THE REAL ESTATE ATTORNEY'S GUIDE TO PLATTING

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PROFESSIONAL

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

EDUCATION

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

PRACTICE AREAS

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

LAND USE PRESENTATIONS

Zoning: A Real Estate Attorney's Guide, Advanced Real Estate Law Course, State Bar of Texas, July 2002

The Land Subdivision Process (Answers to the Most Asked Questions), NBI Land Use Law Conference, June 2002; Advanced Real Estate Law Course (round table discussion), State Bar of Texas, July 2002

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

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

The Mysteries of Platting, Houston Bar Association Real Estate Section, October 2000; State Bar of Texas Advanced Real Estate Law Course, June 2001; South Texas College of Law Commercial Real Estate Course, October 2001; NBI Land Use Law Conference, June 2002; University of Texas at Austin 7th Annual Conference on Land Use Planning Law, February 2003

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

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

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

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

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

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

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

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

HBA Pro Bono Deed Restriction Project, City of Houston Neighborhood Connections Conference, September 1997

LAND USE RELATED PUBLICATIONS

The "Z" Word - An Introduction to Zoning Law
The Houston Lawyer - Nov/Dec 1990

Houston's Central Business District: How Will Its Future Affect Yours?
The Houston Lawyer - Sept/Oct 1991

Houston Land Use Regulation Without Zoning
Houston Economics [UH Center for Public Policy] - February 1994

AWhere to Put a Pipe@- Common Land Use Law Considerations [oil and gas pipelines]
Landman [American Association of Professional Landmen] - May/June 2000

LAND USE RELATED COMMUNITY AND PROFESSIONAL SERVICE

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

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

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

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

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

Assistant City Attorney, City of Seabrook, Texas, 1979-84(will associated with Burke Martin, outside City Attorney)

LEGISLATION

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

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

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THE REAL ESTATE ATTORNEY'S GUIDE TO PLATTING

Platting property is part of the development process. Although platting is a familiar term, even experienced lawyers, consultants and government officials frequently misunderstand its meaning. The problem lies in the origin of subdivision platting law. Subdivision platting law is based in public law, whereas most lawyers spend their time primarily dealing with contract law. Subdivision platting law affects real estate, but its origins come from governmental law concepts premised on the right of the government to protect the health, safety and public welfare of the public (known as the "police power"). To further confuse the issue, subdivision platting law is significantly different from zoning law, another public law area affecting real estate. 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. The Zoning and Planning Commission appointees 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* give a helpful overview of subdivision platting law, these cases also demonstrate 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). *Elgin Bank v. Travis County* compares the more narrowly drawn county subdivision powers with those of the municipal subdivision powers. 906 S.W.2d 120, 124 (Tex. App. – Austin 1995, writ denied).

Subdivision controls are based on the land registration system. Registration is a *privilege* that local governmental entities have the power to grant or withhold based upon the compliance with reasonable conditions. The regulatory scheme depends on the approval and recordation of the plat. *Lacy v. Hoff*, 633 S.W.2d 605, 607-08 (Tex. App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.). 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. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985).

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. 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. Municipal subdivision power is substantially broader than a county's. *Elgin Bank*, 906 S.W.2d at 123.

Even experienced lawyers, consultants and government officials 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 15 years of land use practice. Furthermore this article covers issues in the Houston Subdivision Ordinance - Houston Code Chapter 42 (locally referenced as "Chapter 42"), which was comprehensibly redrafted in 1999, Dallas Development Code Chapter 51A, as well as 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 as "Kushner"], is a national treatise, published by West Group, that has a good representation of Texas cases. Beginning this fall, UH Law Professor John Mixon's treatise, "Texas Municipal Zoning Law," now updated by James L. Dougherty, will include an Appendix on Texas Subdivision Law by the author.

I. 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.). 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. *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App. -- Corpus Christi 1985 writ ref'd n.r.e.) (stating that a rental mobile home park could be regulated by a city). *Cowboy Country Estates v. Ellis County*, 692 S.W.2d 882, 885 (Tex. App. -- Waco 1985, writ ref'd n.r.e.) (holding that where a developer developed a rental mobile home park without platting the property, the county may enjoin leasing or encumbering the project since the public purpose of subdivision platting regulation would otherwise be stymied). Since *Cowboy Country Estates* was decided, Chapter 232 has been amended to exempt "manufactured home rental communities" from the definition of a subdivision. *See* TEX. LOC. GOV'T CODE § 232.007 (Vernon 1999).

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 v. Travis County*, 909 S.W.2d 120, 121 (Tex. App. – Austin 1995, writ denied) (*citing* BLACK'S LAW DICTIONARY p. 1151 – 6th[t] 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 § 212.007(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 § 212.0075. 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. 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. To challenge a variance denial/approval decision the "abuse of discretion" standard should be applied. So long as any logical basis exists for the variance decision, whether or not evidence was introduced, it should be upheld. However, if the variance provision in its text requires specified factual findings, there shall be some factual basis for these findings in the evidence presented at the variance hearing, including the application and staff report/file. Notice to adjacent owners and area civic clubs and a public hearing is required under most ordinances. In some cities, there is an unwritten practice to consider variances without specific authority in their subdivision platting ordinance. However, without a specific variance right, it is better practice not to consider or grant variances.

t is unclear the effect on a property owner where a city approves a subdivision plat even though it does not comply with applicable requirements. On one hand, the city has broad discretion to determine what requirements to adopt for subdivision plats. TEX. LOC. GOV'T CODE § 212.002. On the other hand, a city is not estopped to later enforce its ordinances by an earlier error by the city. *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 831 (Tex. 1970). The author has not experienced the situation where an improperly approved subdivision plat was attempted to be "revoked" by a city. However, there are many example of cities revoking building permits when the permit was erroneously issued. *(e.g., South Padre Island v. Cantu*, 52 S.W.3d 287, 289 (Tex. App. -- Corpus Christi 2001, no pet.)). An additional concern is that there may be a private cause of action for an adjacent property owner to sue and require either a subdividing property owner to comply with subdivision regulations or to sue a city to require it to enforce its subdivision regulations. *See, Porter v. Southwestern Public Service Co.*, 489 S.W.2d 361, 363 (Tex. Civ. App. -- Amarillo 1973 writ ref'd, n.r.e.).

