

# **FUNDAMENTALS OF ZONING**

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# FUNDAMENTALS OF ZONING

Reid C. Wilson

## I. INTRODUCTION

### A. Scope of Article

This article is intended as a general overview of Texas zoning law. Issues relating to subdivisions (addressed in Rick Triplett's following presentation), environmental matters, Americans with Disabilities Act, utility districts, county land use regulation or other quasi-land use restrictions will not be addressed. A broader overview of land use law generally is contained in Development/Land Use Law, James L. Dougherty, Jr. and Reid C. Wilson, 14<sup>th</sup> Annual Real Estate Law Conference of South Texas College of Law (1998). Section X.D. provides practical tips for identifying land use issues and alternatives in specific transactions.

### B. Reference Materials

The bible of Texas Zoning Law is Texas Municipal Zoning Law (3<sup>RD</sup> ed. 1999) published by Lexis Law Publishing, Parker Division, Carlsbad, California (referred to herein as Mixon), the only comprehensive analysis of Texas Zoning Law. It was originally authored by University of Houston Law Center Professor John Mixon, but has been substantially reorganized and by James L. Dougherty, Jr. of Houston and Brenda McDonald of Dallas, Texas. Arthur J. Anderson and William S. Dahlstrom, (both of Dallas, Texas) authored Texas Zoning and Land Use Forms (1992), published by Lexis Law Publishing which contains forms and discussions on governmental requests relating to development.

### C. Acknowledgments

The regulatory principles section of this article is taken from a presentation by James L. Dougherty, Jr. and the author to the 14<sup>th</sup> Annual Real Estate Law Conference of South Texas College of Law (1998) and is Mr. Dougherty's work product.

## II. ZONING

### A. Zoning Defined

Zoning is the comprehensive regulation of land use in a city. Although zoning is commonly considered the geographic division of a city into specified use districts, zoning can accomplish much more. In fact, a zoning ordinance is valid without districts limiting land use. Any more specific definition would not fairly represent the flexibility of modern zoning practices.

### B. History of Zoning

The concept of land use control by cities originated in the early 1900's in the industrialized northeast. The adoption of a comprehensive zoning ordinance by the City of New York in 1916 was generally considered the genesis of the zoning movement. In 1921, then Secretary of Commerce Herbert Hoover

appointed a zoning advisory committee which prepared the Standard State Zoning Enabling Act (the "Standard Act"). The Standard Act was promptly adopted, with some variation, in most states, including Texas in 1927. Zoning as a permissive exercise of municipal power was validated by the landmark U.S. Supreme Court case of Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926). Euclid interpreted the Ohio Zoning Enabling Act, a Standard Act variation, and therefore, was considered to validate all Standard Act derivatives. The Texas Supreme Court upheld the Dallas comprehensive zoning ordinance and the Texas Zoning Enabling Act in 1934. Lombardo v. City of Dallas, 47 S.W.2d 495 (Tex. Civ. App.— Dallas 1932) *aff'd*, 124 Tex. 1, 73 S.W.2d 475 (1934).

Zoning is universally considered to be the primary and most powerful method for the regulation of land use. Almost every city with a population over 5,000 has adopted zoning. Only a handful of cities in the United States with populations over 100,000 do not have zoning. Interestingly, three large cities in Texas, Houston, Victoria and Pasadena, do not have zoning. Houston has long been a case study for both zoning advocates and critics who each assert that its history supports their position. In November 1993, Houston voters narrowly rejected a proposed zoning ordinance. Although other Harris County cities (Baytown, Alvin, Mont Belvieu and Stafford) recently adopted zoning ordinances, Houston looks to remain free of traditional comprehensive zoning. However, Houston now has eighteen (18) Tax Increment Reinvestment Zones. One has implemented zoning and two (2) others are possible candidates for zoning in the future.

### **III. GENERAL REGULATORY PRINCIPLES**

#### **A. Mandatory Public Procedures**

Cities must follow intricate procedures when adopting or amending some regulatory ordinances. For example, a hearing must precede the adoption of platting or zoning regulations. *See* TEX. LOC. GOV'T CODE ANN., Chapters 211 and 212 (Vernon 1999 & Supp. 2001). The Texas Open Meetings Act requires that all city council meetings be posted in advance and, usually, conducted in public. *See* TEX. GOV'T ANN., Chapter 551 (Vernon 1999 & Supp. 2001). City charters sometimes prescribe additional procedural requirements such as readings and publication.

#### **B. Constitutional Reasonableness**

Under federal and state doctrines of substantive due process, an ordinance may be challenged if it is "arbitrary," "unreasonable," or "capricious" or if the means selected do not have a real and substantial relation to the objective. Chandler v. Gutierrez, 906 S.W.2d 195, 202 (Tex. App.—Austin 1995, writ denied) (a rational basis will satisfy due process requirements); *see also* Smith v. Davis, 426 S.W.2d 827, 831 (Tex. 1968) (mere difference of opinion, where reasonable minds could differ, not sufficient basis for striking down legislation as unconstitutional); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998) ("The Town's concerns regarding the urbanization effects of the development are legitimate governmental interests, and the denial of the development application is clearly rationally related to those interests"); Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036 (5th Cir. 1998).

#### **C. Takings and Damagings**

Due process clauses prohibit "taking" of private property without due process of law and, in some cases, compensation. U. S. CONST., amends. V and XIV; Sinclair Pipe Line Co. v. State of Texas,

322 S.W.2d 58 (Tex. Civ. App.–Fort Worth 1959, no writ). In Texas, the state constitution prohibits “damaging” private property as well as takings. TEX. CONST. art. I, §17 (Vernon 1999 & Supp. 2001).

### **1. State inverse condemnation theory**

In the 1970's and 1980's, Texas courts developed a state constitutional right allowing recovery of money damages on the theory of “inverse condemnation.” It has been applied when government interferes too much with private property rights, without a physical taking. *See City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (preservation of a scenic tract by delaying and denying permits for development); *Westgate, Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992). The 10-year limitations period found in section 16.026 of Texas Civil Practices and Remedies Code applies to an inverse condemnation action, both regulatory and physical takings. *Trail Enters., Inc. v. City of Houston*, 957 S.W.2d 625 (Tex. App.–Houston [14<sup>th</sup> Dist.]1997, pet. denied).

The Supreme Court has clarified when zoning might constitute “inverse condemnation” or a “taking.” *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (denial of planned development district that would have quadrupled the town’s population held not a taking because it did not totally destroy the value of the Mayhews’ property or unreasonably interfere with their rights to use and enjoy their property). *Mayhew* has been applied in two recent cases, *City of Glenn Heights v. Sheffield Development Company, Inc.*, 61 S.W.3d 634 (Tex. App.–Waco 2001, pet. filed) (downzoning was a regulatory taking because it unreasonably interfered with owner’s rights) and *Champion Builders v. City of Terrell Hills*, No. 04-99-00779-CV, 2001 WL 1580484 (Tex. App.–San Antonio 2001, no pet. h.) (revocation of building permit was not a regulatory taking as it was not a land use restriction, and increase of minimum square footage for apartment units was not a regulatory taking because the owner failed to prove unreasonable interference).

### **2. Federal takings cases**

Recent federal cases also recognize a federal constitutional right to recover money damages when police power regulations go too far. *See First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992). Federal doctrine generally requires that a plaintiff prove that the challenged regulation prevents all economically viable uses of the land. *See Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036 (5th Cir. 1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

### **3. Exaction cases**

So-called “exactions” have attracted increased judicial and legislative scrutiny in recent years. An “exaction” usually refers to a requirement that a developer give something to the government as a condition for a land use approval (zoning approval or a plat approval). Common exactions are street rights of way, easements, utility facilities and parks.

- a. Parkland dedication. A leading Texas case upheld College Station’s mandatory parkland dedication ordinance. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984). The court emphasized several factors that helped to support the ordinance. For

example, the dedicated land (or cash given in lieu of land) had to be used to benefit the dedicator's remaining land. It had to be used for close-by parks, not diverted for use across town.

- b. Logical nexus test. Under federal cases, exactions have to be logically related to a legitimate governmental purpose. In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the Supreme Court invalidated the exaction of a beach access easement because there was no logical connection between the demanded easement and the alleged governmental purpose to preserve beach scenery.
- c. Roughly proportional test. A 1994 Supreme Court case holds that an exaction must be at least "roughly proportional" to the impact of the developer's proposed project, and the government bears the burden of proof. Dolan v. City of Tigard, 512 U.S. 324 (1994); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).
- d. Impact fee statute. By statute, Texas has limited the ability of cities to require cash payments in lieu of physical facilities. So-called "impact fees" are restricted by TEX. LOC. GOV'T CODE ANN. § 395 (Vernon 1999). Note that the definition of an impact fee is fairly broad.

#### **4. Ripeness and Exhaustion**

Federal cases have required plaintiffs to get final decisions from the appropriate state and local governmental bodies before seeking relief in court. Until there is a final decision, the case is not considered "ripe" for federal intervention. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), the Court required the plaintiff to seek a variance (and possible compensation under state law) before bringing a federal constitutional case. In Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), the plaintiff was required to seek re-zoning before suing for relief under the due process clause. In Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), the Texas Supreme Court held that a town's denial of a planned development district, after months of negotiations and studies, was "ripe" for review, even though the landowner did not apply for approval of a smaller or less-intense development, but only as an exception to the "general rule" that the landowner must seek a variance. Plaintiffs must exhaust their administrative remedies before suing in state court, at least in those instances when the administrative officers have the power to grant relief. See Thomas v. City of San Marcos, 477 S.W.2d 322 (Tex. Civ. App.-- Austin 1972, no writ); City of Houston v. Kolb, 982 S.W.2d 949 (Tex. App.--Houston [14<sup>th</sup> Dist.] 1999, pet. denied).

### **IV. TEXAS ZONING STATUTES**

#### **A. Texas Zoning Enabling Act**

##### **1. Power to Zone**

The Texas Zoning Enabling Act - TEX. LOC. GOV'T CODE ANN. § 211 *et. seq.* (Vernon 1999 & Supp. 2001), (the "Enabling Act") empowers Texas cities to zone. This delegated power from the

state is the exclusive authority of a city to zone. City of San Antonio v. Lanier, 542 S.W.2d 232, 234 (Tex. Civ. App.--San Antonio 1976 writ ref'd, n.r.e.).

The Enabling Act does not specifically define zoning, except to state that zoning regulations are for the purpose of:

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

TEX. LOC. GOV'T CODE ANN. § 211.001 (Vernon 1999).

Zoning may regulate the following:

- height;
- number of stories;
- size of structures;
- lot coverage;
- open space;
- density;
- location of structures;
- use of structures;
- construction, reconstruction, alteration and razing of significant structures in “designated” areas of historical, cultural or architectural importance; and
- bulk (if a home rule city).

TEX. LOC. GOV'T CODE ANN. § 211.003 (Vernon 1999).

Zoning regulation must be adopted in accordance with a “comprehensive plan” (undefined) and be designed to address at least one of the following goals:

- lessen congestion in the streets;
- secure safety from fire, panic, and other dangers;
- promote health and the general welfare;
- provide adequate light and air;
- prevent the overcrowding of land;
- avoid undue concentration of population; or
- facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

TEX. LOC. GOV'T CODE ANN. § 211.004 (Vernon 1999).

Separate zoning districts with different regulations are authorized as follows:

- number, shape and size of districts may be determined by the city’s governing body;
- each district may have regulations regarding the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures and land;
- regulations must be uniform in each district, but may vary between districts; and
- each district’s regulations must be adopted after reasonable consideration of the following:
  - character of the district,
  - suitability of the district for particular land uses,
  - conservation of values, and
  - encouragement of appropriate land uses.

TEX. LOC. GOV'T CODE ANN. § 211.005 (Vernon 1999).



Once adopted, a City may enforce zoning regulation as follows:

- adopting ordinances to enforce zoning regulations;
- violation of the Enabling Act or a zoning regulation is a misdemeanor, the violation of which is punishable by fine, civil penalty, and/or imprisonment, as provided by the City; and
- injunction to restrain, correct or abate violation.

TEX. LOC. GOV'T CODE ANN. § 211.012 (Vernon 1999).

Various conflicts are addressed in the Enabling Act:

- among conflicting governmental regulations, the stricter prevails (i.e., zoning does not trump conflicting, more restrictive regulations);
- “public service businesses” (e.g. common carriers like pipelines) have vested rights protecting existing property made nonconforming by zoning regulation; and
- structures under the “control, administration or jurisdiction” of state or federal governments are exempt from zoning regulation (governmental supremacy issue);
- however as of 1999, privately owned structures and land leased to a state agency are subject to the Enabling Act .

TEX. LOC. GOV'T CODE ANN. § 211.013 (Vernon 1999 & Supp. 2001).

An entire zoning ordinance may be repealed by referendum as part of a charter election or if specifically authorized under the City’s charter. This provision was adopted at the behest of Houston zoning opponents during the 1993 battle over zoning in Houston.

TEX. LOC. GOV'T CODE ANN. § 211.015 (Vernon 1999).

## **2. Zoning Commission**

The Zoning Commission is a legislative body appointed by the City Council and may have any number of members. The Zoning Commission’s authority is limited to the drafting or recommending of the zoning ordinance and amendments (including planned development districts). It has no involvement in interpretation or the granting of variances or special exceptions. TEX. LOC. GOV'T CODE ANN. §§ 211.007, 211.009 (Vernon 1999). The city planning staff (or building inspection department in small cities) handles day to day administration of the zoning ordinance.

A home rule city must appoint a Zoning Commission to avail itself of the powers conferred by the Enabling Act. *See* TEX. LOC. GOV'T. CODE ANN.§ 211.007 (Vernon 1999); Coffee City v. Thompson, 535 S.W.2d 758, 767 (Tex. Civ. App.--Tyler 1976, writ ref'd n.r.e.). If a Planning Commission already exists, it may be appointed as the Planning and Zoning Commission. TEX. LOC. GOV'T. CODE ANN. § 211.007 (Vernon 1999).

General law cities may exercise zoning power without a Zoning Commission through their City Council. TEX. LOC. GOV'T CODE ANN. § 211.007 (Vernon 1999). A general law city must look to the general law for its authority to exercise municipal powers and must comply with the statutory requirements of general laws, such as the Enabling Act. Mayhew v. Town of Sunnyvale, 774 S.W.2d 284, 294 (Tex. App.--Dallas 1989, writ denied).

When appointed, the Zoning Commission recommends the boundaries of the various original districts and the appropriate regulations to be enforced therein. It has the responsibility of

submitting a report reflecting these recommendations to the City Council after the requisite public hearings. The Zoning Commission also has the responsibility of reviewing proposed changes to the zoning ordinance and forwarding its recommendations to the City Council. TEX. LOC. GOV'T. CODE ANN. § 211.006 (Vernon 1999); See Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804, 808 (Tex. Civ. App.--Dallas 1963, writ ref'd n.r.e.). The Zoning Commission is subject to the Texas Open Meetings Act. TEX. LOC. GOV'T. CODE ANN. § 211.0075 (Vernon 1999). The doctrine of governmental function does not immunize cities from state and federal constitutional attacks on zoning ordinances. Mayhew v. Town of Sunnyvale, 774 S.W.2d at 297. However, individual city council members acting on a zoning request are motivated by legislative concerns and are entitled to absolute immunity from personal liability. *Id.* at 298. **[But see Champion Hills]** Additionally, council members may not be compelled to testify in an action challenging a zoning ordinance. *Id.*; In re de la Garza, No. 01-0398, 45 Tex. Sup. Ct. J. 125, 2001 WL 1424507 (Tex. 2001) (applying the holding in In re Perry, 60 S.W.3d 857 (Tex. 2001), which discusses the policy decisions behind legislative immunity).

Cities with over 290,000 population may create neighborhood advisory zoning councils of 5 appointed residents each to provide “information, advice and recommendations to the Zoning Commission on zoning regulation changes affecting the neighborhood. Special notice and hearing is required. The Zoning Commission may overrule an adverse recommendation of the neighborhood council only by a 3/4th vote. TEX. LOC. GOV'T. CODE ANN. § 211.007 (Vernon 1999).

The following section explains the process for initial adoption of a zoning ordinance, or an amendment to an existing ordinance.

### 3. Zoning Procedures

- a. Adoption/Amendment of Zoning Ordinances - Procedural requirements for adopting an initial zoning ordinance or amending an existing zoning ordinance are set forth in TEX. LOC. GOV'T CODE ANN. §§ 211.006 and 211.007 (Vernon 1999) as follows:
  - (1) Preliminary Report - Zoning Commission. The Zoning Commission considers the proposed change and makes a preliminary report;
  - (2) Public Hearing - Zoning Commission. The Zoning Commission holds a public hearing on the preliminary report, providing written notice to affected property owners and those owning property within 200 feet of the affected property. This may be a joint hearing of the Zoning Commission and the City Council, if it is desirable to consolidate and expedite the zoning process. In addition, notice of the time and place of hearing must be placed in the city's official newspaper or a newspaper of general circulation in the city at least 15 days before the date of the public hearing;
  - (3) Final Report - Zoning Commission. The Zoning Commission must make a final report to the City Council;
  - (4) Final Report - City Council Consideration. City Council considers the report from the Zoning Commission;

- (5) Public Hearing - City Council. The City Council holds a public hearing, providing the same notice as required of the Zoning Commission above. This requirement can be satisfied by the joint public hearing;
- (6) Right to Modify Procedure - City Council. The City Council has the authority to modify the typical procedures for adopting a zoning ordinance as follows:
  - (a) The requirement for a public hearing for the City Council can be satisfied by a joint public hearing with the Zoning Commission;
  - (b) The City Council of a home rule city can prescribe, by a 2/3rd vote, the type of notice to be given of a public hearing held by it alone or jointly with the Zoning Commission. Those notice requirements will supersede the notice requirements of the Enabling Act; and
  - (c) By ordinance, the City Council may provide that an affirmative vote of at least 3/4ths of all of its members is required to overrule the recommendation of the Zoning Commission that a proposed change be denied.
- (7) City Council Adoption. The City Council may adopt the zoning ordinance or proposed change to its existing zoning ordinance in the same manner as for any other ordinance, unless written protest by twenty (20%) percent of the owners of the affected property or property located within 200 feet of the affected property is received. In that event, an affirmative vote of at least 3/4ths of all members of the City Council is required. In addition, general law cities may not adopt a zoning ordinance or change to a current ordinance until at least thirty (30) days after the date of notice to affected property owners.
- (8) General Law Cities. Some general law cities exercise zoning authority without the appointment of a zoning commission and, therefore, the procedure is simplified, although the requirements for notice and hearing continue.

#### **4. Zoning Board of Adjustment**

The Zoning Board of Adjustment (“ZBA”) is authorized by the Enabling Act for the purposes of hearing and deciding only the following issues:

- appeals from the administrative decisions including interpretations of the zoning ordinance;
- “special exceptions”;
- “variances”;
- and
- other matters authorized by ordinance.

TEX. LOC. GOV’T CODE ANN. §§ 211.008 and 211.009 (Vernon 1999).

Judicial expansion of the ZBA’s power has been limited to allowing a ZBA to supervise the phasing out of non-conforming uses. *See White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App.--Dallas 1974, no writ). Legislation enacted in 1993 authorized a city to delegate “other

matters” to a ZBA by ordinance. TEX. LOC. GOV’T CODE ANN. § 211.009(a)(4) (Vernon 1999). One city delegates enforcement to its ZBA. Mont Belvieu Code of Ordinances Sec. 25-96.

a. Organization

The ZBA is organized as follows:

- The board is appointed by the governing body of the city.
- The board is composed of at least 5 members.
- Members serve two year terms, with vacancies filled for the remaining term.
- Each member of the governing body may be authorized to appoint 1 member and remove that member for cause, after a public hearing on a written charge.
- A city, by charter or ordinance may provide for alternative members, to sit in place of regular members when requested to do so by the mayor or city manager.
- All cases must be heard by at least 75% of the ZBA members (4 out of the typical 5 members).
- The ZBA may adopt rules pursuant to an ordinance authorizing it to do so.
- The presiding officer may administer oaths and compel attendance of witnesses.
- All meetings shall be public.
- Minutes shall be maintained reflecting each member’s vote and attendance.
- Minutes and records must be immediately filed and are public.
- The governing body of a Type A municipality may act as its ZBA.

TEX. LOC. GOV’T CODE ANN. § 211.008 (Vernon 1999).

Major cities (effective 2001, those with 1,180,000 population or more) may create multiple panels, each of which has the powers of the ZBA. TEX. LOC. GOV’T CODE ANN. § 211.014 (Vernon 1999 and Supp. 2001). This was originally adopted in 1993 to facilitate the zoning of Houston, then anticipated to be implemented in 1994.

- b. Interpretation - The city staff (generally a building official at the permitting stage) makes initial interpretations of the zoning ordinance. Where that interpretation is challenged, the ZBA hears and resolves the disputes. TEX. LOC. GOV’T CODE ANN. § 211.009(a)(1) (Vernon 1999).

