

HOT TOPICS IN TEXAS LAND USE LAW

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I.

Introduction

As usual, when considering hot topics in Texas land use law, there are a few topics we cannot seem to avoid—short-term rentals, for example—as well as some new ones. Who a year ago would have anticipated that a large residential development in rural portions of Liberty County, Texas, would merit a special session of the Legislature and calls from a portion of the Texas Congressional Caucus for action? Honestly, a year ago I did not know about and could not describe the concept of “gentle” density in Texas’ largest cities, although Austin and Houston have addressed it (in significantly different ways) while Dallas flirts (or maybe I should say “flirted”) with it. Last, a recent Dallas appellate case reaffirmed the judicial deference accorded zoning boards of adjustment.

II.

The Colony Ridge Fiasco: Now You See It, Now You Don’t!

Sometimes, odd things happen in the land use world. Some of them are foreseeable—legislative responses to court decisions, for example, and some of them are not—the Colony Ridge fiasco in Texas in the autumn of 2023 is just such one of those. Who would have thought that a legislatively-created municipal development district north of Houston in Liberty County would become the alleged home of Mexican drug cartels and hundreds, if not thousands, of illegal immigrants, with the prospect of thousands more heading north across the Rio Grande to Colony Ridge? Although the Colony Ridge development garnered headlines in Texas for several weeks, in the end, rest assured that Mexican drug cartels have not overtaken Liberty County.

In September 2023, conservative news outlet and website *The Daily Wire* published an (allegedly) investigative article entitled “Inside Colony Ridge: The ‘Fastest Growing Development’ In The U.S. Is A Magnet For Illegal Immigrants.”¹ The investigative article ignited a media and political firestorm—a firestorm that ended almost as quickly as it started.

Colony Ridge is an unincorporated subdivision located in Liberty County, north of Houston, near the small town of Plum Grove. According to *The Daily Wire*, it is over 60 square miles in size² with a population “estimated to be anywhere between 50,000 to

¹ By Spencer Lindquist, *The Daily Wire* (September 16, 2023), found at <https://www.dailywire.com/news/inside-colony-ridge-the-fastest-growing-development-in-the-u-s-is-a-magnet-for-illegal-immigrants>.

² When House Bill 4341 was introduced in the 85th Legislature to create Colony Ridge, the official notice published in *The Cleveland Advocate* on February 22, 2017, described

75,000, and it is growing rapidly thanks to a marketing plan targeted at Texas' Hispanic population.”³ The author suggested that while the population of Colony Ridge is unclear, “estimates suggest that the population in the development could include tens of thousands of illegal aliens.”⁴ The author further described Colony Ridge as “half-built homes, dilapidated trailers, and heaps of trash” with houses flying “the flags of foreign countries” where “[s]tray dogs without collars could be seen trotting along the side of the underdeveloped streets.”⁵ Moreover, the developer of Colony Ridge allegedly provides financing arrangements that allow buyers (most of whom “are either not currently living in the United States or who are not citizens of the country”) at Colony Ridge “to circumvent the usual [home financing] requirements, even dodging the need to provide a social security number,” with high interest rates near 15%.⁶

One interviewee estimated that Colony Ridge could blossom to 200,000 residents, “due to the massive influx of migrants into Texas since President Joe Biden took office in 2021,” and another added that “[t]here’s very thin law enforcement presence in that area,”⁷ meaning that residents

[p]robably have to break a whole lot of different kinds of laws in order to buy vehicles and drive the vehicles and maybe show documents to potential employers. When people buy here, they’re buying peace of mind from law enforcement.⁸

Congressman Brian Babin, from a neighboring congressional district, expressed concerns about drug cartel activity in Colony Ridge.⁹ Additionally, according to *The Daily Wire*,

Liberty County Municipal Management District No. 1 as consisting of approximately 4,619 acres. See <https://capitol.texas.gov/tlodocs/85R/notices/pdf/HB04341.pdf#navpanes=0>.

³ Lindquist, 2023.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

[m]embers of law enforcement in the area explained that members of the Gulf and Sinaloa cartels had invested in Colony Ridge properties early on in order to set up safe houses for human and drug smuggling operations.¹⁰

Concern was expressed that several Texas Republican politicians were involved in the Colony Ridge development, and the developer and his wife had contributed \$1.5 million to Governor Greg Abbott's 2018 gubernatorial campaign. While the Governor's office acknowledged that it had deployed public safety troopers to support the Liberty County Sheriff's Office, it declined to comment about any large political contributions.¹¹ *The Daily Wire* also confirmed that the developer had made contributions to Congressman Morgan Luttrell (\$8,700 in the 2022 election cycle), and State Representatives Briscoe Cain (\$5,000 in 2020) and Ernest Bailes (\$1,800).¹²

The Daily Wire article concluded that "national security experts say the danger posed by developments like Colony Ridge will only get worse as illegal immigrants flood the country. . . . This is going to be cartel land near Houston and at risk of being a no-go zone."¹³ Developments like Colony Ridge, according to one interviewee, "will change the entire United States of America" and Colony Ridge residents "have no idea of the American founding, of American founding principles, they haven't taken any training in what it means to be an American or what the American way of life is all about." This interviewee ended with "[t]his is just symptomatic of the destruction of our country."¹⁴

Reaction was swift. Four days after the publication of the investigative article, *The Daily Wire* reported that pressure was building on Texas Governor Greg Abbott, with Lieutenant Governor Dan Patrick stating that he was asking the governor to convene a special session of the Legislature because "many fear that [Colony Ridge] has become a strategic center for Mexican cartels to operate in the United States."¹⁵ Texas Congressman Chip Roy, while noting that his office was "not in a position to fully articulate what's happening [in Colony Ridge]," believed it was "a continuation of these wide open

¹⁰ *Id.* (quoting Todd Bensman, a National Security Fellow at the Center for Immigration Studies).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ "Pressure Builds in Texas For Investigation Into Illegal Immigrant Enclave Colony Ridge," by Spencer Lindquist, *The Daily Wire* (September 21, 2023), found at <https://www.dailywire.com/news/pressure-builds-in-texas-for-investigation-into-illegal-immigrant-enclave-colony-ridge>.

border policies” of the Biden administration.¹⁶ On September 25, 2023, the Texas Republican Party adopted a resolution calling for action on Colony Ridge, requesting legislation “to prevent further settlement of illegal aliens in Colony Ridge” as well as “call[ing] on Texas Attorney General Ken Paxton to initiate a full investigation into the development activities of Colony Ridge Land, LLC, and its possible connections to elected officials in the region.”¹⁷ On September 30, 2023, in correspondence to Governor Abbott and Attorney General Paxton, the Texas Republican Congressional Delegation unanimously requested that a special session of the Legislature be convened to address Colony Ridge¹⁸ and on October 5, 2023, Governor Abbott included in his call for a special session “[l]egislation concerning public safety, security, environmental quality, and property ownership in areas like the Colony Ridge development in Liberty County, Texas.”¹⁹ The special session convened on Monday, October 9, 2023. The stage was set in Austin and the legislators were primed to fully investigate Colony Ridge and its pernicious effects upon Liberty County and the State of Texas.

So, what emerged from the special session of the Legislature about Colony Ridge and similar developments in Texas? Absolutely nothing. On October 19, 2023, the House State Affairs Committee held a hearing to discuss Colony Ridge, even though no legislation had been introduced.

Legislators heard testimony by local officials and the CEO of the housing development that told a different story [than what was addressed in *The Daily Wire*]. Local officials refuted claims . . . that Colony Ridge had become too dangerous for law enforcement to effectively police and had overwhelmed local government resources.²⁰

In fact, Texas Department of Public Safety (DPS) Director Steve McCraw said concerns that the subdivision was a “no-go zone” for law enforcement were unfounded, and Lt. Craig Cummings of the DPS, after touring the development, pushed back against allegations of widespread activity tied to Mexican drug cartels and surges in crime. “The idea that everyone there is illegal and connected to the cartels is totally false,” and DPS

¹⁶ *Id.*

¹⁷ Resolution of the Texas Republican Party, September 25, 2023, found at <https://www.texasgop.org/colony-ridge/>.

¹⁸ Found at <https://texasscorecard.com/wp-content/uploads/2023/10/2023.09.30-texas-delegation-letter-final.pdf>.

