

ZONING AND REGULATORY POLICIES

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Summary

For centuries, municipal governments have specified what property owners can and cannot do with their land. The most recent group of laws is intended to manage growth and prevent inadvertent destruction of scenic vistas, natural habitats, unpolluted waterways, and other irreplaceable resources. New York City's 1916 Zoning Resolution and all zoning ordinances patterned on it established three land use categories: exclusively *residential*, *commercial* (in which residential uses are permitted), and *unlimited* (to which manufacturing is relegated). During the 1990s the rhetoric changed. as civic leaders, public officials, city planners, environmentalists, and developers advocated "sustainable development" and "smart growth." In the main, these terms refer to development that meets present needs without compromising the ability of future generations to meet their own needs. As planners develop ever more sophisticated regulatory devices they have persuaded public officials to enact a crazy quilt of statutes

and discretionary procedures that needlessly increases the price of housing, places of employment, and virtually everything else. For this reason the leadership of developing countries need to be particularly careful not to copy statutes that may be affordable in rich communities but are inappropriate to their situation and will retard growth. Similarly, advanced economies need to continually examine and eliminate obsolete, expensive-to-implement statutes that may have made sense years ago, add to the cost of development, and are no longer needed.

1. Introduction

For centuries, municipal governments have specified what property owners can and cannot do with their land. In 1212, London banned the construction of straw-roofed houses; in 1707 it required that roofs be built behind parapets. Paris instituted cornice height regulations in 1784. The earliest American land use regulations were scattered ordinances preventing property owners from harming other citizens or damaging their property. In 1672, for example, Boston enacted legislation that required structures to be built of such fireproof materials as brick and stone. Twenty years later, it restricted the location of slaughterhouses, stills, and tallow manufacturers. By the end of the nineteenth century every major city had similar land use statutes.

A second group of regulations was modeled on the comprehensive zoning resolution enacted by New York City in 1916. These regulations combined into a single ordinance: land use, height, bulk, siting, and (later) density requirements.

During the second half of the twentieth century, a third set of laws provided inducements for property owners to establish plazas, arcades, atriums, covered parking, day-care facilities, “affordable housing,” and other facilities that were thought to be in the community’s interest. This approach shifted the cost and responsibility for providing public space and facilities from government agencies to individual property owners.

The most recent group of laws is intended to manage growth and prevent inadvertent destruction of scenic vistas, natural habitats, unpolluted waterways, and other irreplaceable resources. These laws come in two varieties. One attempts to predetermine the location and sequence of development and avoid any unsuitable impact on the natural or human-made environment. The other avoids all planning and mandates specific review of the widest range of possible impacts that might be caused by proposed changes in land use.

The rationale behind each of these approaches is that common action can achieve results that cannot be produced by the market operating independently, or cannot be produced as inexpensively and efficiently, or cannot be produced quickly without such intervention. Economists call these situations “externalities.” They may be caused by individuals acting in their own perceived self-interest, but doing so out of ignorance, short-sightedness, or lack of concern for the rest of society. The demand for intervention may also arise from society’s need to provide some publicly accepted goal that can only be achieved by common action and cannot be withheld if some beneficiaries refuse to pay. But, whether the aim is to prevent the undesirable or to stimulate the beneficial, these are situations that individual citizens find difficult to deal with on their own and, therefore, require public intervention.

By the end of the twentieth century, land use regulation had ceased being purely a method for preventing property owners from causing harm to their neighbors and became one of the most popular techniques for improving cities and suburbs. Many communities that employed land use regulations to achieve a broad range of goals began to apply them in a manner that was so broad in scope, specific in content, and discretionary in application that they clashed with such other societal objectives as fairness, economy, and efficiency. For example, the attempt to achieve one objective, such as protection of a lovely natural landscape, might clash with another objective, such as lowering housing cost, and cause additional problems, such as discrimination against minority groups.

2. Private Land Use Regulation

Private citizens can protect themselves by using deed restrictions. Deed restrictions have serious drawbacks. Only those properties that have restrictive covenants get the benefits of regulation. The amount of land affected thus varies with the locality. Unfortunately, traffic regulation, water supply, pollution control, and many other city planning objectives cannot be accomplished unless the entire region is included.

