The "Shot Clock," Certificates of No Action, and *Ultra Vires* Claims

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I. INTRODUCTION

Your city just received a plan or plat application. The clock is ticking. Arguably just as important as having the appropriate personnel and procedures in place to evaluate the submission for compliance with technical requirements is making sure that your city timely acts on the submission. By statute, the failure to timely act can have significant consequences, potentially the automatic approval of the plan as submitted—the good, the bad, and the ugly.

Known in municipal and land use circles as the "shot clock," Texas law sets firm deadlines for a municipality to act on a plan or plat. "The municipal authority responsible for approving plats shall approve, approve with conditions, or disapprove a plan or plat within 30 days after the date the plan or plat is filed." TEX. LOCAL GOV'T CODE § 212.009(a). Or, if your city requires by ordinance that a plan or plat be approved by the city council and a planning commission, the deadline is 30 days after the plan or plat is approved by the planning commission or is approved by the inaction of the commission. TEX. LOCAL GOV'T CODE § 212.009(b). Whatever the deadline, Section 212.009(a) and (b) make clear that a plan or plat is approved as a matter of law unless it is acted on within the applicable period.

A developer who believes a municipality failed to timely act under Section 212.009 will likely demand that the city issue a certificate of no action. By statute, upon the applicant's request, the municipal authority responsible for approving plats "shall issue a certificate stating the date the plan or plat was filed and that the authority failed to act on the plan or plat within the period." TEX. LOCAL GOV'T CODE § 212.009(d). That certificate is effective in place of the endorsement to be provided if a plan or plat had been formally approved. *Id*.

Assuming the municipality and the developer disagree on whether the developer is entitled to a certificate of no action under Section 212.009(d), the developer may proceed with filing suit to obtain the certificate. In such a case, who is the proper defendant? Is it the city itself? The city council members? The mayor? City manager? Planning and Zoning Commission? Its members? And what cause of action is appropriate? Specifically, can the developer use the ever-increasing *ultra vires* theory, alleging that a governmental actor failed to perform a ministerial duty, and seek attorneys' fees if the developer prevails? This paper discusses those questions and provides the analysis from the only known Court of Appeals to address these issues.

II. THE TEXAS "SHOT CLOCK"

Texas Local Government Code Chapter 212 governs municipal regulation of subdivisions and property development. Sections 212.001 – 212.010 set forth procedures applicable to a municipality's consideration of a "plan" or a "plat" and what a municipality must do with those submissions.

Preliminarily, please note that as of September 1, 2019, Chapter 212 set forth new definitions of "plan" and "plat" and made other changes. A "plan" is defined as "a subdivision development plan, including a subdivision plan, subdivision construction plan, site plan, land development application, and site development plan." TEX. LOCAL GOV'T CODE § 212.001(2). A

"plat" is defined as "includes a preliminary plat, general plan, final plat, and replat." TEX. LOCAL GOV'T CODE § 212.001(3).

Discretion in approving or denying plats is limited by TEX. LOCAL GOV'T CODE § 212.005, which provides "[t]he municipal authority responsible for approving plats must approve a plat or replat that is required to be prepared under this subchapter and that satisfies all applicable regulations."

If a plan or plat is to be denied or approved with conditions, the municipality must act—and act quickly. The "shot clock," TEX. LOCAL GOV'T CODE § 212.009, sets forth statutory timelines for a municipality to act on a plan or plat submission. Section 212.009 provides:

> (a) The municipal authority responsible for approving plats shall approve, approve with conditions, or disapprove a plan or plat within 30 days after the date the plan or plat is filed. A plan or plat is approved by the municipal authority unless it is disapproved within that period and in accordance with Section 212.0091.
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> (b) If an ordinance requires that a plan or plat be approved by the governing body of the municipality in addition to the planning commission, the governing body shall approve, approve with conditions, or disapprove the plan or plat within 30 days after the date the plan or plat is approved by the planning commission or is approved by the inaction of the commission. A plan or plat is approved by the governing body unless it is disapproved within that period and in accordance with Section 212.0091.
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> (b-1) Notwithstanding Subsection (a) or (b), if a groundwater availability certification is required under Section 212.0101, the 30-day period described by those subsections begins on the date the applicant submits the groundwater availability certification to the municipal authority responsible for approving plats or the governing body of the municipality, as applicable.
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> (b-2) Notwithstanding Subsection (a) or (b), the parties may extend the 30-day period described by those subsections for a period not to exceed 30 days if:
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> (1) the applicant requests the extension in writing to the municipal authority responsible for approving plats or the governing body of the municipality, as applicable; and
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> (2) the municipal authority or governing body, as applicable, approves the extension request.
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> (c) If a plan or plat is approved, the municipal authority giving the approval shall endorse the plan or plat with a certificate indicating the approval. The certificate must be signed by:
>
> (1) the authority's presiding officer and attested by the authority's secretary; or
>
> (2) a majority of the members of the authority.

