

STATE OF TEXAS

§

February 28, 2018

COUNTY OF GRAYSON

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BE IT REMEMBERED THAT A Called Meeting of the Sherman City Council was begun and held in the City Council Chambers on February 28, 2018.

COUNCIL MEMBERS PRESENT: Mayor David Plyler.
Council Members Holland, Sofey, Steele, Stevenson,
Teamann.

COUNCIL MEMBERS ABSENT: Deputy Mayor Pam Howeth.

CITY STAFF PRESENT: Robby Hefton, City Manager; Steve Ayers, Assistant City Manager; Brandon Shelby, City Attorney; Terrence Steele, Director of Administration; Scott Shadden, Director of Development Services; Nate Strauch, Community and Support Services Manager; Pam Cloer, Assistant to the City Manager; Linda Ashby, City Clerk.

PURPOSE: Call to Order, Quorum Determined, Meeting Declared Open

Invocation by Mayor David Plyler

Council Member Training Workshop Conducted by E. Allen Taylor, Jr.,
Founding Partner of Taylor, Olson, Adkins, Srala and Elam, LLP

Council Comments

Adjournment

CALL TO ORDER, QUORUM DETERMINED, MEETING DECLARED OPEN

Mayor Plyler called the meeting to order at 11:07 a.m., declared a quorum present, and opened the Called City Council Meeting.

INVOCATION BY MAYOR DAVID PLYLER

**COUNCIL MEMBER TRAINING WORKSHOP CONDUCTED BY E. ALLEN TAYLOR, JR.,
FOUNDING PARTNER OF TAYLOR, OLSON, ADKINS, SRALA AND ELAM, LLP**

Robby Hefton, City Manager, introduced E. Allen Taylor, Jr., Founding Partner of Taylor, Olson, Adkins, Srala and Elam, LLP. Mr. Taylor presented a training session to the City Council last year, and Mr. Hefton said some changes were actually made after that meeting. He said today's training will cover practical things and will serve as a refresher.

Mr. Taylor urged Council Members to consider the background of their speakers and said he is a City lawyer and his firm represents 39 different cities. He has a Master's Degree in Urban Planning and a Master's Degree in Public Administration. Depending on their own environment, a speaker is a product of their education and their experience, and they present things from their point of view. He said he presents things from a City Attorney's perspective.

His discussion generally covers three areas, zoning or land use regulations, governance as it relates to managing the Council Member's role in the regulatory process, and subdivision regulations.

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One thing a Council is responsible for is making land use decisions in the City. This is done through land use regulations, land design regulations, and construction regulations. He said land use regulations are the most dangerous, and flow from zoning and problems of urbanization. Mr. Taylor said zoning is a regulatory structure in which a City divides itself into districts and determines the use or uses of land and buildings within that district.

A zoning district consists of a map that delineates the districts and the text that outlines the rules and performance standards that govern those districts. The text also outlines the procedures for making changes in those districts.

In Texas, zoning must be based on a Comprehensive Plan and is a “tool” that is used to implement the development process. The Comprehensive Plan outlines the aspirations of the community in the intermediate to long range future of the City. Zoning must be consistent with the Comprehensive Plan, but does not have to be a “mirror image” of the Plan. They are concepts, not detailed, boundary areas. If challenged, the courts will look for “conceptual consistency.” As long as there’s a logical relationship between the zoning and the Comprehensive Plan, and it can be explained, it will be sustained by the court.

Mr. Taylor said there are many factors that can be considered when determining zoning, however the courts have said that there is no mathematical formula that cities are required to use when evaluating how these factors play into a zoning decision. Zoning is a subjective, discretionary, legislative act and each City zones to implement its Comprehensive Plan. Every City has a different Plan and what works for one City won’t work for another.

Each City decides what is important to them, however there are some pre-emptive constraints. For example, a City cannot regulate State or Federal activities with its zoning ordinances. They are the superior levels of government. This pre-emption would apply to a Federal building or a State-owned building. However, if the State leases a building for one of their offices, zoning laws would apply. Ownership is determined by the identity of the landlord not the occupant. If they lease, they only have the rights of a tenant.

