UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

22nd Land Use Conference

March 22 – 23, 2018
Austin, Texas

Developing Real Estate Outside Corporate Limits: The Brave New World After SB 6

ARTHUR J. ANDERSON

Arthur J. Anderson
Winstead PC
500 Winstead Building
2728 N. Harwood Street
Dallas, Texas 75201
aanderson@winstead.com
214.745.5745

I. INTRODUCTION

Compared to counties, it is undisputed that Texas cities have significant powers to regulate land development within their corporate limits. It is an open question as to how much authority cities have to control growth outside of these limits. Cities are facing pushback from developers, landowners and counties resulting from often aggressive attempts to push their regulatory agendas. This pushback includes recent legislative enactments that severely curtail municipal annexation powers.

Texas has seen significant real estate development in recent years throughout the state. Many businesses prefer to develop in less regulated areas of the county. Cities have the authority to regulate the following: lot coverage, lot setbacks, density, height, building size, impervious coverage, screening and aesthetics. Counties lack significant authority to regulate in these areas. As a result, there is increasing tension among cities, counties and developers to address these issues.

II. HISTORY OF THE ETJ

All property in Texas is located either in a city's corporate limits, within a city's extraterritorial jurisdiction ("ETJ") or in the unincorporated area of the county outside of any city's ETJ. Prior to 1963, a Texas municipality could annex territory up to the corporate boundaries of another municipality. The "first in time, first in right" rule that the first to commence annexation or incorporation proceedings was entitled to complete the annexation led to numerous municipal conflicts. The Legislature enacted the Municipal Annexation Act, Tex. Rev. Civ. Stat. Ann. art. 970a, in 1963 (now Chapter 43, TEX. LOC. GOV'T CODE) to address this situation.

The Act was designed "to curb the virtually unlimited power of home rule municipalities to unilaterally annex territory." *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 663 n.1, 38 Tex. Sup. Ct. J. 973 (Tex. 1995); *Sitton v. City of Lindale*, 455 S.W.2d 939, 941, 13 Tex. Sup. Ct. J. 370 (Tex. 1970). Extraterritorial jurisdiction refers to "the unincorporated area that is contiguous to the corporate boundaries of the municipality" and is located within a specified distance of those boundaries, depending upon the number of inhabitants within the municipality. *Id.* §42.021. Generally, a municipality's extraterritorial jurisdiction may not expand beyond legislatively prescribed limits. *See id* §42.021. If the owners of a particular area request an expansion, however, "the extraterritorial jurisdiction of a municipality may expand beyond the distance limitations imposed by Section 42.021 to include an area contiguous to the otherwise existing extraterritorial jurisdiction of the municipality." *Id.* §42.022(b).

The Act also authorized the exercise of certain powers by cities and towns in their extraterritorial jurisdiction. TEX. REV. CIV. STAT. art. 970a. When originally introduced in the Legislature, House Bill 13 read in relevant part:

> Sec. 2(a) The governing body of any city or town may, by ordinance, extend to all of the extraterritorial jurisdiction defined under the authority of Section 1(f) of this Act, the application of one or more of such city or town's ordinances relating to: health; sanitation; subdivision development; zoning; building construction, including but not limited to building, plumbing and electrical standards and regulations.

Tex. H.B. 13, 58th Leg., R.S. (1963) (Introduced Version), at p. 6. The enrolled version, which became law, reflected a significantly narrowed scope of municipal authority in the ETJ. Most of the ETJ authority the bill initially set out to grant, including that regarding zoning and building construction, was taken out. The law that was enacted read in relevant part:

> Section 4. Extension of Subdivision Ordinance Within the Extraterritorial Jurisdiction. The governing body of any city may extend by ordinance to all of the area under its extraterritorial

> jurisdiction the application of such city's ordinance establishing rules and regulations governing plats and the subdivision of land. . . .

Tex. H.B. 13, 58th Leg., R.S. (1963) (Enrolled Version), at p.108-109.

III. DIFFERENT CITY CATEGORIES

Texas law recognizes three types of cities: Home rule municipalities, general law municipalities, and special law municipalities. *See Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282, 285 (1948). The nature and source of a municipality's power depends on the type of municipality exercising the power. *See Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 658 (Tex. 1995) ("Laws expressly applicable to one category [of municipalities] are not applicable to others.").

Home-rule cities derive their authority from the Texas Constitution, not from the acts of the Legislature. *See* Tex. Const. art. XI, §5. As the Texas Supreme Court has consistently acknowledged, "[h]ome-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for limitations on their powers." *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013) (citing *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975)). "An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

Still, the mere fact that the Legislature has enacted a law addressing a subject does not mean the subject matter is entirely preempted. *Id.* Rather, "[a] general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *Id.* Thus, "if the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity'." *Southern Crushed Concrete*, 398 S.W.3d at 678 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002)).

This distinction has historically been important because only home rule cities could annex land within their ETJ involuntarily. A general law town, however, was typically required to have landowner consent to annex. *Sitton v. City of Lindale*, 455 S.W.2d 939 (Tex. 1970). Unilateral annexations over landowner opposition created significant political opposition to the practice.

IV. SENATE BILL 6

Newton's third law is that for every action there is an equal and opposite reaction. In September 2017, the Legislature amended the Municipal Annexation Act to significantly reduce involuntary annexations by home rule cities. The bill analysis for SB 6 by Senator Campbell included the following statement of intent:

> Under current law, many cities annex areas simply to boost their tax base while ignoring and passing over poorer areas in desperate need of city services. Other areas are annexed for limited purposes, meaning residents must follow city ordinances and sometimes even pay city taxes despite living outside the municipality and having no elected representation.

Prior to the new law's December 1, 2017, effective date, it was a city council's decision whether to annex an area into the city limits. Now, counties with a population of 500,000 or more are known as Tier 2 counties. §43.001, TEX. LOC. GOV'T CODE. If the municipality seeking annexation is in a Tier 2 county, the municipality must obtain written petition of 50% of the residents or landowners and an election. §43.0681, TEX. LOC. GOV'T CODE. This allows the residents who will be impacted to decide whether they want to be annexed into the municipality.

Title search: Developing Real Estate Outside Corporate Limits: The Brave New World After SB 6

First appeared as part of the conference materials for the
22nd Annual Land Use Conference session
"Development Issues Outside Corporate Limits"