ZONING: A REAL ESTATE PROFESSIONAL'S GUIDE

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I. INTRODUCTION

A. Scope of Article

This article is intended as an overview of Texas municipal zoning law for a real estate professional. Issues relating to subdivision plats, environmental matters, Americans with Disabilities Act, utility districts, county land use regulation or other quasi-land use restrictions will not be addressed.

B. Reference Materials

The bible of Texas Zoning Law is Texas Municipal Zoning Law by Lexis Law Publishing, (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 updated by James L. Dougherty, Jr. of Houston. Mixon now includes an Appendix on Texas Subdivision Platting law by the author.

II. ZONING'S PLACE IN THE LAND USE SCHEME

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. A 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 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 and Stafford) recently adopted zoning ordinances, Houston looks to remain free of traditional comprehensive zoning.

C. Zoning Distinguished From Other Land Use Areas

Real estate professionals deal with three primary land use issues: zoning, platting, and deed restrictions. Each affects real property, often with similar practical results. However, each has a separate defined law applicable to it. The legal basis for each is distinct and independent. There is no overlapping of applicable statutes or case law. Understanding these distinctions will keep the real estate professional from making critical mistakes in misapplication of the law across defined legal boundaries.

1. Deed Restrictions

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 nonprofit 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 cities. Residential deed restrictions are actively enforced in the City of Houston. TEX. LOC. GOV'T CODE ANN. §§ 212.131 *et seq*. (Vernon Supp. 2004).

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 nonprofit 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 restriction enforcement actions 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 actively 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. The scope of deed restrictions enforceable by the City of Houston has been expanded by recent legislative action to include architectural, landscaping and parking issues, but the city has not elected to utilize these rights. The City of Houston only enforces residential restrictions in the following areas:

- Use
- Setback
- Lot size
- Size, type and number of buildings

Section 202.004(a) of the Texas Property Code gives a property owners association's enforcement actions a presumption of validity similar to that accorded to a municipality 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.

Recently, city enforcement of deed restrictions was added to the list of governmental functions, just like zoning. As a result, a city is not subject to equitable defenses to the enforcement of deed restrictions: waiver, estoppel, change in conditions, and substantial performance. Those equitable defenses have been the staple of any attorney defending a deed restriction enforcement action, and without them, there are few defenses remaining. Thus, when a city enforces deed restrictions, it is vested with much the same power and protection as a city enforcing zoning.

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.

2. Subdivision Platting

a. Subdivision Platting Defined.

Platting real property is part of the development process. It is the governmental approval process

for the division of real property. Unless exempted, every division of real property requires approval of a subdivision plat by the appropriate government authority (either municipal or county). TEX. LOC. GOV'T CODE ANN chs. 212, 232 (Vernon 1999 & Supp. 2004) (chapter 212 covers cities and chapter 232 covers counties). The focus of the platting process is infrastructure, not use.

b. Comparison of Zoning and Platting.

Helpful overviews of subdivision platting law and its difference from zoning law are contained in Lacy v. Hoff, 633 S.W.2d 605 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) and City of Round Rock v. Smith, 687 S.W.2d 300 (Tex. 1985). Subdivision controls are based on the land registration system. Registration is a *privilege* that local governmental entities have the power to grant or withhold based upon the compliance with reasonable conditions. The regulatory scheme depends on the approval and recordation of the plat. Lacy, 633 S.W.2d at 607–08. The regulation of subdivision development is based on legitimate government interest in promoting orderly development, insuring that subdivisions are constructed safely, and protecting future owners of lots within a subdivision from inadequate police and fire protection and inadequate drainage and unsanitary conditions. Smith, 687 S.W.2d at 302.

Platting is administered by a Planning Commission, which is often combined with the Zoning Commission. In many cities, the Planning Commission is the final authority on platting, whereas the City Council is always the final decision maker on rezonings.

Platting law starts with Texas Local Government Code chapters 212 (covering cities and originally adopted as Art. 974a in 1927) and 232 (covering counties) which authorize cities and counties to regulate the division of real property. The Local Government Code is broad, but without more can be relied upon by a local government as a basis to review and approve plats (as Houston did until 1982). Most cities have a subdivision ordinance (sometimes part of a comprehensive development code), which provides detailed platting regulation and procedures. Often, the local government will have uncodified rules and regulations adopted by the governing body establishing even more detailed requirements.

Subdivision platting law is significantly different from zoning law. The rights of the government in the area of subdivision platting are significantly limited when reviewing a subdivision plat, but when considering a zoning change a city has broad discretion. Platting relates to infrastructure and thus is engineering based, while zoning is use based and thus focuses on the interrelationships of properties. Platting focuses on the tract in question and whether the tract meets definable engineering standards, while zoning looks to an area of which the tract is one part and applies less defined standards. Platting is engineering, zoning is political.

Like zoning, platting requirements are enforced by the government.

There has been no application of zoning case law to subdivision platting, except in the area of such constitutional law concepts as due process and takings.

3. Comprehensive Planning

a. Comprehensive Planning Defined.

Comprehensive planning is the long term planning process by a city relating to its future development. A Comprehensive Plan is a long term vision of the city's future and typically outlines the goals and objectives of the city, as well as the implementation task. A Comprehensive Plan is not a

regulatory document, but a long term planning guide implemented in the city's zoning and subdivision platting ordinances, as well as other city development ordinances.

b. Relationship of Comprehensive Planning and Zoning.

Planning sets goals and objectives for the future development of a city. Zoning implements those goals and objectives in a regulatory scheme. A Comprehensive Plan is not a regulation, but a guide. Accordingly, such comprehensive plans are merely advisory and not binding on the city. See Fernandez v. City of San Antonio, 158 S.W.3d 532, 534 (Tex. App.—San Antonio 2004, no pet.) (noting that a city's master plan was not binding on the city because the master plan clearly stated that it was "merely a guide for rezoning requests rather than a mandatory restriction on the City's authority to regulate land use").

Texas adopted variations of the Standard Zoning Enabling Act, but did not adopt the standard act related to comprehensive planning. Until the adoption of Texas Local Government Code chapter 213 in 1997, no statutory authority existed for municipal comprehensive planning.

Chapter 213 mandates that a Comprehensive Plan contain a statement that it "shall not constitute zoning regulations or establish zoning district boundaries."

Comprehensive planning documents, including a Comprehensive Plan, where adopted by resolution or ordinance, should not be confused with zoning (or platting) regulation. Specifically, they should be used only as a guide to future legislative actions, not to establish limits on specific development projects.

III. CONSTITUTIONAL LIMITATIONS

Zoning is an application of the police power of the government to protect health, safety, morals and public welfare. In the enactment and enforcement of zoning, the government must respect private property and personal rights of owners. Several fundamental constitutional rights apply to zoning: procedural due process, substantive due process, and no taking of property without compensation. An understanding of these overarching concepts is important to provide an appreciation of the constitutional landscape which molds zoning decisions and cases.

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. chs. 211, 212 (Vernon 1999 & Supp. 2004). The Texas Open Meetings Act requires that all City Council meetings be posted in advance and, usually, conducted in public. See TEX. GOV'T CODE ANN., ch. 551 (Vernon 2004). 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) (noting that a rational basis will satisfy due process requirements); see also Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036 (5th Cir. 1998); 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."); Smith v. Davis, 426 S.W.2d 827, 831 (Tex. 1968) (stating that a mere difference of opinion, where reasonable minds could differ, not sufficient basis for striking down legislation as unconstitutional).

C. Takings and Damagings

Due process clauses prohibit the "taking" of private property without due process of law and, in some cases, compensation. U.S. CONST. amends. V, XIV; Sinclair Pipe Line Co. v. State, 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. The Texas Constitution also prohibits the deprivation of property without due process. Tex. Const. art I, § 19; see also City of Harlingen v. Obra Homes, Inc., No. 13-02-268-CV, 2005 WL 74121 (Tex. App.—Corpus Christi Jan. 13, 2005, no pet.) (mem. op.) (noting that article 1 section 19 does not support a private right of action for money damages, "[i]t only supports claims for equitable relief").

1. State inverse condemnation theory

In the 1970s and 1980s, 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, but without a physical taking. See Westgate, Ltd. v. State, 843 S.W.2d 448 (Tex. 1992); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (preservation of a scenic tract by delaying and denying permits for development). The ten-year limitations period found in section 16.026 of Texas Civil Practices and Remedies Code applies to an inverse condemnation action, and both regulatory and physical takings. Grunwald v. City of Castle Hills, 100 S.W.3d 350, 353 (Tex. App.—San Antonio 2003, no pet.); Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625, 631 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). However the two-year statute of limitations of Texas Civil Practice and Remedies Code sections 16.003(a) and 16.026(a) apply if the underlying cause of action is for damages to property, not taking. Grunwald, 100 S.W.3d at 353–54; Trail Enters., 957 S.W.2d at 631.

The Texas Supreme Court has clarified when zoning might constitute "inverse condemnation" or a "taking." Mayhew, 964 S.W.2d at 922 (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, Sheffield Development Co. v. City of Glenn Heights,140 S.W.3d 660 (Tex. 2004.) (down-zoning was not a regulatory taking because it did not unreasonably interfere with owner's rights) and Champion Builders v. City of Terrell Hills, 70 S.W.3d 221 (Tex. App.—San Antonio 2001, no pet.) (revoking a 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), *rev'd on other grounds*, 144 S.W.3d 417 (Tex. 2004). Additionally, in Obra, the complainants had a contract to purchase land but the city's refusal to rezone the land caused the contract to expire. Obra, 2005 WL 74121, at *1–*2. The court determined that the complainants actually had an option contract, which only gives the "right to choose to purchase the land in the future" instead of a right in the land. Id. at *5–*8. Accordingly, since there was no right in the land, the court determined that the city's zoning decision did not effect a taking. Id. at *8.

In a big win for cities, the Texas Supreme Court in Sheffield upheld a significant down-zoning after a fifteen-month moratorium against takings claims. The developer conducted significant due diligence before buying a 184 acre development tract, including meeting with city officials to determine if any change in the city's development regulatory scheme was contemplated, and was told no changes were planned. The tract was zoned consistent with the developer's desired project. Almost immediately after the developer purchased the property, the city established a moratorium on development applicable to

twelve zoning districts, including the developer's tract. After the moratorium was extended to a total of fifteen months, the city down-zoned the property, decreasing allowed density by increasing minimum lot size from 6,500 square feet to 12,000 square feet, such that the land value dropped fifty percent. The developer sued based on state takings theories for a regulatory taking.

The court fully reviewed federal regulatory taking jurisprudence (which it stated as appropriate guidance for a state constitution takings claim), particularly the U.S. Supreme Court decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). The court applied the Penn Central issues to consider in a regulatory taking case:

(1) the economic impact of the regulation on the owner;
(2) how the regulation has interfered with "distinct investment-backed expectations"; and
(3) the character of the governmental action.

The Penn Central test is applied by the court as a question of law, not a question of fact, but only after a determination that the government action substantially advanced a legitimate government interest.

Applying these factors, the Supreme Court first held that a down-zoning to reduce development density is legitimate to deal with the city's desire to reduce its ultimate population potential. Then, the Court applied the three Penn Central factors as follows:

- **Economic impact** – The down-zoning did not take all economic value of the property (which would result in a taking), but only fifty percent. Furthermore, that value was four times the developer's purchase price. Although the down-zoning significantly interfered with the developer's reasonable expectations when it invested funds in the land and related development, land development is inherently speculative and diminution in value is not the principal element to be considered in takings analysis.
- **Investment-backed expectation** – The investment backing of the developer's expectations at the time of the down-zoning was simply the lot purchase price and due diligence expenses, which was a small fraction of the investment that would be required for full development and therefore, "minimal."
- **Character of the government action** – The rezoning was general, affecting numerous tracts, not just the developer's and thus not like an exaction imposed on a single developer. Although clearly troubled by the city's unseemly conduct during the developer's due diligence, the Court held that the risk of rezoning is to be expected by a developer, particularly in growing communities.

The Court specifically addressed the city's misconduct, citing evidence that the city "took unfair advantage" of the developer including slow playing decisions with a strategy to extract concessions. Nonetheless, the Court was motivated by the legitimate public policy reasons supporting the rezoning. This decision is particularly powerful considering the difference from the refusal to up-zone in the court's previous significant zoning decision in Mayhew where the factual circumstances were much stronger for the city. Despite a much more sympathetic developer with strong facts, the court stated "we think the city's zoning decisions, apart from the faulty way they were reached, were not materially different from zoning decisions made by cities every day. On balance, we conclude that the rezoning was not a taking."

Finally, the court ruled that a fifteen month moratorium is valid and not a taking, noting that the rezoning process is slow and that the moratorium advanced a legitimate government interest.

Sheffield took the wind out of developers' sails, who thought the Texas Supreme Court may be more sympathetic in a down-zoning case than in the denied up-zoning case presented in Mayhew. Even with improper conduct by the city, including an unnecessarily lengthy moratorium, the public policy

considerations supporting the zoning process overcame bad behavior by the city during that process. Developers must carefully consider challenging zoning decisions, whether denied up-zoning or surprise down-zonings under the current state of Texas law.

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 Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992); First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Federal doctrine generally requires that a plaintiff prove that the challenged regulation prevents all economically viable uses of the land. See City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036 (5th Cir. 1998).

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. Essential nexus test.

Under federal case law, an "essential nexus" must exist between the exaction and a legitimate governmental purpose. In Nollan v. California Coastal Commission, 483 U.S. 825, 837 (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. Rough proportionality test.

A 1994 Supreme Court case held 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); Del Monte Dunes, 526 U.S. 687 (1999).

d. Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620 (Tex. 2004).

The development regulations in Flower Mound require any developer to upgrade roads adjacent to a new development to then current construction standards. In Stafford Estates, the developer was required to replace an adequate asphalt road in good repair with a new concrete road with the same traffic capacity. In a rare win for landowners, the Texas Supreme Court upheld a $425,000 judgment in favor of the developer that this off-site requirement constitutes a taking (approximately eighty-eight percent of the cost of the new road, but denying any attorneys' fees).

First, the court permitted the developer to sue after the fact, rather than adopting the city's argument that if the developer received the benefit of city approvals and complied with those approvals, it should be barred from later objecting. Unless there is a specific limitation in state law, the court held there was no public policy to support this argument.

Second, the court applied the two part test in the U.S. Supreme Court decisions in Dolan and Nollan, and the similar requirements of the Texas Supreme Court's decision in Turtle Rock. These cases deal with government "exactions", which are any requirement on a developer to do or provide something as a condition to receiving government development approval. The well-settled Dolan two-pronged test was restated and adopted by the court as follows:

> "Conditioning governmental approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate interest and (2) is roughly proportional to the projected impact of the proposed development."

