CAUSE NO. D-1-GN-19-008617

FRANCISCA ACUÑA; SUSANA ALMANZA; JEFFERY L. BOWEN; WILLIAM BURKHARDT; ALECIA M. COOPER; ROGER FALK; SETH O. FOWLER; RANDY HOWARD; MARY INGLE; PATRICIA KING; FRED I. LEWIS; BARBARA MCARTHUR; ALLAN E. MCMURTRY; LAURENCE MILLER; GILBERT RIVERA; JANE RIVERA; JOHN UMPHRESS; JAMES VALADEZ; and ED WENDLER, JR. *PLAINTIFFS,*	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
THE CITY OF AUSTIN; THE CITY COUNCIL OF AUSTIN; THE HONORABLE AUSTIN MAYOR STEVE ADLER, IN HIS OFFICIAL CAPACITY; THE HONORABLE AUSTIN CITY COUNCIL MEMBERS NATASHA HARPER-MADISON, DELIA GARZA, SABINO RENTERIA, GREGORIO CASAR, ANN KITCHEN, JIMMY FLANNIGAN, LESLIE POOL, PAIGE ELLIS, KATHIE TOVO, AND ALISON ALTER, IN THEIR OFFICIAL CAPACITIES; AND THE HONORABLE AUSTIN CITY MANAGER, SPENCER CRONK, IN HIS OFFICIAL CAPACITY, *DEFENDANTS*	§	201st JUDICIAL DISTRICT

PLAINTIFFS' BRIEF IN SUPPORT OF ORIGINAL PETITION, APPLICATION FOR INJUNCTIVE RELIEF, AND REQUEST FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs and submit this Brief in Support of Original Petition, Application for Injunctive Relief, and Request for Declaratory Judgment, and would respectfully show as

follows:

I.

INTRODUCTION

The City of Austin ("City") has violated two statutory requirements in its effort to adopt changes in zoning regulations, boundaries, and classifications that affect most property within the City. These state-mandated procedures are required for the City to exercise its zoning authority under Chapter 211 of the Texas Local Government Code. Therefore, its actions as to the Land Development Code Revision are void.

The City terminated its prior efforts to enact CodeNEXT on August 9, 2018. The City began a new process in early 2019 to adopt a revision of the land development code and zoning maps, which it calls the "Land Development Code Revision" (hereinafter "LDC Revision"). The LDC Revision, officially proposed on October 4, 2019, cannot be legally adopted due to the two statutory violations.

A. Failure to give statutory notice

The Austin Planning Commission held its statutorily required public hearings on the proposed LDC Revision between October 26, 2029, and November 12, 2019, but in all cases failed to provide the mandatory statutory notice of the public hearing required by Local Government Code § 211.007(c):

> "Before the 10th day before the hearing date, *written notice* of each public hearing before the zoning commission on a proposed change in zoning classification *shall be sent to each owner*, as indicated by the most recently approved municipal tax roll, of real property within 200 feet of the property on which the change in classification is proposed."

(Emphasis added).

The City provided no written notice by mail or otherwise on the LDC Revision before the 10th day prior to the Planning Commission's public hearings on October 26, 2019, November 12, 2019, or any subsequent hearings.[1] Pursuant to a long line of Texas precedent, that failure to give notice deprives the City Council of jurisdiction to even hold a hearing on the LDC Revision. By letter dated November 19, 2019, counsel for the Plaintiffs alerted the City to its failure to provide proper notice.[2]

Nor did the City follow an alternative notice procedure allowed when there is a joint Planning Commission and City Council hearing pursuant to Texas Local Government Code § 211.007(b),(d). Pursuant to a long line of Texas precedent, that failure to give notice deprives the City Council of jurisdiction to even hold a hearing on the LDC Revision.

The lack of proper notice renders the December 9-11th City Council hearings (resulting in the Council's vote on first reading) and any subsequent City Council hearing or action (including the February 13, 2020, vote on second reading) void. *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962) (failure to provide statutory notice renders council's zoning change invalid).

B. <u>Refusal to recognize statutory protest rights</u>

Texas Local Government Code § 211.006(d) plainly states that if property owners timely submit written protests, then "a proposed [zoning] change to a regulation or boundary" cannot "take effect" without a three-fourths super-majority vote of the entire Council:

> "If a proposed change to a regulation or boundary is protested in accordance with this subsection, the proposed change must receive, in order to take effect, the affirmative vote of at least three-fourths of all members of the governing body. The protest must be written and signed by the owners of at least 20 percent of either:

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[1] *See* Joint Stipulations of Fact No. 40: "The City of Austin did not provide individual, written notice from the Planning Commission to the Plaintiffs or any individual property owners of a proposed change in the zoning classification on their property or nearby property by the LDC Revision."

[2] *See* Joint Trial Exhibit No. 35.

> (1) the area of the lots or land covered by the proposed change; or
> (2) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area."

For over two years, the City has repeatedly stated it will disregard any landowner protests of zoning changes under a comprehensive revision of its land development code. Further, the City has engaged in a misinformation campaign, repeatedly telling Austin landowners that they have no right to protest the anticipated zoning changes.

Local Government Code § 211.006(d) plainly states that if written protests are filed, the zoning changes cannot be adopted without a super-majority vote of the entire council—9 out of the 11 City Council members. Any zoning ordinance passed in violation of § 211.006(d) will be void.

II.

BACKGROUND FACTS

On October 4, 2019, the City of Austin released the first draft of its proposed LDC Revision, which changes the zoning regulations, zoning classifications, and zoning district boundaries for most, but not all, of the property in the City of Austin.[3] Plaintiffs are property owners who have protested the proposed zoning changes to their property and/or property with zoning changes within 200 feet of their property.[4]

The City of Austin has stated repeatedly in public memoranda, orally at public hearings, to the media and to the public that it refuses to recognize any state statutory protest rights and will not require a super-majority vote of Council to change Plaintiffs' zoning under the LDC Revision.

[3] *See* Joint Stipulations of Fact No. 31.
[4] *See* Joint Stipulations of Fact Nos. 32 and 33.

In *The Austin Monitor*, "Can You Protest Changes To Your Property Under The Land Code Rewrite? City Says No," Audrey McGlinchy (October 28, 2019), the City repeated its opposition to recognizing protest rights: " 'Zoning protests may not be used to protest broad legislative amendments,' then-Assistant City Attorney Brent Lloyd wrote in a memorandum to the Mayor and Council members on June 15, 2018. 'This includes comprehensive revisions, like CodeNEXT, and amendments to general development standards applicable citywide or throughout one or more zoning districts.'"[5] That same reasoning also has appeared in two memoranda written in 2019 by Mitzi Cotton of the City's Law Department. Her October 24, 2019, City Legal Department memorandum was widely sent to the Mayor, City Manager, Council staff, and media, stating unequivocally:

> "Therefore, zoning protests, such as those citing Texas Local Government Code Section 211.006, may not be used to trigger a super-majority vote on broad legislative amendments, including comprehensive revisions such as the revision of the Land Development Code."[6]

The City has determined that it will approve protested zoning changes with only a simple majority of the Council and will not recognize the super-majority vote requirement of Section 211.006 for property or nearby property owners' valid protest rights petition. The City's LDC Revision website also states definitively in its "Frequently Asked Questions" section that property owners have no protest rights:

> "Question: As a property owner, may I file a protest to the zoning changes being proposed under the Land Development Code Revision, as I could with a standard zoning change in my area?
>
> Answer: No, zoning protests may not be used to protest broad legislative amendments, including comprehensive revisions such as the revision of the entire Land Development Code."[7]

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[5] *See* Joint Stipulations of Fact No. 35.
[6] See Joint Stipulations of Fact No. 38.
[7] *See* Joint Stipulations of Fact Nos. 35, 36, and 39.

Following the Legal Department's position, the City Council voted (7-4) on December 10, 2019, to reject an amendment to recognize protest rights by property owners as to the LDC Revision.[8] In addition, the City Council voted (7-4) that same day to reject an amendment that would delay finalizing the zoning changes of properties under the LDC Revision until: 1) a court has entered a final order on protest rights; and 2) if a court ruling were to recognize protest rights, to extend the deadline for filing protests (because of the City's misleading, incorrect statements on protest rights).[9]

The City of Austin's written public memoranda, the City Council's votes on amendments described above, public statements, and media statements clearly demonstrate that the City of Austin will not recognize Austin property owners' statutory protest rights. These repeated City declarations have misled some property owners and are chilling some Austin property owners from filing their protest rights petitions. These owners wish to protest their properties from having a change in zoning under state law, Section 211.006, but are relying in good faith on the City's erroneous legal position on protest rights. These property owners may lose their protest rights if they fail to file their valid protest rights petitions before the Council adopts the maps changing the zoning of their property, undermining their statutory protest rights because of the City's misinformation.

Brief History of Zoning

Zoning, generally, is the regulation of land use in a city. Zoning as a concept arose in the early 1900s in the industrialized northeast of the country. A zoning ordinance in New York City in 1916 is considered the genesis of the zoning movement. In 1921, then Secretary of Commerce,

[8] *See* Joint Stipulations of Fact Nos. 46 and 47.
[9] See Joint Stipulations of Fact No. 48.

