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Getting to Know "Sim City": Zoning Basics for Beginners
Institute for Local Government Attorneys

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I. Overview: Today's Goals
   A. Getting Oriented in "Sim City": Territory, Objectives, Players, Tools, Ground Rules
   B. Playing the Game: Some Common Dilemmas
   C. Moving Beyond the Basics: Thoughts and Resources for the Future
   D. Caveats: "Don't try this at home" until you gain more comprehensive grounding (at least by reading, attending more lengthy CLE offerings, seeking advice) and know your jurisdiction's laws (since the law differs from state to state)

II. Getting Oriented to "Sim City"
   A. The Territory
      1. Physical Characteristics
         a. nature of land itself includes soils, slopes, hazards, water supply, access, environmental considerations (with associated health and safety implications)
         b. often issues are interconnected (particularly considering "sustainability"
      2. Social and Economic Characteristics
         a. Demographics affect choices regarding development of housing stock, infrastructure needs, economic development options
         b. Traditions and cultural norms affect what is valued, what is to be preserved or changed, understandings about individual rights and need for collective action
         c. Community infrastructure (schools, roads, water and sewer, transit systems, etc.) must generally be paid for with taxes or fees; most local jurisdictions rely to a greater or lesser extent upon ad valorem property taxes (and must therefore balance the mix of residential v. commercial/industrial uses, as well as the burden on existing population v. newcomers and developers to maintain economic health)
      3. Political Characteristics
         a. Land use issues can often be so controversial that they catalyze opposition to incumbents, become "hot potatoes" in local elections, result in vehement splits within elected boards ("no growth" v. "pro-economic development" viewpoints, "old guard" v. "newcomers", "business" v. "neighborhoods" etc.); there are often long histories that linger and influence decisions from times gone by
         b. State law (and in some instances local charters) determine many important facets of land use law including
            i. Relationship of municipalities and counties
            ii. Governmental arrangements at the "margins" of municipalities (e.g., extraterritorial jurisdiction, annexation options, "joint planning," regional planning requirements and roles)
            iii. Types of special entities that have a stake in land use decisions (water and sewer authorities, business districts, school districts, etc.)
         c. Land use decisions in one jurisdiction may affect other nearby jurisdictions in significant ways, for example as to public utility capacity (water, sewer, waste water, waste disposal), housing stock (and affordability), transportation patterns, commercial and economic development (who gets the new regional shopping center and related tax benefits)
         d. Land use decisions often occur in a piecemeal fashion, so that later decisions may need to confront the cumulative impacts of decisions made over many years

B. The Objectives
    1. Traditionally government regulation (zoning) was seen as a means for addressing gaps:
        a. Avoid future nuisances and conflicts by managing potentially incompatible adjacent uses ("a pig in the parlor instead of the barnyard")
        b. Avoid health and safety hazards (be sure there is space for fire trucks);
        c. Manage some forms of "externalities"(e.g. noise, overcrowding)
        d. Make public services feasible (e.g. density and road requirements)
        e. Protect citizens from surprises resulting from poor development practices (road access, septic capacity, etc. in subdivision context)
    2. Land use regulation has increasingly served additional goals
        a. Foster tax base and economic welfare
        b. Address preservation concerns: historic, agricultural, special natural sites (coastal, mountain, and more)
        c. Address aesthetics: appearance, "sense of place"
        d. Provide a range of housing options that are inclusive rather than exclusionary
        e. Assure that adequate public facilities and funded and provided in sync with new development (particularly if substantial growth would swamp existing facilities)
        f. Foster mixed uses where people can live and work in proximity (promoting environmentally "smart" and "sustainable" strategies)

C. The Players
    1. The "Government"
        a. The Deciders:
            i. Elected Governing Board (land use decisions may be crucial in election swings; where people live, and for how long, can make a real difference in their perspectives)
            ii. Appointed Decision-Making Boards: zoning board of appeals, board of adjustment, in some jurisdictions, planning commissioners
        b. The Advisers: Appointed citizen boards including planning, transportation, economic development, and more
        c. The Experts: planning, building, zoning, engineering, health staff
        d. The Observers or Participants:
            i. Other government entities with potential interests including school boards, public utility authorities (water and sewer), special districts, possibly district councils
            ii. Other nearby jurisdictions including bordering municipalities, counties (depending on jurisdiction)
            iii. State agencies (transportation, environmental, economic development, etc.)
    2. The Proponent: Developer and related personnel
    3. The Skeptics
        a. The Neighbors
        b. The Competitors (in some business development contexts)
        c. The "Special Interests" (e.g. environmental groups, preservationists, "alliance of neighborhoods," chambers of commerce, etc)
        d. The Old Timers (why do we need to change, let's keep it as is)

e. The New Comers (I'm over the bridge, why should these others be allowed in if they'll deteriorate the quality of life for me and mine?)
f. The "Tax Watchers": emphasizing fiscal responsibility

4. The Good Citizens (who may watch from afar)
5. The Press (which enjoys conflict, wants information, keeps some people honest, and annoys others)

D. The Basic Tools of a Simpler Time
1. "Comprehensive plan": community goals and objectives (conceptual framework as benchmark for subsequent specific decisions, not just paper document)
2. Districts (basics)
a. Separating Basic Uses:
i. Residential: "single family," "multi-family," and options in between
ii. "Commercial": retail, office, institutional, and options in between
iii. "Industrial": heavy and light
iv. Agricultural and open space
v. Combinations? "Euclidean"(Euclid, Ohio): pyramid of preferences (single family without more, industrial/commercial/agricultural plus residential?); "mixed uses"
b. Prescribing other characteristics
i. Basic standards: areas, density, setbacks, heights, and more
ii. Mitigating requirements: parking, buffers, etc.
c. Absolutes versus particulars
i. Uses as of right
ii. "Conditional uses" with permission (uses that are potentially compatible in a particular district, but are especially sensitive or may pose risk of incompatibility with adjacent property uses; such uses are therefore "conditionally" permitted but only on a "conditional" basis until actually authorized to be situated on particular parcel with appropriate conditions if relevant standards are satisfied as judged through intensive review by elected or appointed board following public hearing)
iii. Overlay districts with additional criteria (e.g. historic preservation)
iv. Large scale impacts and additional regulations: the case of residential subdivisions (plats, covenants, water and sewer, access requirements and more)
3. Placing districts on the "map"

E. The Ground Rules
1. Powers when you need them: Overview: why worry?
a. Statutory authority generally needed since state legislatures (rather than local governments) are generally seen as having plenary authority under the police power
b. Statutes are not always clear on their face, and rules of construction can be important
c. In some jurisdictions, courts may still occasionally reference rules of statutory construction that historically required explicit or necessarily implied authorization

for local governments to act ("Dillon's Rule"), although that rule of construction has been overruled by statute or case law in most jurisdictions; this tendency toward narrow construction is particularly evident when attempting to impose fees or seek exactions

d. Subject-specific statutory authority may be supplemented by home rule authority for eligible local governments which have followed relevant procedures to tap broader authority available under many state constitutions or statutory schemes
   (I) Note that such home rule authority may be limited only to municipalities of certain populations
   (II) Note that such home rule authority may in some jurisdictions limited to "municipal" matters and in many jurisdictions is to some extent subject to preemption by state legislation regarding matters of statewide significance
e. General authority may be stretched, but may also be preempted where there are conflicts with more specific legislation on a particular topic (e.g. hog farming) or where the courts conclude that the state legislature sought to occupy the field or require uniformity throughout a jurisdiction; if attempting novel regulation, check on preemption doctrine found in state common law or statutes
f. Statutory authorization (and common law) is jurisdiction-specific so be aware when trying to incorporate approaches used elsewhere
g. When in doubt, seek local (or general) legislation to assure that there is adequate authority to regulate in novel ways

