

# **Zoning & Platting 101: Basic Concepts, Key Issues & Vocabulary**

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## **I. Historical Overview**

Zoning is defined in Black’s Law Dictionary as “[t]he division of a city or town by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put.”<sup>2</sup> Zoning may be used to restrict the use of property and structures to categories such as industrial, commercial, retail or residential. In Texas, zoning is not authorized outside the jurisdictional limits of a city or town. Zoning laws are different from eminent domain. Zoning laws are enacted under the authority of a municipality’s police power, their enforcement does not constitute condemnation of property or a change in ownership, and a municipality is not required to provide compensation for the taking of private property to the owner.<sup>3</sup>

A brief overview of the history of land use regulation in the United States is helpful in understanding the current mechanisms that constitute zoning. A municipality’s police power is inherent in its sovereign power to regulate the use of private property for the purpose of protecting the public welfare and safety.<sup>4</sup> Municipalities have the authority to regulate a wide variety of activities to promote public health, safety, morals and the general welfare.

In the 1700’s, local governmental bodies sometimes regulated limited areas of land use and structures, such as prohibiting wooden fireplaces and thatched roofs due to fire hazard and safety concerns. In some larger colonial cities, such as Boston, Salem and Charleston, laws enacted before 1800 regulated the location of slaughterhouses, distilleries and couriers.<sup>5</sup>

By the 1840’s, most cities were an unorganized mix of seemingly incompatible uses which resulted in filth and stench in the streets. Fires and deadly diseases were not uncommon. Around this time, the “sanitary reform” movement worked towards the implementation of comprehensive public water and sewage systems and for increased regulation of land uses to reduce the threat of fire and

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<sup>2</sup> Black’s Law Dictionary 6<sup>th</sup> Edition.

<sup>3</sup> 77 Tex. Jur. 3d, Zoning § 2.

<sup>4</sup> See., e.g. *Lawton v. Steele*, 152 U.S. 133 (1894).

<sup>5</sup> See, Ziegler Rathkopf’s, (*The Law of Zoning and Planning* (4<sup>th</sup> ed.) § 1:2 (hereinafter referred to as “*Rathkopt*”).

**Zoning & Platting 101—Riley Fletcher 2020**

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disease.<sup>6</sup> By the end of the 1800's, particularly in large cities, it became increasingly clear that some government regulation of property and land use was necessary since repugnant land uses often existed side-by-side. The first zoning ordinance in the United States was adopted by the city of New York in 1916.<sup>7</sup> The United States Supreme Court found zoning to be constitutional in *Village of Euclid v. Ambler Realty Co.*<sup>8</sup> in 1926.

Four years before the *Village of Euclid* opinion, the United States Department of Commerce produced a Standard Zoning Enabling Act ("SZE A") as a model for the states to follow by delegating zoning power to local governments.<sup>9</sup> The SZE A also contained limitations on the zoning power of local governments. After *Village of Euclid*, the Department of Commerce published the SZE A, which was widely adopted among the states. Texas adopted its version of the SZE A in 1927 and delegated zoning power to the governing bodies of municipalities, however counties were excluded.<sup>10</sup> Texas' version of the SZE A was upheld by the Texas Supreme Court in *Lombardo v. City of Dallas*<sup>11</sup> in 1934.

## II. Zoning

### A. Statutory Authority for Zoning in Texas

Chapter 211 of the Texas Local Government Code (the "Code") grants municipalities the power to zone property. Section 211.001 of the Code provides that the purpose of zoning is to promote "the public health, safety, morals, or general welfare" and protect and preserve "places and areas of historical, cultural, or architectural importance and significance." Further, zoning must be in accordance with a comprehensive plan<sup>12</sup> and be designed to "(1) lessen congestion in the streets; (2) secure safety from fire, panic, and other dangers; (3) promote health and the general welfare; (4) provide adequate light and air; (5) prevent the overcrowding of land; (6) avoid undue concentration of population; or (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements."<sup>13</sup>

Section 211.003, entitled "Zoning Regulations Generally", of the Code provides:

- "(a) The governing body of a municipality may regulate:
- (1) the height, number of stories, and size of buildings and other structures;
  - (2) the percentage of a lot that may be occupied;
  - (3) the size of yards, courts, and other open spaces;
  - (4) population density;

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<sup>6</sup> See, *id.* at 1-9 (and citations contained therein).

<sup>7</sup> *Mixon, Texas Municipal Zoning Law* (3<sup>rd</sup> ed.) §1.000 at 1-2 (hereinafter referred to as "*Mixon*").

<sup>8</sup> 272 U.S. 365 (1926).

<sup>9</sup> See, *Mixon*, §1.000 at 1-4.

<sup>10</sup> See, *Mixon*, §1.000 at 1-4.

<sup>11</sup> 47 S.W. 2d 495 (Tex. Civ. App.—Dallas 1932), *aff'd*, 124 Tex. 1, 73 S.W. 2d475 (1934).

<sup>12</sup> Tex. Local Gov't Code § 211.004(a).

<sup>13</sup> *Id.*

- (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
  - (6) the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.
- (b) In the case of designated places and areas of historical, cultural, or architectural importance and significance, the governing body of a municipality may regulate the construction, reconstruction, alteration, or razing of buildings and other structures.
  - (c) The governing body of a home-rule municipality may also regulate the bulk of buildings.”

For the most part, zoning ordinances in Texas municipalities have two primary components: the **zoning ordinance**, which provides definitions and land use regulations, and the **zoning map**, which visually reflects the zoning districts adopting pursuant to the zoning ordinance within the municipality’s corporate limits.