After a thorough review of federal takings jurisprudence, the court rejected several arguments by the city that would limit the application of Dolan:

(1) Dolan is not limited to required dedications (i.e., streets, easements, parks and the like out of the property) and applies to off-site improvement (such as the new concrete road in this case and contributions to a park land fund in Turtle Rock).

(2) Dolan applies to both adjudicative and legislative decisions, depending on the circumstances of the particular case, rejecting a proposed "bright-line adjudicative/legislative distinction" asserted by the city.

(3) The burden of proof is on the government, which must make an individualized determination that the exaction is related both in nature and extent to the impact of the proposed development.

Applying these rules, the court held that the new road met the essential nexus requirement in that there is strong public policy to require safe and adequate traffic within a city. However, it clearly failed the rough proportionality test since the city did not make an individualized determination that the new concrete road was required based on the impact of the new development, and the new concrete road had the same capacity as the existing asphalt road.

Third, the Texas Supreme Court rejected the developer's claim for attorneys' fees based on a federal civil rights claim (42 U.S.C. § 1988) while also recovering its state law takings claim. Since the state law takings claim was successful, the developer received a complete remedy, therefore there could not be a basis for a federal claim, and thus no right to recover attorneys' fees under that nonexistent claim.

Stafford Estates will require cities to analytically approach exactions or be subject to challenge. Developers may challenge existing development standards adopted with the analysis required in Stafford Estates. Cities are notoriously slow to move in changing regulations and there should continue to be the opportunity to utilize Stafford Estates for a number of years until cities "clean up" their development regulations. The big stick in Stafford Estates (and Dolan) is the unique requirement that the government has the burden of proof, contrary to most other areas of land use law.

The Texas legislature, in 2005, basically codified the Dolan standards at Texas Local Government Code section 212.904. When a city conditions approval of a property development project on the developer agreeing to bear a portion of municipal infrastructure improvements, the developer's portion cannot exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development, as determined by a professional engineer employed by the city. A developer can appeal the engineer's determination and if the developer prevails, then it is entitled to recover costs, attorney's fees, and expert witness fees. Act of May 30, 2005, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. ch. 982 (Vernon) (to be codified at TEX. LOC. GOV'T CODE ANN. § 212.904).

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. Del Monte Dunes, 526 U.S. at 687. 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 rezoning before suing for relief under the due process clause. In Horton v. City of Smithville, 117 Fed. Appx. 345, 347 (5th Cir. 2004), the court, raising the issue of ripeness *sua sponte*, determined the appellant's takings claims were not ripe because a decision on whether a particular use of property complies with zoning ordinances can only be made by the city council, and since the appellants failed to obtain a city council hearing or determination, no final determination had yet been reached. In Mayhew, 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 City of Houston v. Kolb, 982 S.W.2d 949 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); Thomas v. City of San Marcos, 477 S.W.2d 322 (Tex. Civ. App.—Austin 1972, no writ). In Levatte v. City of Wichita Falls, 144 S.W.3d 218 (Tex. App.—Fort Worth 2004, no pet.), the court held that in order for a Fifth Amendment takings claim to become ripe for adjudication, the plaintiff is required to seek compensation through procedures that the state has provided unless those procedures are either unavailable or inadequate. The rationale behind this requirement is that a property owner must utilize the procedures for obtaining compensation prior to bringing any federal takings action because the state's action is not complete until the state fails to provide an adequate post-deprivation remedy. See Phillip K. Hartmann & Stephen J. Smith, 42 U.S.C. §1983: First Stop—State Court (Sometimes), 35 URB LAW. 719, 720 (2003).

IV. ZONING AUTHORITY

Zoning is a creature of statute, particularly Texas Local Government Code chapter 211, known as the Texas Zoning Enabling Act (the "Enabling Act"). There are special zoning statutes, almost all contained in the Local Government Code. The Enabling Act sets forth a special administrative law scheme for the enactment, interpretation and enforcement of zoning. The Zoning Commission and the Board of Adjustment are special administrative bodies with delegated governmental powers in the zoning arena. Understanding the statutory zoning scheme and the relationship of the various governmental bodies is critical to dealing with zoning issues effectively.

A. Power to Zone

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 & Supp. 2004).

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, 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. 2004).

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).

B. Zoning Players

1. Zoning Commission

The first government body a real estate professional or their client think of is usually the 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).

A home rule city must appoint a Zoning Commission to avail itself of the powers conferred by the Enabling Act. See § 211.007; 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. § 211.007.

General law cities may exercise zoning power without a Zoning Commission through their city council. § 211.007. 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, 774 S.W.2d at 297.

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. TEX. LOC. GOV'T. CODE ANN. § 211.007 (Vernon 1999).

2. City Council

The City Council is the final decisionmaker on all zoning and rezoning changes. Only interpretations, variances, special exceptions and other matters specifically delegated by the City Council to the Board of Adjustment do not end up on the city council agenda. It is the critical decision maker and is not bound by the recommendation of the Zoning Commission.

However, individual City Council members acting on a zoning request are motivated by legislative concerns and are entitled to absolute immunity from personal liability. Mayhew, 774 S.W.2d at 298. See also Ballantyne v. Champion Builders, 144 S.W.3d 417, 424 (Tex. 2004) (stating that officials are immune as a matter of law when each of the 3 elements is established: (1) members were acting within the scope of their authority (2) in performing their discretionary duties in (3) good faith). Additionally, council members may not be compelled to testify in an action challenging a zoning ordinance. Mayhew at 298-299; In re de la Garza, 92 S.W.3d 416 (Tex. 2001) (per curiam) (applying the holding in In re Perry, 60 S.W.3d 857 (Tex. 2001), which discusses the policy decisions behind legislative immunity).

3. City Staff

The first stop for all zoning issues is the City Staff, usually the Planning Department. In smaller cities, the building inspector or city manager often serve as the zoning administrator. Many cities have a zoning administrator educated as an urban planner. The City Staff handles day to day administration of the zoning ordinance, including interpretations, consultation with property owners and developers, acceptance and administration of applications, interaction with the zoning bodies and City Attorney, and enforcement.

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, 211.009 (Vernon 1999).

Judicial expansion of the ZBA's power has been limited to allowing a ZBA to supervise the phasing out of nonconforming 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). Some cities delegate enforcement to its ZBA. See MONT BELVIEU, TEX., ORDINANCES § 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 five members.
- Members serve two year terms, with vacancies filled for the remaining term.
- Each member of the governing body may be authorized to appoint one 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 seventy-five percent of the ZBA members (four out of the typical five 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 are public and must be filed immediately.
- 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 1.18 million 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 & Supp. 2004). This was originally adopted in 1993 to facilitate the zoning of Houston, then anticipated to be implemented in 1994.

b. Appeal of Staff Decision/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 made 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 [1st Dist.] 2001, no pet.).
- The administrative official whose decision is appealed must immediately forward the papers constituting a record of the action on appeal to the ZBA.
- 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." W. 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). "A variance allows a property owner to use land in a manner forbidden by the zoning ordinance." Ferris v. City of Austin, 150 S.W.3d 514, 517 n.2 (Tex. App.—Austin 2004, no pet.) (citing W. Tex. Water Refiners, 915 S.W.2d at 627). Only variance from the terms (i.e., setback, frontage, height, lot size, density, parking, yard restrictions) of a zoning ordinance are allowed, not use restrictions. Id.

Economic/financial hardship alone is not sufficient reason to grant a variance. Id.; City of South Padre Island v. Cantu, 52 S.W.3d 287, 290 (Tex. App.—Corpus Christi 2001, no pet.); Southland Addition Homeowner's Ass'n v. Bd of Adjustment, 710 S.W.2d 194, 195 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). A hardship may not be self imposed. Cantu, 52 S.W.3d at 290. The hardship must relate to and be unique to the property for which the variance is sought, not common to other property. Id. Medical conditions of the owner are personal and do not support a variance. City of Alamo Heights v. Boyar, 158 S.W.3d 545, 553 (Tex. App.—San Antonio 2005, no pet.).

Whether a hardship exists is a question of fact to be determined by the ZBA. Ferris, 150 S.W.3d at 521. On appeal, the issue is not whether there was a hardship, but whether the trial court, after reviewing all evidence could make a holding as a matter of law that there was substantive and probative evidence showing that literal enforcement would result in unnecessary and unique hardship. Id.

However, reliance on a mistakenly issued permit was considered the basis for a hardship in City of Dallas v. Vanesko, 127 S.W.3d 220, 227 (Tex. App.—Dallas 2003, pet. granted). In Texas, variances have generally been restricted by case law to height, area and setback issues and may not modify use regulations. City of Amarillo v. Stapf, 129 Tex. 81, 101 S.W.2d 229, 234 (1937). 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 an unusual property shape) make it an unnecessary 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.

An example of a variance granted for violation of a building setback line is the case of Board of Adjustment v. McBride, 676 S.W.2d 705 (Tex. 1984). The property owner was building a home in violation of the setback requirement in the city's zoning ordinance. A twenty-five foot setback line was required by the ordinance but similar lots had ten foot setbacks. The owner met and conferred with city employees and prepared a site plan that he believed met the city's requirements. The site plan submitted

showed a fifteen foot setback line. A building permit was issued and the house was inspected by the city. When the owner had spent $75,000 and the house was 75%-80% complete, the owner was told that he must stop construction because the house encroached into the twenty-five foot setback. The ZBA granted a variance, concluding that "owing to the special circumstances and conditions, a literal enforcement of the provisions of the ordinance would result in an unnecessary hardship on McBride [the property owner] and that a variance to the setback lines would not be contrary to the public interest." Id. at 707. The court held that it was not uncommon for variances to setback lines to be granted and that removing the part of the home that encroached would render the house unsightly, would serve no useful function, and would not serve any of the stated purposes of the Corpus Christi Zoning Ordinance. Id. McBride was followed in Cantu, 52 S.W.3d at 291 and was extensively discussed in Vanesko.

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 seventy-five percent (typically four out of five) 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. Id.

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 Texas Local Government Code section 211.011. See Tellez v. City of Socorro, 164 S.W.3d 823, 829–30 (Tex. App.—El Paso 2005, no pet.) (noting that "the Local Government Code is unique in providing for review of the administrative determination of a quasi-judicial body such as a [ZBA] by a trial court . . . . [and] that the legislature has limited the review available" with section 211.011, which governs judicial review of a ZBA decision).

- 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 ten 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 ten 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.) (discussing the contestant's right to present evidence);
- 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 ZBA, as fact finder, could have reached only one decision, but abused its discretion in reaching the opposite conclusion. See Cantu, 52 S.W.3d at 291 (citing City of San Angelo v. Boehme Bakery, 144 Tex. 281, 190 S.W.2d 67, 71 (Tex. 1945)); Bd. of Adjustment v. Solar, ___ S.W.3d ___, No. 14-04-00419-CV, 2005 WL 1177573 (Tex. App.—Houston [14th Dist.] May 19, 2005, no pet. h.) (not yet released for publication) (finding an unnecessary hardship in the loss of right

to recreate, noting that the ZBA offered no reasons for the variance denial, and concluding that the ZBA abused its discretion in denying a variance for a swimming pool because "if the undisputed evidence shows that granting a variance would not adversely affect other interests and that failure to do so would result in unnecessary hardship, a board of adjustment abuses its discretion if it fails to grant a variance."); and

- The court may also remand the case to the ZBA for further actions taking into consideration the court's judgment. Wende v. Bd. of Adjustment, 27 S.W.3d 162, 173 (Tex. App.—San Antonio 2000), rev'd on other grounds, 92 S.W.3d 424 (Tex. 2002).

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, 479-83, 486-90 (5th Cir. 1986) (nine judge majority decision held the ZBA's decision on a variance was quasi-legislative while a five judge dissent claimed the action was quasi-judicial); Bd. of Adjustment v. Flores, 860 S.W.2d 622, 625 (Tex. App.—Corpus Christi 1993, writ denied); Bd. of Adjustment v. Winkles, 832 S.W.2d 803, 805 (Tex. App.—Dallas 1992, writ denied) (concluding that ZBA actions are quasi-judicial). Despite the Fifth Circuit position, most Texas appellate courts agree that the ZBA is quasi-judicial. See Galveston Historical Found. v. Zoning Bd. of Adjustment, 17 S.W.3d 414, 416 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

C. Zoning Procedures

The process for initial adoption of a zoning ordinance, or an amendment to an existing ordinance, involves a detailed statutory process.

1. Adoption/Amendment of Zoning Ordinances

Procedural requirements for adopting an initial zoning ordinance or amending an existing zoning ordinance are set forth in Texas Local Government Code sections 211.006 and 211.007 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 two hundred 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 fifteen 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 two-thirds 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 three-fourths 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 percent of the owners of the affected property or property located within two hundred feet of the affected property is received. In that event, an affirmative vote of at least three-fourths of all members of the City Council is required. In addition, general law cities may not adopt a zoning ordinance or amend a current ordinance until at least thirty days after the date of notice to affected property owners; and

(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.

D. 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 – Texas Local Government Code §§ 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. 2004), and in 2005, the Legislature amended these sections. These limits apply to moratoria imposed on property development (construction, reconstruction, alteration, or improvement) affecting residential property (zoned "or otherwise authorized" for single family or multi-family use) and commercial property (excluding property zoned for heavy industrial and quarry use) or the subdivision or replatting of a subdivision of residential or commercial property. Act of May 30, 2005, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. ch. 1321 (Vernon) (to be codified at Tex. Loc. Gov't Code Ann. §§ 212.131–.133, 212.135–.137, 212.1351–1352, 212.1361–1362). A moratorium does not affect vested rights under Texas Local Government Code chapter 245 or common law. Id. 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";
- Commercial moratoria not based on a shortage of essential public facilities is limited to situations where existing commercial development ordinances or regulations are inadequate to prevent the new development from being detrimental to the public health, safety, or welfare;
- Moratorium on residential property automatically expires after 120 days from adoption, unless extended after a public hearing and specified findings;
- Moratorium on commercial property not based on shortage of essential public facilities expire 90 days after their adoption but can be extended after a public hearing and specific findings to a maximum of 180 days;
- A two-year "blackout" period on subsequent commercial moratoria; and
- 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.

Id.

2. Municipal Authority to Enforce Deed Restrictions – Texas Local Government Code §§ 212.151 *et seq.*

In 2001, the legislature moved former Texas Local Government Code chapter 230 to the Subdivision Act as sections 212.131 *et seq.* (thus conflicting with the numbering of the foregoing moratorium provision), but in 2003 the legislature renumbered the to sections 212.151 to 212.157. H.B. 3506, 78th Leg., R.S., 2003 Tex. Sess. Law Serv. ch. 1275 (Vernon)

A city with (i) an ordinance requiring uniform application and enforcement of section 211.151 *et seq.*, and (ii) either (a) no zoning, or (b) over 1.5 million in 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. 2004).

