

Introduction to Zoning and Development Regulation

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Chapter 1

Fundamentals

Americans have always cherished personal freedom and independence. Anyone involved with zoning and development regulation very long has been confronted with the challenge, "This land has been in my family for generations. I'll do with it as I please. Government has no right telling me what I can and cannot do on my own land." Yet in spite of this widely held sentiment, zoning and other development ordinances are among the most common regulations adopted by local governments. Why do we so often choose to subject ourselves and our neighbors to this government regulation?

As North Carolina's woods, farms, and small villages of fifty years ago made way for cities, suburbs, industrial parks, and shopping malls, communities have had to adjust to the change. Citizens find themselves wrestling with difficult questions. They ask, Is this the kind of place I want to live, where my children will want to live? How can we encourage quality growth and development while keeping the things that make our community a special place? How can we embrace the positive aspects of change and avoid the negative aspects?

Some of these questions about growth and community transitions address the big picture: How can we provide safe, decent, and affordable housing for all citizens? How can we protect the quality of our air, our water, and natural resources? How can we make our cities attractive, efficient, and livable? Other questions are much more immediate and personal: What will the new strip development along the bypass do to my business downtown?

How will a fast food place on the corner affect my neighborhood? Can I put a mobile home out behind the home place so I can care for my ailing mother?

Because the way one person uses his or her land can so deeply affect neighbors and the broader community, it is not surprising that the role of government in addressing these questions has grown. Local governments undertake a variety of activities to address the questions noted above. They prepare plans and conduct studies to better understand the implications of such decisions. Citizens talk about the directions they want their community to take. And communities adopt regulations that limit what people can do with their land.

Land use regulations are often adopted to assure that one person does not use his or her land in a way that will harm neighbors or the community. These regulations, while adopted to benefit everyone by promoting the common good, do limit our personal choices. Finding the right balance of individual and community interests is a demanding job, one fraught with controversy, difficult choices, and a host of legal rules.

While local governments use many tools for land use planning and regulation, the principal tool for land use regulation in North Carolina and across the country is zoning. Other development regulations, such as subdivision regulations, are also frequently used. Increasingly a number of different development regulations are combined into a single ordinance, often termed a "unified development ordinance" or "land use management ordinance," or something similar. Almost all urban areas and many rural counties in the United States have adopted ordinances to regulate how land is used and developed.

Property owners in a residential neighborhood rely on local zoning ordinances to protect the economic value of their homes and the family character of their neighborhood. Owners of vacant land rely on zoning to determine what they can build and sell there, a decision that often has a substantial impact on the value of the land. Those financing home buyers and business development rely on zoning to provide stability and predictability in real estate markets.

Local governments also use development regulations to project what kinds of urban services, such as roads, water and sewer lines, and schools, will be needed, as well as when and where they need to be installed. The cost of providing these services affects the taxes everyone pays. Planning ahead by using these regulations can help keep costs and taxes under control.

Zoning can be used to separate incompatible uses of land, preserve the character of neighborhoods, protect natural resources, or promote economic development. Indeed, the emergence of zoning as the principal way we collectively deal with issues of land use and development led U.S. Supreme Court Justice Thurgood Marshall to note in a 1974 case that zoning “may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.”¹

Zoning Basics

The basic principle of zoning is simple: zoning creates a number of different districts, or “zones,” in a city or county, each of which sets specific rules on how the land in that district can be used. For example, a district set aside for residential land uses may exclude businesses and industries. A local governing body sets forth the specific rules and zone boundaries in the form of a zoning ordinance. Other aspects of development regulations address more specific topics, such as land subdivision.

Zoning ordinances, in addition to specifying land uses permitted in each zone, often also set detailed standards on how permitted uses may be carried out. For example, zoning ordinances often include instructions on “setbacks,” the minimum distances new buildings should be set back from the street, property lines, or a stream. Other kinds of requirements, or “development standards,” commonly found in zoning ordinances include the minimum number of parking spaces businesses must have for their customers, the maximum size of advertising signs, standard lot sizes or building heights, and landscaping requirements.

