



# Of Brewpubs and Breweries, Growlers and Crowlers: Craft Beverages and the Texas Municipality

TCAA Summer Conference: June 14, 2018

David T. Ritter – BROWN & HOFMEISTER, LLP



# Craft Beverages and the Texas Municipality

- I. The Current Craft Beverage Situation in Texas
  - What is here, what is coming, and why is craft beverage production an important topic for Texas municipalities?
- II. Issues, Concerns and Practice Pointers for Texas Municipalities
  - Land use, legislation, code enforcement and other issues.
- III. Economic Development Opportunities
  - Case Study of a successful North Texas E/D project.



# Craft Beverages and the Texas Municipality

- I. The Current Craft Beverage Situation in Texas
- Definitions: (TEXAS ALCOHOLIC BEVERAGE CODE §1.04)
  - (1) Alcoholic beverage . . . any beverage containing more than  $\frac{1}{2}$  of 1% ABV.
    - (3) Distilled spirit . . .spirits of wine, whiskey, rum, brandy, gin or any liquor produced in whole or in part by the process of distillation.
    - (15) Beer. . . a malt beverage containing  $\frac{1}{2}$  of 1% ABV and not more than 4% ABW.\*
    - (12) Ale . . . A malt beverage containing more than 4% ABW.
    - Malt Beverage . . .a beverage made by the alcoholic fermentation . . .in potable water, of malted barley with hops. . .and with or without other malted cereals. 16 T.A.C. § 45.71(8)
    - Malt Liquor . . .any malt beverage containing more than 4% ABW; = to “Ale.” 16 T.A.C. § 45.71(9)
  - (14) Barrel . . as a standard of measure, a quantity of beer equal to 31 standard gallons.

\* ABV to ABW = multiply by .8 / ABW to ABV = multiply by 1.25



# Craft Beverages and the Texas Municipality

- I. The Current Craft Beverage Situation in Texas
- What makes a producer “craft”?
- Brewer’s Association: a craft brewer is “small, independent, and traditional.”



**Small:** Annual production of <6 million barrels or less (3% US sales);

**Independent:** 25% or less interest by alcoholic beverage industry member which is itself not a craft brewer; and

**Traditional:** a majority of total volume in beers whose flavors derive from traditional or innovative brewing ingredients and fermentation.





# Craft Beverages and the Texas Municipality

- I. The Current Craft Beverage Situation in Texas
- What makes a producer “craft”? Brewer’s Association:

Craft brewers are small brewers. The hallmark of craft brew is innovation. They interpret historical styles with unique twists and develop new styles that have no precedent.

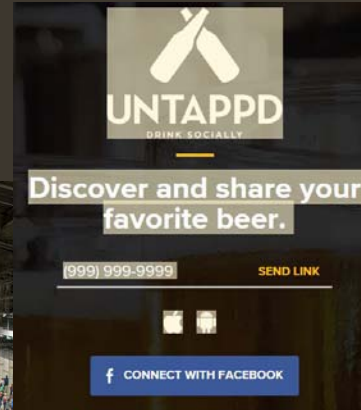
Craft brewers tend to be very involved in their communities through philanthropy, produce donations, volunteerism and sponsorship of events. . .and have distinctive, individualist approaches to connecting with their customers.

Craft brewers maintain integrity by what they brew and their general independence, free from a substantial interest by a non-craft brewer.

The majority of Americans live within 10 miles of a craft brewer.



Brewer's Association: Craft brewers tend to be very involved in their communities through philanthropy, produce donations, volunteerism and sponsorship of events. . .and have distinctive, individualist approaches to connecting with their customers.







# Craft Beverages and the Texas Municipality

- I. The Current Craft Beverage Situation in Texas
- Brewer's Association Market Segmentation: Large, Regional, and Microbreweries:

<u>Size</u>	<u>Annual Production</u>	<u>Examples</u>
Large	Over 6 million barrels	Anheuser-Busch (Houston); MillerCoors (Fort Worth)
Regional	15,000 to 6 million barrels Note: Some commentators interpret 2017 Texas Legislation (H.B. No. 3287) as defining "craft" as <225,000 barrel annual production.	Spoetzel (Shiner), Real Ale (Blanco), St. Arnold (Houston), Deep Ellum (Dallas), Rahr and Sons (Fort Worth), Austin Beerworks (Austin), Independence (Austin), Live Oak (Austin).
Microbrew	Under 15,000 barrels (over 75% sold off-site); also defines brewpub (a restaurant-brewery that sells 25% or less of its beer for off-site consumption).	All other ~240 Texas craft breweries



# Craft Beverages and the Texas Municipality

- I. The Current Craft Beverage Situation in Texas
  - What is here, what is coming, and why is craft beverage production an important topic for Texas municipalities?
  - Currently in Texas:
    - Approximately 251 craft breweries/brewpubs (180/71 respectively), 23 distillers, and 9 cideries, for a total of almost 285 craft alcoholic beverage producers.
  - What is coming, and why should municipalities care?:
    - Continued unprecedented growth in the number of craft beverage producers in all categories, with corresponding challenges and opportunities for Texas cities.





