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Austin, TX**Fundamentals of the Zoning Process: The Law, The Players  
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***This paper and any accompanying presentations are intended for general educational purposes only, and do not constitute legal advice.***

Recognition must be attributed to my law clerk, Damien Shores, a third year law student at Saint Mary's. Damien contributed mightily to the crafting of this paper.

## Introduction

### Historic Role of Zoning

The term “zoning” is defined as “the legislative division of a region, esp. [sic] a municipality, into separate districts with different regulations within the districts for land use, building size, and the like.”<sup>1</sup> Zoning is generally achieved by the adoption of a “zoning ordinance,” which is defined as “a city ordinance that regulates the use to which land within various parts of the city may be put.”<sup>2</sup> Zoning ordinances often do this by allocating residences to certain parts of the city and businesses to other parts of the city. Furthermore, a comprehensive zoning ordinance usually regulates the height of buildings and the proportion of the lot area that must be kept free from buildings.<sup>3</sup>

It is believed zoning was imported to the United States from Germany, where cities there had adopted it around 1870.<sup>4</sup> New York City adopted the United States’ first zoning ordinance in 1916.<sup>5</sup> Zoning’s original purpose was to protect homeowners in residential areas from devaluation by industrial and apartment uses that had been made possible by advances in transportation technology (i.e., trucks and buses) around 1910-1920.<sup>6</sup> Completion of the interstate highway system around 1970 made jobs and employees so mobile that suburbs began to adopt growth controls in the form of zoning and subdivision ordinances to stem the tide.<sup>7</sup> Today, zoning’s purpose remains the same, to segregate uses thought to be incompatible. However it is also used as a tool by communities to preserve the “character” of a community and to prevent new development from interfering with existing residents or businesses.

## The Law

### Municipal Zoning Authority

In Texas, municipal zoning authority can be found in the Local Government Code Chapter 211.<sup>8</sup> The powers granted to municipal governments to zone under Chapter 211 are for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.<sup>9</sup> Chapter 211 also spells out what may be regulated, such as:

- The height, number of stories, and size of building and other structures;
- The percentage of a lot that may be occupied;
- The size of yards, courts, and other open spaces;

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<sup>1</sup> Black’s Law Dictionary 779 (2d pocket ed. 1996).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 4 (presented at the Florida State University Critical Issues Symposium: The Causes and Consequences of Exclusionary Regulations, November 8-9, 2001).

<sup>5</sup> John Mixon, *Texas Municipal Zoning Law* (3d ed.), § 1.000 citing Rathkopf, *The Law of Zoning and Planning* (4<sup>th</sup> ed.), § 1.01.

<sup>6</sup> Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 1 (2001).

<sup>7</sup> *See id.*

<sup>8</sup> *See* Tex. Loc. Gov’t Code Ann. Ch. 211 (Vernon 2010).

<sup>9</sup> *Id.* § 211.001.

- Population density;
- The location and use of building, other structures, and land for businesses, industrial, residential, or other purposes; and
- The pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.<sup>10</sup>

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.<sup>11</sup> While general-law cities may do any of the above-mentioned things, only home-rule municipalities may regulate the bulk of buildings.<sup>12</sup> Chapter 211 also requires that all zoning regulations must be adopted in accordance with a comprehensive plan that is designed to:

- Lessen congestion in the streets;
- Secures safety from fire, panic, and other dangers;
- Promote health and the general welfare;
- Provide adequate light and air;
- Prevent the overcrowding of land;
- Avoid undue concentration of population; or
- Facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.<sup>13</sup>

In addition to spelling out what may be zoned by a municipality, Chapter 211 provides procedures governing the adoption of zoning regulations (211.006); Zoning Commission procedures (211.007); Board of Adjustment procedures, authority, appeals, and judicial review of Board decisions (211.008, 211.009, 211.010, and 211.011 respectively); Enforcement (211.012); and other miscellaneous provisions pertaining to municipal zoning, which will be discussed in more detail in subsequent sections of this paper.

### **Open Meetings Act**

One such miscellaneous, but very important, provision pertaining to municipal zoning is Section 211.0075 of the Local Government Code, which requires any zoning board or commission established by a municipality, regardless of whether they have rulemaking or quasi-judicial powers or functions only in an advisory capacity, to comply with Government Code Chapter 551, more commonly referred to as the Texas Open Meetings Act (TOMA).<sup>14</sup> TOMA was adopted to help make governmental decision-making accessible to the public. It requires meetings of city councils, P&Zs, and BoAs to be open to the public and to be preceded by public notice of the time, place and subject matter of the meeting. Furthermore, TOMA's provisions are mandatory and are to be liberally construed in favor of open government.<sup>15</sup>

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<sup>10</sup> *Id.* § 211.003(a).

