



JOSÉ R. RODRÍGUEZ
COUNTY ATTORNEY

EL PASO COUNTY TEXAS
COUNTY COURTHOUSE
500 E. SAN ANTONIO, ROOM 503
EL PASO, TX 79901

(915) 546-2050
FAX: (915) 546-2133

October 20, 2006

Senator Eddie Lucio, Jr.
Chair for the Senate Committee on
International Relations and Trade
P.O. Box 12068
Austin, Texas 78711

Dear Senator Lucio:

Thank you for this opportunity to provide information relative to efforts toward improving the quality of life for colonia residents, most especially with respect to infrastructure needs.

Given the long history of this subject matter, I would like to begin by first providing a brief outline of the context of this issue as well as the progress and challenges.

We in El Paso County have been actively dealing with colonia issues for approximately 20 years now. In 1987, there was virtually no land development in the outlying areas of El Paso County. This is not to say that there was not any subdividing of land. To the contrary, literally thousands of acres of land subdivisions were being created at an incredible speed. However, by any measure this could not be called land "development". Instead, what we had was the systematic and state-government approved conversion of what were once valuable agricultural production lands into vast "rural subdivisions" which have since become known as "colonias".

The method and manner by which the colonias came into existence were clear. Texas law severely restricted the ability of counties to regulate the creation or development of residential subdivisions. Counties were very limited in regulating road paving or land uses. Counties could not even require basic water or sewer services for residential subdivisions. Under Texas law, not only were these subdivisions permitted, but counties were actually required by law to approve them. As awful as the conditions were in these legally mandated subdivisions, they often paled in comparison to the miasmatic conditions found in the unapproved or unrecorded subdivisions. Repeatedly and consistently, the colonias and the conditions in which our fellow Texans were living were referred to as "substandard", "disease ridden", or "third world".

Counties (and many colonia residents) repeatedly asked for, and were repeatedly denied, county authority to deal with and prevent the rampant problems. Instead they were often assailed for being “overzealous” and were accused of taking “low-income housing” from the reach of the poor. Commencing in 1989 after numerous studies, national reports, and hearings, showing hundreds of thousands of residents living in the some of the worst living conditions in the United States, and facing crisis conditions, the State of Texas began adopting and implementing a series of laws, funding programs and regulations to alleviate some of the myriad health and environmental conditions. Foremost among these actions, the State enacted the Economically Distressed Areas Program (“EDAP”), revisions to Chapter 232 of the Texas Local Government Code, and the Model Subdivision Rules (commonly referred to as “the Model Rules” or the “MSR’s”).

The EDAP program provided significant financial assistance to bring water and sewer services to existing colonias and provided some rudimentary mechanisms to help prevent the further proliferation of colonia conditions. In brief, local governmental entities were authorized to adopt regulations requiring that subdivision developers install basic water and sewer infrastructure or post financial guarantees to assure the installation of promised infrastructure before any lot could be occupied by a resident. Under the Model Rules, land subdividers can still profit from selling land but must also share in the cost of providing for the basic amenities of water, wastewater, and roads infrastructure. No longer could the subdividers reap all the benefits of the land sales, while simply dumping all of the cost of remediation into the laps of taxpayers. Instead, in return for strict enforcement of the MSR’s, particularly the financial assurance provisions discussed below (“build-it or bond-it”) to prevent future colonia conditions, local counties, municipalities and water districts were benefited with funding for water and sewer infrastructure improvements to relieve existing problems.

The EDAP program and the Model rules have proven their value time and time again in preventing more problems. Since the EDAP program’s inception and as of September 30, 2006, approximately \$500 million dollars in State EDAP funds have been committed to address pre-existing colonia infrastructure problems.¹ Concurrently the creation of new colonias in El Paso County has virtually ceased. In return for actively participating in the prevention of new colonias, local governments are provided assistance in remedying older, existing problems. At the same time, they are held accountable and penalized for non-compliance or “back-sliding” which might be brought about by local political pressures.

