PLANNING & ZONING COMMISSION MINUTES – FEBRUARY 26, 2020

STATE OF TEXAS §

February 26, 2020

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 February 26, 2020, 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:	Vice-Chairman Eric Elliott Commission Members: David Downtain, Trish Bridges, Leigh Ann Sims and Paul Manley
MEMBERS ABSENT:	Chairman Clay Mahone, and Commission Member Shawn Davis
CITY STAFF PRESENT:	Scott Shadden, Director of Developmental Services 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 February 26, 2020, at 11:25 a.m.

Scott Shadden, Director of Developmental Services introduced Mr. Allen Taylor, Jr., Founding Partner, Taylor, Olson, Adkins, Srala and Elam, LLP.

Mr. Taylor presented issues that emerged from the most recent Texas Legislative Session, and what that means for those in a planning and development role.

He added that there is a major political issue. There is leadership at the State level, that has publically stated on numerous occasions, that they are not supportive of the local government control. The Governor has announced he wants to eliminate home rule authority for cities. The Lieutenant Governor has said he doesn't think local governments should do zoning regulations because they get it all wrong and they take away people's rights. We got a very rural mind set in a lot of the Legislators both in the House and the Senate that are not familiar with the problems the cities urbanization, rapid growth, the need to try to how deal with the cities that are getting close to one another, mixing in and they are very anti-local government. They do not trust local elected officials to make decisions regulating local development. He said the Governor has said it, the Lieutenant Governor has said it, the soon to be late Speaker of the House has said it, and they have made it very clear that they want to remove the ability of local government to make local based decisions. They want Austin to develop the rules and leave it to the local governments to carry out Austin's decisions. However, he said, there needs to be local control of local decision

making. If local citizens do not feel that these decisions are in their best interest, they are in a position to make a change. Apparently the State leadership is not of that mind.

We got (SB 2) which was the Senate Bill that restructured how we manage local revenue. It was the roll back cap on ad valom taxes from 8% to 3.5%. That restricts the ability for growing cities like Sherman to increase revenue if we have a lot of growth we are trying to support quickly. We don't have the ability to necessarily bring in the revenue we may need to support growth. Is that the end of the world; no, most of the time cities never got their 8% cap, most cities operate in the 3-5% range. The reason it was important to have the flexibility is when the time comes when you need a new Fire Substation, or a Police Substation or you have to make a major expansion to a water or sewer treatment plant or to install a series of major collective roadways because of the increased cost of construction, those are monster expenses to incur in one budget year and they require you to go to the bond market. Public debt can bring in new resources in order to support your growth needs and that can be traumatic for the local government. It can limit your ability and your flexibility to respond to development.

We have not been active enough at the local government level on the most critical tasks that's before us and that is educating our State Elected Officials on the reality of development and the cost of development at the local level. That's just a problem we all face; we have not done the job that we need to do. We haven't taken care of it, we are not talking to them enough. We are not talking to our State Senators or State Representatives and they go down there and get bombarded by lobbyist. The lobbyist tell them sad tales of why their wonderful green projects have been unfairly and unreasonably thwarted by local government bureaucrats and it needs to change, so we get an array of new pieces of legislature that in many ways are killing us.

Mr. Taylor said the biggest issue that the City is dealing with is HB 2439, or the construction materials bill. At the time, no one knew what the implications were from that bill, and it appeared to be a minor amendment. The bill says a local government may not adopt or enforce a rule, regulations, or ordinance, Charter provision, or anything that prevents a builder, developer or property owner from using a building material that has been approved in the last three code cycles.

Building codes are updated about every two to three years. If a builder wants to use a material that was approved nationwide in a code issued within the last three cycles, a City cannot enforce a rule that prohibits its use.

The requirement that hit cities the hardest was the exterior façade requirement. Many cities have a requirement that a certain percentage of the exterior of structures be masonry or at least conform to certain types of appearance. The people who forced through HB 2439 partially were representatives of the Hardie Plank Industry. They went to the Legislature, they said Hardie Plank is just as good as masonry, it's cheaper, it's more efficient, it's easier to install, it's aesthetic prejudice by those rich folks in the cities that won't allow it to be used. So Legislature adopted legislations saying if it's an approved material within the last three code cycles, you can use it. But it also meant that if someone in a residential neighborhood wanted to put galvanized sheet metal as the exterior façade of their house, they can.

When we are talking about internal structures, certain types of wiring, there are wiring harnesses that may be aluminum based, versus copper based, some are safety risk or pose a greater safety risk than others, but they have been approved within the last three code cycles, it doesn't matter what our local experience has been, we are required to allow it to be used because the State has preempted our authority and taken that away from us.

