PLANNING & ZONING COMMISSION MINUTES – MARCH 28, 2019

STATE OF TEXAS §

March 28, 2019

COUNTY OF GRAYSON §

BE IT REMEMBERED THAT A Called Meeting of the Sherman Planning and Zoning Commission and Board of Adjustments was begun and held in the City Council Chambers at City Hall, 220 W. Mulberry Street, Sherman, Texas, on March 28, 2019, when a quorum of Planning and Zoning Commission and Board of Adjustment Members attended the Training Seminar given by E. Allen Taylor, Jr.

MEMBERS PRESENT:	Chairman Clay Mahone. Commission Members: David Downtain, Trish Bridges, Leigh Ann Sims and Paul Manley
MEMBERS ABSENT:	Vice-Chairman Eric Elliott and Commission Member Shawn Davis
CITY STAFF PRESENT:	Scott Shadden, Director of Developmental Services; Clint Philpott, Director of Engineering and Patsy Reeves, Developmental Services Coordinator.
PURPOSE:	**Planning and Zoning Commission and Board of Adjustments Training Workshop to receive Training and Legal Updates Regarding Developmental Regulations and Parliamentary Procedure**

There was a quorum of City Planning and Zoning Commission and Board of Adjustments Members present at the Planning and Zoning Commission and Board of Adjustments Training Seminar on March 28, 2019, at 11:00 a.m.

E. Allen Taylor, Jr. appeared at 11:00 a.m. to present his training and legal updates regarding developmental regulations and parliamentary procedure presentation.

Scott Shadden, Director of Developmental Services introduced Mr. Allen Taylor, a Fort Worth native and currently serves as City Attorney to the cities of Burleson, Southlake, Mansfield, and Cleburne. He is the former Chairman of the Plan Commission of the City of Fort Worth, a former member of the Zoning Commission of the City of Fort Worth, a member of the Advisory Board of the Institute for Local Government Studies of The Center for American and International Law and was previously a member of the Pre-Application Review Panel and the Section 208 Water Quality Advisory Committee of the Lower Rio Grande Valley Development Council. He has served as a speaker and panelist for a number of conferences and seminars in these fields and has authored a number of articles in the land use and development law area. His practice areas include public law, municipal law and land use law. Prior to embarking on a legal career, Allen served as Planning Director of the City of Edinburg, Texas, Director of Planning & Community Development of the City of Pharr, Texas, and the Director of Planning & Community Development for the City of Killeen, Texas.

Mr. Taylor urged Commission Members to be aware of the risks when they attend seminars and make sure what philosophy the speaker brings forward and what their background is. He explained he is a City Lawyer and represents the more extreme position; my clients are only cities. I am a City Attorney to forty cities and have a master's degree in urban planning. He served as a Planning Director, City Manager, and Attorney representing local governments and also served as a Chairman for a local Planning Commission and was a member of a local zoning commission.

He was asked to give a refresher overview of some of the land use regulations, land development regulations and zoning issues to the Planning and Zoning Commission. He concentrated on two different things; land use regulations and land development regulations for municipal governments in Texas, which comes under four different law headings.

The first is land use regulations, which is zoning; it determines how land, buildings or structures may be used within the corporate limits of the City. These are included in Chapter 211 of the Texas Local Government Code.

The second is land design regulations; these are regulations that allow you to establish subdivision ordinances, rules on how lots, blocks, alleys, easements, roads, parks, public project sites, and things that are needed for the design of the physical development of the City are laid out. These are included in Chapter 212 of the Texas Local Government Code.

The third type of land development regulations are construction codes and are found in Chapter 214 of the Texas Local Government Code. They allow the local government to adopt the International Codes for the materials that can be used, the construction techniques employed to build structures designed for human occupancy.

The last category are the "single purpose boutique regulations" also adopted under Chapter 214 of the Texas Local Government Code. These regulations include stand-alone floodplain regulations, stand-alone tree preservation regulations, stand-alone recreational vehicle park regulations, anything we adopt with a single unified purpose under the police powers granted to local governments.

