

# Ground Rules

## Understanding Land-Use Restrictions

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Texas law permits both public and private regulation of land use. A landowner might be unaware of the regulations or their scope, or that third-party approval is required for a desired use. Regulations may limit a seller's land value or marketability or prevent a buyer from accomplishing their intended plans for the property. Frustration and anger could lead to finger pointing, potentially even to litigation.

What is a licensed real estate professional to do?

To begin with, understanding the types of land-use regulations is critical. Regulations fall into two categories: public and private.

### Public Land-Use Regulations

In Texas, public land-use regulations are *primarily* municipal and applicable only within city limits. Limited municipal regulations also apply in the extraterritorial jurisdiction (ETJ) of a city, which is a ring of land around cities—one-half to five miles in depth, depending on the city's population. Under recent legislation

### Key Takeaways

- Texas land-use regulations include public and private rules, each affecting property use and value.
- Buyers and sellers should carefully examine land-use rules—including zoning, platting, covenants, and easements—to understand restrictions on the property.
- Rezoning, amending covenants, or modifying development plans can sometimes reduce regulatory obstacles, though these can be complex processes.
- Real estate professionals help gather information but should defer to legal experts on interpreting land-use regulations and advising clients.

(the constitutionality of which is being contested in court), an owner may opt out of the ETJ and avoid any city regulation.

Texas counties have *limited* land-use regulation author-



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ity, which does not include zoning but does include platting and a list of specific topics. Legal authority for imposing county regulations is derived from the local government code. Enforcement is by the applicable local government and can involve fines and criminal penalties or litigation seeking a judicial order to comply.

### **Zoning**

Municipal zoning is a broad power held by all Texas cities of all sizes. It's a discretionary process. Land use is regulated through a map showing geographic areas and a corresponding list or chart of permitted and prohibited uses (and definitions of those uses). Some uses are permitted only after site-specific approval under a Special Exception or Special/Conditional Use Permit. If a desired use is not listed as permitted, then it is prohibited. City staff makes the initial interpretation of whether a proposed use is permitted under the city's regulations, and that decision must be promptly appealed or the owner's right to challenge the interpretation could be lost.

If a use is prohibited, a multi-step discretionary rezoning process is required to permit that use, which ultimately involves a city council vote after public notice and hearing. Rezoning can be political and is not final until the city council vote is completed. Neighbors have a statutory protest right, which triggers a super-majority vote requirement.

In addition to use regulations, zoning typically includes a long list of development limits such as lot size, building setbacks, height, and density. Some cities are adopting "form-based" zoning that focuses on detailed restriction of building and site dimensions and orientation. Some counties have limited zoning authority, primarily around specific lakes.

### **Platting**

Platting is a government process regulating the division or development of land. It involves the creation of proper building sites, usually shown as lots, blocks, and reserves on the recorded plat. Once platted, the proper legal description of a tract is by reference the recorded plat and its specific tract designation.

Platting focuses on size/dimension of building sites, proper public access, and provision for proper government and private infrastructure (roads, utilities, drainage). The platting process relates to land development activities, not above-ground structures.

All cities may regulate platting within their city limits and ETJ (subject to owner opt-out of the ETJ). All counties may regulate platting within their county boundaries, but not within city limits. For most ETJs, the city and county are required to execute an interlocal agreement to allocate platting authority within ETJ (usually delegated to the city). Platting regulations outside city limits may not affect use or residential density.

Each local government is required to publicize (generally on their website) the requirements for a platting application. Platting is a rule-based process, and, if the applicant complies with the applicable rules, approval is required. After the platting process is initiated, the local government is *required* to proactively respond to the application and limit requirements to issues permitted by law through a detailed statutory process known in the development industry as the "plat shot clock." If a local government ignores plat application timing, the application is *deemed approved* by operation of law.

Manufactured home rental communities outside city limits are exempted from platting and subject to a separate set of rules.

### **Building/Fire Code**

All cities may adopt building codes, but they must be based on the International Code collection (a requirement added to ensure regulatory consistency throughout Texas). Counties have more limited authority, but they may regulate single-family homes and duplexes, but not manufactured or modular homes. Building codes protect citizens by imposing base safety and durability standards. Cities may adopt a fire code. Larger counties may adopt a fire code applicable only to commercial and multifamily structures.

### **Signage**

All cities may adopt limits on signage, such as number, size, type, lighting, and structure. Content of signage is not generally regulated due to constitutional protections of free speech under both the Texas and U.S. Constitutions. Sign regulations have dual purposes of aesthetics and safety (particularly traffic). City regulations may be extended to their ETJ. Counties do not regulate signage.

