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THE UNIQUE NATURE OF LAND DEVELOPMENT IN THE COUNTY

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THE UNIQUE NATURE OF LAND DEVELOPMENT IN THE COUNTY[1]

A confluence of events has resulted in a plethora of development on land outside the corporate limits along with increasing concerns about this type of development. Despite the pandemic, land development in 2020 continued at a feverish pace. At the same time that there are more development pressures in unincorporated areas cities have fewer and fewer land use regulatory tools at their disposal.

Texas cities alone regulate land use within their corporate limits. Counties alone regulate land use outside of the corporate limits and a city's extraterritorial jurisdiction ("ETJ"). Cities and/or counties regulate development in the ETJ.

In 2019 the Texas Legislature extended the prohibitions already in place against general law town unilateral annexations to home rule cities. Texas municipalities are now essentially prevented from annexing, or threatening to annex, potential developments they oppose or wish to regulate. As a result, the steady expansion of corporate boundaries has ground to a halt.

Finally, the Dallas Court of Appeals issued an opinion prohibiting cities from requiring building permits in their extraterritorial jurisdiction but allows cities to require plat approval in certain situations where land is not subdivided. *Collin County v. City of McKinney*, 553 S.W.3d 79 (Tex. App.—Dallas, 2015, no pet.).

TEXAS GROWTH

As we all know, the State of Texas has been one of the fastest growing states for many years. Primarily due to concern about COVID, there has been a significant movement from urban to suburban or rural areas since early 2020. U.S. household moving and relocation trends in response to the pandemic's impact on job situations and lifestyle changes show that 28% of Americans have at least s thought about relocating due to the ongoing COVID-19 pandemic, and U.S. households that indicate planning to move in 2021 increased by 20 percentage points from 2020 to 56%.

According to the Census American Community Survey, the current list of the fastest growing cities (by percentage) in Texas is as follows:

1. Fulshear
2. Prosper
3. Buda
4. Selma
5. Fate
6. Leander
7. Melissa
8. Manor

[1] This paper does not address financing districts in any detail.

9. Cibolo
10. Manvel

The common theme among the cities on this list is that they are further out suburbs from metropolitan centers. For example, Fulshear is approximately 35 miles from downtown Houston and Prosper is 40 miles from downtown Dallas. There is a strong growth trend toward being far away from the downtowns of major cities such as Houston, Dallas, San Antonio and Austin. Numerous residential and commercial developments are also occurring outside of the corporate limits in more rural areas.

GOVERNMENTAL ENTITY TYPES

Texas law recognizes three types of cities: Home rule, general law, and special law municipalities. *See Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282, 285 (1948). The nature and source of a municipality's power depends on the type of municipality. *See Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 658 (Tex. 1995) ("Laws expressly applicable to one category [of municipalities] are not applicable to others.").

Home rule cities derive their authority from the Texas Constitution, not from the acts of the Legislature. *See* Tex. Const. art. XI, §5. As the Texas Supreme Court has consistently acknowledged, "[h]ome-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for limitations on their powers." *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013) (citing *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975)).

Cities have broad zoning and other land use regulatory authority in the corporate limits. Those powers are greatly restricted outside of the corporate limits. Extraterritorial powers must be authorized by statutes. Tex. Att'y Gen. Op. LO-97-055 (1997); *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016).

Texas county legal authority is similar to that of a general law town. Counties lack general police power and may exercise only those powers expressly conferred upon them by the Constitution and by the Legislature. *Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948).

ANNEXATION HALT

Prior to 1963, a Texas municipality could annex territory up to the corporate boundaries of another municipality. The "first in time, first in right" rule that the first to commence annexation or incorporation proceedings was entitled to complete the annexation led to numerous boundary conflicts. The Legislature enacted the Municipal Annexation Act, Tex. Rev. Civ. Stat. Ann. art. 970a, (now Chapter 43, Tex. Loc. Gov't Code) to address this situation.

Pursuant to their police powers, home rule cities historically have been able to unilaterally annex land subject to few constraints. These cities could typically annex (or threaten to annex) land in order to prevent or delay development. General law towns, on the other hand, were limited for the most part to annexing land by landowner consent or petition.

In September 2017, the Legislature amended the Municipal Annexation Act to significantly reduce involuntary annexation opportunities by home rule cities. The bill analysis for SB 6 by the bill's sponsor Senator Campbell included the following statement of intent:

> Under current law, many cities annex areas simply to boost their tax base while ignoring and passing over poorer areas in desperate need of city services. Other areas are annexed for limited purposes, meaning residents must follow city ordinances and sometimes even pay city taxes despite living outside the municipality and having no elected representation.

According to the bill, Tier 1 cities were be located within counties of a population of less than 500,000. Tier 1 cities' annexation powers were relatively unchanged.

Tier 2 home rule cities, on the other hand, were stripped of their unilateral annexation powers subject to a few exceptions. § 43.0505, et seq., Tex. Loc. Gov't Code. These reforms applied to 11 of Texas' 254 counties. Because many Tier 1 cities continued their aggressive annexation programs, a significant political push was made to legislatively remedy the Tier 1/Tier 2 distinction.

In 2019, H.B. 347 virtually closed the book on unilateral city annexations. The bill ended most unilateral annexations by any city regardless of population or location. § 43.001, et seq., Tex. Loc. Gov't Code. Specifically, the bill eliminates the distinction between Tier 1 and Tier 2 cities and counties and makes most annexations subject to the consent annexation procedures in the statute.

