

## **An Overview of Zoning in Texas**

### **The Texas Zoning Enabling Act**

## **Zoning and Land Use in Texas**

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## Introduction

The authority of a municipality to impose land use controls and regulations ultimately derives from its constitutional police power. This is the source of authority from which municipal zoning ordinances are justified for the protection and preservation of communities. Statutory authority is found in Chapter 211 of the Texas Local Government Code (referred to as the "Zoning Enabling Act"). The powers granted by Chapter 211 are for the purpose of promoting the public health, safety, morals, or general welfare and for the preservation of places and areas of historical, cultural, or architectural importance or significance.

Municipalities are empowered to regulate the height, number of stories and size of buildings, the percentage of a lot that may be occupied, the size of yards and open spaces, population density, and the location and use of buildings, structures and land for residential, commercial and industrial purposes.

Zoning ordinances fall within two broad categories: 1) zoning regulations and 2) zoning district boundaries. The former addresses the regulations (typically use, density, and structural requirements) applicable within specified zoning districts. The latter addresses the imposition of those regulations within specified districts, areas or lots. Zoning regulations must be uniform within each district.

Under Section 211.004 of the Local Government Code, zoning regulations must be adopted in accordance with a comprehensive plan (see, Chapter 213, TEX. LOCAL GOV'T CODE) and must be designed to lessen traffic congestion, secure safety

from fire, panic and other dangers, promote health and general welfare, provide adequate light and air, prevent overcrowding and avoid undue concentration of population, and facilitate the adequate provision of transportation, utilities, schools, parks and other public requirements. Zoning regulations must be uniform within each district and should be adopted with reasonable consideration for the character of the area, its suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land within the city.

A zoning ordinance must bear a substantial relationship to the public health, safety, morals or general welfare and must not be arbitrary or unreasonable. The Texas Supreme Court, in *Pharr v. Tippett*, 616 S.W.2d 173 (Tex. 1981), set forth four basic criteria that should be used in reviewing zoning ordinances: 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 amendatory ordinance and the public health, safety, morals or general welfare. *Pharr*, 616 S.W.2d at 176. It has been written that "[t]he 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 US 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), citing, *Berman v. Parker*, 348 US 26, 32-33 (1954).

Despite the discretion afforded to zoning authorities, the application of a zoning regulation to specific property must at least substantially advance legitimate state interests and must not deprive the owner of all economically viable uses of the land. *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Zoning ordinances carry a strong presumption of validity; the burden of establishing the invalidity of a zoning ordinance falls on the party contesting its validity and the burden is a high one. *Pharr v. Tippett*, 616 S.W.2d 173 (Tex. 1981). 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.

### **The Comprehensive Plan**

Zoning decisions are guided by the city's comprehensive plan. Comprehensive plans, created and adopted in accordance with Chapter 213 of the Local Government Code, are intended to establish long-range development goals for the city and should contain provisions relating to land use, transportation and public facilities. A comprehensive plan generally establishes the overall long-range development strategy of a city. It does not establish or contain zoning regulations nor does it establish zoning district boundaries. A comprehensive plan may be amended following public hearing and planning commission review.

### **The Comprehensive Zoning Ordinance**

Introduction. A city's complete set of zoning regulations is typically referred to as the city's "comprehensive zoning ordinance." The comprehensive zoning ordinance provides regulations within

specified categories of uses, 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 limited mixed-use districts referred to as planned developments. It is common for a comprehensive zoning ordinance to specify the particular uses to which land within each category may be put. Rather than being prohibitive in nature (i.e., "thou shalt not. . ."), a use by right within a specified zoning district is specifically enumerated (i.e., "within this district, land may *only* be used for the following purposes. . . .")

The regulations contained in a comprehensive zoning ordinance include an enumeration of uses by right permissible within zoning districts, minimum lot sizes, front, side and rear yard set-back requirements, minimum square footage of primary structures, height restrictions, accessory structure limitations, and floor area ratio (FAR) limitations. An enumeration of the requirements and available uses for special use permits are also established. Provisions that create and empower a planning commission and a board of adjustment are also contained within the comprehensive zoning ordinance. The process for property owners to apply for zoning changes should be described. Provisions for addressing nonconforming uses and structures should also be set forth.

Specific Use Permits. A comprehensive zoning ordinance will also authorize specific (or special) use permits ("SUP's"). It is a misnomer to refer to an SUP as a permit; it is in fact a zoning change which, when granted, is not a right held by the property owner but is instead a zoning regulation applicable to that tract or lot. A

specific use permit zoning change typically constitutes an overlay which exists over some pre-designated zoning district. In theory, the granting of an SUP will allow 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. For example, an in-home day care center operation authorized in a residential district only by SUP would enable the governing body to impose specific conditions on the operation of the business such as days and hours of operation, limitations on the number of children, and parking requirements. Since SUP's are in fact zoning changes, the requisite formalities associated with zoning changes must be followed.

Planned Developments. A planned development ("PD") is generally authorized as a specific zoning category. In theory, a planned development will enable a developer to construct a development that combines mixed uses within a single district and to allow retail or commercial uses within or among a residential area. Master planned communities, golf course communities, and mixed retail and apartment complex areas are good examples. PD's may also be used for developments seeking architectural uniqueness or consistency that vary in certain aspects from base zoning regulations (for example, masonry exterior requirements may prohibit the use of wood siding; a PD would enable a developer to design a development that has a rustic or western setting using wood siding).