> (d) If the municipal authority responsible for approving plats fails to approve, approve with conditions, or disapprove a plan or plat within the prescribed period, the authority on the applicant's request shall issue a certificate stating the date the plan or plat was filed and that the authority failed to act on the plan or plat within the period. The certificate is effective in place of the endorsement required by Subsection (c).
>
> (e) The municipal authority responsible for approving plats shall maintain a record of each application made to the authority and the authority's action taken on it. On request of an owner of an affected tract, the authority shall certify the reasons for the action taken on an application.

TEX. LOC. GOV'T CODE § 212.009.[1]

Clearly the consequences of a not timely acting within the shot clock timelines are significant, as the plan or plat is statutorily deemed approved. TEX. LOC. GOV'T CODE § 212.009(a) and (b). Upon the automatic statutory approval, such must be documented through a certificate of no action as set forth in Section 212.009(d). That process consists of the owner making a request to the municipality, and then the authority responsible for approving plats "shall issue a certificate stating the date the plan or plat was filed and that the authority failed to act on the plan or plat within the period." TEX. LOC. GOV'T CODE § 212.009(d).

Once the municipality issues the certificate of no action, the certificate can be filed and is just as effective as had the municipality approved through an endorsement under Section 212.009(c). Notably, there is no statutory timeframe in which to issue a certificate in Section 212.009(d).

Of course, a developer and a municipality may disagree on whether the developer properly submitted a plan or plat, or otherwise disagree on whether the developer is entitled to a certificate of no action under Section 212.009. In the case of such disagreement, the issue arises as to what the legal options for the developer are to seek to compel the municipality to issue the certificate of no action.

III. MANDAMUS OR MANDATORY INJUNCTION CLAIMS AGAINST THE MUNICIPALITY ITSELF ARE APPROPRIATE TO COMPEL A CERTIFICATE OF NO ACTION

Caselaw suggests that a developer's remedy to obtain a certificate of no action under Section 212.009 is through a mandamus claim or mandatory injunction claim against the

1 This year, the Texas Legislature saw many bills introduced that propose amendments to Section 212.009. *See* H.B. 4447 and S.B. 1947 in the Regular Session, S.B. 75 and H.B. 297 in the 1st Called Session, S.B. 84 and S.B. 207 in the 2nd Called Session, and H.B. 95 and S.B. 37 in the 3rd Called Session. As of the publication of this paper, none of these bills have passed, however, they recommend substantive changes to the statute and should be monitored for changes to the platting process.

municipality. Two cases that have evaluated Section 212.009(d) noted that mandamus and mandatory injunction claims against the municipality are available to compel a certificate of no action. *Howeth Investments, Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 896 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (mandamus relief or mandatory injunction remedy for alleged arbitrary and capricious denial of a plat application or certificate of no action) and *Woodson Lumber Co. v. City of College Station*, 752 S.W.2d 744, 747 (Tex. App.—Houston [1st Dist.] 1988, no writ) (rejecting due process claim, but noting that relief against town was available—"If a landowners believes the City's action is arbitrary, then it may obtain relief by mandamus or mandatory injunction requiring the City to approve the plat.").

Other cases also support that a mandamus action is available to compel a city council to comply with a statute or ministerial duty imposed on the council as a body—by suing the city itself. *See, e.g., Board of Trustees of Houston Firefighters' Relief and Retirement Fund v. City of Houston*, 466 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (writ of mandamus to require governmental board to comply with statute). Also, in *In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015), a city council's collective failure to comply with a statute resulted in the Texas Supreme Court issuing a conditional writ of mandamus not against the individual council members, but against the city council as the governing body itself to perform its collective statutory duty. *Id*. ("The City Council is directed to comply with its duties, as specified in the City Charter, that arise when the City Secretary certifies that a referendum petition has a sufficient number of valid signatures.")

