Zoning:

A Quick Review of Concepts, Key Procedures, Words of Art, etc.

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Mr. Dougherty has practiced municipal law since 1976 in both public and private positions. He is a member of the State Bar of Texas, the American Bar Association (ABA), the Houston Bar Association (HBA) and the Texas City Attorney's Association (TCAA).

Until 1984, Mr. Dougherty worked for the City Attorney of the City of Houston, Texas. Since 1984, Mr. Dougherty has been in private practice, working with a variety of local governmental entities, including municipalities, utility districts, special-purpose entities and a municipal receiver.

Mr. Dougherty attended Lamar High School (Houston, Texas) (1968), Princeton University (Princeton, N.J.)(A.B. 1972), University of Texas Law School (Austin, Texas)(J.D. 1975).

Mr. Dougherty has presented papers to the State Bar of Texas (Advanced Real Estate Law Course), the TCAA, the Houston Chapter of the American Planning Association (APA), the Real Estate Section of the HBA, the IMLA, South Texas College of Law and University of Texas CLE programs and other similar gatherings. Mr. Dougherty and co-authors prepared a new edition of Prof. John Mixon's standard reference work on municipal zoning in Texas, *Texas Municipal Zoning Law* (3rd. Ed.) and annual updates.

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BACKGROUND, EDUCATION AND PRACTICE

Reid Wilson is one of few land use attorneys in Houston, the great unzoned city. His practice involves a broad array of uniquely Houston land use regulations, deed restrictions, development agreements, platting problems, economic development incentives and traditional land use matters in the many zoned communities in the Greater Houston area. Although traditionally a private sector attorney, Reid recently represented three different local governments as special land use counsel.

Reid spent 6 years chairing the Planning and Zoning Commission in West University Place, Texas, a home rule city embedded within the inner loop area of Houston, during which time he oversaw the comprehensive revision of the city's 50 year old zoning ordinance and comprehensive plan. In 1992, he chaired the Houston Bar Association's Zoning Study Group, which monitored Houston's most recent (and unsuccessful) zoning attempt. He was a member of the Neighborhood Preservation Subcommittee of the Houston Planning Commission during 2005-06.

Reid is author of the appendix on subdivision law to Texas Municipal Zoning Law (originally authored by UH Law Professor John Mixon and now updated by Houston attorney Jim Dougherty).

Reid originated and continues to head the Houston Bar Association Pro-Bono Deed Restriction project which provides free attorneys to lower income neighborhoods seeking to create, modify or extend deed restrictions.

Reid is listed in LawDragon 500 (2006, 2007), Best Lawyers in America (2005, 2006, 2007) – Woodward/White, "Texas Super Lawyers" - Texas Monthly (2003, 2004, 2005, 2006, 2007), "Top Lawyers" – H Texas Magazine (2004, 2006). He is a Member of the Houston Real Estate Lawyers Council, Chair of the Urban Land Institute- Houston District Counsel, State Bar Real Estate Probate and Trust Law Section Council, and American College of Real Estate Lawyers (ACREL).

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Reid lives in West University Place with wife Kim, daughter Katherine (now at TCU), and son Palmer, where he has been active as chairman of the Planning and Zoning Commission and a member of boards/committees relating to comprehensive planning, the City Charter and parks.

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A Quick Review of Concepts, Key Procedures, Words of Art, etc.

I. BASIC ZONING CONCEPTS

A. Definition and Purposes

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. A more specific definition would not fairly represent the flexibility of modern zoning practices.

Zoning is intended 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 ref'd). 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 promotes the welfare of the community rather than protects the value of individual properties. *Galveston Historical Found. v. Zoning Bd. of Adjustment*, 17 S.W.3d 414, 417 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (citing *21st 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).

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 Houston's history supports their position. In November 1993, Houston voters narrowly rejected a proposed zoning ordinance. Although other Houston area cities (Baytown, Alvin, Mont Belvieu, Stafford, Tomball) adopted zoning ordinances since the defeat of Houston's attempt, Houston looks to remain free of traditional comprehensive zoning.

C. The "Police Power"

The power to zone and regulate the use of land stems from the "police power," which is the basic power of government to regulate in the public interest. Broad constitutional principles limit the police power as follows:

- -- The goal of the regulation must be to advance the "public health, safety or welfare."
- -- The means chosen must logically lead to that goal.
- -- The regulation may not be unreasonable, arbitrary, capricious, or confiscatory.

When interpreting such broad constitutional principles, the courts tend to defer to the judgment of local communities. In a major land-use case, the Texas Supreme Court heard a challenge to a small town's denial of a development application because it did not conform to a restrictive zoning ordinance. The ordinance was squarely aimed at limiting the town's growth. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). The Supreme Court upheld both the town's goal (controlling growth) and the means of achieving it (refusing to "up-zone"). The Court wrote: "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." (emphasis added)

D. Governmental Action vs. Private Action

Zoning is a governmental power, exercised by public officials for the benefit of the public in general. Public officials must observe restrictions peculiar to government, for example:

-- Requirements for public election or appointment, oaths of office, etc.

