AN OVERVIEW OF ZONING IN TEXAS

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Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also recently had published an article on urban sprawl in Texas in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board and subsequently was appointed to the Civil Service Board in August 2015.

In his free time, while accepting the fact that knee replacement surgery is inevitable, Terry enjoys long distance running, having competed in 61 half-marathons as well as many other long distance races. He completed his 40th marathon in Austin in February 2016. He has competed in the Chicago, New York, San Diego, White Rock/Dallas, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons, all of which he ran very slowly!

I. Zoning: A Definition and Its History in the United States

Zoning is the regulation by a municipality of the use of land located within the municipality's corporate limits as well as the regulation of the buildings and structures located thereon.[1] Thus, the division of a city or area into districts and the prescription and application of different regulations in each district generally is referred to as zoning. A comprehensive zoning ordinance necessarily divides a city into certain districts and prescribes regulations for each one having to do with the architectural design of structures, the area to be occupied by them, and the use to which the property may be devoted. The use of a building may be restricted to that of trade, industry or residence.[2] Zoning is distinguished from eminent domain in that zoning laws are enacted in the exercise of the police power, their enforcement does not constitute condemnation of property, and the constitutional requirement of compensation for the taking of private property does not restrict the exercise of zoning power.[3] Zoning also is distinguishable from the law of nuisance because comprehensive zoning ordinances have a much wider scope than the mere suppression of the offensive use of property. They act, not only negatively, but constructively and affirmatively, for the promotion of the public welfare. Moreover, the existence of a nuisance is not a necessary prerequisite to the enactment of zoning regulations.[4]

First and foremost, zoning is the exercise of the police power by a municipality. To fully understand the evolution of that concept, a brief overview of the history of land use regulation in America, and zoning in particular, is in order. The police power is inherent in the sovereign power of the state to regulate private conduct to protect and further the public welfare.[5] As a consequence, government has the authority to regulate a wide variety of activities to promote public health, safety, morals and the general welfare.

In colonial America, local governments on occasion regulated certain limited areas of land use and structures, such as the location of farming lands and the prohibition of wooden fireplaces and thatched roofs due to fire hazard and safety concerns. In colonial cities such as Boston, Salem and Charleston, laws enacted prior to 1800 regulated the location of slaughterhouses and distilleries as well as the business premises of chandlers (candle makers) and couriers, and the location of potters' kilns.[6]

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[1] Ziegler, *Rathkopf's The Law of Zoning and Planning* § 1:3 at 1-16 (2004) (hereinafter referred to as "*Rathkopf's*").

[2] 10 Tex. Jur. 3d, Building Regulations § 6.

[3] 77 Tex. Jur. 3d, Zoning § 2.

[4] *Id.*

[5] *See, e.g., Lawton v. Steele*, 152 U.S. 133 (1894).

[6] *See Rathkopf's*, § 1:2 at 1-8.

By the 1840s, most American cities were an unseemly clustering of mixed uses characterized by backyard privies and filth and stench in the streets. Fires and deadly diseases were not uncommon. During this time, the "sanitary reform" movement pressed for the implementation of comprehensive public water and sewage systems and for increased regulation of land uses which posed the threat of fire and disease.[7] By the end of the 19th century, in large metropolitan areas in particular, it became increasingly clear that some government regulation of property and land use was necessary since repugnant land uses often existed side-by-side. Consequently, by the early 1900s many American cities had enacted ordinances regulating a variety of types of land uses. For example, in some cities noxious businesses were excluded or entirely prohibited in certain districts. There were restrictions on the operation and location of tenements, the erection of billboards, the discharge of smoke, and in some residential areas there were restrictions on lot size, setbacks and the bulk, type and height of structures. Many of these regulations were upheld by the courts since the police power of local governments was determined to be sufficiently broad to include within its scope new laws affecting the use and development of land, particularly those uses which were deemed harmful to the public welfare.[8]

The beginning of the twentieth century also witnessed the so-called "city beautiful" movement, the precursor to modern urban planning, which pressed for the paving of streets and sidewalks, street lighting, elimination of trash-strewn streets and yards, planting of trees and gardens, creation of public parks, and the development and maintenance of attractive residential areas. In part as a result of this movement, there was recognition of the need for more comprehensive planning and regulation of land uses at the local level.[9] By the 1920s, many U.S. cities had adopted comprehensive zoning codes which regulated land uses within their boundaries. These ordinances routinely were challenged as going beyond the limits of necessity, that such laws were designed to secure some future public benefit rather than to prevent harm, and that the segregation of residential uses under such codes involved impermissible class legislation by discriminating among land users according to their economic situation in life. These arguments, however, often were rejected by the state courts, which generally held that regulation of land use through zoning was within the legitimate scope of the police power.[10]

Zoning at first was considered one of the most radical departures from the traditional concepts of private property ownership because it was perceived as prohibiting

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[7] *See id.* at 1-9 (and citations contained therein).

[8] *Id.* at 1-9-10.

[9] *Id.* at 1-10.

[10] *Id.* at 1-10-11.

a citizen from devoting his property to a purpose useful and entirely harmless. In response the courts generally ruled that the police power justified the enactment of such ordinances to prevent congestion, to secure quiet residential districts and to procure an orderly segregation of industrial, commercial and residential areas brought about by the constantly increasing density of urban populations, the multiplying forms of industry and the growing complexities of civilization.[11] The United States Supreme Court validated zoning as a valid exercise of the police power in *Village of Euclid, Ohio v. Ambler Realty Corp.*[12]

The Village of Euclid, Ohio, is a suburb of Cleveland and in the early 1920s its population was between 5,000 and 10,000 residents. According to the Supreme Court, the industrial development of Cleveland had "reached and in some degree extended into [Euclid], and in the obvious course of things [would] soon absorb the entire area for industrial enterprises."[13] Ambler Realty was the owner of a 68-acre tract of land, and in late 1922, due to its concern about the foregoing industrial development from Cleveland, the village council adopted an ordinance "establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc."[14] Specifically, the ordinance established six classes of use districts, three classes of height districts, and four classes of area districts. The owner challenged the ordinance on federal due process and equal protection grounds and was therefore unconstitutional. Rejecting those contentions, the Supreme Court wrote:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . . Thus, the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . If the validity of the legislative classification for zoning

[11] *Id.* at 1-11.

[12] 272 U.S. 365 (1926).

[13] *Id*. at 389.

[14] *Id*. at 379-80.

> purposes be fairly debatable, the legislative judgment must be allowed to control.[15]

Thus was born Euclidian zoning, the concept of separating incompatible land uses through the establishment of fixed legislative rules. In 1921, prior to the Supreme Court's *Village of Euclid* decision, the United States Department of Commerce had commissioned a Standard Zoning Enabling Act (SZEA), which provided a model for states to follow by delegating zoning power to local governments. The SZEA also contained limitations on the zoning power of local governments. After *Village of Euclid*, the Department of Commerce published the SZEA with explanatory notes and thereafter ensued widespread state adoption of the SZEA. Texas adopted its version of the SZEA in 1927 and delegated zoning power to the legislative bodies of cities and incorporated villages, but not to counties.[16] Texas' version of the SZEA was upheld by the Texas Supreme Court in *Lombardo v. City of Dallas*.[17]

II. The Texas Statutory Scheme

A. Purpose and Scope of Zoning in Texas

In Texas zoning generally is restricted to land within a city's corporate limits and that zoning power is codified in Chapter 211 of the Texas Local Government Code. The power to zone property is delegated from the state and constitutes the exclusive authority of a municipality to zone.[18] The purpose of zoning, while never statutorily defining that term, is to promote "the public health, safety, morals, or general welfare" and protect and preserve "places and areas of historical, cultural, or architectural importance and significance."[19] Further, zoning must be in accordance with a comprehensive plan[20] and

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[15] 272 U.S. at 387-88.

[16] *See* Mixon, *Texas Municipal Zoning Law* (3d ed. 1999), § 1.000 at 1-4-5 (hereinafter referred to as "*Mixon*").

[17] 47 S.W.2d 495 (Tex.Civ.App.—Dallas 1932), *aff'd*, 124 Tex. 1, 73 S.W.2d 475 (1934).

[18] *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.).

[19] Tex. Local Gov't Code § 211.001.

