

Chapter 4. Types of Zones and Uses

- SZEAs empower local governments to regulate and restrict height, number of stories, size of buildings and other structures, % of lot occupied, size of yards and other open spaces, density of population, and location and use of buildings, structures and land for trade, industry, residence, and other purposes.
- To achieve these purposes, local govts. may divide the municipality into districts... (i.e. zones)
- Zoning remains primary tool that local govts. use to regulate land use

Use Zoning

- Often many permitted uses in a zone
- In many ordinances, there is a permitted uses list and a clause that states “and any other similar uses”.
- A zoning ordinance may prohibit a use to avoid the finding that it is similar to permitted uses
- Most courts construe similar use questions in favor of the least restrictive use
- Zoning regulates use, not who owns the land

Cumulative and Exclusive Use Zoning

- Use zoning creates a pyramidal hierarchy of uses with the detached, single-family residence at the top (most restricted use)
- “Highest zone” is not equivalent to “highest and best use of land”—does not reflect economic value
- Rezoning from residential to commercial is referred to as upzoning since value usually increases
- The large lot, single family zone and agricultural zones are generally the least intensive use zones
- Under Euclidean zoning, all other zones are *cumulative*—that is, they permit all uses permitted in any higher, less intensive use zone and exclude uses permitted in lower, more intensive use zones
- The trend is against cumulative zoning in favor of creating *exclusive* zones for uses beyond single family residential

Cumulative and Exclusive Use Zoning (cont'd)

- Ordinances generally allow accessory activities that are necessary or convenient to principal listed activities
- Though ordinances generally list accessory uses, where they aren't listed, courts have implied such rights
- Accessory uses must be subordinate and incidental to the principal use (e.g., a home business would not be allowed to dominate within a residential zoned area)
- Accessory uses must be “customary” in addition to being incidental, but the “customary” standard is difficult to apply
- Accessory living units are a common (and sometimes contentious) accessory use (California law provides for them explicitly)
- Many home occupation ordinances only allow offices for “professionals” (some claim this is “elitist”)

Single-Family Use

- Single-family, detached home was venerated as is represented American dream—but becoming less so due to resource costs
- What is a “family”? Persons living together as single housekeeping unit or persons related by blood, marriage, or adoption
- *Village of Belle Torre v. Boraas*, Supreme Court held that municipal zoning ordinance limiting the occupancy of one-family dwellings to related or to groups of not more than two unrelated persons was constitutional
- Despite Belle Torre decision, an ordinance that targets related persons is unlikely to survive judicial scrutiny
- Group homes often lead to conflicts with neighbors and local zoning authorities
- Many states divest local authorities from using zoning power to differentiate between residential use and certain types of group homes
- *City of Cleburne v. Cleburne Living Center*, SC found that special permit requirements for homes for mentally retarded, but not imposed on similar uses such as fraternity houses violated the equal protection clause
- The exclusion of unrelated persons survives the Cleburne decision
- Fair Housing Amendments Act of 1988 addressed need for group homes by limiting zoning power for persons with disabilities

Agricultural Uses

- Early zoning was urban oriented. Now farmland preservation is a major national concern and ag zoning is common
- Typically ag zoning is nonexclusive but generally does prohibit conventional subdivisions
- Courts have upheld both exclusive and nonexclusive ag zoning as legitimate exercise of police power
- Growth in ag zoning accompanied by trend to ban certain agricultural uses from residential zones

Industrial and Commercial Uses

- Variations in industrial and commercial zones are considerable
 - ordinances today often have separate districts for neighborhood retail businesses, office and institutional uses and shopping centers
 - Industry often divided into light and heavy use zones
- In contrast to early years, these zones today non-cumulative. Courts have upheld commercial and industrial districts that exclude residential uses
- Exclusive ind. or comm. zoning may be invalid if communities are overzoned for these uses because it limits property options
- Performance standards, as an option, may regulate industrial uses.

