TIPS FOR DEALINGS BETWEEN LOCAL GOVERNMENTS AND LANDOWNERS

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PRACTICAL TIPS FOR DEALINGS BETWEEN LOCAL GOVERNMENTS AND LANDOWNERS

During many years of land use law, while maintaining an active commercial real estate law practice, the author has learned that the development community (principals and attorneys alike) and local government often do not communicate well. This outline will attempt to provide the legal background necessary to understand the difference between local government law and real property law and help commercial real estate professionals and local government officials to deal successfully on land use matters.

Landowners face many hurdles when dealing with land use issues confronting their projects. Moving away from the general business orientation of commercial real estate transactions, they become submerged in a seemingly endless labyrinth of government bureaucracy. Techniques successful in the private sector are often extraordinarily counter productive when utilized in the public sector. Government officials and staff sometimes have difficulty dealing with the often naturally aggressive developer mentality. If each side understood more about the other, they would both benefit.

The only treatise on Texas Land Use law is *Texas Municipal Zoning Law,* originally by UH Law professor John Mixon and now completely reorganized and updated by James L. Dougherty of Houston (with an Appendix on Texas Subdivision Platting Law, by the author).

I. LEGAL DIFFERENCES BETWEEN LOCAL GOVERNMENT LAW AND REAL PROPERTY LAW

Everyone must understand that the legal basis for local government law is *completely different* than that for real property law. Private sector representatives must understand that the attitude that local government officials take in reviewing a commercial real estate project is fundamentally different from that taken by an owner/developer. Only when the landowner representative (and their client) understand and accept these differences, will they be prepared to then move forward to apply strategies to successfully deal with local governments.

Real property law is founded upon private contract law. Local governmental law has nothing whatsoever to do with private contract law and is focused upon constitutional law and specific statutes establishing the structure of the particular local government. These differences are outlined in the following chart.

Real Property Law

- Private contract law
- Statutes of general application to all entities (i.e., Property Code)
- Incorporates significant amounts of case law with general application to all entities
- Few "special" laws, rules and regulations

Local Government Law

- Constitutional law and principals - virtually no reliance on private contract law
- Many statutes of specific application only to local government (i.e., Local Government Code) & the *specific* local government involved
- Case law often relates to the dealings of local governments only
- Many special laws, rules and regulations

The fact the Texas Property Code is one-half the size of the Texas Local Government Code illustrates the statutory orientation of local government law.

II. THE GOVERNMENT'S RIGHTS.

Local governments have many special rights. Understanding these rights, and the increasing limitations on these rights is critical.

A. Immunity

Well established Texas law provides special immunity not only to local governments (*governmental immunity*), but to individual government officials (*official immunity*) for good faith actions taken in the course of their authority. The Texas Supreme Court recently clarified and extended the already broad reach of governmental and official immunity.

Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417 (Tex. 2004) held that evidence of actual subjective bad faith by a government land use official will not prevent application of the ever broadening official immunity rule which protects officials from liability so long as the traditional 3 point test is satisfied:

(1) the official acts within the scope of their authority,
(2) the official's duties require discretion, and
(3) the official acts in good faith, based on an *objective* (not subjective) standard.

The concept of official immunity has received ever broadening application to shield public officials from individual immunity. In *Ballantyne,* the Texas Supreme Court addressed on first impression the application of official immunity to a Zoning Board of Adjustment (ZBA). The court ended a 10-year land use dispute with a very favorable holding for local governments, reversing a $600,000.00 judgment against individual members of Terrell Hills ZBA. The Court of Appeals, *en banc,* had reversed the trial court's judgment n.o.v. for the City, holding that the Board members' official immunity defense inapplicable due to evidence of subjective bad faith. A transcript of the ZBA's executive session discussing the disputed permit for an apartment complex contained inappropriate and biased remarks regarding the nature of apartment dwellers, including the statement that they are "scum". This evidence moved the Court of Appeals to hold for the developer despite evidence of some rational basis for the ZBA decision.

The Texas Supreme Court's opinion provides a roadmap to the history and scope of official immunity in Texas, a 50-year-old doctrine based on following well settled public policy:

(i) encourage confident decision making by public officials without intimidation, even if errors are sure to happen, and
(ii) ensure availability of capable candidates for public service, by eliminating most individual liability.

The court held that ZBA members are entitled to official immunity if the following 3 issues are satisfied:

1. Scope of authority – The action must fall within state law authorizing action by the official. In *Ballantyne*, ZBAs have clear statutory authority to hear appeals of actions by a city regarding permits. Whether this ZBA made an incorrect decision or had never previously revoked a permit was irrelevant.

2. Discretionary not ministerial action – The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment. ZBA review of a permit appeal was held to be clearly discretionary.

3. Subjective good faith – If a reasonably prudent official under the same or similar circumstances would have believed their conduct was justified, based on the information available, then this subjective good faith supports official immunity. Neither negligence nor *actual* motivation is relevant. The action need not be correct, only justifiable. Specifically, the personal animus of the ZBA members in *Ballantyne* to apartment residents did not preclude a good faith holding, and in fact was irrelevant. The court analogized to United States Supreme Court decisions interpreting qualified immunity for federal officials to support the court's judgment that suits against government officials exact societal costs which should be avoided in order to permit proper decision making by public officials without concern that those decisions would subject the officials to individual civil liability.

PRACTICE POINT: Official immunity applies to a broad array of governmental officials of all types, at all levels. Often, private owners believe that a strong threat to sue a public official is a simple solution to "scare the government into submission," but NOT TRUE. A threat of suit against any government official will not create much concern (and, in fact, will show you to be a novice in the field). Government defense counsel will be filing (and winning) many motions for summary judgment to eliminate individual claims against government officials. However, constitutional claims, such as violation of procedural and substantive due process, and civil rights violations, although tough to prove, will have continued vitality. Government representatives should be ready and willing to promptly inform owners and their representatives of the scope of official immunity (and cite the *Ballantyne* case) to prevent an uninformed owner from wasting everyone's time with unnecessary and counter productive assertions of official liability.

The broader concept of sovereign immunity is discussed in *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997). This case outlines the following points of law regarding sovereign immunity:

(1) Sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State. *Id.* at 405.

(2) Sovereign immunity embraces two principles: (i) immunity from suit and (ii) immunity from liability. *Id*.

(3) The State retains immunity from suit, without legislative consent, even if the State's liability is not disputed. *Id*. Immunity from suit bars a suit against the State unless the State expressly gives its consent to the suit. *Id*. In other words, although the claim asserted may be one on which the State acknowledges liability, this rule precludes a remedy until the Legislature consents to suit. *Id*. The State may consent to suit by statute or by legislative resolution. *Id*. Legislative consent for suit or any other sovereign immunity waiver must be "by clear and unambiguous language." *Id*.

(4) The State also retains immunity from liability though the Legislature has granted consent to the suit. *Id*. Immunity from liability protects the State from judgments even if the Legislature has expressly consented to the suit. *Id*. Even if the Legislature authorizes suit against the State, the question remains whether the claim is one for which the State acknowledges liability. *Id*. The State neither creates nor admits liability by granting permission to be sued. *Id*.

(5) When the State contracts, it is liable on contracts made for its benefit as if it were a private person. *Id*. Therefore, when the State contracts with private citizens, it waives immunity from liability. *Id*. at 408. But the State does not waive immunity from suit simply by contracting with a private party. *Id*. Legislative consent is still necessary.

TEX. GOV'T CODE Chapter 2260 retains sovereign immunity from suit in breach-of-contract cases against the State but provides an administrative process to resolve those claims. This administrative scheme applies to all written contracts for the sale of goods, services, or construction. TEX. GOV'T CODE § 2260.001(1). The intent of this chapter is to promote mediation and settlement. *Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.* 39 S.W.3d 591, 596 (Tex. 2000) provides a good summary of the administrative scheme under Chapter 2260.

Sovereign immunity should be distinguished from the concept of *governmental immunity* even though Texas courts have a tendency to use them interchangeably. Sovereign immunity refers to the State's immunity from suit and liability. *See Town of Flower Mound v. Rembert Enterprises, Inc.,* 369 S.W.3d 465, 471 (Tex. App. — Fort Worth 2012, pet. denied). Sovereign immunity not only protects the State from liability but also protects the various divisions of state government, including agencies and boards, hospitals and universities. *See Travis Cent. Appraisal Dist.*, 342 S.W.3d 54, 57-58 (Tex. 2011). Governmental immunity, on the other hand, protects political subdivisions of the State which includes counties, cities and school districts. *Id*.

Language in a city's charter stating that a city may "sue and be sued" or "plead and be impleaded" means that a city may sue third parties, but is also subject to being sued. Cities must specifically authorize third parties to sue them, and without that specific authorization, third parties are left to the Texas Torts Claims Act for the scope of areas where a city may be sued. *City of Dallas v. Reata Constr. Corp.*, 83 S.W.3d 392, 398 (Tex. App.—Dallas 2002, pet. granted), *rev'd on other grounds*, 197 S.W.3d 371, 374 asserts affirmative claims against another party. *Reata*, 197 S.W.3d at 376-77. In this situation the government becomes an ordinary litigant. *Id*. at 377.

Also, some city charters require notice to the city in advance of filing a lawsuit and the failure to timely provide the notice is jurisdictional. *Mayers v. City of DeLeon* 922 S.W.2d 200, 203 (Tex. App.—Eastland, 1996, writ declined). *See also City of Beaumont v. Fuentez*, 582 S.W.2d 221 (Tex. Civ. App.—Beaumont 1979, no writ).

Governmental immunity is waived as to vested rights under Texas Local Government Code § 245, and as to "contracts for goods and services" under TEX. LOC. GOV'T CODE §271.152. The later provision has been interpreted to apply to a rather broad array of contracts. *See Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829, 839 (Tex. 2010) (stating that the term "services" in Chapter 271 is "broad enough to encompass a wide array of activities").

Immunity does not preclude constitutional claims for equitable relief. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) held that the State has no power to commit acts that are in violation of the provisions of the Texas Constitution. While state laws in conflict with the Constitution are void, there is no implied private right of action for damages when a party alleges violations of constitutional rights. Suits for equitable relief, however, are not prohibited. Note that this limitation does not apply to the express right to compensation provided in the Takings Clause. *Id*.