[20] A comprehensive plan generally is defined as a long-range plan intended to direct the growth and physical development of a community for an extended period of time. Comprehensive planning is a process by which a community assesses what it has, what it wants, how to achieve what it wants and finally, how to implement what it wants. A comprehensive plan usually contains several components—transportation systems, parks and recreational services, utilities, housing and public facilities. It also provides for the distribution and relationships of various land uses and often serves as the basis for future

be designed to "(1) lessen congestion in the streets; (2) secure safety from fire, panic, and other dangers; (3) promote health and the general welfare; (4) provide adequate light and air; (5) prevent the overcrowding of land; (6) avoid undue concentration of population; or (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements."[21] The basic matters regulated by most zoning ordinances are found in Section 211.003 of the Texas Local Government Code:

> **§ 211.003. Zoning Regulations Generally**
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> (a) The governing body of a municipality may regulate:
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> (1) the height, number of stories, and size of buildings and other structures;
> (2) the percentage of a lot that may be occupied;
> (3) the size of yards, courts, and other open spaces;
> (4) population density; [and]
> (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes. . . .
>
> (b) In the case of designated places and areas of historical, cultural, or architectural importance and significance, the governing body of a municipality may regulate the construction, reconstruction, alteration, or razing of buildings and other structures.
>
> (c) The governing body of a home-rule municipality may also regulate the bulk of buildings.

(Emphasis added). As a practical matter, for those cities in Texas that have adopted zoning, there are two integral components in exercising zoning power: the zoning ordinance, which provides definitions and all relative regulations, and the zoning map, which visually reflects the various zoning districts within the city's corporate limits.

B. Procedures for Adopting and Relief from Zoning Regulations

Again, Chapter 211 of the Texas Local Government Code addresses the procedures that must be followed for a city to adopt zoning regulations. The statutorily-mandated requirements are jurisdictional and if a city fails to follow them, the zoning

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land development recommendations. The plan may be in the form of a map, a written description and policy statements, or it may consist of an integrated set of policy statements.

[21] Tex. Local Gov't Code § 211.004(a).

ordinance is void.[22] As noted in *Mixon*, several reasons justify the requirement that municipalities strictly conform to the procedures outlined in Chapter 211:

> *First*, constitutional due process requires that governments act rationally and fairly when they exercise the police power. Land-use zoning is justified as an exercise of the police power. An exercise of the police power is valid only if it is rationally connected with protection of the community's health, safety, and welfare. The prescribed procedures provide a framework within which the community must systematically balance public welfare and private interests and establish a logical connection between its regulations and the community good in a considered and open process. Following the [Standard Zoning Enabling] act's prescribed formalities ensures that due process requirements are met; any action that falls short is suspect.
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> *Second*, local governments have no inherent governmental powers. Since municipalities can act in a governmental capacity only if the state grants them power, they are strictly held to any limitations or conditions imposed by the enabling act. The act expressly requires municipalities to follow its specific procedures for adopting and amending comprehensive zoning ordinances. These steps are therefore jurisdictional, and condition the authority that is granted.
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> As a by-product of requiring strict adherence to the act, Texas courts are spared the burden of deciding whether particular city actions fall below the constitutional and statutory standard. By making statutory adherence the minimum acceptable standard for adoption, the strict rule draws a sharp line that is easy to apply. Requiring strict adherence also aligns Texas with other jurisdictions whose enabling acts are similar, if not identical, and gives zoning adoption decisions a truly national application.[23]

1. The Zoning Commission

A city wishing to exercise its zoning authority must appoint a zoning commission.[24] The zoning commission's authority is statutorily limited to recommending "boundaries for the original zoning districts and appropriate zoning regulations for each district."[25] It should be noted that a home-rule municipality in Texas

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[22] *See Peters v. Gough*, 86 S.W.2d 515 (Tex.Civ.App.—Waco 1935, no writ).

[23] *Mixon*, § 4.001 at 4-3-4.

[24] While some cities, such as Fort Worth, have both a planning (or plan) commission and a zoning commission, most cities in Texas confer both functions (planning and zoning matters) on a single entity known as the planning and zoning commission.

[25] Tex. Local Gov't Code § 211.007(a).

must appoint a zoning commission[26] while a general law city may appoint a zoning commission.[27] The zoning commission conducts public hearings on proposed changes to the zoning ordinance or on site-specific applications for zoning amendments. The zoning commission makes a preliminary report and that report subsequently is submitted to the city council for consideration. Moreover, the city council cannot hold a public hearing or take action until it receives the final report of the zoning commission.[28] Both the zoning commission and city council must follow the posting requirements contained in the Texas Open Meetings Act (posting of notice at least 72 hours in advance of meeting and an agenda describing the actions to be considered by the entity).[29]

Besides public notice of meetings of the zoning commission, written notice to surrounding landowners is statutorily-mandated within specific timeframes. Prior to a public hearing, the zoning commission (usually through city staff) must provide written notice to affected property owners and those property owners within 200 feet of the affected property. The written notice must be sent to affected property owners before the 10th day before the public hearing date. The notice need not be via certified mail and regular mail will suffice. The notice is sent to those relevant individuals as reflected on the most recently approved tax roll.[30]

2. The City Council

After the zoning commission acts on a site-specific application or zoning ordinance amendment, the matter goes to the city council for consideration. As at the zoning commission stage, a public hearing also is required before the city council.[31] Additionally, newspaper notice of the public hearing is required. Before the 15th day before the date of the public hearing, "notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality."[32] It should be noted, however, that notice to affected landowners is not

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[26] *Id*. *See also Coffee City v. Thompson*, 535 S.W.2d 758, 767 (Tex.Civ.App.—Tyler 1976, writ ref'd n.r.e.).

[27] Tex. Local Gov't Code § 211.007(a).

[28] *Id*., § 211.007(b).

[29] *See* Tex. Local Gov't Code § 211.0075 (zoning commission) and Tex. Gov't Code ch. 551 (city councils).

[30] *Id*., § 211.007(c).

[31] *Id*., § 211.006(a).

[32] *Id*.

statutorily required at the council stage.[33] At the public hearing before the city council, members of the public have the opportunity to comment on the proposed zoning change.

A city council has several options when considering a zoning request. A city council may adopt the proposed matter by simple majority vote, as is the case in other non-zoning matters considered by the city council.[34] In the event, however, that a proposed change to a regulation or boundary is protested by twenty percent (20%) of (i) the owners of the affected property or (ii) the owners of property located within 200 feet of the affected property, then the proposed change must be approved by at least three fourths (3/4) of all members of the city council who are qualified to vote.[35] By ordinance, a city also may provide that the affirmative vote of at least three-fourths (3/4) of all members of the city council is required to overrule the recommendation of the zoning commission that a proposed change be denied.[36] Most cities in Texas have availed themselves of this provision of the Local Government Code.

3. The Zoning Board of Adjustment

In Texas, a zoning board of adjustment must act within the parameters established by the state legislature and the municipal ordinance that both establishes the board and defines its local function and powers. According to state law, a zoning board of adjustment may hear and decide appeals from the administrative decisions made by zoning enforcement officials, special exceptions, variances and other matters authorized by ordinance.[37] Further, a zoning board of adjustment must not stray outside its specifically granted authority. If it does so, its actions may be held by a court to be null and void.

Composition of the Zoning Board of Adjustment. Section 211.008 of the Texas Local Government Code addresses the membership of the zoning board of adjustment.

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[33] As noted, the procedural requirements of Chapter 211 must be followed; however, Section 211.006(c) of the Texas Local Government Code provides that a governing body "may, by two-thirds vote, prescribe the type of notice to be given of the time and place of the public hearing. Notice requirements prescribed under this subsection are in addition to the publication notice required by Subsection (a)." Thus, cities may adopt more stringent notification requirements than those referenced in Chapter 211.

[34] One exception exists for general law cities that do not have a zoning commission. Those cities may not adopt a proposed change until after the 30th day after the date of landowner notification, according to Section 211.006(b) of the Texas Local Government Code.

[35] Tex. Local Gov't Code § 211.006(d).

[36] *Id.*, § 211.006(f).

[37] *Id.*, § 211.009.

