



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 14, 2020

The Honorable Eduardo Arredondo
Burnet County Attorney
220 South Pierce Street
Burnet, Texas 78611

Opinion No. KP-0333

Re: Whether a city ordinance requiring compliance with certain restrictive covenants before granting a building permit violates chapter 3000 of the Government Code (RQ-0340-KP)

Dear Mr. Arredondo:

On behalf of the City of Horseshoe Bay (the “City”), you ask whether a municipality may enact an ordinance that conditions receipt of a building permit on compliance with certain restrictive covenants where applicable.¹ You explain that “[n]umerous subdivisions exist in the City that have restrictive covenants that require construction plans (including elevations, landscaping and exterior materials) to be approved by an architectural control committee.” Request Letter at 1; *see also* TEX. PROP. CODE § 204.011(a) (recognizing architectural control committees). You further explain that the City would like to adopt the following ordinance:

Building Permit Application Requirements: An applicant seeking a building permit for a project located on property subject to restrictive covenants that require architectural control committee approval, may only submit plans to the City that have been submitted to and approved by the applicable architectural control committee stating that the plans comply with the restrictive covenants for the subdivision where the property is located.

Request Letter at 2. You question whether this proposed ordinance would, if adopted, conflict with recent legislation limiting certain governmental actions concerning residential and commercial real estate. *Id.*

Before addressing your question, we consider the methods for enforcing restrictive covenants. Restrictive covenants are contractual arrangements between private parties. *Ski Masters of Tex., LLC v. Heinemeyer*, 269 S.W.3d 662, 668 (Tex. App.—San Antonio 2008, no

¹See Letter from Honorable Eduardo Arredondo, Burnet Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 2 (Mar. 20, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0340KP.pdf>.

pet.). They are generally enforced by the contracting parties, those in direct privity of estate with the contracting parties, or, in some instances, property owners in the same subdivision and subject to the same restrictive covenants. *See id.*; *see also* TEX. PROP. CODE § 202.004(b) (authorizing a property owners' association to initiate, defend, or intervene in litigation to enforce a restrictive covenant). However, the Legislature also granted some local officials express authority to enforce restrictive covenants in certain instances. *See, e.g.,* TEX. LOC. GOV'T CODE § 212.153(a) (authorizing certain municipalities to enforce a restriction "contained or incorporated by reference in a properly recorded plan, plat, or other instrument that affects a subdivision located inside the boundaries of the municipality"); TEX. PROP. CODE § 203.003(a) (authorizing county attorneys to sue to enforce a restrictive covenant "contained or incorporated by reference in a properly recorded plan, plat, replat, or other instrument affecting a real property subdivision located in the county"); TEX. WATER CODE § 54.237(b) (authorizing a municipal utility district to enforce restrictive covenants in certain circumstances); *see also Young v. City of Houston*, 756 S.W.2d 813, 815 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (concluding that city's enforcement of private deed restrictions served a public purpose and, thus, did not violate state constitutional prohibition against grant of public money or other thing of value in aid of individuals enforcing private contract).

Against this background, we review the recent legislation about which you ask. The Eighty-sixth Legislature enacted House Bill 2439 to limit certain governmental regulation over residential and commercial real estate.² You ask about Government Code subsection 3000.002(a)(1), adopted through House Bill 2439, which prohibits entities from restricting the use or installation of building products or materials that are approved for use by a recent national model code:

Notwithstanding any other law . . . , a governmental entity³ may not adopt or enforce a rule, charter provision, ordinance, order, building code, or other regulation that . . . prohibits or limits, directly or indirectly, the use or installation of a building product or material in the construction, renovation, maintenance, or other alteration of a residential or commercial building if the building product or material is approved for use by a national model code published within the last three code cycles that applies to the construction, renovation, maintenance, or other alteration of the building

TEX. GOV'T CODE § 3000.002(a)(1) (footnote added); *see* Request Letter at 1. When the Legislature uses the phrase "notwithstanding any other law," courts treat such language as an unambiguous conflict-of-laws provision. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 413–14 (Tex. 2011). Thus, insofar as subsection 3000.002 conflicts with other law, it will prevail to the extent of the conflict.

²*See* Act of May 23, 2019, 86th Leg., R.S., ch. 1289, 2019 Tex. Gen. Laws 3805, 3805–08.

³"Governmental entity" is defined to include, among others, "a political subdivision of this state." TEX. GOV'T CODE § 2007.002(1)(B); *see also id.* § 3000.001 (defining "governmental entity" for purposes of chapter 3000 by reference to section 2007.002 of the Government Code).