Based on the foregoing, a developer can assert a mandamus or mandatory injunction claim against the municipality itself, not individual defendants, and the relief is to ask the court to compel the "municipal authority responsible for approving plats" to issue the certificate under Section 212.009. While mandamus relief is available to enforce Section 212.009, attorneys' fees are not generally recoverable on a mandamus claim. Accordingly, attorneys for developers and landowners are advancing other theories, such as the increasing *ultra vires* theory, which if successful, does allow for the recovery of attorneys' fees.

IV. A GENERAL OVERVIEW OF *ULTRA VIRES* CLAIMS

If you have not encountered an *ultra vires* suit yet, odds are that you will before long. *Ultra vires* claims are increasing in government litigation across the board. *Ultra vires* principles are complex and ever developing. In fact, since the Texas Supreme Court clarified the application of the *ultra vires* doctrine in 2009 in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009), the Texas Supreme Court has substantively addressed *ultra vires* claims in at least eighteen opinions, with the majority of those coming within the past five or so years. Therefore, an understanding of what *ultra vires* claims are and how they work is appropriate.

Ultra vires claims are a subset of traditional declaratory judgment claims under the Texas Uniform Declaratory Judgment Act ("UDJA"). The UDJA provides a statutory cause of action for a party to have its rights declared by a court, including rights affected by statute or municipal ordinance. TEX. CIV. PRAC. & REM. CODE § 37.004(a). Attorneys' fees are recoverable on declaratory judgment claims. TEX. CIV. PRAC. & REM. CODE § 37.009.

However, declaratory judgment claims are limited by governmental immunity and only certain theories can be advanced against governmental entities. Specifically, the waiver for declaratory judgment claims is generally limited to claims challenging the validity or constitutionality of ordinances or statutes. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b); *see* also *Patel v. Tex. Dep't of Licensing & Regulation,* 469 S.W.3d 69, 76 (Tex. 2015); *Tex. Parks & Wildlife Dep't v. Sawyer Trust,* 354 S.W.3d 384, 388 (Tex. 2011); *Heinrich,* 284 S.W.3d at 373, n.6. Immunity is not waived for claims on how a statute or ordinance applies to a given set of facts, or what a person's rights under a statute or ordinance are generally. Therefore, a developer or property owner cannot use a typical declaratory judgment claim to have the court declare the developer's rights under Section 212.009 or a municipality's platting or subdivision ordinance.

However, *ultra vires* claims provide an exception to the general rule that declaratory judgment claims are barred by immunity other than validity or constitutionality challenges. In an *ultra vires* claim, the claimant argues that a government official is acting unlawfully or beyond his or her power, which does not trigger governmental immunity. In 2009, the Texas Supreme Court clarified the parameters of the *ultra vires* exception. *City of El Paso v. Heinrich* involved an El Paso police officer's widow who filed suit after her pension payments were reduced. *Id*., at 369. Mrs. Heinrich claimed the reduction violated a statute that only allowed changes to *increase* pensions or benefits. *Id*., at 369, 378. Mrs. Heinrich sued the City, the public employee's pension fund, the board of trustees of the pension fund as an entity, and the individual board members. *Id*. Mrs. Heinrich sought declaratory relief and an injunction to restore her payments to the full amount. *Id*., at 369. The defendants filed a plea to the jurisdiction asserting governmental immunity and official immunity. *Id*., at 369. The trial court denied the jurisdictional challenges and the court of appeals affirmed. *Id*., at 369.

The Texas Supreme Court was presented with the situation in which governmental immunity did not appear to allow a declaratory judgment claim to declare Mrs. Heinrich's rights under the statute generally, and therefore Mrs. Heinrich's remedies were limited. With that dilemma, *Heinrich* held that while governmental immunity may preclude declaratory judgment claims against governmental units, an exception exists against officials who act *ultra vires*. The Court noted that "[t]o fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id*., at 372.

Heinrich reasoned that governmental immunity should not preclude *ultra vires* suits because such claims do not attempt to control state action by imposing liability on the entity, but rather seek to "reassert the control of the state" by requiring the official to comply with statutory or constitutional provisions. *Id*. *Heinrich* further reasoned that "extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring [government] resources are spent as intended." *Id*. *Heinrich* then clarified several important principles for the *ultra vires* exception.