Enterprise Zones

- Not traditional use zones for economically deteriorating areas where government incentives attract commercial activity
- ¾ of states authorize them
- Research is divided on whether enterprise zones really attract businesses and revitalize an area
- Though not a “zone”, tax increment financing is a related development tool

Buffer Zones

- Euclidean zoning attempts reduce effects of more intensive zoning
- Common practice is to place multi-family zones between single family zoning and industrial zone but this practice actually places more people closer to the presumed harmful industrial use

Height, Bulk, and Setback Controls

- Height regulations state maximum heights in feet or number of stories
- Supreme Court accepted validity in *Welch v. Swasey*
- Minimum height requirements are less common—but aesthetics may justify them
- Minimum lot size and lot frontage requirements control densities and preserve view and open space and reasonable requirements have been upheld by courts
- SZA provides that community can regulate the % of building lot occupied and the size of yards.
- Ordinances commonly specify setbacks (upheld in *Gorieb v. Fox*) to further the general goal of open space, light and air, and safety from fire. May be invalid if owner left no place to build (*Lucas v. South Carolina Coastal Commission*).
- Floor-area ratio—combine height and bulk. Cities can offer incentives to developers to increase FAR (assumed to be valid).

Zoning with Flexibility (cont'd)

- Floating zones
 - Unmapped district with detailed and conditional use requirements
 - City first creates zone with listed characteristics
 - Upon receipt of application meeting criteria, the zone floats down to the surface by enactment of a second ordinance
 - Conceptually similar to special use permit
- Conditional zoning
 - attaches site specific control to rezoned land
 - May handle problem in general rezonings of local govt. not knowing how the developer will actually use the land
 - Avoids open-ended general rezonings
 - Automatic or reversionary zoning occurs when a parcel is not developed and the zone changes automatically with the passage of time
- Incentive zoning
 - When local govts. rezone in exchange for some public benefit
 - Conceptually similar to conditional zoning
 - Must meet "hexus challenge" under the takings clause of Constitution
- Performance zoning
 - Also called "impact" zoning
 - Established criteria to measure effects and if the criteria are met, the activity is allowed
 - Standards for smoke, noise, dust, toxic emissions, glare, vibration, radioactivity, electrical disturbance, heat, and odors
 - Has met with judicial approval provided standards are reasonably set

Zoning with Flexibility (cont'd)

- Planned unit development
 - A full build-out plan for an area is brought to the local govt. for approval
 - Rezoning occurs with approval of the development plan
- Interim or holding zoning
 - If plan for area is in formation, interim zoning may protect the area pending adoption of permanent zone
 - Vital in preserving the integrity of the planning and zoning processes
 - May serve as a growth management tool
 - Authority to enact interim control is often express
- Overlay zoning
 - Places property simultaneously in two zones
 - Often implements historic preservation, environmentally sensitive land
 - Other examples include land beneath flight paths and floodplain zoning
 - Overlay zones may violate uniformity clause of the SZA

Governmental and Community Uses

- Land uses thought to general special public benefits including government uses, schools, public utilities, airports, religious uses, and medical facilities
- Special treatment sought or afforded by these uses generates significant litigation
- The superior sovereign is generally immune from control by subordinate units of government (Supremacy clause prohibits control of federal government land use)
- Whether immunity attaches depends on the purpose of the land use, not the ownership
- A state's immunity extends not only to departments and agencies of the state but includes local governments when exercising state functions
- Different judicial tests (e.g., superior sovereign, balance of interests) may result in different outcomes
- Local governments often exempt their own uses from zoning laws
- Licenses or contracts issued to private persons or entities (e.g., airports, alcohol sales, nuclear facilities, cemeteries, group homes, hospitals, and waste disposal facilities) may be exempt from local zoning.

Public Utilities

- Public utilities often exempt from local zoning control to assure the utility can meet obligations
- State law typically vests authority over public utilities in a state commission and precludes local regulation
- But even exempt utilities many not be able to act with impunity toward local interests—utilities must petition state commission and the local government usually has input to assert its interest
- Where state law ambiguous, or silent, courts must determine whether state law impliedly preempts local law—court cases weigh in favor of implied preemption
- What constitutes a public utility depends on state statutory definition
- Even non-statutory entities may meet the definition of utility for state zoning law purposes
- Federal and state law limits local control over cellular towers. The Federal Telecommunications Act of 1996 partially exempts zoning of cellular towers
- The Act has generated considerable case law—and different Circuit courts have different standards for reviewing findings of local boards
- Can local government require utilities to underground their services? Cost is key concern. Courts differ over preemption issue.

