

Deborah Markowitz
Secretary of State



Redstone Building
26 Terrace Street
Montpelier, Vermont 05609
802-828-2148
dmarko@sec.state.vt.us

Office of the Secretary of State

Municipal Authority to Regulate Use of Private Property

A. Overview

Local government's authority to regulate the use of land within its jurisdiction represents a delicate balance between the private property rights of the individual landowner and the state's police power interest in protecting the public's health, safety and welfare. In Vermont, municipalities get their authority to regulate local land use through Chapter 117 of Title 24 of the Vermont Statutes. However, this authority is not without limitation. The United States restricts government's ability to limit an individual's right to use and enjoy his or her property.

- * Municipal authority to regulate land use within its jurisdiction is limited by the enabling legislation found in 24 V.S.A. Chapter 117 (or Act 200) which was first enacted by the Vermont Legislature in 1967. When the municipality wishes to adopt a particular bylaw it must first be sure that it is authorized to do so by checking the statutes. Without such authorization, the bylaw will be void.
- * Municipal zoning ordinances and subdivision bylaws must be written to advance a legitimate municipal interest as expressed by Vermont law, 24 V.S.A. § 4302, and must be consistent with the town plan. 24 V.S.A. § 4401.
- * A bylaw or ordinance may only require a landowner to leave his or her land in its natural state (undeveloped) if there is a clear and compelling reason for requiring the land to remain open as when any development on the land would result in health hazard or nuisance for the inhabitants or neighbors.
- * A physical invasion or occupation of the owner's property will be considered a physical taking of the property and will be unconstitutional unless compensated.
- * A regulation or ordinance may only require a landowner to give part of the property to the municipality in exchange for the right to use the property a certain way if there is a 'reasonable relationship' between the conditions imposed on a development permit and the impact of the development.
- * A regulation must leave property with some economically beneficial use. So long as the regulation advances a legitimate state interest and leaves some economic value in the property the regulation will not result in an unconstitutional taking. The regulation may leave property with no economic value if the purpose of the regulation

is to protect other property from a common law nuisance arising from the regulated parcel, or if development of the parcel would be prohibited under common law.

B. History Of Land Use Regulation In Vermont

Local government's authority to regulate the use of land within its jurisdiction represents a delicate balance between the private property rights of the landowner and the state's interest in protecting the public's health, safety and welfare.¹ In Vermont, municipalities get their authority to regulate local land use through Chapter 117 of Title 24 of the Vermont Statutes.

While regulation of land use under Vermont law is clearly a valid exercise of local authority, municipal regulation of privately owned land use has come under increasing attack in recent years. These challenges were spurred on, in part, by a series of United States Supreme Court decisions that set new thresholds for determining whether a local action affects an unconstitutional "taking" of property. In light of these challenges it is of vital importance to understand the historic basis of local zoning authority in Vermont and how the Vermont and United States Constitution might limit that authority.

Vermont's local governments have been authorized to adopt local zoning and subdivision bylaws since the mid 1960's. However, land use controls have existed in Vermont since the turn of the century, having their origin in the common law (judge made law) and the law of public nuisance.

Courts have long recognized that an individual's right to use land can be limited through private actions (law suits) when the use of that land has a negative impact on the ability of neighbors to use and enjoy their property, or if it creates an undue risk to the health, safety or welfare of others. In addition, prior to the authorization of local zoning and subdivision regulation, municipalities adopted building and fire codes designed to prevent the spread of fire, disease and other public nuisances.

The common law principles of nuisance, trespass, and restrictive covenants played an important role in the judicial acceptance of zoning. The laws of nuisance and trespass acknowledged that the use of one individual's land can be restricted to protect the value of another person's property. In addition, privately adopted restrictive covenants were so many and varied that the courts became used to upholding restrictions which established setbacks and side yards, prohibited uses, and created performance standards.

¹ Police power is the right of a government to promote order for the health, safety, security, morals and general welfare. The Tenth Amendment of the United States Constitution gives the police power to the States which then delegate the police power to local governments. Zoning by local governments is included in the local police power.

