

**THE LAND SUBDIVISION PROCESS**  
**(ANSWERS TO THE MOST ASKED QUESTIONS)**

Reid C. Wilson  
Wilson, Cribbs, Goren & Flaum, P.C.  
440 Louisiana, Suite 2200  
Houston, Texas 77002  
Phone: (713) 222-9000  
Fax: (713) 229-8824  
E-mail: [rwilson@wcfg.com](mailto:rwilson@wcfg.com)

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**REID C. WILSON**  
**WILSON, CRIBBS, GOREN & FLAUM, P.C.**  
**440 LOUISIANA, SUITE 2200**  
**HOUSTON, TEXAS 77002**  
**(713) 222-9000- Gen**  
**(713) 547-8504- Dir**  
**(713) 229-8824 - Fax**  
**rwilson@wcgf.com- email**

***PROFESSIONAL***

Shareholder, Wilson, Cribbs, Goren & Flaum, P.C. Since 1985  
Board Certified in Commercial Real Estate Law since 1986

***EDUCATION***

University of Texas (B.B.A. in Finance/Real Estate with Honors, 1975)  
University of Texas Graduate School of Business (1976)  
University of Texas Law School (J.D., 1979)

***PRACTICE AREAS***

Commercial Real Estate Law- all areas  
Land Use Law- zoning (rezoning, variances, specific use permits, special exceptions, interpretations), platting (legal issues and variances), government regulation, state land easements including Texas General Land Office easements for public waters, title issues, abandonment and acquisition of public land, streets and easements, dedications, economic development incentives, tax abatements, industrial districts, negotiation with government entities on land use issues, property owner association law, creation, modification and extension of restrictive covenants, interpretation and enforcement of restrictive covenants, statutory issues relating to restrictive covenants, new legislation.

***LAND USE PRESENTATIONS***

**Legal Panel - Platting;** APA Texas Annual Conference, October 2001

**Private Land Use Regulations: Deed Restrictions,** Zoning and Planning Short Course, Southwest Legal Foundation, June 2001

**The Mysteries of Platting,** Houston Bar Association Real Estate Section, October 2000; State Bar of Texas Advanced Real Estate Law Course, June 2001; South Texas College of Law Commercial Real Estate Course, October 2001

**The Fundamentals of Zoning,** University of Texas Land Use Planning Law Conference, March 1999, February 2000, February, 2002; CLE International Land Use Law Conference, April 2001

**Land Use Law and Deed Restrictions,** Texas Real Estate Practice for Paralegals, October, 1999

**Pipeline Siting: Land Use Issues**, Texas Oil & Gas Association Annual Conference- Pipeline Committee, September, 1999

**Development/Land Use Law**, South Texas College of Law and Texas Real Estate Center of Texas A&M University, Commercial Real Estate Course, October 1998

**Texas Land Use Law**, South Texas College of Law Real Estate Conference, June 1998; Houston Bar Association Real Estate Law Section Seminar, September 1998

**Deed Restrictions**, City of Houston Neighborhood Connections Conference, September 1998 & 1999

**Drafting, Maintaining & Enforcing Deed Restrictions**, Houston Bar Association Continuing Legal Education Seminar, December, 1997

**Land Use Law- The Basics**, State Bar of Texas, Advanced Real Estate Law Seminar for Attorneys, Legal Assistants & Other Professionals, October 1997

#### ***LAND USE RELATED PUBLICATIONS***

**The "Z" Word - An Introduction to Zoning Law**

*The Houston Lawyer* - Nov/Dec 1990

**Houston's Central Business District: How Will Its Future Affect Yours?**

*The Houston Lawyer* - Sept/Oct 1991

**Houston Land Use Regulation Without Zoning**

*Houston Economics [UH Center for Public Policy]* - February 1994

**AWhere to Put a Pipe@- Common Land Use Law Considerations** [oil and gas pipelines]

*Landman [American Association of Professional Landmen]* - May/June 2000

#### ***LAND USE RELATED COMMUNITY AND PROFESSIONAL SERVICE***

**West U 20/20, City of West University Place**(Comprehensive Planning Committee), 1998-9

**Founder and Head - Houston Bar Association Pro Bono Deed Restrictions Project** (provides free legal services to low income neighborhoods) 1995 - Current

**Chair - Zoning Study Group**, 1992 - 1993 (20+ attorneys representing most major Houston firms - organized and funded by the Houston Bar Association Real Estate Section)

**Chairman, Planning & Zoning Commission, City of West University Place**, 1985 - 1991 (Redrafted 50-yr. old zoning ordinance and comprehensive plan)

**Charter Commission, City of West University Place**, 1982 (Drafted new city charter - 15 members)

***LEGISLATION***

**Texas Property Code Chapter 206-** Proposed legislation and concept - Passed May 1997

**Texas Property Code Chapter 207-** Proposed, drafted, testified for and sheparded through passage legislation protecting a historic preservation associations - Passed May 1999

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## **LAND SUBDIVISION PROCESS**

(ANSWERS TO THE MOST ASKED QUESTIONS)

Platting property is part of the development process. Although platting is a familiar term, it is frequently misunderstood, even by experienced lawyers, consultants and government officials. The problem lies in the origin of subdivision platting law. Subdivision platting law is based in public law, whereas most lawyers spend their time primarily dealing with contract law. Subdivision platting law affects real estate, but its origins come from governmental law concepts premised on the right of the government to protect the health, safety and public welfare of the public (known as the “police power”). To further confuse the issue, subdivision platting law is significantly different from zoning law, another public law area affecting real estate. The rights of the government in the area of subdivision platting are significantly limited when reviewing a subdivision plat. When considering a zoning change a city has broad discretion. Government officials often confuse the broad discretion in zoning with the narrow, ministerial authority available in platting.

Helpful overviews of subdivision platting law and its difference from zoning law are contained in *Lacy v. Hoff*, 633 S.W.2d 605 (Tex. App.-Houston [14th Dist.] 1982, *writ ref'd n.r.e.*) and *City of Round Rock v. Smith*, 687 S.W.2d 300 (Tex. 1985).

Subdivision controls are based on the land registration system. Registration is a *privilege* that local governmental entities have the power to grant or withhold based upon the compliance with reasonable conditions. The regulatory scheme depends on the approval and recordation of the plat. *Lacy v. Hoff*, 633 S.W.2d 605, 607-608 (Tex. Civ. App. - Houston [14<sup>th</sup> Dist.] 1982, *writ ref'd. n.r.e.*). The regulation of subdivision development is based on legitimate government interest in promoting orderly development, insuring that subdivisions are constructed safely, and protecting future owners of lots

within a subdivision from inadequate police and fire protection and inadequate drainage and unsanitary conditions. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985).

Platting law starts with Tex. Local Gov't Code Chapters 212 (cities)[originally adopted as Art. 974a in 1927] and 232 (counties) which authorize cities and counties to regulate the division of real property. The Local Government Code is broad, but without more can be relied upon by a local government as a basis to review and approve plats (as Houston did until 1982). Most cities have a subdivision ordinance (sometimes part of a comprehensive development code), which provides detailed platting regulation and procedures. Often, the local government will have uncodified rules and regulations adopted by the governing body establishing even more detailed requirements.

Even experienced lawyers, consultants and government officials have fundamental misunderstandings about the process and law of subdivision platting. Fortunately, their questions asked fall into a relatively small number of categories. This paper synthesizes the author's experience in answering questions from clients, consultants, government officials and lawyers in over 15 years of land use practice. Issues in the Houston Subdivision Ordinance - Houston Code Chapter 42 (locally referenced as "Chapter 42") and Dallas Development Code Chapter 51A are covered. Chapter 42 was comprehensively redrafted in 1999. Recent legislation expanding county authority is addressed.

## **1. WHAT IS A . . . ? (THE JARGON OF PLATTING)**

There are many terms of art in subdivision platting law. A clear understanding of these terms is necessary to practice in this area.