<sup>11</sup> *Id.* § 211.003(b).

<sup>12</sup> *See id.* § 211.003(c).

<sup>13</sup> *Id.* § 211.004.

<sup>14</sup> *See id.* § 211.0075; *See also* Tex. Gov't Code Ann. Ch. 551 (Vernon 2009).

<sup>15</sup> Office of the Attorney General, *Open Meetings Act Handbook*, 2 (2008).

**Notice:** A governmental body must give written notice of the date, hour, place and subject of each meeting held by the governmental body.<sup>16</sup> Generally, notice is adequate for purposes of TOMA if it alerts or informs the public that some action will be taken on a particular topic. In disclosing that some action will be taken, notice that is adequate for purposes of TOMA need not mention all possible results which may arise; yet, a higher degree of specificity is needed when the subject to be debated is of *special or significant* interest to the public.<sup>17</sup> For example, notice of a meeting where a city council or P&Z will consider whether to change the zoning of a particular area must describe the area. The purpose behind TOMA's notice requirement is to ensure that the public has the opportunity to be informed about governmental decisions involving public business.<sup>18</sup> The idea is that citizens are entitled to know not only what a government body decides, but how and why every decision is reached.<sup>19</sup> Inadequate notice can be the basis for challenging governmental decisions.<sup>20</sup>

The notice must be posted in a place readily accessible to the general public at all times for at least seventy-two hours before the scheduled time of the meeting, except for emergency meetings.<sup>21</sup> Notice of emergency meetings must be posted at least two hours in advance.<sup>22</sup> It is unlikely that an emergency meeting will be called on a zoning matter because the mere necessity for quick action does not constitute an emergency where the situation calling for such action is one which reasonably should have been anticipated.<sup>23</sup> The Texas Supreme Court has said that an emergency is a condition arising suddenly and unexpectedly, not caused by any neglect or omission of the person in question, which calls for immediate action.<sup>24</sup> Cities must post notices on a bulletin board at a place convenient to the public at city hall.<sup>25</sup> If a city posts on the internet, they must still physically post the notice at city hall.<sup>26</sup> Depending on the proposed action to be taken, the city might also need to have notices of the meeting mailed to neighboring owners, signs posted on-site, or ads printed in the newspaper.

**Minutes:** A governmental body must preserve the written certified agendas or an audio tape recording of all meetings (open and closed), except for closed consultations with the body's attorney. If written minutes are kept instead of a tape recording, the minutes must include every action taken by the governmental body.<sup>27</sup> The minutes must state the date and time of the meeting, the names of those present, the subject of each deliberation and indicate each vote,

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<sup>16</sup> Tex. Gov't Code § 551.041.

<sup>17</sup> *Gardner v. Herring*, 21 S.W.3d 767 (Tex.App.---Amarillo 2000, no pet. h.).

<sup>18</sup> *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991), and *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990).

<sup>19</sup> *Acker*, 790 S.W.2d at 300.

<sup>20</sup> *Id.*

<sup>21</sup> *See Laidlaw Waste System (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 661 (Tex. 1995) (raised posting error regarding date of the public hearings).

<sup>22</sup> Tex. Gov't Code § 551.045.

<sup>23</sup> *River Road Neighborhood Ass'n South Texas Sports*, 720 S.W.2d 551, 557 (Tex.App.---San Antonio 1986).

<sup>24</sup> *Goolsbee v. Texas & N.O.R. Co.*, 243 S.W.2d 386, 388 (Tex. 1951).

<sup>25</sup> Tex. Gov't Code § 551.050.

<sup>26</sup> *Id.* § 551.043(b).

<sup>27</sup> Op. Tex. Att'y Gen. No. H-1163 (1978).

order, decision or other actions taken.<sup>28</sup> Although minutes do not have to be a verbatim transcript of the meeting, they must provide a brief summary of each deliberation.<sup>29</sup>

**Quorum:** Generally, a quorum must be present for a gathering to be considered a “meeting” and thus fall under TOMA. Under TOMA, a “quorum” is defined as a majority of the governing body unless otherwise defined by applicable law, rule, or charter.<sup>30</sup> A quorum of a governmental body's members must be present in order for the governmental body to exercise the authority delegated to it. A quorum of any governmental body *must be present* to convene an open meeting of that body under the Act. Given that any actions taken in violation of TOMA may be voidable, it is vital to ensure that a governing body has a quorum present before taking any actions covered by the Act.

