MUNICIPAL REGULATION OF GOVERNMENTAL USES

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I.

Introduction

In day-to-day municipal land use practice, attorneys and planning staff often are required to address and evaluate whether a city's land use regulations apply to other governmental entities. While we generally assume municipal zoning powers do not apply to the United States, state or county governments, and there is limited authority relative to public schools, is that actually correct? Are there exceptions in the law that perhaps allow some limited municipal control? And even if municipal control is constitutionally or statutorily preempted, in practice do cities nevertheless have input in the land use decision? The purpose of this paper, and the accompanying presentation, is to provide an overview of the legal aspects of municipal regulation of governmental uses—which term is defined as "uses involving public functions conducted by a governmental entity"[1]—as well as address practical issues when cities must deal with land use issues involving other governmental entities. Last, we will address whether a city is exempted from either following or enforcing its own zoning and land use ordinances.

II.

Municipal Regulation of Federal Land Uses

When we think about dealing with agencies of the federal government, the term "noblesse oblige" comes to mind: "the obligation of anyone who is in a better position than others—due, for example, to high office or celebrity—to act respectably and responsibly."[2] That phrase, in a nutshell, expresses how the federal government usually treats municipal land use regulations—"we will do what you city officials request if we deign it to be in our best interests, and if we deem it is not too expensive to comply!"

While the foregoing may appear dismissive of municipal land use authority by the federal government, there are strong constitutional and statutory bases for federal preemption of municipal land use ordinances and regulations. First and foremost, the Supremacy Clause of Article VI of the United States Constitution provides, in part, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the

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[1] *See* Ziegler, *Rathkopf's The Law of Zoning and Planning* § 76:1 at 76-3 (2019) (hereinafter referred to as "*Rathkopf's*").

[2] *See* Noblesse Oblige | Definition of Noblesse Oblige by Merriam-Webster (merriam-webster.com).

land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." As a consequence, any land owned or leased by the United States or an agency of the federal government for purposes authorized by Congress is immune from and supersedes state and local laws in contravention thereof.[3] The only exception to that rule is where there is "clear and unambiguous" congressional authorization allowing for state and local legislation to apply which, not surprisingly, is very rare.[4]

The Texas zoning regulatory scheme similarly unambiguously recognizes federal preeminence over local land use regulations. Section 211.013(c) of the Texas Local Government Code specifically provides that municipal zoning power "does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a . . . federal agency." While the authors are unaware of any federal land use-related statute that "clearly and unambiguously" defers to the land use authority of Texas municipalities, most play revolves around the question to what extent a federal statute or regulation allows a municipality to assert some municipal land use regulatory authority.

With the construction of post offices in local communities, for example, applicable federal guidelines provide that

> [a]s a federal entity, the Postal Service enjoys immunity from state and local regulation except where Congress has waived such immunity. However, despite this immunity, the Postal Service complies with local zoning, planning, and building codes to the extent practical and consistent with Postal Service operational needs in acquiring interests in real property.[5]

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[3] *Rathkopf's* § 76:23 at 76-88. As discussed in note 1 on that page, and not surprisingly, much of the tension between state and local authority versus federal authority has surfaced over the location of post offices.

[4] *Id*. at 76-89 n.2 (citing applicable federal and state case law for the proposition that congressional authorization must be clear and unambiguous). The United States Supreme Court has noted, however, that land use is a "quintessential state and local power" and that "[w]e ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *See Rapanos v. United States*, 547 U.S. 715, 738 (2006) (and cases cited therein).

[5] Handbook RE-1, *U.S. Postal Service Facilities Guide to Real Property Acquisitions and Related Services* (October 2015), subpart 331 at 7 (emphasis added), found at https://about.usps.com/handbooks/re1.pdf.

Not surprisingly, the decision of the federal government to follow or be subject to local land use regulations rests solely with the federal government. Thus, while it is not unusual for federal and local officials to collaborate about the construction of federal facilities in a municipality, the federal officials need not comply with local regulations except to the extent the federal government deems such cooperation in its best interests.

Please note that while a municipality and its land use regulations do not preempt federal authority on federal property (that is, situations where there exists congressional authority that clearly and unambiguously permits the enforcement of municipal land use regulations on federal property), there are many instances where a federal regulatory scheme either allows, alters or otherwise impacts the enforcement of some municipal land use laws on property not owned by the federal government. For example, in the following instances either the underlying federal statute or courts have determined that some municipal land use authority is permitted (this is by no means an exhaustive listing):

- **Cell Towers:** The Telecommunications Act of 1996[6] preserves local authority over the siting and construction of wireless communications facilities; however, there are five limitations on local authorities when dealing with cell towers and telecommunications carriers. A local government: (1) shall not prohibit or have the effect of prohibiting the provision of service[7]; (2) may not unreasonably discriminate between providers of functionally equivalent services[8]; (3) must act within a reasonable time after a request is filed[9]; (4) must issue a written opinion explaining its decision to deny a request, which decision must be supported by substantial evidence[10]; and (5) that denies a request is subject to judicial review of that decision.[11]

- **Churches and Religious Land Uses:** The Religious Land Use and Institutionalized Persons Act ("RLUIPA")[12] provides, among others, religious

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[6] 47 U.S.C. § 151 *et seq.*

[7] *Id*., § 332(c)(7)(B)(i)(II).

