

HOT TOPIC

Checklist for Local Development Approvals

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Checklist for Local Development Approvals

New development is a "Hot Topic" for real estate attorneys. In the last 5 years there has been as much new development in Texas as in the 10 years preceding that period. New development introduces a whole new level of complexity and issues to the real estate attorney. In order to appropriately handle a transaction and draft proper documents, the real estate attorney must gather background information, evaluate local development regulations and required approvals, determine the current land development status, make recommendations to their client and appropriately draft documents based on the foregoing. This process includes the following steps:

1. **Gathering Information**

a. Zoning Status - The following information should be obtained to knowledgeably review the zoning status for a particular piece of real property:

- (1) Comprehensive Plan (and confirmation of whether it was formally adopted and how adopted [i.e., resolution or ordinance]);
- (2) Zoning Ordinance (and all amendments [current to date]);
- (3) Rules of Planning and Zoning Commission / Zoning Board of Adjustment (if action by either party will be necessary);
- (4) Confirmation that no zoning changes are pending (obtained through City Secretary/Secretary

- to Planning and Zoning Commission); and
- (5) Zoning Map (current).

Each of these documents should be confirmed to be the most current and finally adopted. Care should be taken to insure there are no pending changes.

b. Platting Status - The following information should be obtained to knowledgeably review the platting status of a particular piece of real property:

- (1) Title Commitment;
- (2) Any plat reflected on the title commitment affecting the real property;
- * (3) Subdivision Platting Ordinance (and all amendments);
- * (4) Rules of the Planning and Zoning Commission (if replatting required); and
- * (5) Subdivision Platting Rules of the City (often incorporated in a development manual, and which are separate from the Subdivision Platting Ordinance).

*These items may be reviewed by a knowledgeable engineer instead of the real estate attorney.

Each of these documents must be confirmed to be the most current and finally adopted.

c. Restrictive Covenants - The following information should be obtained to knowledgeably review restrictive covenants relating to a particular piece of real property:

- (1) Title Commitment;

- (2) Legible copies of all restrictive covenants reflected in the title commitment (and all amendments); and
- (3) All plats reflected in the title commitment or the restrictive covenants.

d. Other Development Regulations

- Although zoning and platting are the primary local development regulations where attorneys are often primarily responsible for due diligence, the real estate attorney should inquire of their client to confirm that the following areas are being appropriately investigated:

- (1) Utility location and capacity;
- (2) Drainage and detention/retention requirements;
- (3) Impact fees;
- (4) Planned condemnations (generally road widening);
- (5) Wetlands;
- (6) Building Code

These issues are often addressed by knowledgeable non-attorney development consultants. Often the real estate attorney will coordinate due diligence with those professionals and deal with legal aspects as they arise.

2. Determining Current Status

Review of the relevant local development regulations should be conducted to determine the current status of the property.

a. Zoning Status - A review of the relevant zoning documents should be conducted to determine the current status of the property.

(1) Zoning Confirmation -

Where the zoning map or ordinance is inconclusive, a determination by the city's planning staff is recommended. A letter from the city planning staff confirming the zoning status should be requested when property is to be acquired or developed. However, under most circumstances, the issuance of such a letter will not act to bind the city in the event the letter is incorrect. As a general principal, a city is not bound by the mistakes of its employees and there cannot arise an estoppel defense to prevent the city from enforcing its duly adopted ordinances. **Therefore, blind reliance on a city's zoning letter is not prudent.** The city's zoning letter should simply be a written confirmation of facts confirmed by the practitioner or their client.

(2) Non-Conforming Status -

If the current land use is not in compliance with the zoning ordinance, then the zoning ordinance should be reviewed to determine what specific rights are provided to pre-existing, non-conforming uses and whether amortization is possible.

(3) Comprehensive Plan -

Where the zoning is objectionable, the Comprehensive Plan should be reviewed to determine if the current zoning is consistent with the Comprehensive Plan. If the zoning is inconsistent, a "spot zoning" objection may be possible. However, legal challenges to zoning have rarely been successful. Otherwise, the procedures for rezoning should be reviewed carefully.

