PLATTING 101

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Platting property is part of the development process. Although platting is a familiar term, even experienced lawyers, consultants and government officials (and certainly real estate developers and professionals) frequently misunderstand its meaning. The problem lies in the origin of subdivision platting law. Subdivision platting law is based in public law, whereas most private sector lawyers spend their time primarily dealing with contract law. Subdivision platting law affects real estate, but its origins come from governmental law concepts premised on the right of the government to protect the health, safety, and public welfare of the public (known as the "police power"). To further confuse the issue, subdivision platting law is significantly different from zoning law, another public law area affecting real estate. Many public sector lawyers confuse the two areas. When considering a zoning change, a city has broad discretion over the change; however, the rights of the city in the area of subdivision platting are significantly limited when reviewing a subdivision plat. Zoning and Planning Commission appointees and City Council members often confuse the broad discretion in zoning with the narrow ministerial authority available in platting.

Lacy v. Hoff and *City of Round Rock v. Smith*, seminal platting cases, contain helpful overview of subdivision platting law, and outline the differences between platting law and zoning law. *Hoff*, 633 S.W.2d 605, 607 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) and *Smith*, 687 S.W.2d 300 (Tex. 1985). *Howeth Invs., Inc. v. City of Hedwig Village* provides an excellent overview of current platting law. 259 S.W.3d 877 (Tex. App.—Houston [1st Dist.] 2008, pet. filed). *Elgin Bank v. Travis County* provides a historic context for the previously more narrowly drawn county subdivision powers as compared to municipal subdivision powers. 906 S.W.2d 120, 124 (Tex. App.—Austin 1995, writ denied). Generally, all county powers are narrowly drawn and are limited to those specifically granted by the State. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22 (Tex. 2003). For example, a county cannot charge a plat application fee without specific statutory authorization. Op. Tex. Att'y Gen. No. JC-0367 (April 13, 2001). However, effective in 2007, counties have platting authority essentially equivalent to cities. Tex. Loc. Gov't Code §§ 232.100-107.

Subdivision controls are based on the land registration system. Registration is a *privilege* that local governmental entities have the power to grant or withhold based upon the compliance with reasonable conditions. The regulatory scheme depends on the approval and recordation of the plat. *Hoff*, 633 S.W.2d at 607-08. The regulation of subdivision development is based upon government's legitimate interest in promoting orderly development; insuring that subdivisions are constructed safely; and protecting future owners from inadequate police and fire protection, inadequate drainage, and unsanitary conditions. *Smith*, 687 S.W.2d at 302.

The initial compilation of platting law begins with TEX. LOC. GOV'T CODE Chapters 212 (cities) and 232 (counties); these Chapters authorize cities and counties to regulate the division of real property. TEX. LOC. GOV'T CODE §§ 232.001(a), 232.023(a), *See La Cour Du Roi, Inc. v. Montgomery County*, 698 S.W.2d 178, 186 (Tex. App.- Beaumont 1985 writ ref'd n.r.e.). The Local Government Code is general, without extensive detail on procedures, but without more, can be relied upon by a local government as a basis to review and approve plats (as Houston did until 1982). Most cities have a subdivision ordinance (sometimes part of a comprehensive development code), which provides detailed platting regulation and procedures. Often, the local government will have uncodified rules and regulations adopted by the governing body establishing even more detailed requirements. Traditionally, municipal subdivision power is substantially broader than a county's. *Elgin Bank*, 906 S.W.2d at 123. Powers essentially equal to municipalities have recently been extended to "urban" and "border" counties in 2001, and the bracket limiting that broad authority was deleted in 2007.

Even experienced participants in the platting process often have fundamental misunderstandings about the applicable process and law of subdivision platting. Fortunately, most fundamental misunderstandings fall into a relatively small number of categories. This article synthesizes the author's experience in answering questions from clients, consultants, government officials, and lawyers over the past 25 years of land use practice. Furthermore, this article covers issues in the Houston Subdivision Ordinance – HOUSTON, TX CODE Chapter 42 (locally referenced as "Chapter 42"), which was comprehensibly redrafted in 1999; Dallas Development Code Chapter 51A; and recent legislation that expands a county's authority in platting law.

"Subdivision Law and Growth Management," second edition (2001) by Southwestern University Law Professor James A. Kushner [referred to herein as "Kushner"], is a national treatise, published by West Group, that has a good representation of Texas cases. UH Law Professor John Mixon's treatise, "Texas Municipal Zoning Law," third edition (2001), now updated by James L. Dougherty, includes an Appendix on Texas Subdivision Law by the author which provides additional information.

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

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

Subdivision (to subdivide, subdividing). The division of land without regard to the transfer of ownership. *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *See* Op. Tex. Att'y Gen. No. GA-0223 (2004)(for a discussion of what constitutes a "subdivision"). To subdivide property is to perform the act of subdivision. Subdividing is not the same as platting. Case law has held that "developing" is a type of subdivision if such development is specifically set forth in a subdivision regulation. *Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882, 885 (Tex. App.—Waco 1985, no writ).

Platting (to plat). The process required by the government to obtain an approval of a subdivision of real property. TEX. LOC. GOV'T CODE Chapter 212 (Cities) or 232 (Counties).

Subdivision Plat (or Plat). The written depiction of the lots, blocks, and reserves created by the subdivision of real property, which must be recorded in the Official Public Records of Real Property of a county after it has received the requisite approvals. "[A] map of specific land showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys and easements drawn to scale." *Elgin Bank*, 906 S.W.2d at 121 (*citing* BLACK'S LAW DICTIONARY p. 1151 – 6th Ed. 1990).

Planning Commission. A governmental body, appointed by the city council, with authority (final in most cities) to approve subdivision plats. TEX. LOC. GOV'T CODE § 211.006. The planning commission may also act as the Zoning Commission for a city. TEX. LOC. GOV'T CODE § 211.007(a). A Planning and Zoning Commission is subject to the Texas Open Meeting Act, but a planning commission is not. TEX. LOC. GOV'T CODE § 211.0075. If there is no planning commission, then the city council approves subdivision plats. By ordinance, a city may require additional approval from the city council, but in larger cities the planning commission usually has final authority on subdivision plats. This is also true in most growing suburban cities because the city council does not want to be burdened with the additional responsibility. However, in many smaller towns, the city council retains final approval authority over subdivision plats in order to retain more control over the development process.

Variance. A governmentally issued right to vary from the literal word of the applicable regulation upon a showing of "hardship." Some subdivision platting ordinances have a specific provision for issuing a variance. *See* HOUSTON, TX. CODE § 42-47 (providing for a general variance provision); DALLAS, TX. CODE § 8.503(b)(4), 8.504(6) and 8.506(b)(1) (each providing for the opportunity of a variance for specific issues). Chapter 212 does not specifically address variances, except in TEX. LOC. GOV'T CODE § 212.015, which requires a "super majority" to approve protested variances for residential replats. *See* Op. Tex. Att'y Gen. No. Dm-410 (1996)(ruling that the "super majority" provision is constitutional on its face). The general authority for establishing platting requirements and the right to waive platting in any desired circumstance makes it clear that a city that requires platting may specifically provide for variances. *See* TEX. LOC. GOV'T CODE § 212.002 and 212.045. Further, the reference to variances in § 212.015 clearly condones the practice of issuing variances.

Extraterritorial Jurisdiction ("ETJ"). The area surrounding a city where the city has exclusive right of annexation and limited right of control, specifically including the right to extend its jurisdiction for approval of subdivision plats. TEX. LOC. GOV'T CODE §§ 42.021, 212.002, and 212.003.

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

Population	ETJ from City's Boundary
Less than 5,000	½ mile
5,000 - 24,999	1 mile
25,000 - 49,999	2 miles
40,000 - 99,999	3.5 miles
100,000 +	5 miles

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

Application of municipal subdivision regulation to an ETJ is clear, but one court has indicated in *dicta* that a city may also extend into its ETJ the requirement for building permits and the enforcement of construction related ordinances. *City of Lucas v. North Texas Municipal Water District*, 724 S.W.2d 811, 823-24 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). TEX. LOC. GOV'T CODE § 212.003(a) (Vernon 1999 & Supp.2003) specifically states it does not *authorize* (but does not state that it precludes) a city to regulate the following (but defers to any other state law authorization):

- Use
- Bulk, height or number of buildings per tract
- Building size, such as floor area ratio
- Residential units per acre; and
- The creation of a water or wastewater facility.

TEX. LOC. GOV'T CODE § 212.049 (Vernon 1999) specifically states it does not *authorize* (but does not state it precludes) a city to require building permits or enforce building codes in the ETJ.

Applicant. Any "person" may be an applicant for plat approval, but only an "owner" may actually plat property. *City of Hedwig Village Zoning and Planning Commission v. Howeth Invs., Inc.*, 73 S.W.3d 389, 390 (Tex. App.—Houston [1st Dist.] 2002, no pet.). It is common practice for either of the following to occur: (i) the actual owner signs the final approved plat for recording after the earnest money on the purchase

contract is nonrefundable, or (ii) the closing occurs after final plat approval, so that the buyer is the owner when the plat is signed and filed.

Development Agreement. An agreement between a land owner and a local government relating to the development of that owner's land and the relationship between the land owner and the local government. Effective 2003, development agreements affecting land in the ETJ have specific statutory basis in new TEX. LOC. GOV'T CODE § 212.172. A development agreement may do the following:

- Contract for no annexation for up to an initial term of 15 years and up to 2 additional extensions for a maximum total term of 45 years.
- Extend city planning authority over the land, including enforcement of not only the same land use, development, and environmental regulations applicable in the city, but specific regulations for the land.
- Provide for infrastructure for the land.
- Specify uses.
- "Other lawful terms and considerations" as agreed to by the parties.

TEX. LOC. GOV'T CODE § 212.172(b). A development agreement is a "permit" under TEX. LOC. GOV'T CODE Chapter 245 and thus is a vested right. A development agreement can be used to deal with current and future platting issues for a proposed project. A development agreement was upheld as the basis for vested rights in *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 682 (Tex. App. – Austin 2004, no pet.).

A limited form of development agreement known as a developer participation contract has a specific statutory basis in TEX. LOC. GOV'T CODE §212.071 et seq. (applicable to cities with 5,000 or more inhabitants). A developer participation contract may do the following:

- provide for a developer to construct public improvements, not including a building, relating to a development project. The contract need not meet the requirements of TEX. LOC. GOV'T CODE Chapter 262 (public bidding) and other public purchasing procedural requirements.
- allow a city with a population less than 1.8 million to participate in costs not to exceed 30%, and a larger municipality to participate up to 70% (in all cases up to 100% for oversizing and certain drainage improvements for affordable housing in municipalities with a population of 1.8 million or more).
- require a performance bond.
- establish safeguards against undue loading of cost, collusion or fraud.

Effective in 2007, developer participation contracts were expanded to counties. TEX. LOC. GOV'T CODE §232.105. The format is virtually identical to city developer participation contracts, but reimbursement is limited to 30% of cost (100% to the extent of oversizing).

Plat Note. A plat note is any notation on the face of a plat which affects future land use. The author believes plat notes should be limited to issues applicable to subdivision of the land, as set forth in duly adopted local government regulations and should not be based either on non-platting land use regulations or a generalized concept of general police power. A plat note was upheld in *City of Austin v. Garza*, without specifically discussing its validity. 124 S.W.3d 867, 874-5 (Tex. App. – Austin 2003, no pet.). Plat notes are specifically referenced in the Freeze Law (see Section 9) where TEX. LOC. GOV'T CODE § 245.002(d) states: "…a permit holder may take advantage of recorded subdivision plat notes…that enhance or protect the project…." *Id*. at 871. A plat note is part of a governmentally required permit process and may be modified or eliminated by replat. TEX. LOC. GOV'T CODE § 212.014.

