FEATURE

Rethinking Conventional Zoning

by Joel S. Russell, Esq.

Zoning has been controversial ever since it was first introduced in the early part of this century. As recently as last fall, the City of Houston repudiated zoning for the third time. While it is generally portrayed by planners as an essential tool for managing growth and development, it continually seems to fall short of its promise.

Conventional zoning has been criticized from a variety of viewpoints, ranging from defenders of property rights to protectors of the environment to minority rights advocates. Most recently, it has come in for a good deal of blame for making it difficult to build affordable housing and for despoiling the landscape with sprawl subdivisions and strip commercial development.

The purpose of this article is to suggest how zoning and land use regulation can be improved through increased flexibility. This flexibility must be accompanied by sound community-based criteria for case-by-case land use decision making. The use of non-confrontational dispute resolution processes can also enhance its effectiveness.

As a practitioner in the field of zoning, I am struck by three curious and related phenomena:

1. Many of the most important land use decisions are made by zoning amendment or variance, rather than by following what the zoning prescribes, often because something that makes sense was not considered when the zoning was adopted.

2. Many otherwise law-abiding citizens violate zoning on a regular basis with impunity, conducting innocuous activities that bother nobody. In particular, officials are often reluctant to enforce what appear to be arbitrary restrictions on small-scale businesses.

WHAT CAN BE SAID FOR A SYSTEM THAT IS RIDDLED WITH EXCEPTIONS, IS IGNORED WITH IMPUNITY, AND, WHEN FOLLOWED TO THE LETTER, FREQUENTLY PRODUCES RESULTS THAT NO ONE LIKES?

3. In rapidly developing communities, most zoning ordinances promote sprawl and strip development, which is usually in direct conflict with comprehensive plan goals of keeping development in existing centers and preserving rural landscapes. Indeed, most zoning ordinances would have prevented communities from building their own downtowns (which usually predate zoning).

What can be said for a system that is riddled with exceptions, is ignored with impunity, and, when followed to the letter, frequently produces results that no one likes?

THE CHALLENGE TO CONVENTIONAL ZONING

Whenever a problem is found in a zoning code, the usual response is to tinker with the code to solve that specific problem. A new proposed use requires a new section, sometimes with its own special procedure, such as an office park, industrial park, or "planned unit development." The provisions of the code proliferate, getting ever more specific and detailed. The code book gets thicker, more impenetrable. Each layering of a new set of provisions introduces inconsistencies with other sections and new problems that were not foreseen, which in turn lead to more layers of "clarifying" rules, exceptions, and exceptions to the exceptions. Rarely do people step back and ask whether the basic concepts of zoning in the code make sense in today's world.

Zoning is based upon the assumption that in order for uses to be compatible, they must be segregated by type (residential, industrial, commercial). This ignores the possibility that my residential neighbor playing his drum set at 1:00 a.m. is more incompatible with my sleeping than the quiet office next door, which closed at 5:00 p.m. The sterile segregation of uses is a relic of industrialization, originally designed to separate glue factories from apartments. It prevents the harmonious mixing of uses that historically have characterized every lively village, city, or rural area. It also requires that virtually every errand be done in the car.

USING PERFORMANCE ZONING TO "MIX" USES

What makes uses compatible or incompatible is not their classification, but their impact: how much noise, dust, traffic, pollution, water consumption, smoke, odor, etc., they inflict upon their neighbors and the surrounding area. A houseful of hot-rodding teenagers would have more impact than an office with the same number of accountants. Impact usually has more to do with the size of buildings, the number of people coming and going, and the design, hours, and operation of an activity than with the use classification.

The basic concept of regulating land by impact rather than by use has come to be known as "performance

zoning." There are many variations of this concept, some relying heavily upon sophisticated technical measurements of impact, others upon quantifiable factors such as percentages of impermeable surface and open space, water consumption, and sewage discharge. These technical approaches have been devised to assure uniformity, consistency, and objectivity in zoning administration. However, not every community can afford (or needs) the technology necessary for sophisticated measurements.

Technical impact criteria also do not necessarily tell you whether a proposed development is consistent with the community's land use goals, as reflected in its comprehensive plan. To develop a performance zoning system that only focuses on quantifiable criteria can result in land use decisions that fail to achieve what the community actually wants. For example, if the community's comprehensive plan favors preserving the commercial viability of its existing downtown and discouraging strip development, then uses that would contribute to downtown vitality should not be allowed to locate on the strip. In contrast, uses that cater primarily to the automobile and that would be destructive of the downtown fabric, such as large gas stations and car dealers, would belong on a highway.

The challenge is to devise a system that regulates uses by their impact, rather than by category or type, while simultaneously implementing community land use goals that favor mixed use settlement centers.

Dividing a jurisdiction into districts by use classification is still the cornerstone of conventional zoning. This is changing slowly, as more uses are allowed by special permit (conditional uses), allowing flexibility governed by specific criteria. Also, many developments are now approved through various types of planned unit development (PUD) provisions, which act as exceptions to a community's basic zoning classification scheme. A "new" form of PUD, "traditional neighborhood development," is designed to create old-fashioned downtowns and mixed-use neighborhoods. It relies heavily on design criteria to produce mixed-use places with attractive streets and public spaces that encourage social interaction.

