QUINLAN™ January 10, 2018 | Volume 12 | Issue 1

Zoning Bulletin

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Preemption—County ordinance requires shooting facilities to obtain permit

Shooting range owner argues ordinance is preempted by state law governing firearms regulation

Citation: *Kitsap County v. Kitsap Rifle and Revolver Club, 405 P.3d 1026 (Wash. Ct. App. Div. 2 2017)*

Contributors

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POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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1-800-229-2084
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ISSN 0514-7905

WASHINGTON (11/21/17)—This case addressed the issue of whether a county ordinance requiring shooting facilities to obtain an operating permit was preempted by state law, which explicitly preempted the entire field of "firearms regulation." It also addressed whether that county ordinance violated the Second Amendment to the United States Constitution.

The Background/Facts: In September 2014, Kitsap County adopted Ordinance No. 515-2014, which established a new chapter to the Kitsap County Code ("KCC") entitled "Firearms Discharge." That chapter, KCC 10.25 required all existing and proposed shooting facilities to obtain an operating permit within 90 days of the ordinance's effective date, and provided that the failure to obtain a permit would result in closure of the facility. It also required shooting facilities to meet detailed standards.

The Kitsap Rifle and Revolver Club (the "Club"), which operated a shooting range in the County, failed to submit an application for an operating permit by the deadline and informed the County that it did not intend to apply for a permit. The County then filed a legal action against the Club. The County asked the court to declare that the Club was in violation of KCC 10.25, and asked the court to enjoin the Club from operating its shooting facility until it received a permit. In that legal action, the Club argued that KCC 10.25 was invalid or unenforceable on various grounds, including that: (1) KCC 10.25 was preempted by state statutory law, RCW 9.41.290, which expressly provides that state law "fully occupies and preempts the entire field of firearms regulation . . . including [the discharge of firearms]"; and (2) KCC 10.25 violated the Second Amendment to the United States Constitution (and its similar state constitutional counterpart—Article 1, section 24 of the Washington Constitution), which guarantees the right to bear arms.

Finding no material issues of fact in dispute and deciding the matter on the law alone, the trial court ultimately granted summary judgment in favor of the County. The court ruled that RCW 9.41.290 did not preempt KCC 10.25 because KCC 10.25 was not a firearms regulation. The court also summarily rejected the Club's argument that KCC 10.25 violated the constitutional right to bear arms. The court thus concluded that KCC 10.25 was enforceable against the Club's shooting facility and that operation of the facility without an operating permit was a violation of KCC 10.25.

The Club appealed.

DECISION: Judgment of Superior Court affirmed.

The Court of Appeals of Washington, Division, 2, concluded that KCC 10.25 was not preempted by RCW 9.41.290, and was valid and enforceable against the Club.

In so concluding, the court first held that RCW 9.41.290 did not apply here because KCC 10.25 was not a firearms regulation. The court reached this finding based on several supporting factors. First, the court noted that RCW 9.41.290 did not make any reference to the regulation of shooting facilities, and thus, the court concluded that there was no indication that the legislature intended to preempt local ordinances requiring shooting facilities to obtain operating permits. Second, the court noted that KCC 10.25 did not expressly regulate the discharge of firearms (or a person's ability to discharge a firearm), but only regulated "shooting facilities." Third, the court noted that RCW 9.41.290 expressly acknowledged that local governments may enact laws and ordinances relating to firearms as long as they are "authorized by state law . . . and consistent with this chapter." The court found that KCC 10.25's requirement that a shooting facility obtain an operating permit was "an exercise of the County's police power that [was] authorized under state law." Fourth, the court noted that state supreme court cases addressing RCW 9.41.290 had "limited the scope of preemption" and what was viewed as a "firearms regulation."

Moreover, the court held that even if RCW 9.41.290 did apply, KCC 10.25 fell within the exception to preemption in RCW 9.41.300(2)(a), which allowed for local regulation of the discharge of firearms "where there is a likelihood that humans, domestic animals, or property will be jeopardized." Looking at the stated purposes for adoption of KCC 10.25, the court found that it was "enacted to address the reasonable likelihood that the operation of shooting ranges would jeopardize humans and property," and thus fell within the exception to preemption in RCW 9.41.200(2)(a).

Finally, the court also concluded that KCC 10.25 did not violate the Second Amendment of the United States Constitution, or Article 1, section 24 of the Washington Constitution. The court explained that for Second Amendment challenges, courts must: (1) determine whether the challenged law burdens conduct protected by the Second Amendment; and if so, (2) then apply the appropriate level of scrutiny. Here, finding that the County presented no significant argument on whether KCC 10.25 implicated the Second Amendment, the court assumed, without deciding, that it did. Next, finding the Ninth Circuit and "a majority of other circuit courts" applied "intermediate scrutiny" to firearms regulation, the court here did so as well. The court explained that a law survives intermediate scrutiny "if it is substantially related to an important government purpose." Here, the court found that the County had an important government interest in public safety—"ensuring that shooting facilities do not endanger people or property." And, the court found that KCC 10.25 substantially related to that interest, as the permit required facilities to meet certain standards involving safety issues. Accordingly, the court concluded that KCC 10.25 did not violate the Second Amendment.

See also: *Watson v. City of Seattle, 189 Wash. 2d 149, 401 P.3d 1 (2017).*

See also: *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).*

Case Note:

Although the right to bear arms is protected by both the United States and Washington Constitutions, those rights are not identical, and, the court noted that the state right had to be interpreted separately from its federal counterpart. In doing that, the appellate court here found that KCC 10.25 was also a "reasonable regulation" that did not violate Article 1, Section 24 of the Washington Constitution.

Repeal of Regulations—Board of County Commissioners gives express approval for town's rezoning of annexed property, and then rescinds that approval

Property owner contends board lacked authority to rescind the approval

Citation: *Waterman Family Limited Partnership v. Boomer, 2017 WL 5559857 (Md. 2017)*

MARYLAND (11/20/17)—As a question of first impression (i.e., the first time addressed by the courts), this case addressed the issue of whether a Maryland county may rescind its approval of a municipality's rezoning of annexed land.

