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ZONING LAW IN TEXAS

RICHARD D. WALKER*

Perhaps the greatest legal influence of this century on the development of commercial and residential realty has been the extension of police power to the regulation of building upon and use of urban real estate under what are generally termed zoning laws; and it seems unquestionable that this influence will continue to grow both rapidly and intensively. In 1927 the Texas Legislature enacted this State's first important zoning law. Since that time practically every major city in Texas has enacted zoning ordinances. A substantial amount of case law has followed.

Out of the rapid expansion of commerce and industry have come many developments affecting public health, morals, safety and that ill-defined catch-all, the general welfare. Governmental controls, including among others the regulation of building construction and land and building use was to be expected. Equally expectable was the fact that control, in the form of zoning laws, would result in isolated cases of hardship or even injustice, and in an almost universal desire on the part of individual property owners to escape the rigors of the laws' operation upon them personally.

The purpose of this paper will be first to outline the substantive law of zoning in Texas, next to set out some of its procedural aspects, and finally to offer conclusions on the subject in general.3

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2 A notable exception is Texas' largest city, Houston.
3 As general references and for coverage of certain particular aspects and situations see 10 Tex. Jur., Ten Year Supp., Zoning, 183 (1948); Yoxley, Zoning Law and Practice (1948).
I

URBAN ZONING—THE SUBSTANTIVE LAW

Zoning has been defined as "a general plan to control and direct the use and development of property in a municipality, or a large part of it, by dividing it into districts according to present and potential use of the property." 4

Most zoning litigation arises out of restrictions on the building or use of apartments, suburban stores and other types of commercial activities in residential districts; however, the same legal principles apply to all types of district classification as well as to all other aspects of zoning law.

Prior to 1926, there existed among the states in this country a definite split of authority on the validity of zoning ordinances as a legitimate exercise of the police power. 5 Up to that time in Texas no statute of any broad scope had been enacted concerning zoning. 6

In 1921 a Dallas ordinance restricting commercial uses in residential areas was tested in the case of Spann v. City of Dallas. 7 Chief Justice Phillips, delivering the opinion of the Court, de-

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6. A city has no zoning power other than that conferred by statute. City of West University Place v. Martin, 113 S. W. (2d) 295 (Tex. Civ. App. 1938).
7. In 1921 Art. 1175 (26), now considered impliedly repealed by Luse v. City of Dallas, 131 S. W. (2d) 1079 (Tex. Civ. App. 1939) writ of error refused, was passed giving a simple grant of zoning powers to cities on a home rule charter basis. Before 1921 the only basis for statutory authority to zone was by general provisions relating to general welfare.

7. 111 Tex. 350, 235 S. W. 513 (1921). One of the provisions of the ordinance in question provided that permits for commercial use might be issued if three-fourths of the property owners in the district consented. The court found this feature especially objectionable, saying that a man may not be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors. All city ordinances now avoid any such neighborhood consent features. See City of Dallas v. Mitchell, 245 S. W. 944 (Tex. Civ. App. 1922) writ of error refused; City of Dallas v. Burns, 250 S. W. 717 (Tex. Civ. App. 1923) writ of error refused; City of Dallas v. Urbish, 252 S. W. 258 (Tex. Civ. App. 1923).
clared in effect that use zoning was an improper exercise of the police power, that the ordinance was clearly not a regulation for the protection of the public health or safety or welfare, but that its object was to satisfy a sentiment against the mere presence of a store in a residential part of the city. Stressing the right to own property and deal with it as the owner chooses, so long as the use harms nobody, as a part of the citizen’s natural liberty, the Court declared the ordinance unconstitutional.

Other Texas decisions following the *Spann* case held in substance that general zoning regulations are not within the police power. Thus the Texas courts⁸ effectively put an end to zoning in Texas until *Village of Euclid v. Ambler Realty Company*⁹ was decided by the United States Supreme Court in 1926, and the present zoning enabling statutes were passed in 1927.

It was in the *Euclid* case that the United States Supreme Court for the first time passed upon the validity of city zoning. In this case, the Ambler Realty Company owned a tract of 68 acres in Euclid, Ohio, a suburb of Cleveland. In 1922 the village council for the purpose of establishing a comprehensive zoning plan adopted an ordinance which restricted the use of this tract to residential purposes. The realty company complained of the ordinance on the grounds that it was in derogation of the 14th Amendment in that it deprived it of property without due process of law, (the value of the land for commercial uses being $10,000 per acre but only $2500 per acre for residential uses), and that it denied it the equal protection¹⁰ of the laws. The court held that the ordinance infringed no constitutional right. Mr. Justice Sutherland, speaking for the Court, said:

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⁹ 272 U. S. 365 (1926).

¹⁰ It will be observed that the “equal protection” guaranty of the 14th Amendment is at least theoretically violated in the application of all zoning ordinances. The question has never been fully met by any Texas court; however, see Conner v. City of University-
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 the circumstances and conditions. ... Thus, the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, 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 in the locality.

