

IN THE SUPREME COURT OF TEXAS

No. 98-0685

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 BAKER delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE HANKINSON, JUSTICE O'NEILL and JUSTICE GONZALES joined.

JUSTICE OWEN filed a dissenting opinion, in which JUSTICE HECHT and JUSTICE ABBOTT joined.

JUSTICE ABBOTT filed a dissenting opinion, in which JUSTICE HECHT and JUSTICE OWEN joined.

The primary issue in this direct appeal is whether section 26.179 of the Texas Water Code, which allows certain private landowners to create "water quality protection zones" in certain cities' extraterritorial jurisdictions, violates the Texas Constitution. We conclude that it does because it unconstitutionally delegates legislative power to private landowners. Therefore, we affirm the trial court's judgment on the merits as well as on attorney's fees.

I. BACKGROUND

The Texas Legislature enacted section 26.179 of the Texas Water Code in 1995.¹ *See* TEX. WATER CODE § 26.179. This statute allows landowners of contiguous tracts of at least 500 acres within certain municipalities' extraterritorial jurisdictions (ETJs) to designate their property as "water quality protection zones." *See* TEX. WATER CODE § 26.179(c), (d). The purpose of a water quality protection zone is to "provide the flexibility necessary to facilitate the development of the land within the zone, but which also is intended to result in the protection of the quality of water within the zone." TEX. WATER CODE § 26.179(d). Section 26.179's legislative history clarifies that the statute was intended to relieve large landowners and developers in certain cities' ETJs from "regulatory chaos." *Hearings on S.B. 1017 Before the Senate Comm. on Natural Resources*, 74th Leg., R.S. (Apr. 4, 1995); *Hearings on H.B. 2471 Before the House Natural Resources Comm.*, 74th Leg., R.S. (Apr. 10, 1995). Accordingly, the statute exempts the landowners from a variety of otherwise applicable regulations, including water quality regulations, and allows the landowners to create and implement a water quality plan for the zone.

¹ The Legislature amended relevant parts of section 26.179 in 1999. *See* Act of May 28, 1999, 76th Leg., R.S., ch. 1543, § 1, 1999 Tex. Gen. Laws 5310, 5310. The amendment only applies to water quality plans or amendments submitted to the Texas Natural Resource Conservation Commission for review and approval on or after June 19, 1999. *See* Act of May 28, 1999, 76th Leg., R.S., ch. 1543, § 2, 1999 Tex. Gen. Laws 5310, 5312. Therefore, the amendments do not apply to this case. Except as otherwise noted, all citations to section 26.179 are to the 1995 version of section 26.179.

The landowners designate a zone by filing a water quality plan and a general description of water quality protection facilities and proposed land uses for the zone in the applicable county deed records. *See* TEX. WATER CODE § 26.179(e), (f). Landowners owning 500 to 1,000 contiguous acres must secure approval of their water quality protection zones from the Texas Natural Resource Conservation Commission before designating a zone. *See* TEX. WATER CODE § 26.179(d). Landowners owning 1,000 acres or more may designate a zone without pre-approval from the TNRCC. *See* TEX. WATER CODE § 26.179(d). Zones and their corresponding water quality plans are effective immediately upon recordation in the applicable county deed records. *See* TEX. WATER CODE § 26.179(f), (g). A zone's water quality plan is a covenant running with the land. *See* TEX. WATER CODE § 26.179(h).

Section 26.179 allows landowners to choose between two general objectives in formulating their water quality plans: (1) to maintain background levels of water quality in waterways; or (2) to capture and retain the first 1.5 inches of rainfall from developed areas. *See* TEX. WATER CODE § 26.179(a). For each zone, a registered professional engineer must certify that the water quality plan is designed to achieve one of these objectives. *See* TEX. WATER CODE § 26.179(g). For zones purporting to maintain background levels of water quality, the landowners determine the water quality levels to be maintained by setting up monitoring sites within the zone and collecting water quality data from the sites. *See* TEX. WATER CODE § 26.179(b). If such data are unavailable, the landowners must hire a professional engineer to calculate background levels using methods the statute specifies. *See* TEX. WATER CODE § 26.179(b).

The TNRCC reviews water quality plans, but it must approve a plan unless the TNRCC finds that implementing the plan will not reasonably attain one of the two water quality objectives. *See* TEX. WATER CODE § 26.179(g). Zones are presumed to satisfy all other state and local requirements for water quality protection. *See* TEX. WATER CODE § 26.179(k). But development in the zone must comply with all state laws and commission rules regulating water quality which are in effect on the date the landowner designates the zone. *See* TEX. WATER CODE § 26.179(k)(1). In addition to section 26.179's two water quality objectives, the TNRCC may require and enforce water quality protection measures to comply with mandatory federal water quality requirements. *See* TEX. WATER CODE § 26.179(m).

Landowners may amend a plan from time to time. *See* TEX. WATER CODE § 26.179(g). The TNRCC may deny such amendments only if the TNRCC finds that the amended plan will impair the attainment of section 26.179(a)(1) or (a)(2)'s requirements. *See* TEX. WATER CODE § 26.179(g).

In reviewing the water quality plan, the TNRCC may not require public hearings and must complete its review and approval of a plan or amendment within 120 days after receiving the plan. *See* TEX. WATER CODE § 26.179(g). Landowners may appeal a TNRCC denial of a plan or amendment in a court of competent jurisdiction. *See* TEX. WATER CODE § 26.179(g). On appeal, the TNRCC has the burden of proof. *See* TEX. WATER CODE § 26.179(g). For zones of 1,000 acres or more, a plan or amendment remains effective during an appeal of a TNRCC denial. *See* TEX. WATER CODE § 26.179(g).

The statute requires landowners that choose to maintain water quality background levels to monitor water quality for three years after each phase of development is complete and to submit annual technical reports to the TNRCC for the same three years. *See* TEX. WATER CODE § 26.179(b). If the reports show that the landowner did not maintain background levels the previous year, the landowner must modify the water quality plans for future phases of development in the zone and operational and maintenance practices in existing phases of the zone “to the extent reasonably feasible and practical.” TEX. WATER CODE § 26.179(b)(1), (2). For plans purporting to retain 1.5 inches of rainfall, water quality monitoring is not required. *See* TEX. WATER CODE § 26.179(b).

Once a zone is designated, a municipality may not enforce in the zone any “ordinances, land use ordinances, rules, or requirements including, but not limited to, the abatement of nuisances, pollution control and abatement programs or regulations, water quality ordinances, subdivision requirements, other than technical review and inspections for utilities connecting to a municipally owned water or wastewater system, or any environmental regulations” that are inconsistent with or impair the ability to implement and operate the land use plan and water quality plan as filed. TEX. WATER CODE § 26.179(i).

In addition, a city may not collect fees or assessments or exercise powers of eminent domain within a zone until it annexes the zone. *See* TEX. WATER CODE § 26.179(i). And, a city cannot annex a zone until ninety percent of the zone’s facilities and infrastructure described in the water quality plan as being necessary to carry out the plan are completed, or until twenty years from the designation date has passed, whichever occurs first. *See* TEX. WATER CODE § 26.179(i).

