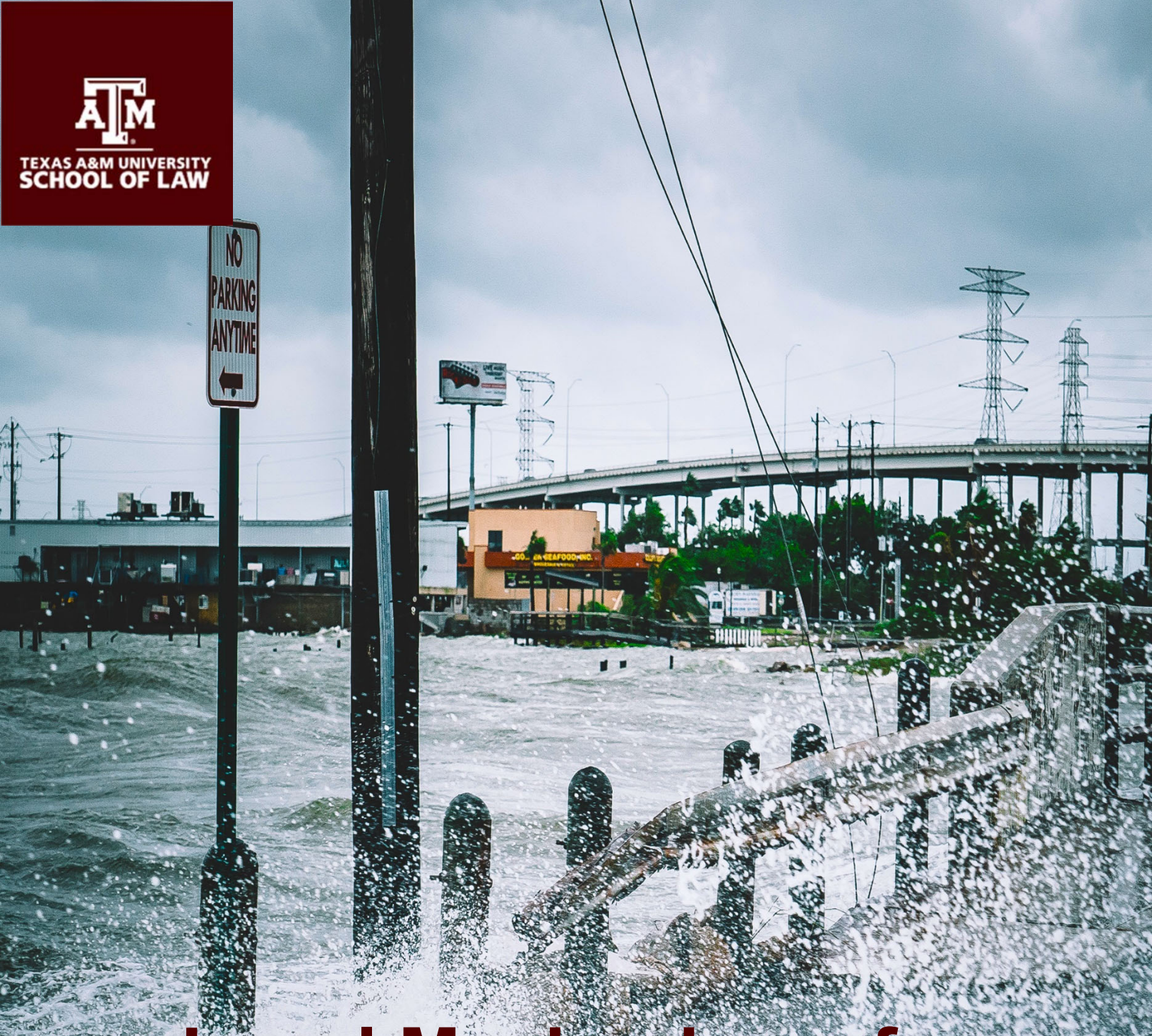


TEXAS A&M UNIVERSITY
SCHOOL OF LAW

# Legal Mechanisms for Mitigating Flood Impacts in Texas Coastal Communities

May 20, 2019

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Erin Milliken
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Published in the United States of America in 2019 by Texas A&M University School of Law Program in Natural Resources Systems


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# Table of Contents

This is a report for educational purposes only. To learn the details about any given topic, read the current statutes, regulations, ordinances, and policy notices, which can change frequently. These materials cannot substitute for an experienced lawyer who is up-to-date on the latest changes in local, state, and federal laws and regulations.

## Definitions

**Benefitted property:** an improved lot or tract to which drainage service is made available under the Municipal Drainage Utility Act.[1]

**City**: a municipal corporation headed by a mayor and governed by a city council.[2]

**Community**: a neighborhood, vicinity, or locality.[3]

**Drainage:** means bridges, catch basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, junction boxes both with and without inlets, pipes, pumps, sloughs, streams, treatment works and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.[4]

**Drainage system:** means the drainage owned or controlled in whole or in part by the municipality and dedicated to the service of benefitted property, including provisions for additions to the system.[5]

**Improved lot or tract:** means a lot or tract that has a structure or other improvement on it that causes an impervious coverage of the soil under the structure or improvement.[6]

**Municipality**: defined by the Texas Local Government Code as a general-law municipality, home-rule municipality, or special-law municipality.[7]

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[1] Tex. Loc. Gov't Code Ann. § 552.044(1)(A) (Westlaw through 2017 Reg. Sess.).

[2] Black's Law Dictionary, *City* (2014).

[3] Black's Law Dictionary, *Community* (2014).

[4] § 552.044(3).

[5] § 552.044(5).

[6] § 552.044(10).

[7] § 1.005.

**General law municipality**: a municipality designated by Chapter 5 of the Texas Local Government Code as a Type A general-law municipality, Type B general-law municipality, or Type C general-law municipality.[8]

**Home rule municipality**: a municipality designated by Chapter 5 of the Texas Local Government Code as a home-rule municipality.[9]

**Special law municipality**: a municipality designated by Chapter 5 of the Texas Local Government Code as a special-law municipality.[10]

**Texas coastal community**: a neighborhood, vicinity, or locality located along the Texas coast.

**Town**: a center of population that is larger and more fully developed than a village, but that, traditionally, is not incorporated as a city.[11]

**User:** means the person or entity who owns or occupies a Benefitted Property.[12]

[8] § 1.005.

[9] *Id.*

[10] § 1.005.

[11] Black's Law Dictionary, *Town* (2014).

[12] § 552.044(9).

## I. Executive Summary

Flooding is a major source of concern for Texas' coastal communities. It affects the quality of infrastructure, the lives of citizens, and the ecological systems upon which coastal communities in Texas rely. To plan for and mitigate the impacts of flooding, Texas coastal communities may implement land use tools such as zoning, drainage utility systems, eminent domain, exactions, and easements. Additionally, these communities can benefit from understanding how flooding affects water quality and the tools available to restore water bodies to healthy water quality levels. Finally, implementing additional programs for education and ecotourism will help citizens develop knowledge of the impacts of flooding and ways to plan and mitigate for coastal flooding.

Land use tools can help communities plan for and mitigate flooding. *Section III* addresses zoning, a land use tool that most municipalities already utilize to organize development. Zoning can help mitigate flooding, drainage, and water quality issues, which, Texas coastal communities continually battle. *Section IV* discusses municipal drainage utility systems, which are a mechanism available to municipalities to generate dedicated funds that can help offset costs associated with providing stormwater management. *Section V* addresses land use and revenue-building tools such as easements, eminent domain, and exactions, which are vital for maintaining existing and new developments in Texas coastal communities. Additionally, *Section VI* addresses conservation easements, which are a flexible tool that can enhance community resilience through increasing purchase power, establishing protected legal rights, and minimizing hazardous flood impacts.

Maintaining good water quality is important for sustaining the diverse ecosystems located within and around Texas coastal communities. Water quality is regulated at the federal level through the Clean Water Act. As discussed in Section VII, the state of Texas is authorized to implement and enforce these regulations by implementing point source and nonpoint source pollutants programs, issuing permits, implementing stormwater discharge programs, collecting water quality data, and setting water quality standards. The state of Texas also assists local communities with implementing restorative programs, such as Watershed Protection Programs, to help local stakeholders restore impaired water bodies.

*Section VIII* addresses ecotourism and how these distinct economic initiatives can help highlight the importance of ecosystem services to local communities. *Section VIX* discusses the role of education in improving awareness within the community

and among visitors, and how making conscious decisions can allow coastal communities to protect their ecosystem and protect against flooding.

## II. Flooding in Texas' Coastal Communities

Weathering storms is not new for Texas coastal communities; eight of the thirty most significant hurricanes in the United States have occurred in Texas.[13] Hurricane Harvey was the most recent of these impactful storms. Harvey hit the Texas coast on August 25, 2017, just four miles east of Rockport, Texas.[14] The Gulf of Mexico's warm water fueled Harvey as the storm advanced toward the Texas coast, making Harvey substantially stronger by the time it made landfall.[15] Harvey reached sustained wind speeds of 130 miles per hour and spawned six-foot storm surges, while wind gusts reached as high as 145 miles per hour near port Aransas.[16]

Harvey caused severe damage to communities throughout much of the Texas coast. Governor Abbott declared a state of emergency in sixty counties, including nearly every coastal county in Texas.[17] Harvey was the longest-lasting tropical storm to make landfall in Texas history, and displaced 780,000 people, flooded 203,000 structures, and destroyed 12,700 buildings across the state.[18]

The cities of Rockport and Fulton experienced some of the most direct damage as a result of the hurricane, with more than a third of Rockport's homes and businesses decimated.[19] Rockport sustained more than $500 million in damages, nearly all due to wind and storm surge.[20] Additionally, Harvey severely damaged ecosystems along the coast. Texas parks and wildlife reported over 50% mortality rates among oysters in Galveston's East and West bays.[21] As a result, nearly every coastal

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[13] Rebuild Texas, *Eye of the Storm: Report of the Governor's Commission to Rebuild* 25(2018), https://gov.texas.gov/uploads/files/press/RebuildTexasHurricaneHarveyEyeOfTheStorm_12132018.pdf (last visited April 5, 2019).

[14] *Id.* at 14.

[15] *Id*. at 14.

[16] *Id.* at 14.

[17] *Id.* at 3.

[18] *Id.* at 18.

[19] *Id.* at 20.

[20] *Id*. at 20.

[21] *Id.* at 25-26.

community was impacted economically; Texas officials estimate $3.8 billion was lost in gross state product in the year after the storm.[22]

In 2014, shortly before Hurricane Harvey, researchers studied 124 of Texas' coastal jurisdictions, including 26 counties and 98 municipalities, to determine whether hazard mitigation planning tools were already in use along Texas' coast.[23] Over 50% of jurisdictions lacked special overlay districts and zones, as well as agricultural or open space zoning.[24] Over 25% of jurisdictions lacked public education for hazard mitigation.[25] Nearly 75% of all jurisdictions did not use fee simple purchases, the acquisition of development rights or easements, or the relocation of existing buildings as hazard mitigation planning strategies.[26] With regard to financial tools, nearly 90% of jurisdictions did not use special tax assessments to generate funds.[27] Over 75% of jurisdictions did not use public-private partnerships or land trusts for mitigation or public education activities.[28]

The above statistics demonstrate the need for coastal communities in Texas to explore legal tools as a means of mitigating the impact of flooding caused by storms and other events. The tools, mentioned above and considered at length throughout this report, are just a select few of many legal and policy tools that Texas coastal communities may use to prepare for severe weather events. As communities rebuild, there is an opportunity to reflect and improve upon the resiliency of these unique communities. This report is intended to serve as a "toolbox" of legal and policy mechanisms that Texas coastal communities can consider and explore as they prepare for and seek opportunities to mitigate damage from future storms.

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[22] *Id.* at 3.

[23] Jamie Hicks Masterson et al., Planning for Community Resilience: A Handbook for Reducing Vulnerability for Disasters, 142 (2014).

[24] Jamie Hicks Masterson et al., Planning for Community Resilience: A Handbook for Reducing Vulnerability for Disasters, 144 (2014).

[25] Jamie Hicks Masterson et al., Planning for Community Resilience: A Handbook for Reducing Vulnerability for Disasters, 150 (2014).

[26] Jamie Hicks Masterson et al., Planning for Community Resilience: A Handbook for Reducing Vulnerability for Disasters, 154 (2014).

[27] Jamie Hicks Masterson et al., Planning for Community Resilience: A Handbook for Reducing Vulnerability for Disasters, 155 (2014).

[28] Jamie Hicks Masterson et al., Planning for Community Resilience: A Handbook for Reducing Vulnerability for Disasters, 156 (2014).

## III. Zoning

As severe weather events become more frequent, Texas coastal communities need to plan development more resiliently. Texas coastal communities have to balance the need to protect people and property from extreme weather events, with encouraging economic growth along the coast. These interests are often at odds. Zoning provides flexibility for communities to determine areas at risk and development patterns that are most in line with the community's vision. This makes zoning a powerful tool because it allows communities to achieve both economic and safety goals.

### A. What is Zoning?

Zoning is a powerful land use tool that allows cities to "group together compatible development."[29] For example, Texas' coastal communities can categorize land as residential, commercial, industrial, or agricultural.[30] Municipalities use zoning to ensure safe and organized growth and to protect property owner's investments.[31] Zoning can also be used to mitigate flood risk and protect property investments.

The State of Texas grants municipalities zoning authority in the Local Government Code, Chapter 211.[32] This allows municipalities to implement zoning regulations to protect "public health safety, morals, or the general welfare." [33] Municipalities can use zoning to regulate (1) building size and height; (2) percentage of lot coverage; (3) population density; (4) Size of yards, courts and open spaces; and (5) location and use of structures.[34] Home rule cities also have the power to regulate the lot size and placement of structures on the lot.[35]

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[29] City of Fort Worth, *Zoning*, http://fortworthtexas.gov/zoning/ (last visited Mar. 25, 2019).

[30] Kenneth T. Kristl, *Assessing the Legal Toolbox for Sea Level Rise Adaptation in Delaware: Options and Challenges for Regulators, Policymakers, Property Owners, and the Public* 30 (2014) https://www.adaptationclearinghouse.org/resources/assessing-the-legal-toolbox-for-sea-level-rise-adaptation-in-delaware-options-and-challenges-for-regulators-policymakers-property-owners-and-the-public.html (last visited April 5, 2019).

[31] City of Fort Worth, *Zoning*, http://fortworthtexas.gov/zoning/ (last visited Mar. 25, 2019).

[32] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.); V.T.C.A., Local Government Code § 211.001.

[33] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.).

[34] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.); V.T.C.A., Local Government Code § 211.003.

[35] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.);

First, municipalities must make a comprehensive plan; this plan serves as a guide for how the city will grow.[36] The comprehensive plan is the city's goal for development.[37] The plan also includes strategies, policies, and projects that will move the city closer to its goal.[38] Once a comprehensive plan is in place, a municipality can begin a notice and comment process to adopt zoning regulation and districts.[39] Once zoning regulations are in place, the municipality can enforce them with criminal and civil penalties, and injunctive action.[40] This gives the regulation teeth, making zoning regulation a powerful tool.

A municipality could implement criminal penalties.[41] The Local Government Code provides that zoning non-compliance is a misdemeanor and city council can determine the fine or jail time.[42] Municipalities can also create civil fines for non-compliance, which, if not paid, allows the municipality to place a lien on the non-compliant property.[43] Municipalities can use zoning to mitigate natural disasters like flooding. They can also assess vulnerabilities and create a comprehensive plan aimed at addressing weaknesses. Zoning can help municipalities inform landowners about expectations and risks associated with the land, and help ensure development occurs in a safe manner.[44] This section discusses the ways municipalities can revise zoning regulations to improve water quality and reduce flood risk.

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https://www.dummies.com/education/law/land-use-regulations-use-height-and-bulk/ (last visited April 5, 2019).

[36] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.).

[37] City of Fort Worth, *Comprehensive Plan*, http://fortworthtexas.gov/comprehensiveplan/ (last visited Mar. 25, 2019).

[38] *Id.*

[39] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.).

[40] *Id.*

[41] 23 Tex. Prac., Municipal Law and Practice § 21.02 (2d ed.); V.T.C.A., Local Government Code § 211.012(c).

[42] *Id.*

[43] *Id.*

[44] *See generally* Jessica Grannis, *Executive Summary, Zoning for Sea-Level Rise: A Model Sea-Level Rise Ordinance and Case Study of Implementation Barriers in Maryland* (2011).

### B. Overlay Zones

Municipalities can incorporate flood risk mitigation measures into their existing zoning or by creating overlay zones. Overlay zones are a flexible alternative to revising existing zones. Overlay zones work with existing zoning ordinances.[45] They allow cities to place additional restrictions to specific areas where there is a higher risk for flooding or impairment to water quality as a result of development in that area.[46] "In order to create an overlay zone, local governments must (1) establish the purposes for creating the district, (2) map the district, and (3) establish the regulations to achieve the purposes for creating the district."[47]

Overlay districts can be an effective way to mitigate natural disasters from wildfires to flooding.[48] Norfolk Virginia is just one example of a municipality using overlay zones to mitigate flood risk. In 2018, Norfolk implemented two overlay zones: the Coastal Resiliency Overlay ("CRO"), and the Upland Resiliency Overlay ("URO").[49] The CRO places more stringent building requirement on areas that have high flood risk that include, for example, increased elevation requirements and requiring developers to use permeable material for any new parking spaces.[50] The URO covers areas where the city wants to encourage development.[51] To promote development in low-risk areas the City of Norfolk uses a Quotient system and

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[45] Kenneth T. Kristl, *Assessing the Legal Toolbox for Sea Level Rise Adaptation in Delaware: Options and Challenges for Regulators, Policymakers, Property Owners, and the Public* 30 (2014) https://www.adaptationclearinghouse.org/resources/assessing-the-legal-toolbox-for-sea-level-rise-adaptation-in-delaware-options-and-challenges-for-regulators-policymakers-property-owners-and-the-public.html (last visited April 5, 2019).

[46] Jessica Grannis , *Adaptation Tool Kit: Sea-Level Rise and Coastal Land Use How Governments Can Use Land-Use Practices to Adapt to Sea-Level Rise* 19 (2011), https://www.georgetownclimate.org/files/report/Adaptation_Tool_Kit_SLR.pdf (last visited April 5, 2019).

[47] *Id.*

[48] For examples of overlay zones to mitigate wildfires see Planning for Hazards: Land Use Solutions for Colorado, Land Use Tool: Overlay Zoning, https://planningforhazards.com/overlay-zoning#dd-contents-728 (last visited Apr. 9, 2019).

[49] Adaptation Clearinghouse, *Building a Better Norfolk: A Zoning Ordinance of the 21st Century*, https://www.adaptationclearinghouse.org/resources/building-a-better-norfolk-a-zoning-ordinance-of-the-21st-century.html (last visited Apr. 9, 2019).

[50] *Id.*

[51] *Id.*

overlay zones together.[52] Developers earn points for developing in the URO zone, which can make the approval process for development simpler and therefore more appealing. [53]

### C. Restrictions That Could Reduce Flood Risk and Improve Water Quality

Regardless of whether a municipality uses overlay zones or revises existing zoning ordinances, municipalities can put additional measures in place to reduce flood risk and improve water quality. For example, municipalities can implement impervious surface cover limits, zero net fill requirements, or any combination of the three.

#### 1. Impervious Cover Requirements

Impervious cover is any surface that cannot absorb rainfall, like roads, parking lots, and rooftops.[54] Impervious cover causes water to run off the surface quickly, and does not have the absorbent qualities of soil or vegetation. As urban development spreads, more and more impervious surfaces cover the land. This increases flood risk because the ground cannot absorb the water, quickening the water's flow downstream, which can cause pooling problems and overwhelm storm infrastructure downstream.[55] Impervious surfaces also increase pollutants that enter water systems. Vegetation and soil serve as a natural filter, removing contaminants like fertilizers and pesticides as water flows.[56]

Many municipalities have implemented impervious cover limits for development using traditional zoning regulations or by using regulation in combination with an

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[52] *Id.*

[53] *Id.*

[54] Delaware NEMO, *Impervious Cover*, *in* GUIDE TO NATURAL RESOURCES-BASED PLANNING (2005) http://nemo.udel.edu/manual/chap2web.pdf (last visited April 5, 2019).

[55] Peter Flinker, *The Need to Reduce Impervious Cover to Prevent Flooding and Protect Water Quality* 5 (Scott Millar ed. 2005 (2010) http://www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/imperv.pdf (last visited April 5, 2019).

[56] Delaware NEMO, *Resources for Writing Ordinances that Protect Natural Resources*, *in* GUIDE TO NATURAL RESOURCES-BASED PLANNING 2-1 (2005) http://nemo.udel.edu/manual/chap2web.pdf (last visited April 5, 2019).

overlay zone.[57] Impervious cover limits are just as the name implies, municipalities setting a percentage of cover that is allowed on parcel size. Implementing individual lot limits is one method cities can use to reduce impervious cover. For example, a municipality could enforce a 40% impervious cover limit on parcels that are two acres or smaller, and a 20% limit on parcels larger than two acres.[58] Allowing more coverage on a smaller lot may seem counter-intuitive, but it is offset by the reduced need for infrastructures like roads and parking lots. When lots are larger the need for impervious infrastructure increases, so allowing a smaller percentage of impervious cover on the parcel offsets this effect. Roads, driveways, and parking lots can account for up to 70% of a cities total impervious cover, so it is beneficial to find ways to reduce the need for this infrastructure.[59] This lot limit is useful in areas that have already been developed because it can be utilized as landowners seek to improve existing building.

As municipalities plan for new development, it may be beneficial to consider limiting impervious surface by zoning for cluster development. Cluster development is well suited for new subdivision development because it sets impervious cover limits for a specific area rather than individual lots. For example, in an area that is zoned for 30% total impervious cover, the developer can then decide how much cover to use on each lot.[60] Often developers chose to take up more space on each lot because it is less expensive to develop the infrastructure when buildings are closer together. Then the high percentage of cover in a small area is offset when the rest of the land is designated as green space in order to meet the limit of 30% impervious cover for the area. This results in "clusters" of development in-between green spaces. Green spaces do not have to be completely undeveloped; cities can allow for recreational spaces like parks and nature areas. While there may be less development of structure because of the impervious cover limit, it often makes the development more appealing because of its proximity to green spaces. While cluster development is not particularly well suited for areas

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[57] Peter Flinker, *The Need to Reduce Impervious Cover to Prevent Flooding and Protect Water Quality* 5 (Scott Millar ed. 2005 15 (2010)) http://www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/imperv.pdf (last visited April 5, 2019).

[58] Delaware NEMO*, Resources for Writing Ordinances that Protect Natural Resources*, *in* GUIDE TO NATURAL RESOURCES-BASED PLANNING 2 (2005) http://nemo.udel.edu/manual/chap2web.pdf (last visited April 5, 2019).

[59] Peter Flinker, *The Need to Reduce Impervious Cover to Prevent Flooding and Protect Water Quality* 5 (Scott Millar ed. 2005 15 (2010)) http://www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/imperv.pdf (last visited April 5, 2019).

[60] *Id.*

with existing development, it is an excellent tool for cities to limit new developments from affecting flooding and water quality.

The Isle of Wight County in Virginia is one example of county using a zoning ordinance to encourage cluster development. The county allows property owners the option of having their property approved for higher density development in exchange for maintaining part of the property as open space.[61] The ordinance language in section 4-3005 of the county's zoning code allows for growth but still promotes the preservation of open space.[62]

### 2. Fill Restrictions

As new development is constructed, fill is brought in to level ground and sometimes even elevate the new development to reduce flood risk to the new structures.[63] Fill is any earthen material, like sand, gravel or dirt.[64] While reducing risk to new structures, fill can reduce the holding capacity of a floodplain, and increase the flood risk to older development. Additionally, unplanned development often results in low-density urban sprawl, inevitably causing unpredictable flooding patterns, as well as increases impervious surfaces as discussed above.[65] All of these factors alone can greatly increase a community's flood risk.[66] By expanding the zero net fill requirement, cities can reduce negative effects of low-density urban sprawl.[67]

There are a few ways municipalities can implement fill restrictions. First, a municipality could require new or substantially improved structures to be certified

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[61] Isle of Wight County, Va. app'x. B, art. IV § 4-3005; for an exsample of ordinance language see https://library.municode.com/va/isle_of_wight_county/codes/code_of_ordinances?nodeId=APXBZO_ARTIVZODIBO_PT3RURERRDI_S4-3005DEBOCLDERURERRDI (last visited April 5, 2019).

[62] *Id.*

[63] Shaun Theriot-Smith, *How Do Houston's Amended Floodplain Regulations Affect You?*, Building Bayou City ( Apr. 10, 2018), http://www.theriotsmith.com/houston-updated-floodplain-regulations/ (last visited April 5, 2019).

[64] FEMA, *Fill*, https://www.fema.gov/fill (last visited March 25, 2019).

[65] Cecilia Turchetti, *Houston at a Crossroads: Land use Post-Harvey*, Geo. Envtl. L. Rev. Online Oct. 17, 2018.

[66] Jim Blackburn & Larry Dunbar, HOUSTON'S HIGH WATER PROBLEMS, 46 Hous. Law. 18, 18 (2018).

[67] Cecilia Turchetti, *Houston at a Crossroads: Land use Post-Harvey*, Geo. Envtl. L. Rev. Online Oct. 17, 2018.

that the fill brought in does not reduce the floodplains storage capacity, sometimes referred to as "no-rise" requirements.[68] Second, municipalities may choose to implement a zero net fill requirement. This means fill is allowed in the floodplain so long as it is offset by removing fill from another location in the floodplain. Both options allow landowners to develop the land but still provides protections for the floodplain.

### 3. Elevation requirement

Municipalities can use overlay zones to impose elevation requirements, often referred to as "freeboard." A common method for cities to determine what an appropriate elevation should be is by first looking at the Base Flood Elevation ("BFE"). The BFE is the elevation that floodwater is anticipated to rise during a 100-year flooding event as illustrated by the Flood Insurance Rate Map ("FIRM").[69] Municipalities can then consider other factors like future development, climate, and cost to determine an appropriate amount of freeboard that should be required in a given area.

There are many benefits to implementing elevation requirements through zoning. First, it is one of the most effective ways to reduce flood damage.[70] For example, a study conducted in Houston after Hurricane Harvey caused massive flooding indicated that 84% of the homes impacted could have been spared if the elevation requirements were in place.[71] Additionally, using zoning to implement elevation requirements rather than building codes offer greater precision. While elevating structures can be costly, by pinpointing where elevation is most needed to prevent property damage, municipalities can avoid burdening property owners where it would be less effective.

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[68] Hous. Tex. Ordinance ch. 19, art. 3, § 19-34 (2018): NRC Brevand NC case study.

[69] Department of City Planning City of New York, *Coastal Climate Resiliency: Retrofitting Buildings for Flood Risk* 11 (2014) [hereinafter Department of City Planning].

[70] Wesley E. Highfield & Samuel D. Brody, *Evaluating the Effectiveness of Local Mitigation Activities in Reducing Flood Losses*, 14 Nat'l Hazard R. 229, 235 (2013); *see generally* Wesley E. Highfield, Samuel D. Brody & Russell Blessing, Measuring the impact of mitigation activities on flood loss reduction at the parcel level: the case of the clear creek watershed on the upper Texas coast, 74 Natural Hazards 687 (2014).

[71] City of Houston, *Houston Public Works: Floodplain Management Data Analysis Chapter 19* 15 (2018).

While elevation requirements are very effective at preventing property loss, they tend not to improve water quality or reduce the severity of flooding events like fill and impervious surface limits.

### D. Additional Benefits Under the Community Rating System

The Community Rating System ("CRS") is a voluntary program and is part of the Federal Emergency Management Agency's ("FEMA") National Flood Insurance Program ("NFIP"). When communities opt into the CRS, the community can receive reductions in flood insurance rates when the community implements flood mitigation standards that exceed the minimum standard required by NFIP.[72] The CRS incentives use traditional zoning or overlay zones to restrict fill in floodplains, impose elevation requirements, and limit imperious cover to manage runoff by providing credits and ultimately reductions in flood insurance rates.[73]

The CRS benefits can also be used as a tool to gain public support. It is not uncommon for municipalities to face pushback when new land use regulations like zoning are introduced. If communities join the CRS, or if they are already participating, highlighting the mitigation and CRS benefits through community outreach initiatives could help to reduce the push back.

### E. Case Study

Newark, Delaware, is approximately nine square miles in size and home to 31,454 people.[74] The area is also a hub for commercial activity because of its proximity to

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[72] FEMA, *National Flood Insurance Program Community Rating System*, https://www.fema.gov/national-flood-insurance-program-community-rating-system (last visited March 25, 2019).

[73] *See generally* FEMA, *National Flood Insurance Program Community Rating System: A Local Official's Guide. to Saving Lives, Preventing Property Damage, and Reducing the Cost of Flood Insurance* (2018) https://www.fema.gov/media-library-data/1535126505943-439b296e7778b037d05f698f65c7891b/2018NFIP_CRS_Brochure_June_2018_508OK.pdf (last visited April 5, 2019).

[74] Newark Delaware, *Facts & Figures* (Source: U.S. Census 2010), https://newarkde.gov/281/Facts-Figures (last visited March 25, 2019).