The Legislature's curtailment of annexation powers has caused cities great angst. According to the Texas Municipal League, cities have lost a significant tool in the regulatory toolbox to manage growth. Scott Houston, Municipal Annexation in Texas (2020), p. 5. But the TML noted that "city officials in Texas are resilient and will find innovative ways to keep the Texas miracle alive." *Id.* This paper addresses some of the innovative ways that have evolved by municipalities to address the changes to the Municipal Annexation Act.

PRE-ANNEXATION DEVELOPMENT AGREEMENTS

For many years landowners were given the Hobson's choice of signing a city-drafted development agreement or else stand by and allow the city to unilaterally annex their property. Section 43.016, Tex. Loc. Gov't Code. These agreements guaranteed this land would not be annexed for a period of time so long as the landowner did not attempt to develop or subdivide his property. Cities also entered into similar non-development agreements under § 212.172, Tex. Loc. Gov't Code. While cities portrayed this process as giving landowners an option, signing the agreement in the form proffered by the city was actually required in order to avoid a distasteful unilateral annexation.

Although hundreds of cities are no longer unilaterally annexing land, there are hundreds of these types of agreements in existence. These agreements are ticking time bombs. If a developer approaches an owner to purchase a tract subject to the agreement, he will be hesitant to proceed if the city can unilaterally annex and zone the property at its whim.

An argument can be made that these landowners were essentially extorted to enter into these types of development agreements which were made under duress. Our firm recently represented landowners in a North Texas city who successfully convinced a majority of the city council to terminate two pre-annexation development agreements. A compelling reason provided to the council was the Legislature's policy decision in 2019 to prevent unilateral annexations due to their adverse impact on constitutionally protected private property rights.

PLAT EXEMPTIONS

While there are various statutes that provide counties and cities authority to regulate land developed outside of the corporate limits, the most commonly utilized process is through platting. This power is authorized by Chapters 212 (cities) and 232 (counties) of the Local Government Code. Within legally defined limits, cities and counties can (1) require infrastructure improvements to be constructed by the developer, and (2) regulate lot development standards. In exercising their statutory authority over platting, cities and counties can greatly impact the economic feasibility of a development project.

A traditional residential subdivision with multiple lots is almost always required to be platted. In many instances involving the building of structures without subdividing, developers try to avoid being subjected to the platting process.

Chapter 232 of the Local Government Code pertains to county regulation of subdivisions. *See id.* §§ 232.001 - .097. Section 232.001 requires the owner of land outside a municipality to have a plat prepared if the landowner subdivides the tract:

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

A county "may not require a landowner to prepare a plat of a subdivision if the landowner divides the tract into no more than four parts; does not lay out streets, alleys, squares, parks, or other areas intended to be dedicated to public use or the use of adjacent landowners, as described by section 232.001(a)(3); and transfers each lot to a close relative. *See id.* § 232.0015(e). A county "may not" require a landowner to prepare a plat if each lot in the subdivision is more than ten acres in area and the owner does not lay out streets, alleys, squares, parks, or other areas intended to be dedicated to public use or to the use of the owners of adjacent lots, as described by section 232.001(a)(3). *See id.* § 232.0015(f).

According to § 212.004, Tex. Loc. Gov't Code, "a division of land under this subsection does not include a division of land into parts greater than five acres, where each part has access and no public improvement is being dedicated." This appears to exempt subdivided tracts larger than five acres under certain conditions from being platted in municipalities.

Different jurisdictions interpret the not "to be dedicated to public use" qualification differently. For example, if a rural tract has frontage on an existing county road, what happens if the county (or city if in the ETJ) show the road on a thoroughfare plan intended for future widening? The city or county could argue that platting should be required because there is additional right-of-way needed to be dedicated. Property rights advocates, on the other hand, would argue that the development has all of the infrastructure it needs and dedications are not needed. Therefore, they should be exempted from the platting process.

BIZIOS* AND *CUSTER

For years Texas cities regulated both infrastructure and building development in the ETJ. This authority has been restricted by case law. Both home rule and general law Texas municipalities have no regulatory authority in their respective ETJ absent express grant from the Legislature. *Bizios v. Town of Lakewood Village*, 453 S.W.3d 598, 600 (Tex. App.—Fort Worth 2014, *aff'd* 493 S.W.3d 527). *Collin Cty. v. City of McKinney*, 553 S.W.3d 79, 87 (Tex. App.—Dallas 2018, no pet.).[2]

In *Bizios*, the town argued that it had implied authority under Chapters 212 and 214 of the Local Government Code to require Bizios to obtain a building permit for his to-be-constructed house in the extraterritorial jurisdiction ("ETJ"). Lakewood Village as a general law town did not have either express or implied statutory authority to require Bizios to obtain a building permit in the ETJ. 453 S.W.3d at 605. Specifically, this power was not reasonably incident to the powers which were expressly granted in Chapters 212 and 214. *Id.* at 605, fn. 13.

The Texas Supreme Court affirmed and held that any fair, reasonable or substantial doubt concerning the existence of implied authority would be resolved against the general law town. 493 S.W.3d at 536. Lakewood Village argued that general law towns have a duty to protect the health and safety of those who live within or near the town, and the ability to apply its building permit requirements was essential to fulfill that duty. *Id.* at 537. The Supreme Court held that a building permit program would not be indispensable to a general law town's purposes and therefore would not be implied. *Id.* at 536.