¹⁹ Found at https://gov.texas.gov/uploads/files/press/PROC_third_called_session_88th_legislature_FINAL_10-05-23.pdf.

²⁰ “After much ado about Colony Ridge, the Texas Legislature has little to show for it,” by Zach Despart, October 19, 2023, www.texastribune.org.

troopers found “appreciative residents” who were “waving to us and thanking us.”²¹ Liberty County Sheriff Bobby Rader testified that while Colony Ridge has more incidents of crime than other parts of Liberty County, such was to be expected given its high population density. Sheriff Rader stated that he was thankful that the Colony Ridge property owners association pays for ten contract deputies to patrol the area, though he would benefit from additional funding for his department. “I believe if we had money in a pot somewhere, we could pay for extra Liberty County deputies and constables over in that subdivision,” Sheriff Rader stated.²² The prior concerns about cartels, tens of thousands of illegal aliens, and rampant crime were not substantiated. In fact, absolutely no testimony corroborated earlier concerns about drug cartels, hordes of illegal aliens, or rampant crime.

Liberty County Judge Jay Knight contended it was inaccurate to describe Colony Ridge as a *colonia*²³ because Colony Ridge “has water, sewer, ditches and roads [and] the water is regulated by [the Texas Commission on Environmental Quality] and it’s a private company that owns it. . . . [T]he roads become property of the county. It’s ours to take care of.”²⁴ Judge Knight’s principal concern was the inability of Texas county commissioners courts to regulate development in unincorporated areas of a county. “If you have 100 acres there, I can’t tell you [that] you can’t have 100,000 goats, or sheep, or whatever. I can’t tell you what kind of house you can build.”²⁵

No action was taken at the hearing, no legislation addressing Colony Ridge or similar developments was ever introduced during the special session, and no legislation

²¹ “Colony Ridge reflects Texas conservative values. It gets bashed anyway,” by Molly Hennessy-Fiske, October 28, 2023, www.washingtonpost.com.

²² *Id.*

²³ Colonias are housing developments located along the Texas-Mexico border. Residents of colonias often lack basic services such as drinking water, sewage treatment, and paved roads. As of March 2023, Texas had over 1,800 colonia areas in 29 border area counties. The development of Texas colonias dates back to at least the 1950s. Using agriculturally worthless land—land that lay in floodplains or other rural properties—developers created unincorporated subdivisions. They divided the land into small lots, put in little or no infrastructure, then sold them to low-income individuals seeking affordable housing. See <https://texaslawhelp.org/article/colonias-in-texas>.

²⁴ “Colony Ridge reflects Texas conservative values. It gets bashed anyway,” by Molly Hennessy-Fiske, October 28, 2023, www.washingtonpost.com.

²⁵ *Id.*

was adopted. As widely reported, during the committee hearing Republican Representative Jay Dean of Longview exclaimed, “why are we even here doing this?”²⁶

Attorney General Paxton, in an October 19, 2023, response to the Republican Members of Congress, addressed the Colony Ridge development and appeared to soften his stance, writing:

The development appears to be attracting and enabling illegal alien settlement in the state of Texas. . . . [The Attorney General’s Office] found that Colony Ridge in particular was made possible by a specific arrangement created by Senator Robert Nichols and Representative Ernest Bailes [through the creation of a municipal management district authorized under Chapter 375 of the Texas Local Government Code]. . . . I am beyond disappointed in Senator Nichols and Representative Bailes for apparently working to enrich specific developers at enormous expense to the rest of the public and reducing the quality of life for their own constituents. . . . I urge the legislature to address this growing crisis created by some of their members’ hidden agendas. Senator Nichols and Representative Bailes created these problems with their initial [MMD] legislation, and now the legislature must undo what they have tolerated in their districts for years.²⁷

²⁶ *Id.*

²⁷ Found at <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Colony%20Ridge%20Letter%20to%20TX%20GOP%20Congressional%200Delegation%2010.19.23.pdf>. In 2017, House Bill 4341, now codified in Chapter 3795 of the Texas Special Districts Local Laws Code, was approved by the Legislature and created the Liberty County Municipal Management District No. 1, with the authority to issue bonds, and impose assessments, fees or taxes. *Id.* Paradoxically, in May 2023, Rep. Bailes had voted to impeach Attorney General Paxton and in September 2023, Senator Nichols voted to convict him on 13 of 20 impeachment articles. Bailes was defeated for reelection in the March 5, 2024, Republican primary election by Janis Holt, who had been endorsed by former President Donald Trump, Gov. Greg Abbott and Attorney General Ken Paxton.

In Texas, a municipal management district, once created and after having incurred bonded indebtedness for infrastructure and public improvements, for example, may only be dissolved once such bonded indebtedness has been repaid. See Tex. Local Gov’t Code §§ 375.261-375.264. According to Colony Ridge Land, LLC, Colony Ridge has “100’s of millions of dollars in bonds & financial guarantees” for infrastructure and public improvements. See “Frequently Asked Questions About Colony Ridge,” found at <https://www.colonyridge.com/author/dbostick/>. It is difficult to imagine “undoing” Colony Ridge due to its substantial debt.

Notwithstanding Attorney General Paxton’s disappointment about the Colony Ridge development, municipal management districts are one of many development districts that are authorized under Texas state law and in fact, hundreds of such districts have been created in Texas over the last several decades. Municipal management districts (MMDs) are usually created by special legislation²⁸ and have broad development authority and powers. As a general rule, MMDs have the ability to construct public infrastructure and provide services within the MMD. The public infrastructure that may be constructed includes water systems, wastewater systems, storm sewer systems, and streets and roadways.²⁹ An MMD may issue tax exempt bonds for the public improvements (MMD bonds do not impact a local government’s bonding capacity), charge fees, assess local sales and use taxes, provide for the collection of hotel occupancy taxes, and charge impact fees.³⁰

In the case of Colony Ridge, its enabling legislation similarly granted broad powers to the MMD. The district’s purpose was “to promote, develop, encourage, and maintain employment, commerce, transportation, housing, tourism, recreation, the arts, entertainment, economic development, safety, and the public welfare”³¹; its “powers were to “be liberally construed”³²; and the district had “the powers and duties necessary to accomplish the purposes for which the district is formed.”³³ With such broad powers, it is not surprising that the developers of Colony Ridge utilized those powers to a significant extent.

After the legislative hearing in Austin, the Colony Ridge developer was not hesitant to defend itself. On October 21, 2023, Colony Ridge Land, LLC, responded with its own “Frequently Asked Questions About Colony Ridge.” Their answers to several questions were somewhat surprising and certainly did not quell concerns:

²⁸ Municipal management districts may also be created through the Texas Commission on Environmental Quality (TCEQ); however, many developers believe that is a more cumbersome process than the introduction of special legislation. The process for the creation of a municipal management district through TCEQ is described in Subchapter B of Chapter 375 of the Texas Local Government Code. It is the authors’ experience that the vast majority of such districts are legislatively created.

²⁹ See *generally* Tex. Local Gov’t Code ch. 375.

³⁰ Subchapter G of Chapter 375, Tex. Local Gov’t Code, provides that impact fees may be imposed pursuant to the provisions of Chapter 395 of the Texas Local Government Code.

³¹ Tex. Spec. Dist. Local Laws Code § 3795.003(b).

³² *Id.*, § 3795.007.

³³ *Id.*, § 3795.101.

Does Colony Ridge sell land to illegal aliens? If so, why?

Short answer: Yes, because State and Federal law prevents discrimination based on race, gender, creed, religion, or nationality.

How many Colony Ridge customers are illegal aliens? How many illegal aliens live in the Colony Ridge development? Is that higher than the rest of Texas?

Answer: We guess it is about 20-22%. Because the law prevents us from asking about citizenship status, we don't ask, so we don't know how many non-citizens purchase property in Colony Ridge. . . . If we assume the people that buy here end up living here, that would put the illegal population at about 20-22%. Although Colony Ridge does not sell homes (we only sell land), 12% of residential homes in Texas are sold to or are owned by foreign (non-US citizen) buyers.

Does Colony Ridge have more crime than surrounding areas in Liberty County?

Answer: Kind of, but only because it has more people. Liberty County Sheriff Bobby Rader explained the situation to the House Committee on State Affairs.

