**Urban Drilling in Texas: New Law and New Rules**

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| On May 19, 2015, Gov. Greg Abbott signed a bill, passed by more than two-thirds vote in the Texas House and Senate, which was the result of months of negotiations and reflects a compromise over how state and local governments will exercise regulatory powers over urban drilling in Texas.[[1]](#footnote-1) The bill, known as HB 40,[[2]](#footnote-2) explicitly states that oil and gas operations in Texas are “subject to the exclusive jurisdiction of the state” and the authority of a municipality or other political organization in the state is “expressly preempted.”[[3]](#footnote-3) Under the new law, a municipality or other political subdivision may not enact or enforce an ordinance or other measure that “bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the municipality or other political subdivision.”[[4]](#footnote-4)  However, the bill expressly authorizes a municipality to enact, amend, or enforce an ordinance or other measure that regulates “aboveground activity related to an oil and gas operation” so long as it is “commercially reasonable” and “does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator.”[[5]](#footnote-5) Municipal regulations governing fire and emergency response, traffic, lights, noise, notice, or reasonable setback requirements are specifically authorized.[[6]](#footnote-6) Under the new law, an ordinance or other measure would be considered *prima facie* to be commercially reasonable “if the measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.”[[7]](#footnote-7)  The law will take effect immediately as it passed both chambers by more than a two-thirds margin.[[8]](#footnote-8)  This new legislation is the result of the statewide controversy created by the fracking ban approved by nearly 59% of the voters in the City of Denton last fall.[[9]](#footnote-9) Denton’s municipal ordinance banning fracking within city limits, notwithstanding drilling permits issued by the Texas Railroad Commission (the state’s oil and gas regulatory authority), put local and state government regulatory powers in open conflict with respect to oil and gas operations. The Denton ordinance not only regulated the means and methods of drilling operations but actually banned a specific type of drilling activity within city limits, which some argued exceeded a city’s police powers to protect the health and safety of residents and prevent nuisance activities. |

An added concern was that municipalities following in the footsteps of Denton could potentially undertake to regulate oil and gas operations in unpredictable ways. Substantially different local ordinances that varied from place to place would create regulatory chaos for the oil and gas industry. Ed Longanecker of the Texas Independent Producers and Royalty Owners Association contended that local regulations could have a chilling effect on investment in the oil and gas industry if they continued unchecked.[[10]](#footnote-10) As Gov. Abbott explained in a press release, “This law ensures that Texas avoids a patchwork quilt of regulations that differ from region to region, differ from county to county, or city to city.”[[11]](#footnote-11)

Over the past several months, state, local, and industry groups negotiated to come up with compromise legislation that addressed the concerns of each within the context of a statewide regulatory scheme for oil and gas operations. One early bill, H.B. 539, was considered too extreme in favoring state government over local government and was vehemently opposed by the Texas Municipal League (TML).[[12]](#footnote-12) In fact, the TML opposed the original version of HB 40 that simply stripped cities of authority to regulate oil and gas operations,[[13]](#footnote-13) which was called the “nuclear option.”[[14]](#footnote-14) Even the former chairman of the Texas Independent Producers and Royalty Owners Association, Rex White, came out against HB 40 in its original form, saying the bill as introduced went too far.[[15]](#footnote-15)

However, the executive director of TML, Bennett Sandlin, then met with the bill’s sponsor, Rep. Drew Darby, R-San Angelo, and the president of the Texas Oil and Gas Association, Todd Staples, and a deal was struck.[[16]](#footnote-16) TML’s [concerns](http://www.tml.org/legis_updates/oil-and-gas-industry-goes-nuclear-against-homeowners) hinged on property values for homeowners, preemption of voter approved ordinances, interference with pending litigation, and limits placed on cities’ ability to protect the health and safety of their residents.[[17]](#footnote-17) Ultimately, an agreement was reached to insert language outlining what aspects of oil and gas operations that local jurisdictions could regulate, and Sandlin and Staples then issued a joint statement to support the bill, or at least be neutral, if certain other conditions were met.[[18]](#footnote-18) Darby promised to put through the agreed amendments to HB 40 that met the primary concerns of the TML and pledged to fight off any other amendments if TML and industry groups would stand down. With the two main adversaries in agreement over the language of a compromise bill[[19]](#footnote-19) and with additional amendments effectively barred, HB 40 had no significant opposition as it sailed through both houses and onto the governor’s desk for signing into law.

