilities and conditions that may qualify you for voting order priority include paralysis, lung disease, the use of portable oxygen, cardiac deficiency, severe limitation in the ability to walk due to arthritic, neurological, or orthopedic inability to walk 200 feet without stopping to rest, or use of a brace, cane crutch, or other assistive device.”



6. Notice of Early Voting in a Residential Care Facility; Determination of Time of Voting.  
Election Code, Chapter 107, §107.007(c)<sup>2</sup>

Notice of the time or times for conducting the election shall be posted on the county’s website as soon as practicable after determination of the time of voting and not later than the fifth day before the first day on which voting will be conducted at the facility.

## ETHICS AND CAMPAIGN FINANCE

1. Candidate, Officeholder, and Specific-Purpose Committee Reports  
Election Code §254.0401

The county clerk of a county with a population of 800,000 or more shall make reports filed by a candidate, officeholder, or specific-purpose committee in connection with a county office or the office of county commissioner available to the public on the county Internet website not later than the 5<sup>th</sup> business day after filing.

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<sup>1</sup> Added by [HB 658](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017.

<sup>2</sup> Added by [HB 658](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017.

2. Conflicts Disclosure Documents  
Local Government Code §176.009(a)

A county shall provide access on its Internet website to the statements and questionnaires filed pursuant to Local Government Code Chapter 176.

3. County Ethics Commission in Certain Counties  
(Applies only to El Paso County)

Local Government Code §161.052, §161.103, §161.155

The creation of a county ethics commission requires approval by a majority of the qualified voters of the county voting at an election called for that purpose. In addition to the notice required by Chapter 4, Election Code, the commissioners court must publish in a newspaper of general circulation in the county, and on the home page of the county's Internet website, a substantial copy of the order calling the election. The notice on the county's Internet website shall remain on the home page each day beginning not later than the 16<sup>th</sup> day before the election and ending on the date of the election.

The county ethics commission shall post plain language information on the county's Internet website detailing the commission's duties and authority.

The county ethics commission shall post its complaint form on the county's Internet website.

4. Report of Political Contributions and Expenditures  
Local Government Code §176.009(b)

A county with a population of 800,000 or more shall post on its Internet website the reports of political contributions and expenditures filed under Election Code Chapter 254 by members of the commissioners court.

## **GENERAL ADMINISTRATION**

1. Utility Bills of Government Entities  
Government Code §2265.001

A county must record in an electronic repository the amount of electricity, water, or natural gas consumed and the aggregate costs for those utility services and report the recorded information on a publicly accessible Internet

website with an interface designed for ease of navigation if available, or at another publicly accessible location.

2. County Treasurer's Report  
Local Government Code §114.026(d)

The affidavits of the members of the commissioners court certifying compliance with Local Government Code §114.026(c) must be filed with the county clerk, published and posted on the county's Internet website.

3. Sale or Lease of Advertising Space  
Local Government Code §263.251

If the commissioners court adopts a procedure by which the county leases advertising space in or on a county-owned building; on a county-owned vehicle; or on an official county's Internet website, the notice must be posted on the county's Internet website continuously for the 14 days immediately before the date the award of the sale or lease is made. The notice must also be published at least one time in a newspaper of general circulation in the county not earlier than the 30<sup>th</sup> day or later than the 14<sup>th</sup> day before the date the award of the sale or lease is made.

4. Municipal and County Water and Energy Improvement Regions  
Local Government Code §399.009

The county shall post the report required by this section for a proposed county water and energy improvement region on its Internet website.

## JUDICIAL

1. Juvenile Court Information  
Family Code §58.352.

In a county with a population of 600,000 or more, not later than the 10<sup>th</sup> day of each quarter, the juvenile court judge must post on the county's Internet website certain information about children committed to a correctional facility operated by the Texas Juvenile Justice Department.

2. Court Orders of Nondisclosure  
Government Code §411.081(f-1)

Each county or district clerk's office that maintains an Internet website shall include on that website a link to the electronic application and printable application form for a petition for an order of nondisclosure available on the Office of Court Administration's Internet website.

3. Report on Court Appointments  
Government Code § 36.004 (b)(2)

The county or district clerk shall prepare a report on court appointments for an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for a case before the court in the preceding month and post the report to any Internet website of the court not later than the 15<sup>th</sup> day of each month.



4. Notice of Self-Help Procedures  
Government Code § 51.808<sup>3</sup>

The clerk of each court in this state shall post on the court's internet website a link to the self-help resources internet website designated by the Office of Court Administration of the Texas Judicial System. The Office of Court Administration's self-help website will include lawyer referral services, the name, location and any website of any local legal aid office, any self-help center serving the county in which the court is located and the State Law Library's internet website.

## LAW ENFORCEMENT

1. Impoundment of Estrays  
Agriculture Code §142.009

If the sheriff cannot determine the owner of an estray, the sheriff shall post a notice of the impoundment on the public notice board at the courthouse and advertise the impoundment in a newspaper of general circulation in the county or on the county's Internet website for at least 15 days after the date of the impoundment.

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<sup>3</sup> Added by [SB 1911](#), 85<sup>th</sup> Leg. 2017. Effective September 1, 2017.

2. Use of Unmanned Aircraft by Law Enforcement Agencies  
Local Government Code §423.008

Not earlier than January 1 and not later than January 15 of each odd-numbered year, each county law enforcement agency located in a county with a population greater than 150,000 shall post to its Internet website a copy of their report to the governor and other state officials detailing the agency's use of unmanned aircraft.