After the Legislature enacted section 26.179, several landowners designated zones in the City of Austin's ETJ. Zones were not designated in any other municipality's ETJ. The City sued several of the landowners who had designated zones in the City's ETJ, seeking a declaration that section 26.179 is unconstitutional. The City alleged that section 26.179 violates various provisions of the Texas Constitution because it: (1) unconstitutionally delegates legislative power to private landowners in violation of article II, section 1 and article III, section 1; (2) is an unconstitutional local and special law targeting the City of Austin in violation of article III, section 56; (3) unconstitutionally infringes on municipal home rule powers conferred to the City by article XI, section 5; (4) retroactively impairs the City's vested property rights in violation of article I, section 16; and (5) allows private landowners to suspend laws in violation of article I, section 28. The Landowners counterclaimed for a declaration that section 26.179 is constitutional and sought attorney's fees. The State of Texas intervened to defend the statute's constitutionality. The City and the defendants filed cross-motions for summary judgment. The trial court rendered a final judgment declaring section 26.179 unconstitutional, without specifying the grounds for its judgment, and permanently enjoined the Landowners from designating new zones or adding land to existing zones. The trial court also denied the Landowners' attorney's fees claims. The Landowners brought this direct appeal asserting that section 26.179 is constitutional and that they are entitled to attorney's fees.

II. APPLICABLE LAW

A. STANDARD OF REVIEW — CROSS -MOTIONS FOR SUMMARY JUDGMENT

When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented. *See Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). The reviewing court should render the judgment that the trial court should have rendered. *See Agan*, 940 S.W.2d at 81; *Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 328 (Tex. 1984). When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

B. STATUTORY CONSTRUCTION

If possible, we interpret a statute in a manner that renders it constitutional. *See Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1999); *Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998). In a facial challenge to a statute's constitutionality, we consider the statute as written, rather than as it operates in practice. *See Proctor*, 972 S.W.2d at 735-36; *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996). But we may also consider legislative history and reasonable constructions of the statute by the agency charged with implementing it. *See TEX. GOV'T CODE* § 311.023(3), (6); *State v. Public Util. Comm'n*, 883 S.W.2d 190, 196 (Tex. 1994).

C. DELEGATION OF LEGISLATIVE POWER

The Texas Constitution vests “legislative power” in the Legislature. *See* TEX. CONST. art. III, § 1. Defining what legislative power is or when it has been delegated is no easy task. *See, e.g.,* BARBER, THE CONSTITUTION AND DELEGATION OF CONGRESSIONAL POWER 38 (1975); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 248 (1937). Generally, commentators have defined legislative power as the power to make rules and determine public policy. *See* BARBER, *supra*, at 38 (defining legislative power as “deciding between conflicting proposals presented by clashing interests”); SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 181 (1993) (“The essence of . . . legislative power is the making of laws of private conduct.”). In Texas, legislative power is defined broadly. It includes the power to set public policy. *See, e.g.,* *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 432 (Tex. 1963); *Davis v. City of Lubbock*, 326 S.W.2d 699, 713 (Tex. 1959). In addition, it includes many functions that have administrative aspects, including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate. *See Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 466-67 (Tex. 1997); *see also* *Housing Auth. of Dallas v. Higginbotham*, 143 S.W.2d 79, 87 (Tex. 1940) (providing categories of delegations to public entities, including delegations to make rules to implement statutes, to find facts and ascertain conditions upon which an existing law may operate, to fix rates, and to determine the question of necessity of taking land for public use). Because this definition of delegation sweeps so broadly, it is not surprising that “the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.” *Boll*

Weevil, 952 S.W.2d at 466 (quoting *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

Although the Constitution vests legislative power in the Legislature, courts have recognized that in a complex society like ours, delegation of legislative power is both necessary and proper in certain circumstances. *See Boll Weevil*, 952 S.W.2d at 466. Thus, the Legislature may delegate legislative power to local governments, administrative agencies, and even private entities under certain conditions. *See Proctor*, 972 S.W.2d at 734-35. The Legislature may delegate powers to agencies established to carry out legislative purposes as long as the Legislature establishes reasonable standards to guide the agency in exercising those powers. *See Boll Weevil*, 952 S.W.2d at 467; *see also Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (upholding a delegation to the Commissioner of Education to adopt rules “necessary for the implementation of” Chapter 36 of the Education Code); *Higginbotham*, 143 S.W.2d at 81, 83, 86 (upholding a statute giving a housing authority the power to, among other things, condemn property and to select housing for tenants).

But because delegations to private entities raise more troubling constitutional issues than public delegations, they are subject to more stringent requirements and less judicial deference than public delegations. *See Proctor*, 972 S.W.2d at 735; *Boll Weevil*, 952 S.W.2d at 469-70. Legislative delegations to private entities can compromise “the basic concept of democratic rule under a republican form of government” because private delegates are not elected by the people, appointed by a public official or entity, or employed by the government. *Boll Weevil*, 952 S.W.2d at 469. And, on a more practical basis, private delegations may allow private interests to adversely affect the

public interest. *See Boll Weevil*, 952 S.W.2d at 469.

Nevertheless, as we explained in *Boll Weevil*, private delegations are frequently necessary and desirable. *See Boll Weevil*, 952 S.W.2d at 469. Indeed, private delegations are used extensively in Texas government. The Legislature has routinely delegated to private associations the power to promulgate certain industrial and professional standards. *See, e.g.*, TEX. GOV'T CODE § 441.007(b) (requiring graduation from a privately accredited library school for permanent certification as county librarian); TEX. HEALTH & SAFETY CODE § 142.006 (allowing the Department of Health to issue licenses to privately accredited homes and community support services agencies); TEX. OCC. CODE § 204.153 (defining physician assistant as person who graduated from a program accredited by the American Medical Association's Committee on Allied Health Education and Accreditation and who has passed the certifying examination administered by the National Commission on Certification of Physician Assistants); *see also Proctor*, 972 S.W.2d at 738 (upholding a delegation to two private entities, the American Arbitration Association and the Federal Mediation and Conciliation Service, to decide whether a hearing examiner was "a qualified neutral arbitrator" to hear civil service appeals); *Dudding v. Automatic Gas Co.*, 193 S.W.2d 517, 519 (Tex. 1946) (upholding adoption of standards recommended by National Fire Protection Association and National Board of Fire Underwriters regarding liquified petroleum gas); *Office of Pub. Ins. Counsel v. Texas Auto. Ins. Plan*, 860 S.W.2d 231, 238 (Tex. App.--Austin 1993, writ denied) (upholding delegation to a private association to make rules for the state's plan for providing motor vehicle liability insurance to high risk drivers).

But as we further explained in *Boll Weevil*, once we determine that there has been a private delegation, we must then determine whether it is constitutional by analyzing it under eight factors:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions adequately represented in the decision making process?
3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with its public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?
8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

See Proctor, 972 S.W.2d at 735; *Boll Weevil*, 952 S.W.2d at 472.

