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Land Use Law:

Current Issues in Subdivision, Annexation and Zoning

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A Look at Land Use Law

Introduction: the Power to Zone

Zoning in a broad sense is the imposition of regulations regarding the use of private property; it is a unique municipal function. Zoning consists of the power of a city to divide the land within the city's limits into separate districts, within which the city may regulate the uses of land and buildings, the size, height and density of structures, lot sizes and dimensions, lot coverage, yard and open space sizes, population density, and to impose a variety of regulations designed to protect and preserve the public health, safety, morals, and general welfare. Although some land use regulatory authority may be exercised by counties, this authority is predominantly restricted to subdivision regulation, not zoning. Similarly, deed restrictions typically impose land use limitations but these restrictions emanate from contract law and not the inherent authority of a homeowner's association to regulate the uses to which property may be put.

The authority of a municipality to impose land use controls ultimately derives from its constitutional police power. This is the source of authority from which municipal zoning ordinances are justified for the protection and preservation of communities. Statutory authority is found in Chapter 211 of the Texas Local Government Code (referred to as the "Zoning Enabling Act").

The powers granted by Chapter 211 are for the express purposes of promoting the public health, safety, morals, or general welfare and for the preservation of places and areas of historical, cultural, or architectural importance or significance. Chapter 211 expressly authorizes municipalities to regulate the height, number of stories and size of buildings, the percentage of a lot that may be occupied, the size of yards and open spaces, population density, and the location and use of buildings, structures and land for residential, commercial and industrial purposes. (§211.003(a), TEX. LOCAL GOV'T CODE). Zoning regulations must be designed to lessen traffic congestion, secure safety from fire, panic and other dangers, promote health and general welfare, provide adequate light and air, prevent overcrowding and avoid undue concentration of population, and facilitate the adequate provision of transportation, utilities, schools, parks and other public requirements.

Zoning regulations must be adopted in accordance with a comprehensive plan. (See, Chapter 213, TEX. LOCAL GOV'T CODE). The comprehensive plan simply serves as a guide for zoning decisions. Comprehensive plans, created and adopted in accordance with Chapter 213 of the Local Government Code, are intended to establish long-range development goals for the city and should contain provisions relating to land use, transportation and public facilities. A comprehensive plan generally establishes the overall long-range development strategy of a city. It does not establish or contain zoning regulations nor does it establish zoning district boundaries. A comprehensive plan may be amended following public hearing and planning commission review.

Zoning is done by ordinance. Zoning ordinances fall within two broad categories: 1) zoning regulations and 2) zoning district boundaries. The former addresses the regulations applicable within specified zoning districts; typically, use, density, lot and building size, and structural requirements. Regulations must be uniform within each district and should be adopted with reasonable consideration for the character of the area, its suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land within the city. Zoning district boundary ordinances establish or amend district boundaries and impose the applicable district regulations on identified property.

A zoning ordinance must bear a substantial relationship to the public health, safety, morals or general welfare and must not be arbitrary or unreasonable. The Texas Supreme Court, in *Pharr v. Tippett*, 616 S.W.2d 173 (Tex. 1981), established four basic criteria that should be used in reviewing zoning ordinances: 1) respect for the approved comprehensive plan, 2) the nature and degree of adverse impact on neighboring properties, 3) the suitability of the tract as presently zoned, and 4) the existence of a substantial relationship between the amendatory ordinance and the public health, safety, morals or general welfare. *Pharr*, 616 S.W.2d at 176. It has been written that "[t]he concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean,

well-balanced as well as carefully patrolled.” *Village of Belle Terre v. Boraas*, 416 US 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), citing, *Berman v. Parker*, 348 US 26, 32-33 (1954).

The rezoning of a specific tract of property or of larger areas of land may be initiated by the owner of the property or by the city, on its own initiative. A zoning change does not require the consent of the property owner. Zoning ordinances carry a strong presumption of validity; the burden of establishing the invalidity of a zoning ordinance falls on the party contesting its validity and the burden is a high one. *Pharr v. Tippett*, *id.* Since zoning decisions are an exercise of a city council’s legislative authority, public officials involved in the zoning process possess legislative immunity for zoning decisions.

The Basic Components of a Comprehensive Zoning Ordinance

Introduction. A city’s complete set of zoning regulations is typically referred to as the city’s “comprehensive zoning ordinance.” Although comprehensive zoning ordinances follow basic patterns, there is no standardized format and each municipality is free to adopt and amend its zoning regulations as it sees fit.

The comprehensive zoning ordinance provides regulations within specified categories of uses that typically include agricultural, residential (generally, single-family residential), multi-family (including structures intended for habitation that range from duplex dwellings to apartment complexes), retail, commercial, industrial or manufacturing, and limited or special districts referred to as planned developments. A comprehensive zoning ordinance will specify the particular uses to which land within each category may be put. Rather than being prohibitive in nature (i.e., “thou shalt not . . .”), a use by right within a specified zoning district is specifically enumerated (i.e., “within this district, land may *only* be used for the following purposes . . .”)

The regulations contained in a comprehensive zoning ordinance include an enumeration of uses by right permissible within zoning districts, minimum lot sizes, front, side and rear yard set-back requirements, minimum square footage of primary and accessory structures, height restrictions, accessory structure limitations, and floor area ratio (FAR) limitations. An enumeration of the requirements and available uses

for special use permits are also established. Provisions that create and empower a planning commission and a board of adjustment are also often contained within the comprehensive zoning ordinance. The process for property owners to apply for zoning changes should be described. Nonconforming uses and structures should also be addressed.

Use Regulations; Uses by Right. The first and most significant component of a comprehensive zoning ordinance is the establishment of zoning district regulations. The comprehensive zoning ordinance will identify the various zoning districts within the municipality and, within each district, will designate the permissible uses by right. The hierarchy of uses (based on intensity) generally consists of agricultural, residential (generally, single-family residential), multi-family (including structures intended for habitation that range from duplex dwellings to apartment complexes), retail, commercial, and industrial or manufacturing. Often there will be divisions or subcategories within each of these districts. For example, several residential districts are often identified, based either on the minimum lot sizes or minimum dwelling sizes that are allowed within each sub-district. In retail, commercial and manufacturing/industrial districts, the specific permissible uses are identified either in a list or in table form. Since zoning regulations are penal in nature and limit the free use of land, specified uses are not subject to strict interpretation; they are instead interpreted broadly to favor a free use of property.

A designated permissible use is referred to as a use by right; the property owner has the right to use his/her property for any of the designated uses without the need to seek a zoning district or regulatory change. Any use not specified is an illegal use that may be prevented by injunctive relief or criminal penalties.

Specific Use Permits. A comprehensive zoning ordinance will also authorize specific or special use permits (“SUP’s”). It is a misnomer to refer to an SUP as a permit; it is in fact a zoning change which, when granted, is not a right held by the property owner but is instead a zoning regulation applicable to that tract or lot. It runs with the land and does not end when ownership of the land is transferred. An SUP typically constitutes an overlay that exists over some pre-designated zoning district. In theory, the granting of an SUP will allow the property to be put to an additional specified use while enabling the municipality to impose additional conditions on that use on a case-by-case basis. For example, an in-home

day care center operation authorized in a residential district only by SUP would enable the governing body to impose specific conditions on the operation of the business such as days and hours of operation, limitations on the number of children, signage, and parking requirements. Since SUP's are in fact zoning changes, the requisite formalities associated with zoning changes must be followed.

Specific use permit regulations often identify categories of uses that are permissible only by SUP in certain specified districts. However, it is not uncommon for a city's SUP regulations to include a catch-all provision that would allow an unspecified use to be allowed by specific use permit. For example, a property owner who seeks to construct and operate a tattoo parlor in a municipality that does not identify tattoo parlors as a use by right in any district may seek a specific use permit that would enable him/her to do so.

