

# **Advanced Issues in Zoning & Land Use Regulation**

Mark Tollison,  
Greenville County Attorney

John DeLoache  
SCAC Staff Attorney

# **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

## **Court Decisions**

- Judicial rulings and orders by State and Federal Courts can expand, affirm or restrict local planning authority

## **A Brief Note on Preemption**

- Federal or State lawmaking has superiority over Counties and Cities
- In South Carolina, local ordinances and rules must be consistent with State law

## **Brief overview of the 1994 Act**

- Planning Commission
- Comprehensive Plan
- Zoning Ordinance
- Board of Zoning Appeals
- Board of Architectural Review
- Land Development Regulations
- Hodgepodge of Post 94 additions

## **Local Pace for Planning**

- Local Land Use Planning is not mandated
- Counties can set their own pace and take on as much or as little planning as desired
- Local ordinances and regulations must be consistent with 1994 Act

## **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

## 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

## The Planning Process

- Elements of the Comp Plan
  - Population
  - Economic
  - Natural Resources
  - Cultural Resources
  - Community Facilities
  - Housing
  - Land Use
  - Transportation
  - Priority Investment

## 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

## 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 allows 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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SCAC Staff Attorney

## **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?
  - *Kelo vs. City of New London, Ct.*
  - 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-back 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

## **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

## **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

## **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