

# Land Use Regulation for Texas Cities

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## I. Zoning

A city's zoning authority is governed by chapter 211 of the Texas Local Government Code. Under the Code, a municipality may adopt zoning regulations 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 significance."<sup>2</sup> The municipality may also amend, repeal or otherwise change existing zoning regulations or boundaries.<sup>3</sup>

### A. What goes into a zoning ordinance?

A city's zoning ordinance will contain the city's preferences for use of land in all areas within the city limits. Chapter 211 of the Local Government Code requires all cities to adopt their zoning regulations in accordance with a Comprehensive Plan.<sup>4</sup> The comprehensive plan is a document that sets forth the city's vision for land use in the future. Most cities adopt their comprehensive plan after receiving input from various citizens' groups and other stakeholders. If a city wants to amend its zoning ordinance in a way that conflicts with the comprehensive plan, the city must first amend the comprehensive plan before it can amend its zoning ordinance. It is prudent for a city to review and update its comprehensive plan periodically.

Most zoning ordinances contain the same basic elements: (1) general definitions; (2) land use definitions; (3) land use districts; (4) administrative provisions; (5) development standards; and penalty and enforcement provisions. Cities have a fair amount of discretion in determining what land uses they wish to allow in various districts. For example, most cities do not allow industrial uses to locate in a single-family residential district, or a truck stop to locate in a district that is reserved for hospital and medical uses. Some cities allow for special districts (often called "Planned Development Districts") that provide even greater flexibility for land use than is available in a normal zoning district. For example, a planned development district may provide

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<sup>2</sup> TEX. LOC. GOV'T CODE § 211.001.

<sup>3</sup> *Id.* at § 211.002.

<sup>4</sup> *Id.* at §211.004.

for a mix of residential, retail, and professional office uses on terms and conditions that the city includes in the planned development district ordinance.

Two pitfalls that cities must be careful to avoid in zoning are “spot zoning” and “contract zoning.” “Spot zoning” is the illegal practice of zoning a single tract of land in a manner that is incompatible with the surrounding area and in a manner that is incompatible with the city’s zoning ordinance and comprehensive plan. “Contract zoning” is an illegal agreement between the city and a property owner to adopt a certain zoning classification in exchange for certain promises by the property owner. Because contract zoning usurps the city council’s legislative function, the council cannot enter into such a contract.

## **B. Planning and Zoning Commission**

Most cities that have a zoning ordinance also have a Planning and Zoning Commission.<sup>5</sup> The commission is an advisory body appointed by the city council that advises the council on requests for changes to the zoning ordinance. A request for rezoning may come from a property owner, or the city council or commission may initiate rezoning on its own initiative. Generally, a request for rezoning will involve the classification of a certain tract of property (*e.g.*, a request to rezone property from multi-family residential to retail). But the commission also reviews and advises the council on requests for changes to zoning regulations (*e.g.*, the creation of a new type of zoning district or an amendment to the land use definitions in the zoning ordinance).

If a city has a Planning and Zoning Commission, the city council generally cannot make changes to the zoning ordinance without first seeking the review and recommendation of the commission.

## **C. Procedural Requirements**

Prior to making a rezoning decision, the city council considers the recommendations of city staff and the planning and zoning commission (if there is one). In addition, section 211.006 of the Texas Local Government Code requires the city to publish advance notice in the newspaper, mail notice to surrounding property owners, and hold a public hearing at which “parties in interest and citizens” have an opportunity to be heard.

In some cases, the receipt of written protests by interested landowners will require the council to approve the change by more than a simple majority in order for the zoning change to become effective. If the owners of land of at least twenty percent of either: (1) the area of the lots or land covered by the proposed zoning 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 file a protest, then the council must approve the rezoning by an affirmative vote of at least three-fourths of all members of the governing body. The protest must be in writing and signed by the property owners. Note that the area of streets and alleys is included in determining whether the protestors have met the twenty percent threshold.<sup>6</sup>

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<sup>5</sup> *Id.* at § 211.007.

<sup>6</sup> *Id.* at § 211.006.

Ultimately, however, the council has discretion as a legislative body to make the decision of whether to rezone. Once the council has denied a rezoning application, it is common for the zoning ordinance to impose a waiting period of one year or more before an applicant can file a new zoning application with the city for the same parcel of land. Depending on the ordinance, however, the council may have specific authority to waive the waiting period.

