EYE OF THE BEHOLDER:

REGULATING THE *LOOK* OF A COMMUNITY

Alan J. Bojorquez

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INTRODUCTION

At its heart, traditional zoning is about making neighboring land uses compatible. Aesthetic zoning uses land use regulatory tools to ***preserve***, or in some cases ***create***, the look and feel of a municipality. With the explosive growth that is occurring across Texas, maintaining or accentuating the appearance of a community is becoming an increasingly difficult task. New residents, businesses and industries come to town. The desire for new amenities sometimes conflicts with the desire to preserve the *status quo*. Certain structures may serve a special need, but can be considered unsightly.

In small doses, signs, manufactured homes, junked vehicles and antenna towers, for example, may not be intrusive to the average person. However, an unrestricted abundance of such structures can dramatically affect the landscape of a quaint, rural community. Many cities seek to regulate these types of structures for both safety and aesthetic reasons. However, some of these have a modicum of federal or state protection.

This paper addresses common methods of regulating the aesthetic qualities of a community and identifies some emerging trends.

Aesthetic Harm Generally

Addressing citizen concerns over aesthetics, zoning and falling property values (actual or perceived" is clearly a legitimate government interest." [1] Texas cities have authority to regulate the community's aesthetic interests through broad municipal police powers. Cities have the authority to adopt ordinances that are "for the good government, peace, or order of the municipality or for the trade and commerce of the municipality."[2] Cities may adopt zoning regulations promoting "public health, safety, morals or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance or significance."[3]

Specific authority exists to regulate certain uses, such as manufactured housing, signs sexually oriented businesses, dilapidated structures, and antenna towers. Although overly restrictive municipal regulations can be countered to state and federal law, cities generally enjoy strong authority to restrict the construction and placement of these structures.

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[1] *CMH Manufacturing, Inc. v. Catawaba County*, 994 F.Supp.697, 710 (W.D. N.C. 1998), citing *Texas Manufactured Housing Association, Inc. v. City of Nederland* , 101 F.3d 1095, 1101 n. 10 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997) ("There can be no dispute that the governmental interest at stake is legitimate. Maintenance of property values has long been recognized as a legitimate objective of local land use regulation.").

[2] Tex. Loc. Gov't Code § 51.001(1).

[3] *Id.* § 211.001.

COMPREHENSIVE PLAN

When it comes to crafting regulations that preserve or encourage a certain look and feel to a community, *where should you start?* Why, ***at the beginning***, of course! In the land use arena, the beginning should generally be the comprehensive plan, which has been defined as a long-range plan intended to direct the growth and physical development of a community for an extended period of time.

Comprehensive planning is a process by which a community assesses what it has, what it wants, how to achieve what it wants, and finally, how to implement what it wants. A comprehensive plan usually contains information regarding transportation systems, parks and recreational services, utilities, housing and public facilities. It also provides for the distribution and relationships of various land uses and often serves as the basis for future land development recommendations. The plan may be in the form of a map, a written description and policy statements, or it may consist of an integrated set of policy statements. An expert in urban planning, T.J. Kent, Jr., defines the comprehensive plan as a community's official statement of policies regarding desirable future physical development. He also stated that the plan should be comprehensive in scope, general in nature and long-range in perspective.[4]

A public hearing is required before a municipality may adopt or amend a comprehensive plan.[5] Additionally, if the municipality has a planning commission or department, it must review the plan before its adoption or amendment. The procedures for adopting or amending the plan may be established by the municipality's charter or by ordinance.

The relationship between the plan and development regulations may be defined either by the municipality's charter or by ordinance. The municipality may also standardize the level of consistency to determine the relationship between the plan and development regulations. Furthermore, the plan may include any land use assumptions. Some municipalities have used land plans as an independent means of controlling or limiting growth.[6] If a municipality is going to enact strict regulations on community design, a good comprehensive plan can help your city attorney defend those restrictive policies should they be challenged in court.

[4] This segment includes data provided by Terrence S. Welch, of Brown & Hofmeister, LLP.
[5] Tex. Loc. Gov't Code § 219.003(a)(1).
[6] Evans, Judy, "Apartment project could be scaled back Plans fit longtime zoning but not land-use guidelines set in 2001," Dallas Morning News, November 18, 2003 (regarding City of Rockwall).

DESIGN STANDARDS

Many municipalities are attempting to create, perpetuate or promulgate a certain look or feel to their communities' built environment by mandating certain external building materials, even for non-historic structures.[7] There are cities that prohibit metal surfaces from facing public roads or key entry corridors. Some cities require stone, brick, earthen materials or wood exteriors in cultural districts. Other cities prohibit the construction of buildings with metal surfaces that face public streets or vital entry corridors.

The authority for enacting such requirements can be drawn from the general zoning authority, economic development authority, or the power to adopt certain building codes. While there has been a question among some experts as to the basis of authority for general-law municipalities to regulate aesthetics, the Texas Legislature seems to think that small cities also have the power because in Spring 2003 the Legislature enacted limitations on that power. As of September 1, 2003, municipalities cannot apply certain zoning regulations (including those affecting the exterior appearance of single-family homes, such as the type and amount of building materials, and landscaping) until the second anniversary of the date the plat was approved, or the date the municipality accepts the subdivision improvements (whichever is later).[8]

"If customers can't see you, they won't come *see* you."
Mayor Charlotte Douglass
owner, home furnishings store
Village of Salado (July 2003)

Design Guidelines

One interesting tool that should be considered is a design guide. If adopted by ordinance, this document can be a tool that serves as a companion to other ordinances, such as comprehensive plan, zoning, signs, subdivision, etc. Design guidelines can address issues such as architectural styles, external building materials, colors, landscaping, parking, fencing, and signage. The guidelines may fill in the blanks left by other regulations or assist in the interpretation of related rules. An example from a Colorado municipality states that:

> "One purpose is to inform the community about the design policies of the Town. These polices are aimed at protecting the integrity of the National Historic District. They

[7] The City of Taylor has recently considered adopting residential zoning standards that require new homes to have brick or stone masonry material on three sides. This proposal has been met with opposition from the Home Builders Association of Greater Austin, which claims that the exclusion of materials such as hardi-plank effectively excludes entry-level housing by increasing the price of a starter home. Heinauer, Laura, "Taylor council will consider raising standards for homes," Austin American-Statesman, October 28, 2003.

[8] Tex. H.B. 1207, 78th Leg., R.S. (2003), codified as Loc. Gov't Code § 211.016.