Chapter 211 of the Code addresses the procedures that must be followed for a municipality to adopt zoning regulations. The statutorily mandated requirements are jurisdictional and if a city fails to follow them, the zoning ordinance is void.<sup>14</sup> Among other things, Chapter 211 requires a municipality to adopt local zoning regulations, publish notices of public hearings and conduct public hearings.<sup>15</sup>

## 1. The Zoning Commission

### Role of the Commission

A home-rule city that desires to exercise its zoning authority must appoint a zoning commission and a general-law city may appoint one.<sup>16</sup> The zoning commission’s authority is limited to recommending “boundaries for the original zoning districts and appropriate zoning regulations for each district.”<sup>17</sup> The zoning commission conducts public hearings on proposed zoning district changes or text amendments to the zoning ordinance.<sup>18</sup> The zoning commission makes a recommendation on the request to the city council for consideration.<sup>19</sup> The city council is prohibited from conducting a public hearing or voting on the item until it receives the final report of the zoning commission.<sup>20</sup> Both the city council and zoning commission must comply with the posting requirements contained in the Texas Open Meetings Act, which requires posting of notice

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<sup>14</sup> See *Peters v. Gough*, 86 S.W. 2d 515 (Tex. Civ. App.—Waco 1935, no writ).

<sup>15</sup> Tex. Local Gov’t Code § 211.006.

<sup>16</sup> *Id.* § 211.007(a).

<sup>17</sup> *Id.* § 211.007(a).

<sup>18</sup> *Id.* § 211.007(a).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

at least 72 hours in advance of meeting and an agenda describing the actions to be considered by the body.<sup>21</sup>

## Notice to Property Owners

In addition to public notice of meetings of the zoning commission required by the Texas Open Meetings Act, written notice to surrounding property owners is statutorily mandated within specific timeframes. Prior to a public hearing before the zoning commission (or city council if general-law city with no zoning commission), written notice must be provided to property owners within 200 feet of the affected property. Typically the owner of the affected property is aware because the change has been requested by the owner and city staff prepares and mails the notices. The written notice must be sent, by regular mail, to affected property owners before the 10<sup>th</sup> day before the public hearing date. The notice is sent to those relevant individuals as reflected on the most recently approved municipal tax roll.<sup>22</sup>

## 2. The City Council

Once the zoning commission has acted on a zoning change application or zoning ordinance text amendment, and makes a final report to the city council, the matter goes to the city council for consideration. The city council must also conduct a public hearing.<sup>23</sup> Before the 15<sup>th</sup> day before the date of the public hearing, “notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality.”<sup>24</sup> It should be noted, however, that mailed notice to affected landowners is not statutorily required for the public hearing at the city council stage.<sup>25</sup>

A city council may approve or deny the proposed matter by simple majority vote.<sup>26</sup> In the event, however, that a proposed change to a regulation or boundary is protested by twenty percent (20%) of: (i) the owners of the affected property; or (ii) the owners of property located within 200 feet of the affected property, then the proposed change must be approved by at least three fourths (3/4) of all members of the city council who are qualified to vote.<sup>27</sup> By ordinance, a city also may provide that the affirmative vote of at least three-fourths (3/4) of all members of the city council is required to overrule the recommendation of the zoning commission that a proposed change be denied.<sup>28</sup> Many Texas municipalities have adopted provisions substantially identical to the provisions of the Code.

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<sup>21</sup> See Tex. Local Gov’t Code § 211.0075 (zoning commission) and Tex. Gov’t Code ch. 551 (city councils).

<sup>22</sup> Tex. Local Gov’t Code § 211.007(c).

<sup>23</sup> *Id.* § 211.006(a).

<sup>24</sup> *Id.* One exception exists for general law cities that do not have a zoning commission. Those cities may not adopt a proposed change until after the 30<sup>th</sup> day after the date of landowner notification, according to Section 211.006(b) of the Texas Local Government Code.

<sup>25</sup> *Id.* § 211.006(b). However, see Section 211.006(c) of the Texas Local Government Code provides that a governing body “may, by two-thirds vote, prescribe the type of notice to be given of the time and place of the public hearing. Notice requirements prescribed under this subsection are in addition to the publication notice required by Subsection (a).” Thus, cities may adopt more stringent notification requirements than those referenced in Chapter 211.

<sup>26</sup> *Id.* § 211.005.

<sup>27</sup> Tex. Local Gov’t Code § 211.006(d).

<sup>28</sup> *Id.* § 211.006(f).

### 3. The Zoning Board of Adjustment

In Texas, a board of adjustment (“BOA”) may act within the parameters established by Chapter 211 of the Code and the municipal ordinance that establishes the BOA. Section 211.008 of the Code is an enabling act, which means its provisions do not apply unless adopted by ordinance approved by the municipality’s governing body. A BOA may only hear and decide appeals from the administrative decisions made by zoning enforcement officials, special exceptions, variances and other matters authorized by ordinance.<sup>29</sup> The BOA shall adopt rules, which must be approved by the city council.<sup>30</sup>

**Composition of the BOA.** Section 211.008 of the Code sets forth the membership of the BOA. Specifically, that section provides that the city council appoints the members of the BOA. The BOA must be comprised of at least five (5) members and municipalities may permit each councilmember to appoint a member of the BOA. The BOA members serve two-year terms and may only be removed for cause. Cities may appoint alternate members to the BOA to serve in the absence of one or more regular members of the BOA. Any case before the BOA must be heard by at least 75% of the members. The meetings of the BOA are public. For Type A general law cities, the city council may act as the BOA.<sup>31</sup>

**Duties of the BOA.** As noted above, the duties of a BOA are statutorily defined by §211.009 of the Code. Specifically, §211.009(a) provides that:

- “(a) The board of adjustment may:
- (1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;
  - (2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;
  - (3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and
  - (4) hear and decide other matters authorized by an ordinance adopted under this subchapter.”