Extraterritorial Jurisdiction ("ETJ") - The area surrounding a city where the city has exclusive right of annexation and limited right of control, specifically including the right to extend its jurisdiction for approval of subdivision plats. TEX. 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 Investments, Inc.*, 73 S.W.3d 389, 390 (Tex. App. -- Houston [1st Dist.] 2002, no pet. h.). In *Howeth*, the court endorsed the practice of buyers making a purchase contingent on plat approval, with the seller delegating the right to apply for plat approval to the buyer, citing the distinction in TEX. LOC. GOV'T CODE § 212.004(a) ("person" for applications) and 212.008 (Vernon 1999) ("owner" for actual platting). This is consistent with common practice, which is either: (i) the actual owner signs the final approved plat for recording after the earnest money on the purchase contract is non refundable, 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 owners land and the relationship between the land owner and the local government. Effective 2003, development agreements 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 extension for a maximum total term of 45 years.
- Extent 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" agreed by the parties.

TEX. LOC. GOV'T CODE § 212.172(b). The development agreement must be signed by both parties and recorded. TEX. LOC. GOV'T CODE § 212.172(c). The development agreement is no an encumbrance on the land or a obligation of subsequent owners of fully developed and improved lots. TEX. LOC. GOV'T CODE § 212.172(f). A development agreement is a "permit" under TEX. LOC. GOV'T CODE Chapter 245 and thus is a vested right.

A. 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. 2d 583, 586 (Tex. App.-- Fort Worth 2001, no pet.). County plats may also be cancelled under TEX. LOC. GOV'T CODE § 232.008 (which provided 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. Tex. Local. Gov't. Code § 212.015 (Vernon 1999).

Minor Plat - A plat involving 4 or fewer lots fronting on existing street and not requiring a new street or municipal facilities. TEX. LOC. GOV'T CODE § 212.0065 (Vernon 1999). 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 addressing limited modifications affecting a limited number of property owners or lots. The scope of amending plats has steadily expanded. Amending plats are important because they do not require notice to adjacent property owners or a public hearing. TEX. 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) (Vernon 1999). 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 (Vernon 1999). 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 (Vernon 1999). Development plats were authorized in the Subdivision Act at the request of Houston and are unique to Houston. A development plat is required in Houston for new construction or enlargement of existing structures by over 100 sq. ft., except (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 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 an engineer 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.

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. CITY 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 engineering details and format. A government should not deny approval of a final plat if it is consistent in all respects with the approved preliminary plat. *See* HOUSTON, 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, and engineering and infrastructure plans to serve the plat and if any condition has changed between the preliminary plat and the final plat, the plat must be reconsidered as a preliminary plat.

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).

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.

II. 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). The development of land triggers many subdivision regulations (*see discussion of the term "subdivision" above in Section 1)*. Both Houston and Dallas subdivision ordinances broadly define the platting requirement. Dallas is particularly inclusive, specifying the following actions require platting:

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

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

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

1. 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.

2. 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.

3. Local Government Exclusions

State law allows cities or counties to determine what will constitute a subdivision and to what extent, if any, the city will require platting. TEX. LOC. GOV'T CODE §§ 212.0045 (city), 232.0015(a) (county). For example, a city could waive the requirement for plat approval for subdivisions of a particular size with adequate public street access and facilities where no new street or public facilities are required. Therefore, an attorney should obtain a copy of the current subdivision ordinance and related rules and procedures and review them to determine if the proposed subdivision requires plat approval. Because of this authority to not require platting, an owner of property with a subdivision plat that was approved and recorded, notwithstanding deficiencies or failure to meet the applicable subdivision requirements, can argue that the plat should not be void or voidable, since the government had the authority to not require platting in the first place. Therefore, if a deficient plat is approved, a court should not be allowed revocation, at least unless there are equitable facts supporting the revocation.

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.

TEX. LOC. GOV'T CODE § 232.010 provides that the Commissioners Court of a County may allow conveyances by metes and bounds description of 1 or more previously platted lots.

4. 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 (Vernon 2002). Land use law may not impose regulation on condominiums not imposed on other physically identical developments. TEX. PROP. CODE § 82.006 (Vernon 2002). A condominium regime may only be established by recording a declaration in accordance with the Condominium Act. TEX. PROP. CODE § 82.051(a) (Vernon 2002). A county clerk must, without prior approval from any other authority, record a condominium declaration and plat and the book for condominium records must the same as for subdivision plats. TEX. PROP. CODE § 82.051(d). A description of 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(Vernon 2002). "Plats" and plans for a condominium may be recorded graphically describing the condominium and its units. TEX. PROP. CODE § 82.059 (Vernon 2002). The condominium "plat " is not a subdivision plat. TEX. PROP. CODE § 82.003(19) (Vernon 2002). 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 proposed condominium development 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 governments preview. 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, such as Pasadena, require replatting upon conversion to a condominium. National practice appears to be mixed. Kushner, Sec. 5:11. In some areas, particularly Austin and more recently Houston, a condominium regime has been used in lieu of subdividing what appears to be a traditional residential neighborhood or townhouse project.

5. 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) (Vernon 2002).

6. Governmental Subdivision

The acquisition of land by dedication, condemnation or purchase by governmental entity is not subject to platting requirements. *See El Paso County v. City of El Paso*, 357 S.W.2d 783 (Tex. Civ. App. -- El Paso, 1962, no writ); *Palafox v. Boyd*, 400 S.W.2d 946, 949 (Tex. Civ. App. -- El Paso, 1966, no writ). TEX. LOC. GOV'T CODE §§ 232.0015(h) & (i) (Vernon 1999). A military base is not a subdivision. Op. Tex. Att'y Gen. No. C-128 (1963).

