

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

I strongly dissent from what the Court has wrought today. The importance of this case to private property rights and to the separation of powers between the judicial and legislative branches of government cannot be overstated. The Legislature is *forbidden by the Texas Constitution*, the Court says, from allowing property owners to make decisions about how they use and develop their own land. While the Constitution certainly permits the Legislature to enact laws that preserve and conserve the State's natural resources, there is nothing in the Constitution that requires the Legislature to exercise that power in any particular manner. How the Legislature chooses to regulate is left to the Legislature, not this Court. Our Constitution plainly states that in preserving and conserving our natural resources, "the Legislature shall pass all such laws as may be appropriate thereto." TEX. CONST. art. XVI, § 59(a). Instead of seeking to uphold the laws that the Legislature has passed toward that end, the Court has seized upon the rarely used nondelegation doctrine to

claim constitutional authority for an unprecedented restriction of the Legislature's power and an equally unprecedented restriction on private property rights.

The Court's holding today raises profoundly disturbing questions. Does the way in which the Legislature regulates water quality on private property in rural areas unconstitutionally delegate legislative powers to private property owners? Does the Legislature's regulation of water quality in suburban areas that are outside a city's extraterritorial jurisdiction amount to an unconstitutional delegation? The answer to these questions should be no, and when the Court's opinion is examined with that in mind, the dearth of logic in the Court's decision is apparent.

I am at a loss to understand what is driving the Court's opinion, since it clearly is not reasoned decision-making. I know only that the Court today exercises raw power to override the will of the Legislature and of the people of Texas. The Court strikes a severe blow to private property rights and usurps authority that is reserved to another branch of government—the Legislature. If the Court has any intention of applying the holdings in this case to future cases, the Court will impair all manner of property rights, and hamstring the Legislature's ability to function as the Texas Constitution and the people of Texas intend that it should.

This case should have been resolved by applying two straightforward principles of law. The first is that it is not an unconstitutional delegation to restore to private landowners in a city's extraterritorial jurisdiction property rights that other landowners across the state enjoy. The second is that the City of Austin had authority to regulate within its ETJ only because the Legislature granted it that authority. What the Legislature grants, it may take away from its own subdivisions.

The Water Code provisions at issue apply to the ETJs of certain cities.¹ The Court spends a considerable amount of time characterizing these provisions. I include them in Appendix A so that readers can see for themselves what the Code provisions say.

The Court does not and cannot dispute that the Legislature's purpose in promulgating these statutes was to balance several considerations, chief among them being the need to maintain water quality and the desire not to unduly hinder economic development in this State. *See* TEX. WATER CODE § 26.003.² The Legislature enacted section 26.179 of the Water Code because it concluded that at least one city, namely Austin, had abused the authority the Legislature had given it under section 26.177³ to regulate water pollution within its ETJ, and that other cities could do the same. By passing section 26.179,⁴ the Legislature restored to landowners some of the freedom from regulation that they enjoyed before their land was engulfed by a city's ETJ.

Briefly summarized, the Legislature gave large landowners within certain cities' ETJs an election. Owners of at least 500 contiguous acres of land in those ETJs could decide either to continue to abide by the city's water quality ordinances adopted under section 26.177, or meet one of two different state-mandated water quality standards under section 26.179. The first state-granted option was to maintain background levels of water quality in waterways, and the second was to capture and retain the first 1.5 inches of rainfall from developed areas. *See id.* § 26.179(a). Section 26.179 and regulations promulgated under it by the Texas Natural Resources Conservation

¹ I, like the Court, cite the 1995 version of the Water Code unless otherwise indicated. The 1999 amendments to the Water Code do not apply to this case.

² *See infra* Appendix A.

³ *See infra* Appendix A.

⁴ *See infra* Appendix A. The trial court held that section 26.179 was unconstitutional.

Commission set forth specific directions as to how these water quality levels were to be achieved and verified. *See id.*; 30 TEX. ADMIN. CODE §§ 216.1-.11. (1996).

The Court concedes, as it must, that in addition to the requirements of section 26.179, landowners are required to meet all other then-existing state water quality regulations as well as all future regulations necessary to comply with federal standards, and that landowners are subject to the TNRCC's power to enforce those regulations. *See* ___ S.W.3d at ___. Thus, landowners within an affected city's ETJ are subject to *more* state regulation than are landowners just a few feet outside an ETJ and rural landowners all across Texas.

