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Habitat in the Plat

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HABITAT IN THE PLAT

A. AUTHORITY

Dr. Seuss Says….[1]

The City has police powers, you see,
But the City shall not try and deny
If you dot all your "I's"
And cross all your "T's".

Municipalities and counties derive their authority to review and approve plats under Chapters 212 and 232 of the Texas Local Government Code. Although there are specific rules for areas near the border or for areas that are in the Economically Distressed Areas Program (EDAP), this presentation will not cover those areas.

> **Sec. 212.002. RULES. After a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivisions 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.**

1. Imagine that, what is a plat?

A plat is 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 of Texas v. Travis County, Tex.*, 906 S.W.2d 120, 122 (Tex. App.—Austin 1995, writ denied), *citing* BLACK'S LAW DICTIONARY 1151 (6th ed. 1990).

A plat is required when the owner of a tract of land wants to divide the tract in two or more parts to lay out a subdivision of the tract, lots, streets, alleys, squares, parks, etc. TEX. LOC. GOV'T CODE § 212.004. A subdivision of property may be the act of partition itself, even if an actual transfer of ownership does not occur. *City of Lucas v. North Texas Mun. Water Dist.*, 724 S.W.2d 811, 818 (Tex. App.—Dallas 1987, writ ref'd n.r.e.),

[1] Jennifer DeCurtis should be especially thanked for her contributions in preparing this paper.

citing City of Weslaco v. Carpenter, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

2. "I don't like your shirt," doesn't work.

Plats or replats required by the local government, which satisfy all the regulations, **must** be approved. TEX. LOC. GOV'T CODE § 212.005. Once applicable rules are satisfied, the approval process is ministerial in nature, and there is not wide latitude. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985); *Integrity Group v. Medina County Com'rs Court*, No. 04-03-00413-CV, 2004 WL 2346620 at *1 (Tex. App.—San Antonio October 20, 2004, pet. denied)(unpublished)(where even though the commissioner's court is an agent of the Texas Commission on Environmental Quality, it still could not reject a plat for failing to comply with one-acre lot requirements for subdivisions over the Edwards Aquifer Recharge Zone when it was not a proper basis for denial under Chapter 232 of the Texas Local Government Code), *citing Projects American Corp. v. Hilliard*, 711 S.W.2d 386, 389 (Tex. App.—Tyler 1986, no writ)(where the authority of commissioner's court to approve plats was not discretionary when it rejected the plat based on neighbors' disapproval). Governments may not make additional 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)(where a plat condition was thrown out when it required dedication not authorized by ordinance). However, if the plat is lacking what "the statutes and laws demand," that is a proper basis for denial. *Howeth Invs. Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 895 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Any other rules for plat applicants that are desired must be adopted by ordinance under the authority of TEX. LOC. GOV'T CODE § 212.002. Further, upon request by the owner, the local government must certify the reasons for denial. TEX. LOC. GOV'T CODE § 212.009(e) and 232.0025(e). Since the statute only mentions certifying the reasons for denial on "on the application," some city ordinances only make the certification opinion applicable to final plats. This compares to no action certificates such as those in *Howeth Invs. Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 896 (Tex. App.—Houston [1st Dist.] 2008, pet. filed)(where the court determined that the preliminary plat failed to meet the statutory recordation requirements of a final plat and therefore it was not considered completed for the purposes of the 30 day deadline).

3. What about my ETJ, you say?

A City may regulate platting within its extraterritorial jurisdiction under TEX. LOC. GOV'T CODE §§ 212.003 and 212.004(a), and TEX. PROP. CODE § 42. But the County authority and the City's ETJ may not regulate the following:

- Use of any building or property;
- Bulk, height or number of buildings constructed on a lot;
- Size of a building, including the ration of floor space;
- Number or density of residential units built per acre; and
- Size, type, or method of construction of a water or wastewater facility if located in a county with a population of 2.8 million or more.

TEX. LOC. GOV'T CODE § 212.003(a)(1)-(5) and § 232.101(b)(1)-(4).

