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Authority of Texas Counties Over Land Use

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A. GENERAL AUTHORITY OF COUNTIES

Unlike a home-rule municipality, a county has only that authority which has been granted to it by the Texas Constitution or a state statute. TEX. CONST. art. V, § 18(b); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003). Thus, most authority exercised by counties with respect to land use is statutorily bestowed upon the counties by the Legislature.

Not all legislative grants of authority apply to all counties. The Legislature has often passed statutes that give authority to only certain counties depending on the needs or circumstances of each county. Thus, in areas of zoning, platting, or other regulations, the authority of a particular county affecting land use may be different from other counties. As a result, the practitioner must always review the applicable statutory basis for a county's regulatory authority to insure that it applies to the county in question. Unless noted otherwise, this paper will only address more generally applicable statutes related to county land use regulations.

B. ZONING

Chapter 231 of the Texas Local Government Code addresses the zoning authority of counties. Generally, counties have no zoning authority, either in the unincorporated area or the ETJ. Chapter 231 does provide some zoning authority, but only to certain counties in areas for which the Legislature has determined that zoning should be allowed. For example, the Legislature determined that due to significant recreational traffic and activities, the commissioners courts of Cameron County and Willacy County should have zoning authority to certain parts of the Padre Island area. Tex. Local Gov't Code § 231.11 - .023.

Subchapters C through L of Chapter 231 also provide for county zoning authority near

Amistad Recreation Area; military zones; around certain lakes; around Lake Tawakoni and Lake Ray Roberts; around Lake Alan Henry, Lake Cooper, Lake Ralph Hall, Post Lake, and Lower Bois D'Arc Creek Reservoir; in El Paso Mission Trail Historical Area; around Lake Somerville; in Hood County; and around Falcon Lake.

In addition to the zoning authority provided in Chapter 231, counties may have zoning authority around airports pursuant to Chapter 241 of the Local Government Code.

C. REGULATORY AUTHORITY

The Legislature can, and has, granted some counties more regulatory authority than others. For example, Tex. Local Gov't Code § 233.001 provides authority for a county to make repairs, remove, or demolish certain structures in an unincorporated area, but the statute grants the authority only to a county that borders the Gulf of Mexico and is adjacent to a county with a population of 3.3 million. Once again, it is important for the practitioner to always review the applicable statutory basis for a county's regulatory authority to insure that it applies to the county in question.

1. Regulation of Housing and Other Structures

a. Building and Setback Lines

If the commissioners court of a county determines that the general welfare will be promoted, the court may:

(1) establish by order building or setback lines on the public roads, including major highways and roads, in the county; and

(2) prohibit the location of a new building within those building or set-back lines.

However, the building or set-back line may not extend:

(1) more than 25 feet from the edge of the right-of-way on all public roads other than major highways and roads; or

(2) more than 50 feet from the edge of the right-of-way of major highways and roads.

The commissioners court may also designate the public roads that are major highways and roads. Tex. Local Gov't Code § 233.032.

County authority under Subchapter B of Chapter 233 of the Local Government Code to establish building and set-back lines applies only to areas outside the corporate limits of municipalities. If the lines conflict with lines adopted by a municipality, the municipal lines prevail if they are in the extraterritorial jurisdiction of the municipality. Tex. Local Gov't Code § 233.031.

b. Fire Code in Unincorporated Area

The commissioners court of a county with a population of over 250,000 or a county adjacent to a county with a population of over 250,000 may adopt a fire code and rules necessary to administer and enforce the fire code. The commissioners court, or any municipality in the county, may contract with one another for the administration and enforcement of the fire code. Tex. Local Gov't Code § 233.061, *et seq.*

A pending bill would remove the 250,000 population threshold in Tex. Local Gov't Code § 233.061(a) and give all Texas counties the authority to adopt a fire code and rules necessary to administer and enforce the fire code. Tex. H.B. 4080, 86th Leg., R.S. (2019).

The fire code applies only to the following buildings constructed in an unincorporated area of the county:

(1) a commercial establishment;

(2) a public building; and

(3) a multifamily residential dwelling consisting of four or more units.

It should be noted that the statute for fire code regulation by the county does not apply to single family residential dwellings or residential dwellings consisting of three or less units (i.e., duplex).

However, Tex. H.B. 4080, 86th Leg., R.S. (2019) would also amend Tex. Local Gov't Code § 233.062(a) to extend fire code regulation by counties in unincorporated areas to single family residential dwellings.

Further, the fire code does not apply to an industrial facility having a fire brigade that conforms to requirements of the Occupational Health and Safety Administration.

The fire code must conform to the International Fire Code, as published by the International Code Council, as the code existed on May 1, 2005; or the Uniform Fire Code, as published by the National Fire Protection Association, as the code existed on May 1, 2005; or establish protective measures that exceed the standards of the aforementioned codes. The commissioners court may adopt later editions of these fire codes. Tex. Local Gov't Code § 233.062(d).

However, Tex. H.B. 4080, 86th Leg., R.S. (2019) would also amend Tex. Local Gov't Code § 233.062(c) to require county fire codes to conform to either the International Fire Code or the Uniform Fire Code, mentioned immediately above, as those codes existed on May 1, 2015.

A person may not begin construction or substantial improvement on a building to which the county has fire code regulatory authority without first obtaining a permit from the county. Tex. Local Gov't Code § 233.063. The county also has the authority to require inspections to insure compliance with the fire code. Tex. Local Gov't Code § 233.0064. As

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