LOCAL LAND USE REGULATION
OUTSIDE CITIES

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CHAPTER 20

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I. INTRODUCTION

Texas is known as a low regulation, development friendly state. Nowhere is that more in evidence 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. 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 (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. 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 to general law and special law cities. To be a home-rule city, a city must have at least 5,000 population 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.

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 a period of years, 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 contractual 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.

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. Examples of major MUD annexations in Houston were Kingwood and Atascocita. The Kingwood annexation has been widely credited with causing the beginning of the end of city non-consent annexation. Today, there are more and more urbanized areas of counties. Large portions of the Houston SMSA which a visitor would assume are within a city (because the area is fully developed and urban in character) are outside Houston city limits. Counties are being asked by these residents for more services and a highly level of attention.

Already, the unincorporated area of counties adjacent to cities is becoming more "urban". COVID trends show more people choosing to live "in the country", as they have now learned they can "work remote," so long as they have reliable high-speed

internet and Amazon deliveries. Residents will ask counties for services and protections similar to those provided inside cities. Cities and counties will surely approach the legislature for expanded authority within the ETJ (cities) and the unincorporated area of the county (county). Existing statutory authority will be scrutinized as cities and counties seek to maximize their land use regulatory authority.

In other words, conflict over the extent of land use regulation outside of city limits will continue, if not escalate.

C. Legal Basis for Land Use Regulatory Authority Outside Cities

A city's authority stops at its boundaries and any land use regulatory authority in its ETJ must be based upon a legislative grant of authority. *FM Props Operating Co. v. City of Austin*, 22 SW3d 868, 902 (Tex. 2000). Barring specific city statutory authority in the city's ETJ, then only county land use regulations will apply. *Id.*, at 902. The primary basis for city land use regulatory authority in the ETJ is under the Texas Subdivision Platting Act, Tx. Loc. Gov't Code Ch. 212. Tx. Loc. Gov't Code Sec. 212.003 specifically authorizes a city to extend into its ETJ its subdivision platting regulation adopted under Tx. Loc. Gov't Code Sec. Ch 212 "other municipal ordinances relating to access to public roads or the pumping, extraction, and use of groundwater . . . for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health." This grant is subject to the specific limits described in Section I.B. above and further discussed later in this paper. Cities *may not* assess fines or criminal penalties in the ETJ for violation of such regulations, but may seek injunctive relief. Tx. Loc. Gov't Code Sec. 212.003(b) and (c).

Counties have authority which is similar to general law and special law cities in that their authority must be granted by the State. *Canales v. Laughlin*, 214 S.W. 2d 451 (Tex. 1948). There is no such thing as a "home-rule" county in Texas.

Recent case law (mentioned in Section II.B. above and further discussed below) indicate that Texas courts will not imply regulatory authority to cities (whether home-rule, general law or special law), but instead will uphold regulatory authority only based upon the strict statutory construction of authorizing statutes. Logically, this authority should be extended to counties.

D. General Land Use Limits Applicable Outside Cities

There are a variety of limitations on a local government's exercise of land use regulatory authority, whether inside or outside city limits. It is beyond the scope of this article to provide a detailed discussion. Many papers on these topics are available through StateBarCLE from prior State Bar Real Estate Conferences, and from other online resources, such as www.REPTL.org.

Among those limitations are the following:

- **Vested Rights-** Tex. Loc. Gov't Code Chapter 245 provides protection against changes in local regulatory schemes after the filing of the first application for a required development permit for a project with a local regulatory entity. See, *Texas Vested Rights Statute – Chapter 245 – A Simplified View*, Reid Wilson, State Bar Real Estate Law Course, 2021.
- **Exaction/Rough Proportionality-** Tex. Loc. Gov't Code Sec. 212.904 and 232.110, and both federal and Texas case law limit the scope of required exactions from developers to the roughly proportionate impact on public infrastructure from a new project.
- **Religious Protections-** Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. Sec. 2000cc. Texas Religious Freedom Restoration Act (TRFRA) Tex. Civ. Prac. & Rem. Code Ch. 110**.** The two acts provide broad protection from government regulations which impose a *substantial burden* on *religious exercise*, unless the government justifies that burden as the *least restrictive* way to achieve a *compelling government interest*. See – *Religious Exercise: Special Use/Special Protection*, Reid Wilson, UT CLE, 2021 Land Use Conference, available through UTcle.
- **Texas Private Real Property Rights Preservation Act-** Tx. Gov't Code Ch. 2007. This act provides a statutory cause of action for certain takings of real property.
- **Impact Fees**. Tx. Loc. Gov't Code Ch. 395. Impact fees imposed in the ETJ may not cover for roads.

E. Development Agreements

A local government and a landowner/developer may enter into a written agreement addressing development issues. Through these agreements, a city may gain certain regulatory authority within a new development located in the ETJ. Traditionally, the agreement of a city not to annex (so to eliminate city regulations and taxation) has been a foundation for most such agreements. That consideration has been eliminated.

However, even after the death of non-consent annexation, Development Agreements are important, as they provide a vehicle for developer/city cooperation. Under a Development Agreement (depending on the type), the following may be addressed:

- city enforceable land use controls outside city limits

- utility service (by extension of city service or the approval of a special district)
- economic incentives
- consent to annexation in the future
- developer finances infrastructure/exactions
- other considerations.

For developers, time and certainty have immense value. The ability to expand city limits (even if many years in the future) and achieve a reasonable level of land use control outside its current city limits is alluring to cities.

More Development Agreements are expected in the ETJ as cities and developers work cooperatively for their mutual benefit.

1. ETJ Development Agreements

TEX. LOC. GOV'T CODE Section 212.171 provides broad statutory authority for a development agreement between a city and a property owner and is the preferred vehicle for Development Agreement. These "ETJ Development Agreements" apply in ETJs (but **not** the ETJ of a municipality with a population of 1.9 million or more [i.e., Houston]). An ETJ Development Agreement must be recorded. Its term may not exceed 45 years (including renewals/extensions). The Development Agreement is considered a permit under Tx. Loc. Gov't Code Sec. Ch. 245 for vesting purposes. A city waives immunity from suit relating to a breach of an ETJ Development Agreement and there are certain limitations on damages and other remedies.

In addition to a laundry list of specific subjects, an ETJ Development Agreement may "include other lawful terms and considerations the parties consider appropriate." Specific subject matters include the city's enforcement of land use and development regulations otherwise enforced within the city's limits and special regulations applicable only within the area under the ETJ Development Agreement.

2. Industrial Districts Agreements

Tx. Loc. Gov't Code Sec. 42.0044 authorize a city to create an "industrial" district in its ETJ by entering into a written contract with the landowner, which contract may include "other lawful terms and considerations that the parties agree to be reasonable, appropriate and not unduly restrictive of business activities." Industrial District Agreements (aka "IDAs") are in common use to permit heavy industrial complexes to remain outside city limits (through non-annexations provisions in IDAs), receive some city services (e.g. police, fire, EMS), avoid city regulation and taxation, and pay a Payment In Lieu Of Tax (aka "PILOT"). Tx. Loc. Gov't Code Sec. 42.004(c)(2). Industrial Districts may have terms of successive periods not to exceed 15 years each. The loss of non-consent annexation authority eliminates the primary reason heavy industry sought IDAs from adjacent cities. However, the statute provides a legal basis for broad authority for city/industry development agreements, such as providing utility services. Future use of IDAs will be limited, as the ETJ Development Agreement has the same authority and more.

3. Chapter 380/381 Agreements.

Tx. Loc. Gov't Code Sec. Tx. Loc. Gov't Code Sec. Tx. Loc. Gov't Code Sec. Tx. Loc. Gov't Code Sec. Tx. Loc. Gov't Code Sec. 380(city) and 381(county) authorize economic development agreements to incentivize desired development. The authority is broad and supported by constitutional amendment. Use of these statutes contemplates an "Economic Development Program" (undefined), which is usually established by a regulatory framework adopted by the local government and sets a procedural process for approvals and fiscal parameters. It is possible to join a Chapter 380 Agreement and an ETJ Development Agreement into a single document, so long as the statutory requirements are satisfied.

See, Development Agreements: Basics and Beyond, by Reid Wilson and James Dougherty, Jr., UT CLE 2012 Land Use Conference available through UT CLE.

III. CASE LAW

The following are relevant case law and an AG Opinion on the extend of land use regulatory authority outside of cities:

***Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016).**

The Texas Supreme Court addressed the long contentious question of whether a general law city may adopt and enforce building codes and building permit requirements within its ETJ. The Court held in the negative. The city argued a combination of statutory, implied and public policy justifications support city regulation of vertical construction within its ETJ.

1. Limited Powers of General Law Cities.

The Town of Lakewood Village is a general law city. The court discussed general law city powers in the following excerpts:

> Municipalities are creatures of law that are "created as political subdivisions of the state ... for the exercise of such powers as are conferred upon them.... They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them." *Payne v. Massey*, 145 Tex. 237, 196 S.W.2d 493, 495 (1946).
>
> Texas law recognizes three types of

municipalities: 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. *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 municipalities "derive their powers from the Texas Constitution" and "possess 'the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power.' " *In re Sanchez*, 81 S.W.3d 794, 796 (Tex.2002) (quoting *Dall. Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex.1993)).

Unlike home-rule municipalities, general-law municipalities, such as the Town, "are political subdivisions created by the State and, as such, possess [only] those powers and privileges that the State expressly confers upon them." *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex.2004).

