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January 10, 2008

First Class Mail
The Honorable Greg Abbott
Attorney General
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0664-GA

RE: Request for Advisory Opinion on (1) whether a municipality may regulate density/zone through platting within its extraterritorial jurisdiction; and (2) whether a County may regulate density/zone through platting in the unincorporated areas of a county.

Dear General Abbott:

In my capacity as legal counsel to and on behalf of the Comal County Commissioners Court, I write requesting an advisory opinion on (1) whether a municipality may regulate density/zone through platting within its extraterritorial jurisdiction (ETJ); and (2) whether a County may regulate density/zone through platting in the unincorporated areas of a county.

Pursuant to Section 242.001(d)(4) of the Texas Local Government Code the City of Bulverde and the County of Comal entered into an Interlocal Agreement on April 4, 2002, establishing consolidated and consistent subdivision regulations for the City of Bulverde's extraterritorial jurisdiction dictating that the City of Bulverde would enforce specified regulations pursuant to and contained within the Interlocal Agreement. See Interlocal Cooperation Agreement Between Comal County and City of Bulverde for Subdivision Regulation within the Extraterritorial Jurisdiction of the City of Bulverde attached as Exhibit "A." The agreement was written to expire on December 31, 2007.[1]

Pursuant to the above-mentioned Interlocal Agreement, the City enforced its subdivision regulations as well as the specified County regulations listed within the Interlocal and its attachments. In enforcing its subdivision regulations, the City of Bulverde regulated the number of residential units that can be built per acre of land in their extraterritorial jurisdiction. See City of Bulverde Ordinance No. 74-02-02-12 attached as Exhibit "B."

I.

History behind approval of subdivisions in the ETJ

Historically speaking, one area where statutes have been in substantial conflict leading to much confusion for citizens is in regards to the respective authority of cities and counties to regulate or approve subdivision plats within the extraterritorial jurisdiction of a city. Through a multitude of attorney general opinions, statutory revisions, and caselaw, the dispute was settled through House Bill 1204.[ii] Specifically, House Bill 1204 created Chapter 242 of the Local Government Code which sets out the manner of deciding which governing entity would control regulation in the ETJ by giving four possible options that a city and county could agree to. Section 242.001(d) states that:

> "An agreement under Subsection (c) may grant the authority to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction of a municipality as follows:
>
> (1) the municipality may be granted exclusive jurisdiction to regulate subdivision plats and approve related subdivisions under Subchapter A of Chapter 212 and other statutes applicable to municipalities;
> (2) the county may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Sections 232.001-232.005, Subchapter B or C, Chapter 232, and other statutes applicable to counties;
> (3) the municipality and the county may apportion the area within the extraterritorial jurisdiction of the municipality with the municipality regulating subdivision plats and approving related permits in the area assigned to the municipality and the county regulating subdivision plats and approving related permits in the area assigned to the county; or
> (4) the municipality and the county may enter into an interlocal agreement that:
>
> (A) establishes one office that is authorized to:
> (i) accept plat applications for tracts of land located in the extraterritorial jurisdiction;

(ii) collect municipal and county plat application fees in a lump-sum amount; and

(iii) provide applicants one response indicating approval or denial of the plat application; and

(B) establish a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land as authorized by Chapter 212, Sections 232.001-232.005, Subchapters B and C, Chapter 232, and other statues applicable to municipalities and counties that will be enforced in the extraterritorial jurisdiction.

TEX. LOCAL GOV'T CODE ANN. 242.001(d) (2003).

Section 242.001(c) gives governing entities a deadline of when the agreement must be in place of April 1, 2002. TEX. LOCAL GOV'T CODE ANN. 242.001(c) (2003). [iii]

In providing four models of enforcement, this Chapter makes it clear what regulations are allowed dependent upon the model of enforcement the parties choose.