Specifically, that section provides that the city council appoints the members of the zoning board of adjustment. The board must be comprised of at least five (5) members and cities may permit each councilmember to appoint a member of the board. The board members serve two year terms and may only be removed for cause. Cities may appoint alternate members to the board to serve in the absence of one or more regular members of the board. Any case before the board must be heard by at least 75 percent (75%) of the members (typically, 4 out of 5 members). The board maintains its minutes of meetings and the presiding officer or acting presiding officer may administer oaths and compel the attendance of witnesses. The meetings of the board are public. For Type A general law cities, the city council may act as the zoning board of adjustment.[38]

Typical Duties of the Zoning Board of Adjustment. As noted above, the duties of a zoning board of adjustment are statutorily defined. In Flower Mound, for example, the Town's Code of Ordinances and the Land Development Regulations (Subpart B of the Town's Code of Ordinances) define the powers of the Zoning Board of Adjustment. They are as follows:

> 1. "To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official of the town in the enforcement of subpart B of this Code, pursuant to section 78-84, appeals."[39] This provision of the Flower Mound Code of Ordinances is applicable to (1) Uniform Building Code appeals[40]; (2) International Residential Plumbing Code appeals[41]; (3) International Energy Conservation Code appeals[42]; (4) Uniform Electrical Code appeals[43]; and (5) Swimming Pool Code appeals.[44] The Zoning Board of Adjustment, sitting as the Oil and Gas Board of Appeals, also hears appeals regarding administrative decisions relative to oil and natural gas permits.[45]

[38] *Id.*, § 211.008.

[39] Flower Mound, Texas, Land Development Regulations § 78-83(1).

[40] Flower Mound, Texas, Code of Ordinances § 14-34.

[41] *Id.*, § 14-573.

[42] *Id.*, § 14-603.

[43] *Id.*, § 14-138.

[44] *Id.*, § 14-172(c).

[45] *Id.*, § 34-432(b).

2. "To permit variances or modifications of the height, yard, area, coverage and parking regulations, pursuant to section 78-85, variances."[46]

3. "To hear and decide special exceptions to the terms of subpart B of this Code, pursuant to section 78-86, special exceptions."[47] In the Land Development Regulations, special exceptions are limited in scope and apply to the following:

a. Reconstruction of nonconforming buildings.[48]

b. Expansion of nonconforming buildings.[49]

c. Discontinuance of nonconforming uses.[50]

d. Although not a special exception, the Zoning Board of Adjustment shall, from time to time, inquire into the existence, continuation or maintenance of any nonconforming use within the Town.[51]

4. "[T]o permit such variances or modifications of . . . sign . . . regulations as may be necessary. . . ."[52]

5. Building and Fire Code Board of Appeals.[53] The Board of Adjustment is authorized to hear Building Code or Fire Code appeals from decisions by the Director of Community Development or the Fire Chief, respectively. This ordinance also provides that a representative of the Building Department and a representative of Fire Department shall serve as non-voting ex officio members of the Board of Appeals.

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[46] Flower Mound, Texas, Land Development Regulations § 78-83(2).

[47] *Id.*, § 78-83(3).

[48] *Id.*, § 78-86(1).

[49] *Id.*, § 78-86(2).

[50] *Id.*, § 78-86(3).

[51] *Id.*, § 78-86(4).

[52] *Id.*, § 78-85(a).

[53] Formerly found in Flower Mound, Texas, Code of Ordinances, ch. 8, § 8.00 *et seq.*

Variances. The term "variance" is not defined in Chapter 211 of the Texas Local Government Code. A "variance" is defined by the Sixth Edition of Black's Law Dictionary, however, as "[p]ermission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding [a] person's property. The purpose of a variance is to prevent the unconstitutional application of the zoning ordinance.[54] It is in the nature of a waiver of the strict letter of the zoning law upon substantial compliance with it and without sacrificing its spirit and purpose. [It is a]n authorization to a property owner to depart from literal requirements of zoning regulations in utilization of his property in cases in which strict enforcement of the zoning regulations would cause undue hardship." In reality, a variance actually sanctions violations of the strict technical terms contained in a zoning ordinance.[55] An administrative official of a city cannot approve a variance.

A variance may only be granted if there exists an unnecessary hardship. Although state law does not define the term "unnecessary hardship," it does **not** include (1) property that cannot be used for its highest and best use[56]; (2) financial or economic hardship[57]; (3) self-created hardship[58]; or (4) the development objectives of the property owner are or will be frustrated.[59] Professor Mixon in his treatise, *Texas Municipal Zoning Law*, defines "unnecessary hardship" by explaining that a "hardship that is self-

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[54] As one Texas court has stated,

> the essential inquiry is whether in the circumstances the specific application of the general regulation would constitute an unnecessary and unjust invasion of the fundamental right of property.

Board of Adjustment v. Stovall, 218 S.W.2d 286, 288 (Tex.Civ.App.—Fort Worth 1949, no writ).

[55] For this reason, the rule is that "[t]he power to vary conditions of zoning ordinances should be sparingly exercised." *Board of Adjustment of City of San Antonio v. Levinson*, 244 S.W.2d 281, 285 (Tex.Civ.App.—San Antonio 1951, no writ).

[56] *See Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex.Civ.App.—San Antonio 1974, writ ref'd n.r.e.).

[57] *See Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, 290 S.W.2d 340 (Tex.Civ.App.—Galveston 1956, no writ); *Southland Addition Homeowner's Ass'n v. Board of Adjustments of City of Wichita Falls*, 710 S.W.2d 194 (Tex.App.—Fort Worth 1986, writ ref'd n.r.e.); *Bat'tles v. Board of Adjustment and Appeals of the City of Irving*, 711 S.W.2d 297 (Tex.App.—Dallas 1986, no writ).

[58] *See Currey v. Kimple*, 577 S.W.2d 508 (Tex.Civ.App.—Texarkana 1979, writ ref'd n.r.e.).

[59] *See, e.g., Willie, supra* note 54.

induced or that is common to other similarly classified properties will *not* satisfy the requirement."[60]

Special Exceptions. A special exception refers to uses that a zoning ordinance permits, but that are screened and specially approved by the board of adjustment for situational suitability. Special exceptions do not require a showing of hardship, unlike variances. As a practical matter, most special exceptions are handled by many cities as specific (or special) use permits. There is no authority to grant a special exception unless the zoning ordinance specifies that special exceptions may be granted. Thus, a zoning ordinance should specify the conditions that must be met for a special exception to be granted or the standards that a zoning board of adjustment is to employ when granting a special exception.

Use Variances. A zoning board of adjustment may not grant use variances. Variances may be granted from dimensional requirements such as setbacks; however, variances may not be granted which would allow a parcel of property to be used for a use that is not permitted under the zoning ordinance. A use variance in such instance would be a rezoning of property and the zoning board of adjustment does not possess the legal authority to rezone property.

A guide for the zoning board of adjustment in considering variances is attached hereto as Appendix A.

Appeals of the Decisions of the Zoning Board of Adjustment. An appeal of the decision of a zoning board of adjustment is by a little-used mechanism known as a writ of certiorari. An appeal may be filed by a person aggrieved by a decision of the board, a taxpayer or an officer, department, board or bureau of the city.[61] The appeal may be to state district court, county court or a county court at law.[62] The petition to the court must state that the decision of the zoning board of adjustment was illegal in whole or in part and specify the nature of the illegality.[63] The petition must be filed within ten (10) days after the date the board's decision is filed in the board's office.[64] The writ of certiorari procedure is described in greater detail in Section 211.011 of the Texas Local Government Code; however, a reviewing court may reverse or affirm, in whole or in part, or modify the decision that is appealed.[65] Texas case law is clear that the court may

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[60] *Mixon*, Glossary at B-10 (emphasis added).

[61] Tex. Local Gov't Code § 211.011(a).

[62] *Id.*

[63] *Id.*

[64] *Id.*, § 211.011(b).

[65] *Id.*, § 211.011(f).

reverse a zoning board of adjustment's decision only if the court determines that the facts are such that the board, as a fact finder, could have reached only one decision, but abused its discretion in reaching the opposite conclusion.[66] A reviewing court also may remand a case back to the zoning board of adjustment for further deliberations.[67]

C. Enforcing Zoning Regulations

Once a city has adopted a zoning ordinance, it may enforce its zoning by fine, imprisonment, or both. A zoning ordinance violation is a misdemeanor and a city also may provide civil penalties for violations.[68] Another remedy is available to municipalities—Chapter 54 of the Texas Local Government Code. Chapter 54 provides that cities may enforce their zoning ordinances, among others, through civil actions and may recover civil penalties not to exceed $1,000 per day.[69]

III. Specific Zoning Issues and Concepts

Zoning law seems full of terms that are not defined in state statutes and often it appears that definitions indeed vary from one locale to another. For example, most cities in Texas utilize planned development districts; however, no statutory definition of that term is to be found and little case law exists to further clarify its definition. Additionally, some cities utilize specific use permits; however, a specific use permit in one city may be

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[66] *See City of South Padre Island v. Cantu*, 52 S.W.3d 287, 291 (Tex.App.—Corpus Christi 2001, no pet.) (citing *City of San Angelo v. Boehme Bakery*, 190 S.W.2d 67, 71 (Tex. 1945)). *See also City of Dallas v. Vanesko*, 189 S.W.3d 769 (Tex. 2006), in which the Texas Supreme Court explained that a district court sits "only as a court of review," reviewing only the legality of a zoning board of adjustment's order, and to establish that a board order's is illegal, a petitioner must present a "very clear showing of abuse of discretion." *Id*. at 771 (citations omitted). A zoning board of adjustment abuses its discretion if it "acts without reference to any guiding rules and principles" or clearly fails to analyze or apply the law correctly. *Id*. (citations omitted). The Supreme Court clarified that an abuse-of-discretion review has two tiers: for findings of fact, a reviewing court "may not substitute its own judgment" for that of the board; instead, a party challenging a fact finding must "establish that the board could only have reasonably reached one decision." *Id*. For legal conclusions, abuse-of-discretion review is "necessarily less deferential" and is "similar in nature to a de novo review." *Id*. In a footnote, the Supreme Court emphasized how deferential the standard of review should be: "like mandamus proceedings, the standard of review in a zoning case requires a 'clear' abuse of discretion to warrant a reversal of the zoning board's decision." *Id*. n.4.

