

# What's Your Damage??

## Case Studies in ZBA Appeals

Tad Cleaves, Assistant City Attorney, City of Georgetown

Skye Masson, First Assistant City Attorney, City of Georgetown

Sofia Nelson, Planning Director, City of Georgetown

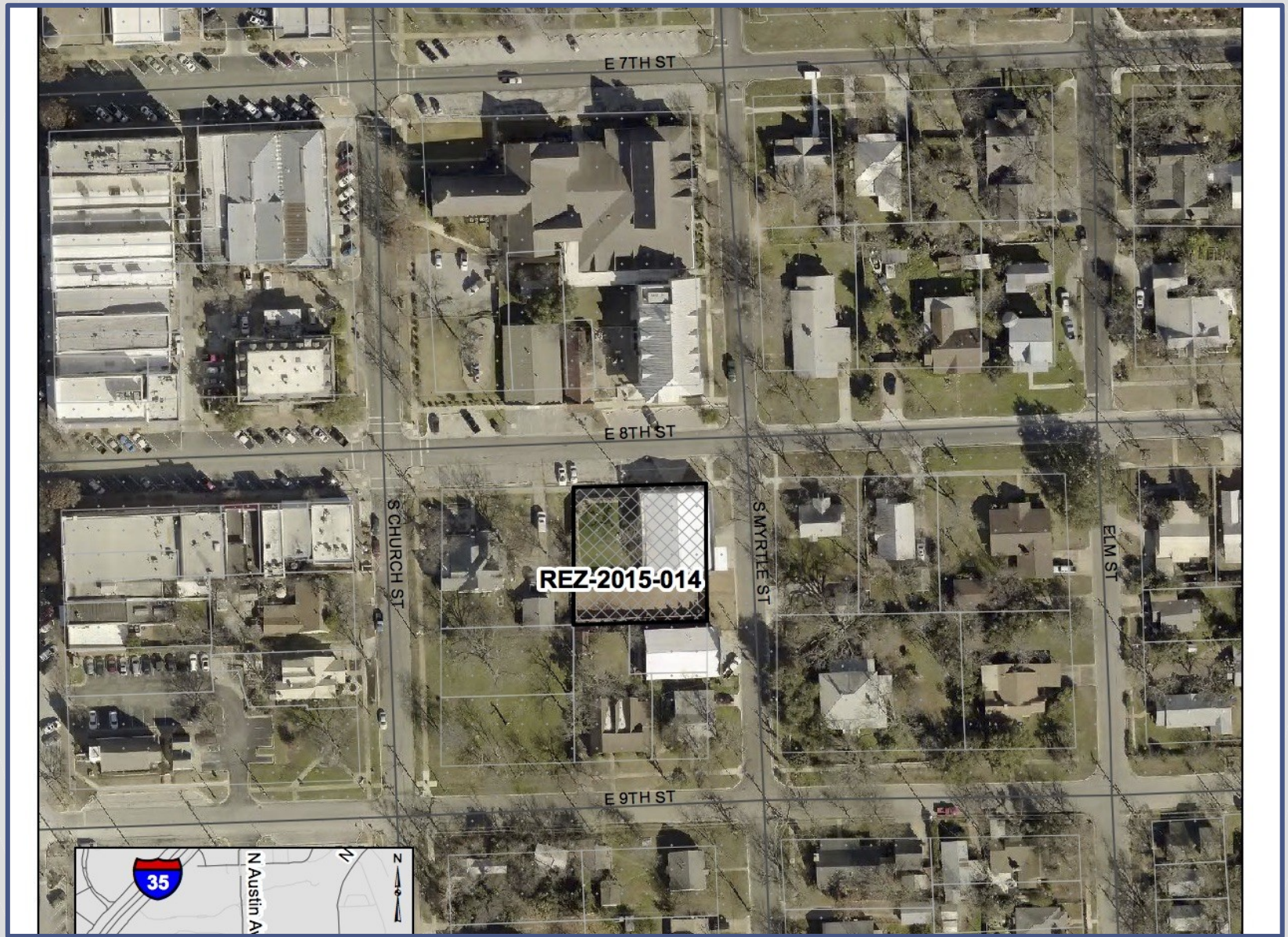
# Case Study 1:

