Chapter 5. Zoning Forms of Action

- Local govt. often sets stage by underzoning its territory placing undeveloped land in highly restrictive zones
- Options for developer are to seek legislative change through:
  - textual or zoning map amendment
  - proceed administratively to seek a variance or special use permit
  - seek judicial declaration that the land improperly or unconstitutionally zoned
  - attempt to qualify the property as nonconforming use
- Collectively, these are zoning "forms of action" and represent the zoning "game"

The Zoning Game

- Adversarial process
- Costs may be high
- Developer may attempt to recover losses inflicted by neighbors (SLAPP) "strategic lawsuit against public participation"
- SLAPPs raise First Amendment constitutional questions
- Several states have passed anti-SLAPP statutes to protect right of citizens to petition the govt. without fear of retribution
- Mediation may avoid or defray the high costs of the zoning game—useful where zoning authorities have discretion to deal with land use issues
- Reported success of mediation is high
- Mediation does not bind the government
- Arbitration differs from mediation in that it results in a binding decision

Legislative and Administrative Action

- The SZEA requires appointment of a zoning commission to make zoning recommendations—commission has real little power
- SZEA allows legislative body to ***delegate*** power to administrative body by establishing a board of adjustment
  - Power to hear and decide appeals where there is alleged error made by administrative official in enforcement of act (may reverse or modify the decision)
  - Power to decide special exceptions to terms of ordinance (grant special use permit)
  - Power to authorize variances to ordinance that is not contrary to public interest (grant variance)
- A "variance" is permitted only by sufferance when the property owner suffers unneccessary hardship
- A special permit allows a use specifically authorized by the legislative body
- Variance and special permit provisions generated vast body of law
- Courts take position that granting neighbors the power to impose a control violates due process but granting them power to waive an existing limitation does not

Initiatives and Referendums

- In some states, electorate can use initiative and referendum to carry out or veto zoning changes (ballot box zoning)
- Most states disallow zoning by initiative but there is a fairly even split with respect to zoning by referendum
- Concern with notice hearing explains why courts treat initiatives less favorably than refenda
- Variances, subdivision map approvals, and conditional use permits are not subject to voter action

Rezonings

- SZEA provides for amendments regulations and zoning
- Most amendments are site specific and require that nearby property owners by notified of proposed changes
- SZEA provides that if a certain percentage of property owners in or near the area of proposed change file a protest, the change can only be made by ¾ of all the member of the legislative body
- Sometimes those seeking rezonings can avoid super-majority vote by creating buffer zones (purchase adjacent land)
- Amendments should be in "accordance with a comprehensive plan"
- Zoning concepts or community needs may change justifying rezoning
- Rezonings more difficult to justify in a few states that require a showing of change in physical circumstances or a mistake in the original zoning
- Is rezoning "legislative" or "quasi-judicial" action?
  - Most states treat all zoning changes as legislative acts (fairly debatable standard)
  - Burden is on one seeking to overturn the legislative body
  - Dissatisfaction with unrestrained power of local govts. have led some courts to review zoning decisions more closely

Rezonings (cont'd)

- Some courts expressly reject the conventional wisdom that all rezonings are legislative
- *Fasano v. Board of County Commissioners* is landmark case that reached conclusion that if the action under review was quasi-judicial, it is not entitled to the full presumption of validity accorded legislative acts
  - Courts should not presume nominally legislative site-specific zonings valid
  - The character the action governs the type of court review
  - A zoning ordinance that lays down a general policy is legislative while rezoning that carries out previously adopted policy is quasi-judicial

Spot Zoning

- Most frequent charge against rezonings
- Permission to use an "island" of land for a more intensive use than permitted on adjacent land
- Courts often examine whether the rezoning is in accordance with a comprehensive plan
- In some cases, courts ask generally whether the rezoning promotes the public interest
  - Reasonableness of change include uses of surrounding properties, whether conditions in area have changed, present use of the property, and property's suitability for other uses
- Spot zoning cases not easily reconciled and some states are more tolerant than others

