

MUNICIPAL REGULATION OF THE ETJ

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A problematic issue for many municipalities is the extent to which a city may regulate the extraterritorial jurisdiction (ETJ) which (usually) surrounds it. While issues relating to the ETJ generally involve annexation disputes, the ETJ often poses land use problems for cities throughout Texas. The purpose of this paper is to address in a general manner annexation and the ETJ, and in particular, land use and related municipal regulations in the ETJ.

I. Introduction

Prior to 1963, a Texas municipality could annex territory up to the corporate boundaries of another municipality. Since courts adhered to the “first in time, first in right” rule that the first to commence annexation or incorporation proceedings was entitled to complete and relate the whole action back to the date of the commencement of the actions, contests often resulted between an area attempting to incorporate and a city racing to annex that area prior to the initiation of incorporation proceedings. The Legislature, recognizing the havoc that was being created by such races, enacted the Municipal Annexation Act, Tex.Rev.Civ.Stat.Ann. art. 970a, in 1963. In addition to statutorily regulating annexation activities, the Municipal Annexation Act created the concept of extraterritorial jurisdiction. Since that time, disputes between municipalities and landowners regarding annexation and the ability of cities to regulate certain activities within the ETJ have become commonplace.

These disputes have churned significant activity in the Texas Legislature. In the 75th Session of the Texas Legislature, approximately 70 annexation or annexation-related bills were introduced. While no significant changes in the state’s annexation scheme were accomplished through the handful of bills that were passed in the 75th Legislative Session, the 76th Legislature dramatically altered the ability of municipalities to annex property. Senate Bill No. 89, which became effective September 1, 1999, has completely changed the annexation landscape.

II. The Municipal Annexation Act and the ETJ

Chapters 42 and 43 of the Texas Local Government Code comprise the current version of the Municipal Annexation Act, originally enacted in 1963, which governs the ability of municipalities to annex property and which created the ETJ concept.¹ The policy purpose underlying ETJ is described in Section 42.001 of the Texas Local Government Code:

The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.

Extraterritorial jurisdiction by statute is defined as “the unincorporated area that is contiguous to the corporate boundaries of the municipality. . . .”² The geographical extent of any municipality’s extraterritorial jurisdiction is contingent upon the number of inhabitants of the municipality:

¹ *City of Bridge City v. City of Port Arthur*, 792 S.W.2d 217, 230 (Tex.App.—Beaumont 1990, writ denied).

² Tex. Local Gov’t Code § 42.021.

<u>Number of Inhabitants</u>	<u>Extent of Extraterritorial Jurisdiction</u>
Fewer than 5,000	One-half Mile
5,000—24,999	One Mile
25,000—49,999	Two Miles
50,000—99,999	Three and one-half Miles
100,000 and over	Five Miles ³

The operative language in Section 42.021 is “number of inhabitants” rather than “population”—a distinction of significance in Texas state law when viewed with reference to Chapter 311 of the Texas Government Code, the Code Construction Act. According to Section 311.002 of the Government Code, the Code Construction Act applies to any code enacted by the 60th or subsequent Legislature. The Local Government Code was enacted by the 71st Legislature in 1989. According to Section 311.005(3) of the Government Code, “population” means “the population shown by the most recent federal decennial census.” Therefore, when any state statute employs the term “population,” that refers to the population as of the most recent decennial census—currently, the 2000 federal decennial census. In contrast, the extent of a city’s extraterritorial jurisdiction is based upon the number of inhabitants (as determined by the city), not the city’s population according to the most recent decennial census. Further, the Attorney General’s Office determined in Letter Opinion No. LO94-033 (1994) that “a municipality may choose the method by which it will ascertain the boundaries of its extraterritorial jurisdiction. . . .” That opinion was in response to the question whether a city “may measure its extraterritorial jurisdiction by drawing a radius around the municipality on a map, or whether the municipality must ‘go into the field, . . . physically [measuring] the . . . radius.’” *Id.* Thus, a municipality may by ordinance or resolution determine the number of inhabitants within its corporate limits and determine how it will measure the extent of its ETJ.

