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ZONING 101

Brenda N. McDonald

Brenda N. McDonald
Messer, Fort & McDonald, PLLC
6371 Preston Road
Suite 200
Frisco, TX 75034
brenda@txmunicipallaw.com
972.668.6400

THE FUNDAMENTALS OF ZONING[1]

Zoning is one of the most crucial powers of a local government. It allows a city to maintain population density, prevent crime, protect civil rights, promote business, and further the needs of the community. It is an exercise of the state police power that allows cities to regulate the property rights of a private individual for the good of the community. Zoning involves the division of a city or area into districts, and the prescription and application of different land use regulations in each district.

The History of Zoning

Interestingly, zoning began as a response to dangerous conditions posed to public health to reduce the presence of waste, nuisances, and other conditions associated with threats to the public health and safety.[2] As cities became larger through the early 20th century, more formal planning of growing communities began to evolve.[3] This led to the first constitutional challenge of zoning in 1926, which became the foundation for local planning and zoning authority, so much so that traditional zoning practices are referred to as "Euclidian zoning."[4]

Village of Euclid v. Ambler Realty Co.

The zoning power was initially challenged facially as a violation of the 14th Amendment of the Constitution, which protects the government from infringing on an individual's fundamental rights.[5] The Supreme Court held in *Village of Euclid v. Ambler Realty Co.* that zoning is constitutional as a valid exercise of the police power to protect the community's health, safety and welfare.[6] The Court found that before a

[1] This article was authored by Cameron Saenz, soon to be a first-year associate with the firm, and edited by Brenda McDonald. Cameron may be reached at cameron@txmunicipallaw.com .
[2] ROBIN MALLOY, LAND USE AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES, 28 (1st ed. 2016).
[3] *Id*. at 29.
[4] *Id*.
[5] USCS Const. Amend. 14.
[6] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

zoning ordinance can be found unconstitutional, it must be shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[7]

This granting of power by the Supreme Court through its decision was a huge expansion of the discretion and authority of local governments. Additionally, the standard of review of a zoning provision applied in this case was rational basis, the lowest standard of review for constitutional challenges.[8] Therefore, a court will not overturn a zoning regulation unless it is at least fairly debatable that the regulation promotes the desired public outcome.[9]

There are some additional key takeaways of this case that are important to zoning law today. [10] First, *Euclid* established the idea of a "hierarchy of uses," meaning that some uses are valued more intently than others.[11] Typically, the single-family residential use is valued highest, followed by multi-family use, commercial use, and industrial use.[12] This furthers the understanding that zoning first protects the home before anything else. Euclid also established the idea that zones are cumulative, meaning that lower-value uses can be placed in higher-value use zones, but not vice versa.[13]

Lombardo v. City of Dallas

In 1934, the Texas Supreme Court followed *Euclid* in state court with its holding in *Lombardo v. City of Dallas*.[14] The Court applied a similar standard, stating "if a regulation, exacted by competent public authority avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency."[15] The Court further

[7] *Id.*
[8] MALLOY, *supra* note 1 at 49.
[9] *Id*.
[10] ROBIN MALLOY, LAND USE AND ZONING LAW: PLANNING FOR ACCESSIBLE COMMUNITIES, 86 (2018).
[11] *Id*.
[12] *Id.*
[13] *Id.*
[14] Lombardo v. Dallas, 73 S.W.2d 475 (1934)
[15] *Id.* at 480.

held that a proper zoning regulation will not be found to be a "taking" for which compensation must be paid.[16]

Texas Zoning Laws

The Zoning Power

Chapter 211 of the Local Government Code contains the statutory structure for the zoning power.[17] Texas zoning law provides that a municipality may, through its governing body, regulate "(1) the height, number of stories, and size of buildings and other structures; (2) the percentage of a lot that may be occupied; (3) the size of yards, courts, and other open spaces; (4) population density; (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and the pumping, extraction, and use of groundwater by persons other than retail public utilities . . . ."[18] Furthermore, the code provides that places designated for historical, cultural, or architectural importance may be regulated by a municipality's governing body with regard to "construction, reconstruction, alteration, or razing."[19]

Governing bodies also have the power to divide their municipalities into zoning districts, by number, shape, and size.[20] Districts must be uniform among the classes or kinds of buildings in a district, but the regulations may vary from district to district.[21] The Texas legislature also considers the subjective character of the districts, requiring that zoning regulations "be adopted with reasonable consideration, among other things, for the character of each district and its peculiar suitability for particular uses, with a view of conserving the value of buildings and encouraging the most appropriate use of land in the

[16] *Id.* at 10.
[17] Tex. Loc. Gov't Code § 211.001-.033.
[18] *Id.* at § 211.003.
[19] *Id.* at § 211.003(b).
[20] *Id.* at § 211.005(a).
[21] *Id.* at § 211.005(b).

municipality."[22] The *character*, or aesthetic, of a zoning district is the means of this statutory scheme that allows a municipality the latitude to create the type of city it envisions.

