

Environmental Regulations and Land Use and Development

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It is well established that environmental regulations have an effect on land use and development. Municipalities, through a variety of sources of authority, have the ability to either use land use controls to protect the environment, or use environmental controls to facilitate land use goals. Additionally, while not directly under the control of a city, there are many other environmental regulations which affect development and land use in urban settings. This paper identifies those land use and environmental protection regulatory authorities available to municipalities that can be used to protect the environment and to regulate land use. The paper also addresses limitations on that authority. Additionally, the paper discusses other environmental regulations, federal, state, and local, that may affect development within a city.

I. Development and Land Use Control through Environmental Regulation

A city's authority to provide for environmental protection starts with the general authority to adopt ordinances, including zoning and subdivision ordinances, that are "for the good government, peace, or order of the municipality, or for the trade and commerce of the municipality" and to promote the public health, safety, morals, or general welfare of the municipality.¹ Cities, through their zoning and subdivision regulatory authority, are able to regulate land use and development within their city limits, and to some extent, within their extraterritorial jurisdictions (ETJ). The authority to zone allows a city to establish uses to which land or property may be placed to ensure incompatible uses are not located together in limited geographic area.² A city's authority over the subdivisions of property helps ensure the safe, orderly, and healthful development of a city.³ Zoning and subdivision regulations are often used by cities for environmental protection. A city's regulatory authority over land use is augmented by the authority, albeit somewhat limited authority, to impose certain regulations to protect the environment such as nuisance regulations, groundwater regulations, and non-point source pollution.

There are also several state and federal environmental regulations that affect land use within a municipality. Some of these regulations require certain municipalities to have permits for activities conducted by the city, such as wastewater permits, Phase I or II non-point source stormwater permits, and municipal solid waste permits. Additionally, industries and developers in a city or in a city's ETJ may also need to obtain permits under these and other state and federal regulations.

While these permitting programs are not administered by municipalities, cities do have the authority to initiate a civil suit to enforce permitting requirements of some of the programs.⁴ Moreover, these state and federal environmental regulations affect the development in cities and cities often require as part of the platting process the applicant to provide evidence that the appropriate authorizations have been obtained from the Texas Commission on Environmental Quality (TCEQ) or other agencies.

A. Land Use Regulations

Cities often incorporate into their subdivision and zoning ordinances provisions that can work to protect the environment and water quality. For example, impervious cover requirements are typically included in municipal zoning and subdivision requirements. Impervious cover, such as roadways and rooftops, is a threat to water quality because it reduces areas where infiltration of water into the underlying soil may occur. Reducing density and impervious cover may provide water quality benefits.

B. Nuisance Regulation

Type A general law municipalities have the authority to “abate and remove a nuisance and punish by fine the person responsible for the nuisance” and to “define and declare what constitutes a nuisance.”⁵ Type B general law municipalities have the authority to prevent any nuisance within the limits of the municipality and to require the responsible person or property owner to remove the nuisance.⁶ Home-rule municipalities have the authority to define and prohibit any nuisances within the limits of the municipalities and within 5,000 feet outside the limits.⁷

Additionally, Texas law provides municipalities with the authority to require the filling of land in the municipality that is “unwholesome, contains stagnant water, or is in any other condition that may produce disease,” allows municipalities to regulate sewers and privies, and allows municipalities to require property owners to keep their property “free from weeds, rubbish, brush, and other objectionable, unsightly, or unsanitary matter.”⁸ These provisions can be used to limit the types of businesses and developments that may exist within the city limits and can be used for environmental protection purposes.

C. Groundwater Protection

The Texas Local Government Code Chapters 211 and 212 allows a municipality to regulate the pumping, extraction, and use of groundwater by persons other than retail public utilities for the “purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.”⁹ This provision is specifically applicable to areas where the groundwater source is contaminated. Preventing the use of

groundwater that poses an actual or potential threat to human health can affect land use both inside and outside the city limits.¹⁰

Additionally, if a person submits a subdivision plat which proposes to utilize groundwater as a water supply source, the city may require the application to include a certification from a licensed engineer or geoscientist that there is adequate groundwater available for the subdivision.¹¹ If there is inadequate available groundwater to support the subdivision, the developer may not be able to develop the property in the proposed manner and may even need to change the use of the property.