PRACTICE POINT: Specifically reference TEX. LOC. GOV'T CODE §271.152 and "goods and services" in any contract with a local government. Draft to emphasis the "services" aspect of the contract.

B. No Equitable Defenses

Equitable defenses: estoppel, waiver, latches and the like, *generally* do not apply to interactions with local governments and their officials. The public policy for this preclusion of standard common law defenses is that, although it is foreseeable that mistakes will be made by government officials (they're just human), those mistakes should not be binding upon the government since that would create a hardship on the general public. The idea is that it is better for the mistake to be ignored and the correct result applied for the benefit of the general public, rather than to protect the rights of the party which received the bad information.

The general rule is that a city cannot be estopped from exercising its governmental functions. *See City of Hutchins v. Prasifka*, 450 S.W.2d 829, 831 (Tex. 1970) (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). In *Edge v. City of Bellaire*, 200 S.W.2d 224, 228 (Tex. Civ. App.—Galveston 1947, writ ref'd), the negligent issuance of a building permit and reliance thereon by the landowner did not prevent the city from enforcing its zoning ordinance, which prohibited the structure. In both cases, the owner could have independently investigated and determined the correct state of affairs, determined the proper situation and then not have been harmed. Unfortunately, in dealings with local governments, many folks simply ask what to do, do it, and figure if they are doing something wrong the government will tell them. The problem is that when the government figures out it should not have let something happen, the cost and time to remediate the problem can be significant.

The Texas Supreme Court recently took the opportunity to reaffirm this general rule and clarify and limit its exception. *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770 (Tex. 2006). The Court held that the land owner could not estop the city from enforcing an ordinance based on erroneously approved site plan and building permit. *Id.* For many years, *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.) had held out hope that there would be some circumstances where estoppel would apply to benefit a property owner. Citing this case, the Court held that a city may be estopped "when justice requires," so long as it would not interfere with the exercise of its governmental functions. *Super Wash*, 198 S.W.3d at 774. *See also Prasifka*, 450 S.W.2d at 836. In *Super Wash*, the Court explained that this exception is extremely narrow and estoppel will only apply in exceptional circumstances such as when a city official "*affirmatively misleads* the party seeking to estop the city and the misleading statements result in the *permanent loss* of their claims against the cities. Evidence that the city officials acted deliberately to induce a party to act in a way that benefited the city but prejudiced the party weighs in favor of applying the exception." *Super Wash*, 198 S.W.3d at 775 (emphasis added). In denying estoppel in this case, the Court emphasized the fact that the ordinance was a matter of public record, Super Wash had other remedies available that it had not yet pursued, and that the city had acted quickly once it discovered the error (10 days).

The Court then discussed a significant limitation of the "when justice requires" exception to the general estoppel rule. Even if justice requires estoppel, a city will not be estopped if doing so would "bar the future performance of that governmental function or impede the city's ability to perform its other governmental functions." *Id*. at 776. A governmental function is "any act that the Legislature has deemed, or the court determines to be, a municipal government function." This includes, but is certainly not limited to, street design, regulation of traffic, zoning, planning, plat approval, and protecting the public safety. *Id*. However, "a city may be estopped if doing so will not frustrate the purpose for which the ordinance was enacted nor bar the city from enforcing the ordinance in the future." *Id*. (citing *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 223 (Tex. App.—San Antonio 2003, no pet.); *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 284 (Tex. App.—Dallas 1991, writ denied).

In its analysis, the *Super Wash* Court did cite a few estoppel cases favorably, noting important factors that weigh on whether the city should be estopped based on exceptional circumstances:

1. The landowner was misled and has no other remedy: *Roberts v. Haltom City*, 543 S.W.2d 75, 80 (Tex. 1976); *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 105 (Tex.

1986) – holding that a city could be estopped from enforcing a notice of claim provision where there was evidence that the city affirmatively misled the plaintiff and there were no other available remedies.

2. City reaps the rewards while the landowner suffers: *City of Austin v. Garza*, 124 S.W.3d 867, 874 (Tex. App. – Austin 2003, no pet.) - holding a city bound to a note on a final, recorded plat upon which the city relied for dedications in the face of allegations by the city that it approved the note as a "mistake" since it would be "manifestly unjust for the city to retain the benefits of its mistake yet avoid its obligations".
3. City fails to act quickly when it learns of the error: *Krause v. City of El Paso*, 106 S.W. 121, 124 (Tex. 1907) - city was successfully estopped after it failed to enforce the ordinance for twenty years.

PRACTICE POINT: Reliance on misinformation obtained from the government is *rarely* successful even if it would be in an identical private sector situation. *Super Wash* continues the narrow "when justice requires" exception, but only where the facts are exceptionally strong and the estoppel will not materially interfere with a governmental function. This is a tough standard.

Real estate professionals should not exclusively rely upon the local government for their conclusions in due diligence without some documentation to support active reliance. Where the transaction can bear the cost, independent confirmation is the rule, and where it cannot, they should advise the client that reliance is risky. Government officials should freely inform owners that they should make an independent land use investigation and that they cannot rely on government representations.

C. Limited Local Government Power

Different local governments have different scopes of power based on how they have been organized structurally. Surprising to some real estate professionals, only "home rule" municipalities have full powers of self governance. Home rule cities have all of the authority that the State of Texas has, except for those limited areas where the State has *specifically* "pre-empted" local power by reserving authority. *Dallas Merchant's and Concessionaire's Ass'n v. Dallas*, 852 S.W.2d 489, 490-491 (Tex. 1993). *See also City of San Antonio v. Greater San Antonio Builders Ass'n*, 419 S.W.3d 597, 601 (Tex. App. – San Antonio 2013, pet. denied).

An example of an area of preemption is regulation of alcoholic beverages, where the State has pre-empted regulation through the adoption of comprehensive regulation through the Texas Alcoholic Beverage Commission. *Id*. at 491-92. Even in the area of State law pre-emption, local governments may regulate, to the extent that the local regulation is not inconsistent with State regulation. *Id*. at 491. To be a home rule city, a city must have a population of at least 5,000 and have properly adopted a home rule charter. Most Texas cities with populations over 5,000 are home rule cities, but a professional dealing with a city should always check to confirm their assumption.

Smaller cities, and larger cites which have not adopted a home rule charter are "general law" cities. General law cities have only the authority that has been *specifically* delegated to general law cities by the State under the Texas Local Government Code.

The charter of a particular city may have limitations on the city's authority. For example, some city charters limit the term of various contracts. *See,* City of Houston Charter Art. II, Sec. 17 limiting franchises and leases to 30 years without a public vote.

Counties are legal subdivisions of the State of Texas, and like general law cities, have only the authority specifically authorized to them by the State of Texas under the Texas Local Government Code. *City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 28 (Tex. 2003).

There are many "special purpose" governmental entities with very limited powers (but in some cases, not as limited as their title might indicate):

Municipal Utility Districts
Water Districts
Flood Control Districts
Navigation Districts
Drainage Districts
Levee Districts
Road Districts
Municipal Management Districts
Public Improvement Districts
Tax Increment Investment Zones

Besides general lack of power, there are other limitations to the enforceability of government agreements for various reasons:

1. No Contract Zoning: A city may not contractually agree to rezone property. ("contract zoning"). *See, City of Pharr v. Pena*, 853 S.W.2d 56 (Tex. App.—Corpus Christi, 1993, writ denied) overruled on other grounds by *Board of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424 (Tex. 2002). Rezoning requires a specific statutory process set forth in TEX. LOC. GOV'T CODE Chapter 211 and contract zoning constitutes an illegal "delegation of authority" which is against public policy and, thus, void.

2. No Debt Without Vote. The Texas Constitution prohibits local governments from incurring "debt" without a public bond election. TEX. CONST. art. 11 §§ 5 & 7. Debt is broadly defined such that any financial obligation which is not fully funded in a current year's budget is a "debt." *Texas & N.O.R.R. Co. v. Galveston County*, 169 S.W.2d 713, 715 (Tex. 1943).

    - Leases to local government are subject to "annual appropriation", which means that the local government must annually include the necessary rent in its budget or the rent *may not be paid. City-County Solid Waste Control Bd. v. Capital City Leasing, Inc.*, 813 S.W.2d 705, 707 (Tex. App.—Austin 1991, writ denied). For a complete discussion of the issues in leasing to a local government, see Cheatham & Lewis, Leases with Texas Home-Rule Municipalities, *Real Estate Law: Leases in Depth, SMU Law School CLE Seminar, March 16, 2000* ("Cheatham & Lewis").

- Many local government attorneys believe indemnities by a city are subject to attack as a violation of the prohibition against debt without a special funding provision. If a city indemnity is limited to "the extent permitted by law", then the city attorney was attempting to placate the other party to a transaction, but preserve this defense (which would really be preserved anyway, in my opinion).
- Attorney fee provisions in contracts are considered a debt by many local government attorneys.
- A constitutional amendment was adopted by Texas voters in 2005 to eliminate this concern for economic development agreements. TEX. CONST. art. III, § 52-a.

TEX. LOC. GOV'T CODE § 271.903(a) provides authority for "local governments" (a list specifically defined therein) to lease real property if the lease provides either or both: (i) the local government may terminate each year if funding is not appropriated for the rent, or (ii) establishing only a "best efforts" obligation on the local government to appropriate rent funds annually. These leases are considered "subject to annual appropriation" in local government speak.

3. Public Sale of Real Property. Generally, all sales of local government owned real property requires a public sales process and conveyance for fair market value. TEX. LOC. GOV'T CODE § 272.001.

PRACTICE POINTS: Always confirm the type of local government involved in a transaction. Then, if an action is being taken, confirm the local government's power to take that action. Generally, in land use matters, this is not a problem.

When dealing with leases or purchases, particularly in smaller towns where the local government (and potentially, even its counsel) is not experienced or sophisticated, everyone should help the local government to accomplish the transaction properly. Owners should be aware that just because a local government is doing what they want, it may not have the power to do so. In economic development situations, local governments have sometimes "done what it takes" to lure a new business, while unintentionally overstepping its authority. Most local governments are open to advice and assistance in documentation, particularly in economic development situations. Counsel for the local government should be consulted as to authority and enforceability issues.

