

LEGISLATIVE BRANCH—OF WATER AND WEEVILS: THE TEXAS SUPREME COURT FURTHER RESTRICTS THE STATE LEGISLATURE'S POWER TO DELEGATE TO PRIVATE ENTITIES. *FM Properties v. City of Austin*, 22 S.W.3d 868 (Tex. 2000).

I. INTRODUCTION

In *FM Properties v. City of Austin*,<sup>1</sup> the Texas Supreme Court overturned an amendment to the Texas Water Code that allowed private landowners in a city's extraterritorial jurisdiction to exempt themselves from municipal water quality standards and replace them with water quality standards of their own making.<sup>2</sup> The court reasoned that the statute delegated legislative power to a private entity that had a pecuniary interest contrary to the public welfare,<sup>3</sup> in violation of article II, section 1, and article III, section 1 of the Texas Constitution.<sup>4</sup> The court's decision rested upon its relatively new test for determining the constitutionality of delegations of legislative power to private entities.<sup>5</sup> The decision and the surrounding political controversy illustrate the usefulness of analyzing private delegations differently from public delegations and the need for strict standards in analyzing the constitutionality of private delegations.

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1. *FM Props. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000).

2. TEX. WATER CODE ANN. § 26.179 (Vernon 2000).

3. *FM Props.*, 22 S.W.3d at 877. The court stated: "[S]ection 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." *Id.* at 876-77.

4. Article II, section 1 of the Texas Constitution states:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

Article III, section 1 of the Texas Constitution states: "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. Although the U.S. Constitution does not explicitly provide for a separation of powers, many state constitutions include such a provision.

5. *Id.* at 874-75.

## II. STATEMENT OF THE CASE

The source of the dispute in the *FM Properties* litigation was the Texas Legislature's enactment of section 26.179 of the Texas Water Code in 1995.<sup>6</sup> Section 26.179 applied to contiguous tracts of land no smaller than 500 acres that were located within the extraterritorial jurisdictions ("ETJ") of "certain municipalities."<sup>7</sup> The statute exempted the owners of such lands from a municipality's water quality standards by allowing them to designate their property as a "water quality protection zone."<sup>8</sup> In a "water quality protection zone," the various applicable state and federal water quality regulations would be enforced, but the governing municipality's water quality standards would be replaced with a water quality plan devised by the landowner.<sup>9</sup> Such a plan would be subject only to the requirements enumerated in section 26.179.<sup>10</sup>

According to section 26.179(d), the objective of the statute was 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."<sup>11</sup> The statute's legislative history confirms that the statute was enacted to "relieve large landowners and developers in certain cities' ETJs from 'regulatory chaos.'"<sup>12</sup>

According to the requirements of section 26.179, owners of between 500 and 1,000 acres of land were required to gain the approval of the Texas Natural Resource Conservation Commission (TNRCC) before designating their property as a water quality protection zone.<sup>13</sup> Owners of tracts of land greater than 1,000 acres were not required to seek the pre-approval of TNRCC.<sup>14</sup>

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6. *Id.* at 870.

7. *Id.* (referring to "certain municipalities" as cities that fit the demographic and political characteristics of Austin, Texas).

8. *Id.*

9. *Id.* at 870-71.

10. *Id.* at 872.

11. *Id.* at 870; see also TEX. WATER CODE ANN. § 26.179(d) (Vernon 2000).

12. *FM Props.*, 22 S.W.3d at 870; see also *Hearings on S.B. 1017 Before the Senate Comm. on Natural Resources*, 74<sup>th</sup> Leg., R.S. (Apr. 4 1995); *Hearings on H.B. 2471 Before the House Natural Resources Comm.*, 74<sup>th</sup> Leg., R.S. (Apr. 10, 1995).

13. *FM Props.*, 22 S.W.3d at 871; see also § 26.179(d).

14. *FM Props.*, 22 S.W.3d at 871; see also § 26.179(d). Most of the landowners affected by the ordinance owned plots larger than 1,000 acres.

Once a zone was designated, section 26.179 allowed the landowner to create a plan that pursued one of two objectives.<sup>15</sup> The first objective required landowners "to maintain background levels of water quality in waterways."<sup>16</sup> Landowners choosing this option were required to determine the existing background water quality before the land's development commenced.<sup>17</sup> In the three years following the completion of each phase of the development of the property, the landowner was required to monitor background levels in waterways and to submit an annual report to the TNRCC.<sup>18</sup> If the TNRCC found that the landowner's plan had failed to maintain adequate background levels, the landowner would be required to amend his existing water quality plan for the future phases of development, and make the developed areas conform to the amended plan "to the extent . . . reasonably feasible and practical."<sup>19</sup>

The second objective a landowner could pursue to maintain water quality under section 26.179 was to "capture and retain the first 1.5 inches of rainfall from the developed areas."<sup>20</sup> In contrast to the relatively detailed monitoring requirements of the "maintaining background levels" option, water quality plans with the objective of capturing and maintaining the first 1.5 inches of rainfall did not require any monitoring by TNRCC at all.<sup>21</sup>

Regardless of the objective selected by the landowner as a goal for a water quality plan under section 26.179, any plan submitted or any amendment to a plan was required to be reviewed by the TNRCC.<sup>22</sup> The TNRCC was not authorized to hold public hearings during the course of its review of a plan, nor was it authorized to deny a plan or amendment unless the proposed plan would impair either of the objectives enumerated in the statute.<sup>23</sup> In the event of rejection by the TNRCC, the landowner had the right to appeal the action in a "court of competent jurisdiction," in which the burden of proof would be upon the TNRCC. The plan or amendment would remain in effect until the resolution of the dispute.<sup>24</sup>

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15. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179.
  16. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(a)(1),(2).
  17. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(b).
  18. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(b).
  19. *FM Props.*, 22 S.W.3d at 871-72; *see also* § 26.179(b)(1),(2).
  20. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(a)(2).
  21. *FM Props.*, 22 S.W.3d at 872; *see also* § 26.179(b).
  22. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(h).
  23. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(h).
  24. *FM Props.*, 22 S.W.3d at 871; *see also* § 26.179(h).