[67] *See Wende v. Board of Adjustment of San Antonio*, 27 S.W.3d 162, 173 (Tex.App.—San Antonio 2000), *rev'd on other grounds*, 92 S.W.3d 424 (Tex. 2002).

[68] Tex. Local Gov't Code § 211.012(b).

[69] *Id*., §§ 54.012 (authorizing civil actions) and 54.017 (civil penalties).

denoted a special use permit or conditional use permit in other cities. Nevertheless, following is a compendium of land use terms that are found in many zoning ordinances:

Accessory Use. A use customarily associated with a main use classification identified in a zoning ordinance, such as private swimming pools incidental to single-family detached housing. Some accessory uses that are intimately related to a classified use may be authorized without specific mention in the ordinance, or they may require separate and specific approval as provided in the ordinance.[70]

Buffer zones. Buffer zones refer to the zoning of an area to "buffer" the incompatibility of adjacent higher or lower use or density zones, *e.g.*, the creation of a two-family residential zone between a single-family zone and a multi-family apartment zone.[71]

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

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

Cumulative Zoning. A simple zoning classification system that establishes a hierarchy of uses, with single-family residential as the most restricted (or least intense), multi-family next (allowing single-family as well), commercial next (allowing all residential uses as well), and industrial as the least restricted (or most intense) (allowing all residential and commercial uses as well).[72] Under a cumulative zoning ordinance, a planning and zoning commission and city council can grant a zoning change for a use that is more restrictive or less intense than the zoning classification requested.

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[70] *Mixon*, Glossary at B-1.

[71] *Rathkopf's*, § 1:20 at 1-46.

[72] *Mixon*, Glossary at B-3.

Downzoning. The rezoning of an area to a less intensive use classification, *e.g.*, from an apartment to a detached single-family zone, and is usually less profitable to a developer. Downzonings are often challenged as being either arbitrary or confiscatory.[73]

Exclusionary Zoning. Zoning regulations that, because of regulation of density, use, area, or similar development aspects, exclude persons of low and moderate economic means from access to housing in a community.[74]

Floor Area Ratio (FAR). Floor Area Ratio is the ratio of total building floor area to the area of its zoning lot. Each zoning district has an FAR which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable on that zoning lot. For example, on a 10,000 square foot zoning lot in a district with a maximum FAR of 1.0, the floor area on the zoning lot cannot exceed 10,000 square feet.

Form-Based Code. A form-based code is a land development regulation that fosters predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code. A form-based code is a regulation, not a mere guideline, adopted into city, town, or county law. Form-based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. The regulations and standards in form-based codes are presented in both words and clearly drawn diagrams and other visuals. They are keyed to a regulating plan that designates the appropriate form and scale (and therefore, character) of development, rather than only distinctions in land-use types. This approach contrasts with conventional zoning's focus on the micromanagement and segregation of land uses, and the control of development intensity through abstract and uncoordinated parameters (*e.g.*, FAR, dwellings per acre, setbacks, parking ratios, traffic level of service (LOS)), to the neglect of an integrated built form. Not to be confused with design guidelines or general statements of policy, form-based codes are regulatory, not advisory. They are drafted to implement a community plan. They try to achieve a community vision based on time-tested forms of urbanism. Ultimately, a form-based code is a tool; the quality of development outcomes depends on the quality and objectives of the community plan that a code implements.[75]

Inclusionary Zoning. Zoning regulations, which may require as a condition to development approval, that housing units for low- or moderate-income households be provided for in the development.[76]

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[73] *Rathkopf's*, § 1:37 at 1-50.

[74] *Mixon*, Glossary at B-4.

[75] Definition of Form-Based Code, found at the Form-Based Code Institute (FBCI) website, http://formbasedcodes.org/.

[76] *Rathkopf's*, § 1:29 at 1-48.

Mixed Use Development. While this term covers a wide variety of development types, a mixed use development generally contains standards for the blending of residential, commercial, cultural, institutional, entertainment and other uses. Mixed use zoning is generally closely linked to increased density, which allows for more compact development. Mixed use developments include a combination of related uses in one place, a significant proportion of each use within the "mix" of development, and often pedestrian and bicycle connectivity within the development.

Nonconforming Uses and "Grandfathering" of Uses/Amortization. Cities can establish zoning districts under their general police power to protect the public health, safety and general welfare.[77] Such restrictions, however, may not be made retroactive; rather, they

> must relate to the future rather than to existing buildings and uses of land, and ordinances may not operate to remove existing buildings and uses not in conformity with the restrictions applicable to the district, at least where such buildings and uses are not nuisances and their removal is not justified as promoting public health, morals, safety or welfare.[78]

"A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist."[79] In other words, nonconforming status is attributable to a use or structure when

(a) such use or structure was constructed or operational prior to:

  (i) the annexation of such property into the municipality, or

  (ii) the adoption or amendment of the zoning ordinance; and

(b) the nonconforming use or structure has continued to exist without subsequent abandonment.

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[77] *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953).

[78] *Id*. (citations omitted) (wrecking yard in light industrial district not nuisance nor harmful to public safety and welfare; therefore, compulsion to cease operation constituted taking). *See also Carthage v. Allums*, 398 S.W.2d 799 (Tex.Civ.App.—Tyler 1966, no writ) (no retroactive application).

[79] *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972), *app. dism'd*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1973); *Town of Highland Park v. Marshall*, 235 S.W.2d 658, 662-63 (Tex.Civ.App.—Dallas 1950, writ ref'd n.r.e.) (the use of a garage apartment pre-dated the zoning ordinance; therefore, although the garage apartment violated the single-family district regulations, the privileged status or exemption applied).

Infrequent or sporadic use of land does not necessarily establish an existing use for purposes of nonconformity.[80]

The use must be lawful at the time the ordinance is passed. For example, a building that previously violated the building code when the zoning ordinance prohibiting its use is enacted, is not a lawful nonconforming use.[81] Further, it must be the same use and not a use of some other kind.[82]

The right to continue a nonconforming use has its genesis in federal and state constitutional provisions that prohibit the unconstitutional taking of property without just compensation and due process of law.[83] Additionally, the exemption for pre-existing nonconforming uses protects an owner's investment in property. The exemption does not apply to uses initiated after the zoning ordinance is promulgated or which are illegal.[84] The protected status continues until such time as the nonconforming building or structure has been abandoned by the owner or terminated under the ordinance.

Pre-existing nonconforming uses need not continue in perpetuity, however, and "[a]mortization is a valid method of eliminating existing nonconforming uses of land."[85] An owner's investment in property, for purposes of calculation, is the recoupment of the landowner's dollar investment, as opposed to the market value or replacement value.[86]

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[80] *See generally Silsbee v. Herron*, 484 S.W.2d 154 (Tex.Civ.App.—Beaumont 1972, writ ref'd n.r.e.).

[81] 8A McQuillin, *Municipal Corporations*, § 28.186.50.

[82] *City of Dallas v. Fifley*, 359 S.W.2d 177, 181-82 (Tex.Civ.App.—Dallas 1970, no writ) (owner must comply with permit requirements notwithstanding that owner commenced construction prior to zoning ordinance).

[83] *Eckert v. Jacobs*, 142 S.W.2d 374, 378 (Tex.Civ.App.—Austin 1940, no writ).

