LOCAL LAND USE REGULATION
OUTSIDE CITIES

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I. INTRODUCTION

Texas is known as a low regulation, development friendly state. Nowhere is that more evident than in the *limited* land use regulation scheme *outside* city boundaries. This article discusses the history and legal basis for such local land use government regulation, reviews recent case law and a relevant AG opinion, mentions areas of significant controversy and lists Local Government Code provisions which either authorize or limit local government land use regulation *outside* city limits. The author's perspective is colored by a land use practice primarily representing private property owners and developers.

II. THE CONTEXT FOR LAND USE REGULATION OUTSIDE CITIES

A. Texas is a Low Regulation State.

Texas has long held a low regulation, business and agriculture friendly attitude, emphasizing a minimum of governmental "interference" with an owner's right to use their land. Property rights are held in high regard. However, *within city limits*, cities were given significant authority to regulate land use, exercising local government "police power" to protect the health, safety and public welfare of urban citizens. The primary land use regulatory schemes are zoning and subdivision platting. Only subdivision platting is applicable outside city limits and beyond in the county. Neither Texas cities nor counties have general zoning authority outside city limits, except in limited circumstances around certain lakes and special use facilities (discussed below).

Generally speaking, cities and counties only have the land use regulatory authority outside of city limits which is specifically granted to them by state law. *City of Lubbock v. Phillips Petroleum Co.*, 41 S.W.3d 149, 159 (Tex. App.—Amarillo 2000, no pet.) ("[I]t is the general rule that a city may only exercise its powers within its corporate limits unless its authority is expressly extended."); *Austin v. Jamail*, 662 S.W.2d 779, 783 (Tex. App.—Austin 1983, writ dism'd w.o.j.) ("A city must have express (or implied when such power is reasonably incident to those expressly granted) statutory authority to exercise its extraterritorial power.").

All commentators agree that the level of local government land use regulation outside city limits in Texas is low. For that reason, there have been many attempts by cities and counties to seek additional statutory authority (and from the private sector to seek statutory limits on that authority). Much controversy surrounded the interpretation of the extent of that statutory authority. However, recent caselaw has settled that no cities (whether general law or home rule) have building code or building permit authority in the extraterritorial jurisdiction (aka "ETJ"). *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016) (general law cities); *Collin County, Texas v. The City of McKinney, Texas,* 553 S.W.3d 79 (Tex. App.—Dallas 2018, no. pet.)(home rule cities). *Bizios* held that i) statutory authority would be narrowly construed and resolved against the city authority, ii) implied authority will be found only if "reasonably necessary" or "indispensable" to the regulatory authority, and iii) public policy considerations are irrelevant. *Bizios*, at 535. *Collin County* extended *Bizios* to home rule cities. *Collin County*, at 85 (specifically holding that Tx. Loc. Gov't Code Sec. 212.003 does not extend "inherent authority" to regulate building in the ETJ). *Id*.

After *Bizios* and *Collin County*, where are the edges in land use regulations outside cities? Regulation of vertical development (buildings) is settled (subject to a grant of new legislative authority), but disputes on the edges of subdivision platting regulations on land development, such as disguised density regulation, continue.

The legislature has established identical "guardrails" on both cities in their ETJs and counties from enacting subdivision platting rules which regulate the following:

> "…the **use** of any building or property for business, industrial, residential, or other purposes;
>
> …the **bulk, height, or number of buildings** constructed on a particular tract of land;
>
> …the **size of a building** that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage;
>
> …the number of **residential units that can be built per acre** of land…"
>
> Tx. Loc. Gov't Code Sec. 212.003(a)(city)
> Tx. Loc. Gov't Code Sec. 232.101(county)
>
> More dispute over the meaning of these exclusions is likely.

