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Legal Q&A**

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Q. What is the extraterritorial jurisdiction and why was it created?

The extraterritorial jurisdiction (ETJ) is an “unincorporated area that is contiguous to the corporate boundaries” of a city. TEX. LOC. GOV’T CODE § 42.021. The ETJ, a concept created by the Texas Legislature in 1963, is said to be established in order “to promote and protect the general health, safety, and welfare of persons residing in and adjacent to” cities, a sort of buffer zone outside of a city’s corporate limits. *Id.* § 42.001. Despite this, cities have been granted relatively little authority to address health and safety issues in the ETJ. Thus, some argue that the real purpose of the ETJ is to limit the geographic area in which a city may annex.

Q. How much territory is encompassed in a city’s ETJ?

The extent of ETJ is generally dependent on the number of city inhabitants. With some exceptions, state law provides that:

- in a city with fewer than 5,000 inhabitants, the ETJ is within one-half mile of the corporate boundaries;
- in a city with 5,000 to 24,999 inhabitants, the ETJ is within one mile of the corporate boundaries;
- in a city with 25,000 to 49,999 inhabitants, the ETJ is within two miles of the corporate boundaries;
- in a city with 50,000 to 99,999 inhabitants, the ETJ is within 3-1/2 miles of the corporate boundaries; and
- in a city with 100,000 or more inhabitants, the ETJ is within 5 miles of the corporate boundaries.

Id. § 42.021(a).

Absent evidence of fraud, a court is required to accept a city’s determination of the number of inhabitants, rather than consider census figures, in determining the extent of the ETJ. *See City of Burleson v. Bartula*, 110 S.W.3d 561, 565 (Tex. App.—Waco 2003, no pet.). When asked about the exact method of measurement a city must use to determine its ETJ, the attorney general concluded that a city may choose the method by which it will ascertain the boundaries of its ETJ. *See Tex. Att’y Gen. LO-94-033.*

Q. Why does my city’s ETJ encompass a different amount of territory than provided in state law?

The extent of a city’s ETJ could be different than what state law provides as the result of local factors and circumstances. For instance, a city that incorporates immediately adjacent to another city may have no ETJ at all. A more common reason for a city’s ETJ to be different than the

distance limits in Section 42.021 is that the city used its authority to adopt an ordinance to bring land contiguous to its ETJ into its ETJ at the request of the landowners. TEX. LOC. GOV'T CODE § 42.022(b).

Q. What happens to the ETJ when a city annexes property?

Generally, when a city annexes an area, the ETJ “expands with the annexation to comprise, consistent with Section 42.021, the area around the new municipal boundaries.” *Id.* § 42.022(a); *but see, e.g., id.* § 42.0225. For example, when a city of 100,000 or more inhabitants annexes an area, its new ETJ would generally comprise the unincorporated area contiguous to the new city boundaries within five miles of the new boundaries. *See id.* § 42.021(5).

It should be noted that the ETJ of a city may not expand — whether it be by an increase in the number of inhabitants, on request of a landowner, or through annexation — into another city’s ETJ without that city’s consent. *Id.* §§ 42.022(c), 42.023. And the ETJ of a city generally may not be reduced, unless the city council of the city gives its written consent. *Id.* §§ 42.022(d), 42.023.

Q. Should a city have a map showing the boundaries of its ETJ?

Yes, a city should have an official map showing both its corporate boundaries and its ETJ. The map should be updated every time the city’s ETJ expands or shrinks, along with a note indicating the date of the change, any related ordinance or resolution number, and a reference to the minutes, ordinance, or resolution records in which the action is recorded. *Id.* § 41.001. Depending on how the map was created, the map may also need to include a disclaimer that reads something like the following: “This map is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey, but only the approximate relative location of property boundaries.” TEX. GOV’T CODE § 2051.102.

Every city must maintain a copy of the map in a location that is easily accessible to the public, including the city secretary’s office, the city engineer’s office (if the city has an engineer), and the city’s website (if the city maintains a website). TEX. LOC. GOV’T CODE § 41.001. Every city must also make a copy of its map publicly available without charge.