2.. Powers when you need them: the traditional framework
   a. The early foundations (1920's, Herbert Hoover and more) (attachment 1)
      i. Planning and subdivision regulation
      ii. Zoning
   b. Supplemented by specialized provisions
      i. Special areas (e.g. coastal, ridgeline protection)
      ii. Historic preservation
      iii. Agricultural preservation
      iv. Economic development (e.g. growth zones, development districts)
      v. Environmental protection (watershed provisions, particular industries such as hog farming, those using bio-solid applications)
   c. Supplemented by legislation incorporating new tools and techniques for addressing common situations: e.g. "vested rights", "development agreements"
   d. Affected by provisions mandating state-wide or regional planning targeting specific topics such as affordable housing

3.. Powers when you need them: the changing scene
   a. Statutory provisions have been evolving and in the last decade there are have been concerted efforts to determine whether new comprehensive legislative reforms are needed.
   b. More modern comprehensive revisions emphasizing "sustainability" and "smart growth" have been proposed with leadership from the American Planning Association; there are also efforts by the American Bar Association to develop a new model land development code; leading planners have also advocated fresh approaches including "smart codes" and form-based codes

c. Rationale: "need to protect natural resources; lack of affordable housing; need for balanced economic growth among state's regions; need to link regulation and capital investment with planning; lack of mechanism to resolve interjurisdictional conflicts; lack of coordination among governmental units; perception that existing system is unfair, unwieldy, unpredictable, and delay-ridden; loss of open space and agricultural lands; control of urban sprawl; mismatch between development and infrastructure, need for new planning tools and techniques" (per APA, Growing Smart, Chapter 1)
d. "Smart Growth" principles have been articulated by many, but commonly include
    i. compact development with growth boundaries
    ii. protection of the environment and natural resources (including agricultural lands)
    iii. emphasis on multi-modal transportation
    iv. emphasis on mixed-use development combining residential and other uses (rather than residential large-lot sprawl)
    v. collaborative decision-making processes (with more structured neighborhood input)
e. Statutory reforms provided new state structures and strategies
    i. Early smart-growth efforts: Maryland, Wisconsin, Pennsylvania, Delaware
    ii. Comprehensive statutory reform: many more and ongoing
f. Model legislation developed by American Planning Association ("Growing Smart" initiative) includes changes:
    (i) State: purposes; state planning agency (with regional?); plans (comprehensive, land development, biodiversity conservation, transportation, economic development, telecommunications, housing and affordability); provisions for siting major state facilities, dealing with areas of critical state concern, developments of regional impact
    (ii) Local: greater emphasis on contents of (and consistency with) comprehensive plan; unified development ordinances (zoning, subdivision, site plan review, planned unit development, exactions, impact fees, transferable development rights, corridor maps, natural hazards, sensitive lands, floodplains, erosion control, affordable housing, infill, brownfields redevelopment, mitigation banking, development agreements, overlay districts); vested rights
g. Model legislation being developed by task force within American Bar Association focuses on administrative and judicial review (and includes proposals adding clarity, streamlining and revamping administrative review including possible use of hearing examiners, and clarifying judicial review) (based on chapter 10 of APA "Smart Growth" legislative manual) (drafts posted on IMLA website, www.imla.org , in archives)

2. Constraints: Very Short Introduction to a Very Large Topic
    a. Preamble:
        i. Federal and state constitutions both apply to government action; bear in mind that even if they have similar language, state constitutions may be applied

differently and may afford more generous protection than afforded under the federal constitution (and vice versa)

ii. State constitutions may include provisions not included in the federal constitution and it's important to become familiar with these provisions (e.g. prohibitions on "exclusive emoluments" or limits on state legislative powers in some areas)

iii. State courts often will use statutory interpretation regarding government authority as a means of avoiding constitutional questions;

iv. Pursuit of administrative remedies may be required before constitutional claims are regarded as "ripe" for purposes of judicial review

v. For an excellent compilation of major constitutional cases on takings, equal protection and due process, see Garrett Power, Constitutional Limitations on Land Use Controls, Environmental Regulations, and Govermental Exactions—2007 Edition (free download from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960765

b. Regulatory takings: profoundly important and profoundly complicated

i. Key texts and contexts

(I) Fifth Amendment: Nor shall private property be taken for public use, without just compensation

(II) Fourteenth Amendment: "Nor shall any State deprive any person of life liberty, or property without due process of law"

(III) State constitutions may differ: e.g. North Carolina's "law of the land" clause (drawn from Magna Carta) has been interpreted to cover regulatory takings and use of eminent domain; some states have language covering "taking" and "damaging"

(IV) As noted below, cases into the 1970's often addressed what we now think of as "takings" using substantive due process analysis

(V) Challenges as to regulatory takings may be brought in state or federal court and there are a host of procedural issues at this stage

(A) State courts generally require exhaustion of administrative remedies before such challenges are ripe for consideration (and variances, discussed below, generally serve as a "safety valve" in many instances to avoid an unconstitutional taking when a land use regulation would make all possible use of property infeasible)

(B) There is a distinct line of federal cases regarding "ripeness" that are too complex for discussion here (see Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) and subsequent cases)

(C) There is also an extensive line of cases relating to the "just compensation" that may be required in the event that a "temporary taking" denies all reasonable use during the period in which a regulation is in effect and litigation is ongoing (see First Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304 (1987) and subsequent cases) but discussion of this subject is beyond the scope of this manuscript

(D) Challenges on takings grounds in state courts have often been brought on an "inverse condemnation" theory (that is, the land owner has to sue the government rather than the government suing to condemn an interest in land), and there are in many instances particular statutes governing how such challenges may be brought

ii. Types of "Takings": The Basics

(I) Part of what makes "takings" analysis so complex is the Supreme Court's penchant for trying to categorize several types of cases; in addition, cases may distinguish between "facial" challenges and challenges against ordinances or actions implementing them "as applied"

(II) Basic types

(A) Permanent physical invasions: per se takings

(1) Such cases often appear to involve governments' efforts to "take" easements or similar interests by regulation when doing so under eminent domain powers would require payment of just compensation.