Specific areas of concern:

- Agreements for future payments
- Agreements regarding zoning
- Indemnifications
- Authority of special purpose entities.

D. Special Economic Development Powers

Traditionally, Texas local governments had little authority to provide economic development incentives. What economic development agreements that were actually signed were

potentially subject to a number of legal attacks. In the 1980's, Texas knew that it must empower Texas cities' ability to compete in the economic development arena. Now, several specific laws provide significant authority to local governments for this purpose. If appropriately handled, there should no longer be concerns that economic development agreements executed by a local government are suspect. Some of these provisions are not well known, particularly to smaller local governments with less sophisticated officials and council engaged in economic development activities. A relocating business will be counting upon the enforceability of agreements entered into by the local government and would be upset if they learned that the agreement was void and unenforceable.

Broad authorization for economic development is extended in TEX. LOC. GOV'T CODE Chapters 380 (cities) and 381 (counties). This authority is applicable to all cities. All that is needed is a "program … to promote the state of local economic development and to stimulate business and commercial activity in the municipality." TEX. LOC. GOV'T CODE § 380.001(a). Benefits offered by Texas cities to a significant new employer have included:

- monetary grants based on the number of new jobs (sometimes limited to "full time" jobs with insurance benefits)
- waiver of local development fees
- public provision of offsite improvements necessary to support the new facility (utilities, streets, traffic control, etc.)
- sales tax sharing
- tax abatement
- expedited permitting.

TEX. CONST. art. III, § 52-a now provides that programs created under this chapter and benefits to new employers such as loans or grants do not constitute an impermissible local government debt, so long as they are not secured by a pledge of ad valorem taxes or financed by the issuance of bonds payable from ad valorem taxes.

TEX. LOC. GOV'T CODE Chapter 378 provides that cities may establish a "neighborhood empowerment zone" to promote affordable housing, economic development, social services, education or public safety within the zone. Once established by following the required procedure, the city is granted power to waive development fees (including building and impact fees), refund sales taxes, abate property taxes and encourage energy conservation. TEX. LOC. GOV'T CODE § 378.004.

Cities may create "industrial districts" in their extraterritorial jurisdiction and then enter into up to 15 year contracts with land owners to provide immunity from annexation, for the city to provide fire protection, and containing "other lawful terms and consideration the parties agree to be reasonable, appropriate and not duly restrictive of business activities." TEX. LOC. GOV'T CODE § 42.044. Houston has been very aggressive in this area, with approximately 929 acres in 99 such districts today and a standard procedure with standard forms to implement them. Action is currently underway to add 75 more companies to Houston's Industrial District program.

TEX. TAX CODE Chapter 312 authorizes cities, counties and other local governments to abate property taxes on real estate improvements (not land) and personal property for up to 10 years.

Every 2 years the local government must adopt rules for the approval of these abatements. Typically, the rules limit the type of new development which qualifies, the type of property to be abated, the length of the abatement period and the percentage of value abated in order to attract specific types of development valued by that community. The primary driver is local jobs and sales tax, although the amount of investment is also important (but primarily a future value to the community since the tax abatement reduces or eliminates current taxes).

The Texas Local Government Code provides for numerous "special districts" such as Tax Incentive Reinvestment Zones, Public Improvement Districts and Municipal Management Districts. *See*, TEX. LOC. GOV'T CODE Chapters 371-397. These districts have various levels of authority to provide grants, reimbursements and directly provide necessary public infrastructure to support private projects which benefit their jurisdiction.

PRACTICE POINT: When discussing economic development issues, be aware of the options available and the process to have them approved.

E. Authority and Procedure

Most actions by a city need to be authorized by an ordinance passed by the city council. *City of Corpus Christi v. Bayfront Assoc., Ltd.*, 814 S.W.2d 98, 105 (Tex. App.—Corpus Christi 1991, writ denied). The ordinance would authorize the action to be taken. The mayor, as chief executive officer of the city, would sign. It may be an illegal "delegation of authority" for anyone other that the city council to be able to bind the city. *Id.*; *City of Galveston v. Hill*, 519 S.W.2d 103, 105-06 (Tex. 1975).

Counties work through a commissioner's court which issues orders. The order would authorize the proposed action. The county judge would sign on behalf of the county. Commissioner's courts may only validly act as a body; the acts of a single commissioner do not bind the court. *Hays County v. Hays County Water Planning P'ship*, 106 S.W.3d 349, 360 (Tex. App.—Austin 2003, no pet.)

Local governments have mishandled procedural matters in the past, thus giving rise to "validation statutes." Historically, each legislature routinely passed limited validation statutes, usually bracketed as to time and size of city. Validation statutes cured all procedural, but no constitutional defects in municipal actions. *Leach v. City of North Richland Hills*, 627 S.W.2d 854 (Tex. App.—Fort Worth 1982, no writ); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991). However, the 1997 legislature failed to pass a validation statute, reportedly the first such failure in 61 years. A "permanent" validation statute was passed by the 1999 Legislature. *See* TEX LOC. GOV'T CODE § 51.003. Any governmental act or proceeding of a city is conclusively presumed valid on the third anniversary of the effective date, unless a lawsuit is filed to invalidate the act or proceeding. The following are excluded from validation:

- void actions or proceedings,
- criminal actions or proceedings,
- pre-empted actions,
- incorporation or annexation attempts in another city's ETJ, and

- matters where authority is being litigated before validation occurs.

Unlike prior validation statutes, there are no limits on the applicable cities.

PRACTICE POINT: Even if the local government didn't "do it right," the Validation Statute may solve the problem.

F. Presumption in Favor of the Government

Generally, government actions are presumed valid. *Koy v. Schneider*, 221 S.W. 880, 888 (Tex. 1920). *See also Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 71 S.W.3d 18, 38 (Tex. App.—Forth Worth 2002); *Bexar Metro. Water Dist. v. City of San Antonio*, 228 S.W.3d 887, 893 (Tex. App. – Austin 2007, no pet.). Therefore, the burden of proof is upon an owner. *Koy*, 221 S.W. at 888. This is a tough burden, as the presumption in favor of the government is strong. *Id*.

The notable exception is in the area of "exactions" where under the US Supreme Court cases of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 324 (1994), as adopted by the Texas Supreme Court in *Flower Mound v. Stafford Estates*, 135 S.W.3d 620 (Tex. 2004), the burden of proof is on the local government to demonstrate that its exaction is valid.

Two major Texas zoning cases show the tough burden to be carried by an owner, whether challenging a "down-zoning" or a "zoning refusal" situation:

***Sheffield Dev. Co. v. City of Glenn Hill Heights*, 140 S.W.3d 660 (Tex. 2004)**

This case was a big zoning win for cities which shows how tough the burden of proof is for a developer challenging a down-zoning. The Texas Supreme Court upheld a significant down-zoning after a 15 month moratorium against the developer's takings claims. The developer conducted significant due diligence before buying a 184 acre development tract, including meeting with city officials to determine if any change in the city's development regulatory scheme was contemplated. The developer was told no changes were envisioned. The tract was zoned consistent with the developer's desired project. Almost immediately after the developer purchased the property, the city established a moratorium on development applicable to 12 zoning districts, including the developer's tract. After the moratorium was extended to a total of 15 months, the city down-zoned the property, decreasing allowed density by increasing minimum lot size from 6500 square feet to 12,000 square feet, such that the land value dropped 50%. The developer sued based on state takings theories for a regulatory taking.

The court fully reviewed federal regulatory taking jurisprudence (which it stated as appropriate guidance for a state constitution takings claim), particularly the US Supreme Court decision in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The court applied the *Penn Central* factors to consider in a regulatory taking case:

(1) the economic impact of the regulation on the owner;

(2) how the regulation has interfered with "distinct investment-backed expectations"; and
(3) the character of the governmental action.

The *Penn Central* test is applied by the court as a question of law, not a question of fact, but only after a determination that the government action substantially advanced a legitimate government interest.

Applying these factors, the Supreme Court first held that a down-zoning to reduce development density is legitimate to deal with the city's desire to reduce its ultimate population potential. Then, the Court applied the three *Penn Central* factors as follows:

- **Economic impact** – The down-zoning did not take all economic value of the property (which would result in a taking), but only 50%. Furthermore, that value was 4 times the developer's purchase price. Although the down-zoning significantly interfered with the developer's reasonable expectations when it invested funds in the land and related development, land development is inherently speculative and diminution in value is not the principal element to be considered in takings analysis.
- **Investment-backed expectation** – The investment backing of the developer's expectations at the time of the down-zoning was simply the lot purchase price and due diligence expenses, which was a small fraction of the investment that would be required for full development and therefore, "minimal."
- **Character of the government action** – The rezoning was general, affecting numerous tracts, not just the developer's and thus not like an exaction imposed on a single developer. Although clearly troubled by the city's unseemly conduct during the developer's due diligence, the Court held that the risk of rezoning is to be expected by a developer, particularly in growing communities.

The Court specifically addressed the city's misconduct, citing evidence that the city "took unfair advantage" of the developer including slow-playing decisions with a strategy to extract concessions. Nonetheless, the Court was motivated by the legitimate public policy reasons supporting the rezoning. This decision is particularly powerful considering the difference from the court's refusal to up-zone in its previous significant zoning decision in *Mayhew v. City of Sunnyvale* where the factual circumstances were much stronger for the city. Despite a much more sympathetic developer with strong facts, the court stated:

> " . . . we think that the city's zoning decisions apart from the faulty way they were reached, were not materially different from zoning decisions made by cities everyday. On balance, we conclude that the rezoning was not a taking."

Mayhew v. City of Sunnyvale, 964 S.W.2d 922 (Tex. 1998).

Finally, the court ruled that a 15 month moratorium is valid and not a taking, noting that the rezoning process is slow and that the moratorium advanced a legitimate government interest.

Sheffield Development took the wind out of developers' sails, who thought the Texas Supreme Court may be more sympathetic in a down-zoning case than in the denied up-zoning

case presented in *Mayhew v. Town of Sunnyvale* (discussed below). Even with improper conduct by the city, including an unnecessarily lengthy moratorium, the public policy considerations supporting the zoning process overrode bad behavior by the city during that process. Developers must carefully consider challenging zoning decisions, even surprise down-zonings under the current state of Texas law. *Sheffield Development* is required reading for all landowners and their counsel to see how tough current zoning law will be on their claims against a local government.

***Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922 (Tex. 1998)**

This case is a unanimous decision written by Justice Greg Abbott which hit all the constitutional issues raised in a "refusal to rezone" case. The landowner lost on every issue except for the holding that the issues are "ripe for adjudication."

Sunnyvale is a lightly developed, general law city with 1 acre minimum lot requirements in its single family zones (originally intended to address septic tank requirements). Mayhew owned 26% of the land in the City available for residential development. Commencing in 1985, Mayhew began meeting with City officials regarding a proposed planned development of his land at a higher density than the 1 unit per acre requirement. In 1986, the City adopted a Comprehensive Plan reflecting an anticipated increase in population from the current 2,000 to 25,000 by 2006, and 30-35,000 by 2016. Contemporaneously, the City amended its zoning ordinance to allow, upon city council approval, planned developments with densities greater than 1 unit per acre. Later in 1996, Mayhew proposed a planned development of between 3,650 - 5,025 units (3+ units per acre). A professional planning and engineering firm retained by the City reviewed the proposal and determined that it satisfied each of the requirements of the City's zoning ordinance, and therefore, recommended approval. After passing a building moratorium, the planning and zoning commission recommended denial. In late 1986, city council appointed a negotiating committee, including two council members, the mayor and the city attorney to work with Mayhew. As a result, there was "tentative" agreement for a 3,600 unit project. However, due to political pressure brought by citizens on the city council, the city council rejected the planned development in January 1987. In March 1987, Mayhew sued the town and the four council members who voted against the request.

Mayhew One: In the first Mayhew case, *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991), summary judgment in favor of the individual council members was upheld, absolving them of any liability for acting in their capacity as council members on the legislative issue of rezoning. The summary judgment rejecting Mayhew's constitutional claims was reversed and remanded for trial.

Mayhew Two - Trial Judgment for Mayhew: Upon remand, the trial court considered all the possible constitutional claims (state and federal procedural due process, substantive due process and equal protection, as well as taking). Mayhew won across the board, being awarded $5,000,000 in damages plus pre-judgment interest and attorney's fees, totaling $8,500,000.00. The trial court entered extensive findings of fact and conclusions of law highly favorable for Mayhew and clearly intended to protect the judgment on appeal, to the maximum extent possible.

Reversal on Appeal: The Court of Appeals reversed, holding that the constitutional claims were not ripe for review. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d at 234. In a Supplemental Opinion, the Court of Appeals reviewed the merits of the Mayhew claims in light of the Supreme Court's recent decision *Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994), *cert. denied* 13 U.S. 1112 (1995) and held that the evidence was factually insufficient to support the trial court's judgment for Mayhew. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d at 259-68.

Texas Supreme Court Affirmation of Reversal: The Supreme Court addressed each issue in a decision which is a primer for a constitutional challenge in a refusal to rezone case. Mayhew lost on all issues but ripeness of the case for adjudication.

The Court applied federal jurisprudence on the issue of ripeness. Mayhew was not required to follow the general rule requiring a request for a variance after the denial of rezoning, or to make reapplication, since the nature of a planned development includes negotiations which can substitute for the variance requirement. Mayhew reapplying with an alternative proposal or requesting a variance was held to have likely been a "futile" act.

Mayhew hit all the right buttons in asserting constitutional claims. Mayhew's claims were reviewed under federal constitutional standards, although the Court declined to hold that federal and state constitutional claims are the same (Texas constitutional claims may be broader). The Court held that the trial court's attempt to bind the appellate courts with extensive findings of fact and conclusions of law was not binding on the appellate courts since most of the issues were questions of law. The Court applied the requirement that to avoid a regulatory taking (one where there is no physical taking), a regulation must "substantially advance" a legitimate state purpose. The maintenance of the city's existing character and regulating the type and character of its growth was sufficient to uphold the density limitations.

The Court proceeded to determine that the denial of the higher density planned development did not either: (1) eliminate all economic viable use; or (2) unreasonably interfere with the land owner's right to use and enjoy its property. The Court spent several pages considering the "investment expectation" of Mayhew and considered the historic use of the property for agricultural purposes, the existence of zoning since 1963 and the retained value of the land for agricultural and low density housing purposes before concluding there was no investment backed expectation which would support a takings judgment.

Mayhew's substantive due process, equal protection and procedural due process claims were reviewed and quickly rejected. The Court held that "political pressure," which could be a contributing factor to a denied rezoning, does not violate the landowner's substantive due process rights, so long as the City has legitimate government concerns and the denial was rationally related to those concerns (in this case the effects of urbanization on the City). On the equal protection claim, the Court was unconvinced there were other "similarly situated" land owners treated differently, and focused on the fact that there only needs to be a rational relationship to a legitimate state interest for regulation to survive an equal protection challenge. On the final issue of procedural due process, the Court held that Sunnyvale must only provide notice and an opportunity to be heard, and that due to the fact that zoning is a legislative act,

Sunnyvale is entitled to consider all facts and circumstances which may effect property of the community and the welfare of its citizens in making a decision.

A landowner and its advisors must realize that a refusal to "up zone" a tract will rarely provide a fertile ground for litigation, unless the facts are truly unusual. The facts in *Mayhew* were positive for the landowner and his counsel asserted all available causes of action, yet came up empty. If a landowner wants to sue a city for a denied rezoning, he should always read *Mayhew* before making the decision to proceed.

PRACTICE POINT: Challenging a zoning decision is tough. Landowners should be as prepared as possible for the administrative re-zoning process and ensure that they go "all out" to win approval in the administrative process, rather than thinking that they have the legal process to fall back on. Landowners should consider retaining qualified zoning professionals to assist and support the zoning process.

G. Moratoria

A city may institute a moratorium on development applications by city council action in order to prevent a "race to the application window" while it is considering changes to its development regulations. A broad 6 month moratorium was upheld as being reasonable as a matter of law. *Mont Belvieu Square, Ltd. v. City of Mont Belvieu*, 27 F. Supp. 2d 935, 937 (S.D.Tex. 1998). A 15 month moratorium applicable to limited property was upheld in *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

The Texas legislature limited moratoria on new residential development (as of 2001) and commercial development (as of 2005). TEX. LOC. GOV'T CODE §§ 212.131-212.132. A moratorium does not affect vested rights under TEX. LOC. GOV'T CODE Chapter 245 or common law. TEX. LOC. GOV'T CODE § 212.139. 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"
- Commercial moratoria not based on a shortage of essential public facilities is limited to situations where existing commercial development ordinances or regulations are inadequate to prevent the new development from being detrimental to the public health, safety, or welfare
- Moratoria automatically expire after 90 days (commercial) and 120 days (residential) from adoption, unless extended after a public hearing and specified findings and commercial moratoria may not extend beyond 180 days total
- A two-year "blackout" period on subsequent commercial moratoria
- 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.

TEX. LOC. GOV'T CODE §§ 212.133-212.137.

PRACTICE POINT: If a moratorium is established before the first development application is filed, the entire development scheme a landowner may have relied upon in their development assumptions may evaporate. Therefore, **prompt** action to assess the local political situation and file necessary applications is warranted. Local governments must be careful to follow all requirements to support development moratoria.

H. Some Cities Enforce Private Residential Restrictions

In 2001, the legislature moved former TEX. LOC. GOV'T CODE Chapter 230 (originally enacted in 1965) to the Subdivision Act as § 212.131. A city with (i) an ordinance requiring uniform application and enforcement of § 212.131, 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, number of structures, and effective 2003, commercial activities, keeping of animals, use of fire, nuisance activities, vehicle storage, parking, architectural regulations, fences, landscaping, garbage disposal and noise levels by suit to enjoin or abate a violation and/or seeking a civil penalty. TEX. LOC. GOV'T CODE §§ 212.131-212.137. Municipal enforcement of deed restrictions is a public purpose and constitutional. *Young v. City of Houston*, 756 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied). *See Truong v. City of Houston*, 99 S.W.3d 204, 211 (Tex. App. – Houston 9 [1st Dist.] 2002, no pet.) (finding that enforcing deed restrictions preserves and maximizes property values).

Deed restriction enforcement is a *governmental* function. *See* TEX. LOC. GOV'T CODE § 212.153. Performance of a governmental function is not typically subject to equitable defenses such as laches, waiver, and estoppel (the typical defenses asserted in a deed restriction case).

In addition to direct enforcement, some cities will not approve a replat if the city attorney determines that the effect of the replat would be a violation of existing restrictions. A replat must not "attempt to **amend or remove** any covenants or restrictions." TEX. LOC. GOV'T CODE § 212.014 (emphasis added). There is no comparable provision for counties. In some neighborhoods, restrictions affecting lot subdivision or size 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 landowner wishes to proceed with the development based on their 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. However, Houston and many surrounding cities construe "amend or remove" in § 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 § 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. Further, replats in the City of Houston have been denied where deed restrictions were modified or created between the initial plat application and final consideration, with the express intent to prohibit the pending subdivision. The City of Houston rejects the argument that the application of the modified restrictions violated the applicant's vested rights in the regulations applicable at the time of application.

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.—Amarillo 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,* 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. *McDonald v. Painter,* 441 S.W.2d 179, 183 (Tex. 1969). 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. Painter* was followed in a county platting context in *Commissioners Ct. of Grayson County v. Albin*, 992 S.W.2d 597, 599 (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.

Many developers build small commercial, townhouse or apartment projects in older neighborhoods with restrictions of record, but a clear pattern of no enforcement. The developer figures it can "out last/litigate" any private party opposing the project and/or assert the many equitable defenses to restrictions. The last thing they anticipate is local government *use* controls when either developing in an unzoned city or where their project is properly zoned. When local government steps in to enforce private residential restrictions, it is a chilling situation which often will kill the project.

PRACTICE POINT: Cities like Houston or Pasadena, directly enforce residential deed restrictions, and may interpret the Subdivision Act to preclude approval of a replat which has the effect to violate deed restrictions.

I. Dealing with a Zoning Board of Adjustment ("ZBA")

ZBAs handle appeals from local government official's development decisions, consider variances and special exceptions, and handle other matters specifically delegated to them by a City. TEX. LOC. GOV'T CODE § 211.009(a). Several special rules apply to ZBAs:

1. Decisions are made by a "super majority" vote requiring 75% of the ZBA members to affirmatively approve a request (typically 4 of 5 members). TEX. LOC. GOV'T CODE § 211.008(d).

