

TML Newly Elected City Officials' Orientation
You've got questions...we've got answers.

LAND USE FUNDAMENTALS
Land Use 101
JANUARY 20, 2023

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Be Prepared . . .

The Basics

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A Brief History of Zoning

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



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

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Purpose – §211.001

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

got purpose?

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Zoning – What Is It?

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



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A Brief History of Zoning

- Standard Zoning Enabling Act – 1926
- Texas:
 - *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W. 2d 475 (1934)
 - All property is held subject to the police power
 - A proper zoning regulation is not a “taking” for which compensation must be paid
 - **Texas Local Government Code – Chapter 211**
 - Referenced 400+ times in subsequent cases

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What Can Cities Regulate – §211.003

1. The height, number of stories, and size of buildings and other structures
2. The percentage of a lot that may be occupied
3. The size of yards, courts, and other open spaces
4. Population density
5. The location and use of buildings, other structures, and land for business, industrial, residential or other purposes
6. In areas of historical, cultural or architectural significance - may regulate construction, reconstruction, alteration or razing of buildings or other structures
7. Home rule cities may also regulate the bulk of buildings

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Districts – § 211.005

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

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The Comprehensive Plan – §211.004

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

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The Comprehensive Plan – §211.004

- Elements of a Comprehensive Plan
 - Land use plan
 - Transportation plan
 - Park and Open Space plan
 - Housing and Public facilities plan
 - Written policies and goals



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Procedures - §211.006 and 211.007

- Notice
 - Published in the newspaper of general circulation
 - Mailed notice to property owners within 200 feet
 - Notice must be mailed to the school district if the zoning classification affects residential or multifamily zoning Sec. 211.007(c-1)
- Hearing - Public hearing required
- Recommendation - Zoning Commission must make a final report (*not a recommendation*) **prior** to the City Council public hearing (in a General Law city, the Council may act as the zoning commission)

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Procedures - §211.006 and 211.007

- Legislative Action
 - Generally simple majority vote approves a zoning change
 - Protest - if the property owners of 20% of the area within 200 feet of the proposed zoning change file a written protest, the Council must vote by a super-majority (3/4 of the members voting in the affirmative) to approve an amendment
 - Property Owner Protest - If the property owners of 20% of the land area covered by the proposed amendment file a protest, the Council must vote by a super-majority (3/4 of the members voting in the affirmative) to approve an amendment
 - In some cities – if the Planning & Zoning Commission recommends denial, then a 3/4 vote is required to approve the request (check your charter or city ordinances)

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Making a Zoning Decision



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Fourteenth Amendment

- The 14th Amendment provides that states (cities) shall not deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
- Due process requires that all persons similarly situated should be treated similarly (equal protection).



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Fourteenth Amendment

Illustration: A municipality refuses to rezone land for a multifamily, government-subsidized housing project. The project site is zoned single family but located in an area which is zoned and developed for multifamily use. The municipality has usually granted rezonings to multifamily use in this type of an area. This illustration raises the issue of exclusionary zoning and equal protection.

Illustration: A homeowner in a single family neighborhood files an application for a Special Use Permit for an adult day care. At the public hearing the entire neighborhood speaks against the request although they have not objected to a day care for children on the same street. The City Council denies the request based on neighborhood opposition and concerns about the safety of their children. This raises the issue of equal protection -- what are the differences between day care for children and day care for adults? Are adults more noisy? Do they require more room? Is there greater traffic generation?

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Fourteenth Amendment

Due process also requires that before a person may be deprived of a property right as a result of the zoning process, they are entitled to notice and a hearing.

Illustration: City sent out notice for a zoning change to rezone property to “accommodate a retail development with design standards.” Zoning would allow for several uses – shops, restaurants, hotels and apartments.

Developer decides to put in a 100,000 sq. ft. Sam’s Club.

Neighborhood association sued to challenge the sufficiency of the notice.

Ruling: Notice was insufficient to **warn property owners** that they were going to be living in the shadow of a 100,000 square foot retailer.

City of Dallas v. East Village Association

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Fourteenth Amendment

- When does an individual have a property interest?

Chapter 211 of the TEXAS LOCAL GOVT. CODE is the Texas Legislature's practical response. If you are the property owner of the property being rezoned or if you own property within 200 feet of the property being rezoned, then you are deemed to have a property interest in the governmental action. *(Home-rule cities may provide different rules but I do not recommend them.)*

- What notice is required?

Again, § 211.007 of the TEXAS LOCAL GOVT. CODE establishes that written notice, 10 days prior to the public hearing before the Zoning Commission is deemed to be adequate notice. *(Home-rule cities may provide different rules but I do not recommend them.)*

- What hearing is required?

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

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Fifth Amendment

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

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

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

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Fifth Amendment

-- Regulatory taking.