More recently the Dallas Court of Appeals expanded the *Bizios* holding related to general law towns to home rule cities as well. In *Collin*, Custer Storage Center ("Custer") constructed a self-storage facility on property located in the ETJ of the city. As part of the development, the property was not subdivided or platted. *Id*. at 82. When the city learned of Custer's development on the property, the city instructed Custer to obtain city building permits. *Id.* Custer refused to comply, and the city brought suit. *Id.* At issue was (1) whether the city, a home rule municipality, had the authority to require building permits in its ETJ, and (2) whether Custer was required to obtain plat approval from the city as a condition of its development. The court resolved the first

[2] The author represented the developer in both cases.

issue in the negative, and the second issue in the affirmative. However, in deciding the second issue, the court specifically relied on the language of the city's ordinance which expressly required that plat approval was required as a condition to construction. *Id*. at 87.

The Dallas Court of Appeals determined that the city did not have the ability to enforce its building codes into its ETJ. However, the fact that Custer's property was not subdivided had no bearing on the Court of Appeals' decision. Rather, the Court of Appeals relied on the Texas Supreme Court's holding in *Bizios* in determining that home rule municipalities cannot impose their building code requirements into their ETJ. Specifically, the Court of Appeals noted that Texas statutes "do not authorize a municipality to enforce its building codes within its ETJ or elsewhere beyond its corporate limits." Moreover, the Court of Appeals determined that the Texas Supreme Court's decision in *Bizios* applies to "*every municipality*" without distinction.

The Court of Appeals also addressed whether the city could require Custer to plat its property, which was located in the city's ETJ. Focusing on Section 212 of the Texas Local Government Code, which states that the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction and may extend these rules to its ETJ, the Court of Appeals determined that the "City possesses authority—to the exclusion of the County—to regulate all subdivision plats and related permits for property in the City's ETJ." Even though Custer was not subdividing, it would still be required to obtain a plat from the City of McKinney.

Unexpectedly, no party appealed the *Custer* opinion to the Texas Supreme Court. Apparently both the city and the county were happy with half a loaf. The storage facility owner had put the fully developed property under contract, so decided not to appeal the plat ruling. Therefore, the legal issue as to whether or not a municipality can require an unsubdivided tract to plat as a condition of development has not been finally decided by the Texas Supreme Court.

Attached as Exhibit A is an aerial photograph of the self-storage facility. Fortunately a regulation fire lane had already been constructed as a loop through the facility. Following lengthy negotiations the new owner and Collin County agreed that the only additional improvement that would be required for plat approval was the extension of the southernmost driveway to the Custer Road pavement.

INTERLOCAL AGREEMENTS

Chapter 242 of the Local Government Code deals with inconsistent municipal and county requirements in the ETJ by requiring the municipality and the county to enter into an agreement allocating authority to regulate subdivision plats and approve related permits in the ETJ. *See* TEX. LOC. GOV'T CODE ANN. § 242.001(c) (Vernon 2005). Section 242.001(d) provides four ways of allocating authority between the city and county.

Option 1. City Regulation. The county ends authority, and the city reviews all plats under city standards.

Option 2. County Regulation. The city ends authority, and the county reviews all plats under county standards.

Option 3. Divided Regulation. The city and county divide the ETJ geographically, each keeping authority only in one portion.

Option 4. Joint Regulation. The city and county jointly review plats under their authority, but provide one office to file plats, one filing fee, and provide one uniform and consistent set of plat regulations.

In most situations, the approved interlocal agreement will authorize either the city or the county to regulate plating. Section 242.001(d)(4), authorizes a municipality and county to enter into an interlocal agreement that establishes one office to "accept plat applications for tracts of land located in the [ETJ];" and to "provide applicants one response indicating approval or denial of the plat application." TEX. LOC. GOV'T CODE ANN. § 242.001(d)(4)(A). An agreement under this provision must also establish "a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land as authorized by Chapter 212 [applicable to municipalities].

Typically, the city is given authority over platting in the ETJ. But the county may include language in the interlocal agreement that certain county regulations must be followed instead of the city's.

DEVELOPMENT PLAT

Municipalities have various options to require developers to obtain plat approval even if they are not subdividing the land. According to the Dallas Court of Appeals in *Collin*, home rule cities can impose this requirement in certain situations. In addition, a site plan requirement known as a development plat can be required for new structures pursuant to Subchapter B, Chapter 212, Tex. Loc. Gov't Code. Development plats must comply with the general land use plans of the city. § 212.047, Tex. Loc. Gov't Code.

Chapter 212 considers Subchapter A and Subchapter B to be mutually exclusive. §§212.0045(b) ("In lieu of a plat contemplated by [Subchapter A], a municipality may require the filing of a development plat under Subchapter B if that subchapter applies to the municipality."), -045(d). The purpose of a development plat is to provide the municipality the opportunity to confirm that new development generally conforms to the city's plans, rules, and ordinances concerning current and future streets, sidewalks, alleys, parks, playgrounds, and public utility systems. *Id.* §212.047.

There are two practical concerns that developers have regarding compliance with a city or county platting process. The first concerns the application process itself. There are out-of-pocket costs to hire an engineer who will prepare all of the materials in a filed application packet. Then there are the delay costs, particularly when the city or county puts up hurdles to development approval.

The second concern involves the government's authority to require dedications and the construction of public infrastructure. These requirements are known as exactions, and they can be very expensive.

Whether an exaction can be enforced when the landowner is not subdividing was addressed in *City of Corpus Christi v. Unitarian Church of Corpus Christi*, 436 S.W.2d 923 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd. n.r.e.). It is important to note that the subject tract was located within the corporate limits of a home rule city. The court of appeals held that an unsubdivided tract can be required to plat. Public dedications would not be required during the platting "without constitutional, statutory or charter authorization." *Id.* at 929.