Finally, section 26.179 prevented a municipality from collecting fees and exercising its powers of eminent domain.<sup>25</sup> Also, a municipality could not annex the zone until ninety percent of the structures described in the owner's water quality plan had been completed, or a period of twenty years had passed.<sup>26</sup>

Shortly after the enactment of section 26.179, a number of landowners whose property lay within the ETJ of the City of Austin designated their properties as water quality protection zones.<sup>27</sup> The City of Austin sued the landowners, claiming that section 26.179 violated the Texas Constitution for a number of reasons, the most prominent of which was that the statute constituted an unlawful delegation of legislative authority in violation of article II, section 1 and article III, section 1 of the Texas Constitution.<sup>28</sup> The two articles explicitly provide for a separation of powers among the three branches of government, and that the legislative power should reside in the legislative branch. The landowners counterclaimed, seeking a pronouncement that section 26.179 was constitutional.<sup>29</sup>

The trial court declared section 26.179 unconstitutional, but did not articulate the reasoning behind its opinion.<sup>30</sup> The trial court also enjoined the landowners from designating new zones, or adding land to existing zones.<sup>31</sup> The landowners then made a direct appeal to the Supreme Court of Texas.<sup>32</sup>

### III. HISTORY OF THE AREA

#### A. *The United States Supreme Court's Analysis of Delegation to Private Parties*

The United States Supreme Court's treatment of delegations to private parties has evolved from a strict standard to a more relaxed posture. Among the first cases that involved the delegation of legislative authority to private parties was *Carter v. Carter Coal Co.*,<sup>33</sup> which was decided during the New Deal era. *Carter Coal* involved a federal statute that required coal mining

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25. *FM Props.*, 22 S.W.3d at 872; see also § 26.179(i).

26. *FM Props.*, 22 S.W.3d at 872; see also § 26.179(i).

27. *FM Props.*, 22 S.W.3d at 872.

28. *Id.*; see *supra* note 3.

29. *FM Props.*, 22 S.W.3d at 872.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

companies to pay either a fifteen percent tax on their coal, or to become members of a "Bituminous Coal Code" ("Code").<sup>34</sup> The Code specified that the wage contracts adopted by at least two thirds of the producers of bituminous coal would be binding upon all producers of bituminous coal.<sup>35</sup> The statute also provided that government officials were to have no input in determining the wages.<sup>36</sup> The Court struck down the statute, reasoning that the statute delegated power to private actors.<sup>37</sup> Writing for the majority, Justice Sutherland stated: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an unofficial body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."<sup>38</sup>

*Carter Coal* was the last time the Court struck down legislation under the nondelegation doctrine.<sup>39</sup> Three years later, the Court upheld a statutory scheme similar to the one struck down in *Carter Coal*,<sup>40</sup> and has regularly upheld numerous delegations of legislative authority to both public and semi-private entities.<sup>41</sup>

#### *B. The Supreme Court of Texas's Analysis of Delegation to Private Parties*

Although the United States Supreme Court has regularly upheld delegations of legislative power to both governmental and non-governmental entities, decisions in state courts have dealt with the issue differently.<sup>42</sup> In contrast to the federal judiciary's relatively liberal view of delegation, the striking down of delegations in state courts has not been unheard of, and Texas is no exception.<sup>43</sup> Another difference between nondelegation doctrine in state and federal jurisdictions is that the United States Constitution does

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34. *Id.* at 280-81.

35. *Id.* at 283-84.

36. *Id.* at 282-83.

37. *Id.* at 311.

38. *Id.*

39. Brian M. Jorgensen, Comment, *Delegations in Danger: The Texas Supreme Court Reinigorates the Nondelegation Doctrine by Holding that the Official Cotton Growers' Boll Weevil Eradication Foundation Violated the Separation of Powers Clause of the Texas Constitution: Texas Boll Weevil Eradication Foundation, Inc., v. Lewellen*, 952 S.W.2d 454 (Tex. 1997), 29 TEX. TECH. L. REV. 213 (1998).

40. See *Currin v. Wallace*, 306 U.S. 1 (1939).

41. See Jorgensen, *supra* note 39, at 220.

42. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 675 (3d ed. 1999).

