

Chapter 2

The Origins of the Zoning Power

2-100 Introduction

Zoning is the process of classifying land in a locality into districts and establishing in each district regulations concerning building and structure location and design and the uses to which land, buildings and structures may be put. *Virginia Code* § 15.2-2201.

Understanding the history of the zoning power allows one to appreciate the stated purposes and objectives of zoning (see section 3-200), as well as the scope of the zoning power (chapter 4), expressed in the current law. Unfortunately, zoning's historical evolution from nuisance law also partially explains its shortcomings in addressing all of the issues pertaining to modern land use and development (see section 2-300).

2-200 A brief history of zoning

In the years before zoning, land uses were regulated by not only actions seeking the common law remedy of nuisance, but also through building and fire codes and established minimum standards for construction and access. *American Law of Zoning*, §§ 1.13 and 1.16 (Patricia E. Salkin, 5th ed. 2011).

Even before challenges to zoning laws were making their way through the courts in the early 1900's, the United States Supreme Court recognized that the police power could control how property was used: "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665, 8 S. Ct. 273, 299 (1887) (holding that the state could claim that a brewery constituted a nuisance). This principle was adopted by the Virginia Supreme Court in 1926, when it said that the "legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare." *Gorieb v. Fox*, 145 Va. 554, 560, 134 S.E. 914, 916 (1926), affirmed 274 U.S. 603, 47 S. Ct. 675 (1927) (zoning ordinance). Thus, the power of a locality to regulate the use of land through zoning and other regulations arises from the locality's police power, which is a residual power, intrinsic in the sovereign, to protect the public health, safety and welfare.

2-210 The first zoning regulations

A number of localities had established building size and height restrictions by 1900 and the City of Los Angeles established use districts in 1909. *American Law of Zoning*, § 2.20 (Patricia E. Salkin, 5th ed. 2011). However, New York City is credited with adopting the first comprehensive zoning regulations in 1916. The New York City Department of City Planning explains the historical reasons for this event as follows:

Technical restraints that had traditionally limited building height vanished with the introduction of steel beam construction techniques and improved elevators. The Manhattan skyline was beginning to assume its distinctive form. Multifamily residences, particularly in Manhattan, were growing in popularity and new retail districts were springing up to meet new demands. Office space was expanding; by 1900, New York City had become the financial center of the country.

Although the concept of enacting a set of laws to govern land use was revolutionary, the time had come for the city to regulate its physical growth. The huge shadow cast by the 42-story Equitable Building, built in 1915 on lower Broadway, deprived neighboring properties of light and air. Warehouses and factories were intruding into fashionable retail areas on lower Fifth Avenue.

The pioneering 1916 Zoning Resolution, though a relatively simple document, established height and setback controls and separated what were seen as functionally incompatible uses – such as factories – from residential neighborhoods. The ordinance became a model for urban communities

throughout the United States as other growing cities found that New York's problems were not unique.

The issues that gave rise to the New York zoning resolution – building heights, conflicting uses, light and air – remain key issues in the purposes and of objectives of conventional zoning regulations to this day.

2-220 Three landmark United States Supreme Court decisions

Following is an overview of three key United States Supreme Court decisions that have shaped zoning and other land use-related areas of the law.

In 1926, the United States Supreme Court validated the zoning ordinance adopted by the Village of Euclid, a suburb of Cleveland, Ohio, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). The term often used today to describe conventional zoning schemes – *Euclidean zoning* – takes its name from this case.

The ordinance and map adopted by the Village of Euclid created several use, height, and lot area zones within the village. The plaintiff in *Euclid* was the owner of 68 acres in the village and had planned to use its land for industrial uses. The plaintiff contended that the land's value for those uses was approximately \$10,000 per acre, but if used for residential purposes as zoned, its value was \$2,500 per acre. The owner also contended that the land abutting Euclid Avenue if developed for industrial uses was worth \$150 per foot, but if used for residential purposes was worth \$50 per foot. The owner alleged that the ordinance attempted to restrict and control the lawful uses of its land so as to confiscate and destroy a great part of its value and was, therefore, unconstitutional. The owner sought an injunction preventing the village from enforcing its ordinance.