Herbert Hoover, appointed a national committee that prepared the Standard State Zoning Enabling Act ("Standard Act"). *See* Attachment "A," hereto. The Standard Act was promptly adopted, with some variation, by all states. Texas adopted the Standard Act verbatim in 1927. The landmark case in the United States Supreme Court, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), validated the Standard Act and zoning as an appropriate exercise of municipal power.

The Texas Supreme Court upheld the Dallas comprehensive zoning ordinance and the Texas Zoning Enabling Act of 1927 in *Lombardo v. City of Dallas*, 47 S.W.2d 495 (Tex. Civ. App.—Dallas 1932) *aff'd*, 124 Tex. 1, 73 S.W.2d 475 (Tex. 1934).

Cities in Texas derive the power to zone from Chapter 211 of the Texas Local Government Code, the non-substantive recodification of the 1927 enabling act. *See City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

Strict Compliance Required

In exercising its zoning power, the City of Austin must strictly comply with all state-mandated procedures. Authority to zone is contained in Texas Local Government Code, Chapter 211, titled Municipal Zoning Authority. "The statutes empowering cities to regulate the use of property within their boundaries, and setting out the procedure therefor and for the enforcement of the relevant ordinances are Articles 1011a to 1011j [predecessor to Chapter 211],[10] inclusive." *Appolo Development, Inc. v. City of Garland*, 476 S.W.2d 365, 366 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). *See also Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962); *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). Section 211.003(a) provides cities with their authority to promulgate zoning regulations: "The governing body of a municipality may regulate: (1) the height, number of stories, and size of buildings and

[10] *See* Attachment "B," hereto, Articles 1011a-1011j.

other structures; (2) the percentage 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…" Section 211.005(a) provides the authority for cities to establish zoning districts and determine zoning boundaries: "The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter…"

Chapter 211's authority for cities to zone expressly applies to *all* acts of zoning, including amendments, repeals, or any other changes. "A reference in this subchapter to the adoption of a zoning regulation or a zoning district boundary includes the *amendment, repeal, or other change of a regulation or boundary*." *See* § 211.002 (emphasis added). "These requirements of the statute must be complied with in detail and each must be rigidly performed. They are necessary to the validity of all zoning ordinances, whether amendatory, temporary or emergency." *Appolo Development, Inc. v. City of Garland*, 476 S.W.2d 365, 367 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

Sections 211.006 and 211.007 prescribe the procedures cities must follow to exercise their zoning authority, requiring cities to enact local zoning procedures as well as to adhere to the state-required procedures. Subsection 211.006(a) provides that cities must prescribe procedures to exercise their zoning authority to adopt and enforce zoning regulations and boundaries: "The governing body of a municipality wishing to exercise the authority relating to zoning regulations and zoning district boundaries shall establish procedures for adopting and enforcing the regulations and boundaries." Section 211.006(d) mandates that protest rights are a state-required procedure for any zoning change to take effect: "if a proposed change to a regulation or boundary is protested in accordance with this subsection, the proposed change must receive, *in order to take effect*, the

affirmative vote of at least three-fourths of all members of the governing body." (Emphasis added). Section 211.007 requires a zoning commission for home-rule cities, public hearings on preliminary reports prior to submitting a final report, as well as notice of those hearings.

Texas courts have held repeatedly that for cities to zone they must follow strictly and completely each prescribed procedural step for zoning, including notice, public hearings, final reports, and protest rights, or their zoning is invalid. The Texas Supreme Court held in *Bolton v. Sparks* that, "Each act required [under Chapter 211] is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed." *Bolton v. Sparks*, 362 S.W.2d 946 (Tex. 1962). *See also Haynes v. City of Quanah*, 610 S.W.2d 842 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); *Truman v. Irwin*, 488 S.W.2d 907 (Tex. Civ. App.—Fort Worth 1972, no writ); *Appolo Development, Inc. v. City of Garland*, 476 S.W.2d 365 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). Relying on *Bolton v. Sparks*, the Court of Appeals in *Haynes v. City of Quanah* held that a city's exercise of its zoning power is "invalid unless the city fully complies with the notice and hearing requirements of article 1011d and any other applicable zoning notice and hearing requirements prescribed by articles 1011e [protest rights in the predecessor statute] and 1011f." 610 S.W.2d 842, 843-44 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.). *See also Truman v. Irwin*, 488 S.W.2d 907, 908 (Tex. Civ. App.—Fort Worth 1972, no writ) ("Each act required by the [zoning] statute applicable to municipal action of this type is essential to the exercise of jurisdiction by its governing body.").

These legislatively mandated zoning procedures "are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power." *Bolton v. Sparks*, 362 S.W.946, 950 (Tex. 1962). In all the cases above, the courts invalidated the cities' attempts to zone because they failed to follow strictly each mandatory procedural protection for property

owners. Failure to strictly follow these zoning procedures renders the zoning void. *Truman v. Irwin*, 488 S.W.2d 907 (Tex. Civ. App.—Fort Worth 1972, no writ).

The State's grant of zoning authority to cities mandates that they provide protest rights. These rights apply to all changes in zoning regulations or boundaries, whether an "amendment, repeal, or other change of a regulation or boundary." Section 211.002. The plain meaning of section 211.006(d) is that whenever "a proposed change to a regulation or boundary is protested," property owners have protest rights to protect their interests "in the stability and continuity of zoning regulations." *Levin v. Parsippany-Troy Hills Township*, 411 A.2d 704, 708 (N.J. 1979), citing *Anderson American Law of Zoning*, section 4.33 at 251 (2d ed. 1976). The statutory language requiring protest rights is not limited by the number of zoning changes enacted at one time. "Comprehensive revisions" by definition are changes, requiring full and strict compliance with statutory protest rights. Cities may not carve out exceptions not found in the statute, such as the City has attempted to do here.

There is no statutory exception for "comprehensive revisions." If the Texas Legislature desires such an exception, it can create one—which it has not done. The Legislature has not modified protest rights substantively since they were adopted in 1927. It is not possible to adopt a comprehensive revision without repealing or changing the zoning regulations and boundaries of individual property owners, which is what section 211.006 clearly covers in its plain language. Based on the plain language and strict construction of these state-mandated rights, protest rights apply to any zoning change, whether comprehensive or not.

III.

THE CITY OF AUSTIN CANNOT PRECLUDE PROPERTY OWNERS' EXERCISE OF PROTEST RIGHTS.

The City is wrong about Texas law. There is no protest rights exception for "broad

legislative amendments." This matter is controlled by Texas Local Government Code Chapter 211. The statutory authority for zoning makes it clear that Chapter 211 applies to *all* zoning changes:

> "Sec. 211.002 ADOPTION OF REGULATION OR BOUNDARY INCLUDES AMENDMENT OR OTHER CHANGE. A reference in this Subchapter [Subchapter A. GENERAL ZONING REGULATIONS] to the adoption of a zoning regulation or a zoning district boundary *includes the amendment, repeal or other change of a regulation or boundary."*

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987 (emphasis added).

The statute makes no exception for zoning changes based on "broad legislative amendments" as opposed to fact-based changes to individual parcels.

The absence of such exceptions is sound policy. Otherwise, the application of protest rights would devolve into disputes as to the City's purposes in making changes (legislative policymaking, fact-based changes, or some combination of both). The statute provides for protest rights for changes to any zoning "regulation or boundary" that is applied to a parcel of property—with no exceptions. This is true whether the changes are a part of a comprehensive revision based on alleged legislative policymaking or fact-specific decisions.

The City's own ordinances belie its asserted exception to property owners' protest rights:[11]

> "§ 25-2-241- DISTINCTION BETWEEN ZONING AND REZONING
>
> 1. Zoning is the initial classification of property as a particular zoning base district. Zoning amends the zoning map to include property that was not previously in the zoning jurisdiction or that was not previously included in the boundaries of a base district.
>
> 2. *Rezoning amends the zoning map to change the base district classification of property that was previously zoned.*
>
> 3. Source: Section 13-1-401; Ord. 990225-70; Ord. 031211-

[11] *See* Joint Stipulations of Fact No. 41.

11."

(Emphasis added). All rezoning is to be treated the same. The current City ordinance does not distinguish between rezoning one parcel or all parcels.

It is settled Texas law that municipalities derive their power to adopt zoning regulations and districts exclusively from the enabling statutes. In approving zoning ordinances cities are confined to the express authority delegated to them by the legislature. *Bolton v. Sparks*, 362 S.W.2d 946 (Tex. 1962); *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). The City's zoning authority is limited by the procedural protections of notice, hearing, and protest rights in Chapter 211.

Section 211.006 is the source of Plaintiffs' protest rights:

> "(d) If a proposed change to a regulation or boundary isprotested in accordance with this subsection, the proposed change must receive, in order to take effect, the affirmative vote of at least three-fourths of all members of the governing body. The protest must be written and signed by the owners of at least 20 percent of either:
>
> (1) the area of the lots or land covered by the proposed change; or
> (2) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.[12]"

[12] City ordinances specifically adopted this language, which does not include an exception for "comprehensive revisions":

> §25-2-284- REQUIREMENT FOR APPROVAL BY THREE-FOURTHS OF COUNCIL.
>
> (A) The affirmative vote of three-fourths of the members of council is required to approve:
>
> ...
>
> (3) a proposed rezoning that is protested in writing by the owners of not less than 20 percent of the area of land:
>
> (a) included in the proposed change; or
>
> (b) immediately adjoining the area included in the proposed rezoning and extending 200 feet from that area.