The legislature added a provision stipulating that deed restriction enforcement is a governmental function. § 212.157. This addition is significant because cities acting in a governmental function are not typically subject to equitable defenses such as laches, waiver, or estoppel. Those types of defenses are the most typical 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 212.151 *et seq*. has, effectively, zoned itself into two 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, commercial activities, keeping of animals, use of fire, nuisance activities, vehicle storage, parking, architectural regulations, fences, landscaping, garbage disposal and noise levels, 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 case law 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 restricted property. § 212.155; see HOUSTON, TEX., CODE §§ 10.551 *et seq*. In order to help city staff discover the existence of deed restrictions, the application 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 – Texas Local Government Code 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 – Texas Local Government Code chapter 214

The section was substantially reorganized in 2001 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 the new chapter 214, these provisions provide cities with 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 nonprofit organization with a 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 TEX. LOC. GOV'T CODE ANN. § 54.044 (Vernon Supp. 2004) (added in 2001) for noncriminal 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 must be perfected within thirty-one days (similar to the ten day 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 – Texas Local Government Code 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 – Texas Local Government Code 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. By its charter or ordinance, a home rule city may license, regulate, control or prohibit the erection of signs or billboards within its territorial limits and extra-territorial jurisdiction, subject to the specific provisions of section 216.

7. Municipal Regulation of Nuisances and Disorderly Conduct – Texas Local Government Code 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 – Texas Local Government Code 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 Sommerville. 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 – Texas Local Government Code chapter 233

The section was substantially reorganized in 2001 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 2.5 million (i.e., Galveston County) may require the repair or removal of bulkheads or other shoreline protection structures it determines to be dangerous (former chapter 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 chapter 233). However, setback lines adopted by a city to be effective within that city's extraterritorial jurisdiction will supersede those adopted by a county.

10. County Regulation of Businesses and Occupations – Texas Local Government Code 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 twelve months. The county may sue for a civil penalty (limited to $50 per day initially, but increasing to $1,000 per day after 30 days) (formerly chapter 238). Counties may also regulate slaughterhouses (former section 240.061 *et seq*.)

11. Miscellaneous Regulatory Authority of Counties – Texas Local Government Code 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 chapter 234) also authorizes county regulations 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 – Texas Local Government Code 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 – Texas Local Government Code 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 general 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 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 the Texas Revised Civil Statutes articles 8801 *et seq*. 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. Bd. of Adjustment, 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 – Texas Local Government Code chapter 244

Correctional & Rehabilitation Facilities:

This chapter was revised to require public and specific notice posting to the county and city for any correctional or rehabilitation facility prior to construction or operation and to provide an opportunity for local objection. The requirements apply to facilities to be located within one thousand feet (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 sixty 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:

This section provides a notice and objection procedure for shelters which follows the criteria described above. This subchapter only applies to cities with a population of 1.6 million or more. Further, shelters are prohibited within one thousand feet of another shelter or a primary or secondary school without city consent.

15. Construction of Certain Telecommunications Facilities – Texas Local Government Code chapter 246

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 Public Utility Commission ("PUC") has enforcement authority.

16. Miscellaneous Regulatory Authority of Municipalities and Counties – Texas Local Government Code 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.

City or county regulation of amateur antennas is limited as follows:

- 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.
- Any regulation of placement, screening, or height, based on health, safety, or aesthetic conditions must:
    - reasonably accommodate amateur communications; and
    - represent the minimal practicable regulation to accomplish the municipality's or county's legitimate purpose.
- Action to protect or preserve a historical or architectural district is not affected.

17. Tax Increment Financing Act Zoning – Texas Tax Code section 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 school district and county if they participate; and
- remaining directors are appointed by the City Council.

E. Validation Statutes

Historically, each legislature routinely passed "validation statutes," which cured all procedural defects, but not 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). Preemption of state statutes is cured by a validation statute. W. End Pink, Ltd. v. City of Irving, 22 S.W.3d 5 (Tex. App.—Dallas 1999, pet. 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 Supp. 2004). 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 (3rd ed.).

All manner of development-related actions by a city will be "validated" on the third anniversary, including zoning and platting actions.

The permanent validation statute is to be liberally construed to cure all nonconstitutional defects in adopted zoning ordinances. Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249, 258 (Tex. App.—Fort Worth 2004, pet. granted). An alleged failure to comply with the requirements of chapter 211 is validated. Id. However, an illegal delegation of authority can not be validated, as such action is void. Id.

F. 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. 2004). Municipalities have broad authority to seek enforcement of zoning ordinances under chapter 54 of the Texas Local Government Code. To enjoin a violation, proof of injury 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. Sw. 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. Persons, 790 S.W.2d at 868. The two year statute of limitations under Texas Civil Practice and Remedies Code sections 16.003(a) and 16.026(a) apply since the underlying principle is that the adjacent property is being damaged by the failure to enforce the zoning ordinance. Grunwald v. City of Castle Hills, 100 S.W.3d 350, 353 (Tex. App.—San Antonio 2003, no pet.). 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.] June 27, 1996, no writ) (not designated for publication). However, in Horton v. City of Smithville, 117 Fed. Appx. 345 (5th Cir. 2004) (not selected for publication), individual citizens raised due process claims against a city's enforcement of its zoning ordinances but the court determined that the true interest the individual citizens were asserting was the right to require the city to enforce its zoning ordinances they way that the individual citizens believed they should be enforced. Id. at 347. The Fifth Circuit determined "that discretionary statutes do not give rise to constitutionally-protected property interests [, and] . . . . '[t]he due process clause does not require a state to implement its own law correctly [, nor does] the Constitution . . . insist that a local government be right.'" Id. at 347–48 (quoting FM Props. Operating Co. v. City of Austin, 93 F.3d 167, 174 (5th Cir. 1996)).

V. CHALLENGING ZONING

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); Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex. App.—Dallas 1989, writ denied); Frost v. City of Hillshire Vill., 403 S.W.2d 836 (Tex. Civ. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.); 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.); see also Shelton, 780 F.2d at 479–83. 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. City of Brookside Vill. v. Comeau, 633 S.W.2d 790, 793 (Tex. 1982), cert. denied, 459 U.S. 1087 (1982); Hunt,

462 S.W.2d at 539; see also 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. City of Round Rock v. Smith, 687 S.W.2d 300, 303 (Tex. 1985); Ellis v. City of W. Univ. Place, 175 S.W.2d 396, 398 (Tex. 1943). 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 2005). The Texas Tort Claims Act limits the exposure of a city to monetary damages under certain circumstances. City enforcement of deed restrictions was recently added to the list of governmental functions.

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, 774 S.W.2d at 293–94. 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.; Bolton v. Sparks, 362 S.W.2d 946, 950 (Tex. 1962); Appolo Dev., Inc. v. City of Garland, 476 S.W.2d 365 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). 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 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 is to promote the welfare of the community rather than to protect 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). 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 ref'd 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 ref'd 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. S. Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229, 238 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). However, this statement does not apply to Tax Increment Zoning. See TEX. TAX CODE ANN. § 311.010(c) (Vernon 2002). 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 percent (20%) of adjacent property owners to protest a replat in a residential subdivision. If twenty percent (20%) of neighboring owners objected in the required manner, then the written approval of sixty-six and two-thirds percent (66-2/3%) of affected owners was required. The effect of this provision was to allow a well organized opposition of at least thirty-four percent (34%) 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).

7. Official Immunity

The concept of official immunity has received ever broadening application to shield public officials from individual immunity. In Ballantyne v. Champion Builders, 144 S.W.3d 417 (Tex. 2004), the Texas Supreme Court provides a roadmap to the history and scope of official immunity in Texas, a fifty year old doctrine based on well settled public policy to (i) encourage confident decisionmaking by public officials without intimidation, even if errors are sure to happen, and (ii) ensure availability of capable candidates for public service, by eliminating most individual liability. The court held that ZBA members are entitled to official immunity if the following three issues are satisfied:

> Scope of authority – The action must fall within state law authorizing action by the official. Whether the ZBA made an incorrect decision or had never previously revoked the permit is irrelevant.
>
> Discretionary not ministerial action – The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment.
>
> Subjective good faith – If a reasonably prudent official under the same or similar circumstances would have believed their conduct was justified based on the information available, then this subjective good faith supports official immunity. Neither negligence nor actual motivation is relevant. They need not be correct, only justifiable. Specifically, the personal animus of the Board members in Ballantyne to apartment residents established on the record did not preclude a good faith holding, and in fact was irrelevant. The court analogized to U.S. Supreme Court decisions interpreting qualified immunity for federal officials.

This analysis clearly applies to all manner of city officials acting on development issues, including a Zoning and Planning Commission.

B. Validity of Specific Zoning Actions

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 City of Brookside Vill. v. Comeau, 633 S.W.2d 790 (Tex. 1982); City of Bellaire v. Lamkin, 317 S.W.2d 43 (Tex. 1958); Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex. App.—1989, writ denied); Gullo v. City of W. Univ. Place, 214 S.W.2d 851 (Tex. Civ. App.—Galveston 1948, writ dism'd w.o.j.).

Texas Local Government Code section 51.003 enacts a permanent validation statute applicable after three years from the date a zoning ordinance is enacted, if not challenged (with certain exceptions). Validation statutes are remedial and to be liberally construed to cure all defects which are not constitutional in nature. Mayhew, 774 S.W.2d at 296 (citing Murmur Corp. v. Bd. of Adjustment, 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). The validation act cures all nonconstitutional challenges to a zoning ordinance including not complying with chapter 211. Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249, 259 (Tex. App.—Fort Worth 2004, pet. granted).

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:

(1) Zoning is an exercise of a city's legislative powers;
(2) Validity of a zoning ordinance is a question of law, not fact; and
(3) 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;
(4) 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;
(5) The burden on the party contesting a zoning ordinance is a heavy one;
(6) 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;
(7) 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

(8) Judicial review of a city's zoning actions is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions.

These rules were set forth in the recent case of Super Wash, 131 S.W.3d at 255.

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. Tippitt, 616 S.W.2d at 177. Spot zoning is illegal and invalid because such an amendatory ordinance will not be in accordance with a city's comprehensive plan. See Bd. of Adjustment 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 Part IV.E.

In Tippitt, the Texas Supreme Court set forth four important criteria against which rezonings of specific property matters should be tested. Tippitt, 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:

- 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;

- 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);

- 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

- 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. Tippitt, 616 S.W.2d at 176. The current status of spot zoning law is confusing. To be safe, a rezoning of a small tract must be supported by changed conditions. See Howard, 633 S.W.2d at 597. No clear test for spot zoning has been established despite the Texas Supreme Court's attempt at clarification in Tippitt. 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. 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. City of Dallas v. Prasifka, 450 S.W.2d 829, 836 (Tex. 1970) (holding that the inaccurate representation of a city official as to the zoning classification of a tract did not estop the city from enforcing its zoning ordinance); Edge v. City of Bellaire, 200 S.W.2d 224, 228 (Tex. Civ. App.—Galveston 1947, writ ref'd.) (holding that the negligent issuance of a building permit and reliance thereon by the land owner did not bind the city from enforcing a valid zoning ordinance prohibiting the structure); see also Marriott v. City of Dallas, 635 S.W.2d 561, 564 (Tex. App.—Dallas 1982), aff'd, 644 S.W.2d 469 (Tex. 1983). However, where justice requires the application of estoppel and there is no interference with the exercise of governmental function, this general rule is set aside. See Joleewu, Ltd. v. City of Austin, 916 F.2d 250, 254 (5th Cir. 1990) (applying the exception to the general rule precluding application of estoppel to cities in the performance of governmental functions where justice, honesty, and fair dealing require); City of San Antonio v. TPLP Office Park, 155 S.W.3d 365, 377-78 (Tex. App.—San Antonio 2004, pet. filed) (stating that a city is bound by plat approved in conflict with prior plat notes due to subsequent owner's reliance on that plat); Super Wash, 131 S.W.3d at 249 (remanding estoppel issue for trial where owner received a permit, relied upon it to complete forty-five percent of its construction before the city caught its error and required changes to the project unacceptable to the owner); City of Austin v. Garza, 124 S.W.3d 867, 874 (Tex. App.—Austin 2003, no pet.) (holding a city bound to a note on a final, recorded plat upon which the city relied for dedications in the face of allegations by the city that it approved the note as a "mistake" since it would be "manifestly unjust for the city to retain the benefits of its mistake yet avoid its obligations"); Maguire Oil Co. v. City of Houston, 69 S.W.3d 350, 353 (Tex. App.—Texarkana 2002, pet. denied) (applying estoppel against a city is appropriate in "exceptional circumstances where justice requires it"). The direction of the estoppel cases shows a significant recent softening in the formerly solid wall barring estoppel claims against cities. The Texas Supreme Court, in accepting the petition in Super Wash, has an excellent opportunity to clarify estoppel applied to city development actions, particularly to improperly issued development permits.

5. Standing

To challenge a zoning ordinance, a party must own real property in the city. Kincaid Sch., Inc. v. McCarthy, 833 S.W.2d 226 (Tex. App.—Houston [1st 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. A property owner has standing to challenge the validity and enforcement of a zoning ordinance affecting the owner's property. Super Wash, 131 S.W.3d at 255. The owner may seek an interpretation by suit for declaratory judgment. Id.

Normally, only a city has standing to enforce a zoning ordinance; however, in Porter v. Southwestern Public Service Co., 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. Cf. TRE Mobilnet of S. Tex. v. Pascouet, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

C. 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 Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 291 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

Contract Zoning is "a bilateral agreement where the city binds itself to rezone land in return for the landowner's promise to use or not use his property in a certain manner. Super Wash, 131 S.W.3d at 257. Since zoning is a legislative matter which may not be delegated, contract zoning is invalid. Id.

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. TAX CODE ANN. § 312.205(b)(5) (Vernon 2002). 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 nonenforceability 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 [14th 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, 73 S.W.3d 304 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

D. Conditions to Rezoning ("Conditional Zoning")

Although Contract Zoning is invalid, Conditional Zoning is valid. Super Wash, 131 S.W.3d at 257. Conditional Zoning occurs when "the city unilaterally requires a landowner to accept certain restrictions on his land without a prior commitment to rezone the land as requested." Id. Since Conditional Zoning omits any promise to rezone which bypasses the required legislative procedure for zoning, it is valid. Id. The Texas Supreme Court can provide more detail to the scope of permitted Conditional Zoning if it deals with the issue in its disposition of Super Wash.