The question, then, concerning landowners within *and outside* cities' ETJs is whether the State's scheme of regulating water quality amounts to an unconstitutional delegation of legislative power. I turn to that question.

II

The Court's opinion focuses extensively on the types of city ordinances that would no longer apply within an ETJ if a landowner elected to create a water quality protection zone and to comply with State as opposed to city water quality standards. *See, e.g.*, ___ S.W.3d at ___. Under section 26.179(i), the Legislature prohibited a city from acting within its ETJ to abate nuisances, control pollution, or enforce any environmental regulations that were inconsistent with a land use and water quality plan filed by a landowner in connection with a water quality protection zone. *See* TEX. WATER CODE § 26.179(i). And the Legislature prohibited a city from annexing land in such a zone until the earlier of twenty years from the date the zone is designated or when at least ninety percent of all facilities and infrastructure described in the water quality plan for the zone have been completed. *See id.*

The Court finds these aspects of section 26.179 particularly offensive. Yet a city cannot enforce any of its ordinances even one yard beyond its ETJ. Does this mean that landowners just outside a city's ETJ have been delegated legislative power because they may use their land free from regulation by a city? Obviously, the answer is no. The vast majority of land in Texas lies outside the boundaries of a city's ETJ. It is ludicrous to suggest that, since there are no regulations comparable to city nuisance and environmental regulations in rural areas or suburban areas outside ETJs, the Legislature has unconstitutionally allowed landowners to develop their property free from this type of governmental oversight.

The Court also totally ignores the fact that a city could not regulate water quality within its ETJ *at all* unless the Legislature gave it that authority. It is not an unconstitutional delegation when the Legislature restores landowners within a city's ETJ to the same status as those outside a city's ETJ. Under section 26.179, the Legislature simply returned to landowners within an ETJ rights that other landowners all across Texas enjoy.

The rhetoric that is laced throughout the Court's opinion, such as the statement that "landowners' power to exempt themselves from the enforcement of municipal regulations is also a legislative power," __ S.W.3d at __, is no substitute for sound analysis of fundamental legal principles and concepts. The Court elevates a city's power to regulate over that of the State. This is indefensible. If the State disapproves of regulations that cities have extended to their ETJs, the State may abolish those regulations or even abolish the ETJs in their entirety. It follows as surely as night follows day that a State may therefore release landowners in an ETJ from the grip of city regulation without unconstitutionally delegating legislative power.

The provision in the Texas Constitution that prohibits the Legislature from delegating its legislative powers to private citizens is Article III, Section 1.⁵ See *Proctor v. Andrews*, 972 S.W.2d 729, 732-33 (Tex. 1998). Historically, what private property owners have chosen to do with their own land has not been a “legislative power.”

In 1917, the Texas Constitution was amended to provide that the preservation and conservation of natural resources, including water, were “public rights and duties” and that “the Legislature shall pass all such laws as may be appropriate thereto.” TEX. CONST. art. XVI, § 59(a). This provision does not strip away private property owners’ rights to decide how to develop their land. It only directs the Legislature to pass “all such laws as may be appropriate” to preserve and conserve water. *Id.* Accordingly, landowners retain the right to make decisions about the development of their own property, subject to laws that the Legislature may pass regarding conservation and preservation of water. A private landowner’s decision about how to develop property does not become the exercise of “legislative power” within the meaning of Article III, Section 1 by virtue of Article XVI, Section 59.

The Court’s quarrel with the Legislature is, at bottom, not a question of delegation, but a question of whether, in the Court’s view, the laws that the Legislature has passed are “appropriate” to preserve and conserve water. *Id.* The Court has overstepped constitutionally prescribed

⁵ The Texas Constitution provides:

1. Senate and House of Representatives

Sec. 1. The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled “The Legislature of the State of Texas.”

TEX. CONST. Art. III, § 1.

boundaries. It is for the Legislature to decide what laws are “appropriate” to conserve water. That is not a function of this or any other court.