A home rule city is required to create, or must contract for the creation of, a digital map that must be made publicly available without charge and in a format widely used by common geographic information system (GIS) software. *Id.* If a home rule city does not have common GIS software, the city must make the digital map available in any other widely used electronic format. *Id.* Presumably, this provision authorizes a city without GIS technology to make its map available in a PDF format.

Q: May cities swap ETJ?

Certain cities have express authority to swap or apportion their ETJs. TEX. LOC. GOV’T CODE § 42.024. It is not clear whether general law cities have authority to contractually agree to swap

ETJ. This issue was discussed in a recent case styled *City of Justin v. Town of Northlake*, No. 06-17-00054-CV, 2018 WL 4259853 (Tex. App.—Texarkana June 15, 2018, pet. denied) (mem. op.). In that case, the City of Fort Worth exchanged ETJ with a general law city (Town of Northlake) pursuant to Texas Local Government Code Section 43.021 (re-codified in 2017 as Texas Local Government Code Section 43.003), which provides as follows:

A home-rule municipality may take the following actions according to rules as may be provided by the charter of the municipality and not inconsistent with the requirements prescribed by this chapter:

- (1) fix the boundaries of the municipality;
- (2) extend the boundaries of the municipality and annex area adjacent to the municipality; and
- (3) exchange area with other municipalities.

The City of Justin argued, among other things, that the agreement between the two cities was void and invalid because it violated the Local Government Code. Although the court refused to make any finding as to that argument, it did conclude that Section 43.021 (now Section 43.003) specifically addresses the “authority given to a home-rule municipality, i.e., a home-rule municipality may exchange area (to include its ETJ) with other municipalities” but does not “address the authority given to the receiving city” so it has “little, if any, relevance regarding [a general law city’s] authority to . . . accept or exchange ETJ.” *Id.* at n.22-23.

Q. May a city apply its ordinances in the ETJ?

A 1997 attorney general opinion concludes that

[a]s a general rule, a city can exercise its powers only within the city’s corporate limits unless power is expressly or impliedly extended by the Texas Constitution or by statute to apply to areas outside the limits. Extraterritorial power will be implied only when such power is reasonably incident to those powers expressly granted or is essential to the object and purposes of the city. ‘[A]ny fair, reasonable, or substantial doubt as to the existence of a power will be resolved against the municipality.’

Tex. Att’y Gen. Op. LO-97-055 (1997) (citations omitted); *cf. also, Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 902 (Tex. 2000).

The following are examples of state laws that authorize cities to regulate in the ETJ:

- Health & Safety Code § 713.009 – Cemeteries
- Local Government Code Chapter 43 – Annexation
- Local Government Code § 212.003(a) – Subdivision and Platting Regulations

- Local Government Code §§ 216.003, 216.902 – Signs
- Local Government Code § 217.042 – Nuisances within 5,000 feet (home rule city only)
- Local Government Code § 341.903 – Policing City-Owned Property (home rule city only)
- Local Government Code § 552.001 – Utility System
- Water Code § 26.177 – Pollution Control and Abatement

State law prohibits a city from regulating the following in the ETJ: (1) the use of a building or property for business, industrial, residential, or other purposes; (2) the bulk, height, or number of buildings constructed on a tract of land; (3) the size of a building that can be constructed on a tract of land; (4) the number of residential units that can be built per acre of land; and (5) the size, type, or method of construction of a water or wastewater facility that can be constructed to served a developed tract in certain circumstances. TEX. LOC. GOV'T CODE § 212.003(a).

The Texas Supreme Court held that general law cities may not extend their building codes into the ETJ. *See Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527 (Tex. 2016). And the Dallas Court of Appeals held that a home rule city “lacks authority to require a landowner developing property in its [extraterritorial jurisdiction] to obtain City building permits, inspections and approvals, and pay related fees.” *Collin Cty. v. City of McKinney*, 553 S.W.3d 79 (Tex. App.—Dallas 2018).