The City's effort to carve out an exception to this statutory right for "broad legislative charges" is precluded by the statutory language.

IV.

OTHER JURISDICTIONS REJECT THE CITY OF AUSTIN'S DENIAL OF PROTEST RIGHTS

No Texas case addresses the issue of whether protest rights apply when there is a comprehensive revision of the zoning laws. Moreover, there is no Texas case that supports the City's reading of the statute. Because other states have protest rights provisions and have addressed this issue, we look to their caselaw. Other states' courts have upheld protest rights where comprehensive revisions or broad zoning changes were made.

Other States' Caselaw Supports Protest Rights.

The New Jersey Supreme Court's case of *Levin v. Parsippany-Troy Hills Township*, 411 2d 704 (N.J. 1979), is directly on point, holding that municipal comprehensive zoning revisions do not override protest rights. New Jersey, like Texas, has had a protest rights provision modeled closely on the Standard Act since the late 1920s. *Id.*, at 708. In 1976, the New Jersey Legislature passed a "comprehensive municipal land use enabling act," superseding the prior municipal zoning authorization statute. This act required that all cities apply new zoning criteria and adopt completely new zoning codes. *Id.*, at 707. The town then adopted a "new zoning ordinance," changing property owners' zoning classifications. *Id.*, at 706-707. Levin protested his property's rezoning, but the town refused to recognize his protest rights. The town argued that it had adopted a new, comprehensive zoning code and protest rights were "inapplicable for the reason that the ordinance is neither a 'revision' nor an 'amendment,' but a new ordinance adopted for the purpose

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...

Source: Section 13-1-407; Ord. 990225-70; Ord. 010329-18; Ord. 03211-11; Ord. No. 2016211-008, pt. 1.2-22.

of complying with the recently enacted New Jersey Municipal Land Use Law." *Levin v. Parsippany-Troy Hills Township*, 396 A. 2d 1144, 1145 (N.J. App. 1978).

The intermediate appellate court agreed with the town, holding that its adoption of a new zoning code precluded protest rights because they interfered with the Legislature's intent that the town completely revise its zoning laws:

> "The lawmakers' overriding intent that the power of municipal land use regulation be exercised solely in accordance with all the strictures of the new law is unmistakable. *Without doubt, this will demand a massive rewriting and republication of thousands of local land use ordinances. Having placed such a burden upon the municipal governments of this State, we cannot conceive that the Legislature would thereafter fetter their attempts to comply by subordinating proposed ordinances to the right of protest by dissatisfied property owners and the necessity for a two-thirds majority vote.* We conclude that the protection accorded by N.J.S.A. 40:55D-63 is not applicable to zoning changes which result from ordinances adopted to conform with the Municipal Land Use Law."

Levin v. Parsippany-Troy Hills Township, 396 A. 2d 1144, 1146 (N.J. App. 1978)(internal citations omitted)(emphasis added).

The New Jersey Supreme Court reversed, holding unanimously that the legislative mandate that cities completely revise their zoning laws did not override property owners' protest rights. *Levin v. Parsippany-Troy Hills Township*, 411 A. 2d 704, 708 (N.J. 1979). The New Jersey Court noted that the plain meaning of the protest rights provision applied to any change and there were no exceptions:

> "The protest provision, which follows immediately after the zoning power provision in the new law, expressly applies to 'any amendment or revision of a zoning ordinance.' Absent a specific indication in the statute that it does not apply in certain circumstances, of which we find none, its plain meaning indicates that it does apply."

Id. (citing N.J.S.A. 40:55D-63).

Considering New Jersey's long history of providing protest rights, the New Jersey Supreme Court concluded that it was best to leave such a policy change to the Legislature: "To fashion an exception to the applicability of this provision when a municipality adopts a new or revised zoning ordinance pursuant to the Municipal Land Use Law would conflict with the Legislature's 50-year history of allowing protests of zoning changes." *Id.*

Campbell v. Borough of North Plainfield, 961 A. 2d 770 (N.J. App. 2008) is also on point, holding protest rights applied to comprehensive revisions. A New Jersey appellate court upheld protest rights with a legislative history similar to that in Texas: both Legislatures amended their zoning statutes to allow an exception to individualized notice with comprehensive zoning revisions, but did not change their provision regarding protest rights. In the *Campbell* case, the city argued that the Legislature's amendment, allowing an exception to individualized notice for comprehensive revisions, necessarily repealed protest rights for comprehensive revisions. The New Jersey appellate court rejected the city's argument and upheld protest rights, holding that a 1995 legislative amendment allowing notice by publication for comprehensive zoning revisions did not change the application of protest rights to comprehensive revisions. *Campbell v. Borough of North Plainfield*, 961 A. 2d 770, 783 (N.J. App. 2008). The court first explained that notice and protest rights were separate and independent rights:

> "We noted that in creating the exemption from the personal notice requirement, the Legislature was well aware of the 'distinction between an isolated zoning change and a broad-based review of a municipality's entire zoning scheme.' (Internal citations omitted)....Our reference in the quoted passage to 'the public's right to notice and protest' should not be read to require that these rights exist in tandem. On the contrary, as we will further explain, these rights are separate and independent of each other."

Id., at 780.

The New Jersey court went on to examine the applicable canons of statutory construction, stating: "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute" and while the legislature had amended the notice provision, it had not amended protest rights:

> "The Legislature did not change the 'protest' language in 1995. It simply appended an additional notice requirement to the beginning of the statute. As such, the 'the provisions introduced by the amendatory act should be read together with the provision of the original section that were reenacted or left unchanged, in the amendatory act, as if they had been originally enacted as one section...'...The right to protest has enjoyed long-standing historical support in this state and other jurisdictions. It is unlikely that the Legislature intended to undercut that right. The notice exemption reflected the understanding that 'the very nature of periodic review of a masterplan preclude[s] it from remaining a secretive process and outside of public oversight and scrutiny.' The Legislature enacted the notice exemption to save local government the time and expense of providing personal notice to a group of individuals that should be aware, because of this lengthy period of oversight, of the possibility of future zoning changes."

Id., at 782 (internal citations omitted). The court explained that "[a]bsent clear and compelling evidence of the Legislature's intent to remove these protests rights protections, we have no occasion to conclude that the 1995 amendment repealed them by implication." *Id.* The court held that "the statute as amended [as to notice], reserves the right to protest 'any proposed amendment or revision.' (Internal citation omitted). This signifies that the right continues undiminished." *Id.*

Texas' legislative history is very similar to New Jersey's history. Our state has a long-standing protest rights provision; many years after its adoption, the Legislature passed an amendment allowing notice by publication for comprehensive revisions and in other circumstances. Since 1927, when the Texas Legislature first authorized zoning and the protest rights of property owners, Texas has not restricted land owners' protest rights. *See* Tex. Rev. Civ. Stat. 1011a-f (Vernon (1928) (Acts of 1927, 40th Leg. p. 424, ch. 283); Tex. Local Govt. Code,

Section 211.006 (re-codifying with non-substantive changes the 1927 law). In 1985, the Texas Legislature, amended the municipal zoning notice provision, authorizing less than individualized notice for comprehensive revisions under certain circumstances. HB 1205 allowed cities to provide alternative notice (*i.e.*, notice by newspaper publication) rather than the standard individualized notices to property owners if the Council voted to hold a joint meeting of the city council and the zoning commission and by 2/3rds vote provide notice by publication. *See* Acts 1985, 69th Legislature, p. 308, ch. 894.[13] The House Committee Bill Report states HB1205's purpose was to provide "optional notice if a public hearing is jointly held between the legislative body and zoning commission." The amendment did not the change the separate protest rights' subsection.

Like in New Jersey, the Legislature in Texas amended the notice provision related to comprehensive revisions, but did not modify protest rights. The City is asking this Court to infer the repeal of protest rights. Texas courts, however, do not favor repealing legislative enactments by implication: "If repeal was effected it was by implication only, and repeal by implication is not favored. *Standard v. Sadler*, 383 S.W.2d 391 (Tex. 1964). *See also, Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000). As stated in *Ramirez v. State of Texas,* 550 S.W.2d 121, 124 (Tex.Civ.App.—Austin 1977, no writ), "Repeal by implication is indulged only if the inconsistency between the legislative acts is irreconcilable (internal citation omitted). For repeal by implication to occur, the implication must be 'clear, necessary, irresistible and free from reasonable doubt.'"

That is not the case here. There is no evidence—much less clear and irresistible evidence—that the Texas Legislature intended to exempt comprehensive revisions from protest rights. The

[13] It is undisputed that the City did not exercise the option of holding a joint public hearing in order to authorize less than individualized notice. *See* Joint Stipulations of Fact Nos. 43 and 44.

fact that the Legislature amended in 1985 only the notice provisions related to comprehensive revisions strongly indicates that it did not intend to change protest rights for comprehensive revisions.

Also instructive is the case of *208 E. 30th St. Corp. v. Town of New Salem,* 88 A.D.2d 281 (N.Y. App. Div. 1982). A municipality passed a unified set of zoning amendments affecting eight discrete sites at one time, with no severability clause. Where protests were filed, city law required approval by three-fourths of the members of the city board. The requisite number of protests were filed for only one of the eight sites.

