



# Legislative UPDATE

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Number 1

## **SENATE INTERIM COMMITTEES WILL STUDY CITY-RELATED TOPICS**

Lt. Governor David Dewhurst has instructed the committees of the Texas Senate to conduct dozens of studies prior to the 2011 legislative session. Many of those studies can impact cities. Descriptions of the major city-related studies are reprinted in their entirety below. TML will monitor the progress of each study.

### **Business and Commerce Committee**

- Study the generation costs of municipally-owned electric utilities' planned generation portfolios. Consider the impact of planned generation costs on electric rates for residential and commercial customers. Solicit input on the impact of future electric rates on charitable and non-profit organizations, and the impact on such organizations' cash assistance programs to indigent customers. Consider the merits of a justifiable planned generation cost standard, and whether a deviation above the standard should be subject to approval by a vote of all customers of a municipally-owned utility's service area.

## Criminal Justice

- Study the efficiency and fairness of the current sexual offender registry system and make recommendations to improve the system, if necessary. Study the issue of compliance with the Adam Walsh Act, focusing on the associated costs to the state and the punishment of juveniles. Examine the risk assessment tools used to measure the likelihood of recidivism of sexual predators.
- Review statistics regarding the crime of driving while intoxicated, including accident statistics, alcohol-related deaths and injury, and other impacts on the community. Examine enforcement options used nationwide to deter driving under the influence and make recommendations to reduce the number of alcohol-related traffic fatalities and accidents in Texas.
- **Study and make recommendations related to municipal jails and other detention facilities that operate without state agency oversight. Identify the number of such facilities and the population detained, as well as best practices for municipal jails. Make recommendations to improve services and consider options for oversight of facilities by the Texas Commission on Jail Standards.**
- Review the detention of juvenile offenders in local jails, state jails, and Texas Department of Criminal Justice prison units by examining conditions of confinement, including quality of education, mental health treatment and medical services, rehabilitative treatment, and equality of access to services for young female inmates. Review access to administrative and inspector general grievances in TDCJ facilities. Make recommendations for improving the system and reducing recidivism for juvenile offenders.
- Study and make recommendations to ensure the accuracy and timeliness of testing done in Texas forensic laboratories, including DNA and blood/alcohol testing. Assess and make recommendations for improving the capacity of Texas criminal laboratories to process evidence, identify ways to reduce the backlog of DNA evidence processing, identify ways to encourage qualified applicants for crime lab jobs, ensure adequate training for new crime lab technicians, ensure the availability of efficient crime lab processing to all regions of the state, and determine the impact of additional collection requirements on the capacity of Texas crime labs to process evidence. Consider the costs and benefits of creating a statewide crime lab.

## Economic Development

- Assess the effectiveness of major economic development programs in Texas. The review should include, but not be limited to, such programs as the Enterprise Fund, Emerging Technology Fund, Skills Development, and Enterprise Zones. Review major tax policy issues that encourage or hinder business development, including options for reinstating a margins tax research and development tax credit. Examine economic development programs in other states that have been successful and recommend changes to existing state programs, new programs, or changes in tax policy incentives that could increase job creation in Texas.

## Finance

- **Review and make recommendations regarding existing and future public debt at all levels of government in Texas including independent school districts, cities, other local governments and the Texas Guaranteed Tuition Plan.**
- **Identify and evaluate potential improvements to the property tax system. Consider and make recommendations relating to the following:**
  - **Methods to increase public participation in the tax rate-setting process and ensure fairness in appraisal protests and appeals;**
  - **Requirement that property appraisal values may not increase by more than inflation and/or population growth, or another amount to be determined by local taxing authorities, with a maximum cap of 10 percent; and**
  - **Exemptions provided to community housing development organizations to determine if changes are needed to ensure that the public benefits outweigh the revenue loss.**
- **Examine transportation funding concepts contained in legislation considered during the 81<sup>st</sup> Legislature, Regular and Special Sessions. Analyze options and make recommendations relating to historical funding strategies, including prioritization of existing revenues, as well as alternative state and local transportation funding concepts. (Joint charge with Senate Transportation and Homeland Security Committee)**

## Government Organization

- **Review opportunities for increasing the transparency of government operations and make recommendations for enhancing public access to government.**