Port Wilmington.[75] Newark sits in the Christina River watershed[76] where land use is evenly split between urban and suburban development, agricultural, and green space.[77] As the city of Newark and the surrounding area grows, water quality issues have become increasingly evident.[78] As the city grows, so does the number of impervious surfaces. One study found that impervious cover in the watershed increased from 9% in 1975 to 16% in 1995.[79] This is just over the 15% threshold where water quality degradation can occur.[80] The Christian River watershed suffers from excessive nutrients that disturb the "fishable" quality water, elevated zinc levels, and high sediment loads among other pollution problems.[81]

Newark adopted zoning ordinances to limit impervious cover in the early 1990s in an effort to keep the impervious cover from damaging water quality even further.[82] New Castle County and Newark worked collaboratively to create zoning overlay districts. The overlay ordinance creates the Excellent Recharge and Wellhead zones. In the Excellent Recharge Zone, the city requires homeowners to conduct studies to ensure that no development inhibits recharge into the aquifer. The Excellent Recharge Zone protects areas where water infiltration into the ground is essential for an aquifer's healthy recharge.[83] It also restricts many types of waste disposable and petroleum storage.[84]

The Wellhead Zone protects areas around wells where pollutants are likely to reach the wellhead; these zones have similar protections to used for the Excellent

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[75] Peter Flinker, *The Need to Reduce Impervious Cover to Prevent Flooding and Protect Water Quality* 4 (Scott Millar ed. 2005 (2010)) http://www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/imperv.pdf (last visited April 5, 2019).

[76] Newark Delaware, *History of Newark*, https://newarkde.gov/56/History-of-Newark (last visited Mar. 25, 2019).

[77] Peter Flinker, *The Need to Reduce Impervious Cover to Prevent Flooding and Protect Water Quality* 4 (Scott Millar ed. 2005 (2010)) http://www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/imperv.pdf (last visited April 5, 2019).

[78] *Id.*

[79] *Id.* at 5.

[80] *Id.* at 5.

[81] *Id.* at 4.

[82] *Id.* at 5.

[83] Newark Delaware, *Comprehensive Development Plan V* 32 (2016).

[84] *Id.*

Recharge Zone.[85] Additionally, Wellhead Zones have more stringent protections, which prohibit impervious surface within 150 feet of the wellhead and limit impervious cover in the zone to 10% to 50% depending on land use.[86] These impervious cover limits have been an effective and powerful tool to protect recharge areas, floodplains, and aquifers. These zoning ordinances have been so valuable that some scholars have even called for expanding the overlay zones.[87]

## IV. Municipal Drainage Utility System

Every Texan knows the old saying "if you don't like the weather, wait a minute." The climate in Texas is changing with a majority of the state experiencing an increase in temperature between one-half and one degree Fahrenheit over the last century.[88] Rainstorms, hurricanes, tornados, and tropical storms have become more powerful, taxing current municipality infrastructures leading to intense flooding around the state.[89] Currently 114 municipalities have taken steps to mitigate the effects of Texas' weather by creating a municipal drainage utility system ("drainage utility").[90] A drainage utility allows municipalities to generate funds to offset some of the costs associated with providing the infrastructure, facilities, and maintenance of drainage systems associated with protecting municipalities from stormwater flooding .[91]

In the context of a municipal drainage utility system, the terms drainage and stormwater are used interchangeably when referring to water not associated with a municipality's sewer system. Therefore, some municipalities have established a

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[85] *Id.*

[86] *Id.*

[87] Peter Flinker, *The Need to Reduce Impervious Cover to Prevent Flooding and Protect Water Quality* 5 (Scott Millar ed. 2005 (2010)) http://www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/imperv.pdf (last visited April 5, 2019).

[88] *What Climate Change Means for Texas*, EPA, https://www.epa.gov/sites/production/files/2016-09/documents/climate-change-tx.pdf (last visited April 5, 2019).

[89] *Id.*

[90] 2018 State Flood Assessment Report to the Legislature 86th Legislative Session, State Flood Assessment, http://www.texasfloodassessment.com/doc/State-Flood-Assessment-report-86th-Legislation.pdf (last visited April 5, 2019).

[91] Tex. Loc. Gov't Code Ann. §§ 552.042-54 (West).

municipal drainage utility system while other municipalities have established a municipal stormwater utility system.

### A. What is a Municipal Drainage Utility System

A drainage utility is similar to the water, sewer, and other utility services provided to citizens by a municipality. A drainage utility focuses on the management of stormwater drainage within the municipality.

To address drainage issues, the Texas Legislature passed the Municipal Drainage Utility Systems Act ("Act") providing additional authority to local municipalities.[92] The Act permits municipalities, by adopting an ordinance, to "charge a lot or tract of benefitted property for drainage service on any basis other than the value of the property" to fund the development and management of drainage systems[93] (*see Appendix A for examples of ordinances used to create Municipal Drainage Utilities*). A "drainage charge" is a "levy imposed to recover the cost of service, of the municipality, in furnishing drainage for any benefitted property."[94]

### B. Establishing a Municipal Drainage Utility[95]

A municipality must complete the following steps in the creation of a drainage utility:

#### 1. Declaration

The governing body must declare that:

> a. the municipality will establish a schedule of drainage charges against all real property in the proposed service area subject to charges under this subchapter;

[92] Tex. Loc. Gov't Code Ann. § 552.042 (West).

[93] Tex. Loc. Gov't Code Ann. § 552.047(a) (West).

[94] Tex. Loc. Gov't Code Ann. § 552.044(4) (West).

[95] Bennett Sandlin, *Legal Q&A*, Texas Municipal League (June 2006), https://www.tml.org/legal-qna/2006June-BS.pdf (last visited April 5, 2019).

b. the municipality will provide drainage for all real property in the proposed service area on payment of drainage charges, except real property exempted under this subchapter; and

c. the municipality will offer drainage services on nondiscriminatory,

reasonable, and equitable terms.[96]

### 2. Publish Notice of Proposed Ordinance

At least thirty days prior, the governing body must publish in the newspaper a first notice of hearing stating the time and place of a public hearing regarding the adoption of the proposed drainage ordinance.[97] The notice must contain the complete text of the proposed drainage ordinance.[98] The governing body shall publish the notice three times before the public hearing.[99]

### 3. Hearing on Proposed Ordinance

The governing body must hold a public hearing regarding the proposed drainage utility.[100]

### 4. Adopt the Proposed Ordinance

The governing body must adopt the proposed ordinance that states:

a. "The Municipality of _____ hereby adopts Subchapter C, section 552.043 of the Texas Local Government Code (the Municipal Drainage Utility System Act)."[101]

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[96] Tex. Loc. Gov't Code Ann. § 552.045(b)(1-3) (West).

[97] Tex. Loc. Gov't Code Ann.. § 552.045(c) (West).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Bennett Sandlin, *Legal Q&A*, Texas Municipal League (June 2006), https://www.tml.org/legal-qna/2006June-BS.pdf (last visited April 5, 2019).

b. "The drainage system of the Municipality of _____ is hereby declared to be a public utility."[102]

### 5. Draft Proposed Schedule of Charges

After adoption of the ordinance, the municipality should prepare a draft "schedule" of drainage charges to be levied within the service area.[103]

### 6. Publish Notice of Drainage Charges

At least thirty days prior, the governing body must publish in the newspaper a first notice of hearing stating the time and place of a public hearing regarding the adoption of the proposed drainage charges.[104] The notice must contain the complete text of the proposed drainage charges.[105] The governing body shall publish the notice three times before the public hearing.[106]

### 7. Hearing on Drainage Charges

The governing body must hold a public hearing on the proposed drainage charges.[107]

### 8. Prepare an Inventory

An inventory of lots and tracts within the service area must be prepared by the governing body.[108] The governing body must use this inventory when calculating the schedule of charges for drainage services.[109]

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[102] Tex. Loc. Gov't Code Ann. § 552.045(a) (West).

[103] Tex. Loc. Gov't Code Ann. § 552.045(d) (West).

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] Tex. Loc. Gov't Code Ann. § 552.045(d) (West).

[108] Tex. Loc. Gov't Code Ann. § 552.047(b) (West).

[109] *Id.*

### 9. Adopt Drainage Charge Schedule

The Texas Local Government Code does not specify the form of the adopted schedule.[110] A follow-up ordinance regarding the original ordinance is the recommended procedure,[111](*see Appendix B for sample ordinances used to create a Drainage Utility Charge Schedule*).

### 10. Adoption of Additional Rules

The governing body may utilize additional ordinances to adopt and enforce rules it considers necessary for the operation of the drainage utility.[112]

## C. How is a Municipal Drainage Utility Fee Calculated?

The Governing body may establish a fee structure based on individual lots or tracts of property that benefit from drainage services.[113] However, the fee may not be based on the property's value; the basis used must directly relate to drainage and terms of the levy[114] (*see Appendix C for examples of municipalities' drainage fee calculation procedures*).

## D. Where Can Municipal Drainage Utility Fees be spent?

Fees must be spent to offset the costs associated with providing drainage services[115] and if specifically provided by the governing body by ordinance, an amount made to fund future drainage construction.[116] All drainage fees must be segregated and completely identifiable within the municipality's account.[117] However, if the drainage charges are solely for the cost of service, the municipality may transfer the charges in whole or part to the municipality's

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[110] Bennett Sandlin, *Legal Q&A*, Texas Municipal League (June 2006), https://www.tml.org/legal-qna/2006June-BS.pdf (last visited April 5, 2019).

[111] *Id.*

[112] Tex. Loc. Gov't Code Ann. § 552.045(e) (West).

[113] Tex. Loc. Gov't Code Ann. § 552.047(a) (West).

[114] *Id.*

[115] Tex. Loc. Gov't Code Ann. § 552.044(4)(a) (West).

[116] *Id.* at § 552.044(4)(b) (West).

[117] Tex. Loc. Gov't Code Ann. § 552.049 (West).

general fund, except other funds established for future construction, repair, and maintenance of the system.[118]

## V. Easements, Eminent Domain, and Exactions

Any Texan can understand and recognize the importance of the ability to do what one wants with their own property. There is, however, an equally important balance that must be struck and maintained between private and public property interests. All property within a municipality must be developed in a responsible way that does not cause harm to the very people the municipality intends to protect. Specifically of importance is a municipality's ability to engage private citizens in land use decisions and operations, or in some cases, restrict them. Easements, eminent domain, and exactions are land use tools that municipalities may use to mitigate the impacts of flooding and development, and that are especially useful for Texas coastal communities. Municipalities may seek an easement that can positively affect flooding for the entire community through negotiation or eminent domain procedures, or require a developer to pay fees relating to the specific impacts the development might cause in the form of an exaction.

### A. What is an easement and how does it work and help?

#### 1. Easements

An easement is a nonpossessory interest in land, meaning a person who owns an easement can enter a specific portion of another person's property to carry out some specific objective.[119] The nonpossessory character means that the easement holder has the right to use property that he or she does not own or possess. While there are different types of easements that affect property interests, their main purpose is to give a person, who does not own a piece of property, the right to enter (or let something enter) upon that property without giving them any ownership in the land. Easements can affect land or a person. Private easements consist of the easement in gross and the easement appurtenant, which are explained below. Public easements include the easement by dedication, which a municipality can use to construct public works or allow a utility company to lay sewer, gas, or water lines. These are land use tools that a municipality can use to serve particular public

[118] *Id.*

[119] V.T.C.A., Property Code T. 2, App., Title Examination Standard 5.50

purposes, such as providing access to public places or creating avenues for drainage that can help mitigate flooding in certain areas.

### 2. Easement in Gross

The easement in gross is an easement that attaches to an individual or business that owns the easement. An easement in gross, for example, would allow a utility provider to enter upon one's land at no charge to provide their services. This would be in the form of a utility easement, allowing the company to enter upon the land in order to maintain and perform work on the utility. One type of utility easement is a drainage easement, which can facilitate two purposes: allow the flow of storm water, or allow access to drainage infrastructure. Typically, an easement in gross is not transferable or assignable, unless there is specific language in writing in the easement granting document to the contrary.

An example of such language would be:

> *"The terms, conditions and provisions of this contract shall extend to and be binding upon the grantee, his heirs, successors and assigns."*

Without such language, an easement in gross will terminate upon the death of the individual owner or end of the business or entity holding the easement.[120]

### 3. Easement Appurtenant

An easement appurtenant is an easement that attaches to a particular piece of land rather, than a person or business, and is owned by whomever is the landowner of that land. This type of easement creates two different estates, the dominant and servient estate. The easement benefits the dominant estate and burdens the servient estate. Along with the easement itself, it creates a duty on both the dominant and servient estate. The dominant estate is obligated to use the easement in a reasonable way that does not negatively affect the servient estate. The servient estate will then have the duty to use the servient estate in a way that does not unreasonably interfere with the dominant estate's use of the easement. Since the easement attaches to the land, an easement appurtenant will run with the land with or without notice. This means that the easement will remain attached to the land regardless of who subsequently purchases the property, and whether or not they knew about the easement.

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[120] *Id.*

An easement is almost always created in writing due to the Texas Statute of Frauds.[121] This requirement serves as a type of constructive notice to the person whose land is affected prior to the sale or lease of real property because easements in Texas are normally recorded in the public record.[122] This allows any person to search the property records of any property and determine if there is an easement that has been recorded on the land.

An exception to the writing requirement is the easement by estoppel. This type of easement arises from oral expressions or actions of the grantor (the person who is giving the easement) that indicate the existence, creation, or conveyance of such an easement. If the grantee (the person receiving the right) relies on the representations and accepts the grantor's offer, but is then damaged by the transaction, he can legally prevent the grantor from denying the existence of the easement. However, the person seeking the declaration of judgement recognizing the easement will likely have to go through the courts to protect the easement, which can be lengthy and expensive.

#### 4. Dedication of Public Easement

Another useful land use tool is a dedication of a public easement. A dedication is "a means by which an owner of real property appropriates and set apart the property for public use."[123] Since a dedication is a grant or donation, there is no consideration or value required for the municipality to receive the dedication. Like an easement, a dedication may be created expressly or impliedly, so a municipality may keep a property owner from denying that they made an express manifestation showing an intent to dedicate.[124] The legal elements to a dedication are: 1) the capacity to dedicate, 2) a public purpose, and 3) an offer and intent to dedicate.[125] A dedication ordinarily only creates an easement in the land for the public, while allowing the property owner to retain the property itself, so long as he or she does not interfere with the easement.[126] In Texas, home-rule cities have the full power and inherent

[121] TX Prop Code 5.021

[122] TX Prop Code 13.002

[123] Texas Transaction Guide Vol 18, §79.20

[124] Id at §79.20(2)(b)

[125] Id at 79.21(1)

[126] Id at 79.22(1)

authority to require land dedication and local authorities may require dedication of land without compensation under the Texas Constitution.[127] Any regulation requiring public dedication of private land must be both reasonable and substantially related to the health, safety, or general welfare of the people.

### B. What is eminent domain?

Eminent domain, under the Texas constitution, requires just compensation for the taking, damaging, or destroying of private land for public use.[128] In Texas, private property taken under eminent domain must be for public use, meaning ownership, use, and enjoyment of the property by the government or another entity, such as a company building public infrastructure.[129] Public use does not include taking of private property for economic development or enhancement of tax revenue, but, for example, for the creation of a groundwater conservation district or for the laying of a common carrier pipeline.[130]

#### 1. How does eminent domain work?

When an agency or utility company seeks the use of this land, it is called condemnation. Texas uses a Broad Instruction Approach to valuing property, meaning there is minimal guidance on what just compensation is based on.[131] The judge of a court in which a condemnation petition is filed, or to which an eminent domain case is assigned appoints three Special Commissioners to value the land based on the Approach.[132] These Special Commissioners must be disinterested landowners in the county in which the condemnation process was prompted.[133] The Broad Instruction Approach means that the they have considerable discretion as to what factors to apply in determining the value.[134]

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[127] Id at §79.24

[128] TX Const. Art 1 Sec. 17

[129] *Id.*

[130] TX Govt Code 2206.001

[131] TX Prop Code 21.042

[132] TX Prop Code 21.014

[133] Id.

[134] Id.

The condemnation process occurs in two, potentially three steps:

(1) Negotiation between the government or condemning entity and the property owner
(2) Special Commissioners' hearing and award of damages and, if there is disagreement with the award of damages:
(3) An appeal through a civil condemnation suit.

Since Texas places a strong preference on the condemning agency and landowners negotiate outside of the court system, the law requires the agency to make a bona fide offer.[135] To begin a condemnation proceeding, the condemning entity must file a petition in court to condemn the property, stating the property, public use for which the property will be used, the name of the owner of the property, that the agency and property owner were not able to agree on compensation, and that the agency made a bona fide offer.[136]

#### 2. How does eminent domain help?

Eminent domain allows governmental agencies or public utility companies to use land owned by a private person or entity to build public infrastructure or allow for other public use. For example, Texas law provides that a municipality or county may exercise eminent domain "to condemn and acquire land, an easement in land, or a right-of-way if the acquisition is necessary for the construction of a jail, courthouse, hospital, or library, or for another public use authorized by law.[137]

### C. What are exactions and how do they work?

An exaction is land use and revenue building tool that could be helpful to a Texas coastal community. Exactions are conditions required by the government that a land developer must meet to continue the process of creating a development.[138] There are two types of exactions: monetary exactions and non-monetary exactions.[139] Monetary exactions are fee based intended to cover development of infrastructure,

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[135] VTCA Property Code 21.0113

[136] VTCA Property Code 21.012

[137] Tex. Loc. Gov't Code Ann. § 261.001

[138] Bruce W. Bringardner, Exactions, Impact Fees, and Dedications: National and Texas Law After Dolan and Del Monte Dunes, The Urban Lawyer, Vol. 32, No. 3 (Summer 2000), pp. 561, https://www.jstor.org/stable/pdf/27895261.pdf (last visited April 5, 2019).

[139] Id.

while non-monetary exactions are easements or dedications of land. A monetary exaction may be the best course of action for coastal cities because they can include various fees intended to cover the majority or even the entirety of costs of public infrastructure needed as a result of new development. Uniquely, such an exaction is not considered a taking by the government. Non-monetary exactions include dedications of land and easements and the construction of public facilities (*see above section on 'Dedication of Public Easement' for an explanation of how dedications of land and easements function*).

### 1. How does an exaction help?

A monetary exaction would likely work well in a city on the Texas Gulf Coast because it provides a new way for cities to create revenue, especially where a city needs a new source of revenue. An impact fee is a monetary exaction that might work best as it requires a developer to pay expenses related to a city's cost of providing infrastructure on the land being developed.[140]
An impact fee is defined under Texas law as "a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development."[141]

Impact fees can avoid many city government's concerns about placing burdens on taxpayers. Impact fees ensure resources are available to accommodate expected growth in a city. The effect of an impact fee shifts the burden of costs associated with development from taxpayers to developers themselves, taking pressure off a municipality. In this case, an impact fee would go toward a developer's appropriate share of the infrastructure that serves the development in question. An example of an impact fee would be a charge to extend the wastewater line to a development before a developer can hook up the internal line to a municipal wastewater system.[142] Texas law requires the following for adopting impact fees: Appointment of an advisory committee; and, public hearings on land use assumptions, a capital improvement plan, and the impact fee ordinance itself.[143] This is a detailed process,

[140] Id. at 565

[141] Local Govt Code 395.001

[142] Michelle McCoy, Introduction to Zoning, website of A Guide to Urban Planning in Texas Communities, https://txplanningguide-ojs-utexas.tdl.org/txplanningguide/index.php/tpg/article/view/12, pg. 204 (last visited April 5, 2019).

[143] Local Govt Code 395.042

but it is important in ensuring the impact fees enacted by a municipality will successfully fund and secure resources for growth.

## VI. Conservation Easements

Texas coastal communities can use conservation easements ("CEs") as a flexible tool to enhance community resilience through increasing purchase power, establishing protected legal rights, and minimizing hazardous flood impacts. CEs typically restrict development to protect ecosystems, thereby utilizing ecosystem functions as a barrier to flood events, which are inevitable in Texas coastal communities. CEs are measurably less costly than outright fee simple purchases of the entire property. Entities with ownership in a CE have a legal right and responsibility to protect the easement's established purpose.

### A. What is a "conservation easement"?

A conservation easement is a landowner's voluntary agreement to relinquish certain rights on their property to a qualified entity for a specified purpose normally involving environmental conservation.[144] Flood hazard mitigation is a common specified purpose for CEs. Both Texas and the Federal government recognize CEs as a community benefit when the agreement includes certain conditions. As defined by the Texas legislature, a CE is "a nonpossessory interest of a holder in real property that imposes limitations or affirmative obligations designed to" protect or preserve the natural environment.[145] Because the landowner only relinquishes part of their rights to a particular property, they can continue to own, use, and enjoy the property. This limited relinquishment of rights is why the cost of a CE is less than the full property cost.

[144] Texas Land Trust Council, *Conservation Easements* (2009) http://www.gbrtrust.org/documents/easements/ConservationEasements.pdf.

[145] Tx. Nat. Res. Code § 183.001(1).

### B. Federal and State governments have recognized conservation easements as a benefit to local communities

#### 1. Federal Benefits

The Internal Revenue Service ("IRS") considers the transfer of rights in a CE without monetary benefit as a charitable donation if the CE meets the requirements of section 170(h) of the IRS code.[146] Although a CE may be purchased, receiving market value for a CE forfeits the tax benefits implicated with a normal charitable donation. However, receiving no monetary value, or partial market value, for a CE does allow for a partial charitable donation with tax benefits. This recognition and benefit through the IRS Code is an implied recognition by the federal government that CEs are beneficial to communities.

A review of the IRS' requirements for CEs is further proof of their benefit to communities. For example, the CE must exist in perpetuity,[147] highlighting the nature of a continuing, long-term, public benefit rather than a momentary, shortsighted, benefit. Additionally, only a qualified entity can own a CE, such as a 501(c)3 or government body.[148] This ensures the legal rights to protect the CE are in control through a publicly beneficial entity. Lastly, the CE must preserve at least one of the listed purposes within the IRS code; (1) public outdoor recreation or education; (2) natural habitats or ecosystems; (3) open space; or (4) historically important land or structures.[149] The federal government particularly enumerates these purposes for the community's benefit, again reiterating the importance for Texas coastal communities to utilize this tool for their benefit.

#### 2. State Benefits

The Texas legislature also recognizes the benefit of CEs in Chapter 183 Texas Natural Resources Code, which explicitly allows for the property right transfer of a CE.[150] Chapter 183 mirrors the IRS Code 170(h) in which entities can hold a CE, and in the purposes for which a landowner can convey a CE with minor

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[146] 26 U.S.C.A. § 170(h) (Westlaw through 2017).

[147] § 170(h)(2)(c).

[148] 26 U.S.C.A. § 170(h)(3)(West).

[149] 26 U.S.C.A. § 170(h)(4)(West).

[150] Tx. Nat. Res. Code § 183.002(West).

differences.[151] This shows that Texas and the federal government agree, both recognizing the benefits to communities of utilizing CEs as a tool.

Importantly, through Chapter 183, Texas specifically authorizes counties to use their general funds or other financial mechanisms to acquire CEs.[152] In general, a Texas county is somewhat restricted in its power to act when compared to a home rule municipality in Texas. However, when it comes to CEs, the legislature has ensured that counties have similar powers as cities. This empowerment is yet another example of how important CEs are for communities, reiterating the importance for communities to utilize CEs beneficially. For example, communities can explore the option of using exactions to obtain CEs.[153]

### C. Alternatives to conservation easements

#### 1. Purchase the property

Localities have the option of outright purchasing flood prone properties through different funding mechanisms such as the general fund or a bond referendum. The complete purchase of a property (also known as "fee simple" purchase) gives the locality all property rights to the property through a voluntary exchange between the landowner and the locality. The locality will then have the right to utilize the property for any legal purpose, without regard for the original landowner's wishes and regard for any conservation purpose. The locality then has the full responsibility of ownership, including maintenance and liability.

A fee simple purchase increases costs because it increases maintenance, liability, and ownership. An outright purchase costs more than a CE because a CE only conveys a limited number of rights while a fee simple purchase conveys all rights in a property. The increase in rights increases the cost of purchasing those rights. With a CE, the landowner maintains the property within the standards of the CE, but a fee simple purchase requires the locality to maintain the property, further increasing costs. Lastly, the increase in rights also increases liability. With the locality's maintenance responsibility comes more liability because the locality now has the duty to maintain the property free of hazards. A fee simple purchase

[151] Tx. Nat. Res. Code § 183.001(West), *compared with* 26 U.S.C.A. § 170(h)(West).

[152] Tx. Nat. Res. Code § 183.006.

[153] *See also* Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 Ne. L.R. 1043 (2006).

includes the right to exclude others from the property, again increasing liability through a duty to remove or warn others of hazards on the property. This increase in maintenance, liability, and ownership increases the costs of ownership when compared to a CE.

#### 2. Eminent Domain

Localities can also use their eminent domain power when the landowner will not voluntarily sell their property to the locality. Eminent domain creates the same increases in costs as with the outright purchase of a property, but may also result in additional costs because of the potential for litigation. Also, localities can generate animosity when using eminent domain powers because they are forcing landowners to give up their rights. Therefore, localities should use eminent domain powers as a last resort. CEs might be a bridge between a fee simple purchase and eminent domain because the locality gets to enforce additional restrictions on the property at the same time as the landowner retains a portion of their rights and some beneficial use. Thus, CEs might be able to convince an otherwise unwilling seller to give up some rights to the property.

#### 3. Drainage Easements

Drainage easements are another option available to some localities. This is similar to a CE in that it grants the locality property rights for a particular purpose. Typically, drainage easements are much narrower, limiting the locality's remedy options (*see Section V on Easements for more details*).

### D. Details of a Conservation Easement

#### 1. The landowner sells some rights

When a landowner grants a CE to another entity (such as a locality or nonprofit) the landowner retains the rights to the land. The CE only grants those rights necessary to protect the purpose of the CE--the public benefit with conservation priorities. If the purpose is for floodplain management, then the landowner gives up any development rights, but the landowner can continue to use the property for other purposes, such as recreational purposes. This can include the right of the landowner to exclude others from the property. The only exception to the exclusion of others is the CE holder's right to inspect the property on an annual basis. However, the landowner can choose to open the property up to the public for any

purpose that does not inhibit the CE's purpose. This "landowner's choice" creates a menu of options for the landowner when granting a CE. Thus, no two CEs are the same because each property is different and each landowner bargains with the CE holder as to what rights the landowner is relinquishing for the purposes of the CE.[154]

#### 2. Others purchase some rights

Only governmental entities or nonprofits can own the property rights for the purposes specified in the conservation easement.[155] This limitation exists because conservation easements exist for the public benefit, not for any private benefit. Individuals may, and should, benefit from a conservation easement's existence, but when more than one individual will benefit, the community as a whole will benefit from the conservation easement's existence. Thus, only an entity with the public's benefit as its main purpose can own a conservation easement because communities expect those entities to enforce the publicly derived benefit the conservation easement creates.

### E. Typical requirements for CEs

For a conservation easement to receive public funding or a tax break, the conservation easement must be in perpetuity, or have no temporal limitation. Other requirements include the following:

- the conservation easement document, which must include a legally sufficient description of the land;
- a baseline inventory (including photographs) of the property's condition at the time the conservation easement is created;
- a qualified appraisal of the conservation easement;
- a subordination agreement, which subordinates any mortgage and all other liens on the property to the terms of the conservation easement;
- a mineral remoteness report (if ownership of the surface and minerals are severed and the mineral owners do not waive their surface rights);
- if granted as a gift, IRS Form 8283 (for charitable contributions of more than $5,000); and

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[154] *See generally*, Texas Land Trust Council, *Conservation Easements* (2009) http://www.gbrtrust.org/documents/easements/ConservationEasements.pdf (last visited April 5, 2019).

[155] Tx. Nat. Res. Code § 183.001(2)(West).

- if granted as a gift, a contemporaneous, written letter of substantiation from the easement holder documenting receipt of the conservation easement as a charitable gift.[156]

These requirements are the minimum requirements to receive the IRS tax incentive. Localities and nonprofits might have more or less requirements depending on the conservation easement's purpose, and whether the transfer is charitable. However, these requirements are typical of many conservation easements and are a good guideline for what to expect when creating a conservation easement.

### F. Funding Sources for Conservation Easements[157]

#### 1. FEMA

As a Hazard Mitigation Project, localities can use FEMA grants to buy-out flood damaged properties.[158] Although the acquisition is in fee simple, localities can use conservation easements to meet FEMA's requirements when utilizing the grant program.[159] One of the grant requirements is to restrict the property in perpetuity to a floodplain open space.[160] This forces either the locality to place a deed restriction on the property or a conservation easement on the property. The government enforces a deed restriction, whereas the conservation easement holder enforces the conservation easement.

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[156] *See generally*, Texas Land Trust Council, *Conservation Easements* (2009) http://www.gbrtrust.org/documents/easements/ConservationEasements.pdf (last visited April 5, 2019).

[157] Appendix D provides a much longer list of funding sources, some of which may be applicable for conservation easements.

[158] FEMA, Hazard Mitigation Assistance Guidance: Hazard Mitigation Grant Program, Pre-Disaster Mitigation Program, And Flood Mitigation Assistance Program 26 (2015) [hereinafter Hazard Mitigation Assistance Guidance], *available at* http://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Guidance_022715_508.pdf (last visited April 5, 2019).

[159] Rebecca Kihslinger and David Salvesen, *Floodplain Buyouts: How Local Governments can Maximize Community Benefits, Connectivity, and Resilience*, Environmental Law Reporter News Analysis (Jan. 2018).

