REGULATING LAND USE:
The Law of Zoning

by IRVING J. SLOAN

Legal Almanac Series No. 78

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General Editor

1988
Oceana Publications, Inc.
London • Rome • New York

This is the seventy-eighth number in a series of LEGAL ALMANACS which bring you the law on various subjects in nontechnical language. These books do not take the place of your attorney's advice, but they can introduce you to your legal rights and responsibilities.

Library of Congress Cataloging-in-Publication Data

Sloan, Irving J.
Regulating land use.

(Legal almanac series ; no. 78)
Includes index.
1. Zoning law—United States—Popular works.
I. Title. II. Series.
KF5698.Z9S54 1988 346.7304'5 88-12573
ISBN: 0-379-11165-9 347.30645

Manufactured in the United States of America

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INTRODUCTION

On the very date the author of this volume completed his final draft, there appeared in *The New York Times** a feature article headlined, "Town Is Split Over Ending 129-Year Era." A small New England community in Connecticut was going to hold a referendum to decide whether it should enact a set of zoning laws which it had never had since its incorporation in 1858. The community was clearly divided:

> "With zoning, 'you're going to have a commission to tell you what to do with your property, how much acreage you must have,' said Frank Zucco, a former selectman who has built several buildings in town, 'We're going to be stuck with what we don't want.'
>
> "'The town is being developed, whether we like it or not,' said a supporter of zoning, Bob Angus, a writer. 'As much as I'd like to keep it as it is, I'm afraid that's not an option.'
>
> "Only seven of Connecticut's 169 cities and towns do not have zoning laws.... All seven are small—Woodstock, with 5,260 people, is the largest. Most are off the beaten track.

**The New York Times,* August 8, 1987, pp. 1, 30. Reprinted with permission.

"But with real-estate prices rising and residential development increasing, particularly in the small towns. . . debates about zoning are increasing. . . .

"'A year ago, people could still buy a house here for less than $100,000. . .You can't do that today. When we see the growth to the south of us, it should make us aware of what the possibility is. We need some type of controlled growth,' said Henry H. Pozzetta, the First Selectman for the last six years.

"Without zoning, anything can be built as long as it meets state building and sanitary codes, Mr. Pozzetta said. 'We've been fortunate so far,' he said, 'but I feel someone is going to take advantage of us.'

"The town considered a proposed zoning code in 1972, but rejected it. 'Zoning has been kept in a closet a long, long time,' Mr. Pozzetto said in an interview. 'Politically, an individual wouldn't dare even discussing zoning.'

". . .At Town Meeting this week, supporters of zoning said they favored basic rules that would, for example, designate specific areas of town for industrial development and establish minimum size for lots, rather than detailed regulations that would govern architecture or color schemes. But other residents complained that altering regulations would be difficult.

"One, Roger Festa, said a zoning commission would be 'the judges and the jury' on what could be built.

"'There's a very strong feeling here that they want more time,' Mr. Festa said of his neighbors.

"'The clock has started, Roger,' Mr. Pozetta replied."

The subject of controlled growth is one of several characterizations of the issue presented in this news story. It is a subject variously designated as one of land-use, management-growth, comprehensive planning and a number of other terms. But whatever we may call it, it is a topic as current as today's newspaper and one that will continue to be so long after our publication date!

This continued significance is readily explained by the fact that the increasing complexities of modern life have pronounced effects on the relationship of the government to private property. In an earlier time, an individual's use of his property was perceived as a wholly autonomous enterprise. Property uses today are seen as highly interdependent and often conflicting in nature. Under the circumstances, the role of government as an arbitrater among conflicting property uses has vastly expanded. But state intervention in the realm of private property arrangements are today recognized as inextricably related to broader social policies, and so government efforts to foster particular social ends have increasingly taken the form of state involvement in land use control.

Zoning is the predominant technique by which governments have exercised this control over private property. It is zoning that is the focus of this volume that is intended to introduce the reader to this subject, which increasingly touches their daily lives and living.