Virtually all zoning decisions are made by local governments, both in North Carolina and nationally. Technically, however, zoning power is a state government power that has been delegated to cities and counties. This is significant because it means that the state legislature passes laws that set the legal framework within which local governments adopt, amend, and implement their zoning and other development regulations. State statutes “enable” or authorize local governments to adopt these ordinances. While local governments decide whether to have zoning and what the content of the ordinance will be, the process they must follow in making those

decisions is set by state law. The state legislature imposes a number of special requirements on how these powers may be exercised. These statutes ensure that the ordinance adoption process includes broad public notice and discussion of the policies and standards proposed. The courts also impose legal limits, mostly by protecting the due process rights of persons affected by regulatory decisions.

Given the importance of development regulation and its impacts on landowners, neighbors, and the community, it is not surprising that a substantial body of law has developed detailing how zoning is carried out. The chapters that follow discuss these legal requirements and restrictions on development regulation.

Actors in the Process

A number of different local government bodies participate in the zoning and development regulation process. The city council or county board of commissioners, the planning board, and the board of adjustment all play key roles. In addition, local government planning and zoning staff provide essential support in zoning administration and enforcement. While some states provide for state agency oversight of some aspects of this work, in North Carolina these decisions are left to cities and counties without state or regional supervision.

North Carolina law gives each local government considerable flexibility in determining how to allocate regulatory decisions to various boards and agencies; the three boards described below commonly take charge of major aspects of development regulation. Smaller towns often combine several of these boards into a single board.

Governing board. The local governing board—the city council or county board of commissioners—controls local zoning and development regulation. This governing board makes final policy decisions. It decides whether or not to have zoning, determines what land uses are allowed in each zone, and sets the rules for development. The governing board amends the ordinance as needed and appoints the members of the other citizen boards involved. The governing board is responsible for adopting a zoning system that fits the needs of the individual community. Therefore the governing board should first understand and approve the policies that serve as the foundation for

development regulation and then conduct ongoing reviews of the system to ensure it is working as intended.

Planning board. The planning board or planning commission is a group of citizens who provide advice to the governing board on planning and regulatory issues. The planning board can be of any size (it must have at least three members) and may be constituted however the governing board deems appropriate. Many cities and counties seek out active community leaders for planning board service. Often they will seek to have various points of view and various neighborhoods represented. The governing board must appoint a planning board before adopting a zoning ordinance.

Cities and counties must refer all proposed zoning amendments to the planning board for review. Some governing boards also assign to their planning boards either advisory or final decision-making authority for special and conditional use permits. Planning boards may help with a number of other matters, such as development of a comprehensive plan, community and economic development programs, plat reviews under a subdivision ordinance, and the like. The governing board may also assign to the planning board any or all of the functions of a board of adjustment.

Board of adjustment. The board of adjustment is rarely involved in setting policies. Rather, this board interprets and applies the standards that have been placed in the zoning ordinance by the governing board. The governing board appoints at least five members to this board. Each member must have a set, three-year term. The board may also have alternate members who participate in the place of an absent member or a member who must not participate in an individual case due to a conflict of interest. The board of adjustment hears individual quasi-judicial cases, such as appeals; requests for special or conditional use permits; and variance petitions. The statutes require a four-fifths vote of the board of adjustment to issue a variance. Decisions of this board are appealed directly to the courts.

Table 1.1 illustrates a typical allocation of responsibilities among these groups.

Staff. City or county managers hire the staff members who administer development regulations. Staff in the planning department, inspections department, and manager's office provide support to the process, preparing drafts of ordinances, processing permits, enforcing ordinances, and keeping the records of the citizen boards. In a few instances in North Carolina, the planning staff is hired directly by the planning board. Local governments

Table 1.1 Local Government Planning and Development Regulation Functions

Agency	Primary role	Other possibilities
Governing board (city council, county board of commissioners)	Legislative decisions: adopts ordinances, amendments, policy statements, budgets; approves acquisitions; makes appointments to other bodies	May also serve as planning agency; may approve plats and special use permits
Planning board (planning board; planning commission; planning committee of governing board)	Advisory decisions: sponsors planning studies; recommends policies, advises governing board; coordinates public participation; must recommend initial zoning ordinance and comment on all amendments	May also serve as board of adjustment; may approve or review plats
Board of adjustment	Quasi-judicial decisions: hears zoning appeals, petitions for variances, and sometimes requests for special and conditional use permits	
Staff (planning department, inspections department, community development department)	Administrative decisions: issues permits, conducts technical studies, initiates enforcement; advises manager; provides staff support for elected and appointed boards	

can also secure staff assistance in zoning from private consultants, from the state Division of Community Assistance, or from regional planning agencies.