Appeal of an administrative official’s decision to the ZBA is pursuant the following procedures set forth in section 211.010 of the Texas Local Government Code:

- The appeal may be brought by a person “aggrieved” by the decision or the city (through an officer, department, board or bureau).
- Notice of appeal must be filed with the ZBA within a “reasonable” period after the decision (as determined by the ZBA’s rules). A 30 day period for appeal was upheld in Fincher v. Hunters Creek Village 56 SW.3d 815, 817 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2001, no pet.).
- The administrative official whose decision is appealed must immediately forward to the ZBA the papers constituting a record of the action on appeal.
- The ZBA sets a “reasonable” time for a hearing and provides notice to the public and the parties.
- The appealed decision is automatically stayed pending ZBA action, except in the event of “imminent peril” to life or property certified by the administrative official, in which

event the ZBA must affirmatively issue a restraining order after a hearing with notice and “due cause” shown.

- The ZBA shall decide the appeal within a “reasonable” period.

The Zoning Commission and City Council have no involvement in interpreting the Zoning Ordinance.

- c. Special Exceptions - Special exceptions modify the normal restrictions of the zoning ordinance on a site specific basis, subject to action by the ZBA. The specific language of the zoning ordinance which allows the special exception will govern the limitations on the ZBA in granting and conditioning the special exception. Any specified type of use which is to be allowed by the Board of Adjustment under certain conditions expressed in the ordinance is a "special exception." West Tex. Water Refiners, Inc. v. S&B Beverage Co., 915 S.W.2d 623, 627 (Tex. App.–El Paso 1996, no writ). An example would be the allowance of church use within a residential district, provided that appropriate safeguards to protect the residential character of the area are included within the proposed development plan. Special exceptions should be limited to noncontroversial issues where site specific review is necessary before allowing a particular use.
- d. Variances - Variances allow deviation from the literal terms of the zoning ordinance if (1) not contrary to the public interest, and (2) due to the special conditions of the property involved, literal enforcement of the zoning ordinance would result in an unnecessary hardship. TEX. LOC. GOV'T CODE ANN. § 211.009 (Vernon 1999); Economic hardship alone is not sufficient reason to grant a variance. Southland Addition Homeowner's Ass'n v. Board of Adjustment of Wichita Falls, 710 S.W.2d 194, 195 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.). In Texas, variances have generally been restricted by case law to height, area and setback issues and specifically may not modify use regulations. City of Amarillo v. Stapf, 129 Tex. 81, 101 S.W.2d 229, 234 (Tex. Comm'n App. 1934, opinion adopted). For example, an apartment may not be allowed in a single family district, but the side yard setback of an apartment may be modified where specific facts (such as an unusual property shape) make it an unusual hardship to require literal compliance and the proposed alternative is consistent with the intent of the zoning ordinance. A recent case held that preservation of trees on a building site qualified as a special circumstance supporting a building set back variance. Southland Addition Homeowner's Ass'n, 710 S.W.2d at 195.
- e. Authority. The ZBA can reverse or affirm, wholly or in part, or modify the order, requirement, decision or determination that is appealed to it. TEX. LOC. GOV'T CODE ANN. § 211.009 (Vernon 1999). A concurring vote of 75% (typically 4 out of 5) of the members of the ZBA is necessary to reverse the appealed administrative official's decision or to decide in favor of the applicant on a variance or special exception. TEX. LOC. GOV'T CODE ANN. § 211.009 (Vernon 1999). [**Remand too**]
- f. Appeal of ZBA Decision. Appeal of the decision of the ZBA is by *writ of certiorari* pursuant to the following procedures set forth in TEX. LOC. GOV'T CODE ANN. § 211.011 (Vernon 1999).
  - The city (through an officer, department, board or bureau) a taxpayer or a person “aggrieved” by a decision of the ZBA may appeal that decision;

- The appeal is to a district court, county court or county court at law;
  - The plaintiff presents a verified petition stating that the ZBA's decision is illegal and specifying the grounds of the illegality;
  - The petition must be presented within 10 days after the date that the ZBA's decision is filed in the ZBA's office;
  - The court receiving the petition issues a *writ of certiorari* to the ZBA, specifying a date (at least 10 days in the future) when the contestant's attorney must be provided with a verified statement reflecting all material facts upholding the ZBA's decision together with appropriate documents (which need not be originals, but may be certified or sworn copies);
  - The *writ of certiorari* does not stay the proceedings on the decision under appeal, but, upon application and notice to the ZBA, the court may grant a restraining order if due cause is shown;
  - After the return of the *writ of certiorari* is received by the court and the contestant's attorney, the court may determine if testimony is necessary, and whether testimony may be taken by an appointed receiver. See Hagood v. City of Houston, 982 S.W.2d 17 (Tex. App.--Houston [1st Dist.] 1998, no pet.) for discussion of the contestant's right to present evidence; and
  - The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. The court may reverse the ZBA's decision if the court determines that the facts are such that the board, as fact finder, could have reached only one decision, but abused its discretion in reaching the opposite conclusion. See City of South Padre Island v. Cantu, 52 S.W.3d 287, 291 (Tex. App.--Corpus Christi 2001, no pet.) (citing City of San Angelo v. Boehme Bakery, 144 Tex. 281, 190 S.W.2d 67, 71 (Tex. 1945)). The court may also remand the case to the ZBA for further actions taking into consideration the court's judgment. Wende v. Board of Adjustment of San Antonio, 27 S. W. 3d 162, 173 (Tex. App.--San Antonio 2000, pet. granted).
- g. Quasi-Judicial Nature of ZBA. Courts have disagreed over whether a ZBA is a quasi-judicial or quasi-legislative body. See Shelton v. City of College Station, 780 F.2d 475, 479 (5th Cir. 1986) (Nine judge majority decision held the ZBA's decision on a variance was quasi-legislative [p. 479-83] while a five judge dissent claimed the action was quasi-judicial [p. 486-90]), Board of Adjustment of Dallas v. Winkles, 832 S.W.2d 803, 805 (Tex. App.--Dallas 1992, writ denied) (ZBA actions are quasi-judicial), Board of Adjustment of Corpus Christi, 860 S.W. 2d 622,625 (Tex. App.--Corpus Christi 1993, writ denied). Despite the Fifth Circuit position, most appellate courts agree that the ZBA is quasi-judicial. See Galveston Historical Found. v. Zoning Bd. of Adjustment of Galveston, 17 S.W.3d 414, 416 (Tex. App--Houston[1st Dist.] 2000, pet. denied).
- h. Disqualification of ZBA Member. The test for disqualification of a ZBA member from a vote is whether the member has an "irrevocably closed mind." Shelton, 780 F.2d at 486. In Shelton, the fact that a ZBA member was also a member of a church which actively opposed a variance before the ZBA (which was denied) did not require the disqualification of the ZBA member. *Id.*
- i. Immunity from Suit. The members of a ZBA are immune from suit arising out of the performance of discretionary duties in good faith within their scope of authority. Champion

Builders v. City of Terrell Hills, No. 04-99-00779-CV, 2001 WL 1580484\*4 (Tex. App.–San Antonio 2001, no pet. h.). However, the officials are personally liable for their negligence if bad faith is shown and the 4 traditional negligence elements are re established: (1) duty, (2) breach of that duty, (3) proximate cause, and (4) actual damages. *Id.* The interpretation of an ordinance is discretionary. *Id.* Good faith is determined objectively such that the officials' actual, subjective belief is irrelevant. *Id.* at \*6. A reasonable official standard is applied. *Id.* Negligence is not the same as bad faith and a negligent official acting in good faith is immune. *Id.* The issue of good faith is a fact question for the jury. *Id.* If an official acted in bad faith, the fact that there may be a hypothetical, legitimate rationale for their action will not prevent liability. *Id.* at \*7.

## **B. Special Zoning Statutes**

The Texas Local Government Code contains a number of quasi-zoning statutes under Title 7, “Regulation of Land Use, Structures, Businesses and Related Activities,” which are in addition to the Enabling Act (Chapter 211). The use of these statutes does not require a municipal zoning ordinance adopted pursuant to the Enabling Act. See SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1278 (5th Cir. 1988). These specific “zoning” statutes are summarized below.

### 1. Moratorium on Property Development - TEX. LOC. GOV'T CODE ANN. Sections 212.131 et. seq.;

In 2001, the legislature adopted limitations on development moratoria. TEX. LOC. GOV'T CODE ANN. § 212.131 et. seq. (Vernon Supp. 2001). The limits apply only to moratoria imposed on property development (new construction on vacant land) affecting only residential property (zoned “or otherwise authorized” for single family or multi-family use). TEX. LOC. GOV'T CODE ANN. § 212.131-.132 (Vernon Supp. 2001). A moratorium does not affect vested rights under TEX. LOC. GOV'T CODE ANN. CHAP. 245 (Vernon 1999) or common law. TEX. LOC. GOV'T CODE ANN. § 212.138 (Vernon Supp. 2001). The limits include the following:

- Required public hearings with notice
- Limits on when temporary moratoria may commence
- Deadline for action on a proposed moratorium
- Required findings in support of the need for the moratorium
- Limitation of moratorium to situations of shortage of (i) essential public services (defined as water, sewer, storm drainage or street improvements), or (ii) “other public services, including police and fire facilities”
- The moratorium automatically expires after 120 days from adoption, unless extended after a public hearing and specified findings.
- A mandatory waiver process with a 10 day deadline for a city decision (vote by the governing body) from the date of the city's receipt of the waiver request.

TEX. LOC. GOV'T CODE ANN. § 212.133-.137 (Vernon Supp. 2001).

### 2. Municipal Authority to Enforce Deed Restrictions - TEX. LOC. GOV'T CODE ANN. Sections 212.131 et. seq.;

In 2001, the legislature moved former TEX. LOC. GOV'T CODE ANN. CHAP. 230 (Vernon 1999) to the Subdivision Act as Sections 212.131 et. seq. (thus conflicting with the numbering of the foregoing Moratorium provision).

A city with (i) an ordinance requiring uniform application and enforcement of Section 211.131 et. seq., and (ii) either (a) no zoning, or (b) over 1,500,000 population, may enforce deed restrictions affecting the use, setback, lot size or type and number of structures by suit to enjoin or abate a violation and/or seeking a civil penalty. TEX. LOC. GOV'T CODE ANN. § 212.131-.137 (Vernon Supp. 2001).

**[Cite the City case]** The legislature added a provision stipulating that deed restriction enforcement is a governmental function. TEX. LOC. GOV'T CODE ANN. § 212.137 (Vernon Supp. 2001). This addition is significant, since cities acting in a governmental function are not typically subject to equitable defenses such as laches, waiver, estoppel. Those type of defense are the most typical defenses asserted in a deed restriction case by the defendant. With the granting of the governmental function veil of protection, an otherwise unzoned city which fully enforces the authority granted in Section 212.131 et. seq. has, effectively, zoned itself into 2 zones: (i) the residential zone, where residential use is required, as well as the related performance standards of setback, lot size, and type or number of structures, and (ii) the other zone, with no such regulation. With the governmental function mantle, enforcement of residential deed restrictions will become more automatic, as the majority of deed restriction case law supporting defendants become irrelevant. That enforcement becomes, effectively, the same as judicial enforcement of zoning. Municipal attorneys enforcing residential deed restrictions will analogize to zoning caselaw for precedent relating to enforcement rights.

A city may enact an ordinance requiring that notice of these rights be given to the owners of deed restrictive property. TEX. LOC. GOV'T CODE ANN. § 212.135 (Vernon supp. 2001); *see* City of Houston Code of Ordinances Sections 10.551 *et. seq.* In order to help city staff discover the existence of deed restrictions, the submission for a commercial building permit requires a certified copy of any deed restriction affecting the subject property. This same obligation applies to any subdivider of property, whether commercial or otherwise, and to any person who proposes to perform substantial repair, or remodel a commercial building located within a subdivision or to convert a single family residence into a commercial building.

### 3. Municipal Comprehensive Plans - TEX. LOC. GOV'T CODE ANN. Chapter 213;

In 1997, the legislature adopted Texas Local Government Code, Chapter 219, which specifically authorized cities to adopt a comprehensive plan for the long-range development of the city. In 2001, this chapter was renumbered as Chapter 213. The content and design of the plan, and its relationship to the city's development regulations is within the city's discretion to determine, either by charter or ordinance.

A comprehensive plan may be adopted or amended as follows:

- public hearing with opportunity for public testimony and submission of written evidence;
- review by the Zoning Commission and city staff;
- additional requirements may be established by the city, and must be followed;
- existence of other plans, policies or strategies does not preclude adoption or amendment of a comprehensive plan;
- the map relating to a comprehensive plan shall contain the following statement:



“A COMPREHENSIVE PLAN SHALL NOT CONSTITUTE ZONING REGULATIONS OR ESTABLISH ZONING DISTRICT BOUNDARIES.”

4. Municipal Regulation of Housing and Other Structures - TEX. LOC. GOV'T CODE ANN., Chapter 214;

The section was substantially reorganized in 2001 by using it as a gathering point for various scattered statutes relating to city regulation of housing. Cities are authorized to establish building lines (i.e. setback lines) along streets (formerly Chapter 213).

The provisions of former Chapter 214 were strengthened in 2001. Retained in new Chapter 214, these provisions provide cities broad power to regulate dangerous structures. The city must adopt an ordinance with minimum standards which provide for notice and public hearing. Dangerous structures may be ordered to be removed or demolished. A non-profit organization with the demonstrated record of rehabilitating residential properties may be appointed as a receiver for dangerous structures should the owners not appear. Plumbing, sewers and swimming pools may be regulated. Liens may be assessed and foreclosed. Energy conservation measures can be required. In the event of natural disaster, rent control can be adopted by ordinance, if approved by the Texas Governor. See Texas Local Government Code, section 54.044, added in 2001, for non-criminal alternative enforcement procedures which allow a hearing officer to impose penalties, cost and fees (no limits set). By failing to appeal (a frequent occurrence in these hearings), the defendant is deemed to admit liability. Appeal to the municipal court is required to be perfected within 31 days (similar to the 10 requirement for writ of certiorari appeal from a ZBA decision).

In 2001, the legislature mandated the statewide adoption (with appropriate local modifications) of the International Residential Building Code and the National Electrical Code. This action addressed building industry concerns with different building codes in different jurisdictions.

5. Municipal Regulation of Businesses and Occupations - TEX. LOC. GOV'T CODE ANN., Chapter 215;

Cities may regulate a wide array of activities, some relating to land use such as tanneries, stables, slaughterhouses, animal breeding, markets and amusement shows.

6. Regulation of Signs by Municipalities - TEX. LOC. GOV'T CODE ANN., Chapter 216;

Cities may require the relocation, reconstruction or removal of any sign within its limits or extra-territorial jurisdiction, subject to compensation or amortization. A home rule city may license, regulate, control or prohibit the erection of signs or billboards by its charter or ordinance, subject to the specific provisions of Section 216, within its territorial limits and extra-territorial jurisdiction.

7. Municipal Regulation of Nuisances and Disorderly Conduct - TEX. LOC. GOV'T CODE ANN., Chapter 217;

Cities are authorized to define and prohibit “nuisances” (not defined). General law cities may do so within their territorial limits, while home rule cities may do so within their territorial limits and 5,000 feet outside those limits.

8. County Zoning Authority - TEX. LOC. GOV'T CODE ANN., Chapter 231;

Counties are provided various levels of zoning authority in the following geographical areas: Padre Island, Amistad Recreation Area, Navy/Coast Guard facilities near certain lakes, around Lake Tawakoni and Lake Ray Roberts, around Lake Allen Henry and Post Lake, the El Paso Mission Trail Historical Area, and around Lake Somerville. Some provisions, such as those applicable to Padre Island and the El Paso Mission Trail, emulate the Enabling Act, while others are significantly more restricted in scope.

9. County Regulation of Housing and Other Structures - TEX. LOC. GOV'T CODE ANN., Chapter 233;

The section was substantially reorganized in 2001 by using it as a gathering point for various scattered statutes relating to county regulation of housing and structures.

Coastal counties adjacent to another county with a population of 2,500,000 (i.e. Galveston County) may require the repair or removal of bulkheads or other shoreline protection structures it determines to be dangerous(former Chap. 239). The owner is then assessed for the cost and the assessment is secured by a lien on the property. Violation is a Class C misdemeanor.

Counties are authorized to establish building and setback lines outside city limits(former Chap. 233). However, setback lines adopted by a city to be effective within that city's extra-territorial jurisdiction will supersede those adopted by a county.

10. County Regulation of Businesses and Occupations- TEX. LOC. GOV'T CODE ANN., Chapter 234;

In 1993, the legislature granted counties the power to establish visual aesthetic standards for the following problematic uses:

- auto wrecking and salvage yards,
- junkyards, recycling businesses,
- flea markets,
- demolition businesses, and
- outdoor resale businesses.

Existing businesses are to be granted a reasonable time to comply, not to exceed 12 months. The county may sue for a civil penalty (limited to \$50 per day initially, but increasing to \$1000 per day after 30 days)(formerly Chap.238). Counties may also regulate slaughterhouses(former Section 240.061, et. seq.)

11. Miscellaneous Regulatory Authority of Counties - TEX. LOC. GOV'T CODE ANN., Chapter 240;

Counties may regulate the management and use of flood prone areas near the Gulf of Mexico and its tidal waters.

This Chapter (renumbered from former Chap. 234) authorizes county regulation to protect McDonald, George and Stephen F. Austin Observatories from light sources which might interfere with their telescopes.

12. Municipal and County Zoning Authority Around Airports - TEX. LOC. GOV'T CODE ANN., Chapter 241;

This Chapter authorizes regulation of land uses, types of structures, height of structures and vegetation around public airports in the interest of public safety. A Zoning Commission and a ZBA are provided.

13. Municipal and County Authority to Regulate Sexually Oriented Business, TEX. LOC. GOV'T CODE ANN., Chapter 243;

A city, by ordinance, or a county, by order of its Commissioners Court, may adopt regulations regarding sexually oriented businesses as necessary to promote the public health, safety or welfare. The city's authorization is limited to its city limits, with the county having authority outside the city limits. The term "sexually oriented business" is defined as:

a sex parlor, nude studio, modeling studio, love parlor, adult bookstore, adult movie theater, adult video arcade, adult movie arcade, adult video store, adult motel, or other commercial enterprise the primary business of which adult video store is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.

This Section specifically provides that regulation of sexually oriented businesses is allowed even if the sexually oriented business holds a liquor license regulated by the Texas Alcoholic Beverage Code or contains coin operated machines such that it is regulated or taxed pursuant to TEX. REV. CIV. ANN. ART. 8801 *et seq.* (Vernon 1999 & Supp. 2001). The location, density and distance of a sexually oriented business to a school, regular place of religious worship, residential neighborhood (or other specified land use determined by a city or county to be inconsistent with the operation of a sexually oriented business) may be regulated. SWZ, Inc. v. Board of Adjustment of Fort Worth, 985 S.W.2d 268 (Tex. App.—Fort Worth 1999, pet. denied). Permitting procedures and fees are authorized.

14. Location of Certain Facilities and Shelters, TEX. LOC. GOV'T CODE ANN., Chapter 244;

Correctional & Rehabilitation Facilities:

This chapter, which is set for sunset review in 2003, was revised to require public and specific notice posting to the county and city for any correctional or rehabilitation facility prior to construction/operation and to provide an opportunity for local objection. The requirements apply

for facilities to be located within 1000' (straight line) of a residential area, primary or secondary school, state park/recreational area or place of worship. The local government must make an affirmative determination by resolution that the proposed location is not in the best interest of the area, within 60 days of the notice and after a public hearing. There are several exceptions, including vested rights to facilities in existence or under construction by September 1, 1997.

Homeless Shelters:

Also revised in 1999, this section (also set for sunset review in 2003), provides a notice and objection procedure for shelters which follows the criteria described above. This subchapter only applies to cities with a population of 1,600,000 or more. Further, shelters are prohibited within 1000' of another shelter or a primary or secondary school without city consent.

15. Construction of Certain Telecommunications Facilities, TEX. LOC. GOV'T CODE ANN., Chapter 246;

Effective September 1, 2001, telecommunication facilities are protected from impervious lot coverage, and sedimentation, retention or erosion regulations unless the regulating body, after a hearing, finds that additional adjacent land to meet the requirements is readily available at market prices. The PUC has enforcement authority.

16. Miscellaneous Regulatory Authority of Municipalities and Counties, TEX. LOC. GOV'T CODE ANN., Chapter 250;

Silhouette, skeet, trap, black powder, target, self-defense and similar recreational shooting is protected from actions by governmental officials and private parties if the sport shooting range complies with applicable regulations. Specifically, a nuisance suit is precluded by regulatory compliance.

Effective May 10,1999, a City or County regulation of amateur antennas is limited as follows:

1. They may not enact or enforce an ordinance or order that does not comply with the ruling of the Federal Communications Commission in "Amateur Radio Preemption, 101 F.C.C.2d 952 (1985)" or a regulation related to amateur radio service adopted under 47 C.F.R. Part 97.
  2. Any regulation of placement, screening, or height based on health, safety, or aesthetic conditions must:
    - (1) reasonably accommodate amateur communications; and
    - (2) represent the minimal practicable regulation to accomplish the municipality's or county's legitimate purpose.
- Action to protect or preserve a historic, historical, or architectural district is not affected.