(2) This kind of taking is regarded as "per se" without balancing private and governmental interests because it involves a core element of property rights, the right to exclude

(3) Example: Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982) (invalidating regulatory requirement that landlords allow cable television boxes and lines to be placed on their property, notwithstanding the relatively minimal area affected)

(B) "Total taking" of all economically beneficial use of property: per se taking

(1) Such cases are modern-day equivalents of the "too far" test articulated in Pennsylvania Coal co. v. Mahon, 260 U.S. 393 (1922) as a matter of due process analysis (case concerned requirement that owners of underlying mineral estate maintain support for surface uses such as roads and residences, notwithstanding prior severance of surface rights subject to mineral rights)

(2) Example: Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (where state regulations established setback line to prevent erosion and did not provide for variances, developer who owned two lots that became unbuildable under the regulations had property "taken" where all economically beneficial use had been removed) (after plaintiff built on his lots a hurricane later demolished his buildings… what the courts give, Mother Nature can take away without paying "just compensation")

(3) Lucas recognized two important exceptions

(a) government action is permissible if justified as an effort to address a "nuisance" pursuant to state law

(b) an individual's property rights are delineated under state law and state law doctrines (such as the "public trust" doctrine) may recognize that certain development rights are unavailable as a matter of established state law precepts

(4) Lucas resulted in further litigation about a variety of related questions (which are also raised under the Penn Central "balancing" analysis discussed below)
(a) what is the "property right" taken for purposes of this analysis (can rights in property be "segmented" by careful carving up of parcels or various interests in property? ("segmentation" issue)
(b) what is meant by a "total" taking? (what's the "denominator"? what limits are permitted short of complete prohibitions on development?)
(c) when is "total taking" determined? (often developers may bring suit when the real estate market shifts, claiming no value is left during a downturn)
(5) Federal law regarding developable wetlands can also be a factor in determining the extent of an individual's property rights

(C) "Exactions" cases: heightened scrutiny when conditioning approvals through inappropriate leverage
(1) Land development often involves tailored requirements on individual parcels, and there is a risk that the government may try "exact, "extract," or "extort" rights or benefits as a condition of necessary approvals; this type of regulatory abuse can be a subterfuge which could impose burdens on individual developers that should be borne by the public as a whole through exercise of eminent domain or spending powers; seen as special case for application of "unconstitutional conditions" doctrine
(2) Test: is there an essential nexus and rough proportionality between condition imposed and impact of proposed development on the public
(3) Examples:
(a) Nollan v. California Coastal Comm 'n, 483 U.S. 825 (1987) (striking down requirement that property owner dedicate path along water and easement of view when seeking permit to redevelop property)
(b) Dolan v. City of Tigard, 512 U.S. 374 (1994) (striking down requirement of dedicated public greenway as opposed to private greenway in order to provide for necessary flood control)

(D) Balancing test": everything else
(1) "Penn Central test" (Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978))
(a) Case involved challenge to historic landmark preservation in New York City; developer proposed large-scale tower on top of Penn Central terminal (an historic landmark), city offered "transferable development rights" to shift possible development to site elsewhere; developer claimed "total taking" of "air rights" (relying on Penn Coal case concerning

subsurface rights as noted above); city also claimed that much of the value in the property resulted form public improvements to roads and public spaces; case was facial challenge; case is memorable in part from Jackie Kennedy Onassis' efforts to bring out the public sporting umbrellas to Central Park so the effect of the added tower in blocking vistas would be seen; case marked a shift from the U.S. Supreme Court's shift from the era in which constitutional land use litigation generally occurred in state courts to a much more active role

(b) Court articulated three-part balancing test, which involved "ad hoc factual inquiries" and in important ways seemed to be an enhanced substantive due process test:
  (i) character of government action;
  (ii) "reasonable investment-backed expectations"
  (iii) "economic impact of the regulation on the claimant"

(c) Court found no facial taking where
  (i) historic preservation interest was well-grounded
  (ii) "air rights" could not be artificially segregated from fee interest
  (iii) rights to use existing Terminal remained, there was a "reciprocity of advantage" in historic preservation scheme that kept property values up through constraints on area properties, and transferable development rights mitigated adverse impact of requirements limiting proposed development, challenge was facial rather than "as applied"

(2) Flexible test can lead to uncertainty of application, but general lessons:
  (a) Care is needed to determine the appropriate unit of "property right"
  (b) "Investment-backed expectations" and relevant interest in land can be tricky, particularly when it is also necessary to determined how and when such expectations are established (see, e.g., Palazzolo v. Rhode Island, 533 U.S. 606 (2001), involving developer's challenge to application of tidal wetland regulations that were adopted after he formed business entity which held land development rights but before rights devolved to him from the business entity; where divided court concluded that acquisition of rights following the adoption of the regulations did not preclude taking claim; on remand state court concluded that developer's taking claim was unfounded since state public trust doctrine applied, limited development rights remained in the parcel, and feasibility and costs associated with proposed development were not supported by the evidence; case illustrated the difficulty of knowing whether the "total taking" or "balancing" approach was the appropriate standard)

(E) Other Types of Regulations: Distinguishing Due Process and Taking Analysis

(1) Until recently, case law appeared to confuse when due process and takings analysis should apply (see., e.g., Agins v. city of Tiburon, 447 U.S. 255 (1980), stating in land use case, that a taking could be found either if the regulation does not substantially advance legitimate state interests or if it denies an owner the economically viable use of his land, and suggesting that compensation is a property remedy if a taking occurs)

(2) Lingle v. Chevron, USA., Inc, 544 U.S. 528 (2005) clarified this situation, holding that the Agins test is suitable for due process challenges (such as the one at hand, involving regulation of rents on gas stations as a means of protecting against increased gas prices arising from market concentration), but not for "takings"

c. Due Process

i. Procedural due process

(I). Federal

(A) 14th Amendment: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

(B):Problems: most likely only if lack of notice, hearing prior to deprivation of property rights; lack of rights to cross-examine; ex parte contacts with decision-makers or conflicts of interests

(II).State:

(A) Constitutional texts may differ

(B) Procedural requirements generally included in state statutes but may be rudimentary

(C) Problems: same as those triggering federal constitutional violations

ii. Substantive due process

(I). Federal:

(A) Post Lochner, activist overturning of government action on this basis supposedly limited

(B) There must be a deprivation of life, liberty, or property to trigger consideration; basic test is whether there's a legitimate public purpose, ends reasonably related to the purposes, non-arbitrary result (problems if "shocks the conscience"; variously stated; some of what once might have been addressed under the substantive due process doctrine is now addressed under the rubric of "takings"

(C) Basic, traditional Euclidean zoning does not violate substantive due process requirements: Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding districting system that separated single family uses from apartments, commercial and industrial uses)

(D) Rare violations: arbitrary result: Nectow v. City of Cambridge, 277 U.S. 183 (1928) (application of district scheme so as to leave tract virtually undevelopable held unconstitutional)

(E) Rare violations: intrusion on fundamental family associations, Moore v. City of East Cleveland, 431 U.S. 494 (1976) (striking down definition of "family" in zoning ordinance, that had limited number of blood relations living together)

(II).State:

(A).Much more often if deemed "arbitrary" or "unreasonable"

(B).May articulate more stringent tests: "real and substantial relation to the objects and purposes intended to be furthered, in view of existing conditions in the community and the physical characteristics of the area and particular tract of land involved" or incorporate balancing test that considers whether the benefits of regulation are clearly outweighed by adverse effects on the public welfare

(C)Examples:

(1) Cases addressing some kinds of requirements that contribute to "exclusionary zoning" that precludes access to housing for those of limited means (e.g. Home Builders League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (NJ 1979), striking down minimum floor area requirements as excessive where not related to health and safety)

(2) Cases holding that completely barring a particular use from any location within a municipality (e.g. Town of Conover v. Jolly, 277 NC 439, 177 S.E.2d 879 (1970), holding that manufactured housing was not nuisance per se and could not be prohibited altogether from town, since as a matter of statutory construction town lacked authority to do so, making it unnecessary to reach constitutional questions) (note that using statutory interpretation as a means of avoiding constitutional questions is a common technique in land use litigation under state law)

d. Equal protection

(I). Federal:

(A).Categorical approaches (protected classes and interests; light handed review in general)

(B) Racial discrimination: Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 422 U.S. 490 (1975) (in case involving all-white suburb, refusal to rezone from single family to multi-family use was challenged as racially discriminatory; developer accorded standing to assert claim; zoning decision upheld as against constitutional challenge in absence of proof of discriminatory intent, absent clear pattern unexplainable on grounds other than race; remanded for further consideration of facts where decision not to rezone was in keeping with zoning of nearby areas)

(C) Example: Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding definition of "single family" that excluded more than 2 unrelated individuals living together so as to preclude aggregations of substantial numbers of college students near SUNY Stony Brook)

(D) Exceptions prove the rule

(1) City of Cleburne v. Cleburne Living Center, 437 U.S. 432 (1985) (in case where city denied special use permit to group home for developmentally disabled individuals, holding that those affected did not constitute a quasi-suspect class, so that "rational basis" standard was applicable, but striking down city action as impermissible nonetheless)

(2) "Class of one": Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (equal protection claim permitted even as to "class of one" who was not part of a protected class, where plaintiffs alleged that government had intentionally and arbitrarily treated them differently than other similarly situated landowners when it required them to dedicate a 33 foot wide easement compared to the 15 foot wide easement required of others)

(II) State:

(A).May recognize additional protected groups and protected interests

(B) Compare

(1) Cases in many jurisdictions striking down definition of "family" permitted in Belle Terre (above) based on state due process or equal protection doctrine

(2) Cases recognizing a "right to housing" as a protected interest and striking down use of zoning power in ways that exclude those of limited means from jurisdiction (NJ "Mount Laurel" litigation and other states)

(3) Cases allowing challenges to treatment of similar uses within a particular district (e.g. denying laundries drive-in and pick-up service where banks, restaurants, etc. were allowed to offer such services)

e. First Amendment

i. Speech

(I) Signs and billboards

(A) Commercial speech: governed by multi-part test: substantial governmental interest, regulation directly advances government interest, regulation no more extensive than necessary (more "teeth" and reverses presumption of constitutionality) (e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) striking down certain prohibitions on cigarette-related advertising close to school)

(B) Billboards on and off premises: Aesthetics coupled with traffic safety held to be acceptable public purpose for regulate billboards; would justify prohibition on off-site commercial signs except when granted off-premises commercial signs more favored treatment than noncommercial signs and thus was impermissible since not content-neutral (Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981))

(C) Regulation of signs in residential neighborhoods: nearly total ban on all noncommercial signs (including political signs) in residential neighborhood struck down as prohibiting too much speech where

political signs in residential neighborhoods was form of speech with long tradition and no adequate substitutes existed

(II) Adult uses: focus on problematic effects of such businesses not on content

(A) Young v. American Mini Theatres, Inc.427 U.S. 50 (1976) (upholding restrictions on location of adult theatres that called for dispersal of such uses as between each other and limiting proximity to residential areas, churches and schools, where restrictions were neutral as to time, place, and manner)

(B) City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding restrictions on adult uses limiting to proximity to schools, churches and residential areas and effectively concentrating such uses in designated area, where studies from other jurisdictions had evidenced demonstrable adverse effects; regulations were neutral time, place and manner restrictions; and reasonable alternative avenues of communication were available)

ii. Association
(see cases above regarding definition of single "family")

iii. Religion (free exercise)

(I) Constitutional challenges have sometimes been raised with regard to churches that are historic landmarks (imposing added costs for operation), operation of church-related activities (e.g. day care programs or homeless shelters), requirements that churches comply with standard requirements regarding parking, or limitations on location of churches within residential districts or in close proximity to others

(II) Generally, application of neutral zoning requirements is upheld as a matter of federal constitutional law, but some state courts have applied more stringent standards to give special protection to churches and church-related schools (e.g. may interpret state zoning statutes or state constitutional provisions as precluding local provisions that prohibit churches in residential areas)

(III) Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2000) is now the most common framework for litigating such issues (see below).

f. Federal supremacy clause and federal preemption

i. Generally

(I) Within the limited powers of the federal government (e.g. commerce clause, fourteenth amendment), Congress may preempt state and local actions that are expressly conflict (or conflict by implication) with federally set policy or intrude into areas where federal policy "occupies the field" because of the need for uniformity

(II) Limits on federal powers to intrude on the states may exist under the tenth amendment (reserving powers to the states) or the eleventh amendment (relating to litigation against the states) but local governments are creatures of the states and are generally not able to assert such claims of sovereignty on their own behalf

ii. Examples
(I) Regulation of airports
(A) Local government may not impose curfew in order to constrain noise where federal regulation of airport operations is pervasive (City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).)
(B) Local governments may, however, regulate location and ground operations (numerous cases)
(II) Fair Housing Act, 42 USC 3601-3619
(A) Act makes it unlawful to "make unavailable or deny… a dwelling to a person because of race"; prima facie case of discrimination can be shown based on discriminatory effects, and has been found to apply to government decisions that deny multi-family affordable-housing projects
(B) In some instances, action by municipality in declining to approve multi-family public housing projects may give rise to liability (see, e.g. Smith v. Town of Clarkton, N. C., 682 F.2d 1055, (4th Cir. 1982) (finding violation where town withdrew from multi-jurisdictional authority seeking to construct such housing); U.S. v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974) (city's action in blocking federally assisted housing projects held racially discriminatory).
(C) Note that federal legislation now prohibits discrimination based on handicap (and thus has bearing on decisions regarding group homes), as well as discrimination based on familial status (families with children); also note that act includes a limited exemption for senior housing
(III) Religious Uses (Protection of Religious Exercise in Land Use and by Institutionalized Persons, "RLIUPA"), 42 USC 2000cc et seq.
(A) This is a complex area and careful review of statutory language and emerging case law is important
(B) Key provisions
(1) GENERAL RULE-
No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution— (A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.
(2) SCOPE OF APPLICATION- This subsection applies in any case in which ...(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the

government to make, individualized assessments of the proposed uses for the property involved.

(3) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(4) Definitions…

(4) GOVERNMENT- The term `government'—

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term `land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term `religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose

(4) Burden of proof is on the government

(5) Attorneys fees are provided

(C) For a good recent overview of developments, see P. Salkin and L. Lucero, The Constitution, RULIPA and Disputes Regarding the Zoning of Religious Institutions, 30 NO. 5 ZPLR 1; for detailed coverage see Federal Land Use Law & Litigation (available through Westlaw) Sections 7.12-7.26

(D) Representatives of churches have generally used RLIUPA aggressively to challenge local government land use decisions in federal court, but trends appear to support upholding municipal decisions in many instances if adequate justification and analysis is provided

(IV) Cell Towers:

(A) Federal Telecommunications Act includes express provision resulting in limited preemption, (47 USC 332(c)(7)), which preserves general authority over decisions "regarding the placement, construction, and modification of personal wireless service facilities" subject to the following limitations—

(1) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(2) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(3) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(4) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(5) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief. Where the following definitions apply:

(i) the term 'personal wireless services' means commercial mobile

services, unlicensed wireless services, and common carrier wireless exchange access services;
(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and
(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