> indicate an approach to design that will help sustain the character of the community that is so appealing to residents and visitors in Crested Butte."[9]

Although design controls may be a valid means of protecting the character of a community, courts rarely uphold these types of regulations without clearly defined standards.[10] In light of the property owner's important rights, design ordinances should include adequate procedural safeguards that are crafted to achieve quantifiable objectives.

National-International Chains

There is a growing aversion in some communities to the proliferation of national or internationally franchised chain stores and restaurants. An increasing number of residents and tourist are becoming opposed to *The GAP-ification* of small-town Texas. It can be frustrating for a tourist to travel a great distance to experience the unique character of a particular city, only to encounter a McDonalds, Starbucks, or Barnes & Noble on every corner. Consequently, impacted local governments have legitimate concerns that the culture of a community (which may be its economic lifeblood) will be diluted or destroyed by fast food restaurants or chain retail stores that visitors can easily find in their home towns. As noted in a recent article about Arizona cuisine,

> "All across America, chain restaurants are driving independent owners out of business and becoming the new vanguard- the arbiters, improbably, of taste."[11]

In the Tucson area, associations of locally-owned eating establishments are being formed in order to educate the public, establish cooperative purchasing programs, job exchange programs, national credit card processing, and group insurance rates. Tucson may be a "hotbed" for the "local is beautiful" movement, but the trend is being embraced across the country. According to an Arizona café owner and founder of *The Tucson Originals*,

> "Chains have their place. But we are trying to prevent them from dumbing down the American palate to such a degree that food no longer possesses regional character, individuality, or sense of place. Chains are about sameness; independent restaurants are about originality and excitement."

[9] Design Guidelines, Town of Crested Butte, Colorado (October 1995).
[10] Tappendorf, Julie A., "A Practical Guide to Drafting Architectural Design Regulations," Municipal Lawyer (March/April 2003).
[11] Rentschler, Kay, "Breaking the Chains," Gourmet (October 2003).

ENTRANCE CORRIDORS

Thoroughfare Overlay Districts can be designed to provide for the diverse uses along a major arterial without sacrificing the integrity of the thoroughfare in its primary function as a means of moving vehicular traffic. Such a district can establish or protect an attractive, higher intensity use corridor composed, perhaps, of office, retail, limited light industrial and commercial uses, hotels, motels, or restaurants. The district would likely be created to enhance the image of key entry points, major corridors, and other areas of concern as determined by the City Council, by maintaining a sense of openness and continuity.

> To protect the integrity of the thoroughfare, lot sizes are typically required to be larger, setback requirements are preferred to be greater, and more stringent access restrictions are imposed within the THOR District than in districts located outside the THOR district. Properties in the THOR District should typically be expected to have increased water, sewer, and drainage capacity, and increased fire protection to accommodate the higher intensity uses typically found in the district. The THOR District is an "overlay" district, meaning that the regulations within the district are in addition to the base zoning district that is being overlaid.

HISTORIC PRESERVATION

Protecting Structures

The United States Supreme Court has recognized that historic preservation is a legitimate government purpose, and that restrictions on alteration and demolition are an appropriate way to carry out historic preservation goals.[12] Many challenges to historic preservation ordinances are made on the basis of the vagueness or arbitrariness of the regulation. Thus, it is important for an ordinance to provide "adequate legislative discretion" to a historical preservation commission "to enable it to perform its functions consonant with the due process clause."[13] To satisfy due process, however, the Fifth Circuit has stated that "guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, precluding reasonable administrative discretion."[14]

In one case, the Fifth Circuit upheld the City of New Orleans's *Vieux Carre* Ordinance after a careful analysis of the steps taken by the city to "assure that the Commission would not be adrift to act without standards in an impermissible fashion."[15] The court applauded the city for "curbing the possibility for abuse by the Commission" by specifying the composition of the Commission and its manner of selection, assuring that it includes "architects, historians and business persons offering complementary skills, experience and interests."[16] The court also emphasized the importance of the "elaborate decision-making and appeal process set forth in the ordinance" with ultimate review of the Commission's decisions by the City Council, calling it

[12] *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).
[13] *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975).
[14] *Id.*; *see also Mayes v. City of Dallas*, 747 F.2d 323, 325 (5th Cir. 1984).
[15] *Maher*, 516 F.2d at 1062.
[16] *Id.*

"another check on any potential arbitrariness that might exist."[17] The Fifth Circuit cited these same factors in rejecting a plaintiff's challenge to the City of Dallas's historic preservation regulation almost a decade later.[18]

Texas cases on historic zoning ordinances, although few, have also focused on the certainty of the challenged regulation. In 1977, the Texas Supreme Court found unconstitutionally vague the section of the state Antiquities Code giving the Texas Antiquities Committee power over "all other sites, objects, buildings, artifacts, implements, and locations of historical, archeological, scientific, or educational interest."[19] Since the Antiquities Committee had formulated no rules or standards, the Court held that the words "buildings ... of historical ... interest" provided no criteria or safeguards.

In *Southern Nat. Bank of Houston v. City of Austin*, a section of the City of Austin's historic preservation ordinance was declared an unconstitutional taking of property because it failed to set a reasonable time limit for a final decision by the city council and because it did not provide standards for the Landmark Commission's officers to follow in placing the building on the commission's agenda.[20]

While the ordinance provided for a sixty-day time limit after which its restrictions did not apply to property that the landmark commission failed to recommend for designation, it failed to set a time limit on the action be taken by the planning commission or the city council.[21] The ordinance also allowed "the chairman, any vice-chairman, or the executive secretary of the Landmark Commission, each at his own discretion, to place a parcel of property on the agenda of the Commission, thereby causing the restrictions of the section to attach for perhaps a minimum of sixty days." Such power over the property of landowners, the court ruled, "must be harnessed by appropriate standards and guidelines."[22]

Under state statute, a person is liable to a municipality for damages if the municipality has a demolition permit and a building permit procedure and the person:

> (1) demolishes, causes to be demolished, or otherwise adversely affects the structural, physical, or visual integrity of a historic structure or property that is located in the municipality; and
> (2) does not obtain the appropriate demolition or building permit or other form of written permission from the municipality before beginning to demolish, cause the demolition of, or otherwise adversely affect the structural, physical, or visual integrity of the structure or property.[23]

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[17] *Id* at 1062-63.
[18] *See Mayes*, 747 F.2d at 324-26.
[19] *Texas Antiquities Committee v. Dallas County Community College Dist.*, 554 S.W.2d 924 (Tex. 1977).
[20] 582 S.W.2d 229 (Tex. Civ. App.–Tyler 1979, writ refused n.r.e.).
[21] *Id*. at 239.
[22] 582 S.W.2d 229.
[23] Tex. Loc. Gov't Code § 315.006.