2. City Arguments:

   a. Express Statutory Authority - The Court reviewed the Texas Subdivision Platting Act (TEX. LOC. GOV.T CODE Chapter 212), specifically Sections 212.002 and .003, which the city argued statutorily authorized building codes and building permit requirements as part of the statutorily authorized "rules governing plats and subdivision." The Court analyzed the basis for subdivision platting compared to the public purpose for regulating building construction. The Court distinguished between i) development of land and ii) construction of buildings, holding that Chapter 212 relates only to the development of land. "[C]hapter 212 uses the term 'plat' and 'subdivision' to refer to the division and development of land, not to the subsequent construction of buildings on such land." *Id*. at 532. The Court rejected the city's attempt to broadly interpret subdivision platting authority. The Court also differentiated between "subdivision plats" (Subchapter A of Chapter 212) and "development plats" (Subchapter B of Chapter 212). Development plats are an alternative to subdivision plats, but only if a city affirmatively adopts Subchapter B (which the Town of Lakewood Village had not). The language in Subchapter B is not relevant to the interpretation of Subchapter A. *Id*. at 533. The Court cited the limited language in TEX. LOC. GOV'T CODE Section 212.003(a) and the "broader" context of Chapter 212 in finding a lack of authority. The Court also dismissed the city's reliance on TEX. LOC. GOV'T CODE sections which reference building codes being applied in ETJs. Instead, the Court held that these references "do not expressly grant such authority." *Id.* at 535.

   b. Implied Authority - The city argued implied authority under the TEX. LOC. GOV'T CODE within the context of its police power (general health, safety and welfare) and subdivision platting authority. Those arguments were dismissed, holding that a general law city's implied powers will be *strictly construed* and *resolved against the city*, due to the inherent character of general law cities. *Id*. at 536 (*See* the following excerpt).

> As we have previously explained, however, general-law municipalities have "only such implied powers as are reasonably necessary to make effective the powers expressly granted. That is to say, such as are *indispensable* to the declared objects of the [municipalities] and the accomplishment of the purposes of [their] creation." *Tri–City Fresh Water Supply Dist. No. 2 of Harris Cty. v. Mann*, 135 Tex. 280, 142 S.W.2d 945, 947 (1940) (emphasis added); *see also Foster v. City of Waco*, 113 Tex. 352, 255 S.W. 1104, 1106 (1923) ("A municipal power will be implied only when without its exercise the expressed duty or authority would be rendered nugatory."). Thus, **we strictly construe general-law municipal authority and "[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipality], and the power is denied."** *Foster*, 255 S.W. at 1106.
>
> As explained above, the only express power that sections 212.002 and 212.003 grant is the authority to enforce ordinances regulating "plats and subdivisions"—not "building codes"—within ETJs. *See* TEX. LOC. GOV'T CODE § 212.002, .003(a). **The Town's authority to regulate plats and subdivisions in its ETJ would not be**

> **"rendered nugatory" without the authority to also enforce its building codes within its ETJ, nor is the authority to extend building codes in its ETJ "reasonably necessary" or "indispensable" to its authority to regulate platting and subdivisions.** In fact, the Town has an ordinance regulating platting and subdivision (the Subdivision Ordinance) that is separate from its building code ordinance. *See* TOWN OF LAKEWOOD VILLAGE, TEX., ORD. 14–13. The Subdivision Ordinance expressly states that the Town "is authorized and empowered to apply the Town's regulations for subdivisions and property development to its ETJ pursuant to Section 212.003 of the Texas Local Government Code," *id.* indicating that the Town understands the scope of its platting and subdivision authority under sections 212.002 and212.003(a), and that the authority to enforce building codes in its ETJ is not "reasonably necessary" or "indispensable" to its ability to regulate platting and subdivision.
>
> **When construing statutes to determine the authority of a general-law municipality, any "fair, reasonable, substantial doubt concerning the existence of power [must be] resolved ... against the [municipality]."** *Foster*, 255 S.W. at 1106. Applying this standard, we conclude that the Local Government Code does not impliedly authorize general-law municipalities to enforce their building codes within their ETJs. (emphasis added)

c. Public Policy - The Court dismissed the use of public policy arguments to support implied power (after noting that each side presented cogent public policy arguments which conflict). *Id.* at 538 (*See* the following excerpt).

> However compelling either side's policy arguments may be, we cannot decide this case based on those concerns. Because a general-law municipality only "possess[es] those powers and privileges that the State expressly confers upon [it]," *Sunset Valley*, 146 S.W.3d at 645, **a general-law municipality cannot exercise its powers outside its corporate limits unless the Legislature expressly or necessarily grants it such authority.** We cannot judicially confer authority on general-law municipalities, even if we believe there are compelling public policy reasons for doing so. **We must leave that choice to the policymaking branch of government.**
> (emphasis added)

3. Related cases

***Collin County, Texas v. The City of McKinney, Texas,* 553 S.W.3d 79 (Tex. App.—Dallas 2018, no. pet.)**

The Court extended the holding in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016) to home-rule cities, holding that building code and building inspection requirements may not be applied by ANY city in its ETJ. The Court held that the Texas Supreme Court in *Bizios* did not differentiate its analysis between home-rule and general law cities. *Id.* at 84. The Court included the following helpful analysis for construing statutes:

The trial court's judgment primarily rests upon its construction of the Texas Local Government Code, which we review de novo. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000).

> When reviewing matters of statutory construction, our primary objective is to ascertain and give effect to the Legislature's intent without unduly restricting or expanding the statute's scope. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016).
>
> When seeking the Legislature's intent, we first look to the statutory text. *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015).
>
> We derive the Legislature's intent from the plain meaning of the text construed in light of the statute as a whole. *Janvey*, 487 S.W.3d at 572.
>
> "The terms of a statute bear their ordinary meaning unless (1) the Legislature has supplied a different meaning by definition, (2) a different meaning is apparent from the context, or (3) applying the plain meaning would lead to absurd results." *Id.*
>
> To determine a statutory term's common, ordinary meaning, we typically look first to its dictionary definitions and then consider the term's usage in other statutes, court decisions, and similar authorities.. *Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 35 (Tex. 2017); *see also Hardy v. Commc'n Workers of Am. Local 6215 AFL-CIO*, 536 S.W.3d 38, 45 (Tex. App.—Dallas 2017, pet. denied)
> (reformatted for clarity)

The city argued that as a home-rule city, it has broader implied powers under the Texas Subdivision Platting

Statute, TEX. LOC. GOV'T CODE Chapter 212, specifically TEX. LOC. GOV'T CODE Section 212.003. The Court rejected this argument as follows:

> "While sections 214.212 and 214.216 provide for the applicability of building codes "in a municipality," section 212.002 states that "the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction." TEX. LOC. GOV'T CODE § 212.002. Section 212.003 authorizes a municipality to extend ordinances adopted under section 212.002 to its ETJ. *Id.* § 212.003(a); *see also Bizios*, 493 S.W.3d at 532. "Together, these two sections expressly give *all municipalities* authority to enforce rules and ordinances 'governing plats and subdivisions of land' within their ETJs." *Bizios*, 493 S.W.3d at 532 (emphasis added) (quoting TEX. LOC. GOV'T CODE §§ 212.002, .003(a)). **If a home-rule municipality had inherent authority to exercise these powers in its ETJ, section 212.003 would be superfluous as applied to home-rule municipalities. We will not read the statute to accomplish such a result.** *See State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) (courts read statute as a whole and interpret it to give effect to every part). Such an interpretation also would be inconsistent with the *Bizios* opinion and existing case law. *See Bizios*, 493 S.W.3d at 532; *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 (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.").

Based on the Texas Supreme Court's opinion in *Bizios*, opinions from our sister courts, and relevant provisions of the local government code, we conclude every municipality, including a home-rule municipality, requires legislative authorization to enforce building codes beyond its corporate limits. We have not found any legislative authorization giving the City the power it seeks to exercise, and the City does not cite any in its brief. Therefore, we conclude the City lacks authority to require a landowner developing property in its ETJ to obtain City building permits, inspections and approvals, and pay related fees. "
(emphasis added)

***Builder Recovery Services LLC v. The Town of Westlake, Texas*, No. 21-0173 (Tex. 2022, decided May 20, 2022)**

The Supreme Court doubled down on its restrictive interpretation of implied powers of General Law Cities, as stated in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016). Although the issue related to authority *within* the city boundaries, the case should be relevant to the extent to which a city's authority could be implied in its ETJ.

A waste disposal operator objected to the city adopting strict licensing and allegedly excessive fees for operating a commercial solid waste business within the city and using city roads. The city has regulatory authority per TEXAS HEALTH & SAFETY CODE Section 364.034, but no *specific* authority to require a franchise license or assess fees. The operator cited *Bizios* in support of a narrow standard of implied authority to hold that the requirement to obtain a license or franchise and/or to pay fees could not be implied from the statutory authority to regulate. The operator also challenged the 15% of revenue fees as excessive.