[8] *Id*., § 332(c)(7)(B)(i)(I).

[9] *Id*., § 332(c)(7)(B)(ii).

[10] *Id*., § 332(c)(7)(B)(iii).

[11] *Id*., § 332(c)(7)(B)(v).

[12] 42 U.S.C. § 2000cc *et seq.*

institutions protection from discrimination by local governments in land use regulations and the processing of applications for the construction of buildings to be used for religious purposes. Section 2(a) of RLUIPA establishes as a general rule that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest."[13]

In Section 2(a)(2) of RLUIPA, this general rule is limited in scope by the following language, which specifies that this general rule applies in any case in which:

> (A) the substantial burden is imposed in a program or activity that receives federal financial assistance, even if the burden results from a rule of general applicability;
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> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
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> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[14]

Section 2(b) of RLUIPA contains non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. Section 2(b)(1) provides that no state or local government "shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" and Section 2(b)(2) provides that these governmental entities shall not "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."[15] In addition, Section 2(b)(3) states that

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[13] 42 U.S.C.A. § 2000cc-2(a)(1).

[14] *Id*., § 2000cc-2(a)(2).

[15] *Id*., § 2000cc-2(b).

"[n]o government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction; or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[16]

- **Natural Gas Compressor Stations:** Under the federal Pipeline Safety Act,[17] the Fifth Circuit Court of Appeals was asked to determine in *Texas Midstream Gas Services, L.L.C. v. City of Grand Prairie*[18] whether the City of Grand Prairie's zoning authority was subservient to a pipeline company's power of eminent domain. A natural gas gathering company acquired land to construct a compressor station in Grand Prairie and the City required the company to obtain a specific use permit as well as comply with the following detailed site-specific requirements: a building permit for the "station complex"; an approved, platted lot; the compressor station buildings and equipment were subject to a minimum setback; a "security fence" of at least eight feet in height enclosing the compressor station site; the portion of the fence that fronted a public right-of-way must be made of wrought iron, with brick or stone columns every 50 feet; the equipment and "sound attenuation structures" must be enclosed within a building, with a "portion of its exterior walls constructed of masonry"; a four foot high masonry bulkhead wall constructed on at least two building facades most visible to the public; at least two building facades, specifically those most visible to the public, shall be constructed with a brick or stone accent that is at least twenty feet in width, extending vertically to the roof line of the building and terminating with a sloped or arched profile; a roof pitch of no less than 5:12 and containing at least one raised structure in the form of a cupola, steeple tower, clear-story element or similar structures; the building's non-masonry wall surfaces were to be constructed of painted metal, stucco or cementitious fiber board material; specified architectural features; a concrete-paved driveway from the street to the station complex and concrete parking areas; and landscaping "in a manner that is compatible with the environment and existing surrounding area."[19]

While holding that a municipality could enforce its reasonable zoning requirements, "[u]nder Texas law, a city may not unreasonably exercise its police powers to zone out eminent domain authorities all together."[20] Here, Grand

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[16] *Id*.

[17] 49 U.S.C. § 60101-60137.

[18] 608 F.3d 200 (5th Cir. 2010).

[19] See *Texas Midstream Gas Services, L.L.C. v. City of Grand Prairie,* 2008 WL 5000038 at *6 (N.D. Tex. 2008), citing City of Grand Prairie Unified Dev. Code art. 4, § 10 (2008). The federal district court concluded that only the security fencing requirement was preempted under the Pipeline Safety Act. *Id*. at *12.

[20] *Texas Midstream Gas Services*, 608 F.3d at 209.

Prairie through its detailed development requirements did not "zone out" natural gas compressor stations and the only zoning requirement that was preempted under the federal statute was the security fencing requirement.[21] All other development standards were enforceable.

III.

Municipal Regulation of State and County Land Uses

In section II, above, we addressed federal preeminence over local land use regulations; however, the same preemption exists for state and county government over local land use regulations. Besides recognizing that the federal government is not subject to local land use regulations, Section 211.013(c) of the Texas Local Government Code similarly provides that municipal zoning power "does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state . . . agency." The statute does provide, however, that local land use regulations in fact do apply "to a privately owned building or other structure and privately owned land when leased to a state agency."[22]

The authors are unaware of any state legislation that specifically authorizes municipalities to impose local land use regulations on state- or county-owned properties; however, not unlike federal legislation, there are numerous state statutes that alter or otherwise impact the enforcement of some municipal land use laws on property not owned by a state or county government. For example, in the following instances either the underlying state statute or courts have determined that some limited municipal land use authority is permitted (again, this is by no means an exhaustive listing):

- **Community/Group Homes:** Chapter 123 of the Texas Human Resources Code, entitled "Community Homes for Persons with Disabilities," prohibits municipal zoning restrictions against community homes. The statute provides basic definitions, and addresses local limitations on community homes.