# Craft Beverages and the Texas Municipality

## • I. The Current Craft Beverage Situation in Texas

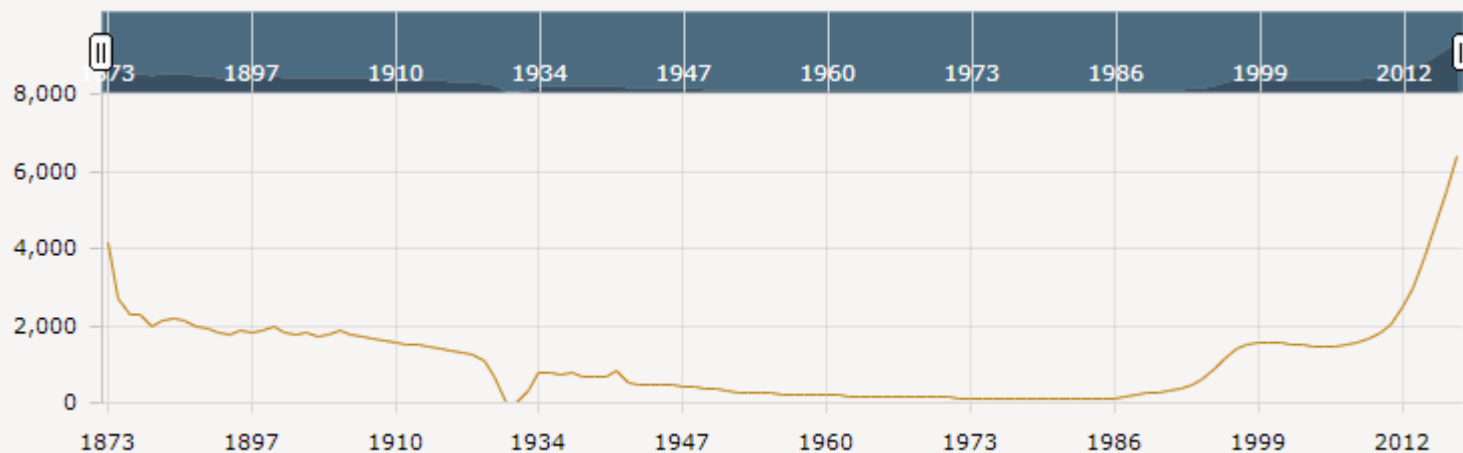
STATISTICS



### NUMBER OF BREWERIES

#### Historical U.S. Brewery Count

Slide the bar at the top of the graph to see number of breweries from 1873 to present day.

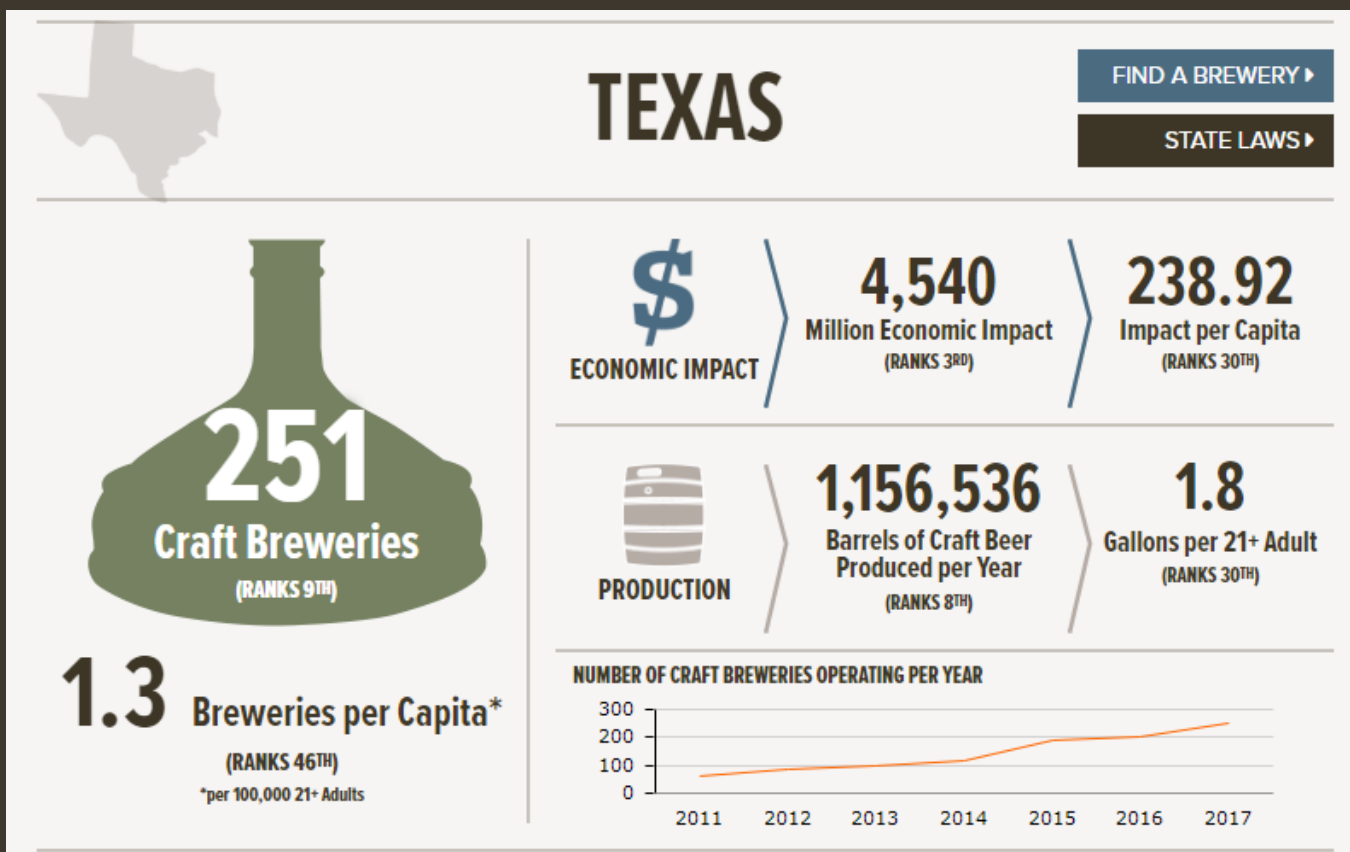


In 1873, the United States had 4131 operating breweries. This decreased to zero during Prohibition. After the ratification of the 21<sup>st</sup> Amendment in 1933, the lowest count was 89 in 1978. Levels did not equal 1873 numbers until 2015. In 2017, the United States had 6372 operating breweries.