II.
Models of Municipal regulation within its ETJ

Under Chapter 242, there are three possible models in which a municipality may control regulation of subdivisions through the platting procedures in its extraterritorial jurisdiction. First, Section 242.001(d)(1) sets out that a municipality may exclusively regulate pursuant to "Subchapter A of Chapter 212 and other statutes applicable to municipalities." TEX. LOCAL GOV'T CODE ANN. 242.001(d)(1)(2003). Second, Section 242.001(d)(3) allows a municipality and a county to geographically apportion the ETJ where one geographic area would be regulated by the municipality, ergo pursuant to the authority granted municipalities under the Local Government Code and other statues applicable to municipalities. TEX. LOCAL GOV'T CODE ANN. 242.001(d)(3)(2003).[iv] Lastly, Section 242.001(d)(4) provides a hybrid approach in which the county and municipality may come to an agreement choosing "one office," being the municipality, with "a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land as authorized by Chapter 212, Sections 232.001-232.005, Subchapters B and C, Chapter 232, and other statutes applicable to municipalities and counties that will be enforced in the extraterritorial jurisdiction." TEX. LOCAL GOV'T CODE ANN. 242.001(d)(4)(2003).[v] In reviewing the above listed three models in which the municipality may regulate, Chapter 242 is clear on when and what authority

may be used in the municipality's regulation either Chapter 212, 232, or "other statutes applicable to municipalities."

III.
Models of County Regulation of ETJ

The same three models of enforcement listed above generally apply to a county except that the first model of enforcement applicable to the county comes under the authority of Section 242.001(d)(2) and not (d)(1).[vi] As explained above, the County would also be able to regulate a geographic portion of the ETJ pursuant to the model contemplated in (d)(3). Likewise, the county could be the one office using the blend of authority under the model contemplated under (d)(4).

IV.
Allowable Regulation within the ETJ

A. Municipal regulation of the ETJ under Chapter 212 of the Local Government Code

Chapter 212 of the Local Government Code sets forth what ordinances a municipality may extend into the extraterritorial jurisdiction. In particular, it states:

> (a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads or the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:
>
> (1) the use of any building or property for business, industrial, residential, or other purposes;
>
> ***(2) the bulk, height, or number of buildings constructed on a particular tract of land;***
>
> (3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of buildings floor space to the land square footage;
>
> ***(4) the number of residential units that can be built per acre of land; or***
>
> (5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land if:

(A) the facility meets minimum standards established for water or wastewater facilities by state and federal regulatory entities; and
(B) the developed tract of land is:
i. located in a county with a population of 2.8 million or more; and
ii. served by:
(a) on-site septic systems constructed before September 1, 2001, that fail to provide adequate services; or
(b) on-site water wells constructed before September 1, 2001, that fail to provide an adequate supply of safe drinking water.

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.
(c) The municipality is entitled to appropriate injunctive relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

TEX. LOCAL GOV'T CODE ANN. 212.003 (2007) (emphasis added).

B. County Regulation of the ETJ under Chapter 232 of the Local Government Code

Chapter 232.101 of the Local Government Code sets forth what ordinances a county may enforce in regulation of platting the unincorporated area of the County including a municipality's ETJ. Specifically, it states:

(a) By an order adopted and entered in the minutes of the commissioners court and after a notice is published in a newspaper of general circulation in the county, the commissioners court may adopt rules governing plats and subdivisions of land within the unincorporated area of the county to promote the health, safety, morals, or general welfare of the county and the safe, orderly, and healthful development of the unincorporated area of the county.

(b) Unless otherwise authorized by state law, a commissioners court shall not regulate under this section:

(1) the use of any building or property for business, industrial, residential, or other purposes;

(2) the bulk, height, or number of buildings constructed on a particular tract of land;

(3) the size of a building that can be constructed on a particular tract of land, including without limitation and restriction on the ratio of building floor space to the land square footage;

(4) the number of residential units that can be built per acre of land;

(5) a plat or subdivision in an adjoining county; or

(6) road access to a plat or subdivision in an adjoining county.

