

Zoning, in its simplest form is the separation of land uses. It is currently the most common way communities seek to control land uses in America. Zoning regulates elements such as building bulk and height, land development characteristics such as open space and parking, as well as allowable land uses.

This chapter will give a brief history of zoning in the United States and Texas and describe the purpose of zoning and what it accomplishes. Following that, will be an overview of many of the aspects involved in zoning and proper administration thereof. This will include the comprehensive plan, basic maps and text that lay out zoning for a community, and the staff and boards involved in administration. Some of the special tools that can be used to make zoning more flexible and suitable for any particular community will be explored next. After laying out the basics, there is a section on potential problems that can occur if zoning is improperly administered, and lastly, common alternatives to traditional zoning.

This chapter is intended to give an overview of the basics that every planning professional and board member involved in the day to day administration of zoning needs to know. It will also describe some special tools not used (or even advisable) for every community, but worthy of noting.

History of Zoning in the United States

As long as people have congregated in "cities" there have been some rudimentary forms of zoning through popularly sought separation of obnoxious or unhealthy land uses and residential areas. Even the most primitive settlements had separation of market uses and reservation of space to allow for movement of people and vehicles.

Two of the oldest and most utilized land controls are the separation of activities considered to be a nuisance or health hazard, and height regulations. Perhaps the oldest example of use separation in the United States was a law passed in Massachusetts in 1628 applying to market towns that prohibited certain noxious industries from operating in any district not

specifically designated for such a use. Height regulations can be traced back to early Roman emperors who restricted the height of buildings.

Zoning is somewhat of an American anomaly. Its American form was originally based on the German police power, yet now is widely used in a country strong on freedoms and private property rights. This may be attributable to the widespread belief that this type of land regulation can efficiently help prevent nuisances and effectively protect the public health, safety and welfare. Various zoning alternatives are dependent upon the actions of individuals against other individuals, but the police power allows the government to intervene on behalf of private property owners for the overall public benefit.

The first modern zoning regulations in the United States were enacted in New York City in 1916 as a reaction to the canyon streets that were appearing with the proliferation of skyscrapers. The original regulations adopted were primarily concerned with imposing minimum standards of light and air at street level and to separate incompatible land uses like factories and upper end homes on 5th Avenue. It was a three-dimensional zoning regulation imposing setbacks on buildings after a certain height was reached, thereby creating a stair step or "wedding cake" appearance at the tops of tall buildings still evident today.

In 1922, the "Standard State Zoning Enabling Act" was adopted by the U.S. Department of Commerce. States, in turn, could set out in their constitutions or adopt enabling legislation allowing municipalities to zone. Zoning ordinances proliferated in many states in the years that followed. Nineteen states adopted the enabling legislation before zoning was challenged at the U. 'S. Supreme Court in 1926. The fact that zoning regulations were made at a local level meant that there was significant variation between municipalities and states in their regulation of land use. Inevitably, zoning regulations and the act of zoning per se, were challenged at the U. S. Supreme Court level on the basis of the Fourteenth Amendment to the U.S. Constitution. This Amendment provides that no person shall be deprived of his property without due process of law. The act of zoning was upheld as constitutional in the monumental U. S. Supreme Court case "*Ambler*

Realty vs. the Village of Euclid" in Euclid, Ohio in 1926, in part based on a brilliant amicus brief written by Alfred Bettman, a member of the Cincinnati bar. Zoning spread like wildfire in American communities after the landmark decision by the Supreme Court. It was found to be an effective tool with which to regulate private land use and prevent nuisances and other externalities that inappropriate adjacent land uses can create. The Euclid case also greatly broadened the definition of a nuisance. One Justice wrote the notable phrase, "A nuisance may be merely a right thing in the wrong place. . . like a pig in the parlor instead of the barnyard." (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)) Zoning was touted by many as a way to create a more favorable environment in which to raise children.

However, in 1928 the U. S. Supreme Court made another landmark zoning decision that warned against unreasonable application of the zoning power in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). In this case, the city had zoned the plaintiff's property "residential" even though it was adjacent to a soap factory, an auto assembly plant and railroad tracks. The zoning of this property could not be found to have a reasonable relationship to the community's goals (no plan) and without substantial relation to the public health, safety and welfare.. The City's use of the zoning power in this case was struck down by the Court as being arbitrary and unconstitutional.

The U. S. Supreme Court did not hear another substantial zoning case for over forty years. This has allowed states and state courts to define their own standards and procedures for zoning application.

History of Zoning in Texas

Texas adopted its version of the State Zoning Enabling Act (SZA) in 1927 and gave zoning power to cities and incorporated villages, but not to counties. The Texas version of the standard enabling act also required that zoning be done in accordance with a comprehensive plan and that it must be for the health, safety and general welfare of the public. It also requires that regulations for various land use specific districts be created and regulated according to a preconceived plan. In the various established districts, use, height and area restrictions can be imposed. This closely follows the form of zoning established by Euclid, Ohio.

At the time of the SZEAs adoption in Texas, the City of Dallas already had a history of attempting to implement zoning regulations of sorts. They had been challenged and had lost on several occasions, most notably the case of *Spann v. City of Dallas*, 111 Tex. 350; 235 S.W. 513 (1921) in which the city's restrictions were held to be unconstitutional. In this case, the city had established regulations against construction of business buildings in residential districts without consent of three-fourths of the property owners in the district and the building inspector's approval of design. This appeared to be too arbitrary for the court's acceptance and was struck down in 1921. The Chief Justice in this case condemned zoning and said that anything that destroys the unrestricted right of use destroys the property itself. This was a terrible blow to zoning and illustrates what still today, is a strong private property rights mentality held in Texas. This case was cited by Ambler in the landmark Euclid Supreme Court case. Dallas persevered, and was taken to court several more times before finally adopting a comprehensive zoning ordinance in 1929 that was upheld when challenged 'six months later in the Dallas Court of Civil Appeals. The Dallas ordinance that was finally upheld divided the city into six use districts and regulated the uses within each. It had a district for dwelling, apartment, retail, commercial, light and heavy manufacturing, quite similar to most ordinances established today, albeit simplified.

In 1987, the State Zoning Enabling Act was codified as Chapter 211 of the Texas Local Government Code. This chapter lays out municipal authority for land use regulation, especially important to general law cities which must rely on grants of authority from the legislature. Chapter 211 gives municipalities the power to promote the public health, safety, morals, or general welfare and to protect and preserve places and areas of historical, cultural, or architectural importance and significance.