# Craft Beverages and the Texas Municipality

## • I. The Current Craft Beverage Situation in Texas



Texas vs. Category Leaders	Texas	Category Leader
Economic Impact	\$4.5 billion	\$7.4 billion (CA)
BBL Production	1.2 million	3.7 million (PA)
Craft Breweries	251	764 (CA)
Breweries/100k	1.3	11.5 (VT)

CBRE Report (9/17): “over the course of 12 years, the number of craft breweries in Texas has expanded from 20 breweries in 2005 to 218 breweries in 2017, an increase of 990%.” The report also found that an estimated 4.8 million sq. ft of commercial property is occupied by craft brewing uses.



# Craft Beverages and the Texas Municipality

- II. Issues, Concerns and Practice Pointers for Texas Municipalities
  - Land use, legislation, code enforcement and other issues.
  - Do your municipal land use codes and procedures recognize the distinct TABC permit types for craft beer producers and their local implications?
  - Breweries (*B Permit*) vs. Brewpubs (*BA Permit*)

But first, some background:



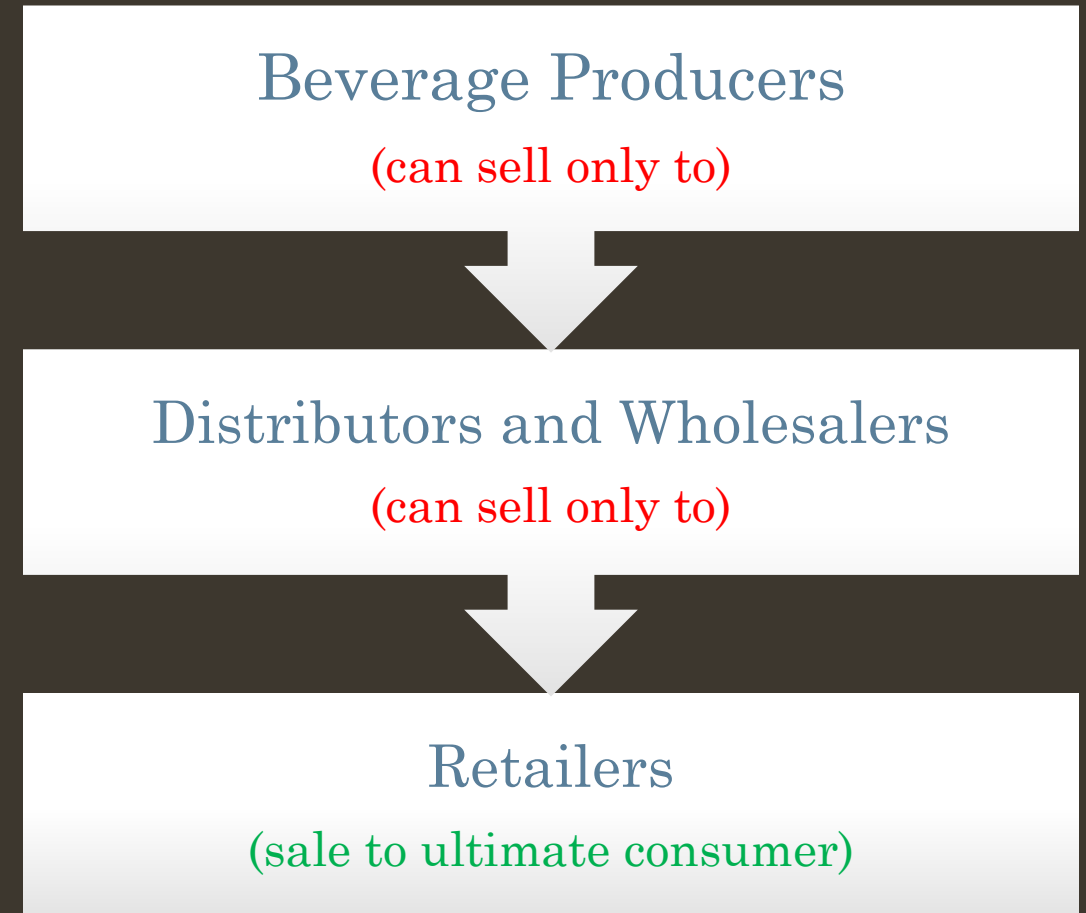


# Craft Beverages and the Texas Municipality

The Texas “Three Tier” system is the legacy of a response to Prohibition-era concerns and the “tied-house” model that existed in the pre-Volstead Act days.

“[N]o person who owns or has an interest in the business of a . . . brewer . . . may . . . own or have a direct or indirect interest in the business of a . . . retailer.”

