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County Regulation of Rural Subdivisions

By Judon Fambrough

Urban flight and the resulting division of rural land are Texas realities. The extensive division of rural acreage and the associated problems were among the topics addressed at the 1996 Agriculture Summit III Conference in Kerrville. Summit participants discussed ways to resolve pressures causing land fragmentation, such as declining farm and ranch incomes, increasing suburban developments and reducing both federal gift and estate taxes and Texas inheritance taxes.

With the problems caused by land division comes the question about the government's authority to regulate. The problems created in the Rio Grande Valley by colonias prompted the 74th Texas Legislature to pass specific laws regarding their sale. Generally, the power to govern rural subdivisions lies with the commissioners court.

The Texas Local Government Code (TLGC) requires landowners outside the city limits and outside the extra-territorial jurisdiction of a city who divide land into two or more parts for a subdivision to file a plat when lots or streets or other areas are to be dedicated to public use.

Before a subdivision plat can be recorded, however, it must be approved by the commissioners court in the county where the land is located. For approval, an order must be entered into the minutes after all statutory requirements have been met. After the order is entered and publication of notice made, the court may prescribe standards for streets (width, specifications and so forth), drainage and water availability and require a bond.

Within limits, the county regulates subdivisions by the standards imposed on the streets, drainage and water availability.

Developers complained that many of the standards were too burdensome and expensive. Others said the standards were impractical, such as requiring a 60-foot easement to the subdivision when a narrower one would be sufficient.

Eventually, challenges reached the courts. The most significant challenge was the 1995 case of *Elgin Bank of Texas v. Travis County, Texas.*

Elgin Bank owned approximately 150 acres in Travis County. The land was not within corporate limits or the extra-territorial jurisdiction of any municipality. Bank officials wanted to subdivide the property for sale in multiple tracts using metes and bounds descriptions, but they did not want to file a subdivision plat. Because the property had access to existing roads and because Elgin Bank did not plan to build streets or roads within the subdivision, bank officials believed the statute did not apply. Travis County authorities asserted that it did. According to the TLGC:

> The owner of a tract of land located outside the limits of a municipality who divides the tract into two or more parts to lay out a subdivision of the tract, including an addition, or to lay out suburban lots or building lots, **and** to lay out streets, alleys, squares, parks or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the streets, alleys, squares, parks or other parts must have a plat of the subdivision prepared [emphasis added].

The trial court granted Travis County a summary judgment. Elgin Bank appealed. The question before the appellate court was whether Travis County could require the owner of a tract of land who subdivides—but does not plan to lay out streets, alleys, squares, parks or other parts of the tract for public or private use—to prepare a plat of the subdivision.

The appellate court reversed the trial court and rendered judgment that Travis County could not require the bank to plat the property under the circumstances.

The court based the decision on legislative history and on the strategic use and placement of the word *and.* "On its face, the plain language of the statute requires a plat **only if** the owner both divides the property **and** lays out streets of other public areas."

Travis County asked the Texas Supreme Court to review the decision. In January 1996, the high court declined, gutting much of a county's power to regulate development in unincorporated, nonmunicipal areas.

Property rights advocates hail the decision as a victory. They believe that Travis County officials were overzealous in interpreting the law. However, the unrestrained use of property may be a detriment to the community as a whole.

In response to the decision in *Elgin Bank of Texas v. Travis County, Texas*, 906 S.W. 2d 120 (1995), the Texas Legislature

passed Senate Bill 710 effective September 1, 1999. The bill amends parts of Section 232 of the Local Government Code that address platting requirements for rural subdivisions. Prior to Senate Bill 710, county developers were not required to file a subdivision plat for the county commission's approval unless they dedicated property for public use. The new bill makes it more difficult for developers to avoid the filing requirement.

