COUNTY ISSUE BRIEF

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Land Use Regulation

Texas' immense population growth[1] presents challenges for Texas counties as they strive for a workable balance of sensible land use regulation that provides for economic development while also preserving current residents' quality of life in unincorporated areas. A more clearly defined regulatory framework will allow counties and developers to work toward positive growth in ways that are uniquely suited to each community.

Background

County land use authority has evolved incrementally during the past 100 years[2] through the collaborative efforts of lawmakers, developers and county officials. Practitioners in this complex area of the law tend to agree that ambiguous statutes and interpretive case law often lead to uncertainty in planning decisions.

This issue brief seeks to identify areas where stakeholders may collaborate to reach compromises that will provide clarity and consistency in this important arena.

Subdivision Authority

House Bill 3697, which passed during the 88th legislative session, struck language in Texas Local Government Code Section 232.001(a)(3) that required subdividers to go through the county platting process regardless of whether parts (usually roads) in a proposed subdivision were destined for public or private use.[3] As a result, developers subdividing land into lots of 10 acres or more are interpreting this change to mean they are exempt from platting so long as the owner does not formally dedicate streets, alleys, squares, parks or other parts of the tract to public use.

Under this interpretation, developers may seek to avoid platting simply by designating all roads as "private." In rural counties, many subdivisions contain lots of 10 acres or more. This leads to utilization of "flag lots,"[4] as shown on the next page.

Subdivision authority is the county's only means to ensure neighborhood roads are accessible to emergency service providers, and that residents have adequate water supply.[5] Purchasers of land without adequate road access to fire suppression services or a reliable water supply may find it difficult to insure their property or secure financing.

Over time, lots without access to basic utility easements, services and resources may lose value as compared with subdivisions with roads built to county standards, access to fire/emergency services and a reliable water supply. The county and its taxpayers ultimately shoulder the burden brought about by substandard growth when residents petition the county for assistance.

In addition, HB 3697 prohibited counties from requiring an analysis, study, document, agreement or similar requirement to be included in or as part of an application for a plat, development permit or subdivision of land that is not explicitly required by state law. This effectively preempts all local, county-specific requirements over plats, permits or subdivision development documents. Developers need only comply with the state law requirements, which counties must also follow and then list on their county website.

Both planners and developers could benefit from a list compiled by the Office of the Attorney General, detailing

1 Texas' population increased by nearly 4 million between 2012 and 2022, the highest of any state, surpassing second-place Florida by 1 million. This 15.1% increase more than doubled the U.S. average of 6.2% https://comptroller.texas.gov/economy/fiscal-notes/economics/2024/region-facts/.

2 The first plat approval requirement statute was adopted in 1927. V.T.C.A., Local Government Code § 212.004 et seq. The stated legislative emergency was the "absence of any adequate law controlling the platting of property within and surrounding large, rapidly growing cities ..." Session Laws—Acts 1927, 40th Leg., pp. 342, 345, ch. 231, § 13.

3 See *Elgin Bank of Texas v. Travis County, Tex.*, 906 S.W.2d 120, 123 (Tex. App.—Austin 1995, writ denied) (construing V.T.C.A., Local Government Code § 231.001(a)). Legislation responsive to this decision enacted in 1999 rectified this and/or quandary. § 43.2. Plat approval, 36A Tex. Prac., County And Special District Law § 43.2 (2d ed.).

4 Flag lots are so named because of the long, slender strips of land resembling flag poles that extend from the typically rectangular main sections of these lots — or the "flags" — out to the street. Each "flagpole" typically provides just enough frontage for vehicle access and is often shared by several neighbors.

5 This change appears to conflict with HB 2440 (also signed into law), which mandates county officials require groundwater availability studies be submitted along with plat applications.