D. Water Quality and Non-point Source Pollutant Control

In Texas, the surface and groundwater quality is protected by the regulatory scheme established in Chapter 26 of the Texas Water Code. Generally, Texas prohibits the discharges of pollutants “into and adjacent to” waters in the state unless the person proposing to discharge obtains a permit from the TCEQ.¹² For discharges into water in the state, as opposed to land application of effluent or discharges into evaporation ponds, a person is issued a Texas Pollutant Discharge Elimination System (TPDES) permit, which is a permit that authorizes the discharge under both the federal Clean Water Act and state law. If a person proposes to land apply effluent or discharge it into an evaporation pond, a state-only wastewater permit is required. However, not all pollution comes from a discernible source.

Section 26.177 of the Texas Water Code authorizes cities to establish water pollution control and abatement programs to protect water quality from non-point source pollution.¹³ Non-point source pollution is water pollution from fertilizers, insecticides, oil, grease, sediments, and animal wastes that flow into streams, lakes, and bays during a rainfall event. It is called non-point source pollution because it comes from many different places, and is difficult to pinpoint or control. Water pollution control and abatement plans are designed to control and abate pollution from these generalized discharges, such as storm sewer discharges and urban runoff from rain. Typically, these plans implement non-point source education and require the use of best management practices to control runoff, such as stormwater retention ponds. The adoption of a water pollution and abatement plan is voluntary unless the TCEQ determines water pollution is attributable to non-point sources in a city with a population of 10,000 or more.

Nevertheless, the Environmental Protection Agency and the TCEQ require local governments with populations of less 100,000 people¹⁴ located within an urbanized area (as defined by the Census)¹⁵ that operate small municipal separate storm sewer systems (MS4s), which includes underground drainage systems, and roads with drainage systems, gutters, and ditches,¹⁶ to implement minimum control measures that are designed to reduce the discharge of pollutants, protect the water quality, and satisfy the Clean Water Act requirements. The minimum control measures include implementation of a public

education and public participation program, development of a plan to detect and eliminate illicit discharges into a storm sewer system, adoption of requirements to control runoff during construction, such as the use of silt fences, construction of facilities to address discharges of post-construction stormwater from new or redeveloped areas, such as detention ponds and grassed swales, and adoption of “good housekeeping” measures, such as regular street sweeping, to prevent pollutant runoff from municipal operations.¹⁷ Small MS4s may be authorized by the TCEQ under its general permit TXR040000. If the city is issued an authorization under the general permit, the permit may require the city to adopt stormwater controls that may affect land use and development within the city.

In addition to non-point source abatement control, cities have the authority to inspect public water from a point source to assess water quality, and to determine if a person who is discharging effluent has a permit and is discharging in compliance with the permit.¹⁸ This authority is complimented by the authority of a city to initiate a civil suit against persons who are discharging into violation of the Texas Water Code or a discharge permit.¹⁹

It should also be noted that if a person proposes to dredge or fill a wetland, the person must obtain a Clean Water Act Section 404 permit from the Army Corps of Engineers. These permits often contain limitations that affect how the property will develop and may require mitigation.

E. Hazardous and Solid Waste Control

The Texas Solid Waste Disposal Act (SWDA) governs the regulation of solid waste in Texas.²⁰ It regulates solid waste, hazardous waste, municipal solid waste, and non-hazardous industrial waste. The state, through this act, administers the federal Solid Waste Disposal Act. The SWDA prohibits the construction, operation, and maintenance of facilities for the storage, processing, or disposal of solid waste without a permit from the TCEQ.²¹

Municipalities may not abolish or restrict the use or operation of a solid or hazardous waste facility in its corporate limits or ETJ if (1) the facility existed when the city incorporated or annexed the territory where the facility is located, and (2) the operation of the facility is in substantial compliance with the applicable state and county regulations.²² Nevertheless, it appears that at least Type A general law cities and home rule cities may be able to use nuisance regulations to prohibit new hazardous and solid waste facilities within the city limits.²³ Home rule cities are able to prohibit new hazardous and solid waste facilities within 5,000 feet of the city limits.²⁴

F. Air Pollution Control

The Texas Clean Air Act is a comprehensive air quality regulatory program. Texas' program, by and large, implements the federal Clean Air Act. The Clean Air Act requires a permit be obtained before a new facility that may emit air pollutants be constructed or an existing facility that emits air pollutants be modified.²⁵ Part of the regulatory scheme includes the identification of non-attainment areas for which special permitting requirements may be imposed.

