

# *Beyond Thunderdome: Regulating Gated Master Planned Communities*

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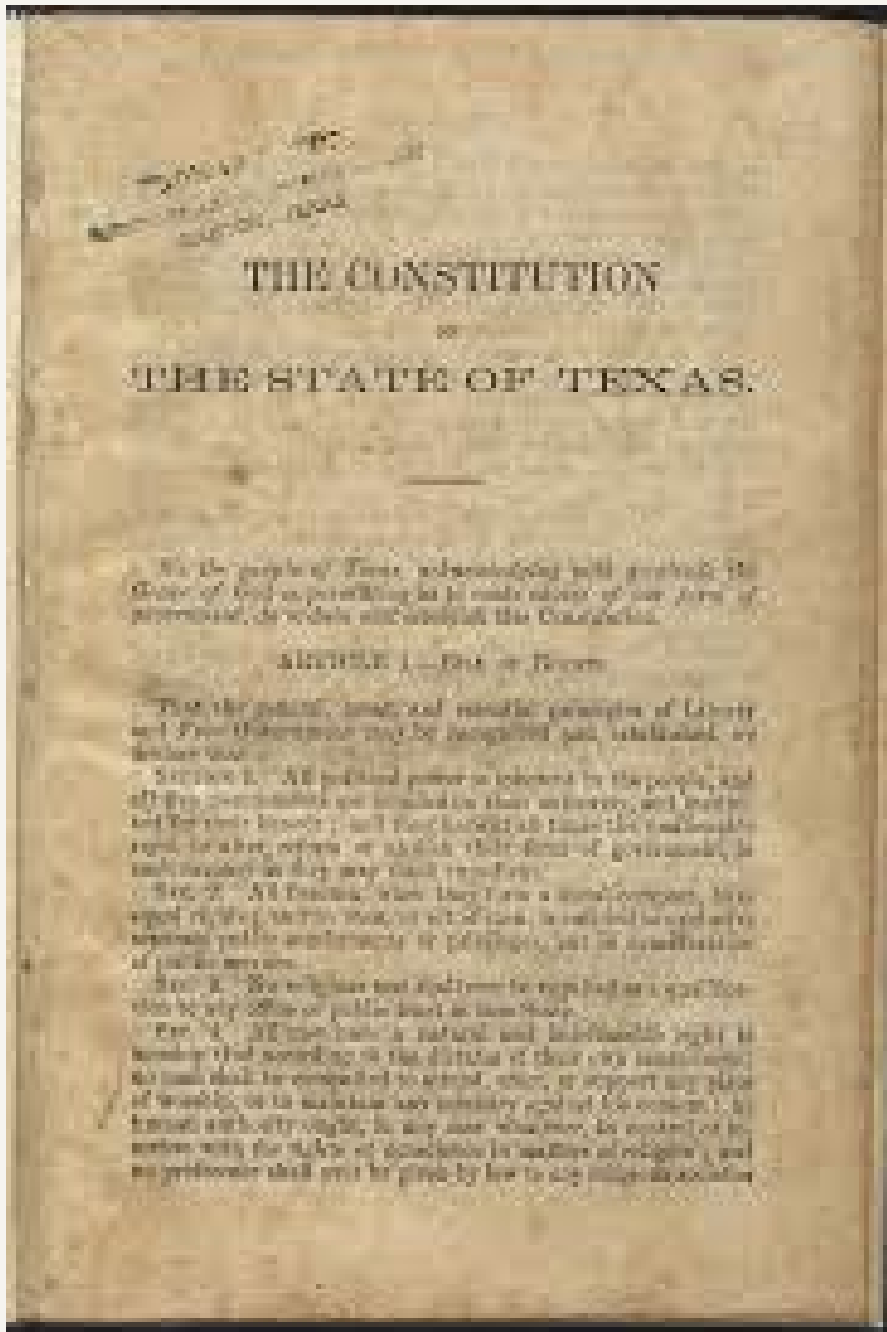
# *Part 1: Establishing a Private Gate Master Planned Community*

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The Texas Constitution Allows Broad Discretion to:

*Acquire, Use, and Dispose of*

Private Property without unwarranted government interference.