In the county and outside the corporate limits of a municipality, the following additional preclusions apply pursuant to TEX. LOC. GOV'T CODE §232.101(b)(5) & (6):

- Platting or subdivision in an adjoining county; and
- Road access to a plat or subdivision in an adjoining county.

Any expansion or reduction in the ETJ that includes an area after a plat application is filed for that area does not spur vested rights. A developer must still comply with the city's regulations once the ETJ expands. *Shumaker Enterprises, Inc. v. City of Austin*, 325 S.W.3d 812, 815 (Tex. App.—Austin 2010, no pet.)(Where the rule where the application freezes the applicable law did not apply because city had no prior regulations in place).

a. If in two cities' ETJ, pick the biggest right away.....unless they agree!

If a tract is in the extraterritorial jurisdiction of more than one municipality, the responsible authority is the municipality with the largest population. However, that municipality may enter into an agreement delegating the responsibility to the other municipality. TEX. LOC. GOV'T CODE § 212.007. Although the first in time rule for extra territorial jurisdiction still exists in determining disputes between neighboring cities over areas that are the subject of incorporation or annexation, a statutory scheme establishing ETJ of cities may determine jurisdiction instead of priority in time alone. *Village of Creedmoor v. Frost Nat. Bank*, 808 S.W.2d 617, 618 (Tex. App.—Austin 1991, writ denied).

b. If a city's ETJ and county mix, look to agreements to get the fix

Cities and most counties have simplified their plat approval scheme by choosing whether there is exclusive city authority, exclusive county authority, geographic apportionment, or an interlocal agreement showing a joint process with singular fees. TEX. LOC. GOV'T CODE § 242.001. If a certified agreement between a county and a municipality is not in effect, the parties must arbitrate disputed issues and cannot refuse the arbitration. TEX. LOC. GOV'T CODE § 242.0015(a).

B. TYPES OF PLATTING

Dr. Seuss Says….

Platting is not zoning.
It is not zoning, in fact!
It needs no hearing
'Til you vacate or replat.

Platting does not derive from the same authority as zoning but the two do often require compliance with each other, e.g. a plat often is required by local ordinance to satisfy zoning requirements. However, zoning restrictions affecting the exterior appearance and landscaping of a single-family residential lot do not apply to a subdivision for two years after the initial plat is approved. TEX. LOC. GOV'T CODE § 211.016 (b)(1).

Not only is zoning different from platting, but platting is also differentiated from a city's Comprehensive Plan. A plat conflicting with a city's comprehensive plan shall not be the basis for a challenge to a plat approved by the city. *Fernandez v. City of San Antonio*, 158 S.W.3d 532, 534 (Tex. App.—San Antonio 2004, no pet.)(where neighborhood association and land owners brought suit against the city for approval of a replat, the court found that the city's neighborhood plan did not remain in effect indefinitely as to prevent the city from replatting the property to allow development within neighborhood).

Some of the different types of plats and hearing requirements are as follows:

AMENDING PLAT: An amending plat is used to make minor changes, such as corrections of clerical errors, the setting of new monuments, relocation of lot lines to preclude encroachment, etc. A plat of record may be amended **without public notice, a public hearing, or approval of other lot owners** and is controlling over the preceding plat without vacation for one or more of the purposes in TEX. LOC. GOV'T CODE § 212.016. Approval can be delegated to city staff. TEX. LOC. GOV'T CODE § 212.0065(a)(1).

DEVELOPMENT PLAT: A municipality may elect after notice and a hearing to require a development plat which shows a site plan where no subdivision is occurring to be filed before a new development may begin on a property. TEX. LOC. GOV'T CODE § 212.041. It must be prepared by a registered professional land surveyor showing each existing or proposed structure, each easement and right of way within or abutting the property, and the dimensions of each street, etc. If a developer is otherwise required to file a subdivision plat under § 212.001, a development plat does not apply.