[160] Hazard Mitigation Assistance Guidance, *supra* Note 129.

A conservation easement is likely to provide more protections than a deed restriction because a CE has two different entities with an obligation to enforce the easement's provisions. In a CE, the landowner and the CE holder are both obligated to enforce the CE's purpose. However, with a deed restriction, only the government has the legal obligation to enforce the deed restriction, now the same entity who owns the land. Therefore, a CE creates a higher likelihood that some entity will protect the mitigation grant's purpose, and thus, is the better option when using funding from FEMA hazard mitigation grants.

Additionally, as explain in Section III on Zoning, FEMA's Community Rating System recognizes some benefits of CEs by lowering the insurance premiums in areas that protect open spaces.

### 2. NRCS – EWP

The Natural Resources Conservation Service ("NRCS"), housed within the United States Department of Agriculture ("USDA"), has an Emergency Watershed Protection ("EWP") Program with a Floodplain Easement Option that funds the purchase of CEs on eligible lands.[161] Using this funding will grant the NRCS, not the locality or a nonprofit, the legal rights of a CE while allowing the private landowner to own the possessory interest. Eligible lands include lands that: (1) have flooded once in the previous year or twice within the previous ten years; (2) contribute to floodplain improvement and management; and (3) a dam breach would negatively impact.[162] The NRCS uses these CE's to "restore, protect, maintain, and enhance the functions of floodplains[,]" which it considers a community benefit.[163] Through the CE, the NRCS receives the surface rights and the right to restore and enhance the property's floodplain functions.[164]

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[161] Natural Resources Conservation Service, *Emergency Watershed Protection Program* https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/ewp/ (last visited Mar. 25, 2019).

[162] *Id.*

[163] Natural Resources Conservation Service, *EWP Floodplain Easement* https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/financial/ewp/?cid=nrcs143_008225 (last visited Mar. 25, 2019).

[164] *Id.*

### 3. NRCS – ACEP

The NRCS has another program that funds CEs, the Agriculture Conservation Easement Program ("ACEP"), created through Congress' Farm Bill. [165] Landowners can use ACEP to fund CEs on wetlands.[166] This is separate from the EWP's floodplain CEs. Here, the NRCS will purchase a CE on converted wetland property that the NRCS can successfully and cost-effectively restore.[167] The NRCS recognizing the community benefits of these wetland CEs to include flooding reduction, water quality improvement, and native habitat improvement for fish and wildlife.[168] The ACEP's purposes and benefits align closely with many goals that Texas coastal communities have articulated—lessening flood impacts, increasing water quality, and increasing eco-tourism.

### 4. Texas Farm and Ranch Lands Conservation Program

The Texas Parks and Wildlife Department administers funds appropriated by Texas for CEs.[169] This program has granted only twenty-two easements since its inception in 2005 because the program receives limited funding from the Texas Legislature. Of the twenty-two easements, ten of them are along the Texas coast.[170] The purpose of these CEs can vary, but include "conserving water quality or quantity[.]"[171] Placing CEs along waterways and in floodplains typically helps to conserve water quality. Thus, when funded appropriately, Texas coastal communities can use the Texas Farm and Ranch Lands Conservation Program to aid in the purchase of CEs in floodplain areas.

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[165] Natural Resources Conservation Service, *Agricultural Conservation Easement Program* https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/ (last visited Mar. 25, 2019).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Texas Parks & Wildlife, *Texas Farm and Ranch Lands Conservation Program* https://tpwd.texas.gov/landwater/land/private/farm-and-ranch/ (last visited Mar. 25, 2019).

[170] Texas Parks & Wildlife, *Texas Farm and Ranch Lands Conservation Program* https://tpwd.texas.gov/landwater/land/private/farm-and-ranch/approved-grant-projects.phtml (last visited Mar. 25, 2019).

[171] Tx. Parks & Wild § 84.002 (West).

### 5. Sales Tax

As articulated earlier, cities and counties can use their general fund to purchase CEs. One revenue stream is the local sales tax. The state sales tax currently is 6.25%, and allows localities to increase the sales tax by 2%.[172] A municipality in Texas can use the revenue collected from the additional 2% sales tax in a manner that would benefit the municipality.[173] Therefore, Texas coastal communities can use their sales tax to purchase CEs because a CE's existence is already dependent on their beneficial qualities to communities.

### 6. Charitable Organizations

Many charitable organizations in Texas and around the country have a mission consistent with preserving natural habitats that include floodplains. Land Trusts are the typical holders of CEs throughout the nation, including here in Texas. The Texas Land Trust Council is a coalition of thirty-plus nonprofits that partner together to be an advocate for conservation of natural resources.[174] The Council has created a regional map of Texas that recognizes Texas coastal communities as its own region, and has created a list of local nonprofits working in the region.[175] Further, the Land Trust Alliance is a national organization with a map of participating land trusts in Texas.[176]

Many land trusts, whether locally oriented, statewide, or nationally active, will work with landowners and localities to create funding campaigns to purchase CEs on particular properties or for a particular purpose. Some recognized land trusts include The Nature Conservancy (TNC), Ducks Unlimited (DU), and the Coastal Conservation Association (CCA). These nonprofits have networks and partners willing to donate funds for credible conservation purposes. For example, CCA

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[172] Texas Comptroller of Public Accounts, *Taxes* https://comptroller.texas.gov/taxes/sales/faq/local.php (last visited Mar. 25, 2019); and Tx Tax § 32 (West).

[173] Tx Tax § 321.506 (West).

[174] Texas Land Trust Council, *About TLTC* http://www.texaslandtrustcouncil.org/index.php/about (last visited Mar. 25, 2019).

[175] Texas Land Trust Council, *Gulf-Coast* http://www.texaslandtrustcouncil.org/index.php/gulf-coast (last visited Mar. 25, 2019).

[176] Land Trust Alliance, *find a land trust* https://www.findalandtrust.org/ (last visited Mar. 25, 2019).

partners with multiple corporations for donations, including large corporations like Columbia, Costa, Karbach Brewing, and Academy Sports and Outdoors. Texas coastal communities should look to nonprofits to help not only in enforcing CEs, but also funding CEs.

### G. Case Studies

San Antonio and Minnesota's use of CEs are examples Texas coastal communities should emulate to perpetually protect themselves from flooding and improve water quality.

#### 1. San Antonio – The Edwards Aquifer Protection Program

In San Antonio, Texas, the City has a program that purchases CEs to protect their main water source—the Edwards Aquifer.[177] Beginning in 2000, the citizens of San Antonio approved a 1/8-of-a-cent addition to the City's sales tax (within the two percent limit referenced earlier). The city capped sales tax collection at $45 million and limited its use to purchasing properties in fee-simple located over the Edwards Aquifer. With this funding, and working within the provided limitations, the City purchased just under 6,500 acres of land that became natural areas within the City's park system.[178]

Five years later, the citizens of San Antonio voted to extend the 1/8-of-a-cent sales tax, doubling the monetary limitation to $90 million, and removed some limitations that existed in the prior funding arrangement. This made it possible to purchase CEs on properties rather than only in fee-simple. Additionally, with this funding round, the City created an expert Scientific Evaluation Team to prioritize which properties had the greatest environmental benefit. This is also when the City started to use nonprofits in their Land Acquisition Team to help communicate with landowners for possibly purchasing CEs on the properties.[179] This increase in flexibility, funding, and expertise created environmental protections on over 90,000 acres of

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[177] City of San Antonio, *Edwards Aquifer Protection Program* https://www.sanantonio.gov/EdwardsAquifer (last visited Mar. 25, 2019).

[178] City of San Antonio, *About the Edwards Aquifer* https://www.sanantonio.gov/EdwardsAquifer/About (last visited Mar. 25, 2019).

[179] *Id.*

land within environmentally sensitive areas over the Edwards Aquifer.[180] This is a substantial change when compared with the 6,500 acres in the prior funding cycle.

Again, in 2010 and 2015 the City refunded the program with similar parameters as the 2005 sales tax, bringing the total amount to $325 million. The 2010 funding cycle brought 51,000 acres into the program and the 2015 cycle has brought 8,300 into the program. The total protected area was *156,081 acres*—bigger than Utah's Zion National Park (146,597) or California's Redwood National Park (112,618).

San Antonio does not dedicate the entirety of the program's funding to acquiring CEs. Some funding goes to linear parks along the San Antonio River and its tributaries, as well as to water quality protection zones. However, San Antonio initiative is a great example of a successful CE program that is tailored to providing specific benefits to a community while saving costs when compared to alternatives such as fee-simple purchases. Another example of alternative in San Antonio is the Vista Ridge Pipeline that will provide more water to their citizens. The pipeline's costs as of 2017 were $927 million.[181] Again, this comparison shows the costs benefits of using CEs to protect vital natural resources such as the Edwards Aquifer water supply.

### 2. Reinvest in Minnesota (RIM) Reserve Program

The State of Minnesota has implemented a program that purchases CEs on agricultural lands for improving water quality within the state.[182] Since 1986, the state has used $200 million in funding to leverage an additional $250 million in funding from federal government programs. They have used this to purchase over 6,000 CEs, covering over 250,000 acres.[183] The state collects the money through many funding mechanisms, and then redistributes it throughout the different

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[180] City of San Antonio, *Protected Properties* https://www.sanantonio.gov/EdwardsAquifer/ProtectedProperties#286117-proposition-1-2005 (last visited Mar. 25, 2019).

[181] Justin Horne, *Construction underway on Vista Ridge Pipeline*, KSAT (3:31 PM Aug. 16, 2017) https://www.ksat.com/news/construction-underway-on-controversial-vista-ridge-pipeline (last visited April 5, 2019).

[182] Minnesota Board of Water & Soil Resources, *Reinvest In Minnesota Reserve* http://www.bwsr.state.mn.us/easements/easements_general.pdf (last visited Mar. 25, 2019).

[183] *Id.*

counties of the state. Each county has a countywide Soil and Water Conservation District that implements the RIM program.

Through RIM, Minnesota has shown how to turn one dollar in taxation into $2.50 in state benefit. Furthermore, Minnesota has improved its water quality through natural ecosystem functions without actually acquiring expensive fee-simple property rights. Instead, they have only paid a fraction of the costs associated with fee-simple purchases. They did not do this through a one-time deal with an artificial time limit. Rather, these CEs are in perpetuity. The benefits of these CEs will last forever. Thus, Minnesota has acquired everlasting property rights in the protection of the state's natural resources at less than a quarter of the costs typically associated with the benefits of land acquisition.

## VII. Water Quality Restoration

### A. What is Water Quality?

Texas coastal communities possess access to unique freshwater and saltwater ecosystems, and both rely on particular levels of water quality. Coastal communities commonly rely on local ecosystems for activities such as commercial and recreational fishing, tourism, swimming, boating, and bird watching. In order to sustain the diverse ecosystems found in coastal communities and ensure that the ecosystems subsist into the future, coastal communities understand that maintaining the water quality of local water bodies is of paramount importance.

Water bodies, such as lakes, rivers, and streams, must have certain water quality levels to sustain plant and animal life. Water quality is a description of the condition of water that includes the chemical, physical, and biological characteristics of the water.[184] Depending on the type of pollutant, any given discharge can affect the water quality of a water body in many different chemical and biological ways. When pollutants enter a water body, the pollutant affects the plant and animal life in the water, and in some cases, the water may become unsafe for human use like drinking and swimming.

[184] NOAA, *Water Quality: Frequently Asked Questions*, https://nmsfloridakeys.blob.core.windows.net/floridakeys-prod/media/archive/scisummaries/wqfaq.pdf (last visited Mar. 26, 2019).

Pollutants that impair water quality come from a wide variety of sources, including domestic, industrial, agricultural, and marine sources. Domestic pollutants include contaminants such as motor oil, trash, pet waste, and fertilizers. Industrial pollutants include substances like contaminated water and industrial byproducts. Agricultural sources include pollutants such as fertilizers, pesticides, hormones, and plant and animal parts, to name a few. Common marine pollutants include oil from marine vessels and bycatch from commercial and recreational fishing boats. Domestic, industrial, and agricultural pollutants can enter a water body through flooding events.

Federal law and state law provide mechanisms for preventing the deterioration of water quality in water bodies, and restorative programs to bring impaired water bodies back to functional levels of health.

### B. How Does the Clean Water Act Help Regulate Water Quality?

Congress enacted the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[185] The enactment of the CWA was Congress' response to a sharp increase in pollution in the United States that impacted the nation's water bodies so dramatically that ecosystems were compromised. A compromised ecosystem eventually compromises a community's ability to use the ecosystem for both economic and recreational purposes.

A prime example of a water body that led to the passage of the CWA is the Cuyahoga River. The Cuyahoga River is famous for catching on fire from the 1930s to the 1960s. The water quality in the river was so poor that it caught on fire more than once from the large quantity of pollutants dumped by the surrounding industry into the river. In 1969, the New York Times published a photo of the burning river, making the Cuyahoga River famous for its notoriously terrible water quality.[186] This photo took the country by storm. In 1972, Congress enacted the Clean Water Act, and the provisions of the Clean Water Act led the long-term revival of the river.[187] Today, there are fish in the river, plants growing along the banks of the

[185] 33 U.S.C.A. § 1251(a) (Westlaw through Pub. L. No. 116-8).

[186] James F. McCarty, *Cuyahoga River's Recovery Since 1969 Fire Documented in Ohio EPA Film on Youtube* (2018) https://www.cleveland.com/metro/2018/11/cuyahoga-rivers-recovery-since-1969-fire-documented-in-new-ohio-epa-film-on-youtube.html (last visited April 5, 2019).

[187] *Id.*

river, and citizens and tourists who walk or run the trails located alongside the river.[188]

The CWA is a federal statutory scheme that regulates pollutants that enter into the waters of the United States by creating a stormwater permitting program, point source pollution controls, and incentives to reduce nonpoint source pollution.[189]

The CWA states, "the discharge of any pollutant by any person shall be unlawful."[190] While this sentence may seem clear and easily understandable on its face, it is subject to an incredible amount of dispute. The CWA has had a tumultuous history, and the future of the Clean Water Act is unclear and unsettled. To understand how this sentence impacts water bodies across the United States, it is important to break down the sentence to understand each separate part. Under federal law, the term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[191] The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[192] Storm water discharges and return flows from irrigated agriculture are exempted from being included within this term.[193]

The word "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." [194]

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[188] *Id.*

[189] 3 U.S.C. §§ 1311, 1342.

[190] § 1311(a); *See also* 40 C.F.R. § 122.1(b).

[191] § 1362(12).

[192] § 1362(14).

[193] § 1362(14).

[194] § 1362(6).

The word "person" means, "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." [195]

The term "navigable waters" means "the waters of the United States, including the territorial seas."[196] The law regarding the meaning of "navigable waters" and "waters of the United States" ("WOTUS") is unsettled.[197] In 2015, the Obama Administration announced the WOTUS Rule, in an attempt to clarify which waters fall under CWA jurisdiction. As of February 2019, the 2015 WOTUS Rule is in effect in 22 states, including Texas. The 2015 WOTUS Rule is temporarily enjoined in 28 states.

On February 28, 2017, President Donald Trump issued an executive order directing U.S. Environmental Protection Agency ("EPA") to rescind the Obama Administration's rule and revise the rule.[198] Pursuant to the Executive Order, on December 11, 2018, the EPA and the U.S. Army Corps of Engineers ("ACE") issued a new proposed WOTUS Rule in the Federal Registrar. Compared to the 2015 WOTUS Rule, this rule narrows the definition of "waters of the United States,"[199] thereby reducing the number and types of waterbodies that are subject to the CWA. The comment period on the proposed new proposed rule closed on April 15, 2019. EPA and ACE are now evaluating the comments and are expected to issue a final rule later this year through the Federal Register.

The outcome of the final WOTUS Rule, and the pending litigation, will impact the final definition of WOTUS. This, in turn, will determine which types of waters in the United States fall under the jurisdiction of the Clean Water Act.

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[195] § 1362(5).

[196] § 1362(7).

[197] *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (Plurality opinion creating multiple tests for the meaning of "navigable waters").

[198] Exec. Order No. 13778, 82 Fed. Reg. 12497 (March 3, 2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-restoring-rule-law-federalism-economic-growth-reviewing-waters-united-states-rule/ (last visited April 5, 2019).

[199] Department of the Army Corps of Engineers, 33 C.F.R. § 328 (2019); Environmental Protection Agency, 40 CFR §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 (2019), https://www.epa.gov/sites/production/files/2019-02/documents/revised_definition_of_waters_of_the_united_states.pdf (last visited April 5, 2019).

## C. How does the Clean Water Act work?

### 1. Cooperative Federalism and the Clean Water Act

Cooperative federalism is a type of "[d]istribution of power between the federal government and the states whereby each recognizes the powers of the other while jointly engaging in certain governmental functions."[200] The federal government may grant states the authority to implement the Clean Water Act. This grant of authority is an example of cooperative federalism.

### 2. Texas Pollutant Discharge Elimination System

The Clear Water Act establishes the National Pollutant Discharge Elimination System ("NPDES"). The NPDES is a permitting program to regulate the discharges of pollutants into the waters of the United States.[201] In 1998, Texas received authority from the federal government to implement NPDES permits at the state level.[202] This is known as the Texas Pollutant Discharge Elimination System ("TPDES") program.

In order to implement the permitting program, Texas first has to understand the water quality standards of the water body in question. The Texas Commission on Environmental Quality ("TCEQ") implements the Surface Water Quality Monitoring Information System ("SWQMIS"). More than 20 organizations report water quality results to SWQMIS.[203] SWQMIS provides data for the Texas Integrated Report of Surface Water Quality, a publication that reports the status of Texas' natural waters every two years.[204]

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[200] Black's Law Dictionary, *Cooperative Federalism* (10th ed. 2014).

[201] 33 U.S.C.A. § 1342 (Westlaw through Pub. L. No. 116-8).

[202] Tex. Water Code Ann. § 26.027 note (1997) (Delegation of NPDES).

[203] Texas Commission on Environmental Quality, Water Quality Program Success https://www.tceq.texas.gov/waterquality/watersuccess (last visited April 5, 2019).

[204] Texas Commission on Environmental Quality, Water Quality Program Success https://www.tceq.texas.gov/waterquality/watersuccess (last visited April 5, 2019).

### 3. Water Quality Standards

The state of Texas sets water quality standards.[205] The water quality standards apply to all surface waters in the state of Texas, including wetlands.[206] These standards address aesthetic parameters, radiological substances, toxic substances, nutrients, temperature, salinity, aquatic life uses and dissolved oxygen, aquatic recreation, and pH.[207] The standards also outline an antidegradation policy that applies to certain actions that could increase the pollution in the state's surface waters.[208]

TCEQ classifies Texas' surface waters into categories, including river basin waters, coastal basin waters, bay waters, and gulf waters.[209] TCEQ also separates surface waters into segments, and classifies those segments according to the river basin in which the segment is located.[210] Specific segment-based criteria may be found in Appendices A-G in the Texas Administrative Code.[211]

Depending on the surface water's use, there are additional site-specific uses that regulate the water to ensure that it is safe for the designated use.[212] Site-specific uses apply to freshwater surface waters and saltwater surface waters at varying levels of recreational use; surface waters for domestic water supply; and surface waters that support aquatic life.[213] The standards apply differently, depending on flow conditions of the surface waters at issue, whether the surface water is a mixing zone, a cooling-water discharge site, or a stormwater discharge site.[214]

### 4. Restoration Programs

If water quality standards are not enough to maintain the water quality of a water body for its designated use, several programs are available that are aimed at

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[205] Tex. Water Code Ann. § 26.023 (Westlaw through 2017 Reg. Sess.).

[206] 30 Tex. Admin. Code § 307.2 (Westlaw through 44 Tex. Reg. No. 638).

[207] § 307.4.

[208] § 307.5.

[209] *Id.*

[210] § 307.10.

[211] *Id.*

[212] § 307.7.

[213] *Id.*

[214] § 307.8.

restoring water quality in surface waters. These include the Total Maximum Daily Load ("TMDL") Program and the Nonpoint Source Program ("NSP").

When pollutant levels in a water body exceed a predetermined, acceptable standard of pollution called a total maximum daily load ("TMDL"), the government will designate the water body as "impaired" under the CWA.[215] When a water body is impaired, the established TMDL serves as a starting point for restoring the water body.

The NPS implements Watershed Protection Plans ("WPPs"). The CWA provides federal funding for states to establish and implement WPPs.[216] WPPs prevent and manage nonpoint source pollution, which local stakeholder groups develop in conjunction with TCEQ.[217] For additional grant and funding options, see Appendix D.

### D. Water Quality Case Studies

#### 1. Oso Bay, Nueces County, Texas

Oso Bay is located in Nueces County, Texas. Low levels of dissolved oxygen ("DO") in Oso Bay impaired the aquatic life in the Bay. As a result, in 2004 TCEQ labeled the entire bay as "impaired" for CWA purposes.

TCEQ worked with local stakeholders in Nueces County to develop a NSP for Oso Bay. The NSP focused on implementing cropland best management practices, repairing and replacing failing septic systems, cleaning up trash, and educating the community.[218] Specifically, the Texas State Soil and Water Conservation Board ("TSSWCB") partnered with the Nueces Soil and Water Conservation District ("NSWCD") to implement 56 water quality management programs on 14,501

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[215] §§ 1311, 1342.

[216] 33 U.S.C. § 1329.

[217] Texas Commission on Environmental Quality, *Watershed Protection Plans for Nonpoint Source Pollution*, https://www.tceq.texas.gov/waterquality/nonpoint-source/mgmt-plan/watershed-pp.html (last visited April 5, 2019).

[218] U.S. Environmental Protection Agency, *Section 319 Nonpoint Source Program Success Story: Adopting Conservation Tillage and Repairing Septic Systems Improves Water Quality in Oso Bay*, https://www.epa.gov/sites/production/files/2015-10/documents/tx_oso-2.pdf (last visited Apr. 9, 2019).

acres.[219] The NSWCB, TSSWCB, and U.S. Department of Agriculture's Natural Resources Conservation Service ("NRCS") provided education and outreach assistance.[220] As a result of the NSP, the community reduced the nutrient load entering the Bay, which resulted in higher levels of DO, ultimately improving conditions for aquatic life.[221] This led TCEQ to remove two segments of the Bay from its "impaired" status in 2010.[222]

### 2. Fodsic Lake, Tarrant County, Texas

Fodsic Lake is a seven-acre man-made lake in the West Fork Tributary in Tarrant County, Texas. In 1995, the Texas Department of State Health Services ("TDSHS") banned the possession of fish from Fodsic Lake because of the high presence of pollutants, such as dieldrin, chlordane, DDE, and PCBs.[223] In 1996, Texas labeled Fodsic Lake as "impaired" under the CWA.[224]

The pollutants at issue were commonly found in pesticides, pollutants, and lubricants in the 1970s and 1980s. Although, by 1988, their use had been prohibited, the pollutants persist in the environment for a long time, and ended up in the tissue of fish, making the fish extremely dangerous for human consumption.

As a result of the impaired status, NSP implemented programs aimed at local pollution and continuous testing of fish tissue.[225] The Fort Worth Environmental Management Department opened an Environmental Collection Center that accepts hazardous household waste year round.[226] The collection center encourages residents to dispose of household waste by taking it to the collection center to ensure the waste does not end up in the soil or water in and around Fodsic Lake.[227]

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[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] U.S. Environmental Protection Agency, *Section 319 Nonpoint Source Program Success Story: Educating Residents and Collecting Hazardous Household Waste Items Reduces Legacy Pollution in Fodsic Lake*, *https://www.epa.gov/sites/production/files/2015-10/documents/tx_fosdic_rev.pdf* (Last visited Apr. 6, 2019).

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

The City of Fort Worth implemented an education program that informed residents about the dangers of household chemical pollutants, which resulted in an overall 21% increase in the use of the City's household hazardous waste facility.[228] As a result of the City of Fort Worth's efforts, the levels of chlordane, dieldrin, and DDE improved in Fodsic Lake to the point that they no longer met dangerous levels, and TCEQ removed the impairment status for these three chemicals in 2008.[229]

## VIII. Ecotourism

The Texas coast provides over three hundred and sixty-seven miles of coastline to both native Texans and tourist alike. During the summer months, there is a large influx of patrons to the Texas coast. These tourists supply the region with revenue to help support local communities. Unfortunately, the Texas coast faces many challenges including hurricanes, habitat destruction, rising sea levels, shoreline erosion, and flooding. Flooding caused by heavy rains and saturated soils play a large role in the destruction of the coast.

Ecosystems can help protect coastal communities from flooding by providing essential ecosystem services. Ecosystem services, such as rich soils for agricultural productivity and abundant fisheries, help protect against degradation. To help mitigate impacts of flooding, coastal communities can work to protect these ecosystems through the support of ecotourism.

### A. What is Ecotourism?

Ecotourism is a means of travel that has a positive impact on a destination's ecology and economy.[230] Ecotourism is defined as "tourism to areas of ecological interest (typically exotic and often threatened natural environments), especially to support conservation efforts and observe wildlife; specifically access to an endangered environment controlled so as to have the least possible adverse effect."[231]

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[228] *Id.*

[229] *Id.*

[230] *What is Ecotourism? (The History & Principles of Responsible Travel),* Green Global Travel, https://greenglobaltravel.com/what-is-ecotourism-10-simple-steps-to-more-sustainable-travel/ (last visited Mar. 26, 2019).

[231] *Id.*

### B. How does Ecotourism help?

Although traveling sustainably and utilizing ecotourism may sound cumbersome, 87% of global travelers want to travel sustainably.[232] Of that percentage, 39% confirm they often manage to do so.[233] 60% of travelers credit their inspiration to travel more sustainably to the natural sights they visited.[234] With such a demand for sustainable travel, communities can use ecotourism to bolster their economy.

Because ecotourism accounts for 6% of the world's gross domestic product, communities can leverage ecotourism to benefit wildlife, the environment, local people, and travelers.[235] Ecotourism can help prevent deforestation, pollution, and protect endemic species habitats. Profits from ecotourism can help combat harmful practices done to the environment.[236] Employing the local labor force can provide an alternative revenue stream to the local community.[237] Travelers will participate in a new experience and develop new relationships between nature and the local people.[238]

Focusing on ecotourism can (1) minimize the negative carbon footprint left on the environment, (2) create a positive impact, and (3) cause individuals to make conscious considerations about low impact actions.[239] By shifting from high-impact to low-impact tours and facilities, critical habitats will experience less degradation and be able to recover from anthropocentric footprints. Switching to facilities with green roofs, energy efficient lighting, or open concepts can lower the carbon footprint.

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[232] NewsDesk, *Stats: 87% of Travelers Want to Travel Sustainably,* Travel Agent Central (Apr. 17, 2018, 11:01 AM).

https://www.travelagentcentral.com/running-your-business/stats-87-travelers-want-to-travel-sustainably (last visited April 5, 2019).

[233] *Id.*

[234] *Id.*

[235] *What is Ecotourism? (The History & Principles of Responsible Travel),* Green Global Travel,

https://greenglobaltravel.com/what-is-ecotourism-10-simple-steps-to-more-sustainable-travel/ (last visited Mar. 26, 2019).

[236] *Id.*.

[237] *Id.*

[238] *Id.*

[239] *Id.*

Ecotourism can be used successfully by "maximizing its environmental and economic benefits while minimizing ecological damage and disruption of local communities."[240] Education is key to ecotourism.[241] The focus is to improve awareness and encourage individuals to be conscious of their impact on the environment.[242] Creating conservation education for local communities and immersive interactions aims to provide environmental and cultural awareness. Opening an individual's eyes to the impact they have on the environment is a means to get them to think twice about their actions. Ecotourism can provide financial benefits to local people through tours, donations, and taxes. These financial benefits can then help fund conservation and alternatives to urbanization, deforestation, unsustainable agriculture, and poaching.

Ecotourism helps boost conservation by self-financing protected areas, protecting wildlife, driving sustainable development, providing long-term income, and providing environmental education.[243]

### C. How does Ecotourism work?

Ecotourism's goal is to develop tourist accommodations, activities, and attractions that benefit local flora and fauna, local people, travel industry stakeholders, and travelers.[244] Ecotourism aims to bring conservationists, local communities, and the travel industry together in an effort for long-term sustainability.[245] Ecotourism also aims to build environmental and cultural awareness, design and operate low-impact ecotours, provide financial benefits for conservation, provide financial benefits for local people, and support human rights.

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[240] *Id.*

[241] Green Global Travel, *What is Ecotourism? (The History & Principles of Responsible Travel),* https://greenglobaltravel.com/what-is-ecotourism-10-simple-steps-to-more-sustainable-travel/ (last visited Mar. 26, 2019).

[242] *Id.*

[243] Jonathan Nash, *Eco-Tourism: Encouraging Conservation or Adding to Exploitation?,* Population Reference Bureau (Apr. 1, 2001), https://www.prb.org/ecotourismencouragingconservationoraddingtoexploitation (last visited April 5, 2019).

[244] Green Global Travel, *What is Ecotourism? (The History & Principles of Responsible Travel),* https://greenglobaltravel.com/what-is-ecotourism-10-simple-steps-to-more-sustainable-travel/ (last visited Mar. 26, 2019).

[245] *Id.*

Constructing ecotourist locations such as kayaking tours, nature trails, and wildlife reserves with staged routes for human crossing attracts patrons and provide revenue to the facilities. The trend toward conservationism has increased the amount of people who travel to these sites and has provided small communities with revenue for their economies.