(4) Interpretation - In the event of any ambiguity in the zoning ordinance or map, a formal interpretation by the Zoning Board of Adjustment should be obtained and should be binding upon the city. This interpretation, unlike a staff issued zoning letter, should be legally binding on the city. Note that the Zoning and Planning Commission does not have any interpretive authority, only the Zoning Board of Adjustment.

b. Platting Status - If the property being purchased is not the entirety of a lot, block or reserve of a recorded subdivision plat, further inquiries are required regarding the Platting Status. The general rule is that all divisions of real property, including those by metes and bounds description, require a subdivision plat.

(1) Exceptions to Platting - If the property is a portion of a platted lot, tract or reserve, some subdivision platting ordinances provide exceptions for tracts of a particular size with direct road frontage and for portions of commercial reserve used for non residential purposes. Even where the property has never been platted, some subdivision platting ordinances grant exceptions for tracts of a particular size with adequate road frontage. State law exempts from subdivision requirements the division of tracts of 5 acres or more with public road frontage.

(2) Architectural Review - Architectural control review is of particular concern for new development. Sometimes the architectural control function has lapsed and there is no

(2) Platting Confirmation - A request can be made to City Staff for issuance of a subdivision platting certification under Tex. Loc. Gov't. Code Sec. 212.0115(a). Under this little known provision, the City must respond promptly and issue a certification stating whether or not the property in question is properly platted. Although as indicated above, there is typically no estoppel against a City based on its representation, since the certification requirement is specifically provided in the state subdivision statute, a strong argument can be made that it is intended that property owners rely on the certification and therefore estoppel would apply even if the certification were granted in error. There is no comparable provision for counties, only cities.

c. Restrictive Covenants - Restrictive covenants are private land use regulations imposed by an owner and should always be carefully reviewed for impact on new development.

(1) Conflict With Government Regulations - Private land use regulations may conflict with local government development regulations such as zoning and platting. Even when conflicting with local governmental controls, restrictive covenants are enforceable.

functioning architectural control committee. Further complicating the issue are the provisions of Property Code Chapter 204.010 which appear to reinstate architectural control authority

to a property owner's association, even if the authority in the restrictive covenants establishing architectural control appear to have lapsed by a passage of time.

In master planned communities, property owner's associations often promulgate a development manual detailing development procedures and regulations, such as The Woodlands. The approval scheme for some master planned communities is similar to, if not more strict, than a typical zoned city.

d. Other Development Regulations
- Other development regulations should similarly be investigated. Often confirmation letters can be obtained from the appropriate authorities regarding the status of issues such as utilities, drainage requirements, etc. Formal reports from consulting professionals are often appropriate.

3. Considering Alternatives

If the current land development status of the property is unacceptable, the real estate attorney should review with their client the available alternatives.

a. Zoning - If the current zoning status of a property is unacceptable, the alternatives may involve rezoning, variance or special exception. All zoning approvals are discretionary and legal challenge is expensive and rarely successful. Rezoning in most cities (and sometimes special exceptions) require both

(2) City Staff Position - Often city planning staff can provide helpful (although perhaps biased) insights into issues critical to the city, how to avoid dead-end detours, and the

Planning and Zoning Commission and City Council approvals and will take, at a minimum, 3-6 months. Variances and many special exceptions are approved by the Zoning Board of Adjustment only. Variances are difficult to obtain. Special exceptions are site and development specific, requiring significant preparation before submission for approval.

(1) Investigations - Before selecting the appropriate alternative, the practitioner should contact the chief planning official with the city to review all issues and determine the following:

1. The planning staff's position;
2. Treatment of similarly situated properties in the past (and why);
3. Make-up and philosophy of the Planning & Zoning Commission/Zoning Board of Adjustment on similar issues;
4. Make-up and philosophy of City Council on similar zoning issues; and
5. Current political issues in the city affecting land use decisions.

proper procedure to achieve your zoning objectives. City planning staff should never be considered as the only source of information. In smaller cities, the chair of the Planning & Zoning

Commission and Zoning Board of Adjustment are often helpful and willing to provide assistance. Experienced local engineers, planners, real estate professionals and attorneys should be consulted.