# *Self Organization and Governance*

*Owners of Private Property Can:*

- 1. Establish Property Owner's Associations (**POAs**)*
- 2. Establish Master Mixed-Use Property Owner's Associations (**MMPOAs**)*
- 3. Create and Enforce **Covenants, Conditions, and Restrictions** within Gated Communities*





# *Maintain Private Roads*

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*Owners of Private Roads Can:*

- 1. Regulate or prohibit the use of private property by the public for vehicular travel*
- 2. Establish their own conditions separate or in addition to those specified by the Code.*

# *Maintain Exclusivity*

*Religious Organizations and Private Clubs can:*

- 1. Own Property*
- 2. Provide Non-Commercial Lodging*
- 3. Exclude Non-Members\**

\*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. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), 42 U.S.C. § 1982.



# *More Than a Neighborhood*

Private organizations possess significant authority to:

- Buy Congruent Tracts of Land
- Construct Border Walls, Private Dwellings, Community Buildings, Shared Spaces, and Private Roads
- Maintain Exclusive Insular Community
- Establish Governing Power
- Adopt and Enforce Rules and Regulations



## *Is This The Result?*





An aerial photograph of a suburban neighborhood. The image shows a grid of streets with houses on either side. Many houses have red-tiled roofs, while others have grey or blue roofs. Some houses have solar panels installed on their roofs. There are green lawns, trees, and some swimming pools visible. The overall scene is a typical suburban residential area.

# *Part 2: What Can HOAs Regulate In Gated Master Planned Communities?*

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# *Limitations to Restricting Access*

Texas Fair Housing Act prohibits:

- Refusing to Sell, Rent, or allow occupancy of dwelling based on *race, color, religion, sex, familial status, or national origin*
- Discrimination in providing community services or facilities based on *race, color, religion, sex, familial status, or national origin*



# *Exceptions: Religious Organizations*



- *Group is Operated, Supervised, or Controlled by or in conjunction with Religious Organization, Association or Society*
- *Owns or Operates Dwellings for Non-Commercial Purposes*
- *Restriction NOT Based on Race, Color, or National Origin*



# *Exceptions: Private Clubs*

- *Membership Not Open to the Public*
- *Owns or Operates Dwellings for Non-Commercial Purposes*
- *Provides Lodging as Incident to Primary Purpose*
- *Restriction NOT Based on Race, Color, or National Origin*



# *Self-Governance: POAs and MMPOAs*

POAs and MMPOAs may:

- Adopt and Enforce Rules and Regulations Governing Use of Property within Gated Community
- Impose Regular and Special Assessments on Property Owners and Occupants
- Enforce Restrictive Covenants and Rules





# *Self-Governance: Restrictive Covenants*



- Primary Mechanism for POA Governance
- Recorded in Real Property Records
- “Run with the Land” and Bind Successive Owners
- Govern Property Aesthetics, Noise Restrictions, Pet Regulation, Use of Shared Spaces and Certain Behavior
- Presumed Reasonable and Liberally Construed

# *Self Governance: Constitutional Limitations*



- POAs and MMPOA are NOT “State Actors”
- Reasonable Regulations of Speech and Expression within Private Gated Community NOT PROHIBITED
- Presumed Reasonable Unless Proven Otherwise
- Content-Based Restrictions Targeting Protected Speech Receive Heightened Scrutiny



# *Self Governance: Constitutional Limitations*



- Higher Standards for **Quasi-Governmental** Organizations
  - *Provide Public Accommodation to Residents*
  - *Receives Government Benefits*
  - *Perform Function Traditionally Performed by State*
- Broader Constitutional Requirements May Apply

