



# Chapter 4 Zoning Regulations in Texas

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This chapter explains the basics of zoning law in Texas. It provides a definition and brief history, along a legal basis for zoning and the statutory authority. The chapter discusses the connection between zoning and the comprehensive plan and districts, the basic zoning units to divide cities. These boundaries and ordinances are approved by zoning commissions. Procedures includes hearings and notice or zoning commission meetings, city council meetings, and general law city council meetings. The supermajority vote is described and the board of adjustment is discussed in detail. The chapter also describes ways in which municipalities enforce zoning ordinances and the variety of exceptions to zoning authority. Additional zoning concepts are briefly discussed as well as the ways in which zoning laws are challenged. Understanding such regulations are valuable because zoning is an essential tool, if not the essential tool, used to implement the comprehensive plan along with subdivision regulations, infrastructure planning, and economic strategies.

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Left: Zoning map of a neighborhood

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## DEFINITION AND HISTORY

“Zoning” is the fundamental regulation of a governmental entity used to control land uses pursuant to a comprehensive plan. “Zoning regulation is a recognized tool of community planning, allowing a municipality, in the exercise of its legislative discretion, to restrict the use of private property.”<sup>1</sup>

As the result of the mounting problems from industrialization and urbanization of cities in the late nineteenth and early twentieth cities, municipal governments recognized the need to adopt regulations to make cities more livable, safe and sanitary. Widely recognized as the first comprehensive zoning ordinance, the New York City Zoning Ordinance of 1916 was enacted to regulate height and setbacks of larger buildings to allow sunlight and air to reach adjacent properties and to restrict incompatible uses from residential districts.<sup>2</sup>

In 1921, U.S. Secretary of Commerce Herbert Hoover, commissioned an advisory committee to draft a model zoning statute, The Standard Zoning Enabling Act of 1926, which became the model for zoning legislation throughout the country. The Act included a section on a “Grant of Power” which authorized zoning for “the purpose of promoting health, safety, morals, or the general welfare of the community.”<sup>3</sup>

Section 3 of the Act, “Purposes in View” provided,

*Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.*<sup>4</sup>

<sup>1</sup> City of Brookside Village. v. Comeau, 633 S.W.2d 790, 792 (Tex. 1982), cert. denied, 459 U.S. 1087 (1982).

<sup>2</sup> New York City Department of City Planning Website, 2013

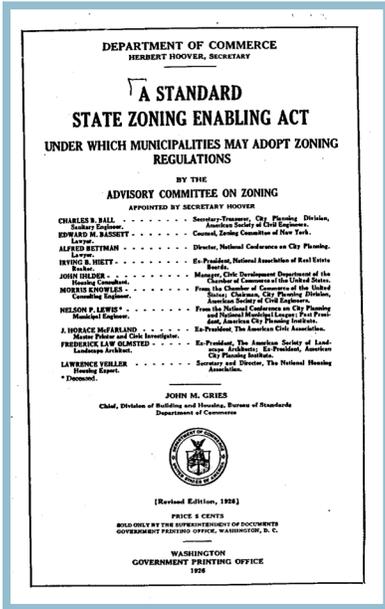
<sup>3</sup> A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations; Section 1, U.S. Department of Commerce (1926)

<sup>4</sup> Id. at Section 3

Typically, zoning will consist of:

- (i) an ordinance that sets forth items such as definitions, permitted land uses and development standards, and
- (ii) a map designating the districts within the jurisdiction.

*Municipal governments recognized the need to adopt regulations to make cities more livable, safe and sanitary.*



The **Standard Zoning Enabling Act of 1926** became the model for zoning legislation throughout the country.

*In Village of Euclid, Ohio v. Ambler Realty Co., the Court ruled that there may be valid reasons to separate intensive uses from less intensive uses for the general welfare*

The Act also included sections describing the means of adopting and amending the regulations, the establishment of a zoning commission and board of adjustment, the enforcement of regulations, and the resolution of conflicts with other laws.<sup>5</sup>

## LEGAL BASIS

The United States Supreme Court ruled in 1926 that zoning is a valid exercise of the municipality’s police power. In **Village of Euclid, Ohio v. Ambler Realty Co.**, 272 U.S. 365 (1926), the Village of Euclid enacted an ordinance that established six classes of use districts, three classes of height districts, and four classes of area districts in an effort to control industrial expansion from the City of Cleveland into the Village. Ambler Realty argued that the classification of its property deprived it “of liberty and property without due process of law” and denied “it the equal protection of the law.”<sup>6</sup> Ambler Realty also specifically argued that the zoning ordinance attempted “to restrict and control the lawful uses of appellee’s land so as to confiscate and destroy a great part of its value.”<sup>7</sup> The Court ruled that there may be valid reasons to separate intensive uses from less intensive uses for the general welfare holding, “it is enough for us to determine, as we do, that the ordinance, in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority.”<sup>8</sup>

