

# IN THE SUPREME COURT OF TEXAS

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No. 98-0685  
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FM PROPERTIES OPERATING COMPANY, ET AL., APPELLANTS

v.

THE CITY OF AUSTIN, APPELLEE

=====  
ON DIRECT APPEALS FROM THE 345TH DISTRICT COURT, TRAVIS COUNTY  
=====

**Argued on December 9, 1998**

JUSTICE ABBOTT, dissenting, joined by JUSTICE HECHT and JUSTICE OWEN.

I disagree with the Court's holding that section 26.179 unconstitutionally delegates legislative power to private landowners. I would hold that section 26.179<sup>1</sup> is not an unconstitutional delegation and that it does not violate any of the other constitutional provisions asserted by the City in its motion for summary judgment. Accordingly, I dissent.

## I

This case is not so much about water quality as it is about the power of local governments to regulate in their extraterritorial jurisdictions (ETJs). Local governments' power to regulate water quality in their ETJs derives solely from the authority granted them by the Legislature in section

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<sup>1</sup> All citations are to the Water Code unless otherwise noted. In addition, section 26.179 was amended while this case was pending. See Act of May 28, 1999, 76<sup>th</sup> Leg., R.S., ch. 1543, 1999 Tex. Gen. Laws 5310, 5310-13. Because those amendments are inapplicable to this case, all citations to section 26.179 are to the pre-amendment version.

26.177. By later passing section 26.179, the Legislature established comprehensive guidelines that empowered private landowners to make responsible decisions regarding water quality. In doing so, the Legislature reduced stifling regulations and administrative burdens imposed by cities under section 26.177. Today, the Court strips the Legislature of its legislative power to limit the regulatory authority it granted to local governments, and the Court improperly vests regulatory power in the hands of the City of Austin. The Court's decision usurps the Legislature's authority to determine public policy and to make law and denigrates the private property rights of landowners. In addition, the Court demands more and more regulation, calling into question a number of existing and contemplated legislative policies and forcing the state down a dangerous road of increased regulation and administration and decreased privatization.

It is the Legislature's responsibility to regulate water quality in Texas. As noted, the Legislature chose to allow cities to regulate water quality in their ETJs via section 26.177. But the Court wholly fails to recognize that the Legislature has the power to rewrite, restrict, or even eliminate section 26.177 without violating the Texas Constitution. The City of Austin's right to regulate water in its ETJ was created by the Legislature. Surely it cannot be unconstitutional for the Legislature to limit that authority. Section 26.179 is merely a vehicle to do just that — it curtails the regulatory and administrative powers given to the City in section 26.177. But the Court concludes that this reduction in the City's regulatory authority is invalid, and in doing so the Court displaces the Legislature's policy decision with its own regarding how water should be regulated in Texas.

The necessary import of the Court's opinion is that by enacting section 26.177, the Legislature can delegate to local governments the authority to regulate, but its hands are tied when it wants to limit that authority. In reaching its conclusion, the Court fails to acknowledge that section

26.179 provides more comprehensive regulation of water quality for subject landowners than for the vast numbers of Texas landowners outside a city's ETJ who are not subject to section 26.177. It can only be presumed that the Court would hold that these numerous landowners are also somehow victims of an unconstitutional delegation of legislative authority. Given the Court's decision today, my suggestion to the Legislature is to eliminate section 26.177 and simply start over.

Besides improperly tying the Legislature's hands, the Court also fails to acknowledge the potential consequences of its decision. The Legislature has demonstrated its desire to empower individuals through a variety of privatization initiatives such as school choice and school vouchers.<sup>2</sup> Would the Court's opinion mandate that such policy choices be stricken as unconstitutional delegations? The same question applies to the Legislature's ability to establish private prisons.<sup>3</sup> And what about existing legislative grants of eminent domain power to private entities?<sup>4</sup> The Court cannot reconcile such policies with its decision. In addition to rendering the viability of these and other legislative policies questionable, the Court's decision leads the state down a dangerous path that requires more and more regulation and less privatization. It is the Legislature's policy choice — not the Court's — that should determine the amount of regulation needed.

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<sup>2</sup> See HOUSE RESEARCH ORG., BILL ANALYSIS, TEX. S.B. 1, 74<sup>th</sup> Leg., R.S. (1995); see also Colona, *The Privatization of Public Schools — A Statutory and Constitutional Analysis in the Context of Wilkinsburg Education Association v. Wilkinsburg School District*, 100 DICKINSON L. REV. 1027, 1048 (1996); Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 505-07 (1992).

<sup>3</sup> See Blakely & Bumphus, *Private Correctional Management: A Comparison of Enabling Legislation*, FED. PROBATION, June 1996, at 49; Dipiano, *Private Prisons: Can They Work? Panopticon in the Twenty-first Century*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 172, 196, 199 (1995).

<sup>4</sup> See, e.g., TEX. NAT. RES. CODE § 111.019(a), (b) (granting common carriers eminent domain power); TEX. REV. CIV. STAT. § 161.125 (electric cooperatives); TEX. REV. CIV. STAT. § 162.124 (telephone cooperatives); TEX. REV. CIV. STAT. art. 3183b-1 (certain nonprofit charitable corporations affiliated with certain medical centers); TEX. REV. CIV. STAT. art. 6351 (railroad companies); TEX. REV. CIV. STAT. art. 6535 (electric railway companies).

Section 26.179 provides comprehensive water-quality regulation to applicable landowners. The Court concedes that section 26.179 provides fairly detailed statutory standards to guide landowners in formulating their initial water-quality plans. \_\_\_ S.W.3d at \_\_\_. And the Court concedes that in addition to the extensive requirements in section 26.179, landowners remain subject to pre-existing state water-quality regulations, future state water-quality regulations necessary to comply with federal standards, and the TNRCC's powers to enforce those regulations. \_\_\_ S.W.3d at \_\_\_. But the Court undertakes its own policy analysis and proclaims that the legislatively established regulations in section 26.179 are insufficient. The Court says the numerous applicable regulations do not go far enough and that private citizens have too much latitude to make their own decisions — despite the fact that the regulations the Court deems to be inadequate are so comprehensive that the Court's mere *synopsis* of them occupies nine paragraphs of its opinion.

Despite the numerous existing regulations, the Court wants more. The Court creates an impossible standard requiring the Legislature to regulate the minutia of land development. For example, although section 26.179(b) requires three years of monitoring after the completion of each phase of development, the Court wants more monitoring. The Court concludes that because the statute does not require that development occur in phases, no monitoring would be required until a zone is completely developed. \_\_\_ S.W.3d at \_\_\_. Although the statute may not require specific “phases,” simple logistics surely requires that development occur in stages. Because the nature of developments may vary, the Legislature could not prescribe the number or types of phases for every development, and the Court should not attempt to force the Legislature to do so. Moreover, the Court complains that developers must modify water-quality plans only for future development phases. \_\_\_ S.W.3d at \_\_\_. But how could they modify in the past? And, section 26.179(b)(2)

appropriately requires modification of operational and maintenance practices in existing phases whenever water quality has not been maintained.

