

**PRACTICAL TIPS FOR  
DEALING WITH LOCAL GOVERNMENTS  
(What a Real Estate Lawyer Needs to Know and Do)**

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**CHAPTER 26**

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**PRACTICAL TIPS FOR DEALING WITH LOCAL GOVERNMENTS  
(What a Real Estate Lawyer Should Know and Do)**

Commercial real estate attorneys face many hurdles when dealing with land use law issues confronting their projects. Moving away from the generally disciplined business orientation of commercial real estate transactions, they become submerged in a seemingly endless and ineffectual quagmire of government bureaucracy without any economic discipline. Techniques successful in the private sector are often extraordinarily counter productive when utilized in the public sector. The commercial real estate attorney feels they have fallen through a hole into an "Alice In Wonderland" type environment where time and money mean nothing and "things are not as they seem." How can a little real estate attorney keep the queen (local government) from chopping the head off the attorney's project?

During many years of land use law, while maintaining an active commercial real estate law practice, the author has learned that the development community (principals and attorneys alike) just do not "get it" when it comes to dealing with local government. This outline will attempt to provide the legal background necessary to understand the difference between local government law and real property law and then equip the commercial real estate attorney with the practical tools to deal successfully with local government officials on land use law matters. Sometimes, that means knowing the attorney's and their client team's limitations, and associating appropriate land use experts.

For more information on land use law topics, check [www.texasbarcle.com/cle/OLSearchResults.aspx](http://www.texasbarcle.com/cle/OLSearchResults.aspx) specifically the following items:

1. *Zoning Considerations in Real Estate Transactions: Options, Limits, and Strategy*; July 9, 2004, Arthur J. Anderson, Real Estate Law Course 2004.

2. *Zoning: A Real Estate Attorney's Guide*; July 12, 2002, Reid C. Wilson, Real Estate Law Course 2002;
3. *Vested Rights and Investment Backed Expectations*; July 12, 2002, Arthur J. Anderson, Real Estate Law Course 2002;
4. *Land Use Litigation*; July 18, 2003, Robert F. Brown, From *Suing and Defending Governmental Entities* 2003;
5. *The Real Estate Attorney's Guide to Platting*; July 10, 2003, Reid C. Wilson, From Real Estate Law Course 2003;
6. *The Platting Maze: How to Get Through It*; July 9, 2004, William S. Dahlstrom, From Real Estate Law Course 2004.

The only treatise on Texas Land Use law is *Texas Municipal Zoning Law*, originally by UH Law professor John Mixon and now completely reorganized and updated by James L. Dougherty of Houston (with an Appendix on Texas Subdivision Law, by the author).

**I. "TOTO, WE'RE NOT IN KANSAS ANYMORE" (Know Your Adversary).**

A commercial real estate attorney must understand that the legal basis for local government law is *completely different* than that for real property law. Further, they must understand that the attitude that local government officials take in reviewing a commercial real estate project is fundamentally different from that taken by an owner/developer. Only when the attorney (and their client) understand and accept these differences, will they be prepared to then move forward to apply strategies to successfully deal with local governments.

### A. Legal Differences Between Local Government Law and Real Property Law.

Real property law is founded upon private contract law. Local governmental law has nothing whatsoever to do with private contract law and is focused upon constitutional law and specific statutes establishing the structure of the particular local government. These differences are outlined in the following chart.

#### Real Property Law

- Private contract law
- Statutes of general application to all entities (i.e., Property Code)
- Incorporates significant amounts of case law with general application to all entities
- Few "special" laws, rules and regulations

#### Local Government Law

- Constitutional law and principals - virtually no reliance on private contract law
- Many statutes of specific application only to local government (i.e., Local Government Code) & the *specific* local government involved
- Case law often relates to the dealings of local governments only
- Many special laws, rules and regulations

Simply comparing the relative sizes of the Texas Property Code (468 pages) and the Texas Local Government Code (1,282 pages) illustrates the difference in the statutory orientation of the two areas of law.

**PRACTICE POINT:** Commercial real estate attorneys must leave most of their current legal thought processes behind and reach back to their law school days when dealing with local governments. Specific legal concepts applicable only to local governments and which are critical for the attorney to understand are summarized in the following sub-sections.

### B. Immunity ("Even if I did what you say... so what?")

Well established Texas law provides special immunity not only to local governments (*governmental immunity*), but to individual government officials (*official immunity*) for good faith actions taken in the course of their authority. The Texas Supreme Court recently clarified and extended the already broad reach of governmental and official immunity.

*Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417 (Tex. 2004) held that evidence of actual subjective bad faith by a government land use official will not prevent application of the ever broadening official immunity rule which protects officials from liability so long as the traditional 3 point test is satisfied:

- (1) the official acts within the scope of their authority,
- (2) the official's duties require discretion, and
- (3) the official acts in good faith, based on an *objective* (not subjective) standard.

The concept of official immunity has received ever broadening application to shield public officials from individual immunity. In *Ballantyne*, the Texas Supreme Court addressed on first impression the application of official immunity to a Zoning Board of Adjustment (ZBA). The court ended a 10-year land use dispute with a very favorable holding for local governments, reversing a \$600,000.00 judgment against individual members of Terrell Hills ZBA. The Court of Appeals, *en banc*, had reversed the trial court's judgment n.o.v. for the City, holding that the Board members' official immunity defense inapplicable due to evidence of subjective bad faith. A transcript of the ZBA's executive session discussing the disputed permit for an apartment complex contained inappropriate and biased remarks regarding the nature of apartment dwellers, including the statement that they are "scum". This evidence moved the Court of Appeals to hold for the developer despite evidence of some rational basis for the ZBA decision.

The Texas Supreme Court's opinion provides a roadmap to the history and scope of official immunity in Texas, a 50-year-old doctrine based on following well settled public policy:

- (i) encourage confident decision making by public officials without intimidation, even if errors are sure to happen, and
- (ii) ensure availability of capable candidates for public service, by eliminating most individual liability.

The court held that ZBA members are entitled to official immunity if the following 3 issues are satisfied:

1. Scope of authority – The action must fall within state law authorizing action by the official. In *Ballantyne*, ZBAs have clear statutory authority to hear appeals of actions by a city regarding permits. Whether this ZBA made an incorrect decision or had never previously revoked the permit was irrelevant.
2. Discretionary not ministerial action – The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment. ZBA review of a permit appeal was held to be clearly discretionary.
3. Subjective good faith – If a reasonably prudent official under the same or similar circumstances would have believed their conduct was justified, based on the information available, then this subjective good faith supports official immunity. Neither negligence nor *actual* motivation is relevant. The action need not be correct, only justifiable. Specifically, the personal animus of the ZBA members in *Ballantyne* to apartment residents did not preclude a good faith holding, and in

fact was irrelevant. The court analogized to United States Supreme Court decisions interpreting qualified immunity for federal officials to support the court's judgment that suits against government officials exact societal costs which should be avoided in order to permit proper decision making by public officials without concern that those decisions would subject the officials to individual civil liability.

*PRACTICE POINT:* Based on *Ballantyne*, official immunity will surely spread to a broad array of governmental officials of all types, at all levels. Often, private owners believe that a strong threat to sue a public official is a simple solution to “scare the government into submission”, but NOT TRUE. No longer will a threat of suit against even a misbehaving official create much concern (and, if fact, will show you to be a novice in the field). Government defense counsel will be filing (and winning) many motions for summary judgment to eliminate individual claims against government officials. However, constitutional claims, such as violation of procedural and substantive due process, and civil rights violations, although tough to prove, will have continued vitality.

The broader concept of sovereign immunity is discussed in *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997). This case outlines the following points of law regarding sovereign immunity:

- (1) Sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State. *Id.* at 405.
- (2) Sovereign immunity embraces two principles: (i) immunity from suit and (ii) immunity from liability. *Id.*
- (3) The State retains immunity from suit, without legislative consent, even if the State's liability is not disputed. *Id.* Immunity from suit bars a suit against the State unless the State expressly gives its

consent to the suit. *Id.* In other words, although the claim asserted may be one on which the State acknowledges liability, this rule precludes a remedy until the Legislature consents to suit. *Id.* The State may consent to suit by statute or by legislative resolution. *Id.* Legislative consent for suit or any other sovereign immunity waiver must be “by clear and unambiguous language.” *Id.*

- (4) The State also retains immunity from liability though the Legislature has granted consent to the suit. *Id.* Immunity from liability protects the State from judgments even if the Legislature has expressly consented to the suit. *Id.* Even if the Legislature authorizes suit against the State, the question remains whether the claim is one for which the State acknowledges liability. *Id.* The State neither creates nor admits liability by granting permission to be sued. *Id.*
- (5) When the State contracts, it is liable on contracts made for its benefit as if it were a private person. *Id.* Therefore, when the State contracts with private citizens, it waives immunity from liability. *Id.* at 408. But the State does not waive immunity from suit simply by contracting with a private party. *Id.* Legislative consent is still necessary.

TEX. GOV'T CODE Chapter 2260 retains sovereign immunity from suit in breach-of-contract cases against the State but provides an administrative process to resolve those claims. This administrative scheme applies to all written contracts for the sale of goods, services, or construction. TEX. GOV'T CODE §2260.001(1). The intent of this chapter is to promote mediation and settlement. *General Services Commission v. Little-Tex Insulation Company, Inc.* 39 S.W.3d 591, 596 (Tex. 2000) provides a good summary of the administrative scheme under Chapter 2260.

