LAND USE LAW

Procedural Tools and Traps

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The Texas Legislature has authorized cities to regulate the division and development of property within its boundaries and extraterritorial jurisdiction through platting requirements.[1] Generally, a plat is a drawing that identifies certain characteristics of a property, including but not limited to a metes and bounds property description, dimensions of subdivided lots, location of easements, and designation of streets, alleys, parks and other areas to be dedicated to the public.[2] A city may use this tool to further the general plan for the municipality; its roads, streets, and public highways; and access to and extension of water mains and the instrumentalities of public utilities.[3]

A city may adopt rules governing plats and subdivisions of property within its jurisdiction to promote "the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality," after a public hearing on the matter.[4] Unless a city classifies or defines what specific division of land requires platting,[5] a plat is required upon the division of a tract into two or more parts through any instrument conveying property.[6] A city's subdivision regulations should dictate the procedures that a plat applicant must meet before the city can approve a plat.

A. PLAT REQUIREMENTS

At a minimum, a plat should identify lot lines and dimensions, the locations of streets and alleys, utility easements, and dedications of parks and other areas designated for public use. Local subdivision regulations, however, often require additional details on plats, such as topographical lines at specified intervals, building setback lines, street construction details, inset maps showing the overall location of the subdivision, existing buildings, and the names of adjacent property owners. Each city's adopted subdivision rules and regulations establish the level of required detail on a plat. An approved plat is recorded with the county. To be recorded, the plat must:

(1) describe the subdivision by metes and bounds;

(2) locate the subdivision with respect to a corner of the survey or tract;

(3) identify the dimensions of the subdivision and each street, alley, park, and other portion to be dedicated to the public use or the use of abutting property owners; and

(4) must contain a jurat or acknowledgement similar to a deed.[7]

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[1] *See* TEX. LOC. GOV'T CODE § 212.002.
[2] *See* TEX. LOC. GOV'T CODE § 212.004.
[3] *See* TEX. LOC. GOV'T CODE § 212.010.
[4] TEX. LOC. GOV'T CODE § 212.002.
[5] *See* TEX. LOC. GOV'T CODE § 212.0045.
[6] *See* TEX. LOC. GOV'T CODE § 212.004.
[7] TEX. LOC. GOV'T CODE § 212.004(b).

B. THE PLATTING PROCESS

The plat approval process involves the submission and approval of a preliminary plat, followed by submission and approval of a final plat. In some cities, the final authority to review and approve plats is vested in the city's Planning and Zoning Commission; in others, the Commission merely reviews the plat application and makes a recommendation to the City Council, which is the final authority responsible for approving plats. The approval of a preliminary plat entitles a developer to submit a final plat application in compliance with the approved elements of the preliminary plat. Once approved, the applicant must file and record the final plat with the county clerk of the county in which the tract is located.[8]

1. Administrative Approval

A city to promote efficiency may use administrative approval, as opposed to City-Planning-Commission or City Council approval, for certain types of plats. Specifically, a city may by ordinance delegate to a City Official, often the Planning Director, the final responsibility: (1) to approve amended plats; and (2) to approve replats and minor plats involving less than five lots, provided that the tract is adequately served by existing streets and city facilities.[9] Under this process, the designated City Official cannot deny the plat; if the official seeks to disapprove the application, the city must present the application to the Planning and Zoning Commission or City Council for consideration within thirty days of its filing.[10] The City Official also may for any reason choose to present the plat application to the Planning and Zoning Commission or City Council for consideration.[11] Often, a City Official will submit an application to the Planning and Zoning Commission or City Council where the subdivision has caused some public controversy.

2. The Thirty-Day Rule

Cities should be wary of the trap created by the Thirty-Day Rule. If a city does not act on a plat application within thirty days after the date of its submission, the plat is automatically approved by operation of law.[12] Once approved, a plat must be endorsed with a certificate of approval. An applicant whose plat is approved by a city's inaction is entitled upon request to a certificate from the City's Planning and Zoning Commission or City Council, which identifies the submission date of the plat, and states that the city failed to timely act on the plat. If a plat is denied, an applicant may request that the City issue a certificate providing the reason(s) for its action on the application.[13]

[8] TEX. LOC. GOV'T CODE § 212.004(d).
[9] TEX. LOC. GOV'T CODE § 212.0065.
[10] *Id.*
[11] *Id.*
[12] TEX. LOC. GOV'T CODE § 212.009.
[13] *Id.*

3. Standards for Approval

A City must approve a plat if it satisfies all applicable regulations, without considering any other factors.[14] A plat *shall* be approved if:

(1) it conforms to the city's general plan and its current and future streets, alleys, parks, playgrounds and public utility facilities;

(2) it conforms to the general plan for the extension of the municipality and its roads, streets, and public highways, taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities; and

(3) it complies with the city's subdivision and other regulations.[15]

The meaning of the word *shall* is clear; if the standards imposed by law are satisfied, the City has no choice but to approve the plat. Accordingly, the review of an application is a ministerial, not discretionary, duty. Since a public official's immunity from personal liability is grounded on the official's exercise of discretion, an official does not enjoy immunity from the failure to perform a ministerial duty. Thus, the members of the governing body may subject themselves to personal liability for wrongfully denying a plat application.[16]