The trial court held that as to the one property for which a protest was filed, the zoning change was not properly enacted because there was not a three-fourths super-majority vote to approve it; but that for the other seven unprotested properties, the less than three-fourths vote was sufficient to make the zoning changes effective. *Id.* at 283. On appeal, the one owner contended that the three-fourths vote requirement did not apply because the protests were not filed by owners of 20% of *all the land covered by the eight amendments*. The town, on the other hand, argued that since the set of eight amendments were "part of one comprehensive scheme and contained no severability clause, protests registered by the owners of 20% of the land in only one site were sufficient to require all eight amendments to be approved by a three-fourths vote." *Id.* at 286.

The appellate court rejected both arguments and agreed with the trial court. The court considered the zoning ordinance affecting eight discrete sites as if they had been separately enacted. The property for which a protest was filed could not be deemed to have been validly enacted on less than a three-fourths vote. *Id.* at 287.

The appellate court rejected the very notion that the City of Austin is advancing—that if the change is big enough, the citizens may be deprived of their statutory right to protest:

> "Where, as here, there are severable provisions of a single zoning change, it would not be proper to require the owners of 20% of all the land affected by the amendments to protest in order to trigger the operation of [the three-quarter vote provision]. Such a holding would enable a municipal agency to insure passage of a highly objectionable amendment by simply combining it with another large, unobjectionable amendment. A statute must not be construed in a manner that would permit its purpose to be defeated."

Id. at 288.

It is not for the courts to carve out their own exceptions to statutory protest rights, which have been state law for over 90 years. If the Texas Legislature wishes to create an exception for comprehensive revisions, it can do so.

Other states have created such exceptions, but Texas has not. For example, in 1989, New Hampshire amended its law to exclude any zoning change rezoning 1/3rd or more of the property within a city:

> "675:5 Zoning Ordinance Protest Petition
>
> I. Zoning regulations, restrictions and boundaries may from time to time be amended or repealed.
>
> I-a. A favorable vote of 2/3 of all the members of the legislative body present and voting shall be required to act upon any amendment or repeal in the case of a protest against such zoning change signed by either:
>
> (a) The owners of 20 percent of the area of the lots included in such proposed change; or
>
> (b) The owners of 20 percent of the area within 100 feet immediately adjacent to the area affected by the change or across a street from such area.
>
> **I-b.** ***Paragraph I-a shall apply only to amendments which alter the boundary locations separating previously defined zoning districts, or to amendments which alter the regulations or restrictions of an area not larger than 1/3 of the land area within the municipality.***"

N.H. Rev. Stat. § 675:5 (2015) (emphasis added).

The New Hampshire amendment indicates that the original Standard Act (as adopted by Texas in 1927), must include protest rights within broad based or comprehensive changes—contrary to the City of Austin's position. If that were not the case, New Hampshire would not have needed to amend its statute to exclude situations where a large portion of the land within municipal boundaries was rezoned.

It is telling that the Texas Legislature, unlike New Hampshire's, has never carved out an exception to protest rights. It has made only very minor amendments to its protest rights procedures since they were adopted in 1927; these amendments addressed only how to define the 200 feet area surrounding a property and authorizing cities to enact, if they wished, a super-majority council vote to overturn a zoning commission decision denying a zoning change.[14]

If the City of Austin wants such an exception to protest rights, it must go to the Texas Legislature to seek a change in the current statutes. The City has no authority to reject the state's statutory protest rights as they currently exist in Chapter 211.

V.

THE CITY'S PLANNING COMMISSION FAILED TO PROVIDE THE REQUIRED STATUTORY NOTICE.

Chapter 211 of the Texas Local Government Code sets out the notice hearing, and reporting requirements that municipalities must meet to take valid action. Home-rule cities are required to appoint a zoning commission (which the City of Austin calls the "Planning Commission"). *See* §

[14] S. B. No. 934, 62nd Leg., p. 2864, ch. 942, § 1, eff. June 15, 1971 (clarifying 200 feet applies to "immediately adjoining" protested property); S.B No 1209, 65th Leg., p. 1308, ch. 516, § 1, eff. Aug. 29, 1977 (this was in response to a court ruling preempting (under Section 211.006) such an ordinance passed by San Antonio. *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.)).

211.007(a). Zoning commissions are required to hold public hearings prior to submitting a final report to the city council. *See* § 211.007(b).

Since 1949, when Texas amended its municipal zoning enabling act, zoning commissions have been required to give written, individual notice to property owners and nearby property owners for all zoning changes:

> "Before the 10th day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in zoning classification shall be sent to each owner, as indicated by the most recently approved municipal tax roll, of real property within 200 feet of the property on which the change in classification is proposed."

Texas Local Govt. Code § 211.007(c). *See* Acts 1949, 51st Leg., p. 205, ch. 111, sec. 1.

In 1985, the Texas Legislature amended the notice provision to allow, in certain circumstances, an exception, including for comprehensive revisions, to individualized zoning notice by zoning commissions. But the City did not invoke it. The 1985 amendment provides that cities must provide either the standard individualized mailed notice or they may vote to receive the final zoning report at a joint hearing with the zoning commission after giving alternative notice, including notice by publication:

> "(d) The governing body of a home-rule municipality may, by a two-thirds vote, prescribe the type of notice to be given of the time and place of a public hearing held jointly by the governing body and the zoning commission. If notice requirements are prescribed under this subsection, the notice requirements prescribed by Subsections (b) and (c) and by Section 211.006(a) do not apply."

The City Council cannot take action regarding the LDC Revision until it receives a valid final report from the Planning Commission:

> "The governing body may not hold a public hearing until it receives the final report of the zoning commission unless the governing body by ordinance provides that a public hearing is to be held, after the notice required by Section 211.006(a), jointly with a public hearing required to be held by the zoning commission. In either case, the

> governing body may not take action on the matter until it receives the final report of the zoning commission.[15]"

Tex. Local Govt. Code § 211.007(b).

The City did not send individualized notice for the LDC Revision. Nor did the City Council vote to hold a joint meeting of the Council and Planning Commission or to authorize alternative notice.

The failure by the City's Planning Commission, to follow the required procedure for either of the required notices of its public hearing on the LDC Revision, renders any subsequent hearing or action taken by the City Council void. In *City of North Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 915 (Tex. App.—Fort Worth 2011, no pet.) (overruled on other grounds *Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98 (Tex. 2014)), the appellate court held, "[I]t is well-settled that the failure to give notice of a proposed zoning change renders the zoning ordinance void, not voidable."

Moreover, the failure to provide the required notice means that there was no valid final report delivered to the City Council upon which it could take any action. *See, City of San Antonio v. Pope*, 351 S.W.2d 269 (Tex. Civ. App.—Eastland 1961, no writ). In that case, the required notice was given as to the first two hearings, but the subsequent hearings occurred without notice being given. *Id.* at 271. The appellate court held that the final report provided by the planning commission was not valid in the absence of the required notice of all hearings on the amendment to the zoning. *Id.* at 272. Further, a valid final report was required before the city council could take action. *Id.* Without proper notice there was not a valid Planning Commission final report,

[15] Section 211.006(a) authorizes notice by publication : "Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality."

and under the statute the City Council cannot even hold a hearing on the LDC Revision, much less vote on any reading. Section 211.007(b) provides:

> "The zoning commission shall make a preliminary report and hold public hearings on that report before submitting a final report to the governing body. The governing body may *not hold a public hearing* until it receives the final report of the zoning commission unless the governing body by ordinance provides that a public hearing is to be held, after the notice required by Section 211.006(a), jointly with a public hearing required to be held by the zoning commission. In either case, the governing body may not take action on the matter until it receives the final report of the zoning commission."

(Emphasis added).

Absent a valid final report, any hearing or vote on the LDC Revision is void. *See Smart v. Lloyd*, 370 S.W.2d 245 (Tex. Civ. App.—Texarkana 1963, no writ).

As discussed above, the failure to strictly comply with the requirements of Chapter 211, renders any zoning ordinance void *ab initio*. *See City of Laredo v. Rio Grande H2O Guardian*, No. 04-10-00872-CV, 2011 WL 3122205 at *9 (Tex. App.—San Antonio July 27, 2011, no pet.) (mem. op.). "A city may not enact zoning ordinances in a way that is inconsistent with zoning law." *Id.* Such ordinances are void *ab initio*. *Id.* (citing *Thompson v. City of Palestine*, 510 S.W.2d 579, 581-83 (Tex. 1974). The City's actions on the LDC Revision are void *ab initio* for the failure of the Planning Commission to provide valid notice.

VI.

CONCLUSION

The City of Austin has failed to comply with the requirements of Chapter 211 of the Local Government Code by the failure of its zoning commission to give proper notice of its public hearings at which it purported to consider and adopt its final report on the LDC Revision. That failure renders that Planning Commission action and any subsequent action by the City Council on the LDC Revision void.

The City has publicly stated time and again that it will not recognize the statutory protest rights of the landowners whose property will be affected by the LDC Revision. The City refuses to follow the clear language of Chapter 211.002 that says Chapter 211 applies to the adoption of any zoning regulation or a zoning district boundary, and that "includes the amendment, repeal, or *other change* of a regulation or boundary." *See* § 211.002, Texas Local Gov't Code (emphasis added). There is no statutory exception for alleged "broad legislative" amendments such as the LDC Revision.

The City engages in a campaign of misinformation, repeatedly telling its property owners that protest rights are inapplicable to these allegedly "broad legislative" amendments. While there is no Texas case law directly on point, there is case law from other jurisdictions that reject the City's argument.