Initially, a "community home" is defined first, as "a community-based residential home" operated by: (A) the Texas Department of Aging and Disability Services; (B) a community center organized under Chapter 534, Texas Health and Safety Code, that provides services to persons with disabilities; (C) an entity subject to the Texas Nonprofit Corporation Law as described by Section 1.008(d) of the Texas Business Organizations Code; or (D) an entity certified by the Texas Department of Aging and Disability Services as a provider under the ICF-

[21] *Id*. at 212.

[22] Tex. Local Gov't Code § 211.013(d).

IID[23] medical assistance program; or second, as "an assisted living facility licensed under Chapter 247 of the Texas Health and Safety Code, "provided that the exterior structure retains compatibility with the surrounding residential dwellings."[24]

A community home must provide the following services to its disabled residents[25]: food and shelter, personal guidance, care, habilitation services and

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[23] Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions program, which provides residential and habilitation services to people with intellectual disabilities or a related condition. *See* https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/intermediate-care-facilities-icfiid.

[24] Tex. Hum. Res. Code § 123.004. In a 2011 paper written by Monte Akers and Jason D. King for the Fall Conference of the Texas City Attorneys Association, entitled "Municipal Regulation of Group Homes," they identify at least 24 types of homes, houses, centers and other facilities that may qualify as group homes: "agency foster home," Tex. Hum. Res. Code ch. 42; "assisted living facility," Tex. Health & Safety Code ch. 247; "boarding home facility," Tex. Health & Safety Code ch. 260; "child-care facility," Tex. Hum. Res. Code ch. 42; "community corrections facility," Tex. Gov't Code ch. 509, including: (A) a restitution center; (B) a court residential treatment facility; (C) a substance abuse treatment facility; (D) a custody facility or boot camp; (E) a facility for an offender with a mental impairment, as defined by Tex. Health & Safety Code § 614.001; (F) an intermediate sanction facility; and (G) a "state jail felony facility" under Subchapter A of Tex. Gov't Code ch. 507; "community homes," Tex. Hum. Res. Code ch. 123; "community residential facility," Tex. Gov't Code § 508.119; "day-care center," Tex. Hum. Res. Code § 42.002; "family home," Tex. Hum. Res. Code ch. 42; "foster group home," Tex. Hum. Res. Code ch. 42; "foster home," Tex. Hum. Res. Code ch. 42; "group day-care home," Tex. Hum. Res. Code ch. 42; "halfway houses," Tex. Gov't Code § 508.118, whether operated by the state, local governments, religious organizations, non-profits, or private companies, including those for former prisoners, mentally handicapped, physically disabled, mental patients, post-addiction recovery, sex offenders, parolees, juvenile/troubled youth, and drug rehabilitation; "hospice," Tex. Health & Safety Code ch. 142; "personal care facilities," Tex. Health & Safety Code ch. 247; "special care facilities," Tex. Health & Safety Code ch. 248; and "residential AIDS hospices," Tex. Health & Safety Code § 248.029.

[25] According to Section 123.002 of the Texas Human Resources code, a "person with a disability" means a person whose ability to care for himself or herself, perform manual tasks, learn, work, walk, see, hear, speak, or breathe is substantially limited because the person has: (1) an orthopedic, visual, speech, or hearing impairment; (2) Alzheimer's disease; (3) pre-senile dementia; (4) cerebral palsy; (5) epilepsy; (6) muscular dystrophy; (7) multiple sclerosis; (8)

supervision.[26] In the zoning context, a community home operated pursuant to Chapter 123 of the Texas Human Resources Code "is authorized in any district [of a city] zoned as residential" and any "restriction . . . that relates to the use of property may not prohibit the use of the property as a community home."[27] Further, while community homes are restricted to not more than six persons with disabilities, regardless of the legal relationship with each other, and two supervisors at any one time,[28] a community home may not be established within one-half mile of an existing community home.[29]

- **Alcoholic Beverage Establishments:** Any municipal attorney or planning professional can attest to the questions that often arise about the extent to which municipalities may regulate alcoholic beverages—from where they may be sold and the extent that a city may regulate alcoholic beverage sales, to which municipal zoning regulations can be applied to alcoholic beverage establishments. Prior to 1977, alcoholic beverages were regulated in the State of Texas by the Texas Liquor Control Act. Numerous courts interpreting the Act held that it did not preempt home-rule cities from enacting more stringent regulations.[30] In 1977, the Texas Liquor Control Act was codified into the Texas Alcoholic Beverage Code ("TABC"). Section 1.06 of the TABC states that

> [u]nless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this code.[31]

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cancer; (9) heart disease; (10) diabetes; (11) an intellectual disability; (12) autism; or (13) mental illness.

[26] *Id*., § 123.005.

[27] *Id*., § 123.003.

[28] *Id*., § 123.006.

[29] *Id*., § 123.008.