E. Construction of a Zoning Ordinance

The following rules apply when construing a zoning ordinance provision:

- Generally, the rules applicable to statutes apply. In construing an ordinance, the court will use the same rules as when it construes a statute. City of Austin v. Hyde Park Baptist Church, 152 S.W.3d 162, 165 (Tex. App.—Austin 2004, no pet.) Texas courts use the "clear and unambiguous meaning test" in which the courts interpret the ordinance only if the language's meaning is not clear and plain on the law's face. Id. at 166. If a particular phrase is clear and unambiguous, extrinsic aids and rules of construction are inappropriate and the ordinance will be given its common meaning. Id.
- 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 by the administrative body's interpretation, although that interpretation may be given some weight if the court is in doubt.

City of Alamo Heights v. Boyar, 158 S.W.3d 545, 550-51 (Tex. App.—San Antonio 2005, no pet.); City of Laredo v. Villarreal, 81 S.W.3d 865 (Tex. App.—San Antonio 2002, no pet.); Wende v. Bd. of Adjustment, 27 S.W.3d 162, 170 (Tex. App.—San Antonio 2000), rev'd on other grounds, 92 S.W.3d 424 (Tex. 2002).

Various dictionaries have been reference sources for zoning cases, such as Websters and Black's. Boyar, 158 S.W.3d at 551.

An owner may seek an interpretation by suit for declaratory judgment. Super Wash, 131 S.W.3d at 255.

F. Validity of a 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 & Supp. 2004). 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, 129 Tex. 81, 89, 101 S.W.2d 229, 234 (1937). The court may also remand the case to the ZBA for further actions taking into consideration the court's judgment. Wende, 27 S.W.3d at 173.

If an aggrieved party decides to appeal an order of the ZBA by requesting a writ of certiorari, they have ten days after the notice of decision to file suit. § 211.011; 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. Bd. of Adjustment, 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 the petition to include the board after expiration of the statutory ten 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 Texas Local Government Code section 211.008(g). 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. Galveston Historical Found. v. Zoning Bd. of Adjustment, 17 S.W.3d 414, 416–17 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); Texans to Save the Capitol, Inc. v. Bd. of Adjustment, 647 S.W.2d 773, 775 (Tex. App.—Austin 1983, writ ref'd n.r.e.). 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. Galveston Historical Found., 17 S.W.3d at 418. An adjacent city is aggrieved if the decision adversely affects it differently than the general public. Wende, 27 S.W. 3d at 167.

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. Bd. of Adjustment, 433 S.W.2d 727, 735 (Tex. Civ. App.—Dallas 1968, writ ref 'd n.r.e.). A ZBA must act within its specifically granted authority. W. 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 Texas Local Government Code section 211.011. 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 WL 219339 (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 Bd. of Adjustment 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). See Ferris v. City of Austin, 150 S.W.3d 514 (Tex. App.—Austin 2004, no pet.) and City of Dallas v. Vanesko, 127 S.W.3d 220 (Tex. App.—Dallas 2003, pet. granted) for a discussion of the nature of hardship. 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 ten day deadline for appealing the variance denial. Fincher, 56 S.W.3d at 816. Types of variances were discussed in Ferris, 150 S.W.3d at 517.

5. Special Exceptions.

A variance is distinguished from a special exception in that, in the case of a variance, the 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 nonconforming uses under a city's zoning ordinance. See Huguley v. Bd. of Adjustment, 341 S.W.2d 212, 216 (Tex. Civ. App.—Dallas

1960, no writ). There existed no statutory basis for ZBA jurisdiction over nonconforming uses until the 1993 amendment of Texas Local Government Code section 219.009. The ZBA may determine whether a nonconforming use existed on the owner's property when it was annexed to the city. Id. The ZBA does not have discretion to grant a nonconforming use where none previously existed. See Bd. of Adjustment 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. Sw. Paper Stock, Inc. v. Zoning Bd. of Adjustment, 980 S.W.2d 802, 804 (Tex. App.—Fort Worth 1998, pet. denied); Bd. of Adjustment v. Amelang, 737 S.W.2d 405, 406 (Tex. Civ. App.—Houston [14th Dist.] 1987, writ denied).

b. The burden of proof to establish its illegality rests upon the contestant. Sw. Paper Stock, Inc., 980 S.W.2d at 804; Swain, 433 S.W.2d at 731.

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. Bd. of Adjustment, 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. SWZ, Inc. v. Bd. of Adjustment, 985 S.W.2d 268, 270 (Tex. App.—Fort Worth 1999, pet. denied); Sw. Paper Stock, Inc, 980 S.W.2d at 804; Amelang, 737 S.W.2d at 406; City of Lubbock v. Bownds, 623 S.W.2d 752, 755–56 (Tex. App.—Amarillo 1981, no writ).

e. The court must not substitute its judgment for the ZBA's. Sw. Paper Stock, Inc., 980 S.W.2d at 804; Amelang, 737 S.W.2d at 406.

f. The only question which can be raised is the legality of the ZBA decision. Sw. Paper Stock, Inc., 980 S.W.2d at 804; Amelang, 737 S.W.2d at 406.

g. The court should make its decision on the legality of the ZBA's decision based on the materials obtained in response to the writ of certiorari and any testimony received. Sw. Paper Stock, Inc., 980 S.W.2d at 804; Amelang, 737 S.W.2d at 406.

h. The legality of a ZBA's denial is a question of law. Sw. 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. Sw. Paper Stock, Inc., 980 S.W.2d at 804; Amelang, 737 S.W.2d at 406.

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 1981), writ ref'd, 617 S.W.2d 188 (Tex. 1981) (per curiam); see also SWZ, Inc., 985 S.W.2d at 268. Some courts 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. See Pick-N-Pull Auto Dismantlers v. Zoning Bd. of Adjustment, 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); Bd. of Adjustment, 860 S.W.2d 622, 625–26 (Tex. App.—Corpus Christi 1993, writ denied) (discussing the conflict). This conflict is fully reviewed in Mixon § 11.516.

In Wende v. Board of Adjustment, 27 S.W.3d 162 (Tex. App.—San Antonio 2000), rev'd on other grounds, 92 S.W.3d 424 (Tex. 2002), the court of appeals applied nonzoning law applicable in mandamus actions to determine whether a ZBA abused its discretion. The court cited Walker v. Packer, 827 S.W.2d 833 (Tex. 1992), which 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. Walker, 27 S.W.3d 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 action. 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. However, the Supreme Court disagreed with the court of appeals' interpretation and upheld the ZBA interpretation. The Supreme Court's opinion indicated that a reviewing court should give greater deference to the ZBA interpretation, but did not overrule the court of appeals analysis, just its result. The court of appeals analysis gives the aggrieved party more room for success on appeal, but the Supreme Court's reversal, even without directly overruling the mandamus analogy takes away most of the benefit.

8. 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 v. City of College Station, 780 F.2d 475, 486 (5th Cir. 1986) (en banc). 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.

9. Official Immunity.

In Ballantyne v. Champion Builders, 144 S.W.3d 417 (Tex. 2004), the Texas Supreme Court provides a roadmap to the history and scope of official immunity in Texas, a fifty year old doctrine based on well settled public policy to (i) encourage confident decisionmaking by public officials without intimidation, even if errors are sure to happen, and (ii) ensure availability of capable candidates for public service, by eliminating most individual liability. The court held that ZBA members are entitled to official immunity if the following three issues are satisfied:

- Scope of authority – The action must fall within state law authorizing action by the official. Whether the ZBA made an incorrect decision or had never previously revoked the permit is irrelevant.

- Discretionary not ministerial action – The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment.

- Subjective good faith – If a reasonably prudent official under the same or similar circumstances would have believed their conduct was justified based on the information available, then this subjective good faith supports official immunity. Neither negligence nor actual motivation is relevant. They need not be correct, only justifiable. Specifically, the personal animus of the Board members in Ballantyne to apartment residents established on the record did not preclude a good faith holding, and in fact was irrelevant.

The court analogized to U.S. Supreme Court decisions interpreting qualified immunity for federal officials. The facts in Ballantyne were quite pro-developer, including tapes of an executive session

considering the request in issue which clearly demonstrated personal prejudice of the ZBA members to all apartment projects and their inhabitants. Specific derogatory comments were included. Nonetheless, the court held that these personal feeling, even if the basis for the ZBA decision, are not sufficient for individual liability.

VI. NONCONFORMING USES

A. Definition of Nonconforming Uses

A nonconforming use is a use that lawfully precedes adoption or application of zoning regulations that prohibit the use and continues to exist in nonconformance with the regulation. Wende, 27 S.W.3d at 169; City of Jersey Vill. v. Texas No. 3 Ltd., 809 S.W.2d 312, 313 (Tex. App.—Houston [14th Dist.] 1991, no writ).

Leasing property with intent to use it for a nonconforming use may be sufficient to entitle the lessee to nonconforming use status.

B. Right of Nonconforming Uses to Continue

A nonconforming 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 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.

C. Elimination of Nonconforming Uses

One of the objectives of zoning regulations is to ultimately eliminate nonconforming 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. Bd. of Adjustment, 718 S.W.2d 790, 797 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). Zoning ordinances requiring termination of nonconforming uses under reasonable conditions (usually an amortization period) are permissible under a city's police power. "[P]roperty owners do not acquire a constitutionally protected vested right in property uses once they have commenced or in zoning classifications once made." City of Univ. Park v. Benners, 485 S.W.2d 773, 778 (Tex. 1972), appeal dism'd, 411 U.S. 901, reh'g denied, 411 U.S. 977 (1973). Most zoning ordinances prohibit:

- the expansion or intensification of nonconforming uses;
- their replacement/reconstruction/relocation; and
- continuation after a specified period of nonuse (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 nonconformance, even if only a portion was being excavated at that time. Wende, 27 S.W.3d at 172–73.

D. Amortization

Amortization of nonconforming uses is allowed. See Bd. of Adjustment 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 nonconforming 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. Benners, 485 S.W.2d at 778; Eller Media Co. v. City of Houston, 101 S.W.3d 668, 683 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

E. Statutory Vested Rights – The "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:

> [T]he 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, 76th Leg., R.S., 1999 Tex. Sess. Law Serv. ch. 73 (Vernon) (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 Supp. 2004).

In 2005, the legislature amended section 245.001 and 245.002 in Senate Bill 848. For projects commencing on or after April 27, 2005, the new provisions apply. The Act broadens the definition of "permit" to include certain contracts for the construction of water or sewer facilities. The new provisions also extend the types of permit applications that "freeze" local regulations to original applications for permits filed for review for any purpose and a plan for development of real property or plat applications. However, to benefit from this statute, the original applicant must give the agency "fair notice of the project and the nature of the permit sought." Additionally, the act defines the freeze dates as: (1) the date the applicant delivers the application or plan to the agency or (2) the date the applicant deposits the application or plan with the United States Postal Service, addressed to the agency, by certified mail. Furthermore, a permit application can expire forty-five days after filing if: (1) the applicant fails to follow technical requirements, (2) the agency notifies the applicant within ten days of filing, and (3) the applicant fails to provide the necessary information within the time provided by the notice. The Act also allows regulatory agencies to require compliance with changes to "technical requirements relating to the form and content of an application", even for frozen projects. See Act of April 26, 2005, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. ch. 6 (Vernon) (to be codified as amendments to TEX. LOC. GOV'T CODE ANN. § 245.001–.002).

The definitions of "permit," "political subdivision," "project" and "regulatory agency" are broad. TEX. LOC. GOV'T CODE ANN. § 245.001 (Vernon Supp. 2004); Op. Tex. Att'y Gen. No. JC-0425 (2001) (determining 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 is a factual determination left to each situation). In Levy v. City of Plano, No. 05-97-00061-CV, 2001 WL 1382520 (Tex. App.—Dallas Nov. 8, 2001, no pet.) (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. A preliminary plat approval creates vested rights for the entire subdivision area, including individual lots, such that no new development rules maybe applied for construction on those lots (subject to any applicable exceptions to that general rule). Hartsell v. Town of Talty, 130 S.W.3d 325, 328 (Tex. App. – Dallas 2004, pet. denied). In Hartsell, the court rejected the city's position that the plat was a distinct "project" for vested rights purposes, separate from development activities on the tracts created by the plat. Noting the practical concerns of the city, that "outdated" rules would apply to future development, the court countered that the legislature clearly intended such result "to alleviate bureaucratic obstacles to economic development." Id. Hartsell supports a broad, literal reading of the protections of chapter 245 and undermines the result in Levy, which is unpublished and has no precedential value.

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 Supp. 2004). The term "in progress" is generously defined to include any viable development project. TEX. LOC. GOV'T CODE ANN. § 245.005 (Vernon Supp. 2004). The replacement statute clarified the legislature's 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. 1, § 16; In re Gruebel, 153 S.W.3d 686 (Tex. App.—Tyler 2005, no pet.) (noting that "laws may not operate retroactively to deprive or impair vested substantive rights acquired under existing laws, impose new duties, or adopt new disabilities in respect to transactions or considerations past . . . . [o]n the other hand, no litigant has a vested right in a statute or rule that is remedial or procedural in nature and affects no vested substantive right." (internal quotation marks omitted)).

In 2005, the legislature amended the vested rights statute with Senate Bill 574. The statute contains several exceptions to vested rights, specifically including zoning regulations, but only those which do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, and building size. Act of May 2, 2005, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. ch. 31 (Vernon) (to be codified as an amendment to TEX. LOC. GOV'T CODE ANN. § 245.004). The first 3 are new and add protection against down zoning (i.e., a change in zoning classification). Previously, vested rights were, effectively, limited to subdivision platting issues. This change was fiercely opposed by cities and is a dramatic victory for developers. Clearly, the change is a legislative response to *Sheffield Development Company, Inc. v. City of Glenn Hill Heights*, 140 S.W.3d 660 (Tex. 2004) where down zoning was upheld by the Texas Supreme Court under circumstances where the city council acted callously. Additionally, the statute will allow cities to apply expiration dates (minimum of two years on permits and five years on projects) 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). Id. (to be codified as an amendment to TEX. LOC. GOV'T CODE ANN. § 245.005). Enforcement is limited to mandamus, declaratory judgment or injunction and a political subdivision waives immunity from suit with regard to an action under this statute. Id. (to be codified as an amendment to TEX. LOC. GOV'T CODE ANN. § 245.006).

Chapter 245 is constitutional and not an illegal delegation of authority to private parties. City of Austin v. Garza, 124 S.W.3d 867, 873–74 (Tex. App.—Austin 2003, no pet.).