SUBDIVISION AUTHORITY

Utilization of "Flag Lots"

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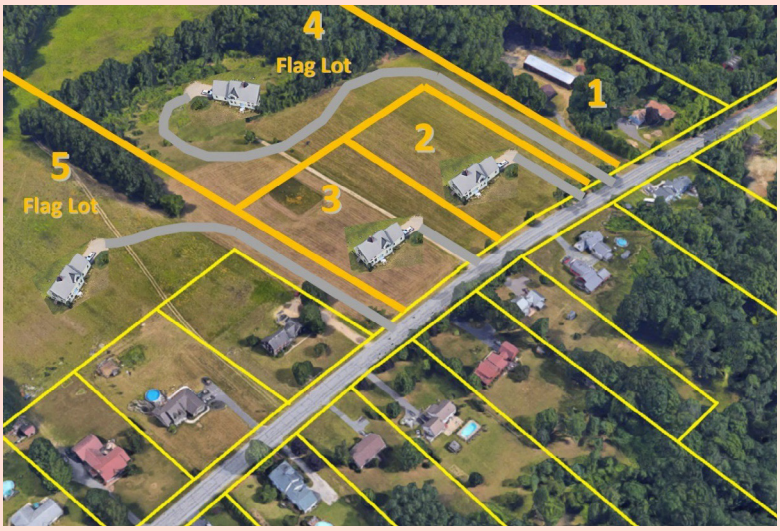

the many statutory sources of these requirements — as was once required by statute.[6] This would eliminate any confusion as to the scope of this preemptive provision.

Issues in the Extraterritorial Jurisdiction (ETJ) of Cities

Deannexation. The power to annex areas within a city's ETJ has long been the subject of controversy in Texas. Current statute allows a resident of an area in a municipality's ETJ to file a petition with the municipality in accordance with the law, for the area to be released from the extraterritorial jurisdiction.

After eliminating forced annexation altogether in the 87th Session (HB 347), Texas lawmakers went a step further in the 88th Session by passing Senate Bill 2038, which allows a resident of an area in a municipality's ETJ to file a petition with the municipality for release from the extraterritorial jurisdiction, also known as "deannexation."

To deannex by petition only, the petition must include signatures of the owner or owner of the majority in value of an area consisting of one or more parcels of land in a municipality's extraterritorial jurisdiction. Thus, the owner of a single tract may cause removal of their tract from the municipality's extraterritorial jurisdiction.

San Antonio's ETJ, shown in green, extends 5 miles past its city limits.

Once a petition representing the majority in value is received, the municipality must immediately deannex the area in the petition. Failure to act within 45 days results in automatic deannexation by operation of law — no further action by the municipality is required.

In addition to the petition pathway to deannexation, an area may be deannexed if at least 5% of the owners of an area sign a petition, an election is held and the majority of owners votes for deannexation. Upon receipt of the petition with 5% of the owners' signatures, the municipality must hold the election, or it may voluntarily release the area specified in the petition.

The bill has created an interesting dilemma for developers. If a developer deannexes, for example, but later needs to obtain electricity, water or wastewater services from a city, the city may be unable to provide immediate services in deannexed areas. However, it should be noted that deannexation does not affect a city's obligation to serve if the city has a Certificate of Convenience and Necessity ("CCN"), but the speed with which a city provides those services may be affected by an owner's election to deannex.

This could have far-reaching consequences on development generally, since cities typically plan for water and wastewater development far into the future. It remains to be seen how the creation of pockets within a growing city where utilities are not provided might potentially pose problems for utility access generally.

6 The Attorney General was once required to prepare a list "briefly describing" the powers of counties in Texas to regulate "land use, the regulation of structures, the platting and subdividing of land, and the provision and regulation of water, sewer, and other utility service to residential property." This law was repealed in 2011. Loc. Gov't § 240.903 (repealed).

In addition to the utility access issue, if a developer were to solve the problem by creating a special district (such as a municipal utility district, or MUD) and developing its own utility infrastructure, the city or county might still be needed to approve the creation of the district. A developer might find itself in a fight with the jurisdiction that just approved deannexation, potentially inadvertently placing power over development back into the hands of cities and/or counties because these developments would be reliant on the jurisdiction's approval.[7]

Potentially anyone — from a single-family homeowner to a developer — may now choose to deannex property out of a home-rule city's extraterritorial jurisdiction, and the city must comply with a request to deannex if a majority requests it.

Current law states certain counties and municipalities are required to have implemented an agreement regarding the subdivision regulations of the extraterritorial jurisdiction of the city/county (generally referred to as "HB 1445 Agreements"). However, the statute does not provide guidance on the impact of withdrawal of an "area" from the ETJ and the impact on the 1445 Agreements. It will be a constant and ever-changing enforcement problem for the county (and city) to know whether a particular parcel or parcels lie within the ETJ and whether county platting regulations and approval are required or whether municipal platting and approval are required.

