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Do Counties Need New Powers to Cope With Urban Sprawl?

Much of Texas' recent population boom has taken place in unincorporated areas outside of city limits. According to the 2000 census, Texas' 23 percent population increase from 1990 to 2000 made it the eighth fastest growing state, and suburban counties were the hotspots. Nine of Texas' 10 fastest growing counties contain large unincorporated areas next to a major city: Collin, Denton, and Rockwall counties near Dallas and Fort Worth; Bastrop and Williamson counties near Austin; Bandera and Kendall counties near San Antonio; and Fort Bend County near Houston.

Ranching and farming traditionally have dominated the unincorporated areas of Texas counties. In fact, the rural setting of these areas is a significant part of their appeal to former city dwellers. In areas free of municipal development restrictions, people can buy homes more cheaply than they could in a city. However, new homeowners also may bring expectations of levels of service and regulatory protection that county governments do not provide. Conflicts, especially regarding land uses, have arisen in high-growth counties as county officials attempt to meet the demands of their changing constituency.

Many county governments are struggling to cope with the challenges arising from urban sprawl. However, a county's authority to deal with such issues is limited by the Texas Constitution and state law.

The 78th Legislature may consider proposals to expand counties' authority to resolve incompatible land uses and manage growth in rapidly urbanizing areas.

Some advocate expanding counties' authority to resolve incompatible land uses and to manage growth. They say the Legislature should authorize counties to regulate land use through limited zoning and other measures, to assess impact fees on new development, and to adopt and enforce construction codes. Opponents of these measures say that counties already have adequate authority to address growth-related issues and that granting

them additional powers could lead to a proliferation of regulations that would increase the cost of housing in unincorporated areas.

This report examines the role of county government in Texas in regulating land use and explores some issues facing counties whose unincorporated areas are undergoing rapid urbanization.

County governance and powers

All Texas counties, regardless of size, have the same form of government, although minor variations exist in some urban counties where the state has allowed additional offices or courts. The commissioners court is the primary policy-making and administrative body of a county. Four commissioners, elected by precinct, and the county judge comprise the commissioners court. The county judge serves as the presiding officer. The court approves the county budget, sets the tax rate, approves subdivision platting, and may oversee county activities such as bridge and road repair, local courts, or county hospital administration. It also manages all county functions not run directly by other county officials. In most counties, voters also elect a sheriff, tax assessor-collector, clerk, and treasurer, all with duties specified by the Constitution or state statute.

As a legal subdivision of the state, a county serves as an administrative arm of the state in helping to carry out the state's business. A county does not have as much autonomy as a city. Under Texas Constitution, Art. 11, sec. 5 and V.T.C.S., Title 28, Chapter 13, a city of more than 5,000 people may adopt a home-rule charter establishing a city government structure and providing for the distribution of powers and duties among branches of the government. A home-rule city has the full power of local self-government, subject to certain statutory limitations. In contrast, a county has neither a charter nor home-rule authority but only the authority expressly granted it by the Constitution or state statutes.

At one time, the Constitution included a procedure by which counties theoretically could exercise home-rule authority. In 1933, voters approved an amendment that allowed counties with more than 62,000 residents to adopt a

home-rule charter and establish their own form of local government. The language of this amendment, however, made it unworkable. Because a county is a legal subdivision of the state, the amendment's requirement that no county charter could "inconsonantly affect" state laws or policies appeared to prevent a county from adopting any government structure other than the form of county government required by state law. Only El Paso County brought a charter up for a public vote, and the measure failed. Texas voters repealed the amendment in 1969, along with various other provisions considered inoperative or obsolete.

No county in Texas has general ordinance-making authority, although in many cases, the Legislature has authorized a county or counties to enact rules or ordinances in regard to a specific issue. All counties have regulatory authority over residential subdivision plats, junkyards, and wild animals. Local Government Code, chapter 232 grants counties specific powers to

regulate subdivision development and approve plats. Under Transportation Code, sec. 396.041, counties may pass ordinances requiring certain automotive wrecking and salvage yards to be licensed by the county. A county may condition approval of the license upon operation of the junkyard at a

location approved by the commissioners court. Counties also may regulate or prohibit the keeping of a wild animal outside of city limits (Local Government Code, sec. 240.002). Also, the Texas Mass Gatherings Act (Health and Safety Code, chapter 751) prohibits a mass gathering of 5,000 or more people, such as at an outdoor concert, in an unincorporated area without a permit from the county judge.