-- Constitutional prohibitions of arbitrary action, discrimination, etc.

-- "Open government" or "sunshine" laws such as the Texas Open Meetings Act (Chapter 551, TEX. GOV'T. CODE) and the Texas Public Information Act (Chapter 552, TEX. GOV'T. CODE).

Unlike deed restrictions, which allow landowners to act in their own personal interests, zoning powers may not be delegated to private parties or to a narrow segment of the community. For example, an ordinance allowing private landowners to "veto" proposed land-use changes can be held illegal as an improper delegation of governmental power. *See* Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921)(private "vetoes" under and early zoning ordinance) and *Minton v. City of Ft. Worth Planning Commission*, 786 S.W.2d 563 (Tex. App.--Ft. Worth 1990, no writ)(neighboring owners approving replats). However, statutes and ordinances allowing landowners to *petition* government for action--including petitions that can increase the number of votes required for governmental action--are more likely to be upheld. *See, e.g.*, §211.006(d), TEX. LOC. GOV'T CODE . Just increasing the number of necessary votes falls short of an outright "veto."

E. Zoning Contracts

Governmental police power, like zoning, is often called "inalienable," in the sense that the government cannot sell it or trade it away. For example, "contract zoning" (where a private party and the government agree upon some particular zoning) is usually illegal. *See* Urso v. City of Dallas, 221 S.W.2d 869 (Tex. Civ. App.--Dallas 1949, writ ref'd). An agreement *not* to zone would also be doubtful. *See* City of Farmer's Branch v. Hawnco, Inc., 435 S.W.2d 288 (Tex. Civ. App.--Dallas 1968, writ ref'd n.r.e.).

However, if the government does not make a bilateral "contract" on zoning, but instead imposes unilateral conditions on a land-use approval, the conditions are much more likely to be upheld. *See* Teer v. Duddlesten, 26 Sup. Ct. J. 544 (July 20, 1983) *(opinion withdrawn)* (City of Bellaire planned unit development ordinance). Conditions often appear in "discretionary" zoning approvals like special exceptions, variances, special/specific use permits, conditional use permits, planned unit developments ("PUD's") and planned development districts ("PDD's"). So-called "incentive zoning" can be thought of as a sort of conditional zoning. *Example*: An ordinance might

include an incentive for greater building setbacks by granting a greater overall height limit if the building is voluntarily set back farther from the street.

Modern-era state laws authorize some land-use contracts, impliedly authorizing contract zoning---but only in specific circumstances. A 2003 state law authorizes "development agreements" between cities and the owners of land within the city's extraterritorial jurisdiction (but does not address land inside the city limits). *See*, §212.171, *et. seq.*, TEX. LOC. GOV'T CODE. Such a development agreement may govern "general uses and development of the land" and may authorize enforcement of development regulations. The statute does not apply to cities of 1.9 million or more, or their ETJ's, *e.g.*, the City of Houston.

Adopted in the 2007 Legislature, House Bill 610 allows a city with less than 1.6 million in population to "negotiate and enter into a written agreement" with the owner of land the city wants to annex. The agreement can cover the annexation service plan as well as "permissible land uses and compliance with municipal ordinances." *See*, §43.0563, TEX. LOC. GOV'T CODE. Another 2007 bill, House Bill 1742, allows cities to enter into "development agreements" with the owners of land used for agriculture, wildlife management or timber. The agreements may "authorize the enforcement of all regulations and planning authority of the municipality that do not interfere with the use of the area for agriculture, wildlife management, or timber." *See*, §43.035, TEX. LOC. GOV'T CODE.

F. Major Constitutional Limitations

1. Due Process, Taking, Damaging. "Due process" clauses prohibit "taking" of private property without due process of law, and, in some cases, they require payment of compensation. *See* U. S. CONST., 5th and 14th Amendments. In Texas, the state constitution prohibits "damaging" private property as well as taking. *See* TEX. CONST. art. I, sec.17.

Both state and federal courts recognize a constitutional right to be paid when zoning 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 Commission*, 112 S.Ct. 2886 (1992). Federal takings doctrine usually requires that a plaintiff prove that the challenged zoning forbids "all economically viable use of his land." Mr. Lucas, for example, showed that the South Carolina Coastal Commission had forbidden practically all development of his beachfront property. (He had bought it for $975,000.) Even if regulations do not destroy all uses of the land, the owner may still win if by showing: (i) a severe economic impact, and (ii) interference with "distinct, investment-backed expectations." So-called "exactions" can also violate the due process clause. In zoning, an "exaction" could be a requirement that a developer build, dedicate or convey something to the city as a condition for getting a zoning approval. Common exactions are easements, utility facilities and open space, landscaping, screening walls, etc.