(B) This area too deserves close attention (including attention to possible federal legislation and regulations); for more detailed overviews, see P. Salkin and L. Lucero, Cell Towers and Aesthetics: Blight on the Neighborhood or Sign of the Times, 29 No. 7 Zoning and Planning Law Report 1 (2006)

(C) Note as well distinctive issues relating to regulation of other types of communications towers (which may be subject to FCC regulation)

(V) Environmental Legislation: note that federal legislation such as that governing coastal areas and wetlands are very important but are beyond the scope of this paper

III. Getting to Play "Sim City": Some Common Dilemmas

A. First Round: "What" goes "where"?

1. The basics: defining districts (uses, heights, setbacks, areas, and more)
   a. Comprehensive plan comes first to set goals and objectives
   b. Common types and related issues
      i. Residential uses
         (I) Typically, multiple residential districts reflecting different densities (in-town, older areas typically have smaller lots where water and sewer is available, larger lots are more typical in more rural areas with septic and wells)
         (II) Important questions can be raised regarding definition of "single family" (see above, and bear in mind that in many jurisdictions "group homes" are by statute declared as acceptable uses in single-family districts); in addition, care is needed to justify distinctions in districts between single-family or duplex versus multi-family units (condos or rental)
         (III) "Accessory uses" are activities (such as home offices for psychologists, architects, etc.) which may be permitted in residential districts with or without permits depending on the impact of the type of use in question; "granny flats" (or "mother-in-law apartments") are increasingly addressed in this way
         (IV) Large minimum lot sizes, large setbacks, and minimum areas can contribute to problematic exclusionary housing patterns if used throughout a jurisdiction
         (V) Zoning does not supersede residential restrictive covenant requirements if they are in effect
         (VI) Mixed uses (including single family residential, multiple unit buildings, and neighborhood retail) featuring "clustered" development with intervening green space have increasingly been used and may be approved

through a system of “floating zones” (one type of which is often used for “planned unit developments”)

(VII) Note that additional review is required for new residential subdivision proposals (even if area is zoned within a residential district, review is required of proposed plat, arrangements for water, waste disposal, access, etc.); subdivision approval may also involve “exactions” issues raising “regulatory takings” questions as noted above

ii. Commercial/retail uses

(I) Different types of “commercial” districts are often used to distinguish between main downtown commercial areas, major shopping malls (often addressed through “floating zone” systems) and “neighborhood retail nodes” (suitable for small convenience stores)

(II) Care is needed to assure that comparable uses are treated in comparable ways within the same district and that distinctions between districts are warranted (e.g. drive-in uses as noted above)

(III) Regulation of signage is an important issue that can be addressed in definitions of districts as well as in separate sign ordinances (and first Amendment issues may arise as noted above)

(IV) Parking is an important issue generally addressed in connection with commercial uses

(V) Regulation of adult uses often requires special care in light of the first amendment issues noted above

iii. Office/institutional uses

(I) Different types of office/institutional use zones may be warranted depending on the anticipated characteristics (such as scale of facilities, height requirements, and traffic impacts)

(II) Institutional uses need to be carefully defined (for example there are differences in scale for small in-home day care operations as compared to larger-scale schools)

(III) Churches/synogogues/mosques may raise RILUPA issues as noted above

iv. Industrial

(I) Light industry (with few external impacts due to contained and noiseless operation) is often distinguished from “heavy” industry (which is more often situated on major traffic or rail corridors, and may have adverse impacts involving light, noise, or possible pollution, which may be regulated in separate parts of local ordinances)

(II) Although, historically, industrial districts were often “cumulative” in character (so that everything from heavy industry to commercial, multi-family residential, or single family residential uses were permitted), such approaches are less common in an era where industrial parks have generally not included residential uses

(III) Redevelopment of “brownfields” areas previously used by hazardous industries may require attention to state and federal environmental laws

v. Agriculture

(I) Zoning was originally focused on urbanized (or urbanizing) uses and agricultural uses were often located outside of city limits

(II) Agricultural districts may be either exclusive (agricultural plus limited residential use) or non-exclusive (allowing agriculture and anything else)
(III) Some jurisdictions are experimenting with systems for "accessory uses" in agricultural districts (e.g. wineries, farmers' markets, feed stores, etc.) with or without permit requirements
(IV) Agricultural districts are sometimes defined to require "large lots" in order to preserve large tracts of valuable farm land; inclusion in agricultural districts (with attendant active farming) may also qualify for use value taxation
(V) Large lot restrictions may raise regulatory takings issues unless justified

vi. Generally: uses and related requirements are embodied in table of uses

c. Key choices: Uses "as of right" or with more intensive review through "permit process"
   i. Certain uses, in certain districts, may be approved subject to administrative review
   ii. Other uses may be designated for approval only with a "special use" or "conditional use" permits
      (I) Basic choice may involve policy judgment whether elected legislative body or appointed body (e.g. board of adjustment) should review permit approvals
      (II) Scale of uses may warrant differing treatment under ordinances (e.g. large day care centers may be treated as conditional uses subject to legislative review in some residential districts, but be subject to special use permit review by appointed board in certain commercial districts)
      (III) Treatment of uses "as of right" or only with permit may significantly affect opportunities to impose conditions to assure mitigation of adverse impacts, and may also affect judicial review if challenged
d. Once districts (and related requirements) are defined, they must be placing on the physical map
e. "Overlay zones" may also be employed to deal with certain types of areas (e.g., "historic preservation district" or "resource conservation district" may be superimposed on certain residential or commercial districts, with additional associated additional requirements such as review by special advisory committees (historical preservation committee or regarding external appearance or review by special advisory committees (such as historical preservation or environmental protection committee)
f. "Floating zones" are districts that are defined in concept (such as "mixed use," "shopping center," "planned unit development" or "conditional zoning" districts) but not applied to the physical map until applicants seek rezoning

B. Second Round: Dealing with "special cases" involving exceptional hardship: Variances
   1. Function of variances: providing a safety valve to avoid takings
   2. Statutory provisions (standard zoning enabling act): board of adjustment is authorized "to authorize upon appeal in specific cases such variances from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in

unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done"

3. Case law in many jurisdictions specifies requirements for awarding variances
    a. Variances may be limited to area or dimensional requirements (such as setbacks and parking requirements) and in many jurisdictions may not be available to vary "use" requirements
    b. "Unnecessary hardship" is generally understood to cover situations in which no reasonable return is available unless the variance is allowed (e.g. topographical constraints preclude development unless parking requirements or setbacks are adjusted); some statutes reference "practical difficulties" as well as "unnecessary hardships" and in such jurisdictions the "no reasonable standard" may not be as stringently applied
    c. "Unnecessary hardship" standard is also generally seen to preclude awards of variances based on self-created hardships
    d. Generally, variances must address "unnecessary hardship" related to the land itself (rather than the inconvenience or desires and needs of individuals who own or occupy the land); there are some exceptions, for example, in accommodating those with disabilities since federal Fair Housing Act requires local governments to make reasonable accommodations for the benefit of disabled individuals (e.g. allowing noncompliance with a buffer or setback requirement in order to allow ramps for purposes of access) (see, e.g., Mastandrea v. North, 760 A.2d 677 (Md. 2000)). For a discussion of the possible implications of the Americans with Disabilities Act, see Randall Sampson, Pygmy Goats, Child Molesters, Fire Bugs and Child Molesters, Municipal Lawyer, Vol. 48, No. 3, p 6-9 (May-June 2007)
    e. Courts may find that hardship is not "unnecessary" if the property owner creates the hardship due to their own action (builds on the property in violation of zoning requirements, and then claims hardship based on expenditures associated with the construction); when someone purchases with knowledge of regulatory requirements and then seeks relief from compliance courts are more divided on the matter (if the land itself has topographic features that would render it unbuildable without a variance, for example, a limited variance on dimensional or parking requirements might be permitted)
    f. "So that the spirit of the ordinance shall be observed": must involve unique hardships rather than hardships that are experienced in common by many property owners in a district; and must not alter the essential character of the neighborhood
    e. "So that the spirit of the ordinance is observed and substantial justice is done" is often interpreted to allow a balancing of individual and community interests to determining whether a variance should be permitted in keeping with the public interest
    f. Administration of variance provisions can prove difficult because lay citizen boards are involved (so that they may be unsure how to apply stringent legal requirements), proponents of variances may submit evidence (and local governments may not have competing expert evidence available), and quasi-judicial proceedings must be observed
    g. Decisions to grant or deny variance applications should be carefully justified and documented with formal factual findings on key elements of legal tests

