

**Municipal Setting Designations**  
**"The Real Estate Community Perspective"**

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## **Municipal Setting Designations: The Real Estate Community Perspective<sup>1</sup>**

Municipal Setting Designations (MSDs) offer the real estate community a valuable new tool to address the acquisition, sale, financing, and redevelopment of urban properties with actual or perceived environmental issues (brownfields). This paper describes the primary issues of interest to the real estate community regarding brownfields and how MSDs can make the acquisition, sale, financing, and redevelopment of such properties both technically and financially manageable.

### **Background**

Many Texas cities and towns have shallow groundwater affected with low levels of contaminants from historical operations of dry cleaners, gas stations, auto repair locations, and other common urban sources. These environmental impacts are usually compared to drinking water standards to determine if corrective action is necessary even though the affected groundwater is not used for potable purposes, if it is used at all. Cleanups governed by drinking water standards are notoriously expensive and time-consuming.

Recognizing that most cities rely on surface water or very deep groundwater for drinking water, Subchapter W of Chapter 361 of the Texas Health & Safety Code now allows municipalities to approve, and the TCEQ to certify, areas called "municipal setting designations." An area is eligible for certification as an MSD if it is within the corporate limits or extraterritorial jurisdiction of a municipality with a population of at least 20,000 and an existing public drinking water system supplies drinking water to the area and surrounding properties within ½ mile of the proposed MSD.

If those eligibility criteria are met, an applicant can seek certification of an MSD by:

- (1) Fulfilling TCEQ and municipal notice and application requirements;
- (2) Restricting the use of affected groundwater within the proposed MSD by ordinance or restrictive covenant;
- (3) Obtaining a resolution in support of the ordinance or restrictive covenant from the local municipality, other municipalities within ½-mile of the proposed MSD, and the governing authority for any retail public utility with a groundwater supply well located within five miles of the proposed MSD; and

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<sup>1</sup> See Whitten, *Municipal Setting Designations in Texas*, (portions of this article reprinted with permission of The Brownfield News, June 2005)

- (4) If necessary, demonstrating to TCEQ that certification of an MSD would not negatively affect the current and future regional water resource needs or obligations of a municipality, retail public utility, or private well owner.

Upon certification of an MSD, contaminant impacts are subject to less rigorous investigation and cleanup requirements. In essence, investigation and cleanup requirements are governed only by the risk of actual human exposure to affected groundwater (such as through contact during construction or inhalation of contaminants from the groundwater to the surface) and as necessary to protect ecological resources. By eliminating investigation and cleanup standards based on human ingestion risk factors, environmental impacts at MSD properties can be resolved more quickly and less expensively. With faster and less expensive cleanups, contaminated sites more easily attract new capital investment that in turn promotes redevelopment, the creation of more jobs, higher taxable values, and stronger urban cores.

To date, several Texas cities, including Dallas and Fort Worth, have taken steps to support the certification of MSDs. In 2004, Dallas approved the State's first two MSD applications on a pilot project basis. These MSD applications ultimately resulted in TCEQ's certification of MSD Nos. 001 (See Attachment "A") and 002. In January 2005, the City of Fort Worth adopted the State's first procedural ordinance governing the approval and enforcement of MSDs.<sup>2</sup> The City of Dallas adopted the State's second MSD procedural ordinance in May 2005.<sup>3</sup>

As the Dallas and Fort Worth MSD programs mature and more Texas cities implement their own MSD programs, MSDs will become an increasingly popular mechanism for facilitating the timely and cost-effective investigation and cleanup of contaminated urban properties. MSDs will succeed because they solve otherwise intractable problems faced by the real estate community.

### **Real Estate Community Issues**

In evaluating the value of MSDs, it is important to consider what the real estate community cares about in evaluating brownfield acquisition and redevelopment opportunities. The primary considerations are:

- (1) Liability Exposure. Real estate owners, lessees, developers, and lenders care about avoiding legal liability for cleanup costs, bodily injury, and property damages related to known and unknown pre-existing pollution conditions, especially when they neither caused nor contributed to such conditions (See Attachment "B").