Another portion of HB 2439 doesn't just talk about materials, it says a local government cannot have a restriction or limitation on the method of construction or an aesthetic requirement of construction if it is permitted within the normal construction codes.

However, the bill also included the prohibition of a requirement for any aesthetic elements to construction, such as roof pitch. There are other "aesthetic" elements that have been adopted as local code amendments for things that work locally. Different construction techniques and materials are required based on the area in which they are used. These local code amendments are not allowed under HB 2439.

This is impacting us all across the board. The safety of the structures, the suitability of the structure, the economic development impact of trying to redevelop areas and improve appearances. It is creating ripple effects all over the development world and that came out of the Legislature.

Texas Municipal League is our municipal resource, they are the consortium of cities; there are 1,200 members, we join together to make our voice heard all through the State Government that talk about concerns of the cities. Texas Municipal League has a limited staff to analyze all the bills that are put before the Legislature for decisions. Apparently 7,600 bills were filed and 3,100 were adopted into law, of those 1,800 affected cities, there were too many to analyze the consequences.

Bill filing for the new Legislative Session will open soon, the third week in November of this year, it convenes January 4, 2021. In this window of time from November to the last filing date; the end of March, all that Legislation is going to hit hard and many of these development issues will be revisited. Mr. Taylor said it is very important that local elected officials be active, involved, and vocal in letting the elected officials at the State level know what their positions are. Some of the decisions previously made by the Legislature created major problems at the local level.

There are a couple of exceptions of HB 2439. Mr. Taylor said if an area has unusual artistic, cultural, or historic requirements, and restrictions have been adopted to protect those, then that area of your City is exempt from limitations of HB 2439.

If there are overlay districts or planned developments, where there is an evidentiary record before the Planning and Zoning Commission or the City Council, and there are restrictions such as aesthetic elements or architectural items, then those are enforceable. These are enforceable because it was done with the intent to create an integrated community, and the aesthetics were part of it.

However, if there was no conversation about architecture, or the cultural import, or the history, it may not be a defensible position. Most overlay districts frequently involve travel corridors or downtowns, preserving the old, historic appearance. The ordinance that adopted it and the plan on which it is based would state that they are preserving the historic character of the community, and that they want to preserve a part of history and culture to pass on to new generations. This type of documentation would make restrictions exempt from the limitations of HB 2439.

Mr. Taylor urged them to consider this as they move forward with planned developments in the future. But according to HB 2439, if a City is on the National Historic Register for some of these issues, they are exempt from everything. If it's not on the Register, if these things existed as part of the planned development, prior to April 2019, it's part of it. Mr. Taylor said they believe the next Legislative Session will expand that to say there is no time limit on it, as long as it acknowledges the aesthetic elements or architectural restrictions are part of the agreement to produce the

planned development.

Mr. Taylor recommended that the City not alter their current code regulations. Because of the problems caused from this bill, he expected that the upcoming Legislature would make some changes. If you have a masonry requirement, leave it in place, if you have a restriction on certain materials, leave them in place. Everybody knows they went too far. They know going back to Austin, they are going to have to make some changes. We don't know how it is going to change. If you have a regulation in place, if HB 2439 is modified, we are going to calculate non-conforming from the date certain regulation is in place. If your regulation has remained in place the whole time, we have an argument that you should be able to continue to enforce it. Don't mess with it until we see what the next session is going to do. Get through the next session before we alter anything.

Mr. Taylor addressed HB 3167, which is the "development shock clock" bill. It is a subdivision regulation rewrite about the procedural process of how we manage plats. It says if a developer or owner submits a subdivision plat, there is a 30-day window in which the City can disapprove a plat or approve it by operation of law. However, HB 3167 says you can approve it, disapprove it, or conditionally approve it. If they disapprove it or conditionally approve it, they are required to give the applicant a written report, explaining the basis upon which it was disapproved or conditionally approved. This means the reason for disapproval or conditional approval needs to be stated in the actual motion.

They are then given an unlimited window of time to review the comments. They can come back and submit a letter and documentation showing how they have addressed the issue and fixed the problem with the plat. The City must then act on that within 15 days. Within 15 days it must be on an agenda and must be acted upon. They can reject it again, approve, conditionally approve, or disapprove.

If it's disapproved or conditionally approved again, they must get written notice. They have as long as they want to review it, but when they send it back to the City, the City must react within 15 days. He added that, in providing your written information for the denial, when you tell them why the plat was not approved, you are "locked into" the list you give them. You cannot add any additional deficiencies, so the staff must be very vigilant in finding all problems.