C. OTHER TOOLS FOR SUBDIVISION REGULATION

Cities may also extend and enforce building codes in their extraterritorial jurisdiction.[17] Although Chapter 212 does not expressly authorize such regulation, at least one Texas court of appeals held that building construction regulation is necessarily and fairly implied from the express grants of authority to control subdivision development.[18] A city is not entitled to enforce subdivision regulations within its extraterritorial jurisdiction by criminal penalties; rather, a city must resort to civil enforcement.[19]

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[14] TEX. LOC. GOV'T CODE § 212.005.
[15] TEX. LOC. GOV'T CODE § 212.010.
[16] *See Bartlett v. Cinemark USA, Inc.,* 908 S.W.2d 229 (Tex. App.—Dallas 1995, no writ). In analyzing the extent to which members of a City Council may enjoy immunity when denying a development plan, the *Bartlett* court acknowledged that absolute legislative immunity is not available when local legislators address a specific situation and specific individuals. Second, the court affirmed that public officials enjoy qualified immunity only when performing discretionary functions, meaning functions that require personal deliberation, decision, and judgment on the part of an official. A discretionary function is to be distinguished from a "ministerial" function, which simply requires obedience to orders or the performance of a duty to which the actor has no choice.
[17] *Lucas v. North Tex. Mun. Water Dist*., 724 S.W.2d 811 (Tex. App.—Dallas 1986, no writ).
[18] *Id.*
[19] *See* TEX. LOC. GOV'T CODE § 54.012, *et seq*.

II. ZONING REGULATIONS

Zoning regulation is a recognized tool of community planning, allowing a city in the exercise of its legislative discretion to restrict the use of private property so as to prevent one property owner from committing his or her property to a use that would unduly impose on the adjoining landowners in the use and enjoyment of their property.[20] But, because property owners have a right to the use and enjoyment of their property, the city's power to regulate zoning is not unlimited.

A. REGULATION GENERALLY

A zoning ordinance must bear a substantial relationship to the public health, safety, morals or general welfare, and must not be arbitrary or unreasonable. When reviewing zoning ordinances, a city should consider four basic criteria:

(1) respect for the approved comprehensive plan;

(2) the nature and degree of adverse impact on neighboring properties;

(3) the suitability of the tract as presently zoned; and

(4) the existence of a substantial relationship between the ordinance and the public health, safety, morals or general welfare.[21]

Despite the discretion afforded to zoning authorities, the application of a zoning regulation to a specific property must substantially advance legitimate state interests and must not deprive the owner of all economically viable uses of the land.[22] Zoning ordinances carry a strong presumption of validity; the heavy burden of establishing the invalidity of a zoning ordinance falls on the party contesting its validity.[23] Since zoning decisions are an exercise of a City Council's legislative authority, public officials involved in the zoning process possess legislative immunity for zoning decisions.

1. The Comprehensive Plan

Zoning decisions are guided by a city's comprehensive plan. Comprehensive plans establish long-range development goals for the city, and should contain provisions relating to land use, transportation and public facilities.[24] The plan does not establish or contain zoning

[20] *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex. 1982); *Strong v. City of Grand Prairie*, 679 S.W.2d 767 (Tex. App.—Fort Worth 1984, no writ); *Wallace v. Daniel,* 409 S.W.2d 184 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).

[21] *Pharr v. Tippett,* 616 S.W.2d 173, 176 (Tex. 1981). "The concept of the public welfare is broad and inclusive. … The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *citing Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

[22] *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[23] *Pharr*, 616 S.W.2d at 173.

[24] TEX. LOC. GOV'T CODE § 213.002.

regulations, nor does it establish zoning district boundaries. A City Council may amend a comprehensive plan following a public hearing and Planning and Zoning Commission review.[25]

2. The Comprehensive Zoning Ordinance

A city's comprehensive zoning ordinance consists of a complete set of the city's zoning regulations and typically include: (1) an enumeration of uses by right permissible within zoning districts; (2) minimum lot sizes; (3) front, side and rear yard set-back requirements; (4) minimum square footage of primary structures; (5) height restrictions; (6) accessory structure limitations; and (7) floor area ratio limitations.[26] The comprehensive zoning ordinance may also:

(1) enumerate the requirements and available uses for special use permits;

(2) provide for the creation and empowerment of a Planning and Zoning Commission and a Board of Adjustment;

(3) sets forth the process for property owners to apply for zoning changes; and

(4) address nonconforming uses and structures.

Zoning regulations must be adopted in accordance with the 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.[27]

A comprehensive zoning ordinance typically provides for zoning classifications, including: agricultural; residential (generally single-family residential); multi-family (including structures intended for habitation that range from duplex dwellings to apartment complexes); retail; commercial; industrial or manufacturing; and planned developments.

[25] TEX. LOC. GOV'T CODE § 213.003.
[26] *See* TEX. LOC. GOV'T CODE § 211.003.
[27] TEX. LOC. GOV'T CODE § 211.004.