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<sup>2</sup> [www.gsfpc.com/areasofspecialfocus/MSD.asp](http://www.gsfpc.com/areasofspecialfocus/MSD.asp)

<sup>3</sup> [www.gsfpc.com/areasofspecialfocus/MSD.asp](http://www.gsfpc.com/areasofspecialfocus/MSD.asp)

- (2) Transaction and Operating Costs. Real estate buyers and developers care about minimizing the added legal, technical, and insurance costs associated with buying, remediating, redeveloping, and operating a brownfield site. In any real estate transaction, it is mandatory that the economics of the deal make sense. The added costs of working with contaminated properties renders many such sites unmarketable.
- (3) Timing. Real estate owners, lessees, developers, and lenders care about how long it takes to resolve the environmental conditions affecting a property. Time is money. Delays that impede planned construction or business activities can result in financial disaster. Uncertainty about timing therefore represents financial risk. Remediation of groundwater contamination is a notoriously lengthy process that involves significant uncertainty as to whether cleanup objectives will ever be met.
- (4) Financing. Real estate owners and developers care about their ability to obtain financing (or re-financing) on reasonable terms and in a reasonable time period. Lenders are often hesitant to finance brownfield sites until the pollution conditions are resolved to the satisfaction of federal and state regulators. Nearly all real estate transactions are leveraged. The inability to obtain financing at acceptable rates can be a non-starter for a prospective real estate transaction involving a contaminated property.
- (5) Future Marketability. Real estate buyers and developers care about their prospects for selling the property at a profit in the future. Every buyer of real estate is a potential future seller of real estate. Brownfield sites can be significantly less marketable than unimpaired properties. Prospective buyers therefore need reasonable assurance that they will be able to cost-effectively remove any impairment to marketability before they are ready to sell the property.
- (6) Uncertainty. Real estate buyers, developers, and lenders care about managing uncertainty. Uncertainty affects all of the above-referenced items and affects the viability of any real estate transaction. The uncertainties associated with contaminated properties often simply exceed the ability of real estate buyers, developers, and lenders to manage the associated risks.

## **How MSDs Address Real Estate Community Issues**

The following outline describes how municipal setting designations address the issues of the real estate community set forth above.

### **1. *Liability Exposure.***

MSDs reduce legal liability exposure relating to pollution conditions at brownfield sites to an acceptable level in several ways:

- Prospective purchasers and lenders can use MSDs in conjunction with the Voluntary Cleanup Program to obtain a statutory release from liability for cleanup costs under the Texas Solid Waste Disposal Act.

- MSDs reduce potential tort liability for bodily injury by notifying at-risk individuals of contaminated groundwater and/or removing potential human exposure pathways by providing alternative sources of potable water.
- MSDs reduce potential tort liability for property damage to surrounding properties by increasing the levels of contamination deemed by the State of Texas to be protective of human health and the environment.<sup>4</sup>
- MSDs reduce the risk of law suits among neighboring property owners by providing a cost-effective alternative to litigation.
- For the reasons set forth above, environmental insurance is available at a reasonable cost for prospective MSD sites.

## **2. *Transaction and Operating Costs.***

MSDs reduce costs associated with site investigation and cleanup. In appropriate situations, MSDs can:

- Eliminate the need to fully delineate the groundwater plume.
- Eliminate the need to negotiate off-site access rights for environmental testing.
- Reduce the amount of soil investigation.
- Reduce or eliminate the need for soil remediation.
- Reduce or eliminate need for groundwater remediation.
- Eliminate ongoing periodic groundwater monitoring.

MSDs can also eliminate the need for permanent physical controls (e.g., caps, slurry walls, sheet piling, hydraulic containment wells and interceptor trenches) that might otherwise lead to ongoing, post-closure costs at brownfield sites.

