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## NONCONFORMING USES AND STRUCTURES

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## ABSTRACT

This Paper intends to provide a practical yet thorough introduction to the topic of nonconforming uses and structures. Specifically, this Paper will provide a basic background of nonconforming uses and structures, the policies that underlie permitting and discontinuing nonconforming uses and structures, and how nonconforming use and structure rights may be established, regulated, and terminated.

Bonus tip: Stop using the term *legal nonconforming*! If it is illegal, it can NEVER be nonconforming. All nonconforming uses are legal by definition.

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## I. INTRODUCTION

Prior to 1926, a split of authority existed amongst the states regarding the validity of zoning as a legitimate exercise of the municipal police power. For example, consider a 1921 City of Dallas ordinance that prohibited construction of a business within a residential district.<sup>1</sup> The ordinance was challenged in *Spann v. City of Dallas* where the Supreme Court of Texas held that zoning was an improper exercise of the police power.<sup>2</sup> The Court defined police power as “a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public” and held that “the right to acquire and own property, and to deal with it and use it as you choose, was not a right over which the police power was paramount.”<sup>3</sup>

On the other hand, in 1920, a New York appellate court upheld the constitutionality of New York City’s comprehensive 1916 zoning plan.<sup>4</sup> In *Lincoln Trust Co. v. Williams Building Corp.*, the court held that “the resolution in question [was] a valid one” and further found that zoning regulation was a proper exercise of the police power.<sup>5</sup>

In 1926, the Supreme Court upheld the constitutionality of zoning as a proper exercise of the police power in *Village of Euclid, Ohio v. Ambler Realty Co.*<sup>6</sup> A 1922 ordinance establishing a comprehensive zoning plan was challenged on the grounds that it conflicted with the Fourteenth Amendment to the Constitution, specifically, the deprivation of land without due process.<sup>7</sup> The Supreme Court held that the ordinance was justified as an exercise of police power because the ordinance was found to be neither arbitrary nor unreasonable.<sup>8</sup> Furthermore, zoning regulations, the Court explained, would generally be upheld as long as there was some connection to the public welfare.<sup>9</sup>

Subsequently, states began to pass enabling statutes, giving municipalities the power to regulate zoning.<sup>10</sup> Notably, while some state enabling acts preclude the elimination of non-conforming uses and structures, the Standard Zoning Enabling Act, prepared by the United States Department of Commerce in 1926, did not.<sup>11</sup>

In 1927, the Texas legislature passed its version of the Standard Zoning Enabling Act, now found in section 211.003 of Title 7 of the Local Government Code.<sup>12</sup> This section empowers the legislative bodies of cities and incorporated villages, “for the purpose of promoting health, safety, morals, or the general welfare of the community, to regulate and restrict the height, number of

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<sup>1</sup> *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 516.

<sup>4</sup> *Lincoln Tr. Co. v. Williams Bldg. Corp.*, 128 N.E. 209, 211 (N.Y. 1920).

<sup>5</sup> *Id.*

<sup>6</sup> *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 379–80, (1926).

<sup>7</sup> *Id.* at 380.

<sup>8</sup> *Id.* at 388

<sup>9</sup> *Id.*

<sup>10</sup> *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 293 (Tex. App.—Dallas 1989), writ denied (Sept. 12, 1990).

<sup>11</sup> *Id.*

<sup>12</sup> TEX. LOC. GOV’T CODE ANN. § 211.003 (2013).

stories and size of buildings and other structures, the percentage of a lot that may be occupied, the size of the yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence and other purposes.”<sup>13</sup> Texas’ enabling statute is extremely broad, as can be seen by the inclusion of the term “general welfare,” and does not explicitly prohibit interference with nonconforming uses or structures existing at the time of the adoption of a zoning ordinance.

However, believing that zoning can protect future development without removing structures or uses already in existence, municipalities often adopt zoning ordinances that expressly authorize existing uses and structures to continue. This is especially true for single-family residential uses and structures because no income stream exists to allow the owners to recover the investment in their home.

## II. NONCONFORMING USES AND STRUCTURES – THE BASICS

A nonconforming use is a use of land or a structure that existed legally when the relevant zoning regulation became effective, has continued to exist, and is allowed to continue to exist in nonconformance with the regulation.<sup>14</sup> In other words, a nonconforming use is a use of land or property that while allowed under the zoning regulations at the time it was established, is now no longer permitted. For example, consider an auto salvage yard that began when the property was in a rural area. As the area around the property begins to develop, the city determines that the use is no longer appropriate and rezones the property to a district that does not allow the auto salvage use.

Similarly, a nonconforming structure is a structure that at its establishment, complied with zoning and development regulations, but because of subsequent changes to the zoning and/or development regulations, no longer fully complies with those regulations.<sup>15</sup> To illustrate, consider a neighborhood store that has parking spaces for twenty cars but current regulations require spaces for fifty, or a building that is built according to a smaller, formerly lawful setback line.<sup>16</sup>

When determining whether there is a nonconforming use in a particular case, the proper focus is on the legislative enactments of the regulating body.<sup>17</sup> The party asserting a right to continue a nonconforming use bears the burden of proving its lawful, pre-existing status.<sup>18</sup>

Since Texas state law relegated the power to regulate zoning to municipalities, municipalities are free, within constitutional limits, to establish their own standards regarding the establishment, regulation, and termination of nonconforming uses and structures.<sup>19</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972).

<sup>15</sup> *Id.* at 779.

<sup>16</sup> Bagley & Mickelson, *The Zoning Ordinance Fundamentals*, TXAPA, [https://www.txplanning.org/media/files/page/cc632492/Short\\_Course\\_I\\_Zoning\\_Ordinance\\_Fundamentals.pdf](https://www.txplanning.org/media/files/page/cc632492/Short_Course_I_Zoning_Ordinance_Fundamentals.pdf).

<sup>17</sup> *Wende v. Bd. of Adjustment of City of San Antonio*, 27 S.W.3d 162, 164 (Tex. App.—San Antonio 2000), *judgment rev'd on other grounds*, 92 S.W.3d 424, 431 (Tex. 2002).

<sup>18</sup> See *City of Pharr v. Pena*, 853 S.W.2d 56, 63 (Tex. App.—Corpus Christi 1993), *writ denied*.

<sup>19</sup> TEX. LOC. GOV'T CODE ANN. § 211.003 (2013).

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