3. Zoning Regulation within Extraterritorial Jurisdiction

The extraterritorial jurisdiction of a city is the area surrounding the territorial boundary of a City on all sides.[28] Its size is determined by statue, based on the city's population and measured by mile or half-mile increments from the city's incorporated boundaries.[29] Although a city has authority to extend by ordinance its subdivision regulations into its extraterritorial jurisdiction, it may not extend its zoning regulations. Section 212.003 of the Local Government Code prohibits a city from regulating within its extraterritorial jurisdiction: the use of buildings or property; the bulk, height and number of buildings on a tract of land; building sizes and floor-area ratios; residential density; and the construction of certain water and wastewater facilities.

B. SPECIFIC ZONING ISSUES

Cities may establish the number, shape and size of zoning districts based on the governing body's considerations of what is best for carrying out the underlying purposes of zoning in the city. The rezoning of a specific tract of property or of larger areas of land may be initiated by the owner of the property or by the city on its own initiative. A zoning change does not require the consent of the property owner.

1. Specific Use Permits

A comprehensive zoning ordinance generally will authorize specific (or special) use permits (often referred to as an *SUP*) in certain pre-designated zoning districts. A specific use permit is not actually a *permit*, but is a zoning change that, when granted, attaches to the land. The zoning change, therefore, does not apply merely to the current property owner, but instead applies to the tract or lot in question. Typically, a specific-use-permit zoning change constitutes an overlay over an existing zoning district. In theory, the grant of a specific use permit allows the property to be put to an additional specified use while enabling the municipality to impose specific additional conditions on that use on a case-by-case basis. In illustration, an in-home day care center authorized in a residential district only by specific use permit enables the city to impose specific conditions on the business, including regulation of the days and hours of operation, limitations on the number of children, and requirements for parking. Since specific use permits are in fact zoning changes, a city must follow the requisite formalities associated with zoning changes.

2. Planned Developments

A planned development (often referred to as a *PD*) is commonly authorized as a specific zoning category. Often, planned developments are designed to allow for developments that combine mixed uses within a single district, such as allowing retail or commercial uses within or among a residential area. Master planned communities, golf course communities, and mixed retail and apartment complex areas normally have PD zoning. Planned developments are also used for developments seeking architectural uniqueness or consistency that vary from base zoning regulations in certain aspects. For example, a city's masonry exterior requirements may

[28] TEX. LOC. GOV'T CODE § 42.021.
[29] *Id.*

prohibit the use of wood siding; however, a planned development would enable a development designed with a rustic or western setting to use wood siding.

The planned development concept has also been used to bend the rules in a comprehensive zoning ordinance. Zoning regulations typically contain minimum square footage requirements for residential dwellings and minimum lot size requirements. A developer seeking to build homes that are less than the minimum square footage established by the base zoning or to subdivide lots that are smaller than the minimum requirements may request planned development zoning for the subdivision. If the ordinance enabling planned development zoning does not set forth structure and lot size minimums, a developer may circumvent zoning regulations by obtaining approval of a PD permitting construction of what would otherwise be a nonconforming and illegal development. For obvious reasons, this use may constitute an abuse of the zoning process. In some circumstances, however, a city can justify the regulation if there is a substantial relationship between the planned development zoning and a legitimate state interest.

A city's comprehensive zoning ordinance should contain provisions that establish broad standards for planned development zoning. These regulations normally should require that a developer submit a concept or development plan detailing certain aspects of the proposed development along with the application for planned development zoning. With approval of the application, the city should adopt a set of development regulations that essentially provide comprehensive zoning standards for the planned development district. Once the city has granted the application and the zoning change to planned development, the developer must then submit plat applications prior to any construction.

C. STATE-LAW PREEMPTION

1. Home-rule municipalities enjoy broad authority to exercise police powers

A home-rule city derives its authority from the Texas Constitution, and has broad authority to exercise its police powers. A home rule city, therefore, may adopt ordinances and charter provisions regardless of whether the Texas Legislature has provided authority for the action.[30] In contrast, a general law city derives its power from state statutes and may only exercise the powers granted by the Legislature.[31] Nevertheless, a home-rule city does not have unlimited legislative power; the law prohibits a city from passing an ordinance that conflicts with legislation enacted by a sovereign.[32] An ordinance that conflicts with a provision of the Texas

[30] *MJR's Fare of Dallas, Inc. v. City of Dallas,* 792 S.W.2d 569, 573 (Tex. App.–Dallas 1990, writ denied) ("Home-rule cities possess the full power of self-government and look to acts of the legislature not for grants of power, but only for limitations on their powers."); *Williams v. City of Borger*, 340 S.W.2d 864 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (Insofar as the passage of ordinances is concerned, a home-rule City Council is an independent lawmaking body with respect to subjects over which it has the power to legislate.); *see also* TEX. LOCAL GOV'T CODE § 51.072 (Vernon 2008) (a municipality has full power of local self government).

[31] TEX. LOCAL GOV'T CODE § 51.001 (Vernon 2008).

[32] *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (ordinances regulating mobile homes and location of mobile homes were not preempted by state and federal legislation).