Promoting and creating such ecotourist locations has become an increasing trend. For example, Texas Parks and Wildlife promotes nature tourism. Texas Parks and Wildlife efforts concentrate on providing a diverse recreational opportunity to both citizens and tourists.[246] Texas' goals of nature-based tourism are to promote habitat conservation, sustainable economic development, and build broad-based public support for wildlife conservation programs.[247] By preserving the environment and showcasing its benefits, ecosystems can be protected and continue to assist in flood mitigation.

### D. Case Study

In 2011, MyNatour ranked Texas as a top ten ecotourism state in the United States.[248] Ecotourism can be found in guided tours, bird watching, bike trials, and conservatoires. For example, the Great Texas Central Coastal Birding Trail is a popular birding site in the Coastal Bend. The area stretches from Kingsville and Corpus Christi to Goliad and through Port Aransas to Bay City.[249] The center focuses on examining the migration patterns of local birds, including the Whooping Crane.[250]

## IX. Education

The National Oceanic and Atmospheric Administration defines coastal communities as "coastal waters and adjacent shore lands strongly influenced by

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[246] Texas Parks & Wildlife Department, *Nature Tourism in the Lone Star State*, https://tpwd.texas.gov/landwater/land/programs/tourism/ (last visited Mar. 26, 2019).

[247] *Id.*

[248] Lindsontheroad, *Top 10 Ecotourism States in the USA,* My NaTour (Feb. 16, 2011 5:41 PM), http://mynatour.org/destination/top-10-ecotourism-states-usa (last visited April 5, 2019).

[249] Texas Parks & Wildlife, *Central Texas Coast- Great Texas Coastal Birding Trail,* https://tpwd.texas.gov/huntwild/wildlife/wildlife-trails/ctc (last visited April 14, 2019).

[250] *Id.*

each other and in proximity to the shorelines of the several coastal states."[251] This definition encompasses eighteen Texas coastal counties.[252] These communities can focus on education as a way to remediate impacts from both anthropocentric and natural causes. Education is a building block to a more sustainable community that is able to withstand and combat the lasting effects of natural disasters. Keeping communities educated about the causes of flooding and the impact individuals have on the environment helps them make more environmentally conscious decisions. Conscious decision-making in turn helps the environment and ecosystem services better combat and withstand flooding.

### A. What does Education in Coastal Communities Look Like?

Education is a way for individuals to connect to their coastal communities. Education can be in the form of brochures, handouts, presentations, and physical lectures. Curriculum can focus on environmental impacts, the causes and effects of flooding, or general awareness. Coastal education and research centers provide individuals with programs and information about their communities and the surrounding ecosystem. These centers can range from strictly informational faculties to wildlife rehabilitation and refuge centers.

### B. How does Education help?

Education is a means to notify communities about the impact individuals have on their environment and how they influence their ecosystem. By educating individuals about the impact they have, the goal is to shift potentially harmful behaviors to beneficial ones.

### C. How does Education work?

Educating communities can help mitigate flood impacts by encouraging the elimination of environmentally negative behaviors. By educating both the local communities and tourist about how their ecological footprint impacts the

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[251] *Coastal Communities Education & Outreach*, Community & Environmental Department Water Resources, https://www.h-gac.com/community/water/cwi/past-workshops/documents/2017-09-26_Coastal%20Communities%20Outreach%20and%20Education.pdf (last visited Mar. 26, 2019).

[252] *Id.*

environment, communities can shift their focus to more sustainably conscious decisions. Each action taken by an individual has an ecological footprint, some of which negatively impact the environment either directly or indirectly.

If each individual were to implement small changes, they could make an impact on the environment. Education can address pet waste disposal, litter and illegal dumping, and sewage systems.[253] Possible small changes include: hand washing dishes and clothing, taking shorter showers, using a reusable water bottle, turning off applications when not in use, buying local products and produce, reducing trash and waste, and purchasing less.

Providing flood related education to the community is increasingly important as a means for public awareness, floodplain management training, and technical assistance. There is a lack of understanding of the risks of flooding. It is important to not only focus on situational awareness and preparedness, but also on weather patterns, flood risks, and the basic concepts of the water cycle.

### D. Case Study

The South Padre Birding and Nature Center is an education center on the Texas coast. Its mission is to educate the public about South Padre Island birds and their environment, along with the Laguna Madre Coastal area.[254] The organization overseeing the center is a non-profit and was created in response to the desires of South Padre residents and visitors.[255] The main emphasis of the center is conservation and environmental awareness.[256] Their attractions include a 3,300-foot boardwalk, five bird blinds, a five-story viewing tower, and a wildlife documentary. [257] The center provides birding opportunities, interpretive tours, and education opportunities to learn about the various species on the island.[258]

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[253] Community & Environmental Department Water Resources, *Coastal Communities Education & Outreach*, https://www.h-gac.com/community/water/cwi/past-workshops/documents/2017-09-26_Coastal%20Communities%20Outreach%20and%20Education.pdf (last visited Mar. 26, 2019).

[254] South Padre Island Birding and Nature Center, https://www.spibirding.com (last visited Apr. 16, 2019).

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

## X. Conclusion

Texas coastal communities have various legal and policy tools that they can implement to mitigate the effects of flooding in their communities. The easiest mechanisms for more immediate action include: zoning restrictions, drainage utilities, and various easements. Other mechanisms such as the exercise of eminent domain, imposition of exactions, use of conservation easements, and focus on water quality, can also assist flood mitigation efforts. Lastly, encouraging and investing in ecotourism and education can help foster a sense of responsibility as a way for citizens and visitors to act independently. By implementing one or multiple of these mechanisms, Texas coastal communities can help alleviate some of the harmful effects of flooding in their community.

# Appendixes

## Appendix A: Municipal Drainage Utility Ordinances

## Appendix B: Drainage Fee Ordinances

## Appendix C: Drainage Fee Calculation Procedures

## Appendix D: Grants for Local Governments

# Appendix A

## Municipal Drainage Utility Ordinance

List of sample ordinances used to establish A Municipal Drainage Utility. The list is arranged in descending order of the city's population.

| | |
|---|---|
| Houston | 2 |
| Austin | 21 |
| McAllen | 31 |
| Deer Park | 40 |
| Kyle | 54 |
| Kingsville | 65 |

**City of Houston, Texas, Ordinance No. 2011- 254**

**AN ORDINANCE ADOPTING ARTICLE XIV TO CHAPTER 47 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, TO CREATE A MUNICIPAL DRAINAGE UTILITY SYSTEM; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING AN EFFECTIVE DATE; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.**

* * * * *

**WHEREAS,** the City Council of the City of Houston, Texas ("the City") received a citizen petition for the amendment of the City Charter pertaining to creation of a dedicated funding source to enhance, improve and renew the City's drainage systems and streets; and,

**WHEREAS,** in accordance with state law and the City Charter, the City Council placed a proposition (Proposition No. 1) on the November 2, 2010, ballot for the electorate of the City of Houston to consider adoption of the proposed charter amendment relating to street and drainage improvements; and

**WHEREAS,** the proposed charter amendment was approved by the voters of the City of Houston, thereby amending the Charter of the City of Houston to add Section 22 to Article IX of the City Charter to create the Dedicated Drainage and Street Renewal Fund and to provide for the collection of drainage charges beginning July 1, 2011; and

**WHEREAS,** this Ordinance has been prepared for consideration by City Council in conformance with Subchapter C of Chapter 552 of the Texas Local Government Code and the City's Home-Rule powers under Article XI, Section 5 of the Texas Constitution to create a City of Houston Municipal Drainage Utility System to accomplish the objectives and directives of Section 22, Article IX of the City Charter with regard to streets and drainage; and

**WHEREAS,** precedent to consideration of this Ordinance, the City Council complied with the requirements of Section 552.045 of the Texas Local Government Code to publish notices, conduct public hearings, and make appropriate findings; and

**WHEREAS,** the City Council previously amended Chapters 36 and 47 of the Code of Ordinances to establish the W.A.T.E.R. Fund to provide financial assistance for qualified elderly residents, persons with disabilities, and certain other residents in the payment of city water and sanitary sewer bills; and

**WHEREAS,** the City Council finds and determines that similar financial assistance will be necessary for qualified individuals in the payment of drainage charges, and that funding should be provided from the proceeds of the drainage charges to provide such

assistance, to be implemented in accordance with the procedures established for the W.A.T.E.R. Fund; and

**WHEREAS,** the City Council determines that adoption of this Ordinance will benefit the health, safety, and welfare of the citizens of the City of Houston and is in the best interest of the City; **NOW, THEREFORE,**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:**

**Section 1.** That the findings contained in the preamble of this Ordinance are determined to be true and correct and are hereby adopted as a part of this Ordinance.

**Section 2.** That Chapter 47 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Article XIV that reads as follows:

**"ARTICLE XIV. MUNICIPAL DRAINAGE UTILITY SYSTEM**

DIVISION 1. CREATION OF THE SYSTEM

**Sec. 47-801. Findings.**

Incident to the creation of a municipal drainage utility system, the city council of the City of Houston finds and determines that:

(1) The city shall establish a schedule of drainage charges against all real property in the city subject to such charges under this article;

(2) The city shall provide drainage for all real property in the city on payment of drainage charges unless the property is exempt from such payment as provided herein;

(3) The city shall offer drainage service on nondiscriminatory, reasonable and equitable terms.

**Sec. 47-802. Definitions.**

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Benefitted property* means a lot or tract to which drainage service is made available under this article and which discharges into a street, creek, river, slough, bayou, culvert, conduit, inlet, or other channel that forms part of the city drainage utility system.

*Billing year* means each twelve-month period that begins on July 1st of one year and ends on June 30th of the ensuing year.

*Cost of service*, as applied to the drainage service for any benefitted property, means but shall not be limited to, the prorated cost of the following:

(1) The acquisition of interests in real property relating to drainage structures, equipment and facilities;

(2) The acquisition, construction, repair, and maintenance of drainage structures, equipment, and facilities;

(3) The acquisition of drainage-related architectural, engineering, legal, and related services, plans and specifications, studies, surveys, estimates of cost and of revenue, and all other expenses necessary or incident to planning, providing, or determining the feasibility and practicality of drainage structures, equipment and facilities;

(4) Providing and operating all drainage-related machinery, equipment, furniture, and facilities;

(5) Start-up costs of drainage facilities; and

(6) Administrative costs including bank fees.

*County* means any of the counties of Fort Bend, Harris, and Montgomery, Texas.

*County-exempt property* means real property owned by a county and administered or used by that county for a public purpose that is primarily supported by general county tax revenue, including, but not limited to, courthouses, emergency management facilities, jails, libraries, offices for county officers, parks, transportation facilities, flood control facilities, and other similar properties. County-exempt property shall not include real property owned and

administered or used by county-wide entities that are largely self-sufficient, are primarily supported by fees and charges or a separate tax, and are not primarily funded by general county tax revenue, including, but not limited to, the Port of Houston Authority, the Harris County Astrodome and Reliant Stadium complex, and other similar properties. For the purposes of this article, real property owned and administered or used for a public purpose by the Harris County Flood Control District, the Harris County Hospital District, and toll road authorities shall be considered county-exempt property.

*Curb and gutter drainage* means drainage primarily removed from a benefitted property by use of street curbs and gutters to channel the water to a system of underground pipes or culverts.

*Department* means the City of Houston department of public works and engineering.

*Director* means the director of the department of public works and engineering or the director's designee.

*Drainage* means streets, curbs, bridges, catch basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works, and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses; drainage shall also mean the water so transported.

*Drainage charge* means the charge imposed by the city herein, including penalties, to recover the city's cost in furnishing drainage for any benefitted property and the cost of funding future drainage system improvements.

*Drainage system* means the drainage owned or controlled in whole or in part by the city and dedicated to the service of benefitted property, including provisions for additions to the system. Drainage system components, including but not limited to streets, sidewalks, other dedicated improvements, and supporting right-of-way shall not be considered residential or nonresidential property as defined herein.

*Impervious surface* means any area that has been compacted or covered such that it does not readily absorb water or does not allow

water to percolate through to undisturbed underlying soil strata. Surface materials considered impervious shall include, but not be limited to, bricks, pavers, concrete, asphalt, compacted oil-dirt, compacted or decomposed shale, oyster shell, gravel, or granite, and other similar materials. Surface features utilizing such materials and considered impervious shall include, but not be limited to, decks, foundations (whether pier and beam or slab), building roofs, parking and driveway areas, sidewalks, compacted or rolled areas, paved recreation areas, swimming pools, and other features or surfaces that are built or laid on the surface of the land and have the effect of increasing, concentrating, or otherwise altering water runoff so that flows are not readily absorbed.

*Initial billing year* means the City of Houston's initial billing year for drainage charges, which begins on July 1, 2011 and ends on June 30, 2012.

*Notification letter* means the letter the city mails to every user, informing the user of the drainage charge the user shall be billed per year, beginning July 1, 2011, and for each year thereafter. The notification letter will also inform the user of the frequency of billing for drainage charges and the amount per bill due the city, based on the number of billing cycles per year. Changes to the drainage charge caused by changes in the square footage of impervious surface or otherwise may prompt a new notification letter.

*Nonresidential property* means any property that is not classified as residential under this article.

*Open ditch drainage* means drainage primarily removed from a benefitted property by use of an open ditch or ditches.

*Parcel* means one or more lots or tracts of land, or portions of lots or tracts.

*Public or private institution of higher education* means a public institution of higher education as defined by Section 61.003 of the Texas Education Code or a private college or university that issues degrees in the state of Texas and is accredited by a recognized accrediting agency as defined by Section 61.003 of the Texas Education Code.

*Public utility* means drainage service that is regularly provided by the city through municipal property dedicated to providing such service to the users of benefitted property within the service area, and that is based on an established schedule of charges, the use of police power to implement the service, and nondiscriminatory, reasonable, and equitable terms as provided under this article.

*Religious organization* means a religious organization exempt from taxation pursuant to the current provisions of Section 11.20 of the Texas Tax Code.

*Residential property* means any property upon which two or fewer single family residential units have or had been constructed or placed, including manufactured homes.

*School district* means any independent school district, as constituted by the laws of this state, located wholly or partly within the service area.

*Service area* for the drainage system, or *drainage service area,* means the corporate limits of the City of Houston, as those corporate limits are altered from time to time in accordance with state law and the charter and ordinances of the city. Land annexed for limited purposes shall become part of the service area upon annexation for full purposes.

*State agency* means an administrative agency of the State of Texas; for the purposes of this article, state agency shall not include counties, special districts, or independent school districts.

*User* means the person or entity who owns or occupies a benefitted property.

*Wholly sufficient and privately owned drainage system* means land owned and operated by a person or entity other than the city's drainage utility system, the drainage of which does not discharge into a street, ditch, culvert, creek, river, slough, or other channel that is a part of the city's drainage system.

**Sec. 47-803. Creation of municipal drainage utility.**

In the interest of public health and safety and a more efficient and economic operation of drainage facilities of the city, a municipal drainage

utility system is created, which shall be a public utility. The public utility is created in accordance with the authority of the city as a home rule city pursuant to Article XI, Section 5 of the Texas Constitution; in accordance with Subchapter C of Chapter 552 of the Texas Local Government Code (the Municipal Drainage Utility Systems Act); and in accordance with Section 22 of Article IX of the City Charter. The provisions of Chapter 552, Subchapter C of the Texas Local Government Code, as amended, which are adopted and incorporated into this article by reference; the city charter; this article; and any other provisions of this code relating to drainage shall govern the operation of the utility. The city shall have full authority to operate such municipal drainage utility system. Drainage service will be offered on nondiscriminatory, reasonable and equitable terms within the service area.

**Sec. 47-804. Dedication of assets to drainage utility system.**

Existing City of Houston drainage facilities, including all real, personal, or mixed property, materials and supplies are incorporated into the drainage utility as permitted by section 552.046 of the Texas Local Government Code, as amended.

**Sec. 47-805. Administration of municipal drainage services.**

The director shall be responsible for the administration of this article including, but not limited to, enacting any procedures or policies necessary for the administration of the drainage system and the drainage charges, developing maintenance and improvement programs, and establishing drainage criteria and standards for operation of the drainage system, in accordance with and subject to the provisions of this article. Calculation of impervious surface shall be adjusted by the director based on utilization of approved storm water management techniques on the benefitted property. Any approved management techniques are to be identified and described in detail by the director and the information made readily available to the public.

**Secs. 47-806–47-820. Reserved.**

DIVISION 2. FUNDING

**Sec. 47-821. Management of utility funds.**

All drainage charges collected by the city beginning July 1, 2011, and such other monies as may be available to the city for the purpose of drainage shall be used exclusively for creation, operation, planning, engineering, inspection, construction, repair, maintenance, improvement, reconstruction, administration and other reasonable and customary expenses associated with the cost of service to provide drainage services within the service area.

The income derived from the operation of municipal drainage services shall be maintained in accordance with Section 552.049 of the Texas Local Government Code and Section 22 of Article IX of the City Charter.

**Sec. 47-822. Drainage charge established; exemptions.**

(a) To recover the city's cost of service to provide drainage to benefitted properties, annual drainage charges calculated as provided herein are hereby imposed on all parcels of real property within the drainage service area for which drainage service is made available under this article, save and except for those properties exempted from the payment of drainage charges as provided herein.

(b) The rate applicable to each square foot of impervious surface of a benefitted property shall be determined on the basis of whether the land use of the benefitted property is classified as residential or non-residential. In addition, the rate applicable to a residential property shall be determined on the basis of whether the drainage system for the property is curb and gutter drainage or open ditch drainage.

(c) All drainage charges shall be calculated by multiplying the appropriate rate per square foot of impervious surface as specified in the Schedule of Rates attached hereto, by the area in square feet of impervious surface on each benefitted property.

(d) The area of impervious surface on each benefitted property shall be determined on the basis of digital map data associated with tax plats and assessment rolls or other similar reliable data as shall be determined by the director.

(e) In the event a residential property is served by curb and gutter drainage on one or more sides and by open ditch drainage on one or more sides, the appropriate rate shall be determined by the street address for the property and the drainage system that corresponds to that side of the property.

(f) The following are exempt from imposition of a drainage charge:

(1) Properties appraised for use as and designated as agricultural use property by the respective county appraisal district where the property is located;

(2) Properties served exclusively by a properly constructed and maintained wholly sufficient and privately owned drainage system;

(3) State agencies;

(4) Any public or private institution of higher education;

(5) Any impervious surface owned by a school district as of 4/06/11 [1];

(6) Any impervious surface owned by a religious organization that is located on property exempt from taxation pursuant to Section 11.20, Tax Code as of 4/06/11 [2];

(7) County-exempt property.

**Sec. 47-823. Review and adjustment of drainage rates.**

The drainage rates established herein shall not be increased by city council for a minimum of ten years from 4/06/11 [3]; provided, however, that such limitations shall not be applicable when a rate increase is necessitated by the enactment of any state law that directly and negatively impacts the collection of drainage charges under the existing rate structure. Save and except for any rate increase prompted by the enactment of state law, approval of any rate increase shall require a super majority vote of 2/3 of the members of city council. The director shall on a regular basis review available data to verify the amount of impervious surface for benefitted property, and will make adjustments where appropriate to the calculations of the square footage of impervious surface for purposes of determining the drainage charge for benefitted property.

**Sec. 47-824. Verification, correction and appeal.**

(a) *Establishing a system for verification and correction.* The director shall establish and implement a system of verification and correction of drainage charges for each property subject to the drainage charges established by this article. Under such system, the amount of surface on a particular property determined to be impervious by the city will be reviewed based on documentation provided to the city by the user. The user requesting such a verification and correction must use either the city's officially-designated internet link (available on the city's website specifically for such

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[1] Editor/City Secretary shall insert the effective date of this Ordinance.

[2] Editor/City Secretary shall insert the effective date of this Ordinance.

[3] Editor/City Secretary shall insert the effective date of this Ordinance.

purpose) or a form provided by the city with the notification letter, and mailed by the user to the address shown in the notification letter within the officially-allotted time frame. As a condition of requesting verification and correction, the user shall grant the city reasonable access to the property for the city to independently verify on-site information.

(b) *Request for verification and correction of the city's initial drainage charge.* A user's request for verification and correction of the city's initial drainage charge imposed on a benefitted property shall be forwarded by the user either electronically or in writing to the city within 60 days from the date of the initial notification letter mailed to the user by the city that initially informed the user of:

(1) The square footage of impervious surface on the benefitted property;

(2) The rate applicable to each square foot of impervious area; and

(3) The calculated drainage charge resulting from the multiplication of the user's square footage of impervious surface by the applicable rate.

The documentation to be provided by the user in support of a request to the city for verification and correction shall include, as a minimum, a drawing or other depiction, with accompanying measurements, supporting the user's claim that the city's calculation of impervious area is in error. To be eligible for verification and correction, any request must at a minimum provide information sufficient to support a correction in the annual drainage charge to the user's favor of at least two percent or $3.00, whichever is greater. Such documentation shall be forwarded to the city either electronically or via the U.S. Postal Service.

Any documentation submitted to the city for purposes of verification and correction shall also include an affidavit in a form approved by the city attorney whereby the user shall sign and verify under penalty of law that any document the user is submitting to the city is true and correct. A special affidavit form shall be mailed by the city to every user along with the letter of notification.

Based on documentation submitted by the user (provided it was received by the city within the allotted time frame) and information available to the city in its files and databases, the city may increase or decrease the figure for the amount of impervious surface on the property for purposes of assessing the drainage charge, and shall adjust the drainage charge accordingly.

The city shall notify the user of the outcome of the city's verification and correction process, using the same address and the same medium by which the request was tendered (whether in writing via the U.S. Postal Service or electronically), including advising the user of the adjustment, if any, made to the drainage charge.

If any charge paid by the user during the initial billing year and prior to such adjustment exceeds the amount of the charge as adjusted by the city, the cumulative total of such corrections due the user for payments made prior to such adjustment shall be credited to the user's account and shall be applied against the user's future charges due the city.

If any charge paid by the user in the city's initial billing year and prior to such adjustment falls short of the amount of the charge as adjusted by the city, the cumulative total of such corrections due the city for payments made prior to such adjustment shall be debited to the user's account and shall be applied against the user's future charges due the city.

The facts and information a user provides in a request to the city for verification and correction shall not form the basis for any subsequent request for verification and correction.

(c) *Request by user for verification and correction of changed impervious surface.* If the user's amount of impervious surface changes subsequent to the user's initial billing year, and the user notifies the city of such change electronically or in writing and requests the city to verify and correct the drainage charges, the request will be handled as an initial request for verification and correction as provided in section 47-824(b) of this Code. Any adjustment in the drainage charge as a result of such request will become effective the first day of the month following the date of the user's request.

(d) *Request by user for verification and correction of change to drainage charge by the city.* The city may periodically review any properties within the service area, shall revise the city's database to reflect any changes that affect the area of the impervious surface, and shall forward a notification letter to the user advising the user of such change and the resulting change in the drainage charge. Any request for verification and correction of drainage charges resulting from changes to the impervious surface as identified by the city that are added by the city to the city's drainage utility database for any year following the city's initial billing year will be handled as an initial request for verification and correction, as provided in section 47-824(b) of this Code. The allotted time frame for submitting such a request shall be 60 days from the date of the letter of notification mailed to the user.

(e) *Appeals.* In the event a user disagrees with the results of the verification and correction process, the user or the user's designated representative may request an appeal. Participation by a user in the verification and correction process as described herein and filing of a timely request for appeal shall be prerequisites to any appeal.

The director shall designate drainage hearing examiners who will be independent of the operation of the city's drainage system to consider appeals as to whether or not a drainage charge was correctly determined based on the amount of impervious surface on the property. City Council is to review and approve the independent process utilized by the director for this appeal process.

Any request for such an appeal shall be submitted by the user either online through a specifically-designated link on the city's website, or in writing, no later than fifteen days following the date of the city's notification letter advising the user of the outcome of the verification and correction process.

The user, or the user's designated representative, may select a date and time for the appeal from those available dates shown on the city's online calendar, or if the user does not have access to said calendar, the user shall contact the city to schedule an appeal. Based on the outcome of the appeal, the drainage charge shall be adjusted accordingly or remain unchanged, and if appropriate, a credit or debit shall be applied to the user's account. The user shall be notified, using the same address and the same medium by which the appeal was tendered (whether in writing via the U.S. Postal Service or electronically), of the outcome of the appeal.

The decision of the hearing examiner, following such appeal, shall be final.

**Secs. 47-825–47-840. Reserved.**

DIVISION 3. BILLING

**Sec. 47-841. Billing and payment.**

(a) For users billed by the city for other utility charges, such as water and/or sewer service, the city may bill for drainage charges, identified separately, in the same bill. Otherwise the city shall establish new drainage billing accounts.

(b) An initial notification letter advising the user of the imposition of a drainage charge shall be mailed to each user. Such notice, as well as the bill itself, shall state the drainage charge that will be billed to the user and that

failure of a user to pay such charges may result in the discontinuance of city drainage, water and sewer services.

(c) Bills for drainage charges shall reflect the annual charge imposed on a property divided by the user's number of utility billing cycles per year, e.g., if the city is billing a user for drainage on a monthly basis, the user's monthly drainage charge will equal the total annual drainage charge imposed on the property divided by 12 billing cycles per year.

(d) Bills shall be considered as received by the user, whether actually received or not, when deposited by the city in the United States mail, postage prepaid, addressed to the user's last known billing address or when electronically transmitted to the user's last known electronic address.

(e) Payment of bills shall be due when the bill is rendered.

**Sec. 47-842. Delinquent charges and penalties.**

(a) Any drainage charge due hereunder that is not paid when due may subject the user to late charges and reconnection fees authorized under the provisions of this Code relating to water and sewer charges.

(b) Any drainage charge due hereunder that is not paid when due may subject the user to discontinuance of all utility services provided by the city, including drainage, water and sewer services.

(c) Any drainage charge due hereunder that is not paid when due may be recovered in an action at law by the city, or by any other remedies or penalties provided at law or in Subchapters A and C of Chapter 552 of the Texas Local Government Code.

(d) The employees of the city's drainage utility shall have access, at all reasonable times, to any benefitted properties served by the drainage utility for inspection or repair of the drainage system or for the enforcement of the provisions of this article.

**Sec. 47-843. Determination of payment responsibility.**

Under circumstances where there may be more than one user, either multiple tenants and/or multiple owners, the director shall determine the party responsible for payment of city-billed drainage charges as follows:

(1) On parcels where multiple utility accounts may exist and more than one tenant may be held responsible for payment of drainage charges within a single parcel or group of parcels belonging to the same owner, the director may choose the

common owner of the subject property or properties to be the officially-designated user.

(2) Where, within a twelve-month period, a rental property has changed tenants two or more times, the director may choose the owner of the property to be the designated user. Such designation shall have no effect on responsibility for payment of water, sewer or solid waste charges.

(3) Where multiple residential owners are grouped into a single association responsible for the payment of collective water or sewer charges, the director may designate the association as the official user for all impervious surfaces within the association's purview, regardless of parcel boundaries.

**Sec. 47-844. Applicability of the W.A.T.E.R. fund.**

Beginning August 1, 2012, and on such date for each billing year thereafter, to the extent drainage charges collected under this article for the previous billing year exceed $125 million, the amount of any excess up to, but no more than $500,000, shall annually be transferred to the W.A.T.E.R. Fund (as such Fund has been established by Section 36-61 of this code), to be available for use in the payment of drainage bills; provided, however, the cumulative amount in the W.A.T.E.R. Fund for payment of drainage charges on such date for each billing year shall not exceed $500,000. Monies accumulated in the W.A.T.E.R. Fund as provided herein shall be administered in accordance with the applicable provisions of Chapters 36 and 47 of this code, but such funds shall be used exclusively for drainage bills.

**Secs. 47-845–47-860. Reserved.**

DIVISION 4. USE OF FUNDS

**Sec. 47-861. Oversight committee.**

There shall be created an oversight committee of nine members, four members to be appointed by the mayor, including the committee chair, and five members to be appointed by city council, whose members shall advise the city on drainage project priorities and process. The committee will consist of individuals with significant backgrounds in community development, infrastructure assessments, and other appropriate qualifications. Contractors, engineers or firms participating in any city drainage system project will be ineligible to serve on the committee. Within twelve months following the appointment of the committee, the committee shall recommend to city council principles and guidelines by which future drainage projects shall be selected,

and shall present to city council a proposed ten-year plan identifying drainage and street improvements recommended for construction with funding collected by the city pursuant to this article. Following presentment of said plan to city council, and after any amendments thereof by city council have been considered, the council shall approve the plan for implementation. The plan may thereafter be reviewed periodically by the city council and may be amended as appropriate. Following approval of the plan by city council, the plan shall be placed on the City's website or other public location for public viewing.

The oversight committee shall be in place by July 1, 2011.

**Sec. 47-862. No assumed liability.**

Floods from drainage and storm water runoff may occasionally occur that exceed the capacity of the drainage system maintained and financed with the drainage charges. In addition, surface water stagnation and pollution arising from nonpoint source runoff may occasionally occur that exceed the capacity of the drainage system maintained and financed with drainage charges. This article does not imply that properties subject to charges shall always be free from flooding or flood damage, surface water stagnation or nonpoint source pollution or that all flood control and water treatment projects to control the quantity and quality of runoff can be constructed effectively. Nothing whatsoever in this article should be construed as creating or be deemed to create additional duties on the part of the city or to hold the city liable for any damages incurred in a flood or from adverse water quality due to drainage runoff. Nothing in this article shall be deemed to waive the city's immunities under state law or to reduce the need or necessity for flood insurance by property owners within or without the city."

