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Regulation of Historic Preservation

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St. Bartholomew's Church v. City of New York, 728 F.Supp. 958 (S.D. NY 1998)

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Park Home v. City of Williamsport, 680 A.2d 835 (Pa. 1996)

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Sherbert v. Verner, 83 S.Ct. 1790 (U.S. 1963)

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Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978, (9th Cir. 2012)

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)

2218 Bryan Street, Ltd. V. City of Dallas, 175 S.W.3d 58, (Tex.App-Dallas 2005)

Benenson v. United States 548 F.2d 939(Ct.Cl. 1977)

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998)

TCI West End, Inc. v. City of Dallas and THC, 407 S.W.3d 292, (Tex.App-Dallas 2013)

City of Dallas v. TCI West End, Inc. 463 S.W.3d 53 (Tex. 2015)

TCI West End, Inc. v. City of Dallas, 2016 WL 890883

TCI West End, Inc. v. City of Dallas, 274 S.W.3d 913 (Tex.App-Dallas 2008)

Authority to Enact Historic Preservation Ordinances

Chapter 211 of the Texas Local Government Code includes protecting and preserving places and areas of historical, cultural, or architectural importance and significance as one of the stated purposes and within the scope of zoning ordinances. See 211.001 of the Texas Local Government Code. In addition, Section 211.003 includes some types of regulations that may be included in zoning ordinances, and specifically mentions that in the case of designated places and areas of historical, cultural, or architectural importance, a city may regulate the construction, reconstruction, alteration, or razing of buildings and other structures

Houston has not adopted formal zoning or a comprehensive plan under Chapter 211 of the Texas Local Government Code, and has instead adopted a variety of land use regulations through its police power, including historic preservation regulations that designate and regulate the construction, demolition, and alteration of landmarks and structures in historic districts. While some commentators have asserted that such regulations can only exist in the context of a zoning ordinance adopted pursuant to Chapter 211, the types of regulations often included in zoning ordinances are generally available to cities as valid and reasonable exercises of police power.

Section 211.003 lists regulations that may be included in a zoning ordinance without specifically preempting the regulation of those things through other means. Absent a comprehensive plan dividing the entire city into different districts, no formal zoning has taken place. At least one example of a regulation listed in Section 211.003 of the Texas Local Government Code, Section 211.003(5) allowing the regulation of "the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes," has been upheld as a valid exercise of police power in Houston and is not considered zoning. In N.W. Enterprises Inc. v. City of Houston, 372 F.3d 333, (5th Cir. 2004), Houston's regulation of the location of sexually oriented businesses, requiring them to be a certain distance from certain sensitive uses, was found to not be illegal zoning in violation of the requirements of Chapter 211. The trial court in that case thoroughly rejected arguments that the effect of requiring sexually-oriented businesses to operate away from certain sensitive uses created small zones throughout the city, and also relied on the general meaning of zoning to refer to comprehensive planning that divides the entire city into districts.

In City of Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982), the Texas Supreme Court noted the possible distinction between a zoning ordinance and a less comprehensive regulation of land use. In that case, the Court upheld two city ordinances which restricted the permissible locations of mobile homes used as residences. The Court said that while these ordinances "have the effect of a zoning regulation," they are to be scrutinized as an exercise of general police power. The Court also suggested that these ordinances, enacted by a general law city with no comprehensive plan or zoning, only restricted the permissible locations for a specific type of land use, and was thus not actual zoning.

Likewise, in City of Houston v. Johnny Frank's Auto Parks, 480 S.W.2d 774, 778, (Tex.Civ.App 1972), an ordinance regulating auto wrecking yards was analyzed as something "akin to a zoning ordinance in that it is an exercise of the city's police power" while not being an actual zoning because "it does not establish a comprehensive plan by which the city is divided into districts wherein property is limited to specified uses and it was not passed in accordance with the procedures specified for the passage of zoning ordinances." Also, like a historic preservation ordinance, the ordinance in question "does not prohibit any particular use of any property, but merely regulates the use of property in operation of an automobile wrecking or salvage yard."

Finally, in MJR's Fare of Dallas, Inc. v. City of Dallas, 792 S.W.2d 569 (Tex.App.-Dallas 1990), the Court of Appeals declined to consider whether a regulation of the location of sexually oriented businesses exceeded authority to Dallas under Chapter 211 of the Texas Local Government Code because Dallas may rely on its home-rule authority to enact police power regulations that protect the public health, safety, and welfare. The Court also declined to read Chapter 211 as preemptive, "Since Dallas possesses the powers of a home-rule city and the statute provides no prohibition against regulations which address the dispersion of sexually oriented businesses, Dallas may rightfully enact an ordinance which regulates the location and use of buildings and land within a zoning district."

Similarly, historic preservation ordinances may have the effect of zoning without actually dividing a city into districts under a comprehensive plan to exercise all manner of zoning regulations. It is a zoning-style regulation adopted as a valid exercise of police power. Houston has also adopted general land use regulations that may apply uniformly across the city or apply differently in different areas. For example, Houston has no off-street parking or building line requirements in its central business district. Until 2013, the City's minimum lot size and other subdivision platting requirements applied differently depending on whether the land was located inside or outside of the city's dense urban core.

Section 106 of the National Historic Preservation Act

I. Overview of Section 106

The National Historic Preservation Act (NHPA) of 1966 promotes the preservation of historical properties by requiring that federal agencies and certain local actors using federal money to take into account the effects of their undertakings on historic properties, which include projects involving a permit or license, funding, or other assistance or approval from a federal agency. Section 106 of the NHPA along with regulations contained in 36 CFR Part 800 lay out review procedures that ensure historic properties are considered in federal planning processes.

Accordingly, any federal undertaking, as defined in the Act, that has the potential to affect historic properties must go through Section 106 consultation and review. Under Section 106 review, the federal agency consults with mandated and invited parties to define areas where the project could affect historic properties, gather information to identify historic properties, determine the effects the project would have on the historic properties identified, and finally explore alternatives to avoid, minimize, or mitigate those effects.

The Act created the American Council on Historic Preservation (ACHP), an independent federal agency that oversees Section 106 implementation. Further, the Act requires the governor of every state to appoint a State Historic Preservation Officer (SHPO) to administer a preservation program in the state. The SHPO represents the interest of the state in protecting its historical properties during Section 106 consultation and review. In Texas, the SHPO is the Executive Director of the Texas Historical Commission (THC).

In general, federal agencies are responsible for initiating Section 106 consultation under the Act. However, Section 104(f) of the Housing and Community Development Act (HCDA) states that local governments are responsible legally as "federal agencies" for compliance with environmental statutes, and implementing regulations make clear that this includes compliance with NHPA. Therefore, responsibility for Section 106 compliance is fully borne by local governments that receive HUD assistance.

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