#### **D. Zoning Board of Adjustment**

A city's ordinances also may provide for the creation of a Zoning Board of Adjustment.<sup>7</sup> Like the Planning and Zoning Commission, the Board of Adjustment consists of members appointed by the city council. Unlike the commission, the Board of Adjustment does not make recommendations to the city council. Instead, the Board acts as a quasi-judicial body. Generally, the Board has authority over two main types of decisions: (1) whether to grant a variance from the city's zoning regulations; and (2) consideration of appeals from decisions of city administrative officials. Appeals from decisions of the Board of Adjustment do not go to the city council; they go directly to the district court.<sup>8</sup>

When considering whether to grant a variance, the Board must make specific findings regarding the request, including: (1) that the variance is not contrary to the public interest; (2) whether due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship to the property owner; and (3) whether by granting the variance spirit of the ordinance will be observed and substantial justice will be done. Note that "unnecessary hardship" does not include a hardship created by the property owner. Further, the hardship must be unique to the property. Finally, the Board cannot grant a variance that would allow a land use otherwise prohibited by the zoning ordinance. Typical variances include items like additions or reductions to height, square footage, or setback requirements. But the Board could not, for example, approve a "variance" that would allow a commercial use in a zoning district zoned exclusively for residential uses.

Section 211.010 of the Texas Local Government Code also provides the exclusive procedure for a plaintiff to appeal a decision of a city administrative official:

- (a) [A]ny of the following may appeal to the board of adjustment a decision made by an administrative official:
  - (1) a person aggrieved by the decision; or
  - (2) any officer, department, board, or bureau of the municipality affected by the decision.

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<sup>7</sup> *Id.* at §§ 211.008 – 211.011.

<sup>8</sup> *Id.* at §§ 211.011.

- (b) The appellant *must* file with the board and the official from whom the appeal is taken a notice of appeal specifying the grounds for the appeal. The appeal *must* be filed within a reasonable time as determined by the rules of the board...<sup>9</sup>

This administrative process is the sole procedure through which the district court may obtain jurisdiction to review the decision of an administrative official. “With regard to a complaint of a Void permit issued under a valid ordinance . . . a party aggrieved by his decision must exhaust his administrative remedy by appealing to the Board of Adjustment before he may sue in a court for redress.”<sup>10</sup> A suit not brought pursuant to the statutory provisions of sections 211.010 and 211.011 of the Texas Local Government Code is an impermissible collateral attack on the administrative official’s decision.<sup>11</sup> When a party has failed to exhaust his or her administrative remedies, the trial court lacks subject matter jurisdiction over the appeal.<sup>12</sup>

### **E. Moratorium on Continued Development**

A moratorium is a tool that permits a city to give itself some “breathing room” to review and update its land use regulations. The Texas Supreme Court has held that a moratorium does not constitute a taking *per se* under the Texas Constitution.<sup>13</sup> Out of an apparent concern that cities were overreaching in their use of moratoria, however, the Texas Legislature has heavily regulated the use of moratoria under Chapter 212 of the Texas Local Government Code.

For example, the Legislature has imposed fairly stringent notice and hearing requirements on cities that seek to impose moratoria on development. Before the city can impose a moratorium on property development, it must conduct a public hearing that provides municipal residents and affected parties the opportunity to be heard. The city must publish notice of the hearing in a newspaper of general circulation on the fourth day before the date of the hearing. Beginning on the fifth day after the city publishes notice, a temporary moratorium will automatically take effect. During the period of the temporary moratorium, the city may stop accepting permits, authorizations, and approvals necessary for the subdivision of, site planning of, or construction on real property to which the moratorium applies.<sup>14</sup>

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<sup>9</sup> *Id.* at § 211.010 (a), (b) (emphasis added).

<sup>10</sup> *City of Dallas v. Gaechter*, 524 S.W.2d 400, 405 (Tex.Civ.App. – Dallas 1975, writ dismissed).

<sup>11</sup> *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 250 (Tex. App. – San Antonio 2006, pet. denied); see also *Horton v. City of Smithville*, No. 03-07-00174-CV, 2008 WL 204160, at \*4 (Tex.App.–Austin Jan. 25, 2008, pet. denied) (mem. op.) (“Texas Local Government Code sections 211.009 and 211.110 provide administrative remedies that must be exhausted before such matters may be brought to the courts for determination.”).

<sup>12</sup> *El Dorado Amusement Co.*, 195 S.W.3d at 250.

<sup>13</sup> *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 679-80 (Tex. 2004).

<sup>14</sup> TEX. LOC. GOV’T CODE § 212.134(a)-(c).

If the city has a planning and zoning commission, the city must hold a second public hearing before the commission. If the city does not have a planning and zoning commission, then the city must hold two hearings before the city council. The city must make a final determination of whether to impose the moratorium within twelve days after the date of the public hearing. In addition, the council must give at least two readings of the ordinance adopting the moratorium, separated by at least four days, before the ordinance can take effect.<sup>15</sup>

Other requirements for imposing a moratorium can be found in sections 212.131 – 212.139 of the Texas Local Government Code.