The Background/Facts: Waterman Family Limited Partnership ("Waterman") owned approximately 148 acres of land in Queen Anne's County (the "County"). Waterman's land was zoned "Countryside" ("CS"). In June 2014, Waterman asked the Town of Queenstown (the "Town") to annex the property to the Town and to rezone the property to "Planned Regional Commercial" ("PRC"). (Under Maryland law, a municipality can annex unincorporated land contiguous to the municipality's boundaries if certain procedures are followed.) (See Maryland Code, Local Government Article ("LG") §§ 4-403, 4-404.)

In September 2014, the Town Commissioners voted to annex Waterman's property, and in October 2014 they voted to approve Waterman's requested rezoning. The Town's new PRC zoning classification was "substantially different" from the County's prior CS classification, allowing for a "substantially higher density" than the CS classification. Under Maryland law, LG § 4-416(b), although a municipality that has planning and zoning authority has exclusive jurisdiction over the planning and zoning in any area that the municipality annexes, that authority is subject to the proviso that, for a period of five years after annexation, the municipality may not allow development of the annexed land for uses "substantially different" from that authorized under the county zoning applicable to the property prior to the annexation. That proviso is subject to the exception that the county may give "express approval" for the new municipal zoning before the five-year period expires. Accordingly, Waterman's property could not be developed with that higher density within five years after annexation, unless the County gave its express approval to the new PRC zoning classification. The Town Commissioners thus made the effectiveness of the rezoning ordinance for Waterman's property contingent in part on the County's approval of the rezoning.

On November 25, 2014, the Board of County Commissioners (the "County Commissioners") gave express approval for the Town's rezoning of the annexed Waterman property. However, at that time, the County government happened to be in a period of transition as a result of November 2014 elections. On December 2, 2014, the newly elected County Commissioners took office. On December 9, 2014, the newly elected County Commissioners rescinded the resolution that their predecessors had passed to approve the rezoning of Waterman's property.

Waterman then filed legal actions appealing the rescission and asking the Circuit Court to declare the resolution rescinding rezoning approval to be void. The Town joined those actions, and the actions were consolidated.

The Circuit Court held that the County Commissioners had "no statutory right of reconsideration" once the County had granted express approval waiving the five-year delay under LG § 4-416. The Circuit Court declared that the County resolution rescinding approval had "no legal force and effect."

The County then asked the Circuit Court to reconsider its decision, which the Circuit Court denied. The County then appealed.

The Court of Special Appeals reversed the Circuit Court's judgment. The Court of Special Appeals held that although LG § 4-416 itself did not explicitly provide that a county may rescind approval of a new zoning classification of land recently annexed by a municipality, the Mary-

land Constitution generally authorized the county commissioners of a home rule county to repeal public local law by resolution, as occurred here.

Waterman and the Town filed a petition for a writ of *certiorari*, which the Court of Appeals of Maryland granted.

DECISION: Judgment of Court of Special Appeals affirmed.

The Court of Appeals of Maryland agreed that neither the text nor the legislative history of LG § 4-416 explicitly provided that a county could rescind approval of a new zoning classification of land recently annexed by a municipality. However, the court found that, under the common law, county commissioners had the authority to rescind such approval, and that nothing in the text or legislative history of LG § 4-416 indicated an intent to preclude a county from exercising whatever authority the county may have under existing law to rescind an action taken by its governing body.

The court found that, under the common law, as a general rule, "the governing body of a local government 'has the right to reconsider its actions and ordinances, and adopt a measure or ordinance that has previously been defeated or rescind one that has been previously adopted before the rights of third parties have vested.' " The court said that general principle was "related to the idea that a legislative body ordinarily lacks authority to restrict the legislative activities of its successors." Were it otherwise, explained the court, "legislative action would be frozen in time with local officials unable to react to changed circumstances or to pursue policies presently preferred over those previously adopted."

Consistent with that common law authority, the court noted that the Maryland Constitution explicitly confers authority on a code home rule county—like the County here—to repeal a public local law (as the Court of Special Appeals had found). (See Maryland Constitution, Article XI-F.) The parties here had debated whether the County resolution rescinding Waterman's rezoning approval was a "public local law" under Maryland. The Court of Appeals found it unnecessary to decide that question to resolve the case, since it had determined that the County Commissioners had common law authority to rescind the resolution. However, the court did say that it would "be inclined to agree" with the Court of Special Appeals that the County resolution at play here was a public local law of the County.

For those reasons, the Court of Appeals concluded that the County had the authority to rescind its assent to the Town's rezoning of Waterman's property in conjunction with the Town's annexation of the property. Accordingly, under LG § 4-406, the new PRC zoning classification for the property would not become effective until five years after annexation, unless the County should approve the rezoning in the interim.

See also: *Dal Maso v. Board of County Com'rs of Prince George's County, 182 Md. 200, 34 A.2d 464 (1943).*

See also: *State v. Fisher, 204 Md. 307, 104 A.2d 403 (1954).*

Case Note:

Another party—Queen Anne's Conservation Association—also joined the County's appeals.

Case Note:

Notably, here there was no contention that Waterman or the Town had taken any action reliant on the County resolution approving the rezoning during the two-week interval before the new Board of County Commissioners rescinded it.

Case Note:

In its decision, the court noted that the general power of a governing body to rescind a prior law or policy on a matter subject to its jurisdiction "may be constrained in particular circumstances, as when a party has acquired a vested right in the governing body's prior policy decision." However, said the court, "[a]bsent such circumstances, the governing body retains the option of changing its mind."