The validity of zoning in Texas was approved by the Texas Supreme Court in **Lombardo v. City of Dallas**. In that case, the Court acknowledged that “it appears that full authority was delegated cities and incorporated villages to restrict the use of buildings, structures and land for trade, industry, residence, or other purposes. Zoning, in general, is the division of a city or area into districts, and the prescription and application of different regulations in each district; generally, such division is into two classes of districts, such as was attempted by the ordinance under consideration. Effective zoning regulations, as that term is now well understood, comprehends, necessarily, prohibitions and restrictions; prohibitions against certain uses in named districts, and restrictions as to the area of lots to be built upon, the size and height of

5 A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations, U.S. Department of Commerce (1926)  
6 Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 384 (1926)  
7 Id.  
8 Id. at 397



structures, yard spaces to be left unoccupied, etc.”<sup>9</sup> The Court held, “that the legislative act and the ordinance of the city of Dallas, called in question, and the provisions of same as applied to plaintiff and his property, are not subject to the objections urged by plaintiff, but that they are valid and enforceable.”<sup>10</sup>

## STATUTORY AUTHORITY

In *Lombardo*, the City of Dallas relied on Texas’ adopted version of the Standard Zoning Enabling Act adopted in 1927 as Article 1011 of the Texas General Statutes. In 1987, the sections of Article 1011 were codified in Chapter 211 of the Texas Local Government Code. Chapter 211 currently provides that the zoning regulatory power is “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>11</sup>

*“...promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance”*

Under Section 211.003, the municipality may regulate:

1. The height, number of stories, and size of buildings and other structures;
2. The percentage of a lot that may be occupied;
3. The size of yards, courts, and other open spaces;
4. Population density;
5. The location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
6. 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>12</sup>

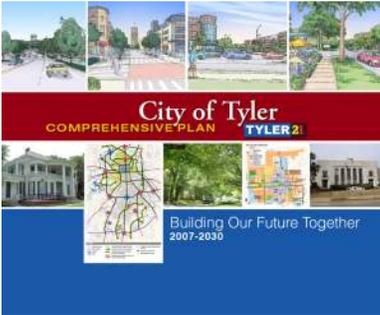
Further, the Statute provides that a city may regulate “the construction,

<sup>9</sup> *Lombardo v. City of Dallas*, 47 S.W.2d 495, 499 (Tex. Civ. App.—Dallas 1932), aff’d, 124 Tex. 1, 73 S.W.2d 475 (1934)

<sup>10</sup> Id.

<sup>11</sup> Texas Local Government Code Section 211.001 (2013)

<sup>12</sup> Id. at Section 211.003 (a)



The Purpose in View of the Standard Zoning Enabling Act states that “such regulations shall be made in accordance with a comprehensive plan...” The above image is of the City of Tyler, Texas Comprehensive Plan 2007-2030.

reconstruction, alteration, or razing of buildings and other structures” with regard to designated places and areas of historical, cultural, or architectural importance and significance.<sup>13</sup> The governing body of a home-rule municipality may also regulate the bulk of buildings.<sup>14</sup>

## THE COMPREHENSIVE PLAN

Zoning is one of the primary implementation tools of a municipality’s comprehensive plan. Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:

1. Lessen congestion in the streets;
2. Secure safety from fire, panic, and other dangers;
3. Promote health and the general welfare;
4. Provide adequate light and air;
5. Prevent the overcrowding of land;
6. Avoid undue concentration of population; or
7. Facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.<sup>15</sup>

## DISTRICTS

According to the Chapter 211, a city may divide the municipality into districts of a number, shape, and size and within each district, the city may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land.<sup>16</sup> The regulations must be uniform for each class or kind of building in a district; however, the regulations may vary from

<sup>13</sup> Id. at Section 211.003 (b)  
<sup>14</sup> Id. at 211.003 (c)  
<sup>15</sup> Id. at 211.004  
<sup>16</sup> Id. at 211.005 (a)



Left: Dallas, Texas Council Chambers.