F. Reliance on Improperly Issued Permit

Several cases uphold the right of an owner to complete construction of a non conforming structure based on improperly issued building permits. City of Dallas v. Vanesko, 127 S.W.3d 220 (Tex. App.—Dallas 2003, pet. granted); Town of South Padre Island v. Cantu, 52 S.W.3d 287 (Tex. App.—Corpus Christi 2001, no pet.); Bd. of Adjustment v. McBride, 676 S.W.2d 705 (Tex. Civ. App.—Corpus Christi 1984, no writ). In these cases, the city issued a building permit for a building based on plans with a nonconforming setback. The buildings were substantially completed (75% in McBride; 80% in Cantu and 45% in Vanesko). 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, 52 S.W.3d at 289. The Cantu court rejected the city's argument that any encroachment into a required setback violates public policy as support for denial for 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. Vanesko, followed both Cantu and McBride, holding that the existence of an improperly issued permit was itself a "hardship" which justified a variance. When the Texas Supreme Court rules in Vanesko, it will clarify the continued viability and breath of this exception to the general rule on estoppel and hardship. In a nonzoning case, promissory estoppel was held applicable to a city which issued a permit it later sought to revoke. Maguire Oil Co. v. City of Houston, 69 S.W.3d 350 (Tex. App.—Texarkana 2002, no pet.).

VII. LIMITS ON ZONING POWER

The limits of zoning are a mystery to most real estate professionals. Over the years, many limitations have been applied to a city's power to zone. Often, a city will not recognize these limitations unless their attention is directed to them. There are some areas where many real estate professionals intuitively believe there are limits, but there are not. Understanding which legal concepts limit zoning and which do not is critical to the real estate professional.

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 & Supp. 2004). Austin has utilized limited purpose annexation to extend land use controls over areas which it cannot currently serve with all municipal services. See AUSTIN, TEX., CHARTER art. 1, § 7.

B. Nonzoning 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. 2004). Less restrictive zoning regulations do not trump more restrictive nonzoning regulations.

C. Deed Restrictions

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

D. Devaluation of Property

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. Dallas Merchs. & Concessionaires Ass'n v. City of Dallas, 852 S.W.2d 489 (Tex. 1993); City of Freeport v. Vandergrifft, 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 [14th Dist.] 1997, no pet.);. 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. Dallas Merchs., 852 S.W.2d 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

Generally speaking, most governmental entities will not be subject to zoning regulation. See PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 40.03 (Matthew Bender & Co. 1995). The Enabling Act exempts state and federal agencies. TEX. LOC. GOV'T CODE ANN. § 211.013(c) (Vernon 1999 & Supp. 2004). 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. N. 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. City of Lubbock, 628 S.W.2d at 50; Austin Indep. School Dist., 502 S.W.2d at 674. 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 corporations should be exempt from municipal zoning power when exercising their primary activities. Gulf, C.& S. Ry. Co. v. White, 281 S.W.2d 441 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.); Fort Worth & D.C. Ry. Co. v. Ammons, 215 S.W.2d 407 (Tex. Civ. App.—Amarillo 1948, 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. Sw. Pub. Serv. Co., 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 City of Lubbock, 628 S.W.2d at 50; Austin Indep. School Dist., 502 S.W.2d at 674. 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 Arlington v. Lillard, 294 S.W. 829, 830 (Tex. 1927); City of Brownwood v. Brown Tel. & Tel. Co., 157 S.W. 1163, 1165 (Tex. 1913).

H. Churches

A number of Texas land use cases address churches. In Congregation Committee v. City Council, 287 S.W.2d 700 (Tex. Civ. App.—Fort Worth 1956, no writ), the court held that the city could not refuse a permit to establish a church in a residential zoning district since restrictions against churches cannot be predicated upon a purpose to protect public morals. The asserted problems (parking, traffic, inconvenience to neighbors, potential loss of property values, noise, etc.) were not adequate justification of the typical land use criteria (protection of public health, safety, morals, and welfare). However, the Texas Supreme Court has held that generally applicable municipal regulations (building, fire, health, sanitation, etc.) may be enforced against a church. City of Sherman v. Simms, 183 S.W.2d 415 (Tex. 1944). In Board of Adjustment v. Leon, 621 S.W.2d 431 (Tex. Civ. App.—San Antonio 1981, no writ), the court held that a city may apply a "special exception" process to allow an individualized evaluation of church use (proposed recreational facility). A building primarily devoted to "healing/prayer rooms" was held not a "church" in Coe v. City of Dallas, 266 S.W.2d 181, 183 (Tex. Civ. App.- El Paso 1953, no writ). A college was held not to be "church-related" in Fountain Gate Ministries, Inc. v. City of Plano, 654 S.W.2d 841 (Tex. App.—Dallas 1983, writ ref’d n.r.e.).

The current status of Texas case law affecting land use by churches may be summarized as follows:

- Church sanctuaries and directly related support facilities may not be excluded from residential districts.
- Reasonable, nondiscriminatory building, fire, health and sanitation rules may be applied to church facilities.
- Church facilities may be subject to a "conditional use permit" or "special exception" administrative zoning process to allow an individualized review, particularly for "related facilities."
- Not all facilities a church desires may be approved as "church-related."

The Texas Religious Freedom Act, Texas Practice and Remedies Code chapter 110, contains significant limitations on government actions affecting "free exercise of religion" (a broadly defined term in the Act). A "carve out" in section 110.010 effectively nullifies the Act's limits applicable to municipal zoning, land use planning, traffic management, urban nuisance, or historic preservation regulations.

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), replaced the unconstitutional Religious Freedom Restoration Act ("RFRA"). RFRA was declared unconstitutional by the U.S. Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997), which involved the regulation by Boerne, Texas, of the expansion of a Catholic Church. RFRA was passed by the U.S. Congress in 1990, in response to the U.S. Supreme Court's decision in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990), which reversed long-standing law that protected religious activities from government regulation. RLUIPA is more limited than RFRA, but for the purposes of our situation, provides significant benefits.

RLUIPA is intended to prohibit local governments from discriminating in land use regulations for structures of religious uses. No local government may impose or implement a land use regulation imposing a "substantial burden" on "religious exercise" unless it demonstrates the burden furthers a "compelling governmental interest" and is the "least restrictive means of furthering that use." 42 U.S.C. § 2000cc(a)(1). The term "substantial burden" is not defined in RLUIPA.

RLUIPA defines "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and states that "the use, building or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7).

RLUIPA applies when a city regulates religious exercise by "the implementation of a land use regulation . . . under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessment of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). Land use regulation must treat religious assemblies or institutions on no less than equal terms with nonreligious assemblies or institutions. 42 U.S.C. § 2000cc(b). If an owner provides prima facia evidence to support a violation of RLUIPA, the local government bears the burden of persuasion on any elements of the claim except the issue of substantial burden. 42 U.S.C. § 2000cc-2(b). RLUIPA is construed in favor of broad protection of religious exercise. 42 U.S.C. § 2000cc-3(g). Violation of RLUIPA entitles a landowner to recover attorneys' fees. 42 U.S.C. § 1988(b).

The U.S. Supreme Court granted certiorari on October 12, 2004 to Cutter v. Wilkinson, 125 S. Ct. 2113 (2005), to review the constitutionality of RLUIPA as it relates to institutionalized persons. The

Court upheld RLUIPA and found no violation of the Establishment Clause. Cutter at 2117, 2124-25. RLUIPA has been held constitutional as to land use in several cases, including recently in Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 WL 546792, at *15 (W.D. Tex. Mar. 17, 2004). It is not clear if Cutter will have any impact on the local government land use regulation aspect of RLUIPA. A booklet published by Sidley, Austin, Brown & Wood (New York law firm) regarding RLUIPA, containing both the text of RLUIPA and President Clinton's statement upon signing RLUIPA, is available at www.sidley.com/db30/cgi-bin/pubs/RLUIPA book 2003 v2.pdf.

I. Sexually Oriented Businesses

Sexually oriented businesses ("SOBs") have limited protection under the constitutional right to freedom of expression. See TEX. LOC. GOV'T. CODE ANN. § 243.003 (Vernon 1999); 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); supra Part VII.D.

J. 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 statutes protect the disabled from discrimination in housing).

K. Community Homes

See TEX. HUM. RES. CODE ANN. § 123.001 et seq. (Vernon 2001); TEX. PROP. CODE ANN. § 202.003(b) (Vernon 1995). A state licensed community home can operate in any residential area, but is limited to six residents. San Miguel v. City of Windcrest, 40 S.W.3d 104 (Tex. App.—San Antonio 2000, no pet.); City of Friendswood v. Strang, 965 S.W.2d 705 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

L. Incidental Uses/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 Aug. 15, 1997, no writ) (not designated for publication) for definition of a "home occupation" allowed in some areas zoned for single-family residential use.

M. 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*.

N. 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, 101 S.W.3d 668 (Tex. App.—Houston [1st Dist] 2001, pet. denied) (explaining the various protections of commercial signage in Texas while upholding the Houston Sign Code amortization of nonconforming billboards).

O. HUD Code Manufactured Housing

See 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); Tex. Manufactured Hous. Ass'n v. City of Laporte, 974 F. Supp. 602 (S.D. Tex. 1996). 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. Op. Tex. Atty. Gen. LO-97-002, 1997 WL 113946 (Feb. 19, 1997). Ordinances that treat mobile homes as HUD code manufactured homes are preempted by the Texas Manufactured Housing Standards Act, TEX. OCC. CODE ANN. § 1201 *et. seq.* (Vernon 2004), which provides that HUD code manufactured homes must be treated separately from mobile homes. City of Freeport v. Vandergrifft, 26 S.W.3d 680 (Tex. App.—Corpus Christi 2000, pet. denied).

P. 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 & Supp. 2004).

Q. Reversionary Clauses

An automatic reversionary clause in a rezoning ordinance which causes a reversion to the prior zoning classification if specified conditions to the rezoning are not satisfied is invalid. Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249, 259 (Tex. App.—Fort Worth 2004, pet. granted). This is due to the improper delegation of legislative zoning power. Id. Further, a reversionary clause without any limits in time is unreasonable and arbitrary. Id. A special permit is distinguishable, as it will have conditions, but they should be limited as to time. Id. A reversionary clause is severable and will not invalidate the rezoning. Id. The Texas Supreme Court granted the petition in Super Wash, thus it will have an opportunity to provide more insight into the validity of reversionary clauses. Super Wash provides a new area for challenge of zoning ordinances which could prove troublesome to a city. However, a city may resolve the problem by simply exercising its legislative prerogative to rezone an area where the conditions have not been satisfied.

VIII. 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/ZBA;
- 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 ZBA (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, nonconforming 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, although recent case law discussed in Part V.B.4 indicate a softening approach to estoppel claims against cities. **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 ZBA 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 and Zoning Commission/ZBA;

(4) Make-up and philosophy of City Council; 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 areas where city planning staff can be useful. City planning staff should never be considered as the only source of information. The chair of the Planning and Zoning Commission and the ZBA are often helpful and willing to provide assistance. Experienced local engineers, planners, real estate professionals and attorneys should also 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 prodevelopment with a focus on increasing property taxes, while others focus on increasing sales taxes. Many smaller communities are rabidly anti-multifamily 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 Appendix 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.

IX. HINTS FOR DEALING WITH DISCRETIONARY APPROVALS

A. What are Discretionary Approvals?

Discretionary approvals fall into two broad categories: (i) Conditional Approvals (usually legislative determinations made by the Zoning and Planning Commission/City Council) and (ii) Judicial Approvals (variances, interpretations and permit appeals which are "quasi-judicial determinations made solely by the ZBA).

1. Conditional Approvals

Traditional zoning establishes a division of uses and allows the uses designated "as a matter of right." In other words, all a property owner needs to do is look in the zoning ordinance and map to determine what uses are allowed and then feel comfortable that a permit for that use will be issued if the specific requirements of the zoning ordinance are satisfied (setback, height, etc.). Today, many cites have moved many uses from "a matter of right" status to conditional status. Conditional status requires a specific approval process for the use as applied to a specific site. This site specific zoning requires a special public consideration of the particular characteristics of the site, the specific use, the specific structures, the performance characteristics of the use, and most importantly, the impact on the adjacent area. Only then is the use approved, and almost always with a list of requirements and limitations. Often, a detailed site plan and architectural renderings are approved, the deviation from which will require additional approvals. The granting or withholding of conditional zoning approvals is within the broad discretion of the city. The uncertainty, time and expense of the conditional zoning approval process deters many purchasers and developers. Often the "highest and best use" from a valuation and development perspective is a conditional use. Property with conditional zoning in place often has greater value and marketability.

2. Judicial Approvals

The ZBA is a "quasi-judicial" body established to provide an administrative approval body for various land use matters which require a public hearing for the party desiring relief. It acts like a "mini-court" to consider a request, hear testimony, consider written evidence and apply the zoning ordinance and applicable law. It will render a formal decision after following a formalized procedure intended to provide procedural and substantive due process to the owner of the property in question.

B. Types of Discretionary Approvals

1. Conditional Approvals

a. Planned Development Districts ("PDD")

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. Civ. App.—Houston [14th Dist.] 1982), 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). Areas otherwise zoned may be eligible to be rezoned as a PDD and then are subject to the special zoning of the PDD, rather than the more restrictive zoning of the particular district. PDDs allow for innovative, often mixed use development. PDDs are a rezoning and follow the rezoning procedure.

b. Specific/Conditional Use Permit ("SUP" or "CUP")

Specific or conditional 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 a rezoning and follow the rezoning procedure. SUPs have replaced special exceptions in many cities, presumably to allow the City Council to determine land use decision rather than the ZBA.

c. Special Exception

A special exception is issued in a quasi-judicial manner by the ZBA. Special exceptions have typically been limited to less controversial land use decisions. Often the zoning ordinance requires specific findings in order for the special exception to be granted. An example is allowing a residential lot to be used as parking for an institutional use such as a church or school if the ZBA finds it is adequately screened from view, does not materially affect traffic and has appropriate landscaping, lighting and signage. 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.

2. Judicial Approvals

a. Variances

A variance allows violation of a zoning ordinance where literal compliance is a "hardship," but granting the variance will not be contrary to the general purposes of the zoning ordinance. The key is the

determination of hardship, which may not be self-imposed, purely financial/economic and must related to the unique characteristics of the real estate, not the personal desires or needs of the owner.

b. Interpretations

All appeals of staff level zoning interpretations are taken to the ZBA, not the Zoning and Planning Commission or City Council. Of course, pressure on the City Council may result in a reconsideration of the staff interpretation, but assuming the final staff interpretation is objectionable, the appeal is through the ZBA. The Board determines if the staff decision was correct and may affirm or issue its own ruling.

c. Permit Appeals

All appeals of permit rejections or issuances is also to the ZBA. This is really just another type of interpretation, the interpretation of staff to issue or not issue a permit.

C. Due Diligence

The real estate professional investigating the potential to develop property for a conditional use or where the need for a judicial approval arises should conduct the due diligence investigation set forth in Article VIII.