Authority/Public and low-income housing—Property owner asks zoning board of appeals to waive deed restrictions to allow for residential use

Property owner and zoning board of appeals dispute whether board has authority under affordable housing law to waive deed restrictions

Citation: *135 Wells Avenue, LLC v. Housing Appeals Committee, 478 Mass. 346, 84 N.E.3d 1257 (2017)*

MASSACHUSETTS (11/13/17)—This case addressed the issue of whether a local zoning board of appeals had the power to alter a land's deed restrictions.

The Background/Facts: 135 Wells Avenue, LLC ("Wells") owned a 6.3-acre parcel of land (the "Parcel") in the City of Newton (the "City"). The Parcel was located in an area known as Wells Avenue Office Park (the "Office Park"), which was in a limited manufacturing zoning district and was subject to a restrictive covenant owned by the City. Among other things, the City's deed restrictions on the Parcel precluded any residential use.

Wells sought to construct a 334-unit residential rental unit complex on the Parcel, with 84 of the units (25%) reserved as affordable housing pursuant to Massachusetts statutory law, G.L. c. 40B §§ 20-23.

Under G.L. c. 40B, a developer who seeks to build a housing development that contains at least 25% affordable housing (intended for those earning less than 80% of the medium income in the area) may apply directly to the zoning board of appeals of a local municipality for a "comprehensive permit," rather than applying to each individual agency that typically would have control over some subset of the necessary permits. (See G.L. c. 40B § 21.) Under G.L. c. 40B, the municipality's zoning board of appeals "has authority to review the application in its entirety, to override local requirements or regulations, and to issue 'permits or approvals' to the same extent, and with the same authority, as any of those local agencies."

In furtherance of its proposed development, in May 2014, Wells sought from the City's aldermen a "modification, waiver, or release of the deed restriction" to permit a residential use and to allow development in a "nonbuild zone." At the same time, Wells applied to the City's zoning board of appeals ("ZBA") for a comprehensive permit under G.L. c. 40B to build the proposed residential rental complex. In its G.L. c. 40B application, Wells requested that the ZBA "waive" the deed restrictions and permit the proposed residential use.

In November 2014, the aldermen declined to modify the deed restrictions. In January 2015, the ZBA ruled that it lacked authority under G.L. c. 40B to waive or modify the deed restriction.

Thereafter, Wells appealed to the Massachusetts Department of Housing and Community Development ("HAC"). HAC affirmed the ZBA's decision that the ZBA lacked authority to amend the deed restriction.

Wells then sought judicial review of the HAC decision in land court. The land court judge also concluded that neither the ZBA nor the HAC had the authority under G.L. c. 40B to require the City to amend the deed restriction so as to allow the requested residential use.

Wells then appealed to the Appeals Court and also sought direct ap-

pellate review. The Supreme Judicial Court of Massachusetts allowed the application for direct appellate review.

On appeal, Wells argued that G.L. c. 40B provides zoning boards of appeals with the authority to amend restrictive covenants. Wells pointed to G.L. c. 40B, § 21, which provides in relevant part:

> The board of appeals . . . shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials.

Wells maintained that the amendment to the restrictive covenant that it was seeking the "functional equivalent of a 'permit[ ] or approval[ ]" with the meaning of G.L. c. 40B. Wells contended that the meaning of the phrase "permits or approvals" encompassed modification to a restrictive covenant. Wells argued that the phrase "permits or approvals," in this context, included "amendments to a restrictive covenant where, as here, the provisions in the restrictive covenant are similar to those applicable to a zoning decision . . . ." Wells further contended that "there are distinct differences in kind between a property interest that is an affirmative easement and a property interest that is a negative easement," and thus that the City had less of an ownership right to them. Finally, Wells suggested that the deed restrictions were not, in fact, a legitimate property interest, but, rather, merely zoning restrictions.

DECISION: Judgment of land court affirmed.

The Supreme Judicial Court of Massachusetts held that the ZBA did not have the power to alter the deed restrictions.

In so holding, the court concluded that, contrary to Wells' contentions, modification to a restrictive covenant was "a fundamentally different action" from the types of "permits or approvals" that G.L. c. 40B authorized a local zoning board to undertake.

Wells had pointed to dictionary definitions of "permits" and "approvals," but the court found that the language of G.L. c. 40B, § 21, itself "defined the term 'permits or approvals' " in that the statute: "delineate[d] the types of local agencies that [could grant permits or approvals (i.e., 'local board[s] or official[s]'), and then enumerate[d] the types of authorizations that fall within the statutory meaning of permits or approvals (e.g., 'conditions and requirements with respect to height, site plan, size or shape, or building materials')."

Wells had contended that the amendments to the restrictive covenant would be the functional equivalent of "permits or approvals" "because they [were] functionally the same as authorizations that have been deemed permits or approvals in other contexts." Wells pointed to past amendments made to the restrictive covenant by the City aldermen. Wells argued that the process of applying for an amendment involved

an application to the aldermen, who serve essentially as a "local board," "a review procedure, and the issuance of an authorization that affects the way that land may be used, similar to the process for seeking G.L. c. 40B approval." The court, however, found it "clear" that "the alderman's allowance of prior amendments to the restrictive covenants were not the functional equivalent of permits or approvals" because: "the aldermen were not sitting as a local permitting authority when allowing the amendments pursuant to G.L. c. 40, § 3, and the amendments, which affected a real property interest held by the [C]ity, were not the same types of permissions as regulations concerning 'building construction and design, siting, zoning, health, safety, [or] environment.' "

Moreover, rejecting Wells' argument that a negative easement was "somehow qualitatively different from a positive easement in terms of ownership rights," the court stated that "both affirmative and negative easements are to be treated, equally, as easements."

Further, rejecting Wells' suggestion that the deed restrictions were not, in fact, a legitimate property interest, but, rather, merely zoning restrictions, the court stated that "[d]espite their similarity to zoning provision, the deed restrictions are a property interest, a restrictive covenant on land, that [could] not be abrogated any any act by a zoning board."