2. There is no "appeal" to City Council, instead the appeal is judicial. TEX. LOC. GOV'T CODE § 211.011(a).
3. Appeal is by "writ of certiorari", a special statutory cause of action. TEX. LOC. GOV'T CODE § 211.011(c).
4. An appeal must be filed within a reasonable time of the date the ZBA decision is filed in its office. TEX. LOC. GOV'T CODE § 211.010(b).
5. Appeal does not stay the ZBA decision unless the appellate court enters an order upon "due cause." TEX. LOC. GOV'T CODE § 211.010(c).

For more information on ZBA's, particularly variances, *see* "Boards of Adjustment and Variances" presented by the author at the 2016 UT Land Use Conference on April 27, 2016.

If an issue can be appealed to the ZBA, then it should be in order to "exhaust administrative remedies" (see. Sec. II.K.). Failure to appeal will terminate your rights!

PRACTICE POINT: Critical ZBA issues to remember:

- There are time limits for appeals to ZBAs
- Winning requires more than a majority
- No appeal to City Council
- Watch the 10 day clock for judicial appeals from the ZBA
- No stay on appeal w/o "due cause" hearing

J. Expansion of County Rights

Historically, county authority to regulate subdivisions was less broad than a city. *Elgin Bank of Texas v. Travis County*, 906 S.W.2d 120, 122 (Tex. App.—Austin 1995, writ denied); *Compare* TEX. LOC. GOV'T CODE § 212.002 (cities) *with* TEX. LOC. GOV'T CODE § 232.003 (counties). Counties historically applied road standards only, except in "urban" counties. *Elgin Bank*, 906 S.W.2d at 123. County authority has been steadily expanded and now is, essentially, equivalent to cities. Beginning in 1995, then expanded in 1997, border counties were given broad regulatory authority over substandard residential subdivisions known as "colonias". TEX. LOC. GOV'T CODE §§ 232.021 et. seq. and 232.071 et. seq.

Beginning in 2001, "urban" and "border" counties were given the same broad regulatory authority as cities. TEX. LOC. GOV'T CODE §232.101. Urban counties include those with 700,000+ population, counties adjacent to 700,000+ population counties and within the same SMSA, and border counties with 150,000+ population. In 2007, the limitation to urban and border counties was eliminated.

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 facilities without a certificate evidencing proper platting or an allowed exception
- Regulation of water and sewer facilities/connections
- Regulation of drainage
- Requiring adequate roads
- Requiring developers to make a reasonable effort to provide electric and gas utility service through a public utility
- Outright denial (or imposition of notice requirements) for plats in future transportation corridors (like the Trans Texas Corridor)

The most significant power is for a commissioner's court, after public notice, to adopt rules governing plats and the subdivision of land to "promote the health, safety, morals or general welfare of the county and the safe, orderly, and healthful development of the unincorporated area of the county." TEX. LOC. GOV'T CODE §232.101(a). This section is identical to municipal platting rulemaking authority in TEX. LOC. GOV'T CODE §212.002. In 2001-2007, the legislature broadened the scope of county plat approval authority, formerly limited to limited components of road and drainage considerations, to include the more generalized development infrastructure considerations considered by municipalities. Courts considering the broadened scope of county platting authority will likely rely upon case law interpreting municipal platting authority.

With this new authority, urban counties will be revising subdivision regulations to make them look like the more detailed regulations typical to cities. However, county platting authority is not without specific statutory limitations. Section III. D. discusses the limitations of county and city platting authority.

K. Ripeness/Exhaustion of Administrative Remedies

Many landowner lawsuits are dismissed for being “unripe” (the local government has not made a “final” decision) or for failure to “exhaust administrative remedies (local government administrative appeals remain). A dispute is not “justiciable” unless the landowner has obtained a final decision from the local government and has availed itself of administrative appeals. Courts abhor “advisory opinions” and only want to consider disputes which are “real”. Without a “ripe” dispute, the courts lack jurisdiction. However, in some cases, the courts will determine that additional administrative action would be “futile” and find the matter ripe for adjudication. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) for a discussion of ripeness by the Texas Supreme Court in a zoning context. Ripeness has become a common part of local government defense to landowner litigation. It is brought as an immediate defense to a new lawsuit by challenging the jurisdiction of the court to hear the lawsuit. If the case is not dismissed, the local government typically files an immediate appeal, thus delaying the lawsuit until a decision on jurisdiction, which could be 12-18 months. If sustained, then the case is dismissed, and the landowners must “ripen” its case through additional administrative proceedings. In some cases, the case becomes permanently unripe because the time period to

appeal administratively has lapsed! In any event, much time is lost and the dispute continues. See, *City of Paris v. Abbott*, 360 S.W.3d 567 (Tex. App. – Texarkana 2011, pet. den.) and *City of Galveston v. Murphy*, 2015 WL 167178, at *# (Tex. App. – Houston [14th Dist.] 2015, pet. den.) for current discussion of this issue and the dire consequences of failure to ripen.

PRACTICE POINT: In any land use matter, the landowner must obtain a final decision, including exhausting any administrative appeals before filing suit, even if the landowner personally feels that the additional effort will be unsuccessful. Much litigation time can be saved by solving the ripeness issue.

III. THE LANDOWNER'S RIGHTS

Despite the dismal feeling many landowners and their advisors have after reviewing current land use law, landowners have an increasing number of rights. However, many relate to the platting process, not the zoning process. The reason is that zoning is a *legislative* process and the law grants broad discretion to local governments making policy and laws. Platting is more *administrative*, with an engineering infrastructure focus and if the rules are met, then the approval becomes *ministerial*.

A. Vested Rights

A landowner has "vested rights" in the rules and regulations application to a plat upon first application for a "project". TEX. LOC. GOV'T CODE § 245. This is known as the "Freeze Law."

TEX. LOC. GOV'T CODE § 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 for review for any purpose, including review for administrative completeness; or a plan for development of real property or plat application is filed with a regulatory agency**.

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, 111 (Tex. 1998) (discussing the history of the Freeze Law and the peculiarities of its inadvertent repeal in 1997, and re-adoption in 1999). The Freeze Law is constitutional and not an illegal delegation of authority to private parties. *City of Austin v. Garza*, 124 S.W.3d 867, 873-74 (Tex. App.—Austin 2003, no pet.).

A preliminary plat approval creates vested rights for the entire subdivision area, including individual lots, such that no new development rules may be applied for construction on those lots (subject to any applicable exceptions to that general rule). *Hartsell v. Town of Talty*, 130 S.W.3d 325, 328 (Tex. App.—Dallas 2004, pet. denied). In *Hartsell*, the court rejected the city's position that the plat was a distinct "project" for vested rights purposes, separate from development activities on the tracts created by the plat. Noting the practical concerns of the city, that "outdated" rules would apply to future development, the court countered that the legislature clearly intended such result "to alleviate bureaucratic obstacles to economic development." *Id.*

In 2005, the Freeze Law was amended to do the following:

1. Waive governmental immunity as to vested rights. TEX. LOC. GOV'T CODE §245.006;
2. Expand the matters covered. TEX. LOC. GOV'T CODE §245.005 *and discussion below;*
3. Add utility contracts to the definition of a "permit". TEX. LOC. GOV'T CODE §245.001;
4. Clarify when vested rights accrue - on filing original application or plan for development or plat approval "that gives the regulatory agency fair notice of the project and the nature of the permit sought." TEX. LOC. GOV'T CODE §245.002; and
5. Permit a regulatory agency to cause a permit application to expire the 45th day after filed if additional required information is not provided (after notice and opportunity to cure). TEX. LOC. GOV'T CODE §245.002(e).

The Freeze Law addressed select issues. Exempted from vested rights are building codes, SOB regulations, colonia regulations, development fees, annexation, utility connection issues, life safety issues and city regulations which do not affect the following:

- landscaping or tree preservation
- open space or park dedication
- property classification
- lot size, dimensions or coverage
- building size
- development permitted by a restrictive covenant required by a city.

Therefore, only municipal regulations affecting the foregoing list are "frozen". The first 3 were new in 2005 and add protection against down zoning (i.e., a change in zoning classification). Previously, vested rights were, effectively, limited to subdivision platting issues. The change appears to be a legislative response to *Sheffield Development Company, Inc. v. City of Glenn Hill Heights*, 140 S.W.3d 660 (Tex. 2004), discussed in Section II. F. above, where down zoning was upheld by the Texas Supreme Court under circumstances where the city council acted callously. The extent of "property classification" vesting has not been litigated. As expected, the interpretation is contested with some municipal attorneys arguing that so long as the zoning category is not changed, the underlying limitation may be changed. For example, so long as a project remained in the "I-Industrial" district, the permitted use can still be changed.

Owner attorneys contest this narrow interpretation and claim that no additional limitation on zoning use is permitted after vesting.

What is a "project"? In *City of San Antonio v. En Seguido, Ltd.*, 227 S.W.3d 237 (Tex. App.—San Antonio 2007, no pet.), the court held that a 1997 subdivision plat might be sufficient to vest rights for a different subsequent development. In *City of Helotes v. Miller*, 243 S.W.3d 704 (Tex. App.—San Antonio 2007, no pet.), the court held that several applications and minor permits, utility contract and preliminary plats for a proposed Wal-Mart-anchored project might be sufficient to vest rights to pursue more generalized retail development after Wal-Mart pulled out of the project. In *Continental Homes of Texas, L.P. v. City of San Antonio*, 275 S.W.3d 9 (Tex. App.—San Antonio 2008, pet. denied), the court held that vested rights are not waived by landowner failure to administratively appeal development approvals attempting to apply land use regulations adopted subsequent to the vesting date, *where the city never affirmatively plead waiver*. In the *Miller* and *Cont'l Homes* cases, declaratory judgments were used to confirm a landowner's vested rights.

Every professional in dealings between local governments and landowners must know and understand the Freeze Law and how it should be asserted to protect developer vested rights.

PRACTICE POINT: A landowner should always check to see if the local government is trying to change the rules in force at the time of the first application relating to the project, and if so, assert the Freeze Law. Usually a plat application is filed early in the development process. *Hartsell* supports the application for the first plat for the project locking in the regulatory scheme for the entire project. Local governments must understand the Freeze Law and its limits, and remember that some areas are exempt.