17. Neighborhood Zoning Areas - TEX. LOC. GOV'T CODE ANN. § 211.021;

A city with a population exceeding 290,000 that has adopted a comprehensive zoning ordinance may provide for neighborhood zoning areas. This Section was adopted at the request of Austin, Texas. See Austin City Charter, Section 7. The mayor of the city, with the approval of the City Council, may appoint a neighborhood advisory zoning council for each neighborhood zoning area.

The neighborhood advisory zoning council is composed of five citizens who reside in the neighborhood zoning areas and who are appointed for a term of two years. The neighborhood advisory zoning councils provide the Zoning Commission with information, advice and recommendations relating to zoning applications affecting property within the neighborhood zoning area. The neighborhood advisory zoning council conducts public hearings on each zoning application affecting the property in the neighborhood zoning area. At or before the Zoning Commission hearing on a zoning change application, the neighborhood advisory zoning council shall submit any information, advice and recommendations to the Zoning Commission. The Zoning Commission may not overrule the recommendation of a neighborhood advisory zoning council except upon a three-fourths vote of the members of the Zoning Commission present at the meeting.

18. Tax Increment Financing Act Zoning - TEX. TAX CODE ANN. § 311.010;

An interesting statute relating to zoning is hidden in the Tax Code.

The Board of Directors of a reinvestment zone created under section 311.010(a)(5) of the Texas Tax Code has the powers to zone set forth in the Enabling Act, if that power is specifically approved by the City Council of the city creating the reinvestment zone. The zoning restriction enacted may continue beyond the termination of the reinvestment zone. The nine member Board of Directors is selected as follows:

- the state senator for the zone (or their designee);
- the state representative for the zone (or their designee);
- one director appointed by each of the school district and county if they participate; and
- remaining directors are appointed by the City Council.

19. Revision to Bracketed Laws - House Bill 2810 (77<sup>th</sup> Legislature, 2001)

All bracketed laws had their population brackets updated based on 2000 census figures.

**C. Enforcement**

A city may adopt ordinances to enforce its zoning ordinance, and any person who violates a zoning ordinance is guilty of a misdemeanor punishable by fine, imprisonment, and/or injunctive relief. TEX. LOC. GOV'T CODE ANN. § § 54.001, 211.012 (Vernon 1999 & Supp. 2001). Municipalities have broad authority to seek enforcement of zoning ordinances under Chapter 54 of the Texas Local Government Code. Proof of damage to the city or its residents is unnecessary – a city need show no more than a violation of its zoning ordinance. San Miguel v. City of Windcrest, 40 S. W. 3d 104, 107-08 (Tex. App.–San Antonio 2000, no pet.), Maloy v. City of Lewisville, 848 S.W.2d 380 (Tex. App.–Fort Worth 1993, no writ). A city need not prove that its legal remedy is inadequate. San Miguel, 40 S.W.3d at 108.

Zoning ordinances are almost always enforced by the cities adopting them. However, in limited circumstances, individual citizens may enforce a zoning ordinance. Persons v. City of Fort Worth, 790 S.W.2d 865, 868 (Tex. App.–Fort Worth 1990, no writ); Porter v. Southwestern Pub. Serv. Co., 489 S.W. 2d 361, 364 (Tex. Civ. App–Amarillo 1971, writ ref'd n.r.e). An individual citizen must prove “special injury” based on damages other than as a member of the general public. *Id.* The violation of a zoning ordinance is not a "nuisance per se" unless the condition substantially interferes with or

invades the rights of others. Couch v. Davis, No. 14-94-01060-CV, 1996 WL 354739 (Tex.App.–Houston [14 Dist.] 1996 no writ) (not designated for publication).

#### **D. Types of City**

The type of city is important in the powers granted by Texas statute. Some powers are delegated only to home rule cities.

##### **1. Home Rule Cities**

Most cities with a population of over 5,000 are home rule cities. Home rule cities are chartered pursuant to article 9, section 5 of the Texas Constitution, which provides cities with "full power of local self government". TEX. LOC. GOV'T CODE ANN. § 51.072 (2000); see City of Houston v. State ex rel City of West Univ. Place, 142 Tex. 190, 176 S.W. 2d 928, 929 (1944), *appeal dismissed*, 322 U.S. 711. A home rule city has all power authorized by its charter to the extent not specifically limited by state law. City of College Station v. Turtle Rock Corp., 680 S.W. 2d 802, 807 (Tex. 1984). Arguably, a home rule city would have the power to zone without the Enabling Act, but case law holds that a city is limited in its zoning power to the rights granted in the Enabling Act. City of San Antonio v. Lanier, 542 S.W.2d 232, 234 (Tex. Civ. App.–San Antonio 1976, writ refused, n.r.e.).

##### **2. General Law Cities**

Most Texas cities with the population of under 5,000, as well as those with 5,000 or more which have not adopted a home rule charter by a vote of its residents, are general law cities chartered pursuant to article IX, section 4 of the Texas Constitution. See TEX. LOC. GOV'T CODE ANN. § 5.001-.003 (Vernon 1999). General law cities are restricted to authority specifically delegated to general law cities by state statute, all other power is reserved by the state. Mayhew v. Town of Sunnyvale, 774 S.W. 2d 284, 294 (Tex. App.–Dallas 1989, writ denied). Some state statutes apply only to general law cities or only to home rule cities, although the Enabling Act applies to all cities. *Id.* at 294.

#### **E. Validation Statutes**

Historically, the legislature routinely passed "validation statutes", which cured all procedural, but no constitutional defects in municipal actions. Leach v. City of North Richland Hills, 627 S.W.2d 854 (Tex. App.–Fort Worth 1982, no writ; Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex. App.–Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991). Pre-emption of state statutes is cured by a validation statute. West End Pink, Ltd. v. City of Irving, 22 S.W. 3<sup>rd</sup> 5 (Tex. App.–Dallas, 1999 writ denied). However, the 1997 legislature failed to pass a validation statute, reportedly the first such failure in sixty-one years.

A "permanent" validation statute was passed by the 1999 Legislature. TEX. LOC. GOV'T CODE ANN. § 51.003 (Vernon 1999 & Supp. 2001). Any governmental act or proceeding of a municipality is conclusively presumed valid on the third anniversary of the effective date, unless a lawsuit is filed to invalidate the act or proceeding. The following are excluded from validation:

- void actions or proceedings,

- criminal actions or proceedings,
- preempted actions,
- incorporation or annexation attempts in another city's ETJ, and
- litigated matters.

Unlike historic validation statutes, there are no limits on the applicable cities. Included within the actions which could be validated are all failures to follow the Enabling Act or local ordinance procedures, incompatibility with comprehensive plans, spot zoning, and irregularities in appointing zoning officials. See Mixon, at §12.500 (3<sup>rd</sup> ed.).

## **V. SCOPE OF ZONING ORDINANCES**

### **A. City Limits**

Zoning ordinances are effective only within city limits and do not extend to any portion of the extraterritorial jurisdiction of a city. An exception to this statement applies to areas which have been the subject of "limited purpose annexation." See TEX. LOC. GOV'T CODE ANN. § 43.056 (Vernon 1999). Austin has utilized limited purpose annexation to extend land use controls over areas which it cannot currently serve with all municipal services. See Austin City Charter Article 1, Section 7.

### **B. Non-Zoning Municipal Ordinance**

Where a zoning ordinance and other municipal restriction conflict, the most restrictive applies. TEX. LOC. GOV'T CODE ANN. § 211.013 (Vernon 1999 & Supp. 2001).

### **C. Deed Restrictions**

The existence of zoning restrictions on a property does not affect existing deed restrictions. Spencer v. Maverick, 146 S.W.2d 819 (Tex. Civ. App.–San Antonio 1941, no writ); City of Gateville v. Powell, 500 S.W.2d 581 (Tex. Civ. App.–Waco 1973, writ ref'd n.r.e.).

### **D. Devaluation of Property to be Condemned**

A city may not use zoning to intentionally devalue property and gain an advantage as the purchaser of land in condemnation proceedings. Taub v. City of Deer Park, 882 S.W.2d 824, 827 (Tex. 1994). Otherwise, a reduction in value due to zoning is not an unconstitutional taking. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998).

### **E. State Law Preemption**

A zoning ordinance cannot conflict with state law on the specific issue involved. A zoning ordinance which tends to regulate a subject matter preempted by a state law is unenforceable to the extent it conflicts with the state law. City of Freeport v. Vndergriff, 26 S.W. 3d 680, 681 (Tex. app.–Corpus Christi 2000, pet. denied), City of Santa Fe v. Young, 949 S.W.2d 559 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1997, no pet.); Dallas Merchs. & Concessionaires Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993). Preemption is not automatic for the complete subject area of the state law. Instead, the state law and zoning ordinance may co-exist if any reasonable construction can resolve the apparent

conflict. *Id.* at 491. This is particularly true for home rule cities, and a state law must clearly intend to preempt a subject area sought to be regulated by a home rule city. *Id.*

#### **F. Governmental Uses**

[Add cite to Yakel] Generally speaking, most governmental entities will not be subject to zoning regulation. See Rohan, Zoning and Land Use Controls, Section 40.03 (Matthew Bender & Co., Inc. 1995) [referred to herein as Rohan]. The Enabling Act exempts state and federal agencies. TEX. LOC. GOV'T CODE ANN. § 211.013(c) (Vernon 1999 & Supp. 2001). The state of Texas, as well as those entities which derive their powers from the state of Texas, are also exempt from zoning regulation by a home rule city. Austin Indep. School Dist. v. City of Sunset Valley, 502 S.W.2d 670, 672 (Tex. 1973). School districts derive their power from the state and are, therefore, exempt. *Id.* The exemption as to a school district extends broadly to include not only school buildings, but athletic facilities and bus storage/maintenance facilities as well. *Id.* at 675. Other governmental entities which specifically derive their authority from the Texas Constitution or state statute should also be exempt. See City of Lucas v. North Tex. Mun. Water Dist., 724 S.W.2d 811 (Tex. App.–Dallas 1986, writ ref'd n.r.e.). A city is not bound by its own zoning ordinance when exercising its eminent domain power. City of Lubbock v. Austin, 628 S.W.2d 49, 50 (Tex. 1982). Arguably, this case should extend to all municipal uses. The action of the state or city in violation of a zoning ordinance may not be arbitrary, capricious or unreasonable. Austin Indep. School Dist., 502 S.W.2d at 674; City of Lubbock, 628 S.W.2d at 50. Since it is the use, not the ownership, of property which is dispositive for zoning purposes, the fact that a governmental entity is a tenant as opposed to an owner should have no impact on the argument for exclusion from a zoning ordinance. However, the 1999 addition of section 211.013(d) to the Texas Local Government Code clearly mandates application of the Enabling Act to privately owned land and structures leased to a state agency.

#### **G. Eminent Domain**

Some "public service corporations" like railroads, common carrier pipelines and utilities are delegated the power of eminent domain for the purpose of locating their facilities. See section 110.019(b) of the Texas Natural Resources Code for the delegation of eminent domain power to common carrier pipelines. The public policy for delegation of eminent domain is that these "quasi-public" land uses are important to the general public and must have the ability to locate their facilities to effectively provide their services. These public service corporation should be exempt from municipal zoning power when exercising their primary activities. Fort Worth & D.C. Ry. Co. v. Ammons, 215 S.W.2d 407 (Tex. Civ. App.–Amarillo 1948, writ ref'd n.r.e.); Gulf, C.& S. Ry. Co. v. White, 281 S.W.2d 441 (Tex. Civ. App.–Dallas 1955, writ ref'd n.r.e.); see also Missouri Pac. Ry. Co. v. 55 Acres of Land, 947 F. Supp. 1301 (E.D. Ark. 1996). This is similar to the well-settled law that a landowner cannot object to the location selected by the public service corporation with the power of eminent domain unless that selection is shown to be arbitrary, capricious or unreasonable. One case indicates the burden of proof is on the condemning authority, Porter v. Southwestern Public Service Company, 489 S.W.2d 361, 363 (Tex. Civ. App.–Amarillo 1971, writ ref'd n.r.e.). However, that case is inconsistent with the general condemnation law cited above, as well as the cases addressing conflicts between governmental entities and zoning which all place the burden on the municipality. See Austin Indep. School Dist. v. City of Sunset Valley, 502 S.W.2d 670, 674 (Tex. 1973); City of Lubbock v. Austin, 628 S.W.2d 49, 50 (Tex. 1982). Many public service company facilities simply pass through municipalities without serving them. Besides the dominance of eminent domain over zoning, cases prohibit cities from excluding



facilities engaged in intrastate commerce, a description which will likely include any facility accorded the power of eminent domain. City of Brownwood v. Brown Tel. & Tel. Co., 157 S.W. 1163, 1165 (Tex. 1913); City of Arlington v. Lillard, 294 S.W. 829, 830 (Tex. 1927).

## **VI. TEXAS ZONING CASE LAW**

### **A. Validity of Zoning Generally**

#### **1. Basic Issues**

The basic concept of zoning and the Enabling Act were initially upheld by the Texas Supreme Court in 1934, Lombardo v. City of Dallas, 47 S.W.2d 495 (Tex. Civ. App.–Dallas 1932), *aff'd*, 124 Tex 1, 73 S.W. 2d 475 (1934). On numerous occasions, Texas courts have upheld zoning as a valid exercise of the police power of the city to protect the health, safety and public welfare of its citizens. City of Bellaire v. Lamkin, 159 Tex. 141, 317 S.W.2d 43, 66 A.L.R.2d 1289 (1959); Frost v. City of Hillshire Vill., 403 S.W.2d 836 (Tex. Civ. App.–Houston [1st Dist.] 1966, writ ref'd n.r.e.); Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex. App.– Dallas 1989, writ dismiss'd); *see also* Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986, en banc).

#### **2. Presumption of Validity**

Since zoning is an exercise of a city's legislative power, zoning ordinances are presumed valid, and courts have no authority to interfere unless the ordinance represents a clear abuse of city discretion. Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971). Bernard v. City of Bedford, 593 S.W.2d 809, 811 (Tex. Civ. App.–Fort Worth 1980, writ ref'd n.r.e.); Shelton v. City of College Station, 780 F.2d 475, 479-83 (5th Cir. 1986, en banc). The party attacking a zoning ordinance bears an extraordinary burden to show that no conclusive or even controversial or issuable fact or condition existed which would authorize the zoning ordinance. Hunt, 462 S.W.2d at 539; City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 793 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982); Shelton, 780 F.2d at 481-83. However, the presumption of validity for an amendatory zoning ordinance disappears if the city spot zones. Hunt, 462 S.W.2d at 539.

#### **3. Governmental Functions**

The exercise of zoning powers by a city, its Zoning Commission and ZBA, is a governmental function. Ellis v. City of W. Univ. Place, 175 S.W.2d 396, 398 (Tex. 1943); City of Round Rock v. Smith, 687 S.W. 2d 300, 303 (Tex. 1985). Generally, activities carried on by cities pursuant to state requirement or to provide for health, safety and general welfare of the public are considered governmental functions, while all other city activities are considered proprietary functions. City of Corsicana v. Wren, 317 S.W. 2d 516, 522 (Tex. 1958). An example of a proprietary function would be street construction and repairs. LeBohm v. City of Galveston, 154 Tex. 192, 273 S.W.2d 951, 953 (1955). The distinction is important since the Texas Tort Claims Act, codified in Chapter 101 of the Texas Civil Practices and Remedies Code, applies to all governmental functions, specifically in the area of zoning, planning and plat approval. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon 1999 & Supp. 2001). The Texas Tort Claims Act limits the exposure

of a city to monetary damages under certain circumstances. [Also DR enforcement reduces equitable defense, estoppel, laches, S of L, waiver]

4. Strict Compliance with Statute

The provisions of the Enabling Act must be strictly complied with and are necessary for the validity of any zoning ordinance, whether amendatory, temporary or emergency. Mayhew v. Town of Sunnyvale, 774 S.W.2d 284, 293-94 (Tex. App.–Dallas 1989, writ dismissed). However, the lack of a separate, formal comprehensive plan does not invalidate a zoning ordinance, provided the zoning ordinance itself is comprehensive and thus can serve as the comprehensive plan. *Id.* But should a city have a comprehensive plan, it must follow it in adopting its zoning ordinance. *Id.*; Appolo Dev., Inc. v. City of Garland, 476 S.W.2d 365 (Tex. Civ. App.–Dallas 1972, writ refused n.r.e.); Bolton v. Sparks, 362 S.W.2d 946, 950 (Tex. 1962). Amendments to the zoning ordinance, must be by ordinance not resolution. City of Hutchins v. Prosifka, 450 S.W.2d 829, 832 (Tex. 1970).

5. Purpose of Zoning Ordinances

Cities are empowered to regulate by zoning ordinances so as to conserve property values and encourage the most effective use of property throughout the city. Connor v. City of Univ. Park, 142 S.W.2d 706, 712 (Tex. Civ. App.–Dallas 1940, writ refused). The basic purpose of all restrictive zoning ordinances is to “prevent one property owner from committing his property to a use which would be unduly imposed on the adjoining landowners in the use and enjoyment of their property.” Strong v. City of Grand Prairie, 679 S.W.2d 767, 768 (Tex. App.–Fort Worth 1984, no writ). Zoning is to promote the welfare of the community rather than to protect the value of individual properties. Galveston Historical Found. v. Zoning Board of Adjustment of Galveston, 17 S.W. 3d 414, 417 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2000, pet. denied), citing 21<sup>st</sup> Century Development Co. v. Watts, 958 S. W. 2d 25, 28 (Ky.Ct.App. 1997). Zoning regulation is a recognized tool of community planning which allows a city, in the exercise of its legislative discretion, to restrict the use of private property. City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 792 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982). Zoning ordinances must have a substantial relation to the community's health, safety, morals and general welfare, or they are void. See Coffee City v. Thompson, 535 S.W.2d 758, 767 (Tex. Civ. App.–Tyler 1976, writ refused n.r.e.).

Land use is often limited by restrictive covenants in addition to a zoning ordinance. The zoning ordinance does not void restrictions contained in covenants running with the land to limit the use of property. If the restrictive covenant is less restrictive than the zoning ordinance, the ordinance prevails. If the restrictive covenant is more restrictive than the zoning ordinance, the covenant prevails. In either case, the zoning ordinance is valid and enforceable. City of Gatesville v. Powell, 500 S.W.2d 581, 583 (Tex. Civ. App.–Waco 1973, writ refused n.r.e.).

6. Delegation of Zoning Power

The enactment or amendment of a zoning ordinance is a legislative act that can be performed only by the City Council, and that authority cannot be delegated to any administrative or advisory officer or board. Southern Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229, 238 (Tex. Civ. App.– Tyler 1979, writ refused n.r.e.). However, this statement does not apply to Tax Increment

Zoning. See TEX. TAX CODE ANN. § 311.010(c) (Vernon 1999 & Supp. 2000). This legislative power may not be delegated to a narrow segment of the community by any procedure which allows citizens to prohibit rezoning. See Minton v. Fort Worth Planning Comm'n, 786 S.W.2d 563 (Tex. App.–Fort Worth 1990, no writ) .

In Minton, the court declared unconstitutional the provision in former article 974a, section 5(c)(2) of the Texas Revised Civil Statutes Annotated, which allowed twenty (20%) percent of adjacent property owners to protest a replat in a residential subdivision. If the twenty (20%) percent of neighboring owners objected in the required manner, then the written approval of sixty-six and two-thirds (66-2/3%) percent of affected owners was required. The effect of this provision was to allow a well organized opposition of at least thirty-four (34%) percent of affected property owners to prevent any replatting which was opposed. The court held that platting statutes which prohibit all replatting are unconstitutional. *Id.* at 565. The Enabling Act does not contain any parallel provision, although a home rule city may adopt an ordinance to require approval by a three-quarter vote of any zoning ordinance which was not recommended for approval by the Zoning Commission. TEX. LOC. GOV'T CODE ANN. § 211.006 (Vernon 1999).

## **B. Validity of Specific Zoning**

### 1. Technical Compliance with Enabling Act

Challenging the technical compliance of a city with the Enabling Act in adopting an original or amendatory zoning ordinance has rarely been a successful venture. See Gullo v. City of W. Univ. Place, 214 S.W.2d 851 (Tex. Civ. App.–Galveston 1948, writ dismiss'd); City of Bellaire v. Lamkin, 317 S.W.2d 43 (Tex. 1958); City of Brookside Vill. v. Comeau, 633 S.W.2d 790 (Tex. 1982); Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex. App.–1989, writ dismiss'd). Further, the Texas legislature periodically passed validation statutes curing all substantive defects in the adoption of zoning ordinances by cities. See, e.g., TEX. REV. CIV. STAT. ANN. art. 974d-22, § 4, arts. 974d-36, 1174a1082 (b), 1174a-12, § 2 (b) (Vernon 1990 & Supp. 2001). [**Reference permanent validation statute**] Validation statutes are remedial and to be liberally construed to cure all defects which are not constitutional in nature. *Id.* at 296; Murmur Corp. v. Board of Adjustment of Dallas, 718 S.W.2d 790, 793 (Tex. App.–Dallas 1986, writ ref'd n.r.e.). However, a validation statute will not give a resolution purporting to amend a zoning ordinance or the effect of an ordinance, City of Hutchins v. Prosifka, 450 S.W.2d 829, 933 (Tex. 1970).