In addition, municipalities generally outline the duties of the BOA in a local ordinance, and many provide additional authority to the BOA in reliance on § 211.009(a)(4), quoted above. The Code provides that applications for appeals to the BOA shall be heard at the next meeting for which notice can be provided and within 60 days from the date the appeal is filed.<sup>32</sup>

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<sup>29</sup> *Id.* § 211.009.

<sup>30</sup> *Id.* § 211.008(e).

<sup>31</sup> *Id.* § 211.008.

<sup>32</sup> *Id.* § 211.010(d).

The additional functions delegated to the BOA by local ordinance, if any, vary among municipalities, and local ordinances should always be reviewed as situations arise.

**Administrative Errors in Decisions Making.** The Code gives the BOA the power to and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of city ordinances adopted under Chapter 211. For example, if the building official believes the zoning ordinance prohibits radio antennas in a particular zoning district, the building official would decline to issue a permit to construct the radio antenna. If the property owner believes that the radio antenna is permissible and the building official has misinterpreted the zoning ordinance, the decision to deny the permit can be appealed to the BOA.

**Variations.** The Code does not define the term “variance”. Black’s Law Dictionary defines a “variance”, as it relates to zoning, as: “Permission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding person’s property. It is in the nature of a waiver of the strict letter of the zoning law upon substantial compliance with it and without sacrificing its spirit and purpose.”<sup>33</sup> An administrative official of a municipality cannot approve a variance. The BOA may not grant a variance for a use that is illegal under the applicable zoning ordinance. Variations may be granted from setbacks and other requirements; but variations may not be granted to allow a tract of property to be used for a use that is not permitted under the applicable zoning ordinance. A use variance in such instance would be a rezoning of property and the BOA does not possess the legal authority to rezone property.

Most local zoning ordinances and Section 211.009(a)(3) of the Code provide that a variance may only be granted if there exists an unnecessary hardship. Although state law does not define the term “unnecessary hardship”, the term does not include: (1) property that cannot be used for its highest and best use<sup>34</sup>; (2) financial or economic hardship<sup>35</sup>; (3) self-created hardship<sup>36</sup>; or (4) the development objectives of the property owner are or will be frustrated.<sup>37</sup>

**Special Exceptions.** A special exception is a use that a zoning ordinance permits, but only in appropriate conditions, thus they are reviewed and approved by the BOA for situational suitability. The showing of hardship is not required for special exceptions, unlike variations. In reality, most special exceptions are handled by many cities as specific (or special) use permits, which are typically granted under the zoning ordinance. Chapter 211 alone does not provide authority to grant a special exception, so the local zoning ordinance must specify that special exceptions may be granted. A zoning ordinance needs to specify the conditions that must be met for a special exception to be granted or the standards that a BOA must use when granting a special exception.

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<sup>33</sup> Black’s Law Dictionary 6<sup>th</sup> Edition.

<sup>34</sup> See *Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.).

<sup>35</sup> See *Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, 290 S.W. 2d 340 (Tex. Civ. App.—Galveston 1956, no writ); *Southland Addition Homeowner’s Ass’n v. Board of Adjustments of City of Wichita Falls*, 710 S.W.2d 194 (Tex. App. Fort Worth 1986, writ ref’d n.r.e.); *Bat’tles v. Board of Adjustment and Appeals of the City of Irving*, 711 S.W. 2d 297 (Tex. App.—Dallas 1986, no writ).

<sup>36</sup> See *Currey v. Kimple*, 577 S.W.2d 508 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.).

<sup>37</sup> See, e.g., *Willie*, footnote 31.

**Appeals of the Decisions of the BOA.** An appeal of a BOA decision is by petition to a court for a writ of certiorari. Either the property owner seeking the BOA approval or the municipality may appeal a decision of the BOA. In addition, if the appeal is based on a decision of an administrative official, an aggrieved owner of land within 200 feet of the property that is the subject of the decision may also appeal.<sup>38</sup> The appeal may be to state district court, county court or a county court at law.<sup>39</sup> The petition to the court must state that the decision of the BOA was illegal and specify why the decision was illegal.<sup>40</sup> The petition must be filed within 10 days after the date the BOA's decision is filed in the BOA's office.<sup>41</sup> The writ of certiorari procedure is described in detail in Section 211.011 of the Code; however, a reviewing court may reverse or affirm, in whole or in part, or modify the decision that is appealed.<sup>42</sup> Texas case law is clear that the court may reverse a BOA's decision only if the court determines that the facts are such that the BOA, as a fact finder, could have reached only one decision, and abused its discretion in reaching the opposite conclusion.<sup>43</sup> A reviewing court also may remand a case back to the BOA for further deliberations.<sup>44</sup>

#### **4. Enforcing Zoning Regulations**

Once a city has adopted a zoning ordinance, it may enforce its zoning by fine, imprisonment, or both. A zoning ordinance violation is a misdemeanor and a city also may provide civil penalties for violations.<sup>45</sup> Conviction of a misdemeanor violation can result in a fine of up to \$2,000 per day.

#### **5. Common Zoning Concepts**

The Code and most zoning ordinances contain terms that are undefined in the Code, and may or may not be defined in the local zoning ordinance. Even when defined by a local zoning ordinance the meanings of the terms may vary from municipality to municipality, and thus may be different in neighboring communities. For example, some municipalities utilize "specific use permits"; however, a specific use permit in one municipality may be denoted a special use permit or conditional use permit in other municipalities. The following is meant to outline common meanings for such land use terms:

**Accessory Uses.** A use that is secondary with a main use allowed in a zoning classification within a zoning ordinance, such as granny flats or barns.<sup>46</sup>

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<sup>38</sup> § 211.010(a-1).

<sup>39</sup> Tex. Local Gov't Code § 211.011(a).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 211.011(b).

<sup>42</sup> *Id.* § 211.011(f).