Zoning, however, has been supplemented by a wide range of new techniques during the past few years in response to evolving social problems. Concern for the environment has spawned growth moratoriums and other limitations on private land use development—a topic not discussed in this volume due to inevitable space limitations. Fear of urban sprawl has led some localities to check overall growth so as to preserve semi-rural areas. We do give some attention to the growing recognition

that zoning may be a vital tool for the pursuit of broad social policy as it is reflected, for example, in the progressive attitudes favoring socially balanced communities that have impelled some municipalities to provide mixed income developments or engage in innovative zoning techniques intended to afford greater housing opportunities for the poor.

We shall see that the direct growth plans adopted by some localities have posed for the courts the difficult question of whether a desire to preserve the values of suburban living, for example, is a legitimate zoning goal, even when its usual implication is the denial of opportunities to excluded groups to share in those values. Most courts have accepted the plans, usually relying on the traditional zoning justification that communities may properly pursue ordered growth and on Supreme Court decisions endorsing an expansive interpretation of the police power.

Today zoning is firmly entrenched as a method of land use control. More than ninety-seven percent of the cities with populations over 5000 exercise zoning powers. Despite the increasing variety and sophistication of zoning techniques, many of the most basic principles of zoning law have remained in force. Most state enabling statutes, for example, require zoning ordinances to conform to a *comprehensive plan,* a framework typically developed by professional planners and intended to insure rationality and consistency in the overall zoning exercise. This factor is developed in our chapter dealing with planning.

Considerable attention in this study is given to the constitutional elements involved in zoning and land-use law and legislation. The balance struck in current zoning practice between individual property rights and the demands of social policy is not without substantial

difficulties. A municipality may pursue only certain ends through zoning. This class of legitimate ends is specified both by the zoning enabling act, which a municipality may not exceed, and by the constitutional limits on the police power itself. While the class of legitimate ends has greatly expanded in recent years, it still imposes some significant restrictions. In addition, even when zoning measures are aimed at legitimate objectives, they may nevertheless run afoul of the "takings" clause of the Fifth Amendment to the Constitution, which provides in part that "private property [shall not] be taken for public use without just compensation." Courts and legal scholars have long debated how to interpret this important restraint on the zoning power.

First Amendment rights are also involved in zoning law and this, too, is touched upon by offering one example of how it comes into play as it does in the matter of "exclusionary zoning" in connection with "adult" movie theaters and book-stores.

Again, the subject of land use control and zoning is a large one with more dimensions and topical areas than can be covered in our Legal Almanacs. But our editor is hopeful and even confident that this volume provides the reader with a useful introductory view of the subject and thereby gives the reader a sense of being informed and able to explore further his or her interest.

Chapter 1

CONSTITUTIONAL FOUNDATIONS: I

The constitutional basis for zoning and planned land use are derived from both the federal and state constitutions. Since the powers of the federal government are delegated by the people, the federal government has the authority to act only when the powers are conferred expressly or by necessary implication. This concept of federalism is stated in the Tenth Amendment of the United States Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This Amendment has been interpreted to mean that the states possess those residual powers not expressly or implicitly given to the federal government. Additionally, states may act in some areas of power delegated to the federal government as long as the federal government has not acted to preempt the field or to prohibit state legislation on the subject.

In the areas related to land use, the state constitutions supplement the federal constitution in two ways. First, certain federal constitutional clauses have the purpose of protecting the rights of individuals in matters of *equal protection, due process,* and the *right to travel.* In these areas, the state constitutions cannot reduce the extent of protection, but they can enlarge the scope of the protection provided to people within the state. Usually the federal government establishes minimum rather than maximum standards for protection.

Second, state constitutions, making use of their residual powers but subject to some federal constraints, have created local governmental units and have defined the powers of those units. In this capacity, states may use constitutions or statutes to effect land control programs by restricting or empowering the local governments to take certain actions with regard to local borrowing, property taxation, other local taxation, local governmental acquisition of property, home rule powers and related matters. Some state constitutions will impose only broad constraints, while others will impose very detailed limitations on political subdivisions. This difference is usually not crucial to the localities, however, because most states with broad contraints regulate the same subjects as those with detailed limitations. They simply use legislation rather than constitutional provisions.

Due Process

Due process of law is a right assured to all persons by the Federal Constitution: the Fifth Amendment requires that it be given by the federal government; the Fourteenth Amendment, by the states. In the land use and zoning context, the state guarantee is most applicable: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The due process clause, in itself, does not give specific rights beyond the one that all people must be treated by the government according to the laws established to regulate given situations.

