

# COUNTY SUBDIVISION REGULATION IN TEXAS "CHANGING TIMES"

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## INTRODUCTION

With the return of the "building boom" in Texas during the late 1990's, county officials have been faced with numerous subdivision platting issues and concerns regarding land development within their respective counties. Oftentimes, county officials are placed in a dilemma in considering subdivision plats due to factors which sometimes conflict. These factors include: (1) **time** - the developer is seeking to minimize the time involved in the subdivision plat review process, while the county officials, while cognizant of the need to act quickly so as not to discourage land development, want to establish that the development satisfies local concerns and statutory requirements; (2) **money** - in many instances the developer desires provide the minimum infrastructure and public dedications necessary to comply with the county's subdivision requirements; however, due to the unique nature of each development, the county may desire additional concessions not found in its subdivision requirements; and (3) **legal requirements** - many developers seek variances or exemptions from county subdivision development standards that are imposed by statute; other times, county regulations of subdivisions within the unincorporated areas of the county extend beyond that allowed by law.

Frequently, the end result of the subdivision platting process is confusion, sometimes resulting in expensive litigation or, alternatively, poorly planned land developments which pose a threat to the public safety and property values of the community. It is the intent of this paper to address the platting process by counties, as well as the purpose of platting and the legal standards for plats established in the Texas Local Government Code. With each legislative session, county officials ask for additional regulatory authority over subdivisions, especially in populous counties. As discussed below, the 77<sup>th</sup> Legislature granted certain urban counties additional authority to regulate subdivisions, however, the extent of such authority has not been sufficiently defined.

In everyday terms, "subdivision," is an act by which a tract or parcel of land is divided into two or more parts for the purpose of sale or building development. Legally defined, "subdivision," is an act by any owner of land ". . .who 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. " Tex. Loc. Gov't. Code § 232.001 (Vernon 2002 Supp.).

From a broader view, the subdivision of land is an integral part of the community development process. After raw land has been converted into new subdivisions of homes and/or businesses, the benefits and costs to the general public from such development have far-reaching implications.

## II.

### **Legal Authority for County Subdivision Regulation**

**Chapter 232 of the Local Government Code** - Historically, and to the present, Texas Counties have been granted far less authority than municipalities to regulate subdivision development through the platting process.<sup>1</sup> With certain exceptions generally applicable to counties along the Texas/Mexico border and counties with low per capita incomes<sup>2</sup>, the Texas Legislature has historically granted counties limited regulatory authority over subdivisions located in unincorporated areas of the county. While this limited authority may have been sufficient in years past when rural areas were generally sparsely populated, county officials are quickly learning their regulatory authority over subdivisions is inadequate to address the growing populations of persons residing beyond municipal boundaries.

The 77<sup>th</sup> Legislature provided certain urban counties with additional authority to promulgate subdivision regulations "to promote the health, safety, morals, or general welfare of the county and the safe, orderly, and healthful development of the unincorporated area of the county."<sup>3</sup> However, counties which do not qualify under the

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<sup>1</sup> Municipalities have statutory authority to adopt subdivision regulations, including regulations applicable to subdivisions located in their extra-territorial jurisdiction under chapter 212 of the Texas Local Government Code. Additional provisions may be contained in their City charters (home-rule cities). County subdivision authority is outlined in chapter 232 of the Texas Local Government Code.

<sup>2</sup> During the late 1980's and early 1990's the Texas Legislature recognized the need to pass "anti-colonia" legislation to stem the development of substandard communities, especially along the Texas border. Many of these developments lacked basic utilities (water, wastewater, solid waste collection, etc.) resulting in health and safety problems for the residents of those communities. The Legislature and the federal government appropriated funding to assist with the development of infrastructure in these subdivisions (generally made available through the Texas Water Development Board and the Texas Department of Housing & Community Affairs) and in addition new statutory authority was granted to certain counties to regulate new development in these economically disadvantaged areas. These statutes are contained in subchapters B and C of the Texas Local Government Code.

<sup>3</sup> See S.B. 873 enacted by the 77<sup>th</sup> Legislature, now codified as section 232.100 of the Texas Local Government Code.

new legislation are left with limited power over new development, especially in their unincorporated territories.

In contrast to the abundant authority of municipalities to regulate subdivision development, there is no comparable authority given to counties to regulate land development in unincorporated areas. Chapter 232 of the Texas Local Government Code does not vest counties with the police powers governing regulation of subdivisions as chapter 212 does with municipalities. Rather, the majority of Texas counties only have the authority to adopt subdivision regulations prescribing the design and construction of roads and drainage improvements. See, Elgin Bank v. Travis County, 906 S.W.2d 120 (Tex. App. - Austin, 1995, writ denied).

