

# Zoning at 85

By [Edward T. McMahon](#)

November 21, 2011



This year marks the 85<sup>th</sup> anniversary of the landmark United States Supreme Court case *Euclid v Ambler Realty*, which upheld the basic constitutionality of local zoning. Given the current debate between liberals and conservatives about the appropriate role of regulation in shaping our economy and our communities, it seems timely to ask the question: do we still need zoning?

Some anti-government activists argue that we don't need zoning and that land use planning is somehow akin to socialism. In fact, planning is the multi-faceted process that communities use to prepare for change. It is an activity as old as humankind itself. In most realms of endeavor, failing to plan, simply means planning to fail. Try to imagine a corporation without a business plan. It would have a hard time attracting investment. The same is true of communities. In America, land use planning is primarily the responsibility of local government. Zoning is considered the quintessential tool of plan implementation.

A zoning ordinance divides a local government's jurisdiction into districts or zones. For each district or zone, the zoning ordinance regulates the type of land uses allowed, intensity or density of development, height, bulk and placement of structures, amount and design of parking, and a number of other aspects of land-use and development activity.

By some estimates over 9,000 cities, towns and counties, big and small in every region of the country and representing at least 90 percent of the nation's population has some form of zoning in place. Zoning in the US has been around since 1916 when New York City enacted the nation's first comprehensive zoning ordinance to protect the health, safety and welfare of residents packed into crowded urban tenements.

Despite criticism from some academics and property rights advocates, zoning has stood the test of time.

Does this mean that every zoning decision made by a local planning commission is a good one or that zoning has produced the beautiful, high quality living and working environments that we all care about? No – zoning has not always lived up to its promise and it has sometimes been misused. For example, in some places zoning has been used to exclude low-income families or to keep out minorities. In other places, zoning has been used to give every landowner exactly what they want regardless of the cost to the community or the impact on neighboring landowners. Want to build a shopping center in a flood plain or a racetrack next to a residential area? No problem – we'll just rezone the property.

Zoning is merely a tool. It is a means to an end. It can be used constructively as a positive force for community good or it can be misused. Zoning is what you make of it. It works best when it is based on a community vision and closely tied to a comprehensive plan. At its best, zoning can provide the marketplace with predictability and certainty. It can protect critical natural resources and it can raise property values. However, by itself, conventional zoning will rarely create a memorable community.

This is because conventional zoning is a limited tool. It is good for protecting what is already there and for preventing nuisances. It is not as good for shaping the future or for improving the quality of new development. This is because most zoning codes are proscriptive in nature. They try to prevent bad things from happening without laying out a vision of how things should be.

Successful communities think beyond conventional zoning. They use education, incentives and voluntary initiatives, not just regulation. They also use design standards, form-based codes, density bonuses, transfer of development rights and other innovative techniques that foster walkable, mixed use neighborhoods.

Today's communities face complex issues, ranging from carbon emissions to community character. These issues require solutions that go beyond conventional zonings focus on the regulation of use, bulk and intensity.

So what about those folks who think that zoning is a dirty word? Why do they get so upset whenever zoning is proposed in a previously unzoned municipality or county or whenever a community wants to strengthen its zoning ordinance?

In my experience, the most common objection to zoning is a perceived loss of control. Zoning opponents say that if you own a piece of land, you should be able to do what you want with it. Related to this is a fear that regulation will reduce property values. So let's examine some of the facts and myths about land use planning and regulation.

### **Myth #1 – Zoning is un-American**

The practice of land use planning in America can be traced back over 400 years to the English settlement at Jamestown, Virginia. The settlement that sprang up along the James River in 1607 was in many respects a planned community. The schematic that became Jamestown featured principles long associated with the 20<sup>th</sup> century planning technique known as Planned Unit Development or PUD's. According to planning historian Eldon James "the planning concerns influencing the Jamestown of 1607 included security issues, access and movement considerations, the use and preservation of natural resources, the procurement and storage of drinking water, the collection and disposal of waste, as well as the location and arrangement of residential areas in relationship to processing and manufacturing enterprises." In short Jamestown was planned, designed, constructed and managed for the well-being and general welfare of its inhabitants.

Despite its long history, zoning disputes often inspire inflated rhetoric. Perhaps this is because zoning does mean that the interests of an individual land owner must sometimes yield to the interests of the community. But this is as American as apple pie or baseball. In fact for more than 160 years our courts have consistently held that the US Constitution allows for public regulation of land.

To understand why, consider the old principle of law that says “your right to swing your fist ends where my face begins.” This principle applies to real estate as well. It means that with rights come responsibilities. Even political philosopher John Locke held as a basic assumption that “free men would never exercise rights without recognizing the obligations that the exercise of those rights implied.”