Mr. Taylor said there is also a school pre-emption. Education entities have the right to select the location of a school and the character of the use, even locating a school, vocational facility, bus barn, or football stadium in a residential area. However, once they select the site and say what it will be used for, all of the performance regulations of the City control it. The City regulates the land use impacts, even though the School District regulates the site selection and says what the “character” will be.

He emphasized that this requirement applies to public educational facilities, but not private schools. Private schools are subject to all the City’s zoning controls.

Mr. Hefton said the City redid the Comprehensive Master Plan in 2008 / 2009. The Plan included various modules such as Neighborhood Revitalization, Land Use, Parks, and Economic Development. Since that time, the City has updated parts of the Master Plan, such as the Parks Master Plan, which was a module to the original Plan.

He said the City updates the Zoning Map a couple of times each year. Mr. Taylor said the City could amend the Land Use Master Plan mapping at any time the Council chooses. It is adopted by ordinance. The law now requires that the Master Plan be adopted by ordinance, not resolution. But if the City is doing interim revisions to the Master Plan, such as component updates, the Council can approve an amendment to the Master Plan Map to incorporate the new changes.

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Mr. Hefton asked if the law laid out what procedures needed to be done to update the Master Plan Map. When the Master Plan was done 10 years ago, community input meetings were held. He verified that the amendments do not have to be handled that way. Mr. Taylor said there are specific requirements and notices that must be done with zoning changes. There is nothing in the Master Plan Statue with those requirements. It says a Master Plan must be adopted by ordinance. There is no formal public hearing requirement.

He explained that zoning has specific boundaries and confers property rights. A change in zoning can either grant or remove rights. A Master Plan change is a change in a plan or concept, not a regulation.

Mr. Taylor also discussed express statutory pre-emption. The State Legislature has adopted a number of statutes that limit a City's right to regulate. One of these deals with alcohol regulations. In 1987, the Legislature held a comprehensive update of all alcoholic beverage regulations and adopted the Texas Alcoholic Beverage Code. They set a statewide procedure for registering people to sell alcohol and established rules and regulations for the sale of alcohol.

Over the years, many cities have attempted to establish other rules and regulations for alcohol sales based on community values. The Legislature adopted a pre-emptive rule saying no local government can adopt any regulation, after 1987, unless it is a mirror image of the Texas Alcoholic Beverage Code. A City with regulations in place prior to 1987, can continue to enforce them. Mr. Taylor reiterated that this was express pre-emption. He said a City can weaken the existing rules, but not make them stronger than the State's rules. He urged Council Members that if they have any more restrictive rules in place, to think "long and hard" before changing them.

The State has also adopted pre-emptions on regulating billboards or signage along major State or Federal highways. There are also some "weird limitations" on operating sexually oriented businesses in rural areas. There are regulations on the ability to limit pawn shops. A City cannot adopt a regulation that treats a pawn shop differently than any other commercial retail business.

Mr. Taylor said there is also some pre-emption that deals with modular and manufactured housing. He urged Council Members to be very careful with regulations on these types of homes, as well as mobile homes. If a Certified HUD Inspector is employed at the manufactured housing factory, who inspected each home one time during the construction process, then they were no longer a mobile home, but a manufactured home. Then the City's ability to regulate their location in a community, was far more limited. The Legislation also determined that a modular home can "go anywhere" in Texas, where a "stick-built" home can be located. A mobile home in two sections, such as a "doublewide" that can be bolted together, is considered a modular structure under the Occupation Code.

Council Member Stevenson arrived at the meeting at 11:42 a.m.

Mr. Taylor said the aforementioned pre-emptions are the direct pre-emptions. There are also some legal theory pre-emptions. One of these is spot zoning. Spot zoning is zoning that is applied to a property that is inconsistent with the Comprehensive Master Plan and confers a zoning classification that doesn't match the Plan, and can't be logically explained. He added that size of the spot zoning does not matter, it can be a huge lot. There are many legal presentations about spot zoning, which is an unequal treatment issue under the Constitutional theory of equal protection and application of the law.

