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Local Land Use Regulation *Outside* Cities

Reid Wilson

Author Contact Information:

Reid Wilson

Wilson, Cribbs & Goren, P.C.

Houston, TX

rwilson@wcglaw.com

713.222.9000

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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.

There are a number of outstanding prior articles on this subject.

Landowner perspective (All by Art Anderson, Winstead P.C., Dallas, Texas):

- *The Unique Nature of Land Development in the County*, UT CLE Land Use Conference and Fundamentals 2021
- *Developing Real Estate Outside Corporate Limited: The Brave New World After SB 6*, UT CLE Land Use Conference 2018
- *Municipal Authority in the ETJ: You're Not the Boss of Me*, State Bar of Texas 38th Annual Advanced Real Estate Law 2016

Local government perspective:

- *The Regulation of Development in the ETJ Including the Creation of Special Districts*, UT CLE Land Use Conference 2022, Dorothy Palumbo, Austin, Texas
- *Authority of Texas Counties Over Land Use*, UT CLE Land Use Conference 2019, Ben L. Stool, Dallas County, Texas
- *Development Issues Outside Corporate Limits (A City Attorney's Perspective)*, UT CLE Land Use Conference 2018, Robert F. Brown, Brown & Hofmeister, Richardson, Texas
- *Beyond Boundaries: Land Use in the ETJ*, UT CLE Land Use Conference 2020, Skye Masson, City of Georgetown
- *County Land Use Regulation: Understanding the World Outside City Limits*, UT CLE Land Use Planning Fundamentals Conference 2011, Tom Nuckells, Travis County, Texas.

This article is focused on land use regulation, not traffic, roads, health and safety, nor environmental, other areas where cities and counties have additional powers. It is also focused on the Texas Local Government Code, not other state law.

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 any 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 dismissed 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.

Both cities in their ETJs and counties are prohibited from enacting subdivision platting regulations which regulate the following:

“...the use of any building or property for business, industrial, residential, or other purposes;

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