A. Mapping Municipal Boundaries and the ETJ

As a threshold matter, before a municipality may consider the annexation of property into the city, it is imperative that the city accurately determine its corporate boundaries and the limits of its ETJ. Section 41.001 of the Texas Local Government Code requires that each city maintain an official map of its city limits which, after each annexation, is updated to show the newly annexed area, the date of annexation, the ordinance number, and a reference to the minutes or ordinance records in which the ordinance is recorded. Further, Section 41.001 of the Local Government Code requires that if a municipality’s ETJ is expanded or reduced, the official map must be revised to indicate the change in the city’s ETJ:

³ *Id.*, § 42.021.

§ 41.001 Map of Municipal Boundaries and Extraterritorial Jurisdiction

(a) Each municipality shall prepare a map that shows the boundaries of the municipality and of its extraterritorial jurisdiction. A copy of the map shall be kept in the office of the secretary or clerk of the municipality. If the municipality has a municipal engineer, a copy of the map shall also be kept in the office of the engineer.

(b) If the municipality annexes territory, the map shall be immediately corrected to include the annexed territory. The map shall be annotated to indicate:

- (1) the date of annexation;
- (2) the number of the annexation ordinance, if any; and
- (3) a reference to the minutes or municipal ordinance records in which the ordinance is recorded in full.

(c) If the municipality's extraterritorial jurisdiction is expanded or reduced, the map shall be immediately corrected to indicate the change in the municipality's extraterritorial jurisdiction. The map shall be annotated to indicate:

- (1) the date the municipality's extraterritorial jurisdiction was changed;
- (2) the number of the ordinance or resolution, if any, by which the change was made; and
- (3) a reference to the minutes or municipal ordinance or resolution records in which the ordinance or resolution is recorded in full.

In a perfect world, all municipal incorporations would result in a survey that would be utilized in creating an official city map, which city map would have been checked for completeness and closure and recorded in the minutes of the municipality and the real property records of the county or counties in which the city lies. Additionally, in a perfect world, all annexations would have been precisely determined with field notes or other legal descriptions that would allow the official city map to be amended to reflect the new corporate city limits, as well as the extent of the city's newly expanded ETJ. Of course, very few cities operate in a perfect world and, as a result, many times uncertainty may exist as to the exact location of municipal boundaries and the exact extent of a municipality's ETJ.

B. Reduction of the ETJ

Section 42.023 of the Texas Local Government Code states that:

[t]he extraterritorial jurisdiction of a municipality may not be reduced unless the governing body of the municipality gives its written consent by ordinance or resolution, except in cases of judicial apportionment of overlapping extraterritorial jurisdiction under Section 42.901.

A city created out of the relinquishment of another city's ETJ had no ETJ of its own where its corporate boundaries adjoined the other city's ETJ.⁴ In *City of Pasadena v. City of Houston*,⁵ the Texas Supreme Court held that where a Houston ordinance purporting to annex property (which the City of Pasadena had subsequently annexed by later ordinances) was not completed within ninety days of the passage of the Municipal Annexation Act, the Houston ordinance was void, notwithstanding that the agreed judgment reached between Houston and Pasadena before passage of the Act that gave Houston exclusive jurisdiction to annex the property. Further, Texas case law consistently has held that an ordinance that attempts to annex territory within the ETJ or municipal boundaries of another city is void.⁶ Indeed, the attempted annexation of land within another municipality's ETJ is unlawful, void and of no effect *ab initio*.⁷

C. Expansion of the ETJ

Section 42.022 of the Texas Local Government Code addresses the expansion of the ETJ. Specifically, it states:

- (a) When a municipality annexes an area, the extraterritorial jurisdiction of the municipality expands with the annexation to comprise, consistent with Section 42.021, the area around the new municipal boundaries.
- (b) The extraterritorial jurisdiction of a municipality may expand beyond the distance limitations imposed by Section 42.021 to include an area contiguous to the otherwise existing extraterritorial jurisdiction of the municipality if the owners of the area request the expansion.
- (c) The expansion of the extraterritorial jurisdiction of a municipality through annexation, request, or increase in the number of inhabitants may not include any area in the existing extraterritorial jurisdiction of another municipality.

