DEVELOPMENT ISSUES OUTSIDE CORPORATE LIMITS

(a City Attorney's Perspective)

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I.

INTRODUCTION

In 1963, the Texas Legislature, as part of the Municipal Annexation Act, Tex. Rev. Civ. Stat. Ann. art. 970a, created the concept of extraterritorial jurisdiction ("**ETJ**"). Chapters 42 and 43 of the Texas Local Government Code comprise the current version of the Municipal Annexation Act, which governs the ability of municipalities to annex property. 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.

ETJ by statute is defined as "the unincorporated area that is contiguous to the corporate boundaries of the municipality. . . ." Tex. Loc. Gov't Code § 42.021. The geographical extent of any municipality's ETJ is contingent upon the number of inhabitants of the municipality. *Id.*

While admittedly the concept of ETJ was created primarily to address annexation practices and to create geographic limits on a city's ability to annex, the stated public purpose of ETJ (as set forth in Tex. Loc. Gov't Code § 42.021) clearly goes beyond mere annexation control as it creates a special interest zone outside a city's corporate boundaries that, to the extent allowed by law, permits a city to protect not only those inside the city, but those just outside the city as well.

Development of land outside of city limits, however, can involve jurisdictional conflicts between cities and counties, as well as conflicts between landowners and cities on the extent to which a city may regulate in the ETJ. Practical problems can also arise when a city seeks to apply in-city urban design standards to rural environments, particularly if those standards are applied to development project that are started prior to annexation.

This paper, offered from a city attorney's perspective, seeks to discuss the general power of cities to regulate in the ETJ, which range from standard, noncontroversial powers, to the controversial, unanswered question of whether home-rule cities have the inherent power to require building permits, inspections, and approvals for development of property located within a home-rule city's ETJ. This ETJ permitting issue is squarely before the Dallas Court of Appeals in a dispute between an ETJ landowner, the City of McKinney, and Collin County, in *Collin County, Texas, v. The City of McKinney, Texas, v. Custer Storage Center, LLC*; No. 05-17-00546-CV (oral argument held on March 8, 2018).

II.

MUNICIPAL REGULATION IN THE ETJ – THE EASY STUFF

Texas municipalities possess the authority to regulate in their ETJs pursuant to a number of express provisions of the Texas Local Government Code. These powers are, for the most part, noncontroversial and are routinely administered.

A. Subdivision Regulations

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

Most, if not all, municipalities routinely extend the application of their subdivision regulations to their ETJs. Thus, platting in the ETJ is fairly commonplace.

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 and related permits in the ETJ of a municipality. Now codified in Chapter 242 of the Texas Local Government Code, H.B. 1445 requires that a city and county (except for counties over 1.9 million and border counties) enter into a written agreement that identifies the governmental entity authorized to regulate subdivision plats and approve related permits in the ETJ. *See* Tex. Loc. Gov't Code § 242.001(a).

Generally speaking, 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 ETJ and any expansion or reduction in a municipality's ETJ 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 ETJ of a municipality as follows:

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

C. Annexation Agreements, House Bill 1197 and the ETJ

This bill 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 ETJ to (1) guarantee the land's immunity from annexation for a period of up to 45 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.

D. 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) (*see* Tex. Loc. Gov't Code § 212.041) 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." *Id.*, § 212.043(1). Subchapter B expressly provides that it "does not authorize a municipality to require municipal building permits or otherwise enforce the municipality's building code in its extraterritorial jurisdiction." *Id*., § 212.049.

E. 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. *Id.*, § 216.0035.

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. *Id*., § 216.901. 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. *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).

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. *See* Tex. Loc. Gov't Code § 216.902.

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. *Id*., § 216.902.

F. 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. *See generally* Tex. Loc. Gov't Code § 42.046.

G. 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.

H. 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.

I. 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*, 275 S.W.2d 658, 664 (Tex.Crim.App. 1954). *Treadgill* dealt with a Houston ordinance prohibiting the sale of fireworks 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.

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.[1] 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. *See* Op.Tex.Att'y Gen. No. JC-0025 (1999). 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:

- high weeds and grass;
- litter control and abatement;
- unwholesome matters (filth, decaying matters, garbage, hazardous materials and substances, etc.);
- mosquito control;

[1] 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. Loc. 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. Loc. Gov't Code § 217.022.

- 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 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. *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).