Types of Plats:

Replat. A new plat of all or a portion of a previously approved plat. Replats eliminate the prior plats as to the area replatted. Cities allow any owner to replat. TEX. LOC. GOV'T CODE § 212.014. County replats were limited to the *original* developer, until the 2003 revision of TEX. LOC. GOV'T CODE § 232.009(b), which now matches municipal platting requirements and allows any owner to replat. *Brunson v. Woolsey*, 63 S.W. 3d 583, 586 (Tex. App.—Fort Worth 2001, no pet.). County plats may also be cancelled under TEX. LOC. GOV'T CODE § 232.008 (which provides for partial cancellations, then a new plat approval). Effective in 2003, counties with a population of 1,500,000 or more may adopt replatting regulations consistent with cities. TEX. LOC. GOV'T CODE § 232.0095.

Residential Replat. A replat where either: (i) during the proceeding 5 years, part was zoned for residential use by not more than 2 units per lot, or (ii) any lot is restricted to residential use by not more than 2 units. There are additional restrictions on residential replats, including notice to adjacent property owners, public hearing, and limitations on approval if the replat is protested. TEX. LOC. GOV'T CODE § 212.015; *See* Op. Tex. Att'y Gen. No. 93-14(1993) (Section 212.015 of the Local Government Code is not a prohibited delegation of legislative powers).

Minor Plat. A plat involving 4 or fewer lots fronting an existing street and not requiring a new street or municipal facilities. TEX. LOC. GOV'T CODE § 212.0065. The city may delegate approval (but not disapproval) of minor plats to City Staff. Most commonly, this plat is utilized for inner-city townhouse redevelopment of formerly single-family lots.

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

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

Vacating Plat/Cancellation Plat. A replat to eliminate the subdivision of property reflected by a prior plat. TEX. LOC. GOV'T CODE § 212.013. A developer who wished to return a failed project to a single unit of property from the subdivision reflected on the recorded plat could use a vacating plat. Vacating plats are rare. Vacating plats may not be used without the consent of all property owners in the plat, even if only a portion of the plat is to be vacated. Once recorded, the vacating plat has the effect of returning the property to raw acreage. TEX. LOC. GOV'T CODE § 212.013(d).

For county plats, the equivalent term is a Cancellation Plat. TEX. LOC. GOV'T CODE § 232.008. Contrary to Chapter 212, under Chapter 232, a full or partial cancellation is allowed without consent from all property owners in a plat.

Development Plat. A site plan approval required for development where no subdivision is occurring. TEX. LOC. GOV'T CODE § 212.041. Development plats were authorized in the Subdivision Act at the request of Houston and are an integral part of Houston's land use scheme. A development plat is required in Houston for new construction or enlargement of existing structures by over 100 sq. ft., except (i) development in the CBD, (ii) a single-family unit on a duly platted lot, (iii) a parking lot, or (iv) a retaining wall. HOUSTON, TX. CODE § 42-22. A building permit will not be issued where a development plat is required and has not been approved. HOUSTON, TX. CODE § 42-4.

Preliminary Plat. There is no state law (or case law) definition of a "preliminary" plat. It is a creature of local regulation. *See* HOUSTON, TX. CODE § 42-43, 74(b); DALLAS, TX. CODE § 51A-8.403(a)(1)-(4). A preliminary plat is the initial plat prepared by a land surveyor on behalf of a landowner and submitted for "preliminary" governmental approval as part of the platting process. Usually, it is conceptual in nature. Often, it will not satisfy all the requirements of TEX. LOC. GOV'T CODE § 212.004(b) and (c). The cost savings of a more general initial plat benefits the landowner because it may be modified or even denied in the approval process. Approval of the preliminary plat is the critical juncture in the platting process. Typically, when a preliminary plat is denied, the landowner either accepts that defeat, sues for mandamus (if the land owner believes the approval was wrongly withheld), or resubmits the preliminary plat with modifications intended to obtain approval.

A preliminary plat was the basis for vested rights in *Hartsell v. Town of Talty*. 130 S.W.3d 325, 327 (Tex. App. – Dallas 2004, pet. denied). *See Howeth Invs. Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 897-902 (Tex. App.—Houston [1st Dist.] 2008, pet. filed) for a discussion of the differences between preliminary and final plats. The court stated "Section 212.009 does not distinguish between preliminary and final plats – indeed, appellees [the City] admits such distinction is 'not specifically contemplated' by the statute." Id. at 898.

Final Plat. There is no state law (or case law) definition of a "final" plat. It is a creature of local regulations. *See* HOUSTON, TX. CODE §§ 42-44, 74(c); DALLAS, TX. CODE § 51A-8.403(a)(8). The final plat is a plat satisfying applicable local regulations for a final plat and is the plat that is recorded. A final plat must be consistent with any approved preliminary plat. The differences between an approved preliminary plat and a final plat are generally surveying details and format. A government should not deny approval of a final plat if it is consistent in all respects with the approved preliminary plat. *See* HOUSTON, TX. CODE § 42-74(c) (indicating that if preliminary plat approval has been obtained, so long as the final plat complies with Chapter 42 of the HOUSTON, TX. CODE, state law, and any conditions of approval of the preliminary plat, the planning commission must grant final plat approval); *but see* DALLAS, TX. CODE § 51A-8.403(a)(4)(A) (stating that approval of a preliminary plat is not final approval of the plat, only an "expression of approval of the layout shown subject to satisfaction of specified conditions"). The preliminary plat serves as a guideline in the preparation of a final plat as well as in the preparation of surveying, engineering and infrastructure plans to serve the plat. If any condition has changed between the preliminary plat and the final plat, the plat must be reconsidered as a preliminary plat. The approving authority may require satisfaction of all requirements of its subdivision regulations and state law as a condition to final plat approval, subject to TEX. LOC. GOV'T CODE §§ 212.009 and 232.025 (discussed in Section 6 herein). *See Howeth Invs. Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 897-902 (Tex. App.—Houston [1st Dist.] 2008, pet. filed) for a discussion of the differences between preliminary and final plats.

Houston Plats. HOUSTON, TX. CODE Chapter 42, effective March 24, 1999, comprehensively overhauled Houston's subdivision regulation scheme and established several plats, unique to Houston:

- **Class III plat.** This is the typical plat approved by the planning commission. (Houston has no zoning and thus no Zoning and Planning Commission.) Both preliminary and final plat approval is required.
- **Class II plat.** A plat or replat (but not a residential replat) without any new street or public easement being dedicated, and which planning commission approves. No preliminary plat is required.
- **Class I plat.** A plat (including an amending plat, but not a replat) without any new street or public easement being dedicated, which creates up to 4 lots, each fronting on an existing street. Class I plats are approved administratively, without planning commission action, unless a variance or special exception is required. No preliminary plat is required. Class I plats are "minor plats" under TEX. LOC. GOV'T CODE § 212.0065.
- **Development Plat.** A site plan not used for subdivision, but as an enforcement mechanism for development regulations (building code, sign code, landscaping ordinance, parking ordinance, setback, etc.) and to require street and public utility dedications and setback requirements. Development plats are approved administratively, without planning commission action, unless a variance or special exception is required. No preliminary plat is required.
- **General Plan.** A site plan submitted for the purpose of establishing a street system for a large tract to be developed in sections. The General Plan is submitted with the subdivision plat for the first section being platted. The General Plan is valid for 4 years and can be extended by planning commission action. Upon planning commission approval, the General Plan establishes the street system for future development.
- **Street Dedication Plat.** A plat to dedicate streets. A Street Dedication Plat is used only after a General Plan has been approved. Planning commission approval is required. No preliminary plat is required.

Dallas Plats. Dallas follows the Chapter 212 categorization of plats without elaborating on subcategories, other than to provide for preliminary and final plats. Dallas does not use Development plats.

2. WHEN IS PLAT APPROVAL REQUIRED?

A. General Rule—Any Subdivision of Property

A subdivision plat should be submitted to the applicable local government (city or county) whenever property is proposed to be subdivided, whether or not the conveyance will be by metes and bounds, unless the subdivision is within an exception in the Subdivision Act or the local subdivision ordinance. TEX. LOC. GOV'T CODE §§ 212.004 (cities) & 232.001 (counties); Op. Tex. Att'y Gen. No.JM-1100 (1989)("Under Local Government Code section 232.001(a) a division of a tract of land outside the limits of a municipality into two or more parts—whether the division be to lay out a subdivision, addition, or suburban or building lots—is subject to the platting requirements of the subsection only if the division is also to lay out streets, alleys, squares, parks, or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent thereto, as provided in the subsection."). The development of land triggers many subdivision regulations (*see discussion of the term "subdivision" above in Section 1).* Both Houston and Dallas subdivision ordinances broadly define the platting requirement. Dallas is particularly inclusive, specifying the following actions require platting:

- creation of a building site
- subdivision of land
- combining lots or tracts
- amending a plat
- incorporating vacated or abandoned property into a building site
- correcting errors in a plat

- erecting a residential subdivision sign
- developing a planned development district

B. Exceptions—State Law, Local Ordinance, Case law

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

Five Acre Exemption. A subdivision of land into 5+ acre tracts where each tract has "access to a public street and no public improvements are dedicated" is exempt from subdivision platting approval. TEX. LOC. GOV'T CODE § 212.004(a). This change was made in 1993, and applies only to cities. Cities will likely interpret this exception to require each tract to abut a public street, although the language supports the position that a private easement could provide the required access.

Airpark Exception. A subdivision of land into 2.5+ acre tracts abutting an aircraft runway located within a city of less than 5,000 population is exempt from subdivision platting approval. TEX. LOC. GOV'T CODE § 212.0046.

Local Option Exclusions. State law allows cities to determine what will constitute a subdivision and to what extent, if any, the city will require platting. TEX. LOC. GOV'T CODE § 212.0045. *See*, Op. Tex. Att'y Gen. No. JC-0260 ("Section 232.0015(a) of the Local Government Code authorizes a county to 'define and classify divisions' to except from the platting requirement particular subdivisions that would otherwise be subject to the requirement, even though the exception is not one listed in section 232.0015(b)-(k)"). The current subdivision ordinance for a city will list local exceptions (which may be hidden in the definition of "subdivision").

HOUSTON, TX. CODE Chapter 42 exempts the following:

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

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

2. County Exceptions:

Chapter 232. A list of exceptions to subdivisions is in § 232.0015, and applies to subdivisions with no streets or common use areas:

- agricultural land;
- certain family transfers (up to 4 parcels);
- 10 acre tracts without streets (public or private);
- certain veteran's land board sales;
- certain public entity sales;

- a seller retaining a portion of a tract from a sale to a developer which plats its purchased tract; and
- partitions of undivided interests.