*Sovereign immunity* should be distinguished from the concept of *governmental immunity* even though Texas courts have a tendency to use

them interchangeably. Sovereign immunity refers to the State's immunity from suit and liability. *See City of Jefferson v. Vallery*, 2005 WL 598312 at 5 Tex.App.-Texarkana 2005). Sovereign immunity not only protects the State from liability but also protects the various divisions of state government, including agencies, boards, hospitals and universities. *See Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003). Governmental immunity, on the other hand, protects political subdivisions of the State which includes counties, cities and school districts. *Id.*

There is a split of authority on the ability to sue cities which focuses on the language in the city's charter. One line holds that charter language stating that a city may “sue and be sued” or “plead and be impleaded” means that a city may sue third parties, but is also subject to being sued. *See Service Employment Redevelopment v. Forth Worth Independent School District* 2005 WL 503172 (Tex. App.-Forth Worth 2005) at 10. Another line of cases holds that cities must more specifically authorize third parties to sue them, and without that specific authorization, third parties are left to the Texas Torts Claims Act for the scope of areas where a city may be sued. *City of Dallas v. Reata Construction Corp.* 83 S.W.3d 392, 398 (Tex. App.-Dallas, 2002).

Also, some city charters require notice to the city in advance of filing a lawsuit and the failure to timely provide the notice is jurisdictional. *Mayers v. City of DeLeon* 922 S.W.2<sup>nd</sup> 200, 203 (Tex. App.-Eastland, 1996, writ declined). *See also City of Beaumont v. Fuentes*, 582 S.W.2<sup>nd</sup> 221 (Tex. Civ. App.-Beaumont 1979, no writ).

Governmental immunity is waived as to vested rights under Tex. Loc. Gov. Code Sec. 245 as of September 1, 2005. Tex. Loc. Gov. Code Sec. 245.006(b).

Immunity does not preclude constitutional claims. *McCrary v. City of Odessa* 482 S.W.2d 151, 153 (Tex. 1972) held that a charter notice provision, as a condition precedent to the institution of suit, was sustained against an

attack that such provision was in violation of Article I, Section 13 of the Texas Constitution. The court did recognize that there may be exceptions to the general application of such notice requirements and mentioned infants of tender years and those either mentally or so physically incapacitated that they are unable to comply.

**PRACTICE POINT:** Be sure you and your client are aware of a local government's immunity protections. If in a dispute with a local government over a contract, promptly and carefully investigate notice requirements, provide timely notice where required and advise your private sector client of special local government protections when considering how to negotiate a dispute resolution. Many well intentioned parties have been speared by the special protections of Texas law provided to government entities.

**C. No Equitable Defenses ("Gee, I'm sorry, I told you the wrong answer and you bought the land... but we're still not liable.")**

Equitable defenses: estoppel, waiver, laches and the like, *generally* do not apply to interactions with local governments and their officials. The public policy for this preclusion of standard common law defenses is that, although it is foreseeable that mistakes will be made by government officials (they're just human), those mistakes should not be binding upon the government since that would create a hardship on the general public. The idea is that it is better for the mistake to be ignored and the correct result applied for the benefit of the general public, rather than to protect the rights of the party which received the bad information.

The seminal case is *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 831 (Tex. 1970) holding that the inaccurate representation of a city official as to the zoning classification of a tract did not estop the city from enforcing its zoning ordinance. In *Edge v. City of Bellaire*, 200 S.W.2d 224, 228 (Tex. Civ. App.—Galveston 1947, writ ref'd.) the negligent issuance of a building permit and reliance thereon by the landowner did not prevent the

city from enforcing its zoning ordinance, which prohibited the structure. In both cases, the owner could have independently investigated and determined the correct state of affairs, determined the proper situation and then not have been harmed. Unfortunately, in dealings with local governments, many folks simply ask what to do, do it and figure if they are doing something wrong the government will tell them. The problem is that when the government figures out it shouldn't have let something happen, the cost and time to remediate the problem can be significant.

One case, *City of Dallas v. Rosenthal*, 239 S.W.2d 636, (Tex. Civ. App.-1951, writ ref'd n.r.e) has held out hope that there would be some circumstances where estoppel would apply to benefit a property owner. For many years, there were no reported decisions where estoppel was applied against a local government. However, recently, several cases demonstrate that exceptions to the estoppel rule have vitality and local governments may be estopped in exceptional circumstances:

1. *Joleewu, Ltd. v. City of Austin*, 916 F.2d 250, 254 (5th Cir. 1990) - applying the exception to the general rule precluding application of estoppel to cities in the performance of governmental functions where justice, honesty, and fair dealing are required.
2. *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 353 (Tex. App.—Texarkana 2002, pet. ref'd) - applying estoppel against a city is appropriate in “exceptional circumstances where justice requires it”. In this case, the city improperly issued a drilling permit, the wells were drilled and the city was estopped to revoke the permit despite the violation of city ordinance.
3. *City of Austin v. Garza*, 124 S.W.3d 867, 874 (Tex. App. – Austin 2003, no pet.) - holding a city bound to a note on a final, recorded plat upon which the city relied for dedications in the face of allegations by the city that it approved the note as a “mistake” since it would be “manifestly unjust for the city to retain

the benefits of its mistake yet avoid its obligations”.

The *Maguire* and *Garza* cases support the argument that an inaccurately issued certification is enforceable against a city, since these cases held that even if the plat (*Garza*) or the permit (*Maguire*) were approved without authority (i.e., in contravention of the then applicable rules), that estoppel applied. However, I do not expect local governments to roll over in every circumstance, but to take a very limited view of the “exceptional circumstances” necessary to justify estoppel. Some may simply try to explain away these cases as “aberrations” and wrongly decided.

**PRACTICE POINT:** Real estate attorneys should realize that arguing reliance on misinformation obtained from the government is *generally* not as successful as in an identical private sector situation. In fact, until the recent line of estoppel cases referenced above, it was a hopeless endeavor. This recent case law provides some hope and, where the facts are strong, there may be a cause of action worth pursuing (or at least a lawsuit to threaten which may get the local government’s attention).

Do not exclusively rely upon the local government for your conclusions in due diligence without some documentation to support active reliance. Where the transaction can bear the cost, independent confirmation is the rule, and where it can’t, advise the client that reliance is risky.

#### **D. Limited Local Government Power (“I thought that the ‘gov-ment’ could do whatever it wants!”)**

Different local governments have different scopes of power based on how they have been organized structurally. Surprising to some attorneys, only “home rule” municipalities have full powers of self governance. Home rule cities have all authority that the State of Texas has, except for those limited areas where the State has *specifically* “pre-empted” local power by reserving authority. *Dallas Merchant's and*

*Concessionaire's Association v. Dallas*, 852 S.W.2d 489, 490-491 (Tex. 1993).

An example of an area of preemption is regulation of alcoholic beverages, where the State has pre-empted regulation through the adoption of comprehensive regulation through the Texas Alcoholic Beverage Commission. *Id.* at 491-492. Even in the area of State law pre-emption, local governments may regulate, to the extent that the local regulation is not inconsistent with State regulation. *Id.* at 491. To be a home rule city, a city must have at least 5,000 population and have properly adopted a home rule charter. Most Texas cities with over 5,000 population are home rule cities, but an attorney dealing with a city should always check to confirm their assumption.

Smaller cities, and larger cities which have not adopted a home rule charter are “general law” cities. General law cities have only the authority that has been *specifically* delegated to general law cities by the State under the Texas Local Government Code.

The charter of a particular city may have limitations on the city’s authority. For example, some city charters limit the term of various contracts. *See*, City of Houston Charter Art. II, Sec. 17 limiting franchises and leases to 30 years without a public vote.

Counties are legal subdivisions of the State of Texas, and like general law cities, have only the authority specifically authorized to them by the State of Texas under the Texas Local Government Code. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003).

There are many “special purpose” governmental entities with very limited powers (but in some cases, not as limited as their title might indicate):

- Municipal Utility Districts
- Water Districts
- Flood Control Districts
- Navigation Districts
- Drainage Districts
- Levee Districts
- Road Districts

Municipal Management Districts  
 Public Improvement Districts  
 Tax Increment Investment Zones

Besides general lack of power, there are other defenses to the enforceability of government agreements for various reasons:

1. No Contract Zoning: A city may not contractually agree to rezone property. ("contract zoning"). See, *City of Pharr v. Pena*, 853 S.W.2d 56 (Tex. App. – Corpus Christi, 1993, writ denied). Rezoning requires a specific statutory process set forth in TEX. LOC. GOV'T CODE Chapter 211 and contract zoning constitutes an illegal "delegation of authority" which is against public policy and, thus, void.
2. No Debt Without Vote. The Texas Constitution prohibits local governments from incurring "debt" without a public bond election. Tex. Const. Art. 11 Sec. 5 & 7. Debt is broadly defined such that any financial obligation which is not fully funded in a current year's budget is a "debt." *Texas & N.O.R.R. Co. v. Galveston County*, 169 S.W.2d 713, 715 (Tex. 1943).
  - Leases to local government are subject to "annual appropriation", which means that the local government must annually include the necessary rent in its budget or the rent *may not be paid*. *City-County Solid Waste Control Board v. Capital City Leasing, Inc.*, 813 S.W.2d 705, 707 (Tex. App – Austin 1991, writ denied) For a complete discussion of the issues in leasing to a local government, see Cheatham & Lewis, Leases with Texas Home-Rule Municipalities, *Real Estate Law: Leases in Depth*, SMU Law School CLE Seminar, March 16, 2000 ("Cheatham & Lewis").

- Many local government attorneys believe indemnities by a city are subject to attack as a violation of the prohibition against debt without a special funding provision. If a city indemnity is limited to "the extent permitted by law", then the city attorney was attempting to placate the other party to a transaction, but preserve this defense (which would really be preserved anyway, in my opinion).
- Attorney fee provisions in contracts are considered a debt by many local government attorneys.
- A constitutional amendment is to be considered by Texas voters in 2005 to eliminate this concern for economic development agreements.

