CONTAINING URBAN SPRAWL: IS REINVIGORATION OF HOME RULE THE ANSWER?

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INTRODUCTION

With an explosive increase in scholarly research and a multiplicity of articles in the media about urban sprawl in the United States and attendant public awareness of the topic, several state legislatures around the country have addressed or attempted to address the issue of urban sprawl. The

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result of such efforts, however, has often been the stark reduction of local government authority to aggressively address and resolve the problems of urban sprawl. Comprehensive land use planning and local government self-determination are concepts that have not always coexisted peacefully. The development community often argues that self-determination leads to inadequately or inappropriately planned communities, and local government advocates argue that residents are entitled to live in communities of their choosing, regardless of whether those communities are the product of perceived-sound planning practices. Indeed, at least in the case of Texas, the result has been that local governments have found their local land use powers to address urban sprawl emasculated by the state legislature, effectively negating proposed local and regional solutions to the problems of urban sprawl.

It is the purpose of this Article to address the legal underpinnings of home rule authority and to suggest various local governmental responses to the issue of urban sprawl. Next, in the case of Texas, this Article discusses actions by the Texas Legislature to effectively constrain home rule authority when addressing urban sprawl issues and concludes that the concept of home rule authority, at least in relation to local land use decision making, has been taken away in large part from local governments, resulting in urban sprawl becoming legislatively sanctioned in Texas. Last, several options are presented that address the concerns of local governments and state legislative bodies by reclaiming home rule powers rather than reducing them.

I. A BRIEF HISTORY OF HOME RULE

The U.S. Constitution allocates powers between the federal government and the various states with no mention being made of local governments. The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1] Due to the lack of mention of any local governmental units, the States necessarily define the relationship between state government and local government. As a consequence, this relationship varies from state to state, and often from one municipality to another in the same state. According to the latest U.S. Census, there are 19,372 municipalities and 16,629 towns or townships in

1. U.S. CONST. amend. X.

the United States.[2] These local governments derive their powers, not from the U.S. Constitution, but from state constitutions and state statutes. The U.S. Supreme Court noted this source of authority more than eighty years ago:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.[3]

As a consequence of municipalities being arms of the State, issues arose about how municipal acts should be viewed: did cities have only those powers expressly conferred by the State upon cities; or could cities legislate even in the absence of express statutory authorization? The seminal case on this topic was a decision by Judge John F. Dillon of Iowa in *Clark v. City of Des Moines*, a case involving the issuance of bonds by the city of Des Moines where such bonds had not been authorized by the Iowa legislature.[4] The receiving party sold the bonds to a bona fide purchaser and the city of Des Moines refused to honor them.[5] Judge Dillon, one of the nation's foremost authorities on municipal law at the time, relied on his rule of statutory interpretation in holding that the city lacked the authority to issue the bonds and that the holder of the bonds could not compel payment by the city.[6] Judge Dillon wrote:

> It is a familiar and elementary principle that municipal corporations have and can exercise such powers, and *such* only, as are expressly granted, and such incidental ones as are necessary to make those powers available and essential

2. JESSE RICHARDSON ET AL., IS HOME RULE THE ANSWER?: CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT 3 n.2 (2003), *available at* http://www.brookings.edu/reports/2003/01metropolitanpolicy_richardson.aspx.

3. City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (footnote omitted).

4. Clark v. City of Des Moines, 19 Iowa 199, 208 (1865).

5. *Id.*

6. RICHARDSON ET AL., *supra* note 2, at 8.

> to effectuate the purposes of the corporation; and these powers are strictly construed.[7]

It has been noted that Judge Dillon was "deeply troubled by not only the corruption, but more fundamentally by local government involvement in private economic activity—especially the promotion of the railroad industry. Local governments often trampled private property rights when they pursued railroad facilities, stations, and lines in an early display of competition for economic development."[8] Several years after the *Clark* decision, Judge Dillon again opined on the extent of municipal authority, this time in a case involving a railroad's use of city streets. He stated:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the States, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.[9]

It is clear from the foregoing that Judge Dillon's view of municipal authority is one that may only be defined with reference to those powers delegated from the state legislature. Thus, "Dillon's Rule" is one of strict construction. Local governments possess only those powers that could be traced to specific and express delegations from the state and, in the absence of such delegations, local governments are powerless to act.[10]

Many states adopted Dillon's Rule of construction and the courts generally characterize Dillon's Rule as a rule of strict construction that gives as little power as can be reasonably intimated by the state legislature's grant of authority. "Others argue that the history of Dillon's Rule dictates a 'fair and reasonable' construction of grants of power to local

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7. *Clark*, 19 Iowa at 212.
8. RICHARDSON ET AL., *supra* note 2, at 7.
9. City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 475 (1868).
10. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2285 (2003).

governments."[11] Nevertheless, absent specific constitutional authorization, the state legislature retains the ultimate authority to eliminate the use and effect of Dillon's Rule.[12] Dillon's Rule does not counsel the legislature with regard to the extent of local governmental power; rather, the state legislature may act as it deems fit, either giving local governments broad powers or severely restricting local authority.[13]