## Event Facility

- **Project:** Renovation of an old muffler shop close to downtown Georgetown for use as an event space and cooperative work space
- **Players:**
  - Excited Entrepreneur
  - Historic Neighbor
- **Issues:**
  - Existing property subject to a conditional zoning ordinance
  - New use not covered by Georgetown zoning regulations
  - Location of property next to residential area (lots of NIMBYs)
  - Tension between City goal to revitalize downtown and NIMBY desire to keep the neighborhood residential



# Event Facility Location



# Zoning Map



# Case Study 2:

## Crude Oil Pump Station

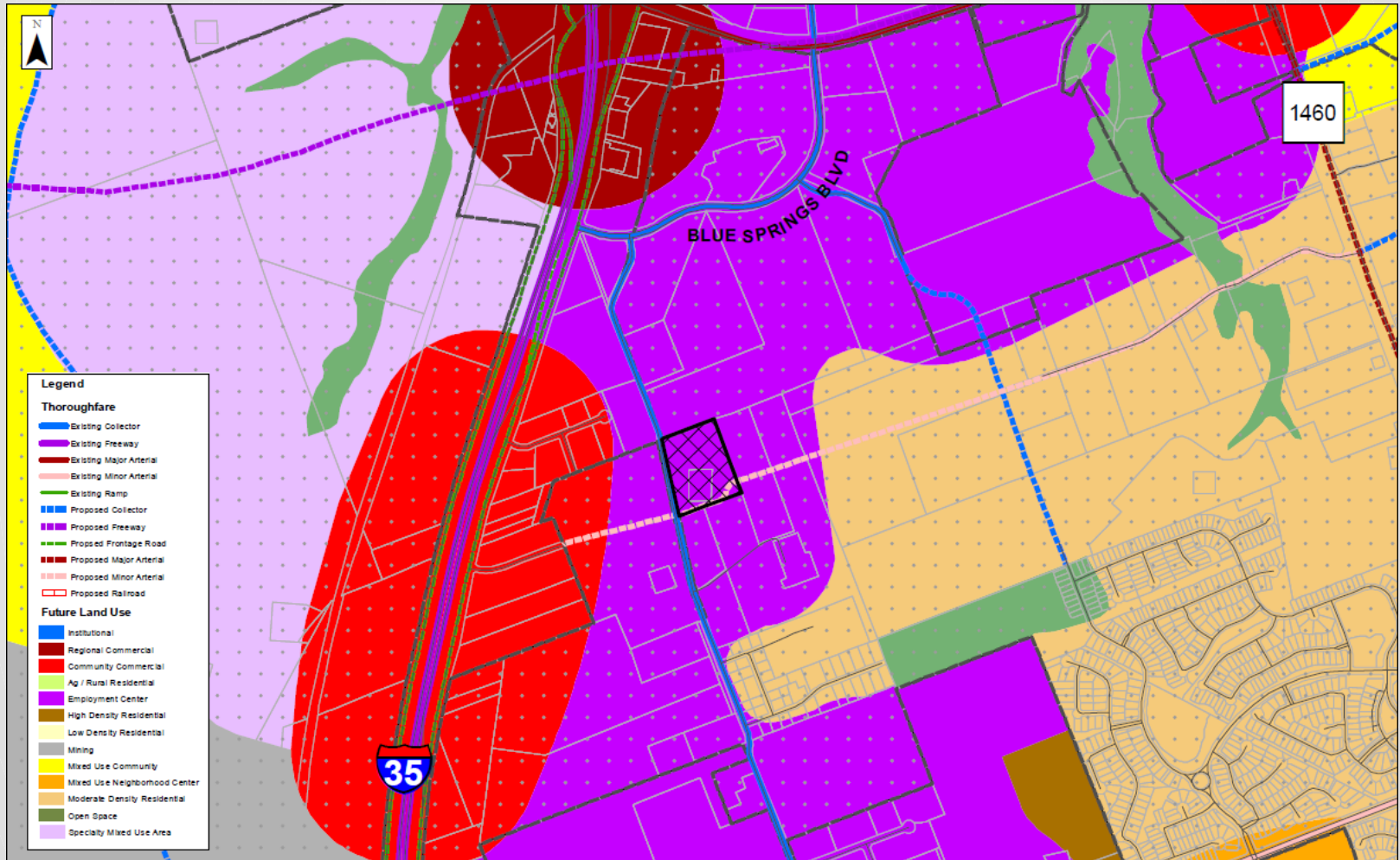
- **Project:** Construction of a crude oil pump station for pipeline on 10 acres on the edge of the City
- **Players:**
  - Pipeline Company
  - ETJ Neighbor with a Grudge
- **Issues:**
  - New use not covered by Georgetown zoning regulations
  - City cannot regulate health and safety of use