B. Context: History (and Demise) of Non-Consent Annexation.

Before 1963, the annexation authority of Texas cities was significant, effectively allowing a city to annex adjacent land limited only by the boundary of adjacent cities. The Texas Municipal Annexation Act (now Tx. Loc. Gov't Code Ch. 43) was adopted in 1963

to limit city annexation authority, as a result of perceived excesses in City annexation. That act created the concept of "extra territorial jurisdiction" (aka "ETJ"). The ETJ is "the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located" a distance beginning with one-half mile and increasing to 5 miles, depending on the city's population. Tx. Loc. Gov't Code Sec. 42.021(a). Tx. Loc. Gov't Code Ch. 42 also contains a number of special rules which complicate a proper determination of the ETJ in a particular circumstance. Cities are required to maintain a map of their city boundaries and ETJ, which should be available on the city's website if the city maintains one (it's 2022, likely all cities do, but the statute still makes the qualification). As a city annexes and expands its boundaries, its ETJ automatically expands. The 1963 Municipal Annexation Act limited cities' authority to annex to the area within its ETJ, with exceptions for consensual annexation. The concept for the ETJ is to provide a reasonably sized area a home rule city could annex *unilaterally*, and within which the city has limited land use regulation authority based upon a rational expectation that the city may later annex that land, thus gaining full jurisdiction over it (and achieving even broader land use regulatory approval). Annexation power was broad for home-rule cities, but limited for general law and special law cities to consent only. To be a home-rule city, a city must have at least 5,000 population (or have a reasonable basis to declare the 5,000-population threshold) and adopt a home-rule charter. Home-rule cities have full power of self-government, subject to limitations established by the State. General law and special law cities have only the authority specifically granted by the State. For years, home-rule cities aggressively annexed, and smaller cities aspired to home-rule powers.

Various limitations on home-rule "non-consent" annexations were established over the years, in response to perceived "land grabs" by aggressive cities. The disputed annexation of the Kingwood master planned community by the city of Houston is cited by many as the turning point for non-consent annexation, hardening opposition to unilateral annexation.

In 2017, the annexation act was rewritten to greatly limit, and effectively eliminate, non-consent annexation by home rule cities in large counties (population of 500,000 or more, known in the act as Tier 2 counties). In 2019, the bracketing was eliminated, and ALL cities are similarly limited to consent annexations only. Home-rule cities are now in the same situation as common law and special law cities.

The impact of this change is dramatic. Cities no longer control their growth and may not unilaterally expand their boundaries (and thus their comprehensive land use regulatory authority). Nonetheless, population growth, and the need for more housing will continue. More development will occur outside city limits since city limits are more static.

Many landowners have entered into Development Agreements under Tx. Loc. Gov't Code Sec. 43.016 (which would defer a city's right to annex land in agricultural, wildlife management or timber use). Pursuant to these Development Agreements, the city agrees not to annex the property for either 1) a period of years, or 2) only upon the occurrence of specific events, and thereafter provides for a "consent" annexation. These agreements were entered into by landowners under duress with a threatened "non-consent" annexation as permitted under prior law. These agreements give cities a unilateral right to annex, which they would not otherwise have under current law. Cities are not likely to pass this opportunity to expand their boundaries. Due to the change in annexation law, it is likely some landowners will contest the enforceability of these agreements now that the consideration for the contractually agreement has been eliminated.

Cities have many demands and limited financial resources. There are more and more caps on city taxation. Many cities lack sufficient employees to handle matters within their limits. There are more and more time limits on city development review processes. See Tx. Loc. Gov't Code Sec. 212.009, et. seq. – the "plat shot clock", and Tx. Loc. Gov't Code Sec. 214.904 – the "building permit shot clock". Some commentators question why cities continue to expend time and effort to regulate in their ETJs, when most ETJ area will *never* be annexed into the city. Perhaps, cities will focus inward on development within their boundaries, and let the county regulate development outside the city. Other cities may create conditions in their ETJ, such as obtaining certificates of convenience and necessity ("CCNs") for the exclusive right to provide water and sewer services, in order to bring landowners and developers to the annexation table in order to obtain needed utilities.

Counties have traditionally been primarily rural. As development occurred within city ETJs, the cities responded by annexation, sometimes aggressively. There were exceptions, such as in many Harris County areas, where MUDs and related special districts provide infrastructure financing to developers. The city of Houston consented to these special districts, but provided for the later right to annex. The city of Houston also entered into special agreements to permit the city to assess and collect sales taxes, then split those collections with the MUD, with the city agreeing to provide a limited array of services to the area in the MUD. The city of Houston typically delayed annexing a MUD until its bonds were paid down to the level where it was profitable for the city to annex, payoff the then outstanding MUD bonds, and to assume the responsibility to provide full city services. It was virtually automatic that those MUDs would be annexed.

Title search: Local Land Use Regulation Outside Cities

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