Not surprisingly, Dillon's Rule was viewed by many authorities as too restrictive and severely limiting the authority of local governments to address local conditions. One of the proponents of a broader interpretation of local government powers was Justice Thomas M. Cooley of the Michigan Supreme Court. First enunciated in an 1871 case, Justice Cooley wrote in favor of an approach that encompassed broader local authority:

> And the question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.
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> . . . The state may mould [sic] local institutions according to its views of policy or expediency; but local government is [a] matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control of their local affairs, or no control at all.[14]

Justice Cooley, reaffirming this position several years later in *Port Huron v. McCall*,[15] wrote that even though municipalities derive their

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11. RICHARDSON ET AL., *supra* note 2, at 9.
12. *Id.*
13. *Id.*
14. People v. Hurlbut, 24 Mich. 44, 94, 96, 108 (1871).
15. Port Huron v. McCall, 10 N.W. 23 (Mich. 1881).

authority from the state legislature,

> when a power is conferred which in its exercise concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous, and which wrongs no one, and the state is in no manner concerned, the construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs.[16]

In response to the effects of Dillon's Rule on interpreting the scope of municipal authority, and energized by the Cooley Doctrine, states began to enact constitutional amendments to protect the autonomy of local governments. The home rule movement gathered steam in 1875 when the State of Missouri adopted a home rule provision granting charter-making power to any city with a population greater than 100,000.[17] Several states followed suit: California in 1879, Washington in 1889, Minnesota in 1896, Colorado and Virginia in 1902, Oregon in 1906, Oklahoma in 1907, Michigan in 1908, and Texas, Ohio, Nebraska, and Arizona in 1912.[18] Although not necessarily constitutional responses to Dillon's Rule, these home rule provisions "attempted to give local governments broad authority to legislate and allow local governments to control local matters unimpeded by the state legislature."[19]

But what is home rule? Although interpretations may vary, as has been noted by several commentators, home rule generally refers to a state constitutional provision or other legislative action that grants local governments the full power of self-government not inconsistent with the constitution or laws of the state.[20] This allows local governments the power to manage local affairs as well as the ability to avoid interference from the state.[21]

In Texas, the 1912 constitutional amendment authorizing cities to adopt a home rule charter has been characterized as "without question, the most

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16. *Id.* at 26.

17. *See* Barron, *supra* note 10, at 2289–90.

18. RICHARDSON ET AL., *supra* note 2, at 10.

19. *Id.* (citing Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 72 (1990)).

20. RICHARDSON ET AL., *supra* note 2, at 10; Barron, *supra* note 10, at 2290.

21. RICHARDSON ET AL., *supra* note 2, at 11 (citing Michele Timmonset et al., *County Home Rule Comes to Minnesota*, 19 WM. MITCHELL L. REV. 811 (1993)).

significant event in Texas jurisprudence regarding municipal government."[22] The home rule amendment to the Texas Constitution, found in article XI, section 5, was approved by the electorate with a three-to-one margin and was codified in 1913 by the legislature.[23] Generally, the Home Rule Amendment has been recognized by the Texas Supreme Court as granting to home rule cities, which are those municipalities with more than 5000 inhabitants and in which the electorate has adopted the home rule form of government, the full powers of local self-government.[24] Texas courts repeatedly have held that home rule municipalities derive their authority from the state constitution and look to the state legislature only for a limitation on that authority:

> It was the purpose of the Home-Rule Amendment [to the Texas Constitution] . . . to bestow upon accepting cities and towns of more than 5000 population full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.[25]

Consequently, it appears that Texas municipalities, like other home rule cities around the nation, possess plenary powers when considering local land use issues. This is not the case, and innovative local initiatives relative to local land use regulations are thwarted.

II. HOME RULE: FOSTERING URBAN SPRAWL?

How is a municipality to respond to the multifaceted challenges presented by urban sprawl? Does home rule result in a multitude of municipalities each applying different sets of rules with different priorities in each municipality? Does home rule exacerbate urban sprawl? Is

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22. 22 DAVID B. BROOKS, TEXAS PRACTICE, MUNICIPAL LAW AND PRACTICE § 1.17 (2d ed. 1999).

23. *Id.* A large portion of the Home Rule Act, although now spread throughout the Texas Local Government Code, is found in Chapter 9 of the Texas Local Government Code. *Id.*

24. *See* City of Houston v. State *ex rel.* City of West University Place, 176 S.W.2d 928, 929 (Tex. 1943) (stating that until a city's population exceeded 5000, they were under the general law in their incorporation, but once that threshold was reached, they could avail themselves of the Home Rule Amendment).

25. Lipscomb v. Randall, 985 S.W.2d 601, 605 (Tex. App.—Fort Worth 1999, pet. dism'd) (quoting Forwood v. City of Taylor, 214 S.W.2d 282, 286 (Tex. 1948)).

regionalism the answer, even with the understanding that regional solutions to urban sprawl are the exception and not the rule in the United States?