### **Myth #2 – Small towns and rural areas don’t need to control uses of land.**

Fact: It is true that zoning is far more common in densely populated cities than in more sparsely populated rural areas, but land use regulation is needed in small towns as well as big cities. This is because change is inevitable every place in America. Demographics, technology, immigration, the global economy, extreme weather and many other factors are changing communities whether they like it or not.

Some years ago, friends bought a beautiful historic house in an unzoned county in Western North Carolina. What attracted them to this rural location was not only the house, but the beautiful views across the surrounding farm fields to the mountains beyond. About a year after moving into their home they took a long planned trip to Europe. When they returned, much to their surprise and chagrin, they found a giant cellular communications tower under construction directly across the road. Because there was no zoning there was no notice, no public hearing, and no opportunity to object. Their unspoiled view was gone and their only recourse was to either live with the cell tower or put their home on the market and move.

Stories like this have been repeated thousands of times in unzoned rural America. Sometimes it is a cell tower, other times it is a billboard, a race track, a hog waste impoundment lot, an auto repair facility or other noxious use. There are really only two kinds of change in the world today: planned change and unplanned change. Land use regulation linked to a community plan is a way to mitigate and manage change. Rural communities that set no standards will compete to the bottom. This is because, communities that are unwilling to say “no” to anything, will get the worst of everything.

Likewise, rural landowners who want to protect the status quo have no real choice except to plan for the future. In many communities, the old-timers who most abhor change are often the first to realize that without sensible land use controls, everything they love about their community will ultimately disappear. Wayne Oldroyd, the former Director of Community Development for the small town of Maryland Heights, Missouri said “linkage of vision and planning to zoning is what enables the creation of a community.”

### **Myth #3 – Land use controls will reduce property values and increase taxes.**

Fact: It is sprawl – not zoning – that increases taxes. Haphazard, inefficient land uses require taxpayers to pay more and more for roads, sewers, schools, utilities and other public infrastructure. Zoning can, of course, affect the layout of a community and this in turn can affect public expenditures, but zoning that encourages a mix of uses or other efficient land use patterns can help to reduce public expenditures, while a purely laissez-faire approach can have the opposite impact.

As for property values, it is true that zoning and other land use controls can affect property values. Every day hundreds of decisions are made by public bodies that affect someone’s property values: however these decisions are just as likely to increase the value of property as to diminish it, for example a rezoning from agricultural to commercial use or an increased density allowance could greatly increase the value of land.

In practice, sensible land use controls almost always enhance rather than diminish property values. If you don’t believe this visit almost any local historic district and compare property values in the historic district to similar neighborhoods outside the district. In almost every case the more heavily regulated property will have the higher value. On the other hand try selling a home next to a junk yard, an asphalt plant or other noxious use. To understand how zoning can positively affect value, let’s look at a nationally famous example: In 1988, the Denver City Council created an historic district in what was then the city’s skid row. It was called the Lower Downtown Historic District.

A majority of the area's property owners opposed the designation fearing a loss of property values. Before designation, the once thriving commercial area had a vacancy rate of 40 percent and 30 percent of the properties had been foreclosed. Blighted conditions triggered precipitous declines in property values, despite the fact that there were few regulations standing in the way of re-development. After the imposition of historic district zoning the area came back to life. In a few short years, the area was transformed. By 1995, Lower Downtown was home to 55 restaurants and clubs, 30 art galleries and 650 new residential units (Today it has thousands of residents). Property values had doubled and private investment, not including Coors Field – home of the Colorado Rockies baseball team – had exceeded \$100 million.

So how did historic district zoning contribute to Lower Downtown's success? The answer is simple: scarcity and certainty create value in real estate. Before the designation you could do anything you wanted, but there was no investment because there was no certainty. After historic designation, small businesses and investors were lured to the area by its charm and historic character – and by the knowledge that it would remain that way. In other words, historic district zoning gave investors the assurance that if they spent millions rehabilitating a turn-of-the-century building, this investment would not be undermined by their next door neighbor demolishing their building and putting up billboards, parking lots or other insensitive development.

Nationally known real estate appraiser Don Rypkema says “sensible land use controls are central to economic competitiveness in the 21<sup>st</sup> century.”

#### **Myth #4 – Land use planning is a bad idea.**

Fact: The truth is virtually every successful individual, organization, corporation and community plans for the future. As we said before, failing to plan means planning to fail. Try imagining a company that didn't have a business plan. They would have a very hard time attracting investors and they would be at a huge disadvantage in a competitive marketplace. The same is true of communities.