The PD concept has also been used to bend the rules in a comprehensive zoning ordinance. As an example, 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 plat the subdivision with lots that are smaller than the minimums may request PD zoning for the subdivision. If the PD enabling ordinance does not set forth structure and lot size minimums, an application for PD zoning may be used to obtain approval from the city to build what would otherwise be a nonconforming and illegal development. For obvious reasons, this may constitute an abuse of the zoning process. But in some circumstances it can be justified if there is some substantial relationship between the PD zoning and a legitimate state interest.

A comprehensive zoning ordinance should contain provisions that establish broad standards for planned development zoning. These regulations should typically require that an application for planned development zoning be accompanied with a concept or development plan detailing certain aspects of the proposed development. Upon approval of the application, a set of development regulations are adopted which essentially constitute a comprehensive set of zoning regulations applicable within the PD district. Following the granting of the application and the zoning change to PD, the developer then submits plat applications prior to actual construction.

### Procedures for Adoption/Amendment of Zoning Ordinances

The Planning and Zoning Commission. Planning and zoning commissions participate in the development of comprehensive plans, recommend zoning changes to the governing body, and review plat applications. A home rule city must have a zoning commission. A general law city may but need not create one. A planning

and zoning commission typically possesses the authority to *recommend* that a rezoning application be approved or denied and to *recommend* adoption or amendment of zoning regulations. The governing body 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 governing body, the provisions of the Texas Open Meetings Act apply. (See, Chapter 551, TEX.GOV'T CODE).

Notices and Public Hearings. The basic process for the adoption of a zoning ordinance involves mailing of notices of a public hearing before the planning commission and the publication of a notice of a public hearing before the council. Notice of the public hearing before the commission must be sent to the property owners of the property that is subject to the zoning change and to all owners of real property within 200 feet of the property subject to the zoning change. The identity and address of the owners should be obtained from the city's tax rolls. The 200-foot radius includes streets and public rights-of-way. This notice must be sent at least eleven (11) days before the public hearing (Section 211.007(c) requires the notice to be sent "before the 10<sup>th</sup> day before the hearing date," thus, at least 11 days). Mailing by regular first class mail is sufficient, certified or registered mailing will comply but is not required. Notice is deemed complete when deposited in the mail.

Following the public hearing by the commission, the commission must make a report to the council as to whether a zoning change application or regulation should be approved or denied. The council may not hold a hearing until the commission's recommendation is made. A public hearing must then be held by the council. Notice of

the council's public hearing must be published in the city's official newspaper or in a newspaper of general circulation in the area at least 16 days before the hearing (Section 211.006(a) states that the notice must be published "before the 15<sup>th</sup> day before the date of the hearing," thus, at least 16 days).

Since the Open Meetings Act applies to both the commission and the council, the public hearings must be posted on the agenda at least 72 hours before the date of the hearing. Typically, an agenda should identify the public hearing as a specific item preceding a consideration and action item on the zoning matter. Since public hearings involve administrative expense and overhead, commissions and councils should avoid tabling a public hearing. If the hearing is not officially closed, then notice of the rescheduled hearing must then either be sent or published, as appropriate. If the process was properly followed and if additional time for consideration is needed, it is advisable to open the public hearing, receive testimony, and formally close the hearing. The action item on the agenda may then be tabled to a later meeting without incurring the burden of mailing or publishing additional notices.

Protests. Section 211.006(d) of the Local Government Code provides a means by which property owners may protest a zoning change. If a written protest is signed by at least 20% of the owners of either 1) the property covered by the proposed change, or 2) the land within 200 feet of the subject property, then a supermajority requirement for approval will apply. If a proper protest is submitted, then the zoning change must be approved by at least a ¾'s majority vote of all members of the council. (Note that the requirement is ¾'s of "all members," not ¾'s of those present at the meeting). The statutes provide no deadline on 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. Presumably, in the absence of an ordinance specifying such a deadline, the public hearing may still be opened and closed and the council may then table the consideration and action item to a later date to enable verification of the signatures. This would avoid the administrative burden of republishing notice of the hearing as well as avoiding the possibility that approval of the zoning change by less than a supermajority would be later invalidated.

Joint Hearings A commission and council may also hold a joint public hearing on a zoning change application. Generally, mailing and publication of notices of the hearing are still required and the commission must act and vote on the application before the council may act. However, a home rule city may by ordinance adopted by a 2/3's majority vote, prescribe the type of notices to be given of the time and place of the joint public hearing.

### Specific Zoning Issues

The number, shape and size of zoning districts may be set by municipalities based on that which the governing body considers best for carrying out the underlying purposes of zoning. But zoning changes are often problematic. 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 itself, on its own initiative. A zoning change does not require the consent of the property owner.