Restricting Modern Uses[24]

An interesting issue that has arisen with some small Texas communities is whether the municipality can zone its historic district to allow only historic ***uses***. In other words, may a city council prohibit modern uses, such as outlets for video rentals, cellular phones, televisions, and other "modern" items?

The Local Government Code lists one of the purposes of zoning to be the preservation of "places and areas of historical, cultural, or architectural importance and significance."[25] It also allows a city to be divided into districts of a "number, shape, and size the governing body considers best for carrying out" the zoning law, and within each district the governing body may regulate the "use of buildings" so long as the regulations are uniform for every class of building in each district.[26] The regulations may vary from district to district, based upon "peculiar suitability for particular uses with a view of conserving the value of buildings and encouraging the most appropriate use of land in the municipality."

The practice of restricting certain uses in certain zoning districts is the essence of zoning, and so long as the regulations are intended to promote the health, comfort, and general welfare of citizens, are reasonable and are not imposed arbitrarily, they will normally be upheld by the courts.[27] Nevertheless, the practice of restricting uses of buildings in a district solely to the types of uses that occurred historically in the district is unusual, and there is very little case law to provide guidance on the extent of city authority to do so.

The courts have upheld the authority of the city to prohibit, through resolution, the issuance of building permits in a proposed historic district until such time as the details of historic preservation were resolved in the district.[28] In one case, a developer wanting to construct high-rise apartments in the proposed district was sued when he was unable to obtain a building permit during the moratorium, even though the zoning ordinances in effect when he applied would have allowed the apartments. In another case, however, the courts struck down a city ordinance that required preservation of designated landmarks in the city, particularly Austin's Driskill Hotel, saying that the ordinance was an unconstitutional taking.[29] In response to this case the Legislature amended the Local Government Code to include preservation of places of "architectural" importance.

At the federal level, the U.S. Supreme Court upheld New York City's preservation ordinance that allowed the city to single out specific landmarks and require the owners to maintain them and not alter them without approval from a landmarks preservation commission.[30] Zoning regulations have also been used to preserve New Orleans French Quarter, Santa Fe's Historic

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[24] This section was primarily authored by Monte Akers, a partner in Bovey, Akers & Bojorquez, LLP, and former Director of Legal Services for the Texas Municipal League.

[25] Tex. Loc. Gov't Code § 211.001.

[26] Tex. Loc. Gov't Code § 211.005.

[27] *See, e.g., City of Pharr v. Pena*, 853 S.W.2d 56 (Tex.App.—Corpus Christi 1993); *Brehmer v. City of Kerrville*, 320 S.W.2d 193 (Tex. Civ. App.—San Antonio 1959).

[28] *City of Dallas v. Crownwich*, 506 S.W.2d 654 (Tex. Civ. App.-Dallas, 1974, writ ref'd n.r.e.).

[29] *Southern National Bank of Houston v. City of Austin*, 582 S.W.2d 229 (Tex. Civ. App.—Austin 1979).

[30] *Penn Central Transportation Co. v. The City of New York*, 438 U.S. 104 (1978).

District, and New York's Grand Central Station.[31] However, the state and federal cases and major city historic preservation programs deal primarily with preservation of historic ***buildings*** and areas rather than the history-sensitive ***uses*** of the buildings or areas. As stated by Professor Mixon, "Texas cases indicate general approval of regulations of historic districts but raise questions about restrictions placed on individual landmark buildings. Severe restrictions may amount to a "taking" that requires payment of compensation to the owner." [32]

Another matter for consideration is whether such an ordinance violates the interstate commerce clause, which prohibits local regulations that discriminate against or unduly burden interstate commerce. Zoning is a function of a city's police power, and while cities are authorized to place reasonable restraints on interstate commerce for police power purposes, they may not place unreasonable or substantial burdens on interstate commerce.[33] Dozens of federal cases have addressed the effect of local zoning ordinances on interstate commerce, and most have been decided in favor of the zoning authority.[34] The fact that a local zoning regulation affects or slightly burdens interstate commerce will not cause a court to strike it down.[35] A showing by a city that its zoning ordinance did not favor local or in-state economic interests while burdening out-of-state economic interests will support the validity of the ordinance.[36] However, in most reported cases, the purpose of the zoning ordinances was related to health and safety rather than historic preservation or historic uses. A court may view an ordinance protecting only the historic atmosphere of an area as being inferior to one protecting health or safety.

There is no specific statute or case that prohibits municipal restrictions on modern uses in historic areas. Further, the unique historic atmosphere of areas in certain municipalities might play an important role in justifying this type of ordinance if it is enacted and challenged. Should a municipality elect to enact such an ordinance, the following matters should be given serious consideration:

(1) The ordinance will affect prospective uses only. An existing use may not be curtailed without the payment of reasonable compensation, or a reasonable amortization period.
(2) The ordinance should specifically list the types of uses allowed and those not allowed in the district in addition to a general prohibitory phrase addressing uses that did exist historically or technologically prior to a date certain.
(3) All historic uses in the district should be documented.
(4) Any use prohibited in the historic district should be allowed in some other district in the municipality.
(5) The ordinance should contain a detailed statement of this purpose of historic and cultural preservation and should not contain any provisions that promote local economic interests to the detriment of out-of-state interests.

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[31] Mixon, *Texas Municipal Zoning Law*, p. 1-26 (2001).
[32] *Id.*
[33] *Transcontinental Pipeline Corp. v. Hackensack Meadowlands Development Commission,* 464 F.2d 1358 (3rd Circuit 1971).
[34] *Florida East Coast Ry. Co. v. City of West Palm Beach,* 266 F.3d 1324 (11th Cir. 2001).
[35] *Georgia Manufactured Housing Ass'n Inc. v. Spalding County, Ga.,* 148 F.3d 1304 (11th Cir. 1998).
[36] *Smart SMR of New York v. Zoning Commission of the Town of Stratford,* 995 F.Supp. 52 (D. Conn. 1998).

MANUFACTURED HOUSING

For many in Texas, manufactured housing is the answer to the state's affordable housing situation. *So what's the problem?* For those who live in traditional, "site-built" homes (aka, "brick and mortar") it is often a matter of neighborhood safety and appearances. There are legitimate concerns about the installation of manufactured housing across the street from traditional homes. First of all, mobile homes tend to be very mobile during severe weather, such as floods and tornados. Second, like it or not, the proximity of manufactured housing tends to have a negative impact on property values.