⁴ *Bridge City*, 792 S.W.2d at 230.

⁵ 442 S.W.2d 325, 329 (Tex. 1969).

⁶ See *City of Waco v. City of McGregor*, 523 S.W.2d 649, 653 (Tex. 1975); *Village of Creedmoor v. Frost Nat'l Bank*, 808 S.W.2d 617, 620 (Tex.App.—Austin 1991, writ denied); *City of Bridge City*, 792 S.W.2d at 230; *Friendship Village v. State*, 738 S.W.2d 12, 14 (Tex.App.—Texarkana 1987, writ ref'd n.r.e.); *City of Houston v. Savely*, 708 S.W.2d 879, 887 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *cert. denied*, 482 U.S. 928 (1987); *City of West Orange v. City of Orange*, 598 S.W.2d 387, 390 (Tex.Civ.App.—Beaumont 1980), *rev'd on other grounds*, 613 S.W.2d 236 (Tex. 1981); *City of Duncanville v. City of Woodland Hills*, 484 S.W.2d 111, 113 (Tex.Civ.App.—Waco 1972, writ ref'd n.r.e.).

⁷ See, e.g., *Village of Creedmoor*, 808 S.W.2d at 621.

Tex. Local Gov't Code § 42.022. Thus, a municipality's ETJ may expand by only one of three methods: annexation, landowner request and increase in the number of inhabitants. Absent the foregoing, there is no valid expansion of a municipality's ETJ.⁸

D. Overlapping ETJs

The only method by which one municipality may have its ETJ overlap another municipality's ETJ is the case where the ETJs overlapped as a consequence of the adoption of the Municipal Annexation Act on August 23, 1963. In such cases, according to Section 42.901 of the Texas Local Government Code, the two municipalities (or more, if applicable) (1) may enter into a written agreement delineating the extent of each municipality's ETJ; or (2) seek a judicial declaration apportioning each municipality's ETJ. Thus, there rarely are situations where ETJs truly overlap; rather, there often are disputes about the specific limits and/or locations of various ETJs and "who got there first."

III. Municipal Regulations in the ETJ

As a general rule, a municipality's ordinances and other regulations are valid and enforceable only within the municipality's corporate limits; however, where there is an express grant of authority either by the Texas Constitution or statute to municipalities to enact and enforce ordinances and regulations outside the corporate limits of a municipality, municipalities consequently may do so.⁹

Texas municipalities possess the authority to regulate in their ETJs pursuant to a number of express provisions of the Texas Local Government Code. Areas of regulation and an explanation of those areas are as follows.

A. Subdivision Regulations

While Texas municipalities do not possess the statutory authority to zone property in their extraterritorial jurisdictions, Section 212.003 of the Texas Local Government Code provides that a subdivision ordinance is applicable to a municipality's extraterritorial jurisdiction *if, and only if*, the municipality specifically has extended its subdivision regulations to the

⁸ For a detailed discussion of the effect of annexation on extraterritorial jurisdiction in light of the 1999 amendments to the annexation statute, see Attorney General Opinion No. GA-0014 (January 22, 2003).

⁹ See Op. Tex. Att'y Gen. LO97-055 (1997). In that opinion, the Attorney General's Office wrote as follows:

As a general rule, a city can exercise its powers only within the city's corporate limits unless power is expressly or impliedly extended by the Texas Constitution or by statute to apply to areas outside the limits. See *City of Austin v. Jamail*, 662 S.W.2d 779,782 (Tex. App.—Austin 1983, writ dismissed w.o.j.); *City of West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 686 (Tex. Civ. App.—Waco 1980, no writ); *City of Sweetwater v. Hammer*, 259 S.W. 191, 195 (Tex. Civ. App.—Fort Worth 1923, writ dismissed); *Ex parte Ernest*, 136 S.W.2d 595, 597-98 (Tex. Crim. App. 1939); Attorney General Opinion JM-226 (1984) at 2. Extraterritorial power will be implied only when such power is reasonably incident to those powers expressly granted or is essential to the object and purposes of the city. *Jamail*, 662 S.W.2d at 782; *Westlake Hills*, 598 S.W.2d at 683. "[A]ny fair, reasonable, or substantial doubt as to the existence of a power will be resolved against the municipality." *Westlake Hills*, 598 S.W.2d at 683.