If one accepts the premise that the Model Rules and the EDAP program are designed to prevent new colonias and ameliorate conditions in existing colonias, the results would seem to indicate that these programs are clearly working as intended. The strict nature of the Model Rules has helped put an end to the problematic practices which would otherwise have gone unabated. Elected officials, subdividers and residents know what the rules are, that they must be enforced, and the consequences for failure to comply. With strong support from the Texas Water Development Board, the Texas Attorney General,

¹ This amount does not include additional amounts provided by other entities such as EPA, NADBank, local counties and water districts, and the residents themselves.

and local governments and legitimate developers, the EDAP program and the Model Rules have proven to be a highly effective deterrent to new colonias, improving living conditions, and bringing about new attitudes as to what are or are not acceptable living conditions in Texas. The legal premise is simple: adopt and enforce strict subdivision standards to prevent new colonias and good things will follow - fail to do so and bad things will follow. Period. No exceptions.

Unfortunately, the lessons so recently learned now seem subject to being “un-learned”. For example, as mentioned above, one of the most effective mechanisms for assuring the installation of adequate infrastructure in subdivisions is what is commonly referred to as the “build-it or bond-it” provision of the Model Rules. Pursuant to this provision, if water, wastewater, or roads and streets are not constructed at the time final plat approval is sought for a subdivision, the commissioners court shall require that the owner of the subdivided tract post a financial assurance to guarantee that they are built within the time stated on the plat. The financial assurance might take the form of a letter of credit or a performance bond. This single provision has been extremely helpful in numerous ways.

First, this provision assures that the party that benefits most from a plat approval also has the responsibility of fulfilling legal obligations. There is many a time when a subdivider requests approval of a subdivision plat, and such approval is given, conditioned upon an explicit promise that the subdivider will install certain infrastructure improvements. In the past, many subdividers would promise improvements, but after having sold the lots and collected the money, failed to make the promised improvements or made them in such a poor way that it ultimately cost more to remedy the situation than what it cost to initially install them. The failure to make the improvements as promised, and a failure to post financial assurances, led directly to many of the colonia conditions the State has since been called upon to remedy.

The enactment of the “build-it or bond-it” provision with specific performance requirements put an end to this practice. In our experience, if a subdivider is required to post a letter of credit or other financial assurance, they are more likely to be eager to complete the improvements as soon as possible in a satisfactory manner in order to be released from the obligation and begin selling lots.

Secondly, it has been our experience that subdividers who are unable to post the required financial assurance at the time of the plat approval are typically subdividers who do not otherwise have the financial wherewithal to install the improvements as promised. Typically, these are also subdividers who are building without proper planning and who have the most problems meeting other regulatory requirements. The financial assurance requirement has been and remains an effective enforcement mechanism to prevent marginal subdividers from creating more problems which then require the intervention of individual homeowners and taxpayers in general to remedy.

After nearly twenty years of dealing with the tremendous colonia problems, it is understandable that a certain fatigue might set in. Giving in to this fatigue would not only set us back as a State, but would destroy the hope of many of being able to ever move forward. Texas does not want to return to the days of having hundreds of thousands of

Texans living in the disgracefully unhealthy conditions which became an ugly stain upon our State. Therefore, we would strongly urge that the State not only reinforce, but also strengthen, its current policy on improving the standards required for rural subdivisions in order to prevent future colonias. It is not practical at this time to provide all the recommendations needed to achieve this goal. However, based on our experiences in this area, and in order to assist the committee, we would at a minimum specifically recommend the following:

1. At a minimum, maintain the standards set forth in the Model Subdivision Rules, most especially those which require that residential subdivision lots may not be sold or occupied without basic water and sewer improvements. This will protect not only the health of the families living there but their communities as well. The MSR's have proven their value time and time again in establishing a base standard which limits the worst of the problems commonly associated with the proliferation of colonias. Adoption of the Model Rules established that Texas families should not be subject to living in residential subdivisions without the most basic modern water and wastewater services. We must not back down from this premise.
2. Maintain the "build-it or bond-it" financial assurance requirements. Proposals to limit this requirement to three years or less would effectively eviscerate the requirement and lead to more colonias. Instead of requiring subdividers to keep their word on providing infrastructure improvements which have been promised and bargained for, weakening this requirement would allow subdividers to reap the financial windfalls without fulfilling their obligations. They would be able to file plats with the promise of providing water, sewer and other improvements but then simply wait until the assurances expired. This would result in residents once again living in the infamous "third-world" colonia conditions of years past and/or leave the state taxpayers to once again fund millions of dollars worth of required improvements.
3. Broaden the provisions of the Local Government Code Chapter 232 to allow all counties to require water and wastewater improvements before subdivision plat approval. The implementation of the Model Subdivision Rule demonstrates the significant improvements in living conditions which can be achieved by simply requiring that the subdividing and selling of land for residential purposes be done in a way that will not threaten the physical, financial and social resources of our State. Although historically colonias were found mostly in the Border Area, these same problems are now spreading to urbanized rural areas throughout Texas. If these other counties are to benefit from the knowledge gained in dealing with colonia problems in the border counties, they should be granted the same tools proven to help stop the spread of colonias.
4. Maintain the incentives between enforcement of the Model Rules and state funding. This incentive approach has been extremely effective in improving conditions, maintaining a checks and balances system, and persuading local officials to consider long term gains for the public good in place of short term