**Elgin Bank** - Section 232.001 requires a plat to be filed in instances where an owner divides the land into two or more parts to “lay out a subdivision of the tract, including an addition, or to lay out suburban lots or building lots, and to lay out 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.” This provision was interpreted by the Third Court of Appeals in the mid-1990’s to exclude divisions of property where there was no conveyance of streets, alleys, or other property for public use. In Elgin Bank v. Travis County, 906 S.W.2d 120 (Tex. App. - Austin, 1995, writ denied), the bank sought to subdivide property which was situated alongside existing roads. The bank contended the platting requirements did not apply since it did not intend to dedicate roads, alleys, parks or other property to the public. The Court of Appeals, focusing on recent legislative changes to the county and municipal platting statutes, distinguished the section 232.001 of the Local Government Code from section 212.004 applicable to municipalities, stating the legislature intentionally used the word "and" in 232.001 and "or" in 212.004, thereby requiring a subdivision of property and a dedication to the public in order to trigger the county platting requirement.<sup>4</sup>

Elgin Bank was inconsistent with many county subdivision orders which require plats for almost all divisions of property and caused significant heartburn statewide among county officials. Elgin Bank was effectively overruled in 2001 by the 76<sup>th</sup> Legislature in 1999 by the passage SB 710 amending section 232.0015 of the Local Government Code, generally requiring a plat to be filed when land is subdivided.

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<sup>4</sup> See also, Op. Tex. Att’y Gen.. No. JM - 1100 (1989) in which the Attorney General, interpreting section 232.001, stated “The platting requirement under the subsection is not triggered unless there is a division of the tract be it for a subdivision, an addition, or suburban or building lots - and the division also involves the laying out of "streets, alleys, squares, parks, or other parts" as described in the statute. SB 710, passed by the Legislature in 1999 effectively overruled the requirement that the developer must do something more than divide land to trigger the requirement that a plat be filed with the County.

Section 232.003 sets forth the limited authority of counties regarding subdivision plats. After an order is adopted, recorded in the minutes of the commissioners court, and published in the local newspaper, the county may impose subdivision requirements as follows:

- (1) require a right-of-way on a street or road that functions as a main artery in a subdivision, of a width of not less than 50 feet or more than 100 feet;
- (2) require a right-of-way on any other street or road in a subdivision of not less than 40 feet or more than 70 feet;
- (3) require that the shoulder-to-shoulder width on collectors or main arteries within the right-of-way be not less than 32 feet or more than 56 feet, and that the shoulder-to-shoulder width on any other street or road be not less than 25 feet or more than 35 feet;
- (4) adopt, based on the amount and kind of travel over each street or road in a subdivision, reasonable specifications relating to the constriction of each street or road;
- (5) adopt reasonable specifications to provide adequate drainage for each street or road in a subdivision in accordance with standard engineering practices;
- (6) require that each purchase contract made between a subdivider and a purchaser of land in the subdivision contain a statement describing the extent to which water will be made available to the subdivision and, if it will be made available, how and when; and
- (7) require that the owner of the tract to be subdivided execute a good and sufficient bond in the manner provided by Section 232.004.

Tex. Loc. Gov't Code § 232.002.

The Commissioners may require a subdivider to post a "good and sufficient" bond to insure the proper constriction of such improvements. Tex. Loc. Gov't Code § 232.004.

Counties may not impose additional subdivision requirements than those specifically authorized by statute. Canales v. Laughlin, 214 S.W.2d 451, 453 (Tex. 1948). (A commissioners court may exercise only such powers as the constitution or the statutes have specifically conferred upon them.) *See also*, Op. Tex. Att'y Gen. No. JM-317 (1985); Op. Tex. Att'y Gen. No. JM-789 (1987) (Commissioners Court could not require

the dedication of public roads and streets by warranty deed, since section 232.001 authorizes no such requirement). If the owner or owners of the tract of land subdivided in the plat follow the specified statutory procedure, the commissioners court is not authorized to reject the filing of the plat, as the approval of a plat properly filed is a ministerial duty of the commissioners court. Commissioners Court v. Frank Jester Development Co., 199 S.W.2d 1004 (Tex.. Civ. App. - Dallas, 1947, no writ); Op. Tex. Att'y Gen. No. JM-317 (1985).