**Subdivision (to subdivide, subdividing)** - The division of land without regard to transfer of ownership. *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App. B Corpus Christi, 1985, writ ref'd n.r.e). To subdivide a property is to perform the act of subdivision. Subdividing is not the same as platting. Case law has upheld "developing" as a type of subdivision, if specifically

set forth in a subdivision regulation. *City of Weslaco v. Carpenter*, 694 S.W.2d 601 (Tex. Civ. App. - Corpus Christi 1985 writ ref'd n.r.e.)(rental mobile home park could be regulated by a city). *Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882 (Tex. Civ. App. - Waco 1985, writ ref'd n.r.e.)(after a traditional subdivision plat was rejected, the developer developed a rental mobile home park without platting the property, but the county obtained an injunction against leasing or encumbering the project since the public purpose of subdivision regulation would otherwise be stymied.). Since *Cowboy Country Estates* was decided, Chapter 232 has been amended to exempt “manufactured home rental communities” from the definition of a subdivision.

**Platting (to plat)** - The governmentally required process to obtain approval of a subdivision of real property pursuant to Tex. Local Gov't Code Chapter 212 (Cities) or 232 (Counties) and applicable local government regulations.

**Subdivision Plat (or Plat)**- The written depiction of the lots, blocks and reserves created by the subdivision of real property by a land owner participating in the platting process, which document will be recorded in the Official Public Records of Real Property of a county after it has received the requisite approvals.

**Planning Commission** - A city council appointed governmental body with authority (final in most cities) to approve subdivision plats. Tex. Local Gov't Code Section 211.006. The planning commission may also act as the Zoning Commission of a city. Tex. Local Gov't. Code Section 212.007(a). A Planning and Zoning Commission is subject to the Texas Open Meeting Act, but a planning commission is not. Tex. Local Gov't Code Section 212.0075. If there is no planning commission, the city council approves subdivision plats. By ordinance, a city may require an additional approval from the city council. In most larger cities, the planning commission has final authority on subdivision plats. This is also true in most growing suburban cities, since the city

council does not want to be burdened with this additional responsibility. However, in many smaller towns, the city council retains final approval authority over subdivision plats in order to retain more control over the development process.

**Variance** - A governmentally issued right to vary from the literal word of the applicable regulation upon a showing of "hardship". Some subdivision platting ordinances have a specific provision for a variance. *See* Houston Code Section 42-47(providing for a general variance provision); Dallas Code Sections 8.503(b)(4), 8.504(6) and 8.506(b)(1) each provide a variance opportunity for specific issues. Notice to adjacent owners and area civic clubs and a public hearing is required under recent ordinances. In some cities, there is an unwritten practice to consider variances without specific authority in their subdivision platting ordinance. However, without a specific variance right, a local government should not grant a variance. It is unclear the effect on a property owner where a city approves a subdivision plat even though it does not comply with applicable requirements. On one hand, the city has broad discretion to determine what requirements to adopt for subdivision plats under Tex. Local Gov't Code Section 212.002. On the other hand, a city is not estopped to later enforce its ordinances by an earlier error by the city. *City of Hutchins v. Prasifka*, 450 S.W.2d 829 (Tex. 1970). The author has not experienced the situation where an improperly approved subdivision plat was attempted to be "revoked" by a city. However, there are many example of cities revoking building permit when the permit was erroneously issued. *eg.*, *South Padre Island v. Cantu*, 52 S.W.3d 287 (Tex. App. - Corpus Christi 2001, no pet.). An additional concern is that there may be a private cause of action for an adjacent property owner to sue and require either a subdividing property owner to comply with subdivision regulations or to sue a city to require it to enforce its subdivision regulations. *See, Porter v. Southwestern Public Service Co.*, 489 S.W.2d 361 (Tex. Civ. App. - Amarillo 1973 writ ref'd n.r.e.).

**Extraterritorial Jurisdiction ("ETJ")** - The area surrounding a city where the city has exclusive right of annexation and limited right of control, specifically including the right to extend its jurisdiction for approval of subdivision plats. Tex. Local Gov't. Code Sections 42.021, 212.002 and 212.003.

The extent of a city's ETJ depends on its population:

<u>Population</u>	<u>ETJ from City's Boundary</u>
Less than 5,000	2 mile
5,000 - 24,999	1 mile
25,000 - 49,999	2 miles
40,000 - 99,999	3.5 miles
100,000 +	5 miles

Houston and Dallas have extended their subdivision ordinances to their ETJ. Houston Code Section 42-2. Dallas Code Section 51A-8.104. However, Houston does not assess fines for violations in the ETJ. Houston Code Section 42-5(b).

Application of municipal subdivision regulation to an ETJ is clear, but one court has indicated in *dicta* that a city may also extend into its ETJ the requirement for building permits and the enforcement of construction related ordinances. *City of Lucas v. North Texas Municipal Water District*, 724 S.W.2d 811, 823-24 (Tex. App. - Dallas, 1986, *writ ref'd n.r.e.*). Tex. Local Gov't. Code Section 212.003(a) specifically states it does not authorize (but does not preclude) a city to regulate the following (but defers to any other state law authorization):

- \$ Use
- \$ Bulk, height or number of buildings per tract
- \$ Building size, such as floor area ratio

\$ Residential units per acre.

Tex. Local Gov't Code Section 212.049 specifically states it does not authorize (but does not preclude) a city to require building permits or enforce building codes in the ETJ.

**Applicant** - Any "person" may be an applicant for plat approval, but only an "owner" may actually plat property. *City of Hedwig Village Zoning and Planning Commission v. Howeth Investments, Inc.*, No. 01-01-00631- CV (Tex. App. - Houston [1<sup>st</sup> Dist. 2002 opinion issued February 7, 2002].

In *Howeth*, the court endorsed the practice of buyers making a purchase contingent on plat approval, with the seller delegating the right to apply for plat approval to the buyer, citing the distinction in Tex. Local Gov. Code Sections 212.004(a) ["person" for applications] and 212.008 ["owner" for actual platting]. This is consistent with common practice which is either the actual owner signs the final approved plat for recording after the earnest money on the purchase contract is non refundable or the closing occurs after final plat approval, so that the buyer is the owner when the plat is signed and filed.

**Types of Plat:**

**Replat** - A new plat of all or a portion of a previously approved plat.

**Residential Repat** - A replat where either (i) during the proceeding 5 years part was zoned for residential use by not more than 2 units per lot; or (ii) any lot is restricted to residential use by not more than 2 units. There are additional restrictions on residential replats, including notice to adjacent property owners, public hearing and limitations on approval. Tex. Local. Gov't. Code Section 212.015.

**Minor Plat** - A plat involving 4 or fewer lots fronting on existing street and not requiring a new street or municipal facilities. Tex. Local Gov't. Code Section 212.0065. The city may

delegate approval (but not disapproval) of minor plats to City Staff. Most commonly, this is utilized for inner city townhouse redevelopment of formerly single family lots.

**Amending Plat** - A replat addressing minor changes, correction of clerical errors or addressing limited modifications affecting a limited number of property owners or lots. The scope of amending plats has steadily expanded. Amending plats are important because they do not require notice to adjacent property owners or a public hearing. Tex. Local Gov't. Code Section 212.016. Approval of an amending plat may be delegated to City Staff. Tex. Local Gov't Code Section 212.0065(a)(1). Examples of potential uses for amending plats are as follows:

- \$ Correct errors and omissions in course or distance, real property descriptions, monuments, lot numbers, acreage, street names, adjacent recorded plats and other clerical error or omission.
- \$ Move a lot line between adjacent lots (with various limitations depending on the circumstances).
- \$ Replat lots on an existing street if (i) all owners join in the application, (ii) the amendment does not remove deed restrictions, (iii) the number of lots is not increased, and (iv) new streets or municipal facilities are not required.

**Vacating Plat** - A replat to eliminate the subdivision of property reflected by a prior plat. Tex. Local Gov't. Code Section 212.013. A vacating plat could be used by a developer who wished to return a failed project to a single unit of property from the subdivision reflected on the recorded plat. Vacating plats are rare. Vacating plats may not be used without the consent of all property owners. Once recorded, the vacating plat has the effect of returning the property to raw acreage. Tex. Local Gov't. Code Section 212.013(d).

**Development Plat** - A site plan approval required for development where no subdivision is occurring. Tex. Local Gov't. Code Section 212.041 et. seq. Development plats were authorized in the Subdivision Act at the request of Houston and are unique to Houston. A development plat is required in Houston for new construction or enlargement of existing structures by over 100 sq. ft., except in the CBD, or a single family unit on a duly platted lot. or a parking lot or retaining wall. Houston Code Section 42-22. A building permit will not be issued where a development plat is required and has not been approved. Houston Code Section 42-4.