If a particular statute delegates legislative authority to a private entity and these eight factors weigh against the delegation, then the statute is unconstitutional. *See Boll Weevil*, 952 S.W.2d at 475. *Boll Weevil* does not specify if any factors weigh more heavily than others, but the importance of each factor will necessarily differ in each case. For example, *Boll Weevil's* constitutional analysis properly focused heavily on the first factor -- whether there was meaningful governmental review of the delegates' actions. *See Boll Weevil*, 952 S.W.2d at 473-74. Because one of the central concerns in private delegations is the potential compromise of our "democratic rule under a

republican form of government,” weighing the first factor heavily is appropriate whenever a statute delegates legislative power to private interested parties. *Boll Weevil*, 952 S.W.2d at 469. Because the other central concern is the potential that the delegate may have a “personal or pecuniary interest inconsistent with or repugnant to the public interest to be served,” another factor that weighs heavily in these kinds of delegations is, of course, the fourth factor -- whether the private delegate has a pecuniary or other personal interest that may conflict with its public function. *Boll Weevil*, 952 S.W.2d at 469.

III. ANALYSIS

A. SECTION 26.179 DELEGATES LEGISLATIVE POWER TO PRIVATE LANDOWNERS

The City asserts that Section 26.179 delegates legislative power to private landowners. We agree.

Section 26.179 delegates to certain private landowners the power to regulate water quality on their property and in waterways located on their property. *See* TEX. WATER CODE § 26.179(d); 21 Tex. Reg. 11597 (1996). Section 26.179 allows landowners to choose between two general objectives in formulating their water quality plans: (1) to maintain background levels of water quality in waterways; or (2) to capture and retain the first 1.5 inches of rainfall from developed areas. *See* TEX. WATER CODE § 26.179(a). But landowners owning 1,000 acres or more, at least initially, decide how to achieve these objectives in their water quality plans. While landowners owning 500 to 1,000 acres must secure pre-approval of their water quality zones from the TNRCC, landowners owning 1,000 acres or more can designate a zone and implement a water quality plan without pre-approval from the TNRCC. *See* TEX. WATER CODE § 26.179(e), (f). Only after these

plans are in effect does the TNRCC have review power. *See* TEX. WATER CODE § 26.179(g). And if the TNRCC denies a plan and the landowner appeals that decision in court, the plan remains in effect throughout the appeal process. *See* TEX. WATER CODE § 26.179(g). Further, for zones of all sizes, the TNRCC has the burden of proof on the denial of a plan or amendment to a plan. *See* TEX. WATER CODE § 26.179(g).

Section 26.179 also delegates to certain landowners the power to exempt themselves from the enforcement of municipal regulations. It authorizes landowners who designate a zone to exempt their property from the enforcement of those municipal 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.” TEX. WATER CODE § 26.179(i). The municipal ordinances affected are not limited to those regulating water quality. They include land use ordinances, nuisance abatement, platting and subdivision requirements, pollution control and abatement programs or regulations, and “any environmental regulations.” TEX. WATER CODE § 26.179(i).

The powers delegated to the landowners are legislative powers. Water quality regulation is a legislative power. *See Barshop*, 925 S.W.2d at 634. The conservation, preservation, and development of the State’s natural resources are public rights and duties, and the Legislature is charged with passing laws to protect these public rights. *See* TEX. CONST. art. XVI, § 59 (stating that the conservation and preservation of Texas’ natural resources are “public rights and duties”); *Sipriano v. Great Springs Waters of Am., Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring) (“The people of Texas have given the Legislature . . . not only the power but the duty to ‘pass all

such laws as may be appropriate' for the conservation, development, and preservation of the State's natural resources."); *Barshop*, 925 S.W.2d at 623 ("[T]he State has the responsibility under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans."); *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 947 (Tex. 1996) ("[A]ll Texans have an interest in protecting this State's natural resources").

The Legislature has generally delegated state water quality regulation to the TNRCC. *See* TEX. WATER CODE §§ 5.012; 26.011, 26.0136, 26.023, 26.036, 26.127. In addition, it has given cities the power to regulate water quality within their city limits and extraterritorial jurisdictions. *See* TEX. WATER CODE § 26.177; TEX. LOC. GOV'T CODE § 401.002. The Legislature has also empowered conservation and reclamation districts to regulate water quality. *See, e.g.*, TEX. WATER CODE §§ 36.001-.374 (groundwater districts) and §§ 51.001-.875 (water control and improvement districts).

Here, the Legislature has provided general water quality objectives in section 26.179, but has empowered private landowners to fill in the details -- to decide whether and how to apply section 26.179 to their property, to make rules to implement section 26.179, and to ascertain conditions upon which the statute may operate. These are legislative powers. *See Boll Weevil*, 952 S.W.2d at 466-67; *see also Higginbotham*, 143 S.W.2d at 87.

The landowners' power to exempt themselves from the enforcement of municipal regulations is also a legislative power. By allowing landowners to decide which municipal regulations are enforceable on their property, section 26.179 allows private landowners to ascertain the conditions upon which existing municipal laws will operate. *See* TEX. WATER CODE § 26.179(i). As a general

premise, municipalities enact water quality and other regulations to further the public interest. *See* TEX. WATER CODE § 26.177(b) (providing that, subject to section 26.179, water pollution control and abatement programs may include areas within a city's ETJ which in the city's judgment should be included to achieve the city's water quality objectives); TEX. LOC. GOV'T CODE § 212.002 (stating that the purpose of subdivision regulations is "to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality"); *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985) (stating that platting regulation promotes orderly development of the community and safe subdivision construction); *Lacy v. Hoff*, 633 S.W.2d 605, 609 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) (stating that subdivision regulation ensures, among other things, adequate streets and alleys, police and fire protection, and sanitary conditions); *LJD Properties, Inc. v. City of Greenville*, 753 S.W.2d 204, 207 (Tex. App.--Dallas 1988, writ denied) (stating that municipalities prescribe and abate public nuisances to protect the health, safety, comfort or welfare of the public). In fact, such regulations must be substantially related to the public health, safety, or welfare to be valid. *See City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984); *see also FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933-34 (Tex. 1998); *LJD Properties, Inc.*, 753 S.W.2d at 207.

Therefore, section 26.179 delegates legislative power to private landowners because it gives them legislative duties and powers, the exercise of which may adversely affect public interests, including the constitutionally-protected public interest in water quality.

Consistent with our holding, a number of courts have held that laws authorizing private

property owners to veto or exempt themselves from otherwise applicable regulations or to regulate their own property are delegations of legislative power. *See County of Fairfax v. Fleet Indus. Park L.P.*, 410 S.E.2d 669, 673 (Va. 1991); *Brodner v. City of Elgin*, 420 N.E.2d 1176, 1178 (Ill. App. Ct. 1981); *Bayside Timber Co. v. Board of Supervisors*, 97 Cal. Rptr. 431, 436-38 (Cal. Ct. App. 1971); *see also Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 775-77, 779 (Utah 1994) (holding that a statute allowing a privately-owned utility to veto an incentive rate regulation plan adopted by a public commission unconstitutionally delegated legislative power to a private party); *Revne v. Trade Comm'n*, 192 P.2d 563, 568 (Utah 1948)(holding that a statute allowing a group representing seventy percent of the barbers in a city to initiate a price schedule to submit to the State Barber Board for approval was an unconstitutional delegation).