### 2. Challenge of Zoning Ordinance

a. General Rules. The Texas Supreme Court set forth the ground rules for challenging a zoning ordinance in City of Pharr v. Tippitt, 616 S.W.2d 173 (Tex. 1981), and City of Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982), as follows:

- (i) Zoning is an exercise of a city's legislative powers;
- (ii) Validity of a zoning ordinance is a question of law, not fact; and

- (iii) Courts are governed by the rule that if reasonable minds may differ as to whether a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, then no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power;
- b. A zoning ordinance duly adopted pursuant to the Enabling Act is presumed to be valid, and the burden is on the one seeking to prevent its enforcement, whether generally or as to a particular property, to prove that the ordinance is arbitrary or unreasonable in that it bears no substantial relationship to the health, safety, morals or general welfare of the city;
- c. The burden on the party contesting a zoning ordinance is a heavy one;
- d. The test for spot zoning is that the city act arbitrarily, unreasonably, discriminatorily and without any substantial relation to the public health, safety, morals or general welfare. In such event, a zoning ordinance constitutes spot zoning and is void;
- e. Zoning regulation is a recognized tool of community planning which allows a city, in the exercise of legislative discretion, to restrict the use of private property; and
- f. Judicial review of a city's zoning actions is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions.

A court might not take judicial notice of zoning ordinances attached to an appellate brief. City of Glenn Heights v. Sheffield Dev. Co., 55 S. W. 3d 158,162 (Tex. App.–Dallas 2001 pet. filed). The ordinances must have been introduced at the trial level. *Id.*

- 3. Spot Zoning - Spot zoning involves the singling out of a tract of land for treatment different from that accorded to similar surrounding land without proof of changes in conditions. City of Pharr v. Tippitt, 616 S.W.2d 173, 177 (Tex. 1981). Spot zoning is illegal and invalid because such an amendatory ordinance will not be in accordance with a city's comprehensive plan. *See Board of Adjustment of San Antonio v. Leon*, 621 S.W.2d 431, 436 (Tex. Civ. App.–San Antonio 1981, no writ). Zoning changes for a small area will be upheld only if changes have occurred that justify treating the area differently from the surrounding land. Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971); City of Texarkana v. Howard, 633 S.W.2d 596, 597 (Tex. App.–Texarkana 1982, writ ref'd n.r.e.). However, spot zoning could be cured by a validation statute. *See supra* section IV.E.

in City of Pharr, the Texas Supreme Court set forth four important criteria against which rezonings of specific property matters should be tested. 616 S.W.2d at 177. Regarding these criteria the court stated:

It has been suggested that such a statement would help to restrain arbitrary, capricious and unreasonable actions by city legislative bodies; improve the quality of the legislation; assist to eliminate ad hoc decisions and focus the evidence from interested parties upon the real issues.

*Id.* at 176.

Based on a footnote citing to numerous law review articles on zoning law at the end of the foregoing statement, it is clear that the court felt it was establishing an important precedent for future zoning cases.

The four criteria are as follows:

- a. Consistency with a comprehensive plan and zoning ordinance should be respected and not altered for the special benefit of one land owner where it may cause a substantial detriment to surrounding property and serve no substantial public purpose;
- b. Nature and degree of adverse impact on neighboring property are important. Rezoning must be consistent with zoning of the surrounding area, and the more divergent the adjacent zoning the more likely the ordinance may be invalid (i.e. rezoning a portion of a residential area to industrial);
- c. Suitability of the tract for the use as presently zoned is also a factor. The size, shape and location of a tract may render it unusable as zoned (i.e. a residence surrounded by businesses). Proof of public need or substantially changed conditions supports rezoning; and
- d. A substantial relationship to the public health, safety, morals or general welfare or to the protection and preservation of historical and cultural areas must exist. The focus is on a substantial public need without regard for the fact that the owner of the rezoned property may benefit.

These four criteria are consistent with the factors previously set forth by the Texas Supreme Court. City of Fort Worth v. Johnson, 388 S.W.2d 400, 404 (Tex. 1964). Violation of these criteria constitutes impermissible spot zoning and therefore is invalid.

The key to the test is that if spot zoning analysis is applied, the presumption of validity no longer applies. City of Pharr v. Tippitt, 616 S.W.2d at 176. The current status of spot zoning law is confused. To be safe, a rezoning of a small tract must be supported by changed conditions. See City of Texarkana v. Howard, 633 S.W.2d 596, 597 (Tex. App.–Texarkana 1982, writ ref'd n.r.e.). No clear test for spot zoning has been established despite the Texas Supreme Court's attempt at clarification in City of Pharr. The current state of Texas spot zoning law has been described as "unworkable and unreliable." Mixon, at §17.05. For a detailed discussion of the history of spot zoning cases in Texas and related commentary, see Mixon, Chapter 14.

4. Use Districts - Traditional zoning focuses on the geographic division of a city into districts and the application of different use regulations in those districts. The Enabling Act specifically allows use regulation. TEX. LOC. GOV'T CODE ANN. § 211.003 (Vernon 1999). A city has broad discretion to exclude and limit uses. See City of Gatesville v. Powell, 500 S.W.2d 581, 583 (Tex. Civ. App.–Waco 1973, writ ref'd n.r.e.) (upholding residential only districts); Meserole v. Board of Adjustment, City of Dallas, 172 S.W.2d 528, 530 (Tex. Civ. App.–Dallas 1943, no writ) (proper to exclude laundry and dry cleaning call station from residential area); City of Corpus Christi v. Jones, 144 S.W.2d 388, 397 (Tex. Civ. App.–San Antonio 1940, writ dism'd judgment cor.) (prohibiting businesses or industries from residential districts).

A city may place municipal buildings in any use district as it deems necessary for the safety, health and general welfare of the public. See City of McAllen v. Morris, 217 S.W.2d 875, 877 (Tex. Civ. App.–San Antonio 1949, writ ref'd). However, a city may burden itself with the obligation to comply with its own zoning ordinance. *Id.*; City of Lubbock v. Austin, 628 S.W.2d 49 (Tex. 1982).

Most cities are divided into residential, business and commercial, and industrial districts. Typically, each district is subdivided into more specific use-districts. Traditional zoning ordinances will frequently list the use district from the "higher" most restrictive (i.e. residential) to the "lower" least restrictive (i.e. industrial) and allow all "higher" uses in the "lower" districts. This is "cumulative" zoning. More modern zoning ordinances are more restrictive in uses allowed. The provisions of and not the order in which the classes are listed in the ordinance determines which zoning classification is the most restrictive. See Wallace v. Daniel, 409 S.W.2d 184, 189 (Tex. Civ. App.–Tyler 1966, writ ref'd n.r.e.).

5. Planned Development Districts - Zoning ordinances often include planned development districts (also known as Planned Unit Developments or "PUDs"). See Teer v. Duddleston, 641 S.W.2d 569, 575 (Tex. App.–Houston [14th Dist.] 1982), 26 Tex. Sup. Ct. J. 544 (July 20, 1983), *rev'd on other grounds*, 664 S.W.2d 702 (Tex. 1984). A planned unit development is defined as an "area with a specified minimum contiguous acreage to be developed as a single entity according to a plan [and] containing one or more residential clusters . . . and one or more public, quasi-public, commercial or industrial uses in such ranges of ratios of nonresidential uses to residential uses" as specified in the zoning ordinance. BLACK'S LAW DICTIONARY 1036 (6th ed. 1990).
6. Specific Use Permits - Specific use permits provide for a site specific approval of uses contemplated in a zoning ordinance, subject to a determination that the use is appropriate where requested. They are issued legislatively by the zoning commission/city council. Specific use permits are similar in application to a special exception, although the special exception is issued in a quasi-judicial manner by the ZBA. Specific use permits are a valid exercise of zoning authority by a municipality. City of Lubbock v. Whitacre, 414 S.W.2d 497, 499 (Tex. Civ. App.–Amarillo 1967, writ ref'd n.r.e.). Amendment to a zoning ordinance by a specific use permit to allow a use not otherwise allowed in that zoning district is not spot zoning. *Id.* at 502.
7. Laches and Estoppel - The equitable doctrines of estoppel and laches are generally not available against a city in an action challenging enforcement of a zoning ordinance against property owners, because a city is discharging its governmental function in enforcing its zoning ordinance. See Marriott v. City of Dallas, 635 S.W.2d 561, 564 (Tex. App.–Dallas 1982), *aff'd*, 644 S.W.2d 469 (Tex. 1983).
8. Standing - To challenge a zoning ordinance, a party must own real property in the city. Kincaid School, Inc. v. McCarthy, 833 S.W.2d 226 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1992, no writ). A party not listed on the most recent tax rolls of the city at the time for the notice of a zoning ordinance change cannot complain of lack of notice despite actual ownership at the time of the zoning change. *Id.* Normally, only a city has standing to enforce a zoning ordinance; however, in Porter v. Southwestern Public Service Company, 489 S.W.2d 361 (Tex. Civ. App.–Amarillo 1972, writ ref'd n.r.e.), individual citizens successfully challenged a violation of a city zoning ordinance after the city determined the utility was exempt.

9. Agreement Concerning Future Zoning Illegal (“Contract Zoning”) - No city may enter an enforceable agreement concerning future zoning decisions, and any attempted agreement will be void. City of Pharr v. Pena, 853 S.W.2d 56 (Tex. App.–Corpus Christi 1993, writ denied); City of Farmer’s Branch v. Hawnco, Inc., 435 S.W.2d 288, 291 (Tex. Civ. App.–Dallas 1968, writ ref’d n.r.e.). However, the Property Redevelopment and Tax Abatement Act, in section 312.001 et seq. of the Texas Tax Code, specifically provides that a tax abatement agreement between a city and a property owner may provide for changes to the city’s zoning ordinance. TEX. LOC. GOV’T CODE ANN. § 205(b)(5), 312 (Vernon 1999). Even if a city enters into a land use related agreement, all necessary legal requirements to authorize the agreement must be satisfied. A city is not estopped to deny the non-enforceability of an agreement which was not properly entered into, even though it was due to city error. Galveston County MUD No.3 v. City of League City, 960 S.W. 2d 875 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1997, no pet.). A further problem with contract zoning is the fact that municipalities have sovereign immunity to suit for contract claims(unless waived). See City of Houston v. Northwood Mun. Util. Dist. No. 1, No. 01-01-00497-CV, 2001 WL1447947\*6 (Tex. App.– Hou[1st Dist] 2001) (not designated for publication).

#### 10. Construction of Zoning Ordinance

The following rules apply when construing a zoning ordinance provision:

- Generally, the rules applicable to statutes apply
- Give effect to the enacting body’s intent
- Give first preference to the language of the provision, but not so literally as to read it out of context
- Then consider context
- Then consider the consequences of the interpretation
- Avoid interpretations which are absurd or create surplusage
- Interpretation is a question of law, so the reviewing court is not bound the administrative body’s interpretation, although that interpretation may be given some weight if the court is in doubt.

Wende v. Board of Adjustment of San Antonio, 27 S.W. 3d 162, 170 (Tex. App–San Antonio 2000, pet. granted).

### C. Validity of ZBA Decision

1. Procedure. The ZBA's decision on an appeal, variance, special exception or other matter can be challenged by petition to a court of record to review the ZBA's decision by *writ of certiorari*. TEX. LOC. GOV’T CODE ANN. § 211.011 (Vernon 1999). The court may reverse or affirm wholly or in part and modify the decision reviewed. § 211.011. The right to appeal a ZBA decision is limited exclusively to *writ of certiorari* under section 211.011. Reynolds v. Haws, 741 S.W.2d 582, 584 (Tex. App.–Fort Worth, 1987, writ denied). As an alternative to *writ of certiorari*, the property owner may independently challenge the validity of the zoning ordinance rather than seeking a variance from its provisions. City of Amarillo v. Stapf, 101 S.W.2d 229, 234 (Tex. Comm’n. App. 1937, judgmt. adopted). **[add remand]**

If an aggrieved party decides to appeal an order of the ZBA by requesting a *writ of certiorari*, they have 10 days after the notice of decision to file suit. TEX. LOC. GOV’T CODE ANN. § 211.011 (Vernon 1999); Reynolds, 741 S.W.2d at 584. The aggrieved party must establish compliance with

this requirement in order to be entitled to appeal. Fincher v. Board of Adjustment of Hunters Creek Vill., 56 S.W. 3d 815, 817 (Tex. App.–Houston [1st Dist.] 2001, no pet.). The former characterization of the ten day period as “jurisdictional” is incorrect, rather it is an issue for the parties to raise on the merits. *Id.* (citing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76-77 (Tex. 2000)). The ZBA itself is an indispensable party and must be named as a defendant, even if individual members of the ZBA are served and answer. *Id.* at 587. When the petition names all members of the ZBA in their official capacities without specifically naming the board as an entity, this defect is curable and petitioner may amend petition to include board after expiration of the statutory 10 day period for filing a *writ of certiorari*. Pearce v. City of Round Rock, 992 S.W.2d 668 (Tex. App.–Austin 1999, pet. denied).

2. Standing. The following parties may appeal to the ZBA: (i) a person aggrieved by the decision, or (ii) any officer, department, board, or bureau of the municipality affected by the decision, other than a member of a governing body sitting on a ZBA under TEX. LOC. GOV'T CODE ANN. § 211.008(g) (Vernon 1999). In order to have standing to appeal an order, requirement, decision, or determination made by an administrative official, the appealing party must demonstrate unique injury or harm to himself other than as an aggrieved member of the general public. Texans to Save the Capitol, Inc. v. Board Adjustment of Austin, 647 S.W.2d 773, 775 (Tex. App.–Austin 1983, writ ref'd n.r.e.); Galveston Historical Found. v. Zoning Bd. of Adjustment of Galveston, 17 S.W.3d 414, 416-7 (Tex. App.–Houston [1st Dist.] 2000, pet. denied). Standing does not require establishing a direct link between a party's activities and the ZBA's decision, or that a harm had already occurred. Residents in the same zoning district are aggrieved and therefore have standing. *Id.* at 418. An adjacent city is aggrieved if the decision adversely affects it different than the general public. Wende v. Board of Adjustment of the City of San Antonio, 27 S.W. 3d 162, 167 (Tex. App.–San Antonio 2000, pet. granted).
3. Limitations on ZBA Action. The ZBA is an administrative, fact finding, quasi judicial body. It is empowered to grant variances or exceptions from the zoning ordinance, but it cannot be delegated the legislative function of the City Council with regard to its zoning ordinance. The ZBA is only authorized to ameliorate exceptional instances which, if not relieved, could endanger the integrity of a zoning plan. Thomas v. City of San Marcos, 477 S.W. 2d 322, 324 (Tex. Civ. App.–Austin 1972, no writ); Swain v. Board of Adjustment of Univ. Park, 433 S.W.2d 727, 735 (Tex. Civ. App.–Dallas 1968, writ ref'd n. r. e.), *cert. denied*, 396 U.S. 277, *reh'g denied*, 397 U.S. 977 (1970). A ZBA must act within its specifically granted authority. West Tex. Water Refiners, Inc. v. S&B Beverage Co., 915 S.W.2d 623, 626 (Tex. App.–El Paso 1996, no writ). If the ZBA acts outside its specifically granted authority, it is subject to a collateral attack in district court, which suit is not governed procedurally by TEX. LOC. GOV'T CODE ANN. § 211.011 (Vernon 1999). *Id.* For example, if a board grants a special exception that is not a conditional use expressly provided for under the ordinance, then the board has exceeded its authority to act rather than merely exercising its power legally. S&B Beverage Co., 915 S.W.2d at 627.

The ZBA has no power to grant zoning exceptions or variances that amount to a zoning ordinance amendment. If the approval of a "specific use permit" constitutes a zoning ordinance amendment, the City Council is the only body that may approve or disapprove such a permit. *See Op. Tex. Att'y. Gen. JM-493 (1986)*.



4. Variances. A variance is authorized where the zoning ordinance does not permit any reasonable use, not merely to accommodate the highest and best use of the property. *See Board of Adjustment of San Antonio v. Willie*, 511 S.W. 2d 591, 594 (Tex. Civ. App.–San Antonio 1974, writ ref'd n.r.e.). The ZBA must find the existence of a "hardship" in order to grant a variance. TEX. LOC. GOV'T CODE ANN. § 211.009 (Vernon 1999). Where a variance is denied, the applicant will not later be allowed to ask for an interpretation that the variance is not required in order to eliminate the 10 day deadline for appealing the variance denial. Fincher v. Board of Adjustment of Hunters Creek Vill., 56 S.W. 3d 815, 816 (Tex. App–Houston[1st Dist.] 2001, no pet.).
5. Special Exceptions. A variance is distinguished from a special exception in that, in the case of a variance, a literal language of the zoning regulations is disregarded. In the case of a special exception, "the conditions permitting the exception are found in the zoning regulations themselves." Moody v. City of Univ. Park, 278 S.W.2d 912, 919 (Tex. Civ. App.–Dallas 1955, writ ref'd n.r.e.).
6. Nonconforming Uses. A ZBA may, by city ordinance, have jurisdiction to adjudicate non-conforming uses under a city's zoning ordinance. *See Huguley v. Board of Adjustment of Dallas*, 341 S.W.2d 212, 216 (Tex. Civ. App.–Dallas 1960, no writ). There existed no statutory basis for ZBA jurisdiction over non-conforming uses until the 1993 amendment of Texas Local Government Code, section 219.009. The ZBA may determine whether a non-conforming use existed on the owner's property when it was annexed to the city. *Id.* The ZBA does not have discretion to grant a non-conforming use where none previously existed. *See Board of Adjustment, City of San Antonio v. Nelson*, 577 S.W.2d 783, 785 (Tex. Civ. App.–San Antonio 1979, writ ref'd n.r.e.), *aff'd*, 584 S.W.2d 701 (Tex. 1979).
7. Rules for Writ of Certiorari.
  - a. A legal presumption exists in favor of the ZBA's decision. Board of Adjustment of Piney Point Vill. v. Amelang, 737 S.W.2d 405, 406 (Tex. Civ. App.–Houston [14th Dist.] 1987, writ denied); Southwest Paper Stock, Inc. v. Zoning Bd. of Adjustment, 980 S.W.2d 802, 804 (Tex. App.–Fort Worth 1998, pet. denied).
  - b. The burden of proof to establish its illegality rests upon the contestant. Swain v. Board of Adjustment of Univ. Park, 433 S.W.2d 727, 731 (Tex. Civ. App.–Dallas 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 277, *reh'g denied*, 397 U.S. 977, (1970); Southwest Paper Stock, Inc., 980 S.W.2d at 804.
  - c. "If the evidence before the court as a whole is such that reasonable minds could have reached the conclusion that the Board of Adjustment must have reached, . . . the order must be sustained." McDonald v. Board of Adjustment of San Antonio, 561 S.W.2d 218, 220 (Tex. Civ. App.–San Antonio 1977, no writ).
  - d. The review of the decision of a ZBA is not a trial de novo where facts are established, but is based on whether the ZBA abused its discretion. City of Lubbock v. Bownds, 623 S.W.2d 752, 755-56 (Tex. App.–Amarillo 1981, no writ); Amelang, 737 S.W.2d at 406, Southwest Paper Stock, Inc., 980 S.W.2d at 804; SWZ, Inc. v. Board of Adjustment of Fort Worth, 985 S.W.2d 268, 270 (Tex. App.–Fort Worth 1999, writ denied).

- e. The court must not substitute its judgment for the ZBA's. Amelang, 737 S.W.2d at 406; Southwest Paper Stock, Inc., 980 S.W.2d at 804.
- f. The only question which can be raised is the legality of the ZBA decision. Amelang, 737 S.W.2d at 406; Southwest Paper Stock, Inc., 980 S.W.2d at 804.
- g. The court should make its decision on the legality of the ZBA's decision based on the materials retained in response to the *writ of certiorari* and any testimony received. Amelang, 737 S.W.2d at 406, Southwest Paper Stock, Inc., 980 S.W.2d at 804.
- h. The legality of a ZBA's denial is a question of law. Southwest Paper Stock, Inc., 980 S.W.2d at 804.
- i. As a question of law, whether a ZBA decision should be upheld is appropriately determined by summary judgment. Amelang, 737 S.W.2d at 406; Southwest Paper Stock, Inc., 980 S.W.2d at 804.

