

BASICS OF MUNICIPAL PLANNING AND ZONING IN TEXAS

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ZONING

I. Zoning: A Definition and Its History in the United States

Zoning is the regulation by a municipality of the use of land located within the municipality's corporate limits as well as the regulation of the buildings and structures located thereon.¹ Thus, the division of a city or area into districts and the prescription and application of different regulations in each district generally is referred to as zoning. A comprehensive zoning ordinance necessarily divides a city into certain districts and prescribes regulations for each one having to do with the architectural design of structures, the area to be occupied by them, and the use to which the property may be devoted. The use of a building may be restricted to that of trade, industry or residence.² Zoning is distinguished from eminent domain in that zoning laws are enacted in the exercise of the police power, their enforcement does not constitute condemnation of property, and the constitutional requirement of compensation for the taking of private property does not restrict the exercise of zoning power.³ Zoning also is distinguishable from the law of nuisance because comprehensive zoning ordinances have a much wider scope than the mere suppression of the offensive use of property. They act, not only negatively, but constructively and affirmatively, for the promotion of the public welfare. Moreover, the existence of a nuisance is not a necessary prerequisite to the enactment of zoning regulations.⁴

First and foremost, zoning is the exercise of the police power by a municipality. To fully understand the evolution of that concept, a brief overview of the history of land use regulation in America, and zoning in particular, is in order. The police power is inherent in the sovereign power of the state to regulate private conduct to protect and further the public welfare.⁵ As a consequence, government has the authority to regulate a wide variety of activities to promote public health, safety, morals and the general welfare.

In colonial America, local governments on occasion regulated certain limited areas of land use and structures, such as the location of farming lands and the prohibition of wooden fireplaces and thatched roofs due to fire hazard and safety concerns. In colonial cities such as Boston, Salem and Charleston, laws enacted prior to 1800 regulated the location of slaughterhouses and distilleries as well as the business premises of chandlers (candle makers) and couriers, and the location of potters' kilns.⁶

By the 1840s, most American cities were an unseemly clustering of mixed uses characterized by backyard privies and filth and stench in the streets. Fires and deadly diseases

¹ Ziegler, *Rathkopf's The Law of Zoning and Planning* § 1:3 at 1-16 (2004) (hereinafter referred to as "*Rathkopf's*").

² 10 Tex. Jur. 3d, Building Regulations § 6.

³ 77 Tex. Jur. 3d, Zoning § 2.

⁴ *Id.*

⁵ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1894).

⁶ See *Rathkopf's*, § 1:2 at 1-8.

were not uncommon. During this time, the “sanitary reform” movement pressed for the implementation of comprehensive public water and sewage systems and for increased regulation of land uses which posed the threat of fire and disease.⁷ By the end of the 19th century, in large metropolitan areas in particular, it became increasingly clear that some government regulation of property and land use was necessary since repugnant land uses often existed side-by-side. Consequently, by the early 1900s many American cities had enacted ordinances regulating a variety of types of land uses. For example, in some cities noxious businesses were excluded or entirely prohibited in certain districts. There were restrictions on the operation and location of tenements, the erection of billboards, the discharge of smoke, and in some residential areas there were restrictions on lot size, setbacks and the bulk, type and height of structures. Many of these regulations were upheld by the courts since the police power of local governments was determined to be sufficiently broad to include within its scope new laws affecting the use and development of land, particularly those uses which were deemed harmful to the public welfare.⁸

The beginning of the twentieth century also witnessed the so-called “city beautiful” movement, the precursor to modern urban planning, which pressed for the paving of streets and sidewalks, street lighting, elimination of trash-strewn streets and yards, planting of trees and gardens, creation of public parks, and the development and maintenance of attractive residential areas. In part as a result of this movement, there was recognition of the need for more comprehensive planning and regulation of land uses at the local level.⁹ By the 1920s, many U.S. cities had adopted comprehensive zoning codes which regulated land uses within their boundaries. These ordinances routinely were challenged as going beyond the limits of necessity, that such laws were designed to secure some future public benefit rather than to prevent harm, and that the segregation of residential uses under such codes involved impermissible class legislation by discriminating among land users according to their economic situation in life. These arguments, however, often were rejected by the state courts, which generally held that regulation of land use through zoning was within the legitimate scope of the police power.¹⁰

Zoning at first was considered one of the most radical departures from the traditional concepts of private property ownership because it was perceived as prohibiting a citizen from devoting his property to a purpose useful and entirely harmless. In response the courts generally ruled that the police power justified the enactment of such ordinances to prevent congestion, to secure quiet residential districts and to procure an orderly segregation of industrial, commercial and residential areas brought about by the constantly increasing density of urban populations, the multiplying forms of industry and the growing complexities of civilization.¹¹ The United States

⁷ See *id.* at 1-9 (and citations contained therein).

⁸ *Id.* at 1-9-10.

⁹ *Id.* at 1-10.

¹⁰ *Id.* at 1-10-11.

¹¹ *Id.* at 1-11.

Supreme Court validated zoning as a valid exercise of the police power in *Village of Euclid, Ohio v. Ambler Realty Corp.*¹²

The Village of Euclid, Ohio, is a suburb of Cleveland and in the early 1920s its population was between 5,000 and 10,000 residents. According to the Supreme Court, the industrial development of Cleveland had “reached and in some degree extended into [Euclid], and in the obvious course of things [would] soon absorb the entire area for industrial enterprises.”¹³ Ambler Realty was the owner of a 68-acre tract of land, and in late 1922, due to its concern about the foregoing industrial development from Cleveland, the village council adopted an ordinance “establishing a comprehensive zoning plan for regulating and restricting the location of trades,

{ "pageset": "S85dc industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.”¹⁴ Specifically, the ordinance established six classes of use districts, three classes of height districts, and four classes of area districts. The owner challenged the ordinance on federal due process and equal protection grounds and was therefore unconstitutional. Rejecting those contentions, the Supreme Court wrote:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . . Thus, the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.¹⁵

Thus was born Euclidian zoning, the concept of separating incompatible land uses through the establishment of fixed legislative rules. In 1921, prior to the Supreme Court’s *Village of Euclid* decision, the United States Department of Commerce had commissioned a Standard Zoning Enabling Act (SZE), which provided a model for states to follow by delegating zoning power to local governments. The SZE also contained limitations on the zoning power of local governments. After *Village of Euclid*, the Department of Commerce published the SZE with explanatory notes and thereafter ensued widespread state adoption of the SZE. Texas adopted its version of the SZE in 1927 and delegated zoning power to the legislative bodies of cities and

¹² 272 U.S. 365 (1926).

¹³ *Id.* at 389.

¹⁴ *Id.* at 379-80.

¹⁵ 272 U.S. at 387-88.

incorporated villages, but not to counties.¹⁶ Texas' version of the SZEA was upheld by the Texas Supreme Court in *Lombardo v. City of Dallas*.¹⁷

II. The Texas Statutory Scheme

A. Purpose and Scope of Zoning in Texas

In Texas zoning generally is restricted to land within a city's corporate limits and that zoning power is codified in Chapter 211 of the Texas Local Government Code. The power to zone property is delegated from the state and constitutes the exclusive authority of a municipality to zone.¹⁸ The purpose of zoning, while never statutorily defining that term, is to promote "the public health, safety, morals, or general welfare" and protect and preserve "places and areas of historical, cultural, or architectural importance and significance."¹⁹ Further, zoning must be in accordance with a comprehensive plan²⁰ and be designed to "(1) lessen congestion in the streets; (2) secure safety from fire, panic, and other dangers; (3) promote health and the general welfare; (4) provide adequate light and air; (5) prevent the overcrowding of land; (6) avoid undue concentration of population; or (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements."²¹ The basic matters regulated by most zoning ordinances are found in Section 211.003 of the Texas Local Government Code:

¹⁶ See *Mixon, Texas Municipal Zoning Law* (3d ed. 1999), § 1.000 at 1-4-5 (hereinafter referred to as "*Mixon*").

¹⁷ 47 S.W.2d 495 (Tex.Civ.App.—Dallas 1932), *aff'd*, 124 Tex. 1, 73 S.W.2d 475 (1934).

¹⁸ *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex.Civ.App.—San Antonio 1976, writ *ref'd n.r.e.*).

¹⁹ Tex. Local Gov't Code § 211.001.

²⁰ A comprehensive plan generally is defined as a long-range plan intended to direct the growth and physical development of a community for an extended period of time. Comprehensive planning is a process by which a community assesses what it has, what it wants, how to achieve what it wants and finally, how to implement what it wants. A comprehensive plan usually contains several components—transportation systems, parks and recreational services, utilities, housing and public facilities. It also provides for the distribution and relationships of various land uses and often serves as the basis for future land development recommendations. The plan may be in the form of a map, a written description and policy statements, or it may consist of an integrated set of policy statements.

²¹ Tex. Local Gov't Code § 211.004(a).

§ 211.003. Zoning Regulations Generally

- (a) The governing body of a municipality may regulate:
 - (1) the height, number of stories, and size of buildings and other structures;
 - (2) the percentage of a lot that may be occupied;
 - (3) the size of yards, courts, and other open spaces;
 - (4) population density; [and]
 - (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes. . . .

(b) In the case of designated places and areas of historical, cultural, or architectural importance and significance, the governing body of a municipality may regulate the construction, reconstruction, alteration, or razing of buildings and other structures.

(c) The governing body of a home-rule municipality may also regulate the bulk of buildings.

(Emphasis added). As a practical matter, for those cities in Texas that have adopted zoning, there are two integral components in exercising zoning power: the zoning ordinance, which provides definitions and all relative regulations, and the zoning map, which visually reflects the various zoning districts within the city's corporate limits.

B. Procedures for Adopting and Relief from Zoning Regulations

Again, Chapter 211 of the Texas Local Government Code addresses the procedures that must be followed for a city to adopt zoning regulations. The statutorily mandated requirements are jurisdictional and if a city fails to follow them, the zoning ordinance is void.²² As noted in *Mixon*, several reasons justify the requirement that municipalities strictly conform to the procedures outlined in Chapter 211:

First, constitutional due process requires that governments act rationally and fairly when they exercise the police power. Land-use zoning is justified as an exercise of the police power. An exercise of the police power is valid only if it is rationally connected with protection of the community's health, safety, and welfare. The prescribed procedures provide a framework within which the community must systematically balance public welfare and private interests and establish a logical connection between its regulations and the community good in a considered and open process. Following the [Standard Zoning Enabling] act's prescribed formalities ensures that due process requirements are met; any action that falls short is suspect.

²² See *Peters v. Gough*, 86 S.W.2d 515 (Tex.Civ.App.—Waco 1935, no writ).

Second, local governments have no inherent governmental powers. Since municipalities can act in a governmental capacity only if the state grants them power, they are strictly held to any limitations or conditions imposed by the enabling act. The act expressly requires municipalities to follow its specific procedures for adopting and amending comprehensive zoning ordinances. These steps are therefore jurisdictional, and condition the authority that is granted.

As a by-product of requiring strict adherence to the act, Texas courts are spared the burden of deciding whether particular city actions fall below the constitutional and statutory standard. By making statutory adherence the minimum acceptable standard for adoption, the strict rule draws a sharp line that is easy to apply. Requiring strict adherence also aligns Texas with other jurisdictions whose enabling acts are similar, if not identical, and gives zoning adoption decisions a truly national application.²³

1. The Zoning Commission

A city wishing to exercise its zoning authority must appoint a zoning commission.²⁴ The zoning commission's authority is statutorily limited to recommending "boundaries for the original zoning districts and appropriate zoning regulations for each district."²⁵ It should be noted that a home-rule municipality in Texas must appoint a zoning commission²⁶ while a general law city may appoint a zoning commission.²⁷ The zoning commission conducts public hearings on proposed changes to the zoning ordinance or on site-specific applications for zoning amendments. The zoning commission makes a preliminary report and that report subsequently is submitted to the city council for consideration.²⁸ Moreover, the city council cannot hold a public hearing or take action until it receives the final report of the zoning commission.²⁹ Both the zoning

²³ *Mixon*, § 4.001 at 4-3-4.

²⁴ While some cities, such as Fort Worth, have both a planning (or plan) commission and a zoning commission, most cities in Texas confer both functions (planning and zoning matters) on a single entity known as the planning and zoning commission.

²⁵ Tex. Local Gov't Code § 211.007(a).

²⁶ *Id.* See also *Coffee City v. Thompson*, 535 S.W.2d 758, 767 (Tex.Civ.App.—Tyler 1976, writ ref'd n.r.e.).

²⁷ Tex. Local Gov't Code § 211.007(a).

²⁸ In 2023, Section 211.007(b) of the Texas Local Government Code was clarified to read that at least one public hearing is required before the Planning and Zoning Commission may submit a final report to the governing body. The prior version of Section 211.007(b) required "public hearings."

²⁹ *Id.*, § 211.007(b).

commission and city council must follow the posting requirements contained in the Texas Open Meetings Act (posting of notice at least 3 business days in advance of meeting and an agenda describing the actions to be considered by the entity).³⁰

Besides public notice of meetings of the zoning commission, written notice to surrounding landowners is statutorily mandated within specific timeframes. Prior to a public hearing, the zoning commission (usually through city staff) must provide written notice to affected property owners and those property owners within 200 feet of the affected property. The written notice must be sent to affected property owners before the 10th day before the public hearing date. The notice need not be via certified mail and regular mail will suffice. The notice is sent to those relevant individuals as reflected on the most recently approved tax roll.³¹

2. The City Council

After the zoning commission acts on a site-specific application or zoning ordinance amendment, the matter goes to the city council for consideration. As at the zoning commission stage, a public hearing also is required before the city council.³² Additionally, newspaper notice of the public hearing is required. Before the 15th day before the date of the public hearing, “notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality.”³³ It should be noted, however, that notice to affected landowners is not statutorily required at the council stage.³⁴ At the public hearing before the city council, members of the public have the opportunity to comment on the proposed zoning change.

A city council has several options when considering a zoning request. A city council may adopt the proposed matter by simple majority vote, as is the case in other non-zoning matters considered by the city council.³⁵ In the event, however, that a proposed change to a regulation or boundary is protested by twenty percent (20%) of the owners of the affected property or (ii) the

³⁰ See Tex. Local Gov’t Code § 211.0075 (zoning commission) and Tex. Gov’t Code ch. 551 (city councils).

³¹ *Id.*, § 211.007(c).

³² *Id.*, § 211.006(a).

³³ *Id.*

³⁴ As noted, the procedural requirements of Chapter 211 must be followed; however, Section 211.006(c) of the Texas Local Government Code provides that a governing body “may, by two-thirds vote, prescribe the type of notice to be given of the time and place of the public hearing. Notice requirements prescribed under this subsection are in addition to the publication notice required by Subsection (a).” Thus, cities may adopt more stringent notification requirements than those referenced in Chapter 211.

³⁵ One exception exists for general law cities that do not have a zoning commission. Those cities may not adopt a proposed change until after the 30th day after the date of landowner notification, according to Section 211.006(b) of the Texas Local Government Code.

owners of property located within 200 feet of the affected property, then the proposed change must be approved by at least three fourths (3/4) of all members of the city council who are qualified to vote.³⁶ As of 2025, it is no longer the case that the affirmative vote of at least three-fourths (3/4) of all members of the city council is required to overrule the recommendation of the zoning commission that a proposed change be denied.³⁷ Most cities in Texas have availed themselves of this provision of the Local Government Code.

3. The Zoning Board of Adjustment

In Texas, a zoning board of adjustment must act within the parameters established by the state legislature and the municipal ordinance that both establishes the board and defines its local function and powers. According to state law, a zoning board of adjustment may hear and decide appeals from the administrative decisions made by zoning enforcement officials, special exceptions, variances and other matters authorized by ordinance.³⁸ Further, a zoning board of adjustment must not stray outside its specifically granted authority. If it does so, its actions may be held by a court to be null and void.

Composition of the Zoning Board of Adjustment. Section 211.008 of the Texas Local Government Code addresses the membership of the zoning board of adjustment. Specifically, that section provides that the city council appoints the members of the zoning board of adjustment. The board must be comprised of at least five (5) members and cities may permit each councilmember to appoint a member of the board. The board members serve two-year terms and may only be removed for cause. Cities may appoint alternate members to the board to serve in the absence of one or more regular members of the board. Any case before the board must be heard by at least 75 percent (75%) of the members (typically, 4 out of 5 members). The board maintains its minutes of meetings and the presiding officer or acting presiding officer may administer oaths and compel the attendance of witnesses. The meetings of the board are public. For Type A general law cities, the city council may act as the zoning board of adjustment.³⁹

Typical Duties of the Zoning Board of Adjustment. As noted above, the duties of a zoning board of adjustment are statutorily defined. In Flower Mound, for example, the Town's Code of Ordinances and the Land Development Regulations (Subpart B of the Town's Code of Ordinances) define the powers of the Zoning Board of Adjustment. They are as follows:

1. "To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official of the town in the enforcement of subpart B of this Code, pursuant to section 78-84,

³⁶ Tex. Local Gov't Code § 211.006(d).

³⁷ *Id.*, § 211.006(f) was repealed by House Bill 24, 89th Legislature. The repeal was effective September 1, 2025.

³⁸ *Id.*, § 211.009.

³⁹ *Id.*, § 211.008.

appeals.”⁴⁰ This provision of the Flower Mound Code of Ordinances is applicable to (1) Uniform Building Code appeals⁴¹; (2) International Residential Plumbing Code appeals⁴²; (3) International Energy Conservation Code appeals⁴³; (4) Uniform Electrical Code appeals⁴⁴; and (5) Swimming Pool Code appeals.⁴⁵ The Zoning Board of Adjustment, sitting as the Oil and Gas Board of Appeals, also hears appeals regarding administrative decisions relative to oil and natural gas permits.⁴⁶

2. “To permit variances or modifications of the height, yard, area, coverage and parking regulations, pursuant to section 78-85, variances.”⁴⁷

3. “To hear and decide special exceptions to the terms of subpart B of this Code, pursuant to section 78-86, special exceptions.”⁴⁸ In the Land Development Regulations, special exceptions are limited in scope and apply to the following:

- a. Reconstruction of nonconforming buildings.⁴⁹
- b. Expansion of nonconforming buildings.⁵⁰
- c. Discontinuance of nonconforming uses.⁵¹

⁴⁰ Flower Mound, Texas, Land Development Regulations § 78-83(1).

⁴¹ Flower Mound, Texas, Code of Ordinances § 14-34.

⁴² *Id.*, § 14-573.

⁴³ *Id.*, § 14-603.

⁴⁴ *Id.*, § 14-138.

⁴⁵ *Id.*, § 14-172(c).

⁴⁶ *Id.*, § 34-432(b).

⁴⁷ Flower Mound, Texas, Land Development Regulations § 78-83(2).

⁴⁸ *Id.*, § 78-83(3).

⁴⁹ *Id.*, § 78-86(1).

⁵⁰ *Id.*, § 78-86(2).

⁵¹ *Id.*, § 78-86(3).

d. Although not a special exception, the Zoning Board of Adjustment shall, from time to time, inquire into the existence, continuation or maintenance of any nonconforming use within the Town.⁵²

4. “[T]o permit such variances or modifications of . . . sign . . . regulations as may be necessary. . . .”⁵³

5. Building and Fire Code Board of Appeals.⁵⁴ The Board of Adjustment is authorized to hear Building Code or Fire Code appeals from decisions by the Director of Community Development or the Fire Chief, respectively. This ordinance also provides that a representative of the Building Department and a representative of Fire Department shall serve as non-voting ex officio members of the Board of Appeals.

Variations. The term “variance” is not defined in Chapter 211 of the Texas Local Government Code. A “variance” is defined by the Sixth Edition of Black’s Law Dictionary, however, as “[p]ermission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding [a] person’s property. The purpose of a variance is to prevent the unconstitutional application of the zoning ordinance.[⁵⁵] It is in the nature of a waiver of the strict letter of the zoning law upon substantial compliance with it and without sacrificing its spirit and purpose. [It is a]n authorization to a property owner to depart from literal requirements of zoning regulations in utilization of his property in cases in which strict enforcement of the zoning regulations would cause undue hardship.” In reality, a variance actually sanctions violations of the strict technical terms contained in a zoning ordinance.⁵⁶ An administrative official of a city cannot approve a variance.

A variance may only be granted if there exists an unnecessary hardship. Although state law does not define the term “unnecessary hardship,” it does **not** include (1) property that cannot

⁵² *Id.*, § 78-86(4).

⁵³ *Id.*, § 78-85(a).

⁵⁴ Formerly found in Flower Mound, Texas, Code of Ordinances, ch. 8, § 8.00 *et seq.*

⁵⁵ As one Texas court has stated,

the essential inquiry is whether in the circumstances the specific application of the general regulation would constitute an unnecessary and unjust invasion of the fundamental right of property.

Board of Adjustment v. Stovall, 218 S.W.2d 286, 288 (Tex.Civ.App.—Fort Worth 1949, no writ).

⁵⁶ For this reason, the rule is that “[t]he power to vary conditions of zoning ordinances should be sparingly exercised.” *Board of Adjustment of City of San Antonio v. Levinson*, 244 S.W.2d 281, 285 (Tex.Civ.App.—San Antonio 1951, no writ).

be used for its highest and best use⁵⁷; (2) financial or economic hardship⁵⁸; (3) self-created hardship⁵⁹; or (4) the development objectives of the property owner are or will be frustrated.⁶⁰ Professor Mixon in his treatise, *Texas Municipal Zoning Law*, defines “unnecessary hardship” by explaining that a “hardship that is self-induced or that is common to other similarly classified properties will *not* satisfy the requirement.”⁶¹

Effective September 1, 2021, the Legislature amended Chapter 211 of the Local Government Code to allow a zoning board of adjustment to “consider the following as grounds to determine whether compliance [with a municipal zoning] ordinance *as applied to a structure . . .* would result in unnecessary hardship: (1) the financial cost of compliance is greater than 50 percent of the appraised value of the structure as shown on the most recent appraisal roll . . . ; (2) compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development may physically occur; (3) compliance would result in the structure not being in compliance with a requirement of a municipal ordinance, building code, or other requirement; (4) compliance would result in the unreasonable encroachment on an adjacent property or easement; or (5) the municipality considers the structure to be a nonconforming structure.”⁶²

Special Exceptions. A special exception refers to uses that a zoning ordinance permits, but that are screened and specially approved by the board of adjustment for situational suitability. Special exceptions do not require a showing of hardship, unlike variances. As a practical matter, most special exceptions are handled by many cities as specific (or special) use permits. There is no authority to grant a special exception unless the zoning ordinance specifies that special exceptions may be granted. Thus, a zoning ordinance should specify the conditions that must be met for a special exception to be granted or the standards that a zoning board of adjustment is to employ when granting a special exception.

Use Variances. A zoning board of adjustment may not grant use variances. Variances may be granted from dimensional requirements such as setbacks; however, variances may not be granted which would allow a parcel of property to be used for a use that is not permitted under the zoning

⁵⁷ See *Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex.Civ.App.—San Antonio 1974, writ ref’d n.r.e.).

⁵⁸ See *Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, 290 S.W.2d 340 (Tex.Civ.App.—Galveston 1956, no writ); *Southland Addition Homeowner’s Ass’n v. Board of Adjustment of City of Wichita Falls*, 710 S.W.2d 194 (Tex.App.—Fort Worth 1986, writ ref’d n.r.e.); *Bat’tles v. Board of Adjustment and Appeals of the City of Irving*, 711 S.W.2d 297 (Tex.App.—Dallas 1986, no writ).

⁵⁹ See *Currey v. Kimple*, 577 S.W.2d 508 (Tex.Civ.App.—Texarkana 1979, writ ref’d n.r.e.).

⁶⁰ See, e.g., *Willie*, *supra* note 54.

⁶¹ *Mixon*, Glossary at B-10 (emphasis added).

⁶² Tex. Local Gov’t Code § 211.009(b-1)(emphasis added).

ordinance. A use variance in such instance would be a rezoning of property and the zoning board of adjustment does not possess the legal authority to rezone property. A guide for the zoning board of adjustment in considering variances is attached hereto at the end of this Chapter.

Appeals of the Decisions of the Zoning Board of Adjustment. An appeal of the decision of a zoning board of adjustment is by a little-used mechanism known as a writ of certiorari. An appeal may be filed by a person aggrieved by a decision of the board, a taxpayer or an officer, department, board or bureau of the city.⁶³ The appeal may be to state district court, county court or a county court at law.⁶⁴ The petition to the court must state that the decision of the zoning board of adjustment was illegal in whole or in part and specify the nature of the illegality.⁶⁵ The petition must be filed within ten (10) days after the date the board's decision is filed in the board's office.⁶⁶ The writ of certiorari procedure is described in greater detail in Section 211.011 of the Texas Local Government Code; however, a reviewing court may reverse or affirm, in whole or in part, or modify the decision that is appealed.⁶⁷ Texas case law is clear that the court may reverse a zoning board of adjustment's or both. A zoning ordinance violation is a misdemeanor and a city also may provide civil penalties for violations.⁶⁸ Another remedy is available to municipalities—Chapter 54 of the Texas Local Government Code. Chapter 54 provides that cities may enforce their zoning ordinances, among others, through civil actions and may recover civil penalties not to exceed \$1,000 per day.⁶⁹

III. Specific Zoning Issues and Concepts

Zoning law seems full of terms that are not defined in state statutes and often it appears that definitions indeed vary from one locale to another. For example, most cities in Texas utilize planned development districts; however, no statutory definition of that term is to be found and little case law exists to further clarify its definition. Additionally, some cities utilize specific use permits; however, a specific use permit in one city may be denoted a special use permit or conditional use permit in other cities. Nevertheless, following is a compendium of land use terms that are found in many zoning ordinances:

Accessory Use. A use customarily associated with a main use classification identified in a zoning ordinance, such as private swimming pools incidental to single-family detached housing. Some

⁶³ Tex. Local Gov't Code § 211.011(a).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, § 211.011(b).

⁶⁷ *Id.*, § 211.011(f).

⁶⁸ Tex. Local Gov't Code § 211.012(b).

⁶⁹ *Id.*, §§ 54.012 (authorizing civil actions) and 54.017 (civil penalties).

accessory uses that are intimately related to a classified use may be authorized without specific mention in the ordinance, or they may require separate and specific approval as provided in the ordinance.⁷⁰

Buffer zones. Buffer zones refer to the zoning of an area to “buffer” the incompatibility of adjacent higher or lower use or density zones, *e.g.*, the creation of a two-family residential zone between a single-family zone and a multi-family apartment zone.⁷¹

Conditional Zoning. Conditional zoning is the granting of a zoning change by a governing body which is subject to agreed upon specific conditions which limit permitted uses in a zoning district. The typical scenario is that a governing body secures a property owner’s agreement (1) to limit the use of the subject property to a particular use (or uses) or (2) to subject the tract to certain restrictions as a precondition to any rezoning. Unlike contract zoning, under conditional zoning a zoning authority requires an owner to perform some future act in order to receive rezoning, but does not enter into an enforceable agreement promising such rezoning.

