Advanced Issues in Zoning & Land Use Regulation

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Part I: The Basics of Planning & Zoning

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**Basic Planning Documents**

- The Planning Enabling Act of 1994
  - Consolidated separate county & municipal planning laws into a single comprehensive act
- The Comprehensive Plan
  - The long term plan for the overall community
- Zoning Ordinance
  - The day to day regulatory document controlling individual parcels in the community

**Framework for a “Planning” House**

- Home Rule Act
- 1994 Planning Act
- Court Decisions

**Home Rule Authority**

The Home Rule Act sets out local powers to regulate for Health, Safety, and General Welfare (via ordinances and regulations) which may govern aspects of private property use

- Found in Chapter 9 of Title 4 of the SC Code

**The 1994 Act**

- Key legislation for Local Planning, Zoning and Land Development Regulations
- Establishes baseline requirements for adoption and updates to covered activities
- Provides Scope and Manner of enforcement
<table>
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<tr>
<th>Court Decisions</th>
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<tr>
<td>Judicial rulings and orders by State and Federal Courts can expand, affirm or</td>
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<td>restrict local planning authority</td>
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<th>A Brief Note on Preemption</th>
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<tr>
<td>Federal or State lawmaking has superiority over Counties and Cities</td>
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<td>In South Carolina, local ordinances and rules must be consistent with State law</td>
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<th>Brief overview of the 1994 Act</th>
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<td>Planning Commission</td>
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<td>Comprehensive Plan</td>
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<td>Zoning Ordinance</td>
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<td>Board of Zoning Appeals</td>
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<td>Board of Architectural Review</td>
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<td>Land Development Regulations</td>
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<td>Hodgepodge of Post 94 additions</td>
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<th>Local Pace for Planning</th>
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<tr>
<td>Local Land Use Planning is not mandated</td>
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<td>Counties can set their own pace and take on as much or as little planning as desired</td>
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The Comprehensive Plan

- Community development and growth blueprint for the future
- Must be in place before zoning or land development regulations
- Built on the Elements

The Zoning Ordinance

- Widely used tool for land use regulation implementation
- Several zoning related goals and techniques are set out in the 1994 Act
- After adoption of the Land Use Element of the comprehensive plan, the County Council may adopt a zoning ordinance

Land Development Regulations

- Rules setting out fundamental requirements for the development of land administered by the Planning Commission
- Covers the changing of land characteristics through redevelopment, construction, subdivision into parcels
- Historically termed “Subdivision Regulations”

Planning Program Roles

- County Council
- Planning Commission
- Board of Zoning Appeals
- Staff
Local Separation of Powers

- Legislative
  - County Council
- Administrative
  - Planning Boards & Commissions
- Quasi-Judicial

County Council

- Legislative Branch – Lawmaking Source
- Appointive and Budgetary Authority

Planning Commission

- Advisory and Quasi-Judicial
  - Comprehensive Plan
  - Zoning Ordinance
  - Land Development Regulations
  - Capital Improvement Plans and Other Tasks
  - Public Facilities Review
    - (location/character/extent)

Board of Zoning Appeals (BZA)

- Serves as a type of “judicial branch” for zoning administration as a hearing review board for enforcement disputes and relief
  - Variances
  - Special Exceptions
  - Administrative Appeals to the Board
The Planning Process

The Purpose of Zoning
- The essential tool to carry out the land use element of comp plan
- Ensures that development fits in with existing and future needs of the community, while promoting public health, safety, and order.

Zoning is a legislative function that cannot be delegated.

Planning & Zoning Foundations
- Relationship to Comp Plan
  - Zoning regulations must follow the comprehensive plan.
  - Certain elements of the comprehensive plan must be adopted before zoning ordinance can be adopted:
    - Community facilities
    - Land use

Planning Staff
- Staff – Key Resource for Administration and Leadership
- Having a good grasp and utilization of the different roles is a key factor for successful local planning programs
Boards of Zoning Appeals
The powers of the BZA are limited to three specific areas:
- **Administrative review**: review/appeal of decisions of Zoning Administrator
- **Granting of Variances**: variances allow uses when strict application creates undue hardship
- **Permit Special Exceptions**: uses based on conditions outlined in the zoning ordinance

Zoning Administration
- The zoning ordinance must designate an administrative official to administer and enforce the ordinance - usually called the zoning administrator.
  - One employee may administer several codes.
  - The zoning ordinance should specify the duties of the zoning administrator.

Zoning Enforcement
- Enforcement is normally the zoning administrator’s day-to-day responsibility.
- Four statutory enforcement mechanisms
  - **Stop Orders**: orders unpermitted work to stop
  - **Injunctions & Mandamus**: injunctions are actions to prohibit or halt contrary land uses, mandamus is a legal action to compel an official to undertake a ministerial duty

Zoning Enforcement
- Four statutory enforcement mechanisms
  - **Ordinance summons**: code enforcement officers issue a summons and authorizes the magistrate to impose fines and costs on a violator
  - **Warrants**: An arrest warrant may be obtained for a zoning ordinance violation, just as for any other ordinance violation. Generally a last resort enforcement tool.
Part II: Legal Issues in Zoning & Land Use Regulation

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Zoning and Land Use Classification

- *Village of Euclid v Amber Realty* considered the grandfather of land use case law.
- Upheld the constitutional authority of local government to enact classification system of land use.