**Section 3.** That, if any provision, section, subsection, sentence, clause, or phrase of this Ordinance, or the application of same to any person or set of circumstances, is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail

by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

**Section 4.** That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor; however, in the event that the Mayor fails to sign this Ordinance within five days after its passage and adoption, it shall take effect in accordance with Article VI, Section 6, Houston City Charter.

**PASSED AND ADOPTED this 6th day of April, 2011.**

**APPROVED this 6th day of April, 2011.**

Mayor of the City of Houston

Pursuant to Article VI, Section 6, Houston City Charter, the effective date of the foregoing Ordinance is _____.

City Secretary

Prepared by Legal Dept.
LWS:asw 03/28/2011 Senior Assistant City Attorney
Requested by Daniel W. Krueger, P.E., Director, Department of Public Works & Engineering
L.D. File No. _____

CAPTION PUBLISHED IN DAILY COURT REVIEW
DATE: APR 12 2011

| AYE | NO | |
|---|---|---|
| ✓ | | **MAYOR PARKER** |
| •••• | •••• | **COUNCIL MEMBERS** |
| ✓ | | STARDIG |
| | ✓ | JOHNSTON |
| ✓ | | CLUTTERBUCK |
| ✓ | | ADAMS |
| | ✓ | SULLIVAN |
| ✓ | | HOANG |
| ✓ | | PENNINGTON |
| ✓ | | GONZALEZ |
| ✓ | | RODRIGUEZ |
| ✓ | | COSTELLO |
| ✓ | | LOVELL |
| ✓ | | NORIEGA |
| | ✓ | BRADFORD |
| ✓ | | JONES |
| CAPTION | ADOPTED | |

MAY 017 Rev. 12/09

# ATTACHMENT

## City of Houston

## Schedule of Proposed Rates

## Annual Rate per Square Foot of Impervious Surface

| **Proposed Rate** (per sq ft of impervious surface per year) | |
|---|---|
| Residential curb & gutter, non residential | 3.20¢ |
| Residential open ditch | 2.60¢ |

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**ORDINANCE NO. 20150625-021**

**AN ORDINANCE AMENDING CITY CODE CHAPTERS 15-2 AND 15-9 RELATING TO THE DRAINAGE UTILITY.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

**PART 1.** City Code Section 15-2-1 (*Definitions*) is amended to read:

**§ 15-2-1 DEFINITIONS.**

(A) Except as provided by Subsection (B), words and phrases in this chapter have the same meaning they have in Chapter 552 [~~402~~] (*Municipal Utilities*), Subchapter C (*Municipal Drainage Utility Systems Act*), of the Texas Local Government Code.

(B) In this chapter:

(1) ADJUSTMENT FACTOR means a number established by ordinance to be used in the drainage charge calculation to account for the percent of impervious cover on a benefitted property.

(2) DIRECTOR means the director of the Watershed Protection [~~and Development Review~~] Department.

(3) BASE RATE means an annual dollar amount per square foot of impervious cover established by ordinance to be used in the drainage charge calculation before application of the adjustment factor.

(4) IMPERVIOUS COVER means the total area, in square feet, of any surface that prevents the infiltration of water into the ground, such as roads, parking areas, concrete, and buildings.

(5) UTILITY CUSTOMER means the person or entity receiving the benefit of, or responsible for payment for, City utility service, such as drainage, consistent with Chapter 15-9 (*Utility Service Regulations*).

[~~(2) DWELLING UNIT means a residential unit providing independent living facilities.~~

~~(3) EQUIVALENT RESIDENTIAL UNIT or ERU means 1,763 square feet of impervious cover.~~

~~(4) NON-RESIDENTIAL USER means all or a portion of a benefitted property that is not a dwelling unit.~~

~~(5) RESIDENTIAL USER means all or a portion of a benefitted property that is a single dwelling unit.~~

~~(6) USER means the person or entity who owns or occupies a benefitted property.~~

[~~(7) VERTICAL CONSTRUCTION means a structure with seven or more stories of residential development.~~]

**PART 2.** City Code Section 15-2-2 (*Findings; Adoption of State Law*) is amended to read:

**§ 15-2-2 FINDINGS; ADOPTION OF STATE LAW.**

(A) The Council finds that notice has been given, and hearings held as required by Section 552.045(c) [~~402.045(c)~~] (*Adoption of System; Rules*) of the Texas Local Government Code.

(B) The Council makes the findings required by Section 552.045(b) [~~402.045(b)~~] (*Adoption of System; Rules*) of the Texas Local Government Code.

(C) Chapter 552 [~~402~~] (*Municipal Utilities*), Subchapter C (*Municipal Drainage Utility Systems*), of the Texas Local Government Code is adopted, and this chapter shall be administered in accordance with its provisions.

(D) The drainage of the City is declared to be a public utility. Existing facilities are incorporated in the drainage utility as permitted by Section 552.046 [~~402.046~~] (*Incorporation of Existing Facilities*) of the Texas Local Government Code.

[~~(E) The drainage utility shall be known as the Watershed Protection and Development Review Department.~~]

**PART 3.** City Code Section 15-2-4 (*Drainage Charge Established*) is amended to read:

**§ 15-2-4 DRAINAGE CHARGE ESTABLISHED.**

(A) A drainage charge is established.

(B) Subject to Section 15-2-8 (*Billing*), the City shall bill the[~~The~~]drainage charge to [~~paid by the~~] every utility customer for [~~user of~~] each benefitted property in the service area.

(C) The drainage charge is based on:

(1) [~~the developed use of the benefitted property;~~

~~(2) the amount that development increases runoff and associated pollutants; and~~

~~(3)~~] the amount of impervious cover on the benefitted property, and

(2) the percentage of impervious cover on the benefitted property.

**PART 4.** City Code Section 15-2-5 (*Categories of Developed Use*) is deleted in its entirety; a new Section 15-2-5 is added to read:

## § 15-2-5 IMPERVIOUS COVER CALCULATION.

(A) Impervious cover shall be calculated in accordance with the Environmental Criteria Manual and City Code Section 25-8-63 (*Impervious Cover Calculations*). For the purpose of impervious cover calculation for drainage utility purposes, impervious cover shall exclude gravel railroad track ballasts.

(B) The percentage of impervious cover on a benefitted property shall be calculated using the total area of the benefitted property as the denominator and the total impervious cover as the numerator, then converting the fraction to a percentage.

(C) The percentage of impervious cover on a benefitted property may be calculated on a composite basis with another benefitted property if:

(1) the properties together constitute a condominium regime; or

(2) the properties were legally developed together as one site as evidenced by a unified development agreement, city site plan, or other acceptable documentation.

**PART 5.** City Code Section 15-2-6 (*Findings Related to Calculation of the Drainage Charge)* is amended to read:

## § 15-2-6 FINDINGS RELATED TO CALCULATION OF THE DRAINAGE CHARGE.

(A) The Council makes the findings listed in this Section. [~~finds that:~~]

(B) [~~(1) impervious~~] Impervious cover increases storm-water runoff and associated pollutants and is directly related to drainage. [~~; and~~]

(C)[~~(2)~~]The total square feet of impervious cover and the percentage of impervious cover on a benefitted property affect both storm-water runoff and associated pollutants from a benefitted property.

(D) It [~~it~~] is non-discriminatory, reasonable, and equitable to assess the drainage charge for [~~to~~] each benefitted property [~~non-residential user~~] based on the amount and percentage of impervious cover.

[~~(B)The Council finds that:~~

~~(1)the drainage attributable to a residential user is relatively uniform;~~

~~(2)it is equitable to assess the drainage charge to each residential user assuming impervious cover of 1,763 square feet per residence, or one ERU; and~~

~~(3)it is equitable to assess a reduced drainage charge to residential users in vertical construction.~~]

**PART 6.** City Code Section 15-2- 7 (*Monthly Drainage Charge for Residential Properties*) is amended to read:

**§ 15-2-7 MONTHLY DRAINAGE CHARGE [~~FOR RESIDENTIAL PROPERTIES~~].**

(A) The monthly drainage charge for each benefitted property shall be calculated by applying the base rate to the total impervious cover on the benefitted property and applying an adjustment factor to account for the percentage of impervious cover on the benefitted property.

(B) The formula for computing the monthly drainage charge is:

$$MDC = BR \times IC \times AF \div 12$$

MDC = monthly drainage charge
BR = base rate
IC = square feet of impervious cover on benefitted property
AF = adjustment factor

(C) After computing the monthly drainage charge as described in subsections (A) and (B), the monthly drainage charge for single family residential properties may be modified by limiting any increase in the charge to be assessed October 1, 2015 – October 1, 2016 as compared to the charge assessed October 1, 2014 – October 1, 2015 by a percentage, if established by separate ordinance.

~~[(A) The monthly residential drainage charge per ERU shall be set by ordinance and shall be known as the residential ERU charge.~~]

~~[(B)Each month residential user shall pay to the City an amount equal to one residential ERU charge.~~

~~(C)Each month each residential user in vertical construction shall pay to the City an amount equal to one half of one residential ERU charge.~~]

**PART 7.** City Code Sections 15-2-8 (*Monthly Drainage Charge for Non Residential Properties*), 15-2-9 (*Utility Meters*), and 15-2-10 (*Billing*) are deleted in their entirety; a new Section 15-2-8 is added to read:

**§ 15-2-8 BILLING.**

(A) The drainage charge shall be shown as a separate listing on the monthly utility bill from the City. Bills become due in accordance with Chapter 15-9 (*Utility Service Regulations*).

(B) If no utility meter serves the benefitted property, the City may establish a non-metered utility account using the utility billing system and shall bill the drainage charge to the utility customer for the non-metered utility account.

(C) If more than one utility customer is associated with a benefitted property, the City shall bill the drainage charge to the owner of the benefitted property unless:

(1) the benefitted property is a single family, duplex, triplex, or fourplex residence, in which case the City shall divide the drainage charge equally among the utility customers and bill the utility customers accordingly; or

(2) the owner of the benefitted property cannot reasonably be determined or located, in which case the City shall determine an equitable method to allocate the drainage charges among the utility customers based upon information available and bill the utility customers accordingly.

**PART 8.** City Code Section 15-2-11 (*Drainage Utility Fund*) is amended to read:

**§ 15-2-9 [~~11~~] DRAINAGE UTILITY FUND.**

(A) A drainage utility fund is created.

(B) The drainage utility fund shall be administered in accordance with Section 552.049 [~~402.049~~] (*Segregation of Income*) of the Texas Local Government Code.

**PART 9.** City Code Section 15-2-12 (*Annual Report*) is amended to read:

**§ 15-2-10 [~~12~~] ANNUAL REPORT.**

The director shall provide an annual report of the drainage utility [~~Watershed Protection and Development Review Department~~] revenues, expenses, and programs to the city council. The annual report shall include findings on the impact of green infrastructure on drainage and recommended strategies that could allow utility customers to reduce the drainage charge by reducing their property's impact on drainage. The recommended strategies shall address the potential for credits or discounts for innovative stormwater

controls that exceed land development requirements and/or detention and water quality treatment minimum requirements.

**PART 10.** City Code Section 15-8-13 (*Administration; Rules*) is renumbered as City Code Section 15-8-11.

**PART 11.** City Code Section 15-8-14 (*Adjustments)* is amended to read:

**§ 15-2-12 [~~14~~] BILLING ADJUSTMENTS.**

(A) A utility customer may request administrative review by the director of the customer's drainage charge. Subject to Subsection (B), the director shall adjust a utility customer's account and issue a corrected bill if the director determines that the utility customer was over-billed or under-billed for drainage utility service based upon:

(1) an error in calculating the amount or percentage of impervious cover on the benefitted property;

(2) an error in calculating the area of the benefitted property;

(3) an error in calculating the drainage charge; or

(4) an error in assessing the drainage charge.

(B) Billing adjustments under this Section are subject to the time limitations in City Code Section 15-9-140 (B) (*Billing Adjustments*).

(C) The administrative review under this Section shall comply with City Code Section 15-9-191 (*Administrative Review*).

(D) After the administrative review is complete, a utility customer may request an administrative hearing as outlined in City Code Chapter 15-9, Article 12 (*Administrative Review and Hearing*).

~~[(A) A user may apply to the director for an adjustment in the user's drainage charge if:~~

~~(1)the user believes that the drainage charge schedule as applied to the user's benefitted property does not fairly reflect the cost of service to the user's benefitted property;~~

~~(2)the user disputes the category of developed use or another factor used in calculating the drainage charge for the user's benefitted property; or~~

~~(3)the user's drainage charge has been assessed in error.~~

~~(B)The director may adjust the drainage charge of a user who applies for an adjustment under Subsection (A).~~

~~(C)A user who disagrees with a determination of the director under this section may apply for a hearing. The director shall assign a hearing officer to consider the user's request for an adjustment. The user requesting the hearing shall have the burden of~~

~~proof. On completion of the hearing, the hearing officer shall recommend a disposition of the matter to the director who may revise or reinstate the original determination.~~

~~(D)After a hearing, a user may appeal the director's decision to the city council. An appeal must be filed in writing with the city clerk no later than the 15th day after the effective date of the director's decision.~~

~~(E)If the city council fails to take action on the appeal by the 45th day after the day the appeal is filed with the city clerk, the director's decision is final.~~

~~(F)A user entitled to an adjustment under this section must apply for the adjustment.~~

~~(G)A user may not receive a refund resulting from an adjustment under this section except for a drainage charge paid during the two years immediately preceding the date the user applied for the adjustment. This subsection does not apply to an adjustment applied for on or before May 22, 2000.~~]

**PART 12.** City Code Section 15-2-15 (*Exemptions*) is amended to read:

**§ 15-2-13 [~~15~~] EXEMPTIONS.**

(A) A benefitted property described in [~~In addition to property exempt under~~] Section 552.053(c) [~~402.053(c)~~] (*Exemptions*) of the Texas Local Government Code [~~, a property~~] is exempt from the drainage charge established by this chapter.

(B) A benefitted property is exempt from the drainage charge established by this chapter if[~~:~~

~~(1)~~] the property is owned and occupied by:

(1) [~~(a)~~] the State of Texas;

(2) [~~(b)~~] a county;

(3) the City, if the property is publicly maintained right-of-way;

(4) [~~(c)~~] an independent school district; or

(5) [~~(d)~~] a public or private institution of higher education.[~~; or~~]

(C) [~~(2)~~]A benefitted property is exempt from the drainage charge established by this chapter if the property is owned and occupied by an organization that is exempt from taxation under Section 11.20 (*Religious Organizations*) of the Texas Tax Code, and the organization submits to the director:

(1) [~~(a)~~] a request for an exemption from the drainage charge;

(2) [~~(b)~~] a copy of the organization's tax exemption certificate; and

(3) [~~(c)~~] an affidavit executed by a person authorized to contract for the organization stating that the organization participates in a program [~~that is approved by the city manager and~~] that provides housing for the homeless, at a monetary amount at least equal to the drainage charge.

(D) [~~(B)~~] The city manager shall review the effectiveness of the exemption under Subsection(C) [~~(A)(2)~~] and report the manager's findings and recommendations to council annually.

**PART 13.** City Code Section 15-2-16 (*Reduced Charge with Pond Registration*) is deleted in its entirety.

**PART 14.** City Code Section 15-1-17 (*Reduced Charge Based on Need*) is amended to read:

**§ 15-2-14 [~~17~~] REDUCED CHARGE BASED ON NEED.**

(A) A utility customer who qualifies for assistance under Austin Energy's Customer Assistance Discount Program [~~The user of residential benefitted property~~] may request a reduced drainage charge based on financial need. [~~A request must be in writing and be provided to the director.~~]

(B) [~~The user of residential benefitted property is eligible for the reduced charge if the user or a person residing in the household of the user:~~

~~(1) is a certified recipient of Supplemental Security Income;~~

~~(2) is an aged, blind, or disabled Medicaid recipient; or~~

~~(3) has been receiving, within the twelve months immediately preceding the request, assistance under one of the Travis County Energy Assistance Programs or the Austin/Travis County Medical Assistance Program.~~

~~(C)~~] The reduced charge is available annually on the utility customer's [~~user's~~] submission of proof of continuing eligibility.

(C)[~~(D)~~] The reduced charge is prospective only and must be requested by the utility customer [~~user~~]. The director may not refund any drainage charges under this section.

(D)[~~(E)~~] The reduced charge under this Section [~~section~~] shall be set by ordinance. A utility customer [~~user~~] may receive only the most recently authorized reduction.

**PART 15.** City Code Section 15-2-18 (*No Waiver of Immunity*) is renumbered as City Code Section 15-2-15.

**PART 16.** City Code Section 15-9-193 (*Administrative Hearing*) Subsection (A) is amended to read:

**§ 15-9- 193 ADMINISTRATIVE HEARING.**

(A) A [~~Except as provided in Section 15-2-14 (Adjustment), a~~] hearing under this article shall be held by a hearings officer appointed by the city manager. A hearings officer may not be an employee of a utility.

**PART 17.** This ordinance takes effect on October 1, 2015.

**PASSED AND APPROVED**

§
§
June 25, 2015 §

Steve Adler
Mayor

**APPROVED:**

Anne L. Morgan
Interim City Attorney

**ATTEST:** for

Jannette Goodall
City Clerk

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**ORDINANCE NO. 2018-_____**

**AN ORDINANCE AMENDING THE CODE OF ORDINANCES OF THE CITY OF McALLEN AT CHAPTER 106 ("UTILITIES"), TO ADD ARTICLE VI ("MUNICIPAL DRAINAGE UTILITY SYSTEM") TO ESTABLISH A MUNICIPAL DRAINANGE UTILITY SYSTEM; PROVIDING FOR DRAINAGE SERVICE, BILLING, EXEMPTIONS, DRAINAGE FEES AND APPEALS; PROVIDING FOR AN EFFECTIVE DATE; PROVIDING FOR PUBLICATION; PROVIDING FOR SEVERABILITY, AND ORDAINING OTHER PROVISIONS RELATED TO THE SUBJECT MATTER HEREOF.**

**WHEREAS**, the Board of Commissioners desires to protect the public health, safety, and welfare of the citizens of McAllen by reducing the risk of loss of life and property caused by surface water overflows and surface water stagnation and by reducing pollution arising from non-point source runoff; and,

**WHEREAS**, the Board of Commissioners has determined that all real property in the City, including property owned by the public and tax-exempt entities, contributes to stormwater runoff and either uses or benefits from the stormwater management system and therefore the system's construction, operation, and maintenance are best funded by the users of said system; and

**WHEREAS**, the Board of Commissioners desires to establish a Municipal Drainage Utility System and adopt the Municipal Drainage Utility Systems Act as set forth in Chapter 552, Subchapter C, Texas Local Government Code, as amended ("Act"); and

**WHEREAS**, the Board of Commissioners finds the drainage of the City is a public utility within the meaning of the Act; and

**WHEREAS**, the Board of Commissioners hereby adopts the Act and incorporates it

herein in its entirety for all purposes; and

**NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MCALLEN, TEXAS, THAT:**

**SECTION I:** The Code of Ordinances, City of McAllen, Texas, Chapter 106 ("Utilities"), is hereby amended by adding Article VIII, Municipal Drainage Utility System, which shall read as follows:

## ARTICLE VIII. - MUNICIPAL DRAINAGE UTILITY SYSTEM

### Sec. 106-223. - Municipal drainage utility system established.

The Municipal Drainage Utility Systems Act, Texas Local Government Code Ch. 552, Subch. C, as amended (the "Act"), is hereby adopted and shall be fully implemented as provided by the Act and by the Board of Commissioners; and the drainage of the City is hereby found to be a public utility within the meaning of the Act.

### Sec. 106-224. - Drainage service provided.

The service area shall include all real property within the corporate City limits. The City will provide stormwater drainage for all real property within the service area upon payment of the determined drainage fees, as defined in the Act, and excluding property exempt under the Act and certain exempted real property by the City, and that the fees and assessments, will be based on nondiscriminatory, reasonable and equitable terms. The drainage fees established herein shall be for all nonexempt benefitted property as defined in the Act within the service area.

### Sec. 106-225. - Billing for drainage service.

The City is hereby authorized to bill the drainage fees incurred as a result of the adoption of the Act and through the establishment of the Municipal Drainage Utility System. The drainage fee shall be separately identified from other public utility billings. Drainage fees may only be expended for the costs of service as defined by the Act.

**Sec. 106-226. - Authority to levy drainage fees.**

The City may levy a schedule of drainage fees upon satisfaction of the procedural requirements provided in the Act and this article. Prior to the levy of any drainage fees, the Board of Commissioners shall conduct a public hearing on the drainage fees pursuant to the Act. Prior to adoption of this article the Board of Commissioners found and determined that: The City will establish a schedule of drainage fees against all real property within the service area based on each parcel's contribution to stormwater runoff in accordance with the fees under the Act; the City will provide drainage for all real property in the service area upon payment of the drainage fees, except real property exempt under the Act; and the City will offer drainage service on nondiscriminatory, reasonable, and equitable terms.

**Sec. 106-227. - Exemptions authorized.**

The City is authorized to exempt certain property, entities or persons from all ordinances, resolutions, and rules which the City may adopt from time to time in connection with the adoption of the Act and the establishment of its Municipal Drainage Utility System. Any exemptions to the drainage fees established herein other than the exemptions required by the Act shall be set forth in the drainage fee schedule.

**Sec. 106-228. - Fees.**

(a) The Board of Commissioners shall, following the adoption of this article, establish

a drainage fee schedule, by resolution of the Board of Commissioners, from time to time, for fees which shall be collected through the City's bill for public utilities pursuant to the Act and other applicable law. There shall be a drainage fee on each monthly public utility statement for the City drainage service as set forth in the drainage fee schedule. The City Manager, or designee, is authorized to collect such fees in a manner consistent with the City Charter, the Act and this article. The drainage fees shall be a separate line item on the public utility statement, and shall be clearly identified as a separate charge. Except, as otherwise provided herein, the billing, fees and collection procedures shall be consistent with City collection procedures for the water, sewer and solid waste collection.

(b) The drainage fees established pursuant to this article will apply to the accounts maintained by the City for public utility services.

(c) All billings, exemptions and other procedures relating to drainage fees established pursuant to this article shall be subject to the provisions of the Act and other applicable law.

**Sec. 106-229. - Appeals.**

(a) Billing and payment disputes for administrative issues relating to the drainage fees shall be subject to appeals procedures used by the City for other public utility billing disputes. A person or entity that owns or occupies a benefitted property may appeal the drainage fees established herein pursuant to this procedure set forth in this section.

(b) Appeals for the following reasons shall be directed to the Director of Engineering for evaluation and determination. An appeal shall be in writing and submitted to the Director of Engineering within 30 days after the public utility billing statement containing the matter to be disputed. During all periods of appeal the person or entity who owns or

occupies the benefitted property and/or the account holder shall be responsible for payment of the fees in full:

(1) Exempt property has been assessed a drainage charge;

(2) Drainage charge for an individual property is assessed on more than one public utility account; or

(3) Drainage charge is assessed to individual property outside the City's jurisdictional area.

(c) The Director of Engineering shall render a written decision on such appeals within 30 days after receiving a timely written notice of appeal from the person or entity who owns or occupies the benefitted property and/or the account holder. The Director of Engineering shall deliver a copy of the appeal decision to the person or entity who owns or occupies the benefitted property and/or the account holder by U.S. Mail to the address of the landowner/account holder according to the most recent records in the possession of the City.

(d) Appeals for claims that the drainage fee for an individual property is based on an incorrect determination of the property's contribution to the drainage system, as established in the City drainage fee schedule shall be directed to the Director of Engineering for evaluation and determination. An appeal pursuant to this subsection shall be in writing and submitted to the Director of Engineering within 30 days after the public utility billing statement containing the matter to be disputed. Documentation submitted in support of said appeal shall include information on all impervious areas and any other features or conditions which influence the hydrologic response of the property. Information may consist of, but is not limited to, improvement surveys prepared by a

Professional Land Surveyor licensed to actively practice in the State of Texas, record drawings, exhibits illustrating actual field measurements and photos. Initiation of the formal appeal process shall also authorize the City's designated officers and employees to enter upon and inspect private and public property owned by entities other than the City, upon notice to the owner thereof. During all periods of appeal the person or entity who owns or occupies the benefitted property and/or the account holder shall be responsible for payment of the fees in full.

(e) Any person or entity who owns or occupies the benefitted property and/or the account holder who disagrees with the decision of the Director of Engineering, as the case may be, may appeal such decision to the City Manager in writing within ten days after receipt of the decision of the Director of Engineering, as the case may be. The City Manager shall render a written decision within 30 days after receipt of a timely appeal. The decision of the City Manager shall be final.

**Sec. 106-230. - Penalties; enforcement.**

Failure to pay the drainage fees promptly when due shall subject such user to discontinuance of any public utility services provided by the City, in accordance with the procedures adopted by the City for discontinuance of any City public utility service including water and/or sewer service and other applicable laws.

**Sec. 106-231. – No effect on landowner obligations; no waiver of immunity**

(a) The establishment of a Drainage Utility by the City does not relieve private land owners, developers, other individuals and entities from responsibility for providing drainage improvements in connection with land development pursuant to the other ordinances of the City or laws of the State of Texas that relate to stormwater runoff,

drainage management, or drainage improvements.

(b) The establishment of a Drainage Utility System by the City does not imply or warrant that a benefitted property will be free from flooding, stormwater pollution, or stream erosion. The City makes no representation that all drainage problems will be remedied. This ordinance does not create additional duties on the part of the City or create new liability or remedies for any flooding, stream erosion, deterioration of water quality or other damages. Nothing in this ordinance shall be deemed to waive the City's immunity under law or reduce the need or necessity for flood insurance.

**Secs. 106-231—106-250. - Reserved.**

**SECTION II:** The City Secretary of the City of McAllen is hereby authorized and directed to cause the caption of this ordinance to be published in a newspaper having general circulation in McAllen, Hidalgo County, Texas in accordance with the Code of Ordinances of the City of McAllen, Section 2-56. Publication of ordinances.

**SECTION III:** The City Secretary of the City of McAllen is hereby authorized and directed to cause the language in Sections 106-223—106-250 of the McAllen Code of Ordinances, as amended by Section I, hereinabove, to be published in the appropriate location in the said Code of Ordinances.

**SECTION IV:** This Ordinance shall be and remain in full force and effect from and after its passage by the Board of Commissioners, and execution by the Mayor.

**SECTION V:** If any part or parts of this Ordinance are found to be invalid or unconstitutional by a court having competent jurisdiction, then such invalidity or unconstitutionality shall not affect the remaining parts hereof and such remaining parts

shall remain in full force and effect, and to that extent this Ordinance is considered severable.

**CONSIDERED, PASSED** and **APPROVED** this _____ day of _____, 2018, at a regular meeting of the Board of Commissioners of the City of McAllen, Texas at which a quorum was present and which was held in accordance with Chapter 551 of the Texas Government Code.

**SIGNED** this ____day _____, 2018.

**CITY OF McALLEN**

By: _____

James E. Darling, Mayor

Attest:

_____
Perla Lara, TRMC, City Secretary

Approved as to form:

_____
Austin W. Stevenson, Assistant City Attorney

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**ORDINANCE NO. 3523**

**AN ORDINANCE OF THE CITY OF DEER PARK ENTITLED "MUNICIPAL STORM WATER DRAINAGE UTILITY SYSTEM"; ESTABLISHING A MUNICIPAL STORM WATER DRAINAGE UTILITY SYSTEM, CHAPTER 106, ARTICLE X; SETTING FORTH DEFINITIONS; ESTABLISHING AND CALCULATING DRAINAGE UTILITY CHARGES AND CATEGORIES AND MONTHLY DRAINAGE UTILITY FEES; ESTABLISHING THE BILLING AND PAYMENT OF DRAINAGE UTILITY FEES; PROVIDING FOR AN APPEAL AND HEARING PROCESS; PROVIDING PENALTIES AND REMEDIES FOR FAILURE TO PAY FEES; PROVIDING THAT THIS ORDINANCE SHALL BE CUMULATIVE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY CLAUSE; PROVIDING FOR PUBLICATION; AND PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.**

**WHEREAS**, within the City of Deer Park ("City") there is an existing drainage system which has been developed over a number of years for the purpose of collecting and disposing of storm water runoff; and

**WHEREAS**, it will be necessary and essential to ensure that the collection of storm water runoff and control of storm water within the City limits adequately protects the health, safety, and welfare of the citizens of the City including, but not limited to, the protection from loss of life and damage to property caused by surface water overflows and surface water stagnation; and

**WHEREAS**, the City Council finds that impervious cover increases and alters runoff and associated pollutants, making it is necessary and essential that the City address the various environmental issues that may further burden its storm water infrastructure requirements; and

**WHEREAS**, the City Council directs the City to provide storm water service for all real property in the proposed service area in a nondiscriminatory, reasonable, and equitable terms; and

**WHEREAS**, Chapter 552, Subchapter C of the Texas Local Government Code (the "Act"), as amended, authorizes the City to establish a municipal drainage utility system within the boundaries of the City; and

**WHEREAS**, the Act authorizes the City to provide rules for the use, operation and financing of the drainage utility system; and

**WHEREAS**, the Act authorizes the City to prescribe basis upon which to fund the municipal drainage utility system and to assess the fees and charges to support the municipal drainage utility system; and

**WHEREAS**, the Act authorizes the City to provide exemptions of certain governmental and other entities or persons from the payment of these charges; and

**WHEREAS**, through the adoption of this ordinance, the City desires to establish rules to support the City's adoption of the Act and the City's declaration that the drainage utility system of the City to be a public utility; and

**WHEREAS**, in setting the schedule of charges for drainage utility service, the calculations are based on an inventory of the parcels within the City and the development on the benefited properties; and

**WHEREAS**, it is the intent of the City to fund a drainage utility system that fairly and equitably allocates the cost of storm water control to properties in proportion to storm water runoff potential for each type of property.

**NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DEER PARK, TEXAS:**

## SECTION I

### Article X – Municipal Storm Water Drainage System

### DEFINITIONS

Sec. 106.601

The following definitions apply to the establishment and the operation of the Drainage Utility System:

(1) **Act** means Chapter 552, Subchapter C of the Texas Local Government Code.

(2) **Benefited Property** means an improved or developed parcel, lot or tract to which storm water service is made available.

(3) **Customer** means the person(s) or entity(ies) that is recorded as the customer, or user of utility services for a parcel as recorded in the records of the City's utility or tax billing system.

(4) **Developed Property** means a lot or tract that has been improved with impervious surface and/or drainage infrastructure. Improved refers to a lot or parcel that has been changed from its natural state.

(5) **Director** means the Public Works Director or the designated representative.

(6) **Drainage Infrastructure** means the property, real, personal or mixed, that is used in providing storm water capabilities and capacity to manage and control storm water runoff for the Drainage Utility System, including, but not limited to, bridges, catch basins, channels, conduits, creeks, culverts, swales, detention ponds, retention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works, and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.

(7) **Drainage Utility Fee** means the charge, including interest and penalties paid by the Customer/Owner of a Benefited Property for services provided by the Drainage Utility System including, but not limited to, the items described in "cost-of-service" in Section 552.044(2) of the Act and any charges for future funding of the Drainage Utility System construction as described in Section 552.044(4).

(8) **Drainage Utility System** means the Drainage Utility System owned, controlled or maintained, in whole or in part by the City, including the City's existing storm water and drainage facilities, materials, and supplies, and dedicated to the service of Benefited Properties, and including provision for additions, extensions, and improvements thereto and replacements thereof.

(9) **Drainage Utility Only Account** means a utility billing account that is established for the sole purpose of billing applicable Drainage Utility Fees where no other utility services are provided through the City, or as deemed appropriate by the Director.

(10) **Equivalent Residential Unit (ERU) or Billing Unit** means the unit of measure used to calculate the Drainage Utility Fee for Non-residential property. One (1) ERU is equal to the average horizontal Impervious Area for single-family residential property within the City.

(11) **Impervious Area or Impervious Surface** means a hard surface are which either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development, and/or a hard surface are which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to

development. Common impervious surfaces include, but are not limited to, roofs, walkways, patios, driveways, parking lots, storage areas, areas which are paved, graveled or made of packed or oiled earthen materials or other surfaces which similarly impede the natural infiltration of surface and storm water. Open, uncovered flow control or water quality treatment facilities shall not be considered as impervious surfaces.

(12) **Non Residential Property** means all Developed Properties within the City other than residential property, including, but not limited to, commercial, industrial, institutional, multi-family and commercial mobile-home park.

(13) **Owner** means the person(s) or entity(ies) recorded as the owner of a lot or parcel as recorded in the records of the Harris County Appraisal District.

(14) **Parcel** means one (1) or more lots or tracts, or portions of lots or tracts.

(15) **Residential Property** means any property platted, zoned or used for single or two (2) family residential development upon which a single or two (2) family home has been constructed or placed, including manufactured homes.

(16) **Storm Water Runoff Potential** means relative potential for causing storm water runoff quantities or velocities from a parcel based on the type of development or land use on the parcel.

(17) **Wholly Sufficient and Privately Owned Drainage System** means land and facilities owned and operated by a person or entity other than the City's Drainage Utility System, the storm water from which does not discharge under any storm frequency event or conditions into a creek, river, slough, culvert, channel, other infrastructure or facility that is part of the City's Drainage Utility System.

## SECTION II

## ESTABLISHMENT OF STORM WATER UTILITY

Sec. 106.602

(a) The City Council finds, as required by Section 552.045(b), Adoption of System; Rules, of the Texas Local Government Code, that the City shall:

(1) Establish a schedule of drainage charges against all real property in the proposed service area subject to charges;

(2) Provide drainage service for all real property in the proposed area upon payment of drainage charges (except real property that is exempt from such charges); and

(3) Offer drainage service on nondiscriminatory, reasonable, and equitable terms.

(b) Chapter 552, Municipal Utilities, Subchapter C, Municipal Drainage Utility Systems, of the Texas Local Government Code is adopted, and this ordinance shall be administered in accordance with its provisions.

(c) The Drainage Utility System of the City is declared to be a public utility. Existing facilities are incorporated in the Drainage Utility as permitted by Section 552.046, Incorporation of Existing Facilities, of the Texas Local Government Code.

## SECTION III

## SERVICE AREA

Sec. 106.603

The Drainage Utility service area is the area of land located within the city limits of the City of Deer Park except as provided in Section XI. Upon the effective dates of completed annexation of additional lands into the City of Deer Park, each such annexed additional land shall become part of the service area. Land annexed for limited purposes shall become part of the service area upon annexation for full purposes.

## SECTION IV

## ESTABLISHMENT OF A DRAINAGE UTILITY FEE

Sec. 106.604

(a) A Drainage Utility Fee is hereby established. The first Drainage Utility Charge shall be billed after September 30, 2012. Like Drainage Utility charges shall be billed on a monthly basis thereafter for the duration of the Drainage Utility.

(b) For purposes of imposing the Drainage Utility Charge, all lots and parcels within the City are classified into the following categories: (1) Residential Property and (2) Non-Residential Property.

(c) The Drainage Utility Fee shall be paid by the user or owner of each Benefited Property in the service area as deemed appropriate by the Director.

(d) The ERU value for the City is determined through an Impervious Area inventory of all improved single-family residential parcels in the City. Evaluation of these data determined that the Equivalent Residential Unit Impervious Area value for assigning charges to Non-Residential properties is four thousand two hundred fifty (4,250) square feet. This ERU value may be adjusted from time to time as more accurate Impervious Area data becomes available.

(e) The Drainage Utility Fee rates are as follows:

(1) Residential property shall be charged at a rate of one (1) ERU per month, regardless of the Impervious Area on the property.

(2) Non-Residential property shall be charged at a rate based on an Impervious Area determination for each parcel:

Total ERUs = (Impervious Area/ERU), minimum 1 ERU.

The Total ERU shall be rounded up to the nearest whole ERU.

(f) The monthly Drainage Utility Charge for properties shall be calculated by multiplying the total number of ERUs for the parcel by the ERU monthly billing rate.

(g) The Director, or his designee, shall be responsible for determining Impervious Area of property based on reliable data, including the Appraisal District Roll, geographic information system technology, aerial photography, or other reliable means of determining Impervious Area. The Director may require additional information from the property owner, tenant, manager or developer to make the determination. The amount of charge may be revised by the Director based on any additions to the Impervious Area through the City approved building permit process.

(h) No Drainage Utility Charge credit shall be given for the installation of drainage facilities required by the Code or state law.

## SECTION V

## CATEGORIES OF DRAINAGE UTILITY RATES

Sec. 106.605

(a) The City Council finds that impervious cover increases runoff and associated pollutants. Each Benefited Property shall be categorized as one of the following:

(1) Residential Property. Residential Property shall be determined based on the most recent Harris County Appraisal District property data or by the City's utility billing authority.

(2) Non Residential Property. Fees for Non Residential Benefited Properties shall be based on the billing units.

(b) The City Council finds that it is equitable to assess the Drainage Utility Fee to each Residential user on a flat rate basis.

(c) The City Council finds that it is equitable to assess the Drainage Utility Fee to each Non Residential user on the basis of the number of billing units in a parcel.

(d) The City Council may review the schedule of rates and billing units at any time and may, by ordinance, increase or decrease said rates and/or billing units within the schedule, upon a reasonable determination that said increase or decrease is warranted.

## SECTION VI

## BILLING FOR DRAINAGE UTILITY FEE

Sec. 106.606

(a) The Drainage Utility Fee shall be shown as a separate listing on the monthly water utility bill from the City.

(b) The Drainage Utility Fee for Residential Property will be charged to the Customer/Owner currently established as the responsible party for City's water utility service. The Drainage Utility Fee for Non-Residential Property will be charged to the parcel Owner.

(c) For a parcel that is not occupied by a customer that may use water, wastewater, solid waste or other utility service and considered by the City to be vacant, either on a temporary or permanent basis, the City may bill the owner of the parcel for the Drainage Utility Fee.

(d) Where the City does not bill water, sewer or solid waste to a Customer/Owner, the City is hereby authorized to establish a "Drainage Utility Only Account" and to bill the Drainage Utility Fee to either the Customer/Owner.

(e) Any charge due hereunder which is not paid when due may be recovered in an action at law by the City. In accordance with Chapter 402.050 of the Texas Local Government Code failure of a user of the Drainage Utility System to pay the charges promptly when due shall subject such user to any remedy or penalty provided by law or in this Section, including discontinuance of any utility services provided by the City and placement of a lien against the property.

## SECTION VII

## DRAINAGE UTILITY FUND

Sec. 106.607

(a) A Drainage Utility fund is created.

(b) The Drainage Utility fund shall be administered in accordance with Section 552.049, Segregation of Income, of the Texas Local Government Code.

## SECTION VIII

## ADMINISTRATION; RULES

Sec. 106.608

(a) The Director shall administer this ordinance.

(b) The Director shall promulgate rules necessary to administer this ordinance.

## SECTION IX

## APPEALS

Sec. 106.609

(a) Subject to the restrictions set forth in this Section, any Customer/Owner who believes the calculation or determination of the Drainage Utility Fee assessed against them to be incorrect may appeal the fees to the City Manager; and the City Manager shall evaluate the appeal based on the methodologies for calculating the Drainage Utility Fee set forth in this Ordinance.

(b) The appeal shall be in writing and set forth, in detail, the relief sought, the grounds upon which relief is sought and whether the petitioner requests a hearing on its appeal.

(c) The appeal shall be filed with the City Manager within fifteen (15) business days of the Customer/Owner receiving the billing statement from the City. The billing statement shall be deemed received five (5) days after it is placed in a mail receptacle of the United States Postal Service.

(d) Failure to submit a timely written appeal for reconsideration shall be deemed to be a waiver of any further right to administrative reconsideration or reviews on such billing statement.

(e) The Customer/Owner requesting an adjustment may be required, at the Customer/Owner's cost, to provide supplemental information to the City Manager, including but not limited to survey data approved by a Texas licensed professional land surveyor, engineering reports approved by a Texas licensed professional engineer, or other documentation the City Manager deems necessary. Failure to provide requested information in a timely manner may result in the denial of the adjustment request.

(f) Within a reasonable time of the submittal of an appeal, the City Manager shall either grant the petition and modify the Drainage Utility Fee assessed; deny the petition if no adjustment is warranted; or a hearing is deemed necessary by the City Manager, set a hearing on the petition for appeal.

## SECTION X

## HEARINGS

Sec. 106.610

(a) If a hearing is deemed necessary by the City Manager, then the City Manager shall set a hearing to determine if an adjustment should be made to the Drainage Utility Fee assessed to the Customer/Owner.

(b) Written notice of the hearing shall be served on the petitioner at least fifteen (15) days prior to the hearing. Notice shall be served in person or by certified mail, return receipt requested.

(c) Notice shall specify the date, time and place of the hearing.

(d) Notice shall be deemed received five (5) days after it is placed in a mail receptacle of the United States Postal Service.

(e) For purposes of this Section, the City Manager shall be empowered to administer oaths and to promulgate procedural rules for the conduct of the hearing.

(f) Decisions shall be based on a preponderance of the evidence and the petitioner shall have the burden of proof to demonstrate that the Drainage Utility Fee is not applicable, that the petitioner's property is exempt from the charge, that the Drainage Utility Fee was calculated incorrectly or that the determination of the value of the Drainage Utility Fee was not calculated according to the applicable Drainage Utility Fee schedule or the guidelines established in this ordinance.

(g) The City Manager shall act as the hearing officer.

(h) After the conclusion of the hearing, the City Manager shall make written findings and shall issue a written decision without undue delay.

(I) The decision of the City Manager shall be final.

## SECTION XI

## EXEMPTIONS

Sec. 106.611

(a) Pursuant to the Texas Local Government Code, Section 552.053 and Section 580.003, the following shall be exempt from the provisions of this chapter:

1. property with proper construction and maintenance of a wholly sufficient and privately owned drainage system;
2. property held and maintained in its natural state, until such time that the property is developed and all of the public infrastructure constructed has been accepted by the municipality in which the property is located for maintenance;
3. a subdivided lot, until a structure has been built on the lot and a certificate of occupancy has been issued by the City;
4. state agencies;
5. public or private institutions of higher education
6. property owned and operated by a state recognized Independent School District
7. City-owned property, including rights-of-way.

8. property owned by a religious organization that is exempt from taxation pursuant to Section 11.20, Tax Code.

## SECTION XII

## NO WAIVER OF IMMUNITY

This Ordinance does not imply or warrant that a benefitted property will be free from flooding, storm water pollution, or stream erosion. The City makes no representation that all drainage problems will be remedied. This article does not create additional duties on the part of the City or create new liability or remedies for any flooding, stream erosion, deterioration of water quality, or other damages. Nothing in this article shall be deemed to waive the City's immunity under law or reduce the need or necessity for flood insurance.

## SECTION XIII

## CUMULATIVE PROVISIONS

This ordinance shall be cumulative of all provisions of ordinances and of the Code of the City of Deer Park, Texas, as amended, except where the provisions of this ordinance are in direct conflict with the provisions of such ordinances and such Code, in which event conflicting provisions of such ordinances and such Code are hereby repealed.

## SECTION XIV

## SEVERABILITY CLAUSE

It is hereby declared to be the intention of the City Council that the phrase, clause, sentence, paragraph or section of this ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

## SECTION XV

## PENALTY CLAUSE

Sec. 106.615

Any person, firm or corporation who violates, disobeys, omits, neglects or refuses to comply with or who resists the enforcement of any of the provisions of this ordinance shall be fined not more than two thousand dollars ($2,000.00) for each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

## SECTION XVI

## RIGHTS AND REMEDIES

All rights and remedies of the City of Deer Park, Texas, are expressly saved as to any and all violations of the provisions of the ordinances amended herein, which have accrued at the time of the effective date of this ordinance and, as to such accrued violations and all pending litigation, both civil and criminal, whether pending in court or not, under such ordinances, same shall not be affected by this ordinance but may be prosecuted until final disposition by the courts.

## NOTICE

The City Secretary of the City of Deer Park, Texas, hereby acknowledges that she published the caption of this ordinance for three (3) separate days in the official newspaper of the City of Deer Park, Texas, as required by Section 552.013, Texas Local Government Code.

## SECTION XVII

The City Council finds that this Ordinance relates to the immediate preservation of the public peace, health, safety and welfare in that the establishment of a municipal storm water drainage utility system be adopted at the earliest possible moment to comply with State Law, and to provide protection for persons within the City, thereby creating an emergency, for which the Charter requirement providing for the reading of ordinances on three (3) several days should be dispensed with, and this Ordinance be passed finally on its introduction; and accordingly, such requirement is dispensed with, and this Ordinance shall take effect upon its passage and approval by the Mayor.

## SECTION XVIII

**EFFECTIVE DATE**

In accordance with Article VIII, Section 1 of the City Charter, this Ordinance was introduced before the City Council of the City of Deer Park, Texas, on the 18 day of September, 2012.

**PASSED, APPROVED and ADOPTED** on this the 18 day of Sept., 2012.

Wayne Riddle, Mayor

**ATTEST:**

Sandra Watkins, City Secretary

**APPROVED AS TO FORM:**

Jim G. Fox, City Attorney

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**ORDINANCE NO.**

**AN ORDINANCE AMENDING CHAPTER 50 "UTILITIES", OF THE CODE OF ORDINANCES OF THE CITY OF KYLE, TEXAS, BY THE ADDITION OF ARTICLE X, "STORM DRAINAGE AND FLOOD RISK MITIGATION" TO ESTABLISH A MUNICIPAL DRAINAGE UTILITY SYSTEM; PROVIDING FOR DRAINAGE SERVICE, BILLING, EXEMPTIONS, DRAINAGE CHARGES AND APPEALS; PROVIDING A SEVERABILITY CLAUSE, PROVIDING A SAVINGS CLAUSE; PROVIDING FOR A PENALTY NOT TO EXCEED THE SUM OF TWO THOUSAND DOLLARS ($2,000.00) PER DAY PER OFFENSE (or VIOLATION); AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS,** the City Council of the City of Kyle, Texas, has investigated and determined that it would be advantageous and beneficial to the citizens of the City to promote the public health, safety and welfare of the citizens to adopt a Municipal Drainage Utility System; and

**WHEREAS,** the City Council further investigated and determined that it would be in the best interest of the citizens to adopt the Municipal Drainage Utility Systems Act as set forth in Chapter 552, Subchapter C, Texas Local Government Code, as amended ("Act"); and

**WHEREAS,** the City Council hereby adopts the Act and incorporates it herein in its entirety for all purposes; and

**WHEREAS,** the City Council finds that the drainage of the City is a public utility within the meaning of the Act; and

**WHEREAS,** the City Council further finds that the City will establish a schedule of drainage charges against all real property in the proposed service area(s) which includes the entire City limits subject to charges under this Article; and

**WHEREAS,** the City Council further finds that the City will provide drainage for all real property in the proposed service area(s) on payment of drainage charges, except real property exempted under the Act or pursuant to this Article; and

**WHEREAS,** the City Council further finds that the City will offer drainage service on nondiscriminatory, reasonable and equitable terms;

**NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KYLE, TEXAS:**

**SECTION 1.** Article X, Storm Drainage and Flood Risk Mitigation Utility, Sections 50-500 to 50-518 are hereby added to Chapter 50 "Utilities" of the Code of Ordinances, and is hereby amended to read and be as follows:

## ARTICLE X. STORM DRAINAGE AND FLOOD RISK MITIGATION UTILITY

**Sec. 50-500. - Purpose.**

The Storm Drainage and Flood Risk Mitigation Utility is established in order to:

(a) Maintain the public health and safety, within the city limits, by protecting the community from the loss of life and property caused by surface water overflows, surface water stagnation and pollution arising from point source and nonpoint source runoff within the boundaries of the service area of the utility, as established in this ordinance; and

(b) Offer and provide drainage service on nondiscriminatory, reasonable and equitable terms within the service area.

**Sec. 50-501. - Definitions.**

The following definitions shall apply to terms within this ordinance:

***Act*** means the Municipal Drainage Utility Systems Act of the Texas Local Government Code.

***Benefitted property*** means an improved lot or tract to which drainage service is made available under this ordinance.

***Commercial property*** means buildings or land intended to generate a profit, either from capital gain or rental income, including multi-family residential; any lot or parcel of land used for any purpose other than single family residential.

***Cost of service*** as applied to a drainage system service to any benefitted property means:

(1) the prorated cost of the acquisition, whether by eminent domain or otherwise, of land, rights-of-way, options to purchase land, easements and interests in land relating to structures, equipment and facilities used in draining the benefitted property;

(2) the prorated cost of the acquisition, construction, repair and maintenance of structures, equipment and facilities used in draining the benefitted property;

(3) the prorated cost of architectural, engineering, legal and related services, plant and specifications, studies, surveys, estimates of cost and of revenue, and all other expenses necessary or incidental to planning, providing or determining the feasibility and practicability of structures, equipment and facilities used in draining the benefitted property;

(4) the prorated cost of all machinery, equipment, furniture and facilities necessary or incidental to the provision and operation of draining the benefitted property;

(5) the prorated cost of funding and financing charges and interest arising from construction projects and the start-up cost of a drainage facility used in draining the benefitted property;

(6) the prorated cost of debt service and reserve requirements of structures, equipment and facilities provided by revenue bonds or other drainage revenue-pledge securities or obligations issued by the city; and
(7) the administrative costs of operating the Storm Drainage and Flood Risk Mitigation Utility.

***Drainage*** means bridges, basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.

***Drainage area*** means the land area from which water drains to a given point.

***Drainage easement*** means a delineated portion of land set aside for the overland or underground transfer or storage of stormwater. This area shall not have any permanent structures, fences, or other obstacles hindering the safe transfer of water through the easement.

***Drainage charge*** means:
(1) the levy imposed to recover the cost of the service of the city in furnishing drainage for any benefitted property; and
(2) an amount made in contribution to funding of future drainage system construction by the city.

***Drainage system*** means the drainage owned or controlled in whole or in part by the city and dedicated to the service of benefitted property, including provisions for additions to the system.

***Drainage utility*** means a drainage service that is regularly provided by the city, through city property dedicated to that service, to the users of benefitted property within the service area and that is based on:
(1) an established schedule of charges;
(2) the use of the police power to implement the service; and
(3) nondiscriminatory, reasonable and equitable terms as determined by the City Council.

***Drainage utility charge*** means the drainage charge, including any interest and penalties paid by the owner or tenant of a benefitted property for drainage services provided by the Storm Drainage and Flood Risk Mitigation Utility including, but not limited to, the items described as "cost of service" in the Act.

***Facilities*** mean the property, either real, personal, or mixed, that is used in providing drainage and included in the drainage system.

***Impervious area, impervious surface or impervious cover*** means covering of the land surface by any means that would prevent penetration or percolation by water including but not limited to all parking areas, buildings, patios, sheds, private sidewalks and driveways within the land, tract, parcel or lot and any other impermeable construction covering the natural land surface.

***Improved lot or tract*** means a lot or tract that has a structure or other improvement on it that causes an impervious coverage of the soil under the structure or improvement.

***Municipal Drainage Utility Systems Act*** or ***the "Act"*** means TEX. LOCAL GOV'T CODE Section 552.041, et seq., as it may be amended by Texas Legislature from time to time to include, but not by way of limitation, the applicable definitions in the Act.

***Nonpoint source runoff*** means runoff that occurs on surfaces before reaching a channel, river or drainage system.

***Runoff*** means the water from rain, snowmelt or irrigation that flows over the land surface and is not absorbed into the ground, and that instead flows into streams or other surface waters or land depressions.

***Service area*** means any area of land located within the City of Kyle city limits and any other land areas in the City's extraterritorial jurisdiction as provided by the Municipal Drainage Utility Systems Act which, as a result of topography or hydraulics, contribute overland flow into the watersheds served by the drainage system of the City. Upon the effective dates of completed annexation of additional lands into the City, each such annexed additional land shall become part of the service area. Land annexed for limited purposes shall become a part of the service area upon annexation for full purposes.

***Single family residential*** means the use of a lot with one building designed for and containing not more than two separate units with facilities for living, sleeping, cooking, and eating therein.

***User*** means the person or entity who owns or occupies a benefitted property.

***Wholly sufficient and privately owned drainage system*** means land owned and operated by a person other than a municipal drainage utility system, the drainage of which does not discharge into a creek, river, slough, culvert, or other channel that is part of a municipal drainage utility system.

**Sec. 50-502. - Establishment of drainage utility and dedication of assets.**

The City of Kyle Storm Drainage and Flood Risk Mitigation Utility is hereby established as a drainage utility. The city dedicates all city-owned property, facilities, materials and supplies constituting the city's drainage system as of the effective date. All future acquisitions of real or

personal property related to drainage shall be maintained as a part of the Storm Drainage and Flood Risk Mitigation Utility.

**Sec. 50-503. – Storm drainage and flood risk mitigation utility service area.**
The service area for the Storm Drainage and Flood Risk Mitigation Utility shall include all property within the city limits, as amended from time to time.

**Sec. 50-504. - Storm drainage and flood risk mitigation utility fund.**
A separate fund shall be created, as of the effective date, known as the Storm Drainage and Flood Risk Mitigation Utility Fund, for the purpose of identifying and controlling all revenues and expenses attributable to the drainage utility. All drainage charges collected by the city and such other moneys as may be available to the city for the purpose of drainage shall be deposited in the Storm Drainage and Flood Risk Mitigation Utility Fund. Such utility revenues shall be used for the purpose of the creation, operation, planning, engineering, inspection, construction, repair, maintenance, improvement, reconstruction, administration and other reasonable and customary charges associated with the operation of the Storm Drainage and Flood Risk Mitigation Utility for the city.

**Sec. 50-505. - Drainage benefitted property.**
It is not required that the revenue from Storm Drainage and Flood Risk Mitigation Utility charges imposed and collected from any property be used specifically to benefit the same property; rather, any revenue collected from Storm Drainage and Flood Risk Mitigation Utility charges may be used for any qualified purpose of the Storm Drainage and Flood Risk Mitigation Utility that is in the best interest of the city.

**Sec. 50-506. - Administration of the drainage utility.**
The City Manager or designee shall be responsible for the administration of this ordinance, including, but not limited to, enacting any procedures necessary for the administration of the drainage charges and the consideration of variances, developing maintenance programs, and establishing drainage criteria and standards for operation of the drainage system.

**Sec. 50-507. - Liability for floods and nonpoint source pollution.**
Floods from drainage and stormwater runoff may occasionally occur, which exceed the capacity of the drainage system maintained and financed with the drainage charges. In addition, surface water stagnation and pollution arising from nonpoint source runoff may occasionally occur, which exceed the capacity of the drainage system maintained and financed with drainage charges. This ordinance does not imply that properties subject to charges shall always be free from flooding or flood damage, surface water stagnation or nonpoint source pollution or that all flood control and water treatment projects to control the quantity and quality of runoff can be constructed effectively. Nothing whatsoever in this ordinance should be construed as or be deemed to create additional duties, on the part of the city, to hold the city liable for any damages incurred in a flood or from adverse water quality, due to drainage runoff. Nothing in this ordinance shall be deemed to waive the city's immunity under State law or reduce the need or necessity for flood insurance.

**Sec. 50-508. Incorporation of existing facilities.**

The city may incorporate existing drainage facilities, materials, and supplies into the drainage system. Existing drainage facilities may be in areas on public and/or private property and may include bridges, basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.

**Sec. 50-509. – Maintenance.**

(a) Public drainage improvements conveyed by dedication to the city as right-of-way and/or dedicated drainage easements accepted by the city for drainage maintenance shall be under the jurisdiction and maintenance of the city. All drainage improvements which accept stormwater runoff from an area greater than 300-acres shall be considered serving a public purpose and shall be dedicated to the city as right-of-way and/or drainage easement.

(b) Private drainage improvements not conveyed by dedication to the city as right-of-way or drainage easement shall be maintained by the user. A maintenance schedule and maintenance plan shall be submitted to the city prior to approval of construction plans. Existing drainage facilities will have 180 calendar days after the effective date of this ordinance to submit a maintenance plan to the city. The city has the right to do periodic inspections of privately owned and maintained drainage improvements to ensure that the maintenance schedule is being implemented. Failure to adhere to a maintenance plan will be a violation of this ordinance.

**Sec. 50-510. – Access.**

Employees of the Storm Drainage and Flood Risk Mitigation Utility, established in accordance with Municipal Drainage Utility Systems Act as set forth in Chapter 552, Subchapter C, Texas Local Government Code, shall have access, at all reasonable times, to any benefitted properties served by the drainage utility for inspection, repair or for the enforcement of the provisions of this ordinance.

**Sec. 50-511 - Storm Drainage and Flood Risk Mitigation Utility charges.**

(a) A Storm Drainage and Flood Risk Mitigation Utility charge is imposed upon each improved lot or tract for services and facilities provided by the Storm Drainage and Flood Risk Mitigation Utility. For purposes of imposing the Storm Drainage and Flood Risk Mitigation Utility charge, all improved lots or tracts are classified into the following three customer categories:
    (1) single-family residential property;
    (2) commercial property; or
    (3) exempt property.

(b) Subject to the provisions of this ordinance, there is hereby imposed on each benefited property within the city jurisdiction, and the owners thereof, a Storm Drainage and Flood Risk Mitigation Utility charge. This charge must be directly related to drainage and

the terms of the levy, and any classification of the benefited properties in the city must be nondiscriminatory, equitable, and reasonable. All of the proceeds of this charge are deemed to be in payment for use of the city drainage system.

(1) The drainage utility charge established herein shall be based upon the land use of a benefited property, as follows:
   (A) improved single family residential lots or parcels of land; and
   (B) all other improved lots or parcels of land.

(2) The initial monthly Storm Drainage and Flood Risk Mitigation Utility Charge will be effective with the adoption of this ordinance. The following fee structure will be applicable and charged on a monthly basis to all non-exempt residential and commercial properties. Thereafter, effective October 1, 2017, the City's annual budget will include any changes or adjustments to the said fee structure in the Rates, Fees and Charges Schedule.
   (A) Single-Family Residential Properties: $5.00 per month
   (B) Commercial Properties: The City will calculate the monthly fee based on the following formula:
   Monthly Fee = Monthly Base Rate x Impervious Cover (sq. ft.) x Adjustment Factor
   Monthly Base Rate = $0.0021 per sq. ft. of impervious cover
   Adjustment Factor = The adjustment factor is unique to each commercial property and is based on the percent of impervious cover. It is calculated using the following formula: (1.5425 x % of impervious cover) + 0.5064

**Sec. 50-512. - Determination of impervious area.**

The City Manager or his/her designee shall be responsible for determining impervious area for commercial property based on data obtained from geographic information systems (GIS) and/or site plans for the location approved by the city.