In *County of Fairfax*, the Virginia Supreme Court held that a state law that required county supervisors to get unanimous consent from all affected landowners before enacting certain zoning regulations was an unconstitutional delegation of legislative power. *See County of Fairfax*, 410 S.E.2d at 428. The court noted that the county was powerless to enact zoning regulations even if it reasonably determined that the regulations were necessary for the public welfare. *See County of Fairfax*, 410 S.E.2d at 433. Similarly, in *Brodner*, the court held that a city ordinance that required an owner's consent before a city could rezone his property was an unconstitutional delegation of legislative power. *See Brodner*, 420 N.E.2d at 227. The court noted that, although the city may be effecting a comprehensive zoning plan in pursuit of the common good, the owner had the absolute discretion to decide that no rezoning shall ever occur and could selfishly and arbitrarily frustrate the City's plan. *See Brodner*, 420 N.E.2d at 227. And, in *Bayside Timber*, the court held that a state law

allowing timber owners and operators to promulgate industry rules was an unconstitutional delegation. *See Bayside Timber*, 97 Cal. Rptr. at 436-37. The court noted the industry's detrimental effects on the environment, the public interest in the environment, and the lack of standards or safeguards in the statute to protect the public interest. *See Bayside Timber*, 97 Cal. Rptr. at 434-37.

Finally, we note that the delegation here presents the very concerns this Court identified in *Boll Weevil*. *See Boll Weevil*, 952 S.W.2d at 469. In developing and implementing a water quality plan, the landowners are exercising authority over water quality, a public interest. In exempting themselves from the enforcement of their choice of municipal regulations, they may affect the public interest on whose behalf those regulations were enacted. Yet, the landowners are not elected by the people, appointed by a public official or entity, or employed by the government. And, their pecuniary interest in developing their land to realize profit may be inconsistent with or repugnant to the public interest. Accordingly, we conclude that section 26.179 delegates legislative power to private landowners.

B. THE DISSENTING OPINIONS

Most of Justice Owen's dissent is nothing more than inflammatory rhetoric, and thus merits no response. We note only that the two legal arguments Justice Owen does make are both based on a flawed premise. First, she argues that section 26.179 is not a delegation because, in enacting the statute, the Legislature merely took back the regulatory power that the Legislature itself gave to municipalities. Second, she argues that section 26.179 cannot be a delegation because it merely restores private property rights to landowners. But section 26.179 does not just deregulate. Instead, as we have explained, the statute gives private landowners public duties and regulatory power to

achieve those duties. Just because the Legislature could have deregulated property in ETJs or regulated property in ETJs itself does not mean that giving these duties and powers to the landowners cannot be a delegation. On the contrary, *this is the definition of a legislative delegation*. Again, legislative power includes the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate. *See Boll Weevil*, 952 S.W.2d at 466-67; *Higginbotham*, 143 S.W.2d at 87. When the Legislature gave these powers to the landowners with the obligation to protect water quality, it delegated legislative power to them. To the extent that Justice Owen's dissent makes additional legal arguments, these arguments mirror Justice Abbott's and we consider them in our response to Justice Abbott's dissent. Interestingly, part I of Justice Abbott's dissent relies heavily on the dissent he joined in *Boll Weevil*. *See Boll Weevil*, 952 S.W.2d at 491 (Cornyn, J., concurring and dissenting). First, Justice Abbott claims that the sky is falling because of our holding that section 26.179 is unconstitutional. ___ S.W.3d ___, ___; *see Boll Weevil*, 952 S.W.2d at 491-92 (Cornyn, J., concurring and dissenting). But this case is not about school vouchers, private prisons, or even private property rights. *Cf. Boll Weevil*, 952 S.W.2d at 473 (“[W]e express no opinion as to whether any of the other statutory enactments cited by the dissenting justices would or would not pass constitutional muster. Thus, in no way does our opinion, as the dissenting justices fear, ‘ultimately threaten the heretofore established role of quasi-governmental entities under Texas law.’”). The issue in this case is whether section 26.179 of the Water Code is a constitutional delegation.

Next, as the dissent in *Boll Weevil* argued, Justice Abbott argues that we have improperly applied the standard of review for facial challenges. ___ S.W.3d at ___; *Boll Weevil*, 952 S.W.2d at

492 (Cornyn, J., concurring and dissenting). Again, we reject this argument here for the same reasons we rejected it in *Boll Weevil*. Because we are reviewing the statute under a facial challenge, section 26.179's constitutionality depends on whether the statute as written, rather than as it operates in practice, passes the *Boll Weevil* factors. See *Proctor*, 972 S.W.2d at 735; *Boll Weevil*, 952 S.W.2d at 472-74. Further, our analysis of the statute's constitutionality does not rely on individual outcomes or individual steps in the governmental review process, but on the statutory scheme as a whole. See *Boll Weevil*, 952 S.W.2d at 473. Thus, the fact that the TNRCC actually denied two water quality plans does not render the statute constitutional. Because the overall statutory scheme is itself unconstitutional, the statute always operates unconstitutionally, regardless of whether the TNRCC approves or denies a particular plan. Indeed, as we explain in our discussion of the *Boll Weevil* factors, despite the TNRCC's power to deny water quality plans, there is no meaningful governmental review of the landowners' actions, there is inadequate representation of those affected by the landowners' actions, the landowners have pecuniary interests that may conflict with their public function, and the delegation is broad in duration and extent. In sum, that the application of an unconstitutional statute can, in some cases, reach the same result as the application of a constitutional statute does not make the unconstitutional statute constitutional.

Before we consider the constitutionality of the delegation in depth, we respond to Justice Abbott's claim that there is no delegation at all. First, Justice Abbott argues that section 26.179 does not delegate legislative power because it merely allows landowners to opt out of municipal regulations and into section 26.179's water quality protection scheme. On the contrary, section 26.179 does more than that. Section 26.179 does not simply allow landowners to choose between

two distinct regulatory schemes. Unlike the statutes in the cases the dissent cites, section 26.179 allows the landowners to *create* part of the regulatory scheme that they choose. *See* TEX. WATER CODE § 26.179(g); *cf. Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941) (statute allowing taxpayers to choose between distinct and predefined tax bases); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) (statute allowing adjoining landowners to waive a zoning prohibition against billboards on their neighbor's property).

The landowners create a water quality and land use plan, thereby exempting themselves from the enforcement of municipal regulations that are inconsistent with or inconvenient to those plans, and thus cannot be enforced on their property. *See* TEX. WATER CODE § 26.179(i). Therefore, although the landowners are not given the power to directly suspend municipal laws, the landowners do ascertain conditions upon which those laws will be enforced. Again, this is a legislative power. *See Higginbotham*, 143 S.W.2d at 87. Justice Abbott argues that the Legislature could not have practically specified which municipal powers would be inconsistent with water quality or land use plans. This may be true. But he misses the point. The landowners have the power to create those inconsistencies simply by drawing up plans that do not comply with municipal regulations. **B**

the same reason, Justice Abbott's argument that there is no delegation because the courts will ultimately decide disputes about whether a particular municipal regulation can be enforced in a zone is equally misguided. The only issue a court could review in such a dispute is whether the regulation at issue is in fact inconsistent with the landowner's plans and therefore cannot be enforced. Further, that a court can ultimately decide disputes about the exercise of a delegated power cannot mean, as the dissent argues, that there is no delegation. Courts routinely review delegates' decisions. *See*,

e.g., Quick, 7 S.W.3d at 119 (holding that a city ordinance was not invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality); TEX. GOV'T CODE § 2001.171 (providing judicial review of state agency decisions).

