DEVELOPMENT/LAND USE LAW

Reid C. Wilson
Wilson, Cribbs, Goren & Flaum, P.C.
440 Louisiana
2200 Lyric Centre
Houston, Texas 77002
(713) 222-9000 - Office
(713) 229-8824 - Fax
E-MAIL - rwilson@wcgf.com

James L. Dougherty, Jr.
Cole & Dougherty
5300 Memorial Drive, Suite 1070
Houston, Texas 77007
Phone 713-880-3800

Texas Real Estate Practice For Paralegals

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Appendices

DEVELOPMENT/LAND USE LAW

I. SUBDIVISIONS AND SITE PLANS

A. General requirement to plat

In general, when a tract is divided into "two or more parts," either state law or a municipal subdivision ordinance will require a subdivision plat. A municipal subdivision ordinance will usually apply not only within the city's limits but also within its extraterritorial jurisdiction ("ETJ"). *See* Chapters 42 and 212, TEX. LOC. GOV'T CODE.

Some ordinances define "subdivision" broadly to include a wide range of divisions of land, even leases and partial encumbrances. Outside city limits, a county platting statute applies. S*ee* Chapter 232, TEX. LOC. GOV'T CODE. The scope of the county platting statute is narrower than the municipal platting statute. *Elgin Bank of Texas v. Travis County,* 906 S.W.2d 120 (Tex. App.--Austin 1995, no writ) (allowed subdivision of tracts outside ETJ without a plat; the opinion notes the difference between the county platting statute and the municipal platting statute).

Most water districts in the City of Houston's ETJ are bound by "consent agreements" or "consent conditions" imposed upon the districts by the City at the time of district creation. They typically require platting of land before it is served by the district. In addition, the platting statutes prohibit serving or connecting "water, sewer, electricity, gas or other utility service" without a certification that a plat, if required, has been reviewed and approved as required by law. *See* TEX. LOC. GOV'T CODE §§212.015, 212.012, 232.028, 232.029.

B. Exceptions

1. General Exceptions

If a tract is not platted, check to see if:

(i) there was no requirement to plat at the time the site was created (this depends on the date the platting occurred as compared to the effective dates of the applicable statute and ordinances and the dates when the site came within the jurisdiction that requires platting);

(ii) there is an express exception from platting (local ordinances typically have a list of exceptions);

(iii) the site is "grandfathered" by local ordinance; or

(iv) the definition of "subdivision" does not include the type of division of land in question. Note that both the municipal and county platting statutes allow divisions of land to be defined and classified; not all divisions of land need to be platted. *See* TEX. LOC. GOV'T CODE §§212.0045, 232.0015.

2. City of Houston exceptions

The City of Houston does not require platting for the following sites, even if there is a division of a larger tract:

(i) a site for which a development plat is filed, and the development plat provides for no new public or private streets, direct street frontage on a conforming street, no excessive block lengths, no dedication of

a major thoroughfare and not more than three single-family units without direct street access;

(ii) a site within an unrestricted reserve, a commercial reserve or a non-residential reserve that is not encumbered by a one-foot reserve and will be used for non-residential purposes; or

(iii) a site used for agricultural purposes, if each parcel is five acres or more and does not involve any new streets, alleys or easements of access. *See* HOUSTON CODE (April 23, 1997), §§42-5 and 42-7(43) (definition of "subdivision").

Important note: The City of Houston is considering a comprehensive revision of its subdivision regulations, including Chapter 42 of HOUSTON CODE.

3. Special need to replat

There may be a special, site-specific need to replat an existing platted parcel. Check for any special restrictions on the face of the plat. *Examples*:

(i) a "one-foot reserve" along the boundary of a street or platted parcel;

(ii) a use restriction;

(iii) obsolete lots, streets or easements; and

(iv) inappropriate features such as building locations, parking or landscaping.

C. Regulations for plats and re-plats

1. Procedures

Subdivision regulations usually prescribe a two-step approval process: preliminary approval and final approval. Usually the approving body is the planning commission (assuming the property is in the city limits or ETJ of a city). Sometimes it is the City Council. For an unincorporated area in a City's ETJ, approval by both the City and the County is required, except possibly in certain large counties. *See* Chapter 242, TEX. LOC. GOV'T CODE. Harris County requires dual approvals. Some cities, including Houston, require approval by county officials as part of the city's subdivision regulations.

Cities may delegate approval authority, for some plats, to an administrative official. S*ee* TEX. LOC. GOV'T CODE §212.0065. Notices and a public hearing are required for some replats. TEX. LOC. GOV'T CODE §212.015. There is a special, simpler procedure for "amending plats." TEX. LOC. GOV'T CODE §212.016.

2. Criteria

Both the municipal platting statute and the county platting statute require:

(i) specific technical plat data, including metes and bounds and a tie to the "corner of the survey or tract" or "an original corner of the original survey;" and

(ii) compliance with specific subdivision regulations.

TEX. LOC. GOV'T CODE §§212.004, 212.010 and 232.001–232.004. The municipal statute also requires compliance with the "general plan" for development of the city. 232.001–232.004.

Most subdivision regulations prescribe the size and shape of lots and reserves. Most prescribe minimum street widths and locations. Most require dedication of streets and easements and the construction of streets and water and sewer lines. Some will limit access or permissible uses. Some call for mandatory dedication of park lands. *See City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802 (Tex. 1984) (parkland dedication requirement upheld). Counties are specifically authorized to prescribe street widths and specifications and to require a bond. TEX. LOC. GOV'T CODE §§232.004.

Platting or replatting will usually trigger any impact fees levied under Chapter 395, TEX. LOC. GOV'T CODE. *Examples*: water capacity fees, sewer capacity fees or regional drainage fees. See discussion below. Platting or replatting may also trigger plan review for drainage purposes, which may entail requirements to provide on-site detention or off-site stream improvements. For example, the applicable subdivision regulations may require approval of the plat (or perhaps a separate drainage plan) by the local flood control district or other drainage official.

D. Site plans (development plats)

1. When required

Even if there is no "subdivision" of land into two or more parts, and therefore no plat requirement, some cities will nevertheless require a "site plan" or "development plat." The trigger is usually "development" activity, which can be defined very broadly. For example, TEX. LOC. GOV'T CODE §212.043 defines "development" to include "the construction or enlargement of any exterior dimension of a building, structure or improvement."

