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## Manufactured Housing and Mobile Homes

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# Manufactured Housing and Mobile Homes

## **I. Definitions**

A threshold issue that must be determined in ascertaining the scope and ability of a municipality to regulate mobile homes and manufactured housing is an accurate determination of the type of housing involved. While the terms “trailer home,” “double-wide,” “mobile home,” “modular home” and “manufactured home” may be used synonymously and interchangeably by the person on the street, the federal and state regulatory schemes governing these types of housing make critical categorical housing classifications that are crucial to a correct analysis.

### **A. Site-Built Homes**

We can view housing types as being located on a spectrum regarding mobility. At the risk of overstating the obvious, at one end of the housing spectrum it is the traditional “stick-built home” or “site-built home,” which is a single-family structure that is constructed from the ground up at the site where it is to be permanently located. Your typical brick house in a standard residential subdivision falls within this category. The location of such housing is controlled by local zoning ordinances and the construction of such housing is controlled by municipal subdivision ordinances and building codes.

### **B. Modular Homes**

The next type of housing on the spectrum is a “modular home,” or “industrialized housing,” which is factory-built housing designed for long-term residential use, and which is transported to a site and installed as a permanent structure that is not designed to be moved again after it is installed on its permanent foundation. Typically, multi-section units are transported to the site and installed. One type of modular home is a “panelized home,” which is a factory-built home in which panels – a whole wall with windows, doors, wiring and outside siding – are transported to the site and assembled. Another type of modular home is a “pre-cut home,” which is sometimes used to describe factory-built housing in which building materials are factory-cut to design specifications, transported to the site and assembled. Pre-cut homes include kit, log and dome homes.

The defining characteristic of each of these types of modular housing is that while they are manufactured and constructed in component parts offsite, they are assembled at the site as a permanent structure that is not designed to be moved once it is in place.

### **C. Manufactured Homes**

Moving further down the mobility spectrum, the next category of housing is the “mobile home” or “manufactured home,” which is housing that is specifically

designed to be moved again after its initial installation on the home site or in a mobile home park. While using the term “mobile home” to define any housing that is designed to be mobile makes complete sense from a common sense perspective, our federal and state legislators, in their infinite wisdom, have seem fit to complicate the situation through precise definitional terms.

A “mobile home” is defined by the Texas Manufactured Housing Standards Act as:

[A] structure that was constructed before June 15, 1976, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air-conditioning and electrical systems.

Tex.Rev.Civ.Stat.Ann. art. 5221f, § 3(17).

Texas law distinguishes a “mobile home” from a “HUD-code manufactured home,” and defines a HUD-code manufactured home as

a structure constructed on or after June 15, 1976, according to the rules of the United States Department of Housing and Urban Development, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems. The term does not include a recreational vehicle as that term is defined by 24 C.F.R. § 3282.8(g)

Tex.Rev.Civ.Stat.Ann. art. 5221f, § 3(9). Understanding these definitions is important because Texas law authorizes a municipality to prohibit “mobile homes” from being located within its city limits, but not HUD-code manufactured homes. Tex.Rev.Civ.Stat.Ann. art 5221f, § 4A(a).

The Texas Manufactured Housing Standards Act also defines the terms “manufactured housing” or “manufactured home” to mean a HUD-code manufactured home or mobile home, and collectively means and refers to both. Tex.Rev.Civ.Stat.Ann. art 5221f, § 3(15).

The definitions placed on these types of housing by the Texas Legislature are extremely important because those definitions, as a matter of law, are binding on cities. The definitions of “mobile home,” “HUD-code manufactured home,” and “manufactured housing” are binding on all persons and agencies in Texas, including local political subdivisions and home-rule cities. A mobile home is not a HUD-code manufactured home and a HUD-code manufactured home is not a mobile home for any purpose under the laws of Texas. Tex.Rev.Civ.Stat.Ann. art. 5221f, § 3A. Any ordinance which regulates these types of structures should

accurately specify whether the ordinance applies to mobile homes, HUD-code manufactured homes or both.

## **II. Federal And Texas Regulatory Schemes Regarding Manufactured Housing**

### **A. Federal Regulations**

In 1974, Congress adopted the National Manufactured Housing Construction and Safety Standards Act of 1974 (“Federal Act”), which can be found, as amended, at 42 U.S.C. §§ 5401 *et seq.* Section 5401 of the Federal Act, entitled “Congressional declaration of purposes,” states that

the purpose of the Act is “to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes.”

Since the Federal Act was intended to provide uniform and national construction and safety standards for manufactured homes, the courts have held that municipal ordinances that attempt to impose greater safety requirements for manufactured homes than those imposed under the Federal Act are preempted by the Act. *See, e.g., Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988).

The Federal Act considers a “manufactured home” to be a home that is built on a chassis and which is “designed to be used as a dwelling with or without a permanent foundation.” In other words, a “manufactured home” under the Federal Act is a home that is mobile and which can be moved once it is placed at a site. *See* 42 U.S.C. § 5402(6). The Federal Act expressly excludes homes that are not designed to be mobile or moved once erected or installed. In other words, “modular homes” are not covered by the Federal Act. 42 U.S.C. § 5403(h).

While the Federal Act expressly prohibits state and local governments from establishing standards for the safety and construction of manufactured homes that differ from federal standards, (*see* 42 U.S.C. § 5403(d)), federal law does allow state regulatory agencies approved by HUD to inspect the construction of “manufactured housing” under the Act. 24 C.F.R. Part 3282, Subpart H.