Cities, subject to the authority of the TCEQ, have the powers and rights vested in cities by other laws to abate nuisances and enact and enforce ordinances to control and abate air pollution.²⁶ Any ordinance must be consistent with TCEQ rules, and may not make unlawful a condition or act approved or authorized by the Texas Clean Air Act or by TCEQ rules or orders.²⁷

G. Endangered Species Protection

It is unlawful to "take" a species listed as endangered or threatened under the Endangered Species Act.²⁸ The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."²⁹ To harm a species has been defined by the United States Fish and Wildlife Service (USFWS) to include actions that may cause "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."³⁰ A person, whose activities are likely to result in a take of an endangered species, may submit a habitat conservation plan that sets out steps the person will take to minimize and mitigate the impacts to the endangered species. The habitat conservation plans are programs to protect endangered species by habitat preserves or other protection strategies developed in order to obtain a federal permit and are limited to the land owned by the plan participant. If the habitat conservation plans meet the statutory and regulatory requirements, the USFWS will issue a permit to the person.³¹ These habitat conservation plans will affect how a tract of land develops.

A city may not impose a regulation relating to endangered species unless the regulation is necessary to implement a habitat conservation plan.³² The city may not deny a permit or water or wastewater service to or otherwise discriminate against a person whose property is located in an area designated as critical habitat by the Endangered Species Act, or has endangered species or endangered species habitat.³³ Additionally, a city may not place conditions on permits or service requests to require mitigation fees or land set asides.³⁴ However, a city may participate in the study and preparation for and creation of a habitat conservation plans and the creation of a regional habitat conservation plan.³⁵ The creation of a regional habitat conservation plans requires biological reviews, citizen advisory committee participation, and public notice and hearing.³⁶

H. Redevelopment of Brownfield Sites

Brownfield sites are typically former industrial sites that may be contaminated as a result of industrial activity on the property. Many Brownfield sites remain undeveloped because of the potential liability prospective purchasers may face under the federal Comprehensive Environmental Response and Liability Act of 1980 (CERCLA) and under the Texas Solid Waste Disposal Act. In 2003, the Texas Legislature passed the municipal setting designation legislation that allows the TCEQ to certify municipal setting designations in order to limit or eliminate the need for investigation of or response actions addressing contamination impacts on groundwater that have been restricted from use as potable water by ordinance.³⁷ Because the remediation of contaminated groundwater can be expensive, this legislation was designed to encourage the redevelopment of brownfields. While the applications for municipal setting designations are filed with the TCEQ and the TCEQ makes the ultimate decision to grant or deny the designation, the municipality are provided notice of the application and provided an opportunity to comment on the designation.³⁸ The TCEQ is required to deny any application submitted if the application would negatively affect the current and future regional water resource needs or obligations of a municipality, retail public utility, or a private well owner.³⁹

I. Limits on Authority

While many of the above mentioned authorities provide power (and in some cases very limited power) to protect the environment through land use, or to facilitate land use goals through environmental regulation, there are some limitations on a city's ability to use these powers. With respect to a city's zoning authority, if the city adopts a regulation that is less stringent than a state statute, the state regulation controls.⁴⁰ A city may not require the removal or destruction of property that exists at the time the municipality adopts a zoning ordinance and that is actually and necessarily used in a public service business.⁴¹ Additionally, Chapter 245 of the Texas Local Government requires a city to consider the approval or disapproval of an application for a permit, license, or other form of authorization required by city ordinance on the basis of its ordinances in effect at the time the original application for the permit is filed.⁴² There are some exemptions to this requirement, including regulations relating to sexually oriented businesses, zoning and land use that do not affect lot size, lot dimensions, lot coverage, or building size and only relate to the use of land, and utility connections, to name a few.⁴³

J. Pending Legislation

Currently, there are several pieces of pending legislation that will affect a city's ability to adopt regulations to protect the environment through land use controls. The following is a list of some of the legislation currently before Texas Legislature:

- SB 574 proposes to amend Chapter 245 of the Local Government Code and relates to the requirements for the issuance of land development permit including expiration dates. The bill has passed the Senate.
- SB 1362 proposes to amend Section 212.003 of the Local Government Code to prohibit cities from regulating the density or number of lots or buildings that can be built per acre of land. This bill has been referred to the Senate Natural Resources Committee.
- SB 1363 proposes to amend Section 26.177 of the Water Code to limits a city's authority to regulate water quality, issue permits, or establish standards and practices for water quality. This bill has been referred to the Senate Natural Resources Committee.
- SB 1647 and HB 2833 propose to amend the Texas Private Real Property Preservation Act in Chapter 2007 of the Government Code and proposes to expand its applicability to governmental actions that have the effect of limiting overall impervious cover of any development or use of an owner's private real property to less than 45 percent of the surface area of the property. HB 2833 has been before the House Land and Resource Management Committee and a substitute was reported favorably from the committee. SB 1647 has been referred to the Senate Natural Resources Committee.