If a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberative process through which that agreement is reached is probably subject to the requirements of TOMA, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.<sup>31</sup> Telephone conferencing can also be considered a violation of TOMA, depending on the facts.<sup>32</sup> The City of San Antonio violated TOMA when its city council, via several small meetings in the city manager’s office, each containing less than a quorum, agreed to strip a pro-gay/lesbian group of its funding from the city’s budget. The Court held that if a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberation by which that agreement is reached is subject to the requirements of TOMA, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time. In other words, if city council members are holding their discussion of public business in numbers less than a quorum in order to avoid having to meet the requirements of TOMA, criminal prosecution can be pursued against such officials for such discussions.<sup>33</sup> Members of governing bodies must be particularly careful to avoid deliberating through *e-mail*. The term “deliberation” is not limited to “spoken communications.” Discussing public business via written notes or electronic mail may constitute a “deliberation” that is subject to TOMA.<sup>34</sup> For example, a case arose from alleged violations of TOMA by certain members of the Alpine City Council for their discussion of public matters via email by a quorum of public officials outside of an open meeting.<sup>35</sup>

**Violations:** Members of a governing body who knowingly take actions in violation of TOMA may subject themselves to prosecution by county or district attorneys.<sup>36</sup> District courts have jurisdiction over criminal violations of TOMA as misdemeanors involving official misconduct.<sup>37</sup> TOMA violations and their accompanying punishments include the following:

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<sup>28</sup> Tex. Gov’t Code § 551.021.

<sup>29</sup> Op. Tex. Att’y Gen. No. JM-840 (1988).

<sup>30</sup> See Tex. Gov’t Code § 551.001(6).

<sup>31</sup> Op. Tex. Att’y Gen. No. DM-95 (1992).

<sup>32</sup> See *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.---San Antonio 1985, no writ).

<sup>33</sup> *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001).

<sup>34</sup> See Op. Tex. Att’y Gen. No. JC-0307 (2000).

<sup>35</sup> See *Rangra, et al. v. Brown, et al.*, 566 F.3d 515 (5th Cir. 2009).

<sup>36</sup> Tex. Gov’t Code § 551.144.

<sup>37</sup> *Id.*

- A member of a governmental body commits an offense if the member knowingly conspires to circumvent TOMA by meeting in numbers less than a quorum for the purpose of secret deliberations (fine of not less than \$100 or more than \$500; and/or jail for not less than one month or more than six months).<sup>38</sup>
- A member of a governmental body commits an offense if the member knowingly calls or aids in calling, or participates in an unauthorized closed meeting (fine of not less than \$100 or more than \$500; and/or jail for not less than one month or more than six months).<sup>39</sup>
- A member of a governmental body commits an offense if the member participates in a closed meeting of the governmental body knowing that a certified agenda of the closed meeting is not being kept or that a tape recording of the closed meeting is not being made (Class C misdemeanor).<sup>40</sup>
- An action taken by a governmental body in violation of TOMA is voidable.<sup>41</sup>

### Limitations on Power

From the first zoning ordinance in 1916 up until 1926, state courts were about evenly split on the constitutionality of zoning because of the 5<sup>th</sup> Amendments' property protections ("...no person shall be deprived of...property...without due process of law; nor shall private property be taken for public use, without just compensation.") which were made applicable to the states via the 14<sup>th</sup> Amendment.<sup>42</sup> The Texas constitution contains similar, albeit stronger language stating that "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation..."<sup>43</sup> Ultimately, the U.S. Supreme Court weighed in on the issue in the landmark decision of *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), which upheld zoning's constitutionality in 1926 and cleared the way for zoning in all state courts. In *Euclid*, zoning was justified as a proper exercise of the police power to protect the health, safety, and welfare of the community.<sup>44</sup> In Texas, the landmark zoning case establishing the constitutionality of comprehensive zoning is *Lombardo v. City of Dallas*, 47 S.W.2d 495 (Tex.Civ.App.---Dallas 1932), *aff'd*, 124 Tex. 1, 73 S.W.2d 475 (1934). *Lombardo* held that all property is held subject to the police power, and that a proper zoning regulation is not a "taking" for which compensation must be paid.<sup>45</sup>

However, such police power can not be exercised arbitrarily, irrationally, or have no substantial relation to the public health, safety, and welfare. In the case of *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court found that zoning a single vacant tract near an industrial area as "residential" was an unconstitutional taking. As a result of the zoning classification, no practical use could be made of the tract because the return on investment from

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<sup>38</sup> *Id.* § 551.143.

<sup>39</sup> *Id.* § 551.144.

<sup>40</sup> *Id.* § 551.145.

<sup>41</sup> See *City of San Antonio v. Hardee*, 70 S.W.3d 207, 212, and 213 (Tex.App.---San Antonio 2001, no pet. h.) (plaintiffs claimed that the annexation was accomplished by written memorandum rather than an authorized action of the City Council meeting in conformity with TOMA; entire annexation was voided).