**Preliminary Plat** - There is no state law (or case law) definition of a "preliminary" plat. It is a creature of municipal ordinance. *See* Houston Code Sections 42-43, 74(b); Dallas Code Section 51A-8.403(a)(1)-(4). A preliminary plat is the initial plat prepared by an engineer on behalf of a land owner and submitted for "preliminary" governmental approval as part of the platting process. Generally, it is not ready for recording (although close), as it is more general and conceptual in nature. A land owner is benefited by the cost savings of a more general plat, as it may be modified or even denied in the approval process. Approval of the preliminary plat is the critical juncture in the platting process. Typically, when a preliminary plat is denied, the land owner either accepts that defeat, sues for mandamus (if the land owner believes the approval was wrongly withheld), or submits a new and different preliminary plat.

**Final Plat** - There is no state law (or case law) definition of a "final" plat. It is a creature of municipal ordinance. *See* Houston City Code Sections 42-44, 74(c); Dallas Code Section 51A-8.403(a)(8). The final plat is a plat satisfying all requirements of Tex. Local Gov't. Code Chapter 212 and applicable local regulations and is ready for recording. A final plat must be consistent with an approved preliminary plat. The differences between an approved

preliminary plat and a final plat are generally engineering details and format. A government should not deny approval of a final plat if it is consistent in all respects with the approved preliminary plat. *See* Houston Code Section 42-74(c)(indicating that if preliminary plat approval has been obtained, so long as the final plat complies with Chapter 42 of the Houston Code, state law and any conditions of approval of the preliminary plat, the planning commission must grant final plat approval); *but see* Dallas Code Section 51A-8.403(a)(4)(A) stating that approval of a preliminary plat is not final approval of the plat, only an “expression of approval of the layout shown subject to satisfaction of specified conditions. The preliminary plat serves as a guideline in the preparation of a final plat, and engineering and infrastructure plans to serve the plat” and if any condition has changed between the preliminary plat and the final plat, the plat must be reconsidered as a preliminary plat.

**Houston Plats** - Houston Code Chapter 42, effective March 24, 1999, comprehensively overhauled Houston’s subdivision regulation scheme and established several types of plats, including some unique to Houston:

- **Class III plat**- This is the typical plat approved by planning commission. Both preliminary and final plat approval is required.
- **Class II plat**- A plat or replat (but not a residential replat) without any new street or public easement being dedicated, and which is approved by planning commission. No preliminary plat is required.
- **Class I plat**- A plat (including an amending plat, but not a replat) without any new street or public easement being dedicated, which creates up to 4 lots, each fronting on an existing street. Class I plats are approved administratively, without planning commission

action unless a variance or special exception is required. No preliminary plat is required.

Class I plats are “minor plats” under Tex. Local Gov't. Code Section 212.0065.

- **Development plat-** A site plan not used for subdivision, but as an enforcement mechanism for development regulations (building code, sign code, landscaping ordinance, parking ordinance, setback, etc.) and to require street and public utility dedications and setback requirements. Development plats are approved administratively, without planning commission action unless a variance or special exception is required. No preliminary plat is required.
- **General Plan-** A site plan submitted for the purpose of establishing a street system for a large tract to be developed in sections. The general plan is submitted with the subdivision plat for the first section being platted. The general plan is valid for 4 years and can be extended by planning commission action. Upon planning commission approval, the general plan establishes the street system for future development.
- **Street Dedication plat-** A plat to dedicate streets. A Street Dedication plat is used only after a General Plan has been approved. Planning commission approval is required. No preliminary plat is required.

**Dallas Plats** - Dallas follows the Chapter 212 categorization of plats without elaborating on subcategories. Dallas does not use Development Plats.

## **2. WHEN IS PLAT APPROVAL REQUIRED?**

### **A. General Rule- Any Subdivision of Property**

A subdivision plat should be submitted to the applicable local government (city or county) whenever property is proposed to be subdivided, whether or not the conveyance will be by metes and bounds, unless the subdivision is within an exception in the Subdivision Act or the local subdivision ordinance. Tex. Local Gov't. Code Section 212.004. The development of land triggers many subdivision regulations (*see discussion of the term "subdivision" above in Section 1*). Both Houston and Dallas subdivision ordinances broadly define the platting requirement. Dallas is particularly inclusive, specifying the following actions require platting:

- creation of a building site
- subdivision of land
- combining lots or tracts
- amending a plat
- incorporating vacated or abandoned property into a building site
- correcting errors in a plat
- erecting a residential subdivision sign
- developing a planned development district

### **B. Exceptions- State Law, Local Ordinance, Case law**

There are exceptions to the requirement for subdivision platting approval both in state law and local regulations.

Five Acre Exemption- A subdivision of land into 5+ acre tracts where each tract has "access to a public street and no public improvements are dedicated" is exempt from subdivision platting approval. Tex. Local Gov't. Code Section 212.004(a). This change was made in 1993 and applies

only to cities. Cities will likely interpret this exception to require each tract to abut a public street, although the language supports the position that a private easement could provide the required access.

Airpark Exception - A subdivision of land into 2.5+ acre tracts abutting an aircraft runway located within a city of less than 5,000 population is exempt from subdivision platting approval. Tex. Local Gov't Code Section 212.0046.

Local Government Exclusions - State law allows cities or counties to determine what will constitute a subdivision and to what extent, if any, the city will require platting. Tex. Local Gov't. Code Section 212.0045 (city), 232.0015(a) (county). For example, a city could waive the requirement for plat approval for subdivisions of a particular size with adequate public street access and facilities where no new street or public facilities are required. Therefore, an attorney should obtain a copy of the current subdivision ordinance and related rules and procedures and review them to determine if the proposed subdivision requires plat approval.

Houston Code Chapter 42 exempts the following:

- Tracts over 5 acres, each with public street access and no public improvements is required. Houston Code Section 42-1(definition of subdivision).
- Divisions of Reserve tracts on approved plats not encumbered by a 1 ft. reserve and not used for single family residential uses. Houston Code Section 42-21(a).
- Remainder tract included in an approved General Plan. Houston Code Section 42-21(b).
- Public street dedication by street dedication plat does not require the remaining land to be platted. Houston Code Section 42-21(c).

Dallas Code Section 51A-8.401(b) exempts property divided for transfer of ownership when a metes and bounds description is used to describe the property. However, the exemption only lasts until a building permit is requested for the property.

Tex. Local Gov't Code Section 232.010 provides that the Commissioners Court of a County may allow conveyances by metes and bounds description of 1 or more previously platted lots.

Condominiums- The creation of a condominium regime is not a subdivision and does not require approval of a plat. Tex. Prop. Code Section 82.006. In some areas, such as Austin, a condominium regime has been used in lieu of subdividing what appears to be a traditional residential neighborhood.

Partitions- Partition of property among co-tenants should not be a subdivision since it is a reallocation of existing property interests to give each owner a different share of the property already owned. *See Hamilton v. Hamilton*, 280 S.W.2d 588 (Tex. 1955), Op. Tx. Att'y. Gen. No. 0-5150 (1943). Tex. Local Gov't Code Section 232.0015(k)(if no road dedicated).

Governmental Subdivision- The acquisition of land by dedication, condemnation or purchase by governmental entity is not subject to platting requirements. *See El Paso County v. City of El Paso*, 357 S.W.2d 783 (Tex. Civ. App. - El Paso, 1962, no writ); *Palafox v. Boyd*, 400 S.W.2d 946 (Tex. Civ. App. - El Paso, 1966, no writ). Tex. Local Gov't Code Section 232.0015(h) & (i). A military base is not a subdivision. Op. Tex. Atty Gen. No. C-128 (1963).

Ground Lease- It is unclear at what point a long term ground lease becomes more a subdivision than a lease. A prudent practitioner would require a subdivision plat for a ground lease effectuating a subdivision any time new improvements will be constructed on the ground lease estate. Some subdivision ordinances specify that any lease over a stated term of less than all the property is deemed a subdivision.

Manufactured Home Rental Community- A manufactured home rental community with residential leases for less than 60 months is not a subdivision under Chapter 232. There is not comparable provision for Chapter 212. Therefore, an appropriately drafted city subdivision regulation may require platting for a manufactured home rental community.

County Exceptions- Chapter 232 excludes a list of exceptions to subdivisions in Section 232.0015:

- agricultural land
- certain family transfers (up to 4 parcels)
- 10 acres tracts without streets (public or private)
- certain veteran's land board sales
- certain public entity sales
- a seller retaining a portion of a tract from a sale to a developer which plats its purchased tract
- partitions of undivided interests.