III. Other Political Subdivisions with Environmental Protection Regulatory Authority

It should also be noted that there are other local governments with environmental protection regulatory authority which may extend into a municipality's extraterritorial limits as well as its corporate limits. For example, groundwater conservation districts are created to provide for conservation, preservation, protection, recharging, and prevention of waste of groundwater.⁴⁴ To fulfill their purpose, these district are authorized to adopt rules limiting groundwater production, to prevent degradation of groundwater, and to prevent waste and subsidence.⁴⁵

Additionally, some river authorities have some environmental protection-type regulatory authority. The Lower Colorado River Authority (LCRA) is allowed, for example, to control both artificial and natural pollution, including organic, inorganic, and thermal, of all groundwater or surface water of the Colorado River and its tributaries within the boundaries of the authority.⁴⁶ LCRA is authorized to adopt by ordinance rules relating to the control of pollution and to enforce its rules.⁴⁷ Under this authority, LCRA has adopted a non-point source pollution control ordinance.

While municipalities are not responsible for the enforcement of the regulations of other political subdivisions, these entities will affect land use and development within a city whose jurisdiction is included within one of these political subdivisions.

ENDNOTES

1. TEX. LOCAL GOV'T CODE ANN. §§ 51.001, 211.001, and 212.002.
2. *Id.* Chp. 211.
3. *Id.* § 212.002.
4. TEX. WATER CODE ANN. § 7.351; *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 382.111 - 382.115 (relating to the regulation of air quality and allowing local governments to conduct inspections, to adopt ordinances to regulate air quality in a manner consistent with TCEQ rules and orders; and allowing local governments to enter into cooperative agreements with the TCEQ for the provide for air quality management, inspection, and enforcement functions).
5. TEX. LOCAL GOV'T CODE ANN. § 217.002.
6. *Id.* § 217.022.
7. *Id.* § 217.042.
8. TEX. HEALTH & SAFETY CODE ANN. §§ 342.001, 342.002, 342.004, and 342.008.
9. TEX. LOCAL GOV'T CODE ANN. §§ 211.003(a)(6), 212.003(a).
10. *See also* TEX. HEALTH & SAFETY CODE ANN. Chp. 361, Subchp. W. (relating to the municipal setting designations). Municipal setting designations are discussed more fully below.
11. TEX. LOCAL GOV'T CODE ANN. § 212.0101.
12. TEX. WATER CODE ANN. § 26.121.
13. TEX. WATER CODE ANN. § 26.177.
14. Cities with populations of more than 100,000 people are also regulated but require individual permits for their MS4s. These permits are often referred to as Phase 1 permits.

15. An urbanized area is land area comprising of one or more places – central places – and adjacent densely populated surrounding areas – urban fringe – that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile.
16. 40 C.F.R. § 122.26.
17. *See generally* 40 C.F.R. §§ 122.26, 122.30, and 122.32 - 122.37.
18. TEX. WATER CODE ANN. § 26.171.
19. *Id.* §§ 7.351-7.358.
20. TEX. HEALTH & SAFETY CODE ANN. Chp. 361.
21. *Id.* §§ 361.061.
22. TEX. HEALTH & SAFETY CODE ANN. § 361.166.
23. TEX. LOCAL GOV'T CODE ANN. §§ 217.002, 217.042.
24. *Id.* § 217.042; Tex. Att'y Gen. Op. JM-226 (1984).
25. TEX. HEALTH & SAFETY CODE ANN. §§ 382.051, 382.0518.
26. *Id.* § 382.113.
27. *Id.*
28. 16 U.S.C.A. § 1538.
29. *Id.* § 1532(19).
30. 50 C.F.R. § 17.3.
31. 16 U.S.C.A. § 1539(a).
32. TEX. PARKS & WILDLIFE CODE ANN. § 83.014(a).
33. *Id.* § 83.014(b) and (c).
34. *Id.* § 83.014(d).
35. *Id.* § 83.013.
36. *Id.* §§ 83.015, 83.016, 83.017, 83.019.

37. **TEX. HEALTH & SAFETY CODE ANN. Chp. 361, Subchp. W.**
38. ***Id.* § 361.805.**
39. ***Id.* § 361.806.**
40. **TEX. LOCAL GOV'T CODE ANN. § 211.013(a).**
41. ***Id.* § 211.013(b).**
42. ***Id.* § 245.001.**
43. ***Id.* § 245.003.**
44. **TEX. WATER CODE ANN. § 36.0015.**
45. ***Id.* § 36.101.**
46. ***Id.* § 222.004(q).**
47. ***Id.***