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P&Z and BOA: A Comparison Review

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I. Introduction

This chapter is a brief summary on appellate/review procedures for planning and zoning matters in Texas. Specifically, this article includes a comparison review of authority, scope, purpose, and due process procedures as applied to a Planning and Zoning Commission (“P/Z”) and Zoning Board of Adjustment (“BOA”). In addition, below is a brief history of planning and zoning matters to provide some valuable context when considering current land use requirements.

II. History of Planning and Zoning

The movie, Gangs of New York, took place during 1863 in lower Manhattan (“Five Points”) wherein Bill “The Butcher” Cutting leads the Natives-gang against a wave of immigrants, mostly Irish, settling into the city. The landscape was a hemorrhaging population that doubled every decade during 1800–1880. Originally constructed single-family dwellings were transformed overnight into poorly managed multi-family complexes called “tenements.” Tenements were narrow low-rise apartment buildings (built of cheap materials) that remained cramped, poorly lit, and lacked plumbing and adequate ventilation.

Accordingly, the City of New York adopted the United States’ first zoning ordinance in 1916. See Arden H. Rathkopf & Daren A. Rathkopf, The Law of Zoning and Planning (4th ed.), Sec. 1.1 (1975). Ten years later, 1926, the United States Supreme Court, in Village of Euclid, Ohio v. Ambler Realty Co., held zoning constitutional:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. ... Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, ... is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. ... If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

Village of Euclid, 272 U.S. 365, 387-88 (1926).

After Village of Euclid, the Department of Commerce published the Standard Zoning Enabling Act (“SZE”) which provided a model for states to follow by delegating zoning power to local governments. Consequently, states readily adopted the SZE. Texas adopted its version of the SZE in 1927 and delegated zoning authority to cities and incorporated villages. See *Mixon*,

Texas Municipal Zoning Law (3d ed. 1999), §1.000 at 1-4-5. The Texas Supreme Court upheld the State's version of the SZE in Lombardo v. City of Dallas, 47 S.W.2d 495 (Tex.Civ.App. – Dallas 1932), *aff'd*, 124 Tex. 1, 73 SW2d 475 (1934):

Lombardo was a zoning contest concerning a gasoline filling station site. Lombardo alleged that the enabling act and the Dallas ordinance resulted in an unconstitutional taking and denied him equal protection of the law. The Court of Appeals applied the burden on the challenger to establish that the legislative act was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or the general welfare. The Texas Supreme Court upheld the Court of Appeals' decision adding that all property is subject to police power and that zoning regulations are not "takings" for which compensation must be paid.

In Texas, the statute governing the delegated zoning authority is found in Chapter 211 of the Texas Local Government Code, wherein the purpose of zoning is listed, as follows:

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.

(Emphasis added). Here, Texas land-use zoning is recognized as an exercise of its police power.

Municipalities are delegated authority to zone property by the state. Therefore, municipalities are held to the limitations imposed by the SZE and Texas Local Government Code, including requirements associated with adopting and amending zoning ordinances.

Specifically, for purposes of this article, municipalities exercising zoning authority may, and in certain cases – must, appoint a "Planning and Zoning Commission" and a "Zoning Board of Adjustment." See Tex. Local Gov't Code §211.007(a) (A home-rule municipality must appoint a zoning commission); see also Coffee City v. Thompson, 535 S.W.2d 758, 767 (Tex.Civ.App. – Tyler 1976, writ ref'd n.r.e.) (A general law city "may" appoint a zoning commission). These two boards are statutorily created and possess varying individualized governing authorities, purposes, requirements, and jurisdictional review procedures.

III. Planning and Zoning Commission

Zoning regulations include, among others, rules governing the type of land use, building heights, parking, landscaping, signs, lot size and dimensions (front, rear, and side yard setbacks). These regulations are codified in a municipality's code of ordinances.

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