The bill contains exceptions, though. Landowners and subdividers who divide property into two or more parts are still exempt from filing if they (1) do not lay out streets, alleys, squares, parks or other property intended for public use or for use by owners of lots fronting or adjacent to the streets, alleys, squares, parks or other property and (2) meet any one of the following requirements:

- the land will be used primarily for agricultural, farm, ranch or wildlife management uses or for timber production;
- each of the new lots will be sold or transferred to a relative of the owner;
- each lot will be more than ten acres;
- all lots will be sold to veterans through the Veterans' Land Board Program;
- all parts will be transferred to persons who owned undivided interest in the original tract;
- the tract presently belongs to the state or any state agency, board or commission or permanent school fund;
- the owner is a political subdivision of the state, the land is in a floodplain and the lots are sold to adjoining landowners and
- the land will be divided in two parts; one part will be retained by the owner, and the other part will be transferred to a person who will subdivide it subject to a plat approval.

It is important to note that developers must not dedicate any property for public use or for use by adjacent lot owners for the above exceptions to apply. Although exceptions remain, Senate Bill 710 makes it more difficult for developers to avoid filing a plat with the county commissioners.

The following is an excerpt from a column written by Robert Elder, Jr., a senior editor at the *Texas Lawyer*, a weekly journal for attorneys. He illustrates how an obscure ruling can degrade the quality of life for thousands of people. The views expressed are those of the author, not the Real Estate Center, the Lowry Mays College & Graduate School of Business nor Texas A&M University. The column, "Obscure Appeals Ruling Produces Subdivision from Hell" is reprinted with permission.

As a result of *Elgin Bank*, colonia-type developments are spreading far beyond the Texas-Mexico Border. (It's a fallacy that severely substandard development is just a Border problem: most urban and high-growth counties can point to a number of developments that are a short step up the development ladder from colonias.) In the heart of fast-growing Hays County, a half-hour drive south of the state capitol, developers have rushed in to take advantage of the decision—in some instances, says County Commissioner Jefferson W. Barton, literally brandishing a copy of the Third Court opinion as they inform the county that they know how big a loophole Elgin Bank created.

"Barton's precinct in northern Hays County contains some of the prettiest country around Austin—and it is that proximity, as well as its beauty, that makes it so attractive to developers, both ethical and unscrupulous. Last summer, several miles east of Interstate 35, a development called I-35 South Ranches was born as a direct result of the Elgin Bank case.

"'Despite the name,' Barton dryly noted in a memorandum to the Conference of Urban Counties, 'I-35 is nowhere near, and nothing about the lots could be mistaken for a ranchette, much less a ranch.' The misnomer is the least of the problems. The dilemma is that the Third Court held that a county doesn't have the power to require an owner of a tract of land to prepare a plat of a subdivision when the owner doesn't plan to lay out streets or parks or other parts of the tract dedicated to public use.

"In nondevelopment-speak, the opinion means that as long as a developer extends part of a subdivision to an existing street, he doesn't have to get subdivision approval from a county. Such lots are often called 'flag lots' because long, thin strips of land, resembling flag-poles, are extended to existing roads. As long as lots are 'flagged' to an existing road, the developer can escape virtually all county supervision.

"The I-35 South Ranches, developed by builder Robert (Bill) Sweeney of Del Valle, are a clear example of what *Elgin Bank* has brought to rural development. Acres of beautiful, rolling Hays County land are dotted with a patchwork of mobile homes and poorly built houses. The aesthetics are not the real problem, however.

"The lots are 'flagged' to two existing public roads, which lets the developer escape virtually all county regulation. In digging septic-tank holes in the region's blacklands clay soil, the developer loaded much of the out-fill into county ditches, which caused flooding, created stagnant pools of water and damaged the abutting county roads.

"Blacklands clay also is a bad surface on which to build and maintain roads. The two existing county roads were already of questionable quality, and the influx of residents has made them worse. Besides crumbling roads, there are no turnarounds for school busses and other large vehicles. And with no streets built inside the subdivision, emergency vehicles have an almost impossible job finding the correct home—assuming, that is, that they can maneuver through the muddy ruts that lead back to resident's houses.

"Sweeney is matter-of-fact about his development's shortcomings. 'We build that way to save us from the expense of building roads. We can offer more for less money,' he says. 'We are targeting the market that is less capable of spending money on a home. County officials,' Sweeney gripes, '"are just social engineers" who need less power, not more.'