<sup>42</sup> See U.S. Const. amends. V and XIV.

<sup>43</sup> Tex. Const. art 1, § 17.

<sup>44</sup> Mixon, *Texas Municipal Zoning Law*, § 2.200 citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

<sup>45</sup> Mixon, *Texas Municipal Zoning Law*, § 2.302

any permitted use would be too low. The reasoning behind the Court's decision was that other landowners in the City of Cambridge were treated reasonably, while Nectow was singled out for a discriminatory classification which rendered his land valueless, thereby effectively confiscating his property.<sup>46</sup> Such discrimination violates the 14<sup>th</sup> Amendment's fundamental command that each governmental entity must treat all similarly situated claimants alike and must afford all persons equal protection under the law.<sup>47</sup> The thing to take away from *Euclid* and *Nectow* is that zoning is constitutionally justified as an exercise of police power to protect the health, safety, and welfare of the community. In general, cities do not need to compensate property owners for financial losses caused by zoning, but they must act with reasonable regard for the impact on the landowner, and if the regulation as applied is arbitrary, confiscatory, or discriminatory, then the ordinance is unconstitutional as to the particularly affected owner.<sup>48</sup>

Another important Supreme Court case is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* was a case which established the "total takings" test for evaluating whether a particular regulatory action constitutes a regulatory taking that requires compensation. The "total takings" test requires a consideration of (1) the degree of harm to public lands or adjacent property posed by the regulated activities, (2) the social value of such activities, and (3) the relative ease with which the alleged harms can be avoided through measures taken by either the claimant or the government.<sup>49</sup>

*Dolan v. City of Tigard*, 512 U.S. 374 (1994), was a landmark case regarding the practice of zoning and property rights, and served to establish limits on the ability of cities and other government agencies to use zoning and land-use regulations to compel property owners to make unrelated public improvements. The Court held that a government agency may not require a person to surrender constitutional rights in exchange for discretionary benefits, where the property sought has little or no relationship to the benefit conferred. A two-prong test was applied: (1) whether or not there is an "essential nexus" between the permit conditions and legitimate state interest, and (2) whether or not the degree of the exactions required by the permit condition bears the required relationship to the projected impact of the proposed development.<sup>50</sup>

*Kelo v. City of New London*, 545 U.S. 469 (2005), was a case involving the use of eminent domain to transfer land from one private owner to another to further economic development. The case arose from the condemnation by New London, Connecticut, of privately owned real property considered to be blight so that it could be used as part of a comprehensive redevelopment plan. The Court held in a 5-4 decision that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public use" under the Takings Clause of the 5<sup>th</sup> Amendment.<sup>51</sup> Prior to the *Kelo* decision, only eight states specifically prohibited the use of eminent domain for economic development except to eliminate blight. Heading public outcry following the decision, forty-three states have amended their eminent domain laws. Texas amended its Constitution to require that "blight" be determined on

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<sup>46</sup> *Id.* § 2.201 citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>50</sup> See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>51</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005).

a property-by-property basis and it authorizes the legislature, by a 2/3 vote, to give any private entity the power of eminent domain.<sup>52</sup>

## The Players

### City Staff

As pertaining to zoning, there are quite a few city employees and consultants who participate in the zoning process. Staff play crucial roles in policy-making, planning, implementation, routine administrative support, and at the enforcement level. City planners, development directors, building officials, and engineers typically work closely with the city management, city attorney, city council, P&Z, and BoA. City inspectors or code enforcement officers are the city's eyes and ears when it comes to violations of the city's zoning ordinance. Once they observe a violation or violations, they typically document it and notify the property owner of the violation(s), providing the property owner a particular window of time within which to remedy the violation before a ticket is issued. Legal authority to enforce, penalize, and remedy zoning violations are found under Section 211.012 of the Local Government Code.<sup>53</sup> A city must provide for authorized criminal penalties and civil remedies via an ordinance. Once a ticket is issued for a zoning ordinance violation, the city prosecutor and municipal court judge become involved; their job is to enforce the zoning ordinance as its written. Appeals of the city inspector's or municipal court's decision could then move on to the BoA, and from the BoA on to state court or federal court.

### P&Z

P&Z is short for "Planning and Zoning," and refers to either a board or commission charged with making planning and zoning decisions on behalf of the municipality. Section 211.007 of the Local Government Code effectively mandates that a city governing body appoint a commission prior to the inception of zoning, although the governing body of a general-law municipality may exercise zoning authority without the appointment of a zoning commission.<sup>54</sup> The law does not establish rules for the selection, qualifications, tenure or organization of the commissioners. The decisions on such matters are left up to the governing body of each city. The P&Z's primary responsibility concerns implementing the land use section of the city's comprehensive plan, as well as the municipal policies pertaining to that plan. It can be said that the P&Z has two responsibilities: (1) they must make a report to the city council regarding proposals for changes to the zoning map or the zoning ordinance text, and (2) they frequently serve as the administrators, either alone or in concert with city council, for conditional use or special use permits.<sup>55</sup> Although the P&Z has some sway, final authority to accept or reject P&Z recommendations rests with the city council. Furthermore, even though the P&Z is an advisory body, the Texas Open Meetings Act still applies.