Justice Abbott also argues that, unlike the delegation in *Boll Weevil*, the landowners do not have authoritative power over the private property of others. *Cf. Boll Weevil*, 952 S.W.2d at 471. We agree. But we disagree that this means that there is no delegation of legislative power here. In *Boll Weevil*, the statute at issue provided for the creation of a private foundation that, subject to referendum approval from affected cotton growers, operated boll weevil eradication programs and assessed cotton growers for the programs' costs. *See Boll Weevil*, 952 S.W.2d at 456-57. The foundation could impose penalties upon growers for the late payment of assessments and could enter private property without the owner's permission for any purpose under the statute, including the monitoring, treatment and destruction of crops. *See Boll Weevil*, 952 S.W.2d at 457-58.

Here, the landowners regulate water quality and decide which municipal regulations are enforceable only on their own property and the property of their successors in interests. *See TEX. WATER CODE* § 26.179 (d), (h). Nevertheless, the landowners' powers over water quality protection and their power to exempt themselves from the enforcement of municipal ordinances could adversely affect the public interest, and more specifically, the interests of downstream water users and the landowners' neighbors. Therefore, the landowners, like the foundation in *Boll Weevil*, are charged with legislative duties and powers, the exercise of which could affect the public interest and specific third parties.

Next, Justice Abbott contends that classifying section 26.179 as a delegation renders every

statute that allows private citizens discretion in meeting a statutory standard a delegation. We disagree. A delegation occurs only when an entity is given a public duty and the discretion to set public policy, promulgate rules to achieve that policy, or ascertain conditions upon which existing laws will apply. *See Boll Weevil*, 952 S.W.2d at 466-67; *Higginbotham*, 143 S.W.2d at 87. By entrusting private landowners with authority over water quality protection and other regulations on their property, section 26.179 entrusts them with public duties and gives them broad discretion to decide whether, how, and to what extent to achieve those duties.

The remainder of the Justice Abbott's argument about why section 26.179 is not a delegation relies heavily on the TNRCC's role in reviewing water quality plans and in regulating water quality in general and implies that because section 26.179 delegates power to the TNRCC, it does not delegate power to the landowners. But, as we explained in *Boll Weevil*, when a statute delegates authoritative power to private interested parties, it is a private delegation. *See Boll Weevil*, 952 S.W.2d at 471. That the delegation is in conjunction with a delegation to a public entity, or that the government reviews the delegate's actions may be relevant in assessing the *constitutionality of the delegation*, but it does not mean that it is not a private delegation. *See Boll Weevil*, 952 S.W.2d at 471.

C. SECTION 26.179'S DELEGATION IS UNCONSTITUTIONAL

Because section 26.179 delegates legislative power to private landowners, we determine its constitutionality by applying *Boll Weevil's* eight-factor test. We conclude that section 26.179 is an unconstitutional delegation of legislative powers to private landowners.

1. Governmental Review

This first factor weighs heavily against the delegation. This is significant because, as we have said, this factor is relatively important in analyzing delegations to private interested parties.

Section 26.179 vests the TNRCC with only limited review over the landowners' water quality protection plans and their effectiveness in protecting water quality. Further, neither the TNRCC nor any other governmental agency has the power to review the landowners' decisions about which municipal regulations will be enforceable on their property.

First, we agree with the Landowners and the dissent that under 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. Zones implementing water quality plans that meet section 26.179's requirements are presumed to satisfy all other state and local requirements for water quality protection. *See* TEX. WATER CODE § 26.179(k). Nevertheless, section 26.179 requires that development in the zones comply with all state laws and TNRCC rules regulating water quality which are in effect on the zone designation date. *See* TEX. WATER CODE § 26.179(k)(1). These may include existing permitting, licensing, and spill response programs designed to prevent pollution from storage, transportation, and disposal of waste, hazardous substances, and wastewater. *See* 21 Tex. Reg. 11601 (1996). Specifically, TNRCC regulations related to the Edwards Aquifer, on-site wastewater treatment, water well drilling, sewerage systems, underground and aboveground storage tanks, effluent limitations, and watershed protection may apply to the zones. *See* 21 Tex. Reg. 11601-02 (1996). Further, subsection 26.179(m) provides that the TNRCC may require and enforce additional water quality protection measures to comply with mandatory federal water quality requirements. *See* TEX. WATER CODE §

26.179(m).

But section 26.179 curbs the TNRCC's review and enforcement powers over section 26.179's requirements and the landowners' discretion in meeting them in several important ways. Section 26.179 requires the TNRCC to review water quality plans and their effectiveness in achieving section 26.179's objectives of maintaining background levels of water quality or retaining 1.5 inches of rainfall. Landowners owning 500 to 1,000 acres must secure pre-approval of their zone designations from the TNRCC before their zone designations are recorded in the county deed records and become effective. *See* TEX. WATER CODE § 26.179(d). Zone designations include a water quality plan for the zone, a description of proposed water quality facilities and infrastructure, and a general description of proposed land uses for the zone. *See* TEX. WATER CODE § 26.179(e). Although the statute is not explicit about the scope of the TNRCC's review, the TNRCC has reasonably interpreted the pre-approval provision to require that the TNRCC approve water quality plans and amendments before they become effective in zones of 500 to 1,000 acres. *See* TEX. WATER CODE § 26.179(d), (e), (g); *see also* 30 TEX. ADMIN. CODE § 216.3(a). Therefore, the TNRCC cannot disapprove a zone designation for any other reason other than the failure of the zone's water quality plan to meet section 26.179's requirements.

Landowners with 1,000 acres or more need not seek TNRCC approval until after their water quality plans or amendments are already in effect. *See* TEX. WATER CODE § 26.179(g). Section 26.179(g) provides that, for these larger zones, water quality plans need not be submitted to the TNRCC until after they are recorded in county deed records. *See* TEX. WATER CODE § 26.179(g). Subsection (g) further provides that water quality plans and amendments to plans are effective

immediately upon recordation and apply during TNRCC review and even during an appeal of a TNRCC denial of the plan or amendment. *See* TEX. WATER CODE § 26.179(g). Thus, landowners owning 1,000 acres or more can begin to develop land and implement water quality plans even before the TNRCC begins its review. *See* 21 Tex. Reg. 11607 (1996) (“[C]onstruction is allowed by provisions of the statute . . . upon proper designation of the zone and submittal of the water quality plan for the zone to the executive director for review.”).