Rather than requiring the Legislature to spell out every detail, it is well recognized that delegations need only establish “reasonable standards” sufficient to guide the entity to which the powers are delegated, especially when conditions must be considered that cannot be conveniently investigated by the Legislature. *See Railroad Comm’n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992). As we have said, “[r]equiring the legislature to include every detail and anticipate unforeseen circumstances in the statutes which delegate authority . . . would defeat the purpose of delegating legislative authority.” *Id.* The Court now abandons these standards.

Last, although the Court claims to apply the standard of review for a facial challenge to a statute’s constitutionality, \_\_\_ S.W.3d at \_\_\_, the Court fails to say what that standard is and fails to apply it. In a facial challenge such as this, it is the challenger’s burden to show that the statute *always* operates unconstitutionally. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996); *Texas Workers’ Compensation Comm’n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995). Rather than demonstrating that section 26.179 always operates unconstitutionally, the Court ignores the standard, ignores the fact that the statute operated constitutionally when applied to two plans that were denied by the TNRCC, and instead insists on hypothesizing the ways in which the statute “could” operate unconstitutionally. In doing so, the Court fundamentally changes the analysis of a facial challenge as it has been repeatedly stated and applied by this Court and the United States Supreme Court. *See New York State Club Ass’n v. New York City*, 487 U.S. 1, 11 (1988); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger

must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . .”); *Wilson v. Andrews*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 1999); *Barshop*, 925 S.W.2d at 623; *Garcia*, 893 S.W.2d at 518.

Although required to construe statutes to be constitutional whenever possible, the Court doggedly construes the statute in a manner that renders it unconstitutional. For example, the Court concludes that more monitoring is necessary, but then goes out of its way to hold that the TNRCC cannot require monitoring in zones opting to retain rainfall. Instead of micro-managing the Legislature and forcing an increase in needless regulation in this area and possibly many others, the Court should conduct a proper facial-challenge review and, as it is bound to do, construe the statute in a constitutional manner.

The only silver lining in the Court’s opinion is its admittedly limited application. As the Court notes, \_\_\_ S.W.3d at \_\_\_ n.1, the Legislature amended section 26.179 in 1999, but the amendments do not apply to this case. The Court appropriately has *not* said that the amended act is unconstitutional.

## II

### DELEGATION

The Court erroneously concludes that section 26.179 delegates to certain private landowners both the power to exempt themselves from otherwise applicable municipal regulations and the power to regulate water quality on their property and in waterways located on their property. To the contrary, the Legislature, by enacting section 26.179, did limit certain municipal powers under

section 26.177, but it did not delegate the power to suspend laws or any other legislative authority to the landowners. It simply curtailed the City's authority within its ETJ and provided the landowners with an alternative state-established and regulated water-quality scheme. Because the Legislature itself, via section 26.179(i), mandated that certain city regulations be suspended, and determined which regulations would be suspended, there has been no delegation of the power to suspend laws to the landowners. In addition, because the landowners must meet specific standards established by the Legislature in section 26.179 and because the landowners are comprehensively regulated by the TNRCC and existing state and federal laws in implementing those standards, section 26.179 does not delegate any other governmental authority to the landowners.

#### A

In order to determine whether section 26.179 is an unconstitutional delegation of legislative power, it is important to understand the statutory framework within which section 26.179 exists. Chapter 26 of the Water Code governs water-quality maintenance and delegates primary responsibility for implementing water-quality management functions, including enforcement actions, to the TNRCC. *See* TEX. WATER CODE §§ 26.011, 26.0136. In addition, the Code delegates some water-quality maintenance responsibility to local governments. *See, e.g., id.* § 26.0136.

One such delegation occurred in 1971, when the Legislature delegated certain water-quality management authority to municipalities via section 26.177. The version of section 26.177 in effect in 1995 required that every city with a population of 5000 or greater establish a water-pollution-control and abatement program for the city, and also allowed smaller cities to do so. *See* Act of May 29, 1971, 62d Leg., R.S., ch. 612, § 7, 1971 Tex. Gen. Laws 1974, 1980. These city programs

encompass the entire city and may include those areas within the city's ETJ that the city determines should be included to enable the city to achieve its objectives for the area within its territorial jurisdiction. *See id.* § 26.177(b). Cities have broad powers to establish water-pollution-control programs under section 26.177, both in the city limits and in the ETJ. But this broad authority to regulate water quality in the ETJ is wholly derived from legislative grants of authority.

Similarly, a city's authority to regulate land development in its ETJ is wholly derived from a legislative grant of authority. Section 212.003 of the Local Government Code provides that a city may extend to the ETJ its municipal ordinances governing plats and subdivisions of land, but cannot regulate (1) the use of buildings or property, (2) the bulk, height, or number of buildings constructed, (3) the size of buildings, or (4) the number of residential units that can be built per acre. *See* TEX. LOC. GOV'T CODE § 212.003. If no municipal ordinances are extended to the ETJ, only county land-use regulations apply.

Austin's approach to protecting water quality under its section 26.177 authority has been to regulate land development, primarily by limiting the uses and development intensities of land. *See* Bray et al., *Environmental Permits: Land Use Regulation and Policy Implementation in Texas*, 23 ST. MARY'S L.J. 841, 884 (1992). As noted, a city's authority to regulate land development in the ETJ under the Local Government Code is limited. But because Austin has used water-control measures under its section 26.177 authority to effectively limit land development — rather than using its express (but limited) authority to regulate land development under section 212.003 of the Local Government Code — the City has evaded most of the Local Government Code's limitations on cities' land-use regulation powers in the ETJ. *See generally Quick v. City of Austin*, 7 S.W.3d 109, 121 (Tex. 1998).

In enacting section 26.179 in 1995, the Legislature responded to its belief that cities such as Austin were improperly using their section 26.177 authority to substantially regulate land development in the ETJ. *See* HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 1017, 74<sup>th</sup> Leg., R.S. (1995); SENATE COMM. ON NATURAL RESOURCES, BILL ANALYSIS, Tex. S.B. 1017, 74<sup>th</sup> Leg., R.S. (1995); HOUSE COMM. ON NATURAL RESOURCES, BILL ANALYSIS, Tex. S.B. 1017, 74<sup>th</sup> Leg., R.S. (1995); *Hearing on Tex. S.B. 1017 Before Senate Comm. on Natural Resources*, 74<sup>th</sup> Leg., R.S. 2-3 (April 4, 1995) (statement of Sen. Wentworth). The Legislature found that such regulation stifled economic development, in contravention of its stated Water Code policy:

It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state . . . and to require the use of all reasonable methods to implement this policy.