B. Limited Discretion for Plat Approvals

The discretion of a governmental authority approving a subdivision plat is limited. Once applicable rules are satisfied, the approval process is ministerial in nature. Local governments are not granted wide latitude. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985) (city); *Commissioners Court of Grayson County v. Albin*, 992 S.W.2d 597, 600 (Tex. App.—Texarkana 1999, pet. denied) (county). A city may only apply those rules adopted in accordance with § 212.002, which cities sometimes fail to follow. A city has broad discretion in the rules adopted, and the rules 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). The foregoing tenets should also apply to "urban" counties' exercising their broad discretion under TEX. LOC. GOV'T CODE § 232.101. If the County desires to regulate a particular matter as part of the platting process, it must properly adopt rules under TEX. LOC. GOV'T CODE § 232.101(a). This same analysis should apply to cities.

In *Howeth Invs. Inc. v. City of Hedwig Village*, 259 S.W.3d 877 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), the failure of a preliminary plat to be acknowledged and to locate the

subdivision with respect to an original corner of the original survey of which the subdivided tract was a part, both statutory requirements, were an adequate basis for plat denial, citing *Myers v. Zoning & Planning Comm'n of the City of West University Place*, 521 S.W.2d 322 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). Therefore, applicants should not expect leeway from a court in the application of platting rules. The author's experience is that there are technical deficiencies with a significant percentage of approved and recorded plats, particularly with the requirement to tie the subdivision to an original corner of the original survey.

In *Stolte v. County of Guadalupe*, 2004 WL 2597443 (Tex. App.—San Antonio 2004, no pet.) (unpublished), the court overruled Guadalupe County's denial of a plat which met all state and county requirements, even though the County felt the number of driveway cuts on a public road were excessive. A county lacks any "inherent authority" to reject a plat based on "public health and safety" and must base any denial on statute or properly adopted county regulation. *Id.* at 3. A county could adopt rules dealing with access issues, but not having done so, the plat must be approved once the county determined that the *applicable* rules were satisfied, as the platting process becomes ministerial at that point. *Id.* at 4.

TEX. LOC. GOV'T CODE § 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. LOC. GOV'T CODE § 232.002(a) states:

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

The law of Platting is significantly different than the law of Zoning. Under Platting law, local government authority is very limited, whereas under Zoning law it is very broad. The two can't be confused or the developer may lose the opportunity for plat approval.

PRACTICE POINT: A local government may not reject a plat which meets all its requirements. If government staff agrees that all standards are met, that will be strong evidence that a rejection was improper and the government authority should think twice before denying the plat. Local governments should focus on promptly updating their ordinances, rules and regulations to address problems, not trying to "work around" problematic regulatory language to achieve a desired result.

C. Plat Certifications

A city is required to issue a certificate confirming whether or not particular property requires plat approval. TEX. LOC. GOV'T CODE § 212.0115(a). There is no comparable provision for

counties. This is particularly helpful for "grandfathered" subdivisions pre-dating a subdivision ordinance or annexation into a city or its ETJ. It will also tell the long-term ground lease tenant if replatting is required. The city must act within 20 days after it receives the request and issue the certificate within 10 days after it makes its determination. TEX. LOC. GOV'T CODE § 212.0115(f). These certificates are useful in due diligence for acquisition, development, and lending.

If a Plat is denied, a city Planning Commission is required to certify the reasons for the denial. TEX. LOC. GOV'T CODE § 212.009(e). The comparable provision for counties is TEX. LOC. GOV'T CODE § 232.0025(e). Promptly requesting this certification (preferably the night of the denial) will help "lock in" the local government on the basis for the denial.

Although common law holds that a local government is not estopped from denying representations it makes regarding land use conditions, the clear statutory authority for these certifications should make them binding. See *Super Wash* discussion in Section II.B.

PRACTICE POINT: Plat certifications should be used by the private sector in purchase/loan/pre-development due diligence. They will be used against a local government which attempts to change its mind later. Local governments should realize that they will likely be held to the statements in a plat certification.

D. Limits on Cities and Counties/ETJ

County platting authority, generally, and city platting authority in the ETJ is statutorily excluded from the following matters:

- Use
- Bulk, height or number of buildings per lot
- Building size, including floor area ratio
- Density of residential units
- Platting or subdivision in adjoining counties (counties only)
- Road access to a plat or subdivision in adjoining counties (counties only)

TEX. LOC. GOV'T CODE §§ 212.003(a) and 232.101(b).

Op. Tex. Atty Gen. No. GA-0648 (2008) discusses these limitations in the context of density controls in platting regulations, alleged by the local governments to be permissible water quality controls. The specific use of the term "density" triggered critical scrutiny by the Attorney General.

A *general law* city may not apply its building code and development regulation in its ETJ. *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527, 538 (Tex. 2016). *Bizios* indicates general law cities have very little authority in ETJ. Whether a *home rule* city (with its broader general powers) may do so is unclear. Extension of tree protection regulations was upheld as part of platting regulation in *Milestone Potranco Dev. v. City of San Antonio*, 298 S.W.3d 242, 244-5 (Tex. App.-San Antonio 2009, pet. den.).

PRACTICE POINTER: Any regulation by a general law city in the ETJ can be closely scrutinized after *Bizios*, and if the regulation is not clearly related to platting, it can be challenged.

E. Limits on Government Exactions

Development exactions must meet the standards set out by the US Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Under *Dolan*, conditioning a government land use approval upon providing a public benefit is a taking unless the condition (i) bears an "essential nexus" to the substantial advancement of a legitimate governmental interest, and (ii) is roughly proportional to the projected impact of the proposed development. Critical to this decision is the placing of the burden of proof on the local government to show that it has made an individualized determination of the impact of the proposed development and that the exaction required is proportional to that impact.

Town of Flower Mound v. Stafford Estates, L.P., 135 S.W.3d 620 (Tex. 2004) applied *Dolan* in a big win for the Texas development community.

In *Stafford Estates*, the court held that off-site public improvements required as a condition to subdivision plat approval must meet the standards set out by the US Supreme Court in *Dolan*.

The development regulations in *Stafford Estates* required any developer to upgrade roads adjacent to a new development to then current construction standards. The developer in *Stafford Estates* case was required to replace an adequate asphalt road in good repair with a new concrete road with the same traffic capacity. In a rare win for landowners, the Texas Supreme Court upheld a $425,000 judgment in favor of the developer that this off-site requirement constitutes a taking (approximately 88% of the cost of the new road, but denying any attorneys' fees).

First, the court permitted the developer to sue after the fact, rather than adopting the city's argument that if the developer received the benefit of city approvals and complied with those approvals, it should be barred from later objecting. Unless there is a specific limitation in state law, the court held there was no public policy to support this argument.

Second, the court applied the two part test in the US Supreme Court decisions in *Dolan v. City of Tigard* and *Nollan v. Cal. Coastal Comm'n*, and the similar requirements of the Texas Supreme Court's decision in *City of College Station v. Turtle Rock Corp*. These cases dealt with government "exactions," which are any requirement on a developer to do or provide something as a condition to receiving government development approval. The well settled *Dolan* two-pronged test was restated and adopted by the court as follows:

> "Conditioning governmental approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate interest and (2) is roughly proportional to the projected impact of the proposed development."

After a thorough review of federal takings jurisprudence, the court rejected several arguments by the city that would limit the application of *Dolan*:

1. *Dolan* is not limited to required dedications (i.e., streets, easements, parks and the like out of the property) and applies to off-site improvement (such as the new concrete road in this case and contributions to a park land fund in *Turtle Rock*).
2. *Dolan* applies to *both* adjudicative and legislative decisions, depending on the circumstances of the particular case, rejecting a proposed "bright-line adjudicative/legislative distinction" asserted by the city.
3. The burden of proof is on the government, which must make an individualized determination that the exaction is related both in nature and extent to the impact of the proposed development.

Applying these rules, the court held that the new road met the essential nexus requirement in that there is strong public policy to require safe and adequate traffic within a city. However, it clearly failed the rough proportionality test since the city did not make an individualized determination that the new concrete road was required based on the impact of the new development, and the new concrete road had the same capacity as the existing asphalt road.

Third, the Supreme Court rejected the developer's claim for attorneys' fees based on a Federal civil rights claim (42 U.S.C. § 1988) while also recovering its state law takings claim. Since the state law takings claim was successful, the developer received a complete remedy, therefore there could not be the basis for a federal claim, and thus no right to recover attorneys' fees under that non-existent claim.

Stafford Estates will require cities to analytically approach exactions or be subject to challenge. Developers may challenge existing development standards adopted without the analysis required in *Stafford Estates*. Cities are notoriously slow to move in changing regulations and there should continue to be the opportunity to utilize *Stafford Estates* for a number of years until cities "clean up" their development regulations. The big stick in *Stafford Estates* (and *Dolan*) is the unique requirement that the *government* has the burden of proof, contrary to most other areas of land use law.

Effective in 2005, if a city conditions plat approval on the developer bearing a portion of infrastructure costs, then that portion may not exceed "the amount required for infrastructure improvements that are roughly proportional to the proposed development as approved by a professional engineer…retained by the municipality." This is a statutory adoption of the *Dolan* test, as confirmed in *Flower Mound*, but requires application by a licensed Texas engineer. If the city requires too much contribution, the developer may sue within 30 days in either county or district court in the county where the property is located, and if successful, recover reasonable attorneys fees and expert witness fees, both of which were denied in *Flower Mound*, despite the developer's victory in that case. TEX. LOC. GOV'T CODE § 212.904. *See generally Mira Mar Dev. Corp., v. City of Coppell*, 421 S.W.3d 74 (Tex. App. – Dallas 2013, no pet.) (providing the only Texas case law analysis on § 212.904).

PRACTICE POINT: Local governments must satisfy the *Stafford Estates/Dolan/*§ 212.904 burden. In the unlikely situation that the local government and its attorney are not familiar with those cases and statute, the landowner should promptly provide them a copy. However, landowners should not go too far and make unreasonable positions. Instead, they should offer to be accountable for the development's impact, but no more.