In Texas, the municipal governing body establishes procedures for zoning adoption and enforcement for both home rule cities (population < 5,000) and general law cities (population > 5,000). The procedure for both requires that the governing body must establish procedures for adoption and enforcement, including a requirement of public hearing within 15 days after a notice published in a newspaper of local circulation. There is a notification requirement for property owners within 200 feet of any proposed zoning changes. If 20% of those owners protest the zoning change, the governing body must

approve the change by at least three-fourths vote. In addition, many municipalities require a three-fourths vote if the zoning commission recommends denial. In some communities denial by the zoning commission is not even heard by City Commission unless the applicant appeals. The zoning commission can also be the same appointed planning commission designated to review subdivision plats and develop master plans that address physical development of the city. Those cities without a zoning commission must still follow notification and public hearing requirements.

Purposes of Zoning

Zoning is generally used to regulate land uses in order to prevent incompatible adjacent land uses, undue density and traffic congestion, restrict height and size/bulk of buildings, provide setbacks to lessen fire hazard and promote aesthetic value. Zoning regulations will often also dictate the percentage of lots that may be built upon, size of yards and other open space, provision of adequate light and air, and facilitate the efficient provision of public infrastructure such as water, sewer, schools, and transportation. Zoning helps protect private property values because property owners can comfortably invest in a site with reasonable expectation of what type of development will occur in the adjacent areas.

Zoning Administration

Zoning is ideally administered with three components: the zoning map, the zoning text, and the comprehensive plan. Those three components should be developed in the reverse order just stated with the comprehensive plan coming first.

Comprehensive Plan

The comprehensive plan is often the most overlooked or undervalued element of zoning administration. A strong community-based plan with a future land use component and land use goals can make zoning decisions much easier for city staff and elected officials and more palatable to citizens. The future land use component should be based on community input combined with solid population projections, infrastructure compatibility considerations and density recommendations. Planning and zoning are not an exact

science and the more community support obtained in the beginning, the stronger the support will be for future decisions. Public involvement can be an exhausting exercise, but will be an invaluable part of the experience of administering the zoning ordinance. After all, we need to remember that planners primarily serve the public and in order to best accomplish this, we have to be in touch with what that public wants. The reason it is so exhausting is because generally, people do not come out in droves to give you their input for something as intangible to them as a "future land use plan". It is only when an action will directly affect them or their property that they want to be heard. Decisions based on a sound comprehensive plan whose beginning had strong community input, will be better supported or at least less vehemently objected to because there is an understanding that the decision was based on a consensus. If there is not a solid understanding of the process by which a zoning decision is made, emotions can often run high and become an overriding influence on the decision.

Neighborhood public involvement effort should include direct contact of any established neighborhood groups or informal group leaders who may have led a charge against a rezoning in the past, and representatives from every part of the community. These representatives are only limited by your imagination. They should include, at a minimum, representatives from churches, schools, water districts, social/community organizations major employers and social service organizations. Hearings should be held at different times and days in neutral locations in various parts of the community. These hearings should include a short informational component followed by ample opportunity and encouragement for actual public input.

Zoning Text

The second element of zoning administration is the text, or ordinance that lays out the exact regulations zoning is created to implement. It is a document that is adopted as law by the local governing body. The text will, at a minimum, need to establish the different zones applicable in the community and the uses allowable in each zone either by right or with a conditional use permit (which will be discussed in a later section). It should also define various requirements for setbacks, open space, landscaping, parking, and include definitions, information on height restrictions, and procedures for zoning applications and appeals or variances to the zoning ordinance. This text should be written in language easy to understand by the average citizen. A

conflict may occur when the ordinance is written or reviewed by legal counsel, who may have seen a vague zoning ordinance struck down in a court of law. The best advice is to try to keep it simple, well organized and concise. This simplicity also applies to the zoning categories. Many cities have an extensive number of zones making it too difficult to distinguish the subtle nuances between the zones. For instance, a city with seven different commercial zones will require extensive detail of uses allowed to identify the difference between the C-3 and the C-4 zone. Many times a "new" zoning district will be created as the result of some particularly difficult zoning case, which may never occur again.

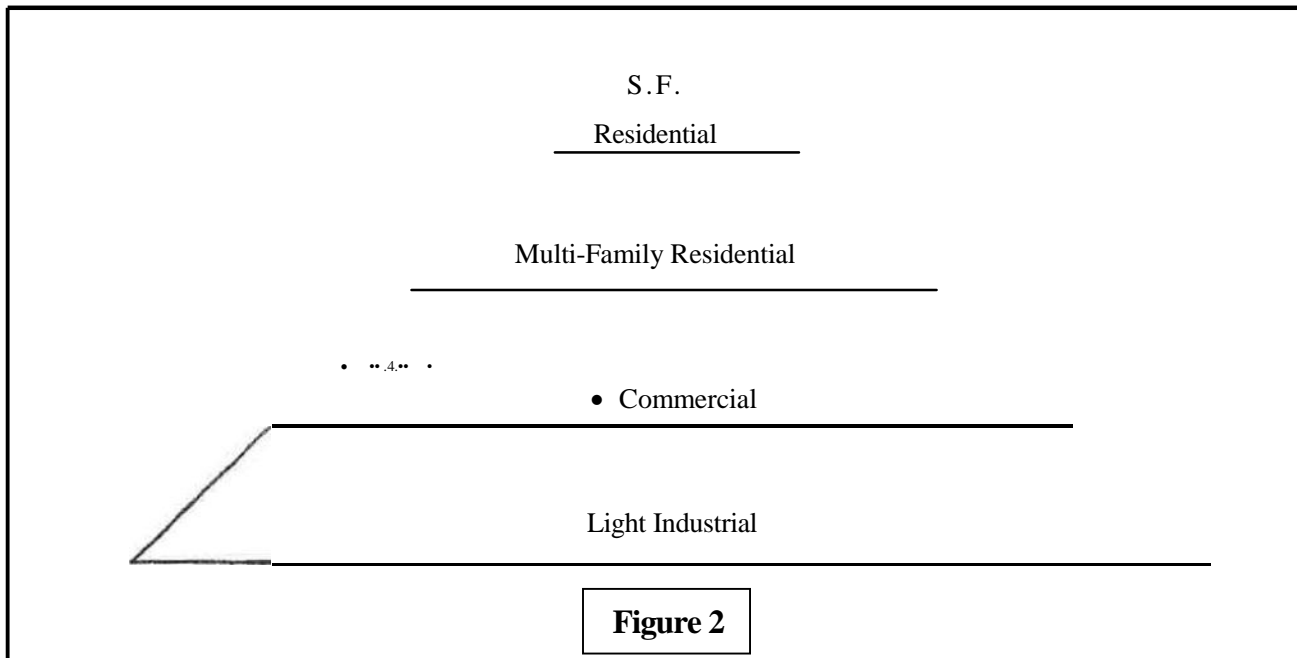
A land use matrix is often a helpful graphical interpretation of the zoning text. This is a chart that lists the different zones across the top of the chart as column titles, while specific land uses are listed along the left **hand** side as the row titles. The intersection of the rows and columns indicate whether the use is allowable in the zone by right, with a

	R-1 single family res.	M-2 multifamily res.	GR general retail	Li light industrial
Single Family Home	•	•	•	
Apartments		•	•	
House of Worship	•	•	•	•
Storage Building < 144 sc. ft.	•	•	•	•
Storage Building > 144 so. ft.	C	C	•	•
Doctors Offices			•	•
Carwash			•	•
Recycling Center (non-ferrous)				•
Recycling Center (ferrous)				C
Airport				C
		use not permitted • C	indicates use by right requires conditional use	
		Figure 1		

conditional use permit, or not at all (see Figure 1).