<sup>43</sup> See *City of South Padre Island v. Cantu*, 52 S.W. 3d 287, 291 (Tex. App. – Corpus Christi 2001, no pet.) (citing *City of San Angelo v. Boehme Bakery*, 190 S.W. 2d 67, 71 (Tex. 1945)).

<sup>44</sup> See *Wende v. Board of Adjustment of San Antonio*, 27 S.W.3D 162,173 (Tex. App. –San Antonio 2000), *rev'd on other grounds*, 92 S.W. 3d 424 (Tex. 2002).

<sup>45</sup> Tex. Local Gov't Code §§ 211.012(b), 54.012 and 54.017.

<sup>46</sup> *Mixon*, Glossary at B-1.

**Comprehensive Plan.** A city-wide plan that establishes community goals and generally sets forth anticipated land uses for planning and development, as well as establishing public policy in terms of transportation, utilities, recreation and housing.

**Contract Zoning.** An unlawful arrangement whereby a property owner or developer agrees to develop or use property in a certain way or bestow value on the municipality in exchange for receiving a particular zoning classification from a city, *i.e.*, contract zoning involves a promise on the part of either the owners or zoning authority to rezone property. This is an area of the law that must be scrutinized if a city attempts to settle zoning/land use litigation by entering into a written settlement agreement.<sup>47</sup>

**Downzoning.** Downzoning refers to the scenario when property is rezoned to a use classification that is less intensive than the prior zoning classification. A common example is when fewer residential units are permitted to be developed per acre following the rezoning. The term downzoning is typically associated with a rezoning that is initiated by the municipality, not the developer.

**Exclusionary Zoning.** Regulations in a zoning ordinance that result in the exclusion of low and/or moderate economic income groups from the municipality, because of regulation of density, use, large minimum square footage requirements for residential units, and the like.<sup>48</sup>

**Inclusionary Zoning.** Regulations in a zoning ordinance that may require residential units for low and/or moderate economic income groups.<sup>49</sup>

**Nonconforming Structures.** A structure that lawfully existed prior to the effective date of a regulation that makes the structure unlawful, *i.e.* structure does not meet current set-back requirements, but no set-back requirements existed when the structure was built.

**Nonconforming Uses.** A use that lawfully existed prior to the effective date of a zoning regulation that prohibits the use.<sup>50</sup>

**Overlay Districts.** A zoning overlay is a specified geographic area within the municipality that imposes development requirements in addition to the requirements of the underlying zoning. For example, historical areas of a municipality may have a historic overlay district and signature or gateway retail areas may have a designated overlay district to maintain the look and feel of an area.

**Planned Developments.** Planned Developments (“PDs”) are specialized zoning designations commonly used by Texas municipalities. PDs provide flexibility when a local zoning ordinance does not contain a zoning classification that will allow for the desired development on the subject property. For example, if a developer desired to construct a

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<sup>47</sup> *Mixon*, Glossary at B-3.

<sup>48</sup> *Mixon*, Glossary at B-4.

<sup>49</sup> *Rathkopf's*, § 1:29 at 1 – 48.

<sup>50</sup> *Mixon*, Glossary at B-6.



mixed-use development that had retail shops on the lower level of a building and residential housing on the upper stories, neither a straight retail zoning or residential zoning will permit both uses, thus a PD allowing both uses would be an appropriate zoning mechanism.

**Specific Use Permits.** A specific use permit (“SUP”) refers to a special approval that is required to allow a specified use in the zoning classification. Specific use permits are not referenced in the Code, but evolved over time in local zoning ordinances, and have been approved by the Texas Courts as being with the police power of municipalities.<sup>51</sup> Thus, SUPs only exist as a zoning tool in municipalities that specifically provide for them in the local zoning ordinance. There is no authority to grant a specific use permit unless the zoning ordinance specifically authorizes it.

**Spot Zoning.** An arbitrary departure from the comprehensive plan.

**Upzoning.** Upzoning refers to the scenario when property is rezoned to a use classification that is more intensive than the prior zoning classification. As an example, if property located at a hard corner of major thoroughfares was zoned as single-family residential and rezoning to retail (considered a more intense use) was approved. If the property were bordered on the two sides not abutting the thoroughfares by existing residential developments, the homeowners in the existing developments may protest the rezoning.

## 6. Discretion In Zoning Matters

Local governmental officials are afforded broad discretion in zoning matters, as zoning is considered a legislative function. In reviewing the constitutionality of a zoning ordinance, a court will use the rational basis test under both the due process and equal protection clauses of the United States Constitution.<sup>52</sup> Zoning ordinances will only be held unconstitutional if they do not bear any possible relationship to the municipality’s interest in securing the health, safety, morals or general welfare of the public and are clearly arbitrary and capricious.<sup>53</sup>

A municipality’s decision-making body is granted a considerable amount of discretion in making zoning decisions. The decision of the acting body will not be reviewed according to whether its zoning decision was necessarily the best course for the community.<sup>54</sup> Instead, in reviewing such a determination, the court will consider whether there was a conceivable or even hypothesized factual basis for the specific zoning decision made.<sup>55</sup> This is not to suggest, however, that a zoning decision can be justified merely by mouthing an irrational basis for an otherwise arbitrary

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<sup>51</sup> See Texas Attorney Gen’l Opinion No. JM-493 (1986) and the citations therein.

<sup>52</sup> *Thompson v. Gallagher*, 489 F.2d 443, 447 (5<sup>th</sup> Cir.1973). See also *Horizon Concepts, Inc., v City of Balch Springs*, 789 F.2d 1165, 1167 (5<sup>th</sup> Cir.1986).

<sup>53</sup> *Village of Euclid*, 272 U.S. at 395; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Shelton v. City of College Station*, 780 F.2d 475, 479-80 (5<sup>th</sup> Cir.) (en banc), cert. denied, 479 U.S. 822 (1986).