Several responses to urban sprawl have evolved over the years, yet none have been terribly successful. The first response is that local government autonomy is the cure for the pressures of metropolitan growth.[26] This approach, however, seems to contradict the fact that local government autonomy often hinders effective growth management efforts and that pressures presented by growth are usually regional in nature and not confined to one or a few municipalities.[27] Thus, rather than fostering a consistent response to the tremendous pressures associated with urban sprawl, the result is the opposite, with a defense of home rule instead being linked to a defense of the legal status quo and continued sprawl.[28]

> Local governments are assumed to be unlikely and ineffective sources of effective reformist policymaking. They are at once too insular, focused as they are on the needs of those people inside the boundary, and too expansive, unaccountable as they are to those people outside the boundary whom their policies inevitably affect. As a result, American local government law's recognition of home rule, broadly understood, seems to be on a collision course with meaningful anti-sprawl reform.[29]

While reliance upon home rule governments to "cure" the problems associated with urban sprawl is unrealistic due to the magnitude of the problem and the multiplicity of governmental entities involved, the second response to address urban sprawl has been a coordinated regional approach that involves state oversight and initiative.[30] The regional approach to urban sprawl, however, has been similarly unavailing, whether the regionalist approach is one of regional government or regional governance.[31]

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26. RICHARDSON ET AL., *supra* note 2, at 22.

27. *Id*.

28. Barron, *supra* note 10, at 2269.

29. *Id.* at 2268.

30. RICHARDSON ET AL., *supra* note 2, at 31.

31. Barron, *supra* note 10, at 2270 n.34. Although the distinction between the terms is somewhat fuzzy, regional government implies the creation of independent governmental entities with powers to regionally address urban sprawl; whereas, regional governance implies cooperative solutions to regional sprawl among existing governmental entities without the creation of new governmental entities.

> Adherents of this view [regional governance] contend that it is in the interests of all localities within a metropolitan region to cooperate—not only on technical matters of system maintenance, like sewage treatment, but also on ones that affect interlocal equity and thus sprawl—to ensure that the region as a whole can compete effectively in the broader marketplace.[32]

The regional governance solution should result in voluntary, mutually agreeable responses between or among different governmental entities. What the regional governance approach fails to recognize is that what is in the best interest of one suburban community may not be in the interest of another suburban community or the central city. Often these governmental entities are in competition with one another for economic development projects, housing projects, state and federal tax money, and grants for community development projects. This results in head-to-head competition by neighboring municipalities, rendering ineffective the regional governance approach. As noted by Professor Barron, "most anti-sprawl reformers are appropriately skeptical" of this approach and "rightly contend that, under the current legal regime, voluntary regional cooperation is not in the interest of all communities within a metropolitan area."[33]

Similarly, the regional government response has its drawbacks. There are two approaches to this concept. The first is regional consolidation, which would replace existing municipalities with a full-fledged regional government. The second is two-tiered regionalism, "which would establish new regional governance structures that wield powers over policy areas that transcend local borders . . . while leaving local governments a reduced but meaningful sphere of local authority."[34] This regional government response, regardless whether a regional consolidation or two-tiered regional approach is selected, is replete with political problems. As a result, local governments are weakened or seemingly rendered insignificant. Traditional home rule powers—such as land use controls and budgetary authority—are shifted away from local (usually more politically accountable) decision-makers to a sub-state regional entity. The voters of one area of the region may impact the makeup of or the policies of the regional government more than the voters of other areas in the region; the loss of "local control" is a difficult concept to sell to the public and the

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32. *Id.* at 2270–71.

33. *Id.* at 2271.

34. *Id.* at 2271–72 (citing Sheryll D. Cashin, *Localism, Self-Interest and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2034 (2000)).

voters, particularly if it is perceived that regional "solutions" will be imposed unilaterally. Furthermore, concerns arise about the inequitable distribution of benefits and projects throughout the region, with certain areas benefiting and other areas lagging behind, and centralized government historically has never, or has rarely, been favored in this nation over local government.

The literature is replete with strong skepticism about the viability of regional governance and regional government. As Professor Laurie Reynolds of the University of Illinois College of Law writes, the likelihood of voluntary action to eliminate regional disparities (in such areas as affordable housing, unemployment, inequality of educational opportunities, and municipal services) has been described as "fanciful."[35] Other scholars have written that "[a]s long as cooperation is voluntary, no locality will cooperate with another unless it sees that it will benefit from such cooperation"[36] and "Americans . . . resist regionalism . . . when it redistributes resources, promotes racial and class mixing, and limits local land use options."[37] Other assessments are more blunt, stating that it is much more likely that local governments will act opportunistically to preserve their "parochial enclaves."[38] Furthermore, voluntary intergovernmental cooperation and agreements "are not stepping stones toward comprehensive regional solutions but successful methods of avoiding them."[39]

As long as home rule authority remains the predominant local government model in this country, are there any ways to address the problem of urban sprawl while recognizing Americans' preference for home rule (or at least autonomy) at the local level? A third approach, suggested by Professors Gerald Frug and David J. Barron of Harvard Law School, reclaims, rather than reduces, the powers associated with home rule, and offers hope for coordinated local and regional responses to urban sprawl.

According to Professor Barron, home rule, as presently constituted, "is a more substantive legal structure that promotes certain kinds of local

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35. Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 497 (2007) (quoting Cashin, *supra* note 34, at 2030–33).

36. *Id*. at 497 (quoting Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1149 (1996)).

37. *Id.* (quoting Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 522 (2005)).

38. *Id.* (quoting Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1863 (1994)).

