

PRESENTED AT
2019 Land Use Fundamentals

April 24, 2019
Austin, TX

Land Use Appeals

Ronald D. Stutes

Author Contact Information:

Ronald D. Stutes
Potter Minton, PC
Tyler, TX

ronstutes@potterminton.com
(903) 597-8311

Table of Contents

I.	Introduction	1
II.	Appeals from the Zoning Commission	1
A.	Statutory Provisions	1
B.	Standing	2
i.	Exhaustion	2
ii.	City Council Decisionmaking	2
iii.	Standing in City Proceedings	3
C.	Avenues to Challenge Zoning Decisions	4
D.	Procedural Appeals	4
E.	Substantive Appeals	5
i.	Abuse of Discretion	5
ii.	Takings	7
iii.	Spot Zoning	7
III.	Zoning Board of Adjustment	8
A.	Statutory Provisions	8
B.	Standing	8
i.	Generally	8
ii.	The Strange Case of a City that Sues Itself	9
C.	Writ of Certiorari	9
D.	Additional Evidence	10
E.	Procedural Appeals	11
F.	Substantive Appeals	11
G.	Award of Costs	11
IV.	Conclusion	12

I. Introduction

Joe Garage just inherited a piece of property from his grandparents. It's in an older part of town, and is vacant. Joe would love to start his own auto repair business, and this is just the jump start he's been looking for. But here's the problem: it's zoned residential. On either side of his property are businesses, but they've been in operation since well before the new zones were enacted in 1985. As far as Joe is concerned, this street is primarily commercial, and his dream business ("Garage's Garage") would fit perfectly there.

So Joe applies to amend the zoning on his tract. Because of opposition from the local neighborhood group ("We Luv Gentrification"), however, the Planning & Zoning Commission votes to recommend denial of the zoning change. The City Council splits along the common pro-business faction (let the man open his business) vs. pro-neighborhood faction (we have a dream for the Pleasant Ridge neighborhood, and a garage doesn't fit that dream), upholds the denial despite an emotional plea from Joe during the public hearing.

But Joe has also inherited a nice pile of cash from Grandpa, and the condescending attitude of the neighborhood group really rubbed him the wrong way. So he decides to sue your city client. What are his options, and what are your defenses?

II. Appeals from the Zoning Commission¹

A. Statutory Provisions

The Zoning Commission is created under the authority of Section 211.007 of the Texas Local Government Code. In one sense, the Zoning Commission is quite powerful, because it has jurisdiction over zoning boundaries and zoning regulations.² On the other hand, its authority is almost completely advisory, in that it only makes recommendations to the city council.³ Nevertheless, because the recommendation of the Zoning commission is required before the City Council may hold a public hearing or take action on the matter, and because many cities have adopted a regulation that requires a supermajority vote to overrule a recommendation

¹ Frequently, this body is referred to as the Planning & Zoning Commission, or the Plan Commission. The statutory reference, however, is to a "Zoning Commission." Accordingly, I shall refer to it by its statutory moniker; the discussion applies equally, of course, to the body, no matter what its appellation.

² Texas Local Government Code Section 211.007(a).

³ Texas Local Government Code Section 211.007(b).

that a change be denied,⁴ the Zoning Commission's regulatory power in practice is more significant than that of an advisory committee.⁵

B. Standing

i. Exhaustion

Because the Zoning Commission is not empowered to make final decisions, it necessarily follows that its recommendations may not be directly appealed. A disappointed applicant for rezoning that is unsuccessful before the Zoning Commission may not sue, as a final decision has not been made until the City Council rules on the request. The Zoning Commission is empowered only to recommend a zoning change to the City Council.⁶

ii. City Council Decisionmaking

The City Council, when acting on a recommendation from the Zoning Commission, is acting in its legislative capacity.⁷ But it often gives the appearance of a contested adjudicative proceeding: the applicant is seeking a zoning change for its land, and is faced with opposition by neighbors, citizen groups, or competitors. A public hearing is held with "evidence" given by both sides. Ultimately, however, the City Council is adopting an amendment to an ordinance. Accordingly, judicial review of a decision whether to change the zoning on a particular parcel in response to a request from the owner of the parcel is under the same standard as the review of a decision whether, city-wide, to permit auto repair shops in commercial zones. Further, unlike a quasi-judicial proceeding, the City Council's review is not limited to consideration of evidence presented to it in public hearings. A Council may, after all parties have been heard, evaluate the matter in light of its own independent knowledge of the community and its own judgment of the public welfare.⁸ Direct review of the council action is available even if the zoning ordinance itself does not confer such a right of review.⁹

⁴ Texas Local Government Code Section 211.006(f).

⁵ While the Open Meetings Act does not apply to committees that are "merely advisory," the Zoning Commission's power is recognized by the fact that it is made expressly subject to the Open Meetings Act. Texas Local Government Code Section 211.0075.

⁶ *Winn v. City of Irving*, 770 S.W.2d 10 (Tex. App.—Dallas 1989, no writ).

⁷ *Eudaly v. City of Colleyville*, 642 S.W.2d 75 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

⁸ *City of San Antonio v. Arden Encino Partners*, 103 S.W.3d 627, 630 (Tex. App.—San Antonio 2003, no pet.); *T & R Associates, Inc.*, 688 S.W.2d 622, 627 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).

⁹ *City of Amarillo v. Stapf*, 101 S.W.2d 229, 233 (Tex. 1937).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Land Use Appeals

Also available as part of the eCourse

[2019 Land Use Fundamentals eConference](#)

First appeared as part of the conference materials for the
2019 Land Use Fundamentals session

"Land Use Appeals"