TEX. WATER CODE § 26.003; *see also* HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 1017, 74<sup>th</sup> Leg., R.S. (1995). This policy recognizes the need to balance the competing interests of conserving and protecting natural resources with continuing existing commercial activities and future economic development. *See* Bray et al., *supra*, at 880. Thus, section 26.179 was intended to act as an “exception” to the ETJ authority granted to cities by section 26.177 of the Water Code. *See* TEX. WATER CODE § 26.177(b). Its purpose is to prevent city-established limitations on land development under their section 26.177 authority in order “to provide the flexibility necessary to facilitate the development of the land within [a water-quality-protection] zone,” while at the same time ensuring the non-degradation of water quality within the zone via TNRCC oversight. TEX. WATER CODE § 26.179(d).

## B

The City contends that section 26.179 “delegates to private landowners the authority to suspend enforcement of certain city ordinances and powers within the zones, effective immediately upon filing the zone designation.” The City argues that section 26.179 improperly delegates the power to suspend laws to private landowners, in violation of article III, section 1 of the Texas Constitution, and separately argues that section 26.179 improperly allows private entities to suspend the laws in violation of article I, section 28’s mandate that the power to suspend laws may be exercised only by the Legislature. *See* TEX. CONST. art. I, § 28 (“No power of suspending laws in this State shall be exercised except by the Legislature.”). These arguments are interrelated and should be considered together.

To determine whether a delegation of the power to suspend laws has occurred, courts focus on the statutory language. *See Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 473-74 (Tex. 1997). Section 26.179(d) allows landowners of a contiguous tract of land in excess of 1000 acres to designate the tract as a zone. *See* TEX. WATER CODE § 26.179(d). Owners of tracts containing fewer than 1000 acres but more than 500 acres may also designate a zone, but only with prior TNRCC approval. *See id.* A landowner may achieve “water-quality protection” within a zone by either (1) maintaining background levels of water quality in waterways or (2) capturing and retaining the first 1.5 inches of rainfall from developed areas. *See id.* § 26.179(a).

When designating a zone, the landowner must describe the zone by metes and bounds and include a general description of the proposed land uses within the zone (the land-use plan), a water-quality plan for the zone, and a general description of the water-quality facilities and infrastructure to be constructed for water-quality protection in the zone. *See id.* § 26.179(e). The water-quality

plan must be signed and sealed by a registered professional engineer acknowledging that the plan is designed to achieve one of the two water-quality protection standards of section 26.179 (capturing rainfall or maintaining background levels of water quality). *See id.* § 26.179(g). The water-quality plan must be submitted to the TNRCC for approval. *See id.* A city may not enforce in a zone any of its ordinances, land-use ordinances, rules, or requirements that are inconsistent with the land-use plan and the water-quality plan or that in any way limit, modify, or impair the ability to implement and operate the water-quality plan and the land-use plan within the zone as filed. *See id.* § 26.179(i). Thus, section 26.179 creates two regulatory schemes. In areas where no zone is designated, all applicable city regulations may be enforced. But where a zone is designated, section 26.179's state-regulated scheme applies and certain city regulations and powers are rendered inapplicable.

To begin with, the Legislature's allowing landowners to choose between alternative, legislatively established regulatory schemes is not a delegation. *See Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941) (holding that a statute allowing taxpayers to choose between alternative tax bases was not a delegation); *see also Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) (declaring that a city ordinance allowing landowners to lift a zoning prohibition by majority consent "is not a delegation of legislative power, but is . . . a familiar provision affecting the enforcement of laws and ordinances").

Moreover, when a landowner chooses the state scheme by designating a zone and formulating water-quality and land-use plans, any city regulations inconsistent with those plans are rendered inapplicable by the terms of section 26.179(i), not by the landowners. Section 26.179(i) plainly states that:

[a] municipality may not enforce in a zone any of its ordinances, land use ordinances, rules, or requirements . . . which are inconsistent with the land use plan and the water quality plan or which in any way limit, modify, or impair the ability to implement and operate the water quality plan and the land use plan within the zone as filed; nor shall a municipality collect fees or assessments or exercise powers of eminent domain within a zone until the zone has been annexed for the municipality. A water quality protection zone may be annexed by a municipality only after the installation and completion of 90 percent of all facilities and infrastructure described in the water quality plan for the entire zone as being necessary to carry out such plan or the expiration of 20 years from the date of designation of the zone, whichever occurs first.

TEX. WATER CODE § 26.179(i). Thus, the Legislature itself suspended the City's authority — it mandated that certain municipal ordinances and powers are rendered inapplicable; it did not delegate the power to suspend laws. *See Harris v. Municipal Gas Co.*, 59 S.W.2d 355, 357 (Tex.Civ.App.—Fort Worth 1933, writ dism'd) (holding that a law suspending a municipal gas rate ordinance when a company filed a supersedeas bond that complied with Railroad Commission guidelines was not a delegation of the power to suspend laws); *see also McDonald v. State*, 615 S.W.2d 214, 219 (Tex. Crim. App. 1981) (holding that the Legislature did not delegate the power to suspend laws to the Wildlife Commission when the Legislature, via statute, provided that certain laws regulating wildlife resources were suspended when the Commission issued a proclamation relating to those wildlife resources).

The Legislature determined which city regulations would be suspended, and did so in a manner narrowly tailored to section 26.179's purposes. The Legislature, via section 26.179(i), intended to and did suspend certain city regulations and powers (the power to annex, the power to collect fees and assessments, and the power to enforce any ordinances or regulations inconsistent with the water-quality and land-use plans), consistent with section 26.179's stated purpose to facilitate development while maintaining water quality. Simply repealing section 26.177 or

suspending all city regulations in the ETJ — which the Legislature could have done — would have been too broad to serve the Legislature’s goal of removing only those city ordinances and powers that unduly hindered development. Section 26.177 is “subject to” section 26.179, and remains in full effect in all areas except where a zone is designated. *See* TEX. WATER CODE § 26.177(b). But even where a zone is designated, only city regulations and powers “inconsistent with” a landowner’s plan are suspended. *See id.* § 26.179(i).

Although a landowner’s plan is developed in accordance with section 26.179 and is subject to TNRCC review, the Legislature could not know which city ordinances and powers would conflict with a specific landowner’s plan in a specific city, and thus could not specifically denote which ordinances and powers would be suspended. To further section 26.179’s purpose, the Legislature chose to suspend only those city regulations inconsistent with a landowner’s attempt to comply with the state scheme for water-quality regulation established in section 26.179, thereby allowing water-quality regulation and development under section 26.179 without undue interference from the city. Fostering development by achieving this balance is a sufficient state interest for the Legislature’s suspension of these city regulations and powers, and is consistent with the Legislature’s stated Water Code policy of maintaining water quality consistent with economic development. *See id.* § 26.003. As both the Court and the City concede, this legislation serves this state interest throughout Texas by limiting cities’ regulatory powers throughout the State.

