

Local Government Development Regulations

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Local Government Development Regulations

- Land Use and Land Design. Both apply to land development but are very different legally.
- Land use is regulated by zoning. Zoning is a statutory grant of authority in Chapter 211 of the Local Government Code. It has deceptive traps.
- Land design is regulated by subdivision regulations and design standards in Chapter 212 of the Local Government Code.
- We'll cover zoning first, and then subdivision regulations.

Development Regulation: Zoning

What is Zoning?

- Zoning is an exercise of the city's police power that allows it to regulate the rights of property owners for the good of the citizenry.
- Zoning is a regulatory structure in which a city regulates the use (or uses) to which land or structures may be placed within different zoning districts in the city. Through zoning, a city divides itself up into individual districts, establishes a list of permitted uses, and sets forth the performance standards for each district.

Development Regulation: Zoning

- Performance standards include regulating how the property can be used (e.g. screening requirements for trash, front yard and side yard requirements, parking spots required, noise in industrial areas).
- Zoning usually occurs only within in the city limits, not the ETJ (extra-territorial jurisdiction). There are limited exceptions, which are not applicable to our city.
- The city's zoning structure consists of two parts.
- First, a zoning ordinance tells you what the uses are and the performance standards that apply.
- Second, is the zoning map. The map takes those districts that are identified in the ordinance and applies them to the land, typically in a color-coded graphic depiction.

Development Regulation: Zoning Decisions

When making zoning decisions, what are we doing?

- The city is determining the highest and best use of the land from a community standpoint and consistency with other planning documents (e.g. the Comprehensive Plan).

Development Regulation: Zoning Decisions

What are you entitled to consider when making a zoning decision?

- A city zones to protect the public health, safety, and welfare. The factors that may be considered in making a zoning decision are fairly broad:
 1. Separate buildings to allow the flow of light and air
 2. Separate structures and uses to avoid the dangers of fire and explosion
 3. Separate incompatible land uses that cannot be co-located together
 4. To balance densities to avoid overloading streets, schools, public utilities, or other public facilities
 5. To establish neighborhood boundaries
 6. To preserve neighborhood character
 7. To provide incentives to provide economic developments
 8. To preserve and establish transportation routes
 9. To preserve historicistically significant structures
 10. To preserve architecturally or environmentally sensitive areas
 11. In certain rare situations, for aesthetics purposes

Development Regulation: Zoning Decisions

- There is no mathematical formula a city is required to follow in evaluating the factors you may consider.
- They are by their very nature different in every community.
- A zoning decision is a subjective, discretionary, legislative act.
- The city council has enormous discretion in making zoning determinations.

Development Regulation: Comprehensive Plan (Comp Plan)

- Comprehensive Plans are long-range planning documents.
- Cities are required to zone in accordance with a comprehensive plan. The city is required by law to adopt a comprehensive plan.
- Unlike a zoning ordinance, a comprehensive plan is a general idea of how the city should develop over time.
- Comprehensive plans are more centered on goals and objectives, and less on performance standards.
- Comprehensive plans are more general in its location and doesn't work specifically on specific property boundaries typically.
- The comprehensive plan is the future vision – it is forward looking.

Development Regulation: Comprehensive Plan

- If the zoning ordinance is in direct conflict with the comp plan, that could be a fatal variance.
- If there is a conflict, you can amend the comp plan to match the zoning decision in certain situations.
- Such an amendment to the comp plan should be based on factors to include: a change in community character, emerging development trends, redevelopment initiatives, etc.

Development Regulation: Zoning Limitations

Limitations on the Zoning Power of the City

SUPREMECY CLAUSE PREEMPTION

The first is the preemption under the supremacy clause. The local zoning power cannot control state or federal agency engaged in a governmental activity they are not subject to our zoning powers.

Development Regulation: Zoning Limitations

Limitations on the Zoning Power of the City

PUBLIC SCHOOLS

The second limitation on the zoning power of the city is schools. Public school districts pick the site and use, but once the site and use is selected, the ISD must comply with the rest of the city regulations governing the use.