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district to district<sup>17</sup> and shall be adopted “with reasonable consideration, among other things, for the character of each district and its peculiar suitability for particular uses, with a view of conserving the value of buildings and encouraging the most appropriate use of land in the municipality.”<sup>18</sup>

## CREATION OF A ZONING COMMISSION

A city may appoint a zoning commission to make recommendations regarding the boundaries of the original zoning districts and zoning regulations.<sup>19</sup> Often, a city will appoint a commission that performs the recommending authority under Chapter 211 and the planning commission authority regarding subdivisions and plats granted under Chapter 212 of the Texas Local Government Code.

With regard to zoning, this body is a “recommending” body. However, some zoning ordinances also provide that the zoning commission is charged with approval of site plans pursuant to the provisions of that city’s zoning ordinance. In that regard, they may be the final municipal authority for the

<sup>17</sup> Id. at 211.005 (b)  
<sup>18</sup> Id. at 211.005 (c)  
<sup>19</sup> Id. at 211.007 (a)



review and approval of a site plan.

## PROCEDURES

### Hearings

Approval of a zoning ordinance, districts and amendments of the same require public hearings before the zoning commission and city council. The commission is required to make a preliminary report, hold the public hearing and submit a final report to the city council.<sup>20</sup> The city council must receive the report before it can conduct its hearing.<sup>21</sup> A home rule city may allow joint hearings of the city council and zoning commission provided the city council, by two-thirds vote, has prescribed the type of notice and location for the hearing.<sup>22</sup>

### Notice

#### Zoning Commission

Written notice of the zoning commission hearing must be sent to the owners of the property within 200 feet of the property on which a change in classification is proposed “before the 10th day before the hearing date.” Notice is sufficient if it is deposited in the municipality, with properly addressed with postage paid, in the United States mail.<sup>23</sup>

#### City Council

Notice of the time and place of the city council hearing must be published in official newspaper or a newspaper of general circulation in the city, “before the 15th day before the date of the hearing.”<sup>24</sup>

#### General law city without a zoning commission

A general law city without a commission must provide notice of the city council hearing to the property owners within 200 feet of the property subject to change in the same manner as notice prior to a commission hearing.<sup>25</sup>

20 Id. at 211.007 (b)

21 Id.

22 Id. at (d)

23 Id. at 211.007 (c)

24 Id. at 211.006 (a)

25 Id. at 211.006 (b)



## SUPERMAJORITY VOTE

The Statute provides that three-fourths majority affirmative vote is required to approve a change in a regulation or boundary if written protest is filed by the owners of at least 20 percent of either:

1. The area of the lots or land covered by the proposed change; or
2. The area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.<sup>26</sup>

Further, the city may by ordinance require that the affirmative vote of at least three-fourths majority of city council is required to overrule a recommendation of the zoning commission that a proposed change to a regulation or boundary be **denied**.<sup>27</sup>

However, in *Appolo Development, Inc. v. City of Garland*, the Court ruled that the supermajority requirement did not apply to property that was subject to interim zoning at the time of annexation.

*"We do not believe it was intended that Section 5 of Ordinance 1011 [predecessor of Section 211.006 (d)] should have the effect of so zoning all property thereafter annexed that no owner of newly annexed property could apply for permanent zoning without placing himself under the burden of obtaining a favorable vote of three-fourths of the members of the City Council if a protest were made by adjacent property owners described in Article 1011e."<sup>28</sup>*

## BOARD OF ADJUSTMENT

The city may appoint a board of adjustment to consider variances, special exceptions and appeals of administrative officials in the enforcement of the zoning regulations.<sup>29</sup> The board consists of five members who are appointed by the city council. Each case before the board must be heard by at least 75 percent of the members of the board.<sup>30</sup> Boards of adjustment in cities in excess of 500,000 may consist of several panels with at least five members

<sup>26</sup> Id. at Section 211.006 (d)

<sup>27</sup> Id. at Section 211.006 (f)

<sup>28</sup> *Appolo Development, Inc. v. City of Garland*, 476 S.W.2d 365 (Tex. App.-Dallas, 1972; reh'g denied 1972)

<sup>29</sup> TEXAS LOCAL GOV'T CODE, Section 211.008

<sup>30</sup> Id. at 211.008 (d)



Above: Zoning and land use maps

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per panel.<sup>31</sup>

The board of adjustment may hear and decide:

1. Appeals of an order, requirement, decision, or determination made by an administrative official in the enforcement of zoning regulations;
2. Special exceptions;
3. Variances from the terms of a zoning ordinance; and
4. Other matters authorized by an ordinance adopted under Chapter 211.<sup>32</sup>