The Trial Court disagreed, as did the Court of Appeals, which held that the authority to regulate implies the authority to license and charge fees. The Court of Appeals noted that waste disposal was an area where cities traditionally have broad regulatory authority. By contrast, *Bizios* held that building codes were not reasonably necessary or indispensable to the power to regulate plats and subdivisions, which the Supreme Court held to be separate from regulating buildings. The Court of Appeals held that there was an *explicit* power to regulate waste disposal, which generally *implies* the related power to license and considered *Bizios* distinguishable on the facts. *Builder Recovery Services LLC v. The Town of Westlake, Texas*, 2021 WL 62135, (Tex. App. – Ft. Worth, 2021 reversed, *Builder Recovery Services LLC v. The Town of Westlake, Texas*, No. 21-0173 (Tex. 2022, May 20, 2022).

The Supreme Court reversed the Court of Appeals, focusing on the issue of the amount of the fees charged by the City as part of the licensing program. The Supreme Court reiterated that any doubt about implied powers of a General Law City will be resolved *against* the City. Interestingly, the Supreme Court did not directly address the question of whether the right to regulate implies the right to license and charge related fees, but simply "assumed" those rights (but stated in dicta that there is support for that position). Although this is dicta, it shows that the Supreme Court is likely to imply the right to license where there is explicit right to regulate. However, the Supreme Court also held that any fees imposed in the licensing process must be calibrated to cover the regulatory costs, and not be revenue producing.

Builder Recovery Services demonstrates the Supreme Court is continuing to strictly limit local government authority, plus will moderate permit and license fees.

***Collin County, Texas v. The City of McKinney, Texas,* 553 S.W.3d 79, 87 (Tex. App. – Dallas, 2018 no writ).**

In *Collin County*, the City of McKinney adopted rules under Tx. Loc. Gov't Code Sec. 212.002-003 that required subdivision platting whenever a landowner sought to construct "streets, utilities, buildings or other improvements." The Court broadly construed municipal authority to require plats, *even without a subdivision occurring*, based only upon the Court's statutory construction of TEX. LOC. GOV'T CODE Chapter 212, particularly Sections 212.002-3. The Court held that, without further analysis or case cite, subdivision is not a condition precedent for a city to require a plat. *Id*. at 87. A plat may be required upon any development of a tract. *Id.*

This result was a surprise to some lawyers, but is consistent with an older case, which held that "developing" is a type of subdivision if such development is specifically set forth in a subdivision regulation. *Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882, 885 (Tex. App.—Waco 1985, no writ). Also see, *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *See* Op. Tex. Att'y Gen. No. GA-0223 (2004) for discussion of what constitutes a "subdivision".

***Town of Annetta South v. Seadrift Development, LP,* 446 S.W.3d 823, (Tex. App. Ft. Worth, 2014 pet. denied)**

The Court invalidated a general law city's adoption of a minimum lot size in its ETJ. The city's Subdivision Platting Ordinance imposed a 2-acre minimum lot size within the ETJ. The city denied a plat based *solely* on the minimum lot size issue. The developer asserted the limitations in TEX. LOC. GOV'T CODE Section 212.003(a)(4) which state a city may not regulate within its ETJ "the number of residential units that can be built per acre of land."

Looking at this limit, the Court stated:

> "The purpose of these restrictions on a municipality's authority to impose regulations on land in the municipality's ETJ is to prohibit the municipality's extension of zoning ordinances into its ETJ under the guise of cleverly drafted 'rules governing plats and subdivision of land'." *See, Id.* Section 212.002; *Quick v. City of Austin*, 7 S.W.3d 109, 121 (Tex. 1998)(noting Section 212.003 prohibits the application of zoning regulations in ETJ areas.)"
>
> *Id.* at 827

The Court held that a plain reading of this limitation shows an *unambiguous* intent to prevent single family lot size minimums, stating: "Thus, giving Section 212.003(a)(4) its plain meaning, the Legislature intended to impose a mandatory duty on municipalities to refrain from controlling or directing any municipality's ETJ – *whether explicitly or implicitly*, the number of residential units built per acre." (emphasis added) *Id*. at 829.

The Court rejected the city's attempt to argue that the statutory prohibition was narrow and should to be limited to zoning ordinances, holding that the language was unambiguous, thus not requiring further investigation (such as legislative history). *Id*. at 827, FN 2

The city argued that a multifamily apartment complex could be developed on the same land, so the city was not regulating "population density", only form. However, the evidence showed the city's intent was to regulate density by requiring larger lot sizes.

City authority in its ETJ should be strictly construed for two reasons, 1) Section 212.003(a)(4) is an express limit on city authority to regulate in the ETJ, and 2) any regulation of land use is in derogation of the common law.

> The Court held that strict construction applies to the review of city power in the ETJ:
>
> **Statutes and ordinances in derogation of the common law are strictly construed.** *Tex. Co. v. Grant*, 143 Tex. 145, 182 S.W.2d 996, 1000 (1944); *accord* 3 Sutherland Statutes and Statutory Construction § 61:1 (7th ed.) ("Statutes in derogation of a property owner's right at common law to build what she pleases upon her own property must be strictly construed in favor of the owner.").
> **Because a municipality possesses authority to regulate land development in its ETJ only to the extent it is legislatively granted that authority, legislatively-created express limitations to that grant of authority—such as local government code section 212.003—are construed strictly against the authority of the municipality and in favor of the land owner.** *See* Tex. Loc. Gov't Code Ann. § 212.003; 3 Sutherland Statutes and Statutory Construction § 64:1 (7th ed.) ("The legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers permits.").
> Id. At 825-6 (emphasis added)

The Court pointed out that municipal regulatory powers in a town's ETJ is based solely on direct authority from the legislature.

> **A city's authority to regulate land development in its ETJ is wholly derived from a legislative grant of authority.** *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 902 (Tex.2000); *accord Ex parte Ernest*, 138 Tex.Crim. 441, 136 S.W.2d 595, 597 (1939) ("As a general rule a municipal corporation's powers cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits."). **If no municipal ordinances are legislatively authorized to be extended to a municipality's ETJ, then only county land-use regulations apply.** *FM Props. Operating Co.*, 22 S.W.3d at 876, 902.
> Id. At 826-7 (emphasis added)

The Court applied strict construction.

> Finally, if any question remains that Ordinance 011 violates section 212/003(a)(4), we are required to construe section 212/003(a)(4) against the authority of the Town to regulate within its ETJ both because section 212.003 is an express limitation on the authority granted to municipalities to regulate within ETJs and because any regulation of land use[5] is in derogation of the common law. *See Thomas v. Zoning Bd. of Adjustment*, 241 S.W.2d 955, 957 (Tex.Civ.App.-Eastland 1951, no writ); *accord Bryan v. Darlington*, 207 S.W.2d 681, 683 (Tex.Civ.App.-San Antonio 1947, writ ref'd n.r.e.) ("All restrictions of the free use of land are in derogation of the common law right to use land for all lawful purposes that go with the title and possession, and are to be construed strictly against the person creating or attempting to enforce such restrictions.")…..

Justice Dauphinot (now retired) disagreed with the majority's statutory construction of TEX. LOC. GOV'T CODE Section 212.003(a) in a dissent, arguing that the majority overbroadly interpreted the statutory limitation to apply to any regulation which *affected* density, although the statute does not use the term "density". She cited legislative history referencing prohibiting zoning regulations in the ETJ. However, the Supreme Court denied petition and Judge Dauphinot is retired, while Justice Walker, who wrote the majority opinion continues to serve on the Court. This case continues as good law and its analysis is consistent with the tenor of *Bizios* and *Collin County*.

This case stands for the proposition that the limitations on city and county platting regulation in TEX. LOC. GOV'T CODE Section 212.003(a)(4) may not *affect* residential lot density, whether achieved "explicitly or implicitly". Because the city and county limitation is identical in language, this case should apply equally to county platting per TEX. LOC. GOV'T CODE Section 232.101.

***Milestone Potranco Development, Ltd. v. City of San Antonio*, 298 S.W.3d 242, (Tex. App. - San Antonio, 2009 pet. denied)**

The Court upheld the extension of the city's Tree Ordinance to the ETJ pursuant to its subdivision platting authority. The Court held that trees are part of the land and related to the impact of subdivision and related development, and that subdivision platting regulations should not be limited to "basic infrastructure." *Id*. at 244-245. The Court also held that a tree ordinance is not just aesthetic regulation, as it promotes the orderly and healthy development of the community. *Id*. The Court declined to apply the limitations in TEX. LOC. GOV'T CODE Section 212.003(a) to prohibit the tree ordinance.

The Court followed a three- step analysis to determine if the Tree Ordinance was both authorized under TEX. LOC. GOV'T CODE Section 212.002 and not prohibited by Tex. Loc. Gov't Code Section 212.003(a)(1).

> (1) Is the Ordinance a rule "governing plats and subdivisions of land", authorized under Section 212.002?

> The developer argued that platting and subdivision ordinances only regulate "basic infrastructure" and not aesthetics. The Court looked at the statutory language in Section 212.002 which authorize a city to adopt rules that: "promote the health, safety, morals, or general welfare of the municipality and the safe, orderly and healthful development of the municipality."

> The Texas Supreme Court has interpreted the purpose of platting and subdivision regulations is to "ensure that subdivisions are safely constructed and promote the orderly development of the community." ***City of Round Rock v. Smith,*** 687 S.W.3d 300, 302 (Tex. 1985). In an earlier case, ***Lacey v. Hoff***, 633 S.W.2d 605, 609 (Tex. App. – Houston 14th Dist., 1982 writ ref'd. n.r.e.), the Court stated that platting is to ensure "adequate provisions have been made for streets, alleys,

parks and other facilities indispensable to the particular community affect." The Court then reviewed the Tree Ordinance to determine its purpose. Without additional analysis, the Court determined that the Tree Ordinance promotes orderly and healthful development, and is a rule "governing plats and subdivisions of land" authorized under Section 212.002.

