



## Land Use – A Zoning Primer

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Zoning is the practice of dividing land into separate districts with different uses<sup>1</sup> with the goal of promoting the general welfare and protecting property values by establishing the most appropriate use of land. Ohio cities derive their power to enact zoning and land use regulations from the Ohio Constitution, Article XVIII, Section 3<sup>2</sup>. In *Village of Euclid, Ohio v. Ambler Realty Co.*, a famous case that hits close to home, the constitutionality of comprehensive zoning as an exercise of local police power was established. Zoning is the most powerful tool for municipalities to employ for land use planning, allowing them to shape defined districts within their boundaries (often in conformance with a master plan) and to build thriving communities where people want to live and work.

### Use and Area Regulations

Within each use district (*i.e.*, single-family residential, multi-family, commercial, and industrial), municipalities establish regulations related to occupancy limits, setbacks, minimum lot size, maximum building height, maximum floor area, signage, and minimum parking—all requirements a project must meet to be considered “legal.”

### Overlay Districts

Zoning overlay districts are an interesting subcategory of zoning not to be overlooked. An area with primary zoning (residential/commercial/industrial) may also have a zoning overlay district that imposes additional regulations on the development of a particular area. For example, the City of Cleveland has established various overlay districts, including the Design Review District (“designed to enhance the visual

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image of downtown Cleveland” and to “preserve Cleveland’s architectural assets”)<sup>3</sup> the Urban Core Overlay District (“established to foster the development of dense, vibrant, mixed-use neighborhoods that encourage a quality pedestrian experience”),<sup>4</sup> and the Urban Form Overlay District (“established to foster a high level of walkability and design quality for Cleveland’s urban streets”).<sup>5</sup> Indeed, overlay districts help foster cohesive, responsible, and desirable development, but generally require a developer to jump through hoops and seek additional approvals to get a building permit and move forward with its project.

### Variances

So what happens when a project doesn’t fit the specific land use regulations? For non-conforming uses (*i.e.*, uses that do not technically fit within the perimeters of the city’s zoning code for a certain area), a “use variance” or “special use permit” can be sought. A use variance typically involves an appeal to the local zoning board of appeals (aka “BZA”). A use variance requires an applicant to show that the enforcement of the use designation will cause “unnecessary hardship” or that it is not economically feasible to restrict the property to a permitted use under its present zoning classification due to characteristics unique to the property.<sup>6</sup>

“Area variances”, or deviations from the various dimensional requirements, are subject to a lesser standard. In granting an area variance, the BZA must find that denial would result in a “practical difficulty” for the applicant. The Ohio Supreme Court, in *Duncan v. Middlefield*<sup>7</sup> established the specific criteria to be considered when determining whether a practical difficulty exists.

### Playing Politics

Local politics can play a major role in whether a developer’s project will be approved by the city under its zoning code. Good practice for developers and lawyers is to put on their “lobbyist hats” and engage stakeholders to tout the communal benefits of their project. Developers and lawyers should also listen to how the project might be improved.

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Building consensus is key. Support from the business community — trade associations, chambers of commerce, and the community’s economic development department — will help promote the benefits of your project and is often the convincing factor. All politicians love to say they’ve created jobs. Developers should anticipate engaging these groups along with the local administration before filing any zoning request to better understand the local attitudes and political landscape and shape an appropriate strategy. The importance of law directors cannot be overstated in this process. Experience shows that they are typically the conduit to stakeholders and can give developers practical advice on who to approach and how to approach them.

If the project is in an area with neighboring commercial and residential uses, organize a community meeting with those who live near the project site. Community meetings can help the developers develop a game plan to vet the project on a grassroots level and find ways to ward off criticisms at the outset. Generally the city council is the best means to do this, and reaching out early with this request will make a positive impression on them and those who are likely to show up at BZA hearings and other public meetings.

### Exactions

Developers should expect that officials or the public will seek to “exact” (as that term is used in the legal sense under *Nollan and Dolan*)<sup>8</sup> certain conditions in connection with any project, such as an impact fee. That’s not meant to be critical — many times favorable ideas come out of such requests, and lawyers should counsel clients to listen and do what they can, particularly with the public. But there is a line, and public officials can cross it. Under *Nollan and Dolan*, there must be a “nexus” and “rough proportionality” between the government’s demand and the effects of the proposed land use, and conditions that do not meet this standard will be deemed a “taking” in violation of the Fifth Amendment.

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### Administrative Appeals

It may come as no surprise that city officials don't always follow these standards, or, in some cases, their own zoning code when a project is unpopular.<sup>9</sup> If this happens, an applicant may seek judicial review of the administrative decision via Ohio Revised Code Chapter 2506. Under judicial review, the common pleas court weighs the evidence in the record and whatever additional evidence is admitted pursuant to the Ohio Revised Code to determine whether a preponderance of the reliable, probative, and substantial evidence exists to support the agency's decision.<sup>10</sup>

### Constitutional Challenges

Applicants can also challenge the constitutionality of the zoning code either by an administrative appeal under Revised Code Chapter 2506 or by a declaratory judgment action pursuant to Revised Code Chapter 2721.<sup>11</sup> Constitutional attacks can be brought under both the United States and Ohio Constitutions in either federal or state courts and encompass claims related to procedural and substantive due process, equal protection, takings, privacy rights, and the First Amendment.

It is important for developers and their counsel to take a comprehensive view of the various zoning issues at play in any given project. Ignoring the legal standards and, perhaps more importantly, the political landscape can prove fatal. Crafting a sound strategy at the outset and engaging the government early in the process will help ensure a successful development.

<sup>1</sup> *Zoning*, Black's Law Dictionary, 10<sup>th</sup> Edition (2014).

<sup>2</sup> *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 225 (1994). Counties and townships derive their zoning power from the Revised Code—their zoning authority is much narrower, and cannot deviate from statute. See R.C. 303.02 and 519.02.

<sup>3</sup> Section 341.01, *Purpose of Chapter 341, Design Review*, City of Cleveland.

<sup>4</sup> Section 348.05, *Urban Core Overlay*, City of Cleveland.

<sup>5</sup> Section 348.01, *Urban Form Overlay*, City of Cleveland.

<sup>6</sup> *Hulligan v. Bd. of Zoning Appeals*, 59 Ohio App.2d 105, 109, 392 N.E.2d 1272, (1978) quoting *Fox v. Johnson*, 28 Ohio App.2d 175, 181, 275 N.E.2d 637 (1971).

<sup>7</sup> *Duncan v. Village of Middlefield*, 23 Ohio St.3d 83, 86, 491 N.E.2d 692 (1986).

<sup>8</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>9</sup> E.g., *Speedway, L.L.C. v. Berea Planning Comm.*, 8th Dist. No. 99341, 2013–Ohio–3433.

<sup>10</sup> R.C. 2506.04; R.C. 2506.03; *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979).

<sup>11</sup> *Karches v. Cincinnati*, 38 Ohio St.3d 12, 15 (1988); *Driscoll v. Austintown Associates*, 42 Ohio St.2d 263 (1975).