Planned Developments. A planned development ("PD") is generally authorized as a specific and independent zoning category. In theory, planned development zoning allows much greater flexibility; it enables a developer to pursue a development that contains uses, lots or structures that do not match the strict regulatory requirements of preexisting zoning districts. Master planned communities, golf course communities, and mixed retail and apartment complex areas are good examples. PD's may also be used for developments seeking architectural uniqueness or consistency that vary in certain aspects from base zoning regulations (for example, masonry exterior requirements may prohibit the use of wood siding; a PD would enable a developer to design a development that has a rustic or western setting using wood siding).

The PD concept is also frequently used to bend the rules in a comprehensive zoning ordinance. As an example, zoning regulations typically contain minimum square footage requirements for residential dwellings and minimum lot size requirements. A developer seeking to build homes that are less than the minimum square footage established by the base zoning or to plat the subdivision with lots that are smaller than the minimum lot sizes required by the comprehensive zoning ordinance may request PD zoning for the subdivision. If the PD enabling ordinance does not set forth structure and lot size minimums, an application for PD zoning may be used to obtain approval from the city to build what would otherwise be a nonconforming and illegal development. For obvious reasons, this may constitute an abuse of the zoning process but in some

circumstances it can be justified if there is some substantial relationship between the PD zoning and a legitimate governmental interest. Moreover, PD zoning may also allow flexibility and provide room for negotiation between property owners and municipalities. A property owner may be given the opportunity to do more in certain areas while being granted the option of doing less in others. Like SUP's, planned development zoning gives a municipality a wider range of discretion and allows a departure from often-monolithic zoning district regulations.

Comprehensive zoning ordinances generally contain provisions that establish broad standards for planned development zoning. These regulations typically require that an application for planned development zoning be accompanied with a concept or development plan detailing certain aspects of the proposed development. Upon approval of the application, the subject property becomes a PD district and a set of development regulations are adopted which essentially constitute a comprehensive set of zoning regulations applicable to that district. Following the granting of the application and the zoning change to PD, the developer then submits plat applications (for residential) or site plans (for nonresidential) prior to actual construction. PD zoning is property-specific; the applicable regulations will apply to that and only that tract of land. As with all zoning regulations, PD regulations run with the land and do not terminate on a transfer of ownership.

The adoption, amendment or repeal of zoning regulations, and the establishment or modification of zoning district boundaries, must follow strict rules that involve notices and public hearings. Review and approval is typically done by a planning and zoning commission, then by the city council. A home rule city must have a planning commission; planning commissions are optional in general law cities. Where one exists, a planning commission simply has the authority to recommend regulatory or district boundary changes; the council has final decision-making authority.

The Ins and Outs of the Planning and Zoning Commission

The Planning and Zoning Commission. A planning and zoning commission is an appointive body whose primary responsibilities relate to zoning and land use oversight. Its members are appointed by the city's governing body. Planning and zoning commissions participate in the development of comprehensive

plans, recommend zoning changes to the governing body, and recommend or pass on plat applications. A home rule city must have a zoning commission. A general law city may but need not create one. A planning and zoning commission typically possesses the authority to *recommend* that a rezoning application be approved or denied and to *recommend* the adoption or amendment of zoning regulations. The governing body has the ultimate authority to adopt, amend, grant or deny zoning changes. Whether a commission has final authority over subdivision plat approval is determined by that city's ordinances. It is not uncommon for commissions to have the final authority over plats.

Open Meetings. Even though a commission may only have the authority to recommend matters to the governing body, the provisions of the Texas Open Meetings Act apply. (See, Chapter 551, TEX. GOV'T CODE). In essence, the Open Meetings Act requires all meetings to be open to the public. It further requires that no meeting be held unless a quorum of the body is present and an agenda has been timely posted. The Act prohibits secret deliberations and closed meetings unless a specific exception applies.

Zoning Amendments; Notices and Public Hearings. The basic process for the adoption or amendment of a zoning ordinance involves mailing of notices of a public hearing before the planning commission and the publication of a notice of a public hearing before the council. Notice of the public hearing before the commission must be sent to the owners of the property that is the subject of the zoning change as well as to all owners of real property within a radius of 200 feet of the subject property. The identity and address of those owners are obtained from the city's tax rolls. The 200-foot radius includes streets and public rights-of-way. This notice must be sent at least eleven (11) days before the public hearing (Section 211.007(c) requires the notice to be sent "before the 10th day before the hearing date," thus, at least 11 days). Mailing by regular first class mail is sufficient, certified or registered mailing will comply but is not required. Notice is deemed complete when deposited in the mail.

Following the commission's public hearing, it must make a final report to the council as to whether a zoning change application or regulation should be approved or denied. The council must also conduct a public hearing and may not do so until it has received the commission's final report. Notice of the council's public hearing must be published in the city's official newspaper or in a newspaper of general circulation in the area at least 16 days before the hearing (Section

211.006(a) states that the notice must be published "before the 15th day before the date of the hearing," thus, at least 16 days).

Since the Open Meetings Act applies to both the commission and the council, public hearings must be posted on an agenda at least 72 hours before the date of the hearing. Typically, an agenda should identify the public hearing as a specific item preceding an action item on the zoning matter. Since public hearings involve administrative expense and overhead, commissions and councils should avoid tabling a public hearing. If the hearing is not officially closed, then notice of the rescheduled hearing must then either be sent or published, as appropriate. If the process was properly followed and if additional time for consideration is needed, it is advisable to open the public hearing, receive testimony, and formally close the hearing. The action item on the agenda may then be tabled to a later meeting without incurring the burden of mailing or publishing additional notices.

Commission/Council Differences; Zoning Protests. The commission only has the authority to recommend zoning changes. There is no obligation on the part of a council to follow the recommendations of its commission. However, a city may adopt an ordinance that imposes a supermajority requirement for a council to override a commission recommendation that a proposed zoning change be denied. ("The governing body by ordinance may provide that the affirmative vote of at least three-fourths of all its members is required to overrule a recommendation of the municipality's zoning commission that a proposed change to a regulation or boundary be denied." §211.006(f), TEX. LOCAL GOV'T CODE).

Further, Section 211.006(d) of the Local Government Code provides a means by which property owners may protest a zoning change and, in doing so, compel a supermajority vote of the council. If a written protest is signed by at least 20% of the owners of either 1) the property covered by the proposed change, or 2) the land within 200 feet of the subject property, then a zoning change must be approved by at least a ¾'s majority vote of all members of the council. (Note that the requirement is ¾'s of "all members," not ¾'s of those present at the meeting). The statutes provide no deadline on which the protest must be filed. Assuming a protest is filed at or on the day of the public hearing, little time is afforded the city to verify the validity of the petition. Presumably, in the absence of an ordinance specifying such a deadline, the public hearing may still be opened and

closed and the council may then table the consideration and action item to a later date to enable verification of the signatures. This would avoid the administrative burden of republishing notice of the hearing as well as avoiding the possibility that approval of the zoning change by less than a supermajority would be later invalidated.

Joint Hearings A commission and council may also hold a joint public hearing on a zoning change application. Mailing and publication of notices of the hearing are still required and the commission must act and vote on the application before the council may act. However, a home rule city may by ordinance adopted by a 2/3's majority vote, prescribe the type of notices to be given of the time and place of the joint public hearing.

The Ins and Outs of the Board of Adjustment

Unlike planning and zoning commissions, boards of adjustment are not recommending bodies. A board of adjustment is quasi-judicial in nature and is empowered to hear and adjudicate a narrowly-defined set of zoning related matters. Its decisions are final.

A board must consist of at least 5 members, each of whom serve terms of two years. Alternates may also be appointed to serve in the absence and in place of a regular member. Members cannot be removed during a term of office except for cause, based on written charges, following a public hearing.