Mr. Taylor explained under the Texas Constitution, Cities and Counties are general-purpose units of government and they have the right to adopt regulations relating to the protection of the public health, safety and welfare; that is the police power. There are two types of cities, general law cities and home rule cities. Sherman is a home rule city, it is greater than 5,000 in population and has adopted a charter, which serves as the constitution of the city and outlines the power of the government, how it is organized and how powers exercise within the government. It serves the same purpose as a constitution does for a State of Government. The reason to know the distinction is general law cities smaller than 5,000 can adopt regulations and carry out activities only where expressly authorized by a State Statue. A home rule city begins under our constitution with the premise it has power because of its charters equivalent to the State Constitutional Brand of Authority; it can do anything the State can do unless the State Legislative adopted a regulation expressly preempting his authority to do that. A general law city can only do what the State says it can expressly can do and a home rule city can do anything that is not expressly prohibited by the State.

Mr. Taylor said he thought they generally understood land use rules but most Planning Commissions hit the bulk of their issues on the zoning side of the planning equation. Zoning is a regulatory process, in Texas there is a State Enabling Act, Chapter 211 of the Texas Local

Government Code, its predecessor provisions were adopted in 1927; it was our standard regulatory grant of authority. It also states what use or uses are allowed for land and structures within each district. As a secondary element of that authority, the City's zoning ordinance can establish performance standards for those uses; those are setback requirements, building height requirements, area ratio requirements, parking requirements, for commercial and industrial development you could limit light, noise, glare, smoke or any industrial operation that would have an environmental impact. Those performance standards are included in the ordinance itself. One of the things to remember is zoning has to be adopted by ordinance and it is a two element item; it consists of a text of an ordinance and an official map. To have a valid zoning structure, a City must have both the text and the map.

The text of the ordinance establishes why it's adopted, what it's intended to do, identifies all the districts within a City, states the use or uses that can occur in each district, and has a series of performance standards for uses that occur within those districts. The ordinance should also include procedures for enforcing the standards.

The zoning map takes these districts and allocates them to specific areas of the City. The map is indispensable and is an official record that must be updated with each change to a zoning ordinance. One way to update the map is to include the update in the template for each zoning ordinance, For example, each zoning ordinance might include the statement "the City staff is hereby directed to amend the official zoning map to reflect this change." Mr. Taylor also recommended that every three years, as an "administrative housekeeping item," the Council agenda include an item for "review and ratification of the official zoning map."

The courts have said that zoning is a "subjective, discretionary, legislative act." Zoning has the broadest grant of authority that routinely exists in governmental operations. A City can zone in order to separate buildings to allow the circulation of light and air; to separate buildings to avoid the danger of fire and explosions; to lessen congestion in the streets; to separate incompatible land uses to avoid negative impacts from one use to another; to preserve property values; to preserve or establish neighborhood boundaries; to preserve character; to avoid overloading the density of areas, to negatively impact public facilities, such as roads, water lines, sewer lines, parks, playgrounds, or schools; to create incentives to implement the City's Comprehensive Plan; to implement the economic development or industrial development plan; to protect architecturally significant structures; to protect historically significant structures or areas; to protect environmentally sensitive areas; and for aesthetic purposes. The courts have said there is no requirement as to what weight any of these reasons is given. That is determined by the local officials of each City based on what they want for their City, however, they must carefully follow the procedural rules for zoning.

Mr. Taylor said zoning should be done in conformance with the Comprehensive Plan. A City is required to adopt a Comprehensive Plan, which is a general statement of policy and position intended to guide the growth of the City into the future, it is not site or activity specific. It is intensity and character of activity specific. The plan is the "blueprint" for the City of how the city can grow responsibly and use its resources effectively and efficiently as it grows. The zoning ordinance is a tool to implement the plan. The zoning structure should be designed to work toward the implementation of the Comprehensive Plan.

Mr. Taylor said that does not mean that a City is required to make every zoning decision exactly in compliance with the plan. A plan is a projection of the future, but zoning must be responsive to current conditions. The plan must be "conceptually in-line" with the zoning actions a City is taking. A City must be able to provide a logical explanation as to why they are transitioning into a new use.

Zoning is limited to the corporate limits of the City; you do not zone in the extra territorial jurisdiction (ETJ). The extra territorial jurisdiction is the magic boundary of land surrounding the City; it is based on the size of the City in which a City has limited development regulatory authority. You can regulate land design, not land use. The subdivision ordinance can if the Council chooses to, be extended to the ETJ.

