

# LAND USE BASICS

*by*

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## **LAND USE BASICS**

This paper is designed to provide an overview of land use basics for municipal attorneys and city officials in Texas. In this State, land use regulations are largely local ordinances and regulations adopted pursuant to the Texas Local Government Code (“the Code”) and other state laws. Section 211.001, et seq. of the Code provides for municipal regulation of zoning and Section 212.001, et seq. provides for subdivision regulation. Other sections of the Code provide more limited powers for counties and address related matters.

Each of these laws and the application of the laws by local governments must also comport with state and federal constitutional law and the interpretation of the laws by the applicable courts. Many landowners and developers are not aware of the extent to which development of land is regulated and the exact procedures by which this is accomplished. When their expectations, whether realistic or not, are not met, lawsuits result. Attorneys and officials working for local governments can reduce the risk of litigation by familiarizing themselves with the processes and limitations found in laws governing land use regulation on the federal, state and local levels and in the case law which has interpreted these laws.

### **I. BASICS OF PLANNING, ZONING, PLATTING AND PERMITTING**

“Land Use Law” encompasses planning, zoning, permitting and other regulatory processes employed by local governments to facilitate the orderly and safe development of land within their jurisdictions. Sec. 211.001 of the Code states the purpose for zoning laws: to promote the public health, safety, morals, or general welfare and protect and preserve places and areas of historical, cultural, or architectural importance and significance. Basic steps in land use regulation include:

- 1. Adoption and application of comprehensive plans;***
- 2. Adoption and amendment of zoning ordinances or codes;***
- 3. Adoption of subdivision regulations and consideration of plats;***
- 4. Adoption of building codes and consideration of building permits; and***
- 5. Local appeals, variances, and non-conforming status determinations.***

## **A. Adoption and Application of Comprehensive Plans**

- Sec. 211.004 of the Code provides that zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:
  - (1) lessen congestion in the streets;
  - (2) secure safety from fire, panic, and other dangers;
  - (3) promote health and the general welfare;
  - (4) provide adequate light and air;
  - (5) prevent the overcrowding of land;
  - (6) avoid undue concentration of population; or
  - (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.
  
- These plans are developed by the planning commission and approved by the city council of a city and usually include areas proposed for various types of land uses and for expansion of city services and transportation.
  
- The plan is a concept, not a law, is not binding on the city, and may be modified, but anyone wishing to change the zoning of a property must show the new zoning will be consistent with the plan or else seek a plan amendment.

## **B. Adoption and Amendment of Zoning Ordinances or Codes**

1. What are Zoning Ordinances or Codes - Zoning regulations include:
  - (1) height, number of stories, and size of buildings and other structures;
  - (2) percentage of a lot that may be occupied;
  - (3) size of yards, courts, and other open spaces;
  - (4) population density;
  - (5) location and use of buildings, other structures, and land for business, industrial, residential, or other purposes;
  - (6) pumping, extraction, and use of groundwater;
  - (7) construction, reconstruction, alteration, or razing of buildings and other structures in places of historical significance; and
  - (8) bulk of buildings.(See Section 211.003 of the Code).

- Pursuant to Section 211.005 of the Code, the governing body may divide the city into districts (these districts are drawn on maps) and regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land in each district (these regulations are contained in ordinances which may be codified into codes, such as a unified development code). Zoning regulations must be uniform for each class or kind of building in a district, but the regulations may vary from district to district. The regulations must be adopted with reasonable consideration, among other things, for the character of each district and its peculiar suitability for particular uses, with a view of conserving the value of buildings and encouraging the most appropriate use of land in the municipality.
- Zoning Commission or Planning and Zoning Commission - Sec. 211.007 of the Code provides that a home rule city shall and a general law city may appoint a zoning commission to recommend appropriate zoning regulations to the city council. If no commission is appointed, the city council acts as the commission. If the city has a planning commission, that commission may be selected as the zoning commission (usually designated as the Planning and Zoning Commission).
- Note: Home rule cities govern themselves by the terms of their Charter by which they may enact any laws not inconsistent with or preempted by state law. General law cities may take different forms (Type A for example) and operate under the general laws of the state. The size of a city determines which form it may take. Depending on the form, a city may be governed by a city council or a board of aldermen and may be managed by a city manager with designated powers or by a city administrator who acts under specific directions from the governing body.
- Chapter 551, Government Code requires meetings of a zoning commission, like those of the city council to be open to the public except for closed sessions noticed for certain allowed purposes.