The language of the proposed ordinance you provide does not itself adopt a regulation concerning the use or installation of specific building products or materials. Thus, on its face, the proposed ordinance does not appear to conflict with subsection 3000.002(a)(1). However, the purpose of the proposed ordinance appears to be to ensure compliance with rules imposed by an architectural control committee, which could in turn address building products and materials. To the extent that an architectural control committee prohibits or limits the use of certain building products or materials approved for use by a national model code, the proposed ordinance would result in the City indirectly prohibiting use of those same products or materials, in conflict with subsection 3000.002(a)(1). Whether the proposed ordinance would violate subsection 3000.002(a)(1) in a particular instance will depend on the underlying facts surrounding the architectural review committee at issue and the requirements it imposes related to building products and materials.⁴

Apart from the question of section 3000.002's application to the proposed ordinance, you also ask more generally whether the City may enforce restrictive covenants under Local Government Code section 212.151 "if (i) the City does not have a population of 1.5 million, and (ii) the City does have zoning ordinances." Request Letter at 2. Chapter 212, subchapter F, of the Local Government Code addresses municipal enforcement of land use restrictions in plats and other instruments. *See* TEX. LOC. GOV'T CODE §§ 212.151–.158. That subchapter provides express authority for certain municipalities to sue "to enjoin or abate a violation of a restriction contained or incorporated by reference in a properly recorded plan, plat, or other instrument that affects a subdivision located inside the boundaries of the municipality." *Id.* § 212.153(a). In essence, it establishes standing for municipalities to sue to enforce restrictive covenants when such standing would not otherwise exist. However, section 212.151 limits the applicability of the subchapter:

This subchapter applies only to a municipality with a population of 1.5 million or more that passes an ordinance that requires uniform application and enforcement of this subchapter with regard to all property and residents or to a municipality that does not have zoning ordinances and passes an ordinance that requires uniform application and enforcement of this subchapter with regard to all property and residents.

Id. § 212.151. You explain that the City does not have a population of 1.5 million and that it has adopted zoning ordinances.⁵ Request Letter at 2; *see also* HORSESHOE BAY, TEX., CODE OF

⁴Our conclusion does not limit the authority of an architectural control committee itself to enforce limitations on the use or installation of a building product or material. Subsection 3000.002(a)(1) restricts actions of a "governmental entity." TEX. GOV'T CODE § 3000.002(a)(1). It does not address or restrict actions taken by a private organization, such as an architectural control committee, with authority deriving from private contractual agreements between property owners.

⁵The City of Horseshoe Bay had a population of 3418 according to the 2010 census. *See* U.S. CENSUS BUREAU, TEXAS: 2010, *Population and Housing Unit Counts* 96, 138 (Sept. 2012), <https://www.census.gov/prod/cen2010/cph-2-45.pdf>.

ORDINANCES ch. 14, §§ 14.02.001–14.02.541 (2020) (collectively “Zoning Ordinance”).⁶ Accordingly, subchapter F does not apply to the City, and the City may not file suit to enforce restrictive covenants on private property under the specific grant of authority in chapter 212, subchapter F.

However, the City is a home-rule city.⁷ “Home-rule cities possess the power of self-government and look to the Legislature not for grants of authority, but only for limitations on their authority.” *BCCA App. Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016); *see also* TEX. LOC. GOV’T CODE § 51.072(b) (“The grant of powers to the municipality by this code does not prevent, by implication or otherwise, the municipality from exercising the authority incident to local self-government.”). Thus, the City may possess authority to enforce restrictive covenants through other means, as long as the law does not prohibit enforcement of the types of covenants at issue. Accordingly, subsection 3000.002(a)(1) of the Government Code prohibits a City from enforcing restrictive covenants related to the use of certain building products or materials, but the City may possess authority to enforce other types of covenants.

⁶See <https://franklinlegal.net/franklin/Z2.Browser2.html?showset=horseshoebayset>.

⁷See <https://www.horseshoe-bay-tx.gov/466/How-the-City-Works>.

S U M M A R Y

Subsection 3000.002(a)(1) of the Government Code prohibits a governmental entity from adopting or enforcing a rule that prohibits or limits, directly or indirectly, the use or installation of a building product or material in the construction of a residential or commercial building if the building product or material is approved for use by a national model code published within the last three code cycles.

An ordinance that conditions receipt of a building permit on architectural control committee approval could conflict with subsection 3000.002(a)(1) to the extent that the architectural control committee prohibits or limits the use of certain building products or materials approved for use by a national model code.

Chapter 212, subchapter F of the Local Government Code does not apply to the City of Horseshoe Bay, and the City may not file suit to enforce restrictive covenants under the specific grant of authority in that subchapter. However, as a home-rule municipality, the City may possess authority to enforce restrictive covenants through other means, as long as the law does not prohibit enforcement of the types of covenants at issue.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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