
**HOUSE COMMITTEE ON COUNTY AFFAIRS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2008**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
81ST TEXAS LEGISLATURE**

**WAYNE SMITH
CHAIRMAN**

**COMMITTEE CLERK
TRAVIS SAMPLEY**



Committee On
County Affairs

December 18, 2008

Wayne Smith
Chairman


P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Tom Craddick
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on County Affairs of the Eightieth Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-first Legislature.

Respectfully submitted,


Wayne Smith



Elliott Naishtat



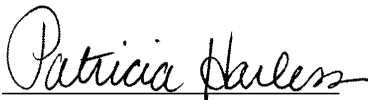
Valinda Bolton



Garnet Coleman




David Farabee



Patricia Harless



Joe Heflin



David Leibowitz



Todd Smith

Elliott Naishtat
Vice-Chairman

Members: Valinda Bolton, Garnet Coleman, David Farabee, Patricia Harless, Joe Heflin, David Leibowitz, Todd Smith

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INTRODUCTION

At the beginning of the 80th Legislature, the Honorable Tom Craddick, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on County Affairs: Wayne Smith, Chair; Elliott Naishtat, Vice-Chair; Valinda Bolton; Garnet Coleman; David Farabee; Patricia Harless; Joe Heflin; David Leibowitz; and Todd Smith.

The House Rules adopted by the 80th Legislature as House Resolution 3 on January 12, 2007, give the House Committee on County Affairs its jurisdiction. Rule 4, Section 8 reads as followed:

County Affairs - The committee shall have nine members with jurisdiction over all matters pertaining to:

- (1) counties, including their organization creation, boundaries, government, and finance and the compensation and duties of their officers and employees;
- (2) establishing districts for the election of governing bodies of counties;
- (3) regional councils of government;
- (4) multicounty boards or commissions;
- (5) relationships or contracts between counties;
- (6) other units of local government; and
- (7) the following state agency: the Commission on Jail Standards.

During the interim, the Speaker assigned charges to the committee. The House Committee on County Affairs has completed its hearing and investigations, and has adopted the following report.

HOUSE COMMITTEE ON COUNTY AFFAIRS

INTERIM STUDY CHARGES

1. Study the issues surrounding the sale, use, and regulation of fireworks in urbanized, unincorporated parts of the county.
2. Examine county procurement statutes to identify areas for increasing efficiency without sacrificing internal controls.
3. Study policies and procedures related to illegal immigration and border security of the Texas Department of Criminal Justice, county probation departments, and local and county jail facilities, and make recommendations to improve coordination with international, federal, state, and local authorities. (Joint Interim Charge with the House Committee on Corrections)
4. Examine recent attempts by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Evaluate the current relationship between and possible conflicts related to regulatory authority expressly given to state agencies by the legislature and regulatory authority delegated to home-rule municipalities. (Joint Interim Charge with the House Committee on Land and Resource Management)
5. Monitor the agencies and programs under the committee's jurisdiction.

CHARGE 1

Study the issues surrounding the sale, use, and regulation of fireworks in urbanized, unincorporated parts of the county.

On November 30, 2007, Texas House Speaker Tom Craddick instructed the House Committee on County Affairs to:

Study the issues surrounding the sale, use, and regulation of fireworks in urbanized, unincorporated parts of the county.

SCOPE OF CHARGE

This section of the Interim Report focuses on the regulation of 1.4G fireworks as defined by Occupations Code Section 2154.001, specifically the issue of these fireworks in densely populated, unincorporated parts of a county. This section examines the current framework of regulation to determine if changes are necessary.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on County Affairs met in a scheduled public hearing on August 18, 2008, in Austin, Texas. Those who were invited to testify were:

Paul Maldonado (State Fire Marshal of Texas)
Tom Spencer (Texas Forest Service)
Don Lee (Texas Conference on Urban Counties)
Jim Allison (County Judges and Commissioners Association of Texas)
Margaret Wallace (City of Houston Planning Department)
Karen DuPont (Houston Fire Department)
Chris Clark (Clear Brook City MUD)
Jim Burke (Northwest Harris County MUD No. 5)
Joe Daughtry (Texas Fireworks Association)
Chester Davis (Texas Pyrotechnics Association)
Ross Coleman (Bexar County Fire Marshal's Office)
Michael Girdley (Alamo Fireworks)

The Committee also heard public testimony on Interim Charge # 1. Twenty-five individuals either testified or turned in witness affirmation forms to register their position.

Summary of Invited Testimony

Testimony that was given in regards to Interim Charge # 1 was divided into panels. The following is a summary of those different panels.

Panel # 1 - The Texas Fire Incident Reporting System

Paul Maldonado, State Fire Marshal of Texas

Mr. Maldonado spoke to the Committee about his role in the regulation of fireworks, which is mainly the licensing of firework vendors authorized by Occupations Code Chapter 2154. The State Fire Marshal's office also releases the *Fires in Texas* annual report. The Texas Fire Incident Reporting System (TEXFIRS) collects fire and non-fire incident information from participating

fire departments. The *Fires in Texas* annual report presents a summary of all fire incident activity each year. Mr. Maldonado stated that structure fires caused by fireworks have stayed steady and grass fires caused by fireworks have declined. Because the reporting system is voluntary, Mr. Maldonado believes there may have been more fires caused by fireworks that were not reported. He described this as the one drawback of the system.

Panel # 2 - Keetch-Byram Drought Index

Tom Spencer, Texas Forest Service

Mr. Spencer is the head of predictive services for the Texas Forest Service. He testified to the Committee about how Keetch-Byram Drought Index (KBDI) is computed and described the changes that were made during the last legislative session to this process. When asked by the members, Mr. Spencer answered many questions regarding what effect the legislative changes have on the program. Mr. Spencer stated that Texas has one of the most advanced drought detection systems in the country.

Panel # 3 - Statewide County Associations

Don Lee, Texas Conference on Urban Counties

Jim Allison, County Judges and Commissioners Association of Texas

Mr. Lee, Executive Director for the Texas Conference of Urban Counties, spoke to the Committee about three different topics. First, he spoke about changes to emergency disaster proclamations made last session. Mr. Lee believes that the current law is working properly. The second topic of discussion was a proposal to ban all aerial fireworks, not just those authorized by Local Government Code Chapter 352 which only bans "missiles with sticks and rockets with fins." Mr. Lee stated that counties need the ability to ban all aerial fireworks when a county is experiencing a drought. The final topic was fireworks being used in heavily urbanized but unincorporated parts of a county. Mr. Lee's proposal, which he called "urban zones" is to allow a county commissioners court to be able to ban the sale, use and possession of fireworks in unincorporated areas of a county whose density is equal to or higher than the largest municipality in that county. Mr. Lee stated that this departure from the current policy of only regulating during drought conditions is necessary because cities have changed their annexation policy, which has in turn allowed fireworks to be used and possessed in unincorporated areas of county that have high population density.

Mr. Allison, General Counsel to the County Judges and Commissioners Association of Texas, testified that finding a balance between a need for public safety and protection of property and the need to not overburden the fireworks industry has been something the Committee has been trying to do for sometime. Mr. Allison stated that there is not a "one size fits all" solution to the problem and that counties need to be given a variety of tools to use.

Panel # 4 - Limited Purpose Annexation and Fireworks Regulation

Margaret Wallace, City of Houston Planning Department

Karen DuPont, Houston Fire Department

Chris Clark, Clear Brook City Municipal Utility District

Jim Burke, Northwest Harris County MUD No. 5

This panel spoke before the Committee to explain and field questions regarding special purpose

annexation (SPA) agreements with the city of Houston. Ms. Wallace and Capitan DuPont did not have any prepared testimony but were ready to answer any questions the Committee had for them.

Mr. Clark said that before the SPA, fireworks were a major problem. He lives in an unincorporated part of Harris County in a Municipal Utility District (MUD) that is surrounded by cities on all sides. Because of this, many people who live in these cities buy and shoot fireworks in his neighborhood. Mr. Clark said the noise, trash and traffic are very unpleasant. Mr. Burke's testimony was very similar to Mr. Clark's in that the residents of the MUD have been pleased that they no longer are dealing with noise and trash issues.

The Committee asked many questions of the panel about the specific issues with regulating fireworks through SPA agreements. One issue discussed focused on individuals who had bought fireworks were not able to transport them because the road next to the fireworks stand was also annexed. Ms. Wallace stated that in the future, transportation of fireworks would not be banned in these agreements. When asked about how residents would know if they were in areas that were annexed, Ms. Wallace stated that maps of annexed areas were released and available to the public well in advance of the firework season.