If land use regulation is to create places that have life and vitality and build constructively on the past, it should recognize that diversity and mixing of uses are essential to healthy communities. It is no accident that land is continually rezoned to reflect the unforeseen needs of different users. This continual process of making "swiss cheese" of the comprehensive plan and zoning ordinance is an inevitable consequence of their rigidity.

Many commentators lament the fact that zoning is so often changed through case-by-case rezoning or variances. The late Richard Babcock called this "the mockery of ad-hockery." The problem with "ad hoc" rezoning is not that changes are made in response to individual requests, but that the criteria for those changes are often irrational and "political," rather than based upon considerations of community benefit. This occurs because the framework itself treats rezonings as a kind of aberration, a departure from "The Plan." But The Plan itself may have arbitrarily foreclosed the best planning and design options (such as traditional downtown mixed-use development).

The notion that any individual, committee, or board can legislate the "best" uses for an entire city or even a single district assumes a kind of knowledge that cannot exist. Yet this is just what our existing approach to zoning assumes, when it sets out *in advance* an exhaustive listing of which uses can or cannot go in which districts.

As a planning commissioner or zoning board member you must surely have felt frustrated, at least on occasion, to know that a use which made sense at a specific site -- and was compatible with your community's overall planning goals -- could not be allowed because the zoning district regulations simply did not permit the use anywhere in the particular zoning district. In fact, as I mentioned before, it is outcomes like this which have led communities to classify a growing number of uses as conditional or specially permitted uses.

State Enabling Laws

It is important to be aware that state zoning enabling laws may limit a community's ability to adopt more flexible zoning. Many enabling laws require the division of a municipality into districts with specified allowable uses. Some of the flexible land use laws I have drafted in New York State have had to rely upon New York's Municipal Home Rule Law, which allows localities to supersede state enabling laws under certain circumstances.

In addition to complying with the requirements of enabling statutes, it is important to draft flexible zoning provisions that avoid conferring excessive discretion upon an administrative board or commission. Conventional zoning does this by establishing rigid categories with defined terminology. However, flexible provisions can lessen the possibility of excessive discretion by requiring written findings based upon applying clear criteria to a factual record. New York's Adirondack Park Agency relies upon very broad criteria in making individual land use permitting decisions, but its decisions have survived court challenge because they are well-reasoned, based upon statutory criteria, and supported by a factual record.

FLEXIBLE ZONING: HOW IT WORKS

The concepts underlying flexible zoning are not radical or new. They are commonly used in the special permit process, in which a planning commission or zoning board decides whether or not to permit a specific proposed use in a particular location by applying performance criteria. In

conventional practice, these special permit criteria are often vague, giving rise to the possibility of arbitrary decisions without clear guidelines or a sound factual basis. *[Editor's Note: See "Special Permits: What They Are & How They Are Used," in Issue 3 of the Journal].*

In working with small towns and villages dissatisfied with conventional zoning, I have been developing a system that combines use flexibility with performance criteria. Each permit application is judged based upon specific compatibility, environmental, and design criteria, including consistency with the goals of the comprehensive plan. See Sidebar, "State Enabling Laws."

There are three tiers of review: "by right," minor project, and major project: (1) By-right uses are those that normally can go anywhere without bothering anyone, such as single-family residential and small-scale home occupations. These uses might require a permit only in areas reserved for large-scale commercial or industrial development. (2) Minor projects are those that are relatively small in scale (defined differently from community to community), based upon square footage, number of units, and/or number of employees. These projects require board review of only a simple site plan. (3) Major projects are subject to a much more thorough review and more stringent criteria, based upon their probable impact.

This three-tiered approach addresses the problem that sometimes arises when a small business has to run the same regulatory gauntlet as a very large one. The greater financial resources of the large company often make it more likely to succeed in gaining an approval, even though the community would prefer to attract the smaller-scale, lower-impact development.

Compatibility criteria based on scale, impact, and consistency with a community-based comprehensive plan will often rule out uses in particular locations. For example, a large factory would fail to satisfy compatibility criteria in the heart of a residential neighborhood. However, a small machine shop would be able to go into an underutilized barn on a farm. A retail drugstore might only be allowed downtown. A tire dealership would be allowed along a state highway, but not in a location where it would block an important mountain view.

BECAUSE OF TRADITIONAL ZONING'S INFLEXIBILITY, MAJOR LAND USE DECISIONS CURRENTLY ARE OFTEN MADE BY THE GOVERNING BODY OF THE MUNICIPALITY THROUGH CASE-BY-CASE REZONING.

Many uses would be allowed subject to conditions on their size, operation, layout, or design. These decisions would arise from the application of rational planning criteria, not from strict use categories or zoning districts.