Are Colony Ridge subdivisions poor areas?

Answer: It depends on what that means to you. Because our developments are rural, our sale prices are generally below the national and state average, which helps alleviate the national housing shortage and provides entry-level home buyers the opportunity to experience the American dream of homeownership. Our buyers represent the proud, responsible, hard-working, but generally poorer population who are working their way up. Most of the homes are starter homes or trailers. Some homes clearly show an architect's touch, but many are plain. Many of the homes are built by the property owners themselves, on weekends or after work, as the owners have time and money. As a result, many of the homes do not carry a traditional mortgage and their owners are debt free.

How does Colony Ridge sell its lots? Does Colony Ridge sell through a contract for deed?

Answer: We follow the Texas Finance Code and federal law regarding residential lot sales. Our empty residential lots generally cost between \$40k and \$65k, depending on which area our buyers chose. The low purchase price of our lots makes down payments and monthly payments more

manageable for our lower and middle class buyers. . . . Some of our buyers have poor credit or no credit, or they don't have traditional banking relationships that upper class buyers enjoy. When these buyers need someone to give them a chance, Colony Ridge Land, LLC will "owner-finance" the lots, which means engaging a third party, independently licensed mortgage loan originator to disclose all of the financing terms and conditions, answer any questions from buyers, and assure compliance with all Truth-In-Lending and similar laws. Buyers are always free to payoff their lot loan early or refinance at a traditional bank, at no additional cost or expense. We have never offered lots for sale through a contract for deed.

Why does Colony Ridge offer such low down payments and low monthly payments?

Answer: We never want to foreclose or have to buy back a lot from an owner. Foreclosure is expensive and time-consuming, and foreclosure costs can quickly overtake any equity in these relatively inexpensive lots. We always lose money if we have to take a lot back, so we encourage owners to improve their property and build a home as soon as they can. Low monthly lot payments are the easiest way to make sure owners have cash flow to build their home. Homeowners are much less likely to face foreclosure than simple empty lot owners.

Does the County leadership approve the developments?

Answer: Yes. The developments are all overseen and approved by the local county commissioners. Each development plan is submitted for approval before beginning any work, and the county engineers oversee and approve the construction of the infrastructure as it is put it. When the roads, water and septic systems are completed, the county then conducts a full-scale review, approves the project, and takes over the responsibility for roads and maintenance. We work closely with local officials to ensure these developments meet the county's expectations and requirements. Colony Ridge is a land developer, not a home builder. However, from time to time Colony Ridge may be required to foreclose on a property that has a dwelling. Such inventory or resale is rare.³⁴

At the present time, there is little discussion about how existing legislation creating municipal management districts across the state, most of which have issued bonds or imposed assessments, fees, or taxes, will be addressed in the upcoming 2025 legislative session. Even though the Colony Ridge developer has maintained that it has followed all financing guidelines for lot purchasers, it appears that may not

³⁴ "Frequently Asked Questions About Colony Ridge," found at <https://www.colonyridge.com/author/dbostick/>.

be the case. Perhaps one positive outcome of the Colony Ridge fiasco is that both the U.S. Department of Justice and the State of Texas have sued the Colony Ridge developers for fraudulent real estate practices targeting mostly Hispanic consumers, including bait-and-switch sales schemes that lead to foreclosure rates approximately fifty times the national average.³⁵ Despite assertions to the contrary, Colony Ridge agents have sold lots without any infrastructure to connect to water, sewer, and electrical services, and as a consequence, parts of Colony Ridge subdivisions have flooded during rains, thereby increasing the cost to building dwellings. Further, between 2017 and 2022, 92% of all foreclosures recorded in Liberty County were attributable to Colony Ridge; from 2021 to 2022, foreclosures in Liberty County (6,495) exceeded those in Dallas County (4,038) or Bexar County [San Antonio] (5,016), even though Liberty County's population is approximately five percent of those counties. Additionally, even though Harris County [Houston] has a population 51 times larger than that of Liberty County, Liberty County counted almost half as many foreclosures as Harris County (14,089).³⁶

So, what did the Colony Ridge fiasco teach us? If this district's abysmal foreclosure rate and massive debt are any indication, it is that Texas' MMD laws are in dire need of reevaluation and those in charge of establishing and running these districts require greater oversight. The fact that it took accusations of drug and human trafficking to draw attention to Colony Ridge despite its seemingly exploitative (and possibly illegal, depending on what the ongoing cases uncover) existing business model seems indicative of a lack of interest among lawmakers in ensuring land developers act responsibly. Nonetheless, substantial changes to Texas MMD laws appear unlikely for the foreseeable future.

Though the legislative fervor around Colony Ridge fizzled out as quickly as it arose, the real-world consequences of the developer's predatory practices did not. Many Colony Ridge residents have been foreclosed on and many more face the same fate because of the high-interest mortgages favored by the Colony Ridge developer. The real fallout of the Colony Ridge fiasco has nothing to do with a cartel invasion of Texas and everything to do with easily abused MMD laws and politicians willing to help developers do so.

³⁵ See *Consumer Financial Protection Bureau and the United States of America v. Colony Ridge Development, LLC, et al.*, Case No. 23-cv-04729, pending in the United States District Court for the Southern District of Texas, Houston Division, and *State of Texas v. Colony Ridge, Inc., et al.*, Case No. 24-cv-0094, also pending in the United States District Court for the Southern District of Texas, Houston Division.

³⁶ See *Consumer Financial Protection Bureau and the United States of America v. Colony Ridge Development, LLC, et al.*, *supra* n. 35, ¶¶ 4, 12.

III.

Is “Gentle” Density in Dallas’ Future?

“Gentle” density refers to the infill of existing single-family neighborhoods to allow up to six units per lot, and can include accessory dwelling units (ADUs),³⁷ two-to-four unit housing, small-scale apartments or condominium buildings. Proponents argue that while high-rise apartments in strategic locations could be part of the solution, many single-family neighborhoods could easily yield more housing—and therefore more affordable housing—if zoning/land use rules allowed “gentle” increases in density.³⁸

The concept of gentle density is not new and various cities and states around the country have adopted regulations providing for such. For example, in 2019, Minneapolis voted to allow at least three homes on every residential lot in the city. In October 2023, St. Paul, Minnesota, approved changes to zoning regulations to allow at least four homes to be built on any residential lot in the city. Charlotte’s new Unified Development Ordinance, passed in 2022, legalized duplexes, triplexes and fourplexes on all single-family zoned properties. In 2021 and 2022, Raleigh, North Carolina, voted to allow accessory dwelling units and tiny homes on all single-family lots, and duplexes on nearly all single-family lots. Arlington, Virginia, voted in March 2023 to allow up to six units on any residential lot. In response to a 2019 Oregon state law, the City of Portland adopted the Residential Infill Project in 2022 which allowed for a greater diversity of housing choices, including duplexes, triplexes, fourplexes, cottage courts and townhomes within single-family zoning districts.

³⁷ An accessory dwelling unit (“ADU”) is generally defined as a smaller, independent residential dwelling unit located on the same lot as a stand-alone (*i.e.*, detached) single-family home. ADUs go by many different names throughout the United States, including accessory apartments, secondary suites, and granny flats. ADUs can be converted portions of existing homes (*i.e.*, internal ADUs), additions to new or existing homes (*i.e.*, attached ADUs), or new stand-alone accessory structures or converted portions of existing stand-alone accessory structures (*i.e.*, detached ADUs). Internal, attached and detached ADUs all have the potential to increase housing affordability (both for homeowners and tenants), create a wider range of housing options within the community, enable seniors to stay near family as they age, and facilitate better use of the existing housing fabric in established neighborhoods. Consequently, many cities and counties have signaled support for ADUs in their plans and adopted zoning regulations that permit ADUs in low-density residential areas. See <https://planning.org/knowledgebase/accessorydwellings/>.

³⁸ See “‘Gentle’ Density Can Save Our Neighborhoods,” by Alex Baca, Patrick McAnaney and Jenny Schuetz (December 4, 2019), Brookings Institute, found at <https://brookings.edu/articles/gentle-density-can-save-our-neighborhoods/>.