State law imposes special quorum and supermajority requirements: all cases must be heard by at least 75% of the members of the board and a 75% majority vote of the board's members is required to pass on most issues. The voting requirements are mandatory and jurisdictional. For example, a variance authorized by a vote of only three members of the board is invalid and subject to collateral attack after the appellate deadline has elapsed.

Under state law, the board is empowered to hear and determine 1) appeals of orders of administrative officials, 2) special exceptions, 3) unnecessary hardship variances, and 4) any other matter authorized by ordinance. (§211.009(a), TEX. LOCAL GOV'T CODE).

Appeals of Administrative Decisions. The board may hear and decide appeals of decisions made by city administrative officials when an error is alleged in an order, requirement, decision, or determination by the

official in the enforcement of a zoning ordinance. In such appeals, the central issue is whether the administrative official correctly applied the city's zoning ordinance and regulations. Appeals to the board may be made by any person aggrieved or by any officer, department, board, or bureau of the city affected by any decision of the administrative officer. Nearby landowners are "persons aggrieved." A city is a proper party to an appeal, even though its own official granted or denied a permit.

An appeal of an administrative official's determination is accomplished by filing a notice with the administrative officer from whose decision appeal is taken and with the board of adjustment. The notice of appeal must state the grounds for the appeal, and must be filed within a reasonable time, pursuant to rules adopted by the board. When notice is filed, the administrative officer must immediately transmit to the board all papers constituting the record on which the action appealed from was taken. The appeal stays all proceedings unless the administrative official certifies that a stay would in his/her opinion cause imminent peril to life or property. If this written statement is filed, then the administrative proceedings can be stayed only by a restraining order granted by the board or by a court. If an appeal is not taken to the board of adjustment, the official's decision becomes incontestable as to a matter within the official's jurisdiction. The board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and make it as it ought to be made. The board has all of the powers of the officer from whom the appeal is taken to accomplish that end.

Special Exceptions. A comprehensive zoning ordinance may authorize a board of adjustment to hear and decide special exceptions to certain ordinances. A special exception may be similar in nature to a variance but is different in application and concept. A special exception refers to uses that a zoning ordinance permits, but that are specially reviewed and approved by the board for situational suitability. Unlike variances, special exceptions do not require a showing of hardship. A special exception differs from a variance in that it is a use expressly authorized under the zoning ordinance under the conditions specified in the ordinance whereas a variance is a suspension of the literal enforcement of the ordinance. *West Texas Water Refiners, Inc. v. S&B Beverage Co., Inc.*, 915 S.W.2d 623 (Tex.App.--8th Dist. 1996).

There must be a specific ordinance that empowers the board to adjudicate special exceptions and the ordinance should set forth a standard of review.

Section 211.009(a)(2) of the Code is simply an enabling provision which allows cities to create special exceptions; in the absence of an ordinance that establishes and delineates the parameters for special exceptions, a board has no inherent authority to consider it.

Variations. A “variance” is defined as permission to depart from the literal requirements of a zoning ordinance by virtue of unique and unnecessary hardship due to special circumstances associated with a tract of property. It constitutes a waiver of the strict requirements of a zoning regulation. An administrative official of a city cannot grant or approve a variance. The underlying theory is to relax the strict requirements in situations where, because of unusual circumstances, strict application of a zoning regulation will produce an unnecessary hardship. Variations relate to technical zoning matters such as area, setback, and height regulations, and are restricted to a relaxation of these technical requirements.

Variations are permissible only if strict application of the zoning ordinance would cause unnecessary hardship. The unnecessary hardship concept relates specifically to property-related conditions. A variance is not authorized merely to accommodate the highest and best use of property. The “special conditions” language of Section 211.009(a)(3) refers to conditions that are unique to the property, not the property owner. Financial hardship is insufficient as a matter of law to justify granting a variance. An unnecessary hardship must be one that is not personal to the property owner or self-created; it relates to a condition associated with the topography or shape of the lot. It is insufficient as a matter of law for a developer, for example, to seek a variance from a zoning ordinance’s minimum lot size requirement on the basis that it would not be economically feasible to develop the property in compliance with the zoning ordinance.

In *Currey v. Kimple*, 577 S.W.2d 508 (Tex.Civ.App.--Dallas 1978, writ ref’d, n.r.e.), the unnecessary hardship arose from the property owner’s desire to build a tennis court on a pie-shaped residential lot. The construction and placement of the tennis court could not be accomplished in compliance with the City of Dallas’ building setback requirements applicable within that residential district. The fact that the owner wanted to build a tennis court on an irregularly shaped lot did not constitute a self-created or personal hardship warranting a denial of the variance; the configuration of the lot created the hardship.

A use variance (a variance that allows a different use than those enumerated in the comprehensive zoning

ordinance within that zoning district) is an illegal variance that a board has no authority to consider. Only the city’s council can change or modify the uses by right allowed in the various zoning districts. A simple example is where a property owner seeks a variance to use residential-zoned property for a retail or commercial purpose. Regardless of the hardship the owner’s circumstances may impose, the board of adjustment has no authority to vary, waive or otherwise modify the permissible uses within the residential district. An illegal use variance is void and may be attacked collaterally.

Other Matters Authorized by Ordinance

A board of adjustment has no inherent statutory authority to hear and decide any matter that does not arise under a city’s zoning ordinances. For example, if a building official were to deny a building permit for a reason not related to the city’s comprehensive zoning ordinance, the board of adjustment has no authority to hear the matter unless the city has, by ordinance, delegated that authority to its board. Moreover, it is not uncommon for cities to delegate additional non-zoning-related functions to its board. A city’s ordinances may appoint the members of its board of adjustment to serve as a city’s board of appeals under uniform building codes or as a minimum urban standards or building standards board. Under those ordinances, the powers and duties of the board are spelled out in the ordinance.

Amortization of Nonconforming Uses. A board of adjustment is authorized under ordinances adopted in many cities to order the termination of a nonconforming use. A property owner has a vested right to use his/her property in any lawful manner subject to preexisting zoning regulations. A nonconforming use (a use that predated the imposition of a zoning regulation), although lawful, may be injurious to surrounding property and detrimental to the safety or welfare of the public. A city, through its board of adjustment, may lawfully cause a termination of the use and induce compliance with zoning regulations. Since a city cannot deprive a property owner of property (including vested rights) without just compensation, a termination must consider the value of the owner’s initial investment. An amortization of this investment should ultimately be based on a comparison between the investment and the income stream generated by the nonconforming use. Once sufficient income has been generated to cover that initial investment, the nonconforming use may be ordered terminated without paying compensation to the owner. If the termination of the use is ordered before the owner’s recoupment of his/her investment, the city

would generally be required to provide just compensation to the owner for the taking.

Provisions in zoning ordinances for amortization of nonconforming uses are valid if they are reasonable and fair in operation; a determination of reasonableness should involve consideration of such factors as the character of neighborhood in general, the amount an owner has invested in the property, the amount of his/her recoupment during the grace period, the protection afforded to the public, the zoning classification and use of nearby property, the availability and location of other sites, the extent to which property values are adversely affected by the nonconforming use, and the amount of loss which would be suffered by the owner upon termination of use. *Bemmers v. City of University Park*, 477 S.W.2d 326 (Tex.Civ.App.--Waco 1972), *reversed on other grounds* 485 S.W.2d 773, *appeal dismissed*, 93 S.Ct. 1530, 411 U.S. 901, 36 L.Ed.2d 191, *rehearing denied* 93 S.Ct. 2142, 411 U.S. 977, 36 L.Ed.2d 700.

Appeal of Board's Decision. There is only one vehicle for appealing an adverse decision of a board of adjustment. An appeal must be made by a verified petition alleging that the board's decision was illegal. The petition must be filed in an appropriate court within 10 days of the board's decision. A proper party to an appeal is any person aggrieved by the board's decision, a taxpayer, or an officer, department or board of the city. As noted, board members are appointed for two-year terms and cannot be removed except for cause. This gives its members relative autonomy to act without concern for the desires of the city's governing body. Thus, the granting of a variance by a board of adjustment may be appealed to an appropriate court by the city itself.