(3) City Goals - It is always critical to determine any overriding philosophy of the city and be sure your zoning request is not contrary to it. Some cities are pro-development with a focus on increasing property taxes, while others focus on increasing sales taxes. Many smaller communities are rabidly anti-multi-family development based on concerns about increased crime and lowering of property values of adjacent single-family neighborhoods. Others are becoming disenchanted with "Big Box Retail". More and more communities are concerned about various environmental issues including trees, landscaping, pervious area and the like. All zoning requests should be presented in a "win-win" context based on the city's Comprehensive Plan and overriding land use/economic development goals.

b. Platting - Where the platting status is unacceptable, in almost every case, the real property should be platted prior to closing. Occasionally, due to local custom and historic lack of enforcement of platting regulations, acquiring the property without properly platting may be an acceptable business decision. The real estate attorney should counsel their client that historic practices will not bind a government and will not estop a government

(2) Variance - In master planned communities, there is sometimes the provision for variance or

from commencing to enforce clearly applicable subdivision platting regulations at any time in the future. The purchaser should also be aware that the development permitting process is typically used by local governments to discover non-compliance and to require it as a condition to the issuance of a permit. When in doubt, the buyer should require the seller to plat.

c. Restrictive Covenant - A careful review of the applicable restrictive covenants will uncover if alternatives are available.

(1) Modification/Termination - Restrictive covenants may be modified (or terminated) by a unanimous consent of all affected parties. Where there is a specific contractual provision for modification or termination, the consent is usually less than unanimous. Often the issue is what parties must provide consent. The larger the number, the less likely that modification or termination is a viable option. Even where restrictive covenants have no provision for modification, Tex. Prop. Code Chapters 201 and 204 provide statutory processes to modify restrictive covenants in residential neighborhoods. The Chapter 201 process is cumbersome and rarely used. Owners may "opt out" of the modified restriction. The Chapter 204 process is streamlined, but available only to neighborhoods with a property owner's association (although one can be created in the 1st step of a 2 step process by vote of 60% of the property owners).

special exception, similar to a zoned community. Otherwise, variances are not common in deed restrictions.

Without specific authority in the restrictive covenants, the an architectural review committee or board of directors may not grant a variance to allow a development to ignore clearly stated restrictions.

(3) Discretion - Where architectural control applies, the architectural review committee typically has broad authority to approve or disapprove development. If the committee's discretion is broad, its approval should not be subject to attack.

d. Other Development Regulations
- The alternatives available on Other development regulatory issues are as varied as the regulations themselves. Generally, meeting with the approving authority to discuss alternatives is the best procedure.

4. **Drafting to Address Local Development Regulations**

Once the real estate attorney has gathered the appropriate information, determined the current land development status and investigated alternatives, they are ready to draft with those considerations in mind. The primary document affected by these considerations is the Earnest Money Contract. Whether the original contract or a modification, among the provisions to be drafted are the following:

a. Zoning Contingencies - The buyer may require that the property be rezoned or that an appropriate special exception or variance is granted as a condition of closing. The following issues should be addressed:

- (1) Specific rezoning result required;
- (2) Cooperation between parties;
- (3) Retention and payment of special zoning counsel and related professionals (and who they represent);
- (4) Appropriate monetary consideration to insure that the buyer closes once the property is rezoned. This is particularly important where the seller is not interested in the rezoned use.
- (5) Timing, and extensions to deadlines, due to delays outside the parties' control;
- (6) Approval of the final application;
- (7) Approval of changes to the application, particularly during hearing and meeting ("on the fly");
- (8) Ability to "pull" rezoning application prior to final decision if unacceptable as presented for final action.
- (9) Representations and commitments to be made to neighboring land owners by a buyer which may impact the seller's remaining property.

b. Platting - As platting is primarily an engineering and land planning matter, the issues in requiring subdivision platting before closing are more straightforward than a rezoning. Issues include the following:

- (1) What property will be included in the replat (just the property to be sold or all of the property owned by the seller);
- (2) Selection of engineer/surveyor;

- (3) Payment of engineer/surveyor and related platting professionals;
- (4) Cooperation in the platting process;
- (5) Approval of the plat applications and related submissions;
- (6) Timing and dealing with local government delays outside the parties' control.

c. Restrictive Covenants - Restrictive covenants are creatures of private contract. Required approvals or modification can be dealt with in contract provisions addressing the following issues:

- (1) Description of the modification or approval required;
- (2) Cooperation of the parties;
- (3) Approval of the submitted changes; and
- (4) Timing.

d. Other Development Regulations - Other development regulations can be dealt with in the Earnest Money Contract and are similar to platting issues.