Because cities are prohibited from issuing building permits in the ETJ, typically a developer must obtain a development permit of some type from the county. Many of these counties require as a condition of granting a development permit that the municipality with ETJ jurisdiction acknowledge that the city will not require approval of a plat. An example of this type of form is attached as Exhibit B. There frequently are lengthy delays by municipalities deciding whether or not to sign the form. Once the city acknowledges that the proposed development is not required to be platted by the city it loses its regulatory authority.

PLATTING LIMITATIONS

The Legislature has imposed restrictions on both city and county platting authority. Chapter 232 of the Texas Local Government Code addresses county platting. Section 232.101(b), Tex. Loc. Gov't Code prevents counties from regulating the following:

1. the use of any building or property;

2. the size and number of buildings;

3. the number of residential units that can be built on an acre of land; and

4. the size and type of a water or wastewater facility that can be constructed to serve a development.

Texas courts have held that a county may not regulate lot size. *See Integrity Group, Inc. v. Medina County Comm'rs Court*, No. 04-03-00413-CV, 2004 WL 2346620 (Tex. App.—San Antonio Oct. 20, 2004, pet. denied) (mem. op.). In *Medina County*, part of a developer's tract was located over the Edwards Aquifer Recharge Zone. *See id.* at *1. In 1995, Medina County rejected the developer's plat for non-compliance with a rule requiring a minimum lot size of one acre for subdivisions that would use onsite sewage facilities in the Edwards Aquifer Recharge Zone. *See id.* The court held that Medina County's powers were limited to those allowed by the platting statute found in Chapter 232 of the Local Government Code, and it therefore could not reject the plat because of lot size. *See id.* at *2.

Similarly, in its extraterritorial jurisdiction a municipality shall not regulate:

(1) the use of any building or property for business, industrial, residential, or other purposes;

(2) the bulk, height, or number of buildings constructed on a particular tract of land;

(3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage;

(4) the number of residential units that can be built per acre of land.

Id. § 212.003(a)(1)-(4) (footnote added). "Unless otherwise authorized by state law," a commissioners court is subject to the same four restrictions on its regulatory power that section 212.003(a)(1)-(4) applies to a city. *See id.* § 232.101(b). Thus, Chapters 212 and 232 impose on a city and a county the same four limits on plat and subdivision regulations.

According to the Fort Worth Court of Appeals, the Legislature intentionally imposed "restrictions on a municipality's authority to impose regulations on land in the municipality's ETJ to prohibit the municipality's extension of zoning ordinances into its ETJ under the guise of cleverly drafted rules 'governing plats and subdivision of land.'" *Town of Annetta S. v. Seadrift Dev., L.P.*, 446 S.W.3d 823 (Tex. App.—Fort Worth 2014, pet. den.). The town argued that the §212.003 language was only intended to prevent zoning regulations from being adopted in the ETJ. *Id.* at 826. Because the statutory language was unambiguous, the court did not have to resort to extrinsic aids to address this contention. *Id.* The town also argued that a two acre lot could logically be the site for duplexes, triplexes and apartment buildings. But the court of appeals pointed out that these units could not be further subdivided and sold due to the ordinance. *Id*. at 828.

Further, the town claimed that the word "regulate" meant "specifically proscribing." *Id.* at 829. The court of appeals ruled that the ordinance could have the same impact on the resulting number of residential units per acre and was therefore covered by the statute. In addition, the town in fact intended to regulate the number of residential units built per acre in the ETJ. The court of appeals held that the town's argument that the two acre restriction is not a regulation of land use but only a regulation of lot size was a distinction without a difference.

Much of the current discussion regarding these elements focuses on their indirect application. For example, neither a city nor a county can require a minimum or maximum building size. But what about a situation where the city imposes a 50' front yard setback on a 100' deep lot? This is not an express regulation or limitation on building size, but it has a significant impact on whether certain housing products can be built.

STANDARD COUNTY REGULATIONS

Counties have statutory authority in Chapter 232 of the Texas Local Government Code to draft subdivision regulations for the following:

- Road right-of-way;
- Road construction;
- Road drainage;
- Statements of water availability to purchasers;
- Drainage;
- Performance bond, financial guarantee or letter of credit; and

- Certification by an engineer of water availability

Sections, 232.03 and 232.031 specify which road construction standards counties may require in submitted plats. Section 232.03 allows counties to set the specifications, but Section 232.031 states that the standards imposed on subdivision roads may not exceed those the county imposes upon itself. Generally speaking, subdivision roads used as main arterials can have a required right-of-way of 50-100 feet with shoulder-to-shoulder widths from 32 to 56 feet, while local roads in the subdivision may have required rights-of way of 40-70 feet with shoulder-to-shoulder widths from 25-35 feet. This section allows for "reasonable" standards for roadway construction and drainage specifications to be set based upon the amount and types of travel over the roads. Perhaps most directly relevant to land use control, Section 233.032 allows counties to establish set back lines on public roads. Counties may not require more than a 25 foot setback from all public roads other than major highways or roads or more than a 50 foot setback on major highways and roads.

The Legislature has also provided certain urban counties with additional platting powers. Section 232.0033 Tex. Loc. Gov't Code, allows counties to conduct tighter reviews of plats where all or part of the plat is within a planned major transportation corridor. Similarly, Section 232.102 allows for the creation of major thoroughfare plans in urban counties. This includes allowing eligible counties to require a 120-foot right-of-way for corridors that a county identifies as major thoroughfare, or rights-of-way of greater than 120 feet if identified as a major thoroughfare in a Metropolitan Planning Organization's long-range plan.