7. Ground Lease

It is unclear at what point a long-term ground lease becomes more a subdivision than a lease. 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.

8. 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.

9. County Exceptions

Chapter 232 establishes a list of exceptions to subdivisions in § 232.0015 (Vernon 1999 & Supp. 2003):

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

C. 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. The city must act within 20 days after its receives the request and issue the certificate within 10 days after it makes its determination. TEX. LOC. GOV'T CODE § 212.0115(c). These certificates are useful in due diligence for acquisition, development and lending. Although common law holds that a city is not estopped from denying representations it makes regarding land use conditions, the clear statutory authority of § 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 Company v. City of Houston*, 69 S.W.3d 350, 353 (Tex. App. – Texarkana 2002, pet ref'd) (applying estoppel against a city is appropriate in "exceptional circumstances where justice requires it"). *But see 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) (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).

III. 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). 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 each of the "preliminary" plat and "final" plat
- In some cities (like Houston), evidence of the approval of the final plat by the planning commission/city council is sufficient for the city to issue a building permit
- After final plat approval, a mylar version of the approval subdivision plat is signed by the surveyor, the owner, any lender (to consent and subordinate its lien), the chairman of the planning commission and/or mayor (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 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 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, but not satisfy the foregoing requirements for recordation.

The "substantive 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 located the survey with reference to the original survey.)

A city's authority in adopting these rules is quite broad, limited only to the promotion of "health, safety, morals or general welfare of the municipality and the state's orderly and helpful development of the municipality". (TEX. LOC. GOV'T CODE § 212.004). Many subdivision ordinances have lengthy sections defining engineering details. Some cities have separately adopted design manuals. The substantive area of plat design is an engineering function to be undertaken by knowledgeable, experienced engineers and surveyors.

It is common to see a platting ordinance require compliance with the city's zoning ordinance. This is a reasonable requirement, as both ordinances are regulatory in nature. It would be illogical to approve a plat which provides for subdivision of property which could not be developed under the same city's zoning ordinance. However, the author believes that some cities' requirement for a plat to satisfy the city's comprehensive plan is improper, since that is not a regulatory document, but rather a planning guideline. (See discussion in Section 15.)

It is critical that the current subdivision ordinance and duly adopted rules and regulations be utilized in preparation of a plat. Preferably, the engineer or surveyor selected to prepare a plat has experience not only in preparation of subdivision plats generally, but in the area in question, particularly if there are unusual circumstances. The preparer must carefully review all local rules and regulations. *See* Houston Code §§ 42-100 and Dallas Code §§ 51A-8.500.

County authority to regulate subdivision is less broad than a city. *Elgin Bank v. Travis County*, 906 S.W.2d 120, 122 (Tex. App. – Austin 1995, writ denied). *Compare* TEX. LOC. GOV'T CODE § 212.002 (cities) to TEX. LOC. GOV'T CODE § 232.003 (counties). Counties look to road standards only (except in "urban " counties). *Elgin Bank*, 906 S.W.2d at 123. However, in 2001, "urban" counties were given the same broad regulatory authority as cities. TEX. LOC. GOV'T CODE §232.101.

Urban counties include:

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

Specific authority is granted for:

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

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

C. Development Plats

Development plats are a type of plat, but the most basic. They are, essentially, a site plan review. They are no longer used 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 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 on 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 where 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

Changes to TEX. LOC. GOV'T CODE Chapter 242 in 2001 mandate that cities and counties (other than Houston area counties and border counties, which are exempt) simplify the plat approval scheme by selecting one of the following alternatives by April 1, 2002:

- 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 recent changes to TEX. LOC. GOV'T CODE Chapter 242 mandates **binding** arbitration if no agreement is timely entered. TEX. LOC. GOV'T CODE Chapter 242.001(f). The deadline for cities with 3.5 mile or greater ETJ is January 1, 2004 and for other cities is January 1, 2006. TEX. LOC. GOV'T CODE Chapter 242.0015. The arbitrator must issue an interim decision and set of subdivision rules within 60 days if the arbitator (or panel) is not able to issue a final decision within that time period. TEX. LOC. GOV'T CODE Chapter 242.001(f).

As to counties and cities not subject to the requirements of TEX. LOC. GOV'T CODE Chapter 242.001(b-h) (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 Chapter 242.001(g).

IV. MUST A PLAT MEETING ESTABLISHED REQUIREMENTS BE APPROVED?

YES. The discretion of a governmental authority approving a subdivision plat is limited, as the approval process is ministerial in nature. Local governments are not granted wide latitude. *City of Round Rock v. Smith*, 686 S.W.2d 300, 302 (Tex. 1985) (city); *Projects American Corp. v. Hilliard*, 711 S.W.2d 386, 387 (Tex. App. -- Tyler, 1986, no writ) (county); *City of Stafford v. Gullo*, 886 S.W.2d 524, 527 (Tex. App. -- Houston [14th Dist.] 1994, no writ) (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 they should be upheld upon challenge so long as there is a rational relationship between the rule and a legitimate governmental purpose relating to the subdivision of land. Governments may not add additional requirements or increase the limitations of their existing requirements as justification for denial of a plat. *City of Stafford v. Gullo*, 886 S.W.2d 524, 525 (Tex. App. – Houston [1st Dist.] 1994, no writ). The foregoing tenets should also apply to "urban" counties' exercising their broad discretion under TEX. LOC. GOV'T CODE § 232.101.

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 prove a plat if:
>
> 1. It **conforms to the general plan** of the municipality and its current and future streets, alleys, parks, playgrounds and public utility facilities;
> 2. It **conforms to the general plan** for the extension of the municipality and its roads, streets, and public highways within the

municipality and in its extraterritorial jurisdiction, taking into account access to an extension of sewer and water mains and the instrumentalities of public utilities;

3. ... [applicable to Colonias only]; and
4. It **conforms to any rules adopted under § 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...."