**C. Certification- Tex. Loc. Gov. Code Sec. 212.0115(a)**

A city is required to issue a certificate confirming whether or not particular property requires plat approval. Tex. Local Gov't. Code Section 212.0115(a). This is particularly helpful for "grandfathered" subdivisions pre-dating a subdivision ordinance or annexation into a city or its ETJ. The city must act within 20 days after its receives the request and issue the certificate within 10 days after it makes its determination. Tex. Local Gov't. Code Section 212.0115(c). These certificates are useful in due diligence for acquisition, development and lending. Although common law holds that a city is not estopped from denying representations it makes regarding land use conditions, the clear statutory authority of Section 212.0115 may make such certification binding on the city. *See City of Hutchins v. Prasifka, supra* (holding that the inaccurate representation of a city official as to the zoning classification of a tract did not estop the city from enforcing its zoning ordinance); *Edge v. City of Bellaire*, 200

S.W.2d 224, 228 (Tex. Civ. App. - Galveston, 1947) (holding that the negligent issuance of a building permit and reliance thereon by the land owner did not bind the city from enforcing a valid zoning ordinance prohibiting the structure permitted). *But see Joleewu, Ltd v. City of Austin*, 916 F.2d 250, 254 (5<sup>th</sup> Cir. 1990) (applying the exception to the general rule precluding application of estoppel to cities in the performance of governmental functions where justice, honesty and fair dealing require).

### **3. WHERE ARE THE REQUIREMENTS FOR PLAT APPROVAL?**

#### **TEX. LOC. GOV'T CODE CH. 212, LOCAL SUBDIVISION ORDINANCE (E.G., HOUSTON CODE CH. 42 OR DALLAS CODE CH. 51A) AND LOCALLY ADOPTED RULES.**

Plat approval requires satisfaction of both procedural and substantive requirements. These requirements are set forth in state law (Tex. Local Gov't Code Chapters 212 [Cities] and 232 [Counties]), local ordinance (city) or order (county), and any rules or regulations adopted under the local ordinance or order (often including a design manual). Platting rules may be adopted by the city council only after a public hearing. Tex. Local Gov't Code Sections 212.002 (regular plats) and 212.044 (development plats). The commissioners court may adopt platting rules by order only after public notice. Tex. Local Gov't Code Section 232.003 (limiting the area of regulation to 9 specified issues). Road and groundwater issues are addressed in Tex. Local Gov't Code Sections 232.0031 and 32.

#### **A. Procedural**

Procedural requirements typically include:

- Submission of a duly completed application and payment of a fee
- Preliminary meeting with governmental staff to review the application
- Preparation by a qualified engineer/surveyor of a "preliminary" subdivision plat submitted to government staff for review and comment (with appropriate corrections made)

- Posting of public notice for a public meeting of the governmental body for a review of the preliminary plat (**and notice to adjacent property owners in the event of a residential replat**)
- Consideration by the governmental body of the preliminary plat. The preliminary plat may be approved (with or without conditions) or denied
- Preparation of a "final" plat and submission to government staff for review, approval and correction
- All lenders must approve and execute the final subdivision plat
- Consideration of the final plat by the governmental authority (which should be disapproved only if there is a material inconsistency between the "final" plat and "preliminary" plat)
- Where applicable, city council must also approve each of the "preliminary" plat and "final" plat
- In some cities (like Houston), evidence of the approval of the final plat by the planning commission/city council is sufficient for the city to issue a building permit
- After final plat approval, a mylar version of the approval subdivision plat is signed by the surveyor, the owner, any lender (to consent and subordinate its lien), the chairman of the planning commission and/or mayor and submit it for filing in the Official Public Records of Real Property of the county.

*See Houston Code Sections 42-20 et.seq. and Dallas Code Section 51A-8.403, et. seq.*

## **B. Substantive**

Some substantive requirements for the design of the subdivision plat are contained in state law (Tex. Local Gov't Code Section 212.004(b) and (c)), but primarily the authority to establish these requirements is delegated to cities (Tex. Local Gov't Code Section 212.002). A city's authority in adopting these rules is quite broad, limited only to the promotion of "health, safety, morals or general welfare of the municipality and the state's orderly and helpful development of the municipality". *Id.* Many subdivision ordinances have lengthy sections defining engineering details. Some cities have separately adopted design manuals. The substantive areas of plat design is an engineering function to be undertaken by knowledgeable, experienced engineers and surveyors. It is critical that the current subdivision ordinance or order and duly adopted rules and regulations be utilized in preparation of a plat. Preferably, the engineer or surveyor selected to prepare a plat has experience not only in preparation of subdivision plats generally, but in the area in question, particularly if there are unusual circumstances. Otherwise, the preparer must carefully review all local rules and regulations. *See* Houston Code Sections 42-100 et. seq. and Dallas Code Sections 51A-8.500, et. seq.

County authority to regulate subdivision is less broad than a city. *Compare* Tex. Local Gov. Code Section 212.002(cities) to Tex. Local Gov. Code Section 232.003(counties). However, in 2001, "urban" counties were given the same broad regulatory authority as cities. Tex. Local Gov. Code Section 232.101 et. seq. Urban counties include;

- 700,000+ population
- counties adjacent to 700,000+ population counties and within the same SMSA
- border counties with 150,000+ population.

Specific authority is granted for:

- adoption of rules

- adoption of major thoroughfare plans
- establishment of lot frontage minimums
- establishment of setbacks
- entering into developer participation contracts for public improvements without competitive bidding, if a performance bond is provided and the public participation is limited to the lesser of 30% or the actual additional cost to oversize the improvements
- prohibition of utility connections without a certificate evidencing proper platting or an allowed exception.

With this new authority, urban counties will be revising subdivision regulations to make them look like the more detailed regulations typical to cities.

### **C. Development Plats**

Development plats are a type of plat, but the most basic. They are, essentially, a site plan review. They are no longer used to subdivide property, and therefore are not typically recorded. Approval is administrative, without planning commission involvement, except for variances or special exceptions. No preliminary plat required. Design and engineering standards are less stringent, even allowing an existing survey to be used. See Houston Code Section 42-26. A development plat is required in Houston for new construction or enlargement of existing structures by over 100 sq. ft., except on the CBD, or a single family unit on a duly platted lot, or a parking lot or retaining wall. Houston Code Section 42-22. A building permit will not be issued where a development plat is required and has not been approved. Houston Code Section 42-4.

#### **D. Manufactured Housing**

Counties have additional powers to regulate manufactured home rental communities. Tex. Local Gov't Code Section 232.007.

#### **E. Colonias**

Cities and counties have additional powers to regulate colonias (substandard neighborhoods catering to low income residents in counties adjacent to Mexico). Tex. Local Gov't. Code Sections 212.0105, 0106 & 0175 (city) and 232.021 et. seq.(county). The county powers are extensive.

#### **F. Overlapping Jurisdiction**

In a city ETJ, the plat must satisfy **both** the city and county subdivision regulations. Historically, many cities and counties have cooperated, formally or informally, to accomplish plat approvals. Since most city ordinances are more detailed and cities typically have more staff, many counties will defer, practically, to the city's approval. However, formal approval is still required and the plat must be signed by both city and county officials for recording. Unfortunately, this cooperation has not been present in many instances, thus delaying and complicating development with multiple approvals and conflicting regulations.

Changes to Tex. Local Gov. Code Chapter 242 in 2001 mandate that cities and counties (other than Houston area counties and border counties, which are exempted) to simplify the plat approval scheme by selecting one of the following alternatives by April 1, 2001:

- Exclusive city authority
- Exclusive county authority
- Geographic apportionment of the ETJ between the city and county with exclusive authority as apportioned

- Interlocal agreement establishing a joint subdivision approval process with single fees, office and processing.

However, there is no penalty for non compliance (other than the implication that the legislature will impose a legislative resolution and/or penalties in the next legislature).