The county may enjoin violations, recover damages and impose criminal penalties for knowing violations of platting requirements imposed by chapter 232 and the commissioners court's subdivision order.<sup>5</sup> Tex. Loc. Gov't Code §232.005.

### III.

#### **Dedication of Public Streets and Roads**

A common misconception held by local government officials is that the filing of a plat acts as a dedication of the streets, roads, pails, squares and other common areas indicated. on the plat. This is not necessarily so. The issue was litigated in Commissioners Court v. Frank Tester Development Co., 199 S.W.2d 1004 (Tex. Civ. App. - Dallas, 1947, writ denied) and the Court held that the mere filing of a plat did not constitute an acceptance of a dedication of the public streets and roads indicated on the plat. Rather, in order to effectuate an express dedication there must be an intent to dedicate, a communication of the intent to dedicate, and an acceptance of the land being dedicated by the Commissioners Court. Op. Tex. Att'y Gear. No. JM-317 (1985). The filing of a map or plat is only an offer to dedicate the streets thereon to the public. Without the signatures of all of the landowners, there is no effective offer or intent to dedicate land shown on a plat to the public. Id. A commissioners court sly accepts a dedication when it votes and notes the acceptance in the minutes. Op. Tex. Att'y Gen. No. JM-200 (1984). Local governments should verify subdivision plats presented for approval to make sure the owners of the property have executed a statement on the plat dedicating the public roads, sets, etc. to the local governmental entity.

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<sup>5</sup> Subchapter B of chapter 232 (i.e., Tex. Loc. Gov't Code § 232.021 et seq.) provides for comprehensive subdivision platting regulations, notices, and enforcement mechanisms, includes criminal penalties for subdivisions located in "affected counties" as defined in section 232.021. The gist of such regulations is to insure subdivisions is those counties are constructed with adequate paving, water and sewer infrastructure. These provisions were enacted to address the growing problem of "colonias" along the Texas/Mexico border.

## IV.

### **Standard Municipal Procedures for Plat Approval**

#### **Before Plat is Filed**

1. **Developer's Site Analysis** - The Developer should undertake a thorough preliminary analysis of the proposed land development scheme prior to the time it is presented to the governing body for consideration. The preliminary analysis should include: (a) an evaluation of the location of the proposed subdivision; (b) a physical survey of the site; and (c) a study of the economic feasibility of the development proposal.

Detailed platting information should be developed on numerous factors, including the availability of public utilities to serve the tract, topographical and other physical characteristics of the site, and the nature of residential and other improvements on the tract.

2. **Pre-application Conference** - Many municipalities utilize informal pre-application procedures under which the developer meets with representatives of the planning and zoning commission or other city officials prior to the time a preliminary plat is filed and formally submitted for approval. The pre -application conference gives the developer an opportunity to become familiar with what will be expected before committing the resources to the preparation of the preliminary plat and other materials required by the municipality.

In some municipal ordinances, pre-application procedures are a mandatory part of the plat approval process; others treat pre-application procedures as an optional service available to the developer at his or her option.

#### **Post filing**

3. **The Preliminary Plat** - Although "preliminary" implies something rather tentative, the preliminary plat is among the most important documents the developer will prepare. Once approved by the planning and zoning commission, or reviewing body, the preliminary plat will become the developer's primary frame of reference for the construction of streets, utilities, and other major improvements needed to serve his tract. After commitments for the construction of these installations have been made, any major changes in the developer's plans are likely to be enormously expensive.

It is the purpose of the preliminary plat to provide the reviewing body (usually the planning and zoning commission) with all of the information it needs to arrive at a

decision on the subdivider's proposed development. To adequately serve this purpose, the preliminary plat must either contain or be accompanied by detailed information which shows the number of lots in the tract, typical lot dimensions, proposed recreational areas, streets, utilities, and any additional items needed to present a comprehensive picture of the developer's plan.

**4. Application for Approval** -Municipalities usually require the developer to file a formal application with the reviewing body for approval of his preliminary plat. At the time of submission, the reviewing body acknowledges receipt of the application, formally accepts the developer's preliminary plat for review, and advises the developer of the time he can expect a decision from the reviewing body. However, there has been confusion as to when an application is "complete" and formally filed. Thus, it is important to establish definite guidelines to determine when the formal review process begins. It is imperative that the reviewing body act to: (a) approve the preliminary plat as submitted; or, (b) approve the preliminary plat with conditions--that is, subject the developer to make subsequent modifications to the plat in accordance with requirements imposed by the municipality; or, (c) disapprove the preliminary plat.