Consequently, many cities attempt to restrict manufactured housing to particular parts of town through zoning ordinances. A local zoning ordinance is a valid exercise of police power unless it is "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare."[37] Cities must be able to demonstrate a connection, between the ordinance and the legitimate government goal it is designed to achieve.

Construction & Safety

According to federal law, no state or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding *construction or safety* applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.[38] Courts have recognized a distinction between aesthetic regulations and structural ones.[39] Courts have frowned, for example, when there is no showing of local conditions which justify a requirement that bricks or stone be used to construct exterior walls to the exclusion of steel, studs and ribbed lath covered with three-fourths inch of stucco.[40]

Mobile Homes

Note that under the Texas Manufactured Housing Standards Act, there is a difference between a "mobile home" and a "HUD-Code Manufactured Home." A city may prohibit the installation of a "mobile home" for use or occupancy as a residential dwelling within its corporate limits.[41] This applies to ***pre***-1976 homes only.

HUD-Code Manufactured Homes

The construction of ***post***-1976 structures is regulated by the federal government. According to state and federal law, HUD-Homes can go in any area(s) determined appropriate by the city.[42] If the city does not designate an area for HUD-Homes, there is an argument that they can go in ***any residential area***. Of course, they must find a willing seller or lessor, which isn't always easy. A Texas city was defeated in court when it attempted to stop a HUD-Home from going

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[37] *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1929).
[38] National Manufactured Home Construction and Safety Standards Act, 42 U.S.C. § 5403(d) [emphasis added]; see also 24 C.F.R. § 3282.11(a).
[39] See *Campbell v. Monroe County, Florida*, 426 So.2d 1158, 60 (Fla. Dist. Ct. App. 1983).
[40] See *Scurlock v. City of Lynn Haven, Florida*, 858 F.2d 1521, 1527 (11th Cir. 1988).
[41] Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A (a).
[42] *Id*., § 4A (b).

into a residential area. The city lost because the city's ordinance failed to specifically provide space elsewhere in the city for HUD-Homes.[43]

Five Percent Rule
It is generally accepted by many municipal attorneys that if a city sets aside 5% of the developable residential area (*i.e.*, not within floodplain, etc.) of the city for HUD-Homes, it has satisfied its obligation under the law. If that space fills up, there is no need to designate new areas. To the author's knowledge, this rule of thumb has not been tested in court. The 5% may take the form of an overlay zone, covering an otherwise single-family residential neighborhood comprised of site-built homes.

Installation
The Texas Department of Housing and Community Affairs regulates things such as foundations, support and anchoring. A city can inspect the installation, but it cannot require permits or impose a fee, fine or penalty. Any violations of state law are to be reported to TDHCA.

Appearance Criteria
A city's building regulations (*e.g.*, masonry requirements) generally cannot be used as a backdoor means of effectively prohibiting HUD-Homes. Courts have generally struck down such provisions. However, courts have consistently upheld portions of ordinances that impose appearance criteria or zoning restrictions on the placement of manufactured housing without regard to building, construction, or safety concerns.[44] For example, amendments to a county's zoning ordinance that established "appearance criteria – including a prohibition on metal siding and metal roofs—for single-wide mobile homes in order to make them appear more attractive, less likely to drive down nearby property values, and generally more palatable to the objecting public" – were upheld. [45]

Limiting To Parks
Within limits, a municipality may be able to restrict manufactured housing to lots it has specifically designated as "trailer parks." For example, the US Court of Appeals for the Fifth Circuit has upheld an ordinance prohibiting the placement of "trailer coaches" on any lot within the city limits except in a "duly authorized trailer park."[46] The court held that the prohibition was not preempted by the "Act,"[47] because the ordinance's restrictions were for the purpose of protecting property values and did not expressly link its provisions in any way to local safety and construction standards.[48]

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[43] *City of Freeport v. Vandergrifft*, 26 S.W.3d 680 (Tex.App.-Corpus Christi, 2000) (held that zoning ordinance failed to comply with Texas Manufactured Housing Standards Act's mandate that "HUD-code manufactured homes" be provided space and defined separately from "mobile homes" and thus was of no effect as to homeowner.

[44] *CMH Manufacturing, Inc. v. Catawaba County*, 994 F. Supp. 697.

[45] *Id.*at 707.

[46] *Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996).

[47] National Manufactured Home Construction and Safety Standards Act, 42 U.S.C. § 5403(d); see also 24 C.F.R. § 3282.11(a).

[48] *Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d at 1100.

A city's discretion is not without limits, however. Even recognizing the broad scope of discretion inherent in the police power, a federal district court in Louisiana found that the failure of parish officials to engage in any other regulative activity aimed at promoting aesthetic values made it difficult to accept the argument that the exclusion of mobile homes was anything other than arbitrary.[49] In that case, the only rationale the parish actively offered in favor of upholding its ordinance was that the ordinance promoted the welfare of parish residents by preserving aesthetic and property values.[50] In support, the parish provided evidence that "when there are mobile homes in a subdivision that are adjacent or within a block of the traditional brick and mortar homes, the value of the traditional goes down as much as $5,000."[51] Yet, as plaintiffs pointed out, the parish had no building codes. The parish conceded a landowner "could build a tar paper shack if he wanted to," as long as the structure was site built.[52] Therefore, the court struck the ordinance as an invalid exercise of police power.[53]

It is clear that the police power covers aesthetic as well as safety and health concerns.[54] Although it may be true that some cities restrict manufactured housing based solely on issues of appearance, an opinion of the Texas Supreme Court demonstrates that it is not easy to separate aesthetics from more substantive concerns such as safety. Mobile homes, by definition, are manufactured to permit movement; the inherent structural differences in such manufactured housing can make them vulnerable to windstorm and fire damage; and their mobile nature may lead to transience and detrimentally impact property values if scattered throughout a municipality.[55]

New Legislation!

