

AN OVERVIEW OF ZONING IN TEXAS

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**Terrence S. Welch
Brown & Hofmeister, L.L.P.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/ 747-6100
214/ 747-6111 (Fax)
www.bhlaw.net
twelch@bhlaw.net**

Terrence S. Welch

In 1981, Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1981, Terry has represented numerous growing communities in North Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, natural gas drilling and other regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also recently had published an article on urban sprawl in Texas in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board and subsequently was appointed to the Civil Service Board in August 2015.

In his free time, while accepting the fact that knee replacement surgery is inevitable, Terry enjoys long distance running, having competed in 61 half-marathons as well as many other long distance races. He completed his 40th marathon in Austin in February 2016. He has competed in the Chicago, New York, San Diego, White Rock/Dallas, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons, all of which he ran very slowly!

I. Zoning: A Definition and Its History in the United States

Zoning is the regulation by a municipality of the use of land located within the municipality's corporate limits as well as the regulation of the buildings and structures located thereon.¹ Thus, the division of a city or area into districts and the prescription and application of different regulations in each district generally is referred to as zoning. A comprehensive zoning ordinance necessarily divides a city into certain districts and prescribes regulations for each one having to do with the architectural design of structures, the area to be occupied by them, and the use to which the property may be devoted. The use of a building may be restricted to that of trade, industry or residence.² Zoning is distinguished from eminent domain in that zoning laws are enacted in the exercise of the police power, their enforcement does not constitute condemnation of property, and the constitutional requirement of compensation for the taking of private property does not restrict the exercise of zoning power.³ Zoning also is distinguishable from the law of nuisance because comprehensive zoning ordinances have a much wider scope than the mere suppression of the offensive use of property. They act, not only negatively, but constructively and affirmatively, for the promotion of the public welfare. Moreover, the existence of a nuisance is not a necessary prerequisite to the enactment of zoning regulations.⁴

First and foremost, zoning is the exercise of the police power by a municipality. To fully understand the evolution of that concept, a brief overview of the history of land use regulation in America, and zoning in particular, is in order. The police power is inherent in the sovereign power of the state to regulate private conduct to protect and further the public welfare.⁵ As a consequence, government has the authority to regulate a wide variety of activities to promote public health, safety, morals and the general welfare.

In colonial America, local governments on occasion regulated certain limited areas of land use and structures, such as the location of farming lands and the prohibition of wooden fireplaces and thatched roofs due to fire hazard and safety concerns. In colonial cities such as Boston, Salem and Charleston, laws enacted prior to 1800 regulated the location of slaughterhouses and distilleries as well as the business premises of chandlers (candle makers) and couriers, and the location of potters' kilns.⁶

¹ Ziegler, *Rathkopf's The Law of Zoning and Planning* § 1:3 at 1-16 (2004) (hereinafter referred to as "*Rathkopf's*").

² 10 Tex. Jur. 3d, Building Regulations § 6.

³ 77 Tex. Jur. 3d, Zoning § 2.

⁴ *Id.*

⁵ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1894).

⁶ See *Rathkopf's*, § 1:2 at 1-8.

By the 1840s, most American cities were an unseemly clustering of mixed uses characterized by backyard privies and filth and stench in the streets. Fires and deadly diseases were not uncommon. During this time, the “sanitary reform” movement pressed for the implementation of comprehensive public water and sewage systems and for increased regulation of land uses which posed the threat of fire and disease.⁷ By the end of the 19th century, in large metropolitan areas in particular, it became increasingly clear that some government regulation of property and land use was necessary since repugnant land uses often existed side-by-side. Consequently, by the early 1900s many American cities had enacted ordinances regulating a variety of types of land uses. For example, in some cities noxious businesses were excluded or entirely prohibited in certain districts. There were restrictions on the operation and location of tenements, the erection of billboards, the discharge of smoke, and in some residential areas there were restrictions on lot size, setbacks and the bulk, type and height of structures. Many of these regulations were upheld by the courts since the police power of local governments was determined to be sufficiently broad to include within its scope new laws affecting the use and development of land, particularly those uses which were deemed harmful to the public welfare.⁸

The beginning of the twentieth century also witnessed the so-called “city beautiful” movement, the precursor to modern urban planning, which pressed for the paving of streets and sidewalks, street lighting, elimination of trash-strewn streets and yards, planting of trees and gardens, creation of public parks, and the development and maintenance of attractive residential areas. In part as a result of this movement, there was recognition of the need for more comprehensive planning and regulation of land uses at the local level.⁹ By the 1920s, many U.S. cities had adopted comprehensive zoning codes which regulated land uses within their boundaries. These ordinances routinely were challenged as going beyond the limits of necessity, that such laws were designed to secure some future public benefit rather than to prevent harm, and that the segregation of residential uses under such codes involved impermissible class legislation by discriminating among land users according to their economic situation in life. These arguments, however, often were rejected by the state courts, which generally held that regulation of land use through zoning was within the legitimate scope of the police power.¹⁰

Zoning at first was considered one of the most radical departures from the traditional concepts of private property ownership because it was perceived as prohibiting

⁷ *See id.* at 1-9 (and citations contained therein).

⁸ *Id.* at 1-9-10.

⁹ *Id.* at 1-10.

¹⁰ *Id.* at 1-10-11.

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