Manufactured Home Rental Community. A manufactured home rental community with residential leases for less than 60 months is not a subdivision under Chapter 232. There is no comparable provision for Chapter 212. Therefore, an appropriately drafted city subdivision regulation may require platting for a manufactured home rental community. *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Local Option Exclusions. State law allows counties to determine what will constitute a subdivision and to what extent, if any, the county will require platting. TEX. LOC. GOV'T CODE § 232.0015(a). *See* Op. Tex. Att'y Gen. No. JC-0260 ("Section 232.0015(a) of the Local Government Code authorizes a county to 'define and classify divisions' to except from the platting requirement particular subdivisions that would otherwise be subject to the requirement, even though the exception is not one listed in section 232.0015(b)-(k)"). The current subdivision regulations for a county may list local exceptions (which may be hidden in the definition of "subdivision"). TEX. LOC. GOV'T CODE § 232.010 specifically permits a county to allow conveyances by metes and bounds description of 1 or more previously platted lots.

3. Exemptions Applicable to both Cities and Counties:

Condominiums. The creation of a condominium regime is not a subdivision and does not require approval of a plat. A condominium unit is a separate parcel of real property and is separately taxed. TEX. PROP. CODE § 82.005. Land use law may not impose regulation on condominiums not imposed on other physically identical developments. TEX. PROP. CODE § 82.006. A condominium regime may only be established by recording a declaration in accordance with the Condominium Act. TEX. PROP. CODE § 82.051(a). A county clerk must, without prior approval from any other authority, record a condominium declaration and plat, and the book for condominium records must be the same as for subdivision plats. TEX. PROP. CODE § 82.051(d). A description of a condominium unit is legally sufficient if it references the name of the condominium, the recording data for the declaration and the county of recording, and the unit number. TEX. PROP. CODE § 82.054. "Plats" and plans for a condominium may be recorded graphically describing the condominium and its units. TEX. PROP. CODE § 82.059. The condominium "plat" is not a subdivision plat. TEX. PROP. CODE § 82.003(19). The forgoing makes it clear that condominiums should be construed as a separate and distinct legal mechanism to divide real property.

However, the Condominium Act specifically states that it does not affect or diminish local government right to approve plats or enforce building codes. TEX. PROP. CODE § 82.051(e). This could be simply an unnecessary statement to prevent unintended consequences, but could also be used to argue that platting regulation also overlays a condominium development. Clearly, if a platting regulation applies to apartments, then an identical condominium project would be subject to similar (but not more restrictive) regulation. TEX. PROP. CODE § 82.006. A local government could require a developer to plat or replat the area where the condominium will be developed as a commercial reserve, as this is consistent with the treatment of an apartment development. However, the division of the condominium units and common area would be outside the local government's purview. Where an apartment complex is being converted to a condominium, replatting could not be required unless the local regulation would also require replatting if the apartment complex was not being turned into condominiums. *Id*. Nonetheless, some local governments may require replatting upon conversion to a condominium. National practice appears to be mixed. Kushner, Sec. 5:11. In some areas, a condominium regime has been used in lieu of subdividing what appears to be a traditional townhouse project, and this procedure has been accepted by the local government.

Opinion No. GA-0223, July 30, 2004 by Texas Attorney General Greg Abbott considered a "land only" condominium where 17 "limited common elements" with .13 acre land each were set aside for individual owner use out of a 12 acre parcel (presumably all the remainder was common area). Apparently, the project looked and felt like a traditional single family neighborhood with stand alone homes on the limited common elements. The opinion held that (i) a county has the power under TEX. LOC. GOV'T CODE § 232.001 to determine that such a condominium development constitutes a subdivision which must be platted, and (ii) TEX. PROP CODE ANN. § 82 does not prohibit county regulation of condominium development by requiring such projects, *which have been determined to be subdivisions*, to plat. The opinion takes a functional approach to whether a "subdivision" has occurred and relies heavily on *Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882 (Tex. App. – Waco 1985, no writ) and *City of Weslaco v. Carpenter*, 694 S.W.2d 601 (Tex. App. – Corpus Christi, writ ref'd n.r.e.) in broadly construing what constitutes a "subdivision", and specifically declining to require a separation of fee simple ownership. If the land is functionally divided, it is a subdivision, in the AG's view. Once the determination of subdivision is made, only any limitation in the Condominium Act would preclude county plat authority. The AG noted the various preclusions on interference with condominium approvals, but focused on the statement on TEX. PROP. CODE § 82.051(e) that the Condominium Act "does not affect or diminish the rights of municipalities or counties to approve plats or subdivisions…." "Thus, while a commissioners court lacks the authority to approve a condominium plat, chapter 82 does not affect county authority to require or approve a subdivision plat for a condominium *for which a subdivision plat is required under chapter 232 of the Local Government Code*." (emphasis added). This opinion should not be read too broadly, it focuses on a very limited circumstance; when the function effect of the condominium is to effectuate a plat of land without improvements. The AG cited specifically the fact that the project provided for *separate* units without common walls. The opinion did NOT hold that all condominiums are subdivisions, only that a county has the authority to consider, on a case by case basis, if a particular condominium is a subdivision of property.

Partitions. Legitimate partition of property among co-tenants should not be a subdivision, since it is a reallocation of existing property interests to give each owner a different share of the property already owned. *See Hamilton v. Hamilton*, 280 S.W.2d 588, 590 (Tex. 1955); Op. Tex. Att'y. Gen. No. 0-5150 (1943); TEX. LOC. GOV'T CODE § 232.0015(k) (if no road dedicated); TEX. PROP. CODE § 12.002(g).

Governmental Subdivision. The acquisition of land by dedication, condemnation, or purchase by governmental entity with condemnation power is not subject to platting requirements, as the ability to acquire land for a public purpose would be compromised. *See El Paso County v. City of El Paso*, 357 S.W.2d 783 (Tex. Civ. App.—El Paso 1962, no writ); *Palafox v. Boyd*, 400 S.W.2d 946, 949 (Tex. Civ. App.—El Paso1966, no writ); TEX. LOC. GOV'T CODE §§ 232.0015(h) & (i). Condemnation allows acquisition of land, without the obligation to be subject to any limitation on the land acquired; therefore, there is no public policy to require platting land acquired without condemnation. *El Paso County*, 357 S.W.2d at 7; *Palafox*, 400 S.W.2d at 948. A military base is not a subdivision. Op. Tex. Att'y Gen. No. C-128 (1963). The transfer of a strip of land to a city for street widening is not a resubdivision of the tract. *Airpark – Dallas Zoning Committee v. Crow-Billingsley Airpark*, 109 S.W.3d 900, 912 (Tex. App.—Dallas 2003, no pet.).

Ground Lease. It is unclear at what point a long-term ground lease becomes more a subdivision than a lease. As practical guide, a prudent practitioner should consider requiring a subdivision plat or clear evidence of a platting exception for a ground lease effectuating a subdivision any time new improvements will be constructed on the ground lease estate. Some subdivision ordinances specify that any lease over a stated term of less than all the property is deemed a subdivision. Authority to consider ground leases as a subdivision can be drawn from the manufactured housing cases which hold that short term leasing of manufactured home lots are, effectively, subdivisions. *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882, 885 (Tex. App.—Waco 1985, writ ref'd n.r.e.).

C. Plat Certification—TEX. LOC. GOV'T CODE Sec. 212.0115(a)

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. Moreover, effective September 1, 2005, a purchaser under a contract for deed, executory contract, or other executory conveyance is included in the list of parties who may request plat compliance certifications. *See* TEX. LOC. GOV'T CODE ANN. § 212.0115(c); TEX. PROP. CODE ANN. § 5.083. If not properly platted, the purchaser may rescind the transaction and is entitled to all funds paid regarding the property: purchase price, taxes and for improvements. *Id.* 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. Although common law holds that a city is not estopped from denying representations it makes regarding land use conditions, the clear statutory authority of § 212.0115 should make such certification binding on the city. *See Joleewu, Ltd. v. City of Austin*, 916 F.2d 250, 254 (5th Cir. 1990) (applying the exception to the general rule precluding application of estoppel to cities in the performance of governmental functions where justice, honesty, and fair dealing require); *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 353 (Tex. App.—Texarkana 2002, pet. denied) (applying estoppel against a city is appropriate in "exceptional circumstances where justice requires it"); *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 to for the city to retain the benefits of its mistake yet avoid its obligations"), even if the plat approved in that case were approved without authority (i.e., in contravention of the then applicable rules). However, *see City of San Antonio v. TPLP Office Park,* 218 S.W.3d 60 (Tex. 2007) (holding the city is not estopped by the approval of its planning commission of a plat); *City of Hutchins v. Prasifka*, 450 S.W.2d at 831 (holding that the inaccurate representation of a city official as to the zoning classification of a tract did not estop the city from enforcing its zoning ordinance); *Edge v. City of Bellaire*, 200 S.W.2d 224, 228 (Tex. Civ. App.—Galveston 1947, writ ref'd.) (holding that the negligent issuance of a building permit and reliance thereon by the land owner did not bind the city from enforcing a valid zoning ordinance prohibiting the structure). In summary, the direction of the estoppel cases supports platting certifications being enforceable against a city, even if improperly issued, where there has been meaningful reliance, as such holding is fair and just. Reliance should be found if the owner purchased or improved the property after receiving the certification.

3. WHERE ARE THE REQUIREMENTS FOR PLAT APPROVAL?

TEX. LOC. GOV'T CODE CH. 212 AND 232, LOCAL SUBDIVISION ORDINANCE (E.G., HOUSTON, TX CODE CH. 42 OR DALLAS, TX CODE CH. 51A) AND LOCALLY ADOPTED RULES.

Plat approval requires satisfaction of both procedural and substantive requirements. These requirements are set forth in state law (TEX. LOC. GOV'T CODE Chapters 212 [Cities] and 232 [Counties]), local ordinance (city) or order (county), and any rules or regulations adopted under the local ordinance or order (often including a design manual). Op. Tex. Att'y Gen. No. JM-789(1987)("A county may provide requirements for the approval of subdivision plats only to the extent such requirements are authorized by Chapter 232 of the Local Government Code.); Op. Tex. Att'y Gen. No.JC-0367(2001)(county may not charge an applicant the costs of issuing notice of the proposed revision under Local Government Code Section 232.041(b)). Platting rules may be adopted by the city council only after a public hearing. TEX. LOC.

GOV'T CODE §§ 212.002 (regular plats) and 212.044 (development plats). The commissioner's court may adopt platting rules by order only after public notice. TEX. LOC. GOV'T CODE § 232.003 (limiting the area of regulation to 9 specified issues). Road and groundwater issues are addressed in TEX. LOC. GOV'T CODE §§ 232.0031 and 232.0032.

A. Procedural

Procedural requirements typically include:

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

See HOUSTON, TX. CODE § 42-20 and DALLAS, TX. CODE § 51A-8.403.

B. Substantive

The authority to establish substantive requirements is delegated to cities (TEX. LOC. GOV'T CODE § 212.002) and "urban" counties (TEX. LOC. GOV'T CODE § 232.101).

TEX. LOC. GOV'T CODE § 212.004 (applicable only to cities) requires the following to *record* a plat:

- Metes and bounds description.
- "Locate the subdivision with respect to a corner of the survey or tract or an original corner of the original survey of which is it a part" (many surveyors fail to satisfy this requirement, particularly in preliminary plats, but even in final plats).
- Dimensions of the subdivision, publicly dedicated parcels, and common areas.
- Acknowledgement by the owner or "proprietor" or their agent.
- Recordation in compliance with TEX. PROP. CODE § 12.002.

TEX. PROP. CODE § 12.002 (applicable to all plats) establishes the following requirements for recording subdivision plats:

- Proper approval.
- Tax certificates showing no delinquent taxes.