Industrialized Housing

During the Spring of 2003, the Texas Legislature enacted a statute stating that single-family or duplex industrialized housing must have all local permits and licenses that are applicable to other single-family or duplex dwellings.[56] Also, a municipality may adopt regulations that require single-family or duplex industrialized housing to:

(1) have a value equal to or greater than the median taxable value for each single-family dwelling located within 500 feet of the lot on which the industrialized housing is proposed to be located, as determined by the most recent certified tax appraisal roll for each county in which the properties are located;
(2) have exterior siding, roofing, roof pitch, foundation fascia, and fenestration compatible with the single-family dwellings located within 500 feet of the lot on which the industrialized housing is proposed to be located;

[49] *Bourgeois v. Parish of St. Tammany*, 628 F.Supp. 159 (E.D. La. 1986).
[50] *Id.* at 162.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 163.
[54] See *Stone v. City of Maitland*, 446 F.2d 83 (5th Cir. 1971).
[55] *City of Brookside Village v. Comeau*, 633 S.W.2d. 790, 795 (Tex. 1982).
[56] Tex. S.B. 1326, codified as Tex. Occ. Code § 1202.253.

(3) comply with municipal aesthetic standards, building setbacks, side and rear yard offsets, subdivision control, architectural landscaping, square footage, and other site requirements applicable to single-family dwellings; or
(4) be securely fixed to a permanent foundation.

For purposes of this new legislation, "value" means the taxable value of the industrialized housing and the lot after installation of the housing. Except for the requirements mentioned above, a municipality may not adopt a regulation under this section that is more restrictive for industrialized housing than that required for a new single-family or duplex dwelling constructed on-site. The new law does not limit the authority of a municipality to adopt regulations to protect historic properties or historic districts, or affect deed restrictions.

SIGNS

Signs warrant a level of free speech protection as an important media for communication. That being said, the aesthetic impact of signs can be devastating to an otherwise picturesque community. A billboard that goes without notice in Austin can be a tremendous eyesore in Fredricksburg. State and federal highway beautification efforts, combined with traditional local zoning authority have given cities a sound basis for the reasonable regulation of these communications devices. Common elements of local sign regulations include durational limits, setbacks, surface area parameters, height restrictions, limitations on illumination and animation, color pallets, and required building materials. However, regulators must always be aware of statutory and constitutional limitations on their power to regulate signs.

Authority to Regulate

With certain restrictions, Texas municipalities are granted specific statutory authority to enact regulations for the relocation, reconstruction, or removal of signs within the corporate limits and extraterritorial jurisdiction.[57] A person may not place a sign on the right-of-way of a road or highway maintained by a city without municipal authorization.[58] The Texas Department of Transportation (TxDOT) exercises regulatory authority over signs along certain roadways. No outdoor advertising sign that is visible from the main-traveled way of an interstate or primary highway may be erected or maintained along a regulated highway, except in accordance with state regulation, which includes receiving a permit.[59] If a city has established a program regulating signs, a permit issued by the city shall be accepted in lieu of a permit issued by TxDOT. The city must certify to TxDOT that it has established and will enforce standards and criteria for size, lighting, and spacing of outdoor advertising signs.[60]

Aesthetic Issues

The U.S. Supreme Court has recognized that cities can perceive billboards, by their very nature and wherever located and however constructed, as “esthetic harm.” [61] Such aesthetic judgments

[57] Tex. Loc. Gov’t Code § 216.003.
[58] Tex. Transp. Code Ann. § 393.0025(a).
[59] 43 TAC § 21.146.
[60] 43 TAC § 21.151.
[61] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 510 (1981).

are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only public rationalization of an impermissible purpose (e.g., suppression of speech).[62] The Court recognized that because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development.[63] It is interesting to note that in *Metromedia*, the Supreme Court ultimately found the ordinance at issue to be unconstitutional on its face, because it reached too far in into the realm of protected speech by allowing on-site billboards and non-commercial off-site billboards while prohibiting off-site commercial billboards.[64]

Political Signs

Restricting political signs is risky business. Cities can establish reasonable, nondiscriminatory restrictions on such traits as size.[65] However, cities cannot enact blanket prohibitions on all political signs in residential neighborhoods.[66] When faced with the issue, the U.S. Supreme Court rejected a city's "time, place and manner" defense, finding that there was no adequate substitute for a political sign on a home.

While signs are certainly a form of speech worthy of First Amendment protection, they may be subject to municipal regulation because, "unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." [67]

However, political subdivisions cannot impose overly strict durational limits. In striking down one post-election removal requirement, the court stated that "there is no natural termination date for a 'cause' sign; a cause and a private resident's passion for it exists as long as the cause exists."[68] The Court held that although traffic safety and aesthetics are *significant* interests, they are not *compelling* interests, especially given the nature of the First Amendment rights at stake.[69] Although restrictions imposed on political signs but not commercial signs are not content-neutral, they may still survive constitutional scrutiny if they are narrowly tailored. In order to narrowly tailor such restrictions, the city must be prepared to demonstrate how its interests in aesthetics justify a durational limit on political signs.[70]

In the Spring of 2003, the Texas Legislature enacted a statutory provision that restricts the ability of municipalities to regulate signs that contain primarily a ***political message*** if the political signs are on private property, are not located within the public right-of-way, do not exceed a surface area of 36 square feet, are not artificially illuminated, and do not have moving parts.[71]

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[62] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490.
[63] *Id.* at 502.
[64] *Id.*
[65] *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).
[66] *Ladue v. Gilleo*, 512 U.S. 43 (1994).
[67] *Id.*, at 48.
[68] *Curry v. Prince George's County*, 33 F. Supp.2d 447.
[69] *Id*. at 452.
[70] See *Whitton v. City of Gladstone*, 832 F.Supp. 1329, 1335 (W.D.M.O. 1993).
[71] Tex. H.B. 212, 78th Leg., R.S. (2003), codified as Tex. Loc. Gov't Code §216.903.

ANTENNA TOWERS

In developed areas, you seldom see a hilltop that isn't adorned with a metal tower sporting a flashing red beacon. Communications antenna towers are becoming increasingly prevalent feature in our high-tech society. While many people rely upon these spires for modern communications, others view them as just another way that progress has littered the landscape.

Common municipal regulations for antenna towers (a.k.a., HAM Radios) include locational restrictions, height limitations, safety requirements (*e.g.*, fencing, anti-climb devices), co-location, landscaping and structural specifications. Zoning regulations often dictate minimum distances from high voltage power lines, rights-of-way, and property lines. As with signs and manufactured homes, cities often have valid safety concerns regarding antenna towers, such as danger of collapse and attractive nuisance for climbers. Equally important to elected officials is the appearance of towers on the visual horizon.

