TEXAS ASSOCIATION OF BUILDERS

June 1, 2015

Via email and regular mail

The Honorable Ken Paxton
Attorney General of the State of Texas
Attn: Opinion Committee
209 W. 14th, 6th Floor
Mail Code 24
Austin, Texas 78701

Re: Request No. 0023-KP

Dear General Paxton:

This letter brief is in response to Attorney General Opinion Request No. 0023-KP (the "Request") dated April 27, 2015 by Jeff May, Colin County Auditor. The Request asks whether a home-rule city may impose its building, fire and construction-related codes in its extraterritorial jurisdiction (ETJ), and if so, may a home-rule city and a county include provisions which authorize the home-rule city to enforce those codes through a subdivision plat approval agreement entered into under Chapter 242 of the Local Government Code. On behalf of the Texas Association of Builders ("TAB"), I am writing to respectfully state our view that the answer to each question should be answered in the negative.

TEXAS ASSOCIATION OF BUILDERS

TAB is a non-profit trade association that was founded in 1946 to promote a positive business environment for the housing industry by addressing the housing issues of the people of Texas. TAB's membership base of nearly 10,000 members across Texas is primarily made up of home and apartment builders, remodelers, developers, and other companies and individuals who have an interest and a stake in a healthy and vibrant homebuilding industry in the State of Texas. TAB is affiliated with the National Association of Home Builders and 28 local Home Builder Associations that are located throughout the State of Texas. Representing approximately 702,500 jobs and $31.1 billion annually of the Texas economy, TAB and its affiliated local associations play a crucial role in providing housing for Texans.

INTRODUCTION

The Request poses two questions:

1. May a home-rule municipality impose its building, fire and construction-related codes in its extraterritorial jurisdiction (ETJ) assuming its ordinances relating to such codes extend their application into the ETJ?

2. Assuming the answer to the above question is "yes", may a home-rule municipality and a county include in their subdivision plat approval agreement entered into under chapter 242 of the Local Government Code, provisions which authorize the home rule municipality to enforce its building, fire and construction-related codes in lieu of any conflicting, less-stringent county regulations, namely the county's fire code?

Because cities have not legislatively been authorized to extend their building codes to the ETJ, the answer to the first question is "No." As the answer to the first question is "No," the answer to the second question must be a "No" as well. If, however, authority is contemplated under question 1, the municipality and county are not statutorily authorized to enter into a Chapter 242 agreement authorizing the home-rule city to enforce its building code in the ETJ. Therefore, the answer to the second question should be "No."

Furthermore, serious policy considerations exist to prevent cities from enforcing building code authority in the ETJ. Chief among those is the fact that people living in the ETJ do not receive important municipal services, nor do they have the ability to vote in city council elections.

LACK OF AUTHORITY TO EXTEND BUILDING CODES TO THE ETJ

The Request correctly summarizes the holdings of the Fort Worth Court of Appeals in *Bizios v. Town of Lakewood Village*, 453 S.W.3d 598 (Tex. App.—Fort Worth 2014, pet. filed). Because Lakewood Village is a general law town, as opposed to a home-rule municipality, the opinion focuses on the legislative powers of general law towns. Lakewood Village as a general law town was held to lack statutory authority under Chapter 212, Tex. Loc. Gov't Code to extend its building code to the ETJ. The Fort Worth Court of Appeals did not rule on whether a home-rule city can extend its building code to the ETJ.

When construing the statutes referenced in the Request, courts begin with the language. *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006). If the statute is clear, the court must construe the language according to its common meanings. *Crosstex Energy Servs. LP v. Pro Plus, Inc.*, 430 S.W.3d 384 (Tex. 2014). The court initially limits its statutory review to the plain meaning of the text as the sole expression of legislative intent, *see State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002), unless the Legislature has supplied a different meaning by definition, a different meaning is apparent from the context, or applying the plain meaning would lead to absurd results, *see Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

The statutory authority to extend ordinances to the ETJ was addressed by current Governor Greg Abbott when he was on the Supreme Court: "(A) city's authority to regulate land development in its ETJ is wholly derived from a legislative grant of authority." *FM Props*

Operating Co. v. City of Austin, 22 S.W.3d 868, 902 (Tex. 2000). Justice Abbott was joined in his dissenting opinion by current Texas Supreme Court Chief Justice Nathan Hecht and current judge of the U.S. Court of Appeals for the Fifth Circuit Priscilla Owen.