43. See *id.*

not explicitly provide for the separation of legislative, executive and judicial powers. In contrast, many state constitutions, including the Texas Constitution, explicitly provide for the separation of powers. Article II, section 1 of the Texas Constitution is one example.<sup>44</sup>

The watershed case in the area of delegation of legislative power in Texas is the Supreme Court of Texas's decision in *Housing Authority of Dallas v. Higginbotham*,<sup>45</sup> which established specific categories that would be considered constitutional delegations to public entities.<sup>46</sup> The categories included:

cases where the legislature delegated authority because it was more practical and efficient . . . where the legislature gave an administrative body the power to determine situations where the existing law may operate . . . where the legislature gave an administrative body the power to determine situations where the existing law may operate . . . where the legislature delegated the power to enforce the legislative policies and standards laid down in the statutes to an entity . . . and where the legislature delegated the authority to fix rates and cases where the legislature delegated the power of eminent domain.<sup>47</sup>

Cases decided since *Higginbotham* have generally held that delegations to public entities were permissible so long as the legislature provided "reasonable standards to guide the entity as to which the powers are delegated."<sup>48</sup> Under that standard, the court has become increasingly permissive of statutes delegating legislative power to public entities.<sup>49</sup>

In contrast to its treatment of delegations to public entities, the Supreme Court of Texas has followed an opposite path in its analysis of delegations to private entities. The court first addressed the problem in *Greene v. Robison*,<sup>50</sup> which was decided in 1928. *Greene* considered the constitutionality of the "Relinquishment Act," a statute that allowed landowners to lease the state owned oil and gas beneath their property and donate the proceeds to an education fund.<sup>51</sup> The statute directed the

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44. See *supra* note 3.

45. 143 S.W.2d 95 (Tex. Civ. App. 1940).

46. See Jorgensen, *supra* note 39, at 221 (citing *Higginbotham*, 143 S.W.2d at 87).

47. *Id.* at 222.

48. See *id.* at 225 (citing *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (1995)).

49. *Id.*

50. *Greene v. Robison*, 8 S.W.2d 655 (Tex. 1928).

51. Jorgensen, *supra* note 39, at 226.

landowners to execute the leases "upon such terms and conditions as such [private persons] may deem best," subject only to the statute's price provisions.<sup>52</sup> The *Greene* court upheld the statute but failed to establish a guiding principle of law.<sup>53</sup>

In 1992, the court upheld a delegation of legislative power to an organization of insurance companies in *Office of Public Insurance Counsel v. Texas Auto Insurance Plan*.<sup>54</sup> The court held the delegation constitutional because the legislative purpose was clearly discernible and thus provided an adequate safeguard against the arbitrary use of power.<sup>55</sup> In each of these cases, the court did not distinguish between private and public entities in its analysis.

### C. *The Boll Weevil Test*

In 1997, the court departed from its past practice and adopted a new test for analyzing delegations to private entities. In *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*,<sup>56</sup> the court considered the constitutionality of a delegation of legislative authority to a nonprofit organization devoted to the eradication of boll weevils among the state's cotton crop.<sup>57</sup> The statute authorized the foundation to designate "eradication zones" in which elections among the resident cotton farmers would be held.<sup>58</sup> If two-thirds of the farmers in the zone voted for such a designation, the foundation was authorized to impose a fee upon the farmers that would be used to eradicate boll weevils.<sup>59</sup> A dispute arose when the foundation incurred a debt of \$9,000,000, and ordered the farmers to provide the funds for its payment.<sup>60</sup> Another dispute arose when ten farmers who lived in a zone that had voted for designation sued the foundation on nondelegation grounds.<sup>61</sup> The two disputes were consolidated and eventually reached the Supreme Court of Texas.<sup>62</sup>

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52. *Id.* at 227.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997).

57. Jorgensen, *supra* note 39, at 229-30.

58. *Boll Weevil*, 952 S.W.2d at 457-58; *see also* Jorgensen, *supra* note 39, at 213-15.

59. *Boll Weevil*, 952 S.W.2d at 457; *see also* Jorgensen, *supra* note 39, at 213-15.

60. *Boll Weevil*, 952 S.W.2d at 460.

61. *Id.*; *see also* Jorgensen, *supra* note 39, at 215.

62. *Boll Weevil*, 952 S.W.2d at 460.

In the first part of its opinion, the court noted that a clear principle of law necessary for deciding the case was absent.<sup>63</sup> To solve the problem, the court created a test that was based upon a number of law review articles, one of which was written as early as 1937.<sup>64</sup>

The new test began by classifying the delegation as either "public" or "private."<sup>65</sup> This classification was significant because it represented the first time the court had made such a distinction.<sup>66</sup> Next, the court provided that if the delegation was considered to be "private," a unique test crafted specifically for private delegations would be applied.<sup>67</sup> The new test considered eight different 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 delegation also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her 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?<sup>68</sup>

The court applied the factors to the delegation of power to the Foundation, and concluded that delegation was unconstitutional under article II of the Texas Constitution.<sup>69</sup> The court also noted, "[t]he nondelegation doctrine should be used sparingly, when there is, in Justice Cardozo's memorable phrase, 'delegation running riot.'"<sup>70</sup>

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63. *Boll Weevil*, 952 S.W.2d at 466-70; see also Jorgensen, *supra* note 39, at 230-32.

64. *Boll Weevil*, 952 S.W.2d at 466, 468; see also Jorgensen, *supra* note 39, at 232.

65. *Boll Weevil*, 952 S.W.2d at 471; see also Jorgensen, *supra* note 39, at 232-33.

66. Jorgensen, *supra* note 39, at 245-46.

67. *Id.*

68. *Boll Weevil*, 952 S.W.2d at 472; see also Jorgensen, *supra* note 39, at 233.

69. *Boll Weevil*, 952 S.W.2d at 475.

70. *Id.* (quoting *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 553 (1935)).