Contract Zoning. Contract zoning is an unlawful activity whereby a property owner or developer agrees to develop or use property in a certain way in exchange for receiving a particular zoning classification from a city, *i.e.*, contract zoning involves an enforceable promise on the part of either the owners or zoning authority to rezone property. This is an area of the law that must be scrutinized if a city attempts to settle zoning/land use litigation by entering into a written settlement agreement.

Cumulative Zoning. A simple zoning classification system that establishes a hierarchy of uses, with single-family residential as the most restricted (or least intense), multi-family next (allowing single-family as well), commercial next (allowing all residential uses as well), and industrial as the least restricted (or most intense) (allowing all residential and commercial uses as well).⁷² Under a cumulative zoning ordinance, a planning and zoning commission and city council can grant a zoning change for a use that is more restrictive or less intense than the zoning classification requested.

Downzoning. The rezoning of an area to a less intensive use classification, *e.g.*, from an apartment to a detached single-family zone, and is usually less profitable to a developer. Downzonings are often challenged as being either arbitrary or confiscatory.⁷³

⁷⁰ *Mixon*, Glossary at B-1.

⁷¹ *Rathkopf’s*, § 1:20 at 1-46.

⁷² *Mixon*, Glossary at B-3.

⁷³ *Rathkopf’s*, § 1:37 at 1-50.

Exclusionary Zoning. Zoning regulations that, because of regulation of density, use, area, or similar development aspects, exclude persons of low and moderate economic means from access to housing in a community.⁷⁴

Floor Area Ratio (FAR). Floor Area Ratio is the ratio of total building floor area to the area of its zoning lot. Each zoning district has an FAR which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable on that zoning lot. For example, on a 10,000 square foot zoning lot in a district with a maximum FAR of 1.0, the floor area on the zoning lot cannot exceed 10,000 square feet.

Form-Based Code. A form-based code is a land development regulation that fosters predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code. A form-based code is a regulation, not a mere guideline, adopted into city, town, or county law. Form-based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. The regulations and standards in form-based codes are presented in both words and clearly drawn diagrams and other visuals. They are keyed to a regulating plan that designates the appropriate form and scale (and therefore, character) of development, rather than only distinctions in land-use types. This approach contrasts with conventional zoning's focus on the micromanagement and segregation of land uses, and the control of development intensity through abstract and uncoordinated parameters (*e.g.*, FAR, dwellings per acre, setbacks, parking ratios, traffic level of service (LOS)), to the neglect of an integrated built form. Not to be confused with design guidelines or general statements of policy, form-based codes are regulatory, not advisory. They are drafted to implement a community plan. They try to achieve a community vision based on time-tested forms of urbanism. Ultimately, a form-based code is a tool; the quality of development outcomes depends on the quality and objectives of the community plan that a code implements.⁷⁵

Inclusionary Zoning. Zoning regulations, which may require as a condition to development approval, that housing units for low- or moderate-income households be provided for in the development.⁷⁶

Mixed Use Development. While this term covers a wide variety of development types, a mixed use development generally contains standards for the blending of residential, commercial, cultural, institutional, entertainment and other uses. Mixed use zoning is generally closely linked to increased density, which allows for more compact development. Mixed use developments include a combination of related uses in one place, a significant proportion of each use within the "mix" of development, and often pedestrian and bicycle connectivity within the development.

⁷⁴ *Mixon*, Glossary at B-4.

⁷⁵ Definition of Form-Based Code, found at the Form-Based Code Institute (FBCI) website, <http://formbasedcodes.org/>.

⁷⁶ *Rathkopf's*, § 1:29 at 1-48.

Nonconforming Uses and “Grandfathering” of Uses/Amortization. Cities can establish zoning districts under their general police power to protect the public health, safety and general welfare.⁷⁷ Such restrictions, however, may not be made retroactive; rather, they

must relate to the future rather than to existing buildings and uses of land, and ordinances may not operate to remove existing buildings and uses not in conformity with the restrictions applicable to the district, at least where such buildings and uses are not nuisances and their removal is not justified as promoting public health, morals, safety or welfare.⁷⁸

“A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist.”⁷⁹ In other words, nonconforming status is attributable to a use or structure when

- (a) such use or structure was constructed or operational prior to:
 - (i) the annexation of such property into the municipality, or
 - (ii) the adoption or amendment of the zoning ordinance; and
- (b) the nonconforming use or structure has continued to exist without subsequent abandonment.

Infrequent or sporadic use of land does not necessarily establish an existing use for purposes of nonconformity.⁸⁰ The use must be lawful at the time the ordinance is passed. For example, a building that previously violated the building code when the zoning ordinance prohibiting its use

⁷⁷ *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953).

⁷⁸ *Id.* (citations omitted) (wrecking yard in light industrial district not nuisance nor harmful to public safety and welfare; therefore, compulsion to cease operation constituted taking). *See also Carthage v. Allums*, 398 S.W.2d 799 (Tex.Civ.App.—Tyler 1966, no writ) (no retroactive application).

⁷⁹ *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972), *app. dismiss'd*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1973); *Town of Highland Park v. Marshall*, 235 S.W.2d 658, 662-63 (Tex.Civ.App.—Dallas 1950, writ ref'd n.r.e.) (the use of a garage apartment pre-dated the zoning ordinance; therefore, although the garage apartment violated the single-family district regulations, the privileged status or exemption applied).

⁸⁰ *See generally Silsbee v. Herron*, 484 S.W.2d 154 (Tex.Civ.App.—Beaumont 1972, writ ref'd n.r.e.).

is enacted, is not a lawful nonconforming use.⁸¹ Further, it must be the same use and not a use of some other kind.⁸²

The right to continue a nonconforming use has its genesis in federal and state constitutional provisions that prohibit the unconstitutional taking of property without just compensation and due process of law.⁸³ Additionally, the exemption for pre-existing nonconforming uses protects an owner's investment in property. The exemption does not apply to uses initiated after the zoning ordinance is promulgated or which are illegal.⁸⁴ The protected status continues until such time as the nonconforming building or structure has been abandoned by the owner or terminated under the ordinance.

Pre-existing nonconforming uses need not continue in perpetuity, however, and "[a]mortization is a valid method of eliminating existing nonconforming uses of land."⁸⁵ An owner's investment in property, for purposes of calculation, is the recoupment of the landowner's dollar investment, as opposed to the market value or replacement value.⁸⁶ The amortization formula may consider past depreciation of the structure,⁸⁷ or the value of structures which can be moved to another location.⁸⁸ It need not consider appreciation of land value, improvements or profit from an advantageous acquisition.⁸⁹

⁸¹ 8A McQuillin, *Municipal Corporations*, § 28.186.50.

⁸² *City of Dallas v. Fifley*, 359 S.W.2d 177, 181-82 (Tex.Civ.App.—Dallas 1970, no writ) (owner must comply with permit requirements notwithstanding that owner commenced construction prior to zoning ordinance).

⁸³ *Eckert v. Jacobs*, 142 S.W.2d 374, 378 (Tex.Civ.App.—Austin 1940, no writ).

⁸⁴ See generally *Scott v. Champion Bldg. Co.*, 28 S.W.2d 178, 184 (Tex.Civ.App.—Dallas 1930, no writ) (only "innocent" nonconforming uses protected; *i.e.*, one who legally and rightfully began or planned the construction of a building as opposed to one who acted in defiance of a valid ordinance).

⁸⁵ *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268, 1371 (5th Cir. 1988).

⁸⁶ *Murmur Corp. v. Board of Adjustment, City of Dallas*, 718 S.W.2d 790, 795-97 (Tex.App.—Dallas 1986, writ ref'd n.r.e.).

⁸⁷ *Neighborhood Comm. on Lead Pollution v. Board of Adjustment, City of Dallas*, 728 S.W.2d 64, 70 (Tex.App.—Dallas 1987, writ ref'd n.r.e.).

⁸⁸ *Board of Adjustment, City of Dallas v. Winkles*, 832 S.W.2d 803, 807 (Tex.App.—Dallas 1992, writ denied).

⁸⁹ *Id.*, 832 S.W.2d at 806.

The Texas Supreme Court has recognized the “public need for a fair and reasonable termination of nonconforming property uses . . . [and is] in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power.”⁹⁰ In fact, a zoning regulation may have as a legitimate objective the eventual elimination of nonconforming uses.⁹¹ In this regard, Texas courts have approved the direct and systematic termination of nonconforming uses provided that adequate time is allowed to recoup an owner’s investment in the property.⁹² In *Benners*, the court held that termination of nonconforming uses is not a “taking in the eminent domain sense”; rather it is a legitimate exercise of the police power.⁹³ The court upheld the constitutionality of a twenty-five year amortization provision terminating pre-existing nonconforming uses.⁹⁴

Abandonment of a nonconforming use may also terminate the privileged status. In *Rosenthal v. City of Dallas*,⁹⁵ the court established the test for abandonment of a nonconforming use. Specifically, abandonment requires “(1) the intent to abandon and (2) some overt act or failure to act that carries the implication of abandonment.”⁹⁶ Temporary discontinuance of a nonconforming use is insufficient to show abandonment. Specifically,

[t]he mere cessation of the use for a reasonable period does not itself work an abandonment, whether the building is permitted to remain vacant or is temporarily devoted to a conforming use with the intent that the nonconforming use be resumed when opportunity therefore should arise, and periods of interruption due to lack of

⁹⁰ *Benners*, 485 S.W.2d at 778; *White v. Dallas*, 517 S.W.2d 344 (Tex.Civ.App.—Dallas 1974, no writ) (termination of wrecking yard within one year not unreasonable or arbitrary). *See also Fifley, supra*.

⁹¹ *City of Garland v. Valley Oil Co.*, 482 S.W.2d 342, 346 (Tex.Civ.App.—Dallas 1972, writ ref’d n.r.e.), *cert. denied*, 411 U.S. 933 (1973).

⁹² *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 735 (Tex.Civ.App.—Dallas 1968, writ ref’d n.r.e.), *cert. denied*, 396 U.S. 277, *reh’g denied*, 397 U.S. 977 (1970) (twenty-five years sufficient for amortization and discontinuance of nonconforming uses).

⁹³ *Id.*, 485 S.W.2d at 777-78.

⁹⁴ *Benners, supra*. *See also Valley Oil Co.*, 482 S.W.2d at 345-46 (ordinance requiring owner of property to discontinue use as gasoline station within one year not unreasonable and arbitrary given the equipment was removable and could be used at other stations and the owner had recouped the initial investment).

⁹⁵ 211 S.W.2d 279 (Tex.Civ.App.—Dallas 1948, writ ref’d n.r.e.).

⁹⁶ *Id.* at 284; *Turcuit v. City of Galveston*, 658 S.W.2d 832, 834 (Tex.App.—Houston [1st Dist.] 1983, no writ) (discontinued use for 6 months not abandonment).

demand, inability to get a tenant, and financial difficulty do not change the character of use.⁹⁷

In addition, the failure to adhere to registration requirements may effectuate the termination of a nonconforming use.⁹⁸

A municipality should note, however, that if it annexes property, a property owner may continue using the land “in the manner in which the land was being used on the date annexation proceedings were instituted if the land use was legal at the time,” and if the property owner had taken certain steps to begin a specific land use, the property owner can continue to do so.⁹⁹

Legislation approved in 2023 relative to amortization dramatically changed the landscape in how Texas municipalities amortize nonconforming uses. Prior to May 19, 2023, cities looked at how long it took for a property owner to recoup its investment in the property; however, new provisions in the Local Government Code require that a city must now pay the fair market value of the use of the property.¹⁰⁰ It is anticipated that very few cities will now utilize the amortization to terminate nonconforming uses of property. Further, if a city desires to either adopt or change a zoning regulation or boundary under which a current conforming use will result in a nonconforming use, notice of a public hearing must be given to each owner of real or business personal property informing the owner of the time and place of the public hearing, with the following text in bold, 14-point type or larger, stating: “THE [MUNICIPALITY NAME] IS HOLDING A HEARING THAT WILL DETERMINE WHETHER YOU MAY LOSE THE RIGHT TO CONTINUE USING YOUR PROPERTY FOR ITS CURRENT USE. PLEASE READ THIS NOTICE CAREFULLY.”¹⁰¹

Overlays (or Zoning Overlays, Overlay Districts or Overlay Zones). A zoning overlay is a mapped district superimposed on one or more established zoning districts and is used to impose supplemental restrictions on uses in these districts, permit uses otherwise disallowed or implement some form of density bonus or incentive zoning program.¹⁰² Often historically significant areas of a municipality have a “historic district overlay” in an effort to preserve and maintain the unique historic qualities of an area.

⁹⁷ *Marshall*, 235 S.W.2d at 664 (citations omitted).

⁹⁸ *Board of Adjustment, City of San Antonio v. Nelson*, 577 S.W.2d 783 (Tex.Civ.App.—San Antonio 1979, writ ref’d n.r.e.).

⁹⁹ Tex. Local Gov’t Code § 43.002 (the statute goes into greater detail about the continuation of land uses and describes certain land uses that are nevertheless prohibited).

¹⁰⁰ See Tex. Local Gov’t Code § 211.019 (detailed procedure now required for amortization of nonconforming uses of property).

¹⁰¹ Tex. Local Gov’t Code § 211.006(a-1).

¹⁰² *Rathkopf’s*, § 1:31 at 1-49.

Performance Zoning. Performance zoning consists of land use regulations based upon the application of specific performance standards and represents an alternative to traditional zoning. Performance zoning provides for greater flexibility, avoiding the detailed specification of acceptable uses for specific parcels inherent in traditional zoning. It provides for the exercise of greater discretion by the regulatory jurisdiction at the time developments are proposed while at the same time establishing specific standards for the exercise of this discretion. Performance zoning provides a framework for the establishment of a system for the exchange of certain rights that could allow for even greater responsiveness to the market while preserving the public objectives sought in a system of land use control.

Under performance zoning, land development and use are regulated by a series of performance standards relating to specific impacts of a proposed development. Performance standards can, for example, limit the intensity of development, control the impacts of development on nearby land uses, limit the effects of development on public infrastructure, and protect the natural environment. Performance standards can be either negative or positive. They can set a maximum level for the noise impacts on adjacent property or they can require specified types of buffers to be established between certain types of land uses. Performance zoning dispenses with the large numbers of narrowly defined and highly specific use districts typical of traditional zoning. In its purest form, performance zoning may allow all possible uses and establish a uniform system of performance standards throughout a jurisdiction. Some systems of performance zoning, however, do provide for the specification of a relatively small number of more generalized zones, with some broad restrictions on types of use and different performance standards in the different zones. The key aspect of performance zoning lies in its regulation of land use through the establishment of standards intended to achieve specific public objectives. If one public objective is to limit the negative impacts of land uses on adjoining uses, attempts are made to define the undesirable levels of such impacts and develop standards to prohibit these. For purposes of assuring that development takes place within the capacity of the public infrastructure, such capacity levels are established. Then development is limited based upon these specific infrastructure-based impacts and limitations. For example, the effect of development on the transportation system could be controlled using standards involving maximum levels of trip generation per acre.¹⁰³

Planned Developments (or Planned Development Districts). Planned Development Districts (PDDs) are specialized land use districts utilized in most municipal zoning schemes. “PDD procedures allow developers to obtain site-specific approval for developments that may not fit standard area and use zoning categories and that require specific negotiations to ensure that community interests are protected. PDDs conventionally accommodate designated types of major development, such as apartment projects, cluster housing, office developments, shopping centers and hospital facilities.”¹⁰⁴ Professor Mixon defines a PDD as follows:

A zoning classification, ordinarily not identified on the zoning map prior to specific project approval, that authorizes particular development that has been specifically

¹⁰³ See <http://www-pam.usc.edu/index.html> (and references contained therein).

¹⁰⁴ Mixon, *Texas Municipal Zoning Law*, § 17.03 (2d ed. 1994).

approved. Planned development districts often operate as zoning amendments that authorize issuance of permits to allow specifically approved developments on condition that all development conditions are fulfilled.¹⁰⁵

A prior Dallas Development Code described and defined Planned Development Districts as follows:

In order to provide flexibility in the planning and development of projects with combinations of uses and of specific physical designs such as office centers, combination apartment and retail centers, shopping centers, medical centers with office and housing elements, special industrial districts, housing developments and other similar developments, a PD district is provided. This district is intended to be applied to the district map as an amendment to the zoning ordinance. Certain maximum and minimum standards are specified for various use categories and certain standards such as for yards, coverage, and building spacing are to be determined by the design. Specific development conditions and development schedules can be enforced with respect to a PD district and failure to adhere to a development schedule can be the basis of removing all or part of a PD district from the zoning district map. The purposes of the PD district are to achieve flexibility and variety in the physical development pattern of the city, to encourage a more efficient use of open space and to encourage the appropriate use of land. It is intended that cognizance be taken of surrounding property and that proper protection be given to it in locating and approving any PD district.¹⁰⁶

Planned Development Districts are usually designated as “floating zones” in a city’s zoning scheme; that is, they usually are not found on a zoning map until after the PDD has been approved. Most municipal planned development ordinances describe the general attributes as well as the purposes of a planned development district rather than actually defining the term “planned development.”¹⁰⁷

¹⁰⁵ *Mixon*, Glossary at B-6.

¹⁰⁶ Dallas, Texas, Development Code § 51-4.102(c)(1).

¹⁰⁷ *See, e.g.*, Town of Prosper, Texas, Zoning Ordinance, ch. 2, § 24: “The Planned Development (PD) District is a district that accommodates planned associations of uses developed as integral land use units such as offices, commercial or service centers, shopping centers, residential developments of multiple or mixed housing (including attached single-family dwellings), or any appropriate combination of uses that may be planned, developed, or operated as integral land use units either by a single owner or a combination of owners. A PD District may be used to permit new or innovative concepts in land utilization not permitted by other zoning districts in this Ordinance”; City of Dallas, Texas, Code of Ordinances, § 51A-4.702(a)(1) and (2): “The purpose of the PD is to provide flexibility in the planning and construction of development projects by allowing a combination of land uses developed under a uniform plan that protects contiguous land uses and preserves significant natural features. . . . A PD may contain any use or combination of uses. . . .”; City of McKinney, Texas, Code of Ordinances, § 146-94(a): “Planned Development zoning district is designed to provide for the unified and coordinated development of parcels or

Critics of planned developments contend that “the flexibility of [planned development] zoning may result in misuse by developers and abuse of discretionary authority by a municipality’s governing agency.”¹⁰⁸ Listed below are several issues—legal, planning-related and political—that may be problematic.

Due Process Concerns. While planned developments that are approved by a local government rarely result in litigation by developers, projects that are rejected indeed may create the basis for litigation. A constitutional concern is that the standards by which a local government rejects a project allegedly may be unconstitutional. The “standard” attack is based on due process—the planned development provisions of a zoning ordinance contain indeterminate standards and are subject to the unbridled discretion of the governing body. While the Texas Supreme Court’s decision in *Town of Sunnyvale v. Mayhew*¹⁰⁹ may provide some solace to a local government in rejecting a planned development proposal, standardless review of PD applications could result in liability.¹¹⁰

No Mixture of Uses. A common concern regarding planned development projects is that they often consist of a single use of the property, rather than containing a mixture of uses.¹¹¹ As

tracts of land. Certain freedom of choice as to intended land use and development standards may be permitted; provided that the special ordinance provisions of the district are complied with and the intended uses and standards are not in conflict with the general purpose and intent of either this chapter or the city comprehensive plan”; and Town of Flower Mound, Texas, Code of Ordinances, § 98-811: “The PD planned development district (PD) is designed to permit flexibility and encourage a more creative, efficient and aesthetically desirable design and placement of buildings, open spaces and circulation patterns by allowing a mixture or combination of uses and to best utilize special site features such as topography, size and shape. A planned development district may be used to permit new or innovative concepts in land utilization not permitted by other zoning districts in this Code. While greater flexibility is given to allow special conditions or restrictions that would not otherwise allow the development to occur, the requirements established herein ensure against the misuse of such increased flexibility. It is intended for application in all land use designations on the land use map of the master plan, provided that the uses and development standards proposed are consistent with the stated goals of the town’s master plan.”

¹⁰⁸ *Rathkopf’s*, § 88:1.

¹⁰⁹ *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex.App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991).

¹¹⁰ See Daniel R. Mandelker, *Designing Planned Communities*, at 92-98 (and cases cited therein) (iUniverse 2010).

¹¹¹ The planned development ordinances in the municipalities referenced in note 10, *supra*, all contain language reflecting a mixture or combination of land uses. See Prosper: “planned associations of uses” and “combination of uses”; Dallas: “a combination of land uses”; McKinney: “intended uses”; and Flower Mound: “a mixture or combination of uses.”

noted above, “traditional” planned developments, by definition, contain multiple uses of property—single-family residential, multifamily residential, commercial/retail and occasionally civic/governmental uses. One current trend in North Texas, however, abandons the “mixture of uses” concept inherent in traditional planned developments and instead, planned development projects become single-family residential projects with a few “bells and whistles” thrown in—resident amenity centers, enhanced landscaping, entryway features, limited trails and small park areas, for example. In effect, there is no “planned development”; rather, the project consists of a single-family residential product with a few additional amenities or features. We refer to this project as “zoning plus”—a “straight” zoning project, almost every time with higher density, “dressed up” as a planned development.

The Higher Residential Density of Planned Developments. Almost universally, PD applications include higher residential density than “straight” zoning projects. The result is clear—if a municipality wishes to have developed in its corporate limits the planned development as proposed, it must approve higher residential density for the development than would otherwise be allowed. Besides the lack of a mixture of uses, higher density is the perceived “developer bonus” for not submitting a traditional, “cookie cutter” residential project. In fact, my experience has been that planned developments are often viewed by the development community as a method by which to “trump” the density requirements in a zoning ordinance or comprehensive plan. Thus, if a community has adopted a zoning ordinance or comprehensive plan that contains a minimum lot size of 7,500 square feet, by rezoning property to a PD district, the 7,500 square foot lot size does not apply, simply by adding a few additional development features. The economic impact to the developer is obvious—more lots, higher density, greater profit—while citizens often complain that planned developments are simply a means by which to negate zoning ordinance, comprehensive plans and minimum lot sizes.

The Impotence of the Comprehensive Plan. Many municipal comprehensive plans often contain a minimum lot size for single-family development in the municipality. By approving a planned development with smaller lot sizes than envisioned in the comprehensive plan, citizen frustration may become problematic, with citizens questioning the value of a comprehensive plan’s lot size provisions, only to see the lot size uniformly and routinely decreased because “it is a planned development.” This citizen frustration may lead to responses at the ballot box since the municipality’s comprehensive plan in effect means little “on the ground” due to the liberal interpretations of what may constitute a planned development.

Specific Use Permits. A specific use permit refers to uses that a zoning ordinance permits, but that are screened and specially approved for situational suitability. There is no authority to grant a specific use permit unless the zoning ordinance specifically authorizes it. Thus, a zoning ordinance should specify the conditions that must be met for a specific use permit to be granted. For example, a helicopter landing pad may be permitted in an industrial zone; however, due to safety concerns, overhead power lines and other issues, a city obviously would not desire that every parcel zoned industrial be entitled to a helicopter landing pad. Thus, a specific use permit is a method by which many cities regulate such uses. Specific use permits are a valid exercise of a city’s zoning authority.¹¹² Specific use permits are sometimes denoted as conditional use permits

¹¹² *City of Lubbock v. Whitacre*, 414 S.W.2d 497, 499 (Tex.Civ.App.—Amarillo 1967, writ ref’d n.r.e.).

of special use permits, depending upon an underlying zoning ordinance's characterization of this type of permit.

Spot Zoning. Spot zoning is a rezoning of property that benefits a specific tract of land with a use classification that is less restrictive than provided by the original zoning ordinance. One theory of spot zoning is that when a city council departs from its comprehensive plan and rezones especially to benefit a small tract, it violates the state law requirement that zoning be "in accordance with a comprehensive plan."¹¹³ Thus, spot zoning is illegal because it is an arbitrary departure from the comprehensive plan. Zoning changes for a small tract will be upheld only if changes have occurred that justify treating the area differently from the surrounding land.¹¹⁴

Upzoning. Upzoning refers to the rezoning of property to a more intensive use classification, e.g., from a single-family residential classification to a commercial or retail classification, and is often more profitable to a developer. Neighbors sometimes challenge upzonings as being arbitrary and capricious.¹¹⁵

IV. Discretion In Zoning Matters

As a general rule, local governmental officials are afforded broad discretion in zoning matters. Further, in determining the constitutionality of a zoning ordinance, a court is guided by the rational basis test under both the due process and equal protection clauses of the United States Constitution.¹¹⁶ Zoning ordinances and zoning legislation may be held unconstitutional only if they are shown to bear no possible relationship to the state's interest in securing the health, safety, morals or general welfare of the public and are clearly arbitrary and capricious.¹¹⁷

Within this general framework, a municipality's decisionmaking body is afforded considerable discretion in its zoning decisions. The decisionmaking body will not be judged

¹¹³ *Mixon, Texas Municipal Zoning Law*, § 4.12 (2d ed. 1994). See also *Board of Adjustment of San Antonio v. Leon*, 621 S.W.2d 431, 436 (Tex.Civ.App.—San Antonio 1981, no writ).

¹¹⁴ *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971); *City of Texarkana v. Howard*, 633 S.W.2d 596, 597 (Tex.App.—Texarkana 1982, writ ref'd n.r.e.).

¹¹⁵ *Rathkopf's*, § 1:39 at 1-50.

¹¹⁶ *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973). See also *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986).

¹¹⁷ *Village of Euclid*, 272 U.S. at 395; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Shelton v. City of College Station*, 780 F.2d 475, 479-80 (5th Cir.) (en banc), cert. denied, 479 U.S. 822 (1986).

according to whether its zoning decision was necessarily the best course for the community.¹¹⁸ Rather, in making such a determination, the appropriate inquiry is whether there was a conceivable or even hypothesized factual basis for the specific zoning decision made.¹¹⁹ This is not to suggest, however, that a zoning decision can be justified merely by mouthing an irrational basis for an otherwise arbitrary decision.¹²⁰ “The key inquiry is whether the question is ‘at least debatable.’”¹²¹ Further, local legislators who decide discretionary zoning matters are entitled to absolute immunity.¹²²

V. Legal Challenges to Zoning Ordinances

While there are a number of potential theories under which a disgruntled landowner conceivably could challenge a local government’s zoning decisions, there are several fairly established categories of land use and zoning challenges that may be used as a framework within which to analyze any such challenge. Without going into detail, the general categories of challenges to zoning ordinances are as follows:

Just Compensation Takings Claim. This claim arises when a landowner asserts that the zoning or land use decision applied to his property constitutes a taking of his property without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution. The remedy usually sought in this type of challenge is just compensation.