<sup>54</sup> See *Shelton*, 780 F.2d at 480 (“It is not the function of the trial court to determine whether the Town’s zoning decision was necessarily the best course for the community, which effect would be to move the function of a zoning decision maker from a legislator to judge”).

<sup>55</sup> *Id.*, 780 F.2d at 480-81.

decision.<sup>56</sup> The Fifth Circuit has stated: “The key inquiry is whether the question is ‘at least debatable.’”<sup>57</sup> Further, local legislators who decide discretionary zoning matters are entitled to absolute immunity.<sup>58</sup>

## 7. Zoning of Governmental Property

Generally, municipalities may not enforce zoning regulations against a governmental entity.<sup>59</sup> Section 211.013(c) of the Code states that municipal zoning regulations do “not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency.” In addition, political subdivisions of the State of Texas, such as school districts, are exempt from the application of certain municipal zoning regulations.<sup>60</sup>

## 8. Vested Rights; Chapter 245

Chapter 245 of the Texas Local Government Code (“LGC”) is titled “Issuance of Local Permits”, however it is generally referred to as the “vested rights statute.” Section 245.002(a) of the LGC requires a city to consider each application for a permit on the basis of the ordinances that existed at the time the original application for the permit is filed. Section 245.002(a-1) provides that vesting accrues either when an “original application” or a “plan for development” that gives the city “fair notice of the project and the nature of the permit sought” is filed. The application or plan is considered filed on the date it is delivered to the city or on the date the applicant mails it to the city by certified mail.<sup>61</sup> Many cities have standard or uniform submittal dates that applications are considered filed for purposes of streamlining the processing and consideration of permits by staff and deliberative bodies.

Section 245.001 contains definitions for “project” and “permit”, but does not define “plan for development”. “Project” is defined in § 245.001(3) as:

“. . . an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.”

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<sup>56</sup> See *Id.* 780 F.2d at 481-82 (“[a] denial of a building permit on the King Ranch because of inadequate parking might fall into this category”). See also *City of Cleburne v Cleburne Living Center*, 473 U.S. 432,450 (1985) (“mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases” upon which a council may rely).

<sup>57</sup> *Shelton*, 780 F.2d at 483.

<sup>58</sup> *Mayhew v. Town of Sunnyvale*, 774 S.W. 2d 284 (Tex. App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991).

<sup>59</sup> The effect of the Supremacy Clause, in Article IV of the U.S. Constitution, is that land owned or leased by the United States or one of its agencies for purposes authorized by Congress is protected from regulation by state and local authorities. See *Township of Middletown v. N/E Regional Office, United States Postal Service*, 601 F. Supp. 125 (D. New Jersey 1985) and *United States Postal Service v. City of Hollywood, Florida*, 974 F. Supp. 1459 (S.D. Florida 1997).

<sup>60</sup> See *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W. 2d 670, 672 (Tex. 1973) (school districts exempt not subject to municipal zoning regulations); *City of Lucas v. North Texas Mun. Water Dist.*, 724 S.W. 2d 811 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (water district not subject to municipal zoning regulations, but subdivision requirements and uniform codes apply).

<sup>61</sup> Tex. Local Gov’t Code §212.002(a-1).

“Permit” is defined in § 245.001(1) as:

“. . . a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.”

Another significant change made in 2005 is the addition of paragraph (e) to § 245.002, which provides as follows:

- “(e) A regulatory agency may provide that a permit application expires on or after the 45<sup>th</sup> day after the date the application is filed if:
- (1) the applicant fails to provide documents or other information necessary to comply with the agency’s technical requirements relating to the form and content of the permit application;
  - (2) the agency provides to the applicant not later than the 10<sup>th</sup> business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the date the application will expire if the documents or other information is not provided; and
  - (3) the applicant fails to provide the specified documents or other information within the time provided in the notice.”

Ordinances requiring that applications be administratively complete before they were considered filed, and thus triggered vesting, were quite common among cities prior to the passage of § 245.002(e). Under § 245.002(e), an applicant could vest with the filing of an incomplete application, so long as the application provides “fair notice” of the project. Cities must now take the affirmative steps outlined in § 245.002(e) to expire an application and prevent vesting based on an incomplete application.

In 2005, § 245.005 was amended regarding dormant projects to add a new paragraph (b), which restricts expiration dates from being less than two years for permits and less than five years for projects. However, the expiration dates do not apply if the applicant makes “any progress towards completion of the project”, which is defined as doing any one of the following:

- “(c) Progress towards completion of the project shall include any one of the following:
- (1) an application for a final plat or plan is submitted to a regulatory agency;
  - (2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;

- (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;
- (4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or
- (5) utility connection fees or impact fees for the project have been paid to a regulatory agency.”<sup>62</sup>

Section 245.004 lists items to which the vesting provided by § 245.002 does not apply.

### **9. H.B. 3167, Effective September 1, 2019.**

The requirements of H.B. 3167, which became effective September 1, 2019, are discussed in more detail in Section III. Platting, below. H.B. 3167 applies to plats and “plans”. The term “plan” is defined in Code Section 212.001(2) as a “subdivision development plan, including a subdivision plan, subdivision construction plan, site plan, land development application, and site development plan.” While the individual terms used within the definition of “plan” are not defined, the author’s opinion is that the definition of “plan” does not include zoning applications/plans required by zoning ordinances promulgated under Chapter 211, but applies only to plans required under ordinances authorized by Chapter 212.

## **III. Platting**

### **A. Municipal Platting Authority.**

#### **1. Adoption of Subdivision Rules.**

Platting, or the subdivision of property into tracts or lots, is generally governed by Chapter 212 of the Code. Code Section 212.002 provides that after a public hearing, the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality’s jurisdiction.