[84] *See generally Scott v. Champion Bldg. Co.*, 28 S.W.2d 178, 184 (Tex.Civ.App.—Dallas 1930, no writ) (only "innocent" nonconforming uses protected; *i.e.*, one who legally and rightfully began or planned the construction of a building as opposed to one who acted in defiance of a valid ordinance).

[85] *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268, 1371 (5th Cir. 1988).

[86] *Murmur Corp. v. Board of Adjustment, City of Dallas*, 718 S.W.2d 790, 795-97 (Tex.App.—Dallas 1986, writ ref'd n.r.e.).

The amortization formula may consider past depreciation of the structure,[87] or the value of structures which can be moved to another location.[88] It need not consider appreciation of land value, improvements or profit from an advantageous acquisition.[89]

The Texas Supreme Court has recognized the "public need for a fair and reasonable termination of nonconforming property uses . . . [and is] in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power."[90] In fact, a zoning regulation may have as a legitimate objective the eventual elimination of nonconforming uses.[91] In this regard, Texas courts have approved the direct and systematic termination of nonconforming uses provided that adequate time is allowed to recoup an owner's investment in the property.[92] In *Benners*, the court held that termination of nonconforming uses is not a "taking in the eminent domain sense"; rather it is a legitimate exercise of the police power.[93] The court upheld the constitutionality of a twenty-five year amortization provision terminating pre-existing nonconforming uses.[94]

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[87] *Neighborhood Comm. on Lead Pollution v. Board of Adjustment, City of Dallas*, 728 S.W.2d 64, 70 (Tex.App.—Dallas 1987, writ ref'd n.r.e.).

[88] *Board of Adjustment, City of Dallas v. Winkles*, 832 S.W.2d 803, 807 (Tex.App.—Dallas 1992, writ denied).

[89] *Id.*, 832 S.W.2d at 806.

[90] *Benners*, 485 S.W.2d at 778; *White v. Dallas*, 517 S.W.2d 344 (Tex.Civ.App.—Dallas 1974, no writ) (termination of wrecking yard within one year not unreasonable or arbitrary). *See also Fifley*, *supra*.

[91] *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).

[92] *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 735 (Tex.Civ.App.—Dallas 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 277, *reh'g denied*, 397 U.S. 977 (1970) (twenty-five years sufficient for amortization and discontinuance of nonconforming uses).

[93] *Id.*, 485 S.W.2d at 777-78.

[94] *Benners, supra*. *See also Valley Oil Co.*, 482 S.W.2d at 345-46 (ordinance requiring owner of property to discontinue use as gasoline station within one year not unreasonable and arbitrary given the equipment was removable and could be used at other stations and the owner had recouped the initial investment).

Abandonment of a nonconforming use may also terminate the privileged status. In *Rosenthal v. City of Dallas*,[95] the court established the test for abandonment of a nonconforming use. Specifically, abandonment requires "(1) the intent to abandon and (2) some overt act or failure to act that carries the implication of abandonment."[96] Temporary discontinuance of a nonconforming use is insufficient to show abandonment. Specifically,

> [t]he mere cessation of the use for a reasonable period does not itself work an abandonment, whether the building is permitted to remain vacant or is temporarily devoted to a conforming use with the intent that the nonconforming use be resumed when opportunity therefore should arise, and periods of interruption due to lack of demand, inability to get a tenant, and financial difficulty do not change the character of use.[97]

In addition, the failure to adhere to registration requirements may effectuate the termination of a nonconforming use.[98]

Overlays (or Zoning Overlays, Overlay Districts or Overlay Zones). A zoning overlay is a mapped district superimposed on one or more established zoning districts and is used to impose supplemental restrictions on uses in these districts, permit uses otherwise disallowed or implement some form of density bonus or incentive zoning program.[99] Often historically significant areas of a municipality have a "historic district overlay" in an effort to preserve and maintain the unique historic qualities of an area.

Performance Zoning. Performance zoning consists of land use regulations based upon the application of specific performance standards and represents an alternative to traditional zoning. Performance zoning provides for greater flexibility, avoiding the detailed specification of acceptable uses for specific parcels inherent in traditional zoning. It provides for the exercise of greater discretion by the regulatory jurisdiction at the time developments are proposed while at the same time establishing specific standards for the exercise of this discretion. Performance zoning provides a framework for the establishment of a system for the exchange of certain rights that could allow for

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[95] 211 S.W.2d 279 (Tex.Civ.App.—Dallas 1948, writ ref'd n.r.e.).

[96] *Id*. at 284; *Turcuit v. City of Galveston*, 658 S.W.2d 832, 834 (Tex.App.—Houston [1st Dist.] 1983, no writ) (discontinued use for 6 months not abandonment).

[97] *Marshall*, 235 S.W.2d at 664 (citations omitted).

[98] *Board of Adjustment, City of San Antonio v. Nelson*, 577 S.W.2d 783 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.).

[99] *Rathkopf's*, § 1:31 at 1-49.

even greater responsiveness to the market while preserving the public objectives sought in a system of land use control.

Under performance zoning, land development and use are regulated by a series of performance standards relating to specific impacts of a proposed development. Performance standards can, for example, limit the intensity of development, control the impacts of development on nearby land uses, limit the effects of development on public infrastructure, and protect the natural environment. Performance standards can be either negative or positive. They can set a maximum level for the noise impacts on adjacent property or they can require specified types of buffers to be established between certain types of land uses. Performance zoning dispenses with the large numbers of narrowly-defined and highly-specific use districts typical of traditional zoning. In its purest form, performance zoning may allow all possible uses and establish a uniform system of performance standards throughout a jurisdiction. Some systems of performance zoning, however, do provide for the specification of a relatively small number of more generalized zones, with some broad restrictions on types of use and different performance standards in the different zones. The key aspect of performance zoning lies in its regulation of land use through the establishment of standards intended to achieve specific public objectives. If one public objective is to limit the negative impacts of land uses on adjoining uses, attempts are made to define the undesirable levels of such impacts and develop standards to prohibit these. For purposes of assuring that development takes place within the capacity of the public infrastructure, such capacity levels are established. Then development is limited based upon these specific infrastructure-based impacts and limitations. For example, the effect of development on the transportation system could be controlled using standards involving maximum levels of trip generation per acre.[100]

Planned Developments (or Planned Development Districts). Planned Development Districts (PDDs) are specialized land use districts utilized in most municipal zoning schemes. "PDD procedures allow developers to obtain site-specific approval for developments that may not fit standard area and use zoning categories and that require specific negotiations to ensure that community interests are protected. PDDs conventionally accommodate designated types of major development, such as apartment projects, cluster housing, office developments, shopping centers and hospital facilities."[101] Professor Mixon defines a PDD as follows:

> A zoning classification, ordinarily not identified on the zoning map prior to specific project approval, that authorizes particular development that has been specifically approved. Planned development districts often operate as zoning amendments that authorize issuance of permits to allow

[100] *See* http://www-pam.usc.edu/index.html (and references contained therein).

[101] Mixon, *Texas Municipal Zoning Law*, § 17.03 (2d ed. 1994).

> specifically approved developments on condition that all development conditions are fulfilled.[102]

A prior Dallas Development Code described and defined Planned Development Districts as follows:

> In order to provide flexibility in the planning and development of projects with combinations of uses and of specific physical designs such as office centers, combination apartment and retail centers, shopping centers, medical centers with office and housing elements, special industrial districts, housing developments and other similar developments, a PD district is provided. This district is intended to be applied to the district map as an amendment to the zoning ordinance. Certain maximum and minimum standards are specified for various use categories and certain standards such as for yards, coverage, and building spacing are to be determined by the design. Specific development conditions and development schedules can be enforced with respect to a PD district and failure to adhere to a development schedule can be the basis of removing all or part of a PD district from the zoning district map. The purposes of the PD district are to achieve flexibility and variety in the physical development pattern of the city, to encourage a more efficient use of open space and to encourage the appropriate use of land. It is intended that cognizance be taken of surrounding property and that proper protection be given to it in locating and approving any PD district.[103]

Planned Development Districts are usually designated as "floating zones" in a city's zoning scheme; that is, they usually are not found on a zoning map until after the PDD has been approved. Most municipal planned development ordinances describe the general attributes as well as the purposes of a planned development district rather than actually defining the term "planned development."[104]

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[102] *Mixon*, Glossary at B-6.

[103] Dallas, Texas, Development Code § 51-4.102(c)(1).