(c) The authority granted under Subsection (a) is subject to the exemptions to plat requirements provided for in Section 232.0015.

TEX. LOCAL GOV'T CODE ANN. 232.101 (2007) (emphasis added).

C. Comparison of Chapters 212 and 232 of the Local Government Code

Reviewing together the statutory language found in 212.003 and 232.101 of the Local Government Code, the similarities found in the statutes far outweigh the differences. The two statutes are express exclusions, i.e. a county or city must have other statutory authority to circumvent the prohibited regulation. TEX. LOCAL GOV'T CODE ANN. §§212.003 and 232.101 (2007). One notable difference found is that 232.101 applies countywide, whereas 212.003 is specifically limited to the ETJ.

V.

Testing the Boundaries under Chapter 212 and 232 of the Local Government Code

A. *Quick v. City of Austin*

Few cases or attorney general opinions exist that interpret or decipher the proper limitation of property development rights pertaining to the ETJ. In 1998, the Texas Supreme Court was faced with a challenge to a municipal ordinance that limited impervious or non-porous cover for a portion of the City of Austin's ETJ. *Quick v. City of Austin,* 7 S.W.3d 109 (1998).

"Frustrated by their perception that the Austin City Council was failing to safeguard Barton Springs adequately, a group of Austin citizens interested in protecting the environment initiated the Save Our Springs Ordinance and placed it on the Austin municipal ballot for a local referendum election.

> In August 1992, the Austin citizens participating in the referendum election overwhelmingly approved the Ordinance. Two days after the voters approved the Ordinance, the Austin City Council enacted the Ordinance and incorporated it into the City Code. The purpose of the Ordinance, according to its Declaration of Intent is to insure water quality control in Barton Creek, Barton Springs, and the Barton Springs Edwards Aquifer. The provisions of the Ordinance apply to those areas within Austin and Austin's extraterritorial jurisdiction that contain watersheds contributing to Barton Springs. The Ordinance limits impervious or non-porous cover on land in the regulated areas to between 15% and 25% of the net site area. The Ordinance also requires that new developments be set back from streams and not contribute to an increase in the amount of pollution constituents commonly found in urban rainfall runoff water. Construction in the 'critical water quality zone' of the Barton Creek watershed is prohibited by the Ordinance. The Ordinance provides for no waivers or exceptions unless necessary to avoid conflict with state and federal laws." *Id.* at 112-13.

In 1992, the Texas Supreme Court was confronted with a challenge to the City of Austin's Save Our Springs Ordinance that was a water pollution control measure. *Id.* at 113. The petitioners in this suit challenged the Ordinance because it governed the land they owned located within the City of Austin's extraterritorial jurisdiction. *Id.* One of the claims presented by the petitioners was that the Ordinance "impermissibly regulated the number, use, and size of buildings in the City's extraterritorial jurisdiction."[vii] *Id.* The trial court held that the Ordinance was null and void; however, the court of appeals reversed in part and modified in part finding the Ordinance was valid. *Id.* The Supreme Court found that because the Ordinance was "rationally related to the governmental interest in protecting water quality" the City had the authority to significantly limit development in watershed areas to further the interest. *Id.* at 120, *citing Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 424, 72 S.Ct. 405, 96 L.Ed. 469 (1952).