[30] *See, e.g., City of Clute v. Linscomb*, 446 S.W.2d 377 (Tex.Civ.App.-Houston [1st Dist.] 1969, no writ); *Louder v. Texas Liquor Control Board*, 214 S.W.2d 336 (Tex.Civ.App.-Beaumont 1948, writ ref'd n.r.e.); *Eckert v. Jacobs*, 142 S.W.2d 374 (Tex.Civ.App.-Austin 1940, no writ).

[31] Tex. Alco. Bev. Code § 1.06.

Nevertheless, subsequent to this codification, at least one court continued to hold that the statute did not preempt more restrictive municipal control.[32] In 1987, the Texas Legislature added Section 109.57 to the TABC. Section 109.57 was further amended in subsequent legislative sessions and now reads, in part, as follows:

> (a) Except as is expressly authorized by this code, a regulation, charter, or ordinance promulgated by a governmental entity of this state may not impose stricter standards on premises or businesses required to have a license or permit under this code than are imposed on similar premises or businesses that are not required to have such a license or permit.
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> (b) It is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code.
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> (c) Neither this section nor Section 1.06 of this code affects the validity or invalidity of a zoning regulation that was formally enacted before June 11, 1987, and that is otherwise valid, or any amendment to such a regulation enacted after June 11, 1987, if the amendment lessens the restrictions on the licensee or permittee or does not impose additional restrictions on the licensee or permittee. For purposes of this subsection, "zoning regulation" means any charter provision, rule, regulation, or other enactment governing the location and use of buildings, other structures, and land.[33]

The Texas Supreme Court considered the preemptive effect of Section 109.57(a)-(c) in *Dallas Merchant's and Concessionaire's Association v. City of Dallas*.[34] In that case, the Dallas Merchant's and Concessionaire's Association and other various parties challenged an ordinance passed by the City of Dallas which prohibited the sale of alcoholic beverages within 300 feet of residential areas in certain parts of the City without a specific use permit. The City's ordinance was passed in an effort to curtail rising crime and other problems associated with the high concentration of alcohol-related businesses in the Fair

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[32] *See Young, Wilkinson & Roberts v. City of Abilene*, 704 S.W.2d 380, 383 (Tex.App.-Eastland 1985, writ ref'd n.r.e.); *Abilene Oil Distributors v. City of Abilene*, 712 S.W.2d 644 (Tex.App.-Eastland 1986, writ ref'd n.r.e.).

[33] Tex. Alco. Bev. Code § 109.57 (emphasis added).

[34] 852 S.W.2d 489 (Tex. 1993).

Park area of Dallas. Following a bench trial, the trial court held that the City's ordinance was void to the extent it conflicted with the TABC. The Texas Court of Appeals reversed and rendered judgment in favor of the City.

On appeal, the Texas Supreme Court reversed the Court of Appeals and affirmed the judgment of the trial court. The Texas Supreme Court held that the City's ordinance was preempted by the TABC, stating that "the regulation of alcoholic beverages is exclusively governed by the provisions of the TABC unless otherwise provided. Section 109.57 clearly preempts an ordinance of a home-rule city that regulates where alcoholic beverages are sold under most circumstances."[35] The Court concluded that the City could have prohibited the sale of alcoholic beverages in residential areas, but not in the 300-foot zone surrounding residential areas. The Court also held that Section 109.33, which permits a city to prohibit the sale of alcoholic beverages within 300 feet of a church, school, or public hospital, did not apply to residential areas. Accordingly, a municipality's authority to enact new legislation regulating the sale of alcoholic beverages is unenforceable to the extent it is in conflict with the TABC.

Importantly, Sections 1.06 and 109.57 of the TABC do not affect the validity or invalidity of a zoning regulation that was formally enacted before June 11, 1987, and that is otherwise valid, or any amendment to such a regulation enacted after June 11, 1987, if the amendment lessens the restrictions or does not impose additional restrictions.[36]

The legal and practical effects of Section 109.57 on municipal land use regulations are far-reaching: (1) a city may not impose stricter standards on premises required to have a liquor license than are imposed on similar premises that are not required to have a liquor license; (2) the TABC exclusively governs the regulation of alcoholic beverages and a city may not discriminate against a business holding a liquor license; (3) a city may prohibit the sale of alcohol in residential zones, but not in non-residential zones; and (4) a city may not prohibit the sale of alcohol in one residential zone but allow it in another residential zone.

- **Pawn Shops:** In part in response to attempts by municipalities to "zone out" pawn shops, in 1991 the Legislature approved House Bill 1258, now codified in Section 211.0035 of the Texas Local Government Code, which addresses the authority of municipalities to zone pawnshops:

> (b) For the purposes of zoning regulation and determination of zoning district boundaries, the governing body of a municipality shall designate pawnshops that have been licensed to transact

[35] *Id.* at 491-92.

[36] Tex. Alco. Bev. Code § 109.57(c).

business by the Consumer Credit Commissioner under Chapter 371, Finance Code, as a permitted use in one or more zoning classifications.