The City cannot adopt the LDC Revision without strict compliance with Chapter 211 of the Local Government Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 4, 2020, a true copy of the foregoing *Plaintiffs' Brief in Support of Original Petition, Application for Injunctive Relief, and Request for Declaratory Judgment* was served on counsel for Defendants in accordance with Texas Rule of Civil Procedure 21a via e-service through the Texas E-file system.

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DEPARTMENT OF COMMERCE
HERBERT HOOVER, SECRETARY

A STANDARD STATE ZONING ENABLING ACT

UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS

BY THE

ADVISORY COMMITTEE ON ZONING

APPOINTED BY SECRETARY HOOVER

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[Revised Edition, 1926]

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EXHIBIT A

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FOREWORD

By Herbert Hoover

The importance of this standard State zoning enabling act can not well be overemphasized. When the advisory committee on zoning was formed in the Department of Commerce, the proposal to frame it received unanimous support from the public-spirited organizations represented on the committee and other groups interested in zoning. The urgency of the need for such a standard act was at once demonstrated, when, within a year of its issuance, 11 States passed zoning enabling acts which were modeled either wholly or partly after it.[1] Similar acts have been introduced in four other States, with the prospect of more to follow.

The discovery that it is practical by city zoning to carry out reasonable neighborly agreements as to the use of land has made an almost instant appeal to the American people. When the advisory committee on zoning was formed in the Department of Commerce in September, 1921, only 48 cities and towns, with less than 11,000,000 inhabitants, had adopted zoning ordinances. By the end of 1923, a little more than two years later, zoning was in effect in 218 municipalities, with more than 22,000,000 inhabitants, and new ones are being added to the list each month.[2]

In this rapid movement the fundamental legal basis on which zoning rests can not be overlooked. Several of our States, fortunately, already have zoning enabling acts that have stood the test in their own courts. This standard act endeavors to provide, so far as it is practicable to foresee, that proper zoning can be undertaken under it without injustice and without violating property rights. The committee did not make it public until it had given it the most exacting and painstaking study in relation to existing State acts and court decisions and with reference to zoning as it has been practiced and found successful in cities and towns throughout the country. Prac-

[1] By 1925 the following 19 States had used the standard act wholly or in part in their laws: Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, and Wyoming.

[2] On January 1, 1926, there were at least 425 zoned municipalities, comprising more than half the urban population of the country.

tical zoners who have been associated with a majority of zoned cities were consulted for their opinions, and the committee itself represents the professional, commercial, and civic societies most interested in zoning problems.

The drafting of the act has required very large effort, and the members of the advisory committee on zoning, particularly those who served on the subcommittee on standard law, merit the gratitude of the people of the United States for the thoroughness with which they executed their task.

FEBRUARY 15, 1924.

A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS

EXPLANATORY NOTES IN GENERAL

1. *An enabling act is advisable in all cases.*—A general State enabling act is always advisable, and while the power to zone may, in some States, be derived from constitutional as distinguished from statutory home rule, still it is seldom that the home-rule powers will cover all the necessary provisions for successful zoning.

2. *Constitutional amendments not required.*—No amendment to the State constitution, as a rule, is necessary. Zoning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States.

3. *Modify this standard act as little as possible.*—It was prepared with a full knowledge of the decisions of the courts in every case in which zoning acts have been under review, and has been carefully checked with reference to subsequent decisions. A safe course to follow is to make only those changes necessary to have the act conform to local legislative customs and modes of expression.

4. *Adding new words and phrases.*—Especial caution is given to beware of adding additional words and phrases which, as a rule, restrict the meaning, from the legal point of view.

5. *Do not try to consolidate sections.*—It is natural to try to shorten the act by consolidating sections. This may defeat one of the purposes of the act, namely, of keeping the language of the statute as simple and concise as possible. It is much better to have an act broken up into a number of sections, provided they are properly drawn, than to have one or two, or a few long, involved sections. While it is recognized that some of the sections in the standard act could be combined, it is put purposely in its present form.

6. *Title and enacting clause necessary.*—No title of the act and no enacting clause have been included. These are purposely omitted, as the custom varies in almost every State. The act should, of course, be preceded by the appropriate title and enacting clause in accordance with the local legislative custom.

7. *Definitions.*—No definitions are included. The terms used in the act are so commonly understood that definitions are unneces-

sary. Definitions are generally a source of danger. They give to words a restricted meaning. No difficulty will be found with the operation of the act because of the absence of such definitions.

8. *Validity of one section affecting other sections.*—Some States have included in the enabling act a declaration to the effect that the finding void or unconstitutional by the courts of one section or provision shall not affect the rest of the act. This is so well accepted a principle of legal interpretation that it seems unnecessary to include it in the act. If any State desires to have it included, it can be added without danger.

9. *No declaration that act is not retroactive.*—Some laws contain a provision to the effect that "the powers by this act conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted." While the almost universal practice is to make zoning ordinances nonretroactive, it is recognized that there may arise local conditions of a peculiar character that make it necessary and desirable to deal with some isolated case by means of a retroactive provision affecting that case only. For this reason it does not seem wise to debar the local legislative body from dealing with such a situation.

10. *The repeal clause.*—No repeal clause has been included in the act for the reason that the method of phrasing such a clause will vary in nearly every State. The local legislative custom as to repeal clauses should be followed.

11. *Date of taking effect.*—For similar reasons the act does not include any provision as to the date on which it will take effect. Here also the local legislative custom should be followed.

12. *Typical ordinances or local regulations.*—The department has made a careful study of the use, height, and area regulations embodied in 16 typical zoning ordinances, together with notes on the trend of certain newer ordinances. Single copies of this bulletin are available by application to the division of building and housing, Department of Commerce, Washington, D. C.

13. *Interim ordinances.*—After the local legislative authorities have the power to zone, they are nearly always pressed to bring immediate protection to certain threatened localities. Sometimes the authorities frame an ordinance to cover a few blocks, or only a part of the city; this is called piecemeal zoning. Its adoption is inadvisable and may lead to much litigation. Interim zoning, although undesirable, is not as objectionable as piecemeal zoning. Interim zoning, at least, has the advantage of applying to the whole city. For instance, an ordinance providing that wherever three-fourths of the houses in a block are residential then no new business structure or factory can be built in that block is an illustration of

interim zoning. The reason it is objectionable is because it is too general, not sufficiently adapted to the particular need of each street, and therefore likely to be arbitrary in many cases. In such case, if a new house is built or an old one destroyed, the legal protection of the district may be altered. In this sense the district is a "traveling zone." As such, a district has no stability, and as the police power may be differently applied according to the acts of property owners it is not looked upon with favor by the courts. To prevent this the words "at the time of the passage of this ordinance" should be inserted. If it is deemed necessary to prohibit a nonconforming building because of the consents or protests of the property owners, the ordinance should always be phrased so as to prohibit the nonconforming use, *unless* the desired majority files written consents with the officials. In other words, a provision which conditions the permission to have a nonconforming use upon the consents of a majority of the property owners is void. If at all possible, the first zoning ordinance should be comprehensive.

14. *Note to revised edition, 1926.*—A standard State zoning enabling act under which municipalities may adopt zoning regulations was first issued in mimeographed form in August, 1922. A revised edition was made public in the same form in January, 1923, and the first printed edition in May, 1924. In this second printed edition note 15a has been added to cover the needs of cases where it is found desirable to control the development of areas adjacent to the city limits; and section 8, dealing with enforcement and remedies, has been revised in order to give the municipality more effective means of obtaining conformance to the zoning ordinance.

The circulation of the standard act has not been confined to those directly interested in drafting State zoning legislation. Calls for it have been received from persons in all sections of the country who have desired to use it on account of its general bearing on the legal and social aspects of zoning. More than 55,000 copies of the first printed edition have been sold by the Superintendent of Documents.

A STANDARD STATE ZONING ENABLING ACT

SECTION 1. GRANT OF POWER.—For the purpose of promoting health,[1] safety, morals, or[2] the general welfare[3] of the community, the legislative body[4] of cities and incorporated villages[5] is hereby empowered to regulate and restrict[6] the height, number of stories,[7] and size of buildings[8] and other structures,[9] the percentage of lot[10] that may be occupied, the size of yards, courts, and other open spaces,[11] the density of population,[12] and the location and use[13] of buildings, structures, and land for trade, industry, residence, or other purposes.[14, 15, 15a]

[1] "*health*": It is to be noted that the word used is "health," not "public health," for the latter narrows the application. There are some things that relate to the health only of the people living in a given dwelling, such, for instance, as the size of yards, and have only a remote relation to public health. If the term "public health" were used, the act might be set aside in a given case where it would be possible to show that the particular provision in which legal action was being taken did not concern itself with the public health but only with health.

[2] "*or*": It should be noted that the word used is "or" and not the word "and." If the latter word were used, then it might be necessary to show to the satisfaction of the court that *all* four of the purposes mentioned were involved in a given case, viz, health, safety, morals, and general welfare. The use of the word "or" limits the application to any one of the four instead of to all of them.

[3] "*general welfare*": The main pillars on which the police power rests are these four, viz, health, safety, morals, and general welfare. It is wise, therefore, to limit the purposes of this enactment to these four. There may be danger in adding others, as "prosperity," "comfort," "convenience," "order," "growth of the city," etc., and nothing is to be gained thereby.

