

Timing Issues in Land Use Regulation

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1

Your City Attorney is Your Friend! (I hope...)

- This presentation is for **information only**.
- This presentation is not legal advice.
- If something in here scares you, please engage your city attorney!



2

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3

Proper Timing Matters in Life...



...and in Land Use Regulation.

4

The Basic Question Today: What Rules Apply?

- After Incorporation or Annexation
 - Can the landowner continue using their property as they did prior?
- After Zoning or Rezoning
 - Can the landowner continue using their property as they did prior?
- New Regulatory “Shot Clocks”
 - What shot clocks exist? And what happens if the city misses a deadline?
- Procedural Error
 - Must the error be corrected? Or is the action confirmed regardless?



5

Today's Topics

- Nonconforming Uses
- Vested Rights
- Shot Clocks
- Validation



6

Nonconforming Uses

Annexation

Zoning & Rezoning

7

Nonconforming Uses

- A nonconformity is a use of land or buildings that existed legally when a regulation became effective and continued, even though the use is no longer compliant with current regulations.
 - Uses
 - Structures
- Commonly created through
 - Initial Zoning Adoption
 - Zoning map or text amendments
 - Annexation

8

Tension

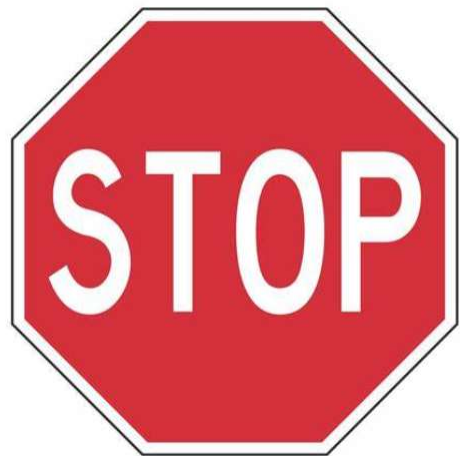
- Zoning and Comprehensive Planning strive to create or maintain community order to protect the health and general welfare of the community.
 - Allowing nonconformities undermines the effectiveness of this community planning,
- To shut down an “innocent” nonconforming use could violate constitutional protections against taking property without compensation

Planning Policy & Zoning Theory
vs.
Equity & Landowner Rights

9

Common Limitations on Nonconforming Use

- Only legal uses are protected
- The creation of the nonconformity must be “innocent.”
- Common Prohibitions:
 - No expansion or extension of the nonconformity
 - No improvements or modifications
- If challenged, the landowner has the burden of proving the existence of the nonconforming use.
- Review the city’s ordinance for local regulations.



10

Termination of Nonconformities -- Historically

- Prior to 2023, nonconforming uses could be terminated under certain circumstances:
 - Illegal activity
 - Destruction of the nonconformity
 - Intentional abandonment of the nonconforming use
 - Nuisance
 - Amortization process in local ordinances
- Senate Bill 929, 88th Leg., R.S. (2023)
 - Created a new statutory process for terminating nonconforming uses

11

Termination of Nonconforming Uses Post S.B. 929

What It Does:

- Protects landowners and tenants when a city requires a nonconforming use to stop
- Applies when zoning changes make a previously legal use nonconforming
- Tex. Loc. Gov't Code § 211.019

Key Rights:

- Owner or lessee may continue the use unless city takes formal action to end it
- If the city requires termination, the owner/lessee must receive:
 1. **Payment** for:
 - Demolition, relocation, lease/mortgage termination
 - Loss in property value**OR**
 2. **Right to continue the use** until the value is recouped through business operations

12

Termination of Nonconforming Uses Post S.B. 929

City's Obligations:

- Must provide **written notice** of termination and available remedies within 10 days
- Owner/lessee must choose remedy within 30 days—or the city may choose

Additional Provisions:

- Owners who receive payment must stop use within 10 days
- If continuing the use, it must stop once the owner recovers the specified value
- Appeals go to the **board of adjustment**, then **district court** (no deference to city)
- **Waiver is allowed** by written agreement
- **Immunity is waived**—owners can sue to enforce rights
- **Exception:**
No protection for uses **abandoned for 6+ months**

13

Hypothetical: Nonconforming Use Created by Annexation

- Radiator Springs, Texas wishes to annex a certain tract of land in the ETJ.
- The landowner, Mr. McQueen, also wants the annexation.
- A portion of the tract has been used by his friend, Tow Mater, as a salvage yard for years.
- Junk yards are not permitted in Radiator Springs.