Darby claims that his bill struck the proper balance. In his words, “We have lived with the oil and gas industry for over 100 years in West Texas, and we have maintained that balance. Most of the communities in West Texas have maintained a healthy balance between the need to explore our mineral resources, protect private property rights, and yet balance the cities’ need to police what happens within their cities.”[[20]](#footnote-20) Gov. Abbott concurred as he stated when signing the bill into law: “HB 40 strikes a meaningful and correct balance between local control and preserving the state’s authority to ensure that regulations are even-handed and do not hamper job creation.”[[21]](#footnote-21)

Sandlin welcomed the new law in a statement: “HB 40 represents balanced legislation that will build upon a 100-year history of cooperation between Texans, their communities, and oil and natural gas operators. HB 40 enjoys wide bipartisan support, because the legislation provides cities with authority to reasonably regulate surface activity related to oil and gas operations, while affirming that regulation of oil and gas operations like fracking is under the exclusive jurisdiction of the state.”[[22]](#footnote-22)

Even Rep. Myra Crownover, R-Denton, voted for HB 40 in the Texas House.[[23]](#footnote-23) As she explained her vote: “Nobody gets everything. We tried to address both sides. It’s a nice balance – not a perfect balance – between mineral rights and surface rights.”[[24]](#footnote-24) She said the 125-20 vote in the House was the result of bipartisan effort to protect all sides.[[25]](#footnote-25)

The new law is broad in scope and does more than merely prohibit cities from banning fracking. Local rules applying to oil and gas operations will now need to pass a four-part test: (1) the rule cannot apply to subsurface activity; (2) must be “commercially reasonable”; (3) must not effectively prohibit oil and gas operations; and (4) must not be pre-empted by another state or federal regulation.[[26]](#footnote-26) The new law defines “commercially reasonable” to mean “a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an actual operator’s capacity to act.”[[27]](#footnote-27)

However, the new law is not without its critics. Robin Schneider, executive director of Texas Campaign for the Environment, described the new law as “a bipartisan failure of leadership with politicians from both parties putting the whims of big lobbyists ahead of the interests of their constituents.”[[28]](#footnote-28) Cyrus Reed of the Lone Star Chapter of the Sierra Club has stated that HB 40 “doesn’t really clarify the municipal role, it really just undermines city authority by preempting that authority and then uses a “commercially reasonable” clause that will keep lawyers and courts busy and will give all of the leverage to the oil and gas industry.”[[29]](#footnote-29)

Some potential legal flaws in the new law have been identified that could trigger additional litigation and/or subject the law to challenge in the courts, such as:

* The Environmental Defense Fund recently tallied up more than 80 areas where Texas cities had made local rules for oil and gas operations that no state agency addressed.[[30]](#footnote-30) The new law could potentially create a void where matters previously regulated by cities would not be regulated at all.[[31]](#footnote-31)
* County and groundwater conservation districts have expressed concern that the plain language of the new law could affect their authority.[[32]](#footnote-32) Although legislators have indicated that this was not their intent, the new law expressly confers rule-making authority only on municipalities.[[33]](#footnote-33)
* Legal precedent in Texas has held that a city ordinance is presumed valid if it balances public good against the parties subject to the regulation.[[34]](#footnote-34) The new law makes a significant change in this test for the apparent benefit of a specific industry.[[35]](#footnote-35) Whether the legislature over-stepped its authority in restricting the powers of home rule cities could give rise to judicial review at some point.
* While mineral estate owners claimed to have their property rights impaired by Denton’s fracking ban,[[36]](#footnote-36) surface estate owners may argue that their property rights (and property values) have been impaired or unlawfully “taken” under the new law. According to Deborah Goldberg, representing Denton citizens in the two lawsuits triggered by the Denton fracking ban,[[37]](#footnote-37) the new law raises substantial due process claims under the state constitution.[[38]](#footnote-38) How much protection the new law would give to oil and gas operators facing suits by surface estate owners for property damage also remains to be seen.