Constitution, the United States Constitution, or Texas statutes is void.[33] A municipal ordinance is enforceable only if it is consistent with all such provisions.[34] A home-rule city's authority to promulgate zoning ordinances, therefore, is subject to the limitation that no zoning ordinance can be enacted that is inconsistent or conflicts with a state statute.[35]

2. State and local laws are read in harmony unless the legislature clearly manifests an intention to preempt municipal regulation

Although an ordinance that is inconsistent with state legislation is impermissible, the fact that state legislation exists on a particular subject does not necessarily preempt that subject from local regulation:

> [I]f the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity.[36]

Thus, the state's entry into a field of legislation does not automatically preempt that field from City regulation; "local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable."[37] Courts also endeavor to construe state and local laws so as to give effect to each. "A state law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached."[38] Accordingly, when no conflict exists between a state law and a city ordinance, the ordinance is valid and enforceable.[39]

The state legislature by express limitation or by implication of a general law may preempt a home-rule city's regulation of a subject matter. Courts, however, do not imply preemption unless the provisions of the general law are clear and compelling to that end.[40] Again, "[t]he

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[33] *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (regarding preemption based on the clearly-expressed intent of the legislature in the Alcoholic Beverage Code).
[34] *Bolton v. Sparks*, 362 S.W.2d 946, 948 (Tex. 1962).
[35] *B&B Vending Co. v. City of Garland,* 711 S.W.2d 132 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).
[36] *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (emphasis added); *see also City of Sweetwater v. Geron,* 380 S.W.2d 550, 552 (Tex. 1964); *Villarreal v. State*, 267 S.W.3d 204, 211 (Tex. App.—Corpus Christi 2008, no pet.).
[37] *City of Brookside Village v. Comeau,* 633 S.W.2d 790, 796 (Tex. 1982); *see also City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990) (a comprehensive animal control ordinance, due to its broad application, was not preempted by the Health and Safety Code's "first bite" law); *City of Welasco v. Melton*, 308 S.W.2d 18 (Tex. 1957); *But see B&B Vending Co. v. City of Garland,* 711 S.W.2d 132 (Tex. App.—Tyler 1986, writ ref'd n.r.e.) (City's ordinance prohibiting the location of coin-operated amusement machines within 300 feet of a church, school, hospital, or residentially zoned property was in conflict with the statute providing that, for zoning purposes, coin-operated amusement machines must be treated as having the same use as the principal use of the property where they are exhibited. Although, under the statute, cities may restrict the location of such machines within 300 feet of a church, school, or hospital, the ordinance went beyond the exception and additionally prohibited such machines within 300 feet of residentially-zoned property).
[38] *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993), *citing City of Beaumont v. Fall,* 291 S.W. 202, 206 (Tex. 1927); *see also City of Richardson v. Responsible Dog Owners*, 794 S.W.2d at 19 (finding "no repugnancy" between ordinance and state code; therefore ordinance was not preempted).
[39] *See id.*
[40] *Lower Colo. River Auth v. City of San Marcos,* 523 S.W.2d 641, 645 (Tex. 1975) (emphasis added) (citations omitted); *see also Cook v. City of Addison,* 656 S.W.2d 650, 654 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

intention of the Legislature to impose such limitations must "appear with unmistakable clarity."[41] The state legislature at times will expressly declare a subject preempted, such as the statutory language in the Alcoholic Beverage Code stating that the state "shall exclusively govern the regulation of alcoholic beverages."[42] Nevertheless, even with such express preemption, Courts will give full effect to both the state and local regulation of a subject if no conflict exists between the provisions.[43]

D. PROCEDURAL TRAPS

The Texas Local Government Code provides stringent procedures for the adoption of zoning ordinances. In addition, a home-rule city's charter may contain additional regulations affecting the Planning and Zoning Commission and the City Council. Failure to follow the specified procedures may invalidate the zoning change, creating numerous unforeseen problems and expense for the City and potentially the property owner, as well.

1. HEARING NOTICES

Planning and Zoning Commissions participate in the development of comprehensive plans, recommend zoning changes to the City Council, and review plat applications.[44] A Planning and Zoning Commission typically possesses the authority to recommend that the City Council approve or deny a rezoning application and to recommend adoption or amendment of zoning regulations. The City Council has the ultimate authority to adopt, amend, grant or deny zoning changes. Even though a Commission may only have the authority to recommend matters to the City Council, the provisions of the Texas Open Meetings Act apply to the Commission.[45]

The Planning and Zoning Commission and the City Council must hold public meetings when considering zoning changes. The City must send notice of each public hearing to the owners of the property that is subject to the zoning change, as well as to all owners of real property, as certified on the most recent municipal tax roll, within 200 feet of the property subject to the zoning change. The City must send the notice at least eleven (11) days before the public hearing.[46] Mailing by regular first class mail satisfies the notice requirement and notice is deemed complete when deposited in the mail. The City need not prove that the property owners received the requisite notice, but only that the City properly and timely sent the notice.

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[41] *Lower Colo. River Auth v. City of San Marcos,* 523 S.W.2d 641, 645 (Tex. 1975) (emphasis added) (citations omitted); *see also Cook v. City of Addison,* 656 S.W.2d 650, 654 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

[42] *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex.1993); *see also* TEX. ALCO. BEV. CODE ANN. § 109.57 (Vernon 2007).

