

Getting to Know Sim City: Zoning Basics

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Game Plan

- Getting Oriented in Sim City
 - Territory
 - Objectives
 - Players
 - Tools
 - Ground Rules
- Playing the Game: Some Common Dilemmas
- Prizes: Sim City Societies (draw at end)

Getting Oriented: The Territory

- **Physical characteristics:** land itself
- **Social/economic characteristics:** demographics, traditions/cultural norms, infrastructure
- **Political characteristics:**
 - Controversies, factions history
 - State law (e.g. control at margins, city/county)
 - Jurisdictional interplay (e.g. public utilities)
 - Piecemeal decisions with later impacts

Getting Oriented: Objectives

- **Avoid minuses (hazards, gaps, problems)**
 - Incompatible uses, safety, externalities, public services, surprises)
- **Gain pluses (advancing collective “goods”)**
 - Enhance economic base/jobs/taxes
 - Preservation & the environment
 - Aesthetics
 - Social considerations: Inclusionary housing, live/work in proximity

Getting Oriented: The Players

- **“The Government”**
 - “Deciders”: elected and appointed
 - “Advisers”: citizen boards
 - “Experts”: administrative staff (planners, etc.)
 - “Observers”/“Participants”: other governments
- The **“Proponent”**: developer
- The **“Skeptics”**: neighbors (old/new) etc.
- The **“Good Citizens”** (absent?)
- The **“Press”**: what’s interesting and/or important

Getting Oriented: The Tools

- **“Comprehensive Plan”**: conceptual framework
- **“Districts”**
 - Separating basic uses and combinations
 - Prescribing other characteristics
 - Uses as of right or conditional/with permission
 - Supplemented by overlay & subdivision reqts
- **Placement on the map**

Getting Oriented: Ground Rules

- **Powers:**

- Why worry?
- Traditional as supplemented in specific areas
- Changing times

- **Constraints:**

- Federal: Constitutional, statutory
- State: Constitutional, statutory, common law

Ground Rules: Powers (1)

- **Why worry?**
 - No inherent local government powers
 - Common enabling authority by statutes
 - Supplemented by home rule authority/charter?
 - Supplemented by local legislation?
 - Judicial strategies for interpretation
 - Preempted by more specific legislation?
 - JURISDICTION-SPECIFIC!!!

Ground Rules: Powers (2)

- **In the beginning...**
 - Herbert Hoover (planning, subdivision, maps, zoning)
- **Supplemented by specialized statutes**
 - Sensitive areas (coastal, ridgelines)
 - Historic preservation, agricultural preservation
 - Economic development (growth zones, etc.)
 - Environmental (hog farming, etc.)
 - New tools/requirements: (development agreements, state-wide or regional planning reqts. re housing)

Ground Rules: Powers (3)

- **Changes coming**

- Need for comprehensive overhaul in 1920's schemes?
- New concerns: “sustainability”/ “smart growth”
 - Compact development, growth boundaries
 - Environmental/natural resource protection
 - Multi-modal transportation
 - Mixed-use development (rather than sprawl)
 - Collaborative and/or efficient decision-making
- American Planning Association models

Constraints: Preamble

- **Complex and crucial:** need to learn details
- **State constitutions:** not the same as federal; added constraints in many cases
- **Administrative remedies:**
 - Messy but important
 - Set by statute or ordinance (pay attention)
 - Critical to ripen constitutional issues
 - Regard as safety valves

Constraints: “Takings” (Sources)

- PROFOUNDLY IMPORTANT
- Federal: Constitution and 42 USC 1983
 - 5th A: “Nor shall private property be taken for public use without just compensation”
 - 14th A: “Nor shall any State deprive any person of life, liberty, or property without due process of law”
 - Confusion re “taking” v. substantive due process
- State: Constitutional language and interpretation may differ; statutes may nail down key specifics (“inverse condemnation,” “vested rights”)

Takings: Types Overview

- Basic Types:
 - Permanent physical invasion: per se taking
 - “Total taking” of all economically beneficial use of “property”: per se taking
 - Inappropriate “exactions” (leverage in permits): heightened scrutiny
 - Balancing test: everything else

Takings: “Total Taking”