#### 4. MUST A PLAT MEETING ESTABLISHED REQUIREMENTS BE APPROVED?

**YES.** The discretion of a governmental authority approving a subdivision plat is limited, as the approval process is ministerial in nature. Local governments are not granted wide latitude. *City of Round Rock v. Smith*, 686 S.W.2d 300 (Tex. 1985) (city); *Projects American Corp. v. Hilliard*, 711 S.W.2d 386, 387 (Tex. App. - Tyler, 1986, no writ) (county); *City of Stafford v. Gullo*, 886 S.W.2d 524 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1994, no writ) (city); *Commissioners Court of Grayson County v. Albin*, 992 S.W.2d 597 (Tex. App. - Texarkana 1999, pet. denied) (county). A city must only apply those rules adopted in accordance with Section 212.002, which cities sometimes fail to follow. A city has broad discretion in the rules adopted and they should be upheld upon challenge so long as there is a rational relationship between the rule and a legitimate governmental purpose relating to the subdivision of land. Governments may not add additional requirements or increase the limitations of their existing requirements as justification for denial of a plat. *City of Stafford v. Gullo*, 886 S.W.2d 524, 525 (Tex. App. - Houston[1st Dist.] 1994, no writ).

Tex. Local Gov't. Code Section 212.005 states:

"The municipal authority...**must approve** a plat or replat...**that satisfies all applicable regulations.**"

Some city subdivision ordinances contain a similar requirement.

Tex. Local Gov't. Code Section 212.010 states:

"The government authority...shall prove a plat if:

1. It **conforms to the general plan** of the municipality and its current and future streets, alleys, parks, playgrounds and public utility facilities;
2. It **conforms to the general plan** for the extension of the municipality and its roads, streets, and public highways within the municipality and in its extraterritorial jurisdiction, taking into account access to an extension of sewer and water mains and the instrumentalities of public utilities;
3. ... [applicable to Colonias only]; and
4. It **conforms to any rules adopted under Section 212.002.**"

Tex. Local Gov't Code Section 212.002 states:

**"After a public hearing** on the matter, **the governing body of a municipality may adopt rules governing plats** and subdivision 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."

Tex. Local Gov't Code Section 232.002(a) states:

**"The commissioners court...must approve**, by an order entered in the minutes of the court, **a plat required by Section 232.001**. The commissioners court may refuse to approve the plat **if it does not meet the requirements** prescribed by or under this chapter...."

##### **5. MUST REASONS FOR A PLAT DENIAL BE PROVIDED?**

**YES.** Upon request by the owner, the local government shall certify the reasons for subdivision plat denial. Tex. Local Gov't Code Sections 212.009(e)(city) and 232.0025(e)(county). If a controversial subdivision plat is denied (preliminary or final) and the property owner wants to contest the denial, it should promptly request this certification, as it is the best evidence of the basis for the denial.

Some city attorneys interpret Section 212.009(e) to apply only to final plats, but the statute does not have any distinction. Dallas Code Section 51A-8.403(a)(5) requires an "action letter" be generated by the City within seven (7) days of Planning Commission action on a plat, which letter states the action taken: if denied, the reason for the denial, and if approved, any conditions for final approval.

## **6. MUST A PLAT APPLICATION BE PROMPTLY CONSIDERED?**

**GENERALLY.** Subdivision plat requests must be acted upon within 30 days after the plat is filed. Tex. Local Gov't Code Section 212.009(a). State law does not distinguish between "preliminary" and "final" plats. Some city attorneys take the position that only the "final" plat is contemplated for this 30 day requirement, arguing that only the "final" plat meets the requirements of Tex. Local Gov't Code Section 212.004(c) and (d) and is in recordable form. Land use attorneys representing land owners disagree and consider the rule applicable to any plat submission. There is no case law on the subject. Most cities apply the 30 day requirement to both preliminary and final plats. This means a plat may not be "tabled" by a planning commission if the result is to delay decision beyond the 30 day limit.

When a subdivision plat application is "filed" is usually addressed in the city subdivision ordinance by stating that until the application is "complete" it is not considered filed for 30 day consideration purposes. Typically, a subdivision ordinance provides that the filing date is the date determined administratively by the city staff's determination that the application is "complete". Obviously, this will be a fact issue in any litigation which arises from a denial. Therefore attorneys and engineers involved in a potentially controversial plat should exercise best efforts to "paper the file" with evidence of the date that the plat application is considered "complete."

A city should always make a determination on either a preliminary and final plat within 30 days from the date when the application could be considered complete. This is the practice in Houston. Therefore plat applications cannot be "tabled", "held" or "deferred" for later consideration if the 30 day

time period will be exceeded. Instead, the application should be denied or the applicant should be told that unless they withdraw their application (perhaps subject to refileing without a new fee), the application must be ruled on at that time. Faced with an almost certain denial, most land owners will agree to withdraw the application for resubmittal at a later time.

In 2001, the legislature exempted amending and minor plats, the approval of which has been delegated to staff for review and approval, from the 30 day limits. Tex. Local Gov't Code Section 212.006(c).

In *Meyers v. Zoning and Planning Commission of the City of West University Place*, 521 S.W.2d 322 (Tex. Civ. App. - Houston [1<sup>st</sup> Dist.] 1975 writ ref'd n.r.e.), the court refused to apply the 30 day deemed approval provision to a requested mandamus when the city showed that the plat did not meet its subdivision regulations, despite the fact of no action within the 30 day period.

Effective in 1999, Counties have a 60 day limit for final action on a plat, with additional requirements relating to response to applications, determination of when a submission is complete, extension of the deadline (generally requires applicant approval) and penalties. Tex. Local Gov't Code Section 232.0025. If no action is taken, the plat is deemed approved. Tex. Local Gov't Code Section 232.0025(i)(2).

**7. MAY THE CITY OR COUNTY REQUIRE SIGNIFICANT "EXTRACTIONS" WITHOUT COMPENSATION?**

**YES, WITH LIMITATIONS.** Subdivision regulation is based on legitimate government interest in promoting orderly development, insuring safe neighborhoods, insuring adequate police and fire protection is possible and insuring adequate drainage. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985). The basis of subdivision controls is the land registration system. Registration is a privilege that local governmental entities have the power to grant or withhold based upon the

compliance with conditions. The entire regulatory scheme depends on the approval and recordation of the plat. *Lacy v. Hoff*, 633 S.W.2d 605, 607-608 (Tex. Civ. App. - Houston [14<sup>th</sup> Dist.] 1982, writ *ref'd. n.r.e.*). A subdivision ordinance may require dedication and construction of streets, alleys and utilities as part of orderly development and may be enforced through the platting approval process. *City of Corpus Christi v. Unitarian Church*, 436 S.W.2d 923, 930 (Tex. Civ. App. - Corpus Christi, 1968 writ *ref'd. n.r.e.*). These types of requirements are called "extractions". The imposition of those dedications to provide for infrastructure improvement as a condition precedent to plat approval is not a taking. *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448, 460 (Tex. Civ. App. - Corpus Christ, 1968, writ *ref'd. n.r.e.*). However, a city may require dedications only if properly authorized by constitutional, statutory or charter authority. *City of Stafford v. Gullo*, 886 S.W.2d 524 (Tex. App. - Houston[1st Dist. 1994, no writ). In *Gullo*, the city required more right of way to be dedicated than provided in its subdivision ordinance and therefore, the dedication was improper. *Id.* at 525.

Typical extractions:

- drainage easements and facilities
- street and alley rights of way and paving with curb and gutter
- water and wastewater easements and facilities(including lift stations)
- street lighting
- fire hydrants
- sidewalks
- street signage
- traffic control devices

Less typical extractions:

- park dedication(or fees in lieu thereof)

- school site dedications
- major public works facility dedication(e.g. water storage, waste treatment plant)
- public service facility dedication(fire or police station)

Counties may require street and drainage easement dedications and construction, within specified limitations. Tex. Local Gov't Code Section 232.003.

*City of College Station v. Turtle Rock Corporation*, 680 S.W.2d 802 (Tex. 1984) upheld requiring park land to be dedicated as a condition to plat approval. The park land (and any other dedications required), must be “reasonably related” to the public needs created by the new development. In other words, the dedication requirement is related to the additional burden of public infrastructure, not to satisfy pre-existing problems which are not exacerbated by the new development. A payment in lieu of dedication is not a taking, so long as it is earmarked for parks to benefit the area in question. *Id.* Neither Houston nor Dallas require park dedication in the platting process, although Dallas requires notice to the Director of Parks and Recreation if the plat incorporates land shown on the Long Range Physical Plan for Park and Recreational Facilities as potential parkland, so to allow an opportunity for the City to negotiate acquisition. Dallas Code Section 51A-8.508(a).

