

Legal Q&A

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Q. What is zoning?

A. Zoning is the division of a city into districts and prescribing regulations for each district. The purpose of zoning is to promote the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance. Tex. Loc. Gov't Code § 211.001. Usually, a city that implements zoning is divided into residential, commercial, industrial, and agricultural districts. Within these districts, the city may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land. *Id.* § 211.005(a). Each district can be regulated differently, but the regulations must be uniform within that district. *Id.* § 211.005(b).

Q. What may a city regulate thorough zoning?

A. Zoning may regulate:

- 1) the height, number of stories, and size of buildings and other structures;
- 2) the percentages of a lot that may be occupied;
- 3) the size of yards, courts, and other open spaces;
- 4) population density;
- 5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
- 6) the pumping, extraction, and use of groundwater by persons other than retail public utilities, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.

Id. § 211.003(a); *see* Tex. Water Code § 13.002 (definition of retail public utilities).

Q. What is a comprehensive plan?

A. A comprehensive plan is a plan adopted by a city for the purpose of promoting sound development of a city and public health, safety, and welfare. Tex. Loc. Gov't Code § 213.001. A city may adopt a comprehensive plan for the long-range development of the city and may define the content and design of that plan. *Id.* § 213.002(a). The comprehensive plan may:

- 1) include, but is not limited to, provisions on land use, transportation, and public facilities;
- 2) consist of a single plan or a coordinated set of plans organized by subject; and geographic area; and
- 3) be used to coordinate and guide the establishment of development regulations.

Id. § 213.002(b).

Q. What is the relationship between a city's comprehensive plan and zoning regulations?

A. Zoning regulations must be adopted in accordance with a city's comprehensive plan and must be designed to:

- 1) lessen congestion in the streets;
- 2) secure safety from fire, panic, and other dangers;
- 3) promote health and the general welfare;
- 4) provide adequate light and air;
- 5) prevent the overcrowding of land;
- 6) avoid undue concentration of population; or
- 7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

Id. § 211.004.

Q. Is a city required to establish a zoning commission?

A. A home rule city is required to establish a zoning commission in order to exercise any zoning regulation authority. However, a general-law city is not required to establish a zoning commission. *Id.* § 211.007(a). The city council of a general-law city can serve as the zoning commission. *Id.* § 211.007(e).

Q. What procedure must a city follow to adopt or amend zoning regulations?

A. In order for a city to adopt and amend zoning regulations, a city is required to have public hearings before the zoning commission and the city council. Notice of the time and place of the public hearing must be published in the city's official newspaper or a newspaper of general circulation in the city before the 15th day before the date of the hearing. *Id.* § 211.006(a). Also, written notice of the zoning commission's public hearing

must be sent to each owner of real property within 200 feet of the property on which a change is proposed. This written notice must be sent before the 10th day before the hearing date. *Id.* § 211.007(c). If a general-law city does not have a zoning commission, that city council is also required to send the above written notice. *Id.* § 211.006(b). Also, the zoning commission must comply with the Open Meetings Act. *Id.* § 211.0075.

The zoning commission is required to make a preliminary report, hold the public hearing, and submit a final report to the city council. *Id.* § 211.007(b). The city council must receive the zoning commission's final report before the city council can hold a public hearing on the zoning regulation. *Id.* Generally, the city council needs a simple majority of the council to approve the final report of the zoning commission. However, the city can adopt an ordinance that would require an affirmative vote of at least three-fourths majority of the city council in order to overrule a recommendation of the zoning commission. *Id.* § 211.006(f). Also, if the city council receives a written protest signed by the owners of at least 20% of either: a) the area of the lots or land covered by the proposed change; or b) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area; then the city council's vote has to be at least a three-fourth majority to approve the change. *Id.* § 211.006(d).

Q. What is a restrictive covenant?

A. Restrictive covenants are sometimes called "deed restrictions." They are essentially a restriction on the use of land so that the value and enjoyment of adjoining land will be preserved, and often contain restrictions on the use of property for certain purposes and other lawful restrictions. According to state law, a restrictive covenant is any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative. Tex. Prop. Code §§ 202.001(4), 209.002(11). Restrictive covenants are liberally construed to give effect to its purpose and intent. *Id.* § 202.003(a).