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<sup>52</sup> Castle Coalition: Citizens Fighting Eminent Domain Abuse, [http://www.castlecoalition.org/index.php?option=com\\_content&task=view&id=34&Itemid=119](http://www.castlecoalition.org/index.php?option=com_content&task=view&id=34&Itemid=119) (accessed on Feb. 09, 2010).

<sup>53</sup> See *id.* § 211.012.

<sup>54</sup> See Tex. Loc. Gov't Code § 211.007(c).

<sup>55</sup> David L. Pugh, *Zoning*, 6, Texas Municipal League, presented Feb. 19, 1993 at the Municipal Land Use Regulation in Texas Workshop.

P&Zs can be quasi-legislative, administrative, or a combination. Some municipalities structure their P&Zs to serve a representative function (i.e., to advocate on behalf of various segments of the population). P&Zs can be the *frontline*, buffering city council's from public input. Some P&Zs in small towns are tasked with administrative tasks that would typically be undertaken by paid employees in larger cities.

## **BoA**

BoA is short for "Board of Adjustment," which is sometimes called the "Zoning Board of Adjustment" or "Board of Appeals." The BoA's primary function is to deal administratively with individual and neighborhood zoning decisions on a tract-by-tract basis.<sup>56</sup> As such, the BoA has a quasi-judicial role, unlike the P&Z, which has more of a policy recommendation role. The BoA has three fundamental powers: (1) to hear appeals from individuals contesting the decision of a zoning enforcement officer, (2) to hear and decide special exceptions (a.k.a., conditional use permits) to the zoning ordinance where the city governing body has placed this function in the hands of the BoA as opposed to the P&Z, and (3) to grant variances from the terms of the ordinance text where unusual conditions make its literal enforcement unjust.<sup>57</sup> The organization and legal authority for the BoA is found under Section 211.008 of the Local Government Code. The BoA must consist of at least five members to be appointed by the city's governing body for terms of two years.<sup>58</sup> A city can appoint four additional alternative members to serve in the absence of regular board members.<sup>59</sup> Each case before the BoA must be heard by at least seventy-five percent of the members.<sup>60</sup> Appeals to the BoA are governed by Section 211.010 and judicial review of BoA decisions are governed by Section 211.011.<sup>61</sup> Additionally, cities can restrain board authority by requiring specific findings before the board approves variances or special exceptions.<sup>62</sup> Typically, such required findings will be spelled out in zoning ordinance. Its important that the BoA know what findings need to be made, because failure to make the required findings will render a board's actions illegal and void.<sup>63</sup> The BoA must also keep minutes of its proceedings, showing the vote of each member on each question and indicate absences and failures to vote.<sup>64</sup> Furthermore, the BoA must keep records of its examinations and other official actions and maintain them as a public record in the board's office.<sup>65</sup> Maintaining minutes and records are crucial, especially if the BoA's zoning decisions get reviewed by a court.

## **City Council**

The "governing body of a city" mentioned above is basically the city council. Their role in zoning is to establish the vision for the city, determine big picture policies, pass zoning ordinances, accept or reject recommendations made by the P&Z, appoint P&Z and BoA members, and establish rules for the organization of the P&Z and BoA. Under Section

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<sup>56</sup> Mixon, *Texas Municipal Zoning Law*, § 6.000.

<sup>57</sup> Pugh, *Zoning*, 7; *See also* Tex. Loc. Gov't Code § 211.009.

<sup>58</sup> Tex. Loc. Gov't Code § 211.008(b).

<sup>59</sup> *Id.* § 211.008(c).

<sup>60</sup> *Id.* § 211.008(d).

<sup>61</sup> *See id.* §§ 211.010 and 211.011.

<sup>62</sup> Mixon, *Texas Municipal Zoning Law*, § 6.005.

<sup>63</sup> *See Metzger v. City of San Antonio*, 384 S.W.2d 901 (Tex. Civ. App. San Antonio 1964, no writ).

<sup>64</sup> Mixon, *Texas Municipal Zoning Law*, § 6.007 *citing* Tex. Loc. Gov't Code § 211.008.