### **B. Texas Regulations**

Pursuant to the enabling authority provided by the Federal Act, Texas has adopted HUD’s construction standards and has empowered the Texas Department of Housing and Community Affairs with enforcing the state’s regulations. The Texas Manufactured Housing Standards Act (“Texas Act”), Tex.Rev.Civ.Stat. Ann. art. § 5221f, addresses the construction, safety and installation of mobile homes and manufactured housing and mirrors the Federal Act. As previously noted, under the Texas Act, the term “HUD-code manufactured home” is used to denote a mobile home constructed on or after June 15, 1976, the term “mobile home” is

used to denote a mobile home constructed before that date, and the term “manufactured home” is used to denote a mobile home and a HUD-code manufactured home.

**1. Authority To Regulate The Use And Occupancy, But Not The Installation,  
Of Manufactured Housing**

The Texas Act expressly allows a city to require a permit for the use and occupancy of a HUD-code manufactured home. Section 4A of the Act provides, in pertinent part, as follows:

(b) Upon application the installation of HUD-Code manufactured homes shall be permitted as residential dwellings in those areas determined appropriate by the city, including subdivisions, planned unit developments, single lots, and rental communities and parks. An application to install a new HUD-Code manufactured home for use and occupancy as a residential dwelling is deemed approved and granted unless the city denies the application in writing within 45 days from receipt of the application setting forth the reason.

Tex.Rev.Civ.Stat.Ann. art. 5221f, § 4A(b).

Since state law specifically allows a city to determine which areas are appropriate for a HUD-code manufactured home, a city can determine where to place them by a specific use permit. While a city may utilize a specific use permit to determine the appropriate location for a HUD-code manufactured home, state law prohibits, however, the requirement of a permit for the installation of a HUD-Code manufactured home.

The Texas Act authorizes the Texas Commission on Licensing and Regulation (“Commission”) to establish standards for the construction and installation of manufactured housing in Texas. The Act provides that cities may not adopt different standards unless expressly authorized by the Commission:

Notwithstanding any provisions of any other statute, regulation or ordinance to the contrary, a licensed retailer or licensed installer is not required to secure a permit, certificate, or license or pay any fee for the transportation of manufactured housing to the place where it is to be installed except, as required by the department or by the State Department of Highways and Public Transportation pursuant to Subchapter E, Chapter 623, Transportation Code. The department shall cooperate with the Texas Department of Transportation by providing current lists of registered manufactured housing manufacturers, retailers and installers.

Tex.Rev.Civ.Stat.Ann. art. 5221f, § 18(f).

The Act further provides that

[a] local governmental unit or home-rule city may not require any permit, fee, bond, or insurance for the installation of manufactured housing by a licensed retailer or installer except as may be approved by the department.

Tex.Rev.Civ.Stat.Ann. art 5221f, § 18(g).

“Installation” is defined as

the construction of the foundation systems, whether temporary or permanent, and the placement and erection of a manufactured home or manufactured home components on the foundation system and includes supporting, blocking, leveling, securing, anchoring, and proper connection of multiple or expandable sections or components, and minor adjustments.

Tex.Rev.Civ.Stat.Ann. art 5221f, § 3(10).

Consequently, a city cannot require an anchoring and blocking permit. Registered manufactured housing manufacturers, retailers, and installers are authorized by the Texas Act to perform these installations. A city can inspect anchoring and blocking, but cannot charge a fee. If a city finds that anchoring and blocking is not in compliance with state law, these violations should be reported to the Department of Housing and Community Affairs. Further, a city can contract with the Department of Housing and Community Affairs to perform these inspections.

A city can require, however, permits for utilities, such as water, sewer, gas and electric. A city can also require permits to indicate that the HUD-code manufactured home complies with city zoning ordinances. State regulations regarding manufactured home installation requirements can be found in the Texas Administrative Code in Title 10, Chapter 80 of that code.

## **2. Authority To Regulate The Location Of Mobile Homes And**

### **HUD-Code Manufactured Housing**

#### **a. Case Law**

In *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex. 1982), the Texas Supreme Court upheld the constitutionality of an ordinance regulating mobile home parks and restricting the location of mobile homes. *Id.* at 793. The Court, citing a number of cases from other jurisdictions, noted that “the considerations of encouragement of the most appropriate use of land and conservation of property values have been found proper justification for regulation of the location and use of mobile homes. . . .” *Id.* at 794. This is consistent with other states’ considerations of mobile home location restrictions. *See generally* Jay M. Zitter, Annotation, *Validity of Zoning or Building Regulation Restricting Mobile Homes or Trailers to Established Mobile Home or Trailer Parks*, 17 A.L.R. 4th 106

(1982); Erwin S. Barbre, Annotation, *Validity and Application of Zoning Regulations Relating to Mobile Home or Trailer Parks*, 42 A.L.R.3d 598 (1972).

The plaintiff in *Comeau* argued that “mobile homes constructed in accordance with state and federal standards are structurally as safe and aesthetically comparable to conventional housing, thus rendering the purported justification for dissimilar treatment of mobile homes arbitrary.” *Comeau*, 633 S.W.2d at 794. The Court rejected this argument and held that the dissimilarities between mobile homes and conventional housing provided a rational basis for the municipality’s zoning ordinance:

We find that adequate governmental interests are served by regulation of the location of mobile homes. Mobile homes, by definition, are manufactured to permit movement; the inherent structural differences in such manufactured housing can make them vulnerable to windstorm and fire damage; and their mobile nature may lead to transience and detrimentally impact property values if scattered through a municipality.

*Id.* at 795.

The Texas Supreme Court expressly noted, however, that the substantial improvements made in modern mobile homes might necessitate a different answer to the validity of mobile home zoning ordinances, but stated that the legislature would be the appropriate body to address that issue.

It is possible that the general improvements in appearance and quality of manufacture of mobile homes will persuade municipalities to alter ordinances similar to the one before us. Such changes, however, should be made through the legislative, not the judicial, process. This principle has its inception in judicial acknowledgment of zoning power.

*Id.* at 795.