Private regulatory action is often limited in its duration and effectiveness. Sometimes the rules may be trivial—too trivial for court action. But even if they were not, litigation still might not be practical. Enforcing covenants is difficult, costly, and time consuming. Furthermore, the only individuals with standing to sue are property owners affected by the same covenants.

Most localities stopped regulating land use solely by private agreement because the time, cost, and complexity of separately and individually making, amending, and rescinding these agreements proved to be too great. It seemed better to prescribe actions by legislation rather than by written agreement among the property owners affected, to make decisions by majority vote rather than by unanimous consent, and to have them enforced by administrative agencies rather than by the courts.

Houston, Texas is the only major American city that continues to regulate land use largely by private agreement. While Houston's deed restrictions are pervasive, they have been augmented by laws that establish minimum lot sizes for areas with and without sewers and minimum setbacks for buildings on local streets and major thoroughfares and by an ordinance that allows public enforcement of private covenants. The city's attempts to combine its land use legislation into a single comprehensive zoning ordinance were rejected by referendum in 1948, 1962, and 1993.

3. The Police Power

The power to govern implies the power to establish suitable regulations protecting the public order, health, safety, and morals of the community, or—in nineteenth-century parlance—the power to “police.” In America the extent to which localities can regulate land use, however, is determined by the degree to which this *police power* is circumscribed by the United States Constitution and specifically the Fifth and Fourteenth Amendments. The Fourteenth Amendment, approved in 1868, was intended to protect civil rights and included the prohibition against state legislation depriving

“any person of life, liberty, or property without due process of law.” Such language clouds the constitutionality of local property regulations because to some extent any restriction will deprive citizens of the use of their property.

The critical case in determining the point at which regulation becomes a “taking” in violation of the Fourteenth Amendment came in 1922 in *Pennsylvania Coal Company v. Mahon*, in which the Supreme Court found that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

The words “police power” cannot be found in the U.S. Constitution. It is among the many powers retained by the states. Nevertheless, because of a variety of other constitutionally established responsibilities, the federal government does regulate land use. For example, the Constitution gives the federal government the primary role in policing interstate commerce and thus responsibility for ensuring the navigability of the country’s waterways. Another example is the Federal Water Pollution Act of 1972 that required “zero discharge” after 1985 of any refuse into U.S. waterways other than liquids flowing from streets or sewers. It allowed the federal government to establish performance standards for new industries locating along navigable waterways. The Wild and Scenic Rivers Act of 1968, Clean Air Act of 1970, and Coastal Zone Management Act of 1972, are only a few of the many other federal laws with land use implications that flow from other constitutionally authorized activity.

The most potent device in federal land use regulation does not derive directly from the Constitution, but rather from federal expenditures. Any time the U.S. Congress appropriates funds it has the right to demand that the recipient comply with specified requirements that can include anything from preventing discrimination to complying with prevailing wage rates. The most important of the funding-derived statutes that affect land use, the National Environmental Policy Act of 1969 (NEPA), does so by requiring that every major federal action as well as every federal and federally funded project prepare detailed statements concerning any major effects they could have on the quality of the environment.

Local authority to “police” land use derives from state constitutions. City, county, and regional governments are considered to be “creatures” created by the states and are entitled to carry out only state-authorized functions. For this reason, when comprehensive zoning became the favored form of land use regulation, Secretary of Commerce Herbert Hoover appointed a committee to draft a model state enabling statute. The resulting Standard State Zoning Enabling Act was issued by the Government Printing Office in 1924. Within four years it “had been used wholly or largely in zoning laws enacted in some thirty states.”

Early zoning ordinances were narrow in scope. They dealt with simple questions of design and land use, ignoring such other issues as drainage, air and water quality, or noise. These first zoning laws could not have been sufficiently inclusive because the individuals who wrote them had neither the knowledge nor the experience to draft truly “comprehensive” regulations. Political opposition would have been so virulent that they never would have been adopted. Even if they had been adopted, no government agency could have hired the staff to enforce them because trained personnel did not exist.

Equally important, they only applied in governmental jurisdictions that had adopted such ordinances. As a result, vast stretches of territory remained unregulated.

For at least half a century, large segments of the planning profession continued to duck environmental issues. The staffs of most planning and zoning commissions did not include individuals trained to consider environmental issues.