The "Takings" Question. The imposition of a zoning regulation to a

specific tract of property may constitute a takings, giving rise to a cause of action against the city for inverse condemnation. Zoning decisions always involve a balance between the competing rights of a property owner to use his/her property in the manner in which he/she sees fit and the interests of the city in protecting the community, preserving land values, and promoting healthy, safe and beneficial development. A governmental regulation may be so restrictive as to constitute an unconstitutional taking of private property for public use without just compensation. (Note that the Texas Constitution provides greater protections to property owners than does the United States Constitution. See, e.g., *City of Glenn Heights v. Sheffield Development Company, Inc.*, 61 S.W.3d 634 (Tex.App.-Waco 2001), in holding that the Texas Constitution allows a cause of action for property that is "damaged" even if not "taken."). Takings may be either regulatory or physical; physical takings occur when the governmental authority authorizes an unwarranted physical occupation of property. *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

A regulatory taking, on the other hand, will occur when the application of a zoning regulation to specific property 1) does not substantially advance legitimate state interests or 2) deprives the owner of all economically viable uses of the land or unreasonably interferes with the owner's use and enjoyment of the property. The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the state interest it is intended to promote. A court should not examine the wisdom of the city's zoning decision but should, instead, be concerned only with whether the decision satisfies constitutional standards. A broad range of governmental

purposes will suffice to establish a “legitimate governmental interest” including protecting residents from the “ill effects of urbanization,” protecting an area for recreation, tourism, and public health, the preservation of open space or agricultural land, and controlling the rate and character of community growth. *Mayhew v. City of Sunnyvale*, 964 S.W.2d 922 (Tex.1998).

The deprivation of all economically viable uses of land (separate and independent from an unreasonable interference with a landowner’s right to the use and enjoyment of his/her property) is actionable when the restriction “denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless.” *Mayhew*, 964 S.W.2d at 935. This determination is a relatively simple analysis of whether any property value remains after the imposition of the regulation.

In contrast, the determination of whether there has been an unreasonable interference with the right to use and enjoyment requires consideration of 1) the economic impact of the regulation and 2) the extent to which the regulation interferes with investment-backed expectations. *Mayhew*, 964 S.W.2d at 936.

Spot Zoning. Spot zoning generally refers to a singling out of a specific tract of land for a zoning use classification that is different and inconsistent with that of the surrounding area for the benefit of the owner of the property and to the detriment of the rights of other property owners. “Spot zoning” was described in *Pharr v. Tippett* as connoting “an unacceptable amendatory [zoning] ordinance that singles out a small tract for treatment that differs from that accorded similar surrounding land without

proof of changes in conditions. . . . Spot zoning is regarded as preferential treatment which defeats a pre-established comprehensive plan. . . . It is piecemeal zoning, the antithesis of planned zoning.” (citations omitted). 616 S.W.2d 173 at 177.

Nonconforming Uses and Vested Rights. A nonconforming (or “grandfathered”) use or structure is one which predated the imposition of a zoning regulation. A use or structure which existed before the adoption of a comprehensive zoning ordinance is lawful and nonconforming. A use or structure which is lawful under current zoning should generally be allowed to continue if the zoning is later changed rendering the use or structure in violation of the new regulations. An illegal use or structure (one which was contrary to the zoning regulations at the time of its commencement) is never grandfathered.

A lawful nonconforming use will not terminate upon a change of ownership. The conveyance of ownership of the property on which a nonconforming use or structure exists will not defeat the lawful nonconforming status. The triggering events which terminate nonconforming status are: 1) an abandonment of the nonconforming use combined with some overt act evidencing an intent to abandon, 2) a cessation of the nonconforming use for the duration specified in the comprehensive zoning ordinance, 3) the destruction of the nonconforming structure to the extent specified in the comprehensive zoning ordinance, or 4) an order of the municipality to cease the nonconforming use combined with either payment of just compensation for the taking or an amortization of the owner’s investment over a period of time sufficient to enable the owner to recoup his/her investment in the property.

Most cities' ordinances contain provisions that deal with the abandonment or destruction of nonconforming uses and structures. Ordinances typically indicate that an abandonment of between 6 months to two years or more creates a presumption of abandonment and an intent to abandon. The destruction of a nonconforming structure of at least 50% to 75% of its value is also typical in zoning ordinances to trigger the termination of grandfathered status.

The concept of vested rights, on the other hand, generally deals with the preservation of the rights of owners and developers in the regulations and ordinances that existed at the time of the first development permit application. The concept of vested rights in Texas is codified in Chapter 245 of the Texas Local Government Code. Chapter 245 essentially prevents a city from changing its development regulations and enforcing new regulations against an ongoing development. Once the first development permit relating to a project is filed, the city's development regulations are locked in and any subsequent changes in those regulations will not apply to that particular project. The developer will be entitled to pursue development of the project under the regulations that existed at the time the first permit application was submitted.

Chapter 245 broadly defines "project" as any endeavor over which a regulatory agency (e.g., a city) exerts jurisdiction and for which one or more permits are required. The issue becomes critical in the plat review process. When a preliminary plan application or application for site plan approval is submitted in connection with a development that is disfavored by the community, the council may change the city's zoning regulations to

either prevent this type of development or to modify the parameters of the development, but those changes will not affect that specific project. Historically, the problem was dealt with by a city through the imposition of a moratorium applicable to all development within that specific zoning district.