Due Process Takings Claim. In this challenge, a landowner claims that the zoning or land use regulation applied to his property goes too far and destroys the value of his property to such an extent that it amounts to a taking by eminent domain without due process of law. The remedy sought in this challenge is typically the invalidation of the zoning or other land use regulation.

Arbitrary and Capricious Substantive Due Process Claim. A landowner may claim that the zoning regulation or other land use decision is arbitrary and capricious in that it does not bear a substantial relation to the public health, safety, morals or general welfare. This type of challenge may be brought under either a facial or “as applied” attack.

¹¹⁸ See *Shelton*, 780 F.2d at 480 (“It is not the function of the trial court to determine whether the Town’s zoning decision was necessarily the best course for the community, which effect would be to move the function of a zoning decision maker from a legislator to judge”).

¹¹⁹ *Id.*, 780 F.2d at 480-81.

¹²⁰ See *id.*, 780 F.2d at 481-82 (“[a] denial of a building permit on the King Ranch because of inadequate parking might fall into this category”). See also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (“mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases” upon which a council may rely).

¹²¹ *Shelton*, 780 F.2d at 483.

¹²² *Supra*, note 108.

Equal Protection. An equal protection challenge may be based upon an assertion that the zoning regulation or other land use decision unfairly impacts upon a suspect class, which would involve a strict scrutiny review, or results in economic discrimination, which would involve a rational basis review.

Procedural Due Process. This last category involves an attack whereby a landowner claims that he has been deprived of procedural due process in the manner in which the zoning or other land use regulation has been enacted.

The foregoing challenges may be brought under both the United States and Texas Constitutions. These challenges typically arise under the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 17 of the Texas Constitution.

VI. The Use of Initiative and Referendum in Zoning

In a heated political debate involving a zoning issue, it is not unusual for a citizen group to threaten to gather signatures to force a city council to “undo” zoning or amend the zoning ordinance so that some action may, or may not, be taken by a municipality. While many home-rule charters prohibit the initiative process from being utilized to amend zoning ordinances, state law does not allow zoning ordinances (other than the initial adoption of a zoning ordinance and the repeal of a zoning ordinance¹²³) to be adopted through the initiative process.

Initiative is the “initiation of municipal legislation and its enactment or rejection by the municipal electorate in the event the proposed measure is not enacted by their elected representatives.”¹²⁴ While the right to initiative is to be liberally construed, “the field in which the initiatory process is operative is not unlimited.”¹²⁵

Any rights conferred by or claimed under the provisions of a city charter, including the right to an initiative election, are subordinate to the provisions of the general law. It follows that the Legislature may by general law withdraw a particular subject from the field in which the initiatory process is operative. Other provisions of the charter may withdraw from the people the power under which the initiative provisions deal with a particular subject. The limitation by the general law or by the charter of the field in which the initiatory process is operative may be either an express limitation or one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end.¹²⁶

One of the exceptions to the initiatory process is where a public hearing is mandated by law.

¹²³ Tex. Local Gov’t Code § 211.015.

¹²⁴ 5 *McQuillin Municipal Corporations* § 16.52 (3d ed.).

¹²⁵ *Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951).

¹²⁶ *Id.*

In all the Texas cases called to our attention in which it has been held that the people of a municipality could not validly exercise a delegated legislative power through initiative proceedings, it will be found that authority to act was expressly conferred upon the municipal governing body exclusively, or there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, by statute or charter made a prerequisite to the exercise of the legislative power.¹²⁷

Thus, initiative elections are limited by either the general laws of the State of Texas or by a city charter. In a recent case, the Texas Court of Appeals held that initiative and referendum could not be used for zoning matters.¹²⁸ *City of Canyon v. Fehr* involved the approval of the rezoning of two tracts of land by the Canyon city commission. Two citizens filed a petition with the city, requesting that (1) the city adopt a resolution negating the rezoning ordinances, (2) repeal the zoning amendments, or (3) submit the rezoning issue to a referendum election. When the city did not do so, suit was filed to compel the city commission to "undertake one of the three actions mentioned."¹²⁹

In discussing the initiative and referendum provisions, the Court of Appeals discussed the initiative and referendum powers of Texas local governments.

As previously said, initiative and referendum is not a right granted the citizenry. Rather, it represents a power reserved from the government and retained by the people. Because of this, provisions dealing with it should be liberally construed in favor of the reservation. However, it may be limited. That can occur through either express directive or by implication. And, before it can arise through implication, the provisions must evince a clear and compelling intent to limit the power.¹³⁰

While discussing one exception to the rule that referendum could not be utilized in the zoning context,¹³¹ the Court of Appeals addressed two cases that held initiative and referendum may not be utilized in the zoning arena.¹³² In *San Pedro North, Ltd. v. City of San Antonio*, the court held

¹²⁷ *Id.*, 244 S.W.2d at 653.

¹²⁸ *City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex.App.—Amarillo 2003, no pet.),

¹²⁹ *Id.*, 121 S.W.3d at 902.

¹³⁰ *Id.*, 121 S.W.3d at 903.

¹³¹ In 1993 the Texas Legislature authorized zoning referenda to repeal a home rule municipality's zoning regulations in their entirety or for the determination whether a municipality should initially adopt zoning regulations. See Tex. Local Gov't Code § 211.015.

¹³² See *San Pedro North, Ltd. v. City of San Antonio*, 562 S.W.2d 260 (Tex.Civ.App.—San Antonio 1978, writ ref'd n.r.e.); *Hancock v. Rouse*, 437 S.W.2d 1 (Tex.Civ.App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.). See also *City of Canyon*, 121 S.W.3d at 904.

that to allow the initiative process in the zoning context “would be to add a procedural step which is not required by the comprehensive provisions of the [Texas Zoning] Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one.”¹³³ Similarly, in *Hancock v. Rouse*, the court held that “[a] zoning ordinance enacted by the City Council without the notice and hearing required by statute would be invalid and the power of the people to legislate directly is subject to the same limitations. . . . [T]he power of the people . . . to legislate directly does not extend to the subject of zoning.”¹³⁴ Thus, the initiative process may not be utilized to adopt or amend zoning ordinances and the use of referendum is limited solely to those purposes expressed in the Texas Local Government Code.

VII. Application of Municipal Zoning Ordinances to Other Governmental Units

As a general rule, most governmental entities are not subject to a municipality’s zoning regulations. Section 211.013(c) of the Texas Local Government Code specifically provides that municipal zoning power “does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency.” Similarly, those governmental entities which derive their authority from the State of Texas, such as school districts and special purpose districts, also are exempt from the application of municipal zoning regulations.¹³⁵ In a 2009 opinion, the Texas Attorney General’s Office determined that a home rule municipality may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of aesthetics and the maintenance of property values.¹³⁶

VIII. Practical Pointers in Zoning Matters

1. Make sure that city staff is made aware of the need for, and importance of, creating and maintaining a detailed administrative record of the zoning and land use decisions of the planning and zoning commission and city council.

2. Document the both the beneficial or harmful impacts of the proposed project or proposed land use. This documentation, as well as letters and comments from interested persons on the harms of the project or proposed land use, should be placed in the record, along with all comments made at any public hearings or meetings. This includes e-mails from residents.

¹³³ *San Pedro North*, 562 S.W.2d at 262, citing *City of San Antonio v. Lanier*, 542 S.W.2d 232 (Tex.Civ.App.—San Antonio 1976, writ ref’d n.r.e.).

¹³⁴ *Hancock*, 437 S.W.2d at 4.

¹³⁵ See *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 672 (Tex. 1973) (school districts exempt not subject to municipal zoning regulations); *City of Lucas v. North Texas Mun. Water Dist.*, 724 S.W.2d 811 (Tex.App.—Dallas 1986, writ ref’d n.r.e.) (water district not subject to municipal zoning regulations, but subdivision requirements and uniform codes apply).

¹³⁶ Tex. Att’y Gen. Op. No. GA-0697 (2009).

3. In addition to the regular minutes taken of such matters, audio record the various meetings and hearings and maintain the recordings should the need to transcribe them arise. In some cities, minutes tend to be very “bare bones” and simply reflect that there was a public hearing and then specify which councilmember made the motion to approve or deny an application.

4. If the zoning matter is one that is likely to be controversial (and potentially result in a legal challenge), consider having a court reporter attend and transcribe the public hearings.

5. If the zoning matter is one that is likely to be controversial (and potentially result in a legal challenge), consider retaining experts and consultants to develop evidence of the harm that would result from the proposed project or proposed land use. Have the consultants prepare written reports to be included in the record, as well as have the consultants testify at the public hearings on the request.

6. Educate your planning and zoning commissioners and city council members ahead of time. Give them written questions to ask both the applicant and the consultants that are designed to elicit evidence and rationales to support a denial. Ask them to frame comments in objective terms and avoid discussion of personal likes and dislikes.

7. Prepare draft findings for the decisionmaking bodies that help support a decision to deny the project or requested land use. To the extent possible, each finding should be supported by reference to evidence in the record and should use a cause and effect logic, *i.e.*, because the project will increase traffic at this site by 25%, the increased traffic will be harmful to the existing neighborhood. State your findings with certainty and avoid words such as “could cause,” “might increase,” or “may result in.” If you are conditionally approving a project, make sure that your findings connect each condition to a harmful impact or impacts of the proposed project.

8. If the record and draft findings are not ready at the time that the decisionmakers are ready to render a decision, strongly suggest that the planning and zoning commission or city council issue a tentative indication only, and postpone consideration of the matter until formal findings can be prepared and adopted by the decisionmakers that will support the decision and, if needed, incorporate any new evidence. Many times, the decisionmakers will not completely follow staff recommendations, or will indicate an intent to make a finding that departs materially from the draft findings and staff recommendations. Sometimes, new evidence is presented that is not included in the draft findings prepared by staff; and sometimes, staff simply has not prepared and presented proposed findings to the decisionmakers. If these, or similar instances arise, the local government should not hesitate to table the decision until it can cross all of the “t’s” and dot all of the “i’s.”

9. It is not unusual for developers to request that the zoning process be sped up. While there may be times when speeding up the process is desirable, make certain that all necessary steps have been followed, including notice to adjoining landowners and newspaper/publication notices.

10. Beware of a request that the area of land subject to a zoning change be **increased**. For a zoning change to occur, there must be public notice of the proposed change in zoning. Since the public notice contains a description of the property for which a zoning change is sought, there would not be adequate notice of a change in the increased area. Conversely, the area of land

subject to a zoning change may be **reduced** since there has been public notice of the portion of land subject to a zoning change. Thus, decreasing the amount of land included in a zoning change would not violate the public notice requirements. The fact that a zoning change has been effected on only a portion of the land instead of all of the land is not injurious to those individuals who have an interest in the zoning change. If in doubt, start the process over with new notice to adjoining landowners and newspaper notice. The failure to provide adequate notice may invalidate the zoning decision.

11. Similarly, beware of a request that the area of land subject to a zoning change be zoned to a **more intense use** than was advertised. In such a situation there would not have been adequate public notice. For example, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 10,000 square feet, the governing body of a municipality instead could not zone the land residential with lots of 5,000 square feet since there was not adequate public notice and the use is more intense than advertised. Conversely, the area of land subject to a zoning change may be zoned to a **less intense use** than was advertised. In this situation there was adequate public notice. Thus, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 5,000 square feet, the governing body of a municipality instead could zone the land residential with lots of 10,000 square feet since there was adequate public notice and the use is less intense than advertised.

12. Eliminate all discrimination concerns (no ethnic comments or socio-economic comments) and consider disabled persons' concerns.

13. City councilmembers and planning and zoning commission members should always keep in mind the amount of discretion they possess—in a zoning/rezoning matter, their discretionary authority is very broad; however, in the platting/site plan approval context, their discretionary authority is severely circumscribed.

14. State law provides that an appeal from the decision of a zoning board of adjustment must be filed within ten (10) days after the date the board's decision is filed in the board's office. Most cities, however, do not define by ordinance when this occurs, thus resulting in confusion about when "filing" actually occurred and consequently, when the ten-day period begins to run. The city ordinance should define the date upon which "filing" occurs—the first business day after the board's meeting, for example.

15. Beware of land use decisions that may implicate federal laws. For example, land use decisions affecting churches and certain religious exercise will be impacted by the Religious Land Use and Institutionalized Persons Act of 2000.¹³⁷ Similarly, cell tower siting and related concerns may be impacted by the limitations placed upon local governments in the Telecommunications Act of 1996.¹³⁸ These areas of the law are evolving rapidly and requiring specific use permits for churches, for example, is probably now illegal in Texas.

¹³⁷ 42 U.S.C. § 2000cc *et seq.*

¹³⁸ 47 U.S.C. § 332(c)(7)(A).

16. For attorneys who represent landowners, the landowner's attorney may not contact the mayor or a councilmember to discuss a pending land use matter before the city council or planning and zoning commission. While there is no prohibition against a non-attorney applicant contacting the mayor or a councilmember to discuss his/her pending application, an attorney for the applicant may run afoul of the rules of professional responsibility (and thus possibly be subject to a grievance being filed against him/her) if he/she contacts the mayor or a councilmember without contacting the local government's attorney. Specifically, in Texas, Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct addresses this issue:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

...

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

Further, an Ethics Committee Opinion is directly on point. In Ethics Opinion 474 (June 1991), the Texas Supreme Court Professional Ethics Committee concluded that the provisions of Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

17. Prior to voting on a land use matter, individual members of a city council or planning and zoning commission may go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code; however, caution also is advised in doing so. It is clear that in Texas the zoning or rezoning of property is a legislative act.¹³⁹ With such legislative authority comes absolute legislative immunity for the public officials exercising it.¹⁴⁰ While legally there may be little concern about the information a city councilmember, for example, receives before a council meeting about a specific case, the political aspects of that case may mandate more cautious behavior by the city councilmember. Thus, while talking to a neighbor opposed to the zoning case may be legally permissible, politically there may be an appearance of impropriety or predilection to reach a decision without going through the

¹³⁹ See *Shelton*, *supra* note 116.

¹⁴⁰ See *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

public hearing process. Further, Texas municipalities must follow the Texas Open Meetings Act¹⁴¹ and its prohibition of deliberation outside a properly noticed public hearing and meeting.

18. Prior to voting on a variance or other authorized land use matter, members of a zoning board of adjustment should **not** go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code. In Texas the law is clear that members of a zoning board of adjustment act in a quasi-judicial capacity. Consequently, the *ex parte* receipt of information or opinions is unfair and may deprive an applicant of due process. As a noted commentary states, “[a] situation which presents the element of unfairness is for the views of one party to a proceeding before the board [of adjustment] to be presented to the board under circumstances which deprive the opposing party of the opportunity to know what was presented and the further opportunity to respond to it.”¹⁴² Thus, to survive a constitutional procedural due process challenge, the following elements must be present: (1) an unbiased decision, (2) adequate notice of the hearing, (3) a hearing in which witnesses are sworn and in which there is an opportunity to present evidence and an opportunity for cross-examination, and (4) a decision based on the record supported by reasons and findings of fact.¹⁴³

IX. Frequently Asked Questions

1. Can the area of land subject to a zoning change be increased?

No. For a zoning change to occur, there must be public notice of the proposed change in zoning. Since the public notice contains a description of the property for which a zoning change is sought, there would not be adequate notice of a change in the increased area.

2. Can the area of land subject to a zoning change be reduced?

Yes. Since there has been public notice of the portion of land subject to a zoning change, decreasing the amount of land included in a zoning change would not violate the public notice requirements. The fact that a zoning change has been effected on only a portion of the land instead of all of the land is not injurious to those individuals who have an interest in the zoning change.

3. Can the area of land subject to a zoning change be zoned to a more intense use than it was advertised?

No. In such a situation there would not have been adequate public notice. For example, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 10,000 square feet, the governing body of a municipality instead

¹⁴¹ Tex. Gov't Code, ch. 551.

¹⁴² *Rathkopf's*, § 57.68 at 57-136.

¹⁴³ *See Mixon*, § 6.006 at 6-11.

could not zone the land residential with lots of 5,000 square feet since there was not adequate public notice and the use is more intense than advertised.

4. Can the area of land subject to a zoning change be zoned to a less intense use than it was advertised?

Yes. In this situation there was adequate public notice. Thus, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 5,000 square feet, the governing body of a municipality instead could zone the land residential with lots of 10,000 square feet since there was adequate public notice and the use is less intense than advertised.

5. What is spot zoning?

Spot zoning is a rezoning of property that benefits a specific tract of land with a use classification that is less restrictive than provided by the original zoning ordinance. One theory of spot zoning is that when a city council departs from its comprehensive plan and rezones especially to benefit a small tract, it violates the state law requirement that zoning be “in accordance with a comprehensive plan.” *Mixon, Texas Municipal Zoning Law*, § 4.12 (2d ed. 1994). Thus, spot zoning is illegal because it is an arbitrary departure from the comprehensive plan.

6. What is contract zoning?

Contract zoning is an unlawful activity whereby a property owner or developer agrees to develop or use property in a certain way in exchange for receiving a particular zoning classification from a city, *i.e.*, contract zoning involves an enforceable promise on the part of either the owners or zoning authority to rezone property. This is an area of the law that must be scrutinized if a city attempts to settle zoning/land use litigation by entering into a written settlement agreement.

7. What is conditional zoning?

Conditional zoning is the granting of a zoning change by a governing body which is subject to agreed upon specific conditions which limit permitted uses in a zoning district. The typical scenario is that a governing body secures a property owner’s agreement (1) to limit the use of the subject property to a particular use (or uses) or (2) to subject the tract to certain restrictions as a precondition to any rezoning. Unlike contract zoning, under conditional zoning a zoning authority requires an owner to perform some future act in order to receive rezoning but does not enter into an enforceable agreement promising such rezoning.

8. Do zoning ordinance text amendments require notice to individual property owners who may be impacted by the amendment?

No. Texas courts have held that no individual property owner notice is required in which a zoning ordinance change applies district-wide or across multiple zoning districts without a change in classification of the individual property owners' properties.¹⁴⁴

9. Is property owner notification needed when a variance is requested from the Zoning Board of Adjustment?

No, unless the underlying zoning ordinance mandates a specific type of notice. Section 211.010(d) of the Local Government Code only requires public notice of the hearing (the 3 business day notice required by the Texas Open Meetings Act) and notice to the parties in interest.

10. Can cities enforce building materials requirements by including such requirements in the city's zoning ordinance or an ordinance zoning/rezoning a specific tract of land?

No. Section 3000.001 *et seq.* of the Texas Government Code provides, in part, that municipalities, and other specified governmental entities, may not adopt or enforce a rule, charter provision, ordinance, order, building code, or other regulation that prohibits or limits the use or installation of building materials. One "work around" of this prohibition may be the use of a development agreement outside the zoning process. A development agreement that includes provisions about the use (or prohibition) of certain building materials should not run afoul of the "illegal contract zoning" principle of Texas law—such a requirement is not a traditional zoning requirement, but rather a building or design standard; the legislative history of the 2019 legislative building materials bill (codified in Chapter 3000 of the Texas Government Code) does not support a contention that the Legislature viewed the bill as a zoning matter; and had the Legislature indeed viewed local regulation of building materials as a traditional zoning matter, it arguably would have placed the prohibition in Chapter 211 of the Texas Local Government Code.

A note of caution, however, is in order. Cities should avoid entering into development agreements where the uses of property, or traditional zoning matters, such as setbacks, specific or conditional uses, building heights, etc., are included in the development agreement. It will be more difficult to defend the inclusion of such terms in a development agreement, especially where the developer/owner is undertaking other obligations, such as property dedications or financial obligations to the city. Traditional zoning matters should be contained in the ordinance and not necessarily imported into a development agreement.

11. Is a city required to follow and enforce its own land use regulations?

No. In the absence of express or clearly implied statutory preemption, the general rule has been that municipalities may be granted immunity from zoning ordinances based on the application of traditional immunity doctrines. These doctrines include: (1) the distinction

¹⁴⁴ See *FLCT Ltd. v. City of Frisco*, 493 S.W.3d 238 (Tex.App.—Fort Worth 2016, pet. denied). See also *Wells v. City of Killeen*, 524 S.W.2d 735 (Tex.Civ.App.—Beaumont 1975, writ ref'd n.r.e.)

between the entity exercising a governmental or propriety function; (2) the doctrine of eminent domain; and (3) the state sovereign immunity doctrine.¹⁴⁵ Texas case law has addressed both the governmental function test and the eminent domain authority of Texas municipalities, generally concluding that cities are not required to follow their own land use regulations.

Texas courts have long recognized the authority of a municipality to locate municipal buildings and structures anywhere in the city. In *City of McAllen v. Morris*,¹⁴⁶ the San Antonio Court of Civil Appeals held that “absent some restraint imposed by constitutional provision or by action of the State Legislature,” the provisions of the Texas Zoning Enabling Act¹⁴⁷

do not preclude the legislative body of a city from providing in a comprehensive zoning ordinance that such ordinance shall not prevent the city from erecting in any zone such municipal buildings and structures as may be deemed necessary for the safety, health and general welfare of the public.¹⁴⁸

This conclusion was upheld by the Texas Supreme Court more than 30 years later in *City of Lubbock v. Allen*.¹⁴⁹ In *Allen*, the City of Lubbock “decided to improve a heavily traveled street intersection next to the Austins’ house” and “it was necessary for the City to acquire portions of the Austins’ lot, thus leaving the Austins with a side yard only four and three-tenths feet wide.”¹⁵⁰ The Austins sued, contending that “the City had abused its discretion by exercising its power of eminent domain in derogation of one of its zoning ordinances.”¹⁵¹

The Texas Supreme Court, framing the question as “whether a city is bound by its zoning ordinances when exercising its eminent domain authority,”¹⁵² concluded that “a city

¹⁴⁵ *Rathkopf’s* § 76:2 at 76-6.

¹⁴⁶ 217 S.W.2d 875 (Tex.Civ.App.—San Antonio 1948, writ ref’d). In *Morris*, neighboring property owners contended that the City of McAllen’s construction of a fire station violated the city’s zoning ordinance and the city should be enjoined from constructing or operating the proposed fire station.

¹⁴⁷ Found in Chapter 211 of the Texas Local Government Code.

¹⁴⁸ *Morris*, 217 S.W.2d at 877.

¹⁴⁹ 628 S.W.2d 49 (Tex. 1982).

¹⁵⁰ *Allen*, 628 S.W.2d at 49. The Lubbock zoning ordinance required a 10-foot minimum side yard.

¹⁵¹ *Id.* at 49-50.

¹⁵² *Id.* at 50.

exercising its eminent domain power is not bound by its own zoning ordinance unless the objecting party can show that the condemnation is unreasonable or arbitrary.”¹⁵³ Moreover, the Court held that where a city’s exercise of eminent domain has come into conflict with an existing zoning ordinance, the reasonableness or arbitrariness or the proposed action is a question of law to be decided by the court. “To hold otherwise would tend to substitute the land use preferences of a jury for those of a governing body acting under statutory authority, presumably with a special expertise in the area.”¹⁵⁴ Therefore, Texas cities may erect municipal buildings and facilities in any zoning district where the city deems necessary for the public health, safety and welfare, even if it is in violation of the city’s zoning regulations.

Similarly, the law is well-established that a municipality is not liable for its failure to enforce its own ordinances, and that irregularities in following its own ordinances do not render governmental actions void.¹⁵⁵

The rationale behind the canon that municipalities are not liable for the failure to enforce their own ordinances stems from the public duty rule.

The public duty rule provides that where a municipality has a duty to the general public, as opposed to a particular individual, breach of that duty does not result in tort liability. . . . The rule protects municipalities from liability for failure to adequately enforce general laws and regulations, which

¹⁵³ *Id.*, citing *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 673 (Tex. 1973).

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., *Ellis v. City of West University Place*, 175 S.W.2d 396, 398 (Tex. 1943) (municipality not liable for damages while attempting to enforce a void ordinance); *Swafford v. City of Garland*, 491 S.W.2d 175, 176 (Tex.Civ.App.—Eastland 1973, writ ref’d n.r.e.) (no liability for damages for the exercise or failure to exercise discretion in enforcing a city ordinance); *Young v. Jewish Welfare Fed’n of Dallas*, 371 S.W.2d 767, 771 (Tex.Civ.App.—Dallas 1963, writ ref’d n.r.e.) (city’s procedures in amending site plan, even if in violation of city’s own ordinances, were an exercise of the city’s governmental powers and the city was immune from damages for any irregularities); *Stigler v. City of Chicago*, 268 N.E.2d 26, 29 (Ill. 1971) (city not liable for failure to enforce housing code since “[t]he ordinance did not give rise to any special duty to the plaintiff or to any particular person different from the public at large.”); *Hannon v. Counihan*, 369 N.E.2d 917, 921-22 (Ill.App.Ct. 1977) (city not liable for failure of building inspector to follow city building code since “[t]o recognize such a duty here would be to make a municipality substantially an insurer of all construction it undertook to inspect and control through its building codes and would likely discourage all efforts at such control.”); *Whitney v. City of New York*, 275 N.Y.S.2d 783, 784 (N.Y. App. Div. 1966) (city not liable for negligent inspection and for failure to enforce ordinances relating to inspection since “[u]nless it can be said that the statute was enacted for the benefit of an individual, no liability may be imposed for failure to carry out the statutory function.”).

were intended to benefit the community as a whole. The public duty rule is not technically grounded in governmental immunity, though it achieves much the same result. Unlike immunity, which protects a municipality from liability from breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place.

Courts give several reasons for the rule. First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone would discourage municipalities from passing such laws in the first place. Fourth, exposure to liability would make avoidance of liability rather than promotion of the public welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.¹⁵⁶

Consequently, even if a party could prove that a city had violated its own ordinances, such irregularities would not subject the city to liability or damages.

¹⁵⁶ *McQuillin Municipal Corporations* § 53.18 (3d ed.) (footnotes omitted).