- Unlike the comprehensive plan, zoning ordinances or code provisions are law and must be followed by the city and all applicants. These laws may be amended only by following specific procedures.
2. Types of Zoning Districts – Zoning districts may be formed for a variety of uses, and different uses may overlap into different districts. Different regulations will apply in each district. Some basic categories might include:
1. Single family residential
  2. Multi-family residential
  3. Light Office
  4. Commercial
  5. Industrial
- PUD Zoning – One type of zoning which allows a city to plan with developers in advance for multiple uses in one zoning district is Planned Unit Development Zoning. The developer will usually be required to submit a plan for the development which shows the uses in each section of the development.
3. Zoning Procedures - Sec. 211.006 of the Code provides that procedures must be established for adopting and enforcing zoning regulations and that a regulation or boundary is not effective until after a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard. Once in place, if the zoning map and code or ordinances do not allow the use contemplated by a project or the project plan is otherwise inconsistent with these zoning regulations (for instance where a different density is desired), a zoning amendment, specific use permit, variance, or non-conforming use registration will be required before plat approvals and building permits may be obtained. The same procedures used for adopting zoning regulations also apply to zoning amendments.
- Notice and hearing are required before city council - Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality. Each

municipality may also have additional notice requirements.

- If the city has a zoning commission, the city council may not adopt zoning regulations until the zoning commission has held its own hearings and submitted a report to the council. The required hearing for the city council may be held in conjunction with a zoning commission hearing. If a proposed change to a regulation or boundary is protested the proposed change must receive, in order to take effect, the affirmative vote of at least three-fourths of all members of the governing body
- 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.
- Before the 10th day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in a zoning classification shall be sent to each owner, as indicated by the most recently approved municipal tax roll, of real property within 200 feet of the property on which the change in classification is proposed. Different notice requirements may be set by the municipality.
- If the amendment sought is not consistent with the comprehensive plan of the city, the applicant should approach the city's planning department and planning commission about a possible amendment to the plan (different procedures will apply).

**C. Adoption of Subdivision Regulations and Consideration of Plats**

1. Plat Process – Even if a landowner has zoning in place which will allow the type of use being contemplated for the land, there must be an approved final plat in place before the development of the land may proceed. Sec. 212.002 of the Code provides that after a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivisions of land within the

municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.

- Plat Required - Sec. 212.004 requires a landowner who divides the tract into two or more parts to lay out a subdivision of the tract, including an addition to a municipality, to lay out suburban, building, or other lots, or to lay out streets, alleys, squares, parks, or other parts of the tract intended 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 must have a plat of the subdivision prepared (except 5 acre tracts or larger which have access where no public dedication will be made). This includes any type of conveyance of or contract for the divided land. Municipalities do not have to require plats for every division of land. Also, where a development plat is required by the municipality, the regular platting requirement will not apply.
- Extraterritorial Jurisdiction - Sec. 212.003 of the Code extends platting authority to the extraterritorial jurisdiction of the city (the area outside of the city limits which falls within a certain number of miles from the city depending upon the size of the city). This differs from zoning laws which are not extended into the e.t.j. However, there are vehicles such as development agreements which can be used to regulate certain matters in a development within the e.t.j. of a city. If land lies within the e.t.j.s of two cities, the larger city will have authority. However, the cities may enter into an agreement regarding these matters.
- Vesting – Chapter 245 (“Chapter 245”) of the Code provides that regulations pertaining to permits will “freeze” at the time of the first application submitted to a city for a project which gives the city fair notice of the project. A permit can be anything which is required to be submitted to the city for approval in order for a project to proceed. Consequently, when a city amends the regulations governing land development, any landowner who has filed any required plan or application with

the city which gives the city fair notice of a project will be governed by the prior regulations for the entire project. There are some limited exceptions to this requirement. Traditionally, zoning is not a vested right, even in situations where a plat has been approved. However, Chapter 245 has recently been amended to “freeze” additional types of laws which may include certain types of use classifications. This provision seems to conflict with other laws and has not yet been interpreted by the courts. Chapter 245 does allow cities to provide for expiration of permits and projects after a certain time period. See Senate Bill 574, effective September 1, 2005. See also Senate Bill 848, amending Sec. 245.001 and 002 of the Code pertaining to vesting relating to water or sewer construction contracts. See also Sec. 211.015 and 016 of the Code.