Moratoriums. Moratoriums were once regarded as an effective tool in a city's arsenal to prevent or restrain unfavorable development from occurring. A moratorium on the issuance of building permits is also an effective means of slowing the pace of development to enable a city to develop proper utility, roadway and administrative infrastructure to adequately serve an expanding population. An effective moratorium should be temporary in nature. The longer in duration, the more the restriction becomes a taking.

In response to developer's concerns, the 77<sup>th</sup> legislative session produced amendments to Chapter 212 of the Local Government Code to limit the availability of moratoriums on residential development. Ostensibly, the purpose of imposing such restrictions was to eliminate the uncertainty and potential hardship for property developers. Under the new law, a moratorium on residential property development (both single- and multi-family) can only be adopted after compliance with the notice, public hearing and written finding requirements of subchapter E of Chapter 212 of the Local Government Code (§212.131, *et seq.*). A moratorium on residential property development must now be adopted by ordinance and at least two public hearings separated in time by at least 4 days must be conducted following publication of notice of the time and place of the public hearings. The moratorium can only be adopted if justified by written

findings of a need to prevent a shortage of essential public facilities (“essential public facilities” being defined as water, sewer, storm drainage or street improvements). A moratorium may not last more than 120 days unless additional notice, hearings and written findings requirements are fulfilled. Section 212.138 of the Code also specifically provides that a moratorium does not affect a developer’s vested rights.

It should be noted that these new limitations on moratoriums now extend commercial development.

### **The Platting Process**

A “subdivision” is defined in Chapter 212 of the Local Government Code as the division of a tract of land into two or more lots to lay out a subdivision of the tract, to lay out suburban, building or other lots, or to lay out streets, alleys, parks and other areas to be dedicated to the public. Unless an ordinance dictates otherwise, the division of a part of any one lot into two or more parts, whether by a metes and bounds description or by a deed conveying ownership of a part of one singular lot, constitutes a subdivision for which a plat may be required. Generally, a plat is simply a blue-line diagram typically prepared by an engineer that lays out lot lines. A city’s subdivision regulations should dictate the formalities which must be met before a plat can be approved.

The typical process associated with plat approval involves the submission of a preliminary plan application which is reviewed by the planning commission before submission to the council. The approval of a preliminary plan entitles a developer to submit an application for approval of a final plat. The planning commission and the council must act on the

plat within 30 days of submission. This deadline is critical; Section 212.009 of the local Government Code provides that a plat is deemed approved as a matter of law if it is not denied within 30 days. Section 212.010(a) of the Code states that a city “shall” approve a plat if it meets the standards set forth in Section 212.010.

If a city fails to deny a plat application within the statutory time frame, the plat is automatically approved. The review of a plat application is ministerial, not discretionary, in nature. For these reasons, the platting process is perhaps the most difficult land use area to navigate simply because the members of the governing body may subject themselves to personal liability. Legislative immunity and qualified immunity protect council members from adverse zoning decisions but this immunity does not necessarily extend to the platting process.

Council members, as legislators engaged in legitimate legislative activities are immunized from the consequences of litigation and the burden of defending themselves. But not all actions taken by officials with legislative duties are protected by the doctrine of legislative immunity. Legislative immunity protects only those duties that are “functionally legislative.” Although there is no absolute standard by which to distinguish between legislative and nonlegislative acts, courts have consistently recognized a distinction between the legislative act of establishing a policy, act, or law and the nonlegislative act of enforcing or administering that policy, act, or law. The doctrine of qualified immunity, as distinct from legislative immunity, shields a public official performing discretionary functions from liability for civil damages under section 1983 so long as the official’s conduct does not violate clearly established

constitutional or statutory rights of which a reasonable person would have been aware. *Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229 (Tex.App.--Dallas 1995, n.w.h.).

The participation by a member of a city council in the plat approval process is not functionally legislative in nature and, therefore, there is no absolute legislative immunity. This is because the decisionmaking involved in the plat approval process is specific and relates to a particular individual or situation; it does not involve the establishment of general policy. In the absence of

The plat review and approval process is nondiscretionary. The review of an application for plat approval is based on a checklist; the process involves a comparison between the plat application and the city's ordinances. If the application meets the ordinance requirements, its approval is ministerial. The denial of the application is actionable and the doctrines of legislative and official immunity do not apply.

### **The Board of Adjustment**

The Board of Adjustment (or Zoning Board of Adjustment) is a citizen-comprised board having quasi-judicial authority over certain zoning-related matters. The BOA oversees the permitting process by hearing appeals from decisions of administrative officials and authorizes variances when strict application of setback, sideyard, area, and height limits would cause individual property owners unnecessary hardship. The board also has the authority to grant special exceptions when authorized to do so by specific ordinances. Specifically, Section 211.009(a) of the Local Government Code provides as follows:

“(a) The board of adjustment 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;

(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.”

Administrative Decisions. The board reviews administrative decisions of staff as to correctness of interpretation. The board may hear and decide appeals of such decisions when an error is alleged in an order, requirement, decision, or determination by an administrative official in the enforcement of a zoning ordinance.

Without the board, persons complaining about the granting or denial of permits would have no vehicle for appeal except to the city council or to a court of proper jurisdiction. The council would be tempted to grant relief by ordinance and thereby amend the basic zoning in an ad hoc manner. On appeal, the only question for the board is whether the administrative official correctly applied the ordinance and its regulations.