"... If the validity of the legislative classification for zoning purposes be fairly debatable, legislative judgment must be allowed to control."11

The 1927 Statutes

The Euclid case having established as a general proposition that proper city zoning is a valid exercise of police power, the Texas Legislature in 1927 passed enabling statutes specifically empowering 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 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."12 Not only were these statutes specific but also very broad, as can be seen by the inclusion of the term "general welfare." While requiring that "all such regulations shall be uniform for each class or kind of building throughout each district,"13 they also provided that "the regulations in one district may differ from those in other districts."14

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13 Id., Art. 1011b.
14 Ibid.
The enactment sets out purposes, in addition to the promotion of health, morals, etc., which the city legislative bodies shall bear in mind in passing such regulations. This same article prohibits the interference with a nonconforming use existing at the time of the adoption of the zoning ordinance.15

The Validity of the 1927 Statute, in General

Following the passage of these statutes, a large number of municipalities enacted comprehensive zoning ordinances, and under one of the earliest of these the Dallas Court of Civil Appeals in Scott v. Champion Building Company16 upheld Dallas' refusal to issue a permit to erect a filling station on a corner lot in an area zoned as residential. However, the 1927 statute did not receive its first real test until the case of Lombardo v. City of Dallas17 was decided by the Texas Supreme Court in 1934. That case also involved the right of the city to deny a permit to erect a filling station in a residential district. The Court, specifically approving the decision in the Scott case, sustained the city and upheld the zoning statutes of 1927 as "an admissible exercise of that power of the government of Texas known as the police power."18

Chief Justice Cureton, speaking for the court, stated:

"All property is held subject to the valid exercise of the police powers. Nor are regulations unconstitutional merely because they operate as a restraint upon private rights of personal property or will result in loss to rights of personal property or will result in loss to individuals. . . . Moreover, police regulations do not constitute a taking of property under the right of eminent domain; and compensation is not required to be made for such loss as is occasioned by the proper exercise of the police power."19

The court reiterated the general constitutional law rule that regulations adopted under the police power must be based on

15 Id., Art. 1011c.
17 124 Tex. 1, 73 S. W. (2d) 475 (1934).
18 Id. at 3, 73 S. W. (2d) 475, 478.
19 Id. at 4, 73 S. W. (2d) 475, 478.
public necessity, and stated that if such a regulation as that under consideration be enacted avowedly for the protection of the public health and have a real, substantial relation to that object, the courts will not strike it down solely upon grounds of public policy or expediency, as it is not the province of the courts to question the wisdom of municipal ordinances; the courts' authority extends only to holding a statute invalid if it is clearly unconstitutional, and to holding an ordinance void if it is clearly and plainly unreasonable or arbitrary.

A regulation based purely on aesthetic considerations, the court pointed out, would be unreasonable.20 The court also stated that it would "follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise."21

The total effect of the case was to hold that the police power in Texas may properly be extended to the regulation and restriction of the use of urban realty and to regulation of spacing, height and construction of buildings thereon.

Texas Cases, General

Inasmuch as the Lombardo case settled the question of the validity of the Texas zoning statutes and city zoning ordinances in general, most of the litigation since that time has involved amendments and exceptions to local zoning ordinances, particularly exceptions requested and refused. The Texas decisions do not fall easily into well-defined categories; however, a review of selected zoning cases involving different types of situations will serve to illustrate, in a practical light, the attitude of Texas appellate courts toward the zoning problems that most frequently arise.

The court in the Lombardo case took judicial notice that filling stations increase traffic hazards and that "gasoline and other inflammable petroleum products are explosive and constantly men-

20 Id. at 4, 73 S. W. (2d) 475, 479. But there has been an observable tendency, in more recent cases, to give aesthetic considerations more and more weight.
21 Id. at 11, 73 S. W. (2d) 475, 486 (quoting the Euclid case).
ace the safety of persons and property wherever stored or kept for
sale,22 and therefore ruled that the ordinance in question had a
reasonable relationship to the public interest sought to be protected.

In Young v. City of Abilene23 a permit was requested to set up a
cleaning and pressing plant in a residential district. Evidence had
been adduced upon a hearing before the Board of Commissioners
that such plants put off obnoxious odors and create fire hazards
because of the kind of chemicals used. The court observed that the
fact that permits may have been previously issued, as exceptions,
for the establishment of the same type of business within the pro-
hibited area was not alone sufficient to show that the City Commis-
sion had abused its discretion in refusing the permit requested in
this case.24

The court in City of Dallas v. Lively25 upheld the city in denying
a filling station permit on the triangular end of a residential block,
though a number of businesses existed nearby (including a non-
conforming filling station use located diagonally across the street)
and though a jury had found as a matter of fact that the property
was not suitable for residential purposes. Justice Looney rendered
a vigorous dissenting opinion largely based on the almost confisca-
tory loss in value—$12,500 to $500—which the refusal of a per-
mit for commercial use entailed.