No Texas statute expressly authorizes a municipality to apply its building code to its ETJ

TAB's membership is diverse and includes companies involved with the entire process to plan, design and build single-family and multi-family housing. Some of TAB's members are developers of land. They buy raw land and obtain plat approval from the relevant jurisdiction to subdivide the property into platted lots for sale to homebuilders. As part of the subdivision process, the developer will construct public infrastructure in accordance with the governing jurisdiction's comprehensive plan and development regulations.

As would be expected, a large number of TAB's members are homebuilding companies. They purchase platted lots in a subdivision developed by a residential developer. In order to build a home, the homebuilder will either acquire a residential building permit from the relevant city if the home is located within the corporate boundaries of a city, or follow any applicable county regulations if the home is located in the unincorporated areas of the state (which includes ETJ areas), in order to build a home in accordance with the relevant building code.

The platting process applies to infrastructure such as roads and utilities that will eventually be dedicated to a governmental entity, whereas the residential building code generally applies to the construction of a private home located on private land. Permitting and regulatory schemes differ significantly between subdivision development and home construction.

Under Subchapter A of Chapter 212, Tex. Loc. Gov't Code, a plat is only required to be submitted and approved under § 212.004 when a tract of land is subdivided. There is no indication that the Legislature intended to address building permits or codes in Subchapter A of the platting statute and there is no express authority stated in the statute. Adding verbiage to statutes by implication was expressly forbidden by the Texas Supreme Court in *M. Fitzgerald v. Advanced Spine Fixation*, 996 S.W.2d 865, 867 (Tex. 1999).

Following are arguments against possible provisions to which a municipality might turn in order to claim building code authority in the ETJ:

(i) **§§ 212.002 and 212.003, Tex. Loc. Gov't Code do not expressly authorize cities to extend their building codes to the ETJ.**

Sections 212.002 and 212.003 of the Tex. Loc. Gov't Code are directed at the regulation of plats and subdivisions, not the building of structures. In fact, Subchapter A of Chapter 212 is entitled "Regulation of Subdivisions." This subchapter says nothing about building structures in general or permits specifically.

Subchapter B, in contrast, is titled "Regulation of Property Development," with "development" defined as "the new construction or the enlargement of any exterior dimension of any building, structure, or improvement." *See* Tex. Loc. Gov't Code § 212.043(1). This subchapter, moreover, expressly provides that "[t]his subchapter does not authorize the municipality to require municipal building permits or otherwise enforce the municipality's building code in its extraterritorial jurisdiction." *Id.* at § 212.049.

By differentiating between land development and house construction, the Legislature's apparent intent was to not allow cities to require building permits or enforce building codes in the ETJ. Sections 212.002 and 212.003 do not authorize any municipalities, including home-rule municipalities, to extend their building codes to the ETJ.

(ii) **§ 214.212 does not expressly authorize cities to extend their building codes to the ETJ.**

Section 214.212, Tex. Loc. Gov't Code actually limits the applicability of the International Residential Code ("IRC") to a city's corporate limits. Significantly, § 214.212 requires municipalities to adopt the IRC. It imposes a mandatory uniform residential building code, as opposed to merely providing an optional code that cities may, but are not required to, adopt. The statute expressly authorizes a municipality to apply its building code to construction only "in a municipality," e.g., within its corporate boundaries. To imply that the Legislature intended to allow cities to also apply their building codes in the ETJ would violate the holding in *M. Fitzgerald.*

Another indicia of legislative intent was the introduction, but lack of passage, of HB 609 (Smith) in 2007. *See* Exhibit A. This bill would have expressly authorized cities to extend by ordinance their building codes to the ETJ. If the Legislature's interpretation of state statutes was that cities already had the power to require building permits in the ETJ, then the introduction of HB 609 would have been unnecessary. Note that HB 609 did not differentiate between a general law town and home-rule city.