C. Common Law Actions

Modern zoning laws evolved from the following private common law actions:

- 1. Nuisance Law.** Nuisances are those acts or uses of property that lower the value of neighboring property or lessen the ability of a person to use and enjoy their land. A nuisance does not generally prevent a person from actually possessing their property. A person who complains that a use of private property is creating a nuisance must show that the nuisance activity substantially reduces the use and value of the property and that a rational person in the area would believe that the activity is unreasonable. *Pierce v. Riggs*, 149 Vt. 136, 140 (1987). Nuisances can be “public” if they affect a large portion of the community or they can be “private” if they affect only one or a few individuals. The local selectboard (or board of trustees) has the authority to abate public nuisances through regulation.
- 2. The Law of Trespass.** Trespass is unreasonable interference with the possession of property. Trespass can involve actual entry onto the property by people or animals or by objects that reduce an individual’s ability to possess or to use and enjoy his or her property. Note that the law of trespass and nuisance sometimes overlap. For example, the encroachment of dust particles, noxious odors or airplanes flying over a property may constitute both trespass and nuisance.
- 3. Restrictive Covenants, Easements and Equitable Servitude.** Prior to zoning, easements, covenants and equitable servitudes were common methods for privately regulating the right to use land. Through the use of these devices developers could assure prospective purchasers that land adjacent to their dwellings would not be used for particular purposes or that access to particular land would be guaranteed. They can be used to establish setbacks, density requirements, home cost requirements, maintenance requirements and to prohibit certain occupations or uses of the property. Restrictive covenants, easements and equitable servitudes can only be enforced by a lawsuit brought by a landowner who was meant to benefit from the restriction.

In response to the explosion of development and urban sprawl following the onset of the industrial revolution, many urban municipalities began to adopt comprehensive zoning schemes. In 1926, for the first time, the United States Supreme Court upheld as constitutional a zoning regulation. The court stated that such an ordinance was a legitimate exercise of the police power on the grounds of preserving property values and promoting a rational scheme of land development and did not constitute, on its face, a “taking” of property. (Leaving open the possibility that particular provisions of an ordinance could constitute a taking.) *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 389-90 (1926).

It was not until 1967 that the Vermont legislature authorized local governments to adopt zoning and subdivision bylaws. In 1978 the Vermont Supreme Court determined that zoning was constitutional and held that the exercise of police powers through

comprehensive zoning is *per se* constitutional without payment of “just compensation” so long as the owner retains some practical use of his land and that the regulation furthers the public good or benefit. *Galanes v. Town of Brattleboro*, 136 Vt. 235, 240 (1978).

D. Authority to Regulate Land Use

In Vermont, municipalities have only those powers conferred upon them by the state legislature. Therefore, municipal authority to regulate land use within its jurisdiction is limited by the enabling legislation. In Vermont, the zoning authorization is found in 24 V.S.A. Chapter 117 (or Act 200) which was first enacted by the Vermont Legislature in 1967.

E. Purpose of Vermont’s Local Land Use Regulation

24 V.S.A. § 2302 provides in part: “It is the intent and purpose of [Vermont’s land use law] to encourage the appropriate development of all lands in this state by the action of its constituent municipalities and regions, with the aid and assistance of the state, in a manner which will:

- promote the public health, safety against fire, floods, explosions and other dangers;
- to promote prosperity, comfort, access to adequate light and air, convenience, efficiency, economy and general welfare;
- to enable the mitigation of the burden of property taxes on agricultural, forest and other open lands;
- to encourage appropriate architectural design;
- to encourage the development of renewable resources;
- to protect residential, agricultural and other areas from undue concentrations of population and overcrowding of land and buildings, from traffic congestion, from inadequate parking and the invasion of through traffic, and from the loss of peace, quiet and privacy;
- to facilitate the growth of villages, towns and cities and of their communities and neighborhoods so as to create an optimum environment, with good civic design;
- to encourage development of a rich cultural environment and to foster the arts;
- and to provide means and methods for the municipalities and regions of this state to plan for the prevention, minimization and future elimination of such land development problems as may presently exist or which may be foreseen and to implement those plans when and where appropriate.
- In implementing any regulatory power under this chapter, municipalities shall take care to protect the constitutional right of the people to acquire, possess, and protect property. . . .
- To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside. . . .

- To provide a strong and diverse economy that provides satisfying and rewarding job opportunities and that maintains high environmental standards, and to expand economic opportunities in areas with high unemployment or low per capita incomes.
- To broaden access to educational and vocational training opportunities sufficient to ensure the full realization of the abilities of all Vermonters.
- To provide for safe, convenient, economic and energy efficient transportation systems that respect the integrity of the natural environment, including public transit options and paths for pedestrians and bicyclers. . . .
- To identify, protect and preserve important natural and historic features of the Vermont landscape . . .
- To maintain and improve the quality of air, water, wildlife and land resources. . .
- To encourage the efficient use of energy and the development of renewable energy resources.
- To maintain and enhance recreational opportunities for Vermont residents and visitors.
- To encourage and strengthen agricultural and forest industries. . . .
- To provide for the wise and efficient use of Vermont's natural resources and to facilitate the appropriate extraction of earth resources and the proper restoration and preservation of the aesthetic qualities of the area.
- To ensure the availability of safe and affordable housing for all Vermonters. . . .
- To plan for, finance and provide an efficient system of public facilities and services to meet future needs. . . .
- To ensure the availability of safe and affordable child care and to integrate child care issues into the planning process, including child care financing, infrastructure, business assistance for child care providers, and child care work force development.”