Contract zoning is another type of theoretical pre-emption. He explained the difference between a developer that may want to do things in his development a little different, such as smaller rear yards, community green space, or walking trails within the development, and actual contract zoning. This developer would present a development plan, including a set of covenants, declarations, or

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restrictions. When the City approves the planned development district, they would approve the actual plan and it would become a part of the zoning ordinance. The City “traded” the standard template performance standards for other amenities that the City would like to have.

Actual contract zoning is an impermissible delegation of legislative authority for a future event. He gave examples of contract zoning that were not permissible. Contract zoning is when Council Members try to make a deal on an item that is not jurisdictionally in front of them and would have to come back at a future date, perhaps under a new City Council, for a decision. This would bind a future Council and is not permissible.

If an issue is jurisdictionally in front of the Council and they are being asked to take final action on the issue, it is not impermissible contract zoning. The Council would not be taking away the legislative discretion of a future Council. They are making a decision that this Council is empowered to make right now.

The last pre-emptive issue is exclusionary zoning. Exclusionary zoning is a “tripwire” on the Federal Fair Housing Act. A City cannot exceed the authority of a local government by violating a tenant’s First Amendment rights in the United States Constitution, such as the freedom to decide where they will reside. No local government has the right to construct an artificial barrier to that right, absent the showing of a compelling public necessity.

In order to ensure that cities understood how seriously they meant it, the Federal Government developed a rule of implementation. If they find by fact, and then law, that a City has engaged in exclusionary zoning, they invalidate the City’s entire land use regulatory structure, assuming that it is contaminated by the impermissible motive. They strike the entire zoning ordinance and take away the City’s authority. Mr. Taylor reiterated that a City must have a defensible reason as to why they do something.

When the City is looking at a regulatory action, Mr. Taylor urged them to always be aware as to whether there are any consequential results of the decision that they may need to think about before the decision is made. The Council must have a legal, defensible explanation as to why they’re doing what they’re doing.

City Council Members took a break from 12:04 p.m. to 12:12 p.m.

Mr. Taylor spoke on how to manage the City Council’s role. In a home rule City, the Council must appoint a Zoning Commission that serves “at the pleasure” of the City Council. Members of the Commission can be removed for lack of confidence.

The City has the right to initiate a zone change on any piece of property, based upon a “compelling need” even if the property owner does not do so. A notice would be sent to the owner and those within 200 feet of the zone change. Letters would need to be sent and notification would be needed for the public hearing, advising the public of the nature of what is being purposed. The Zoning Commission then convenes the public hearing. Mr. Taylor recommended that the staff present a general, factual presentation on the zone change prior to comments from the audience.

He said the Commission, as well as the City Council, should follow Roberts Rules of Order, “in a general sense.” Roberts Rules are a general guide for the management of parliamentary systems. They are “not gospel” and they do not control. Their only purpose is to bring order out of a public debate and conversation.

During the public hearing, anyone that wants to speak should have the opportunity to speak. The Zoning Commission and the City Council can enforce time limits for the speakers, if they desire. They

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do have to allow affected persons “a reasonable opportunity” to present their position. Most cities that have a time limit, allow between three and seven minutes per speaker, and the same rule must be applied to all speakers for the same agenda item.

Normally cities allow, and the courts recognize, the need to give the applicant a longer window to speak, if the circumstances justify it. It may be hard to fully explain the request in the time allotted. The applicant bears the burden of proof or persuasion and they must be able to fully explain their proposal. The status quo is the existing zoning map and the existing zoning ordinance.

After everyone else speaks, normally the applicant is allowed the opportunity to present a short rebuttal. Since the applicant has the burden of proof, they are allowed to answer the questions or complaints that were presented against their request.