[4] "*legislative body*": This term is sufficiently understood to include all forms of government, including commission and city manager, as well as the older forms of government. Whatever form of government exists, there must be some local body performing legislative functions.

[5] "*cities and incorporated villages*": This phrase includes those municipalities which ordinarily will find it advantageous to be given zoning powers. In some States, where different forms of governmental provisions exist, it will be necessary to add those municipalities to the term "cities and incorporated villages"; in other States the word "town" or "borough" will probably need to be added. The term "cities and incorporated villages," however, will cover the normal situation.

[6] "*regulate and restrict*": This phrase is considered sufficiently all-embracing. Nothing will be gained by adding such terms as "exclude," "segregate," "limit," "determine."

[7] "*number of stories*": It is thought wise to add this to the term "height," as courts may construe this expression narrowly, as limited to a given number of feet only, and may hold that this does not give the power to limit the number of stories, provided the building in question came within the limitation of the number of feet imposed by the ordinance. It is obvious that the power to restrict the number of stories should be granted.

[8] "*size of buildings*": The term "size" is a better expression to use than "bulk" or "area," for the reason that both "bulk" and "area" imply, to some extent, a regularity of outline that may not be involved in all cases, whereas "size" is sufficiently all-inclusive to cover all contingencies.

[9] "*other structures*": This phrase would include other structures which possibly might not be defined as "buildings," such as open sheds, billboards, fences, spite fences, etc., none of which can be strictly considered as "buildings," as commonly understood.

[10] "*percentage of lot*": This is a better method of expression than granting the power to limit "the area of the building," as has been done in some laws, for the latter expression does not imply a variation of the fraction of the lot built upon.

[11] "*other open spaces*": This is a catch-all expression and is necessary in view of the fact that "yards" and "courts" are not defined in the act.

[12] "*density of population*": The power to regulate density of population is comparatively new in zoning practice. It is, however, highly desirable. Many different methods may be employed. For this reason the phrase "density of population" is a better phrase to use than one giving the power to "limit the number of people to the acre," as this is only *one* method of limiting density of population. It may be more desirable to limit the number of families to the acre or the number of families to a given house, etc. The expression "number of people to the acre" is therefore more limited in its meaning and describes only one way of reducing congestion of population, while the phrase "limiting density of population" is all-embracing. It is believed that, with proper restrictions, this provision will make possible the creation of one-family residence districts.

[13] "*use*": This term is broad enough to include all meanings desired.

[14] "*other purposes*": This is a catch-all phrase. It will include every use.

[15] Although the power to require open spaces allows the fixing of setback building lines, some recent acts contain a specific grant of that power. The establishment of setback lines is somewhat novel in zoning practice but is beginning to be employed. As it is in the minds of some people of doubtful legality and has not as yet been sustained by the courts, this power has not been included here. If it should be desired to grant such power, it can readily be done by adding at the end of this section the following words: "and may also establish setback building lines."

[15a] Some communities find it desirable to control the development of areas adjacent to the city's limits—which, in many cases, are ultimately to become a part of that city. Where it is desired to control those "fringes of cities," the legislature may grant such power to any community. Where this power is desired, strike out the period after the word "purposes" at the end of section 1 and add the following: "within the boundaries of such city or village; and, in the case of cities having a population of 25,000 or over, also within that non-municipal territory immediately adjacent and contiguous to the boundaries of such city and extending for the radial distance of 5 miles beyond such boundaries in all directions." Caution should be given, however, that this effort

SEC. 2. DISTRICTS.—For any or all of said purposes the local legislative body may divide the municipality [16] into districts of such number, shape,[17] and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use [18] of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district,[19] but the regulations in one district may differ [20] from those in other districts.

SEC. 3. PURPOSES IN VIEW.[21]—Such regulations shall be made in accordance with a comprehensive plan [22] and designed [23] to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses,[24] and with a view to conserving the value of buildings [25] and encouraging the most appropriate use of land throughout such municipality.

SEC. 4. METHOD OF PROCEDURE.—The legislative body of such municipality shall provide for the manner [26] 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. However, no such regulation, restriction, or boundary shall become effective until after a public hearing [27] in relation thereto, at which parties in interest and citizens [28] shall have an opportunity to be heard. At least 15 days' notice [29] of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

SEC. 5. CHANGES.[30]—Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change,[31]

by one community to control the development of some other community will often give rise to political and practical difficulties. It is for this reason that this provision is not included in the text of the act but appended as a note, to be used by those who desire it. This question will ultimately have to be dealt with, however, in most cases, by a process of regional planning.

[16] "*municipality*": This term is sufficiently broad to include cities, towns, villages, boroughs, or whatever governmental unit may be involved.

[17] "*shape*": This permits districts of irregular outline, something that is quite necessary.

[18] "*reconstruction, alteration, repair, or use*": All of these words are thought necessary, so as to allow no loophole for evasion of the law.

[19] "*uniform for each class or kind of buildings throughout each district*": This is important, not so much for legal reasons as because it gives notice to property owners that there shall be no improper discriminations, but that all in the same class shall be treated alike.

[20] "*may differ*": This is the essence of zoning, and without this express authority from the legislature to make different regulations in different districts zoning might be of doubtful validity.

[21] "*Purposes in view*": This section should be clearly differentiated from the statement of purpose (under the police power) contained in the first sentence of section 1. *That* defined and limited the powers created by the legislature to the municipality under the police power. *This* section contains practically a direction from the legislative body as to the purposes in view in establishing a zoning ordinance and the manner in which the work of preparing such an ordinance shall be done. It may be said, in brief, to constitute the "atmosphere" under which the zoning is to be done.

[22] "*with a comprehensive plan*": This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.

[23] "*and designed*": This is the statement of direction given by the legislature referred to in note 21. It has purposely been made to include many purposes. There are not the same dangers involved here that there are in adding to the statement of purposes under the police power, as set forth in the first sentence of section 1.

[24] "*peculiar suitability for particular uses*": This is a reassurance to property interests that zoning is to be done in a sane and practical way.

[25] "*conserving the value of buildings*": It should be noted that zoning is not intended to enhance the value of buildings but to conserve that value—that is, to prevent depreciation of values such as come in "blighted districts," for instance—but it *is* to encourage the most appropriate use of land.

[26] "*provide for the manner*": In view of the great variety in the form of government that exists throughout the country, it is not thought wise to use the expression "provide by ordinance," for that method may be inappropriate in those communities that have commission government or city managers.

[27] "*after a public hearing*": It is thought wise to require by statute that there must be a public hearing before a zoning ordinance becomes effective. There should be, as a matter of policy, many such hearings.

[28] "*and citizens*": This permits any person to be heard, and not merely property owners whose property interests may be adversely affected by the proposed ordinance. It is right that every citizen should be able to make his voice heard and protest against any ordinance that might be detrimental to the best interests of the city.

[29] "*15 days' notice*": This requirement can be varied to conform to local custom. All that is important is that there should be due and proper notice and ample time for citizens to study the proposals and make their opposition manifest.

[30] "*Changes*": It is obvious that provision must be made for changing the regulations as conditions change or new conditions arise, otherwise zoning would be a "strait-jacket" and a detriment to a community instead of an asset.

[31] "*change*": This term, as here used, it is believed will be construed by the courts to include "amendments, supplements, modifications, and repeal," in view of the language which it follows. These words might be added after the word "change," but have been omitted for the sake of brevity. On the

signed by the owners of 20 per cent or more either of the area of the lots[32] included in such proposed change, or of those immediately adjacent[33] in the rear thereof[34] extending —— feet therefrom,[35] or of those directly opposite[36] thereto extending —— feet[36] from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members[37] of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

SEC. 6. ZONING COMMISSION.—In order to avail itself of the powers conferred by this act,[38] such legislative body shall appoint a

other hand, there must be stability for zoning ordinances if they are to be of value. For this reason the practice has been rather generally adopted of permitting ordinary routine changes to be adopted by a majority vote of the local legislative body but requiring a three-fourths vote in the event of a protest from a substantial proportion of property owners whose interests are affected. This has proved in practice to be a sound procedure and has tended to stabilize the ordinance.

[32] "*area of the lots*": Most laws heretofore enacted, based on the first enactment in New York City, have used ownership of feet frontage as the basis for this consent. This has given rise to many difficulties in practice, especially with corner lots which have frontage on two streets and whose owners accordingly have had two votes to the single vote of the other property owners. In order to get rid of this unnecessarily complex method of determining solely the question of assent to a change in the ordinance, it is recommended that *area of the lots* included in the proposed change be used as the basis instead of feet frontage. This will do away with the present unfair element of double voting and the unnecessary complications of the generally used method.

[33] "*or of those immediately adjacent*": There are three groups of property ownership, and if 20 per cent of *any one* of these object to the proposed change it will require a three-fourths vote of the legislative body before the change can become effective. These three are (1) the owners of the lots included in the change, (2) the owners of the lots immediately adjacent in the rear, and (3) the owners of the lots directly opposite.

[34] "*immediately adjacent in the rear thereof*": This phrase is necessary for precision; otherwise there will be doubt, and owners of lots in the rear but some distance away might claim the right to be included in the objection.

[35] "*extending —— feet therefrom*": There should be inserted in the act the number of feet which is the prevailing lot depth in the municipalities of the State.

[36] "*directly opposite*": The same considerations apply to this phrase as to "immediately adjacent in the rear thereof."