Euclidean or Pyramidal Zoning

There are several well-known *types* of zoning ordinances. One of the first was "Euclidean" zoning, named after the city of Euclid, Ohio whose ordinance was upheld in the landmark U. S. Supreme Court case that established zoning as a valid and constitutional way to regulate land use. It is also called pyramidal zoning. This type of regulation places the most protection and restrictions on residential land uses, less on commercial and virtually none on industrial uses. This concept places the most restrictive zoning category, single family residential, at the top of the pyramid. Each more intensive land use is on the next level down with industrial use being the base of the pyramid (see Figure 2).



Cumulative Zoning

A variation on the pyramidal scheme is cumulative zoning. Cumulative zoning is less protective of the various land uses, yet is commonly used today_ • It does still afford a great level of protection for single-family residential uses when located in a single-family residential district because that is the exclusive use allowable in that zone. However, in this scheme, each successively more intense zoning category — multifamily, commercial, and industrial — allow

all the uses from the previous zones. The uses at the top of the pyramid can slide down to the zones below, but not back up. For example, in this scheme multifamily and single-family would be allowed in a commercial zone. The reverse is not true, so a commercial use would not be allowed in a multifamily or single-family residential zone. The fact that this type of zoning would allow a single-family use to be built in an industrial zone gives the property owner more discretion, but dilutes the power of protection intended in zoning.

This type of zoning has several obvious shortcomings. An area designated for one type of land use cannot be guaranteed protection from another type of land use encroachment. (with the exception of single-family residential). For instance, an area designated as industrial may not be quite ready to be developed as such and an impatient landowner may decide to develop multifamily units in order to begin realizing income from the property. Later, the industrial development begins to take place around the multifamily units and the effects of the industrial development affect the families living in those units. Eventually, all but the poorest of families would leave the undesirable living conditions in the area. Conversely, the multifamily presence could have a further chilling affect on the development of industrial due to developers concerns of frequent citizen complaints. Because of this concern, it could also cause other property owners to lower the asking price of their land for the purpose it was originally intended.

Modified Cumulative

A modified version of cumulative zoning has been a more recent development in zoning schemes. This gives cities a better tool to implement the land use plan as it was intended and provides a greater degree of protection from incompatible adjacent land uses. There are any number of modified zoning schemes, most of which allow specific land uses in only one or perhaps two zoning categories, but do not allow huge jumps across the pyramid. The land use matrix in Figure 1 illustrates a modified cumulative zoning scheme since single-family residential is not allowed in a light industrial zone.

No matter which type of ordinance your community has, make sure your zoning ordinance has a severability clause. This provides protection in case any part of the ordinance should be challenged and found to be unconstitutional, it prevents the entire ordinance from being rendered invalid by the courts.

Zoning Map

The third element of zoning administration is the zoning map. This is probably the highest profile element of the zoning process because this is where zoning clearly becomes applicable to individual properties. This tool is the color-coded map that shows which types of land uses are allowable where. It is generally a detailed city map overlaid with various colors depicting the type of zoning for each property. There is a standard set of colors used to depict various zones. The most common standards dictate yellow for single-family residential, shades of orange for multifamily residential, reds for commercial and *retail activities*, green for open spaces, blue for industrial uses, and gray for institutional uses such as schools, hospitals and airports (see Figure 3).

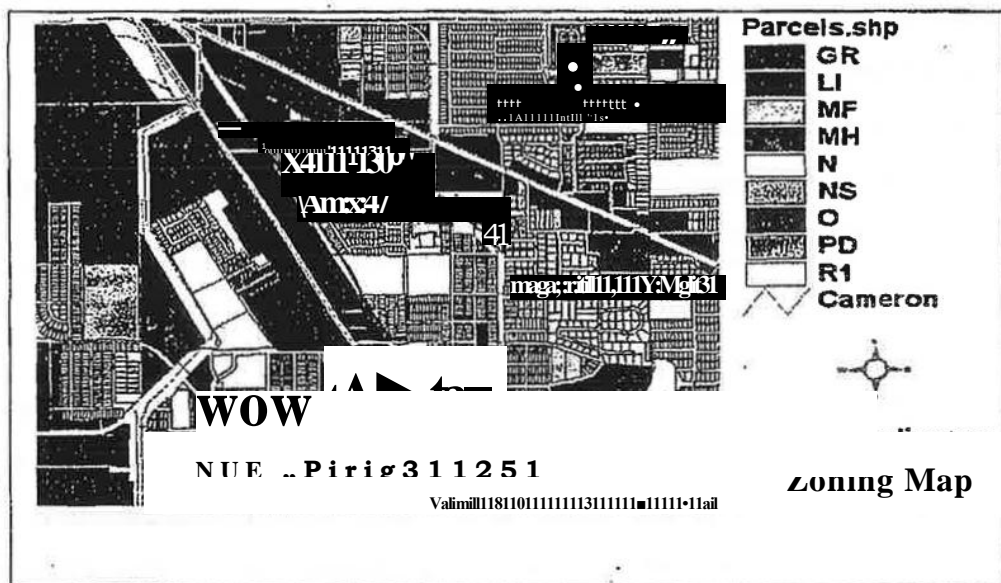


Figure 3

Trained Staff

Many communities hire professional staff people to handle matters pertaining to planning and zoning. Some smaller cities may hire an outside consultant to administer zoning and still others delegate that work strictly to a board of volunteers designated as the planning and zoning commission. For purposes of this section the individuals entrusted to zoning administration will be called "staff". No matter which is the case in your community, it is imperative to ensure that these individuals understand the implications of zoning regulations. Zoning regulates private property use and can significantly affect land values. Almost no other issue will bring more citizens to a city council meeting — and when they do come, it is usually not to offer support. Nearly every city has had at least one occasion to have a "standing room only" public hearing on a controversial zoning issue. Many lawsuits brought against cities stem from zoning cases or some aspect of the administration of the zoning ordinance. In fact, the only appeal to the decisions of the Zoning Board of Adjustment is judicial.

