

2017
SHORT ANSWERS TO
COMMON QUESTIONS

TEXAS ASSOCIATION OF COUNTIES

1210 San Antonio Street Austin, Texas 78701

Honorable Joyce Hudman
Brazoria County Clerk & Association President

Gene Terry
Executive Director

Rex Hall
Assistant Executive Director

PREPARED BY ASSOCIATION LEGAL DEPARTMENT

Stan Reid
General Counsel

Jenny Gilchrist
Associate General Counsel

Katherine Howard
Associate General Counsel

Paul Miles
Associate General Counsel

Michael Pichinson
Associate General Counsel

Jamie Chandler
Paralegal

Kristi Shepperson
Paralegal



LEGAL RESEARCH

Legal Helpline: (888) 275-8224 • Toll Free: (800) 456-5974
or visit our website at www.county.org



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. Each public officer is responsible for determining duties of the office or position held. Any question regarding such duties should be directed to competent legal counsel for a written opinion.

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

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

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.¹

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.²

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

¹ 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.

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. 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