Q. Do city taxes apply in the ETJ?

The inclusion of an area in the ETJ of a city does not itself authorize a city to impose a tax in the area. TEX. LOC. GOV'T CODE § 42.902. Just as with the application of a city’s ordinance, a city must identify express or implied authority to impose a tax in an area in the ETJ. For instance, state law allows a city with a population of less than 35,000 to impose its hotel occupancy tax in the ETJ so long as the combined rate of state, county, and city hotel occupancy taxes in the extraterritorial jurisdiction does not exceed 15 percent of the price paid for a room in a hotel. TEX. TAX CODE § 351.0025. State law also authorizes a municipal development district (a district created by a city) to impose its sales tax in a city’s ETJ if the voters of the entire district approve the tax, and the combined tax rate of all local sales and use taxes are not more than two percent in any location in the district. TEX. LOC. GOV'T CODE §§ 377.002, 377.021, 377.101. This is the only city sales tax that may be levied in the ETJ of a city.

Q. May qualified voters residing in the ETJ ever vote in a city election?

Generally, to be eligible to vote in a city election a person must, among other things, reside in the city on the day of the election. TEX. ELEC. CODE § 11.001. (As used in the Election Code, the term “residence” means domicile or “legal residence” and not necessarily the actual place where a person is living for the time being. *Id.* § 1.015.) There are some exceptions to this general rule. For instance, a city that seeks to annex an area with a population of 200 or more must get, at an election, the approval of a majority of the qualified voters in the area. TEX. LOC. GOV'T CODE § 43.0691; *see also, e.g., id.* §§ 42.904, 43.130.

Q. Do city police officers have any authority to make arrests in the ETJ?

A permanently licensed city police officer is a peace officer. TEX. CODE CRIM. PROC. art. 2.12(3). Various categories of peace officers, a licensed city police officer among them, may make an arrest without warrant for an offense committed in their presence or view. *Id.* art. 14.03(g)(2). However, if the police officer is outside of the city, the officer “may arrest a person for a violation of Subtitle C, Title 7, Transportation Code only if the offense is committed in the county or counties in which the municipality employing the peace officer is located.” *Id.* Subtitle C, Title 7, Transportation Code, contains the “Rules of the Road,” which are the state traffic laws that a city police officer enforces. A police officer who makes an arrest under the article 14.03(g)(2) authority “shall as soon as practicable after making the arrest notify a law enforcement agency having jurisdiction where the arrest was made. The law enforcement agency shall then take custody of: (A) the person committing the offense and take the person before a magistrate in compliance with Article 14.06; and (B) any property seized during or after the arrest as if the property had been seized by a peace officer of that law enforcement agency” *Id.* 14.3(g)(3). Thus, while a city police officer may make an arrest in the ETJ, it is oftentimes county law enforcement and county courts that handle the case.

Another instance in which a police officer has authority to arrest a person outside of the city occurs when the officer is acting as part of a regional task force. When counties and cities form mutual aid law enforcement task forces pursuant to Local Government Chapter 362, a law enforcement officer for one entity is authorized to make arrests within the area covered by the agreement, even when the area exceeds what would be the officer’s normal geographic or territorial jurisdiction. TEX. LOC. GOV’T CODE § 362.003.

Q. Do municipal courts have jurisdiction over cases that arise in the ETJ?

While a detailed discussion of the jurisdiction of a municipal court is beyond the scope and purpose of this publication, suffice it to say that a municipal court may sometimes hear and decide cases involving territory and persons located or residing in the ETJ. For instance, Government Code Chapter 29 provides municipal courts with jurisdiction over certain criminal cases that occur on property owned by the city but located in the ETJ. TEX. GOV’T CODE § 29.003. And Government Code Chapter 30 provides that a municipal court of record has jurisdiction over criminal cases arising under ordinances authorized by Local Government Code Sections 215.072, 217.042, 341.903, and 551.002. *Id.* § 30.00005. Those ordinances may be applied outside of a city’s boundaries and, thus, municipal courts of record have jurisdiction over certain criminal cases arising from ordinance violations outside city limits. *See* Tex. Att’y Gen. Op. JC-0025 (1999); *cf. also PPC Enters., Inc. v. Texas City*, 76 F.Supp.2d 750, 760, n.8 (S.D. Tex. 1999).