#### **2. Subdivision Plat required.**

Section 212.004(a) of the Code states, “The owner of a tract of land located within the limits or in the extraterritorial jurisdiction of a municipality who divides the tract in two or more parts to layout a subdivision of the tract, including an addition to a municipality, to layout suburban, building, or other lots, or to layout streets, alleys, squares, parks or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the streets, alleys, squares, parks, or other parts must have a plat of the subdivision prepared.” However, Code Section 212.004 provides that a plat is not required for a subdivision of land into parts greater than five acres, where each part has access and no public improvement is being dedicated. In addition, Code Sections 212.0045 and 212.0046 provide, respectively, that, in certain

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<sup>62</sup> *Id.* § 245.005(c).

instances, a development plat may be filed instead of a plat and that a plat is not required for certain property abutting an aircraft runway.

Section 212.004(d) of the Code requires the recording of plats in the county land records. Plats are subject to filing and recording provisions of Section 12.002 of the Property Code. To be eligible for recording, the plat must meet the following minimum requirements:

- (a) describe the subdivision by metes and bounds;
- (b) locate the subdivision with respect to a corner of the surveyor tract or an original corner of the original survey of which it is a part;
- (c) state the dimensions of the subdivision and of each street, alley, square, park, or other part of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the street, alley, square, park, or other part; and
- (d) the owner or proprietor of the tract or the owner's or proprietor's agent must acknowledge the plat in the manner required for the acknowledgment of deeds.<sup>63</sup>

### 3. Plat Approval.

A property owner or developer must submit a copy of the plat with an application seeking approval with the municipality having jurisdiction over the property. The plat application will first be considered by the municipality's zoning commission then the governing body or, if the municipality has no zoning commission, only the governing body of the municipality will consider the plat.<sup>64</sup> Some municipalities have given final approval over plats to the zoning commission, and the city council only considers the plat if an appeal is made from the zoning commission's decision. Section 212.008 of the Code also provides that if the submitted plat or replat complies with all of applicable regulations, such as the municipality's subdivision ordinance, then it must be approved. The municipal authority responsible for approving plats is (1) the municipal planning commission; (2) the governing body of the municipality, if the municipality has no planning commission; or (3) both if required by ordinance.<sup>65</sup>

In a municipality with a population of more than 1.5 million, at least two members of the municipal planning commission, but not more than 25 percent of the membership of the commission, must be residents of the area outside the limits of the municipality and in which the municipality exercises its authority to approve subdivision plats.<sup>66</sup>

The municipal authority responsible for approving plats shall approve a plat if:

- “(1) it conforms to the general plan of the municipality and its current and future streets, alleys, parks, playgrounds, and public utility facilities;

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<sup>63</sup> *Id.* § 212.004(b)(1) – (3) and (c).

<sup>64</sup> *Id.* § 212.008.

<sup>65</sup> *Id.* § 212.006.

<sup>66</sup> *Id.* § 212.006.

- (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 and extension of sewer and water mains and the instrumentalities of public utilities;
- (3) a bond required under Section 212.0106, if applicable, is filed with the municipality; and
- (4) it conforms to any rules adopted under Section 212.002.”<sup>67</sup>

The municipal authority responsible for approving plats must act on a plat within 30 days after the date the plat is filed in accordance with Code Section 212.009. If municipal regulations require that a plat be approved by the governing body of the municipality, in addition to the planning commission, the governing body shall act on the plat within 30 days after the date the planning commission approves the plat or the plat is considered approved by the inaction of the commission.<sup>68</sup> The Code mandates that a plat shall be considered approved by the municipal authority unless it is disapproved within the provided timeframe.<sup>69</sup> If a plat is approved due to a failure to act, the municipality must issue a certificate stating the date the plat was filed and that the approving authority failed to act on the plat within the requisite period.<sup>70</sup>

#### **4. Conditional Approval or Disapproval.**

In addition to approval, the municipal authority may also conditionally approve or disapprove a plan or plat.<sup>71</sup> If the municipal authority conditionally approves or disapproves a plan or plat, it shall provide the applicant a written statement of clearly articulated, specific conditions for the conditional approval or the reasons for disapproval.<sup>72</sup> The conditions or reasons may not be arbitrary, and must be directly related to the requirements of city ordinances promulgated under Chapter 212, and include a citation to the law, including a city ordinance, that is the basis for the decision.<sup>73</sup> Thereafter, the applicant may submit a written response to the decision, subject to no deadline, which satisfies each condition for conditional approval or remedies each reason for disapproval.<sup>74</sup> The city may not establish a deadline for the applicant to respond.<sup>75</sup> The municipal authority then has 15 days after the applicant’s response to approve or disapprove the plat or plan.<sup>76</sup> In any legal action challenging the disapproval of a plan or plat, the municipality has the burden of proving by clear and convincing evidence that the disapproval meets the requirements of this subchapter or any applicable case law.<sup>77</sup>

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<sup>67</sup> *Id.* § 212.010.

<sup>68</sup> *Id.* § 212.009(a).

<sup>69</sup> *Id.* § 212.009(b).

<sup>70</sup> *Id.* § 212.009(d).

<sup>71</sup> *Id.* § 212.009(a).

<sup>72</sup> *Id.* § 212.0091(a).

<sup>73</sup> *Id.* § 212.0091(b).

<sup>74</sup> *Id.* § 212.0093.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 212.0095(a).

<sup>77</sup> *Id.* § 212.0099.