Variances by definition are modifications to zoning regulations authorized by the board when the following standards are met:

1. The variance is not contrary to the public interest;
2. Due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship. (A financial hardship will not be sufficient to qualify as an unnecessary hardship adequate for a variance request.<sup>33</sup>);
3. The spirit of the ordinance must be observed; and
4. Substantial justice must be done.<sup>34</sup>

Special Exceptions are modifications to the zoning regulations specifically set forth in the zoning ordinance that allow such if certain criteria set forth in the ordinance are satisfied.<sup>35</sup>

Additionally, some cities authorize the board to amortize nonconforming uses after conducting hearings and enabling the owner of the nonconforming use to recoup its investment in the nonconforming use. In *City of University Park v. Benners*, the Texas Supreme Court ruled “[m]unicipal zoning ordinances requiring the termination of nonconforming uses under reasonable

<sup>31</sup> Id. at 211.012  
<sup>32</sup> Id. at 211.009 (a)  
<sup>33</sup> *Board of Adjustment of the City of Piney Point Village v. Solar*, 171 S.W. 3d 251, 255 (Tex. App-Houston [14th Dist.] 2005)  
<sup>34</sup> TEXAS LOCAL GOV'T CODE, Section 211.009 (a) (3)  
<sup>35</sup> Id. at 211.009 (a) (2)



conditions are within the scope of municipal police power.”<sup>36</sup>

Any person aggrieved by the decision of an administrative official or any officer, department, board, or bureau of the municipality affected by the decision may appeal the decision of the administrative official by filing with the board and the official from whom the appeal is taken a notice of appeal specifying the grounds for the appeal.<sup>37</sup> The appeal will stay all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies in writing to the board facts supporting the official’s opinion that a stay would cause imminent peril to life or property.<sup>38</sup>

A concurring vote of 75 percent of the board members is required to:

1. Reverse an order, requirement, decision, or determination of an administrative official;
2. Decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or
3. Authorize a variation from the terms of a zoning ordinance.<sup>39</sup>

The decision of the board may be appealed to district court or county court, but not to the zoning commission or city council.<sup>40</sup> The appeal must be a verified petition, presented within 10 days after the date the decision is filed in the board’s office, stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality.

The party attacking the decision of the board must demonstrate that the decision is a “very clear showing of abuse of discretion”<sup>41</sup> and that the board could have reasonably reached only one decision.<sup>42</sup> The Courts in Texas hold that the Board “is a quasi-judicial body and the district court sits only as a court of review by writ of certiorari.”<sup>43</sup> The order of the Board is presumed valid and the party attacking the order must establish a “very clear showing of abuse of discretion.” [cite omitted] A zoning board abuses its discretion

36 *City of University Park v. Benners*, 485 S.W. 2d 773, 778 (Tex. 1972)  
 37 *Id.* at 211.010 (a)  
 38 *Id.* at 211.010 (c)  
 39 TEXAS LOCAL GOV’T CODE at 211.009 (c)  
 40 *Id.* at 211.011 (a)  
 41 *City of Dallas v. Vanesko*, 189 S.W.3d 769, 771 (Tex.2006)  
 42 *Id.*  
 43 *Board of Adjustment of City of Corpus Christi v. Flores*, 860 S.W. 2d 622, 625 (Tex. Pp.- Corpus Christi 1993, writ denied)

*In City of University Park v. Benners, the Texas Supreme Court ruled that cities could terminate nonconforming uses under ‘reasonable conditions’.*

**The appeal or verified petition must be filed by:**

1. A person aggrieved by a decision of the board;
2. A taxpayer; or
3. An officer, department, board, or bureau of the municipality.<sup>1</sup>

1 *Id.*



if it acts without reference to any guiding rules and principles or clearly fails to analyze or apply the law correctly. [cites omitted] With respect to a zoning board's factual findings, a reviewing court may not substitute its own judgment for that of the board. [cite omitted]. Instead, a party challenging those findings must establish that the board could only have reasonably reached one decision. [cite omitted].<sup>44</sup>

## ENFORCEMENT

A violation of a zoning ordinance is a misdemeanor, punishable by fine, imprisonment, or both, as provided by the city. The governing body may also provide civil penalties for a violation.<sup>45</sup> Per chapter 54 of the Texas Local Government Code, a fine or penalty for violation of a zoning regulation may not exceed \$2,000.00.<sup>46</sup>

Further, the city may institute the following measure if a building or other structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or if a building, other structure, or land is used in violation of zoning regulations:

1. Prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use;
2. Restrain, correct, or abate the violation;
3. Prevent the occupancy of the building, structure, or land; or
4. Prevent any illegal act, conduct, business, or use on or about the premises.