extraterritorial jurisdiction. Thus, subdivision regulations are *not* automatically applicable to a municipality's ETJ. Section 212.003 specifically provides as follows:

(a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:

(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; or

(4) the number of residential units that can be built per acre of land.

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.

(c) The municipality is entitled to appropriate injunctive relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

As noted earlier in this paper in the platting discussion, most Texas municipalities routinely extend the application of their subdivision regulations to their extraterritorial jurisdictions. The only case directly on point concluded that a municipality may require building permits for construction in its ETJ and enforce its construction-related ordinances in its ETJ.¹⁰ Therefore, based upon the court's rationale in *City of Lucas*, a municipality (1) may enforce its subdivision ordinance in its ETJ, (2) may issue building permits for construction in its ETJ and further, (3) may enforce its construction-related ordinances (Uniform Building Code, Uniform Plumbing Code, Uniform Mechanical Code and Uniform Electrical Code) in its ETJ.

A municipality may regulate subdivisions and approve plats for tracts of land located outside its corporate limits and outside its extraterritorial jurisdiction *if* there is an interlocal agreement providing for such regulation and approval.¹¹ In the event a tract of land lies within the ETJ of more than one municipality, the municipality with the largest population has approval

¹⁰ See *City of Lucas v. North Texas Municipal Water Dist.*, 724 S.W.2d 811 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

¹¹ Tex. Local Gov't Code § 242.001(e).

responsibility.¹² Nevertheless, the portion of the tract that lies in the ETJ of the smaller municipality must comply with the subdivision and platting regulations of that municipality while the portion of the tract the lies in the ETJ of the larger municipality must comply with the subdivision and platting regulations of that municipality. Thus, plat approval is the responsibility of the larger municipality even though the larger municipality only applies its regulations to that portion of the tract in its ETJ.

B. Subdivisions, House Bill 1445 and the ETJ

House Bill 1445, as it is commonly known, was adopted by the 2001 session of the Legislature and provided for an agreement between a county and a municipality to regulate a subdivision in the ETJ of a municipality. Now codified in Chapter 242 of the Texas Local Government Code, H.B. 1445 required that a city and county (except for counties over 1.9 million and border counties) shall enter into a written agreement that identifies the governmental entity authorized to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction.¹³ For a municipality in existence on September 1, 2001, the municipality and county were required to enter into a written agreement on or before April 1, 2002.¹⁴ For a municipality incorporated after September 1, 2001, the municipality and county shall enter into a written agreement no later than the 120th day after the date the municipality incorporates.¹⁵

Texas municipalities have four options under H.B. 1445: (1) the county will possess no authority over plats and all review will be done by the city; (2) the city possesses no authority over plats and all review will be done by the county; (3) the city and county will divide the ETJ geographically and each will delineate in which area it possesses authority over plats; and (4) the city and county jointly review plats under their respective authority, but there must be one filing fee, one office to file plats and one uniform and consistent set of plat regulations.

A municipality and a county may adopt the agreement by order, ordinance or resolution. A municipality must notify the county of any expansion or reduction in the municipality's extraterritorial jurisdiction and any expansion or reduction in a municipality's extraterritorial jurisdiction that affects property that is subject to a preliminary or final plat filed with the municipality or that was previously approved under the platting statute does not affect any rights accrued under Chapter 245 of the Texas Local Government Code, the Texas vested rights statute. The approval of the plat or any permit remains effective as provided by Chapter 245 regardless of the change in designation. An agreement may grant the authority to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction of a municipality as follows:

- A municipality may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may

¹² *Id.*, § 212.007(a).

¹³ *See id.*, § 242.001(a).