To be legal, exactions have to be: (i) logically related to a legitimate governmental purpose and (ii) at least "roughly" proportional to the impact of the developer's proposed project. In Texas, state laws limit some exactions. A 2005 law requires cities to hire an engineer to determine if a developer's share of "municipal infrastructure costs" are out of proportion to the development. TEX. LOC. GOV'T CODE §212.904. An older law limits the power of cities to require cash payments ("impact fees") in lieu of physical facilities. *See* Chapter 395, TEX. LOC. GOV'T CODE.

2. Equal Protection. "Equal protection" clauses prohibit discrimination, especially based on race, creed, nationality, and handicap, but also including differential treatment lacking a rational basis. *See* U. S. CONST., 14th Amendment. *See also* the federal Fair Housing Act, 42 U.S.C. §3601 *et seq*.

3. Free Exercise. "Free exercise" clauses protect both religious activity and speech. *See* U. S. CONST., First Amendment. In Texas, places of religious worship have a constitutional right to exist, even in an area zoned residential. *City of Sherman v. Simms*, 183 S.W.2d 415 (1944). A 2000 federal law restricts zoning regulations that impose "a substantial burden" upon religious activities or institutions. *See* the Religious Land Use and Institutionalized Persons Act ("RLUIPA") codified as 42 U.S.C. 2000cc, *et seq.* The Texas Religious Freedom Act prevents impositions on the exercise of religions which are not the "least restrictive means" of furthering a "compelling government interest." *See* Chapter 110, TEX. CIV. PRAC. & REM. CODE.

The First Amendment also limits the power of cities to regulate speech, including signs in residential neighborhoods. *City of Ladue v. Gilleo*, 114 S.Ct. 2038 (1994). Numerous First Amendment cases deal with sexually-oriented businesses and limit the power of government to zone and regulate them.

G. Zoning Power vs. Other Governmental Powers

Zoning cannot usually inhibit another local governmental entity from performing an essential governmental function, especially where the entity derives its authority from state law. For example, a city cannot "zone out" all school facilities of an overlapping school district. *Austin Independent School District v. City of Sunset Valley*, 502 S.W.2d 670 (1973). However, city ordinances may impose some regulations, short of an outright prohibition. *Port Arthur Independent School District v. Groves*, 376 S.W.2d 330 (Tex. 1964). Apparently, a city can "zone out" its own facilities. In *City of McAllen v. Morris*, 217 S.W.2d 875 (Tex. Civ. App.--Dallas 1948, writ ref'd n.r.e.), the City required itself to obtain a special exception from its own Board of Adjustment before building a fire station in a residential district.

The Texas zoning enabling statute "does not apply" to state or federal facilities, and it "does not authorize" removal or destruction of facilities used by "public service businesses." *See* TEX. LOC. GOV'T CODE, ' 211.013. *See also Gulf, Colorado & Santa Fe Ry. Co. v. White*, 281 S.W.2d 441 (Tex. Civ. App.--Dallas 1955, writ ref'd n.r.e.) (eminent domain vs. zoning power).

H. Statutes Limiting Zoning

Certain land uses have special protection from zoning. Pawnshops are protected from some regulations. *See* TEX. LOC. GOV'T CODE, §211.0035. Zoning ordinances may not impose restrictions on locations for the sale of alcoholic beverages, except as authorized by the Alcoholic Beverage Code. *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993). Community homes for persons with certain disabilities have special protection. *See* Chapter 123, TEX. HUMAN RES. CODE.

Some federal statutes limit the power to zone. *Examples*: Fair Housing Act, Telecommunications Act, RLUIPA (mentioned above).

Sometimes, cities halt new development while a new zoning plan is being studied, heard and adopted. The idea is usually to prevent the construction of buildings that might soon become non-conforming. A 2001 state statute—amended in 2005—requires that cities follow an intricate process (including notice and hearing requirements) before imposing a "moratorium" on certain types of

projects. *See* TEX. LOC. GOV'T CODE, §212.131 *et. seq*. The statute also limits the length of moratoria.

II. ZONING REGULATIONS

A. Zoning By Municipalities

State legislation specifically authorizes municipalities to zone. The Texas Zoning Enabling Act stems from the Standard Act and is codified in Chapter 211, TEX. LOC. GOV'T CODE. Key provisions include (all cites are to TEX. LOC. GOV'T CODE):

- --- *Purposes*: protect the health, safety, morals and welfare and protect historical, cultural or architecturally-important places. (§211.001)
- --- *Regulations authorized:* height, stories, size, percentage of lot that may be occupied, size of yards and open spaces, population density, location and use of buildings, etc. (§211.003)
- --- *Historic district regulations*: construction, alteration and razing (§211.003)
- --- *Comprehensive plan*. Zoning must be adopted "in accordance with a comprehensive plan" designed to "lessen congestion," promote safety, promote health and welfare, provide "light and air," prevent "overcrowding," avoid "undue concentration of population," and facilitate transportation, utilities and other facilities. (§211.004) *See also* TEX. LOC. GOV'T CODE, Chapter 213, derived from a 1997 law regarding comprehensive plans. It allows cities to "define the relationship" between a comprehensive plan and development regulations (e.g., zoning ordinances).
- --- *Separate districts*. 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.