[43] *See City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) ("The referenced state and federal legislation has, to an extent, preempted the field as to construction, safety and installation of mobile homes. We find nothing in the statutes, however, that creates a conflict with Brookside Village ordinances regulating the location of mobile homes."); *City of Santa Fe v. Young*, 949 S.W.2d 559 (Tex. App.—Houston [14th Dist.] 1997, no writ) (The Texas Aggregate Quarry and Pit Safety Act clearly preempted the field of regulation for quarries and pits within 200 feet of any road, but not beyond that zone. Therefore, a home-rule City's ordinance regulating the operation of sand pits and quarries within the City limits unless the sand pit or quarry in question was located within 200 feet of the road was not preempted.).

[44] TEX. LOC. GOV'T CODE § 211.007. A home-rule City must have a zoning commission. A general-law city may, but need not, create one.

[45] *Id.*; *see also* TEX. GOV'T CODE ch. 551.

[46] TEX. LOC. GOV'T CODE § 211.007(c).

Following a public hearing, the Commission submits a report to the Council detailing its recommendation as to whether a zoning change application or regulation should be approved or denied. The Council may not hold a hearing until it receives the Commission's recommendation. The Council must then hold a public hearing and publish notice of the public hearing in the City's official newspaper or in a newspaper of general circulation in the area at least sixteen (16) days before the hearing.[47]

Since the Open Meetings Act applies to both the Commission and the City Council, the public hearings must be posted on the agenda at least seventy-two (72) hours before the date of the hearing.[48] The agenda should identify the public hearing as a specific item preceding a consideration and action item on the zoning matter.

Because public hearings involve administrative expense and overhead, Commissions and Councils should avoid tabling a public hearing. If the deliberating body fails to officially close the hearing, notice of the rescheduled hearing must be sent or published, as appropriate. As such, if the deliberating body needs additional time for consideration, it should open the public hearing, receive testimony, and formally close the hearing; it may then table the action item to a later meeting without incurring the burden of mailing or publishing additional notices.

a. Failure to Give Notice

Notice of proposed zoning legislation is sufficient if it reasonably apprises those for whom it was intended of the nature of the pending proposal to the extent that they can determine whether they should be present at the hearing. The content of the notice should be sufficiently specific to warn the recipient that he or she may be affected by the contemplated action. A notice deficient in this respect will be treated as no notice at all. While the notice need not be complete and perfect in every respect, it must afford the recipient an opportunity to oppose the measure if he or she desires.[49] Full compliance with the notice requirements of the Texas Local Government Code is critical to the validity of a zoning-change ordinance, even if the ordinance is enacted only on an emergency or temporary basis.[50] A City's failure to give notice of a public hearing prior to the adoption of a zoning ordinance as required by state law invalidates the ordinance.[51] "These statutory requirements are intended for the protection of the property owner and are his safeguards against an arbitrary exercise of the powers granted by the statute."[52]

Likewise, proper notice must be provided each time a hearing is held on a zoning-change ordinance. An ordinance adopted at an improperly-noticed second meeting after a second public hearing is invalid, even if the initial meeting and public hearing was properly noticed.[53]

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[47] TEX. LOC. GOV'T CODE § 211.006(a).
[48] *See* TEX. LOC. GOV'T CODE § 211.0075.
[49] *Midway Protective League v. City of Dallas*, 552 S.W.2d 170 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.).
[50] *Bolton v. Sparks*, 362 S.W.2d 946 (Tex. 1962).
[51] *Peters v. Gough*, 86 S.W.2d 515 (Tex. Civ. App. 1935).
[52] *Id.*
[53] *Truman v. Irwin,* 488 S.W.2d 907 (Tex. Civ. App. 1972) (failure of proposed zoning change to receive approval of three-fourths of members of home-rule City governing body, as required for passage, at initial meeting held in compliance statutory notice provisions was not cured and obviated by subsequent meeting at which proposed change

b. Effect of Commission or Council Modifications

The deliberating body will often tweak a zoning request when approving it. Notice provisions under zoning enabling statutes do not require additional and further notice when, as a result of consideration or debate at the hearing, the deliberating body makes minor and insubstantial changes to the noticed proposal. A City has the power to make changes in a proposed ordinance after discussion at the hearing, and where statutory notice and hearing have been afforded, it is not necessary that another notice be given to render the changes effective.[54] If, on the other hand, the deliberating body makes substantial changes to the zoning proposal as originally noticed, a new notice may be required to satisfy the statute requiring notice as a prerequisite to the valid enactment of zoning measures.[55]

c. Errors in Notice

While a notice must be sufficient to alert interested persons as to the subject matter of the zoning change, certain errors in a notice will not automatically render it legally insufficient. For example, a mistaken reference on an agenda to the current zoning of the property in question will not invalidate the ordinance, as long as the notice clearly identifies the property and nature of the proposed change.[56] However, notice is insufficient if it fails to properly identify the: (1) property in question; or (2) the requested zoning change.

d. Waiver of Notice

By appearing at and participating in a hearing on an ordinance rezoning a property owner's land, a property owner waives any right to argue that notice was improper.[57]

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did receive approval of three-fourths of City governing body where there was not at least 15 days' notice of time and place of the subsequent meeting and ordinance was therefore invalid).

[54] *City of Corpus Christi v. Jones*, 144 S.W.2d 388 (Tex. Civ. App.—San Antonio 1940, writ dism'd) (the fact that minor changes were made in City zoning ordinance, recommended by Zoning Commission, before its final enactment by City Council, did not invalidate ordinance, as Council has power, after statutory hearing, of which required notice has been given by newspaper publication, to make changes in regulatory provisions recommended by Commission without further notice).