14

Must Tow Mater Close His Yard??

- The General Rule: No.
- Tex. Loc. Gov't Code § 43.002 (1999)
- A person may:
 - Continue a legal land use in place before annexation, or
 - Begin a legal land use that was planned 90 days before the annexation's effective date.
- Exceptions: SOBs, colonias, nuisance, flood control, fireworks, weapons discharge, imminent danger, hazardous materials.
- This is an essentially equitable result.



15

Wrinkle: What if there is a Development Agreement in Place?

- Tex. Loc. Gov't Code § 212.172
- City and owner of ETJ property may agree, among other things, to "specify the uses and development of the land **before and after annexation**, if annexation is agreed to by the parties"
- With DAs, cities and ETJ property owners may also agree to:
 - Land uses and city planning authority
 - "Provide for" infrastructure
 - Opportunities for incentivizing annexation and development
- Also an essentially equitable result.



16

Neighbors are sick of it...

- It's been a number of years since the annexation, and some people in Radiator Springs have had enough of Tow Mater and his antics, and they want his Junk Yard shut down.
- Can the city shut down Tow Mater's Junk Yard after some period of time has passed?



17

Mater (Probably) Wins!

- The city likely cannot shut down Tow Mater's junk yard in this case following annexation
- Tex. Loc. Gov't Code § 43.002 is a very powerful protection for the land owner.
 - If the annexation was prior to 1999, other law may apply



18

Zoning Hypothetical:

- Tow Mater opened and operates his yard in Radiator Springs – not an annexation issue!!
- Junk yards have been permitted in Radiator Springs, but there is pressure from members of the community to shut down this use.
- Can the city rezone the property and force Tow Mater to close his salvage yard?



19

Currently, Yes.

Current: Tex. Loc. Gov't Code § 211.019

- City can follow the process to either pay for the salvage yard to close or allow it to remain open for a period of time and amortize the value.

Pending Legislation:

- H.B. 2149 (Tepper) – Nonconforming Uses
 - Amends Sect. 211.019 to require landowner agreement to terminating the use; allow a landowner to resume a nonconforming use after within 5 years; allow for repairs, expansion, and modification of nonconformities
 - Passed House on May 5; Set for hearing in Senate Local Govt tomorrow
- S.B. 3016 (Creighton) – Super Preemption
 - Adds field preemption to Titles 2 & 7 of the Tex. Loc. Gov't Code which include annexation and zoning.
 - Passed Senate on May 8

20

Other Scenarios

- A community with numerous STRs decides to reign in the number by adding a Conditional Use Permit requirement to any property being used as an STR.
 - Is that a problem?
- Same community has the Conditional Use Permit *expire annually*, so all STR operators must reapply.
 - Is that a problem?

21

Basic Nonconforming Use Checklist

NONCONFORMING USE (Section 211.019, TLGC + Case Law)

1. Is the property now *nonconforming* under new zoning?

- ☐ Was the use legal at the time it began?
- ☐ Did the zoning change after the use was established?

2. Has the use continued without abandonment?

- ☐ Has the property sat unused for 6+ months?
- ☐ Did the owner *intentionally* stop using the site in the nonconforming way?

3. Is the city requiring termination of the use?

- ☐ If yes, has the city complied with §211.019 (notice + compensation or time to recoup loss)?
- ☐ Did the landowner choose a remedy (payment or continued operation)?

4. Is the use being modified or expanded?

- ☐ Does the expansion fall under protected activity (e.g., health/safety, continuity)?
- ☐ Does local ordinance restrict changes to nonconforming uses?

22

Permits & Vested Rights

23

Uniformity of Requirements Tex. Loc. Gov't Code Chapter 245

Key Idea:

- Chapter 245 requires that once a qualifying application for a **permit** is filed by a landowner, the city must review that application – and all other permit applications for the same **project** – based on the rules in effect at the time of filing.
- Also known as “**vesting**” to a set of regulations
- Once a project is vested, future regulation changes do not apply

24

What is a “Permit?”

