

# **THE DEVELOPER WANTS TO DO WHAT IN OUR FAIR CITY?**

## **The Basics of Land Use and Development Regulation**

*By*

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# **The Basics of Land Use and Development Regulation**

## **I. Introduction**

This paper is an introduction to the basic land use and development regulatory authority of municipalities. Hopefully, it will serve as a starting point for understanding the concepts at play and the underlying authority for city controls. The reader is encouraged to look to hornbook treatises such as John Mixon's Texas Municipal Zoning Law and the Matthew Bender multi-volume treatise by Patrick Rohan entitled Zoning and Land Use Controls. Both of these works are good resources for understanding the general theory and legal principles associated with land use and development regulation.

**Warning:** My experience with land use and development regulation is an Austin experience. My paper and my presentation reflect this prospective. I welcome comments from others concerning their experience with other jurisdiction in the hopes that those experiences will provide a broader perspective to the participants in this seminar.

## **II. City Authority**

### **The Authority**

As societies became more complex and developed into extensive urban communities, land use controls by a municipality were recognized as a way in which the problems caused by intense or inappropriate development can be controlled or remedied. The authority and purpose for those controls was enunciated by the U.S. Supreme Court in the landmark case: *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 567, 53 L.Ed. 923 (1909). This authority was confirmed by the Texas Supreme Court recognition that “all property is held subject to [the] valid exercise of police power” and that a municipality has the ability to protect the “health, comfort, and general welfare” of its citizens through the exercise of land use controls. *Lombardo v. Dallas*, 73 S.W.2d 495, 124 Tex. 1 (1934).

This exercise of police power authority by cities, in turn, has also been extended over time to other development controls such as subdivision and site development (plan) controls. See, e.g., *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.). Obviously, the valid exercise of a city's police power to regulate use and development requires compliance with statutory, constitutional, and city charter limitations. See, also, Texas Local Government Code ("Local Government Code"), Sections 211.001 and 212.0025.

### **Impact of City Type and Location of the Development**

A city's authority over land use and development is controlled by two fundamentals: (1) the nature of the city, and (2) the location of the development. Title 2 of the Local Government Code describes the types, boundaries, extra-territorial jurisdiction, formation, governing body, form of government, and annexation authority, etc. of the various types of Texas cities. Cities are divided into general law, special law, or home-rule cities by the Local Government Code.

City type, whether general law A, B, C, or home-rule, affects a city's authority and the procedures it must follow in land use and development regulatory matters. For example, the Local Government Code requires home-rule municipalities to appoint a zoning commission, but makes that appointment discretionary with general law cities. Local Government Code, Section 211.007. Annexation authority is affected by city type, while the extent of a city's extra-territorial jurisdiction is affected by the number of its inhabitants. Local Government Code, Sections 42.021, and 43.023 et seq.

Land use and development regulatory authority also depends upon whether the development is located inside or outside a city's municipal boundaries. A municipality's boundaries consist of full purpose, limited purpose, and extra-territorial jurisdiction areas.

- In its full purpose annexed area jurisdiction a municipality exercises full land use and subdivision authority under Chapters 211 and 212 of the Local Government Code.
- In its limited purpose annexed area jurisdiction, a municipality may exercise planning, zoning, and health and safety powers under section 43.121 et seq. and 212.101 et seq. of the Local Government Code. A city must be a home-rule city, must exceed 225,000 inhabitants, and must have a charter provision allowing limited purpose annexation to exercise this authority. It is also advisable for the annexation

ordinance for limited purpose annexation to indicate the limited purpose authority for the annexation, such as planning and zoning.

- While a municipality has subdivision and other public health, safety, and welfare authority in its extra-territorial jurisdiction, it may not exercise land use controls or require building permits. Local Government Code, Sections 212.003, and 212.049. Furthermore, municipalities share subdivision authority with the county in which that city has extra-territorial jurisdiction if the county is exercising subdivision authority under Chapter 232 of the Local Government Code. See, Local Government Code, Chapter 242.

Consequently, it is imperative to know both the type of the municipality exercising jurisdiction and the location of the proposed development to determine the nature and extent of the regulatory authority controls over the proposed development.

### **III. Order of Process and Effect on Land Development Controls**

#### **Concepts**

Cities control both the way land is used and the way in which development takes shape:

- (1) Zoning is the control of the use of property as recognized by *Euclid* and *Lombardo* and section 211.003 of the Local Government Code.
- (2) Subdivision is the laying out of a tract of land into lots, streets, parks, etc. in conformance with the proposed use of the tracts, including public dedications. See, *City of Corpus Christi v. Unitarian Church of Corpus Christi*, supra at 928. The City of Austin requires, with exceptions, a two step subdivision process consisting of a preliminary plan and the final plat. As discussed more in detail below, the preliminary plan is the conceptual development plan for the layout of the final subdivision plat, which follows. The Local Government Code does not speak to preliminary plans.
- (3) The site plan, at least for City of Austin purposes, is the master plan for development of individual tracts based upon the zoning and

final plat for the tracts. See, generally, Chapter 25-5 of the Austin City Code. There are exceptions to the necessity for a site plan, such as single-family residential structures under certain conditions. As with preliminary plans, the Local Government Code does not speak to site plans.