TEX. LOC. GOV'T CODE § 271.903(a) provides authority for "local governments" (a list specifically defined therein) to lease real property if the lease provides either or both: (i) the local government may terminate each year if funding is not appropriated for the rent, or (ii) establishing only a "best efforts" obligation on the local government to appropriate rent funds annually. These leases are considered "subject to annual appropriation" in local government speak.

3. Public Sale of Real Property. Generally, all sales of local government owned real property requires a public sales process and conveyance for fair market value. TEX. LOC. GOV'T CODE § 272.001.

*PRACTICE POINTS*: Whenever an attorney is dealing with a local government, the attorney needs to confirm the type of local government. Then, if an action is being taken, the attorney needs to confirm that the local government has the power to take that action. Generally, in land use matters, this is not a problem.

When dealing with leases or purchases, particularly in smaller towns where the local government (and potentially, even its counsel) is not experienced or sophisticated, you may need to tell the local government how to accomplish the transaction properly. Be aware that just because a local government is doing what you want, it may not have the power to do so. In economic development situations, local governments have sometimes “done what it takes” to lure a new business, while unintentionally overstepping its authority. Most local governments are open to advice and assistance in documentation, particularly in economic development situations.

One solution is to ask the counsel for the local government to provide an opinion as to authority, and enforceability. The opinion may not be forthcoming, but it opens the door to a discussion which may cause the local government counsel to investigate and provide background for the private sector attorney to independently determine if the authority and enforceability is an issue. This process may uncover problems and then the attorneys can work co-operatively to solve them.

Specific areas of concern:

- Agreements for future payments
- Agreements regarding zoning
- Indemnifications
- Authority of special purpose entities.

#### **E. Special Economic Development Powers (Maybe we can do what you want, IF you bring jobs and tax revenue to town)**

Traditionally, Texas local governments had little authority to provide economic development incentives. What economic development agreements which were actually signed were potentially subject to a number of legal attacks. In the 1980’s, Texas knew that it must empower Texas cities’ ability to compete in the economic development arena. Now, several specific laws provide significant authority to local governments for this purpose. If appropriated

handled, there should no longer be concerns that economic development agreements which a local government executed are suspect. Some of these provisions are not well known, particularly to smaller local governments, with less sophisticated officials and council engaged in economic development activities. A relocating business will be counting upon the enforceability of agreements entered into by the local government and would be upset if they learned that the agreement was void and unenforceable.

Broad authorization for economic development is extended in TEX. LOC. GOV’T CODE Chapters 380 (cities) and 381 (counties). This authority is applicable to all cities. All that is needed is a “program ... to promote the state of local economic development and to stimulate business and commercial activity in the municipality.” TEX. LOC. GOV’T CODE § 380.001(a). Benefits offered by Texas cities to a significant new employer have included:

- monetary grants based on the number of new jobs (sometimes limited to “full time” jobs with insurance benefits)
- waiver of local development fees
- public provision of offsite improvements necessary to support the new facility (utilities, streets, traffic control, etc.)
- sales tax sharing
- tax abatement
- expedited permitting.

TEX. LOC. GOV’T CODE Chapter 378 provides that cities may establish a “neighborhood empowerment zone” to promote affordable housing, economic development, social services, education or public safety within the zone. Once established following the required procedure, the city is granted power to waive development fees (including building and impact fees), refund sales taxes, abate property taxes and encourage energy conservation. TEX. LOC. GOV’T CODE § 378.004.

Cities may create “industrial districts” in their extraterritorial jurisdiction and then enter into up to 15 year contracts with land owners to

provide immunity from annexation, for the city to provide fire protection, and containing “other lawful terms and consideration the parties agree to be reasonable, appropriate and not duly restrictive of business activities.” TEX. LOC. GOV'T CODE § 42.004. Houston has been very aggressive in this area, with approximately 929 acres in 99 such districts today and a standard procedure with standard forms to implement them. Action is currently underway to add 75 more companies to Houston's Industrial District program.

TEX. TAX CODE Chapter 312 authorizes cities, counties and other local governments to abate property taxes on real estate improvements (not land) and personal property for up to 10 years. The local government must adopt each 2 years rules for the approval of these abatements. Typically, the rules limit the type of new development which qualifies, the type of property to be abated, the length of the abatement period and the percentage of value abated in order to attract specific types of development valued by that community. The primary driver is local jobs and sales tax, although the amount of investment is also important (but primarily a future value to the community since the tax abatement reduces or eliminates current taxes).

The Texas Local Government Code provides for numerous “special districts” such as Tax Incentive Reinvestment Zones, Public Improvement Districts and Municipal Management Districts. See, TEX. LOC. GOV'T CODE Chapters 371-397. These districts have various levels of authority to provide grants, reimbursements and directly provide necessary public infrastructure to support private projects which benefit their jurisdiction.

**PRACTICE POINT:** When discussing economic development issues, be aware of the options available and the process to have them approved.

#### **F. Authority and Procedure ("Who needs to approve it and who needs to sign it?")**

Most actions by a city need to be authorized by an ordinance passed by the city council. *City of Corpus Christi v. Bayfront Associates, Ltd.*, 814 S.W.2d 98, 105 (Tex. App. – Corpus Christi 1991, writ denied) The ordinance would authorize the action to be taken. The mayor, as chief executive officer of the city, would sign. It may be an illegal “delegation of authority” for anyone other than the city council to be able to bind the city. *Id.*, *City of Galveston v. Hill*, 519 S.W.2d 103, 105 (Tex. 1975).

Counties work through a commissioner's court which issues orders. The order would authorize the proposed action. The county judge would sign on behalf of the county. Commissioners court may only validly act as a body; the acts of a single commissioner does not bind the court. *Hays County v. Hays County Water Planning Partnership*, 106 S.W.3d 349 (Tex. App. – Austin, 2003, no pet.)

Local governments have a history of fouling up procedural matters, thus giving rise to "validation statutes." Historically, each legislature routinely passed limited validation statutes, usually bracketed as to time and size of city. Validation statutes cured all procedural, but no constitutional defects in municipal actions. *Leach v. City of North Richland Hills*, 627 S.W.2d 854 (Tex. App.--Fort Worth 1982, no writ); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.--Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991). Even pre-emption of state statutes is cured by a validation statute. *West End Pink, Ltd. v. City of Irving*, 22 S.W.3d 5 (Tex. App.-- Dallas 1999, writ denied). However, the 1997 legislature failed to pass a validation statute, reportedly the first such failure in 61 years. A “permanent” validation statute was passed by the 1999 Legislature. TEX LOC. GOV'T CODE § 51.003. Any governmental act or proceeding of a city is conclusively presumed valid on the third anniversary of the effective date, unless a lawsuit is filed to invalidate the act or proceeding. The following are excluded from validation:

- void actions or proceedings,
- criminal actions or proceedings,
- pre-empted actions,

- incorporation or annexation attempts in another city's ETJ, and
- matters where authority is being litigated before validation occurs.

Unlike prior validation statutes, there are no limits on the applicable cities.

**PRACTICE POINT:** Try to have the local government “do it right”, but even if it doesn't, the Validation Statute may solve your problem.

### **G. Presumption in Favor of the Government ("You mean that I have to prove that the government was wrong?!")**

Generally, government actions are presumed valid. *Kay v. Schneider*, 221 S.W. 880, 888 (Tex. 1920). See also, *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 71 S.W.3d 18, 38 (Tex. App.-Forth Worth 2002). Therefore, the burden of proof is upon an owner. *Id.* This is a tough burden, as the presumption in favor of the government is strong. *Id.*

The notable exception is in the area of “exactions” where under the US Supreme Court cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 324 (1994), as adopted by the Texas Supreme Court in *Flower Mound v. Stafford Estates*, 135 S.W.3d 620 (Tex. 2004), the burden of proof is on the local government to demonstrate that its exaction is valid.

Two major Texas zoning cases show the tough burden to be carried by an owner, whether challenging a “down-zoning” or a “zoning refusal” situation:

#### ***Sheffield Development Company, Inc. v. City of Glenn Hill Heights*, 140 S.W.3d 660 (Tex. 2004)**

This case was a big zoning win for cities which shows how tough the burden of proof is for a developer challenging a down-zoning. The Texas Supreme Court upheld a significant down-zoning after a 15 month moratorium against the developer's takings claims. The developer conducted significant due diligence

before buying a 184 acre development tract, including meeting with city officials to determine if any change in the city's development regulatory scheme was contemplated. The developer was told no changes were envisioned. The tract was zoned consistent with the developer's desired project. Almost immediately after the developer purchased the property, the city established a moratorium on development applicable to 12 zoning districts, including the developer's tract. After the moratorium was extended to a total of 15 months, the city down-zoned the property, decreasing allowed density by increasing minimum lot size from 6500 square feet to 12,000 square feet, such that the land value dropped 50%. The developer sued based on state takings theories for a regulatory taking.

The court fully reviewed federal regulatory taking jurisprudence (which it stated as appropriate guidance for a state constitution takings claim), particularly the US Supreme Court decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The court applied the *Penn Central* issues to consider in a regulatory taking case:

- (1) the economic impact of the regulation on the owner;
- (2) how the regulation has interfered with “distinct investment-backed expectations”; and
- (3) the character of the governmental action.

The *Penn Central* test is applied by the court as a question of law, not a question of fact, but only after a determination that the government action substantially advanced a legitimate government interest.

Applying these factors, the Supreme Court first held that a down-zoning to reduce development density is legitimate to deal with the city's desire to reduce its ultimate population potential. Then, the Court applied the three *Penn Central* factors as follows:

- **Economic impact** – The down-zoning did not take all economic value of the property (which would result in a taking), but only

50%. Furthermore, that value was 4 times the developer's purchase price. Although the down-zoning significantly interfered with the developer's reasonable expectations when it invested funds in the land and related development, land development is inherently speculative and diminution in value is not the principal element to be considered in takings analysis.