The Petitioners argued that sections 212.002 and 212.003 govern the Ordinance and the Ordinance violated the prohibitions in 212.003 by "regulating the use, bulk, height, number, or size of buildings." *Quick,* 7 S.W.3d at 120. The City countered with the argument that sections 212.002 and 212.003 do not apply because these are zoning statutes and the Ordinance is a water pollution control measure. *Id.* at 121. The Court agreed with the City stating:

> "By their express terms, sections 212.002 and 212.003 apply to ordinances that 'govern plats and subdivisions of land.' Further, the statutes' legislative history indicates that they govern a city's zoning authority, not a city's authority to apply water quality requirements. For instance, House Bill 3187, which amended section 212.003 'prohibits the application of zoning regulations in ETJ areas.' COMMITTEE ON URBAN

AFFAIRS, BILL ANALYSIS, Tex. H.B. 3187, 71st Leg., R.S. (1989). In fact, the Legislature made it clear that section 212.003 was not intended 'to affect the ability of a municipality to apply water control requirements' in its extraterritorial jurisdiction. CONFERENCE COMMITTEE REPORT, Tex. H.B. No. 2187, 71st Leg., R.S. (1989). We therefore conclude that section 212.002 and 212.003 apply only to zoning statutes, and not water control measures such as the Ordinance." *Id.*

The Petitioners further argued that the Ordinance's impervious cover limitations constitutes a regulation on the use, bulk, height, number, and size of buildings in the City's extraterritorial jurisdiction thereby violating Section 212.003. *Id.* at 122. Further, they argued that the court should consider **"the actual effect of the Ordinance, and not its stated purpose, in determining whether the Ordinance must comply with the statutes."** *Id.* (emphasis added).

Despite the arguments raised by the Petitioners, the Court found that the Ordinance's stated goal was to protect and preserve a "clean and safe drinking water supply" and "to prevent further degradation of the water quality" in the area. *Id.* (holding that **while the Ordinance has effects on land use by imposing impervious cover limitations, such are typical with ordinances focused on protecting water quality**)(emphasis added). **"On balance, the Ordinance is not a zoning regulation seeking to shape urban development, but rather is a measure designed to protect water quality."** *Id.* (emphasis added) Important to note is the Court's complete focus in determining the Ordinance to be valid was the fact that the Ordinance's clearly stated and intended goal was to reduce water pollution and not shape urban development.

Justice Enoch's concurrence raises an issue that must be considered. Namely, through the majority's ruling whether it conferred on a municipality the ability and authority to control land use outside its boundaries on a group of citizens without a voice. *Id.* at 127-28. (concluding that citizens of one community by their vote placed land use restrictions on citizens of neighboring communities who had no vote). Further, Justice Enoch felt that in this case the Petitioners appeared to bear most of the burdens imposed with the City enjoying the benefits.

The majority did stray from deciding whether the Ordinance would classify as an unconstonstitutional taking because they concluded it was "rationally related to the governmental interest in protecting water quality, [therefore] the City has the right to significantly limit development in watershed areas in furtherance of this interest. *See Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 424, 72 S.Ct. 405, 96 L.Ed. 469 (1952)." *Id.* at 120.[viii] However, because such a challenge was not part of this lawsuit, the Court's holding that the Ordinance was not invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality accordingly has no impact on any potential claim

that the Ordinance unconstitutionally interferes with a landowner's property rights.

C. City of Bulverde's Subdivision Regulations

While it is clear that the City of Austin's Save Our Springs Ordinance passed constitutional muster because it was rationally related to reducing water pollution, this County is faced with whether the City of Bulverde's Subdivision Regulation would pass the same muster. As I write this letter requesting an advisory opinion, I am aware of two jurisdictions, Kendall County and the City of Bulverde, that have taken different interpretations on the extent of allowable regulation of development within a municipality's ETJ. More specifically, I have attached a copy of the City of Bulverde Ordinance No. 74-02-02-12 which regulates subdivision development in the incorporated limits and in the ETJ, as Exhibit "B." Section 2.03 of Ordinance No. 74-02-02-12 requires that the

> "density of a development shall be classified by the number of equivalent dwelling units (EDU) provided for in the development. The density determinations shall be developed for residential development and commercial/industrial development separately for each development within a[n] individual subdivision plat. An EDU shall be approximately equivalent to the demand for services of a single family residence. Lots for a single family residence shall each constitute one EDU. Density shall be classified into three categories as follows:
>
> 1) Low Density: Less than 0.17 EDU's per acre.
> 2) Medium Density: 0.17 or more EDU's per acre but not more than 0.4 EDU's per acre.
> 3) High Density: more than 0.4 EDU's per acre.