Another development issue is HB 2840, which changed the meeting structure. In the past, the meeting agenda had items listed for consideration. Certain items required public hearings, but most items only required that the government body take action in an open, public forum. Many meetings had an item on the agenda allowing citizen's comments.

The Legislature adopted HB 2840 which specifically says, any citizen has the right to address a governmental body, on an item to be considered by that body, before or during the consideration of that item. In most cities this isn't a problem and the board makes time for the citizens because it's important. But in other cities these comments start out and degenerate into three hundred people screaming about items that aren't on the agenda.

So with HB 2840, it says any citizen has the right to speak to the board on any item on the agenda that the board is going to consider, before or during. The board still holds the public hearing; in which everyone has a right to speak. However, on non-public hearing items, the question is, does the board have to let them speak during the individual item. Mr. Taylor said the answer is no.

At the beginning of the meeting, there would be a designated citizen's comment section where a

citizen can address the board on any item on the agenda, other than the public hearing. On the public hearing items, the Chairman will ask for citizen's comments. Be aware, if it is not a public hearing item, this is your only opportunity to speak. The Chairman will say “do we have anyone that would like to speak under citizen’ comments for a matter that is not scheduled for a public hearing. If they want to speak they speak at that time. He said this is the most efficient way to make it work.

Commission Member Downtain asked if this was what is considered the consent agenda items. Mr. Taylor explained yes, but they have to do it during citizen’s comments, before you approve the consent agenda. It is important that you pay attention to your meeting management issues.

Mr. Taylor said HB 2497 changed the structure of the Zoning Board of Adjustments, and made it clear that the Board can adopt its own rules. It also limited the individuals that can file appeals from Zoning Board of Adjustment cases. The Zoning Board of Adjustments grants variances to the performance standards of the ordinance where an applicant can show a hardship, they grant special exceptions where authorized by the Council within the text of the Zoning Ordinance, and it rules on appeals of interpretations made by the Zoning Administrator.

The change limited the appeals for the Zoning Board that were used to create zoning delays that could kill a project for developers. Many times neighborhood groups would file these appeals in order to delay the project. Even though the Zoning Administrator and the Zoning Board would make a perfectly good ruling, the delays could cause the developer to walk away from the project. This HB limits the people that can appeal the decision to the property owner, someone that lives within the 200-foot radius, or the local government. It removed the neighborhood associations.

Mr. Taylor also addressed HB 852, which is the building permit change. For many years, building departments based their fees upon the value of the structure. The Legislature said that could not be the basis for the fees anymore. They said a City should base their permit fee on the time it takes the City to do the elements of the permit itself. They said a City needs to develop a system, either based on square footage or on some method of calculating a uniform time it takes to provide the staff's inspection. The City of Sherman is already complying with this requirement.

Mr. Taylor said there are two issues that he is concerned about becoming an issue in North Texas. One is low-income housing and the other is short-term rentals. He said these issues are coming up in every City.

Under low-income housing, he said cities are seeing "tax subsidy units" being located in many areas throughout Texas, and is a very lucrative endeavor for multi-family developers.

The Texas Department of Housing and Community Affairs has a program under which they rate project proposals for low-income tax credit housing. They can get valuable tax credits to help with securing their financing, developing the project, and marketing it correctly. In order to do this, they must qualify for the credits. In order to get these tax credits, they must score points on a scorecard for certain things, such as accessibility to grocery shopping, accessibility to public transportation, accessibility to health care facilities, and points for how they are structured.

They also get points if they have a resolution from the local government announcing its support for the development of this type of housing at this site. They can still get funded without it, if they have enough points. They will tell the City they can't make it work without the City's support, but the local government is not required to do this.

The approval of the City's support for a project like this is strictly a policy decision for the Council to make, and there are not negative consequences. Adopting a resolution of support is a voluntary choice that the Council makes.

There is another check-off on the project where the developer might want financial assistance from the local government for the project. They don't actually want money for the housing project, they want money "to support" the housing project by building a sewer line or a road in front of the project, or some other type of public work project that is attributable to the project. Mr. Taylor said the City is not required to do it, it is not a violation of the Federal Fair Housing Act, it is not a discriminatory decision to not agree to do this. You should make an individual decision, looking at the project proposal, the communities housing stock and housing needs, where the project is, does it serve a legitimate purpose and would it be in the community interest to do that.

He added that it is prudent, that a City address their housing situation and need on a regular basis, as part of the ongoing planning process. The City needs to have an inventory of their housing units, so they actually know what is needed to make intelligent decisions.