Many counties have unique powers to regulate specific activities or to enact ordinances. For example, although counties generally do not have zoning authority, certain counties may adopt zoning ordinances in limited areas around special features, such as Padre Island beachfront, Amistad Recreation Area, El Paso Mission Trail Historical Area, or specific lakes (Local Government Code, chapter 231). In some counties with this zoning authority, a petition for election and approval by a majority of voters is required before a commissioners

Counties' authority to deal with land-use issues related to rapid growth in unincorporated areas is limited by the Texas Constitution and state law.

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County Platting Requirements

Approval of plats is the primary tool by which a Texas county regulates subdivision development in unincorporated areas. A plat is a legal document that includes a map of the subdivided property and public improvements, such as streets or drainage infrastructure. A plat must be approved by the county commissioners court and filed with the county clerk as a permanent real property record. The plat may be used for land title research, land sales, or property tax purposes. Local Government Code, sec. 232.003 specifies the steps a commissioners court may order before approving a plat, such as requiring rights-of-way on subdivision roads, adopting reasonable specifications on street and road construction and drainage infrastructure, and requiring purchase contracts to specify the availability of water.

The Third Court of Appeals' 1995 decision in *Elgin Bank of Texas v. Travis County* (906 S.W.2d 120 (Tex.App - Austin, writ denied)) had narrowly limited the circumstances under which a subdivision plat had to be filed. Elgin Bank owned about 150 acres of land in an unincorporated portion of Travis County. The bank sought to subdivide and sell the property as multiple tracts without filing a plat. Because the property was served by existing roads, the county did not intend to lay out streets or roads on the subdivided property.

Travis County argued that the bank had to file a subdivision plat under Local Government Code, sec. 232.001(a). The bank argued that the statute required a subdivision plat only if the tract owner subdivided the property into two or more parts *and* laid out streets, alleys, parks, squares, or other areas dedicated to public use. Because the subdivision included no such features, the bank argued that it was not required to file a plat. The trial court ruled in favor of Travis County on summary judgment, but the bank appealed. The appellate court reversed the decision and found that the bank was not required to file a plat.

Before the *Elgin Bank* decision, many counties required plats for all new subdivisions. The decision, however, carved out an exception to county platting requirements. A county could not require a plat if the subdivided property included no streets or other areas dedicated to public use. This ruling led to the creation of the "flag lot" — a basic subdivision lot connected to an existing road by a long strip of land resembling a flagpole from above. The design allowed developers to create subdivisions in unincorporated areas without county approval.

Flag lot subdivisions, some exhibiting conditions similar to those in colonias along the U.S.-Mexico border, began to appear in unincorporated areas across the state. Many of these subdivisions had significant drainage problems, leading to flooding, stagnant pools of water, or road damage. Unpaved "driveways" leading to homes often became impassable after heavy rains. Emergency vehicles experienced problems finding the correct home in a maze of manufactured homes and rutted tracks. Preexisting county roads serving the new developments sometimes lacked adequate turnaround areas for school buses or other large vehicles.

The 76th Legislature in 1999 enacted SB 710 by Wentworth to close the loophole created by the *Elgin Bank* decision. The law amended Local Government Code, sec. 232.001(a) to require a plat if an owner divided the property into two or more parts to lay out a subdivision of the tract, lots, *or* streets or other areas dedicated to public use. At the same time, SB 710 specifically exempted from platting requirements: property to be used for agriculture, ranching, wildlife management, or timber production; property subdivided into four or fewer parts and transferred to close relatives; property subdivided into lots larger than 10 acres; and property sold as lots through the Veteran's Land Board program.

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court can enact zoning ordinances, such as near lakes Tawakoni or Ray Roberts in North Texas. Also, counties near the McDonald Observatory, George Observatory, or Stephen F. Austin State University Observatory may adopt, upon request of an observatory director, ordinances regulating the installation and use of outdoor lighting (Local Government Code, sec. 240.032).

To combat the proliferation of colonias along the Texas-Mexico border, the Legislature has given border counties broad regulatory and enforcement authority over subdivision development. Local Government Code, chapter 232, subchapter B grants specific powers to counties within 50 miles of the border, including the authority to set subdivision regulations requiring that water and wastewater facilities meet minimum state standards and that solid waste disposal service meets state and county standards. The commissioners court also must establish flood management standards and requirements for the provision of electric and natural gas service in subdivisions. Subchapter B allows the commissioners court to establish a planning commission to carry out the county’s duties relating to subdivision regulation, land use, health and safety, and planning and development. The attorney general or a district or county attorney may take action to enjoin a violation of state water and wastewater standards or county subdivision regulations. The law includes criminal penalties for failing to file a required subdivision plat with the county or to provide for the timely delivery of water, sewer, electric, or gas service.