[104] *See, e.g.*, Town of Prosper, Texas, Zoning Ordinance, ch. 2, § 24: "The Planned Development (PD) District is a district that accommodates planned associations of uses developed as integral land use units such as offices, commercial or service centers, shopping centers, residential developments of multiple or mixed housing (including attached single-family dwellings), or any appropriate combination of uses that may be planned, developed, or operated as integral land use units either by a single owner or a combination of owners. A PD District may be used to permit new or innovative concepts in land utilization not permitted by other zoning districts in this Ordinance"; City of Dallas, Texas, Code of Ordinances, § 51A-4.702(a)(1) and (2): "The purpose of the PD is to provide flexibility in the planning and construction of development projects by allowing a combination of land uses developed under a uniform plan that protects contiguous land uses and preserves significant natural features. . . . A PD may contain

Critics of planned developments contend that "the flexibility of [planned development] zoning may result in misuse by developers and abuse of discretionary authority by a municipality's governing agency."[105] Listed below are several issues—legal, planning-related and political—that may be problematic.

Due Process Concerns. While planned developments that are approved by a local government rarely result in litigation by developers, projects that are rejected indeed may create the basis for litigation. A constitutional concern is that the standards by which a local government rejects a project allegedly may be unconstitutional. The "standard" attack is based on due process—the planned development provisions of a zoning ordinance contain indeterminate standards and are subject to the unbridled discretion of the governing body. While the Texas Supreme Court's decision in *Town of Sunnyvale v. Mayhew*[106] may provide some solace to a local government in rejecting a planned development proposal, standardless review of PD applications could result in liability.[107]

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any use or combination of uses. . . ."; City of McKinney, Texas, Code of Ordinances, § 146-94(a): "Planned Development zoning district is designed to provide for the unified and coordinated development of parcels or tracts of land. Certain freedom of choice as to intended land use and development standards may be permitted; provided that the special ordinance provisions of the district are complied with and the intended uses and standards are not in conflict with the general purpose and intent of either this chapter or the city comprehensive plan"; and Town of Flower Mound, Texas, Code of Ordinances, § 98-811: "The PD planned development district (PD) is designed to permit flexibility and encourage a more creative, efficient and aesthetically desirable design and placement of buildings, open spaces and circulation patterns by allowing a mixture or combination of uses and to best utilize special site features such as topography, size and shape. A planned development district may be used to permit new or innovative concepts in land utilization not permitted by other zoning districts in this Code. While greater flexibility is given to allow special conditions or restrictions that would not otherwise allow the development to occur, the requirements established herein ensure against the misuse of such increased flexibility. It is intended for application in all land use designations on the land use map of the master plan, provided that the uses and development standards proposed are consistent with the stated goals of the town's master plan."

[105] *Rathkopf's*, § 88:1.

[106] *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex.App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 1087 (1991).

[107] *See* Daniel R. Mandelker, *Designing Planned Communities*, at 92-98 (and cases cited therein) (iUniverse 2010).

No Mixture of Uses. A common concern regarding planned development projects is that they often consist of a single use of the property, rather than containing a mixture of uses.[108] As noted above, "traditional" planned developments, by definition, contain multiple uses of property—single-family residential, multifamily residential, commercial/retail and occasionally civic/governmental uses. One current trend in North Texas, however, abandons the "mixture of uses" concept inherent in traditional planned developments and instead, planned development projects become single-family residential projects with a few "bells and whistles" thrown in—resident amenity centers, enhanced landscaping, entryway features, limited trails and small park areas, for example. In effect, there is no "planned development"; rather, the project consists of a single-family residential product with a few additional amenities or features. I refer to this project as "zoning plus"—a "straight" zoning project, almost every time with higher density, "dressed up" as a planned development.

The Higher Residential Density of Planned Developments. Almost universally, PD applications include higher residential density than "straight" zoning projects. The result is clear—if a municipality wishes to have developed in its corporate limits the planned development as proposed, it must approve higher residential density for the development than would otherwise be allowed. Besides the lack of a mixture of uses, higher density is the perceived "developer bonus" for not submitting a traditional, "cookie cutter" residential project. In fact, my experience has been that planned developments are often viewed by the development community as a method by which to "trump" the density requirements in a zoning ordinance or comprehensive plan. Thus, if a community has adopted a zoning ordinance or comprehensive plan that contains a minimum lot size of 7,500 square feet, by rezoning property to a PD district, the 7,500 square foot lot size does not apply, simply by adding a few additional development features. The economic impact to the developer is obvious—more lots, higher density, greater profit—while citizens often complain that planned developments are simply a means by which to negate zoning ordinance, comprehensive plans and minimum lot sizes.

The Impotence of the Comprehensive Plan. Many municipal comprehensive plans often contain a minimum lot size for single-family development in the municipality. By approving a planned development with smaller lot sizes than envisioned in the comprehensive plan, citizen frustration may become problematic, with citizens questioning the value of a comprehensive plan's lot size provisions, only to see the lot size uniformly and routinely decreased because "it is a planned development." This citizen frustration may lead to responses at the ballot box since the municipality's

[108] The planned development ordinances in the municipalities referenced in note 10, *supra*, all contain language reflecting a mixture or combination of land uses. *See* Prosper: "planned associations of uses" and "combination of uses"; Dallas: "a combination of land uses"; McKinney: "intended uses"; and Flower Mound: "a mixture or combination of uses."

comprehensive plan in effect means little "on the ground" due to the liberal interpretations of what may constitute a planned development.

Specific Use Permits. A specific use permit refers to uses that a zoning ordinance permits, but that are screened and specially approved for situational suitability. There is no authority to grant a specific use permit unless the zoning ordinance specifically authorizes it. Thus, a zoning ordinance should specify the conditions that must be met for a specific use permit to be granted. For example, a helicopter landing pad may be permitted in an industrial zone; however, due to safety concerns, overhead power lines and other issues, a city obviously would not desire that every parcel zoned industrial be entitled to a helicopter landing pad. Thus, a specific use permit is a method by which many cities regulate such uses. Specific use permits are a valid exercise of a city's zoning authority.[109] Specific use permits are sometimes denoted as conditional use permits of special use permits, depending upon an underlying zoning ordinance's characterization of this type of permit.

Spot Zoning. Spot zoning is a rezoning of property that benefits a specific tract of land with a use classification that is less restrictive than provided by the original zoning ordinance. One theory of spot zoning is that when a city council departs from its comprehensive plan and rezones especially to benefit a small tract, it violates the state law requirement that zoning be "in accordance with a comprehensive plan."[110] Thus, spot zoning is illegal because it is an arbitrary departure from the comprehensive plan. Zoning changes for a small tract will be upheld only if changes have occurred that justify treating the area differently from the surrounding land.[111]

Upzoning. Upzoning refers to the rezoning of property to a more intensive use classification, *e.g.*, from a single-family residential classification to a commercial or retail classification, and is often more profitable to a developer. Neighbors sometimes challenge upzonings as being arbitrary and capricious.[112]

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[109] *City of Lubbock v. Whitacre*, 414 S.W.2d 497, 499 (Tex.Civ.App.—Amarillo 1967, writ ref'd n.r.e.).

[110] Mixon, *Texas Municipal Zoning Law*, § 4.12 (2d ed. 1994). *See also Board of Adjustment of San Antonio v. Leon*, 621 S.W.2d 431, 436 (Tex.Civ.App.—San Antonio 1981, no writ).

[111] *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.).

[112] *Rathkopf's*, § 1:39 at 1-50.

IV. Discretion In Zoning Matters

As a general rule, local governmental officials are afforded broad discretion in zoning matters. Further, in determining the constitutionality of a zoning ordinance, a court is guided by the rational basis test under both the due process and equal protection clauses of the United States Constitution.[113] Zoning ordinances and zoning legislation may be held unconstitutional only if they are shown to bear no possible relationship to the state's interest in securing the health, safety, morals or general welfare of the public and are clearly arbitrary and capricious.[114]

Within this general framework, a municipality's decisionmaking body is afforded considerable discretion in its zoning decisions. The decisionmaking body will not be judged according to whether its zoning decision was necessarily the best course for the community.[115] Rather, in making such a determination, the appropriate inquiry is whether there was a conceivable or even hypothesized factual basis for the specific zoning decision made.[116] This is not to suggest, however, that a zoning decision can be justified merely by mouthing an irrational basis for an otherwise arbitrary decision.[117] "The key inquiry is whether the question is 'at least debatable.'"[118] Further, local legislators who decide discretionary zoning matters are entitled to absolute immunity.[119]

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[113] *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973). *See also Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986).