For those communities fortunate enough to have paid full-time staff, it is important to note that the Planning & Zoning Department is often divided into two functions: current planning and long-range planning. While re-zonings and administration of the zoning ordinance is usually a current planning function, the adoption and administration of the comprehensive plan is a long-range planning function. Therefore, it is important to have a Director that maintains a strong relationship and good communication between the two divisions. The current planning division is generally the section that staffs the Planning and Zoning Commission (P&Z) as well as the Zoning Board of Adjustments (ZBA) to be discussed in detail in the following sections.

A primary task of the staff is to provide information to the public regarding ordinances and plans administered by the Planning Department. This often includes building codes, subdivision ordinances and the comprehensive plan, in addition to the zoning ordinance. This requires a broad range of knowledge, but it is imperative that each member of the staff who will be advising the public knows these codes well or at least understands where to look up information and how to interpret the ordinances. Therefore, regular inter-departmental training is advisable for anyone who will be interpreting or enforcing the codes. Outside training, when available, is also quite valuable because it can provide a different perspective of issues the community may be facing and give staff new ideas to deal with particular challenges they face.

Another important staff function is to investigate requests and write reports for the P&Z Commission and the ZBA for rezoning requests and applications for variance, respectively. Staff will prepare an informational packet for the Boards that will include reports on each application. These reports should include the application from the property owner, address and/or location of the property at issue, zoning of the property and surrounding properties, land use of the property and the surrounding area, and purpose of the request (if known). In addition, information should be provided regarding the size of the property, infrastructure capacity and availability (including roads, water and sewer lines), future land use designation on the comprehensive plan, and a history of zoning (or variance) actions in the general vicinity. The staff report should state facts and avoid editorializing. Attached to the report should be any additional information that is available, such as maps, technical drawings, renderings, correspondence, etc.

The report should be written with the audience in mind and technical jargon kept to a minimum. The report is presented at a public hearing with any visual aids that may be too bulky to distribute (models) or too expensive to reproduce (color renderings, slides or pictures). Staff members should arrive at the meeting early enough to set up and check electronic presentation equipment and strategically place visual aids for the clearest presentation (see Figure 4). They should also be prepared to answer questions that may be asked by the Board members regarding the specific case or the general application of the ordinance.

P&Z Commission

The Zoning Commission is established under Texas Local Government Code Chapter 211.007. The Code mandates that a city's governing body must appoint the Commission prior to its adoption of zoning. A city can have a separate zoning' commission and planning commission, but more often they are a combined board called the Planning & Zoning Commission (P&Z), which issue recommendations in matters of zoning and long-range planning. They also review subdivision plats and make recommendations to the governing body or render final approval if such power has been

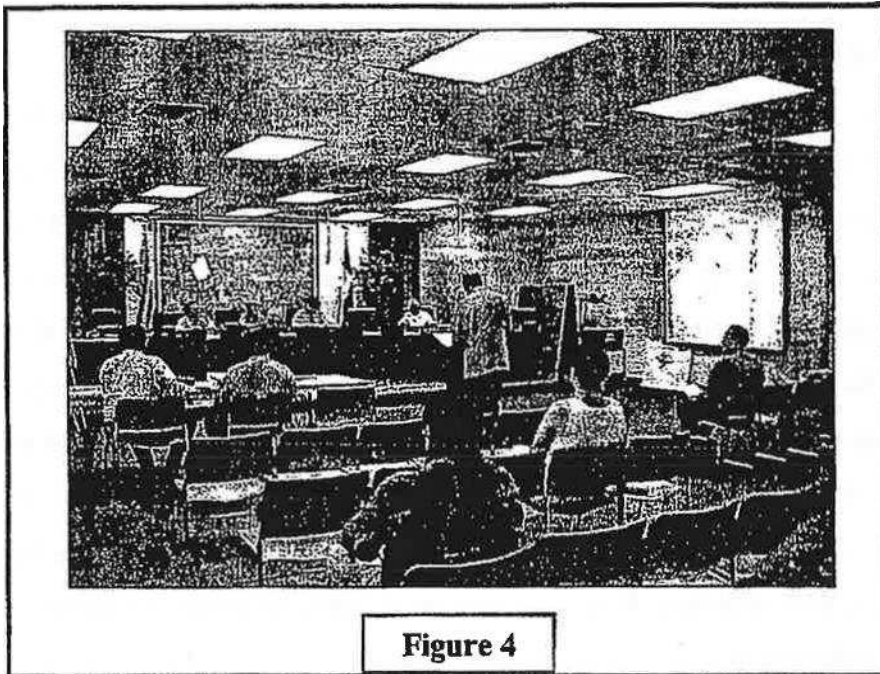
delegated to them.

The P&Z issues recommendations on rezoning cases that go forth to the governing body for final action and issuance of an ordinance. There are no uniform regulations for the makeup of the board membership, therefore, the following are just guidelines. Most cities require that members of the P&Z Commission be residents of their city or at least operate a business within the city limits. Some cities accept applications from citizens interested in serving on the Commission. Most P&Z Commissions are made up of appointees by each of the City Council members and the Mayor. These appointees usually track the term of the Mayor or City Council member who appointed them and continue to serve until they have been replaced by appointment of another member. The P&Z Commission membership should be non-paid positions made up of members in good standing with the community who inspire trust and confidence. It is also useful to limit the overall makeup of the Commission to having no more than one or two members from any one profession to avoid a narrow scope or special interest commission.

It is also important that P&Z Commissioners have knowledge of the legal ramifications of their actions. Annual training is offered by the Texas American Planning Association in at the state conference. Ideally the members should have further training provided by the city's professional staff on the particulars of the community's own comprehensive plan and zoning ordinance.

Members of the P&Z Commission are usually not professional planners, but lay people. Only some of them will even work in fields related to land use, such as real estate, construction or land development. Even members in those related fields will have a unique perspective of land use. Trained staff members should be cognizant of that fact and sensitive to the level of technical planning expertise of the commission members.

P&Z Commissioners should take adequate time to read staff reports thoroughly, noting questions they may have, visit the sites prior to the meeting and come prepared to participate in the discussion. It is also critical to think "long-term". For instance, while a rezoning on a parcel for the specifically proposed use may not seem to impact the area significantly, once the zoning change is made the property may be used for *any* use allowable in that zone category. The business proposed today may not succeed but the zoning will be available for the next potential tenant.



Zoning Board of Adjustments

The Zoning Board of Adjustments and Appeals (ZBA) is established under Texas Local Government Code Chapter 211.008. It is a quasi-judicial board that serves three primary purposes. It hears appeals to the staff's administration of the zoning ordinance, conducts hearings on special exceptions to the ordinance, and can grant variances to the zoning ordinance where strict application will result in undue hardship to a property owner due to special circumstances.