This is contrary to the rule in similar regulatory schemes. *See* TEX. WATER CODE § 26.027(c) (“A person may not commence construction of a [water] treatment facility until the commission has issued a permit.”); TEX. WATER CODE § 11.121 (“Except as provided in . . . this code, no person may . . . begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the commission.”); 30 TEX. ADMIN. CODE § 213.2 (“[T]he owner of an existing or proposed site, such as a residential or commercial development, . . . who proposes new or additional regulated activities under this chapter, must file for and receive [TNRCC] executive director approval of all appropriate applications prior to commencement of construction of new or additional regulated activities”); 30 TEX. ADMIN. CODE § 213.4(a)(1) (“No person may commence the construction of any regulated activity until an Edwards Aquifer protection plan or modifications to the plan . . . has been reviewed and approved by the [TNRCC] executive director.”).

The TNRCC must approve a plan or amendment to a plan unless the TNRCC finds that implementing it will not reasonably maintain background levels of water quality or capture and retain the first 1.5 inches of rainfall. *See* TEX. WATER CODE § 26.179(g). The statute is silent about

the effect of a TNRCC denial of a plan or amendment. The TNRCC, however, has reasonably interpreted the statute to provide that a denied water quality plan is no longer effective unless the landowner appeals the denial. *See* 30 TEX. ADMIN. CODE §§ 216.3(e)(6), 216.4(1). The statute allows a landowner to appeal the TNRCC's denial of a plan or amendment to the courts, and, contrary to the general rule for judicial review of agency decisions, the denied plan or amendment is effective and applies to the zone during the appellate process. *See* TEX. WATER CODE § 26.179(g); *cf.* § 26.177(d) (the TNRCC's ruling on city water pollution abatement regulation remains in effect for all purposes during appeal of the ruling). Although the statute does not expressly limit this particular provision's application to landowners with 1,000 acres or more, we interpret this provision to apply only to these larger landowners and not to landowners with 500 to 1,000 acres. This is because the latter group's plans and amendments are not effective until the TNRCC approves them and therefore cannot apply to development in the zone during the appeal of a TNRCC denial. Also atypical of review procedures, for both small and large zones, the TNRCC has the burden of proof on appeal. *See* TEX. WATER CODE § 26.179(g); *cf.* *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752, 758 (Tex. 1966) (the party appealing the TNRCC's order has the burden to show that the evidence does not reasonably support the order).

Once the TNRCC approves a plan, the statute requires landowners purporting to maintain background levels of water quality to monitor water quality. *See* TEX. WATER CODE § 26.179(b). But monitoring is not required until after each phase of development is completed, and then, monitoring is only required for three years. *See* TEX. WATER CODE § 26.179(b). Further, there is no requirement that development occur in phases. Therefore, monitoring might not be required until a

zone is completely developed, which could take years. During the three-year monitoring period, the landowner must summarize the monitoring results, describe the best management practices being used in the zone, and annually submit them to the TNRCC in a technical report for review. *See* TEX. WATER CODE § 26.179(b). If the reports reveal that background levels were not maintained during the previous year, the landowner must modify the water quality plan but only *for future development phases* in the zone and *only to the extent reasonably feasible and practical*. *See* TEX. WATER CODE § 26.179(b)(1). The statute requires modification of operational and maintenance practices in existing phases, but again, only *to the extent reasonably feasible and practical*. *See* TEX. WATER CODE § 26.179(b)(2).

The TNRCC reviews the landowners' modifications and determines whether they modify plans and practices to the extent required under the statute, that is, to the extent reasonably feasible and practical. *See* TEX. WATER CODE § 26.179(g) (providing that the TNRCC reviews all amendments to water quality plans). But as is true for TNRCC review of initial water quality plans, for landowners owning 1,000 acres or more, modifications and amendments to plans are effective immediately upon recordation and remain effective during TNRCC review and an appeal of a TNRCC denial. *See* TEX. WATER CODE § 26.179(g). Further, for zones of all sizes, the TNRCC has the burden of proof on appeal of a denial of a modification. *See* TEX. WATER CODE § 26.179(g).

Therefore, regardless of the modifications actually necessary to achieve section 26.179's objectives, any modification is required only to the extent it is reasonably feasible and practical. Further, plan modifications are only required for future phases of development in the zone. It follows that if the landowner does not develop in phases, the landowner need not modify even a

grossly insufficient water quality plan, because there are no future phases for which the statute requires plan modification. *See* 21 Tex. Reg. 11611 (1996). Further, because monitoring is required only after development is complete, or after a phase of development, if any, is complete, extensive modifications of existing operational and maintenance practices, even if needed to achieve section 26.179's water quality objectives, may not be reasonably feasible and practical, and consequently not required. And, as development continues in zones of 1,000 acres or more during TNRCC review of modifications, necessary modifications likely become less feasible and practical.

The TNRCC has even less enforcement power in zones purporting to retain the first 1.5 inches of rainfall from developed areas. The statute states that, for these zones, “[w]ater quality monitoring shall not be required.” TEX. WATER CODE § 26.179(b). Moreover, all of the statute’s language about monitoring and submitting annual reports falls under the first paragraph in subsection 26.179(b), which expressly refers to zones maintaining background water quality levels. *See* TEX. WATER CODE § 26.179(b). Nevertheless, the TNRCC has promulgated rules requiring zones retaining rainfall to maintain certain records and submit them, along with an assessment of the water quality plan’s success in meeting the TNRCC’s water quality requirements. *See* 30 TEX. ADMIN. CODE § 216.8(a)(2), (a)(3), (b). To the extent the TNRCC’s rules require monitoring of water quality in these zones, they are contrary to the statute’s plain language prohibiting the TNRCC from requiring such monitoring. Indeed, the Landowners’ comments to proposed TNRCC rules note that the TNRCC’s reporting requirements for zones retaining rainfall were “excessive and unnecessary.” 21 Tex. Reg. 11613 (1996). Although we defer to administrative interpretations of legislation, we do so only when they are reasonable interpretations. *See* TEX. GOV’T CODE §

311.023(6); *Public Util. Comm'n*, 883 S.W.2d at 196. Contrary to the TNRCC's interpretation, the statute's plain language prohibits the TNRCC from monitoring or requiring monitoring of water quality in these zones. *See* TEX. WATER CODE § 26.179(b). Not surprisingly, all but one of the zones filed with the TNRCC elected to retain the first 1.5 inches of rainfall from developed areas instead of maintaining background levels of water quality. *See* 21 Tex. Reg. 11605 (1996).

Finally, the TNRCC has very limited power over the decision to designate a zone. The TNRCC does have pre-approval power over zone designations of 500 to 1,000 acres. But the statute does not allow the TNRCC to de-designate any zone for noncompliance with section 26.179 or other applicable regulations. Similarly, in *Boll Weevil*, although the Commissioner of Agriculture could dissolve the foundation once the Commissioner determined the foundation had fulfilled its eradication purpose or had become inoperative or abandoned, the Commissioner had no power to dissolve the foundation for noncompliance with applicable statutory requirements. *See Boll Weevil*, 952 S.W.2d at 473. This fact weighed heavily against the delegation. *See Boll Weevil*, 952 S.W.2d at 473. Here, the TNRCC has no authority whatsoever to dissolve or de-designate a zone for noncompliance with section 26.179 or other water quality protection laws and regulations. This fact similarly weighs against the delegation here.