See also: *Zoning Bd. of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35, 883 N.E.2d 899 (2008).*

Case Note:

Wells had also presented an alternative argument that the restrictive covenant was invalid because the nature of the property had changed such that the covenant no longer provided the benefit intended when it was purchased. The court rejected that argument finding that, although the Park was not supporting any manufacturing uses and was thus not being used for the price purpose for which the restrictive covenant was created, the restrictions still provided a valuable benefit to the City in that it restricted all residential use of land, "while maintaining an active economic district, protecting certain areas as open space, and maintaining buffer zones which protect[ed] the [a local river] from encroaching development."

Zoning News from Around the Nation

MARYLAND

Frederick County officials are reportedly working to draft a compromise ethics reform bill for the upcoming General Assembly session. Currently, "the law prohibits members of the County Council and county executive from accepting campaign donations from people who have pending zoning applications." Current law also "requires the officials to disclose any ex parte communications about applications while they are pending." Under the proposals being considered, reform would include a prohibition on campaign donations from people who work for applicants seeking zoning changes, which would include attorneys, architects, engineers and traffic consultants. Another proposal being considered would add candidates from the Planning Commission to the prohibition.

Source: *The Frederick News-Post*; *www.fredericknewspost.com*

MISSOURI

The City of Springfield is considering a bill aimed at regulating short-term rentals. Among other things, the bill would require owners to obtain annual business licenses and certificates of occupancy. The bill would also institute distance requirements between different short-term rentals in certain areas of the city. The bill will undergo public comment in January and is expected to be presented by the city's Planning and Zoning Commission to the City Council in February.

Source: *Springfield News-Leader*; *www.news-leader.com*

PENNSYLVANIA

An inclusionary zoning bill is being considered by the Philadelphia City Council. The bill "aims to promote affordable housing by mandating developers to set aside about 10 percent of units for affordable housing in properties featuring nine or more units. In lieu of affordable housing, developers could pay between $11,000 and $30,000 per unit into the Philadelphia Housing Trust Fund, depending on specifications of the project." Reportedly, proponents of the bill believe it will help alleviate the city's affordable housing crises, while opponents worry the bill will "leav[e] developers more vulnerable to additional costs, possibly pushing them out of the market entirely."

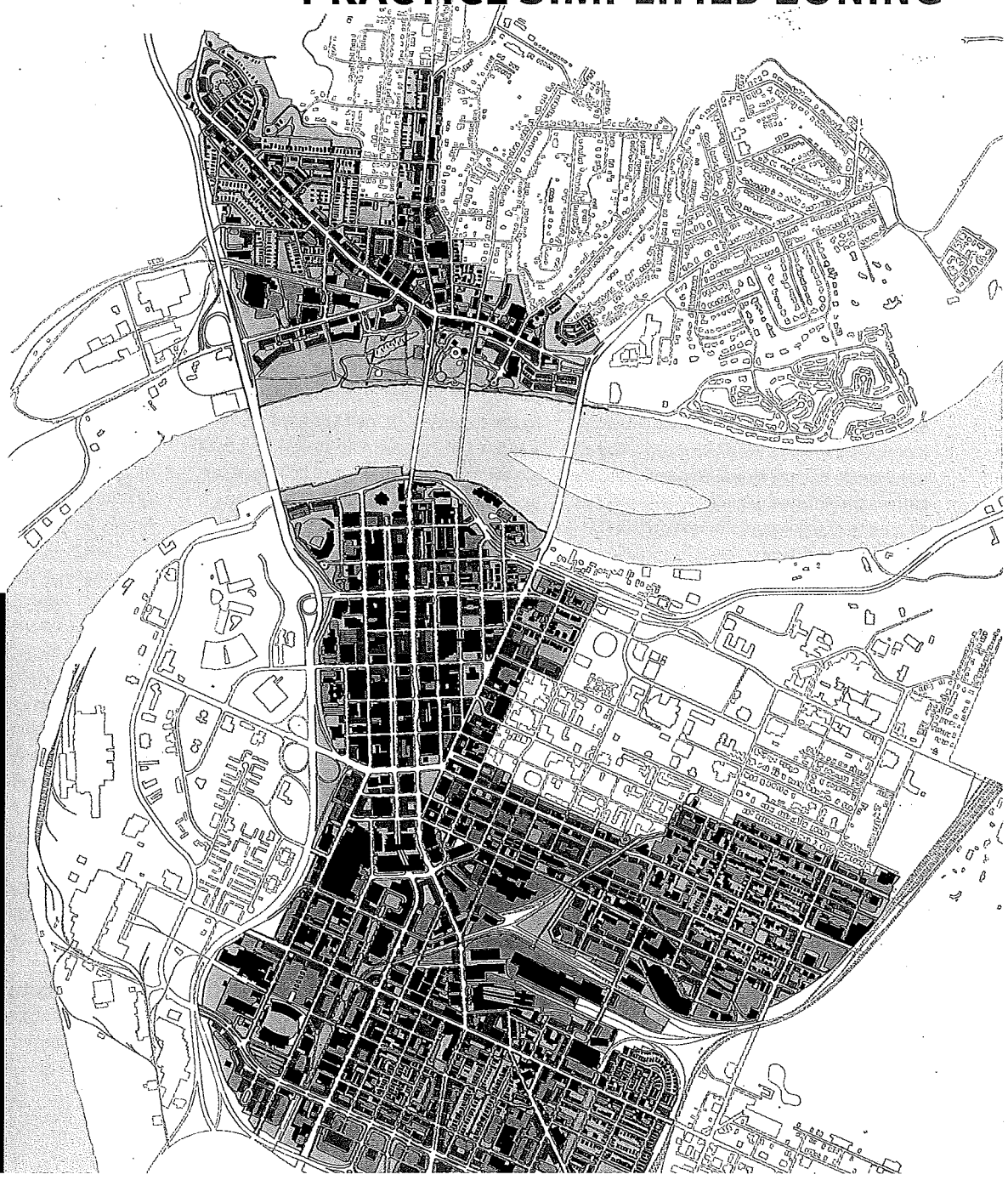
Source: *Billy Penn; https://billypenn.com*

ZONING PRACTICE JANUARY 2018

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 1

PRACTICE SIMPLIFIED ZONING



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Why Can't We Make Zoning Simpler?