This board is generally made up of appointees by the City Council members and the Mayor. Alternate members may be appointed to serve if an original member is not able to attend a meeting. Appeals from the ZBA go to a court of record. The appellate process is described in Section 211.011 of the Texas Local Government Code. The fact that this board's decisions have no administrative appeal process make it even more important that the members are well versed in the city's comprehensive plan and zoning ordinance.

The guidelines for ZBA members are similar to those for the P&Z Commission members. They should be members in good standing in the community who have ties to that community. Good standing generally means that all their taxes are up to date, they have no outstanding judgments or citations, and are respected by those who know them.

There are a series of professional workshops put on throughout the state annually to provide training to ZBA members (as well as planning & zoning members). The annual short course provided by the state chapter also provides some education for ZBA members. Again, it is important to have the professional staff provide additional training based on the community's local zoning ordinance.

ZBA members are also usually volunteers with little or no professional planning experience. It is important for the members to take adequate time to thoroughly review the packet staff provides and to visit the subject properties before the meeting to ensure that they are prepared to discuss the proposal and ask pertinent questions. Consistency of the decisions made is very important. Similar circumstances should produce similar results, therefore it is important for staff to provide case histories of similar and nearby cases. Variances should be issued sparingly and only when the strict enforcement of the ordinance would cause an undue hardship to the property owner through no fault of their own. They should never be issued to help owners cut development costs.

One special aspect of the zoning ordinance that is commonly dealt with by the ZBA is the nonconforming use. A nonconforming use (sometimes referred to as a "grandfather clause") is a property use that existed prior to the regulations for the district being adopted. Communities have different ways of dealing with these special cases. Some will allow the use to continue indefinitely until such time the use naturally ceases for a period of time defined in the ordinance. The subsequent property use would then be required to be in conformance with the current zoning ordinance. Other communities will amortize nonconforming uses, thus allowing a definite sunset period on the out of place uses. Amortization is often quite controversial because it requires that the administrators of the ordinance determine a fair period of time the use will be allowed to continue as nonconforming before it must come into full compliance. This time period is based on the property owner's original investment, the use of the property and other factors that affect the owner's potential income to be realized by the use. Most ordinances also have a clause for nonconformance privileges to end if a certain

percentage of the use is destroyed by either natural or manmade causes. The ZBA will often hear matters regarding the continuance or expansion of a nonconforming use.

Special Zoning Tools

One of the most common criticisms of zoning is that it is inflexible and limiting. Some of the tools discussed below offer some variations on zoning that offer more flexibility.

Conditional Use Permits

There are some instances when a use is only marginally acceptable in a specific zone. In some cases, under certain circumstances, the use could be compatible with its surroundings. In these instances, a special zoning tool called a conditional use permit *can* be useful. It is also called special use permit or specific use permit. The uses that qualify for placement in a zone with a conditional use permit are called out in the land use matrix. For instance, a bar may be a general retail use, but it can often impose additional burdens that most retail uses do not, due to the fact that liquor is served. Some of the externalities associated with a bar can include increased noise factors at late hours and excessive litter. When located in the middle of a heavy retail area these conditions may not be so offensive, but when on the edge of a retail zone adjacent to a residential area they are much more distasteful. Therefore, a conditional use permit requirement allows the governing body to place "conditions" on the particular business. A conditional use permit might be issued without conditions if located in the middle of a retail **area**. On a more marginal area some conditions that could be placed on the use in this example might include a screening fence between the use and an adjacent neighborhood, decibel limitations recorded from the property line or increased setback from adjacent property, and daily trash removal.

The conditional use permit can be issued in one of two ways: to run with the land or to run with ownership. If the permit runs with ownership, it offers the city an opportunity to review the circumstances should ownership change. If the original conditions imposed were ineffective or too stringent they can be modified when a new conditional use permit is requested. The danger in this form is primarily to the property owner. There is no guarantee a

new owner will be allowed to continue an established business .even when the building may be specifically designed for that particular use. This can become a problem when the use was originally permitted with conditions in a fairly unpopulated area and later becomes surrounded by mixed residential uses and less intensive business uses whose owners may come out to oppose the granting of a new conditional use permit under any circumstances. When the permit runs with the land, it does not allow any "tweaking" of the conditions at any time. If the conditions imposed were not adequate, there is no room for future adjustment. Only if the business fails to meet the original conditions can the community take any action.

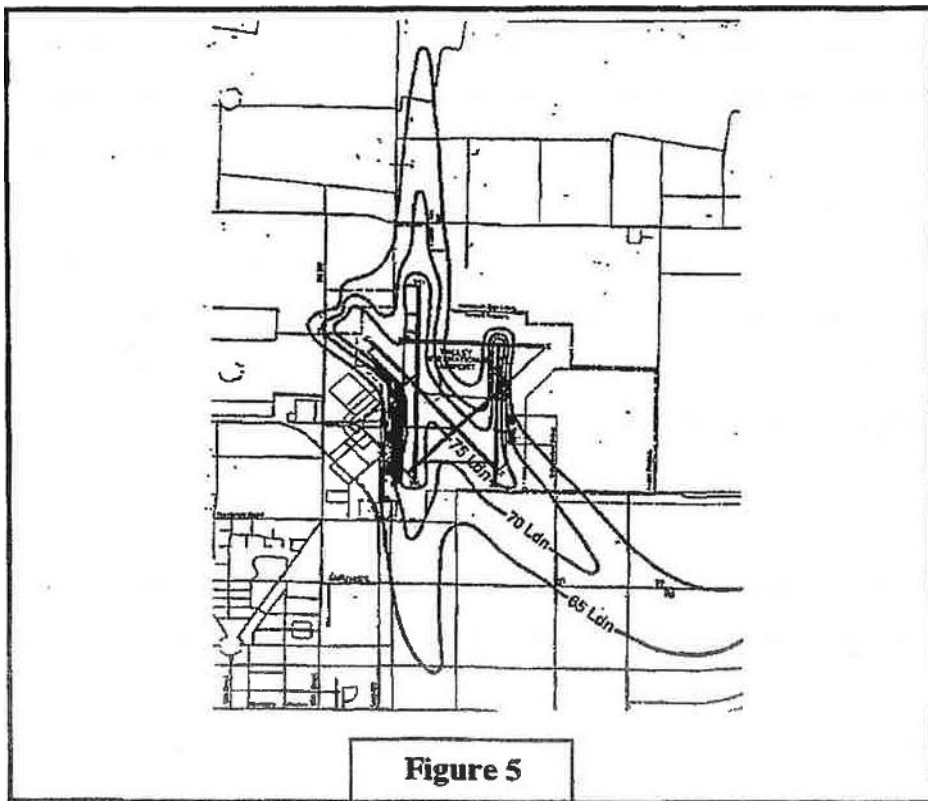
The issuance of a conditional use permit is not a rezoning and it is not a legislative action. As such, it can be issued by the P&Z Commission without a hearing by the governing body if that power is set out in their charge. Many communities do treat it like a rezoning and require the item to be heard ultimately by the governing body.

