

# Land Use Training

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FEBRUARY 8, 2018  
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Be Prepared . . .

# The Basics

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# Zoning – What Is It?

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The division of a city or area into districts and the prescription and application of different land use regulations in each district. An exercise of the police power that allows cities to regulate the rights of a private individual for the good of the community.



# A Brief History of Zoning

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Zoning is a valid exercise of the police power to protect the community's health, safety and welfare.



*Village of Euclid v. Ambler Realty Co.*  
272 U.S. 365 (1926)



# A Brief History of Zoning

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- Standard Zoning Enabling Act – 1926
- Texas:
  - *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W. 2d 475 (1934)
    - All property is held subject to the police power
    - A proper zoning regulation is not a “taking” for which compensation must be paid
  - Texas Local Government Code – Chapter 211

# Purpose – §211.001

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To promote the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.



got purpose?

# What Can Cities Regulate – §211.003

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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
5. The location and use of buildings, other structures, and land for business, industrial, residential or other purposes
6. In areas of historical, cultural or architectural significance - may regulate construction, reconstruction, alteration or razing of buildings or other structures
7. Home rule cities may also regulate the bulk of buildings



# Districts – § 211.005

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1. City may divide the municipality into districts of a number, shape, and size
2. Regulations must be uniform for each class or kind of building in a district
3. Regulations may vary from district to district
4. Regulations must be adopted “with reasonable consideration, among others things, for the character of each district and its peculiar suitability for particular uses with a view of conserving the value of buildings and encouraging the most appropriate use of land in the municipality”
5. Planned Development Districts
6. Conditional Use Permit

# The Comprehensive Plan – §211.004

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1. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to (police power elements):
  - a. lessen congestion in the streets
  - b. secure safety from fire, panic, and other dangers
  - c. promote health and general welfare
  - d. provide adequate light and air
  - e. prevent the overcrowding of land
  - f. avoid undue concentration of population
  - g. facilitate that adequate provision of transportation, water, sewers, schools, parks, and other public requirements

# The Comprehensive Plan – §211.004

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## 2. Elements of a Comprehensive Plan

- a. Land use plan
- b. Transportation plan
- c. Park and Open Space plan
- d. Housing and Public facilities plan
- e. Written policies and goals



# Procedures - §211.006 and 211.007

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## 1. Notice of Public Hearings

- a. Mailed notice of P&Z hearing to property owners within 200 feet

“Before the 10<sup>th</sup> day before the hearing date, . . .” §211.007(c)

- b. Publish notice of City Council hearing in the newspaper of general circulation

“Before the 15<sup>th</sup> day before the date of the hearing, . . .” §211.006(a)

## 2. Hearing - Public hearings required

- 3. P&Z Recommendation – P&Z must make a recommendation prior to the City Council public hearing (in a General Law city, the Council may act as the zoning commission)

# Procedures - §211.006 and 211.007

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- 4. Legislative Action by City Council
  - a. Generally simple majority vote approves a zoning change
  - b. Protest by Neighbors- if the property owners of 20% of the area with 200 feet of the proposed zoning change file a written protest, the Council must vote by a super-majority (3/4 of the members voting in the affirmative) to approve an amendment
  - c. Protest by Owner- If the property owners of 20% of the land area covered by the proposed amendment file a protest, the Council must vote by a super-majority (3/4 of the members voting in the affirmative) to approve an amendment
  - d. Many local ordinances require more than a simple majority vote by City Council to approve zoning that received a negative recommendation from the P&Z

# Making a Zoning Decision

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# Fourteenth Amendment

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1. The 14th Amendment provides that states (cities) shall not deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Due process requires that all persons similarly situated should be treated similarly (equal protection).
3. Due process also requires that before a person may be deprived of a property right as a result of the zoning process, they are entitled to notice and a hearing.



# Fourteenth Amendment

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## a. When does an individual have a property interest?

Chapter 211 of the TEXAS LOCAL GOVT. CODE is the Texas Legislature's practical response. If you are the property owner of the property being rezoned or if you own property within 200 feet of the property being rezoned, then you are deemed to have a property interest in the governmental action. (Home-rule cities may provide different rules.)