## **II. Subdivision**

An additional source of a city's land use regulations is through the city's subdivision ordinance.<sup>16</sup> The subdivision of land is the first step in the process of development. The distribution and relationship of residential, nonresidential and agricultural uses throughout the community, along with the system of improvements for thoroughfares, utilities, public facilities and community amenities, determine, in large measure, the quality of life enjoyed by the residents of the community. Health, safety, economy, amenities, environmental sensitivity, and convenience are all factors that influence and determine a community's quality of life and overall character. A community's quality of life is of the public interest. Consequently, the subdivision of land, as it affects a community's quality of life, is an activity where regulation is a valid function of municipal government. Subdivision regulations are intended to encourage the development of a quality municipal environment by establishing standards for the provision of adequate light, air, open space, storm water drainage, transportation, public utilities and facilities, and other needs necessary for ensuring the creation and continuance of a healthy, attractive, safe and efficient community that provides for the conservation, enhancement and protection of its human and natural resources.

Unlike zoning, which only applies within the city's corporate limits, cities have the authority to extend their subdivision regulations by ordinance to include their extraterritorial jurisdictions (ETJs).<sup>17</sup> In fact, with certain exceptions, state law requires an owner of a tract of land located in the city limits or extraterritorial jurisdiction (ETJ) of a city to file and record a plat any time the property owner subdivides the tract into two or more parcels.<sup>18</sup>

A property owner must file the plat with the city for review and approval. If the city has a planning and zoning commission, then the commission generally is the body that has the authority to review and approve plats. However, the city may provide by ordinance that the city

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<sup>15</sup> *Id.* at § 212.134(d)-(f).

<sup>16</sup> *Id.* at § 212.001, *et seq.*

<sup>17</sup> *Id.* at § 212.003.

<sup>18</sup> *Id.* at § 212.004.

council must approve plats in addition to the commission.<sup>19</sup> Note that the authority of the commission and/or the city council to review and approve plats is virtually ministerial – section 212.005 provides that the reviewing body “must approve a plat or replat . . . that satisfies all applicable regulations.” Further, a plat is considered approved if the city does not act on the plat within thirty days after the plat is filed (or up to an additional thirty days if the ordinance requires additional review and approval by the city council).<sup>20</sup>

A city’s real land use authority relating to subdivisions arises not in the procedures, but in the text of the city’s subdivision ordinance. A typical subdivision ordinance will include: (1) definitions; (2) design standards; (3) requirements for public sites and open spaces; (4) improvements required prior to acceptance by the city; (5) procedures for filing; and (6) enforcement and penalties. The subdivision ordinance may require proper zoning prior to approval of a plat. The ordinance also may divide the platting process into multiple steps. For example, the ordinance may first require approval of a less detailed, preliminary plat before the applicant can submit a final plat that the applicant ultimately will file with the county following city approval. Generally, the ordinance will require that all subdivision plats be prepared and sealed by a professional and licensed engineer.

If a subdivision plat includes multiple properties, the developer may include (and the city may require) streets, parks, sidewalks, utility rights-of-way, and other public facilities that the developer intends to dedicate to the city. Once the city accepts the dedication, the city then accepts responsibility for maintaining such public facilities. But just because a city has approved a plat that includes public facilities does not mean that the city automatically becomes responsible for all of the parks, roads and other facilities included on the plat. A dedication of public facilities does not become official until the city council formally accepts the dedication.

### **III. Annexation**

A third method that cities use to control future growth and land use is targeted annexation. The procedures and requirements for annexation are found in Chapter 43 of the Texas Government Code. Because annexation will be addressed separately in this seminar, this paper does not include a detailed discussion of the annexation process.

### **IV. Development Agreements (ETJ)**

Section 212.172 of the Texas Local Government Code gives cities the ability to contract with landowners in the city’s ETJ. The statute gives the parties broad discretion to determine the terms of the agreement, including the right to provide for terms regarding annexation:

The governing body of a municipality may make a written contract with an owner of land that is located in the extraterritorial jurisdiction of the municipality to:

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<sup>19</sup> *Id.* at §212.006.

<sup>20</sup> *Id.* at §212.009.