By Lee D. Einsweiler

Zoning is perhaps the most important tool cities and counties have at their disposal to control the form and character of new development. The trouble is that many current zoning codes frustrate efforts to build projects that appear consistent with the local vision for community growth and change.

They include impediments and barriers, such as restrictive use lists, lot area, and setback standards that do not match the underlying pattern of development, density restrictions, and other controls on housing choice that generate exclusionary communities, and onerous processes that do not improve the quality of development.

Zoning often cannot keep pace with new ideas in the marketplace. For example, many ordinances do not adequately accommodate alternative energy facilities such as solar and wind energy systems, trending commercial uses such as cat cafes or doggie day care, or tactical urban projects such as temporary pop-ups, right-of-way encroachments, and installations.

Zoning has accreted over time, like oysters layering on top of their predecessors. In 1946, Los Angeles was regulated by a 96-page Zoning Code, while today's code has swollen to more than 800 pages. And the current effort (titled re:code LA) will likely expand that page count, for reasons discussed further below.

We know better. At least we should. So why can't we make zoning simpler and remove these impediments and barriers? The following material will cover a bit of history to ground us all in how we got here, followed by a discussion of current ongoing efforts to simplify zoning. Some guiding principles for rethinking our reform efforts are provided, along with a series of techniques worth considering as your community heads toward the simplification of its zoning.

HOW DID ZONING GET SO COMPLICATED?

Zoning began with two key purposes: (1) ensuring nearby uses were not harmful to each other and (2) managing building bulk to improve public health. This led to Euclidean zoning, with its focus on separation of uses (often to the extent that zoning is found to be exclusionary). It also set the tone for today's form-based codes (beginning with the early 20th century ziggurat skyscrapers generated by New York City's zoning).

Early Complications

As communities began to adopt zoning, the simple systems for separating residential, commercial, and industrial areas began to splinter into more and more districts. These new districts were often established to differentiate the character across the community—more types of residential areas were identified, separating building types like apartments from single-family homes (which later became a mechanism that has generated serious equity issues in many communities). As the forms of residential were split up, so to, the types of commercial areas were separated (often based on scale). Individual uses were relegated to specific locations in the community, and the combinations of use and form began to multiply the total number of districts established.

The expansion of the total available zoning districts and uses was complemented by the expansion of the uses to which zoning was applied. Specifically, aesthetics became a more significant issue, and zoning began to specify far more detailed design standards for new development. Processes for review started to vary by zoning district or project type as well, further complicating the original concept.

In the 1950s and '60s, in an effort to move away from these strict systems, the concept of planned unit development (allowing for a master plan approved by the legislative body) grew in importance. The master plan was a vehicle that could serve communities well by allowing flexibility to mix uses and housing types once again. The separation and bulk regulations of Euclidean zoning could be modified through the master planning process. It was also touted as a way to reduce the impact on the environment through design that took existing character of the land into account. Unfortunately, in many cases, the city councils and county commissions were not well informed on planning or environmental issues, and these master planned communities often were vast areas of a single housing type surrounding a golf course. The addition of the PUD tool rarely led to elimination of any existing districts—it simply added to the zoning palette.

Many communities tried to pin down the master plan's flexibility by adding point systems that required the applicant to earn their development rights through sound planning. While this was a sensible response to a potential excess of flexibility available to applicants, it complicated the planning process. These point systems have since fallen by the wayside in most communities, although some landscaping point systems continue to function to this day.

By the 1970s, Lane Kendig's performance zoning (in which external impacts caused by a use were the focus of regulation) had become the flavor of the day. One lasting legacy of his work was the concept of landscape buffers, to be established between uses based on the degree of incompatibility. In some communities, this was extended to the extreme of buffering "like from like" (placing landscape buffers around all multifamily projects, for instance, even where they abutted another multifamily development. Full-blown performance systems like Bucks County, Pennsylvania's, were rare, since implementing them often involved a significant understanding of math and engineering, not the typical planner's strongest subjects.

These efforts were focused on curing ills created by prior efforts. Today, most codes hybridize these elements, using a combination of tools where they fit best. However, it's fair to say that none of these techniques has ever really managed to simplify zoning over the last 100 years.

CURRENT APPROACHES TO SIMPLIFICATION

The trend toward new approaches continues today. There are a variety of potential contenders—all suggesting they offer the path to simplification and ease of use.

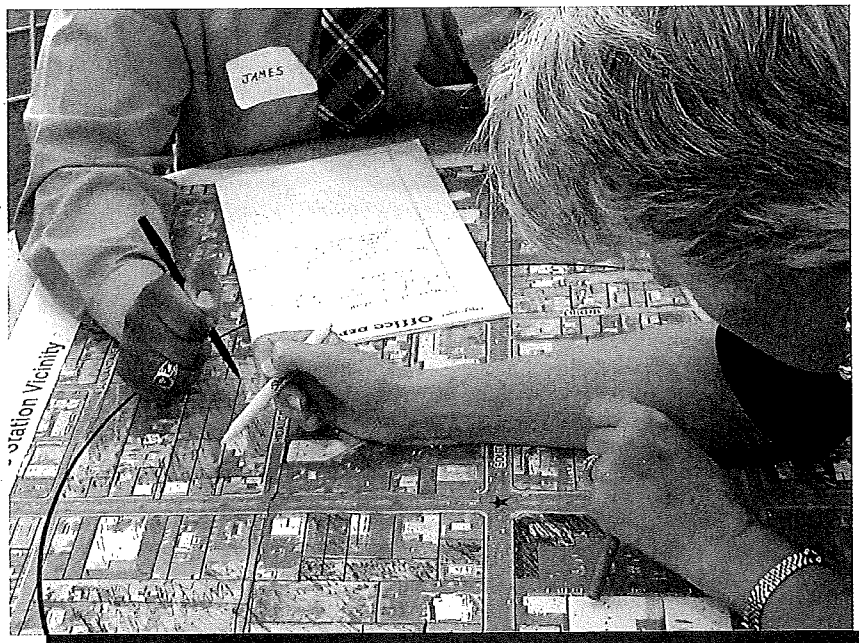
Form-Based Codes

Today's most common zoning innovation is the form-based code, our latest silver bullet,