Others. There are a number of other entities that may play some role in development regulation. A historic preservation commission, for example, may review permits related to specially designated historic districts or landmarks. Locally appointed community appearance commissions and economic development commissions rarely work directly in regulatory implementation, but their activities may need to be closely coordinated with zoning and development regulation.

Types of Decisions

The legal rules for how zoning decisions are made vary significantly depending upon the type of zoning decision involved. Zoning decisions can be grouped into four categories: legislative, quasi-judicial, advisory, and admin-

istrative. Often the body charged with making the decision varies according to the type of decision involved. Governing boards usually make legislative decisions but can also make quasi-judicial decisions. Planning boards usually make advisory decisions but can also make quasi-judicial decisions. The rules that must be followed change depending on the type of decision involved, and these rules apply no matter which board is making the decision. Therefore, knowing the type of decision is vital to determining what decision-making process should be used.

Legislative decisions affect the entire community by setting the policies and standards included in ordinances. They include decisions to adopt, amend, or repeal zoning and other ordinances. The zoning map is a part of the zoning ordinance, so amending the map to rezone even an individual parcel of land is a legislative decision. Because legislative decisions have such an important impact on landowners, neighbors, and the public, state law mandates public notice and hearing requirements. Broad public discussion and careful deliberation are encouraged, and substantial discretion in these decisions is allowed. These decisions are made by the local governing board, which “legislates” or sets policy. This body is either the city council or county board of commissioners. The state legislature does not usually make or review these decisions (though the General Assembly has the legal authority to do so and on occasion does).

Quasi-judicial decisions involve the application of policies to individual situations. Examples include variances, special and conditional use permits (even if issued by the governing board), appeals, and interpretations. These decisions involve two key elements—the finding of facts regarding the specific proposal and the exercise of judgment and discretion in applying predetermined policies to the situation. Since quasi-judicial decisions do not involve setting new policies, the broad public notice requirements that exist for legislative decisions do not apply. However, the courts have imposed fairly strict procedural requirements on these decisions in order to protect the legal rights of the parties involved. Quasi-judicial decisions are most often assigned to boards of adjustment, appointed by the governing board. But some or all of these decisions can also be assigned to the planning board or to the governing board itself.

Advisory decisions are made by bodies that may recommend decisions on a matter but have no final decision-making authority over it. The most common example is the advice on rezoning petitions given by planning boards to the city council or board of county commissioners. Advisory review is

sometimes mandated by the state in order to secure additional public review of proposed zoning policy choices. There are no special rules set by state law or by the courts on how advisory decisions are made, so there is little further discussion of advisory decisions in this book. Such decisions can, however, provide thoughtful review and commentary on proposed policies. The absence of further discussion about them here reflects more the lack of special rules or restrictions placed on them than any lack of importance of advisory comments.

Administrative decisions (also known as “ministerial” decisions) are typically made by professional staff in various government departments. Such decisions cover the day-to-day nondiscretionary matters related to the implementation of ordinances, including issuing basic permits, interpreting the ordinance, and enforcing it. Administrative decisions involve the application of objective standards, such as the application of specified height limits and property line setbacks. Examples include issuing a certificate of zoning compliance for a permitted use or a notice of violation. These decisions may be appealed to the board of adjustment. If the standards to be applied require judgment, such as whether a proposed project is “compatible” with the surrounding neighborhood, the decision is quasi-judicial.

Hearings

Before a land use regulatory decision is made, it is often useful and sometimes legally necessary to gather information and public comment. This is particularly the case with zoning decisions. State law requires that a formal hearing be conducted prior to making either legislative or quasi-judicial zoning decisions. No hearings are required for advisory or administrative zoning decisions.

Since the forums for soliciting information for both legislative and quasi-judicial decisions are typically called “hearings,” many people mistakenly believe that hearings for the two kinds of decisions are conducted in the same way. This is not the case, though citizens and board members accustomed to one type of hearing may well not realize they have to follow an entirely different set of ground rules when attending a hearing on a different type of decision. Careful attention to the type of decision involved is necessary to prevent use of the wrong set of procedures.