The new law may assist in resolving the pending lawsuits,[[39]](#footnote-39) however. District Judge Sherry Shipman has put the Texas Oil and Gas Association’s lawsuit on hold since bills were already filed by the time the lawsuit landed in her court after Judge Jonathan Bailey recused himself *sua sponte* last December.[[40]](#footnote-40) She considered it would be a better use of the court’s time to wait and see if then-pending legislation would affect the proceedings.[[41]](#footnote-41) A district judge in Austin ruled that the Texas General Land Office’s suit be moved to Denton County, which has fueled speculation that the two lawsuits may soon be combined in Judge Shipman’s court.[[42]](#footnote-42) On its face, though, the new law does not retroactively repeal the Denton ban.[[43]](#footnote-43) The attorney representing the City of Denton in both suits has opined that the new law does not actually overturn the citizens’ initiative since Denton’s ban would technically remain in effect even if the new law barred its enforcement.[[44]](#footnote-44)

Denton’s mayor, Chris Watts, is uncertain about the impact of the new law. “We hope there will be less litigation and it doesn’t have the opposite effect. The [issue] is can cities, the oil and gas industry, surface owners work together and maximize the interests of everyone involved.”[[45]](#footnote-45) He remains an advocate of the process that produced the ban. Even if the ordinance is overturned, he said it raised the conversation to the level where it needs to be.[[46]](#footnote-46) As he pointed out, “it took a city like Denton and its residents to shine the spotlight on the inherent and unique problems associated with urban drilling.”

Local control of what happens in local communities is a mainstay of Texas political thinking, and the new law clearly restrains local governments in dealing with urban drilling. The widespread support of the new law in the Texas legislature, with its strong Republican majority, seems in opposition to the party’s stated goal of ending big government in favor of renewed local control.[[47]](#footnote-47) “It’s a bad situation when city leaders’ hands are tied,” Denton City Councilman, Kevin Roden, stated.[[48]](#footnote-48) “There seems to be an attitude that big government knows better than the citizens of a city, and, conservative or liberal, that is something you just don’t do in Texas.”[[49]](#footnote-49) The lone GOP vote against HB40 came from their caucus chair, Tan Parker, who represents Flower Mound which has its own ordinance.[[50]](#footnote-50) “My perspective is, personally, I support greater local control,” he told the Texas Tribune, “and that’s the reason why I supported Flower Mound and voted against the bill.”[[51]](#footnote-51)

In a published editorial opinion, Denton’s mayor noted that the new law offers no solution to the multifaceted challenges of urban drilling and does not even address long-term comprehensive regulations of oil and gas development in urban areas.[[52]](#footnote-52) In his view, the new law leaves many unanswered questions and raises others. The “commercially reasonable” test imposed under the new law is vague, leaving enforcement in his view either to voluntary compliance or something to be settled by the courts in decisions costly to taxpayers.[[53]](#footnote-53)

Whether those who voted for the new law will face political consequences at the polling booth remains to be seen. According to Andrew Dobbs, program director for Texas Campaign for the Environment, “there are a lot of elected officials, both Republicans and Democrats, from across the state that have expressed a lot of concern about this bill. We’re already seeing local governments question whether they’ll be able to protect their residents when this bill becomes law.”[[54]](#footnote-54) Rep. Crownover has apparently already been hammered with public comments by irate Denton citizens for her support of HB 40.[[55]](#footnote-55)

Increased seismic activity in Texas in recent months could potentially cause urban fracking to become even less popular than it was when Denton passed the fracking ban. A week after the Texas House passed HB 40, a team of seismologists led by Southern Methodist University (SMU) [concluded](http://www.smu.edu/News/2015/earthquakes-azle-report-21april2015) that “gas field fluid injection and removal is the most likely cause of 2013-14 earthquakes” in the Barnett Shale region.[[56]](#footnote-56) All of the earthquakes in Texas in the last seven years have reportedly occurred above the Barnett Shale, a geological formation that has become a major fracking site for petroleum companies.[[57]](#footnote-57) The study, published in April, looked at the uptick in earthquakes near the towns of Reno and Azle, both located atop the Barnett Shale. Between late 2013 and early 2014, there were more than two dozen small earthquakes in the area that researchers said were most likely due to fracking. The report was the first time a study found fracking a likely cause of small earthquakes and not just a possible one, and adds to the growing body of evidence that fracking could be causing more earthquakes. "While some uncertainties remain, it is unlikely that natural increases to tectonic stresses led to these events," Heather DeShon, a professor of geophysics at SMU and the report’s head researcher, said in a [statement](http://www.smu.edu/News/2015/earthquakes-azle-report-21april2015).[[58]](#footnote-58) On the other hand, some experts have their doubts that fracking could be causing more earthquakes. "There just isn't enough evidence to support the claim yet in this case," USGS researcher George Choy said, according to CNN. “The connection has not been established, but we cannot rule them out.”[[59]](#footnote-59) As explained by Stephen Harris at Rice University, the scientific debate is less about fracking *per se* and instead about whether waste disposal wells are causing subsurface stress relief in the form of tremors, as water produced from oil and gas wells is disposed of underground by means of injection wells that may be entering old fault lines.[[60]](#footnote-60)