### **Drainage**

All cities and counties may adopt regulations to ensure new developments properly handle drainage onto and from building sites. Some counties have authority to establish drainage districts controlled by the county.



Drainage is regulated as part of the platting process or, if there is no new plat required, through development permits. Dams are regulated by the Texas Commission on Environmental Quality.

## **Private Land-Use Regulations**

Private land-use regulations are established by private owners via recorded documents. Once the documents are part of the public record, all subsequent owners are deemed to have notice of these documents and subject to those regulations, even without actual knowledge or consent. Legal authority for these regulations is derived from contract law and real property law. Enforcement is by private lawsuit seeking a judicial order to comply and recovery of enforcement costs (and, in appropriate circumstances, damages for violation).

### ***Restrictive Covenants***

Owners might wish to restrict future use of their property for many reasons. For example, developers know potential homebuyers often like to have a clear, concrete understanding of future plans for a development before buying a home there, making lots in a comprehensively planned project more attractive—and therefore worth more—than lots in an unrestricted one. Or a landowner selling a portion of land may wish to protect the retained land from possible objectionable uses or structures on the sold land. Such restrictions on future use are called restrictive covenants.

A restriction that is included in a deed when the land is conveyed is known as a “deed restriction.” When the restriction is contained in a separate document, it can go by various names, such as “Declaration of Covenants, Conditions, and Restrictions.” In all restrictive covenants, the owner agrees to the restrictions and, due to recording, all future owners are also restricted. Virtually any type of rational restriction is permitted. The terms and time period vary, but restrictive covenants commonly cover many of the same issues as public land-use regulations.

Restrictions may benefit specified individuals or entities (known as personal covenants) or designated land, such as an entire project or portion thereof (known as real covenants). Real covenants “run with the land” and bind all future owners until the restrictions terminate per their terms (although they may continue in perpetuity).

## ***Property Owners Associations***

Restrictive covenants may provide for a comprehensive regulatory scheme for a multi-lot project (usually residential, but also commercial or industrial) to be managed by a property owners’ association.

The association is almost always a non-profit corporation created by the developer with a board of directors to make policy decisions benefiting the entire project. Initially appointed by the developer, the board is often controlled by the developer while the project is developed and sold to the public, then transitions to a board elected by the property owners. This time period is known as the “development period” or “developer control period.” During this period, property owners may be frustrated by the developer’s control of the association and a perceived lack of owner input or consideration.

Most associations provide for mandatory assessments (without any opt-out right), which may increase as needed, but commonly with some limits. The association may enforce the applicable restrictive covenants. The association, either through the board or a separate architectural control committee (ACC), often must approve any development within the project. ACC approval is based on demonstrated compliance with the applicable restrictive covenants and is usually a broadly discretionary design/architectural-style review. Discontent with association authority has led to a series of regulations in the property code.

### ***Easements***

An owner may grant a third party rights to use a portion of the owner’s land for that party’s benefit. This is called an easement. The owner retains fee ownership of the land subject to the easement, including the right to use that land for any purpose that does not interfere with the easement holders’ use rights. The owner is compensated for agreeing to the easement.

The easement is created by a recorded document setting forth the terms negotiated by the parties, such as location, use, duration, and maintenance of the easement. Once recorded, the easement burdens the land, and future owners are subject to the easement such that future use must accommodate the easement holders’ dominant rights.

The most common examples of easements are public



or private utilities, private road access, and private pipelines. Several types of easements do not require a recorded document but are implied by physical use. These implied easements include easements by necessity, easements implied by prior use, and prescriptive easements. Ultimately, a court determines if an implied easement exists.

Most easements are for the benefit of specified land (known as appurtenant easements), and ownership follows the land benefited, even if the deed to the benefited land does not mention the easement. Pipeline easements are in a class of their own. They don't necessarily benefit any particular piece of land, but rather are part of an assemblage of other pipeline easements to create a transportation system for liquids or gases (known as easement in gross).

## Due Diligence

Due diligence by the seller before the land is listed for sale and by the buyer before the land is purchased will reduce misunderstanding and disputes that could lead to litigation. In fact, most transactions have a due diligence period running from a few days for single-family houses to months for large land development transactions. During that period, the buyer may terminate the contract and the earnest money will be refunded, less an option fee retained by the seller, if the buyer's due diligence determines that the land is not acceptable for the buyer's intended use and development.