Specific Zoning Issues

The number, shape and size of zoning districts may be set by municipalities based on that which the governing body considers best for carrying out the underlying purposes of zoning, but zoning changes are often problematic. An inherent friction exists between the objectives of a city in creating and enforcing zoning regulations, the desires of surrounding property owners and the community, and the basic rights of property owners to free use of real estate.

The "Takings" Question: Inverse Condemnation. Zoning decisions involve a balance between the competing rights of a property owner and the power of the city. Although all property is held subject to

the legitimate exercise of a government's police power, government action may at times go so far as to constitute a taking of private property without the payment of just compensation. Both the United States and the Texas constitution prohibit the taking of private property for public use without the payment of just compensation. The Texas Constitution provides greater protections to property owners than does the US Constitution; Texas law allows a cause of action for property that is "damaged" even if not "taken." See, e.g., *City of Glenn Heights v. Sheffield Development Company, Inc.*, 61 S.W.3d 634 (Tex.App.-Waco 2001), *rev'd other grounds*, 140 S.W.3d 660 (Tex.2004).

A governmental "taking" may be either regulatory or physical; a physical taking occurs when a governmental authority authorizes or engages in an unwarranted physical occupation of property. *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). Physical takings are often straightforward, a physical entry onto or appropriation of real estate is difficult to dispute. However, a regulatory taking is not as evident.

A regulatory taking will occur when the application of a regulation to specific property unreasonably interferes with the use and enjoyment of property; deprives the owner of all economically viable uses of the land; or, is an exaction that is not roughly proportional to the interest sought to be advanced by the exaction.

Substantial Advancement of Government Interest. A government regulation was an unconstitutional taking if the regulation failed to at least substantially advance a legitimate state interest. This test examines the nexus between the effect of the ordinance and the state interest it is intended to promote. A broad range of governmental purposes will suffice to establish a "legitimate governmental interest" including protecting residents from the "ill effects of urbanization," protecting an area for recreation, tourism, and public health, the preservation of open space or agricultural land, and controlling the rate and character of community growth.

The "substantial advancement" test, although still a part of Texas jurisprudence, no longer serves as a viable cause of action. Texas courts have traditionally followed the opinions of the US Supreme Court in analyzing regulatory takings. In *Lingle v. Chevron USA*, 544 US 528 (2005), the US Supreme Court did away with the substantial advancement test in regulatory takings jurisprudence, stating that a court should not examine the wisdom of the city's zoning

decision but should, instead, be concerned only with whether the intrusion or affect on property rights satisfies constitutional standards.

Unreasonable Interferences. The determination of whether there has been an unreasonable interference with the right of use and enjoyment requires consideration of 1) the economic impact of the regulation and 2) the extent to which the regulation interferes with investment-backed expectations. *Mayhew v. City of Sunnyvale*, 964 S.W.2d 922 (Tex.1998). In this case, the Town of Sunnyvale had adopted zoning regulations that imposed a minimum lot size of one acre. The Town had refused to grant a developer's request to rezone land to smaller, more profitable lots. Although unsuccessful at the trial court level, the Texas Supreme Court determined that the Town's refusal to rezone the land did not as a matter of law constitute a regulatory taking.

In *Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004), the facts were more extreme. Rather than simply refusing to grant an up-zoning application, the City of Glenn Heights imposed a year-long moratorium, after which it proactively down-zoned the developer's 194 acres. The down-zoning resulted in a diminution in market value of 50% and lost profits of more than \$8 million. In *Sheffield*, the Court stated that three criteria are to be used in evaluating whether an unconstitutional taking has occurred: 1) the severity of economic impact, 2) the extent of the interference with the owner's reasonable investment-backed expectations, and 3) the nature and character of the government's actions (whether the regulation was general in character and not directed exclusively at the property owner).

There was no question that the City of Glenn Heights had interfered with the property owner's investment-backed expectations. Notwithstanding the developer's lost profits and the substantial diminution in property value, these facts did not rise to the level of a compensable taking. "But while the economic impact of rezoning . . . was unquestionably severe, it did not approach a taking." The *Sheffield* court stated that Glenn Heights' zoning decisions "were not materially different from zoning decisions made by cities every day." The takings clause of the Texas Constitution does not charge the government with guaranteeing the profitability of every piece of land subject to its authority.

Deprivation of Economic Viability. The deprivation of all economically viable uses of land (separate and independent from an unreasonable interference with a

landowner's right to the use and enjoyment of his/her property) is actionable when a restriction "denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless." *Mayhew*, 964 S.W.2d at 935. This determination is a relatively simple analysis of whether any property value remains after the imposition of the regulation.

In *Rowlett/2000, Ltd. V. City of Rowlett*, ___ S.W.3d ___ (Tex.App.--Dallas 2007, no pet.; 2007 TX CA5-05-06-00520-082007, August 20, 2007), the City of Rowlett refused to grant a developer's request to rezone his land to allow for a residential development of less than one-acre minimum lot sizes. Both the developer's and the City's experts testified that residential development under the City's minimum one-acre zoning was not economically viable or feasible; the cost to develop 1-acre lots would exceed the potential for revenue. Experts testified that the 1-acre zoning left the property in an undeveloped state, with values that ranged from \$2,000 per acre to \$5,000 per acre. In a state capable of profitable development, the land could have been worth as much as \$25,000 per acre. Nevertheless, in finding for the City, the Court held that a value of as little as \$2,000 was not a token value and the property was not valueless. The appropriate inquiry is whether the value of the property has been completely eliminated. The Court noted that even when a regulation completely precludes development, a "valueless" finding is implausible.

The import of *Mayhew*, *Sheffield* and *Rowlett/2000* is that although the determination of whether a compensable taking has occurred involves a complex review, the level of economic severity must be drastic. It is improper to employ a simple cost-benefit analysis suggesting that the cost of developing land according to a particular zoning regulation may exceed the income derived from that development. Even if a city has deprived a developer of reasonable investment-backed expectations, the level of economic severity must be so dramatic as to approximate a physical appropriation. A city's refusal to rezone property, even when the existing zoning renders property development economically unviable, is not sufficient. A reduction in property value of as much as 50% as a result of proactive zoning is not enough.

Exactions. A takings-by-exaction claim results when a government entity withholds approval of some form of activity in exchange for some concession or exaction from an applicant. Municipal regulatory actions that impose an exaction on a developer as a

condition of development are not impermissible but must be done in a manner that is roughly proportional to the direct impact that the development will have on the city.

In *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), the Town of Flower Mound required a developer to pay for paving improvements to a roadway adjacent to its development. As a condition of approval of the developer's residential subdivision, the Town required the developer to rebuild a nearly new asphalt roadway to a concrete roadway in accordance with the Town's thoroughfare plan. The asphalt roadway could have accommodated some but not all of the increased traffic that would be generated by the proposed development. The lack of rough proportionality between the exaction and the Town's interest was the basis for the Court's determination that a taking by exaction had occurred. The Court relied on federal law in setting forth the rule that a taking will not occur if the condition imposed by the government 1) bears an essential nexus to the substantial advancement of some legitimate governmental interest, and 2) is roughly proportional to the projected impact of the proposed development.

The first requirement (the "essential nexus" requirement) involves an evaluation of the connection between the condition or restriction imposed by the governmental entity and the interests to be served. The second requirement (the "rough proportionality" requirement) requires an individualized determination that the cost-participation requirement is related in nature and extent to the impact of the proposed development. Although no precise mathematical calculation is required, there must be some assessment of the impact that will be caused by the project and the costs that will be incurred to accommodate that impact. Those two costs must be roughly proportional.