(2) Does the Ordinance contain provisions unrelated to platting and subdividing?

The Court stated it must consider the ordinance as a whole, and in the context of the Unified Development Code of which it was a part, citing ***Tex. Dept. of Transportation v. City of Sunset Valley***, 146, S.W.3d 637, 647 (Tex. 2014). The Court then reviewed the Unified Development Code and determined that only if property was being platted was it subject to the Tree Ordinance. Since the Tree Ordinance did not apply to other circumstances, the Court held it was not overly broad.

(3) Is the Ordinance prohibited by TEX. LOC. GOV'T CODE Chapter 212.003(a)(1)'s prohibition on regulating "…the *use* of any building or property…."?

The Court held it was not a prohibited use regulation for several reasons:

(i) Section 212.003(a)'s limitation on municipal regulation was similar to TEX. LOC. GOV'T CODE Section 211.003(a) (and the Texas Zoning Enabling Act), which lists issues which may be regulated by a city in a zoning ordinance, revealed an intent to prohibit a city from regulating "zoning-type uses in the ETJ";
(ii) Legislative history indicated an intention to prevent a city from imposing "zoning requirements, including those that regulate the use of any building or property, in any area outside of its corporate limits." *Id*. at 248
(iii) TEX. LOC. GOV'T CODE Chapter 245 (statutory vested rights) limits its exception for zoning regulations, to permit vesting from a listed number of topics, specifically including tree preservation. The Court interpreted the Legislature's action to be an attempt to prevent cities from adding non-zoning regulations to zoning ordinances in order to evade vested rights. The Court felt this was an indication that tree preservation was not a typical zoning regulation.
(iv) ***Lacey v. Hoff***, 633 S.W.2d 605, 609 (Tex. App. – Houston 14th Dist., 1982) writ ref'd. n.r.e., differentiated between zoning ("zoning contemplates the prohibition of certain physical uses of land" and "allows a municipality to create districts where land uses are limited to or restricted to specific enumerated purposes", Id at 609) and platting **(**"contemplates adequate provision for orderly growth and development.", *Id.*). The Tree Ordinance does not regulate the physical use of land or a specific purpose for which it is used, but simply regulates tree preservation during the development of land for any use or purpose, which is not related to zoning.

Tree regulation is not use regulation, but regulation of the development of land, thus within the city's regulatory scope as part of plat regulation.

***Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1999)**

The Court upheld a city adopting a water quality regulation in its ETJ. Among other arguments, Quick argued the regulation violated TEX. LOCAL GOV'T CODE Sections 212.002 and 212.003(a), arguing:

(1) its legal basis is platting and subdivision regulation, and
(2) it violated the prohibitions against ETJ regulation of use, bulk, height, number or size of buildings.

The Court quickly dismissed these challenges. The entire discussion was very short, and the Court stated that the Water Quality Ordinance was easily distinguishable from the prohibited regulation in Section 212.003(a), as the Water Quality Ordinance was "not a zoning regulation seeking to shape urban development. . . ." *Id*. at 121. If the challenged regulations were similar to a zoning regulation (i.e., restrictions typically contained within a zoning ordinance), perhaps this issue would have been differently decided. Water quality is an issue not usually addressed in a typical zoning ordinance. Zoning ordinances contain many aspects beyond use, such as size, type and no. of structures per lot, size, geometry and orientation of lots, setbacks, height, density, parking/loading, signage and many performance

standards which (in the words of Justice Abbott) "shape urban development."

***Medina County Commissioners Court v The Integrity Group,* 21 S.W. 3d 317 (Tex. App.—San Antonio 1999, pet. denied).**

A developer sought to mandamus the Commissions Court to sign a plat which did not meet a one-acre lot minimum, but otherwise was compliant with applicable rules and regulations. The trial court ruled on cross motions for summary judgement and grants the developer's request to grant the mandamus. The Court held that the Commissioners Court lack any discretion to deny a plat which meets statutory requirements. *Id.* at 310. The Commissioners Court may not condition approval on compliance with additional substantive requirements not contained in the TEX. LOC. GOV'T CODE Chapter 232. The Court noted that the county did not even argue that it could impose a minimum lot size.

Related cases:

> ***The Integrity Group v. Medina County Commissioners Court,* 2004 Tex. App. LEXIS 9186, 2004 WL 234662021 (Tex. App.—San Antonio 2004, pet. denied)**
>
> The court held that the county had no authority to reject a plat purely based on lot size and discuss in detail the underpinning of county plat authority.
>
> ***Stolte v. County of Guadalupe*, 402 WL 2597443 (Tex. App. – San Antonio, 2004 no pet.)**

The Court held that counties do not have an *inherent* authority to reject a plat application based on general concerns with public health and safety, without specific statutory authority or a properly adopted county regulation. Stolte's plat provided for a large number of driveways onto an existing county road. The Commissioner's Court felt that the number of driveways was excessive. However, the county did not have any rules or regulations adopted as part of its subdivision regulation scheme which addressed the issue. After several applications and rejections, the plat met all the of the county's rules and regulations and those of State law (TEX. LOC. GOV'T CODE Chapter 232). The Court held as follows:

> "A Commissioner's Court cannot require additional substantive requirements not contained within the statute for a plat if the submitted plat meets all statutory requirements…
>
> The County's authority to approve the plat is not discretionary if the plat meets all requirements whereupon the Commissioner Court's due to approve the plat becomes ministerial."
> *Id.at 4.*

***Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477 (Tex. 2018)**

A developer sought to require the County Engineer to submit a plat application to the County Commissioner's Court for a vote, and to enjoin a specific county commissioner from advocating that the county impose an exaction to require dedication and construction of a four-lane (rather than a two-lane, as offered by the developer) road. This case was appealed on a limited issue of a plea to the jurisdiction and did not address substantive exaction law. The developer was willing to dedicate the requested right of way, but only design and construct two lanes, arguing that the two-lane road was roughly proportionate to the impact of the proposed new project, thus all that the law requires.

An *individual* county commissioner does not have authority, acting alone, over a plat application. Therefore, the developer had no standing to pursue relief against the single commissioner. *Id.* at 488. However, the county engineer does have authority to process plats and recommend them to the Commissioner's Court, so was a legitimate focus of the litigation. *Id.* at 481.

The Supreme Court stated that the county may not add extra conditions for plat approval, citing *Medina County Commissioners Court v. The Integrity Group, Inc.*, 21 S.W.3d 307, 308 (Tex. App. – San Antonio, 1999, pet. denied), providing strong support for that case's holding and analysis. There was no subsequent reported decision after remand to the trial court.

Texas Atty. General Opinion No. GA-0648(2008)

This opinion addressed whether a city or a county may regulate density, particularly residential lot sizes, without violating the limitations of TEX. LOC. GOV'T CODE Sections 212.003(a)1-4(city) and Section 232.101(b)1-4 (county). The AG correctly noted that these sections related to density regulation. Then, the AG noted that the city regulates density, by restricting lot size and number of dwelling units, but defends that regulation as being focused on protecting water quality. Similarly, the county regulations refer to density restrictions, but are allegedly water quality regulations. In its summary, the AG stated:

> "Certain city regulations and county regulations…appear to be facially inconsistent with the Local Government Code restrictions on lot size and residential unit density, but some of these regulations are claimed to actually protect water

quality…their validity under Local Government Code chapter 212 and 232 cannot be determined as a matter of law in an attorney general opinion."

IV. WHAT IS THE EXTENT OF "PLATTING AND SUBDIVISION" REGULATION?

A. City Regulation in ETJ.

A city may extend into its ETJ the application of its subdivision ordinance. TEX. LOC. GOV'T CODE Section 212.003(a). In addition to its ordinance, a city, after a public hearing, may adopt rules "*governing plats and subdivisions* of land within the municipality's jurisdiction *to promote the health, safety, morals or general welfare* of the municipality and the *safe, orderly and healthful development* of the municipality." In addition, a city may extend to its extraterritorial jurisdiction ordinances relating to:

- Access to public roads
- The pumping, extraction and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that prevents an actual or potential health threat to human health. (Added to insure city authority for "municipal settings designations" under Health and Safety Code Sec. 361.801, et. seq may extend to the ETJ. HB 3152 (78th Leg.(R)) effective 9/1/03.

Id.

However, *unless otherwise authorized by State law*, a city **may not** regulate in its ETJ the following:

"(1) the use of any building or property for business, industrial, residential, or other purposes;
(2) the bulk, height, or number of buildings constructed on a particular tract of land;
(3) 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;
(4) the number of residential units that can be built per acre of land; or
(5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land if:

(A) the facility meets the minimum standards established for water or wastewater facilities by state and federal regulatory entities; and

(B) the developed tract of land is:

(i) located in a county with a population of 2.8 million or more; and
(ii) served by:

(a) on-site septic systems constructed before September 1, 2001, that fail to provide adequate services; or
(b) on-site water wells constructed before September 1, 2001, that fail to provide an adequate supply of safe drinking water."

Id.

Although a city may not apply a fine or criminal penalty in the ETJ, it is entitled to injunctive relief to enjoin a violation. (TEX. LOC. GOV'T CODE Section 212.003 (b) and (c).