## EXCEPTIONS TO A CITY'S ZONING AUTHORITY

### State or Federal Preemption

Matters regulated by state or federal law are preempted from local zoning authority. For example, the Texas Alcoholic Beverage Code specifically provides

44 Vanesko at 771.  
45 Id. at 211.012  
46 Id. at 54.001 (b)



that such Code “shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code.”<sup>47</sup> However, that Code permits city regulation of alcoholic beverage sales and service in specific areas. City regulation of alcoholic beverages where not otherwise permitted by the Texas Alcoholic Beverage Code would be preempted.

In the case of *Southern Crushed Concrete, LLC v. City of Houston*, a concrete crushing company secured an air quality permit from the Texas Commission on Environmental Quality, but was denied a similar permit by the City whose regulations were more restrictive to the point of rendering the use unlawful. The Texas Supreme Court ruled, “But, the express language of section 382.112(b) compels us to give effect to the Legislature’s clear intent that a city may not pass an ordinance that effectively moots a Commission decision. We hold that the Ordinance makes unlawful an ‘act approved or authorized under . . . the [C]ommission’s . . . orders’ and is thus preempted by the TCAA and unenforceable. TEX. HEALTH & SAFETY CODE § 382.113(b).”<sup>48</sup>

## State and Federal Buildings

The Local Government Code provides that zoning regulations enacted pursuant to Chapter 211 do not apply to “a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency.”<sup>49</sup> However, zoning will apply to a privately-owned building which is leased to a state agency.<sup>50</sup>

## Pawnshops

Pawnshops are afforded some protection under the Texas Local Government Code. Section 211.0035 provides a city must designate pawnshops, which have been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code, as “a permitted use in one or more zoning classifications and cannot “impose a specific use permit requirement or any requirement similar in effect to a specific use permit requirement on a pawnshop.”<sup>51</sup>

47 Texas Alcoholic Beverage Code, Section 109.57 (b)  
48 *Southern Crushed Concrete, LLC v. City of Houston*; \_\_\_\_\_ (Tex. 2013)  
49 TEXAS LOCAL GOV'T CODE, Section 211.013 (c)  
50 Id. at Section 211.013 (d)  
51 Id. at Section 211.0035



Above: Austin, TX food truck  
Many cities do not indicate ‘mobile food truck vending’ among approved land uses listed in the city zoning codes.

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## SOME ADDITIONAL ZONING CONCEPTS

**Accessory Use** A use that is customarily incidental to a main use. Typically, these uses must be on the same lot as the main use and are permitted in the same zoning district as the main use.

**Conservation Zoning** Zoning regulations that provide development standards aimed at protecting environmental, historic or cultural amenities of a community. Often these types of regulations provide modifications to standard zoning development standards, including but not limited to setbacks and lot sizes, and may provide density bonuses, in order to provide flexibility and incentives for protecting the targeted amenities.

**Cumulative Zoning** Zoning regulations in which uses in more restrictive districts are permitted in more intensive districts.

**Euclidean Zoning** Zoning regulations that provide individual districts for permitted uses and development standards.

**Design Guidelines** Standards aimed at maintaining the architectural integrity of a unique area of a city or at providing an architectural or design theme for an area of the city.

**Exclusionary Zoning** A discriminatory zoning system in which regulations are enacted to unlawfully exclude certain groups of people.

**Form-Based Code** A zoning code in which the regulations “address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks.”<sup>52</sup>

**Incentive Zoning** Zoning regulations that provide bonuses or other incentives pursuant to standards that further specific community development objectives.

**Inclusionary Zoning** Zoning that provides for wide array of residential uses including low income and affordable units.

<sup>52</sup> Definition of a Form-Based Code, Form-Based Code Institute; 2011 [Form-Based Code Institute website]



**Nonconforming Uses** Uses that were previously permitted on a property, but subsequently prohibited by zoning regulations imposed with annexation or an amendment to the zoning regulations.

**Performance Zoning** Zoning regulations that focus on performance criteria rather than solely on the separation of uses.

