

# ZONING ORDINANCES, SUBDIVISION/LAND DEVELOPMENT ORDINANCES, AND DESIGN REVIEWS

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## THE STANDARD STATE ZONING ENABLING ACT

1. The U.S. Department of Commerce published this document in 1922. It was merely a model law that – when passed by a particular state – would enable that state’s municipalities to enact zoning ordinances.<sup>1</sup>
2. In one form or another, nearly every state passed this model law. Thus, the Standard State Zoning Enabling Act (SSZEA) was extraordinarily influential in the development of modern zoning.<sup>2</sup>
3. The SSZEA was drafted by a group of planning lawyers headed by Edward Basset – who had also directed the commission that developed the first modern zoning ordinance for New York City (see below).<sup>3</sup>
4. The SSZEA required that zoning ordinances be in “accordance with a comprehensive plan.” However, there was no definition of what a comprehensive plan should be.<sup>4</sup>
5. The SSZEA provided for the creation of a “zoning commission,” but it noted that “where a city planning commission already exists, it may be appointed as the zoning commission.” The zoning commission’s role was to “recommend the boundaries of the various original districts... and hold public hearings thereon.”<sup>5</sup>
6. The SSZEA also provided for the creation of a quasi-judicial “zoning board,” which was to hear appeals from the actions of administrative officers and interpret unclear provisions of the ordinance itself. A modern “zoning board” is most often called a “board of zoning adjustments,” a “board of zoning appeals,” and – in Pennsylvania – a “zoning hearing board.” In many states (including Pennsylvania), this board also decides on requests for variances<sup>6</sup> and special exceptions.<sup>7</sup>

## THE STANDARD CITY PLANNING ENABLING ACT<sup>8</sup>

1. The U.S. Department of Commerce published this document in 1928. Like the SSZEA, the Standard City Planning Enabling Act (SCPEA) was merely a model law that – when passed by a particular state – would enable that state’s municipalities to do the following.
  - Create a planning commission, and endow this body with the power to review and approve all proposed public improvements and subdivisions
  - Create a regional planning commission

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<sup>1</sup> So, Frank S., and Judith Getzels, eds. *The Practice of Local Government Planning* (i.e., the “Green Bible”). Washington DC: the International City/County Management Association, 1988. Page 252.

<sup>2</sup> So et al. Eds. (1988) Page 252.

<sup>3</sup> So et al. Eds. (1988) Page 252.

<sup>4</sup> So et al. Eds. (1988) Page 64.

<sup>5</sup> So et al. Eds. (1988) Page 256.

<sup>6</sup> Note that in most states (including Pennsylvania), financial hardships do not – in and of themselves – justify the granting of a variance.

<sup>7</sup> So et al. Eds. (1988) Page 257.

<sup>8</sup> So et al. Eds. (1988) Pages 37 and 64.

- Develop a “master” (i.e., comprehensive) community plan
  - Develop a “master” (i.e., comprehensive) regional plan
  - Develop a master street plan
2. Like the SSZEA, nearly every state passed the SCPEA in one form or another. Thus, it was extraordinarily influential in the development of the modern planning framework.
  3. The SSZEA and the SCPEA were both drafted by the same team of planning lawyers, headed by Edward Basset.
  4. The SCPEA did not clearly define what comprehensive plans should address. Only five areas of concern were recommended for these plans: streets, other public grounds, public buildings, public utilities, and zoning.
  5. Prior to the SCPEA, Wisconsin had passed the first state planning enabling act in 1909.<sup>9</sup>
  6. According to *The Practice of Local Government Planning* (i.e., the “Green Bible”), the SSZEA and the SCPEA are most notable for their weaknesses.
    - They failed to fully define the relationship between planning and zoning. They failed to clearly distinguish between a zoning ordinance’s role as the regulation of existing uses and a comprehensive plan’s role as the long-range view of what these uses should be. Thus, many municipalities adopted zoning ordinances without first drafting comprehensive plans.
    - They sanctioned the piecemeal adoption of a comprehensive plan’s components. This led to uncoordinated functional planning.
  7. Subsequent model planning enabling acts – such as the American Law Institute’s *Model Land Development Code* (1976) – introduced concepts such as state and county coordination of local land use controls, regional reviews of “**developments of regional impact**” (DRIs), quasi-judicial re-zonings, and stronger connections between zoning and planning.<sup>10</sup>

## ZONING ORDINANCES

1. A zoning ordinance (1) divides a municipality into zoning districts, and (2) imposes different land use controls on each of these districts – specifying the permitted uses of land and buildings, the acceptable intensities and densities, and the allowable building bulks (e.g., heights, setbacks, etc...). A zoning ordinance may also delegate certain roles to the municipality’s governing body, planning commission, zoning hearing board, zoning enforcement officer, and staff.<sup>11</sup>
2. The following is a brief history of zoning.
  - The legal authority of American cities to regulate land use was generally weakened after the Revolution.<sup>12</sup>
  - In 1867, the City of San Francisco enacted the first ordinance in the United States that could be classified as zoning. This ordinance merely addressed the location of obnoxious uses.<sup>13</sup>

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<sup>9</sup> So et al. Eds. (1988) Page 24.