The statutes under scrutiny in this case permit landowners to make decisions, within limits, about how to use *their own property*. The Court concedes that section 26.179 does not give landowners “power over the private property of others,” or “the power to apply the law to particular individuals other than themselves and their successors in interest.” ___ S.W.3d at __, __. The Court, however, struggles mightily to conjure up examples of how landowners’ use of their own land might *indirectly* affect third parties. See ___ S.W.3d at __. But those effects are no different from the effects that any use of land may have on a neighbor or on third parties tens or hundreds of miles away. The use of one’s own property does not implicate a delegation of legislative power. A delegation of legislative authority to private individuals or entities necessarily contemplates that those individuals or entities will have some direct say so over third parties. In cases that the Court cites regarding delegation, a private individual or group was empowered to directly control the actions or rights of another. See, e.g., *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997); *County of Fairfax v. Fleet Indus. Park L.P.*, 410 S.E.2d 669 (Va. 1991); *Bayside Timber Co. v. Board of Supervisors*, 97 Cal. Rptr. 431 (Cal. Ct. App. 1971). That is not what is at issue here.

The Court says that “[w]ater quality regulation is a legislative power.” ___ S.W.3d at __. I agree. But I disagree with the Court that the Legislature has delegated water quality regulation to landowners under section 26.179. It is the Legislature who has determined the water quality standards. A landowner who elects not to comply with city ordinances that cover water quality must meet the State’s standards. Specifically, a landowner must have a plan for maintaining background levels of water quality in waterways or maintaining the first 1.5 inches of rainfall from developed

areas. *See* TEX. WATER CODE § 26.179. Section 26.179 includes detailed requirements for maintaining background levels of water quality. *See id.* § 26.179(b). A landowner must also meet all then-existing state laws regarding water quality and all future state laws to the extent necessary to comply with federal law. *See id.* § 26.179(k), (m).

The Court insists that section 26.179 results in a delegation because 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.” ___ S.W.3d at ___. First, the *Legislature* has set forth the laws that must be followed within section 26.179 itself. The only matter left to a landowner is how he will physically capture the first 1.5 inches of rainfall or maintain background levels of water quality. Complying with the law is not the same as making the law. Second, nothing in section 26.179 gives landowners the power to make rules or regulations. Section 26.179 requires a landowner to submit a plan showing how it intends to meet the State-mandated water quality standards. That does not amount to giving landowners rule-making authority. But even if a water quality protection plan under section 26.179 could legitimately be characterized as imposing rules, to whom would those rules apply? As we have seen, the inescapable answer is that the plan only applies to the landowner who files it and his successors in interest. The Court concedes as well that section 26.179 does not give landowners any authority over the property of others. ___ S.W.3d at ___. Directing landowners to file and implement a water quality control plan that applies only to their own property does not amount to a delegation of legislative power.

The Legislature has determined the consequences if a landowner fails to meet the State-prescribed water quality standards. The Court obviously believes that those consequences are not severe enough. It extensively criticizes the Legislature’s scheme for regulating water quality,

apparently finding it too minimal. *See, e.g.*, __ S.W.3d at __. But that is not a call for this Court to make. The Legislature is empowered by the Texas Constitution to pass “all such laws as may be appropriate” to preserve and conserve water. TEX. CONST. art. XVI, § 59. The Legislature has done so. It has not delegated that responsibility to landowners. The Court cannot use its power to strike down legislation as unconstitutional simply because the Court does not think that the legislation goes far enough to maintain water quality in Austin, Texas.

IV

The Court’s determination to strike down water quality laws rather than trying to uphold them is apparent when it applies the *Boll Weevil* factors. I would not reach those factors because there has been no delegation here. But I think it is important to illuminate the shallowness and transparency of the Court’s reasoning in its discussion of these factors and the Court’s failure to abide by the longstanding common-law tenet that “[i]f under any possible state of facts an act would be constitutional, the courts are bound to presume such facts exist.” *Texas Workers’ Compensation Comm’n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995) (quoting *Corsicana Cotton Mills, Inc. v. Sheppard*, 71 S.W.2d 247, 250 (Tex. 1934)).

Although the Court concludes that the third and fifth *Boll Weevil* factors weigh in favor of finding the “delegation” constitutional, the Court finds that the remaining factors tip the scales the other way. First, the Court says, there is no meaningful governmental review. This is belied by the fact that the TNRCC has rejected landowners’ plans for a water quality protection zone under section 26.179 forty percent of the time. If the TNRCC is not providing meaningful review, why is it rejecting plans so frequently? Nevertheless, the Court is resolute in its failure to apply the well-established requirement for holding that a statute is unconstitutional on its face, namely, “that the statute, by its terms, *always* operates unconstitutionally.” *Garcia*, 893 S.W.2d at 518 (emphasis

added). How can the Court justify an ivory-tower pronouncement that this statute can never afford meaningful agency review when over in the agency offices meaningful review is actually happening, unless the Court has simply determined to say whatever it takes, true or not, to strike down this statute?