The Court also rejected a challenge that the Federal Act and the Texas Act preempted the municipality’s mobile home zoning ordinance, noting that such legislation addressed the construction, safety and installation of mobile homes, but that there was nothing in those statutes regulating the location of mobile homes. *Id.* at 796. Accordingly, in 1982, at the time of the *Comeau* decision, it was clear that zoning ordinances regulating the location of mobile homes were clearly permissible and not preempted by either state or federal law.

Legislative amendments to the Texas Act, however, particularly those in 1987, brought into question the holding in *Comeau*. As previously noted, the Act defines “mobile homes,” “manufactured housing,” and “HUD-code manufactured housing,” and distinguishes between mobile homes that were constructed before June 15, 1976 (before HUD construction standards became mandatory for mobile homes), and mobile homes constructed on or after June 15, 1976 (after HUD

construction standards became mandatory for mobile homes). Mobile homes constructed before June 15, 1976, are designated “mobile homes,” and mobile homes constructed on or after June 15, 1976, are designated “HUD-code manufactured homes.” *See* Tex.Rev.Civ.Stat. Ann. art. 5221f, § 3(9) and (17). The term “manufactured housing” includes both “mobile homes” and “HUD-code manufactured homes.” *See* Tex.Rev.Civ.Stat. Ann. art. 5221f, § 3(15). Section 3A of the Act provides that these definitions are binding on all political subdivisions. *See* Tex.Rev.Civ.Stat. Ann. art. 5221f, § 3A.

The section of the Texas Act of concern to cities is § 4A, which is entitled “Municipalities,” and which provides as follows:

(a) An incorporated city may prohibit the installation of a mobile home for use or occupancy as a residential dwelling within its corporate limits. Any such prohibition must be prospective and shall not apply to a mobile home previously legally permitted and used or occupied as a residential dwelling within the city. Permits for such use and occupancy must be granted by an incorporated city for the replacement of a mobile home within its corporate limits with a HUD-Code manufactured home.

(b) Upon application the installation of HUD-Code manufactured homes shall be permitted as residential dwellings in those areas determined appropriate by the city, including subdivisions, planned unit developments, single lots, and rental communities and parks. An application to install a new HUD-Code manufactured home for use and occupancy as a residential dwelling is deemed approved and granted unless the city denies the application in writing within 45 days from receipt of the application setting forth the reason.

(c) This section shall not affect the validity of any deed restriction that is otherwise valid.

Tex.Rev.Civ.Stat. Ann. art. 5221f, § 4A. Further, § 18(b) of the Act provides, in pertinent part, that “[t]he provisions of all laws, parts of laws, ordinances, rules or regulations which are in conflict with any of the provisions of this Act are superseded and preempted to the extent of such conflict.” Tex.Rev.Civ.Stat. Ann. art. 5221f, § 18(b).

One interpretation of Section 4A is that the legislature, in response to the invitation issued by the Texas Supreme Court in *Comeau*, has mandated that mobile homes constructed on or after June 15, 1976, be considered the same as traditional residential dwellings for zoning purposes, with the result being that mobile homes be allowed in all “subdivisions, planned unit developments, single lots, and rental communities and parks.” Tex.Rev.Civ.Stat. Ann. art. 5221f, § 4A(b). Another interpretation is that a city may prohibit the use of mobile homes constructed before June 15, 1976, as residential dwellings, but that a municipality may not prohibit the use of mobile homes constructed on or after June 15, 1976, as

residential dwellings “in those areas determined appropriate by the city.”  
Tex.Rev.Civ.Stat.Ann. art. 5221f, § 4A(b).

Subsequent case law and attorney general opinions support the latter interpretation. While a city may not deny the use of a mobile home constructed on or after June 15, 1976 (a HUD-code manufactured home), as a residential dwelling, the city still retains the power to determine what areas of the municipality, if any, are appropriate locations for such HUD-code manufactured homes.

In *Texas Manufactured Hous. Ass’n v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 531 U.S. 1112 (1997), the Fifth Circuit addressed a challenge made by the Texas Manufactured Housing Association (“TMHA”) that a city ordinance that limited the placement of trailer coaches to trailer parks (1) was preempted by the Federal and Texas Acts, (2) discriminated against interstate commerce and (3) was not rationally related to furthering a legitimate governmental interest.

Factually, the City of Nederland adopted an ordinance that prohibited the placement of “trailer coaches” on any lot within its city limits except in a “duly authorized trailer park.” *Id.* at 1098. The city’s ordinance defined a “trailer coach” as “a transportable, single family dwelling unit which is or may be mounted on wheels suitable for year-round occupancy and containing the same water supply, waste disposal and electrical conveniences as immobile housing.” Nederland’s ordinance did not distinguish between “HUD-code manufactured homes” (which means that the structure was constructed on or after June 15, 1976) and “mobile homes” (which means that the structure was constructed before June 15, 1976).

A property owner sought a permit from the city to place a “HUD-code manufactured home” on a lot with a permanent foundation system. The home was intended to replace an aging, dilapidated, site-built home that the property owner was currently occupying. *Id.* Since the city determined that a HUD-code manufactured home was a “trailer coach” under the terms of its ordinance, the city denied the property owner’s application for a permit. The property owner, in conjunction with the TMHA, filed suit against the city challenging Nederland’s ordinance as discriminatory and unconstitutional.

The plaintiffs initially challenged the ordinance as being preempted by the Federal Act, which expressly prohibits state and local governments from establishing standards for the safety and construction of manufactured homes that differ from federal standards. The court rejected the preemption argument because the court found that Nederland’s ordinance “regulates the placement and permitting of trailer coaches for the purpose of protecting property values and does not expressly link its provisions in any way to local safety and construction standards.” *Id.* at 1100.

