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**MEMORANDUM**

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**SUBJECT:** FIREWORKS BANS IN TEXAS COUNTIES

**DATE:** 6/2/2011

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The following is a summary of the actions that Williamson County may take in relation to fireworks bans. Texas counties are subdivisions of the State of Texas and they have only those powers that the Texas Constitution and the Texas Legislature have expressly given them. Specifically, they have no implied power to act to protect public health, safety, or welfare outside the limits drawn by state law.

The Texas Legislature has chosen to specifically define what counties can or cannot do with regard to restricting or prohibiting the sale or use of fireworks in the unincorporated areas of counties. Those rules are expressed in state laws that were adopted based on input from the public, including both people who love fireworks and people who hate wildfires. As with any law, the result was a compromise that did not fully satisfy either side. Nevertheless, it is the law and those who disagree with it are still bound by it.

Texas counties are only allowed to prohibit or restrict the sale or use of fireworks in accordance with one of two Texas statutes. Section 352.051 of the Texas Local Government Code provides a county commissioners court with the authority to adopt an order prohibiting or restricting the sale or use of "restricted fireworks" in all or in a portion of the unincorporated areas of a county where drought conditions are determined to exist. The Texas Forest Service must first determine that drought conditions have been met. Upon a drought determination, a county then must adopt an order before (1) April 25th of each year for the Cinco de Mayo fireworks season; (2) June 15 of each year for the Fourth of July fireworks season; and (3) December 15 of each year for each December fireworks season.

As stated above, the order may only prohibit or restrict the sale or use of "restricted fireworks", which means only those items classified under 49 C.F.R. Sec. 173.100(r)(2) (10-1-86 edition), as "skyrockets with sticks" and "missiles with fins." An order that is adopted pursuant to Section 352.051 of the Texas Local Government Code expires upon the Texas Forest Service's determination that drought conditions no longer exist.

It is very important to keep in mind that even if the county adopts a ban on fireworks sales or use on the adoption deadlines set forth above, such ban will not prevent the importation or possession of any type of fireworks within the county and it will not stop the sales of any type of fireworks other than just "skyrockets with sticks" and "missiles with fins."

In prior years, the Texas Pyrotechnic Association has asked that all fireworks retailers voluntarily ban the sale of rockets and fireworks with sticks and fins from being sold in Williamson County during very dry Fourth of July seasons as a matter of compromise when the county could not order that type of restriction or prohibition under Section 352.051.

Section 418.108 of the Texas Government Code also provides Texas counties with the authority to prohibit or restrict the sale or use of fireworks. This section allows a county judge to declare a local state of disaster and institute restrictions that can exceed the restrictions allowed under the above cited Section 352.051 of the Texas Local Government Code (i.e. restrict the sale or use of all fireworks as opposed to restricting only “skyrockets with sticks” and “missiles with fins”). See Tex. Gov’t Code Ann. § 418.108(i) (Vernon 2008). Restrictions that exceed those authorized by Section 352.051 of the Texas Local Government Code (a ban on “skyrockets with sticks” and “missiles with fins”) may only be effective for 60 hours unless extended by the governor upon a county judge’s request.

According to Section 418.104 of the Texas Government Code, a "disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.

It thus seems that a disaster must be something very much out of the ordinary that could either cause or threaten widespread or severe damage, injury or loss of life or property as opposed to the daily threat of a fire that results from seasonal dry vegetation in a Texas summer. The county judge must rely upon the feedback that it receives from the emergency management agencies within the county in order to determine if factors and conditions have risen to the level that a local state of disaster must be declared.

There has been some litigation over the years on whether or not counties can issue a general burn ban pursuant to Texas Local Government Code Section 352.081 that includes both a general prohibition on outdoor burning and a prohibition or restriction against the use of all fireworks. A general ban on outdoor burning under Section 352.081 does not apply to the specific issue of fireworks because there is a legal rule of construction that when a more general statute is in conflict with a more specific one, the specific one applies. As set forth above, Section 352.051 of the Texas Local Government Code and Section 418.108 of the Texas Government Code specifically apply to fireworks and they must control over the more general statute relating to burn bans that are authorized under Texas Local Government Code Section 352.081.

Unfortunately, only cities have the authority to prohibit the possession of fireworks or the transportation of fireworks into their jurisdiction. Williamson County does not have any

ability to keep fireworks out of the hands of people inclined to set them off on the July 4th weekend. Most Texas counties probably yearn for more authority and power in relation to prohibiting or restricting the sale, use and possession of fireworks within the unincorporated areas of their counties, but such counties continue to only be authorized to do what the law allows.