Panel # 5 - Statewide Firework Associations

Joe Daughtry, Texas Fireworks Association

Chester Davis, Texas Pyrotechnics Association

Mr. Daughtry, President of the Texas Fireworks Association, spoke to the Committee about issues his association has with counties implementing the current statutes that regulate fireworks. He stated that he operates a legal business but is targeted because there are people who do not like the product he sells. Mr. Daughtry also opposed municipalities using SPA agreements to ban firework sales, possession and transport. It is difficult to know where one annexed area begins and ends; therefore, he said that his vendors continually have to move locations each season.

Mr. Davis, President of the Texas Pyrotechnics Association, spoke to the Committee about the issues his association had with SPA agreements. He gave an example of a fireworks warehouse that is not in the SPA, but the road directly in front of the warehouse is in the SPA. When this warehouse's customers leave the parking lot, they can no longer legally possess the fireworks. Mr. Davis also spoke about emergency disaster proclamations. Mr. Davis stated that his association tried to work with counties to avoid a ban on fireworks. He said that some counties were willing to work with the local firework vendors while others were not.

Panels # 6 - Firework Safe Zones

Michael Girdley, Alamo Fireworks

Orlando Hernandez, Bexar County Fire Marshal's office

Ross Coleman, Bexar County Fire Marshal's office

This panel spoke to the Committee about the use of firework safe zones in Bexar County. Because of the drought conditions that existed in the county, the firework companies and the county worked together to allow people to purchase fireworks and shoot them in designated areas called safe zones.

Mr. Girdley, whose family owns and operates Alamo Fireworks, spoke about his experience working with the county to allow the citizens of Bexar County to continue to purchase and shoot fireworks. Mr. Girdley stated that his sales for the 2008 year was down 70%, but that he was pleased that all counties that he operated in did not take a "hard line approach" when banning fireworks. Without the cooperation in Bexar County between the local government and firework companies, he stated that he would probably have gone out of business.

Mr. Hernandez, Bexar County Fire Marshal, said that the December 2007 Firework Season was one that produced many fires and that he was directed by his commissioners court to look into the increased use of safe zones for the July 2008 Season. While he believed that the safe zones worked well, but there were still ways to improve. When asked by the Committee about specific issues, he stated that there was a need for more firefighters because if they were called to put out a fire, the safe zone had to close.

Mr. Coleman, Deputy Fire Marshal for Bexar County, spoke to the Committee about the history of Bexar County's use of firework safe zones. When first utilized, the county only had four sites, but in 2008, Bexar County had more than doubled the amount of safe areas to 10 available areas. He stated that the firework vendor purchased or leased the land at his cost, mowed the grass to prevent against possible grass fires and daily soaked the area with water daily to keep the soil moist. When asked by the Committee, Mr. Coleman said that these zones received much use and that there were very few incidents or fires.

BACKGROUND

During the 80th Legislative Session, House Bill 539 was passed into law and made certain changes in how fireworks are regulated in Texas. Fireworks in Texas are regulated in two different ways. The first manner is through licensing of vendors and operators in Occupations Code Chapter 2154. This Texas statute divides fireworks into two categories: 1.3G and 1.4G. 1.3G fireworks are typically for large professional shows, and individuals who purchase and use this type of firework are required to have a pyrotechnics operator's license. 1.4G fireworks are sold to consumers. Individuals who sell 1.4G fireworks are required to be licensed by the state. The Occupations Code also sets the type of 1.4G fireworks that are permissible for sale and when these fireworks can be sold.

The second way in which fireworks are regulated is found in the Local Government Code Section 352.051. This section controls when fireworks can be used and is based on drought conditions in a particular county. According to this section, certain fireworks classified as "rockets with sticks and missiles with fins" can be banned throughout a county if there is a determination that drought conditions exist. During the July Firework Season, which starts on June 24 and ends at midnight of July 4, drought conditions are defined as a Keetch-Byrum Drought Index (KBDI) of 575 or more.

John L. Keetch and George Byram designed a drought index specifically for fire potential assessment. It is a continuous index, relating to the flammability of organic material in the ground. The index attempts to measure the amount of precipitation necessary to return the soil to full field capacity. It is a closed system ranging from 0 to 800 units and represents a moisture regime from 0 to 8 inches of water through the soil layer. At 8 inches of water, the KBDI

assumes saturation. Zero is the point of no moisture deficiency and 800 is the maximum drought that is possible. At any point along the scale, the index number indicates the amount of net rainfall that is required to reduce the index to zero, or saturation. ¹

The December fireworks season, which starts on December 20 and ends at midnight on January 1, also uses the KBDI to determine drought conditions. The code, however, also allows for the commissioners court of a county to restrict fireworks in specified areas when conditions on rural acreage in the county not under cultivation for a period of at least 12 months are determined to be extremely hazardous for the danger of fire because of high grass or dry vegetation.²

DISCUSSION

While House Bill 539 changed certain aspects of firework regulation, one issue that continues to be a point of contention was not addressed in this legislation. This issue is the regulation of fireworks in unincorporated, yet heavily urbanized areas of Texas counties.

It is a rule of law that home rule municipalities are authorized to do anything that the Legislature could have authorized them to do, so long as such actions are not inconsistent with their charters, the Constitution, or the general laws of the state.³ Through ordinance making authority, home rule municipalities can ban the sale, use, possession and transportation of fireworks in their corporate boundaries. Counties, on the other hand, have very limited authority to ban fireworks. Local Government Code Section 352.051 is the primary statute giving counties any authority in regards to fireworks. Under this section, counties have the ability to ban certain firework products described in code through a vote by the commissioners court of that county. There are two criteria for the ban. First, the counties must have an average KBDI of at least 575. Second, the order must be adopted before June 15th for the July Fireworks Season and December 15th for the December Fireworks Season.⁴

Under current law, municipalities have full authority to regulate any type of firework devices within their boundaries. Counties, on the other hand, have limited ability to ban certain types of fireworks when drought conditions exist. When these regulations were put into place, the general thinking was that urban areas of a county were organized into municipalities and that unincorporated parts of a county were rural.

In many counties throughout Texas, large communities are located outside of corporate boundaries and are organized by municipal utility districts (MUDs). For example, Harris County has a population estimated at 3.93 million and roughly a third of the county does not live in an incorporated city.⁵ This trend continues to grow and it has lead many county officials to ask the legislature to rethink how it regulates fireworks in unincorporated areas.

One proposal to increase the regulation of fireworks is called urban zones. House Bill 3648, filed during the 80th regular session, is an example of urban zones. The bill, authored by Representative Bill Callegari and Representative Joe Crabb, authorized a county commissioners court to designate certain densely populated unincorporated areas of a county as an urban zone. The bill authorized a commissioners court that has designated an urban zone to prohibit or regulate, by order, the sale, possession or use of fireworks in that area. If a commissioners court adopted prohibitory or regulatory orders regarding fireworks in an urban zone, it would be required to submit a copy of that order to the state fire marshal within 30 days of the order's adoption. The state fire marshal must then send a copy of the order to each licensed fireworks

manufacturer, distributor and jobber within 30 days. An individual who knowingly violates this prohibition regarding the use of fireworks in the urban zone would be liable for a Class C misdemeanor, which entails a fine of up to \$500. This bill received a public hearing in the County Affairs Committee on April 11, 2007, but did not pass out of committee.

While the use of urban zones would require the Legislature to pass new laws allowing for increased regulation, there are current statutes that can allow for municipalities to regulate fireworks outside of their municipal boundaries through the practice of special purpose annexation (SPA). This practice has been used numerous times within Harris County, specifically through agreements between MUDs in the county and the city of Houston. Currently, the City of Houston has entered into 173 SPAs, 94 of these agreements not only ban the sale, use and possession of fireworks in the annexed area, but also the transportation of fireworks in their unopened original packaging.⁶

Banning the transport of fireworks has become a contentious issue in Harris County. When a city annexes territory, it is required to make the municipal boundaries contiguous. To do this, a city will annex a road to connect the annexed area to the current municipal boundaries. This is problematic because these roads, in some cases, have permanent fireworks buildings on them. While it is not illegal for the fireworks to be sold to consumer, there have been cases where individuals have been ticketed by city fire marshals once they leave the fireworks building's parking lot. In other circumstances, individuals have been pulled over for driving through annexed areas with fireworks in the trunk of the car.⁸

The state of Oklahoma has had similar issues in the past dealing with municipalities ticketing individuals for transporting fireworks. In 2006, the Oklahoma Legislature passed House Bill 2612, which prohibited municipalities from regulating certain conduct. The Oklahoma law specifically prohibited municipalities from regulating by "order, resolution, ordinance, regulation or other legislation prohibiting the transport of fireworks, in their unopened original packaging in a motor vehicle within the municipal limits."