Findings – Variances

Inquiry		Findings
<p>Is the request for a variance owing to special condition inherent in the property itself?</p> <p>If yes, CONTINUE If no, STOP</p> <p style="text-align: center;">↓</p>	→	The property is/has ... (e.g., odd-shaped, unusual topography, etc.)
<p>Is the condition one unique to the property requesting the variance?</p> <p>If yes, CONTINUE If no, STOP</p> <p style="text-align: center;">↓</p>	→	The condition is unique to this property.
<p>Is the condition self-imposed or self-created?</p> <p>If yes, STOP If no, PROCEED</p> <p style="text-align: center;">↓</p>	→	The condition necessitating the request was not created by the property owner.
<p>Will a literal enforcement of the zoning ordinance result in an unnecessary hardship?</p> <p>If yes, CONTINUE If no, STOP</p> <p style="text-align: center;">↓</p>	→	Strict enforcement of the zoning ordinance would impose a hardship above that suffered by the general public.
<p>Will the hardship prevent any reasonable use whatsoever?</p> <p>If yes, CONTINUE If no, STOP</p> <p style="text-align: center;">↓</p>	→	Without the grant of the requested variance, the property owner would be deprived of the right to use his property. Financial considerations alone cannot satisfy this requirement.
<p>Would the grant of the variance be contrary to public interest?</p> <p>If yes, STOP If no, CONTINUE</p> <p style="text-align: center;">↓</p>		
<p>Is the request within the spirit of the ordinance and does it further substantial justice?</p> <p>If yes, CONTINUE If no, STOP</p>		

COMPREHENSIVE PLANS

I. Statutory Basis - Chapter 213, Texas Local Government Code

§ 213.001. Purpose

The powers granted under this chapter are for the purpose of promoting sound development of municipalities and promoting public health, safety, and welfare.

§ 213.002. Comprehensive Plan

(a) The governing body of a municipality may adopt a comprehensive plan for the long-range development of the municipality. A municipality may define the content and design of a comprehensive plan.

(b) A comprehensive plan may:

(1) include but is not limited to provisions on land use, transportation, and public facilities;

(2) consist of a single plan or a coordinated set of plans organized by subject and geographic area; and

(3) be used to coordinate and guide the establishment of development regulations.

(c) A municipality may define, in its charter or by ordinance, the relationship between a comprehensive plan and development regulations and may provide standards for determining the consistency required between a plan and development regulations.

(d) Land use assumptions adopted in a manner that complies with Subchapter C, Chapter 395, may be incorporated in a comprehensive plan.

§ 213.003. Adoption or Amendment of Comprehensive Plan

(a) A comprehensive plan may be adopted or amended by ordinance following:

(1) a hearing at which the public is given the opportunity to give testimony and present written evidence; and

(2) review by the municipality's planning commission or department, if one exists.

(b) A municipality may establish, in its charter or by ordinance, procedures for adopting and amending a comprehensive plan.

§ 213.004. Effect on Other Municipal Plans

This Chapter does not limit the ability of a municipality to prepare other plans, policies, or strategies as required.

§ 213.005. Notation on Map of Comprehensive Plan

A map of a comprehensive plan illustrating future land use shall contain the following clearly visible statement: “A comprehensive plan shall not constitute zoning regulations or establish zoning district boundaries.”

II. What Is A Comprehensive Plan?

Traditionally, land use regulations such as zoning and subdivision ordinances adopted by local governments were written and promulgated without reference to any prior comprehensive municipal plan. In a growing number of states, however, the adoption of such regulatory ordinances in the absence of a general comprehensive plan may cast doubts upon the validity of the ordinances. The comprehensive plan, once viewed primarily as an advisory document to the local governmental body, is in many states becoming a legal, binding document as well as a prescription for future development patterns.

A comprehensive plan generally is defined as a long-range plan intended to direct the growth and physical development of a community for an extended period of time. Comprehensive planning is a process by which a community assesses what it has, what it wants, how to achieve what it wants and finally, how to implement what it wants. A comprehensive plan usually contains several components—transportation systems, parks and recreational services, utilities, housing and public facilities. It also provides for the distribution and relationships of various land uses and often serves as the basis for future land development recommendations. The plan may be in the form of a map, a written description and policy statements, or it may consist of an integrated set of policy statements. An expert in urban planning, T.J. Kent, Jr., defines the comprehensive plan as a community’s official statement of policies regarding desirable future physical development; the plan should be comprehensive in scope, general in nature and long-range in perspective.

A. “Rational Process” Comprehensive Planning

The growing importance in the United States of the comprehensive plan in local land use decisions prompted urban planning practitioners and theorists to develop a theory of planning as a “rational process.” The rational, comprehensive planning process has four principal characteristics. First, it is *future-oriented*, establishing goals and objectives for future land use and development, which will be attained incrementally over time through regulations, individual decisions about zoning and rezoning, development approval or disapproval, and municipal expenditures for capital improvements such as road construction and the installation of utilities.

Second, planning is *continuous*. The comprehensive plan is intended not as a blueprint for future development which must be as carefully executed as the architect’s design for a building or the engineer’s plan for a sewer system, but rather as a set of policies which must be periodically reevaluated and amended to adjust to changing conditions. A plan that is written purely as a static blueprint for future development will rapidly become obsolete.

Third, the comprehensive plan must be based upon a *determination of present and projected conditions* within the area covered by the plan. This requirement ensures that the plan is not simply a list of hoped-for civic improvements, as were many of the plans prepared during the early part of the 20th century. Substantial efforts have been made by public planning staffs, university planning departments and planning consulting firms to develop useful techniques for gathering data, analyzing existing conditions and projecting future trends and conditions within the geographic area covered by a comprehensive plan. This body of methods, procedure and models is generally termed “planning methodology.”

Fourth, planning is *comprehensive*. In the past, architects and engineers who became involved in solving urban problems tended to identify one problem perceived to be solvable by one solution. Having targeted that problem, these early planners preferred to develop and advocate one solution, usually expressed as a static blueprint which, if fully implemented, would solve that problem. This problem-solution approach was the product of the project orientation that was typical of traditional civil engineering and architecture.

Planning theorists over the past several decades have observed that this approach has led to a phenomenon termed “disjointed incrementalism,” in which successive municipal problems such as drainage, traffic circulation, or sewage treatment might be incrementally “solved” without reference to related concerns of municipal government. For example, sewer systems in the mid-to late-1800s were usually designed without reference to any overall plan for the optimum future locations, and densities, of different land uses to be served by them. Highways were often laid out without reference to any long-range plans for the types of land uses they were to serve in the future.

B. The Process of Comprehensive Planning

The recognition, starting after World War II, that the entire range of municipal land use, transportation, and growth problems were all interrelated, led to advocacy of comprehensive plans as a means of identifying the key problems in land use regulation, and recommending alternative solutions to these problems which were the product of rational planning process. The courts have recognized this role of planning, in defining planning as concerned with

the physical development of the community and its environs in relation to its social and economic well-being for the fulfillment of the rightful common destiny, according to a “master plan” based on “careful and comprehensive surveys and studies of present conditions and the prospects of future growth of the municipality,” and embodying scientific teachings and creative experience.

The rational planning process essentially subsumes four discrete steps: *data gathering and analysis, setting of policies, plan implementation, and plan re-evaluation*. Rather than resulting in a final plan effective for all time, the process is instead reiterative over a period of years: re-evaluation of the plan starts the process over again, resulting in a new set of policies to be implemented, and the success of the new plan is again evaluated at a future date. Thus, the rational planning process is both reiterative and continuous.

During the first step of the process, the planner preparing the comprehensive plan performs research and analysis of a wide range of present and projected physical, economic, and sociological conditions of the municipality, aided by a wide variety of planning methodologies. Statistical

surveying, population forecasting, mapping of existing conditions in land use, transportation, and environmentally-sensitive areas, mathematical modeling of economic trends, analysis of traffic flows on major highways, and techniques borrowed from other professions such as economics, geography and engineering are some of the methods employed by planners in data gathering and analysis.

The data-gathering and analysis phase of the process usually results in the identification of present and potential future concerns in land use, transportation, environment, utilities, housing and other areas to be addressed in the plan. Thus, following the first stage of the process, the planner may identify and prioritize a range of municipal problems and opportunities which should be addressed in the policy-formation stage of the planning process.

Analysis of the data then leads naturally to the second phase, setting of policies for the plan. In this phase, the planner ceases being a data gatherer, and assumes a policy formation role. Working closely with the planning commission and sometimes the local legislative body, the planner examines and proposes alternative means of solving or averting the problems identified in the first phase of the process. Through communication with the local legislative body and the planning commission (if one exists), the planner develops a set of policies, goals, and objectives which constitute the principal, future-oriented sections of the comprehensive plan. Thus, for example, the policies may include a provision that sewage-treatment services must be expanded to accommodate new development; that the legislative body should initiate a program to stimulate new economic development in the declining downtown; and that steps should be taken to prevent further flood-prone development in low-lying areas adjoining rivers and streams.

As a supplement to these general policies, or goals, of planning, the planner may suggest means of achieving these goals. In setting the goals and recommending alternative objectives, the planner may refer to standards and principles widely accepted in the planning profession: that excessive use of septic tanks may tend to pollute groundwater; that decay of the central business district leads to devaluation of the tax base; that development in flood-prone areas is detrimental to public safety by exposing buildings and their occupants to flood hazards.

The mere statement of policies and objectives will not, in itself, ensure that action is taken. Thus, the third stage of the planning process, implementation of the plan, becomes the most important stage. Implementation involves three discrete steps: developing public support for the plan by means of various forms of citizen participation and a series of public hearings and media coverage; securing adoption of the plan, either as an advisory document (as in many states) or as a legally-binding ordinance or resolution (as in a growing number of states); and action by the legislative body to implement the policies and objectives.

Upon adoption of the plan, the adopting agency espouses the policies and objectives of the plan as guidelines for daily decision-making. Thus, to return to our three examples of policies, the local legislative body will undertake revisions of the municipal zoning map to bring it into accordance with the land-use recommendations of the plan. Similarly, the governing body may prepare plans for expansion of sewers and construction of new roads to serve new development. The legislative body may appoint a downtown revitalization authority to oversee efforts to attract new businesses back into the central business district. The governing body may authorize the city attorney to draft a new flood-plain protection ordinance prohibiting careless construction of new

buildings in low-lying areas adjoining streams and rivers. See Juergensmeyer & Roberts, *Land Use Planning and Control Law* (West 1998), at 27-30.

The comprehensive plan is the single most important document for managing a community's physical growth because it can consolidate and coordinate physical planning needs and goals and policies, as well as separate community studies that address various aspects of physical development in a city. Further, comprehensive planning, to be effective, has to be an on-going process, involving periodic evaluation and updating. To further aid in its effectiveness, the comprehensive plan has to be based on a shared vision of the community. This vision usually is constructed through consensus-based planning. See *A Guide to Urban Planning in Texas* at 1-10, 3-1—3-2 (Texas Chapter, American Planning Association).

It should be noted that in Texas it is not mandatory that cities adopt comprehensive plans; however, if one is adopted, Section 211.004 of the Texas Local Government Code provides, in part, that “[z]oning regulations must be adopted in accordance with a comprehensive plan. . . .” Thus, any city that has a comprehensive plan must zone in accordance with that plan; otherwise, a strong argument may be made that any action not taken in accordance with the comprehensive plan is arbitrary and capricious as well as violative of a zoning applicant's federal and state constitutional rights.

III. Frequently Asked Questions

1. Are Texas cities required to adopt comprehensive plans?

No. In *Bernard v. City of Bedford*, 593 S.W.2d 809, 812 (Tex.Civ.App.—Fort Worth 1980, writ ref'd n.r.e.), the Court of Civil Appeals wrote that “[w]e know of no rule of law which requires that a city adopt a comprehensive zoning ordinance which constitutes or becomes its comprehensive zoning or land use plan.” The Court further wrote that “[t]here is no requirement that a single comprehensive ordinance be passed to constitute the comprehensive plan.” *Id.*

2. If a city has not adopted a comprehensive plan, may it nevertheless zone property?

Yes. In *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 793 (Tex.), *cert. denied*, 459 U.S. 1087 (1982), the Texas Supreme Court, in footnote 4 to its opinion, wrote as follows:

Because Brookside Village, a general law city, has no comprehensive zoning plan, the ordinances in question do not come under article 1011a [the Zoning Enabling Act, now contained in Chapter 211 of the Texas Local Government Code], which embodies legislative authorization for zoning. . . . A city, however, may regulate land use under its general police powers. [Citation omitted].

3. If a city has adopted a comprehensive plan, must it follow it when making zoning decisions?

Yes. As the Texas Court of Appeals wrote in *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 295 (Tex.App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991), “[t]he [municipal] legislative body does not, on each rezoning hearing, redetermine as an original matter, the city’s policy of comprehensive planning. The law demands that the approved zoning plan should be respected. . . . The duty to obey the existing law forbids municipal actions that disregard not only the pre-established zoning ordinance but also the long-range master plans and maps that have been adopted by ordinance.” See also *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176-77 (Tex. 1981). Be aware, however, that one Texas Court of Appeals in an unpublished opinion has specifically held that a city’s failure to rezone in accordance with the comprehensive plan, the ordinances passed to rezone the property were void ab initio—and the city’s attempt to amend the comprehensive plan after rezoning were of no avail. See *City of Laredo v. Rio Grande H2O Guardian*, 2011 WL 3122205 (Tex.App.—San Antonio 2011, no pet.)/

4. But does that mean a city must approve a rezoning request if the request is in compliance with the city’s comprehensive plan?

No. The Texas Court of Appeals has held that while a city’s zoning regulations must be in accordance with a comprehensive plan, it does not follow that the comprehensive plan dictates that a city council must approve every rezoning application that seeks to have certain property zoned in accordance with the comprehensive plan. If a city council were required to do so, then the city’s comprehensive plan would become a de facto zoning ordinance. See *Weatherford v. City of San Marcos*, 157 S.W.3d 473 (Tex.App.—Austin 2004, pet. denied).

5. What is the effect of a comprehensive plan on pre-existing zoning?

Pre-existing zoning on a tract of land controls the development of that tract, regardless of the use designation contained in the comprehensive plan. For example, if a parcel was zoned for multi-family uses in 1990 and the new comprehensive plan adopted in 1994 calls the parcel to be low density residential, the parcel may be developed as multi-family notwithstanding the comprehensive plan designation. If, however, the owner of the parcel elected to rezone the property in 1995, it must be rezoned in accordance with the comprehensive plan designation of low density residential. To rezone the parcel to anything else would violate the state law provision that zoning must be done in accordance with a comprehensive plan. See Tex. Local Gov’t Code 211.004(a).

6. Is there a difference between a master plan and a comprehensive plan?

Sometimes yes, sometimes no. On occasion, comprehensive plans have been denominated as “master plans.” On other occasions, a comprehensive plan is composed of various “master plans.” For example, a city’s comprehensive plan could consist of a parks master plan, land use master plan, thoroughfare master plan, wastewater master plan and water master plan. In such a situation, all of the “master plans” constitute the “comprehensive plan.”

7. How should a city view a comprehensive plan, as a guide or a document with the force of law?

Due to the requirements of state law that all zoning must be in accordance with a comprehensive plan, we personally view a comprehensive plan as far more than a “guide.” The term “guide” seems to me to imply that one may or may not follow it, depending upon the facts of any particular situation. It is my opinion that, due to the requirements of the Texas Local Government Code, a comprehensive plan is a legally binding document that a city must follow. This means that whenever an individual wishes to rezone property, he or she must do so in accordance with the comprehensive plan and that the failure to do so will result in the denial of both a comprehensive plan amendment and a subsequent zoning amendment.

PLATS AND SUBDIVISIONS

I. Basic Platting Concepts In Texas

The Sixth Edition of Black's Law Dictionary defines a plat as "a map of a specific land area such as a subdivision, showing the location and boundaries of individual parcels of land subdivided into lots with streets, alleys, easements, etc. drawn to scale." The subdivision of real property is subject to local government regulation in Texas. Specifically, municipal regulation of the subdivision of property is found in Chapter 212 of the Texas Local Government Code and county regulation of the subdivision of property is found in Chapter 232 of the Texas Local Government Code. There is a distinction, however, between platting and subdivision. Platting is a geographical description that aids in recording and deed description and does not necessarily involve subdivision. Subdivision, conversely, actually divides land into marketable parcels.

II. Municipal Regulation Of The Subdivision of Property

A. Statutory Authority

In Texas, the statutory authority relative to municipal plats and subdivisions is found in Chapter 212 of the Local Government Code. Relevant provisions of Chapter 212 are as follows:

§ 212.002. Rules

After a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.

§ 212.003 Extension of Rules to Extraterritorial Jurisdiction

(a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:

- (1) the use of any building or property for business, industrial, residential, or other purposes;
- (2) the bulk, height, or number of buildings constructed on a particular tract of land;
- (3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage; or
- (4) the number of residential units that can be built per acre of land; or

(5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land. . . .

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.

(c) The municipality is entitled to appropriate injunction relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

§ 212.004. Plat Required

(a) The owner of a tract of land located within the limits or in the extraterritorial jurisdiction of a municipality who divides the tract in two or more parts to lay out a subdivision of the tract, including an addition to a municipality, to lay out suburban, building, or other lots, or to lay out streets, alleys, squares, parks, or other parts of the tract intended by the owner of the tract to be dedicated to public use must have a plat of the subdivision prepared. A division of a tract under this subsection includes a division regardless of whether it is made by using a metes and bounds description in a deed of conveyance or in a contract for a deed, by using a contract of sale or other executory contract to convey, or by using any other method. A division of land under this subsection does not include a division of land into parts greater than five acres, where each part has access and no public improvement is being dedicated.

(b) To be recorded, the plat must:

(1) describe the subdivision by metes and bounds;

(2) locate the subdivision with respect to a corner of the survey or tract or an original corner of the original survey of which it is a part; and

(3) state the dimensions of the subdivision and of each street, alley, square, park, or other part of the tract intended by the owner of the tract to be dedicated to public use.

(c) The owner or proprietor of the tract or the owner's or proprietor's agent must acknowledge the plat in the manner required for the acknowledgment of deeds.

(d) The plat must be filed and recorded with the county clerk of the county in which the tract is located.

(e) The plat is subject to the filing and recording provisions of Section 12.002, Property Code.

(f) A plat is considered filed on the date the applicant submits the plat, along with a completed plat application and the application fees and other requirements prescribed by or under this subchapter, to:

- (1) the governing body of the municipality; or
- (2) the municipal authority responsible for approving plats.

(g) The governing body of a municipality or the municipal authority responsible for approving plats may not require an analysis, study, document, agreement, or similar requirement to be included in or as part of an application for a plat, development permit, or subdivision of land that is not explicitly allowed by state law.

§ 212.005. Approval by Municipality Required

The municipal authority responsible for approving plats must approve a plat or replat that is required to be prepared under this subchapter and that satisfies all applicable regulations.

§ 212.006. Authority Responsible for Approval Generally

(a) The municipal authority responsible for approving plats must approve a plat or replat that is required to be prepared under this subchapter and that satisfies the requirements of this subchapter.

(b) This subchapter may not be construed to convey any authority to a municipality regarding the completeness of an application or the approval of a plat or replat that is not explicitly granted by this subchapter.

* * *

§ 212.009. Approval Procedure: Initial Approval

(a) The municipal authority responsible for approving plats shall approve, approve with conditions, or disapprove a plat within 30 days after the date the plan or plat is filed. A plat is approved by the municipal authority unless it is disapproved within that period and in accordance with Section 212.0091.

(b) If an ordinance requires that a plat be approved by the governing body of the municipality in addition to the planning commission, the governing body shall approve, approve with conditions, or disapprove the plat within 30 days after the date the plat is approved by the planning commission or is considered approved by the inaction of the commission. A plat is approved by the governing body unless it is disapproved within that period and in accordance with Section 212.0091.

(b-1) Notwithstanding Subsection (a) or (b), if a groundwater availability certification is required under Section 212.0101, the 30-day period described by those subsections begins on the date the applicant submits the groundwater availability certification to the municipal authority responsible for approving plats or the governing body of the municipality, as applicable.

(b-2) Notwithstanding Subsection (a) or (b), the parties shall extend the 30-day period described by those subsections for one or more periods, each not to exceed 30 days if:

(1) both:

(A) the applicant requests the extension in writing to the municipal authority responsible for approving plats or the governing body of the municipality, as applicable; and

(B) the municipal authority or governing body, as applicable, approves the extension request; or

(2) Chapter 2007, Government Code, requires the municipality to perform a takings impacts assessment in connection with the plan or plat.

(c) If a plat is approved, the municipal authority giving the approval shall endorse the plat with a certificate indicating the approval. The certificate must be signed by:

(1) the authority's presiding officer and attested by the authority's secretary; or

(2) a majority of the members of the authority.

(d) If the municipal authority responsible for approving plats fails to approve, approve with conditions, or disapprove a plat within the prescribed period, the authority on the applicant's request shall issue a certificate stating the date the plat was filed and that the authority failed to act on the plat within the period. The certificate is effective in place of the endorsement required by Subsection (c).

(e) The municipal authority for approving plats shall maintain a record of each application made to the authority and the authority's action taken on it. On request of an owner of an affected tract, the authority shall certify the reasons for the action taken on an application.

§ 212.0091. Approval Procedure: Conditional Approval or Disapproval Requirements.

(a) A municipal authority or governing body that conditionally approves or disapproves a plat under this subchapter shall provide the applicant a

written statement of the conditions for the conditional approval or reasons for disapproval that clearly articulates each specific condition for the conditional approval or reason for disapproval.

(b) Each condition or reason specified in the written statement:

(1) must:

(A) be directly related to the requirements under this subchapter; and

(B) include a citation to the law, including a statute or municipal ordinance, that is the basis for the conditional approval or disapproval, if applicable; and

(2) may not be arbitrary.

§ 212.0093. Approval Procedure: Applicant Response to Conditional Approval or Disapproval

After the conditional approval or disapproval of a plat under Section 212.0091, the applicant may submit to the municipal authority or governing body that conditionally approved or disapproved the plat a written response that satisfies each condition for the conditional approval or remedies each reason for disapproval provided. The municipal authority or governing body may not establish a deadline for an applicant to submit the response.

§ 212.0095. Approval Procedure: Approval or Disapproval of Response

(a) A municipal authority or governing body that receives a response under Section 212.0093 shall determine whether to approve or disapprove the applicant's previously conditionally approved or disapproved plat not later than the 15th day after the date the response was submitted.

(b) A municipal authority or governing body that conditionally approves or disapproves a plat following the submission of a response under Section 212.0093:

(1) must comply with Section 212.0091; and

(2) may disapprove the plat only for a specific condition or reason provided to the applicant under Section 212.0091.

(c) A municipal authority or governing body that receives a response under Section 212.0093 shall approve a previously conditionally approved or disapproved plat if the response adequately addresses each condition of the conditional approval or each reason for the disapproval.

(d) A previously conditionally approved or disapproved plat is approved if:

(1) the applicant filed a response that meets the requirements of Subsection (c); and

(2) the municipal authority or governing body that received the response does not disapprove the plat on or before the date required by Subsection (a) and in accordance with Section 212.0091.

§ 212.0096. Approval Procedure: Alternative Approval Process

(a) Notwithstanding Sections 212.009, 212.0091, 212.0093, and 212.0095, an applicant may elect at any time to seek approval for a plat under an alternative approval process adopted by a municipality if the process allows for a shorter approval period than the approval process described by Sections 212.009, 212.0091, 212.0093, and 212.0095.

(b) An applicant that elects to seek approval under the alternative approval process described by Subsection (a) is not:

(1) required to satisfy the requirements of Sections 212.009, 212.0091, 212.0093, and 212.0095 before bringing an action challenging a disapproval of a plat under this subchapter; and

(2) prejudiced in any manner in bringing the action described by Subdivision (1), including satisfying a requirement to exhaust any and all remedies.

§ 212.0097. Approval Procedure: Waiver Prohibited

A municipal authority responsible for approving plats or the governing body of a municipality may not request or require an applicant to waive a deadline or other approval procedure under this subchapter.

* * *

§ 212.010. Standards for Approval

(a) The municipal authority responsible for approving plats shall approve a plat if:

(1) it conforms to the general plan of the municipality and its current and future streets, alleys, parks, playgrounds, and public utility facilities;

(2) it conforms to the general plan for the extension of the municipality and its roads, streets, and public highways within the

municipality and in its extraterritorial jurisdiction, taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities;

(3) a bond required under Section 212.0106, if applicable, is filed with the municipality; and

(4) it conforms to any rules adopted under Section 212.002.

(b) However, the municipal authority responsible for approving plats may not approve a plat unless the plat and other documents have been prepared as required by Section 212.0105, if applicable.

B. Purpose And Policy

The general purpose of adopting rules and regulations governing plats and the subdivision of land is “to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.” Tex. Local Gov’t Code § 212.002. As stated in *Lacy v. Hoff*, 633 S.W.2d 605, 607-08 (Tex.Civ.App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.),

[t]he basis of subdivision control is the land registration system. Registration is a privilege that appropriate regulatory bodies have the power to grant or withhold based upon the compliance with certain conditions. The entire regulatory scheme depends upon the recordation of the plat.

Besides land registration, *Lacy* discussed several other purposes that municipalities have in requiring platting of property:

- to regulate subdivisions and implement planning policies;
- to implement plans for orderly growth and development within the municipality’s boundaries and extraterritorial jurisdiction (ETJ);
- to require compliance with certain lot and development standards;
- to insure adequate public facilities such as streets, parks, water, wastewater and other facilities indispensable to the community;
- protect future purchasers from inadequate police and fire protection; and
- to insure sanitary conditions and other governmental services.

Id. Municipal and county regulation of the subdivision of property is an exercise of the police power and has been recognized as such by the Texas Supreme Court. *Lombardo v. City of Dallas*, 73 S.W.2d 475, 479 (Tex. 1934). “Plat approval, like zoning, is an exercise of the police power. The police power is a grant of authority from the people to their governmental agents ‘to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.’” *City of Round Rock v. Smith*, 687 S.W.2d

300, 302 (Tex. 1985). Moreover, “[t]he purpose of plat approval is to ensure that subdivisions are safely constructed and to promote the orderly development of the community. Plat approval protects future purchasers from inadequate police and fire protection, inadequate drainage, and insures sanitary conditions. Public health, safety, and morals are general public interests.” *Id.*

The foregoing purposes often are codified by local governments in their applicable platting and subdivision regulations. For example, the City of McKinney, Texas, provides that the purpose of its subdivision regulations is as follows:

It is the purpose of this chapter to provide for the safe, efficient, and orderly development of the city, and the provision of adequate streets, utilities, services, and facilities, all in accordance with the comprehensive urban plan for the city.

McKinney Code of Ordinances, § 40-2. The Town of Flower Mound, Texas, similarly provides in its Land Development Code (a unified code containing both zoning and subdivision regulations):

The regulations of this chapter have been established in accordance with the Comprehensive Master Plan for the purpose of promoting the health, safety and general welfare of the Town of Flower Mound. They have been designed to lessen the congestion in the streets; the secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. They have been made with reasonable consideration, among other things, for the character of the districts and their peculiar suitability for the particular uses specified; and with a view of conserving the value of buildings and encouraging the most appropriate use of land throughout the Town consistent with the Comprehensive Master Plan.

Flower Mound Code of Ordinances, ch. 12, § 1.02.