- Moratoria - Cities may place moratoria on applications during a period when general changes to the cities land use laws are being considered. Recently, House Bill 3461 amended Chapter 212 of the Code to add regulations relating to moratoria.
- Must be Approved and Recorded - In order for a plat to be final, it must be approved by the municipal authority and recorded with the county clerk of the county in which the tract is located subject to the filing and recording provisions of Section 12.002 of the Property Code and must:
  - (1) describe the subdivision by metes and bounds;
  - (2) locate the subdivision with respect to a corner of the survey or tract or an original corner of the original survey of which it is a part;
  - (3) state the dimensions of the subdivision and of each street, alley, square, park, or other part of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the street, alley, square, park, or other part; and
  - (4) be acknowledged by the owner or proprietor of the tract or the owner's or proprietor's agent in the manner required for the acknowledgment of deeds.
- Planning Commission has Final Approval – Unlike zoning which must be approved

by the city's governing body or go to the board of adjustment for a variance, plats are approved by the planning commission or planning and zoning commission of a city pursuant to Sec. 212.006 of the Code. If the municipality has no planning commission, the governing body of the municipality approves plats. The governing body by ordinance may require the approval of the governing body in addition to that of the municipal planning commission.

- Sec. 212.009 requires the municipal authority responsible for approving plats to 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. If an ordinance requires that a plat be approved by the governing body of the municipality in addition to the planning commission, the governing body shall act on the plat within 30 days after the date the plat is approved by the planning commission or is considered approved by the inaction of the commission. A plat is considered approved by the governing body unless it is disapproved within that period. The governing body must endorse an approved plat as being approved, or provide the applicant with a certification that it was approved by inaction upon request. An applicant who is denied must be provided with reasons upon request.
- Sec. 212.010 of the code provides the municipal authority responsible for approving plats shall approve the plat if:
  - (1) it conforms to the general plan of the municipality and its current and future streets, alleys, parks, playgrounds, and public utility facilities;
  - (2) it conforms to the general plan for the extension of the municipality and its roads, streets, and public highways within the municipality and in its extraterritorial jurisdiction, taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities;
  - (3) a bond required under Section 212.0106, if applicable, is filed with the municipality; and
  - (4) it conforms to other rules adopted under the code and has been prepared as required by Section 212.0105, if applicable.

- Chapter 212 also provides for replatting, vacating and amending plats and for enforcement by injunction as well as allowing for a city to take the measures necessary to bring land into compliance. Criminal penalties do not apply within the e.t.j.

## 2. Alternative Development Plat Process

- Sec. 212.041, et seq. of the Code provides and alternative development plat process which only applies in cities which elect to apply these provisions. After a public hearing on the matter, the municipality may adopt general plans, rules, or ordinances governing development plats of land within the limits and in the extraterritorial jurisdiction of the municipality to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.
- Under Sec. 212.045, if this alternative is in place, any person who proposes the development of a tract of land located within the limits or in the extraterritorial jurisdiction of the municipality and who is not otherwise required to submit a plat for approval must have a development plat of the tract prepared. Requirements for municipal approval of development plats and enforcement provisions are similar to those for general plats.
- The development plat must be prepared by a registered professional land surveyor as a boundary survey showing:
  - (1) each existing or proposed building, structure, or improvement or proposed modification of the external configuration of the building, structure, or improvement involving a change of the building, structure, or improvement;
  - (2) each easement and right-of-way within or abutting the boundary of the surveyed property; and
  - (3) dimensions of each street, sidewalk, alley, square, park, or part of the property intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the street, sidewalk, alley, square, park, or other part.

#### **D. Adoption of Building Codes and Consideration of Building Permits**

Even if the zoning of a lot allows the type of use being contemplated by the lot owner and an approved plat is on file showing the layout of the lot which will allow for a structure to be built, the landowner must still obtain building permits from the municipality for any construction on the lot. Building codes are the regulations which determine the manner in which structures must be constructed, altered, remodeled, enlarged, or repaired and related matters. Sections 214.211 to 214.216 of the Code adopt the International Residential Code, the National Electrical Code, and the International Building Code for the State. However, municipalities may have other building codes in effect and may pass amendments to these codes. These codes are enforced by local building officials.