1. **Who is the proper defendant**? *Heinrich* concluded that while "for all practical purposes" the suit is against the governmental entity, because the entity cannot act

outside its authority, the proper defendant in an *ultra vires* claim is the government official in his or her official capacity. *Id*. at 373.

2. **What relief is available through an *ultra vires* claim?** The Texas Supreme Court acknowledged that "[t]his is a curious situation: the basis for the *ultra vires* rule is that a government official is not following the law, so that immunity is not implicated, but because the suit is, for all practical purposes, against the state, its remedies must be limited." *Id*., at 374. Balancing this dilemma, *Heinrich* concluded that an *ultra vires* claim should be limited to prospective relief. *Id*., at 374-76. The Court confirmed that an *ultra vires* claim also does not authorize the recovery of retrospective monetary damages. *Id*., at 374-76. However, the Court recognized that in some situations the payment of future money—such as with Mrs. Heinrich's future pension payments in their full amount—is prospective and would not implicate immunity simply because monetary relief is awarded. *Id*., at 374.

3. **How should an *ultra vires* defendant challenge the claim**? *Heinrich* established that an *ultra vires* claim should be challenged through a plea to the jurisdiction, and the burdens, including evidentiary considerations, are like any other jurisdictional challenge. *Id*., at 378. An employee or official sued in his or her official capacity has the same governmental immunity, derivatively, as the government entity. *Id*., at 380. Thus, the proper "answer" for an *ultra vires* claim is to file a plea to the jurisdiction. This is because either: (a) the plaintiff has a proper *ultra vires* claim against the official, for which there is no immunity and the prospective relief is appropriate; or (b) there is no proper *ultra vires* claim and the court lacks jurisdiction.

4. **Are individual immunities applicable to ultra vires claims against an official in his or her official capacity?** No. *Heinrich* rejected the idea on the basis that governmental officials are not sued in their individual capacities on *ultra vires* claims, and therefore individual immunities, including official immunity, are not applicable.[2] *Id*.

V. CAN *ULTRA VIRES* CLAIMS BE USED TO SEEK A CERTIFICATE OF NO ACTION UNDER SECTION 212.009(d)?

Does a municipality's failure to issue a required certificate of no action under TEX. LOCAL GOV'T CODE § 212.009(d) raise the potential for *ultra vires* claims? Our position, which was recently accepted by the Dallas Court of Appeals, is that the answer is no, because Section 212.009(d) does not impose a specific duty on a specific individual for purposes of an *ultra vires* claim.

As discussed in the preceding section, to state a viable *ultra vires* claim, a petition must allege that a government official either acted without legal authority or failed to perform a purely ministerial act. *Heinrich*, at 372. For an act to be ministerial, the law must be one that "prescribes

[2] The official could be sued in both his or her official capacity for an *ultra vires* claim, as well as in his or her individual capacity. *See, e.g., Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). In that situation, the individual can assert individual immunities as to the individual capacity claims, if otherwise appropriate.

and defines the duties to be performed with such precision and certainly as to leave nothing to the exercise of discretion or judgment." *Houston Municipal*, 549 S.W.3d at 576 (quoting *Emmett*, 459 S.W. 3d at 587). To the contrary, discretionary acts "are those that require the exercise of judgment and personal deliberation." *Id.*

Section 212.009(d) clearly provides that if a time period in Section 212.009(a) or (b) is not met, "the authority on the applicant's request shall issue a certificate…." TEX. LOCAL GOV'T CODE § 212.009(d). The "shall issue" language of Section 212.009(d) likely imposes a ministerial duty if the applicant makes a proper request. However, Section 212.009(d) imposes the obligation to act on "the municipal authority responsible for approving plats." It does not impose a duty on a specific governmental employee or official.

Section 212.006 provides that the "municipal authority responsible for approving plats under this subchapter is the municipal planning commission or, if the municipality has no planning commission, the governing body of the municipality." TEX. LOCAL GOV'T CODE § 212.006. However, "[t]he governing body by ordinance may require the approval of the governing body in addition to that of the municipal planning commission." *Id*. Therefore, the "municipal authority responsible for approving plats" could be the city council, the planning commission, or perhaps both. But because Section 212.009(d) imposes the obligation to act on "the municipal authority responsible for approving plats" and not a particular individual or position, we argue that the failure to issue a certificate does not give rise to an *ultra vires* claim against an official capacity defendant.