in which a prescriptive code ensures good urbanism without the need for additional public input during development review (formbasedcodes.org). A form-based code, as the name suggests, is intended to focus attention on the urban form of the community, downplaying the need for the typically intense use regulations applied in Euclidean zoning. The other key element of the form-based code is that it brings together a focus on private development in relation to the public realm (the space from the face of one building, across the street and sidewalk to the other building across the way). This is intended to assure that land use and multimodal transportation issues are taken into account together. The code document is typically highly illustrated, and uses simple tables to display what was once conveyed through paragraphs of legalese. The form-based code is typically the result of detailed planning, often conducted with the general public through a charrette process, which enhances the ease of adoption of new zoning in many communities.

The challenge is that many citizens feel as though their input on each development project is critical to the final quality and neighborhood fit, even where detailed planning has already occurred. In many cases, this challenge is compounded by politicians that believe they have been elected to determine the individual outcomes of development projects. This reluctance to let go often leads to great zoning districts that are subject to the same old review processes. In some communities, this leads to adoption as an overlay or parallel code (in which both old and new zoning can be selected by applicants), rather than committing to the new model of zoning. This reduces predictability, one of the key elements of a form-based code, and increases the complexity for staff when explaining the rules.

When viewed in light of simplification efforts, one final challenge associated with form-based codes is that they do not typically remove any existing zoning from the books, just add to the existing content. Also, by establishing multiple systems in place in the same community, they can be confusing as well.



Ryan Scherzinger, AICP, © American Planning Association

A community charrette process can help to build support for adopting a form-based code or related techniques.

Lean Urbanism

The "lean urbanism" movement is all about making small incremental changes and tactical projects possible (leanurbanism.org). It aims to reduce both the extent of development standards applied to smaller projects, along with streamlining the review for those projects. In communities that apply a public review and comment process to the majority of their development approvals, it can be just as costly and challenging to move through the approval process with a small-scale project as a large one. This often impacts local property owners, who come to believe they cannot get through the approval process on their own. The end result is that these high-discretion communities often find their developers are outsiders to the community that often bring a focus on short-term gains over long-term planning goals. Lean urbanism is focused on enabling local, small-scale changes, expanding opportunities for young entrepreneurs, makers, immigrants, and others typically pushed out of the development system.

It's important to note that many communities already apply variable thresholds to exempt smaller projects or make them more affordable. This often includes simplified subdivision review, reduced stormwater obligations, and in the case of renovation or adaptive reuse, even reduced building code requirements. However, every community could use a review of the ease with which small-scale projects can be achieved.

It's not clear whether lean urbanism should be considered a zoning reform movement, since it does not impact all project types, but rather has its specific focus on the small-scale activities. From this perspective, it may serve better as an economic development policy of the community, implemented not only through zoning, but all kinds of permitting including business licensing and street vending.

Once again, from the perspective of simplifying zoning, it may do so, but also likely creates a two-tier system (small versus large), instead of simplifying the entire system for all.

'Pink Zones'

The pink zone concept of reducing red tape (eliminating bureaucratic processes that hamper activity) is often applied in selected areas as a pilot or test case. While uncommon in high-pressure markets, it is common in low-demand communities. Detroit is preparing new zoning that proposes to enhance development opportunity by getting at the low-hanging fruit along commercial corridors through tools like reducing parking requirements and allowing more by-right uses, in exchange for changes to design standards such as streetscape improvements.

See also the concept of a Relaxed Zoning Overlay, intended for declining cities, where an increased use list (such as adding urban agriculture and corner stores to an existing neighborhood) is intended to spark activity in the market (*Zoning Practice*, September 2011: planning.org/media/document/9006924). Both ideas are intended to simplify zoning through the reduction of standards and the streamlining of processes.

Unfortunately, if experience from other communities is any guide, once development takes off in a pink zone, it will be reined in once again by demands for higher standards, more conditional uses, and more cumbersome review. Also, as a pilot project, one can hope it impacts the entire community eventually, otherwise it is just another layer of complexity (albeit a useful one).

GUIDING PRINCIPLES FOR ZONING REFORM

Here's our chance. Let's set some guiding principles for every new zoning effort.

Start with a Policy Foundation

Set the goals and vision in a *plan*. All too often, zoning projects are asked to apply new features to an area without any policy guidance or support. Zoning is a tool (or toolkit) that is applied to implement planning and vision. Without this base of support, it is all too easy to forget why we have the zoning rules.

Zone Like We Mean It

Zoning impacts the value of property in a way that planning seldom does. This means the exercise is more serious for property owners (or would-be property owners) than any planning project. Yet planners rarely attempt to explain the "why" of zoning. We simply use the same tools we see in other communities, snagged off the internet and sometimes combined in ways that work at cross-purposes. We should always have a sound reason for every rule we impose. Where we cannot enforce a rule, we should not apply it.

Consider the Golden Rule:

- Try to think about the potentially impacted next-door neighbor. Are the trade-offs of some localized impact worth the outcome for the community as a whole?
- Think about others in the community who might like an opportunity to develop something similar. Are they given an equal chance at enhancing the community through development, or are they locked out? Let's ensure equity is a part of the planning and zoning discussion.