The foregoing rules incorporate the “abuse of discretion” rule, which was adopted by the Texas Supreme Court in City of San Angelo v. Boehme Bakery, 190 S.W. 2d 67 (Tex. 1945) and Nu-Way Emulsion, Inc. v. City of Dalworthington Gardens, 610 S.W.2d 562 (Tex. Civ. App.–Fort Worth), *writ ref'd per certiam*, 617 S.W.2d 188 (Tex. 1981). *See also* SWZ, Inc. v. Board of Adjustment of Fort Worth, 985 S.W.2d 268 (Tex. App.–Fort Worth 1999, pet. denied). Some Court of Appeals apply the “substantial evidence” rule, requiring a factual basis for the ZBA's decision, whereas the “abuse of discretion” standard only inquires whether the ZBA's decision is arbitrary and unreasonable, whether or not evidence exists. *See* Pick-N-Pull Auto Dismantlers v. Zoning Board of Adjustment of Fort Worth, 45 S. W. 3d 337, 340 (Tex. App–Fort Worth 2001, pet. denied) (court cites the “abuse of discretion” rule, but applies the “substantial evidence” rule), Board of Adjustment of Corpus Christi, 860 S.W. 2d 622, 625-6 (Tex. App.–Corpus Christi 1993, writ denied) (court discusses the conflict). This conflict is fully reviewed in Mixon, § 11.516.

In Wende v. Board of Adjustment of the City of San Antonio, 27 S.W.3d 162 (Tex. App.–San Antonio 2000, pet. granted), the court applied non zoning law applicable in mandamus actions to determine whether a ZBA abused its discretion, citing Walker v. Packer, 827 S.W.2d 833 (Tex. 1992). Walker held that an abuse of discretion occurs if a decision is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.* at 839. The court specifically rejected the “substantial evidence” rule. Wende, 27 S.W.3d at 167. The court considered a ZBA, as a quasi-judicial body, to be subject to the same limitations as a trial court being reviewed in a mandamus actions. *Id.* The ZBA abuses its discretions if it incorrectly analyzes or applies the law. *Id.* Only in the area of factual determinations will the reviewing court not substitute its own judgement. *Id.* The court must determine whether mixed issues are more fact than law. *Id.* In Wende, the appellate court held that the trial court misapplied the zoning ordinance and remanded the matter for further action consistent with the appellate court's decision. This case give the aggrieved party more room for success on appeal. It may also result in more cases being remanded to the trial court for further action as the appellate court may determine that the trial court misinterpreted or misapplied the law. **[interpretation case - contrast to varied spec. ex. cases]**

#### D. Non-Conforming Uses

1. Definition. A non-conforming use is a use that lawfully precedes adoption or application of zoning regulations that prohibit the use and continues to exist. Wende v. Board of Adjustment of San Antonio, 27 S.W.3d 162, 169 (Tex. App.–San Antonio 2000, pet. granted); City of Jersey Vill. v. Texas No. 3 Ltd., 809 S.W.2d 312, 313 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1991, no writ). The use must have commenced before the zoning ordinance, mere intent is insufficient. Wende, 27 S.W.3d at 169. Acquiring (whether by buyer or leasing) property in contemplation of future use is insufficient. *Id.* Preparation (permits, planning, surveying, testing, etc.) for a use is insufficient. *Id.* at 171. A previous use, since discontinued is insufficient. *Id.* Construction commencing after notice of annexation is too late. *Id.*
2. Right to Continue. A non-conforming use lawfully existing prior to enactment of a zoning ordinance has vested rights to continue in existence so long as the structures and uses are not nuisances and are not harmful to public health, safety, morals or welfare. City of Corpus Christi v. Allen, 254 S.W.2d 759, 761 (Tex. 1953). For a proposed project to have common law vested rights in Texas, it must satisfy the following:
  - permit for construction has been issued;
  - the owner have expended substantial funds; and
  - reliance by the owner was in good faith.

*Id.*; Brown v. Grant, 2 S.W.2d 285 (Tex. Civ. App.–San Antonio 1928, no writ).

In addition to the common law vested rights, most zoning ordinances specifically provide for the continuation of pre-existing nonconforming uses.

3. Elimination is Lawful. One of the objectives of zoning regulations is to ultimately eliminate non-conforming uses. City of Garland v. Valley Oil Co., 482 S.W.2d 342, 346 (Tex. Civ. App.–Dallas 1972, writ ref'd n.r.e.), *cert. denied*, 411 U.S. 933 (1973), *aff'd on remand*, 499 S.W.2d 333 (Tex. Civ. App.–Dallas 1973, no writ); Murmur Corp. v. Board of Adjustment of Dallas, 718 S.W.2d 790, 797 (Tex. App.–Dallas 1986, writ ref'd n.r.e.). Zoning ordinances requiring termination of non-conforming uses under reasonable conditions (usually an amortization period) are permissible under a city's police power. Property owners do not acquire a constitutionally protected right in property uses once they have commenced or in zoning classifications once they are made. Benners v. City of Univ. Park, 477 S.W.2d 326, 329 (Tex. Civ. App.–Waco 1973), *rev'd on other grounds*, 485 S.W.2d 773, 780 (Tex. 1972), *appeal dismissed*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1973). Most zoning ordinances prohibit:
  - the expansion or intensification of non-conforming uses;
  - their replacement/reconstruction/relocation; and
  - continuation after a specified period of non use (*i.e.*, abandoned).

However, the “diminishing asset doctrine” applies to quarries to allow excavation of all of the land owned as of the date of non conformance, even if only a portion was being excavated at that time. Wende v. Board of Adjustment of San Antonio, 27 S.W.3d 162, 172-73 (Tex. App.–San Antonio 2000, pet. granted).

4. Amortization. Amortization of non-conforming uses is allowed. See Board of Adjustment of Dallas v. Winkles, 832 S.W. 2d 803 (Tex. App.–Dallas 1992, writ denied) (clearing setting forth the right to amortize and general rules applicable).

The concept of amortization is to allow the owner of a non-conforming use to operate that use for the period of time necessary to allow the owner to recover its investment. Winkles, 832 S.W.2d at 806. At the end of the amortization period, the owner is forced to either conform to the provisions of the zoning ordinance or to terminate the use. Amortization is acceptable because the owner does not acquire a constitutionally protected vested right in property use or in zoning classifications. City of Univ. Park v. Benners, 485 S.W.2d at 773 (Tex. 1972). **[Add cite to Eller v. City of Houston]**

5. Statutory Vested Rights - Freeze Law. A vested rights statute was enacted in 1987 to streamline regulatory processes and encourage economic development, and was codified as section 481.141 of the Texas Government Code. The statute “froze” regulation as it was when a project commenced in order to prevent regulatory authorities from changing development rules and standards mid- stream. The vested rights statute was repealed inadvertently by the Texas Legislature in 1997, but has now been reenacted and codified as Chapter 245 of the Texas Local Government Code. The Texas Supreme Court dealt with the effect of the repeal in Quick v. City of Austin, 7 S.W.3d 109 (Tex. 1999).

When reenacting this statute, the legislature found that the 1997 repeal was, in fact, inadvertent stating:

“the repeal of former subchapter I, Chapter 481, Government Code, which became effective September 1, 1997, resulted in the reestablishment of administrative and legislative practices that often result in unnecessary governmental regulatory uncertainty that inhibits the economic development of the state and increases the cost of housing and other forms of land development and often resulted in the repeal of previously approved permits causing decreased property and related values, bankruptcies, and failed projects. The legislature finds that the restoration of requirements relating to the processing and issuance of permits and approvals by local governmental regulatory agencies is necessary to minimize to the extent possible the effect of the inadvertent repeal . . . and to safeguard the general economy and welfare of the state and to protect property rights.” Finding and Intent, Section 1 of H.B. 1704 (1999 Tex. Sess. Law Serv. Ch. 73 HB 73 Vernon), available at WL TX LEGIS 73 (1999) (amending Chapter 481 of the Texas Government Code).

Vested rights granted by the statute are as follows:

- A regulatory agency may consider a permit application solely on the basis of the “orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements” effective when the “original application” is filed.
- If there are a series of permits, the application for the first permit in that series triggers the vested rights.
- All permits required for the project are considered a single series. Specifically, preliminary plans, subdivision plats, site plans and all other development permits for land covered by preliminary plans or subdivision plats are collectively a single series.

- Once a permit is issued, its duration may not be shortened. TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 1999 & Supp. 2001).

The definitions of “permit”, “political subdivision”, “project” and “regulatory agency” are broad. TEX. LOC. GOV'T CODE ANN. § 245.001 (Vernon 1999 & Supp. 2001); Op. Tex. Att’y Gen. No. JC-0425 (2001) (opines that vested rights apply to the “project” and not the owner; therefore, the property retains the vested rights, but only so long as the project remains the same [which factual determination is left to each situation]). In Levy v. City of Plano, No. 05-97-00061-CV, 2001 WL 1382520 (Tex. App.–Dallas 2001) (not designated for publication) the court held that the filing of a permit application for a project in a city’s ETJ does not protect the project from subsequent application of the city’s zoning ordinances after annexation.

The new statute, in compensation for the two year gap between the statute’s repeal and re-enactment, applies to projects “in progress on or commenced after September 1, 1997.” TEX. LOC. GOV. CODE ANN. § 245.003 (Vernon 1999 & Supp. 2001). The term “in progress” is generously defined to include any viable development project. TEX. LOC. GOV'T CODE ANN. § 245.005 (Vernon 1999 & Supp. 2001). The replacement statute clarified the legislatures intent that any project, permit, or series of permits protected by the former statute would not be prejudiced by the inadvertent repeal. This provision conflicts with the Texas Constitution provision prohibiting retroactive laws. TEX. CONST. art. 3, § 56 (Vernon 1999 & Supp. 2001).

The statute contains several exceptions to vested rights, specifically including zoning regulations, but only those which do not affect lot dimensions, lot coverage, and building size. TEX. LOC. GOV'T CODE ANN. § 245.004 (Vernon 1999 & Supp. 2001). Additionally, the statute will allow cities to apply expiration dates on a permit not previously containing one if no effort at progress has resulted towards completion of the project after May 22, 2000 (one year from the effective date). TEX. LOC. GOV'T CODE ANN. § 245.005 (Vernon 1999 & Supp. 2001). Enforcement is limited to mandamus, declaratory judgment or injunction. TEX. LOC. GOV. CODE ANN. § 245.006 (Vernon 1999).

An owner may not recover damages for a regulatory taking and be granted relief under Chapter 245 and thus have the right to complete the proposed project in the manner originally requested, because the owner made an election of remedies. City of Glenn Heights v. Sheffield Dev. Co., 55 S. W. 3d 158, 165 (Tex. App.–Dallas 2001, pet. filed). In Glenn Heights, the owner asserted that PUD zoning was a “permit” and a plat filed based on the PUD must be considered under the PUD provisions, not withstanding a later down zoning.

#### 6. Reliance on Improperly Issued Permit

Two cases uphold the right of an owner to complete construction of a non conforming structure based on improperly issued building permits. Board of Adjustment of Corpus Christi v. McBride, 676 S.W. 2d 705 (Tex. App.–Corpus Christi 1984, no writ); Town of South Padre Island v. Cantu, 52 S. W. 3d 287 (Tex. App.–Corpus Christi 2001, no pet.). In both cases, the city issued a building permit for a building based on plans with a non conforming set back. The buildings were substantially completed (75% in McBride and 80% in Cantu). Cantu cited McBride in holding that a ZBA abuses its discretion if it fails to grant a variance when the facts show that a hardship exists and the variance would not adversely affect others. Cantu, id. at 289. The Cantu court rejected

the city's argument that any encroachment into a required setback violates public policy and is support of denial of a variance to encroach into the setback. *Id.* at 291, n. 2. These cases provide strong support for an owner seeking a "minor" setback variance where the owner has a building permit, there is little neighbor opposition and the health, safety risks are small.

## VII. SPECIALLY TREATED LAND USES

The following land uses are accorded special treatment due to statute and/or case law:

1. **Churches** - See City of Sherman v. Simms, 183 S.W.2d 415 (Tex. 1944) (holding that constitutional separation of church and state prevent church sanctuaries from being excluded from residential zoning districts) Church related uses like schools can be regulated. [add cite to other cases] Application of performance standards is acceptable. [add cite]
2. **Sexually Oriented Businesses** - See N. W. Enterps. v. City of Houston, 27 F. Supp. 2d 754 (S.D. Tex.1998) (on reconsideration); Schleuter v. City of Fort Worth 947 S.W.2d 920 (Tex. App.–Fort Worth 1997, writ denied); TEX. LOC. GOV'T. CODE ANN. § 243.003 (Vernon 1999 & Supp. 2001) and Section V.D. of this paper. [add cite to court cases]

(SOBs have limited protection under the constitutional right to freedom of expression.)

3. **Disabled/Handicapped Housing** - See Federal Fair Housing Act, 42 U.S.C. § 3601 et seq.; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Deep E. Tex. Reg'l MHMRS v. Kinnear, 877 S.W.2d 550 (Tex. App.–Beaumont 1994, no writ). (holding that constitutional principles of equal protection and specific statute protect the disabled from discrimination in housing).
4. **Community Homes** - See TEX. HUM. RES. CODE ANN. § 123.001 et seq. (Vernon 1999); TEX. PROP. CODE ANN. § 202.003(b) (Vernon 1999 & Supp. 2001). A state licensed community home can operate in any residential area, but is limited to six residents. San Miguel v. City of Windcrest, 2000 WL 1153710 (Tex. App.–San Antonio 2000); City of Friendswood v. Strang, 965 S.W.2d 705 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1998, no writ).
5. **Home Occupation** - Some zoning ordinances specifically allow some level of business activity in residential districts. See Pruitt v. Town of St. Paul, No. 05-96-00025-CV, 1997 WL 466526 (Tex. App.–Dallas 1997) (not designated for publication) for definition of a "home occupation" allowed in some areas zoned for single-family residential use.
6. **Low Income Housing** - See Arlington Heights v. Metro. Hous. Ass'n, 429 U.S. 252 (1977). Exclusionary zoning may also violate a citizen's civil rights under the Federal Civil Rights Act, 42 U.S.C. § 1983, as well as the limitations of the Federal Fair Housing Act, 26 U.S.C. § 3601 et seq. [add cite to court cases]
7. **Signage** - See Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981) (recognizing Constitutional protection of free speech); Eller Media Co. v. City of Houston, No. 01-00-0058-CV, WL 1298901 (Tex. App.–Houston [1<sup>st</sup> Dist] 2001) (explaining the various protections of commercial signage in Texas while upholding the Houston Sign Code amortization of non-conforming billboards).

8. **Liquor Sales** - See Dallas Merchs. & Concessionaires Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993) (holding that State of Texas preempted the field of regulation of liquor serving establishments).
9. **Quarries & Pits** - See City of Santa Fe v. Young, 949 S.W.2d 559 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1997, no pet.) (holding that Quarry Safety Act preempted the field for regulation of quarries and pits within 200 feet of roads, but not otherwise). In Wende v. Board of Adjustment of the City of San Antonio, 27 S.W.3d 162 (Tex. App.–San Antonio 2000, pet. granted), the court applied the “diminishing asset doctrine” to recognize that, by their nature, quarries involve a unique land use. Therefore, as a non conforming use, they deserve special treatment allowing the expansion of quarry operations to areas owned as of the time the use become non conforming, rather than be limited to the area being excavated at that time. *Id.* at 172-3. The court cited numerous decisions in other states and noted that this was a case of first impression in Texas. *Id.* at 173.
10. **HUD Code Manufactured Housing** - See Texas Manufactured Hous. Ass'n v. City of Laporte, 974 F. Supp. 602 (S.D. Tex. 1996) and National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401 et seq. (zoning regulations based on location and impact on values upheld, although safety regulation is preempted). A city may exclude HUD code manufactured housing from certain (but not all) residential zoning districts, if based upon locational rather than construction or safety issues. Atty. Gen. Op. No. 97-002, 1997 WL 113946 (February 19, 1997). Ordinances that treat mobile homes and HUD code manufactured homes are pre-empted by the Texas Manufactured Housing Standards Act, Tex. Rev. Civ. Stat. Ann. Art. 5221f (Vernon 1987 and Supp. 2001), which provides that HUD code manufactured homes must be treated separately from mobile homes. City of Freeport v. Vandergriff, 26 S.W.3d 680 (Tex. App.–Corpus Christi 2000, pet. denied).
11. **Pawnshops** - Licensed pawnshops must be an allowed use in at least one zoning district in a city and may not be subject to a specific use permit requirement. TEX. LOC. GOV'T CODE ANN. § 211.0035 (Vernon 1999).
12. **Public Uses** - Local regulation of uses by public entities (schools, municipal facilities, utility district facilities, etc.) or quasi public entities (railroads, common carrier pipelines, electric lines, etc.) is severely limited. Such uses cannot be excluded, but might be subject to reasonable regulation, such as building codes. Often safety regulation has been preempted by comprehensive state or federal regulation and oversight agencies. See *supra* section V.5.

## VIII. RECENT ZONING CASE LAW (1997-2001)

The following summaries are intended to contain all Texas zoning cases decided from 1997 through December 17, 2001 based on a WESTLAW search. Unpublished opinions were included as their facts, issues or analysis may be of assistance, although they may not be cited for precedential value.

### A. Constitutional Issues

Schleuter v. City of Fort Worth, 947 S.W.2d 920 (Tex. App.–Fort Worth 1997, pet. denied.).

The City of Fort Worth obtained a permanent injunction against a “sports bar” that featured female dancers dressed in “t-back” bottoms and latex pasties, based on the violation of the zoning ordinance banning sexually oriented businesses featuring female dancers with their breasts uncovered within 1000

feet of a residential neighborhood. The bar owner claimed the definition of nudity in the zoning ordinance violated the Texas Equal Rights Amendment; TEX. CONST. art. 1 § 3a. The zoning ordinance was upheld as:

1. content neutral (the City's predominate concern was to limit the negative secondary effects of sexually oriented businesses);
2. narrowly tailored (it effectively promotes the City's legitimate goals); and
3. proving alternative channels for communication (the bar owner did not prove insufficient alternative sites).

Hallco Texas, Inc. v. McMullen County, No. 04-96-00681-CV, 1997 WL 184719 (Tex. App.–San Antonio 1997, no pet.) (not designated for publication).

McMullen County's regulation of the placement of solid waste disposal facilities under Texas Health and Safety Code, section 364.112 was upheld in the face of takings, due process, equal protection, statutory vested rights and state preemption arguments. The Court also dismissed a unique argument that summary judgment is an inappropriate means of dealing with complex land use cases which the landowner based on dicta in Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex. App.–Dallas, 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991) citing the difficulty in using summary judgment in such cases.

City of Boerne v. Flores, 521 U.S. 507 (1997).

Roman Catholic Archbishop Flores applied for a building permit to enlarge a church in Boerne, Texas. Local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which, they argued, included the 1923 mission-style church. The Archbishop's suit challenged the ordinance under the Religious Freedom and Restoration Act of 1993 ("RFRA"). The Supreme Court declared the RFRA unconstitutional, in violation of separation of powers, in that Congress specifically sought to overturn Supreme Court precedent by purporting to change the burden of proof in free speech cases. The RFRA goes far beyond remedying or preventing unconstitutional behavior by prohibiting laws such as the zoning ordinance at issue that merely places an incidental burden on religion.

N. W. Enterprises., Inc. v. City of Houston, 27 F. Supp. 2d 754 (S.D. Tex. 1998).

The City of Houston's expanded sexually oriented business regulatory ordinance was challenged by affected parties. The court's memorandum opinions on cross-motions for summary judgment and for reconsideration are a primer for challenging and maintaining ordinances regulating sexually oriented businesses. Of primary concern to cities is the extensive discussion of the legislative record necessary for a court to uphold such an ordinance under First Amendment attack. The specific statements made and evidence heard during the legislative discussion on each amendment determined whether the court held that the particular section of the ordinance was content-based or content-neutral. This, in turn, determined the standard of review applied to each amendment. Almost all amendments found to be content-neutral were upheld.



Houston was not allowed to increase the distances between sexually oriented businesses and protected areas such as schools, churches, residential areas, etc. because the record of committee and City Council meetings on the ordinance did not show that the City Council considered or had reason to believe that the increased distance would reduce secondary effects of such businesses, such as lowering property values, increased crime, or the spread of sexually transmitted diseases.

Among many creative challenges, Plaintiffs postulated that the Ordinance was invalid because it was a zoning ordinance passed in conflict with a 1994 amendment to the Houston City Charter mandating that Houston may adopt a zoning ordinance only after the approval of a public referendum. The court held that the locational restrictions in the amendments are not zoning ordinances, because they were not exercised under a comprehensive plan.

A few issues remained unresolved via summary judgment. The court determined that the addition of parks to protected land uses was content-neutral, but that a genuine issue of material fact remained regarding the number of permissible sites for adult entertainment that would be available if this amendment were in force. For the same reason, the court reserved judgment on the new formula concerning how multi-family dwellings count toward determining residential areas.

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

In a unanimous decision, Justice Greg Abbott hit all the constitutional issues raised in a “refusal to rezone” case. The landowner loses on every issue except for the holding that the issues are “ripe for adjudication.”