(4) Finally, a building permit (and in some instances, a subdivision construction permit) is the authorization to proceed with construction and is issued upon the satisfaction of, and in conformance with, all applicable zoning, platting, and site plan requirements. The building permit is also the means by which a city requires compliance with the building codes authorized by Chapter 214 of the Local Government Code.

### **The Order**

Cities often elect to specify the order of process for securing development approvals. The order of process addresses the nature of the control exercised by a municipality. Development of a comprehensive plan and zoning in compliance with that plan are legislative functions of the city, while subdivision, site plan, and building permit approvals are, generally speaking, regulatory activities implementing the city's legislative wishes concerning how land within its jurisdiction is to be used. See, *Lacy v Hoff*, 633 S.W.2d 605 (Tex. Civ. App.-Houston 14<sup>th</sup> dist. 1982, writ ref'd. n.r.e.) for a general comparison of zoning and platting.

Land use dictates how development occurs. Land zoned or laid out for single-family detached residential use will look differently than land zoned or laid out for a commercial or industrial development. If property is laid out through the subdivision process prior to zoning, the plat may require modification if that zoning approval is inconsistent with the original plat. Consequently, it is desirable to speak to the order in which development approvals are received.

The general goal is to establish land use by legislative act first so that the land use drives the subdivision design and subsequent permits needed for the development. The goal is not to allow the regulatory function of plat approval to affect the legislative will of the municipality. Finally, the site plan or the building permit is a function, not only of what use is being permitted on the land, but also the way in which the tract is laid out for

purposes of construction. Logically, those permits should be approved last in the series of permits for the development.

Accordingly, the City of Austin provides for the following order of process: zoning, subdivision, site plan, and building permit. Austin City Code, Section 25-1-61. While this provision sets forth the process permitting the City to legislate first, where it has the authority to do so, the Austin City Code remains flexible concerning the zoning and regulatory application process. The Code permits concurrent applications for all of these approvals, but requires the order of the granting of the approvals to follow the order of process. See, e.g., Austin City Code, Section 25-4-53.

#### IV. Zoning

##### Comprehensive Plan

Having generally looked at the differences in what, where, and how a municipality regulates development, it is appropriate to look at each of these controls in detail. Zoning is the logical starting point because it drives the remaining regulatory approvals in those areas where it applies. It must be emphasized that a city may not regulate land use in its extra-territorial jurisdiction. Local Government Code, Section 212.003. That inability considerably constrains a city's development regulatory control and may affect its control over the remainder of the development process.

Under the Local Government Code, the zoning process begins with a comprehensive plan. Cities must zone in compliance with their adopted comprehensive plans. Local Government Code, Section 211.004. However, the courts have recognized that cities without adopted comprehensive plans may zone under the authority granted by the Local Government Code, but in those instances the zoning ordinances themselves become the comprehensive plan. *Mayhew v. Town of Sunnyvale*, 774 S.W. 2d 284 (Tex.App.-Dallas 1989, writ den.) cert. den. 498 U.S. 1087, 111 S.Ct. 963, 112 L.Ed.2d 1049 (1991).

Zoning must accomplish certain purposes: lessening street congestion; securing the safety of the city from dangers such as fire, promoting health and general welfare; providing light and air; preventing overcrowding, etc. Local Government Code, Section 211.004. If the proposed zoning is

inconsistent with the comprehensive plan, it must either be denied, or the plan must be amended to accommodate the zoning.

A municipality may divide the city into zoning districts and may adopt zoning regulations for the districts. The zoning regulations must be uniformly applied within a district, but may vary between districts. The Local Government Code mandates that district regulations take into consideration the character of the districts and suitability of the district for a particular use. The Local Government Code also requires the regulations to consider the most appropriate use for a given district and to conserve the value of buildings within the district. Local Government Code, Section 211.005.

The Local Government Code specifies what constitutes an appropriate zoning regulation, e.g., size and bulk of structures, height or stories, lot coverage, open space, density, location of structures, and construction and reconstruction of structures with certain cultural and historic characteristics. Local Government Code, Section 211.003.

### **General Procedures and the Zoning Commission**

Cities are required by section 211.006 of the Local Government Code to establish procedures for adopting both zoning regulations and zoning district boundaries. The Local Government Code also establishes minimum procedural and notice requirements for adopting those zoning regulations and boundaries. The City of Austin's procedures for enacting zoning ordinances are contained in Chapter 25-1 of its City Code.

In addition to the minimum notice provisions specified for zoning decisions in sections 211.006 and 211.007 of the Local Government Code, the Code requires the creation of a zoning commission in home-rule municipalities whose duty it is to recommend zoning boundaries and regulations to the City's governing body for final adoption. A city's planning commission may serve as the zoning commission under certain circumstances. Local Government Code, Section 211.007.

General law cities, on the other hand, are not mandated to create a zoning commission but, rather, are given the discretion to decide whether a separate commission to recommend zoning boundaries and regulations is appropriate. If a general law city does not have a zoning commission, the time line for

adoption of a zoning decision is delayed. Local Government Code, Section 211.006.

