



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 7, 1997

The Honorable Chris Harris
Chair, Senate Administration Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 97-062

Re: Whether a city council may require that certain or all requests for zoning variances be directed to the city council rather than the zoning board of adjustment (ID # 39261)

Dear Senator Harris:

You ask whether a city council may require that requests for zoning variances in a specific zoning district be directed to the city council instead of the zoning board of adjustment, although other requests for zoning variances would continue to go to the zoning board of adjustment. If the answer to the foregoing question is in the negative, you ask whether a city council may require that all requests for zoning variances go to the city council rather than the zoning board of adjustment. We conclude that a city council may not, consistent with the general zoning enabling statutes, require that any requests for variance be directed to the city council.

The power of a municipality to zone is that delegated to it by the state. Thus, the authority of a municipality, including a home-rule city, to enact zoning regulations is derived from and circumscribed by the general zoning enabling statutes.¹ Municipal ordinances must conform to and be consistent with each of the limitations of the statutes.² When the zoning statutes direct that action be taken in a particular way, it may not be performed in a different manner.³

The general municipal zoning enabling statutes are codified at chapter 211 of the Local Government Code (the "act").⁴ The act authorizes the governing body of a municipality to adopt zoning regulations in accordance with a comprehensive zoning plan. Local Gov't Code §§ 211.003,

¹See *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex. Civ. App.-- San Antonio 1976, writ ref'd n.r.e.) (in approving zoning ordinances, cities confined to express authority delegated by legislature); *Swain v. Board of Adjustment of University Park*, 433 S.W.2d 727, 731 (Tex. Civ. App.--Dallas 1968, writ ref'd n.r.e.) (city confined in exercise of power to pass comprehensive zoning ordinances to express authority granted by legislature found in enabling statutes).

²*Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962).

³*Smart v. Lloyd*, 370 S.W.2d 245, 248 (Tex. Civ. App.--Texarkana 1963, no writ).

⁴See Local Gov't Code §§ 211.001 - .013; Act of April 30, 1987, 70th Leg., R.S., ch. 149, § 1, 1987 Tex. Gen. Laws 707, 963 (recodifying V.T.C.S. arts. 1011a - 1011m as Local Gov't Code ch. 211); *Swain*, 433 S.W.2d at 731 (legislative authority to pass comprehensive zoning ordinance found in V.T.C.S. arts. 1011a *et seq.*).

.004. Under the act, the governing body may divide the municipality into zoning districts within which the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of any structures or land. *Id.* § 211.005(a). Prior to implementing zoning regulations, the governing body of a home-rule municipality is required to, and the governing body of a general law municipality may, appoint a zoning commission which recommends boundaries for the original zoning districts and appropriate zoning regulations for each district. *Id.* § 211.007(a). The governing body must give notice and hold a public hearing before adopting and enforcing the zoning district boundaries and regulations. *Id.* § 211.006.

The governing body of a municipality is also authorized to appoint a board of adjustment to administer the zoning ordinances enacted by the governing body:

The functions of the [board of adjustment] are an integral part of the system of zoning regulations. In order that zoning may work fairly, the zoning ordinance authorizes the granting of permits for variances, and the determination of the question whether such permits shall be granted or denied is an essential part of the proper administration of the zoning ordinance.

Board of Adjustment of City of Ft. Worth v. Stovall, 216 S.W.2d 171, 173 (Tex. 1949); *see also City of Amarillo v. Stapf*, 101 S.W.2d 229, 233 (Tex. 1937) (board of adjustment created primarily for purpose of varying or modifying zoning regulations in particular cases). Section 211.008(a) of the act states that the “governing body of a municipality may provide for the appointment of a board of adjustment.” Section 211.009(a) of the act enumerating the powers of a board of adjustment provides as follows:

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done; and

(4) hear and decide other matters authorized by an ordinance adopted under this subchapter.

We have been unable to find any Texas cases that have specifically addressed and passed on the issue presented by your questions, namely the authority of a municipality's governing body to perform functions that the act authorizes a board of adjustment to perform.⁵ This office, however, has previously concluded that the governing body of a municipality that has adopted a comprehensive zoning plan cannot, consistent with the enabling statutes, act as a zoning board of adjustment. See Attorney General Opinion JM-1069 (1989) at 7; see also Letter Opinion No. 92-56 (1992) (confirming applicability of Attorney General Opinion JM-1069 to type A general-law municipality). In Attorney General Opinion JM-1069, the governing body of a home-rule city that had adopted a comprehensive zoning plan wished to designate itself as the zoning board of adjustment. Attorney General Opinion JM-1069 stated that although a city is not expressly required by section 211.008(a) to appoint a board, the statutory scheme "effectively precludes the exercise of such board's powers except in conformity with statutory requirements." Attorney General Opinion JM-1069 (1989) at 6.⁶ The opinion noted that when the legislature intended to permit a governing body to exercise the zoning powers of an appointive commission or board, it has so provided as it did with respect to a zoning commission in section 211.007.⁷ *Id.* at 4. Attorney