Thus it is apparent, in cases in which the exception desired
involves a filling station or any other use employing inflammable
substances, that a very difficult if not impossible task confronts the
disappointed applicant in the courts.

City of West University Place v. Ellis26 was a case which, like
the Lively case, involved a substantial loss in value caused by
refusal to grant an exception, but which, unlike the Lively case,
did not involve a filling station use. Nearby non-conforming uses

22 Id. at 8, 73 S. W. (2d) 475, 482.
24 Id. at 840.
The court, in finding that the ordinance, as applied in this case, was arbitrary and unreasonable, quoted a United States Supreme Court case to the effect that where the loss in value is almost total there must be an exercise of eminent domain and compensation to sustain the restriction. Thus, though loss in value is not controlling, it is at least a factor for consideration.

On the other hand, loss in value to surrounding property has also been taken into consideration by the courts in upholding restrictions. In University Park v. Hoblitzelle a permit was sought for the erection of commercial buildings on two lots in the City of University Park. There were business houses across the street and to the immediate north, and also to the immediate south but across the city boundary in Highland Park. Holding that private interest must yield to the good of the community, the court found that to allow the permit would substantially decrease the market value of the surrounding residential property, as well as create additional traffic hazards; etc.

Luse v. City of Dallas involved two lots in a block which was zoned residential but which lay across the street from two businesses in a block classified commercial. The court upheld the city in denying a permit for commercial use of the two lots saying that such use would result in substantial damage to the value of adjoining and nearby residential property in addition to causing traffic congestion, noise and making the residential area undesirable.

In Texas Consolidated Theaters, Inc. v. Pitillo, the applicant desired an exception to a residential classification for the purpose of establishing a parking lot in the rear of its theater. The Board of Adjustment allowed the exception despite the protest of adjoining property owners. While reversing the Board's ruling on other grounds, the court found that the Board was justified in its con-

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clusion that a denial of the exception would result in substantial detriment to the applicant and that the establishment of the parking lot would not be against the public interest but would, on the contrary, be subservient thereto.

In Conner v. University Park\(^1\) a dentist was denied a permit to make structural changes in his residence for office use although in the same residential district, about two miles away an architect maintained his office in his home. In upholding the city the court found that to allow the requested use would increase the traffic hazard and the opportunity for spread of contagious disease, adversely affect environment, privacy of home life, render the section less desirable for homes and reduce property values.

Another recent Texas case\(^2\) involved a request by a physician for a permit to enlarge his house to include a laboratory and reception room. The ordinance under which the district was zoned permitted one family dwellings together with uses customarily incident thereto when not involving the conduct of a “business.” Although the practice of medicine is not generally considered a “business” and though it is customary in many areas for doctors to practice in their homes, the court held that it was not an abuse of discretion on the part of the Board of Adjustment to deny the permit.

In Edge v. City of Bellaire\(^3\) a property owner had used his house in a district classified residential as a cafe for many years without interference from the city. The city had even issued a permit for the improvement of the house for cafe purposes, though it was later revoked. Nevertheless the court held that no vested right in the cafe use had been created in the property owner and that the city and its citizens cannot be estopped or bound by the unauthorized acts of its officers.


Similarly it has been held that a zoning ordinance may be invoked against one seeking a building permit even though he applied for the permit and filed suit upon its refusal, before the ordinance was passed. Likewise, a landowner who owned property outside a city and had started construction work on it before the city annexed the property and who continued the work after annexation and before a zoning ordinance was passed, was held to have acquired no vested rights in the use.

In *Corpus Christi v. Jones* property was bought for the purpose of establishing an ice manufacturing plant in an area classified commercial. Although there were similar valid non-conforming uses in the same commercial district, the city ordinance specifically provided that such plants could be set up only in manufacturing districts. A permit was secured from a city engineer and an ice plant, including machinery, was actually set up for operation. Nevertheless, the court held the ordinance valid and that it could be enforced by way of an injunction restraining further operation of the plant.

On the other hand in *Amarillo v. Stapf* which was a case involving property located in a “first” manufacturing district, which had been acquired for the purpose of erecting a foundry, whereas the Board of Adjustment determined that foundries could operate only in “second” manufacturing districts, it was held that since other uses not unlike a foundry use were permitted in the “first” district the restriction was unreasonable and arbitrary.

A zoning classification restricting the sale of intoxicating liquor in an area near a public school bears a reasonable relationship to public morals and general welfare.

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It should be noted also that the power of the city to zone cannot override restrictive covenants in existence at the time the zoning ordinance is passed.  

Non-conforming Uses and Extensions Thereof

In compliance with Article 1011c the usual zoning ordinance provides that the lawful use of a building existing at the time the ordinance was passed may be continued although such use does not conform with the ordinance.