- (1) guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the municipality for a period not to exceed 15 years;
- (2) extend the municipality's planning authority over the land by providing for a development plan to be prepared by the landowner and approved by the municipality under which certain general uses and development of the land are authorized;
- (3) authorize enforcement by the municipality of certain municipal land use and development regulations in the same manner the regulations are enforced within the municipality's boundaries;
- (4) authorize enforcement by the municipality of land use and development regulations other than those that apply within the municipality's boundaries, as may be agreed to by the landowner and the municipality;
- (5) provide for infrastructure for the land, including:
  - (A) streets and roads;
  - (B) street and road drainage;
  - (C) land drainage;
  - (D) water, wastewater, and other utility systems;
- (6) authorize enforcement of environmental regulations;
- (7) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties;
- (8) specify the uses and development of the land before and after annexation, if annexation is agreed to by the parties;  
or
- (9) include other lawful terms and considerations the parties consider appropriate.<sup>21</sup>

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<sup>21</sup> *Id.* at § 212.172.

A municipality may not require an agreement under this statute as a condition for providing water, sewer, electricity, gas, or other utility service from a municipally owned or municipally operated utility that provides any of those services.<sup>22</sup>

An ETJ Development Agreement must be in writing, contain an adequate legal description of the subject territory, be approved by both the city and the landowner, and be recorded in the real property records of all the counties in which the territory is located.

To some extent, the powers that the Legislature granted municipalities under section 212.171 mirror those in effect prior to 2003 under section 42.044 of the Local Government Code (Creation of Industrial District in Extraterritorial Jurisdiction). Pursuant to section 42.044, a municipality may enter into an annexation agreement through which the municipality agrees not to annex business property in a designated industrial district for a period up to fifteen (15) years. The term “industrial district” is defined to include its ordinary meaning in addition to any area where tourist-related businesses and facilities are located.<sup>23</sup> Although similar, section 42.044 is more restrictive than section 212.174. In addition to providing a wider menu of contract term options, section 212.171 does not require cities to designate an industrial district prior to entering into an agreement.

## **V. Other Land Use Authority**

Cities have other sources of land use authority sprinkled throughout the Texas statutes. This section briefly addresses three: (1) alcohol regulation; (2) regulation of sexually oriented businesses; and (3) tax increment financing.

### **A. Alcohol Regulation**

Section 1.06 of the Texas Alcoholic Beverage Code (TABC) generally preempts local legislation of alcoholic beverages: "Unless otherwise specifically provided by the terms of this code the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this code."<sup>24</sup> Similarly, section 109.57(b) of the Code provides: "It is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code."<sup>25</sup>

In *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491-92 (Tex. 1993), the Texas Supreme Court held, “The Legislature's intent is clearly expressed in

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<sup>22</sup> *Id.* at § 212.174.

<sup>23</sup> *Id.* at § 42.044.

<sup>24</sup> TEX. ALCO. BEV. CODE § 1.06.

<sup>25</sup> *Id.* at § 109.57(b).



section 109.57(b) of the TABC - the regulation of alcoholic beverages is exclusively governed by the provisions of the TABC unless otherwise provided." The Attorney General has interpreted this language broadly, concluding that "to the extent that [an] ordinance purports generally to regulate the sale of all alcoholic beverages of whatever kind, it is preempted by section 109.57(b) of the Alcoholic Beverages Code."<sup>26</sup>

The Code does provide a "grandfathering" exception, however, for certain municipal ordinances that were in effect before June 11, 1987:

Neither this section nor Section 1.06 of this code affects the validity or invalidity of a zoning regulation that was formally enacted before June 11, 1987, and that is otherwise valid, or any amendment to such a regulation enacted after June 11, 1987, if the amendment lessens the restrictions on the licensee or permittee or does not impose additional restrictions on the licensee or permittee. For purposes of this subsection, "zoning regulations" means any charter provision, rule, regulation, or other enactment governing the location and use of buildings, other structures, and land.<sup>27</sup>

There is an additional exception from state preemption of local regulation of alcoholic beverages for local regulations that affect business that serve or sell alcohol in the same way that such regulations affect businesses that do not serve and sell alcohol. For example, the Supreme Court has indicated that an ordinance requiring all businesses with the same kind of premises to have a fire extinguisher would not violate section 109.57 of the TABC, but an ordinance that required alcohol-related businesses to have two fire extinguishers but only required all other businesses with the same kind of premises to have one would violate the statute.<sup>28</sup> Similarly, an ordinance banning the sale of all beverages in glass containers would be permissible, but an ordinance that only banned the sale of alcoholic beverages in glass containers would not.<sup>29</sup>

In addition, the Code provides two separate statutes through which a municipality may extend the hours of operation for the holders of a mixed beverage permit and a retail dealer's license (*i.e.*, beer license) respectively. A city that has a population of less than 800,000, according to the last preceding federal census, or less than 500,000, according to the 22<sup>nd</sup> Decennial Census, may adopt an ordinance extending the hours for the sale of mixed beverages to 2:00 a.m. on any day.<sup>30</sup> Similarly, a city that has a population of less than 800,000, according to the last preceding federal census, or less than 500,000, according to the 22<sup>nd</sup> Decennial

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<sup>26</sup> Op. Tex. Att'y Gen. No. GA-0110, at 2 (2003).