[37] "*all the members*": It is important to use this expression, otherwise changes in the ordinance might be made by a three-fourths vote of the members present at a given meeting.

[38] "*In order to avail itself of the powers conferred by this act*": Without this phrase it would be necessary for the local legislative body forthwith to appoint a zoning commission, even though it was not desired to take up zoning at that time. This act is an enabling act *empowering* action, not making it mandatory.

commission,[39] to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until[40] it has received the final report of such commission. Where a city plan commission[41] already exists, it may be appointed[42] as the zoning commission.[43]

SEC. 7. BOARD OF ADJUSTMENT.—Such local legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

[39] "*shall appoint a commission*": Even though a committee of the local legislative body might be entirely competent to undertake the painstaking, careful, and prolonged detailed study that is ordinarily involved in the preparation of a zoning ordinance and map, the appointment of an outside body of representative citizens is most desirable as a means of securing that participation in and thorough understanding of the zoning ordinance which will insure its acceptance by the people of the particular municipality. One of the most important functions of such a commission is the holding of numerous conferences in all parts of the city with all classes of interests. No zoning ordinance should be adopted until such work has been done.

[40] "*shall not hold its public hearings or take action until*": This is a proper safeguard against hasty or ill-considered action. It should be carefully noted that this is in no sense a delegation of its powers by the local legislative body to the zoning commission. The legislative body may still reverse the recommendations of the zoning commission.

[41] "*city plan commission*": It is highly desirable that all zoning schemes should be worked out as an integral part of the city plan. For that reason the city plan commission, preferably, should be intrusted with the making of the zoning plan.

[42] "*may be appointed*": It should be noted that its appointment is not made mandatory, however, as sometimes there will be local reasons for desiring a separate body.

[43] "*Zoning commission*": Some laws contain a provision to the effect that all changes in the ordinance shall be reported upon by the zoning commission before action on them can be taken by the legislative body. Such a provision has *not* been included here. In the first place, that involves continuing the zoning commission as a permanent body, which may not be desirable. In the second place, it is *before* a zoning ordinance is established that the necessity exists for that careful study and investigation which a zoning commission can so well perform. Amendments to the original ordinance do not as a rule require such comprehensive study and may be passed upon by the legislative body, provided that proper notice and opportunity for the public to express its views have been given.

The board of adjustment shall consist of five members, each to be appointed for a term of three years [1] and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board of adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

In exercising the above-mentioned powers such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

[1] "*each to be appointed for three years*": This can be altered to provide for overlapping terms, if desired.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.

SEC. 8. ENFORCEMENT AND REMEDIES.[45]—The local legislative body may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder. A violation of this act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violation.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings[46] to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

SEC. 9. CONFLICT WITH OTHER LAWS.[47]—Wherever the regulations made under authority of this act require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this act shall govern.. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this act, the provisions of such statute or local ordinance or regulation shall govern.

[45] "*Enforcement and Remedies*": This section is vital. Without it the local authorities, as a rule, will be powerless to do more than inflict a fine or penalty for violation of the zoning ordinance. It is obvious that a person desiring undue privileges will be glad to pay a few hundred dollars in fines or penalties if thereby he can obtain a privilege to build in a manner forbidden by law, or use his building in an unlawful manner, when he may profit thereby to the extent of many thousands of dollars. What is necessary is that the authorities shall be able to stop promptly the construction of an unlawful building before it is erected and restrain and prohibit an unlawful use.

[46] "*Any appropriate action or proceedings*": Under the provisions of this section the local authorities may use any or all of the following methods in trying to bring about compliance with the law: They may sue the responsible person for a penalty in a civil suit; they may arrest the offender and put him in jail; they may stop the work in the case of a new building and prevent its going on; they may prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; they can evict the occupants of a building when the conditions are contrary to law and prevent its reoccupancy until the conditions have been cured. All of these things the local authorities should be given power to do if zoning laws are to be effective.

[47] "*Conflict with other laws*": By this provision the community is always assured of the maintenance of the higher standard. Without a provision of this kind the later enactment would probably govern. This requirement is especially necessary in those States which now have or later may enact housing laws, as housing laws also contain requirements as to height of dwellings, size of yards, and other open spaces, etc.

Art. 1010. Salary of Officers

The city council shall, on or before the first day of January next preceding each election, fix the salary and fees of office of the mayor to be elected at the next regular election, and fix the compensation to be paid to the officers elected or appointed by the city council. The compensation so fixed shall not be changed during the term for which said officers shall be elected or appointed.

[Acts 1925, S.B. 84.]

Art. 1010a. Cities of 1,200,000 or More; Salary and Expenses of Elected Officials

Sec. 1. The city council of an incorporated city having a population of 1,200,000 or more, according to the last preceding or any future federal census, may set the salary and expenses to be paid elected city officials. Said ordinance shall not take effect until the succeeding term, and the salary of a state district court judge of the county in which the city is located shall be the comparative salary; provided that a councilman's salary shall not exceed 40 percent of the comparative salary; the comptroller's salary shall not exceed the comparative salary; and the mayor's salary shall not exceed 150 percent of the comparative salary.

Sec. 2. (a) The city council may not adopt an ordinance under this Act unless the procedures prescribed by this section are followed.

(b) Before adopting an ordinance the city council shall publish notice in a newspaper of general circulation in the city. Notice must be published for two consecutive weeks immediately preceding the week in which the meeting is to be held and at which the proposed ordinance is to be considered. The notice must include a general description of the proposed ordinance, a statement that a public hearing will be held before the ordinance is adopted, a statement of the time and place of the hearing, and a statement that any interested person may appear and testify at the hearing.

(c) The city council must hold a public hearing before taking up an ordinance for consideration.

(d) An ordinance must be approved by a majority vote of the membership of the city council.

(e) A certified copy of an ordinance must be filed with the city secretary within 10 days after enactment, and it is effective on the first day of the succeeding term unless the ordinance prescribes a later effective date.

Sec. 3. (a) The city council may submit an ordinance adopted under this Act to the voters for their approval in the same fashion as charter amendments as provided in Article 1170, Revised Civil Statutes of Texas, 1925, as amended.

(b) After an election held under this Act, a two-year period of time must elapse prior to the calling of another election on the same proposition.

[Acts 1977, 65th Leg., p. 2079, ch. 829, §§ 1 to 3, eff. Aug. 29, 1977.]

Art. 1011. Powers

The City Council, or other governing body shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations, not contrary to the Constitution of this State, for the good government, peace and order of the City and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this title in the corporation, the city government or in any department or office thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof. No fine or penalty shall exceed $1,000 for violations of all such rules, ordinances and police regulations that govern fire safety, zoning and public health and sanitation other than vegetation and litter violations nor exceed $200 for all other violations.

[Acts 1925, S.B. 84. Amended by Acts 1949, 51st Leg., p. 367, ch. 190, § 1; Acts 1983, 68th Leg., p. 3839, ch. 601, § 1, eff. Sept. 1, 1983.]

Art. 1011a. Grant of Power for Zoning

For the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical, cultural, or architectural importance and significance, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of 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, or other purpose; and, in the case of designated places and areas of historic, cultural, or architectural importance and significance, to regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 1. Amended by Acts 1959, 56th Leg., p. 883, ch. 406, § 1; Acts 1983, 68th Leg., p. 4575, ch. 764, § 1, eff. Aug. 29, 1983.]

Section 2 of the 1983 amendatory act provides:

"The provisions of this Act shall not apply to buildings, structures, or land under the control, administration, or jurisdiction of any federal or state agency."

Art. 1011b. Districts

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act;[1] and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or

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land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 2.]

[1] Article 1011a et seq.

Art. 1011c. Purposes in View

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality, and it is hereby provided that this Act[1] shall not enable cities and incorporated villages aforesaid to require the removal or destruction of property, existing at the time such city or incorporated village shall take advantage of this Act, actually and necessarily used in a public service business.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 3.]

[1] Article 1011a et seq.

Art. 1011d. Method of Procedure

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. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 4.]

Art. 1011e. Changes

(a) Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a written protest against such change, signed by the owners of 20 per cent or more either of the area of the lots or land included in such proposed change, or of the lots or land immediately adjoining the same and extending 200 feet therefrom, such amendment shall not become effective except by the favorable vote of three-fourths of all members of the legislative body of such municipality. The legislative body of a municipality may also provide by ordinance that a vote of three-fourths of all its members is required to overrule a recommendation of the zoning commission that a proposed amendment, supplement, or change be denied.

(b) The provisions of the previous section relative to public hearing and official notice shall apply equally to all changes or amendments.

(c) In addition to the notice required by Subsection (b) of this section, a general law municipality without a Zoning Commission must provide notice of a proposed change to each property owner who would be entitled to notice under Section 6 of this Act if the municipality had a Zoning Commission. Notice must be given in the same manner as is required for notice to property owners under Section 6 of this Act. The legislative body may not adopt a change until after the 30th day after the day that notice required by this subsection is given.

[Acts 1927, 40th Leg., p. 425, ch. 283, § 5. Amended by Acts 1971, 62nd Leg., p. 2864, ch. 942, § 1, eff. June 15, 1971; Acts 1977, 65th Leg., p. 1308, ch. 516, § 1, eff. Aug. 29, 1977; Acts 1979, 66th Leg., p. 1869, ch. 754, § 1, eff. Aug. 27, 1979.]