The Court also glosses over the fact that unless a zone has 1,000 or more acres, the plan cannot go into effect unless and until the TNRCC approves it. Then, the Court finds fault with the fact that the Legislature has placed the burden of proof on the TNRCC if an application is denied. Are we really prepared to say that the constitutionality of a statute turns on who has the burden of proof? Why should the State *not* have the burden of proof here? The State has the burden of proof when it seeks to restrict the exercise of rights such as those to life and liberty.

The Court's obsession with elevating city ordinances above state regulation also crops up again in its analysis of the adequacy of governmental regulation and in its analysis of the fourth and sixth *Boll Weevil* factors. *See* ___ S.W.3d at ___, ___, ___. But, as discussed above, the facts that the State rather than a city regulates, and that the State's regulations are less onerous than a city's, do not mean that the State has delegated its regulatory power to the private sector.

In analyzing the second *Boll Weevil* factor, the Court faults section 26.179 because it does not provide for public hearings to give third parties an opportunity to be heard and it does not give a right of appeal to third parties. *See* ___ S.W.3d at ___. When a landowner in rural West Texas, who is far from a city's ETJ, decides to subdivide and develop his property, is a hearing necessary so that neighbors or downstream water users can lodge complaints? If the Legislature does not provide some means for third parties to appeal a landowner's decision to subdivide and develop rural property, has the Legislature unconstitutionally delegated legislative power to the private sector? I submit that the answer to these questions is a resounding "no," and that the answer should

be the same for other property owners in this state, regardless of whether their land is located within a city's ETJ.

V

I fully join in JUSTICE ABBOTT'S dissent, including his analysis of the City's other constitutional challenges to section 26.179. Accordingly, I would reverse the trial court's judgment and render judgment that section 26.179 of the Texas Water Code is not unconstitutional for any of the reasons advanced by the City of Austin.

* * * * *

In sum, the Court says that landowners trapped within a city's ETJ are somehow on different constitutional footing than rural or even suburban landowners who are not in a city's limits or a city's ETJ. The State must, the Court says, impose extensive regulations in place of city ordinances or else the State has unconstitutionally delegated legislative authority. Because the Court's conclusion is so obviously flawed and because the Court's ruling is an impermissible incursion into the domain of the Legislature, I dissent.

Priscilla R. Owen
Justice

OPINION DELIVERED: June 15, 2000

Appendix A

1995 Texas Water Code Provisions

§ 26.003. Policy of This Subchapter

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; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.

§ 26.011. In General

Except as otherwise specifically provided, the commission shall administer the provisions of this chapter and shall establish the level of quality to be maintained in, and shall control the quality of, the water in this state as provided by this chapter. Waste discharges or impending waste discharges covered by the provisions of this chapter are subject to reasonable rules or orders adopted or issued by the commission in the public interest. The commission has the powers and duties specifically prescribed by this chapter and all other powers necessary or convenient to carry out its responsibilities. This chapter does not apply to discharges of oil covered under Chapter 40, Natural Resources Code.

§ 26.177. Water Pollution Control Duties of Cities

(a) Every city in this state having a population of 5,000 or more inhabitants shall, and any city of this state may, establish a water pollution control and abatement program for the city. The city shall employ or retain an adequate number of personnel on either a part-time or full-time basis as the needs and circumstances of the city may require, who by virtue of their training or experience are qualified to perform the water pollution control and abatement functions required to enable the city to carry out its duties and responsibilities under this section.

(b) The water pollution control and abatement program of a city shall encompass the entire city and, subject to Section 26.179 of this code, may include areas within its extraterritorial jurisdiction which in the judgment of the city should be included to enable the city to achieve the objectives of the city for the area within its territorial jurisdiction. The city shall include in the program the services and functions which, in the judgment of the city or as may be reasonably required by the commission, will provide effective water pollution control and abatement for the city, including the following services and functions:

(1) the development and maintenance of an inventory of all significant waste discharges into or adjacent to the water within the city and, where the city so elects, within the extraterritorial jurisdiction of the city, without regard to whether or not the discharges are authorized by the commission;