To support its argument that the landowner is entitled to suspend city laws, the City contends, and the Court agrees, that “a landowner is the sole arbiter of whether any City ordinance is ‘inconsistent with’ or ‘may limit, modify or impair’ his water quality plan.” But these contentions are foreign to the actual language of the statute; section 26.179 does not in any way empower the

landowners to determine which city regulations will not apply. Via section 26.179, the Legislature suspended those laws “inconsistent with” the landowner’s water-quality and land-use plans, which must be formulated in compliance with section 26.179 and approved by the TNRCC. *Id.* § 26.179(i). Nowhere does the statute give landowners the authority to determine which ordinances are inconsistent with their plans. They are not given any license to themselves suspend any regulations. Nor are they even given any rights against the city if the city fails to comply with section 26.179(i) by enforcing regulations. Instead, if the city enforced other ordinances or regulations that a landowner believed to be inconsistent with its plans, the landowner would have to resort to the courts for relief, in which case the courts, not the landowners, would decide which city water-quality regulations were inconsistent with the plans. Thus, I would reject the City’s arguments that section 26.179 violates article III, section 1 and article I, section 28 of the Texas Constitution because the statute does not delegate the power to suspend laws to the landowners.

### C

The City also argues, and the Court agrees, that section 26.179 impermissibly delegates legislative power in violation of article III, section 1 because it allows private landowners to set and enforce water-quality standards within the zones. To reach this conclusion, the City contends that section 26.179 delegates “no legislative authority at all” to the TNRCC. Similarly, the Court adopts an unnecessarily narrow interpretation of the TNRCC’s regulatory and enforcement powers in the zones. And, it is only by reading the statute so narrowly that the Court can conclude that a delegation has occurred.

To repeat, a landowner of a tract with fewer than 1000 acres and more than 500 acres may not even designate the tract as a zone without prior TNRCC approval. *See* TEX. WATER CODE § 26.179(d). But even for landowners with tracts exceeding 1000 acres (who may designate the tract as a zone without prior approval), section 26.179 provides that certain water-quality standards must be met. These standards place substantial limitations on a landowner's actions and are enforced by the TNRCC.

As noted, under section 26.179's state scheme, landowners may achieve water-quality protection either by capturing rainfall or by maintaining background levels of water quality. *Id.* § 26.179(a). Regardless of which option is chosen, the landowner must formulate a water-quality plan, which must be submitted to and approved by the TNRCC. *See id.* § 26.179(g). The TNRCC has the power to disapprove any plan if implementation of the plan will not reasonably attain one of the two defined water-quality-protection standards.<sup>5</sup> *See id.* Thus, the Legislature defined the water-quality-protection standards, and the TNRCC is the arbiter of whether a landowner has satisfied one of those standards.

If a landowner chooses to maintain background levels of water quality, section 26.179(b) imposes extensive monitoring requirements. The landowner must maintain background levels of water quality in waterways comparable to those levels that existed before new development. *See id.* § 26.179(b). Background levels are established by either (1) collecting data from one or more sites located within the zone or (2) if such data are unavailable, from calculations performed and certified by a registered professional engineer using certain methods approved by the TNRCC until such data are available. *See id.* Background levels for undeveloped sites must be verified based on monitoring

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<sup>5</sup> In fact, the TNRCC denied approval of two water-quality plans filed by the landowners in this suit.

results from other areas of property within the zone prior to its development. *See id.* And, the determination of background levels of water quality must be signed and sealed by a registered professional engineer. *See id.* § 26.179(g). Each new phase of development requires monitoring for a three-year period, with a minimum of four samples taken per year at four different locations where runoff occurs. *See id.* § 26.179(b). Results of monitoring and a description of the best management practices being used in the zone must be summarized and submitted to the TNRCC each year during development, unless the TNRCC determines that monitoring is no longer required. *See id.* If performance monitoring and best management practices indicate that background levels were not maintained during the previous year, the landowner must (1) modify water-quality plans for future phases of development to the extent reasonably feasible and practical and (2) modify operational and maintenance practices in existing phases to the extent reasonably feasible and practical. *See id.* If a landowner chooses to retain the first 1.5 inches of rainfall, this water-quality monitoring is not required. *See id.*

Regardless of whether a landowner chooses to capture rainfall or to maintain background levels of water quality, section 26.179 provides that — in addition to section 26.179’s requirements — the landowner is subject to a host of federal, state, and city regulations that govern the zone throughout its development and are enforceable by the TNRCC. For example, section 26.179(k) provides that development in a zone must comply with all state laws and TNRCC rules regulating water quality that are in effect on the date the zone is designated. *Id.* § 26.179(k). Thus, each phase of development in a zone must satisfy these requirements. Section 26.179(k) further provides that nothing in section 26.179 shall supersede or interfere with the applicability of water-quality measures or regulations adopted by a conservation and reclamation district comprising more than two counties

and that apply to the watershed area of a surface lake or surface reservoir that impounds at least 4000 acre-feet of water. *Id.* And, section 26.179(m) provides that the TNRCC may require and enforce additional water-quality-protection measures to comply with mandatory federal water-quality requirements, standards, permit provisions, or regulations. *Id.* § 26.179(m). Last, the city may still enforce any city ordinances and regulations that are not inconsistent with the land-use and water-quality plans. *See id.* § 26.179(i).

The TNRCC has authority to enforce these provisions under section 26.179(m) and under other provisions of Chapter 26 such as section 26.019, which expressly provides the TNRCC with authority “to issue orders and make determinations necessary to effectuate the purposes of [Chapter 26].” *See id.* § 26.019; *see also id.* § 26.0136 (“The [TNRCC] is the agency with primary responsibility for implementation of water-quality management functions, including enforcement actions, within the state.”). In addition, other sections of the Water Code clearly establish that the TNRCC has “general jurisdiction over water and water rights” and the state’s water-quality program, and that the TNRCC has the power to perform any acts “necessary and convenient to the exercise of its jurisdiction and powers as provided by [the Water Code] and other laws.” *Id.* §§ 5.013(a), 5.102(a).

Thus, for landowners designating a zone, section 26.179 simply replaces city water-quality regulations established pursuant to section 26.177 with section 26.179’s legislatively established standards — with TNRCC oversight. In addition to the city, state, and federal standards described in the preceding paragraphs, the landowners must develop a water-quality plan that will meet one of the two water-quality standards established by the Legislature. *See id.* § 26.179(g). Compliance

with section 26.179's standards and additional state and TNRCC rules and regulations is monitored and enforced by the TNRCC. *See id.* § 26.179(g), (m).