<sup>27</sup> TEX. ALCO. BEV. CODE § 109.57(c).

<sup>28</sup> *Dallas Merchant's*, 852 S.W.2d at 492 n.5.

<sup>29</sup> Op. Tex. Att'y Gen. No. GA-0110 at 4 (2003).

<sup>30</sup> *Id.* at § 105.03.

Census, may adopt an ordinance extending the hours for the sale of beer to 2:00 a.m. on any day “or any part of [such] extended hours.”<sup>31</sup>

Section 109.33 of the Code permits cities to prohibit the sale any alcoholic beverage within 300 feet of a church, public or private school, or public hospital. A city by charter or ordinance may prohibit the sale of beer in a residential area,<sup>32</sup> and a home rule city by charter may prohibit the sale of liquor in a residential area.<sup>33</sup> Finally, a city can regulate the location of: (1) a massage parlor, nude modeling studio, or other sexually oriented business; or (2) an establishment that derives 75 percent or more of the establishment's gross revenue from the on-premise sale of alcoholic beverages.<sup>34</sup>

## **B. Sexually Oriented Businesses**

Because the courts have determined that sexually oriented businesses engage in protected speech under the First Amendment of the United States Constitution, a city cannot outlaw sexually oriented businesses entirely. Nevertheless, cities have authority to regulate the location and operation of sexually oriented businesses, including, but not limited to, strip clubs, video arcades, and retailers that earn a large portion of their profits from the sale of pornography and related items. One source of such authority is Chapter 243 of the Texas Local Government Code. Among other powers, that chapter authorizes a city to: (1) restrict the location of sexually oriented businesses;<sup>35</sup> (2) prohibit sexually oriented businesses within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use the governing body of the municipality or county finds to be inconsistent with the operation of a sexually oriented business;<sup>36</sup> (3) regulate the density of sexually oriented businesses;<sup>37</sup> and (4) require that an owner or operator of a sexually oriented business obtain a license or other permit or renew a license or other permit on a periodic basis for the operation of a sexually oriented business.<sup>38</sup>

Many cities have included regulations in their ordinances designed to address the “secondary effects” of such businesses on the areas in which they are located – *e.g.*, higher crime and loss of property value. A good sexually oriented business ordinance should include detailed legislative findings that cite published studies to support the premise that the regulation of such businesses is reasonable and necessary to control the secondary effects that such businesses

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<sup>31</sup> *Id.* at § 105.05.

<sup>32</sup> *Id.* at §109.32.

<sup>33</sup> *Id.* at §109.31.

<sup>34</sup> *Id.* at §109.57(c).

<sup>35</sup> TEX. LOC. GOV'T CODE § 243.006(a)(1).

<sup>36</sup> *Id.* at § 243.006(a)(2).

<sup>37</sup> *Id.* at § 243.006(b).

<sup>38</sup> *Id.* at § 243.007.

bring. In *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5<sup>th</sup> Cir. 2003), the Fifth Circuit held that the studies that Texas cities traditionally had cited to support their secondary effects regulations did not apply to retail-only sexually oriented businesses. In response to *Encore*, the Texas City Attorneys Association and a number of Texas Cities commissioned an off-site secondary effects study, *Survey of Texas Appraisers: Secondary Effects of Sexually-Oriented Businesses on Market Values* and *Crime-Related Secondary Effects: Secondary Effects of "Off-Site" Sexually-Oriented Businesses*, which is available for download at <http://www.texascityattorneys.org/bulletin-SOB.html>.

### **C. Tax Increment Financing (TIF) Zone**

A Tax Increment Financing (TIF) Agreement permits a municipality to designate a "TIF" zone (a.k.a reinvestment zone) to fund projects within the zone through additional tax dollars generated by growth of real property value in the zone.<sup>39</sup> To be designated as a reinvestment zone under the TIF statute, an area must meet the following criteria:

(1) substantially arrest or impair the sound growth of the municipality creating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of:

(A) a substantial number of substandard, slum, deteriorated, or deteriorating structures;

(B) the predominance of defective or inadequate sidewalks or streets;

(C) faulty size, adequacy, accessibility, or usefulness of lots;

(D) unsanitary or unsafe conditions;

(E) the deterioration of site or other improvements;

(F) tax or special assessment delinquency exceeding the fair market value of the land;

(G) defective or unusual conditions of title;

(H) conditions that endanger life or property by fire or other cause; or

(I) any combination of these factors;

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<sup>39</sup> TEX. TAX CODE §§ 311.001 *et seq.*

(2) be predominantly open and, because of obsolete platting, deterioration of structures or site improvements, or other factors, substantially impair or arrest the sound growth of the municipality; or

(3) be in a federally assisted new community located in a home-rule municipality or in an area immediately adjacent to a federally assisted new community located in a home-rule municipality; or . . .