39. *Id.* (quoting Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1787 (2002)).

actions while foreclosing others."[40] Thus, in an effort to change the scope of home rule, he generally suggests

> that a more substantive understanding of the law of home rule initiative can redirect anti-sprawl reform. Specifically, this understanding suggests the need to expand the scope of current state constitutional grants of home rule initiative to include matters of greater-than-local concern as an alternative to the confinement of such grants to those matters with little impact on neighboring jurisdictions. Similarly, this understanding suggests the advantages of curbing state preemption in some respects, rather than enhancing the power of higher-level actors to veto local decisions.
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> Implementation of these suggestions . . . would help overcome the isolation of individual localities that the legal structure promotes. Providing individual localities with enhanced initiative authority . . . would promote effective interlocal cooperation to curb the costs of sprawl.[41]

This third "new regionalism" or "democratic localism" approach emphasizes that regional problems may be solved "by empowering cities with greater inherent authority so that they can truly compete in the marketplace; by creating more permeable municipal boundaries, by creating rights of regional citizenship, and by exploring new notions of cross border rights and responsibilities."[42] According to this approach, the stark reality is that local authority is restricted and that many municipalities have little, if any, discretion over taxes, fees, education, land use, and borrowing due to state controls over these areas. Thus, because municipalities lack control over their own affairs, they often resist efforts to bring them into regional strategies for issues that are truly regional in scope.

In response, one solution is to reclaim home rule by encouraging greater regional cooperation. "By giving [municipalities] greater capacity, in some cases as a carrot for working together, local governments will not only be able to solve more local problems locally, but also be better able to join with neighboring communities on issues of mutual concern."[43] The

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40. Barron, *supra* note 10, at 2362.

41. *Id.* at 2366.

42. Myron Orfield, *The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform*, 55 BUFF. L. REV. 91, 104 (2007).

43. DAVID BARRON ET AL., DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON, at x (2004), *available at* http://www.ksg.harvard.edu/rappaport/downloads

notion of reclaiming home rule is centered on the belief that home rule is more a myth than most local officials believe and that the true obstacle to regionalism is not too much home rule but too little. As a consequence in the land use context, while many local officials believe they possess great control over land use planning, the reality is the opposite.

State governments often inhibit local and municipal land use authority by regulating in detail what aspects of land use planning municipalities may and may not address: lot size, lot coverage, lot dimensions, building size and floor areas, landscaping and tree preservation, state exemption of its own use of land from local zoning controls, and expansive notions of vested rights.[44] To correct the shackling of land use authority by State-imposed regionalism, which is often ineffective and met with widespread resistance by local officials, the State might promote regionalism by instead loosening the bonds that constrain home rule.

> The possibilities are numerous. Virtually every municipal official we interviewed emphasized the lack of local power. . . . [In the land use context, the state could address the requirement] that developers be allowed to operate under existing zoning while the municipality considers changes. Since any move to alter its land use rules would presumably spur, in fire-sale fashion, just the kind of development local officials are hoping to discourage, this state requirement serves as a powerful disincentive against rethinking development guidelines. The state could encourage regional growth management by relaxing this rule for cities and towns that enter into regional land use planning agreements.
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> . . . But the mythology of home rule—which blames localities for exercising power they don't really have—is impeding progress toward regionalism more than the reality is.
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> We need a new way of thinking about home rule, one that would empower cities and towns to work together to solve regional problems, not just go to the state with hat in

/home_rule/home_rule.pdf.

44. *See generally* David J. Barron et al., *Overruling Home Rule*, 9 COMMONWEALTH, Winter 2004, at 15, 16 (describing the lack of local power in Massachusetts municipalities).

> hand—or dig in their heels against changes they have little power to control.[45]

A variant of Professor Barron's approach has been put forth by Professor Reynolds. Her proposal builds upon Professor Barron's concept and includes participation by elected officials in jointly owned and jointly governed entities. It differs from Professor Barron's approach in that "the potential he identifies for home rule cooperative regionalism is seriously eroded by the continual splicing off of new special purpose government units."[46] Hers is a program of strengthening regionalism by strengthening localism and does not call for the creation of any new governmental entities.

> [It] recognizes the devotion of residents to their local governments and seeks to achieve more regionalism without changing or diluting that relationship. In the process, it has the potential to strengthen existing local governments while at the same time building regional citizenship and awareness. It is, no doubt, a more difficult course of action because it requires sustained involvement and governance by the region's constituent multi-purpose government units, it prohibits general purpose entities from "passing the buck" on difficult policy issues by creating a new unit of government to deal with regional problems, and it requires the integration of regional issues into the agenda of local government officials. Ultimately . . . the increased effort is well worth it, because it is likely to enhance regional equity while at the same time strengthening localism.[47]

III. WELCOME TO TEXAS, WHERE SPRAWL IS KING

Texas, not unlike many other states, has statutorily sanctioned urban sprawl and unduly imposed restrictions on home rule authority to address the problem. While often couched in seductive phrases such as "protecting private property rights" and "allowing low income Texans affordable housing," the Texas Legislature has enacted restriction upon restriction in an effort to curb home rule and municipal authority to regulate local land

45. *Id*. at 17–18.
46. Reynolds, *supra* note 35, at 488.
47. *Id.*

uses.[48] The result is that Texas's metropolitan areas—Houston, Dallas/Fort Worth, San Antonio, and Austin—are sprawling in every direction as municipalities across the state are impeded by the Texas Legislature from adequately and comprehensively responding.