[114] *Village of Euclid*, 272 U.S. at 395; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *Shelton v. City of College Station*, 780 F.2d 475, 479-80 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 822 (1986).

[115] *See Shelton*, 780 F.2d at 480 ("It is not the function of the trial court to determine whether the Town's zoning decision was necessarily the best course for the community, which effect would be to move the function of a zoning decision maker from a legislator to judge").

[116] *Id*., 780 F.2d at 480-81.

[117] *See id*., 780 F.2d at 481-82 ("[a] denial of a building permit on the King Ranch because of inadequate parking might fall into this category"). *See also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) ("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" upon which a council may rely).

[118] *Shelton*, 780 F.2d at 483.

[119] *Supra*, note 106.

V. Legal Challenges to Zoning Ordinances

While there are a number of potential theories under which a disgruntled landowner conceivably could challenge a local government's zoning decisions, there are several fairly established categories of land use and zoning challenges that may be used as a framework within which to analyze any such challenge. Without going into detail, the general categories of challenges to zoning ordinances are as follows:

Just Compensation Takings Claim. This claim arises when a landowner asserts that the zoning or land use decision applied to his property constitutes a taking of his property without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution. The remedy usually sought in this type of challenge is just compensation.

Due Process Takings Claim. In this challenge, a landowner claims that the zoning or land use regulation applied to his property goes too far and destroys the value of his property to such an extent that it amounts to a taking by eminent domain without due process of law. The remedy sought in this challenge is typically the invalidation of the zoning or other land use regulation.

Arbitrary and Capricious Substantive Due Process Claim. A landowner may claim that the zoning regulation or other land use decision is arbitrary and capricious in that it does not bear a substantial relation to the public health, safety, morals or general welfare. This type of challenge may be brought under either a facial or "as applied" attack.

Equal Protection. An equal protection challenge may be based upon an assertion that the zoning regulation or other land use decision unfairly impacts upon a suspect class, which would involve a strict scrutiny review, or results in economic discrimination, which would involve a rational basis review.

Procedural Due Process. This last category involves an attack whereby a landowner claims that he has been deprived of procedural due process in the manner in which the zoning or other land use regulation has been enacted.

The foregoing challenges may be brought under both the United States and Texas Constitutions. These challenges typically arise under the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 17 of the Texas Constitution.

VI. The Use of Initiative and Referendum in Zoning

In a heated political debate involving a zoning issue, it is not unusual for a citizen group to threaten to gather signatures to force a city council to "undo" zoning or amend the zoning ordinance so that some action may, or may not, be taken by a municipality. While many home-rule charters prohibit the initiative process from being utilized to amend zoning ordinances, state law does not allow zoning ordinances (other than the

initial adoption of a zoning ordinance and the repeal of a zoning ordinance[120]) to be adopted through the initiative process.

Initiative is the "initiation of municipal legislation and its enactment or rejection by the municipal electorate in the event the proposed measure is not enacted by their elected representatives."[121] While the right to initiative is to be liberally construed, "the field in which the initiatory process is operative is not unlimited."[122]

> Any rights conferred by or claimed under the provisions of a city charter, including the right to an initiative election, are subordinate to the provisions of the general law. It follows that the Legislature may by general law withdraw a particular subject from the field in which the initiatory process is operative. Other provisions of the charter may withdraw from the people the power under which the initiative provisions deal with a particular subject. The limitation by the general law or by the charter of the field in which the initiatory process is operative may be either an express limitation or one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end.[123]

One of the exceptions to the initiatory process is where a public hearing is mandated by law.

> In all the Texas cases called to our attention in which it has been held that the people of a municipality could not validly exercise a delegated legislative power through initiative proceedings, it will be found that authority to act was expressly conferred upon the municipal governing body exclusively, or there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, by statute or charter made a prerequisite to the exercise of the legislative power.[124]

Thus, initiative elections are limited by either the general laws of the State of Texas or by a city charter. In a recent case, the Texas Court of Appeals held that initiative and

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[120] Tex. Local Gov't Code § 211.015.

[121] 5 *McQuillin Municipal Corporations* § 16.52 (3d ed.).

[122] *Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951).

[123] *Id.*

[124] *Id.*, 244 S.W.2d at 653.

referendum could not be used for zoning matters.[125] *City of Canyon v. Fehr* involved the approval of the rezoning of two tracts of land by the Canyon city commission. Two citizens filed a petition with the city, requesting that (1) the city adopt a resolution negating the rezoning ordinances, (2) repeal the zoning amendments, or (3) submit the rezoning issue to a referendum election. When the city did not do so, suit was filed to compel the city commission to "undertake one of the three actions mentioned."[126]

In discussing the initiative and referendum provisions, the Court of Appeals discussed the initiative and referendum powers of Texas local governments.

> As previously said, initiative and referendum is not a right granted the citizenry. Rather, it represents a power reserved from the government and retained by the people. Because of this, provisions dealing with it should be liberally construed in favor of the reservation. However, it may be limited. That can occur through either express directive or by implication. And, before it can arise through implication, the provisions must evince a clear and compelling intent to limit the power.[127]

While discussing one exception to the rule that referendum could not be utilized in the zoning context,[128] the Court of Appeals addressed two cases that held initiative and referendum may not be utilized in the zoning arena.[129] In *San Pedro North, Ltd. v. City of San Antonio*, the court held that to allow the initiative process in the zoning context "would be to add a procedural step which is not required by the comprehensive provisions of the [Texas Zoning] Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one."[130] Similarly, in *Hancock v. Rouse*, the court held that "[a] zoning ordinance enacted by the City Council without the notice and hearing required by statute would be invalid and the power of the people to

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[125] *City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex.App.—Amarillo 2003, no pet.),

[126] *Id*., 121 S.W.3d at 902.

[127] *Id*., 121 S.W.3d at 903.

[128] In 1993 the Texas Legislature authorized zoning referenda to repeal a home rule municipality's zoning regulations in their entirety or for the determination whether a municipality should initially adopt zoning regulations. *See* Tex.Local Gov't Code § 211.015.

[129] *See San Pedro North, Ltd. v. City of San Antonio*, 562 S.W.2d 260 (Tex.Civ.App.—San Antonio 1978, writ ref'd n.r.e.); *Hancock v. Rouse*, 437 S.W.2d 1 (Tex.Civ.App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.). *See also City of Canyon*, 121 S.W.3d at 904.

[130] *San Pedro North*, 562 S.W.2d at 262, citing *City of San Antonio v. Lanier*, 542 S.W.2d 232 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.).

legislate directly is subject to the same limitations. . . . [T]he power of the people . . . to legislate directly does not extend to the subject of zoning."[131] Thus, the initiative process may not be utilized to adopt or amend zoning ordinances and the use of referendum is limited solely to those purposes expressed in the Texas Local Government Code.

VII. Application of Municipal Zoning Ordinances to Other Governmental Units

As a general rule, most governmental entities are not subject to a municipality's zoning regulations. Section 211.013(c) of the Texas Local Government Code specifically provides that municipal zoning power "does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency." Similarly, those governmental entities which derive their authority from the State of Texas, such as school districts and special purpose districts, also are exempt from the application of municipal zoning regulations.[132] In a 2009 opinion, the Texas Attorney General's Office determined that a home rule municipality may enforce its reasonable land development regulations and ordinances against an independent school district for the purposes of aesthetics and the maintenance of property values.[133]

VIII. Practical Pointers in Zoning Matters

1. Make sure that city staff is made aware of the need for, and importance of, creating and maintaining a detailed administrative record of the zoning and land use decisions of the planning and zoning commission and city council.

2. Document the harmful impacts of the proposed project or proposed land use. This documentation, as well as letters and comments from interested persons on the harms of the project or proposed land use, should be placed in the record, along with all comments made at any public hearings or meetings. This includes e-mails from residents.

3. In addition to the regular minutes taken of such matters, audio record the various meetings and hearings and maintain the recordings should the need to transcribe them arise. In some cities, minutes tend to be very "bare bones" and simply reflect that there was a public hearing and then specify which councilmember made the motion to approve or deny an application.

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[131] *Hancock*, 437 S.W.2d at 4.

[132] *See Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 672 (Tex. 1973) (school districts exempt not subject to municipal zoning regulations); *City of Lucas v. North Texas Mun. Water Dist.*, 724 S.W.2d 811 (Tex.App.—Dallas 1986, writ ref'd n.r.e.) (water district not subject to municipal zoning regulations, but subdivision requirements and uniform codes apply).

[133] Tex. Att'y Gen. Op. No. GA-0697 (2009).