CONCLUSION

As the population in unincorporated parts of Texas counties continues to grow, the Texas Legislature will be faced with ongoing issues regarding firework regulation in Texas. The firework industry, like any other licensed and regulated business in Texas, has a fundamental right to continue selling its product to consumers. While the demographics in unincorporated areas of a county continue to change and evolve, steps need to be taken to preserve public safety and the quality of life as well as a healthy business environment.

RECOMMENDATIONS

- 1) The Texas Legislature should consider prohibiting municipalities from banning the transport of fireworks in their unopened original packaging.
- 2) The Texas Legislature should consider reexamining the laws governing special purpose annexation in regards to the regulation of fireworks.
- 3) The Texas Legislature should continue to examine the issue of urban zones to find a suitable manner to regulate fireworks in high density regions of a county regardless of municipal boundaries.

CHARGE 2

Examine county procurement statutes to identify areas for increasing efficiency without sacrificing internal controls.

On November 30, 2007, Texas House Speaker Tom Craddick instructed the House Committee on County Affairs:

Examine county procurement statutes to identify areas for increasing efficiency without sacrificing internal controls.

SCOPE OF CHARGE

This section of the Interim Report examines the county procurement statutes, specifically areas that are unclear or inconsistent. Currently, counties must follow Local Government Code Chapter 262 when purchasing good or services. This section looks at how these statutes are implemented in counties throughout the state and whether the statute allows counties to operate in the most efficient manner.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on County Affairs met in a scheduled public hearing on May 22, 2008, in Austin, Texas. Those who testified were:

Jim Allison (County Judges and Commissioners Association of Texas)
Kevin Smith (Texas Association of County Auditors)
Rick Dollahan (Texas Association of County Auditors)
April Bacon (Texas Association of County Auditors)
Cyd Grimes (Texas Public Purchasing Association)
Jack Beacham (Texas Public Purchasing Association)

Summary of Testimony

Jim Allison, General Counsel for the County Judges and Commissioners Association of Texas, spoke to the Committee about raising the competitive bidding threshold for counties. He stated that in the past legislative session, the cities' ability to award competitive bid contracts was increased from \$25,000 to \$50,000 and that counties should have the same authority. When asked by the members, Mr. Allison stated that he believes that increasing this threshold is necessary due to inflation and would not compromise the ethical standards of counties.

Kevin Smith, President of the Texas Association of County Auditors, testified about how unclear language in the county procurement statutes leads to confusion when trying to implement the statute in their daily practices. When asked by the members about the required public notice for bids, Mr. Smith, who is also the Burnet County Auditor, explained that the newspaper advertising is the largest known cost to fulfilling this requirement. He believes that online notices would help to reduce this expense and would still allow for the public to know where their county is spending taxpayer money. Mr. Smith also recommended that the competitive bidding threshold for counties be increased from \$25,000 to \$50,000.

Rick Dollahan, President Elect for Texas Association of County Auditors and currently the chair of the law study committee of the Association, gave testimony about the role of the county

auditor in regards to county purchasing, which is to provide proper oversight of all financial transactions by certifying that all applicable laws were followed in the process. Mr. Dollahan, who is the county auditor for both Gaines and Dawson County, feels that his role can sometimes put him at odds with other departments of the county because the law requires him to approve any claim or bill before they can be paid. Mr. Dollahan explained that many auditors prefer to be involved in the process early on so that they can prevent mistakes from happening. Any mistake that is found by the auditor would invalidate the request for payment. When asked by the members, Mr. Dollahan answered question regarding how bid requests are written and outlined the steps that counties take to make sure the individuals do not abuse the current system.

April Bacon, representing the Texas Association of County Auditors, spoke about how certain areas of the county procurement statute are unclear and how this has caused implementation issues. She stated that if any part of the statute is violated, the auditor must not approve payment to the vendor. If an auditor does approve a claim that has not followed the law, that person can be charged with a class B misdemeanor. When asked by the members about this process, Ms. Bacon explained the biggest issue is that there is no part in the statute that allows for a mistake to be fixed without completely starting the process over. At this point in the process, many vendors believe they are legally entitled to this payment and in many cases bring suit against a county.

Cyd Grimes, purchasing agent for Travis County, addressed the Committee on behalf of the Texas Public Purchasing Association. Ms. Grimes talked about the legislative goals for the upcoming sessions, which was to increase the competitive bidding threshold for counties to \$50,000 and to update the public notice requirements for competitive bidding. Her testimony centered around cooperative purchasing, which allows cities, counties, school district and other public entities to group together for certain identical purchases. By grouping the purchases, each entity is able to purchase a particular item at lower price than compared to the entity purchasing it separately. When asked by the members about the public notice requirement for competitive bids, Ms. Grimes stated that she believes that Internet use is widespread and that this type of technology should be incorporated in the public notice requirement that currently utilizes only print advertising.

Jack Beacham, President of the Texas Public Purchasing Association, spoke to the Committee about his experiences as the Tarrant County purchasing agent. He favors one procurement statute for counties, cities, school district and other public entities. Currently, each entity has its own set of requirements. According to Mr. Beacham, streamlining this process would help to lower the price of items purchased because vendors would not be required to have different rules and procedures for each entity, which leads to more cost overhead. When asked by the members about level in which the public should be informed of purchases, Mr. Beacham stated that the newspaper requirement should be reduced if the purchaser notified the public on the Internet.

BACKGROUND

Purchasing statutes control how counties acquire and dispose of property. During the 69th Legislative Session, SB 807 was passed to allow for a uniform purchasing law in counties across the state. Since this bill became law, it has been amended in every legislative session. Over time, gaps in application have been identified. These gaps create questions which have resulted in numerous Attorney General Opinions, which result in a cost to the state, and in lawsuits, which result in a cost to counties. Since these laws contain special criminal penalties and

punitive provisions, there is a substantial cost to the individuals that mistakenly misapplies them.

DISCUSSION

While most official actions taken by a county are approved through commissioners court, many decisions must be made before a vote can be taken. With regards to county purchasing, two officers are most involved. They are the county auditor and the county purchasing agent.

The Office of County Auditor

Local Government Code Section 84.002 requires every county with a population of 10,200 to appoint an auditor. Of Texas' 254 counties, 164 meet this population threshold. Of those 164, only three do not have auditors. Counties with a population less than 10,200, while not required, have the ability to request that a district judge appoint a county auditor. In the 90 counties that this applies, 29 have auditors. Local Government Code Section 84.006 allows counties with a population less than 25,000 to jointly employ an auditor. Seven counties currently share an auditor.⁹

A county auditor, by law, must be a competent accountant with at least two years of experience in auditing and accounting, thoroughly competent in public business details and a person of unquestionably good moral character and intelligence.¹⁰ Their primary duty is to oversee financial record-keeping for the county and to assure that all expenditures comply with the county budget. A county auditor must have continuous access to all books and financial records in order to conduct detailed reviews of all county financial operations. Local Government Code Section 112.006 stipulates that the county auditor has general oversight of all the books and records of all county officials and is charged with strictly enforcing laws governing county finances.¹¹

The office of county auditor is neither created by nor under the hierarchical control of the administrative body - the commissioners court. While commissioners court is the budgeting body in county government, both the county auditor and commissioners court are required, by law, to approve or reject claims for disbursement of county funds.¹² The integrity of county financial administration is entrusted to a dual control system of "checks and balances."

The Purchasing Agent

Local Government Code Chapter 262 is the primary source for county purchasing rules and contracting authority. Section 262.011 outlines the process for a county to designate a purchasing agent and details their role in all purchases. Not only does this person purchase all supplies and materials, but the purchasing agent is also in charge of supervising all purchases made on competitive bids.

Local Government Code Section 262.012 allows for a commissioners court that employs a county auditor jointly to act as the purchasing agent. This provision only applies to counties with a population between 41,680 to 42,100. Currently, six county auditors act as a purchasing agent.

Policy Issues

The County Purchasing Act is unclear

Although Local Government Code Chapter 262, Subchapter C, (the County Purchasing Act) is the primary source for county purchasing rules, similar language requiring competitive bidding is found in Local Government Code Chapter 271 Subchapter B, "Competitive Bidding on Certain Public Works Contracts." In 1990, AG Opinion JM-1220 (1990) held that county public works contracts are subject to the Purchasing Act rather than the more specific Subchapter B. If Certificates of Obligation were used, Local Government Code Chapter 271, Subchapter C, "Certificate of Obligation Act," may apply. While the sale or lease of property has a specific statutory process, it is unclear whether other types of contracts resulting in revenue for a county are subject to competitive procurement processes.