# *Self Governance: Texas Statutory Limitations*

- Texas Property Code:
  - *POAs and MMPOAs MAY NOT Prohibit Religious Displays on Individual's Property or Dwelling*
  - *POAs and MMPOAs MAY NOT Prohibit Property Owner's from Displaying Political Signs during Election Season*
- Internal Rules **MAY NOT Conflict with or Supersede State and Federal Law**





## *Part 3: What Can Cities Regulate In Gated Master Planned Communities?*

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- Traffic Laws
- Police Entry
- Public Places



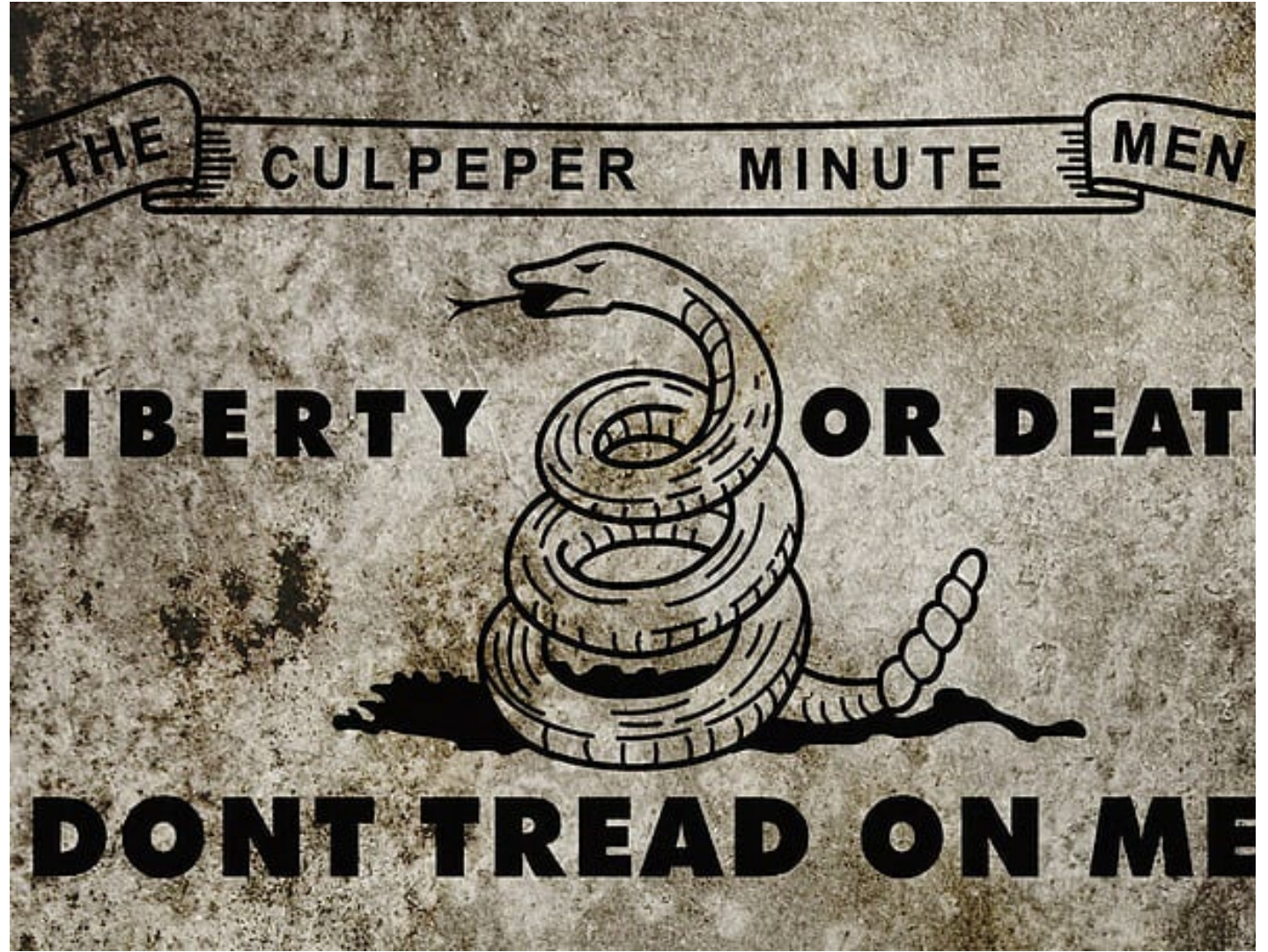
# *Private Street or Highway?*

## **Texas Transportation Code:**

- Traffic Regulations in Texas Relate to Operating Vehicles on a “Highway”
