

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

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Introduction Overview

- Platting and the “Shot Clock”
- If an owner seeks to compel the municipality to issue a certificate of no action if the shot clock is allegedly missed:
 - Who is the proper defendant?
 - What is the proper claim?
- What is an *ultra vires* claim? Is the theory available to compel a certificate of no action and seek attorneys’ fees?

The Texas “Shot Clock”

- Texas Local Government Code Chapter 212
- TEX. LOCAL GOV'T CODE § 212.009(a) and (b) set forth statutory timelines for a municipality to act on a plan or plat submission
- “A plan or plat is approved by the municipal authority unless it is disapproved within that period and in accordance with Section 212.0091.” *See* Section 212.009(a) and (b).

TEX. LOCAL GOV'T CODE § 212.009(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).”

TEX. LOCAL 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).
- No statutory timeframe in which to issue a certificate in Section 212.009(d).

Pursuing a Certificate of No Action Claim

- What type of claim can be pursued?
- Who is the proper defendant?
 - City itself? Council members? Mayor? City manager? Planning and Zoning Commission? Its members?

Mandamus Claim Against City

- Two cases have evaluated Section 212.009(d), with both holding that mandamus or mandatory injunction is available:
 - *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)
 - *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 support that a mandamus action against a municipality is available to compel a city council to comply with a statute or ministerial duty imposed on the collective body.

Ultra Vires Claims?

- Governmental immunity for declaratory judgment claims is generally waived only for claims challenging the validity or constitutionality of ordinances or statutes.
- But what about declarations that the government is acting unlawfully (*i.e., ultra vires*)—should immunity apply?
 - Increasing area of litigation
 - 18 Texas Supreme Court opinions since 2009, the majority in last 5 years

City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex. 2009)

- Widow sued alleging her pension benefits were unlawfully reduced because, per statute, any changes could only increase her benefits.
- *Heinrich* held that while governmental immunity may preclude general declaratory judgment claims against governmental entities, an exception exists for claims alleging that government officials acted without lawful authority or failed to perform a ministerial act. *Id.*, at 372.
- Reasoning:
 - 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.
 - “[E]xtending 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.”

Ultra Vires Basics from *Heinrich*:

- *Ultra vires* claims must be brought against one or more government officials in their official capacity. However, “for all practical purposes” the suit is against the entity.
- Must show that an official acted without legal authority OR failed to perform a ministerial act.
- Individual immunities such as official immunity are not applicable.
- Governmental immunity can be asserted, thus the proper answer for the official capacity defendant is a plea to the jurisdiction.
- Remedies limited to *prospective* relief only, but future payments of money are not necessarily precluded.

Ultra Vires for a Section 212.009(d) Certificate?

- 212.009(d) appears to create a ministerial duty with no discretion:
 - 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).
- The duty is imposed on “the municipal authority responsible for approving plats”
- Sufficient for an *ultra vires* claim against a municipal employee or official in his or her official capacity?

Proper *Ultra Vires* Defendant

- “An *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).
- Evaluating a proper *ultra vires* defendant should include an evaluation of “horizontal selection—pinpointing which official has the duty to act.”
 - *Hall*, at 240 (emphasis added).

London v. Rick Van Park, LLC, 2021 WL 1884650 (Tex. App.—Dallas 2021, no pet.)

- P&Z denied a preliminary plat for development of RV Park
- Developer resubmitted application. Deficiencies included several issues identified in first submission.
- Town advised developer that the second submission was not considered “properly filed” and was “substantially incomplete” under the Town’s subdivision ordinance.
- Town took no further action. After “shot clock” deadline, developer sent notice to Mayor demanding certificate under Section 212.009(d).

London v. Rick Van Park, LLC

- Developer initially sued Town and P&Z Commission—jurisdictional challenges
- Ultimately ended with *ultra vires* and mandamus claims against Town Administrator/Secretary and P&Z Chairman in their official capacities
- Officials filed a plea to the jurisdiction, asserting immunity.
 - Primary Argument: No ministerial duty imposed on either official, but rather any duty was owed by the collective “municipal authority responsible for approving plats,” and such is insufficient for an *ultra vires* claim.
- Developer argued the individuals had to take some action relating to plats, so it should be them. And if not, *someone* had to issue the certificate for the Town, so compel discovery to identify who the proper *ultra vires* defendant was.

London v. Rick Van Park, LLC

- Trial court denied the jurisdictional challenge; interlocutory appeal.
- Court of Appeals evaluated Chapter 212 and Town's ordinances, and concluded that no ministerial duty imposed on either official capacity defendant.
- Rather any duty was on the "municipal authority responsible for approving plats," which the Court concluded under the Town's ordinance was the Town Council.
- Rejected *ultra vires* claims against the two defendants—or anyone else.

London v. Rick Van Park, LLC

- 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.
- 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
 - 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.*, at *5.
- Court acknowledged that mandamus action against Town was available to compel certificate under Section 212.009(d), and therefore remanded to allow the developer to amend and pursue those claims.
- Court rejected the request to remand to further develop other *ultra vires* claims
 - “The 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.



SUMMARY

- Mandamus or mandatory injunction claims available to enforce Section 212.009(d).
 - Municipality itself is the proper defendant.
 - Remedy is to compel the “municipal authority responsible for approving plats” to issue the certificate.
 - Theory should not provide for attorneys’ fees.
- *London* provides favorable law and argument that Section 212.009 imposes no ministerial duty on any specific person/office, thus negating *ultra vires* claims (and attorneys’ fees).
- Practice tip: Check ordinances and evaluate whether an argument can be made that a ministerial duty is imposed on a specific person/office.