(4) be an area described in a petition requesting that the area be designated as a reinvestment zone, if the petition is submitted to the governing body of the municipality by the owners of property constituting at least 50 percent of the appraised value of the property in the area according to the most recent certified appraisal roll for the county in which the area is located.<sup>40</sup>

The Attorney General has determined that an area designated for TIF treatment must be “unproductive, underdeveloped or blighted” w/in the meaning of article VIII, section 1-g(b) of the Texas Constitution.<sup>41</sup>

## **VI. Vested Rights**

“Vested rights” refer to a property owner’s right to use the owner’s property in a certain manner based on the regulations in place at a particular time, which is usually the date on which the property owner first received approval from the city for such use. A property owner has no vested right in a particular zoning category or restriction.<sup>42</sup> Similarly, a neighboring property owner cannot enforce previous zoning requirements against future construction.<sup>43</sup> Therefore, if the city were to eliminate a building setback requirement, for example, neighboring property owners who were subject to the setback requirement when they built their homes would not have legal standing to enforce the setback against future builders.<sup>44</sup>

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<sup>40</sup> *Id.* at § 311.005(a).

<sup>41</sup> Op. Tex. Atty Gen. No. JC-0152 (1999).

<sup>42</sup> *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 343 (Tex. App. – Austin 1995, no writ).

<sup>43</sup> 1 KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 4:28 (4<sup>th</sup> ed. 2003).

<sup>44</sup> *See Nusbaum v. City of Norfolk*, 145 S.E. 257, 259 (Va. 1928).

## **A. Nonconforming use**

Where a property owner is already using a particular tract of land in accordance with current zoning regulations, a change in zoning will not immediately affect that property. A municipality may not make the restrictions in its zoning ordinance retroactive.<sup>45</sup> If property is previously zoned for a specific use, and a zoning change occurs that negates the previous zoning, then the use of that property becomes a legal nonconforming use. A nonconforming use is a use that exists legally when a new zoning restriction becomes effective and that continues to exist.<sup>46</sup> A city may include a provision in its zoning ordinance that terminates non-conforming uses after a set period of time following the zoning change (e.g., 25 years) so that the property owner has an opportunity to recoup his investment in the nonconforming use over the normal life-span of the non-conforming structure.<sup>47</sup>

As a general rule, mere preparation for use of property before adoption of a zoning change is not enough to establish a nonconforming use.<sup>48</sup> Note, however, that a change in zoning that unreasonably restricts development may result in a taking under the Texas Constitution. In *Sheffield Dev. Co., Inc. v. City of Glenn Heights*,<sup>49</sup> for example, the Texas Supreme Court held that a city's decision to "down zone" the area of a proposed subdivision from 6,500 square foot lots to 12,000 square-foot lots did not *unreasonably* interfere with the property owner's investment-backed expectations for development of the property. However, the Court left open the possibility that under different facts, a city's decision to down zone could rise to the level of an unconstitutional taking of private property.

## **B. Chapter 245 of the Texas Local Government Code ("Vested Rights Statute")**

The legislature originally enacted Chapter 245 of the Texas Local Government Code, "Issuance of Local Permits," to protect property owners from changes in local regulations that occurred after the property owner had already begun development on his or her property. Now known as the "vested rights" or "entitlement" statute, the statute has become a sword for developers and a burden on cities that seek to control growth and development within their jurisdictions.

The Texas Legislature enacted the vesting provisions under Chapter 245 of the Texas Local Government Code to require that "each permit in a series required for a development project be subject to only the regulations in effect at the time of the application for the project's

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<sup>45</sup> *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953).

<sup>46</sup> *City of Univ. Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972).

<sup>47</sup> *Murmur Corp. v. Bd. of Adjustment of City of Dallas*, 718 S.W.2d 790, 798 (Tex. App. – Dallas 1986, writ ref'd n.r.e.).

<sup>48</sup> *City of Pharr v. Pena*, 853 S.W.2d 56, 64 (Tex. App. – Corpus Christi 1993, writ denied).