political or personal gains. While EDAP funding may likely diminish over the coming years, it would be wise to connect other funding such as facility planning, water conservation, or clean water funding to implementation of a responsible development and enforcement program. This would not only prevent recurring problems but allow the State to gain some knowledge as to possible future demands.

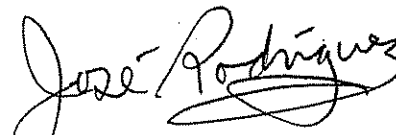
5. Grant counties limited ordinance-making authority for regulating development. There are several reasons clearly supporting this position. First, we note that most cities have been granted the authority to enact some form of plumbing, fire suppression, and building codes for many years. Cities enact these codes in clear recognition of the safety provided to the occupants of residential housing as well as the communities in which they are located. Many colonia homes are self-built. We believe that the families should be able to continue to build their own homes but should be given basic standards to achieve some of the same level of protection for their families and neighbors. Allowing counties to enact plumbing, fire and building codes would provide these basic standards. We do not want to penalize residents whose homes have already been built, are being occupied, and whose owners lack the resources to improve their home. However, we do feel that there should be some acknowledgement that a poor family deserves to be in a safe home as much as anyone else. Enacting basic safety codes for new homes would help provide this protection.
6. Additional support for allowing basic ordinance making authority is based on the need to protect the significant economic investment in the colonia areas. As stated, the State of Texas alone spent in the vicinity of \$508 million in infrastructure improvements to remedy what years of un-regulated “development” have wrought. This does not include the resources expended by State agencies and local governmental entities or private individuals. While it is deeply appreciated, one must also wonder what other improvements might have been made if there had been a coherent and consistent plan in the beginning? How well-protected are these investments given the absence of minimum standards for plumbing, fire suppression, and building safety or land use compatibility? Not only should the State be able to protect its investment, but a family should also be able to protect their investment in a home from incompatible land uses. This way when they build their home, they know they will have some protection against a pallet factory or drag strip destroying any resale value they might have in the home. Considering the magnitude of the State’s investment in improving these areas, and the level of individual investment, we believe there must be some legal framework to protect and enhance these investments. Allowing counties to enact basic ordinance authority would provide that framework.
7. Provide sufficient funding to allow the Texas Attorney General and the Texas Water Development Board to increase their oversight of EDAP and other colonia prevention programs as well as increase the legal assistance provided to local governmental entities. Historically, our office has had a very strong working relationship with both the TWDB and the OAG. In fact, some of the first colonia

enforcement lawsuits were filed in El Paso County through a close cooperative effort between the local OAG office and the El Paso County Attorney. The State utilized local knowledge and familiarity with the situation, and the County utilized the State's investigatory capabilities. (Typically the colonia enforcement cases are investigation intensive and require a great deal of contact with local residents.) In addition, the TWDB was able to provide financial and technical leverage to bring about desired results. This created a synergy with excellent results and demonstrated the depth of commitment by all involved. While there are still good relations with the agencies, it seems now that due to a shortage of resources, much more effort is required to accomplish the same objectives and results in less efficacy. In the case of the OAG, we would recommend that investigators possibly be assigned to them to assist developing and investigating colonia enforcement cases. In this way, the State could re-establish the synergy which was so successful. In the case of both agencies, additional resources should be provided so that they can continue to assist in the implementation and enforcement of colonia prevention programs.