Amateur Radio

By and large, amateur radio operators do not find safety precautions objectionable.[72] What they do object to are the sometimes prohibitive, non-refundable application fees necessary to erect towers and those provisions in ordinances that regulate antennas for purely aesthetic reasons. The amateurs contend, almost universally, that "***beauty is in the eye of the beholder***." [73] They assert that antenna tower facilities are not more aesthetically displeasing than other objects that people keep on their property (*e.g.*, motor homes, trailers, solar collectors, and gardening equipment). Note that cities, as well, often attempt to regulate these objects.

State law provides some protection for amateur radio towers, but recognizes the authority of cities and counties to regulate such towers based on health, safety or aesthetic conditions, and in order to protect and preserve historic and architectural districts.[74] Cities and counties that adopt regulations involving the placement, screening, or height of amateur radio antennas must be sure that the regulations: (1) reasonably accommodate amateur communications; and (2) represent the minimal practicable regulation to accomplish the city or county's legitimate purpose.[75] Such state requirements effectively mirror federal regulations.[76]

Wireless Communications

The Telecommunications Act of 1996[77] is an omnibus overhaul of the federal regulation of communications companies. The Act was intended to:

> provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and

[72] See 101 FCC 2nd 952 (1985).
[73] 101 FCC 2nd 952 (1985) [emphasis added].
[74] Tex. Loc. Gov't Code § 250.002(b).
[75] *Id.*
[76] See 101 FCC 2nd 952 (1985) and 47 C.F.R. 97.
[77] 47 U.S.C. § 151, *et seq.*

> information technologies and services… by opening all telecommunications markets to competition….[78]

In the context of developing a national wireless communications infrastructure, Congress chose to expressly preserve local zoning authority by stating:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[79]

The Act places limitations on regulatory agencies by stating in relevant part that:
any State or local government or instrumentality thereof: (1) shall not unreasonably discriminate among providers of functionally equivalent services; and (2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.[80] Thus, state and local governments can regulate the siting of towers, so long as the restrictions do not reach the point of prohibiting service. Thereafter, the inquiry is very fact specific: Does the situation warrant the placement of the tower in that location, or can the area otherwise be serviced? In considering these issues, the federal Court of Appeals for the Second Circuit stated that:

> local governments may not regulate personal wireless services facilities in such a way as to prohibit remote users from reaching such facilities. In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines.[81]

However, the court went on to say that:

> a local government may reject an application for construction of a wireless service facility in an underserved area without hereby prohibiting personal wireless services if the service gap can be closed by less intrusive means…. A local government may also reject an application that seeks permission to construct more towers than the minimum required to provide wireless telephone services in a given area. A denial of such a request is not a prohibition….[82]

In upholding the town planning board's denial of an application for a site plan for construction of three communications towers, the Second Circuit held that aesthetics is generally a valid subject of municipal regulation and concern under the planning board's authority to review a site plan. The town planning board was able to reject the site plan based upon a finding of economic injury to adjoining properties and a significant negative aesthetic impact.[83]

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[78] H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124.
[79] 47 U.S.C. § 332(c)(7).
[80] *Id.*.
[81] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643 (2nd Cir. 1999).
[82] *Id.*
[83] *Id.*

OPEN SPACE

Landscaping

The Natural Landscaping Movement probably began in the 1960s. Advocates of the concept assert that the benefits of a pro-active municipal policy are substantial.[84] When compared to traditional suburban exotic lawns (i.e., monocultural), natural landscapes are touted as helping with water shortages, non-point source pollution, habitat for native animals, flood reduction, and increasing property values. Experts urge municipalities to adopt ordinances that encourage native landscaping, or at least protect the right of property owners to choose their own landscaping.

Many municipal health and safety (i.e., nuisance) ordinances actually discourage natural landscaping by placing arbitrary limits on the height of "weeds" and "brush." Under the Texas Health & Safety Code, the city council may require the owner of a lot in the municipality to keep the lot free from weeds, rubbish, brush, and other objectionable, unsightly, or unsanitary matter.[85] The term "Weeds" means any brush, grass, vegetation, weeds or any plant, with the exception of wildflowers, that is not regularly cultivated vegetation, that exceed a certain height (e.g, eighteen (18) inches). A municipality might want to declare by ordinance that any plant (perhaps with the exception of wildflowers), that is not regularly cultivated which exceeds eighteen (18) inches in height shall be presumed to be objectionable, unsanitary and unsightly. "Dangerous weeds" means weeds that have grown higher than forty-eight (48) inches and are an immediate danger to the life, health, or safety of any person.[86]

Conservation

Across the US, communities are recognizing that the conservation of open space can benefit their economic health. Experts have identified three basic ways in which local governments can protect open space:

(1) Regulatory measures, such as Zoning or mandatory exactions (i.e., public dedications);
(2) Land acquisition (e.g., purchase, lease or condemnation); and
(3) Conservation easements that protect land while keeping it in the hands of private owners.[87]

SUBSTANDARD BUILDINGS

The City Council has authority to order the repair, removal or demolition of a substandard (i.e., dilapidated) building or structure and to repair, remove, or demolish a substandard structure and assess such costs against the property.[88] The term "building" might be defined by ordinance as any structure of any kind or any part thereof, erected for the support, shelter or enclosure of

[84] Rappaport, Bret, "Landscaping Naturally: A Municipality's Obligation to Promote and Encourage Native Landscaping," Municipal Lawyer, (March/April 2003).
[85] Tex. Health & Safety Code, § 342.004.
[86] *Id*., § 342.008.
[87] Tibbetts, John, "Open Space Conservation: Investing in Your Community's Economic Health," Lincoln Institute of Land Policy (1998).
[88] Tex. Loc. Gov't Code § 214.002.

persons, animals, chattel or property of any kind. A "structure" could be defined as that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built or composed of parts joined together in some definite manner, or any part thereof.

The Texas Legislature has provided the following standards to aide in determining whether a building should be ordered repaired or demolished:

(a) The building or structure is liable to partially or fully collapse.
(b) The building or structure was constructed or maintained in violation of any provision of the City's building code, or any other applicable ordinance or law of the City, county, state, or federal government.
(c) Any wall or other vertical structural members list, lean or buckle to such an extent that a plumb line passing through the center of gravity falls outside of the middle one-third (1/3) of its base.
(d) The foundation or the vertical or horizontal supporting members are twenty-five (25) percent or more damaged or deteriorated.
(e) The nonsupporting coverings of walls, ceilings, roofs, or floors are fifty (50) percent or more damaged or deteriorated.
(f) The structure has improperly distributed loads upon the structural members, or they have insufficient strength to be reasonably safe for the purpose used.
(g) The structure of any part thereof has been damaged by fire, water, earthquake, wind, vandalism, or other cause to such an extent that it has become dangerous to the public, health, safety and welfare.
(h) The structure does not have adequate light, ventilation, or sanitation facilities as required by the City.
(i) The structure has inadequate facilities for egress in case of fire or other emergency or which has insufficient stairways, elevators, fire escapes or other means of ingress or egress.
(j) The structure, because of its condition, is unsafe, unsanitary, or dangerous to the health, safety or general welfare of the City's citizens including all conditions conducive to the harboring of rats or mice or other disease carrying animals or insects reasonably calculated to spread disease.