There also has been activity at the state level. In 2019, Oregon passed House Bill 2001, which required cities with a population greater than 25,000 to allow people to build duplexes, triplexes, fourplexes, cottage clusters, and townhouses in residential areas. California Senate Bill 9, which took effect in 2022, allows California homeowners to split their lot and build up to four homes on a single-family parcel. The State of Montana in 2023 passed Senate Bill 323, which requires that duplex housing be allowed on any lot where a single-family residence is permitted, and that zoning regulations applying to the development or use of duplex housing cannot be more restrictive than zoning regulations that are applicable to single-family homes.³⁹

In Texas, only Austin has adopted gentle density through its zoning regulations. On December 7, 2023, Austin amended its Land Development Code generally to (1) create a new three-unit residential use in three single family residential districts, and (2) revised two-unit residential uses and duplex residential uses in two single-family residential districts by easing site development restrictions. Now, the foregoing uses will be permitted in certain single-family districts as of right.⁴⁰ Even though Houston has no zoning, beginning in 1998 it achieved “gentle” density through amendments to its platting regulations by allowing landowners by right to subdivide or replat existing lots into much smaller parcels.⁴¹ With subsequent amendments, it has been estimated that almost 80,000 townhomes have been developed in Houston owing to these changes.⁴² Houston also included an opt-out process that enabled residents to exempt their block from the new rules. These so-called “block votes” allow homeowners to vote to incorporate into one of two special districts where land-use regulations are determined not by citywide ordinance but by the characteristics of existing lots in the area.⁴³

Let’s pivot to the City of Dallas. On November 8, 2023, five city council members requested a discussion about potential options to expand the “zoning menu” for a wider variety of housing options. There was no specific proposal submitted; rather, the council members requested a briefing to explain the process and potential effects of amending

³⁹ See Code Amendment Review Sheet, City of Austin, Texas (Dec. 7, 2023), at 4 (“For Responses to Questions Submitted by Planning Commission and City Council”), found at <https://services.austintexas.gov/budget/landdevcode/index.cfm>.

⁴⁰ Ordinance No. 20231207-001, City of Austin, Tex., adopted on Dec. 7, 2023.

⁴¹ See “Houston, we have a solution,” by Anya Martin (Sept. 7, 2023) in *Works in Progress*, found at <https://worksinprogress.co/issue/houston-we-have-a-solution/>.

⁴² *Id.*

⁴³ See “Lot-Size Reform Unlocks Affordable Homeownership in Houston,” by Alex Horowitz and Tara Roche (Sept. 14, 2023), found at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/09/lot-size-reform-unlocks-affordable-homeownership-in-houston>.

Dallas' zoning regulations by (1) defining new uses called "tri-plex" and "four-plex"; (2) reducing minimum lot size of single family districts; and (3) amending single family and duplex district regulations to allow tri-plex and four-plex uses.⁴⁴ Not surprisingly, almost fifty percent (50%) of the City of Dallas is zoned for single-family use.⁴⁵ It is generally understood that Austin's gentle density amendments primarily were the catalyst for the request to review Dallas' land use regulations for gentle density options.

The council members' request was the subject of an editorial column the following day from a Dallas developer, predicting the rapid demise of gentle density in Dallas:

People favor change when it does not impact them and takes place far from their residence. Some members of the Dallas City Council plan to challenge their constituents where they live. . . . The proposal calls for reducing the minimum size for single-family lots in a subdivision. Even more shocking, the memo suggests the city could allow triplex and fourplex uses by right in single-family districts where there are undeveloped lots. . . . It takes a substantial level of frustration for Dallasites to pay attention to what's going on at City Hall. Local politics is considered boring. . . . But I think five elected officials may have awakened the slumbering masses this time.

I believe this new policy would be used in the most affluent neighborhoods to create more baby boomer-friendly retirement residences. It would not appreciably solve our housing issue. . . . People got out the pitchforks last year to come down and complain about short-term rentals of single-family homes. The City Council banned these rentals because single-family homeowners wanted that to happen. I predict the same type of uprising and that this suggestion dies much earlier in the process.⁴⁶

A January 14, 2024, editorial in the *Dallas Morning News* severely criticized the concept of gentle zoning, writing that "there is a plan moving forward at Dallas City Hall

⁴⁴ See "Discussion of Expanding Housing Development Options with Potential Regulations for Two-Four-Unit Housing and Minimum Residential Lot Size," City Council Briefing (Jan. 31, 2024), at 4, found at <https://dallascityhall.com> (hereinafter "Expanding Housing Development Options").

⁴⁵ "Expanding Housing Development Options," at 9.

⁴⁶ "Multi-family everywhere without zoning?," by Dallas Cothrum (Dec. 9, 2023), *Dallas Morning News*, found at <https://dallasnews.com/opinion/commentary/2023/12/09/proposed-multifamily-housing-policy-will-start-firestorm/>.

that will permanently change single-family neighborhoods throughout our city. Whatever you might know about it, it's actually worse than you think."⁴⁷ The author continued:

[Proposed regulations] would circumvent long-established zoning with new development and construction codes and "upzone" the entire city by allowing, without zoning change, accessory dwelling units (ADUs), duplexes, triplexes and fourplexes by right on every single-family home lot. . . .

[T]he planners tell us, single-family zoning needs to end. Dallas needs more affordable housing. They promise that if more housing is built in Dallas, the price of housing will go down because of supply and demand. They say that Dallas needs to keep adding density until the cost of housing goes down. Dallas needs to "grow up" and "act more like a big city." . . . Despite the aspirational platitudes, [proposed regulations] reduce[] affordable housing, eliminate[] single-family homes for workforce families and stym[y] the cycle that creates generational wealth for first-time homebuyers.

Dallas is currently confronted with two different visions for the city. One would undermine the very core of what made Dallas the great city it is, a city of distinct and established neighborhoods. The other recognizes that Dallas must grow but that it can do so in ways that respect and enhance those neighborhoods through the addition of new development in underused or poorly used tracts of land that are easy to find wherever you go.

The city manager's plan, through his development staff, is hostile to a bedrock of the American dream: a home with a little yard. They want such homeowners to share what they see as a burden of providing housing.⁴⁸

On January 31, 2024, Dallas' Planning & Urban Design departmental representatives briefed the Dallas City Council on gentle density and housing development options that Dallas could consider. First, the question was asked why are other cities considering these options? The answers:

- To create more housing options at different price points and for diverse households including multi-generational households, single parents, those who want to age in place, and students.

⁴⁷ "Dallas is risking single-family neighborhoods," by Douglas Newby (Jan. 14, 2024), *Dallas Morning News*, found at <https://opinion/commentary/2024/01/13/dallas-housing-plan-bad-for-home-owners/>.

⁴⁸ *Id.*

- Allow greater access to neighborhood living.
- Gentle density was a common housing type in cities before development code updates in the 1980s.
- Requests are growing again for these housing types, but cities do not have the proper zoning to facilitate good design.⁴⁹

With that context, Dallas city staff outlined possible land use and zoning paths by which to attain gentle density.⁵⁰ The first land use option was to allow accessory dwelling units and duplexes on any single-family lot. Similarly, tri-plexes and four-plexes would be allowed on single-family lots; however, they would be required to meet certain additional criteria: house-scale homes; same footprint (lot size, lot coverage; height; and yard size); same design standards as existing homes; include maximum square footage for accessory dwelling units; adopt a maximum amount of impervious surface on a lot; and maintain the requirement for at least one tree per lot.⁵¹

The zoning path would include the creation of a floating base zoning district for small multiplexes, perhaps allowing attached, stacked and detached small scale homes. Another suggestion was to consider updating current zoning district requirements by addressing dwelling units/bedroom density or housing types; rethink lot pattern requirements; and rethink front yards and their relationship with streets.⁵² A longer term

⁴⁹ “Expanding Housing Development Options,” at 10.

⁵⁰ One advocacy group, Texas 2036, whose mission is “to enable Texans to make policy decisions through accessible data, long-term planning and statewide engagement,” and whose vision is to “make Texas the best place to live and work,” suggests that “Texas needs to raise the valid petition threshold from 20 percent to 50 percent. This modest reform will empower property owners and city councils to infuse their neighborhoods with additional housing—a critical step in solving the affordability crisis.” Specifically, this option would require a legislative amendment to Section 211.006(d) of the Texas Local Government Code. Currently, Section 211.006(d) provides that a protest submitted by the owners of 20% of the area adjoining the area proposed for a change and extending 200 feet from that area triggers a three-quarters vote of the governing body to approve a zoning change. The Texas 2036 proposal would increase the protest requirement from 20% to 50%. See <https://texas2036.org/posts/empower-local-communities-to-plan-for-gentle-density/>.