Due diligence has several components.

### Identifying Applicable Regulations

Private land-use regulations are primarily based on recorded documents that should be listed in the Commitment for Title Insurance generated by the title company handling the transaction. They should be listed in Schedule B, with all restrictive covenants listed in Section B-1 and any recorded easements listed in later subsections.

Public land-use regulations are generally available on the website of the applicable city or county, but they are not generally listed in the title commitment. MuniCode, a private company that assists cities in their regulations, lists many city regulations on its website.

Determining whether land is within the city limits or ETJ is important. This can be done either by specifically requesting the surveyor to include that information on the land survey or by reviewing online maps on the city's website.

Most cities and many counties will send a letter to a potential buyer listing any known regulatory deficiencies of a site and stating the applicable zoning district. Such letters often provide other pertinent information, including which uses are permitted. However, under Texas law, a local government is rarely held to such a letter if a later review determines it was erroneously issued. There are third-party services that prepare land-use reviews and issue reports. These are common in commercial transactions, particularly when a national lender is involved. Private land-use lawyers also provide this service.

### Gauging Regulation's Impact On the Land

Although covenants and easements are legal in nature, a layperson usually can, with diligence and patience, understand them well enough to generally determine how they might impact a piece of property. A review should focus primarily on permitted and prohibited uses and any limitations on size/density/placement of new structures.

Public regulations can be extensive and complicated, but, as with private regulations, they are often understandable by a layperson. Zoning ordinances are, by far, the primary concern, particularly the applicable zoning district and the related-use list/chart (and related definitions). Each zoning ordinance has a related zoning map showing all districts. Ordinances and maps can usually be found on a city's website. Once the zoning district is determined, identifying the permitted uses is simply a

### Types of Land-Use Regulations

Public	Private
Zoning	Restrictive Covenants (Deed Restrictions)
Platting	Owners Associations with Assessments and/or Architectural Control
Building/Fire/Sign Codes	Easements



matter of finding either the unified-use chart or the separate sections applicable to the particular district (depending on how the zoning ordinance is drafted).

Through this process, someone may determine if the existing structures/uses are compliant with existing regulations and whether those regulations permit new structures/uses that are consistent with highest and best-use valuation or the specific desires of an owner or buyer. If not, the owner or buyer should seek specialized legal counsel. Beware: This analysis can take weeks, not days.

### ***Weighing Options That Could Mitigate Impact***

Many options are available that can mitigate troublesome regulations, but they may not apply in all situations and could be too difficult, expensive, or time-consuming to be practical. Examples include:

- Legal consultation may conclude the regulations do not apply to the land, have lapsed, or don't limit the use or structure. This process requires the assistance of qualified professionals plus a supportive title company.
- Restrictive covenants or easements may be amended, but this requires third-party consent.
- Rezoning may change use districts or amend regulations, but it requires time for the process leading to city council approval.
- The desired development might not be prohibited outright, but simply require certain government/ACC approvals. These approvals might be achievable with delay in closing and active engagement in the government/ACC approval process.
- Non-compliance uses or structures might be allowed to continue through a variance process.
- Modifying the proposed project might yield a comparable result acceptable to the buyer, or the footprint of the land sold can be modified to avoid the most problematic regulation.

### ***Deciding How to Proceed With the Transaction***

Land can suffer a loss of marketability and value when problematic land-use regulations aren't resolved, so it makes sense for all parties to patiently and reasonably consider their options when dealing with these unforeseen complications.

When land-use regulatory issues are discovered, the buyer should always seek an extension of the due diligence period for further analysis. Sometimes the parties, assisted by legal counsel and licensed real estate professionals, can keep all parties at the table, working cooperatively to solve a regulatory problem and preserve the deal.

Sellers should consider giving a diligent, careful buyer more time, but they should also consider requiring that the buyer commit to taking certain actions, such as hiring professionals, keeping the seller advised, and possibly depositing more earnest money to demonstrate commitment to the deal. Otherwise, the transaction could fail.

### ***The Licensee's Role***

Land-use regulations are legal in nature, and licensees are not permitted to practice law. While they can assist with gathering information and spotting issues, they should not interpret ambiguous or complex land-use documents. Instead, they should recommend qualified lawyers to their clients or ask other real estate professionals, such as title company staff or surveyors, for recommendations.

Licensees can and should advise their clients on the economic and practical impact that problematic regulations could have on the piece of real estate and the transaction as a whole. This will enable clients to make the best decisions possible. ➡

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