FINAL PLAT: The final plat is a plat that satisfies local and statutory regulations, i.e. deemed "completed" by city staff and approved by the appropriate authority, and is the plat that is recorded. If it is consistent with the preliminary plat, the city should not deny it. Generally, many cities consider a change in substance from the preliminary plat to the

final plat a condition that would require considering the plat as preliminary all over again, *e.g.*, *See* Dallas City Code Sec. 51A-8.403(4)(c). This stems from the character of the "project" being changed as contemplated under TEX. LOC. GOV'T CODE SEC. 245.001. *See also, City of San Antonio v. En Seguido, Ltd.*, 227 S.W.3d 237, 242 (Tex. App.—San Antonio 2007, no pet.)(Where the court stated, "neither a purchaser nor an owner may alter a project without the possibility of a consequence. If a project is altered…, the development regulations are no longer locked in under chapter 245 and current development regulations [platting rules] apply").

MINOR PLAT: A minor plat is permitted for four (4) or fewer lots that have not been previously platted and recorded. The lots must have direct access to an existing public road. A minor plat **does not require a public hearing** and can be administratively approved by city staff. TEX. LOC. GOV'T CODE § 212.0065.

PLAT NOTE: A plat note is a notation on the face of a plat which may restrict or affect future land use. By statute, the City may enact an ordinance that requires or allows modification or elimination of restrictions or covenants by replat, unless it refers to a restriction that runs with the land in a "dedicatory instrument." TEX. LOC. GOV'T CODE § 212.0146(c).

PRELIMINARY PLAT: A preliminary plat is an initial plat prepared by a land surveyor or professional engineer on behalf of an owner and submitted for approval. The preliminary plat is not a creature of statute, but the local government may require it. A preliminary plat does not have to meet the requirements for recordation in most cities.

REPLAT: A new plat of all or a portion of a previously approved plat that is controlling over the preceding plat without vacation of that plat if the plat meets the requirements of TEX. LOC. GOV'T CODE § 212.014. A **public hearing is required** if additional single family or two family zone lots are created or if the location or width of interior streets and pedestrian circulation routes are significantly altered. Otherwise, they may be administratively approved. If a public hearing is required, the city must make publication in an official newspaper in the county in which the city is located and serve written notice with a copy of the statute to the owners of lots that are in the original subdivision and that are within 200 feet of the lots to be replatted. TEX. LOC. GOV'T CODE § 212.015(b)(2).

VACATED PLAT: A vacated plat is a replat that is used to eliminate the subdivision of property reflected by a prior plat. TEX. LOC. GOV'T CODE § 212.013. Plats may not be vacated without **consent of all property owners in the plat and requires a public hearing**. The vacated plat has the effect of returning the property to raw acreage. TEX. LOC. GOV'T CODE § 212.013(d). In a county authority, a cancellation plat would be filed instead of a vacated plat. TEX. LOC. GOV'T CODE § 232.008.

VARIANCE: A variance is a government approved divergence from a platting regulation. There must be a super majority (3/4) of members present of the municipal planning commission or governing body, or both, to approve protested variances for residential replats. TEX. LOC. GOV'T CODE § 212.015(c).

C. EXCEPTIONS

Dr. Seuss Says….

Let us plat, you say
We shall plat all day.
We can plat our land,
But not our hay.

AIRCRAFT RUNWAY EXCEPTION: A division of land located within a city of less than 5,000 in population into parts larger than 2.5 acres, and abutting any part of an aircraft runway is excepted. TEX. LOC. GOV'T CODE § 212.0046.

CONDOMINIUM REGIME EXCEPTION: The creation of a condominium regime is not a subdivision and is excepted, but usually platted under a condominium plat under the TEX. PROP. CODE § 82.059. However, the county may have the authority to decide what constitutes a subdivision that requires platting. TEX. LOC. GOV'T CODE § 232.001. *See* Tex. Atty. Gen. Op. GA-0223, 2004 WL 1718870 (Tex. A.G. July 30, 2004)(where condos may be regulated by the county if the county chooses and they are not foreclosed by Chapter 82 of the Texas Property Code).