Section 211.0075 of the Local Government Code requires the commission created to assist with the development of the initial comprehensive plan and initial zoning to comply with the open meetings provisions contained in Chapter 551 of the Government Code. Austin's code requires all of its boards and commissions to comply with the Open Meetings Act. Austin City Code, Section 2-1-2. It is also important to note that the Local Government Code mandates public hearings for zoning changes before both the zoning commission and the governing body of the municipality. Local Government Code, Section 211.007.

As previously noted, the notice requirements contained in the Local Government Code are minimum requirements, and cities may adopt additional notice procedures. For example, the Local Government Code specifies newspaper notice of zoning changes in section 211.006(a) and specifies notice to certain property owners in section 211.007(c). The City of Austin provides for notice not only to property owners, but also neighborhood associations. The Local Government Code requires notice to property owners within 200 feet of the property, while the City of Austin proscribes notice to property owners within 300 feet. The City of Austin also requires that signs concerning the proposed zoning matter be posted on the property. Austin City Code, Sections 25-1-133(A) and 25-2-261.

Some procedures and rights created by the Local Government Code such as the notice requirement contained in section 211.006(a) apply to all zoning, whether it is the initial zoning or a change in zoning. Some procedures only apply to changes in zoning, such as the super-majority vote provisions contained in 211.006(d). The City of Austin also distinguishes between zoning and rezoning. Austin City Code, Section 25-2-241.

### **Two Commission System**

The Local Government Code speaks to the creation of a zoning commission and a planning commission. The Code recognizes that both functions may be combined into one body under certain circumstances. See, generally, Local Government Code, Section 211.007. The Local Government Code contains no limitation concerning the possibility of multiple commissions with differing functional jurisdictions. The City of Austin recently engaged

in a neighborhood-by-neighborhood re-working of its comprehensive plan and associated zoning through a neighborhood planning process. To accommodate the increased workload caused by this massive undertaking, the City created a bifurcated commission system in 1992.

The City of Austin's Planning Commission was created by Article X of the City's Charter and charged with making recommendations to the City Council concerning the comprehensive plan. That Commission also makes zoning recommendations, land development regulation recommendations, and controls platting and subdividing within the annexed areas of the City and the City's extra-territorial jurisdiction. Under the re-work of the City's comprehensive plan, the Planning Commission considers all plan amendments and associated zonings and subdivision permitting for the areas of the city in the neighborhood planning process. The Planning Commission also considers potential changes to Austin's land development regulations.

The Austin City Council then created an additional Zoning and Platting Commission to serve as the zoning and platting commission for those areas of the city which have not undergone the planning effort (except for the Robert Mueller Municipal Airport redevelopment site). The jurisdictional split between the two commissions is described in detail in section 25-1-46 of the Austin City Code.

### **Interim Zoning, Initial Zoning, or Re-Zoning**

As discussed briefly above, the provisions of the Local Government Code distinguish between initial zoning and a change in zoning. Once initial zoning is granted by the governing body of the municipality any re-zoning is a change in zoning, which then invokes all of the Local Government provisions that apply to the process for changing zoning. Of critical importance in this regard is that the "valid petition/super-majority" provisions of the Local Government Code apply to changes in zoning and not the grant of initial zoning. Local Government Code, Section 211.006(d).

Cities have different practices concerning zoning on annexation. The Local Government Code does not dictate this particular process. Case law has generally recognized the need for cities to preserve the status quo of land uses upon annexation to provide adequate time for appropriate land use planning. See, e.g., *Appollo Development, Inc. v. City of Garland*, 476 S.W.2d 365 (Tex. Civ. App.-Dallas 1972, writ ref'd n.r.e.); *Westwood*

*Development Co. v. City of Abilene*, 273 S.W. 2d 652 (Tex. Civ. App.-Eastland 1954, writ ref'd. n.r.e.). In many instances, this status quo is preserved by some type of temporary zoning. However, cities must take action to permanently zone annexed property within a reasonable period of time. *Haynes v. City of Quanah*, 610 S.W. 2d 842 (Tex Civ. App.-Amarillo 1980, writ ref'd. n.r.e.). The issue of whether the Texas validation statute addressing procedural errors might cure the failure to permanently zone in a reasonable period of time was not addressed in the *City of Quanah* case and constitutes a debate beyond the scope of this paper. Texas Government Code, Section 51.002.

Property annexed into the City of Austin is automatically accorded interim zoning under section 25-2-222 of the City Code unless permanent zoning is accomplished during the course of annexation. Under the Austin City Code the conversion to permanent zoning is considered the initial zoning for the property. After conversion to permanent zoning, further zoning is considered a change in zoning for the property. Consequently, the “valid petition/super-majority” provisions of the Local Government Code do not apply to either the interim or the permanent zoning conversion process. Those provisions only apply to a change in the permanent zoning.

### **Initiation of Zoning**

As to who may actually initiate a zoning proceeding, the Local Government Code is silent on the issue. However, under section 25-2-242 of the Austin City Code, zoning changes may be initiated by the appropriate land use commission, the City Council, or the owner. In Austin historic zoning changes may be initiated by the city’s Historic Landmark Commission in addition to the owner, the land use commission, or the City Council.

### **Number of Votes for Approval**

A final zoning determination is an expression of the governing body’s legislative authority. The number of votes required for passage is the number of votes required for passage of legislation and may often be dictated by a city’s charter.

