Beyond Thunderdome:
Regulating Gated Master Planned Communities

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Introduction

There are many times when it seems like municipalities and developers/POAs of master planned communities are forever locked in battle traveling down and fighting for control over an endless dystopian road. Both sides have powers on that road, but understanding what those powers are – and how they can be deployed – is not always clear.

The Texas Transportation Code allows owners of private roads to regulate or prohibit the use of private property by the public for vehicular travel and to establish their own conditions separate or in addition to those specified by the Code. Additionally, the Texas Property Code allows property owners' associations to establish and enforce restrictive covenants governing the use of homeowners' property within gated communities. Although there are defined limitations, generally, such covenants are to be liberally construed to give effect to their purposes and intents.

As such, private organizations possess significant authority to establish exclusive gated master planned communities on private property which may (in many respects) appear to operate as semi-autonomous municipalities.

But how much autonomy does the law actually provide to private organizations when establishing a private, gated master planned community?

While private property rights are strongly protected, certain restrictions on exclusion, access, governance, speech, and religious requirements may face legal challenges under federal constitutional principles and Texas statutory frameworks.

This paper will explore the limitations, work arounds, and vexations concerning the regulatory powers municipalities maintain over such communities.

1. Scope and Limitations in Establishing Privately-Owned and Exclusive Master Planned Communities.

Private individuals and organizations in Texas generally possess broad discretion to acquire, use, and dispose of their private property without unwarranted government interference.[1] Private organizations are also granted rights under the First Amendment to control their membership.[2]

Constitutional limitations on governmental conduct are generally inapplicable to private landowners and privately operated commercial enterprises. Title 11 of the Texas Property Code provides the framework for private property owners' associations (POA's) and master mixed-use property owners' associations (MMPOA's) to establish covenants, conditions and restrictions in a

[1] See eg, Texas Constitution, Article I, § 17

[2] See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

private master planned community and enforce the same through common law contract principles. Private property owners, including POA's and MMPOA's, are generally able to operate with wide autonomy upon their own property. However, there are limitations and exceptions to this general rule.

a. Limitations to Restricting Access based on Membership or Affiliation

Under the Texas Fair Housing Act, private property owners may not refuse to sell or rent, or in any other manner make unavailable or deny a dwelling to another because of race, color, religion, sex, familial status, or national origin.[3] Additionally, property owners may not discriminate against another in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with a sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin.[4]

There are exceptions to this, however, based on the status of the property owner. For example, the Texas Fair Housing Act does not prohibit a religious organization, association, or society or a nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society from: (1) limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than commercial purposes to persons of the same religion; or giving preference to persons of the same religion, unless membership in the religion is restricted because of race, color, or national origin.[5] Additionally, private clubs that are not open to the public and that, as an incident to their primary purpose, provide lodging that they own or operate for other than commercial purposes from limiting the rental or occupancy of the lodging to its members or from giving preference to its members.[6]

Therefore, it is possible for certain religious organizations or private clubs to prevent non-members from living in a private gated community so long as the organization or club owns or operates the property for non-commercial purposes. However, such exclusionary policies may not be based on race or national origin pursuant to 42 U.S.C. § 1982, which bars all racial discrimination, by both public and private entities, in the sale or rental of property.[7]

Additionally, a private organization's ability to restrict access to a gated master-planned community may be dependent upon the organizations "public function" and whether the organization is considered "quasi-governmental."

b. Limitations to Restricting Access to State and Municipal Officers

Complete exclusion of unwanted private and public organizations is generally permissible on private property in Texas pursuant to the Texas Penal Code § 30.05**,** as well as the Fourth Amendment of the U.S. Constitution. However, the ability of a property owner to deny entry upon private property is subject to emergency access requirements, utility easements, and specific

[3] Tex. Property Code, Sec. 301.021(a).
[4] Tex. Property Code, Sec. 301.021(b).
[5] Tex. Property Code, Sec. 301.042(a).
[6] Tex. Property Code, Sec. 301.042(b).
[7] See *Jones v. Alfred H. Mayer Co*., 392 U.S. 409 (1968), 42 U.S.C. § 1982.

statutory obligations. Both state and federal law recognize several scenarios where access cannot be completely restricted. For example, law enforcement officers are authorized to enter private property without warrant during emergencies to "protect or preserve life or avoid serious injury"[8] or when in immediate pursuit of a fleeing suspect.[9]