#### **E. Local Appeals, Variances, and Non-Conforming Status Determinations**

- Specific Use Permits - A zoning amendment may not always be required or possible. For instance, the zoning ordinance may provide that a use will be allowed in a certain district if a specific use permit is obtained. These permits may contain conditions for the use. Check the zoning ordinance and the local planning department for the applicable procedures.
- Nonconforming Uses ("grandfathering") – when a zoning change or annexation occurs, uses or structures which do not conform with the zoning district regulations may be allowed to continue as nonconforming uses. Check the zoning ordinance of the city for registration requirements and conditions on nonconforming uses. These uses may be terminated by a city at any time, provided enough time is allowed for the investment in the nonconforming use or structure at the time the use became nonconforming to be recouped ("amortized").
- Variances – Sec. 211.008 of the Code provides that the governing body of a municipality may provide for the appointment of a board of adjustment to make

special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance. In certain general law cities this function will be carried out by the city council.

- Board of Adjustment – The board is a separate legal body from the municipality. Sec. 211.009 of the Code provides the board of adjustment may:
  - (1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official relating to zoning;
  - (2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;
  - (3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and
  - (4) hear and decide other matters authorized by an ordinance.
- The concurring vote of 75 percent of the members of the board is necessary on most of these matters. It is up to an applicant to file an appeal with a board of adjustment in accordance with the board's rules. If no timely appeal is filed from the decision of a board of adjustment, the decision becomes final.
- Enforcement – If a person fails to obtain one of the exceptions outlined in this section, but continues to use their land in violation of the law, Sec. 211.012 provides that a violation of the statute or any ordinance or regulation adopted under the statute is a misdemeanor, punishable by fine, imprisonment, or both, as provided by the governing body. The governing body may also provide civil penalties for a violation, and may prevent, restrain, correct, or abate the violation.

## F. Development Agreements and Other Matters

Many other regulations, such as environmental regulations, affect land use. There are also various alternative processes available during the development of land, such as development agreements, which allow cooperation between developers and local governments.

## II. EXACTIONS AND RELATED ISSUES

Many issues other than land use regulation are involved in most development projects. One of the more complex issues in development projects is often determining who will pay for the required extension of municipal services and infrastructure into the developed area and how this will be accomplished. This decision requires a balancing of the legal principles that a city may not expend public funds for the benefit of private individuals, but also may not mandate that developers pay for extensions which are “beyond that necessitated by” their development, as per recently adopted State legislation. The following is an analysis of various ways cities can deal with these costs (check to see which of these methods are allowed by your ordinances):

**A. Impact Fees** (***Only*** applies to extensions listed in the City’s Capital Improvement Plan “CIP.”) Chapter 395 of the Texas Local Government Code (“the Code”) allows a City to charge impact fees within the City and in its extraterritorial jurisdiction provided notice and hearings are provided. Impact fees are defined as:

A charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development. The term includes amortized charges, lump-sum charges, capital recovery fees, contributions in aid of construction, and any other fee that functions as described by this definition.

1. Impact fees, as collected, may only be used for the purpose for which they were imposed and may only be assessed for items approved in the Code, based on a formula set per service unit. Impact fees may only be used to pay for public capital improvements or facility expansions identified in the CIP.
2. Impact fees may be assessed on, but may not be collected in areas where services are not yet available, except in certain circumstances outlined in the statute.

**B. Developer Required Construction and Dedication** (Applies to extensions which are not listed in the CIP.) Where the extension of a utility which is not provided for in the CIP is required solely for the purpose of serving the development, and does not provide utility infrastructure which will be “greater than that required for the use of that particular development,” the City may legally require the developer to construct and pay for the extension of the utility.

**C. Participation Agreements**

1. Cost Reimbursement – (These agreements arise when a developer agrees to construct an extension which will “partly” serve another development or which is “oversized” for future city development.) In these cases, the City may not require the developer to construct the entire extension, or bear the total cost for the entire extension. However, the City may negotiate and obtain an agreement from the developer in which the developer will be responsible for constructing the entire extension with the City committing to reimburse the developer for that portion of the cost attributable to use to be made for future plans of the City or by other properties.
2. Developer Participation Contract - (These contracts usually involve an

agreement by the City to “construct facilities,” and can occur whether the extension is on - or not on - the CIP.) Costs may be split and apportioned between a developer and a city by means of a “developer participation contract”. This type of contract might provide for the City to construct an extension - up to a certain point - with the developer participating in the cost of the project to the extent it is necessitated by the development.