(2) the regular monitoring of all significant waste discharges included in the inventory prepared pursuant to Subdivision (1) of this subsection;

(3) the collecting of samples and the conducting of periodic inspections and tests of the waste discharges being monitored to determine whether the discharges are being conducted in compliance with this chapter and any applicable permits, orders, or rules of the commission, and whether they should be covered by a permit from the commission;

(4) in cooperation with the commission, a procedure for obtaining compliance by the waste dischargers being monitored, including where necessary the use of legal enforcement proceedings;

(5) the development and execution of reasonable and realistic plans for controlling and abating pollution or potential pollution resulting from generalized discharges of waste which are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater; and

(6) any additional services, functions, or other requirements as may be prescribed by commission rule.

(c) The water pollution control and abatement program required by Subsections (a) and (b) of this section must be submitted to the commission for review and approval. The commission may adopt rules providing the criteria for the establishment of those programs and the review and approval of those programs.

(d) Any person affected by any ruling, order, decision, ordinance, program, resolution, or other act of a city relating to water pollution control and abatement outside the corporate limits of such city adopted pursuant to this section or any other statutory authorization may appeal such action to the commission or district court. An appeal must be filed with the commission within 60 days of the enactment of the ruling, order, decision, ordinance, program, resolution, or act of the city. The issue on appeal is whether the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality. The commission or district court may overturn or modify the action of the city. If an appeal is taken from a commission ruling, the commission ruling shall be in effect for all purposes until final disposition is made by a court of competent jurisdiction so as not to delay any permit approvals.

(e) The commission shall adopt and assess reasonable and necessary fees adequate to recover the costs of the commission in administering this section.

§ 26.179. Nonpoint Source Water Pollution Control Programs of Certain Municipalities

(a) In this section, “water quality protection” may be achieved by:

(1) maintaining background levels of water quality in waterways; or

(2) capturing and retaining the first 1.5 inches of rainfall from developed areas.

(b) For the purpose of Subsection (a)(1), “maintaining background levels of water quality in waterways” means maintaining background levels of water quality in waterways comparable to those levels which existed prior to new development as measured by the following constituents: total suspended solids, total phosphorus, total nitrogen, and chemical and biochemical oxygen demand. Background levels shall be established either from sufficient data collected from water quality monitoring at one or more sites located within the area designated as a water quality protection zone or, if such data are unavailable, from calculations performed and certified by a registered professional engineer utilizing the concepts and data from the National Urban Runoff Program (NURP) Study or other studies approved by the Texas Natural Resource Conservation Commission (commission) for the constituents resulting from average annual runoff, until such data collected at the site are available. Background levels for undeveloped sites shall be verified based on monitoring results from other areas of property within the zone prior to its development. The monitoring shall consist of a minimum of one stage (flow) composite sample for at least four storm events of one-half inch or more of rainfall that occur at least one month apart. Monitoring of the four constituents shall be determined by monitoring at four or more locations where runoff occurs. A minimum of four sample events per year for each location for rainfall events greater than one-half inch shall be taken. Monitoring shall occur for three consecutive years after each phase of development occurs within the Water Quality Protection Zone. Each new phase of development, including associated best management practices, will require monitoring for a three-year period. The results of the monitoring and a description of the best management practices being used throughout the zone shall be summarized in a technical report and submitted to the commission no later than April 1 of each calendar year during development of the property, although the commission may determine that monitoring is no longer required. The commission shall review the technical report. If the performance monitoring and best management practices indicate that background levels were not maintained during the previous year, the owner or developer of land within the water quality protection zone shall:

(1) modify water quality plans developed under this section for future phases of development in the water quality protection zone to the extent reasonably feasible and practical; and

(2) modify operational and maintenance practices in existing phases of the water quality protection zone to the extent reasonably feasible and practical.

Water quality monitoring shall not be required in areas using the methodology described by Subsection (a)(2).

(c) 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.

(d) The owner or owners of a contiguous tract of land in excess of 1,000 acres that is located within an area subject to this section may designate the tract as a “water quality protection zone.” Upon prior approval of the commission, the owner of a contiguous tract of land containing less than 1,000 acres, but not less than 500 acres, that is located within an area subject to this section may also designate the tract as a “water quality protection zone.” The tract shall be deemed contiguous if all of its parts are physically adjacent, without regard to easements, rights-of-way, roads, streambeds, and public or quasi-public land, or it is part of an integrated development under common ownership or control. 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.