## b. What notice is required?

Again, § 211.007 of the TEXAS LOCAL GOVT. CODE establishes that written notice, 10 days prior to the public hearing before the Zoning Commission is deemed to be adequate notice. (Home-rule cities may provide different rules.)

## c. What hearing is required?

See §211.006 and § 211.007 of the TEXAS LOCAL GOVT. CODE.

# Fifth Amendment

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1. The 5th Amendment provides that private property shall not be taken for public use without just compensation.
2. There are typically two types of claims for a taking by a municipality. One involves an actual physical invasion of private property and the other a diminution in the development rights on the property by virtue of some regulatory action taken by the city.
  - a. Physical invasion.

**Illustration:** A city passes an ordinance which requires that a landowner permit the installation of a very small cable t.v. connection box and connection by the cable company upon payment to the property owner of a nominal fee.

*See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

# Fifth Amendment

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## b. Regulatory taking.

**Illustration:** A developer owns property located on a steep hillside that is zoned a Planned Development District for single family homes that would allow 60 homes to be built on the hillside. The city conducts a hillside preservation study and as a result implements a rezoning of the property that ties the maximum density permitted to the degree of slope of the hillside. The bottom line is that the developer will now only be permitted to construct 10 houses instead of his original 60. He claims that his property has been taken for a public use (preservation of the hillside for the enjoyment of all residents of the city) without just compensation.

*See City of El Paso v. Madero Development*, 803 S.W.2d 396 (Tex. App. -- El Paso 1991, writ denied).

# First Amendment

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1. The 1st Amendment provides that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
2. Land use regulation challenges typically involve two oft-discussed freedoms: freedom of speech and freedom of religion.

# First Amendment

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**Illustration:** Freedom of speech -- A municipality adopts a sign ordinance prohibiting all off-premise advertising (commercial billboards) and limiting on-premise signs to the display of commercial messages (general business signs).

*See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

**Illustration:** Freedom of speech -- A municipality has an ordinance regulating sexually oriented businesses by prohibiting them from locating within 1,000 feet of another sexually oriented business, bars, taverns, pool halls, residential property, schools, churches and hospitals. The municipality's stated purpose in the regulation was to prevent the neighborhood deterioration that has been shown to accompany the concentration of adult businesses in a neighborhood.

# First Amendment

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**Illustration:** Freedom of religion -- A municipality denies an application from a newly formed congregation to convert a single-family residence in a residential district into a church.

*See Religious Land Use and Institutionalized Persons Act of 2000*, signed by President Clinton on Sept. 22, 2000 and the *Texas Religious Freedom Act*. Chapter 110 CPRC

# Factors to Consider in Making a Land Use Decision

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# Compliance with Comprehensive Plan?

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The State of Texas requires that municipalities zone in accordance with a comprehensive plan. §211.004, TEXAS LOCAL GOVT. CODE.

Comp Plan adoption governed by Chapter 213, TEXAS LOCAL GOVT. CODE.

# Secondary Effects of Proposed Use?

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Decisions on zoning applications should be made based on an analysis of the impact of the proposed use on the neighborhood and on the city as a whole. Such factors include traffic impacts, noise, light, air, crime, and the facilitation of the adequate provision of water, sewers, schools, parks and other public requirements. See §211.004 of the TEXAS LOCAL GOVT. CODE.



# Reasonable Use of the Property?

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Any zoning regulation by a municipality must provide a property owner with a reasonable use of the property. Does the proposed regulation allow the property owner a reasonable use of the property?

# Reasonable Use of the Property?

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**Illustration:** A property owner purchased property during the development boom of the mid-1980s and was successful in seeking a rezoning to a multi-family zoning category (the most valuable land classification at the time). In 1991, the city begins to implement its new comprehensive plan and rezones the property to single-family (a less valuable land use classification). Does the property owner have a legitimate regulatory taking claim or a reasonable use of the property for single-family development?