The Comprehensive Plan

Although a municipality has the latitude to create the city it envisions, it must do so within its police power function and according to a defined, transparent plan known as the "comprehensive plan."[23] A comprehensive plan includes general guidelines on zoning regulations that ensure that a governing body remains within its police power function, while also outlining the subjective goals of a city for implementing its zoning regulations.[24] Elements of a comprehensive plan typically include a land use plan, transportation plan, park and open space plan, housing and public facilities plan, and written policies and goals. For example, the 2015 comprehensive plan of Frisco, TX, includes twelve "overarching ideals" that were principles to the implementation of its comprehensive plan, such as "Frisco is sustainable . . . Frisco's natural assets and open spaces are retained and are valued focal points for the community . . . Frisco has a diverse economy and is recognized as a major DFW employment center and a regional event, sports and cultural destination."[25]

A local governing body should be sure to align its zoning decisions with the comprehensive plan of the city. The zoning decision and the comprehensive plan should serve to accomplish the same purposes and function cohesively. Although the comprehensive plan is implemented for the "long-range development of the municipality," it should not conflict with the specific, case-by-case zoning decisions made by the governing body.[26]

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[22] *Id.*
[23] *Id*. at § 211.004(a).
[24] "The governing body of a municipality may adopt a comprehensive plan for the long-range development of the municipality." Tex. Loc. Gov't Code § 213.002.
[25] *2015 Comprehensive Plan*, CITY OF FRISCO, https://www.friscotexas.gov/DocumentCenter/View/4926/2015-Comprehensive-Plan-PDF?bidId=.
[26] Tex. Loc. Gov't Code § 213.002.

However, in addressing conflicts, some courts have interpreted the comprehensive plan as being not meaningfully impactful on zoning decisions. For example, the Third Court of Appeals of Texas determined that a zoning ordinance in the City of Austin which allowed for an animal shelter to be located in an area for civic uses was not preempted by the City's comprehensive plan and thereby violative of its charter.[27] The comprehensive plan stated:

> "[the comprehensive plan] is the planning tool which indicates how citizens and their government leaders want the community to develop. . . . By definition, such a plan must be comprehensive, general and long range. . . . [I]t should be a general statement of policies and proposals but should not specify operational details. . . . [T]he plan should look beyond the pressing day-to-day decisions to the community's greater long range goals."[28]

If a city council were subject to zoning challenges based on non-conformity to the comprehensive plan, then the comprehensive plan would become a de facto set of zoning regulations for the city. On the contrary, comprehensive plans in Texas must bear the following statement: "A comprehensive plan *shall not* constitute zoning regulations or establish zoning district boundaries."[29]

On the other hand, some courts find that zoning regulations may in fact be void if they are not in compliance with a comprehensive plan.[30] Therefore, a good rule of thumb is that if the requested land use is shown on the comprehensive plan, the local government's decision on a zoning case is discretionary, but if the requested use is *not* shown on the comprehensive plan, the local government should amend the plan or deny it.

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[27] Poder v. City of Austin, No. 03-08-00226-CV, 2008 Tex. App. LEXIS 7916, at *27 (Tex. App.—Austin Oct. 16, 2008).
[28] *Id*. at 22.
[29] Tex. Loc. Gov't Code § 213.005.
[30] City of Laredo v. Rio Grande H20 Guardian, 2011 WL 3122205 at 10 (Tex. App. – San Antonio 2011, no pet.).