[55] *Id*.

[56] *Eudaly v. City of Colleyville*, 642 S.W.2d 75 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (zoning-change ordinances were not invalid due to fact that a City Council agenda was mistaken in its references to the then-current zoning of two of the four parcels under consideration where such mistake did not result in any failure to give accurate notice of which land was to be rezoned or of the nature of the proposed change of zoning).

[57] *City of Beaumont v. Salhab*, 596 S.W.2d 536 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (by appearing at and participating in hearing, property owner waived any defect in hearing notice).

e. Validation Statute

Even if a City fails to provide proper notice, if no person challenges the adoption of the ordinance within three years, the ordinance is valid despite such errors.[58] The Validation Statute creates a conclusive presumption of validity for actions taken more than three years before suit is filed.

> (a) A governmental act or proceeding of a municipality is conclusively presumed, as of the date it occurred, to be valid and to have occurred in accordance with all applicable statutes and ordinances if:
>
> (1) the third anniversary of the effective date of the act or proceeding has expired; and
>
> (2) a lawsuit to annul or invalidate the act or proceeding has not been filed on or before that third anniversary.[59]

The purpose of the Validation Statute is to cure defects for failure to comply with statutory requirements.[60] Validation statutes also cure substantive defects of a non-constitutional nature.[61] Validation statutes may not be used, however, to cure constitutional defects, such as the unjust taking of property.[62]

2. PROTESTS

Typically, a City Council approves a zoning change by a simple majority vote. However, the Local Government Code affords certain property owners the right to protest a zoning change, triggering a requirement for a supermajority vote to affirm a zoning change.[63] When the requisite percentage of the property's neighbors opposes a zoning change requested by the

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[58] *See* TEX. LOC. GOV'T CODE § 51.003; *see also Kinkaid Sch., Inc. v. McCarthy*, 833 S.W.2d 226 (Tex. App.—Houston [1st Dist.] 1992) (regarding predecessor validation statute) (ordinance granting school's specific use permit was valid, though owners of surrounding real property did not receive written notice, where any irregularities regarding compliance with notice provisions of ordinance were cured by validation statute).

[59] TEX. LOC. GOV'T CODE § 51.003; *see also City of Alton v. City of Mission*, 164 S.W.3d 861, 868 (Tex. App.—Corpus Christi 2005, pet. denied) (finding that Validation Statute cures any substantive defects in ordinances if such ordinances are not contested within the subscribed time period); Tex. Att'y Gen. Op. No. GA-0084 (2003) (given that the City Council approved the agreements in question more than three years prior and that no litigation concerning their validity was filed during that time, the agreements were valid); *see, e.g., City of Murphy v. City of Parker,* 932 S.W.2d 479, 481 n.1 (Tex. 1996).

[60] *See Kinkaid Sch., Inc. v. McCarthy,* 833 S.W.2d 226, 231 (Tex. App.—Houston [1st Dist.] 1992, no writ) (validation statutes cure non-constitutional procedural defects and irregularities in adoption of ordinance); *Richardson v. State,* 199 S.W.2d 239, 244 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.) (basic purpose of validation statute is to give effect to ordinance passed in good faith, but plagued by some procedural or minor defect).

[61] *See Leach v. City of N. Richland Hills,* 627 S.W.2d 854, 858 (Tex. App.—Fort Worth 1982, no writ) (substantive defects which do not render ordinances unconstitutional can be cured by validating statutes).

[62] *See Kinkaid Sch.,* 833 S.W.2d at 231; *Murmur Corp. v. Bd. of Adjustment of City of Dallas,* 718 S.W.2d 790, 793 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

[63] TEX. LOC. GOV'T CODE § 211.006(f).

property owner or the City, the protest can defeat the zoning change even though a majority of the City Council favors the change.

Such a protest can cause administrative havoc, as the statutes provide no deadline by which the protest must be filed. Assuming a protest is filed at or on the day of the public hearing, little time is afforded the City to verify the validity of the petition. However, because requirements for a protest are stringent, it is advisable for a City to take all steps to verify that the petition meets the statutory requirements before the City Council meeting.

a. Who May Protest

A supermajority vote is required for approval of a zoning change when a written protest is signed by at least twenty percent (20%) of the owners 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.[64]

Property owners who are entitled to sign zoning change protests are the same as those entitled to notice – property owners, as indicated on the most recently approved municipal tax roll, of real property within 200 feet of the property on which the change is proposed.[65] Although the statute addresses land "immediately adjoining the area covered," the protestor's property need not share a common border with the property in question, nor must the protestor's property extend a distance of 200 feet from the property in question.[66]

In computing the percentage of land area for purposes of a protest, the area of streets and alleys must be included.[67] Thus, the Texas Department of Transportation, as owner of real property in its right-of-way, may be included among owners of twenty percent of immediately adjoining property protesting zoning change under Local Government Code Section 211.006(d)(2).[68] State agencies may also protest zoning changes, if the State owns land in the qualifying area and if the agencies' enabling statutes grant them such authority to act.[69] If a