City of Bulverde, Tx., Ordinance No. 74-02-02-12 at 22 (Feb. 12, 2002).

Furthermore, there are minimum lot size requirements dependent upon the density category of the subdivision as follows:

1) Low Density: 5.01 acres.
2) Medium Denisty: 2.01 acres.
3) High Density: 20,000 square feet for single-family residential lots with a density of no more than one residence per 30,000 square feet of the entire tract being subdivided, excluding the 100-year floodplain, commercial property and school property. Lots other than single-family residential shall be a minimum of 30,000 square feet. (Ordinance 210-06-02-14 adopted 2/14/06).

Id. at 22-23.

The City of Bulverde has extended into its ETJ the above listed density regulations.[ix] However, Section 212.003 clearly states that "unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality **shall not regulate**:

> ***(2) the bulk, height, or number of buildings constructed on a particular tract of land;***
> ***(4) the number of residential units that can be built per acre of land; or***

Reviewing Bulverde's Ordinance, it appears to fly in the face of the prohibitions of Section 212.003 of the Local Government Code by regulating the number of buildings/residential units that may be constructed per acre. Furthermore, Section 1.01(ii) of Bulverde's Ordinance states that the development constraints and regulations are enacted under the City's authority granted by the Texas Local Government Code Chapter 212. City of Bulverde, Tx., Ordinance No. 74-02-02-12, § 1.01(ii) (Feb. 12, 2002). This Ordinance does not provide any other state law authorizing this regulation as seen in *Quick v. Austin* where it cites authority under the Water Code. Furthermore, the express purpose and intent of the Save Our Springs Ordinance was water quality and reduction of water pollution to a highly sensitive area of the Barton Springs. However, while in one blush it may appear that the intent behind Bulverde's density ordinance is to "maintain critical water availability and quantity, to provide for the safe, orderly and healthful development of the community, and to secure adequate provisions for traffic, light, air, recreation, transportation, drainage, sewage, and other public facilities," the City's Sunrise 2025 plan appears to state a different purpose. City of Bulverde, Tx., Ordinance No. 74-02-02-12, § 1.01(ii) (Feb. 12, 2002). Found within the Sunrise 2025 plan pertaining to the city's ETJ is the goal to "exercise subdivision and signage regulations in a very large area and avoid unmanaged development around the city proper." City of Bulverde Comprehensive Plan "Sunrise 2025" Section 3.4 (Jul. 13, 2004), attached as Exhibit "C". The Plan goes on stating that:

> "[s]uch growth can result in undesirable or low-quality developments. By exercising higher development standards in the ETJ, the City of Bulverde can promote quality development, enhance property values and avoid costly road upgrades and other infrastructure retrofit expenses when it annexes land. Preservation of the Hill-country landscape is essential to maintaining the City of Bulverde's sense of community and identity. Past large-lot development patterns have resulted in a high percentage of private open space. But with the provision of more expensive surface waters, more dense development will inevitably follow, and existing city ordinances are not prepared to require adequate open space in these kinds of developments. Denser development patterns can make infrastructure most cost-effective."

City of Bulverde Comprehensive Plan "Sunrise 2025" Section 3.4 (Jul. 13, 2004).

According to Bulverde's Sunrise 2025, which was adopted by the Bulverde City Council on July 13, 2004, the main intent is to shape urban development beyond its city limits and into its ETJ. This intent has no statutory authority backing as seen in *Quick v. Austin.*

Applying *Quick v. Austin* to this Ordinance, can Bulverde enforce in its ETJ the above density regulations? Additionally, can the County by virtue of an interlocal agreement entered into under Section 242.001(d)(4) enforce Bulverde's density regulations?