⁵¹ *Id.* at 21.

⁵² *Id.* at 22.

consideration included reforming lot sizes after community conversations on the topic as well as consider minimum lot sizes across the board.⁵³

The result of the January 31 briefing was the conclusion that if the city council expressed a desire to move forward, Dallas would need to consider code reforms to incorporate more housing types throughout the city.⁵⁴ Since the briefing was solely that, no action was taken and, as suggested by city staff, the issue of gentle density could be addressed in the update of the City’s comprehensive plan—Forward Dallas 2.0.

In fact, the Dallas City Council will consider Forward Dallas 2.0 on September 25, 2024—3 days after this paper was due. Since the early days of the discussion of gentle density in Dallas, I believe the intensity of opposition to gentle density will either doom the concept or endeavor to neutralize it. The City Council agenda packet for September 25 shows other than single-family uses in single-family zoning districts would be secondary uses which require “justification, higher scrutiny, and adherence with the locational strategy.”⁵⁵

One noted commentator has written that the concept of gentle density “may well prove to be much more of a band-aid than a cure.”⁵⁶ Professor Michael Allan Wolf cites four reasons why this concept is problematic:

First, many subdivisions, especially older ones, are already built out, meaning that, unless current buildings are razed, [gentle density] ordinances will be irrelevant. Second, homeowners association (HOA) fees run on average from a few to several hundred dollars a month. Third, there is a high likelihood that the neighborhoods in single-family residential zones are covered by restrictive covenants that prohibit more than one building per lot, duplexes, townhouses, and other more intensive uses of undeveloped lots. Fourth, because the missing middle housing must still meet the area (for example setbacks) and height requirements for the most restrictive zoning classification, the impact of these measures will be limited. In order to overcome the last two barriers, state lawmakers who are serious about creating a blend of single- and multi-family housing in new neighborhoods (and in those with available lots) should introduce legislation preempting covenants and height and area restrictions that frustrate good-

⁵³ *Id.* at 23.

⁵⁴ *Id.* at 27.

⁵⁵ See City of Dallas agenda packet for the September 25, 2024, City Council meeting, found at <https://cityofdallas.legistar.com/View.ashx?M=F&ID=13303299&GUID=2121F169-9367-4F98-A337-C55E609091A9>.

⁵⁶ Michael Allan Wolf, *Zoning Reformed*, 70 U. Kan. L. Rev. 171, at 194 (2021).

faith efforts to address segregation by class and race and to augment the supply of affordable housing in desirable communities.⁵⁷

Will gentle density be a viable option in Dallas? Probably not, but if there are areas where the concept is implemented, it will likely be with strong community support—that is, with “justification, higher scrutiny, and adherence with the locational strategy.”

IV.

A Very Brief Update on Recent Developments in Municipal STR Litigation

Municipal regulation of short-term rentals is a topic that I have addressed on multiple occasions at both TCAA and The University of Texas Land Use Conference. Consequently, I will simply refer you to my previous presentations for details about the history, case law and so far, unsuccessful legislation regarding municipal STR regulations in Texas. But during the last twelve months or so, the courts have remained active in this evolving area of the law. In December 2023 there were preliminary injunctions entered in two unreported cases—one in federal district court in San Antonio, and one in state district court in Dallas. Neither result was good for the cities in question.⁵⁸

In *Browning v. Town of Hollywood Park, Tex.*,⁵⁹ the United States District Court for the Western District of Texas addressed Hollywood Park’s foray into STR regulations. On November 14, 2023, the Town adopted a zoning code amendment to prohibit short-term rentals anywhere in the Town. For those STRs in existence or under contract as of November 14, 2023, they would have six months to come into compliance with the new zoning regulations. Two of the plaintiffs had purchased a home in Hollywood Park in 2021, made significant improvements to the home, and when they were out of town, they

⁵⁷ *Id.* at 194-95 (internal citations omitted).

⁵⁸ The United States District Court for the Eastern District of Louisiana recently upheld portions of the latest version of the New Orleans STR ordinance. See *Hignell v. City of New Orleans*, 2024 WL 838217 (E.D. La. Feb. 28, 2024). In a lengthy opinion, citing prior cases involving the City of New Orleans, the federal district judge noted that options available to cities to address the effects of STRs include “stepping up” enforcement actions; increasing the chance that STR owners face punishment for disorderly guests and strengthening their incentive to monitor their rentals; increase the magnitude of penalties imposed on owners whose guests violate quality-of-life regulations; strip repeat offenders of their STR licenses; increasing taxes on STRs; requiring an operator to stay on the property during the night; increasing the price of an STR license; or capping the number of licenses available for a given neighborhood. See *id.* at *3 (and cases cited therein). Obviously some of the federal district judge’s suggestions would be problematic in Texas due to significant differences between Texas and Louisiana state laws.

⁵⁹ 2023 WL 9503457 (W.D. Tex. Dec. 22, 2023).

would lease the home on a short-term basis, with all but one lease being booked for under 30 days. The other plaintiff, a corporate entity, similarly had purchased a residence in 2021, also made improvements to the property, and began offering short-term rentals in 2022. Plaintiffs filed suit in federal district court in late 2023 and requested a preliminary injunction to enjoin the Town from enforcing its new STR ordinance.⁶⁰ Oral argument was held on December 19, 2023, and shortly thereafter a preliminary injunction against the Town was entered on December 22, 2023.

Plaintiffs alleged that the Town's ordinance was a retroactive law and violated Article 1, Section 16 of the Texas Constitution.⁶¹ Relying upon Texas Supreme Court precedent in *Robinson v. Crown Cork & Seal Co.*,⁶² the federal district court relied upon a three-part test to determine whether a retroactive law is unconstitutional: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment.⁶³ The court addressed the *Robinson* factors seriatim.

With regard to the first *Robinson* factor—the public interest served by the ordinance—the Town noted that the ordinance sought to address “increases in traffic, public nuisances, parking, noise, litter, and the influx of strangers into residential areas” that allegedly result from permitting short-term rentals.” Further, the ordinance stated that the Town found the STR ban necessary to “safeguard and protect the public health, safety, and welfare” of the Town and to “protect the beauty and integrity of [the Town’s] residential ambiance.”⁶⁴ Notwithstanding the Town’s purported justifications for the STR ordinance, there were no legislative factual findings in the record to support the conclusion that a ban on STRs would resolve the Town’s public health and safety concerns. Moreover, at the preliminary injunction hearing, the City Secretary testified that he was not aware of the Town’s police department or city council having performed any studies analyzing the difference between the number of police calls for long-term rentals versus short-term rentals. Consequently, the federal district court held that the first *Robinson* factor weighed in favor of granting a preliminary injunction.⁶⁵

⁶⁰ *Id.* at *1-2. Neither plaintiffs nor their guests had ever received a citation or nuisance complaint from the Town. *Id.* at *2.

⁶¹ “No bill of attainder, ex post facto law, retroactive law, or any other law impairing the obligation of contracts shall be made.” Tex. Const. Art. 1, § 16.

⁶² 335 S.W.3d 126 (Tex. 2010).

⁶³ *Id.* at 145.

⁶⁴ 2023 WL 9503457 at *3.

⁶⁵ *Id.* at *2, citing *Zaatari v. City of Austin*, 615 S.W.3d 172, 189-90 (Tex. App.—Austin 2019, pet. denied) (finding that a ban on short-term rentals “cannot be considered

Under the second *Robinson* factor, the plaintiffs asserted that property owners in Texas who “purchase property prior to the enactment of a short-term rental ban have a[n] ‘established’ property right” to engage in short-term rentals “subject to protection under Article 1, Section 16” of the Texas Constitution. In support of their contention, plaintiffs submitted affidavits confirming that when they purchased their respective properties and made substantial investments for the purpose of generating additional short-term rental income, the Town did not restrict short-term rentals. The federal district court determined that based on several recent federal and state court decisions, the plaintiffs likely would succeed on their contention that the Town’s STR ordinance impaired a prior right.⁶⁶ In line with that finding, the federal district court held that under the third *Robinson* factor concerning the extent of the impairment of the right, the plaintiffs also demonstrated a substantial likelihood of success because where an ordinance eliminates a right, “there is no disputing that the extent of the impairment is ‘significant.’”⁶⁷

After determining that all three *Robinson* factors weighed in favor of the plaintiffs, _____ compelling” where nothing in the record indicated that the ban would prevent the city’s stated concerns and the city passed other ordinances banning the nuisances at issue).