C. Where Are Plats Required?

Section 212.002 of the Texas Local Government Code provides that municipalities may adopt rules governing plats and subdivisions of land within a municipality’s jurisdiction. Section 212.003 similarly provides that a municipality’s plat and subdivision regulations may apply to the extraterritorial jurisdiction of the municipality as well. Extraterritorial jurisdiction (ETJ) is defined as “the unincorporated area that is contiguous to the corporate boundaries of the municipality. . . .” Tex. Local Gov’t Code § 42.021. The geographical extent of any municipality’s extraterritorial jurisdiction is contingent upon the number of inhabitants of the municipality:

<u>Number of Inhabitants</u>	<u>Extent of Extraterritorial Jurisdiction</u>
Less than 5,000	One-half Mile
5,000—24,999	One Mile
25,000—49,999	Two Miles

50,000—99,999

Three and one-half Miles

100,000 and over

Five Miles

Tex. Local Gov't Code § 42.021. As a general rule, a municipality's ordinances and other regulations are valid and enforceable only within the municipality's corporate limits; however, where there is an express grant of authority by the state to municipalities to enact and enforce ordinances and regulations outside the corporate limits of a municipality, then municipalities possess the express power to regulate outside their corporate limits.

Thus, while Texas municipalities do not possess the statutory authority to zone property in their extraterritorial jurisdictions, Section 212.003 of the Local Government Code provides that a subdivision ordinance is applicable to a municipality's extraterritorial jurisdiction if, and only if, the municipality specifically has extended its subdivision regulations to the extraterritorial jurisdiction. Subdivision regulations are not automatically applicable to a municipality's ETJ.

The authors' experience is that most, if not all, municipalities routinely extend the application of their subdivision regulations to their extraterritorial jurisdictions. A question that consequently arises is whether, and to what extent, a municipality may enforce its subdivision and related ordinances in its extraterritorial jurisdiction. Prior case law on point compelled the conclusion that (1) a municipality may require building permits for construction in its ETJ and (2) a municipality may enforce its construction-related ordinances in its ETJ. *See City of Lucas v. North Texas Municipal Water Dist.*, 724 S.W.2d 811 (Tex.App.-Dallas 1986, writ ref'd n.r.e.). In *Lucas*, a water district contended, in part, that a city in its ETJ could not impose its development standards on the District. The Dallas Court of Appeals unequivocally rejected that contention.

Article 970a [the predecessor statute to Section 212.003(a) of the Texas Local Government Code] confers authority upon a city to extend its subdivision ordinances into its extraterritorial jurisdiction. In determining whether jurisdiction under article 970a has attached, a subdivision may be simply a division of a tract of land into smaller parts. However, use of the term is not restricted to the division itself but also encompasses the development of the divided tracts. Consequently, ordinances regulating development, such as those specifying design, construction and maintenance standards, may be extended by a city into its extraterritorial jurisdiction.

Moreover, a municipal corporation may exercise both those powers expressly granted by a statute and those necessarily or fairly implied in such grant. Were we to hold that building standards are not contemplated by article 970a, we would be left with a statute that grants authority over the laying out of streets, alleys and lot boundaries, but precludes authority over the most important part of a subdivision. Consequently, *we conclude that the power over subdivisions conferred by article 970a necessarily or fairly implies a right to issue regulations governing construction of housing, buildings, and the components thereof.*

Lucas, 724 S.W.2d at 823-24 (citations omitted)(emphasis added). The Texas Supreme Court, however, in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016), ruled that general law cities may not extend their building codes into their ETJs. Thus, at present, both general law

and home rule municipalities may enforce their subdivision ordinances in their ETJs; however, only home rule municipalities may issue building permits for construction in their ETJs and further, may enforce their construction-related ordinances (Uniform Building Code, Uniform Plumbing Code, Uniform Mechanical Code and Uniform Electrical Code) in its ETJ.

A municipality may regulate subdivisions and approve plats for tracts of land located outside its corporate limits and outside its extraterritorial jurisdiction if there is an interlocal agreement providing for such regulation and approval. Tex. Local Gov't Code § 242.001(d). In the event a tract of land lies within the ETJ of more than one municipality, the municipality with the largest population has approval responsibility. Tex. Local Gov't Code § 212.007(a). Nevertheless, the portion of the tract that lies in the ETJ of the smaller municipality must comply with the subdivision and platting regulations of that municipality while the portion of the tract that lies in the ETJ of the larger municipality must comply with the subdivision and platting regulations of that municipality. Thus, plat approval is the responsibility of the larger municipality even though the larger municipality only applies its regulations to that portion of the tract in its ETJ.

Legislation in 2023 significantly reduced municipal authority in the ETJ. How? By making it incredibly easy for landowners in the ETJ to seek release from a city's ETJ. Subchapter D of Chapter 42 of the Texas Local Government Code authorized landowners and residents of an ETJ area to petition to be removed from a city's ETJ and generally, the failure of a city to do so results in the automatic release of the ETJ 45 days after a release petition is filed.¹⁵⁷

D. When Are Plats Required?

Section 212.004 of the Texas Local Government Code provides, in part, that an “owner of a tract of land located within the limits or in the extraterritorial jurisdiction of a municipality who divides the tract in two or more parts . . . must have a plat of the subdivision prepared.” This provision refers to any partitioning of a tract, not any sale or even intended sale, and is liberally construed. *See Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882 (Tex.App.-Waco 1985, no writ) (holding that (1) there is nothing in the platting statute that requires that lots be offered for sale to constitute a “subdivision” and (2) “the manifest overall purpose of the [platting] statutes concerned is to give counties the power to control subdivisions to protect its citizens in matters of public health and sanitation, drainage, and maintenance of public roads”); *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.) (“We decline to hold that the legislature intended a ‘subdivision’ to be specifically a partition of property into separate lots accompanied by a permanent transfer of ownership to the occupant of each separate lot. Rather, a ‘subdivision’ of property may refer simply to the act of partition itself, regardless of whether an actual transfer of ownership - or even an intended transfer of ownership - occurs”); *City of Corpus Christi v. Unitarian Church of Corpus Christi*, 436 S.W.2d 923 (Tex.Civ.App.—Corpus Christi 1969, writ ref'd n.r.e.) (A city may require the filing of a plat prior to the issuance of a building permit unless the tract was created by a conveyance prior to annexation and is therefore “grandfathered”).

¹⁵⁷ See Tex. Local Gov't Code §§ 42.101-42.105. Subchapter E of Chapter 42 authorizes an election to be removed from a city's ETJ. *See id.*, §§ 42.151-42.156.

Even though the term “divides” is liberally construed, there are exceptions to the platting requirements mandated by Chapter 212 of the Texas Government Code. They are as follows:

1. **Acquisition of Property by Governmental Entities.** Platting is not required when a government acquires property via condemnation, dedication or purchase. *See Palafax v. Boyd*, 400 S.W.2d 946 (Tex.Civ.App.-El Paso 1966, no writ) (a city’s platting requirement does not restrict the exercise of the police power to acquire land for public use); *El Paso County v. City of El Paso*, 357 S.W.2d 783 (Tex.Civ.App.—El Paso 1962, no writ) (no plat required when one governmental entity condemns the property of another governmental entity, even though the court held that condemnation in such circumstances is unnecessary).
2. **Partitions.** Partition of property among co-tenants does not constitute a subdivision of property since a partition is not a conveyance *per se*, but only divides the property to give each owner the share of property already owned as a consequence of some prior conveyance. *Hamilton v. Hamilton*, 280 S.W.2d 588, 593 (Tex. 1955).
3. **Common Ownership Arrangements.** Apartments, condominiums, trailer (or manufactured housing) parks, commercial and office buildings are not subdivisions of property required to be individually platted since there generally is common ownership of the property.
4. **Military Installations.** According to Texas Attorney General Opinion No. C-128 (1963), a military installation in Grand Prairie “is not a subdivision of a city within the accepted meaning of a subdivision.”
5. **Municipal Determination of Platting Requirement.** According to Section 212.0045 of the Texas Local Government Code, “[t]o determine whether specific divisions of land are required to be platted, a municipality may define and classify the divisions. A municipality need not require platting for every division of land otherwise within the scope of this subchapter.” Thus, a municipality may modify platting requirements, *i.e.*, determine when a plat is or is not required for a subdivision of property.
6. **Five Acre Tract Exemption.** While a plat is required for most subdivisions of property, according to Section 212.004(a) of the Texas Local Government Code, no plat is required for “a division of land into parts greater than five acres, where each part has access and no public improvement is being dedicated.”

E. Types of Plats

Although there are plats that are filed of record in the county records (often referred to as “final plats” or “record plats”), there are other plats as well: amending plats, replats and vacating plats.

Amending Plats are described in Section 212.016 of the Texas Local Government Code. Like minor plats, the governing body of a municipality may delegate the authority to approve amending plats to a designated employee of the municipality. Tex. Local Gov't Code § 212.0065(a)(1). Amending plats are intended to correct minor errors only and the approval of all property owners is not required. Tex. Local Gov't Code § 212.0016(b). Amending plats may be approved for only the following reasons:

1. To correct an error in a course or distance shown the preceding plat;
2. To add a course or distance that was omitted on the preceding plat;
3. To correct an error in a real property description shown on the preceding plat;
4. To indicate monuments set after the death, disability, or retirement from practice of the engineer or surveyor responsible for setting monuments;
5. To show the location or character of a monument that has been changed in location or character or that is shown incorrectly as to location or character on the preceding plat;
6. To correct any other type of scrivener or clerical error or omission previously approved by the municipal authority responsible for approving plats, including lot numbers, acreage, street names, and identification of adjacent recorded plats;
7. To correct an error in courses and distances of lot lines between two adjacent lots if:
 - (1) both lot owners join in the application for amending the plat;
 - (2) neither lot is abolished;
 - (3) the amendment does not attempt to remove recorded covenants or restrictions; and
 - (4) the amendment does not have a material adverse effect on the property rights of the other owners in the plat;
8. To relocate a lot line to eliminate an inadvertent encroachment of a building or other improvement on a lot line or easement;
9. To relocate one or more lot lines between one or more adjacent lots if:
 - (1) the owners of all those lots join in the application for amending the plat;
 - (2) the amendment does not attempt to removed recorded covenants or restrictions; and

- (3) the amendment does not increase the number of lots;
10. To make necessary changes to the preceding plat to create six or fewer lots in the subdivision or a part of the subdivision covered by the preceding plat if:
 - (1) the changes do not affect applicable zoning and other regulations of the municipality;
 - (2) the changes do not attempt to amend or remove any covenants or restrictions; and
 - (3) the area covered by the changes is located in an area that the municipal planning commission or other appropriate governing body of the municipality has approved, after a public hearing, as a residential improvement area; or
11. To replat one or more lots fronting on an existing street if:
 - (1) the owners of all those lots join in the application for amending the plat;
 - (2) the amendment does not attempt to remove recorded covenants or restrictions;
 - (3) the amendment does not increase the number of lots; and
 - (4) the amendment does not create or require the creation of a new street or make necessary the extension of municipal facilities.

Tex. Local Gov't Code § 212.016(a).

Replats, not surprisingly, are plats. *See* Tex. Local Gov't Code § 212.001(2) (“Plat’ includes . . . a replat”). Sections 212.014, 212.0145, 212.046, 212.015 and 212.0155 of the Texas Local Government Code control replats of property. Section 212.014 addresses replatting without vacating the preceding plat while Section 212.015 contains “Additional Requirements for Certain Replats.”

In replatting large residential subdivisions, it is often difficult to obtain the signatures of all lot owners. As a result, Section 212.014 of the Texas Local Government Code was amended to permit replatting of property without the vacation of the preceding plat as long as the replat is (1) signed and acknowledged by only the property owners of the property being replatted; (2) the replat does not attempt to amend or remove any covenants or restrictions; and (3) there is a public hearing at which parties in interest and citizens have an opportunity to be heard before the municipal authority responsible for approving plats.

If a subdivision or any part of a subdivision was, during the preceding five years, subject to zoning or deed restrictions for residential uses of not more than two residential units per lot, additional notice and hearing requirements apply, according to Section 212.015 of the Texas Local

Government Code. Notice of the hearing must be published in the official municipal newspaper at least fifteen (15) days before the date of the public hearing and written notice must be given to property owners within 200 feet of the property being replatted. Notice must contain a statement that if the proposed replat is protested in writing by owners of at least twenty percent (20%) of the area immediately adjoining the area covered by the replat, then the replat must be approved by at least three-fourths (3/4) of the members present of the municipal planning commission or governing body, or both, if the proposed replat requires a variance. These provisions, however, do not apply to the resubdivision of property whose use was designated for other than single family or duplex family residential use, *i.e.*, the resubdivision of multi-family, commercial, retail and industrial property is not subject to these additional replat procedures.

Vacating Plats are described in § 212.013 of the Texas Local Government Code. A plat may be vacated at any time before any lot in the plat is sold. The plat is deemed “vacated when a signed, acknowledged instrument declaring the plat vacated is approved and recorded in the manner prescribed for the original plat.” Tex. Local Gov’t Code § 212.013(a). If lots have been sold, however, the plat, or any part of the plat, may be vacated only if all owners of the lots in the plat have approved the vacation of the plat and the approval of the municipality has been obtained in the same manner as required for the original plat. Tex. Local Gov’t Code § 212.013(b). *See also Priolo v. City of Dallas*, 257 S.W.2d 947 (Tex.Civ.App.—Dallas 1953, writ ref’d n.r.e.); *Blythe v. City of Graham*, 287 S.W.2d 527 (Tex.Civ.App.—Fort Worth 1958, writ ref’d n.r.e.); *Bjornson v. McElroy*, 316 S.W.2d 527 (Tex.Civ.App.—San Antonio 1958, no writ). Once recorded, the vacated plat has no effect. Tex. Local Gov’t Code § 212.013(d).

F. The Platting Process

After the subdivision of a tract of property into at least two or more parts (Tex. Local Gov’t Code § 212.004(a)) and the preparation of a plat by a developer or landowner, the municipal review process begins. Administrative or staff review procedures will vary from municipality to municipality; however, the following is indicative of a typical review process, from staff review to city council approval. For purposes of this discussion, this procedure relates to a final or record plat, not a preliminary plat, development plan, concept plan or any instrument that is not to be filed in the deed records of the county.

Staff Review. Staff review of a plat involves determination by a city’s staff whether a plat is necessary, and if so, staff review usually involves comments to the applicant regarding what is or should be included in the plat. This usually is a technical review to determine compliance with applicable ordinances and other municipal regulations and involves review of engineering plans, drainage plans, improvement plans, etc. After corrections or modifications have been made to the plat, then the plat is ready to proceed to the next step. It should be noted that the staff review process may be lengthy depending upon the quality of the plat initially presented to staff for review.

Planning and Zoning Commission Review. After staff has determined that the plat is complete and technical issues have been adequately addressed, the plat proceeds to the Planning and Zoning Commission. Tex. Local Gov’t Code § 212.006(a). After review and approval by the Planning and Zoning Commission, the plat proceeds to the governing body. It should be noted that not all municipalities have Planning and Zoning Commissions. If that is the case, obviously

there is no Planning and Zoning Commission review and the plat proceeds from staff review to consideration by the governing body for approval. Tex. Local Gov't Code § 212.006(a).

Section 212.009(a) of the Texas Local Government Code provides, in part, that “[t]he municipal authority responsible for approving plats shall approve, approve with conditions, or disapprove a plan or plat within 30 days after the plan or plat is filed.” When is a plat filed? A good municipal ordinance should spell this out. For example, a plat may be considered “filed” when it is determined to be administratively complete, *i.e.*, it is ready for submission to the Planning and Zoning Commission. Some cities provide that a plat is filed on the date when it has been placed on the Planning and Zoning Commission’s agenda and the agenda has been posted in accordance with all legal requirements.

Governing Body Review. After the municipality’s Planning and Zoning Commission has approved a plan or plat, the governing body must review it and act upon the plan or plat within thirty (30) days. Tex. Local Gov’t Code § 212.009(b). If the governing body does not approve the plan or plat within thirty (30) days, then state law deems the plan or plat approved. Tex. Local Gov’t Code § 212.009(b) (“A plan or plat is approved by the governing body unless it is disapproved within that period. . .”). Assuming the plat is approved, it is signed and filed in the county’s records, usually in the county clerk’s office in the county’s deed records. To be recorded, the plat must:

- (1) describe the subdivision by metes and bounds;
- (2) locate the subdivision with respect to a corner of the survey or tract or an original corner of the original survey of which it is a part; and
- (3) state the dimensions of the subdivision and of each street, alley, square, park, or other part of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the street, alley, square, park, or other part.
- (4) The owner or proprietor of the tract or the owner’s or proprietor’s agent must acknowledge the plat in the manner required for the acknowledgment of deeds.
- (5) The plat must be filed and recorded with the county clerk of the county in which the tract is located.

Tex. Local Gov’t Code § 212.004(b), (c) and (d).

Standards for Plat Approval. Whether the planning and zoning commission or city council has plat approval responsibility, a key issue is what standards are to be employed in plat approval. Many developers will tell you that many cities act arbitrarily in this process, often disregarding the standards contained in applicable municipal ordinances and creating *ad hoc* standards, holding the developers hostage to the whims of the planning and zoning commission and/or city council. Conversely, many cities will tell you that developers try to evade responsibilities under the applicable ordinances, sometimes promising many things and not following through on those promises.

Section 212.010 provides that the municipal authority responsible for approving plats shall approve a plat if:

- (1) it conforms to the general plan of the municipality and its current and future streets, alleys, parks, playgrounds, and public utility facilities;
- (2) it conforms to the general plan for the extension of the municipality and its roads, streets, and public highways within the municipality and in its extraterritorial jurisdiction, taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities;
- (3) a bond required under Section 212.0106, if applicable, is filed with the municipality; and
- (4) it conforms to any rules adopted under Section 212.002 (*i.e.*, it conforms to applicable subdivision regulations).

Governmental Discretion in Platting Matters. As a general principle, the scope of discretionary authority in platting matters is severely circumscribed by state law. Section 212.010 of the Texas Local Government Code, above, provides the standards for plat approval. Thus, the approval of plats is mandatory as long as the conditions enumerated in Section 212.010(a) are met. If a plat meets all applicable standards and regulations, the governmental body's inclusion of new standards or guidelines, not mandated by the applicable zoning ordinance and subdivision regulations, prior to approval by that body of the plat may operate as a denial of the applicant's state and federal due process rights absent compelling health, safety or welfare concerns. Consequently, while there may exist in extremely limited circumstances valid health, safety or welfare concerns for rejecting a plat that complies with all applicable regulations, as a general principle, local governments are not granted wide latitude in considering platting issues; however, a city is not liable for negligence in the plat approval process (*see City of Round Rock v. Smith*, 687 S.W.2d 300 (Tex. 1985)) and the approval of plats is a governmental function. Tex. Civ. Prac. & Rem. Code § 101.0215(a)(29).

Enforcement of Platting and Subdivision Regulations. Subdivision regulations may be enforced in any of the following ways:

1. Refusal to serve or allow connection to water, electricity, gas or other utility service (Tex. Local Gov't Code § 212.012);
2. Injunctive relief for the violation or threatened violation by the owner of a tract of land of a municipal requirement, such as a subdivision regulation, regarding the tract (Tex. Local Gov't Code § 212.018(a)(1));
3. Recovery of damages from the owner of a tract of land in an amount adequate for the municipality to undertake any construction or other activity necessary to bring about compliance with a subdivision or other municipal regulation (Tex. Local Gov't Code § 212.018(a)(2));
4. Criminal penalty for violation of municipal ordinances; or

5. A civil action and penalties pursuant to Chapter 54 of the Texas Local Government Code.

G. Conflicts of Interest

Section 212.017(d) of the Texas Local Government Code provides that “[i]f a member of the municipal authority responsible for approving plats has a substantial interest in a subdivided tract, the member shall file, before a vote or a decision regarding the approval of a plat for the tract, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter. . . .” A “substantial interest,” not unlike its counterpart in Chapter 171 of the Texas Local Government Code, is defined as

(b) A person has a substantial interest in a subdivided tract if the person:

(1) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more;

(2) acts as a developer of the tract;

(3) owns 10 percent or more of the voting stock or shares of or owns either 10 percent or more or \$5,000 or more of the fair market value of a business entity that:

(A) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more; or

(B) acts as a developer of the tract; or

(4) receives in a calendar year funds from a business entity described by Subdivision (3) that exceed 10 percent of the person’s gross income for the previous year.

Tex. Local Gov’t Code § 212.017(b). A local official who has a substantial interest must file an affidavit stating the nature and extent of the interest and must abstain from further participation in the matter. Tex. Local Gov’t Code § 212.017(d). Anyone who violates Subsection (d) commits a Class A misdemeanor. Tex. Local Gov’t Code § 212.017(e).

III. Frequently Asked Questions

1. Can a plat be tabled?

No. A plat is approved by operation of law if it is not disapproved within thirty (30) days, as referenced above in § 212.009 of the Texas Local Government Code; however, developers, in attempting to resolve differences and avoiding a council vote to disapprove or deny a plat, often agree on the record to a continuance to resolve those differences. Other cities deny the plat subject to additional items being resolved. Once those items are resolved, the plat is placed on a subsequent agenda for consideration. These procedures are almost always beneficial to the developer because he/she is not required to file a new

plat and pay a new filing fee. Please be advised, however, that there is no reported case law that sanctions this procedure, although it is highly unlikely to be challenged.

2. Can (or should) a plat be approved subject to the staff working out certain problems?

No. A plat must be approved or disapproved with specific conditions set out. As a practical matter, if the plat is acceptable except for some very minor condition (*e.g.*, no indication of north on the plat, an adjacent road name is improperly labeled, etc.), the plat may be approved subject to it being corrected *and* the motion to approve the plat should specifically state the necessary addition or modification. It is not advisable, however, to approve a plat subject to a major condition or modification (*e.g.*, all streets will be curvilinear, the number of lots will be reduced or increased, easements will be added or removed, etc.). In those situations, problems invariably arise and it is unclear whether there is an approved plat or not.

3. If a plat conforms to all applicable ordinances, must a city council or commissioners court approve the plat?

Yes. If the plat conforms to the general plan of the city, its streets, alleys, parks, playgrounds, public utility facilities, sewer, water and all rules and regulations governing plats, then the city must approve the plat. The same applies to counties as well.

4. Should cities and counties periodically review their subdivision regulations?

Yes. Ordinances (or commissioners court orders) should be reviewed periodically to ensure compliance with constitutional standards regarding exactions, vagueness, procedural due process issues as well as a host of other issues.

5. Should governing bodies be aware of other statutory obligations?

There always should be compliance with the Texas Open Meetings Act (Tex. Gov't Code ch. 551) and all meetings should be posted in accordance with the Texas Open Meetings Act. This applies also to Planning and Zoning Commissions as well as other bodies, such as a Zoning Board of Adjustment.

6. Is a municipality liable for negligently approving a plat?

No. *See City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985) (“[P]lat approval is a discretionary function that only a governmental unit can perform. By definition a quasi-judicial exercise of the police power is exclusively the province of the sovereign. An individual or private corporation cannot exercise the same power. We hold that plat approval is a governmental function”).

VESTED RIGHTS

I. Introduction

In 1997, the Texas Legislature inadvertently repealed Section 481.141 *et seq.* of the Texas Government Code, commonly known as the vested rights statute. To remedy this situation, the Legislature adopted a new vested rights statute which became effective May 11, 1999. This “new” vested rights statute, which now can be found in Chapter 245 of the Texas Local Government Code, does not significantly change the rules under which a municipality was required to operate prior to the repeal of the former vested rights statute.

The vested rights statute, as well as the concept of vested rights, are significant in the Texas land use context, particularly in the case of residential subdivisions that previously were platted but never developed due to a variety of reasons—downturns in local real estate markets, developer insolvency or bankruptcy, and environmental issues, among others. Preliminary plats without expiration dates often were approved by municipalities (and occasionally still are). Consequently, developers would seek approval of final plats for these subdivisions, asserting that under the vested rights statute only those ordinances and regulations in effect *at the time the preliminary plat was approved* should apply to the development of these tracts. Obviously, in many cities land development regulations and ordinances will have changed dramatically in the interim.

To apply the vested rights statute as it exists today, one must examine the recent history of vested rights statutes in Texas. The 1995 Texas Legislature enacted several significant amendments to former Section 481.141 *et seq.* of the Texas Government Code, the prior vested rights statute. Most of these amendments arguably were pro-developer and restricted the ability of municipalities to apply current zoning ordinances and regulations or any amendments thereof to certain real estate developments.

II. Overview of Former Vested Rights Statute Prior to 1995 Amendments

The former vested rights statute stated:

Section 481.142 DEFINITIONS

In this subchapter:

- (1) “Political subdivision” means a political subdivision of the state, including a county, a school district, or a municipality.
- (2) “Permit” means a license, certificate, approval, registration, consent, permit, or other form of authorization required by law, rule, regulation, or ordinance that must be obtained by a person in order to perform an action or initiate a project for which the permit is sought.
- (3) “Project” means an endeavor over which a regulatory agency exerts its jurisdiction and for which a permit is required before initiation of the endeavor.
- (4) “Regulatory agency” means an agency, bureau, department, division, or commission of the state or any department or other agency of a political subdivision that processes and issues permits.

Section 481.143 UNIFORMITY OF REQUIREMENTS

- (a) The approval, disapproval, or conditional approval of an application for a permit shall be considered by each regulatory agency solely on the basis of any orders, regulations, ordinances, or other duly adopted requirements in effect at the time the original application for the permit is filed. If a series of requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project.

Under the former law, developers argued that only those ordinances and regulations in effect at the *initial* stage of the permit application process could be applied to the final permit review and the ultimate construction of the project. According to the developers' argument, all subsequent revisions to regulations governing permit review, including zoning and subdivision ordinances, were inapplicable. In effect, a "snapshot" was to be taken of existing ordinances and regulations at the time of application for the initial permit, and that picture could not later be changed by the municipality.

Prior to the 1995 amendments, municipalities had effective rebuttals to the developers' aforementioned arguments. For example, the statute was unclear whether it was applicable to zoning ordinance amendments since the statute did not expressly state that it was applicable to a municipality or other governing body.¹⁵⁸ Municipalities also could argue that the developers' position would result in seemingly inequitable results, such as a planning and zoning commission being forced to review and approve two permits under vastly differing regulations during the same meeting's agenda.

There was little Texas case law directly addressing these issues. The court in *Long Reach Associates, Inc. v. City of Sugarland*, Cause No. 84,807, in the 240th Judicial District Court of Fort Bend County, Texas, sustained the plaintiff developer's argument that approval of a preliminary plat vested the developer's rights under the statute. In *Williamson Pointe Venture v. City of Austin*, Cause No. 93-09435, in the 126th Judicial District Court of Travis County, Texas, the trial court indicated in an informal letter opinion that permit applications which had expired could not be used to "lock in" applicable regulations. The court further indicated that zoning was not a "permit" and therefore regulations, ordinances, and other requirements in effect at the time of a zoning application were not controlling. Uncertainty regarding these and related issues undoubtedly provided the impetus for the 1995 amendments, which resolved most ambiguities. As previously stated, the results were generally not favorable to municipalities.