In validating the village's zoning ordinance, the *Euclid* court's opinion laid down several principles that govern to this day. First, the Court recognized that the police power of state and local governments must be flexible to allow changing conditions to be addressed. In the context of zoning, the court said:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Euclid, 272 U.S. at 386-387, 47 S. Ct. at 118.

The *Euclid* court then identified the standard of review under which local zoning ordinances should be considered to determine their validity:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control. (italics added)

Euclid, 272 U.S. at 387-388, 47 S. Ct. at 118.

The *fairly debatable* standard is the applicable standard for legislative zoning decisions in Virginia. See chapters 10 (*zoning map and zoning text amendments*) and 12 (*special use permits*).

The *Euclid* court upheld the validity of the village's ordinance that excluded entire classes of uses from specific zoning districts, even though a particular establishment might not have been dangerous or offensive. With respect to the exclusion of industrial uses, the court said:

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. . . [W]e are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Euclid, 272 U.S. at 388-389, 47 S. Ct. at 118-19.

Finally, in upholding the village's regulations that excluded apartment houses, business houses, retail stores and shops, hotels, and other like establishments from single family residential districts, the Court was persuaded by decisions from state courts and various studies, which were summarized in part as follows:

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are – promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.

Euclid, 272 U.S. at 391-392, 394, 47 S. Ct. at 119-120.

As noted at the outset of the discussion of *Euclid*, one of the principles underlying the Court's decision was its acknowledgement of the need for flexibility. *Euclid* was considered in the context of an American society that was shifting from agrarian to industrialized and the need to address the problems that came with that shift. The impacts from many of today's industries and businesses bear little resemblance to the impacts from the industries and businesses from the 1920's. Moreover, many localities now find benefits in integrating various types of use classifications and encourage mixed-uses, provided that development and performance standards are met. See section 2-300 for a discussion of the criticisms of Euclidean zoning and its future.

In *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98 (1954), the United States Supreme Court rejected a landowner's challenge to the legality of the District of Columbia's redevelopment plan on the ground that the District's use of eminent domain violated the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. *Berman* is not a zoning case, but it nonetheless warrants attention because the Court was considering issues related to planning and land use, the deference the courts are to give to legislative decisions, and what it means when the government acts to promote the public welfare.

The Court identified the essence of the landowner's argument to be that, while taking property for ridding an area of slums was permissible, taking it merely to develop a better balanced, more attractive community was not. In the following excerpts, the *Berman* court declined to limit the concept of the public welfare that may be enhanced by land use regulations:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman, 348 U.S. at 32-33, 75 S. Ct. at 102-103. The extent to which a Virginia locality may exercise its zoning powers to remedy a particular problem is, of course, constrained by the public purposes and the enabling authority established by the General Assembly.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974), the United State Supreme Court upheld the validity of the Village of Belle Terre's zoning ordinance in the face of a challenge to its zoning regulations which restricted the permissible uses to single-family dwellings and prohibited the occupancy of a dwelling by more than two unrelated persons as a "family," while permitting occupancy by any number of persons related by blood, adoption, or marriage. The Court described an expansive view of the police power to allow a community to be a desirable place to live and work. In noting that regimes of boarding houses, fraternity houses and the like presented urban problems with increased density, more traffic, more required parking, and noise, the Court said:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Boraas, 416 U.S. at 9, 94 S. Ct. at 1541.

This examination of the history of zoning provides the context for much of the remainder of this handbook and, in particular, it explains the purposes and objectives of zoning identified in chapter 3 and the factors to be considered in a zoning decision discussed in chapter 10.

2-300 The present and the future of zoning

Today, it is well established that localities enjoy broad powers to implement land use controls to meet the increasing encroachment of urbanization on the quality of life. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974). "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v.*

Borough of Mount Ephraim, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182 (1981). Zoning continues to evolve. Cluster developments (*Virginia Code* § 15.2-2286.1) and historic district regulations (*Virginia Code* § 15.2-2306) are two examples of zoning regulations that likely would have been considered arbitrary years ago.