¹⁴ *Id.*, § 242.001(c).

¹⁵ *Id.*

regulate subdivisions under Subchapter A of Chapter 212 and other statutes applicable to municipalities;

- A county may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Sections 232.001-.005, Subchapter B or C, Chapter 232, and other statutes applicable to counties;
- A municipality and county may apportion the area within the extraterritorial jurisdiction of the municipality with the municipality regulating subdivision plats and approving related permits in the area assigned to the municipality and the county regulating subdivision plats and approving related permits in the area assigned to the county; or
- A municipality and a county may enter into an interlocal agreement that establishes one office that is authorized to accept plat applications for tracts of land located in the extraterritorial jurisdiction; collect municipal and county plat application fees in a lump-sum amount; and provide applicants one response indicating approval or denial of the plat application; and establishes a consolidated and consistent set of regulations related to plats and subdivisions of land as authorized by Chapter 212, Sections 232.001-232.005, Subchapters B and C, Chapter 232, and other statutes applicable to municipalities and counties that will be enforced in the extraterritorial jurisdiction.

A question that was frequently raised by local government officials under S.B. 1445 is what happens if a city did not enter into the required agreement? H.B. 1445 contained no penalty provision and, as a result, had no “real teeth” to encourage compliance. Legislation passed in the 78th Legislature addressed this issue.

C. H.B. 1204 - ETJ Agreements Between Cities and Counties

This bill modified the provisions of Chapter 242 of the Texas Local Government Code (added by H.B. 1445, 2001 Session), which require a city and county to enter into an agreement specifying which entity will regulate subdivisions of property in the city’s ETJ. **The bill applies only to an agreement or subdivision plat that is filed on or after the bill’s effective date, which is immediate upon the governor’s signature, which was on June 20, 2003. A development agreement or subdivision plat that was filed before June 20, 2003, is governed by the prior law. This means that existing agreements developed during the past two years are grandfathered.** Specifically, the bill

1. Provides that the agreement requirement does not apply to land subject to a development agreement between a city and an owner of land in the city’s ETJ.
2. Provides that a city and a county may not both regulate subdivisions or “approve related permits” in the ETJ of a city after an agreement is executed.

3. Requires a city and county, on reaching an agreement, to certify that the agreement complies with the requirements of Chapter 242 of the Texas Local Government Code.
4. Provides that any expansion or reduction in a city's ETJ that affects property that is subject to a preliminary or final plat, a plat application, or an application for a related permit filed with the city or the county or that was previously approved does not affect any rights accrued under Chapter 245 of the Texas Local Government Code, the "permit vesting" or "vested rights" statute).
5. Provides that if the city and county enter into an agreement to establish one, joint office to regulate subdivision plats in the ETJ, the office must establish a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land.
6. Requires a city and a county that have not entered into an agreement by January 1, 2004 (in the case of a city with a population of 100,000 or more) or January 1, 2006 (in the case of a city with a population of 99,000 or less) to enter into arbitration.
7. Provides a method by which either an arbitrator or arbitration panel is chosen.
8. Limits the authority of the arbitrator or arbitration panel to issuing a decision relating only to the disputed issues regarding the authority of the county or city to regulate plats, subdivisions, or development plans.
9. Provides that each party is equally liable for the costs of arbitration.
10. Mandates that if the arbitrator or arbitration panel has not reached a decision in a 60-day period, the arbitrator or arbitration panel shall issue an interim decision regarding the regulation of plats and subdivisions and approval of related permits in the city's ETJ, which must provide for a single set of regulations and authorize a single entity to regulate plats and subdivisions until a final decision is reached.
11. Provides that if an agreement establishes a plan for future roads that conflicts with a proposal or plan for future roads adopted by a metropolitan planning organization, the proposal or plan of the metropolitan planning organization prevails.
12. Provides that in certain counties (a) a plat may not be filed with the county clerk without the approval of both the city and the county; (b) if city and county regulations conflict, the more stringent regulation prevails; and (c) if one entity requires a plat to be filed and the other does not, the entity that does not require a plat must certify that fact in writing to the subdivider.