<sup>49</sup> 140 S.W.3d 660 (Tex. 2004).

first permit, and not any intervening regulations.”<sup>50</sup> Chapter 245 defines “project” as “an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.”<sup>51</sup> The statute defines “permit” as “a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility agency owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.”<sup>52</sup> The statute applies to “political subdivisions,” which includes municipalities.

Under Chapter 245, the city must consider the permit application solely on the basis of the regulations that were in effect: (1) at the time the original application for the permit was filed for any purpose, including review for administrative purposes; or (2) a plan for development of real property or plat application was filed with the city.<sup>53</sup> Further, the applicant’s rights “vest” on the filing of an application “that gives the regulatory agency fair notice of the project and the nature of the permit sought.”<sup>54</sup> And if a series of permits is required for a project, the regulations in place at the time of the original application for the permit in the series must be the sole basis for consideration of all subsequent permits required for completion of the project.<sup>55</sup> After the application for a project is filed, the city may not shorten the duration of any permit required for the project.<sup>56</sup> At least one court has held that the filing of a plat is the first permit application in a series of permits constituting a “project” under section 245.002(b) of the Local Government Code.<sup>57</sup>

The Legislature did leave some authority for cities. First, the city may provide that a permit application expires after 45 days if the applicant fails to provide the necessary information and the city provides the applicant with notice within 10 days after the filing of the application.<sup>58</sup> In addition, the city may, by ordinance, impose an expiration date on “dormant projects” for which no progress has been made towards completion of the project. The expiration date can be no earlier than September 1, 2010. After that time, the expiration date can be two years for an individual permit but for a “project”, no earlier than five years after the date the first permit

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<sup>50</sup> *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998) (construing predecessor statute); *see also* TEX. LOC. GOV’T CODE § 245.002.

<sup>51</sup> TEX. LOC. GOV’T CODE § 245.001(3).

<sup>52</sup> *Id.* at § 245.001(1).

<sup>53</sup> *Id.* at § 245.002(a).

<sup>54</sup> *Id.* at § 245.002(a-1).

<sup>55</sup> *Id.* at § 245.002(b).

<sup>56</sup> *Id.* at § 245.002(c).

<sup>57</sup> *Hartsell v. Town of Talty*, 130 S.W.3d 325, 327-38 (Tex. App. - Dallas 2004, pet. denied).

<sup>58</sup> TEX. LOC. GOV’T CODE § 245.002(e).

application was filed. The statute provides multiple avenues for the developer to establish that it has made progress toward completion of the project, including: (1) the submission of an application for a final plat or plan; (2) a good-faith attempt to file a permit application necessary to begin or continue towards completion of the project; (3) the incursion of costs in developing the project (exclusive of land acquisition) that equal five percent of the most recent appraised market value of the real property in which the project is located; (4) the posting of a bond with the city to ensure performance of an obligation that the city requires; or (5) payment of utility connection fees or impact fees.<sup>59</sup>

Finally, the legislature has exempted certain regulations from Chapter 245's vesting provisions. These include: (1) building permits that are at least two years old, provided that the building or structure is intended for human occupancy and habitation, and the permit was issued under laws or regulations adopting only uniform building, fire, electrical, plumbing, or mechanical codes and local amendments to those codes; (2) zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by restrictive covenant required by the municipality; (3) regulations that specifically control only the use of the land and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage or building size; (4) regulations for sexually oriented businesses; (5) municipal or county regulations affecting colonias; (6) fees imposed in conjunction with development permits; (7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication; (8) regulations for utility connections; (9) flood control regulations; (10) construction standards for public works located on public lands or easements; (11) regulations to prevent the imminent destruction of property or injury to persons that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size, residential or commercial density, or the timing of a project, or that do not change development permitted by restrictive covenant required by the municipality.<sup>60</sup>

An aggrieved applicant cannot recover money damages under Chapter 245. Rather, the statute provides that the only method of enforcement is through mandamus or declaratory or injunctive relief.<sup>61</sup>

### **C. Legal Use Prior to Annexation**

Section 43.002 of the Texas Local Government Code permits a property owner to continue certain land uses following annexation:

#### **§ 43.002. Continuation of Land Use**

(a) A municipality may not, after annexing an area, prohibit a

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<sup>59</sup> *Id.* at § 245.005.

<sup>60</sup> *Id.* at § 245.004.

<sup>61</sup> *Id.* at § 245.006.

person from:

(1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time; or

(2) beginning to use land in the area in the manner that was planned for the land before the 90th day before the effective date of the annexation if:

(A) one or more licenses, certificates, permits, approvals, or other forms of authorization by a governmental entity were required by law for the planned land use; and

(B) a completed application for the initial authorization was filed with the governmental entity before the date the annexation proceedings were instituted.