Additionally, law enforcement officers have the same rights as private citizens to approach a residence and knock on the front door, so long as there are no express orders forbidding trespass, such as "No Entry" or No Trespassing" signs. Courts have held that this same principle applies even if the residence is within a gated community. In *Nored v. State*, the Dallas Court of Appeals held that the defendant's reasonable expectation of privacy was not violated when officers entered a closed but unlocked privacy fence where there were no signs indicating "No Entry" or "No Trespassing".[10]

The Texas Local Government Code gives Counties specific authority to "assure reasonable access for fire-fighting vehicles and equipment, emergency medical services vehicles, and law enforcement officers…" [11] Subchapter E allows counties to require lockboxes on vehicular gates and at least one pedestrian gate, siren operated sensor systems for electric gates, and accessibility requirements related to emergency vehicles. However, the provisions in Chapter 352 apply only to county regulations outside of municipal boundaries.

There is no specific analogous provision for cities under the local government code. However, many cities have adopted ordinances with similar provisions which require gated subdivisions in their jurisdictions to install features such as Knox key switches, lock boxes, or size requirements for gates to allow for emergency vehicle access.

2. Self-governance Under Restrictive Covenants

Private communities may establish certain internal governance structures through enforceable land covenants, deed restrictions, and policy provisions.

Texas law explicitly authorizes the creation of property owners' associations with significant governance powers. Under Texas Property Code Chapter 204, property owners' associations may adopt and enforce rules and regulations governing the use of property within the development, impose regular and special assessments on property owners for maintenance, improvements, and operational costs, as well as enforce restrictive covenants and rules through various mechanisms, such as fines and liens.

The primary mechanism for internal governance is through restrictive covenants recorded in the real property records. These covenants "run with the land" and bind successive owners. Through such covenants, POA's may establish rules addressing property use, architectural and landscaping requirements, as well as other aesthetic standards; noise restrictions, pet regulations and general community behavior standards; use of common area amenities, recreational facilities and shared

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[8] See *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (emergency doctrine)
[9] See *United States v. Santana*, 427 U.S. 38 (1976) (hot pursuit).
[10] *See Nored v. State*, 875 S.W.2d 392 (Tex. App. 1994).
[11] Tex. Loc. Gov't Code 352.113

spaces; collection of fees, budgeting procedures and financial oversight; and enforcement mechanisms and dispute resolution processes.

However, the fact that a POA may privately own the property within the gates of the community, both state and federal laws will remain in effect. Internal rules cannot conflict with or supersede state criminal law, federal regulations, or constitutional protections. Private communities cannot exercise certain police powers, such as arrest, detention or criminal prosecution.

a. Restrictions on Speech and Assembly Rights

Private property owners, including POA's and MMPOA's, are generally not subject to many constitutional rights restrictions because they do not constitute "state actors." However, certain fundamental constitutional rights, such as due process, equal protection, and First Amendment protections will often apply to privately-owned community organizations, particularly when the organization functions as a quasi-governmental entity.

Private property owners can create places for public gathering and speech, without forfeiting either property rights or speech rights. Private organizations retain the right to regulate speech and expression within common areas of their private property through contractual instruments, such as restrictive covenants. Through restrictive covenants and policies, POA's may impose reasonable time, place, and manner restrictions on speech and assembly.[12] The exercise of a POA's discretionary authority to enforce its covenants is considered reasonable unless proven otherwise. However, courts apply heightened scrutiny to content-based restrictions that appear to target protected speech.

Additionally, if the organization provides public accommodation, receives government benefits, or otherwise performs functions that have been traditionally performed by the state, the organization may be considered quasi-governmental[13] and therefore, broader Constitutional requirements may apply. In such instances, private communities may not institute complete bans on political speech or religious expression, engage in viewpoint-based discrimination or establish restrictions that effectively eliminate fundamental rights.[14]

Texas law places additional limits on what POAs may prohibit concerning free expression. For example, under the Texas Property Code, POAs may not prohibit individual property owner's from displaying religious items on the individual's property or dwelling.[15] Additionally, POA's may not prohibit individual property owners from displaying political signs during election season.[16]

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[12] See *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274 (Tex. 2018).
[13] For example, in *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), a private company owned an entire town performing all of the usual municipal functions and owning all the buildings and sidewalks. *Id*. at 502-03, 66 S. Ct. 276.
[14] *Friedman v. State*, 781 S.W.2d 257 (Tex. Crim. App. 1989).