Eminent Domain

- Eminent Domain is the legal authority granted to government entities, including counties by state and federal constitutions.
- Allows for the use of private property for public purposes with the payment of “just compensation”

Eminent Domain

- What are the federal and state limits on Eminent Domain?
  - SC Constitutional limits – economic development use prohibited
- What is “just compensation” & how can it be calculated?

Takings

- Takings: The unconstitutional use of private property without just compensation.
- Physical takings:
  - Nolan vs. California CC; Dolan v. Tigard
- Regulatory takings:
  - Penn Central and Lucas v. SC Coastal Commission
Physical Takings

- Physical takings: Government physically takes all or part of private property
  - *Nolan vs. California CC* – public beach access
  - *Dolan v. Tigard* – public bike path
- Regulatory takings: Regulation burdens owners use/value
  - *Penn Central* and *Lucas v. SC Coastal Commission*

Penn Central v. City of New York

- Partial Regulatory taking
  - *Preservation law* restricted owner from building tower above the Grand Central Terminal
  - *Court imposed the following test to apply when regulation did not completely eliminate the value/use of property*
    - The economic impact on the owner
    - The degree of interference with investment-backed expectations
    - The character

Lucas v. SC Coastal Commission

- After a series of storms caused beach erosion, the State imposed a new oceanfront set back line.
- Lucas’ lot in Wild Dunes could not be built on after the new regulation.
- US Supreme Court held that rule deprived Lucas of “all economically viable use of his land”
  - A rather high burden

Assessing a Takings Claim

- Determine the character of the government action
- What is the economic impact produced by the government action
- What is the degree of interference with “investment-backed expectations” of the owner
South Carolina Cases - Roads

- Hilton Head Automotive v. SCDOT (2011): road modifications prohibiting left turns onto property was not considered a taking. Other mode of ingress/egress were available
- SCDOT vs. M&T Enterprises: leased property subject to condemnation

South Carolina Cases – Due Process

- Harbit v. City of Charleston: (2009) An owner was not deprived of due process when the city denied a rezoning for commercial use, even though other properties in the area had been rezoned. City based its decision on studies of similar commercial conversions and the nature of the area.
- SCDOT vs. M&T Enterprises: leased property subject to condemnation

Advanced Issues of Note

- Moratoria
- Pending Ordinance Doctrine
- Initiative and Referendum
- H. 4445
- Adequate Public Facilities Ordinances
- Spot Zoning

Development Moratorium

- Development will return – be ready
- To what degree can local government say no to private development
- Upheld by U.S. Supreme Court
- S.C. Supreme Court might find zoning/land development moratorium must be by ordinance
- Watch out for vested rights accruing to previously issued permits
Pending Ordinance Doctrine

- Denial of permit application allowed if repugnant to pending/later enacted ordinance
- Recognized by the SC Supreme Court
- Main Point – must be legally pending when Council resolved to consider new or amended scheme and advertised to public its intention to hold a public hearing
  - Sherman v. Reavis, 273 S.C. 542, 257 S.E.2d 735 (1979)

Initiative & Referendum

- Home Rule provides for ballot vote on petition driven ordinance measures
- But, S.C. Supreme Court has ruled initiative and referendum method inapplicable for making zoning changes
- Advisory referendum is a possible mechanism

H.4445 – Permit Revival

- Otherwise known as the “Vampire Clause”
- S.C. General Assembly passed 2010 law bringing expired permits back to life
- Double check time frames to see if expired permit, plat, approval, etc. falls into window

Adequate Public Facilities

- Exactions are development approvals conditioned on provision/contribution
- Supreme Court has held that Constitution requires “essential nexus” between local objectives and exaction of public facilities
- Impact Fees must comply with State law and are tied to Capital Improvement Plans
Spot Zoning

- A process of singling out a small parcel of land for use classification totally different from that of surrounding area.
- Frequently called out, but not easily found
  - Key case -- *Knowles v. City of Aiken* (1991)

More Spot Zoning

- Difficult to define – single parcel benefiting owner to detriment of adjacent properties

- Review by Court will likely examine:
  - Corrections w/ little harm designed to fix old inappropriate zoning
  - Adherence to Comp Plan Land Use Element
Part III: Selected Legal Issues for Planning & Zoning Officials

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Comprehensive Plans and Planned Development Districts – Two Cases

- Mikell v. Charleston County (2009) and Sinkler v. Charleston County (2010)
- S.C. Supreme Court chimes in on two Charleston County zoning disputes with landmark decisions that have statewide impact