Health and Safety Code, chapter 366 allows a county or other local government entity to serve as an agent of the Texas Commission on Environmental Quality (TCEQ) to regulate on-site sewage disposal systems or septic tanks. The TCEQ has authorized about 160 counties to conduct on-site sewage programs. Problems with on-site sewage disposal in new subdivisions in unincorporated areas sometimes have been severe. For example, a former Hays County commissioner recalls a “flag lot” subdivision (see box, page 3) in which nearly one-third of the septic tanks installed by the developer turned out to be faulty.

Concerns about sewage backing up into residents’ yards led the commissioners court and the local school district to secure funding to immunize children in the subdivision for hepatitis.

Many special districts authorized by the Constitution provide water, wastewater, or other services in unincorporated areas. The most widely used form of district, a municipal utility district (MUD), may provide services such as water supply, wastewater treatment, solid waste collection and disposal, and acquiring and maintaining parks and recreational facilities. Because MUDs have authority to issue bonds and levy taxes, they are a popular financing tool for developers seeking to build infrastructure and provide services for new developments in unincorporated areas. Water control and improvement districts and freshwater supply districts also may provide water and wastewater services in unincorporated areas.

Special districts have been created for many additional purposes. Health and Safety Code, chapter 344 authorizes the creation of mosquito control districts funded by a tax of up to 25 cents per \$100 of taxable property value in the district. Texas Constitution, Art. 3, sec. 48-d provides for the creation of rural fire prevention districts and allows a tax of up to 3 cents per \$100 (5 cents per \$100 in Harris County). Not all of the nearly 135 rural fire prevention districts operate a fire department. Many serve solely as a funding source for local volunteer fire departments. Art. 3, sec. 48-e authorizes counties to levy property taxes up to 10 cents per \$100 for emergency services districts to provide ambulance and other emergency services.

Counties, unlike cities, have no zoning authority and only limited power to regulate the types of activities or development in a given area.

Counties face different challenges according to their location, economy, population, and urban or rural disposition. Harris County contains 3.4 million people, making it the nation’s third most populous county. It features a major shipping port and is home to some of the world’s largest corporations. Traffic and air quality are among the issues of local concern. In far West Texas, Loving County and its population of 67 residents face different challenges, such as a dwindling population and the scarcity of water and economic investment. Not all counties have to cope with rapid growth, and many counties in the Panhandle or West Texas do not face the

same issues as do their counterparts around Austin, Dallas, Fort Worth, Houston, or San Antonio, or the special needs of fast-growing counties along the Texas-Mexico border.

The counties in high-growth regions are undergoing profound change. For example, the 2000 census reported that the population of Comal County in Central Texas grew by 50 percent between 1990 and 2000, to a total of 78,000 residents. According to a county official, nearly 10,000 subdivision lots are under development in the county, mostly in unincorporated areas. The rapid development underway in areas formerly dominated by ranch and farm land has brought issues such as land-use authority, impact fees, and building codes to the forefront of local concerns in these areas.

Land-use authority

Generally, counties have no zoning authority and have limited authority to regulate land use, primarily through approval of plats (see box, page 3). Many cities use zoning ordinances to plan growth by regulating the types of activities or development that may take place in a given area. City zoning districts include uniform regulations on permissible land uses, building height and lot-size requirements, or other development restrictions. Not all cities in Texas impose zoning requirements; most notable among those that do not is Houston. Private contractual obligations such as restrictive covenants and homeowner associations also are used to regulate or restrict land use in both cities and the unincorporated areas of counties.

The 77th Legislature in 2001 enacted SB 873 by Lindsay, increasing certain counties' authority to conduct infrastructure planning. The law applies to 30 counties: those with a population of at least 700,000 and neighboring counties in the same Metropolitan Statistical Area, plus counties along the Texas-Mexico border with a population of at least 150,000. These counties may adopt rules governing plats and subdivisions of land in unincorporated areas to promote public health, safety, morals, and welfare and the safe, orderly, and healthful development of the unincorporated area. A county may require a right-of-way on a major thoroughfare, establish minimum lot frontages on county roads, and require certification of plat approval before utility hookup. However, a county may not regulate the purposes, such as business, industrial,

or residential, for which a building or property may be used, nor the size, number, or density of buildings on a tract of land.