Broad Definition in § 245.001(1)

- Essentially any approval required to initiate, continue, or complete a project, including:
 - Plats
 - Site Development Permits
 - Utility Service Authorizations
 - Building Permits
 - Zoning or Subdivision Approvals tied to Construction
 - Could be a meeting – if required.

25

When Does a Project Vest?

Rights vest when:

- A complete original application **is filed** for a permit, or
- A plan for development or plat application is filed that gives fair notice of the project
 - A pre-application **meeting** can be a vesting moment.
- **Filing** occurs on the date the complete application is:
 1. Delivered to the city, or
 2. Deposited with USPS certified mail
- **Incomplete applications** can be expired after 45 days if:
 - Notice is given to applicant within 10 business days detailing deficiencies, and
 - Applicant fails to complete the submission

Rights vest on one date and apply to the entire project.

26

Exceptions

Cities **can still apply**:

- Technical submission rules (form, completeness)
- Certain health & safety codes:
 - Building codes (e.g., fire, plumbing, electrical)
 - Environmental floodplain regulations
 - Sexually oriented business restrictions
 - Colonias regulations
 - Certain zoning regulations that do not affect land development

Vesting generally locks in the **land development rules** – not *ALL* the city's rules.

27

Dormant Projects

- City may impose expiration dates on vested projects
 - Not less than 5 years for a project if no progress is made
 - Not less than 2 years for an individual permit if no progress is made
- **Progress** includes submission of final plat; posting fiscal surety; infrastructure costs incurred of at least 5% of the property value; utility connection or impact fees have been paid.
- Expiration is not automatic. The city must have an **ordinance** in place.

28

Hypothetical: Biff's Pleasure Paradise



- Hill Valley, Texas.
- Biff Tannen has purchased the site of the former local courthouse where he wants to construct Biff Tannen's Pleasure Paradise Casino & Hotel.
- The current zoning allows the use, and Biff submits a complete application including a site plan, application for a plat amendment, and a utility service request on November 12, 2020.



29

Can Biff Be Stopped??

- March 2021, the city takes action to rezone the area for residential only use and prohibit casinos
- City also modifies its façade regulations.
- Biff completes the platting process and posts fiscal in January 2022, but doesn't start construction until March 2024.

Can the city stop the Pleasure Paradise Hotel and Casino?

Vesting issues? Nonconforming Use Issues? Dormancy? Progress?



30

Other Scenarios

- Eccentric ETJ landowner lives on 10 acres with his family and their 35 rescue dogs. They agree to annex into the city. The following week, the city serves notice that only 6 dogs are permitted per household, so they need to un-rescue 29 dogs.
 - Does vesting protect the pups?
 - What about nonconforming use protections?
 - What about the protection for continuation of land use post annexation under Tex. Loc. Gov't Code § 43.002?
- Other loud or obnoxious business that was annexed in after 1999. Can it be shut down as a nuisance? Did S.B. 929 delete that judicial avenue?

31

Quick Vested Rights Checklist

VESTED RIGHTS (Chapter 245, Local Government Code)

1. Was a permit or development application filed?

- ☐ What kind of permit was it (plat, site plan, construction, utility)?
- ☐ Is it a “*project*” as defined in Chapter 245?

2. When was the *original* application filed?

- ☐ Note the exact date — this establishes the regulatory “snapshot.”
- ☐ Were all required elements submitted to make the application complete?

3. Is the application or permit part of a *series* for the same project?

- ☐ If yes, vesting may apply to all related permits under §245.002(b).
- ☐ Do the subsequent permits match the nature/scope of the original?

• 4. Has the project been dormant?

- ☐ Has there been **progress** under §245.005?
- ☐ Has the city lawfully imposed expiration dates (minimum 5 years from first permit filing)?

32

Shot Clocks

Subdivision & Platting

Building Permits

Third-Party Review & Inspection

33

We Talk About “Subdivision”

- “A subdivision is an area, part or section of something which is itself a part of something larger.”
- “To divide a part into smaller parts.”
- “A piece of land that is divided into smaller plots.”
- “A tract of land surveyed and divided into lots for the purposes of sale.”
- Rules should promote **health, safety, morals or general welfare** of the City and the **safe, orderly, and healthful development** of the City. (TLGC § 212.002)
- Subdivision rules include regulations on utilities, streets, trees, drainage, stormwater, water quality, and parks.



