

STATE OF TEXAS

§

February 27, 2019

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 27, 2019.

COUNCIL MEMBERS PRESENT: Mayor David Plyler; Deputy Mayor Shawn Teamann.
Council Members Holland, Howeth, Melton, Steele, Stevenson.

COUNCIL MEMBERS ABSENT: None.

CITY STAFF PRESENT: Robby Hefton, City Manager; Terrence Steele, Assistant City Manager; Brandon Shelby, City Attorney; Scott Shadden, Director of Development Services; Clint Philpott, Director of Engineering; 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 Council Member Willie Steele

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 11:13 a.m., declared a quorum present, and opened the Called City Council Meeting.

INVOCATION BY COUNCIL MEMBER WILLIE STEELE

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

Scott Shadden, Director of Development Services, said this training for the City Council and the Planning and Zoning Commission was begun two years ago. Allen Taylor, Founding Partner at Taylor, Olson Adkins, Srala and Elam, LLP, conducted the workshop. He is an attorney, representing several Texas cities, and previously served in the Planning and Development Departments of several other cities.

Mr. Taylor urged Council Members to be aware of the risks when they attend seminars and make sure what philosophy the speaker “brings to the table” and what their background is. He listed his credentials, adding that he is a “City lawyer” and has a master’s degree in urban planning. He has served as a Planning Director, City Manager, and Attorney, representing local governments. He said his perspective is defending the cities and he related some personal experiences.

His task today is to work with Council Members, especially new Council Members, to tell them what they need to know when working with zoning cases, from a City defense lawyer’s position. He said that development in Texas does not fall under a unified code, but comes from a series of statutory

COUNCIL MINUTES – FEBRUARY 27, 2019

enactments, that were never conceived as a homogenous body of law. The types of development regulations include land use regulations, which determine how land, buildings, or structures may be used within the corporate limits of the City. The City's authority is governed by Chapter 211 of the Texas Local Government Code.

The second is land design regulations, which allows a City to establish 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. The regulations were adopted at different times under different statutory structures, and frequently they do not interrelate well and they contain internal conflicts.

Mr. Taylor said a City has the option of adopting each of these sets of regulations, but there are different standards for those regulations, in how they are applied. There are different procedural and substantive due process issues, and courts review them under different standards.

The fourth type of regulations, are the "boutique regulations", which are also adopted under Chapter 214 of the Texas Local Government Code. These can include a "stand-alone" floodplain management ordinance, a "stand-alone" landscaping ordinance, a "stand-alone" mobile home park operations ordinance, basically stand-alone, single purpose ordinances.

Mr. Taylor said he would concentrate today on land use and land design regulations. These are the types of zoning issues they will routinely see on the agenda and that can have consequences for them. He outlined the history of zoning and said zoning is a regulatory structure that divides a City into districts. It also states what use or uses are allowed for land and structure within each district. It consists of a text of an ordinance and a 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

COUNCIL MINUTES – FEBRUARY 27, 2019

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. 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 doesn’t mean that a City is required to make every zoning decision exactly in compliance with the plan. A plan is a plan, 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.

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 doesn’t “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.

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 what can occur for the development. The courts have been consistent in following this rule since it was established.

City Council Members took a break from 11:53 a.m. to 12:06 p.m.

Mr. Taylor said the State can adopt regulations that preempt the City’s ability to do something. One of these areas is alcoholic beverage sales. 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 pawn shops, 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 conventional home would be permitted. A modular home is a home that is built in component parts and brought to the site. If a double-wide mobile home doesn’t have running gear, it meets the statutory definition of a modular home.

COUNCIL MINUTES – FEBRUARY 27, 2019

He urged the Council to be vigilant and aware that the State is likely to consider adopting other limitations on a City's authority. They feel that cities are over reaching and over regulating.

Robby Hefton, City Manager, verified that a modular home can be located anywhere a single-family home would be allowed. Mr. Taylor said they could, but they would still need to maintain the lot size as required by the zoning ordinance. Deputy Mayor Teamann confirmed that any deed restrictions would still apply.

Mr. Taylor said the next area of preemption is spot zoning, where a City treats one property in a manner inconsistently with an adjoining property. It is zoning inconsistent with the Comprehensive Master Plan, with no explanation. If there is a logical explanation, it's okay.

Another issue is contract zoning, where a deal for zoning is made, but the issue isn't in front of the Council for a decision. However, according to Mr. Taylor, a City has contract zoning every day, called planned unit development zoning. A special district is contract zoning, a mutual set of agreements that were negotiated, documented by an ordinance. A Council can contract for anything they want, as long as the item is jurisdictionally in front of the legislative body on an agenda. They can't commit to action that hasn't been brought before them as a 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 doesn't 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." The City would not have any zoning.

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 Council 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. Hefton said the issue came up at the annual TML Conference. The distinction was made that, if Council Members are meeting in less than numbers of a quorum, to intentionally circumvent the Open Meetings Act, then it could be a criminal violation. Mr. Taylor said the presumption is intent, and the Council Member will have to offer proof that there was no intent. That's the way the District Attorney will look at it.

Mr. Hefton discussed his contact with Council Members in less than a quorum. Mr. Taylor said of all the cases prosecuted, it always involves a Council Member to Council Member conversation. If a staff member is involved, they never take it to prosecution, he added. Mr. Taylor warned of a "daisy chain" type of communication.

Mr. Taylor also advised Council 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.

COUNCIL MINUTES – FEBRUARY 27, 2019

He discussed the processes for the Planning and Zoning Commission. 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 it's validity.

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. The Planning and Zoning Commission's recommendation is then placed on the City Council agenda. He discussed the process for Council Members to hear zoning issues. Their standard is the "highest and best use" of the property.

He said more and more cities are doing Planned Unit Development or Site Plan Zoning, where an applicant requests their own zoning district. This is a legitimate use, but there are pros and cons and they probably need to be decided on a case-by-case basis, to determine what works best for the individual City. The good thing about Planned Unit Development is that it allows for flexibility and a more creative development of property. Both the developer and the City can get the amenities they want.

Mr. Taylor said the down side is the inflexibility of a zoning district. Once the Planned Development is approved, it is "locked in." If they want to make changes to a Planned Development in the future, the entire tract must be "reopened" to rezone a portion of it. Once it is a Planned Development, it is a single, harmonious zoning district. It is not good to use on property as a speculative venture and probably shouldn't be used on property if you're not sure the person applying for it can and will follow through. He reiterated that it's never good on speculative property because all the subsequent owners are bound by it.

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.

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's prejudgment. If there are any factual studies that were presented to support the decision the Council made, the Court must presume that the Council relied on that information to make their decision. He urged Council Members to "learn the benefit of silence." They must make decisions based on fact, not on emotions. He added that "it won't get better with an explanation."

COUNCIL COMMENTS

There were no Council comments.

ADJOURNMENT

There being no further business to come before the City Council, motion was duly made and approved to adjourn the Called Meeting at 1:24 p.m.

ATTEST

MAYOR

CITY CLERK