Summary

Texans in unincorporated areas and extraterritorial jurisdictions would benefit from clarifying legislation that gives both planners and developers the ability to address localized development needs.

ISSUES IN THE EXTRATERRITORIAL JURISDICTION (ETJ) OF CITIES

San Antonio's ETJ

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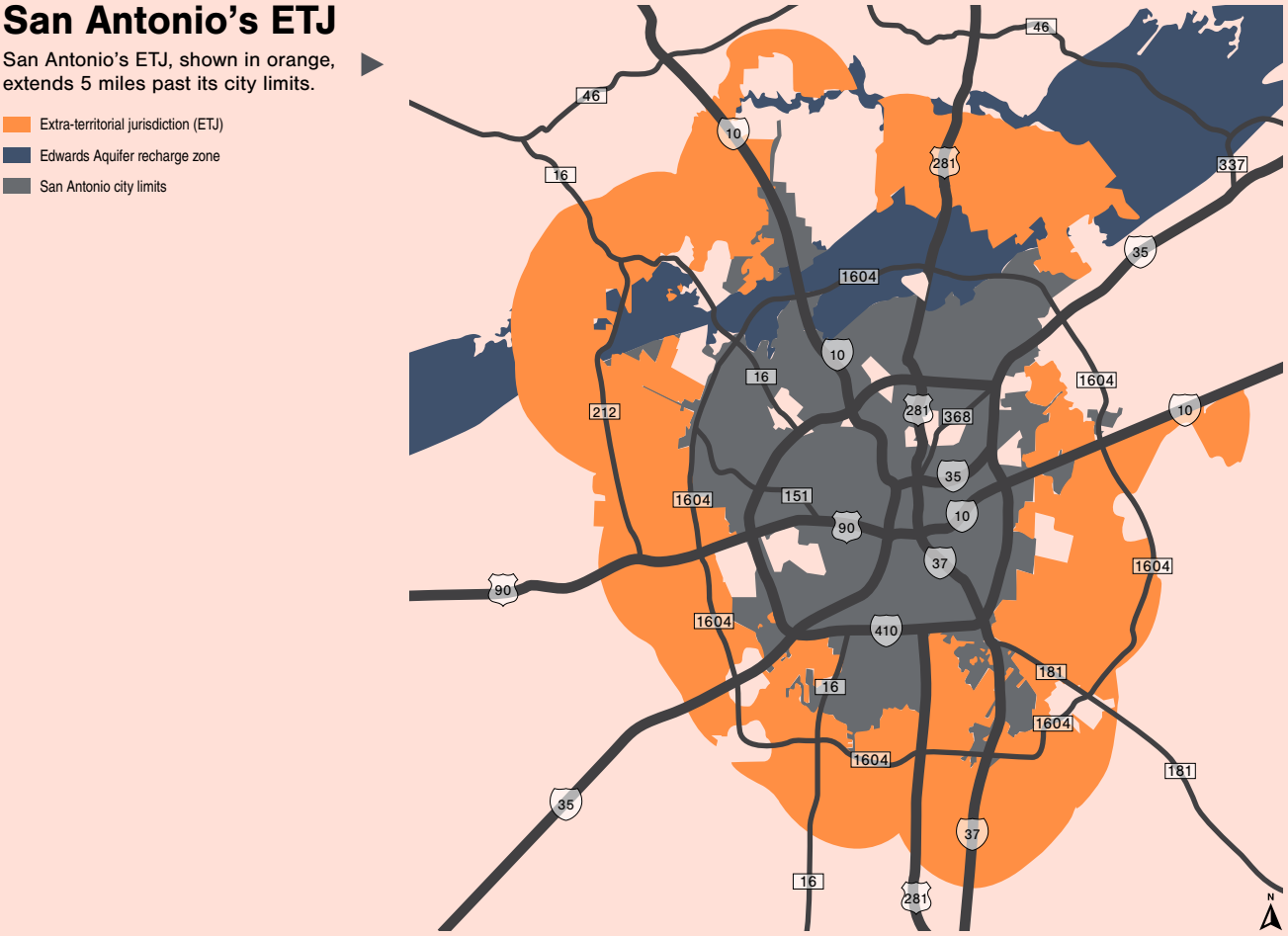

7 See "Pecan Hill" quandary regarding Navasota/Grimes counties development at https://www.navasotaexaminer.com/article/news/muddy-mess-city-county.