The foregoing state law substantive requirements are set forth as requirements for a plat to be recorded, not to be approved; therefore, a subdivision plat could be approved yet still not satisfy the foregoing requirements for recordation. The "substantial compliance" rule applies to these requirements. *Bjornson v. McElroy*, 316 S.W.2d 764, 765 (Tex. Civ. App.— San Antonio 1958, no writ) (The failure to locate the subdivision with respect to the original survey was excused where expert testimony showed that a surveyor could locate the subdivision with reference to the original survey.).

Historically, county authority to regulate subdivisions was less broad than a city. *Elgin Bank*, 906 S.W.2d at 122; *Compare* TEX. LOC. GOV'T CODE § 212.002 (cities) to 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.

However, county platting authority is not without specific statutory limitations:

Areas where county plat regulation is prohibited:

- 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
- Road access to a plat or subdivision in adjoining counties

TEX. LOC. GOV'T CODE §232.101(b); Op. Tex. Atty Gen. No. GA-0648 (2008).

Platting standards for roads may not exceed those the county imposes on itself for county constructed roads. TEX. LOC. GOV'T CODE §232.0031.

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

If a water district adopts a master drainage plan under TEX. WATER CODE §49.211, then as a condition of plat approval, the district may require the landowner to submit a drainage report to the district and obtain district approval that the drainage plan for the project is consistent with the district's master drainage plan. TEX. WATER CODE § 49.211 (d-e).

C. Development Plats

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

D. Manufactured Housing

Counties have additional powers to regulate manufactured home rental communities. TEX. LOC. GOV'T CODE § 232.007.

E. Colonias

Cities and counties have additional powers to regulate colonias (substandard neighborhoods catering to low income residents in counties adjacent to Mexico). TEX. LOC. GOV'T CODE §§ 212.0105, 212.0106 & 212.0175 (city) and 232.021 (county). The county powers are extensive.

F. Overlapping Jurisdiction

The platting authority of cities and counties may overlap when a city extends its platting regulations to its ETJ. Until recently, there was no statutory procedure to address the potentially burdensome and inconsistent procedures for dual platting approvals within the ETJ of a city.

TEX. LOC. GOV'T CODE Chapter 242.001mandates that cities and most counties (Houston area counties and border counties are *exempt*) simplify the plat approval scheme by selecting one of the following alternatives:

- Exclusive city authority
- Exclusive county authority
- Geographic apportionment of the ETJ between the city and county, with exclusive authority as apportioned
- Interlocal agreement establishing a joint subdivision approval process with single fees, office, and processing.

There is no penalty for non-compliance (other than the implication that the legislature will impose a legislative resolution and/or penalties), but 2003 changes to TEX. LOC. GOV'T CODE Chapter 242 mandates **binding** arbitration if no agreement is timely entered. TEX. LOC. GOV'T CODE § 242.001(f). The deadline for cities with 3.5 mile or greater ETJ was January 1, 2004, and for other cities was January 1, 2006. TEX. LOC. GOV'T CODE § 242.0015. The arbitrator must issue an interim decision and set of subdivision rules within 60 days if the arbitrator (or panel) is not able to issue a final decision within that time period. TEX. LOC. GOV'T CODE § 242.001(f).

In Houston area counties and border counties, a plat may not be recorded without approval from *both* the city and county. If one governmental entity does not require plat approval for the particular subdivision, but the other does, then the one which does not require platting shall, upon request by the subdivider, issue a certification so stating, which shall be attached to the plat when recorded.

New in 2003, if an approved set of regulations for plats "conflicts with a proposal or plan for future roads" adopted by a "metropolitan planning organization", then the proposal or plan of the metropolitan planning organization prevails. TEX. LOC. GOV'T CODE § 242.001(g).

G. Are there Statutory Limits on Platting Powers?

1. Limitations on Land Use Regulation via Platting.

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.

2. County Limitations.

- Platting standards for roads may not exceed those the county imposes on itself for county

constructed roads. TEX. LOC. GOV'T CODE § 232.0031.

3. City Limitations.

- In certain situations, a municipality may not deny or condition the development of land based on the effect the proposed development would have on traffic. TEX. LOC. GOV'T CODE § 212.103.

H. What if a Plat is Improperly Approved?

A plat approved in spite of non-compliance with duly adopted local regulations may be the basis for an estoppel defense against the local government which approved it. *Garza,* 124 S.W.3d at 874 (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"). The holding in *Garza* is powerful support for an argument that an improperly approved plat may not be rejected by a city, since the *Garza* court held that, even if the plat were approved without authority (i.e., in contravention of the then applicable rules), that estoppel applied. *Id*. at 870. In *City of San Antonio v. TPLP Office Park,* 155 S.W.3d 365, 378 (Tex. App.-San Antonio 2004), *rev'd* 218 S.W.3d 60 (Tex. 2007), the court held that the city was bound by the approval of its planning commission of a plat and the reliance of subsequent owners on that plat was sufficient for the city to be estopped to challenge the public rights of way dedicated by that plat in a case where the city sought to distance itself from a decision by the planning commission which was inconsistent with prior plat notes. *See,* discussion of estoppel cases in Section 2.C. However, the Supreme Court stated that the courts may not "second guess" a governmental entity's decision as to how it performs its governmental functions by imposing an estoppel theory on the city. *City of San Antonio v. TPLP Office Park,* 218 S.W.3d 60 (Tex. 2007). Therefore, the Supreme Court ruled that the City of San Antonio was not estopped. *Id.*

The *Garza* and *TPLP* rulings seem as though they may be inconsistent. But, the difference between *TPLP* and *Garza,* is that in *Garza* the court is clear that it would be manifestly inequitable for the city to retain some sort of benefit from their mistake and then deny the benefit to the developer. *Garza,* 124 S.W.3d at 875. Thus, the city would be estopped when it is benefited. However, in *TPLP* the city did not benefit by their mistake. Furthermore, the city attempted to cure their mistake by instituting other traffic control devices without terminating the right of way. *TPLP,* 218 S.W.3d at 67. When the other devices failed, the city decided to close the right of way. *Id.* Because the city did not benefit and attempted alternative solutions to the traffic problem, the city was not estopped. *Id.*

Not reached in *Garza* was the owner's allegation that the "Validation Statute" in TEX. LOC. GOV'T CODE § 51.003 cured any defects in the approval of the plat. *Id*. at 870. The court pointed out the issue would be whether the defect was procedural (cured by validation) or substantive (which created a void action not subject to validation). *Id.* 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). Even pre-emption of state statutes is cured by a validation statute. *West End Pink, Ltd. v. City of Irving,* 22 S.W.3d 5 (Tex. App.—Dallas 1999, pet. denied). However, the 1997 legislature failed to pass a validation statute, reportedly the first such failure in sixty-one years. A "permanent" validation statute was passed by the 1999 Legislature. TEX. LOC. GOV'T CODE § 51.003. Any governmental act or proceeding of a municipality 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
- litigated matters.

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

A city need not require subdivisions to be approved via a platting process. TEX. LOC. GOV'T CODE § 212.0045. The entire platting process could be characterized as procedural, since approval is optional, at city discretion. Thus the failure to follow any local subdivision ordinance, locally adopted rules which are part of the local plat approval and even the failure to follow any of the few specific rules set forth in TEX. LOC. GOV'T CODE Chap. 212 for plats would not prevent validation after 3 years from the date of approval.

4. MUST A PLAT MEETING ESTABLISHED REQUIREMENTS BE APPROVED?

YES. 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, 898-901 (Tex. App.—Houston [1st Dist.] 2008, pet. filed), 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. 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) (unpublished), the court overruled Guadalupe County's denial of a plat which meet 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 property 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.

A city may not require as a condition to plat or other development approval, maximum sales prices on homes or residential lots, but may create incentive plans to increase low cost housing. TEX. LOC. GOV'T CODE ANN. §214.905.

The Attorney General declined to hold whether a building official could simply "rely" upon an engineer's seal and certification that all applicable rules had been met by a submitted document and be absolved from any duty for further inquiry. AG Op. GA-0439 (2006).

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 § 212.010 states:

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

TEX. LOC. GOV'T CODE § 212.002 states:

> **After a public hearing** on the matter, **the governing body of a municipality may adopt rules governing plats** and subdivision of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly and healthful development of the municipality.

TEX. 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...."

5. MUST REASONS FOR A PLAT DENIAL BE PROVIDED?

YES. Upon request by the owner, the local government shall certify the reasons for subdivision plat denial. TEX. LOC. GOV'T CODE §§ 212.009(e) (city) and 232.0025(e) (county). If a controversial subdivision plat is denied (preliminary or final) and the property owner wants to contest the denial, it should promptly request this certification, as it is the best evidence of the basis for the denial. Some city attorneys interpret § 212.009(e) to apply only to final plats, but the statute makes no such distinction. DALLAS, TX. CODE § 51A-8.403(a)(5) requires an "action letter" be generated by the City within seven (7) days of Planning Commission

action on a plat, which letter states the action taken: if denied, the reason for the denial, and if approved, any conditions for final approval.

6. MUST A PLAT APPLICATION BE PROMPTLY CONSIDERED?

GENERALLY, YES. Subdivision plat requests must be acted upon within 30 days (city) and 60 days (county) after the plat is "filed". TEX. LOC. GOV'T CODE §§ 212.009(a) and 232.0025. These provisions establish discipline and timeliness in the subdivision platting process. State law does not distinguish between "preliminary" and "final" plats. Some city attorneys argue that only the "final" plat is subject to the 30 day requirement, since only the "final" plat satisfies TEX. LOC. GOV'T CODE § 212.004(c) and (d) and is in recordable form. Landowners can avoid this objection by submitting preliminary plats meeting the substantive requirements of these sections (i.e. in "final" plat form). Most land use attorneys representing land owners consider the rule applicable to any plat submission. There is no case law on the subject. However, a preliminary plat was the basis for vested rights in *Hartsell v. Town of Talty.* 130 S.W.3d 325, 327 (Tex. App. – Dallas, 2004, pet. denied). If a preliminary place qualifies for vested rights, the holy grail of land use, which provides substantive rights, it certainly should qualify for the benefits of the 30-day rule, which only provides procedural rights.

Many cities apply the 30-day requirement to <u>both</u> preliminary and final plats as a matter of practice or ordinance. Therefore, a plat may not be tabled, held, or deferred beyond the 30-day limit. Instead, the application should be denied or the applicant should be told that unless they withdraw their application (perhaps subject to refiling without a new fee), the application must be ruled on at that time. Faced with an almost certain denial, most landowners will agree to withdraw the application for resubmittal at a later time. Amending and minor plats, the approval of which has been delegated to staff for review and approval, are exempt from the 30 day limits. TEX. LOC. GOV'T CODE § 212.0065.

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

Mandamus is the remedy to enforce the deemed approval plat procedure. *Andricks v. Schaefer*, 279 S.W.2d 421, 424 (Tex. Civ. App.—San Antonio 1955, no writ). However, in *Meyers v. Zoning and Planning Commission of the City of West University Place*, the court refused to apply the 30-day deemed approval provision to a requested mandamus when the city showed that the plat did not meet its subdivision regulations, despite the fact of no action within the 30-day period. 521 S.W.2d 322, 324 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). In *Howeth Invs., Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 901 (Tex. App.—Houston [1st Dist.] 2008, pet. filed), the court held the 30-day "deemed approval" rule inapplicable to any plat not literally compliant with the plat recordation requirements in TEX. LOC. GOV'T CODE §212.004(b) and (c) (locate an original corner of the original survey and acknowledgement), citing *Meyers*. In *Stolte v. County of Guadalupe,* the court mandamused Guadalupe County Commissioners Court to approve 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, holding that the plat must be approved once the county determined that the *applicable* rules were satisfied, as the platting process becomes ministerial at that point. 2004 WL 2597443 (Tex. App. – San Antonio 2004) (unpublished).