This rule is derived from two landmark US Supreme Court cases, *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and is frequently referred to as the "Nollan/Dolan" test. In these two cases, the government required property owners to dedicate easements allowing public access to their property as a condition of development approval. *Nollan* involved a required dedication of a public easement across the property owners' beachfront property in exchange for a permit to allow the owners to build a larger home on their

lot. The court determined that there was no adequate relationship (no essential nexus) between the required easement and the building permit, referring to the commission's explanation as "gimmickry." *Dolan*, on the other hand, upheld a city's requirement that a commercial property owner dedicate land for use as a greenbelt and bike/pedestrian path in order to expand a store and parking lot.

The response to the *Stafford* case by the Texas Legislature was the adoption of Section 212.904 of the Local Government Code, which became effective on June 18, 2005. Under this legislation, a developer has the option to compel a city to conduct a rough proportionality study if the city requires, as a condition of development approval, that the developer bear a portion of the cost of municipal infrastructure improvements. The study must be conducted by a professional engineer. Based on the study, the developer's portion of the costs (i.e., the exaction demanded by the city) may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development. A developer may dispute the study by appealing to the city council. If not satisfied with the council's determination, the developer may, within 30 days, appeal the council's determination to an appropriate court. If successful in court, a court may award costs and attorney's fees to the developer.

Spot Zoning. Spot zoning generally refers to a singling out of a specific tract of land for a zoning use classification that is different and inconsistent with that of the surrounding area for the benefit of the owner of the property and to the detriment of the rights of other property owners. "Spot zoning" was described in *Pharr v. Tippet*, *id.*, as connoting "an unacceptable amendatory [zoning] ordinance that singles out a small tract for treatment that differs from that accorded similar surrounding land without proof of changes in conditions. . . . Spot zoning is regarded as preferential treatment which defeats a pre-established comprehensive plan. . . . It is piecemeal zoning, the antithesis of planned zoning." (citations omitted). 616 S.W.2d 173 at 177.

Nonconforming Uses. A nonconforming (or "grandfathered") use or structure is one which predated the imposition of a zoning regulation. A use or structure which existed before the adoption of, and which does not conform to, a zoning regulation is lawful and nonconforming. A use or structure which is lawful under current zoning should generally be allowed to continue if the zoning is later changed rendering the use or structure in violation of the new regulations. An illegal use or structure (one which

was contrary to the zoning regulations at the time of its commencement) is never grandfathered.

A lawful nonconforming use will not terminate upon a change of ownership. The conveyance of ownership of the property on which a nonconforming use or structure exists will not defeat the lawful nonconforming status. The triggering events which terminate nonconforming status are: 1) an abandonment of the nonconforming use combined with some overt act evidencing an intent to abandon, 2) a cessation of the nonconforming use for the duration specified in the comprehensive zoning ordinance, 3) the destruction of a nonconforming structure to the extent specified in the comprehensive zoning ordinance, or 4) an order of the municipality to cease the nonconforming use combined with either payment of just compensation for the taking or an amortization of the owner's investment over a period of time sufficient to enable the owner to recoup his/her investment in the property.

Most cities' ordinances contain provisions that deal with the abandonment or destruction of nonconforming uses and structures. Ordinances typically indicate that an abandonment of at least 6 months to two years creates a presumption of an intent to abandon. The destruction of a nonconforming structure of at least 50% to 75% of its value is also typical in zoning ordinances to trigger the termination of grandfathered status.

Vested Rights. The concept of vested rights, on the other hand, generally deals with the preservation of the rights of owners and developers in the regulations and ordinances that existed at the time of the first development permit application. Chapter 245 of the Texas Local Government Code (the "Vested Rights Statute") is a legislative mandate that insures uniform regulatory requirements during the progress of development of a project. The chapter prevents a regulatory agency from changing its regulations and applying those changed regulatory requirements to an on-going project once the first permit application has been filed. Section 245.002 requires that the approval, disapproval, or conditional approval of a permit application or development plan be based solely on the basis of the regulations in effect at the time the original permit application, development plan or plat application is filed. The chapter essentially freezes regulations on the date the first permit application is filed until the project is complete.

Permit Series. If a series of permits is required for a project, the regulations in effect at the time the

original application for the first permit in that series is filed shall be the sole basis for the consideration of all subsequent permits required for the completion of the project. Under this law, all permits required for a 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.

Project. Section 245.001(3) defines a "project" to mean "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." In *Hartsell v. Town of Talty*, 130 S.W.3d 325 (Tex.App.--Dallas 2004, pet. den), several developers had obtained final plat approvals for residential subdivisions within the Town's extraterritorial jurisdiction (an area consisting of all land within ½ mile beyond the Town's existing territorial limits).¹ The Town subsequently adopted an ordinance extending its building codes into its extraterritorial jurisdiction. The Town then attempted to compel the home builders, who were essentially the same people as the subdividers, to apply for building permit applications for new homes that were started after the building codes were extended. The Town argued that the subdivision development project was a separate and distinct project from the construction of each different home.

Although the trial court found in the Town's favor, the Court of Appeals reversed, holding that the series of development permits that began when the plat application was filed included the construction of the homes in the subdivision; a plat application for a residential subdivision is a permit application for a project that encompasses each subsequent building project for homes within that subdivision.

Date of Accrual. Vested rights under Chapter 245 accrue upon the filing of the first permit application or development plan. In 2005, the legislature expanded on this triggering event by adopting subsection (a-1) to Section 245.002 which indicates that vested rights accrue upon the filing of an application that gives the regulatory agency "fair notice" of the project and the nature of the permit. Thus, the failure of an applicant to submit a permit

¹ The extraterritorial jurisdiction (ETJ) of a city is the area surrounding a city's boundaries within which the city has limited regulatory authority. The size of a city's ETJ is determined by its population. (§42.021, TEX. LOCAL GOV'T CODE).

application on a prescribed form, or on any form at all, will not defeat the vesting of rights so long as the submittal is sufficient to give the agency fair notice of the project. The filing date is the date the applicant delivers the plan to the regulatory agency or deposits the application in the mail if sent by certified mail. 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.

The 2005 amendments further establish a process whereby a regulatory agency may adopt a 45-day expiration date on a permit if the applicant has failed to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application. However, the agency must provide written notice within 10 business days after the date the application is filed that specifies the necessary documents or information and sets forth the date the application will expire if the documents or information is not provided. It should be noted that the failure of the agency to comply with this 10-day notice requirement does not mean that the permit application will be granted automatically; it simply may prevent the imposition of later-enacted regulations to the intended project.

Exemptions. The statute does provide several exemptions. First, Chapter 245 does not generally apply to projects commenced on or before September 1, 1997. Moreover, Section 245.004 provides that the chapter does not apply to:

1. Permits that are at least two (2) years old, which were issued for the construction of a building or structure intended for human occupancy, and issued under laws, ordinances, procedures, rules or regulations adopting only uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization, or local amendments to those codes that address imminent threats of destruction of property or injury to persons;
2. Municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;
3. Regulations that specifically control only the use of land in a municipality that does not have

zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;

4. Regulations designed to prevent imminent harm if the regulations do not 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 change development permitted by a restrictive covenant required by a municipality;
5. Regulations intended to prevent imminent harm from flooding that are effective only within established flood plains and enacted to prevent the flooding of buildings intended for public occupancy;
6. Development permit fees;
7. Regulations for sexually oriented business;
8. Regulations affecting colonias;
9. Regulations for utility connections;
10. Annexation regulations that do not affect landscaping or tree preservation or open space or park dedication; and
11. Construction standards for public works located on public lands or easements.

Dormant Projects and Expired Permits. A regulatory agency may enact a rule 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. Any such rule 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. "Progress towards completion of the project" is defined to include any one 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 agency.

Enforcement. Section 254.006 contains specific provisions that authorize enforcement by mandamus, injunctive or declaratory relief and specifically waives immunity from suit.