Not only the dedication of right of way and easements, but the requirement for a developer to construct streets and install infrastructure improvements as a condition to plat approval, as well as the requirement for bonds to insure construction of those improvements has been upheld. *Crownhill Homes, Inc., supra*. However, requiring a landowner to dedicate property for use as a right-of-way for a **state** highway constitutes a taking which requires just compensation. *City of Houston v. Kolb*, 982 S.W.2d 949 (Tex. App. - Houston [14th Dist.] 1999, pet. denied). In *Kolb*, the City acknowledged it had no power over the location of a **state** highway (the proposed Grand Parkway). *Id.* at 953. Further, testimony showed that the intent was to reduce future right of way acquisition expenses for the Grand

Parkway, which is not an appropriate reason for governmental regulation. *Id.* This decision would have been different if it addressed a city street. *Kolb* was analyzed as a condemnation case rather than a subdivision exaction case.

Houston Code Section 42-120 et. seq. requires dedication of street and alley right-of-way based on the Major Thoroughfare and Freeway Plan and the right-of-way widths of Section 42-122 (generally 100' for major thoroughfares, 60' for collector streets, 50' for local streets and 20' for alleys). Public utility and drainage easements are required to be dedicated in Houston Code Section 42-210 et. seq. The planning commission is authorized to grant a special exception or variance to these requirements (as interpreted by the planning department staff) upon a majority vote. Houston City Code Sections 42-81(variance) and 42-82(special exception). Special exceptions are limited to reductions of no greater than 33% of the standard requirement. The standard for obtaining a variance is tougher, but the planning commissions discretion is not limited.

Dallas Code Section 51A-8.602 et. seq. requires dedication of all land needed for construction of streets, thoroughfares, alleys, sidewalks, storm drainage facilities, flood ways, water mains, wastewater mains and other utilities. The dedications are based on the amount of right-of-way, pavement width and minimum centerline radius required by the chart in Section 51A-8.602(g). Dallas Code Section 51A-86.02(b)(1) requires city staff make an “individualized determination” that the required dedication relate to the proposed development and are roughly proportional to the needs created, and benefit the new development. This language addresses the requirements of the US Supreme Court in *Dollan v. City of Tigard*, discussed in Section 8 below.

## **8. ARE THERE LIMITS ON EXACTIONS A CITY CAN REQUIRE OF A DEVELOPER?**

**YES.** State and Federal law provide guidance on the limits on a city requiring exactions as part of the platting approval process. Generally, the required dedications and mandatory construction of

public facilities must be related to the burdens on the city placed by the new development and its related population and business impact.

- **Impact Fees** - Tex. Local Gov't. Code Chapter 395 requires a detailed procedure as a prerequisite to assess "impact fees" (sometimes previously known as capital recovery fees) from developers. Impact fees are charges to developer to defray the cost of off-site public infrastructure designed to service new growth. The impact fee statute is designed to specifically authorize these charges, but to protect developers by establishing a fair, mandatory formula for determining how a particular tract should equitably share in the cost of infrastructure which benefits that development.
- **Federal Case Law** - The US Supreme Court has established a number of rules which limit government exactions:

Exactions must substantially further a legitimate state interest and there must be a nexus between the exaction and the public need to be addressed. *Nollan v. California Coastal Corp.*, 107 S.Ct. 3140(1987). As a condition for a required permit to construct a new house, Nollan was required to grant an easement over his private beach in order to connect two public beaches separated by his property. Since there was no link between the public benefits of beach access and the public burden from construction of the new house, the requirement was rejected.

No regulation may deprive the owner of "all economically beneficial or productive use" of the property. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886(1992). Lucas was denied permission to build on a coastal lot in order to protect sand dunes. Only decks and other uninhabitable structures were allowed. This regulation was considered a taking requiring compensation. In effect, this regulation was so excessive that it became a

condemnation. The court provided an exception (not applicable here) where a use is a "nuisance" under state law. A nuisance use may be prohibited without compensation.

A city has the burden to demonstrate the exaction is justified by making an individualized determination that the nature and extent of the exaction is "roughly proportional" to the anticipated impact of the project. Thus, the city has the duty to produce evidence to support its exactions. *Dollan v. City of Tigard*, 114 S. Ct. 2309 (1994). A building permit for expansion of a business was conditioned on granting an easement over an adjacent creek for future storm drainage and a bike path. The city could not link the expansion to either flooding concerns or increase bike traffic, therefore the exaction was a taking requiring compensation.

- **State Case Law** - The Texas Supreme Court has addressed exactions and proper extent of land use regulation.

One project may not bear all the burden of a general community benefit. *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978). Teague was denied a permit to rechannel a creek necessary to prepare land for development. The permit was denied due to public desire to preserve the area due to its scenic character for the generalized benefit of the public and to prevent any development. Teague was held to have the right to recover damages since this benefit was for the general public.

Exactions must meet a two level test:

- (1) A requirement must accomplish a legitimate government goal which is substantially related to health, safety and general welfare.
- (2) The requirement must be reasonable, not arbitrary (with the burden of proving unreasonableness on the property owner).

Park land dedication as part of residential development was upheld when a developer requested plat approval. *City of College Station v. Turtle Rock Corp.* 680 S.W.2d 802 ( Tex. 1984). Providing neighborhood parks is a legitimate government goal and the city imposed the dedication requirement only as a condition to a requested plat approval. There must be a reasonable connection between the impact of the development and the goals being addressed by the required exaction. The developer is not required to solve pre existing deficiencies or provide for future, off site development needs.

Regulation may not interfere with "reasonable investment backed expectations" established when property was purchased, such that the regulation eliminates all economic viable use. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). Zoning regulation with large minimum lots and the related denial of a proposed land development was broadly upheld. Legitimate government interests to justify land development regulation included:

- Protecting from the ill-effects of urbanization
- Enhancing quality of life
- Preserving aesthetics
- Preserving historic agricultural uses
- Controlling the rate and character of growth

Since the land use regulations substantially advanced these interests in the face of increased density reasonably anticipated by the development, the regulation were upheld.

**9. MAY A LOCAL GOVERNMENT CHANGE THE RULES AFTER THE DATE OF A PLAT APPLICATION?**

**NO.** A land owner has "vested rights" in the rules and regulations application to a plat upon first application. Tex. Local Gov't. Code Section 245. This is known as the "Freeze Law."

Tex. Local Gov't Code Section 245.002(a) states:

“Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit **solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed.**”

This vested right applies to subsequent governmental approvals in the platting process so long as they are all part of the same project. Therefore, if a land owner hears that the subdivision ordinance of the city is being redrafted and is proposed to implement limitations which will negatively impact the land owner, they can have a "race to the application window" to submit for plat approval prior to the date that the revised rules and regulations are legally applicable. See *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998) for a complete discussion of the history of the Freeze Law and the peculiarities of its inadvertent repeal in 1997 and re-adoption in 1999.

#### **10. CAN A CITY HALT DEVELOPMENT TO CONSIDER CHANGES TO ITS SUBDIVISION REGULATIONS?**

**YES, BUT THE MORATORIUM MUST BE LIMITED IN LENGTH.** A city may institute a moratorium on plat applications by city council action in order to prevent the "race to the application window" while it is considering changes to its subdivision ordinance. A moratorium of 6 months has been held clearly defensible. *Mont Belvieu Square, Ltd. v. City of Mont Belvieu*, 27 F. Supp.2d 935 (S.D.Tex., 1998). *Mont Belvieu* held a 6 month moratorium for consideration of a zoning ordinance valid as a matter of law.

In 2001, the legislature adopted limitations on development moratoria. Texas Loc. Gov't Code Ann. § 212.131 et. seq. (Vernon Supp. 2001). The limits apply only to moratoria imposed on property development (new construction on vacant land) affecting only residential property (zoned “or otherwise

authorized” for single family or multi-family use). Texas Loc. Gov’t Code Ann. § 212.131-.132 (Vernon Supp. 2001). A moratorium does not affect vested rights under Texas Loc. Gov’t Code Ann. Chap. 245 (Vernon 1999) or common law. Texas Loc. Gov’t Code Ann. § 212.138 (Vernon Supp. 2001). The limits include the following:

- \* Required public hearings with notice
- \* Limits on when temporary moratoria may commence
- \* Deadline for action on a proposed moratorium
- \* Required findings in support of the need for the moratorium
- \* Limitation of moratoria to situations of shortage of (i) essential public services(defined as water, sewer, storm drainage or street improvements), or (ii) “other public services, including police and fire facilities”
- \* The moratorium automatically expires after 120 days from adoption, unless extended after a public hearing and specified findings.
- \* A mandatory waiver process with a 10 day deadline for a city decision (vote by the governing body) from the date of the city’s receipt of the waiver request.