- **Investment-backed expectation** – The investment backing of the developer's expectations at the time of the down-zoning was simply the lot purchase price and due diligence expenses, which was a small fraction of the investment that would be required for full development and therefore, "minimal."
- **Character of the government action** – The rezoning was general, affecting numerous tracts, not just the developer's and thus not like an exaction imposed on a single developer. Although clearly troubled by the city's unseemly conduct during the developer's due diligence, the Court held that the risk of rezoning is to be expected by a developer, particularly in growing communities.

The Court specifically addressed the city's misconduct, citing evidence that the city "took unfair advantage" of the developer including slow playing decisions with a strategy to extract concessions. Nonetheless, the Court was motivated by the legitimate public policy reasons supporting the rezoning. This decision is particularly powerful considering the difference from the refusal to up-zone in the court's previous significant zoning decision in *Mayhew v. City of Sunnyvale* where the factual circumstances were much stronger for the city. Despite a much more sympathetic developer with strong facts, the court stated:

" . . . we think that the city's zoning decisions apart from the faulty way they were reached, were not materially different from zoning decisions made by cities everyday. On balance, we conclude that the rezoning was not a taking."

Finally, the court ruled that a 15 month moratorium is valid and not a taking, noting that the rezoning process is slow and that the moratorium advanced a legitimate government interest.

*Sheffield Development* took the wind out of developer's sails, who thought there may be a more sympathetic Texas Supreme Court in a down-zoning case than in the denied up-zoning case presented in *Mayhew v. Town of Sunnyvale* (discussed below). Even with improper conduct by the city, including an unnecessarily lengthy moratorium, the public policy considerations supporting the zoning process overruled bad behavior by the city during that process. Developers must carefully consider challenging zoning decisions, even surprise down-zonings under the current state of Texas law. *Sheffield Development* is required reading for all landowners and their counsel to see how tough current zoning law will be on their claims against a local government.

***Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998)***

This case is a unanimous decision written by Justice Greg Abbott which hit all the constitutional issues raised in a "refusal to rezone" case. The landowner lost on every issue except for the holding that the issues are "ripe for adjudication."

Sunnyvale is a lightly developed, general law city with 1 acre minimum lot requirements in its single family zones (originally intended to address septic tank requirements). Mayhew owned 26% of the land in the City available for residential development. Commencing in 1985, Mayhew began meeting with City officials regarding a proposed planned development of his land at a higher density than the 1 unit per acre requirement. In 1986, the City adopted a Comprehensive Plan reflecting an anticipated increase in population from the current 2,000 to 25,000 by 2006, and 30-35,000 by 2016. Contemporaneously, the City amended its zoning ordinance to allow, upon city council approval, planned developments with densities greater than 1 unit per acre. Later in 1996,

Mayhew proposed a planned development of between 3,650 - 5,025 units (3+ units per acre). A professional planning and engineering firm retained by the City reviewed the proposal and determined that it satisfied each of the requirements of the City's zoning ordinance, and therefore, recommended approval. After passing a building moratorium, the planning and zoning commission recommended denial. In late 1986, city council appointed a negotiating committee, including two council members, the mayor and the city attorney to work with Mayhew. As a result, there was "tentative" agreement for a 3,600 unit project. However, due to political pressure brought by citizens on the city council, the city council rejected the planned development in January 1987. In March 1987, Mayhew sued the town and the four council members who voted against the request.

Mayhew One: In the first Mayhew case, *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.BDallas, 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991), summary judgment in favor of the individual council members was upheld, absolving them of any liability for acting in their capacity as council members on the legislative issue of rezoning. The summary judgment rejecting Mayhew's constitutional claims was reversed and remanded for trial.

Mayhew Two- Trial Judgment for Mayhew: Upon remand, the trial court considered all the possible constitutional claims (state and federal procedural due process, substantive due process and equal protection, as well as taking). Mayhew won across the board, being awarded \$5,000,000 in damages plus pre-judgment interest and attorney's fees, totaling \$8,500,000.00. The trial court entered extensive findings of fact and conclusions of law highly favorable for Mayhew and clearly intended to protect the judgment on appeal, to the maximum extent possible.

Reversal on Appeal: The Court of Appeals reversed, holding that the constitutional claims were not ripe for review. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d at 234. In a Supplemental Opinion, the Court of Appeals reviewed the

merits of the Mayhew claims in light of the Supreme Court's recent decision *Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994), *cert. denied* 13 U.S. 1112 (1995) and held that the evidence was factually insufficient to support the trial court's judgment for Mayhew. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d at 259-68.

Texas Supreme Court Affirmation of Reversal: The Supreme Court addressed each issue in a decision which is a primer for a constitutional challenge in a refusal to rezone case. Mayhew lost on all issues but ripeness of the case for adjudication.

The Court applied federal jurisprudence on the issue of ripeness. Mayhew was not required to follow the general rule requiring a request for a variance after the denial of rezoning, or to make reapplication, since the nature of a planned development includes negotiations which can substitute for the variance requirement. Mayhew reapplying with an alternative proposal or requesting a variance was held to have likely been a "futile" act.

Mayhew hit all the right buttons in asserting constitutional claims. Mayhew's claims were reviewed under federal constitutional standards, although the Court declined to hold that federal and state constitutional claims are the same (Texas Constitutional claims may be broader). The Court held that the trial court's attempt to bind the appellate courts with extensive findings of facts and conclusions of law was not binding on the appellate courts since most of the issues were questions of law. The Court applied the requirement that to avoid a regulatory taking (one where there is no physical taking), a regulation must "substantially advance" a legitimate state purpose. The maintenance of the city's existing character and regulating the type and character of its growth was sufficient to uphold the density limitations.

The Court proceeded to determine that the denial of the higher density planned development did not either: 1) eliminate all economic viable use; or 2) unreasonably interfere with the land owner's right to use and enjoy its property. The Court spent several

pages considering the “investment expectation” of Mayhew and considered the historic use of their property for agricultural purposes, the existence of zoning since 1963 and the retained value of the land for agricultural and low density housing purposes before concluding there was no investment backed expectation which would support a takings judgment.

Mayhew’s substantive due process, equal protection and procedural due process claims were reviewed and quickly rejected. The Court held that “political pressure,” which could be a contributing factor to a denied rezoning, does not violate the landowner’s substantive due process rights, so long as the City has legitimate government concerns and the denial was rationally related to those concerns (in this case the effects of urbanization on the City). On the equal protection claim, the Court was unconvinced there were other “similarly situated” land owners treated differently, and focused on the fact that there only needs to be a rational relationship to a legitimate state interest for regulation to survive an equal protection challenge. On the final issue of procedural due process, the Court held that Sunnyvale must only provide notice and an opportunity to be heard, and that due to the fact that zoning is a legislative act, Sunnyvale is entitled to consider all facts and circumstances which may effect property of the community and the welfare of its citizens in making a decision.

A landowner and its attorney must realize that a refusal to “up zone” a tract will rarely provide a fertile ground for litigation, unless the facts are truly unusual. The facts in *Mayhew* were positive for the landowner and his counsel asserted all available causes of action, yet come up empty. If a landowner wants to sue a city for a denied rezoning, he should always read *Mayhew* before making the decision to proceed.

**PRACTICE POINT:** Never have confidence when dealing with a controversial zoning matter. Don’t think that challenging a zoning decision which goes against your client will be easy...so be sure your client is as prepared as possible for the re-zoning process. Consider retaining

qualified zoning professionals to assist and support the zoning process.

## **H. Moratoria (They are freezing out our project!!)**

A city may institute a moratorium on development applications by city council action in order to prevent a "race to the application window" while it is considering changes to its development regulations. A broad 6 month moratorium was upheld as being reasonable as a matter of law. *Mont Belvieu Square, Ltd. v. City of Mont Belvieu*, 27 F. Supp.2d 935, 937 (S.D.Tex. 1998). A 15 month moratorium applicable to limited property was upheld in *Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

The Texas legislature limited moratoria on new residential development (as of 2001) and commercial development (as of 2005). TEX. LOC. GOV’T CODE §§ 212.131-212.132. A moratorium does not affect vested rights under TEX. LOC. GOV’T CODE Chapter 245 or common law. TEX. LOC. GOV’T CODE § 212.138. The limits include the following:

- Required public hearings with notice
- Limits on when temporary moratoria may commence
- Deadline for action on a proposed moratorium
- Required findings in support of the need for the moratorium
- Limitation of moratoria to situations of shortage of (i) essential public services (defined as water, sewer, storm drainage, or street improvements), or (ii) “other public services, including police and fire facilities”
- Moratoria automatically expire after 90 days (commercial) and 120 days (residential) from adoption, unless extended after a public hearing and specified findings and commercial moratoria may not extend beyond 180 days total
- A mandatory waiver process with a 10-day deadline for a city decision (vote by

the governing body) from the date of the city's receipt of the waiver request.

TEX. LOC. GOV'T CODE §§ 212.133-212.137.

**PRACTICE POINT:** A landowner must realize that if a moratoria is established before their first development application is filed, the entire development scheme they may have relied upon in their development assumptions may evaporate. Therefore, **prompt** action to assess the local political situation and file necessary applications is warranted.