With respect to structural changes or enlargement of a non-conforming building use the typical ordinance provides that such building may not be "enlarged, extended, reconstructed or altered unless its use is changed to a use permitted in the district in which such building is located . . . ."  

A recent case on this point is San Angelo v. Boehme Bakery. The bakery was in existence as a non-conforming use in a residential area. The owner desired to extend the building to the rear and side for accessory non-conforming use purposes. The property desired to be taken in by the extension was vacant land owned by the applicant at the time the zoning ordinances were passed. The Supreme Court upheld the Board of Adjustment in its refusal to permit the extension.

The existence within a district of non-conforming uses similar or identical to a use applied for is no basis for a contention of unreasonable discrimination.

Concerning change of use of a building which is non-conforming it is sometimes provided that the use of such building "may be changed to another use of the same or more restricted classification but where such use is changed to a more restricted classification it

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42 City of Corpus Christi Ordinance No. 2266, Art. XXI, § 5 (1948).
43 144 Tex. 281, 190 S. W. (2d) 67 (1945).
shall not thereafter be changed back to a use of a less restricted classification."45

Another typical ordinance provision with respect to the vacancy or temporary discontinuance of a non-conforming use states that if the building is left vacant or its non-conforming use is discarded for one year "it shall not thereafter be occupied except by use which conforms to regulation of the district in which it is located."46 Similarly, some ordinances provide that if a non-conforming building is moved in whole or in part to another location, even on the same lot, it must conform to the regulations of the district in which it is located.47

The right to repair or replace a non-conforming building after partial destruction or obsolescence presents an interesting problem of zoning law. One Texas city ordinance provides:

"A non-conforming use shall not be extended or rebuilt in case of obsolescence or total destruction by fire or other cause. In case of partial destruction . . . not exceeding 50% of its value, the building inspector shall issue a permit for reconstruction. If greater than 50% and less than total, the Board of Adjustment may grant permit for repair after public hearing . . . ."48

In contrast, another city's ordinance provides:

"Nothing in this ordinance shall be taken to prevent the restoration of a building destroyed to the extent of not more than 75% of its reasonable value . . . nor the continued . . . use of such building . . . which existed at the time of such partial destruction."49

Though akin to the question of replacing after total obsolescence, there seems to be no objection to keeping a non-conforming use building in good repair so as to prevent such obsolescence. Commercial signs and billboards existing at the time of passage of a zoning ordinance although non-conforming are often required,

45 City of Corpus Christi Ordinance No. 2266, Art. XXI, § 2 (1948).
46 Id., § 3.
47 Id., § 6.
48 City of Dallas Ordinance No. 4047, Art. 165-19, § 3 (1947).
49 City of Fort Worth Ordinance No. 2082 as amended, § 9 (c) (1940).
by the ordinance, to be removed within a specified time after its passage.\textsuperscript{50}

With respect to the non-conforming use of land, as distinguished from non-conforming use of buildings, some ordinances provide that such use may continue for a limited period only, and that it may not be extended to adjoining property and that when discontinued it shall not be resumed.\textsuperscript{51}

To prevent future non-conforming uses, a number of zoning ordinances now require that when new land is annexed to the city, if any person is in process of erecting a building upon such land and the building is incomplete, no further work shall be done except upon issuance of a permit authorizing the work to be continued.\textsuperscript{52}

In general the city ordinances dealing with non-conforming uses reflect a desire by city planners to eliminate such uses as rapidly as possible, consistent with the statute and constitutional guarantees, in order to achieve the greatest possible degree of city wide uniformity.

\textit{Miscellaneous}

A special problem arises when restrictions are placed upon such uses as public buildings, privately owned public service businesses, schools, churches and similar uses.

There is only one statutory exception to the Texas Zoning Act, namely, buildings for telephone service.\textsuperscript{53} However, the Supreme Court in \textit{City of Sherman v. Simms}\textsuperscript{54} held that the police power could not be extended to restrict the location of churches regardless of the district classification.

Two recent civil appeals cases\textsuperscript{55} have upheld the city in allowing

\textsuperscript{50} The Fort Worth Ordinance requires removal within three years. \textit{Ibid}, § 9 (d).

\textsuperscript{51} See Fort Worth and Corpus Christi zoning ordinances.

\textsuperscript{52} \textit{City of Dallas Ordinance No. 4047, Art. 165-4, § 4 (1947)}.


\textsuperscript{54} \textit{143 Tex. 115, 183 S. W. (2d) 415 (Tex. Comm. App. 1944) opinion adopted.}

\textsuperscript{55} \textit{Taylor v. McLennan County Crippled Home, 206 S. W. (2d) 332 (Tex. Civ. App.}
exceptions to permit the establishment of children’s homes in residential districts. Neither of these cases, however, ruled upon the question of whether it would have been an invalid exercise of police power if the cities had refused the permits.