Appeals to the board may be made by any person aggrieved or by any officer, department, board, or bureau of the city affected by any decision of the administrative officer. Nearby landowners are "persons aggrieved." Cities are proper parties to take appeals, even though their own official granted a contested permit.

An appeal of an administrative official's determination is accomplished by filing a notice with the administrative officer from whose decision appeal is taken and with the board of adjustment. 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. 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 appeal is not taken to the board of adjustment, 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 partly, or may modify the order, requirement, decision, or determination appealed from and make it as it ought to be made. The board has all of the powers of the officer from whom the appeal is taken to accomplish that proper end.

Special Exceptions. A comprehensive zoning ordinance may authorize a board of adjustment to hear and decide special exceptions to certain ordinances. A special exception may be similar in nature to a variance but is different in application and concept. 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. *West Texas Water Refiners, Inc. v. S&B Beverage Co., Inc.*, 915 S.W.2d 623 (Tex.App.--8<sup>th</sup> Dist. 1996).

There must be a specific ordinance which empowers the board to adjudicate special exceptions and the ordinance should set forth some standard of review. 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.

Variances. A "variance" is defined as permission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding a person's property. It is a waiver of the strict requirements of the zoning ordinance. An administrative official of a city cannot approve a variance. The theory of granting variances is to relax the strict requirements in situations where, because of unusual circumstances, strict application of zoning regulations will produce unnecessary hardship. Variances relate to technical zoning matters such as area, setback, and height regulations. Variances are restricted to relaxation of these technical regulations.

Current law holds that no matter how much hardship a use regulation creates, the board of adjustment has no power to relax it. Only the City Council can change or relax

the uses that are allowed in the various districts. The simple example is a situation where a property owner seeks a variance to use residential-zoned property for some retail or commercial purpose. Regardless of the hardship the owner's circumstances may impose, the board of adjustment has no authority to vary, waive or otherwise modify the permissible uses within the residential district. An illegal use variance is void. Accordingly, a contestant can attack it collaterally and need not appeal by certiorari.

Variations are permissible only if strict application of the zoning ordinance would cause unnecessary hardship. When considering applications for variations, 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. "Special conditions" means that the property is not environmentally suited to be adapted to a conforming use.

The "special conditions" language of Section 211.009(a)(3) of the Code refers to conditions that are unique to the property, not the property owner. 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.

In *Currey v. Kimple*, 577 S.W.2d 508 (Tex.Civ.App.--Dallas 1978, writ ref'd, n.r.e.), the unnecessary hardship 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.

Amortization of Nonconforming Uses. A board of adjustment is also authorized to order the termination of a nonconforming use. A property owner has a vested right to use his/her property in any lawful manner subject to preexisting zoning regulations. A nonconforming use, although lawful, may be injurious to surrounding property and detrimental to the safety or welfare of the public. A city, through its board of adjustment, may lawfully cause a termination of the use and induce compliance with zoning regulations. However, this infringes on the owner's rights and should, therefore, be reviewed carefully and judiciously. Most decisions relating to a board's termination of nonconforming uses involve converting a commercial use to residential. Since a city cannot deprive a property owner of vested rights without just compensation, any termination must consider the value of the owner's investment. Since a board of adjustment does not typically have a budget or access to funds with which to pay private owners, a termination must make provisions for the owner's recoupment of his/her investment. This is done by amortizing the investment over time.

An amortization of investment should ultimately be based on a comparison between the investment and the income stream generated by the use. Provisions in zoning ordinances for amortization of nonconforming uses are valid if they are reasonable and fair in operation; a determination of reasonableness of such provisions should involve consideration of such factors as the character of neighborhood in general, the amount an owner has invested in the property, the amount of his recoupment during the grace period, the protection afforded to the public, the zoning classification and use of nearby property, the availability and location of other sites, the extent to which property values are adversely affected by nonconforming use, and the amount of loss which would be suffered by owner upon termination of use. *Benners v. City of University Park*, 477 S.W.2d 326 (Tex.Civ.App.--Waco 1972), *reversed on other grounds* 485 S.W.2d 773, *appeal dismissed*, 93 S.Ct. 1530, 411 U.S. 901, 36 L.Ed.2d 191, *rehearing denied* 93 S.Ct. 2142, 411 U.S. 977, 36 L.Ed.2d 700.

Board Membership and Voting Procedures. A board of adjustment consists of five members, each appointed for a term of two years. 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 (75% 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.

The voting requirements are mandatory and jurisdictional. A variance

authorized by a vote of only three members of the board is invalid and subject to collateral attack after expiration of the time for regular appeal.

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. At least four members must hear each case. 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 can appear in person or by agent or attorney.

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 10 days of the board's decision. Since the decisions of a board are final, the petition and burden of proof in district court is whether the board's decision was illegal.