TEXAS ALCOHOLIC BEVERAGE CODE 101.08(a)(1), as quoted in *Cadena Commercial USA Corp. d/b/a OXXO v. Texas Alcoholic Beverage Commission*, 518 S.W.3d 318, 339 (Tex. 2017)(Willett, J., dissenting).



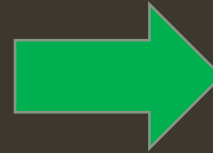


# Craft Beverages and the Texas Municipality

Beverage Producers  
CAN SELL TO, BUT ALSO

Distributors and Wholesalers  
(can sell only to)

Retailers  
(sale to ultimate consumer)



Limited  
Direct  
Sales

Beverage Consumers

A focal point of craft beverage production is interaction with --- and direct sales to --- the ultimate consumer. This is diametrically opposed to the traditional rigidity of the Three Tier regulatory system.



# Craft Beverages and the Texas Municipality

## **Brewer's Permit (B)**

Texas Alcoholic Beverage Code Chapter 12

- Can manufacture, bottle, package, and label malt liquor.
- Can dispense ale and malt liquor for consumption on premises.
- Can conduct samplings and tastings at a retailer's premises.
- Can contract to provide brewing services or facilities for other B permit holders.
- Can also hold Manufacturer's License (<4% ABW)
- Could sell only to wholesale permit holders (for Texas distribution) (until H.B. 3287).

## **Brewpub License (BA)**

Texas Alcoholic Beverage Code Chapter 74

- Can manufacture, brew, bottle, can, package, and label malt liquor, ale, and beer.
- Can sell (or offer without charge) beer produced: (1) by holder and (2) on premises, and (3) in or from a lawful container for on-site or off-site consumption. (BG, MB, or BE permit required) \*
- Can sell food on premise.
- Can sell other breweries' beers on site, and can growler other breweries' beers (only if no liquor license).
- \* BG - wine or beer retailer permit, MB - mixed beverage permit, BE – retail dealer's on-premise license.





# Craft Beverages and the Texas Municipality

## **Brewers Permit (B)**

Texas Alcoholic Beverage Code Chapter 12

- H.B. 3287 (eff. June 15, 2017) – allows brewer's permit holders whose ale production (+ beer production under manufacturer's license) is less than 225,000 barrels to sell to ultimate consumers for on-premise consumption. Maximum direct sales are 5,000 barrels annually.

Municipal Bottom Line: May be a manufacturing or industrial type zoning location, but taproom on/premise operations are very likely.

## **Brewpub License (BA)**

Texas Alcoholic Beverage Code Chapter 74

- Limited to 10,000 barrels a year in production (total malt liquor, beer, and ale) per brewpub location.
- Must be located in a “wet” area, per §251.71 of the Texas Alcoholic Beverage Code.

Municipal Bottom Line: May be a restaurant type zoning location; crowler/growler sales and on-site consumption are likely, but note that restaurant is not required by TABC regulations.

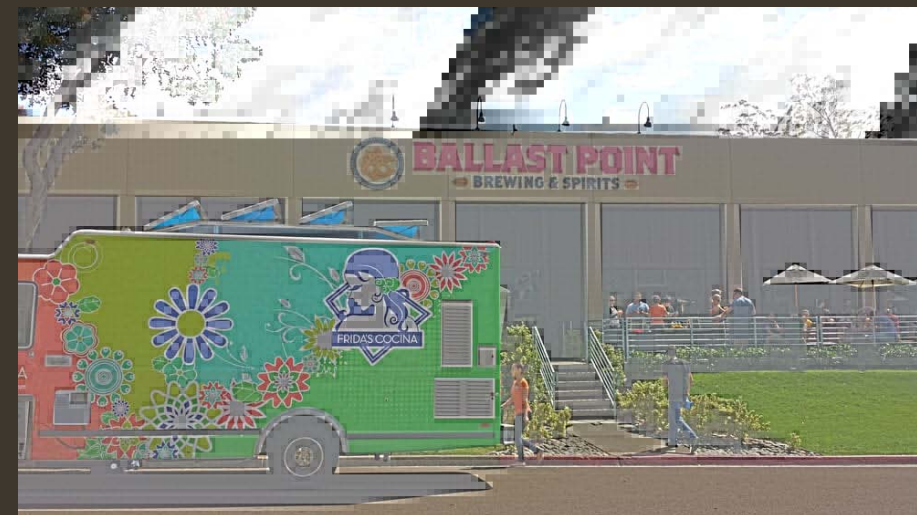
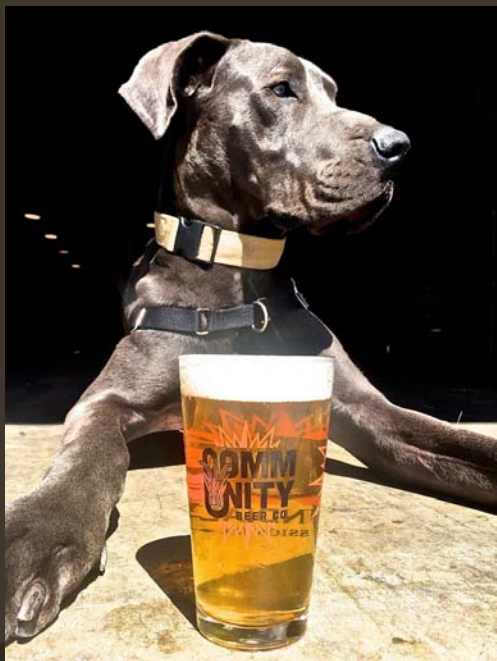


# Craft Beverages and the Texas Municipality

- II. Issues, Concerns and Practice Pointers for Texas Municipalities
  - Land use, legislation, code enforcement and other issues.
  - Local Focus: Craft brewing may raise ancillary policy and legislative issues for cities:

Dog-Friendly Patios?