D. Kendall County's Development Rules and Regulations

As stated above, the County of Kendall has taken a unique approach in their Development Rules and Regulations. I have attached a copy of Kendall County's Development Rules and Regulations as Exhibit "D."

Within Kendall County's Development Rules and Regulations, it is clear that the "[r]ules and [r]egulations adopted [by Kendall County's Commissioners Court are] solely pursuant to the authority granted to the County by Chapter 232, Subchapter E, Local Government Code [and] ***are not intended and should not be interpreted to regulate the use of any building or property for business, industrial, residential or other purposes; the bulk, height, or number of buildings constructed on a particular tract of land; the size of a building that can be constructed on a particular tract of land, including without limitation, any restriction on the ratio of building floor space to the land square footage; or the number of residential units that can be built on a lot or per acre of land.***" Kendall County, Tx., Order No. 08-29-2005 on Development Rules and Regulations at 7 (Sep. 25, 2006) (emphasis added). Furthermore, the Order distinguishes that the Cow Creek Groundwater Conservation District (CCGCD) maintains the authority and responsibility to regulate groundwater production in Kendall County. *Id.* at 8.

Under Kendall County's regulations, Table 301.1700 provides the maximum density, corresponding lot sizes and road frontage depending on the source/type of water and sewage disposal system. *Id.* at 34. Generally speaking, the allowable density per subdivision is determined first by the source of the water and sewage disposal system. Next, each category has its own divisor (a number by which another number, the dividend, is divided) that determines the allowable number of lots in the subdivision.

For instance, a proposed subdivision that will be served by individual water well and on-site sewage facility has a minimum lot size of 3.0 acres. If the

total number of acres within this proposed subdivision is 3,000, then the total number of lots cannot be more than 500 (3,000 / 6 = 500). Under this regulatory scheme, it is clear that this Order does not limit the number of buildings that can be constructed on a particular tract of land nor does it limit the number of residential units that can be built on a lot or per acre of land. Instead, this Order succinctly limits the size of lots.[x] Thus, a developer under the above scenario could take his 3,000 acres split into 500 lots and put on one of the 500 lots 10 buildings.[xi] However, a developer under this same scenario, could not split his 3,000 acres into 1,000 three acre lots.

Applying Section 232.101 and the Texas Supreme Court's reasoning in *Quick v. Austin*, does this regulation pass the muster? Could Comal County adopt such a development regulation too and apply it to the extraterritorial jurisdiction of the City of Bulverde by virtue of an interlocal agreement under Section 242.001(d)(4)?

D. *Medina County Commissioners Court v. The Integrity Group, Inc.*

Taking the analysis a step further beyond *Quick v. Austin*, is the extent of a Court's authority to approve or deny a plat application that has not complied with regulations beyond the authority granted under Chapters 212 or 232? One case that was faced with the question of whether a County may effectively regulate minimum lot size is the case of Medina County Commissioners Court v. The Integrity Group, Inc. *Medina County Commissioners Court v. The Integrity Group, Inc.*, 2004 WL 2346620 (Tex. App.—San Antonio, 2004) (rehearing of pet. for review denied Dec. 9, 2005), on subsequent appeal 2007 WL 675726 (Tex. App.—San Antonio Mar. 07, 2007). In this case, Medina County was faced with a plat application seeking approval to subdivide a 4.843-acre tract of land adjacent to Medina Lake. Part of the proposed tract was located over the Edwards Aquifer Recharge Zone (EARZ) and the tract called for on-site sewage systems. At this point in time, Medina County had in place a minimum lot size requirement of one acre for tract seeking to use on-site sewage systems. The Commissioners Court denied the application because it did not comply with the one-acre minimum lot size requirement. The San Antonio Appeals Court held that a:

> "commissioners court power relative to the plat approval process is found in Chapter 232 of the Texas Local Government Code. Under section 232.002(a) of the Code, a commissioners court 'may refuse to approve a plat if it does not meet the requirements prescribed by or under [chaper 232] or if any bond required under [chapter 232] is not filed with the county.' On the other hand, if a developer meets the statutory requirements, the commissioners court duty to approve the plat becomes ministerial." *Id.* at 1, *citing, Elgin Bank of Texas v. Travis County,* 906 S.W.2d 120, 123 (Tex. App.—Austin 1995, writ denied)(per

curium)("Section 232 is the only authority upon which the county may base platting requirements").