Facts: Sunnyvale is a lightly developed, general law city with 1 acre minimum lot requirements in its single family zones (originally intended to address septic tank requirements). Mayhew owned 26% of the land in the City available for residential development. Commencing in 1985, Mayhew began meeting with City officials regarding a proposed planned development of his land at a higher density than the 1 unit per acre requirement. In 1986, the City adopted a Comprehensive Plan reflecting an anticipated increase in population from the current 2,000 to 25,000 by 2006, and 30-35,000 by 2016. Contemporaneously, the City amended its zoning ordinance to allow, upon city council approval, planned developments with densities greater than 1 unit per acre. Later in 1996, Mayhew proposed a planned development of between 3,650 - 5,025 units (3+ units per acre). A professional planning and engineering firm retained by the City reviewed the proposal and determined that it satisfied each of the requirements of the City’s zoning ordinance, and therefore, recommended approval. After passing a building moratorium, the planning and zoning commission recommended denial. In late 1986, city council appointed a negotiating committee, including two council members, the mayor and the city attorney to work with Mayhew. As a result, there was “tentative” agreement for a 3,600 unit project. However, due to political pressure brought by citizens on the city council, the city council rejected the planned development in January 1987. In March 1987, Mayhew sued the town and the four council members who voted against the request.

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

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

Reversal on Appeal: The Court of Appeals reversed, holding that the constitutional claims were not ripe for review. Town of Sunnyvale v. Mayhew, 905 S.W.2d at 234. In a Supplemental Opinion, the Court of Appeals reviewed the merits of the Mayhew claims in light of the Supreme Court's recent decision Taub v. City of Deer Park, 882 S.W.2d 824 (Tex. 1994), *cert. denied* 13 U.S. 1112 (1995) and held that the evidence was factually insufficient to support the trial court's judgment for Mayhew. Town of Sunnyvale v. Mayhew, 905 S.W.2d at 259-68.

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

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

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

The Court proceeded to determine that the denial of the higher density planned development did not either: 1) eliminate all economic viable use; or 2) unreasonably interfere with the land owner's right to use and enjoy its property. The Court spent several pages considering the "investment expectation" of Mayhew and considered the historic use of their property for agricultural purposes, the existence of zoning since 1963 and the retained value of the land for agricultural and low density housing purposes before concluding there was no investment backed expectation which would support a taking judgment.

Other Constitutional Claims: Mayhew's substantive due process, equal protection and procedural due process claims were reviewed and quickly rejected. The Court held that "political pressure," which could be a contributing factor to a denied rezoning, does not violate the landowner's substantive due process rights, so long as the City has legitimate government concerns and the denial was rationally related to those concerns (in this case the effects of urbanization on the City). On the equal protection claim, the Court was unconvinced there were other "similarly situated" land owners treated differently,

and focused on the fact that there only needs to be a rational relationship to a legitimate state interest for regulation to survive an equal protection challenge. On the final issue of procedural due process, the Court held that Sunnyvale must only provide notice and an opportunity to be heard, and that due to the fact that zoning is a legislative act, Sunnyvale is entitled to consider all facts and circumstances which may effect property of the community and the welfare of its citizens in making a decision.

Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036 (5th Cir. 1998).

The City of Austin placed utility holds on new tenants moving into an allegedly substandard apartment complex. A City employee signed an “agreement” regarding actions to be taken to avoid further utility holds. After efforts to work out a resolution failed, the City “got tough” with the owner, refusing to allow new tenants to move in until remedial efforts were satisfactory to the City. The apartment owner filed suit for lost rents based on breach of the “agreement” and takings. At trial, the constitutional issues were dismissed but the land owner won on the contract law claim and was awarded damages equal to lost rent during the period the utility holds were in place.

The Court held that federal takings claims were not “ripe” since the apartment owner failed to appeal the utility holds to the Building and Standards Commission, where a claim could have been asserted that the holds were wrongfully imposed. On the takings claim, the Court held that, as a matter of law, placing utility holds on substandard property qualifies as a reasonable, non-arbitrary decision designed to accomplish the “legitimate goal” of keeping substandard housing unoccupied, at least as to the substandard units. However, the issue of nonstandard units on which utility holds were placed in an effort to force compliance on other substandard units gave the Court more trouble. Nevertheless, on the facts submitted, the Court upheld the City’s action. On the issue of substantive due process, the Fifth Circuit reaffirmed its longstanding holdings that there is a very limited range for substantive due process analysis and that so long as there is a conceivable rational basis for a City land use decision, it will be upheld. The City waived what apparently would have otherwise been a winning argument that the “agreement” was invalid either because it was not authorized by the City Council or it was an unenforceable restriction on the City’s police power. Statements by the City’s attorney in the charge conference denying that there was a dispute regarding the “validity of the agreement” constituted judicial waiver of those defenses.

Although the contract law judgment was upheld, the Fifth Circuit remanded on the issue of damages.

SWZ, Inc. v. Board of Adjustment of Fort Worth, 985 S.W.2d 268 (Tex. App.–Fort Worth 1999, pet. denied).

A city ordinance forbids the operation of sexually oriented businesses within 1000 feet of any church. After denial of a certificate of occupancy to operate a sexually oriented business within 1000 feet of a church hall, a business owner challenged the ZBA decision, claiming it to be unreasonable and unconstitutional. The district court affirmed the decision, and the owner appealed. The owner argued that an intervening elevated freeway and railroad tracks were substantial buffer zones that would mitigate any negative secondary effects the sexually-oriented business might have on church goers. This argument was ultimately rejected by the appellate court on the grounds that the ordinance’s distance requirement was narrowly tailored to protect a legitimate interest.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

Property owner Del Monte Dunes brought suit against the city alleging the city's repeated rejections of its request for development approvals resulted in a regulatory taking which violated owner's equal protection and due process rights. Del Monte Dunes applied for an application to develop a parcel of land 5 separate times over 5 years, and with each rejection, the city imposed more rigorous demands. A total of 19 site plans were submitted. The facts indicate that the city never wanted the development to occur, and later, the land became public land. The owner filed suit under 42 U.S.C. § 1983.

The district court submitted the case to a jury on Del Monte Dunes' theory of a regulatory taking. The jury was instructed to find for Del Monte Dunes if it found "either that Del Monte Dunes had been denied all economically viable use of its property, or that the city's decision to reject the final development proposal did not substantially advance a legitimate public purpose." The jury found in favor of Del Monte Dunes and assessed money damages. The Ninth Circuit affirmed. In its holding, the Ninth Circuit held that under 42 U.S.C. § 1983, Del Monte Dunes had a right to a jury trial, and the jury, with the evidence presented, could reasonably have decided in Del Monte Dunes' favor. The Supreme Court affirmed the right of the jury to decide the takings issues and also affirmed the money judgment.

The Supreme Court also addressed the "ripeness" issue. This dispute was held to be ripe for adjudication under the rather extreme facts of numerous applications over many years. Specifically, the Supreme Court held that pursuit of relief in state court was not a condition of seeking federal law relief since "the State of California had not provided a compensatory remedy for temporary regulatory takings."

Finally, the Supreme Court concludes ". . . we have not extended the rough-proportionality test of *Dolan* beyond the special context of extractions—land use decisions conditioning approval of development on the dedication of property to public use."

Avalon Residential Care Homes v. City of Dallas, 130 F. Supp. 2d 883 (N.D. Tex. 2000).

Avalon sued the City under the Fair Housing Standards Act and Equal Protection Clause of the 14th Amendment, when the City denied Avalon a special use permit to operate a handicapped home. The home housed more persons and was closer to another similar home than allowed by city ordinance. Avalon claimed: (1) discrimination by making housing unavailable to handicapped persons because of their status; (2) discrimination by refusal to make reasonable accommodations under the City's zoning; (3) violation of the Equal Protection. The case was decided on cross motions for summary judgment.

As to Avalon's first claim, the court held that Avalon failed to establish the ordinance made housing unavailable to handicapped persons because of their handicapped status. In fact, the regulation permitted a greater number of unrelated handicapped persons to live together than non-handicapped persons, thus making housing more available to handicapped persons.

The court found some support for Avalon's contention that the City ordinance failed to make a reasonable accommodation for handicapped persons. In determining whether there had been a "reasonable accommodation," the court focused on how the ordinance operated under the City's overall zoning laws, citing Elderhaven, Inc. v. City of Lubbock, 98 F.3d 175, 178 (5th Cir. 1996). According

to the court, even a neutral regulation might fail to produce a reasonable accommodation. Avalon presented evidence that the City's denial of Avalon's application for a specific use permit was based on generalized perceptions and speculations of persons with disabilities and the business status (as opposed to residential status) of the home. The court also cited the fact that handicapped group homes have no way to be certain whether they are operating within 1000 feet of other such homes. Therefore, the court concluded there was a fact issue as to whether the City ordinance provided handicapped persons a reasonable accommodation.

The court rejected Avalon's third claim that the City's zoning ordinance violated the Equal Protection Clause, since only 6 unrelated, non-handicapped persons may occupy a home, so even if Avalon's 8 residents were not handicapped, they would be in violation. Since the ordinance regulated handicapped group homes substantially the same as non-handicapped group homes, the court granted summary judgment for the City.

Baby Dolls Topless Saloons, Inc. v. City of Dallas, 114 F. Supp. 2d 531 (N.D. Tex. 2000).

Baby Dolls claimed the Dallas SOB ordinance was unconstitutional because it was overbroad, and content-based. The SOB ordinance required Baby Dolls to relocate or to change the dancer's attire from pasties to bikini tops. The SOB ordinance was upheld as constitutional.

LLEH, Inc. v. Wichita County, 121 F. Supp. 2d 513 (N.D. Tex. 2000).

LLEH claimed the Wichita County SOB ordinance was unconstitutional because the restrictions were arbitrary and content based. Defendant argued that the regulations were justified because they aimed to reduce secondary effects of sexually oriented businesses. Applying the test set forth in United States v. O'Brien 391 U.S. 376 (1968), the location restrictions failed due to lack of evidence of secondary effects that could possibly be reasonably believed to be relevant to the problems being addressed. Thus, the location requirements were unconstitutional. A 6 foot buffer zone was held excessive, but 3 feet acceptable. The requirement for an 18 inch pedestal was rejected as it had no purpose since the interest of deterring sexual contact and touching had already been satisfied with the buffer zone rule.

Community Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764(W. D. Texas) 2000.

The San Antonio SOB ordinance was upheld in a challenge by a newstand. The ordinance was held to be narrowly drafted and thus constitutional.

Wilkinson v. Dallas/Fort Worth Int'l Airport Bd., 54 S.W.3d 1 (Tex. App.–2001, pet. filed).

A group of homeowner brought an inverse condemnation claim and Fifth Amendment taking claims against D/FW Airport for its actions in connection with the expansion of the airport. At the trial court level, the Airport won its motion for summary judgment. On appeal, the court affirmed the summary judgment. The court held that the injuries alleged by the homeowners were not sufficient to support an inverse condemnation claim because the injuries were suffered by the community as a whole. Inverse condemnation requires "special" or "unique" harm, and according to the court, the decrease in the value of the homeowner's

homes, did not meet this requirement. Nor did the temporary noise, dust, traffic, vibration and dislocation of vermin support the homeowner's claims since Texas courts have consistently found that temporary interferences do not constitute a physical governmental appropriation of private property that entitles property owners to compensation.

Rosenblatt v. City of Houston, 31 S.W. 3d 399 (Tex. App.–Corpus Christi 2000, pet. denied), *cert. denied*, 121 S. Ct. 2218 (2001).

The Houston SOB ordinance was upheld in a challenge of the “line of sight” requirement between the manager’s station and each area in an arcade where the public is permitted. The arcade proposed to use video cameras instead of direct line to sight. The court held that the cameras did not literally or substantially comply with the requirements. The arcade’s attempt to challenge the ordinance provisions was determined to be barred by res judicata due to the decision in N.W. Enterprises, Inc. v. City of Houston, 27 F.Supp. 2d 754 (S.D. Tex. 1998).

Champion Builders v. City of Terrell Hills, No. 04-99-00779-CV, 2001 WL 1580484 (Tex. App.–San Antonio 2001, no pet. h.) (not designated for publication). **[Dev. wins @ trial. Taking claim reversed but individual liability upheld!]**

A developer asserted regulatory takings claims against the City of Terrell Hills and sought recovery for damages against the individual members of the ZBA for negligence. These claims arose from the revocation of a building permit for construction of an apartment complex and a subsequent reduction in allowed density. The revocation was apparently due to disgruntled citizens objecting to the city about the project. While considering the revocation, the ZBA went into closed session and discussed their collective desire to revoke the permit because the project would become a “whorehouse” bringing “undesirables”, “scum” and “drug dealers” to the city. The jury found for the developer, but the judge entered judgement n.o.v. for the city.

The appellate court affirmed the takings holding, finding that the evidence failed to establish a compensable taking under Mayhew, but remanded on the issue of commissioner liability, finding that there was some evidence of bad faith..

Government officials are entitled to official immunity unless they are negligent and acted in bad faith. Good faith is determined by an objective standard, not the actor’s subjective intent. The court held the following was evidence of bad faith:

- Discussion in the executive session showed bias and an unspoken agenda caused the denial, not the stated legitimate purpose,
- The ZBA had never before revoked a permit, met in executive session or acted in contravention of the advice of the city attorney, and
- An zoning and planning consultant who was an expert witness for the developer testified the commissioners acted unreasonably.

The developer’s first takings claim alleged the revocation set in motion a legal dispute that delayed and ultimately killed the project, therefore, the revocation denied the developer the use and benefit of its property and is a taking. The court stated that the developer was not challenging the application of a governmentally imposed restriction, as is necessary for a takings claim, citing City of Cincinnati v.

Chavez Properties, 690 N.E.2d 561, 565 (Ohio Ct. App. 1996). Instead, the basis for the takings claim was the act of revocation. That revocation will not support a regulatory takings claim.

The developer's second takings claim focused on the down zoning density by increasing minimum square footage for apartment units (by 300 square feet). However, the developer failed to establish causation, since it had not learned of the down zoning until after filing the lawsuit.

Glenn Heights v. Sheffield Dev. Co., 61 S.W.3d 634 (Tex. App.–Waco 2001, pet. filed) (“Glenn Heights I”). [**Dev. wins - but no profits**]

Sheffield, a real estate developer, purchased 194 acres of land in Planned Development District 10 (“PD 10”) of the City of Glenn Heights. Prior to closing, Sheffield conducted an extensive due diligence investigation, specifically the current zoning and the possible rezoning by meeting with officials and employees of the city. Sheffield intended to develop the land in compliance with the then existing zoning regulations, and apparently made this well known. After Sheffield purchased the property, the city enacted a six month development moratorium; then extended the moratorium, and finally down zoned the property.

Sheffield sued for violation of due process and equal protection, regulatory taking and the common law causes of action of estoppel, laches and vested rights. Sheffield claimed that the down zoning and the unreasonable length of the moratorium were separate taking. Applying Mayhew, the court held that (i) the down zoning was a taking, and (ii) the unreasonably long moratorium was a separately compensable taking.

In holding that Sheffield was entitled to compensation, the court focused on whether the regulation unreasonable interfered in Sheffield's right to use and enjoy the property. Two factors are relevant to this inquiry: (1) the economic impact of the regulation; and (2) the extent to which the regulation interferes with distinct investment-backed expectations. As to the first factor, evidence that the rezoning reduced the property value by at least 38 percent convinced the court there was a sufficient adverse economic impact to satisfy the first prong of the unreasonable interference test.

The second prong focuses on whether the existing and permitted uses of the property constitute the “primary expectation” of the owner affected by the regulation. The court held it was, citing the following facts:

- Everyone on city council knew of Sheffield's intended purpose in purchasing the property,
- Sheffield reviewed the city's unified development code and comprehensive plan and determined they conformed with the zoning regulations in effect,
- City officials met in secret before Sheffield closed his purchase to discuss the moratorium and down zoning without Sheffield's consent or knowledge,
- No one on city council advised Sheffield of the possible rezoning action,
- The best use of the property after the rezoning was to hold the land and wait for demand for it, as rezoned, to increase.

The city argued that Sheffield knew the zoning was subject to change by city council's vote. The court explained that although every regulation is subject to change, the landowner is still entitled to compensation when the regulation unreasonable interferes with investment backed expectations.

The moratorium was not a taking until it became unreasonably long and thus failed to substantially advance a legitimate government purpose. Rather, it was simply a way to prevent Sheffield from developing. Testimony established that the city extended the moratorium, in part, to gain negotiating leverage in discussions with Sheffield. The purpose of the moratorium was to allow the city to investigate the situation, obtain needed information and consider it in making an appropriate decision. Once the purpose was fulfilled, there was no need for further delay on a zoning vote. Beyond that point, the taking took place. Further, the fact that there was a “stalemate” on city council regarding the appropriate action to take did not justify a further moratorium.

On an interesting side issue, the court remanded for consideration Sheffield’s allegation that the city’s failure to act on a submitted plan (which the city rejected because the city felt the moratorium was still in effect, although Sheffield alleges the moratorium lapsed for a short period, thus allowing the plat to be filed) caused a “deemed approval” under Texas Local Government Code, section 212.009. Part of the interest is the fact that the submitted plat was a “preliminary” plat, which some municipal attorneys claim is not subject to the deemed approval provision.

#### **B. Zoning Board of Adjustment**

Dengler v. City of Groves, 997 S.W. 2d 418(Tex. App.– Beaumont, 1999, pet. denied).

A grocery store turned restaurant provided dancing without a cover charge. The owner applied for and received a dance hall license, but operated in a zoning district which allowed only restaurants, not dance halls. Neighbors complained about noise and traffic, alleging the establishment violated the use provisions of the district. The City building official disagreed and interpreted the establishment to be a restaurant with dancing, not a precluded dance hall, so long as food was the primary revenue source and was always served. The ZBA agreed. The neighbors filed a *writ of certiorari* and declaratory judgment action against the City.

The court listed the rules for review of a ZBA interpretation and then held the establishment was a dance hall, and thus prohibited. Interpretations are a matter of law to be decided by summary judgment. The court did not grant any weight to the ZBA’s interpretation and, essentially, made its own decision based on an independent review of the evidence. Since “restaurant” was not defined in the zoning ordinance, the court referred to Webster’s Dictionary and noted that dancing was not mentioned. Since the court disagreed with the ZBA, it reversed its decision and remanded the case for further proceedings consistent with the court’s interpretation. The dissent disagreed with the interpretation, closing with “laissez le bon temps roulez!”

SWZ, Inc. v. Board of Adjustment of Fort Worth, 985 S.W.2d 268 (Tex. App.–Fort Worth 1999, pet. denied).

A sexually oriented business owner challenged by *writ of certiorari* the ZBA’s decision to uphold the denial of an application to open a business within the prohibited distance from a church. The trial court granted summary judgment for the ZBA.

On appeal, the owner alleged that the actual structure within the prohibited zone was not a church, but a hall used for religious education classes, prayer groups and socials (apparently the actual church building was outside the prohibited zone). The owner cited several cases holding that particular



structures were not churches (parish priest's home, area in a prison where religious activities sometimes occurred). After listing the typical standards for review of a ZBA interpretation, the appellate court applied the "abuse of discretion" standard finding the owner did not prove the ZBA acted arbitrarily or unreasonably. The court applied a "common-sense" definition of a church which requires that "activities are primarily connected with religious worship or intended to propagate religious beliefs." The court held that the interpretation of the hall as a church was reasonable and did not contradict the plain language of the statute, therefore it was upheld.

Pearce v. City of Round Rock, 992 S.W.2d 668 (Tex. App.–Austin 1999, pet denied).

The City extended its regulation into its ETJ. Stop work orders were posted on nine of Pearce's signs. Pearce's application for sign permits was denied. Pearce appealed the denial to the ZBA. The ZBA upheld the denial by a 3-2 vote in favor of Pearce (one short of the required four). Pearce appealed the ZBA decision by writ of certiorari filed within ten days. In both his first and amended petitions, Pearce listed as defendants the City, the planning director (in his official capacity), and the members of the ZBA (in their official capacities). The City's plea to jurisdiction was granted and the case dismissed because the repleading (caused by the City's pleading) was outside the statutory ten day period under section 211.011 of the Texas Local Government Code. The court recited that the ten day period is jurisdictional, citing Davis v. Zoning Bd. of Adjustment, 865 S.W.2d 941, 942 (Tex. 1993). The court noted that Section 211.011 does not specifically require the ZBA itself be named as a defendant, but is silent on whom must be or can be sued. Therefore, the court held that naming the individual members, in their official capacities, was equivalent to naming the ZBA. This action placed the ZBA, as a body, on notice of the suit. Jurisdiction was properly and timely invoked.

Note that Reynolds v. Haws, 741 S.W. 2d 582, 584 (Tex. App. –Fort Worth, 1987, writ denied) held that the ZBA itself is an indispensable party and must be named as a defendant, even if individual members of the ZBA are served and answer. *Id.* at 587. Apparently, the distinction of naming the member, "in their official capacity" was not at issue.

6<sup>th</sup> & Neches, L.L.C. v. Aldridge, 992 S.W.2d 674 (Tex. App. - Austin 1999, no pet.).