- “Width between the Boundary Lines of a Publicly Maintained Way any Part of Which is *Open to the Public for Vehicular Traffic.*”
- If the City maintains the road then it is a highway
- If it is maintained by the HOA or POA then it is a private street, not a highway

# *State and Municipal Traffic Laws*

- Texas Constitution Prohibits Cities from Granting Public Money to Private Entities
- Cities CANNOT Maintain Streets or Traffic Control Devices on Private Streets
- Arguably Extends to Use of Officers' Time Enforcing Traffic Offenses





# *State and Municipal Traffic Laws*

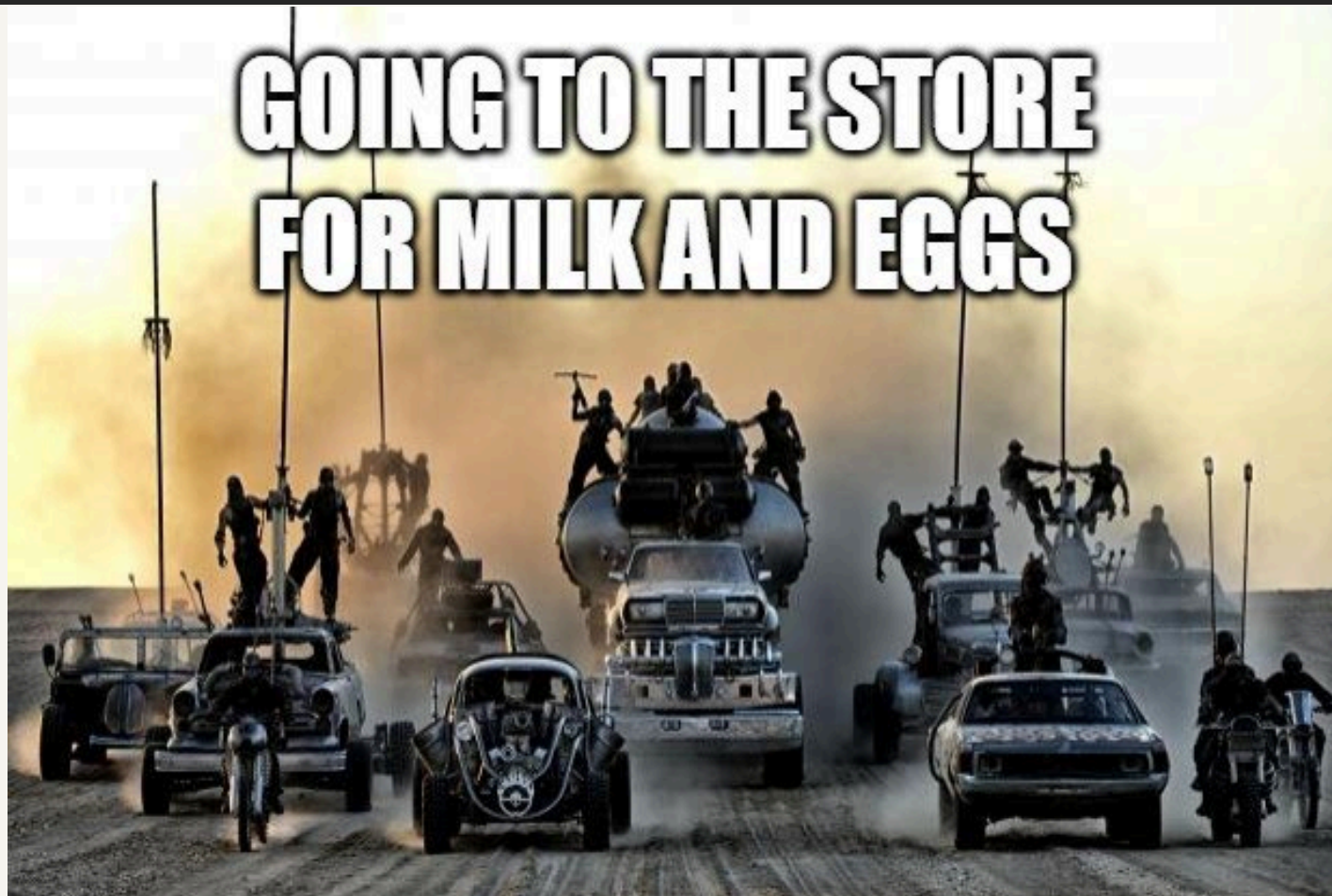
“A peace officer has no authority to issue a citation under state law for a traffic offense on the private streets, and if such a citation is issued, it may not be prosecuted.”