The vacuum was filled by enacting environmental regulations that involved such issues as the siting of power plants, supervision of surface mining, protection of agricultural land, conservation of water resources, and the management of floodplains, wetlands, and shore lands.

These regulations usually applied to property outside city limits. Proponents of such regulation were asking for the same things that had been obtained decades earlier by urban reformers demanding zoning. They were just filling the jurisdictional void caused by the absence of city governments and traditional zoning.

California's coastal-zone management is probably the best known and surely one of the most far-reaching examples of such state land use regulation. During the 1970s, Florida, Oregon, Vermont, Maine, and Wyoming took the lead in adopting statewide land use programs, which, like California's coastal-zone management program, attempted to regulate areas of critical concern as well as projects that had major regional impact.

Virtually all this legislation was aimed at safeguarding the environment while simultaneously protecting such favored activities as farming, fishing, hunting, logging, and tourism. But, whether aimed at the California coastline or the Wyoming mountains, it was generated as much by unhappiness with the character of new development as by the desire to protect scarce resources that were particularly vulnerable to new development. (*Hawaii is the sole exception. There, land use regulation has always been a state function. A statewide comprehensive zoning ordinance was adopted in 1961.*)

4. Land Use Regulation Strategies

Early twentieth-century urban reformers, who fought for city zoning ordinances, and latter twentieth-century environmentalists, who fought for state and federal legislation to protect the countryside, share a common distaste for entirely market-driven land use decisions. They are not willing to wait till the damage is done; till the stream has been polluted, the traffic is in gridlock, or the landmark has been demolished.

Instead, they would augment the private market either with legislatively specified requirements (e.g. codes and ordinances) or with administrative review (i.e. discretionary action by a government agency). However, both the proponents of entirely market-driven land use and the proponents of government regulation are burdened with the same unrealistic expectation: that results inevitably will be satisfactory.

Land use decisions, unlike arithmetic problems, never have one and only one correct solution. Their success depends on the value systems of the people who examine them. Predominant among these values are the desire to protect private property, to encourage orderliness, and to ensure stability.

5. Comprehensive Zoning

Although there were a vast number of land use regulations already in effect by the beginning of the twentieth century, such regulation often is erroneously thought to start with the Zoning Resolution enacted by New York City in 1916. This law was indeed innovative. But it was not the attempt to assign specific land uses to different sections of the city that was new, it was the zoning resolution's comprehensive scope.



Figure 1: Continuous cornice line on Connecticut Avenue in Washington DC, USA, established by the height limit enacted by the U.S. Congress in 1899.

For the first time, a land use ordinance simultaneously specified permitted land use, building height, and building placement for the entire city. It did so by providing three bulky sets of *zoning maps*, which designated the regulations that applied to every block and lot within the city limits, and a *zoning text* that explained them.

The 1916 Resolution set off a chain reaction in the United States. Within five years of its passage, 76 communities had adopted similar statutes. By 1926 that number had grown to 564. Thus, when the Supreme Court validated the constitutionality of comprehensive zoning in the case of *Ambler Realty Company v. Village of Euclid*, the overwhelming majority of American cities had adopted comprehensive zoning patterned on the law New York had pioneered a decade earlier.

The same thing happened in 1961 when New York City completely revised its resolution. At that time it eliminated height limits, replacing them with more flexible bulk regulations, and added both density controls and incentives to encourage an

increase in the amount of public open space. Once again, the techniques pioneered in New York were taken up by cities across the country.

6. New York City Zoning Resolutions of 1916 and 1961

Although both of New York City's trail-blazing zoning resolutions tried to deal comprehensively with every section of the city, they did not emerge from a comprehensive planning process. Nor were they based on previously adopted, comprehensive city plans. (Some attempts at comprehensive planning had been initiated in 1914, when the city established a Committee on the City Plan. However, its report, *Development and Present Status of City Planning in New York City*, had only a tangential relationship to the 1916 Zoning Resolution. Nor did the 1961 ordinance evolve from a comprehensive plan. Although the city established a planning commission in 1938 and required it to produce a comprehensive plan, none was produced until 8 years after the 1961 Resolution had been enacted.) The 1916 resolution was enacted because a group of powerful business leaders and good-government reformers were unhappy with existing real estate activity and sought legislation to protect their property, ensure the orderly development of the districts they frequented, and establish stable land use patterns for those areas.