The owner requested a zoning variance to construct a taller downtown Austin office building than the maximum limit allowed. The variance was denied by the Austin city council. The city council's decision was heavily based upon the protest letters issued from the General Services Commission and the State Preservation Board concerning impact on the views of the state capitol. The State owned at least 20% of the land adjoining the subject property, and an objection was voiced to protect the state's property interest and anything adversely impacting the views of the Capitol. The owner claimed the State did not have the right to object. The court disagreed and held the State's objections could be considered in denying the variance.

Southwest Paper Stock, Inc. v. Zoning Bd. of Adjustment of Fort Worth, 980 S.W.2d 802, 1998 (Tex. App.–Fort Worth 1998, pet. denied).

Southwest operated a paper recycling facility in the City of Fort Worth pursuant to a special exception. It began recycling glass, aluminum cans and wood products in violation of the zoning ordinance. Southwest requested an expanded special exception. Hearings were continued three times to allow Southwest, the City and concerned citizens to negotiate. Southwest requested the fourth hearing be

rescheduled, but instead the Zoning Board of Adjustment (the “ZBA”) took testimony from various citizens and City staff and rejected the special exception. Southwest submitted no testimony or evidence.

The trial court entered summary judgment for the City. The Court of Appeals reviewed applicable law for challenging a ZBA decision by *writ of certiorari*, and specifically held that summary judgment is an appropriate procedure since the issue of whether the ZBA abused its discretion is a question of law. The Court noted that the requirements for the special exception required that the proposed use be “fully compatible with the use and permitted development of adjacent property.” Southwest specifically challenged the authority of the ZBA to consider testimony of neighboring property owners, asserting that only the reports of City staff should be considered. This was specifically rejected. Southwest also contended that the ZBA had a legal duty to grant special exceptions, subject to appropriate conditions to protect the stability of adjacent property, which contention was also rejected. The Court held that the ZBA did not abuse its discretion as long as its decision was supported by some evidence of substantial and probative character.

Hagood v. City of Houston, 982 S.W.2d 17 (Tex. App. Houston [1<sup>st</sup> Dist.] 1998, no pet.); Hagood v. City of Houston, No. 01-98-00916-CV, 2000 WL 730660 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2000, no pet.) **(not designated for publication)**.

Tax Increment Reinvestment Zone No. 1 in Houston adopted zoning regulations. A builder received a variance from the ZBA. A neighbor (an attorney) brought a petition for a *writ of certiorari*. The ZBA’s answer attached an affidavit of the zoning official, all applicable rules and regulations and other exhibits totaling 91 pages. The ZBA requested the Judge decline to accept jurisdiction and deny the petition for *writ of certiorari*. The trial court denied the petition for *writ of certiorari*, without any hearing.

In Hagood I, the Court of Appeals held that the issuance of the *writ of certiorari* is discretionary, but the party filing the petition for writ of certiorari should have an opportunity to submit evidence at the trial level. Therefore, the Appellate Court dismissed the appeal for want of jurisdiction until a final judgment is issued by the trial court after reviewing evidence. The dissenting opinion criticized the majority opinion’s “form over substance” decision as requiring unnecessary judicial resources.

The trial court again dismissed the petition for *writ of certiorari*, and Hagood appealed again. First, Hagood contended the district court erred in denying his petition because the court did not conduct a trial, oral hearing, or hear any other evidence before taking action. The court held, however, there is “no statutory requirement that the district court conduct a trial, hearing, or otherwise hear evidence before deciding whether or not to grant a petition for writ of certiorari.” Only if the writ is granted does a party have the right to submit evidence.

Hagood also argued that the district court erred in denying his petition based on the pleadings, claiming the ZBA abused its discretion by granting the variance when Weekly would not suffer an unnecessary hardship. The court held that the fact that Weekly had been issued a building permit before commencing the construction, and only after construction had begun was Weekly notified of the error provided a basis for finding an unnecessary hardship.

City of Lubbock v. Ward, No. 07-96-0254-CV, 1997 WL 136656 (Tex. App.–Amarillo 1997, no pet.) **(not designated for publication)**.

Ward sought a variance to retain a portico constructed without a building permit which was contrary to the set back requirements of the city’s zoning ordinance. The zoning board of adjustment (“ZBA”) denied the variance. The Wards filed a petition for *writ of certiorari*. The trial court held that the ZBA acted unreasonably, arbitrarily and without reference to any guiding rules and/or principles of the law and thus, abused their discretion in denying the variance. The ZBA appealed. However, the transcript containing the evidence admitted at the ZBA hearing omitted the statement of facts memorializing the evidence received by the trial court. Therefore, the appellate court held that the ZBA failed to carry its burden to provide evidence to the reviewing court of whether the ZBA abused its discretion. Because the appellate court had no way of assessing whether the trial judge accurately held that the ZBA abused its discretion, the appellate court could only affirm the trial court decision.

City of Lubbock v. Tri-Star Invs. d/b/a Camelot Vill. Mobile Home Park, No. 07-96-0254-CV, 1997 WL 331006 (Tex. App.–Dallas 1997, no pet.) **(not designated for publication)**.

After several requests by the owner (each rejected), the city issued a permit for a large sign for a mobile home park. After the sign was erected, the city realized that the permit was issued in error. The landowner requested a variance from the ZBA for violations of set back and height. The variance was denied. Landowner filed a petition for *writ of certiorari*. The trial court held that the ZBA abused its discretion and reversed the ZBA’s denial of the variance, as well as estopped the city from revoking the permit and enforcing the city’s sign ordinance. The Appellate Court stated that the test for overruling a denied variance is whether the evidence is such that the ZBA could have reached no other decision but to grant the variance, citing Board of Adjustment, City of Corpus Christi v. Flores, 860 S.W.2d 622 (Tex. App.–Corpus Christi, 1993, no writ). The Appellate Court reversed and upheld the ZBA decision to deny the variance since the record contained some evidence from which the ZBA could have decided that granting the variance was against the public interest.

Galveston Historical Found. v. Zoning Bd. of Adjustment of City of Galveston, 17 S.W.3d 414 (Tex. App.–Houston [1st Dist.] 2000, pet. denied).

The Foundation, a non profit group, appealed to the ZBA the city’s decision granting a permit for two freestanding monument signs within an historic overlay zone where it leased property. The ZBA ruled the Foundation did not have standing to pursue the appeal. The court held that the Foundation had standing as an “aggrieved person ,” since it operated a business withing the overlay zone and had an interest in preserving the historic character of the district.

The court also held that establishing standing did not require the Foundation to establish a direct link between signs and the Foundation’s business activities, or that a harm had already occurred. It was sufficient that “GHF established that its business would be affected other than as a member of the general public if non-conforming signs were permitted, and it had a peculiar interest to itself in preserving the historical nature of the neighborhood.”

Fincher v. Board of Adjustment of Hunters Creek Vill., 56 S.W.3d 815 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2001, no pet.).

In April 1995, the City rejected the homeowners' plans to build a covered porch (or carport) because the plans violated the City's zoning ordinance. The homeowners proceeded without a permit and were caught. In April 1996, the homeowner's applied for a variance from the ZBA, but were denied. Then the homeowner's requested an interpretation from the ZBA that would allow the structure to remain. The ZBA meet and considered the request but took no action at that meeting. The homeowners filed a *writ of certiorari* within 10 days thereafter. The trial court dismissed the writ without addressing the merits, holding that the court did not have subject matter jurisdiction due to the failure to exhaust administrative remedies by failing to timely appeal the building inspector's decision not to issue the permit in 1995. City ordinance required such appeals to be made within 30 days. The appellate court reversed the trial court's dismissal, holding that although the Finchers failed to exhaust all remedies, the court could still render judgment on the merits. The court noted that the recent Texas Supreme Court decision in Dubai Petroleum Co. v. Kazi, 12 S.W. 3d 71 (Tex. 2000), held that the failure to comply with statutory requirements to bring suit should not be treated as jurisdiction, but as an issue to be raised on the merits. The appellate court construed the Finchers' request for interpretation as an end run of the requirement that they appeal the first rejection to the ZBA. Essentially, in asking for an interpretation of the ordinance, the Finchers were really appealing the denial of their permit application. Since the 30 day period for appeal had run, the Finchers were denied relief. However, the appellate court reversed the trial court's judgement dismissing the case for lack of subject matter jurisdiction, and instead rendered judgement for the city on the merits, citing Tex. R. App. P. 43.2(c).

South Padre Island v. Cantu, 52 S.W.3d 287 (Tex. App.–Corpus Christi 2001, no pet.). **[owner wins]**

The city approved building plans and issued a building permit despite a set-back encroachment shown on the plans (how clearly shown is not known). When the building was 80% complete, the building inspector informed the Cantus that the home violated the zoning ordinance's set-back provision. The Cantus then sought a variance. The ZBA denied their request, and the Cantus sought judicial review. The district court held that the ZBA abused its discretion by refusing to grant the variance, and the court of appeals affirmed. A ZBA abuses its discretion if it refuses to grant a request for a variance when (1) enforcement of the ordinance would result in an unnecessary hardship, and (2) the variance would not adversely affect the public interest.

The court noted that the hardship cannot be purely financial nor self-inflicted. To comply with the zoning ordinance the Cantus would need to change the style of their roof in a way which would have an adverse aesthetic affect. Since the city knew that the Cantus' building plans violated the set-back before the building started, then the city was responsible. In effect, the city acquiesced in the violation. This holding amounts to the application of an estoppel theory against the city. Therefore, the court was satisfied the appropriate hardship existed.

The court also held that the variance would not adversely affect the public interest. This conclusion was based on testimony that there was no health or safety concerns and the neighbors' support of the variance. The court was impressed that despite the set-back encroachment, 10 feet of set-back from any utility line remained.

Pick-N-Pull Auto Dismantlers v. Zoning Bd. of Adjustment of Fort Worth, 45 S.W.3d 337 (Tex. App.–Fort Worth 2001, pet. denied).

Pick-N-Pull sought a special exception for an automobile dismantling and retail parts facility in an area zoned heavy industrial. The ZBA denied the request and Pick-N-Pull filed a writ of certiorari. The district court denied Pick-N-Pull's motion for summary judgment and granted the ZBA's motion. Pick-N-Pull appealed both.

The court of appeals held that the ZBA did not abuse its discretion, citing evidence that the proposed facility would be incompatible with existing uses. This evidence consisted of testimony and letters opposing the special exception. The court held that since there was substantive and probative evidence to support the Board's decision the ZBA decision must be upheld. Although quoting the "abuse of discretion" rule, this court applied the "substantial evidence" rule.

### C. Vested Rights/Non-conforming Uses/Estoppel/Limitations

Centeno v. City of Alamo Heights, No. 04-00-00546-CV, 2001 WL 518911 (Tex. App.–San Antonio 2001, no pet.) (**not designated for publication**).

The Centenos applied for a building permit. When denied, they appealed to the ZBA. The ZBA denied their request on the grounds that the proposed modifications would not cure the nonconformity. The Centenos filed a *writ of certiorari*, but after 13 days. The trial court granted the City's motion for summary judgment, but without stating the grounds. Therefore, appellant must show error to each independent ground. The Centenos were unable to challenge the City's position that the *writ of certiorari* was untimely and therefore the trial court lacked jurisdiction.

Glenn Heights v. Sheffield Dev. Co., 55 S.W.3d 158 (Tex. App.–Dallas 2001, pet. filed)- "Glenn Heights II".

After trial of the liability phase, but not damages phase, of Glenn Heights I (discussed in Section VIII.A), Texas Local Government Code, Chapter 245 became effective. Sheffield claimed it vested in it the right to develop its property under the former Planned Development District zoning classification as the specifics of the PDD approval constituted a "permit" as contemplated by the vested rights law. The trial court agreed and entered summary judgment for Sheffield. The appellate court focused on the city's claim that Sheffield elected its remedy of damages in Glenn Heights I. Since Sheffield proceeded to complete the damages phase of Glenn Heights I, it elected that remedy. To allow Sheffield to collect damages and have vested rights would be an improper double recovery.

Levy v. City of Plano, No. 05-97-00061-CV, 2001 WL 1382520 (Tex. App.–Dallas 2001, no pet.) (**not designated for publication**).

Levy owned land in the City of Plano's extraterritorial jurisdiction ("ETJ"). In 1994, Levy filed a proposed land study with the City. The study related Levy's intent to subdivide the land into four parcels. The City approved the proposal subject to two conditions: (1) the proposed land study was for information only, and approval did not operate to permit or limit land use, and (2) street connections to adjoining subdivisions may be required.

In 1995, the City condemned a part of Levy's property for a road, annexed all Levy's property and zoned it agricultural. Levy filed a counterclaim in the condemnation lawsuit alleging that TEX. LOC. GOV'T. CODE Sec. 481.143 provided statutory vested rights such that subsequent requests for permits would be subject to the ordinances in place at the time the land study was filed, and thus no zoning ordinance could be applied to the property.

The district court granted summary judgment in favor of the City, holding that no vested rights existed. The court of appeals affirmed. The court explained that Section 481.143 applies to lock in ordinances in effect at the time a *required* permit application is filed. Here, Levy was not required to file the land study since the City's subdivision ordinance did not require a land study to merely subdivide land in the ETJ. Furthermore, even if the City required a land study to be filed, the "proposal" only contemplated subdividing property. Therefore, the only right locked in was the right to subdivide, not the use rights that Levy was claiming.

Wende v. Board of Adjustment of San Antonio, 27 S.W.3d 162 (Tex. App.–San Antonio 2000, pet. granted).

The quarry operator leased several tracts for quarrying. When the land was annexed and zoned as residential, only one tract had a history of quarrying. Several aggrieved parties, including area landowners and an adjacent city challenged the ZBA's decision to recognize the quarry's nonconforming use rights to all tracts it leased, even those it had never quarried. The trial court affirmed the decision. The appellate court overruled the ZBA's decision because (i) the evidence did not support the establishment of a nonconforming use, and (ii) the diminishing asset doctrine did not apply.

First, the court held that area landowners, as taxpayers, and an adjacent city, as an "aggrieved party," each had standing to appeal the ZBA decision.

A nonconforming use is one that lawfully existed before the date of a zoning restriction and that is allowed to continue to exist in nonconformance with the restriction. The court construed "nonconforming use" to require more than intent to use the property for the nonconforming purpose at some time in the future. Under the zoning ordinance being applied, if there is no pre-existing use, the applicant must prove "planning for the proposed use was in progress." Such "planning" requires the property owner to submit a site plan, evidence of financial commitment, and affidavit of ownership, and a narrative explanation of the proposed project and its purpose. A lease was not sufficient to meet the planning requirement.

Alternatively, the operator argued that it actually began the nonconforming use before the annexation. Actual use requires more than "intending" to use the property for a nonconforming purpose at some time in the future. Since the ZBA failed to cite actual use as a basis for its decision to permit the nonconforming use, for the court to find such use, the evidence would have to establish it as a matter of law. The operator presented the following evidence to prove intent: several permits had been obtained, quarrying had occurred at some time in the past (although such discontinued use does not constitute a nonconforming use), some construction had commenced on the tracts before annexation, material were stockpiled on one of the tracts, and some activities the city had defined as part of quarry operation had taken place on the tracts. That evidence was insufficient to establish the right to nonconforming use status as a matter of law.

The operator also asserted the “diminishing asset doctrine.” Courts in other states have allowed quarry operations to extend beyond the area being excavated at the time a prohibiting ordinance takes effect, due to the unusual character of quarries and mines. See In re Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651, 655 (N.Y. 1980). However, without a finding by the ZBA on this issue, the court was unwilling to extend the doctrine to this situation.

Quick v. City of Austin, 7 S.W.3d 109 (Tex.1999).

In an opinion by Justice Greg Abbott, the Texas Supreme Court upheld the Save Our Springs Ordinance adopted by the City of Austin in 1992 to protect the Barton Creek Watershed, both inside and outside Austin’s city limits (but within its extraterritorial jurisdiction). The Court held that the ordinance was a water pollution control measure, not a zoning ordinance, notwithstanding that its effect is to control and limit land development, particularly density. This holding defeated a challenge that the Ordinance was a “disguised” zoning ordinance, which was invalid since it had not been adopted following the procedural requirements for a zoning ordinance. Although not a zoning case, the Court discussed limits on the judiciary’s review of legislative functions of a municipality and indicated strong policy to uphold those decisions.

In its initial decision, the Court held that former Section 481.143 of the Texas Government Code, containing a statutory vested rights provision, was no longer applicable to any matter, whether suit had been filed or not, since the repeal of a statute without a savings clause for pending suits is given an immediate effect. Therefore, the fact that a party to a suit had asserted the statutory vested rights provision was irrelevant.

However, on rehearing the Court applied section 481.143 of the Texas Government Code, ruling that the City must consider a permit application on the basis of any orders, regulations, ordinances or other adopted requirements in effect when the original applications for preliminary subdivision approval were filed and approved in 1985.

The court noted the general rule that the right to develop property is subject to intervening regulations and changes of section 481.143 of the Texas Government Code significantly altered this common law rule.

Mont Belvieu Square, Ltd. v. City of Mont Belvieu, 27 F. Supp. 2d 935 (S.D. Tex– Galveston 1998).

The City of Mont Belvieu imposed a 6 month moratorium on issuance of all building permits (except single family), to consider a comprehensive zoning ordinance. The moratorium, coincidentally, prevented construction of a controversial low income housing project. Shortly after the moratorium was passed, the project lost its financing. Promptly thereafter, the developers filed suit due to the city’s refusal to issue a building permit, based on constitutional, Fair Housing Act 42 U.S.C. § 3601 et seq. and Civil Rights Act claims.

The Court followed Quick in denying the developer’s statutory vested rights argument under section 481.143, but this statute was repealed in the 1997 legislature. The Court also denied an equitable vested rights claim, holding that the general rule is that the right to develop properties is subject to intervening regulations or regulatory changes. Only in “unusual circumstances” (not defined) would equitable vested rights apply. The Court held that a 6 month moratorium which bans the issuance of

building permits (except for single family), while the city considers whether to develop a comprehensive zoning ordinance is, as a matter of law, reasonable.

Jim Sowell Construction Co., Inc. v. City of Coppell, 82 F. Supp. 2d 616 (N.D. Tex. 1998), *aff'd at*, No. CIV.A.3.96-CV-0666-D, 2000 WL 968782 (N.D. Tex. 2000) (not designated for publication).

The City of Coppell denied a permit to build a low income housing project since the project did not comply with applicable zoning. The developer sued based on the Fair Housing Act 42 U.S.C. § 3601 et seq. and other claims. The Court denied a statutory vested rights claim under section 481.143 of the Texas Government Code following Quick. The Court also rejected the developer's claim of equitable vested rights citing the general rule from the City of University Park v. Benners, 485 S.W.2d 773, 778 (Tex. 1972), that property owners have no constitutionally protected vested right to property uses once commenced or in zoning classifications once made. The Court also noted that the few cases in Texas applying the concept of equitable estoppel to preclude enforcement of government regulation are exceptionally unusual citing City of Dallas v. Rosenthal, 239 S.W.2d 636 (Tex. Civ. App. 1961, writ ref. n.r.e.), City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970) and J. R. Marriott v. City of Dallas, 635 S.W.2d 561 (Tex. App. 1982). The Court also denied the developer's request that the city be estopped from enforcing its zoning ordinance, noting that it is a back door vested rights theory.

This case was revisited in 1999 by the United States District Court to address a racial discrimination suit in violation of the Fair Housing Act against the city. The city moved for summary judgment and was denied. The District Court held that there was a genuine issue of material fact regarding whether race was a significant factor in the city's zoning decision which precluded summary judgment. Jim Sowell Constr. Co., Inc. v. City of Coppell, 61 F. Supp.2d 542 (N.D. 1999).

Amonette d/b/a Mr. Sign v. City of Pasadena, No. 01-96-01512-CV, 1998 WL 255103 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1998, no pet.) **(not designated for publication)**.

Owner of the sign business failed to satisfy procedural requirements for his signs to continue to be non-conforming, thus they were required to comply with a new sign ordinance. The sign company owner brought claims for conversion, fraud, tortious interference, civil conspiracy, breach of contract, civil rights, constitutional violations, negligent misrepresentation and estoppel. Apparently, in earlier years (but after passage of the new sign ordinance) non-conforming permits had been issued to the sign owner, notwithstanding certain procedural requirements had not been satisfied by the sign owner. Only when the city began enforcing procedural requirements were the non-conforming permits denied. The Court held that estoppel would not apply to the performing of a governmental function in regulating signs and outdoor advertising and, specifically, that the jury's answers on these issues could be disregarded. The Court held that sign regulation is a governmental function, not a proprietary function.

Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625 (Tex. App.–Houston [14<sup>th</sup> Dist.]1997, writ ref'd).

The Court applied a 10-year limitations period found in section 16.026 of the Texas Civil Practices and Remedies Code to an inverse condemnation action. This limitation period applies to both regulatory and physical takings. The taking occurred when the ordinance in question, which effectively prohibited drilling on the landowner's mineral estate, was passed, not when the land owner was later denied a hearing on its request for a variance from that ordinance. The Court also rejected an estoppel claim



asserted by the landowner, citing the general rule that the doctrine of estoppel does not apply against a city exercising governmental functions.