(§211.005)

--- *Commissions, boards*. Provisions for zoning commissions and boards of adjustment. (§211.007, 211.008)

--- *Procedures*. Adoption, amendment, appeals, etc. (§211.006 *et seq*.)

--- *Enforcement.* Provisions to enforce zoning regulation as follows:

- adopting ordinances to enforce zoning regulations;
- violation of the Enabling Act or a zoning regulation is a misdemeanor, which is punishable by fine, civil penalty, and/or imprisonment, as provided by the city; and
- injunction to restrain, correct or abate violation. (§211.012).

For a more in-depth treatment of the municipal zoning law, *see* TEXAS MUNICIPAL ZONING LAW, 3d Ed., (Lexis-Nexis/Matthew Bender).

"Home rule" cities have additional powers to zone, independent of the zoning enabling statutes. *See* *White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App.--Dallas 1974, no writ). "Home rule" cities are those with at least 5,000 in population which have adopted or amended home rule charters under art. XI, §5 of TEX. CONST. Unlike "general law" cities, home rule cities do not necessarily need to rely upon the legislature to delegate powers to them.

Some cities regulate land uses outside conventional zoning ordinances. The City of Houston, although un-zoned, has adopted an array of non-zoning ordinances regulating many types of land uses and development activity. *See*, for example, the following chapters of the Houston Code:

--- Chapter 26 (off-street parking)

--- Chapter 28 (junk yards, correctional facilities, motels, etc.)

--- Chapter 33 (historic buildings and areas)

--- Chapter 42 (development generally, including street setbacks and density restrictions)

Houston has also adopted airport zoning to restrict height and land uses near airports.

An obscure Tax Code provision authorizes less-than-citywide zoning within "tax increment reinvestment zones." *See* Chapter 311, TEX. TAX CODE. The City of Houston has adopted

limited-area zoning regulations for an area near the Galleria, under this law.

B. Zoning by Counties

Counties have some limited powers to zone around some reservoirs, military establishments, historic sites and airports. *See* Chapters 231 and 241, TEX. LOC. GOV'T CODE. A 2005 statute, codified as TEX. LOC. GOV'T CODE, §§240.081 *et. seq.*, allows large counties (over 1.4 million in population) to impose zoning-like regulations upon certain "communication facility structures" (wireless, mobile, satellite and radio structures). Such large counties may: (i) regulate the location of the structures in unincorporated areas, (ii) prohibit such structures near certain residential subdivisions, and (iii) require permits for construction or expansion. Counties also have the power to regulate outdoor lighting near observatories and military bases.

C. The Zoning Apparatus

Somewhat like the federal government, the zoning apparatus has three branches: *legislative*, *executive* and *judicial*. Property owners also play key roles.

1. Legislative Branch.

The "legislative branch" includes the Zoning Commission (if appointed) and the governing body (usually the City Council). A home rule city must appoint a commission; a general law city may do so. *See* TEX. LOC. GOV'T CODE, §211.007. The primary role of the Zoning Commission is to advise the City Council about proposals to adopt or amend zoning ordinances. It holds hearings and makes recommendations to the Council. *(Note*: Many Zoning Commissions also serve as municipal planning commissions that review subdivisions plats and re-plats. *See* Chapter 212, TEX. LOC. GOV'T CODE. The platting responsibilities of a planning commission are fundamentally different--and separate--from its advisory responsibilities on zoning matters.)

Cities with a population over 290,000 may create neighborhood advisory zoning councils of five 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 three-fourths vote.

The most important part of the "legislative branch" is the City Council. The Council receives recommendations from the Zoning Commission and makes the final decision to adopt or amend zoning ordinances. Best practice is for the Council not to administer a zoning ordinance or grant variances or special exceptions, but some ordinances assign such roles to the Council. However, a

specific law allows the city council of some small cities to act as the Board of Adjustment. *See* TEX. LOC. GOV'T CODE, §211.008(g).

The standard procedure for adoption of zoning ordinances includes these steps:

-- *Comprehensive plan.* Hold hearing(s), review and adopt a comprehensive plan and define the relationship of the plan to proposed zoning regulations, at some point in the process (if a separate plan is desired; *see* Chapter 213, TEX. LOC. GOV'T CODE)

--- *Procedures and Zoning Commission.* Governing body establishes procedures and appoints a zoning commission (if required). *See* TEX. LOC. GOV'T CODE, §§211.006 and 211.007.

--- *Preliminary Report.* Zoning Commission makes a preliminary report. *See* TEX. LOC. GOV'T CODE, §211.007.