A dissent by Justice Cornyn argued that the new distinction between public and private entities was unnecessary, and that the proper inquiry was whether or not the legislature had provided sufficient guidance.<sup>71</sup> Justice Cornyn also discussed the possible ramifications of the court's new test, arguing that the test made it more difficult for the Legislature to delegate power in situations where delegation was necessary and desirable.<sup>72</sup>

One commentator has suggested that the court's eight-pronged test enumerated in the *Boll Weevil* decision was "results oriented."<sup>73</sup> In *Boll Weevil*, the court dealt with the Texas cotton industry, which accounted for between one third and one quarter of the nation's production.<sup>74</sup> To reach a result that was in accordance with the economic well-being of the state, the court first sidestepped the large body of case law devoted to public delegation by distinguishing the delegation as "private."<sup>75</sup> Free of the constraints of prior case law, the court devised a cumbersome eight-pronged test that yielded the result it desired.<sup>76</sup> The "results oriented" theory is supported by the fact that the new test was "formalistic," whereas the Texas Supreme Court had traditionally followed a "functionalist" approach in its analysis of delegations.<sup>77</sup>

Since the court's unveiling of its new analysis for the assessment of private delegations in *Boll Weevil*, the court has employed the test in at least one other case. *Proctor v. Andrews*<sup>78</sup> involved a statute that delegated legislative authority to an private arbitration service to hear the appeals of public servants recommended for demotion.<sup>79</sup> The court employed the *Boll Weevil* test and concluded that the arbitration statute was constitutional under article III of the Texas Constitution, specifying that delegations of

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71. *Boll Weevil*, 952 S.W.2d at 494-95; see also Jorgensen, *supra* note 39, at 236-39.

72. *Boll Weevil*, 952 S.W.2d at 492.

73. See Jorgensen, *supra* note 39, at 239.

74. *Id.* at 213 (citing Robert Elder, Jr., *Disturbing the Peace: Boll Weevils and Big Bucks*, TEXAS LAWYER, Feb. 24, 1997).

75. *Id.* at 245.

76. *Id.*

77. *Id.* at 241-43. A "functionalist" approach to delegation grants the legislature greater discretion in delegating its authority. *Id.* at 242. Functionalism holds that placing formal requirements on delegations is inefficient because there are too many unforeseen circumstances for the legislature to anticipate. *Id.* Therefore, a functionalist standard for reviewing delegations would require only that the statute provide general guidelines and standards. *Id.* at 242-43. A "formalistic" approach to delegation would require a statute to explicitly limit an agency's discretion by providing a detailed statutory scheme. *Id.* at 241-42. The *Boll Weevil* test represents a formalistic approach to analyzing delegations. *Id.* at 244.

78. *Proctor v. Andrews*, 972 S.W.2d 729 (Tex. 1998).

79. *Id.* at 732.

legislative authority are prohibited under both article II and article III of the Texas Constitution.<sup>80</sup> *Proctor* demonstrates that the *Boll Weevil* test was not prohibitive of all private delegations. Despite this demonstration that the test was not impassable, by the time the court considered *FM Properties*, the *Boll Weevil* test was not well established, and remained open to criticism.

#### IV. THE COURT'S REASONING

##### A. *The Majority Opinion*

After noting that judicial review of the constitutionality of a statute should focus on the statute as it appears on its face,<sup>81</sup> the majority reviewed the various issues surrounding delegations of legislative power.<sup>82</sup> The majority first explained the nature of legislative power in general, and determined that legislative power was "the power to make rules and to determine public policy."<sup>83</sup> The majority then examined the definition of legislative power in Texas and concluded that the power sweeps broadly.<sup>84</sup> In Texas, legislative power encompasses not only "the power to set public policy," but a number of additional roles, including "the power to provide the details of the law, to promulgate rules and regulations to apply to the law, and to ascertain conditions upon which existing laws may operate."<sup>85</sup> The majority addressed the dangers, as well as the benefits of the delegation of legislative power to other entities and concluded that in many situations, delegation was not only practical, but necessary.<sup>86</sup>

The majority then turned its attention to the issues surrounding the delegation of legislative power to private entities.<sup>87</sup> The majority's most prominent concern was the danger of politically unaccountable private entities acting in ways that were adverse to the public interest.<sup>88</sup> Despite this concern, the majority cited a number of instances in which private delegations had been appropriate, desirable, and most importantly,

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80. *Id.* at 733.

81. *FM Props. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) (citing *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1999)).

82. *Id.* at 873-74.

83. *Id.* at 873.

84. *Id.*

85. *Id.*

86. *Id.* at 873-74.

87. *Id.* at 874.

88. *Id.*

constitutional.<sup>89</sup> To determine the constitutionality of a private delegation, the majority pointed to the eight-pronged test introduced by the court in *Boll Weevil* as the appropriate means of deciding.<sup>90</sup>

Having established that the *Boll Weevil* test governed private delegations, the majority considered whether there had been a private delegation in the case at bar.<sup>91</sup> The majority first pointed to the fact that water was a natural resource, the protection of which was enumerated in the Texas Constitution as a legislative power, and an area in which the public has a direct interest.<sup>92</sup> The majority conceded that the Legislature had delegated authority over water quality to executive and municipal bodies such as the TNRCC and the City of Austin.<sup>93</sup> Section 26.179, however, differed from such delegations in the sense that it allowed the landowners to "fill in the details" of the law.<sup>94</sup> The problem with section 26.179, according to the majority, was that the statute simply stated the broad goal of what the water plans should accomplish and left the rest up to the landowners.<sup>95</sup> Thus, section 26.179 constituted a delegation of legislative power to a private party.