A proper *ultra vires* claim should identify a specific individual required to perform the ministerial duty. The Texas Supreme Court has dictated that the *ultra vires* exception is narrow in scope. *Houston Belt*, 487 S.W.3d at 164 ("our opinion merely reinforces the narrow ultra vires principles we have repeatedly announced and endorsed."). An individual sued on an *ultra vires* theory should be the person that acted unlawfully or failed to perform a ministerial duty imposed *on him or her*. "The proper defendant in an *ultra vires* action is the state official whose acts or omissions 'trampled on the plaintiff's rights, not the agency itself.'" *Vanderwerff v. Travelers Indem. Co. of Connecticut*, No. 05-17-00564-CV, 2018 WL 3154425, at *6 (Tex. App.—Dallas 2018, pet. denied) (quoting *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011).

Further, "[a]n *ultra vires* claim may not be brought against 'a nominal, apex representative who has nothing to do with the allegedly *ultra vires* action' because *ultra vires* claims against a government actor must be confined to *that defendant's conduct*." *Kilgore Indep. Sch. Dist. v. Axberg*, 535 S.W.3d 21, 30 (Tex. App.—Texarkana 2017, no pet.) (emphasis added), citing *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017) (quoting *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015)). *See* also *Beeman v. Livingston*, 468 S.W.3d 534, 538 (Tex. 2015) ("whether Livingston's actions were ultra vires depends on whether the statute required anything of him.") (emphasis added).

Evaluating a proper *ultra vires* defendant should include an evaluation of "horizontal selection—pinpointing which official has the duty to act." *Hall*, at 240. With that consideration, the following cases have rejected *ultra vires* theories on the basis that the *ultra vires* defendant

was not the person that failed to perform a ministerial duty imposed specifically on him or her by statute, ordinance, or other regulation:

- *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017): Limitations placed on a Board of Regents, *and not the chancellor himself*, could not support an *ultra vires* theory against the chancellor. Rather, *ultra vires* claims against the chancellor could only seek to compel the chancellor to follow the requirements directly and clearly imposed on him.

- *Montrose Management Dist. v. 1620 Hawthorne, Ltd.*, 435 S.W.3d 393, 413 (Tex. App.—Houston [14th Dist.] 2014, pet. denied): *Ultra vires* claims against an executive director were improper when the executive director was *not an actual member of the voting body responsible for the alleged ultra vires act*.

- *Texas A&M University, Mark Hussey, Ph.D. v. Starks*, 500 S.W.3d 560, 571 (Tex. App.—Waco 2016, no pet.): Rejecting *ultra vires* claims against an interim university president who was sued in his official capacity because he was "one of the officials in authority at TAMU with the power to act on the injunctive relief that Starks requests" through the *ultra vires* claim. That the president could have presumably provided the relief sought was immaterial, as the president did not have the ministerial duty.

- *Kilgore Indep. Sch. Dist. v. Axberg*, 535 S.W.3d 21, 30 (Tex. App.—Texarkana 2017, no pet.): *Ultra vires* claims against a governmental official improper because the official was not specifically obligated to act. *Axberg* further confirmed that a plaintiff must show that each *ultra vires* defendant specifically violated a law or ministerial duty imposed on him or her—in *Axberg* seven specific defendants each required an independent analysis. *Id*., at 31. ("To maintain an ultra vires action against each of the named Trustees, Axberg must plead and ultimately prove that *each* of those seven people acted without legal authority or failed to perform a ministerial act.") (emphasis in original).

- *City of Amarillo v. Nurek*, 546 S.W.3d 428, 436 (Tex. App.—Amarillo 2018, no pet.): *Ultra vires* claims against interim city manager were improper because the plaintiff could not establish that the city manager was *individually responsible* for the challenged employee classification. ("Notably, nothing in appellees' petition identifies under what specific authority Childers is made responsible for classification of civil service positions such that a court could conclude that his failure to classify FMO positions within the civil service constituted a violation of his ministerial duties.")

- *Roach v. Ingram*, 557 S.W.3d 203, 225–26 (Tex. App.—Houston [14th Dist.] 2018, pet. denied): *Ultra vires* claims against an individual "or his predecessor" failed to allege any specific wrongdoing by the *ultra vires* defendant himself and failed to invoke the court's jurisdiction.