--- *Notices, Public Hearings.* Zoning Commission gives notice and holds public hearings. *See* TEX. LOC. GOV'T CODE, §211.007.

--- *Final Report.* Zoning Commission makes a final report to the governing body. *See* TEX. LOC. GOV'T CODE, §211.007(b).

--- *Council Hearing.* Council gives notice and holds another hearing. *See* TEX. LOC. GOV'T CODE, §211.007(b).

--- *Adoption.* Council proceeds with the regular steps necessary for adopting an ordinance (meeting notices, votes, signatures, etc.).

Optionally, the Council, by ordinance, can prescribe a joint hearing with the Zoning Commission (in lieu of the separate hearings described above) and can prescribe the notice of the joint hearing. *See* TEX. LOC. GOV'T CODE, §211.007.

The procedure for amending a zoning ordinance is the same as for original adoption. As a result, it takes a long time (usually many weeks) to adopt any amendment of a zoning ordinance, no matter how small the amendment might be. The amendment process also applies to small-area "legislative" approvals like district boundary changes (re-zonings), special use permits, PUD's and PDD's.

2. Executive Branch

The "executive branch" includes the chief "administrative official" and other city staff members. Often, the administrative official is called the "building official," sometimes "city

planner" or "zoning administrator." The administrative official's main job is usually to review applications for projects and issue permits to authorize the beginning of the work. As a result, the administrative official is the initial interpreter of the zoning ordinance. The administrative official's interpretations carry a lot of weight. If there is an appeal to the Board of Adjustment (described below), it takes a 75% vote to overrule the administrative official.

Typically, the administrative official is also responsible for inspection, enforcement and the issuance of occupancy permits. Inspection requirements vary. Some jurisdictions require a "forms" survey to check the location of foundation forms before concrete is poured. This helps to prevent inadvertent setback (or “yard”) violations. Many cities require, in addition to a building permit, an occupancy permit (sometimes called a "certificate of occupancy") at the end of a project, to make sure that zoning and other building requirements have been met.

3. Judicial Branch.

The "judicial branch" is the Zoning Board of Adjustment, usually appointed by the governing body. The Board of Adjustment has three, sometimes more, key duties:

(a) *Appeals*. By statute, the Board hears appeals from the decisions of the administrative official. *See* TEX. LOC. GOV’T CODE, §211.009(a)(1). Most appeals involve interpretations of the zoning ordinance, but may include the denial of a permit.

(b) *Special Exceptions*. By statute, the Board hears and decides special exceptions. *See* TEX. LOC. GOV’T CODE, §211.009(a)(2). A special exception must be authorized and "carved out" *in the text of the zoning ordinance*. For example, an ordinance may provide that a theater may only be located in a commercial district if authorized by a special exception. The ordinance should set criteria the Board must apply in deciding whether to grant a special exception. Those criteria can be less stringent that the statutory tests for granting variance (see below).

(c) *Variances*. By statute, the Board may authorize variances. *See* TEX. LOC. GOV’T CODE, §211.009(a)(3). Unlike a special exception, a variance does not depend upon being authorized in the text of the ordinance. Instead, a variance typically authorizes something that would otherwise *violate* the zoning ordinance. Most types of zoning regulations can be modified by a

variance, *except "use" regulations*. For example, a variance may authorize a reduced setback, but may *not* authorize a commercial use in a residential-only district. The statutory tests for any variance are stringent and subjective:

(i) The variance may not be "contrary to the public interest."

(ii) Due to "special conditions," a literal enforcement of the ordinance must cause an "unnecessary hardship." *Note:* "Financial" hardship alone is not sufficient to meet this test; the hardship may have to arise from some kind of "environmental" condition of the property. *See* Battles v. Board of Adjustment of Irving, 711 S.W.2d 297 (Tex. App.--Dallas 1986, no writ). A "personal" or "self-created" hardship is not sufficient. City of Dallas v. Vanesko, 189 S.W.3d . 769 (Tex. 2006) (alleged hardship arose from the owner's design choices, not the nature and configuration of the lot; it did not matter that a permit was issued and the building was mostly completed).

(iii) The "spirit of the ordinance" must be observed.

(iv) "Substantial justice" must be done.

(d) *Prior Non-Conforming Uses, Other Duties*. A zoning ordinance may assign other duties to the Board of Adjustment. *See* TEX. LOC. GOV'T CODE, §211.009(a)(4). Dallas's zoning ordinance, for example, assigned to the Board responsibility for overseeing claims for "grandfathered" non-conforming uses (sometimes called prior non-conformities or "PNC's) . *See* White v. City of Dallas, 517 S.W.2d 344 (Tex. Civ. App.--Dallas 1974, no writ).

4. Property Owners

Many ordinances require that property owners apply for some zoning changes affecting their own land. *Some possible examples:* re-zonings, PUD's, PDD's, special use permits, special exceptions and variances. Neighboring property owners often get notified about zoning proceedings, and they can appear and participate in public hearings.