F. Constitutional Limits on Local Land Use Regulation

While state statutes authorize the adoption of local zoning and subdivision regulations, the state and federal constitutions limits the scope and manner of those regulations. Although there have been few court cases challenging local zoning under the Vermont constitution, in recent years there has been a series of United States Supreme Court decisions which provide some guidance as to the limits the federal constitution places on local zoning authority.

The Fourteenth Amendment of the U.S. Constitution limits state governments’ use of eminent domain (ability of the government to take privately owned land) to certain public purposes and does not allow the “taking” of private property without just compensation. While most zoning regulations will survive constitutional scrutiny, sometimes local land regulation can rise to the level of a “taking” and require compensation.

During the 19th Century, courts viewed “takings” narrowly, essentially requiring a physical taking of property before requiring compensation. Regulation of property use did not entitle the owner to compensation because land use regulation was a proper exercise of the police power, governed by the nuisance maxim that no one may use land

in such a way as to interfere with a neighbor's use. Under this rationale, even regulations greatly decreasing the value of property were not considered a "taking."

In recent years the United States Supreme Court has recognized that in some circumstances a government regulation can result in a "taking." When the Supreme Court developed regulatory takings it admitted that there was no set analysis, the takings analysis could vary for different cases, depending on the situation. However, the Court listed three factors to help determine if a "taking" had occurred.

- First, a court will determine the economic impact of the regulation on the use of the property. A regulation that significantly decreases the value of the property (not 'mere diminution' in value - but a near total reduction in value) may be considered a taking.
- Second, the court will consider the extent that the regulation interferes with 'distinct investment-backed expectations' of the owner. This means that if the owner planned to use the property in a manner which would make money, and the plan was reasonable at the time, but which the regulation later prohibited, the regulation may have affected a "taking."
- The third factor the court will consider is whether the board's action required a physical invasion of the property. See *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

G. Five Types of Takings

Five types of "takings" are recognized by the courts: physical takings, required dedication taking, total economic takings, facial takings and temporary takings.

1. **Physical Taking.** Otherwise known as "per se" taking, this is a physical invasion or occupation of the owner's property. Any physical occupation, however small, will be considered a physical taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (a small box that was a four inch-square, placed on the roof of a building by a cable television company was a physical taking.)
2. **Required Dedication.** Also called "title taking", this occurs when a regulation or ordinance requires the land owner to give part of the property to the municipality in exchange for the right to use the property a certain way. A "required dedication," may be permissible if there is an "essential nexus" between the ordinance and legitimate government interest such that the condition "substantially advances" the government interest. This means that there must be a 'reasonable relationship' between the conditions imposed on a development permit and the impact of the development. *Nollan v. California Coastal Commission*, 483 U.S. 825, 843 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386, 388 (1994). Note that in June 2005 the U.S. Supreme Court decided a case interpreting the Fifth Amendment takings

clause's "public use" requirement in a case involving a challenge to a condemnation action by the city of New London, Connecticut. The court held that the city may use its powers of eminent domain to acquire private, residential property for an economic development area, even if the city was going to give the property to a nonprofit private economic development corporation to develop a project including parks, a marina support facility and privately-owned buildings. In *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). The court held that while the state could not take private land simply to confer a private benefit on a particular private party, economic development projects could satisfy the Fifth Amendment's "public use" requirement if they had a "public purpose.

- 3. Total Economic Taking.** This occurs when a zoning ordinance denies a landowner all economically beneficial use of his or her land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009, 1019 (1992). In order to show that a "total economic taking" has occurred, the landowner must show that the regulation does not advance a legitimate state interest or that the ordinance does not substantially achieve the intended purpose of the regulation. In addition, no taking will be found if there is still some economic value in the property viewed in its entirety. Note however, that a taking will not occur if a regulation leaves property with no economic value if the purpose of the regulation is to protect other property from a common law nuisance arising from the regulated parcel,² or if development of the parcel would otherwise be prohibited under common law or because of limitations within the title to the property. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 473-74 (1987).
- 4. Facial Taking.** Vermont case law recognizes that in some cases a regulation can be challenged as violating the takings clause "on its face" (ie. without applying the regulation to a specific permit application.) See *Killington, Ltd. v. State*, 164 Vt. 253, 261, 668 A.2d 1278, 1283 (1995) (mere adoption of land use regulations creates a taking of the property.) A facial challenge can be considered by a court as soon as the regulation is adopted. Until a recent decision of the United States Supreme Court it was believed that to win a facial challenge case the landowner must show either that the ordinance in question does not substantially advance a legitimate state interest or that it denies the owner an economically viable use of his land. In *re Interim Bylaw*, *Waitsfield, VT*, 170 Vt. 541 (1999.) See *Chioffi v. City of Winooski*, 165 Vt. 37, 41, 676 A.2d 786, 789 (1996) (quoting *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980)). However, in May 2005, the U.S. Supreme Court backed away from the idea that a takings challenge could succeed simply by showing that the regulations "does not substantially advance a legitimate state interest." In doing so it clarified that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above.
- 5. Temporary Taking.** Takings can result from regulations that only temporarily