# Crude Oil Pump Station Location



# Future Land Use Map



# Zoning Case Process

In a perfect world, this is the rezoning process:

1. Potential applicant attends a pre-app meeting with planners and other staff to discuss project
2. Applicant files application for rezoning based upon outcome of pre-app meeting
3. Proposed uses are clearly within existing use categories for desired district
4. Staff report recommends approval of rezoning
5. Planning and Zoning Commission reviews rezoning request and recommends approval
6. City Council approves rezoning in two ordinance readings



# Event Facility: Unlisted Use

- Proposed use in application as event space max of 225 guests
- Director determined use was not listed in use tables
  - Some of the closest possible uses:
    - Community Center
    - Bed and Breakfast with Events
    - Dance Hall
    - Live Music or Entertainment
    - Major Event Entertainment
- Applicant was informed that an Unlisted Use Determination would be required
  - Applicant provided additional information to assist with review by Director
- Historic Neighbor also was informed of next step in process

# Determination of Unlisted Use Process

- UDC Sec. 5.01.030 “Determination of Unlisted Use”
- Director must consider the following when determining the appropriate district for a use:
  - District purpose statements
  - Descriptive character of each use category
  - Definition of similar uses
  - Specific characteristics of the use
- Director can then determine a use is allowed by right, with specific limitations or with special use permit
- The formal determination is posted on the website for 30 days, during which time an appeal can be filed
- If no appeal, determination is final after 30 days and the determination is eventually codified as a text amendment to the code

# Pump Station:

## Listed Use

- Proposed use includes a crude oil pump station.
- Does the proposed use fit within an existing use category?
  1. Oil Refinery and Distribution - a plant for purifying crude oil and distributing petroleum
  2. Utility Service (Minor/Intermediate/Major) - publicly or privately owned facilities including pumping stations, lift stations, substations, storage tanks, power plants and wastewater treatment plants



# Listed Use Process

- Informal process
- Planners meet with applicant to discuss proposed use
- Internal discussion with other City staff on proposed use and possible determination
- Decision communicated to applicant as part of application review
- Eventually documented in staff report on rezoning

# Practical and Legal Considerations

## Practical

- Planners have to make decisions on use definitions efficiently and often
- Requiring a formal use determination slows the process down
- Longer process can mean more time for opposition

## Legal

- Formal use determination provides a clear timeline
- The record, if there's an appeal, is easily established
- Less chance of abuse of discretion by planners