Food Trucks?





# Craft Beverages and the Texas Municipality

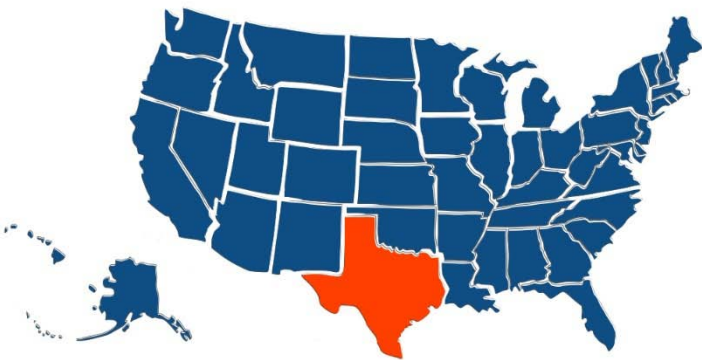
- II. Issues, Concerns and Practice Pointers for Texas Municipalities
  - Land use, **legislation**, code enforcement and other issues.
  - State Focus: **continued intense legislative efforts by craft brewers, large beverage conglomerates, and second-tier industry members (distributors and wholesalers) may markedly affect the craft brewing industry and, by extension, may also have an impact on municipal-level operations.**





# Craft Beverages and the Texas Municipality

## Beer-to-Go Sales from Production Brewery Taprooms



■ = LEGAL  
■ = TEXAS

\* QUANTITY, PACKAGE FORMAT & QUALIFYING  
BREWERY SIZE LIMITS VARY BY STATE. SOME STATES  
REQUIRE ADDITIONAL LICENSE.

Beer Laws in Texas are  
Broken. Help us Fix Them.  
[craftpac.org](http://craftpac.org)



“House Bill 3287, which lawmakers passed during their regular legislative session earlier this year, requires craft brewers that produce more than 225,000 barrels per year to pay a distributor to deliver their beer --- even if the destination is inside their own facility.

Proponents of the legislation say it will maintain the state’s three-tier system – Prohibition-era regulations that legally separate brewers, distributors and retailers – and properly regulate large companies that purchase craft breweries. To opponents, though, the law targets newer craft breweries . . . while protecting larger . . . beer companies.

[Texas Craft Brewer’s Guild spokesman] says distributors . . . will benefit most from the new law. Carve-outs written into the law allow three craft breweries recently purchased by larger breweries to avoid the 225,000-barrel cap: Karbach in Houston (Anheuser-Busch In Bev); Revolver in Granbury (Miller-Coors); and Independence in Austin (Heineken-owned subsidiary).”

– *Texas Tribune*, September 13, 2018



# Craft Beverages and the Texas Municipality

Craft beverage litigation is frequent and ongoing:

*Deep Ellum Brewing Company, LLC v. Texas Alcoholic Beverage Commission*

Case No. 1:15-CV-00821 (W.D. Texas)

Deep Ellum challenged the Texas Alcoholic Beverage Code provisions that prevent brewer's permit holders from selling their product to off-site consumers, in contrast to holders of brewpub licenses, winery permits, and distiller's and rectifier's permits. Deep Ellum, the holder of a B permit, could not have a BA license at the same time, and, (even if this were an option under the Code) would have had decrease its 2015 beer production by more than 50% to fit under the 10,000 barrel limit for a BA license.

Deep Ellum alleged Equal Protection and Substantive Due Process violations posed by the current Code. TABC alleged that the Code furthers the rational governmental interests of: (1) maintaining the integrity of the three-tier system; (2) promoting temperance; and (3) ensuring fair competition within the alcoholic beverage industry.

WINNER - TABC: Order granting TABC's Motion for Summary Judgment, March 20, 2018



# Craft Beverages and the Texas Municipality

- II. Issues, Concerns and Practice Pointers for Texas Municipalities
  - Land use, legislation, **code enforcement** and other issues.

Craft beverage producers may pose unique code enforcement challenges that require close interdepartmental cooperation, and a strong understanding of brewery or brewpub operations.

Code  
Enforcement

Fire Marshal

Planning

Building  
Inspections

Community  
Relations





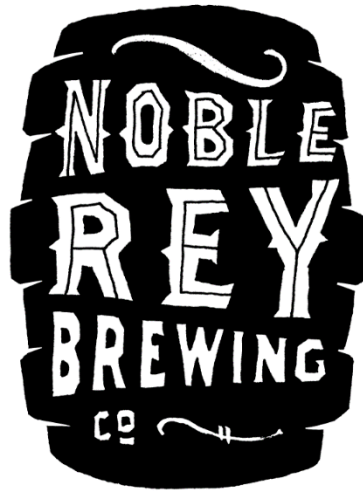
# Craft Beverages and the Texas Municipality

Late December 2017 to Early January 2018:

Bishop Cidercade, Noble Rey Brewing Co., and Peticolas Brewing Company all have taproom operations shut down by the Dallas Fire Marshal.

The logo for Bishop Cider Co. features the word "BISHOP" in a large, bold, teal-colored sans-serif font. Below it, the words "CIDER CO." are written in a smaller, bold, orange-red sans-serif font.