Id.

The Court remanded and completed its analysis by finding that there was no statutory authority permitting the Commissioners Court to reject a plat because of lot size, thus the trial court erred in upholding the Commissioners Court action. *Id.* at 2. Justice Stone's concurrence sums up the issue by explaining that

> "[t]he Commissioners Court has a ministerial duty to approve a plat that complies with the provisions of Chapter 232 of the Local Government Code. *See Elgin Bank v. Travis County*, 906 S.W.2d 120,122-23 (Tex. App.—Austin 1995, writ denied). While at first blush it may seem more efficient to submit plats only if they can meet other requirements, such as the OSSF requirements, the two processes of accepting a plat and permitting an OSSF are separate. That the two processes remain separate does not diminish the Commissioners Court's role as an agent for the Commission on Environmental Quality. Whether the Commissioner Court, as an agent for the Commission on Environmental Quality, can ultimately regulate minimum lot size is a question for another day."

Id. at 3.

Beyond the analysis found in Medina County Commissioners Court v. Integrity, little if any, caselaw exists on whether a county may deny a plat application where the proposed plat does not comply with minimum lot size requirements.

VI.
Conclusion

Taking into consideration the history behind the four possible models of regulation under 242.001(d), in addition to the express statutory prohibitions, it is hard for this County to feel comfortable with the City of Bulverde continuing its enforcement of their density regulations or having the County enforce them through an interlocal agreement in Bulverde's ETJ. Because no court has decided whether Bulverde's regulation can withstand scrutiny, this County is looking to you for guidance on the dilemma we are faced with. In the event, you determine that Bulverde's regulatory scheme is an overreach of their authority, then perhaps Kendall County's minimum lot size requirements may withstand scrutiny. If so, could Comal County adopt a similar regulation to apply countywide in Comal County thereby including Bulverde's ETJ.

Thank you in advance for your attention to this matter. Should you have any further questions, please feel free to contact me.

Sincerely,

Jennifer Tharp
Chief Civil Prosecutor

Geoffrey I. Barr
Criminal District Attorney

cc: (Copied without enclosures):
Honorable Danny Scheel, Comal County Judge
Honorable Jack Dawson, Comal County Commissioner Precinct #1
Honorable Jay Millikin, Comal County Commissioner Precinct #2
Honorable Gregory Parker, Comal County Commissioner Precinct #3
Honorable Jan Kennady, Comal County Commissioner Precinct #4
Thomas Hornseth, Comal County Engineer
Honorable Sarah Stevick, City of Bulverde Mayor
Frank Garza, Attorney for City of Bulverde

[i] The County declared breach of this Interlocal Agreement on December 13, 2007. From this date forward, no agreement exists between the County and the City necessitating both entities to regulate. The focus of this request for an opinion pertains to a City Regulation previously enforced by the City of Bulverde. Assuming that either the City or the County provides future subdivision regulation pursuant to an interlocal agreement, the City through negotiations would require their density regulation to remain enforced by either party.

[ii] Some statutes beginning the evolution of plat approval and disapproval authority began with article 974a (1927)(authorizing cities to approve or disapprove plats within five miles of the municipality's city limits); article 6626 (1931)(amended article 974a giving approval and disapproval authority to commissioners court for plats not located within the city); *see also Trawalter v. Schaefer*, 179 S.W.2d 765 (1944); Op. Tex.