- **Lucas**: Setback requirement to prevent coastal erosion and injury but no variance; when lot rendered unbuildable, then “taking” of “all economically beneficial use”
- **Exceptions re state law**: “nuisances” & underlying doctrine (e.g. public trust)
- **Questions**:
 - what is “property right”? (segmentation)
 - what is “total”? (denominator);
 - what is “total taking” (effect of market shifts)

Takings: Exactions

- **Exactions:**

- Where tailored requirements as condition to permit approvals risk of “extorting” and imposing “unconstitutional conditions”

- **Examples:**

- Dedicated public path along water, view rights
- Public (not private) greenway for flood control

- **Test: Enhanced scrutiny (not rational basis)**

- Essential nexus and rough proportionality between condition imposed and impact of development

Takings: Balancing

- **Penn Central**:

- NYC historic landmark preservation strategy: limit “top off” of Beaux Arts terminal but TDRs
- Analysis: balance found no facial taking
 - Character of government action
 - “Reasonable investment-backed expectations”
 - “Economic impact” of the regulation

- **Palazzolo**: balancing or total taking?

- changing wetland requirements over time; property segmentation

Constraints: Procedural Due Process

- Procedural:
 - Generally statutes address risks so constitutional requirements met (notice, hearing, ex parte or conflicts of interest)
 - Important to comply with statutes and own regulations

Constraints: Federal Substantive D/P

- Post-*Lochner*, generally enough if a legitimate public purposes, ends reasonably related to purposes, non-arbitrary result that does not “shock the conscience”
- Applied:
 - Arbitrary result in land use: *Nectow* (might now be addressed under “takings”)
 - Fundamental rights: family association (*Moore v. East Cleveland*): (illegal to limit number of blood relations living together)

Constraints: State Due Process

- **May articulate more stringent test: e.g.,**
 - “real and substantial relation to the objects and purposes to be furthered, in view of existing conditions in the community and physical characteristics of area and particular tract involved”
 - balancing
- **Examples**
 - Exclusionary zoning (NJ) (minimum floor area)
 - Barring particular use throughout jurisdiction

Constraints: Equal Protection

- **Federal:** categorical approach to protected classes and interests
 - Racial discrimination: (Arlington Heights)
 - College students: Village of Belle Terre
 - Developmentally disabled (Cleburne)
 - “Class of One” (Willowbrook v. Olech)
- **State:** may be more demanding
 - Definition of family (college students)
 - “Right to housing” (NJ, Mount Laurel)
 - Similar uses within particular district (drive-ins)

Constraints: First Amendment

- **Speech**

- **Signs/billboards:**

- “Commercial speech” (Lorillard)
 - Billboards on/off premises: aesthetics acceptable purpose but beware content distinctions or insufficient alternatives

- Adult uses: regulate effects not content

- **Religion:**

- Neutral requirements traditionally upheld, but now focus is now RLUIPA (statutory)

Constraints: Preemption

- **Federal Supremacy clause:**
 - Federal: if within limited federal powers, Congress may preempt if (express or implied) “conflict” or “occupies the field”
 - Examples:
 - Airports (okay to regulate location, not curfews)
 - Fair Housing Act: (e.g. group homes, familial status)
 - Religious Uses (RLIUPA): higher standard
 - Cell towers
- **State Preemption:** common law or statute

Getting to Play “Sim City”

Some Common Dilemmas

1. Getting started: “what” goes “where”?
2. Dealing with “special cases” of “exceptional hardship” (variances)
3. Dealing with “change” (transition issues, conditional/special use permits, rezoning, initiatives/referenda)
4. Dealing with unhappiness (appeals to the courts)

“What” goes “where”?: Overview

- a. **Comprehensive plan:**
 - sets stage with goals and objectives
- b. **Common types of districts/issues**
- c. **Nuances**
 - Use “as of right” or special review/permit
 - overlay districts, floating zones

What goes where: details

- **Residential uses:**
 - multiple district types, defining “family,” “accessory uses”, McMansions, mixed uses, exclusionary/inclusionary practices, water/septic, subdivision regulation
- **Commercial/retail:**
 - Different types (neighborhood v. downtown), comparable uses (drive-ins), signage, parking
- **Office/institutional**
- **Industrial and agricultural:**
 - Mixture of uses, supplemental uses