# Zoning Board of Adjustment

- Established by State law and City Ordinance
- Local Government Chapter 211 - City may establish a ZBA to hear the following matters:
  - Variances
  - Special Exceptions
  - Appeals
  - Other matters authorized by Ordinance
- ZBA has power to reverse/affirm in whole or part or modify the decision of an administrative official
- 75% of members of ZBA required to reverse the administrative decision



# Appeal of Administrative Decision

- ZBA may hear an appeal that alleges error in an order, requirement, decision or determination of an administrative official in the enforcement of zoning regulations
- Appeal must be filed within a reasonable time as specify by the ZBA and state the grounds of the appeal

# What Is an Administrative Decision?

- What qualifies as an appealable decision, order, requirement or determination?
  - State law limits the appeal to administrative decision, order, requirement or determination in the enforcement of ***zoning regulations***
  - Potentially a large number of every day administrative actions could be appealed
  - Many city codes simply provide for appeal of an "administrative decision"
    - Example: Appeals are allowed for ***administrative decision*** and code provides a list of administrative decisions such as site plan approval
    - Does that attempt to narrow what is appealable?

# Expanded Jurisdiction?

- Can a City broaden what can be appealed?
  - State law limits the appeal to administrative decisions in the enforcement of zoning regulations
  - It also allows a ZBA to "hear and decide other matters authorized by an ordinance adopted under this subchapter."
- What is the effect of the following?
  - Unified Development Code Sec. 3.14.010:
    - "the Zoning Board of Adjustment may 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 Code***"
    - "This Code" is the unified development code - to what extent has the City allowed for appeals of decisions not related to zoning regulations?



# Complicating Factors

- Timing - what is the effect of a legislative approval after an administrative decision?
  - Can that decision be appealed at that point?
  - Crude Oil Pump Station:
    - Appeal filed after first reading of rezoning ordinance
    - City took the position that the approval of the rezoning did not affect the appeal
    - Was that correct? Can a legislative approval moot an administrative decision appeal?
- Staff Awareness - how well do city staff understand appeal rights?

# Who can appeal?

To appeal, a person must have standing to appeal.

- Defined by statute

LGC 211.010(a) The following may appeal an administrative decision:

- A person aggrieved by the decision; or
- Any officer, department, board, or bureau of the municipality affected by the decision.

*Only these people have standing to appeal to the ZBA—  
and the requirement cannot be waived.*

# Why does Standing matter?

"We are of the opinion that in this era when agencies are besieged with innumerable complaints by innumerable parties, the agencies, when empowered by statute, should demand a party to show his standing to bring the complaint. This is not to deny any party any substantive right of access to the agency, but it merely guarantees the efficient opportunity of exercising the right. ... An agency can not waive what the legislature has demanded"

*Austin Neighborhoods Council, Inc. v. Board of Adjustment of City of Austin*

# What is "aggrievement" in Texas?

- The party must prove that it has been “injured or damaged other than as a member of the general public.”
  - Damaged or Affected
  - Damage or affects must be unique to the party
  - Damage or affects must have causal connection to the decision being appealed.
- Mere proximity *is not* enough to establish aggrievement (in Texas).
- Owning the land at issue in the appeal *may not be* sufficient to confer standing.



# What is enough?

- **Actual Damage:** Issuance of Certificate of Occupancy resulted in a construction that caused actual damage (flooding) to a neighbors property. *Lazarides v. Farris*
  - Textbook setup
  - Unique damage causally connected to the decision being appealed.
- **Historic Zone:** Location with a special zone so that a property owner has a unique interest in maintaining that zone. *Galveston Historical Foundation v. Zoning Board of Adjustment of the City of Galveston*
  - Historic zone imparts uniqueness.
  - Alleged harm resulted from the decision being appealed.