(c) The governing body of a municipality may not impose a specific use permit requirement or any requirement similar in effect to a specific use permit requirement on a pawnshop that has been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code.[37]

Consequently, Texas municipalities now may not "zone out" pawnshops from a city, may not impose any type of specific use permit or similar permit requirement on pawnshops, and must allow pawnshops as a permitted use in at least one zoning district in the city.[38]

- **Oil and Natural Gas Operations:** During the last 20 years many Texas municipalities struggled with the pervasive effects of gas drilling on their communities, and it was not unusual that municipal drilling regulations were usually very detailed and addressed drilling surface site standards as well as setbacks from nearby surface land uses.[39] On November 4, 2014, everything changed—the citizens of Denton overwhelmingly enacted Texas' first hydraulic fracturing ban, with 59% of residents voting in favor of the ban. The "fracking ban" was a municipal business regulation, not a zoning regulation, and it simply provided that "it shall be unlawful for any person to engage in hydraulic fracturing within the corporate limits of the City." The same week of the election saw lawsuits being filed by the oil and gas industry against the City of Denton, but more significantly, the next session of the Legislature in January 2015 took care of any future fracking bans or other municipal regulations the industry considered to be against its best interests. The Legislature adopted House Bill 40, now codified in Section 81.0523 of the Texas Natural Resources Code.

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[37] Emphasis added.

[38] *See Hollingsworth v. City of Dallas*, 931 S.W.2d 699, 704 (Tex.App.-Dallas 1996, writ denied) (Court of Appeals compares municipal regulation of pawnshops to municipal regulation of alcoholic beverage sales, concluding that "the legislature nevertheless passed other legislation enabling home-rule cities to regulate the location of those businesses under limited circumstances").

[39] Terry will shamelessly plug a book for which he was a contributing author. *See Beyond the Fracking Wars*, E. Powers and B. Kinne, eds. (American Bar Association 2013). It addresses the plethora of issues confronted by local governments in regulating natural gas drilling operations.

House Bill 40 mandated that an oil and gas operation[40] is subject to the exclusive jurisdiction of the state, and provided that a city "may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction" of the city[41]; however, cities were authorized to "enact, amend, or enforce an ordinance or other measure that: (a) regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements; (b) is commercially reasonable[42]; (c) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and (d) is not otherwise preempted by state or federal law." While the legislation offers cities a "safe harbor" for regulations that have been in effect for at least five years,[43] the authors believe it is highly unlikely that the "safe harbor" would provide much solace to a local government undergoing a court attack on its drilling regulations by a natural gas operator.

IV.

Municipal Regulation of Schools

Not that many years ago the law was fairly—but certainly not 100%—clear about the extent to which a municipality could impose its land use regulations on independent school districts. The advent of charter schools, some of which may or may not have several of the attributes of governmental entities, has complicated the issue of the extent of permissible municipal regulation. Consequently, we have opted to address municipal regulation of schools that are

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[40] An "oil and gas operation" means "an activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities." Tex. Nat. Res. Code § 81.0523(a)(2).

[41] Tex. Nat. Res. Code § 81.0523(b).

[42] "Commercially reasonable" is defined as "a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator's capacity to act." *Id*., § 81.0523(a)(1).

[43] *Id*., § 81.0523(d).

operated by independent school districts or other governmental entities versus charter schools operated by non-governmental entities. Thus, the parameters of municipal regulation of charter schools operated by non-governmental entities are less than clear at the present time.

A. Schools Operated by Independent School Districts

There has long been conflict between municipalities and independent school districts whether city zoning ordinances apply to school districts. Over the years cities and school districts have litigated this issue, and the result has been fairly clear—cities may not "zone out" schools but may enforce their reasonable land use regulations relative to schools.

The first Texas Supreme Court decision to address this issue was handed down in 1964 in *Port Arthur Independent School District v. City of Groves*.[44] In *Groves*, the Supreme Court held that school districts are subject to building codes, city inspections and permits, writing that a city "in performing its duties as delegated to it by the state, does not usurp the authority and responsibility of the school district in the realm of education by requiring the school buildings to meet certain minimum standards of construction any more than it usurps the control and management of individuals and private corporations over their property and affairs by making them meet those same standards."[45]

Not surprisingly, almost a decade later the Texas Supreme Court held that a municipality could not "zone out" a facility operated by an independent school district. The City of Sunset Valley, a southwest suburb of Austin, had zoned all land in its corporate limits for residential purposes. When Austin Independent School District (AISD) proposed to build a sports center, a school bus barn and garage in Sunset Valley, the city refused to issue a permit. The Supreme Court ruled in favor of AISD, writing that municipalities cannot utilize their zoning powers to totally exclude the reasonable location of school facilities within their municipal boundaries.[46]

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[44] 376 S.W.2d 330 (Tex. 1964).

[45] *Id*. at 334. *See also* Tex. Att'y Gen. Op. JM-180 (1984) (the legislature, by authorizing a school district to locate a school facility within a municipality, did not preempt the city's police power to enforce necessary health and safety regulations).