## **3. *Timing.***

MSDs can accelerate the regulatory closure process with the TCEQ and reduce business and construction delays:

- MSDs can be used to self-implement a Remedy A Standard under the Texas Risk Reduction Program (TRRP). Self-implementation, for example, can eliminate the need to obtain advance TCEQ concurrence for soil response actions that must be performed prior to commencement of site grading and construction. Self-

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<sup>4</sup> See Susan Rainey, Municipal Setting Designations and Tort Liability: Adjacent Property Owners at Risk, 35 St. B. Tex. ENVTL. L.J. 41 (2004).

implementation enables owners and developers to avoid business interruptions and construction delays. Without an MSD, many brownfield sites cannot cost-effectively achieve Remedy Standard A and therefore cannot qualify for self-implementation.

- MSDs can eliminate the need for long-term soil and groundwater treatment and monitoring.

#### **4. Financing.**

MSDs can significantly enhance the ability to obtain financing for brownfield properties. Experience has shown that commercial lenders are willing to lend on MSD properties prior to regulatory closure, and even prior to certification of the MSD, ***IF THEY ARE COMFORTABLE WITH THE LEGAL-CONSULTING TEAM.***

#### **5. Marketability.**

MSDs can significantly enhance the ability to market a property for sale or lease in the following ways:

- As noted previously, MSDs enable real estate owners and developers to achieve Remedy Standard A under TRRP (i.e., a closure with no temporary or permanent institutional or physicals controls). The finality of a Remedy Standard A closure (especially when joined with a VCP Final Certificate of Completion) reduces uncertainty for prospective buyers and lenders and thereby increases marketability.
- By enabling a Remedy Standard A closure and by involving the city government and local community in the regulatory process, MSDs reduce the unwarranted post-closure stigma sometimes associated with brownfield sites. As a result, MSDs are now being used for single and multi-family residential developments in addition to commercial/industrial sites.
- A VCP certificate of completion obtained using an MSD is far superior to a certificate under the Innocent Owner/Operator Program because a VCP certificate of completion ***RUNS WITH THE LAND*** and is far less susceptible to being reopened by the State in the event of the future discovery of new information (e.g., when a future prospective purchaser identifies a previously unknown onsite source during pre-acquisition due diligence).

#### **6. Uncertainty.**

MSDs reduce the degree of uncertainty associated with many aspects of brownfield cleanup and redevelopment. For example:

- The technical feasibility of MSD certification and its impact on applicable investigation and cleanup standards can be determined early in the process (e.g., during the pre-acquisition timeframe) at relatively low cost.

- Once the MSD is certified, regulatory closure can be achieved with a much higher degree of certainty as to both timing and cost.
- The availability of affordable environmental insurance on prospective MSDs sites reduces uncertainty regarding potential liability exposures.

The assessment of the political feasibility of an MSD will continue to present varying degrees of uncertainty depending upon a variety of factors, in particular, the location of a property being considered for an MSD. For example, properties in cities which have already adopted procedural ordinances, such as Dallas and Fort Worth, present a high level of certainty that an MSD will be certified. An even greater level of certainty exists for projects in the City of Beaumont. Beaumont has banned potable use of groundwater beneath the entire city and has designated the City of Beaumont as a Municipal Setting Designation (See Attachment "C").

## Other Notes

1. MSDs are not just for the private sector.

MSDs are tools not just for the private sector but for municipalities themselves. Several municipalities either in the process or considering seeking MSDs on city-owned properties and areas targeted for large-scale redevelopment.

2. **Consultant Alert!**

As the real estate community becomes aware of the potential advantages of MSDs, it will be incumbent upon the environmental consulting community to inform their clients of the existence and potential benefits of MSDs. Property owners who learn from other sources about the potential of MSDs to accelerate closure of sites undergoing long-term cleanup can be expected to take to task their consultants who are continuing with business as usual (i.e., monitored natural attenuation, pump-and-treat, or bioremediation). Consultants who do not evaluate the advantages an MSD and advise their clients accordingly risk losing their clients' confidence. Furthermore, for sites that are permanently "stuck" in the VCP, IOP, or corrective action because of groundwater issues, it is incumbent upon consultants to evaluate whether an MSD might facilitate closure.