- D. Tax Increment Financing** Section 311.001, et seq. of the Texas Tax Code provides authority for cities to create ‘Enterprise’ or ‘Reinvestment’ zones in certain circumstances and to subsequently finance construction of utilities in those zones by ‘tax increment financing’. These zones and the provisions for taxation and financing must be set up under extensive regulations and require cooperation with other government entities. Joint utility and infrastructure construction agreements may also be appropriate with landowners or developers involved in projects in these zones. A Tax Increment Financing District (“TIF”) is an area within a city created for a defined period of time for the promotion of development within the targeted area. All or part of the tax revenue produced from any new development in the district is used to provide public services and/or infrastructure improvements within the district. TIF boards may issue debt to finance public infrastructure in the district. The district’s tax receipts, which are based on assessment values frozen at the time of its formation, are paid to the TIF Board for use in its development plan and to pay any outstanding TIF debt service obligation.

### **III. OTHER LEGAL CONSIDERATIONS IN LAND USE MATTERS**

Landowners whose expectations in the development of their land have been stopped because of an inability to acquire zoning, plat approval, building permits, or other required approvals may claim they have been deprived of the use of their property or other constitutional rights or may raise a variety of other claims against a city and its officials.

The following are additional legal considerations which may develop in land use matters:

**A. Due Process**

There are two types of due process claims, substantive and procedural. A substantive due process claim may arise in circumstances where there is an allegation that a person has been deprived of a protected interest, such as a property interest, by governmental action which was arbitrary and capricious or involved discrimination or suspect classifying criteria.<sup>1</sup> Procedural due process claims arise when the deprivation of a protected interest occurs because of the procedures employed.<sup>2</sup> When making land use decisions, local government officials should make a record of the reasons for the actions being taken, such as protecting the residential character of a neighborhood, and should avoid making statements which could create an impression that there is no valid reason for the action or that it is being taken for discriminatory reasons. Procedural due process can usually be shown when the decision makers have followed procedural requirements in ordinances and statutes which provided the complaining person with notice, an opportunity to be heard, and some type of appeal.

**B. Equal Protection**

Equal protection claims may be filed in the land use context as well.<sup>3</sup> To succeed, a plaintiff must show a regulatory classification which denies equal protection, and that the classification either lacks a legitimate regulatory purpose or is not rationally related to the regulatory purpose; that is, "whether the state could rationally determine that by distinguishing among persons as it has, the state could accomplish its legitimate purpose."<sup>4</sup>

Local governments should avoid passing land use regulations or taking actions which treat similarly situated individuals differently based on a classification of these individuals as belonging to a particular type based upon factors such as race or income. The Americans with Disabilities Act and the Rehabilitation Act also provide protections for persons with disabilities or who are in rehabilitation.

## C. Takings Claims

A municipality may be accused of taking private property without compensation or for other than a public purpose in violation of the Fifth Amendment to the United States Constitution either because of a physical invasion of the property or because of a regulation. A physical taking occurs when a city authorizes or implements a physical occupation of a property for a public purpose.<sup>5</sup> A recent Supreme Court case addressed whether economic development could constitute a public purpose.<sup>6</sup>

A regulation may result in a taking if the regulation denies an owner all economically viable use of his land.<sup>7</sup> The Supreme Court has recently determined that an analysis of whether a regulation substantially advances a government interest, a factor previously considered in these cases, is a due process factor and is not an appropriate consideration in a fifth amendment takings case.<sup>8</sup> Under the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, a takings analysis focuses on both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.<sup>9</sup> Regarding whether the regulation sufficiently intruded upon the owner's economically viable use of his land to constitute a "taking," the Fifth Amendment does not guarantee the most profitable use of property.<sup>10</sup> A diminution in value, standing alone, does not establish a taking.<sup>11</sup> A regulation which does not deprive the owner of all economically viable use of the property may be a taking if it unreasonably interferes with the owners ability to use the property. The taking issue is resolved by focusing on a complex set of factors (the *Penn Central* factors) including: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) the character of the governmental action," and involves weighing private and public interests and a careful examination and weighing of all the relevant circumstances.<sup>12</sup> A temporary moratorium, delay, or regulation may also be a taking.<sup>13</sup>