## Intergovernmental Relations

- **Monitor the proliferation of municipal utility districts (MUDs) outside the corporate limits or extraterritorial jurisdiction of municipalities and whether increased oversight of these districts by other political subdivisions is needed. Review the process for the creation of municipal utility districts (MUDs) through the template developed during the 81<sup>st</sup> Legislative Session, including any changes needed to increase the efficiency and oversight over the creation of proposed districts. Review the process for creating special districts, including whether the creation of a template, similar to the one created for municipal utility districts (MUDs), is feasible and would enable the legislature to more effectively evaluate other proposed special districts during future Sessions.**
- **Review the process and costs for local governments to make government information available online. Consider ways to encourage local governments to provide more transparency, including the Comptroller's experience with transparency and her offer to assist local governments, and consider penalties for entities that fail to comply with the online requirement.**

- **Review state and local policies related to development and growth in rural and unincorporated regions of the state with regard to annexation and zoning authority. Focus on impacts to private property rights. Determine the appropriateness of existing extraterritorial jurisdiction authority. Make recommendations regarding possible changes to this authority.**
- Review the types of support state government can provide to assist local government consolidations with county governments. Evaluate budget implications for city and county government consolidations. Research the appropriateness and cost savings of eliminating duplicity between city and county governments in different regions of the state.
- Review the statutory authority granted to municipal management districts (MMDs) and to emergency service districts (ESDs), and the authority of municipalities and counties to create public improvement districts (PIDs). Determine whether the authority granted for each entity is adequate to accomplish the goals of local governments. Assess whether the consolidation of ESDs under one statute would improve uniformity and provision of fire and emergency services through these districts.

### **Intergovernmental Subcommittee on Flooding and Evacuations**

- Study the benefit of legislation that would require coastal regions, when making routine improvements to drainage systems and other infrastructure, to take into account probability of future flooding and any upgrades necessary to prevent future flooding.
- Study and make recommendations on methods of emergency notification during a natural disaster. Look into alternative systems and new technologies for rerouting 911-type calls to become more efficient and effective. Study and make recommendations to streamline the process of informing citizens impacted by an emergency or disaster prior to the event about re-entry and aid.
- Study and make recommendations relating to cost effective options to either retrofit or require new building structures to be built as shelters for use during future evacuations.

### **State Affairs**

- Study the adequacy of workers' compensation benefits in the following categories: lifetime income benefits, wage benefits for the high wage earner, and workers whose wage benefits stop before Social Security benefits begin. In order to determine the impact of increased benefits in one or more of these categories, work with the Texas Department of Insurance to develop a publicly accessible model to predict the costs related to those enhanced benefits, the effect of those costs on workers' compensation premiums, and whether enrollment in the workers' compensation system will be adversely impacted by increasing the benefits in one or more of the stated categories.
- **Study the Public Information Act and the Open Meetings Act to ensure that government continues to operate in a way that is open and transparent. The**

**study should consider how advances in technology and the emergence of various forms of social media (e.g. Facebook, MySpace, Twitter) have affected communications by and within governmental bodies.**

### **Transportation and Homeland Security**

- Review and make recommendations relating to the Texas Department of Transportation's organizational structure and working relationship with local governments, Metropolitan Planning Organizations, Regional Tolling Authorities and Regional Mobility Authorities.
- Explore the policy implications of transportation reinvestment zones funded by state sales and use taxes as an alternative to public financing of transportation projects.

## **THE TEXAS OPEN MEETINGS ACT AND CAMPAIGN SEASON: INCUMBENTS BEWARE!**

As campaign season approaches, new candidates and incumbents seeking elected municipal positions will be asked to participate in a variety of political events. Candidate forums and fundraisers are two examples. For new candidates, the Texas Open Meetings Act (Act) does not apply because they are not yet members of the city council. For incumbents, however, the Act may create legal pitfalls.

The Act is intended to allow the public to view the business of the city council. But does the Act distinguish between official meetings and campaign gatherings of the city council? Absolutely not. If a gathering of a quorum of incumbents takes place anywhere, a "meeting" of the city council may have occurred, and all the Act's requirements (e.g., a properly posted agenda, public access, and a specific listing of subject matter) may apply.