(iii) **§ 214.904(a) does not expressly authorize cities to extend their building codes to the ETJ.**

Section 214.904(a) of the Tex. Loc. Gov't Code refers to the issuance of building permits "in the municipality or its extraterritorial jurisdiction." But this statutory provision provides neither express nor implied authority for a city to extend its building codes to its ETJ similar to §§ 216.003 and 216.902 of the Tex. Loc. Gov't Code. As the HB 265 bill analysis attached as Exhibit B indicates, the bill creating § 214.904 in 2005 was simply intended to force cities to act on development permits instead of delaying them indefinitely. There is no statutory language or legislative history indicating legislative intent for Section 214.904(a) to expand a city's authority to allow it to extend its building code to its ETJ. TAB was involved in the legislative process for enacting §§ 214.904 and 233.151, Tex. Loc. Gov't Code.

For example, Scott Norman of TAB testified in support of HB 265, which was intended to prevent cities from arbitrarily delaying taking action on permit applications. The types of permit applications that may be required as part of the process to build a home could include septic systems, wastewater capacity, asbestos abatement, 911 address assignments, water hookups, environmental cleanup, fire alarms, floodplain development, sign permits, curb cuts and pool construction. There is no legislative history indicating that § 214.904 was intended to grant cities the authority to extend their building codes to the ETJ so as to regulate the construction of the house itself.

(iv) **§ 233.153(c) does not expressly authorize cities to extend their building codes to the ETJ.**

Section 233.153(a) of the Tex. Loc. Gov't Code requires certain new houses in unincorporated areas of a county to meet IRC requirements. While § 233.153(c) states that if a city has adopted a building code in the ETJ then the county's jurisdiction does not apply, the statute does not expressly authorize cities to extend their building codes to the ETJ.

Subchapter F, Chapter 233, Local Government Code, concerns the authority of counties to mandate that houses be built to IRC requirements. Section 233.153(c) is a limiting statute, not a power granting statute. TAB was also involved with the 2009 legislative process in enacting HB 2833 (§ 233.151, Tex. Loc. Gov't Code, et seq.). As originally drafted, the legislative intent was to address the proliferation of "colonias" along the border by authorizing commissioners courts along the border the authority to, among other things, adopt building codes. During the session, the scope of the covered counties was expanded to include virtually every Texas county and allow those counties to require that all one and two family homes built in the unincorporated areas of the county meet IRC standards. At no point was there any discussion or consideration to give cities the authority to require building permits in the ETJ.

As with § 214.904(a), Tex. Loc. Gov't Code there are various scenarios which the Legislature could have considered that did not involve cities unilaterally enforcing their building codes in the ETJ. While the statute can be implied to mean that some municipalities within the State may be requiring a permit to improve a building or "other structure," there are fact situations that might be applicable other than a city unilaterally extending its building code to the ETJ:

- Land in the ETJ subject to a development agreement under § 212.172, Tex. Loc. Gov't Code, which allows a city to require building permits.

- Land in the ETJ subject to an industrial district agreement under § 42.044, Tex. Loc. Gov't Code, which can require permitting.

- Land in the ETJ subject to a planned unit district agreement under § 42.046, Tex. Loc. Gov't Code, which can require permitting.

- Land in the ETJ with a special district agreement under § 42.042, Tex. Loc. Gov't Code, which can require permitting.

- Land subject to limited purpose annexations under Subchapter F, Chapter 43, Tex. Loc. Gov't Code, which can require permitting under § 43.130(c). Please note that § 43.131 states that a city's ETJ is not extended by limited purpose annexation. Due to that, it follows that the Legislature very likely considers land under limited purpose annexation as being equivalent to land in the ETJ.

- "Other structures" could refer to billboards. General law towns and home-rule municipalities are given express authority to require building permits for signs in the ETJ. § 216.902, Tex. Loc. Gov't Code.