⁶⁶ The federal district court first cited several recent federal court decisions. In *Anding v. City of Austin*, the Western District of Texas evaluated a 2016 STR ordinance limiting short-term rental licenses in certain zoning districts to properties where the owner resided on the premises (the “homestead requirement”). 2023 WL 4921530, at *2 (W.D. Tex. Aug. 1, 2023). There, because the plaintiffs had purchased their property in 2014—two years before the passage of the homestead requirement that would have prohibited them from engaging in short-term rentals—the court concluded that the plaintiffs “had a settled and reasonable expectation of a right to rent their property for short-terms when they purchased it in 2014” and the challenged ordinance was “unconstitutionally retroactive.” *Id.* at *10; see also *TXI Operations, LP v. City of McKinney*, 2023 WL 161942, at *22 (E.D. Tex. Jan. 11, 2023) (finding that a city’s rezoning and amortization of plaintiff’s property violated plaintiff’s reasonable and settled expectation to use its property as a concrete batch plant, where plaintiff “spent a significant amount of time and money investing in its property for the purpose of using it as a concrete batch plant, a use that was lawful when [plaintiff] invested its time and money”). Two recent state court opinions were cited that affirmed that the plaintiffs would likely be able to articulate a prior right impaired by the STR ordinance. See *Zaatari*, 615 S.W.3d at 191 (finding “Austinites have long exercised their right to lease their property by housing short-term tenants”); *City of Grapevine v. Muns*, 651 S.W.3d 317, 345 (Tex. App.—Fort Worth 2021, pet. denied) (enjoining a Grapevine ordinance after finding that plaintiffs adequately pleaded the zoning ordinance impaired their right to “lease their properties on a short-term basis”). The federal district court concluded that “[g]iven this line of federal and state court cases, the Court finds that Plaintiffs have demonstrated a substantial likelihood of success in alleging that the Ordinance impaired a prior right.” 2023 WL 9503457 at *3.

⁶⁷ 2023 WL 9503457 at *3, citing *Anding*, 2023 WL 4921530 at *9.

the federal district court easily determined that the financially devastating effects of the STR ordinance upon plaintiffs constituted irreparable harm; the threatened injury to plaintiffs far outweighed the Town's interests in enforcing the STR ordinance, particularly since neither the plaintiffs nor their guests "have ever received any nuisance complaints from the police or neighbors"⁶⁸; and the issuance of a preliminary injunction would not be adverse to the public interest because "permitting two homeowners who have never received any warning or complaints from the Town to continue renting their properties on a short-term basis for the duration of [the] litigation would [not] harm the public interest."⁶⁹ The bottom line—the Town was enjoined from enforcing its STR ordinance pending final trial of the matter.⁷⁰

About two weeks prior to the *Hollywood Park* decision in San Antonio, a state district court in Dallas County entered a preliminary injunction against the City of Dallas on December 6, 2023, prohibiting it from enforcing its recently adopted STR regulations.⁷¹ The Dallas Opinion by Judge Monica Purdy contained fairly detailed findings of fact in issuing the preliminary injunction. Not unlike *Hollywood Park*, the district court's findings sounded somewhat familiar:

- Short-term rentals have been a vibrant industry in Dallas for decades and STRs provide temporary lodgings for a variety of guests: out-of-state visitors traveling to Dallas for weddings, concerts, to see family members who are hospitalized, or local Dallas citizens who are briefly dislodged from their residences for construction or emergency⁷²;
- As early as October 2019, Dallas began collecting hotel occupancy taxes from STRs and established an online registration portal to assist STR owners to register their properties with the City⁷³;
- Dallas adopted STR regulatory ordinances on June 14, 2023, and the "short-term rental lodging" regulations will ban approximately 95% of STRs

⁶⁸ 2023 WL 9503457 at *4.

⁶⁹ *Id.*

⁷⁰ The case is currently scheduled for trial in late February 2025, according to the court docket.

⁷¹ *Dallas Short-Term Rental Alliance, Sammy Aflalo, Vera Elkins, Danielle Lindsey and Denise Lowery v. City of Dallas*, Cause No. DC-23-16845, 95th Judicial District Court, Dallas County, Texas (hereinafter "Dallas Opinion"). A copy of the Dallas Opinion can be found online at <https://www.dallascounty.org/services/record-search/>.

⁷² Dallas Opinion at 2.

⁷³ *Id.* at 3.

in the City of Dallas⁷⁴;

- Notwithstanding the City’s June 2023 studies it relied upon in enacting the STR ordinances, the City’s “alleged governmental interests” mostly “centered around a small number of ‘nuisance’ properties” as well as the City’s “apparent concerns regarding the lack of affordable housing,” complaints from community members, “preventing excessive traffic, noise, and density” and “broad and undefined interests regarding life, health, safety, noise, and welfare”⁷⁵;
- The plaintiffs presented evidence that the 2023 studies were inconclusive and overestimated the associated concerns with STRs, and therefore were rationally unrelated to the City’s claimed governmental interests, many of which interests “are unquantified and unquantifiable, and that the City does not know how much improvement the [STR ordinances] will actually achieve in those areas—if any”⁷⁶; and
- The City’s registration regulations, adopted in conjunction with the short-term rental lodging regulations, are “oppressive regulations.”⁷⁷

Based on those findings of fact, the state district court’s conclusions of law were not surprising. The trial judge held that Dallas regulations “are likely unconstitutionally oppressive,” and that “the right to conduct STR activity is a vested right in Texas that is a component of home ownership.” Moreover, she concluded that “nuisance ordinances that already exist in the Dallas City Code could be enforced to prevent any nuisance violation.”⁷⁸ Further, echoing prior case law in Texas, the trial court concluded that the City’s STR regulations “constitute a taking of Plaintiffs’ property, particularly those properties that were acquired and improved upon for the purpose of operating an STR, in that they can no longer engage in the STR activity to which they have a vested right to conduct under Texas law.”⁷⁹ The Dallas STR regulations were determined to be

⁷⁴ *Id.* The two Dallas ordinances in question were Ordinance No. 32482 (creating short-term rental lodging as a land use in the Dallas Development Code) and Ordinance No. 32473 (registration requirements for short-term rentals). As noted in the Dallas Opinion, both ordinances were adopted by the Dallas City Council on June 14, 2023.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 5-6.

unconstitutionally retroactive, in violation of the plaintiffs' equal protection rights, and unlike the federal district court in *Hollywood Park*, concluded that Dallas' STR ordinances violated the Texas Zoning Enabling Act because they were a ban on residential use, "remembering that STR activity is a vested property right as a component of home ownership."⁸⁰

The one legal issue that has not been addressed to date in Texas STR jurisprudence is the effect of House Bill 2127, the "super preemption" or "death star" legislation enacted by the Texas Legislature, and signed by the Governor, in 2023. The Dallas Opinion addressed that issue head on:

Plaintiffs are likely to prevail on their claim that the [Dallas ordinances] violate the so-called "Death Star Act," enacted in the last legislative session as HB 2127, and codified in relevant part of section 1.004 of the Property Code. The Court notes that this law is presently the valid and enforceable law of Texas, and that the City will have received any required notice of the claim by the time of trial on the merits. The Court concludes that sections 92.001, 92.002, 92.010, and 92.153 of the Property Code,^[81] when construed in the full context of applicable Texas law (including established rights under property law and the HOT Tax provisions of the Texas Tax Code), show the Legislature's intent to occupy the field of STR regulation and thus cause the [Dallas] Ordinances to be preempted and unenforceable under HB 2127.⁸²

The City of Dallas filed an interlocutory appeal on December 27, 2023, in the Court of Appeals for the Fifth District of Texas at Dallas and as of the date of this paper (September 22, 2024), the parties have concluded briefing; however, oral argument, originally set for September 10, 2024, will be reset to a date not yet determined.⁸³ I would note, however, that the City of Dallas filed its brief on February 27, 2024, and strongly pushed back on the notion that House Bill 2127 preempts municipal regulation of STRs,

⁸⁰ *Id.* at 6-7.