We conclude that, while the landowners' powers under section 26.179 are subject to some TNRCC review, the review is not *meaningful* as the first factor requires. Instead, the statute allows a landowner with 1,000 acres or more to develop before TNRCC approval and during the appeal of a TNRCC denial. Further, it allows landowners of zones of all sizes to lock into an insufficient water quality protection plan by developing under the plan before any monitoring for the plan's

effectiveness in protecting water quality is required. And, as development continues in larger zones during TNRCC review and the appellate process, necessary modifications become less and less feasible and practical, and are therefore less likely to be required.

While the landowners' water quality plans are subject to some TNRCC review, the landowners' authority to decide which municipal regulations can be enforced on their property is not subject to *any* TNRCC review. By designating a zone, a landowner exempts himself from the enforcement of municipal ordinances relating to land use, nuisance abatement, pollution control, water quality, subdivision requirements, and any other municipal environmental regulation that is "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." TEX. WATER CODE § 26.179(i). While section 26.179 does provide some TNRCC oversight of water quality protection plans, it does not give the TNRCC or any other governmental agency the authority to review the landowners' power to exempt themselves from the enforcement of their choice of city regulations and powers. Of course, courts could eventually decide disputes about whether certain municipal ordinances are inconsistent with water quality and land use plans. But, as discussed earlier, the landowner makes the initial decision about which municipal regulations can be enforced on its property without any governmental oversight.

Because the landowners' powers under section 26.179 are not subject to meaningful governmental review, the first factor weighs heavily against the delegation.

2. Representation of Affected Persons

Section 26.179 does not afford adequate representation to those affected by the landowners'

actions. Therefore, this factor also weighs against the delegation.

As discussed previously, the landowners' actions in creating and implementing water quality plans could adversely affect neighbors, downstream water users, and the public generally. The statute requires that the landowners give notice of zone designations to the municipality within whose ETJ a zone is located and the county in which the property is located. *See* TEX. WATER CODE § 26.179(f). But section 26.179 *prohibits* the TNRCC from requiring a public hearing on a water quality plan. *See* TEX. WATER CODE § 26.179(g). This is contrary to the TNRCC's general power to hold public hearings on the administration of chapter 26 of the Water Code, and the TNRCC's duty to hold public hearings on the TNRCC's water quality standards, on discharge permit applications, and on orders regulating the Edwards Aquifer. *See* TEX. WATER CODE §§ 26.020, .024, .028, .029, .046.

The statute expressly provides landowners the right to appeal TNRCC *denial* of a water quality plan to a court of competent jurisdiction. *See* TEX. WATER CODE § 26.179(g). But the statute does not confer any party the right to appeal TNRCC *approval* of a plan or zone designation. Section 5.351 of the Water Code generally allows affected persons to seek a court order setting aside, modifying or suspending a ruling, order, decision, or other act of the TNRCC. *See* TEX. WATER CODE § 5.351(a). Nevertheless, a plain reading of section 26.179 leads us to conclude that the Legislature did not intend to confer a right to appeal any act under section 26.179 except TNRCC denial of a plan. That section 26.179(g) expressly confers a right to appeal the denial of a plan but is devoid of similar language allowing an appeal of a plan, its approval, or zone designation is significant. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (holding

that every word or phrase excluded from a statute must be presumed to have been excluded for a purpose). This is especially true given the language of section 26.177(d), which expressly confers a right to appeal to “[a]ny person affected by any ruling, order, decision, ordinance, program, resolution, or other act of a city relating to water pollution control and abatement.” TEX. WATER CODE § 26.177(d). Section 26.177(d) shows that the Legislature knows how to provide a right of appeal to persons affected by a water quality plan or government action relating to a plan. Yet, the Legislature chose not to provide such a right to persons affected by section 26.179 plans or TNRCC approval of plans.

In addition, the landowners alone decide which municipal regulations cannot be enforced in their zones. The statute requires that landowners give applicable counties and municipalities notice of their zone designations, which includes a description of proposed land uses and a water quality plan. *See* TEX. WATER CODE § 26.179(e), (f). This provides constructive notice of the land use and water quality plans to affected members of the public. But the statute does not require the landowners to notify anyone, including neighboring property owners or downstream water users, about the municipal regulations that cannot be enforced on their property because they interfere with the land use or water quality plan. And, although affected persons retain their common law causes of action, the statute does not provide any right of review of the landowners’ decisions about their land use or water quality plans to affected individuals or to the municipality.

Because the statute provides inadequate representation of persons affected by the delegates’ actions, this factor weighs against the delegation.

3. Power to Apply the Law to Particular Individuals

This factor weighs in favor of the delegation. The landowners have the power to create water quality plans and apply them to their property and to decide which municipal regulations are enforceable on their property. Again, these powers may affect particular individuals, such as neighboring landowners and downstream water users. But section 26.179 does not give the landowners the power to *apply the law* to particular individuals other than themselves and their successors in interest. *See* TEX. WATER CODE § 26.179(h) (“The water quality plan for a zone shall be a covenant running with the land.”).

In *Boll Weevil*, this factor weighed against the delegation because of the foundation’s power to directly apply the law to third parties. *See Boll Weevil*, 952 S.W.2d at 474. The foundation had the power to impose penalties for late payment and to enter private property for any purpose under the statute, including the treatment, monitoring, and destruction of crops. *See Boll Weevil*, 952 S.W.2d at 458. Here, the landowners have no power to apply the law to third parties other than their successors. *See* TEX. WATER CODE § 26.179(h). Therefore, we conclude that this factor weighs in favor of the delegation.

4. Pecuniary Interest and Public Function

As we stated earlier, this factor weighs heavily in delegations to private interested parties. We conclude that it weighs heavily against the delegation here.

Landowners under section 26.179 obviously have a pecuniary interest that may conflict with their public function. The Landowners concede that those who designate their property as a zone have an interest in protecting their property values. The Landowners argue, though, that they do not have a public function. As we have already explained, section 26.179 allows landowners to regulate

water quality and to decide which municipal regulations cannot be enforced on their property. Because these powers affect the public interest, the landowners do have a public function. Undeniably, the landowners' pecuniary interest in maximizing profit and minimizing costs may conflict with this public function.

5. Criminal Authority

The fifth factor weighs in the delegation's favor. Although section 26.179 allows landowners to exempt themselves from municipal regulations that may be otherwise enforced with criminal penalties, it does not empower landowners to define criminal acts or impose criminal sanctions.

6. Duration, Extent, and Subject Matter of Delegation

The sixth factor weighs against the delegation. The delegation's subject matter is fairly narrow. The statute delegates to private landowners the power to govern water quality and land use only on their own property and that of their successors in interest. And, the landowners are still subject to existing state and TNRCC water quality regulations and additional regulations necessary to comply with federal standards.