² A state legislature may not create new nuisance restrictions on property to expand the common law nuisance exception.

prevent a landowner from using, enjoying or deriving economic benefit from his or her property. For example, The United States Supreme Court has held that a moratorium on building can constitute a “temporary taking” which is no different in kind from permanent takings and requires compensation for the period that the building is denied. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). This means that a temporary ban on construction or limits on the number of permits to be issued can result in a taking of property if, in the interim, the landowner is denied reasonable, economically beneficial use of his or her property. A court may choose to overturn such a bylaw rather than require a calculation of damages for the temporary taking. ³

Note that the Vermont Supreme Court has held that regulatory delays will not ordinarily give rise to a temporary taking. *Chioffi v. City of Winooski*, 165 Vt. 37, 40 (1996). This means that unless the municipality is acting with some intent to deprive an applicant of all economically beneficial use of his or her property, the fact that an applicant may be deprived of such use of his or her property while seeking a permit will not ordinarily give rise to a taking claim.

☞ **To Prevent Successful Takings Challenges:**

Regulations, municipal zoning ordinances and subdivision bylaws must be written to advance a legitimate municipal interest expressed in the town plan. See eg. *Hinsdale v. Village of Essex Jct.*, 153 Vt. 618, 623-24 (1990) (regulations that advance conformity to a zoning scheme by preventing the undue perpetuation of non-conforming uses is a regulation that substantially advances a legitimate state interest.)

No part of the ordinance may require a landowner to leave his or her land in its natural state (undeveloped) unless there is a clear and compelling reason for requiring the land to remain open (i.e. any development on the land would result in health hazard or nuisance for the inhabitants or neighbors - as in the case when the property will not support a septic system or if the lot is extremely small.)

H. Other Constitutional Challenges To Zoning

- 1. Substantive Due Process.** Substantive due process comes from the Fourteenth Amendment and protects individuals from arbitrary actions of local government. Ordinances that are arbitrary or an abuse of power will be unconstitutional. However,

³ Note that there are some circumstances in which a temporary ban on development may be permissible. For example, no taking will occur in the event that there is insufficient sewage capacity, so long as the municipality is making plans to expand such capacity as soon as reasonably possible. *Bryant v. Town of Essex*, 152 Vt. 29, 36, 39 (1989) (upholding local authority to adopt a sewer allocation policy). In addition, a particular development can be denied if it is a conditional use and will create an undue burden on the provision of municipal services including the capacity of existing and planned community facilities and traffic

an ordinance enacted to protect the health, safety and welfare of the inhabitants of the municipality generally will not be found to violate substantive due process rights so long the regulation bears a rational relation to a legitimate governmental purpose.

- 2. Procedural Due Process.** Procedural due process refers to the process that is constitutionally required before an individual is deprived of an interest in his or her property. This means that since zoning and subdivision regulations affect rights to use and enjoy property the landowner and other interested parties will be deprived of due process if, with respect to a particular permit request, they are not given notice of the decision of the municipality and an opportunity to be heard on appeal.
- 3. Equal Protection.** No ordinance may deny an individual “equal protection of the laws.” The equal protection clause of the Fourteenth Amendment prohibits undue discrimination. This means that ordinances and regulations must apply equally to all individuals who are in the same or similar circumstances.
- 4. First Amendment Rights.** The municipality may not adopt ordinances whose primary purpose or effect is to regulate, infringe or promote religion. Properties used for particular religious purposes must be treated the same as all other similar properties. A municipality is also prohibited from adopting ordinances that unreasonably restrict freedom of speech or the press. However, a municipality may restrict the time, place and manner of speech, if such regulations are closely tailored to meet a compelling governmental objective and is the least restrictive method available to advance the interest. Free speech applies to zoning for sexually oriented businesses. Commercial speech, which includes outdoor advertising, receives less protection than political speech, so, although it may not be banned, it can be subject to greater regulation than other speech.