2. Purposes

Most often, site plans are used to check for platting defects and for zoning compliance. Some cities use them to check for any required dedication of streets, easements, etc. *Example*: If a city's general plan calls for a street to be widened or opened through a certain tract, the city might require that the necessary right of way be dedicated as a condition for approval of the site plan. See the discussion in Appendix B regarding "exactions."

II. ZONING

A. Nature of zoning

1. Municipal zoning

Comprehensive zoning ordinances directly control the development and use of land, typically imposing different regulations in different zones of the city. Such zones are referred to in the statutes as "districts." Municipal zoning only applies within city limits, except for some airport zoning. *See generally* Chapter 211 and §212.003, TEX. LOC. GOV'T

CODE. An obscure tax statute authorizes less-than-citywide zoning within "reinvestment zones." *See* Chapter 311, TEX. TAX. CODE. Houston has such zoning in an area near the Galleria.

2. County and special zoning

Counties have some limited powers to zone around some reservoirs, military establishments, historic sites and airports. *See* Chapters 231 and 241, TEX. LOC. GOV'T CODE. Special airport zoning is allowed under Chapter 241, TEX. LOC. GOV'T CODE.

B. Achieving compliance "as of right"

Sometimes, compliance with a zoning ordinance can be achieved "as of right," meaning that a project can meet all requirements of the ordinance without obtaining any "discretionary approvals." As discussed below, discretionary approvals can be difficult and time-consuming to obtain; there are elaborate decision-making processes required by state zoning law.

1. Basic compliance check

Some planning or zoning departments will help applicants determine whether a project complies with zoning requirements. Some will issue a "certificate of zoning compliance" or similar document. Generally, errors in such documents are not binding on the issuing city, so it is prudent for the owner (or the owner's consultants) to examine the site plan, the subdivision plat (if any), the zoning map and the zoning ordinance to check for possible non-compliance with zoning requirements. *See* Appendix B.

2. Special circumstances; PNC's

Even if a project appears not to comply with the current zoning ordinance, check for the following special circumstances:

(i) any exceptions and defenses within the ordinance itself, perhaps in the definitions, or in the enforcement sections or appendices to the ordinance;

(ii) exceptions in state law, especially in Chapter 211, TEX. LOC. GOV'T CODE); see also a provision for "community homes" in Chapter 123, TEX. HUMAN RES. CODE;

(iii) any special "grandfather" status as a "prior non-conformity" or "PNC" (this will depend on the text of the zoning ordinance, typically allowing PNC status for land uses started legally but becoming illegal by a subsequent change in the ordinance); and

(iv) any prior zoning approval given to the item (check especially for special exceptions, variances, special use permits, specific use permits, conditional use permits, planned development districts, etc.).

3. Role of the building official

Typically, a property owner first files an application for zoning approval with the building official (or other code or zoning official). The building official's initial decision may affect all subsequent actions. The building official usually will be responsible for:

(i) reviewing applications for projects and issuing building permits to authorize the beginning of the work;

(ii) acting as the initial interpreter of the zoning ordinance;

(iii) handling inspections, enforcement, etc.

The building official's decisions carry a strong presumption in zoning matters. If the building official's initial decision is unfavorable, the applicant may appeal. Practice varies, but there may be different routes. Sometimes officials in the "chain of command" above the building official will allow an informal appeal. There is a statutory appeal to the ZBA. *Example*: an appeal that a specific ruling by the building official--such as a refusal to issue a permit--is wrong. *See* TEX. LOC. GOV'T CODE §211.010.

4. Appeals to the ZBA

Decisions and interpretations of the building official can be appealed to the zoning board of adjustment ("ZBA"), not to the zoning and planning commission or city council. At the ZBA, it takes four votes (typically out of a maximum of five) to overrule the building official.

Any "person aggrieved by the decision" can appeal to the ZBA. *See* TEX. LOC. GOV'T CODE §211.010. For example, a neighboring property owner may be able to appeal from the building official's approval of a project, as would an applicant whose application is denied.

A statutory appeal must be filed within "a reasonable time" as determined by the Board's rules. Watch for short filing deadlines. There is usually a fee and often a standard form to fill out. The appeal halts all enforcement action on the appealed decision, unless the building official certifies there is "imminent peril" to life or property. TEX. LOC. GOV'T CODE §211.010(c). The ZBA must give public notice of the appeal and decide "within a reasonable time." It takes four (out of a maximum of five possible votes) to reverse the building official's decision.

C. Discretionary zoning approvals.

The basic types of discretionary zoning approvals are: (1) special exceptions, (2) variances, and (3) ordinance amendments.

1. Special exceptions

Only the ZBA can issue a "special exception." See 211.008, TEX. LOC. GOV'T CODE. Zoning ordinances typically impose filing deadlines, fees and requirements for public notices and hearings. It takes four (typically out of five possible votes on the ZBA) to grant a special exception. A special exception must be created and "spelled out" within the text of the zoning ordinance. *West Texas Water Refiners Inc. v. S&B Beverage Company, Inc.*, 915 S.W.2d 623, 627 (Tex. App.--El Paso 1996, no writ). For example, an ordinance may provide that a theater may only be located in a commercial district if authorized by a special exception. The ordinance should set out criteria for issuance of a special exception. However, a special exception does not necessarily have to meet the stringent statutory tests that every variance must meet (see below).

2. Variances

By statute, the ZBA. may authorize "variances." *See* TEX. LOC. GOV'T CODE §211.009(a)(3). A variance authorizes something that would otherwise violate the zoning ordinance. Unlike a special exception, a variance does not depend upon any pre-existing provision spelled-out within the text of the ordinance. Zoning ordinances typically impose filing deadlines, fees and requirements for public notices and hearings. It takes four (typically out of a maximum of five possible votes) to grant a variance.

The statutory requirements for the issuance of a variance are stringent and subjective: (1) The variance may not be "contrary to the public interest." (2) Due to "special conditions," a literal enforcement of the ordinance must cause an "unnecessary hardship." "Financial" hardship alone is not sufficient to meet this test. *Bat'tles v. Board of Adjustment of Irving*, 711 S.W.2d 297 (Tex. App.--Dallas 1986, no writ). The hardship must arise from some kind of "environmental" condition of the property. *Id.* (3) The "spirit of the ordinance" must be observed. (4) "Substantial justice" must be done.