There is one exception to this general rule, the super-majority requirement in the instance of a “valid petition”. Section 211.006 of the Local Government Code requires a three-fourths majority vote of all of the members of the

governing body of a municipality if a zoning change is protested in accordance with the requirements of the Code. Cities may also provide for super-majorities in other instances as well. For example, section 25-2-284 of the Austin City Code requires a super-majority vote if the Austin City Council denies planned unit development (“PUD”) zoning recommended by the land use commission.

### **Additional Constraints**

The governing body of a municipality may grant conditional zoning; that is, it may impose additional conditions of restraint in a zoning matter under a city’s general zoning/public health, safety, welfare powers. Conditional zoning may, for example, impose greater height restrictions or prohibit otherwise allowable uses. Such conditions are not considered impermissible contract zoning, because the conditions do not require something of value in return from the developer.

In Austin these additional conditions are imposed in one of two ways, either by conditional overlays creating a conditional overlay combining district or by restrictive covenant. Under Austin’s City Code conditional overlays are appropriate only to further restrict existing use and site development restrictions. If the restriction desired is not addressed by City Code, the appropriate mechanism is to impose a restrictive covenant to achieve the desired restriction. See, Austin City Code, Sections 25-2-331 et seq.

### **Cumulative Zoning**

Some zoning is hierarchical in nature. Governing bodies will establish intensity of zoning ranges from the least intensive to the most intensive use of land. See, e.g., Austin City Code, Section 25-2-33. Some jurisdictions, once the hierarchy is established, permit less intense uses such as single-family residential development in zoning districts that allow more intense uses such as multi-family. Allowing uses less intensive uses from one zoning category to be permitted in a zoning category consisting of more intense uses is cumulative zoning.

### **Planned Unit Developments--PUD’s**

PUD’s are zoning districts containing large areas of development, which may include different uses. Generally, the planning for such an area is done

on a holistic basis with the idea of integrating diverse uses into a community development. The goal is to create a set of individualized development regulations that achieves this unified community development. The City of Austin contains extensive regulations concerning how PUD zoning may be accomplished and the manner in which the individualized regulations may be created for such developments. Austin City Code, Sections 25-2-391, et seq.

### **Legal Non-Conforming Uses**

In zoning parlance, a legal non-conforming use is a use that, at the time of its creation, was permissible, but, because of the passage of zoning regulations, is no longer permitted. In essence, it is the grandfathering of a use. Generally, a legal non-conforming use is created by an annexation event or a change in zoning. The City of Austin City Code contains specific conditions for the perpetuation of a non-conforming use and what may be done under a non-conforming use status. See, Sections 25-2-941, et seq.

### **Accessory and Temporary Uses**

There are instances in which a use, although it is prohibited as a primary use, may be allowed as an accessory or temporary use. A classic example in the City of Austin is the garden center attached to a Home Depot or a Lowe's. In some instances a zoning district that permits a Home Depot or a Lowe's does not permit a stand-alone garden center. However, the Austin City Code recognizes that such uses are permissible and appropriate if they are a part of the business constituting the primary use. Under very specific limitations a prohibited use will be permitted as an accessory use to a primary use in Austin. Austin City Code, Sections 25-2-891 et seq.

Other uses may be temporary or transitory in nature, and do not justify the time and effort necessary for a zoning change. The governing body of the municipality may elect to treat these uses as permissible on a temporary basis in zoning classifications in which they are otherwise prohibited. Examples recognized by the Austin City Code as appropriate temporary uses, again under certain conditions and limitations, include: model home sales, on-site construction field offices, Christmas tree sales lots, and arts and crafts shows, among others. Austin City Code, Section 25-2-921.

## **Federal and State Constraints**

Constitutional constraints on exactions, takings, and due process issues are discussed elsewhere. However, there are constraints other than property interest constraints that affect zoning. Without a doubt, sexually-oriented businesses and religious assemblies are uses that fall within special First Amendment protections. In addition, the manner in which local governments may regulate the location of cellular towers, satellite dishes, and other telecommunications infrastructure has been constrained by federal enactments. Another constraint on zoning is imposed by federal fair housing legislation.

The Local Government Code contains specific provisions prohibiting land use controls over federal and state properties but permits land use controls over facilities leased to a state agency. Local Government Code, Section 211.003. The Local Government Code also contains provisions regarding pawnshops and procedures regarding the location of correctional or rehabilitation facilities and homeless shelters. See, Section 211.0035 and Chapter 244. Section 31.165 of the Texas Natural Resource Code addresses zoning and development authority and process for state surplus lands.

There is also extensive case law concerning the ability of a municipality to control the development activities of other political subdivisions, both from a zoning and development regulatory perspective. Suffice it to say, an in-depth review of these various aspects of the limitation on a municipality's zoning and development regulatory authority should be carefully examined if this is an issue.

## **Historic Zoning**

Section 211.003(b) of the Local Government Code permits the governing body of a municipality to “regulate the construction, reconstruction, alteration, or razing of buildings and other structures” of historical importance. Additionally, section 11.24 of the Texas Tax Code permits cities to provide tax breaks to structures designated as historic. As previously noted, the City of Austin has provided initiation of historic zoning by the City of Austin Historic Landmark Commission in addition to initiation by the land use commissions and the City Council. Austin has also provided tax breaks to structures zoned as historic. Austin protects both

individual structures and areas that exhibit certain historic characteristics. Austin City Code, Section 25-2-171, among others.

