MEMORANDUM

To: County Commissioners Court and County Fire Marshal
From:
Date:
Re: Legal Authority of County to Implement Industrial Facility Permit and Safety Review Requirements in Unincorporated Areas

I. Introduction

This memorandum addresses the authority of the County Commissioners Court and the County Fire Marshal to implement a permit and pre-construction safety review process specifically for industrial facilities that present elevated fire or life safety risks, including Battery Energy Storage Systems (BESS). It further addresses whether such a permit requirement may lawfully exempt residential development without violating applicable state law.

II. Summary of Conclusions

The County possesses legal authority under Texas Local Government Code Chapter 352 to regulate fire and life safety risks associated with industrial facilities in the unincorporated areas of the county.

The County may lawfully adopt a permit and pre-construction safety review system specifically for industrial facilities without imposing the same requirement on residential development, provided the distinction is rationally related to public safety.

Enforcement of such permit requirements, including the prevention of construction or occupancy for non-compliant facilities, is authorized through the County Fire Marshal's existing powers under Sections 352.016 and 352.022 of the Local Government Code.

III. Legal Framework

A. County Authority Over Fire Safety and Hazard Mitigation

Texas law recognizes that counties, while limited in land-use regulation in unincorporated areas, retain express authority to act to protect public safety through fire hazard mitigation. Section 352.016 of the Texas Local Government Code grants counties, through their fire marshals, the power to inspect structures, review plans, and issue orders for the correction of hazardous conditions that may pose a threat to life or property.

Additionally, Section 352.016(b-1) authorizes the county to require and conduct plan reviews for businesses, multi-family dwellings, commercial properties, or other

developments to assess fire and life safety hazards. The county commissioners court may further authorize the imposition of reasonable fees to support this review function.

B. Enforcement Powers

The statutory scheme provides enforcement mechanisms where a person or entity fails to comply with hazard abatement orders issued by the fire marshal. Under Section 352.022, failure to comply with such orders constitutes a criminal offense, escalating to a state jail felony for repeat violations. Moreover, under general nuisance and public safety doctrines, the county may act to prevent occupancy or use of non-compliant facilities that pose imminent risk.

IV. Lawful Differentiation Between Industrial and Residential Facilities

A. Rational Basis for Regulatory Distinction

Under Texas law, counties may draw distinctions between classes of facilities or land uses where the classification bears a rational relationship to legitimate governmental objectives, such as public safety. Industrial facilities—such as energy storage systems, chemical plants, or fuel storage sites—present materially greater fire, explosion, and hazardous material risks than typical residential development.

Consequently, the County may impose a permit requirement, including submission of site plans, hazard materials documentation (e.g., Material Safety Data Sheets), and fire suppression designs, exclusively on industrial or high-risk developments without extending the same requirement to standard residential dwellings.

Such differentiation is supported by existing county authority to regulate specific high-risk activities (e.g., fireworks, outdoor burning, hazardous materials storage) that are not applicable to ordinary residential uses.

B. Legal Risk of Disparate Treatment

To minimize legal risk, the County should ensure that the permit requirement:

- Applies to clearly defined categories of industrial or hazardous use.
- Is tied directly to objective safety concerns (e.g., hazardous material thresholds, energy storage capacity, or fire load).
- Is applied uniformly within the defined category without arbitrary exceptions.

Provided these conditions are met, the regulatory distinction is unlikely to be found unlawful or arbitrary under Texas law.

V. Implementation Considerations

To implement such a permit system, the Commissioners Court may:

- Adopt a local order or policy creating the permit requirement for specified industrial uses.
- Authorize the fire marshal to conduct pre-construction plan reviews for fire safety and emergency response capacity.
- Establish procedures for enforcement, including denial of occupancy or operational clearance for non-compliant facilities.

It is important that the county clearly document the public safety rationale for the permit system and maintain records of inspections, plan reviews, and enforcement actions to ensure transparency and defensibility.

VI. Conclusion

The County has clear statutory authority under Chapter 352 to implement a permit and safety review requirement for industrial facilities presenting elevated fire or life safety risks. This requirement may lawfully exclude residential development, provided the distinction is rationally related to public safety and applied consistently.

If desired, I can assist with drafting the necessary court order language, permit application forms, and procedural guidelines to operationalize this framework.