Contract and Conditional Zoning

- Zoning authorities often impose conditions on development permission to mitigate harm to neighbors or to protect the public generally
- Neighbors often accuse zoning authorities as engaging in "contract zoning" because it appeared to have involved a bargaining process
- Courts often look to see whether the rezoning is in the public interest
  - Rezonings the courts find invalid are labeled "contract zoning"
  - Rezonings the courts find valid are labeled "conditional zoning"
- Over time, courts have looked more favorably upon the idea of conditional zoning
- Oral representations by a developer that is not put in writing as part of rezoning are not generally not enforceable
- Conditions imposed by private covenant is a bad idea as land records are not where one expects to find zoning laws—should be placed in the rezoning amendment
- "Piecemeal" zoning refers to omission of areas from coverage of zoning ordinance
  - Courts don't require zoning of entire geographical area, but zoning only a small portion is suspect
- SZEA requires "uniformity" for each class of zones and regulations
  - Courts treat this clause inconsistently—some interpret literally, others are more lenient
  - Overlay zones may conflict with uniformity clause

Variances

- A variance is an administrative authorization to use property in a manner otherwise not allowed by the zoning ordinance
  - Alleviates hardship situations when zoning boundaries do not fit well with distinctive feature of a parcel or area
  - Power to issue variance lies with Board of Adjustment
  - Faster and cheaper than rezoning but is more likely to be overturned on appeal than rezoning
- Stringent rules limit grants of variances
  - Variances are to be granted "sparingly" and should serve as "safety valve"
  - Must have legally recognizable interest in the property
  - Some courts review the granting of variances closely
- Variances are of two kinds
  - Area or dimensional—modification for height and building size or placement
  - Use variances—allow a use inconsistent with uses permitted of right
    - Some statutes and ordinances do not allow them
    - In other states, courts refuse to permit them on the theory they are defacto rezonings
  - Standards for allowing variance
    - Land in question cannot yield a reasonable return as currently zoned
    - Plight of the landowner is due to unique or unusual circumstances
    - Variance requested will not alter essential character of neighborhood
    - Variance is not contrary to the public interest

Variances (cont'd)

- Personal hardships, absent disability considerations, are inappropriate factors for granting variances
- Variances for disabilities may be reasonable unless it requires a fundamental alteration in the nature of the program or imposes undue costs
- Self-created hardships
  - Owner build in violation of the zoning law and then seek variance
    - *not* entitled to a variance
  - Person who purchases land with knowledge of zoning and then seeks variance based on hardship in having to comply
    - Courts differ as to treatment—if ownership is not relevant, then should consider the merits of the application regardless of prior knowledge
- A showing that the public interest will not be harmed is required
- An argument that the variance would be advantageous to the public is usually improper as Board of Adjustment lacks power to decide what public needs
- Applicant must show that the land, as zoned, cannot yield a reasonable return
  - Courts require proof of economic loss, not conclusory allegations
- Characteristics that are unique or unusual to the property must cause the hardship (e.g., property in transitional or deterioating areas
- Should not alter essential character of the neighborhood
- Board can grant variance with conditions to mitigate adverse effects

Special Permits

- Uses that don't fit nicely into a zone by right
- Special relates to the type of use rather than uniqueness of property
  - Some examples might be airports, religious uses, recreational facilities, schools, hospitals, drug treatment centers, child care facilities, gas stations, landfills, gun clubs, and dog kennels
- Before the Board can exercise the power to grant permit, the legislative body must list the uses to be treated as special
- Issuance of special use permit does not change the underlying zone
- The use of special permits have increased over time
- Most frequent objection to issuance of special use permits is that legislature failed to provide adequate ***standards*** for guiding administrative discretion
  - Standards must not be so general as to allow unchecked discretion
  - But there is no agreement on how specific the standards must be so as to not allow unchecked discretion
  - Standards must be somewhat general to accommodate the many situations that may arise
  - Many courts tolerate fairly vague standards
  - In some jurisdictions, the legislative body (not Board of Adjustment) may issue special use permits
    - Courts may review legislative special use permits with greater deference
- Boards can put conditions on special use permits (allowed in SZEA)
  - Conditions must relate to the use allowed by the permit; common conditions include off-street parking, minimum acreage, access, and landscaping