Some have argued that the Dillon Rule, discussed in chapter 5, limits a Virginia locality's ability to accomplish the goal of achieving a high quality of life. In their article *Why Does Dillon Rule? Or Judge John's Odd Legacy* appearing in *Nice & Curious Questions*, Edwin S. Clay III and Patricia Bangs note that some complain that the rule continues to bind the Commonwealth's ability to respond to the priority needs of its localities and regions, while the Virginia Chamber of Commerce believes that the rule "represents a positive tradition of legislative oversight" and encourages economic growth through a consistency in laws throughout the state.

2-310 Criticism of Euclidean zoning

Euclidean (*i.e.*, conventional) zoning has not been entirely successful. As the successor to the doctrine of common law nuisance, it may have succeeded more as a way to protect the public health, safety and welfare rather than as an effective planning tool for creating balanced growth, good urban design, beautiful cityscapes, or affordable housing. Roger K. Lewis, *Traditional Zoning Can't Meet the Challenge of Modern Development*, *The Washington Post*, July 24, 2004.

Lewis observed that "conventional zoning has produced patchwork quilts of single-use districts and private enclaves, often with minimal vehicular, pedestrian or visual connections between neighboring zones." Others have leveled similar criticisms. Conventional zoning has been criticized because it separates land uses, decreases densities, and increases the amount of land devoted to car travel, "prohibiting the kind of urbanism that typifies our most beloved urban places." Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 *Fordham Urb. L.J.* 1445, note 1145.

Braham, Boyce, Ketcham, *The Alexandrian Planning Process: An Alternative to Traditional Zoning and Smart Growth*, *The Urban Lawyer*, vol. 41 no. 2, Spring 2009 explain:

The type of zoning implemented in the [Standard Zoning Enabling Act], known as Euclidean zoning, favors strict separation of land uses into low-density single-use districts. These sorts of restrictions on land use represented a "significant departure from the way towns were built in the early 20th century," but were nevertheless broadly adopted. As a result, the American landscape became fragmented along zoning district lines, and the places where people lived and where they worked grew farther apart.

Although suburban development was not new, the development of zoning codes forced the development to take on an entirely different character. As uses spread apart from each other, towns began to sprawl. The debate on urban sprawl has been extensive, but there is wide consensus that sprawl results in towns which are reliant on the automobile, with devastating environmental and emotional consequences. Euclidean zoning, which was an attempt to reconcile the competing pressures within a city, has in fact exacerbated those pressures. (footnotes omitted)

Jonathan Barnett, *New Urbanism and Codes*, in *Codifying New Urbanism* 1, 3 (Congress for the New Urbanism ed., 2004) describes "mapping of [single-use] zones over big areas" as "a big part of the recipe for suburban sprawl".

The shortcomings of conventional zoning have given rise to the New Urbanism movement, discussed in section 2-320.

2-320 New Urbanism

Form-based codes based on New Urbanism principles focus on the configuration and architectural quality of urban and suburban environments. Although these codes may be a solution, Lewis notes the difficulty in

implementing form-based codes. *Roger K. Lewis, Traditional Zoning Can't Meet the Challenge of Modern Development, The Washington Post, July 24, 2004.*

New Urbanism has been described as an approach that addresses two of the problems with conventional zoning – spatial separation of land use and lack of mobility. “Remedies for the problem of spatial separation include mixing land uses and creating diverse environments similar to traditional, older cities. Possible solutions for the lack of mobility include compact development and the promotion of public transit.” Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 *Fordham Urb. L.J.* 1445, 1447 (2002).

New Urbanism is not without its critics and the criticisms range from not solving the automobile-centric lifestyle, causing sprawl similar to that under conventional zoning, only in a different form, where the developments are greenfields developments, failing to achieve the true mixed use community that is sought, failing to attract a diverse population because the residents in these developments tend to be affluent, and creating a faux urbanism that cannot match the organic urbanism of a true downtown.