Regulators must consider the investment-backed expectation of a property owner - existing and permitted uses constitute the “primary” expectation.

**Illustration:** Does a property owner who originally purchased and used the land for ranching and made subsequent purchases of land zoned for one-acre residential uses have a reasonable investment-backed expectation that the municipality would zone the property to allow 3+ units per acre?

*Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) *cert. denied*, 526 U.S. 1144, 119 S. Ct. 2018 (1999).

# Vested Rights - *See* Ch. 245 of the TEXAS LOCAL GOVT. CODE.

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§245.002 -- Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed.

# Frequently Asked Questions

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# Can the Area of Land Subject to a Zoning Change be Increased?

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No. For a zoning change to occur, there must be public notice of the proposed change in zoning. Since the public notice contains a description of the property for which a zoning change is sought, there would not be adequate notice of a change in the increased area.



# Can the Area of Land Subject to a Zoning Change be Reduced?

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Yes. Since there has been public notice of the portion of land subject to a zoning change, decreasing the amount of land included in a zoning change would not violate the public notice requirements. The fact that a zoning change has been effected on only a portion of the land instead of all of the land is not injurious to those individuals who have an interest in the zoning change.

# Can the Area of Land Subject to a Zoning Change be Zoned to a More Intense Use Than it was Advertised?

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No. In such a situation there would not have been adequate public notice. For example, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 10,000 square feet, the governing body of a municipality instead could not zone the land residential with lots of 5,000 square feet since there was not adequate public notice and the use is more intense than advertised.

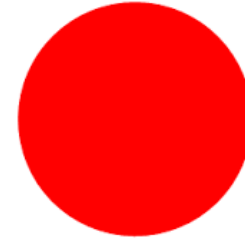
# Can the Area of Land Subject to a Zoning Change be Zoned to a Less Intense Use Than it was Advertised?

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Yes. In this situation there was adequate public notice. Thus, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 5,000 square feet, the governing body of a municipality instead could zone the land residential with lots of 10,000 square feet since there was adequate public notice and the use is less intense than advertised.

# What is Spot Zoning?

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Spot zoning is a rezoning of property that benefits a specific tract of land with a use classification that is less restrictive than provided by the original zoning ordinance. One theory of spot zoning is that when a city council departs from its comprehensive plan and rezones especially to benefit a small tract, it violates the state law requirement that zoning be in accordance with a comprehensive plan. Thus, spot zoning is illegal because it is an arbitrary departure from the comprehensive plan.

# What is Contract Zoning?

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Contract zoning is an unlawful activity whereby a property owner or developer agrees to develop or use property in a certain way in exchange for receiving a particular zoning classification from a city, *i.e.*, contract zoning involves an enforceable 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.

# What is Conditional Zoning?

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Conditional zoning is the granting of a zoning change by a governing body which is subject to agreed upon specific conditions which limit permitted uses in a zoning district. The typical scenario is that a governing body secures a property owner's agreement (1) to limit the use of the subject property to a particular use (or uses) or (2) to subject the tract to certain restrictions as a precondition to any rezoning. Unlike contract zoning, under conditional zoning a zoning authority requires an owner to perform some future act in order to receive rezoning, but does not enter into an enforceable agreement promising such rezoning.

## Does an Applicant Have the Right to Withdraw a Zoning Application for Which Notice Has Been Given in Accordance with State Law and Local Requirements?

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No. Unless the municipal ordinance specifically provides the right for the applicant to withdraw the application, the Planning & Zoning Commission and the City Council have jurisdiction to rezone the property. If the property owner protests, a super-majority vote is required.



# PLAT Regulations

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CHAPTER 212, TEXAS LOCAL GOVT. CODE

- Instrument conveying portion of property;
- Division into lots, laying out streets, alleys, and other areas dedicated to the public.



# PLAT Requirements

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**At a minimum should identify:**

1. Lot lines and dimensions;
2. The locations of streets and alleys;
3. Utility easements; and
4. Dedications of parks and other areas, designated for public use.

Local subdivision regulations usually include additional requirements.