Art. 1011f. Zoning Commission

(a) In order to avail itself of the powers conferred by this Act, the legislative body of a home-rule city shall, and the legislative body of a general law municipality may, appoint a commission, to be known as the Zoning Commission.

(b) If a Zoning Commission is appointed, it shall recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such Commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such Commission; provided, however, that any city or town, by ordinance, may provide for the holding of any public hearing of the legislative body, after published notice required by Section 4 of this Act, jointly with any public hearing required to be held by the Zoning Commission, but such legislative body shall not take action until it has received the final report of such Zoning Commission. Where a City Plan Commission already exists, it may be appointed as the Zoning Commission. Written notice of all public hearings before the Zoning Commission on proposed changes in classification shall be sent to owners of real property lying within two hundred (200) feet of the property on which the change in classification is proposed, such notice to be given, not less than ten (10) days before the date set for hearing, to all such owners who have rendered their said property for city taxes as the ownership appears on the last approved city tax roll. Such notice may be served by depositing the same, properly addressed and postage paid, in the city post office. Where property lying within two hundred (200) feet of the property proposed to be changed is located in territory which was annexed to the city after the final date for making the renditions which are included on the

last approved city tax roll, notice to such owners shall be given by publication in the manner provided in Section 4 of this Act.

(c) Any other law that refers to a municipal Zoning Commission or Planning Commission shall be construed as referring to the legislative body in the case of a general law municipality that exercises zoning power without appointment of a Zoning Commission.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 6. Amended by Acts 1949, 51st Leg., p. 205, ch. 111, § 1; Acts 1953, 53rd Leg., p. 732, ch. 287, § 1; Acts 1961, 57th Leg., p. 570, ch. 267, § 1; Acts 1979, 66th Leg., p. 1869, ch. 754, § 1, eff. Aug. 27, 1979.]

Art. 1011g. Board of Adjustment

(a) Such local legislative body may provide for the appointment of a Board of Adjustment, and in the regulations and restrictions adopted pursuant to the authority of this Act may provide that the said Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

(b) The Board Adjustment shall consist of five (5) members, each to be appointed for a term of two (2) years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. Provided, however, that the governing body of any city may, by charter provision or ordinance, provide for the appointment of four (4) alternate members of the Board of Adjustment who shall serve in the absence of one or more regular members when requested to do so by the mayor or city manager, as the case may be. All cases to be heard by the Board of Adjustment will always be heard by a minimum number of four (4) members. These alternate members, when appointed, shall serve for the same period as the regular members and any vacancies shall be filled in the same manner and shall be subject to removal as the regular members.

(c) The Board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this Act. Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall be a public record.

(d) Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the Board, by filing with the officer from whom the appeal is taken and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

(e) An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the Board of Adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

(f) The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(g) The Board of Adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this Act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such Board is required to pass under such ordinance.

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(h) In exercising the above-mentioned powers such Board may, in conformity with the provisions of this Act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

(i) The concurring vote of four (4) members of the Board shall be necessary to reverse any order, requirement, decision or determination of any such

administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

(j) Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within ten (10) days after the filing of the decision in the office of the Board.

(k) Upon presentation of such petition the court may allow a writ of certiorari directed to the Board of Adjustment to review such decision of the Board of Adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten (10) days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the Board and on due cause shown, grant a restraining order.

(*l*) The Board of Adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(m) If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm wholly or partly, or may modify the decision brought up for review.

(n) Costs shall not be allowed against the Board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

(*o*) Repealed by Acts 1981, 67th Leg., p. 2646, ch. 707, § 4(54), eff. Aug. 31, 1981.

[Acts 1927, 40th Leg., p. 425, ch. 283, § 7. Amended by Acts 1959, 56th Leg., p. 545, ch. 244, § 1; Acts 1961, 57th Leg., p. 687, ch. 322, § 1; Acts 1971, 62nd Leg., p. 2385, ch. 742, § 1, eff. June 8, 1971; Acts 1981, 67th Leg., p. 2646, ch. 707, § 4(54), eff. Aug. 31, 1981.]

Art. 1011h. Enforcement and Remedies

The local legislative body may provide by ordinance for the enforcement of this Act[1] and of any ordinance or regulation made thereunder. A violation of this Act or of such ordinance or regulation is hereby declared to be a misdemeanor, and such local legislative body may provide for the punishment thereof by fine or imprisonment or both. It is also empowered to provide civil penalties for such violation.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this Act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 8.]

[1] Article 1011a et seq.

Art. 1011i. Repealed by Acts 1975, 64th Leg., p. 2352, ch. 721, § 90, eff. Sept. 1, 1976

See, now, the Public Utility Regulatory Act, classified as art. 1446c.

Art. 1011j. Conflict with Other Laws

Wherever the regulations made under authority of this Act[1] require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this Act shall govern. Wherever the provisions of any other statute or local ordinance or regulation requires a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this Act, the provisions of such statute or local ordinance or regulation shall govern.

[Acts 1927, 40th Leg., p. 424, ch. 283, § 9.]

[1] Article 1011a et seq.

Art. 1011k. Neighborhood Zoning Areas in Cities over 290,000

The legislative body of any city having a population of more than 290,000 inhabitants according to the last preceding Federal Census, and which has adopted a comprehensive zoning ordinance under the law of the State of Texas, may by ordinance divide the city into such neighborhood zoning areas after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality. The Mayor of such city,

with the approval of its legislative body, may thereupon appoint for each of said areas a Neighborhood Advisory Zoning Council, consisting of five citizens residing in the area, who shall hold office for two years or until their successors are appointed and qualify. It shall be the duty of such Neighborhood Advisory Zoning Council to furnish to the Zoning Commission of such city information, advice and recommendations with respect to all applications filed with the Zoning Commission for changes in the zoning regulations of such city affecting property within said area. As soon as any such application is filed with the Zoning Commission of the city, the Zoning Commission shall furnish the Neighborhood Advisory Zoning Council for the area which would be affected by such application if granted with a copy thereof, and thereupon it shall be the duty of the Neighborhood Advisory Zoning Council to hold a public hearing in relation thereto, giving at least ten days notice of the time and place of such hearing by publication in an official paper or a paper of general circulation in such municipality, and at or before the hearing on such application before the Zoning Commission it shall be the duty of the Neighborhood Advisory Zoning Council to furnish and submit to the Zoning Commission such information, advice and recommendations with respect to such application as it deems proper. Overruling of any recommendation of the Neighborhood Advisory Zoning Council with respect to the disposition of such application shall require the vote of at least three-fourths (¾) of the members of the Zoning Commission present.

[Acts 1945, 49th Leg., p. 202, ch. 155, § 1.]

Art. 1011*l*. Joint Municipal Planning in Certain Areas

Grant of Power to Expend Public Funds

Sec. 1. Each city (including home rule charter cities), town, or village incorporated under the laws of this State, or by special act or charter, is hereby authorized, by ordinance duly passed, to expend public funds from the municipal treasury for compiling statistics, conducting studies and formulating plans relative to the future growth and development of such municipality or municipalities.

Municipalities Subject to Act

Sec. 2. Municipalities located or situated in whole or in part within an area wherein the sphere of zoning influence of each municipality is adjacent or contiguous to the other may contribute, and/or expend, public funds from the municipal treasury, to a joint planning commission for the joint planning of the growth and development of two (2) or more of such municipalities that are located or situated in whole or in part within the sphere of influence of such planning commission.

Joint Planning Commission

Sec. 3. Municipalities affected by this Act shall, if they adopt the provisions hereof, by the governing bodies of each of such municipalities, appoint an equal number of representatives, from each of the municipalities affected hereby, to a joint planning commission, and it shall be the duty of such joint planning commission to meet and determine the sphere of influence of such planning commission which they shall describe by metes and bounds in writing and cause the same to be placed upon a map and the same shall be recorded for record with the county clerk of the county within which such municipalities are located or situated.

Powers and Duties of Commission

Sec. 4. The duties, powers and authorities of such joint planning commission, so appointed by the governing body of such municipalities, shall be as follows, as authorized by ordinances duly passed within each of such municipalities, to wit:

(a). To employ engineers, clerks, secretaries, field personnel, and administrative personnel as are necessary to formulate, prepare, and design an organized master plan for the area as designated.

(b). To prepare, formulate, and design an organized master plan for the area which such members represent, including, but not limited to, highway design, street layout, park layout, schooling areas, residential areas, business areas, commercial areas, industrial areas, and water reservoir areas, for the orderly growth of the area, such plan must be approved by each of the municipalities within the area.

(c). To make aerial photographs, land surveys, and topography studies to facilitate such planning.

(d). To keep and maintain a complete record of all activities, meetings, expenditures, and plans.

(e). To submit regular reports of income, expenditures, accounts, and progress reports to each municipality represented.

(f). All records, minutes, books, accounts and meetings shall be open to the public for attendance and/or examination.

(g). To prepare and submit to each municipality represented an annual audit of all accounts, expenditures, funds and moneys coming into the hands of said joint planning commission.

(h). To make all reports, accounts, and records as may be required by each of the municipalities represented, by ordinance or resolution duly passed.

(i). To perform such duties and functions as may be required by each of the municipalities represented, by ordinance or resolution duly passed where the same is approved by a majority of the governing bodies of such municipalities so represented and where such is not inconsistent with the purposes of this Act.