B. County Regulation in Unincorporated Areas

Similarly, a county, acting through its commissioner's court, may require approval of a plat whenever a tract is subdivided (as defined in TEX. LOC. GOV'T CODE Section 232.101(a) and Section 232.002(a)). A commissioner's court, by an order entered after published notice, may adopt rules "*governing plats and subdivisions* of land within the unincorporated area of the county to promote the *health, safety, morals, or general welfare* of the county in a *safe, orderly and healthful development* of the unincorporated area of the county."

Counties are subject to similar limitations on platting and subdivision regulation as cities, in that *unless otherwise authorized by state law*, a county may not regulate under its rule making authority the following:

"(1) the use of any building or property for business, industrial, residential, or other purposes;
(2) the bulk, height, or number of buildings constructed on a particular tract of land;
(3) the size of a building that can be constructed on a particular tract of land, including without limitation and restriction on the ratio of building floor space to the land square footage;
(4) the number of residential units that can be built per acre of land;
(5) a plat or subdivision in an adjoining county; or
(6) road access to a plat or subdivision in an adjoining county."

Tx. Loc. Gov't Code Sec. 323.101(b)

Items (1-4) are identical for cities and counties.

County rule making authority is contained in Subchapter E entitled *Infrastructure Planning Provisions in Certain Urban Counties.* Now repealed Tx. Loc. Gov't Code Sec. 232.100 previously limited all of Subchapter E to urban counties (any county with 700,000+ population and adjacent counties which are within the same SMSA, and in border counties with 150,000+ population). In 2007, the bracket limitation to urban and border counties was eliminated, such that Subchapter E now applied statewide. The subdivision platting rulemaking authority of cities and counties is now the same.

C. Scope of "Platting and Subdivision" Regulation/Rules

Statutory authority and caselaw relating to the scope of "platting and subdivision" rulemaking authority for cities (in their ETJ) and counties supports a 3-part analysis:

> First- The subject matter must relate to "governing plats and subdivision of land".
> Second- Eliminate prohibited regulation.
> Third- Other specific statutory authority (outside "platting and subdivision") may authorize the regulation.

1. The subject matter of the rules must relate to "governing plats and subdivision of land"

a. Statutory Language Analysis.

> Cities- Tex. Loc. Gov't Code Sec. 212.002- "…the governing body…may adopt rules *governing plats and subdivisions of* ***land***…to promote the health, safety, morals and general welfare of the municipality and the safe, orderly and healthful development of the municipality."
>
> Counties- Tex. Loc. Gov't Code Sec. 232.101- "…the commissioners court may adopt rules *governing plats and subdivisions of* ***land***…to promote the health, safety, morals and general welfare of the county and the safe, orderly and healthful development of… the county."

This statutory basis is *identical* for cities and counties. Rulemaking is authorized and permissive.

Critical terms:

- "governing"- In this context, governing means to control, influence or regulate. See, *Town of Annetta South v. Seadrift Development, LP*, 446 S.W.3d 823, 829 (Tex. App. Ft. Worth 2014 pet. denied) (defining "regulate" to be the power "to control or supervise by means of rules and regulations" or "to govern and direct according to rule.")
- "plats" - Plats are the governmentally required document evidencing the division of land, recorded in the official public records of real property, and are a critical component of the governmentally established land record and conveyancing system. In *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016), the Court defined "plat" to be a "map or plan of delineated or partitioned ground", citing to Black's Law Dictionary. *Id.* at 532.
- "subdivisions"- In this context, subdivision(s) as a noun referencing the physical result of separation of land into pieces, for development and/or sale. In *Bizios*, the Court defined "subdivision" to be a "parcel of land in a larger development", again citing to Black's Law Dictionary. *Id.*
- "land"- Land refers to the earth, and is more restricted than the term "real property", which includes immovable property like physical improvements, buildings and fixtures. In *Bizios*, the Court equated "land" to "ground". *Id.*
- "to promote the health, safety, morals and general welfare" - This phrase refers to the general "police power" of local government to protect the public interest.
- "the safe, orderly and healthful development"- In *Bizios*, the Court held that the use of the term "development" was limited by the prior use of the term "land", and was not an independent term. *Id.* Land development, or the development of land, is the exclusive subject matter of platting and subdivision rules.

b. Regulation of Land v. Vertical Development - Town of Lakewood Village v. Bizios, 493 S.W.3d 527 (Tex. 2016).

In *Bizios*, the Court distinguished regulation of land development from regulation of vertical/building development, holding that building codes and building permit requirements are not authorized as part of platting and subdivision regulation. *Id.* at 532. *Collin County, Texas v. The City of McKinney, Texas*, 553 S.W.3d 79, 80 (Tex. App. Dallas, no. pet., 2018) followed *Bizios* to apply the same analysis to home rule cities.

Regulation of any aspect of vertical development will not be upheld as platting and subdivision regulation, and must be based on other specific statutory authority.

c. Trees = Land- *Milestone Potranco Development, Ltd. v. City of San Antonio*, 298 S.W.3d 242(Tex. App. - San Antonio 2009 pet. denied).

In *Milestone*, the Court held a tree preservation ordinance included within a unified development code extended to the ETJ of San Antonio was a valid part of platting and subdivision regulation. This holding is consistent with *Bizios* and *Collin County*. Trees are part of the earth and encompassed with the definition of land. The developer's argument that only "basic infrastructure" may be regulated was rejected. The Court reviewed the purpose of platting and subdivision regulation, the purpose of the tree ordinance and the connection to the police power to promote healthy and orderly development in making its holding. *Id.* At 245.

d. Purpose of Platting and Subdivision Regulations

There are surprisingly few references in caselaw to the purpose of platting and subdivision regulation, but those references may guide the proper scope of that regulation. The following 2 cases are commonly cited for the purpose:

- "ensure that subdivisions are safely constructed and promote the orderly development of the community." *City of Round Rock v. Smith***,** 687 S.W.3d 300, 302 (Tex. 1985).
- "adequate provisions have been made for streets, alleys, parks and other facilities indispensable to the particular community affect." *Lacey v. Hoff*, 633 S.W.2d 605, 609 (Tex. App. – Houston 14th Dist., 1982 writ ref'd. n.r.e.).

e. Implied Authority

In *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016), the city argued that the Court should imply broad regulatory authority based on the explicit statutory authority for rulemaking related to "plats and subdivisions". The Court declined, holding that express authority is required and implied authority will be found only when

> "reasonably necessary to make effective the powers expressly granted…such as they are indispensable to…the accomplishment of the purposes…."
> *Id.* at 536.

Further, implication occurs only when failure to do so would render the expressly granted authority useless or unenforceable (using the archaic word "nugatory"). *Id.*

Importantly, implication of power is strictly construed against a general law city. *Id.* In *Collin County, Texas v. The City of McKinney, Texas*, 553 S.W.3d 79 (Tex. App. Dallas, no. pet., 2018), the Court followed *Bizios* in regards to the authority of a home rule city, including the limited implication of authority. at 85. Also see, *Builder Recovery Services LLC v. The Town of Westlake, Texas*, No. 21-0173 (Tex. 2022, decided May 20, 2022) which restates and reaffirms the rule that implied powers for general law cities are narrowly construed and any doubt is resolved against that power.

2. Limits on Platting and Subdivision Regulation**.**

Certain "platting and subdivision" regulations are prohibited. A city or county regulation or properly adopted rule could be challenged for improperly regulating the following areas which are statutorily prohibited (unless authorized specifically by other state law):

(1) "the *use* of any building or property for business, industrial, residential or other purposes."
(2) "the *bulk, height or number of buildings* constructed on a particular tract of land"
(3) "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"
(4) "the *number of residential units that can be built per acre* of land"

Tx. Loc. Gov't Code Sec. 212.003(a)1-4 and Sec. 232.101(b)1-4.

a. Language Analysis

- Use- Use regulation is a fundamental part of zoning. *Powell v. City of Houston*, 628 S.W.3d 838, 840 (Tex. 2021). Zoning is not permitted except in City limits. This prohibition unambiguously precludes zoning type regulation, wherein "building or property" is regulated based on its use, whether by geographic district or generally. If regulation differs from generally applicable standards due to the use of a building or property, then than regulation is prohibited.
- Bulk, Height, Size of Buildings- The term "bulk" is broad enough to encompass height, size and floor area ratio regulation (which are specifically referenced as prohibited), but also setback, or any other regulation which affects bulk, height or size of buildings.
- Number of Buildings- No tract or platted lot may be limited in the number of separate buildings per platted lot. For example, a "build to rent" community of single-family houses on a single platted lot may not be regulated by number of permitted buildings. The same analysis would

apply to low density traditional garden apartment projects with numerous buildings.

- Residential Unit per Acre- Residential density may not be regulated. Density is defined as "the average number of individuals or units per unit of space." Merriam-Webster Dictionary, www.merriam-webster.com accessed 3-26-22. Any regulation which affects density is prohibited.

b. Legal Analysis - *Town of Annetta South v. Seadrift Development, LP*, 446 S.W.3d 823, (Tex. App. Ft. Worth 2014 pet. denied) analyzed the limitations on "plat and subdivisions" regulations:

- Rulemaking authority is strictly construed against the regulation, and in favor of the landowner. *Id*. at 825-826, 830. However, regulations will be presumed valid and the landowner bears the burden to establish invalidity. *Id. At 826*
- If regulation conflicts with a listed prohibition, then it is unenforceable. *Id.*
- Prohibitions will be giving their plain meaning. *Id.* at 829-830
- This statutory language is clearly intended to effectuate a limitation on authority. *Id.*
- Regulation may be *either explicit or implicit*, but if it has the *effect* of regulating any of the listed items, the regulation will be invalidated. *Id. Also see*, Texas Atty. General Opinion No. GA-0648(2008).
- Declaratory judgment is appropriate to determine the validity of the regulation, including entitlement to attorney's fees and mandamus. *Id.* at 831-832

c. Tree Regulation is not an Invalid Use Regulation- *Milestone Potranco Development, Ltd. v. City of San Antonio*, 298 S.W.3d 242(Tex. App. - San Antonio 2009 pet. denied).