The plaintiffs also argued that Nederland's ordinance was preempted by the Texas Act. In its analysis, the court first noted that the Act specifically allowed cities to restrict the installation of HUD-code manufactured homes to areas determined to be appropriate by the city. The plaintiffs contended, however, that because Nederland treated "HUD-code manufactured homes" and "mobile homes" under the single rubric of a "trailer coach," that such definition violated the Texas Act's requirement that the definitions of manufactured housing contained in the Act be binding on all local political subdivisions. The court held, however, that there was nothing in the Act that precluded a municipality from regulating both types of manufactured housing using a single term such as "trailer coach." Further, the court found that the Nederland ordinance did not impermissibly regulate either mobile homes or HUD-code manufactured homes. *Id.* at 1101-02.

The plaintiffs' commerce clause challenge contained an interesting argument that HUD-code manufactured housing was an out-of-state economic interest because most of those homes are fabricated outside of Texas and imported into the state, while modular housing is an in-state economic interest because the modular homes that are sold to Texas customers are constructed in Texas since they must meet state building codes. *Id.* The court, after determining that the market for modular homes and for HUD-code manufactured homes, although overlapping, were basically distinct, held that Nederland's ordinance had only an incidental effect on interstate commerce and, thus, did not violate the interstate commerce clause. *Id.* at 1103-04.

The court also rejected the plaintiffs' argument that the ordinance did not advance a legitimate governmental interest.

There can be no dispute that the governmental interest at stake is legitimate. Maintenance of property values has long been recognized as a legitimate objective of local land use regulation, and the Texas Supreme Court has expressly held that a local ordinance regulating the location of mobile homes is a land use ordinance properly within the local police power.

*Id.* at 1104 n.10 (citing *Comeau*, 633 S.W.2d 790).

Based on this finding, the court also made short shrift of the plaintiffs' takings analysis by determining that the ordinance substantially advanced a legitimate state interest since it "restrict[ed] the placement of manufactured housing inside the City's limits to trailer parks in an effort to prevent haphazard placement of such housing throughout the City and therefore prevent[ed] a concomitant decline in property values." *Id.* at 1105. The court held that "[r]estricting manufactured housing to trailer parks directly respond to this legitimate concern." *Id.* Based on these legitimate governmental interests, the court also denied the plaintiffs' substantive due process and equal protection claims. *Id.* at 1106.

Both *Comeau* and *Nederland* provide strong authority for Texas municipalities to regulate the locations of HUD-code manufactured housing within the community

and to prohibit mobile homes (mobile dwelling units that are not HUD-code manufactured housing) within a municipality.

#### **b. Attorney General Opinions**

Two Texas Attorney General Opinions are also worthy of note. In Morales Letter Opinion No. 97-002, General Morales held that under the Texas Act, a city could forbid the installation of single-wide or aluminum-roof dwellings only if such dwellings failed to meet the standards specified by HUD. Of interest in the opinion, however, is the discussion regarding the scope of Section 4A of the Texas Act, which authorizes cities to prohibit mobile homes, and to restrict the location of HUD-code manufactured homes to appropriate areas of the city. Tex.Rev.Civ.Stat.Ann. art. 5221f, § 4A.

General Morales opined on an issue not directly addressed in the Texas Act, which is whether a city may determine that there are no areas deemed appropriate by the city for the installation of HUD-code manufactured homes, which in essence would be to ban such housing completely. General Morales, relying upon the legislative history of the Texas Act, concluded that a city may not lawfully institute such a ban.

As we read section 4A, then, mobile homes that do not meet HUD standards may be prohibited by cities under section 4A(a). However, under section 4A(b), units that do meet HUD's standards must be provided for within cities. The city has the power to zone such units in the sense of determining suitable or unsuitable locations for their installation, but does not have the power to forbid them altogether.

The bill analysis prepared for section 4A by the House Committee on Business and Commerce is to the same effect. It declares that "city governments would be allowed to designate locations for manufactured housing developments but would not be allowed to pass banning ordinances."

Tex. Att'y Gen. LO-97-002 (1997).

In Morales Letter Opinion No. 98-093, General Morales opined that the Texas Act does not preclude a home-rule city from regulating unoccupied and unsafe mobile homes and manufactured homes that pose a threat to public health and safety. As part of the analysis, General Morales stated, once again, that "[a] municipality has the authority to zone manufactured homes, but may not forbid them altogether." Tex. Att'y Gen. LO-98-093 (1998). Accordingly, while neither the Texas Act nor case law expressly states that a city is prohibited from an outright ban on all HUD-code manufactured housing within a city, the Texas Attorney General's Office, at least under the administration of General Morales, believes that such a regulation would be unlawful.

### **III. Regulation Of Modular Housing**

Modular homes are regulated by the State. Tex.Rev.Civ.Stat.Ann. art. 5221f-1. Texas law defines a "modular home," or "industrialized housing," as

a residential structure that is designed for the use and occupancy of one or more families, that is constructed in one or more modules or constructed using one or more modular components built at a location other than the permanent residential site, and that is designed to be used as a permanent residential structure when the modules or modular components are transported to the residential site and are erected or installed on a permanent foundation system.

Tex.Rev.Civ.Stat. Ann. art. 5221f-1 § 1(1) (emphasis added).

A “modular component” is defined as

a structural portion of any dwelling or building that is constructed at a location other than the homesite in such a manner that its construction cannot be adequately inspected for code compliance at a homesite, without damage or without removal of a part thereof and reconstruction.

Tex.Rev.Civ.Stat. Ann. art. 5221f-1, § 1(6).

