



*Empowering Texas cities to serve their citizens*

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President **Holly Gray-Moore**, Mayor Pro Tem, Roanoke  
Executive Director **Bennett Sandlin**

September 4, 2018

The Honorable Eddie Lucio  
Senate Intergovernmental Relations Committee  
Texas Senate  
P.O. Box 12068  
Austin, Texas 78711

Dear Chairman Lucio:

I am writing on behalf of the Texas Municipal League to provide our written input on two of your committee's interim charges.

At the May 31, 2018, hearing, the committee considered the following charge:

*Housing Affordability: Examine issues that impact housing affordability, including the effect of local government taxes, fees, and mandates. Evaluate the cost of purchasing a single-family residence in different parts of the state, factoring in the impact of local rules and regulations, to identify matters of policy with the greatest influence, and identify ways to increase transparency and awareness prior to the adoption of costly local ordinances or orders.*

Some commenters routinely focus solely on the “cost” side of the housing equation and pay no mind to the “benefit” component. For example, the Texas Public Policy Foundation routinely asserts in testimony and elsewhere that city building fees constitute almost 30 percent of the cost of new home in Texas. Those [commenters](#) cite to a National Association of Homebuilders [survey and report](#) to support the claim. The methodology behind that survey isn't easily obtainable, but it's clear that figures based on other parts of the country certainly aren't true here.

A [study](#) commissioned by TML found the number to be much, much lower in Texas. It found that city fees constitute around 1.8 percent of the mortgage payment on an average house.

The most frequently omitted portion of the NAHB study states the following:

The discussion in this article is confined to regulatory costs. No attempt is made to estimate possible benefits resulting from a particular regulation, or category of regulations, or to argue that costs associated with particular regulations are (or are not) justified. Governments usually have justifications for the regulations they impose, and the justifications are sometimes contentious, but these contentions are better left for elsewhere. The issue of regulatory costs embodied in the price of a house is by itself complex and substantial enough for a separate article devoted to the topic.

The League frequently refers to the above as the “reciprocity of advantage” provided by thoughtful regulations. Reviewing fees without the context of why they are charged leaves little in the way of beneficial analysis. Traditional, cost-benefit analyses may or may not make sense in the context of a building code. Some codes, like energy codes, lend themselves to this type of analysis. For example, how much does more energy efficiency save in utility costs over time and is that worth the price? But other codes are largely life-safety based. In other words, just because it costs more to build a fence around a pool, should that extra safety measure be prohibited solely because of the extra cost? What if it saves the life of a child?

The same goes for the notion that building codes somehow limit affordable housing stock. What price can one put on a properly-constructed home? The building code of 4,000 years ago was simple but brutal. According to an ancient *Hammurabi* code: “If a builder builds a house and does not make its construction firm, and the house collapses and causes the death of the owner, that builder shall be put to death.” Today’s common-sense building code standards ensure that homes are safe. We no longer execute substandard builders, but that’s because they are bound to local codes that reflect the will of citizens and protects life-safety and property values. Additional, state-mandated bureaucracy added to the already transparent building code process isn’t needed. If numbers are the only reason that homes are built, the national homebuilder profit percentage of [10.7 percent](#) would seem to show that things are moving along well.

One other topic was raised by the TPPF witness: Regulatory takings. He suggested that cities should be subjected to a state law known as the Texas Private Real Property Rights Preservation Act (Act).

The Act, first adopted in 1995, requires the state and certain political subdivisions (excluding cities) consider whether a proposed regulation might be a “taking” of private real property. It is designed to protect rural property owners from unnecessary governmental actions. The Act defines a “taking” as an action that would reduce the value of property by more than 25 percent. That definition is drastically different from both the Texas and United States Supreme Courts’ definition of a “taking” as applied to cities. Those courts apply a more reasonably balancing test to weigh regulatory benefits between the public and property owner.

Put simply, the Act is known as a “pay or waive” law. That means that a city would have three choices when presented with a claim from a landowner: (1) pay the alleged damages; (2) waive

the regulations; or (3) litigate the claim. Disastrous experiments in other states with similar laws have shown that cities can't afford to litigate or pay the sometimes bogus claims, and thus waive their regulations.

Cities are exempt from the law as a matter of sound public policy. People move to cities with the expectation that their property will be protected for the good of the city as a whole. Because of that expectation, cities regulate private real property in many ways, such as by zoning and platting; by regulating nuisances, sexually oriented businesses, setbacks, and landscaping requirements; and by adopting building codes.

As the Texas Supreme Court has [stated](#):

The takings clause...does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk.

Subjecting cities to the Act would strike at the very reason cities are incorporated in the first place: *To protect the property values and the health and safety of those living in close proximity to one another.*

The League stands ready to assist the committee with housing affordability.

At its August 14, 2018, hearing, the committee heard testimony on the following charge:

*ETJ Limitations and Notice: Review the existing regulatory authority granted to home-rule municipalities within the extraterritorial jurisdiction (ETJ), including practices used by cities to expand ETJ boundaries, and whether proper notification is provided to property owners added to a city's ETJ following an annexation proceeding. Determine the limitations that need to be placed on a city's authority within the ETJ to better protect the private property rights of individuals and landowners, and ways to notify individuals of the impact of being within a city's ETJ. Develop a statewide rule and minimum requirements for such notifications.*

Invited witnesses included city officials, League staff, the Dallas Association of Homebuilders, and others. While the charge appears to speak to city regulations in the ETJ, the hearing actually focused on annexation authority. Representatives from the Cities of Pflugerville and Pearland spoke to the negative effects they are already facing in the wake of S.B. 6, last session's annexation curtailment bill. Those cities were aggressively planning for utilities and other services in anticipation of annexing. Now that they've lost the power, they (and so many other cities) must rethink those plans.