<sup>10</sup> Meck, Stuart. “A Short History of Model Planning and Zoning Enabling Legislation.” *PAS Memo*. February 1995: Pages 1-4.

<sup>11</sup> So et al. Eds. (1988) Page 251.

<sup>12</sup> So et al. Eds. (1988) Pages 20-21.

- In 1909, Los Angeles became the first municipality to apply zoning to undeveloped land.<sup>14</sup>
  - In 1916, New York City enacted the first modern, “comprehensive” zoning ordinance<sup>15</sup>: that is, it was the first zoning ordinance to contain land use, density, **and** building bulk controls. Note that the United States Supreme Court had previously upheld land use controls in *Hadacheck v. Sebastian* and building bulk/density controls in *Welch v. Swasey* and *Eubank v. City of Richmond* (see the planning law notes).<sup>16</sup>
  - However, the United States Supreme Court did not uphold a modern, “comprehensive” zoning ordinance in its entirety until the 1926 case *Village of Euclid v. Ambler Realty Co.* (see the planning law notes). The court had apparently decided to strike down Euclid’s ordinance<sup>17</sup> when Alfred Bettman filed an amicus curiae brief on behalf of the Ohio Planning Conference. Bettman’s brief apparently changed the court’s mind.<sup>18</sup>
  - In 1961, Jane Jacobs’s book *The Death and Life of Great American Cities* initiated a movement towards mixed-use zoning districts.<sup>19</sup>
3. A **Euclidean zoning** ordinance simply lists the land uses permitted in each zoning district. On the other hand, a **performance zoning** ordinance sets so-called “*performance standards*” for each zoning district. These standards are either minimum requirements or maximum limits for use characteristics (e.g., the allowable amounts of smoke, odor, noise, heat, vibration, glare, traffic generation, and visual impacts). Any land use that meets a particular zoning district’s performance standards is then permitted in that district.<sup>20</sup>
    - Performance zoning precisely defines what the involved community wants as an end result. However, it leaves developers with a choice in the means to that end. It automatically allows mixed use districts, and instead focuses on the impacts of development.
    - Lane Kendig’s 1980 book *Performance Zoning* is the bible of performance zoning.
    - A pure performance zoning ordinance requires a significant amount of technical skills and equipment for enforcement. Thus, such ordinances are beyond the means of most municipalities.
    - Nevertheless, many municipalities incorporate performance standards into traditional Euclidian zoning ordinances, subdivision/land development ordinances, and building codes. Performance standards are particularly useful in defining and regulating light industries, heavy industries, and buffers.
  4. Euclidean zoning ordinances may use either an **exclusive classification system** or a **pyramid classification system**. The former lists the permitted land uses of each

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<sup>13</sup> So et al. Eds. (1988) Page 24.

<sup>14</sup> So et al. Eds. (1988) Page 24.

<sup>15</sup> Note that this particular ordinance was not based on a comprehensive plan.

<sup>16</sup> So et al. Eds. (1988) Page 33.

<sup>17</sup> Note that this particular ordinance was also not based on a comprehensive plan.

<sup>18</sup> So et al. Eds. (1988) Pages 36-37.

<sup>19</sup> So et al. Eds. (1988) Page 253.

<sup>20</sup> So et al. Eds. (1988) Page 278.

zoning district separately. The latter sometimes makes all of the permitted uses of one district automatically permitted in a second district.<sup>21</sup>