4. If the zoning matter is one that is likely to be controversial (and potentially result in a legal challenge), consider having a court reporter attend and transcribe the public hearings.

5. If the zoning matter is one that is likely to be controversial (and potentially result in a legal challenge), consider retaining experts and consultants to develop evidence of the harm that would result from the proposed project or proposed land use. Have the consultants prepare written reports to be included in the record, as well as have the consultants testify at the public hearings on the request.

6. Educate your planning and zoning commissioners and city council members ahead of time. Give them written questions to ask both the applicant and the consultants that are designed to elicit evidence and rationales to support a denial. Ask them to frame comments in objective terms and avoid discussion of personal likes and dislikes.

7. Prepare draft findings for the decisionmaking bodies that help support a decision to deny the project or requested land use. To the extent possible, each finding should be supported by reference to evidence in the record and should use a cause and effect logic, *i.e.*, because the project will increase traffic at this site by 25%, the increased traffic will be harmful to the existing neighborhood. State your findings with certainty and avoid words such as "could cause," "might increase," or "may result in." If you are conditionally approving a project, make sure that your findings connect each condition to a harmful impact or impacts of the proposed project.

8. If the record and draft findings are not ready at the time that the decisionmakers are ready to render a decision, strongly suggest that the planning and zoning commission or city council issue a tentative indication only, and postpone consideration of the matter until formal findings can be prepared and adopted by the decisionmakers that will support the decision and, if needed, incorporate any new evidence. Many times, the decisionmakers will not completely follow staff recommendations, or will indicate an intent to make a finding that departs materially from the draft findings and staff recommendations. Sometimes, new evidence is presented that is not included in the draft findings prepared by staff; and sometimes, staff simply has not prepared and presented proposed findings to the decisionmakers. If these, or similar instances arise, the local government should not hesitate to table the decision until it can cross all of the "t's" and dot all of the "i's."

9. It is not unusual for developers to request that the zoning process be sped up. While there may be times when speeding up the process is desirable, make certain that all necessary steps have been followed, including notice to adjoining landowners and newspaper/publication notices.

10. Beware of a request that the area of land subject to a zoning change be **increased**. For a zoning change to occur, there must be public notice of the proposed

change in zoning. Since the public notice contains a description of the property for which a zoning change is sought, there would not be adequate notice of a change in the increased area. Conversely, the area of land subject to a zoning change may be **reduced** since there has been public notice of the portion of land subject to a zoning change. Thus, decreasing the amount of land included in a zoning change would not violate the public notice requirements. The fact that a zoning change has been effected on only a portion of the land instead of all of the land is not injurious to those individuals who have an interest in the zoning change. If in doubt, start the process over with new notice to adjoining landowners and newspaper notice. The failure to provide adequate notice may invalidate the zoning decision.

11. Similarly, beware of a request that the area of land subject to a zoning change be zoned to a **more intense use** than was advertised. In such a situation there would not have been adequate public notice. For example, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 10,000 square feet, the governing body of a municipality instead could not zone the land residential with lots of 5,000 square feet since there was not adequate public notice and the use is more intense than advertised. Conversely, the area of land subject to a zoning change may be zoned to a **less intense use** than was advertised. In this situation there was adequate public notice. Thus, if the public notice stated that there was an application to change land zoned agricultural to residential with lots of 5,000 square feet, the governing body of a municipality instead could zone the land residential with lots of 10,000 square feet since there was adequate public notice and the use is less intense than advertised.

12. Eliminate all discrimination concerns (no ethnic comments or socio-economic comments) and consider disabled persons' concerns.

13. City councilmembers and planning and zoning commission members should always keep in mind the amount of discretion they possess—in a zoning/rezoning matter, their discretionary authority is very broad; however, in the platting/site plan approval context, their discretionary authority is severely circumscribed.

14. State law provides that an appeal from the decision of a zoning board of adjustment must be filed within ten (10) days after the date the board's decision is filed in the board's office. Most cities, however, do not define by ordinance when this occurs, thus resulting in confusion about when "filing" actually occurred and consequently, when the ten-day period begins to run. The city ordinance should define the date upon which "filing" occurs—the first business day after the board's meeting, for example.

15. Beware of land use decisions that may implicate federal laws. For example, land use decisions affecting churches and certain religious exercise will be impacted by the Religious Land Use and Institutionalized Persons Act of 2000.[134]

[134] 42 U.S.C. § 2000cc *et seq*.

Similarly, cell tower siting and related concerns may be impacted by the limitations placed upon local governments in the Telecommunications Act of 1996.[135] These areas of the law are evolving rapidly and requiring specific use permits for churches, for example, is probably now illegal in Texas.

16. For attorneys who represent landowners, the landowner's attorney may not contact the mayor or a councilmember to discuss a pending land use matter before the city council or planning and zoning commission. While there is no prohibition against a non-attorney applicant contacting the mayor or a councilmember to discuss his/her pending application, an attorney for the applicant may run afoul of the rules of professional responsibility (and thus possibly be subject to a grievance being filed against him/her) if he/she contacts the mayor or a councilmember without contacting the local government's attorney. Specifically, in Texas, Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct addresses this issue:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
>
> . . .
>
> (c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

Further, an Ethics Committee Opinion is directly on point. In Ethics Opinion 474 (June 1991), the Texas Supreme Court Professional Ethics Committee concluded that the provisions of Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

17. Prior to voting on a land use matter, individual members of a city council or planning and zoning commission may go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code; however, caution also is advised in doing so. It is clear that in Texas the zoning or

[135] 47 U.S.C. § 332(c)(7)(A).

rezoning of property is a legislative act.[136] With such legislative authority comes absolute legislative immunity for the public officials exercising it.[137] While legally there may be little concern about the information a city councilmember, for example, receives before a council meeting about a specific case, the political aspects of that case may mandate more cautious behavior by the city councilmember. Thus, while talking to a neighbor opposed to the zoning case may be legally permissible, politically there may be an appearance of impropriety or predilection to reach a decision without going through the public hearing process. Further, Texas municipalities must follow the Texas Open Meetings Act[138] and its prohibition of deliberation outside a properly noticed public hearing and meeting.

18. Prior to voting on a variance or other authorized land use matter, members of a zoning board of adjustment should **not** go to the site in question, confer with interested parties, meet with neighborhood opposition members, and evaluate the situation outside the public hearing process mandated by Chapter 211 of the Texas Local Government Code. In Texas the law is clear that members of a zoning board of adjustment act in a quasi-judicial capacity. Consequently, the ex parte receipt of information or opinions is unfair and may deprive an applicant of due process. As a noted commentary states, "[a] situation which presents the element of unfairness is for the views of one party to a proceeding before the board [of adjustment] to be presented to the board under circumstances which deprive the opposing party of the opportunity to know what was presented and the further opportunity to respond to it."[139] Thus, to survive a constitutional procedural due process challenge, the following elements must be present: (1) an unbiased decision, (2) adequate notice of the hearing, (3) a hearing in which witnesses are sworn and in which there is an opportunity to present evidence and an opportunity for cross-examination, and (4) a decision based on the record supported by reasons and findings of fact.[140]

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[136] *See Shelton, supra* note 113.

[137] *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

[138] Tex. Gov't Code, ch. 551.

[139] *Rathkopf's*, § 57.68 at 57-136.

[140] *See Mixon*, § 6.006 at 6-11.

APPENDIX A: Findings – Variances

Inquiry		Findings
Is the request for a variance owing to special condition inherent in the property itself? If yes, **CONTINUE** If no, **STOP** ↓	→	The property is/has … (e.g., odd-shaped, unusual topography, etc.)
Is the condition one unique to the property requesting the variance? If yes, **CONTINUE** If no, **STOP** ↓	→	The condition is unique to this property.
Is the condition self-imposed or self-created? If yes, **STOP** If no, **PROCEED** ↓	→	The condition necessitating the request was not created by the property owner.
Will a literal enforcement of the zoning ordinance result in an unnecessary hardship? If yes, **CONTINUE** If no, **STOP** ↓	→	Strict enforcement of the zoning ordinance would impose a hardship above that suffered by the general public.
Will the hardship prevent any reasonable use whatsoever? If yes, **CONTINUE** If no, **STOP** ↓	→	Without the grant of the requested variance, the property owner would be deprived of the right to use his property. Financial considerations alone cannot satisfy this requirement.
Would the grant of the variance be contrary to public interest? If yes, **STOP** If no, **CONTINUE** ↓		
Is the request within the spirit of the ordinance and does it further substantial justice? If yes, **CONTINUE** If no, **STOP**		