Local zoning regulations do not control actions of the State or Federal government. Federal and State governments are senior to local governments. A City is a "subdivision" of the State government. However, if the State does not "own" the facility, and instead leases it, they are not immune from the zoning rules. Therefore, a building owned by the State or Federal government is immune from the City's zoning rules, but for a building leased from another owner and used by the State or Federal government, that immunity does not apply. The issue of jurisdiction hinges on ownership not occupancy.

As for school districts, Mr. Taylor said they may think they are exempt from zoning, but that's not the case. The City and the school district are both entities created by the State, with specific grants of authority and delineation of responsibilities. The responsibility of a school district is to educate the children and to establish a funding program of taxation to fund that operation. Cities have a responsibility to protect the public health, safety, and welfare, and that involves land use management.

Therefore, the rule is, the school district gets to pick a site and determine the activity that will occur on that site, but whatever that activity is, has to comply with the City's zoning regulations and performance standards. The school picks the site and the character of the activity, but the City's regulations control how it is built. The courts have been consistent in following this rule since it was established. You have to work cooperatively with your sister government in trying to make a rational decision about use. There is a limit on a City's land use authority if it deals with a public school.

The next is an area of expressed specific statutory preemption. The Texas Legislature in a number of areas has adopted specific State Statutes that limit the authority of home rule cities to make certain land use decisions. The one that gets the most coverage in the media and is in the courthouse most frequently is the alcoholic beverage issue. In 1987, they enacted laws that superseded any laws not already on record that were made by individual cities. The law in place prior to 1987 remained in place, but cities could not adopt new or extended regulations after that date.

There are other "limited" preemptions on things such as pawnshops, signage, billboards along major State highways, and sexually oriented businesses. One that comes up more often is modular or manufactured housing. The City cannot prohibit the location of manufactured housing in the City. They also cannot prohibit or limit the placement of a "modular home" in any area, on any lot, on which a conventionally built home would be permitted. A modular home is a home that is built in components off-site, moved to the site, and placed on a foundation. If a doublewide mobile home does not have running gear, it meets the statutory definition of a modular home.

The next area of preemption is spot zoning. It is zoning applied to a piece of property that cannot be logically be explained under the City's Masterplan and treats that property in a manner unlike how other, similar properties are treated. If you think of an intersection with four corners, if three corners are zoned commercial and the fourth corner is zoned single-family residential on this one lot, the owner comes in and would like for it to be zoned commercial because there is commercial all around me and you say no, the court says explain why. What is different about this one corner on that block that it should be treated in a different manner? If you cannot logically

explain it, you fall into the rule of spot zoning. Spot zoning can involve large tracts of land if it is in an area with a zoning district designation that does not match the Comprehensive Plan, does not appear logical and isn't consistent with how you treated other similar properties. It is a question of fairness.

The next issue is contract zoning, where a deal for zoning is made, but the issue is not in front of the board for a decision. However, according to Mr. Taylor, a City has contract zoning every day, called planned unit development zoning or site plan zoning. A special district is contract zoning, a mutual set of agreements that were negotiated, documented by an ordinance. The Planning and Zoning Commission and Council can contract for anything they want, as long as the item is jurisdictionally in front of the legislative body on an agenda. A proper application has been presented, the item has been noticed and mailed to the appropriate property owners, it has been advertised and a public hearing is held. They cannot commit to action that has not been brought before them as a Planning and Zoning Commission or City Council. They can only act on agenda items that are before them.

He discussed the preemption issue of exclusionary zoning for fair housing, or lower cost housing. The City has the right to adopt zoning regulations to protect the public health, safety, and welfare of the citizens. They can also take into account those many items that were previously listed.

However, because the City exercises sovereign governmental authority, it must be done in a way that does not have a disproportionate impact on any group or class of individuals, unless you can document that it is the least intrusive method of achieving a legitimate governmental objective. If it is found to be an impermissible, unacceptable use, the courts will "invalidate your zoning ordinance" entirely. This is exclusionary zoning. They say "your zoning ordinance and regulatory structure have an impermissible bias, and we strike your zoning ordinance; they invalidate your zoning ordinance and make you start over." At that time, your City is un-zoned; that means everything in town is a legal nonconforming use, anything you were already fighting over is now legal and if you adopt new zoning, that is great, but these people get to be here forever because they were locked in at this moment in time and they are legal forever.