An important limitation on the power of the ZBA is that a variance may not be used to authorize a "use" prohibited by the zoning ordinance. See *Davis v. City of Abilene*, 250 S.W.2d 685(Tex. Civ App.–Eastland 1952, writ ref'd)(ZBA not authorized to allow garment factory in residentially-zoned district).

3. Appeals from ZBA actions

The following persons can appeal to "a court of record" (typically district court) from a decision of the ZBA.: (1) "Any person aggrieved." Property owners who are specially affected by a project have an independent right to sue to enforce a zoning ordinance. *Porter v. Southwestern Public Service Co.*, 489 S.W.2d 361 (Tex. Civ. App.--Amarillo 1972, writ ref'd n.r.e.). (2) A "taxpayer." (3) A city officer, department or board. *See* TEX. LOC. GOV'T CODE §211.011.

An appeal must be in the form of a verified (sworn) petition filed in a court of record. It must be presented "*within 10 days after the date the decision [appealed from] is filed in the board's office*." There is no statutory requirement to give notice of this date, so anyone with an appeal must be especially vigilant. The court may grant a "writ of certiorari" that requires the board to certify the written records back to the court. The court can theoretically decide the appeal based on the written record. The court may also decide to hear evidence. The court may appoint a "referee" to make a report. The court may reverse, affirm or modify the decision of the Board of Adjustment.

4. Zoning amendments

If zoning compliance is not achieved "as of right," and if no special exception or variance is obtained to achieve compliance, it may be necessary to request an amendment to a zoning ordinance. Amendments are handled by legislative bodies (typically the zoning commission and city council), not the

ZBA. See the procedures discussed below. Some ordinances require a filing fee.

The most common amendment is probably a simple rezoning to change use classification of tract, usually by amending the zoning map. Other amendments can change just the zoning regulations, leaving the map unchanged. An amendment is usually the only way to get a "use" restriction changed.

Many zoning ordinances contemplate site-specific amendments for certain types of projects. Often, such amendments are referred to as "specific use permits," "planned development districts" or "planned unit developments" ("PUD's"). Although these may resemble special exceptions, the approval process is entirely different.

The basic zoning amendment procedure includes these steps:

(i) (Sometimes) the zoning commission makes a preliminary report;

(ii) Zoning commission gives notice and holds public hearings;

(iii) Zoning commission makes a final report to the governing body;

(iv) Governing body gives notice and holds another hearing; and

(v) Governing body proceeds with the usual steps necessary for adopting an ordinance (notices of meeting, votes, signatures, publication, etc.).

See TEX. LOC. GOV'T CODE §§211.006, 211.007.

Optionally, a city council, by ordinance, can prescribe a joint hearing with the zoning commission and may prescribe some notices. Special written notice must be given to nearby property owners if there is "a proposed change in zoning classification" (that is, a rezoning or map change). TEX. LOC. GOV'T CODE §211.007 (Vernon 1988). Property owner protests can trigger a three-fourths vote requirement. *See* TEX. LOC. GOV'T CODE §211.006 (Vernon 1988).

5. Comprehensive plans

All zoning must be "in accordance with a comprehensive plan," and this requirement is often the basis for "spot zoning" attacks on amendments. *See* TEX. LOC. GOV'T CODE §211.004. However, the comprehensive nature of a zoning ordinance, by itself, may satisfy the comprehensive planning requirement, without a separate plan document. *See* TEXAS MUNICIPAL ZONING LAW, Mixon, J., §6.03 (3rd Ed.).

A 1997 statute grants broad, permissive authority for municipalities to adopt comprehensive plans for "long range development" and to define "the relationship between a comprehensive plan and development regulations. . . ." See Chapter 219, TEX. LOC. GOV'T CODE. Both adoption and amendment of a comprehensive plan require a hearing and review by the "municipality's planning commission or department." A map indicating future land use must contain a statutory disclaimer stating that it does not "constitute zoning regulations or establish zoning district boundaries."

III. WATER, SEWER AND DRAINAGE SERVICES

A. Initial investigation

1. Needs and providers

For new or expanded projects, an engineer or other qualified person should investigate the needs for water, sewer and drainage capacity and survey the local providers of those services and their available capacities, fees, policies, etc. Most utilities have a standard procedure for handling inquiries about capacity. Typically, an application and a fee are required. *See, for example*, HOUSTON CODE (April 23, 1997), §§47-301 et seq. Some will issue "letters of availability" or "capacity reservations."

The types of information that a utility might make available include: (i) utility plant capacity restrictions and reservations, (ii) utility line capacity and necessary line extensions, (iii) impact fees, tap fees, etc. Similar information may also be available for storm drainage and storm water detention requirements.

Water districts will often require the applicant to pay the cost of determining the feasibility of serving large tracts, plus the cost of annexation into the district, if required. See below.

2. Certificates of convenience and necessity

For water and sewer service, it may be helpful to check to see if the affected tract is covered by the area of a certificate of convenience and necessity ("CCN") issued by the Texas Natural Resource Conservation Commission("TNRCC") under Chapter 13, TEX. WATER CODE. Chapter 13 requires certificated utilities to provide adequate service in their service areas, and it restricts the ability of other utility providers to invade a certificated area. For CCN maps, contact Water Utilities Division, TNRCC, 512-239-6433.

3. Water districts

Water districts are not required to obtain CCN's (but some do). Their service areas usually approximate their boundaries. To obtain water district boundary maps, contact TNRCC, District Administration Section, 512-239-6423. The powers of water districts vary widely, depending on the type of district and, sometimes, the mode of creation. See Appendix E, "District Powers And Duties." The most common type of district is a municipal utility district operating under Chapters 49 and 54, TEX. WATER CODE. See Appendix F, "Magnitude of Districts." Note that Chapter 49 applies to a wide range of districts.

If there is an existing district that includes the land in question, the landowner will usually work out water, sewer and drainage arrangements with that district. Sometimes the landowner will want to have his property removed from an existing water district. This might arise if

there is a "dormant" district or a district that cannot provide the needed services. Being disannexed from an existing district can be difficult or impossible. *See, e.g.,* §§49.303–49-314, TEX. WATER CODE. It may be easier to dissolve a dormant district. *See* §§49.321–49-327, TEX. WATER CODE, which applies to districts inactive for five years with no indebtedness. Dissolution requires notice, a hearing and TNRCC action. The owners of all the property in a dormant district should be able to have the district dissolved.