**BISHOP**  
**CIDER CO.**





# Craft Beverages and the Texas Municipality

Local press coverage was not favorable:



Peticolas Brewing Company, one of three that have had visits from the fire marshal in the last week.  
Photography by Elizabeth Lavin

LOCAL NEWS

## No, the Dallas Fire Marshal Is Not Cracking Down on Breweries (Cough, Cough)

Noble Rey becomes the third brewery in a week to get an order from the fire marshal to get a new permit.

BY MATT GOODMAN | PUBLISHED IN FRONTBURNER | JANUARY 5, 2018 | 6:22 PM

OPINION JAN 11

## Dallas taprooms, businesses take the fall with city departments tripping over each other

 Dallas Morning News Editorial 



# Craft Beverages and the Texas Municipality

Dallas microbrewery permitting was relatively new, having begun in 2012.

“...the building inspectors approve the permit based on the physical structure, not the actual use of the structure. Fire inspectors check it out after the operation was up and running, but under current city code, do not have a say prior to the permit being issued. And so the building inspector, who may be blind to what a taproom is, may approve a permit for a building that does not account for its actual use. Then the fire marshal arrives and shuts it down.”

“One of the things we’re seeing is that the use they applied for was for brewing and for storage,” says Christopher Martinez, a deputy chief at Dallas Fire-Rescue and the city’s fire marshal. “In a lot of cases, there’s probably confusion.”

“So here’s the confusion that Martinez brought up: the idea that a brewery would operate a taproom — in other words, a bar --- was beyond the expectations of the building inspectors.” — **D Magazine**, January 5, 2018.



## Craft Beverages and the Texas Municipality

“And so the breweries think their brewing and storage permit would allow a 3,000 square foot taproom, because the building inspectors didn’t know any better --- then the fire marshal shows up and finds a bar.” – **D Magazine**, January 5, 2018.

It is key that municipalities understand that a Texas brewery or brewpub doesn’t just look like this. . . . :







... but also often looks like this:



“And so the breweries think their brewing and storage permit would allow a 3,000 square foot taproom, because the building inspectors didn’t know any better --- then the fire marshal shows up and finds a bar.”  
— [D Magazine](#), January 5, 2018.





# Craft Beverages and the Texas Municipality

- II. Issues, Concerns and Practice Pointers for Texas Municipalities
  - Land use, legislation, code enforcement and other issues.

Municipal police department enforcement of Texas Penal Code § 49.031

Possession of Alcoholic Beverage in Motor Vehicle:

“A person commits an offense if the person knowingly possesses an **open container** in a passenger area of a motor vehicle that is located on a public highway, regardless of whether the vehicle is being operated or is stopped or parked. Possession by a person of one or more open containers in a single criminal episode is a single offense.” TEX. PENAL CODE § 49.031(b).

Key Question: is a growler an “open container” for purposes of this common misdemeanor?



# Craft Beverages and the Texas Municipality

Growlers and the Texas Open Container Law:

???





# Craft Beverages and the Texas Municipality

- II. Issues, Concerns and Practice Pointers for Texas Municipalities

“A person commits an offense if the person knowingly possesses an **open container** in a passenger area of a motor vehicle that is located on a public highway...

“Open container” means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and that is open, that has been opened, that has a broken seal, or the contents of which are partially removed.” TEX. PENAL. CODE 49.031(a)(1).

The Texas Alcoholic Beverage Code does not contain a definition of “open container,” but 16 T.A.C. § 45.71(4) contains a definition of “container,” – “any can, bottle, barrel, keg, or other closed receptacle, irrespective of size or of the material from which made, for the sale of malt beverages at retail.”



# Craft Beverages and the Texas Municipality

- III. Economic Development Opportunities

Why does craft beverage production make sense for municipal economic development projects?

Creative Use or Reuse of Historic Buildings

Economic Development Case Study

SEDCO/903 Brewers

Sherman, Texas



# Craft Beverages and the Texas Municipality

- **III. Economic Development Opportunities**

Contract	Date	SEDCO Incentive	903 Brewers Benchmark
1	May 2013	\$7500 in promotional support, for use throughout the North Texas Regional Area, for one year term beginning in June 2013.	Marketing and promotion of brewery operations in Sherman, Texas that will benefit the City of Sherman.
2a	July 2014	Up to \$22,000 in three installments: \$11,370, \$6390, and \$4240, based on investment and employment benchmarks.	Investment of \$389,000 in facility improvements and new equipment and addition of ten (10) full time positions. Payment benchmarks: \$201,000, \$113,000, and \$75,000 + employment.





# Craft Beverages and the Texas Municipality

- **III. Economic Development Opportunities**

Contract	Date	SEDCO Incentive	903 Brewers Benchmark
2b	October 2014 ( <i>modified contract 2a</i> )	\$50,000 in total incentives, including \$38,630 in new incentive money minus the \$11,370 paid under the prior contract.	\$100,000 in new equipment to be purchased and installed in one year; reporting to demonstrate sales growth, employment, outside financing, and fixed asset progress.
3	December 2015	Up to \$42,000 (20 % of new investment costs).	\$215,000 in new equipment – a canning line and a 30 barrel brewing system to be installed in one year; quarterly reporting to SEDCO.