D. Application Process

Before applying for a discretionary approval, a real estate professional must be sure they have fully investigated the legal and political aspects of the proposed project. Once the project is public and an application submitted, the applicant loses much of the control over the project's destiny. The application must not be considered simply a formality, but as the first presentation of the project. As public record, it may be circulated and quoted widely. It must not be sloppy, incomplete or nonpersuasive. Do not be limited by the form as most cities will allow additional materials and or the retyping and reformatting of the application form in order to allow a more complete presentation of the project application.

E. Procedural Process

1. Conditional Approvals

PDDs and SUPs are rezonings, and follow the procedural process set forth in Part IV.C. The presentation to the Zoning Commission is critical as the first required pubic approval. Although the City Council may override a negative recommendation by the Zoning Commission, that may be difficult politically. Some cities require a super majority of the City Council to override a negative recommendation by the Zoning Commission.

Applications may need to be withdrawn and resubmitted during the zoning process in order to deal with issues and opposition which arise. This tactic may avoid a certain defeat and allow a revised proposal to receive a "fresh start". Although a "rehearing" of a negative decision is not allowed, typically, an applicant can withdraw an application that is under fire, and thus achieve the same result. Additional delay and fees are incurred. Sometimes there are limits on the withdrawal and reapplication process which limit/prevent these tactics. Many applications must be modified and are considered at multiple meeting/hearings. Delay is common. Efficiency and expediency is not part of the zoning vernacular.

Public hearings allow public input to the zoning process. Some cities are better than others in limiting public input to the public hearing. Sometimes, a city allows any public meeting to become a de facto public hearing by allowing public comment on a conditional zoning proposal as part of the general public comment period. Objection to this improper informal continued public hearing is tricky and may be a "lose-lose" decision. Proper handling of public hearings, particularly contentious ones, is an art and requires experience. Often the applicant forgets the focus of the forum and emphasizes their own desires (almost always profit motivated), rather than addressing the concerns of the zoning bodies and the public. All issues must be presented in a public policy context. Assertion of private property rights is rarely beneficial and often leads to disastrous results.

2. Special Exceptions and Judicial Approvals

Special Exceptions are decided solely by the ZBA and thus are somewhat simpler. Usually only one public hearing is held and the ZBA makes its decision at that meeting or the succeeding one. As an appointed body, the ZBA is somewhat distanced to the political issues which affect a City Council. Often, the ZBA has members with experience in their positions and an understanding of their authority.

A problem with ZBAs is that most of their experience will be with variances, and thus many ZBAs are used to denying the great majority of applications coming before it. In presenting a special exception, the applicant must remind the ZBA of the difference in the standards applicable to a variance and a special exception. Further action by a ZBA requires a supermajority of seventy-five percent affirmative vote. The applicant must also remember that the ZBA public hearing is a "one shot" proposition, without the opportunity for a rehearing by the ZBA or reversal by the City Council.

Variances require very careful consideration of the scope of the requested noncompliance. That scope should be kept as narrow as possible, but broad enough to provide the practical benefits desired.

Hardship is the almost exclusive focus of a ZBA considering a variance. Keep in mind that most ZBA’s deny the vast majority of variances and thus have a "negative" mind set. The requirement of a supermajority seventy-five percent vote is a structural guard against "easy" variances. For most variances, the situation can be characterized as either self-imposed or financial, neither of which is a basis for a variance. The applicant must do its best to articulate a legitimate argument based on the physical characteristics of the site to support the variance. Sometimes, a ZBA will be willing to distinguish between sympathetic owners and either (i) their predecessor or (ii) their contractor, where the violation was made by that "third party." However, where a mistake can be cured (what mistake cannot) there needs to be an argument that just because the mistake can be fixed for an exorbitant amount of money does not make it a purely financial hardship. The time to cure and the possibility that the cure will not look as good, or function appropriately should mentioned.

The issuance of an improper permit by the city and reliance on that permit has been upheld in several cases as sufficient hardship. See discussions supra Parts IV.B.4.d, VI.F.

F. Political Process

1. Conditional Approvals

Zoning is a political process. It is different from platting, which is primarily an engineering exercise in meeting the city's stated rules. Zoning decisions are legislative and discretionary. For practical and legal reasons, the opportunity to successfully challenge a zoning decision is remote. Therefore, the adroit assessment of the zoning process and the political implications of the zoning application is critical. Sometimes, lobbying of City Council is a critical aspect of the process. Certainly, a proper assessment of

the City Council's concerns, which sometimes can be ascertained through City Manager, City Attorney, Mayor, Zoning Commission Chair and/or City Staff is mandatory. In the zoning process, the applicant must address the concerns of the interested parties, with primary consideration to the final decisionmakers; City Council usually, but sometimes the ZBA.

If there is a local newspaper, the applicant must be aware of whether it routinely covers zoning issues, and if the issue is controversial, to expect coverage. An understanding of how to deal with the press is important to having a fair presentation of the applicant's position.

If a City Council election is to occur within six months of any zoning decision, beware. Zoning is often a favorite topic for campaigning, most frequently with a "neighborhood protection" angle. Sometimes, it is best to defer any application, or at least the public hearing until after the election.

2. Judicial Approvals

The ZBA is appointed and not subject to easy removal by the City Council. Plus, the typical ZBA member is a technician, often a lawyer, engineer, architect or contractor. This is a tough audience who feels little, if any, political pressure. This group has no broad focus, but is very limited in the consideration of its responsibility to the city. Beware of political pressure, which may backfire. Many ZBAs will not allow direct contact of members to discuss pending matters, but rarely is this a written policy in smaller communities. The ZBA rules should be reviewed to determine what prohibitions to contact exist.

G. Public Presentations

Public presentations are tricky and the applicant and its team must present a presentation carefully tailored to the city and specific project. Several rules apply:

- Know Your Forum – The Zoning Commission, ZBA and City Council have different backgrounds, powers and political agendas. Treat them accordingly. Address the local concerns and be careful about citing other cities. Every city considers itself unique and deserving of special attention.

- Be Prepared – Know the facts, the law, the zoning body, the opposition and your presentation. Do not read a prepared presentation. Be ready to speak extemporaneously. Have exhibits mounted on boards and copies to distribute, if appropriate (enough for all of the zoning body and all city staff, perhaps copies for the audience)

- Be Professional – Keep cool and unemotional. Realize that many of the public will react emotionally and perhaps make personal accusations. Show knowledge and preparation in your presentation and response to issues. Dress appropriately to show respect for the forum and the importance of the issue. In asserting legal points, beware of being overbearing, unless part of your plan.

- Be On Point and Timely – Never ramble. Abide by procedural rules and time limits. Keep on point and directed. If irrelevant issues arise, do not hesitate to guide the hearing back on track.

- Prepare the Client – The client representative should be fully prepared to respond to questions from the zoning body. Any presentation by the client should be carefully outlined, and if needed, rehearsed. Prepare the client for any likely attacks, so they will not be surprised. Never let the client respond emotionally. Do what you can to prevent the client from harming their own cause.

- Be Ready to React – Be ready to speak extemporaneously. Have set answers to likely questions and concerns. Use the opportunity to respond as a forum to reassert applicant's position.

X. RECENT ZONING CASE LAW

The following summaries include selected Texas and U.S. Supreme Court cases.

A. Constitutional Issues

Weatherford v. City of San Marcos, 157 S.W.3d 473 (Tex. App.—Austin 2004, pet. denied).

Weatherford wanted to develop his property for commercial purposes. At the time, the city was in the process of updating its comprehensive land use plan. Weatherford's neighbors opposed any commercial development. A mediation workshop was held between Weatherford, city officials, neighborhood residents, and others which resulted in a "mediated resolution" that allowed "some future multi-family and commercial development." The mediated resolution was incorporated into the city's comprehensive plan. Over several years, Weatherford sent in several rezoning and Planned Development District (PDD) applications. All his requests were denied. On his last application, the city tabled the application, changed the comprehensive plan, and then denied the application. Weatherford sued the city, claiming the denials violated of due process and equal protection, violated Texas Local Government Code Chapter 245 (which provides landowners vested rights under certain circumstances), and constituted a regulatory taking.

The court stated that the PDD applications "did not vest any property rights in Weatherford because the PDD approval process remained a legislative act subject to the discretion of the City." Furthermore, the mediation resolution incorporated into the comprehensive plan served merely as a guide for future development. "The Plan expressly stated that applicants still had to go through the zoning process for approval." The court concluded that the city's denials were rationally related to the general welfare, thus the city did not act arbitrarily or capriciously. While noting the city might have acted unfairly, all that is needed to satisfy procedural due process are notice and hearing and Weatherford was provided with notice and an opportunity to be heard.

Furthermore, the court stated zoning is a governmental function that allows a municipality to exercise discretion and generally, "governmental bodies are not subject to estoppel in the exercise of their governmental capacity." While Weatherford received the "run-around" from the city, it did not rise to the level of "manifest injustice" to require estoppel. The court concluded "the City acted in its legislative and governmental capacity and estoppel is not warranted by the threat of manifest injustice."

In Weatherford's Chapter 245 claim, the court concluded that PDD applications are only a preliminary step to seeking development, and thus do not qualify as "permits" under Texas Local Government Code Chapter 245 approval.

On the issue of regulatory taking, the court stated that "in reviewing a zoning decision, the inquiry is not whether the decision was wise, but whether it substantially advanced some legitimate state interest." The court concluded that the city "showed that its denials of Weatherford's applications substantially advanced a legitimate governmental interest" because the development would "have drastically changed the character of the neighborhood. A taking can also occur if the city's denials "unreasonably interfered with Weatherford's use and enjoyment of his property." Determining if the city unreasonably interfered requires consideration of (1) the economic impact of the City's decision and (2) the degree to which the decision interferes with investment-backed expectations. The court stated that

"[a]t best, Weatherford's argument is that his property would be worth more if he could rezone it," and he had no investment-backed expectations when he originally purchased the property. Accordingly, no taking occurred because the city "did not unreasonably interfere with the use and enjoyment of his property" and the city's decisions "substantially advanced legitimate governmental interests."

Cox v. City of Dallas, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253 (N.D. Tex. Sept. 22, 2004).

Homeowners living adjacent to a landfill sued the City of Dallas alleging violations of the Fair Housing Act (42 U.S.C. § 3601 *et seq.*) and the Equal Protection Clause due to illegal dumping. The homeowners claim that the city failed to stop illegal dumping at the Deepwood landfill with the intent to discriminate against them because of their race. The court awarded summary judgment to the city on the Fair Housing claims. A bench trial was held on claims, 42 U.S.C. § 1981 and 42 U.S.C. § 1983.

42 U.S.C. § 1983 – Equal Protection: Where a facially neutral state law has been shown to produce disproportionate effects along racial lines, courts consider the facts set out in Arlington Heights Hunter v. Underwood, 471 U.S. 222, 228 (1985). These factors include (1) whether the official action "bears more heavily on one race than another;" (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequence and (5) the legislative or administrative history. Id. at 12. However, an action does not violate the equal protection clause simply because the decisionmaker knows that it will have a disparate impact on racial or ethnic groups. Id. A violation occurs "only if a state decisionmaker selects or continues in a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Id.

The court applied the Arlington factors and held that the homeowners failed to prove by a preponderance of the evidence that the city intended to discriminate against them on the basis of race.

42 U.S.C. § 1981 – To establish a right under section 1981, homeowners must show (1) that they belong to a racial minority; (2) that the city intended to discriminate against them on the basis of race and (3) that the discrimination occurred on or more of the activities enumerated in the statute. Homeowners could not establish by a preponderance of the evidence that the city's actions were more than negligence and that the actions were the result of an intent to discriminate. The court acknowledged that the evidence presented supports an inference of gross negligence by the city in its "lackadaisical" code enforcement, absence of communication between city department and no follow through by either the Board of Adjustment or the City Attorney's office.

Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620 (Tex. 2004).

In a rare win for landowners, the Supreme Court in Town of Flower Mound v. Stafford Estates Limited Partnership, upheld a $425,000 judgment in favor of a developer required to replace an adequate asphalt road in good repair with a new concrete road. The roads had the same traffic capacity. The requirement constituted a taking.

First, the court permitted the developer to sue after the fact, rather than adopting the city's argument that if the developer received the benefit of city approvals and complied with those approvals, it should be barred from later objecting. Unless there is a specific limitation in state law, the court held there was no public policy to support this argument.

Second, the court applied the two-part test in the U.S. Supreme Court decisions in Dolan v. City of Tigard and Nollan v. California Coastal Commission, and the similar requirements of the Texas Supreme Court's decision in City of College Station v. Turtle Rock Corp. These cases deal with

government "exactions," which are any requirement on a developer to do or provide something as a condition to receiving government development approval. The well settled Dolan two-pronged test was restated and adopted by the court as follows:

> Conditioning governmental approval of a development of property on some extraction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate interest and (2) is roughly proportional to the projected impact of the proposed development.

After a thorough review of federal takings jurisprudence, the court rejected several arguments by the city that would limit the application of Dolan:

- Dolan is not limited to required dedications (i.e., streets, easements, parks and the like out of the property) and applies to off-site improvement (such as the new concrete road in this case and contributions to a park land fund in Turtle Rock).

- Dolan applies to both adjudicative and legislative decisions, depending on the circumstances of the particular case, rejecting a proposed "bright-line adjudicative/legislative distinctive" asserted by the city.

- The burden of proof is on the government, which must make an individualized determination that the extraction is related both in nature and extent to the impact of the proposed development.

The new road met the essential nexus requirement in that there is strong public policy to require safe and adequate traffic within a city. However, it clearly failed the rough proportionality test since the city did not make an individualized determination that the new concrete road was required based on the impact of the new development, and the new concrete road had the same capacity as the existing asphalt road.

Third, the Texas Supreme Court rejected the developer's claim for attorney's fees based on a federal civil rights claim (42 U.S.C. § 1988) while also recovering its state law takings claim. Since the state law takings claim was successful, the developer received a complete remedy, therefore there could not be any basis for a federal claim, and thus no right to recover attorney's fees under that nonexistent claim.

Sheffield Development. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004).

In a big win for cities, the Texas Supreme Court in Sheffield Development Co. v. City of Glenn Heights upheld a significant down-zoning after a fifteen month moratorium against takings claims. The developer conducted significant due diligence before buying an already zoned development tract, including meeting with city officials to determine if any change in the city's development regulatory scheme was contemplated, and was told no changes were planned. Almost immediately after the developer purchased the tract, the city established a moratorium on development applicable to twelve zoning districts, including the developer's tract. After the moratorium was extended to a total of fifteen months, the city down-zoned the property, decreasing allowed density by increasing minimum lot size from 6,500 square feet to 12,000 square feet, such that the land value dropped fifty percent. The developer sued based on state takings theories for a regulatory taking.