If there is no existing district that includes the land in question, it may be possible to have the land annexed into a nearby district. There is usually no requirement for physical contiguity. Conditions may be imposed by the district. See the discussion of water districts in Appendix C.

Another approach is to have a new district created. This requires, typically, much more time and money than being annexed into an existing district. For the applicable statutes, see Appendix E entitled "District Powers And Duties."

4. On-site water and sewer facilities

If on-site water and sewer facilities are contemplated, it is wise to check for applicable state, city and county regulations. Most jurisdictions prohibit or limit on-site utilities. For example, many municipal ordinances and county regulations require connection to an organized sanitary sewer system, if available, as a means of preserving water quality. If an organized sanitary sewer system is not available, the applicable regulations for septic tanks and other on-site sewer facilities ("OSSF's") will require a permit, and the requirements will be at least as stringent as the statewide regulations set out in 30 TAC Chapter 285. Both cities and counties are authorized to adopt OSSF rules. Often there is a minimum lot size required for OSSF's. The OSSF rules not only control the design of septic tanks and other facilities, but they also require physical separation between OSSF's and water wells.

Private water wells may be regulated by municipal ordinances and state water system regulations. *See, e.g.,* Chapter 30 TAC Chapter 290. Special groundwater regulation districts may also regulate water wells. *See, e.g.,* Chapter 151, TEX. WATER CODE, regarding the Harris-Galveston Coastal Subsidence District. Section 151.084 provides that the H-GCSD's "regulatory provisions" do not apply to "wells with a casing diameter of less than five inches that serve a single-family dwelling."

5. Drainage

Providing drainage can be much more complicated than water and sewer. The applicable regulations vary widely. Most cities and counties regulate drainage under one or more of the following auspices: (i) regulation of flood hazards under FEMA's national flood insurance damage prevention program and flood insurance program (*see, e.g,* 44 CFR, Chapter I), (ii) control over roads and bridges; most drainage plans use storm

sewers or roadside ditches located in public rights of way, (iii) direct control of ditches and other drainage facilities, (iii) subdivision regulations (see Section I, above). Most jurisdictions have a drainage criteria manual of some kind. It will typically address such questions as when must plans or plats be submitted for drainage system review, when will in-stream improvements or detention be required and whether impact fees are applicable under Chapter 395, TEX. LOC. GOV'T CODE.

A critical question for a new project is the drainage route. From the site, water must be conveyed to a receiving point in a public ditch or stream. Roadside ditches (or storm sewers in the right of way) may not have sufficient capacity. A special drainage easement may be necessary, perhaps across private property. There should be sufficient capacity in the receiving ditch or stream to avoid adverse impacts on downstream lands. County or city criteria manuals will often prescribe what this may require.

B. Construction of Utility or Drainage Facilities

If off-site utility or drainage facilities need to be constructed, the guidelines of the local utility and drainage agencies will usually control.

1. Policies for extension of utility facilities.

Most utilities have a policy for extension of utility facilities. Many utilities will require the applicant to bear the entire cost, subject to possible refund or reimbursement arrangements, if applicable. However, most utilities will allow developers to make prorata contributions to projects designed to serve more than one user, or perhaps to serve the whole system. Some utilities simply charge an impact fee under Chapter 395, TEX. LOC. GOV'T CODE. Some utilities will allow the applicant to handle the design and construction of new facilities, subject to engineering reviews, inspections, etc.

2. Refund or "trust fund" arrangements

Some utilities will allow partial refunds of the cost that an applicant might incur to extend the utility's system, particularly if the utility requires that a system facility be "oversized" to serve other land. *See, e.g.*, HOUSTON CODE, §§47-168–47-170. Typically, there will be an agreement that requires the utility to levy an assessment on customers who connect to the facility later. The amount assessed might be a proportional part of the cost of the facility, and the assessments would be collected into a sort of "trust fund" and then refunded to the initial customer who bore the cost of the facility's construction. Note that "lot or acreage fee to be placed in trust funds for the purpose of reimbursing developers for oversizing water or sewer mains or lines" are apparently exempted from the normal impact fee restrictions under Chapter 395, TEX. LOC. GOV'T CODE (see definition of "impact fee").

3. Reimbursements from water districts

Most water districts will consider reimbursements for persons who "pre-

construct" water, sewer and drainage facilities. A rule of thumb is that reimbursements will not exceed 70% of the cost. This derives from the minimum developer contribution rule set out in 30 TAC 293.47. The rule only sets a minimum developer contribution, not a minimum district reimbursement. Some districts do not reimburse at all. Also, some districts and some facilities are exempt from the minimum developer contribution rule (that is, the district is allowed to reimburse up to 100% in certain cases.). It is critical that the TNRCC's reimbursement and "pre-construction" rules be followed carefully. *See, e.g.*, the following sections from Title 30 of the Texas Administrative Code:

293.44 Limits on reimbursements and district participation in various types of projects and cost items.
293.46 Rules for "pre-construction" of water, sewer and drainage facilities.
293.47 Thirty percent developer contribution rule, with exceptions.
293.50 Limits on reimbursement for interest and professional fees.
293.51 Developer donation of easements, etc.
293.59 TNRCC approval, and repairs, for certain facility purchases.
293.65 Inspection by TNRCC.
293.67 "As built" plans and certificate of completion.
293.70 Requires audit before payment of bond proceeds.

Annexation into the district may be required, if the land is outside the boundaries. For a more detailed description of water district reimbursements and annexations, see Appendix C.

IV. USE OF PUBLIC PROPERTY

1. Private construction within public streets, etc.

Most cities and counties regulate or prohibit private construction within public street rights of way. Excavations, curb cuts, driveways, sidewalks, vaults and conduits typically trigger permit requirements. *See, e.g.,* HOUSTON CODE (April 23, 1997), Chapter 40. *See, also,* Chapters 31 and 33 of the *1994 Standard Building Code.* Some cities, by charter or otherwise, may require a special approval, such as a franchise, as a condition for occupancy of public rights of way. *See, e.g.*, art. II, §17, HOUSTON CHARTER and TEX. TRANSP. CODE §§311.001, 311.002, 311.007, 311.008, 311.071.