Att'y Gen. No. V-1138 (1950); article 6626 (as amended 1951)(returning approval and disapproval authority to the city); and Property Code § 12.02(1987).

[iii] Furthermore, if a certified agreement between a county and municipality is not in effect by the given deadline, the parties must enter into arbitration as provided by Section 242.0015. TEX. LOCAL GOV'T CODE ANN. 242.001(f) (2003). On a side note, while Chapter 242 sets for the requirement, deadline, and arbitration procedure requiring the parties to come to an original agreement, this chapter does not contemplate nor provide a procedure for the parties to settle later disputes arising from the agreement originally executed.

[iv] The model of enforcement called for in (d)(3) does not specifically state that the two governing entities may blend their respective authorities under Chapers 212 and 232 of the Local Government Code Code as allowed under (d)(4), therefore, limiting the two entities from blending their authority. In such a situation, even more confusion arises in that the ETJ would be regulated with two different hybrid regulations and the parties would be creating a fifth model by blending (d)(3) and (d)(4).

[v] *See* Attorney General Opinion JC-0518 (2002) (finding that 242.001(d)(4) allows a municipality and county to agree upon a "hybrid mix" of their regulatory authorities, whereas, (d)(3) authorizes the municipality and county to agree to divide the area within the extraterritorial jurisdiction so that the municipality regulates a geographic portion of the area and the county regulates the other geographic portion). This opinion puts forward the point raised in endnote iv. Further, (d)(4) was the chosen model in the interlocal agreement executed by the City of Bulverde and Comal County.

[vi] "The county may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Sections 232.001-232.005, Subchapter B or C, Chapter 232, and other statutes applicable to counties." TEX. LOCAL GOV'T CODE ANN. 242.001(d)(2)(2003).

[vii] The City's expert economist concluded the Ordinance decreased property value in the range of $229 million to $379 million with some land losing ninety percent of its value. *Quick,* 7 S.W.3d at 118.

[viii] The Court went further to state that "[a] governmental regulation can restrict, or even take, property for such a public benefit; however, if the regulation of property rights goes too far, compensation must be provided. *See Barshop,* 925 S.W.2d at 628. To the extent that the City's limitations on development deny all economically viable use of property or unreasonably interfere with the right to use and enjoy property, affected property owners may have a remedy in takings law. *See Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 935 (Tex.1998)(recognizing that a compensable taking can occur if a governmental regulation totally destroys a property's value or if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations)." *Quick,* 7 S.W.3d at 120.

[ix] Beyond these two requirements is a required park dedication for subdivisions with at least 25 residential lots. "Subdivisions with at least 25 residential lots shall dedicate an area equal to or greater than 1.0 acres per one hundred single family lots. Lots for multifamily development shall provide a minimum of 1.0 acres per one hundred units." *Id.* at Section 2.03(e) at 26. Further, the minimum size for parks shall be 2.0 acres. *Id.* It is questionable whether this required park dedication would also be a regulation of the number of buildings that may be constructed or the number of residential units that may be constructed since it would be park land.

[x] While this order is concise in its terminology of how many lots a developer may place in a subdivision through its divisor, the order does not limit the number of times a particular piece of land may be subdivided. That is, in the above scenario, a developer could split his 3,000 into 500 lots. Of the 500 lots, 499 could be 3 acre lots, with the remaining lot being 1,503 acres (499x 3 = 1497) (3,000-1497 = 1503). What is not contemplated is whether that developer could later subdivide the 1,503 acre lot into 250 more lots (1,503 / 6 = 250.5) to get around the density limitations originally placed on this proposed subdivision.

[xi] It may be prudent to note that on-site sewage facility are generally set up for individual tracts to service individual structures. Thus, putting the property owner in the position that they cannot place multiple structures on a single tract with an OSSF may beg the question of whether this regulation does in fact regulate the number of buildings constructed on a particular tract of land or the number or residential units that can be built on a lot or per acre of land as prohibited by Section 232.101 of the Local Government Code.