h. Variances run with the property and are not available simply to accord individual users more expansive development rights
i. Sometimes the term "variance" is confused with "special exceptions" (a term also used in the standard zoning enabling act); "special exception" is a phrase that references conditionally permitted uses (those eligible for "conditional" or "special" use permits), in contrast to "variances" (which reference legal waivers of standard requirements associated with particular zoning districts); because boards of adjustment in many jurisdictions have authority both to grant variances and to review applications for certain types of special use or conditional use permits, it is imperative for local government lawyers to clarify the differences for the lay people who are charged with administering these distinctive provisions of local land use ordinances

C. Third Round: Dealing with change
1. Transition issues
a. Nonconforming uses: when previously legal uses would no longer be legal following regulatory or map changes
i. Meaning: generally refers to uses and buildings that were once legally compliant, but are inconsistent with terms of later-applied land use regulation requirements (can be buildings that are nonconforming, conforming uses of nonconforming buildings, nonconforming uses of conforming buildings or nonconforming uses of land)
ii. Examples: can take the form of more limited setbacks, too little on-site parking or smaller lot size than required under a subsequent regulation, uses (for example quarries or gas stations) that might not be permitted at all once there has been a zoning map amendment or changes in the requirements
iii. Purpose of "nonconforming use" doctrine is to provide fair treatment of uses that had been legally established prior to changes and to avoid possible constitutional problems if abrupt discontinuation were required
iv. Key criteria to be deemed a nonconforming use: lawful existence in the first instance
v. Nonconforming uses can be continued, but within fairly strict constraints: they lose legal protection if there is a change in use, they generally cannot be expanded to more intensive or extended use, they cannot be reinstituted if use has been discontinued or abandoned, they cannot be rebuilt if substantially destroyed (most of these constraints are established by the regulations in the land use ordinance, and nuances are important)
vi. Typically, some level of repair is allowed, and in some jurisdictions it is permissible to modify a nonconforming use if bringing it more closely into compliance with the ordinance; some ordinances and courts permit limited "natural expansion" so that a use doesn't have to continue at the precise level of intensity as it enjoyed at the time that a change in permissible characteristics or uses first put it out of compliance
vii. "Amortization" is a term used when certain uses (e.g. junkyards and billboards) are given a grace period during which they are permitted to continue as legally allowed nonconforming uses, but at the end of which they must be phased out; the idea is that the grace period allows the basic

investment in the use to run its course; the rationale is that when new junkyards or billboards have been prohibited, it would provide an unfair monopoly to allow those that preexisted in a district to continue on indefinitely; amortization has historically been accepted in many states (with litigation centering on the appropriate duration for the amortization period); in recent years, billboard companies have sought legislation that in some instances would undercut prior practice

b. Vested rights: Pipeline issues
   i. Vested rights issues often arise when a development project is in the pipeline during the period in which changes in zoning or land use regulations are being contemplated; the question becomes whether the project is so far along that rights to proceed have "vested" (that is, become protected) so that the project can be brought to fruition under the regulations and requirements in effect at the time it crossed the line into "vested" status; such situations are more difficult from "nonconforming use" situations because the issue relates to projects that are still to some extent in an inchoate status (that is, not fully built)
   ii. Some states have statutes regarding vesting (a much cleaner approach to this problem), but others may focus on whether
   ‘ (A) the developer has made substantial expenditures (or undertaken substantial obligations or would have substantial harm if not allowed to continue), and
   (B) the developer's actions reflect good faith reliance on a validly issued building permit
   (C) (note that a building permit may be revoked if the above conditions are not satisfied)
   iii. Estoppel is a somewhat distinctive doctrine that does not necessarily require that a building permit has been issued
   (A) the developer must show that there has been a substantial change of position or substantial expenditures in good faith reliance
   (B) on action or omission by the government, and that
   (C) application of a new ordinance would be highly inequitable and failing to apply the new ordinance would not put the public health or safety at risk
   iv. Note that difficult situations arise if a permit has been issued illegally and the developer relies on the illegal permit (if the development is clearly illegal courts have said that illegal permits cannot bind the government; on the other hand there may be liability under tort law principles)
   v. "Development agreements" have increasingly been authorized in many states so as to allow governments and developers to "lock in" requirements applicable over relatively long-term, multi-phase, large-scale projects in order to provide assurances to the developer that government rules will not change mid-stream and often to secure exactions that the government believes appropriate in order to deal with the infrastructure needs associated with such development
c. Moratoria

i. Moratoria are generally short-term "time out" periods in which a local government seeks to study whether it needs to make changes in some aspect of its land use regulations and wants to protect against a run-up of projects entering the pipeline and trying to establish vested rights before changes may be made
ii. Permissible: The Supreme Court has upheld moratoria designed to allow a limited time for this kind of planning process (see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 525 U.S. 302 (2002)), but it is important to be sure that the duration of the moratorium is limited and the purposes are clearly to achieve the planning goals rather than to unfairly try to block proposals that are already well along in the pipeline before the "time out" is called

2. Granting conditional or special use permits (these terms are often used interchangeably or used to differentiate as to which reviewing entity is involved)
   a. Conditional or special uses are important parts of zoning schemes that allow certain uses to be designated as potentially appropriate within defined types of districts, but such uses may not proceed as legally authorized unless there has been notice and a public hearing, review of detailed facts and proposals as to use proposed for particular parcel, and authorization by the designated board (elected or appointed) upon findings that key criteria are satisfied and appropriate conditions are imposed
   b. Examples might include such uses as day care, hospice, or religious programs proposed for operation within in residential or commercial areas (there may be need to consider traffic, impact on neighbors, or safety considerations); such uses might be specified as "conditional" or "special" uses within the table of uses associated with a zoning ordinance, but could not be commenced unless there has been review and an appropriate permit awarded; the uses could then be undertaken but could only continue if in compliance with the governing permit
   c. Most jurisdictions use a "table of permitted uses" which displays cross-references uses and levels of permission required (administrative, special or conditional use permit, use as of right); for a good example see land use ordinance for town of Carrboro, North Carolina, http://townofcarrboro.org/PZI/luo.htm
   d. Note that there is risk of confusion between variances and special/conditional uses (also referred to as "special exceptions" in standard zoning enabling statutes)
      i. In both cases there is a variation from the norm
      ii. In some jurisdictions both variances and some special use permits are handled by the board of adjustment so that the forum for these two situations may be the same, adding to confusion
      iii. Nonetheless, the two conceptions are really very different
         (I) Variances are in effect a waiver of otherwise applicable requirements (usually dimensional rather than use requirements) based on a showing of substantial hardship (and other requirements) in order to avoid a taking
         (II) Special use/conditional uses are provisionally permissible in a particular zoning districts, but are actually authorized only after a permit review that involves a determination that standards are met and conditions are imposed as to a particular proposed use on a particular parcel of property