Sections 232.003 and 232.0032 grant counties the ability to set and enforce specifications for the supply of water, the treatment of wastewater and the handling of stormwater runoff. Section 366 of the Health and Safety Code allows counties to regulate the design, location and construction of on-site sewage disposal systems. Section 232.0032 specifically grants counties the ability to require an engineer's certification that wells or other subsurface sources of drinking water are adequate to serve the subdivision.

PLATTING PROCESS

Both cities and counties have a similar plat application process. An engineer will prepare the plat in conformance with the requirements in the subdivision regulations. Following the submittal, the staff provides comments and the plat document is usually revised to address those comments. Following back and forth, the plat is then scheduled for review and approval.

Section 245.002(e), Tex. Loc. Gov't Code, states that a permit application can expire if the City sends notice within 10 days of the submittal "that specifies the necessary documents or other information and the date the application will expire if the documents or information is not provided."

Section 232.0025 provides the explicit procedure for the submission and review of plat applications by counties. Section 232.0025 (a) requires counties to create a list of required documents and other information that are necessary for a county to review and approve a plat. For counties, applicants must be notified within 10 days if their applications are incomplete, and

applications must be given to the commissioners court within 60 days of completion. *See* Tex. Loc. Gov't Code §232.0025.

Section 212.009(a), Tex. Loc. Gov't Code, requires that a plat application be acted upon by the city's planning and zoning commission within thirty (30) days after submittal. The city council then has an additional thirty (30) days to act on the application. If the application is delayed, the mayor is required to certify that the City failed to act on the application within the mandatory statutory time frame pursuant to § 212.009(d). His refusal to certify is unauthorized by state statute and would be illegal and *ultra vires*.

One of the ways to address platting delays is to bring House Bill 3167 to the attention of the regulating authority. Enacted in 2019 the bill requires both cities and counties to provide detailed written reasons for denying or conditionally approving a plat. See §§ 212.009(a), 232.0025(d), TEX. LOC. GOV'T CODE. The entity must "clearly articulate each specific condition for the conditional approval or reason for disapproval." The language of sections 212.0091 and 232.0026 prohibit generic statements for a denial or conditional approval and instead require specific reasons with accompanying citations to law for anything other than full approval of a plan or plat. A municipal authority or commissioners court that does not provide such specificity violates chapter 212 or 232.

In 2018, the Texas Supreme Court issued its opinion on plat review in *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477 (Tex. 2018). JDC was the developer of a 1400 acre master-planned community in Fort Bend County. One of the final plats was delayed by the county in an attempt to force the developer to build four, rather than two, lanes of a major road. *Id.* at 481. JDC filed a mandamus suit to require the county engineer to submit the plat application to the county commissioners court for a vote. The suit included a request to enjoin County Commissioner Meyers from attempting to extract two additional road lanes from JDC.

The Supreme Court held that because an individual county commissioner in the county lacks legal authority to receive, process or present a completed plat application to the county commissioners court, JDC did not have standing to pursue its claim for injunctive relief against Meyers. *Id.* at 488. But JDC did have standing to file its suit against the county engineer. A county representative cannot place extra conditions on approving a plat application. *Commissioners Court v. The Integrity Grp., Inc.*, 21 S.W.3d 307, 309 (Tex. App.—San Antonio 1998, pet. denied).

In issuing and conditioning building permits, site plan and plat approval, a city is purely an administrative agent and cannot exercise any independent discretion. If the applicant complies with all existing valid requirements, the issuance or conditioning of a building, plat or development permit becomes a mere ministerial duty. *Rhodes v. Shapiro*, 494 S.W.2d 248 (Tex. Civ. App.—Waco 1973, no writ); 1 Yokley, Municipal Corporations 163-164 (1956). The remedy for a denial of a certificate of no action under the 30-day rule of Local Government Code § 212.009 is to seek mandamus relief or a mandatory injunction in the trial court. *Woodson Lumber Co. v. City of College Station*, 752 S.W.2d 744, 747 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Myers v. Zoning & Planning Comm'n of the City of W. Univ. Place*, 521 S.W.2d 322 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

PROPORTIONALITY

Regardless of which governmental entity is imposing its infrastructure standards during the platting process, they must pass constitutional muster. A city's application of its subdivision ordinance must comply with the Texas constitution and statutes. The Texas Supreme Court addressed this issue in *Town of Flower Mound v. Stafford Estates*, 135 S.W.3d 620 (Tex. 2009). Relying on federal case law precedent, the court held that the Town's requirement that a single-family subdivision developer construct a perimeter street must be roughly proportional to the number of cars from the subdivision that would utilize the road. In this case the Town could not prove up the nexus and the court held that the construction requirement was not roughly proportional.

In *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), Stafford sued the Town in the District Court of Denton County alleging the requirement that it construct and pay for the improvements to Simmons Road as a condition to the Town's approval of the final plats constituted a taking of property without compensation in violation of Article I, Section 17 of the Texas Constitution, and the Fifth and Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983, and a claim for attorneys' fees and expert witness fees under 42 U.S.C. § 1988. After a trial on stipulated facts, the District Court awarded Stafford approximately $425,000.00 in damages under the Texas Constitution as a result of the exaction of the Simmons Road improvements in excess of Stafford's proportionate share.