Commission Members took a break from 11:58 a.m. to 12:08 p.m.

He discussed the processes for the Planning and Zoning Commission. When someone wants a change to the ordinance or map, they come forward and present it to the City. He discussed the process of preparing an item for the agenda and requirements for the Planning and Zoning Commission and public hearing. The Planning and Zoning Commission's recommendation is then placed on the City Council agenda. Their standard is the "highest and best use of land for the public's purposes on that property".

You are going to get into cases on Special Use Permits; things where there are a special limited use. You look at these to see if these are reasonable under the circumstances. Remember the issue of the spot zoning, have you allowed other compatible uses in the area, what safeguards have you put in place. The one's we run into all the time are tattoo parlors, vaping and the CBD oil distributors who want to go in places, a lot of cities have done things with a Specific Use Permits. You evaluate the case like you would any other zoning case, there is no preemption for tattoo parlors, vaping parlors or CBD parlors, they are subject to whatever normal zoning regulations of the applicate, neighborhood character, compatibility of neighboring uses, does it change traffic flows, does it affect property values, all of those are valid considerations. Just think about if you have looked at any others when you are dealing with a Specific Use Permit, have you put any

special conditions on them, have you made any special restrictions that you are not considering in relation to this application. It is the spot zoning issue, are you truly situated properly in a compatible matter, if not, can you explain why the matter is different.

Mr. Taylor discussed the practical aspect of zoning and how the Open Meetings Act applies to the process. He also discussed the use of Executive Sessions and violations of Commission Members talking as a quorum. He urged them to be careful about different forms of communication that might cause violations. He also encouraged them to "stay off of social media" to provide their constituents with a "level playing field." Many examples were discussed.

Mr. Taylor said the Planning and Zoning Commission and the City Council can hold a joint public hearing, but it is never a good idea. It is time efficient, but a divided method is best. The Planning and Zoning Commission should hold the first public hearing and make a recommendation to the City Council. This allows the Council to make a better, more informed decision.

The existing zoning ordinance and zoning map are the status quo, and are presumed valid and legitimately adopted. It is presumed philosophically and culturally appropriate for this community. Judges are required to presume its validity.

If there are facts at issue upon which reasonable minds might differ, the court cannot substitute its judgement for those of the locally elected or appointed decision makers.

In a zoning case, a court will look to see if any action looks arbitrary or capricious. They will look at comments on social media that look like there is prejudgment. If there are, any factual studies that were presented to support the decision the Commission made, the Court must presume that the Commissioners relied on that information to make their decision. He urged Commissioners to "learn the benefit of silence." They must make decisions based on fact, not on emotions. He added, "it won't get better with an explanation."

Subdivision regulations come from a different State enabling Act, Chapter 212. It is a land design regulation, not use. Subdivision regulations regulate the division of land into tracts for the purpose of resale for any development or layout of lots, blocks, alleys or easements for improvements. You can subdivide by deed, by replat, by contract, by lease; if you are breaking up ownership; you are subdividing. Cities may adopt reasonable regulations how you lay out subdivisions by lots, blocks, street right-of-ways, alleys, easements, storm drains to ensure roadways, utilities and storm drains systems are inner connected and allow the City to grow in a reasonable manner. If a developer submits a subdivision that is consistent with your plan, you shall approve it. The case has to be heard in a public meeting, not a public hearing; it does not matter if they do not like it, if it is compliant with the regulations set forth in your ordinance, you have to approve it. The public hearing portion of it only happens if you are resubdividing (Replatting) an area that has already been subdivided and zoned for single-family residential purposes, five years prior to the resubmission. Subdivision is ministerial, the “trip wire” is when it is submitted, and when it is complete; you have thirty-day clocks from the time it is submitted to complete form. If a Planned Commission has not acted on it within thirty days, their approval is operational; you have approved it by inaction.

Mr. Taylor also advised Commission Members that they are subject to the Open Records Act and their notes and records are official records of the City and subject to public information requests. He warned them not to use their personal computers or cell phones.

The meeting was adjourned at 1:18 p.m.

CHAIRMAN

SECRETARY