As noted previously, once a water-quality plan is in effect, if a landowner has opted to maintain background levels of water quality but fails, he must modify existing operational and maintenance practices, modify his plan for future phases, and obtain TNRCC approval of the modified plan. *See id.* § 26.179(b), (g). The TNRCC need not approve a modified plan unless it finds the new plan will reasonably attain the water-quality protection standards of section 26.179. *See id.* § 26.179(g).

The Court also points to the fact that, if a landowner opts to capture the first 1.5 inches of rainfall, no water-quality monitoring is required. Simply because monitoring is not required does not mean that legislative authority has been delegated. The Legislature defined capturing 1.5 inches of rainfall as a water-quality-protection standard. If a landowner submits a plan to capture the first 1.5 inches of rainfall, which is sworn by a registered engineer and approved by the TNRCC, the landowner has complied with the standard created by the Legislature. The landowner is required to continue to capture rainfall throughout the project's development; the Legislature states that doing so will "achieve water-quality protection;" and the TNRCC can enforce this requirement. The simple lack of water-quality monitoring does not indicate that any legislative authority has been delegated to the landowners under this scheme.

The Court also incorrectly concludes that section 26.179(b) "prohibits the TNRCC from monitoring or requiring monitoring" in zones that are capturing rainfall. \_\_\_ S.W.3d at \_\_\_. The TNRCC requires landowners in such zones to maintain certain records and submit them with "an assessment of the water quality plan's success in meeting the TNRCC's water quality requirements."

30 TEX. ADMIN. CODE § 216.8. As noted, the TNRCC has authority to enforce TNRCC regulations in effect at the time of the zone’s designation, and may require landowners to submit records and reports indicating whether those requirements are satisfied. Although section 26.179(b) states that “[w]ater quality monitoring shall not be required in areas using the methodology described by Subsection (a)(2) [capturing rainfall],” a reasonable interpretation of that language, which comes at the end of the description of the water-quality monitoring required of zones electing to maintain background water quality, means that the water-quality monitoring described in section 26.179(b) is not applicable to such zones. It does not necessarily mean that no reporting or assessment of any type may be required to enforce other regulations. For example, if mandatory federal requirements required monitoring, certainly such monitoring could be required and enforced under section 26.179(m) despite section 26.179(b)’s apparently broad prohibition. Similarly, if state laws or TNRCC rules in effect at the time of the zone’s designation require monitoring, such monitoring could be required and enforced by the TNRCC.

In sum, by enacting section 26.179, the Legislature established the two water-quality standards to be applied (capturing rainfall or maintaining background levels of water quality), and the methods by which landowners must comply with those standards. As the Court acknowledges, the statute provides specific standards and the specific means to comply with them. The only discretion given the landowners is in designing and implementing the land-use and water-quality plans to satisfy these standards. Section 26.179 does not delegate legislative power merely because the landowners may choose one of the two legislatively established methods and devise their own specific plans to meet the standards imposed. *See Perot v. Federal Election Comm’n*, 97 F.3d 553, 559-60 (D.C. Cir. 1996) (“One might view [allowing organizations to decide what specific ‘objective

criteria’ to use in holding a debate] as a ‘delegation,’ because the organization must use their discretion . . . . But in that respect, virtually any regulation of a private party could be described as a ‘delegation’ of authority, since the party must normally exercise some discretion in interpreting what actions it must take to comply.”); *Whaley v. State*, 52 So. 941, 941 (Ala. 1909) (holding that a streetcar company’s right to make rules concerning transfers was not a delegation, because the right to make rules concerning transfers existed independently of the act, and the authority given was not the delegation of the authority to legislate). Otherwise, only complete governmental control and oversight would avoid an unconstitutional delegation. The Legislature should not be forced into the business of detailing the development plans for all parcels of land throughout the state; it is sufficient for the Legislature to establish a framework (through the TNRCC) to ensure that its standards are being satisfied.

This case differs significantly from *Boll Weevil*, in which we found that an unconstitutional delegation had occurred. See *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). In *Boll Weevil*, the foundation created by the statute was “little more than a posse” authorized to make decisions concerning other people’s property without any supervision by a governmental agency. *Id.* at 486, 484-86 (Hecht, J., concurring in part and dissenting in part). The foundation represented the interests of growers who elected the board members, and the foundation was authorized to conduct referenda. The board then devised eradication guidelines and applied them to others’ property. It could impose assessments and enter others’ property to carry out its eradication programs, and could even require a cotton grower to destroy his crop. All of these powers were exercised without any meaningful review by a governmental agency. See *id.* Here, there is no such representational system, landowners make decisions only with regard to their own

property, and the decisions are subject to TNRCC review and approval both before and during implementation. Thus, in contrast to the situation in *Boll Weevil*, landowners designating a zone under section 26.179 control only their own property, are subject to legislatively defined standards and meaningful regulation, and are ultimately accountable to the TNRCC and the courts. Under such circumstances, I cannot conclude that any legislative power has been delegated to the landowners.

### D

Section 26.179 does not delegate legislative authority to private individuals or entities and does not violate article III, section 1 or article I, section 28 of the Texas Constitution. Because I would hold that no legislative power has been delegated to the landowners, I would not apply the second part of the *Boll Weevil* analysis (whether the delegation is appropriate). *See id.* at 471-72.

### III

#### SPECIAL OR LOCAL LAW

The City also challenges section 26.179 as an unconstitutional local or special law. Article III, section 56 of the Texas Constitution provides:

**Local and special laws**

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law

...

Regulating the affairs of counties, cities, towns, wards or school districts;

...

Exempting property from taxation;

...

And in all other cases where a general law can be made applicable, no local or special law shall be enacted . . . .

TEX. CONST. art. III, § 56.

Section 26.179 generally applies to the ETJ of a city with a population greater than five thousand. TEX. WATER CODE § 26.179(c), (d).<sup>6</sup> Section 26.179 applies when a municipality either: (1) enacted or attempted to enforce three or more ordinances or amendments attempting to regulate water quality or control or abate water pollution within the five years preceding the effective date of the Act (June 16, 1995), or (2) enacts or attempts to enforce three or more such ordinances or amendments in any five-year period. *Id.* § 26.179(c). The City of Austin maintains, without dispute from the landowners, that Austin is the only city that fell within section 26.179’s classifications when it was passed by the Legislature, and that Austin is the only city that falls within these classifications today.

In *Maple Run v. Monaghan*, this Court recognized “the Legislature’s broad authority to make classifications for legislative purposes.” 931 S.W.2d 941, 945 (Tex. 1996) (citing *Miller v. El Paso County*, 150 S.W.2d 1000, 1001 (Tex. 1941)). To determine whether a law that is limited to a particular class or locality is general or is an unconstitutional local or special law:

“[T]he classification . . . must be based on characteristics legitimately distinguishing [the] class from others with respect to the public purpose sought to be accomplished by the proposed legislation.” “The primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class.”