Galveston County MUD No.3 v. City of League City, 960 S.W.2d 875 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1997, no pet).

In a non-zoning case, the Court held that a city was not estopped to deny the non-enforceability of an agreement which was not properly entered into, even though it was due to city error. In this case, the city and a utility district entered into an agreement regarding payment by the city of ad valorem tax revenues to the district. The initial agreement was executed with proper formalities but an amendment, increasing the percentage of revenues paid by the city to the utility was not. The Court cited City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970) for the general rule that when a unit of government is exercising its governmental powers, it is not subject to estoppel and that exceptions to the rule are applied with caution, and only in exceptional cases where the circumstances clearly demand its application to prevent manifest injustice. Applying the Prasifka standard, the Court denied the utility district's estoppel defense against an agreement which was otherwise unenforceable as a matter of law.

#### **D. Preemption/Delegation**

City of Freeport v. Vandergriff, 26 S.W.3d 680 (Tex. App.–Corpus Christi 2000, no pet.).

The zoning ordinance violated the Texas Manufactured Housing Standards Act because it did not provide separate treatment of HUD-code manufactured homes and mobile homes. *See* TEX. REV. CIV. ST. ART. 5221f, § 3(17), 3(A), 4A(b). The zoning ordinance provision were pre-empted under Dallas Merchs. & Concessionaire's Ass'n v. Dallas, 852 S.W.2d 489, 491 (Tex. 1993).

The Act mandates separate treatment for mobile homes and HUD-code manufactured homes. The court explained separate treatment to mean (i) a mobile home is not a HUD-code manufactured home, and (ii) a HUD-code manufactured home may not be treated as a mobile home for any purpose. The zoning ordinance treated mobile homes and HUD-code manufactured homes the same because its definition of "mobile homes" included HUD-code manufactured homes. Therefore, the ordinance violated the Act and would not be given effect when applied to HUD-code manufactured homes.

Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997).

A divided Supreme Court held that the delegation of authority to a private foundation as part of the state's boll weevil eradication efforts constituted an unconstitutionally broad delegation of authority to a private entity in violation of Article II, Section I of the Texas Constitution. Although a non-zoning case, the Supreme Court established an eight part test to assess the validity of a private delegation relevant in land use cases as follows:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions adequately represented in the decision process?
3. Is the private delegate's power limited to making rules or does the delegate also apply the law to particular individuals?

4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent and subject matter?
7. Does the private delegate possess special qualifications or training for the test delegated to it?
8. Has the legislature provided sufficient standards to guide the private delegate in its work? 952 S.W.2d at 472

This test applies only to private delegations, not to the more typical delegation by the legislature to an agency or other department of government. *Id.*

West End Pink, Ltd. v. City of Irving, 22 S.W.3d 5 (Tex. App.–Dallas 1999, pet. denied).

West End Pink brought a declaratory judgment action to have the zoning ordinance preempted as to the limit on the sale of alcoholic beverages in restaurants to no more than 40% of annual total sales. West Pink argued the ordinance was unconstitutional because it conflicted with a state statute giving the Texas Alcoholic Beverage Commission the exclusive power regulate alcoholic beverages, citing Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489, 490 (Tex. 1993). The court held that any inconsistency was cured by various validation statutes. West Pink argued that a validation statute cannot cure an unconstitutional ordinance. However, the court explained that a validation statute cannot validate a law that the legislature itself could not pass. In this case, the legislature had the authority to pass a law regulating alcoholic beverages (although the city might not have had such authority), and therefore the validation statutes effectively cured the otherwise defective ordinances.

Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998).

In a non-zoning case, this unanimous decision of the Texas Supreme Court discusses the power of the state to overrule regulations of a home rule City. The decision is relevant to the right of the state to preempt local zoning and land use laws. Consistent with the Court's earlier decision in Dallas Merchs. & Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489, 490-91 (Tex. 1993), the Court held that to do so, the state legislature must make it abundantly clear that the preemption of home rule authority on the particular issue is intended. The Court holds that cities are created for the exercise of governmental functions, but as agencies of the state, they are subject to state control. The Court also overruled a challenge based on illegal delegation of police power, applying the test set forth in Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997).

City of Santa Fe v. Young, 949 S.W.2d 559 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1997, writ ref'd).

The City of Santa Fe, a general law city, enforced a non-zoning ordinance regulating the operation of sand pits and quarries within its city limits with permits, setbacks, fencing, studies, etc. The Texas Aggregate Quarry & Pit Safety Act, section 133.001 et seq. of the Texas Natural Resources Code prohibits operation of sand pits within 200 feet of a road or highway and requires safety devices for certain quarries located within hazardous proximity to a public road. The Court applied the rules of Dallas Merchs. & Concessionaires' Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993) to reconcile

the seemingly conflicting regulations. The Court held that the state preempted the field of regulation for quarries and pits within 200 feet of a road, but not others. Therefore, the City regulation is valid outside that area.

#### **E. Other Cases**

CDC Real Estate, Inc. v. Curtis, No. 06-97-00053-CV, 1997 WL 1049837 (Tex. App.–Texarkana 1997) (not designated for publication).

The Court held that the landholder failed to exhaust its administrative remedies with the city before seeking judicial relief, because the landowner did not file an administrative appeal of the city's issuance of the disputed sign permit. Instead, the landowner filed suit in District Court for declaratory judgment to enjoin construction of the sign. The Court held that since the landowner failed to exhaust its administrative remedy, the District Court was without authority to issue the injunction enjoining construction of the disputed sign.

Pruitt v. Town of St. Paul, No. 05-96-00025-CV, 1997 WL 466526 (Tex. App.–Dallas 1997, no writ) (not designated for publication).

Pruitt operated a transmission repair business in violation of the zoning ordinance. The town requested an injunction, which was granted by summary judgment, as was a declaration that Pruitt violated the zoning ordinance. The Court overruled the summary judgment based on insufficient evidence, since the town failed to introduce evidence specifically addressing the fact that Pruitt was operating a transmission business after the effective date of the ordinance in question.

City of Friendswood v. Strang, 965 S.W.2d 705 (Tex. App.–Houston [1<sup>st</sup> Dist.]1998, no writ).

Strang bought a house in a single family zoned district to operate a personal care facility. After commencing operation of the facility, the City of Friendswood asserted violation of its zoning ordinance and brought charges in municipal court. Subsequently, Strang requested appropriate permits to convert the house to a community home, which is authorized to exist in all residential areas. TEX. HUM. RES. CODE ANN. §123.003 (Vernon 1999). The city refused the permits on the grounds that Strang was operating a business in a residential area in violation of city zoning ordinance. Without the modifications, the house would not qualify as a community home under the state requirements and therefore, would be denied a license by the state. Without the license, the house is not accorded the protection of a community home, and thus would be in violation of the city's zoning ordinance. The Court held that the injunction should be dissolved since Strang testified that 9 elderly persons lived in the house while state law limits the number of residents in a community home to six. TEX. HUM. RES. CODE ANN. § 123.006(a) (Vernon 1999). The Court acknowledged the "catch-22" situation since they had not been able to make the changes to the house necessary to qualify for a license which, in turn, would protect them against the zoning regulations. However, the testimony that the number or residents exceeded those allowed for a community doomed Strang. It is clear that if only 6 persons resided at the house, the Court would have upheld the injunction.

Rossano v. Townsend, 9 S.W.3d 357 (Tex. App.–Houston[14th Dist.] 1999, no pet.).

The City of Alvin's charter required a proposed zoning ordinance to be published at least six months before the proposal could be submitted to voters. The City was also required to hold public hearings on proposed ordinances before election. The Townsends alleged that the City's placement of a zoning ordinance on the May 1998 ballot was invalid because the City failed to meet the publication and hearing requirements. The ordinance was approved by the voters. The City argued that the requirements were met because essentially the same ordinance had been placed on a previous ballot after proper notice and hearing. The earlier ordinance was not approved by the voters. The second ordinance had a different name, voting date, the addition of a contained caption, verifying provision, repealer clause and severability clause, but was otherwise the same. Since the proposed ordinance that met the publication and hearing requirements was different from the ordinance at issue, the court held that the publication and hearing requirements for the later ordinance were not satisfied.

San Miguel v. City of Windcrest, 40 S.W.3d 104 (Tex. App.–San Antonio 2000, no pet.).

The San MIGUELS operated a group home for the elderly in their home in a “one-family dwelling” zoning area. The zoning ordinance defined a “family” as “[o]ne or more individuals living together a single housekeeping unit, in which not more than two (2) individuals are unrelated by blood, marriage, or adoption.” The city sought temporary and mandatory injunctions prohibiting the group home. The trial court granted injunctions enjoining the operation pending trial and requiring removal of 3 of the elderly residents. The San MIGUELS claimed the trial court erred in issuing the injunctions.

The appellate court upheld the injunctions. Although the city did not plead and prove a probable injury, when a city seeks to enjoin a zoning violation, it does not have to prove the violation would cause injury to the residents nor that the any other legal remedy is adequate. The injury was the violation of the zoning ordinance, and such entitled the City to the equitable relief of the injunction. See City of Fort Worth v. Johnson, 388 S.W.2d 400, 402 (Tex. 1964).

The San MIGUELS also challenged the issuance of the injunctions for destroying the status quo and resolving the goals of pending litigation without the benefit of a trial. However, the court held that the status quo to be preserved should be the state that existed immediately before the violation, not the status consisting of acts constituting the violation. See Houston Compressed Steel v. State, 456 S.W.2d 768, 773 (Tex. Civ. App.–Houston [1<sup>st</sup> Dist] 1970, no writ); State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 528 (1975); Edgewood Indep. Sch. Dist. v. Paiz, 856 S.W.2d 269, 270 (Tex. App.–San Antonio 1993, no writ). Also, the injunctions did not resolve the goals of pending litigation because the San MIGUELS' affirmative defenses remained to be addressed at trial.

Eller Media Co. v. City of Houston, No. 01-00-0058-CV, 2001 WL 1298901 (Tex. App.– Houston [1st Dist.] 2001, no pet.). **[To C. amortization upheld]**

The City of Houston Billboard Ordinance was upheld in the face of constitutional challenges and the claim that it is preempted by state law. The suit specifically sought to avoid the enforcement of the amortization provisions of the ordinance, which preceded state law regulations in that area. The court agreed that the ordinance's requirement for certain non-conforming billboards to be removed after an amortization period was a taking, but disagreed that it was a taking without compensation. The amortization period was sufficient compensation for the taking, citing City of University Park v.

Benners, 485 S.W. 2d 773 (Tex. 1972), which set forth the rules and rationale for using amortization in the exercise of the government’s police power to regulate use of property. The court held that Benners was not pre-empted by the later regulatory taking analysis in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

#### **F. Law Reviews/Attorney General Opinions**

Op. Tex. Att’y Gen. No. SR-062 (1997).

A city council may not decide variances, only a ZBA. The opinion reviews the basis for a city’s power to zone, including the well settled premise that a city has only the power granted to it in the Enabling Act (TEX. LOC. GOV’T CODE ANN., Chapter 211 Vernon 1999). Further, the opinion notes that it is contrary to that of Mixon § 9.01.

Op. Tex. Att’y Gen. No. JR-002 (1997).

The Texas Manufactured Housing Standards Act, TEX. REV. CIV. STAT. ANN. art. 5221(f) repealed by Legislature in 1943, preempts city regulation of construction or installation of HUD-Code manufactured housing. A city, however, may determine appropriate location within the city, although it may not exclude them. Further, a city may exclude older, non HUD-Code manufactured housing not already located in the city.

Op. Tex. Att’y Gen. No. JC-0142 (1999).

The Attorney General was asked to interpret the authority of a home rule municipality to restrict residential growth. Specifically, the SMART Growth program of Flower Mound, Texas was questioned. Amicus briefs were filed by the Home & Apartment Builders of Greater Dallas and the Texas Association of Builder. The two specific questions were:

- Without an emergency, may a city limit building permits?
- If so, may the city differentiate between residential and non-residential permits?

The Attorney General opined that a home rule city can do so, subject to constitutional limitations. The justification is based on the following analysis: (i) a home rule municipality has any governmental power that the legislature has not withheld, (ii) growth management plans are not inconsistent with applicable state law, and (iii) there is not statute limiting the “with unmistakable clarity” standard (Dallas Merchs. & Concessionaire’s Ass’n v. City of Dallas, 852 S.W.2d 489, 490-91 (Tex. 1993)). Constitutional issues were reviewed, but since Attorney General Opinions cannot consider specific factual situations, the Attorney General simply opined that constitutional safeguards must be met, and that a growth management plan is not *per se* unconstitutional.

The summary of the opinion states:

“A home rule municipality may implement a growth-management plan that apportions, or “caps,” the number of building permits the municipality issues in a specified time period even in the absence of an emergency. The municipality must provide appropriate substantive and procedural due process and the municipality must not apply the growth-management plan to building permit applications filed prior to

the adoption of the plan. The denial of a building permit application may constitute an unconstitutional taking for which the municipality must compensate the landowner.

A home rule municipality may adopt a growth management plan that limits the number of residential building permits, and not the number of nonresidential permits, the municipality will issue in a given time period. Depending on the circumstances of a given situation, the growth-management plan may implicate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”

Op. Tex. Att’y Gen. No. JC-0425 (1999).

The Attorney General was asked whether land regulations in effect when a landowner files an application are locked-in such that a subsequent purchaser of the land is entitled to the rights and benefits of those regulations. Essentially, the petitioner was questioning the limits of vested rights as prescribed in Quick v. City of Austin, 7 S.W.3d 109, 131 (Tex. 1998) and Texas Local Government Code, section 245.001(3). The Attorney General opined that the vested rights run with the land if the "project" for which the application was filed remains the same. The Attorney General refrained from defining “project,” and instead stated that the resolution will depend on the facts of the case.

The Role of Variances in Determining Ripeness in Takings Action Under Zoning Ordinances and Subdivision Regulations of Texas Municipalities, John Mixon and Justin Waggoner, 29 ST. MARY’S LAW JOURNAL L. J. 765 (1998).

Zoning guru John Mixon and co-author Justin Waggoner reviewed the conflict between Texas case law requiring a landowner whose rezoning has been rejected to request a variance, when long standing Texas case law does not allow use variances. The article contains a helpful overview of Texas zoning and subdivision law and the role of the Zoning Board of Adjustment (in zoning cases) and the Planning Commission (in subdivision cases) to grant variances. The authors conclude that the current state of the law is illogical and recommend various alternatives, including granting authority to ZBAs to grant use variances or requiring a disenchanted property owner to have an adjudicatory hearing before city council.

Restoring Order in Urban Public Spaces, Rob Teir, TEX. REV. OF LAW & POL. 256 (Spring 1998).

This article reviews urban quality of life issues, particularly urban camping, sidewalk use and panhandling.

## **IX. DEED RESTRICTIONS AND ZONING**

### **A. Deed Restrictions Defined**

Deed restrictions are private, contractual covenants which limit land use. Deed restrictions are placed on real property by affirmative action of the owner of the real property, for the benefit of that property only, with a typical intent to enhance the value of that real property. Deed restrictions affect subsequent owners of the real property for a stated term, and for any extensions. There are no limitations on the nature of deed restrictions except for compliance with laws and public policies.

Private land use restrictions may be imposed upon the real property by any owner of real property, and such restrictions are enforceable by Texas courts. Enforcement of deed restrictions is typically undertaken by classification into one of three categories:

1. those that have an entity, such as a Texas non-profit corporation, established to provide for their enforcement on a long-term basis;
2. those that have no such entity, but which instead rely upon private enforcement by individuals such as, initially, the developer and, later, individual landowners; and
3. those enforced by specially authorized counties and the City of Houston. Deed restrictions are enforceable in the City of Houston. TEX. LOC. GOV'T CODE ANN. § § 212.131 *et seq.* (Vernon 1999 & Supp. 2001).

Deed restrictions commonly have the following general characteristics:

1. design and construction standards for initial construction within a development;
2. negative covenants which prohibit various types of construction and uses;
3. an assessment mechanism; and
4. creation of a private non-profit corporation as the vehicle for enforcement of the restrictive covenants.

## **B. Comparison of Zoning With Deed Restrictions**

Laymen often confuse zoning and deed restrictions since both affect the right of a property owner to use their land. Although zoning and deed restrictions do, to some extent, regulate the same rights, they are fundamentally different. This section compares zoning and deed restrictions and their basis, goals, interpretation and enforcement.

### 1. Basis

- a. Zoning. The basis for zoning is the police power of a municipality to protect the health, safety and public welfare of the community. This is a legislative power exercised by a governmental entity.
- b. Deed Restrictions. The basis for deed restrictions is private contract.

### 2. Goals

- a. Zoning. The goal of zoning is the protection of the community through regulation of land use by individuals. These are societal goals focusing on the benefit to the whole community, despite the fact that individuals' rights are limited and, in many cases, their property values reduced.

- b. Deed Restrictions. The goal of deed restrictions is, generally, to enhance the value of property being subdivided by the developer for sale to a number of end users. This focuses on the benefit to the property encumbered without the intent to effect, negatively or positively, adjacent property in any way.

### 3. Interpretation

- a. Zoning. Zoning regulations must have a substantial relationship to a community's health, safety, morals and general welfare. Over the years, the subject matter which may be covered by zoning has broadened, although it is still stated that the regulation of aesthetics alone, without other substantive purposes, is not allowed.
- b. Deed Restrictions. Deed restrictions, as a matter of private contract, can cover any matter which are not illegal or against public policy. The interpretation of deed restrictions under common law was to enforce clearly drafted deed restrictions even though deed restrictions were not favorites of the law. By legislative action, the Texas Legislature now mandates the liberal construction of deed restrictions in order to enforce their intent and has mandated a strong presumption in favor of property owners association's actions in the enforcement and interpretation of deed restrictions. Although the full scope of these actions is not yet clear, it is certain that the burden of defeating deed restrictions enforcement action has become more difficult.

### 4. Enforcement

- a. Zoning. Zoning restrictions are typically enforced by municipalities. Violations usually constitute Class C misdemeanors. Many zoning violations are picked up through the building code and the occupancy permitting process. The private cause of action for an individual property owner to enforce a zoning ordinance is limited to situations of "special injury" and standing is rarely granted by the courts.
- b. Deed Restrictions. Deed restrictions are typically enforced by incorporated property owners associations (once a subdivision is established), and by the developers (while the subdivision is in the development stages). Both have a vested interest in the enforcement of these deed restrictions on behalf of the entire subdivision in order to maintain property values. Private causes of action by individual property owners are allowed since deed restrictions are contractual and the parties are in privity of estate. The City of Houston and Harris County both have statutorily provided rights to enforce deed restrictions.

## C. The Blurring Of Zoning Law And Deed Restriction Law

Zoning law and deed restriction law, although both affecting private land use, come from different ends of the legal spectrum. Nonetheless, recent legislative forays into deed restriction law, and the development of large scale planned developments, have imported a number of zoning law procedures and concepts to deed restriction law.

The City of Houston and Harris County now enforce certain deed restrictions, although this could be considered a historic anomaly since Houston has never utilized zoning. The idea that a municipality



should enforce private land use covenants implies the municipality's adoption of the deed restrictions being enforced as public policy. In large master planned communities, with extensive deed restrictions and adequate funding through assessments, the property owners' association will take on many characteristics of a municipal government, particularly when enforcing deed restrictions. Section 202.002(a) of the Texas Property Code gives a property owners association's actions a presumption of validity similar to that accorded to a municipality in enforcing deed restrictions. Where deed restrictions in a master planned community are comprehensive and consistent in scope as to a large development, the enforcement goals of the property owners association take on many of the goals of zoning in seeking to benefit the community as a whole, rather than a particular piece of property.

Despite these significant developments, it still remains unlikely that either zoning law or deed restriction law will look to the other for legal support in the resolution of legal issues. Although they both impact land use, their basis, basic goals, interpretation and enforcement are fundamentally different from a legal perspective.

## **X. ZONING DUE DILIGENCE**

When a knowledgeable practitioner advises a client interested in acquiring or developing real property, they must gather background information, evaluate the current zoning status of the property in question and then make recommendations to the client of their alternatives.

### **A. Gathering Information**

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

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

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

### **B. Current Status**

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

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

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

Where the zoning is objectionable, the Comprehensive Plan should be reviewed to determine if the current zoning is consistent with the Comprehensive Plan. If the zoning is inconsistent, a "spot zoning" objection may be possible. Otherwise, the procedures for rezoning should be reviewed carefully.

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

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

### C. **Alternatives**

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

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

- (1) The planning staff's position;
- (2) Treatment of similarly situated properties in the past (and why);
- (3) Make-up and philosophy of the Planning & Zoning Commission/Zoning Board of Adjustment on similar issues;
- (4) Make-up and philosophy of City Council on similar zoning issues; and
- (5) Current political issues in the city affecting land use decisions.

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

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

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

**D. Checklist**

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

**Appendix A**  
**CHECKLIST FOR LOCAL DEVELOPMENT REGULATIONS**

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

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