A. The Flower Mound Smart Growth Plan: Texas' First Growth Management Plan

The Town of Flower Mound, Texas, a suburban community incorporated in 1961 located just north of the Dallas/Fort Worth International Airport, is an example of a municipality that successfully attempted to address unbridled suburban residential growth. While the Flower Mound experience to curb growth generally has been perceived as positive by its residents, similar actions by other Texas communities are now effectively impossible due to recently enacted state statutory constraints.

The Flower Mound story is not strikingly different from that of many suburban communities across the nation. Flower Mound was undergoing rapid and intense urbanization during the ten-year period from 1990 to 2000:

> The Town's population grew from 15,527 to 50,702, a total population increase of 35,175 or 226.5%;

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48. In Texas, there are two general classifications of municipalities: Home Rule Cities and General Law Cities. Home Rule Cities generally are those cities with more than 5000 inhabitants and which have adopted a charter. *See* TEX. LOC. GOV'T CODE ANN. ch. 9 (Vernon 1999) (authorizing home rule municipalities); BROOKS, *supra* note 22 (defining home rule cities as those with more than 5000 inhabitants). General Law Cities are those whose powers theoretically are constrained by the grants of power from the state legislature. *See* TEX. LOC. GOV'T CODE ANN. chs. 5–8 (Vernon 1999) (organizing Types A, B, and C general law municipalities). It is the author's opinion that the distinction between the authority of general law cities to enact ordinances is not radically different from the authority of home rule cities to do likewise since section 51.001 of the Texas Local Government Code allows all municipalities, whether general law or home rule, to adopt ordinances, rules, or police regulations that are "for the good government, peace, or order of the municipality or for the trade and commerce of the municipality; and [are] necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality." TEX. LOC. GOV'T CODE. ANN. § 51.001 (Vernon 1999). Thus, the distinction between the authority granted to both types of cities to enact laws is blurred, with literally every law enacted by a general law city being based on "the government, interest, welfare, or good order of the municipality as a body politic." *Id*. § 51.012 (for Type A general law cities); *see also* § 51.032 (permitting Type B general law cities to adopt ordinances "that the governing body considers proper for the government of the municipal corporation"); §§ 51.051, 51.052 (permitting Type C general law cities to adopt ordinances applicable to either Type A or Type B cities, depending upon the number of inhabitants in the municipality).

> The average number of residential building permits issued annually was 1,170;
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> The average annual increase in population was 3,518;
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> The average annual growth rate was 12.8%; and
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> The United States Census Bureau identified Flower Mound as the nation's tenth fastest growing community within its population category.[49]

The Flower Mound Town Council was concerned that the historical development patterns since 1990 were evidence to the fact that the development pressures associated with Flower Mound's rapid and intense urbanization would ultimately consume and destroy many of the community's irreplaceable natural and cultural resources, community character, and quality of life. The Council opted to adopt a growth management plan, denoted the Flower Mound SMARTGrowth Management Plan. The basic purpose of the SMARTGrowth Management Plan, among others, was to "mitigate the ill effects of rapid and intense urbanization in Flower Mound."[50] The plan also purported to "promote a vigorous, diversified and regionally competitive economy" and to "foster a balanced tax base to ensure Flower Mound's long-term financial ability to respond to the service demands of both new and existing development without placing a disproportionate tax burden on existing homeowners."[51]

Originally adopted on January 11, 1999, Flower Mound's SMARTGrowth Program was designed as a strategic initiative to manage both the rate and character of development in Flower Mound, with the "SMARTGrowth" acronym representing "Strategically Managed And Responsible Town Growth."[52] The Town's position paper at that time noted that though "smart growth" is sometimes "used synonymously with 'sustainable growth,' which generally encompasses growth that does not

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49. Position Paper for Flower Mound SMARTGrowth Management Plan, at 4, *available at* http://www.flower-mound.com/smart/smartgrowth.pdf (last visited Mar. 13, 2008) [hereinafter Position Paper].

50. *Id.* at 4–5.

51. *Id.*

52. *See* FLOWER MOUND, TEX., RESOLUTION NO. 1-99 (Jan. 11, 1999) (providing for a SMARTGrowth program). The SMARTGrowth Program was later amended in 2000, 2001, and 2002 to provide for a growth management plan. *See* Town of Flower Mound, Smart Growth, http://www.flower-mound.com/smart/smartgrowth.php (last visited Feb. 9, 2008). The current SMARTGrowth Program is found in article II of Chapter 98 of the Town of Flower Mound, Texas, Code of Ordinances. FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 98, art. II (2007). It does not include any caps on the number of building permits that may be issued. *Id.*

damage or deplete the natural environment nor contribute to urban sprawl, SMARTGrowth in Flower Mound is a broader concept that speaks to our community vision and values and other intangible aspects of our quality of life."[53]