COUNTY EXCEPTIONS: TEX. LOC. GOV'T CODE § 232.0015 outlines several exceptions from the platting requirements, such as: agricultural use or timber production (c)(2); interfamily transfers up to the third degree of consanguinity for a maximum of 4 parts (e), tracts that are more than 10 acres (f), veterans' land board sales (g), if the owner is the state (h), public entity owned land (i), seller retaining a portion of a tract from sale to developer who will plat (j), and partitions of undivided interest (k).

FIVE ACRE EXCEPTION: A division of land into parts greater than five (5+) acres, where each part has access to a road and no public improvement is being dedicated is excepted from platting, TEX. LOC. GOV'T CODE § 212.004(a), unless it is a golf course. TEX. LOC. GOV'T CODE § 212.0155(c).

LOCAL OPTION EXCEPTION: Cities and counties may further except what will require platting. TEX. LOC. GOV'T CODE §§ 212.0045, 232.0015(a). They may instead require a development plat.

MANUFACTURED HOME EXCEPTION: For counties, a manufactured home rental community with residential leases for less than 60 months is not a subdivision and excepted. TEX. LOC. GOV'T CODE § 232.007 (b). However, there are additional powers with which to regulate these properties under TEX. LOC. GOV'T CODE § 232.007.

D. PROCEDURE AND SUBSTANCE

Dr. Seuss Says….

Procedure comes from local rule,
But when you record, don't be a fool.

There is no statutory regulation for how a local government chooses to process plats, other than it must be done timely. Most ordinances require the submission of a "complete" application with payment of fee to begin the process. Several steps may be required, but generally, there is a preliminary plat prepared by a certified engineer or surveyor, which is reviewed for approval by the local authority and with notice to adjacent property owners if it is a replat. A final plat is then submitted with all necessary approvals for review and approval by the local authority before filing in the county deed records.

1. The substantive requirements for a plat to be recorded in the county deed records are determined by statute:

   a. Metes and bounds description;
   b. Location of 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;
   c. Dimensions of the subdivision, of each street, alley, square, park, etc. intended to be dedicated to public use or common areas;
   d. Acknowledgement by the owner or proprietor or their representatives; and
   e. Recordation in compliance with Tex. Prop. Code § 12.002 (tax certificates).

TEX. LOC. GOV'T CODE § 212.004 (b)(1)-(3), (c)-(e).

2. Approve it quick, you'll be famous! For if you don't, then it's mandamus!

Plats must be acted upon by a city within 30 days or by a county within 60 days after the plat is filed. TEX. LOC. GOV'T CODE §§ 212.009 (a) and 232.0025. There is no statutory difference in a preliminary versus a final plat, but most cities apply the timeframe to both. In *Howeth Invs. Inc. v. City of Hedwig Village*, the court determined that a preliminary plat that was not in the form required for filing with the county clerk made the developer ineligible for a mandamus action seeking relief when the city planning commission failed to provide a no action certificate within 30 days. 259 S.W.3d 877, 896 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)(where the court determined that the plat failed to meet the requirements of Sections 212.004(b) and (c) of the Local Government Code).

A plat cannot be tabled or deferred beyond the 30 or 60 day limit, but the owner may withdraw the application to be ruled on at a later time to avoid denial if he/she so chooses. Until the application is "complete," it is not considered filed for the purposes of

the 30-day limitation. *Howeth Invs. Inc. v. City of Hedwig Village*, 259 S.W.3d at 901. Further, city staff designated under Section 212.0065 to review amending and minor plats must refer any plats they refuse to approve to the city platting authority within the 30 days provided by Section 212.009. TEX. LOC. GOV'T CODE § 212.0065.