After the public hearing is closed, the Planning and Zoning Commission will discuss the request and take a vote on the item. They can recommend approval, they can recommend denial, or they can recommend modifications. The Planning and Zoning Commission’s obligation is to “make a report or recommendation” of their discussion. Then it goes to the City Council for a public hearing and for consideration.

Mr. Taylor reminded Council Members that zoning is a legislative process, and it is not illegal for them to be “lobbied” on the issue by the applicant. If they choose not to, the Council does not have to meet with them. He urged them to be careful about how they carry out that advisory role. They are allowed to visit the site and can talk to people, however if any notes are taken in the course of the visit, the written notes become a public record and they are discoverable. If the documentation is on a personal iPad, computer, or cell phone, it also becomes part of the public record and is subject to discovery. Mr. Hefton reiterated that Council Members should use their City-owned iPads or iPhones to do that, because it won’t subject their personal items to discovery.

Mr. Taylor asked how careful does a Council Member need to be about what they say when they speak at an event or directly to someone. When a party is angered about the treatment they got from the City in a zoning case and they file a lawsuit and go to court, the judge is principally interested in ensuring that the applicant got a procedurally and substantively, fair and even-handed hearing.

Council Members are products of the community and have feelings and opinions about projects. What they want is a record that shows that the Council Member made a good-faith effort to appear to be a fair and unbiased Council Member during the window of time when everyone had the opportunity to present their case or position on the zoning matter.

When asked about their feelings on a project, Mr. Taylor said it’s always wisest for a Council Member to say “I have my own feelings about it, but as a member of the City Council, I will be asked to participate in a public hearing to consider all the information and evidence before we make a final decision toward approving or disapproving. I’m not going to make a final decision until I’ve heard all the information.” The property owner has property rights and the right to a fair hearing. If decisions are already made, there is a “tainted” proceeding. Don’t give opinions until after the public hearing.

The Planning and Zoning Commission and the City Council could convene together and hold a joint public hearing. Afterwards, the Council would leave while the Planning and Zoning Commission debates the issue and makes their vote. When the Council returns, the Commission gives their report and leaves. Then the City Council makes their final decision. Mr. Taylor said this is faster, but is usually a bad idea, and he recommended that the Council not handle zoning issues this way.

He said the role of the Planning and Zoning Commission is to be a “point man” and, unfortunately, point men are expendable. The public hearing before the Planning and Zoning Commission is the

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first time the request is being heard. This is the first “angry confrontation.” The Commission must sort through the information and determine what is true, what is being made up, what is a rumor heard on social media, what is really going on, and who’s telling the truth. The role of the Zoning Commission is to develop information. The staff will then determine the correct information and feed it to the Council. Then when the Council hears the issue during their public hearing, they can display wisdom in their decision based on truthful information.

Mr. Taylor said it is always better to let the Zoning Commission deal with the issue first. The staff will communicate and research the issues. Then the Council can make a better quality decision. He stressed that it is very dangerous for Council Members to become involved at the Planning and Zoning level. He said they “cannot be involved in the Planning and Zoning Commission process.” Council appoints the Zoning Commission Members and they report to the Council. The Council can remove them for any reason. He added that, “it is an intervention that will not produce a good result.”

Also, he reminded them that any notes, communications, or items on social media, between the Zoning Commission and the City Council, become a public record open to disclosure. He reminded them to watch what they email and what they put on social media.

Mr. Taylor listed the reasons that the City Council can use Executive Sessions. If the Council violates that privilege, they personally lose their immunity and must pay individually for their defense. It becomes a personal liability and the Council Member is financially responsible to the City for any damages it suffers.

He outlined the “daisy chain” violation of a closed session, which is a criminal violation. The law provides that a Council can only enter a closed session with a quorum of Council Members and if there is a proper agenda posted. If Council Members engage in a series of private conversations outside of a properly posted and called meeting, for the purpose of evading the Open Meetings Act rule, they have created a criminal violation of the Act. This is a Class B Misdemeanor and can result in six months in County Jail. He discussed ways this might happen, some very innocently. He urged them to be very cautious in dealing with things that might cause an open meeting violation. Don’t talk about City business outside of a meeting, he warned.