Several attorney general opinions (available online at the attorney general's Web site) have broadly interpreted the definition of a meeting to include the attendance by a quorum of a governmental body at various lectures or gatherings. For example, opinion JC-0203 (2000) concludes that the Act applies if: (1) a quorum of a governmental body attends the same speaking engagement or lecture; (2) an attending member participates in the discussion; and (3) the deliberation relates to public business or public policy over which the quorum of the governing body in attendance has supervision or control. *See also* opinions JC-0248 (2000) and JC-0308 (2000). Thus, if a quorum attends a chamber of commerce meeting, and discussion there concerns an issue over which the city council has authority (e.g., street repairs or economic development incentives), councilmembers may not participate in the meeting unless all requirements of the Act are met.

Consequently, the Act would apply if a quorum of a city council attends a "candidate forum" to debate among new candidates, themselves, or to answer questions from an

audience. Why not just post the forum as a meeting of the city council? That's a possibility, but in that case the dilemma is the inability to list the items for discussion. The attorney general concluded in opinion GA-0668 (2008) that general postings such as "Council and Other Reports" provide insufficient notice to the public. The same would be true of a candidate forum. For example, posting an agenda listing "candidate forum to discuss campaign matters" would be insufficient for incumbents to discuss any specific matter in detail.

The Act does allow a municipal elected official certain latitude at a properly posted meeting. Section 551.042(a) provides that:

*If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given..., the notice provisions of this subchapter do not apply to: (1) a statement of specific factual information given in response to the inquiry; or (2) a recitation of existing policy in response to the inquiry.*

Section 551.042(b) further provides that: "[a]ny deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting." However, attorney general opinion JC-0169 (2000) provides that "[t]his provision relates to 'inquiries' from members of the public. Its purpose is to authorize a governmental body to make a limited response to an inquiry from the public about a subject not included on the posted notice *and to prevent it from engaging in 'deliberation'...about the subject matter of the inquiry.* When an inquiry or a comment from a member of the public requires such deliberation..., members of the governmental body may respond merely that the matter shall be placed on a future agenda." Thus, while a new candidate could respond in detail, an incumbent would arguably have to state that he or she cannot do so at the present time, and it is unlikely that attendees would understand why.

What about fundraisers? To begin, the following do not constitute meetings under the Act:

1. the gathering of a quorum of a governmental body at a social function unrelated to public business; or
2. the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, if formal action is not taken and any discussion of public business is incidental to the social function, convention, or workshop.

For example, if a quorum attends a Texas Municipal League Conference, that attendance is not generally subject to the Act so long as the members do not take formal action or more than incidentally discuss public business. In addition, if a quorum attends a cocktail party for a friend's birthday or something similar, the Act does not apply.

Some fundraisers could arguably be classified as social functions, but it remains questionable as to whether that social function is “unrelated to public business.” Case in point: an incumbent councilmember in a central Texas city attended a private fundraising event held on his behalf. A quorum of other incumbents was present (although none sat at the same tables). The event was essentially a social function, but the incumbent was asked to give a short speech at the end of the evening. His speech was intentionally focused on his local heritage and connection to the community, rather than any specific items related to city business. Technically, that speech shouldn’t violate the Act. The councilmember’s position was that the event was a social one, and his presentation wasn’t about “city business” *per se*.

However, a person in the audience asked an inflammatory question relating to whether the councilmember knew that his constituents believed that he was a poor steward of taxpayer dollars. The councilmember answered in a general way. According to the councilmember, an opponent reported the exchange to the local county attorney’s office. The report led to a criminal investigation into the incumbent’s behavior at the fundraiser. Ultimately, no charges were filed, but the event led to much publicity regarding the incumbent’s integrity.

The League certainly has no position on who is the best candidate for any city council position; that’s up to the voters of each city. But every incumbent should be aware of the pitfalls described above. The following ideas may be worthy of consideration:

1. A city might wish to establish procedures for giving proper notice if a quorum will attend outside gatherings, and/or warn councilmembers of the danger of public discussions.
2. If compliance with the Act is not possible because the gathering is not accessible to the public or notice has not been posted, the members in attendance may not deliberate or answer questions regarding subject matter that is within their supervision.
3. If a member is invited to comment on issues raised by attendees, he or she should decline to address subjects within the jurisdiction of the city council, explaining that under the circumstances his or her remarks would violate the Act.

Keep in mind that the suggestions above are based on existing legal precedent, regardless of whether that precedent is a correct or incorrect interpretation of the Act. City officials should consult with their local legal counsel to determine the proper course of action in any given situation. With regard to candidate forums and fundraisers, it appears that the Act may hinder the free flow of ideas from incumbents to their constituents, while providing new candidates with a political advantage.