The highest city zoning classification is usually designated a “single family residence” district, and in addition to residence uses the following additional uses are often allowed in such districts: church (except rescue missions or temporary revivals); school, public or private; public parks, playgrounds, golf courses (except miniature golf courses and driving ranges); public recreation and community buildings and public museums; municipal buildings; non-profit libraries or museums; police and fire stations; public utility installations.66

Some ordinances, however, provide for the issuance of special council permits for drive-in theaters, hospitals, miniature golf courses and driving ranges, nurseries or greenhouses, private clubs, philanthropic or correctional institutions, privately owned and operated parks and playgrounds, radio transmission towers, and temporary commercial amusement enterprises such as circuses.67

Special permit exceptions are also often provided for to allow group housing units, shopping villages, etc.

By allowing them in the highest classification district (i.e., single family residence) many cities exclude from restriction such uses as farming, truck gardening, orchard, nursery or greenhouse uses, provided no wholesale or retail office is maintained on the premises.68

Where an area classification of “C-2” commercial prohibited the sale of beer, it was held that such restriction did not contravene the Texas Liquor Control Act.69

66 City of Corpus Christi Ordinance No. 2266, Art. VI, § 1 (1948).
67 Ibid, Art. XX, § 2.
The zoning statute is no basis for an ordinance prohibiting the erection of a wooden building.\(^{60}\)

The state zoning statutes have no application to an ordinance limiting the use of a public street by establishing parking meters.\(^{61}\)

Finally, it should be noted that federal government agencies or installations are excepted from the provisions of zoning ordinances.\(^{62}\)

**Height and Area Requirements**

Most zoning ordinances include area and height regulations as a part of the district use restrictions. Of course these restrictions must be an integral part of the comprehensive zoning plan and must be designed to promote the public health, safety or general welfare.

The term "area requirements," as generally used, means the distance from front, side and back property lines on which structures, buildings or certain uses may not be placed or made and/or the percentage of land which may be occupied by a structure. Undoubtedly the *Euclid* case set the pattern for the inclusion of such area regulations, which are parts of a comprehensive zoning scheme, within the valid exercise of the police power, and in *Gorieb v. Fox*\(^{63}\) the United States Supreme Court ruled directly on the point, upholding the validity of such regulations.

Where a building permit had been issued for construction of a residence having a frontal set-back of 35 feet and improvements had been made, it was held error to cancel such permit.\(^{64}\)

Building line restrictions are enforceable against structure additions extending into the restricted area.\(^{65}\)

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\(^{62}\) YOKEY, *ZONING LAW AND PRACTICE* (1948).

\(^{63}\) 274 U. S. 603 (1927).


Like use restrictions, such area and height regulations must be reasonable and must apply uniformly to the various classes of property in the various use districts.

One typical area restriction, in which any motorist can see the wisdom, is that which prohibits walls, fences, structures, signs, shrubs, hedges or embankments on corner lots when they interfere with traffic vision.66

II

PROCEDURE

Original Enactment, Repeal and Amendment of City Ordinances

Article 1011d is the source of the cities' authority to put their zoning power into effect:

"The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced and from time to time amended, supplemented or changed."

This article also provides that at least 15 days notice of public hearing, by publication in an official paper, or a paper of general circulation,66 shall be given prior to enactment of such ordinances and that no ordinance shall become effective until interested parties have had an opportunity to be heard.66 Accordingly, it has been held that failure of a City Council to give the proper notice of such public hearing invalidates the ordinance adopted.70 The ordinance proper does not have to define classified areas but may make an attached map, which delineates the zoned areas, a part of it by reference.71

66 City of Dallas Ordinance No 4047, Art. 165-21 § 21 (1947).
68 It has been held a private publication featuring religious and other news is a paper of general circulation within the meaning of the statute. City of Corpus Christi v. Jones, 144 S. W. (2d) 388 (Tex. Civ. App. 1940) writ of error dismissed, judgment correct.
Similar notice and public hearing are required prior to the amendment, modification or repeal of ordinances. While city councils ordinarily enact zoning ordinances by majority vote, the statute provides that if 20% of the property owners in an area in which an ordinance change is proposed, protest the change, the amendment becomes effective only upon a 3/4 majority vote.

Article 1011f provides for the appointment of zoning commissions "to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein..." It further provides that these commissions are to hold public hearings before submitting final reports to the city legislative bodies and that the latter shall not take action until such reports have been received.

Thus, the zoning commission is a purely advisory body. Property owners may petition the commission to hear a request for a change in an existing zoning ordinance, and in the event of a favorable vote by the commission it forwards to the city council a recommendation that the change be made. The administrative procedure by which these petitions may be laid before the zoning commission is a matter of local "ground rules." Whether the commission has authority to make recommendations on its own initiative, without directive from the council or petition from property owners, is an open question, but apparently it may do so.