2. Encroachments

Sometimes buildings or structures encroach onto public streets or easements. Sometimes there may be an ordinance or regulation authorizing such encroachments. *See, for example*, HOUSTON CODE (April 23, 1997), §§10-31 et seq. which authorizes permits for certain structures within city easements. *But see* HOUSTON CODE (April 23, 1997), §40-7 which generally forbids encroachments within streets or alleys. Some jurisdictions will issue a type of "acquiescence" for encroaching

structures. The appropriate body to grant permission in an unincorporated area is the county, although many applicants will also seek consents from affected water districts and public utilities.

Typically, neither a permit nor an acquiescence will grant much more than a revocable license or permission. They may require that the encroaching structure be removed when access is needed for public purposes.

3. Purchase of public property

Some jurisdictions will abandon and sell unneeded rights of way or easements, which might be an effective method of solving an encroachment problem. There are statutory restrictions. *See* Chapter 253, 263 and 272, TEX. LOC. GOV'T CODE. Practices vary. Some jurisdictions require full cash payment of the appraised value, others may not. The City of Houston usually requires: (i) payment of an "up-front" fee, (ii) appraisal, (iii) consent of any affected utilities, and (iv) cash payment of the appraised value. The Public Works Department has an established procedure for handling street and easement abandonments. There may be some flexibility in the case of a desirable redevelopment project.

V. OTHER LOCAL REGULATIONS

A. Building codes

1. Families of standardized codes

Traditional building codes now embrace entire families of standardized codes. The two families most often used in Texas are published by the Southern Standard Building Code Congress International ("SBCCI") and by the International Congress of Building Officials ("ICBO"). SBCCI publishes the "Southern" or "Standard" Building Code family, and it is most commonly used by smaller cities in Texas. The ICBO publishes the Uniform Building Code family, which has been adopted (with extensive amendments) by the City of Houston. Most jurisdictions use the *National Electrical Code* published by the National Fire Protection Association.

The SBCCI family includes separate code books for the following: (i) standard building code, (ii) one-and-two- family dwelling code, (iii) housing code, (iv) mechanical code, (v) plumbing code, (vi) fire prevention code, (vii) gas code, and (viii) other specialized codes.

Typically, a city's building or development ordinances will adopt specific editions of specific code books. Often there are local amendments added. Such codes usually apply only within city limits. Counties lack the broad code-making powers enjoyed by cities. Harris County has no building code and no certificates of occupancy.

2. Achieving code compliance

Achieving building code compliance usually requires the assistance of an architect or engineer who is familiar with the particular codes in question. Documenting compliance with building codes can be difficult, especially for existing buildings. Check for a certificate of occupancy ("CO"), which is a type of

permit that typically indicates that a building has been built in compliance with the then-existing codes and that it may be occupied. Because of poor historic records, it may be difficult or impossible to find a copy of an old CO in some cities, including Houston. Some cities, including Houston, will perform special inspections for life safety compliance and issue corresponding certificates. Reportedly, Houston will not re-inspect and issue a CO, but Houston officials consider the life safety compliance certificate a substitute for a CO.

The building official usually has broad powers to interpret and apply the building codes. For example, the *1997 Uniform Building Code* includes these sections granting authority to the building official:

104.2.1 "to render interpretations of this code and to adopt and enforce rules and supplemental regulations. . ."

104.2.7 to "grant modifications for individual cases"

104.2.8 to approve an "alternate material, alternate design or method of construction"

There is usually a provision for an administrative appeal from actions of the building official. Section 105 of the *1997 Uniform Building Code* contemplates a "board of appeals" to hear and decide appeals of "orders, decisions and determinations" of the building official. Watch out for any short time deadlines to file, which are sometimes added by local amendment.

3. Pre-existing buildings

Although most building codes apply to new work, existing buildings may be required to be brought into compliance with "life safety" regulations such as exits, fire escapes, signs, smoke detectors and sprinklers. *See, e.g.*, Appendix 34 (entitled "EXISTING STRUCTURES") of the *1997 Uniform Building Code*. Section 3406 allows 18 months from the effective date to submit plans for compliance and an additional 18 months to complete the work "or the building shall be vacated until made to conform." The City of Houston, which uses the *Uniform Building Code*, has amended this section extensively.

B. Flooding, storm water, grading, filling, etc.

Most cities and counties regulate development in flood-prone areas. *See, e.g.*, HOUSTON CODE (April 23, 1997), Chapter 19. Such regulations are required for participation in the Federal Emergency Management Agency's National Flood Insurance Program. Typical requirements include permits, flood proofing and prohibitions of certain development activities. Some cities adopt ordinances regulating the handling of storm water, on-site detention of storm water runoff, grading, filling and erosion control.

More extensive ordinances may include limitations on construction near streams and may require sedimentation controls and filtration. *See* the discussion of the "Save Our Springs" ordinance in *Quick v. City of Austin*, ___ S.W.2d ____ (Tex. 1998). In that case, the "Save Our

Springs" ordinance was upheld as a valid water pollution control measure, even though it strongly affected land use. That ordinance applied not only within Austin's city limits but also within its ETJ.

C. Off-street parking

Most cities require off-street parking for some land uses. Usually, a change in the use of a building or site will trigger a review of the required number of off-street parking spaces. *See, e.g.*, HOUSTON CODE (April 23, 1997), Chapter 26.

D. Trees and landscaping; buffers

More and more, cities have begun requiring the installation of landscaping for new improvements, and some cities require that trees be protected during construction. *See, for example*, HOUSTON CODE (April 23, 1997), §§33-101 et seq. Section 33-128 requires either a screening fence or landscape buffer for a non-residential or multi-family use adjacent to a single-family residential use. Some ordinances restrict the removal or damaging of some trees at all times, whether there is construction or not. *See, for example*, HOUSTON CODE (April 23, 1997), §33-105.