Modular housing must be constructed to meet one of two specified national building codes adopted by the municipality in which the home is to be placed. Tex.Rev.Civ.Stat. Ann. art. 5221f-1, § 2(a). If the municipality has not adopted a building code, or if it has adopted a code different from the two national codes specified by the statute, the manufacturer may choose to comply with either of the two specified national codes. Tex.Rev.Civ.Stat. Ann. art 5221f-1, § 2(b). The statute specifically prohibits cities from enforcing any amendments they may have made to the applicable national code. Tex.Rev.Civ.Stat. Ann. art 5221f-1, § 2(e). A modular home need not be constructed entirely in a factory, but may be assembled at the homesite from one or more structural portions that, themselves, were constructed in a factory setting. Tex.Rev.Civ.Stat. Ann. art. 5221f-1, § 1(6). The statute contains a specific provision concerning local regulatory authority over modular housing. It provides, in pertinent part, as follows:

All areas of authority belonging to municipalities are specifically and entirely reserved to them. That authority may include local land use and zoning requirements, building setback requirements, side and rear yard requirements, site planning and development and property line requirements, subdivision control, and landscape architectural requirements. Those local requirements and regulations and others not in conflict with this article and other state law relating to transportation, erection, or installation, or use, shall be reasonably and uniformly applied and enforced without distinction as to whether the housing or buildings or manufactured or are constructed on site . . . .

Tex.Rev.Civ.Stat. Ann. art. 5221f-1, § 2(d) (emphasis added).

The prohibition on any regulatory distinction between modular homes and site-built homes probably invalidates any attempt to directly segregate modular homes from site-built homes through zoning or otherwise, but should not effect a city's ability to adopt and enforce zoning regulations which are aimed at regulating the size or appearance of residential structures to promote compatibility. Cities are specifically authorized to review plans and drawings, require permits for any on-site construction, and inspect on-site erection and construction activities. Tex.Rev.Civ.Stat.Ann. art. 5221f-1, § 2(d).

#### **IV. Unanswered Questions Regarding Nonconforming Manufactured Housing**

Mobile homes, manufactured housing and HUD-code manufactured homes can become nonconforming uses when a municipality annexes land into a city with these uses in existence on the land at the time of the annexation. Additionally, new zoning can render such uses nonconforming. Two issues that may arise involve whether such uses, as legally existing nonconforming uses, may be replaced with another mobile home or type of housing that is mobile, and whether such uses may be expanded. While the answers to these questions are far from clear, an analysis of those issues is set forth below.

##### **A. Can A Nonconforming Mobile Home Be Replaced With Another Mobile Home Or HUD-Code Manufactured Housing?**

Some cities do not directly address the issue of whether an owner may improve or replace mobile homes that are currently nonconforming because they believe that replacing a dilapidated structure with a newer, improved model is advantageous and beneficial, and should be encouraged, rather than discouraged. Other cities, however, believe that the only way to eliminate a legally existing nonconforming use is to prohibit that use from being improved, expanded or replaced. It is this latter classification of cities that have routinely grappled with this issue.

Once again, we must constantly remember that mobile homes must be distinguished from HUD-code manufactured housing. A mobile home is one constructed prior to June 15, 1976; a HUD-code manufactured home is a structure constructed on or after June 15, 1976.

A city may prohibit "mobile homes" from being located within the city limits; however, this prohibition does not apply to mobile homes which already exist in the city or to HUD-code manufactured housing. *See* Tex.Rev.Civ.Stat.Ann. art. 5221f, § 4A. A city may determine which areas are appropriate for such homes through its zoning ordinances. A city can further require a permit for the use and occupancy of a HUD-code manufactured home and determine where to place such homes through a specific use permit. Tex.Rev.Civ.Stat.Ann. art. 5221f, § 4A(a). Permits for the installation of HUD-code manufactured housing are expressly prohibited. Tex.Rev.Civ.Stat.Ann. art. 5221f, § 18f. Further, a city may not enforce any construction or safety standard which is inconsistent with the Federal Act. Inasmuch as the Texas Act is consistent with the federal statute, if a city complies with the Texas Act, it will not conflict with Federal Act.

The critical language of the Texas Act is as follows:

(a) An incorporated city may prohibit the installation of a mobile home for use or occupancy as a residential dwelling within its corporate limits. Any such prohibition must be prospective and shall not apply to a mobile home previously legally permitted and used or occupied as a residential dwelling within the city. Permits for such use and occupancy must be granted by an incorporated city for the replacement of a mobile home within its corporate limits with a HUD-Code manufactured home.

Tex.Rev.Civ.Stat. Ann. art. 5221f, § 4A(a) (emphasis added).

The question is what is meant by “previously legally permitted.” Does “previously legally permitted” mean a mobile home located on property zoned to allow the mobile home as a permitted use? Clearly, the term would, at a minimum, include mobile homes that were authorized by the zoning in place. The more problematic situation is one where a nonconforming mobile home, which is not legally permitted by the zoning in place, is at issue. A nonconforming use is a legally permitted use, in the one sense, because the law allows that use to continue in spite of the fact that it is in violation of applicable zoning. It is not legally permitted, in another sense, in that it is a use that is in violation of the zoning ordinance and it is a use that is allowed to exist with more limited property rights than other uses since nonconforming uses are subject to discontinuance through amortization, and significant limitations on replacement, repair or expansion of the use are typically imposed.

If the term “previously legally permitted” does include nonconforming use mobile homes, and those mobile home owners are allowed, as a matter of right, to replace their nonconforming use mobile homes with a HUD-code manufactured homes, such a construction provides greater rights to mobile home residents than to traditional single-family home residents since a nonconforming traditional site-built house could not be replaced with another similar house, while a mobile home could be replaced with a HUD-code manufactured home. I believe that a strong public policy argument can be made that the legislature did not intend to allow mobile home and HUD-code manufactured homeowners greater rights than those rights given to traditional single-family homeowners who may have nonconforming use status on their property.

The Texas Act does not address non-conforming uses and I have found no law addressing this specific issue. Most cities have codes that do not allow the expansion or increase of a non-conforming use or structure beyond the lot on which it is located, structural alterations and expansions beyond repairs and normal maintenance, or reconstruction in the event of partial destruction of the nonconforming use not exceeding seventy-five percent. As a practical matter, a city would not allow an owner to replace any other type of nonconforming structure with an equally nonconforming structure.