To the contrary, clear examples of *ultra vires* acts based on the failure to perform ministerial duties imposed on a specific individual include:

- *Wineinger v. Z Bar A Ranch, LP*, No. 05-15-01104-CV, 2016 WL 3971560, *3 (Tex. App.—Dallas 2016, no pet.): Allegations that an elected tax assessor failed to issue a proper deed adequately alleged an *ultra vires* claim. However, there was no question that the statute creating the ministerial duty required "the presiding officer of a taxing unit selling real property"—which was Mr. Wineinger—to issue the deed. *Id*., citing TEX. TAX CODE §34.05.

- *City of Plano v. Carruth*, No. 05-16-00573-CV, 2017 WL 711656, at *2 (Tex. App.—Dallas 2017, pet. denied): A city secretary held to have acted *ultra vires* when she failed to fulfill a ministerial duty imposed specifically on her office by city charter. The charter provision provided "Immediately upon the filing of such petition, the person performing the duties of city secretary shall present said petition to the city council." *Id*. The specific obligation on the specific position supported the *ultra vires* claims against her. *Id*., at 4. ("The City Secretary's duty under section 7.03 is clear: the secretary must present the petition to the City Council immediately upon the filing of such petition. Charter § 7.03. This is a ministerial duty and the allegations support the conclusion that the City Secretary failed to perform that duty.")

Clearly in *Wineinger* and *Carruth*, the official sued for *ultra vires* acts had a specific duty imposed on their position. Yet, in Section 212.009(d), there is no such specific official or position required to issue a certificate of no action and, therefore, arguably a developer would be unable to pursue an *ultra vires* claim against an employee or official of the municipality.

***London v. Rick Van Park*—the current lone "shot clock" *ultra vires* case.**

To our knowledge, the only case thus far to consider *ultra vires* claims in the context of a municipality's refusal to issue a certificate of no action is *London v. Rick Van Park, LLC*, No. 05-20-00813-CV, 2021 WL 1884650 (Tex. App.—Dallas 2021, no pet.).

In *London*, a developer submitted a preliminary plan for development of an RV park. By ordinance, the Town of St. Paul, Texas had a Planning and Zoning Commission. The P&Z Commission held a public meeting and denied the developer's preliminary plan for failing to comply with Town ordinances and requirements. The developer then submitted a renewed preliminary plan application. The second submission contained numerous deficiencies, many of which remained from the prior submission. The Town concluded that the resubmission remained deficient, including uncorrected issues from the first application, and therefore concluded that the second application was not considered "properly filed" and was "substantially incomplete" under the Town's subdivision ordinance. The Town Administrator notified the developer of these determinations, including findings by the town engineer. The Town then took no further action on the second submission.

After the timeframe under Section 212.009(b) passed, the developer sent notice to the Town's mayor, demanding that the Town issue a certificate of no action under Section 212.009(d). The Town refused and the developer ultimately filed suit.

The developer initially sued the Town only, alleging various claims including negligence and estoppel/waiver. Our firm challenged jurisdiction on behalf of the Town based on governmental immunity and, in response, the developer: dropped those theories and asserted a general declaratory judgment claim, added the P&Z Commission, and added two defendants in their official capacities: the P&Z Chairperson and the Town Administrator/Secretary. The four defendants again challenged jurisdiction based on governmental immunity. The developer again amended, dropping the Town and the P&Z Commission as parties, and asserting *ultra vires* and mandamus claims against only the P&Z Chairman and the Town Administrator/Secretary in their official capacities.

On behalf of the two *ultra vires* official capacity defendants, our firm filed a plea to the jurisdiction to the new claims, challenging the court's jurisdiction based on governmental immunity. While several arguments were advanced, the primary argument was that while the developer could seek a mandamus to compel the Town to issue a certificate of no action (with no attorneys' fees recovery), the developer had not presented proper *ultra vires* claims, as neither a Town ordinance nor Section 212.009(d) imposed any ministerial duty on either the P&Z Chairman or the Town Administrator/Secretary.

The developer argued that governmental immunity barred declaratory judgment claims against the Town or the P&Z Commission, but that *ultra vires* claims were available against governmental official(s) that failed to issue the certificate of no action, a clear ministerial duty. The developer contended that "the city is merely a legal fiction and presumably must act through its individual agents," therefore an *ultra vires* claim was appropriate against *someone*. And the developer argued that if the P&Z Chairman or the Town Administrator/Secretary were not obligated to issue the certificate of no action for the Town, the defendants should be ordered to respond to discovery and identify who the appropriate Town employee or official was, so that the developer could amend and name that person as the appropriate *ultra vires* defendant.