13. Provides that property subject to pending approval of a preliminary or final plat application filed after September 1, 2002, that is released from a city's ETJ shall be subject only to county approval of the plat application and related permits.

D. Annexation Agreements, House Bill 1197 and the ETJ

H.B. 1197 - ETJ Agreements with Landowners

This bill, adopted by the Legislature in 2003, added Subchapter G, entitled "Agreement Governing Certain Land in a Municipality's Extraterritorial Jurisdiction," to Chapter 212 of the Texas Local Government Code, "Municipal Regulation of Subdivisions and Property Development." The bill allows a city council to enter into a written contract with an owner of land in the city's extraterritorial jurisdiction ("ETJ") to (1) guarantee the land's immunity from annexation for a period of up to fifteen years; (2) extend certain aspects of the city's land use and environmental authority over the land; (3) authorize enforcement of land use regulations other than those that apply within the city; (4) provide for infrastructure for the land; and (5) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties. The bill also validates an agreement entered into prior to the effective date of the bill, so long as the agreement complies with the bill's requirements.

Prior to HB 1197, there was no specific statutory authorization for a municipality to enter into an agreement with an owner of land in the municipality's ETJ to govern the future development of the land. H.B. 1197 authorizes the governing body of a municipality to make a written contract with an owner of land that is located in the ETJ of the municipality to authorize some other type of use.

E. Development Plats

Sections 212.041-212.050 of the Texas Local Government Code provide authority for cities to require development plats in the ETJ. A development plat, however, should not be confused with a subdivision plat. The authority to regulate subdivisions is found in Subchapter A of Chapter 212 whereas the authority to regulate property development through the use of development plats is found in Subchapter B of Chapter 212 of the Texas Local Government Code. A city must choose by ordinance to be covered by Subchapter B (or the law codified by that subchapter)¹⁶ and if a city so elects, any person who proposes development of a tract of land in the corporate limits or ETJ must prepare a development plat. "Development," for purposes of Subchapter B, means "the new construction or the enlargement of any exterior dimension of any building, structure or improvement."¹⁷ While *City of Lucas*¹⁸ clearly authorizes the issuance of building permits in the ETJ, Subchapter B expressly provides that it

¹⁶ See *id.*, § 212.041.

¹⁷ *Id.*, § 212.043(1).

¹⁸ *City of Lucas v. North Texas Municipal Water Dist.*, 724 S.W.2d 811 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

“does not authorize a municipality to require municipal building permits or otherwise enforce the municipality’s building code in its extraterritorial jurisdiction.”¹⁹

F. Sign Regulations

Chapter 216 of the Texas Local Government Code addresses, in part, the relocation, reconstruction or removal of a sign in the ETJ. Specifically, Section 216.003 authorizes a city to “require the relocation, reconstruction, or removal of any sign within its corporate limits or extraterritorial jurisdiction,” subject to the detailed regulatory scheme encompassed in Chapter 216 (creation of municipal sign control board, compensation requirements, exceptions and appeal provisions). It should be noted, however, municipal authority to require the relocation, reconstruction or removal of signs does not apply to on premises signs in the ETJ of municipalities in a county with a population of more than 2.4 million (Harris County) or of a county that borders a county with that population.²⁰

A home-rule municipality has additional authority to regulate signs. Home rule cities may license, regulate, control or prohibit the erection of signs or billboards by charter or ordinance in compliance with Chapter 216 of the Local Government Code.²¹ Cities may regulate the location, proximity, size, separation, setback and height provisions so long as the ordinance bears a reasonable relationship to the public health, safety or general welfare.²²

A home-rule municipality may extend the provisions of its outdoor sign regulatory ordinance and enforce the ordinance within its ETJ. In lieu of regulatory ordinances, however, home-rule cities may allow the Texas Transportation Commission to regulate outdoor signs in the ETJ by filing a written notice with the Commission. If a municipality extends its outdoor sign ordinance within its ETJ, the municipal ordinance supersedes the regulations imposed by or adopted by the Commission.²³

The foregoing authority granted to a home-rule municipality does not apply to (1) on premise signs in the ETJ of municipalities in county with a population of more than 2.4 million (Harris County) or a county that borders a county with that population; or (2) on premise signs in the ETJ of a municipality with a population of 1.5 million or more that are located in a county that is adjacent to the county in which the majority of the land of the municipality is located.²⁴

¹⁹ Tex. Local Gov’t Code § 212.049.