iv. Both variances and special/conditional use permits are authorized through the use of "quasi-judicial" procedures that involve careful fact-finding (in contrast to "rezoning" decisions where in most cases are "legislative" in character as discussed below

d. Standards typically incorporated in ordinances authorizing conditional uses include the following required findings:
   i. The application is complete (meaning that necessary detailed information has been provided to allow necessary review of pertinent aspects of proposed use on the parcel in question)
   ii. The proposed project meets requirements imposed by ordinance or case law (e.g., the project (I) does not materially endanger the public health or safety; (II) meets all required conditions and specifications; (III) would not substantially injure the value of adjoining property or is a public necessity; (IV) is in harmony with the area in which it is to be located and is in general conformity with the comprehensive plan and other adopted plans such as those governing thoroughfares, other aspects of the land use plan, historic area requirements and so forth)
   iii. Types of conditions typically imposed:
      (I) conditions may vary but typically relate to buffering from adjacent properties, lighting, plantings, parking, and other features that help assure that the project is compatible with adjacent uses
      (II) large scale projects may also involve the imposition of "exactions" (requirements of land dedication, easements, access, fees) as a condition of permit authorization; such exactions may at times raise "takings" questions as noted above
   iv. Many jurisdictions use standard worksheets for reviewing boards to make factual findings on each key issue so that the board is clear about the nature of the decision making process, creates a solid record in the event of an appeal to the courts, and helps elected boards appreciate the differences in the nature of their review between special/conditioning use permit authorization and rezoning (which is generally a legislative action as opposed to one that is "quasi-judicial" involving fact-finding that involves factual findings related to stated criteria

e. Review and burden of proof:
   i. generally, applicants for special/conditional use permits bear the burden of proving that they satisfy applicable standards
   ii. if that burden has been carried, many courts effectively shift the burden thereafter to the government to demonstrate why the permit has not been granted (working on the assumption that the elected board has previously determined that conditionally permissible uses are appropriate in a given district if the standards for compatibility have been satisfied)

3. Rezoning
   a. Rezoning generally involves a change in which zoning district is to be applied to a given parcel (either a change to a different standard use district or the application

of a “floating zoning” or “overlay district”); such changes are referred to as “map amendments”

b. Rezonings may either be sought
    i. by the property owner (who generally seeks to “upzone” by gaining approval for more intensive uses such as denser residential development or more intensive commercial use) or to gain permission to apply a floating zone (for example involving a planned unit development or shopping center) or
    ii. initiated by the government itself (generally over a larger area than a single parcel), in order to guide economic revitalization, “downzone” an area in order limit residential density or protect agricultural lands, or apply an overlay zone (for example to foster historic preservation)
c. Rezonings are in important ways different from approvals of special use permit applications
    i. Creation of zoning districts and initial mapping decisions are generally viewed as inherently legislative decisions involving policy judgments that are subject to deference on judicial review
    ii. Many jurisdictions likewise regard decisions to rezone by changing the zoning map as legislative in nature, and accordingly subject to deference, although there are exceptions as noted below
    iv. Rezoning typically results in a more substantial change than would be true with approval of a single conditional or special use permit, since applying a new district to a property authorizes all uses allowed as of right in the new district, and renders the property potentially useable for the full range of “conditionally permitted” uses if authorized following permit review
d. Procedural requirements for rezonings differ insofar as in many states the statutes provide that notice must be given to owners of neighboring properties and, if a procedurally valid protest is filed by a specified proportion of those property owners, the rezoning can only proceed if authorized by a supermajority vote of the legislative board (the details of protest petition statutes or related ordinances are important and should be carefully reviewed)
e. Courts have developed various doctrines to try to protect against arbitrariness in rezoning decisions, since there is a risk that action by an elected board to rezone a single parcel can be arbitrary
    i. “Spot zoning”
        (I) “Spot zoning” refers to instances in which an individual parcel or area is “upzoned” to create an island of more intensive use that stands in contrast to the districting applied to surrounding properties
        (II) It is not necessarily the case that rezoning a parcel in ways that contrast with the surrounding property is arbitrary, but courts appear to look more closely at such cases and tend to apply the label “spot zoning” as a means of tagging rezonings in these circumstances of which they disapprove
        (III) Rezonings such as these are reviewed to determine whether they are “in accordance with a comprehensive plan” (that is the underlying policy framework for the overall zoning ordinance, not a particular paper document)

(IV) Courts also may consider the reasonableness of the zoning change and consider not only the character of adjacent uses, but whether circumstances have changed, and whether the property is suitable for current and proposed future uses

ii. "Contract zoning"
   (I) "Contract zoning" is a term used by the courts when they conclude that a rezoning decision has failed to consider the full range of future uses that would be permitted when an area is rezoned (for example, when the legislative body has focused its attention only on a particular project proposal)
   (II) Once an area has been placed into a new zone, the initial applicant for rezoning may well sell to others (who would have the benefit of the full range of permissible uses and would not be constrained by the contours of the initial project presented at the time rezoning was requested)
   (III) Some jurisdictions have adopted "conditional use zoning" involving "floating zone" districts that allow a narrow range of uses (as of right or with approved conditional use permit review) as a means of regularizing policy choices that might otherwise be challenged on the grounds just summarized
   (IV)"Contract zoning" (like "spot zoning") is an epithet used to suggest that there has been inappropriate bargaining between the legislative board and the proponent of the rezoning; while some courts have tried to differentiate between "bilateral" bargaining and "unilateral" promises by the proponent of rezoning, the trend has been to determine whether rezoning in such instances complied with procedural requirements and is in keeping with the public interest and comprehensive plan
   (V) A growing number of jurisdictions have legislatively authorized the use of "development agreements" to provide more structured and transparent approaches to rezoning in instances in which bargaining may be needed in the public interest in order to deal with large scale, multi-phase projects with infrastructure impacts that may trigger government demands for exactions

iii. Rezoning as "quasi-judicial action"
   (I) Some courts have looked through the label of "rezoning" of a single or few parcels and concluded that decisions of this type are at heart not broad-scale legislative decisions involving broad policy judgments, but instead very targeted decisions regarding facts and circumstances that should be regarded as "quasi-judicial" in character
   (II) Landmark decision: Fasano v. Board of County Com'rs, 507 P.2d 23 (Ore. 1973) (in case involving application of a floating zone for mobile home parks to a 32 acre tract previously zoned for single-family residential use, the court required that the governing board bear the burden of proving that the rezoning was appropriate because the rezoning represented the application of a policy not the creation of a policy that might otherwise have been given deference as legislative in character)

iv. "Change or mistake" rule: some jurisdictions use a "change or mistake" rule as a standard to limit piecemeal rezoning of individual parcels