[15] Tex. Property Code, § 202.018.
[16] Tex. Election Code, § 259.002.

b. Restrictions on Religiously-Oriented Communities

Religious organizations in Texas have broad authority to acquire and develop private property for religious purposes.[17]

As stated above, it is possible for certain religious organizations to enact certain forms of exclusionary and discriminatory policies so long as such policies are not based on race or national origin.[18] Additionally, speech and assembly restrictions within private religious communities are generally permissible since they are not generally "state actors."[19]

This broad authority for religious organizations could potentially expand even more in September this year.

S.B. 854 is currently making its was through the Texas Senate which aims to modify municipal regulations regarding multifamily and mixed-use development on religious land. Specifically, S.B. 854 would require municipalities to permit multifamily and mixed-use developments on religious land while prohibiting municipalities from imposing certain zoning or land use changes, special exceptions, or variances that would hinder these developments. If signed into law, it would further prohibit municipalities from enacting a list of specific requirements, such as height restrictions below 40 feet, excessive setbacks, and minimum parking requirements. Therefore, it is entirely possible that municipalities will have less power to regulate or control communities owned by religious organizations.

Still, while religious organizations may have broad constitutional protections, their authority to impose their own laws separate from controlling federal, state, and municipal provisions faces significant constitutional constraints. Religious communities may not supersede or replace civil and criminal law and all members of a gated religious community are still subject to the Texas statutes and penal code, municipal code of ordinances, state and municipal court jurisdiction and the U.S. Constitution.

A controversial mix-used development which was recently proposed (and then quickly halted due to a Civil Investigative Demand ("CID") issued by the Attorney General) in Collin County provides an interesting look at these issues. The development entitled EPIC City was proposed by the non-profit religious organization known as the East Plano Islamic Center ("EPIC") – along with Community Capital Partners, LP ("CCP"), purportedly organized by EPIC as a commercial for-profit entity. EPIC City is proposed as a 400-acre development consisting of 1,000 homes, apartments, retail shops, a K-12 faith-based school, community college, and a mosque. According to EPIC's website, it will be "a community that caters to the evolving needs of families of the Muslim community."[20] As stated, Texas law does not prohibit a religious organization from limiting sale, rental or occupancy of dwellings that it operates for non-commercial purposes to persons of the same religion or from giving preference to persons of the same religion, unless

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[17] Tex. Property Code § 5.026.
[18] See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), 42 U.S.C. § 1982
[19] Unless the community functions as a quasi-governmental entity or violates specific statutory protections for political/religious expression.
[20] https://epicccp.com/about-us/

membership is based on race, color or national origin.[21] However, in the CID letter to CCP, Attorney General Ken Paxton quoted EPIC's promotional material insinuating that EPIC – a non-profit religious organization – would receive profits from this development.

Additionally, several Texas politicians (including the Governor) have claimed that EPIC City may seek to incorporate elements of Sharia law into its operations. While the veracity of such claims remains unknown[22] – and it is unclear what and how such "elements" may be incorporated if true – suffice it to say, no POA or community organization (even a private non-profit religious organization) may enact laws that are in conflict with the federal, state, and municipal laws upon which the property lies. Additionally, if EPIC did receive profit from the development, the exception set out in Tex. Property Code, 301.042(a)(1) would no longer apply and EPIC would be prohibited from excluding non-Muslims from ownership and occupancy in EPIC City. However, should the fact that the community may become predominantly (or even exclusively) Muslim is not in-and-of-itself illegal.

While religious organizations enjoy significant constitutional protections and private property rights in Texas, their ability to operate discriminatory gated communities is substantially limited by federal civil rights laws, particularly regarding racial discrimination. The religious organization's goals may be partially achievable through careful structuring, but complete exclusion based on protected characteristics or total restriction of constitutional rights would likely face successful legal challenges.

3. Applicability of State and Municipal Traffic Laws in Private Gated Communities.

This issue primarily depends on whether the streets are public or private in nature.

Provisions related to traffic regulations are primarily found under title 7, subtitle C of the Texas Transportation code. Subtitle C relates to the operation on a vehicle on a *highway* unless the provision specifically applies to a different place.[23] A "highway or street" is defined as "the width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular traffic."[24] If the city does not own and maintain the street, then it is most likely private in nature.