V. 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.

VI. MUST A PLAT APPLICATION BE PROMPTLY CONSIDERED?

GENERALLY. 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 take the position that only the "final" plat is contemplated for this 30 day requirement, arguing that only the "final" plat meets the requirements of TEX. 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). Land use attorneys representing land owners disagree and consider the rule applicable to any plat submission. There is no case law on the subject. Most cities apply the 30-day requirement to <u>both</u> preliminary and final plats. This means a plat may not be "tabled" by a planning commission if the result is to delay decision beyond the 30-day limit.

When a subdivision plat application is "filed" is usually addressed in the city subdivision ordinance by stating that until the application is "complete", it is not considered filed for 30 day consideration purposes. 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 and engineers involved in a potentially controversial plat should exercise best efforts to "paper the file" with evidence of the date that the plat application is considered "complete."

A city should always make a determination on either a preliminary and final plat within 30 days from the date when the application could be considered complete. This is the practice in Houston. Therefore, plat applications cannot be "tabled", "held" or "deferred" for later consideration if the 30-day time period will be exceeded. Instead, the application should be denied or the applicant should be told that unless they withdraw their application (perhaps subject to 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.

In 2001, the legislature <u>exempted</u> amending and minor plats, the approval of which has been delegated to staff for review and approval, from the 30 day limits. TEX. LOC. GOV'T CODE § 212.006(c).

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*, 521 S.W.2d 322, 324 (Tex. Civ. App. -- Houston [1st Dist.] 1975 writ ref'd n.r.e.), the court refused to apply the 30 day deemed approval provision to a requested mandamus when the city showed that the plat did not meet its subdivision regulations, despite the fact of no action within the 30 day period.

Effective in 1999, Counties have a 60-day limit for final action on a plat, with additional requirements relating to response to applications, determination of when a submission is complete, extension of the deadline (generally requires applicant approval) and penalties. TEX. 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. Since they are not specifically limited, these provisions should apply to all types of plats, including preliminary, final, replat and development. Until the 2001 change in TEX. LOC. GOV'T CODE § 212.006(c), amending and minor plats were subject to the 30-day deemed approved limits. However, many plats, including those approved and recorded, fail to satisfy one or more of the requirements under TEX. LOC. GOV'T CODE § 212.004(b)(2) or other applicable requirements imposed by the local government. Since plats are highly technical in nature, a technical violation can often be found. Such violation is then asserted as a bar against the application of the deemed approval provisions. *See, Myers,* 521 S.W.2d at 324. One argument is that a non-complying plat may not be given deemed approval, since it should not be given approval if formally considered by the approving entities. Another argument is that any deemed approval may be undone since governments are not estopped to apply their rules and regulations even when an improper approval is granted. Particularly, many surveyors fail to locate the subdivision with respect to the corner of the survey or tract or an original corner of the original survey of which it is a part. However, this failure was excused in *Bjornson v. McElroy*, 316 S.W.2d 764, 765 (Tex. Civ. App. – San Antonio 1958, no writ) where the plat was shown to be sufficiently detailed to enable the property to be located. Further, the common practice is for plats submitted for approval to not be signed by the owner until time for recordation. These omissions may be asserted by the governmental authority to defeat the "deemed approved" provisions.

A court would give effect to the deemed approval of any plat (whether preliminary, final, replat or development, but excluding amending and minor plats), in the form the plat is presented to the approving authority. The plat, as it was submitted (including with any technical or recording defects) would be approved if the applicable period has passed. The technical or recording requirements could be either (i) deemed substantially satisfied, if appropriate (the "substantial compliance" test applies to these standards. *Bjornson, Id.*), or (ii) satisfied by post approval action by the applicant, including the addition of additional surveying details (such as location of the corner of the original survey of which the subdivision is a part, additional surveying details typical to a final plat, surveyor's certification, etc.), the addition of additional engineering details (in order to meet all technical requirements of the applicable regulations), and to meet the additional recording requirements (acknowledged signatures and acknowledgements of various parties, proper format, etc.) the foregoing being similar to the changes made between preliminary plat and final plat. This analysis is consistent with the bifurcation of most platting ordinances between the preliminary plat (where the primary attention is given by the approving body) and the final plat (where approval is "automatic" if the government staff is satisfied that all surveying, engineering and recording requirements have been met and the final plat is consistent with the approved preliminary plat).

An alternative analysis would focus on the *approval* process, separately from the *recording* process. A subdivision plat approval process contains some elements of discretion (i.e., the interpretation of the applicable platting requirements and application to the plat submitted), while the recording process is ministerial in the most literal sense. This analysis would allow the public policy behind the recording requirements: public notice and formality of the recording systems to be satisfied. At the same time, the intent of the deemed approval provisions would also be given effect.

A third analysis focuses on the government's authority to establish the rules for platting and the right to exempt certain subdivisions. A "deemed approved" plat with technical deficiencies can be considered like a plat, which is exempted from the platting process. Alternatively, the deficiencies can be deemed waived since the governing body was not required to include them any way. Finally, the governing body can be deemed to have granted variances to all the deficiencies. This last point has particular strength when the subdivision ordinance specifically provides variances.

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. An overall reading of TEX. LOC. GOV'T CODE Chapters 212 and 232 show the ministerial character of the review and approval process. The legislature has clearly intended to limit local government authority in the award of subdivision plats. The government has the ability to avoid the draconian nature of these remedies by careful handling of the subdivision platting approval process, both by requiring complete and accurate submittals and by timely reviewing them. Plat applicants also have the ability to insure their compliance with the applicable rules, but common practice in the subdivision platting area is for the professionals handling subdivision plat approvals to follow local custom as dictated by government staff (which may or may not literally follow the requirement of the government's own promulgated regulations). A court must balance the conflicting provisions of subdivision platting law to give effect to the Texas Legislature's intent to require discipline and timelines through the deemed approval provisions.