In *Milestone*, the Court upheld a tree preservation ordinance from a challenge that is was a prohibited use regulation. The prohibition of regulation of "the *use* of any building or property for business, industrial, residential or other purposes" pertains to "zoning-type regulations". *Id.* At 248. Tree regulation is not typically found in zoning ordinances. *Id.* "The Tree Ordinance does not regulate the physical use of the land or the specific purpose for which is it used but regulated the manner in which trees must be preserved in developing the land for any use or purpose." *Id.* At 248-249. To be considered a prohibited use regulation, the regulation must differentiate regulation due to the use of the building or property.

d. Density Regulation may be Indirect - *Town of Annetta South v. Seadrift Development, LP*, 446 S.W.3d 823, (Tex. App. - Ft. Worth 2014 pet. denied)

Regulation may be *either explicit or implicit*, but if it has the *effect* of regulating residential density, it is invalid. *Id.* At 830. Minimum lot size regulation is not permitted, as it affects density of residential units. *Id. Also see*, Texas Atty. General Opinion No. GA-0648(2008).

e. Analogy to Vested Rights Analysis for Exceptions to Zoning Exemption- *FLCT, Ltd. v. City of Frisco*, 49 S.W.3d 238 (Tex. App.—Fort Worth 2016, pet. denied.).

In *FLCT*, the Court construed statutory limitations on the scope of certain exceptions from statutory vested rights (Tx. Loc. Gov't Code Ch. 245). In that act, there is a general exception from vesting applicable to municipal zoning ordinances. However, there is a limitation on the exception to a list of particular issues, to which vesting applies. Disagreement is common over which specific regulations are subject to vesting (i.e., what regulations in a zoning ordinance fit within this list). The list includes a broad array of land use topics:

- landscaping or tree preservation
- open space or park dedication
- property classification
- lot size, lot dimensions or lot coverage
- building size

This list is similar to the list of the statutory limitations on platting and subdivision regulation. In *FLCT*, the Court took a practical approach in reviewing those vested rights exceptions, similar to the *Town of Annita South* court's analysis of the platting and subdivision limits. As a result, the court held that any regulation which *affected* the listed regulations which were carved out from the zoning ordinance exception would be vested. A similar analysis should be adopted by a court reviewing an alleged platting and subdivision regulation adopted by rule to determine if it is invalidated.

Any regulation which *affects*

(1) use,
(2) bulk, height or number of buildings,
(3) size of building, or
(4) number of residential units per acre (i.e., density)
should be invalidated.

Such analysis is consistent with the clear and unambiguous language that cities and counties "shall not regulate" those issues, even if

otherwise authorized to adopt rules governing "plats and subdivisions."

For example, any type of lot size (including any dimensions), building setback, building height, story limit, lot coverage/open space, pervious area, floor area ratio, form-based code regulation, or performance type regulations affecting the above issues, (unless *specifically* authorized by other statutory authority) is prohibited. Any regulation which has the practical effect of regulating a prohibited subject matter, even if under the guise of another purpose, should also be prohibited. *Also see*, Texas Atty. General Opinion No. GA-0648(2008). These determinations will keep litigators active until there is more case law.

3. Trump Card- "unless otherwise authorized by state law"

The limits on platting and subdivision regulation (including the statutory limits discussed above) do not affect regulatory authority explicitly "authorized by state law." In *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1999), the Court upheld a city adopting a water quality regulation in its ETJ. Texas Atty. General Opinion No. GA-0648(2008) discussed whether lot size regulation was permitted under the guise of water quality regulations.

See Article VI. for a listing of city and county land use regulatory powers (and limits), primarily focused on the Local Government Code.

V. DEVELOPMENT PLATS

"Development plats", as authorized under Subchapter B "Regulation of Property Development" in Tx. Loc. Gov't Code Ch. 212, apply in the ETJ. Development plats are simply a site plan approval process triggered by any "development" (i.e., does not require a "subdivision").

In *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527, 533 (Tex. 2016), the Texas Supreme Court discussed development plats, but held that they did not apply under those particular facts, since the town had not adopted Subchapter B. Thereafter, some commentators felt that cities might pursue use of Subchapter B to expand their authority in their ETJ. Certainly, Subchapter B permits a city to regulate "development" in the ETJ even without their being a subdivision. However, the scope of regulation under a development plat is limited to a site plan approval process, focused on enabling a city to require exactions relating to the public infrastructure system and no other purpose.

Development plats were established to benefit the City of Houston. The City of Houston has long been an outlier in the area of land use regulation due to its lack of zoning. Instead, Houston has an oversized reliance upon subdivision platting regulation, as well as a laundry list of other specific regulatory authority outside a traditional comprehensive zoning ordinance. Subdivision platting regulation has traditionally been viewed as being triggered only by a "subdivision." *See*, Tx. Loc. Gov't Code Sec. 212.004 "Plat Required." Without zoning, and with a mishmash of specific development regulations, Houston often had no opportunity to require exactions to support the expansion of public infrastructure (streets and utilities). The development plat was the land use approval to fill that gap by requiring a site plan approval prior to any new construction or enlargement of an existing structure, even without a subdivision.

The City of Houston reached out to the Texas Legislature for the creation of Subchapter B. Subchapter B does not conflict with the traditional subdivision plat required by Subchapter A. Importantly, if a Subchapter A subdivision plat is required, then a development plat is not required. Therefore, a city may only require either the development plat under Subchapter B or the subdivision plat under Subchapter A, not both. Tx. Loc. Gov't Code Sec. 212.045. All requirements of Subchapter A subdivision plats, also apply to Subchapter B development plats, to the extent of no conflict. Tx. Loc. Gov't Code Sec. 212.042.

Cities must choose by ordinance to apply Subchapter B. Tx. Loc. Gov't Code Sec. 212.041. Rulemaking authority regarding development plats uses similar language as for subdivision plats. Tx. Loc. Gov't Code Sec. 212.044. If a development plat is required, then new development may not be commenced until a development plat is approved, and a city, county or official of another governmental entity may not issue a building or development permit until the development plat is approved. Tx. Loc. Gov't Code Sec. 212.045(c) and 212.046

Subchapter B specifically does not authorize application of building codes or building permit requirements in the ETJ. Tx. Loc. Gov't Code Sec. 212.049.

A holistic review of Subchapter B, particularly the sparce statutory requirements in Section 212.045(b), shows that a development plat is simply a site plan approval required whenever new structures or extension of existing structures is contemplated without a subdivision.

Finally, there is already judicial support for cities requiring subdivision platting upon any development of property, even without a subdivision. *Collin County, Texas v. The City of McKinney, Texas*, 553 S.W.3d 79, 87 (Tex. App. – Dallas, 2018 no writ). In *Collin County*, the City of McKinney adopted rules under Tx. Loc.

Gov't Code Sec. 212.002-003 that required subdivision platting whenever a landowner sought to construct "streets, utilities, buildings or other improvements." The Court upheld the city requiring a non-subdivided land to be platted under Subchapter A as a condition to development. *Id.* Rather than adopting Subchapter B, it seems likely that cities will simply expand the requirements for subdivision platting as permitted under *Collin County*.

VI. REGULATORY POWER AND LIMITS FROM THE TEXAS LEGISLATURE

A. Summary

Cities and counties have (limited) land use regulatory authority other than "platting and subdivision". The statutory limits on "platting and subdivision" regulation, excepts for "…unless otherwise authorized by state law…." State law has both *granted* and limited city and county land use regulatory approval. *See* Attorney General Op. GA-0648 (2008) for a discussion of the interaction between special land use regulations and "platting and subdivision" regulations. Cities and counties must look to explicit statutory authority for land use regulatory power. That authority is primarily located in the Local Government Code. Many of these provisions are "bracketed" to apply to limited circumstances. See Tex. Loc. Gov't Code Sec. 212.101-105 for an extreme example of a bracketed bill, clearly intended to apply to a very specific situation.

B. Changing the Law

After reading the statutes listed in Section C below, it is clear that some private sector parties have used the Texas Legislature to provide significant protections for certain industries, facilities, uses and areas. Texas statutes are ever evolving. If your client has a concern or problem, there may be a statutory solution! It will take time, effort, money and planning. See, *So You Want to Change the Law: How to Draft and Pass Legislation*, by Roland Love and Reid Wilson, 32nd Annual State Bar Advanced Real Estate Drafting Course, 2021, for a full discussion of the legislative process.