**Planned Development District (PD) or Planned Unit Development (PUD)** A zoning classification that provides flexible development regulations to allow the construction of a unified development concept which may not conform entirely to the standard zoning regulations. Often these types of development include mixed uses, protection of environmentally significant features, preservation of and provision for open space, interconnection of uses, modified development standards, and special design guidelines and landscaping requirements. Because the authority and limitations for planned development districts are set forth in a city's zoning code, it is necessary to review those portions of the city's code to determine to what extent a planned development district may be used.

**Smart Growth** According to the American Planning Association,

*Smart Growth is not a single tool, but a set of cohesive urban and regional planning principles that can be blended together and melded with unique local and regional conditions to achieve a better development pattern. Smart Growth is an approach to achieving communities that are socially, economically, and environmentally sustainable. Smart Growth provides choices — in housing, in transportation, in jobs, and in amenities (including cultural, social services, recreational, educational, among others) — using comprehensive planning to guide, design, develop, manage, revitalize, and build inclusive communities and regions to:*

- *Have a unique sense of community and place;*
- *Preserve and enhance valuable natural and cultural resources;*
- *Equitably distribute the costs and benefits of land development, considering both participants and the short- and long-term time scale;*
- *Create and/or enhance economic value;*





The Saltillo Lofts development in Austin, TX exemplify many Smart Growth principles.

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- *Expand the range of transportation, employment, and housing choices in a fiscally responsible manner;*
- *Balance long-range, regional considerations of sustainability with short-term incremental geographically isolated actions;*
- *Promote public health and healthy communities;*
- *Apply up-to-date local and regional performance measures of successful urban and regional growth;*
- *Encourage compact, transit-accessible (where available), pedestrian-oriented, mixed-use development patterns and land reuse; and,*
- *Increase collaboration and partnerships to advance place-based and regional goals and objectives, while respecting local land-use preferences and priorities.*

Core principles of Smart Growth include:

1. Efficient use of land and infrastructure
2. Creation and/or enhancement of economic value
3. A greater mix of uses and housing choices
4. Neighborhoods and communities focused around human-scale, mixed-use centers
5. A balanced, multi-modal transportation system providing increased transportation choice
6. Conservation and enhancement of environmental and cultural resources
7. Preservation or creation of a sense of place
8. Increased citizen participation in all aspects of the planning process and at every level of government



9. Vibrant center city life
10. Vital small towns and rural areas
11. A multi-disciplinary and inclusionary process to accomplish smart growth
12. Planning processes and regulations at multiple levels that promote diversity and equity
13. Regional view of community, economy and ecological sustainability
14. Recognition that institutions, governments, businesses and individuals require a concept of cooperation to support smart growth
15. Local, state, and federal policies and programs that support urban investment, compact development and land conservation
16. Well defined community edges, such as agricultural greenbelts, wildlife corridors or greenways permanently preserved as farmland or open space.<sup>53</sup>

The U.S. Environmental Protection Agency identifies the following ten basic principles of Smart Growth developments:

1. Mix land uses
2. Take advantage of compact building design
3. Create a range of housing opportunities and choices
4. Create walkable neighborhoods
5. Foster distinctive, attractive communities with a strong sense of place

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<sup>53</sup> Policy Guide on Smart Growth, American Planning Association; Originally Ratified by Board of Directors, April 15, 2002; Updated Guide Adopted by Chapter Delegate Assembly, April 14, 2012; Updated Guide Ratified by Board of Directors, April 14, 2012



6. Preserve open space, farmland, natural beauty, and critical environmental areas
7. Strengthen and direct development towards existing communities
8. Provide a variety of transportation choices
9. Make development decisions predictable, fair, and cost-effective
10. Encourage community and stakeholder collaboration in development decisions.<sup>54</sup>

**Street Design Standards** Standards focusing on various elements of street design and construction including, but not limited to street width, curbs and gutters, medians, lane widths, street parking, sidewalks, pedestrian amenities, bicycle lanes, crosswalks, landscaping, lighting, and street.

**Transit-Oriented Development** Typically higher density, mixed use development surrounding a transit station (usually 1/4-1/2 mile radius) which is designed to exploit the transportation opportunities afforded by the transit station.

**Unified Development Code** A single code that incorporates all development-related regulations including zoning and subdivision regulations, but may also include signage, landscaping, screening and fencing, environmental performance, and other development-related regulations.

