

New Developments in Land Use and Zoning Law

Christopher J. Tyson

Newman Trowbridge Distinguished Associate
Professor of Law

Paul M. Hebert Law Center, Louisiana State
University



Today's Discussion

- **Overview of Land Use & Zoning Law**
- Exactions
- Short Term Rentals
- Questions

Overview of Zoning

- Since New York City first adopted zoning in 1916, zoning regulations have been adopted by virtually every major urban area in the US.
- In 1926 the SCT constitutionalized zoning in *Euclid v. Ambler*, which pursued a use-based segregative district model to allocate public space for residential, commercial and industrial purposes. Such as scheme has come to be known as “Euclidian Zoning.”
- Since 1926 zoning has evolved to embrace less use-restrictive conventions and towards more mixed uses

Overview of Land Use

- The same forces promoting zoning also pushed for land use planning broadly.
 - Today most municipalities engage in periodic updates to their land use planning maps and guidelines
- Comprehensive master plans are put into effect by ordinances controlling zoning, the regulation of subdivisions, street plans, plans for public facilities and building regulations and building regulations
- There is increasing emphasis on regional and statewide planning

Limits on Land Use and Zoning Regulations

Overview

- Land use and zoning regulations constitute restrictions on substantive property rights – they prioritize public property rights over private property rights
- Courts generally have held land use and zoning regulations to be permissible if they are:
 - Reasonable and not arbitrary
 - Bears reasonable and substantial relation to the public health, safety, comfort, morals and general welfare of the community wherein the regulations apply
- Because of the subjective nature of these standards, this is often the source of controversy and litigation

Challenges to Zoning Regulations

- Courts are often called upon to assess the reasonableness of a zoning ordinance or administrative action.
- Reasonableness is based on a range of factors, including:
 - The needs of the municipality
 - The purpose of the restriction
 - The location, size and physical characteristics of the land
 - The character of the neighborhood
 - The effect on the value of the property involved
- Spot zoning of individual parcels of property in a manner different from that of surrounding property, primarily for the private interests of the owner of the property so zoned, is subject to challenge unless there is a reasonable basis for distinguishing the parcel from surrounding parcels.

GBT Realty Corp v. City of Shreveport, 180 So.3d 458 (La. App. 2 Cir. 9/30/15)

Recent Cases

- Plaintiffs sought to build a store on a property zoned for that use – “use by right”
 - Denied by both the Planning Commission & City Council
- Brought action for wrongful denial of site plan, trial court found for the City
 - Argued that the City had no right to disapprove a site plan in use by right cases & failed to show a legitimate objective
- Court finds for the City and affirmed their discretion in the choice to approve a site plan

Gebre v. City of New Orleans, 177 So. 3d 723 (La. App. 4 Cir. 10/7/15)

Recent Cases

- Store operated as a legal non-conforming use, shut down following hurricane, received restoration permit, later revoked
- Did the Board of Zoning Adjustments follow proper procedures in revoking the restoration permit?
- Appellate Court held that the revocation of the restoration permit was proper after a finding that the damage to the building was from neglect rather than hurricane damage

Moretco v. Plaquemines Parish Council, 112 So3d 287 (La. App. 4th Cir 3/6/13)

Recent Cases

- Moretco agreed to purchase a 35-acre tract in Plaquemines Parish with the intention of developing a shopping center
- Parish adopted an ordinance which stopped the issuance of permits
 - Moretco brought suit alleging ordinance was unconstitutionally vague & violated constitutional rights
- Court held that ordinance was not vague and that applying for a permit does not create a vested right
- Affirmed zoning as a legislative function and state law affording local governing bodies the ability to amend, supplement, modify, change or repeal existing zoning ordinances.

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Land Use & Exactions

- Local land use regulation has profound impact on environmental law and the day-to-day lives of residents.
- Land use decisions make up a substantial portion of environmental law, including sprawl management, wetlands protection and pollution mitigation.
- Exactions are a regulatory tool used by local governments in land-use planning
 - Local government will require that property owner meet certain conditions in order to secure entitlements
 - Considered a valuable tool for promoting economic development while requiring developers to internalize the full costs of that development

Land Use & Exactions

- 5th Amendment:
 - “...nor shall private property be taken for public use, without just compensation.”
 - Applies to federal and state government takings, but still allows local governments to regulate land through zoning and permitting.
 - Court has long recognized that a land use regulation does not effect a taking if it “substantially advances legitimate state interests” and does not “deny an over economically viable use of land.”

Takings Cases

- Penn Central Transportation v. New York City, 438 U.S. 104 (1978)
- Nollan v. California Coastal Commission, 483 U.S. 825 (1987)
- Dolan v. City of Tigard, 512 U.S. 374 (1994)

"each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."
- Justice O'Connor, *Lingle v. Chevron*, 544 U.S. 528, 539 (2005).