5. Development Agreements

In some situations, it may be appropriate for a transaction to close before all development approvals have been obtained. The parties will enter into a Development Agreement to handle development issues post-closing. As to local development approvals, a buyer would close and deal with those approvals post-closing only where the denial of the approval would not be critical to the development. Otherwise, the approval should be obtained prior to closing.

Issues that could be addressed in a Development Agreement include the following:

- (1) Post closing local development approvals;
- (2) All pending issues reviewed in Section 4 above;
- (3) Joint development issues affecting local development regulations such as joint detention/retention facilities, road construction, and selection of development professionals;
- (4) Coordination of dealings with local governments;
- (5) Restrictive covenants;
- (6) Reciprocal easements, including access, parking, and the like;
- (7) Utility easements;
- (8) Common area construction and maintenance;
- (9) Future Development Phases.

There are a number of development documents relating to local development regulations:

- (1) Restrictive Covenants;
- (2) Dedication of public easements and rights of way;
- (3) Reimbursement Agreement;
- (4) Land Swap Agreements;
- (5) Dedication Deed.

6. Checklists

Attached as Exhibit A is a general land use law checklist from an earlier presentation by the author and James L. Dougherty, Jr., a Houston municipal law attorney. Attached as Exhibit B is a development checklist from an earlier presentation by the author and David S. Brewer, P.E., of Brewer & Escalante Associates, Inc., a Houston engineering, architecture and development consulting firm.

Exhibit A
CHECKLIST FOR LOCAL DEVELOPMENT REGULATIONS

<p>Is the existing site lawfully platted? How was it created? Metes and bounds? Exceptions/defenses in the ordinance or state law? Was there a prior plat? Check notes/restrictions.</p>	<p>How will drainage be handled? Is there stream capacity? Is detention required? What is the drainage route? Who controls it?</p>
<p>Will a new plat (or replat) be required? Division of a tract? Change in use or restriction? Crossing a lot line? Need to cross or use a one-foot reserve? Check procedures. Will other jurisdictions review? Check for relaxed amending plat or minor plat rules Will any dedications/fee payments be required?</p>	<p>Are there tap fees, impact fees, other fees? See Ch. 395, LGC for the times they accrue. Check for possible exceptions or limits.</p>
<p>Is a site plan (development plat) required? Check the ordinance "trigger." Is there "development" under 212.043 LGC? Check exceptions/defenses in the ordinance Are special traffic or other studies needed? Will any dedication/fee payments be required?</p>	<p>Is any public property needed? Construction in street or easement Encroachments by improvements</p>
<p>Are there zoning regulations applicable? Ordinary municipal zoning? Special airport or reinvestment (TIF) zoning? County zoning (airport, reservoir, etc.)?</p>	<p>If so, what permission is needed? Permit or other revocable permission Contractual permission Outright purchase (appraisal) Check to see if a replat could work instead</p>
<p>If so, does the project comply? What is the building site/lot/parcel? In which zone(s) does it lie? Any overlay zones? Which regulations apply to sites in those zones? Does the project comply with those regulations? For each non-compliant item, check: Exceptions/defenses in the ordinance Exceptions/defenses in state law Prior-non-conforming status ("grandfathering") Prior approvals given (variances, etc.)</p>	<p>Does the project meet all building codes? Prior inspections, permits, certificates? New inspection/certificate from city? Administrative interpretation or modification possible? Appeal to hearing board? Watch deadline.</p>
<p>Can the project comply "as of right"? Has the building official ruled? What appeals are available? Deadline? Has anyone else appealed?</p>	<p>Are there flooding, storm water, grading or filling or special water quality regulations? Check for 100-year flood plain or floodway Check for county and city storm water rules Check for special city/ETJ water quality regulations</p>
<p>Is a ZBA discretionary approval needed? Appeal from administrative ruling? Watch deadline. Special exception (provided for in the ordinance) Variance (hardship; not in the ordinance)</p>	<p>Is off-street parking required? Existing land use? New construction or change in use? Check possible exceptions and transitional rules.</p>
<p>Is another discretionary approval needed? Rezoning or change in district boundaries? Change in regulations only, not boundaries? Amendment called "permit" (SUP, CUP, etc.)? Planned unit development or PDD? Does the comprehensive plan, if any, allow it? Amendment of the plan? See Ch. 219, LGC.</p>	<p>Is landscaping or buffering required?</p>
<p>Is there sufficient water/sewer? Plant/line capacity, points of connection. What are the local providers? Check CCN's. Will the utility issue a letter of availability? Can capacity be reserved? How? Is construction needed? Who does it? Who pays?</p>	<p>Are there tree protection or environmental rules?</p>
<p>Are on-site water/sewer facilities needed? Check state/local rules.</p>	<p>Are there any historic preservation regulations?</p>
	<p>Are there single-subject nuisance-like regulations? Depends on land use/type of activity Use code of ordinances as checklist</p>
	<p>Are there deed restrictions? Architectural control? Compliance needed for building permit? Affidavit? Can a building permit be revoked? Can a lawsuit be brought?</p>
	<p>Check alcoholic beverage licenses and permits.</p>
	<p>Special assessments or special tax districts?</p>