Just days before the bill was passed into law, a new series of earthquakes hit the Dallas-Fort Worth area. The Dallas area was shaken by a 3.3-magnitude earthquake on May 18, and parts of rural West Texas experienced a 3.1 magnitude earthquake the day before on May 17.[[61]](#footnote-61) USGS reported the 3.1 magnitude quake was centered about 20 miles west-northwest of Fort Stockton.[[62]](#footnote-62) A 4.0 magnitude earthquake recorded on May 7 was centered about 30 miles southwest of Dallas, which was the strongest quake ever detected thus far in north Texas.[[63]](#footnote-63) The Texas Railroad [Commission](http://www.kwtx.com/home/headlines/Another-Earthquake-Strikes-North-Texas-304150811.html) has now ordered the operators of five disposal wells near the area to perform tests and gather seismic data.[[64]](#footnote-64) While HB 40 was improved to affirm a city’s ability to regulate things like light and noise pollution, the deafening regulatory silence concerning the earthquake problem could prove to be a powerful political dynamic lurking beneath the surface.[[65]](#footnote-65)

Robin Schneider, executive director of Texas Campaign for the Environment, was critical of the new law in light of these recent events. In his words, “this was a bipartisan failure of leadership with politicians from both sides putting the whims of big lobbyists ahead of the interests of their constituents. You would think that when scientists are getting more clarity about the connections between fracking and disposal wells with swarms of earthquakes, state politicians would want to provide higher levels of protection for people’s homes and families. Instead of acting to provide more safeguards for Texans living near oil and gas operations, they have proceeded to strip Texas cities of their ability to put meaningful safeguards in place.”[[66]](#footnote-66)

The currently depressed price of oil and gas in the world market may have more immediate impact on oil and gas operations in Texas than either municipal ordinances or state laws. Bloomberg reported last week that more than 3000 wells had been drilled, but not fracked, in the Eagle Ford Shale area, as producers try to wait for oil prices to rise.[[67]](#footnote-67) Just six rigs were operating in the Barnett Shale last week, down from 24 a year ago. After reaching a high of 5,742 million cubic feet per day in natural gas production in 2012, the Barnett Shale produced an average of 4,439 million cubic feet per day in January and February of this year, the lowest level in eight years. The chilling effect of market prices on oil and gas production is not subject to negotiation or compromise, but, as those in the oil patch are well aware, can only be cured by time.

Wresting regulatory power over oil and gas operations away from local communities is not just happening in Texas, but seems to be the focus of a multistate effort on the part of the oil and gas industry. Oklahoma's governor is now deciding whether to sign a bill that stops local governments there from enacting fracking bans.[[68]](#footnote-68) Oklahoma lawmakers filed several bills this year to prevent municipalities from banning fracking or other oil and gas activities, because of what happened in Denton last year. A final bill has now been sent to Gov. Mary Fallin, who is expected to sign it. Oklahoma's legislation reportedly preserves local authority to enact reasonable zoning rules, but no one agrees what that means. Like Denton’s mayor, Oklahoma’s Stillwater mayor, Gina Noble, said lawmakers should practice in the state what they preach to Washington.[[69]](#footnote-69)

New laws intended to limit the power of local government to regulate oil and gas operations may be an emerging trend, which would constitute a significant development in urban drilling. However, because such legislation fails to address the serious impacts of drilling in populated areas while taking away the customary remedies of local communities to solve their own problems, public support for such new laws cannot be assumed. The local vs. state power struggle over how best to protect the public while keeping both real estate interests and the oil and gas industry economically healthy will likely continue for a while.

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