J. 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. *See* Tex. Loc. Gov't Code § 243.006(a).[2] 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

[2] 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.

> 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.

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.

II.

MUNICIPAL REGULATION IN THE ETJ – THE HARD STUFF

A. Building Permits in the ETJ – Before *Bizios*

Before the Texas Supreme Court's 2016 decision in *Town of Lakewood Village v. Bizios*, 493 S.W.3d. 527, 530 (Tex. 2016), it was generally accepted, at least among some city attorneys, that all cities - home rule and general law - could require building permits, inspections, and approvals for development of property located within a city's ETJ. Those city attorneys relied on *City of Lucas v. North Texas Municipal Water Dist*., 724 S.W.2d 811 (Tex.App.-Dallas 1986, writ ref'd n.r.e.), and its progeny.

In *Lucas*, a general-law town applied its city ordinances involving subdivision rules to its ETJ. The North Texas Municipal Water District sought to construct a wastewater treatment plant on a 75-acre tract within Lucas' ETJ. The water district, however, argued that Lucas' subdivision rules did not apply to its ETJ. The Dallas Court of Appeals disagreed. *Id.*, 724 S.W.2d at 817, 823. It held that the former Tex. Rev. Civ. Stat. Ann. Art. 970a § 4 [recodified at Tex. Loc. Gov't Code, §§ 212.002, .003] confers authority upon a city to extend its subdivision ordinances and related development ordinances into its ETJ. *Id.* at 817, 823.

Lucas specifically held that "ordinances regulating development, such as those specifying design, construction and maintenance standards, may be extended by a city into its extraterritorial jurisdiction." *Id*. at 823. Notably, the court stated:

> Were we to hold that building standards are not contemplated by article 970a, we would be left with a statute that grants authority over the laying out of streets, alleys and lot boundaries, but precludes authority over the most important part of a subdivision. Consequently, we conclude that the power over subdivisions conferred by article 970a necessarily or fairly implies a right to issue regulations governing construction of housing, buildings, and the components thereof.

Id. at 823-824.

Understandably, after *Lucus*, some cities felt emboldened to require building permits in the ETJ. Subsequent decisions seemed to support the reasoning in *Lucas*. *See, e.g.*, *Milestone Potranco Dev. Ltd. v. City of San Antonio*, 298 S.W.3d 242 (Tex.App.-San Antonio 2009, pet. denied) (finding that tree preservation ordinance was a regulation of subdivision of land and applied to ETJ), *Hartsell v. Town of Talty*, 130 S.W.3d 325, 328

(Tex.App.-Dallas 2004, pet. denied) ("ordinances regulating development, such as those specifying design, construction and maintenance standards may be extended into a city's extraterritorial jurisdiction"); *Levy v. City of Plano*, 2001 WL 1382520, *2 (Tex. App.-Dallas 2001, no pet.) ("city subdivision regulations apply to the city's ETJ"); *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex.App.-Corpus Christi 1985, writ ref'd n.r.e.) (enjoining the construction of a RV park located within the ETJ).

B. *Bizios*

The Supreme Court's decision in *Town of Lakewood Village v. Bizios*, 493 S.W.3d. 527 (Tex. 2016), however, dramatically changed the playing field (at least as to general law cities). In that case, the Town of Lakewood Village, a general-law municipality, brought an action against the owner of a subdivision lot located in Lakewood Village's ETJ seeking an injunction to stop the owner's construction of a home on the lot until the owner obtained a town building permit. The landowner challenged the power of Lakewood Village to require building permits in the ETJ seeking, effectively, to overrule *Lucas*. *Bizios*, 439 S.W.3d at 529. Because Lakewood Village was a general law city, it sought to rely on certain provisions in the Texas Local Government Code as an implied grant of authority to enforce building codes within its ETJ. *Id*. at 530.

The Court, however, held that Lakewood Village, as a general-law municipality, did not have statutory authority to enforce its building codes or building-permit requirements within its ETJ. It held even though the town had authority to enforce rules and ordinances governing plats and subdivisions of land within its ETJ, building codes and building-permit requirements were not rules governing plats and subdivisions; and that statutes that referenced enforcement of building codes within ETJs and recognized that other statutes might permit such authority (Tex. Loc. Gov't Code §§ 42.021, 212.002, 212.003, 214.904, 233.153) did not authorize the town to enforce building codes within its ETJ. In short, the Court held that the Local Government Code did not impliedly allow the town to enforce building codes within its ETJ, therefore abrogating the holding in *Lucas* and its progeny.