NOTE: _ indicates items that usually apply both inside and outside city limits.

Development Due Diligence

Due diligence is the buyer's duty to itself to understand the risks and costs involved in the acquisition and development of the purchased property. It is our role to assist the buyer in reducing or eliminating these risks before the land is acquired. The Buyer is responsible for establishing the criteria for risk management. This means that the Buyer will decide when it is satisfied and ready to close on the land.

This is a checklist for the due diligence aspect of our services for land acquisitions. The following items are within the scope of our typical site investigation (due diligence) services. A typical criterion for risk management is noted as an example only. Only the Buyer can determine the level of risks to be taken. We may modify our scope of services to conform to the Buyer's risk criteria. If the Buyer's risk management criteria cannot be met we must timely notify the Buyer.

These criteria are based on the Houston metropolitan area:

1. Site Visit Make a site reconnaissance to observe the existing situation. Take photographs.
2. Platting If platting is required: conditional approval comments from preliminary plat submittal.
3. Land Dedications Report to the Buyer any land dedications that are required as part of the plat process.
4. Highway/Street Widening For all abutting public roads we will research the planning for construction and/or right-of-way widening by the agencies having jurisdiction.
5. Access Driveways Research to assure that the desired access driveways will be allowed.
6. Water/Sewer Utilities Obtain written confirmation of a specific utility capacity commitment (in gallons per day or in service units) in the Seller's name (with transfer to the Buyer perfected at closing). This may take the form of a City of Houston "wastewater capacity" letter or a formal commitment letter from a Municipal Utility District (MUD).
7. Drainage Refer to published City, County or TxDOT criteria or, if time permits, obtain written confirmation of drainage requirements. This may take the form of TxDOT approval of drainage plans and/or HCFCD development letter and/or City of Houston "storm sewer" letter. Obtain floodplain determination.
8. Geotechnical Obtain a geotechnical engineer's report ("soils report") with construction and materials recommendations. The civil engineer and the structural engineer should review the report.
9. Alcoholic Beverage (Beer & Wine) Permits Engage permit consultant (such as Butera).
10. Survey Obtain a current boundary and topographic survey meeting lender's or industry standard specifications. The attorney, Title Company and the civil engineer should check the survey.
11. Easements Research and note any easements to be created, modified, released and/or vacated (as required) prior to closing. Review issues with the attorney.
12. Dry Utilities (gas and electrical) Service Confirm availability at the site or the cost to extend services. Caution! Note if deed restrictions dictate underground *primary* electrical.
13. Special Costs Identify special cost factors (such as unusual site preparation requirements or off-site utilities) and assist the Buyer in determining the estimated additional development costs.
14. Long Taps The City (or MUD) will specify where water and sewer taps are to be made. All "long" taps shall be reviewed by the civil engineer to assure a clear path is available for construction of the services. If an alternative method of service is available explore it and report to the Buyer.
15. Deed Restrictions Study and report to the Buyer the design, development or cost impacts. Review issues with the attorney.
16. Architectural (Design) Review Obtain preliminary approval of site and building plans. For corporate standard or prototype buildings (such as retail rollouts) all non-standard architecture needs to be defined and agreed to between the Architectural Control and the Buyer.
17. Permitting Identify all required permits to construct and occupy. Estimate the time to permit for the project.
18. Other Issues May be discovered during the site investigation, due diligence or permitting process.