Match Regulations to Existing Patterns

All too often, zoning ignores underlying patterns of platting or development. Many communities have applied suburban lot area minimums over the top of traditional urban development patterns, leading to widespread nonconformities and frequent variance requests. Where existing patterns are acceptable to the community (and not meant to be transformed to another pattern), let's right-size the development regulations to allow reconstruction and enhancement of these traditional patterns.

Be More Flexible About Use

Consolidate uses to the maximum feasible extent. There are a variety of tools for managing uses, including use standards for performance and scale. Let's not get caught up in naming and defining every use in the known universe to ensure we have placed it in the perfect location—the market is pretty good at that! And let's focus on the real impacts, not perceived ones. Often, the use is not the problem. A bail bond establishment is really just an office. However, it is frequently the amount and garishness of its signage, or the perception of its users, that leads us to severely limit its location options. Let's also consider existing impact mitigation tools. Your community likely already has rules for impacts such as noise, glare, and property maintenance, along with an existing code enforcement process outside of zoning that can be relied upon. We should try not to duplicate that in zoning.

Be More Flexible About Housing Types

Let's resurrect the historic development patterns that are so often beloved in our older communities. Let's learn not to fear mixing housing types in urban neighborhoods—small apartment buildings can live pleasantly alongside duplexes, fourplexes, and single-family homes in many neighborhoods. Let's return to providing those "missing middle" housing options the market is craving.

Quit with the Studies

Even after we have planned (and built infrastructure) for a certain level of development, we often study it to death when a site is proposed to be developed. Once the comprehensive plan has established a general intensity for an area, and the community has provided public facilities to serve it, why are we continually studying every development to determine whether it should move forward?

Consider Simple Rules to Convert Suburban Form to Urban

Do we really need as much suburban form as we have developed on the fringes of our communities? Is a mall really better than a shopping street? As the market begins to modify the patterns of development that we have established over the past 50 years, can we use simple rules ("build to" instead of setback, for example), to begin to convert our suburban forms into more urban settings?

Try to Differentiate the Real from the Perceived

When it comes to urban development, we so often deal with perceptions of how uses or development patterns impact our communities that we cannot have any meaningful discussion of alternatives. We panic when perceived problem uses are allowed near our homes, when we should be focusing on the elimination of any externalities associated with the use. The U.S. has a tendency to pour amber over its suburban single-family neighborhoods,

many of which are less than 50 years old. Do we really need this "nanny state" approach to the places we live in? Could we have at least some portion of the community with a mix of uses and housing types?

TECHNIQUES FOR SIMPLIFICATION

The following are some potential ways to achieve simplification in your community. While you may not employ every technique, we should all aspire to a constant whittling away of the nanny-state aspects of our zoning.

Managing Uses

Rethink your uses. Gather them into broad categories whenever possible. Make a place for every use somewhere in your community (no, you don't have to accommodate nuclear waste facilities, but almost everything else should be allowed somewhere). Use your planning processes to think through where uses are allowed, then use conditions to manage any remaining impacts likely to be created by a use (stick to the real, not perceived, impacts). Add only objective use-specific standards; avoid "undesirability" if it cannot be described in unique physical or operational characteristics that trigger use-specific standards.

Imposing Minimum Elements of Good Form

One of the most difficult conversations to have with the community and developers is what the rules ought to include. Focusing on the minimal elements necessary to achieve good developed form is critical. We all too often control the tiniest details (such as through "pattern books" or architectural standards outside of historic districts). While the architecture of by-right development may not be the best, at least the building will be in the right place. This approach has improved the urban form in Nashville, Tennessee, for example, while keeping its hands off of architectural details. Would we all be better off with the original 1986 Seaside Urban Code consisting of one page (albeit a very large page)?

Applying Scale

Doing a better job of prescriptively managing the scale of our urban form allows disparate elements to play nicely together. A small

Jimmy Dominico, Pixabay.com (CCo 1.0)

Nashville's approach of imposing minimal elements of good form to by-right development has helped to improve its urban form.

Meghan Stromberg, © American Planning Association

Managing the scale of the local urban form is an effective way of managing disparate elements. The grocery store pictured here is the ground floor of a contextual residential development.

corner store can be a boon to a neighborhood, creating a walkable alternative to a trip across the city. A large house can successfully accommodate more residents, so let's allow for continued upkeep of these historic forms by allowing more units within the existing building. Thinking about managing scale and keeping it in context is key. A corner grocery in a fourplex is a successful scale, but so is a full grocery on the ground floor of a high rise. Let's think through these scale issues, and manage them more often with form controls and less through use restrictions.

Ditching Cumulative Zoning

It's long past time for us all to move away from cumulative (or cascading) zoning. Every district is *not* a consolidation of all the less intense uses plus some new more intense ones. We're smarter than that.

Reducing or Eliminating Parking Requirements

There's been a lot published on parking in recent years, but we're still requiring too much in most cases.

See "Eliminating Parking Minimums" in the June 2017 issue of *Zoning Practice* (planning.org/media/document/9125905) and get your community in alignment.

Improving Process

If we plan well, with special regard to development form, we should be able to let loose of the exaction-filled, time-consuming processes for development review that have accreted over the years. Streamlining development review (and clarifying exactions and tax policy so that we don't have to mix the two) by allowing by-right development to the maximum extent possible is a key opportunity for simplification (see *Zoning Practice,* April 2016: planning.org/media/document/9100319). Where there are common approaches to a challenging issue, let's pre-approve them (this may include blanket encroachments for projecting signs, or preapproved site plans for housing of a certain type on a certain lot size). Preapproved elements make investment easier.

