Land Use 101

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Your instructor

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A brief history of zoning

Historical Perspective: If zoning was the solution, what was the problem?

- Limitations on the common law's ability to enhance the quality of urban residential life
- Policymakers were increasingly interested in enhancing overall property value by restricting what can occur where

Historical Perspective

- As a means of achieving compatible land uses and planning communities, nuisance law had shortcomings

Basic policies behind nuisance law

- "an owner is at liberty to use his property as he sees fit," but "one must so use his property as not to injure that of another."
  - *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229 (N.Y. App. Div. 1932)
  - Whether a use constitutes a nuisance "depends upon *whether such use is reasonable under all the surrounding circumstances*." *Id.*

In a private nuisance suit, the plaintiff must prove . . .

- *Intentional* conduct, resulting in
- *Actual* interference with use and enjoyment, resulting in
- *Substantial* harm (usually including, at a minimum, diminution in property value)
- *Subject to the court's own balancing* of the utility of the conflicting interests

Disadvantages of a system based on private nuisance suits

- So much turns on the *court's* assessment of social value or suitability
- Common law does not provide clear standards for such decisions
- Uncertainty results
- Uncertainty can discourage investment decisions in property
- Some effects/benefits can be overlooked

The advent of zoning

- Before 1926, urbanized cities tried to adopt zoning, with mixed results in court
  - NYC ordinance requiring setbacks to allow light to reach the streets
  - Minneapolis zoning ordinances invalidated by Minn. Supreme Court
- This changed when SCOTUS upheld Euclid, Ohio's zoning ordinance in 1926

Who the stakeholders are in land use matters (and what influences them)

A grossly oversimplified (but useful) exercise

The project proposer

- Often the owner of a piece of property – but not always
  - They may just have a dream (and a right under a purchase agreement or option)
- Often playing the game with money that is not entirely their own
- By the time they file applications, they've likely spent tens of thousands getting there