Although Flower Mound's SMARTGrowth Program was comprised of four distinct components, the most controversial components were: (1) a temporary moratorium on residential master plan (comprehensive plan) amendments, zoning amendments, and development plans (preliminary plats); (2) amendments to the town's building code to preclude the "banking" of and speculation in residential building permits in response to the temporary moratorium; and (3) the announced intent to consider "the need and feasibility of a plan to manage and equitably apportion residential building permits in a manner that ensures the town's ability to maintain a defined level of service while accommodating reasonable and sustainable residential and non-residential growth."[54]

B. The Development Community's Response

Shortly after Flower Mound announced its intent to consider a limitation on the issuance of residential building permits, Texas State Representative Bill Carter of Fort Worth, at the request of the Home Builders Association of Greater Dallas, the Home and Apartment Builders Association of Greater Dallas, and the Texas Association of Builders, requested that Texas Attorney General (now United States Senator) John Cornyn opine "whether a home-rule municipality may limit the number of residential building permits issued in a given time period while not limiting the number of nonresidential building permits."[55] In a surprising setback to the development community, Attorney General Cornyn concluded that since nothing in state law prohibited a home rule municipality from enacting such a provision,

> [a] home-rule municipality may implement a growth-management plan that apportions, or 'caps,' the number of building permits the municipality will issue in a specified

53. Position Paper, *supra* note 49, at 6.

54. FLOWER MOUND, TEX., RESOLUTION NO. 1-99 § 3 (Jan. 11, 1999). Town approval of record plats (final plats) was not included in the moratorium due to concerns about vested rights under Texas law. With regard to residential building permits, the validity of a building permit was reduced from 180 days to forty-five days, with one additional renewal period of fifteen days. *See* FLOWER MOUND, TEX., ORDINANCE NO. 3-99 § 1 (Jan. 11, 1999) (detailing expiration of residential building permits).

55. Op. Tex. Att'y Gen. No. JC-0142 (1999) at 1.

> period of time even in the absence of an emergency. The municipality must provide appropriate substantive and procedural due process, and the municipality may not attempt to apply its growth-management plan to building permits filed prior to the adoption of the plan.[56]

While noting that a growth management plan may impact state and federal constitutional protections, Attorney General Cornyn further wrote that "[a] home-rule municipality may adopt a growth-management plan that limits the number of residential building permits, and not the number of nonresidential building permits, the municipality will issue in a given time period."[57]

While officials in Flower Mound celebrated the Attorney General's opinion on the residential building permit limitation issue, the development community, wary of what other rapidly growing suburban cities might do in response, sought assistance from the Texas Legislature. Not surprisingly, residential development interests received their customary warm welcome in Austin.[58]

C. The Texas Legislature Responds

The 2001 session of the Texas Legislature responded to the Attorney General's Flower Mound growth management opinion by approving legislation that virtually made it either impossible or extremely difficult to enact a moratorium on residential development. Senate Bill 980, now codified as subchapter E of chapter 212 of the Texas Local Government Code, established stringent regulatory controls on moratoriums in Texas. Specifically, Senate Bill 980 circumscribes the authority of municipalities to adopt moratoriums and mandated certain procedural requirements for a city to adopt a moratorium on residential development. This legislation generally provides that before a moratorium is adopted, a city must give notice of public hearings at least four days in advance of the public hearings;[59] there must be at least two public hearings on the question of

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56. *Id*. at 9.

57. *Id*.

58. While a detailed analysis of campaign contributions by the Texas development community to individual state legislators is beyond the scope of this article, a review of campaign finance reports clearly indicates that the Texas legislative committees that usually consider zoning and land use matters (House Committee on Land and Resource Management and Senate Committee on Intergovernmental Relations) certainly are not strangers to developer and development-related contributions. *See generally* Texas Ethic Commission, Campaign Finance and Lobby Reports, http://www.ethics.state.tx.us/main/search.htm (last visited Feb. 9, 2008) (providing a research portal).

59. TEX. LOC. GOV'T CODE ANN. § 212.134(b) (Vernon 2007).

adopting a moratorium (one before the planning and zoning commission and one before the governing body);[60] and it further provides that on the fifth business day after a public hearing notice is published, a temporary moratorium takes effect.[61] Thereafter, within twelve days after the first public hearing, a city must decide whether to impose a moratorium.[62] If the moratorium is not imposed, the temporary moratorium ends. However, if a moratorium is adopted, the ordinance must be given at least two readings separated by at least four days. The ordinance imposing the moratorium must be finally adopted upon a second reading thereof within the twelve-day window from the first public hearing.[63] Most importantly, the legislation provides that a moratorium may be imposed only if there is a need, supported by written findings, to prevent a shortage of essential public services (water, wastewater, drainage facilities, or street improvements)[64] or significant need (one that would endanger public health and safety) for other public facilities, including police and fire services.[65] Any such moratorium is limited to 120 days in length, unless a city extends the moratorium by going through another process of required notices, hearings and adoption of written findings.[66] Additionally, any moratorium is not valid if it does not provide a "waiver" procedure.[67] Amendments to this statute in 2005 included both residential and commercial moratoriums being included within the purview of this law, not just residential moratoriums.[68]

