

# Value Transforming Potential: Municipal Setting Designations and Development of Contaminated Properties

---

*presented by*

**Scott D. Deatherage**  
Thompson & Knight LLP  
[Scott.Deatherage@tklaw.com](mailto:Scott.Deatherage@tklaw.com)  
214.969.1206



## Issues to Discuss

- **The Critical Problem with Developing Contaminated Property**
- **How Can MSDs Solve This Problem?**
- **What Is an MSD?**
- **Description of Existing Municipal MSD Programs**



# The Critical Problem with Brownfields



Cost of Investigation  
and Remediation

Cost of Property  
and Development

Reasonable  
Rate of Return

## Critical Problem with Developing Brownfields

- **Contaminated groundwater invariably the critical unknown in terms of**
  - ▶ **Cost, and**
  - ▶ **Timing.**



## True Risk-Based Remediation

- **If groundwater consumption must be assumed in a city with a water supply, then true risk-based cleanup levels are not possible.**
- **Once the drinking water issue is eliminated, the risk of the contaminants and exposure to future users of property can be more realistically evaluated.**

## Investment Decision Without Drinking Water Cleanup Goal

- A narrower range of costs to remediate soil and groundwater can be reasonably factored into capital and cash flow considerations.
- A more certain time period to achieve cleanup level can be factored into construction plans.
- Cost cap or finite risk insurance may be available and may be purchased at more reasonable rates, or may be considered unnecessary.



## Summary of Potential Benefits of an MSD

- Reduce investigation costs required to determine the extent of the contamination on other people's property.
- Reduce the costs for groundwater monitoring.
- Avoid the need to obtain off-site landowner access for investigation.
- Avoid the need to obtain off-site landowner agreement on cleanup requirement and deed recordation of contaminated groundwater.
- Reduce potential cleanup costs, for groundwater, and potentially soil.



## Summary of Potential Benefits of an MSD *(cont)*

- Reduce risk of third-party claims.
- Reduce uncertainty in terms of cost and timing to reach closure.
- MSD “runs with the land” while Innocent Owner/Operator certificate does not.
- Increase ability to finance.
- Increase ability to sell and value of property.

## MSD Statute

- **Allows zones of groundwater to be restricted by City ordinance so that it cannot be used for potable use.**
- **For such zones, the drinking water exposure pathway is not considered.**
- **Limited to cities of 20,000 or more and areas serviced by public water supply.**
- **City must adopt ordinance or approve deed restriction.**



## Cities with MSD Ordinances

- Dallas
- Fort Worth  
Arlington  
Grand Prairie  
Grapevine
- Beaumont
- Irving  
McKinney



## Municipal Concerns

- **Multiple exposure pathways for shallow groundwater**
- **Takings issues**
- **Notice to nearby property owners**

## Dallas MSD Procedural Ordinance

- **Negotiation of ordinance to provide procedure for City approval of MSD application to State.**
  - ▶ **We spent about a month or more negotiating various aspects of the MSD Ordinance**
    - **Certification by Engineer no health risk**
    - **Consistency of definitions and other provisions with MSD statute**
    - **Allowing TCEQ to make environmental and health decisions**
    - **Scientific information provided to the extent known**



## Ordinance Adopted in Dallas

- **Reduced the burden on applicants; but still significantly more effort required in Dallas than in Fort Worth.**
- **Significant information must be provided to City Staff regarding potential non-ingestion risks — maps, tables, discussions, etc.**
- **Consultant certification regarding level of diligence conducted and non-ingestion risks.**



## City of Dallas Requirements

- **A listing of all existing state or U.S. Environmental Protection Agency registrations, permits, and identification numbers that apply to the designated property.**
- **A statement as to whether the designated property has been submitted to the Texas Voluntary Cleanup Program or similar state or federal program, and status in the program.**
- **A summary of any environmental site assessment reports filed with the TCEQ regarding any site investigations or response actions that are planned, ongoing, or completed related to the designated property.**

## If Contaminants are Migrating Through the Property to Other Properties and Exceed a Non-Ingestion Risk Level

- The applicant must:
  - ▶ Specify the name and address of owner of each property to which the contaminants have migrated.
  - ▶ Send a copy of the application to each owner of such property with the notice of the public meeting.
  - ▶ Provide documentation showing that the designated property is in a governmental program that requires the non-ingestion risk be addressed and providing the estimated time to gain governmental approval.
  - ▶ Provide documentation to City once governmental approval obtained.