Koontz Background



What was at stake in Koontz?

- Two issues were at stake in Koontz:
 - Whether a permit denial was subject to the Nollan-Dolan test, and
 - Whether a demand for money could constitute a taking requiring just compensation
- Developers argued for the extension of the Nollan-Dolan test
 - Acknowledged the centrality of negotiation & need to reduce after-the-fact litigation
- Local governments worried an expanded Nollan-Dolan test would be unworkable, illogical and unnecessary
 - Reduce negotiating ability & quality of decision-making

Koontz v. St. Johns, 133 S. Ct. 2586 (2013)

Exactions

- Prior to this case, courts did not subject the denial of land use permits or the imposition of monetary conditions upon them to heightened scrutiny under its previous decisions in *Nollan* and *Dolan*.
 - Those cases involved the imposition of a “title exactions:” a requirement that an easement or title to some of the property be dedicated to the public.
 - *Nollan* established that title exactions must bear an **essential nexus** to the harm prevented;
 - *Dolan* required that the condition imposed be **roughly proportional** to the adverse impact of the project on the community.
 - To require such a title transfer, if done outside the land use permitting system, would be a taking of property requiring just compensation.
 - Because of this, permit conditions that accomplished the same result were subjected in these cases to heightened scrutiny.
 - Other actions, such as permit denials or monetary exactions, under U.S. Supreme Court jurisprudence, were deferred to by the courts, presumed valid, and the burden of proving that they constituted takings was borne by the applicant.

Koontz Legal Analysis

- The Court holds that under the unconstitutional conditions doctrine, which prevents governments from coercing people to give up their constitutional rights, courts cannot distinguish between approving a permit on a condition and denying a permit because the applicant refused to agree to a concession.
- The Federal Constitution can be violated in permit denial cases, the Court notes, not because property interests were taken, but because extortionate demands burden the right not to have property taken without just compensation. “The impermissible denial of a government benefit is a constitutionally cognizable injury.”

Implications of Koontz

- Before *Koontz*, all but title exactions were subject to a judicial presumption of validity and a burden imposed on the applicant to prove that denials or monetary exactions were unreasonable, arbitrary, or capricious.
- Post-*Koontz*, denials of permits where applicants fail to properly mitigate project impacts by following suggestions made by agency representatives and any monetary conditions imposed on permits are now subject to higher scrutiny, a judicial standard that requires the government to prove that its actions bear a “**essential nexus**” to the property’s impacts and that the monetary conditions required are “**roughly proportional**” to the project’s impact on the community.

Implications of Koontz

- Represents a continuing trend towards strengthening private property rights in the courts
- While Koontz creates confusion, the decision did not explicitly prevent local governments from negotiating with permit applications

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STRs

Short-term Rentals - Background

- The sharing economy is redefining long-established conventions in land use and broader notions about property values and neighborhood integrity.
- Airbnb.com, Vacation Rentals and others are connecting guests with global properties around the world.



Short-term Rentals - Background



- Airbnb began in 2008, similar sites are HomeAway.com and VRBO (Vacation Rentals By Owner)
- Recent funding scored \$850 million investment from Google Capital, now a \$30 billion company
- That's more than Marriott, Hilton, InterContinental Hotels Group, Wyndham & Hyatt Hotels Corp.
- Cost nothing for Airbnb to grow its inventory of rooms
- 70% growth rates

Short-Term Rentals

- Regulation – or more accurately, the LACK of existing regulation – of “vacation rentals” or “transient accommodations” is breaking out as ***one of the biggest zoning issues in this current, still-evolving development stage of internet commerce and info exchange.***
- Explosion in cases addressing short-term rentals through programs like VRBO and AirBnB in zoning and land use regulations around the country

Short-Term Rentals

- Current short-term rental restrictions can be divided into six types:
 - (1) full prohibitions;
 - (2) geographically-based restrictions;
 - (3) quantitative restrictions;
 - (4) proximity restrictions;
 - (5) operational restrictions; and
 - (6) licensing requirements.

Airbnb v. New York – in the beginning...

STRs

- New York City’s “illegal hotel law” bans short-term rentals of 30 days or less in an effort to preserve affordable long-term rental housing & ensure public safety.
- NY AG requested information on Airbnb’s NYC operations. Airbnb initially refused to cooperate, claiming they were beyond the reach of regulatory oversight by the city

"There are laws for people and there are laws for business, but you are a new category, a third category, people as businesses As hosts, you are microentrepreneurs, and there are no laws written for microentrepreneurs."

-Airbnb CEO, Brian Chesky

Airbnb v. New York

- NY Gov. Cuomo signed legislation that imposed fines of up to \$7500 on hosts who advertise illegal short-term rentals on platforms like Airbnb
- Airbnb contended the law's ambiguity could allow NY authorities to apply the law to online platforms like itself that host third-party listings, creating a risk of civil penalties and liabilities
- Filed suit: ***Airbnb Inc v. Schneiderman, et al, U.S. District Court, Southern District of New York, No. 16-08239.***

A Growing Trend...