But the extent of the delegation is fairly broad. Landowners have the power to create, implement, and enforce their own water quality plans. *See* TEX. WATER CODE § 26.179 (b), (d), (f), (g). These plans could adversely affect the public interest and the interests of neighbors and downstream water users. Yet, these plans apply to development in zones with 1,000 acres or more before TNRCC approval, and even after a TNRCC denial if the landowners appeal the denial. *See* TEX. WATER CODE § 26.179(g). Further, for those plans for which water quality monitoring is required, even if monitoring reveals that the plans are not achieving section 26.179's objectives, the

plans need not be modified except in future phases of development, if any. *See* TEX. WATER CODE § 26.179(b). Modifications are required only to the extent reasonably feasible and practical. *See* TEX. WATER CODE § 26.179(b). Therefore, as we noted in our discussion of the first factor, the landowners have broad discretion in actually complying with section 26.179's water quality objectives. Landowners also have the power to exempt their property from the enforcement of any city regulations that are inconsistent with their water quality plan and land use plan or that could limit, modify, or impair the landowners' ability to implement those plans for the property. *See* TEX. WATER CODE § 26.179(i).

The delegation to the landowners is not narrow in duration either. The statute expressly provides that the water quality plan is a covenant running with the land. *See* TEX. WATER CODE § 26.179(h). A zone and the coordinate power to regulate water quality and exempt property from municipal laws exists until a city annexes the zone. *See* TEX. WATER CODE § 26.179(i). And section 26.179 prohibits annexation until 20 years after zone designation or until 90 percent of the zone's facilities and infrastructure are complete, whichever occurs first. *See* TEX. WATER CODE § 26.179(i). Thus, under the statute, if a city does not annex under subsection (i), the zone and the landowners' powers in the zone last indefinitely. This is contrary to the time limits found in other regulatory schemes. *See* TEX. WATER CODE § 26.029 ("In each permit, the commission shall prescribe the conditions on which it is issued, including the duration of the permit."); 30 TEX. ADMIN. CODE § 213.4(h) ("[A]pproval of an Edwards Aquifer protection plan will expire two years after the date of initial issuance, unless prior to the expiration date, substantial construction related to the approved plan has commenced."). Therefore, this factor also weighs against the delegation.

7. Qualifications or Training

Section 26.179 does not require landowners to possess any special qualifications or training in land use planning, water quality management, or public health, safety, and welfare management. Therefore, ordinarily, this factor would weigh against the delegation. Nevertheless, the statute does require landowners to hire registered professional engineers to review their water quality plans and amendments. Accordingly, although the statute does not require the delegate to have relevant qualifications or training, it requires the delegate to hire a professional who does. Because engineers have a professional obligation beyond their employers' self-interest, requiring their review makes it more likely that landowners will achieve section 26.179's water quality objectives than would requiring the landowners themselves to have engineering expertise.

Specifically, the statute requires that a professional engineer certify that a landowner's water quality plan achieves one of section 26.179's standards, either maintaining background levels of water quality or retaining rainfall. *See* TEX. WATER CODE § 26.179(g). Further, in zones purporting to maintain background levels of water quality, if data on background levels are unavailable, an engineer must calculate and certify the background levels to maintain. *See* TEX. WATER CODE § 26.179(b). And, a professional engineer must acknowledge that the landowner's subdivision plat complies with the water quality plan. *See* TEX. WATER CODE § 26.179(j)(2). Therefore, the statute provides a check on the landowner's discretion in formulating a water quality plan and a subdivision plat to comply with that plan.

In contrast, neither the engineer nor any other party with qualifications or training has *any* role in the landowner's decisions about which municipal regulations the landowner's water quality

and land use plans will comply with and are therefore enforceable on its property.

Therefore, we conclude that this seventh factor weighs neither for nor against the delegation.

8. Sufficiency of Legislative Standards to Guide Delegates

This last factor weighs neither for nor against the delegation. Section 26.179 provides fairly detailed statutory standards to guide landowners in formulating their initial water quality plans. Landowners are given two broad standards for their water quality plans -- maintain background levels of water quality or retain the first 1.5 inches of rainfall from developed areas. *See* TEX. WATER CODE § 26.179(a). Retaining the first 1.5 inches of rainfall from developed areas is adequately specific, and the standards on determining and maintaining background levels are fairly specific. *See* TEX. WATER CODE § 26.179(a), (b). Further, the statute requires that development in the zones comply with all existing state and TNRCC water quality regulations and additional state regulations designed to comply with mandatory federal water quality standards. *See* TEX. WATER CODE § 26.179(k).

But section 26.179 provides little guidance on what to do if background water quality levels are not maintained. The statute simply directs the landowner to modify the plan for future phases of development and current operational and maintenance practices “to the extent reasonably feasible and practical.” TEX. WATER CODE § 26.179(b). There is no time limit for submitting proposed modifications to the TNRCC, and for landowners with 1,000 acres or more, the modifications apply to zone activities during TNRCC review and even during the appeal of a TNRCC denial of a modification. *See* TEX. WATER CODE § 26.179(g). Further, as more development occurs, needed modifications become less feasible and practical. This standard is thus insufficient to guide

landowners in modifying their plans to comply with section 26.179's requirements or the TNRCC in reviewing modifications to plans.

In *Proctor*, this Court held that a delegation of authority to private entities to select “qualified neutral arbitrators” to hear civil service commission appeals provided adequate guidance. *Proctor*, 972 S.W.2d at 738. In that case, however, the assessment of qualifications was uniquely within the delegate’s expertise, and the term “neutral” was sufficiently specific to reflect legislative intent. Moreover, in *Proctor*, the authority delegated was narrow -- to forward names of potential arbitrators for selection. The criteria “qualified” and “neutral” were well-suited for this narrow purpose. This contrasts starkly with the delegation here, in which the elastic standards “reasonably feasible and practical” provide little guidance to the landowners in exercising their relatively broad authority.

Similarly, section 26.179 does not provide sufficient standards to guide the landowners in deciding which municipal regulations can be enforced on their property. Landowners can craft a land use or water quality plan without regard to municipal regulations. Those regulations that 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,” are then not enforceable on the landowner’s property. TEX. WATER CODE § 26.179(i) (emphasis added). This seems to allow the landowners to exempt themselves from the enforcement of municipal laws for any reason as long as it is somehow related to their water quality and land use plans.

This last factor weighs neither for nor against the delegation. But the *Boll Weevil* factors as a

whole weigh against the constitutionality of delegation. Therefore, we conclude that section 26.179 of the Water Code is an unconstitutional delegation of legislative power to private landowners. We need not consider the additional grounds in the cross-motions for summary judgment. *See Doe*, 915 S.W.2d at 473.

IV. ATTORNEY'S FEES

We conclude that the trial court did not abuse its discretion in denying the Landowners' claim for attorney's fees. Under the Texas Uniform Declaratory Judgment Act, the trial court has discretion in awarding attorney's fees "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009; *see also Barshop*, 925 S.W.2d at 637. We affirm the trial court's judgment denying the Landowners' claims for attorney's fees.

V. CONCLUSION

We hold that section 26.179 of the Texas Water Code is an unconstitutional delegation of legislative power to private landowners. We also hold that the trial court did not abuse its discretion in denying the Landowners' claims for attorney's fees. Accordingly, we affirm the trial court's judgment.

James A. Baker, Justice

OPINION DELIVERED: June 15, 2000