In a takings case involving a possible nuisance, the Fifth Circuit found an ordinance prohibiting quarrying was more than mere exercise of police power and denied all economically viable use of the property where it prohibited activity for which Plaintiff had a leasehold interest.<sup>14</sup> However, the Court remanded the case for determination of whether the quarry constituted a nuisance, holding that under federal law, even if the value of the property is destroyed, there will be no recovery if the State's law would have prohibited that activity as a nuisance.<sup>15</sup> In any event, when making land use decisions, city officials should avoid taking actions which deprive a landowner of all economically viable use of their property. However, this does not mean the city must allow the landowner to make a profit off the property or change the use of the property as they choose.

#### **D. Fair Housing**

If a landowner or its tenants qualify as aggrieved persons under the Fair Housing Act of 1968, as amended, 42 U.S.C. §3601, et seq. ("the Act"), a claim may be filed under this Act as well. 42 U.S.C. §3602(i) defines an aggrieved person as any person who claims to have been injured by a discriminatory housing practice or believes that such person will be injured by a discriminatory housing practice that is about to occur. 42 U.S.C. §3604(a), governing discrimination in the sale or rental of housing, makes it unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Under 42 U.S.C. §3602(k), "Familial status" applies to a person under 18 years living with a person having legal custody of them or that person's written designee. For example, under the Act, an entity might be sued for taking an action which caused an apartment complex to close (e.g. terminating a non-conforming apartment use by an amortization process) where it can be alleged depriving the tenants of housing would have a discriminatory effect on low income persons and families with children under 18.

The Courts consider the following multi-factor test to determine whether the plaintiff

has proven discriminatory intent: (i) discriminatory impact; (ii) the historical background of the challenged decision; (iii) the specific sequence of events leading up to the decision; (iv) any procedural and substantive departures from the norm; and (v) the legislative or administrative history of the decision.<sup>16</sup> "Once the plaintiff establishes a *prima facie* case, then the burden shifts to the defendant to articulate — but not prove—a legitimate nondiscriminatory reason for its action."<sup>17</sup> If the defendant meets its burden, then the burden shifts back to the plaintiff to show the reason was a pretext.

## **E. Free Speech**

A freedom of expression claim may be filed in land use cases in which a government entity is attempting to regulate businesses, such as sexually oriented businesses, which engage in protected expression. These regulations may take the form of distance and location regulations or interior configuration and licensing and operation regulations. If a city chooses to require licensing, a license for a First Amendment-protected business must be issued within a reasonable period of time because undue delay results in the unconstitutional suppression of protected speech.<sup>18</sup> For a discussion of the legal standards applicable in a free expression case, the analysis in *N. W. Enterprises*<sup>19</sup> is helpful. The Court of Appeals in *N.W. Enterprises* first determined what standard of scrutiny would apply using the refined *Renton* test set forth by the Supreme Court in *Alameda Books, Inc.*,<sup>20</sup> (1) whether a sexually oriented business zoning ordinance is a time, place and manner regulation; (2) whether the ordinance is aimed at the content of sexually-oriented speech (content-based) or the "speech's" secondary effects on the community (content-neutral); and after passing those tests; (3) whether the ordinance is designed to serve a substantial governmental interest and leaves open reasonable alternative avenues of communication.

The courts have found SOB ordinances content-neutral where the legislative record demonstrated that the predominant concern was to regulate secondary effects (looking at findings of the City Council, the expressed purposes of the ordinance and committee

reports) and not to censor the expression itself.<sup>21</sup> Local government officials can usually demonstrate content neutral purposes when they rely on studies showing the negative secondary effects of the businesses in question and draft ordinances or otherwise take actions which are designed to eliminate those secondary effects, not limit the expression.

#### **F. RLUIPA**

Where an action by a local government entity interferes with the free exercise of a religious activity, a plaintiff may choose to bring a claim under the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”).<sup>22</sup> In general, merely failing to approve an application which would allow a religious use in a certain location is not enough for a plaintiff to proceed in this type of claim without a showing of an actual interference with a religious practice by the local government.