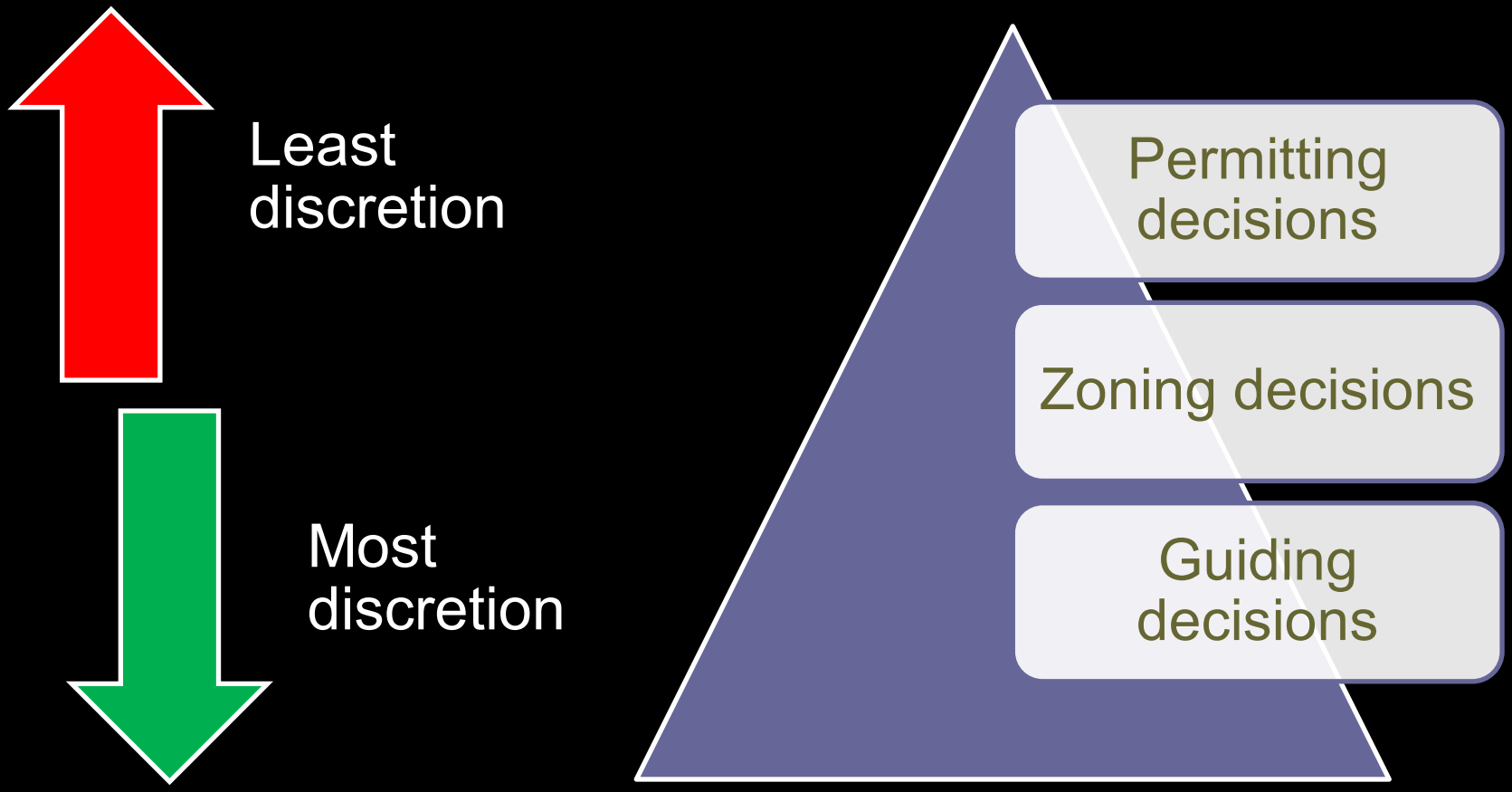
The project proposer, continued

- Simple but important dynamics
  - *Absent planning and zoning laws*, the project proposer would rarely pick the proposed location for a project that is the ideal place for it (from the community's perspective)
  - The "do nothing" option remains available to the project proposer, at least until they decide to give up that option to the city as part of the permit approval process or in negotiations

The elected body

- Roles
  - A very limited role of defining its own legal authority
  - A broad role when drafting, adopting and amending a comprehensive land use plan (CLUP)
  - A broad role in drafting, adopting and amending a *zoning ordinance* consistent with the CLUP
  - A relatively limited role in deciding whether to withhold discretionary permits necessary for proposed projects
  - No effective role in withholding ministerial permits for which the proposer has satisfied all criteria

Shown graphically: the pyramid of municipal discretion



The elected body, continued

- Simple but important dynamics
  - Once applications reach them, they rarely have the “do nothing” option
  - While elected officials have the power to approve or deny applications, they have no duty to find a better place for a project proposer to build his or her project
  - They do not have a duty to make the proposed project “work” financially, somewhere else

The Planning Commission

- Appointed volunteers with little ultimate power
- Their responsibilities
  - Hold hearings on applications
    - Review documents and plans
    - Listen to comments
    - Recommend
      - Approval or denial
      - Findings
      - Conditions or potential changes
  - Review and recommend potential ordinance changes

City Staff

- Front line responsibilities for –
  - Processing and commenting upon applications
  - Enforcement of laws against those who violate zoning laws and conditions to approval
- Additional responsibilities
  - Answering questions from citizens
  - Attracting new uses to the community that will further the elected body's policy goals

Tensions

Conflicts between goals and interests that land-use law attempts to resolve

Tensions: Property owner v. City

- CONTROL
  - What discretion does the City have to *dictate* how the property is developed and used?
    - Does the City have discretion to *simply deny* the proposed use?
    - If not, does it have discretion to *put significant conditions on* an approval?
    - When does it need the property owner's *consent* for a regulation, condition, or fee?

Tensions: Property owner v. City

- Answers
  - Under classic “Euclidean” zoning, “permitted uses” must be allowed as a matter of right
  - But mid-20th Century innovations like Planned Unit Development requirements can displace as-of-right zoning
  - For *conditional* uses, cities have limited discretion on both the grant/denial decision, and attaching conditions to approval

Tensions: Property owner v. City

- Other forms of leverage
  - How burdensome can the property owner make it for the City, if the City imposes burdensome restrictions
    - Litigation costs
    - Publicity campaigns
    - Political challenges
  - How powerful is the property owner's option to do nothing (or to use its property lawfully but differently)?

Tensions: Property owner v. City

- Using the property lawfully but differently: If a suburb controls growth by preventing rezoning of Ag-zoned land for residential subdivisions, owners have some unattractive *but lawful* alternatives



Tensions: Property Owner v. City

- Expense
  - Does the proposed project impose “externalities” upon the City or other citizens?
  - Can the City use the land-use application process to “internalize” those externalities?
    - Making new development pay the costs arising from new development
  - If further study is required, who foots the bill?

Tensions: Property Owner v. City

- Answers
  - Even conservative judges recognize that approval of a changed use can be conditioned on making the owner bear "roughly proportionate" costs of mitigating the impacts of the change
    - This trilogy: *Nollan* (1987), *Dolan* (1994) and *Koontz* (2013)

Tensions: Property Owner v. City

- Answers
  - Double-check your statutory authority when coming up with creative ways to make applicants bear certain costs
    - If the legislature didn't think of it first, your city may not have the power to implement the idea
    - Be especially careful about fees that serve the same function as assessments but without the statutory limits on assessments

Tensions: City *v. Other Citizens*

- What role in the application process does the law create for other citizens?
  - Do they have veto power?
  - If not, do they have *any* special rights?
  - Do they have a right *to be heard* before a final action?
  - If the City violates the law in approving, do others have standing to enforce that law?