- Over the last several years, a number of cities across the country enacted ordinances to regulate short-term rentals (STRs), such as Airbnb and VRBO (a subsidiary of HomeAway)
- Most of them proved practicably unenforceable
- San Francisco estimates that approximately 75% of STRs offered in the city are illegal under its new law
- Cities have three bad options:
 - (1) invest heavily in enforcing existing STR laws;
 - (2) decide not to regulate; or
 - (3) revise these land use-style regulations to make them more enforceable
- San Francisco chose the third option

Short Term Rentals & San Francisco

- October 21, 2014: City enacted ordinance (No. 218-14) to allow STRs on certain terms
- STR defined as rental of all or a portion of a residential unit for periods of less than 30 nights
- Permanent residents wanting to operate an STR were required to
 - (a) register the unit with the City, including submitting documents to prove residency in the unit being registered
 - (b) obtain a business license and pay the City's Transient Occupancy Taxes
 - (c) agree to a 90-day limit on unhosted rentals, and
 - (d) comply with specified other City rules and regulations.

Short Term Rentals & San Francisco

- Hosting Platforms are required to
 - (a) provide notice to STR users regarding the rental laws in San Francisco
 - (b) comply with the requirements of the City's Business and Tax Code, including collecting and remitting all required Transient Occupancy Taxes and
 - (c) maintain records demonstrating that all taxes have been remitted to the City's Tax Collector
- Violations of the noticing requirements can subject Hosting Platforms to administrative, civil and criminal penalties.

Short Term Rentals & San Francisco

- Ordinance had four major parts:
 - (a) Require Hosting Platforms to verify that a residential unit is on the City's Registry prior to listing the unit to be rented on the Hosting Platform.
 - (b) Require the Office of Short Term Rentals to monitor Hosting Platforms and issue noncompliant notices and require Hosting Platforms to respond expeditiously.
 - (c) Provide for civil, administrative and criminal penalties against Hosting Platforms for violations of existing law
 - (d) Require the Office of Short Term Rentals to file quarterly reports

Short Term Rentals & San Francisco - new changes in June, 2016

STRs

- Ordinance provided three options for Hosting Platforms to verify that a residential unit is on the City's Registry:
 - (1) Provide the verified registration number on each web page listing that contains verified information for the specified residential unit, such as host response rates, host ratings and date of joining the platform;
 - (2) Ensure that the host posting the listing for a residential unit includes a verified registration number within their listing and the registration number is visible to all users; or
 - (3) Provide the verified registration number, residential unit street address, unit number and host name to the Office of Short Term Rentals by electronic mail before posting the listing on the Hosting Platform.

Airbnb & HomeAway brought suit, alleging:

STRs

- Violates Communications Decency Act of 1996 (CDA)
 - 47 U.S.C. § 230 (prohibits “interactive computer service providers from being ‘treated as the publisher or speakers of any information’ provided by a third party”)
- Stored Communications Act
 - Requires disclosure to the City of customer information without any legal process
- First Amendment
 - Impermissible content-based regulation
- Dormant Commerce Clause
 - Subjects Hosting Platforms to unique requirements in San Francisco that create risk of inconsistent legislation

San Francisco amended the ordinance

STRs

- Made a number of amendments to the previous ordinance that seek to limit its application only to Hosting Platforms charging a fee
 - Applies only where the entity “collects or receives, directly or indirectly through an agent or intermediary, a fee in connection with the reservation and/or payment services provided for the short-term rental transactions”
- Reiterated need for enforcement with 75% of STRs not abiding by the law and a study that Airbnb alone had taken 2,000 units of housing off the market in the city

Short-Term Rental Case Examples

- *Marchenko v. Zoning Hrg. Bd. of Pocono Township*, 2021 C.D. 2015, 2016 WL 4978459 (Pa. Cmmw. 9/19/2016)
 - Homeowner who used property temporarily for vacation rentals cited for violating zoning code when “single-family dwelling” definition did not prohibit activity, but zoning board concluded use constituted use as a “lodge” and a transient dwelling accommodation. Trial court found in favor of zoning board, appellate court reversed, rejecting “lodge” classification because homeowner lived there most of the time.
- *Vilas County v Accola*, 2015 WL 2193002 (WI App. 5/12/2015)
 - Homeowner purchased home and began short-term rentals. County issued injunction, owner argued that zoning ordinance didn’t expressly prohibit short-term rentals. Owner appealed summary judgment, appellate court affirmed arguing that zoning ordinance’s definition of “transient lodging” (less than a month) effectively renders short term rentals an unpermitted use in a single-family dwelling district (otherwise transient lodging is meaningless).

Questions?