# Craft Beverages and the Texas Municipality

- III. Economic Development Opportunities

## Creative Use or Reuse of Historic Buildings



**Sherman**  
CLASSIC TOWN. BROAD HORIZON.

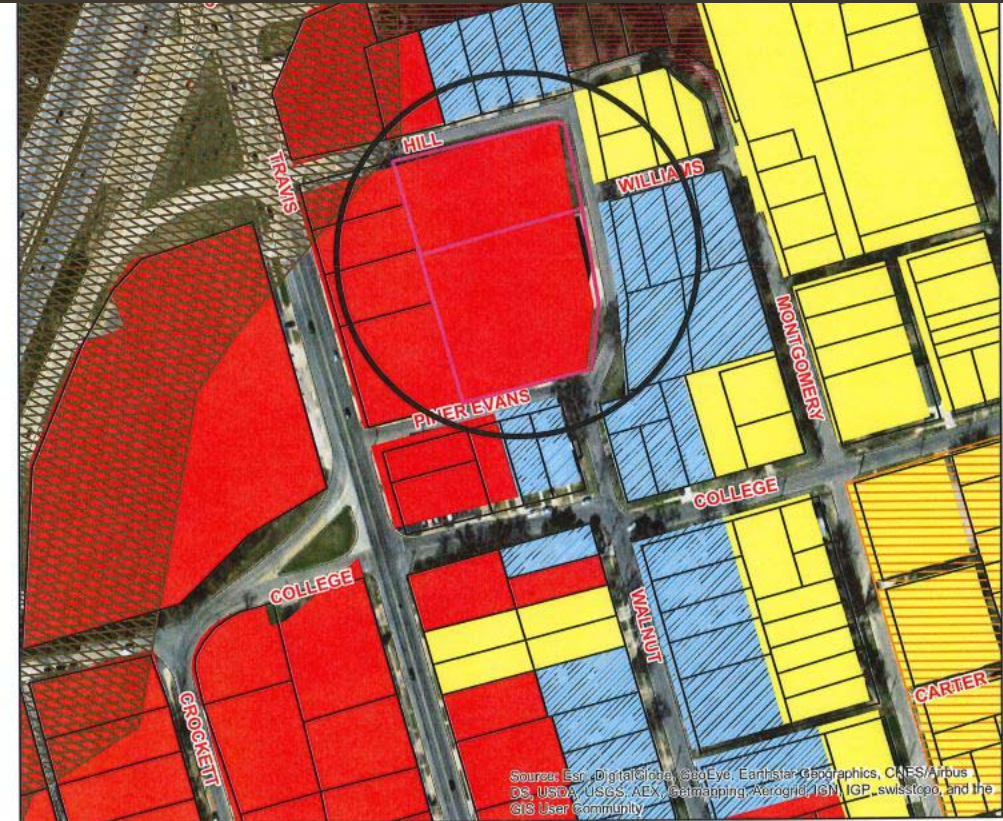
1002 N. Walnut Street





# Craft Beverages and the Texas Municipality

- III. Economic Development Opportunities



Zoning - 1002 N. Walnut





# Craft Beverages and the Texas Municipality

- III. Economic Development Opportunities

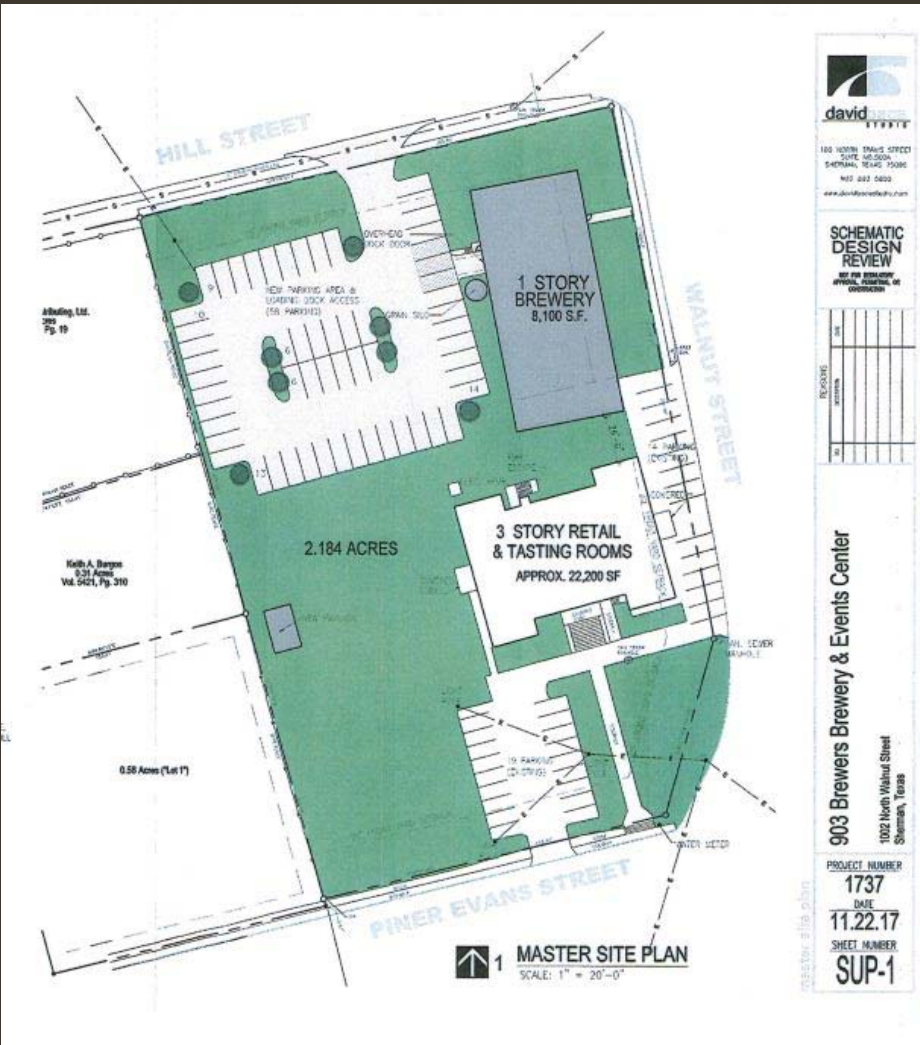


**1002 N. Walnut**





# Craft Beverages and the Texas Municipality



Site Plan calls for conversion of existing building – the former Lee Elementary School - to 22,000 sq. ft. of retail/restaurant and tasting rooms and the addition of an 8100 sq. ft brewery and grain silo.

Parking requirements are 121 spaces: 111 for restaurant use; 2 for office use; and 8 for manufacturing/warehouse use. Existing parking is 33 spaces in two lots, and 58 spaces will be added in a new lot, for a total of 91 spaces, leaving a deficit of 30 spaces.