Victor Gonzales, the mayor of Pflugerville, spoke to the efforts that his city has made to plan for the literally hundreds of thousands of people that will eventually move to the city and its ETJ. Senator Huffines then accused him of “getting the city into a trap” by planning for future growth: “This isn’t a trap that you’re in, this is a trap that you want to be in.” Cities (rather than counties, special districts, or the state) are the only thing – in the face of exponential population growth – standing between a livable quality of life or bedlam. Planning for what is sure to come isn’t a “trap.”

If cities stop doing it, the results will be detrimental to every aspect of Texans’ lives. The most important aspect is the economy. Companies want to come here because the infrastructure and services to sustain them are within cities. Without city planning and services, those just won’t exist.

That premise is also supported by the testimony of Darrin Coker, the city attorney of Pearland. Pearland provided essentially free fire service to ETJ residents. It did so in anticipation of those residents eventually becoming part of the city and sharing in the costs. Now that the citizens aren’t being annexed, the city has stopped that free service. The ETJ residents may now have to create an emergency services district to get the service, at the cost of a new layer of government and more taxes.

In addition to the testimony of the two home rule cities, Mayor Balis Dailey and Councilmember Klint Dailey from the City of Grapeland, a general law city that doesn’t currently have the authority to annex without consent, testified. They spoke to, among other things, needing the power to regulate the areas just outside of their city to prevent water well contamination and to ensure that businesses that drive their big rigs through the city share in their infrastructure costs. The city witnesses were clear in explaining the harm that curtailing annexation authority is causing and will continue to cause.

Rather than focus on how to maintain the state’s economy and quality of life, the Dallas Association of Homebuilders and TPPF witnesses spoke to an issue that has already been decided: The enforcement of building codes in a city’s extraterritorial jurisdiction. Several cities believed in good faith that they were authorized to do so, but the courts have stated that, except in some limited circumstances, the authority doesn’t exist. The League reported on these cases as they were decided:

- [https://www.tml.org/legis\\_updates/building-permits-in-the-etj-part-iv-no-home-rule-authority](https://www.tml.org/legis_updates/building-permits-in-the-etj-part-iv-no-home-rule-authority)
- [https://www.tml.org/legis\\_updates/building-permits-in-the-etj-part-iii-home-rule-authority](https://www.tml.org/legis_updates/building-permits-in-the-etj-part-iii-home-rule-authority)
- [https://www.tml.org/legis\\_updates/building-permits-in-the-etj-part-ii-home-rule-authority](https://www.tml.org/legis_updates/building-permits-in-the-etj-part-ii-home-rule-authority)
- [https://www.tml.org/legis\\_updates/texas-supreme-court-no-building-permits-in-the-etj](https://www.tml.org/legis_updates/texas-supreme-court-no-building-permits-in-the-etj)
- [https://www.tml.org/legis\\_updates/home-rule-cities-building-permits-in-the-etj](https://www.tml.org/legis_updates/home-rule-cities-building-permits-in-the-etj)

- [https://www.tml.org/legis\\_updates/general-law-cities-no-building-permits-in-the-etj](https://www.tml.org/legis_updates/general-law-cities-no-building-permits-in-the-etj)

It seems that both witnesses were more focused on wallowing in the past than moving towards the future. Moreover, the TPPF witness complained of the efforts made by the League to educate its members about non-annexation agreements for agriculturally-exempt property. As you know, the League prepares educational materials, and those materials are prepared with the most conservative advice possible. A [comprehensive paper](#) is available on annexation laws. The “offending portion” provides that:

There are several other issues relating to Section 43.016 that a city should be aware of:

Contiguity: In most cases, a city may annex only an area that is contiguous to the current city limits. Section 43.016(c) provides that, for purposes of any law, including a municipal charter or ordinance, relating to municipal authority to annex an area adjacent to the city, an area adjacent or contiguous to an area that is the subject of a development agreement is considered adjacent or contiguous to the city. In other words, a city is not prohibited from annexing land beyond the area that is the subject of the agreement solely because that land is not contiguous to the city limits, so long as the area touches the area that is subject to the development agreement. A question that follows is whether it is also reasonable to conclude that the area that is the subject of the agreement acts to expand the city’s extraterritorial jurisdiction? *That expansion is not expressly provided for in the statute and has not been tested in court.*

As the italicized portion shows, the League certainly isn’t encouraging any city to act in any particular way.

What’s the bottom line in relation to the two charges discussed above? It’s that cities are working. The dramatic growth in jobs and population in Texas cities in recent decades is indisputable proof that the decisions Texans have made at the local level have produced the kind of communities where people want to live, work, and do business. Year after year, Texas towns and cities lead the nation in the number of companies and people moving here.

The success Texas cities have had in attracting people and businesses is the envy of the nation. But that success comes with challenges such as traffic congestion and the need for more police officers, firefighters, water and sewer lines, trash collection, development services, and all the other local services we depend on.

The most important decisions citizens must make as a community involve the level of services we want and how much we are willing to pay for them. Those decisions should be made by them and the people they elect locally.

Thank you for your consideration and please do not hesitate to contact me if I can be of any assistance to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Igo', with a stylized flourish at the end.

Shanna Igo  
*Deputy Executive Director*

cc: Members of the Senate Intergovernmental Relations Committee