Additionally, counties can only perform those acts for which they have specific authority. When problems arise in a competitive bidding process, the prevailing position is that the bid process must be repeated until a successful bid is obtained. The Purchasing Act does not provide alternatives for problems that develop within the competitive bidding process. For example, if no vendors respond to a bid solicitation, a county must continue to advertise for bids until someone submits a responsive bid. As another example, if the lowest bidder is unable to procure the mandatory bond, the county must again advertise and the other unsuccessful vendors must resubmit their bids. The competitive bidding process is costly to both the county and to responding vendors. Further, violation of the competitive bidding statute carries possible criminal penalties for the county employee and risk of non-payment for the vendor.

With severe consequences and little statutory guidance, counties can find themselves without adequate bidders. Take for example, competitive bidding and the recent volatility in fuel prices. Some suppliers of oil dependent products are hesitant to engage in a bid process that would result in a fixed price over an extended period of time. Suppliers are asking for agreements with fluctuating prices, which is contrary to a process that compares and selects the lowest bid. Counties would like to secure a fixed rate, but cannot force a supplier to bid. The Purchasing Act provides little clarity on how to proceed when competitive bidding is not effective in a particular business environment.

Some of the conflict can be removed by raising the competitive bidding threshold from \$25,000 to \$50,000. The current threshold barely exceeds the purchase of a patrol car or a work truck. In a large county, where purchases are aggregated across individual departments and offices, the threshold may be quickly met. This increase would not necessarily result in a lack of competition. The Local Government Code provides for the adoption of a less formal competitive process for procurements not subject to the more restrictive competitive bid process.

The County Purchasing Act is Inconsistent

Currently, Local Government Code Section 262.005 references the need for Section 361.426 of the Health and Safety Code to be applied when the county makes purchases. While it is necessary to mention the Health in Safety Code in the County Procurement Act, there are many other applicable statutes that are just as relevant but not included.

Local Government Code 262.023 requires that before a county may purchase one or more items under a contract that will exceed \$25,000, the commissioners court of the county must seek competitive bids, or must meet one of the statutorily prescribed exceptions. Some construe this language to require an aggregation of purchases countywide, to reach the competitive bidding threshold of \$25, 000. Under this construction, four offices needing the same item would have to solicit bids if the total of all four offices will exceed the \$25,000.

However, section 262.023, also states that all separate, sequential, or component purchases of items ordered or purchased from the same supplier by the same county officer or department are treated as a single purchase if they were made with the intent of avoiding the competitive bidding requirements. Some construe this language to preclude competitive bidding so long as each officer spends no more than \$25,000 from a single supplier. Under this construction, four offices needing the same item would not need to solicit bids so long as each office did not spend over \$25,000. Also under this construction, each officer could spend over \$25,000 without competitive bidding so long as less than \$25,000 was spent with a single supplier.

The question on how to reach the competitive bidding threshold is the subject of numerous Attorney General Opinions. Local county and district attorneys also spend time advising counties on how to apply the provisions of the Act. County auditors review each claim for payment to determine if the Act was violated. Clarification can increase productivity in several offices, as a clearer standard will raise fewer questions needing investigation and response.

CONCLUSION

While the County Purchasing Act has streamlined the process in which counties acquire goods and service, there is a need for clarity in regards to specific required actions. In the 23 years since the passage of Senate Bill 807, many issues have arisen which need to be addressed by updating the relevant statues. By addressing these issues, all levels of government should be able to operate in a more effective and efficient manner.

RECOMMENDATIONS

- 1) The Texas Legislature should consider amending Local Government Code 262 to clarify the purchasing process, thus allowing for allow for greater efficiency.
- 2) The Texas Legislature should consider raising the competitive threshold from \$25,000 to \$50,000.

CHARGE 3

Study policies and procedures related to illegal immigration and border security of the Texas Department of Criminal Justice, county probation departments, and local and county jail facilities, and make recommendations to improve coordination with international, federal, state, and local authorities. (Joint Interim Charge with the House Committee on Corrections)

On November 30, 2007, Texas House Speaker Tom Craddick instructed the House Committee on County Affairs:

Study policies and procedures related to illegal immigration and border security of the Texas Department of Criminal Justice, county probation departments, and local and county jail facilities, and make recommendations to improve coordination with international, federal, state, and local authorities. (Joint Interim Charge with the House Committee on Corrections)

SUMMARY OF COMMITTEE ACTION

In response to this charge, the House Committee on Corrections and House Committee on County Affairs held a joint public hearing on February 1, 2008 in Richardson, Texas. The Committees heard both invited and public testimony.

BACKGROUND

The mission of the Texas Department of Criminal Justice is to provide public safety, promote positive change in offender behavior, reintegrate offenders into society, and assist victims of crime. The Texas Department of Criminal Justice (TDCJ) manages offenders in state prisons, state jails, and private correctional facilities that contract with TDCJ.

Community Justice Assistance Division (CJAD) administers adult probation. CJAD works with community supervision and corrections departments (CSCD) which supervise offenders. The mission of the division is to help Texas communities protect the public, help rehabilitate offenders and serve the victims of those offenders by developing sound public policy that leads to effective, community-based programs and services.

The Texas Commission on Jail Standards (TCJS) is the regulatory agency for all county jails and privately operated municipal jails in the state. Their mission is to assist local governments in providing safe, secure and suitable local jail facilities.

Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security (DHS). The agency was created in March 2003, combining the law enforcement arms of the former Immigration and Naturalization Service (INS) and the former U.S. Customs Service, to more effectively enforce immigration and customs laws and to protect the United States against terrorist attacks.

Article 1, section 8, clause 4 of the United States Constitution grants the federal government with exclusive power over immigration matters and to establish a uniform rule of naturalization. The federal government delegates ICE with specific authority to investigate a person's immigration status and deport individuals who have no legal status to reside in the United States. The state of Texas faces challenges with illegal immigration on a daily basis. The Texas Legislature, however, must act diligently and accordingly when creating new local and state laws dealing with immigration to ensure legislation passed is not preempted by federal law.

DISCUSSION

Texas Department of Criminal Justice

In 1995, the Texas Legislature passed SB 279 requiring the Texas Department of Criminal Justice to identify deportable noncitizens and notify the Immigration and Naturalization Service (now ICE). That legislation added Section 493.015 to the Government Code and required the Texas Department of Criminal Justice to promptly notify ICE of inmates who are imprisoned in the institutional division or confined in a transfer facility, a substance abuse treatment facility, a state jail felony facility, or a county jail awaiting transfer to the institutional division and for whom the department is unable to reasonably ascertain whether or not the person is an illegal criminal alien. The legislation was effective immediately and in that same year a working relationship between the TDCJ and the former INS was formalized with the creation of the Texas State Enhanced Institutional Hearing Program (IHP). The purpose of the program is to identify criminal noncitizens incarcerated in TDCJ, begin deportation proceedings against them while they are incarcerated and deport them after they serve their state prison sentence. Criminal noncitizens are individuals without U.S. citizenship residing in the United States, either legally or illegally, who have been convicted of a felony and in the custody of the state.¹³

Noncitizens who commit crimes are prosecuted and punished the same way as U.S. citizens. After serving their sentence, some noncitizens (including documented immigrants) are deported back to their home countries depending on the severity of their crimes. The role of TDCJ begins with the identification of potentially deportable, foreign-born offenders by intake staff and the reporting of those identified to ICE. ICE interviews the individual and decides whether to issue a detainer. An ICE detainer flags a criminal alien in custody and asks law enforcement to hold the inmate. When the individual serves his or her sentence, ICE agents pick up the individual to begin deportation proceedings. Deportation can only occur after completion of the inmate's sentence.¹⁴

The process is as follows:

- Foreign-born offenders are identified at all TDCJ intake sites;
- ICE staff in the IHP are notified of each offender's arrival;
- Upon request from ICE, male offenders are transported to the Holliday Unit in Huntsville and female offenders in the Gatesville area for interview;
- When the interview process is completed, offenders are returned to their regular unit of assignment;
- If ICE lodges a detainer, then ICE officials are notified at the time of release; and
- ICE staff with the IHP then assume custody of the offender at the Huntsville Unit Releasing Office.¹⁵

Offenders requiring a deportation hearing are transported to the IHP building in Huntsville. The Executive Office of Immigration Review provides immigration judges and ICE trial attorneys. TDCJ provides offenders with counsel through the State Counsel for Offenders office.

Statistics as of December 31, 2007:

- 11,768 offenders claim foreign place of birth
- 10,634 offenders claim foreign citizenship

- 7,080 offenders have ICE detainers
- 2,816 offenders have final orders of deportation*

*Final orders are as of November 30, 2007, and include male prison offenders only¹⁶

Executive officials at both the TDCJ and ICE report a strong relationship with one another. Both agencies work together to process these criminal noncitizens through removal proceedings while imprisoned to ensure they are promptly removed at the end of their sentences. ICE often holds TDCJ out as a model for how a criminal justice system should partner with federal agencies.