### **Deviations from Zoning Limitations**

Variations from the literal requirements of a zoning grant are permitted without the necessity of a zoning change. This area of zoning is conceptually one of the more complicated areas of zoning law with extensive case law guidance.

The Local Government Code permits the creation of a board of adjustment by the governing body of a municipality with the authority to consider and grant of relief from zoning limitations. The relief the board may grant is extraordinary in nature in the sense that the board is empowered to deviate from the legislative will of the governing body of the municipality. Given this grant of authority, the legislature has imposed very strict substantive and procedural limitations on the exercise of that authority. Local Government Code, Section 211.008.

The board of adjustment functions as a quasi-judicial board and is sovereign in its decision-making. That is, its decisions may only be reviewed by the courts using an abuse of discretion review standard. Local Government Code, Section 211.011; *Board of Adjustment of the City of Dallas v. Patel*, 887 S.W.2d 90 (Tex. App. 1994, writ den.).

Section 211.009 of the Local Government Code allows a board of adjustment, upon authorization by a municipality, to consider: (1) appeals concerning an allegation of error by an administrative official concerning zoning regulations or provisions of Chapter 211 of the Local Government Code; (2) special exceptions to a zoning ordinance if required by the zoning ordinance; (3) variances to zoning ordinances; and (4) other matters authorized by ordinance under Chapter 211. One common subject area often assigned to boards of adjustment not mentioned in the Local Government Code is the extension of a non-conforming status where that status is limited in duration by city code. The City of Dallas is an example of a municipality that has granted this authority to its board of adjustment.

The board must consist of at least five members serving two-year terms. The Local Government Code speaks to the manner of appointment and removal. The Code imposes a requirement that each case must be heard by

75% of the members of the Board and that the consent of 75% of the members of the board is required to grant relief. Recognizing the difficulty of reaching this hearing requirement and voting hurdle, the Code provides for the appointment of alternates to serve for absent board members. The board must keep minutes including a record of the vote, and the board is required to keep a record of its examination during its proceedings. The Code specifically mandates that the board's hearings and its records are open to the public. Local Government Code, Section 211.008.

The grant of a special exception may only occur as provided by the zoning ordinance and must be subject to appropriate conditions and safeguards. Local Government Code, Section 211.008. Variances to zoning ordinance conditions considered by the board may only be granted if: (1) the variance is not contrary to the public interest; (2) special conditions exist that would result in a literal enforcement of the ordinance creating an undue hardship; (3) the spirit of the zoning ordinance is observed in the grant of the variance; and (4) granting the variance does substantial justice. Local Government Code, Section 211.009; *Ferris v. City of Austin and Board of Adjustment*, 150 S.W.3rd 514 (Tex. App.-Austin 2004, no writ hist); see, also, *City of Alamo Heights v. Boyar*, 158 S.W.3rd 545 (Tex. App.-San Antonio 2005, no writ hist.) for an excellent discussion of hardship.

A board of adjustment may only vary the terms of a zoning ordinance to the extent that the purpose or the intent of the original zoning enactment is fulfilled. It may not grant a variance regarding anything that may be solved by a zoning change; that function is within the exclusive purview of the governing body of the municipality. A board simply may not take over the legislative function of the governing body. *Swain v City of University Park*, 433 S.W.2d 727 (Tex. Civ. App. – Dallas 1968, writ ref'd. n.r.e.), *cert. den.* 396 U.S. 277, 90 S.Ct. 563, 24 L.Ed.2d 465 (1970), and *rehearing den.* 397 U.S.977, 90 S.Ct. 1085, 25 L.Ed.2d 274 (1970).

For example, boards of adjustment may not vary a use. Use changes require a zoning change, because such changes invade the legislative prerogative of the governing body that set the use for the property. *Ferris v. City of Austin and Board of Adjustment*, *supra* at 517. Analogously, boards of adjustment may not vary the terms of a conditional overlay imposed on the zoning grant by the governing body of the municipality, because, again, a conditional overlay is a specific legislative imposition by the governing body. Quite simply, if a request for a variance from the terms of the zoning ordinance

may be cured by seeking a zoning change, the appropriate remedy is to seek that change, not a board of adjustment variance.

## **V. Subdivision**

### **Platting According to Intended Use**

Property must be properly laid out through the subdivision process in accordance with its designated use for purposes of conveyance and development. Even in a municipality's extra-territorial jurisdiction, the appropriate way to lay out property will be dictated by its intended use.

Chapter 212 and Chapter 242 of the Local Government Code address the requirements and process for subdivision approval. Chapter 212 sets the fundamental process and substantive approval requirements for plats, while Chapter 242 of the Local Government Code addresses the shared jurisdiction over plat approvals between counties and cities in a city's extra-territorial jurisdiction.

While zoning is complete once the decision is made by the governing body of the municipality, approval of a plat does not accord the plat "final plat status". That status is gained only when the plat is both approved and recorded in the county deed records. Property cannot be conveyed by plat until it is both approved and recorded. Texas Property Code, Section 12.002.