²⁰ *Id.*, § 216.0035.

²¹ *Id.*, § 216.901.

²² *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 939 (Tex.Civ.App.—Amarillo 1978, writ ref’d n.r.e.), cert. denied, 444 U.S. 833 (1979).

²³ See Tex.Local Gov’t Code § 216.902.

²⁴ *Id.*, § 216.902.

G. Industrial Districts and Planned Unit Development Districts

Section 42.044 of the Texas Local Government Code authorizes a city to designate a part of its ETJ as an industrial district and treat that area in the manner considered to be in the best interest of the city, including making written contracts with the owner of the land regarding annexation and regulations. Chapter 42 of the Local Government Code also addresses planned unit development districts in the ETJ. The governing body of a municipality that has disannexed territory previously annexed for limited purposes may designate an area within its ETJ as a planned unit development district by written agreement with the owner of the land. The planned unit development district must contain no fewer than 250 acres.²⁵

H. Impact Fees

Impact fees, pursuant to Chapter 395 of the Texas Local Government Code, may be imposed in the ETJ; however, impact fees for roadway facilities may not be imposed in the ETJ. Section 395.001(9) of the Texas Local Government Code provides the following guidance regarding service areas for the various statutorily-authorized impact fees:

Water and wastewater facilities. Most cities in Texas have adopted the entire city and the city's ETJ as the service area and thus, impact fees are the same city-wide.

Roadway facilities. The service area is limited to an area within the corporate boundaries (*i.e.*, ETJ cannot be included) and not exceeding six miles.

Storm water, drainage and flood control facilities. The service area is limited to all or part of the land within the corporate limits of the city or its ETJ actually served by the storm water, drainage and flood control facilities designated in the Capital Improvements Plan and shall not extend across watershed boundaries.

I. Municipal Drainage Utility Systems

According to Section 402.044(8) of the Texas Local Government Code, the boundaries of a municipal drainage system service area may extend into areas of the ETJ that contribute overland flow into the watershed of the municipality. Subchapter C of Chapter 402 of the Local Government Code addresses the procedures for creating such a drainage utility and the methods by which to fund such a utility.

IV. The 5,000 Foot "Nuisance Zone"

In 1954 the Texas Court of Criminal Appeals held that when a state statute grants a city express authority to prohibit nuisances outside the city limits, that grant impliedly confers jurisdiction upon the municipal court for the prosecution of those offenses committed outside the city limits. *Treadgill v. State*²⁶ dealt with a Houston ordinance prohibiting the sale of fireworks

²⁵ See generally *id.*, § 42.046.

²⁶ 275 S.W.2d 658, 664 (Tex.Crim.App. 1954).

within 5,000 feet of the city limits. The fireworks ordinance was adopted pursuant to the predecessor statute to Section 217.042 of the Texas Local Government Code.²⁷ This statute allows a home-rule city to define and prohibit any nuisance within the limits of the city and within 5,000 feet of the city limits.²⁸ Attorney General John Cornyn extended the analysis of *Treadgill* to a Wylie ordinance that declared outdoor burning a nuisance and prohibited it within 5,000 feet of the city limits.²⁹ Based upon the analysis contained in the foregoing Attorney General opinion, one can conclude that any ordinance adopted by a home-rule municipality under the authority of Section 217.042 of the Local Government Code that defines and prohibits a nuisance within the city limits and extends that prohibition to that area within 5,000 feet of the city limits may be enforced in municipal court.