The vested rights statute favors development. When a preliminary plan application or application for site plan approval is submitted in connection with a development that is disfavored by the community, the city is prevented from making changes to its regulations that affect the development. Historically, the problem was dealt with by a city through the imposition of a moratorium applicable to development within specific zoning districts. The adoption of a moratorium on development permits would preclude the submission of new permits, giving the city the opportunity to amend its development regulations and compel the developer to comply.

Moratoriums. Moratoriums were once regarded as an effective tool to prevent or restrain unfavorable development from occurring. A moratorium on the acceptance or issuance of development plans and building permits is also an effective means of slowing the pace of development to enable a city to develop proper utility, roadway and administrative infrastructure to adequately serve an expanding population.

In 2001, in response to developer's concerns, the Texas Legislature adopted amendments to Chapter 212 of the Local Government Code to limit the availability of moratoriums on residential development. Ostensibly, the purpose of imposing such restrictions was to eliminate the uncertainty and potential hardship for property developers. In 2005, the legislature extended the rules to commercial development as well. Under the law, a moratorium on

property development must be justified based on written findings of a need to prevent a shortage of essential public facilities ("essential public facilities" being defined as water, sewer, storm drainage or street improvements) or a significant need for other public facilities, including police and fire facilities. A moratorium can only be adopted after compliance with complex notice, public hearing and written finding requirements imposed by subchapter E of Chapter 212 (§212.131, *et seq.*). A moratorium on property development may be adopted by ordinance following at least two public hearings separated in time by at least 4 days, which must be preceded by publication of notice of the time and place of the public hearings.

A moratorium on residential development may not last more than 120 days unless additional notice, hearings and written findings requirements are fulfilled. The moratorium period for commercial development is 90 days. An extension beyond this 90-day period cannot exceed an aggregate of 180 days. A city must allow waivers from the restrictions imposed by a moratorium if an applicant can claim a right obtained under a development agreement or can provide the public facilities that are the subject of the moratorium at the applicant's cost. If an applicant submits a written request for a waiver under Section 212.137, the city's governing body must vote on the request within 10 days after the request is received. Nevertheless, Section 212.138 of the Code specifically provides that a moratorium does not affect a developer's vested rights.

The procedures for adopting a moratorium are detailed and strict. The expense and difficulty associated with its adoption often discourage if not prevent most cities from considering the process.

The Land Subdivision Process

The Platting Process

Distinct from zoning, the application of subdivision rules and regulations involve substantially less discretionary review at the municipal level. Zoning decisions are to be made in the context of that which the governing body deems to be in the best interest of the public health, safety, morals and general welfare. As nebulous as those concepts may be, the review of subdivision and development applications is not quite so expansive. The platting process is regarded as a permitting process, ministerial in nature, where an application must be granted, regardless of considerations of general welfare, if the application

satisfies established technical rules. Favoring property development, Texas law imposes limitations on plat review and on the ability to deny development proposals.

Municipal Regulatory Authority. All cities have the authority to adopt rules governing plats and subdivisions in order to promote “the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.” §212.002, TEX. LOCAL GOV'T CODE. Counties have similar regulatory authority under Chapter 232 of the Local Government Code. State law is an enabling statute; the Local Government Code simply provides the authority to adopt subdivision regulations, it does not impose the regulations themselves.

County Regulatory Authority. Counties possess the authority to adopt and enforce subdivision regulations and to oversee the platting process only in areas that are not within the limits of a municipality. Counties do not have zoning authority.² The plat approval process for counties is similar to that for municipalities. A county must approve a compliant plat application and may refuse to approve a plat if the application does not satisfy all statutory and county regulatory requirements.

Counties are given a 60-day period within which to take final action on plat applications and resolve any outstanding appeals. If a county fails to meet this deadline, it is required to refund the greater of 50% of the application fee or the unexpended portion of the fee. The application will be deemed approved as a matter of law and the applicant is entitled to sue for a writ of mandamus to compel the county to issue documents recognizing the plat's approval.

“Subdivision” Defined. The imposition of subdivision regulations is invoked when a property owner seeks to subdivide property. A “subdivision” is defined in Chapter 212 of the Local Government Code as the division of a tract of land into two or more lots to lay out a subdivision of the tract, to lay out building or lot lines, or to lay out streets, alleys, parks and other areas to be dedicated to the public. Unless an ordinance dictates otherwise, the division of a part of any one lot into two or more parts, whether by a metes and bounds description or by a deed conveying

² Counties have limited zoning authority in certain statutorily designated areas, predominantly in and around larger state reservoirs. See, Chapter 231, TEX. LOCAL GOV'T CODE.

ownership of a part of one singular lot, constitutes a subdivision for which a plat may be required. A division of land does not invoke a city's subdivision regulations if the division is into parts greater than five acres, where each part has access and no public improvement is being dedicated. Section 231.001 of the Code contains a substantially similar definition for counties but creates exemptions for agricultural land and subdivisions where lots are transferred to family members, so long as no street or alley dedications are necessary.

Once approved by a city or county, in order to be recorded with county records, the plat must 1) describe the subdivision in metes and bounds, 2) locate the subdivision with respect to a corner of the survey or tract, 3) identify the dimensions of the subdivision and each street, alley, park, and other portion to be dedicated to the public use or to abutting property owners, and 4) must contain a jurat or acknowledgement similar to a deed.

Platting. In essence, a plat will establish lot lines and dimensions, show the locations of streets and alleys, identify utility easements, and set aside and dedicate parks and other public property. Notably, this is an oversimplification; subdivision regulations often require additional details to be shown on plats that may include topographical lines at specified intervals, building set-back lines, street construction details, inset maps showing the overall location of the subdivision, the names of adjacent property owners, and a variety of other detailed items. The level of required detail is set by applicable subdivision regulations.

At the municipal level, the typical process associated with plat approval involves the submission and approval of a preliminary plan, followed by submission and approval of a final plat. In some cities, the final authority to review and approve plats is vested in the city's planning and zoning commission; in others, the commission has the role of reviewing plat applications and making recommendations to the city council. The approval of a preliminary plan entitles a developer to submit a final plat application in compliance with the approved elements of the preliminary plan.

Certain types of plats need not be approved by the city's plan commission or council. A city may by ordinance delegate to a city official the final responsibility to approve amending plats and, if the tract is adequately served by existing streets and city facilities, replats and minor plats involving less than 5 lots. The official may for any reason choose to present the plat application to the planning

commission or city council. However, the designated official cannot deny the plat; if the official seeks to disapprove the application, the application must be submitted to the planning commission or city council within 30 days of its filing.

The 30-Day Rule. If a plat application is not denied within 30 days after the date the plat is filed, the plat is by operation of law automatically approved. Section 212.009 is clear and mandatory; “The municipal authority responsible for approving plats shall act on a plat within 30 days after the date the plat is filed. A plat is considered approved by the municipal authority unless it is disapproved within that period.” As noted earlier, counties have 60 days to consider plat applications. If final action is not taken within this time, the plat is deemed to be approved, and the county must refund to the developer a portion of the application fee.

If a city has adopted the two-step planning-commission-then-council review process, the commission must act within 30 days. The council must then act on the commission’s recommendation within 30 days, even if the recommendation is approval by virtue of inaction. This is often problematic for cities. In many smaller cities, councils and planning commissions rarely meet more than once each month. A developer could, in theory, submit a plat application within two days preceding a regular council meeting, knowing that the Open Meetings Act prohibits the application from being considered without the mandatory prior 72-hour agenda posting. If the next regular meeting of the council is the same day of the following month, the 30-day period will lapse before the council can act to deny the plat unless it can call a special meeting.