### **Two Systems**

There are two systems for laying out property in Chapter 212, one in subchapter A and one in subchapter B. A city may elect to require development plats under subchapter B in lieu of the subdivision plat requirements contained in subchapter A. Subchapter B applies those requirements contained in subchapter A that do not conflict with the subchapter B provisions. The focus of this presentation is on subchapter A requirements and the provisions of Chapter 242.

## **Subdivision Requirement**

The basic subdivision requirement is set forth in Section 212.004 of the Local Government Code and requires the owner of a tract of land to prepare a plat if the owner is dividing the tract into at least two parcels:

“to lay out suburban, building, or other lots, or to lay out streets, alleys, squares, parks, or other parts 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 streets, alleys, squares, parks, or other parts...”

The approval authority for plats by a municipality is the planning commission, if one exists; otherwise the authority for approval lies with the governing body of the municipality. A municipality may elect to require the approval of the governing body of the municipality in addition to the approval of the planning commission. Local Government Code, Section 212.006(a). Those cities having more than 1.5 million inhabitants have additional requirements concerning the makeup of the planning commission for plat approvals. Local Government Code, Section 212.006(b). Section 212.0065 of the Local Government Code permits an administrative approval process in some instances for minor adjustments or minimal land under certain restrictions. Finally, the Code addresses approvals in overlapping extra-territorial jurisdictions in Section 212.007.

As always, there are exceptions to the requirement. Most notably section 212.004 of the Local Government Code excludes the need for a plat if the property is being subdivided into tracts greater than five acres as long as those tracts have access, and no dedication of public improvements is necessary. Under certain circumstances tracts abutting aircraft runways also need not be subdivided. Local Government Code, Section 212.0046.

## **Necessity to Plat**

Section 212.0115 of the Local Government Code entitles property owners to a determination concerning the necessity to plat in the form of a certificate of compliance. There are deadlines and procedures for securing the needed status. In Austin this is referred to as a “Land Status Determination”. Upon receipt of the certificate, a property owner may then secure utility service. The Austin City Code procedure for securing a Land Status Determination is contained in section 25-4-2.

## **Procedure and Standards**

A copy of the proposed plat must be submitted to either the planning commission or the governing body, depending upon which body has approval authority. The approving authority must act on the plat within 30 days after filing, or the plat is deemed approved. Additional time is allotted if both a planning commission and the governing body must approve the plat. Once approved, the plat must be endorsed indicating the approval. Local Government Code, Section 212.009.

Unlike zoning, which is a discretionary legislative act, plat approvals are a regulatory function performed by a municipality under rules established by the governing body. The Local Government Code recognizes the purpose for platting as the promotion of the “health, safety, morals or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.” Local Government Code, Section 212.002.

Section 212.010 of the Local Government Code mandates approval if the plat conforms to the municipality’s general plan, meets bonding requirements, and conforms to the rules adopted by the municipality under Section 212.002. That is, the plat must be approved if it meets all regulatory requirements. The only discretion the approving authority may exercise in the approval process is the decision as to whether platting requirements have been met.

## **Consequences for Failing to Plat**

Section 212.012 of the Local Government Code does not permit the extension of utility service to a piece of property that does not have the appropriate determination concerning the necessity of a plat. More importantly, the state attorney general has enforcement authority concerning water and sewer facilities, and a municipality’s city attorney has authority to seek injunctive relief and damages for failure to comply with platting requirements. Local Government Code, Sections 212.0175 and 212.018; see, also, Section 212.050.

## **Plats and Dedications**

Dedication of land for public purposes and acceptance of the dedication is separate and apart from platting. The approval of a plat does not constitute acceptance of a proposed dedication. In other words, the approval of a plat does not impose any duty regarding a proposed dedication until the municipality actually enters, uses, or improves the dedicated property. Local Government Code, Section 212.011. The Austin City Code provides for the specific acceptance of a dedication by an action other than the plat approval. Austin City Code, Section 25-4-38.

## **Vacations, Re-Plats Without Vacation, and Amending Plats**

The consequences of attempting to change a plat can be devastating once public dedications have been made, covenants or restrictions imposed, or subdivided tracts have been sold by plat reference. A plat vacation has the effect of eliminating the original layout of the land. Obviously, a plat vacation affects the property rights of purchasers of subdivided tracts. Consequently, the Local Government Code contains extensive requirements for vacating, re-platting without vacation, and amending plats. Local Government Code, Sections 212.013, 212.014, et seq.

Again, each particular situation should be carefully considered to determine the appropriate procedure and necessary approvals. Both Local Government Code provisions and the corresponding city code requirements associated with these provisions must be carefully consulted.

## **Preliminary Plans**

Some jurisdictions, such as the City of Austin, provide for a two step subdivision process. The Local Government Code, on the other hand, addresses the platting process as a whole. The authority for the creation of the two step process is the general municipal authority contained in the Local Government Code to develop appropriate rules and regulations for subdivision approvals.

In Austin the purpose of the preliminary plan is to lay out a master plan for the division of the property and the general scheme of development. A preliminary plan must include all of the property proposed for development and must speak to the “orderly planning of roads, utilities, drainage, and

other public facilities”. Austin City Code, Section 25-4-33; see, also, Section 25-4-51. Once the preliminary plan is approved, individual portions of the plan then may be final platted in separate discrete subdivision plats. Austin City Code, Section 25-4-81.

