

RISK COMMUNIQUÉ

The Municipal Zoning Issue

What is Zoning?

Zoning is the division of a political subdivision into districts and the enforcement of regulations regarding the structural and architectural designs of buildings and their use in each district. The primary purpose of land use regulation is segregating uses that are thought to be incompatible. Generally, zoning regulations are authorized by police power rights that governments may exercise over real property. Zoning is usually controlled by local governments via their authority to adopt land use regulation but may be determined by state or national planning authorities. Through a permitting system, zoning is used to prevent unauthorized nonconforming use or new development, which harms existing residents or businesses.

Zoning on the local level is usually accomplished by enacting land use ordinances, or zoning codes, and may result in:

- *Regulation of various kinds of activities*
- *Density limits at which those activities can be permitted*
- *Specified maximum or minimum heights for buildings*
- *Regulations regarding the amount of space a building can occupy*
- *Placement specifications for buildings on lots*
- *Required proportions for certain types of space on lots*
- *Minimum parking space provisions*

Finally, zoning regulations should include procedures for granting variances (exceptions to zoning regulations).

Standard Zoning Format

A zoning ordinance consists of two parts: a map and text. The zoning map shows how the municipality is divided into different use districts. The districts common to most ordinances include various types or densities, which are designated as Residential, Commercial, Industrial or Agricultural uses and often various sub-categories within those classifications. The text or regulations explains the zoning rules that apply in each district and establishes the procedures for their administration and application.

Zoning Ordinances often include the following provisions:

1. Title/Authority/Purpose - This includes "statement of purpose," scope and policy or authority of the legislature to enact the ordinance.
2. Definitions - These list and identify specific words and phrases of substantial importance that are used in the ordinance (e.g., "shall" means that the action is mandatory).

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3. Zoning Regulations - These sections include the general regulations that apply to all zoning districts. It also includes the types of uses permitted in each zoning district according to the Use Schedule. Zoning regulations describe dimensional restrictions that control size and placement of structures on land, and this section may also include Special Use Permits, and regulations for Site Plans and Sub-Divisions.
4. Non-Conforming Uses - This portion should be included separately, because preexisting structures and uses need to be treated differently. Structures or uses that predate the applicable zoning regulation are generally allowed to continue until the use materially changes.
5. Administration/Enforcement - Here the duties and rules of the zoning enforcement officer are described and the review power is delegated to a local zoning board, which generally has the power to grant variances. Also detailed in this section are procedures that need to be followed when amending a zoning ordinance as well as rules for assessing fines or penalties.

Legal Pitfalls in Zoning

Legal challenges can be brought against a local government if the municipality does not follow the proper legal standards and honor certain state and federal constitutional protections. Four of particular concerns are:

Takings - the regulation of land that so affects the value of the property that it is diminished to nearly nothing. An example of this legal challenge would be the passing of an inclusionary zoning regulation in which more valuable development rights are diminished by supplementary development or use requirements created by regulation. One way that municipalities can take steps to address this challenge prior to passing the regulation is by providing developer incentives.

Equal Protection - the type of claim that asserts that zoning treats one parcel differently than a similar parcel with no apparent justification. An example might be a zoning ordinance that allows a large (in excess of a specific square footage) department store to sell a specific product but denies that opportunity to a smaller retailer selling the same product.

Substantive Due Process - alleges that the zoning does not advance a legitimate public purpose and that the regulation is "arbitrary and capricious." An example would be enacting a regulation that is purely in reaction to public pressure but that serves no legitimate public purpose.

Procedural Due Process - this results from a political subdivision failing to follow a statutorily prescribed process on a land use decision. It usually involves violating the rights of the involved parties to receive notice, be given an opportunity to be heard, or have a deliberate and thoughtful process by the decision maker.

In responding to these challenges, the courts have usually exercised judicial restraint, and challengers bear a heavy burden of proof.

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Three other zoning issues, however, raise specific concerns under federal law that a local government must be aware of when addressing local zoning issues,

Adult Business Ordinances—constitutional concerns regarding the regulation, licensing, imposition of alcohol bans, and zoning limitations on adult businesses are the subject of many expensive federal lawsuits. Obsolete zoning and adult business ordinances that have not been kept current with the many new requirements of recent court decisions in a particular jurisdiction cause many legal problems. If a municipality's ordinances involving adult businesses have not been reviewed lately, you should seek legal advice on determining whether they remain valid or are obsolete and vulnerable to legal attack.

Cellular Telephone Towers—there is a federal law protecting cellular telephone and other telecommunication providers against local ordinances and zoning decisions. Problems generally arise when such providers seek zoning approval for a new or expanded cellular tower. The federal law places specific procedural and evidentiary burdens on local governments seeking to limit telecommunication providers, something many local governments are unaware of and which leads to many lawsuits. A municipality must comply with these federal requirements or risk a lawsuit striking down any zoning decision involving limitations on telecommunication providers.

Religious land use—a federal statute protects religious organizations from local land use regulations that place an undue burden on the organization's ability to exercise its religion. Zoning regulations that have a specific focus on religious organizations—such as restrictions on the location of places of worship or requirements for variances specific to religious land uses—are very vulnerable to legal attack under the federal law.

What Can Municipalities Do to Avoid Legal Challenges?

To minimize the risk of legal challenges, the municipality should:

- Always make sure that it abides by all applicable state and local laws, regulations and procedures that establish and govern land use in the state or municipality.
- Contract land use experts to conduct adequate research, study and inquiry prior to any changes or decisions regarding land use or zoning changes.
- Provide an open process environment or forum in which there are adequate opportunities for all parties to be heard.
- Consider regulatory flexibility and continued evaluation of the applicable zoning laws and regulations when addressing land use issues.

** The information in this Communiqué is intended to be only a general multi-jurisdiction discussion of zoning issues, and it does not take into consideration different laws and court rulings specific to a particular state or jurisdiction. Each state or jurisdiction may have statutes or court decisions that can significantly impact zoning issues and you should seek advice specific to your state before making any zoning decisions or adopting any zoning ordinances.

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