Illustration: A developer owns property located on a steep hillside that is zoned a Planned Development District for single family homes that would allow 150 homes to be built on the hillside. The city conducts a hillside preservation study and as a result implements a rezoning of the property that ties the maximum density permitted to the degree of slope of the hillside. The bottom line is that the developer will now only be permitted to construct 11 houses instead of his original 150. He claims that his property has been taken for a public use (preservation of the hillside for the enjoyment of all residents of the city) without just compensation.

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

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First Amendment

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

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First Amendment



Illustration: A city passed an ordinance regulating the posting of signs in the town. The ordinance created different categories of signs, including ideological signs, political signs and temporary directional signs relating to a qualifying event. The ordinance applied different restrictions to each category. The ordinance was more restrictive with its regulation of temporary directional signs. A church posted temporary signs around the town to direct parishioners to the services. The town cited the church because the signs violated the sign ordinance.

See Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Holding: Content-based sign regulations must meet the strict scrutiny test: the government must show that the regulation is designed to serve a *compelling* governmental interest and *narrowly tailored* to achieve that interest.

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First Amendment



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First Amendment

Illustration:

- Orthodox Jewish congregation begins meeting in a home in a single-family neighborhood
 - 30 people on Friday and Saturday
 - 12+ people meet at the home every morning, afternoon and evening for prayer
- Neighborhood had deed restrictions limiting the use of property to a single-family home
- Neighbors cited problems with traffic and parking
- Congregation cited Texas Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) – *(applied to governmental entities)*
- Ruling: Court refused to allow enforcement of the deed restrictions thus allowing the church to continue to meet

Dallas Morning News – Feb. 5, 2015

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Factors to Consider in Making a Land Use Decision

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Compliance with Comprehensive Plan?

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

- Conflicting cases:
 - *Weatherford v. City of San Marcos* – “While a city’s zoning regulations ‘must be adopted in accordance with a comprehensive plan,’ TEX. LOCAL GOVT. CODE §211.004(a), it does not follow that the comprehensive plan dictates that a city council must approve every rezoning application that seeks to have certain property zoned in accordance with the comprehensive plan. If a city council were required to do so, then a comprehensive plan would become a de facto set of zoning regulations for the city. On the contrary, comprehensive plans in Texas must bear the following statement: ‘A comprehensive plan *shall not* constitute zoning regulations or establish zoning district boundaries.’ *Id.* §213.005 (emphasis added).

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Compliance with Comprehensive Plan?

- *City of Laredo v. Rio Grande H2O Guardian*
 - City rezoned property from Residential and Ag to Light Industrial.
 - Comprehensive plan established a low density residential buffer zone for areas near the Rio Grande River.
 - “because the City did not rezone in accord with its Comprehensive Plan, the ordinances passed to rezone the property were void *ab initio*. ‘Void *ab initio*’ means ‘null from the beginning.’”
2011 WL 3122205 (Tex. App. – San Antonio 2011, no pet.) at 10

RULE OF THUMB: If the requested land use is shown on the Comp Plan, the City’s decision on a zoning case is discretionary. If the requested use is **NOT** shown on the Comp Plan, should amend the plan or deny.

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Secondary Effects of Proposed Use?

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



Consider the USE – not the USER!

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Reasonable Use of the Property?

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

- The U.S. Supreme Court ruled that a 94 percent reduction in value was a “mere diminution.”

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448 (2001)

- U.S. Supreme Court ruled that an exaction that is a legitimate public purpose but unduly burdens an individual property owner is a regulatory taking.

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994)

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Reasonable Use of the Property?

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

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

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

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Frequently Asked Questions



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

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

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

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

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

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

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

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

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What is Spot Zoning?



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

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What is Contract Zoning?

Contract zoning is an unlawful activity whereby a property owner or developer agrees to develop or use property in a certain way in exchange for receiving a particular zoning classification from a city, *i.e.*, contract zoning involves **an enforceable promise on the part of either the owners or zoning authority to rezone property**. This is an area of the law that must be scrutinized if a city attempts to settle zoning/land use litigation by entering into a written settlement agreement.

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What is Conditional Zoning?

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

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

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

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Questions



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SUBDIVISION REGULATIONS
FUNDAMENTALS

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Enabling Legislation

Texas Local Government Code

Chapter 213 – Municipal Comprehensive Plans

Chapter 211 – Municipal Zoning Authority

Chapter 212 – Municipal Regulation of Subdivisions

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Purposes Served

- Creates a legal description
- Convenient and accurate plat recordation
- Orderly community development
- Adequate roads, utilities, drainage, open space, park and school sites
- External protection and conservation for surrounding areas
- Adequacy/capacity of public facilities



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When is a Plat Required?

“The owner of a tract of land located within the limits or in the extraterritorial jurisdiction of a municipality who divides the tract into two or more parts to lay out a subdivision of the tract ... must have a plat of the subdivision prepared.”