### I. Some Cities Enforce Private Residential Restrictions

In 2001, the legislature moved former TEX. LOC. GOV'T CODE Chapter 230 (originally enacted in 1965) to the Subdivision Act as § 212.131. A city with (i) an ordinance requiring uniform application and enforcement of § 211.131, and (ii) either (a) no zoning, or (b) over 1,500,000 population, may enforce deed restrictions affecting the use, setback, lot size or type, number of structures, and effective 2003, commercial activities, keeping of animals, use of fire, nuisance activities, vehicle storage, parking, architectural regulations, fences, landscaping, garbage disposal and noise levels by suit to enjoin or abate a violation and/or seeking a civil penalty. TEX. LOC. GOV'T CODE §§ 212.131-212.137. Municipal enforcement of deed restrictions is a public purpose and constitutional. *Young v. City of Houston*, 756 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

Deed restriction enforcement is a *governmental* function. TEX. LOC. GOV'T CODE § 212.137. Performance of a governmental function is not typically subject to equitable defenses such as laches, waiver, and estoppel (the typical defenses asserted in a deed restriction case).

In addition to direct enforcement, some cities will not approve a replat if the city attorney determines that the effect of the replat would be a violation of existing restrictions. A replat must not "attempt to **amend or remove**

any covenants or restrictions" (*emphasis added*). TEX. LOC. GOV'T CODE § 212.014. There is no comparable provision for counties. In some neighborhoods, restrictions affecting lot subdivision or size may not have been enforced and, in the opinion of the real estate lawyer, are no longer enforceable due to waiver or change in conditions, but nonetheless remain of record. Sometimes the restrictions are ambiguous as to whether they would prevent the subdivision in question, but the landowner wishes to proceed with the development based on his attorney's legal opinion that the restrictions are unenforceable or inapplicable, figuring that area property owners will not have the stomach or resources for a legal fight. Houston and many surrounding cities construe "amend or remove" in § 212.014 to mean "violate." Therefore, if a proposed plat arguably violates restrictions, the city will take the position that the replat must be disapproved, as it violates § 212.014(3). The City of Houston takes the further position that it is the applicant's burden of proof to show that the restrictions are not being violated. Further, residential replats in the City of Houston have been denied where deed restrictions were modified or created between the initial plat application and final consideration, with the express intent to prohibit the pending subdivision. The City of Houston rejects the argument that the application of the modified restrictions violated the applicant's vested rights in the regulations applicable at the time of application.

Many developers build small commercial, townhouse or apartment projects in older neighborhoods with restrictions of record, but a clear pattern of no enforcement. The developer figures it can "out last/litigate" any private party opposing the project and/or assert the many equitable defenses to restrictions. The last thing they anticipate is local government *use* controls when either developing in an unzoned city or where their project is properly zoned. When local government steps in to enforce private residential restrictions, it is a chilling situation which often will kill the project.

**PRACTICE POINT:** Beware in cities like Houston or Pasadena, which directly enforce

residential deed restrictions, or interpret the Subdivision Act to preclude approval of a replat which has the effect to violate deed restrictions.

### **J. Watch Out When Dealing with a Zoning Board of Adjustment (What do you mean that my time is up?!)**

Zoning Boards of Adjustment handle appeals from local government official's development decisions, consider variances and special exceptions and handle other matters specifically delegated to them by a City. TEX. LOC. GOV'T CODE § 211.009(a). Several special rules apply to ZBAs:

1. Decisions are made by a "super majority" vote requiring 75% of the ZBA members to affirmatively approve a request (typically 4 of 5 members). TEX. LOC. GOV'T CODE § 211.009(c).
2. There is no "appeal" to City Council, instead the appeal is judicial. TEX. LOC. GOV'T CODE § 211.011(a).
3. Appeal is by "writ of certiorari", a special statutory cause of action. TEX. LOC. GOV'T CODE § 211.009.
4. An appeal must be filed within **10 days** of the date the ZBA decision is filed in its office. TEX. LOC. GOV'T CODE § 211.009(b).
5. Appeal does not stay the ZBA decision unless the appellate court enters an order upon "due cause." TEX. LOC. GOV'T CODE § 211.009(c).

*PRACTICE POINT:* When consulted by a client on a ZBA issue, remember:

- Winning requires more than a majority
- No appeal to City Council
- Watch the 10 day clock for judicial appeals
- No stay on appeal w/o "due cause" hearing.

## **II. THE LANDOWNER'S WAR CHEST (DOROTHY, DON'T FORGET YOU HAVE THE RUBY SLIPPERS!!)**

Despite the dismal feeling most landowner's and their attorneys have after

reviewing current land use law, there are a few magic potions available to the wizards representing landowners. However, these primarily relate to the platting process, not the zoning process. The reason is that zoning is a *legislative* process and the law grants broad discretion to local governments making policy and laws. Platting is more *administrative*, with an engineering infrastructure focus and if the rules are met, then the approval become *ministerial*.

### **A. Vested Rights**

A landowner has "vested rights" in the rules and regulations applicable to a project upon first development permit application (usually the plat). TEX. LOC. GOV'T CODE § 245. This is known as the "Freeze Law."

TEX. LOC. GOV'T CODE § 245.002(a) states:

"Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit **solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time [(1) the original application for the permit is filed [eff. 9/1/05 add- for review for any purpose, including review for administrative completeness; or (2) a plan for development or real property or plat application is filed with a regulatory agency.]**"

This vested right applies to subsequent governmental approvals in the development process so long as they are all part of the same project. Therefore, if a land owner hears that the subdivision or zoning ordinance of the city is being redrafted and is proposed to implement limitations which will negatively impact the land owner, they can have a "race to the application window" to submit for plat approval prior to the date that the revised rules and regulations are legally applicable. See *Quick v. City of Austin*, 7 S.W.3d 109, 111 (Tex. 1998) for a complete

discussion of the history of the Freeze Law and the peculiarities of its inadvertent repeal in 1997, and re-adoption in 1999. The Freeze Law is constitutional and not an illegal delegation of authority to private parties. *City of Austin v. Garza*, 124 S.W.3d 867, 873-4 (Tex. App.—Austin 2003, no pet.)

A preliminary plat approval creates vested rights for the entire subdivision area, including individual lots, such that no new development rules may be applied for construction on those lots (subject to any applicable exceptions to that general rule). *Hartsell v. Town of Talty*, 130 S.W.3d 325, 328 (Tex. App. – Dallas 2004, no petition history to date). In *Hartsell*, the court rejected the city’s position that the plat was a distinct “project” for vested rights purposes, separate from development activities on the tracts created by the plat. Noting the practical concerns of the city, that “outdated” rules would apply to future development, the court countered that the legislature clearly intended such result “to alleviate bureaucratic obstacles to economic development.” *Id.*

Effective September 1<sup>st</sup>, the Freeze Law has just been amended to do the following:

1. Waive governmental immunity as to vested rights. *See S.B. 574*;
2. Expand the matters covered. *See S.B. 574 and discussion below*;
3. Add utility contracts to the definition of a “permit”. *See S.B. 848*;
4. Clarify when vested rights accrue—on filing original application or plan for development or plat approval “that gives the regulatory agency fair notice of the project and the nature of the permit sought.” *See S.B. 848*;
5. Permits a regulatory agency to cause a permit application to expire the 45<sup>th</sup> day after filed if additional required information is not provided (after notice and opportunity to cure). *See S.B. 848*.

The Freeze Law is not a panacea, and only covers selected issues. Exempted from vested rights are building codes, SOB regulations, colonia regulations, development fees, annexation, utility connection issues, life safety issues and city regulations which do not affect the following:

- landscaping or tree preservation
  - open space or park dedication
  - property classification
  - lot size, dimensions or coverage
  - building size
  - development permitted by a restrictive covenant required by a city
- (in other words, only municipal regulations affecting the foregoing list are “frozen”).

The first 3 are new in 2005 (part of S.B. 574) and add protection against down zoning (i.e., a change in zoning classification). Previously, vested rights were, effectively, limited to subdivision platting issues. This change was fiercely opposed by cities and is a dramatic victory for developers. Clearly, the change is a legislative response to *Sheffield Development Company, Inc. v. City of Glenn Hill Heights*, 140 S.W.3d 660 (Tex. 2004), discussed in Section I. G. above, where down zoning was upheld by the Texas Supreme Court under circumstances where the city council acted callously.

Every attorney dealing with a local government must know and understand the Freeze Law and how it should be asserted to protect developer vested rights.

**PRACTICE POINT:** Always check to see if the local government is trying to change the rules in force at the time of the first application relating to the project. If so, assert the Freeze Law. Usually a plat application is filed early in the development process. *Hartsell* supports the application for the first plat for the project locking in the regulatory scheme for the entire project.

## **B. Limited Discretion for Plat Approvals**

The discretion of a governmental authority approving a subdivision plat is limited. Once applicable rules are satisfied, the approval process is ministerial in nature. Local governments are not granted wide latitude. *City of Round Rock v. Smith*, 686 S.W.2d 300, 302 (Tex. 1985) (city); *Commissioners Court of Grayson County v. Albin*, 992 S.W.2d 597, 600 (Tex. App.—Texarkana 1999, pet. denied) (county). A city may only apply those rules adopted in accordance with § 212.002, which cities sometimes fail to follow. A city has broad discretion in the rules adopted, and the rules should be upheld upon challenge so long as there is a rational relationship between the rule and a legitimate governmental purpose relating to the subdivision of land. Governments may not add additional requirements or increase the limitations of their existing requirements as justification for denial of a plat. *City of Stafford v. Gullo*, 886 S.W.2d 524, 525 (Tex. App.—Houston [1st Dist.] 1994, no writ). The foregoing tenets should also apply to “urban” counties’ exercising their broad discretion under TEX. LOC. GOV’T CODE § 232.101. If the County desires to regulate a particular matter as part of the platting process, it must properly adopt rules under TEX. LOC. GOV’T CODE § 232.101(a). This same analysis should apply to cities.