(e) A water quality protection zone designated under this section shall be described by metes and bounds. The designation shall include a general description of the proposed land uses within the zone, 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.

(f) Creation of a water quality protection zone shall become immediately effective upon recordation of the designation in the deed records of the county in which the land is located. The designation shall be signed by the owner or owners of the land, and notice of such filing shall be given to the city clerk of the municipality within whose extraterritorial jurisdiction the zone is located and the clerk of the county in which the property is located.

(g) The water quality plan for a zone, including the determination of background levels of water quality, shall be signed and sealed by a registered professional engineer acknowledging that the plan is designed to achieve the water quality protection standard defined in this section. On recordation in the deed records, the water quality plan shall be submitted to and accepted by the commission for approval, and the commission shall accept and approve the plan unless the commission finds that implementation of the plan will not reasonably attain the water quality protection as defined in this section. A water quality plan may be amended from time to time on filing with the commission, and all such amendments shall be accepted by the commission unless there is a finding that the amendment will impair the attainment of water quality protection as defined in this section. The commission shall adopt and assess reasonable and necessary fees adequate to recover the costs of the commission in administering this section. The commission’s review and approval of a water quality plan shall be performed by the commission staff that is responsible for reviewing pollution abatement plans in the county where the zone is located. The review and approval of the plan shall be completed within 120 days of the date it is filed with the commission. A public hearing on the plan shall not be required, and acceptance, review, and approval of the water quality plan or water quality protection zone shall not be delayed pending the adoption of rules. The commission shall have the burden of proof for the denial of a plan or amendments to a plan, and any such denial shall be appealable to a court of competent jurisdiction. The water quality plan, or any amendment thereto, shall be effective upon recordation of the plan or the amendment in the deed records and shall apply during the period of review and approval by the commission or appeal of the denial of the plan or any amendment.

(h) The water quality plan for a zone shall be a covenant running with the land.

(i) A municipality may not enforce in a zone any of its 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 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.

(j) Subdivision plats within a water quality protection zone shall be approved by the municipality in whose extraterritorial jurisdiction the zone is located and the commissioners court of the county in which the zone is located if:

- (1) the plat complies with the subdivision design regulations of the county; and
- (2) the plat is acknowledged by a registered professional engineer stating that the plat is in compliance with the water quality plan within the water quality protection zone.

(k) A water quality protection zone implementing a water quality plan which meets the requirements of this section shall be presumed to satisfy all other state and local requirements for the protection of water quality; provided, however, that:

- (1) development in the zone shall comply with all state laws and commission rules regulating water quality which are in effect on the date the zoning is designated; and
- (2) nothing in this section 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 which apply to the watershed area of a surface lake or surface reservoir that impounds at least 4,000 acre-feet of water.

(l)(1) One or more of the provisions of this section may be waived by the owner or owners of property that is or becomes subject to an agreement entered into after the effective date of this Act between the owner or owners of land within the zone and the municipality. The agreement shall be in writing, and the parties may agree:

- (A) to guarantee continuation of the extraterritorial status of the zone and its immunity from annexation by the municipality for a period not to exceed 15 years after the effective date of the agreement;
- (B) to authorize certain land uses and development within the zone;
- (C) to authorize enforcement by the municipality of certain municipal land use and development regulations within the zone, in the same manner such regulations are enforced within the municipality's

boundaries, as may be agreed by the landowner and the municipality;

(D) to vary any watershed protection regulations;

(E) to authorize or restrict the creation of political subdivisions within the zone; and

(F) to such other terms and considerations the parties consider appropriate, including, but not limited to, the continuation of land uses and zoning after annexation of the zone, the provision of water and wastewater service to the property within the zone, and the waiver or conditional waiver of provisions of this section.

(2) An agreement under this section shall meet the requirements of and have the same force and effect as an agreement entered into pursuant to Section 42.046, Local Government Code.

(m) In addition to the requirements of Subsections (a)(1) and (a)(2), the commission may require and enforce additional water quality protection measures to comply with mandatory federal water quality requirements, standards, permit provisions, or regulations.

(n) This section does not apply to an area within the extraterritorial jurisdiction of a municipality with a population greater than 900,000 that has extended to the extraterritorial jurisdiction of the municipality an ordinance whose purpose is to prevent the pollution of an aquifer which is the sole or principal drinking water source for the municipality.