Effective in 1999, counties have a 60-day limit for final action on a plat, with additional requirements relating to response to applications, determination of when a submission is complete, extension of the deadline (generally requires applicant approval), and penalties. TEX. LOC. GOV'T CODE § 232.0025. If no action is taken, the plat is deemed approved. TEX. LOC. GOV'T CODE § 232.0025(i)(2).

Problems exist with the practical application of the "deemed approved" provisions of the municipal and county subdivision statutes. These are discussed in detail in Mixon, Appendix C, C-340.6. The deemed approval provisions are draconian remedies and clearly intended to provide a harsh (and final) result to governments failing to provide timely platting approval.

7. MAY SIGNIFICANT "EXACTIONS" WITHOUT COMPENSATION BE REQUIRED AS A CONDITION TO PLAT APPROVAL?

YES. Subdivision regulation is based on legitimate government interest in promoting orderly development, insuring safe neighborhoods, insuring adequate police and fire protection is possible, and insuring adequate drainage. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985). The basis of subdivision controls is the land registration system. Registration is a privilege that local governmental entities have the power to grant or withhold based upon the compliance with conditions. The entire regulatory scheme depends on the approval and recordation of the plat. *Lacy v. Hoff*, 633 S.W.2d 605, 607-08 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). A subdivision ordinance may require dedication and construction of streets, alleys and utilities as part of orderly development and may be enforced through the platting approval process. *City of Corpus Christi v. Unitarian Church*, 436 S.W.2d 923, 930 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). These types of requirements are called "exactions." The imposition of those dedications to provide for infrastructure improvement as a condition precedent to plat approval is not a taking. *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448, 460 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). However, a city may require dedications only if properly authorized by constitutional, statutory or charter authority. *City of Stafford v. Gullo*, 886 S.W.2d 524, 526 (Tex. App.—Houston [1st Dist.] 1994, no writ). In *Gullo*, the city required more right of way to be dedicated than provided in its subdivision ordinance, and therefore, the dedication was improper. *Id.* at 525.

Typical exactions:

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

Less typical exactions:

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

Counties may require only street and drainage easement dedications and construction, within specified limitations. TEX. LOC. GOV'T CODE § 232.003.

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

In addition to the dedication of right-of-way and easements, the requirement for a developer to construct streets and install infrastructure improvements (as well as the requirement for bonds to insure construction of those improvements) has been upheld as a condition to plat approval. *Crownhill Homes, Inc.*, 433 S.W.2d at 526. However, requiring a landowner to dedicate property for use as a right-of-way for a **state** highway constitutes a taking which requires just compensation. *City of Houston v. Kolb*, 982 S.W.2d 949, 951 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

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

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

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

YES. State and Federal law provide guidance on the limits on a city requiring exactions as part of the platting approval process. Generally, the required dedications and mandatory construction of public facilities must be related to the burdens on the city placed by the new development and its related population and business impact.

A. Federal Case Law. The U.S. Supreme Court has established a number of rules which limit government exactions:

Exactions must substantially further a legitimate state interest, and there must be a nexus between the exaction and the public need to be addressed. *Nollan v. California Coastal Corp.*, 483 U.S. 825 (1987). As a condition for a required permit to construct a new house, Nollan was required to grant an easement over his

private beach in order to connect two public beaches separated by his property. Since there was no link between the public benefits of beach access and the public burden from construction of the new house, the requirement was rejected.

No regulation may deprive the owner of "all economically beneficial or productive use" of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004-05 (1992). Lucas was denied permission to build on a coastal lot in order to protect sand dunes. Only decks and other uninhabitable structures were allowed. This regulation was considered a taking requiring compensation. In effect, this regulation was so excessive that it became a condemnation. The Court provided an exception (not applicable here) where a use is a "nuisance" under state law. A nuisance use may be prohibited without compensation.

A city has the burden to demonstrate the exaction is justified by making an individualized determination that the nature and extent of the exaction is "roughly proportional" to the anticipated impact of the project. Thus, the city has the duty to produce evidence to support its exactions. *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994). A building permit for expansion of a business was conditioned on granting an easement over an adjacent creek for future storm drainage and a bike path. The city could not link the expansion to either flooding concerns or increased bike traffic; therefore, the exaction was a taking requiring compensation.

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

One project may not bear all the burden of a general community benefit. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978). Teague was denied a permit to re-channel a creek necessary to prepare land for development. The permit was denied due to public desire to preserve the scenic character of the area for the generalized benefit of the public and to prevent any development. Teague was held to have the right to recover damages since this benefit was for the general public.

Exactions must meet a two level test:

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

Parkland dedication as part of residential development was upheld when a developer requested plat approval. *City of College Station v. Turtle Rock Corp.* 680 S.W.2d 802, 803 (Tex. 1984) (Providing neighborhood parks is a legitimate government goal, and the city imposed the dedication requirement only as a condition to a requested plat approval). <u>There must be a reasonable connection between the impact of the development and the goals being addressed by the required exaction.</u> The developer is not required to solve pre-existing deficiencies or provide for future, offsite development needs.

Regulation may not interfere with "reasonable investment backed expectations" established when property was purchased, such that the regulation eliminates all economic viable use. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 924 (Tex. 1998). Zoning regulation with large minimum lots and the related denial of a proposed land development was broadly upheld. Legitimate government interests to justify land development regulation included:

- Protecting from the ill-effects of urbanization,
- Enhancing quality of life,
- Preserving aesthetics,

- Preserving historic agricultural uses,
- Controlling the rate and character of growth.

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

Town of Flower Mound v. Stafford Estates Limited Partnership, is a significant city platting opinion applying *Dolan* to offsite exactions. 135 S.W.3d 620 (Tex. 2004). The Supreme Court affirmed the holding of the Court of Appeals, which summarized the case as follows:

> In this development exaction case, the primary issue we must decide is whether the two-prong test articulated in *Dolan*, 512 U.S. at 375 applies to a municipality's requirement that a developer construct and pay for offsite public improvements as a condition to plat approval for subdivision development. We conclude that the *Dolan* test applies to the public improvements development exaction in this case and that the exaction does not satisfy the *Dolan* test.
>
> We must also decide what is the proper measure of damages when a development exaction does not satisfy the *Dolan* test and whether a developer can recover attorney's fees and expert witness fees under United States Code §1988 if a state remedy adequately compensates the developer for any taking resulting from the development exaction. We hold that the proper measure of damages is the amount paid for the public improvements in excess of the amount roughly proportional to the consequences generated by the development minus any special benefits conferred on the development by the exaction. Applying this measure of damages, we hold that legally and factually sufficient evidence exists supporting the trial court's damages award. We also hold that the developer cannot recover § 1988 expert witness fees and attorney's fees if the state remedy provides adequate compensation because, in this circumstance, the developer's federal takings claim is not ripe. Accordingly, we will affirm the trial court's judgment in part and reverse and render in part.

In this case, the city's subdivision ordinance required <u>offsite</u> improvements to public facilities as a condition of plat approval. Specifically, a street bounding the proposed development was required to be completely reconstructed as a concrete street, notwithstanding that a recently installed asphalt street was in place. The benefits to the public from the new work were: (i) concrete over asphalt, and (ii) wider shoulders. There was no increase in traffic capacity. After receiving plat approval and installing the road, the developer sued to recover its costs, alleging an unconstitutional taking under the state and federal constitutions and a civil rights takings violation under § 1983 of the United States Code, as well as seeking attorney's fees and expenses under § 1988 of the United States Code. The court made a number of significant holdings:

- Reasonableness of conditions to plat approvals, including exactions, may be challenged <u>after</u> obtaining final plat approval and providing the exactions.

- *Dolan v. City of Tigard*, 512 U.S. 374 (1994) applies to <u>offsite</u> exactions, not just a requirement to dedicate real property.

- *Dolan* applies when a city makes an ad hoc "adjudicative" (case by case) decision, but is not applicable to a uniformly applied "legislative" action.

- *Dolan* applies to a state-taking claim. The court explains that *Dolan* is intended to "prevent opportunistic takings by the government simply because a land owner is seeking some type of land-related governmental approval", sometimes described as "regulatory leveraging."

- Burden of proof is on the government to prove the legitimacy of the exactions, but the landowner has the burden to prove its damages.

- Damages are the portion of the exaction other than that appropriately assessed to the landowner (applying the rough proportionality test). In this case, the developer paid 100% of the offsite road construction, but should only have been assessed 12.2%. Therefore, the developer recovered 87.8% of the cost.

- Attorney's fees/expenses were denied under USC § 1988. Since the landowner recovered under its state law takings claim, that complete recovery eliminated any §1983 claim, and therefore, no attorney's fees.

C. State Statute. 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 thirty 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.

D. Required Objections to Improper Exactions. A landowner must consistently object to improper platting exactions at every opportunity and at an administrative level, or the landowner will be deemed to have consented to the exaction. *Rischon Dev. Corp. v. City of Keller,* 242. S.W.3d 161, 167 (Tex. App.—Fort Worth 2007, pet. denied). In *Rischon*, the developer waited until after its plat, and a related development agreement, were approved before objecting to required exactions, and the failure to timely and repeatedly object was considered a waiver. *Id*. In *Town of Flower Mound v. Stafford Estates, L.P*, 71 S.W.3d 18, 30 (Tex. App.—Fort Worth 2002), *aff'd* 135 S.W.3d 620 (Tex. 2004), the landowner repeatedly objected to the contested exactions throughout the platting process, but ultimately acceded to the city's requirement at the final plat stage. The fact that the developer only acceded under protest was held sufficient to preclude a waiver of the landowner's right to later challenge the exactions. *Id*.

9. MAY THE RULES BE CHANGED AFTER PLAT APPLICATION?

NO. 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) for a complete discussion of the history of the Freeze Law and the peculiarities of its inadvertent repeal in 1997, and re-adoption in 1999. 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, 873-4 (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 (i.e., zoning)
- 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 are 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), where down zoning was upheld by the Texas Supreme Court under circumstances where the city council acted callously.

Since 2005, the San Antonio Court of Appeals has addressed the scope of the statutory term "project" in 3 cases as owners have become more and more aggressive in the types of applications and permits which

are alleged to vest a development. 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*, NO. 04-07-00038-CV 2008 Tex. App. LEXIS 2709 (Tex. App. – San Antonio Apr. 16, 2008, no pet. h.), 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.

10. MAY THE GOVERNMENT HALT DEVELOPMENT TO CONSIDER CHANGES TO ITS SUBDIVISION REGULATIONS?

YES, BUT THE MORATORIUM MUST BE LIMITED IN LENGTH. A city may institute a moratorium on plat applications by city council action in order to prevent the "race to the application window" while it is considering changes to its subdivision ordinance. A moratorium of six months has been held clearly defensible. *Mont Belvieu Square, Ltd. v. City of Mont Belvieu,* 27 F. Supp.2d 935, 937 (S.D.Tex. 1998). *Mont Belvieu Square, Ltd.* held a six-month moratorium for consideration of a zoning ordinance valid as a matter of law. *See also Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004) (upholding a fifteen-month moratorium). According to the court in *Sheffield Development Co.*, "the moratorium…substantially advanced a legitimate governmental purpose" and was not a taking of developer's property; during eight months of the moratorium, the city rezoned seven planned developments in an orderly, but slow, process toward resolving the differences between the city council, the planning and zoning commission, and the city's consultant, and the developer did not show that the moratorium had an economic impact distinct from the rezoning or how his reasonable, investment-backed expectations excluded the possibility of a fifteen-month delay. *Sheffield*, 140 S.W.3d at 663.