Q. Who enforces restrictive covenants?

A. Generally, property owners associations (POAs) have discretionary authority to enforce restrictive covenants. *Id.* § 202.004. Their discretionary authority is presumed reasonable unless a court determines the exercise of discretionary was arbitrary, capricious, or discriminatory. POAs have the ability to initiate, defend, or intervene in litigation or administrative proceedings that affect the enforcement of restrictive covenants or the protection, preservation or operation of property covered by the

dedicatory instrument. *See id.* §§ 202.001(1), 209.002(4) (definition of dedicatory instrument). Certain cities that take certain steps can also enforce restrictive covenants. (See below.)

Q. What is a property owners association?

A. A property owners association (POA) is an incorporated or unincorporated association owned by, or whose members consist primarily of, the owners of the property covered by the dedicatory instrument and through which the owners, or board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development. Tex. Prop. Code § 202.001(2). However, the property owners associations that govern most subdivisions within a city are covered by Chapter 209 of the Texas Property Code and are defined as an incorporated or unincorporated association that:

- is designated as the representative of the owners of property in a residential subdivision;
- has a membership primarily consisting of the owners of the property covers by the dedicatory instrument for the residential subdivision; and
- manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision. *Id.* § 209.002(7).

Q. Is there a difference between POAs and home owners associations (HOA)?

A. Generally, POAs encompasses home owners association and condominium owners association. *See id.* § 202.001(2). HOA usually refers to a POA in a planned community that does not have condominiums, membership is mandatory, and the association collects regular or special assessments on all or a majority of the property in the subdivision. *See id.* § 209.003.

Q. Does a city have authority to enforce restrictive covenants?

A. Only two types of cities have the ability to enforce restrictive covenants: 1) a city with a population of 1.5 million or more; or 2) a city that does not have zoning ordinances. Tex. Loc. Gov't Code § 212.151. Both types of cities have to pass an ordinance that requires uniform application and enforcement of restrictions with regard to all property and residents. *Id.* § 212.156. Restrictions are defined as land-use regulations that:

- 1) affects the character of the use to which real property may be put;
- 2) fixes the distance that a structure must be set back from the property lines, street lines or lot lines;

- 3) affects the lot size, or the size, type, and number of structures which may be built on the lot;
- 4) regulates or restricts the type of activities that may take place on the property;
- 5) regulated architectural features of a structure, construction of fences, landscaping, garbage disposal, or noise levels; or
- 6) specifies the type of maintenance that must be performed on a lot or structure.

Id. § 212.152. Also, these cities may sue in court to enjoin or abate a violation of a restriction contained or incorporated by reference in a properly recorded plan, plat, or other instrument that affects a subdivision on the city limits. *Id.* § 212.153(a). However, if the subdivision has a POA with the authority to enforce a restriction and files a suit to enforce that restriction, then the city may not initiate or maintain such a suit. *Id.* § 212.153(b).

Cities that have adopted a zoning ordinance do not have the authority to enforce restrictive covenants.

Q. What is the relationship between a restrictive covenant and a city's zoning ordinance?

A. A restrictive covenant and a zoning ordinance can both be imposed on private property. Usually, restrictive covenants are said to “run with the land”; meaning the covenants and the property are inseparable and all subsequent owners of the property are subject to them. On the other hand, zoning ordinances are created for the general welfare of the community. However, a zoning ordinance cannot override a restrictive covenant. *Farmer v. Thompson*, 289 S.W.2d 351 (Tex. Civ. App. — Fort Worth 1956, rev. denied); *City of Gateville v. Powell*, 500 S.W.2d 581 (Tex. Civ. App. — Fort Worth 1973, rev. denied). If there is a conflict between a restrictive covenant and a zoning ordinance, the general rule is that the more restrictive one will prevail as to the owner's use of the property. *Id.*