Supporters of enhancing counties' land-use authority say:

SB 873 is a significant step toward enhancing counties' ability to manage growth. Many counties are studying implementation of the law's provisions, although no county has adopted rules under the new authority. However, SB 873 does not grant counties clear authority to regulate land use. In fact, it explicitly prohibits counties from regulating the use of a building or property for business, industrial, residential, or other purposes.

Lacking clear authority to regulate land use, a county often must turn to the Legislature for help in resolving local land-use conflicts. Not only does this approach sometimes take years to achieve results, it also consumes lawmakers' valuable time during the legislative session and has contributed to a confusing patchwork of statutory grants of county authority.

Counties need additional tools to resolve incompatible land uses. For example, Comal County is experiencing problems with rock quarries operating near residential neighborhoods. Blasts from the quarries rattle windows, shake doors, and disturb residents. Many counties have experienced problems with cement batch plants in the proximity of residential developments or schools. County commissioners are under pressure from residents worried about the effect of industries and other developments, such as the proliferation of manufactured-home parks in unincorporated areas, on their property values.

Limited zoning authority would allow counties to promote development according to compatible land uses, thus preventing land-use conflicts while attracting continued growth and development. Counties would not need the comprehensive zoning and planning ordinances that cities employ. One county commissioner has suggested that four categories of land use would be enough to resolve many of the county's land-use conflicts. Counties could use this authority to shift heavy industrial development away from residential areas.

Another means of resolving land-use conflicts in unincorporated areas would be to allow counties to require buffer zones between certain incompatible uses of land. For example, the state already authorizes counties to prohibit the establishment of a sexually oriented business within a certain distance of a school, church, residential neighborhood, or other incompatible land use (Local Government Code, sec. 243.006). Counties also may prohibit businesses that sell alcohol from operating within 300 or 1,000 feet of a church, school, or hospital (Alcoholic Beverage Code, sec. 109.33). Counties could use similar buffer zones to reduce conflicts between incompatible land uses and to protect the property values of homeowners.

Granting counties limited land-use authority, such as the power to enact zoning ordinances or designate buffer zones, on an optional basis would take into account the diversity of Texas counties. Not all counties need new or enhanced powers to manage growth. Requiring voter approval before a county could exercise such powers would help to limit land-use authority to counties in which residents were concerned about the consequences of rapid growth and development.

Opponents of enhancing counties' land-use authority say:

Counties already have adequate authority to regulate land use. In authorizing counties to adopt rules promoting public health, safety, morals, and welfare, SB 873 gives counties sweeping new authority that they could use to allay many of the concerns expressed by homeowners. In fact, counties' new authority under SB 873 is the same as a city's authority within its extraterritorial jurisdiction. Counties should make full use of their existing authority before seeking new powers.

If the Legislature granted counties more authority, it would surrender a measure of control to county governments that could be influenced by tumultuous local politics. Overzealous counties could enact restrictive ordinances out of line with the Legislature's

intentions, putting developers and local businesses at the mercy of county officials.

The state traditionally has resisted giving zoning authority to counties and should not reverse that policy. Allowing counties to dictate where certain types of development may occur could penalize unfairly the owners of property near areas designated for undesirable development. Also, zoning ordinances impose notoriously burdensome regulations on development. Many developers build in unincorporated areas to avoid the expense of complying with zoning ordinances and other municipal regulations. Additional county regulation would increase costs and reduce the availability of affordable housing in unincorporated areas.

Not all counties support expanding county land-use authority, even on an optional basis. For many county commissioners, their elected office is only a part-time job. If for some reason voters approved new county authority under a new law enacted by the Legislature, some commissioners might not have the resources or technical expertise to evaluate properly new and complex rules governing development. Moreover, in many parts of Texas, especially isolated and rural areas, residents mistrust any new governmental authority over private property and generally would prefer to limit county authority rather than establish a mechanism for expanding county powers.

Impact fees

An impact fee is a charge levied on a new development to cover the costs of capital improvements or public infrastructure expansion necessitated by the new development. With a few exceptions, counties lack the authority to charge impact fees.