In 1945 the Legislature enacted Article 1011k which provides that cities having a population of 290,000 which have adopted comprehensive zoning ordinances, may be divided into neighborhood zoning areas, and that a Neighborhood Advisory Zoning Council may be set up in each area to advise the zoning commission and make recommendations upon zoning changes requested in the area. The same rules concerning notice and public hearing

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73 Ibid.
74 Id., Art. 1011f.
75 Ibid.
76 Id., Art. 1011k.
apply to the zoning council, and its recommendations cannot be overruled by the commission except by \( \frac{3}{4} \) vote.

The city council may, on its own motion, change or repeal any zoning regulation, but apparently it is not required to act upon any petition submitted to it. However, by self-imposed regulations some councils must act upon a proposed change, within 90 days, when the owners of 50% of the property within 200 feet of the area in question request such change.\(^7\)

**Permits and Certificates of Occupancy**

The zoning enforcement officer is a city official usually designated city building inspector or commissioner. In this capacity he decides upon the conformity with existing ordinances before issuing building or repair permits or occupancy certificates. He also determines whether a zoning violation exists, and may require proof of property owners that their non-conforming uses existed prior to the enactment of the zoning ordinance.\(^8\)

Permits are generally required for the erection, alteration, moving or enlargement of any building.\(^9\) It is normally required that applications must be accompanied by plans or architects drawings. A permit may be revoked after issuance and prior to completion of construction since no vested right accrues to the permit holder.\(^0\)

Most zoning ordinances require that certificates of occupancy be obtained as a prerequisite to the use of vacant land or of buildings newly erected or altered. It is often provided that no building permit shall be issued unless a certificate of occupancy has also been applied for. Such certificates are issued, of course, only when the use will be in conformity with the zoning regulations.

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77 City of Fort Worth Ordinance No. 2082 as amended, § 24 (1940).
79 City of Corpus Christi Ordinance No. 2266, Art. XIX (1948).
Boards of Adjustment

By statute the municipal legislative body of a city may create a Board of Adjustment and give it the following powers:

1. To make special exceptions to the terms of an ordinance.
2. To authorize such variances from the terms of an ordinance as will not be contrary to the public interest, in order to prevent unnecessary hardship.
3. To determine whether an error has been made by an administrative official in the enforcement of an ordinance.\(^{81}\)

Thus, one of the functions of the Board is to hear appeals from orders of building inspectors or commissioners, such as their orders denying building permits. Appeals may be taken to the Board within "a reasonable time"\(^ {82} \) and the officer whose order is appealed from must transmit all papers in the matter to the Board. The Chairman of the Board may administer oaths and compel attendance of witnesses and any party may appear by attorney. Due notice to the interested parties and public hearing are provided for.\(^ {83} \)

The Board is empowered to "reverse or affirm ... or ... modify the order ... appealed from and ... make such order ... as ought to be made..."\(^ {84} \)

Thus it appears that the Board's functions are administrative, fact finding and quasi-judicial in nature.\(^ {85} \) As a fact finding and quasi-judicial body it determines whether the city official has properly interpreted the zoning ordinance, and as an administrative body (if it decides that the official's decision was wrong) it may issue the proper order.

The statute authorizes the Board to make special exceptions to

\(^{82}\) Ibid.
\(^{83}\) Ibid.
\(^{84}\) Ibid.
\(^{85}\) Because of the quasi-judicial aspect, the Board's orders are not subject to collateral attack. Washington v. City of Dallas, 159 S. W. (2d) 579 (Tex. Civ. App. 1942).
and authorize variances from zoning ordinances to prevent unnecessary hardship. Accordingly, many city ordinances authorize the Board to extend a district where a district boundary cuts through a single lot, to permit, for limited periods, in a residential district a commercial building used in furtherance of residential development, and to permit transitional uses in the case of property abutting on a commercial district, etc. In *City of Amarillo v. Stapf* the court said:

"... we state as our conclusion that the Board of Adjustment...is created primarily for the purpose of varying or modifying zoning regulations in particular cases as the exigencies of justice and the circumstances may require."88

Yet, theoretically, at least, the Board cannot make or amend zoning ordinances, since that is a legislative function and since the Board is not and cannot legally be vested with legislative power.89

Whether the granting of an exception or variance is an act properly within the Board's power or whether it is an invalid usurpation of legislative power is a question about which there is some confusion.