Arguably, while a mobile home may have the right, by law, to be replaced with a HUD-code manufactured home, if a HUD-code manufactured home is non-conforming, it arguably cannot be replaced with another HUD-code manufactured home, since the public policy in favor of replacing mobile homes with safer, HUD-code manufactured structures does not apply to replacing HUD-code manufactured housing with another HUD-code manufactured structure.

Attorneys with the Texas Municipal League and other attorneys knowledgeable in this field have, for the most part, taken a very conservative approach that would allow a nonconforming use mobile home to be replaced, as a matter of law, by a HUD-code manufactured home, while not allowing a nonconforming HUD-code manufactured home to be replaced with another HUD-code manufactured home. While I believe that a serious argument can be made (given the nature of the limited property rights involved in nonconforming uses, as compared to uses legally permitted by a zoning category), that a city can lawfully prohibit the upgrading of a mobile home to a HUD-code manufactured home in an area that the city has not designated as appropriate for manufactured housing, my opinion is not shared by most practitioners who have studied the field and it is considered an extremely aggressive approach to manufactured home regulation. Consequently, you should check with your own city attorney to determine his or her views on this matter prior to undertaking any regulation or program that would prohibit the upgrading of nonconforming mobile homes to HUD-code manufactured homes.

**B. To What Extent, If Any, Can a Nonconforming Use Mobile Home Park Expand To Include Additional Trailer Homes Or Mobile Homes?**

It is not uncommon for a city to annex property that contains an existing trailer park or mobile home park. An interesting question arises when the land contained in the mobile home park was not completely and fully occupied by mobile homes at the time of the annexation. For example, assume that there is a previously existing mobile home park that could, and quite possibly in the past has, accommodated 100 mobile homes. At the time the property is annexed into the city, and thus at the time that the uses on the property became nonconforming, only 50 mobile homes are contained in the mobile home park. The question presented is whether the nonconforming use is the right to use the property for the 50 mobile homes, which were present at the time at the annexation, or whether the mobile home park operator has a nonconforming use to use the property for up to 100 mobile homes since the property could accommodate such use and may have been used for such use in the past. While, once again, there are no clear cut answers to the question, any discussion must begin with an overview of the law of nonconforming uses in the State of Texas.

**1. Nonconformance**

Cities can establish zoning districts under their general police power to protect the public health, safety and general welfare. *City of Corpus Christi v. Allen*, 254

S.W.2d 759, 761 (Tex. 1953). Such restrictions, however, may not be made retroactive; rather, they

must relate to the future rather than to existing buildings and uses of land, and ordinances may not operate to remove existing buildings and uses not in conformity with the restrictions applicable to the district, at least where such buildings and uses are not nuisances and their removal is not justified as promoting public health, morals, safety or welfare.

*Id.* at 761 (citations omitted) (wrecking yard in light industrial district not nuisance nor harmful to public safety and welfare; therefore, compulsion to cease operation constituted taking). *See also Carthage v. Allums*, 398 S.W.2d 799 (Tex.Civ.App.-Tyler 1966, no writ) (no retroactive application).

“A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist.” *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972), *app. dismiss’d*, 411 U.S. 901, *reh’g denied*, 411 U.S. 977 (1973); *Town of Highland Village v. Marshall*, 235 S.W.2d 658, 662-63 (Tex.Civ.App.-Dallas 1950, writ ref’d n.r.e.) (the use of a garage apartment pre-dated the zoning ordinance; therefore, although the garage apartment violated the single-family district regulations, the privileged status or exemption applied). In other words, nonconforming status is attributable to a use or structure when

(a) such use or structure was constructed or operational prior to

- (i) the annexation of such property into the municipality, or
- (ii) the adoption or amendment of the zoning ordinance; and

(b) the nonconforming use or structure has continued to exist without subsequent abandonment.

Infrequent or sporadic use of land does not necessarily establish existing use for purposes of nonconformity. *See generally Silsbee v. Herron*, 484 S.W.2d 154 (Tex.Civ.App.-Beaumont 1972, writ ref’d n.r.e.).

The use must be lawful at the time the ordinance is passed. For example, a building that violates the building code when the zoning ordinance prohibiting its use is enacted, is not a lawful nonconforming use. 8A McQuillin, *Municipal Corporations*, § 28.186.50. Further, it must be the same use and not a use of some other kind. *City of Dallas v. Fifley*, 359 S.W.2d 177, 181-82 (Tex.Civ.App.-Dallas 1970, no writ) (owner must comply with permit requirements notwithstanding that owner commenced construction prior to zoning ordinance).

## 2. “Grandfathering” – The Right To Continue Use

The right to continue a nonconforming use has its genesis in federal and state constitutional provisions that prohibit the unconstitutional taking of property without just compensation and due process of law. *Eckert v. Jacobs*, 142 S.W.2d 374, 378 (Tex.Civ.App.-Austin 1940, no writ). Additionally, the exemption for pre-existing nonconforming uses protects an owner’s investment in property. The exemption does not apply to uses initiated after the zoning ordinance is promulgated or which are illegal. *See generally Scott v. Champion Bldg. Co.*, 28 S.W.2d 178, 184 (Tex.Civ.App.-Dallas 1930, no writ) (only “innocent” nonconforming uses protected; *i.e.*, one who legally and rightfully began or planned the construction of a building as opposed to one who acted in defiance of a valid ordinance). The protected status continues until such time as the nonconforming building or structure has been abandoned by the owner or terminated under the ordinance.