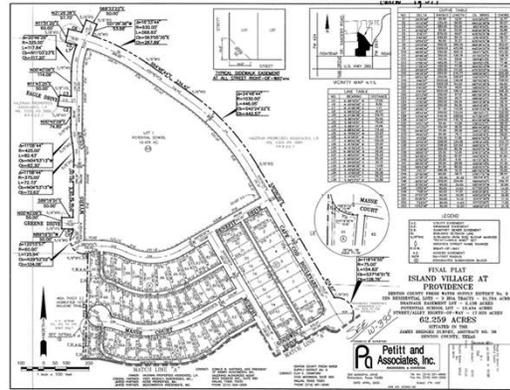
Section 212.004, Local Government Code

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Types of Plats

- Preliminary Plat (actually not required by statute)
- Final Plat
- Minor Plat (4 or less lots)
- Replat (Non-residential)
- Replat (Residential)
- Amending Plats
- Vacating Plat
- Administrative Plat



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Approval Process



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Approval Process - Submittal

- Pre-submittal Conference (recommended)
- Submittal Requirements - Statutory
 - Metes and bounds description
 - Land survey locating the subdivision
 - Dimensions of lots, streets, easements, public/common use areas
 - Acknowledgement of the owner
- City may specify more requirements

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Approval Process - Technical Review

- Subdivision Plat Review Committee
 - City Departments
 - Engineering, City Services, Police, Fire, Economic Development, GIS, etc.
 - Utility Companies
- Committee meets to examine all code issues prior to consideration by approving authority



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Approval Process: Review by Authority

- Approving authority is the City Council
 - May delegate approval to Planning Commission
 - May allow staff administrative approval of certain minor plats, replats, amending plats
- Must act on a plat, plans, etc. within 30 days after it is filed, otherwise plat is considered approved
- “Shot clock” Bill - 2019

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Standards for Approval

- **Ministerial act**
- **Must approve** plat if it conforms to:
 - The general plan of municipality;
 - The general plan for the extension of infrastructure;
 - The requirement to file a bond (if required);
 - All other technical requirements
- Limited flexibility in plat approval

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Replatting

- Like a plat, the City **must approve** a replat that meets all ordinance requirements and
 - Residential replats require a public hearing with
 - Notice in newspaper & mailed to owners w/in original subdivision & w/in 200 ft (depends on your regs)
 - Notices generally at least 15 days prior to hearing
 - except if owners of 20% of land area notified protest in writing, then requires $\frac{3}{4}$ vote of the approving body to approve replat

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Development Exactions - Proportionality

§ 212.904 Texas Local Govt. Code. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.

- (a) If a municipality requires, including under an agreement under Chapter 242, as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality. The municipality's determination shall be completed within thirty days following the submission of the developer's application for determination under this subsection.

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Development Exactions - Proportionality

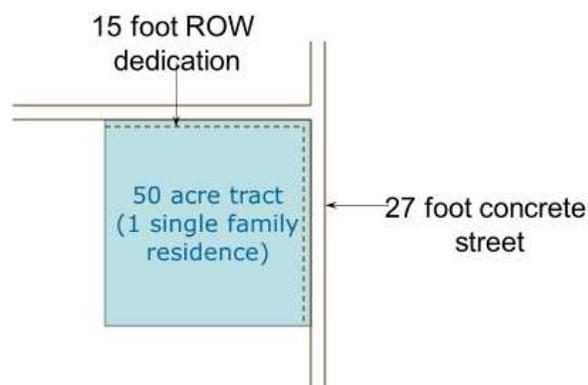
§ 212.904 (Rough Proportionality)

- Codifies *Nollan/Dolan* and Flower Mound Cases
 - If city requires developer to pay portion of infrastructure costs as condition of plat approval, developer's portion of cost must be **"roughly proportionate"** or consistent with only the impact of proposed development
 - As estimated by city's engineer

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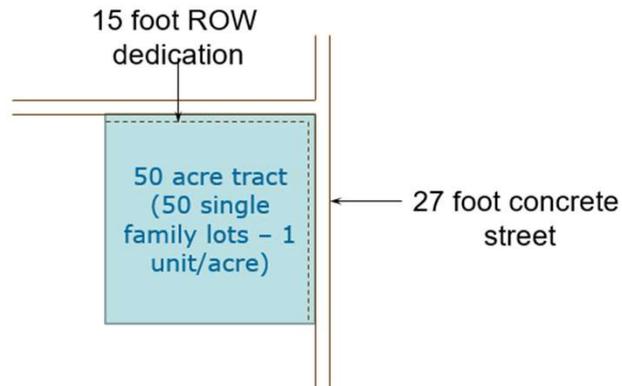
Proportionality



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Proportionality



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Other Issues

- Extraterritorial Jurisdiction
 - Most Cities extend their Subdivision Regulations into the ETJ
- Gated Communities, Private Streets
 - Need to have specific requirements to handle eventual replacement
- Impact Fees/Pro-Rata Charges
 - Fees that cover effect of development on existing city services
- Park Dedication or Fees-in-lieu-of Land

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Dos and Don'ts

- Don't plat setbacks/building lines
- Don't plat firelanes
- Do require platted access easements
- Do require Development Plats
- Do involve the City Engineer in the recommendation

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Questions



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