Development Regulation: Zoning Limitations

Limitations on the Zoning Power of the City

EXPRESS STATUTORY PREEMPTIONS

The third limitation on the zoning power of the city are express statutory preemptions. Burleson is a home rule city and is allowed to do anything unless preempted or denied by a state statute. A few major areas where the city is specifically preempted include:

- 1) Alcohol;
- 2) Pawn Shops;
- 3) Sign regulations on certain highways; and
- 4) Modular housing.

Development Regulation: Zoning Process

- As a home rule city, the Planning and Zoning Commission and City Council must review a zoning case in Burleson.
- The open meetings act applies.
- Zoning is done by ordinance, not resolution or minute order.
- Before the City Council can consider a zoning case, the Planning and Zoning Commission considers the case and makes a report to the City Council. Reports do not have to be a positive recommendation.
- The City Council does not have jurisdiction until after zoning commission makes a report.
- The City Council is not required to agree with the zoning commission's recommendation. The City Council is free to make its own decision on a zoning case.

Development Regulation: Zoning Process

Planning and Zoning Consideration

- Any proposed zoning change requires a public hearing at the Planning and Zoning Commission in our city.
- Notice of the public hearing must be given by letter notice to all property owners within 200 feet of the boundary of the property with the proposed change, no later than 10 days before the public hearing.
- Just like City Council, a Planning and Zoning commission is allowed to apply rules to the order of its meetings and public hearings (e.g. limiting speakers to no more than 3 minutes).
- Generally speaking, at a public hearing staff proceeds first and gives an overview of the case. Then the applicant speaks, followed by the public, and then the applicant is allowed to a time to give a brief rebuttal.

Development Regulation: Zoning Process

Planning and Zoning Consideration

- The applicant is allowed a time to rebut at the end because, generally speaking, the applicant bears a burden of proof.
- From the city's perspective, the zoning map is highest and best use of the property. Since the applicant is seeking to change that zoning map, the applicant bears the burden of persuasion, and can address the comments and questions raised. The applicant is allowed more time to speak than the general public because they bear that burden.

Development Regulation: Zoning Process

City Council Consideration

- Once the Planning and Zoning Commission makes a report, the City Council considers the matter.
- Like the Planning and Zoning Commission, a zoning change requires a public hearing in front of the City Council.
- Notice of the council public hearing is given in the newspaper at least fifteen days before the hearing.
- The hearing operates in the same manner as the Planning and Zoning Commission public hearing as to the order of speakers.

Development Regulation: Zoning Decisions

Zoning Decisions

- A City Council may approve or deny the zoning case by a majority vote.
- There are two exceptional situations that require 3/4ths vote.
- First, is a Planning and Zoning Commission Denial. The City's zoning ordinance requires that if the zoning commission recommend denial on a case, the case can only be approved by a three-fourths vote of City Council.
- Second, is a protest. In the event, however, that a proposed change to a regulation or boundary is protested by twenty percent (20%) of the owners of the affected property or the owners of property located within 200 feet of the affected property, then the proposed change must be approved by at least three-fourths of the City Council.
- The three-fourths requirements do not apply, however, in a case where the land has not received a zoning designation.

Development Regulation: Zoning Decisions

Zoning Decisions

- Zoning decisions do not have to match the zoning change requested. The Planning and Zoning Commission can recommend and the Council approve a zoning change that is different from the change requested in the case before it.
- However, to do so, the zoning change that is different must be less intensive than the zoning change given in the public letter or newspaper notice.
- If the zoning change desired by the Commission or Council is more intensive, the item must be re-noticed.
- For example, if a zoning change is noticed for medium industrial, but Council or the Commission feels like light industrial is better, than the Council or Commission is free to select light industrial because the light industrial is a less intensive use than medium industrial. If however, a zoning change is noticed for medium industrial, but council or the commission feels like heavy industrial is better, the item must be re-noticed because the desired use is more intensive than the zoning noticed.

Development Regulation: Zoning Decisions

Planned Development Districts

- Planned Development zoning is typical for mixed use development that doesn't fit neatly within the designated zones and their associated performance standards. It's flexible in a way, that the developer and city are allowed to create a unique framework for the development.
- The downside is that PD districts are so specific, and if the envisioned use does not pan out, then the developer has to comeback to council to have the property rezoned to amend the PD.
- Enormous flexibility at the front end, but very rigid on the back end.