*Maple Run*, 931 S.W.2d at 945 (citations omitted). This test ensures that the classification is not “a mere arbitrary device resorted to for the purpose of giving what is, in fact, a local law the appearance of a general law.” *Miller*, 150 S.W.2d at 1002.

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<sup>6</sup> Section 26.179 does not apply to the ETJ of a city with more than 900,000 citizens that has passed an ordinance to prevent the pollution of an aquifer that is the sole or principal drinking water source for that city. TEX. WATER CODE § 26.179(n).

The City argues that section 26.179 is an unconstitutional local or special law because it violates the underlying purpose of section 56, which is to prevent the granting of special privileges and the trading of votes for personal interests, *see Maple Run*, 931 S.W.2d at 945, and because it fails the test the Court has relied upon to foster that purpose. Specifically, the City argues that: (1) laws that define a class of one city are constitutional only if they advance a statewide interest, and section 26.179 does not; (2) section 26.179 is not broad enough to include a substantial class; (3) section 26.179's classification is not reasonably related to the statute's alleged purpose of ensuring regulatory certainty or providing the regulatory flexibility necessary to facilitate land development; (4) section 26.179's legislative history demonstrates it is unconstitutional; and (5) section 26.179's substantive provisions are not reasonably related to its alleged purpose.

In considering these arguments, it must be presumed that the Legislature has not acted arbitrarily or unreasonably. *See Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). It is also presumed that the Legislature "understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Id.* (quoting *Texas Nat'l Guard Armory Bd. v. McCraw*, 126 S.W.2d 627, 634 (Tex. 1939)). A mere difference of opinion on the matter is not a sufficient basis for striking down legislation as arbitrary and unreasonable, because "[t]he wisdom or expediency of the law is the Legislature's prerogative, not ours." *Id.*

## A

The City first argues that Texas has consistently applied a rule that statutes defining a class of one are constitutional only if they advance a statewide interest. To support this contention, the

City cites *Maple Run*, 931 S.W.2d at 947; *County of Cameron v. Wilson*, 326 S.W.2d 162, 165-67 (Tex. 1959); *Miller*, 150 S.W.2d at 1002-03; and *City of Irving v. Dallas/Fort Worth Int'l Airport Bd.*, 894 S.W.2d 456, 467 (Tex. App.—Fort Worth 1995, writ denied). But these cases fail to support its contention.

In *Maple Run*, this Court found no legitimate reason why the Legislature chose a classification confining the statute at issue to a single municipal utility district. See *Maple Run*, 931 S.W.2d at 946-47. The statute thus failed the traditional local and special law test. The statute's defenders argued that the otherwise unconstitutional statute should stand because it affected water conservation, a matter of statewide interest. See *id.* at 947. The City relies on the Court's response that "[w]hile we agree that all Texans have an interest in protecting this State's natural resources, we disagree that one may simplistically conclude that any law having a conservation purpose is ipso facto not a local or special law." *Id.* The City's reliance on this statement is misplaced for two reasons. First, the Court's statement was essentially that an otherwise unconstitutional statute cannot be saved merely by the fact that the statute affects a matter of statewide interest. That statement does not support the City's very different assertion that a statute *must* affect a matter of statewide interest to be constitutional. Second, *Maple Run* held that "the ultimate question under article III, section 56 is whether there is a *reasonable basis* for the Legislature's classification," and that the significance of the subject matter is merely a factor, albeit a substantial factor, in determining that reasonableness. *Id.*

Nor does *County of Cameron v. Wilson* support the City's proposed rule. The City asserts that the Court upheld the statute at issue in that case "because it concerned a matter of statewide importance." That assertion does not necessarily support a rule that a statute is unconstitutional

*unless* it concerns a matter of statewide importance. Furthermore, this Court stated in *County of Cameron* — similar to its statement in *Maple Run* — that whether a statute deals with a general rather than local interest is “an important consideration,” but “the primary and ultimate test is whether there is a reasonable basis for the classification and whether the law operates equally on all within the class.” *County of Cameron*, 326 S.W.2d at 165.

*Miller v. El Paso County* also fails to support the rule that the City urges. The City contends that the Court in *Miller* struck down a statute because it limited its effect to one county. The case reveals that the Court struck down the statute not for that reason, but because “the attempted classification [was] unreasonable and [bore] no relation to the objects sought to be accomplished by the Act.” *Miller*, 150 S.W.2d at 1003. Again the ultimate and dispositive inquiry was whether the classification was reasonably related to a purpose advanced by the statute.

Similarly, the City’s reliance on *City of Irving* is misplaced. In that case, the court of appeals relied on the argument that a statute with an arbitrary classification can nonetheless be constitutional if it affects a matter of statewide importance. *See City of Irving*, 894 S.W.2d at 467. As stated above, that rationale does not necessarily support the rule that the City urges.

Most importantly, this Court rejected the City’s argument in *Maple Run*, explaining that the ultimate question is whether there is a reasonable basis for the Legislature’s classification and the significance of the statute’s subject matter is merely an important factor in determining reasonableness. *See Maple Run*, 931 S.W.2d at 947.

Because there is no support for the City’s contention that Texas courts have applied — much less “consistently applied” — a rule that one-member classes are appropriate only if they advance a statewide interest, I would reject the City’s first argument and adhere to the rule recited in *Maple*

*Run* that the ultimate inquiry is whether there is a reasonable basis for the classification; whether the statute advances a statewide interest is merely a factor in making that inquiry.

## B

In *Maple Run*, this Court quoted the fifty-eight-year-old proposition that “where a law . . . affects only the inhabitants of a particular locality, ‘the classification must be broad enough to include a substantial class and must be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation.’” *Maple Run*, 931 S.W.2d at 945 (quoting *Miller*, 150 S.W.2d at 1001-02). The City invokes part of this language in arguing that section 26.179’s classification “is not ‘broad enough to include a substantial class,’ as required when a statute applies only to a ‘particular locality.’” That argument could be understood to presuppose that the Court’s language creates — apart from the usual requirement that a classification be reasonable — a discrete requirement that a statute be broad enough to include a substantial class.

That supposition would be misguided. In 1941, *Miller* first referred to a “substantial class.” See *Miller*, 150 S.W.2d at 1001. In subsequent cases we have restated or quoted *Miller*’s statement of the law. See, e.g., *Maple Run*, 931 S.W.2d at 945; *County of Cameron*, 326 S.W.2d at 164; *Anderson v. Wood*, 152 S.W.2d 1084, 1087 (Tex. 1941). Unfortunately, a selective reading of Texas courts’ unusual<sup>7</sup> reference to a “broad” or “substantial class” could give a mistaken impression that article III, section 56 requires that legislation affect a certain minimum number of persons or entities.