C. Statutes Granting and Limiting Land Use Regulation Outside Cities.

The following are most of the statutory provisions authorizing cities and counties to exercise explicit land use regulations. Limitations are shown in *italics* (for general limits) and underlining (for geographic limits) and granting/denying of regulatory power is **bolded**. You will quickly note that there are some industries which have excellent lobbyists and political connections who have assisted them in blunting or eliminating certain land use regulation. Several of the following statutory provisions are not triggered until the county reaches a certain population. For a complete list of all statutes, land use and beyond, that apply to counties based on its population size, see https://www.county.org/Population-Bracket-Map.

1. Access to Public Roads - *Tex. Local Gov't Code* § 212.003

All cities may extent to their ETJ municipal ordinances relating to access to public roads.

2. Limits on Traffic Based Regulation in a Limited Purpose Annexed Land (in an Affected Area)- *Tex. Loc. Gov't Code* §§ 212.101-105

A home-rule municipality that has *annexed land for limited-purpose annexation* is subject to limitations on its regulatory approves within an "affected area."

> "(a) A municipality **may not** *deny, limit, delay, or condition the use or development of land*, any part of which is within an affected area, because of:
>
> (1) *traffic or traffic operations* that would result from the proposed use or development of the land; or
> (2) the effect that the proposed use or development of the land would have on traffic or traffic operations.

Section 212.103(a)

> (1) "Affected area" means an area that is:
>
> (A) in a municipality or a municipality's extraterritorial jurisdiction;
> (B) in a county other than the county in which a majority of the territory of the municipality is located;
> (C) within the boundaries of one or more school districts other than the school district in which a majority of the territory of the municipality is located; and
> (D) within the area of or within 1,500 feet of the boundary of an assessment road district in which there are two state highways.
>
> (2) "Assessment road district" means a road district that has issued refunding bonds and that has imposed assessments on each parcel of land under Subchapter C, Chapter 1471, Government Code.
> (3) "State highway" means a highway that is part of the state highway system under Section 221.001, Transportation Code.

NOTE: See this example of an extremely narrow bracket, likely making this provision apply only to a single site.

3. Trees – *Tex. Loc. Gov't Code* § 212.905

Tree protection regulation by cities is **limited** as follows:

- *for a homestead*, tree mitigation fees for smaller trees (less than 10' in diameter, measured 4.5' above the ground) are prohibited
- *for all properties,*
    - trees which are diseased, dead or pose an imminent safety threat may be removed
    - credit against tree mitigation fees must be granted for new trees (minimum amounts of credit are imposed).

NOTE: This provision is reportedly due to Governor Abbott having concerns with the City of Austin tree regulations.

4. Man. Homes- *Tex. Loc. Gov't Code* § 214.906(b)

> "(b) *Notwithstanding any other law*, the governing body of a municipality **may not** regulate a tract or parcel of land as a manufactured home community, park, or subdivision *unless the tract or parcel contains at least four spaces* offered for lease for installing and occupying manufactured homes."

5. Signs - *Tex. Local Gov't Code* Chapter 216

All cities **may** require "the relocation, reconstruction, or removal of any sign" in their ETJ, subject to detailed process and compensation. *Tex. Loc. Gov't Code* Sec. 216.003(a). Certain on-premises signs in the ETJ are **exempt**. *Tex. Loc. Gov't Code* Sec. 216.0035. Home rule cities **may** "license, regulate, control, or prohibit the erection or signs or billboards" and extend that regulation to their ETJ, subject to certain exceptions. *Tex. Loc. Gov't Code* Sec. 216.901-902.

> NOTE: The city must take affirmative action to implement this authority by ordinance.

6. Nuisance/Firework Sales - *Tex. Loc. Gov't Code* § 217.042

> "(a) *Except as provided by Subsection (c)*, the municipality **may** define and prohibit any nuisance within the limits of the municipality and within 5,000 feet outside the limits.
>
> (b) The municipality **may** enforce all ordinances necessary to prevent and summarily abate and remove a *nuisance*.
>
> (c) The municipality **may not** define and prohibit as a nuisance the *sale of fireworks or similar materials* outside the limits of the municipality."

NOTE: Cities consider this a significant grant of authority and may broadly interpret and apply it.

7. Limited Muni. Reg. of Firearms/Air Guns/Knives/Ammo - *Tex. Loc. Gov't Code* § 229.001-004

Cities are **limited** in their regulation of firearms, air guns, knives, and ammunition, both generally and also in their ETJ. Certain limits apply based on population and other criteria.

8. County Zoning Authority- *Tex. Loc. Gov't Code* Chapter 231

Counties may adopt zoning style regulations *in limited, specially designated areas*:

- Padre Island
- Amistad Recreation Area
- US Navy/Coast Guard Military Establishments (subject to county designation- regulation limited to speed/parking/pictures)
- Certain Large Lakes (completed after June 15, 1985, and subject to local option election)
- Lake Tawakoni and Lake Ray Roberts (subject to local option election)
- Lake Alan Henry/Lake Cooper/Lake Ralph Hall, Post Lake/Lower Bois D'Arc Creek Reservoir/Sam Wahl Recreation Area
- El Paso Mission Trail Historical Area
- Lake Summerville (authorizes a Planning Commission to investigate zoning)
- Hood County/Lake Granbury/Brazos River (authorizes development regulations instead of zoning regulations)
- Falcon Lake

A county zoning ordinance **may not** prohibit "cottage food production operations" (undefined) in a home.

9. Manufactured Home Rental Communities - *Tex. Loc. Gov't Code* § 232.007

A county **may not** consider a "manufactured home rental community" to be a land subdivision.

A county **may**, after notice and hearing, adopt "minimum infrastructure standards" for such projects located in their unincorporated area, which may include only "*reasonable*" regulations within 5 enumerated areas (*but no more stringent than for land subdivisions*):

- Drainage
- Water supply
- Sanitary sewer
- Site plan/survey
- Road system (with "*reasonably necessary*" ingress/egress for fire/emergency vehicles).

A "infrastructure development plan" and related inspections and certificate of compliance **may** be required.

10. Lot Frontage - *Tex. Loc. Gov't Code* § 232.103

> "…the commissioners court **may** adopt *reasonable* standards for minimum lot frontages on *existing* county roads and establish *reasonable* standards for the lot frontages *in relation to the curves* in the road."

NOTE: The limitation to "existing" roads means this authorization should not apply to new plats.

11. Setback Lines- *Tex. Loc. Gov't Code* § 233.031-037

A county **may** adopt building and setback lines in its unincorporated area, *subject to the following limitations*:

- Certain required notice and hearing
- A map showing "in a general manner" the applicated setbacks must be filed with the county clerk
- Any city regulations in their ETJ prevail
- *Maximum setbacks*:
    - **25'** generally (measured from edge of right of way
    - **50'** from "major highways and roads" (as designated by the county). or is limited on its application of setback requirements.
- If the county does not begin the construction of an improvement or road widening *within 4 years* of the establishment of a setback line, *then the setback becomes void*, unless the county and "affected property owners" agree to extend the time period.

A "Board of Building Line Adjustment" is authorized to grant variances due to hardship, similar to a Zoning Board of Adjustment, but the hardship scope is broader than under zoning law.

12. Fire Code - *Tex. Loc. Gov't Code* § 233.061

A county *with over 250,000 population or an adjacent county* **may adopt** a fire code and rules necessary to administer and enforce the fire code as to commercial, public and multi-family structures, **but** not an industry facility with a fire brigade. Permits, fees, inspections and civil penalties are authorized.

13. Res. Bldg. Code- *Tex. Loc. Gov't Code* § 233.151-901

Counties **may** adopt by resolution or order, building code requirements for single family houses or duplexes in their unincorporated area, *excluding manufactured or modular homes*.

14. Time to Issue Permits- *Tex. Loc. Gov't Code* § 233.901 (Large Counties)

A county *with a population of 3.3 million or more* is subject to a 45 day deadline to:

(1) grant or deny the permit;
(2) provide written notice to the applicant stating the reasons why the county has been unable to act on the permit application (and then grant or deny the permit with in an additional **30** days); or
(3) reach a written agreement with the applicant providing for a deadline for granting or denying the permit.

Noncompliance eliminates the county's right to collect any permit fees associated with the application and requires the county to refund previously paid permit fees.

15. No Reg. of Farm machinery - *Tex. Loc. Gov't Code* § 234.003

A county **may not**, under its rights to regulate certain outdoor business (defined in Section 234.001) regulate farm machinery owned or operated by the person on whose property the machinery is located and kept on that property for purposes other than sale.

16. Explosives- *Tex. Loc. Gov't Code* Chapter 235

A county *with a population of 1 million or more* **may** regulate explosives, including requiring permits and charging fees, *provided*:

- Rules may not conflict with "*generally accepted standards of safety concerning explosives and must conform to published standards of the Institute of Makers of Explosives*."
- The rules must be provided by the county fire marshal upon request.
- Fees must be *reasonable* in amount, and will be deposited in the county's general fund.

Violation is a Class A misdemeanor.

17. Firearms- *Tex. Loc. Gov't Code* § 235.020-025

A county **may** regulate or prohibit the discharge of firearms and air guns *inside platted subdivisions with lots less than 10 acres in area in the unincorporated area*, but **may not** regulate registration, transfer, ownership, possession or transportation thereof. Violations may be enjoined, and are a Class C misdemeanor.

18. Bows & Arrows- *Tex. Loc. Gov't Code* § 235.040-045

A county **may** regulate or prohibit hunting with bows and arrows *inside platted subdivisions with lots less than 10 acres in area in the unincorporated area*, but **may not** regulate registration, transfer, ownership, possession or transportation thereof. Violations may be enjoined, and are a Class C misdemeanor.