The majority also noted that the issue raised by section 26.179 was the exact situation the *Boll Weevil* test had been created to address.<sup>96</sup> The landowners were not answerable to the public, had a direct pecuniary interest in developing the land free of municipal interference, and had been granted the power to do so in a way that was potentially repugnant to the public interest.<sup>97</sup>

After analyzing the dissents of Justices Owen and Abbott, the court returned to its analysis, and employed the eight-pronged *Boll Weevil* test to the case at hand.<sup>98</sup> The majority decided that the first factor of the *Boll Weevil* test, which considers whether the actions of the private actor are subject to meaningful review, was not satisfied.<sup>99</sup> This conclusion was founded on the fact that section 26.179 allowed a landowner to proceed with development under an insufficient water quality plan, and thus "lock in" the

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89. *Id.*

90. *Id.*

91. *Id.* at 875.

92. *Id.* at 875-76.

93. *Id.* at 876.

94. *Id.*

95. *Id.* at 876-77.

96. *Id.* at 877.

97. *Id.*

98. *Id.* at 877-88.

99. *Id.* at 880.

plan before TNRCC had an opportunity to review it.<sup>100</sup> The majority pointed to the statute's language that provided for review after each "phase" of construction was complete, and noted that the statute did not require development to take place in "phases."<sup>101</sup> Therefore, the majority reasoned, a landowner could build an entire development under an insufficient water quality plan in one phase, free of agency review.<sup>102</sup> By the time the statute granted TNRCC the power to review the water quality plan, development would be well under way.<sup>103</sup> In addition, section 26.179's provision that the insufficient plan would remain in effect throughout the appeals process permitted development to continue throughout the appeals proceedings.<sup>104</sup> Therefore, "as development continu[ed] in larger zones during TNRCC review and the appellate process, necessary modifications [would] become less and less feasible and practical, and are therefore less likely to be required."<sup>105</sup> For this reason, the majority concluded that the statute did not provide for meaningful review. Consequently, the majority determined that the first factor of the *Boll Weevil* test weighed against delegation.<sup>106</sup>

The second factor in the *Boll Weevil* test considers the representation of the parties affected by the landowners' actions. The majority found that this factor weighed against delegation because section 26.179 prohibited the TNRCC from holding public hearings when it approved water quality protection zones.<sup>107</sup> The majority also pointed to the section 26.179 provision that gave the landowners discretion to decide which municipal provisions applied to their land, combined with the absence of a requirement that the landowners give notice of such changes to the surrounding landowners.<sup>108</sup>

*Boll Weevil*'s third factor, which considers the landowners' power to apply the law to particular individuals, weighed in favor of delegation.<sup>109</sup> The majority reasoned that because the statute only gave the power to the landowners to apply the law to themselves or their successors in interest, the danger anticipated by the third factor was not present.<sup>110</sup>

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100. *Id.*

101. *Id.* at 882.

102. *Id.*

103. *Id.* at 882-83.

104. *Id.* at 883.

105. *Id.* at 883-84.

106. *Id.* at 884.

107. *Id.*

108. *Id.* at 885.

109. *Id.*

110. *Id.*

The majority found that the fourth factor of the *Boll Weevil* test, which considered the pecuniary interest of the private party, weighed against delegation because the landowners clearly had a pecuniary interest in developing the land in a manner not in accordance with the public interest.<sup>111</sup>

The fifth factor of *Boll Weevil* weighed in favor of delegation because section 26.179 did not give the landowners the power to exempt themselves from municipal criminal laws.<sup>112</sup>

*Boll Weevil*'s sixth factor, which considers the duration, extent, and subject matter of the delegation weighed against section 26.179.<sup>113</sup> The majority reasoned that although the subject matter of the delegation was very narrow, its extent was very broad.<sup>114</sup> The statute granted the landowners the power to create, implement and enforce the water quality statutes, which the majority considered overly broad.<sup>115</sup> The majority also found that the statute's grant of legislative power "for twenty years or until ninety percent of the structures necessary for the water quality plan's implementation" was very lengthy in duration as compared with other delegations.<sup>116</sup>

The majority held that the seventh prong of the *Boll Weevil* test, which considered the qualifications or training of a private party, did not weigh for or against delegation.<sup>117</sup> The majority reasoned that although the landowners were not experts in water quality, section 26.179 provided for the use of professional engineers in determining whether a landowner's plan was sufficient in attaining one of the two objective outlined in the statute.<sup>118</sup> The court noted, however, that despite an engineer's role in determining the sufficiency of a plan, the statute did not require any professional input into a landowner's decision regarding which of the municipality's rules would be applicable under the water quality plan.<sup>119</sup>

Like the seventh factor of the *Boll Weevil* test, the majority reasoned that the eighth factor weighed neither for nor against the delegation.<sup>120</sup> The eighth factor considers the sufficiency of legislative standards to guide the

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111. *Id.*

112. *Id.*

113. *Id.* at 886.

114. *Id.*

115. *Id.*

116. *Id.* The majority cited the Texas Administrative Code as an example.

117. *Id.* at 886-87.

118. *Id.* at 887.

119. *Id.*

120. *Id.*

private parties to whom the legislative power has been delegated.<sup>121</sup> The majority held that although section 26.179 provided broad objectives and continued to allow the enforcement of state and federal water quality laws, the statute said little about what should be done in the event of the rejection of a water quality plan by the TNRCC.<sup>122</sup>

After analyzing the facts in accordance with *Boll Weevil's* factors, the majority concluded that section 26.179 constituted an unconstitutional delegation of legislative power to a private party.<sup>123</sup>

### *B. Owen's Dissent*

Justice Owen criticized the majority's opinion on two grounds. First, Owen argued that the court had failed to recognize that the Legislature had not granted legislative authority to the landowners.<sup>124</sup> Instead, Owen argued, the Legislature had simply removed legislative authority over the properties from the City of Austin's jurisdiction and restored to the landowners the right to develop their property with the freedom that any landowner whose land lay outside of a municipality's jurisdiction enjoyed.<sup>125</sup> In sum, the city was elevating the power of the city over that of the Legislature, a prospect Owen considered "indefensible."<sup>126</sup> Second, Owen argued that the majority was substituting its own standards for water protection for that of the Legislature.<sup>127</sup> Owen argued that the environmental provision located within article XIV, section 59(a) of the Texas Constitution did not prohibit delegation.<sup>128</sup> Rather, the constitution simply allowed the legislature to

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121. *Id.*

122. *Id.* at 888.