Overlay Districts

As the name implies, an overlay district or zone is a set of additional restrictions placed over the top of an existing zone. One of the most common overlays is an airport overlay district. The airport may be located on property that is zoned general retail or light industrial. Due to the special nature of an airport, a community may impose an overlay district over the airport itself and hundreds of acres of surrounding land whether it is similarly or differently zoned. This overlay district would likely include all land located under the flight patterns of the aircraft in bands representative of noise levels (see Figure 5). Land located under the noisiest bands would generally have the heaviest restrictions to land use such as no residential uses, schools, nursing homes or other uses that could pose significant risk to life if an airplane crashed on takeoff or landing.

Another example of an overlay district is an historic preservation district. A typical historic preservation district can include residential as well as commercially zoned properties. A map delineating where the overlay regulations are applicable must be developed and maintained. Sometimes this is added to the official zoning map. Regulations that might be imposed by this type of overlay could include sensitivity to significant architectural elements indicative of a certain time period of development that a community might desire to preserve.

Often a more stringent architectural review is necessary to obtain a building permit in this type of overlay.



Neighborhood revitalization zones are a type of overlay district that are beginning to become more popular as a tool. These delineated areas can often include downtown commercial areas as well as their surrounding neighborhoods. This is a holistic approach to revitalizing an entire area in decline. Additional regulations imposed in this type of overlay zone may include off-street parking waivers for existing commercial businesses, increased levels of code enforcement, and design guidelines (see figure 6).

The later types of overlay districts are often established by first performing a study of the unique characteristics, needs and special challenges defining it as an area in need of special regulations. Other types of overlays can include flood hazard areas, enterprise zones, foreign trade zones and fire districts.

Planned Unit Developments / Floating Zones

Planned Unit Developments (PUDs) are a unique zoning tool that can offer an alternative to strict zoning regulations. PUDs are typically large developments that include mixed uses. A PUD will apply a different set of controls to a tract of land than with the

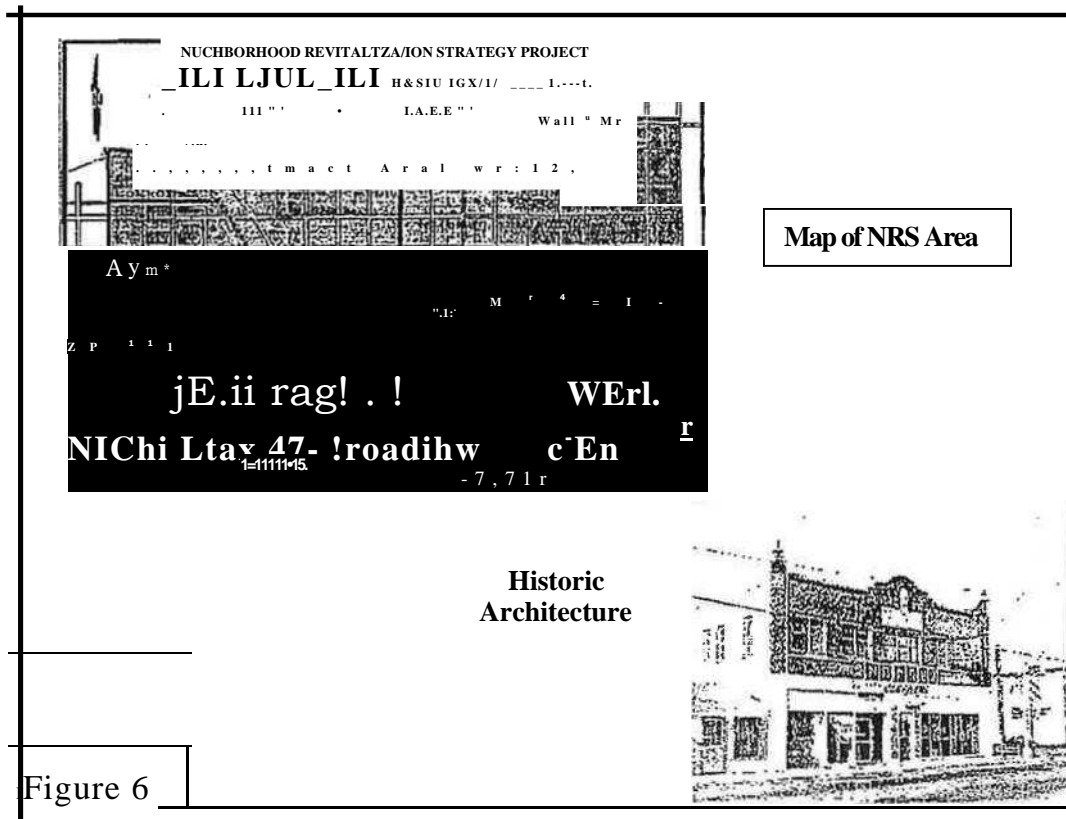


Figure 6

Standard land use zone. The entire development site plan will be reviewed by a single entity. One advantage to this tool is that the whole development is planned up front and carefully called out on a site plan that is often attached and made part of the zoning amendment. This allows more innovative development design. PUDs will sometimes be allowed flexibility in normal subdivision and/or zoning regulations such as being allowed to increase density or reduce street width requirements and to mix land uses. In return, they offer trade-offs such as community amenities and open space. Most

PUDs leave more common open space than standard housing developments because units are clustered (see Figure 7).