In *Harrington v. Board of Adjustment* the Board allowed an exception by permitting the commercial use of a single corner lot in a residential district. The court found such action to be legislative in nature, hence void. Again, in *Texas Consolidated Theaters v. Pittillo* the Board granted an exception in a residential district by permitting the establishment of an auto parking lot in the rear of a theater. In holding the Board's order invalid the

88 Id at 85, 101 S. W. (2d) 229, 233.
89 "The Board is not permitted to enact legislation. That is the function of the City Council and it cannot be usurped by nor delegated to the Board of Adjustment." Harrington v. Board of Adjustment, 124 S. W. (2d) 401, 404 (Tex. Civ. App. 1939).
court stated that if the Board could authorize a variance to the extent of the use of half a city block for a purpose prohibited by ordinance, then there was "no valid reason why it should not also be empowered upon successive applications to permit the use of one or more blocks in any zoned district for any lawful purposes provided only that it be satisfied from the evidence presented in each successive hearing that the refusal of such application would result in 'unnecessary hardship'..."92

On the other hand, in the recent case of Driskell v. Board of Adjustment93 another court of civil appeals upheld a Board in allowing an exception covering eight blocks in a residential district, for the purpose of establishing a private orphanage. The court held that the Board acted properly in order to prevent unnecessary hardship and that such action was not legislative in nature.

In City of San Angelo v. Boehme Bakery94 the Supreme Court stated that the Board of Adjustment was not lacking in authority to grant a permit for the purpose of adding a garage, boiler room and tool-shed onto a non-conforming commercial building. On this point the court specifically approved the opinion of the Court of Civil Appeals95 which held that the permit desired involved an "exception" which was within the Board's power, rather than a reclassification of property, which, of course, is not. But the Supreme Court has as yet laid down no authoritative yardstick by which to tell when a change in use ceases to be an "exception" and becomes legislative reclassification.

The property owner seeking to obtain an exception to a zoning ordinance faces the following quandry: If, upon denial of a permit by a building inspector, he appeals to the Board of Adjustment and is there granted an exception, and if the city then appeals to the courts, it may be held, as in the Harrington and Pitillo

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92 Id at 399.
94 144 Tex. 281, 190 S. W. (2d) 67 (1945).
cases, that the Board's action was an invalid attempt to legislate. On the other hand, if he goes before the zoning commission, thence to the city council, which is the proper body to grant the change by legislation, and if the council turns him down and he appeals direct to the courts, his appeal may be rejected in that he has failed to exhaust his administrative remedies by appealing to the Board of Adjustment.

The safest procedure, if the desired change involves as much as a city lot, would seem to be to pursue both courses: first attempt to get an ordinance amendment through the legislative body (City Council via zoning commission) and, failing there, apply for a building permit from the building inspector or commissioner, and upon its rejection, appeal to the Board of Adjustment for an exception.

**Appeal to the Courts**

The only method of appeal from the ruling of a Board of Adjustment is by certiorari. It is provided by statute that "any person . . . taxpayer . . . officer, department, board or bureau of the municipality"\(^9\) may present to the district court\(^9\) within ten days a petition setting forth that a decision of the Board is illegal and why. Upon presentation of the petition the court may issue a writ of certiorari to review the decision of the Board. The court sets out the time, not less than ten days, within which the return must be made by the Board. This return must set forth such facts as are material to show the grounds of the Board's decision. The court may take evidence or it may appoint a referee to take evidence and report the same with findings of fact and conclusions of law.\(^9\)

It has been held that the only question which may be raised by


\(^9\) “Since jurisdiction is not conferred upon any particular court, it follows that under the provisions of Art. 1909 R. S. 1925, the district court is the proper tribunal in which to institute the proceeding.” City of San Angelo v. Boehme Bakery, 144 Tex. 281, 283, 190 S. W. (2d) 67, 70 (1945).

a petition to the court is the "legality of the board's order." Whether the board's order is "legal" is, in most instances, a question of whether or not the Board has abused its discretion in arriving at its decision. The court cannot substitute its discretion for that of the Board, but whether there has been an abuse of discretion is a question of law, and a "very clear showing" of such abuse must be found in order to overturn the board's ruling.

A heavy burden thus rests upon a petitioner seeking to show abuse of discretion by the board. In the *Boehme Bakery* case the trial court found that the evidence was overwhelmingly in favor of granting the requested permit, yet it also found that the evidence did not show that the board acted arbitrarily, fraudulently or capriciously in denying the permit. The Supreme Court held that these findings were in no sense conflicting.

There is another method of reaching the courts in a zoning case, in addition to certiorari to the Board of Adjustment, and that is by direct attack, in a proper case, upon the constitutionality of the ordinance itself. In *City of Amarillo v. Staff* it was stated:

"The question of whether or not an ordinance prohibiting the construction of a particular kind of building or preventing a particular kind of use, at a particular location, is unreasonable, arbitrary or discriminatory, is a question peculiarly within the province of the courts. An owner of property is entitled to direct access to the courts for the purpose of litigating such questions, regardless of whether the zoning ordinance has made provision therefor or not."

A presumption exists that the ordinance passed by the city legislative body is valid. Even though "it should appear that a classification made is of doubtful validity, yet a court cannot substitute its judgment for that of the legislative body..."
Among the decisions in this state there appears an uncertainty as to the province of the jury in zoning cases. In the case of Barrington v. City of Sherman the trial court gave a peremptory instruction to the jury to find for the defendant city, which had not offered any evidence. The Civil Appeals Court reversed and remanded, holding that an issue as to the existence of a de facto business area and the reasonableness of the ordinance should have been submitted to the jury. Chief Justice Bond, in this case, varying from the reasoning of the majority opinion, contended that the reasonableness of an ordinance is a question for the court to "determine as a matter of law and not for jury verdicts."