The Fort Worth Court of Appeals affirmed the award of damages to Stafford under Article I, Section 17 of the Texas Constitution. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 71 S.W.3d 18 (Tex. App.—Fort Worth, 2002). The Supreme Court affirmed the judgment of the Court of Appeals. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.2d 620 (Tex. 2004).

The Legislature incorporated the elements of *Stafford* when it enacted § 212.904, Tex. Loc. Govt. Code. This section requires the City to prepare an engineer's report showing that the cost of infrastructure improvements imposed on a developer may not exceed an amount that is "roughly proportionate to the proposed development." There is no statutory requirement for the developer to provide a similar study. CTMGT challenges the amount of the Fee itself pursuant to § 212.904.

Despite this pronouncement from the Supreme Court, cities continued to impose unlawful exactions during the platting process. A fed up Texas Legislature reacted in 2005 by enacting §212.904, Tex. Loc. Gov't Code which applies to all types of exactions, including land dedications, improvements and fees. According to the statute, the city engineer must initially issue a report with his proportionality determination. Many cities do not comply with this obligation. It only becomes an issue if the developer opposes a particular exaction.

In most instances on-site infrastructure improvements are considered to be proportional because they are necessary for the development to be operational. For example, a four lot residential subdivision needs a two lane road even though the capacity of a two lane road can accommodate hundreds of houses. Of course, if the city required that the developer of a four lot subdivision construct a four lane road then §212.904 would be violated.

Similarly, the four lot subdivision will probably need water and sewer lines extended to the houses. A certain minimum sized line is needed to provide sufficient pressure. Even though these lines could serve many more houses, these lines are necessary to provide service and are therefore likely proportional.

Many proportionality issues involve the dedication and/or construction of perimeter and/or off-site roads. Developers and cities usually approach road exactions differently. The developer's consultant will typically prepare a traffic impact analysis which is limited to just the roads at issue. If the city requires a subdivision developer to widen an existing perimeter road from two to four lanes, the consultant will determine the vehicle capacity of the two new lanes and compare it to the number of vehicles generated by the new subdivision.

Assume that the cost of the new road improvement is $1,000,000.00 and traffic for the new subdivision constitutes 25% of the capacity. The developer will argue that (1) it should not be required to make the improvement, or (2) the city should pay 75% of the cost. Most cities, on the other hand, hire engineering consultants who will utilize a street system analysis. This approach examines all of the roads in the area that might be accessed by vehicles from the subdivision. It is similar to the impact fee act methodology inasmuch as it examines future improvements to the system and the cost to provide. Not surprisingly, the city's consultant will usually opine that the city's perimeter road exaction is proportional.

A developer who disputes the city's determination may appeal to the city council. §212.904(b), Tex. Loc. Gov't Code. At the appeal, both sides present evidence to the council. The city is required to rule "within 30 days following the final submission of any testimony or evidence by the developer." *Id.* If the council rules against the developer, he or she may appeal to the county or district court within 30 days after the final determination. §212.904(c), Tex. Loc. Gov't Code. A prevailing developer on appeal is entitled to costs and reasonable attorney and expert witness fees.

For example, a client we represented who wanted to build a house and a barn within the ETJ of a city about three miles from the corporate limits. The city told her she would have to conform with the city's general plan for roads, water and sewer. This included a right-of-way dedication for the adjacent county road and a significant escrow payment based upon the cost to construct two new lines. In addition, the city requested a $250,000.00 escrow to pay for the extension of water and sewer lines to the city's system located several miles away. Following the filing of a § 212.904 appeal, the city withdrew all of these demands and agreed that no additional infrastructure would be required for this development .

A relatively recent exactions case involving ETJ property is *Selinger v. City of McKinney*, 2020 Tex. App. LEXIS 4894 (Tex. App.—Dallas, July 1, 2020, no pet.). Selinger proposed a subdivision plat for 331 smaller residential lots. Because city water and sewer lines were located several miles from the site, Selinger planned to construct a sanitary sewer package plant and obtain water supply from a special utility district. The city confirmed that the plat complied with the city's subdivision regulations other than the condition that Selinger pay the city $482,000.00 when the city's water and sewer transmission lines were eventually extended to the development. *Id.* at 3.

According to the court of appeals, an exaction occurs if a governmental entity imposes an exaction as a condition to obtaining governmental approval for a requested land development. The definition of an exaction is broad enough to include a contingent obligation such as the one in this case. *Id.* at 11.

One of Selinger's causes of action was a violation of Government Code Chapter 2007, also known as the Private Real Property Rights Preservation Act. Because the city admittedly did not impose its regulations uniformly in the ETJ, this cause of action was properly pled. *Id.* at 17.

In addition, Selinger properly pled a violation of § 212.904 of the Texas Local Government Code. According to the statute a city is prohibited from requiring a developer to pay more than its proportional share of the required infrastructure costs. Although Selinger did not submit a formal § 212.904 appeal to the city, the court of appeals held that the city council denied Selinger's plat application because he would not pay the nonproportional $482,000.00 contingent exaction. *Id.* at 27.

SPECIFIC PLAT ISSUES

In most instances, a municipality's infrastructure construction standards will be more stringent than a county's. Urban city street design standards may be incompatible with typical county maintenance. For example, most urban cities require that streets be constructed with concrete, paving curbs and enclosed drainage systems. Most counties allow county roads to be constructed with asphalt or chip seal and open barrow ditches.

Even though a plat may be approved by a city in the ETJ, multiple jurisdictions may be impacted. For example, the city may require fire hydrants at certain locations but is not the water service provider. The nonprofit water supply corporation with the certificate of convenience and necessity usually makes these decisions. Various examples of platting issues are described below.