[46] *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 673 (Tex. 1973). *See also City of Addison v. Dallas Indep. Sch. Dist.*, 632 S.W.2d 771, 773 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (a school district may place any facility within an area zoned residential and is generally exempt from a city's location-based requirements as long as the school district is not acting unreasonably or arbitrarily).

With *Groves* and *Sunset Valley* in mind, questions still remained about the extent of municipal regulation over school districts in the land use context—the authors' experience has been that most cities do not "zone out" school district facilities and most school districts have no objection to city inspections and obtaining construction-related permits from a city. But the unanswered question remained about the degree of regulatory control a city had over a school district. Fortunately, the Texas Attorney General has provided additional (but by no means conclusive) context in responding to this issue. In Texas Attorney General Opinion No. GA-0697 (2009), Attorney General Greg Abbott determined that a home rule municipality "may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of aesthetics and the maintenance of property values."[47] Thus, from the foregoing case law and attorney general opinions, a city cannot, under its zoning laws, prevent a school district from constructing facilities authorized as a school function under the Education Code, but a city may enforce its (1) building codes and (2) land development regulations for the purpose of aesthetics and maintenance of property values.

B. Charter Schools

More and more frequently cities are required to determine the extent to which charter schools are subject to their land use regulations. Should a charter school be treated the same as a school operated by the local independent school district, or are charter schools distinct? The answer to that question is not quite clear at present.

Charter schools were authorized by the Texas Legislature in 1995 to provide an alternative to traditional public schools. The statutory purposes for charter schools are to (1) improve student learning; (2) increase the choice of learning opportunities within the public school system; (3) create professional opportunities that will attract new teachers to the public school system; (4) establish a new form of accountability for public schools; and (5) encourage different and innovative learning methods.[48] The various types of open-enrollment charter schools[49] are addressed in Subchapter D of Chapter 12 of the Texas Education Code. Specifically, Section 12.101 of the Education Code describes in detail "eligible entities" for an open-enrollment charter school: (1) a charter may be granted to an institution of higher education; (2) a private or independent institution of higher education; (3) a tax-exempt organization; or (4)

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[47] Tex. Att'y Gen. Op. GA-0697 at 3 (2009).

[48] Tex. Educ. Code § 12.001(a).

[49] An open-enrollment charter school is one that must accept every student who applies.

a governmental entity.[50] Open-enrollment charter schools are "part of the public school system of this state."[51]

The paradox of charter schools is that while on one hand they are "part of the public school system," those that are operated as non-profit tax-exempt organizations specifically lack many of the indicia of public entities—for example, their boards of trustees are not elected by the citizens, they do not possess the power to tax, they have no mechanism by which to condemn property, and they possess no power to issue public debt.[52] Further, Section 12.1058(c) of the Education Code provides that an open-enrollment charter school operated by a tax-exempt entity "is not considered to be a political subdivision, local government or local governmental entity" except in very limited circumstances.[53] So, while it is clear that a charter school operated by an independent school district or a public university is considered part of a governmental entity, how should cities treat charter schools operated by non-profit tax-exempt entities?

The Texas Education Code provides a mixed message in response to this question. Section 12.103(a) of the Education Code mandates that "an open-enrollment charter school is subject to . . . municipal zoning ordinances governing public schools"; however, Section 12.103(c) states that such campuses are exempt from municipal zoning regulations governing public schools if the campus is "located in whole or in part in a municipality with a

[50] *Id*., § 12.1010(a). Both an "institution of higher education" and a "private or independent institution of higher education" are defined in § 61.003 of the Texas Education Code.

[51] *Id*., § 12.105.

[52] While not specifically addressing zoning or land use issues, a May 2018 article in the *Texas Tribune* addressed the issue whether charter schools are considered public or private. The article was appropriately entitled: *Are charter schools private? In Texas courts, it depends why you're asking*. *See* https://www.texastribune.org/2018/05/07/are-charter-schools-private-texas-courts-depends-when-you-ask/.

[53] An open-enrollment charter school operated by a tax-exempt entity is only considered a political subdivision, a local government or a governmental entity when (1) an applicable statute specifically applies to an open-enrollment charter school or (2) a provision in Chapter 12 of the Education Code states that a specific statute is applicable to an open-enrollment charter school. *See* Tex. Educ. Code § 12.1058(c).

population of 20,000 or less."[54] In such cases, the open-enrollment charter school need not be treated as a public school.

The authors do note, however, that during the preparation of this paper, two identical companion bills were introduced in the 87th Regular Session of the Texas Legislature—Senate Bill No. 487 and House Bill No. 1348.[55] If adopted, this legislation appears to expand municipal regulation of open-enrollment charter schools—but only by cities with a population of more than 20,000.

Under both bills,[56] Section 12.1058 of the Education Code would be amended to add a new subsection (d), which provides as follows:

> (d) Except as provided by Section 12.103(c), a municipality shall consider an open-enrollment charter school a school district for purposes of zoning, permitting, code compliance, and development.