The 1999 Act which re-enacted the vested rights statute uses substantially the same language contained in former Texas Government Code § 481.141 *et seq.* and therefore should be

¹⁵⁸ The prior vested rights statute referred to approvals, etc., by a "regulatory agency." Since, by definition, a "regulatory agency" is an agency, department or division of a political subdivision, the political subdivision itself was not included. Therefore, a rezoning of property, which can only be implemented by the governing body, arguably did not come within the express terms of the vested rights statute.

interpreted substantially the same. In addition, certain additions to the 1999 statute make the current version retroactive to the date of repeal.

III. Committee Report to the 1995 Amendments

The Committee Report to the 1995 Amendments stated that “[i]n the case of real estate development, there has been some confusion as to what constitutes a project and what constitutes a series of permits under the current law.” Additionally, the Report noted confusion whether health and safety regulations can be changed after a permit has been filed. The stated purpose of the amendments was to “clarify the existing law with regard to the uniformity of requirements for the approval of permits related to real estate development.”

IV. Significant Sections of the Vested Rights Statute and Its Application

A. Definitions

Under the 1999 Act, the following definitional changes were enacted:

- (3) “Project” means an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.
- (4) “Regulatory agency” means the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision acting in its capacity of processing, approving, or issuing a permit.

Tex. Local Gov’t Code § 245.001 (1999).

The definition of “project” makes clear that the real estate development permit process, which will generally include multiple stages, will be viewed as a single event for purposes of the statute. In addition, the “regulatory agency” amendment eliminates any argument that the statute does not apply to municipalities or their governing bodies.

B. Uniformity of Requirements

Section 245.002 of the Local Government Code now provides as follows:

Section 245.002 UNIFORMITY OF REQUIREMENTS

- (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:
 - (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or
 - (2) a plan for development of real property or plat application is filed with a regulatory agency.

- (a-1) Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought. An application or plan is considered filed on the date the applicant delivers the application or plan to the regulatory agency or deposits the application or plan with the United States Postal Service by certified mail addressed to the regulatory agency. A certified mail receipt obtained by the applicant at the time of deposit is prima facie evidence of the date the application or plan was deposited with the United States Postal Service.
- (b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.
- (c) After an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project. . . .

The expansive language of § 245.002 clearly strengthens a developer’s argument that the first act required by a municipality for real estate development “locks in” the applicable ordinances and regulations. Some developers likely will attempt to push this argument to its illogical extreme, asserting that the mere application for change of a comprehensive plan or zoning ordinance is sufficient, upon approval, to vest the application of the then existing ordinances and regulations. While the expansive language may lend some credence to this argument, it should not prevail. The vested rights statute addresses procedural administrative practices, and zoning is more properly viewed as an exercise of a municipality’s legislative powers. *See City of Pharr v. Tippitt*, 616 S.W.2d 173, 175 (Tex. 1981).

This analysis is consistent with the Austin Court of Appeals decision in *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340 (Tex.App.-Austin 1995, no writ), which analyzed the vested rights statute prior to the 1995 amendments to that statute. In that case, the court held that a rezoning was not a permit that entitled a property owner to later develop his property to comply only with the standards existing at the time of the rezoning. In its analysis, the court distinguished between zoning, subdivisions and platting, and site plan analysis. *Id.* at 342. The court reviewed the definition of permit, which is essentially the same definition of permit used in Chapter 245, and concluded that a permit did not include the legislative act of rezoning. *Id.* at 343.

Established law provides that no property owner has a vested interest in particular zoning categories. Otherwise, “a lawful exercise of the police power by the governing body of the city would be precluded.” Because the City could rezone

the property to entirely prohibit previously permissible uses, even established uses, the City can amend regulations that affect the prospective development of the property within the broad zoning categories. The proposition that the legislative act of zoning entitles the landowner to develop his or her property free from all subsequent regulatory changes is so contrary to established law that the legislature, had it wanted to effect such a change, must have clearly so stated.

Id. (citations omitted).

Moreover, the court held that even if zoning could be considered as a “permit,” it was not at all clear that zoning is part of a “project.” In reviewing substantially the same language that is contained in Chapter 245 regarding what is a “project” and what is a “series of permits for a project,” the court concluded that “[z]oning, which appellants claim is simply another development permit, is not included in that definition.” *Id.* at 345 n.7.

In fact, the language used in Chapter 245 provides further support that a “permit” cannot include zoning because Chapter 245 provides lawful authority for municipalities to provide for the expiration of a permit under certain circumstances. Clearly, the Legislature would not have included zoning as a permit if the Legislature intended for permits to expire at some point in time. Accordingly, the better argument is that the applicable rules and ordinances do not “vest” until a person has made application for a preliminary plat. Furthermore, there is nothing in the statute addressing a developer’s application for a replat. Again, the better argument is that the replat is a new project and therefore begins the permit process anew under the ordinances in place at the time of application for such replat.

C. Applicability of Chapter 245

Section 245.003 states:

This chapter applies only to a project in progress on or commenced after September 1, 1997. For purposes of this chapter a project was in progress on September 1, 1997, if:

- (1) before September 1, 1997:
 - (A) a regulatory agency approved or issued one or more permits for the project; or
 - (B) an application for a permit for the project was filed with a regulatory agency; and
- (2) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:
 - (A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;

- (B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the project before September 1, 1997; or
- (C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.

As indicated, the vested rights statute applies to all projects in progress on or commenced after September 1, 1997, the date of the inadvertent repeal of the former vested rights statute. Ironically, the statute, as read, will apply even with respect to preliminary plats approved prior to the 1987 enactment of the original vested rights statute if the preliminary plat in question has no expiration date.

D. Exemptions

Section 245.004 of the Texas Local Government Code states:

This chapter does not apply to:

- (1) a permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation and is issued under laws ordinances, procedures, rules or regulations adopting only:
 - (A) uniform building, fire electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or
 - (B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;
- (2) municipal zoning regulations that do not affect lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by the municipality;
- (3) regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect lot size, lot dimensions, lot coverage, or building size;
- (4) regulations for sexually oriented businesses;
- (5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;
- (6) fees imposed in conjunction with development permits;
- (7) regulations for annexation;
- (8) regulations for utility connections;

- (9) regulations to prevent imminent destruction of property or injury to persons including regulations effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;
- (10) construction standards for public works located on public lands or easements; or
- (11) regulations to prevent the imminent destruction of property or injury to persons if the regulations do not:
 - (A) affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or
 - (B) change development permitted by a restrictive covenant required by a municipality.

1. Health and Safety Regulations

As indicated, health and safety regulations adopting uniform codes are exempt from the vested rights statute. Municipalities therefore can compel a developer to comply with the most recent uniform codes regardless whether such codes were modified after the permit process began. Local amendments addressing imminent threats of destruction of property or injury to persons are also exempted if the applicable permit is less than two years old. It is unclear if the two-year requirement under subsection (1) also applies to changes in a uniform code. If so, developers would not be required to comply with modifications to a uniform code enacted within two years of the initial permit application.

2. Municipal Zoning Regulations

Municipal zoning regulations that do not affect “lot size, lot dimensions, lot coverage, or building size” are also excluded under the statute. The reasonable construction of this exemption is that all other zoning ordinances and regulations are exempt from the statute and changes are therefore permissible during the permit application process. It should be noted, however, that most zoning regulations directly or indirectly affect lot size, dimensions, and/or coverage, and therefore most zoning regulation amendments and certainly most site-specific rezonings of property would be inapplicable once a preliminary plat has been filed. It is unclear, however, how a court may view changes to certain environmental ordinances, such as tree or noise ordinances. Arguably, these ordinances do not affect the totality of the uses of the land and are properly viewed as zoning regulations exempt from the statute.

3. Impact Fees

Pursuant to subsection (6), impact fees assessed by a municipality pursuant to Chapter 395 of the Texas Local Government Code are exempt from the statute and may be modified at any phase of development.

4. Construction Standards for Public Streets

Pursuant to subsection (10), construction standards for public works on public lands and easements are exempt. Accordingly, those provisions of a municipality's subdivision ordinance governing construction standards for streets, medians, curbs, fencing, and similar matters may also be changed. In addition, the modifications may be made at any time in the permit process, even post-final plat.

E. Developers Can Change the "Snapshot"

Section 245.002(d) of the Texas Local Government Code states:

- (d) Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the project, including changes that lengthen the effective life of the permit after the date the application for the permit was made, without forfeiting any rights under this chapter.

Accordingly, although a developer is not required to suffer the consequences of changes in regulations restricting his rights, the developer may take advantage of any changes benefiting the development project. The "snapshot" can be changed, but only if the developer wants it to be changed. Furthermore, while a municipality cannot shorten the effective time periods of permits, developers can take advantage of changes lengthening the effective life of a permit.

F. Dormant Projects

Section 245.005 states:

- (a) After the first anniversary of the effective date of this chapter, a regulatory agency may enact an ordinance, rule, or regulation that places an expiration date on a permit if as of the first anniversary of the effective date of this chapter: (i) the permit does not have an expiration date; and (ii) no progress has been made towards completion of the project. Any ordinance, rule, or regulation enacted pursuant to this subsection shall place an expiration date of no earlier than the fifth anniversary of the effective date of this chapter.
- (b) A regulatory agency may enact an ordinance, rule, or regulation that places an expiration date of not less than two years on an individual permit if no progress has been made towards completion of the project. Notwithstanding any other provision of this chapter, any ordinance, rule, or regulation enacted pursuant to this section shall place an expiration date on a project of no earlier than the fifth anniversary of the date the first permit application was filed for the project if no progress has been made towards completion of the project. Nothing in this subsection shall be deemed to affect the timing of a permit issued solely under the authority of Chapter 366, Health and Safety Code, by the Texas Commission on Environmental Quality or its authorized agent.

(c) Progress toward completion of the project shall include any one or more of the following:

- (1) an application for a final plat or plan is submitted to a regulatory agency;
- (2) a good faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;
- (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;
- (4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or
- (5) utility connection fees or impact fees for the project have been paid to a regulatory body.

This provision, while seemingly innocuous, indeed is rather significant. Many developers filed preliminary site plans during the housing boom of the 1980s only to abandon the project in the late 80's or early 90's when the housing market took a turn for the worse. As the housing market continues to expand, many of these same developers will argue that their rights are vested and they should be allowed to develop their property under the ordinances (both zoning ordinances and subdivision regulations) in effect at the time of preliminary plat approval. Alternatively, municipalities will argue that the zoning ordinances have changed in the interim period and they should not be required to accede to a developer's demand to develop under antiquated rules. While Section 245.005 does not grant a municipality the power to unilaterally cancel all approved applications, it does allow a municipality to place a time limit during which the developer must complete its project.

V. Summary

In summary, the "new" vested rights statute again generally favors developers. The law is substantially the same as it existed in 1997 when the Texas Legislature inadvertently repealed the statute as it then existed in the Texas Government Code. Over the years, the statute has been clarified to "lock in" most procedural requirements at the time of preliminary plat application. For this reason, it is important that municipalities take all available steps to limit the adverse effects of the new legislation. In this regard, municipalities should initially establish expiration periods for all preliminary plats. A time period of twelve to eighteen months is generally reasonable. Second, comprehensive plan regulations, zoning ordinances and subdivision ordinances should clearly state that approval of proposed changes does not begin the permit process. As indicated above, the permit process should only begin upon approval of a preliminary plat. Finally, municipalities

must be aware of the various modifications and exemptions to the former law. Specifically, certain health and safety standards, zoning ordinances, impact fees, and construction standards for street improvements are expressly exempted under the statute. For these reasons, municipalities must become knowledgeable about the advantages, as well as the disadvantages, of the new legislation.

MUNICIPAL
REGULATION OF
THE ETJ

A problematic issue for many municipalities is the extent to which a city may regulate the extraterritorial jurisdiction (“ETJ”) which (usually) surrounds it. While issues relating to the ETJ generally involve annexation disputes, the ETJ often poses land use problems for cities throughout Texas. The purpose of this paper is to address in a general manner annexation and the ETJ, and in particular, land use and related municipal regulations in the ETJ.

I. Introduction

Prior to 1963, a Texas municipality could annex territory up to the corporate boundaries of another municipality. Since courts adhered to the “first in time, first in right” rule that the first to commence annexation or incorporation proceedings was entitled to complete and relate the whole action back to the date of the commencement of the actions, contests often resulted between an area attempting to incorporate and a city racing to annex that area prior to the initiation of incorporation proceedings. The Legislature, recognizing the havoc that was being created by such races, enacted the Municipal Annexation Act, Tex.Rev.Civ.Stat.Ann. art. 970a, in 1963. In addition to statutorily regulating annexation activities, the Municipal Annexation Act created the concept of extraterritorial jurisdiction. Since that time, disputes between municipalities and landowners regarding annexation and the ability of cities to regulate certain activities within the ETJ have become commonplace.

These disputes have churned significant activity in the Texas Legislature. In the 75th Session of the Texas Legislature, approximately 70 annexation or annexation-related bills were introduced. While no significant changes in the state’s annexation scheme were accomplished through the handful of bills that were passed in the 75th Legislative Session, the 76th Legislature dramatically altered the ability of municipalities to annex property. Senate Bill No. 89, which became effective September 1, 1999, has completely changed the annexation landscape.

II. The Municipal Annexation Act and the ETJ

Chapters 42 and 43 of the Texas Local Government Code comprise the current version of the Municipal Annexation Act, originally enacted in 1963, which governs the ability of municipalities to annex property and which created the ETJ concept. *City of Bridge City v. City of Port Arthur*, 792 S.W.2d 217, 230 (Tex.App.—Beaumont 1990, writ denied). The policy purpose underlying ETJ is described in Section 42.001 of the Texas Local Government Code:

The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.

Extraterritorial jurisdiction by statute is defined as “the unincorporated area that is contiguous to the corporate boundaries of the municipality. . . .” Tex. Local Gov’t Code § 42.021. The geographical extent of any municipality’s extraterritorial jurisdiction is contingent upon the number of inhabitants of the municipality:

<u>Number of Inhabitants</u>	<u>Extent of Extraterritorial Jurisdiction</u>
Less than 5,000	One-half Mile
5,000—24,999	One Mile
25,000—49,999	Two Miles
50,000—99,999	Three and one-half Miles
100,000 and over	Five Miles

Tex. Local Gov't Code § 42.021. The operative language in Section 42.021 is “number of inhabitants” rather than “population”—a distinction of significance in Texas state law when viewed with reference to Chapter 311 of the Texas Government Code, the Code Construction Act. According to Section 311.002 of the Government Code, the Code Construction Act applies to any code enacted by the 60th or subsequent Legislature. The Local Government Code was enacted by the 71st Legislature in 1989. According to Section 311.005(3) of the Government Code, “population” means “the population shown by the most recent federal decennial census.” Therefore, when any state statute employs the term “population,” that refers to the population as of the most recent decennial census—currently, the 2000 federal decennial census. In contrast, the extent of a city’s extraterritorial jurisdiction is based upon the number of inhabitants (as determined by the city), not the city’s population according to the most recent decennial census. Further, the Attorney General’s Office determined in Letter Opinion No. LO94-033 (1994) that “a municipality may choose the method by which it will ascertain the boundaries of its extraterritorial jurisdiction. . . .” That opinion was in response to the question whether a city “may measure its extraterritorial jurisdiction by drawing a radius around the municipality on a map, or whether the municipality must ‘go into the field, . . . physically [measuring] the . . . radius.’” *Id.* Thus, a municipality may by ordinance or resolution determine the number of inhabitants within its corporate limits and determine how it will measure the extent of its ETJ.

A. Mapping Municipal Boundaries and the ETJ

As a threshold matter, before a municipality may consider the annexation of property into the city, it is imperative that the city accurately determine its corporate boundaries and the limits of its ETJ. Section 41.001 of the Texas Local Government Code requires that each city maintain an official map of its city limits which, after each annexation, is updated to show the newly annexed area, the date of annexation, the ordinance number, and a reference to the minutes or ordinance records in which the ordinance is recorded. Further, Section 41.001 of the Local Government Code requires that if a municipality’s ETJ is expanded or reduced, the official map must be revised to indicate the change in the city’s ETJ:

§ 41.001 Map of Municipal Boundaries and Extraterritorial Jurisdiction

(a) Each municipality shall prepare a map that shows the boundaries of the municipality and of its extraterritorial jurisdiction. The municipality shall maintain a copy of the map in a location that is easily accessible to the public, including:

(1) in the office of the secretary or clerk of the municipality;

(2) if the municipality has a municipal engineer, in the office of the engineer; and

(3) if the municipality maintains an Internet website, on the municipality's website.

(a-1) A municipality shall make a copy of a map required under Subsection (a) available without charge.

(b) If the municipality annexes territory, the map shall be immediately corrected to include the annexed territory. The map shall be annotated to indicate:

(1) the date of annexation;

(2) the number of the annexation ordinance, if any; and

(3) a reference to the minutes or municipal ordinance records in which the ordinance is recorded in full.

(c) If the municipality's extraterritorial jurisdiction is expanded or reduced, the map shall be immediately corrected to indicate the change in the municipality's extraterritorial jurisdiction. The map shall be annotated to indicate:

(1) the date the municipality's extraterritorial jurisdiction was changed;

(2) the number of the ordinance or resolution, if any, by which the change was made; and

(3) a reference to the minutes or municipal ordinance or resolution records in which the ordinance or resolution is recorded in full. . . .

In a perfect world, all municipal incorporations would result in a survey that would be utilized in creating an official city map, which city map would have been checked for

completeness and closure and recorded in the minutes of the municipality and the real property records of the county or counties in which the city lies. Additionally, in a perfect world, all annexations would have been precisely determined with field notes or other legal descriptions that would allow the official city map to be amended to reflect the new corporate city limits, as well as the extent of the city's newly expanded ETJ. Of course, very few cities operate in a perfect world and, as a result, many times uncertainty may exist as to the exact location of municipal boundaries and the exact extent of a municipality's ETJ.

B. Reduction of the ETJ

Section 42.023 of the Texas Local Government Code states that:

[t]he extraterritorial jurisdiction of a municipality may not be reduced unless the governing body of the municipality gives its written consent by ordinance or resolution, except:

- (1) in cases of judicial apportionment of overlapping extraterritorial jurisdiction under Section 42.901;
- (2) in accordance with an agreement under Section 42.022(d); or
- (3) as necessary to comply with Section 42.0235.

Tex. Local Gov't Code § 42.023. A city created out of the relinquishment of another city's ETJ had no ETJ of its own where its corporate boundaries adjoined the other city's ETJ. *Bridge City*, 792 S.W.2d at 230. In *City of Pasadena v. City of Houston*, 442 S.W.2d 325, 329 (Tex. 1969), the Texas Supreme Court held that where a Houston ordinance purporting to annex property (which the City of Pasadena had subsequently annexed by later ordinances) was not completed within ninety days of the passage of the Municipal Annexation Act, the Houston ordinance was void, notwithstanding that the agreed judgment reached between Houston and Pasadena before passage of the Act that gave Houston exclusive jurisdiction to annex the property. Further, Texas case law consistently has held that an ordinance that attempts to annex territory within the ETJ or municipal boundaries of another city is void. See *City of Waco v. City of McGregor*, 523 S.W.2d 649, 653 (Tex. 1975); *Village of Creedmoor v. Frost Nat'l Bank*, 808 S.W.2d 617, 620 (Tex.App.—Austin 1991, writ denied); *City of Bridge City*, 792 S.W.2d at 230; *Friendship Village v. State*, 738 S.W.2d 12, 14 (Tex.App.—Texarkana 1987, writ ref'd n.r.e.); *City of Houston v. Savely*, 708 S.W.2d 879, 887 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), cert. denied, 482 U.S. 928 (1987); *City of West Orange v. City of Orange*, 598 S.W.2d 387, 390 (Tex.Civ.App.—Beaumont 1980), rev'd on other grounds, 613 S.W.2d 236 (Tex. 1981); *City of Duncanville v. City of Woodland Hills*, 484 S.W.2d 111, 113 (Tex.Civ.App.—Waco 1972, writ ref'd n.r.e.). Indeed, the attempted annexation of land within another municipality's ETJ is unlawful, void and of no effect *ab initio*. See, e.g., *Village of Creedmoor*, 808 S.W.2d at 621.

C. Expansion of the ETJ

Section 42.022 of the Texas Local Government Code addresses the expansion of the ETJ. Specifically, it states:

- (a) When a municipality annexes an area, the extraterritorial jurisdiction of the municipality expands with the annexation to comprise, consistent with Section 42.021, the area around the new municipal boundaries.
- (b) The extraterritorial jurisdiction of a municipality may expand beyond the distance limitations imposed by Section 42.021 to include an area contiguous to the otherwise existing extraterritorial jurisdiction of the municipality if the owners of the area request the expansion.
- (c) The expansion of the extraterritorial jurisdiction of a municipality through annexation, request, or increase in the number of inhabitants may not include any area in the existing extraterritorial jurisdiction of another municipality.
- (d) The extraterritorial jurisdiction of a municipality may be expanded through annexation to include area that on the date of annexation is located in the extraterritorial jurisdiction of another municipality if a written agreement between the municipalities in effect on the date of annexation allocates the area to the extraterritorial jurisdiction of the annexing municipality.

Tex. Local Gov't Code § 42.022. Thus, a municipality's ETJ may expand by only one of three methods: annexation, landowner request and increase in the number of inhabitants. Absent the foregoing, there is no valid expansion of a municipality's ETJ.¹⁵⁹

D. Overlapping ETJs

The only method by which one municipality may have its ETJ overlap another municipality's ETJ is the case where the ETJs overlapped as a consequence of the adoption of the Municipal Annexation Act on August 23, 1963. In such cases, according to Section 42.901 of the Texas Local Government Code, the two municipalities (or more, if applicable) (1) may enter into a written agreement delineating the extent of each municipality's ETJ; or (2) seek a judicial declaration apportioning each municipality's ETJ. Thus, there rarely are situations where ETJs truly overlap; rather, there often are disputes about the specific limits and/or locations of various ETJs and "who got there first."

¹⁵⁹ For a detailed discussion of the effect of annexation on extraterritorial jurisdiction in light of the 1999 amendments to the annexation statute, see Attorney General Opinion No. GA-0014 (January 22, 2003).

III. Municipal Regulations in the ETJ

As a general rule, a municipality's ordinances and other regulations are valid and enforceable only within the municipality's corporate limits; however, where there is an express grant of authority either by the Texas Constitution or statute to municipalities to enact and enforce ordinances and regulations outside the corporate limits of a municipality, municipalities consequently may do so. *See* Op.Tex.Att'y Gen. LO97-055 (1997).¹⁶⁰

Texas municipalities possess the authority to regulate in their ETJs pursuant to a number of express provisions of the Texas Local Government Code. Areas of regulation and an explanation of those areas are as follows.

A. Subdivision Regulations

While Texas municipalities do not possess the statutory authority to zone property in their extraterritorial jurisdictions, Section 212.003 of the Texas Local Government Code provides that a subdivision ordinance is applicable to a municipality's extraterritorial jurisdiction *if, and only if*, the municipality specifically has extended its subdivision regulations to the extraterritorial jurisdiction. Thus, subdivision regulations are *not* automatically applicable to a municipality's ETJ. Section 212.003 specifically provides as follows:

(a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:

¹⁶⁰ In that opinion, the Attorney General's Office wrote as follows:

As a general rule, a city can exercise its powers only within the city's corporate limits unless power is expressly or impliedly extended by the Texas Constitution or by statute to apply to areas outside the limits. *See City of Austin v. Jamail*, 662 S.W.2d 779,782 (Tex. App.—Austin 1983, writ dism'd w.o.j.); *City of West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 686 (Tex.Civ.App.—Waco 1980, no writ); *City of Sweetwater v. Hammer*, 259 S.W. 191, 195 (Tex.Civ.App.—Fort Worth 1923, writ dism'd); *Ex parte Ernest*, 136 S.W.2d 595, 597-98 (Tex.Crim.App. 1939); Attorney General Opinion JM-226 (1984) at 2. Extraterritorial power will be implied only when such power is reasonably incident to those powers expressly granted or is essential to the object and purposes of the city. *Jamail*, 662 S.W.2d at 782; *Westlake Hills*, 598 S.W.2d at 683. “[A]ny fair, reasonable, or substantial doubt as to the existence of a power will be resolved against the municipality.” *Westlake Hills*, 598 S.W.2d at 683.

(1) the use of any building or property for business, industrial, residential, or other purposes;

(2) the bulk, height, or number of buildings constructed on a particular tract of land;

(3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage; or

(4) the number of residential units that can be built per acre of land. . . .

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.

(c) The municipality is entitled to appropriate injunctive relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

Most, if not all, municipalities routinely extend the application of their subdivision regulations to their extraterritorial jurisdictions. A question that consequently arises is whether, and to what extent, a municipality may enforce its subdivision and related ordinances in its extraterritorial jurisdiction. *See City of Lucas v. North Texas Municipal Water Dist.*, 724 S.W.2d 811 (Tex.App.-Dallas 1986, writ ref'd n.r.e.). In *Lucas*, a water district contended, in part, that a city in its ETJ could not impose its development standards on the District. The Dallas Court of Appeals unequivocally rejected that contention.

Article 970a [the predecessor statute to Section 212.003(a) of the Texas Local Government Code] confers authority upon a city to extend its subdivision ordinances into its extraterritorial jurisdiction. In determining whether jurisdiction under article 970a has attached, a subdivision may be simply a division of a tract of land into smaller parts. However, use of the term is not restricted to the division itself but also encompasses the development of the divided tracts. Consequently, ordinances regulating development, such as those specifying design, construction and maintenance standards, may be extended by a city into its extraterritorial jurisdiction.

Moreover, a municipal corporation may exercise both those powers expressly granted by a statute and those necessarily or fairly implied in such grant. Were we to hold that building standards are not contemplated by article 970a, we would be left with a statute that grants authority over the laying out of streets, alleys and lot boundaries, but precludes authority over the most important part of a subdivision. Consequently, *we conclude that the power over subdivisions conferred by article 970a necessarily or fairly implies a right to issue regulations governing construction of housing, buildings, and the components thereof.*

Lucas, 724 S.W.2d at 823-24 (citations omitted)(emphasis added). The Texas Supreme Court, however, in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016), ruled that general law cities may not extend their building codes into their ETJs. Thus, at present, both general law and home rule municipalities may enforce their subdivision ordinances in their ETJs; however, only home rule municipalities may issue building permits for construction in their ETJs and further, may enforce their construction-related ordinances (Uniform Building Code, Uniform Plumbing Code, Uniform Mechanical Code and Uniform Electrical Code) in its ETJ.