Texas Loc. Gov’t Code Ann. § 212.133-.137

**11. CAN A PLANNING COMMISSIONER OR CITY COUNCIL MEMBER BE CONFLICTED OUT OF AN ISSUE?**

**YES, UNDER LIMITED CIRCUMSTANCES.** If a member of a municipal authority responsible for plat approval has a "substantial interest" in the tract, the member must file an affidavit stating the nature and extent of the interest and thereafter abstain from participation. Tex. Local Gov't

Code Sections 212.017(d)(city) and 232.0048(county). Substantial interest occurs when (1) a person has equitable or legal ownership interest of fair market value of \$2,500 or more, or (2) is a developer, or (3) owns (i) 10% or more of the interest, stock or shares or (ii) more than \$10,000 (city) or \$5,000 (county) fair market value of a business entity that meets either of the preceding two tests, or (4) the person receives funds from the business entity in which they own an interest described in 3 above and which income exceeds 10% of the person's gross income for the previous year. Tex. Local Gov't Code Sections 212.017(b)(city) and 232.0048(b)(county). Violation of these prohibitions is a Class A misdemeanor. Tex. Local Gov't Code Sections 212.017(b)(city) and 232.0048(e)(county).

## **12. DOES PLATTING AFFECT DEED RESTRICTIONS?**

**YES.**

### **A. Enforcement- The platting process is used to enforce restrictions.**

Many cities will not approve a residential replat if the city attorney determines that the effect of the residential replat would be a violation of existing restrictions.

A residential replat must not "attempt to **amend or remove** any covenants or restrictions" (*emphasis added*). Tex. Local Gov't Code Section 212.014. There is no comparable provision for counties. In some residential neighborhoods, restrictions affecting lot size, set back, etc., may not have been enforced and, in the opinion of the real estate lawyer, are no longer enforceable due to waiver or change in conditions, but nonetheless remain of record. Sometimes the restrictions are ambiguous as to whether they would prevent the subdivision in question, but the land owner wishes to proceed with the development based on its attorney's legal opinion that the restrictions are unenforceable or inapplicable, figuring that area property owners will not have the stomach or resources for a legal fight.

Many Houston area cities (including Houston) construe "amend or remove" in Section 212.014 to mean "violate". Therefore, if a proposed plat arguably violates restrictions, the city will take the

position that the replat must be disapproved, as it violates Section 212.014(3). The City of Houston takes the further position that it is the applicant's burden of proof to show that the restrictions are not being violated. A recent residential replat application in the City of Houston was denied when the neighborhood modified its deed restrictions between the date of initial application and final consideration to prohibit the pending subdivision. The City of Houston rejected the argument that the application of the modified restrictions violated the applicant's vested rights in the regulations applicable at the time of application.

**B. Some Cities are authorized to directly enforce residential restrictions.**

In 2001, the legislature moved former Texas Loc. Gov't Code Ann. Chap. 230 (Vernon 1999) to the Subdivision Act as Sections 212.131 et. seq (thus conflicting with the numbering of the new Moratorium provisions).

A city with (i) an ordinance requiring uniform application and enforcement of Section 211.131 et. seq., and (ii) either (a) no zoning, or (b) over 1,500,000 population, may enforce deed restrictions affecting the use, setback, lot size or type and number of structures by suit to enjoin or abate a violation and/or seeking a civil penalty. Texas Loc. Gov't Code Ann. § 212.131-.137 (Vernon Supp. 2001).

The legislature added in 2001 a provision stipulating that deed restriction enforcement is a *governmental* function. Texas Loc. Gov't Code Ann. § 212.137 (Vernon Supp. 2001). This addition is significant, since cities performing a governmental function are not typically subject to equitable defenses such as laches, waiver and estoppel. Those are the most typical defenses asserted in a deed restriction case by the defendant. With the granting of the governmental function veil of protection, an otherwise unzoned city which fully enforces the authority granted in Section 212.131 et. seq. has, effectively, zoned itself into 2 zones: (i) the residential zone, where residential use is required, as well as the related performance standards of setback, lot size, and type or number of structures, and (ii) the other

zone, with no such regulation. With the governmental function mantle, enforcement of residential deed restrictions will become more automatic, as the majority of deed restriction case law supporting defendants become irrelevant. That enforcement becomes, effectively, the same as judicial enforcement of zoning. Municipal attorneys enforcing residential deed restrictions may begin to analogize to zoning case law for precedent relating to enforcement rights.

A city may enact an ordinance requiring that notice of these rights be given to the owners of deed restricted property. Texas Loc. Gov't Code Ann. § 212.135 (Vernon supp. 2001); *see* City of Houston Code of Ordinances Sections 10.551 *et. seq.* In order to help city staff discover the existence of deed restrictions, the submission for a commercial building permit requires a certified copy of any deed restriction affecting the subject property. This same obligation applies to any subdivider of property, whether commercial or otherwise, and to any person who proposes to perform substantial repair, or remodel a commercial building located within a subdivision or to convert a single family residence into a commercial building.

### C. Creation- Plats might create restrictions.

Some city attorneys interpret setback lines on a recorded subdivision plat as deed restrictions which are enforceable by property owners in the subdivision. *See, Maisen v. Maxey*, 233 S.W.2d 309, 312 (Tex. Civ. App. - Austin 1950 writ ref'd n.r.e.). In *Maisen*, the court upheld the denial of a plat attempting to eliminate a common area amenity (referenced on the plat as "Terraced Park Area") and replace it with residential lots. The court stated "if appellant did not intend to dedicate the area in question as a public park, he should not have impressed the said area upon the map or plat as Terraced Park Area." *Id.* at 313. However, the case focuses on equitable concepts of estoppel and reliance rather than platting law or restrictive covenant law. *McDonald v. Painter*, 441 S.W.2d 179 (Tex. 1969) allowed a residential replat creating more, smaller lots and denied the argument that the platting of the lots to a smaller size violated deed restrictions against duplexes. The restrictions required residential use, but did not establish minimum lot size or preclude more than one house per lot. The court stated, "the restrictions do not mention resubdivision, or expressly require one house per platted lot..." and "...covenants cannot be implied from the mere making and filing of the map showing the different subdivisions or by selling lots in conformity therewith." *Id.* at 183. *Painter* was followed in a county platting context in *Commissioners Court of Grayson County, Texas v. Albin*, 992 S.W.2d 597 (Tex. App. - Texarkana 1999, pet. denied). The *Albin* court stated, "...under Texas law, the only rights established for the purchasers of lots set forth on the plat were the ownership rights of the specific property which the owner was conveyed." *Id.* at 604. In *Albin*, replatting three 4.5 acre rural lots to 11 new lots was upheld over the objections of the purchaser of an adjacent 4.5 acre lot and the Commissioners Court. However, the dissenting opinion makes cogent arguments against the majority opinion.

In many cities, as a condition of plat approval, the city will require “plat notes”, which often state a limitation of use to non residential. As discussed above, some city attorneys construe these as private restrictions.

The author believes the proper interpretation is that plat setbacks and notes are simply a part of the governmentally required platting requirements and thus, should be able to be changed by a replat. A replat is controlling over the preceding plat. Tex. Local Gov’t Code Section 212.014. Therefore, the approval of the replat is all that is required for the elimination of the setback lines in a prior plat. Neighbor consent is not necessary. If plat setbacks and notes are restrictions, they should be interpreted as personal covenants between the developer and the government, not real covenants which run with the land and can be enforced by subsequent owners. The City of Houston follows this interpretation and allows setback lines to be modified without approval of other property owners. Without such interpretation, a residential replat changing setback lines, common areas or the elimination of use related plat notes would always be rejected, as Section 212.014(3) precludes approval of a replat which attempts to “amend or remove any covenants or restrictions.” Further, the consent of all owners of property in a subdivision and their lender would be required to modify plat setbacks. This consequence would result in an illegal delegation of authority for plat approvals such as was declared unconstitutional in *Minton v. City of Fort Worth Planning Comm’s*, 786 S.W.2d 563 (Tex. Civ. App. - Fort Worth 1990, no writ).