123. *Id.*

124. *Id.*

125. *Id.* at 889.

126. *Id.* at 890.

127. *Id.* at 891. Owen stated:

The Court's quarrel with the Legislature is, at the 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. The Court has overstepped its constitutionally prescribed 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.

*Id.*

128. *Id.* Article XVI, section 59(a) of the Texas Constitution states:

The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful

"pass such laws as may be appropriate thereto." Essentially, Owen argued that the court did not have the authority to decide whether or not a Legislature's statutory scheme was appropriate.

The majority responded to Owen's dissent by clarifying that section 26.177 did not simply deregulate, but granted power to private entities over matters of public concern.<sup>129</sup> The majority restated its argument that legislative power included "the power to fill in the details of a law, promulgate rules, and ascertain conditions upon which existing laws operate," and that the legislature's grant of the power to the landowners constituted a delegation.<sup>130</sup>

### C. Abbott's Dissent

Justice Abbott's dissent echoed the concerns of Justice Cornyn in *Boll Weevil*. Abbott began by expressing his concern that the majority's holding endangered future delegations, many of which were necessary for the efficient functioning of the state.<sup>131</sup> The majority responded to this argument by specifying that its holding applied only to private entities, not quasi-governmental entities.<sup>132</sup>

Next, Abbott argued that the standard of review employed by the majority had been erroneous.<sup>133</sup> Abbott pointed to the court's decision in

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purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

TEX. CONST. art. XVI, § 59(a).

129. *FM Props.*, 22 S.W.3d at 878. The court stated: "Most of Justice Owen's dissent is nothing more than inflammatory rhetoric, and thus merits no response." *Id.* at 877.

130. *Id.* at 878.

131. *Id.* at 898-99.

132. *Id.* at 878. The majority stated:

Justice Abbott claims that the sky is falling because of our holding that section 26.179 is unconstitutional . . . . But this case is not about school vouchers, private prisons, or even private property rights . . . . 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.

*Id.* (citations omitted).

133. *Id.* at 900.

*Barshop v. Medina County Underground Water Conservation District*,<sup>134</sup> stating that when reviewing a statute, a court must determine whether the statute always acts unconstitutionally.<sup>135</sup> Thus, the majority's employment of a standard of review that analyzed the operation of a statute on its face was incorrect.<sup>136</sup> Abbott criticized the majority for spending much of its opinion creating hypothetical situations in which the statute would act unconstitutionally, while ignoring the fact that on two previous occasions, the statute had acted constitutionally.<sup>137</sup> The majority responded to this argument by stating that it was irrelevant whether the statute had operated successfully in previous occasions.<sup>138</sup> The proper standard of review, according to the majority, was to analyze the statutory scheme in its entirety, a standard that was spelled out in the previous decisions of *Proctor and Boll Weevil*.<sup>139</sup>

Abbott argued that the statute did not constitute a delegation and suggested that the statute simply allowed the landowners to decide between the regulations of the municipality or the regulations of section 26.179.<sup>140</sup> The majority responded by arguing that the statute did not simply grant a landowner the choice between two statutory schemes.<sup>141</sup> Rather, section 26.179 allowed the landowner to choose between the municipal regulations and a statutory scheme, the details of which would be determined by the landowner.<sup>142</sup> Such an exercise of power on the part of a private party would be legislative.<sup>143</sup>

Finally, Abbott argued that there had not been a delegation because of the statute's ultimate reliance on the courts to settle disputes regarding which municipal statutes could be enforced and which could not.<sup>144</sup> The majority responded by stating that the fact that a court could resolve disputes regarding the exercise of the delegated power did not mean that there had not been a delegation.<sup>145</sup> The majority pointed to the routine practice of judicial resolution of disputes framed in the context of a constitutional

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134. 925 S.W.2d 618 (Tex. 1996).

135. *Id.*

136. *Id.* at 900-01.

137. *Id.* at 900.

138. *Id.* at 878.

139. *Id.*

140. *Id.* at 901.

141. *Id.* at 878-79.

142. *Id.*

143. *Id.* at 879.

144. *Id.* at 902-03.

145. *Id.* at 879.

delegation.<sup>146</sup> The majority also stated that the absence of a grant of power over others did not mean that there had not been a delegation.<sup>147</sup> Finally, the majority argued that the power granted to a landowner to affect water quality on his own property affected the water quality on the property of downstream landowners.<sup>148</sup>

## V. ANALYSIS AND IMPLICATIONS

### A. *Environmental Politics in Austin*

The court's decision in *FM Properties* is set against a backdrop of an ongoing political controversy surrounding the land that was owned by the landowners in the case. To fully understand the motives of the City of Austin, the landowners, and the legislature, it is necessary to examine the facts that do not appear in the text of the court's opinion.