[64] TEX. LOC. GOV'T CODE § 211.006(d).
[65] *Strong v. City of Grand Prairie*, 679 S.W.2d 767 (Tex. App.—Fort Worth 1984, no writ)*;* Tex. Att'y Gen. Op. No. GA-630 (2008); Tex. Att'y Gen. Op. No. DM-167 at 2-3 (1992) (discussing *Strong*); Tex. Att'y Gen. Op. No. JM-1014 at 3-5 (1989) (discussing *Strong)*; *see also* TEX. LOC. GOV'T CODE § 211.007(c). Because the identity of the property owners is ascertained from the City tax rolls, property owners within a 200-foot radius whose property does not lie within the corporate limits of the City and who are not generally subject to municipal taxation, will likely be ineligible to protest a zoning change under *Strong's* construction of Section 211.006(d)(2), regardless of their land's proximity to a proposed zoning change. Tex. Att'y Gen. Op. No. GA-630 (2008).
[66] Tex. Att'y Gen. Op. No. JM-1014 (1989).
[67] TEX. LOC. GOV'T CODE § 211.006(e) (adopted in response to *Strong,* allowing for the inclusion of roadways, despite right-of-ways not being included on municipal rolls); *see also* Tex. Att'y Gen. Op. No. JM-1014 (1989).
[68] Tex. Att'y Gen. Op. No. DM-167 (1992).
[69] *6th & Neches, L.L.C. v. Aldridge*, 992 S.W.2d 684 (Tex. App.—Austin 1999, pet. denied) (the General Services Commission and the State Preservation Board had authority under their enabling statutes to protest a property owner's request for a zoning variance).

zoning change applies only to a portion of a tract of land, the protestors' property must be within 200 feet of the affected portion, not of the larger tract.[70]

b. Adequacy of Petition

Inaccuracies in a petition do not automatically render the petition legally insufficient. For example, when the zoning change targeted Lots 12 and 13, but protestors' petition listed the protestors' names and addresses and described them as property owners within 200 feet of Lots 11 and 12, there was "no question that the objecting property owners were objecting to the rezoning of Lots 12 and 13."[71]

c. Calculating Members

Upon receipt of a proper protest, the City Council must approve the zoning change by at least a three-fourths majority vote of all members of the Council, not three-fourths of those members present at the meeting.[72] However, if a conflict of interest disqualifies a councilmember from voting, then the zoning measure must pass by an affirmative vote of three-fourths of the remaining members of the Council.[73]

IV. THE BOARD OF ADJUSTMENT

The Zoning Board of Adjustment (often referred to as the *ZBA* or *BOA*) is a citizen-comprised board having quasi-judicial authority over certain zoning-related matters.[74] The Board oversees the permitting process by hearing appeals from decisions of administrative officials and authorizes variances when strict application of setback, side yard, area, and height limits would cause individual property owners unnecessary hardship.[75] The Board also has the authority to grant special exceptions when authorized to do so by specific ordinances. The Board may:

> (1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

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[70] *See Midway Protective League v. City of Dallas*, 552 S.W.2d 170 (Tex. Civ. App. 1977, writ ref'd n.r.e.) (City ordinance rezoning 7.9806 acres of 17.54-acre tract of land for use as shopping center was not void on ground that it was not passed by three-fourths majority of City Council, where less than twenty percent of owners of land within 200 feet of shopping center had filed protest, even though more than twenty percent of owners of land within 200 feet of entire 17.54-acre tract had protested).

[71] *Strong v. City of Grand Prairie*, 679 S.W.2d 767, 769 (Tex. App.—Fort Worth 1984, no writ).

[72] TEX. LOC. GOV'T CODE § 211.006(f).

[73] *See Hannan v. City of Coppell*, 583 S.W.2d 817 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (a vote of three-to-one was adequate, where the one councilmember who was not present had disqualified himself due to a conflict of interest); *City of Alamo Heights v. Gerety*, 264 S.W.2d 778, 780 (Tex. Civ. App.—San Antonio 1954, writ ref'd n. r. e.). (a vote of three-to-one was adequate, even though all five councilmembers were present, as one had disqualified himself due to a conflict of interest).

[74] TEX. LOC. GOV'T CODE § 211.008.

[75] TEX. LOC. GOV'T CODE § 211.009.

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and

(4) hear and decide other matters authorized by an ordinance adopted under this subchapter.[76]

A. ADMINISTRATIVE DECISIONS

The Board reviews City staff's administrative decisions to ensure that staff properly interpreted the zoning ordinances.[77] Basically, any aggrieved person may appeal to the Board from any alleged error in an order, requirement, decision, or determination by a city official, officer, department, board, or bureau in the enforcement of a zoning ordinance. Nearby landowners constitute "persons aggrieved." Cities may also file appeals from administrative decisions, even though their own official granted the contested permit.

Without the Board, persons complaining about the granting or denial of permits would have no vehicle for appeal except to the City Council or a court of proper jurisdiction. A danger exists that the City Council may grant relief to the person by ordinance, thereby amending the basic zoning regulations in an ad hoc manner. A Board considering an appeal, however, may only determine whether the administrative official correctly applied the ordinance and its regulations.