Plats that are not acted upon within 30 days are deemed approved. TEX. LOC. GOV'T CODE § 212.009 (b). The city must issue a certificate upon request showing that it failed to act within the time frame under TEX. LOC. GOV'T CODE § 212.009 (C). However, the court in *Woodson Lumber Co. v. City of College Station* determined that a developer who failed to make a request to the city waived its complaints under Section 212.009. 752 S.W.2d 744, 748 (Tex. App.—Houston 1988, no writ). If the city fails to issue a certificate of no action upon a proper request, however, the developer may file a writ of mandamus to enforce the deemed approval. TEX. LOC. GOV'T CODE § 232.096 (g); *See, City of Hedwig Village Planning and Zoning Com'n v. Howeth Investments, Inc*., 73 S.W.3d 389, 390 (Tex. App.—Houston [1st Dist.] 2002, no pet.)(the court affirmed denial of a city's plea to the jurisdiction when it failed to issue a properly requested no action certificate after no action on a plat application for 30 days).

Cities sometimes enter into "letter agreements" with developers so that they will agree to waive or extend the 30 day requirements under Section 212.009. The statute does not preclude or address this activity. Even though there is no case concerning a letter agreement waiver, it is akin to waiver by consent. In *Town of Flower Mound v. Rembert Enterprises, Inc.*, the court discussed that consent will cause a plaintiff to lose or waive its ability to seek redress. No. 02–10–00408–CV, 2011 WL 6141584 at *10 (Tex. App.—Fort Worth December 8, 2011, no pet.)(the court did not find a waiver of the city's immunity where a landowner "consented" to property being taken when it failed to object to exactions in a plat approval), *citing Rischon Dev. Corp. v. City of Keller*, 242 S.W.3d 161, 168-69 (Tex. App.—Fort Worth 2007, pet. denied)(where the court affirmed a take nothing judgment against the developer where the developer "consented" to conditions imposed by the city by signing the development agreement without objection).

E. EXACTIONS

Dr. Seuss Says….

So the City will approve it
After payment of fees.
With certain conditions,
We shall plant some trees.

1. Without further action, what exactly is an exaction?

Exactions are any requirements, like the dedication or construction of certain items, as a condition of receiving municipal approval on a plat. *Dolan v. City of Tigard*, 512 U.S.

374, 375 (1994). Types of exactions include street lighting and signage, trees, sidewalks, drainage easements and facilities, street and alley rights of way, park dedications, etc.

Platting ordinances may require dedication and construction of streets, alleys, and utilities as part of orderly development and may be enforced through the platting approval process. *Sefzik v. City of McKinney*, 198 S.W.3d 884, 898 (Tex. App.—Dallas 2006, no pet.), *citing 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.). However, a city may require these types of dedications as a condition of plat approval only if the dedications are within constitutional or statutory authority. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004)(where the town required the developer to install a concrete street over newly laid asphalt, which did not increase the traffic capacity, the court found a taking).

Stafford relied on a two-prong test handed down in the *Dolan* case, and the Texas Supreme Court determined that exactions must meet the following to be constitutional:

a. The condition bears an essential nexus to the substantial advancement of some legitimate government interest; and
b. The condition is roughly proportional to the projected impact of the proposed development.

Town of Flower Mound v. Stafford Estates Limited Partnership, 135 S.W.3d at 634.

2. With the conditions you make, do not use platting to take!
(Rough Proportionality)

A city may be subject to a takings claim if it unreasonably withholds a plat approval because the developer did not comply with conditions that were unconstitutional. *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 803 (Tex. 1984)(where there must be a reasonable connection between the impact of the development and the goals being addressed by the required exaction; the court found that a payment in lieu of dedication was not a taking, so long as it was earmarked for parks to benefit the area in question and the burden of proof was on the developer); *See also, City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978)(where the Court held that one project should not bear the whole burden for a benefit to the community and therefore a taking was found).