Most state constitutions contain the same due process provision that has been interpreted to be its equivalent. But whether one brings a challenge on the basis of the federal or state constitutional provision, the due process analysis is the same.

It is generally stated that there are two kinds of due process—substantive and procedural. Substantive due process is concerned with the rights and duties of people and governments in their ordinary relations with each other. It includes a concern for what the government can do, the limits of regulatory powers, and the essential fairness of governmental actions. A law may violate the substantive due process guarantee if it seeks to control something that is beyond its power to control, or controls in a way that is unfair. It may be substantive rights violation under the due process clause if a statute or ordinance regulates something beyond the delegated powers, is arbitrary or capricious, or is lacking in ascertainable standards or a statement of reasons. The major concerns of a challenge on this ground are whether the regulation is otherwise constitutional, whether there is proper statutory authority for it, and whether in itself it is unreasonable.

Procedural due process is concerned with the safeguards for the maintenance or protection of individual rights when the government violates, or threatens to violate, these rights through exercise of its powers. It seeks to ensure that all parties to a dispute feel that they are being dealt with fairly, and that they have a reasonable chance to present their views before an impartial and reasonably convenient tribunal.

A substantive or procedural due process challenge may be made on the grounds that a governmental action is generally unfair because of the unreasonableness of the ends sought or the unreasonableness of the means used. A due process challenge could also accompany any of the other specific constitutional challenges, such as taking, equal protection or right to travel, on the grounds that the governmental action violated this specific constitutional guarantee and, in so doing, did not give an

individual due process of law. An example of the latter use of the due process claim occurs when the government confiscates an individual's land without paying him for it. This would be a violation of the Fifth Amendment on taking grounds as well as a violation of substantive due process.

A land use policy or zoning regulation could be challenged as having an improper objective, as utilizing means unrelated to an otherwise proper end, or as employing means that, although related to a proper end, are unreasonable to accomplish that end. For example, a community may adopt a zoning regulation that prohibits multifamily housing, zones the undeveloped land exclusively for large-lot residential purposes, and implies that its policy is only to allow wealthy families to move into the jurisdiction. Such a policy would be subject to challenge on due process grounds since exclusion on socioeconomic grounds has been held to be an improper objective for the use of the police power.

Other localities may subject themselves to challenge by announcing that they want to accomplish an end that is proper but then resorting to means that are not designed to achieve that end. Implementing an open space acquisition program in order to accomplish the end of encouraging the provision of law and moderate cost housing might be construed as such a violation, despite the locality's expectation that public provision of recreational areas might encourage developers to build on smaller lots, thereby reducing housing costs. While both the acquisition of open space and the encouragement of low and moderate income housing may be proper in themselves, they are not generally viewed as having a cause-effect relationship. Thus the locale would probably not be able to show sufficient justification for the open space acquisition program.

Finally, the means may be challenged as related, but unreasonable to accomplish a given end. For example, after Fairfax County, Virginia, had adopted the objective of delaying development until adequate public facilities were available, it refused to rezone a certain parcel to a higher-intensity use on the grounds that public facilities were still inadequate for intense urban development. The Virginia Supreme Court found the refusal to rezone to be unreasonable, arbitrary and capricious, not because the keying of development to adequate facilities was an improper end, nor because zoning was a means unrelated to that end, but rather because, since the court found the facilities were adequate, the use of low-density zoning was unreasonable to accomplish the stated end.

The power of municipalities to regulate the use of land is generally based on the state's *police power* as delegated to local governments by *enabling legislation* and home rule provisions. Whether this power is used for a proper objective and whether the means comply with notions of fairness are concerns of due process.

Long before comprehensive zoning began, some municipalities sought to employ the police power to remedy the evil of unrestricted use. The general power to regulate conduct for the protection of the public health, safety, morals, or welfare was a less expensive remedy than eminent domain, which required the expenditure of public funds to compensate owners for condemned uses. Within the dimensions of appropriate police regulations, losses incident to limitations upon use were absorbed by landowners, in the same fashion as all persons are required to absorb losses caused by limitations upon conduct imposed under proper police regulations.

Early ordinances that limited the use of land usually concerned matters that were clearly related to the health or safety of the community. During the prezoning years,