Mr. Taylor addressed subdivisions. He said zoning is land use regulations, while subdivisions are land design regulations. The statute provides that a local government can adopt regulations for the laying out, design, and development of property. He outlined the process, which does include a public hearing, but no notice to property owners.

A subdivision is the division of a tract of land into two or more parts for the purpose of building; development; sale; conveyance; laying out the lots, blocks, alleys, and easements; or anything that relates to development. A City has the right to regulate inside its corporate limits and in its extraterritorial jurisdiction. The ETJ is the band of land around the boundary of the City that the Legislature has allowed a City to control in the design stage. Depending on population, the ETJ could be from one-half mile to five miles around the City.

Once a City adopts the subdivision regulation and sets the development standards, there is a radical difference between subdivision (land design) and zoning (land use). The statute says that if an applicant submits a plat for subdivision purposes, that is compliant with the City’s subdivision regulations, the City “shall” approve the plat. Mr. Taylor said zoning is a subjective, discretionary, legislative act, but subdivision plat review is an objective, ministerial act. If a plat is compliant, the Council doesn’t have any authority to deny it.

During a Zoning Meeting, the Commission hears requests for zoning and for plats. Citizens appear to talk during the public hearing for zoning issues and discuss things like incompatible land uses,

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neighborhood character, and neighborhood boundaries. However, when subdivision plats are discussed, Mr. Taylor said it is a “dangerous avenue” to allow citizens to speak. He said politically, it’s always important to allow the public to speak, even though it’s not a public hearing. The reason it is dangerous, is that it infers to them that their opinion matters, and it doesn’t.

When a citizen wants to talk on the subdivision issue, some Zoning Commissioners will explain that the Commissioners do have some discretion on zoning issues, however there is no discretion on plat review. The City has a set of rules, and if a developer submits a plat that fully complies with these rules, the law says the City has to approve it. It is not discretionary. They make sure the citizens know that the Zoning Commission will listen to their comments, but that they understand they can’t not approve the plat.

Mr. Taylor said it is also important because of liability issues. Council Members are public officers, and are performing duties in the zoning, planning, and platting areas. There are rules that say you have immunity for performing public service acts. The basic rules of immunity say that advisory boards or elected officials, who are performing discretionary duties on behalf of the governmental unit, are immune from suit as long as they acted with the good faith belief that they were within the scope of their authority of what they needed to do. He said this covers almost everything.

However, in subdivision, the Council has a ministerial duty to approve, and in zoning they don’t . . . they have discretion. Council Members cannot afford to confuse the two. He warned them against applying the zoning rules of discretionary review to a subdivision plat, even when there is major public pressure or neighborhood opposition.

Mr. Taylor said if the Council applies the zoning rules of discretionary review to a subdivision plat, they will encounter the Civil Rights Act, which says that any person, who, acting under color of State law, deprives another of Constitutional right or property interest shall be answerable in money damages. Council Members fall under the coverage of that Act. Mr. Taylor warned that if Council Members act outside that authority, they will be liable.

Mr. Hefton asked how the “daisy chain” quorum related to a Council Member’s conversation with the City Manager. Mr. Taylor said, as individual Council Members, they can talk to the City Manager, but they cannot ask him to relay it to other Council Members or ask him what other Council Members have relayed to him. The City Manager can’t relay concerns from other Council Members.

He added that “emails are the worst.” Since the City Manager is not an elected official, he can send out a general informational email to all Council Members, but they can’t send emails to each other.

Council Member Teamann asked if a Council Member talks to a citizen and gives statements of fact. If the citizen talks to another Council Member about the information, is that a violation. Mr. Taylor said that is not a violation because the Council Member didn’t do it. The citizen can spread the information and they aren’t an elected official.

COUNCIL COMMENTS

There were no Council comments.

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ADJOURNMENT

There being no further business to come before the City Council, motion was duly made and approved to adjourn the Called Meeting at 1:12 p.m.

MAYOR

ATTEST

CITY CLERK