In 2001 (amended in 2005), the legislature adopted limitations on development moratoria, TEX. LOC. GOV'T CODE ANN. §§ 212.131 *et. seq*. A moratorium does not affect vested rights under TEX. LOC. GOV'T CODE Chapter 245 or common law. TEX. LOC. GOV'T CODE ANN. § 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 moratorium 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;
- Moratorium on residential property automatically expires after 120 days from adoption, unless extended after a public hearing and specified findings;
- Moratorium on commercial property not based on shortage of essential public facilities expire 90 days after their adoption but can be extended after a public hearing and specific findings to a maximum of 180 days;
- A two-year "blackout" period on subsequent commercial moratoria; and

- 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 ANN. §§ 212.131-.137

11. DO CONFLICTS PREVENT PARTICIPATION IN PLATTING DECISIONS?

YES. A specific prohibition of conflicts exists in the State Subdivision Act. If a member of a municipal authority responsible for plat approval has a "substantial interest" in the tract, the member must file an affidavit stating the nature and extent of the interest and thereafter abstain from participation. TEX. LOC. GOV'T CODE §§ 212.017(d) (city) and 232.0048 (county). Substantial interest occurs when: (1) a person has equitable or legal ownership interest of fair market value of $2,500 or more; or (2) is a developer; or (3) owns (i) 10% or more of the interest, stock or shares or (ii) more than $10,000 (city) or $5,000 (county) fair market value of a business entity that meets either of the preceding two tests; or (4) the person receives funds from the business entity in which they own an interest described in 3 above and which income exceeds 10% of the person's gross income for the previous year. TEX. LOC. GOV'T CODE §§ 212.017(b) (city) and 232.0048(b) (county). The conflicted person must disclose the conflict by filing an affidavit and must abstain from participation. TEX. LOC. GOV'T CODE §§ 212.017(d) (city) and 232.0048(d) (county). Violation of these prohibitions is a Class A misdemeanor. TEX. LOC. GOV'T CODE §§ 212.017(b) (city) and 232.0048(e) (county).

Additionally, the general conflict provision applicable to any "local pubic official" has the same effect. TEX. LOC. GOV'T CODE § 171.003. This provision picks up not only the Planning Commission and City Council, but City Staff. Different than the specific provisions, participation in the decision is allowed, after filing the affidavit, unless there is a special economic effect on the interest held, distinguishable from the general public. TEX. LOC. GOV'T CODE § 171.004(a).

12. DOES PLATTING AFFECT DEED RESTRICTIONS?

YES.

A. Enforcement—The platting process is used to enforce restrictions.

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

A replat, without vacating the prior plat, must not "attempt to **amend or remove** any covenants or restrictions" (*emphasis added*). TEX. LOC. GOV'T CODE § 212.014. There is no comparable provision for counties. In some neighborhoods, restrictions affecting lot size, set back, etc., may not have been enforced and, in the opinion of the real estate lawyer, are no longer enforceable due to waiver or change in conditions, but nonetheless remain of record. Sometimes the restrictions are ambiguous as to whether they would prevent the subdivision in question, but the landowner wishes to proceed with the development based on his 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. 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.

Effective 2007, certain large cities (1.9 million or more population, currently only Houston) may amend or remove some covenants or restrictions, by replat, if they are contained only in the preceding plat or replat "without reference in any dedicatory instrument recorded in the real property records separately from the preceding plat or replat." TEX. LOC. GOV'T CODE §212.0146. In effect, this section allows changes to restrictions *on the face of the plat*. The city may adopt rules setting criteria for amending or removing "covenants, restrictions or plat notations", but only those contained in a preceding plat "without reference in" a separate recorded instrument. To amend or remove such covenants, restrictions or plat notations the following requirements apply: (1) owner signature, (2) public hearing, (3) utility company consent to any changes in easements affecting them, and (4) the replat complies with the law and the city's rules. This new provision is, in the author's opinion, simply a resolution to a problem unique to Houston, a city without zoning, which in 2006 changed it longstanding position which permitted replats to change plat setbacks. The author believes that TEX. LOC. GOV'T CODE §212.0145 does not preclude replatting setback lines established by plat, however, it is arguable that only TEX. LOC. GOV'T CODE §212.0146 permits amending or removing covenants, express or implied, derived from a plat. A provision in the adopting act validates the many replats approved before the effective date of the new statute which affected plat derived covenants or restrictions. Tex. H.B. 1067, 80th Leg. R.S. (2007). Also, this new statute clearly provides authority to deny re-plats which *violate* or have the effect of *violating* any separate covenants or restrictions, which is not a term in TEX. LOC. GOV'T CODE § 212.014.

City enforcement should be upheld against an attack that it is an unconstitutional enforcement of private contract and thus not a public purpose, as the city can assert that enforcement of private restrictions has a public benefit of protecting property values and preserving neighborhood character. *Young v. City of Houston*, 756 S.W.2d 813, 814 (Tex. App. – Houston [1st Dist.] 1988, writ denied). Further, Deed restriction enforcement is now statutorily designated as a *governmental* function. TEX. LOC. GOV'T CODE § 212.157.

If a city determines a proposed plat violates deed restrictions, the applicant for the plat may determine it is possible to modify the restrictions, then resubmit the plat, rather than fight with the city.

B. Enforcement—Some Cities are authorized to directly enforce 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 § 211.151, and (ii) either (a) no zoning, or (b) over 1,500,000 population, may enforce deed restrictions affecting the use, setback, lot size or size, type, number and orientation 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 §§ 212.151-212.157. 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).

Deed restriction enforcement is a *governmental* function. TEX. LOC. GOV'T CODE § 212.157. 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). Additional special powers were granted in 2003, to cities enforcing deed restrictions by eliminating as defenses to the enforcement of residential use restrictions the theory of incidental use relating to the following activities: (i) storing a tow truck, crane, moving van or truck, dump truck, cement mixer, earth-moving device or trailer longer than 20 feet, or (ii)

repairing or offering for sale more than 2 motor vehicles in a 12 month period. TEX. LOC. GOV'T CODE § 212.153(d). Cities may not: (i) enforce deed restrictions as to public utilities dealing with easements and rights of way, TEX. LOC. GOV'T CODE § 212.153(e); (ii) enforce deed restrictions if a property owner's association has already filed suit to do so, TEX. LOC. GOV'T CODE § 212.153(c); and (iii) participate in a suit to foreclose a property owner's association lien, TEX. LOC. GOV'T CODE § 212.1535. A city may enact an ordinance requiring that notice of these rights be given to the owners of deed restricted property. TEX. LOC. GOV'T CODE § 212.155.

C. Creation—Plats and Restrictions.

Some city attorneys interpret setback lines on a recorded subdivision plat as deed restrictions, which are enforceable by property owners in the subdivision. *See Maisen v. Maxey*, 233 S.W.2d 309, 312 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.). In *Maisen,* the court upheld the denial of a plat attempting to eliminate a common area amenity (referenced on the plat as "Terraced Park Area") and replace it with residential lots. The court stated "if appellant did not intend to dedicate the area in question as a public park, he should not have impressed the said area upon the map or plat as Terraced Park Area." *Id.* at 313. However, the case focuses on equitable concepts of estoppel and reliance rather than platting law or restrictive covenant law. *McDonald v. Painter,* 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. 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 Court of Grayson County, Texas 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.

The author believes the proper interpretation is that plat setbacks and simple notes are simply a part of the governmentally required platting requirements, and thus, should be able to be changed by a replat. A replat is controlling over the preceding plat. TEX. LOC. GOV'T CODE § 212.014. Therefore, the approval of the replat is all that is required for the elimination of the setback lines in a prior plat. Neighbor consent is not necessary. If plat setbacks and notes are restrictions, they should be interpreted as personal covenants between the developer and the government, not real covenants which run with the land and can be enforced by subsequent owners. Until 2006, the City of Houston permitted plat setbacks, then changed its position, necessitating the passage of TEX. LOC. GOV'T CODE §212.0146. If plat setbacks are covenants or restrictions, any replat changing setback lines, common areas, or simple plat notes would always be rejected, as § 212.014(3) precludes approval of a replat which attempts to "amend or remove any covenants or restrictions." Further, the consent of all owners of property in a subdivision and their lender would be required to modify plat setbacks. This result is arguably an illegal delegation of authority for plat approvals such as was declared unconstitutional in *Minton v. City of Fort Worth Planning Comm'n*, 786 S.W.2d 563, 565 (Tex. Civ. App.—Fort Worth 1990, no writ).

Sometimes plat notes are used to create restrictions that *specifically* state that they are to run with the land and be enforceable by area lot owners or a civic association, or otherwise are clearly intended to confer valuable rights. These restrictions could not be changed by replat, but would require vacation or release of the plat notes by the benefited parties, then replat. TEX. LOC. GOV'T CODE § 212.014. However, if the plat

notes are just notations and do not convey substantive rights, the author does not believe they rise to the level of private restrictions.

If city staff takes the position that plat setbacks or plat notes are covenants or restrictions, a landowner may insist on the plat being considered by the local municipal authority and hope that the municipal authority will overrule the city staff. If the local municipal authority denies the plat, then the landowner might consider the following approaches: (1) vacate the plat under TEX. LOC. GOV'T CODE § 212.013 (requires unanimous consent of owners of all lots in the plat), (2) obtain a declaratory judgment that the setback (or other item on the face of the plat) is not a covenant or restriction, has been waived or is otherwise unenforceable, or (3) modify the setback or other item on the face of the plat as if it were a covenant or restriction. In the later case, the statutory modification procedures of TEX. PROP. CODE Chapter 201 could be considered, as they provide a statutory process for modification of covenants or restrictions which do not otherwise provide for modification.

Not only may plats create restrictions, a recent case held that an area identified on a plat, but not located within the platted boundaries of the subdivision, may be subject to the subdivision's restrictions. *Rakowski v. Committee to Protect Clear Creek Village Homowners' Rights*, 252 S.W.3d 673 (Tex.App.—Houston [14th Dist.] 2008, pet. denied). In *Rakowski*, both the recorded plat and restrictive covenants referenced a "Recreational Area" reserved for the use and enjoyment of those residing in the Clear Creek Village subdivision. *Id.* at 676. However, the "Recreational Area" was outside the "dark line that demarcates the lots of the subdivision." *Id.* at 677. An earlier Texas case held that restrictive covenants did not apply to a tract outside the dark line delineating the subdivision boundaries where the restrictive covenants referred only to the subdivision lots and failed to show any scheme or plan of development imposing the restrictions on property located outside the subdivision boundaries. *Sills v. Excel Servs.*, 617 S.W.2d 280, 283-84 (Tex. Civ. App.—Tyler 1981, no writ). The Court of Appeals distinguished *Sills* because the restrictions in this case demonstrate a scheme or plan of development. *Id.* at 677. The court held that the subject restrictions applied to the "Recreational Area" because the restrictive covenants specifically referenced this area and the recorded plat of the subdivision clearly marked that section as a "Recreation Area", putting any person on notice that it is part of a scheme or plan of development. *Id.* As such, even if the subject area was located outside the platted boundaries of the subdivision, this alone did not preclude the application of the restrictions. *Id.*

These issues will have increasing importance as plats continue to become more complicated, contain more and more detailed plat notes and are utilized as a vehicle to convey information beyond the establishment of lots, blocks and sections and lay out subdivisions for the extension of public infrastructure. *See Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n, Inc.*, 178 S.W.3d 384 (Tex. App.—Fort Worth 2005, pet. denied) (plat states that certain private open space will be owned and maintained by an owners' association as defined in separately recorded restrictions); *Anderson v. McRae*, 495 S.W2d 351, 359 (Tex. App.—Texarkana 1973, no writ) (recreation areas designated on a plat for the exclusive use of subdivision lot owners deemed to became part of the deed by incorporation by reference).