Local Government Code, chapter 395 authorizes cities and certain districts or authorities to impose impact fees. Sec. 395.014 requires a city or district to develop a capital improvement plan to calculate impact fees. The plan must be prepared by qualified professionals and must meet statutory requirements, such as including a

County impact fees, touted by proponents as reducing public subsidy of new development, would drive up housing costs unacceptably, opponents say.

description of existing capital improvements, an analysis of total capacity and current usage, and a description of costs necessitated by the new development. Sec. 395.079 allows a county with a population of at least 3.3 million and adjacent counties to charge an impact fee to provide stormwater, drainage, and flood-control facilities needed to accommodate new development.

Supporters of authorizing counties to assess impact fees say:

Existing property owners often pay a subsidy in the form of higher taxes to accommodate new development. For example, a county road may have been built 50 years ago to serve a few farmhouses. Within a relatively short time, however, a developer could establish a manufactured-home community with 200 residences served by the road. The road, originally intended for light use, suffers under the crush of heavy trucks transporting manufactured homes and of increased usage by new residents. Without time to build up its tax base, a county with limited financial resources could be forced to raise the taxes of existing residents to pay to repair potholes, crushed culverts, or damaged pavement or to improve the road to serve the new development.

Allowing a county to charge impact fees would reduce public subsidy of new development. Counties that charged impact fees could shift some of the cost of improving infrastructure to serve new development from the general tax base to the development that ultimately would benefit from the improved facilities. Impact fees also could improve a county's attractiveness to new businesses by providing some assurance that tax rates likely would remain stable.

Opponents of authorizing counties to assess impact fees say:

Impact fees charged to developers would be passed along to home buyers. This could be especially harmful to low- and moderate-income families seeking to buy new homes. In Austin's extraterritorial jurisdiction,

for example, impact fee costs can add \$3,000 to the price of an undeveloped lot. According to one builder, an industry rule of thumb is that the final home price is about five times the lot cost, which includes the raw land plus impact and other development fees. Because of this, a \$3,000 impact fee could add \$15,000 to the price of a new home.

Most counties lack the professional resources or staff to calculate impact fees in the manner required of cities under Local Government Code, chapter 395. Allowing counties to assess impact fees would necessitate hiring additional staff or contracting for services to calculate the fee. The associated cost would add to the county budget and increase the tax burden on local residents.

Construction codes

A construction code is a set of laws, regulations, or ordinances governing new construction or renovation. Codes usually are enacted by adopting a set of model rules that cover building, plumbing, mechanical, and electrical work. The codes establish standards for construction and related work that are intended to reduce the risk of fire and to ensure that new buildings are structurally sound and sanitary.

Counties have no authority to adopt construction codes. The 77th Legislature enacted SB 365 by Armbrister, which designates the International Residential Code as the municipal residential building code for the state and the National Electrical Code as the state's municipal residential electrical construction code, although cities may adopt local amendments to the codes.

Supporters of allowing counties to adopt construction codes say:

Counties need the authority to adopt and enforce construction codes in unincorporated areas. New home construction is increasing in unincorporated areas where counties have no authority to enforce minimum construction standards. Unscrupulous businesses may prey on first-time or unsophisticated

Counties generally lack authority to adopt construction codes that would govern new building or renovation in rapidly urbanizing unincorporated areas.

home buyers by selling new houses that do not meet basic standards for safety or sanitation. In fact, shoddy construction practices and low-quality materials used in some new housing developments may be contributing to Texas' insurance crisis, as increased claims for mold remediation have fueled insurers' threats to increase premiums or stop selling comprehensive policies.

Opponents of allowing counties to adopt construction codes say:

The lack of county authority to enforce construction codes does not create a statewide problem. Most problems relating to construction codes have occurred in colonias along the Texas-Mexico border, and counties in that region have been granted authority to adopt and enforce rules to ensure that subdivisions

have adequate and sanitary drinking water and sewage facilities. Moreover, adopting codes for unincorporated areas could penalize the many legitimate businesses that build affordable housing. Although their work may not always meet the exacting specifications of an international building code, these businesses provide safe and sanitary homes at affordable prices. Also, many ranchers or farmers choose to build their own homes on their property, and counties should not tell them how to build such structures.

Enforcing code compliance would require imposing fees to pay for professional inspection staff or to contract for the service, and these fees would drive up the cost of housing. Without adequate funding for inspection, builders might have to wait for a few inspectors to work through their backlog of inspections.

— by **Travis Phillips**

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