Certain notice and hearing procedures are mandated by state statute.

JUNKED VEHICLES

What is one person's project car is another person's junked vehicle. These wreaks, which can typically be found without tires and on cinder blocks, are conducive to the stagnation of water and promulgation of weeds, thus contributing to infestations of insects, vermin and other threats to the public. Some city councils have determined that the existence of junked vehicles within the city limits will likely result in vandalism, fire hazards, hazards to the health and safety of minors and the production of urban blight.

The Texas Transportation Code provides that a junked vehicle, including a part thereof, that is visible from a public place or public right-of-way can constitute a public nuisance and the city council has authority to abate and remove such a nuisance through certain legal and/or administrative proceedings. By definition, a "junked vehicle" is self-propelled and:

(a) does not have lawfully attached to it:
  (1) an unexpired license plate; or
  (2) a valid motor vehicle inspection certificate; and

(b) is:

  (1) wrecked, dismantled or partially dismantled, or discarded; or
  (2) inoperable and has remained inoperable for more than:

    a. 72 consecutive hours, if the vehicle is on public property; or
    b. 30 consecutive days, if the vehicle is on private property.[89]

ETJ AGREEMENTS

Scope of Agreements

During the Spring 2003 Session, the Texas Legislature enacted House Bill 1197, which clarifies the authority of municipalities to enter into agreements with property owners in the extraterritorial jurisdiction (ETJ). Agreements can be executed to:

(1) guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the city for a period not to exceed 15 years;

(2) extend the city's planning authority over the land by providing for a development plan to be prepared by the landowner and approved by the municipality under which certain general uses and development of the land are authorized;

(3) authorize enforcement by the city of certain municipal land use and development regulations (e.g., zoning and building codes) in the same manner the regulations are enforced within the municipality's boundaries;

(4) authorize enforcement by the city of land use and development regulations other than those that apply within the municipality's boundaries, as may be agreed to by the landowner and the municipality;

(5) provide for infrastructure for the land, including:
  (a) streets and roads;
  (b) street and road drainage;
  (c) land drainage; and

[89] Tex. Transp. Code, § 683.071.

(d) water, wastewater, and other utility systems;

(6) authorize enforcement of environmental regulations;

(7) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties;

(8) specify the uses and development of the land before and after annexation, if annexation is agreed to by the parties; or

(9) include other lawful terms and considerations the parties consider appropriate.[90]

Process for Agreement
An agreement must:

(1) be in writing;
(2) contain an adequate legal description of the land;
(3) be approved by the city council and the landowner; and
(4) be recorded in the real property records of the county.

Extensions
The parties to an agreement may renew or extend it for successive periods not to exceed fifteen (15) years each. The total duration of the original agreement and any successive renewals or extensions may not exceed forty-five (45) years.

Binding Nature of Agreement
The agreement between the city council and the landowner is binding on the city and the landowner and on their respective successors and assigns for the term of the agreement.

Vested Rights
An agreement constitutes a permit under the "Vested Rights" or "Freeze" statute.[91]

ERROGENOUS ZONES

There is convincing documented evidence that Sexually Oriented Businesses (SOBs) have a deleterious effect on both surrounding businesses and residential areas, causing increased crime and reduced property values;[92] Many municipalities have found that SOBs are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature. However, municipalities cannot necessarily prohibit SOBs altogether because the US Supreme

[90] Tex. Loc. Gov't Code § 212.172.
[91] Tex. Loc. Gov't Code Chapter 245.
[92] *See* Studies of the cities of Austin (May 19, 1986); Amarillo (September 12, 1977); Beaumont (September 14, 1982); and Houston, Texas (1982-83); and to the cities of Indianapolis, Indiana (February, 1984); Los Angeles, California (June, 1977); Oklahoma City, Oklahoma (March 3, 1986); Phoenix, Arizona (May 25, 1979); and Seattle, Washington (March 24, 1989).

Court has held that sexually explicit printed materials, films, and live presentations can involve federally-protected, First Amendment speech.[93]

Rather than focus on the expressive activities conducted inside these establishments, it is better for municipal regulations to strive to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight. Restricting the location of sexually oriented businesses within a city is a reasonable and legitimate exercise of the city's zoning authority under Local Government Code Chapter 211. Also, Chapter 243 of the Local Government Code the City Council has authority to regulate sexually oriented businesses to promote the public, health, safety and welfare.

HOT TOPICS

Other uses that sometimes impact the visual character of a community, and perhaps even other aspects such as water quality, health, and traffic safety, include:

(1) **Big Box Retail:** Opposition to stores such as Walmart and Home Depot has led some communities to restrict the location of these enterprises.[94]

(2) **Peddlers:** Street vendors and door-to-door salesmen can pose certain safety risks in addition to any aesthetic concerns. Municipalities have the statutory authority to license, tax, suppress, prevent, or otherwise regulate hawkers and peddlers (aka, street vendors).[95] A municipality may not completely prohibit the occupation or business of street vending. However, in general, the city may prohibit or reasonably regulate by ordinance the sale of merchandise on its city streets, sidewalks, and other public places. It may also require by ordinance that a vendor obtain a permit as a condition to selling merchandise in the city and charge a reasonable fee.[96]

(3) **Church Facilities:** Churches are generally allowed in any residential neighborhood. When municipalities attempt to limit churches or related operations (e.g., schools, community centers, parking garages), they should be aware of a law designed to protect religious freedom from undue government restriction.[97] Pursuant to the state statute enacted in 1999, a government agency may not ***"substantially burden"*** a person's free

[93] See a more thorough discussion in "Basics of Planning and Zoning in Texas," by Brown & Hofmeister, LLP, citing *Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 571 (1991), *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), *Erzoznick v. City of Jacksonville*, 422 U.S. 205 (1975); and *Kois v. Wisconsin*, 408 U.S. 229 (1972).