In the case of a candidate forum or fundraiser, does the Act violate an incumbent councilmember’s right to freedom of speech under the First Amendment to the U.S. Constitution? You decide.

## **CITY FUNDING OF CONTINUATION OF HEALTH BENEFITS IS EXTENDED**

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is the federal law that requires employers, including cities, to offer continuation of health benefits to certain employees and their family members if the employee is terminated or otherwise loses his or her health benefits with the city. In the past, a city was not responsible for paying for that continued health coverage under COBRA, but could do so if it chose to. However, a new law, passed as part of last year's federal stimulus package, requires cities to pay 65 percent of the cost of the continued health benefits if an employee is involuntarily terminated for a reason other than misconduct. The city is then reimbursed for the payment through its payroll taxes.

The new requirement has recently been extended to employees who lose their health insurance through February 2010. For more information, go to <http://www.dol.gov/ebsa/cobra.html>. This topic will also be discussed in the Legal Q&A section of the February issue of *Texas Town & City* magazine.

Contact Laura Mueller at the TML Legal Department with questions at (512) 231-7400 or [laura@tml.org](mailto:laura@tml.org).

## **MUNICIPAL COST INFLATION RISES SLIGHTLY**

The Municipal Cost Index (MCI), developed exclusively by *American City and County* magazine, shows the effect of inflation on the cost of providing municipal services. The MCI is used to study price trends, make informed government contract decisions, and facilitate sound budget planning.

According to *American City and County* magazine, the MCI for December was 206.9. That's 0.2 percent higher than last month's MCI, but still a decline of 1.8 percent over the previous 12 months. The December 2008 MCI was 210.6.

## **TCEQ TO REVIEW SURFACE WATER QUALITY STANDARDS**

Surface water quality in Texas is governed both by Section 303 of the Federal Clean Water Act and Chapter 26, Subchapter D, of the Texas Water Code. Under those statutes, the Texas Commission on Environmental Quality (TCEQ), sometimes under the direction of the U.S. Environmental Protection Agency (EPA), creates rules and standards to monitor and protect surface water quality in Texas. These "Texas Surface Water Quality Standards" are important for cities, especially those with wastewater treatment plants because those plants affect the levels of certain biological and chemical

substances that the city may discharge into surface waters. Over the past two years, the TCEQ has held several meetings regarding proposed changes to the surface water quality standards and accompanying implementation procedures (IPs) in Texas. These proposed changes include the following:

- **The existing contact use categories for surface water bodies.** Currently, surface waters are designated by their potential use as either primary contact recreation (high likelihood of recreational use/water must be suitable for ingestion) or non-contact recreation (low likelihood of ingestion/water is unsuitable for recreational use). The proposed standards would create new categories in between these existing levels: “secondary contact recreation 1” and “secondary contact recreation 2.” These new categories will allow for certain waters that do not have a high likelihood of recreational use or ingestion to have slightly modified water quality standards for certain pollutants.
- **Bacteria measurements and limits.** These proposed changes would govern the way in which standards-attainment is calculated and would create an exemption in certain cases where water flow is high during collection.
- **Current standards and procedures for nutrient testing.** This may include changes to how chlorophyll *a* is used in nutrient standards attainment testing.
- **Whole Effluent Toxicity (WET) testing and procedures.** The proposed standards include stricter requirements for sublethal testing (where organisms survive but fail to reproduce at a specific toxicity level) and subsequent limits. Most of these changes will be in the IPs.

The anticipated publication date for the new proposed standards and IPs in the *Texas Register* is January 29, 2010. However, the proposed standards and IPs may be viewed now on TCEQ’s Web site at [http://www.tceq.state.tx.us/assets/public/legal/rules/rule\\_lib/proposals/07002307\\_pro.pdf](http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/07002307_pro.pdf) (standards) and [http://www.tceq.state.tx.us/assets/public/legal/rules/rule\\_lib/proposals/07002307\\_IP.pdf](http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/07002307_IP.pdf) (IPs). The comment period will run from January 19 through March 17, with a public hearing at the TCEQ offices in Austin on March 11, 2010. The rule project manager at the agency is Debbie Miller, who may be reached at (512) 239-1703.

The proposed changes can affect a wastewater discharger’s permit requirements leading to significant expenses to ensure compliance. The League has monitored and participated in the process for over two years. If you have questions about surface water quality standards or how to become involved in the process, please contact Lauren Crawford at the TML Legal Department at (512) 231-7400.