The Austin City Code recognizes the possibility of a development that extends beyond the scope of the filed preliminary plan. If that is the case, an applicant must also file a master development plan in schematic form again emphasizing the “safe, healthful, and orderly extension of roads, utilities, drainage, and other public facilities.” Austin City Code, Section 25-4-52.

As always, at least in Austin, there are exceptions to the necessity for securing a preliminary plan; those exceptions are outlined in sections 25-4-51 et seq. of the City Code. The relevant city code provisions should be consulted for guidance.

### **Chapter 242 Shared Authority with Counties**

Chapter 242 of the Local Government Code is an attempt to streamline the joint approvals of subdivision plats between counties and cities in a city’s extra-territorial jurisdiction. The chapter requires the adoption of a regulatory agreement between cities and counties providing for plat approvals for property located in a city’s extra-territorial jurisdiction. The provisions do not apply to cities including counties with a population in excess of 1.9 million or more, counties within 50 miles of an international border, or to a tract of land subject to certain development agreements. Local Government Code, Section 242.001.

Cities and counties subject to the provisions were mandated to reach agreements concerning how subdivision plats would be approved by January 1, 2004. Additional provisions of Chapter 242 dictate the process to create a regulatory approval scheme where no agreements were reached by the deadline.

To determine whether a proposed development is subject to a joint regulatory scheme, the first inquiry is to determine whether the development is within the extra-territorial jurisdiction of the city and the county in which the proposed development is located. The next inquiry is to determine the nature of the regulatory scheme ultimately adopted for plat approval. That regulatory agreement or mandated scheme may provide for one of four

options: (1) the county retaining exclusive jurisdiction; (2) the city retaining exclusive jurisdiction; (3) the city and the county apportioning the area within the jurisdiction over which each exercises independent regulatory authority; or (4) the city and county agreeing on joint control through one office, one set of rules, one approval. Local Government Code, Section 242.001.

The City of Austin has agreements in place for Williamson, Travis, Hays and Bastrop counties providing for different scenarios of regulation. The scenarios include joint approval, applicability of city regulations only, and applicability of city regulations unless county regulations are stricter. Each agreement affects approvals both substantively and procedurally.

## **VI. Site Plans**

### **Site Plans and the Local Government Code**

Site plan permitting is another aspect of permitting not specifically mentioned by the Local Government Code but, which, falls within the permissible rules that cities may adopt to fulfill its mandate under sections 211.001 and 211.003 of the Code. Generally, a site plan is a master plan for the actual development construction on a site. Perhaps one way to look at the difference between subdivision permits and site plan permits is that subdivisions look horizontally at a development, while site plans look vertically at a development. Cities may not necessarily require a site plan for every proposed development. See, e.g., the site plan exemption provisions of Austin City Code, Section 25-5-2.

Some cities may provide for heightened use scrutiny through the conditional or special use permit, which is also a form of site plan. See, generally, Austin City Code, Chapter 25-5. Cities may provide for administratively approved site plans and site plans that are approved by the land use commissions or the governing body.

### **Site Plan Examples**

Austin commission-approved site plans include conditional use permits and hill country roadway site plans. In Austin the administrative site plan and a hill country roadway site plan lay out a plan of the buildings and other required structures to assure conformance to the zoning restrictions and

subdivision permits pertaining to the site. The site plan must demonstrate conformance with City Code requirements such as traffic regulation and drainage, detention, water quality, landscaping, etc. Proposed development along designated hill country roadway corridors under the hill country roadway site plan must demonstrate compliance with additional restrictions regarding buffers, construction materials, impervious cover limitations, and height restrictions, among others. Austin City Code, 25-2-1101, et seq.

A conditional use site plan in Austin carries with it additional burdens that must be satisfied to secure approval. These burdens focus on the impact of the proposed use on adjacent uses and properties. Austin City Code, Sections 25-5-145 through 25-5-148. These requirements must be met in addition to the substantive site plan requirements of an administrative site plan.

Because site plans are not creatures of state law but of individual city enactments, the approval process and substantive criteria for site plan approval will vary from city to city. Individual city codes should be consulted to determine applicable requirements.

## **VII. Building/Construction Permits**

The building or construction permit is the permit for proceeding with actual construction inside the full purpose jurisdiction of a municipality. It is only issued after compliance with all zoning, subdivision, and site plan (if applicable) requirements. It also is issued upon a demonstration of compliance with all technical building codes authorized by Chapter 214 of the Local Government Code.

It bears repeating that a municipality does not have the authority to require a building permit in its extra-territorial jurisdiction, and it may not enforce its building codes in its extra-territorial jurisdiction. Local Government Code, Section 212.049.

## **VIII. Exactions, Vesting, Takings, Grandfathering--King's X**

The discussion of land use controls and development regulation is incomplete without mentioning the protections that property owners enjoy from certain governmental actions. This paper will only provide an introduction to the vesting/grandfathering provisions in the Local Government Code and the broader questions concerning exactions/takings under state and federal constitutional law. Introductions, however, are always proper.