Assuming the foregoing legislation is enacted this year, the following is a summary of municipal regulatory authority for an open-enrollment charter school:

- In a city with a population in excess of 20,000, an open-enrollment charter school is considered a school district, and the charter school is subject to the same municipal zoning, permitting,

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[54] Please note that when a Texas statute refers to "population," according to the Code Construction Act (which applies to any code enacted by the 60th or subsequent Legislature), that term means "the population shown by the most recent federal decennial census." *See* Tex. Gov't Code § 311.005(3). Therefore, at the present time the most recent decennial census is the 2010 federal decennial census. The 2020 federal decennial census should be released sometime later this year.

[55] Both bills address various amendments to the Texas Local Government Code specific to both public school districts and charter schools. Section 2 of both bills address development standards in territory which has been annexed for limited purposes (*see* Tex. Local Gov't Code § 212.902); Section 3 amends Chapter 250 of the Local Government Code by adding a new § 250.013 which provides that a municipality, among others, cannot prohibit an open-enrollment charter school from locating at any location or in any zoning district in the municipality; Section 4 amends § 395.022 of the Local Government Code by not requiring open-enrollment charter schools to pay impact fees, as is the current practice with independent school districts; and Sections 5 and 6 amend § 552.053 of the Local Government Code by exempting open-enrollment charter schools from fees imposed by a municipal drainage utility ordinance.

[56] *See* Senate Bill No. 487, § 1 and House Bill No. 1348, § 1.

code compliance and development ordinances governing a school district.

- In a city with a population of 20,000 or less, an open-enrollment charter school is not subject to a municipal zoning ordinance governing public schools.

As a practical matter, many cities do not have specific zoning regulations governing schools. Schools, like most other governmental facilities, generally may be located in any zoning district, so what municipal zoning ordinance provisions would apply to an open-enrollment charter school? As a practical matter—with no Texas case law or attorney general opinion directly on point, and with the proliferation of non-profit tax-exempt charter schools, particularly in urban/suburban areas around the state—we believe it is wise to take Section 12.105 of the Education Code at face value. Any open-enrollment charter school is a public school and consequently, whether operated by a non-profit tax-exempt entity or not, and regardless of the indicia of public entities the charter school may possess, they should be analyzed the same as facilities operated by independent school districts. Further, municipal zoning and land development codes should be amended, if necessary, to provide that charter schools are subject to the same regulatory framework as school districts. There is no reason to believe that open-enrollment charter schools will be treated any differently than independent school districts when it comes to municipal land use regulations. Therefore, we would recommend following *Groves*, *Sunset Valley* and Texas Attorney General Opinion No. GA-0697 (2009): a city may enforce its (1) building codes and (2) land development regulations for the purpose of aesthetics and maintenance of property values.

V.

Must Cities Follow and Enforce Their Own Land Use Regulations?

In the absence of express or clearly implied statutory preemption, the general rule has been that municipalities may be granted immunity from zoning ordinances based on the application of traditional immunity doctrines. These doctrines include: (1) the distinction between the entity exercising a governmental or propriety function; (2) the doctrine of eminent domain; and (3) the state sovereign immunity doctrine.[57] Texas case law has addressed both the governmental function test and the eminent domain authority of Texas municipalities, generally concluding that cities are not required to follow their own land use regulations.

[57] *Rathkopf's* § 76:2 at 76-6.

Texas courts have long recognized the authority of a municipality to locate municipal buildings and structures anywhere in the city. In *City of McAllen v. Morris*,[58] the San Antonio Court of Civil Appeals held that "absent some restraint imposed by constitutional provision or by action of the State Legislature," the provisions of the Texas Zoning Enabling Act[59]

> do not preclude the legislative body of a city from providing in a comprehensive zoning ordinance that such ordinance shall not prevent the city from erecting in any zone such municipal buildings and structures as may be deemed necessary for the safety, health and general welfare of the public.[60]

This conclusion was upheld by the Texas Supreme Court more than 30 years later in *City of Lubbock v. Allen*.[61] In *Allen*, the City of Lubbock "decided to improve a heavily traveled street intersection next to the Austins' house" and "it was necessary for the City to acquire portions of the Austins' lot, thus leaving the Austins with a side yard only four and three-tenths feet wide."[62] The Austins sued, contending that "the City had abused its discretion by exercising its power of eminent domain in derogation of one of its zoning ordinances."[63]

The Texas Supreme Court, framing the question as "whether a city is bound by its zoning ordinances when exercising its eminent domain authority,"[64] concluded that "a city exercising its eminent domain power is not bound by its own zoning ordinance unless the objecting party can show that the condemnation is unreasonable or arbitrary."[65] Moreover, the Court held that

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[58] 217 S.W.2d 875 (Tex.Civ.App.—San Antonio 1948, writ ref'd). In *Morris*, neighboring property owners contended that the City of McAllen's construction of a fire station violated the city's zoning ordinance and the city should be enjoined from constructing or operating the proposed fire station.

[59] Found in Chapter 211 of the Texas Local Government Code.

[60] *Morris*, 217 S.W.2d at 877.

[61] 628 S.W.2d 49 (Tex. 1982).

[62] *Allen*, 628 S.W.2d at 49. The Lubbock zoning ordinance required a 10-foot minimum side yard.