Lucas is the only appellate opinion which states that a town can extend building codes through Chapter 212. The Fort Worth Court of Appeals clearly articulated in *Bizios* the reasons that the *Lucas* holding no longer applies. 453 S.W.3d at 604. Section 212.049 was added with Subchapter B of Chapter 212 of the Local Government Code after *Lucas*. Subchapter B of Chapter 212, Local Government Code, relates to development plats and development is defined as "the new construction or the enlargement of an exterior dimension of any building . . ." Subchapter A, on the other hand, is related solely to the regulation of platting and subdivisions as the courts commonly define subdivisions. Unlike Subchapter A of Chapter 212, § 212.049 expressly states the Legislature's intent on the issue: **"This subchapter does not authorize the municipality to require municipal building permits . . . in its extraterritorial jurisdiction".** Because Subchapter A does not expressly address building permits like Subchapter B, the power to extend building codes through Subchapter A's subdivision authority to the ETJ should not be implied by the court. In addition, the Dallas Court of Appeals appears to have overruled its dicta in *Lucas* when it held in the 2001 opinion in *Levy v. City of Plano*, 2001 WL, 1382520 (Tex. App—Dallas 2001, no pet.) that § 212.003(a) does not authorize the extension of "land use and construction" ordinances to the ETJ. 2001 WL 138250 at 3. Furthermore, because the enactment of § 212.049 and Subchapter B of the Tex. Loc. Gov't Code occurred in the Legislative session immediately following the *Lucas* decision, *Lucas* is effectively overturned as a matter of policy.

Due to the 2009 enactment of Subchapter F of Chapter 233, Tex. Loc. Gov't Code, all houses constructed in the unincorporated areas of a county must meet the standards of the IRC if the county has adopted a resolution or order requiring such. There is no longer a danger of substandard housing being built in a home-rule city's ETJ. As a result, there is no valid policy reason for home-rule cities to extend their building codes to the ETJ.

If the intent of the home-rule city's request is to allow it to regulate development, then it has the ability to annex property pursuant to Chapter 43, Tex. Loc. Gov't Code. The city would then have to provide municipal services to the property and allow its residents to vote in city elections. Otherwise, the city will regulate private property and require the homebuilder to pay potentially excessive building permit fees without providing municipal services or voting rights.

Because there is no legislative authority providing for a home-rule city to extend its building code to the ETJ, the answer to the first question of the Request should be "No. "

CHAPTER 242 DOES NOT AUTHORIZE THE INCLUSION OF A BUILDING PERMIT REQUIREMENT IN AN INTERLOCAL AGREEMENT.

We reiterate that as the answer to the first question is "No," the answer to the second question must be a "No" as well. If, however, authority is contemplated under the first question in the Request, the answer to the second question should be "no." The phrase "related permits" in § 242.001(c), Tex. Loc. Gov't Code, refers to subdivision and platting permits, not building permits.

TAB supported the passage of House Bill 1445 in 2001 when § 242 was originally enacted. It is undisputed that the primary objective of the changes enacted by House Bill 1445 was to eliminate the "unnecessary expenses and delays for property owners because municipalities and counties have different standards, requirements, and levels of authority over subdivisions." (Bill analysis, H.B. 1445, 2001, attached as Exhibit C.) In order to avoid the confusion and expense created by overlapping platting jurisdictions, this legislation requires cities and counties to agree about the manner with which subdivision plats will be approved within the extraterritorial jurisdictions of municipalities. Tex. Loc. Gov't Code §242.001(d) (West 2002). The statute authorizes cities and counties to agree to a system that would simplify the administration of subdivision plats in the extraterritorial jurisdiction in one of four manners:

Option 1: Agreeing to allow the municipality exclusive jurisdiction to regulate subdivision plats as authorized by Chapter 212 of the Texas Local Gov't Code ("Chapter 212");

Option 2: Agreeing to grant the county exclusive jurisdiction over subdivision plats as authorized by Chapter 232 of the Texas Local Gov't Code;

Option 3: Agreeing to physical apportionment of the extraterritorial area over subdivision plat regulations with some portions to be governed by the city and others to be governed by the county; or

Option 4: Agreeing to establish an office responsible for submittal and approval of subdivision plat applications using a "consolidated and consistent set of regulations" as authorized by Chapter 212 and Chapter 232.