A. Signage

A frequent issue that comes up is the regulation by cities of new signs in the ETJ. In *Primary Media, LTD. v. City of Rockwall*, the court of appeals held that the city could extend some or all of its sign regulations to its ETJ. No. 05-09-01116-CV 2011 WL 908353 at 14 (Tex. App.—Dallas Mar. 17, 2001, no pet.). In that case, the parties did not even dispute whether the city was authorized to extend its sign regulations to its ETJ pursuant to Tex. Loc. Gov't Code § 216.902. *Id.* at 13. Rather, the sign owner sought to challenge the city's sign ordinance on the basis that it only extended portions of the ordinance instead of its entirety. *Id.* at 12-13. The court held that the plain language of the statute permitted the city to extend one or all of its sign regulations to its ETJ. *Id.* at 13-14. Counties do not have authority to regulate signage.

B. Streets

The acceptance and dedication of streets is frequently at issue for rural developments. Long-term street maintenance is a major expense. The prior experience of cities eventually annexing subdivisions and taking over the maintenance responsibility is now less likely.

A commissioners court's approval of a plat for filing purposes does not constitute acceptance of the dedicated streets and roads. *See Miller v. Elliott*, 94 S.W.3d 38, 45 (Tex. App.—Tyler 2002, pet. denied); *Comm'rs Ct. v. Frank Jester Dev. Co.*, 199 S.W.2d 1004, 1007 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.). A dedication is a mere offer; the commissioners court must accept it for the street or road to become a county road. Dedication of streets and roads by a particular plat does not make them county roads, such that the county has an obligation to maintain them, unless the county accepts the dedication. *See Frank Jester Dev. Co.*, 199 S.W.2d at 1007; Tex. Att'y Gen. LO-95-064, at 1 ("A road does not become part of the county road system merely by virtue of a dedication of the road to the public in a subdivision plat. The dedication must be accepted by the county."). Acceptance may be express; it may also be implied if the county uses or maintains the road. *See Viscardi v. Pajestka*, 576 S.W.2d 16, 19 (Tex. 1978);

Nevertheless, the purchasers of land abutting the streets may have an enforceable private easement that can be enforced. A conveyance of real property "by reference to a map or plat showing abutting roads or streets results in the purchaser, or one holding under him, acquiring a private easement in the roads or streets shown on the plat." *Horne v. Ross*, 777 S.W.2d 755, 756 (Tex. App.—San Antonio 1989, no writ); *see Dykes v. City of Houston*, 406 S.W.2d 176, 181 (Tex. 1966) (stating that if a seller sells lots by referring to a map on which a street is defined, "this operates as an immediate dedication of the street").

Even under an ex officio road commissioner system, a county commissioner, acting alone in his or her capacity as an ex officio road commissioner, has no authority to accept a street for county maintenance. In general, a county can act only through its commissioners court, and an individual commissioner has "no authority to bind the county" by his or her separate action. *Canales v. Laughlin*, 214 S.W.2d 451, 455 (Tex. 1948); *accord Nueces County v. de Pena*, 953 S.W.2d 835, 836-37 (Tex. App.—Corpus Christi 1997, no writ).

On the other hand, a commissioners court, acting as a body, has authority to accept a road for county maintenance, but it must do so in compliance with statutory requirements. *Cf. Chesser v. Grooms*, 302 S.W.2d 488, 491 (Tex. Civ. App.—Beaumont 1957, no writ) (finding that the Orange County Commissioners Court was within its rights in rejecting a subdivision developer's offer of dedication of the streets or of making the streets part of the county road system).

Texas law on city streets is similar. "Acceptance" of a dedicated street obligates a city to maintain and improve the street. *Id.* § 212.048. But a city's approval of a plat alone does not constitute such acceptance. *See id.*; *see also Miller v. Elliott*, 94 S.W.3d 38, 45 (Tex. App.—Tyler 2002, pet. denied) ("Dedication is a mere offer and the filing does not constitute an acceptance of the dedication."). Section 212.048 of the Local Government Code provides that:

> The approval of a development plat is not considered an acceptance of any proposed dedication for public use or use by persons other than the owner of the property covered by the plat and does not impose on the municipality any duty regarding maintenance or improvement of any purportedly dedicated parts until *the municipality's governing body makes an actual appropriation of the dedicated parts by formal acceptance, entry, use, or improvement*.

Tex. Loc. Gov't Code Ann. § 212.048 (Vernon 1999) (emphasis added); *see also City of Waco v. Fenter*, 132 S.W.2d 636, 637 (Tex. Civ. App.—Waco 1939, writ ref'd) ("In order to render a municipality liable for negligence in failing to keep a street . . . in repair, the evidence must show that such street . . . has been dedicated by the owner and accepted by the municipality as a public way."). Thus under section 212.048, a city has no obligation to maintain or improve a dedicated street unless the city formally accepts, enters, uses, or improves the dedicated street.

There are more and more controversies involving new streets in subdivisions in the ETJ. If the city has jurisdiction typically it will require concrete street pavement. Counties on the other hand prefer asphalt streets because (a) they have the equipment and manpower to maintain this type of surface, and (b) while concrete streets last longer they are more expensive to maintain if there are issues in the future. Many developers are now forced to make internal streets private in order to avoid this conflict between city street construction standards and county maintenance.

C. Site Improvements

While cities are not legally allowed to impose land use and building construction regulations in the ETJ they often apply platting regulations to make site improvements more expensive. This is done to drive a proposed development away due to the adverse economic impact.