E. Historic buildings and sites

Some cities restrict demolition or alteration of historic buildings or sites, usually those designated as landmarks or located in a designated historical district. Many historic preservation regulations are incorporated into comprehensive zoning ordinances, as specifically contemplated by the enabling law. TEX. LOC. GOV'T CODE §211.003 (Vernon Supp. 1997). A typical historic preservation ordinance will require, as a minimum, notice of planned work affecting an historic building or site. *See, for example*, HOUSTON CODE (April 23, 1997), §§33-201 et seq. There are some special sections of interest in the Houston ordinance: (i) §33-228 provides for the issuance of a "certificate of non-designation" which could be used to show that a building is not designated as historic, and (ii) §33-250 provides for a 90-day "waiver certificate" which may provide a simple means of compliance. Other ordinances can impose much more substantial restrictions on property. In *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the City's zoning ordinance required the denial of a building permit to alter an historic church building.

F. Nuisance-like activities

Most municipalities regulate nuisance-like activities, which are sometimes referred to as "locally undesirable land uses" ("LULU's") or "non-in-my-back-yard" activities ("NIMBY's"). Counties have some authority to regulate in this area. *See, e.g,* Chapters 234–240, TEX. LOC. GOV'T CODE. Regulations vary widely. Some regulations are incorporated into a comprehensive zoning ordinance. Others appear in single-subject ordinances. The City of Houston, which has no comprehensive zoning ordinance, nevertheless regulates many quasi-nuisance activities by single-subject ordinances. Attached as Appendix D is a list of some regulated activities and structures together with the corresponding

sections in the HOUSTON CODE (April 23, 1997).

G. Deed Restrictions

The City of Houston and some other cities enforce private deed restrictions, under authority of state statutes. *See* Chapter 230, TEX. LOC. GOV'T CODE. The statute authorizes a requirement that purchasers of property receive notices of deed restrictions. Houston requires an applicant for a building permit, certificate of occupancy or life safety compliance certificate to submit a strongly-worded affidavit which: (i) discloses the existence of deed restrictions and (ii) states that the proposed work will not violate any deed restrictions. *See* HOUSTON CODE (April 23, 1997), §§10-3, 10-3.1. Other sections: (i) impose civil penalties for violations of deed restrictions, (ii) authorize the City Attorney to sue to enforce deed restrictions and (iii) authorize the revocation of building permits. *See* HOUSTON CODE (April 23, 1997), §§10-551, et seq.

Certain large counties, including Harris County, are also authorized to enforce deed restrictions. *See* Chapter 203, TEX. PROP. CODE.

H. Alcoholic Beverages

Strictly speaking, alcoholic beverage regulations are imposed by state law. *See* ALCOH. BEV. CODE. However, the county judge has the statutory duty to issue certain permits.

Appendix A
CHECKLIST FOR LOCAL DEVELOPMENT REGULATIONS

◘	**Is the existing site lawfully platted?** How was it created? Metes and bounds? Exceptions/defenses in the ordinance or state law? Was there a prior plat? Check notes/restrictions.
◘	**Will a new plat (or replat) be required?** Division of a tract? Change in use or restriction? Crossing a lot line? Need to cross or use a one-foot reserve? Check procedures. Will other jurisdictions review? Check for relaxed amending plat or minor plat rules Will any dedications/fee payments be required?
❑	**Is a site plan (development plat) required?** Check the ordinance "trigger." Is there "development" under 212.043 LGC? Check exceptions/defenses in the ordinance Are special traffic or other studies needed? Will any dedication/fee payments be required?
❑	**Are there zoning regulations applicable?** Ordinary municipal zoning? Special airport or reinvestment (TIF) zoning? County zoning (airport, reservoir, etc.)?
❑	**If so, does the project comply?** What is the building site/lot/parcel? In which zone(s) does it lie? Any overlay zones? Which regulations apply to sites in those zones? Does the project comply with those regulations? For each non-compliant item, check: Exceptions/defenses in the ordinance Exceptions/defenses in state law Prior-non-conforming status ("grandfathering") Prior approvals given (variances, etc.)
❑	**Can the project comply "as of right"?** Has the building official ruled? What appeals are available? Deadline? Has anyone else appealed?
❑	**Is a ZBA discretionary approval needed?** Appeal from administrative ruling? Watch deadline. Special exception (provided for in the ordinance) Variance (hardship; not in the ordinance)
❑	**Is another discretionary approval needed?** Rezoning or change in district boundaries? Change in regulations only, not boundaries? Amendment called "permit" (SUP, CUP, etc.)? Planned unit development or PDD? Does the comprehensive plan, if any, allow it? Amendment of the plan? See Ch. 219, LGC.
◘	**Is there sufficient water/sewer?** Plant/line capacity, points of connection. What are the local providers? Check CCN's. Will the utility issue a letter of availability? Can capacity be reserved? How? Is construction needed? Who does it? Who pays?
◘	**Are on-site water/sewer facilities needed?** Check state/local rules.
◘	**How will drainage be handled?** Is there stream capacity? Is detention required? What is the drainage route? Who controls it?
◘	**Are there tap fees, impact fees, other fees?** See Ch. 395, LGC for the times they accrue. Check for possible exceptions or limits.
◘	**Is any public property needed?** Construction in street or easement Encroachments by improvements
◘	**If so, what permission is needed?** Permit or other revocable permission Contractual permission Outright purchase (appraisal) Check to see if a replat could work instead
❑	**Does the project meet all building codes?** Prior inspections, permits, certificates? New inspection/certificate from city? Administrative interpretation or modification possible? Appeal to hearing board? Watch deadline.
◘	**Are there flooding, storm water, grading or filling or special water quality regulations?** Check for 100-year flood plane or floodway Check for county and city stormwater rules Check for special city/ETJ water quality regulations

❑	**Is off-street parking required?** Existing land use? New construction or change in use? Check possible exceptions and transitional rules.
❑	**Is landscaping or buffering required?**
❑	**Are there tree protection or environmental rules?**
❑	**Are there any historic preservation regulations?**
❑	**Are there single-subject nuisance-like regulations?** Depends on land use/type of activity Use code of ordinances as checklist

◘	**Are there deed restrictions? Architectural control?** Compliance needed for building permit? Affidavit? Can a building permit be revoked? Can a lawsuit be brought?
◘	**Check alcoholic beverage licenses and permits.**
◘	**Special assessments or special tax districts?**

NOTE: ◘ indicates items that usually apply both inside and outside city limits.