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<sup>7</sup> *State v. Town of Montclair*, 51 A. 494, 497 (N.J. 1902) is one of the few cases beyond Texas that refers to a “substantial class.”

But the greater expanse of this Court’s local and special law jurisprudence reveals that an inquiry into the substantiality of a class cannot be divorced from the reasonableness of the lines drawn to form that class. Instead, the primary and ultimate inquiry is and has been the reasonableness of the lines a statute draws and whether the statute operates equally on all within the class. *See, e.g., Maple Run*, 931 S.W.2d at 945, 947; *County of Cameron*, 326 S.W.2d at 165; *Rodriguez v. Gonzales*, 227 S.W.2d 791, 793 (Tex. 1950). Our cases demonstrate that a class is “substantial” not because it is big, but because it is delimited by reasonable distinctions that respond to real or substantial differences.

Before *Miller*, in *O’Brien v. Amerman*, 247 S.W. 270, 271 (Tex. 1922), the Court referred to “substantial grounds for the classification.” And two weeks before we decided *Miller*, we issued *Friedman v. American Surety Co.*, 151 S.W.2d 570, 577 (Tex. 1941), in which we stated that “[c]lassifications must be based on a real and substantial difference, having relation to the subject of particular enactment. If there is a reasonable ground for the classification, and the law operates equally on all within the same class, it will be held valid.”<sup>8</sup>

*Miller* itself makes clear that an inquiry into the substantiality of a class is ultimately part of an inquiry into the reasonableness of the classification. The portion of the opinion that first refers to a “substantial class” states that

legislation must be intended to apply uniformly to all who may come within the classification designated in the Act, and the classification must be broad enough to include a substantial class and must be based on characteristics legitimately

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<sup>8</sup> In *Friedman*, the challenge was actually based on the Texas Constitution’s equal rights provision, article I, section 3, rather than on article III, section 56. Nevertheless, “[t]he same considerations govern decisions whether a statute is challenged as special legislation or under the guaranty of equal protection” even though “[t]he close relation between these prohibitions . . . has seldom been emphasized.” 2 SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 40.27 (5<sup>th</sup> ed. 1993); *see also Owens Corning v. Carter*, 997 S.W.2d 560, 583 (Tex. 1999) (holding that a statute did not violate article III, section 56 for the same reasons it did not violate the Equal Protection Clause).

distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation. *In other words, there must be a substantial reason for the classification.*

*Miller*, 150 S.W.2d at 1001-02 (emphasis added).

And in *Maple Run*, the Court made this explicit by explaining that “the ultimate question under article III, section 56 is whether there is a *reasonable basis* for the Legislature’s classification. . . . [T]he number of persons affected by the legislation are merely factors, albeit important ones, in determining reasonableness.” *Maple Run*, 931 S.W.2d at 947 (emphasis in original).

## C

The City also argues that section 26.179’s classifications are not reasonably related to the statute’s alleged purposes of ensuring regulatory certainty or providing the regulatory flexibility necessary to foster land development. Section 26.179(c) provides the following classifications:

This section applies only to those areas within the extraterritorial jurisdiction, outside the corporate limits of a municipality with a population greater than 5,000, and in which the municipality either:

- (1) has enacted or attempted to enforce three or more ordinances or amendments thereto attempting to regulate water quality or control or abate water pollution in the area within the five years preceding the effective date of this Act, whether or not such ordinances or amendments were legally effective upon the area; or
- (2) enacts or attempts to enforce three or more ordinances or amendments thereto attempting to regulate water quality or control or abate water pollution

in the area in any five-year period, whether or not such ordinances or amendments are legally effective upon the area.

TEX. WATER CODE § 26.179(c). The City challenges both section 26.179's three-ordinance demarcation and its population-based classification.

The stated purpose of section 26.179 is to “provide the flexibility necessary to develop the land [within the ETJ of certain municipalities] while ensuring the non-degradation of water quality within the area.” SENATE COMM. ON NATURAL RESOURCES, BILL ANALYSIS, Tex. S.B. 1017, 74<sup>th</sup> Leg., R.S. (1995); HOUSE COMM. ON NATURAL RESOURCES, BILL ANALYSIS, Tex. S.B. 1017, 74<sup>th</sup> Leg., R.S. (1995); *see also* TEX. WATER CODE § 26.179(d). Legislative testimony and debate also suggest a related purpose of providing would-be developers with regulatory stability, certainty, or consistency and relief from “regulatory chaos.” *See Hearing on Tex. H.B. 2471 Before House Comm. on Natural Resources*, 74<sup>th</sup> Leg., R.S. 1-2 (April 10, 1995) (statement of Rep. Lewis); *Hearing on Tex. S.B. 1017 Before Senate Comm. on Natural Resources*, 74<sup>th</sup> Leg., R.S. 2-3 (April 4, 1995); Debate on Tex. S.B. 1017 on the Floor of the Senate, 74<sup>th</sup> Leg., R.S. 1 (April 19, 1995). These are, of course, legitimate objectives for legislation.

The classification limiting section 26.179's application to cities that have enacted or attempted to enforce three or more ordinances or amendments regulating water quality within five years legitimately distinguishes between cities with respect to these objectives. This classification may not be perfectly tailored. It may not even be wise. But the Legislature was not arbitrary or unreasonable in deciding that enforcing or enacting three or more different municipal water-quality standards in a five-year period can interfere with “the flexibility necessary to develop the land” or result in the uncertainty section 26.179 was designed to combat.

The City argues that the classification is unreasonable because it is, in effect, overbroad: a city could fall within the classification for merely attempting to enforce three longstanding ordinances, for enacting ordinances not enforced against landowners, for enacting non-substantive water-quality ordinances, or for enacting ordinances that never become legally effective. I find some irony in the City's argument that a statute can be unconstitutionally local or special because its classification is too broad or general. Moreover, the City's interpretation of section 26.179's application is erroneously overbroad: to trigger section 26.179, the City must enforce or enact three different ordinances attempting to regulate water quality or control or abate water pollution — so that there are three different standards governing water quality — during a five-year period. The legislative history indicates that the Legislature was primarily concerned with a City's changing water-quality standards so that three or more different standards would apply during any five-year period. The Legislature believed that application of three or more different water-quality standards in a five-year period would lead to regulatory chaos that would in turn hinder development. Accordingly, consistent with this legislative intent, I would construe section 26.179 as applying when a City enacts or enforces three different water-quality ordinances within a five-year period.<sup>9</sup> Thus, enforcing or enacting an ordinance triggers section 26.179 only insofar as applicable water-quality standards are changed. Accordingly, section 26.179 is not triggered simply by a City's enforcing three long-standing ordinances because standards are not changed. It is not arbitrary or unreasonable for the Legislature to determine that applying three or more water-quality standards

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<sup>9</sup> For example, when a City enforces one ordinance for two years and then enacts a new ordinance, it has applied two different standards, one enforced and one enacted. If the City then enacts another ordinance two years later, it has applied three different standards within a five-year period, and section 26.179 is triggered.

in a five-year period could cause uncertainty that hampers a landowner's plans for development, whether or not the regulations are in the end applied to the landowner.