The city may not ask an applicant to waive any deadlines or procedures in Chapter 211.<sup>78</sup> However, a city has the authority to accept a written waiver should the applicant request one in writing. An applicant can choose an alternative procedure adopted by the municipality if the process allows for a shorter approval period.<sup>79</sup>

### **5. Post Approval Procedures.**

Following approval, the plat must be endorsed by the municipality with a certificate indicating the approval. The certificate must be:

- (a) signed by the authority's presiding officer and attested by the authority's secretary (such as the Chair of the planning commission or the Mayor); or
- (b) signed by a majority of the members of the governing body responsible for approval.<sup>80</sup>

The municipal authority responsible for plat approval must maintain a record of each application filed for a plat approval and the action taken on the application. If an owner of an affected tract requests, the municipal authority that acted on the plat must certify, in writing, the reasons for the action taken on an application.<sup>81</sup> Usually this Code provision is used by a property owner when the plat is not approved for purposes of determining whether there was lawful authority to deny the plat.

### **6. Vacating Plats.**

The owner of a tract covered by an approved plat may vacate the plat at any time before a lot depicted on the plat is sold. To be vacated, an instrument declaring the plat to be vacated must be approved by the municipality and must be signed, acknowledged and recorded in the manner prescribed for the original plat. If lots depicted on the plat have been sold, the plat, or any part of the plat, may be vacated only upon the application of every owner of each lot, with approval obtained in the manner prescribed for the original plat. Following the execution and recording of the vacating instrument, the vacated plat has no effect.<sup>82</sup>

### **7. Replatting Without Vacating Preceding Plat.**

Section 212.014 of the Code reads as follows:

“A replat of a subdivision or part of a subdivision may be recorded and is controlling over the preceding plat without vacation of that plat if the replat:

- (1) is signed and acknowledged by only the owners of the property being replatted;
- (2) is approved by the municipal authority responsible for approving plats; and
- (3) does not attempt to amend or remove any covenants or restrictions.”

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<sup>78</sup> *Id.* § 212.0097.

<sup>79</sup> *Id.* § 212.0096(a).

<sup>80</sup> *Id.* § 212.009(c).

<sup>81</sup> *Id.* § 212.009(e).

<sup>82</sup> *See Id.* § 212.013.

Additional requirements for certain replats are located in Section 212.015 of the Code, and apply to replats without vacation of the preceding plat if: (1) during the preceding five years, any of the area to be replatting was limited by an interim or permanent zoning classification to residential use for not more than two residential units per lot; or (2) any lot in the preceding plat was limited by deed restrictions to residential use for not more than two residential units per lot.

## **8. Amending Plat.**

Section 212.016 of the Code reads as follows:

“(a) The municipal authority responsible for approving plats may approve and issue an amending plat, which may be recorded and is controlling over the preceding plat without vacation of that plat, if the amending plat is signed by the applicants only and is solely for one or more of the following purposes:

- (1) to correct an error in a course or distance shown on the preceding plat;
- (2) to add a course or distance that as omitted on the preceding plat;
- (3) to correct an error in a real property description shown on the preceding plat;
- (4) to indicate monuments set after the death, disability, or retirement from practice of the engineer or surveyor responsible for setting monuments;
- (5) to show the location or character of a monument that has been changed in location or character or that is shown incorrectly as to location or character on the preceding plat;
- (6) to correct any other type of scrivener or clerical error or omission previously approved by the municipal authority responsible for approving plats, including lot numbers, acreage, street names, and identification of adjacent recorded plats;
- (7) to correct an error in courses and distances of lot lines between two adjacent lots if:
  - (A) both lot owners join in the application for amending the plat;
  - (B) neither lot is abolished;
  - (C) the amendment does not attempt to remove recorded covenants or restrictions; and
  - (D) the amendment does not have a material adverse effect on the property rights of the other owners in the plat;
- (8) to relocate a lot line to eliminate an inadvertent encroachment of a building or other improvement on a lot line or easement;
- (9) to relocate one or more lot lines between one or more adjacent lots if:
  - (A) the owners of all those lots join in the application for amending the plat;
  - (B) the amendment does not attempt to remove recorded covenants or restrictions; and



- (C) the amendment does not increase the number of lots;
- (10) to make necessary changes to the preceding plat to create six or fewer lots in the subdivision or a part of the subdivision covered by the preceding plat if:
- (A) the changes do not affect applicable zoning and other regulations of the municipality;
  - (B) the changes do not attempt to amend or remove any covenants or restrictions; and
  - (C) the area covered by the changes is located in an area that the municipal planning commission or other appropriate governing body of the municipality has approved, after a public hearing, as a residential improvement area; or
- (11) to replat one or more lots fronting on an existing street if:
- (A) the owners of all those lots join in the application for amending the plat;
  - (B) the amendment does not attempt to remove recorded covenants or restrictions;
  - (C) the amendment does not increase the number of lots; and
  - (D) the amendment does not create or require the creation of a new street or make necessary the extension of municipal facilities.
- (b) Notice, a hearing, and the approval of other lot owners are not required for the approval and issuance of an amending plat.”

## 9. Development Plats.

Development plats are authorized by Subchapter B of Chapter 212 of the Code and may be required by a municipality if a municipality adopts rules or ordinances requiring development plats. A municipality that requires a subdivision plat may not also require a development plat.<sup>83</sup> If required, a development plat must be prepared by a registered professional land surveyor as a boundary survey showing:

- “(1) each existing or proposed building, structure, or improvement, or each proposed modification of the external configuration of the building, structure, or improvement;
- (2) each easement and right-of-way within or abutting the boundary of the surveyed property; and
- (3) the dimensions of each street; sidewalk, alley, square, park, or other part of the property intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the street, sidewalk, alley, square, park, or other part.”<sup>84</sup>

<sup>83</sup> *Id.* § 212.045(d).

<sup>84</sup> *Id.* § 212.045(b).

New development can begin only after the development plat is filed with and approved by the municipality in accordance with Section 212.047 of the Code.