F. Time Limits for Building Permit Approvals

Continuing the march toward tightening the timeframes for local governments to respond, and thus to prevent "informal moratoria," the Texas Legislature has created deadlines for certain actions on building permits in Sections 214.904 (municipalities) and 233.901 (counties) of the Local Government Code. Effective September 1, 2005, the new deadlines apply to permits required by a municipality or county to erect or improve a building or other structure. The deadline for counties only applies to those with a population of 3.3 million or more (Harris County) and does not apply to a permit for an on-site sewage disposal system.

Within 45 days from the date the permit application is submitted, the government must either (1) grant or deny the permit, (2) provide written notice as to why the permit has not been granted or denied or (3) reach a written agreement with the applicant for a deadline for granting or denying the permit. If the government provides notice under the second option, the permit must be granted or denied within 30 days. If the government fails to grant or deny the permit within these time limits, the government may not collect any permit fees and must refund any permit fees already collected.

PRACTICE POINT: Local governments are not used to these deadlines and, in some instances, local officials will not be aware of them. Local governments need to establish policies, procedures and forms to address these new limits on local government power.

G. Administrative Hearings are Insufficient to Adjudicate Demolition.

The Texas Supreme Court withdrew its previous opinion in the case of *City of Dallas v. Stewart*, 2011 WL 2586882, No. 09-0257 (Tex. July 1, 2011) (opinion withdrawn and superseded on denial of rehearing by *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012). The court denied a motion filed by the City of Dallas seeking rehearing of its original decision that an appointed city board's determination that a building is a public nuisance and should be demolished should not be given deference by the courts, and that the determination can be reviewed as a taking by a court.

The substituted opinion came to essentially the same conclusion:

> *Today we hold that a system that permits constitutional issues of this importance to be decided by an administrative board, whose decisions are essentially conclusive, does not correctly balance the need to abate nuisances against the rights accorded to property owners under our constitution. In the context of a property owner's appeal of an administrative nuisance determination, independent court review is a constitutional necessity.*

While – at first glance – the opinion appears to be troubling, it seems to limit the time in which a challenge can be made. Moreover, another opinion issued by the court in a similar case, *Patel v. City of Everman*, 361 S.W.3d 600 (Tex. 2012), may ameliorate its effect by further limiting the time in which a challenge must be brought.

IV. CONFLICTING ATTITUDES AND WORLD VIEWS

Not only is the legal basis for local government law and real property law completely independent, but the attitudes and world view of the commercial real estate community and those of public officials are similarly distinctive, as illustrated by the following chart:

1. The Developer's view of the Government:

Developer	Government
White hat	Black hat
Best & brightest	Last in class
Best job	Last job
Innovative, productive	Obstructionist, Non-productive
Trustworthy	Untrustworthy

2. The Government's view of Developers:

Developer	Government
Black hat	White hat
Overly Aggressive	Thoughtful
Un-principled	Principled
Thinks they are smart and can outsmart us	Smart enough to figure out Developers
Job is about max $$	Job isn't about max $$
Wants to maximize profit (at all cost?)	Wants the job done right (for

	the benefit of the public)
Untrustworthy	Trustworthy

The trick is to realize the fundamentally different decision-making criteria of these parties, and to appreciate why conflict is inherent in their relationship. Then, with that knowledge, determine how best to work cooperatively. The decision-making criteria of developers and local governments are shown in the following chart:

Developer	Government
Profit oriented	Public service oriented
Goal oriented	Process oriented
Time driven	Focused on proper review and decision-making
Efficient	Fair

PRACTICE POINT: In order for developers and local governments to work together effectively, the key is to create a cooperative approach based on a common focus. Discussion points to be raised which lead them to a cooperative approach in seeking the approval of a project are in the table below:

Common focus of Public & Private Sector:

- "Good" development is desirable and should be encouraged
- The public and private sector should cooperatively foster good development
- Substandard existing conditions should be upgraded
- Working together makes the community a better place
- We need to work through this process, so let's do the best that we can
- As owner, I want to make this process easier for you as a public official. Can you do the same for me?
- Economic development is good since finances are an issue for this area.

V. RECOMMENDATIONS FOR HANDLING LAND USE ISSUES

A. Due Diligence

When a knowledgeable professional advises a client interested in acquiring or developing real property, they must gather background information, evaluate the current land use status of the property and then make recommendations to the client of their alternatives.

1. Gathering Information

The following information should be obtained to knowledgeably review the zoning status of a particular piece of real property:

- Comprehensive plan (and confirmation of whether formally adopted and how adopted [resolution or ordinance])
- Zoning ordinance (and all amendments)
- Rules of Zoning and Planning Commission/Zoning Board of Adjustment
- Confirmation that no zoning changes are pending (obtained through City Secretary/Secretary to Planning & Zoning Commission)
- Zoning map

PRACTICE POINT: Each of the documents must be confirmed to be the most current before it is adopted. Care should be taken to insure there are no pending changes.

2. Current Status

A review of the relevant zoning documents (enumerated above) should be conducted to determine the current status of the property.

Where the zoning map or ordinance is inconclusive, a determination by the city's planning staff is recommended. If the city planning staff's determination is objectionable, it can be appealed to the Zoning Board of Adjustment (not the Zoning & Planning Commission) for an interpretation.

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

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. Otherwise, the procedures for rezoning should be reviewed carefully.

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 principle, a city is not bound by the mistakes of its employees, and an estoppel defense cannot arise 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.

PRACTICE POINT: 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.

3. Alternatives

If the current zoning status of the property is unacceptable, the practitioner should review the available alternatives with their client. These alternatives may involve rezoning, variance or special exceptions (all discussed at length earlier in these materials).

Before selecting the appropriate alternative, the practitioner should contact the city's chief planning official 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;

(4) Make-up and philosophy of City Council; and

(5) Current political issues in the city affecting land use decisions.

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 proper procedure to achieve zoning objectives exemplify two such instances. City planning staff should never be considered as the only source of information. 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.

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-multifamily development based on concerns about increased crime and lowering of property values in adjacent single-family neighborhoods. More and more communities are concerned about various environmental issues including trees, landscaping, pervious area and the like.

PRACTICE POINT: All zoning requests should be couched with a "win-win" context based on the city's Comprehensive Plan and overriding land use/economic development goals.

4. Checklist

Attached as Appendix A is a general land use law checklist from a presentation by James L. Dougherty, Jr. and the author, which may be useful to spot the full array of land use law issues.

B. Discretionary Approvals

1. What are Discretionary Approvals?

Discretionary approvals fall into 2 broad categories: (i) Conditional Approvals (usually legislative determinations made by the Zoning and Planning Commission/City Council) and (ii) Judicial Approvals (Variances, Interpretations and Permit appeals which are "quasi-judicial" determinations made solely by the Zoning Board of Adjustment).

a. Conditional Approvals

Traditional zoning establishes a division of uses and allows the uses designated "as a matter of right." In other words, all a property owner needs to do is look in the zoning ordinance and map to determine what uses are allowed and then feel comfortable that a permit for that use will be issued if the specific requirements of the zoning ordinance are satisfied (setback, height, etc.). Today, many cites have moved many uses from "a matter of right" status to conditional status. Conditional status requires a specific approval process for the use as applied to a specific site. This site- specific zoning requires a special public consideration of the particular characteristics of the site, the specific use, the specific structures, the performance characteristics of the use, and most importantly, the impact on the adjacent area. Only then is the use approved, and almost always with a list of requirements and limitations. Often, a detailed site plan and architectural renderings are approved, the deviation from which will require additional approvals. The granting or withholding of conditional zoning approvals is within the broad discretion of the city. The uncertainty, time and expense of the conditional zoning approval process deters many purchasers and developers. Often the "highest and best use" from a valuation and development perspective is a conditional use. Property with conditional zoning in place often has greater value and marketability.

b. Judicial Approvals

The Zoning Board of Adjustment is a "quasi-judicial body established to provide an administrative approval body for various land use matters which require a public hearing for the party desiring relief. It acts like a "mini-court" to consider a request, hear testimony, consider written evidence and apply the zoning ordinance and applicable law. It will render a formal decision after following a formalized procedure intended to provide procedural and substantive due process to the owner of the property in question.

2. Types of Discretionary Approvals

a. Conditional Approvals

(1) Planned Development Districts ("PDD")

Zoning ordinances often include planned development districts (also known as Planned Unit Developments or "PUDs"). *See Teer v. Duddleston*, 641 S.W.2d 569, 575 (Tex. App—

Houston [14th Dist.] 1982), *rev'd on other grounds*, 664 S.W.2d 702 (Tex. 1984). A planned unit development is defined as an "area with a specified minimum contiguous acreage to be developed as a single entity according to a plan [and] containing one or more residential clusters . . . and one or more public, quasi-public, commercial or industrial uses in such ranges of ratios of nonresidential uses to residential uses" as specified in the zoning ordinance. BLACK'S LAW DICTIONARY 1036 (6th ed. 1990). Areas otherwise zoned may be eligible to be rezoned as a PDD and then are subject to the special zoning of the PDD, rather than the more restrictive zoning of the particular district. PDDs allow for innovative, often mixed use development. PDD's are a rezoning and follow the rezoning procedure.

(2) Specific/Conditional Use Permit ("SUP" or "CUP")

Specific or conditional use permits provide for a site specific approval of uses contemplated in a zoning ordinance, subject to a determination that the use is appropriate where requested. They are a rezoning and follow the rezoning procedure. SUPs have replaced Special Exceptions in many cities, presumably to allow the City Council to make land use decisions rather than the ZBA.

(3) Special Exception

A special exception is issued in a quasi-judicial manner by the ZBA. Special exceptions have typically been limited to less controversial land use decisions. Often the zoning ordinance requires specific findings in order for the special exception to be granted. An example is allowing a residential lot to be used for parking for an institutional use such as a church or school if the ZBA finds it is adequately screened from view, does not materially affect traffic and has appropriate landscaping, lighting and signage. Specific use permits are a valid exercise of zoning authority by a municipality. *City of Lubbock v. Whitacre*, 414 S.W.2d 497, 499 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.). Amendment to a zoning ordinance by a specific use permit to allow a use not otherwise allowed in that zoning district is not spot zoning. *Id*. at 502.

b. Judicial Approvals

(1) Variances

A variance allows violation of a term of a zoning ordinance where literal compliance is a “hardship,” but granting the variance will not be contrary to the general purposes of the zoning ordinance. The key is the determination of hardship, which may not be self-imposed or purely financial/economic and must related to the unique characteristics of the real estate, not the personal desires or needs of the owner.