-Tex. Atty. Gen. Op. JC-0016 (Tex. A.G.), 1999 WL 156285





*Is This The Result?*



# *What About This?*



# *Traffic Enforcement Upon Request*

## **Texas Transportation Code 542.008 :**

- Municipalities with a population of 300 or more may extend by ordinance traffic regulations to private subdivisions:
  - On petition of 25 percent of the property owners in the subdivision; or
  - On request of the entity that maintains the roads.
- The request can specify which traffic regulations they want extended to the private subdivision
- The private streets are then considered to be public highways for purposes of specified traffic rules
- City can require the subdivision to pay all or part of the cost of enforcement in the subdivision



## *Access for State and Municipal Officers*

- Officers generally have the same rights as any private citizen to approach a residence so long as there are no express orders forbidding trespass
- Applies in gated communities so long as the officers follow the usual path to the front door
- Exceptions for Emergency Access Requirements:
  - *Counties Granted Authority under LGC to "Assure Reasonable Access" for Emergency and Law Enforcement*
  - *Home Rule Cities May Adopt Ordinance Requiring Lock Boxes, Key Switches or Size Requirements for Emergency Vehicle Access*



# *Can a Private Street be a Public Place?*

## Texas Penal Code:

- Defines a "public place" as any place to which the public **or a substantial group of the public** has access

- *Woodruff v. State*

*Woodruff arrested for DWI on military base. Civilians could not enter base without a sponsor or a visitor's pass. Court said "the proper focus should be on the extent of actual access and not on the formalities by which access is gained."*

- *State v. Gerstenkorn*

*Gerstenkorn arrested for DWI in gated community. Defendant stated that he was lost and didn't know how to get out the neighborhood. Court found this as evidence that anyone could gain access to the community under the right set of circumstances .*

# *EPIC CITY*



- Islamic-based Community Proposed by East Plano Islamic Center (“EPIC”)
  - *400-acres*
  - *1,000 homes*
  - *Retail Shops*
  - *K-12 Faith-Based School and Community College*
  - *Mosque*
- **Not intended to be exclusive or privately run**

“[A] community that caters to the evolving needs of families of the Muslim community.”



# *EPIC CITY*

- What is Possible?
  - *Enact Exclusionary or discriminatory policies?*
  - *Restrict speech and assembly rights?*
  - *Receive variances on zoning or land use changes?*
  - *Enforce Sharia law?*
- Effects of SB 854