⁸¹ Chapter 92 of the Texas Property Code is entitled "Residential Tenancies." Section 92.001 provides for definitions; Section 92.002 provides that Chapter 92 applies only to the relationship between landlords and tenants of residential rental property; Section 92.010 addresses occupancy limits in residential dwellings; and Section 92.153 addresses security devices on residential dwellings.

⁸² Dallas Opinion at 7-8.

⁸³ Case No. 05-23-01309-CV in the Court of Appeals for the Fifth District of Texas at Dallas.

asserting that House Bill 2127 is unconstitutional.⁸⁴ Moreover, Dallas contended that Chapters 92 and 93 of the Texas Property Code “not only fail to show occupation of the field of [municipal] STR regulation but . . . do not apply to that field at all.”⁸⁵

While recognizing that the opinion in the Dallas case has no (or at most, severely limited) precedential value, it is the first judicial opinion to conclude that those pertinent provisions of the Texas Property Code derived from House Bill 2127 totally preempt municipal regulation of short-term rentals. If this conclusion is ultimately addressed by the Dallas Court of Appeals, the issue could be squarely presented to the Texas Supreme Court in the near future. Moreover, when the Dallas decision is viewed in light of the Texas Supreme Court’s denial of City of Grapevine’s petition for review in *City of Grapevine v. Muns*⁸⁶ on June 16, 2023, coupled with Justice Evan A. Young’s short opinion in support of the denial of the petition for review, the Dallas case could be the case the Texas Supreme Court will opt to hear.

By background, Justice Young phrased the question of “increasing and demonstrable importance” about short-term rentals is “the extent to which municipal bans on short-term rentals pass constitutional muster.”⁸⁷ Justice Evans wrote that Grapevine, like many other municipalities, sought to outlaw the STR market entirely, and due to the “explosion” of the short-term rental market, he “tended to agree” that there are constitutional questions which should be addressed by the Texas Supreme Court.⁸⁸ Notwithstanding those constitutional questions, he wrote that the *Muns* case “starts out as a less-than-ideal vehicle for resolving the constitutional issues” associated with short-term rental bans due to complex administrative exhaustion and enforcement issues unique to *Muns*:

Given the seeming prevalence of short-term rental bans, and of the opposition against them, I am confident that other cases—unburdened by potentially dispositive collateral questions—will lead to a better vehicle for this Court to address the bans’ constitutionality.⁸⁹

⁸⁴ See *id.*, City of Dallas Brief at 34-40, relying in part upon *City of Houston v. State*, 2023 WL 5618634 (345th Dist. Ct., Travis County, Tex. Aug. 30, 2023), for the proposition that House Bill 2127 is facially unconstitutional.

⁸⁵ City of Dallas Brief at 36-37.

⁸⁶ 651 S.W.3d 317 (Tex. App.—Fort Worth 2021, pet. denied).

⁸⁷ Opinion on Petition for Review in *City of Grapevine v. Muns*, Case No. 22-0044, Texas Supreme Court (June 16, 2023) at 1.

⁸⁸ *Id.* at 2-3.

⁸⁹ *Id.* at 4.

What does this mean? Would the Dallas litigation provide “a better vehicle” for the Texas Supreme Court to determine the constitutionality/legality of municipal bans on STRs? While I tend to stay away from guessing the future decisions of any court, the Dallas decision might be viewed as “a better vehicle” for judicial review.

There is one other recent yet unreported federal case from the United States District Court for the Western District of Texas, *Villanueva v. Village of Volente*, 2024 WL 2143596 (W.D. Tex. May 13, 2024). The Village of Volente, Texas, on the shores of Lake Travis with approximately 600 full-time residents, amended its STR ordinance in March of 2023. According to the 2023 ordinance, STRs are not authorized in a residential or commercial zoned district unless a property owner receives a conditional use permit. The 2023 Ordinance lays out the following permitting application process. First, a property owner must submit an application that involves certifying that he or she has complied with various requirements. One of the requirements is that the property owner must submit an affidavit that states that neighbors within 500 feet of the property of an STR application must be given, among other things, information about how to report violations of the STR ordinance. Second, the City Secretary shall conduct an administrative review of the application to determine if the application is complete. Third, the Planning and Zoning Commission will hold a public hearing on the application after which it will make a recommendation to the City Council. Fourth, the City Council will then hold a public hearing and make a final decision on the STR application. The Ordinance instructs that when considering STR applications, both the Commission and the Council shall evaluate “the impact of the STR’s use on and the compatibility of the use with surrounding properties to ensure the appropriateness of the use at a particular location.” The Ordinance also gives both bodies the authority to recommend or impose conditions on the STR use that are “reasonably necessary to assure compliance with the[] standards and the purpose and intent of” the ordinance.⁹⁰

The 2023 Ordinance also lays out a process by which Village residents can submit a written complaint to the City Secretary regarding an STR. The City Secretary is mandated to notify the property owner or operator within ten business days of any “substantiated complaint.”¹ If the City Secretary finds that an STR owner has received three separate “substantiated complaints” in one twelve-month period, the STR permit shall be suspended. The Planning and Zoning Commission will then hold a public hearing to determine whether to recommend that the City Council revoke the STR permit. The Ordinance stipulates that the City Council, after public notice and a public hearing, has the authority to revoke a permit for the following reasons: (1) if there has been a substantial violation of the conditions of the CUP or a substantiated violation of any village ordinance or state law or regulation; (2) if the property owner has maintained the property in such a manner that is detrimental to the public’s health or safety or in a manner that constitutes a nuisance; (3) or if there has been a discontinuance of the STR use altogether. If an STR permit is revoked, the owner must wait one year before filing a new

⁹⁰ *Villanueva* at *2.

STR conditional use application.⁹¹

The plaintiffs in the lawsuit requested a preliminary injunction, relying upon a retroactivity claim under the Texas Constitution, an ultra vires claim under Texas law, and a freedom of assembly claim under both the U.S. and Texas Constitutions.⁹² The district court rejected all plaintiffs' claims, concluding that

[i]n passing the 2023 Ordinance, the Village of Volente sought to find a compromise between the private property rights of those who wished to operate STRs and other residents in their community who wished to enjoy their property free of the issues that had arisen in the Village due to STR tenants. In doing so, the Village's action abides by a well-trodden principle in property law: that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." The Court finds no reason at this stage of the litigation to interfere with the wide range of discretion the Village is afforded to decide for itself which STR uses are compatible with its community and which are not. For the reasons stated above, the Court finds that Plaintiffs are unlikely to succeed on the merits of the three claims that form the basis of their motion for preliminary injunction.⁹³

As is apparent from the foregoing cases, uncertainty reigns supreme about the scope of municipal regulation of short-term rentals in Texas, with two different federal judges in the Western District of Texas, for example, ruling significantly differently when addressing municipal STR regulations. The uncertainty will continue until such time as the Texas Supreme Court finds that "better vehicle" to provide guidance to cities struggling with this issue.

V.

"Single-Family for Rent" Update

"Single-family for rent" (also called "purpose-built single-family rental homes") developments are burgeoning throughout the nation. In mid-February of this year, developments of 133 rental homes in Melissa and 134 rental homes in Aubrey were announced, in addition to more than 5,200 rental homes in the Metroplex on which

⁹¹ *Id.* at *3.

⁹² *Id.* at *5.

⁹³ *Id.* at 14 (citation omitted).

construction was commenced in 2023.⁹⁴ There certainly is no reason to expect the increase in single-family rental (SFR) developments to subside.