34

A Plat *Might* Be Required...

- **If** a landowner subdivides land into:
 - Two or more parts:
 1. To lay out a subdivision of the tract;
 2. To lay out suburban, building, or other lots; OR
 3. To lay out streets, alleys, squares, parks, or other parts of the tract intended by the owner to be dedicated to public use.
- **Then** they must have a plat of the subdivision prepared. (LGC 212.004)
 - Platting is required even if only laying out a part of the tract that will be dedicated to public use.
 - Does NOT have to meet all three criteria!!
- Currently a “plat” is defined to mean a preliminary or final plat, or a replat.



35

Exceptions (as always...)

- State law provides that a division of land into parts greater than **five acres**, which each part has **access**, and **no public improvements** are being dedicated does NOT have to plat. (TLGC § 212.004)
 - Does not define what “access” means.
 - City can (should) establish what access means in its regulations.
- **City can also adopt additional exceptions** to the platting requirement though its subdivision regulations. (TLGC § 212.0045)
 - Examples include divisions as part of an inheritance, lots or parcels existing in the same configuration as time of subdivision ordinance adoption, divisions created through eminent domain.

36

The Shot Clock

- Municipal Authority has **30 days** from date plat is **filed** to:
 - Approve
 - Approve with Conditions, or
 - Deny the plat application. (TLGC § 212.009)
- “Municipal Authority” duties can be delegated to staff (TLGC § 212.0065)
 - (If P&Z and Council are involved, 60 days total)
- Denial or Condition must cite the regulation
 - So there must first **be** a regulation...
- Extensions by agreement are permissible.
- City may not request a waiver of a deadline.

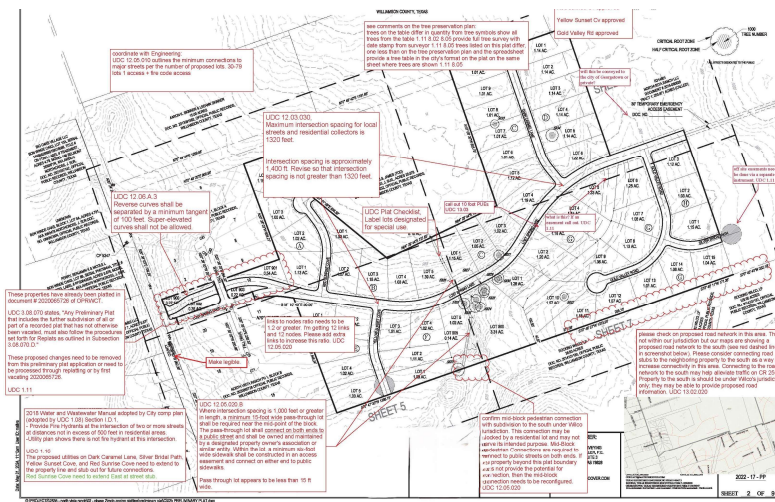


Failure to act within 30 days means the plat application is approved!

(Sorry – no DeLoreans allowed.)

37

Aside: Plats Review is Complicated!



38

The Shot Clock

- Following a denial or conditional approval, applicant may resubmit.
- Within **15 days**, municipal authority must:
 - Approve
 - Approve with Conditions, or
 - Deny the plat application. (TLGC § 212.0095)
- City cannot make a “new” comment on the plat.
- Plat approval is not discretionary. City must approve a complying plat.



Failure to act within 15 days of a resubmission means the plat application is approved!

(Again – no DeLoreans allowed.)

39

Filing Date is the Critical Moment

- City must **adopt** and **post** its complete list of all documentation and information required to submit an application. (TLGC § 212.0081)
 - City cannot require the submittal of an analysis, study, document or other requirement as part of the application unless explicitly allowed by State law.
- The application is complete and a plat is “filed” **on the date the plat is submitted, with complete application**, the application fee, and other requirements listed by the City. (TLGC § 212.004)
 - The **filing date** of the plat triggers the deadlines for review and response by the City.
- Submission calendars are not prohibited.