## **B. Regulation of Development in a Municipality's ETJ**

Unlike zoning regulations, a municipality may extend its ordinances governing plats to the extraterritorial jurisdiction ("ETJ") of the municipality.<sup>85</sup> In addition, Chapter 232 of the Code allows counties to regulate the subdivision of property located outside a municipality. However, following the passage of H.B. 1445 by the Texas Legislature in 2001, a municipality and a county may not both regulate subdivisions of property in the ETJ. This legislation is codified in Code §242.001. Each municipality is required to enter into an agreement with each county within which the municipality is situated that identifies which entity will regulate subdivision plats and related permits in the ETJ.<sup>86</sup> The agreement may grant authority to the county, the municipality, or apportion the ETJ between them for regulation.<sup>87</sup>

## **C. County Platting Authority.**

### **1. County Plat Requirements.**

Section 232.001(a) of the Code states as follows:

- “(a) The owner of a tract of land located outside the limits of a municipality must have a plat of the subdivision prepared if the owner divides the tract into two or more parts to lay out:
- (1) a subdivision of the tract, including an addition;
  - (2) lots; or
  - (3) streets, alleys, squares, parks, or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the streets, alleys, squares, parks or other parts.”

### **2. County Plat Approval.**

The commissioner's court must approve, by an order entered in the minutes of the court, a plat required by Section 232.001.<sup>88</sup> The commissioner's court may refuse to approve a plat if it does not meet the requirements prescribed by or under Chapter 232 or if any bond required under Chapter 232 is not filed with the county.<sup>89</sup> The commissioner's court may not approve a plat until the plat and other documents have been prepared as required by Section 232.023, if applicable.<sup>90</sup>

Section 232.003 of the Code states as follows:

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<sup>85</sup> *Id.* § 212.003.

<sup>86</sup> *Id.* § 242.001(c).

<sup>87</sup> *Id.* § 242.001(d).

<sup>88</sup> *Id.* § 232.002(a).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* § 232.002(b). (Which references § 232.0035, but it was repealed and a footnote references 232.023).

“By an order adopted and entered in the minutes of the commissioners court, and after a notice is published in a newspaper of general circulation in the county, the commissioners court may:

- (1) require a right-of-way on a street or road that functions as a main artery in a subdivision, of a width of not less than 50 feet or more than 100 feet;
- (2) require a right-of-way on any other street or road in a subdivision of not less than 40 feet or more than 70 feet;
- (3) require that the shoulder-to-shoulder width on collectors or main arteries within the right-of-way be not less than 32 feet or more than 56 feet, and that the shoulder-to-shoulder width on any other street or road be not less than 25 feet or more than 35 feet;
- (4) adopt, based on the amount and kind of travel over each street or road in a subdivision, reasonable specifications relating to the construction of each street or road;
- (5) adopt reasonable specifications to provide adequate drainage for each street or road in a subdivision in accordance with standard engineering practices;
- (6) require that each purchase contract made between a subdivider and a purchaser of land in the subdivision contain a statement describing the extent to which water will be made available to the subdivision and, if it will be made available, how and when;
- (7) require that the owner of the tract to be subdivided execute a good and sufficient bond in the manner provided by Section 232.004;
- (8) adopt reasonable specifications that provide for drainage in the subdivision to:
  - (A) efficiently manage the flow of storm water runoff in the subdivision; and
  - (B) coordinate subdivision drainage with the general storm drainage pattern for the area; and
- (9) require lot and block monumentation to be set by a registered professional surveyor before recordation of the plat.”

### **3. Post Approval Procedures.**

A subdivision plat governed by county regulations must be recorded in the county land records after approval. To be recorded, the plat must:

- (a) describe the subdivision by metes and bounds;
- (b) locate the subdivision with respect to an original corner of the original survey of which it is a part; and
- (c) state the dimensions of the subdivision and of each lot, street, alley, square, park, or other part of the tract intended to be dedicated to public use or for

the use of purchasers or owners of lots fronting on or adjacent to the street, alley, square, park, or other part.<sup>91</sup>

The owner of the tract or an agent therefore must acknowledge the plat in the manner required for the acknowledgment of deeds.<sup>92</sup> The plat is subject to the filing and recording provisions of Section 12.002, Property Code.

#### **4. Bond Requirements.**

If the owner of property is required by the commissioners' court to execute a bond, the owner must do so before subdividing the tract unless an alternative financial guarantee is provided under Section 232.0045. Section 232.004 provides that the bond must:

- “(1) be payable to the county judge of the county in which the subdivision will be located or to the judge’s successors in office;
- (2) be in an amount determined by the commissioners court to be adequate to ensure proper construction of the roads and streets in the subdivision, but not to exceed the estimated cost of construction of the roads and streets;
- (3) be executed with sureties as may be approved by the court;
- (4) be executed by a company authorized to do business as a surety in this state if the court requires a surety bond executed by a corporate surety; and
- (5) be conditioned that the roads and streets will be constructed:
  - (A) in accordance with the specifications adopted by the court; and
  - (B) within a reasonable time set by the court.”<sup>93</sup>

Section 232.0045, which allows for a financial guarantee in lieu of bond, provides as follows:

- “(a) In lieu of the bond an owner may deposit cash, a letter of credit issued by a federally insured financial institution, or other acceptable financial guarantee.
- (b) If a letter of credit is used, it must:
  - (1) list as the sole beneficiary the county judge of the county in which the subdivision is located; and
  - (2) be conditioned that the owner of the tract of land to be subdivided will construct any roads or streets in the subdivision:
    - (A) in accordance with the specifications adopted by the commissioners court; and
    - (B) within a reasonable time set by the court.”

## **IV. Conclusion**

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<sup>91</sup> *Id.* § 232.001(b)(1) – (3).

<sup>92</sup> *Id.* § 232.001(c).

<sup>93</sup> *Id.* § 232.004.

While Texas has a state statutory scheme established for local government entities to regulate the development of property through zoning and platting, the county or municipal regulations for the area in which the property is situated need to be reviewed when development occurs. Local regulations will govern the use and/or subdivision of the property.