While *Bizios* clearly and definitively closed the door on the power of general law cities to require building permits in the ETJ, as will be seen below, the Court left the door open for home-rule cities to advocate that they have the inherent power to do so because of the nature of home-rule power.

C. Building Permits in the ETJ for Home Rule Cities – After *Bizios*

Not directly answered in *Bizios* was whether home rule cities, which do not look to State law for grants of power like general law cities, are also precluded from requiring building permits in the ETJ. That question is squarely before the Dallas Court of Appeals in a dispute between an ETJ landowner, the City of McKinney, and Collin County, in *Collin County, Texas, v. The City of McKinney, Texas, v. Custer Storage Center, LLC*; No. 05-17-00546-CV (oral argument held on March 8, 2018). McKinney's positions in that case, are set forth herein.

1. Home Rule Authority.

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 exercising the power. *See Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 658 (Tex.1995) ("Laws expressly applicable to one category [of municipalities] are not applicable to others.").

The Texas Constitution has granted home-rule cities the sovereign power to pass any law which is not in conflict with a state statute, including ordinances which regulate building codes and permitting in a home-rule city's ETJ. Texas Const. art. II, § 5 (1912). The "Home-Rule Amendment" has been an inherent right of local self-government for over 100 years. The power of home-rule cities to self-govern without inference unless state law expressly provides otherwise is the fundamental purpose of home rule. As a result, home-rule cities have the inherent right of local control to ensure quality growth, adequate public infrastructure, and safe structures in their ETJs, including extending building codes into the ETJ. *See Bizios*, 493 S.W.3d. at 530 ("[H]ome-rule municipalities inherently possess the authority to adopt and enforce building codes, absent an express limitation on this authority").

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

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

Further, "if the limitations arise by implication, the provisions of the law must be 'clear and compelling to that end.'" *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 807 (Tex. 1984) (providing that a statutory enumeration of powers is not to "be construed as an implied limitation on home rule powers").

2. Arguments in Favor of Home-Rule ETJ Power After *Bizios*.

In 2016, the Texas Supreme Court addressed the power of cities to require building permits in the ETJ in *Bizios*, *supra*. In reviewing this import of the decision, it is important for the reader

to understand what was at stake in *Bizios*. While the precise legal question was whether Lakewood Village, a Type A general-law city, had the authority under certain provisions in the Texas Local Government Code to require a homebuilder to obtain building permits from Lakewood Village to build a home in its ETJ (*id.*, 493 S.W.3d at 529), the eyes of all Texas cities, including home rule cities, were closely following the case, as were scores of special interest groups favoring developers.[3] Everyone wanted to know what cities could and could not do in their ETJs.

The Court recognized this interest when it proclaimed, as part of its analysis, that it would discuss, as a threshold issue, whether ***any type of city*** could enforce building codes in the ETJ.

> Because the Code expressly authorizes the enforcement of building codes in certain circumstances, depending on the status of the governing entity, **we consider when different types of political subdivisions can enforce building codes inside corporate limits, inside ETJs, and in unincorporated areas outside corporate limits** before proceeding to our analysis of the current dispute.

Id (emphasis added).

The Court noted that home-rule cities, by virtue of their home-rule charters, possessed broad powers to pass any law which is not in conflict with a state statute. *Id*. ("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.'") (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (*quoting Dallas Merchant's & Concessionaire's*, 852 S.W.2d at 490–91)).

Importantly, the Court recognized that even limitations on home-rule power must be extraordinarily clear and explicit. *Id*. ("Statutory limitations on home-rule municipal authority are ineffective unless they appear with "unmistakable clarity," and even when they do, a municipality's ordinance is only "unenforceable to the extent it conflicts with [a] state statute.") (*quoting Dallas Merchant's & Concessionaire's, supra*).

Based on the power of a home-rule city to enact a law unless state law expressly and clearly prohibits it, the Court held that home-rule cities could require building permits in general and, presumably given the context of the discussion, in their ETJs. *Id*. ("Therefore, ***home-rule municipalities inherently possess the authority to adopt and enforce building codes, absent an express limitation on this authority***.") (emphasis added). Importantly, the Court did not identify any state law that would curtail a home-rule city's power to require building permits in its ETJ.