This coalition obtained approval of a zoning resolution that segregated land uses by district and limited the bulk and placement of the buildings that could contain those uses. They understood that property owners would still want the highest possible return on their investments. The new law was intended to prevent them from maximizing return by erecting buildings whose occupants would be "incompatible" with their neighbors, or by building bulky behemoths blocking sun and sky.

The new zoning resolution determined the future of every part of the city in which development was to take place. Given the speed with which the zoning resolution had been adopted and the complete lack of experience with such legislation, demands for revision were inevitable. By 1961, when the 1916 Resolution was supplanted, 2500 amendments had been approved. The pressure for change was seldom directed at market-driven real estate activity. It was aimed at the regulations themselves, which were thought to be inadequate, inflexible, and unnecessarily confusing.

The regulations themselves had been developed with little concern for construction practices or enforcement procedures. Buildings were required to fit specific envelopes without regard to site, use, structure, or cost of construction. Worst of all, consulting three sets of maps and numerous written regulations was cumbersome even for the city officials with the responsibility of interpreting and enforcing them.

This complexity was eliminated in 1961, when New York City replaced its Zoning Resolution, consolidating the three sets of maps into a single map system. Like the 1916 Resolution, it indicated use, bulk, and building placement requirements. To these were added density and parking regulations. The text was also simplified by presenting many of the requirements in tabular form. The most important revisions, however, were in content.

For the first time, the city had density controls that established the number of people likely to occupy every development site. Ostensibly, that density was related either to the existing capacity of infrastructure (i.e., water, sewer, streets, transit, etc.) and

community facilities (i.e., schools, libraries, parks, playgrounds, etc.) or to future capacity, once planned capital construction was completed. Since New York had yet to prepare a comprehensive city plan, this was more theory than fact.

Another major change was the replacement of height limits with flexible bulk regulations that, district by district, specified the maximum allowable floor area as a multiple of lot area. Each building's shape would now depend on the regulations for that zoning district. The new resolution also sought to provide additional space, light, and air for pedestrians, particularly in densely built-up areas, like lower Manhattan. In selected areas of the city, for every additional square foot of sidewalk or plaza, projects were entitled to increase the amount of floor area beyond what would otherwise be allowable.

As in 1916, New York's innovations were immediately copied. Cities everywhere adopted the single map system. They junked height limits, instead specifying a ratio of floor area to lot area. Some adopted the bonus for plazas and arcades. Many also went on to develop their own variants, thereby supplanting New York in pioneering regulatory techniques.

Cities include densely built-up areas and vacant land, highly prized districts that are not likely to change, and obsolete areas that certainly will be rebuilt, complex, heterogeneous neighborhoods, and districts whose consistency verges on the monotonous. Despite these variations, comprehensive zoning resolutions apply the same techniques to all sections of all cities, techniques that regulate allowable land uses, density, bulk, building placement, and open space.

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Biographical Sketch

Alexander Garvin has combined a career in urban planning and real estate with teaching, architecture, and public service. He is currently a commissioner on the New York City Planning Commission in the United States. From 1970 to 1980, he held prominent positions in New York City government, including Deputy Commissioner of Housing and Director of Comprehensive Planning. Garvin is Adjunct Professor of Urban Planning and Management at Yale University, where he has taught a wide range of subjects including "Introduction to the Study of the City," which for more than three decades has remained one of the most popular courses in Yale College. He is a member of the National Advisory Council of the Trust for Public Land and a fellow of the Urban Land Institute for whom he has organized and taught workshops on basic real estate development, the residential development process, and the role of design in real estate. He has a private consulting practice and is planning director for NYC2012, the committee to bring the Summer Olympics to New York in 2012. He is the author of the book, *The American City: What Works, What Doesn't*, winner of the 1996 American Institute of Architects book award in urbanism, and one of the principal authors of *Urban Parks and Open Space*, published in 1997 jointly by the Trust for Public Land and the Urban Land Institute. The American Planning Association recently released his latest book: *Parks, Recreation, and Open Space: A 21st Century Agenda*.