**Zoning Overlay** “A set of zoning ordinances, optional or required, specifying land use and/or design standards for a designated portion of the underlying zoning within a defined district; typically used to keep architectural character and urban form consistent, make adjacent uses compatible, and/or accelerate the conversion of non-conforming land uses.”<sup>55</sup>

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<sup>54</sup> About Smart Growth, U.S. Environmental Protection Agency, (2013) [U.S. EPA website]

<sup>55</sup> *Makin Smart Growth Happen*, U.S. Environmental Protection Agency, [U.S. EPA website] (2013)



## CHALLENGES

Zoning is an exercise of a municipality’s legislative powers<sup>56</sup> and courts will give deference to the municipality’s ordinances and “[i]f reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city’s police power.”<sup>57</sup> Therefore, a zoning ordinance receives deference and is presumed valid. A party challenging the zoning ordinance must show that the ordinance is arbitrary or unreasonable because it bears no substantial relationship to the public health, safety, morals or general welfare.<sup>58</sup> “Determining the reasonableness of a zoning ordinance is a question of law for the court.”<sup>59</sup>

The following are some of the common challenges to zoning ordinances:

### Inverse condemnation, taking, damaging

The U.S. Supreme Court has held that, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking” in violation of the Fifth Amendment of the U.S. Constitution.<sup>60</sup> In this sense the action of the governmental authority is characterized as a “regulatory taking” as opposed to a physical taking such as the acquisition of property for a public purpose. “In a regulatory taking, it is the passage of the ordinance that injures a property’s value or usefulness.”<sup>61</sup>

A regulatory taking may occur if a regulation deprives a property owner of all economically beneficial use of his land.<sup>62</sup> A regulatory taking may also be found if the regulation unreasonably interferes with a landowner’s right to use and enjoy his property or does not substantially advance a legitimate

<sup>56</sup> *City of Pharr v. Tippitt*, 616 S.W. 2d 173, 173 (Tex. 1981) citing *Thompson v. City of Palestine*, 510 S.W. 2d 579 (Tex. 1974)  
<sup>57</sup> *Id.* at 176  
<sup>58</sup> *Id.*  
<sup>59</sup> *City of San Antonio v. Arden Encino Partners, Ltd.*, 103 S.W.3d 627, 630 (Tex. App.- San Antonio 2003) *Id.* at 103 S.W.3d 627  
<sup>60</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922)  
<sup>61</sup> *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex.2005)  
<sup>62</sup> *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex.1998) cert. denied, 526 U.S. 1144, 119 S.Ct. 2018, 143 L.Ed.2d 1030 (1999).

## CHALLENGES:

1. Inverse condemnation, taking, damaging
2. Substantive due process
3. Procedural due process
4. Failure to comply with statutory or local procedures
5. Equal protection
6. Free exercise
7. Spot Zoning
8. Contract Zoning

In order to **challenge a zoning ordinance**, one must show that the ordinance is

1. arbitrary or
2. unreasonable

because it bears no substantial relationship to the:

- public health,
- safety,
- morals or
- general welfare.



*A regulatory taking may occur if a regulation deprives a property owner of all economically beneficial use of his land.*

governmental interest.<sup>63</sup> Further, regulations may be deemed as takings if they unreasonably interfere with an owner’s investment-backed expectations while also considering the economic impact of the regulation on the property owner, and the character of the governmental action.<sup>64</sup>

### Substantive due process

Regulations may be subject to a substantive due process challenge if they fail to further a legitimate State interest or fail to have any relation to the public health, safety or welfare.<sup>65</sup> The regulations must first be “rationally related to legitimate government interests.”<sup>66</sup> Further, the regulations must not be arbitrary, unreasonable or capricious and must have a substantial relationship to the public health, safety or welfare.<sup>67</sup>

*“When a zoning determination is challenged on substantive due process grounds, if reasonable minds could differ as to whether the city’s zoning action had a substantial relationship to the public health, safety, morals or general welfare, the action must stand as a valid exercise of the city’s police power.”<sup>68</sup>*

### Procedural due process

Procedural due process mandates that a property owner who is deprived of a property right must have been given an “appropriate and meaningful opportunity to be heard.”<sup>69</sup> A city satisfies this standard if it provides notice and an opportunity to be heard.<sup>70</sup>

### Failure to comply with Statutory or local procedures

Zoning ordinances are invalid, and not merely voidable, if the statutory procedure is not followed. “(F)ull compliance with the statute is necessary to the validity of amendatory, temporary or emergency zoning ordinances.”<sup>71</sup> Further, the “right to have notice and appear before a zoning commission is a

63 *Mayhew* at 935  
64 *Sheffield Development Company, Inc. v City of Glenn Heights*, 140 S.W. 3d 660, 672 (Tex. 2004)  
65 *Mayhew* at 938  
66 *Id.*  
67 *Id.*  
68 *City of Waxahachie v. Watkins*, 154 Tex. 206, 275 S.W.2d 477, 481 (1955)  
69 *Mayhew* at 939  
70 *Id.* at 940  
71 *Bolton v. Sparks*, 362 S.W. 946, 950 (Tex. 1962)



statutory right, not a due-process requirement.”<sup>72</sup> Therefore, one complaining of defective notice, based solely on noncompliance with the statute, does not have a constitutional claim.