The court fully reviewed federal regulatory taking jurisprudence (which it stated as appropriate guidance for a state constitution takings claim), particularly the U.S. Supreme Court decision in Penn Central Transportation Co. v. City of New York. The Penn Central test is applied by the court as a

question of law, but only after a determination that the government action substantially advanced a legitimate government interest.

After holding that a down-zoning to reduce development density is legitimate to deal with the city's desire to reduce its ultimate population potential, the Court applied the three Penn Central factors as follows:

- **Economic impact of the regulation** – The down-zoning did not take all economic value of the property (which would result in a taking), but only fifty percent. Furthermore, that value was four times the developer's purchase price. Since land development is inherently speculative, it is a risk borne by a developer.

- **Developer's investment-backed expectation** – The investment backing of the developer's expectations at the time of the down-zoning was simply the lot purchase price and due diligence expenses, which was a small faction of the investment that would be required for full development and therefore, "minimal."

- **Character of the government action** – The rezoning was general, affecting numerous tracts, not just the developer's and thus not like an exaction imposed on a single developer. The risk of rezoning is to be expected by a developer, particularly in growing communities.

Despite acknowledging that the city "took unfair advantage" of the developer including slow playing decisions with a strategy to extract concessions, the court was motivated by the legitimate public policy reasons supporting the rezoning. This decision is particularly powerful considering the difference from the refusal to up-zone in the court's previous significant zoning decision in Mayhew v. City of Sunnyvale where the factual circumstances were much stronger for the city. Despite a much more sympathetic developer with strong facts, the court stated "we think the city's zoning decision apart from the faulty way they were reached, were not materially different from zoning decisions made by cities everyday. On balance, we conclude that the rezoning was not a taking."

Finally, the court ruled that a fifteen month moratorium is valid and not a taking, noting that the rezoning process is slow and that the moratorium advanced a legitimate government interest.

Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004)

The Castle Hills First Baptist Church sought to expand its premises and applied for special use permits to improve an existing educational building and to add a six-acre parking lot (consisting of approximately three hundred spaces). The city refused to issue the permits. The court held that city's refusal to consider the permit for the educational building was a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and applied a "strict scrutiny" test. The court noted that strict scrutiny was also appropriate under 42 U.S.C. § 1983 because there was a substantial burden on religious exercise caused by "an individualized assessment" rather than "generally applicable laws." The city failed to show a compelling interest to justify the refusal and the church prevailed.

The court reached a different result on the parking lot permit. The court held that the denial of the parking lot permit did not cause a "substantial burden" on the exercise of religion. Therefore, the court applied the "rational basis" test and found that the city's interests (primarily traffic and neighborhood impact) were sufficient to justify the denial.

Finally, the court upheld the constitutionality of the RLUIPA against claims that it violated the Establishment Clause and exceeded the lawful authority of Congress.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

The U.S. Supreme Court considered whether a moratorium on development imposed during the process of developing a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the U.S. Constitution.

The moratoria imposed by Tahoe Regional Planning Agency ("TRPA") was not a per se taking of property requiring compensation. TRPA imposed two moratoria, totaling thirty-two months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area in order to protect and preserve the condition of Lake Tahoe. Landowners claimed that TRPA's actions constituted a taking of their property without just compensation. The district court found that TRPA had not effected a "partial taking" under the Penn Central analysis; but it did find the moratoria did constitute a taking under Lucas' categorical rule, because the owners were deprived of all economically viable use of their land. On appeal, TRPA prevailed in challenging the district court's takings determination. The appellate court was left only with the issue of whether Lucas applied. The Ninth Circuit held that no categorical taking had occurred because the regulations had only a temporary effect and thus did not deprive the real estate owners of all economically viable use of their land. It distinguished Lucas as the rare case in which a regulation denies all use of an entire parcel. The Ninth Circuit also concluded that Penn Central's balancing approach was the proper analysis in determining whether or not a taking had occurred.

The Supreme Court held that the Penn Central balancing approach of all the relevant circumstances is the proper way to determine whether a taking has occurred (as opposed to a categorical taking analysis applied in Lucas.

There is a clear distinction between a physical taking and regulatory taking in the text of the Fifth Amendment:

- Physical takings involve the straightforward application of per se rules that require a categorical duty to compensate the former owner regardless of whether the taking constituted the entire parcel or just a portion. This contemplates temporary use as a taking.
- Regulatory takings jurisprudence is characterized by ad hoc, factual inquiries designed to allow examination and weighing of all the relevant circumstances. Treating them all as per se takings would create severe problems in which the government would be compensating for every delay necessary for the common good.

The Supreme Court held that the district court erred when it separated the real estate owners' property into segments and then analyzed whether there had been a taking. The proper starting point should have been whether there was a taking of the entire parcel; if the answer is yes, then Lucas would apply, if the answer is no, then Penn Central would apply.

Moratoria protect the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of regulations that may ultimately be adopted. Although a moratorium lasting longer than one year is likely to cause skepticism, it is not per se objectionable.

The dissent by Justice Rehnquist, joined by Justices Scalia and Thomas, noted that the actual time that the owners could not use their land was six years (not thirty-two months). The dissent argues that the distinction between "temporary" and "permanent" is weak, and it is already well established that temporary takings are as protected by the Constitution as are the permanent ones. Rehnquist agrees that

Lucas does apply because the Court agreed that, although temporary, there was a denial of all viable use of land for six years—thus constituting a taking. Lastly, the moratoria grossly exceeded the time for similar moratoria.

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

Palazzolo owned a coastal tract, primarily wetlands, acquired after the date wetlands regulations were adopted which severely limited development by prohibiting virtually all filling. After having several fill requests denied (which were also denied to a prior, related owner), Palazzolo filed an inverse condemnation action claiming that the residual $200,000 value of the tract for a single family homesite was but a token and under Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003 (1992) all economically beneficial use was deprived. He also asserted a taking under the various factors stated in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), including interfering with investment-backed expectations.

The court first addressed and rejected the ripeness defense asserted by the state. The state asserted that Palazzolo had not satisfied the requirement to have obtained a final decision on the permitted land uses, sufficient for court review. Although Palazzolo had not filed the number of applications as in the Supreme Court's recent decision on Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), the facts showed that further applications would be futile. The issue is giving the regulatory authority an opportunity to exercise its discretion. Before resorting to the courts, an applicant must be able to demonstrate that the permissible land uses are known to a reasonably certain degree.

Next the court rejected the state's claim that an owner may not assert a takings claim for regulations in place when the property was acquired. The state claimed that those regulations were part of the background principals of state property law, of which Palazzolo took title with notice, therefore, under Lucas, there is not taking. The Supreme Court rejected this "illogical and unfair" rule.

Unfortunately for Palazzolo, the Supreme Court poured him out on the Lucas analysis, holding that the undisputed $200,000 residual value for a single family homesite was sufficient to defeat a Lucas claim. All economically beneficial use was not deprived because the upland portion of the tract was developable. The Supreme Court would not let Palaozzolo bifurcate the tract and make his claim solely on the wetlands portion, although the court left open the door for a smart owner to do so in an appropriate future case.

The Supreme Court remanded the case for further consideration of the Penn Central takings claim. Notwithstanding that the Lucas claim failed and the difficulty in proving investment-backed expectations due to the prior existence of the wetlands regulations, the court made it clear that the land owner deserved a trial on the merits of his takings claims. The decision acknowledges the difficulty in takings analysis, noting the following:

> [W]e have "given some, but not too specific, guidance to the courts confronted with deciding whether a particular government action goes too far and is a regulatory taking….Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. [cites Penn Central]…These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 617–18.

Simi Investment Co. v. Harris County, 236 F.3d 240 (5th Cir. 2000).

Harris County denied Simi access to Fannin Street from their property due to an intervening five foot sliver of county land (supposedly a "park") separating Simi's property from the street. Apparently, the conveyance to the County was intended to limit access to Fannin Street for the benefit of area developers. Simi claims the County arbitrarily interfered with its property rights. The court notes the unique factual situation of this case, and limited its substantive due process analysis to this blatant governmental interference with property rights present in the case. The court found no rational basis exists to justify the County's interference with Simi's property rights. The court could ascertain no rational reason for the County to deny abutting owners' access to the street, thus the denial was a violation of Simi's right to substantive due process. The Fifth Circuit affirmed the district court's findings that the County acted arbitrarily and without a governmental purpose. The Fifth Circuit further held that the invention of a "park" solely to deny private property holders lawful access to an abutting street is an abuse of governmental power, which on this particular set of facts, rises to the level of a substantive due process violation.

Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

In a land use exaction case, the Supreme Court held a cause of action under the Equal Protection Clause may be asserted by a "class of one," where the plaintiff did not allege membership in a class or group. The court reasoned that the purpose of the equal protection clause is to grant security to every person against intentional and arbitrary discrimination. Accordingly, the court affirms the Court of Appeals of the Seventh Circuit holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by spite and unrelated to any legitimate state objection. Here, the city sought to require a thirty-three foot easement, while similarly situated persons had previously only been required to dedicate a fifteen foot easement for the same purpose.

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 five separate times over five years, and with each rejection, the city imposed more rigorous demands. A total of nineteen 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 exactions—land-use decisions conditioning approval of development on the dedication of property to public use."

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 one acre minimum lot requirements in its single family zones (originally intended to address septic tank requirements). Mayhew owned twenty-six percent 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 one 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 30,000 to 35,000 by 2016. Contemporaneously, the city amended its zoning ordinance to allow, upon City Council approval, planned developments with densities greater than one unit per acre. Later in 1996, Mayhew proposed a planned development of between 3,650 to 5,025 units (three-plus 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 Mayhew's claims in light of the Texas 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 Texas 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 (however, it should be noted that the recent U.S. Supreme Court case, Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2078 (2005), held that the "substantially advances" test is inappropriate for determining whether a governmental taking has occurred). 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.

B. Zoning Board of Adjustment

City of Alamo Heights v. Boyar, 158 S.W.3d 545 (Tex. App.—San Antonio 2005, no pet.)

Ken and Lisa Boyar own a condominium in Alamo Heights, Texas. After purchasing the property, the Boyars completely enclosed their backyard with screens to block out noise, lights, debris, insects, rodents and trespassers from neighboring properties. The Boyars applied to the city for a permit after they had completed the screen. The city denied their application because the screened structure did not comply with the side-yard and rear-yard setback provisions of the Zoning Code. The city stated that it

denied the application because the Boyar's minimum side yard would be zero feet instead of the required fifteen feet and the rear setback would be zero feet instead of the required twenty-five feet.

When the Boyars petitioned for a variance, the ZBA denied the request. The Boyars subsequently asked the district court, via writ of certiorari to review the Zoning Board's decision under section 211.011 of the Texas Local Government Code. After a bench trial, the court found that the Zoning Board incorrectly interpreted or applied the provisions of the Zoning Code to the Boyars' screened structure. The trial court further found that the Zoning Board had abused its discretion by failing to grant the Boyars a variance because "a literal enforcement of the applicable ordinance would result in unnecessary hardship on the Boyars." Id. at 548. The trial court modified the Zoning Board's decision to allow the Boyars a variance for their screened structure.

Plain meaning of zoning code: The first issue in this case was the definition of the term "structure" as set forth in the Zoning Code. In construing an ordinance, courts use the same rules as when construing a statute and seek to discern the intent of the enacting body.

> Courts must take statutes as they find them . . . . They should search out carefully the intendment of the statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere. They are not responsible for omissions in Legislation. They are reasonable for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.

Id. at 550.

When making a determination, a court will look first to the plain meaning of the words of the ordinance. If words and phrases are not defined by the enacting body, the court should apply the ordinary meaning of the word or phrase. When construing a phrase within a statute, a court will consider the associated words and the context in which they appear.

If a meaning of an ordinance is doubtful or ambiguous, the court should give serious consideration to the construction given by the body charged with its enforcement and administration. "Texas courts have universally adopted the 'clear and unambiguous meaning test' under which courts may interpret the ordinance only if the language's meaning is not clear and plain on the law's face." Id.

According to the court, its objective in construing the Zoning Code was to discern the intent of the Alamo Heights City Council, considering first the plain meaning of the words used in the Code. The court analyzed the terms used in the ordinance ("enclosure," "structure," "enclose") and looked to their plain meaning. The court held that on its face, the ordinance was plainly intended to extend to a structure such as the screen erected by the Boyars.

Undue hardship: The second issue in this case was whether the Zoning Board abused its discretion by denying the Boyars' variance request. The Boyars claim that Mrs. Boyar would suffer significantly from the loss of the screened structure because she would be unable to enjoy her backyard due to her sun and insect allergies. They further claimed that they would suffer a $27,000 financial loss if they were required to remove the screen because it cost $17,000 to build and another $10,000 to remove.

> Under state law, a board of adjustment may authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in

unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

Id. at 552.

The existence of a hardship is a question of fact for the Board. On appeal, the issue was "whether the trial court could conclude as a matter of law that the Board had evidence of a substantive and probative nature before it upon which it could conclude that a literal enforcement would result in an unnecessary and unique hardship." Id.

The hardship cannot be self imposed, nor financial in nature and must relate to the very property for which the variance is sought (i.e., a condition unique, oppressive, and not common to other property). The hardship cannot be personal in nature.

The court held that although a literal enforcement of the ordinance would undeniably result in hardship to the Boyars, the resulting hardship would be only personal or financial in nature. The court also held that the trial court erred by not considering the city and the Board's request for an injunction to enjoin the Boyar's violation of the Zoning Code.

Harris v. Board of Adjustment, No. 2-04-061-CV, 2005 WL 32316 (Tex. App.—Fort Worth Jan. 6, 2005, no pet.) (mem. op.)

Harris was denied a variance of the zoning ordinance that requires a ten foot side yard. He wanted to add an enclosed garage to his home that would encroach six feet into the side yard leaving only a four foot side yard on a lot that is exposed to the public on a side street. Harris began building the garage despite the denial of the variance.

Harris filed another variance application requesting continued use of the garage that encroached four feet, nine inches into the side yard, creating a five foot, three inch side yard instead of a minimum required ten foot side yard. The Board again denied the application and he appealed to the county court. The trial court granted summary judgment in favor of the Board. Harris argued: (1) the trial court erred by granting summary judgment; (2) the trial court committed reversible error by failing to consider Harris' equal protection claims and (3) Harris was denied his right to due process in the first hearing because panel members did not understand the documentation.

The court analyzed whether the Board proved as a matter of law that it did not abuse its discretion in denying Harris' request. The Planning Department noted on Harris application that it:

(1) Does not describe unnecessary hardship or practical difficulty;
(2) Conditions described are not unique;
(3) Is not a result of condition or age of property;
(4) Conditions described do not satisfy burden of proof;
(5) Adjacent property will be adversely impacted;
(6) Approval of variance will impair uniform application of the ordinance;
(7) Use does conform to the 2000 Comprehensive Plan; and
(8) Applicant was informed of setback prior to beginning of construction.