5. Many courts have defined **spot zoning** as a small “spot” of one zoning district (e.g., “commercial”) in the middle of a second, larger zoning district (e.g., “residential”). Many courts have struck down spot zoning on the grounds that the “spot” was inconsistent with the larger neighborhood’s character. However, spot zoning should be defined in reference to the involved comprehensive plan – which may permit such “spots” in some circumstances (e.g., a neighborhood commercial district).<sup>22</sup>
6. **Inclusionary zoning** requires residential developers to include affordable housing in their developments.
7. In many states, zoning is the only legal basis for architectural or design controls.
8. The federal government is immune from local zoning ordinances if they will interfere with federal functions.
9. Zoning floodplains and wetlands is difficult because they often “move” – either naturally or in response to development elsewhere.<sup>23</sup>
10. Note that a maximum density requirement of four dwelling units per acre is not the same as a minimum lot size requirement of a quarter-acre – because of potential clustering.
11. A municipality’s zoning procedures (for official determinations, official decisions, public meetings, public hearings, and public notices) are subject to the constitutional requirements for **procedural due process**. “The basic meaning of due process is fairly simple: an individual whose rights are being determined or directly affected by a governmental action ought to be notified of that action and to be given the opportunity for a fair hearing before an impartial tribunal.” Regarding zoning, procedural due process requirements have four basic impacts.<sup>24</sup>
  - The public notice procedure should be effective, and should follow any state mandates.
  - The involved tribunal (e.g., the zoning hearing board) should be impartial.
  - Hearings must be fair both to the applicant and to those who are opposed to the application.
  - Determinations and decisions should be based on explicit findings of fact – as well as on any involved evidence and testimony.
12. A municipality’s zoning regulations are also subject to the constitutional requirements for **substantive due process** – that is, the regulations must be rationally related to promoting the general welfare, and they cannot be arbitrary.

## AGRICULTURAL ZONING<sup>25</sup>

1. Zoning is the most commonly used tool to preserve farmland under development pressure.

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<sup>21</sup> So et al. Eds. (1988) Page 269.

<sup>22</sup> So et al. Eds. (1988) Page 265.

<sup>23</sup> So et al. Eds. (1988) Page 273.

<sup>24</sup> So et al. Eds. (1988) Pages 280-281.

<sup>25</sup> Coughlin, Robert E. “Formulating and Evaluating Agricultural Zoning Programs.” *Journal of the American Planning Association*. Spring 1991: Pages 183-192.

2. Agricultural zoning can take the form of either *exclusive regulations* (i.e., non-farm buildings are not permitted) or *non-exclusive regulations* (i.e., non-farm buildings are permitted). Exclusive regulations are the most common of the two forms.
3. Non-exclusive regulations can take the form of either large minimum lot requirements or area-based allocations (i.e., the number of lots that can be subdivided out of an original lot is determined by the original lot's size).
4. Area-based allocations can take the form of either a fixed scale (i.e., one lot per every "x" acres of the original lot) or a sliding scale.
5. A sliding scale area-based allocation decreases the number of permitted lots per acre as the original lot gets larger. Thus, higher densities are allowed on smaller original lots.
6. In general, agricultural zoning regulations should be based on the following determinations.
  - prime farmland soils are involved
  - a strong local farm economy exists
  - local land values are low enough for farms to make a profit
7. Furthermore, agricultural zoning regulations should target the size of the farm core instead of the size of the entire farm.
8. Finally, agricultural zoning must be applied early in the development cycle for it to be effective.

## SUBDIVISION AND LAND DEVELOPMENT ORDINANCES

1. Subdivision and land development ordinances regulate the subdivision of lots and the design of major developments. In doing so, they tend to control the platting and recording of the newly created lots – as well as the provision and maintenance of any involved easements, open spaces, and physical infrastructure.
2. In 1913, New Jersey became the first state to institute the mandatory referral of subdivision plats. This was the beginning of modern subdivision controls.<sup>26</sup>
3. For the AICP Exam, familiarize yourself with the design standards recommended on pages 210-215 and 236-249 of *The Practice of Local Government Planning* (1988 edition).
4. The typical steps that municipalities follow in reviewing a proposed subdivision or land development under a subdivision and land development ordinance are as follows.<sup>27</sup>
  - **Pre-application conferences:** In these meetings, the municipality's code enforcement staff familiarizes the developer with the local development regulations. Any potential problems that the proposed subdivision may cause to either public infrastructure systems or other developments are identified. Relatively few details should be expected of the developer at this stage. The overall goal is to help the developer avoid any costly redesigns later.
  - **Preliminary plat review:** At this step, the developer submits a preliminary plat of his or her proposed subdivision for review and approval by the municipality's code enforcement staff, governing body, and/or planning commission. The submitted plat

<sup>26</sup> So et al. Eds. (1988) Page 24.

<sup>27</sup> So et al. Eds. (1988) Pages 226-233.

is usually approved, approved with conditions, or denied. Note that the approval of a preliminary plat usually implies that a similar final plat will also be approved (it also sometimes implies that any subsequent zoning changes will be irrelevant). Involved school districts and/or sewer/water authorities may additionally review the preliminary plat as a courtesy. Note that to call a map submitted at this stage “preliminary” is somewhat misleading, since most of the subdivision’s major characteristics are already somewhat fixed.