The intent of the statute with respect to permits not specifically related to subdivision land development was addressed in Texas Attorney General Opinion No. GA-0366. At issue was whether a county could assess a municipal drainage charge under the § 242 interlocal agreement. Comal County argued that the drainage charge would be "a subdivision related permitting activity." The Attorney General's office disagreed.

According to the opinion, the statute is intended to clarify which local regulations are "related to plats, subdivision construction plans, and subdivisions of land." This phrase was interpreted as relating specifically to land subdivisions. Chapter 402 was held to not relate "specifically to plat-related regulations nor specifically to subdivisions." The drainage utility fees in question in the opinion are akin to building code regulations that are not related to subdivision development.

Similarly, for the reasons stated in the response to the first question of the Request, the platting statutes do not mention or authorize extending a home-rule city's building code to the ETJ. Subdivision permits are those related to infrastructure development envisioned by Chapters 212 and 232 and not the vertical construction of structures. Section 242 does not authorize a home-rule municipality and a county to include a provision in their interlocal agreement allowing a city to apply its building, fire and construction-related codes in the County.

POLICY ARGUMENTS AGAINST EXTENDING A MUNICIPALITY'S CONSTRUCTION CODES TO THE ETJ.

Private property rights are a principle upon which Texas was built. Defending those rights from the actions of a governmental entity that is not accountable to the citizens has long been a principle foundation and activity of the Texas Legislature. It is not the proper function of municipalities to regulate building codes outside a city's limits where property owners cannot vote for city council and do not get municipal services. All municipalities have the right to reasonably regulate activities inside the city, as there is a remedy if the voters don't like the policies of the municipal government; e.g., the election of new council members.

ETJ landowners, however, have no remedy against objectionable city regulations, as they cannot vote on the city council members who affected their property rights through construction codes and fees. For a city, regulations in the ETJ are cost-free, because the city does not have to provide services to the affected ETJ residents.

The Legislature undoubtedly has numerous policy reasons for not giving municipalities the authority to extend construction codes to the ETJ. The strongest reason of all is the fact that people living in the ETJ do not receive important municipal services, nor do they have the ability to vote in city council elections. The exception to this occurs only when a city exercises limited purpose annexation under Subchapter F, Chapter 43, Tex. Loc. Gov't Code (*see* § 43.130(a)). **The fact that § 43.130(c) gives a city the direct authority to impose building inspection and permit fees when exercising limited purpose annexation is clear indication that a city may not do so in the ETJ absent such annexation.**

As argued above, due to the enactment of Subchapter F of Chapter 233, Tex. Loc. Gov't Code, all houses constructed in the unincorporated areas of a county must meet the standards of the IRC if the county has adopted a resolution or order requiring such. There is no longer a danger of substandard housing being built in a home-rule city's ETJ. As a result, there is no

valid policy reason for home-rule cities to extend their building codes to the ETJ. Furthermore, the enactment of Subchapter F, Chapter 233, shows the Legislature's recent intent to have counties, not municipalities, regulate building codes in the unincorporated areas of the state, which include ETJs; as detailed above, there are numerous fact situations that do not involve cities unilaterally enforcing their building codes in the ETJ under § 233.153(c).

CONCLUSION

In conclusion, because there is no legislative authority providing for a home-rule city to extend its building code to the ETJ, the answer to the first question of the Request should be "No. " Furthermore, because subdivision permits are those related to infrastructure development envisioned by Chapters 212 and 232 and not the vertical construction of structures, § 242 does not authorize a home-rule municipality and a county to include a provision in their interlocal agreement allowing a city to apply its building, fire and construction-related codes in the County.

Thank you for your time and attention to this matter. Should you or your staff have any questions or comments, please feel free to contact me.

Sincerely,

Ned Muñoz
V.P. of Regulatory Affairs and General Counsel
TEXAS ASSOCIATION OF BUILDERS