3. **Get the right team.**

Finally, it is critical that the legal and environmental consulting community understands that a successful MSD project requires a sophisticated team with the appropriate technical, legal, and political expertise. MSD projects must "begin with the end in mind" through an early analysis of the particular situation to determine if an MSD is technically and politically

feasible and, if obtained, whether the MSD would be effective in achieving the desired objectives.

The team must be comprised of environmental consultants fully conversant in how the MSD changes the standards under TRRP and able to discuss technical issues with non-technical people (e.g., at public meetings and city council briefings). The team's lawyers must also be fully conversant with the administrative and political process to obtain an MSD and the legal effects attendant to certification of an MSD. At present, due to the young age of the MSD program, there are very few consulting/legal teams in the State with the experience needed to execute the MSD process from beginning to end.<sup>5</sup>

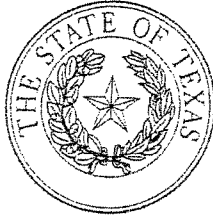
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<sup>5</sup> The author wishes to thank his colleagues, Greg Rogers and John Slavich, for their input on this article.



ATTACHMENT "A"

# Texas Commission on Environmental Quality



## Municipal Setting Designation Certificate 001

As provided for in §361.807, Subchapter W, Texas Health and Safety Code (Solid Waste Disposal Act):

I, Glenn Shankle, Executive Director of the Texas Commission on Environmental Quality certify the Municipal Setting Designation for the Goodwill Industries of Dallas, Inc. Property, 2800 North Hampton Road, Dallas, the tract of land described in Exhibit "A". The eligibility requirements of Texas Health and Safety Code §361.803 are satisfied as attested to by the affidavit in Exhibit "B" provided pursuant to Texas Health and Safety Code §361.804(b)(2)(D). This certificate shall continue in effect so long as the institutional control required by Texas Health and Safety Code §361.8065 is maintained in effect.

Any person addressing environmental impacts for a property located in the certified municipal setting designation shall complete any necessary investigation and response action requirements in accordance with Texas Health and Safety Code §361.808, in conjunction with the applicable Texas Commission on Environmental Quality environmental remediation regulation, as modified by Texas Health and Safety Code §361.808.

EXECUTED this 11th day of October, 2004.

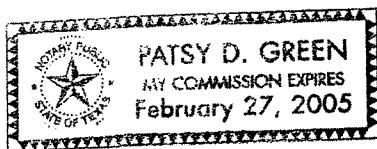
Handwritten signature of Glenn Shankle in black ink.

Glenn Shankle  
Executive Director  
Texas Commission on Environmental Quality

STATE OF TEXAS  
TRAVIS COUNTY

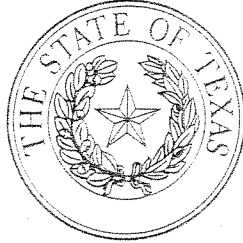
BEFORE ME, on this the 11th day of October, 2004, personally appeared Glenn Shankle, Executive Director of the Texas Commission on Environmental Quality, known to me to be the person whose name is subscribed to the foregoing instrument, and they acknowledged to me that they executed the same for the purposes and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 11th day of October, 2004.

Handwritten signature of Patsy D. Green in black ink.  
Notary Public in and for the State of Texas

ATTACHMENT "B"

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



VOLUNTARY CLEANUP PROGRAM FINAL CERTIFICATE OF COMPLETION

As provided for in §361.609, Subchapter S, Solid Waste Disposal Act (SWDA), Texas Health and Safety Code.