Open storage is a popular use on ETJ properties. Most jurisdictions require a concrete regulation fire lane to be built to serve new structures. The goal is to ensure fire trucks can drive on an acceptable pavement surface to put out a fire. Usually the materials are stored on dirt or gravel. Sometimes a city will attempt to force the business owner to concrete the entire property as a condition of locating storage on the tract. This type of requirement may drive up the cost to develop to such an extent that the project is not economically feasible.

D. Fire Codes

Counties that either have a population of 250,000 or that are adjacent to a county with a population of 250,000 may pass fire codes for their unincorporated areas. The main limitation of this grant of power is that single-family residential structures are not affected. Rather, the fire code is only allowed to cover commercial, public or multifamily residential buildings.

Many cities do not provide fire protection in the ETJ. As rural areas have become increasingly urbanized, a growing concern has been the provision of water service of sufficient quantity and pressure to adequately fight fires, known as "fireflow." Smaller nonprofit water supply corporations have historically provided service to rural areas. Texas Water Code chapter 13 does not mandate fireflow as a condition for holding a CCN. Retail water service is defined merely as "potable water service . . . provided by a retail public utility to the ultimate consumer for compensation." Tex. Water Code § 13.002(20). This definition does not encompass fireflow, as the TCEQ made clear in its rulemaking following House Bill 2876 (2005): "The commission does not have statutory authority to require CCN holders to have the ability to provide fireflows."

E. Building Construction

In 2009 the Legislature enacted Subchapter F of Chapter 233 of the Local Government Code to allow county governments to regulate new home construction. Counties now have the option to require compliance with the International Residential Code. The specific inspections to be undertaken are described in §233.151(a)(2). The statute calls for the inspections to take place during three stages of residential inspection: the foundation stage, the framing and mechanical systems stage and upon completion of construction. These provisions apply to both the construction of new residential units and the expansion of existing units. The developer is responsible for having either professional inspectors from each of the specialties represented in the required inspection, a professional combination inspector or a qualified county employee perform the inspection.

F. Park Land

Governmental requests to dedicate park land or pay fees in lieu of dedication are often controversial. There is a question as to whether cities can own and operate parks outside of their city limits. It is often difficult for maintenance crews to maintain these parks which are used primarily by non-residents. In addition, the city's parkland exaction may not be proportional to the subdivision's impact on the park system.

Travis County has implemented a parkland requirement in new subdivisions. Developers unwilling or unable to incorporate the required parkland in their subdivisions must pay a fee in lieu of parkland. The formula for determining the amount of parkland required to be dedicated is based upon the number of units created multiplied by the number of residents per unit.

G. CCN Issue

Chapter 13 of the Texas Water Code provides the framework for securing authorization to obtain, amend, and revoke water and sewer CCNs from the PUC, the state agency responsible for administering CCNs. The significance of ETJ land being located within a city's CCN is that the city is obligated to serve a developer requesting a connection pursuant to Chapter 13 of the Texas Water Code. Without access to centralized sanitary sewer, then only larger lots that can be served by septic systems can be developed. In the past, many cities would attempt to require annexation as a condition to providing the requested utility service. These demands, however, violated Chapter 13. Due to the passage of SB 6, most cities now recognize the illegality of imposing this obligation.

Texas law mandates that "*any retail public utility that possesses* or is required to possess a certificate of public convenience and necessity shall serve every consumer with [its] certified area and shall render continuous and adequate service . . . ." *Id.* (emphasis added). By its clear language, section 13.250 applies to "any retail public utility that possesses" a certificate. *Id.*

The Texas Legislature intended certificates of convenience and necessity to be creatures of statute. The general purpose of certification is to provide for a rational distribution of public utility services within defined geographical areas so that, within a specified area, the provider of utility service is unhampered by competitive forces. The Texas Commission on Environmental Quality issues a certificate authorizing the holder to provide service to customers within a specified area.

Tex. Water Code Ann. § 13.242 (2000). The certificate grants the holder a monopoly within its service area. Thus, certification is a benefit to its holder because generally no other utility may operate within the area, and the Commission is given authority to issue orders against any provider that transgresses into another's area. Tex. Water Code Ann. §§ 13.242(a), 13.252 (2000). The certificate obligates its holder to provide continuous and adequate service to every customer and every qualified applicant within its area. Tex. Water Code Ann. § 13.250.

The statutory obligation on a city to allow utility connections does not mean that the city has to construct, or pay to construct, line extensions to the developer's property. Virtually every subdivision ordinance requires that the developer construct all or part of the extensions. In some cases, these extensions can cost hundreds of thousands of dollars.

Our firm represents a potential developer of land in the ETJ subject to a sanitary sewer CCN. As shown on Exhibit C, the city recently rejected the developer's small lot subdivision on the grounds that the project would require sewer service from an existing transmission line located on the tract. The city intends to ask the Public Utility Commission to decertify the tract from the CCN in the future expressly to prohibit the proposed development. Without sanitary sewer service, only a minimum one acre lot size served by septic could feasibly be developed.

CITY ENFORCEMENT

Typically a city's criminal enforcement jurisdiction ends at the corporate limits. This means that cities do not have the authority to stop building construction by issuing a red tag or issuing a certificate of occupancy. In *Bizios* the builder simply ignored the city's red tags and the city was forced to hire an attorney to file suit to enforce its ordinances. The same tactic was taken in the Custer Storage case. As a practical matter a city may not want to file a lawsuit against every developer in its ETJ who questions the city's regulatory authority.