As noted, it is not necessary that the legislation advance a matter of statewide interest, but whether it does so is a significant factor in determining whether the Legislature's classifications are reasonable. In addition, the substantiality of the class (*i.e.*, the number of persons affected by the legislation) must be considered in evaluating the reasonableness of the classifications. Promoting development without unnecessary regulatory chaos is a matter of statewide interest. *See, e.g.*, TEX. WATER CODE § 26.003 ("It is the policy of this state . . . to maintain the quality of water in the state consistent with . . . the economic development of the state . . ."). Although section 26.179 currently affects only the City of Austin, the City admits that section 26.179 creates an "open" class, which will include other cities who choose to enact additional water-quality ordinances. The City raises the possibility that other cities may hesitate to enact new water-quality ordinances in the future to avoid falling into this class. Rather than militating against section 26.179's reasonableness, this possibility demonstrates that section 26.179's classification reasonably advances the statute's purpose. Thus, I would hold that section's 26.179's three-ordinance classification is reasonable.

I would also hold that section 26.179(c)'s population classification has a reasonable basis. When the Legislature passed section 26.179 in 1995, section 26.177 required only cities with populations greater than five thousand to establish water-pollution-control and abatement programs. *See* Act of May 29, 1971, 62d Leg., R.S., ch. 612, § 7, 1971 Tex. Gen. Laws 1974, 1980, *amended by* Act of May 5, 1997, 75<sup>th</sup> Leg., R.S., ch. 101, § 5, 1997 Tex. Gen. Laws 193, 197 (section 26.177 now provides that cities of 10,000 or more are required to establish a water-quality program if directed to do so by the TNRCC). These programs could include areas in the cities' ETJs. *See* TEX.

WATER CODE § 26.177(b). It was not unreasonable for the Legislature to provide section 26.179's option only in the ETJs of the cities that section 26.177 required to implement water plans. Moreover, the five-thousand person population threshold distinguishes between small cities with half-mile ETJs and larger cities with ETJs ranging from one to five miles. *See* TEX. LOC. GOV'T CODE § 42.021(1)-(5). In a city with a population of fewer than five thousand inhabitants, the zone would necessarily be within one-half mile of the city's boundaries, while it may be up to five miles from a larger city's boundaries. The Legislature could have reasonably believed that it was necessary to exempt the state's smallest cities from section 26.179 because it would disproportionately affect their power to regulate water quality immediately adjacent to their boundaries.

## D

The City further argues that section 26.179's legislative history exposes it as an unconstitutional local and special law. To be sure, the legislative history reveals that FM Properties' experience in Austin's ETJ prompted at least some legislators to introduce and pass section 26.179. *See, e.g.*, Debate on Tex. S.B. 1017 on the Floor of the Senate, 74<sup>th</sup> Leg., R.S. 1-9 (April 19, 1995). And indeed, section 26.179's classification was intended to include Austin's ETJ. Nevertheless, "a judiciary must judge by results, not by the varied factors which may have determined legislators' votes." *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949).

As the City acknowledges, "[a]n improper legislative motive . . . cannot taint an otherwise constitutional statute." *Cf. id.* at 224 ("[A court] cannot undertake a search for motive in testing constitutionality."). Moreover, even if some legislators intended the Act to apply to Austin's ETJ,

the fact remains that the Act potentially subjects all Texas towns with a population of five thousand or greater to its application.

## E

Finally, the City argues that “[n]ot only is section 26.179’s classification scheme unrelated to the purpose of avoiding regulatory chaos, but its practical application is likewise unrelated to this purpose.” Apparently, the City is arguing that section 26.179’s substance could not advance the purpose suggested, so the Court must look for another purpose as a basis for the classification. This assertion is wrong. For the would-be developer at least, forming a water-quality-protection zone will likely provide more regulatory certainty and “provide the flexibility necessary to develop the land” in areas previously subject to numerous changing standards because the landowner will be subject to only the standards detailed in section 26.179.

## IV

In addition to its argument that section 26.179 allows private landowners to suspend certain laws by designating a zone, the City contends that, even if the Legislature rather than the landowners suspended the City’s regulations within the zones, that suspension is unconstitutional because it is local, not general. The Interpretive Commentary to article I, section 28 states that it prohibits “any person . . . , except the Legislature, from setting aside the law,” and even when the Legislature suspends the law, “it must make the suspension general, and cannot suspend [the law] for individual cases or for particular localities.” TEX. CONST. art. I, § 28 interp. commentary (Vernon 1997). I

would reject the City's argument that the suspension is local for the same reasons that I would hold that section 26.179 is not a local or special law.

## V

The City also argues that section 26.179 violates the Home Rule Amendment because its home-rule powers such as annexation may be curtailed only by the state's general laws. The City contends that section 26.179 is a local or special law that limits the City's annexation power, and, as such, it violates the Home Rule Amendment. Once again, because this argument is simply a reiteration of the City's allegation that section 26.179 is an unconstitutional local or special law, I would reject it on the same grounds.

## VI

Finally, the City argues that section 26.179 violates article I, section 16's prohibition against retroactive laws. *See* TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."). A statute is retroactive if it takes away or impairs a party's vested rights acquired under existing law. *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997). The City alleges that section 26.179 retroactively impairs its vested rights because the City may no longer enforce water-quality and other ordinances or exercise its right of eminent domain within areas of its ETJ designated as zones.

First, the City makes no attempt to demonstrate how its authority to enforce water-quality, land-use, or other ordinances within its ETJ is a vested right. As noted, the City has such authority only because the Legislature chose to grant it in the first place. The City's continued authority to

regulate in the ETJ is at all times subject to the will of the Legislature. But even assuming that the City does in fact have a vested right affected by section 26.179, the City's argument fails. The City contends that section 26.179's retroactive impairment of its rights is unconstitutional because section 26.179 is a "special interest statute designed to assist private developers within the City's ETJ" and therefore the Legislature did not enact section 26.179 as part of a valid exercise of the police power to safeguard the public safety and welfare. This argument fails because section 26.179 is not a special law, but is a valid exercise of the police power to safeguard the public safety and welfare.

\* \* \* \* \*

In sum, because I disagree with the Court's conclusion that section 26.179 is an unconstitutional delegation and because I would hold that section 26.179 does not violate the other constitutional provisions asserted by the City, I respectfully dissent.

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GREG ABBOTT  
JUSTICE

OPINION DELIVERED: June 15, 2000