Tensions: City *v. Other Citizens*

- Answers
  - Public hearings are usually required
  - *Aggrieved* parties have the power to sue
  - On whether property owners' consent can be required for changes, state laws vary
    - In Minnesota:
      - Minneapolis, St. Paul and Duluth residents can, by statute, veto one kind of rezoning
      - But for residents of every other city, ordinances are unlawful if they give neighbors the power to veto variances (through consent requirements)

Tensions: City *v. Court*

- DEFERENCE to the City's authority
  - On questions of fact
  - On questions of law
  - On questions of policy

Tensions: City v. Court

- DEFERENCE:
  - On ***factual*** matters, what standard of review is the court using?
    - De novo review (sitting in the shoes of the City's decision makers)?
    - Deference except if the decision is unreasonable?
    - Deference except if the decision is irrational?
    - No judicial review at all?

Tensions: City *v. Court*

- Answers
  - On questions of fact, in ordinary zoning cases courts give cities some deference
    - However, the findings must be supported by some evidence in the record
  - But some constitutional challenges can be different
    - Courts tend to exercise de novo review on facts that relate to whether property was taken

Tensions: City v. Court

- DEFERENCE:
  - On questions of ***legal interpretation***:
    - Is the City's interpretation of its own ordinance entitled to deference?
    - Does the property owner receive any "breaks" in the interpretation process?

Tensions: City *v. Court*

- Answers
  - On questions of legal interpretation, deference varies by state
    - States that treat zoning boards like agencies may defer more to a zoning board's interpretation
    - Minnesota: a city's interpretation of its own ordinance is only entitled to "some" deference, while courts are required to construe ambiguities in favor of the property owner and to consider the law's underlying policy

Tensions: City v. Court

- DEFERENCE:
  - On questions of ***policy*** (i.e. what is and is not in the public's best interests, and what goals a community should pursue and with what means):
    - When, if ever, is a court willing to overrule an elected body's policy choices?
      - When constitutional questions arise:
        - Public use
        - First Amendment cases

Tensions: City v. Court

- Answers
  - It depends on the standard of review, which often depends on the nature of the right at stake
    - When constitutional questions arise:
      - First Amendment cases
    - Strict scrutiny in constitutional cases reflects the opposite of deference – it embodies a *distrust* of discretion
  - Current trend: more judicial second-guessing of land-use policymaking

Tensions: City v. Court

- Does a court treat a zoning dispute like a typical lawsuit?
  - Is the court allowing the plaintiff to treat public officials like ordinary fact witnesses?
  - Is the court willing to speed up the process for the sake of any party – including the Plaintiff?

Tensions: City v. Court

- Answers
  - In ordinary judicial review, a modern court will *not* treat a land-use dispute like a typical lawsuit
    - No trials
    - On-the-record review is the rule, with some exceptions
    - Public officials are protected from depositions
    - The process is usually speedier than ordinary litigation
  - But making a *constitutional* case out of a land-use dispute can turn that all upside down

Zoning as a problem-solving tool

Benefits – and limitations – of using zoning powers to try to solve your city's problems

A simple scenario

- One main street business (selling lawn furniture) is making people mad by putting his merchandise on the sidewalk in front of his store during business hours
- The mayor asks – should we change our –
  - Zoning laws?
  - Criminal laws?
  - Business regulation laws?

Benefits of using zoning powers

- Nearly every local government has been delegated zoning powers by the state legislature, so you're less likely to have an *ultra vires* problem through zoning powers
- You don't have to create a new department or hire a new person, because your town is probably already staffed up for zoning enforcement

The big downside of using zoning powers

- Grandfathering, otherwise known as the "prior lawful nonconforming use" doctrine
  - By statute (in some states), ordinance (in others), and caselaw (in others), there is a general right to continue a use or structure that was lawful before the zoning law was changed
  - This means that the problem property on Main Street would have a general right to violate the new prohibition (if it's viewed as a "use")

Other downsides of using zoning powers instead of police powers

- Certain federal limitations – such as RLUIPA – apply to "land use regulations"
- Most zoning ordinances include provisions allowing someone to get a "variance" from a zoning regulation
  - Variances mean, as a practical matter, that a new law applies to everyone else, but not to the person given the variance

Solving problems by changing the rules

- Many people assume that the local law in place at the time of the application should govern the application.
  - But project proponents often accomplish their objectives by asking the city to change its laws
- Can that ever work both ways?
  - If the proposed use is legal, can the city more safely turn down the project if it first changes its laws?

Solving problems by changing the rules

- The correct answer often depends on how your state approaches “vested rights” law
- For example, the conventional wisdom in Minnesota is that, once the “sticks are up” on a building, the owner has a vested right to continue notwithstanding an intervening law
- But that also means that a local government that acts fast, can prohibit a potential future use before the property owner does enough to cause that use to become established
- In other words, it is possible to change the rules in the middle of the land use regulation game, in a way that either expands or limits property rights

Solving problems by changing the rules

- So how fast can your city move to change the rules to block a lawful but terrible use?
  - Pay attention to whether a statute requires planning commission review before the Council can consider it
  - Pay attention to whether your charter or code requires multiple readings of a new ordinance, especially if it cannot be waived
- This is often a race

Questions?