## Process and Deadlines

- **30 days after application submitted, City staff notifies applicant if application complete.**
- **60 days for applicant to send correction of deficiencies to City staff.**
- **If not submitted within 60 days, application deemed withdrawn.**

## Pubic Meeting

- **45 days after submission of complete application, City staff conducts Public Meeting.**
- **15 days before Public Meeting, City mails notices, paid for by applicant, to:**
  - ▶ **owners of real property within 2,500 feet of the designated property as indicated by the most recent appraisal district records; and**
  - ▶ **All of the well owners, public utilities, and municipalities required by MSD statute.**
- **Application placed at nearest public library.**



## City Council Meeting

- **Scheduled after Public Meeting and payment of an additional fee of \$5,000.**
- **Possible Director recommendations**
  - ▶ **MSD ordinance prohibit GW use under City rights-of-way**
  - ▶ **If property the source of COCs, applicant must include rights-of-way in TCEQ MSD application.**
  - ▶ **Ordinance specifies time for state or federal program to address area of contamination that presents a non-ingestion risk.**



## **The MSD Ordinance May Include the Following**

- **Prohibit the use of groundwater beneath immediately adjacent public rights-of-way as potable water.**
- **Include a condition that public rights-of-way immediately adjacent to the designated property be included, at no additional cost to the City, in the TCEQ application.**
- **Specify a time period for a state or federal program to address the entire area where non-ingestion risks are exceeded because of contamination originating from the designated property or migrating from or through the designated property.**

## How did we help the City of Dallas?

- Multiple exposure pathways for shallow groundwater
- Takings issues
- Notice to nearby property owners



## City of Fort Worth MSD Procedural Ordinance

- **Application requirements**
  - ▶ **\$2,000 application fee.**
  - ▶ **Chemicals of concern and levels, and vertical and horizontal extent, if identified.**
  - ▶ **If off-site contamination not documented, statement whether contamination more likely than not exceeds residential levels.**
  - ▶ **Identification of person responsible for contamination, if known.**



## Public Meeting

- **Public meeting within 45 days of application.**
- **Public hearing within 60 days of application.**
- **If determined deficient, Director will return application with deficiencies; applicant has 30 days to return.**

## Public Notice

- **Notice not less 15 days before meeting**
  - ▶ **Legal advertisement**
  - ▶ **Notice at City Hall and written notice to**
    - **Landowners within ½ mile**
    - **Well owners within 5 miles**
    - **Public utilities with wells within 5 miles**
    - **Municipalities within ½ mile.**
    - **Sign on property.**
  - ▶ **Copy of application at Public Library**



## Public Meeting

- Applicant to provide information to affected community
- Affected community members may question applicant's representative.

## Public Hearing

- Director provides City Council a written report with any concerns of reviewing departments and copy of application.
- Public can voice views in favor or against MSD.
- City Council may approve or disapprove of MSD or postpone decision.
- To approve either
  - ▶ adopt resolution supporting application, or
  - ▶ enact ordinance prohibiting potable use of groundwater beneath the designated property.



## Other Requirements

- **Person receiving approval must provide a copy of a Certificate of Completion or other documentation that response actions are completed.**
- **Applicant commits offense if not provided within 30 days of issuance by TCEQ.**
- **Fines for violations of ordinance not more than \$2000.**

## City of Beaumont MSD Ordinance

- Beaumont established a municipal setting designation for the entire City.
- The City prohibits potable use of designated groundwater from all property within City limits.

## City of Irving/City of McKinney

- Irving has a draft procedural ordinance, but has not passed it yet.
- Irving will still grant an MSD on a property specific ad hoc basis
- McKinney has granted an MSD, but does not have a procedural ordinance.



# Questions?