In *Stolte v. County of Guadalupe*, 2004 WL 2597443 (Tex. App. – San Antonio 2004) (unpublished), the court overruled Guadalupe County’s denial of a plat which met all state and county requirements, even though the County felt the number of driveway cuts on a public road were excessive. A county lacks any “inherent authority” to reject a plat based on “public health and safety” and must base any denial on statute or properly adopted county regulation. *Id.* at 3. A county could adopt rules dealing with access issues, but not having done so, the plat must be approved once the county determined that the *applicable* rules were satisfied, as the platting process becomes ministerial at that point. *Id.* at 4.

TEX. LOC. GOV’T CODE § 212.005 states:

**"The municipal authority...must approve a plat or replat...that satisfies all applicable regulations."**

Some city subdivision ordinances contain a similar requirement.

TEX. LOC. GOV’T CODE § 232.002(a) states:

**"The commissioners court . . . must approve, by an order entered in the minutes of the court, a plat required by § 232.001. The commissioners court may refuse to approve the plat if it does not meet the requirements prescribed by or under this chapter...."**

The law of Platting is significantly different than the law of Zoning. Under Platting law, local government authority is very limited, whereas under Zoning law it is very broad. The two can’t be confused or the developer may lose the opportunity for plat approval.

**PRACTICE POINT:** Don’t be afraid to challenge a city or county rejecting a plat which meets all requirements, particularly if the government staff agrees (and hopefully said so in a public forum). Where the government’s own staff advises that the plat complies, that will be strong evidence that a rejection was improper.

### C. Plat Certifications

A city is required to issue a certificate confirming whether or not particular property requires plat approval. TEX. LOC. GOV’T CODE § 212.0115(a). There is no comparable provision for counties. This is particularly helpful for "grandfathered" subdivisions pre-dating a subdivision ordinance or annexation into a city or its ETJ. It will also tell the long-term ground lease tenant if replatting is required. The city

must act within 20 days after it receives the request and issue the certificate within 10 days after it makes its determination. TEX. LOC. GOV'T CODE § 212.0115(c). These certificates are useful in due diligence for acquisition, development, and lending.

If a Plat is denied, a city Planning Commission is required to certify the reasons for the denial. TEX. LOC. GOV'T CODE § 212.008(e). The comparable provision for counties is TEX. LOC. GOV'T CODE § 232.0025(e). Promptly requesting this certification (preferably the night of the denial) will help “lock in” the local government on the basis for the denial.

Although common law holds that a local government is not estopped from denying representations it makes regarding land use conditions, the clear statutory authority for these certifications should make them binding.

**PRACTICE POINT:** Use plat certifications in purchase/loan/pre-development due diligence and have them available to use against a local government which attempts to change its mind later.

#### **D. Limits on Government Exactions**

Development exactions must meet the standards set out by the US Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 324 (1994). Under *Dolan*, conditioning a government land use approval upon providing a public benefit is a taking unless the condition (i) bears an “essential nexus” to the substantial advancement of a legitimate governmental interest, and (ii) is roughly proportional to the projected impact of the proposed development. Critical to this decision is the placing of the burden of proof on the local government to show that it has made an individualized determination of the impact of the proposed development and that the exaction required is proportional to that impact.

*Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) applied *Dolan* in a big win for the Texas development community.

In *Stafford Estates*, the court held that off-site public improvements required as a condition to subdivision plat approval must meet the standards set out by the US Supreme Court in *Dolan*.

The development regulations in *Stafford Estates* require any developer to upgrade roads adjacent to a new development to then current construction standards. The developer in *Stafford Estates* case was required to replace an adequate asphalt road in good repair with a new concrete road with the same traffic capacity. In a rare win for landowners, the Texas Supreme Court upheld a \$425,000 judgment in favor of the developer that this off-site requirement constitutes a taking (approximately 88% of the cost of the new road, but denying any attorneys' fees).

First, the court permitted the developer to sue after the fact, rather than adopting the city argument that if the developer received the benefit of city approvals and complied with those approvals, it should be barred from later objecting. Unless there is a specific limitation in state law, the court held there was no public policy to support this argument.

Second, the court applied the two part test in the US Supreme Court decisions in *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*, and the similar requirements of the Texas Supreme Court's decision in *City of College Station v. Turtle Rock Corp.* These cases deal with government “exactions”, which are any requirement on a developer to do or provide something as a condition to receiving government development approval. The well settled *Dolan* two-pronged test was restated and adopted by the court as follows:

“Conditioning governmental approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate interest and (2) is

roughly proportional to the projected impact of the proposed development."

After a thorough review of federal takings jurisprudence, the court rejected several arguments by the city that would limit the application of *Dolan*:

1. *Dolan* is not limited to required dedications (i.e., streets, easements, parks and the like out of the property) and applies to off-site improvement (such as the new concrete road in this case and contributions to a park land fund in *Turtle Rock*).
2. *Dolan* applies to both adjudicative and legislative decisions, depending on the circumstances of the particular case, rejecting a proposed "bright-line adjudicative/legislative distinctive" asserted by the city.
3. The burden of proof is on the government, which must make an individualized determination that the exaction is related both in nature and extent to the impact of the proposed development.

Applying these rules, the court held that the new road met the essential nexus requirement in that there is strong public policy to require safe and adequate traffic within a city. However, it clearly failed the rough proportionality test since the city did not make an individualized determination that the new concrete road was required based on the impact of the new development, and the new concrete road had the same capacity as the existing asphalt road.

Third, the Supreme Court rejected the developer's claim for attorneys' fees based on a Federal civil rights claim (42 U.S.C. §1988) while also recovering its state law takings claim. Since the state law takings claim was successful, the developer received a complete remedy, therefore there could not be the basis for a federal claim, and thus no right to recover attorneys' fees under that non-existent claim.

*Stafford Estates* will require cities to analytically approach exactions or be subject to challenge. Developers may challenge existing development standards adopted without the

analysis required in *Stafford Estates*. Cities are notoriously slow to move in changing regulations and there should continue to be the opportunity to utilize *Stafford Estates* for a number of years until cities "clean up" their development regulations. The big stick in *Stafford Estates* (and *Dolan*) is the unique requirement that the government has the burden of proof, contrary to most other areas of land use law.

Effective June 18, 2005, if a city conditions plat approval on the developer bearing a portion of infrastructure costs, then that portion may not exceed "the amount required for infrastructure improvements that are roughly proportional to the proposed development as approved by a professional engineer...retained by the municipality." This is a statutory adoption of the *Dolan* test, as confirmed in *Flower Mound*, but requires application by a licensed Texas engineer. If the city requires too much contribution, the developer may sue within thirty days in either county or district court in the county where the property is located, and if successful, recover reasonable attorneys fees and expert witness fees, both of which were denied in *Flower Mound*, despite the developer's victory in that case. TEX. LOC. GOV'T CODE §212.904.

**PRACTICE POINT:** A landowner should always hold a local government to the *Stafford Estates/Dolan* §212.904 burden and challenge any exactions which do not meet the standard for an individual determination by the local government. In the unlikely situation that the local government and its attorney are not familiar with those cases and statute, provide them a copy of the cases and statute. However, don't go too far and make unreasonable positions...offer to be accountable for the development's impact, but no more.

### III. CONFLICTING ATTITUDES AND WORLD VIEWS.

Not only is the legal basis for local government law and real property law completely independent, but the attitudes and world view of the commercial real estate

community and those of public officials similarly distinctive, as illustrated by the following chart:

1. The Developer's view of the Government:

<u>Developer</u>	<u>Government</u>
White hat	Black hat
Best & brightest	Last in class
Best job	Last job
Innovative, productive	Obstructionist, Non-productive
Trustworthy	Untrustworthy

2. The Government's view of Developers:

<u>Developer</u>	<u>Government</u>
Black hat	White hat
Overly Aggressive	Thoughtful
Un-principled	Principled
Thinks they are smart and can outsmart us	Smart enough to figure out Developers
Job is about max \$\$	Job isn't about max \$\$
Wants to maximize profit (at all cost?)	Wants the job done right (for the benefit of the public)
Untrustworthy	Trustworthy

The trick is to realize the fundamentally different decision-making criteria of these parties, and to appreciate why conflict is inherent in their relationship. Then, with that knowledge, determine how best to work cooperatively. The decision-making criteria of developers and local governments are shown in the following chart:

<u>Developer</u>	<u>Government</u>
Profit oriented	Public service oriented
Goal oriented	Process oriented
Time driven	Focused on proper review and decision-making
Efficient	Fair

*PRACTICE POINT:* In order to most effectively work with local government, the key is to create a cooperative approach based on a common focus. Discussion points to be raised with local government officials to lead them to a cooperative approach in seeking the approval of a project are in the table below:

Common focus of Public & Private Sector:

- “Good” development is desirable and should be encouraged
- The public and private sector should cooperatively foster good development
- Substandard existing conditions should be upgraded
- Working together makes the community a better place
- We need to work through this process, so let's do the best that we can
- As owner, I want to make this process easier for you as a public official. Can you do the same for me?
- Economic development is good since finances are an issue for this area.

**IV. RECOMMENDATIONS FOR HANDLING LAND USE ISSUES**

**A. Due Diligence**

When a knowledgeable practitioner advises a client interested in acquiring or developing real property, they must gather background information, evaluate the current land use status

of the property and then make recommendations to the client of their alternatives.

### 1. Gathering Information

The following information should be obtained to knowledgeably review the zoning status of a particular piece of real property:

- Comprehensive plan (and confirmation of whether formally adopted and how adopted [resolution or ordinance])
- Zoning ordinance (and all amendments)
- Rules of Zoning and Planning Commission/Zoning Board of Adjustment
- Confirmation that no zoning changes are pending (obtained through City Secretary/Secretary to Planning & Zoning Commission)
- Zoning map.

*PRACTICE POINT:* Each of the documents must be confirmed to be the most current before it is adopted. Care should be taken to insure there are no pending changes.

### 2. Current Status

A review of the relevant zoning documents (enumerated above) should be conducted to determine the current status of the property.