Texas Community Justice Assistance Division

The Texas Community Justice Assistance Division (CJAD) has oversight over 122 community supervision and corrections departments (CSCD). CJAD conducted a survey to collect information on procedures regarding illegal immigration. Eighty-one of the adult probation departments across the state responded to the survey, and information collected was reported at the hearing to the House Committees on Corrections and County Affairs.

The chart below summarizes some of those responses:

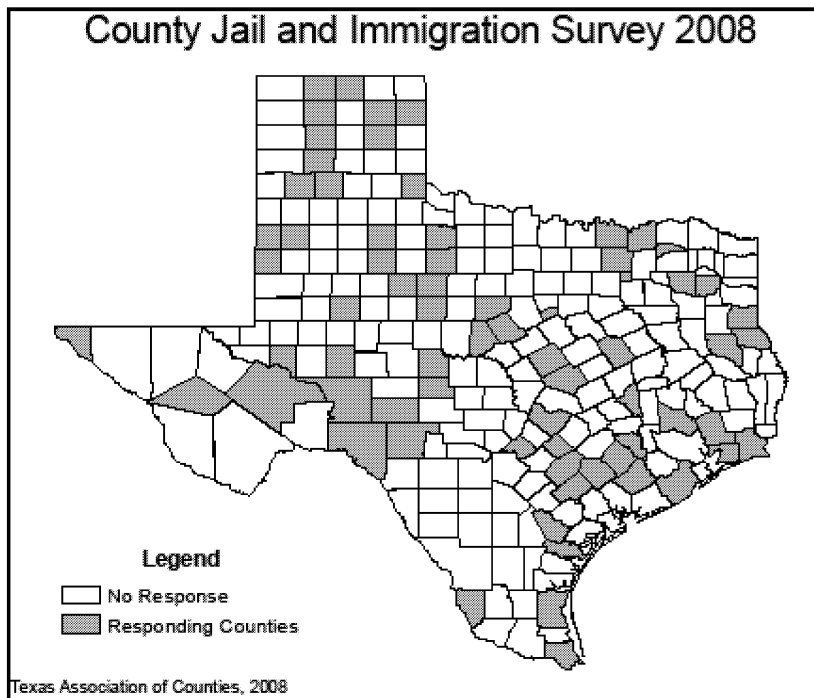
CJAD SURVEY <i>(Percentages based on the 81 CSCDs that responded)</i> 01/2008	YES	NO
Does your department have policies and procedures in place for dealing with illegal immigrants?	33%	67%
Does your department have procedures to verify the legal status of immigrants placed on probation?	40%	60%
How many illegal immigrants do you currently supervise?	93.4% (1-6,231)	6.6% none
How many illegal immigrants under supervision are felons?	89.3% (1-2,703)	10.7% no felons
Do you report all illegal immigrants or just illegal immigrant felons to the Immigration and Customs Enforcement (ICE) agency?	36.7% report all 31.6% only felons	31.6% none
Does your department have a formal, informal, or no relationship with ICE?	17.5% formal 51.3% informal	31.1% none

Certain CSCDs send a form of a criminal alien status report to ICE when an offender is not a US citizen or contact the local Border Patrol. Other departments only report to ICE if the court makes a request. The departments do not have policies and procedures in place for dealing with noncitizens argue the citizenship status of an individual should occur at the earliest possible point in the criminal justice system. If individuals are identified as criminal noncitizens and are set for deportation after being placed on community supervision, then a significant amount of state dollars would have already been spent. CSCDs also identified challenges such as verifying

citizenship status, documentation, and employment, language barriers and difficulty tracking noncitizens after they have left the country and finding out if they returned.

Texas Commission on Jail Standards

County jails do not have a definitive process to track and report to the Texas Commission on Jail Standards (TCJS) noncitizens convicted of a felony, much less a misdemeanor. The House Committees asked the Texas Association of Counties (TAC) to conduct a survey regarding the impact of illegal immigration in county jails. Seventy out of 237 county jails completed the survey. According to the TAC survey, there were an estimated 3,711 illegal immigrants in county jails as of February 2008.¹⁷



Most county departments do not have policies and procedures in place to report illegal immigrants. Over half of the responding counties reported they identify the status of citizenship at the time of booking. The standards for that identification vary from county to county; several report that the status is identified on the claims of the individual while other counties ask for a driver's license.

Although immigration enforcement is vested in the federal government, local law enforcement has an increasing role in identifying and apprehending, and reporting criminal noncitizens.

FINDINGS

The federal government and its designated agencies, such as ICE, have clear authority and responsibility to regulate and enforce immigration laws. It is these federal agencies who have the ability to determine if a person will be criminally prosecuted for their violations of federal

immigration laws or be dealt with through civil deportation process. TDCJ has a partnership with ICE to begin a removal process against a criminal alien while he or she is incarcerated. Currently, no statewide protocols exist for other local agencies, such as CSCDs and county jails, to identify noncitizens and coordinate with federal authorities. Local law enforcement agencies are ill-equipped in terms of training, experience, and resources to determine citizenship status, but they are committed to "arresting anyone who violates the criminal laws of their jurisdictions regardless of the immigration status of the perpetrator. Those immigrants, documented and/or undocumented, who commit criminal acts will find no safe harbor or sanctuary from their criminal violations of the law within any major city but will instead face the full force of criminal prosecution."¹⁸

Local authorities do not have access to databases that ICE administrators do and, are therefore, unable to determine citizenship status. The National Crime Information Center (NCIC) is a computerized index of criminal justice information available to federal, state, local law enforcement, and other criminal justice agencies that is operational 24 hours a day, 365 days a year.

The NCIC does not have up-to-date data on 'Immigration Violator File' hits. The National Security Entry-Exit Registration System (NSEERS), available to ICE, does provide information regarding any outstanding warrant for removal of an individual or a previously deported felon. The information available in NSEERS is now being entered into the NCIC. It is essential that state and local officials have access to that information in order to assist federal authorities, recognizing they have no legal authority to independently enforce federal immigration law. It is the role of local and state authorities to report suspensions of noncitizens. It is ICE's responsibility to determine the citizenship status of inmates and whether they are in the United States legally.

RECOMMENDATIONS

- 1) The Texas Legislature should consider developing uniform guidelines to identify noncitizens in Texas' courts, jails, and probation departments.
- 2) The Texas Legislature should consider statutorily requiring the citizenship status check of a person who is arrested for a felony offense, pending Attorney General's opinion to RQ-0733-GA.
- 3) The Texas Legislature should consider amending the Texas Government Code, Chapter 511.0101 Section (1) by adding a subsection (L) to include a category of citizenship status to their jail population reports to determine if illegal immigration is a cause for jail overcrowding.
- 4) The Texas Legislature should consider requiring community supervision and corrections departments to track citizenship status in the Community Supervision Tracking System under Chapter 509.004 of the Texas Government Code.
- 5) The Texas Legislature should consider changing all statutory references from INS to ICE.

CHARGE 4

Examine recent attempts by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Evaluate the current relationship between and possible conflicts related to regulatory authority expressly given to state agencies by the legislature and regulatory authority delegated to home-rule municipalities. (Joint Interim Charge with the House Committee on Land and Resource Management)

On November 30, 2007, Texas House Speaker Tom Craddick instructed the House Committee on County Affairs:

Examine recent attempts by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Evaluate the current relationship between and possible conflicts related to regulatory authority expressly given to state agencies by the legislature and regulatory authority delegated to home-rule municipalities. (Joint Interim Charge with the House Committee on Land and Resource Management)

SCOPE OF CHARGE

This section of the Interim Report briefly examines the authority of municipalities to enact and enforce ordinances that apply to areas beyond their corporate and extraterritorial jurisdictional boundaries, especially in light of recent attempts by some municipalities to exert their regulatory authority beyond their jurisdictional limits. This section examines the current relationship between local, state and federal authorities regarding regulatory matters and attempts to determine what the proper role of these entities should be in relation to one another.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management met in a scheduled public joint hearing with the House Committee on County Affairs on March 28, 2008, in Deer Park, Texas. Those who testified were:

Wayne Riddle (Mayor, City of Deer Park)
Julian Grant (Office of the Texas Attorney General)
Alton E. Porter (Mayor, City of La Porte)
Stephen DonCarlos (Mayor, City of Baytown)
Jan Lawler (President, Economic Alliance Houston Port Region)
Don Empfield (President, East Harris County Manufacturing Association)
John Esparza (President, Texas Motor Transportation Association)
Michael Stewart (President, Texas Aggregates & Concrete Association)
Ned Munoz (Texas Association of Builders)
Michael Honeycutt (Texas Commission on Environmental Quality)
Matthew Tejada (Galveston Houston Association of Smog Prevention)

Summary of Testimony

Wayne Riddle, Mayor of the city of Deer Park, explained to the Joint Committee the steps that his municipality takes to protect air quality and a healthy business environment in his and neighboring communities. The Mayor described to the members the role that the Community Advisory Council (composed of local officials, emergency management officers, health officials, and plant managers) plays in protecting the community against possible harm from air pollutants. Mayor Riddle also advised the Joint Committee that he has good working relationships with the

Harris County Pollution Control Department and Texas Commission on Environmental Quality (TCEQ) and can always turn to them for guidance and conflict resolution when disagreements arise between his community and other municipalities in the region.