Accordingly, while closing the door on the ability of general law cities to enforce building codes in the ETJ, the *Bizios* Court left the door wide open for home-rule cities to advocate that they possess that power. When the Court stated that "home-rule municipalities inherently possess the authority to adopt and enforce building codes, absent an express limitation on this authority,"

[3] Amicus Briefs were filed, in chronological order, by the City of Helotes, the City of Canton, the Town of Cross Roads, the City of McLendon-Chisholm, the Texas Association of Builders, Continental Homes of Texas, DR Horton Homes, the Property Owners' Association of Sunrise Bay, the City of Liberty, the Texas Municipal League, and the Greater San Antonio Builders Association.

the door the Court left open is the implication that "home-rule municipalities inherently possess the authority to adopt and enforce building codes **in their ETJs**, absent an express limitation on this authority." While the Court did not use these words, given the context of the statement, the author submits that a fair reading of what the Court intended to convey was that home rule cities have the power to require building permits in the ETJ. *Bizios*, 493 S.W.3d at 531. In short, not only was the door left open, but the "home-rule welcome mat" was left rather prominently on display for all to see.

Remember, it was the Court that indicated that it was going to answer the question of "when different types of political subdivisions can enforce building codes inside corporate limits, **inside ETJs**, and in unincorporated areas outside corporate limits." *Id.* at 529 (emphasis added). The Court, in its discussion, was trying to address the power of what type of cities could enforce building codes in the ETJ even if its direct holding only addressed general law cities.

In *Bizios*, the Court was trying to reconcile the language in two Local Government Code provisions – Sections 214.904 and 233.153 – with its holding that general law cities had not been provided an explicit grant of authority to enforce building codes in the ETJ.

Those sections provide as follows:

> **§ 214.904 Time for Issuance of Municipal Building Permit**
>
> (a) This section applies only to a **permit** required by a **municipality to erect or improve a building or other structure in** the municipality or **its extraterritorial jurisdiction**.

Tex. Loc. Gov't Code § 214.904 (emphasis added).

> **§233.153 Building Code Standards Applicable**
>
> (a) New residential construction of a single-family house or duplex in the unincorporated area of a county to which this subchapter applies shall conform to the version of the International Residential Code published as of May 1, 2008, or the version of the International Residential Code that is applicable in the county seat of that county.
>
> * * *
>
> (c) **If a municipality** located within a county to which this subchapter applies **has adopted a building code in the municipality's extraterritorial jurisdiction**, the building code adopted by the municipality controls and building code standards under this subchapter have no effect in the municipality's extraterritorial jurisdiction.

Tex. Loc. Gov't Code § 233.153 (emphasis added).

As both sections refer to city building codes in the ETJ, the Court was tasked with giving some meaning to those sections if, as the Court held, they did not apply to general law cities.

> While the references in these sections to the enforcement of municipal building codes within ETJs recognize that other statutes may expressly grant such authority to general-law municipalities, or **that home-rule cities may inherently have such authority**, they do not expressly grant such authority themselves, and the Town does not rely on any other statutes.

Bizios, 493 S.W.3d at 534-35 (emphasis added). It strains credulity to suggest that the Court would haphazardly throw out the statement that "home-rule cities may inherently have such authority [to enforce municipal building codes within ETJs]" if the Court did not mean to, at the very least, leave open that legal possibility.

The Court further noted that

> [w]hile we need not and do not determine today whether any of these statutes permit a municipality to enforce its building codes within its ETJ, we acknowledge that sections 214.904 and 233.153 recognize that **municipalities in general may have such authority**.

Id. at n.7 (emphasis added). Once again, the Court gives credence to its discussion that certain types of cities (*i.e.*, home-rule cities) have the power to enforce building codes within their ETJs through their home-rule charters. If the Court was of the opinion that no category of Texas city could enforce a building code within the ETJ without express legislative authority, it could have said so. It did not.

Moreover, given the robust interest in the case by Texas cities and developers, there can be little doubt that the *Bizios* Court was fully aware of the full implications of its opinion - - not only on those cities it found did not have the power to require building permits in the ETJ (general law cities), but on those cities that it implied did have such power (home-rule cities). *Bizios* leaves open the very real possibility that home-rule cities may require building permits in their ETJs.

III.