**5. Preliminary Plat Review** - After the preliminary plat has been formally accepted for review, the planning and zoning commission should distribute copies (all of which should be furnished by the developer) to the city engineer, public works director, fire chief, police chief, and other city officials advising each of the deadline for the return of their comments. In turn, these officials should study the plat, note any problems, and transmit their recommendations back to the planning and zoning commission.

The recommendations of other city departments, in combination with its own conclusions should provide the planning and zoning commission with the basis for a decision on the preliminary plat. As soon as a decision has been reached, the planning and zoning commission should meet with the developer to advise whether the plat has been approved outright, conditionally approved with the understanding that it will be modified to incorporate specified modifications, or disapproved.

**6. The Final Plat** - The final plat represents the municipality's last opportunity to assure that the subdivision development conforms to municipal requirements. The final plat should conform in every respect to the preliminary plat earlier approved by the planning and zoning commission, and should incorporate any modifications specified at that time. The only differences between the preliminary and final plat should be in the degree of detail provided.

The final plat should include:

- (a) The exact location, dimensions, name and description of all existing or recorded streets, alleys, reservations, easements, or other public right-of-way within the subdivision, intersecting or contiguous with its boundary or forming such boundary.
- (b) The exact location, dimensions, description and name of all proposed streets, alleys, drainage structures, parks, other public areas, reservations, easements, or other right-of-way, block, lots, and other sites within the subdivision.
- (c) Copies of plans and profiles of all streets, alleys, sidewalks, crosswalk ways, and monuments, and copies of detailed cost estimates for each.
- (d) The location and dimensions of existing and proposed water and sanitary sewer lines; plans and profiles of proposed water and sanitary sewer lines, indicating depths and grades of lines; detailed cost estimates for each.
- (e) When drainage channel or storm sewer is proposed, complete plans profiles, and specifications should be submitted, including complete construction details and detailed cost estimates.
- (f) A number to identify each lot or site.
- (g) Purpose for which sites, other than residential lots, are dedicated or reserved.
- (h) Minimum building setback line on all lots and other sites.
- (i) Location and description of monuments.
- (j) Name of owners of record of adjoining unplatted land.
- (k) Reference to recorded subdivision plats of adjoining platted land by record name, date and number.
- (l) Certification by surveyor or engineer.
- (m) Statement by owner dedicating streets, rights-of way and any sites for public uses.
- (n) Certification of local authorities.
- (o) Title, scale, north arrow and date.

- (p) Detailed site improvement data, including detailed cost estimates approved by the City.

The developer's final plat submission also should contain a sworn statement signed by all landowners dedicating the streets and other public places within the tract to the municipality, the certification of the city engineer or director of public works that the plat conforms to the requirements of the municipality's subdivision ordinance, the certification of the engineer or surveyor who prepared the survey of the tract that it is true and-correct, and a certificate from the engineer responsible for the preparation of the final plat that proper engineering consideration given such plat.

After the municipality accepts the developer's formal application for final plat approval, the agency has 30 days to grant its approval, conditional, approval, or disapproval to the plat. If a decision is not reached within the prescribed time, the final plat is deemed approved. Tex. Loc. Gov't Code § 212.009.

**7. Plat Filing Fee** - Any municipality which attempts a thorough program of subdivision control is likely to incur substantial administrative expenses by requiring the developer to pay a filing fee at the time he/she - submits the plat for review and approval. In some municipalities, a flat rate is charged, without regard to the size of the tract or the number of lots or acres involved. In other cases, the amount of the fee is in proportion to the acreage or number of lots in the area proposed to be subdivided. In yet other cases, the fee is a combination of a flat sum and unit charges.

Regardless of the method used, the amount of the fee should always bear a reasonable relationship to the municipality's actual administrative costs. In no event should plat filing fees be looked to as a new source of municipal revenue; nor should the fee ever be so high as to constitute an impediment to subdivision activity.

## **CONCLUSION**

While municipalities have broad authority to regulate new subdivisions via ordinance, counties do not. In every instance, however, the local governmental body should be aware of its responsibilities and authority, and should exercise such authority regarding new developments to the degree necessary to protect the public health and preserve property values within the community. Platting and subdivision requirements established by local ordinance or order should closely conform to statutory grant and the governing body should periodically review its plat review procedures to insure the orderly and consistent treatment of land development within the community.