<sup>65</sup> *Id.*

211.008(g) of the Local Government Code the governing body of a Type-A General-Law municipality may, by ordinance, grant the members of the governing body the authority to act as the BoA.<sup>66</sup> While it is legally possible for the city council in a Type A, General-Law municipality to wear both hats, it may not be ideal (from a legal or political perspective) for the body that makes the laws to also be the body that makes specific exceptions to the laws. Alas, in small towns it is often difficult to find enough qualified, willing and able volunteers to fill a city council, P&Z, and BoA.

### **Property Owners, Developers, and Citizens**

Property owners, developers, and citizens are the parties subject to the city's zoning ordinance. These groups have the greatest impact on zoning decisions because of their input at city council meetings and at the voting booth. Additionally, citizens of a home-rule municipality may repeal the municipality's zoning regulations by either a charter election or a referendum.<sup>68</sup> This option is not available to citizens of a general-law municipality. The zoning process is required by law to be an open, participatory activity.

### **Courts**

Courts come into play when the zoning decisions of the BoA are challenged. The standard of review for a court to overturn a BoA decision (discussed in more detail in "Appeals of Zoning Decisions" below) is "abuse of discretion," which is a heightened standard of review. Given this heightened standard, courts are hesitant to second guess zoning decisions. In fact, a legal presumption exists in favor of a BoA's decision to grant or deny a variance, and an aggrieved party has the burden of proof to clearly establish an abuse of discretion.<sup>69</sup> The trial court must not substitute its judgment for that of a BoA, and if reasonable minds could have reached the same decision, the board's action must be upheld.<sup>70</sup>

## **The Procedures**

### **Comp Plan**

The first step in the zoning process is the preparation of a comprehensive plan (sometimes called a "Comp Plan" or "Master Plan"). This is so because under Section 211.004 of the Local Government Code, all zoning regulations must be adopted in accordance with a comp plan.<sup>71</sup> Usually the city council will appoint a planning commission (P&Z), and the plan will be based upon its recommendation. A comprehensive plan is generally made up of maps which delineate zoning district boundaries, land-use plans which forecast future growth patterns, a designation of districts and specifications of uses within those districts. As growth occurs and circumstances change, the plan should be reviewed and updated at least every five to ten years. The plan should include provisions on land use, transportation, and public facilities to promote sound development and to promote public health, safety, and welfare.

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<sup>66</sup> Tex. Loc. Gov't Code. § 211.008(g).

<sup>68</sup> See *id.* § 211.015.

<sup>69</sup> See *Bd. Of Adjustment of Piney Point Village v. Amelang*, 737 S.W.2d 406, 406 (Tex.App.--Houston [14th Dist.]1987, writ denied).

<sup>70</sup> *Id.*

<sup>71</sup> Tex. Loc. Gov't Code. § 211.004.

The comp plan provides *the vision thing*. It is the aspirational document that guides a municipality's rule-making and decision-making. A comp plan is not law; rather, it provides the philosophical foundation upon which municipal zoning laws are based. Ideally (from both legal and practical perspectives), the choices reflected in a city's zoning ordinances are supported by the principles enumerated in the city's comp plan. Furthermore, when it comes to implementation and administration of the city's regulations, the comp plan is used to fill-in any gaps or answer questions that arise regarding vague or ambiguous regulatory provisions. In this sense, the comp plan is a living, breathing tool that is used routinely, rather than an academic exercise that, upon completion, is shelved and allowed to gather dust. Municipalities must conduct at least one public hearing, which can be conducted by the city council and/or the P&Z. Note that the P&Z must be given an opportunity to review the comp plan prior to adoption, in accordance with Section 213.003 of the Local Government Code.<sup>72</sup>

Once the comp plan is adopted the city can then adopt a zoning ordinance so long as it is enacted in accordance with the comp plan, and is designed to meet one of the goals required by Section 211.004 of the Local Government Code (previously discussed), and attempts to achieve one of the permitted purposes required by Section 211.001 (previously discussed). The city council may divide the municipality into districts of such number, shape, and area; and within such districts, it may regulate and restrict the erection, construction, alteration, repair, or use of buildings, structures, or land. All of the regulations shall be uniform for each class or kind of building through each district, but the regulations in one district may differ from those of other districts.<sup>73</sup> After the zoning ordinance is adopted, it can be enforced. The zoning ordinance can also be amended as the city council sees fit, provided that proper notice is given under the Texas Open Meetings Act.