Julian Grant, an Assistant Attorney General at the Texas Attorney General's Office, provided the Joint Committee with background information regarding the historical evolution of municipalities, the types of municipalities that exist in the state, and the authority that these differing types of municipalities have within their corporate and extraterritorial jurisdictional boundaries. Mr. Grant also highlighted for the members some examples of conflicts that have arisen between municipal and state governing bodies over the years. In response to questions from the members regarding the legal issue of preemption, Mr. Grant informed them that generally home rule municipalities have the ability to regulate within their boundaries so long as such regulations are consistent with state and federal law.

Alton E. Porter, Mayor of the city of La Porte, focused his comments to the Joint Committee on the need for regional cooperation between municipalities and the problematic nature of allowing municipalities to exert their regulatory influence within the boundaries of other municipalities. Mayor Porter explained to the members that, in his opinion, the processes and activities of the Community Advisory Council described by Mayor Riddle are working properly.

Stephen DonCarlos, Mayor of the city of Baytown, focused his testimony to the Joint Committee on the issue of municipal sovereignty, arguing that municipal governing bodies do not have the authority to impose their will upon those citizens residing outside of their jurisdiction. Mayor DonCarlos reiterated to the members that the current system for controlling air emissions is appropriate and working well.

Jan Lawler, President of the Economic Alliance Houston Port Region (EAHPR), explained to the Joint Committee the work that the EAHPR (a nonprofit entity funded by sixteen local communities and various chambers of commerce) performs in attracting international businesses to Harris County. Ms. Lawler's testimony to the members focused on the need for consistency among the many sets of laws governing the area, given that consistency is the number one factor that businesses look for when determining whether or not to invest in the region.

Don Empfield, Chairman of the East Harris County Manufacturing Association (EHCMA), explained to the Joint Committee the negative effects that inconsistent and burdensome regulations have on those businesses that comprise EHCMA. Mr. Empfield advised the members that these businesses are at a disadvantage when compared to companies in other regions of the country when such inconsistent and burdensome conditions exist. Given the negative effects on local business, Mr. Empfield advised the Joint Committee that it is crucial that there be uniformity in the regulation of businesses and that municipalities respect the jurisdictional boundaries of their neighboring communities.

John Esparza, President of the Texas Motor Transportation Association (TMTA), explained to the Joint Committee a situation that the TMTA has recently been involved in regarding the City of Houston's attempt to exert its regulatory authority in an area that has historically been regulated by the state. According to Mr. Esparza, the city of Houston has discussed enacting an ordinance that would require drivers to obtain local permits for oversized and overweight trucks, a permit that is currently issued by the Texas Department of Transportation (TxDOT). Mr.

Esparza explained to the members that the TMTA requested an informal Texas Attorney General Opinion on the legality of the municipality's plan, which when released, held that municipalities do not have the authority to issue vehicular permits, especially when the state has its own permit scheme in place.

Michael Stewart, President of the Texas Aggregates & Concrete Association (TACA), described to the Joint Committee a controversy, in which TACA has recently been involved with the city of Houston. According to Mr. Stewart, the City of Houston has recently enacted ordinances regarding the location of rock crushers and facilities that handle aggregates that are stricter than the standards set by the TCEQ. Mr. Stewart explained to the members that these restrictions are burdensome on business and inappropriate because the state is more qualified and has greater expertise than municipalities when it comes to creating these types of restrictions.

Ned Munoz, speaking on behalf of the Texas Association of Builders, described to the Joint Committee the current body of law that homebuilders must comply with when building homes and acknowledged that municipalities have the ability to amend building codes to make them more or less stringent than the existing municipal code. In addition, Mr. Munoz answered a number of questions from the members regarding home construction in municipal extraterritorial jurisdictions and the changes made to state law during the 80th Texas Legislative Session.

Michael Honeycutt, the Director of the Toxicology Division at the TCEQ, answered many questions from the Joint Committee regarding air quality in the state. Dr. Honeycutt informed the members that the Toxicology Division is staffed by 14 people (six of whom have earned Doctorate of Philosophy degrees) whose primary responsibility is to monitor almost 200 different chemicals in the state. When asked by the members about air quality improvements in the region, Dr. Honeycutt stated that there have been significant decreases in air pollutants but that greater decreases can still be accomplished.

Matthew Tejada, speaking on behalf of the Galveston Houston Association of Smog Prevention, explained to the Joint Committee that more needs to be done in the region to improve air quality and commended the city of Houston for its efforts in protecting the health of its residents. In response to questions from the members regarding which governmental body should establish air quality standards, Mr. Tejada stated that he believes that the standards set by TCEQ are not stringent enough and that in such cases it is up to local officials to set appropriate standards.

BACKGROUND

In February 2007, Houston Mayor Bill White proposed using the municipality's nuisance ordinance as a tool to reduce the amount of benzene in Houston's air. The Mayor suggested amending the municipality's nuisance ordinance so that Houston could levy fines against industrial facilities located outside of its corporate and extraterritorial jurisdictional boundaries. The ordinance would have allowed the municipality to fine such facilities up to \$2,000 per day for violations of the ordinance. Importantly, the ordinance would have treated benzene more stringently than it is treated by either the state or the federal governments. Mayor White has explained that his proposal was one of last resort, one that he brought to the table only following the failure of the TCEQ to adequately address the issue.¹⁹

Mayor White's proposal has been controversial since its introduction. Almost immediately, the

mayors of La Porte, Baytown, Pasadena, City of Deer Park (municipalities where most of the affected facilities are located) argued that Mayor White had overstepped his authority and that his proposal would harm their communities. As a direct response to such concerns, legislation was filed during the 80th Texas Legislative Session aimed at prohibiting the use of nuisance ordinances for such purposes.²⁰ Senate Bill 1317 by Senator Mike Jackson was passed favorably by the Senate and by the House Committee on Environmental Regulation, but the legislative session ended before the bill could be placed on a House calendar.

More recently, Houston officials agreed to refrain from amending its municipal nuisance ordinance while the Houston Regional Air Quality Task Force (a group sponsored by the Greater Houston Partnership) studied alternatives. In September 2007, the Task Force released its report recommending eighteen measures aimed at reducing toxic chemicals such as benzene and chlorine in Houston's air.²¹

DISCUSSION

Questions Raised by Houston's Proposal and Other Similar Situations

The principal question raised by Mayor White's proposal is whether or not municipalities should be allowed to enforce local ordinance provisions that affect entities beyond the municipality's corporate and extraterritorial jurisdictional boundaries. Secondary to this question is the issue of whether or not it is good public policy to allow local entities to define and enforce air quality regulations that are broader than those of the state and federal governments. A proper analysis of these questions involves determining what authority municipalities have under current law, and whether or not, from a public policy standpoint, municipalities should be allowed to regulate air quality in the manner proposed by Mayor White.

Present Municipal Authority

Texas law generally prohibits municipalities from exercising their powers beyond their corporate boundaries. However, exceptions do apply to this general rule, and a question exists as to the length of the reach of municipal enforcement powers under local nuisance ordinances.