Let's also coordinate our triggers (when parking, lighting, landscaping, streetscaping, and other site elements must be improved). Pre-thinking these issues to allow for ease of use and clarity is important assistance for the front-line plan reviewers (see *Zoning Practice,* May 2017: planning.org/media/document/9100319). And let's allow for reasonable nonconforming structures and sites to be expanded and improved. Allowing for phased development using the nonconforming rules is a vast improvement over planned development or other similar processes. While offering expedited review would seem a useful process for moving select projects through more quickly, any process improvements should be applied to *all* projects, not just those with the ability to pay higher fees.

Enhancing the Document.

The content of your regulations can be simplified without ever changing the policy behind them. No matter what, approaching your rules by writing in "plain English" and including tables and graphics that ease the use of the document is a key step (see *Zoning Practice,* January 2015: planning.org/media/document/9117686). Some communities have focused on the modularity of their codes. Denver, for example, duplicates material in each context, but as a user, you only need a smaller portion of the zoning book to understand the rules applied to your property. As computers become a more important part of development review, this

SIMPLIFICATION TECHNIQUES, PROS AND CONS

Technique	Pro	Con
Managing uses	Consolidation allows for easier change in use, which means quicker market responsiveness	Many communities cannot politically avoid singling out uses for special treatment
Imposing minimum elements of good form	Ensures that buildings are in the right place	Requires community agreement on what good form is applying scale
Applying scale	Allows for richer mixing of uses and housing types, reduces trips	Scary to folks who have always lived in single-use, car-oriented places
Ditching cumulative zoning	Allows carefully tailoring districts to their intended forms and uses	Moves away from traditional thinking about land use and land value
Reducing or eliminating parking requirements	Eliminates excess pavement, allows buildings to be closer together for walkability	May require parking on adjacent public streets
Improving process	Reduces time (and therefore cost) of development approval	May be perceived as reducing community input
Enhancing the document	Easier to read in plain English with illustrations	May require skills (page layout and illustration) beyond those that local planners are trained in

document organization issue may fade (more pages may be easier to use) (see *Zoning Practice,* October 2017: planning.org/media/document/9006882).

CHALLENGES: IT'S NOT ALWAYS ZONING'S FAULT!

There are a variety of reasons why we don't seem to be able to simplify zoning. It's almost always easier to just add a new layer on top, without rethinking the layers below, and so often this is just what we do. Of course, any planning and zoning exercise is subject to the political system that must "own" the results. In many communities, the issue is complicated by fiscal woes that seldom place planning at the top of the funding list.

Politics

Always a contender. Sound planning policy is always subject to approval by the political system, and if your community does not have a rational way to discuss land-use policy, then simplifying your zoning will remain a huge challenge. In addition, if short time horizons are all your community is willing to discuss, you will never achieve truly sound planning practices (because they consistently require looking to the longer term).

It takes bold leadership to truly change a community's planning and zoning system, which makes complete reform projects a rarity (often created by the combination of a strong mayor and a great planning director). Only with this willingness to hold strong to an ideal of reform can the various layers of zoning be stripped away, and their essence as plan implementation tools reemerge.

Bad Planning

All too often, it's not bad zoning that creates equity and fairness issues, it is the planning implemented by the regulations that is to blame. If planning is inequitable or overly complex, then the toolkit used to implement it will follow suit. Good, simple, strategic planning is likely to lead to simplified zoning.

Clarity and community buy-in for planning policy means regulations are welcomed as the tools to achieve the plan, not threats to ownership rights. Not allowing hot-button issues to consume all of the air in your community is also a challenge. A tradition of successful planning will allow the community to get beyond the one squeaky wheel of the month to handle larger issues.

Blunt Tools

We all too often only see part of the toolkit available for plan implementation. Since zoning is often the most powerful tool that planners have control over, it is frequently applied in too broad a fashion, even though other tools (financial or regulatory, but not land-use driven) will better serve the community.

Inadequate Staffing

Without enough planners to implement your new, simpler regulations, the community will still be challenged to produce swift, effective development review. And in many cases, it is not the planning review that occurs too slowly, but engineering and other internal or external reviews. And yet zoning often takes the hit for these other entities and their work (one solution for this issue is an online permit review system that helps folks see where their permit is stuck).

Keep it Legal

Some places simply do not have the authority to operate in a manner consistent with best practice. In places with restrictions on taxation authority, such as California, the exaction process has stepped up to take over something most states believe should be handled through property taxes. Until improved regulatory authority exists in those settings, some of the reforms described in this piece will not be allowed.

IN SUMMARY

Most practitioners believe the most important issues to be resolved by zoning relate to the externalities generated by a specific development in a specific location. These range from glare and noise to traffic and stormwater runoff. Of course, these issues differ from place to place and site to site.

A community with no room for greenfield development often has a higher tolerance for the impacts associated with infill than a location on the fringe with room to spare. And a community with high market demand can afford stricter controls than one with little economic activity.

Clearly, every community's approach must be customized to the situation at hand—not every simplification technique makes sense in every community. But remember, every community has the option to simplify its zoning, whether through piecemeal changes or an entire zoning reform project. Tying zoning to sound planning is the most important of all (even more important than a simple code with no policy basis).

It has all been said before . . . but here's your chance to take the time and energy required to improve and simplify your zoning. Point out the advantages of a simpler code (in ease of use and administration). Clarify your community's desired limits on market intervention. Hey—take a risk! It's only zoning.

ABOUT THE AUTHOR

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Cover: Chattanooga Illustrative Plan, courtesy Code Studio

VOL. 35, NO. 1

Zoning Practice (ISSN 1548–0135) is a monthly publication of the American Planning Association. James M. Drinan, JD, Chief Executive Officer; David Rouse, FAICP, Managing Director of Research and Advisory Services; Joseph DeAngelis and David Morley, AICP, Editors.

Subscriptions are available for $95 (U.S.) and $120 (foreign). Missing and damaged print issues: Contact APA Customer Service (312-431-9100 or subscriptions@planning.org) within 90 days of the publication date.

WHAT ARE THE BEST APPROACHES TO SIMPLIFYING A COMPLICATED ZONING CODE?

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