A municipality may regulate subdivisions and approve plats for tracts of land located outside its corporate limits and outside its extraterritorial jurisdiction *if* there is an interlocal agreement providing for such regulation and approval. Tex. Local Gov't Code § 242.001(e). In the event a tract of land lies within the ETJ of more than one municipality, the municipality with the largest population has approval responsibility. Tex. Local Gov't Code § 212.007(a). Nevertheless, the portion of the tract that lies in the ETJ of the smaller municipality must comply with the subdivision and platting regulations of that municipality while the portion of the tract the lies in the ETJ of the larger municipality must comply with the subdivision and platting regulations of that municipality. Thus, plat approval is the responsibility of the larger municipality even though the larger municipality only applies its regulations to that portion of the tract in its ETJ.

B. Subdivisions, House Bill 1445 and the ETJ

House Bill 1445, as it is commonly known, was adopted by the 2001 session of the Legislature and provided for an agreement between a county and a municipality to regulate a subdivision in the ETJ of a municipality. Now codified in Chapter 242 of the Texas Local Government Code, H.B. 1445 required that a city and county (except for counties over 1.9 million and border counties) shall enter into a written agreement that identifies the governmental entity authorized to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction. *See* Tex. Local Gov't Code § 242.001(a). For a municipality in existence on September 1, 2001, the municipality and county were required to enter into a written agreement on or before April 1, 2002. *Id.*, § 242.001(c). For a municipality incorporated after September 1, 2001, the municipality and county shall enter into a written agreement no later than the 120th day after the date the municipality incorporates. *Id.*

Texas municipalities have four options under H.B. 1445: (1) the county will possess no authority over plats and all review will be done by the city; (2) the city possesses no authority over plats and all review will be done by the county; (3) the city and county will divide the ETJ geographically and each will delineate in which area it possesses authority over plats; and (4) the city and county jointly review plats under their respective authority, but there must be one filing fee, one office to file plats and one uniform and consistent set of plat regulations.

A municipality and a county may adopt the agreement by order, ordinance or resolution. A municipality must notify the county of any expansion or reduction in the municipality's extraterritorial jurisdiction and any expansion or reduction in a municipality's extraterritorial jurisdiction that affects property that is subject to a preliminary or final plat filed with the municipality or that was previously approved under

the platting statute does not affect any rights accrued under Chapter 245 of the Texas Local Government Code, the Texas vested rights statute. The approval of the plat or any permit remains effective as provided by Chapter 245 regardless of the change in designation. An agreement may grant the authority to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction of a municipality as follows:

- A municipality may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Subchapter A of Chapter 212 and other statutes applicable to municipalities;
- A county may be granted exclusive jurisdiction to regulate subdivision plats and approve related permits in the extraterritorial jurisdiction and may regulate subdivisions under Sections 232.001-.005, Subchapter B or C, Chapter 232, and other statutes applicable to counties;
- A municipality and county may apportion the area within the extraterritorial jurisdiction of the municipality with the municipality regulating subdivision plats and approving related permits in the area assigned to the municipality and the county regulating subdivision plats and approving related permits in the area assigned to the county; or
- A municipality and a county may enter into an interlocal agreement that establishes one office that is authorized to accept plat applications for tracts of land located in the extraterritorial jurisdiction; collect municipal and county plat application fees in a lump-sum amount; and provide applicants one response indicating approval or denial of the plat application; and establishes a consolidated and consistent set of regulations related to plats and subdivisions of land as authorized by Chapter 212, Sections 232.001-232.005, Subchapters B and C, Chapter 232, and other statutes applicable to municipalities and counties that will be enforced in the extraterritorial jurisdiction.

A question that was frequently raised by local government officials under S.B. 1445 is what happens if a city did not enter into the required agreement? H.B. 1445 contained no penalty provision and, as a result, had no “real teeth” to encourage compliance. Legislation passed in the 78th Legislature addressed this issue.

C. H.B. 1204 - ETJ Agreements Between Cities and Counties

This bill modified the provisions of Chapter 242 of the Texas Local Government Code (added by H.B. 1445, 2001 Session), which require a city and county to enter into an agreement specifying which entity will regulate subdivisions of property in the city’s ETJ. **The bill applies only to an agreement or subdivision plat that is filed on or after the bill’s effective date, which is immediate upon the governor’s signature, which was on June 20, 2003. A development agreement or subdivision plat that was filed before June 20 is governed by the prior law. This means that existing agreements developed during the past two years are grandfathered.** Specifically, the bill

1. Provides that the agreement requirement does not apply to land subject to a development agreement between a city and an owner of land in the city's ETJ.
2. Provides that a city and a county may not both regulate subdivisions or "approve related permits" in the ETJ of a city after an agreement is executed.
3. Requires a city and county, on reaching an agreement, to certify that the agreement complies with the requirements of Chapter 242 of the Texas Local Government Code.
4. Provides that any expansion or reduction in a city's ETJ that affects property that is subject to a preliminary or final plat, a plat application, or an application for a related permit filed with the city or the county or that was previously approved does not affect any rights accrued under Chapter 245 of the Texas Local Government Code, the "permit vesting" or "vested rights" statute).
5. Provides that if the city and county enter into an agreement to establish one, joint office to regulate subdivision plats in the ETJ, the office must establish a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land.
6. Requires a city and a county that have not entered into an agreement by January 1, 2004 (in the case of a city with a population of 100,000 or more) or January 1, 2006 (in the case of a city with a population of 99,000 or less) to enter into arbitration.
7. Provides a method by which either an arbitrator or arbitration panel is chosen.
8. Limits the authority of the arbitrator or arbitration panel to issuing a decision relating only to the disputed issues regarding the authority of the county or city to regulate plats, subdivisions, or development plans.
9. Provides that each party is equally liable for the costs of arbitration.
10. Mandates that if the arbitrator or arbitration panel has not reached a decision in a 60-day period, the arbitrator or arbitration panel shall issue an interim decision regarding the regulation of plats and subdivisions and approval of related permits in the city's ETJ, which must provide for a single set of regulations and authorize a single entity to regulate plats and subdivisions until a final decision is reached.

11. Provides that if an agreement establishes a plan for future roads that conflicts with a proposal or plan for future roads adopted by a metropolitan planning organization, the proposal or plan of the metropolitan planning organization prevails.
12. Provides that in certain counties (a) a plat may not be filed with the county clerk without the approval of both the city and the county; (b) if city and county regulations conflict, the more stringent regulation prevails; and (c) if one entity requires a plat to be filed and the other does not, the entity that does not require a plat must certify that fact in writing to the subdivider.
13. Provides that property subject to pending approval of a preliminary or final plat application filed after September 1, 2002, that is released from a city's ETJ shall be subject only to county approval of the plat application and related permits.

D. Annexation Agreements, House Bill 1197 and the ETJ

H.B. 1197 - ETJ Agreements with Landowners

This bill added Subchapter G, entitled "Agreement Governing Certain Land in a Municipality's Extraterritorial Jurisdiction," to Chapter 212 of the Texas Local Government Code, "Municipal Regulation of Subdivisions and Property Development." The bill allows a city council to enter into a written contract with an owner of land in the city's extraterritorial jurisdiction ("ETJ") to (1) guarantee the land's immunity from annexation for a period of up to fifteen years; (2) extend certain aspects of the city's land use and environmental authority over the land; (3) authorize enforcement of land use regulations other than those that apply within the city; (4) provide for infrastructure for the land; and (5) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties. The bill also validates an agreement entered into prior to the effective date of the bill, so long as the agreement complies with the bill's requirements.

Prior to HB 1197, there was no specific statutory authorization for a municipality to enter into an agreement with an owner of land in the municipality's ETJ to govern the future development of the land. H.B. 1197 authorizes the governing body of a municipality to make a written contract with an owner of land that is located in the ETJ of the municipality to authorize some other type of use.

E. Development Plats

Sections 212.041-212.050 of the Texas Local Government Code provide authority for cities to require development plats in the ETJ. A development plat, however, should not be confused with a subdivision plat. The authority to regulate subdivisions is found in Subchapter A of Chapter 212 whereas the authority to regulate property development through the use of development plats is found in Subchapter B of Chapter 212 of the Texas Local Government Code. A city must choose by ordinance to be covered by Subchapter B

(or the law codified by that subchapter) (*see* Tex. Local Gov't Code § 212.041) and if a city so elects, any person who proposes development of a tract of land in the corporate limits or ETJ must prepare a development plat. "Development," for purposes of Subchapter B, means "the new construction or the enlargement of any exterior dimension of any building, structure or improvement." *Id.*, § 212.043(1). While *Lucas, supra*, clearly authorizes the issuance of building permits in the ETJ, Subchapter B expressly provides that it "does not authorize a municipality to require municipal building permits or otherwise enforce the municipality's building code in its extraterritorial jurisdiction." *Id.*, § 212.049.

F. Sign Regulations

Chapter 216 of the Texas Local Government Code addresses, in part, the relocation, reconstruction or removal of a sign in the ETJ. Specifically, Section 216.003 authorizes a city to "require the relocation, reconstruction, or removal of any sign within its corporate limits or extraterritorial jurisdiction," subject to the detailed regulatory scheme encompassed in Chapter 216 (creation of municipal sign control board, compensation requirements, exceptions and appeal provisions). It should be noted, however, municipal authority to require the relocation, reconstruction or removal of signs does not apply to on premises signs in the ETJ of municipalities in a county with a population of more than 2.4 million (Harris County) or of a county that borders a county with that population. *Id.*, § 216.0035.

A home-rule municipality has additional authority to regulate signs. Home rule cities may license, regulate, control or prohibit the erection of signs or billboards by charter or ordinance in compliance with Chapter 216 of the Local Government Code. *Id.*, § 216.901. Cities may regulate the location, proximity, size, separation, setback and height provisions so long as the ordinance bears a reasonable relationship to the public health, safety or general welfare. *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 939 (Tex.Civ.App.—Amarillo 1978, writ ref'd n.r.e.), *cert. denied*, 444 U.S. 833 (1979).

A home-rule municipality may extend the provisions of its outdoor sign regulatory ordinance and enforce the ordinance within its ETJ. In lieu of regulatory ordinances, however, home-rule cities may allow the Texas Transportation Commission to regulate outdoor signs in the ETJ by filing a written notice with the Commission. If a municipality extends its outdoor sign ordinance within its ETJ, the municipal ordinance supersedes the regulations imposed by or adopted by the Commission. *See* Tex. Local Gov't Code § 216.902.

The foregoing authority granted to a home-rule municipality does not apply to (1) on premise signs in the ETJ of municipalities in a county with a population of more than 3.3 million or a county that borders a county with that population; or (2) on premise signs in the ETJ of a municipality with a population of 1.5 million or more that are located in a county that is adjacent to the county in which the majority of the land of the municipality is located. *Id.*, § 216.902.

G. Industrial Districts and Planned Unit Development Districts

Section 42.044 of the Texas Local Government Code authorizes a city to designate a part of its ETJ as an industrial district and treat that area in the manner considered to be in the best interest of the city, including making written contracts with the owner of the land regarding annexation and regulations. Chapter 42 of the Local Government Code also addresses planned unit development districts in the ETJ. The governing body of a municipality that has disannexed territory previously annexed for limited purposes may designate an area within its ETJ as a planned unit development district by written agreement with the owner of the land. The planned unit development district must contain no fewer than 250 acres. *See generally* Tex. Local Gov't Code § 42.046.

H. Impact Fees

Impact fees, pursuant to Chapter 395 of the Texas Local Government Code, may be imposed in the ETJ; however, impact fees for roadway facilities may not be imposed in the ETJ. Section 395.001(9) of the Texas Local Government Code provides the following guidance regarding service areas for the various statutorily-authorized impact fees:

Water and wastewater facilities. Most cities in Texas have adopted the entire city and the city's ETJ as the service area and thus, impact fees are the same city-wide.

Roadway facilities. The service area is limited to an area within the corporate boundaries (*i.e.*, ETJ cannot be included) and not exceeding six miles.

Storm water, drainage and flood control facilities. The service area is limited to all or part of the land within the corporate limits of the city or its ETJ actually served by the storm water, drainage and flood control facilities designated in the Capital Improvements Plan and shall not extend across watershed boundaries.

I. Municipal Drainage Utility Systems

According to Section 402.044(8) of the Texas Local Government Code, the boundaries of a municipal drainage system service area may extend into areas of the ETJ that contribute overland flow into the watershed of the municipality. Subchapter C of Chapter 402 of the Local Government Code addresses the procedures for creating such a drainage utility and the methods by which to fund such a utility.

IV. The 5,000 Foot "Nuisance Zone"

In 1954 the Texas Court of Criminal Appeals held that when a state statute grants a city express authority to prohibit nuisances outside the city limits, that grant impliedly confers jurisdiction upon the municipal court for the prosecution of those offenses committed outside the city limits. *Treadgill v. State*, 275 S.W.2d 658, 664 (Tex.Crim.App. 1954). *Treadgill* dealt with a Houston ordinance prohibiting the sale of fireworks within

5,000 feet of the city limits. The fireworks ordinance was adopted pursuant to the predecessor statute to Section 217.042 of the Texas Local Government Code.¹⁶¹ This statute allows a home-rule city to define and prohibit any nuisance within the limits of the city and within 5,000 feet of the city limits.¹⁶² Attorney General John Cornyn recently extended the analysis of *Treadgill* to a Wylie ordinance that declared outdoor burning a nuisance and prohibited it within 5,000 feet of the city limits. See Op.Tex.Att’y Gen. No. JC-0025 (1999). Based upon the analysis contained in the foregoing Attorney General opinion, one can conclude that any ordinance adopted by a home-rule municipality under the authority of Section 217.042 of the Local Government Code that defines and prohibits a nuisance within the city limits and extends that prohibition to that area within 5,000 feet of the city limits may be enforced in municipal court.

Examples of city ordinances routinely adopted pursuant to the express authority contained in § 217.042 of the Texas Local Government Code that could be or are considered to be in the nuisance category are:

- sale, storage or use of fireworks in the city or within 5,000 feet of the city limits;
- high weeds and grass;
- litter control and abatement;
- unwholesome matters (filth, decaying matters, garbage, hazardous materials and substances, etc.);
- mosquito control;
- rodent control; and
- junked and abandoned vehicles.

It should be noted, however, that the foregoing activities must be declared nuisances by ordinance *and* extend their application out 5,000 feet from the existing city limits. Thus,

¹⁶¹ Section 217.042 of the Texas Local Government Code provides as follows:

- (a) The municipality may define and prohibit any nuisance within the limits of the municipality and within 5,000 feet outside the limits.
- (b) The municipality may enforce all ordinances necessary to prevent and summarily abate and remove a nuisance.

¹⁶² Type A and Type B general law municipalities also may prohibit nuisances. Type A municipalities may abate and remove a nuisance, define and declare what constitutes a nuisance and punish by fine those persons responsible for the nuisance. Tex. Local Gov’t Code § 217.002. Type B municipalities may prevent nuisances and have nuisances removed at the expense of the person who is responsible. Tex. Local Gov’t Code § 217.022.

if a home-rule city desires to enforce these activities extraterritorially, city ordinances must be amended to reflect the extraterritorial application of the ordinances. Further, a home-rule city cannot simply declare all conduct a nuisance and extend such nuisance regulations 5,000 feet from the city's boundaries. A "nuisance" is anything that works injury, harm or prejudice to an individual or public, or which causes a well-founded apprehension of danger. A nuisance obstructs, impairs or destroys the reasonable, peaceful and comfortable use of property. *Parker v. City of Fort Worth*, 281 S.W.2d 721, 723 (Tex.Civ.App.—Fort Worth 1955, no writ). See also Op.Tex.Att'y Gen. No. JM-226 (1984) (discussing what activities may constitute a nuisance per se or nuisance at common law).

V. The "SOB Zone"

Chapter 243 of the Texas Local Government Code authorizes city and county regulation of sexually oriented businesses ("SOBs"). Most city ordinances that regulate SOBs provide distance requirements; that is, requirements that an SOB may not be located within a certain number of feet of a church, school, residentially-zoned area, day care center or other sexually oriented business. See Tex. Local Gov't Code § 243.006(a).¹⁶³ In Texas Attorney General Opinion No. JC-0485 (2002), the question was presented whether a municipality may enforce its own SOB ordinance when the entity to be protected is outside the corporate limits of the municipality. At issue in this opinion was a church that, while located outside the corporate limits of San Antonio, was within 1,000 feet of an SOB located within the corporate limits of San Antonio. Since Section 243.003(b) of the Local Government Code specifically provides that "[a] regulation adopted by a municipality applies only inside the municipality's corporate limits," could the San Antonio SOB ordinance's distance requirements be enforced?

After discussion of case law from other states, the Attorney General concluded that even though Section 243.003 of the Local Government Code does not give extraterritorial effect to an SOB ordinance, Section 243.006(a)(2) of the Local Government Code nevertheless may apply.

A city may apply a municipal ordinance to prohibit a sexually oriented business within a specified distance of a school, church, or other entity covered by section 243.006(a)(2) of the Local Government Code even though that entity is not within the corporate limits of the city in question, so long as the sexually oriented business is within those limits. Such application

¹⁶³ Section 243.006(a) of the Texas Local Government Code provides as follows:

- (a) The location of sexually oriented businesses may be:
 - (1) restricted to particular areas; or
 - (2) prohibited within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use the governing body of the municipality or county finds to be inconsistent with the operation of a sexually oriented business.

does not violate the statutory requirement that the ordinance apply only in the city's corporate limits.

Op.Tex.Att'y Gen. No. JC-0485 (2002) at 4. Thus, the distance requirements contained in local SOB ordinances may be enforced, even if the underlying SOB ordinance has no extraterritorial effect.

VI. Conclusion

In the authors' opinion, the single most important issue for municipalities in regulating activities in the ETJ often tends to be enforcement issues, not whether activities are statutorily authorized to be regulated in the ETJ. Nevertheless, statutory authorization for municipal regulation in the ETJ tends to be "hit and miss" with no one source of such authority.

IMPACT FEES

There is no more technical, difficult area of land use law in Texas than municipal impact fees. Nevertheless, in light of United States Supreme Court cases, all cities should consider impact fees relative to the development of property and off-site improvements related to specific developments. Before addressing these issues, however, a short explanation of the purpose of impact fees is warranted.

I. Capital Improvements, Growth and Impact Fees

Capital improvements, such as sewer lines, lift stations, water or wastewater treatment plants, drainage facilities and roadways, are usually characterized by a high, one-time cost, a useful life exceeding five years, significant land acquisition costs, site preparation, engineering, planning and construction costs and long-term financing options. Most local governments plan for such investments far in advance. Local financing of these public facilities is generally built upon a foundation consisting of three elements: the annual budget, a capital improvements program and long-range facilities/transportation plans. Many local governments also adopt “master plans” for specific public facility systems. Impact fees generally have been welcomed by local governments as a tool in financing facilities and other capital projects. Impact fees shift a portion of the cost of providing capital facilities to serve new growth from the general tax base to the new development generating the demand for the facilities.

“Impact fees, like other forms of development exactions, are imposed as a condition of development approval to mitigate impacts on public facilities and services generated by the development project. The principal use of impact fees, which distinguishes them from traditional subdivision exactions, is the financing of off-site capital facilities to support new growth.” Morgan, T. “The Effect of State Legislation on the Law of Impact Fees, With Special Emphasis on Texas Legislation,” 18th Annual Institute on Planning, Zoning and Eminent Domain § 7.01 at 7-2 (1988)(hereinafter “Effect of State Legislation”). Further, “[i]mpact fees . . . serve as a substitute for denial of development projects that otherwise would not be served by adequate facilities. In essence, development exactions mitigate adverse impacts of new development on the municipality’s ability to provide essential facilities and services.” *Id.*, § 7.02[1] at 7-4.

An impact fee is broadly defined as a contribution of land, improvements or money imposed as a condition of development approval to mitigate the impacts of the development project. Such development exactions include mandatory dedications of property for rights-of-way, requirements to construct capital improvements, fees in lieu of dedication or construction, impact fees for public facilities, and fees or charges that are assessed against development projects to mitigate environmental or social impacts. Texas Municipal League Public Policies Briefing Series, “Impact Fees in Texas,” § 1.2 at 1-2 (Nov. 1989)(hereinafter “Impact Fees”). The Texas impact fee statute, codified in Chapter 395 of the Local Government Code, defines “impact fee” as “a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions¹⁶⁴ necessitated by and attributable to the new development. The term includes

¹⁶⁴ The terms “capital improvement” and “facility expansion” are terms of art. A “capital improvement” is limited to only one of four types of public facilities with a life expectancy of three or more years. “These are (1) ‘water supply, treatment and distribution facilities’; (2) ‘wastewater collection and treatment facilities’; (3) ‘storm water, drainage, and flood control facilities’; or ‘roadway facilities.’” Impact Fees, § 2.1 at 5-6. *See also* Tex. Local Gov’t Code

amortized charges, lump-sum charges, capital recovery fees, contributions in aid of construction, and any other fee that functions as described by this definition. . . .” Tex. Local Gov’t Code § 395.001(4). The statute specifically excludes park dedication or payments in lieu of park land dedication, several different categories of on-site and off-site facilities and lot or acreage fees placed in trust for reimbursing developers, and other pro rata fees for reimbursement of water and sewer lines extended by a political subdivision.¹⁶⁵ *Id.*

In certain instances a developer may be entitled to a refund or credit of impact fees. For example, if a developer constructs wastewater facilities in a service area, the developer would not also be required to pay the maximum amount of impact fees for wastewater facilities. To do so would be unfair to the developer since he/she, in essence, would be paying twice for the same capital improvement.¹⁶⁶ The impact fee statute contains three provisions requiring that impact fees be refunded. The first is upon request of an owner “if existing facilities are available and service is denied or the political subdivision has, after collecting the fee when service was not available, failed to commence construction within two years or service is not available within a reasonable period. . . .” Tex. Local Gov’t Code § 395.025(a). The second instance entitling a record owner to a refund is when any impact fee is not spent as authorized . . . within 10 years after the date of payment. *Id.*, § 395.025(c). Last, the impact fee statute contains a refund provision requiring comparison of the actual costs of capital improvements identified in the capital improvements plan with estimated costs included in the capital improvement plan. *Id.*, § 395.025(b).¹⁶⁷

In light of two United States Supreme Court decisions, the authors believe the use of impact fees to finance off-site capital facilities is far preferable to other methods of obtaining both on-site and off-site improvements impacted by a new development. The first case, *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), placed local governments on notice that drafting and implementing regulatory conditions in the development approval process that effectuate acquisition of title or interfere with possession can result in a finding that private property has been taken without just compensation. In this case, the Nollans were private beachfront landowners

§ 395.001(1). “Facility expansion” refers to the “expansion of the capacity of an existing facility of one of these types of capital improvements.” *Id.*, § 2.1 at 6. *See also* Tex. Local Gov’t Code §395.001(3).

¹⁶⁵ Tex. Local Gov’t Code § 395.001(4), as amended by Senate Bill 243, 77th Legislature, effective September 1, 2001.

¹⁶⁶ The impact fee statute provides that “an owner may not be required to construct or dedicate facilities and to pay impact fees for those facilities.” Tex. Local Gov’t Code § 395.001(4). A “credit” is “a reduction in the amount of the impact fee reflecting previous monetary contributions identified in the capital improvements plan for impact fees” and an “offset” refers to “a reduction in the amount of an impact reflecting the value of land dedicated by a developer for a capital improvement designated in the capital improvements plan for impact fees, or the value of such improvement constructed by a developer pursuant to the political subdivision’s land use regulations or requirements.” Impact Fees, § 11.3 at 102-03.

¹⁶⁷ One commentator has described this third refund provision as “virtually unworkable.” *See* Impact Fees, § 10.5 at 94.

who wanted to replace their dilapidated small bungalow with a larger house. They were granted a permit from the California Coastal Commission with the condition that they grant an easement, by deed, for the public to pass across their beach. The easement required was a lateral one that would pass across a portion of their property. The Coastal Commission's stated rationale for requiring the easement was that the new structure would obscure the view of the ocean, thus burdening the public's right to traverse the beachfront. The Supreme Court ruled in favor of the Nollans, finding that

a condition attached to approval of a single-family development permit, which required the owner to dedicate a portion of his lot to provide the public with lateral access to the beach, violated the guarantee of the Fifth Amendment that private property shall not be taken for public use without just compensation. In so ruling, the Court established a standard of "remoteness," under which development exactions attached as conditions to development approval must "substantially advance" the asserted and legitimate governmental interest for which they are imposed.

Effect of State Legislation, § 7.03[4][a] at 7-10, *citing Nollan*. The Supreme Court also wrote that it was "inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan*, 483 U.S. at 841.

The second significant Supreme Court case is *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Tigard, Oregon, city planning commission approved Mrs. Dolan's application to expand her hardware store and pave her parking lot conditioned upon her compliance with the dedication of land (1) for a public greenway to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development and (2) for a pedestrian/bicycle pathway intended to relieve traffic congestion in the city's central business district. *Id.*, 512 U.S. at 380. She appealed the commission's denial of her request for variances from these standards to the Land Use Board of Appeals. She alleged that the land dedication requirements were not related to the proposed development, constituted an uncompensated taking of her property for a public use and therefore violated the just compensation clause of the Fifth Amendment to the United States Constitution. The Board found that there was a reasonable relationship between the development and the requirement to dedicate land for a greenway due to the impact that a larger building and increased impervious surfaces would have on runoff into the creek. The Board also found that requiring a pathway was reasonable to mitigate the impact of the increased traffic from the development and to facilitate alternative means of transportation. *Id.*, 512 U.S. at 381-82. On appeal, both the Oregon Court of Appeals and Supreme Court affirmed the Board's ruling. *Id.*, 512 U.S. at 383.

The United States Supreme Court, however, held that the requirements in fact did constitute an uncompensated taking of property. The Court wrote that, under the well-settled doctrine of "unconstitutional conditions," a government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought had little or no relationship to the benefit. *Id.*, 512 U.S. at 385. The Court stated that the first question, in evaluating Dolan's claim, is whether an "essential nexus" exists between a legitimate state interest and the permit condition. If it does, the second question is whether the

degree of exaction demanded by the permit condition bears the required relationship to the projected impact of the proposed development. In assessing the second question, the Court instructed that the necessary connection required by the Fifth Amendment is “rough proportionality,” or essentially the “reasonable relationship” test adopted by a majority of state courts. *Id.*, 512 U.S. at 386-91.