Appendix B
General Regulatory Principles

A. Mandatory public procedures

Municipalities must follow intricate procedures when adopting or amending some regulatory ordinances. For example, a hearing must precede the adoption of platting or zoning regulations. *See* Chapters 211 and 212, TEX. LOC. GOV'T CODE (Vernon 1988). The Texas Open Meetings Act requires that all city council meetings be posted in advance and, usually, conducted in public. *See* Chapter 551, TEX. GOV'T CODE (Vernon 1994). City charters sometimes prescribe additional procedural requirements such as readings and publication.

B. Constitutional reasonableness

Under federal and state doctrines of substantive due process, an ordinance may be challenged if it is "arbitrary," "unreasonable," or "capricious" or if the means selected do not have a real and substantial relation to the objective. *Chandler v. Gutierrez*, 906 S.W.2d 195, 202 (Tex.App.--Austin 1995, writ denied)(a rational basis will satisfy due process requirements). *See also Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968)(mere difference of opinion, where reasonable minds could differ, not sufficient basis for striking down legislation as unconstitutional) and *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998)("The Town's concerns regarding the urbanization effects of the development are legitimate governmental interests, and the denial of the development application is clearly rationally related to those interests.")

C. Takings and damagings

Due process clauses prohibit "taking" of private property without due process of law and, in some cases, compensation. U. S. CONST., 5th and 14th Amendments. In Texas, the state constitution prohibits "damaging" private property as well as takings. TEX. CONST. art. I, sec.17.

1. State inverse condemnation theory

In the 1970's and 1980's, Texas courts developed a state constitutional right allowing recovery of money damages on the theory of "inverse condemnation." It has been applied when government interferes too much with private property rights, without a physical taking. *See City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (preservation of a scenic tract by delaying and denying permits for development).

The Supreme Court has clarified when zoning might constitute "inverse condemnation" or a "taking." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998)(denial of planned development district that would have quadrupled the Town's population held not a taking because it did not totally destroy the value of the Mayhews' property or unreasonably interfere with their rights to use and enjoy their property.).

2. Federal takings cases

Recent federal cases also recognize a federal constitutional right to recover money damages when police power regulations go too far. See *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992). Federal

doctrine generally requires that a plaintiff prove that the challenged regulation prevents all economically viable uses of the land.

3. Exaction cases

So-called "exactions" have attracted increased judicial and legislative scrutiny in recent years. An "exaction" usually refers to a requirement that a developer give something to the government as a condition for a land use approval (perhaps a zoning approval or a plat approval). Common exactions are street rights of way, easements, utility facilities and parks.

a. Parkland dedication. A leading Texas case upheld College Station's mandatory parkland dedication ordinance. *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 (Tex. 1984) . The court emphasized several factors that helped to support the ordinance. For example, the dedicated land (or cash given in lieu of land) had to be used to benefit the dedicator's remaining land. It had to be used for close-by parks, not diverted for use across town.

b. Logical nexus test. Under federal cases, exactions have to be logically related to a legitimate governmental purpose. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Supreme Court invalidated the exaction of a beach access easement because there was no logical connection between the demanded easement and the alleged governmental purpose to preserve beach scenery.

c. "Roughly proportional" test. A 1994 Supreme Court case holds that an exaction must be at least "roughly" proportional to the impact of the developer's proposed project, and the government bears the burden of proof. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

d. Impact fee statute. By statute, Texas has limited the ability of cities to require cash payments in lieu of physical facilities. So-called "impact fees" are restricted by Chapter 395 of TEX. LOC. GOV'T CODE (Vernon Supp. 1997). Note that the definition of an impact fee is fairly broad.

4. Ripeness and exhaustion

Federal cases have required plaintiffs to get final decisions from the appropriate state and local governmental bodies before seeking relief in court. Until there is a final decision, the case is not considered "ripe" for federal intervention. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U. S. 172 (1985), the Court required the plaintiff to seek a variance (and possible compensation under state law) before bringing a federal constitutional case. In *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), the plaintiff was required to seek re-zoning before suing for relief under the due process clause. In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), the Supreme Court held that a Town's denial of a planned development district, after months of negotiations and studies, was "ripe" for review, even though the landowner did not apply for approval of a smaller or less-intense development.

There are similar doctrines requiring plaintiffs to exhaust their administrative remedies before suing in state court, at least in those instances when the administrative officers have the power to grant relief. *See Thomas v. City of San Marcos*, 477 S.W.2d 322 (Tex. Civ. App.--Austin 1972, no writ).

D. Vested rights

Sometimes, a property owner may be able to establish a "vested right" to finish a project once it starts. There is a common law estoppel theory and a constitutional property rights theory.

1. Estoppel cases

Using estoppel to defeat enforcement of an ordinance is not easy in Texas. An owner must show not only that he relied upon city action but also: (i) the circumstances are so exceptional that "justice requires" intervention by the Court and (ii) there will be no interference with governmental functions. *See Davis v. City of Abilene*, 250 S.W.2d 685 (Tex. Civ. App.--Eastland 1952, writ ref'd) and *City of Hutchins v. Prasifca*, 450 S.W.2d 829 (Tex. 1970).

2. Property rights theories

One early case seemed to establish a sort of property right to finish a project once started under a city-issued permit. *Gulf Refining Co. v. City of Dallas*, 10 S.W.2d 151 (Tex. Civ. App.--Dallas 1928, writ dism'd). This case is difficult to reconcile with the later-decided, strongly anti-estoppel cases discussed above. A recent civil rights case, which is also difficult to reconcile with the anti-estoppel cases, required the City of Houston to pay money damages because its building official told a billboard owner that his billboard should be removed. The building official, it turned out later, had made a mistake, but the owner had already removed the sign. *City of Houston v. DeTrapani*, 771 S.W.2d 703 (Tex. App.--Houston [14th Dist.] 1989, writ denied).

3. Vested rights statute

Until 1997, Texas had a statute that purported to immunize permittees from changes in local regulations occurring after a "permit" is applied for. *See* TEX. GOV'T CODE §§481.141 et seq. (Vernon Supp. 1997). In 1997, the Legislature re-adopted the Department of Commerce statutes, but omitted the vested rights sections. So the vested rights stature was repealed, and the Supreme Court has indicated that the repeal went into effect immediately. *See, e.g, Quick v. City of Austin*, ___ S.W.2d ____ , 1998 Tex. LEXIS 82 (May 8, 1998, rehearing pending). Rehearing is pending on the vested rights issue.