The U.S. Supreme Court addressed the constitutionality of exactions in regards to building permits in two different cases. First, in the *Nollan* case, the Supreme Court determined that exactions must substantially further a legitimate state interest, and there must be a nexus between the exaction and the public need to be addressed. *Nollan v. California Coastal Corp*., 483 U.S. 825 (1987)(forcing an easement over private beach property to allow public access to the ocean). Secondly, in the *Dolan* case, the Supreme Court determined that the city has the burden to show the exaction is justified, which the Court had failed to find in *Nollan*, by making an individualized determination that the nature and extent of the exaction is roughly proportional to the anticipated impact of the

project. *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994)(when the city conditioned a building permit on an easement for future storm drainage when there was no link between expansion and flooding, it was a taking). In *Dolan*, the Court found that there was a nexus between the city's demand for a greenway and flood control from the impact of a parking lot construction. However, the Court further found that the city must make some sort of individual determination that the required dedication is related both in nature and extent to the impact of the proposed development, which is the "rough proportionality" test. The City of Tigard failed this portion of the test because in removing Dolan's right to exclude, the City could not explain why a public greenway would be required over a private one in order to control flood. Again, the City has the burden to prove there is an individual analysis and it can show the proper nexus.

The Texas Supreme Court in Stafford examined and adopted the arguments in *Nollan* and *Dolan* to determine its decision in *Town of Flower Mound v. Stafford Estates Limited Partnership,* 135 S.W.3d at 645 (where even though damages were recovered for taking under state law, no attorneys' fees and expenses were recoverable under § 1988 since the § 1983 claim was virtually eliminated). In response to this holding, the legislature enacted Section 212.904 of the Texas Local Government Code which provides that if the city conditions include a portion of the infrastructure costs, then the portion may not exceed the amount required for infrastructure improvements that are roughly proportional to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality. TEX. LOC. GOV'T CODE § 212.904(a). Otherwise, a developer may sue within 30 days, after an administrative appeal is decided by the governing body, to recover attorney fees statutorily under § 212.904(e) if he/she prevails. Further, a city may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project under § 212.904(d). Lastly, impact fees under Texas Local Government Code 395 are not diminished or modified based on this statute. The 212.904 rule necessarily requires that rough proportionality determinations are made prior to imposing exactions since the city's exactions may not exceed the proportional determination.

Other areas where taking may be potentially found in the regulation of plats is when a condition interferes with "reasonable investment backed expectations" established when property was purchased, such that the regulation eliminates all economic viable use. In *City of North Richland Hills v. Home Town Urban Partners, Ltd.*, the court affirmed a denial of the city's plea to the jurisdiction where the developer showed evidence that the city deprived it of its reasonable investment backed expectations when the city refused to allow the development of a recreation center that was approved in the plat. 340 S.W.3d 900, 916 (Tex. App.—Fort Worth 2011, no pet.). Additionally, requiring a landowner to dedicate property for use as a right-of-way for a *state* highway as a condition of plat approval constitutes a taking which requires just compensation since the city lacked authority to impact the path of the proposed state parkway. *City of Houston v. Kolb*, 982 S.W.2d 949, 951 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

3. The take has took, where do I look?

A property owner may challenge the reasonableness of a condition to the plat after obtaining final plat approval according to *Stafford*. However, a property owner must object at every opportunity or the complaint is waived by consent. In *Stafford*, the owner repeatedly objected to the contested exactions throughout the process and only acceded under protest. This case also made a finding that rough proportionality may be challenged after obtaining a final plat and providing the exactions. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d at 628; s*ee also Rischon Dev. Corp. v. City of Keller*, 242 S.W.3d at 167, (where city council required Rischon to provide fencing along a public right of way adjacent to the property that was reflected on the plat and submitted for final approval and in a developer's agreement without objection, the court found Rischon had waived his complaint for a taking).

A property owner must exhaust administrative remedies prior to suit. *See, City of Carrollton v. HEB Parkway South, Ltd.*, 317 S.W.3d 787, 798 (Tex. App.—Fort Worth 2010)(where takings claims deemed not ripe because a variance to the plat condition was not officially sought and denied). If a property owner fails to exhaust administrative remedies, then the city may claim ripeness issues. *Id.*

F. VESTED RIGHTS

Dr. Seuss Says….

Up on the top you are seeing great sights,
But down at the bottom
We, too, should have rights.