Where the zoning map or ordinance is inconclusive, a determination by the city's planning staff is recommended. If the city planning staff's determination is objectionable, it can be appealed to the Zoning Board of Adjustment (not the Zoning & Planning Commission) for an interpretation.

If the current land use is not in compliance with the zoning ordinance, the zoning ordinance should be reviewed to determine what specific rights are provided to pre-existing, non-conforming uses and whether amortization is possible.

Where the zoning is objectionable, the Comprehensive Plan should be reviewed to determine if the current zoning is consistent with

the Comprehensive Plan. If the zoning is inconsistent, a "spot zoning" objection may be possible. Otherwise, the procedures for rezoning should be reviewed carefully.

A letter from the city planning staff confirming the zoning status should be requested when property is to be acquired or developed. However, under most circumstances, the issuance of such a letter will not act to bind the city in the event the letter is incorrect. As a general principal, a city is not bound by the mistakes of its employees, and there cannot arise an estoppel defense to prevent the city from enforcing its duly adopted ordinances. **Therefore, blind reliance on a city's zoning letter is not prudent.** The city's zoning letter should simply be a written confirmation of facts confirmed by the practitioner or their client.

*PRACTICE POINT:* In the event of any ambiguity in the zoning ordinance or map, a formal interpretation by the Zoning Board of Adjustment should be obtained and should be binding upon the city.

### 3. Alternatives

If the current zoning status of the property is unacceptable, the practitioner should review with their client the available alternatives. These alternatives may involve rezoning, variance or special exceptions (all discussed at length earlier in these materials).

Before selecting the appropriate alternative, the practitioner should contact the chief planning official with the city to review all issues and determine the following:

- (1) The planning staff's position;
- (2) Treatment of similarly situated properties in the past (and why);
- (3) Make-up and philosophy of the Planning & Zoning Commission/Zoning Board of Adjustment;
- (4) Make-up and philosophy of City Council; and

- (5) Current political issues in the city affecting land use decisions.

Often city planning staff can provide helpful (although perhaps biased) insights into issues critical to the city. How to avoid dead-end detours, and the proper procedure to achieve zoning objectives exemplify two. City planning staff should never be considered as the only source of information. The chair of the Planning & Zoning Commission and Zoning Board of Adjustment are often helpful and willing to provide assistance. Experienced local engineers, planners, real estate professionals and attorneys should be consulted.

It is always critical to determine any overriding philosophy of the city and be sure your zoning request is not contrary to it. Some cities are pro-development with a focus on increasing property taxes, while others focus on increasing sales taxes. Many smaller communities are rabidly anti-multi-family development based on concerns about increased crime and lowering of property values of adjacent single-family neighborhoods. More and more communities are concerned about various environmental issues including trees, landscaping, pervious area and the like.

*PRACTICE POINT:* All zoning requests should be couched with a "win-win" context based on the city's Comprehensive Plan and overriding land use/economic development goals.

#### 4. Checklist

Attached as Exhibit A is a general land use law checklist from an earlier presentation by James L. Dougherty, Jr. and the author which may be useful to spot the full array of land use law issues.

### **B. Discretionary Approvals**

#### 1. What are Discretionary Approvals?

Discretionary approvals fall into 2 broad categories: (i) Conditional Approvals (usually legislative determinations made by the Zoning

and Planning Commission/City Council) and (ii) Judicial Approvals (Variances, Interpretations and Permit appeals which are "quasi-judicial determinations made solely by the Zoning Board of Adjustment).

#### a. Conditional Approvals

Traditional zoning establishes a division of uses and allows the uses designated "as a matter of right". In other words, all a property owner needs to do is look in the zoning ordinance and map to determine what uses are allowed and then feel comfortable that a permit for that use will be issued if the specific requirements of the zoning ordinance are satisfied (setback, height, etc.). Today, many cities have moved many uses from "a matter of right" status to conditional status. Conditional status requires a specific approval process for the use as applied to a specific site. This site specific zoning requires a special public consideration of the particular characteristics of the site, the specific use, the specific structures, the performance characteristics of the use, and most importantly, the impact on the adjacent area. Only then is the use approved, and almost always with a list of requirements and limitations. Often, a detail site plan and architectural renderings are approved, the deviation from which will require additional approvals. The granting or withholding of conditional zoning approvals is within the broad discretion of the city. The uncertainty, time and expense of the conditional zoning approval process deters many purchasers and developers. Often the "highest and best use" from a valuation and development perspective is a conditional use. Property with conditional zoning in place often has greater value and marketability.

#### b. Judicial Approvals

The Zoning Board of Adjustment is a "quasi-judicial body established to provide an administrative approval body for various land use matters which require a public hearing for the party desiring relief. It acts like a "mini-court" to consider a request, hear testimony, consider written evidence and apply the zoning

ordinance and applicable law. It will render a formal decision after following a formalized procedure intended to provide procedural and substantive due process to the owner of the property in question.

## 2. Types of Discretionary Approvals

### a. Conditional Approvals

#### (1) Planned Development Districts ("PDD")

Zoning ordinances often include planned development districts (also known as Planned Unit Developments or "PUDs"). See *Teer v. Duddleston*, 641 S.W.2d 569, 575 (Tex. Civ. App. - Houston [14th Dist.] 1982), 26 Tex. Sup. Ct. J. 544 (July 20, 1983), *rev'd on other grounds*, 664 S.W.2d 702 (Tex. 1984). A planned unit development is defined as an "area with a specified minimum contiguous acreage to be developed as a single entity according to a plan [and] containing one or more residential clusters . . . and one or more public, quasi-public, commercial or industrial uses in such ranges of ratios of nonresidential uses to residential uses" as specified in the zoning ordinance. BLACK'S LAW DICTIONARY 1036 (6th ed. 1990). Areas otherwise zoned may be eligible to be rezoned as a PDD and then are subject to the special zoning of the PDD, rather than the more restriction zoning of the particular district. PDDs allow for innovative, often mixed use development. PDD's are a rezoning and follow the rezoning procedure.

#### (2) Specific/Conditional Use Permit ("SUP" or "CUP")

Specific or conditional use permits provide for a site specific approval of uses contemplated in a zoning ordinance, subject to a determination that the use is appropriate where requested. They are a rezoning and follow the rezoning procedure. SUPs have replaced Special Exceptions in many cities, presumably to allow the City Council to determine land use decision rather than the ZBA.

#### (3) Special Exception

A special exception is issued in a quasi-judicial manner by the ZBA. Special exceptions have typically been limited to less controversial land use decisions. Often the zoning ordinance requires specific findings in order for the special exception to be granted. An example is allowing a residential lot to be used for parking for an institutional use such as a church or school if the ZBA finds it is adequately screened from view, does not materially affect traffic and has appropriate landscaping, lighting and signage. Specific use permits are a valid exercise of zoning authority by a municipality. *City of Lubbock v. Whitacre*, 414 S.W.2d 497, 499 (Tex. Civ. App. -- Amarillo 1967, writ ref'd n.r.e.). Amendment to a zoning ordinance by a specific use permit to allow a use not otherwise allowed in that zoning district is not spot zoning. *Id.* at 502.

### b. Judicial Approvals

#### (1) Variances

A variance allows violation of term of a zoning ordinance where literal compliance is a "hardship", but granting the variance will not be contrary to the general purposes of the zoning ordinance. The key is the determination of hardship, which may not be self-imposed, purely financial/economic and must related to the unique characteristics of the real estate, not the personal desires or needs of the owner.

#### (2) Interpretations

All appeals of staff level zoning interpretations are taken to the Zoning Board of Adjustment, not the Zoning and Planning Commission or City Council. Of course, pressure on the City Council may result in a reconsideration of the staff interpretation, but assuming the final staff interpretation is objectionable, the appeal is through the Zoning Board of Adjustment. The Board determines if the staff decision was correct and may affirm or issue its own ruling.

#### (3) Permit Appeals

All appeals of permit rejections or issuances are also to the Zoning Board of Adjustment. This is really just another type of interpretation, being the interpretation of staff to issue or not issue a permit.

### 3. Due Diligence

The attorney investigating the potential to develop property for a conditional use, or where the need for a judicial approval arises should conduct the due diligence investigation set forth in Section IV.A.

### 4. Application Process

Before applying for a discretionary approval, an attorney must be sure they have fully investigated the legal and political aspects of the proposed project. Once the project is public and an application submitted, the applicant loses much of the control over the projects destiny. The application must not be considered simply a formality, but as the first presentation of the project. As public record, it may be circulated and quoted widely. It must not be sloppy, incomplete or non persuasive. Do not be limited by the form as most cities will allow additional materials and or the retyping and reformatting of the application form in order to allow a more complete presentation of the project application.

### 5. Procedural Process

#### a. Conditional Approvals

PDDs and SUPs are rezonings, and follow the procedural process set forth in Section IV.C. The presentation to the Zoning Commission is critical as the first required public approval. Although the City Council may override a negative recommendation by the Zoning Commission, that may be difficult politically. Some cities require a super majority of the City Council to override a negative recommendation by the Zoning Commission.

Applications may need to be withdrawn and resubmitted during the zoning process in order to deal with issues and opposition which

arises. This tactic may avoid a certain defeat and allow a revised proposal to receive a "fresh start". Although a "rehearing" of a negative decision is not allowed, typically, an applicant can withdraw an application that is under fire, and thus achieve the same result. Additional delay and fees are occurred. Sometimes there are limits on the withdrawal and reapplication process which limit/prevent these tactics. Many applications must be modified and are considered at multiple meeting/hearings. Delay is common. Efficiency and expediency is not part of the zoning vernacular.