Mikell v. Charleston County

- Started with a request to rezone several parcels on Edisto Island with PD zone which was ultimately approved by County
- Comprehensive Plan and Zoning/LDR Ordinance provisions contained fairly explicit guidelines for Agricultural Zoning Districts

Mikell in Court

- Court action filed by neighbors to have PD zoning of parcels invalidated
- The Master ruled for Plaintiff neighbors – declared ordinance in express conflict with the Zoning Ordinance and Comp Plan
- The Court of Appeals reversed – upheld County Council’s adoption of PD rezone using “fairly debatable” standard

Mikell in the Supreme Court

- The S.C. Supreme Court reversed the Court of Appeals
- Ruled that the PD ordinance was invalid due to authorizing maximum densities in excess of those specifically outlined by the ZLDR and established in Comp Plan
Mikell’s Fallout

- Elevated Comp Plan language to a new level beyond mere guidance
- Watch for explicit mirroring between Comp Plan elements and Zoning and Development Ordinances
- Erosion of long time “fairly debatable” standard

Sinkler v. Charleston County

- Another case involving PD zoning – third phase of a Wadmalaw Island subdivision
- Existing agricultural zoning for area called for 3 acre lots and Comp Plan promoted ag and single family uses in the area
- PD rezone preserved several hundred acres and allowed a reduced lot size

Sinkler in Court

- Again, like Mikell, action filed by neighbors to have PD zoning invalidated
- Circuit Court declared Council’s PD approval violated the 1994 Planning Act and Charleston’s zoning ordinance
- Court of Appeals reversed the lower court based on 1994 Act’s broad grant of zoning power and that PD rezone fell within County authority

Sinkler in the Supreme Court

- Again, the S.C. Supreme Court reversed the Court of Appeals
- This time the court found the PD ordinance in Sinkler violated the 1994 Act’s definition of a “Planned Development District” by approving single use
- The court also rejected the concept of broad authority in S.C. Code 6-29-720(C) as a law source allowing the deviation
Sinkler’s Fallout

- No Single Use PD zoning
- S.C. Code Section 6-29-720(C) is not a savings clause

Legal Issues for Planning & Zoning Staff/Officials

- The Official Map takes precedent
- You should always check the map against the text before advising parties of a zoning classification
- Two recent cases
  - Carolina Chloride v. Richland County
  - Quail Hill v. Richland County

Carolina Chloride

- CC purchased property and was told by Zoning Administrator that zoning was heavy-industrial (based on tax map)
- The Zoning Map showed zoning was actually rural
- CC was told to submit a rezoning application – CC waited six months
- A subsequent sale of the property fell a part

Carolina Chloride

- Circuit Court directed verdict for the county
- Court of Appeals reversed and further held that the SC Tort Claims Act did not apply.
**Carolina Chloride**

- The SC Supreme Court held:
  - A mistaken zoning designation by staff did not give rise to an inverse condemnation.
  - Property was never legally zoned industrial
  - The Official Zoning Map designation is the guiding designation for zoning classification

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**Carolina Chloride Fallout**

- Developers should always check the County’s official Zoning Map before making taking any action
- The Duty of Care doesn’t require that staff be right – they just have to exercise the care a reasonable man would in similar circumstances

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**Quail Hill**

- In 2002 Quail Hill purchased 73 acres to develop a manufactured home community
- QH advised that Tax Assessors office listed zoning as RU – allowing the development
- In 2003 Planning Commission approved the development
- In late 2004 a review of the Zoning Map found actual zone was RS-1

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**Quail Hill**

- November 17, 2004 Zoning Administrator issued a stop order
- QH applied for a zoning change, which was denied
- QH filed suit against the County
Quail Hill

- The Circuit Court granted the county’s motion for Summary Judgment
- The Court of Appeals affirmed the issue of inverse condemnation. Reversed on negligent misrepresentation

Quail Hill at the Supreme Court

- The SC Supreme Court held:
  - The Official Map governed: Developer could not rely on Tax Assessor’s Office or Planning Services staff
  - Developer had the means of determining the correctness of statements made by county staff. They could have reviewed the map themselves.

Quail Hill Fallout

- Like Carolina Chloride, Quail Hill suggests that Developers have a duty to verify unofficial statements made by staff.
- The Official Map is the governing document related to zoning & use
- ??? What about a private individual???

Legal Issues for Planning & Zoning Staff/Officials

- Legal Liability
  - SCTCA: generally provides personal immunity for official actions
  - Duty of care is reasonable man standard
  - 1983 Actions: unlike the state statutes – federal tort law (42 USC §1983 ) can impose personal liability for actions by government employees
  - Both revolve around the issue of scope and duty
Legal Issues for Planning & Zoning
Staff/Officials

- Freedom of Information Act – Records and Open Meetings
  - S.C. Code §30-4-10

- S.C. Ethics Act – Rules of Conduct
  - S.C. Code §8-13-700