Vested Rights

- Changes in land use regulations while permits are in process raise question of vested rights
- May be "race" between municipality and to change the law and developer seeking to build
- To acquire a vested right, a developer must 1) engage in substantial expenditures 2) in good faith reliance 3) on a validly issued building permit
- In most states, a building permit alone does not vest a right to continue—must still show 3 conditions
- Purchase price is regularly deemed not to vest
- Expenditures in good faith—expenditures made in haste to beat the new law are in bad faith
- A functional equivalent to a building permit may suffice
- There is no right to a development permit based on the zoning that existed when the developer acquired the land (in the great majority of states)
- In some jurisdictions, rights vest under the law in existence at the time of application
- If a change in law is pending at time of application, no rights may vest
- As a general rule, no rights vest pursuant to illegally or erroneously issued permit
- In some cases, a property owner may seek damages in tort for the loss from a wrongfully issued permit

Estoppel

- A doctrine that prevents local government from enforcing its laws
- Requires that landowner or developer
  - Make a substantial change of position or engage in substantial expenditures
  - In good faith reliance
  - Upon some act or omission of the government
  - So that applying a new law would be highly inequitable
- Some confusion exists whether estoppel differs from vested rights
- Courts apply doctrine from govt. protective perspective—courts are reluctant to leave public unprotected
- Govt. tolerance of an illegal use over a long period of time forms the basis for many estoppel cases

Statutory Solutions to Uncertainty

• Development agreements that fix the rights of developers and municipalities as of a certain date and limit the power of govt. to apply new ordinances to approved projects

• California was first state to enact legislation allowing development agreements—cover permitted uses, density and intensity of use, height and size of buildings, and reservation or dedication of land for public purposes

• Agreement is not a contract in common law sense. Can govt. breach for health and safety reasons? Probably. If impact fees are part of agreement, do they have to meet constitutional nexus test? Probably not under contract theory ….

Exclusionary Zoning

- The dark side of zoning is that it can be exclusionary and segment a community by income and station in life (snob zoning)
- Lower cost single-family homes with 4 bedrooms is a poor tax deal (educational costs)
- The exclusion of high density, lower cost housing is the major problem with exclusionary zoning
- Exclusion achieved through minimum lot and house size, large-lot frontage requirements, and limitations or bans multi-family housing and manufactured housing.

Exclusionary Zoning

- Minimum lot size
  - Requirements for 5,000, 20,000, 40,000 square feet, 3 acres and 5 acres are common and have been upheld
  - Communities enact to preserve the character and tax base of community
  - Pennsylvania Supreme Court articulated argument against large lot zoning (see p. 233)
  - Large lot zoning are likely valid to preserve agriculture in rural areas
- Minimum floor space
  - Arguments made to have minimums for health and safety but such arguments are weak
- Multi-family housing
  - Supreme Court once said that apartments in districts of private houses were "mere parasites"
  - Often provided limited land in many cities
  - Moderate or low income developer faces uphill challenge
  - Rezoning (upzoning) is only way for developer to "win"
- Manufactured housing
  - Provides affordable housing but viewed as "slums on wheels"
  - Where not totally excluded, may be limited to unattractive lands (de facto ban)
  - Some communities ban entirely
  - Municipal concerns that children from mobile homes will overrun them (with educational costs) is imaginary
  - Some states (including Vermont) have legislation that deprives local govt. to discriminate against manufactured housing

Exclusionary Zoning

- Manufactured housing (cont'd)
  - In some states, legislation simply prohibits total exclusion
  - Courts in some states have held that cities cannot sequester manufactured housing in parks
  - A number of courts have upheld limitations on the placement of manufactured homes
  - Federal law also prohibits states from enacting safety standards for manufactured homes that differ from federal ones
- Fair Share Requirements
  - Implement regional responsibilities for local government to provide affordable housing
  - Landmark case of Southern Burlington County NAACP v. Township of Mt. Laural—required that municipality's land use regulations provide a realistic opportunity for low and moderate income housing
  - Implementation of judicially mandated fair share requirements has been modest
  - New Jersey has been leading state in enforcing fair share requirements
  - Some states require municipalities address housing needs in their comprehensive planning legislation
  - Overall, local governments tend to resist fair share mandates
  - A fair share requirements translates into negative and affirmative duties
    - Negative—don't enact exclusionary zoning ordinances
    - Affirmative—e.g., adoption of streamlined permitting for low to moderate income housing and mandatory set asides or density bonuses