### **Nollan and Dolan and State Holdings**

No paper on land use and development regulation is complete without mentioning “Nollan” and “Dolan” and related state takings and exaction cases. *Nollan v. California Coastal Corporation*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987) established the requirement that a condition for approval advances a legitimate state interest only if there is an essential nexus between the approval requirement and the condition. If the nexus is missing, the condition may not be imposed. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed. 2d 304 (1994) stands for the proposition that any requirement imposed as a condition of approval must be roughly proportional to the impact of the development causing the need for the condition.

In Texas three basic cases recognize that a city may be held liable in inverse condemnation for a taking of property by inappropriate exaction. The cases recognize that dedications must accomplish legitimate goals and be substantially related to the health, safety, and general welfare principles of municipal regulatory authority. Regulations requiring exactions must not be unreasonable or arbitrary. *Town of Flower Mound v. Stafford*, 135 S.W.3d 620 (Tex. 2004); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984).

In the zoning arena the Texas Supreme Court in the *Mayhew v. Town of Sunnyvale* case cited earlier in this paper affirmed the zoning authority of municipalities and recognized the legitimate interests advanced by zoning. However, the court then addressed the point at which zoning results in a compensable taking of property. If the owner is denied all economically viable use of the owner's property as a result of the zoning action, the owner is due compensation for the taking.

## **Chapter 245 (1704) Vesting**

The terms 1704 and 245 are used interchangeably to refer to Chapter 245 of the Local Government Code. The 1704 reference is a reference to the number of the bill that added this section of the Code. There is a colorful history behind this provision, its inadvertent repeal and reenactment in Chapter 245, which makes for great late night reading for legislative history buffs. Suffice it to say, Chapter 245 of the Local Government Code is now the significant vesting/grandfathering law for development rights.

The premise of Chapter 245 is to protect a development from changing regulatory standards as the development proceeds through the regulatory process. This principle is expressed in section 245.002, which requires a regulatory agency (a city) only to consider the grant or denial of a permit based upon the rules, regulations, orders, etc. in effect at the time of the filing of the application for the original permit approved for the project.

In other words, for Chapter 245 vesting to apply, there must be a project and an approved permit. If these two conditions exist, the requirements governing the development may not be changed after the project begins the regulatory process. Further, if the project is in the process of receiving its first permit, the requirements for that permit may not be changed pending the approval of that permit.

Chapter 245 contains definitions of what is meant by the terms “permit” and “project”. The definition of project is general, but is significant in one singular aspect; a project is “an endeavor over which a regulatory agency exerts its jurisdiction and of which one or more permits are required to initiate, continue, or complete the endeavor.” Local Government Code, Section 245.001(3). In other words, the project must remain the same for vesting to occur.

Permits are defined in section 245.001(1) as:

“a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to

perform an action or initiate, continue or complete a project, for which the permit is sought.”

If you have to ask permission to do something, it is a permit; it is covered, except, of course, for the exceptions.

Chapter 245 contains an extensive list of what is and is not exempt from the list of regulations that fall within the vesting provisions of Chapter 245. For example, zoning is not considered a permit under Chapter 245, but zoning regulations that:

“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”

are subject to vesting. See, Local Government Code, Section 245.004. Categories of regulations that cannot be grandfathered include sexually-oriented business regulations, regulations or rules affecting colonias, utility connection regulations, among others.

Chapter 245 also contains a dormant project provision, which permits regulating agencies to declare projects as dead for Chapter 245 vesting purposes. Unfortunately, for regulating agencies, not much is necessary on the developer’s part to keep a project from being declared dormant. Local Government Code, Section 245.005.

There is much more that can be said about Chapter 245 and the difficulties in determining whether development is vested. Questions the City of Austin has addressed include a myriad of issues. For example, is a Land Status Determination a permit? Must cities consider county mining permits as the first permit in the series for grandfathering out of city regulations? Is a change from single-family residential development to a multi-family residential development a change in project? If religious assembly is permitted in commercially zoned areas, is the change from a commercial use to a church use a change in project?

## **Annexation Provisions**

Section 43.002 of the Local Government Code specifically permits the continuation of a use in existence on the date annexation proceedings were instituted. Proceedings are instituted at the time the city first considers adoption of the annexation ordinance. Local Government Code, Section 43.0561. Section 43.002 also permits annexed land to be used differently after annexation if it is in the manner planned 90 days prior to the date annexation proceedings were instituted and a permit, license, certificate, etc. for the new use was secured.

Again there are exceptions to this vesting, including regulations concerning sexually-oriented businesses and colonias, among others.

## **Chapter 242 Extra-Territorial Jurisdiction Provisions**

Chapter 242 of the Local Government Code vests plat approvals acquired prior to the expansion or reduction of extra-territorial jurisdiction. This provision specifically provides that the expansion or reduction of extra-territorial jurisdiction does not affect the validity of rights accrued under Chapter 245 of the Local Government Code.

## **IX. Conclusion**

I have only begun to scratch the surface of land use and development regulation. Suffice it to say, this is a complicated area, especially with the constant movement on vesting and takings. Continued monitoring of the case law and legislative enactments is absolutely essential to understanding what a municipality may do to control the way in which development takes shape within its jurisdictional boundaries. Careful scrutiny must also be given to the particular powers a municipality may exercise depending upon whether it is a home-rule or general law city. If the City of Austin Law Department staff can assist you in anyway, do contact us for help.