In applying this two-step analytical model, the Supreme Court found that although preventing flooding along the creek and reducing traffic congestion in the district were legitimate public purposes, thereby establishing a nexus, the findings upon which the city relied did not show the required reasonable relationship between the flood plain easement and bike path and Dolan’s proposed building. Specifically, the Community Development Code already required Dolan to leave 15% of her property as open space, which would have practically been satisfied by the undeveloped flood plain. The city, however, never stated why a public, as opposed to private, greenway is required in the interest of flood control. Moreover, the city did not meet its burden of establishing, beyond mere conclusory statements, that the additional traffic generated by Dolan’s development reasonably related to the city’s requirement for a dedication of the pathway easement. *Id.*, 512 U.S. at 392-93.

We believe the potential impact of *Dolan* upon local governments across the country is significant. First, most local governments routinely exact donations of land and facilities in conjunction with subdivision plats or other development approvals based on proximity of the land to be developed to existing or planned services and facilities. Typically, as in *Dolan*, the location of the future facilities is designated in master plans or other comprehensive planning documents. These documents, and development regulations that implement those policies, seldom quantify the relationship between the required contribution and the impacts arising from the proposed development of specific tracts and subdivisions. These forms of development exactions contrast markedly with demand-based exactions such as impact fees which necessarily quantify the relationship. Most commentators agree that the *Dolan* decision, in its demand for quantification, likely will encourage the use of fee-based exactions which provide a standard against which land dedications or construction requirements can be measured.

Second, it is common local government practice to formulate conditions that are unique to the development application pending. *Ad hoc* conditions routinely are attached to applications ranging from rezoning proposals to building permits. Often development regulations do not anticipate even the types of conditions that will in fact be imposed. The lack of standards to guide development approval, while always problematic, can be expected to be more so following *Dolan*. The *Dolan* opinion expands *Nollan* so that conditions must be related both to the nature and extent of the proposed development. In the absence of standards and with a newly assigned burden to justify conditions,¹⁶⁸ local governments will have difficulty clearing even the first hurdle - the nexus test.

¹⁶⁸ In *Dolan*, the Supreme Court, although stating that precise mathematical calculation is not required, placed the burden of proof upon cities to make some sort of individualized determination that a city-imposed dedication is related both in nature and extent to the impact of the proposed development. *Id.*, 512 U.S. at 389-91. Thus, any exaction must bear a reasonable relationship to

Third, impact fees directly address the concerns raised in *Dolan* when such fees have been enacted pursuant to proportionality standards established by state statute or constitutional requirements. Impact fees allow local governments to fully mitigate the demands created by new development on public facilities through monetary payments that are quantified for the development at issue. At the same time, traditional subdivision requirements, such as land dedication and facilities construction, can be continued in effect by crediting the value of such improvements against the payment of impact fees.

After *Nollan* and *Dolan*, it is safe to say that impact fees are far more advantageous than traditional development exactions that may arbitrarily vary from one development to another. As stated in *Impact Fees*, the advantages are as follows:

First, impact fees represent an additional source of revenue from which to finance a portion of future capital improvements' needs. Political subdivisions which are responsible for supplying water, sanitary sewer, roads and drainage facilities increasingly are subject to fiscal constraints for funding such improvements to serve new growth. With the disappearance of many federal and state grants, and taxpayer sensitivity to increased taxes and utility rates, local governments must transfer a portion of the costs of capital improvements which serve new development to the ultimate beneficiaries. The more the local government relies upon debt financing to serve its capital improvement needs, the more likely it becomes that service levels in the community will be reduced. By supplementing tax and utility revenues with impact fee revenues, existing revenue sources may be devoted to maintaining service levels and funding capital improvements to correct existing deficiencies or replace existing facilities.

Because impact fees present a means for assuring that community-related facilities will be coordinated with new development, their use promotes economic development by encouraging the location of new employers in the community who value such services. At the same time, the use of impact fees provides assurance to existing businesses that local taxes and utility rates will remain relatively stable. If the local government must rely upon these sources to finance capital improvements to serve both new and existing development, the community faces steady increases in tax and utility rates attributable to debt financing.

Impact fees also represent a means of attaining certain police power objectives, which are not easily attained through the use of traditional development exactions. Thus, local governments may adjust impact fee rates to meet particular economic development or other police power objectives. Impact fees may be varied among service areas or by type of land use, as long as such differences are reasonably related to a proper police power objective. Through the use of impact fees, the community may encourage the establishment of certain kinds of developments, such as major employers or affordable housing projects.

the needs created by the development and the burden of proof rests with the city to establish and quantify such needs.

Finally, impact fees represent a more equitable form of distributing the burdens for financing future capital improvements among various types of development. Traditional development exactions practices, which require the on-site dedication or construction of capital improvements, are based on the location of the property in relation to existing or planned public improvements. As a consequence, developments which equally contribute to the need for additional capital improvements may be assessed widely differing costs under such practices. Generally speaking, the owner of the property which is located on or abutting the site for a future public improvement is required to contribute more than the owner of property which is not so located. This unequal distribution of responsibilities for providing for future capital improvements is avoided through an impact fee program, in which the contribution of a particular development project is in proportion to the demand it creates for additional capital improvements.

Impact Fees, § 3.2 at 15-17.

From a strictly legal standpoint, impact fees provide cities with easily enforceable standards relative to both on- and off-site exactions. If a city had no impact fee ordinance, prior to requiring *any* dedication or exaction, the city would be virtually indefensible without conducting studies regarding the relationship between any dedication or exaction and the impacts of the development. Further, a study would be mandated for each development plan considered by the city and the city would be required to quantify its findings in support of each such exaction or dedication. Consequently, it would be cost-prohibitive to conduct such studies and the potential would be great that the conclusions of any study would be challenged. If a city opted not to conduct studies for each new development, the risk of liability would be exponentially greater with little likelihood the city would prevail. Last, to require a developer to construct a capital improvement pursuant to a city's capital improvements plan and also assess that developer impact fees would violate state law. In the situation where a developer constructed a capital improvement, the developer under state law would be entitled to either a refund or credit because it would be manifestly unfair, and legally indefensible, to "double charge" for the construction of a capital improvement.

II. The Adoption of an Impact Fee Ordinance in Texas

The adoption of an impact fee ordinance by a Texas city is a detailed process, the steps of which are outlined in Chapter 395 of the Texas Local Government Code. An overview of that process is discussed below. It should be noted that most cities retain consultants to assist in this process due to the technical nature of the subject matter.

After a city has determined that impact fees are or would be beneficial to the community, a capital improvements advisory committee must be appointed. Tex. Local Gov't Code § 395.058. The city's Planning and Zoning Commission may be appointed as the advisory committee; however, if that is done by the city, at least one member of the advisory committee must be a representative of the real estate, development or building industry. In that case, the industry representative is an ad hoc voting member of the planning and zoning commission when it acts as the advisory committee. *Id.*, § 395.058(b).

The primary purpose of the advisory committee in Texas is to advise and assist in the preparation of the land use assumptions and the capital improvements plan. The advisory committee also has the ongoing responsibility to produce semi-annual reports and assist in the updating of the impact fee program. *Id.*, § 395.058(c).

It is important that the scope of the proposed impact fee ordinance be reviewed and that target facilities be identified. In Texas, those eligible facilities are water supply, treatment and distribution facilities; wastewater collection and treatment facilities; storm water, drainage and flood control facilities; and roadway facilities. *Id.*, § 395.001(1). In determining the scope of the impact fee program, only certain charges and facilities may be included in the impact fee. Those are:

1. construction contract price;
2. surveying and engineering fees;
3. land acquisition costs, including land purchases, court awards and costs, attorney's fees and expert witness fees;
4. fees actually paid or contracted to be paid to engineers and financial consultants preparing or updating the capital improvements plan and who is not an employee of the political subdivision;
5. interest and other finance costs (if bonds, notes or other obligations are issued to finance the capital improvements or facility expansions); and
6. the political subdivision's share of costs for improvements to federal and Texas highway system.

Id., § 395.012(a) and (b) and § 395.001(8)(effective September 1, 2001). The Local Government Code provides, however, that certain items may *not* be paid by impact fees. Those items are:

1. projects and related costs of those projects that are not included in the capital improvements plan or facility expansions;
2. repair, operation and maintenance of existing or new capital improvements or facility expansions;
3. upgrading, updating, expanding or replacing existing capital improvements to serve existing development to meet stricter safety, efficiency, environmental or regulatory standards;
4. upgrading, updating, expanding or replacing existing capital improvements to provide better service to existing development;
5. administrative and operating costs of the impact fee program; and
6. principal payments and interest or other finance charges on bonds or other indebtedness for projects not in the capital improvements plan.

Id., § 395.013. It should be noted that impact fees may be assessed for both residential and non-residential properties.

III. Land Use Assumptions

After the scope of a proposed impact fee ordinance is determined, the advisory committee must prepare Land Use Assumptions (LUA) and prepare a Capital Improvements Plan (CIP). “Land Use Assumptions” are defined as including a “description of the service area and projections of changes in land uses, densities, and population in the service area over at least a 10-year period.” *Id.*, § 395.001(5). The advisory committee may engage in the following types of review and analysis:

1. **Analyze existing conditions.** This provides base data relating to population, density, zoning classifications and other land use analysis.
2. **Determine service areas.** The boundaries for service areas are contingent upon the specific capital improvement. With the exception of roadway, storm water, drainage and flood control facilities, the service area may be the entire city and the city’s extraterritorial jurisdiction (ETJ). Section 395.001(9) of the Texas Local Government Code provides the following guidance regarding service areas:

Water and wastewater facilities. Most cities in Texas have adopted the entire city and the city’s extraterritorial jurisdiction (ETJ) as the service area and thus, impact fees are the same city-wide.

Roadway facilities. The service area is limited to an area within the corporate limits (*i.e.*, ETJ cannot be included) and shall not exceed 6 miles.

Storm water, drainage and flood control facilities. The service area is limited to all or part of the land within the corporate limits of the city or its extraterritorial jurisdiction (ETJ) actually served by the storm water, drainage and flood control facilities designated in the Capital Improvements Plan.

3. **Project ten-year growth patterns.** Projection of ten-year growth patterns involves a review of all available land use data, including zoning classifications, density calculations, anticipated growth, population trends, economic issues, including employment projections, and the various land use matters often contained in comprehensive plans.
4. **Ultimate (or “built out”) growth projections.** The same type of data required for the ten-year growth projections also is utilized in determining the ultimate or “built out” projections for each service area. This is often based on the holding capacity of the ultimate land area of the city using proposed future land uses to determine anticipated land use types and densities and ultimate populations. Again, a city’s comprehensive plan may be the best source of much of this information.

If there is no comprehensive plan or other projections of growth and land uses, then a city must develop a basis and methodology for land use and population projections within the Land Use Assumptions. The Land Use Assumptions (LUA) will serve as a basis for the preparation of the Capital Improvements Plan (CIP) over a ten-year period as well as a basis for the generation of the number of “service units” to be served. A city must be able to show that costs within the Capital Improvements Plan that are eligible for impact fee funding indeed are attributable to new growth and are derived from the Land Use Assumptions.

IV. The Capital Improvements Plan

At the same time, the Capital Improvements Plan (CIP) must be prepared. *Id.*, § 395.0411. The statute sets out certain requirements for the Capital Improvements Plan. It must:

1. be prepared by a qualified professional (registered professional engineer);
2. describe existing capital improvements within the service area and the costs to upgrade, update, improve, expand or replace the improvements to meet existing needs and usage and stricter safety, efficiency, environmental or regulatory standards;
3. analyze the total capacity and current levels of usage and commitments for usage of capacity of the existing capital improvements;
4. describe each type of facility expansions or capital improvements (water, wastewater, storm water, roadway, etc.) and associated costs for improvements of each necessitated by and attributable to new development within each service area based on the approved Land Use Assumptions;
5. determine by service unit the consumption, generation, discharge or use of a facility or capital improvement relative to various types of land use (residential, commercial and industrial);
6. determine the total number of projected service units;
7. project the demand for capital improvements or facility expansions required by new service units over the next ten-year period; and
8. include a plan for awarding:
 - A. a credit for the portion of ad valorem tax and utility revenues generated by new service units that is used for payment of improvements, including payment of debt, included in the CIP; or
 - B. a credit equal to 50% of the total projected cost of implementing the CIP.

Id., §§ 395.014. It should be noted that the Capital Improvements Plan prepared pursuant to Chapter 395 of the Texas Local Government Code is very different from a city’s traditional capital improvements plan. The traditional capital improvements plan usually identifies many projects (including repairs or enhancements of existing facilities) that are to be undertaken during a shorter

period of time. Consequently, some cities may have two types of capital improvements plans, a Chapter 395 Capital Improvements Plan and a traditional capital improvements/projects plan. The Chapter 395 Capital Improvements Plan requires a city to define an appropriate level of service. This level will vary depending upon the nature of the targeted capital facility. Selection of a service level represents an indirect commitment by the city to both correct existing deficiencies and to deliver services in accordance with projected need. Although all facilities expected to serve growth in the ten-year period are not required to be included in the Capital Improvements Plan, there should be an attempt to include all that are appropriate. The Plan should not attempt to underestimate or over-estimate the facilities that will be required to serve growth over the next ten-year period. See Kahn & Sefko, "Impact Fees and Exactions," *A Guide to Urban Planning in Texas Communities* (American Planning Association, Texas Chapter) at 11-9.

V. Calculation, Assessment and Collection

The impact fee per service unit may not exceed the amount determined by subtracting the capital improvement plan credit for the cost of the capital improvement and dividing that amount by the total number of projected service units. *Id.*, § 395.015.

Pursuant to Section 395.016 of the Texas Local Government Code, impact fees may be assessed and calculated at different "trigger" times: recordation of plats, issuance of building permits, connection to the water or sewer system, issuance of a building permit or issuance of a certificate of occupancy. The Code differentiates between assessment and collection. Assessment is the determination of the amount of the fee. *Id.*, § 395.016(f). The city's ordinance must clearly state when assessment and when collection occurs.

The trigger depends on the time the ordinance was adopted and when the land was platted. For fees adopted and land platted before June 20, 1987, or for land on which new development occurs without platting, the fee may be assessed at any time during the development process. The fee may be collected when the land is connected to the water or sewer system or issuance of building permit or certificate of occupancy. *Id.*, § 395.016(a).

For impact fees adopted before June 20, 1987 and land platted after that date, the fee may be assessed before or at time of recordation. Collection may be at either recordation or connection to water or sewer system, or at building permit or certificate of occupancy. *Id.*, § 395.016(b).

For impact fees adopted after June 20, 1987, and land platted before the adoption of the fee, the impact fee may not be collected in any service unit for which a valid building permit is issued within one year after the adoption of the fee. *Id.*, § 395.016(c).

For land platted after the adoption of an impact fee after June 20, 1987, the fee shall be assessed before or at the time of recordation. If water and sewer capacity is available, the fee shall be collected at the time the city issues a building permit; or for land outside the city limits, the city shall collect the fee at the time of application for a meter connection. *Id.*, § 395.016(d).

All collection of impact fees, except road impact fees, are subject to the limitation that they may not be collected in areas where services are not currently available unless:

1. the collection is to pay for a facility identified on the CIP and the city commits to commence construction within two years and service will be available within 5 years;
2. the city and developer agree that the developer may construct the improvement with funds advanced as credit against the fees or with reimbursement from other new development; or
3. the owner requests city to reserve capacity for future development. *Id.*, § 395.019.

VI. Public Hearings Procedure

The 2000 legislation significantly changes the order of the public hearing process. Although the CIP is based upon the adopted land use assumptions (*Id.*, § 395.014(3)), both the CIP and LUA will now be considered at the same public hearing. *Id.*, § 395.042.

Both the LUA and CIP must be available to the public prior to notices of hearings. *Id.*, § 395.043. Notice must be published once, 30 days before the hearing in a newspaper of general circulation in each county in which the city lies. *Id.*, § 395.044(b).

After the public hearing on the LUA and CIP, the council has 30 days to approve or disapprove the LUA and CIP. This action may not be taken as an emergency measure. *Id.*, § 395.045.

Following adoption of the LUA and CIP, the city council shall order a public hearing on the imposition of an impact fee. § 395.045. Notice must be published once, 30 days before the hearing in a newspaper of general circulation in each county in which the city lies. *Id.*, § 395.049.

After the public hearing on the imposition of an impact fee, the city council has 30 days to approve or disapprove it. This action may not be taken as an emergency measure. *Id.*, § 395.051.

Any impact fee ordinance adopted as a consequence of the Land Use Assumptions and Capital Improvements Plan should contain the following elements:

1. administration of impact fees;
2. time of assessment of the impact fees;
3. time of collection of the impact fees;
4. make provision for offsets and credits of impact fees;
5. schedule of maximum fees and actual fees to be collected;
6. accounting system for funds collected; and
7. refund provisions.

VII. Post-Adoption Requirements

According to the state impact fee statute, cities have an ongoing requirement to semi-annually review the progress of the Capital Improvements Plan and report any perceived inequities in implementing the Plan or imposing the impact fee. The advisory committee undertakes this function and must report its findings to the governing body. Tex. Local Gov't Code § 395.058(c)(4). Every five years a city must review and update its Land Use Assumptions and Capital Improvements Plan. *Id.*, § 395.052. The new notice and hearing procedures apply to the amendments of the LUA and CIP. *Id.*, § 395.055.

If the city council does not perform a duty imposed by the statute within the required time, a person who has paid a impact fee has the right to present a written request to the city council requesting that it be performed. If the council finds it is late in performing a duty, it shall commence within 60 days from the date of the request and continue until completion. *Id.*, § 395.071.

A suit to contest an impact fee must be filed within 90 days after the date of adoption of the ordinance, order or resolution establishing the impact fee. *Id.*, § 395.077(b).

VIII. Myths About Impact Fees

Although we would like to claim credit for the following, Professor Arthur C. Nelson of Georgia Tech published the following myths about impact fees in *Exactions, Impact Fees and Dedications: Shaping Land-Use Development and Funding Infrastructure in the Dolan Era* (American Bar Association, State and Local Government Law Section 1995) at pages 93-96. we have slightly modified this portion of Professor Nelson's article for this paper.

Many impact fee myths so distort the truth as to ignore that the purpose of impact fees is to actually *improve* the climate for developers. These myths concern effects on housing and development prices, affordable housing, economic development, border effects, and administration.

Myth 1: Impact Fees Will Be Passed on to Homebuyers

Developers usually argue that impact fees will simply be passed on to the homebuyer. This implies that impact fees will raise the price of housing. If this were true, developers would not oppose impact fee policy since it would cost them nothing. Also, if this were true, developers are not now charging as much as the market will bear and are therefore leaving money on the table.

In fact, developers have it part right. Depending on market dynamics, the impact fee will actually be paid by the landowner, land developers, builder, or homebuyer. There are two kinds of markets: competitive and noncompetitive. In competitive markets, housing prices are set at the maximum the market will bear across all housing segments. In these markets, it is very difficult to pass impact fees forward to the buyers of new homes. Except for a transitional period, impact fees will be mostly, if not entirely, paid by the seller of the land--whether that is the seller of raw land or the seller of finished lots. This is because, according to classic economic theory, the urban land market will force landowners to absorb the fees in the form of lower sales prices. Indeed, by viewing impact fees as a form of tax, classic economic theory requires that the fees be internalized

in land prices. From a public policy perspective, this is a desirable outcome because it leads to more efficient use of land and its resources, thereby maximizing social benefits while maximizing social costs.

The situation is different in noncompetitive markets. Rising costs can indeed be passed on to homebuyers, especially in the short term. Such markets may be characterized by the affluent San Francisco Bay Area communities of the 1980s, and smaller, isolated communities where buyers have no locational alternatives, such as the affluent mountain communities of Colorado. However, such a market situation is irrelevant to impact policy consideration. Generally speaking, noncompetitiveness is a product of supply constraints. Ironically, impact fees finance the very facilities that expand the supply of buildable land. In effect, impact fees help make noncompetitive markets less noncompetitive.

Builders and developers are becoming quite adept at forcing landowners to pay the fee. One to two years before impact fees were adopted by Atlanta metropolitan area local governments, for example, developers were routinely inserting a new paragraph in their land purchase option agreements requiring landowners to reduce their sales prices by the impact fees charged. Indeed, it is the inefficient or unprofessional builder and developer who do not require the seller to internalize such fees. While impact fees may adversely affect developers and builders who have excess inventory acquired previously at high prices, inventory accumulation usually includes a risk factor that helps account for future uncertainties of both government and markets.

Based on economic logic and builder/developer behavior, it is unlikely that all impact fees will be passed forward to homebuyers. Indeed, in competitive markets and after a transition period, impact fees will be passed backward to the owners of vacant land.

Myth 2: Impact Fees Are Bad for Low- And Moderate-Income Housing

Some will argue that impact fees will be bad for the production of low- and moderate-income housing. This is true if the fees result in reducing land prices to nearly zero. However, impact fees probably do more to facilitate the production of such housing than inhibit such production. Consider that housing prices rise if demand exceeds supply. What causes supply to fall below demand? Inadequate infrastructure. What is the purpose of impact fees? To provide infrastructure commensurate with demand. In effect, impact fees enable local government to increase the supply of buildable land to more closely match demand. If supply meets demand, prices will not rise.

There are thus two dynamics at work to keep low- and moderate-income housing prices competitive. First, impact fees will result in lowering land prices to offset the fee. Second, impact fees will increase the supply of buildable land, thereby also dampening price effects. Indeed, careful economic analysis of impact fees applied to competitive housing markets suggests that they will actually improve the opportunities for low- and moderate-income housing. Nevertheless, there can be some problems associated with impact fees on low- and moderate-income housing.

Myth 3: Impact Fees Will Have Border Effects

This argument asserts that if a developer is choosing between two parcels of land on which to build, where the first parcel is inside a city that charges impact fees and the second is in another

where impact fees are not charged, the developer will choose the second parcel. The trouble is that the owner of the first parcel does not make a sale. The owner must lower the land price to offset the fee in order to make a sale.

Myth 4: Impact Fees Are Bad for Economic Development

Related to Myth 3 is the argument that because impact fees raise the price of doing business, they frustrate economic development. However, just the reverse is true. First, remember that impact fees will be offset by reduced land prices and by enabling the community to more easily expand the supply of buildable land relative to demand. Now, consider what economic development *really* looks for: skilled labor, access to markets, and land with adequate infrastructure. Competitiveness for economic development will be stimulated by the new or expanded infrastructure paid in part by impact fees.

Myth 5: Impact Fees Are Too High

This argument relates that the only good impact fee is no impact fee, and any impact fee is too high. First of all, impact fees merely reflect the real cost to provide the very infrastructure to new development that development needs. Second, impact fees rarely exceed one quarter of the total cost of new facilities needed to accommodate new development; the larger share of that cost is paid from intergovernmental sources and existing tax structures. Third, impact fees (other than utility connection fees) usually run less than 5 percent of the total sales price of a new home, which is less than the customary 6 or 7 percent charged by real estate professionals.

Myth 6: Impact Fees Are Difficult and Costly To Administer

At 1 to 5 percent of total receipts, impact fees are the most efficient method of exaction. For example, researchers at the Georgia Institute of Technology recently found that government costs associated with case-by-case, negotiated exactions are four times higher than impact fee administration costs. Moreover, considering that developers incur far greater costs associated with case-by-case negotiations than local government, but there are no such costs where impact fees are involved, the developer savings can be considerable.

Myth 7: Impact Fees Are Just One More Bureaucracy Developers Have to Contend With

Since developers pay fees based on a published fee schedule, gone are many of the time-consuming, unpredictable, usually unfair horse trading between developers and local government for improvements. The result is several important efficiencies that accrue to developers. These include predictability of decision-making processes, certainty of infrastructure provision, streamlined decision processes, and more precise information for financial analysis purposes.

IX. Frequently Asked Questions

1. Can only cities impose impact fees?

No. According to Section 395.001(7) of the Texas Local Government Code, the following political subdivisions may impose impact fees: (1) municipalities, (2) districts or authorities created pursuant to Article III, Section 52 (conservation and water districts and county road districts) or Article XVI, Section 59 (conservation and reclamation districts)

of the Texas Constitution, and (3) certain counties, as described in Section 395.079 of the Texas Local Government Code.

2. Can a city charge an impact fee outside its corporate limits and ETJ?

Yes, but only if it has contracted to provide capital improvements to such an area. It cannot collect a roadway impact fee, however. *See* Tex. Local Gov't Code § 395.011(c).

3. If a city wishes to impose an impact fee, can it do so on its own without following all of the requirements of Chapter 395?

No. According to Section 395.011(a) of the Texas Local Government Code, unless specifically authorized by state law or Chapter 395, no governmental entity or political subdivision may enact or impose an impact fee.

4. If a landowner cannot pay an impact fee, can a city enter into an agreement providing for the time and method of paying the fee?

Yes. Section 395.018 of the Texas Local Government Code specifically provides that a political subdivision “may enter into an agreement with the owner of a tract of land for which the plat has been recorded providing for the time and method of payment of the impact fees.”

5. If a city has assessed impact fees, but those fees have not yet been paid, can the city subsequently increase the fees?

No. According to Section 395.017 of the Texas Local Government Code, “[a]fter assessment of the impact fees attributable to the new development or execution of an agreement for payment of impact fees, additional impact fees or increases in fees may not be assessed against the tract for any reason unless the number of service units to be developed on the tract increases.”

6. May a city, for example, require that a school district pay impact fees?

Yes. Section 395.022 provides that other governmental entities may pay impact fees imposed under Chapter 395.

7. Does Chapter 395 of the Texas Local Government Code prohibit moratoriums?

Yes and no. Section 395.076 of the Texas Local Government Code specifically prohibits a city or other covered governmental entity from placing a moratorium “on new development for the purpose of awaiting the completion of all or any part of the process necessary to develop, adopt, or update the impact fee.” Moratoriums for non-impact fee matters (*e.g.*, moratorium on zoning applications while a zoning ordinance is being reviewed and amended) are permissible.

8. How long does a developer have to challenge the imposition of an impact fee?

Ninety days. According to Section 395.077 of the Texas Local Government Code, a suit to contest an impact fee “must be filed within 90 days after the adoption of the ordinance, order, or resolution establishing the impact fee.” Venue lies in the county in which the major part of the land is located and a successful litigant is entitled to recover reasonable attorney’s fees and court costs.

9. Can impact fees be assessed for park land?

No. Section 395.001(4) of the Texas Local Government Code specifically excludes impact fees for a dedication of park land or payment in lieu of dedication to serve park needs.

10. Are pro rata agreements for water and sewer lines valid if a city has adopted an impact fee ordinance?

Yes. Section 395.001(4)(C) of the Texas Local Government Code provides that “lot or acreage fees to be placed in trust funds for the purpose of reimbursing developers for oversizing or constructing water or sewer mains or lines” are not included in the definition of “impact fees.”