What goes where: Nuances

- Uses as of right v. uses with review/permit
 - Significance: who decides, what review
 - Examples: large day care?
- Overlay districts
 - Historic
 - “Traditional waterfront”
- Floating zones
 - Planned unit development and more

2. Exceptional Hardship Variances

- Function: safety valve to avoid takings
- Basis: statutory
 - “to authorize upon appeal in specific cases such variances from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done”
- Typically: areas, dimensions, not use

Variations: Criteria

- **Unnecessary hardship**
 - Land itself (topography)
 - Not personal (but ADA, ramps)
 - Not “self-imposed”
- **“So spirit of ordinance observed”:**
 - Unique problem not widespread
 - Balancing

Variations: Administration

- **Board of Adjustment**

- Lay board: challenging to understand criteria?
- Important to have specific findings and justifications (there may be appeals)
- Avoid confusion with “special exception”/ “special use permits”
 - Variance: exceptional hardship, avoid taking
 - “Special exception/special use permit”: grants authority to develop after intensive review, also requires findings

3. Dealing with Change

- Transition issues: preexisting, pipeline, moratoria
- Granting special/conditional use permits
- Rezoning

“Nonconformities”: Basics

- Meaning and goals
 - Uses and buildings that were once legally compliant, but inconsistent with later applied requirements protected to
 - Be fair in treatment and avoid takings

Nonconformities: Standards

- Preexisting use/structure legal in the first instance
- Strictly constrained:
 - Continuing use, not discontinued or abandoned
 - No expansion of use (unless “natural”?)
 - Time-limited? Amortization of billboards

Pipeline Issues: Vested Rights

- Development project so far along that rules can change
 - Common law: estoppel based on developer's substantial change in position/substantial expenditure in good faith reliance on act or omission of government, and application of prior law would be highly inequitable and not put public health/safety at risk
 - Statutory: “vested rights” and “development agreements”

Pipeline Issues: Moratoria

- Short term “time out” to review some aspects of land use ordinances or infrastructure delivery
- Permissible under federal constitution (Lake Tahoe) if short term, clearly grounded
- State statutes may govern
- Can't be arbitrary to those in pipeline

Special/Conditional Uses: Basics

- Meaning: Uses that are provisionally permissible in particular districts, subject to closer review
- Review may be by board of adjustment or elected board (depending on ordinance)
- May involve substantial public outcry even if provisionally permissible because of impact
- Contrast: variances, rezonings

Conditional/Special Use Process

- Quasi-judicial (not legislative) process
 - Requires factual findings tied to ordinance standards: does not materially engager public health/safety; meet required conditions; would not substantially injure value of adjoining property or is public necessity; is in harmony with area and general conformity with comprehensive and other plans
 - Typical conditions: buffering, “exactions”
 - Judicial review more stringent than rezoning

Rezoning: Basics

- Typically involve change in district on map
- Types:
 - Initiated by landowner (typically to gain approval for more intensive use) or floating zone
 - Initiated by government (typically to foster economic development, downzone to limit density, or overlay zone such as historic)
- Character: usually more significant change than approving special use permit

Rezoning: Process and Review

- Procedural requirements
 - Statute: notice, hearing, petition/supermajority)
 - Ordinances: may include other requirements (e.g. consultation with neighbors?)
- Judicial review
 - “Legislative” decision so great deference
 - But: no “spot zoning,” no “contract zoning”
 - But: some states may require “change or mistake”
 - But: some states may treat as “quasi-judicial”

4. Dealing with Unhappiness

- Judicial review:
 - Jurisdiction-specific
 - Key issues: exhaust administrative remedies, timing, character of review (on the record or de novo), standing, standards of review
 - Other possibilities: enforcement action, federal court

Dealing with Unhappiness: More

- Important other dimensions:
 - open meetings laws, public records laws
 - conflicts of interest laws, ex parte contacts
- Remember professional ethics: who's the client, confidentiality, more

Resources for the Future

- Listed resources
- Electronic current developments
 - Professor Patricia Salkin’s blog on land use law (“The Law of the Land”):
<http://lawoftheland.wordpress.com/>
 - IMLA/MuniCode: listserv
- Planning: American Planning Assn, et al