3. Reports Required For Officer-Involved Injuries or Deaths  
Code of Criminal Procedure Articles 2.139, 2.1395,

County law enforcement agencies must submit report forms to the attorney general's office for officer-involved injuries or deaths and for officers injured or killed by persons using firearms who are not law enforcement officers, and post copies of the report forms on any website that the law enforcement agencies maintain not later than the 30<sup>th</sup> day after the date of the incidents.

## OPEN GOVERNMENT

1. Notice of Open Meeting  
Government Code §551.056

Notice of a commissioners court meeting must be concurrently posted on the website, in addition to normal physical posting. A county with a population of 65,000 or more must also post the meeting agenda.<sup>4</sup>

2. Posting of Video and Audio Recordings  
Government Code §551.128

Commissioners courts of counties with a population of 125,000 or more shall make a video and audio recording of reasonable quality for each regularly scheduled open meeting that is not a work session or special called meeting and make an archive copy of the recording available on the Internet. The recording of the meeting may be posted either on the county's own site or on

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<sup>4</sup> Because the terms "notice" and "agenda" are used interchangeably in the Open Meetings Act and in common parlance, it is not clear what additional information should be included under this provision.

a publically accessible video-sharing or social networking site. The meeting must be posted no later than seven days after the recording was made and must be maintained on the internet for not less than 2 years after posting.

## PROPERTY

1. Revision of Subdivision Plats  
Local Government Code §232.009

The county must post notice of proposed subdivision plat revisions that do not impact public interest or public property on the county's Internet website continuously for at least 30 days preceding the date of the meeting until the day after the meeting.

2. Property Owner's Bill of Rights  
Property Code §21.0112

Before negotiating with a property owner prior to exercising eminent domain, a county must provide the property owner with the Property Owner's Bill of Rights as contained in Government Code §402.031, and must post it on the county's Internet website, if feasible.

3. Notice of Foreclosure Sale  
Property Code §51.002(f-1)

The county must post notice of foreclosure sales on a page on its Internet website and make the notice available for viewing without charge or registration.

## PUBLIC FINANCE

1. Capital Appreciation Bonds  
Government Code §1201.0245(4)

Before issuing capital appreciation bonds that are secured by ad valorem taxes, the commissioners court must post the total amount of the proposed bonds; the length of maturity; the projects to be financed; the intended use of the bond proceeds; the total amount of the county's outstanding bonded indebtedness at the time of the bond election; the total amount of the county's

outstanding bond indebtedness; cost of the bond issuance; and disclosure of any personal or financial relationships between members of commissioners court and any financial advisor, bond counsel, bond underwriter, or other professional associated with the bond issuance.

The commissioners court must regularly update the total amount of the county's bonded indebtedness.

2. Annual Report of Certain Financial Information

Local Government Code § 140.008

The county must provide information annually to the Comptroller detailing the county's outstanding debt obligations secured by ad valorem taxes and post the annual report on the county's website. The county must include the contact information for the main office of the county on the county's website. (The "main office" of the county is usually considered to be the county judge's office.) See §140.008 (c) and (d) for alternatives to posting certain debt obligation information in a manner prescribed by the comptroller and alternatives to posting for counties with a population of less than 35,000.

3. Alternative Finance and Procurement for Public and Private Facilities and Infrastructure

Government Code §§2267.052(b)(10)(C), 2267.066(a)(1)

The commissioners court may enter into agreements with private entities to develop qualifying public works projects or to improve real estate owned by the county. The county's guidelines for compliance with Chapter 2267 must include a requirement for posting notice of a proposal requesting approval of a qualifying project on the county Internet website and on TexasOnline or the state's official website. The county must post notice of proposed projects on its Internet website no later than the 10<sup>th</sup> day after the date the proposals are accepted.

## **TAX RATE INCREASE NOTICES**

1. Notice of Proposed Property Tax Rate

Local Government Code §140.010

The county must post the Proposed Property Tax Rate Notice on its Internet website beginning not later than the later of September 1 or the 30<sup>th</sup> day after

the first date that the county has received each applicable certified appraisal roll and continuing until the county adopts its tax rate.

2. Tax Rate Increase Notice

Tax Code §26.05(b)

If the commissioners court proposes to adopt a tax rate higher than the effective tax rate, it must post on the county's Internet website notice that the county intends to raise more taxes than last year, and state approximately how much the taxes on a \$100,000.00 home will increase.

3. Hearing on Tax Increase

Tax Code §26.06(c)

The county must post notice for the hearings necessary to increase a tax rate on the county's Internet website and publish the notice in a newspaper. The notice must be posted on the website from the date the notice is first published in the newspaper until the second public hearing is concluded.

4. Supplemental Notice of Hearing on Tax Rate Increase

Tax Code §26.065

The county must post the notice prescribed by this section on its Internet website before the public hearings on a proposed tax rate increase.

5. Posting of Tax Rates on County Internet Website

Tax Code §26.16

The tax assessor-collector shall annually post on the county's Internet website tax-related information including the adopted tax rate, the maintenance and operations rate, the debt rate, the effective tax rate, the effective maintenance and operations rate and the rollback tax rate for the most recent five tax years beginning with the 2012 tax year for each taxing unit that is located in the county.