# Pump Station Neighbor

- Next door property owner
- Appeal letter alleges following as basis for standing:
  - Reduction in property value
  - Interference with access easement
  - Noise
  - Safety risk
  - Change of neighboring use will result in additional development standards
- Unclear what the nexus was between Administrative decision and some of the alleged damages

# Historic Neighbor

- Appeal letter purportedly filed on behalf of the residents of the adjacent historic neighborhood
- Signed and submitted by one resident living within 200 feet of the proposed facility
- Appeal letter provides no basis for standing
- What could have been the basis?
  - Access to health and safety
  - Property values
  - Noise
  - Change of neighborhood setting
  - Belong to same historic district
  - 200 foot notice area

# Can a City expand "Standing"?

- Example:
  - Code defines "interested party":
    - Applicant or
    - Anyone who communicates an interest in the decision and
      - Resident of a primary residence or property owner of a property that is within 500 feet of the site;
      - Officer of neighborhood organization or environmental organization with boundaries within 500 feet of the site; or
      - Utility account holder for an address within 500 feet of the site
  - Requirements for an appeal - must be an "interested party" and code must provide that the decision appealed is one that can be appeal by "that person"
  - For a use determination, code states that anyone who is required to get notice can appeal (notice is mailed to the property owners within 500 feet and neighborhood/environmental organization)



# Outcome of Event Facility Appeal

- No challenge to standing, ZBA heard appeal
- Historic Neighbor says Director was wrong to allow Event Facility use in the mixed-used downtown district
- Error based upon potential for the use to have much greater impact than other similar uses in the MUDT district
  - *Does that qualify as an error on which to base an appeal?*
- ZBA heard arguments from appellant, property owner, and City—upheld Director's determination.

# Outcome of Pump Station Appeal

- Crude Oil Pump Station
  - City and property owner objected to appellant's standing.
  - After an initial continuance, the ZBA established rules for the hearing and heard arguments on standing from the City, the appellant, and the property owner
  - Ruled that no evidence of aggrievement had been provided—appellant therefore had no standing and case was dismissed.

# Other Considerations

- Who represents the ZBA during the appeal?
  - Does the City Attorney represent ZBA? Outside Counsel?
  - What happens if the ZBA overturns the decision and the city initiates the writ to district court?
- Does the ZBA have procedures in place for an appeal?
- How is the hearing handled?
- Rules of evidence?
- When is the decision of the board put into writing and filed with the ZBA office?

# Back to the Rezoning

- More opportunities for neighbors to influence the outcome!
- Assuming ZBA appeal is unsuccessful, the underlying zoning continues (or the stay is lifted and development moves forward if rezoning already done)
- For both cases, lots of participation during rezoning:
  - Historic Neighbor submits sufficient zoning protest letters to require super majority
  - ETJ Neighbor alleges enough issues to cause a vote to delay reading of rezoning ordinance
- In the end, City Council approves both rezonings

# What else could happen?

- Writ of Cert to District Court (LGC 211.001(a))
  - Must allege illegality of ZBA decision
  - Expanding Standing:
  - Must be presented to District Court within 10 days of filing of decision in office of the ZBA
    - City can have a designated "office" or customary practice can indicate proper place.
    - Decision must be written
      - Approved minutes count and start the 10 day clock.
      - Another writing could also start the 10 day clock.



# And....

- Suit against City seeking declaratory judgment on effect of filing of appeal to ZBA and TRO to stop rezoning case
- In effort to stop pump station rezoning, Neighbor sought to stop the City from approving the rezoning ordinance on second reading -
  - Court determined that it did not have jurisdiction and would not issue a TRO to stop legislative action
  - City argued that the rezoning had no effect on appeal to ZBA

# Lessons Learned

- Coordinate between Legal and Planning
- Improve documentation, time frame for decisions is key
- Procedurally - who represents ZBA in an appeal?
- Make sure your ZBA has adopted rules
- More and more people just won't take NO as the answer

# One final thought...

- NIMBYs never go away!
- To date -
  - 30 open records requests about the event facility
  - Over 30 calls to police for enforcement
  - Special Use Permit went back to Council for amendment
  - And new commercial development expands on the same block.