Use, Not User

- Generally zoning decisions are business or owner neutral. Look at the use, not the user.
- Zoning cannot be tied to a specific business (e.g. only a Dairy Queen can be located on this site), except when dealing with a specific use permit (SUP). A SUP can be tied to a specific business, but they are permits that are distinct from a specific zoning district.

Development Regulation: Zoning Decisions

Judicial Review

- If a court ever reviews a zoning decision of this Council, the standard of judicial review that the court will use is whether the zoning decision was arbitrary or capricious.
- In a disputed land use hearing, if there were facts at issue upon which reasonable minds may differ, if there was information or evidence offered that would support the decision the Council made, in the absence of clear evidence to the contrary, the court must presume that was the basis of the Council's decision.
- What that means is that sometimes in a disputed zoning case, silence can be golden.

Development Regulation: Zoning Decisions

Takings

- 42 USC 1983. All zoning decisions are made under 1983.
- Any person who acting under color of state law deprives of another of a constitutionally protected right or property interest shall be answerable therefor in money damages.
- Remember, when making a zoning decision a councilmember is applying a state power while holding an elected office under state law. It effects the property rights of the applicant. If you deny a zoning case without a good basis, you have engaged in a taking in violation of Section 1983.

Development Regulation: Land Design

Land design is governed by Chapter 212 of the Local Government Code. It's very sparse with specifics.

When is a plat required?

- A plat is required when the owner of a tract of land located within the limits or in the extraterritorial jurisdiction of a municipality divides a tract into two or more parts to lay out a subdivision of the tract

Development Regulation: Land Design

What is a plat?

- A division of the tract into lots, laying out streets, alleys, and other areas dedicated to the public.
- At a minimum a plat should identify the property, the number of block and lots with lot lines and dimensions, the locations of streets and alleys, utility easements, dedications of parks and other areas, designated for public use, name the person or firm who prepared the plat with a seal, list the owner's name and address, and list the date plat was prepared.
- Can be an instrument that conveys property

Development Regulation: Land Design

What is a plat?

- There are variety of different plats, including preliminary plats, final plats, minor plats, replats, amending plats, vacating plats, and administrative plats
- Preliminary plats are not mentioned in Chapter 212. However, they are often used because they save developers money on engineering
- Final plats are recorded on the real property records and create the lots, blocks, and dedications listed on the plat

Development Regulation: Land Design

Plat Consideration

- Ministerial duty on plat approval. The Planning and Zoning Commission and Council **MUST** approve the plat if the plat conforms with state law and the city's subdivision regulation. The act is non-discretionary. Very different from the zoning case consideration process.

Development Regulation: Land Design

Plat Consideration

- Conditional approval or denial.
- If the city conditionally approves or disapproves a plat, the city shall provide the applicant for plat approval a written statement of the specific conditions for the conditional approval or the reasons for disapproval. The conditions or reasons may not be arbitrary, and must be directly related to the requirements of city ordinances, and include a citation to the law that is the basis for the decision.
- The applicant for plat approval is allowed to submit a written response to the city's decision, and the city has fifteen days from receiving the response to approve or disapprove the plat.
- If the applicant challenges the city's disapproval in a lawsuit, the city bears the burden of proving by clear and convincing evidence that the disapproval is allowed under law.

Development Regulation: Land Design

Plat Consideration

- 30 Day Shot Clock. The City must approve, approve with conditions, or disapprove a plat within 30 days after the date the plat is filed. A plat is considered approved by the City unless it is disapproved within the 30 day period

Exactions

- Rough proportionality. When the City requires a developer to put in something for a development, the requirement must be roughly proportional to the demand for that service or facility that the developer is required to put in. If it's not roughly proportional, it's eminent domain by another name.

Development Regulation: Land Design

Vested Rights

- Vested Rights Act. Chapter 245 of the Local Government Code. After a developer has put the city on full and fair notice of development intent or plan, their development will be bound to comply with the development standards or requirements that were applicable at the time that notice was given.
- If a developer comes in with a development plan and the city wishes its subdivision ordinance had additional requirements, it's too late to amend the subdivision ordinance so that applies to the development plan received by the city.
- Ultimately, you can amend your land design regulations to apply to future development plans going forward, but they do not automatically apply to existing development plans.

Questions/Comments