Public hearings allow public input to the zoning process. Some cities are better than others in limiting public input to the public hearing. Sometimes, a city allows any public meeting to become a de facto public hearing by allowing public comment on a conditional zoning proposal as part of the general public comment period. Objection to this improper informal continued public hearing is tricky and may be a "lose-lose" decision. Proper handling of public hearing, particularly contentious ones, is an art and requires experience. Often the applicant forgets the focus of the forum and emphasizes their own desires (almost always profit motivated), rather than addressing the concerns of the zoning bodies and the public. All issues must be presented in a public policy context. Assertion of private property rights is rarely beneficial and often leads to disastrous results.

#### b. Special Exceptions and Judicial Approvals

Special Exceptions are decided solely by the ZBA and thus are somewhat simpler. Usually only one public hearing is held and the ZBA makes its decision at that meeting or the succeeding one. As an appointed body, the ZBA is somewhat distanced to the political issues which affect a City Council. Often, the ZBA has members with experience in their positions and an understanding of their authority.

A problem with ZBAs is that most of their experience will be with variances, and thus many ZBAs are used to denying the great

majority of applications coming before it. In presenting a special exception, the applicant must remind the ZBA of the difference in the standards applicable to a variance and a special exception. Further action by a ZBA requires a supermajority of 75% affirmative vote. The applicant must also remember that the ZBA public hearing is a "one shot" proposition, without the opportunity for a rehearing by the ZBA or reversal by the City Council.

Variations require very careful consideration of the scope of the requested non-compliance. That scope should be kept as narrow as possible, but broad enough to provide the practical benefits desired.

Hardship is the almost exclusive focus of a ZBA considering a variance. Keep in mind that most ZBA's deny the vast majority of variances and thus have a "negative" mind set. The requirement of a supermajority 75% vote is a structural guard against "easy" variances. For most variances, the situation can be characterized as either self imposed or financial, neither of which is a basis for a variance. The applicant must do its best to articulate a legitimate argument based on the physical characteristics of the site to support the variance. Sometimes, a ZBA will be willing to distinguish between a sympathetic owners and either (i) their predecessor or (ii) their contractor, where the violation was made by that "third party". However, where a mistake can be cured (what mistake can't) there needs to be an argument that just because the mistake can be fixed for an exorbitant amount of money doesn't make it a purely financial hardship. The time to cure and the possibility that the cure will not look as good, or function appropriately should mentioned.

The issuance of an improper permit by the city and reliance on that permit has been upheld in several cases as sufficient hardship. See discussions in Section IV.B.4.d. and VI.F.

## 6. Political Process

### a. Conditional Approvals

Zoning is a political process. It is different from platting, which is primarily an engineering exercise in meeting the city's stated rules. Zoning decisions are legislative and discretionary. For practical and legal reasons, the opportunity to successfully challenge a zoning decision is remote. Therefore, the adroit assessment of the zoning process and the political implications of the zoning application is critical. Sometimes, lobbying of City Council is a critical aspect of the process. Certainly, a proper assessment of the City Council's concerns, which sometimes can be ascertained through City Manager, City Attorney, Mayor, Zoning Commission Chair and/or City Staff is mandatory. In the zoning process, the applicant must address the concerns of the interested parties, with primary consideration to the final decision makers; City Council usually, but sometimes the ZBA.

If there is a local newspaper, the applicant must be aware of whether it routinely covers zoning issues, and if the issue is controversial, to expect coverage. An understanding of how to deal with the press is important to having a fair presentation of the applicant's position.

If a City Council election is to occur within six months of any zoning decision, beware. Zoning is often a favorite topic for campaigning, most frequently with a "neighborhood protection" angle. Sometimes, it is best to defer any application, or at least the public hearing until after the election.

### b. Judicial Approvals

The ZBA is appointed and no subject to easy removal by the City Council. Plus, the typical ZBA member is a technician, often a lawyer, engineer, architect or contractor. This is a tough audience who feels little, if any, political pressure. This group has no broad focus, but is very limited in the consideration of its responsibility to the city. Beware of political

pressure, which may backfire. Many ZBAs will not allow direct contact of members to discuss pending matters, but rarely is this a written policy in smaller communities. The ZBA rules should be reviewed to determine what prohibitions to contact exist.

## 7. Public Presentations

Public presentations are tricky and the applicant and its team must present a presentation carefully tailored to the city and specific project. Several rules apply:

- Know Your Forum - The Zoning Commission, ZBA and City Council have different backgrounds, powers and political agendas. Treat them accordingly. Address the local concerns and be careful about citing other cities. Every city considers itself unique and deserving of special attention.
- Be Prepared - Know the facts, the law, the zoning body, the opposition and your presentation. Do not read a prepared presentation. Be ready to speak extemporaneously. Have exhibits mounted on boards and copies to distribute, if appropriate (enough for all of the zoning body and all city staff, perhaps copies for the audience)
- Be Professional - Keep cool and unemotional. Realize that many of the public will react emotionally and perhaps make personal accusations. Show knowledge and preparation in your presentation and response to issues. Dress appropriately to show respect for the forum and the importance of the issue. In asserting legal points, beware of being overbearing, unless part of your

plan.

- Be On Point and Timely – Never ramble. Abide by procedural rules and time limits. Keep on point and directed. If irrelevant issues arise, not hesitate to guide the hearing back on track.
- Prepare the Client - The client representative should be fully prepared to respond to questions from the zoning body. Any presentation by the client should be carefully outlined, and if needed, rehearsed. Prepare the client for any likely attacks, so they will not be surprised. Never let the client respond emotionally. Do what you can to prevent the client from harming their own cause.
- Be Ready to React - Be ready to speak extemporaneously. Have set answers to likely questions and concerns. Use the opportunity to respond as a forum to reassert applicant's position.
- Bring in the Professionals - If you or your client are uncomfortable with the process and don't feel able to handle the process yourself, or the stakes are too high, don't be afraid to bring in experts. Most land use specialists don't want to do anything for your client other than handle land use issues and are make their living on limited representations.

**Appendix A**

**CHECKLIST FOR LOCAL DEVELOPMENT REGULATIONS**

<p>■ Is the existing site lawfully platted? How was it created? Metes and bounds? Exceptions/defenses in the ordinance or state law? Was there a prior plat? Check notes/restrictions.</p>	<p>■ How will drainage be handled? Is there stream capacity? Is detention required? What is the drainage route? Who controls it?</p>
<p>■ Will a new plat (or replat) be required? Division of a tract? Change in use or restriction? Crossing a lot line? Need to cross or use a one-foot reserve? Check procedures. Will other jurisdictions review? Check for relaxed amending plat or minor plat rules Will any dedications/fee payments be required?</p>	<p>■ Are there tap fees, impact fees, other fees? See Ch. 395, LGC for the times they accrue. Check for possible exceptions or limits.</p>
<p>□ Is a site plan (development plat) required? Check the ordinance "trigger." Is there "development" under 212.043 LGC? Check exceptions/defenses in the ordinance Are special traffic or other studies needed? Will any dedication/fee payments be required?</p>	<p>■ Is any public property needed? Construction in street or easement Encroachments by improvements</p>
<p>□ Are there zoning regulations applicable? Ordinary municipal zoning? Special airport or reinvestment (TIF) zoning? County zoning (airport, reservoir, etc.)?</p>	<p>■ If so, what permission is needed? Permit or other revocable permission Contractual permission Outright purchase (appraisal) Check to see if a replat could work instead</p>
<p>□ If so, does the project comply? What is the building site/lot/parcel? In which zone(s) does it lie? Any overlay zones? Which regulations apply to sites in those zones? Does the project comply with those regulations? For each non-compliant item, check: Exceptions/defenses in the ordinance Exceptions/defenses in state law Prior-non-conforming status ("grandfathering") Prior approvals given (variances, etc.)</p>	<p>□ Does the project meet all building codes? Prior inspections, permits, certificates? New inspection/certificate from city? Administrative interpretation or modification possible? Appeal to hearing board? Watch deadline.</p>
<p>□ Can the project comply "as of right"? Has the building official ruled? What appeals are available? Deadline? Has anyone else appealed?</p>	<p>■ Are there flooding, storm water, grading or filling or special water quality regulations? Check for 100-year flood plain or floodway Check for county and city storm water rules Check for special city/ETJ water quality regulations</p>
<p>□ Is a ZBA discretionary approval needed? Appeal from administrative ruling? Watch deadline. Special exception (provided for in the ordinance) Variance (hardship; not in the ordinance)</p>	<p>□ Is off-street parking required? Existing land use? New construction or change in use? Check possible exceptions and transitional rules.</p>
<p>□ Is another discretionary approval needed? Rezoning or change in district boundaries? Change in regulations only, not boundaries? Amendment called "permit" (SUP, CUP, etc.)? Planned unit development or PDD? Does the comprehensive plan, if any, allow it? Amendment of the plan? See Ch. 219, LGC.</p>	<p>□ Is landscaping or buffering required?</p>
<p>■ Is there sufficient water/sewer? Plant/line capacity, points of connection. What are the local providers? Check CCN' s. Will the utility issue a letter of availability? Can capacity be reserved? How? Is construction needed? Who does it? Who pays?</p>	<p>□ Are there tree protection or environmental rules?</p>
<p>■ Are on-site water/sewer facilities needed? Check state/local rules.</p>	<p>□ Are there any historic preservation regulations?</p>
	<p>□ Are there single-subject nuisance-like regulations? Depends on land use/type of activity Use code of ordinances as checklist</p>
	<p>■ Are there deed restrictions? Architectural control? Compliance needed for building permit? Affidavit? Can a building permit be revoked? Can a lawsuit be brought?</p>
	<p>■ Check alcoholic beverage licenses and permits.</p>
	<p>■ Special assessments or special tax districts?</p>

**NOTE:** ■ indicates items that usually apply both inside and outside city limits.