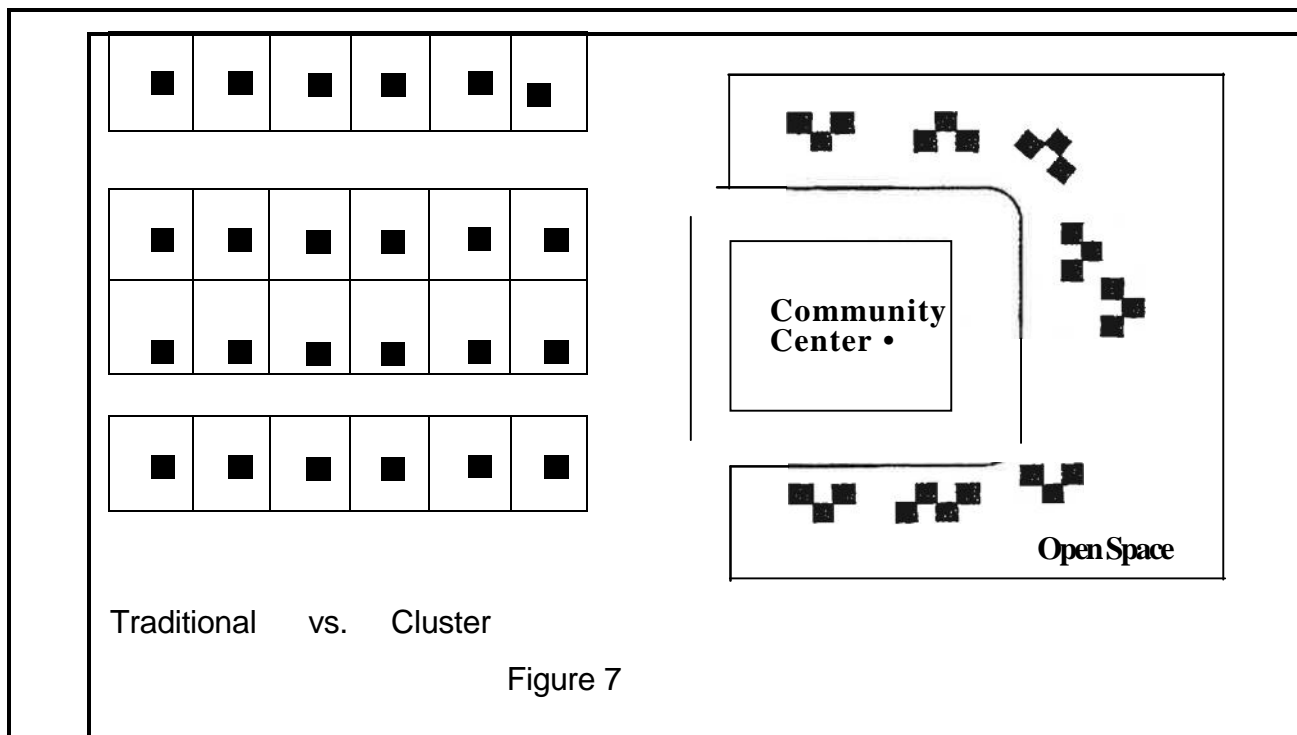
It is important to identify a minimum acceptable acreage for a planned development and require that the zoning be tied to a detailed site plan. If the plan changes or construction documents deviate substantially from the site plan, the plan should go back for amendment, a process essentially the same as a rezoning. Regulations for PUDs should be more detailed than for any other zone, because if they are not carefully called out, your ordinance may inadvertently allow this category of zoning to be used as a loophole to stricter subdivision and zoning regulations. Writing proper regulations for this type of zone is a tricky undertaking, because if the regulations are too strict they will lose the flexibility that makes it so attractive in the first place. At the same time, the incentives for this type of development have to be considerable to offset the increased length of time and complexity of the zoning approval process.

Some information the zoning administrators should ask for and collect when reviewing a proposed planned development can include—the location of the property and all abutting developed properties and streets; location and size of streets within the development; the location and proposed use of buildings within the development; location and capacity of the nearest infrastructure and public facilities; proposed landscaping and pedestrian ways; and any proposed development restrictions.

A significant advantage to this type of development is that the land is developed in a much more natural way and allows leverage for community amenities such as a recreation center, bike trails, or just natural open space. The development can be fixed to a great degree of certainty, similar and perhaps even to a greater extent, than traditional zoning. At the same time this type of zoning allows room for negotiation that traditional zoning simply does not.

Transfer of Development Rights / Zoning Incentives

Transfer of Development Rights originated in the United States as an incentive to encourage historic preservation. The historic Grand Central Station in New York City was



located in a zoning classification that allowed a much more intensive (and profitable) use of the property. Declaring the building "historic" and preventing its demolition was viewed at that time as a possible taking, therefore a compromise was reached. The historic building was preserved by allowing the owner to take the additional cubic footage that could have been built above and beyond what was existing on the site and transfer those rights to another property the developer owned elsewhere in the city. These rights can also be sold to another developer. In establishing this type of incentive a city must designate receiving areas eligible for the rights to be transferred.

Transfer of development rights have more recently been used to preserve agricultural land and open space close to cities. Farmers are often enticed by offers from developers looking for land on the fringe of the city for residential development. If the farmers are able to transfer, in this case sell, their development rights while preserving prime agricultural land, there is less incentive to sell quickly and perpetuate urban sprawl.

This zoning tool allows municipalities to encourage preservation of some types of land use without having to purchase the land or use "taken" from the owner, because the owner can still obtain value by selling his development rights in another location where the city is better able to accommodate significant growth. However, it is important to establish that some development value exists prior to allowing a sale of rights to become possible. If there is no real potential for development in the property, the municipality should not consider any rights to be transferred. This is a considerably complex zoning tool to administer.

Performance Zoning

Performance zoning is an odd type of zoning that does not propose separation of land uses. In fact, it allows any mix of land uses provided the more intrusive land uses meet certain levels of "performance". The more invasive land use must **mitigate** any signs of disturbance such as traffic, visual impact, noise, light, and any other emissions associated with more intensive land uses. Our traditional smokestack industries have changed significantly over the last several decades due to technological advances. These advances may mean that an industry is no longer automatically doomed to be a nuisance simply by its existence. Inventions like scrubbers and afterburners, while they may add to the cost of production, *can* significantly reduce emissions and make a business a much better, or at least less intrusive, neighbor.

In a performance zoning ordinance, strict standards are adopted that set absolute limits on odor, glare, smoke, vibration, and all identifiable adverse effects. These externalities must be kept within the property boundaries or cause minimal disturbance to surrounding property owners. In some cases, all yard setbacks are removed and density is simply controlled by imposing maximum floor area ratios and lot coverage. This deletion of setbacks can significantly impact the aesthetic quality of a community.

The major disadvantage to this type of zoning is that it is extremely difficult to enforce due to the specialized and costly equipment necessary to measure the various externalities that can be created, and the intensive training and manpower that would be necessary to enforce this type of ordinance.

Urban Growth Boundaries

With buzz words like "sustainable growth" and "livable communities" appearing at every turn and in other planning literature these days, urban growth boundaries are quickly becoming more popular. This is a tool that allows for one of the most efficient ways to utilize and provide infrastructure, but is essentially a growth management device.