To appeal an administrative official's determination, a party must file a notice with the administrative officer – usually the planning director – from whose decision the appeal is taken and with the Board of Adjustment.[78] The notice must state the grounds for the appeal. When notice is filed, the administrative officer must immediately transmit to the Board all papers constituting the record on which the action appealed from was taken. Such records may include the application, the denial, and any communication between the administrative official and the applicant.

The appeal stays all proceedings unless the administrative officer whose decision has been appealed certifies after notice of appeal that a stay would, in his opinion, cause imminent peril to life or property. If this written statement is filed, then the administrative proceedings can be stayed only by a restraining order granted by the Board or by a court. If no appeal is taken, the permit officer's decision to issue or deny a permit becomes incontestable as to a matter within the officer's jurisdiction. The Board may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from to make it conform to applicable law. The Board has all of the powers of the officer from whom the appeal is taken to accomplish a proper end.

[76] TEX. LOC. GOV'T CODE § 211.009(a).
[77] TEX. LOC. GOV'T CODE § 211.010(a).
[78] TEX. LOC. GOV'T CODE § 211.010(b).

B. SPECIAL EXCEPTIONS

A comprehensive zoning ordinance may authorize a Board of Adjustment to hear and decide special exceptions to certain ordinances.[79] A special exception refers to uses that a zoning ordinance permits, but that are specially reviewed and approved by the Board for situational suitability. Unlike variances, special exceptions do not require a showing of hardship**.** A special exception differs from a variance in that the former is a use expressly authorized under the zoning ordinance under the conditions specified in the ordinance and the latter is a suspension of the literal enforcement of the ordinance.[80]

C. VARIANCES

A variance is permission to depart from the literal requirements of a zoning ordinance by virtue of an unnecessary hardship due to special circumstances inherent to the property.[81] An administrative official of a City cannot approve a variance; only the Board of Adjustment holds that authority. Variances relate to technical zoning matters such as area, setback, and height regulations.

Variances are permissible only if strict application of the zoning ordinance would cause unnecessary hardship. When considering applications for variances, the Board should require some evidence of hardship unique to property-related conditions. A variance is not authorized merely to accommodate the highest and best use of property.

Financial hardship is insufficient as a matter of law to justify granting a variance. An unnecessary hardship must be one that is not personal to the property owner or self-created; it relates to a condition associated with the topography or shape of the lot. It is insufficient as a matter of law for a developer, for example, to seek a variance from a zoning ordinance's minimum lot size requirement on the basis that it would not be economically feasible to develop the property in compliance with the zoning ordinance.[82]

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[79] TEX. LOC. GOV'T CODE § 211.009(a)(2). Section 211.009(a)(2) of the Code is simply an enabling provision which allows cities to create special exceptions; in the absence of an ordinance that establishes and delineates the parameters for special exceptions, a board has no inherent authority to consider it.

[80] *West Tex. Water Refiners, Inc. v. S&B Beverage Co., Inc*., 915 S.W.2d 623 (Tex. App.—El Paso 1996, no writ).

[81] *See* TEX. LOC. GOV'T CODE § 211.009(a)(3).

[82] *See Currey v. Kimple,* 577 S.W.2d 508 (Tex. Civ. App.—Dallas 1978, writ ref'd, n.r.e.). The unnecessary hardship in this case arose from the property owner's desire to build a tennis court on a pie-shaped residential lot. The construction and placement of the tennis court could not be accomplished in compliance with the City of Dallas' building setback requirements applicable within that residential district. The fact that the owner wanted to build a tennis court on an irregularly shaped lot did not constitute a self-created or personal hardship warranting a denial of the requested variance from the setback requirements; the configuration of the lot created the hardship and the evidence did not reveal that the owners wanted the variance for personal reasons not connected with the configuration of the lot.

D. BOARD MEMBERSHIP AND VOTING PROCEDURES

A Board of Adjustment consists of five members, each appointed for a term of two years.[83] Alternate members may also be appointed to serve when one or more regular members are absent. Members may be removed for cause, on written charges, after hearing; vacancies will be filled for the unexpired term of the vacant member. All cases must be heard by a minimum of four members (seventy-five percent of the members). The concurring vote of at least four members is required to reverse administrative decisions, grant special exceptions, authorize variances, and take any other action authorized by the ordinance.

Chapter 211 of the Local Government Code requires that the Board adopt rules in accordance with the zoning ordinance. Meetings are held at the call of the chairman or as the Board determines. The chairman or acting chairman can administer oaths and compel attendance of witnesses. All meetings must be open to the public. The Board must keep minutes of its proceedings, showing the vote of each member of its examinations and other official actions and maintain them as a public record in the Board's office. When deciding appeals the Board must fix a reasonable time for hearing, give notice to the public and the parties, and decide the appealed matter within a reasonable time. Parties may appear in person or by agent or attorney.

E. APPEAL OF BOARD'S DECISION

An appeal of an adverse determination by the Board is by petition for writ of certiorari, which must be filed in an appropriate district court within ten (10) days of the Board's decision.[84] Since the decisions of a board are final, the plaintiff's burden of proof in district court is whether the Board's decision was illegal.[85] The court may reverse or affirm, in whole or in part, or modify the decision of the Board.[86]

[83] TEX. LOC. GOV'T CODE § 211.008.
[84] TEX. LOC. GOV'T CODE § 211.011.
[85] *Id.*
[86] *Id.*