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APPENDIX "A"

Chapter 211 of the Local Government Code

**TITLE 7. REGULATION OF LAND USE,  
STRUCTURES, BUSINESSES, AND RELATED  
ACTIVITIES**

**SUBTITLE A. MUNICIPAL REGULATORY  
AUTHORITY**

**CHAPTER 211. MUNICIPAL ZONING  
AUTHORITY**

**SUBCHAPTER A. GENERAL ZONING  
REGULATIONS**

**§ 211.001. Purpose**

The powers granted under this subchapter are for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

**§ 211.002. Adoption of Regulation or  
Boundary Includes Amendment or Other  
Change**

A reference in this subchapter to the adoption of a zoning regulation or a zoning district boundary includes the amendment, repeal, or other change of a regulation or boundary.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

**§ 211.003. Zoning Regulations Generally**

(a) The governing body of a municipality may regulate:

(1) the height, number of stories, and size of buildings and other structures;

(2) the percentage of a lot that may be occupied;

(3) the size of yards, courts, and other open spaces;

(4) population density; and

(5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes.

(b) In the case of designated places and areas of historical, cultural, or architectural importance and significance, the governing body of a municipality may regulate the construction, reconstruction, alteration, or razing of buildings and other structures.

(c) The governing body of a home-rule municipality may also regulate the bulk of buildings.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

**§ 211.0035. Zoning Regulations and District  
Boundaries Applicable to Pawnshops**

(a) In this section, "pawnshop" has the meaning assigned by Section 371.003, Finance Code.

(b) For the purposes of zoning regulation and determination of zoning district boundaries, the governing body of a municipality shall designate pawnshops that have been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code, as a permitted use in one or more zoning classifications.

(c) The governing body of a municipality may not impose a specific use permit requirement or any requirement similar in effect to a specific use permit requirement on a pawnshop that has been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code.

Added by Acts 1991, 72nd Leg., ch. 687, § 18, eff. Sept. 1, 1991.

Amended by Acts 1999, 76th Leg., ch. 62, § 7.81, eff. Sept. 1, 1999.

**§ 211.004. Compliance With Comprehensive Plan**

(a) Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:

- (1) lessen congestion in the streets;
- (2) secure safety from fire, panic, and other dangers;
- (3) promote health and the general welfare;
- (4) provide adequate light and air;
- (5) prevent the overcrowding of land;
- (6) avoid undue concentration of population;  
or
- (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

(b) Repealed by Acts 1997, 75th Leg., ch. 459, § 2, eff. Sept. 1, 1997

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 458, § 1, eff. Aug. 28, 1989; Acts 1997, 75th Leg., ch. 459, § 2, eff. Sept. 1, 1997.

**§ 211.005. Districts**

(a) The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land.

(b) Zoning regulations must be uniform for each class or kind of building in a district, but the regulations may vary from district to district. The regulations shall be adopted with reasonable consideration, among other things, for the character of each district and its peculiar suitability for particular uses, with a view of conserving the value of buildings and

encouraging the most appropriate use of land in the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

**§ 211.006. Procedures Governing Adoption of Zoning Regulations and District Boundaries**

(a) The governing body of a municipality wishing to exercise the authority relating to zoning regulations and zoning district boundaries shall establish procedures for adopting and enforcing the regulations and boundaries. A regulation or boundary is not effective until after a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard. Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality.

(b) In addition to the notice required by Subsection (a), a general-law municipality that does not have a zoning commission shall give notice of a proposed change in a zoning classification to each property owner who would be entitled to notice under Section 211.007(c) if the municipality had a zoning commission. That notice must be given in the same manner as required for notice to property owners under Section 211.007(c). The governing body may not adopt the proposed change until after the 30th day after the date the notice required by this subsection is given.

(c) If the governing body of a home-rule municipality conducts a hearing under Subsection (a), the governing body may, by a two-thirds vote, prescribe the type of notice to be given of the time and place of the public hearing. Notice requirements prescribed under this subsection are in addition to the publication of notice required by Subsection (a).

(d) If a proposed change to a regulation or boundary is protested in accordance with this subsection, the proposed change must receive, in order to take effect, the affirmative vote of at least three-fourths of all members of the governing body. The protest must be written and signed by the owners of at least 20 percent of either:

(1) the area of the lots or land covered by the proposed change; or

(2) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.

(e) In computing the percentage of land area under Subsection (d), the area of streets and alleys shall be included.

(f) The governing body by ordinance may provide that the affirmative vote of at least three-fourths of all its members is required to overrule a recommendation of the municipality's zoning commission that a proposed change to a regulation or boundary be denied.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### **§ 211.007. Zoning Commission**

(a) To exercise the powers authorized by this subchapter, the governing body of a home-rule municipality shall, and the governing body of a general-law municipality may, appoint a zoning commission. The commission shall recommend boundaries for the original zoning districts and appropriate zoning regulations for each district. If the municipality has a municipal planning commission at the time of implementation of this subchapter, the governing body may appoint that commission to serve as the zoning commission.

(b) The zoning commission shall make a preliminary report and hold public hearings on that report before submitting a final report to the governing body. The governing body may not hold a public hearing until it receives the final report of the zoning commission unless the governing body by ordinance provides that a public hearing is to be held, after the notice required by Section 211.006(a), jointly with a public hearing required to be held by the zoning commission. In either case, the governing body may not take action on the matter until it receives the final report of the zoning commission.

(c) Before the 10th day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in

a zoning classification shall be sent to each owner, as indicated by the most recently approved municipal tax roll, of real property within 200 feet of the property on which the change in classification is proposed. The notice may be served by its deposit in the municipality, properly addressed with postage paid, in the United States mail. If the property within 200 feet of the property on which the change is proposed is located in territory annexed to the municipality and is not included on the most recently approved municipal tax roll, the notice shall be given in the manner provided by Section 211.006(a).