D. Creation—Some Cities require restrictions for plat approval.

Some cities in the Dallas-Fort Worth area now require a developer have a comprehensive set of restrictions in place (and sometimes recorded) as a condition to plat approval. *See* COLLEYVILLE, TEX. REV. ORDINANCES Ch. 10, § 10.6.F (requiring property owner's association with assessments whenever a subdivision has private streets, and the deed restrictions establishing the property owner's association must be recorded **prior** to final plat approval); FLOWER MOUND, TEX. REV. ORDINANCES Ch. 12, § 6.07 (authority to require property owner's associations); PLANO, TEX. REV. ORDINANCES Art. 5, § 13 (authority to requiring a property owner's association and related deed restrictions when common area amenities are contemplated).

All three establish criteria for the deed restrictions and city attorney review; additionally, all three restrict amendment without city approval on issues such as assessments and termination of the property owner's association.

Since there is a rational basis between the public policy behind plat approvals (protection of lot owners, particularly for health, safety, and public welfare purposes) and the establishment of restrictions to govern privately owned infrastructure in new residential neighborhoods (parks, swimming pools, rec. centers, etc.), this requirement is proper. However, if a city were to legislature the contents of the restrictions beyond those issues related to the public policy behind platting approvals generally, then the requirements may become improper. For example, a limitation on the amount of assessments may be challenged, but the requirement for establishment of a property owner's association with assessment power to operate and maintain common areas would be proper. It would also be questionable to require limitations on construction issues more stringent then the cities zoning ordinance standards because (i) these issues are unrelated to the subdivision of property, and (ii) it would be effectuating a rezoning without following the required statutory procedures.

E. Violation—Platting may violate restrictions.

Platting may violate prohibitions in restrictions against subdivision of land or the minimum dimensions of new lots. *See Witte v. Sebastain*, 278 S.W.2d 200, 203 (Tex. Civ. App.—Amarillo 1953, no writ).

F. Amendment—Platting does not amend or invalidate restrictions.

Platting property in violation of restrictions (for example, creating new lots not allowed by the restrictions) does not effectuate an amendment of the restrictions, nor precludes enforcement of the restrictions. *Id*.

13. DOES PLATTING AFFECT ZONING?

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

Often, a plat must satisfy zoning performance standards for approval. *See*, Section 3.B.

Effective in 2003, TEX. LOC. GOV'T CODE § 212.016 provides that for 2 years after a "residential subdivision plat" (not defined) is approved, the construction of single-family houses within the subdivided area is NOT subject to municipal zoning restrictions that affect the following:

- Exterior appearance (including type of building materials).
- Landscaping (including type and amount of plants or landscaping materials).

The 2-year period runs from the later of (i) date of plat approval (most likely to be construed as final plat approval), and (ii) acceptance of the subdivision's improvements (roads and utilities) offered for public dedication. This provision will provide significant benefit to "tract home" builders who are currently regulated by zoning ordinances as to exterior appearance and landscaping. In effect, builders can develop and sell out their residential neighborhoods without being subject to exterior appearance and landscaping zoning regulations affecting all other owners in a city. This is an interesting confluence of platting and zoning.

Possible challenges may include (i) spot zoning equal protection, and (ii) illegal delegation of authority to private land owners to "amend" a zoning ordinance by filing a "residential subdivision plat". What is a "residential subdivision plat" is open to debate. Perhaps the entire plat must be residential single-family only (i.e., no commercial reserves).

14. DOES A COMPREHENSIVE PLAN AFFECT PLATTING?

IT SHOULD NOT, BUT IT MIGHT. A comprehensive plan sets forth a scheme for future land development regulations in a city. It typically has a 20 – 50 year view. Future land use decisions by a city should be consistent with the comprehensive plan. The comprehensive plan itself is not regulatory; instead, it is a planning document. TEX. LOC. GOV'T CODE § 213.005 requires that any land use map in a comprehensive plan specifically state: "A comprehensive plan shall not constitute zoning regulations or establish zoning district boundaries." A city's master plan (apparently a comprehensive plan) "is merely a guide for rezoning requests rather than a mandatory restriction on the City's authority to regulate land use" and thus the fact a plat approved by the city conflicted with a portion of the plan shall not be the basis for a challenge to the plat. *Fernandez v. City of San Antonio*, 158 S.W.3d 532, 534 (Tex. App. – San Antonio 2004, no pet.). However, state law does not provide any connection between comprehensive plans and platting, but does reference a city's "general plan". TEX LOC. GOV'T CODE § 212.010(1) and (2). A "general plan" is not defined. Some cities require a plat to comply with not only the subdivision ordinance, but the zoning ordinance and comprehensive plan. If there are different standards in these 3 documents, how should these conflicts be resolved?

If a subdivision plat application satisfies all requirements of the applicable subdivision platting regulations, it should be approved, even if it is inconsistent with the guidance for future land development decisions as set forth in a comprehensive plan. A city should not require in its subdivision ordinance that subdivision plats comply with the city's comprehensive plan because one is regulatory and one is a generalized planning guide. Instead, the city should modify the subdivision ordinance itself to establish regulatory procedures consistent with the comprehensive plan. Since comprehensive plans are, by their nature, general rather than specific, and subdivision platting is, by its nature, specific rather than general, it is inappropriate to apply comprehensive planning documents in the subdivision platting approval process. Rather, it is appropriate to incorporate requirements of a zoning ordinance, which, unlike a comprehensive plan, is regulatory in nature. If a subdivision ordinance requires compliance with both the zoning ordinance and the comprehensive plan, but the comprehensive plan conflicts or is more restrictive than the zoning ordinance, the comprehensive plan should be ignored and the zoning ordinance followed, or the approving body has, de facto, accomplished a rezoning without following the property procedure. *See Cristofavo v. Burington*, 584 A.2d 1168, 1170-71 (Conn. 1991) (holding that a planning commission's denial of a plat satisfying then current zoning requirements, but not the comprehensive plan, was an impermissible encroachment into the legislative function and exceeded its authority).

The author's position is not accepted by some municipal attorneys, who argue that a city has broad latitude to establish rules for plats (see discussion in Section 3); therefore, a requirement to comply with both a city's zoning ordinance and a comprehensive plan to obtain plat approval should be upheld.

15. MAY "CROSS SUBDIVISION" REPLATS BE APPROVED?

YES. TEX. LOC. GOV'T CODE § 212.014 allows replatting without vacating a preceding plat. Other than § 212.014, once a plat is approved, it can only be changed by vacating the prior plat under § 212.013. Vacating a plat requires consent of all owners of lots in the plat. After a vacating plat is approved and recorded, the vacated plat has no effect. Therefore, the property is unplatted and a new original plat may be

approved. A replat changes all or a portion of a subdivision plat previously recorded. Once approved and recorded, the replat imposes its subdivision scheme over that established in the prior plat, thus eliminating all of the provisions of the prior plat as to the area being replatted. A replat requires approval of only the owners of the property being replatted, as opposed to the entire subdivision (as required for a vacating plat). Some attorneys express concern that "a replat of a subdivision or part of a subdivision" means that a replat may not cross boundaries between two or more separate subdivision plats. However, it is common practice in the Houston area to replat across subdivision plat lines. Consent to vacating an entire plat under § 212.013 is justified since a lot owner purchased that lot in reliance upon the development scheme set forth on the recorded subdivision plat. However, the replatting exception to consent under § 212.014 acknowledges the practical reality that, once platted, large pieces of property could not be appropriately redeveloped since unanimous approval is usually impossible. The replatting exception protects lot owners' expectations by requiring a public hearing, the consent of the property owners whose property is being replatted, and prohibiting any "attempt to amend or remove any covenants or restrictions." For replats of residentially restricted properties, there are additional limitations, including required public notice and a super majority approval requirement if the replat is protested. Since replatting is an exception to the general rule, it can be argued that it should be strictly construed. However, a reasonable interpretation would focus on the authority granted as to each subdivision plat to replat, even if the replat included other subdivisions plats. The replatting exception introduces needed flexibility to the subdivision platting process, subject to the oversight of the Planning Commission after receiving public input. Allowing cross subdivision replats is consistent with the public policy behind the Subdivision Act and an overall reading of that statute to introduce more flexibility into the land development process.

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

IF NOT ACCEPTED, BY REPLAT. Plats contain language offering to dedicate the public easements shown. The act of plat approval does not mean the city is accepting the offered dedication. TEX. LOC. GOV'T CODE § 212.011(a); *Stein v. Killough*, 53 S.W.3d 36, 42 (Tex. App.— San Antonio 2001, no pet.). Texas law is clear that a plat with dedicatory language is simply an offer of dedication. *Miller v. Elliot*, 94 S.W.3d 38, 45 (Tex. App.—Tyler 2002, pet. denied). Acceptance occurs upon either (i) express acceptance, or (ii) use by the public. *Id*. If the plat has not effectuated a dedication, the question of whether a dedication has occurred is a matter of law to be interpreted by the court based on whether there has been a clear and unequivocal intention to dedicate. *Ives v. Karnes*, 452 S.W.2d 737, 741 (Tex. Civ. App.—Corpus Christi 1970, no writ). For example, dotted lines accompanied by the word "road" is not a clear dedication of a road. *Dallas v. Crow*, 326 S.W.2d 192, 196 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.). Delay in acceptance is not rejection of dedication. *McLennan County v. Taylor*, 96 S.W.2d 997, 999 (Tex. Civ. App.—Waco 1936, writ dism'd); *Bowen v. Ingram*, 896 S.W.2d 331 (Tex. App.—Amarillo 1995, no writ). However, the equitable doctrine of estoppel may apply to prevent denial of dedication, particularly where lots were sold by reference to the plat. *Dallas*, 326 S.W.3d at 198; *Ives*, 452 S.W.2d at 741. Acceptance can occur by formal action or by public use. *Stein*, 53 S.W.3d at 42. The failure to assess the land for taxes is an indication of acceptance. *City of Waco v. Fenter*, 132 S.W.2d 636 (Tex. Civ. App.—Waco 1939, writ ref'd.). The offer of dedication remains open until there is action to demonstrate rejection or abandonment by the government; mere passage of time alone is not sufficient. *Taylor*, 96 S.W.2d at 999. When the use to which the land is dedicated is impossible or highly improbable, the dedication may be presumed abandoned. *Viscardi v. Pajestka*, 576 S.W.2d 16 (Tex. 1978). Land outside the ownership of the land owner cannot be dedicated by plat. *Crow*, 326 S.W.2d at 196. The doctrine of partial acceptance will imply dedication of the entirety of a street if a significant portion is improved. *Town of Palm Valley, Texas v. Johnson*, 17 S.W.3d 281, 285 (Tex. App.—Corpus Christi 2000), *aff'd* 87 S.W.3d 110 (Tex. 2001) (affirming the result, but disagreeing with lower court's language regarding injunctions). Sale of lots by reference to a plat reflecting streets to be

dedicated makes the dedication irrevocable, even without acceptance by the government, as to the purchasers of lots. *Taylor*, 96 S.W.2d at 999.