Zoning is a subjective discretionary legislative act. The factors you can consider are; the need to separate buildings to avoid the danger of fire and explosion, to allow the circulation of light and air, you zone in order to preserve property values, to separate incompatible uses that would impact one another, to preserve neighborhood character, to establish or preserve neighbor boundaries, you zone to implement the City's master land use plan, to implement economic development plans, to protect historically significant structures or areas, to preserve architectural significant areas, to preserve environmentally sensitive areas, you zone for aesthetic purposes, you must zone in conformance with the comprehensive plan. There is no mathematical formula of what weight you give to each of these items, in every community it is different based on the needs of the community.

Mr. Taylor explained you do not talk about low-income people who live there, if crooks or criminals live there. Citizens will get up and say this stuff. You do have to have a plan and your zoning should logically be an implementation step in that plan. You talk about the characters of the land use, density, number of vehicles, vehicle movements in and out, noise, height, light that illuminates out from higher buildings or more structured buildings; impacts of land uses, that is what is important in your review of a multi-family land situation.

Mr. Taylor said the other big issue is short-term rentals, which is owners listing homes for vacation rentals, for weekends, for parties, or similar things. Most of the time it is done reasonably and responsibly. But it could be rented for a "frat party" with alcohol, loud music, and vehicles parked everywhere. The neighbors aren't happy and the police have been called.

Some cities have prohibited short-term rentals completely, while other cities have not enacted any regulations. Then there are "owner-occupied" homes where the owner actually lives there but might go away for "Super Bowl" weekend and rent their home out for a short-term rental. This is an owner occupied, short-term rental versus rental property that has never been lived in by the owner and is actually a business operation for short-term rentals.

The City of Austin adopted a very complex set of regulations related to short-term rentals. They have been sued, and the lawsuit is focused on non-owner occupied, short-term rentals. The decision rendered by the court is that Austin's regulations prohibit in requiring the amortization and closure of non-owner occupied, short-term rentals was unconstitutional. They said with the ownership of a single-family home, you buy it as a single-family home in a residential area and it's not a business. But when the court considered the history of Texas law, which said when you buy a single-family home, it comes with inherent ownership elements and rights. One of which is the

right to rent that property. A property owner has a "fundamental right to rent their property," and a government can't interfere with a property owner's right to use their property, except to the extent that they can show that they are substantially advancing a legitimate State interest and they are doing it in the minimum method necessary to achieve the public purpose. He discussed the merits of the Austin lawsuit, and the court's question about why they were trying to take away the inherent rights of property owners. Ultimately, there was no indication that adopting the regulations they were adopting would achieve the things they said they wanted to achieve.

Mr. Taylor said you need to talk through this problem before you get hit with it." Don't open your mouth and let your brain fall out on the table without thinking first." When you get caught by something you don't see coming. Take the time to listen carefully to what the audience is saying, what the applicant is saying, what the people in support of the issue are saying, what the people in opposition are saying, what their positions are, and what they're laying out. The board should make sure their comments are consistent with the Master Plan. What does the Master Plan say about that area and the planned use? Don't let the audience control the conversation. He said to listen, but to be careful not to adopt the things they say.

Mr. Taylor asked the commission members if they had any concerns they would like to discuss.

Commission Member Downtain said they recently had a request for a zone change to manufactured housing and a lot of the opposition is exactly what you described; who would live there and most of that had nothing to do with the adjoining property within the 200-foot radius except for one. We have a need for some affordable housing, so on many levels it made sense but there was so much opposition; it was really challenging to get behind it.

Mr. Taylor explained that is a very legitimate concern and one of the reasons I stressed earlier to take a look at the housing stock and housing opportunities. No one is building the entry level homes for the first time home buyer and there is a huge shortage; that is the upward pressure on building multi-family, there isn't enough housing to get young families in reasonably. So manufactured housing is going to be a larger part of the solution.

There is a provision in the Texas Code, Occupation Code, Chapter 1200, that says a modular home can go on any lot upon which a conventional single-family home can be located. Modular means it is manufactured in a factory in components and assembled onsite.

Commission Member Downtain explained in this case the owner of the property was not going to sell the property into lots, they were going to be a rental community. They would own the home but not the lot.