- **Final plat review:** The developer then submits a final plat of his or her proposed subdivision for review and approval by the municipality’s governing body and/or planning commission. The construction, operation, and maintenance of any public or semi-public improvements or dedications should be thoroughly investigated at this time.
5. An approved final plat typically exhibits the following certifications.<sup>28</sup>
    - A certificate of approval from the plat approval agency (e.g., the municipality’s governing body or planning commission)
    - A certificate of accuracy and mapping by the involved surveyor
    - A certificate of ownership and dedication
    - A certificate of registration by the recorder of deeds
  6. Most subdivision and land development ordinances require an approved final plat to be registered with the recorder of deeds within a month or two. This prevents the developer from delaying the reassessment of his or her land as building lots.<sup>29</sup>
  7. In any design review process, the following items are necessary.
    - Efficient, early interaction between the developer and the municipality
    - Clearly defined standards that the municipality’s staff agrees on, supports, and consistently enforces

## EXACTIONS<sup>30</sup>

1. “The questions of who will finance subdivision improvements and community facilities and how financing and maintenance will be handled are fundamental to subdivision regulation. Most jurisdictions now expect subdividers to provide certain public improvements at their own expense. These ‘exactions’ may take the form of requirements for the dedication of land, the construction or installation of infrastructural improvements, or the payment of fees to finance these improvements (e.g., fees in lieu of dedication, impact fees).”<sup>31</sup> Thus, **three kinds of exactions** are commonly used in subdivision regulations. Each of these will be discussed separately below.
2. **Improvements and dedications of land:** The most common form of a subdivision exaction is a requirement that the developer provide certain infrastructural improvements to serve the land being developed (e.g., public streets, utility lines, drainage systems, sidewalks, bus shelters, open spaces, etc...). Occasionally, these improvements are required on lands that the developer does not own or control.

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<sup>28</sup> So et al. Eds. (1988) Page 233.

<sup>29</sup> So et al. Eds. (1988) Page 233.

<sup>30</sup> So et al. Eds. (1988) Pages 215-219.

<sup>31</sup> So et al. Eds. (1988) Pages 215-216.

- If the required improvements are to be made available for public use or are to be connected to a public system, the municipality usually (1) will require the dedication (i.e., donation) of the land so improved to the municipality, and (2) will accept this dedication only after the improvements have been completed and inspected. This dedication may involve a fee simple title, an easement, or some other property interest.
  - In some instances, a municipality may require a developer to provide an improvement that is clearly designed to serve a larger population than that expected in the subdivision. In such cases, the municipality should partially reimburse the developer for these “oversized” improvements.
  - Requiring developers to provide infrastructural improvements and to dedicate lands can be justified on a special assessment basis (i.e., those who will most benefit from the improvements and dedications pay for them).
  - However, requirements for improvements and dedications of land are often too coarse for capital improvements programming. The full cost of many major public improvements (e.g., arterial roads) cannot be honestly assigned solely to one subdivision. Many public improvements cannot be built in stages as different subdivisions are developed over time (e.g., arterial roads). For some public improvements (e.g., parks), a large areawide facility may be superior to several smaller ones – each in its own subdivision. Thus, requirements for improvements and dedications of land developed into the next kind of subdivision exaction...
3. **Fees in lieu of dedication:** This form of subdivision exaction either allows or requires the developer to pay a fee in lieu of the improvements or dedications that would have otherwise been obligatory. Payment is usually made prior to and as a condition of final plat approval. In order to satisfy constitutional tests, the required fees are typically placed in accounts earmarked both by purpose (e.g., parks, schools) and by the geographic area in which they were collected.
  4. **Impact fees:** This form of subdivision exaction is similar in concept and in function to fees in lieu of dedication. However, impact fees do not have to be directly tied to any requirements for improvements or dedications of land. Furthermore, impact fees can be more easily applied to off-site improvements.
    - Note that impact fees are usually collected when building permits are issued – and not prior to final plat approval.
    - Impact fees are a systematic, comprehensive method of funding the capital facilities required by a series of new developments. An impact fee system is typically developed and operated as follows.
      1. An estimate is made of the public improvements that will be required in a municipality over a specific planning period (usually 20 to 25 years). The extent to which these improvements will be funded through impact fees is then determined.
      2. The appropriate distribution of these costs is determined on the basis of the costs of each facility that are attributable to, and that should be equitably borne by, both new and existing developments in each service area. These costs are then allocated among the various development sectors: residential, commercial, and industrial.