Appendix C

Water District Reimbursements and Annexation

A. Utility development agreements

Water district reimbursements are usually governed by a utility development agreement between the developer and the district. The agreement will typically specify: (i) procedures for design and construction of facilities, (ii) dedication of necessary easements, (iii) platting of the affected property, (iv) the "trigger" for reimbursements, which would typically be the construction of taxable improvements with a specified minimum value and (v) details of the actual reimbursements. Other common provisions would include a requirement that the land owner give up any agricultural appraisals or special exemptions that might reduce the taxable value.

B. Regulation of land uses

Water districts are not authorized to zone or regulate land use. *Winograd v. Clear Lake City Water Authority*, 811 S.W.2d 147, (Tex. App.–Houston [1st Dist.] 1991). However, the negotiation of utility development agreements and other similar arrangements usually involves land use to one extent or another, if only to determine the amount of capacity and the value of improvements. However, districts have an obligation to treat all landowners even-handedly. *See, e.g., Inverness Forest Improvement District v. Hardy Street Investors*, 541 S.W.2d 454 (Tex. Civ. App.–Houston [1st Dist.] 1976, writ ref'd n.r.e.).

If the land must be annexed into the district as a condition of extending service, the district may take the position that annexation is a discretionary or legislative act. A district might decide not to annex an undesired land use, for any number of reasons. Similarly, a district might require that annexed land meet certain criteria specified by the district.

C. Source of reimbursement; timing

If funds are not already on hand, the district will usually make a heavily-conditioned promise to sell bonds and use the proceeds to reimburse the developer. A bond election may be necessary. Reimbursement may not occur for months or years.

D. "Out-of-district" service

Water districts will usually refuse to serve property that is outside the boundaries of the district. If the property is outside, most districts will require that it be annexed. Some districts will agree to serve property pending annexation, but only at a much higher price, usually including a payment "in lieu of" taxes. This is nevertheless valuable to a purchaser who wants to close a transaction before the annexation becomes final. See below.

E. Annexation into water districts

1. Petition required

Annexation requires a landowners's petition under either §49.301 (if 100% of the landowners sign the petition) or §49.302 (where at least a majority, by value, sign the petition), TEX. WATER CODE. Published notice, a hearing and (usually) an election are required for annexations under §49.302. To tally landowners, it is probably safe to rely upon the names and values shown on the county tax rolls, including the values of any severed mineral interests. Watch out for any high-value mineral interests, particularly

producing wells. If the minerals account for half or more of the value of the property, it may be impossible to be annexed into a district, unless the mineral owner joins in the petition. If new bonds must be sold to serve the land to be annexed, the annexation can be made subject to the outcome of the election. *See* §49.302(n), TEX. WATER CODE.

2. City consent

Annexation into a water district also requires the consent of any city having ETJ over the area to be annexed. *See, e.g.*, §54.016, TEX. WATER CODE. A separate petition is required. Obtaining consents from the City of Houston, for example, can take months, but they are rarely refused.

3. Voting Rights Act submissions

Annexation into a water district also requires a submission to the U.S. Attorney General under Section 5 of the federal Voting Rights Act. The boundary change may not be enforced for voting purposes if the Attorney General objects. Usually, the Attorney General issues a letter of non-objection, reserving rights to sue if the law is violated. The whole process usually takes more than two months.

Appendix D
Nuisance-Like Activities Regulated by City of Houston

Activity or structure regulated	*Section or chapter of HOUSTON CODE (April 23, 1997*
Selling alcohol within 300 feet of a church, school, hospital	3-2
Bungee cord jumping	5-1
Carnivals, amusement rides	5-16 et seq.
Dance halls	5-46 et. seq.
Golf facilities, archery ranges	5-101 et. seq.
Skeet clubs and shooting galleries	5-116 et seq.
Game rooms (dominoes, cards, etc.)	5-171 et. seq.
Keeping fowl, rabbits, guinea pigs	6-31 et seq.,
Keeping wild animals	6-51 et seq.
Kennels	6-121 et. seq.
Secondhand dealers, used appliances	7-1 et seq., 28-34
Antique dealers	7-16 et seq.
Junk dealing, scrap and metal processing	7-51 et seq., 28-34
Pawnshops	7-81 et seq.
Common markets (“flea markets”)	7-101 et. seq.
Automotive dealers	8-16 et seq.
Auto wreckers, storage and salvage yards	8-101 et seq., 28-34
Heliports and helistops	9-315 et seq.
Airport-area land uses (airport zoning)	9-5 (see Ord. Nos. 63-206 and 70-346 as amended)
Abattoirs, slaughterhouses, rendering plants	10-271 et seq.
Junk vehicles	10-531 et seq.

Visual blights (graffiti, etc.)	10-541 et seq.
Burglar and fire alarms	Chapter 11
Food sellers (various types)	Chapter 20
Vending machines (food)	20-200 et seq.
Tire storage	21-181 et seq.
Smoking areas in buildings	21-236 et seq.
Docks, canals, ditches affecting Lake Houston	23-4, 23-136 et seq.
Fences (barbed or electric)	28-9, 28-10
Wells, cisterns, excavations	28-11, 28-12
Theater (visible from street)	28-17
Attention-getting devices (banners, flags, smoke, balloons, etc.)	28-37
Adult arcades and sexually-oriented businesses	28-81 et seq., 28-121 et seq., 28-251 et seq.
Correctional facilities (parolees, pre-releasees, etc.)	28-151 et seq.
Hotels, motels, inns, etc.	28-201 et seq.
Hazardous enterprises (hazardous or toxic materials)	28-221 et seq.
Manufactured homes, trailers and recreational vehicles	Chapter 29
Noise and sound levels	Chapter 30
Oil and gas wells	Chapter 31
Railroads	Chapter 38
Sidewalk cafes	40-10.1
Towers	41-50 et seq.
Swimming pools	Chapter 43
Production, industrial, manufacturing, food processing, etc.	47-186 et seq. (‘industrial waste” regulations)
Grease traps, sewage, car washes, laundries, etc.	47-411 (“Class B” and “Class C” generators)

Appendix E

Provided courtesy of TNRCC, Districts Administration Section

Appendix F

Provided courtesy of TNRCC, Districts Administration Section