I, JACK W. CARSTEN, JR., P.G., MANAGER OF THE VOLUNTARY CLEANUP SECTION, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ), CERTIFY UNDER §361.609, SWDA, TEXAS HEALTH AND SAFETY CODE, THAT NECESSARY RESPONSE ACTIONS HAVE BEEN COMPLETED FOR VCP NO. 1669 AS OF MAY 2, 2005 FOR THE TRACT(S) OF LAND DESCRIBED IN EXHIBIT "A". CERTIFICATION IS BASED ON THE AFFIDAVIT OF COMPLETION OF RESPONSE ACTION, EXHIBIT "B", DEED NOTICE, EXHIBIT "C" AND ON ADDITIONAL SITE INFORMATION MAINTAINED IN TCEQ FILES. THE CERTIFICATE IS ISSUED IN RELIANCE ON A MUNICIPAL SETTING DESIGNATION THAT HAS BEEN CERTIFIED BY THE TCEQ UNDER §361.807 OF THE HEALTH AND SAFETY CODE FOR THIS TRACT OF LAND TO PROHIBIT USE OF GROUNDWATER AND THE MUNICIPAL SETTING DESIGNATION CERTIFICATE IS INCLUDED AS EXHIBIT "D". AN APPLICANT WHO ON THE DATE OF APPLICATION SUBMITTAL WAS NOT A RESPONSIBLE PARTY UNDER §361.271 OR §361.275(g) SWDA, AND ALL PERSONS (e.g., FUTURE OWNERS, FUTURE LESSEES, FUTURE OPERATORS AND LENDERS) WHO ON THE DATE OF ISSUANCE OF THIS CERTIFICATE WERE NOT RESPONSIBLE PARTIES UNDER §361.271 OR §361.275(g), SWDA ARE QUALIFIED TO OBTAIN THE PROTECTION FROM LIABILITY PROVIDED BY §361.610, SUBCHAPTER S, SWDA.

EXECUTED this 23 day of May 2005

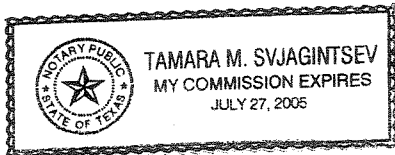
[Signature]
Jack W. Carsten, Jr., P.G., Manager
Voluntary Cleanup Section

STATE OF TEXAS
TRAVIS COUNTY

BEFORE ME, on this the 23rd day of May, personally appeared Jack W. Carsten, Jr., P.G., Manager, Voluntary Cleanup Section of the Texas Commission on Environmental Quality, known to me to be the person and agent of said commission whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same for the purposes and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 23rd day of May, 2005

[Signature]
Notary Public in and for the State of Texas



ATTACHMENT "C"

ORDINANCE NO. 05-031

ENTITLED AN ORDINANCE ESTABLISHING ALL PROPERTIES WITHIN THE CORPORATE CITY LIMITS OF THE CITY OF BEAUMONT AS A MUNICIPAL SETTLING DESIGNATION AND PROHIBITING THE USE OF DESIGNATED GROUNDWATER FROM BENEATH THIS PROPERTY AS POTABLE WATER.

WHEREAS, the City of Beaumont is a municipal corporation of the State of Texas, with a population of at least 20,000; and

WHEREAS, the public drinking water supply system that exists within the corporate limits of the City of Beaumont, satisfies the requirements of Chapter 341 of the Texas Health and Safety Code and supplies or is capable of supplying safe and sanitary drinking water to property within the city limits of the City of Beaumont and to property within one-half (½) mile of the property within the city limits of the City of Beaumont; and,

WHEREAS, the City of Beaumont requires all property owners owning property within the city which is within 300 feet of a city sanitary sewer or water line to be connected to the city sanitary sewer or water line; and,

WHEREAS, the City desires to establish within its corporate limits a municipal settling designation for all property located within the city limits and prohibit the use of designated groundwater from beneath all property within the City of Beaumont as potable water.

NOW, THEREFORE, BE IT RESOLVED BY THE

CITY COUNCIL OF THE CITY OF BEAUMONT:

THAT all property located within the corporate city limits of the City of Beaumont be established as a municipal settling designation; and,

BE IT FURTHER ORDAINED that the use of designated ground water from beneath all property within the corporate limits of the City of Beaumont as potable water is hereby prohibited.

PASSED BY THE CITY COUNCIL of the City of Beaumont this the 22nd day of March, 2005.



  
- Mayor Evelyn M. Lord -