19. Limitation on County Regulation of Firearms, Knives, Ammunition, Firearm Supplies and Sports Shooting Ranges - *Tex. Loc. Gov't Code* § 236.002

> "(a) *Notwithstanding any other law, including Chapter 251, Agriculture Code*, a county **may not** adopt or enforce regulations relating to:
>
> (1) the transfer, possession, wearing, carrying, ownership, storage, transportation, licensing, or registration of firearms, air guns, knives, ammunition, or firearm or air gun supplies or accessories;
> (2) commerce in firearms, air guns, knives, ammunition, or firearm or air gun supplies or accessories; or
> (3) the discharge of a firearm or air gun at a sport shooting range. [except under Sec. 235.020 et. seq.]". Certain limited exceptions apply.

20. Regulation of Outdoor Lighting near McDonald Observatory- *Tex. Loc. Gov't Code* § 240.032

> "…a county located, any part of which is located within 57 miles of a major astronomical observatory at the McDonald Observatory, **shall** adopt order regulating *the installation and use of outdoor lighting* in any unincorporated territory of the county."

21. Airport Zoning - *Tex. Loc. Gov't Code* Section 241

A city or county **may** adopt "airport hazard area zoning regulations". They may be extended to the ETJ of a city with a population of over 45,000, if the airport is located within the city.

22. Sexually Oriented Businesses - *Tex. Local Gov't Code* § 243

Counties **may** regulate SOBs in their unincorporated area, but Cities are specifically limited to their city limits.

23. Location of Correctional/Rehabilitation Facility - *Tex. Loc. Gov't Code* §244.003

Any city located within 1,000' of a facility, and any county if the facility is located within an unincorporated area of the county **may prohibit** a correctional or rehabilitation facility *from operation within 1,000 feet of a residential area, a primary or secondary school, property designated as a public park or public recreation area by the state or a political subdivision of the state, or a church, synagogue, or other place of worship*.

24. Critical Telecommunication Facilities- *Tex. Loc. Gov't Code* § 246.003

Any "regulatory authority" *which has adopted an impervious lot coverage regulation, or a sedimentation, retention, or erosion regulation, (does not apply to a flood control regulation)* **may not** apply that regulation to the expansion of a central office for a telecommunications system existing as of April 1, 2001, *unless it determines that suitable, contiguous, vacant land is available at a fair market value, and such determination is made within 60 days of application*.

25. Restriction on Regulation of Sport Shooting Ranges- *Tex. Loc. Gov't Code* §250.001

> "(b) A governmental official **may not** seek a civil or criminal penalty *against a sport shooting range or its owner or operator* based on the violation of a municipal or county ordinance, order, or rule regulating *noise:*
>
> (1) *if the sport shooting range is in compliance with the applicable ordinance, order, or rule*; or
> (2) if no applicable noise ordinance, order, or rule exists."

26. Amateur Radio Antennas - *Tex. Loc. Gov't Code* § 250.002

> "(a) A municipality or county **may not** enact or enforce an ordinance or order that does not comply with the ruling of the Federal Communications Commission in "Amateur Radio Preemption, 101 FCC 2nd 952 (1985)" or a regulation related to *amateur radio service* adopted under 47 C.F.R. Part 97.
> (b) If a municipality or county adopts an ordinance or order involving the placement,

screening, or height of an amateur radio antenna based on health, safety, or aesthetic conditions, the ordinance or order must:

(1) *reasonably accommodate* amateur communications; and
(2) represent the minimal practicable regulation to accomplish the municipality's or county's legitimate purpose.

(c) *This section* **does not prohibit** *a municipality or county from taking any action to protect or preserve* a historic, historical, or architectural district that is established by the municipality or county or under state or federal law."

27. Employee Immunity - *Tex. Loc. Gov't Code* § 250.003

"(a) An individual who is an employee of the owner of real property for which a citation for a violation of a county or municipal rule or ordinance is issued, or of a company that manages the property on behalf of the property owner, **is not personally liable for criminal or civil penalties** resulting from the violation if, not later than the fifth calendar day after the date the citation is issued, *the individual provides the property owner's name, current street address, and telephone number to the enforcement official* who issues the citation or the official's superior.

28. Rental Assistance- *Tex. Loc. Gov't Code* § 250.007

"(a) *Except as provided by this section*, a municipality or county **may not** adopt or enforce an ordinance or regulation that prohibits an owner, lessee, sublessee, assignee, managing agent, or other person having the right to lease, sublease, or rent a housing accommodation from refusing to lease or rent the housing accommodation to a person because the person's lawful source of income to pay rent *includes funding from a federal housing assistance program*.
(b) *This section* **does not affect** *an ordinance or regulation that prohibits the refusal to lease or rent a housing accommodation to a military veteran* because of the veteran's lawful source of income to pay rent.
(c) *This section* **does not affect** *any authority of a municipality or county or decree to create or implement an incentive, contract commitment, density bonus, or other voluntary program* designed to encourage the acceptance of a housing voucher directly or indirectly funded by the federal government, including a federal housing choice voucher."

29. Linkage Fees Prohibited - *Tex. Loc. Gov't Code* § 250.008.

"(a) A political subdivision **may not** adopt or enforce a charter provision, ordinance, order, or other regulation *that imposes, directly or indirectly, a fee on new construction for the purposes of offsetting the cost or rent of any unit of residential housing*.
(b) For purposes of this section:

(1) a fee is imposed indirectly on new construction if a charter provision, ordinance, order, or other regulation *allows acceptance by the political subdivision of a fee on new construction*; and
(2) new construction includes zoning, subdivisions, site plans, and building permits associated with new construction."

30. Youth Lemonade Sales- *Tex. Loc. Gov't Code* 250.009

"Notwithstanding any other law, a municipality, county, or other local public health authority **may not** adopt or enforce an ordinance, order, or rule that *prohibits or regulates, including by requiring a license, permit, or fee, the occasional sale of lemonade or other nonalcoholic beverages from a stand on private property or in a public park by an individual younger than 18 years of age*.

31. Battery-Charged Fences- *Tex. Loc. Gov't Code* § 250.010

Cities and countries **may not** adopt or enforce regulations on certain battery-charged fences connected to an alarm system which transmits a signal to summon law enforcement, *if the fence is located in a non-residential area*, if the regulations i) charge a fee in addition to any applicable alarm system permit, ii) impose installation or operational requirements inconsistent with standards of the International Electrotechnical Commission (6/29/18 version), or iii) prohibit such fences.

32. Refugee Child Detention Facilities - *Tex. Loc. Gov't Code* § 250.011

Counties **may** regulate in their unincorporated area a "residential child detention facility" that operates under a contract with a federal agency to provide 24-hour custody or care to unaccompanied immigrant or refugee children.

33. Impact Fees- *Tex. Loc. Gov't Code* § 395.011

Impact fees **may not** be assessed *for roads in the ETJ*.

34. Pits and Mines - Texas Natural Resource Code § 133.091 -093

Counties with a *population with 3.3 million or more* **may** require *signage or barriers on aggregate quarries and pits* in their unincorporated area *if not in conflict with Texas Railroad Commission regulations*.

35. Water Quality- Water Code Subchapter E "Authority of Local Governments" Sec. 26.170-

The Texas Commission on Environmental Quality ("TCEQ") is the state agency with primary responsibly for water quality management, including enforcement actions, within the state. Water Code Sec. 26.0136(a). TCEQ **may delegate** water quality functions to cities and counties. Id. "Nothing in this section is intended to *enlarge, diminish, or supersede the water quality power*, including enforcement authority, authorized by law for …local governments." Water Code Sec. 26.136(b). Cities and counties **may not** impose standards for the design, construction, installation, or operation of *underground storage tanks, unless pursuant to regulations in place as of January 1, 2001*. Water Code Sec. 26.359(c)

Local government authority includes the following powers:

- Conduct inspections of water quality
- Make recommendations to TCEQ
- If agreed by TCEQ, receive and apply delegated TCEQ authority
- Regulate its own waste system
- Adopt water quality protection and abatement programs within a city or its ETJ.

Water Code Sec. 26.179 permits creation of "water quality protection zones" and approve "land use plans" and "water quality plans" to insure proper water quality, if the areas are i) in the ETJ of a city with a population greater than 10,000, and ii) the city enacts or attempts to enact 3 or more water quality regulations in any 5 year period (whether or not such are legally effective upon the area). The designation may be established as follows:

i) by the owner(s) of a contiguous tract over 1,000 acres
ii) with TCEQ approval, by the owner(s) of a contiguous tract of over 500 acres.

The purpose of such zones if "to provide for the consistent protection of water quality in the zone without imposing undue regulatory uncertainty on owners of land in the zone."

Within such zones, local regulation is *severely* limited.

VII. FORECAST - MORE LEGISLATIVE TINKERING IN LOCAL LAND USE REGULATORY AUTHORITY

Without the right to non-consent annexation, cities will expand at a dramatically slower pace than previously. Urbanization will occur in unincorporated areas. Citizens will seek more protections. Cities and Counties will certainly seek more statutory authority for land use regulation outside city limits. On the other hand, the current legal scheme for land use regulations outside city limits is very, very limited, and recent caselaw supports strict interpretation of the scope of that authority. These issues will not go away and the conflict of city/county desire for more land use authority and the history of limited land use regulation outside city limits will create sparks for many years.