

Permitting Paralysis

Land Use Approvals in the Houston Area



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Although Texas, and in particular, Houston, celebrates a reputation as an entrepreneur's dreamland, we have a consistently increasing body of land use and development regulation. Densification brings growing pains in the form of land use conflicts and, in many cases, results in more regulation, both public and private. Development in metro Houston is regulated by more sophisticated land use controls than many realize. The persistent rumor that the City of Houston's lack of formal zoning codes results in a lax regulatory environment inside the City and around the metro Houston area creates false expectations for developers. Developers neglecting to do their homework experience problems in the form of delay, cost and unexpected limitations on their projects.



Does Houston actually have zoning?

Houston has limited forms of both actual zoning districts, as well as districts that operate just like zoning districts where increased land use regulations apply based on geographic location:

- Airport zoning
- St. George's Place TIRZ zoning
- Historic Districts
- Minimum Lot Size/Setback Districts
- Special Parking Areas
- Major Activity Centers

These districts look and operate virtually identically to zoning districts in zoned cities. Within these zones and districts, development is significantly restricted, often in a way that is similar to traditional zoning. Furthermore, developers confront a variety of regulations typically found in zoning ordinances: lot size, setback, open space, parking, signage, traffic, drainage. These regulations are often enforced through the subdivision platting process and the permitting process. Several regulations apply not only within Houston's boundaries, but within its extraterritorial jurisdiction as well, which extends 5 miles into unincorporated areas. Many land uses are geographically restricted by forced separation by the City of Houston by a specified distance from certain sensitive uses such as residences, churches, school, day care, libraries, etc. hotels, businesses that serve alcohol, facilities containing hazardous materials such as high-piled storage, sexually-oriented businesses, cell towers, and many other uses.

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Over 50 cities in the metro Houston area have formal zoning codes, including:

- Memorial Villages
- Bellaire/West U./Southside Pl.
- Bay Area communities
- Baytown/Mt. Belvieu
- Katy/Fulshear
- Pearland/Friendswood/Manvel
- Sugar Land/Missouri City/Stafford/Richmond

Within these cities, developers fight the same zoning battles as the rest of the country against constantly revamped and increasingly sophisticated regulations. Rezonings take time, often several months, and developing in these areas without proper due diligence and accessible expertise is fraught with peril.

What can the neighborhood do about it?

As Houston densifies, neighborhood opposition to development of all type increases, even if the City issues all required permits. Townhouses, apartments, industrial expansions, large towers, even churches and schools have been targeted by organized, often aggressive opposition. The underlying objections run the gamut from aesthetics to noise, to light pollution, to diminution of value, to even outright prejudice. Consider the controversies surrounding the Ashby High Rise, the White Oak Music Hall, the Fountainview Low Income Housing Project, and many others. Neighbors sued the developers of the Ashby High Rise and the White Oak Music Hall alleging common law nuisance. The Ashby case was resolved in favor of the developer. The Music Hall case is pending. Another opposition tactic involves invoking regulatory authorities on real and alleged non-compliance with local ordinances. Recently, the City of Houston's noise ordinance was brought down against the Music Hall. Neighborhood opposition sometimes results in reactive regulations designed to prevent the battles that have just been fought, which may produce problems for the next developer, even if the regulation will not stop the current one.



What's this about the City of Houston enforcing private deed restrictions?

Houston enforces, through its legal department, private deed restrictions for the following issues:

- Use
- Setback
- Lot size
- Size, type and number of structures per lot
- Building orientation
- Fences

This is unheard of in zoned cities. In effect, Houston has adopted the private land use limitations in deed-restricted areas as part of Houston's own regulatory scheme. However, the City Council does not have the opportunity to create these rules, rather the neighborhood does, and then the City legal department enforces them. As the neighborhood amends the rules, the City enforces the amended rules. As a result, regulations are constantly subject to change.

What are Exactions and how are they limited?

Developers often bear significant infrastructure costs in the form of dedication of public easements, the construction of public infrastructure, or the payment of fees in lieu thereof. These requirements are called exactions. Typical examples include water, sewer, drainage, roads. The legal concept of rough proportionality provides that governments cannot require a developer to pay more than their fair share of infrastructure costs when measured in proportion to the impact of their development. Sometimes, governments demand excessive exactions. Whether the exactions exceed the rough proportionality standard is a legal question with an engineering underpinning. Developers should avail themselves of experts and consultants versed in these issues prior to abandoning a project faced with an excessive infrastructure bill.

What are Vested Rights?

Governments, by law, must approve all permits, plats, and other regulatory approvals for a project that comply with the government's development rules in effect at the time the first application for the project is submitted. This simple and powerful principle protects new development from uncertainty that comes from constantly changing rules. Several exceptions exist, in particularly for zoning codes, so consult with knowledgeable counsel.

Regulatory Opportunities exist:

- Certain performance standards may be lower requirements
- Variances or special exceptions may lower requirements
- Special parking areas may modify off-street parking standards
- Streets and easements may be abandoned to increase options for assembling parcels
- Economic development tools may incentivize desired development such as tax-increment funding, Chapter 380 development incentives, tax abatements, and others

How can these issues be identified before development commences?

Outside Houston, due diligence routinely involves a study of the zoning/land use regulations, by lawyers/consultants versed in the local regulatory scheme. This level of due diligence is quickly becoming the norm in metro Houston.

The mix of formal zoning along with land use controls closely resembling formal zoning makes metro Houston a unique and somewhat complicated place for development. Familiarity with these regulations prevents problems, efficiently secures required approvals, makes accessible available incentives and generally streamlines the development process. ●

Property tax reform update: SB 2 advances to Senate floor

By Brandi Smith

After a more than 10-hour debate, the Texas Senate Finance Committee voted 9-5 to approve Senate Bill 2, the Property Tax Reform and Relief Act, which means it will now move to the full Senate for consideration.

Sen. Paul Bettencourt, a Houston Republican, sponsored the bill after hearing from frustrated property owners all over the state last year. As a member of the Senate Select Committee on Property Tax Reform and Relief, Bettencourt and other state leaders visited seven cities and heard testimony from 321 witnesses. Many, he said, were concerned about double-digit increases in their property's appraised value each year.

SB 2, which is also sponsored by Sens. Charles Creighton, Kelly Hancock, Nicholas Taylor, Bob Hall and Donald Huffines, would create a property tax administration advisory board at the state Comptroller's office that will oversee the county appraisal districts.

"Different districts can have completely different attitudes. There's no place to complain about appraisal review board members or about operations in the districts," Bettencourt told REDNews in January. "You can complain to the licensing board about somebody's license, but you can't complain how you were treated or how you were treated differently from one county to the next."

The bill would also require voters to approve any property tax increase more than 4 percent. The limit is currently 8 percent.

Though Bettencourt introduced the bill on Nov. 29, 2016, its first hearing was on March 14. Some municipal leaders, including Fort Worth's mayor, spoke in opposition. Betsy Price told the committee that SB 2 would limit local officials. However, other organizations, such as the Greater Houston Partnership, have thrown support behind SB 2.

"In a hearing that lasted over ten hours, we heard from frustrated taxpayers that came to the Capitol on their own nickel to testify on the importance of SB 2," said Bettencourt. "I have never been more proud of regular Texans coming to the Capitol to speak up for all those who couldn't be there!"

A similar bill is under consideration in the Texas House of Representatives. House Bill 15, the Property Tax Payer Empowerment Act of 2017, is being considered by the House Ways & Means Committee. It has not yet been scheduled for a hearing.

REDNews will keep you updated on any developments for SB 2 and HB 15.