The land in question in *FM Properties* is known as Barton Springs, a tranquil vista outside of Austin<sup>149</sup> that is home to the endangered "Barton Springs Salamander."<sup>150</sup> During the 1980's, a number of developers acquired Barton Springs. The City of Austin authorized the establishment of four municipal utility districts, and made plans for their eventual annexation.<sup>151</sup> In 1987, one of the landowners, Freeport McMoRan, Inc.,

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146. *Id.*

147. *Id.*

148. *Id.*

149. The water quality of Barton Springs is dependant on multiple factors. For example:

Water quality in the Barton Springs segment of the Edwards Aquifer and at Barton Springs is dependent on the quality of water in the six streams that contribute to the aquifer as they pass over the recharge zone. Likewise, water quality at Barton Springs is a factor of the aquifer level and the encroachment of saline water from the east during low water conditions. Water quantity is dependent on the natural rainfall conditions, antecedent conditions, and the amount of water that is removed from the aquifer by the 40,000 users that rely on it as their sole source of water. Since most of the recharge and contributing zone lies outside of the jurisdiction of the City of Austin, these issues need to be addressed in a regional watershed plan.

Austin City Connection, *Potential Impacts: Water Quality and Water Quantity* (2001), at <http://www.ci.austin.tx.us/salamander/potimp.htm>.

150. The salamander grows to a length of 2.5 inches, and its coloring "varies from a pale purplish-brown to a yellowish cream." Its only known habitat is the area surrounding Barton Springs. See Salamander Facts, at <http://www.ci.austin.tx.us/salamander/default.htm>.

151. See *Chronology of Barton Springs and Austin*, AUSTIN AMERICAN-STATESMAN, June 7, 2000, at A7.

unveiled its plan for the "Barton Creek Planned Unit Development."<sup>152</sup> The public response to news of the development was negative.<sup>153</sup> At the city council hearing that considered the Barton Creek plan, 800 citizens spoke out against development.<sup>154</sup> Eventually, the public outcry evolved into a concerted effort to stop development in Barton Creek.<sup>155</sup> By 1991, the movement had culminated in a referendum in which the citizens of Austin voted two-to-one to enact the "Save our Springs" ("SOS") ordinance, which severely limited the potential for development in Barton Creek.<sup>156</sup> By 1993, a majority of the members of the city council were "Green" candidates, who were backed by the environmental community.<sup>157</sup> In 1994, the landowners challenged the SOS ordinance in court.<sup>158</sup> Although the trial court struck down the ordinance as unconstitutional, the Green-controlled city council voted to appeal the court's decision, which was later reversed by the Texas Supreme Court.<sup>159</sup>

The landowners' reaction to the actions of the city council was to lobby the Texas Legislature for relief.<sup>160</sup> The Legislature responded by amending the Texas Water Code to include section 26.179, which applied only to cities that fit the exact description of Austin and effectively exempted the Barton Creek development from the SOS ordinance.<sup>161</sup> In 1998, the *FM Properties* litigation began when the City sued the landowners, alleging that the statute was unconstitutional.<sup>162</sup> The year 1997 also saw the Environmental Protection Agency designate the "Barton Springs Salamander" as an endangered species.<sup>163</sup>

The motives of each of the actors in the Barton Springs affair are easily explained by the rapid growth Austin has undergone in the last ten years.

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152. *Id.* "FM Properties" was a subsidiary of Freeport McMoRan, which eventually broke away from Freeport McMoRan and changed its name to Stratus Properties.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*; see *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1999).

160. See generally Dylan Rivera & Leah Quin, *Court Rules for City, Rejects Water Quality Zones // Large Landowners Lose Key Exemption*, AUSTIN AMERICAN-STATESMAN, June 16th, 2000, at A1.

161. *Id.*

162. *Id.*

163. See *Chronology of Barton Springs and Austin*, AUSTIN AMERICAN-STATESMAN, June 7, 2000, at A7.

Until the 1990's, Austin was a quiet town of approximately 500,000 citizens.<sup>164</sup> The town's most prominent characteristics were its status as the home of the state capitol and the University of Texas.<sup>165</sup> Many of the residents of Austin lived there because of the city's tranquil setting.<sup>166</sup>

The high technology boom of the 1990's changed Austin significantly.<sup>167</sup> Austin became home to a large number of software companies, one of which was Dell Computer, and consequently saw a staggering amount of growth within a very short time.<sup>168</sup> The original residents of Austin responded to the rapid growth negatively, and sought to obstruct it.<sup>169</sup> City regulations became increasingly complex, reflecting an attitude among many in local government that "no development is good development."<sup>170</sup> Consequently, the landowners sought a remedy in the state legislature, which passed legislation to relieve the landowners of the deliberately cumbersome regulations.<sup>171</sup> Thus, by the time the court heard the *FM Properties* case, the dispute had become widely publicized and framed as a battle between the competing interests of economic growth and environmental protection.

#### *B. The Court's Decision: Results Oriented?*

The political controversy surrounding the *FM Properties* litigation, as well as the use of the virtually impassable *Boll Weevil* test may suggest that the court followed a "results oriented" analysis as it did in *Boll Weevil*. While such a view be attractive in light of the fact that the Justices on the Texas Supreme Court are elected,<sup>172</sup> such a thesis probably does not apply to the *FM Properties* decision. Regardless of the court's motives in *Boll Weevil*, the court's decision in *FM Properties* illustrates the necessity of the

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164. Telephone Interview with Craig Chick, aide to Representative Fred Bosse, and Chief Committee Clerk for the House Committee on Civil Process (Jan. 24, 2001). Mr. Chick has been intimately involved in the Barton Springs controversy.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. The Texas Supreme Court has come under fire on such news programs as "60 Minutes" and "Frontline" for the potential role that political factors play in its decisions. For a more thorough discussion of the court's political side, see Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court Elections*, 84 JUDICATURE 20 (July/Aug. 2000).

public-private distinction, as well as the need for stricter standards in delegating legislative authority to private entities.