While these recommendations are not all encompassing, we believe they provide a good basis to examine and reinforce Texas commitment to preventing the scourge of colonias from becoming re-established on a widespread basis. Existing laws such as the Model Subdivision Rules and on-site sewage facility programs have provided a limited ability to help contain the spread of colonia conditions in selected counties. We would urge the committee to take the additional steps to resolve the problems as they now exist and prevent the spread to new areas. There is no doubt that as a state, we do not want to return to the days when we had hundreds of thousands of Texans living in residential subdivisions in substandard housing without water or sewer services and unpaved roads.

We offer a simple premise: allow local counties to enact and enforce regulations in cooperation with the State so that never again will our fellow Texans live in rural neighborhoods and communities described as "third world".

Sincerely yours,

A handwritten signature in black ink that reads "Jose Rodriguez". The signature is written in a cursive style with a large, sweeping flourish at the end.

Jose R. Rodríguez
El Paso County Attorney

cc: Senator Eliot Shapleigh, Vice Chair
Senator Kevin Eltife
Senator Craig Estes
Senator Troy Fraser
Senator Kel Seliger
Senator Judith Zaffirini

I. History

1. Prior Law required plat approval
2. No water, no sewer,
3. "Third world" conditions

II. Current EDAP Program

A. Model Subdivision Rules

1. required water/sewer infrastructure
2. Largely eliminated subdivisions w/o water or sewer
3. Funding in return for compliance

B. "Build-it or bond-it" provision

1. Shifted costs of improvements to those who benefit most
2. required subdividers to fulfill promises to build infrastructure
3. Minimized marginal projects
4. Highly effective

C. Problems remain

1. Existing inventory of lots
2. Conditions spreading to other counties
3. Will see return of colonia conditions

III. Recommendations

A. Do not weaken MSR's

1. Have proven value in limiting creation of new colonias
2. Preventative value
3. Establishes that at a minimum, TX subdivisions must have water and sewer improvements

B. "Build-it or bond-it" requirements

1. proposal to limit to 3 years would gut program
2. builders could engage in waiting games
3. reasons to maintain it, but no good reasons to weaken
4. requires builders to plan ahead and be prepared to fulfill promises

C. Broaden application of Ch 232 subdivision to other counties

1. Significant improvements in living conditions
2. Have learned lessons in border areas
3. use this knowledge to prevent problems in other areas
4. This set of solutions helps address this set of problems

D. Maintain financial incentives

1. "carrot and stick approach" very effective on local level

2. EDAP funding may not be available, but other water/sewer programs still available
3. Prevents local “back-sliding” on enforcement
4. Promotes efficient infrastructure planning to plan for future growth

E. Grant Counties limited ordinance making authority

1. Grant building fire and plumbing code authority
2. Provide basic safety standards for County residents
3. Continue to allow residents to build own homes
4. Minimum level of protection for families and communities

F. Protection of economic investments

1. Protect \$500 million State infrastructure investments
2. Protect millions in local entity investments
3. Protect millions in private investments

G. Increase resources to State entities

1. Provide assistance to local counties
2. Provide investigators to assist both OAG and local counties
3. Provide TWDB with resources necessary to enforce financial incentive provisions
4. Overall maintain stronger nexus among residents, State entities, and local counties

IV. Conclusion

1. Maintain strong Model Subdivision Rules
2. Increase authority to all counties on discretionary basis
3. Provide basic ordinance making authority on discretionary basis
4. Maintain premise that “never again will our fellow Texans live in rural neighborhoods and communities described as third-world”

**SENATE COMMITTEE ON INTERNATIONAL RELATIONS AND
TRADE
79TH LEGISLATIVE INTERIM CHARGES**

1. Study state and federal programs aimed at assisting cities and businesses to compete in national and international markets. Develop recommendations to increase the competitiveness of Texas communities and entities in trade and commerce.
2. Study and develop recommendations to address the infrastructure and economic development needs of border and coastal communities in rural and non-urban areas of Texas.
3. Study and report on the availability of housing in distressed areas of the state, especially along the Border colonias and rural Texas. Review state, federal and private initiatives aimed at providing housing assistance. Work with private and non-profit entities to address the growing housing needs. Develop recommendations for the cost-effective use of existing housing monies, leveraging of funds and initiatives for new funding sources.
4. Review state and local policies impacting the water/wastewater services, transportation and health infrastructure needs of Texas colonias. Work with the Texas Water Development Board, the Office of the Attorney General and the Colonia Coordinator to develop recommendations aimed at improving and strengthening the available resources and policies affecting economically distressed areas.