# To Be Recorded a PLAT must...

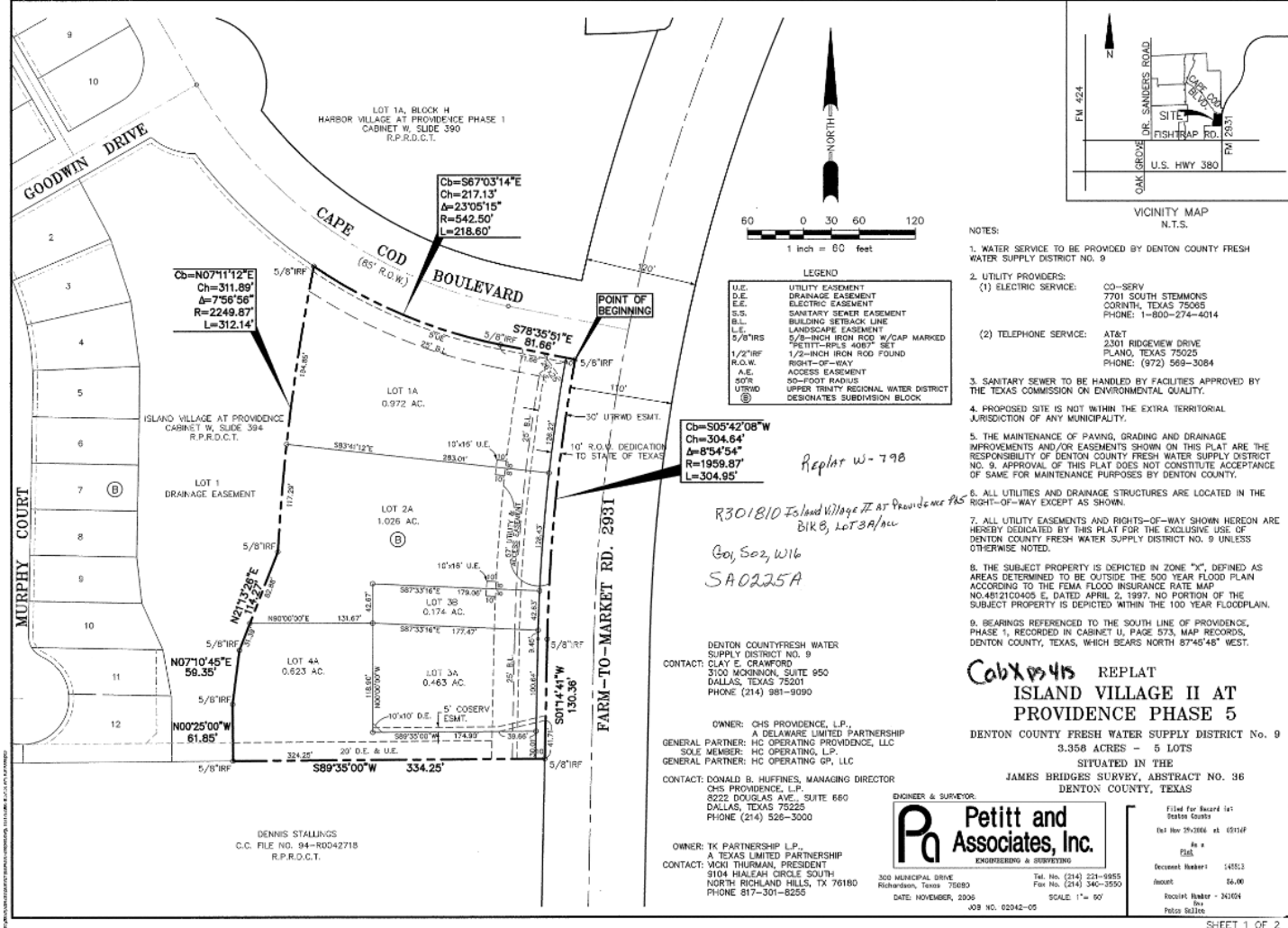
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- Describe the subdivision by metes and bounds;
- Locate the subdivision with respect to a corner of the survey or tract;
- Identify the dimensions of the subdivision and each street, alley, park, and other portion to be dedicated to the public use or the use of abutting property owners; and
- Must contain an acknowledgement similar to a deed (notarized signature).