In *FM Properties*, the court again employed its unique test to a politically precarious situation, and again struck down the delegation. Unlike the court's employment of the test in *Boll Weevil*, in which the organization could have been characterized as a quasi-public agency, *FM Properties* dealt with an unquestionably private enterprise. Indeed, the private entity under consideration in *FM Properties* was of the most dangerous variety—one that seeks profit. As the court noted in its opinion, a delegation to a private entity with a pecuniary interest should receive greater scrutiny than a delegation to a public entity.

One commentator has recognized the need for a more formalistic approach in the area of private delegations.<sup>173</sup> Professor David M. Lawrence noted in 1986 that “given the current interest in privatization and the likelihood that the interest will increase, it is timely to review the law of delegation of governmental power to private actors . . . and to propose a more structured method for dealing with delegation issues.”<sup>174</sup> Since then, private delegations have increasingly become a part of the political rhetoric, and show no sign of fading away.<sup>175</sup> In light of this fact, the Supreme Court of Texas's continued endorsement of a strict test for private delegations may be more appropriate now than ever. By using such a test, the court will allow publicly beneficial delegations, such as the one in *Proctor* to stand, while frustrating efforts on the part of the legislature to grant power to self-interested parties.

### C. Implications

In the wake of the *FM Properties* decision, the environmental community celebrated its victory over the developers.<sup>176</sup> The environmentalist-supported mayor of Austin stated: “Austin citizens have fiercely guarded their ability to protect their quality of life and the things that are important to them—the hills and the water. The water-quality zones

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173. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986).

174. *Id.* at 647. Professor Lawrence's article was among the law review articles relied upon by the majority in *Boll Weevil* to support the distinction between private and public entities and the eight-pronged test.

175. See Jack M. Beerman, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001) (describing the current situation regarding privatization and political accountability on the state and federal level).

176. See Rivera & Quin, *supra* note 160, at A1.

took that ability away. . . . There was a need to challenge that and do it in the court system."<sup>177</sup> The landowners amended their development plans to conform with the SOS water quality ordinance.<sup>178</sup> An even more encouraging result of the decision, at least for the environmental community, was talk of a "land swap," where the city would grant the developers the right to develop an abandoned airport in East Austin in exchange for FM Properties' rights to develop Barton Springs.<sup>179</sup>

Despite the victory in the Texas Supreme Court, the SOS ordinance still stands to be frustrated Legislative action.<sup>180</sup> In 1999, the Texas House passed H.B. 1704, which allowed the landowners' property to be governed by the less stringent municipal rules that predated the SOS ordinance and were in place at the time the developers submitted their plans.<sup>181</sup>

While the practical effect of the *FM Properties* decision will be at least a temporary deceleration in Austin's growth, a more far-reaching consequence may be the Legislative reaction. In June of 2000, the House Select Committee on Judicial Interpretation of the Law convened to consider the decisions in which the court overturned legislative acts.<sup>182</sup> Although the Select Committee's primary motive in examining the decisions was to improve the quality of bill drafting in the House, another motive was to determine whether or not the court had overstepped its bounds.<sup>183</sup> Justice Phillips, who joined the majority in *FM Properties*, was present at the first meeting of the Select Committee.<sup>184</sup> Justice Phillips was neither offended nor worried by the possible implications of the Select Committee's findings. He felt that the Select Committee was a good idea, stating: "We try to express the difficulties and frustration we sometimes encounter in interpreting legislation. But we're never sure anybody reads it."<sup>185</sup>

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177. *Id.*

178. *Id.* The developers changed their plans from a scheme that incorporated a large number of inexpensive homes to a scheme that incorporated a small number of more expensive properties. *Id.*

179. See Alberta Phillips, *Time is Ripe for Stratus Land Swap*, AUSTIN AMERICAN STATESMAN, January 16, 2001, at A10.

180. *Id.*

181. *Id.* This seems to confirm the theory that the legislature will eventually find a way around the SOS ordinance.

182. See Janet Elliott, *Texas Journal: Panel Reviews Laws Rejected By the Courts*, THE WALL STREET JOURNAL, June 28, 2000, at T1.

183. *Id.*

184. *Id.*

185. *Id.*

The possible implications for future delegations of legislative power to private parties, which were touched upon in the dissenting opinions, remain to be seen. If some delegations fail to pass constitutional muster, it is likely that the Legislature will find another way to accomplish whatever task it sought to delegate. This sentiment was echoed by Representative Fred Bosse, the chairman of the Select Committee. Bosse stated, "If something is important enough to enough people, they'll get one of the 181 of us to carry it."<sup>186</sup> Therefore, the fears of Justices Owen and Abbott that the state will make the legislature's functions more difficult to carry out may not be completely justified.

## VI. CONCLUSION

In *FM Properties v. City of Austin*, the Texas Supreme Court demonstrated that the nondelegation doctrine is alive and well in the area of private delegations. Although the court's decision can be viewed as a threat to future delegations, it pales in comparison to the societal harm that could be caused by vesting legislative power in the hands of self-interested groups. In recognizing the substantial difference between a public and private actor, and then following up the distinction with a higher standard for private actors, the court ensured that future delegations to private parties will not harm the public interest. Accordingly, *FM Properties v. City of Austin* represents an encouraging step toward a more coherent body of case law that will undoubtedly be useful in a political climate that increasingly leans toward privatization at both the state and federal level.

*Gregory F. Brown*

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186. *Id.*