THE *CUSTER STORAGE* CASE

Currently pending before the Dallas Court of Appeal is Collin *County, Texas, v. The City of McKinney, Texas, v. Custer Storage Center, LLC*; No. 05-17-00546-CV (oral argument held on March 8, 2018). This case involves, among other matters, the question of whether a city or a county can control building permits in the ETJ. The case is a classic example of the types of conflicts that can arise between cities, counties, and landowners when development in the ETJ occurs.

A. Case Background

Custer Storage Center, LLC ("**Custer**"), purchased land in the City of McKinney's ETJ for the purpose of development as a multiple unit mini-warehouse facility. When the City became aware that the property was developing, it informed Custer that the City would require Custer to obtain development permits from the City. Custer, however, relying on representations from Collin County that the County controlled building permits in the ETJ and not the City, refused to obtain any City permits. The City brought suit against Custer and, after being ordered by the court to add the County as a party, sued Collin County seeking a declaration of the respective rights of the City, the County, and Custer in the matter.

Cross-motions for summary judgment were filed by all parties. The City's motion requested partial summary judgment on a number of matters, including declarations that (1) McKinney had the lawful authority to require development permits in its ETJ, and requires that such permits be obtained to develop in the City's ETJ; and (2) McKinney had properly exercised its authority to extend the application and enforcement of its building codes to its ETJ, and to require building permits and other development permits in its ETJ; and (3) Collin County issued building permits to Custer for construction when Collin County did not possess authority to do so under the City's Interlocal Agreement with the County regarding plats and related permits in the ETJ (the "**1445 Agreement**").

The County's motion requested the trial court to find that (1) the City did not possess the authority to impose its municipal building regulations and municipal building permits beyond the city limits and into the ETJ; and (2) the County did have the authority to issue permits regulating onsite sewage facilities, prescribe requirements for regulation of storm water discharges arising from new construction, and provide fire code safety inspections and permits pertinent thereto for commercial structures located in the ETJ. Custer's motion on the ETJ permitting matter essentially tracked the County's motion.

B. Trial Court Rulings

After ruling on the various motions, the court entered its final judgment, which found and held the following regarding permitting authority in the City's ETJ:

> 1. The Court finds that the City has the lawful authority to require landowners developing property located in the City's ETJ to obtain building permits, inspections and approvals, and pay related fees in those instances, but only in those instances, where the property at issue is subdivided and is therefore lawfully required to obtain plat approval from the City. In those instances where the property at issue is not subdivided and therefore lawfully required to obtain plat approval from the City, the City lacks the lawful authority to require landowners developing property located in the City's ETJ to obtain building permits, inspections and approvals, and pay related fees.
>
> 2. The Court finds that the City-County 1445 Agreement is valid and enforceable, and that the County ceded all platting, inspection and building code authority in the ETJ to the City in 2002 as to all properties that are required to

subdivide under State statute. Properties in the City's ETJ that are not required to subdivide under State statute, however, are not required to obtain building permits, inspections and approvals, and pay related fees.

Because the court found that Custer was not required to plat with the City, it held that Custer did not need building permits from the City. Both the County and the City appealed the court's rulings, with Custer being brought along solely as an appellee.

C. The Appeal

The primary issue on appeal whether home-rule cities in Texas need express legislative authority to regulate in their ETJs. McKinney's position is that, as a home-rule city and under well-established precedent, it has the inherent power to pass legislation on any given subject matter under its home-rule charter unless state law expressly provides otherwise and, consistent with the provisions of its charter, it has done so in extending its power to require building permits to its ETJ. In contrast, the County and Custer assert that McKinney cannot regulate in its ETJ without express statutory authority.

Regarding the 1445 Agreement between the City and the County, the City asserts that (1) the 1445 agreement limits the County's power to regulate in the City's ETJ such that, as a result, the City is the exclusive permitting authority in the City's ETJ; and (2) taken together, the City's power to require building permits in the ETJ (by virtue of its charter), and the County's lack of authority to do so (by virtue of the 1445 Agreement), results in McKinney having the lawful authority to require landowners developing property located in the City's ETJ to obtain McKinney building permits, inspections and approvals, and pay related fees, and the County lacks such authority.

The case was argued on March 8, 2018, and the parties await the court's decision. Given that the issue -- whether home-rule cities have the inherent power to require building permits, inspections, and approvals for development of property located within the ETJ -- has broad reaching implications for municipalities, counties, developers and landowners, the author suspects that this case will find its way before the Texas Supreme Court to obtain an answer to the question that *Bizios* raised, danced around, but left unresolved for the moment.