Generally, cities cannot enforce municipal traffic laws or state traffic laws on private streets. "A peace officer has no authority to issue a citation under state law for a traffic offense on the private streets, and if such a citation is issued, it may not be prosecuted."[25]

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[21] Tex. Property Code, Sec. 301.042(a).
[22] EPIC has denied such claims and stated that the community will be inclusive and that they will follow all local, state, and federal laws. https://www.cbsnews.com/texas/news/epic-city-development-collin-county-controversy-investigation/
[23] Tex. Transp. Code Sec. 542.001.
[24] Tex. Transp. Code Sec. 541.302
[25] Tex. Atty. Gen. Op. JC-0016 (Tex. A.G.), 1999 WL 156285.

There is an exception, however, if a municipality with a population of 300 or more receives a request to extend its traffic regulations to a subdivision with private streets.[26] The request must come either by petition from at least 25% of the property owners residing in the subdivision, or on the request of the governing body of the entity that maintains the roads. Upon such a request, a city may pass an ordinance extending its traffic rules to the subdivision. It is also worth noting that the petition must specify the traffic rules that are sought to be extended to the subdivision. A municipality can choose to extend any or all of the rules requested.[27] Further, the City can require that the property owners in the subdivision pay all or part of the cost of enforcing the traffic rules in the subdivision including the placement of traffic control devices.[28]

Under the Texas constitution, cities are prohibited from lending credit, granting public money, or making any appropriation or donation to any private entity.[29] As a result, cities cannot spend public funds to maintain streets or traffic control devices on private streets.[30] This prohibition could arguably extend to any costs associated with the use of officers time spent enforcing traffic offenses, absent an agreement for the private subdivision to reimburse the city for the costs of enforcement.

4. "Public Places" in Privately-Owned Gated Communities

Under the Texas Penal Code, it is an offense to operate a motor vehicle in a public place while intoxicated.[31] The Penal Code defines a "public place" in part as "any place to which the public *or a substantial group of the public* [emphasis added] has access…" Is a gated community a place where a substantial group of the public has access? Courts have interpreted this provision fairly broadly.

In *State of Texas v. Gerstenkorn*, the defendant was stopped for suspicion of DWI while driving in a gated community which had a security guard and limited access. The trial court found that the gated community was not a public place as a matter of law. The Court of Appeals overturned the trial court's ruling and held that the gated community was a "public place" in light of evidence that anyone could gain access to the community under the right set of circumstances. "Gerstenkorn stated that he was lost and did not know how to get out of the neighborhood. This is evidence that anyone could gain access to the community under the right set of circumstances."[32]

5. Applicability of State Licensing Requirements for Operating Vehicles within Private Roads in Gated Communities.

Due to their enclosed and secluded nature, private gated communities have become popular for operating golf carts and other alternative motor vehicles on quiet neighborhood streets. This trend extends to teenage minors (ages 13-15) whose parents allow their unlicensed children to explore

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[26] Tex. Transportation Code Sec. 542.008
[27] Tex. Transportation Code Sec. 542.008(b).
[28] *Id* 542.008(c).
[29] Tex. Const. Art. III Sec. 52 and Tex. Const. Art. XI Sec. 3.
[30] See Tex. Att'y Gen. Op. DM-13
[31] Tex. Penal Code Sec. 49.04.
[32] *State of Texas v. Gerstenkorn,* 239 S.W.3d 357 (2007)

the neighborhood and visit friends on the family golf cart. As the teens get older, it can even be common for parents to allow unlicensed minors to drive the family car around the enclosed streets simply for driving practice. Many parents allow this because they perceive the streets within the gates to be safer, protected, and, above all, private property!

However, in Texas, all operators of golf carts, off road vehicles, and motorcycles are required to have a proper license (regardless of where they are driving). [33]

State law further prohibits anyone younger than 17 years of age from operating any motor vehicle (which includes a golf cart) without a license on a public road or highway, street or alley in a municipality or public beach.[34] The Attorney General has even confirmed that, without a specific law exempting the same, the universal requirement for anyone operating a motor vehicle to be licensed applies to golf cart operations.[35]

Conclusion

Under Texas law, private organizations possess significant authority to establish exclusive gated master planned communities on private property. While private property rights are strongly protected, there are numerous laws that municipalities in Texas may employ to regulate and maintain control over combatant private communities that believe themselves to be The Road Warriors in a lawless and insular land.

[33] Transportation Code Sec. 521.021
[34] Transportation Code Sec. 729.001
[35] Tex. Att'y Gen. Op. No. KP-0364