### **Rezoning**

Upon its own initiative or upon request of the property owner, a city can change the zoning regulations that apply to a parcel. Rezoning must be in conformity with the comp plan. If twenty percent (20%) of the neighbors protest the rezoning, three fourths (3/4) of the city council must vote in favor of rezoning in order for it to be approved.<sup>74</sup>

### **Variations and Special Exceptions**

A variance is a modification of the literal provisions of a zoning ordinance granted when strict enforcement of the zoning ordinance would cause undue hardship owing to circumstances unique to the individual property on which the variance is granted.<sup>75</sup> There are three crucial characteristics associated with a variance that should be committed to memory: (1) the existence of undue hardship; (2) the presence of a unique set of circumstances; and (3) the application of both items (1) and (2) above, to property rather than to an individual.<sup>76</sup> Unless provided

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<sup>72</sup> See *id.* § 213.003.

<sup>73</sup> See *id.* § 211.005.

<sup>74</sup> See *id.* § 211.006(d).

<sup>75</sup> John Delafons, *Land Use Controls in the United States* (Cambridge, Mass.: The Joint Center for Urban Studies, 1962), p. 76.

<sup>76</sup> Pugh, *Zoning*, 7.

otherwise by the zoning ordinance, variances run with the land. Given these characteristics, there are four requirements that need to be proved before the BoA can grant a variance:

- That the granting of the variance will not be contrary to the public interest, as evidenced in the goals and objectives of a city's comprehensive plan;
- The individual requesting the variance must show that the literal enforcement of the zoning ordinance will result in undue hardship;
- That by granting the permit contrary to the provision of the zoning ordinance, the spirit of the ordinance will be observed; and
- That there is substantial justice in granting the permit.<sup>77</sup>

Under Section 211.008 of the Local Government Code, the BoA is authorized to make special exceptions to the terms of a zoning ordinance which are consistent with the general purpose, rules, and intent of the ordinance.<sup>78</sup> Thus, a zoning ordinance should specify the conditions that must be met for a special exception to be granted or the standards that a BoA is to employ when granting a special exception.<sup>79</sup>

### **Conditional Use Permit**

A Conditional Use Permit (CUP, also called a "Specific Use Permit") refers to uses that a zoning ordinance allows, but that are screened and specially approved by the city for situational suitability. Unlike variances, CUPs do not require a showing of hardship. As a practical matter, most CUPs are handled by cities as specific (or special) use permits.

### **Appeals of Zoning Decisions**

Typically, the first zoning decision someone will be unhappy with is the decision of the city inspector to ticket an individual property owner for non-compliance with the zoning ordinance. When this happens, the first place for the property owner to go is to appeal the city inspector's ticket to the BoA so they can get a variance or special exception. Authority to do so is found under Section 211.010 of the Local Government Code, which says a person aggrieved by a decision made by an administrative official may appeal to the BoA.<sup>82</sup> To start the appeal process, the appellant must file with the BoA and the official from whom the appeal is taken, a notice of appeal specifying the grounds for the appeal. The appeal must be filed within a reasonable time as determined by the rules of the BoA. On receiving the notice, the official from whom the appeal is taken shall immediately transmit to the BoA, all the papers constituting the record of the action that is appealed.<sup>83</sup> The appeal stays all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies, in writing to the BoA, facts supporting the official's opinion that a stay would cause imminent peril to life or property.<sup>84</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> See Tex. Loc. Gov't Code § 211.008(a).

<sup>79</sup> Robert F. Brown, *The Complete Primer on the Law of Zoning: From Regulation to Litigation*, 15, A workshop on Planning and Zoning by Vial, Hamilton, Koch & Knox, L.L.P. [now of Brown & Hofmeister]

<sup>82</sup> See Tex. Loc. Gov't Code § 211.010(a).

<sup>83</sup> *Id.* § 211.010(b).

<sup>84</sup> *Id.* § 211.010(c).

Once the BoA makes a decision, if the property owner person is still unhappy, they may present to a district court, county court, or county court-at-law a verified petition alleging that the decision of the BoA is illegal in whole or in part, specifying the grounds of illegality.<sup>85</sup> The petition must be presented within ten days after the date the decision is filed with the BoA.<sup>86</sup> The reviewing court applies a legal presumption in favor of the BoA's order and the contesting party has the burden of establishing that the board clearly abused its discretion. The general process for judicial review of a BoA decision can be found under Section 211.0011 of the Local Government Code.<sup>87</sup> To establish an abuse of discretion, the contesting party must demonstrate that the board acted *arbitrarily* and *unreasonably*, without reference to any guiding rules or principles.<sup>88</sup> Generally, if the evidence as a whole is such that reasonable minds *could* have reached the same conclusion as that made by the BoA, then no abuse of discretion is shown and the BoA's decision will stand.