[63] *Id*. at 49-50.

[64] *Id*. at 50.

[65] *Id*. The Court specifically cited its 1973 *Sunset Valley* decision, noted above in n. 46.

where a city's exercise of eminent domain has come into conflict with an existing zoning ordinance, the reasonableness or arbitrariness or the proposed action is a question of law to be decided by the court. "To hold otherwise would tend to substitute the land use preferences of a jury for those of a governing body acting under statutory authority, presumably with a special expertise in the area."[66] Therefore, Texas cities may erect municipal buildings and facilities in any zoning district where the city deems necessary for the public health, safety and welfare, even if it is in violation of the city's zoning regulations.

Similarly, the law is well-established that a municipality is not liable for its failure to enforce its own ordinances, and that irregularities in following its own ordinances do not render governmental actions void.[67]

The rationale behind the canon that municipalities are not liable for the failure to enforce their own ordinances stems from the public duty rule.

> The public duty rule provides that where a municipality has a duty to the general public, as opposed to a particular individual, breach of that duty does not result in tort liability. . . . The rule protects municipalities from liability for failure to adequately enforce general laws and regulations, which were intended to benefit the

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[66] *Id*.

[67] *See, e.g., Ellis v. City of West University Place*, 175 S.W.2d 396, 398 (Tex. 1943) (municipality not liable for damages while attempting to enforce a void ordinance); *Swafford v. City of Garland,* 491 S.W.2d 175, 176 (Tex.Civ.App.—Eastland 1973, writ ref'd n.r.e.) (no liability for damages for the exercise or failure to exercise discretion in enforcing a city ordinance); *Young v. Jewish Welfare Fed'n of Dallas*, 371 S.W.2d 767, 771 (Tex.Civ.App.—Dallas 1963, writ ref'd n.r.e.) (city's procedures in amending site plan, even if in violation of city's own ordinances, were an exercise of the city's governmental powers and the city was immune from damages for any irregularities); *Stigler v. City of Chicago*, 268 N.E.2d 26, 29 (Ill. 1971) (city not liable for failure to enforce housing code since "[t]he ordinance did not give rise to any special duty to the plaintiff or to any particular person different from the public at large."); *Hannon v. Counihan*, 369 N.E.2d 917, 921-22 (Ill.App.Ct. 1977) (city not liable for failure of building inspector to follow city building code since "[t]o recognize such a duty here would be to make a municipality substantially an insurer of all construction it undertook to inspect and control through its building codes and would likely discourage all efforts at such control."); *Whitney v. City of New York*, 275 N.Y.S.2d 783, 784 (N.Y. App. Div. 1966) (city not liable for negligent inspection and for failure to enforce ordinances relating to inspection since "[u]nless it can be said that the statute was enacted for the benefit of an individual, no liability may be imposed for failure to carry out the statutory function.").

> community as a whole. The public duty rule is not technically grounded in governmental immunity, though it achieves much the same result. Unlike immunity, which protects a municipality from liability from breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place.
>
> Courts give several reasons for the rule. First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone would discourage municipalities from passing such laws in the first place. Fourth, exposure to liability would make avoidance of liability rather than promotion of the public welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.[68]

Consequently, even if a party could prove that a city had violated its own ordinances, such irregularities would not subject the city to liability or damages.

VI.

Conclusion

Although there are both constitutional and statutory limitations on the extent of municipal zoning powers when dealing with other governmental entities, municipalities are not powerless and often there are negotiations between cities and other governmental entities about the extent of municipal regulations that are acceptable. In practice, cities often have significant input in the land use decisions of other governmental entities.

[68] *McQuillin Municipal Corporations* § 53.18 (3d ed.) (footnotes omitted).

ABOUT THE PRESENTERS:

Terrence S. Welch

In 1981, Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1981, Terry has represented numerous growing communities in North Texas.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also recently had published an article on urban sprawl in Texas in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Vice Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board. In August 2015 he was appointed a member of the Board and in September 2019 Mayor Eric Johnson appointed him as the Chair of the Civil Service Board.

Tommy Ludwig

Tommy currently serves as Assistant City Manager with the City of Waxahachie, and has oversight of the City's development services related functions. He manages the Building Inspection, Code Enforcement, Solid Waste Services, Health Inspection, Planning, GIS, Public Works, Engineering, and Water and Wastewater Utilities operations for the City of Waxahachie, where he has worked since 2017.

Prior to his time in Waxahachie, Tommy worked for the City of Dallas, in a number of different roles, for 10 years. His positions included Management Development Associate, Assistant to the City Manager, Fleet and Fuel Operations Manager, Process Improvement Team Manager, and Development Services Administrator. As the City's Development Services Administrator Tommy managed the Building Inspection and Plan Review, Subdivision, and Private Engineering Review functions for Dallas.

Tommy holds a Bachelor's Degree from the University of Texas, Tyler and a Master's Degree from the University of North Texas. Tommy also holds a Lean Six Sigma Green Belt Certification and is currently pursuing a Certified Public Manager Certificate from Texas State University.