It is a rule of law that home rule municipalities are authorized to do anything that the legislature could have authorized them to do, so long as such actions are not inconsistent with their charters, the constitution, or the general laws of the state.²² However, municipalities may exercise these powers only within their corporate limits unless otherwise authorized to by the constitution or by the legislature.²³ The legislature has granted municipalities extended authority in various situations, most notably in regards to a municipality's extraterritorial jurisdiction and in the case of nuisance abatement, where a home rule municipality is authorized to define and prohibit any nuisance within 5,000 feet of the municipality's limits.²⁴

The Law of Public Nuisance

The law of "public" or "common nuisance" involves questions surrounding unreasonable interferences with rights common to the general public.²⁵ Texas law recognizes a myriad of places, conditions, and actions to be nuisances, generally those involving interferences with the public health or public order, or those that constitute an obstruction of public rights. For

example, provisions in the Texas Civil Practice & Remedies Code (sometimes referred to as the "Texas Nuisance Abatement Statutes") authorize local officials to abate various "public order" nuisances by closing property involved in illegal activities such as prostitution, obscenity, gambling, organized criminal activity, or discharge of a firearm, to name a few.²⁶

Texas law also recognizes various "public health" nuisances that may, and in some cases must, be abated by local officials. For example, the Texas Health and Safety Code defines certain places, actions, or conditions to be "public health" nuisances. Among these are "a condition or place that is a breeding place for flies . . .," "spoiled or diseased meats intended for human consumption," "sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission . . .," and "a place or condition harboring rats in a populous area."²⁷

Texas municipalities may define and abate nuisances within their boundaries under the common law as part of their police powers. In addition, the legislature has granted municipalities fairly broad nuisance abatement powers through statute. For example, the Texas Local Government Code authorizes Type A General Law Municipalities to "abate and remove" nuisances, and requires Type B General Law Municipalities to "prevent to the extent practicable any nuisance within the limits of the municipality."²⁸

Important to this discussion is the construction of the general nuisance statute for home rule municipalities. This provision authorizes such entities to not only prohibit any nuisance within the limits of the municipality and within 5,000 feet outside the limits, but to define such nuisances as well.²⁹ While this provision appears clear on its face, questions have been raised regarding the reach of home rule municipalities under this provision. Specifically, some have argued that a nuisance occurs where the injury takes place, not where the condition giving rise to the injury originates. Under such a construction, a municipality could abate any nuisance anywhere, so long as an injury from the condition occurs within the municipality or within 5,000 feet outside its corporate limits.

Policy Issues

"Sovereignty"

When the action of a municipality affects parties beyond the municipality's corporate and extraterritorial jurisdictional boundaries, even when such an action is based on a well-developed area of the law such as the law of nuisance, basic questions of municipal independence (what some throughout this debate have called "sovereignty") are raised.

"Sovereignty" is defined by Black's Law Dictionary to be the "supreme, absolute, and uncontrollable power by which an independent state is governed."³⁰ Since municipalities are political subdivisions of the state, and as such are subject to the authority of the state, they can not accurately be described as sovereigns. Nevertheless, the use of the word "sovereignty" by the critics of Mayor White's proposal certainly encompasses the feeling that is engendered when one municipality attempts to legislate and then enforce prohibitions or limitations on what occurs within the boundaries of another municipality. What is really at stake is the independence of municipalities in relation to one another.

As a general rule, public policy favors the enactment and retention of laws that protect the independence of a municipality (and consequently its residents) against the actions of neighboring municipalities. This nation's republican form of government generally dictates that a citizen not be subjected to the decisions of a governmental body unless that citizen is represented by a member of that body.³¹ In fact, this basic principle is one upon which this nation was founded. This principle is supported by an understanding that because local officials are more knowledgeable of their community, they are most capable of balancing the true costs of the enactment of a governmental measure. In addition, since these same officials are also vested in, and accountable to, their community, they will be much more likely to make appropriate choices for that community and its members. Finally, state law certainly should discourage such jurisdictional controversies simply to avoid the sorts of jealousies and angers that inevitably will occur if one municipality attempts to regulate entities located within another.

Authority Over Air Quality

The responsibility of implementing and administering federal air quality standards has generally been delegated by the federal government to the states. As a result of this delegation, in 1989 the 71st Texas Legislature, in 1989, enacted the Clean Air Act (CAA)³² and delegated to the TCEQ the responsibility for administering its provisions.³³ The CAA grants municipalities the power to both abate a nuisance (which air pollution may be considered under the common law), and to enact and enforce an ordinance for the control and abatement of air pollution, so long as such an ordinance is consistent with the CAA and the TCEQ's rules and orders.³⁴

The actions of the city of Houston have raised questions regarding not only the "consistency" of Mayor White's proposal with state law, but also the question of whether it is good public policy to allow local entities to define and enforce air quality regulations that are broader than those of the state and federal governments. It can be argued that it is not helpful to allow each local community to set their own air quality standards. While the courts may determine that such local standards are "consistent" with state policy, it would be bad public policy to allow such communities to adopt standards that conflict with one another, given the transient nature of pollutants in the air. It can also be argued that local entities are less qualified than their federal and state counterparts to define and regulate air quality in a prudent manner. Some have explained that the degree of complexity of air quality issues requires an amount of specialized knowledge and experience that local entities do not possess. As such, many have argued that the decisions of the TCEQ and the federal Environmental Protection Agency should trump those made by local entities.

CONCLUSION

While all parties involved with the city of Houston case agree that Mayor White's goal of reducing hazardous air pollutants is admirable, many believe that the means he has employed has actually worsened the situation in the region, and will probably have little or no effect on reducing pollutants in the air. Given the fact that exertions of authority such as that proposed by the city of Houston have the potential to create significant harms to a given region of the state (jurisdictional disputes, inconsistency of laws, litigation, etc.), coupled with the fact that both the state and federal government have the authority, resources, and expertise to appropriately handle such matters, the Joint Committee is generally of the opinion that the political subdivisions of the state should exert their authority in a manner that respects the autonomy of other political subdivisions.

RECOMMENDATIONS

- 1) The Texas Legislature should continue to monitor the actions of municipalities when they attempt to exert regulatory authority beyond their corporate and extraterritorial jurisdiction boundaries.

CHARGE 5

Monitor the agencies and programs under the committee's jurisdiction.

On November 30, 2007, Texas House Speaker Tom Craddick instructed the House Committee on County Affairs:

Monitor the agencies and programs under the committee's jurisdiction.

SCOPE OF CHARGE

This section of the Interim Report focuses on the Texas Commission on Jail Standards (TCJS), more specifically its operation as a state agency. While the topic of County Affairs Interim Charge # 3 does involve TCJS, the discussion regarding the issue of criminal noncitizens in county jail facilities will not be addressed in this section. Interim Charge # 5 concentrates on legislative issues that the commission faces.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on County Affairs met in a scheduled public hearing on May 22, 2008, in Austin, Texas. Those who were invited to testify were:

Adan Muñoz (Texas Commission on Jail Standards)
Anne Daniels (Texas Commission on Jail Standards)
Jim Allison (County Judges and Commissioners Association of Texas)

Summary of Testimony

Adan Muñoz, Executive Director of the Texas Commission on Jail Standards (TCJS), testified about the current status of the commission. Mr. Muñoz stated that TCJS is currently undergoing a Sunset Review and he provided a copy of the commission's Self Evaluation Report. The Executive Director testified that he felt TCJS was fulfilling its obligation to empower local government in their efforts to operate safe and secure county jails. When asked by the members, Mr. Muñoz stated that in the latest budgetary requests, the commission requested an increased level of funding to employ additional inspectors. By hiring these inspectors, Mr. Muñoz felt he can provide a better level of assistance to local governments as they continue to deal with an increase in local jail populations. Mr. Muñoz, when asked by the members, stated that requiring county jails to verify the nationality of their inmates would increase the training cost of a county.

Anne Daniels, a research specialist with the TCJS, spoke to the committee about the customer service survey that is conducted yearly. When asked by the members about the methodology of the survey, Ms. Daniels stated that TCJS requests information from 50 different counties about their facilities. TCJS picks the different counties for many different reasons such as size of county facility or how long a facility has been functioning. Ms. Daniels stated that the commission coordinates this effort with the Legislative Budget Board as well as the Governor's Budget Office to make sure that the survey adequately meets the statutory requirement for this study.

Jim Allison, general counsel for the County Judges and Commissioners Association of Texas, talked to the Committee about how TCJS is a great resource for counties. He stated that the

commission's role in monitoring county jails has allowed many counties to avoid federal intervention. Mr. Allison also stated that he believed the single largest uncontrollable cost for jail facilities is mental health. This cost is due to the lack of beds in state hospitals. Mr. Allison said that he hopes state hospitals will receive additional funding so that the individual with mental illness can seek treatment in the best possible facilities instead of in jail.

BACKGROUND

In 1975, the Texas Legislature created the TCJS to implement a state policy that all county jail facilities meet the minimum standards of construction, maintenance and operation. The jurisdiction of TCJS has been expanded since its inception to include county and municipal jails operated by vendors. The Texas Legislature has also expanded the role of TCJS to include consultation and technical assistance to individual facilities throughout the state and the State Jail program.

The policy-making body consists of nine commission members appointed by the governor to staggered six-year terms expiring on January 31, of odd-numbered years. The commission consists of a sheriff from a county with a population of more than 35,000, a sheriff from a county with a population of 35,000 or less, a county judge, a county commissioner, a practitioner of medicine, and four private citizens, at least one of whom is from a county with a population of 35,000 or less. The chairperson is designated by the governor, with the vice-chairperson elected by the membership. The commission holds regular meetings each calendar quarter as required. Special meetings are held as needed.