In cities where councils and planning commissions meet more frequently, and where plat applications are reviewed by sophisticated planning or development services departments, the problem can become more acute. Often, development proposals must be reviewed and approved by several departments to insure compliance with a variety of technical regulations. For example, a city may require a plat application to be approved by the fire department, street department, and city engineers before formal consideration by the planning commission. Multiple departmental approvals often take time. There are no exceptions for these circumstances in Chapter 212; action within 30 days is mandatory; approval is automatic notwithstanding the presence of substantial departures from the city’s regulations.

Once a plat is approved, it must be endorsed with a certificate of approval. If the plat is approved by inaction, the planning commission or council must, on request, issue a certificate stating the date the plat was filed and that the authority failed to act on the plat within the period. If a plat is denied, the property owner may request that the city issue a certification stating the reasons for its actions taken on the application.

Standards for Plat Approval. Section 212.005 states that a city must approve a plat if it satisfies all applicable regulations. Section 212.010 indicates that a plat must be approved if: 1) it conforms to the city’s general plan 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, taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities; and 3) it complies with the city’s subdivision and other regulations. Other regulations deal with subdivision designs set by zoning regulations (e.g., lot sizes, uses, building sizes, setbacks, etc.), street and alley construction and design requirements, drainage and hydrologic features and design criteria, and public safety requirements.

The plat review and approval process is simply a checklist exercise. In theory or in actual practice, a city will have a checklist of regulatory requirements against which a plat application will be compared. If the application meets each requirement, the plat must be approved. If certain requirements are not satisfied, the city may but need not deny the application.

The Ministerial Nature of Plat Review; Mandatory Approval. Section 212.010(a) of the Code states that a city “shall” approve a plat if it meets the standards set forth in Section 212.010. The meaning of the word “shall” is clear; if the standards imposed by law are satisfied, the city has no choice but to approve the plat. Thus, the review of an application is ministerial, not discretionary, in nature. Since immunity is grounded on a public official’s exercise of discretion, immunity from personal liability is lost if the action required to be taken is ministerial in nature and does not involve the exercise of discretion. For this reason, the platting process can be perhaps the most unsettling land use area to navigate simply because the members of the governing body may subject themselves to personal liability for wrongfully denying a plat application.

This principle is illustrated in *Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229 (Tex.App.--Dallas 1995, no writ). In 1985, the City of Dallas approved planned development zoning for a 22-acre tract owned by Lincoln Property Company. The planned development ordinance authorized any use allowed in Dallas' SC Shopping Center District zoning category. However, other language in the ordinance and attached conceptual plan suggested the property could only be used for retail and office uses. A theater is a use permitted as of right in an SC Shopping Center District but was not a proposed use in the approved concept plan. The ordinance required a more detailed development plan to be submitted within six months. Several months later, a development plan was submitted and was conditionally approved subject to certain modifications. Lincoln Property never submitted a revised plan incorporating the required modifications. No further action was taken on Lincoln Property's planned development, until nearly eight years later, when a company who had the property under contract submitted a proposed development plan that provided for construction of an 18-screen movie theater and restaurant.

Bowing to vocal public opposition, the council denied the plan, concluding the proposed theater was not a permitted use on the property. The applicant lost the contract to purchase the property and filed suit against the City as well as each of the seven council members who had voted to deny the development plan. In analyzing the extent to which members of a city council may enjoy immunity, the *Bartlett* opinion acknowledges first that absolute legislative immunity is not available when local legislators are addressing a specific situation and specific individuals. Second, the opinion affirms existing law that affords public officials qualified immunity only when those officials are performing discretionary functions. Texas courts have defined the term to mean a function that requires personal deliberation, decision, and judgment on the part of an official. A "discretionary" function is to be distinguished from a "ministerial" function, which simply requires obedience to orders or the performance of a duty to which the actor has no choice.

Damages Arising from Plat Approvals. Just as the denial of proper development plans may result in liability, so too may the approval of plans if the city knows that damage to property is substantially certain to result. The leading case is *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). The City of Keller's Master Drainage Plan required developers who owned

property upstream from property owned by Wilson to construct a detention basin and easement on and across their property as a condition of development approval. Although the Plan showed the drainage easement extending across the Wilson property, the easement required by the City and built by the developers ended at the edge of the Wilson property, allowing the water to run freely out of the easement channel across the Wilson property. The channel increased both the volume and velocity of water runoff, causing damage to the Wilson land.

The suit alleged inverse condemnation by physical trespass, essentially alleging that the City's approvals of the upstream development caused the damage to the Wilson tract. In finding for the City, the court held that inverse condemnation requires that a city act intentionally in inversely condemning private property. To be liable, the City must have known that that flooding was substantially certain to result.

The Extraterritorial Jurisdiction

One of the critical legal features relating to subdivision regulation is that a city may choose to extend its subdivision regulations into its extraterritorial jurisdiction (ETJ). The ETJ of a city is an aura surrounding the territorial boundaries of a city on all sides. Its distance from city limits is determined by the city's population: if less than 5,000 inhabitants, the ETJ is one-half mile; if the population is between 5,000 and 24,999, the ETJ is one mile; if between 25,000 and 49,999, the ETJ is two miles; if between 50,000 and 99,999, the ETJ is 3½ miles; and, if the population exceeds 100,000, the ETJ is five miles.

Although a city may extend its subdivision regulations into its ETJ, it may not extend its zoning regulations. Section 212.003 of the Local Government Code states that a city shall not, within its ETJ, regulate the use of buildings or property, the bulk, height and number of buildings on a tract of land, building sizes and floor-area ratios, residential density, and the construction of certain water and wastewater facilities.

Cities may also extend and enforce building codes in their ETJ under *Lucas v. North Texas Mun. Water Dist.*, 724 S.W.2d 811 (Tex.App.-Dallas 1986, no writ). Although this authority is not expressed in Chapter 212, the *Lucas* opinion states that building construction regulation is necessarily and fairly implied from the express grants of authority to control subdivision development.

A city is not entitled to enforce subdivision regulations that occur within its ETJ by criminal means but may sue for appropriate injunctive relief.

Outside the limits of cities and beyond the ETJ of municipalities, counties have statutory authority to regulate subdivision development. However, for areas that are within a city's ETJ, cities and counties are not allowed to independently regulate subdivisions. Cities and counties are required to enter into interlocal agreements to allocate regulatory authority so as to establish a single office for plat acceptance and review and a consolidated set of development regulations. Chapter 242 of the Local Government Code requires these interlocal agreements and allows cities and counties to agree to one of four options. First, the city may be granted exclusive jurisdiction over plat and subdivision regulation; second, this exclusive regulatory authority may be conferred on the county; third, the extraterritorial jurisdiction may be apportioned into defined areas within which either the city or county may have authority; and, fourth, the city and county may agree to establish one office for plat and subdivision application review and one set of consolidated, consistent regulations.

Dedications and Exactions.

In typical subdivisions, streets and alleys, utility easements and parkland are dedicated to the public use. The effect of this dedication is that once accepted, the public (i.e., the city) acquires easement rights and assumes control and responsibility over maintenance and operation. The mere approval of a plat is not considered an acceptance of any proposed dedication and does not impose on the municipality any duty regarding the maintenance or improvement of any dedicated parts until the city makes an actual appropriation of the dedicated parts by formal action, entry, use, or improvement. For example, an approved plat that purports to dedicate a street "to the public use" does not effectively convey easement rights or the responsibility of maintenance and repair unless and until the city accepts the dedication by formal action or, in the absence of formal action, begins to conduct maintenance or repair activities.

Dedications are typically done by plats or by separate deeds that specifically convey a public easement to a public entity. Express dedications by plats and deeds are not the exclusive means, however. In order for there to be a valid dedication, there must be some act by the land owner which clearly indicates an intent to dedicate to the land in question as well as an acceptance by public or local authorities. *Broussard v. Jablecki*, 792 S.W.2d 535 (Tex.App.--Houston [1st

District] 1990); *Aransas County v. Reif*, 532 S.W.2d 131 (Tex.App. 1975 writ refused, n.r.e.).