This type of zoning management must still relate to the public health, safety and welfare. In addition, it places emphasis on protection of the environment and natural resources, and controls urban sprawl. The tools necessary to implement successful managed growth boundary include a comprehensive plan, capital improvements program, zoning ordinance and a financial means of implementation whether it is through user fees, assessments or some other means. The comprehensive plan designates the areas best suited for development. The timing of future development is spelled out in the capital improvements plan, and the zoning ordinance requires that a special permit be obtained that relates the approval of new development to the availability of supporting infrastructure.

Utilization of urban growth boundaries requires that the municipality set absolute boundary limits within which property can be developed. These defined areas are determined by the availability of infrastructure such as water, sewer, roads and public facilities. The zoning regulations adopted under this type of system are closely tied to subdivision regulations and environmental codes. In addition to the tools introduced above, other tools can be used in combination to implement a good urban growth management strategy. Included might be downzoning, incentives for in-fill development, transfer of development rights, impact fees, user fees, assessments and planned unit developments.

Zoning Caveats

There are a number of pitfalls that staff, P&Z Commissioners, ZBA and City Commissioners need to avoid in order to steer clear of lawsuits. Following are some of the most common.

Spot Zoning

Spot zoning is difficult to define, but can be characterized as an inappropriate singling out of a piece of property mostly surrounded by a particular type of zone and land use and changing

POTENTIAL SPOT ZONING

The map displays numerous parcels with codes such as WCOMM11.1.13, 11101, 11101 M, 11101, 11101 010ki, 11101 !A 1101, 11101-11101 100L JL, 11101 Mill 11101 Mk, 11101 TIMAITILM 1, 11101 MI 0111 11101 1311 11101 U3111111 10 1, 11101 IM11 11101 11101 an 11101 1101 NMI Mu, um, min, mis, and 20. The legend on the right lists: MF, MH, rd, NS, 0, and A/- Cameron. A compass rose shows North (N), South (S), East (E), and West (W). The street name 'Fionre K' is visible at the bottom.

Fourteenth Amendment Violations

be wise for city staff to recommend an alternative zoning to *single* family if that falls within the comprehensive plan so the owner cannot claim a taking.

No Comprehensive Plan

Since the Texas Local Government Code gives cities the power to zone in *accordance* with a comprehensive plan, it is essential that a community have a plan. It is also important that it is up to date and used in the decision making processes of rezonings. If a community has a plan that is outdated or does not have one at all, it is easier for a property owner (or neighboring property owners) to claim a rezoning denial (or granting) is unconstitutional.

Conditional Zoning

Conditional zoning is when a municipality tries to place conditions on an application for rezoning. For example, an applicant may propose to build a funeral home on a property. The subject property is currently zoned multi-family and the owner applies to change the zoning to commercial in order to allow such a use. The Commission cannot stipulate that the property can be rezoned conditional on the use being only a funeral home, that would be illegal. Once the property is rezoned to *commercial*, the municipality could not limit the use of the property to one specific use and would be obligated to allow any use that is allowed by right under the zoning ordinance in a commercial zone.

Discrimination

This type of problem is self-explanatory and is intolerable for any laws enforced in our modern society. As it applies to zoning, it is well documented in the realm of affordable housing. A community cannot ban a certain type of housing in order to exclude particular income groups. This is also referred to as exclusionary zoning.

Alternatives to Zoning

Zoning has not been adopted everywhere. Two notable exceptions to zoning in Texas are Houston and Victoria. Both of these cities regulate land use to some extent using other means, primarily deed restrictions. Nuisance law, another alternative, does not generally include

a municipal involvement, but is conducted between private parties. Both alternatives are not as effective at overall land use control as traditional zoning is.

Nuisance Law

Laws that are designed to prevent the unreasonable interference with someone's use and enjoyment of his property are called nuisance laws. It must be agreed upon in advance what constitutes a nuisance and the activity must actually be taking place before it can be prosecuted as such. Prosecution of a nuisance law cannot be generally applied, but must individually address each and every instance of nuisance. In addition, prosecution of the nuisance will depend on the court system and the injured party's ability to *prove* guilt on the party creating the nuisance. There is no assumption of correctness on the city's behalf as there would be in a zoning law case. This is a reactive measure of land use control rather than proactive and provides no assistance in the implementation of a comprehensive plan.

Deed Restrictions

Deed restrictions have even less ability to implement a municipality's comprehensive plan. In most municipalities, deed restrictions are not enforced by the municipal government. A set of restrictive covenants are generally a legal document which is recorded with a subdivision plat that limits the use of the property. It can lay out rules for the type and minimum size structure allowable as well as building materials. It can specify many things a zoning ordinance does, but is generally enforceable only by the property owners who are under similar restrictions (in the same subdivision).

Summary & Conclusions

Zoning is one of the most powerful and dangerous tools a municipality has to control land use in their community. By itself, it has no power to create anything, but in its absence, chaos can ensue. It is a police power delegated to municipalities through the State Zoning Enabling Act now codified in the Texas Local Government Code for the purpose of controlling attributes of property including land use, building height and bulk,

setbacks, open space, landscaping and parking requirements and other land development characteristics in the interest of the public health, safety and welfare:

While traditional zoning is criticized as being inflexible there are many tools available that can be used to best suit the particular needs of a community. When administered properly, zoning can provide a sense of order and stability for a community. When poorly administered, a community can face serious lawsuits so it is important that staff administering the ordinances and the boards making decisions be well trained.

Bibliography

A Guide to Urban Planning in Texas Communities, Chapter 4 introduction to Zoning, by David L. Pugh, APA Texas Educational Foundation, Seventh Edition, 1996.

Branch, Melville C., Comprehensive City Planning Introduction and Explanation, Planners Press American Planning Association, Washington D.C., Chicago, Ill., 1985.

Barnett, Jonathan, An Introduction to Urban Design, Harper and Row, publishers, New York, 1982.

Levy, John M., Contemporary Urban Planning, 5th edition, Prentice Hall, Upper Saddle River, New Jersey, 2000.

Mixon, John, et. al., Texas Municipal Zoning Law, third edition, Lexus Publishing, Charlottesville, Virginia, 1999.

Nectow v. City of Cambridge, 277 U.S. 183 (1928).

So, Frank S. et. al. editors, The Practice of Local Government Planning, Library of Congress, Washington, D. C., 1979.

Solnit, Albert et. al., The Job of the Practicing Planner, APA. Planners Press, Washington D.C., Chicago, Ill., **1988**.

Spann v. City of Dallas, 111 Tex. 350; 235 S.W. 513 (1921).

Stein, Jay M., editor, Growth Management: The Planning Challenge of the 1990's. Sage Publications, Newbury Park, CA, 1993.

Texas Local Government Code, West's Texas Statutes and Codes, 2000 Edition, West Group, 1999. *Village of Euclid v. Ambler Realty Co.*, 272 US 365 (192