"Hays County contains some extreme examples of *Elgin Bank*-type problems, but the county is by no means alone. About two dozen counties have reported similar problems to the Texas Association of Counties and a related group, the Conference of Urban Counties. The two groups sought legislation during the last session that would cure some of the regulation problems caused by the decision.

"What *Elgin Bank* produced is a situation in which market forces are unfettered by regulation, and free-market rule isn't pretty. For one thing, it has put a new twist on the brewing 'property rights' movement in Texas, in which landowners have claimed that governmental actions that adversely affect their land is an unconstitutional 'taking' of property.

"In Hays and other Texas counties, property owners who live near unregulated subdivisions are experiencing their own forms of takings—reduced property values. In a countryside that was fairly pristine, longtime landowners have found that shoddy subdivisions bring eyesore housing—sometimes with malfunctioning septic systems—and county roads that become less passable with increased

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traffic. The counties, in turn, find their costs skyrocketing in the form of road maintenance.

"*Elgin Bank* is a bad decision for a lot of reasons, not the least of which is that it is based on a poorly written statute. Section 232.001(a) of the TLGC governs preparations of plats by landowners who divide a tract of land—and, unfortunately, this part of the code is a masterpiece of run-on sentences and ungrammatical construction. The case hinged on the interpretation of and in the relevant section of the code.

"Travis County District Judge F. Scott McCown, sitting in the 250th District, granted summary judgment for Travis County in a case brought by the Elgin Bank of Texas, which wanted to subdivide a 150-acre tract without filing a subdivision plat or plan. Travis County officials, as counties across the estate have done for decades, read the law requiring a plat to be drawn up for almost any instance where land was being subdivided. The bank's argument was that the statute should be read to require a plat only if two conditions were met: the land was being subdivided and new roads or utility improvements were being constructed in the subdivision.

"Faced with two different interpretations—an unsurprising result, given the vagueness of the statute—McCown did the smart thing: he looked to the legislative history. What McCown found, going back to a 1927 act concerning city land development, was that the legislature always intended to make it unlawful to provide public utilities without approval of a plat. McCown also found that the county statutes were modeled on the city statutes—and that both were intended to give local officials a degree of control over development.

"In its short ruling, the Third Court ignored legislative history and instead interpreted the unwieldy grammar of the statute. The panel of Justices John Powers, J. Woodfin Jones and Mack Kidd sided with Elgin Bank, thus giving developers a huge escape clause from county regulation.

"Corrective legislation carried by Rep. Ron Lewis, D-Mauriceville, failed in a House committee. The Texas Association of Builders and the counties were at odds over how much lot acreage should continue to be exempt from county authority. The details were complex, but Andrew Erben, the builders' legislative director, acknowledges it boiled down to this: *the Elgin Bank* decision gave developers a gift that some are reluctant to return. Compromise is possible, Erben says, and his association will continue to negotiate with the counties' association, but he adds that 'some of my members' feel that even a small compromise is giving up a lot.

"The same market forces that drive the creation of colonias—scarcity of affordable housing, developers who offer homeowners little-to-no-money-down deals, proximity to jobs—are at work in Hays County, which is within commuting distance of Austin and even San Antonio. To most city dwellers of at least modest means, the I-35 South Ranches must look like barely habitable eyesores. But the demand for this type of housing clearly exists; the development started with 46 lots last summer and all sold out in a matter of weeks.

"*Elgin Bank* gives developments like the I-35 South Ranches a chance to proliferate, to be established almost overnight—and to put quality developers at a disadvantage. The legislature did not overturn *Elgin Bank* in the 1997 session. The next opportunity to rein in development will not come again until 1999. When it comes to developing unincorporated areas of a fast-growing county, that is an eternity.

"In the booming 1980s, Hays County's population soared by 62 percent to 65,614 residents in 1990. Already this decade the county population had increased to about 88,000.

"That's a big market for developers who work fast, sell hard and move on to the next parcel of land.

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