(d) The governing body of a home-rule municipality may, by a two-thirds vote, prescribe the type of notice to be given of the time and place of a public hearing held jointly by the governing body and the zoning commission. If notice requirements are prescribed under this subsection, the notice requirements prescribed by Subsections (b) and (c) and by Section 211.006(a) do not apply.

(e) If a general-law municipality exercises zoning authority without the appointment of a zoning commission, any reference in a law to a municipal zoning commission or planning commission means the governing body of the municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### **§ 211.0075. Compliance With Open Meetings Law**

A board or commission established by an ordinance or resolution adopted by the governing body of a municipality to assist the governing body in developing an initial comprehensive zoning plan or initial zoning regulations for the municipality, or a committee of the board or commission that includes one or more members of the board or commission, is subject to Chapter 551, Government Code, regardless of whether the board, commission, or committee has rulemaking or quasi-judicial powers or functions only in an advisory capacity.

Added by Acts 1993, 73rd Leg., ch. 381, § 1, eff. Aug. 30, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.95(82), eff. Sept. 1, 1995.

### § 211.008. Board of Adjustment

(a) The governing body of a municipality may provide for the appointment of a board of adjustment. In the regulations adopted under this subchapter, the governing body may authorize the board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance.

(b) A board of adjustment must consist of at least five members to be appointed for terms of two years. The governing body must provide the procedure for appointment. The governing body may authorize each member of the governing body, including the mayor, to appoint one member to the board. The appointing authority may remove a board member for cause, as found by the appointing authority, on a written charge after a public hearing. A vacancy on the board shall be filled for the unexpired term.

(c) The governing body, by charter or ordinance, may provide for the appointment of alternate board members to serve in the absence of one or more regular members when requested to do so by the mayor or city manager. An alternate member serves for the same period as a regular member and is subject to removal in the same manner as a regular member. A vacancy among the alternate members is filled in the same manner as a vacancy among the regular members.

(d) Each case before the board of adjustment must be heard by at least 75 percent of the members.

(e) The board by majority vote shall adopt rules in accordance with any ordinance adopted under this subchapter. Meetings of the board are held at the call of the presiding officer and at other times as determined by the board. The presiding officer or acting presiding officer may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public.

(f) The board shall keep minutes of its proceedings that indicate the vote of each member on each question or the fact that a

member is absent or fails to vote. The board shall keep records of its examinations and other official actions. The minutes and records shall be filed immediately in the board's office and are public records.

(g) The governing body of a Type A general-law municipality by ordinance may grant the members of the governing body the authority to act as a board of adjustment under this chapter.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 126, § 1, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 724, § 1, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 363, § 1, eff. Sept. 1, 1997.

### § 211.009. Authority of Board

(a) The board of adjustment 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;

(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.

(b) In exercising its authority under Subsection (a)(1), the board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the board has the same authority as the administrative official.

(c) The concurring vote of 75 percent of the members of the board is necessary to:

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 126, § 2, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 724, § 2, eff. Aug. 28, 1995.

### **§ 211.010. Appeal to Board**

(a) Except as provided by Subsection (e), any of the following persons 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.

(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. On receiving the notice, the official from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record of the action that is appealed.

(c) An appeal stays all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies in writing to the board facts supporting the official's opinion that a stay would cause imminent peril to life or property. In that case, the proceedings may be stayed only by a restraining order granted by the board or a court of record on application, after notice to the official, if due cause is shown.

(d) The board shall set a reasonable time for the appeal hearing and shall give public notice

of the hearing and due notice to the parties in interest. A party may appear at the appeal hearing in person or by agent or attorney. The board shall decide the appeal within a reasonable time.

(e) A member of the governing body of the municipality who serves on the board of adjustment under Section 211.008(g) may not bring an appeal under this section.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, § 2, eff. Sept. 1, 1997.

### **§ 211.011. Judicial Review of Board Decision**

(a) Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

(1) a person aggrieved by a decision of the board;

(2) a taxpayer; or

(3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted

but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

(g) The court may not apply a different standard of review to a decision of a board of adjustment that is composed of members of the governing body of the municipality under Section 211.008(g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, § 3, eff. Sept. 1, 1997.

Amended by Acts 1999, 76th Leg., ch. 646, § 1, eff. Aug. 30, 1999.

#### **§ 211.012. Enforcement; Penalty; Remedies**

(a) The governing body of a municipality may adopt ordinances to enforce this subchapter or any ordinance or regulation adopted under this subchapter.

(b) A person commits an offense if the person violates this subchapter or an ordinance or regulation adopted under this subchapter. An offense under this subsection is a misdemeanor, punishable by fine, imprisonment, or both, as provided by the governing body. The governing body may also provide civil penalties for a violation.