## **ATTORNEY GENERAL DECISION GIVES CITIES MORE FLEXIBILITY UNDER THE PUBLIC INFORMATION ACT**

The attorney general recently released ORD 684, an open records decision that serves as a “previous determination” allowing governmental bodies, including cities, to withhold several categories of requested information without the necessity of first requesting a decision from the attorney general. ORD 684 allows cities to more efficiently respond to requests under the Public Information Act by giving them the ability to withhold information if it fits within the categories described in the decision. According to the attorney general, the purpose of ORD 684 was to encourage “governmental bodies to quickly release clearly public information to requestors while saving the time and expense involved in seeking a decision on specific, clearly delineated categories of information the Legislature has deemed confidential.” The ten categories of information covered by the decision are:

- Direct deposit authorization forms;
- Employment Eligibility Verification Form I-9 and attachments;
- W-2 and W-4 forms;
- Certified agendas and tapes of executive sessions;
- Fingerprints;
- L-2 and L-3 declarations;
- Motor vehicle record information under 552.130;
- Access device information under 552.136;
- E-mail addresses of members of the public under 552.137; and
- Certain military discharge records.

To read the decision, please visit

<http://www.oag.state.tx.us/opinions/openrecords/50abbott/ord/2009/htm/ord20090684.htm>.

## **NATIONAL LEAGUE OF CITIES (NLC) FILES PETITION FOR RECONSIDERATION IN FCC CELL TOWER SITING PROCEEDING**

*Last November, the Federal Communications Commission (FCC) issued an order that, among other things, sets presumptive deadlines of 90 days (for co-location applications) and 150 days (for all other wireless siting applications) within which a city must act on wireless tower applications. (See the December 10, 2009, edition of the Legislative Update for background information.) The following is an update from the National League of Cities on a challenge to that order.*

On December 17, NLC, joined by the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the United States Conference of Mayors, and the American Planning Association, filed a Petition for Reconsideration with the FCC as to a part of the FCC's recent ruling developing a "shot clock" for tower siting application review.

Although the entire rule and the FCC's claim of legal authority to issue are troublesome to NLC, the petition focused on one of the most troubling aspects of the ruling. In addition to establishing deadlines of 90 days for collocation application reviews and 150 days for reviews of all other applications, the ruling gave a local government the ability to toll those shot clocks when an application was "incomplete." However, the local government would only have the power to toll the shot clock because the application was incomplete if it discovered the incompleteness within 30 days of when the application was submitted. This rule has the potential for serious unintended consequences, especially when problems with an application are only apparent after 30 days through no fault of the local government, or when third parties (or the applicant) hold up the review process.

The groups' petition focused on this 30-day incompleteness deadline. First, the petition argues that the FCC (even under its own, incorrect, understanding of its authority) exceeded its power by issuing this rule. Second, the petition discusses some of the numerous practical problems with the 30-day incompleteness deadline. Third, the petition expresses our concern about the origin and thought process behind this rule when the rule wasn't requested by the initial petitioner (the national wireless association), was included without discussion in any party's comments or *ex parte* presentations, and was included without preliminary discussion with any local government.

The petition requested that the FCC remove or revise the 30-day deadline and give local authorities the ability to toll the shot clock for legitimate reasons at any point during the review process. To accompany this petition, the groups also filed an Emergency Motion for Stay requesting that the Commission suspend the entire ruling or at least the 30-day incompleteness deadline until there is more deliberation on this issue.

The petition does not address the FCC's legal authority to institute the 90- and 150-day shot clocks. The petition makes clear to the FCC that we are not accepting their argument that they acted within their authority.

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## **MAY 2010 ELECTION LAW CALENDAR**

In years past, the Texas Municipal League legal staff has prepared an election calendar for general law cities. The calendar, which spelled out various deadlines for the May general election of city officers, appeared in each January issue of *Texas Town & City* magazine. Other groups annually prepare calendars as well. One of those groups is the Texas Municipal Clerks Association (TMCA), a TML affiliate. Because of the outstanding calendar prepared by TMCA, the League will no longer prepare a separate calendar. The TMCA calendar is now available online at <http://municlerks.unt.edu/pdf/electioncal2010.pdf>. The League's legal staff remains available to answer election-related questions.

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