## 3. Amortization And Termination

Pre-existing nonconforming uses need not continue in perpetuity and “[a]mortization is a valid method of eliminating existing nonconforming uses of land.” *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), *aff’d*, 837 F.2d 1268, 1371 (5th Cir. 1988). An owner’s investment in property, for purposes of calculation, is the recoupment of the landowner’s dollar investment, as opposed to the market value or replacement value. *Murmur Corp. v. Board of Adjustment, City of Dallas*, 718 S.W.2d 790, 795-97 (Tex.App.-Dallas 1986, writ ref’d n.r.e.). The amortization formula may consider past depreciation of the structure, *Neighborhood Comm. on Lead Pollution v. Board of Adjustment, City of Dallas*, 728 S.W.2d 64, 70 (Tex.App.-Dallas 1987, writ ref’d n.r.e.), or the value of structures which can be moved to another location. *Board of Adjustment, City of Dallas v. Winkles*, 832 S.W.2d 803, 807 (Tex.App.-Dallas 1992, writ denied). It need not consider appreciation of land value, improvements or profit from an advantageous acquisition. *Id.* 832 S.W.2d at 806.

The Texas Supreme Court has recognized the “public need for a fair and reasonable termination of nonconforming property uses . . . [and is] in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power.” *Benness*, 485 S.W.2d at 778; *White v. Dallas*, 517 S.W.2d 344 (Tex.Civ.App.-Dallas 1974, no writ) (termination of wrecking yard within one year not unreasonable or arbitrary). *See also Fifley, supra*. In fact, a zoning regulation may have as a legitimate objective the eventual elimination of nonconforming uses. *City of Garland v. Valley Oil Co.*, 482 S.W.2d 342, 346 (Tex.Civ.App.-Dallas 1972, writ ref’d n.r.e.), *cert. denied*, 411 U.S. 933 (1973). In this regard, Texas courts have approved the direct and systematic termination of nonconforming uses provided that adequate time is allowed to recoup an owner’s

investment in the property. *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 735 (Tex.Civ.App.-Dallas 1968, writ ref'd n.r.e.), cert. denied, 396 U.S. 277, reh'g denied, 397 U.S. 977 (1970) (twenty-five years sufficient for amortization and discontinuance of nonconforming uses). In *Benners*, the court held that termination of nonconforming uses is not a "taking in the eminent domain sense"; rather it is a legitimate exercise of the police power. *Id.*, 485 S.W.2d at 777-78. The court upheld the constitutionality of a twenty-five year amortization provision terminating pre-existing nonconforming uses. *Id.* See also *Valley Oil Co.*, 482 S.W.2d at 345-46 (ordinance requiring owner of property to discontinue use as gasoline station within one year not unreasonable and arbitrary given the equipment was removable and could be used at other stations and the owner had recouped the initial investment).

Abandonment of a nonconforming use may also terminate the privileged status. In *Rosenthal v. City of Dallas*, 211 S.W.2d 279 (Tex.Civ.App.-Dallas 1948, writ ref'd n.r.e.), the court established the test for abandonment of a nonconforming use. Specifically, abandonment requires

(1) the intent to abandon and (2) some overt act or failure to act that carries the implication of abandonment.

*Id.* at 284; *Turcuit v. City of Galveston*, 658 S.W.2d 832, 834 (Tex.App.-Houston [1st Dist.] 1983, no writ) (discontinued use for 6 months not abandonment). Temporary discontinuance of a nonconforming use is insufficient to show abandonment. Specifically,

[t]he mere cessation of the use for a reasonable period does not itself work an abandonment, whether the building is permitted to remain vacant or is temporarily devoted to a conforming use with the intent that the nonconforming use be resumed when opportunity therefore should arise, and periods of interruption due to lack of demand, inability to get a tenant, and financial difficulty do change the character of use.

*Marshall*, 235 S.W.2d at 664 (citations omitted). In addition, the failure to adhere to registration requirements may effectuate the termination of a nonconforming use. *Board of Adjustment, City of San Antonio v. Nelson*, 577 S.W.2d 783 (Tex.Civ.App.-San Antonio 1979, writ ref'd n.r.e.).

#### **4. Case Law**

The author has found no Texas case which addresses the issue of whether a trailer park, once annexed, can be expanded to include additional trailer homes even if those homes were not present at the time of annexation and at the time the property became legally nonconforming. There are a handful of cases, however, from other jurisdictions that have addressed the issue.

For example, in *Patchak v. Township of Lansing*, 105 N.W.2d 406 (Mich. 1960), the Supreme Court of Michigan held that where a 15 acre tract of land was annexed by a city and only five acres of the 15 acre tract had been operated as a trailer coach park at the time of annexation, that there was no nonconforming use as to the remaining 10 acres of the tract. The critical fact in that case was that the record disclosed that the trailer park was in operation only on a portion of the north five acres of the land in question at the time of the annexation of the 15 acre tract and that no more than that five acres had ever been used for a trailer park. *Id.* at 411.

In *Blundell v. City of West Helena*, 522 S.W.2d 661 (Ark. 1975), the Supreme Court of Arkansas undertook a more complex analysis to determine the extent of a nonconforming use when a trailer park was annexed into a city. In that case, a five acre tract of land had been developed into a mobile home park, which was planned to consist of 44 lots. *Id.* at 663-64. At the time the property was annexed into the city, spaces 1-12 had existing mobile homes on them. Spaces 13-25 did not have mobile homes on them, but they had been paved and water and sewer services had been made available to them. The remainder of the proposed lots, spaces 26-44, had serious drainage problems, were not being used for mobile homes currently, and the court found that they were properly characterized as long-range future mobile home spaces. *Id.* at 663-64.

With the respect to spaces 1-12, which contained mobile homes at the time of the annexation, the court had no difficulty in determining those spaces constituted nonconforming uses. With regard to spaces 13-25, the court held although there were no mobile homes in place at the time of the annexation, the spaces had been paved, water and sewer lines had been brought to the property, and a septic tank had been constructed to accommodate sewage from those spaces. Because of the level of development activity on those spaces, the court held that they were entitled to nonconforming use status.