SFR developments are built for long-term occupancy, obviously unlike short-term rentals, and such developments generally fall in one of three categories. The first category of SFR projects is horizontal multifamily. Generally composed of dense one-story single-family detached units, as well as townhouses and duplexes for the smallest units, horizontal multifamily communities often achieve densities of 9-14 dwelling units per acre, depending on the unit mix and site layout. Not unlike the new SFR projects announced for Melissa and Aubrey, these communities generally offer between 100 and 150 units. Horizontal multifamily communities are often developed on land zoned for commercial or multifamily uses, given the density and construction configuration of the product. It is the author's experience that in Texas most SFR developments are zoned as planned developments, and include amenities such as private fenced patios or lawns, a resort-style pool, a small fitness center, a clubroom, and a business center. Units generally do not include attached garages, but ample street parking and occasionally rentable detached garages are available.⁹⁵

The second category of SFR projects is build-for-rent single-family attached developments. This type of development encompasses a broad spectrum of community configurations, unit types, and sizes, though each unit shares at least one vertical wall, and units are not stacked on top of each other. Since many single-family attached communities are located in urban and suburban settings, they have noticeable variations in project sizes, typically ranging between 70 and 200 units, achieving densities of 8 to 16 dwelling units per acre, with communities offering three-story townhouses able to achieve relatively high densities. Generally, two or more bedrooms are provided and are larger on average than multifamily unit sizes but smaller than traditional single-family homes. Amenity packages are similar to those offered in horizontal multifamily developments.⁹⁶

The third category of SFR projects is build-for-rent single-family detached housing. Many of these communities are associated with or are sold from a larger master-planned community and typically contain between 85 and 175 homes, with an average density of

⁹⁴ "Rental home communities coming to Melissa, Aubrey," by Steve Brown (Feb. 19, 2024), *Dallas Morning News*.

⁹⁵ See "Low Density Rental Housing in America," Urban Land Institute (2021), at 8, found at https://www.knowledge.uli.org/-/media/files/research-reports/2021/uli-lowdensityrentalhousinginamerica_fin.pdf?rev=a902aaf85c2b48f89fe83236c143b16d&hash=95E82274EE8EA39FB3B534BDC9CA8CD0&gl=1*1w87mqn*ga*MTg3NDMxODkxNy4xNzA4ODA0NzM5*ga_68JJQP7N7N*MTcwODgwNDczOS4xLjAuMTcwODgwNDczOS4wLjAuMA.

⁹⁶ *Id.* at 10.

3 to 7 dwelling units per acre. Due to their lower densities, these communities are predominantly located in suburban locations and are typically platted as individual residential lots. Units generally provide three or more bedrooms and are significantly larger on average than multifamily unit sizes. A key feature of this category of SFR communities often is spacious backyards, with many communities offering large, fenced backyards. Furthermore, higher-end single-family detached communities typically include a community clubhouse with a fitness center, pool, business center, walking trails, dog park, and playground. When communities are located within a larger master-planned community, residents of the community are often allowed access to the broader community amenity center. Most products include an attached two-car garage.⁹⁷

A couple of observations about what Texas land use practitioners should expect in the near future about SFR developments. First, this type of development only appears to be increasing in numbers, especially in the large suburban areas around the state. As the Urban Land Institute writes, “[t]he trend toward purpose-built SFR housing has evolved over the past decade but has experienced exponential interest and growth over the past few years.”⁹⁸ Simply stated, expect to see more of these projects.

Second, due to the lower construction costs and time-to-construct associated with SFR developments as compared to traditional single-family subdivisions, I would anticipate that there will be greater pressure to construct lower cost single-family housing, especially to address affordability concerns. Indeed, it would not be unreasonable to anticipate that SFR communities could be modular construction rather than typical “stick built” or “brick and mortar” products.⁹⁹ Not every SFR development will be in master-planned suburban communities.

Third, it would not be unreasonable to expect that other governmental entities—such as public facility corporations¹⁰⁰—will have more involvement with SFR developments in metropolitan areas around the state. Consequently, there may be more community pushback to such projects, particularly when property is initially zoned for a single-family for rent development.

VI.

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 18.

⁹⁹ *Id.* “Some SFR developers are evaluating the opportunities to incorporate modular construction systems that could ultimately lower the cost of building low-density homes and providing more affordable housing options to households priced out of the for-sale housing markets.” *Id.*

¹⁰⁰ See Chapter 303 of the Texas Local Government Code for statutory provisions related to public facility corporations.

Deference to Decisions of a Zoning Board of Adjustment

The City of Dallas has had a long, tortured history with poker clubs. In 2020, Dallas' building official issued TCHDallas2 a certificate of occupancy (CO) for commercial amusement (indoor) use for a poker club on Harry Hines Boulevard in northwest Dallas. On December 17, 2021, an assistant building official revoked TCHDallas2's CO because the operations at the location violated Section 47.04 of the Texas Penal Code, and the CO had been issued in error. On January 5, 2022, TCHDallas2 appealed the revocation of its CO to the Zoning Board of Adjustment (BOA). On February 22, 2022, and March 22, 2022, the BOA held hearings on TCHDallas2's appeal.¹⁰¹

The Dallas BOA was tasked with deciding "whether the building official erred when the building official revoked the certificate of occupancy by concluding that it was issued in error because the applicant violates Texas Penal Code Section 47.04, keeping a gambling place." The BOA's attorney clarified, "so a violation of one of those [ordinances, regulations, or laws] is what you have to determine." The BOA presumed that the TCH use of the property was a legal use. The BOA discussed whether TCHDallas2 came within the "safe harbor" provided by Section 47.04(b) of the Penal Code. In doing so, the BOA noted that it took TCHDallas2 two years of due diligence to obtain the CO. One board member stated, "we, as a Board, are deciding whether or not the city official erred, not whether or not the use is illegal." The BOA also discussed the fact that TCHDallas2 had not been prosecuted by the district attorney, and the issue of whether its operation was legal or illegal remained undetermined by a court of law. At the conclusion of the hearing, the BOA voted unanimously to reverse the building official's decision and reinstate TCHDallas2's CO.¹⁰²

On April 1, 2022, the building official in his official capacity for the City of Dallas timely filed an original petition and petition for writ of certiorari against the BOA, seeking a reversal of the BOA's decision. Following a trial before the court on October 25, 2022, the trial court entered an order granting the building official's first amended petition and petition for writ of certiorari. The trial court determined that the BOA "abused its discretion and made an illegal decision" when it reversed the building official's revocation of TCHDallas2's CO "which was issued in violation of state law." The trial court reversed the BOA's decision and entered judgment in favor of the building official. On November 28, 2022, TCHDallas2 filed its notice of appeal.¹⁰³

¹⁰¹ *TCHDallas2, LLC v. Espinoza*, No. 05-22-01278-CV, 2024 WL 3948322 (Tex. App.—Dallas Aug. 27, 2024) at *1. Section 47.04 of the Texas Penal Code generally addresses places of gambling and provides criminal penalties for operating places of gambling.

¹⁰² *Id.* at *1-2.

¹⁰³ *Id.* at *2.

The court of appeals, in a detailed discussion of the deference owed to the decisions of boards of adjustment, held that the trial court had impermissibly substituted its own discretion in place of the BOA's, thereby concluding that the trial court thereby erred in failing to afford the required deference to the BOA's decision. Because the BOA could have reasonably reached more than one decision in the case, the trial court was required to give deference to the BOA's decision. Consequently, the appellate court reversed the trial court's judgment and affirmed the BOA's reinstatement of TCHDallas2's CO.¹⁰⁴

VII.

Conclusion

It has been an oddly different year for Texas land use practitioners. While our "old friend" short-term rentals and municipal regulation of them remains a very hot topic with the landscape rapidly evolving against most such municipal regulation, there is no reason to expect that next year there will not be additional judicial and legislative developments. Affordability issues, whether "gentle" density or single-family rental developments, likewise will continue to be the subject of debate across the state. And last, who knows what hot topic—Colony Ridge comes to mind—will make its short appearance on the horizon and quickly fade out. Nonetheless, it has been a bumpy ride the last few years and there is no reason to expect that to change!

¹⁰⁴ *Id.* at *4-5.

ABOUT THE PRESENTER:

Terrence S. Welch

Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Over the years Terry has represented numerous growing communities in North Texas.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign, his law degree from the University of Houston College of Law and a Master of Public Affairs at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also had published an article on Confederate monuments, urban sprawl in Texas, municipal regulation of governmental uses and an article on the 2023 Colony Ridge fiasco in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Vice Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board, subsequently was appointed to the Civil Service Board in August 2015 and currently serves as Chair of the Civil Service Board.

In his free time, Terry enjoys long distance running, having finished 54 marathons and 116 half-marathons as well as many 20Ks, 25Ks and 30Ks. Unfortunately, he is a slow runner!