Public-Private and Profit-Nonprofit Distinctions

- The distinction between public and private use rises frequently in the context of schools—the distinction generally does not make a difference
- Validity of treatment may turn on whether the private use is open to the public
- Profit vs. non-profit distinction will be upheld where court applies a deferential rule of review

Schools

- Schools have positive and negative features—schools have been granted favored status in zoning
- Non-existent or lax regulation has allowed virtually unchecked expansion of schools (including universities and colleges)
- Can govt. exclude school from certain zones, and if not, can it regulate them? Total exclusion is highly suspect
- Most ordinances permit public schools to locate as a matter of right in even most restrictive residential districts
- Most recent court cases use “balance of interests” test rather than traditional immunity tests
- Zoning codes that permit public schools but exclude private schools raise questions about unequal treatment

Schools (cont'd)

- While cities generally cannot exclude private schools from zones where public schools allowed, private schools often subjected to special permit process
- Most courts have held that First Amendment does not insulate parochial schools from zoning controls
- Generally no meaningful distinction between parochial and private non parochial schools
- What qualifies as a school?
 - Zoning codes often define schools as buildings used for educational purposes or by reference to whether state or local school officials certify the use as meeting state educational requirements
 - Courts have rendered some widely various reasons on what constitutes a school

Religious Uses

- The use of property for religious purposes traditionally has been considered beneficial to a community
- Religious use zoning is more suspect than school zoning due to religious freedom guarantees in the federal and state constitutions
- Three basic approaches in zoning religious uses:
 - Allow them in any district as a matter of right
 - Allow them in any residential district only if they obtain a special use permit
 - Exclude them from some residential zones
- Where special use permit required, courts are watchful that conditions are not too onerous
- In a few states, courts allow the exclusion of religious uses from some residential zones
- Determination about what qualifies as a religious use or meets the definition of “church” is a delicate one
- As general rule, courts have liberally construed activities to be religious uses or legitimate accessory uses (see list of interesting court opinions on p. 130)
- The need to define religious use invites court to interject personal values

Airports

- Airports have dramatic and widespread impact on community
- Airports have overlapping regulation—federal and local—leading to conflict
- Takings issues arise with airport use by the invasion of personal airspace and the loss of property value
- Leading preemption case is *City of Burbank v. Lockheed Air Terminal Inc.*—Supreme Court held a municipal ordinance that imposed a curfew on flights between 11 pm and 7 am was preempted by federal regulations
- The location of airports can be controlled by zoning
- Congress passed Airport Noise and Capacity Act of 1990—phased out older, noisier aircraft
- When local authorities not preempted, airport siting is normally handled by special permit rather than permitted of right
- Owners of properties close to airport frequently try trespass, nuisance, and inverse condemnation to secure damages
- Airport zoning that directly limits use through height controls has been held a taking by several courts—other courts disagree

Nonconforming Uses

- Nearly all zoning ordinances provide that a use that would be unlawful if established after the passage of the ordinance may continue if it lawfully preexists the adoption of the ordinance
- SZA makes no provision for treatment of existing uses, some enabling acts require nonconforming uses be allowed to continue
- To acquire immunity from newly enacted law, developer must engage in substantial expenditures on validly issued building permit
- Municipalities often place restrictions on changes in use, repairs or alterations, on rebuilding in the event of destruction, and on resuming after period of abandonment
- In the absence of ordinance permitting it, a nonconforming use cannot be expanded—exception—some courts allow “normal” expansion
- Obtaining a variance or special permit can change status of legal nonconforming use
- A nonconforming use is not entitled to continue in perpetuity
- A destroyed or abandoned nonconforming use cannot be rebuilt
- If the owner abandons the use, nonconforming status is lost
- Amortization provisions require the termination of nonconforming uses after the passage of a period of time—most courts uphold in principle
- Signs are popular target of amortization—most billboards amortized in 3 to 7 years
- When a nonconforming use is a nuisance, courts can order immediate termination