In *Tellez v. City of Socorro*, 269 S.W.3d 645 (Tex.App.---El Paso), the El Paso Court of Appeals cited the standard of review noted above when reviewing adverse BoA decisions. In this case, an owner of a salvaged vehicle and auto parts business was challenging the city's BoA's decision to deny his request for a non-conforming use of his property, which he was using as storage space for his business. A non-conforming use of land is a use that existed legally when the zoning restriction became effective and has continued to exist thereafter. Non-conforming use lands are exempt from the requirements of a zoning ordinance. Tellez maintained that he was using the land for auto parts storage prior to and after the 1989 zoning ordinance that re-zoned it to R-1 Single Family Residential. However, under the ordinance, when a non-conforming use is discontinued or abandoned for six consecutive months or for eighteen months during any three-year period, any subsequent use of the premises must conform to the existing regulations. There was conflicting evidence as to whether the property in question was continuously used as a storage space after the date the ordinance was enacted. Regardless, Tellez had the burden of providing a sufficient record at the hearing to determine the illegality of the BoA's decision. Since Tellez failed to provide a record of the board's decision for the trial court to review, the court must presume that the board's decision was valid and uphold it. Therefore, Tellez failed to carry his burden of establishing that the BoA abused its discretion by denying his request for a non-conforming use.

## Conclusion

### Overview

Given all the above information on the zoning process, its good to get a bird's eye view of how everything fits together. The steps in the zoning process are below from first to last.

- Establish a P&Z.
- Have the P&Z draft a Comprehensive Plan.
- Have the Comprehensive Plan approved by City Council.
- Once the Comprehensive Plan is approved, have the P&Z draft a Zoning Ordinance.

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<sup>85</sup> *Id.* § 211.011(a).

<sup>86</sup> *Id.* § 211.011(b).

<sup>87</sup> *See id.* § 211.011.

<sup>88</sup> *Tellez v. City of Socorro*, 269 S.W.3d 645, 649 (Tex.App.---El Paso 2009).

- Have the Zoning Ordinance approved by City Council.
- Enforce the Zoning Ordinance.
- BoA hears Zoning Ordinance enforcement appeals.
- If BoA's decision is appealed, a court with jurisdiction will hear the appeal.
- Once appeals are exhausted in the court system, the final decision must be carried out by the city.

### **Common Pitfalls to Look Out For**

Any municipality can expect challenges to their zoning regulations. The best insurance is to be sure:

- That the zoning ordinance is based upon a comprehensive plan.
- That changes are made based only upon changed conditions which necessitate changes in the master plan.
- That the ordinance is uniformly applied to all landowners and that spot zoning is not allowed. The term "spot zoning" is used to describe an unacceptable amendatory ordinance that singles out a small tract for treatment that differs from that accorded similar surrounding land, without proof of changes in conditions.<sup>89</sup>
- That notice is given of all hearings.
- That records of all hearings are kept, including all evidence supporting a change or denial of a change, and evidence showing what the property can be used for.
- That care is taken not to completely destroy the economic value of a piece of property.
- That P&Z and city council members avoid even the appearance of impropriety of conflict of interest.
- That neither the zoning ordinances themselves nor their application by municipal officials violate federal or state anti-discrimination statutes protecting racial and religious minorities, women, and the handicapped.
- That the authority of a local government to adopt zoning regulations is not preempted by express statutory enactment of the legislature. The most common areas for this preemption are the sale of alcoholic beverages,<sup>90</sup> sign regulation on highway billboards,<sup>91</sup> pawnshop regulation,<sup>92</sup> and sexually oriented businesses.<sup>93</sup> Also, remember that cities can not apply zoning authority to schools and counties because these entities have express statutory authority to provide facilities.

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<sup>89</sup> *City of Pharr v. Tippitt*, 616 S.W.2d 173, 177 (Tex. 1981).

<sup>90</sup> *City of Dallas v. Dallas Merchants Concessionaires Association*, 852 S.W.2d 489 (Tex. 1993).

<sup>91</sup> Tex. Loc. Gov't. Code § 216.003.

<sup>92</sup> *Id.* § 211.0035 (a city must designate a pawnshop as a permitted use in one or more zoning classifications and may not require a specific use permit).

<sup>93</sup> *Id.* § 243.003.

## Resources

This paper is meant as an introduction the zoning process, for more in-depth zoning information, the following resources are recommended:

- John Mixon, *Texas Municipal Zoning Law*, (3<sup>rd</sup> Ed.) Matthew Bender (2009).
- Alan J. Bojorquez, *Texas Municipal Law and Procedure Manual*, (5<sup>th</sup> Ed.) Texas Municipal Clerks Certification Program (2005).
- Texas Local Government Code Ch. 211.
- David B. Brooks, *Municipal Law and Practice*, (2<sup>nd</sup> Ed.) West (2009).
- Jennifer Evans, *A Citizen's Guide to Texas Zoning*, Real Estate Center (1999).
- Barbara Slotnik, *Texas Jurisprudence*, (3<sup>rd</sup> Ed.) West (2009).