If a "change in regulation or boundary" is under consideration, neighboring property owners can sign written protests. If 20% or more of those within a 200-foot radius sign a protest, the change cannot take effect unless three-fourths of all members of the governing body vote in favor. TEX. LOC. GOV'T CODE, §211.006(d).

D. The Zoning Process

For most projects, the zoning process starts with an application to the administrative official. In most cases, the applicant will be seeking a permit based upon the zoning ordinance, as written. That may require a certain interpretation. It may also require recognition of "prior non-conforming" (PNC) status under the "grandfather" clauses of the zoning ordinance. Either way, the administrative official's initial decision is very important. If the administrative official's decision is unfavorable, an applicant typically has these options: (i) Go up the "chain of command" above the administrative official, as a sort of informal appeal. (ii) File a formal appeal with the Zoning Board of Adjustment (ZBA), seeking a different interpretation or ruling on PNC status. Appeals to the ZBA must be filed within "a reasonable time" as determined by the Board's rules. *See* TEX. LOC. GOV'T CODE, §211.010. Both applicants and neighbors should be aware of the Board's rules, because they can impose short deadlines for filing appeals. There is usually a fee and often an application form. The appeal halts all enforcement action, unless the administrative official certifies there is "imminent peril" to life or property. The Board must give public notice of the appeal and decide the case "within a reasonable time." Some Board's observe formal procedures, almost like a courtroom. Others operate more informally. It takes a 75% vote of the entire ZBA to reverse the administrative official.

Even if the administrative official's initial decision is favorable to the applicant---that is, even if a permit is issued---there is the possibility *someone else* can appeal the decision to the ZBA. "Any person aggrieved by the decision" has the right to appeal. *See* TEX. LOC. GOV'T CODE, §211.010. For example, a neighboring property owner might appeal the *approval* of a project (or the issuance of a permit). If that happens, the original applicant faces the need to go to the hearing to defend his project.

When an applicant seeks a permit---either directly from the administrative official or from the Board on appeal---the applicant is typically asking for approval "as of right." That is, the applicant is usually relying upon the zoning ordinance as it is written. They may be asking for a certain interpretation or ruling, but they are not asking for a "discretionary" approval.

"Discretionary" approvals typically require a public body (like the Board) to weigh competing considerations and make a judgment call about whether to grant approval, or not. Here are some typical "discretionary" approvals:

--- a special exception granted by the Board;

--- a variance granted by the Board;

--- a "legislative" approval granted by the City Council after following the procedures for a zoning amendment, including hearings and reports by the zoning commission. *Examples*: district boundary changes (re-zonings), changes in regulations within a district, special use permits, PUD's and PDD's

For some projects, a special exception may be available in the text of the zoning ordinance. *Example*: A provision in the ordinance might authorize a multi-family use in a single-family district, but only with a special exception. Only the ZBA can issue a special exception. An applicant can request a special exception in addition to, or in lieu of, an interpretation. Zoning ordinances typically impose filing deadlines, fees and requirements for public notices and hearings. It takes a 75% vote of the entire ZBA to grant a special exception.

Even if there is no special exception that might apply to the applicant's project, they can still request a variance (except on "use" questions). Only the ZBA can issue a variance. Zoning ordinances typically impose filing deadlines, fees and requirements for public notices and hearings. As mentioned above, the statutory test for issuing a variance is stringent, and it takes a 75% vote of the entire ZBA to grant a variance.

If an applicant sees no relief available at the ZBA (*i.e.*, no appeal, no special exception, no variance), they may want to seek a "legislative" discretionary approval like a district boundary change (re-zoning) or a change in the zoning regulations. Each is a type of amendment to the ordinance itself. Amendments are handled by the "legislative branch" (zoning commission and city council), not the ZBA. See the procedures for adopting zoning ordinances discussed aboveCthey also apply to amendments. Some ordinances require the applicant to pay a filing fee and furnish data, in order to have an amendment considered.

Many ordinances provide for site-specific amendments to authorize certain types of projects. *Examples*: specific use permits, PDD's, PUD's. *Example*: An ordinance may require a "specific

use permit" (sometimes also called a "special use permit" or "SUP") for certain project (*e.g.*, a gas station in light commercial district).

An amendment is the only way to get a "use" restriction changed, because a variance cannot change "use" restrictions.

An amendment that only affects a small area might be attacked as illegal "spot zoning." There are many "spot zoning" cases, some invaliding and some upholding small-tract rezonings. *See, e.g.*, *Pharr v. Tippitt*, 616 S.W.2d 175 (Tex. 1981) and *Hunt v. City of San Antonio*, 462 S.W.2d 536 (Tex. 1971). The *Pharr* case lists factors to consider and weigh to determine if a small-tract rezoning is illegal. These include:

(i) consistency with the ordinance,

(ii) consistency with surroundings,

(iii) suitability as currently zoned,

(iv) police-power objective, and

(v) minimum size.