40

Building Permit Shot Clock

For a permit required by a city to erect or improve a building or other structure in city or the ETJ

- **45 Day Rule** (TLGC § 214.904)
 - City must grant or deny the permit; or
 - Provide written explanation to the applicant (and grant/deny w/in 30 days); or
 - Agree on a deadline.
- Failure to meet the deadlines means the city:
 - May not collect any permit fees associated with the application; and
 - Refund any permit fees associated with the application that have been collected.



41

Third Party Review or Inspection

- Tex. Loc. Gov't Code Ch. 247 (H.B. 14 in 2023)
- **If a deadline is missed** related to a development review or inspection by more than **15 days**, landowners have the right to have a third party complete the review or inspection.
 - Authorized Document Reviewers include engineers, city employees, or employees of other government entities (w/ city approval).
 - Authorized Inspectors include engineers, city employees, employees of other government entities (w/ city approval), certified building inspectors.
- No additional fee to city
- Landowner may appeal 3rd party review/inspection to governing body. 60 days to affirm the decision, or the review is approved / inspection waived.



42

Third Party Review or Inspection

Pending Legislation: H.B. 23 (Harris)

- Makes 3rd Party Review / Inspection an **option any time**
 - No need for a missed deadline...
- **Expands the definition of “plan”** to include construction plans, site development plans, and land development applications.
- Better guardrails on “engineer”
- City would have grounds to deny an improper review and conduct an inspection prior to issuing a CO.
- Passed the House on April 30
- Referred to Senate Local Government Comm. May 8



43

Validation of Procedural Errors

44

Municipal Actions are Presumed Valid (eventually...)

- Tex. Loc. Gov't Code 51.003
- A governmental act or proceeding of a municipality is **conclusively presumed, as of the date it occurred, to be valid** and to have occurred in accordance with all applicable statutes and ordinances **if**:
 - 3 years have passed, and
 - No lawsuit to annul or invalidate the act or proceeding has been filed
- This validation process does not apply to:
 - Act that were void at the time they occurred;
 - Criminal acts;
 - Actions which were preempted at the time
- Can cure procedural questions – when the procedure is not fundamental to due process.



45

Final Hypothetical: Grocery Store

- In 2016, a property owner in the ETJ of the City of Willow Vale submits a completed application to the city for a site development permit to build a 24-hour grocery store. (Required by **existing development agreement**.) The application also includes a drive-thru pharmacy window. The city **accepts the application** and issues a permit under its then-current commercial zoning and development rules. Work begins.
- In 2018, Willow Vale **annexes** the area (under the DA) and adopts a **new zoning ordinance** that reclassifies the site as “**Residential-Only**.” Construction has only recently begun on the store.



46

Final Hypothetical: Grocery Store

- What is the store's status during construction but following annexation and rezoning in 2018?
 - Nonconforming use under annexation law (TLGC § 43.002)
- Store opens in 2019. In 2022, the grocery store decides to finally add the drive-thru pharmacy window. Is that a problem?
 - Is this an impermissible expansion of a nonconforming use?
 - Was the original approval made in error because it violated internal city rules about proximity to residential neighborhoods?



47

Basic Validation Checklist

VALIDATION (Section 51.002, TLGC)

1. Was a permit, plat, or action arguably invalid or procedurally flawed?

- ☐ Was it challenged within **3 years**?
- ☐ If not, it may be conclusively presumed valid (even if flawed).

2. Does the challenge involve zoning, permit issuance, or regulatory procedure (due process concerns)?

- ☐ If yes, confirm whether the action was *adopted / approved / issued*.
- ☐ Check whether any exception to validation might apply (e.g., criminal acts, constitutional violations, *void ab initio*).

48

Conclusions

- **Nonconforming Uses** don't vanish on annexation or rezoning — cities must follow clear legal steps before requiring change.
- **Vested Rights** protect projects based on the rules in place when a valid application is filed — timing matters.
- **Shot Clocks** mean cities must act fast on plats and permits — or risk automatic approval or fee loss.
- **Validation Laws** can shield even flawed permits if they go unchallenged — don't delay if something seems off.
- **Your Role:** Know what's protected, what can be enforced, and when the clock is ticking.