**Sec. 50-513. - Responsible parties and billing.**

(a) Single family residential property.
   (1) Drainage charges for single family residential property shall be billed with the city's other utility charges and shall be identified separately on the bill as a drainage charge.
   (2) Payment of the Storm Drainage and Flood Risk Mitigation Utility charge imposed on single family residential property is the responsibility of the person or entity under whose name the utility account is established for the said property.
   (3) Single family residential properties that have all other city utilities disconnected will not be billed a Storm Drainage and Flood Risk Mitigation Utility charge.

(b) Commercial Property.
   (1) Drainage charges for commercial property shall be billed with the city's other utility charges and shall be identified separately on the bill as a drainage charge.

(2) Payment of a Storm Drainage and Flood Risk Mitigation Utility charge imposed on commercial property is the responsibility of the person or entity under whose name the utility account is established for the said property.
(3) Commercial properties that have all other city utilities disconnected, the owner of the property shall be responsible for paying the monthly Storm Drainage and Flood Risk Mitigation Utility charge.

(c) Delinquent Charges.
(1) In addition to any other remedies or penalties provided by law or in this Ordinance, failure to pay the drainage charge shall result in the discontinuance of all utility services, including water, wastewater and trash services, at the location provided by the city and/or placement of a lien against the property.
(2) If drainage is the only utility provided by the city at a location, utilities provided by other providers may be disconnected pursuant to an interlocal agreement.

**Sec. 50-514. - Penalties.**

(a) *Criminal Penalty* – any person, firm or corporation who violates, disobeys, omits, neglects or refuses to comply with or who resists the enforcement of any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a penalty or fine not to exceed the sum of Two Thousand Dollars ($2,000.00) for each offense, and each and every day such offense is continued shall constitute a new and separate offense.
(b) *Civil Penalty* – The City may file suit to recover any charges due hereunder, together with maximum interest, attorney fees and other costs and charges that may be allowed by the Act or other law, which is not paid when due. Nothing herein shall prevent the City from taking such lawful action as is necessary to prevent or remedy any violation.

**Sec. 50-515. - Adjustment of charges and appeal process.**

(a) Any user who disputes the category of land use, size of commercially developed property, or any other factor upon which the drainage charge is based may petition the Building Official or his/her designee, in writing, for a decision on the validity of the requested revision or adjustment of the drainage charge and shall set forth in detail the grounds upon which relief is sought.
(b) The property owner shall submit a certified “as-built” survey and/or a foundation survey, at the owner's cost, to assist in determining impervious area. In order to make a determination, additional information may be required, including but not limited to, survey data approved by a Texas registered professional land survey or a detailed development plan approved by the City of Kyle. Failure to provide requested information may result in the denial of the appeal or adjustment request.
(c) No request for an appeal will be addressed if the rate per billing unit is the only factor disputed.
(d) The adjustment of billing units as part of an appeals process will stand as the user's basis for future billings, whether higher or lower than the original determination, until such

time as future changes in land use cover or customer status may warrant further adjustments.

(e) A decision shall be rendered in writing within 30 days of the receipt of the written request.

**Sec. 50-516. - Program responsibility.**

It shall be the duty of the City Manager or his/her designee to administer the Storm Drainage and Flood Risk Mitigation Utility. The City Manager shall keep an accurate record of all properties benefitted or served by the services and facilities of the Storm Drainage and Flood Risk Mitigation Utility of the city and to make changes in accordance with the rules and charges established in this ordinance.

**Sec. 50-517. - Drainage utility fund.**

(a) The Storm Drainage and Flood Risk Mitigation Utility fund may consist of one or more accounts. All Storm Drainage and Flood Risk Mitigation Utility charges shall be deposited, as collected and received, into this fund and shall be used exclusively for the drainage services as stated in the Act, which includes, but is not limited to, the following:
   (1) operation and maintenance of the Storm Drainage and Flood Risk Mitigation Utility;
   (2) funding of pollution abatement and peak flow attenuation devices constructed on stormwater systems discharging to the surface water of the city;
   (3) administrative costs associated with the management of the Storm Drainage and Flood Risk Mitigation Utility;
   (4) payment of the debt service requirements on any outstanding drainage revenue bonds, including any fees and expenses incidental thereto;
   (5) engineering consultant fees.

(b) The income derived from the operation of the Storm Drainage and Flood Risk Mitigation Utility must be segregated and completely identifiable from other city accounts.

**Sec. 50-518. – Exempt properties.**

(a) The following users shall be exempt from payment of the charges established by this ordinance:
   (1) Any property to which a mandatory exemption under Section 552.053 of the Local Government Code applies, including without limitation:
      (A) Property with proper construction and maintenance of a wholly sufficient and privately owned drainage system that does not discharge under any storm frequency events or conditions to waterways controlled or maintained by the City;
      (B) Property held and maintained in its natural state, until such time that the property is developed and all of the public infrastructure constructed has been accepted by the City for maintenance;

(C) A subdivided parcel or lot, until a structure has been built on the lot and a certificate of occupancy has been issued, or the City has taken other official action to release the property for occupancy;

(2) Any property to which a mandatory exemption under Section 580.003 of the Local Government Code applies or which is exempt under applicable federal law, including without such limitation:

(A) A federal or state agency; and

(B) A public institution of higher education.

(b) Proof of Exemption. If a user asserts their property is exempt pursuant to this section or any other applicable law, such user has the burden to assert such exemption by filing notice of eligibility for such exemption, and sufficient evidence of entitlement to such exemption, using the procedures for appeal provided in Sec. 50-515 above.

**SECTION 2. SEVERABILITY CLAUSE:** If any section, subsection, phrase, sentence or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be stricken from the ordinance, and such holding shall not affect the validity of the remaining portions thereof. The balance of the ordinance shall be construed as one instrument and as if the offending portion had not been included.

**SECTION 3. SAVINGS CLAUSE:** All ordinances or parts of ordinances, in conflict herewith are to the extent of such conflict hereby repealed. The balance of such ordinance is hereby saved from repeal.

**SECTION 4. EFFECTIVE DATE:** Effective immediately following the publication of this ordinance in the local newspaper as required by Section 51.052 of the Texas Local Government Code, the provisions of this ordinance will apply within the City of Kyle, Texas.

PASSED AND ADOPTED this ___ day of_____, 2016.

_____
R. Todd Webster, Mayor

ATTEST:

_____
Jennifer Vetrano, City Secretary

APPROVED AS TO LEGAL FORM:

_____
Frank J. Garza, City Attorney

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**ORDINANCE NO. _____**

**AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF KINGSVILLE, TEXAS, AMENDING CHAPTER V PUBLIC WORKS OF THE CODE OF ORDINANCES OF THE CITY OF KINGSVILLE, TEXAS BY ADDING ARTICLE 6 ENTITLED "STORMWATER UTILITY SYSTEM"; ARTICLE I "STORMWATER UTILITY SYSTEM RULES" TO ESTABLISH A MUNICIPAL STORMWATER UTILITY SYSTEM; ESTABLISH AN ADMINISTRIATIVE APPEALS PROCESS; PROVIDE PENALTIES AND REMEDIES FOR NONPAYMENT; EXEMPT CERTAIN PROPERTY FROM FEES; AND PROVIDE A PROCESS BY WHICH TO DISCONTINUE THE STORMWATER UTILITY SYSTEM; PROVIDNG A CUMULATIVE CLAUSE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A SAVINGS CLAUSE; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS,** it is necessary to ensure that the collection of stormwater runoff and conveyance of stormwater within the City of Kingsville ("City") protects the public health, safety, and welfare of City residents, as well as protects against property damage; and

**WHEREAS,** the City Commission of the City of Kingsville, Texas ("the City Commission") desires to address the various water quality and environmental issues that may further burden the City's stormwater infrastructure; and protect against surface water overflow, standing water, and pollution; and

**WHEREAS,** the City Commission desires to establish a Stormwater Utility System, as authorized by the Texas Local Government Code Chapter 552, Subchapter C "Municipal Drainage Utility Systems," ("the Act") within the City's municipal boundaries; and

**WHEREAS,** the Act further authorized the City to establish a municipal Stormwater Utility System service area; to provide rules for the use, operation, and financing of the system; to declare, after a public hearing, the City's Stormwater System to be a "public utility" as defined in the Act; to prescribe bases upon which to fund a Stormwater Utility System and to assess the fees and charges to support the system; and to require certain exemptions along with other mandatory exemptions contained in Texas Local Government Code sections 552.053 and 580.003(a); and

**WHEREAS,** the City desires to adopt the Act and establish a Stormwater Utility System as a public utility; and

**WHEREAS,** it is the intent of the City to fund the Stormwater Utility System in a manner that fairly, equitably, and in a non-discriminatory manner allocates the cost of stormwater control and treatment to properties in proportion to stormwater runoff potential for each class of property; and

**WHEREAS,** proper notice has been given and a public hearing has been held regarding the adoption of this Ordinance, as required by law.

**NOW, THEREFORE BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF KINGSVILLE, TEXAS THAT:**

**SECTION 1:** The Code of Ordinances of the City of Kingsville, Texas is hereby amended by adding Chapter Article 6, "Stormwater Utility System" to Chapter V Public Works to read as follows:

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## Article 6. STORMWATER UTILITY SYSTEM

ARTICLE I. STORMWATER UTILITY SYSTEM RULES

### Sec. 5-6-1. Authority to create Stormwater Utility System.

The City does hereby declare under the Texas Constitution and the Texas Local Government Code, Chapter 552, Subchapter C, The Municipal Drainage Utility System Act, that said Act is hereby adopted and it is declared that the stormwater utility of the City of Kingsville, Texas, shall be a "public utility" as defined in the Act. Pursuant to the provisions of Section 552.046 of the Act, the City incorporates its existing stormwater facilities, materials, equipment, and supplies into the Stormwater Utility System ("Stormwater System" or "Utility" or "Public Utility").

### Sec. 5-6-2. Finding and determinations.

(a) *Determination of Utility Service Area.* The Stormwater System shall serve the City, the boundaries of which shall be the City's municipal boundaries.

(b) It is hereby found, determined, and declared that the City shall:

1) Ensure that the cost of operating and maintaining the Stormwater System, and the financing of necessary repairs, replacements, improvements, and extension thereof must be related to stormwater service and the terms of the Stormwater Utility Fees;
2) Provide stormwater facility and services for benefitted real property within the utility service area upon payment of the Stormwater Utility Fee unless the property is exempt under Section 5-6-11; and
3) Establish a schedule of Stormwater Utility Fees for benefitted properties within the utility service area in accordance with the provisions of the Act; and
4) Offer stormwater service under non-discriminatory, reasonable, and equitable terms.

### Sec. 5-6-3. Application.

This Article applies to the Owner or Customer of a benefited property within the utility service area, as determined by Section 5-6-2, to which stormwater service is provided, either directly or indirectly.

### Sec. 5-6-4. Definitions.

The following definitions shall apply to the establishment and operation of the Stormwater System:

*Act* means Chapter 552, Subchapter C "Municipal Drainage Utility Systems," of the Texas Local Government Code, as amended.

*Allocated portion of a parcel* means the lot, tract, or part of a parcel that has been assigned to an Owner or Customer based on the portion used by the Owner or Customer as compared to the parcel's total area.

*Benefitted property* means an improved lot, tract or parcel within the utility service area to which stormwater service is made available under this Article. All real property within the utility's service area directly or indirectly receives stormwater service.

*City* means the City of Kingsville, Texas and the City's officers and employees.

*City Engineer* means the City's Engineer or his/her designee responsible for the administration and enforcement of this Article.

*Customer* means the person(s) or entity(ies) recorded as the customer or user of utility services for a parcel based on the records of the City or its contracted utility billing system provider.

*Equivalent residential unit (ERU)* means a unit of measurement of impervious surface area calculated for the average single family residential property within the utility service area, as measured in square feet (SF), including the residential structure, garage, driveway, sidewalk, patio, out buildings, and any other impervious surface.

*Impervious surface* means a surface that has been compacted or covered with a layer of material so that it is resistant to penetration by water and does not have vegetative cover. An impervious surface includes, but is not limited to, parking lots, driveways, a sidewalk or private roadway, a building or artificial structure, or any surface that changes the natural landscape and increases, concentrates, pollutes, or otherwise alters the flow or amount of stormwater runoff.

*Impervious area* means a measurement in square feet (SF) of impervious surface on which the amount of stormwater runoff potential for a benefitted property within a customer class is estimated.

*Improved parcel* means a parcel, lot or tract or portion of lot or tract that has been changed from its natural state by addition of a building, facility, structure or other improvement on all or a portion of the parcel, which creates an impervious surface.

*KCAD* means the Kleberg County Appraisal District.

*Non-residential property* means an improved parcel that is not a residential property, including commercial, industrial, institutional, and government uses, a condominium or apartment consisting of four (4) or more residential units, a homeowner's association, or other similar uses or properties.

*Owner* means the person(s) or entity(ies) listed as the owner of a parcel in the records of KCAD or the City.

*Public Utility* (or *Utility*) shall have the same meaning as defined by the Act, Section 552.044(7).

*Residential property* means an improved parcel upon which three (3) or fewer residential units are constructed in one building on the Improved Parcel.

*Residential dwelling unit* means any building or portion thereof that contains living facilities, including provisions for sleeping, eating, cooking and sanitation, as required by applicable City codes, for not more than one family. A residential unit may be a single-family house, a town home, a condominium, a manufactured home or a portion of a duplex, triplex, or quadplex.

*Service area* means the geographical area within the incorporated limits of the City.

*Stormwater infrastructure* means the property – real, personal or mixed – that is used in providing stormwater capacity to manage and control stormwater runoff for the stormwater system, including bridges, catch basins, channels, conduits, creeks, culverts, detention ponds, retention ponds, ditches, draws, creeks, flumes, pipes, pumps, sloughs, treatment works, and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the stormwater runoff away, collect, store, or treat the stormwater runoff, or divert the stormwater runoff into natural or artificial watercourses.

*Stormwater Utility expenditures* means an expenditure required to finance, operate and maintain stormwater infrastructure, including debt service, equipment, personnel, educational and administrative expenditures.

*Stormwater runoff potential* means the relative potential for causing stormwater runoff quantities, qualities, or velocities from an improved parcel based on the type of development or land use on the parcel and the size of the parcel.

*Stormwater Utility Fee* means the fee established under Article 6 of Chapter V of the Code of Ordinances of the City of Kingsville, Texas that is levied against the Owner or Customer of a benefitted property for stormwater services provided by the Stormwater System, including but not limited to, the items described in the definition of "cost-of-service" in the Act. The Stormwater Utility Fee may also be referred to a *Fee.*

*Stormwater System* means the Stormwater Utility System owned or controlled, in whole or in part, by the City, including the City's existing stormwater facilities, materials, and supplies and any stormwater facilities, materials, and supplies hereafter constructed or utilized and dedicated to the service of benefitted property, and including provision for additions to the system. The Stormwater System may also be referred to as a *Public Utility* or *Utility.*

*Wholly sufficient and privately owned Stormwater System* means land and a facility owned and operated by a person or entity other than the City and from which stomrwater does not discharge, under any storm frequency event or conditions, into a creek, river, slough, culvert, channel or other infrastructure that is part of the City's Stormwater System.

**Sec. 5-6-5. Administration**

(a) *Duty of City Engineer.* The City Engineer shall administer the Stormwater System. The City Engineer shall maintain an accurate record of all properties benefitted or served by the Stormwater System and the Stormwater Utility Fee levied for each parcel or portion of a parcel. The record may be maintained within the City's billing system or in another record keeping system that may be developed.

(b) *Program Implementation.* By the adoption of this Article, the City makes no representation that all stormwater problems may or will be remedied and the City Commission retains full discretion in establishing the priorities in expending funds as they become available to meet the City's stormwater needs. The adoption of this Article shall not be construed to relieve private land owners, developers or other individuals or entities from providing stormwater improvements required by the Code of Ordinances of the City of Kingsville, Texas, and federal or State laws and regulations.

(c) *Access to Benefitted Properties.* City employees shall have access to a benefitted property within the utility service area to inspect, maintain, repair, or enforce this Article or State laws or regulations.

(d) *Governmental Immunity.* The City does not waive any immunity granted under any law.

**Sec. 5-6-6. Stormwater Utility Fee, billing policies, and procedures.**

(a) *Stormwater Utility Rate Classes.* A Stormwater Utility Fee is established, and the fee shall be imposed on each benefitted property within the utility service area for stormwater services and stormwater facilities provided by the Stormwater System. A benefitted property within the utility service area shall be classified and charged a Stormwater Utility Fee based on the Stormwater Utility rate determined by the property's rate class. Depending on the use of the benefitted property, the property shall be classified as one of the rate classes:

1) Residential property; or
2) Non-residential property.

(b) *Responsible Party.*

1) A Customer or Owner shall be billed monthly for stormwater services. The Stormwater Utility Fee shall be levied along with other municipal utility services provided to the premises, including water, wastewater or solid waste/refuse services.
2) The utility bill imposing the Stormwater Utility Fee will be mailed to either the Customer or Owner; and, the Customer or Owner recorded in the utility billing system shall be responsible for payment of the Stormwater Utility Fee.
3) If there is no active Customer account for a benefitted property recorded in the City's utility billing system, or at the discretion of the City, or when a benefitted property is not served by other municipal utility services, the City Engineer shall establish a "Stormwater Only Account" and shall bill the Owner of the benefitted property for the Stormwater Utility Fee. The Owner

of the benefitted property shall be responsible or payment of fees imposed via a Stormwater Only Account.

(c) *Revision of Rates.* The City Commission shall establish the initial Stormwater Utility Fee and Stormwater Utility rates though an ordinance pursuant to the provisions of the Act. The City Commission reserves the right to review the fee and rate schedules at any time and may, by ordinance, increase or decrease the Stormwater Utility Fee or rates within the schedule upon a determination that the increase or decrease is warranted.

(d) *Billing Procedures and Policies.*

1) Any partial payment of the Stormwater Utility Fee shall be applied against the amount due in accordance with the policies and procedures established for municipal utility services.
2) A late charge and interest may be imposed in accordance with the policies and procedures established for municipal utility services.

(e) *Non-Payment.* The City may file suit to recover any unpaid fees, together with maximum interest, attorney's fees and other costs and fees allowable under State or federal law. In addition, to any other remedies or penalties provided by State or federal law or in this Article, a Customer's failure to pay the Stormwater Utility Fee when due shall subject the Customer to disconnection of any or all municipal utility services and/or the placement of lien against the benefitted property to the extent authorized by law and the Code of Ordinances of the City of Kingsville, Texas, as amended.

**Sec. 5-6-7. Calculation of Fees.**

(a) *Rates in Accordance with the Act.* The Stormwater System rates shall be established in accordance with the provisions of the Act and this Section.

(b) *Fee Calculation.* The Stormwater Utility Fee shall be based on an inventory of improved parcels within the service area. The inventory shall evaluate the stormwater runoff potential for improved parcels within the service area and establish a rate for each class of benefitted properties. The stormwater runoff potential for each class shall be equitably and proportionately distributed between classes and among parcel within each class of benefitted properties relative to the contribution of each class to stormwater runoff.

(c) *Stormwater Runoff Potential.* For purposes of establishing the stormwater runoff potential for each class of benefitted properties and between classes of benefitted properties, the City Engineer shall calculate the impervious area for parcels within the service area based on data gathered from KCAD, Geographic Information System records, and aerial photography and site plans or plats available. The City Engineer shall then determine the relative stormwater runoff potential for each rate class and among parcels within each rate class. The rate for each class of benefitted properties and for parcels within each rate class shall be based on the impervious area measured in square feet (SF).

**Sec. 5-6-8. Appeal.**

(a) *Standing and Exclusive Remedy.* An Owner or Customer who has been charged with and contests a Stormwater Utility Fee, or who challenges action taken by the City under this Article for non-payment of the Stormwater Utility Fee charged to that Owner or Customer, shall have standing to appeal under this Article; that Owner or Customer will be referred to as an "appellant" in this section. The provisions in this section shall be the exclusive administrative remedy for an appellant. By way of example and not limitation, an appellant may appeal an error in calculating the Stormwater Utility Fee for a benefitted property due to an error in calculating impervious surface area or an error in calculating the customer class; or an appellant may appeal the discontinuance of utility service, the filing of a lien, or other legal action taken by the City under this Article for non-payment of the Stormwater Utility Fee. The City's appeal process is set forth in Appendix C of "_____."

(b) *Burden of Proof.* The appellant shall bear the burden of proving by a preponderance of the evidence the relief sought in the appeal. By way of example and not limitation, the appellant shall bear the burden of proving that a fee does not apply, or that the fee is calculated in error, or that the rate class assigned to the appellant is incorrect.

**Sec. 5-6-96. Termination of Stormwater Utility System.**

If, after at least five (5) years of substantially continuous operation of the Stormwater System, the City Commission determines that the Stormwater System should be discontinued, the powers under the Act should be revoked, and the provision for financing municipal stormwater costs should be made by using other revenues, the City Commission may adopt an ordinance that in effect, after providing notice and a public hearing as required by the Act, discontinues the Stormwater System.

**Sec. 5-6-10. Stormwater Utility fund.**

(a) *Stormwater Utility fund.* A Stormwater Utility fund is established and may consist of one or more accounts. All Stormwater Utility fees shall be deposited as collected and received into this fund, and shall be used exclusively for stormwater services as provided in the Act, but not limited to the following:

1) The cost of the acquisition of land, rights-of-way, options to purchase land, easements, and interests in land relating to structures, equipment, and facilities used in draining the benefited property;
2) The cost of the acquisition, construction, repair, and maintenance of structures, equipment, and facilities used in draining the benefitted property;
3) The cost of architectural, engineering, legal, and related services, plans and specifications, studies, surveys, estimates of cost and of revenue, and all other expenses necessary or incident to planning, designing, providing, or determining the feasibility and capability of structures, equipment, and facilities used in draining the benefitted property;
4) The cost of all machinery, equipment, furniture, and facilities necessary or incident to the provision and operation of draining the benefitted property;

5) The prorated cost of funding and financing charges and interest arising from construction projects and the start-up cost of a stormwater facility used in draining the benefitted property;
6) The prorated cost of debt service and reserve requirements for funding of stormwater infrastructure, equipment and facilities paid with revenue bonds or other securities or obligations issued by the City and supported by pledge of stormwater revenues, including any fees and expenses incidental thereto;
7) To the extent permitted by law, the cost of constructing, sampling, monitoring, building, inspecting and maintaining structures needed for the State's regulation and permitting requirements imposed on the City for providing stormwater quality improvements for the benefitted property; and
8) The administrative costs of the Stormwater System.

(b) *Stormwater Utility fund accounting.*
1) The City shall clearly account for revenues and expenditures authorized for operation of the Stormwater System.
2) The revenues collected from Stormwater Utility Fees shall be segregated and completely identified from other City funds and accounts.
3) Funds and revenues in the Stormwater Utility fund may be transferred to the City's general fund as allowed by law.

(c) *Stormwater Utility service deposit.* A deposit shall not be imposed for initiation or continuation of Stormwater Utility service.

**Sec. 5-6-11. Exemptions.**

(a) The following shall be exempt from payment of the fees established by the Article:
1) Entities to which a mandatory exemption under Section 580.003(a) of the Texas Local Government Code applies.
2) Any property to which a mandatory exemption under Section 552.053 of the Texas Local Government Code applies, including without limitation:
A. Property with proper construction and maintenance of a wholly sufficient and privately owned Stormwater System that does not discharge under any storm frequency event or conditions to waterways controlled or maintained by the City;
B. Property held and maintained in its natural state, until such time that the property is developed and all of the public infrastructure constructed has been accepted by the City for maintenance; or
C. A subdivided parcel or lot, until a structure has been built on the subdivided parcel or lot and a certificate of occupancy has been issued, or the City has taken another official action to release the property for occupancy.

(b) Proof of Exemption. If an Owner asserts that property is exempt pursuant to this Section or any other applicable law, the Owner has the burden of proving the exemption by filing with the City Engineer a notice of exemption eligibility and

sufficient evidence of entitlement to such exemption. If the exemption is not granted, the Owner may appeal under Section 5-6-8.

**SECTION 2:** It is provided that in case a section, clause, sentence or part of this Ordinance shall be deemed or adjudged by a Court of competent jurisdiction to be invalid, then such invalidity shall not affect, impair or invalidate the remainder of this Ordinance.

**SECTION 3:** All ordinances or parts of ordinances in conflict herewith are specifically repealed to the extent of such conflict.

**SECTION 4:** This Ordinance shall be in full force and effect from and after its passage and approval.

**INTRODUCED** on this the 27th day of August, 2012.

**PASSED AND APPROVED** by the City Commission on this the 10th day of September, 2012.

_____
SAM FUGATE, MAYOR

ATTEST:

_____
EDNA S. LOPEZ, CITY SECRETARY

APPROVED AS TO FORM AND LEGALITY:

_____
COURTNEY ALVAREZ, CITY ATTORNEY

# Appendix B

## Municipal Drainage Fee Ordinance

List of sample ordinances-relating to the original Municipal Drainage Utility Ordinance-used to establish the drainage charge schedule for each city.

**ORDINANCE NO. 20150625-021**

**AN ORDINANCE AMENDING CITY CODE CHAPTERS 15-2 AND 15-9 RELATING TO THE DRAINAGE UTILITY.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

**PART 1.** City Code Section 15-2-1 (*Definitions*) is amended to read:

**§ 15-2-1 DEFINITIONS.**

(A) Except as provided by Subsection (B), words and phrases in this chapter have the same meaning they have in Chapter 552 [~~402~~] (*Municipal Utilities*), Subchapter C (*Municipal Drainage Utility Systems Act*), of the Texas Local Government Code.

(B) In this chapter:

(1) ADJUSTMENT FACTOR means a number established by ordinance to be used in the drainage charge calculation to account for the percent of impervious cover on a benefitted property.

(2) DIRECTOR means the director of the Watershed Protection [~~and Development Review~~] Department.

(3) BASE RATE means an annual dollar amount per square foot of impervious cover established by ordinance to be used in the drainage charge calculation before application of the adjustment factor.

(4) IMPERVIOUS COVER means the total area, in square feet, of any surface that prevents the infiltration of water into the ground, such as roads, parking areas, concrete, and buildings.

(5) UTILITY CUSTOMER means the person or entity receiving the benefit of, or responsible for payment for, City utility service, such as drainage, consistent with Chapter 15-9 (*Utility Service Regulations*).

[~~(2) DWELLING UNIT means a residential unit providing independent living facilities.~~

~~(3) EQUIVALENT RESIDENTIAL UNIT or ERU means 1,763 square feet of impervious cover.~~

~~(4) NON-RESIDENTIAL USER means all or a portion of a benefitted property that is not a dwelling unit.~~

~~(5) RESIDENTIAL USER means all or a portion of a benefitted property that is a single dwelling unit.~~

~~(6) USER means the person or entity who owns or occupies a benefitted property.~~

[~~(7) VERTICAL CONSTRUCTION means a structure with seven or more stories of residential development.~~]

**PART 2.** City Code Section 15-2-2 (*Findings; Adoption of State Law*) is amended to read:

**§ 15-2-2 FINDINGS; ADOPTION OF STATE LAW.**

(A) The Council finds that notice has been given, and hearings held as required by Section 552.045(c) [~~402.045(c)~~] (*Adoption of System; Rules*) of the Texas Local Government Code.

(B) The Council makes the findings required by Section 552.045(b) [~~402.045(b)~~] (*Adoption of System; Rules*) of the Texas Local Government Code.

(C) Chapter 552 [~~402~~] (*Municipal Utilities*), Subchapter C (*Municipal Drainage Utility Systems*), of the Texas Local Government Code is adopted, and this chapter shall be administered in accordance with its provisions.

(D) The drainage of the City is declared to be a public utility. Existing facilities are incorporated in the drainage utility as permitted by Section 552.046 [~~402.046~~] (*Incorporation of Existing Facilities*) of the Texas Local Government Code.

[~~(E) The drainage utility shall be known as the Watershed Protection and Development Review Department.~~]

**PART 3.** City Code Section 15-2-4 (*Drainage Charge Established*) is amended to read:

**§ 15-2-4 DRAINAGE CHARGE ESTABLISHED.**

(A) A drainage charge is established.

(B) Subject to Section 15-2-8 (*Billing*), the City shall bill the[~~The~~]drainage charge to [~~paid by the~~] every utility customer for [~~user of~~] each benefitted property in the service area.

(C) The drainage charge is based on:

(1) [~~the developed use of the benefitted property;~~

~~(2) the amount that development increases runoff and associated pollutants; and~~

~~(3)~~] the amount of impervious cover on the benefitted property, and

(2) the percentage of impervious cover on the benefitted property.

**PART 4.** City Code Section 15-2-5 (*Categories of Developed Use*) is deleted in its entirety; a new Section 15-2-5 is added to read:

## § 15-2-5 IMPERVIOUS COVER CALCULATION.

(A) Impervious cover shall be calculated in accordance with the Environmental Criteria Manual and City Code Section 25-8-63 (*Impervious Cover Calculations*). For the purpose of impervious cover calculation for drainage utility purposes, impervious cover shall exclude gravel railroad track ballasts.

(B) The percentage of impervious cover on a benefitted property shall be calculated using the total area of the benefitted property as the denominator and the total impervious cover as the numerator, then converting the fraction to a percentage.

(C) The percentage of impervious cover on a benefitted property may be calculated on a composite basis with another benefitted property if:

(1) the properties together constitute a condominium regime; or

(2) the properties were legally developed together as one site as evidenced by a unified development agreement, city site plan, or other acceptable documentation.