1. My shoe is off, my foot is cold. I have a PLAT I like to hold….

Texas Local Government Code 245.002(a) states:

> **Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed for review for any purpose, including review for administrative completeness; or a plan for development of real property or plat application is filed with the regulatory agency.**

This section is also known as the "freeze law" because the ordinances in place at the time of the plat application govern for the remainder of the project. An owner has "vested rights" in the rules and regulations to a plat upon first application for a "project." TEX. LOCAL GOV'T CODE § 245.002. A developer may rush to submit for plat approval prior to the date that a revised rule and regulation are legally applicable, which may potentially

negatively impact the developer. *City of Austin v. Garza*, 124 S.W.3d 867, 873-4 (Tex. App.—Austin 2003, no pet.)(Where the court determined the filing of an application to preserve rights under certain regulations was constitutional). Preliminary plats are also the basis for vested rights. *Hartsell v. Town of Talty*, 130 S.W.3d 325, 328 (Tex. App.—Dallas 2004, pet. denied).

The Texas Local Government Code waives governmental immunity as to vested rights. TEX. LOCAL GOV'T CODE § 245.006. Vesting accrues on filing the original application that gives the agency fair notice of the project and the nature of the permit sought. TEX. LOCAL GOV'T CODE §245.002. *See Harper Park Two, LP v. City of Austin*, 2011 WL 3658923 at *3 (Tex. App.—Austin 2011, pet. filed)(unpublished)(where the court determined that the "… 'Project' was a single endeavor reflected in the original application for first permit in a series, rather than individual components of larger, original project that could subsequently require a separate permit, and thus, owner, under vested-rights protections, was entitled to develop six-acre lot as hotel, office, or any other commercial use consistent with rules, regulations, and ordinances in effect at time of initial permit application, along with zoning and restrictive covenants that were previously voluntarily imposed on property; "project" was "commercial" development, as defined under then-applicable ordinances, and was not limited to office building or other specific type of "commercial" development."). A city may expire a plat if it is not complete within 45 days after filing and after notice and a cure period, thereby waiving vested rights. § 245.0002(e).

2. No vested rights occur on the filing of a plat when changes in law concern certain zoning issues.

Changes in zoning classification regarding SOBs, annexation, utility connections, life and safety conditions, among others, are exempt from the vesting rules provided in platting. Section 245.004(2)-(11), unless the changes affect landscaping or tree preservation, open space or park dedication, zoning, lot size, building size, or restrictive covenants, etc. *Id*. This statute occurred after the Texas Supreme Court decided *Sheffield Development Company, Inc. v. City of Glenn Hill Heights*, 140 S.W.3d 660 (Tex. 2004), where the Court found that down zoning does not waive immunity in respect to vested rights.

3. What's a city to do when it needs change?

The City should consider a moratorium on taking applications for plats while changes are being considered. A moratorium does not affect vested rights, but requires several limitations outlined in TEX. LOCAL GOV'T CODE § 212.139. At least one court has held a six-month moratorium is valid as a matter of law, *Mont Belivieu Square Ltd. V. City of Mont Belivieu*, 27 F. Supp. 2d 935, 937 (S.D. Tex. 1998), and the limitations by statute allow up to 120 days on residential property unless extended after a public hearing and specific findings. TEX. LOC. GOV'T CODE § 212.139.

G. ADDITIONAL USES

Dr. Seuss Says….

You may not want to ask this, but
Plats may work for restrictions & taxes!

1. A plat notation may be used to create or amend restrictions in certain circumstances.

A replat, without vacating the prior plat, must not "attempt to amend or remove any covenants or restrictions." TEX. LOCAL GOV'T CODE § 212.014. If the City has 1.9 million or more in population, then an applicant can remove restrictions on the face of the plat from a preceding plat as long as the restriction is not in a separate instrument. TEX. LOCAL GOV'T CODE § 212.0146. Deed restrictions are a governmental function by statute. TEX. LOCAL GOV'T CODE § 212.157. Therefore, the enforcement of private restrictions by the city is constitutional. *Young v. City of Houston*, 756 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied). However, cities may not enforce deed restrictions as to public utilities dealing with easements and rights of way, if a H.O.A. has already filed suit to do so, and may not participate in a suit to foreclose a H.O.A. lien. TEX. LOCAL GOV'T CODE § 212.153.