When a street dedication is accepted, it creates an easement in favor of the public and the fee remains in the abutting landowner. *State v. Williams*, 161 Tex. 1, 335 S.W.2d 834, 836 (1960); *Humble Oil & Refinery Co. v. Blankenburg*, 149 Tex. 498, 235 S.W.2d 891, 893 (1951). The adjacent property owner owns fee to the center of the road, subject only to the easement in favor of the public to a right of passage. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22 (Tex. 2003). A commissioner's court may "discontinue, close, abandon, or vacate public roads or highways." TEX. LOC. GOV'T CODE § 81.028.

A replat will replace the prior plat and eliminate the former offered (not accepted) dedications, without the requirement for separate abandonment. The elimination of unconstructed roads and easements is a typical requirement in land assemblages. However, if the former dedications were accepted, whether by writing, construction of the improvements, or use, a separate abandonment action is required. TEX. LOC. GOV'T CODE § 253.001. The installation of any public utilities will be sufficient for many cities to assert acceptance of dedication. Cities may have a detailed procedure to abandon streets or easements. In Houston, the abandonment process typically takes 6-12 months from initial application, with a minimum of 4 months.

Sale of a part of a street is allowed, even over the objection of one adjacent landowner, so long as the street abutting the objecting landowner is not sold. *Jordon v. Landry's Seafood Restaurant, Inc.*, 89 S.W.3d 737, 743 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Restricting access to a street to pedestrians and emergency vehicles is not a street closure. *Id*.

17. MAY ACCESS TO ABUTTING PLATTED STREETS BE DENIED?

NO. ADJACENT LOTS HAVE A RIGHT TO ACCESS A PUBLIC STREET. Anyone purchasing property within or adjacent to a platted subdivision has a private property right in dedicated streets shown on the plat. *Dykes v. City of Houston*, 406 S.W.2d 176, 180 (Tex. 1966). Denial of access to an abutting street is a taking. *Simi Inv. Co., Inc. v. Harris County, Texas*, 236 F.3d 240 (5th Cir. 2000); *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966). In *State v. Delany*, 197 S.W.3d 297 (Tex. 2006) (per curiam) the court held "Texas has long recognized that property abutting a public road has an appurtenant easement of access guaranteeing ingress to and egress from the property....Under the Texas Constitution, a compensable taking has occurred if the State materially and substantially impairs access to such property….In Texas, easements of access do not guarantee access to any specific road absent a specific grant....[Owners] would be entitled to compensation if [the denial of access] substantially and materially impaired access to their property. That is a question of law that we review de novo….[Owners] are entitled only to reasonable access, not the most expansive or expensive access their planners might design." *Also see, County of Bexar v Santikos*, 144 S.W.3d 455, 460-61 (Tex. 2004); *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *DuPuy v. City of Waco*, 396 S.W.2d 103, 109 (Tex. 1965); *City of Houston v. Fox*, 444 S.W.2d 591, 592-93 (Tex. 1969); *Archenhold Auto. Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965).

However that access may be limited so long as the allowed access is reasonable. *City of Waco v. Texland Corp*. 446 S.W.2d 1, 3 (Tex. 1969). In determining whether a taking for limitation of access occurs, all factors which affect access may be considered, including whether the allowed access is unsafe. *State v. Northborough Ctr., Inc*., 987 S.W.2d 187, 193 (Tex. App. –Houston [14th Dist.] 1999, pet. denied). An owner of property not within the platted area, or immediately abutting a street shown on the plat, has no private property right since the right is inferred from the purchase of property based on the recorded plat. In general law cities, an abutting street may not be closed or vacated without consent of the adjoining property owners. *Town of Palm Valley, Texas v. Johnson*, 17 S.W.3d 281, 285 (Tex. App. – Corpus Christi 2000), *aff'd* 87

S.W.3d 110 (Tex. 2001) (affirming but disagreeing with lower court's language regarding injunctions)(applying TEXAS TRANSP. CODE § 311.008). Under some circumstances, a city may be enjoined from closing the street. *Id.* at 111; *Dykes*, 406 S.W.2d at 182. However, only an abutting landowner may request an injunction. TEX. CIV. PRAC. & REM. CODE § 65.015. Denial of access to a non-abutting portion of a specific street, where alternative access is available, is not a material and substantial impairment of the owner's property right, and thus, is probably not irreparable harm. *City of Houston v. Fox*, 444 S.W.2d 591, 592 (Tex. 1969); *City of San Antonio v. Olivares*, 505 S.W.2d 526, 530 (Tex. 1974). *Fox* and *Olivares* back away from the broader language of *Dykes* and interpret the right of a lot purchaser to streets in a platted subdivision to be a generalized access right. In both cases, the court held no damages accrued to the property owner. The opening of a dedicated street is subject to reasonable regulation. *Dykes*, 406 S.W.2d at 181. If a city acts unreasonably in refusing to open the street, it may be subject to mandamus. *Id*. at 182. However, some cities will require a one-foot reserve between platted streets and adjacent unplatted property to eliminate this right. *See* CITY OF HOUSTON CODE OF ORDINANCES § 42.192. Since the dedication stops short of the boundary, the adjacent property owner's property does not "abut" the street. *See Johnson,* 17 S.W.3d at 285 (setting out a definition of "abut"). A city may restrict public street access to pedestrians and emergency vehicles. *Jordon,* 89 S.W.3d at 739. Of course, a government can always exercise its condemnation power to acquire all or any portion of the property rights of an owner.

18. ARE PLATS USED TO COLLECT AD VALOREM TAXES?

YES. TEX. PROP. CODE § 12.002(e) states that a plat or replat may not be filed or recorded in the county clerk's office unless it has attached to it an original tax certificate from each taxing unit showing that no delinquent ad valorem taxes are owed on the property. If filed after September 1 of a year, the plat or replat must also have attached to it a tax receipt indicating that the taxes for the current year have been paid. If the taxes for the current year have not been calculated, a statement from the tax collector from that taxing unit must be attached, indicating that taxes for the current year have not been calculated. Finally, if the tax certificate for the taxing unit does not cover the preceding year, the plat or replat must have attached to it a tax receipt for the preceding year.

19. WHAT ARE THE CONSEQUENCES OF IGNORING PLATTING REQUIREMENTS?

A. City remedies:

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

TEX. LOC. GOV'T CODE §§ 212.003, 212.012, 212.018 and 54.001.

B. County remedies:

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

TEX. LOC. GOV'T CODE § 232.005.

C. Colonias:

Cities and counties have additional remedies relating to colonias. TEX. LOC. GOV'T CODE §§ 212.0175 (city), 232.035, and 212.079.

D. Criminal Penalties:

TEX. PROP. CODE § 12.002 establishes the following misdemeanors subject to a $10.00 - $1,000.00 fine and/or jail for up to 90 days (each violation constitutes a separate offense and also constitutes *prima facia evidence of an attempted fraud*):

- Recording an unapproved plat or replat,
- Using an unrecorded subdivision description in a conveyance, and
- Filing a plat without tax certificates showing all taxes are paid.

20. WHO DO YOU SUE IF PLATTING GOES WRONG?

A. Government Entity Which Reviewed the Plat?

NO. Plat approval is a governmental function. *City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985). Negligent approval of a plat will not expose a city to damages. *Id.* at 302. This rule applies even if the plat provides for diversion of water from its natural course which results in flooding. *Kite v. City of Westworth Village*, 853 S.W.2d 200, 202 (Tex. App. – Fort Worth, 1993 writ denied). In *Smith*, the city was held not responsible for flooding caused by a subdivision where the plat was allegedly approved negligently by the city. Further, the court held that the original developer who signed the plat consented to the taking, and that all subsequent owners took title subject to the plat and that consent. *Id*. at 303. *See City of Keller v. Wilson*, 86 S.W.3d 693, 707 (Tex. App. – Fort Worth 2002.), rev'd on other grounds, 168 S.W.3d 802(Tex. 2005). On remand, a sharply divided court (with 2 strong dissents) held the city immune form all claims under sovereign immunity, despite the fact it was plead only after remand, after the case had been pending 6 years. *City of Keller v. Wilson*, NO. 2-00-183-CV, 2007 LEXIS 4173 (Tex. App.—Fort Worth, June 21, 2007, no pet.). In *Gonzalez v. City Plan Comm'n*, 2006 U.S. Dist. LEXIS 4415 (US Dist. – N.D. Tex. Feb. 3, 2006) (unreported) the court dismissed claims that the city improperly approved a preliminary plat, based on sovereign immunity. The owners claimed the new construction would "overwhelm the infrastructure, reduce property values and damage the surrounding landowners' quality of life." *Id.* at 2. The dismissed causes of action included violations of TEX. LOC. GOV'T CODE § 211.005 and specific local development ordinance provisions, and negligence, none of which contain the required express waiver of immunity. On remand, the landowner's challenges to the replat approval based on procedural and substantive due process, equal protection and takings were rejected. *Gonzales v. City Plan Comm'n*, NO. 3:05-CV-1737-M, 2007 U.S. Dist. Ct. LEXIS 46520 (N.D. Tex. June 26, 2007). In *City of Garden Ridge v. Ray*, NO. 03-06-00197-CV, 2007 LEXIS 1202 (Tex. App.—Austin Feb. 15, 2007, no pet.), sovereign immunity barred a claim asserting damages due to drainage features in a city approved plat. The landowner made the novel argument that the plat approval on adjacent property created a contractual obligation for the city to properly install drainage improvements in the platted drainage easement. The court held that the landowner's request for declaratory and injunctive relief seeking to construe the plat was barred by sovereign immunity.

B. Individual Government Decision-makers?

NO. Planning commissioners and county commissioners have official immunity. *Medina County v. Integrity Group*, 944 S.W.2d 6, 9 (Tex. App. – San Antonio, 1996, no writ) (county), *Ballantyne v. Champions Builders*, 144 S.W.3d 417 (Tex. 2004) (city). *See, Joe v. Two Thirty Nine Joint Venture*, 145

S.W.3d 150 (Tex. 2004) holding that a city council member who was also an attorney received official immunity for claims relating to a former client asserting conflict of interest in the member's vote which negatively affected the client's project.

C. Engineer/Surveyor Who Drew the Plat?

MAYBE. Since the lot buyers were never in direct privity, the engineer/surveyor has no professional duty to them. *Hartman v. Urban*, 946 S.W.2d 546, 550 (Tex. App.—Corpus Christi 1997, no pet.). However, the Texas Deceptive Trade Practices Act may give rise to liability. *Id*. at 551.

D. Seller of the Lot?

YES. A buyer has a number of claims against the seller of an illegally subdivided tract, which may include Texas Deceptive Trade Practices Act, fraud, and negligent/ fraudulent misrepresentation. *See Precision Sheet Metal Mfg. v. Yates,* 794 S.W.2d 545, 546 (Tex. Civ. App.—Dallas 1990, writ denied). The Real Estate Fraud Act may also apply. TEX BUS & COM CODE, Chapter 27.

E. Broker?

YES. A real estate broker and the individual agent (or the sales agent for a home builder) involved in the acquisition of property may be sued for misrepresentation relating to platting. *See Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002), *Lopez v. Martin,* 10 S.W.3d 790 (Tex. App. – Corpus Christi, 2000, pet. denied).