Examples of city ordinances routinely adopted pursuant to the express authority contained in § 217.042 of the Texas Local Government Code that could be or are considered to be in the nuisance category are:

- sale, storage or use of fireworks in the city or within 5,000 feet of the city limits;
- high weeds and grass;
- litter control and abatement;
- unwholesome matters (filth, decaying matters, garbage, hazardous materials and substances, etc.);
- mosquito control;
- rodent control; and
- junked and abandoned vehicles.

It should be noted, however, that the foregoing activities must be declared nuisances by ordinance *and* extend their application out 5,000 feet from the existing city limits. Thus, if a home-rule city desires to enforce these activities extraterritorially, city ordinances must be

²⁷ Section 217.042 of the Texas Local Government Code provides as follows:

- (a) 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.

²⁸ Type A and Type B general law municipalities also may prohibit nuisances. Type A municipalities may abate and remove a nuisance, define and declare what constitutes a nuisance and punish by fine those persons responsible for the nuisance. Tex.Local Gov't Code § 217.002. Type B municipalities may prevent nuisances and have nuisances removed at the expense of the person who is responsible. Tex.Local Gov't Code § 217.022.

²⁹ See Op.Tex.Att'y Gen. No. JC-0025 (1999).

amended to reflect the extraterritorial application of the ordinances. Further, a home-rule city cannot simply declare all conduct a nuisance and extend such nuisance regulations 5,000 feet from the city's boundaries. A "nuisance" is anything that works injury, harm or prejudice to an individual or public, or which causes a well-founded apprehension of danger. A nuisance obstructs, impairs or destroys the reasonable, peaceful and comfortable use of property.³⁰

V. The "SOB Zone"

Chapter 243 of the Texas Local Government Code authorizes city and county regulation of sexually oriented businesses ("SOBs"). Most city ordinances that regulate SOBs provide distance requirements; that is, requirements that an SOB may not be located within a certain number of feet of a church, school, residentially-zoned area, day care center or other sexually oriented business.³¹ In Texas Attorney General Opinion No. JC-0485 (2002), the question was presented whether a municipality may enforce its own SOB ordinance when the entity to be protected is outside the corporate limits of the municipality. At issue in this opinion was a church that, while located outside the corporate limits of San Antonio, was within 1,000 feet of an SOB located within the corporate limits of San Antonio. Since Section 243.003(b) of the Local Government Code specifically provides that "[a] regulation adopted by a municipality applies only inside the municipality's corporate limits," could the San Antonio SOB ordinance's distance requirements be enforced?

After discussion of case law from other states, the Attorney General concluded that even though Section 243.003 of the Local Government Code does not give extraterritorial effect to an SOB ordinance, Section 243.006(a)(2) of the Local Government Code nevertheless may apply.

A city may apply a municipal ordinance to prohibit a sexually oriented business within a specified distance of a school, church, or other entity covered by section 243.006(a)(2) of the Local Government Code even though that entity is not within the corporate limits of the city in question, so long as the sexually oriented business is within those limits. Such application does not violate the statutory requirement that the ordinance apply only in the city's corporate limits.³²

³⁰ *Parker v. City of Fort Worth*, 281 S.W.2d 721, 723 (Tex.Civ.App.—Fort Worth 1955, no writ). See also Op.Tex.Att'y Gen. No. JM-226 (1984) (discussing what activities may constitute a nuisance per se or nuisance at common law).

³¹ See Tex.Local Gov't Code § 243.006(a). Section 243.006(a) of the Texas Local Government Code provides as follows:

- (a) The location of sexually oriented businesses may be:
 - (1) restricted to particular areas; or
 - (2) prohibited within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use the governing body of the municipality or county finds to be inconsistent with the operation of a sexually oriented business.

³² Op.Tex.Att'y Gen. No. JC-0485 (2002) at 4.

Thus, the distance requirements contained in local SOB ordinances may be enforced, even if the underlying SOB ordinance has no extraterritorial effect.

VI. Conclusion

The single most important issue for municipalities in regulating activities in the ETJ often tends to be enforcement issues, not whether activities are statutorily authorized to be regulated in the ETJ. Nevertheless, statutory authorization for municipal regulation in the ETJ tends to be “hit and miss” with no one source of such authority.