Legislative hearings are required prior to making legislative decisions. The purpose of these hearings is to gather opinions on a proposed policy. They are formal mechanisms to secure citizens' comments on a specific proposal. These are often called public hearings. They must be conducted in a fair, orderly manner to allow citizen opinion to be expressed directly to those making policy decisions. Public hearings must be held by the governing board (and additional hearings may be held by the planning board or other advisory bodies). State law requires newspaper notice of all hearings on amendments to development regulations and also requires individual mailed and posted notice when a rezoning (a zoning map amendment) is involved. Speakers are not placed under oath and the board need not make formal findings at the conclusion of the hearing. Reasonable time limits can be placed on speakers and on the overall length of the hearing.

Evidentiary hearings are used in making quasi-judicial decisions. The purpose of these hearings is to gather evidence in deciding an individual case. They are more like court proceedings than the usual public hearing on a rezoning. These hearings are required for variances, special and conditional use permits, and appeals of the staff's formal ordinance interpretations. The purpose of an evidentiary hearing is to gather facts, not to solicit citizen opinions. In these hearings, witnesses present testimony under oath and are subject to cross-examination, exhibits are submitted, detailed minutes are kept, and a formal written decision is rendered by the body holding the hearing. These legal requirements apply to any board assigned the responsibility for making quasi-judicial decisions, be it the governing board, planning board, or board of adjustment.

Table 1.2 summarizes some of the key differences between legislative public hearings and evidentiary hearings.

In addition to these two types of formal hearings, many local governments often also conduct more informal public meetings to inform the public about a pending matter and solicit comments. Such forums are most often used for advisory decisions or as a prelude to a legislative hearing. They are not mandated by state law, and they may be conducted in any manner the city or county deems appropriate.

Table 1.2 Some Key Differences between Legislative and Quasi-Judicial Decisions

	Legislative	Quasi-judicial
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board
Notice of hearing	Newspaper notice, plus mailed and posted notice to owners and neighbors required for zoning map amendments (and actual notice to owner for third party rezonings)	Only mailed notice to parties and posting of site required unless ordinance mandates otherwise
Type of hearing	Legislative	Evidentiary
Speakers at hearing	Can reasonably limit number of speakers, time for speakers	Witnesses are presenting testimony and are limited to relevant evidence that is not repetitious
Evidence	None required; members free to discuss issue outside of hearing	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross-examination; no ex parte communication allowed
Findings	None required, but must adopt brief statement on rationale for zoning amendments	Written decision required that includes determination of contested facts and application to applicable standards
Voting	Simple majority, but three-fourths required if protest petition filed on city rezoning	Four-fifths majority for variances; simple majority otherwise
Standard for decision	Sets standard	Can only apply standards previously set in ordinance
Conditions	Not allowed (unless included within conditional zoning)	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge to rezoning; one year for others	30 days to file challenge
Conflict of interest	Requires direct, substantial financial interest to disqualify	Any financial interest or personal bias disqualifies
Creation of vested right	None	Yes, if substantial expenditures are made in reliance on it

Public Access to Meetings and Records

In North Carolina, as in many states, the law requires most public meetings and records be open to the public.

Whenever a majority of the members of any public board (and any committee of a board) meet to discuss business, advance notice of the meeting must be provided, full and accurate minutes of the meeting must be kept, and the public must be allowed to observe the meeting.² There are some very limited instances where a board is allowed to conduct closed sessions, such as when the board is getting advice from its attorney on a pending lawsuit or when the board is conducting a personnel evaluation of one of its staff members. It is rare that a land use regulatory matter will qualify for discussion in a closed session. Open public meetings are required for everything from a planning board workshop on a rezoning proposal to a board of adjustment deliberation on a variance petition. A meeting of professional staff members to discuss a regulatory matter is not required to be open to the public.

All documents, reports, and letters sent or received in the course of business are considered public records, including staff reports presented to the citizen boards, minutes of meetings, and staff logs of complaints received.³ These records must be made available for public inspection at reasonable times in the offices where the records are normally kept. A reasonable fee can be charged for copying these materials.

Notes

1. Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).
2. DAVID M. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA (7th ed. 2008).
3. DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS (2nd ed. 2009).