3. A series of formulas is used to allocate the appropriate portion of costs to each proposed development. For example, the costs of a street improvement project may be allocated on the basis of the number of trips generated by each involved development.
4. Once collected, the impact fees must be placed into an account earmarked both by purpose (e.g., parks, schools) and by the geographic area in which they were collected. When the account reaches an appropriate level, the involved public improvement is constructed.
5. Note that some forms of exactions are not authorized by statute or by case law in some states (e.g., Pennsylvania). Furthermore, note that all exactions are subject to the legal precedents discussed in the planning law notes.

### PERFORMANCE GUARANTEES OR BONDS<sup>32</sup>

1. As was noted above, the most common form of a subdivision exaction is a requirement that the developer provide certain infrastructural improvements to serve the land being developed (e.g., public streets, utility lines, drainage systems, sidewalks, bus shelters, open spaces, etc...). Generally, the developer may not begin to construct these improvements until the preliminary plat is approved. Often, final plat approval is withheld until these improvements are constructed and the municipality has inspected and approved them.
2. However, many municipalities allow the developer to construct the required improvements after final plat approval. In such a situation, the developer is usually required to post a financial guarantee or bond that the municipality will release after the improvements have been inspected and approved.
3. For staged developments, the municipality may withhold a stage's final plat approval until the improvements required for a previous phase have been inspected and approved. This eliminates the need for any guarantees or bonds. However, these so-called "sequential approvals" often do not lend themselves to large-scale improvements – such as a wastewater treatment plant. In such situations, a hybrid approach must be used.
4. Some municipalities insure that the required improvements will be built to their standards after final plat approval by withholding the involved building permits until the improvements are inspected and approved. This also avoids the use of guarantees or bonds.
5. Performance guarantees or bonds come in the following forms.
  - The developer may obtain a performance bond from a surety company.
  - The developer may obtain an irrevocable letter of credit from a lender (this is often preferred by smaller developers, as performance bonds are costly).
  - The developer may place cash in an escrow account held in trust by the municipality or a local financial institution.
  - The developer may escrow his or her personal property.
  - The developer, the developer's lender, and the municipality may enter into a three-party subdivision improvement agreement.

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<sup>32</sup> So et al. Eds. (1988) Pages 234-235.

6. Declaring a default and taking the responsibility for completing the required improvements can be costly for the involved municipality. Surety companies rarely allow a performance bond to be called without putting up resistance. Furthermore, the added costs of inflation, administration, and damage remediation are rarely reflected in the bond's original amount.

## MISCELLANEOUS DESIGN ITEMS

1. Randall Arendt's book *Rural by Design* argues for, among other things...<sup>33</sup>
  - The inclusion and proper design of open space in developments
  - The reclamation of commercial strips
  - Land conservation trusts
  - The elimination of cul-de-sac designs
  - The use of small turnarounds, non-circular turning loops, or hammerheads where cul-de-sacs are necessary
2. A higher "**R-rating**" for a home means more insulation.
3. The following items address proposals for **casinos**.<sup>34</sup>
  - In order to maximize local growth opportunities, casinos should be located in existing commercial areas.
  - If more than 50% of the casino's market is local, the casino will drain the local economy.
  - Casinos most often harm local retailing businesses.
  - The frequently given base multiplier of 1.35 for casinos is usually a bit high.
  - Most casino jobs do not pay very well.
  - Most municipalities, in themselves, have profited from local casino developments.
4. Areas with higher **coefficients of runoff** drain faster. Dense urban commercial districts have the highest coefficients of runoff.
5. Surfaces with higher **albedos** reflect more of the sun's energy. For instance, snow has an albedo of 0.9, while asphalt has an albedo of 0.05.
6. The table on the next page shows some features of "neighborhood," "community," and "regional" shopping centers. This table was just pieced together – so it may be somewhat subjective.

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<sup>33</sup> Arendt, Randall. "How to Create a Subdivision With Character." *Planning*. May 1994: Pages 24-26.

<sup>34</sup> Chadbourne, Christopher, Philip Walker, and Mark Wolfe. "Gambling, Economic Development, and Historic Preservation." *Public Investment* (a "special edition" of the American Planning Association's *PAS Memo*). March 1997: Pages 1-4.

SHOPPING CENTER TYPES			
	Neighborhood	Community	Regional
Typical size	50,000 – 100,000 sq. ft.	100,000 – 300,000 sq. ft.	300,000 – 1,000,000 sq. ft.
Typical anchors	Grocery or drug store	Department or discount store	?
Typical population served	10,000	40,000 – 50,000	50,000 and up
Typical site acreage	2.5 – 5 acres	10 – 30 acres	50 acres and up
Typical travel times to the site	5 minutes	10 minutes	30 minutes