The duty of the Commission is best described in Title 37 of the Texas Administration Code, Part 9, Chapter 521, Rule §251.1:

It is the duty of TCJS to promulgate reasonable written rules and procedures establishing minimum standards, inspection procedures, enforcement policies and technical assistance for:

- (1) the construction, equipment, maintenance and operation of jail facilities under its jurisdiction;
- (2) the custody, care and treatment of inmates;
- (3) programs of rehabilitation, education and recreation for inmates confined in county and municipal jail facilities under its jurisdiction.

According to TCJS' monthly assessment, the total population at the beginning of the 2009 fiscal year was 70,919 inmates. With a total capacity of all local and contract jails being 85,550 available beds, county jails collectively operated at 82.30% of capacity. By August 2009, an additional 9,763 beds will be available.

POSSIBLE LEGISLATIVE ISSUE

Inspections of Private Jail Facilities

In 2003, House Bill 3517 modified Government Code Section 511.0094 by removing any facility housing only federal inmates from TCJS oversight. The fact that counties remain liable for the operation, safety and security of these facilities, all of which are operated by a private contract provider draws concern. In the previous 12 months alone, numerous disturbances have occurred

at these facilities and several multi-million dollar lawsuits have been filed regarding the operation of these facilities.

During the 80th Legislative Session, House Bill 3304 attempted to undo changes made in 2003. Besides the obvious possibility that a facility without any oversight may pose a risk to public safety, the change makes it difficult for facilities that were built without having been reviewed by commission staff during the planning and construction phase to meet minimum standards and house any type of inmate other than federal, regardless of the need or circumstance. The proposed change would have subjected any facility that was operating through an inter-governmental agreement with a county to TCJS oversight. This bill received a public hearing in the County Affairs Committee on May 2, 2007, but did not pass out of committee.

RECOMMENDATIONS

- 1) The Committee recommends that the Legislature consider amending Government Code Section 511.0094 to broaden the oversight of TCJS in regards to jail facilities operated by private contract providers.

APPENDIX A

Letters from Representatives Naishtat and Coleman

STATE of TEXAS
HOUSE of REPRESENTATIVES



GARNET F. COLEMAN
STATE REPRESENTATIVE
DISTRICT 34D

December 17, 2008

The Honorable Wayne Smith
Chairman
House Committee on County Affairs
Capitol, E2.822
Austin, Texas

Dear Chairman Smith:

Though I have reservations regarding Interim Charges 3 and 4, I am signing the County Affairs Interim Report.

With regard to Interim Charge 3, the state of Texas should not determine federal immigration policy.

Regarding Interim Charge 4, I would like to see tougher standards regulating air pollution than those currently employed by the EPA and TCEQ. Air has no boundaries and affects all Texans. Air quality is an issue that requires oversight by and cooperation between local jurisdictions. At the same time, it is a statewide issue relating to health and climate. The state of Texas must turn its focus to how air quality affects its citizens and the condition of the earth.

Sincerely,

A handwritten signature in black ink, appearing to read "Garnet F. Coleman".

Representative Garnet F. Coleman

Texas House of Representatives



December 16, 2008

The Honorable Wayne Smith
Chairman
House Committee on County Affairs
State Capitol, E2.122
Austin, Texas

Dear Chairman Smith:

While we have serious concerns about several of the recommendations contained in Charge 3 of the Interim Report, relating to illegal immigration and border security, we are signing the Report with reservations. Although the recommendations are posited in terms of "the Texas Legislature **should consider**," we do not, in general, believe identification of citizenship or immigration status is a state responsibility. In the Findings to Charge 3, the Report specifies that the "federal government and its designated agencies such as Immigration and Customs Enforcement have clear authority and responsibility to regulate and enforce immigration laws." If Recommendations Number 2, 3 and 4 should be enacted, we believe the state would be intruding into areas where there is no clear state jurisdiction or authority to enforce federal immigration laws.

We appreciate the opportunity to comment on the Interim Report, and we thank you for the courtesy you and your staff have extended to us.

Sincerely,

A handwritten signature in cursive script that reads "Elliott Naishtat".

Elliott Naishtat
District 49

A handwritten signature in cursive script that reads "Garnet F. Coleman".

Garnet Coleman
District 147

ENDNOTES

¹ Texas Forest Service Article found at:

<http://txforests.tamu.edu/shared/article.asp?DocumentID=406&mc=fire>

² Local Government Code Section 352.501 (c)

³ See, TEX. CONST., art 11, § 5 (providing that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

⁴ There is a Cinco de Mayo Fireworks Season that starts on May 1 and ends at midnight on May 5. For fireworks to be sold during this season, a county must adopt an order opting in to the Season and that county must be within 100 miles from the Texas-Mexico border. Because no counties have passed an order adopting this Season, it will not be mentioned in the discussion.

⁵ Information found at <http://www.txcip.org/tac/census/profile.php?FIPS=48201>.

⁶ This figure was provided to the Committee by Darrin Hall (City of Houston) at the public hearing conducted on August 18, 2008.

⁸ Details of this circumstance can be found at: <http://www.chron.com/dispatch/story.mpl/front/5867060.html>.

⁹ These figures were gathered from the Texas Association of County Auditors membership list

¹⁰ Local Government Code Section 84.006, "Qualifications"

¹¹ Local Government Code Section 112.006, "General Oversight Authority of County Auditor"

¹² Local Government Code Section 113.064, "Approval of Claims by County Auditor"

¹³ Texas Government Code Section 493.015(b)

¹⁴ Texas Government Code Section 493.015(g)

¹⁵ Written testimony provided by Brad Livingston to the Texas House of Representatives, Committee on Corrections and Committee on County Affairs on February 1, 2008.

¹⁶ Written testimony provided by Brad Livingston to the Texas House of Representatives, Committee on Corrections and Committee on County Affairs on February 1, 2008.

¹⁷ The Legislative Department of the Texas Association of Counties provided this information to the Committee on May 20, 2008. This information is part of their 2008 County Jail Survey Report.

http://www.county.org/resources/countydata/products/2008_CountyJailSurveyReport_Final.pdf

¹⁸ Major Cities Chiefs. M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies. June 2006. http://www.houstontx.gov/police/pdfs/mcc_position.pdf

¹⁹ Mayor White's proposal and the controversy surrounding it have been covered widely by the Houston press and is a reasonable starting point when attempting to understand this issue. See e.g. Dina Cappiello, "Mayor's Proposal Would Let City Sue Polluters," *Houston Chronicle*, February 3, 2007; Cindy Horswell, "Emissions Plan has Mayors Miffed at White," *Houston Chronicle*, March 7, 2007; Dina Cappiello, "Bills Filed to Block White's Clean Air Campaign," *Houston Chronicle*, March 10, 2007; Kristen Mack, "White Takes his Pollution Fight to Senate Panel," *Houston Chronicle*, April 18, 2007; Eric Berger, "Houston Mayor Sets 6-month Pollution Deadline," *Houston Chronicle*, November 6, 2007.

²⁰ See, Senate Bill 1317 (Jackson, 80th Leg. 2007); House Bill 3592 (Smith, Wayne, 80th Leg. 2007).

²¹ Houston Regional Air Quality Task Force, (September 7, 2007), "Houston Regional Air Quality Task Force Report". Retrieved from the Greater Houston Partnership's website: <http://www.houston.org/pdfs/PP/AirQualityTaskForceReporttoMayor.pdf> (accessed August 28, 2008).

²² See, TEX. CONST., art 11, § 5 (providing that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

²³ See, *City of Austin v. Jamail*, 662 S.W.2d 779 (Tex. App.--Austin 1983); *City of West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681 (Tex. Civ. App.--Waco 1980).

²⁴ See, TEX. LOC. GOV'T CODE, § 42.001 (stating that the purpose of extraterritorial jurisdictions is to "promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities"); *Id.*, § 217.042(a).

²⁵ See, *Jamail v. Stoneledge Condominium Owners Ass'n*, 970 S.W.2d 673, 676 (Tex. App.--Austin 1998, no pet.).

²⁶ See TEX. CIV. PRAC. & REM. CODE, §§ 125.001 *et seq.*

²⁷ TEX. HEALTH & SAFETY CODE, § 341.011.

²⁸ TEX. LOC. GOV'T CODE, §§ 217.002, 217.022.

²⁹ *Id.*, § 217.042(a).

³⁰ Black's Law Dictionary, 5th ed. (West Publishing, 1979).

³¹ This rule is not uniform throughout the state's body of law as evidenced by a municipality's unilateral ability to

annex unrepresented citizens into its jurisdiction.

³² *See*, TEX. HEALTH & SAFETY CODE, §§ 382.001 *et. seq.*

³³ *Id.*, § 382.011(a).

³⁴ *Id.*, § 382.113.