## Equal protection

An equal protection challenge may be brought if an individual can demonstrate that the city treated the individual differently from other similarly situated individuals without any reasonable basis. Such an ordinance generally must only be rationally related to a legitimate state interest unless the ordinance discriminates against a suspect class or infringes.<sup>73</sup> “Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause.”<sup>74</sup>

*Cities cannot treat individuals differently from other similarly situated individuals without any reasonable basis.*

## Free Exercise

Regulations that attempt to regulate religious activities may be challenged if they interfere with the exercise of religious freedoms in violation of the First Amendment of the U.S. Constitution. The Religious Land Use and Institutionalized Persons Act (RLUIPA), provides further protection by prohibiting:

*“zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (i) the state or local government entity imposing the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government’s formal or informal procedures for making individualized assessments of a property’s uses. In addition, RLUIPA prohibits zoning and landmarking laws that:*

1. *Treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions;*
2. *Discriminate against any assemblies or institutions on the basis of religion or religious denomination;*

<sup>72</sup> *Murmur Corporation v. Board of Adjustment of the City of Dallas*, 718 S.W. 2d 790, 792 (Tex. App- Dallas, 1986, writ ref’d n.r.e.)

<sup>73</sup> Mayhew at 939

<sup>74</sup> Id.



3. *Totally exclude religious assemblies from a jurisdiction; or*
4. *Unreasonably limit religious assemblies, institutions, or structures within a jurisdiction. laws.”<sup>75</sup>*

## Spot Zoning

Some zoning changes may be challenged if the rezoning is deemed to be “Spot Zoning”. “Spot Zoning” is the process of singling out a small tract of land and treating it differently from similar surrounding land “without any showing of justifiable changes in conditions.”<sup>76</sup> In *City of Pharr v. Tippitt*, the Texas Supreme Court identified the following factors to be reviewed in determining whether a rezoning is Spot Zoning:

1. Whether the City has disregarded the zoning ordinance or long-range master plans and maps that have been adopted by ordinance;
2. The nature and degree of an adverse impact on surrounding properties; i.e. is the change substantially inconsistent with surrounding properties; and,
3. Whether the use of the property as presently zoned is suitable or unsuitable;
4. Whether the rezoning ordinance bears a substantial relationship to the public health, safety, morals or general welfare or protect and preserve historical and cultural places and areas.

## Contract Zoning

Zoning ordinances whereby the City commits itself to rezone land in consideration of the landowner to use or not use his land in a particular manner, or provide some other consideration in exchange for the zoning may be challenged as “Contract Zoning.” Contract zoning is invalid because the city dele-

<sup>75</sup> Religious Land Use and Institutionalized Persons Act of 2000; The United States Department of Justice

<sup>76</sup> *City of Pharr v. Tippitt*, 616 S.W.2d 173, 177 (Tex.1981)



gates its legislative authority and bypasses the legislative process.<sup>77</sup> Zoning is legislative function of municipalities that they cannot contract away.<sup>78</sup>

## CONCLUSION

Comprehensive plans are intended to set forth a city's goals and objectives for future growth and identify a strategy by which the city will strive to achieve them. Zoning is an essential tool, if not the essential tool, used to implement the comprehensive plan along with subdivision regulations, infrastructure planning, and economic strategies. As evidenced above, there are numerous technical, legal and political issues that must be evaluated in the enactment and modification of zoning regulations. This article was intended to introduce these concepts at a broad level and not penetrate the deeper judicial analyses and more developed standards of review. A fundamental awareness of zoning should include the basics of the grant of authority, purposes, police power, process, and enforcement just as those same basic concepts were imperative in the Standard Zoning Enabling Act of 1926.

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<sup>77</sup> *Super Wash, Inc. v City of White Settlement*, 131 S.W.3d 249,257 (Tex. App.-Fort Worth, 2004)

<sup>78</sup> *Id.*