Amendments provided for in the base zoning ordinance (like specific use permits, PDD's, PUD's) are much less vulnerable to spot zoning challenges than are outright re-zonings.

E. Appeals from ZBA Action

The following persons have standing to appeal from a decision of the ZBA:

--- "any person aggrieved" (this could include a neighbor who is specially affected by the decision)

--- a "taxpayer"

--- a city officer, department or board.

The courts have been fairly flexible in allowing parties to appeal. *In Galveston Historical Foundation v. Zoning Board of Adjustment of the City of Galveston*, 17 S.W.3d 414 (Tex. App.-Houston [1st Dist.] 2000, *pet. den.*), the court ruled that an historical foundation had standing to appeal. The foundation owned property some distance away from the site in question, but it was within the same special "overlay" district (called the "Broadway Overlay District"). *Wende v. Board of Adjustment of the City of San Antonio*, 27 S.W.3d 162 (Tex. App.-San Antonio 2000) held that a city had standing to challenge a proposed quarry to be located across the city limit line, in a different city.

An appeal must be in the form of a “verified” (sworn) petition filed in a court of record. It must be presented "*within **10 days** after the date the [ZBA’s] decision is filed in the board’s office*." (emphasis added). *Note*: there is no statutory requirement to give special notice of this date, so anyone interested in filing an appeal must be especially vigilant.

The court may grant a "writ of certiorari" that requires the ZBA to certify the written case records back to the court. The court may decide the appeal based on the written records above. The court may also decide to hear evidence. The court may even appoint a "referee" to make a report. The court may reverse, affirm or modify the decision of the ZBA. Costs may not be assessed against the city unless the ZBA acted with "gross negligence, in bad faith, or with malice."

The big question on appeal is whether the Board "abused" its discretion. *See City of Dallas v. Vanesko*, 189 S.W.3d . 769 (Tex. 2006). The *Vanesko* case confirms that there is a two-tier test for abuse of discretion. For fact findings made by the ZBA, a reviewing court "may not substitute its own judgment" for that of the ZBA---instead, a party challenging a ZBA fact finding must "establish that the board could only have reasonably reached one decision." However, for legal conclusions made by the ZBA, the reviewing court clearly gets the last word: abuse-of-discretion review is "necessarily less deferential" and is "similar in nature to a de novo review."

F. Other Zoning Litigation

Cities can sue to enforce zoning regulations. The law includes some special rules aiding enforcement. *See San Miguel v. City of Windcrest*, 40 S.W.3d 104, 108 (Tex. App.-San Antonio 2000), where the court held that the city did not have to specially prove an “injury” (or special harm) when suing to enjoin a zoning violation. *See, also, City of Dallas v. North By West Entertainment, Ltd.*, 24 S.W.3d 917 (Tex. App.-Dallas 2000), which held that a temporary injunction against the city was automatically suspended when the city filed notice of appeal; the city was not required to post a bond.

Property owners who are specially affected by a project can sue to *enforce* a zoning ordinance. *Porter v. Southwestern Public Service Co.*, 489 S.W.2d 362 (Tex. Civ. App.--Amarillo 1973, writ ref’d n.r.e.). This right appears to be independent of a city’s right to enforce its zoning ordinance, so, even if the city takes no action, property owners may be able to sue. Plaintiffs often try to include "takings" claims in zoning appeals. The courts generally require plaintiffs to get a final decision from local administrative bodies before being allowed to recover money on a “taking” claim. Until there is a final decision, the case is not considered "ripe" for judicial intervention. The

leading case is *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U. S. 172 (1985), where the Supreme Court required the plaintiff to seek a variance (and possible compensation in state court) before bringing a federal taking case. In *Mahew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), the Texas Supreme Court did not require the landowner to make repetitive applications to "ripen" his claim, noting that the landowner spent a year in negotiations with the city and incurred $500,000 in expenses, and that further applications would be futile.

A similar doctrine requires plaintiffs to exhaust their administrative remedies before suing, at least in those instances when 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).

III. VESTED RIGHTS

Sometimes, landowners can acquire "vested rights" to continue a project---or finish it after work begins---without being hindered by changes in zoning. Various legal theories can come into play.

A. Early Cases

One early case seemed to establish a kind of fundamental right to finish a project begun before a zoning ordinance was adopted. In *Ellis v. City of West University Place*, 134 S.W.2d 1038 (Tex. Comm'n App., 1940, opinion adopted), the city adopted a new zoning ordinance that zoned Mr. Ellis's lot residential. At the time of adoption, Mr. Ellis had a business building already under construction. The court found that the lot was "practically worthless" for residential use because of its location near existing businesses, a major thoroughfare and a drainage ditch. The court enjoined enforcement of the ordinance (as to that one lot). A later case, *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953), indicated that a project should be allowed to proceed if a permit for construction has been issued, the owner expended substantial funds and reliance by the owner was in good faith.