Solution: “when events warrant the need for parking beyond capacity. . .owner shall provide valet parking. . .at any of the free city-owned parking lots or reserved city-owned lots during nights and weekends.”





# Craft Beverages and the Texas Municipality



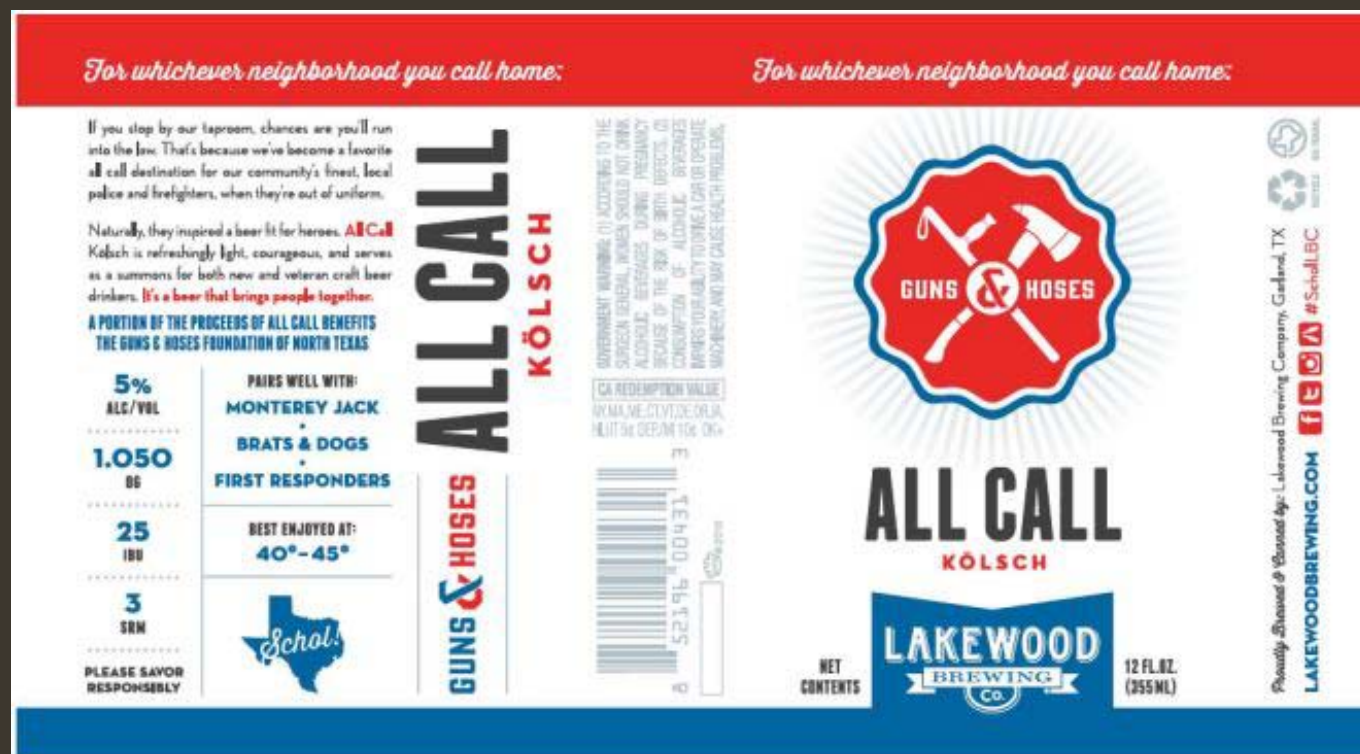
**903 Brewery & Event Center**

The facility is scheduled to open in summer of 2019, and will include a taproom, restaurants (a backyard casual grill concept and a locally sourced, farm-to-market concept), a beer garden with live music, a playground, and a third-story event center for weddings and parties.



# Craft Beverages and the Texas Municipality

The Texas craft beverage revolution represents both challenges and opportunities for municipalities. Craft producers can add a unique element to their home cities, and can serve as a catalyst for community building and enrichment.





Thank you for the opportunity to present!  
Questions?



David T. Ritter

BROWN & HOFMEISTER, LLP  
740 East Campbell Road, Suite 800  
Richardson, TX 75081

[www.bhlaw.net](http://www.bhlaw.net) 214.747.6100 dritter@bhlaw.net

Untappd: TexasRoo96

2018 TCAA Summer Conference