At the time of the adoption of the zoning ordinance, the street on which spaces 13-25 were located have been paved. Water and sewer service were available to them. The problem about sewage disposal which had prevented occupancy of the property had been solved. Although it is true that none of these spaces had been occupied by a mobile home, the first 25 spaces, considering their state of development at that time, constituted a use of the property for mobile home park under [Arkansas' nonconforming use] test.

*Id.* at 666.

Regarding the remainder of the anticipated spaces, the court held that, other than the first 25 spaces, there was no evidence of actual use sufficient to vest any right of the property owner to develop those spaces for occupancy by mobile homes or house trailers in the future. *Id.* at 667-68.

In another case out of the Supreme Court of Michigan, *Gackler Land Co., Inc. v. Yankee Springs Township*, 398 N.W.2d 393 (Mich. 1986), the court held that the fact that single-wide mobile homes had been placed on 11 lots within a tract did not establish a nonconforming use with respect to other lots in the tract so as to enable the owner to place single-wide mobile homes on those lots even after an ordinance was passed setting forth requirements which the single-wide mobile homes did not meet. *Id.* at 398-99. The plaintiff had argued because its recorded plat consisted of 54 lots, and that it had 11 single-wide mobile homes placed on lots, that it was entitled to develop the entire 54 lot tract as a mobile home park. The court rejected that argument by determining that there was no concrete manifestation that development of the entire plat was dedicated in its entirety to the use as sites for single-wide mobile homes, since the water, sewer and street infrastructure placed on the property were equally consistent with the use of property for conventional dwellings, rather than mobile homes.

In this case, the improvements to the land by way of the road construction, surveying, setting of monuments, grading, and excavation work have rendered the lots in the plat equally suitable for the placement of single-wide mobile homes and conventional dwellings. These improvements, therefore, do not constitute work of a substantial character which makes apparent an actual use of the plat as a single-wide mobile home plat. Nor does the fact that approximately one-fourth of the back lots are occupied by single-wide mobile homes establish the nonconforming use.

*Id.* at 399.

Other cases seem to be in accord that while an actual mobile home need not be in place on a lot in order to make the lot nonconforming and available for a future mobile home, some level of expenditure and preparation must have been demonstrated to show that there was an actual use or setting aside of the land for use as a mobile home site. *See, e.g., Overstreet v. Zoning Hearing Bd. of Schuylkill Township*, 412 A.2d 169, 171-72 (Pa. Cmwlth. 1980) (in proceeding where owners of tract of land sought to extend mobile home park located on western half of the tract into the eastern half, evidence that eastern half of the tract was unused in any manner supported finding that owner's lawfully nonconforming use extended only over western half of tract); *Gamache v. Town of Acushnet*, 438 N.E.2d 82, 86-87 (Mass. App. Ct. 1982) (in action challenging decision of town denying property owners' request for nonconforming use of their lot as mobile home park, finding of trial court that nonconforming use did not exist was supported by evidence which disclosed that no plan of mobile home park had been filed, mobile homes on the lot had individual wells and septic systems and were individually taxed, and that change to park of 19 mobile homes on same lot would be enlargement of nonconforming activity so great as to be different in kind in its effect on neighborhood); *Llewellyn's Mobile Home Court, Inc. v. Springfield Township Zoning Hearing Bd.*, 485 A.2d 883, 885-86 (Pa. Cmwlth. 1984) (finding of township zoning hearing board that nonconforming mobile home park contained only eight units was not error, despite fact that two certificates of

nonconformance were issued apparently showing 28 mobile home lots, since certificates were evidence merely of landowner's intention to install 28 mobile home lots on property and could grant only such nonconforming use as it existed at time of their issuance, and since 20 undeveloped lots had none of improvements necessary for erection of mobile homes upon them); *Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1100-02 (8th Cir. 1997) (finding that mobile home seller's predecessors did not use nine-acre sales lot located on mobile home park property for retail sales operations prior to effective date of city ordinance prohibiting such use was not clearly erroneously, given city administrator's testimony that she never saw mobile homes displayed on lot during portion of pertinent time period, aerial photographs of area suggesting that mobile homes were not displayed on lots during pertinent period, and stipulated language to such effect incorporated in state court order issued in action involving predecessor and arising under related ordinance).

### **5. Chapter 43.002 Of The Texas Local Government Code**

In the 1999 legislative session, the Texas Legislature adopted Senate Bill 89 which changed the landscape under which municipalities may regulate territory which they annex. Section 43.002 of the Texas Local Government Code precludes a municipality, after annexing territory, from prohibiting a person from:

(1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time; or

(2) beginning to use land in the area in the manner that was planned for the land before the 90th day before the effective date of the annexation if:

(A) one or more licenses, certificates, permits, approvals or other forms of authorization by a governmental entity were required by law for the planned use ; and

(B) a completed application for the initial authorization was filed with the governmental entity before the date the annexation proceedings were instituted.

As in the example previously given, assume that there is a previously existing mobile home park that could, and quite possibly in the past has, accommodated 100 mobile homes. At the time the property is annexed into the city only 50 mobile homes are contained in the mobile home park. The question presented is whether the property owner has the right to use the property to accommodate 100 mobile homes since the property was being used as a mobile home park at the time the property was annexed. The city will argue that since the park was only housing 50 mobile homes at the time the property was annexed, the city may not prevent the property owner from housing 50 units but can prevent the property owner from housing 100 units. Since Senate Bill 89 was enacted to curb the excesses of municipalities in their annexation practices, however, it is my belief that a court would choose to interpret any section of the bill liberally and in favor of property owners. Therefore, in annexing specific property, municipalities must

now be careful that they do not annex any specific headaches, including mobile home parks.