Plat notes may be used to create restrictions that specifically state that they are to run with the land and be enforceable by area lot owners, but they cannot be changed by replat and would require a vacation or release of plat notes by the benefited parties. TEX. LOCAL GOV'T CODE § 212.014.

A plat may state that certain private open space will be owned and maintained by an H.O.A. *Raman Chandler Props., L.C. v. Caldwell's Creek Homeowner's Ass'n, Inc.*, 178 S.W.3d 384 (Tex. App.—Fort Worth 2005, pet. denied). In fact several cities require developers to have restrictions that run with the land as a condition of plat approval, e.g. requiring subdivisions with private streets to have an HOA with assessments. There has to be a rational basis between the purpose of the plat and the establishment of the restrictions.

2. Platting may be used to assist in collecting ad valorem taxes.

The Texas Property Code states that a plat or replat may not be filed or recorded in the county clerk's office unless it has attached to it an original tax certificate from each taxing unit showing that no delinquent ad valorem taxes are owed on the property. TEXAS PROP. CODE § 12.002 (e). If the tax certificate is not attached, then there is no recordation and no proper plat. If there is no proper plat, then penalties may be assessed of not less than $10 or more than $1,000. In addition, failure to follow this provision may result in confinement in county jail for a term not to exceed 90 days.

H. REMEDIES

Dr. Seuss Says….

Ignore your plat today,
And tomorrow you will pay!

1. Failure to abide by platting requirements carries penalties.

The city is entitled to injunctive relief in district court to enjoin a violation of ordinances applicable in its ETJ. TEX. LOC. GOV'T CODE § 212.003(c). However, a fine or criminal penalty associated with plats does not apply to a violation in the ETJ. TEX. LOC. GOV'T CODE § 212.003(b). Still, a city may get injunctive relief and damages from the owner of the tract in an amount adequate for the city to construct or bring about compliance under 212.018(a), as well as civil penalties of up to $1,000 per day and injunctive relief under Chapter 54 of the Texas Local Government Code, which allows enforcement for ordinances that establish "criteria for land subdivision or construction of buildings, including provisions related to street width and design, lot size, building width or elevation, setback requirements, or utility service specification or requirements." Section 54.012(4). The city may also refuse utility service under Texas Local Government Code § 212.012(a) unless a certification of plat approval is obtained. Further, the County may also receive injunctive relief and recover damages as well as pursue the action as a Class B misdemeanor. TEX. LOCAL GOV'T CODE § 232.005 (a)-(c).

Criminal penalties may also be assessed for recording unapproved plats or replats, using an unrecorded subdivision description in a conveyance, and filing a plat without tax certificates under Section 12.002 of the Texas Property Code. In addition, a violation of this statute constitutes prima facie evidence of an attempt to defraud according to Section 12.002(f).

2. Remember that the City has immunity from suit!

The city will not have damages for negligent approval of a plat since plat approval is a government function. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985)(where the city's approval of a subdivision plat was a discretionary function and the city was therefore immune to liability for its alleged negligence in approving the filling of watercourses, which resulted in flooding). The planning commissioners and county commissioners also have official immunity. *Ballantyne v. Champions Builders*, 144 S.W.3d 417, 423 (Tex. 2004)(where a board of adjustment official was entitled to immunity in exercising his vote to revoke a permit). The city council is also immune. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 162-163 (Tex. 2004)(where the city councilperson was an attorney for the plaintiff but voted on a moratorium adverse to the plaintiff as a city councilperson, the Supreme Court held that the city councilperson

had legislative immunity from conflict of interest provisions in a malpractice suit and had official immunity from lawsuits arising out of his vote).

FINAL THOUGHTS
And will you succeed?
Yes! You will indeed!
(98 and ¾ percent guaranteed)