The trial court denied the officials' plea to the jurisdiction, and the officials took an interlocutory appeal. For the reasons discussed below, and in the opinion attached hereto, the Dallas Court of Appeals reversed and rendered on the claims against the two *ultra vires* defendants, finding no viable *ultra vires* claim existed.

The Court of Appeals noted that Section 212.009(d) imposed the duty to issue the certificate of no action on "the municipal authority responsible for approving plats." *London*, at *4. The Court then concluded that per Town ordinance, the Town Council was the municipal authority responsible for approving plats for the Town. *Id.*

London then concluded that the developer "has not identified anything in § 212.009 or any of the Town ordinances establishing that London or Davis are the 'municipal authority,' nor has he identified any statute or ordinance making London or Davis responsible for issuing such certificates." *Id.*, at *5. The Court further noted that "at the hearing on the plea, Park admitted

that he did not know who was responsible for issuing the certificate and suggested that 'we need to pick a person who has the authority to issue it.'" *Id*.

The developer argued that by ordinance, the Town Secretary and the P&Z Chairperson sign final plats approved by the Town, the applications are submitted to the Town Secretary, and therefore the official capacity defendants "would presumably have to sign a certificate of no action." *Id*. The Dallas Court of Appeals rejected those arguments. In doing so, the Court provided favorable language, noting that a government employee's obligations to sign municipal documents or engage in other actions "does not equate to a legal duty to issue certificates of no action." *Id*. Therefore, the Court rejected that a government official merely involved in the platting process is a proper *ultra vires* defendant for a certificate of no action claim. *Id*.

The Court specifically noted that "[t]he narrow ultra vires exception requires identification of the specific authority delineating an official's ministerial duty." *Id*. Finding that no ordinance, statute, or other requirement imposed any duty on either of the two official capacity defendants, the Dallas Court reversed the denial of the officials' plea to the jurisdiction and rendered judgment in the officials' favor. *Id*.

Consistent with the discussion in Section III above, *London* acknowledged that the developer could pursue mandamus claims against the Town to seek a certificate of no action, and therefore remanded the case to allow the developer an opportunity to replead. *Id*., at *6. However, the Court appeared to foreclose any *ultra vires* claims against any Town employee or official, noting "declaratory judgment is not a viable remedy." *Id*. The opinion further explained that there was no basis to remand to allow the developer to seek discovery to identify an appropriate party for *ultra vires* claims, such as a council member or other official, as "[t]he Town Ordinance reflects, however, that no single official is charged with issuing a no action certificate. Instead, the Town Ordinance commits that obligation to the Town Council as the municipal authority for approving plats." *Id*., at fn. 3.

In other words, *London* rejected, at least under the Town's ordinances, that any *ultra vires* claim existed for the issuance of a certificate of no action. Rather, *London* suggested that the developer's claims were limited to a general mandamus claim against the Town to have the district court compel the issuance of the certificate. Notably, following the appeal, the developer dismissed its claims with prejudice in exchange for the Town not seeking appellate costs.

Only a handful of months old, *London* has not yet been cited by any other court. However, *London* appears to be the only case on point, as there are currently no other known appellate cases involving *ultra vires* claims in the context of a Section 212.009(d) certificate of no action.

VI. CONCLUSION

Taking a conservative and careful approach to processing platting submissions is advisable and can hopefully avoid litigation. The most conservative approach is to have the municipality formally act on every plat or plan submitted, and to approve, disapprove, or approve with conditions consistent with Section 212.009. However, there will inevitably be situations wherein a developer and a municipality disagree as to the legal implications of a particular submission, as well as whether the municipality timely acted under Section 212.009.

Based on caselaw, a developer can file suit against the municipality, asserting a mandamus action and seeking to have the court compel the municipality's "authority responsible for approving plats" to issue a certificate of no action under Section 212.009(d). However, the *London* decision, and the *ultra vires* principles set forth above, provide a strong argument that Section 212.009(d) does not impose individual ministerial duties and, unless a city's ordinance otherwise imposes specific mandates on an individual, an *ultra vires* claim is not appropriate to seek to compel a certificate of no action. Of course, it is important to consider your municipality's ordinances and evaluate whether an argument could be made that any ministerial duty as to the approval of a plan or plat is imposed on a specific person or office.