Community planning is about choices. Communities can grow by choice or by chance. People can accept the kind of community they are given or they can create the kind of community they want. In a democracy, citizens have a right to choose the future and to have some idea what it will look like. A comprehensive plan is like a blueprint. It allows a community to set out its goals and objectives. Even the Bible recognizes the importance of planning. The book of Proverbs says: “Without vision the people will perish.”

Land use planning provides the essential bedrock on which zoning should be founded. Just as a business plan won't work if every salesman or business unit could take it or leave it, at their discretion, land use planning won't work without implementing regulations. In fact communities that engage in zoning in isolation from planning are setting themselves up for failure, as their regulations will appear arbitrary and capricious, without any consistent purpose.

#### **Myth #5 – Houston, Texas proves that zoning is unnecessary**

Fact: It is true that Houston is a different kind of city: brash, booming. Like most cities, it has sprawl and air pollution, but it also has vibrancy and a can do spirit. What really makes Houston unique; however is that it is the only large American city without a zoning code. Some people view the absence of zoning as quirky, if not downright dangerous. Others say, Houston's economic success proves that cities don't need zoning.

The truth is somewhere in the middle. Houston does have a strong economy and low priced housing, but housing is even cheaper in San Antonio and Fort Worth, both cities with zoning and despite Houston's boomtown reputation, Austin –another Texas city with strong zoning- has grown faster and has a lower unemployment rate: 6.6% versus 8.2%. Houston's economic success, undoubtedly, has more to do with the presence of the oil industry than it does with lack of zoning. What's more Houston does have an active planning department and developers have compensated for the lack of government regulations by widely

employing private covenants and deed restrictions which serve a comparable role to zoning. While libertarians would have you believe that zoning results in fewer freedoms, in fact many residential neighborhoods, particularly in suburban Houston are strictly controlled by homeowners associations.

In contrast to outlying areas, central Houston does have its share of land use anomalies (some might say intrusions). Here it is possible to see strip clubs, warehouses, bars, churches and houses all along the same street. What's more, if someone wants to run a marble grinding business out of their house (a real case) there is little the next door neighbor can do. This is of course one of the reasons that no other American city has chosen to follow Houston's lead.

## **Conclusion**

Zoning's original supporters included both liberals and conservatives who shared a belief in the power of land use planning to improve people's lives and to protect property values. It was former President Herbert Hoover, who as US Secretary of Commerce chaired the commission which drafted the first model zoning enabling act. As Hoover said in a forward to the act "the discovery that it is practical by city zoning to carry out reasonably neighborly agreements as to the use of land has an almost instant appeal to the American people."

Zoning in urban neighborhoods is not merely a tool for protecting the market value of individual properties, but it is also device for protecting resident's interest in the "neighborhood commons". In other words, zoning protects a neighborhood from encroachments by land uses that are inconsistent with its character, regardless of the positive or negative effects of a proposed development on the market value of individual properties.

Neighborhoods and communities are not just made up of individual parcels, but include collective resources that comprise a community's commons. The commons is often made up of intangible qualities such as neighborhood ambiance, aesthetics, the physical environment and the relative degree of privacy or neighborliness. These features together make up the character of a neighborhood. They are what give a neighborhood a distinctive flavor and feel. A buyer of a residential property in a neighborhood buys not only a particular parcel of real estate, but also a share in the commons.

Not all uses belong in all neighborhoods. For example, a hot new restaurant and bar might be a welcome addition in a trendy urban neighborhood, but it might be considered a nuisance in a quiet suburban neighborhood. The point is negative externalities (like noise, traffic, crowds) are contextual. A land use that would have severe negative externalities in one neighborhood may be considered an amenity in another.

Zoning is aimed at preventing, or at least limiting, precisely those changes in the use of property that are disruptive of neighborhood character because they are inconsistent with current uses of the neighborhood commons. These changes can include density as well as shifts from residential to commercial or industrial uses.

Not all neighborhoods are alike, nor should they be. The whole point of zoning is to allow people to live in the kind of neighborhood they want. In a community without zoning, a developer is free to ignore the neighborhood commons. On the other hand, in a community with zoning the developer must "buy" the support of the neighborhood through concessions. Zoning allows developments to proceed as long as they are consistent with the current uses of the neighborhood commons or in a way that the neighborhood has agreed in advance (through the political process) to allow.

Perhaps the most important reason that zoning has persisted despite its imperfections is because it gives citizens a voice in local government. Without zoning, citizens would have no voice when an out-of-town corporation or insensitive landowner decides to run roughshod over local values and traditions. Zoning

also makes land use decisions more public. This is important because the more a community understands how decisions are made, the better future decisions will be.

Zoning is really about balance. At its best, zoning can help strike the elusive balance between quality of life and economic vitality.