The effect of this legislation has been very clear—few cities in Texas currently enact moratoriums for any zoning and land use-related purposes. Consequently, rather than fight the moratorium battle in city after city around Texas, the expedient way for the development community to address the moratorium issue was to enact state legislation, yet again thwarting cities in their attempts to address local growth issues. With cities unable to impose zoning and land use moratoriums without following the stringent notice requirements imposed by Senate Bill 980, the practical implications of the legislation are apparent—any notice of a proposed moratorium by a city will result in a mad dash to city hall to acquire

60. *Id*. § 212.134(d).
61. *Id*. § 212.134(c).
62. *Id*. § 212.134(f).
63. *Id*.
64. *Id*. § 212.135.
65. *Id*. § 212.1351. This provision was recodified from section 212.135(b) to the current section as a result of a 2005 amendment to the statute.
66. *Id*. § 212.136.
67. *Id*. § 212.137.
68. *Id*. § 212.1352.

appropriate permits to vest development rights prior to city council consideration of the moratorium, thus allowing developers to "beat" the moratorium.[69]

D. The Texas Legislature's Handcuffing of Home Rule Powers to Address Growth and Urban Sprawl Issues

As noted by Professors Barron and Frug, state governments often shackle local governments and effectively prevent them from dealing with inherently local land use issues.[70] Consequently, the "toolbox" of land use techniques, options, and procedures simply are not available to local governments in addressing the multitudinous problems attendant to rapid and intense urbanization. Texas is no exception to this general principle. Indeed, the Texas Legislature, in response to development concerns (and I dare say development special interest money) has enacted a series of land use laws that have been designed to limit local government control over local land use issues. Besides the moratorium statute referenced above, these include:

> limitations on municipal land use activities in the extraterritorial jurisdiction;[71]
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> super-majority voting requirements in certain instances;[72]
>
> extremely pro-developer, early vesting requirements;[73]
>
> municipal infrastructure cost-sharing provisions that favor developers and grant developers who challenge municipal

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69. That is exactly what occurred in Flower Mound in early May 1994. At that time the Flower Mound Town Council posted an agenda item that it would consider the possible implementation of a proposed growth management plan that capped the number of residential building permits that would be issued by the Town. The development community appeared at the Town Council meeting in question and agreed that its members would "self police" relative to the issuance of building permits, contending that building permit caps would be therefore unnecessary. The Town Council did not implement the proposed growth management plan at that time; however, in May 1994 alone, the Town issued in excess of 600 building permits and residential developers "banked" those building permits in anticipation of the adoption of a growth management plan that would cap such permits.

70. *See supra* note 44 and accompanying text.

71. TEX. LOC. GOV'T CODE ANN. §§ 212.049–.171 (Vernon 2007) (chapter 42 sets out the rules for extraterritorial jurisdictions of municipalities).

72. *Id*. §§ 211.006(d)–(e), 212.015(c)–(d).

73. *Id*. ch. 245 (chapter 245 sets out the issuance of local permits for land developments in Texas).

> infrastructure cost apportionment and who subsequently prevail, court costs, attorney's fees, and expert fees;[74]
>
> municipal annexation provisions that often are unwieldy and allow for protracted annexation battles, both in court and out of court;[75] and
>
> a plethora of special districts (created under state law and special legislative acts) that often are used by developers to circumvent municipal annexation and develop property, the costs of which are funded by bonded indebtedness, paid by future residents of the project.[76]

The result of this handcuffing has been obvious. Municipalities are unable to adequately address growth issues and, as a result, costs addressing these issues skyrocket. The legislature then steps in and adopts legislation to aid the development community if business and development interests are threatened by local initiatives. The result is that local government control over local land use issues is severely circumscribed.

IV. A PROPOSAL FOR CHANGE

If there is any solution—or at least an attempt at one—to the problems associated with urban sprawl, legislative incursions into municipal home rule powers are not the answer. Indeed, as reflected in this Article, such incursions have the effect of exacerbating urban sprawl issues. Local autonomy is a non-factor in the Texas land use model, leaving only the minutiae of land use decisions to home rule municipalities and other Texas local governments.

First, while regional cooperation, particularly in suburban and exurban environments, is often viewed as untenable or as just another layer of government and bureaucracy, there are indeed communities of interest in metropolitan areas. Transportation is one such area where regional cooperation has effectively addressed major transportation and

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74. *Id*. § 212.904.

75. *Id*. ch. 43 (encompassing the provisions for municipal annexations in Texas).

76. These include, but are not limited to, water control and improvement districts, fresh water supply districts, municipal utility districts, water improvement districts, county development districts, drainage districts, levee districts, irrigation districts, navigation districts, stormwater control districts, and other special utility districts. While all of these special districts do not have the legal authority to engage in land development activities, some of them do have such authority when the Texas Legislature specifically allows such activities in enabling legislation.

transportation funding issues, particularly in the Dallas/Fort Worth Metroplex. Efforts on a regional basis should continue, whether there is discussion of transportation or clean air and water issues. The various Texas Councils in often have been the conduit for such discussions. This effort should be fostered with the regional councils taking more proactive roles in addressing truly regional issues.