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

YES, WITH LIMITATIONS. Subdivision regulation is based on legitimate government interest in promoting orderly development, insuring safe neighborhoods, insuring adequate police and fire protection is possible and insuring adequate drainage. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985). The basis of subdivision controls is the land registration system. Registration is a privilege that local governmental entities have the power to grant or withhold based upon the compliance with conditions. The entire regulatory scheme depends on the approval and recordation of the plat. *Lacy v. Hoff*, 633 S.W.2d 605, 607-08 (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 "extractions". The imposition of those dedications to provide for infrastructure improvement as a condition precedent to plat approval is not a taking. *Crownhill Homes, Inc. v. City of San Antonio,* 433 S.W.2d 448, 460 (Tex. Civ. App. -- Corpus Christ 1968, writ ref'd. n.r.e.). However, a city may require dedications only if properly authorized by constitutional, statutory or charter authority. *City of Stafford v. Gullo*, 886 S.W.2d 524, 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 extractions:

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

Less typical extractions:

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

Counties may require 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, although Dallas requires notice to the Director of Parks and Recreation if the plat incorporates land shown on the Long Range Physical Plan for Park and Recreational Facilities as potential parkland, so to allow an opportunity for the City to negotiate acquisition. DALLAS, TX. CODE § 51A-8.508(a).

Not only the dedication of right of way and easements, but the requirement for a developer to construct streets and install infrastructure improvements as a condition to plat approval, as well as the requirement for bonds to insure construction of those improvements has been upheld. *Crownhill Homes, Inc.*, 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). In *Kolb*, the City acknowledged it had no power over the location of a **state** highway (the proposed Grand Parkway). *Id* at 953. Further, testimony showed that the intent was to reduce future right of way acquisition expenses for the Grand Parkway, which is not an appropriate reason for governmental regulation. *Id*. This decision would have been different if it addressed a city street. *Kolb* was analyzed as a condemnation case rather than a subdivision exaction case.

HOUSTON, 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. CITY 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 commissions 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 dedication relate to the proposed development and are roughly proportional to the needs created, and benefit the new development. This language addresses the requirements of the US Supreme Court in *Dollan v. City of Tigard*, discussed in Section 8 below.

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

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

Impact Fees - TEX. LOC. GOV'T CODE Chapter 395 requires a detailed procedure as a prerequisite to assess "impact fees" (sometimes previously known as capital recovery fees) from developers. Impact fees are charges to developer to defray the cost of off-site public infrastructure designed to service new growth. The impact fee statute is designed to specifically authorize these charges, but to protect developers by establishing a fair, mandatory formula for determining how a particular tract should equitably share in the cost of infrastructure which benefits that development.

Federal Case Law - The US Supreme Court has established a number of rules which limit government exactions:

Exactions must substantially further a legitimate state interest and there must be a nexus between the exaction and the public need to be addressed. *Nollan v. California Coastal Corp.*, 483 U.S. 776, 778 (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. *Dollan 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 increase bike traffic, therefore the exaction was a taking requiring compensation.

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

One project may not bear all the burden of a general community benefit. *City of Austin v. Teague*, 570 S.W.2d 389, 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 area due to its scenic character for the generalized benefit of the public and to prevent any development. Teague was held to have the right to recover damages since this benefit was for the general public.

Extractions 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). There must be a reasonable connection between the impact of the development and the goals being addressed by the required exaction. The developer is not required to solve pre existing deficiencies or provide for future, off site development needs.

Regulation may not interfere with "reasonable investment backed expectations" established when property was purchased, such that the regulation eliminates all economic viable use. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 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 regulation were upheld.

Town of Flower Mound, Texas v. Stafford Estates Limited Partnership, 71 S.W. 3d 18 (Tex. App.--Ft. Worth 2002, pet. granted) is a significant city platting opinion applying *Dolan* to off site extractions, which is best summarized by the Court's own introduction:

> "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 offsite 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. 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:

- The developer is not required to challenge the reasonableness of conditions to plat approvals before obtaining final plat approval. The court specifically rejects Minnesota and California cases supporting this bar on a developer challenge.

- *See generally Dolan v. City of Tigard*, 512 U.S. 374 (1994) applies to offsite extractions, not just a requirement to dedicate real property. Thus, an exaction that requires payment of fees or making of public improvements is subject to a *Dolan* analysis. The court rejected cases cited by the city where *Dolan* was not applied to various takings claims, such as denial-of-development situations, impact fees and other land use regulations not involving exactions.

- The *Dolan* analysis applies when a city makes an ad hoc "adjudicative" decision, but is not applicable to a uniformly applied "legislative" action. Here the court was convinced that the exaction was adjudicative since there was a variance procedure to allow the exaction requirement to be waived in certain circumstances and, in fact, the exaction had been waived for other developers on a project-by-project consideration. It appears that without the variance procedure, the *Dolan* analysis would not have applied to this case, because the same rules would apply to all developers.

- *Dolan* applies to a state-taking claim. The court outlined its holding as follows:

  > "The United States Constitution sets the floor for constitutional protections; state constitutions establish the ceiling. . . . State constitutions cannot subtract from the rights guaranteed by the federal constitution, although they can provide additional rights for their citizens. . . . The Supreme Court has held that the *Dolan* test 'best encapsulates what we hold to be the requirement of the Fifth Amendment.' . . . Thus, at a minimum, article I, section 17 of the Texas Constitution affords Texas citizens the right to have adjudicative development exactions scrutinized under the *Dolan* standard. To the

> extent that the 'reasonable connection' test adopted by the Texas Supreme Court in *City of College Station v. Turtle Rock Corp.* . . . requires a less rigorous review of development exactions, it has been superseded by the *Dolan* test." (citations omitted).

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."

The court explains the proper *Dolan* analysis:

> "[A]n adjudicative development exaction effects a taking when it *either* fails to substantially advance a legitimate government interest (*Nollan*), or when it is not roughly proportional to the public consequences created by the proposed development (*Dolan*)." The *Dolan* test requires a two point analysis: (1) the reviewing court first determines whether an essential nexus exists between a legitimate state interest and the condition exacted by the government; (2) if an essential nexus exists, the court must decide the required degree of connection between the exaction and the projected impact of the proposed land use. No precise mathematical calculation is required, but the government must make some sort of individualized determination that the exaction is roughly proportional in both nature and extent to the proposed impact of the proposed land use submitted for governmental approval.