(c) If a building or other structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or if a building, other structure, or land is used in violation of this subchapter or an ordinance or regulation adopted under this subchapter, the appropriate municipal authority, in addition to other remedies, may institute appropriate action to:

(1) prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use;

(2) restrain, correct, or abate the violation;

(3) prevent the occupancy of the building, structure, or land; or

(4) prevent any illegal act, conduct, business, or use on or about the premises.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

#### **§ 211.013. Conflict With Other Laws; Exceptions**

(a) If a zoning regulation adopted under this subchapter requires a greater width or size of a yard, court, or other open space, requires a lower building height or fewer number of stories for a building, requires a greater percentage of lot to be left unoccupied, or otherwise imposes higher standards than those required under another statute or local ordinance or regulation, the regulation adopted under this subchapter controls. If the other statute or local ordinance or regulation imposes higher standards, that statute, ordinance, or regulation controls.

(b) This subchapter does not authorize the governing body of a municipality to require the removal or destruction of property that exists at the time the governing body implements this subchapter and that is actually and necessarily used in a public service business.

(c) This subchapter does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency.

(d) This subchapter applies to a privately owned building or other structure and privately owned land when leased to a state agency.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

Amended by Acts 1999, 76th Leg., ch. 476, § 1, eff. June 18, 1999.

#### **§ 211.014. Panel of Board of Adjustment**

(a) This section applies only to a municipality with a population of 1,000,000 or more.

(b) A board of adjustment shall consist of one or more panels of five members each to be appointed for terms of two years. If more than one panel of the board is appointed, the board consists of the regular members of all of the panels. The board may adopt rules for the assignment of appeals to a panel.

(c) If the board consists of more than one panel, only one panel may hear, handle, or render a decision in a particular case. A decision of a panel of the board on a case constitutes the decision of the board.

(d) Meetings of a panel of the board are held at the call of the presiding officer of the panel and at other times as determined by the panel or the board.

(e) A panel of a board of adjustment has the powers and duties that a board of adjustment has under Sections 211.008, 211.009, 211.010, and 211.011.

Added by Acts 1993, 73rd Leg., ch. 126, § 3, eff. Sept. 1, 1993.

#### **§ 211.015. Zoning Referendum in Home-Rule Municipality**

(a) Notwithstanding other requirements of this subchapter, the voters of a home-rule municipality may repeal the municipality's zoning regulations adopted under this subchapter by either:

(1) a charter election conducted under law; or

(2) on the initial adoption of zoning regulations by a municipality, the use of any referendum process that is authorized under the charter of the municipality for public protest of the adoption of an ordinance.

(b) Notwithstanding any procedural or other requirements of this chapter to the contrary, the governing body of a home-rule municipality may on its own motion submit the repeal of the municipality's zoning regulations, as adopted under this chapter, in their entirety to the electors by use of any process that is authorized under the charter of the municipality for a popular vote on the rejection or repeal of ordinances in general.

(c) The provision of this chapter shall not be construed to prohibit the adoption or application of any charter provision of a home-rule municipality that requires a waiting period prior to the adoption of zoning regulations or the submission of the initial adoption of zoning regulations to a binding referendum election, or both, provided that all procedural requirements of this chapter for the adoption of the zoning regulation are otherwise complied with.

(d) Notwithstanding any charter provision to the contrary, a governing body of a municipality may adopt a zoning ordinance and condition its taking effect upon the ordinance receiving the approval of the electors at an election held for that purpose.

(e) The provisions of this section may only be utilized for the repeal of a municipality's zoning regulations in their entirety or for determinations of whether a municipality should initially adopt zoning regulations, except the governing body of a municipality may amend, modify, or repeal a zoning ordinance adopted, approved, or ratified at an election conducted pursuant to this section.

(f) The provisions of this section shall not authorize the repeal of an ordinance approving land-use regulations adopted under the provisions of this chapter by a board of directors of a reinvestment zone under the authority of Section 311.010(c), Tax Code.

Added by Acts 1993, 73rd Leg., ch. 126, § 4, eff. Sept. 1, 1993.

**SUBCHAPTER B. ADDITIONAL ZONING REGULATIONS IN MUNICIPALITY WITH POPULATION OF MORE THAN 290,000**

**§ 211.021. Additional Zoning Regulations**

(a) The governing body of a municipality with a population of more than 290,000 that has adopted a comprehensive zoning ordinance under Subchapter A may, by ordinance, divide the municipality into neighborhood zoning areas after a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard. Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality.

(b) The mayor of the municipality, with the approval of the governing body, may appoint a neighborhood advisory zoning council for each of the neighborhood zoning areas. Each zoning council must be composed of five citizens who reside in the neighborhood zoning area. A zoning council member is appointed for a term of two years.

(c) Each neighborhood advisory zoning council shall provide the zoning commission with information, advice, and recommendations relating to each application filed with the zoning commission for zoning regulation changes that affect property within that neighborhood zoning area.

(d) On the filing of a zoning change application with the zoning commission, the zoning commission shall provide the appropriate neighborhood advisory zoning council with a copy of the application. The zoning council shall conduct a public hearing on the application and must publish notice of the time and place of the hearing in an official newspaper or a newspaper of general circulation in the municipality before the 10th day before the date of the hearing.

(e) At or before the zoning commission's hearing on the zoning change application, the neighborhood advisory zoning council shall submit to the zoning commission any information, advice, and recommendations relating to that application that the zoning council considers proper. The zoning commission may not overrule a recommendation

of the zoning council with respect to the disposition of the application unless at least three-fourths of the members of the zoning commission who are present at the meeting vote to overrule the recommendation.

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.