⁵There are listed in JOHN MIXON, TEXAS MUNICIPAL ZONING LAW § 9.01 (2d ed. 1995), several cases which apparently assumed, without deciding, that a city's governing body could perform functions delegated to the board of adjustment: *Congregation Comm., North Ft. Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700, 702 (Tex. Civ. App.—Fort Worth 1956, no writ) (city council deciding special exceptions); *Fountain Gate Ministries v. City of Plano*, 654 S.W.2d 841, 842 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (city council administering special use permits by waiving district restrictions); *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191, 194 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985) (city council issuing special-use permits); *Dunaway v. City of Austin*, 290 S.W.2d 703, 705 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.) (appeal to city council regarding special-use permit issued by city planning commission); *Slater v. City of River Oaks*, 330 S.W.2d 892, 893 (Tex. Civ. App.—Ft. Worth 1959, no writ) (city council approving gasoline filling stations as special exceptions). However, as noted in Attorney General Opinion JM-1069, several of these cases were decided prior to the Texas Supreme Court's decision in *Bolton v. Sparks* and none directly addressed the authority of a city council to perform the board of adjustment functions. See Attorney General Opinion JM-1069 at 6 n. 5 (1989); see also *Bolton v. Sparks*, 362 S.W.2d at 950 (holding that ordinance passed without meeting zoning statutory requirements was invalid).

⁶But see MIXON, *supra* note 5 (by stating in section 211.008 of Local Government Code that a municipality may appoint a board of adjustment, governing body is presumably free not to provide one in which case governing body is arguably proper body to issue variances and hear appeals). In light of Attorney General Opinion JM-1069, we believe Mixon to be incorrect.

⁷Section 211.007 of the Local Government Code provides in part:

(a) To exercise the powers authorized by this subchapter, *the governing body of a home-rule municipality shall, and the governing body of a general-law municipality may, appoint a zoning commission.* The commission shall recommend boundaries for the original zoning districts and appropriate zoning regulations for each district. If the municipality has a municipal planning commission at the time of implementation of this subchapter, the governing body may appoint that commission to serve as the zoning commission.

....

(continued...)

General Opinion JM-1069 also noted that under the statutory scheme provided by the legislature, the board is charged with deciding appeals from the decisions of administrative officials; parties aggrieved or affected, including cities, by the decision must exhaust administrative remedies before petitioning a court. *Id.* at 5. The opinion concluded that “[t]he incongruity of the governing body being at the same time an appellant and the adjudicator of its own appeal argues strongly against any supposed legislative intent that the governing body of a city could, at its election, act as the legislatively contemplated board of adjustment for the city.” *Id.*

We begin our analysis of your specific query by noting that it is apparent from your questions that the city in issue has enacted zoning regulations and appointed a board of adjustment. Authorizing a variance from the terms of a zoning ordinance is a function delegated to the board of adjustment. *See* Local Gov’t Code § 211.009(a)(3). If the city council in question were to pass on requests for variance, it would act as the board of adjustment in such regard. The city council may not, however, act as a board of adjustment. *See* Attorney General Opinion JM-1069 (1989) at 7. Therefore, based on Attorney General Opinion JM-1069, we conclude that the city council may not require that any requests for variance be directed to the city council rather than the board of adjustment.

Our conclusion is further supported by the plain language of the act itself. As indicated previously, the city in question *has* appointed a board of adjustment. The act expressly delegates to the board of adjustment the authority to grant a variance. The act does not give or retain to the governing body that authority.⁸ *See generally* Local Gov’t Code §§ 211.001 - .013. We find no provision in the act which would authorize the selective exercise of certain functions delegated to the board of adjustment by the city council and others by the duly appointed board of adjustment. Assuming a board of adjustment has been appointed, it is our view that the city council cannot, consistent with the act, take over functions delegated to the board and act on requests for variance.⁹

⁷(...continued)

(e) *If a general-law municipality exercises zoning authority without the appointment of a zoning commission, any reference in a law to a municipal zoning commission or planning commission means the governing body of the municipality.* [Emphasis added.]

⁸Except, arguably, where no board of adjustment has been appointed. *See supra* note 6.

⁹For cases precluding a governing body from assuming duties of a planning commission, a body analogous to a board of adjustment, *see Hollis v. Parkland Corp.*, 40 S.W.2d 53, 56 (Tex. 1931) (city has nothing to do with approval of plats insofar as recording of plats nor does statute purport to give city any authority except where there is no planning commission); *W. H. Sparks v. W. T. Bolton*, 335 S.W.2d 780, 784 (Tex. Civ. App.--1960, no writ) (city ordinance was void if by its terms city council attempted to take over platting and subdividing responsibilities of city planning commission); *Lacy v. Hoff*, 633 S.W.2d 605, 609 (Tex. Civ. App.--Houston [14th Dist.] 1982, writ ref’d n.r.e.) (ordinance which purports to take platting and subdividing responsibilities of planning commission and subjects such functions to review of board of adjustment is void).

S U M M A R Y

A city may not, consistent with the general municipal zoning enabling statutes, require that any requests for a variance be directed to the city council rather than the board of adjustment.

Yours very truly,

A handwritten signature in cursive script that reads "Sheela Rai".

Sheela Rai
Assistant Attorney General
Opinion Committee