Under RLUIPA, a local government defendant may be able to moot the case by amending the offending legislation to remove any burden on religion.<sup>23</sup> This can be accomplished by placing the same zoning restrictions on all assembly type uses and providing at least one zoning district in which the religious use can exist as of right. In cases in which an establishment is being denied the ability to build at a certain location, a local government should take steps to document the availability of other locations within the city at which the activity could be permitted and to show that the same process is applied to other similarly situated applicants which are non-religious.

#### **G. EMINENT DOMAIN**

Other matters related to land use issues include eminent domain and condemnation, the city’s right to take private land for public purposes for just compensation. The Texas legislature recently passed legislation curtailing a city’s ability to exercise eminent domain where the purpose is primarily for economic development in most cases.

## Conclusion

The actions of cities in planning for municipal development, considering zoning changes, plan amendments, plats, the treatment of non-conforming uses and building permits will always be a source of litigation for landowners determined to use their property in whatever manner they choose. Municipalities can lessen the risk of these lawsuits by enacting ordinances governing these matters which provide sufficient notice and hearing procedures, by always following those procedures, and by acting on landowner requests with a legitimate government purpose in mind.

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1. *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 700 (5th Cir. 1991); *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 52 L.Ed.2d 171 (1979).
  2. *Kacal*, 928 F.2d at 700.
  3. See *Jackson Court Condominiums*, 874 F.2d at 1079.
  4. *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 933 (5th Cir. 1988); *Reid v. Rolling Fork Pub. Utility Dist.*, 854 F.2d 751, 753 (5th Cir. 1988).
  5. See generally, *Williamson*, 473 U.S. 172, 186-87, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).
  6. *Kelo v. City of New London, et al.*, 125 S. Ct. 2655 (2005) (would be public use if the taking would be implemented pursuant to a carefully considered plan which was not adopted "to benefit a particular class of identifiable individuals") (But see "Eminent Domain" section).
  7. *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980); *Jackson Court Condominiums*, 874 F.2d 1070 at 1080; *but see Sheffield*, 47 Tex. Sup. J. 327 (minority of jurisdictions have not applied the substantial advancement factor).
  8. *Lingle v. Chrevron U.S.A.*, 544 U.S. \_\_\_, 125 S. Ct. 2074, 2083 (2005).
  9. *Penn Cent. Transp. Co.*, 438 U.S. at 130-131.
  10. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592, 82 S. Ct. 987, 989, 8 L. Ed. 2d 130 (1962).
  11. *Penn Cent. Transp. Co.* 438 U.S. 104 at 131; *Jackson Court Condominiums, Inc.*,

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874 F.2d at 1080.

12. *Sheffield Devel. Co., Inc.*, 47 Tex. Sup. J. 327 (citing *Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211, 225, 89 L.Ed. 2d 166, 106 S. Ct. 1018 (1986) (quoting *Penn Central*, 438 U.S. at 124)).
13. See, e.g., *Dufau v. United States*, 22 Cl. Ct. 156 (1990) (holding that 16-month delay in granting a permit did not constitute a temporary taking); *Tahoe-Sierra Pres. Council*, 535 U.S. at 338 and n.32 (lists cases).
14. *Vulcan Materials Co. v. The City of Tehuacana*, 369 F. 3d 882 (5th Cir., 2004).
15. *Id.*
16. See *Arlington Heights*, 429 U.S. at 266-68; *Buckeye Cmty. Hope v. City of Cuyahoga Falls*, 263 F.3d 627, 635, 639 (6th Cir. 2001) (stating that "the standard for finding discriminatory intent is the same under the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment").
17. *Texas*, 85 F. Supp.2d at 729; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (U.S., 1973).
18. *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 124 S. Ct. 2219, 2224 (U.S., 2004).
19. *N.W. Enterprises, Inc. v. City of Houston*, 352 F. 3d 162 (5th Cir. 2003).
20. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433-34, 122 S. Ct. 1728, 1733-34 (2002):
21. *Id.*
22. 42 U.S.C. §2000cc, et seq.
23. See *Civil Liberties for Urban Believers, et al v. City of Chicago*, (No. 01-4030, U.S. App., 7<sup>th</sup> Cir., 2003).