(b) For purposes of this section, a completed application is filed if the application includes all documents and other information designated as required by the governmental entity in a written notice to the applicant.

(c) This section does not prohibit a municipality from imposing:

(1) a regulation relating to the location of sexually oriented businesses, as that term is defined by Section 243.002;

(2) a municipal ordinance, regulation, or other requirement affecting colonias, as that term is defined by Section 2306.581, Government Code;

(3) a regulation relating to preventing imminent destruction of property or injury to persons;

(4) a regulation relating to public nuisances;

(5) a regulation relating to flood control;

(6) a regulation relating to the storage and use of hazardous substances; or

(7) a regulation relating to the sale and use of fireworks.



(d) A regulation relating to the discharge of firearms or other weapons is subject to the restrictions in Section 229.002.<sup>62</sup>

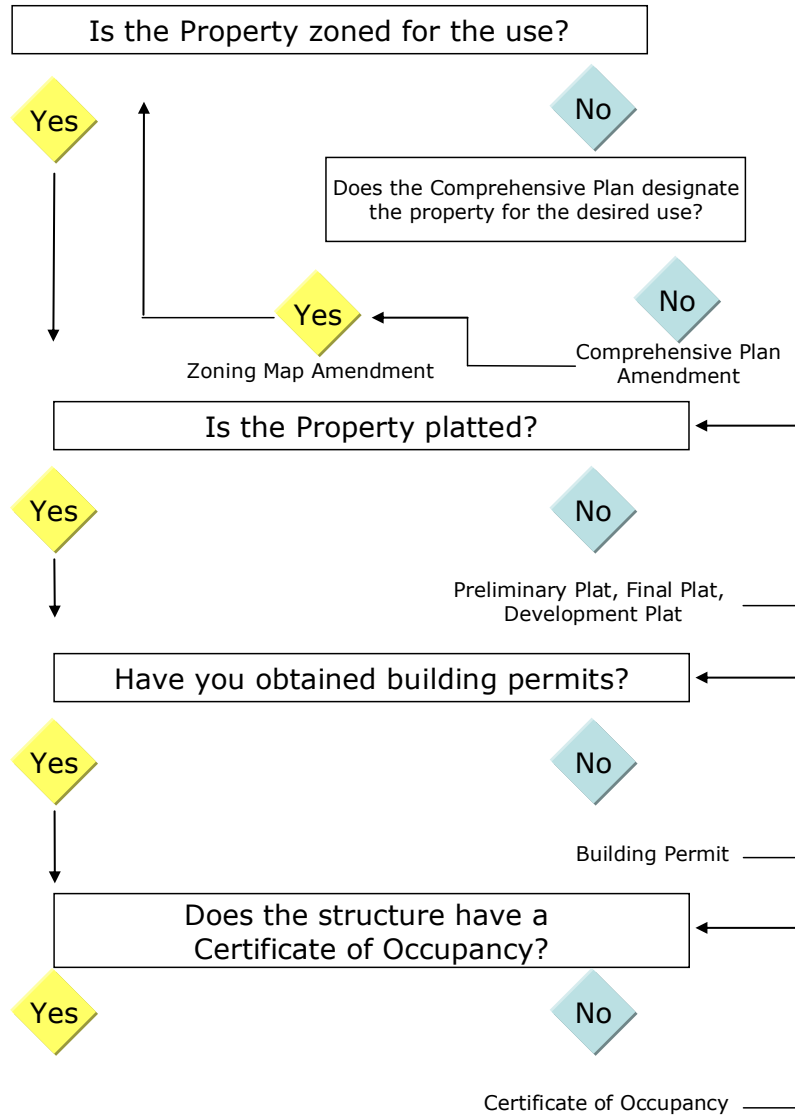
Under the above statute, the basic test is: (1) was the land use legal in the county prior to annexation; and (2) if it was, does the regulation that the city is seeking to impose fall within one of the exceptions under subsection (c) (*e.g.*, public nuisances, flood control, fireworks etc.)? A good rule of thumb is that the city rarely will be able to force the property owner to change his land use to comply with the city's zoning ordinance following annexation, but the city almost always can force the property owner to comply with the city's nuisance ordinances.

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<sup>62</sup>TEX. LOC. GOV'T CODE § 43.002.

**APPENDIX "A"**

**PROPERTY DEVELOPMENT PROCESS**



\* Describes current ordinance requirements

\*From Subdivision Ordinance of the City of Granite Shoals, Texas.