B. Regulatory Mistakes; Estoppel

Builders sometimes claim a right to finish a project once a permit is issued. When a permit is issued by mistake—for example, when a permit is issued, but it is not really allowed by the zoning ordinance---disputes can arise. It is hard for builders to win that kind of case. Twice in 2006, the Texas Supreme Court resolved cases resulting from mistakenly-issued city permits. In each case, a building was under construction, and in each case the city effectively invalided the permit. *See City*

of White Settlement v. Super Wash, Inc., 198 S.W.3d 770 (Tex. 2006), and *City of Dallas v. Vanesko*, 189 S.W.3d . 769 (Tex. 2006).

The *Super Wash* case turned on the doctrine of "equitable estoppel." The court held that the city was not estopped to enforce a zoning regulation (relating to street access). The *Vanesko* case came up as an appeal from a Zoning Board of Adjustment (ZBA). The ZBA denied a variance from a height regulation. The court found no "abuse of discretion" by the ZBA and upheld the denial.

C. "Grandfathering" prior non-conformities

Most zoning ordinances attempt to "grandfather" existing buildings and buildings under construction when zoning is first applied to the building (or when zoning regulations change). Usually, such uses will be allowed to continue, but there are typically restrictions on expansion, reconstruction and replacement. Sometimes, ordinances go further to require: (i) registration of non-conforming uses, and (ii) bringing property into compliance after a time period designed to allow the owner to amortize the value of the property.

For an example of non-conforming use analysis, *see* *Wende v. Board of Adjustment of the City of San Antonio*, 27 S.W.3d 162, 173 (Tex. App.--San Antonio 2000). In that case, a rock quarry lost its claim to nonconforming-use status following annexation by the city. Construction of the quarry started *after* petitions for the annexation were filed, when the owners were on notice that zoning regulations could apply.

D. "Freeze Law"

Before 1997, Texas had a novel statute that immunized projects from changes in regulations imposed after a project had begun. *See* former Sections 481.141--481.143, TEX. GOV'T CODE. The law was repealed--some say by mistake--in 1997. The Legislature re-adopted it in 1999, with modifications. It is now codified as Chapter 245, TEX. LOC. GOV'T CODE.

In general, Chapter 245 applies to "permits" and "projects." The law "freezes" land use regulations as of the time when "the original application for the permit is filed." If a series of permits is required for a project, Chapter 245 freezes the regulations that are in effect when "the original application for the first permit" is filed. Subsequent changes in the regulations would not apply to that project.

The term "permit" is defined broadly to include a "license, certificate, approval registration, consent permit or other form of authorization . . . ." The term "project" is also defined broadly:". . . an endeavor over which a regulatory agency exerts its jurisdiction or for which one or more permits

are required . . . .:" In *Hartsell v. Town of Talty*, 130 S.W.3d 325 (Tex. App. --Dallas 2004, *reh. den., clarified*), the court interpreted "project" to include not only subdivision and platting a residential subdivision, but also "vertical" construction (buildings) in the subdivisions. Therefore, the court ruled that filing applications for preliminary plats froze the ordinances in effect at that time, thereby blocking the application of a later-adopted building code.

The court in *City of San Antonio v. En Seguido, Ltd.*, 227 S.W.3d 237 (Tex.App.-San Antonio 2007) took a more cautious approach. That case involved an old subdivision plat, approved by the City in 1971. In 1999 and 2000, the then-owner of the property arranged for utilities and made some preliminary arrangements for development. En Seguido, Ltd. bought the land in 2004 and arranged sewer service (with a river authority). En Seguido and the City disagreed about whether the old 1971 land use regulations would apply, so En Seguido sued for a declaratory judgment. The court reasoned that the 1971 plat was a "permit," but it applied to a *project*, not the property. The court remanded for trial, to determine if the original project had changed or had been abandoned.

Chapter 245 includes an intricate list of "exemptions" describing types of regulations that are not subject to being frozen. In other words, a City can adopt or amend the exempt regulations, and the newly adopted or amended regulations can sometimes be applied to projects even if permit applications have been filed. *Example*: A new or amended uniform code (building, fire, electrical and plumbing code) can be applied to permits at least two years old.

Section 245.002(d) allows permit holders to take advantage of required plat notes, restrictive covenants and changes in laws rules, rules, regulations or ordinances that "enhance or protect" a project, "without forfeiting any rights." Apparently, this is intended to let permit holders take advantage of relaxed regulations (even while they escape the effect of new or tightened regulations).

In 2003 and 2005, the Legislature tightened Chapter 245 by listing certain types of regulations that can be frozen: (i) lot size, (ii) lot dimensions, (iii) lot coverage, (iv) building size, (v) density, (vi) timing of a project, (vii) landscaping, (viii) tree preservation, (ix) open space, (x) park dedication, and (xi) “property classification.” Most of these---and especially the last one---appear to indicate a legislative intent to prevent “downzoning” a project after the first permit application is filed.