Equal Protection: The court held that there was no equal protection violation. The principle of equal protection guarantees that "all persons similarly situated should be treated alike." Id. at *4. An equal protection claim requires that the government treat the claimant different from other similarly situated landowners without any reasonable basis. Generally, an ordinance is not rendered either invalid or

inoperative by the failure of officials to enforce it on other occasions. Instead, the ordinance must only be rationally related to a legitimate state interest to survive an equal protection challenge, unless the ordinance discriminates against a suspect class. Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause.

According to the court, the Board did not treat similarly-situated individuals differently than it treated Harris when the Board approved half of the garage variances requested and denied the other half. Furthermore, the Board indicated that its decision turned on the safety concerns involved with a busy street. Therefore, the Board's decision to deny the variance was rationally related to its interest in keeping citizens safe.

Due Process Claim: A court should not set aside a zoning determination for a substantive due process violation unless the action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Id. at *5. A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose. The question is not on the effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. An ordinance will violate substantive due process only if it is clearly arbitrary and unreasonable.

Harris claimed that one of the Board members at his first hearing did not understand the dimensions of the land. The member in question mentioned at the second hearing that she thought that granting a variance would put the garage "too close to South Drive, which is a very busy street." According to the court, the evidence shows that the Board's decision to deny the variance was based on safety concerns. The zoning ordinance requires wider side yards because South Drive is a busy neighborhood collector that runs near a mall. Therefore, the ordinance is a legitimate exercise of the city's police power where it is reasonably necessary to protect homeowners and drivers along that street. Because the zoning ordinance is rationally related to a legitimate governmental interest (protecting the safety of homeowners and drivers on South Drive) it does not violate Harris's substantive due process rights. The court cited Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (holding that the ordinance prohibiting drilling in watershed area did not violate appellant's substantive due process rights where it was reasonably related to legitimate state interest of protecting city's water supply).

Ferris v. City of Austin, 150 S.W.3d 514 (Tex. App.—Austin 2004, no pet.).

In 1999, the City of Austin approved the Urban Renewal Plan which targeted property along East 11th and 12th streets in Austin for redevelopment and renovation. Property located at 1101 to 1111 East 12th Street and 1190 to 1196 Navasota Street was marked for development of townhomes. The property was zoned for both commercial and residential use. All development, whether commercial or residential, had to comply with the lot size restrictions governing commercial development.

Jerry Freese on behalf of the City of Austin Neighborhood Housing and Community Development asked the city's Board of Adjustment for an area variance from the zoning requirements governing development of the property. The Board held a public hearing where Freese stated that the lots were too small and irregularly shaped to comply with the minimum lot-size restrictions. Freese also stated that the property had topographical restraints such as trees and slopes which interfered with the city's ability to make reasonable use of the property. He further stated that without the variances he would not be able to comply with the Urban Renewal Plan's goal of building between ten and fifteen townhomes.

A neighboring landowner argued that the city's plan to construct townhomes on the property would result in a financial loss to the city and the neighborhood. He said the neighbors preferred a grocery store or laundry over townhomes. The Board unanimously approved the variance. The trial court affirmed the Board's decision and the landowner appealed. The court of appeals affirmed.

The court held that the Board is authorized to make "special exceptions" to the terms of a zoning ordinance "in appropriate cases and subject to appropriate conditions and safeguards" that are "consistent with the general purpose and intent of the ordinance." Id. at 519. In order to justify a variance, "a hardship must not be self-imposed, nor financial only and must relate to the very property for which the variance is sought, i.e., a condition unique, oppressive and not common to other property." Id. at 522. The court held (1) there is no evidence that the city was the original developer of the property or that it was responsible for subdividing the lots into their present nonconforming shapes; (2) the Board's decision was supported by noneconomic evidence—the lots could not accommodate commercial or residential use and (3) the property was burdened by topographical restraints making residential use impracticable.

Board of Adjustment of San Antonio v. Wende, 92 S.W.3d 424 (Tex. 2002).

Redland Stone Products Company ("Redland Stone") operated a quarry on a tract of land (Beckman Tract) that was annexed and zoned as a quarry district. Redland Stone leased two additional tracts adjacent to the Beckman Tract, the Schoenfeld and Roger Tracts, which were also annexed by the city and zoned for residential use. Redland Stone filed a registration statement of nonconforming use for the Schoenfeld and Roger Tracts with the city's Director of Department of Building Inspections. The Director approved the registration giving Redland Stone the right to use the property for quarrying as a nonconforming use. Wende, Brown, and other San Antonio taxpayers and the City of Shavano Park (a municipality near the quarry) appealed the Director's decision to the Board. The Board affirmed the Director's decision stating that the Director's determination was correct because a preexisting lease on the property gave Redland Stone nonconforming use rights. The taxpayers and the City of Shavano Park sought a writ of certiorari from the district court to reverse the Board's decision. The court affirmed the Board's decision. Wende, Brown and the City of Shavano Park appealed.

After construing the city Development Code's nonconforming use provisions and definitions, and examining the common law and the zoning ordinances of other cities, the court of appeals noted that the Board's construction would allow a person to obtain nonconforming use rights not only by leasing property for a nonconforming purpose, but also by merely intending to use a property for a nonconforming use. It reasoned that such a construction produced an absurd result "diametrically at odds with the fundamental conception of nonconforming uses throughout the country." Such a construction would also render a portion of the city's Development Code superfluous. The court of appeals held that the preexisting leases were not sufficient to establish nonconforming use rights. The Board and Redland Stone Products Company petitioned the Texas Supreme Court for review.

The Texas Supreme Court reversed holding that preexisting leases establish nonconforming use rights. The supreme court's analysis focused on discerning the city council's intent by looking to the plain meaning of the words of the Development Code. The supreme court analyzed the Development Code as a whole stating that "we should not assign a meaning to a provision that would be inconsistent with other provisions of the Development Code." Id. at 430–31. The court focused on the definition of the term "use" and how the term fit into the definition in the Code of the term "nonconforming use." The result of such an analysis is that a nonconforming use exists when "the purpose for which land . . . is . . . leased" does not "comply with the applicable use regulations." The court stated that regardless of the court of appeals' determination that the common law and the other zoning ordinances of other cities require actual preannexation use to establish nonconforming rights, the "proper focus is on the City's own legislative

enactments." Id. at 431. Judgment was entered in favor of the Board and Redland Stone Products Company.

C. General Zoning Issues

Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249 (Tex. App.—Fort Worth 2004, pet. granted)

Super Wash contracted to purchase a tract of land in the City of White Settlement for the construction of a car wash facility. The city issued Super Wash a building permit. At the time the permit was issued, the building official was not aware of an ordinance that amended the original zoning classification from multifamily medium density to thoroughfare commercial zoning classification. Residents brought the ordinance to the official's attention. The building official contacted Super Wash and for the first time, informed it that the city required it to construct a wooden fence along the northern edge of its property along Longfield Drive. By letter, the city researched the ordinance and informed Super Wash that its original site plan had to be modified to include the wooden fence. At the time Super Wash received the letter, the construction of the car wash was forty-five percent completed. Based on the letter, Super Wash amended its site plan and submitted it. It was approved. Super Wash then sued the city challenging the validity and the enforceability of the Ordinance. Both parties moved for summary judgment. The trial court granted the city's motion. Both parties submitted a joint motion for final judgment which was granted. Super Wash appealed.

The court of appeals held that the fence requirement was not invalid contract zoning. The court defined contract zoning as "a bilateral agreement where the city binds itself to rezone land in return for the landowner's promise to use or not use his property in a certain manner." Id. at 257. Zoning must be done through legislative power and not via special arrangements with the owner of a particular piece of property. Contract zoning is invalid because the city surrenders its authority to determine proper land use and bypasses the entire legislative process.

The court distinguished contract zoning from *conditional* zoning. Conditional zoning occurs "when the city unilaterally requires a landowner to accept certain restrictions of his land without a prior commitment to rezone the land as requested." Id. Conditional zoning is not invalid per se because it does not involve a promise to rezone that bypasses any procedure required by the Local Government Code, the Texas Constitution, or the U.S. Constitution. Conditional zoning is valid so long as it is not arbitrary or capricious and it if reasonably relates to the public welfare. Id.

The court held that the city never made a bilateral agreement with Super Wash to rezone the property. Although the landowner did inform the Zoning Commission and the city council that it would build a fence, this promise did not bind the city, nor did it prevent any legislative procedure. The procedures required by the Local Government Code, including notice and a hearing, were followed by the city before it enacted the ordinance.

Additionally, the city has the ability to require the fence because it reasonably relates to the public welfare. Requiring a screening fence prevents access to a residential street, decreases congestion of traffic and promotes safety.

D. Vested Rights / Nonconforming Uses / Estoppel / Limitations

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.

E. Preemption/Delegation

FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000).

The City of Austin brought action against landowners seeking a declaration that a provision of the Water Code allowing certain private landowners to create "water quality protection zones" in certain cities' extraterritorial jurisdictions and to exempt themselves from enforcement of those municipal ordinances was unconstitutional. The trial court held that the provision was unconstitutional and the landowners appealed. The Supreme Court of Texas affirmed.

The court held that water quality regulation is legislative power. Id. at 876. The Legislature has delegated state water quality regulation to the Texas Natural Resource Conservation Commission (the "TNRCC"). In addition, it has given the cities the power to regulate water quality within their city limits and extraterritorial jurisdictions. According to the court, the landowners' power to exempt themselves from the enforcement of municipal regulations is also a legislative power. The court held that "by allowing landowners to decide which municipal regulations are enforceable on their property, Section 26.179 [of the Water Code] allows private landowners to ascertain the conditions upon which existing municipal laws will operate.

The court applied the eight factor test set forth in the Boll Weevil case to assess the constitutionality of the delegation. The court concluded that the provision of the Water Code is an unconstitutional delegation of legislative power.

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

In a nonzoning 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).

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

A divided Texas 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 1 of the Texas Constitution. Although a nonzoning case, the Texas 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?

Id.

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.

F. Official Immunity

Ballantyne v. Champion Builders, 144 S.W.3d 417 (Tex. 2004)

The concept of official immunity has received ever broadening application to shield public officials from individual immunity. In Ballantyne v. Champion Builders, the Texas Supreme Court provides a roadmap to the history and scope of official immunity in Texas, a fifty year old doctrine based on well settled public policy to (i) encourage confident decisionmaking by public officials without intimidation, even if errors are sure to happen, and (ii) ensure availability of capable candidates for public service, by eliminating most individual liability. The court held that ZBA members are entitled to official immunity if the following three issues are satisfied:

- Scope of authority – The action must fall within state law authorizing action by the official. Whether the ZBA made an incorrect decision or had never previously revoked the permit is irrelevant.

- Discretionary not ministerial action – The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment.

- Objective good faith – If a reasonably prudent official under the same or similar circumstances would have believed their conduct was justified based on the information available, then this objective good faith standard supports official immunity. Neither negligence nor actual motivation is relevant. They need not be correct, only justifiable. Specifically, the personal animus of the Board members in Ballantyne to apartment residents established on the record did not preclude a good faith holding, and in fact was irrelevant. The court analogized to U.S. Supreme Court decisions interpreting qualified immunity for federal officials.

Appendix A
CHECKLIST FOR LOCAL DEVELOPMENT REGULATIONS

■
Is the existing site lawfully platted?
How was it created? Metes and bounds?
Exceptions/defenses in the ordinance or state law?
Was there a prior plat? Check notes/restrictions.

■
Will a new plat (or replat) be required?
Division of a tract?
Change in use or restriction? Crossing a lot line?
Need to cross or use a one-foot reserve?
Check procedures. Will other jurisdictions review?
Check for relaxed amending plat or minor plat rules
Will any dedications/fee payments be required?

□
Is a site plan (development plat) required?
Check the ordinance "trigger."
Is there "development" under 212.043 LGC?
Check exceptions/defenses in the ordinance.
Are special traffic or other studies needed?
Will any dedication/fee payments be required?

□
Are there zoning regulations applicable?
Ordinary municipal zoning?
Special airport or reinvestment (TIF) zoning?
County zoning (airport, reservoir, etc.)?

□
If so, does the project comply?
What is the building site/lot/parcel?
In which zone(s) does it lie? Any overlay zones?
Which regulations apply to sites in those zones?
Does the project comply with those regulations?
For each noncompliant item, check:
Exceptions/defenses in the ordinance
Exceptions/defenses in state law
Prior-nonconforming status ("grandfathering")
Prior approvals given (variances, etc.)

□
Can the project comply "as of right"?
Has the building official ruled?
What appeals are available? Deadline?
Has anyone else appealed?

□
Is a ZBA discretionary approval needed?
Appeal from administrative ruling? Watch deadline.
Special exception (provided for in the ordinance)
Variance (hardship; not in the ordinance)

□
Is another discretionary approval needed?
Rezoning or change in district boundaries?
Change in regulations only, not boundaries?
Amendment called "permit" (SUP, CUP, etc.)?
Planned unit development or PDD?
Does the comprehensive plan, if any, allow it?
Amendment of the plan? See Ch. 219, LGC.

■
Is there sufficient water/sewer?
Plant/line capacity, points of connection.

■
What are the local providers? Check CCN's.
Will the utility issue a letter of availability?
Can capacity be reserved? How?
Is construction needed? Who does it? Who pays?

■
Are on-site water/sewer facilities needed?
Check state/local rules.

■
How will drainage be handled?
Is there stream capacity? Is detention required?
What is the drainage route? Who controls it?

■
Are there tap fees, impact fees, other fees?
See Ch. 395, LGC for the times they accrue.
Check for possible exceptions or limits.

■
Is any public property needed?
Construction in street or easement
Encroachments by improvements

■
If so, what permission is needed?
Permit or other revocable permission
Contractual permission
Outright purchase (appraisal)
Check to see if a replat could work instead

□
Does the project meet all building codes?
Prior inspections, permits, certificates?
New inspection/certificate from city?
Administrative interpretation or modification possible?
Appeal to hearing board? Watch deadline.

■
Are there flooding, storm water, grading or filling or special water quality regulations?
Check for 100-year flood plain or floodway
Check for county and city storm water rules
Check for special city/ETJ water quality regulations

□
Is off-street parking required?
Existing land use?
New construction or change in use?
Check possible exceptions and transitional rules.

□
Is landscaping or buffering required?

□
Are there tree protection or environmental rules?

□
Are there any historic preservation regulations?

□
Are there single-subject nuisance-like regulations?
Depends on land use/type of activity
Use code of ordinances as checklist

■
Are there deed restrictions? Architectural control?
Compliance needed for building permit? Affidavit?
Can a building permit be revoked?
Can a lawsuit be brought?

■
Check alcoholic beverage licenses and permits.

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