Implied Dedications. If there is no express dedication, an implied dedication may nevertheless exist. The elements of an implied dedication are 1) the acts of the landowner induced the belief that he had an intent to dedicate to the public use; 2) the landowner was competent to dedicate; 3) the public relied on the acts and will to be served by the dedication; and, 4) there was an offer and acceptance of the dedication. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 256 (Tex. 1984).

The first of the foregoing elements does not require that the developer or property owner actually have the intent to dedicate. Rather, it is sufficient if the owner's acts induced the belief. In the *Zavala County* case, the only acts which substantiated an implied dedication, and the ensuing road easement in favor of *Zavala County*, were a continuous public use of the roadway for 30 years and *Zavala County's* maintenance of the roadway for many years. 682 S.W.2d at 256-257.

Dedication by Sale of Lots. Where a recorded plat fails to accomplish a dedication of land, a dedication may nevertheless occur by a sale of lots within the platted subdivision that make reference to the recorded plat. The sale of lots by deeds which make reference to a recorded plat constitutes a dedication of the streets, alleys and other ways designated in the plat. *Adams v. Rowles*, 149 Tex. 52, 228 S.W.2d 849 (1950); *Bowen v. Ingram*, 896 S.W.2d 331 (Tex.App.--Amarillo 1995); *Manziel v. Railroad Commission of Texas*, 197 S.W.2d 490 (Tex.Civ.App.--Austin 1946, writ ref'd, n.r.e.). The court's inquiry is centered on three requirements: 1) whether the plat shows the existence of the disputed easement, 2) whether it can be ascertained with reasonable certainty the purpose for which the easement was intended, and 3) whether property was purchased with reliance on the plat. *Fall v. Thompson*, 126 Tex. 326, 87 S.W.2d 712 (1935); *Clement v. City of Paris*, 107 Tex. 200, 175 S.W. 672 (1915); *City of Corsicana v. Zorn*, 97 Tex. 317, 78 S.W. 924 (1904).

Dedications required by subdivision regulations are not problematic in most instances. For example, a developer usually has no desire to bear the responsibility of perpetual street maintenance and the city has a genuine public safety interest in insuring proper rights-of-way, not just for public travel but for emergency vehicle access. However, a dedication is by definition an exaction, a cost exacted by a city from a property owner in exchange for the city's development approvals. As discussed earlier, in some circumstances an exaction may be regarded as a

taking of private property without just compensation, a categorical form of inverse condemnation, in the absence of rough proportionality.

Public vs. Private Streets.

A street is nothing more than an easement held by the public where the public has the right of use for the purposes of travel, regardless of the manner in which it was acquired.

“A way over land set apart for public travel in a town or city is a street, no matter what it may be called. It is the purpose for which it is laid out and the use made of it that determines its character. ‘Street’ is a general term, and includes all urban ways which can be and are generally used for the ordinary purposes of travel.” *Kalteyer v. Sullivan*, 18 Tex.Civ.App. 488, 46 S.W. 288, 290 (San Antonio 1898). See, also, *Anderson v. Tall Timbers Corporation*, 378 S.W.2d 16, 28 (Tex.1964); *Howeth v. State*, 635 S.W.2d 636, 637 (Tex.Civ.App.--Austin 1983) *rev’d on other grounds*, 645 S.W.2d 787 (Tex.Cr.App.1983); *Town of Refugio v. Strauch*, 29 S.W.2d 1041, 1043 (Tex.Comm.App. 1930, jdmt adopted).

When a road or street is dedicated to the public, the governmental entity exercising jurisdiction over the street ordinarily acquires only an easement in the street. *Word of Faith Outreach v. Oechsner*, 669 S.W.2d 365, 367 (Tex.App.--Dallas 1984). See also, *Humble Oil and Refining Co. v. Blankenburg*, 149 Tex. 498, 235 S.W.2d 891, 893 (1951); *Pittman v. City of Amarillo*, 598 S.W.2d 941, 944 (Tex.Civ.App.--Amarillo 1980, writ ref’d, n.r.e.).

Nevertheless, the public has the responsibility for road repair and maintenance. Government entities can be liable for unsafe road conditions, subject to limited waivers of immunity set forth in the Tort Claims Act (Ch. 101, TEX. CIV. PRAC. & REM. CODE). If an injury arises from a street defect, the government entity owes to the claimant the same duty that a private person owes to a licensee on private property, *i.e.*, to refrain from willful, wanton or gross negligence, and to warn and make conditions reasonably safe if the government has actual knowledge of a condition likely to cause injury. If the defect is a special defect, one that involves excavations, obstructions, or other conditions that present unexpected and unusual danger to ordinary users of roadways, the duty owed is that owed by a private person to an invitee, *i.e.*, the exercise of

ordinary care to protect against a condition that creates an unreasonable risk of harm.

Private streets in subdivisions are maintained by a homeowner’s association. A city or county will exercise authority over street design and standards in the platting process but will not bear the responsibility for maintenance. The general public has no right to use private streets for travel. A city’s aversion to maintain streets, and its proclivity to allow private streets, necessitates regulatory requirements over the establishment of a mandatory and perpetual homeowner’s association. Where private streets may be allowed, the municipality should insist on retaining the authority to approve the terms and conditions of the subdivision’s deed restrictions to insure that the homeowner’s association is mandatory and perpetual, that unpaid dues can constitute a lien on property, and that the city has the option (but not the duty) to assume all responsibilities and authorities of the association in the event of its default.

Private streets present two issues, the question of maintenance if a homeowner’s association defaults, and the question of traffic enforcement.

HOA Default. In older subdivisions, street maintenance becomes a significant issue when the homeowner’s association’s funding becomes limited or when the homeowner’s association simply dissolves or becomes inactive. It is common for the residents to look to the city to assume maintenance and repair. It should be noted that public entities are constitutionally prohibited from expending public funds for private benefit. Expending taxpayer funds to improve a private street approaches this constitutional prohibition, even assuming that the city is willing to effectively make the taxpayers residing outside the private subdivision share in the cost of street repairs for which they receive no benefit. The city’s reluctance is often exacerbated if prior councils had approved nonconforming streets. Moreover, were the city to simply perform repairs on a one-time or limited basis, it may inadvertently render the streets public and no longer private. Since members of the public (the residents of the subdivision) use the streets, the maintenance of the roadway can be regarded as an acceptance of an implied dedication. *Las Vegas Pecan & Cattle Co. v. Zavala County, id.*

There are some limited solutions to this problem. The city may assume responsibility over the deteriorating streets and compel adjacent homeowners to participate in the cost of repairs by levying street paving assessments. Although the

rules are somewhat different as between home rule cities and general law cities, the basic result is the same: the property owners fronting the street will be assessed a percentage of the cost of street improvement. See, Chapter 311, TEX. TRANS. CODE). If the city is unwilling to accept the streets as public streets, a city may, on the petition of a majority of the subdivision residents, create a public improvement district (PID) which will assume responsibility for, among other things, street repair and improvement. The cost of repair and maintenance is assessed against the owners of property within the district, and is assessed and collected in the same manner as ad valorem taxes. (See, Chapter 372, TEX. LOCAL GOV'T CODE).

Traffic Enforcement. A city has no authority to enforce the vast majority of state-imposed traffic laws on private streets. Compliance with traffic laws in private subdivisions is voluntary. Section 542.008 of the Transportation Code allows for the extension of traffic enforcement to private streets on petition of at least 25% of the subdivision residents or the HOA, assuming the HOA has street repair responsibility. If a city receives such a petition, it may adopt an ordinance that extends traffic regulations to and authorizes traffic enforcement on the streets within the subdivision. The petition must specify the traffic rules that are sought to be extended. The ordinance may extend any or all of the requested rules.