TEX. LOC. GOV'T CODE § 212.004(b)

# PLATTING Process

- Preliminary Plat (saves property owners money on engineering to do this first). Not mentioned in Chapter 212
- Final Plat-recorded in land records to create the lots and make the dedications



# A PLAT Shall Be Approved If (§ 212.005):

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## **Standards For Approval**

1. It conforms to the general plan for the extension of the municipality and its roads, streets, alleys, parks and public utilities, taking into account access to and extension of sewer and water mains, utilities, and infrastructure; and
2. It complies with the city's subdivision regulations.

Be sure the ordinance contains the standards you want!

# 30 Day Rule

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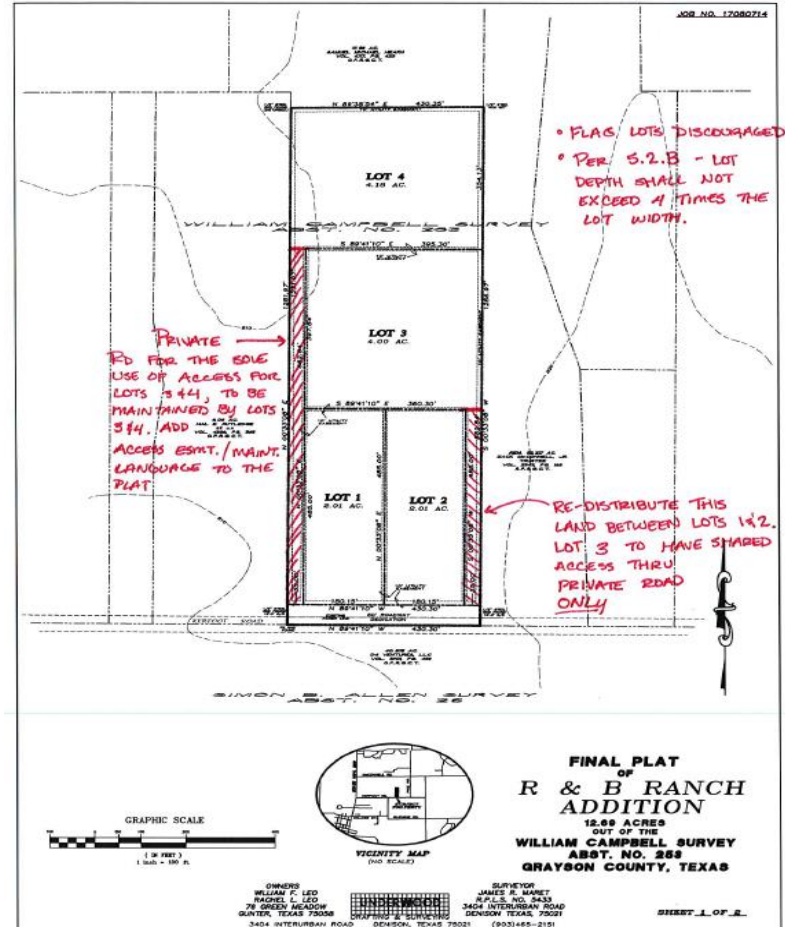
“The municipal authority responsible for approving plats shall act on a plat within 30 days after the date the plat is filed. *A plat is considered approved* by the municipal authority unless it is disapproved within that period.”

Tex. Loc. Gov't Code § 212.009

- **Best Practice Tip:** city engineer should write up technical deficiencies before a plat is denied.
- If process involves P&Z and council review process, the 30 day period applies to each body.
- Applicant can request, and city must issue, certificate stating date of filing and failure to act within 30 days.

# Does your ordinance prevent this?

Bad Plat:





# Does the city have to provide the reason for a plat denial?

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YES, upon request by the applicant, the city must certify the reasons for the plat denial.

TEX. LOC. GOV'T CODE § 212.009(e)

# QUESTIONS?