**D. Platting may violate restrictions.**

Platting may violate prohibitions in restrictions against subdivision of land or the minimum dimensions of new lots. See, *Witte v. Sebastain*, 278 S.W.2d 200 (Tex. Civ. App. - Amarillo, 1953 no writ).

### **13. DOES PLATTING AFFECT ZONING?**

The platting process is independent from the zoning process, with different legal origins and enabling statutes. However, they are intertwined, as they both relate to the development of real property. Often, each process provides a requirement of compliance with the other. *See*, Dallas Code Section 51A-8.501.

### **14. CAN OWNERS OF LOTS SUE THE ENGINEER WHO CREATE THE PLAT FOR NEGLIGENCE?**

**NO, THE ENGINEER HAS NO DUTY TO THE ULTIMATE BUYERS, ONLY TO THE DEVELOPER.** Since the lot buyers were never in direct privity, the engineer has not professional duty to them. *Hartman v. Urban*, 946 S.W.2d 546, 550 (Tex. App. - Corpus Christi 1997, no writ). However, there *may* be liability under the Tex. Deceptive Trade Practices Act, if the plat was filed after 1973. *Id. at 551*.

### **15. IS LENDER CONSENT NECESSARY FOR PLATTING?**

**YES, BUT OFTEN IT IS NOT A REQUIREMENT FOR PLAT APPROVAL.** If a lender does not consent, a foreclosure will terminate the plat. Also, most all institutional lender deeds of trust prohibit platting without lender consent, thereby creating an event of default if the plat does not have that consent.

**16. HOW DO YOU ELIMINATE UNCONSTRUCTED, BUT PLATTED STREETS AND OTHER PUBLIC IMPROVEMENTS?**

**IF NOT ACCEPTED, BY REPLAT.** Plats contain language offering to dedicate the public easements shown. The act of plat approval does not mean the city is accepting the offered dedication. Tex. Local Gov't. Code Section 212.011(a). A replat will replace the prior plat and eliminate the former offered dedications, without the requirement for separate abandonment. The elimination of unconstructed roads and easement is a typical requirement in land assemblages. However, if the former dedications were accepted, whether by writing, construction of the improvements or use, a separate abandonment action is required. Tex. Local Gov. Code Section 253.001. The installation of any public utilities will be sufficient for many cities to assert acceptance of dedication. Cities may have a detailed procedure to abandon streets or easements. In Houston, the abandonment process typically takes 6-12 months from initial application, and will take a minimum of 4 months. The process involves the following steps:

- Application to the Real Estate Branch of the Public Works Dept.
- City Staff investigation regarding current use and potential future public use
- Approval by the Joint Referral Committee
- City Council Motion approving the abandonment and appointing 2 independent appraisers
- Detailed survey (to exacting city standards) of the abandonment parcels
- Appraisal of the fair market value of the abandonment parcels, as if they were fee simple tracts
- Required waiver letters from public utility providers

- Offer of abandonment fee- 100% of fair market value if a street, 50% if an easement. If the abandonment parcel is to be burdened with a new public easement, a 50% credit is granted. If the abandonment is related to a significant redevelopment project with will increase property tax collections, a 50% *redevelopment credit* may be requested.
- Payment of abandonment fee
- Approval of abandonment ordinance by City Council
- Recording of certified copy of abandonment ordinance to evidence the abandonment. Title companies will rely upon the “strips and gores” doctrine to grant title to the abandonment parcels to the adjacent property owners. The City of Houston will not sign a deed of any type, even a quitclaim deed.

Where the road was proposed, but never accepted, or the city does not consider that a proper dedication offer was made, the City of Houston will consider a request to issue a “non-dedication” or “non-acceptance” letter, after Joint Referral Committee approval. This eliminates the need to replat simply to eliminate the road in question.

**17. CAN A DEVELOPER STOP A CITY FROM ANNEXING ADJACENT PROPERTY,  
(resulting in application of the city's subdivision regulations on the developer)?**

**NO. WHERE THE DEVELOPER'S PROPERTY WAS NOT ANNEXED AND THE COMPLAINT IS THE INCLUSION IN THE CITY'S ETJ, THE DEVELOPER HAS NO STANDING TO CHALLENGE THE ANNEXATION.** Generally, annexation is only challenged by *quo warranto* proceedings brought by public officials, and the only exceptions allow owners of annexed property to challenge. *Sunchase Capital Group v. City of Crandall*, 69 S.W.3d 594, (Tex. App. - Tyler 2001, no pet. h.).

## **18. MAY A CITY DENY ACCESS TO PLATTED STREETS ABUTTING PROPERTY?**

### **NO. ADJACENT PROPERTY HAS A RIGHT TO ACCESS A PUBLIC STREET.**

Anyone purchasing property within or adjacent to a platted subdivision has a private property right in dedicated streets shown on the plat. *Town of Palm Valley, Texas v. Johnson*, 3 S.W. 3<sup>rd</sup> 281, 288 (Tex. App.—Corpus Christi 2000, pet. den. 44 Tex. Sup. Ct. J. 1186, 2001), *Dykes v. City of Houston*, 406 S.W. 2<sup>nd</sup> 176, 180 (Tex. 1966). The abutting street may not be closed or vacated without consent of the adjoining property owner. *Johnson*, at 285. Where irreparable injury is shown, the city may be enjoined from closing the street. *Id.* at 288. Apparently, the denial of access itself is irreparable harm. *Id.* 44 Tex. Sup. Ct. J. at 1095357\*1. The opening of a dedicated street is subject to reasonable regulation. *Dykes*, at 181. If a city acts unreasonably in refusing to open the street, it may be subject to mandamus. *Id.* At 182. However, some cities will require a one foot reserve between platted streets and adjacent unplatted property to eliminate this right. *See, City of Houston Code of Ordinances Section 42.192*. Since the dedication stops short of the boundary, the adjacent property owner’s property does not “abut” the street. *See, Johnson*, at 285 for definition of “abut”.

## **19. WHAT HAPPENS IF PLATTING REQUIREMENTS ARE IGNORED?**

### City remedies:

- Injunctive relief
- Fine (w/in city limits only) up to \$2,000/day or civil penalty up to \$1,000/ day (city limits only)
- Refuse utility service
- Recover damages in an amount necessary to cause compliance (but only against the developer, not innocent lot owners)

Tex. Local Gov’t Code Sections 212.003, 012, 018 and Sections 54.001 et.seq.

County remedies:

- Injunctive relief
- Recover damages in an amount necessary to compensate the county for the cost of bringing about compliance with platting requirements
- Pursue any willing violation as a Class B misdemeanor.

Tex. Local Gov't Code Section 232.005.

Colonias:

Cities and counties have additional remedies relating to colonias. Tex. Local Gov't Code Sections 212.0175(city) and 232.035 et. seq. & .079 et. seq.

Other penalties and remedies:

- See Houston Code Section 42-4,5,6 and 7 and Dallas Code Section 51A-1.103 for local enforcement provisions.
- Using an unrecorded plat to convey land violates Tex. Prop. Code Section 12.002 and is a misdemeanor.
- Refusing to issue a building permit on unplatted property was upheld in *Head v. City of Shoreacres*. 401 S.W.2d 703 (Tex. Civ. App. - Waco 1966 writ ref'd n.r.e.).
- A buyer has a number of claims against the seller of an illegally subdivided tract, which may include Texas Deceptive Trade Practices Act, fraud, and negligent/ fraudulent misrepresentation. See, *Precision Sheet Metal Mfg. v. Yates*, 794 S.W.2d 545 (Tex. Civ. App. - Dallas 1990, error den'd). In *Precision Sheet Metal*, the court applied the discovery rule to allow the statute of limitations to run from the date of the buyer's discovery of the platting violation, rather than the date of transfer. *Id.* at 550.

**20. IS A GOVERNMENT LIABLE FOR A PLATTING DECISION?**

**NO.** Plat approval is a governmental function. *City of Round Rock v. Smith*, 687 S.W.2d 300 (Tex. 1985) Negligent approval of a plat will not expose a city to damages. *Id.* at 302. In *Smith*, the city was held not responsible for flooding caused by a subdivision where the plat was allegedly approved negligently by the city.