4. Initiatives and referenda
   a. Some jurisdictions allow public initiatives or referenda as a form of direct citizen action to address policy issues of various sorts
   b. Even in jurisdictions that allow such actions, procedural requirements must be satisfied, and courts may limit the use of these strategies to "legislative" actions (not "quasi-judicial" actions such as those involving issuance of conditional/special use permits)
   c. Due process issues may be raised in some instances in connection with use of referenda or initiatives with regard to land use decision-making. For example, litigation arose in Ohio when a non-profit organization sought site-plan approval to develop a multi-family affordable housing project. The city approved the proposal, but then a citizen group sought to take the matter to public referendum pursuant to provisions of the city charter. The city inspector declined to issue necessary permits while the referendum was pending. The referendum subsequently passed effectively denying the project the right to proceed. On review, the Ohio Supreme Court held that under the state constitution, referenda could only be used with regard to "legislative" matters not administrative, quasi-judicial decisions such as site-plan approvals, and invalidated the referendum. See Buckeye Community Hope Found. v. Cuyahoga Falls, 697 N.E. 2d 181 (Oh. 1998). In related litigation that proceeded through the federal courts, the non-profit organization sued the city, claiming that the referendum effort was in part motivated by racial prejudice in violation of the equal protection and due process clauses. The United States Supreme Court concluded that the city had proceeded in accordance with facially neutral criteria in carrying out the referendum, there was insufficient evident to link discriminatory statements by individual citizens to the city itself so that no equal protection violation had been proved, and that submission of the decision to referendum was not per se a violation of constitutional due process requirements whether the matter was viewed as legislative or administrative in character. See City of Cuyahoga Falls Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003).

D. Fourth Round: Dealing with Unhappiness (Appeals to the Courts)
   1. Judicial review of challenges to zoning and other forms of land use decisions is a topic that requires much more extensive treatment than is possible in the time and space available
   2. State statutes are very important in determining such matters as
      a. Exhaustion of administrative remedies required in order to perfect an appeal
      b. Time frames for seeking review
      c. Procedural nature of review (on the record in the nature of certiorari, or de novo?)
      d. Standing to seek review (proponent of requested permit versus neighbors, etc.)
      e. Standards for review (this topic has been referenced to some extent above, but specific standards regarding review of particular types of land use decisions vary from state to state)

3. Bear in mind that governments may also have to seek enforcement against violators of land use regulations
4. Litigation may also be brought in federal court claiming violation of civil rights, and there are important procedural issues there that are beyond the scope of this paper
5. Other state statutes may be implicated including open meetings laws, public records laws, conflicts of interest laws, ex parte contacts
6. Treatises listed below provide much more in-depth information

IV. Moving Beyond the Basics: Resources for the Future

A. Treatises Included in Lexis Data Base
1. A Practical Guide to Winning Land Use Approvals and Permits (PGWLAP)
2. Mandelker, Land Use Law (LNDLAW)
3. Eagles, Regulatory Takings (REGTAK)
4. Zoning and Land Use Controls (ZLANDU)
5. Zoning Law and Practice (ZONLP)

B. Treatises Included in Westlaw Data Base
1. Williams, American Land Planning Law (ALPLAW)
2. Rathkopf, Zoning and Planning Law (RLZPN)
3. McQuillin The Law of Municipal Corporations: Land Use and Zoning Practice (MUNICORP-ZONPL)
4. Land Use Practice & Forms (LANDUSELAW)
5. Land Use Liability (STLOCLAND)
6. Zoning and Planning Deskbook (ZPLDESK)
7. Environmental Regulation of Land Use (ENVRLNDU)
8. Law of Wetlands Regulation (LWETR)
9. Local Regulation of Adult Businesses (ADULTBUS)
10. Federal Land Use Law & Litigation (FEDLANDLAW)

C. Useful Journals
1. The Urban Lawyer (ABA Publication) (both Lexis and Westlaw)
2. Zoning and Planning Law Report (ZPLR) (Westlaw)
3. Planning and Environmental Law (PEL) (Westlaw)
4. Journal of Land Use & Environmental Law (both; Lexis lists as Florida State Journal of Land Use and Environmental Law)
5. Washington University Journal of Law and Policy (formerly Washington University Journal of Urban and Contemporary Law) (both)
6. Fordham Urban Law Journal (both)

D. Useful Hornbooks
1. Mandelker, *Land Use Law* (Lexis)
2. Jurgensmeyer & Roberts, *Land Use Planning and Development Regulation Law* (Thompson/West)
3. Burke, *Understanding the Law of Zoning and Land Use Controls* (Lexis)
4. Nolon & Salkin, *Land Use in a Nutshell* (Thomson/West)

D. Useful Websites
   1. Planning:
      a. American Planning Association (www.planning.org)
      b. Cyburbia (http://www.cyburbia.org)
      c. Planetizen: http://www.planetizen.com
      d. About Planning: http://www.aboutplanning.org
      e. Smart Growth On Line: (http://www.smartgrowth.org)
   2. Think Tanks
      a. Brookings Institution, Metropolitan Policy Program: http://www.brookings.edu/es/urban/urban.htm
      b. Urban Institute: http://www.urban.org
      c. Lincoln Institute of Land Policy: http://www.lincolninst.edu/index-high.asp
   3. Law
      a. American Bar Association, Section on State and Local Government Law (http://www.abanet.org/statelocal/home.html)
      b. Washington University Law School Professor Daniel Mandelker (http://law.wustl.edu/landuselaw)
      c. Compilation of constitutional law cases regarding land use regulation and exactions: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960765 (Prof. Garrett Power, University of Maryland School of Law)

      c. Pace Law School, Land Use Law Center (http://appserv.pace.edu/execute/page.cfm?doc_id=23239)
      d. Albany Law School, Government Law Center (http://www.albanylaw.edu/sub.php?navigation_id=668)
      e. Georgetown Environmental Law and Policy Institute: http://www.law.georgetown.edu/gelpi
   4. Blogs
      a. Professor Patricia Salkin's blog on land use law ("The Law of the Land"): http://lawoftheland.wordpress.com/
      b. Land Use Law Prof blog: http://lawprofessors.typepad.com/land_use
   5. Codes
      a. Smart Codes: http://www.smartcodecomplete.com/learn/downloads.html
      b. Form Based Codes: http://www.formbasedcodes.org
      c. Municipal Codes from various jurisdictions:
         i. Municode: http://www.municode.com
         ii. American Legal Publishing: http://www.amlegal.com/library
      v. General Code Publishers: http://www.generalcode.com/webcode2.html
      vi. Code Publishing, Inc.: http://www.codepublishing.com/elibrary.html
         iii. Seattle Public Library Links to Municipal Codes: http://www.spl.org/default.asp?pageID=collection_municodes

APPENDIX I. A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations: (Recommended by the U.S. Department of Commerce, 1926)

A STANDARD STATE ZONING ENABLING ACT
Section 1. Grant of Power.

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes.

Section 2. Districts.

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Section 3. Purposes in View.

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Section 4. Method of Procedure.

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

Section 5. Changes.

Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending — feet therefrom, or of those directly opposite thereto extending — feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such

municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

Section 6. Zoning Commission.

In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action, until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission.

Section 7. Board of Adjustment.

Such local legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

The board of adjustment shall consist of five members, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.