(2) Interpretations

All appeals of staff level zoning interpretations are taken to the Zoning Board of Adjustment, not the Zoning and Planning Commission or City Council. Of course, pressure on the City Council may result in a reconsideration of the staff interpretation, but assuming the final

staff interpretation is objectionable, the appeal is through the Zoning Board of Adjustment. The Board determines if the staff decision was correct and may affirm or issue its own ruling.

(3) Permit Appeals

All appeals of permit rejections or issuances are also to the Zoning Board of Adjustment. This is really just another type of interpretation, being the interpretation of staff to issue or not issue a permit.

3. Due Diligence

The real estate professional investigating the potential to develop property for a conditional use, or where the need for a judicial approval arises should conduct the due diligence investigation set forth in Section IV.A.

4. Application Process

Before applying for a discretionary approval, a professional must be sure they have fully investigated the legal and political aspects of the proposed project. Once the project is public and an application submitted, the applicant loses much of the control over the project's destiny. The application must not be considered simply a formality, but as the first presentation of the project. As public record, it may be circulated and quoted widely. It must not be sloppy, incomplete or non persuasive. Do not be limited by the form as most cities will allow additional materials and or the retyping and reformatting of the application form in order to allow a more complete presentation of the project application.

5. Procedural Process

a. Conditional Approvals

PDDs and SUPs are rezonings, and follow the procedural process set forth in Section IV.C. The presentation to the Zoning Commission is critical as the first required pubic approval. Although the City Council may override a negative recommendation by the Zoning Commission, that may be difficult politically. Some cities require a super majority of the City Council to override a negative recommendation by the Zoning Commission.

Applications may need to be withdrawn and resubmitted during the zoning process in order to deal with issues and opposition that arise. This tactic may avoid a certain defeat and allow a revised proposal to receive a "fresh start." Although a "rehearing" of a negative decision is not allowed, typically an applicant can withdraw an application that is under fire, and thus achieve the same result. Additional delay and fees are incurred. Sometimes there are limits on the withdrawal and reapplication process which limit/prevent these tactics. Many applications must be modified and are considered at multiple meetings/hearings. Delay is common. Efficiency and expediency is not part of the zoning vernacular.

Public hearings allow public input to the zoning process. Some cities are better than others in limiting public input to the public hearing. Sometimes a city allows any public meeting to become a de facto public hearing by allowing public comment on a conditional zoning proposal as part of the general public comment period. Objection to this improper and informal continued public hearing is tricky and may be a "lose-lose" decision. Proper handling of a public hearing, particularly contentious ones, is an art and requires experience. Often the applicant forgets the focus of the forum and emphasizes their own desires (almost always profit motivated), rather than addressing the concerns of the zoning bodies and the public. All issues must be presented in a public policy context. Assertion of private property rights is rarely beneficial and often leads to disastrous results.

b. Special Exceptions and Judicial Approvals

Special Exceptions are decided solely by the ZBA and thus are somewhat simpler. Usually only one public hearing is held and the ZBA makes its decision at that meeting or the succeeding one. As an appointed body, the ZBA is somewhat distanced from the political issues which affect a City Council. Often the ZBA has members with experience in their positions and an understanding of their authority.

A problem with ZBAs is that most of their experience will be with variances, and thus many ZBAs are used to denying the great majority of applications coming before it. In presenting a special exception, the applicant must remind the ZBA of the difference in the standards applicable to a variance and a special exception. Further action by a ZBA requires a supermajority of 75% affirmative vote. The applicant must also remember that the ZBA public hearing is a "one shot" proposition, without the opportunity for a rehearing by the ZBA or reversal by the City Council.

Variances require very careful consideration of the scope of the requested non-compliance. That scope should be kept as narrow as possible, but broad enough to provide the practical benefits desired.

Hardship is the almost exclusive focus of a ZBA considering a variance. Keep in mind that most ZBA’s deny the vast majority of variances and thus have a “negative” mind set. The requirement of a supermajority 75% vote is a structural guard against “easy” variances. For most variances, the situation can be characterized as either self imposed or financial, neither of which is a basis for a variance. The applicant must do its best to articulate a legitimate argument based on the physical characteristics of the site to support the variance. Sometimes a ZBA will be willing to distinguish between a sympathetic owner and either (i) their predecessor or (ii) their contractor, where the violation was made by that “third party”. However, where a mistake can be cured (what mistake can’t) there needs to be an argument that just because the mistake can be fixed for an exorbitant amount of money doesn’t make it a purely financial hardship. The time to cure and the possibility that the cure will not look as good, or function appropriately should mentioned.

The issuance of an improper permit by the city and reliance on that permit has been upheld in several cases as sufficient hardship. See discussions in Section IV.B.4.d. and VI.F.

6. Political Process

a. Conditional Approvals

Zoning is a political process. It is different from platting, which is primarily an engineering exercise in meeting the city's stated rules. Zoning decisions are legislative and discretionary. For practical and legal reasons, the opportunity to successfully challenge a zoning decision is remote. Therefore, the adroit assessment of the zoning process and the political implications of the zoning application is critical. Sometimes lobbying City Council is a critical aspect of the process. Certainly, a proper assessment of the City Council's concerns, which sometimes can be ascertained through City Manager, City Attorney, Mayor, Zoning Commission Chair and/or City Staff is mandatory. In the zoning process, the applicant must address the concerns of the interested parties, with primary consideration to the final decision makers: City Council usually, but sometimes the ZBA.

If there is a local newspaper, the applicant must be aware of whether it routinely covers zoning issues, and if the issue is controversial, to expect coverage. An understanding of how to deal with the press is important to having a fair presentation of the applicant's position.

If a City Council election is to occur within six months of any zoning decision, beware. Zoning is often a favorite topic for campaigning, most frequently with a "neighborhood protection" angle. Sometimes, it is best to defer any application, or at least the public hearing, until after the election.

b. Judicial Approvals

The ZBA is appointed and not subject to easy removal by the City Council. Plus, the typical ZBA member is a technician, often a lawyer, engineer, architect or contractor. This is a tough audience who feels little, if any, political pressure. This group has no broad focus, but is very limited in the consideration of its responsibility to the city. Beware of political pressure, which may backfire. Many ZBAs will not allow direct contact of members to discuss pending matters, but rarely is this a written policy in smaller communities. The ZBA rules should be reviewed to determine what prohibitions to contact exist.

7. Public Presentations

Public presentations are tricky and the applicant and its team must present a presentation carefully tailored to the city and specific project. Governmental staff and officials appreciate a well prepared presentation. Several rules apply:

- Know Your Forum - The Zoning Commission, ZBA and City Council have different backgrounds, powers and political agendas. Treat them accordingly. Address the local concerns and be careful about citing other cities. Every city considers itself unique and deserving of special attention.

- Be Prepared - Know the facts, the law, the zoning body, the opposition and your presentation. Do not read a prepared presentation. Be ready to speak extemporaneously. Have exhibits mounted on boards and copies to distribute, if appropriate (enough for all of the zoning body and all city staff, perhaps copies for the audience)

- Be Professional - Keep cool and unemotional. Realize that many of the public will react emotionally and perhaps make personal accusations. Show knowledge and preparation in your presentation and response to issues. Dress appropriately to show respect for the forum and the importance of the issue. In asserting legal points, beware of being overbearing, unless part of your plan.

- Be On Point and Timely – Never ramble. Abide by procedural rules and time limits. Keep on point and directed. If irrelevant issues arise, do not hesitate to guide the hearing back on track.

- Prepare the Client - The client representative should be fully prepared to respond to questions from the zoning body. Any presentation by the client should be carefully outlined, and if needed, rehearsed. Prepare the client for any likely attacks, so they will not be surprised. Never let the client respond emotionally. Do what you can to prevent the client from harming their own cause.

- Be Ready to React - Be ready to speak extemporaneously. Have set answers to likely questions and concerns. Use the opportunity to respond as a forum to reassert applicant's position.

- Bring in the Professionals - If you or your client are uncomfortable with the process and don't feel able to handle the process yourself, or the stakes are too high, don't be afraid to bring in experts.

Attachment

TIPS FOR DEALING WITH MUNICIPALITIES MAINLY-BUT NOT ALWAYS---ON LAND USE ISSUES

1. DON'T (sometimes)
- a. Whom to convince?
- b. Who normally does that?

2. DECIDE WHAT YOU REALLY NEED
- a. The least intrusive/inclusive action
- b. "As of right" vs. "discretionary" and adjudicatory vs. legislative
- c. Timing, timing, timing

3. GET THE REAL DOCS
- a. Ordinance, plan, maps, rules, regs, etc.
- b. Data on the last couple of similar cases
- c. Check recent amendments, pending changes
- d. City certifications; plat certificates

4. FIGURE OUT THE PROCESS
- a. Normally done vs. should be done
- b. Multi-step vs. single-step-who decides
- c. Notices, hearings, etc.
- d. Adjudicatory vs. legislative proceedings
- e. Will there be a champion?

5. FOCUS ON THE STAFF
- a. Figure out the last couple of similar cases
- b. The value of candor
- c. Two fear factors
- d. If the staff beats you up ...

6. DON'T FORGET THE NEIGHBORS
- a. What they already know
- b. What you can do
- c. What to avoid at all costs
- d. What neighbors can do

7. TIMING, TIMING, TIMING
- a. The longest it could possibly take ...
- b. Other things on the calendar
- c. Unexpected deadlines
- d. "Moratoria," "blackouts" etc.

8. BE CAREFUL WHAT YOU SAY
- a. Basic approach (and the client's basic approach)
- b. Disciplinary Rules: adjudicatory vs. non-adjudicatory proceedings
- c. Penal Code: surprising breadth and sweep

9. IF YOU WANT TO SUE ...
- a. Timing, timing, timing
- b. Ripeness doctrines
- c. Exhaustion of remedies

10. REMEMBER, IT'S REALLY DIFFERENT
- a. Public decision-making vs. private
- b. Contracts
- c. Mistakes, immunities, etc.