Second, while many local officials are skeptical of regional cooperation, there often is a direct financial cost associated with a "go-it-alone" approach. Suburbs in particular are without the financial resources to address region-wide traffic congestion problems, and any effort to do so without the involvement of the state or other local governments would be viewed as preposterous. While apparently little support exists for a new layer of government at the regional level,[77] a better alternative may be as Barron has suggested:

> to promote regionalism by responding seriously to the widespread sentiment that the state has unduly limited home rule. The idea would be for the state to enhance local power—and relax existing limitations on that power—as a carrot to induce greater regionalism. In this way, the state would help overcome the sense of opposition between home rule and regionalism . . . .[78]

In the land use context, the state could relax the early vesting requirements of state law.[79] In an effort to promote regionalism, the state could relax such requirements only for municipalities that enter into regional land use planning agreements. If this concept were enacted, it may increase municipal power to manage growth as municipalities agree to work together to devise a greater-than-local land use strategy. "Cooperation would make planning strategies possible that now are effectively foreclosed."[80]

Third, land use issues could be addressed on a sub-region basis: a northern tier of suburban cities may have unique land use issues that are not problematic in other sub-regions. While such sub-regions could fracture

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77. BARRON ET AL., *supra* note 43, at 84.

78. *Id*. at 85 (addressing concerns expressed by Boston-area local government officials).

79. TEX. LOC. GOV'T CODE ANN. §§ 212.049–.171 (Vernon 2007). As it currently stands in Texas, a development right may be vested by simply dropping a hand-written "development plan" on a cocktail napkin in the mail to a municipality, as long as the municipality has "fair notice" of the project and the nature of the permit sought. TEX. LOC. GOV'T CODE ANN. § 245.002(a-1) (Vernon 2007). Most local government officials find such an early vesting provision ludicrous, as does the author.

80. BARRON ET AL., *supra* note 43, at 86.

regional cooperation, sub-regional cooperation could be "incentivized" by the state allowing consideration of other financing options for joint projects. For example, the state could allow funds from one municipality to be utilized in another to address an area or sub-regional problem.

Additionally, relaxation of land use controls contained in state law could be relaxed on a sub-regional basis for those cities that join together to address projects of regional concern. This also could take the form of multi-jurisdictional economic development projects—although one city might be the site of a large corporate relocation, large scale corporate projects often impact neighboring communities. Thus, neighboring cities could enjoy enhanced home rule authority by entering into such regional economic development agreements. Another alternative could be statutory authorization to impose a sub-regional impact fee for projects that traverse municipal boundaries, such as major roadways, water, and wastewater projects that are multi-jurisdictional in scope. Alternatively, the legislature could allow cities or counties to impose impact fees for one hundred percent of the cost of roadway facilities or expansions necessitated by new development outside of a city's corporate limits, within its extraterritorial jurisdiction, or in other unincorporated areas of a county. Such statutory authorization would have the effect of fostering regional cooperation between and among the affected entities, requiring them to address those infrastructure issues that impact them all.[81]

Last, the legislature should place a moratorium on the creation of new special purpose districts. While those that already have been created obviously cannot be dissolved, the state "should recognize that regional special districts are not a quick, efficient solution for region-wide problems, but rather a contributor to further regional inequality."[82] The proliferation of special purpose districts impedes regionalism and it is time to reconsider "state and local attitudes that see [the creation of special purpose districts] as an unabashedly positive phenomenon in metropolitan regions."[83] As Professor Reynolds notes,

> [N]o tremendous overhaul of the status quo is proposed. The shift would be one of governance, not government, taking the locus of power away from the existing regional

81. Chapter 395 of the Texas Local Government Code authorizes municipalities to impose impact fees in their corporate limits and certain impact fees in their extraterritorial jurisdictions; however, nothing in chapter 395 addresses the concept of regional or sub-regional impact fees. TEX. LOC. GOV'T CODE ANN. § 395.011(b) (Vernon 2007).

82. Reynolds, *supra* note 35, at 526.

83. *Id.* at 527.

> special district and redistributing it among the constituent units of multi-purpose local government within its territory. . . .
>
> . . . For starters, most general purpose local governments are already well aware of the local impacts of regionalism, because many regional issues also have easy to identify and narrowly local impacts. Being forced to act on a regional scene, however, would allow local governments to seek solutions that respect both the local government's more narrow self-interest, as well as to recognize how their own self-interest is tied up with the region's interest, thus making a consensual regional solution more likely.[84]

CONCLUSION

Urban sprawl is a problem of gargantuan proportions around the nation. Many cities, and most metropolitan areas, feel helpless to address the issue. Sadly, when attempts are made to do just that, it is not unusual, as is the case in Texas, for the state legislature to immediately step in to protect development interests, almost uniformly at the cost of municipalities by stripping them of home rule powers to comprehensively address the issue of sprawl.

One solution is greater regional cooperation. The goal of regional cooperation, however, is not to create new governmental entities and new bureaucracies with new layers of approvals, but to empower local governments to work together and cooperate regionally, enhancing their home rule powers to do so, rather than hindering them from doing so, as is the current state of affairs in Texas. While the concept of regional cooperation often is resisted at first, with appropriate statutory incentives from the state, the concept of regional cooperation may flourish and allow cities, particularly with regard to urban sprawl and land use issues, to mutually and cooperatively address the serious growth issues that confront our country.

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84. *Id.* (footnotes omitted).