AVOIDING ARBITRARY DECISIONS

While flexible regulations rely upon case-by-case decision making, such decisions need not be whimsical or arbitrary. Rather, each decision results from analyzing a specific situation and applying clear criteria approved by the community. Decisions about major projects should always be accompanied by detailed written findings that show in a reasoned way how the criteria were applied to the specific facts of the case.

As mentioned at the start of this article, because of traditional zoning's inflexibility, major land use decisions currently are often made by the governing body of the municipality through case-by-case rezoning. Since a rezoning is a legislative action, it usually does not need to conform to any specific criteria, other than the general requirement of consistency with the comprehensive plan (rezoning in a manner inconsistent with the plan can be invalidated as unlawful "spot zoning," though many plans are vague or contain internal contradictions making it difficult to prove inconsistency).

In contrast, the criteria applied in a flexible zoning framework help ensure that the reviewing board does not act in an arbitrary manner. Permits must be based upon a factual record and the application of specific criteria, supported by written findings. By building appropriate criteria into an administrative (as opposed to legislative) decision forum, the flexible system is less arbitrary than ad hoc rezoning.

It is also arguably less arbitrary than conventional zoning. We often forget that the initial zoning of a community may involve hundreds of largely arbitrary decisions about what districts to have, where to draw the boundary lines between them, and what uses to allow or prohibit. Many districts are simply based on what is already there, whether it is single-family housing, apartments, or specific types of existing businesses. Meanwhile, vacant land and land considered to be "underutilized" is usually zoned according to what planners and politicians consider to be desirable at the time, often with little community input (though property owners may exert influence in their own self-interest). Subsequent rezonings are usually done in response to ad hoc requests for uses that either did not exist or were not contemplated originally.

As I suggested earlier, it is impossible to legislate appropriate specific uses site-by-site all at once throughout a municipality. This is because appropriateness depends not upon what you call the use, but upon the individual characteristics of each site, its surroundings, the community's overall goals for the area, and the specific scale, impact, and operation of

the use. As places evolve over time, uses that were never anticipated may become central to an area's growth and attractiveness.

A flexible land use decision process avoids arbitrariness by deciding what is appropriate site-by-site through the application of criteria based upon both localized impact and shared community goals. This allows consideration of the unique factual circumstances of each case in an open public forum, at the time that development is proposed. This approach is less arbitrary than the mechanical application of a series of rules that are frequently rigid, arbitrary, and/or obsolete. *See Sidebar "Moving Away From Conventional Zoning."*

MEDIATION

Many zoning disputes are really disputes between neighbors that have little consequence for the community as a whole. For example, the parking of a business truck in a residential driveway may give rise to such a dispute. Some towns try to adopt specific hard and fast zoning rules for every small problem of this type, adding to the bulk of the zoning code, but never quite solving the problems. In such situations it may be more appropriate to have a framework to help neighbors work things out themselves, with the assistance of a neutral third party. Mediation centers have been springing up throughout the country to help resolve these types of disputes.

A mediation procedure is an essential component of a flexible zoning framework, because it enables the parties to design their own solutions on a case-by-case basis. Settlements must be brought to the reviewing board for approval to assure consistency with the criteria in the land use law. On larger projects, collaborative problem-solving usually produces far better results than the adversarial, winner-take-all battle-ground that so many planning board meetings have become. *[Editor's Note: For more on the use of mediation see Edith Netter's "Land Use Mediation: A New Way to Resolve Conflicts," in Issue 3 of the Journal].*

SUMMING UP:

Flexible land use regulation represents a return to traditions of applying community values and common sense to develop communities that maintain diversity and enhance their sense of place. It recognizes that compatibility results not from homogeneity, but from the harmonious orchestration of differences. This requires flexibility, judgment, and the application of clear standards. Allowing this kind of flexibility will enable cities, villages, and towns once again to evolve as they have historically, thawed from the deep freeze of rigid and arbitrary zoning classifications, guided by planning criteria that reflect the community's desires. ◆

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Moving Away From Conventional Zoning

Communities that have conventional zoning systems in place, with rigid segregation of uses, can start moving towards more flexible zoning by expanding the number of uses that are allowed by special permit (or by right) -- and by strengthening their special permit criteria and adding design guidelines. This is already happening in many communities.

Communities need to decide where mixed-uses are most appropriate and politically acceptable. This is most likely to occur in older downtowns that have traditionally had a mixed-use fabric, and in rural areas that have traditionally had mixed uses and little or no regulation. Older, economically depressed urban neighborhoods and undeveloped land along the urban fringe are also good candidates for this approach. It is most difficult to apply this kind of zoning in areas with existing suburban residential subdivisions whose identity seems to depend upon homogeneity.

Editor's Note: Even areas where single-family residential developments predominate may be amenable to at least limited mixed-use zones. For example, here in Burlington, Vermont, the planning department is looking into the possibility of redeveloping older shopping centers as mixed-use zones -- or, as we call them, "neighborhood activity centers." The goal is to allow for a mix of commercial and residential uses. One of these would be in the City's "New North End," where single-family subdivisions are the norm.