In this case, the court held that the offsite roadwork satisfies the essential nexus test, but not the rough proportionality test. The city has the burden to prove both are met.

> "[T]he Town has not met its burden of demonstrating that the additional traffic generated by the Subdivision bears a sufficient relationship to the requirement that Stafford demolish a nearly new two-lane asphalt road that was not in disrepair and replace it with a two-lane concrete road. . . . But the Town has not explained why demolishing the asphalt road and replacing it with a cement road, as opposed to improving the asphalt road, was required because of the Subdivision's impact."

- Although the burden of proof is on the government to prove the legitimacy of the exactions, the landowner has the burden to prove its damages. In an exaction case, the court looks to eminent domain cases for guidance in determination of damages.

- In an improper exaction case, the landowner will recover damages equal to the cost expended for the improper exaction, less the portion of the exaction which could have been 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. If the city had proven up a benefit to the project from the existence of the new street, there would have been a further offset.

- The landowner could not recover attorney's fees and expenses under § 1988 of the United States Code. The court held that since the landowner recovered under its takings claim, it had no §1983 claim, and therefore, no § 1988 claim. The court considered the takings claim was not "ripe" for adjudication due to the state law recovery. Perhaps there would have been a different result if only a federal law takings claim was plead (usually a landowner pleads takings claims under both the Texas and U.S. Constitutions).

Lessons to be learned from *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*:

1. Cities may eliminate variance provisions affecting subdivision exactions in order to avoid the *Dolan* test. The court held that a uniformly applied, legislative exaction is not subject to *Dolan*. The variance procedure introduced a fact based, case by case analysis to the city's assessment of the exaction.

2. Using an U.S.C. §§1983, 1988 claim in order to recover attorney's fees will not be successful if a state takings claim is successful. Landowners' attorneys may drop state takings claims and rely solely on federal takings claims so to have a claim for attorneys' fees.

3. Cities will be more careful in exactions and must carefully apply the *Dolan* test to both onsite and offsite exactions. Specifically, the requirement to construct offsite public improvements is acceptable only when an individualized determination has been made as to the impact of the new development and the landowner is assessed its proportional share. This is a tougher standard than *City of College Station v. Turtle Rock Corp.*

4. In the damages stage of an exaction case, cities will be careful to introduce evidence showing an economic benefit to the project in question from the required

exaction, so that the city can obtain an additional offset against the damages to be awarded.

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

NO. A landowner has "vested rights" in the rules and regulations application to a plat upon first application. 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**"

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.

X. MAY A CITY HALT DEVELOPMENT TO CONSIDER CHANGES TO ITS SUBDIVISION REGULATIONS?

YES, BUT THE MORATORIUM MUST BE LIMITED IN LENGTH. A city may institute a moratorium on plat applications by city council action in order to prevent the "race to the application window" while it is considering changes to its subdivision ordinance. A moratorium of 6 months has been held clearly defensible. *Mont Belvieu Square, Ltd. v. City of Mont Belvieu* , 27 F. Supp.2d 935, 937 (S.D.Tex. 1998). *Mont Belvieu* held a 6 month moratorium for consideration of a zoning ordinance valid as a matter of law.

In 2001, the legislature adopted limitations on development moratoria. TEX. LOC. GOV'T CODE § 212.131. The limits apply only to moratoria imposed on property development (new construction on vacant land) affecting only residential property (zoned "or otherwise authorized" for single family or multi-family use). TEX. LOC. GOV'T CODE §§ 212.131-212.132. A moratorium does not affect vested rights under TEX. LOC. GOV'T CODE Chapter 245 (Vernon 1999) or common law. TEX. LOC. GOV'T CODE § 212.138. The limits include the following:

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

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

XI. MAY A PLANNING COMMISSIONER OR CITY COUNCIL MEMBER BE CONFLICTED OUT OF AN ISSUE?

YES, UNDER LIMITED CIRCUMSTANCES. If a member of a municipal authority responsible for plat approval has a "substantial interest" in the tract, the member must file an affidavit stating the nature and extent of the interest and thereafter abstain from participation. TEX. 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). Violation of these prohibitions is a Class A misdemeanor. TEX. LOC. GOV'T CODE §§ 212.017(b) (city) and 232.0048(e) (county).

XII. DOES PLATTING AFFECT DEED RESTRICTIONS?

YES.

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

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

A residential replat must not "attempt to **amend or remove** any covenants or restrictions" (*emphasis added*). TEX. LOC. GOV'T CODE § 212.014. There is no comparable provision for counties. In some residential neighborhoods, restrictions affecting lot size, set back, etc., may not have been enforced and, in the opinion of the real estate lawyer, are no longer enforceable due to waiver or change in conditions, but nonetheless remain of record. Sometimes the restrictions are ambiguous as to whether they would prevent the subdivision in question, but the 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. A recent residential replat application in the City of Houston was denied when the neighborhood modified its deed restrictions between the date of initial application and final consideration to prohibit the pending subdivision. The City of Houston rejected the argument that the application of the modified restrictions violated the applicant's vested rights in the regulations applicable at the time of application.

B. Enforcement - Some Cities are authorized to directly enforce residential restrictions.

In 2001, the legislature moved former TEX. LOC. GOV'T CODE Chapter 230 to the Subdivision Act as § 212.131 (thus conflicting with the numbering of the new Moratorium provisions).

A city with (i) an ordinance requiring uniform application and enforcement of § 211.131, and (ii) either (a) no zoning, or (b) over 1,500,000 population, may enforce deed restrictions affecting the use, setback, lot size or type, number of structures, and effective 2003, commercial activities, keeping of animals, use of fire, nuisance activities, vehicle storage, parking, architectural regulations, fences, landscaping, garbage dispose and noise levels by suit to enjoin or abate a violation and/or seeking a civil penalty. TEX. LOC. GOV'T CODE §§ 212.131-212.137.