[94] The City of Austin enacted a temporary moratorium on stores larger than 100,000 square feet over the Edwards Aquifer. Osborne, Jonathan, "6-week aquifer retail ban OK'd: Austin will consider permanent 'big box' ban," Austin American-Statesman,

[95] Tex. Loc. Gov't Code § 215.031.

[96] Op. Tex. Att'y Gen. No. JC-0145 (1999).

[97] Tex. Civ. Prac. & Rem. Code Chapter 110. *See also* House Research Org., Bill Analysis, Tex. S.B. 138, 76th Leg., R.S. 2, 5 (May 17, 1999). Chapter 110 was intended to provide essentially the same protections as the federal law had provided.

exercise of religion.[98] If it does so, the municipality must demonstrate that the application of the burden to the person:

(a) is in furtherance of a compelling governmental interest; and
(b) is the least restrictive means of furthering that interest.

(4) **Group Homes:** Municipalities have traditionally regulated group homes in two ways: (a) by making no mention of group homes in the zoning ordinance but enforcing a restrictive definition of "family" in residential districts; and/or (b) by requiring a special use permit to establish a group home in residential districts.[99] Zoning ordinances can regulate as group homes through imposing occupancy restrictions. An occupancy restriction excludes group homes by limiting the number of unrelated persons who can legally occupy a single-family dwelling unit as a "family." Such an ordinance should be applied uniformly to all residents of all dwellings in order to protect health and safety by preventing overcrowding.[100]

(5) **Entrance Corridors:** Thoroughfare Overlay Districts can be designed to provide for the diverse uses along a major arterial without sacrificing the integrity of the thoroughfare in its primary function as a means of moving vehicular traffic. Such a district can establish or protect an attractive, higher intensity use corridor composed, perhaps, of office, retail, limited light industrial and commercial uses, hotels, motels, or restaurants. The district would likely be created to enhance the image of key entry points, major corridors, and other areas of concern as determined by the City Council, by maintaining a sense of openness and continuity.

To protect the integrity of the thoroughfare, lot sizes are typically required to be larger, setback requirements are preferred to be greater, and more stringent access restrictions are imposed within the THOR District than in districts located outside the THOR district. Properties in the THOR District should typically be expected to have increased water, sewer, and drainage capacity, and increased fire protection to accommodate the higher intensity uses typically found in the district. The THOR District is an "overlay" district, meaning that the regulations within the district are in addition to the base zoning district that is being overlaid.

(6) New Legislation: H.B. 1460 –Manufactured Housing: Notwithstanding any zoning or other law, in the event that a manufactured home occupies a lot in a city, the owner may remove the manufactured home from its location and place another manufactured home on the same property, provided that the replacement is a newer manufactured home and is at least as large in living space as the prior manufactured home. The bill provides that an owner's ability to replace the home as a result of a fire or natural disaster cannot be restricted, and, other than in the case of a fire or natural disaster, a city by an ordinance or charter may limit the ability of the owner to replace the home to a single replacement.

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[98] Tex. Civ. Prac. & Rem. Code § 110.003 [emphasis added].
[99] See Daniel Lauber, A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988, 29 J. MARSHALL L. REV. 369, 387 (1996).
[100] *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

MORATORIUMS

If time is needed to explore how to integrate some of the regulatory tools presented in this paper, perhaps a ***time out*** would be justified. Moratoriums can be used to allow municipalities time to conduct research, confer with experts, solicit input from the regulated community, public feedback, prepare regulations and structure administrative procedures. In 2002, the US Supreme Court held that a regulation that affects only a ***portion*** of the parcel whether limited by time, use, or space does not deprive the owner of all economically beneficial use. In the *Lake Tahoe* case, the Supreme Court upheld a series of local government moratoriums which totaled three years. While the Court did not expressly provide any particular guidelines for adopting moratoriums, the author offers the following suggestions:

- Clearly articulate the legitimate public purpose that is being served by the moratorium, such as the development of a comprehensive zoning plan or creation of administrative land use approval procedures.[101]
- Specifically define the development activities that are covered by the moratorium.
- Ensure that the moratorium is not discriminatory and is adopted in good faith.[102]
- Ensure the temporary nature of the moratorium by expressly stating a termination date or duration. It may be wise to also provide means for extending the moratorium. Note that in the *Lake Tahoe* case, neither the ordinance nor the resolution contained an express termination date.
- Keep the duration of the moratorium brief. They should only last as long as reasonably necessary. In *Lake Tahoe*, the majority stated any moratorium that lasts for more than one year should be viewed with "special skepticism."
- Review the newly enacted moratorium statute located in Chapter 212 of the Texas Local Government Code. The statute applies to a moratorium imposed on property development affecting "only residential property." Chapter 212 requires certain public notices, hearings, and written findings, and limits the duration and extension of moratoriums.
- If growth management is your goal, consider alternate types of regulations. For example, the Office of the Attorney General of Texas has recognized the authority of a home-rule municipality to adopt a growth-management plan that limits the number of building permits the municipality will issue in a given time period.[103]

The most controversial aspect of moratoriums is the issue of public notice (generally) and notice to local developers (in particular). Builders often scream "fowl" when they perceive that a moratorium was snuck in. Unfortunately, if unscrupulous builders are forewarned that a moratorium is being contemplated, they typically rush to file shoddy plans and applications for inappropriate projects in an effort to get in under the wire.

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[101] See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167 (April 23, 2002).
[102] See *Almquist v. Town of Marsham*, 245 N.W.2d 819 (Minn. 1976).
[103] See Op. Tex. Atty. Gen. No. JC-0142 (1999).

CONCLUSION

The courts have generally recognized the principle that ***appearances matter***. Reasonable municipal regulations designed to stem the adverse effects of aesthetic harm are legitimate and can withstand judicial scrutiny, provided the regulations fall within the broad parameters established by state and federal law. In addition to clearly establishing any public health or safety justifications for the regulations, it is always wise to carefully document the anticipated negative impacts the offending structure(s) will have on property values or the cultural / historical aspects of a community or neighborhood.

Municipalities undertaking the management of aesthetic development should:

- Document what the municipality had yesterday, has today, and wants tomorrow.
- Identify any public health or safety concerns that might supplement interests that are otherwise purely aesthetic.
- Pay attention to what is happening in your region, including projects being conducted by the state, county, school district, or neighboring municipalities.
- Make aesthetic regulations part of a comprehensive scheme of land use control.
- Establish clear standards and guidelines.
- Avoid regulations that require judgment calls, or that provide city officials with too much discretion without adequate criteria.
- Provide a sound administrative procedure with an adequate appeals process.