In the case of City of Dallas vs. Lively, where a jury found that the classification was unreasonable and arbitrary, the court, in reversing and rendering, held that, since the presumption of validity is in favor of the city and the courts must so find if there are issuable facts, and the submission of a matter to a jury is of itself the concession of an issuable fact and in turn effects the presumption.

In an earlier Texas Supreme Court case, the court in speaking of ordinances and the question generally, held that in such cases the court can only determine as to the validity or the invalidity of the ordinance when the facts upon which the question depends are established, and if they are in dispute, they are to be determined as other matters of fact.

Right to Appeal

In a very recent case it was held that a Board of Adjustment has an appealable interest from an adverse ruling of the trial court. The Supreme Court stated:

104 Ibid.
"Under other statutes, where essentially the same kind of review is authorized, the right of a board or commission to appeal from judgments nullifying its orders has apparently never been questioned... the review authorized by Art. 1011g... is not essentially different in nature from the review contemplated by the other statutes we have referred to... In proceedings of this kind, the board represents the public interest in the proper enforcement of the particular law or regulation involved. In zoning cases, the public is properly interested in the granting or withholding of permits for non-conforming uses."

The same case held that as a governmental agency, a board of adjustment does not have to file an appeal bond.

**Enforcement**

Zoning ordinances generally provide for their enforcement by the city manager or other officer and assess penalties for violations. Such a penal provision was upheld by the Court of Criminal Appeals in *Ex parte Hobbs.* In that case the appellant had been convicted and fined for violation of the Fort Worth Zoning Ordinance. Upon default of payment of the fine he was arrested and taken into custody. In seeking his release through writ of habeas corpus he attacked the validity of the penal provision of the ordinance on the grounds that the zoning statute under which the ordinance was passed did not authorize the passage of a penal provision, and further that any such penal ordinance was void as class legislation in that each city in the state could fix a different punishment for the same act. The court, overruling both contentions, stated that the penal provision of the ordinance in question was necessary and incident to the full accomplishment of the purpose of the statute, and that since the ordinance applied only to the city and since no other person or class outside of that city was affected, the ordinance was not class legislation, hence not subject to the claimed constitutional invalidity.

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108 Ibid.
109 See City of Fort Worth Ordinance No. 2082 as amended, § 26 (1940) which provides fines of $5 to $50 for violations each day that such violations continue constituting a separate offense.
CONCLUSIONS

The original zoning of a municipality, as well as subsequent revisions and expansions of the zoning plan, should be undertaken only after thorough investigation and expert analysis of the present and probable future needs of the city community. All too often ordinances have been adopted without sufficient study, or forethought, and this has inevitably resulted in uneconomic utilization of valuable property, inconvenience to the inhabitants generally and cases of real hardship to individuals, much of which could have been avoided by the adoption of a logical, comprehensive well thought-out plan.

Once a comprehensive plan is established, reclassification of certain small areas will usually be necessary to meet the peculiar needs of the particular city, but this "spot zoning," so called, should be done with extreme caution and only after full consideration of the economic and social consequences to the surrounding areas which will probably result.

As the urban communities of this state continue to grow and the problem of zoning becomes more and more vital, consideration should be given to the desirability of placing the Zoning Commissions and Boards of Adjustment on a civil service basis. Giving all due credit to the public spirited citizens who generously contribute their time and efforts to these bodies, there can be no doubt that full time, technically expert, professional engineers and planners would function with greater efficiency and that better zoning would result.

Of more immediate and practical concern to lawyers is the problem of working with the zoning set-ups in existence at the present. In this regard, the first and perhaps most important lesson to be learned is that once a zoning matter has been determined by the city, it is seldom set aside. That lesson, of course, counsels the attorney to go "all out" to win his case in the city.

As noted herein, there are a number of points of both the substantive and procedural law of zoning that are in need of clari-
fication; a number of others have not yet been judicially interpreted in this jurisdiction.

It goes without saying that attorneys who represent owners or purchasers of city property or land which may some day be annexed to the city, should familiarize themselves with the prevailing zoning ordinances and keep abreast of the changes and amendments thereto.

There can be no doubt that zoning will be a permanent factor in future city development and a matter of very real concern to every urban property owner, yet most city inhabitants are partially if not totally ignorant of the terms and interpretation of their ordinances and the reasons behind their zoning laws. Therefore it is suggested that cities operating under comprehensive zoning schemes would do well to incorporate as an integral part of their zoning programs a public "zoning education" program. An enlightened and understanding citizenry would not only minimize day-to-day zoning difficulty, but the public interest created should also result in the over-all improvement of zoning methods and planning in general.
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