The legislature added in 2001 a provision stipulating that deed restriction enforcement is a *governmental* function. TEX. LOC. GOV'T CODE § 212.137. This addition is significant, since cities performing a governmental function are not typically subject to equitable defenses such as laches, waiver and estoppel. Those are the most typical defenses asserted in a deed restriction case by the defendant. 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 § 212.135(d). Cities may not enforce deed restrictions as to public utilities dealing with easements and rights of way. TEX. LOC. GOV'T CODE § 212.135(e).

With the granting of the governmental function veil of protection, an otherwise unzoned city which fully enforces the authority granted in § 212.131 has, effectively, zoned itself into 2 zones: (i) the residential zone, where residential use is required, as well as a full component of performance standards, including architectural control, and (ii) the other zone, with no such regulation. With the governmental function mantle, enforcement of residential deed restrictions will become more automatic, as the majority of deed restriction case law supporting defendants becomes irrelevant. With the significant broadening of the ambit of municipal enforcement of deed restrictions by the 2003 legislature, that enforcement becomes, effectively, the same as judicial enforcement of zoning. Municipal attorneys enforcing residential deed restrictions may begin to analogize to zoning case law for precedent relating to enforcement rights.

A city may not enforce deed restrictions if a property owner's associations has already filed suit to do so. TEX. LOC. GOV'T CODE § 212.133. A city may not participate in a suit to foreclose a property ower's association lien. TEX. LOC. GOV'T CODE § 212.1335.

A city may enact an ordinance requiring that notice of these rights be given to the owners of deedrestricted property. TEX. LOC. GOV'T CODE § 212.135; *see* CITY OF HOUSTON CODE OF ORDINANCES § 10.551. In order to help city staff discover the existence of deed restrictions, the submission for a commercial building permit requires a certified copy of any deed restriction affecting the subject property. This same obligation applies to any subdivider of property, whether commercial or otherwise, and to any person who proposes to perform substantial repair, or remodel a commercial building located within a subdivision or to convert a single-family residence into a commercial building.

C. Creation- Plats might create restrictions.

Some city attorneys interpret setback lines on a recorded subdivision plat as deed restrictions, which are enforceable by property owners in the subdivision. *See, Maisen v. Maxey*, 233 S.W.2d 309, 312 (Tex. Civ. App. -- Austin 1950, writ ref'd n.r.e.). In *Maisen*, the court upheld the denial of a plat attempting to eliminate a common area amenity (referenced on the plat as "Terraced Park Area") and replace it with residential lots. The court stated "if appellant did not intend to dedicate the area in question as a public park, he should not have impressed the said area

upon the map or plat as Terraced Park Area." *Id.* at 313. However, the case focuses on equitable concepts of estoppel and reliance rather than platting law or restrictive covenant law. *McDonald v. Painter*, 441 S.W.2d 179, 183 (Tex. 1969) allowed a residential replat creating more, smaller lots and denied the argument that the platting of the lots to a smaller size violated deed restrictions against duplexes. The restrictions required residential use, but did not establish minimum lot size or preclude more than one house per lot. The court stated, "the restrictions do not mention resubdivision, or expressly require one house per platted lot..." and "...covenants cannot be implied from the mere making and filing of the map showing the different subdivisions or by selling lots in conformity therewith." *Id.*

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.

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

The author believes the proper interpretation is that plat setbacks and 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 interpreted as personal covenants between the developer and the government, not real covenants which run with the land and can be enforced by subsequent owners. The City of Houston follows this interpretation and allows setback lines to be modified without approval of other property owners. Without such interpretation, a residential replat changing setback lines, common areas or the elimination of use related plat notes would always be rejected, as § 212.014(3) precludes approval of a replat which attempts to "amend or remove any covenants or restrictions." Further, the consent of all owners of property in a subdivision and their lender would be required to modify plat setbacks. This consequence would result in an illegal delegation of authority for plat approvals such as was declared unconstitutional in *Minton v . City of Fort Worth Planning Comm's*, 786 S.W.2d 563, 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. These restrictions could not be changed by replat. TEX. LOC. GOV'T CODE § 212.014.

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, city attorney review and 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, both because these issues are unrelated to the subdivision of property, but because 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. *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.*

XIII. DOES PLATTING AFFECT ZONING?

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

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

Effective in 2003, 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 subdivisions 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 a interesting confluence of platting and zoning. Possible challenges may include spot zoning equal protection, and 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).

XIV. 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 often 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.

XV. WHAT IS THE EFFECT OF A COMPREHENSIVE PLAN ON PLAT APPROVAL?

NONE. The 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."

If a subdivision plat application satisfies all requirements of the applicable subdivision platting regulations, it must 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 many 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.

XVI. MAY OWNERS OF LOTS SUE THE ENGINEER WHO CREATE THE PLAT FOR NEGLIGENCE?

NO, THE ENGINEER HAS NO DUTY TO THE ULTIMATE BUYERS, ONLY TO THE DEVELOPER. Since the lot buyers were never in direct privity, the engineer has no professional duty to them. *Hartman v. Urban*, 946 S.W.2d 546, 550 (Tex. App. -- Corpus Christi 1997, no writ). However, there *may* be liability under the TEXAS DECEPTIVE TRADE PRACTICES ACT, if the plat was filed after 1973. *Id. at* 551.

XVII. IS LENDER CONSENT NECESSARY FOR PLATTING?

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

XVIII. 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). 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.* Perhaps the plat has not effectuated a dedication and 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). For example, dotted lines accompanied by the work "road" is not a clear dedication of a road. *Dallas v Crow*, 326 S.W.2d 192, 196 (Tex. Civ. App. – Dallas 1959). Delay in acceptance is not rejection of dedication. *McLennan County v. Taylor*, 96 S.W.2d 997, 999 (Tex. Civ. App. –Waco 1936), *Bowen v. Ingram*, 896 S.W.2d 331 (Tex. App. – Amarillo 1995). However, the equitable doctrine of estoppel may apply to prevent denial of dedication, particularly where lots were sold by reference to the plat. *Id. At 198, Ives, supra.* Acceptance can occur by formal action or by public use. *Stein, supra 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). 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 can't be dedicated by plat. *Crow, supra 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 200) aff'd 87 S.W.3d 110 (Tex. 2001) (affirming the result, but disagreeing with lower court's language regarding injunctions).