**PART 5.** City Code Section 15-2-6 (*Findings Related to Calculation of the Drainage Charge)* is amended to read:

## § 15-2-6 FINDINGS RELATED TO CALCULATION OF THE DRAINAGE CHARGE.

(A) The Council makes the findings listed in this Section. [~~finds that:~~]

(B) [~~(1) impervious~~] Impervious cover increases storm-water runoff and associated pollutants and is directly related to drainage. [~~; and~~]

(C)[~~(2)~~]The total square feet of impervious cover and the percentage of impervious cover on a benefitted property affect both storm-water runoff and associated pollutants from a benefitted property.

(D) It [~~it~~] is non-discriminatory, reasonable, and equitable to assess the drainage charge for [~~to~~] each benefitted property [~~non-residential user~~] based on the amount and percentage of impervious cover.

[~~(B)The Council finds that:~~

~~(1)the drainage attributable to a residential user is relatively uniform;~~

~~(2)it is equitable to assess the drainage charge to each residential user assuming impervious cover of 1,763 square feet per residence, or one ERU; and~~

~~(3)it is equitable to assess a reduced drainage charge to residential users in vertical construction.~~]

**PART 6.** City Code Section 15-2- 7 (*Monthly Drainage Charge for Residential Properties*) is amended to read:

**§ 15-2-7 MONTHLY DRAINAGE CHARGE [~~FOR RESIDENTIAL PROPERTIES~~].**

(A) The monthly drainage charge for each benefitted property shall be calculated by applying the base rate to the total impervious cover on the benefitted property and applying an adjustment factor to account for the percentage of impervious cover on the benefitted property.

(B) The formula for computing the monthly drainage charge is:

$$MDC = BR \times IC \times AF \div 12$$

MDC = monthly drainage charge

BR = base rate

IC = square feet of impervious cover on benefitted property

AF = adjustment factor

(C) After computing the monthly drainage charge as described in subsections (A) and (B), the monthly drainage charge for single family residential properties may be modified by limiting any increase in the charge to be assessed October 1, 2015 – October 1, 2016 as compared to the charge assessed October 1, 2014 – October 1, 2015 by a percentage, if established by separate ordinance.

~~[(A) The monthly residential drainage charge per ERU shall be set by ordinance and shall be known as the residential ERU charge.]~~

~~[(B)Each month residential user shall pay to the City an amount equal to one residential ERU charge.~~

~~(C)Each month each residential user in vertical construction shall pay to the City an amount equal to one half of one residential ERU charge.~~]

**PART 7.** City Code Sections 15-2-8 (*Monthly Drainage Charge for Non Residential Properties*), 15-2-9 (*Utility Meters*), and 15-2-10 (*Billing*) are deleted in their entirety; a new Section 15-2-8 is added to read:

**§ 15-2-8 BILLING.**

(A) The drainage charge shall be shown as a separate listing on the monthly utility bill from the City. Bills become due in accordance with Chapter 15-9 (*Utility Service Regulations*).

(B) If no utility meter serves the benefitted property, the City may establish a non-metered utility account using the utility billing system and shall bill the drainage charge to the utility customer for the non-metered utility account.

(C) If more than one utility customer is associated with a benefitted property, the City shall bill the drainage charge to the owner of the benefitted property unless:

(1) the benefitted property is a single family, duplex, triplex, or fourplex residence, in which case the City shall divide the drainage charge equally among the utility customers and bill the utility customers accordingly; or

(2) the owner of the benefitted property cannot reasonably be determined or located, in which case the City shall determine an equitable method to allocate the drainage charges among the utility customers based upon information available and bill the utility customers accordingly.

**PART 8.** City Code Section 15-2-11 (*Drainage Utility Fund*) is amended to read:

**§ 15-2-9 [~~11~~] DRAINAGE UTILITY FUND.**

(A) A drainage utility fund is created.

(B) The drainage utility fund shall be administered in accordance with Section 552.049 [~~402.049~~] (*Segregation of Income*) of the Texas Local Government Code.

**PART 9.** City Code Section 15-2-12 (*Annual Report*) is amended to read:

**§ 15-2-10 [~~12~~] ANNUAL REPORT.**

The director shall provide an annual report of the drainage utility [~~Watershed Protection and Development Review Department~~] revenues, expenses, and programs to the city council. The annual report shall include findings on the impact of green infrastructure on drainage and recommended strategies that could allow utility customers to reduce the drainage charge by reducing their property's impact on drainage. The recommended strategies shall address the potential for credits or discounts for innovative stormwater

controls that exceed land development requirements and/or detention and water quality treatment minimum requirements.

**PART 10.** City Code Section 15-8-13 (*Administration; Rules*) is renumbered as City Code Section 15-8-11.

**PART 11.** City Code Section 15-8-14 (*Adjustments)* is amended to read:

**§ 15-2-12 [~~14~~] BILLING ADJUSTMENTS.**

(A) A utility customer may request administrative review by the director of the customer's drainage charge. Subject to Subsection (B), the director shall adjust a utility customer's account and issue a corrected bill if the director determines that the utility customer was over-billed or under-billed for drainage utility service based upon:

(1) an error in calculating the amount or percentage of impervious cover on the benefitted property;

(2) an error in calculating the area of the benefitted property;

(3) an error in calculating the drainage charge; or

(4) an error in assessing the drainage charge.

(B) Billing adjustments under this Section are subject to the time limitations in City Code Section 15-9-140 (B) (*Billing Adjustments*).

(C) The administrative review under this Section shall comply with City Code Section 15-9-191 (*Administrative Review*).

(D) After the administrative review is complete, a utility customer may request an administrative hearing as outlined in City Code Chapter 15-9, Article 12 (*Administrative Review and Hearing*).

~~[(A) A user may apply to the director for an adjustment in the user's drainage charge if:~~

~~(1)the user believes that the drainage charge schedule as applied to the user's benefitted property does not fairly reflect the cost of service to the user's benefitted property;~~

~~(2)the user disputes the category of developed use or another factor used in calculating the drainage charge for the user's benefitted property; or~~

~~(3)the user's drainage charge has been assessed in error.~~

~~(B)The director may adjust the drainage charge of a user who applies for an adjustment under Subsection (A).~~

~~(C)A user who disagrees with a determination of the director under this section may apply for a hearing. The director shall assign a hearing officer to consider the user's request for an adjustment. The user requesting the hearing shall have the burden of~~

~~proof. On completion of the hearing, the hearing officer shall recommend a disposition of the matter to the director who may revise or reinstate the original determination.~~

~~(D)After a hearing, a user may appeal the director's decision to the city council. An appeal must be filed in writing with the city clerk no later than the 15th day after the effective date of the director's decision.~~

~~(E)If the city council fails to take action on the appeal by the 45th day after the day the appeal is filed with the city clerk, the director's decision is final.~~

~~(F)A user entitled to an adjustment under this section must apply for the adjustment.~~

~~(G)A user may not receive a refund resulting from an adjustment under this section except for a drainage charge paid during the two years immediately preceding the date the user applied for the adjustment. This subsection does not apply to an adjustment applied for on or before May 22, 2000.~~]

**PART 12.** City Code Section 15-2-15 (*Exemptions*) is amended to read:

**§ 15-2-13 [~~15~~] EXEMPTIONS.**

(A) A benefitted property described in [~~In addition to property exempt under~~] Section 552.053(c) [~~402.053(c)~~] (*Exemptions*) of the Texas Local Government Code [~~, a property~~] is exempt from the drainage charge established by this chapter.

(B) A benefitted property is exempt from the drainage charge established by this chapter if[~~:~~

~~(1)~~] the property is owned and occupied by:

(1) [~~(a)~~] the State of Texas;

(2) [~~(b)~~] a county;

(3) the City, if the property is publicly maintained right-of-way;

(4) [~~(c)~~] an independent school district; or

(5) [~~(d)~~] a public or private institution of higher education.[~~; or~~]

(C) [~~(2)~~]A benefitted property is exempt from the drainage charge established by this chapter if the property is owned and occupied by an organization that is exempt from taxation under Section 11.20 (*Religious Organizations*) of the Texas Tax Code, and the organization submits to the director:

(1) [~~(a)~~] a request for an exemption from the drainage charge;

(2) [~~(b)~~] a copy of the organization's tax exemption certificate; and

(3) [~~(c)~~] an affidavit executed by a person authorized to contract for the organization stating that the organization participates in a program [~~that is approved by the city manager and~~] that provides housing for the homeless, at a monetary amount at least equal to the drainage charge.

(D) [~~(B)~~] The city manager shall review the effectiveness of the exemption under Subsection(C) [~~(A)(2)~~] and report the manager's findings and recommendations to council annually.

**PART 13.** City Code Section 15-2-16 (*Reduced Charge with Pond Registration*) is deleted in its entirety.

**PART 14.** City Code Section 15-1-17 (*Reduced Charge Based on Need*) is amended to read:

**§ 15-2-14 [~~17~~] REDUCED CHARGE BASED ON NEED.**

(A) A utility customer who qualifies for assistance under Austin Energy's Customer Assistance Discount Program [~~The user of residential benefitted property~~] may request a reduced drainage charge based on financial need. [~~A request must be in writing and be provided to the director.~~]

(B) [~~The user of residential benefitted property is eligible for the reduced charge if the user or a person residing in the household of the user:~~

~~(1) is a certified recipient of Supplemental Security Income;~~

~~(2) is an aged, blind, or disabled Medicaid recipient; or~~

~~(3) has been receiving, within the twelve months immediately preceding the request, assistance under one of the Travis County Energy Assistance Programs or the Austin/Travis County Medical Assistance Program.~~

~~(C)~~] The reduced charge is available annually on the utility customer's [~~user's~~] submission of proof of continuing eligibility.

(C)[~~(D)~~] The reduced charge is prospective only and must be requested by the utility customer [~~user~~]. The director may not refund any drainage charges under this section.

(D)[~~(E)~~] The reduced charge under this Section [~~section~~] shall be set by ordinance. A utility customer [~~user~~] may receive only the most recently authorized reduction.

**PART 15.** City Code Section 15-2-18 (*No Waiver of Immunity*) is renumbered as City Code Section 15-2-15.

**PART 16.** City Code Section 15-9-193 (*Administrative Hearing*) Subsection (A) is amended to read:

**§ 15-9- 193 ADMINISTRATIVE HEARING.**

(A) A [~~Except as provided in Section 15-2-14 (Adjustment), a~~] hearing under this article shall be held by a hearings officer appointed by the city manager. A hearings officer may not be an employee of a utility.

**PART 17.** This ordinance takes effect on October 1, 2015.

**PASSED AND APPROVED**

§
§
June 25, 2015 §

Steve Adler
Mayor

**APPROVED:**

Anne L. Morgan
Interim City Attorney

**ATTEST:**

Jannette Goodall
City Clerk

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**ORDINANCE NO.2012-51**

**AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF KINGSVILLE, TEXAS, AMENDING CHAPTER V PUBLIC WORKS THE CODE OF ORDINANCES OF THE CITY OF KINGSVILLE, TEXAS BY AMENDING ARTICLE 6 ENTITLED "STORMWATER UTILITY SYSTEM", AS AMENDED, BY ADDING "STORMWATER UTILITY FEES", TO ESTABLISH MONTHLY STORMWATER UTILITY FEES FOR THE PURPOSE OF FUNDING THE STORMWATER UTILITY SYSTEM; PROVIDING A CUMULATIVE CLAUSE; PROVIDNG A SEVERABILITY CLAUSE; PROVIDING A SAVINGS CLAUSE; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS,** the City Commission of the City of Kingsville, Texas ("City Commission") has adopted Ordinance No. 2012-48, to create a Stormwater Utility System and provide stormwater drainage service to collect and direct stormwater runoff for benefitted properties within the utility service area upon payment of Stormwater Drainage Utility Fees; and

**WHEREAS,** the City Commission, after holding a public hearing and finding that the fees are non-discriminatory, reasonable, and equitable, now desires to levy a schedule of Stormwater Utility Fees for stormwater service; and

**WHEREAS,** in setting the schedule of Stormwater Utility Fees, the fees are based on an inventory of improved parcels within the utility service area.

**NOW, THEREFORE BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF KINGSVILLE, TEXAS THAT:**

**SECTION 1:** The City Commission hereby establishes Stormwater Utility Fees as set forth herein. Stormwater Utility Fees shall be levied against all benefited properties within the utility service area unless exempt under Chapter V, Article 6, Section 11. These fees shall be imposed and issued with utility billing statements issued on and after October 1, 2012.

**SECTION 2:** The Code of Ordinances of the City of Kingsville, Texas is hereby amended by adding 5-6-20 and 5-6-21 to Chapter V, Article 6 "Stormwater Utility Fees" to read as follows:

---

ARTICLE II. STORMWATER UTILITY FEES

**Sec. 5-6-20. Applicability.**

A Stormwater Utility Fee shall be levied against all benefitted property within the utility service area unless exempt under Section 5-6-11.

**Sec.5-6-21. Fee Calculation.**

(a) *Stormwater Utility Fee Calculation.* Stormwater Utility Fees shall be calculated based on the total stormwater runoff potential for benefitted properties for all customers within the utility service area. The total stormwater runoff potential shall be measured as impervious cover in square feet (SF).

(b) *Stormwater Utility Fee.* The total stormwater runoff potential for the service area shall be allocated between the customer classes based on the relative amount of impervious area in each class established in Section 5-6-6. The monthly Stormwater Utility Fee is based on the average impervious area for an ERU, which is Two Thousand Four Hundred Twenty Five Square Feet (2,425.0 SF).

1) *Residential Property Class.* The monthly Stormwater Utility Fees for each residential property as defined in Section 5-6-4, shall be either a flat-rate fee per singly-family equivalent residential unit (ERU) or a flat-rate fee per dwelling unit on a residential parcel.
2) *Non-Residential Property Class.* The monthly Stormwater Utility Fees for each improved non-residential property or allocated portion of an improved non-residential property shall be equal to: Impervious Area in square feet divided by 2,425.0 square feet for the ERU time the applicable flat-rate ERU fee.
3) *Minimum Monthly Stormwater Utility Fee.* The minimum Stormwater Utility Fee for all customer classes shall be the fee for one ERU.

(c) *Revision of Fees or Rates.* The Stormwater Utility Fee or the stormwater utility rate may be revised by the City Commission through an ordinance from time to time as permitted by the Article and the Act.

(d) *Applicable Stormwater Utility Fee.* The applicable Stormwater Utility Fee is $1.25/ERU/month.

---

**SECTION 3:** It is found and determined by the City Commission that the fees established by this Ordinance are non-discriminatory, reasonable, and equitable, and that the fees are based upon an inventory of improved parcels within the utility service area.

**SECTION 2:** It is further provided that in case a section, clause, sentence or part of this Ordinance shall be deemed or adjudged by a Court of competent jurisdiction to be invalid, then such invalidity shall not affect, impair or invalidate the remainder of this Ordinance.

**SECTION 3:** All ordinances or parts of ordinances in conflict herewith are specifically repealed to the extent of such conflict.

**SECTION 4:** This Ordinance shall be in full force and effect from and after its passage and approval.

**INTROUCED** on this the 10th day of September, 2012.

**PASSED AND APPROVED** by the City Commission on this the 17th day of September, 2012.

_____

SAM FUGATE, MAYOR

ATTEST:

_____

MARY VALENZUELA, CITY SECRETARY

APPROVED AS TO FORM AND LEGALITY:

_____

COURTNEY ALVAREZ, CITY ATTORNEY

Effective Date: October 3, 2012

# Appendix C

## Municipal Drainage Fee Calculation

List of sample procedures used to calculate the actual drainage fee for each city.

**ORDINANCE NO. 20160804-080**

**AN ORDINANCE AMENDING CITY CODE CHAPTER 15-2-7 RELATING TO THE AUTHORIZATION OF A CREDIT TO THE DRAINAGE CHARGE FOR CERTAIN STORMWATER CONTROL MEASURES; AMENDING CITY CODE SECTION 15-2-8 RELATING TO THE BILLING OF CERTAIN SECONDARY RESIDENCES; AND AMENDING CITY CODE SECTION 15-2-13 RELATING TO EXEMPTIONS FROM THE DRAINAGE CHARGE FOR CERTAIN GOVERNMENT ENTITIES.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

**PART 1.** City Code Section 15-2-7 (*Monthly Drainage Charge*) is amended to read:

**§ 15-2-7 - MONTHLY DRAINAGE CHARGE.**

(A) The monthly drainage charge for each benefitted property shall be calculated by applying the base rate to the total impervious cover on the benefitted property and applying an adjustment factor to account for the percentage of impervious cover on the benefitted property.

(B) The formula for computing the monthly drainage charge is:

$$MDC = BR \times IC \times AF \div 12$$

MDC = monthly drainage charge

BR = base rate

IC = square feet of impervious cover on benefitted property

AF = adjustment factor

(C) The director may credit the monthly drainage charge based on voluntary installation of on-site stormwater control measures that exceed the applicable requirements of City Code, state law, or a development agreement with the City. A credit under this subsection:

(i) may not exceed an amount equivalent to a 50% reduction in the square feet of impervious cover under the formula established in Subsection (B) of this section; and

(ii) must be based on criteria, established by administrative rule, that tie the amount of the credit to the overall value of voluntary stormwater control measures in reducing runoff from the benefited property.

(D)[~~(C)~~]After computing the monthly drainage charge as described in subsections (A) and (B), the monthly drainage charge for single family residential properties may be modified by limiting any increase in the charge to be assessed October 1, 2015—October 1, 2016 as compared to the charge assessed October 1, 2014—October 1, 2015 by a percentage, if established by separate ordinance.

**PART 2.** City Code Section 15-2-8 (*Billing*) is amended to read:

**§ 15-2-8 BILLING.**

(A) The drainage charge shall be shown as a separate listing on the monthly utility bill from the City. Bills become due in accordance with Chapter 15-9 (*Utility Service Regulations*).

(B) If no utility meter serves the benefitted property, the City may establish a non-metered utility account using the utility billing system and shall bill the drainage charge to the utility customer for the non-metered utility account.

(C) If more than one utility customer is associated with a benefitted property, the City shall bill the drainage charge to the owner of the benefitted property unless:

(1) the benefitted property is a single family, duplex, triplex, or fourplex residence, in which case the City shall divide the drainage charge equally among the utility and bill the utility customers accordingly; [~~or~~]

(2) the benefitted property includes a utility customer at a secondary residence, in which case the City shall bill the utility customer associated with the primary residence;

(3)[~~(2)~~] the owner of the benefitted property cannot reasonably be determined or located, in which case the City shall determine an equitable method to allocate the drainage charges among the utility customers based upon information available and bill the utility customers accordingly; or[~~,~~]

(4) the owner of the benefitted property is exempt under this chapter or state law, in which case the City shall determine an equitable method to allocate the drainage charges among the other utility customers based upon information available and bill the utility customers accordingly.

**PART 3.** City Code Section 15-2-13 (*Exemptions*) is amended to read:

## § 15-2-13 EXEMPTIONS.

(A) A benefitted property described in Section 552.053(c) (*Exemptions*) of the Texas Local Government Code is exempt from the drainage charge established by this chapter.

(B) The following entities are exempt from the drainage charge established by this chapter: [~~A benefitted property is exempt from the drainage charge established by this chapter if the property is owned and occupied by:~~]

(1) the State of Texas;

(2) a county;

(3) the City, for [~~if the~~]property that is publicly maintained right-of-way;

(4) an independent school district; or

(5) a public or private institution of higher education.

(C) A benefitted property is exempt from the drainage charge established by this chapter if the property is owned and occupied by an organization that is exempt from taxation under Section 11.20 (*Religious Organizations*) of the Texas Tax Code, and the organization submits to the director:

(1) a request for an exemption from the drainage charge;

(2) a copy of the organization's tax exemption certificate; and

(3) an affidavit executed by a person authorized to contract for the organization stating that the organization participates in a program that provides housing for the homeless, at a monetary amount at least equal to the drainage charge.

(D) The city manager shall review the effectiveness of the exemption under Subsection (C) and report the manager's findings and recommendations to council annually.

**PART 4.** This ordinance takes effect on August 15, 2016.

**PASSED AND APPROVED**

August 4, 2016

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§

Steve Adler
Mayor

**APPROVED:**

Anne L. Morgan
City Attorney

**ATTEST:**

Jannette S. Goodall
City Clerk

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## Storm Drainage & Flood Risk Mitigation Utility Commercial Rate Structure

The monthly commercial fee is based on the following formula:
Monthly Fee = Monthly Base Rate x Impervious Cover (sq. ft.) x Adjustment Factor
Monthly Base Rate = $0.0021 per sq. ft. of impervious cover
Adjustment Factor = The adjustment factor is unique to each commercial property and is based on the percent of impervious cover. It is calculated using the following formula: (1.5425 x % of impervious cover) + 0.5064

The commercial rate is based on the concept of "adjusting" the charge upwards or downwards based on the lot size, total square feet of impervious cover and the percent impervious cover on the lot. The commercial calculation uses the residential rate of $5.00, dividing it by Kyle's average residential structure square footage which is 2382 sq. ft.; giving the base rate of $0.0021. The calculation also uses Kyle's average percent impervious cover for residential property which is 32% impervious cover.

Using the commercial calculation, a large business in Kyle that has a lot size of 706,424 sq. ft., covering 538,006 sq. ft. of the lot with a building and parking lot (76.16% impervious cover) will be paying $1,899.39 per month. Using the same business noted above, two nearby cities would be charging that same business $2,186.85 and $3,680.22 based on their respective commercial drainage rates.

A smaller business in Kyle that has a lot size of 54,112 sq. ft., covering 29,520 sq. ft. of the lot with a building and parking lot (54.55% impervious cover) will be paying $83.56 per month. This same business, in nearby cities, would be paying $118.95 and $152.73.

The calculation takes into account the lot size, the total square feet of impervious cover and the percent impervious cover on a property. This allows the city to charge commercial customers based on the lot's overall stormwater runoff contribution to the drainage system.

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Gainesville, Texas Drainage fee

**DRAINAGE CHARGES**

It is necessary to maintain and repair existing storm drainage systems and to minimize natural stream erosion. This charge is passed on to the customers through their monthly water billings.

How much will you pay? The following storm water drainage fees have been set:

**RESIDENTIAL FEE**

Each house, duplex or triplex, regardless of size, will be charged an additional $3.79 per month for the Storm Water Utility Drainage System. The charge will be included on the customer's water bill statement.

**COMMERCIAL FEE**

The fee for commercial and industrial properties is based on the amount of "impervious surface area", where water is not readily absorbed, such as roofs, driveways and parking lots. The fee will be calculated on the following formula.

(square feet of impervious area / 1,895*) x $3.79 = monthly fee

*Note: The amount of 1,895 is the average square-footage of impervious area on a residential lot. That figure was used to determine the monthly proportionate fee for non-residential property.

**EXAMPLE**

If a business property has 10,000 square feet of impervious area, the company would pay $20.01 a month to the Storm Water Utility Drainage System.

## Appendix D
## Federal and State Grants for Local Government

A grant is a sum of money given by the government, a university, or a private organization to another organization or person or government for a special purpose.[1] Grants help local governments fund projects for a variety of purposes. The following grants are available to Texas Municipalities (Grants and their corresponding links were accessible and current as of April 10, 2019 at 1230).

**Federal Grants:**

**Federal Emergency Management Agency (FEMA)**

http://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Guidance_022715_508.pdf

**U.S. Department of Agriculture (USDA)**

USDA Agricultural Conservation Easement Program
https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/

USDA Emergency Watershed Protection Program
https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/ewp

USDA Drought Programs and Assistance
https://www.usda.gov/topics/disaster/drought/usda-drought-programs-and-assistance

**U.S. EPA Clean Water State Revolving Fund**

https://www.epa.gov/cwsrf

**Texas Grants:**

**Texas Department of Agriculture:**
**Texas Rural Community Block Development Grant Fund Categories**

Community Development Fund
http://www.texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant(CDBG)/CDBGResources/Applications/CommunityDevelopmentFundApplicationGuide.aspx

[1] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/grant.

Downtown Revitalization and Mainstreet Programs
http://www.texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant%28CDBG%29/CDBGResources/Applications/DRPMS.aspx

Planning and Capacity Building Fund
http://www.texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant(CDBG)/CDBGResources/Applications/PCBApplicationandGuide.aspx

Texas Capital Fund Infrastructure / Real Estate Programs
http://www.texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant(CDBG)/CDBGResources/Applications/INFRARE.aspx

Disaster Relief and Urgent Needs Funds
http://www.texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant(CDBG)/CDBGResources/Applications/DisasterReliefFundApplicationandGuide.aspx

Colonia Fund
http://www.texasagriculture.gov/GrantsServices/RuralEconomicDevelopment/RuralCommunityDevelopmentBlockGrant(CDBG)/ColoniaFunds.aspx

**Texas Water Development Board Grants**

Flood Protection Planning Grants
http://www.twdb.texas.gov/about/contract_admin/request/RFA-Flood/index.asp

FEMA Flood Mitigation Assistance Grant Planning
http://www.twdb.texas.gov/flood/grant/fma.asp

Texas Water Development Fund
http://www.twdb.texas.gov/financial/programs/TWDF/index.asp

Economically Distressed Areas Program
http://www.twdb.texas.gov/financial/programs/EDAP/index.asp

**Texas Parks and Wildlife**

Co-op Grants
https://tpwd.texas.gov/business/grants/recreation-grants/community-outdoor-outreach-program-co-op-grants

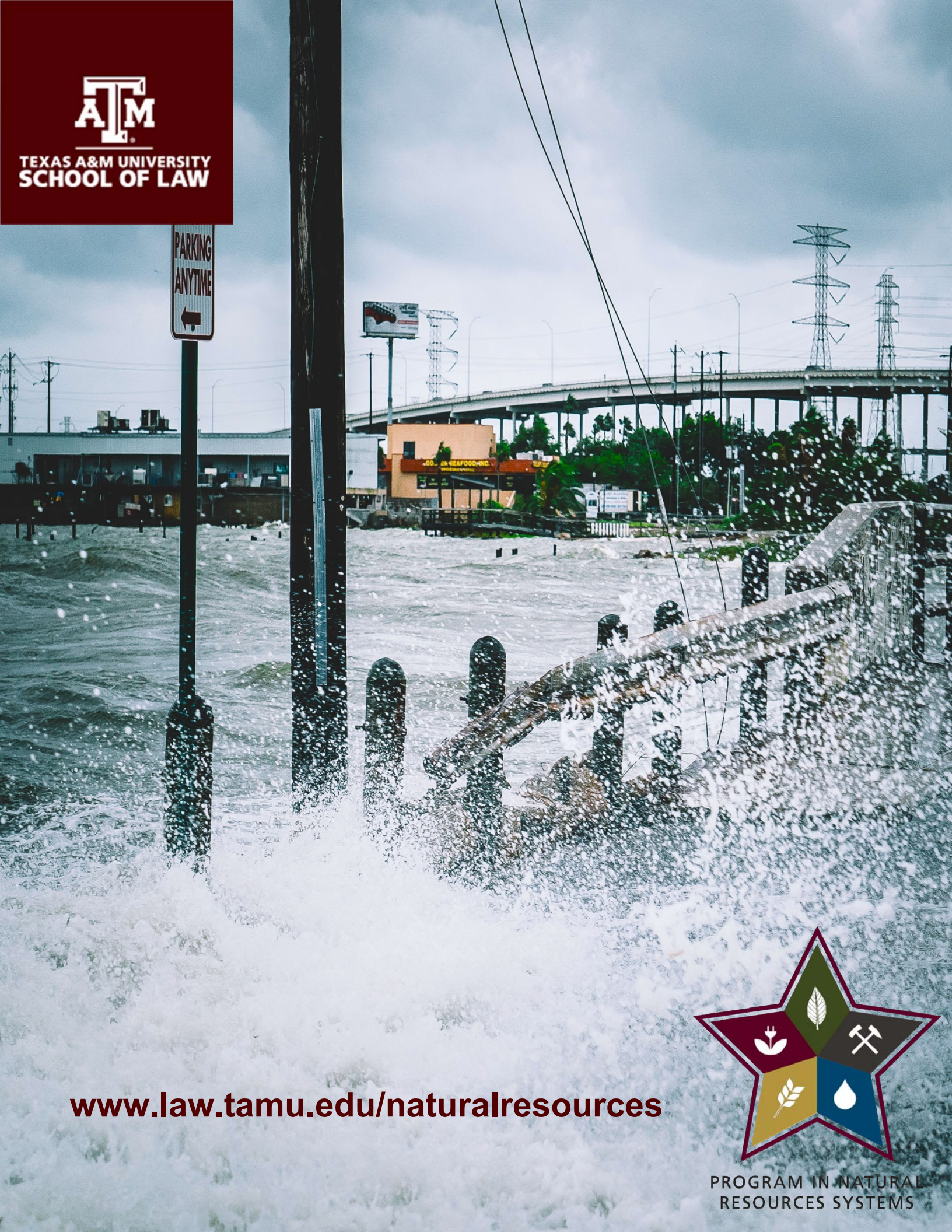
Texas Farm and Ranch Land Conservation Program
https://tpwd.texas.gov/landwater/land/private/farm-and-ranch/

**Keep Texas Beautiful Grants**

https://www.ktb.org/grants

**Texas Downtown Association**

Anice Read Fund Grant
https://www.texasdowntown.org/anice-read-grants.html

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