Mr. Taylor explained the rental community issue is a legitimate concern. Remember, if you are dealing with manufactured housing, you have the authority to restrict manufactured housing to certain designated zoning districts; modular housing, you don't. The big issue is trying to decide whether or not the use is in some way a low density, lower density multi-family operation. The land areas, the space of the rental, much like an apartment, rental units and people move in their rental equipment. You have to make the determination, is this type of use appropriate for that site. You talk about traffic, traffic in and out, are the supporting roadways adequate to handle more, does it have access to collective roads to get the traffic in and out, access to shopping, all the other things that would be supportive of a major rental type community; those are the factors you consider.

Mr. Taylor explained part of the role you play as a commissioner is you serve as an educator of the public. Most citizens don't know if their city has a comprehensive plan, if there is an ordinance

regulating subdivision, most do not know what zoning district their house is located in or the permitted uses or the setback requirements for the zoning districts. Sometimes, the most important role for a Planning Commissioner performs is to say "we need to talk for a minute, we know you are all here because Sherman is important to you, you care about the community and we appreciate the fact that you are here. You need to understand the world we work in, everybody has rights, you have rights as neighbors, but the property owner has rights. You have to balance the rights of all the different stake holders in the contest." The laws both Federal and State in Texas say, "you can't decide a case based on who will live in rental units". Our business is to deal with, is the house appropriately constructed and located and will it be a safe addition to the community. The community needs to start thinking about where do we go.

Sherman is at the point where you are going to get hit with the growth wave; it's going to happen, it will start slowly, pickup and you will get more and more pressure. The idea of planning these things in advance, thinking these things through, planning how you are going to deal with it before it hits is the critical thing, so you don't get caught blind sighted.

Commission Member Elliott asked when considering things with a lot of opposition, what is a good way to approach in making a motion when most of what has been presented could be seen as a discriminatory nature and you want to make sure that is it clear that you are not basing your decision on something that is discriminatory at the same time not backing yourself into a corner.

Mr. Taylor explained, "the appropriate thing to say is Mr. Chairman I would like to make a motion but before I do I would like to make it clear I have listened carefully to each and everything that was said and I am trying to sort those items that are relevant from those that are clearly not." Conversations about who might live there and their behavior really isn't an appropriate issue for this decision, but the land use impacts of this activity are important and how it will impact the surrounding area and based upon what I have heard tonight I am going to make a motion to deny, approve, whatever, second and go. You can disassociate yourself from the comments about who would live there and things like that. As long as you are saying I am basing it on the land use impact, traffic, noise, property value impacts; you do not have to be specific with one.

Commission Member Downtain explained they sometimes serve a dual role on the Board of Adjustments and Planning and Zoning Commission. From previous training, I have learned we don't want to come in with any previous research or knowledge of any of the items on the agenda.

Mr. Taylor explained this is the unusable thing about Sherman. "I don't think there are four cities in the State that have the P&Z serving as the Board of Adjustments." The Planning and Zoning Commission was created pursuant to the provisions of Chapter 212 of the Local Government Code. That is an advisory body on zoning, master planning and platting issues. That means it is legislative for a significate portion of its actions. The Board of Adjustment is created under one section of Chapter 211 that says "the board is a Quasi-Judicial Body" and you are in a judicial role. The only thing you can premise your decision on is evidence presented at the hearing. That is why when somebody appeals the decision, they appeal it by "writ of certiorari", which means the record of your proceedings and all of the evidence of your exhibits be sent to the court and the court reviews them to say "could a reasonable decision maker have reached the same decision they did on this record" and if the answer is yes, they sustain your decision.

I wouldn't do any personal investigations on any of the items on the Board of Adjustments. Reading the packets and simply reading the material that was submitted to you, that is the first thing that is offered in the record. It will be the record on which a court would review your decision. Where we

get into trouble with the Board of Adjustments is where a member later admits they got into the car and drove out to the site where the variance was requested and they went and talked to a couple of the neighbors who were outside and they got all this extraneous information. You then become a fact finder rather than the issue decided. You are the judiciary body when you are on the Board of Adjustments, you base it on the information that was provided and that goes to the court if it is appealed. You are not a judicial body on the Planning and Zoning Commission level.

The Board of Adjustments can hear appeals from an executive decision made by the Zoning Administrator. They can grant variances to the performance standards of the ordinance; never use, there is no variance for use. Special exceptions, the board can grant special exceptions where expressly authorized within the zoning ordinance text, meaning there has to be a section in your ordinance says “the zoning board of adjustments is authorized to grant the following special exceptions”. If it is one of those, the Board of Adjustments can hear them, if not, it has to go to the Planning and Zoning Commission and City Council.

Scott Shadden explained the Board of Adjustments decision is final, it would have to go to a court of law for appeals.

The meeting was adjourned at 1:05 p.m.

_____
CHAIRMAN

_____
SECRETARY