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 easement is a typical requirement in land assemblages. However, if the former dedications where 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, and will take a minimum of 4 months. The process involves the following steps:

- Application to the Real Estate Branch of the Public Works Dept.
- City Staff investigation regarding current use and potential future public use
- Approval by the Joint Referral Committee
- City Council Motion approving the abandonment and appointing 2 independent appraisers
- Detailed survey (to exacting city standards) of the abandonment parcels
- Appraisal of the fair market value of the abandonment parcels, as if they were fee simple tracts
- Required waiver letters from public utility providers
- Offer of abandonment fee- 100% of fair market value if a street, 50% if an easement. If the abandonment parcel is to be burdened with a new public easement, a 50% credit is granted. If the abandonment is related to a significant redevelopment project with will increase property tax collections, a 50% *redevelopment credit* may be requested.
- Payment of abandonment fee
- Approval of abandonment ordinance by City Council
- Recording of certified copy of abandonment ordinance to evidence the abandonment. Title companies will rely upon the "strips and gores" doctrine to grant title to the abandonment parcels to the adjacent property owners. The City of Houston will not sign a deed of any type, even a quitclaim deed.

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

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[st] Dist.] 2002, pet. denied). Restricting access to a street to pedestrians and emergency vehicles is not a street closure. *Id*.

XIX. MAY A DEVELOPER STOP A CITY FROM ANNEXING ADJACENT PROPERTY (RESULTING IN APPLICATION OF THE CITY'S SUBDIVISION REGULATIONS ON THE DEVELOPER)?

NO. WHERE THE DEVELOPER'S PROPERTY WAS NOT ANNEXED AND THE COMPLAINT IS THE INCLUSION IN THE CITY'S ETJ, THE DEVELOPER HAS NO STANDING TO CHALLENGE THE ANNEXATION. Generally, annexation is only challenged by *quo warranto* proceedings brought by public officials**,** and the only exceptions allow owners of annexed property to challenge. *Sunchase Capital Group v. City of Crandall*, 69 S.W.3d 594, 595 (Tex. App. -- Tyler 2001, pet. filed).

XX. MAY A CITY DENY LOTS ACCESS TO ABUTTING PLATTED STREETS?

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. *Town of Palm Valley, Texas v. Johnson*, 17 S.W.3d 281, 285 (Tex. App. – Corpus Christi 200) aff'd 87 S.W.3d 110 (Tex. 2001) (affirming but disagreeing with lower court's language regarding injunctions); *Dykes v. City of Houston*, 406 S.W.2d 176, 180 (Tex. 1966), *Jordon, id*. In general law cities, an abutting street may not be closed or vacated without consent of the adjoining property owners. Johnson, 17 S.W.3d at 285, applying Texas Trans. Code Section 311.008. Under some circumstances, a city may be enjoined from closing the street. *Johnson*, 87 S.W. 3d at 111, *Dykes, id* at 182. However, only an abutting landowner may request an injunction. Tex. Civ. Prac. & Rem. Code Section 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 subdivsion 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 for definition of "abut". A city may restrict public street

access to pedestrians and emergency vehicles. *Jordon*, 89 S.W.3d at 739.

XXI. WHAT HAPPENS IF PLATTING REQUIREMENTS ARE IGNORED?

City remedies:

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

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

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.

Colonias:

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

Criminal Penalties:

Effective September 1, 1999, under TEX. PROP. CODE § 12.002, the following actions are 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.

TEX. PROP. CODE § 12.002(f).

The Criminal District Attorney of Rockwall County, Texas sent a letter dated May 20, 2002 to all title companies in Rockwall County indicating his intent to enforce the criminal penalties in the county subdivision statute and TEX. PROP. CODE § 12.002. In his letter, he indicated that title companies participating in the sale of unplatted properties may be subject to prosecution. As a result of this position, at least one title insurance underwriter has promulgated internal procedures to place a notice in its title commitments for unplatted properties and to either have a specific approval of the plat (or an exception to platting requirements) or place a specific exclusion in any title policy issued on unplatted subdivisions. Paul McNutt, Jr., Title Resources Guaranty Company, Dallas, Texas, *Illegal Subdivisions: Not Just a Platting Issue*, Texas Land Title Institute (December 2002).

Other penalties and remedies:

- *See* HOUSTON, TX. CODE §§ 42-4, 5, 6 and 7 and DALLAS, TX. CODE § 51A-1.103 for local enforcement provisions.
- Refusing to issue a building permit on unplatted property was upheld in *Head v. City of Shoreacres.* 401 S.W.2d 703, 706 (Tex. Civ. App. -- Waco 1966 writ ref'd n.r.e.).
- A buyer has a number of claims against the seller of an illegally subdivided tract, which may include Texas Deceptive Trade Practices Act, fraud, and negligent/ fraudulent misrepresentation. *See Precision Sheet Metal Mfg. v. Yates*, 794 S.W.2d 545, 546 (Tex. Civ. App. -- Dallas 1990, writ denied). In *Precision Sheet Metal*, the court applied the discovery rule to allow the statute of limitations to run from the date of the buyer's discovery of the platting violation, rather than the date of transfer. *Id*. at 550.

XXII. IS A GOVERNMENT LIABLE FOR A PLATTING DECISION?

NO. Plat approval is a governmental function. *City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985). Negligent approval of a plat will not expose a city to damages. *Id*. at 302. In *Smith*, the city was held not responsible for flooding caused by a subdivision where the plat was allegedly approved negligently by the city.