"NO BUILD" REGULATION BY CITY GOVERNMENT

The Texas Local Government Code currently gives cities a blank check to regulate land, subject only to the grandfathering protections of Chapter 245 therein. Most cities in Texas embrace growth and job opportunity for their citizens, maintaining cooperative relationships with landowners to provide new locations for homes, businesses and public services. The City of Austin, however, uses the blank check in a different manner; adopting and aggressively enforcing ordinances within its corporate limits and ETJ preventing property owners from constructing improvements. Austin's "No-Build" ordinances appropriate 95% or more of privately owned property as "open space" for the benefit of well-organized inner-city environmental and no-growth groups.

Examples: a) an African-American church established in a freedman community in southwest Austin following the Civil War, was informed by city hall that its ordinances would limit the coverage of the church's planned improvements to 3.6% of the surface area of a 7.5 acre tract acquired for expansion. b) A performing arts theater, after receiving permits from Austin to construct approximately 2.9 acres of improvements on a fully grandfathered 8.4 acre lot, was then informed by city bureaucrats that a mistake had been made and theater improvements would be limited to 0.28 acres, approximately 3.3% of the site. c) Austin attempted to limit a 5 acre grandfathered commercial site to 1498 square feet of improvements or 0.6% of the site. In the latter two cases, city government failed to honor the grandfathering protections of Chapter 245.

These outcomes duplicate the characteristics of the land burdened with conservation easements. Chapter 183 of the Natural Resources Code authorizes formation of conservation easements either with the consent of the landowner or the exercise of eminent domain. No other method is authorized. Austin effectively rewrites this chapter, taking conservation easements from landowners by government edict.

The KELO decision: Texas thought the case wrongly decided, quickly approving legislation to shore up the protections of eminent domain generally and restricting private to private takings specifically. But let's be clear: landowners impacted by Kelo takings received compensation for their land. Landowners impacted by Austin's "no build" regulations receive no compensation whatsoever, failing to qualify for even the tax deductions that normally accompany the donation of conservation easements.

The landowners of Texas trust the leaders of this state to see this for what it is: a "back-door" taking in its starkest sense, an abuse of government far worse than Kelo. To drive home this point, Austin routinely pays out millions of dollars to acquire conservation easements from landowners, but the land involved sits outside of the jurisdictional reach of the city, outside of the areas impacted by its "no-build" rules.

Highlighting the extremism faced by landowners in Austin, a leader of the SOS organization referred to property owners objecting to Austin "no build" rules as "crack cocaine dealers" in testimony before a House Land and Resource Management Committee hearing in 2005. An attorney for TML testifying in the same hearing argued that Austin's regulations devaluing an individual's private property by even 99% should not be considered a taking**.**

The adverse effects of "no-build" ordinances:

1. Land is seriously devalued. The Texas Supreme Court observed in City of Austin v. Quick that Austin's "no build" rules devalue farms and ranches in the path of development by as much as 90%. Austin did not challenge the court's finding. Appraisal districts recognize this devaluation resulting in significant loss of tax revenues for state and local government and school districts.
2. Lack of new housing/Promotion of urban sprawl. The subject rules prohibit the development of new lots, leading to a lack of affordable/middle class housing. Development then skips over

the city's jurisdiction, requiring sprawled roadway and utility infrastructure, resulting in greater drive times and air pollution.

3. Loss of the integrity of municipal services. State law requires cities to provide city services to land located within corporate limits. "No build" ordinances allow Austin to circumvent the duty to provide such services.
4. Fertile ground for government corruption. We know the adage about absolute power's corrupting influence. Indeed Austin's no build rules set the stage for corruption; e.g. A**ustin regulated away the right to construct improvements on 19 acres owned for many decades by an elderly couple and then bought the property from the damaged couple for 10% of market value as set by another sale of land with similar road frontage occurring simultaneously a few hundred feet away. (Lundelius)** In other cases, Austin has required landowners to contribute land or money to the city in exchange for the "reacquisition" of the right to construct improvements.

Let's acknowledge if the law allows Austin to regulate in this manner, it could be repeated anywhere in Texas. Let's also acknowledge that a majority of Texans in both parties believe that the citizens of this state should be free to reasonably use their real property and be free from clever circumvention of the protections of eminent domain. The following are recommended amendments to the Natural Resources Code and the Local Government Code providing a much needed safety net for landowners and balancing the relationship between the public and private sectors:

1. Establish a 50% minimum impervious cover standard for tracts of land served by municipal grade water and wastewater service and a lower standard, perhaps 35%, for tracts served by water wells and/or on-site septic systems, after deducting the 100 year FEMA floodplain. Why 50%? This parameter is consistent with suburban development densities, thus preserving property values. Professional engineers testified in 2005 hearings conducted by the House Land and Resource Management Committee and the Senate Natural Resources Committee that engineered environmental and flood controls, installed on the undeveloped 50% portion of private property, provide excellent environmental and flood protection. Landowners and the environment to both win. In the same hearings, Austin acknowledged the accuracy of the engineer's testimony, but because engineered systems could fail, they said, Austin holds fast to "no build" rules. By this standard, Austin is telling us that we should refrain from constructing and using any engineered component of modern life. Consider the absurdity of this position.
2. A corollary to the preceding parameter would prohibit cities from withholding otherwise available utility services to land in the municipal limits and requiring service extension plans to be promulgated for the ETJ.
3. The grandfathering provisions of Chapter 245 of the LGC should be simplified and clarified to prevent parsing by city government. Landowners that have given or dedicated significant property to the public for requested public purposes should have their remaining land grandfathered as to state and local land regulations as of the date of the donation.
4. Tree ordinances should not convert privately owned trees to public property, a) requiring enormous fees to be paid into city coffers for tree removal or b) denying the right to remove trees altogether, resulting in effective takings. Ordinances requiring mitigation through replanting of trees or payment of reasonable sums into tree planting funds provide protection of the urban tree canopy.

As Robert Frost declared as poet laureate of the United States, "poetry is about the grief, politics is about the grievance." Texas landowners, always a minority in the city limits and completely disenfranchised in the ETJ, must rely solely upon state leaders to address this grievance.