In addition to accordance with a comprehensive plan, a zoning regulation must also be designed to "(1) lessen congestion in the streets; (2) secure safety from fire, panic, and other dangers; (3) promote health and the general welfare; (4) provide adequate light and air; (5) prevent the overcrowding of land; (6) avoid undue concentration of population; or (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements."[31]

Zoning Procedures

The Local Government Code further provides that a municipality "shall establish procedures for adopting and enforcing the regulations and boundaries."[32] Regulations or boundaries will not be effective until after a public hearing has been held involving the interested parties and citizens.[33] Zoning commissions may also play a role in the zoning process by making a preliminary report, followed by public hearings, either in conjunction with, or prior to the governing body's public hearings.[34] The zoning commission will submit a final report to the governing body with its recommendations on the proposed regulations or boundaries.[35] Additionally, there are notice requirements for both the zoning commission and governing body public hearings.[36]

In order for zoning regulations or boundaries to be passed, they generally require only a simple majority vote by the governing body.[37] However, protests may be made by adjacent property owners which will trigger a supermajority vote requirement (three-fourths of the governing body members) for passing a zoning change.[38] Protests that trigger a supermajority vote are made by "20% of either (1) the area of the lots or land covered by the proposed change; or (2) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area."[39] If property owners of 20%

[31] Loc. Gov't Code § 211.004(a).
[32] *Id*. at § 211.006(a).
[33] *Id*.
[34] *Id*. at § 211.007(a)-(b).
[35] *Id*.
[36] § 211.006(a); § 211.007(c).
[37] § 211.006.
[38] *Id*.
[39] § 211.006(d).

of the area within 200 feet of the proposed zoning change file a written protest, the governing body may only approve the change by a supermajority, being three-fourths affirmative votes by the members.[40]

Zoning Regulations—Constitutional Considerations

A few constitutional amendments can affect a zoning change decision. When making land use decisions, local governments should be cognizant of these constitutional restrictions and avoid making actions that would put them in the arena of a constitutional challenge. Much of these challenges have been developed on due process and "takings" claims.

14th Amendment—Due Process and Equal Protection

First and foremost, the 14th Amendment provides that all people shall be protected equally by the government.[41] This is challenged in a zoning decision where the government is seemingly depriving property owners of uses of their land when implementing zoning decisions, while other property owners' uses are allowed.[42] The most important and succinct way to remember this is to consider the *use*, not the *user*. Zoning regulations should be used to protect the public health, safety, welfare, and morals, not focus on race, ethnicity, religion, disability, or other characteristics of a person.[43]

For example, in *Willowbrook v. Olech*, the property owners alleged that their equal protection rights under the 14th amendment had been violated because the municipality required a 33-foot easement for access to the city water supply, where other property owners only had to give up a 15-foot easement.[44] The Supreme Court recognized that a successful equal protection claim is brought "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational

[40] *Id.*
[41] USCS Const. Amend. 14.
[42] *Id.*
[43] MALLOY, *supra* note 9 at 215.
[44] Willowbrook v. Olech, 528 U.S. 562, 563 (2000)

basis for the difference in treatment."[45] Therefore, the Court found that the allegations were sufficient to state a claim for relief under the equal protection clause.[46]

In 1985, the Supreme Court struck down an ordinance in Cleburne, Texas after an applicant requested a permit for operation of a group home for the mentally retarded pursuant to the municipal ordinance.[47] Although the Court did not apply the strict scrutiny standard afforded in equal protection claims based on race, alienage, or national origin, the Court nevertheless struck down the case on the lower, rational basis standard—a rare occurrence.[48] The Court found that the record did not reveal any rational basis that the group home "would pose any special threat to the city's legitimate interests" but had the negative effect of creating "an irrational prejudice against the mentally retarded."[49]

As a result of the 14th Amendment application to the zoning power, a person whose property interest may be affected by a zoning decision is entitled to notice and hearing.[50] In Texas, property owners that own property within 200 feet of the property being rezoned are considered to have a protected property interest in the governmental action and are afforded additional notice and protest rights.[51]

5th Amendment—Takings

The 5th Amendment is another constitutional amendment used highly when it comes to challenging zoning regulations. Due process and takings claims can often be closely related, perhaps with both claims being made in a zoning challenge.[52] The 5th Amendment states, "private property shall not be taken for public use without just compensation."[53] Takings claims are generally made in one of two veins: actual physical invasions or regulatory takings.

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[45] *Id*. at 564.
[46] *Id*. at 565.
[47] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
[48] *Id*. at 445-46.
[49] *Id*. at 448.
[50] Local Government Code Sec. 211.006-.007.
[51] *Id.*
[52] MALLOY, *supra* note 9 at 91.
[53] USCS Const. Amend. 5.

A physical invasion is illustrated in *Loretto v. Teleprompter Manhattan CATV Corp.* where a city passed an ordinance that required landowners to permit the installation of cable TV connection boxes upon payment to the property owner of a small fee.[54] The cable boxes, although not meaningfully burdensome, were nonetheless a permanent physical invasion by the government.[55] No government official actually came onto the property, but through the local government ordinance, the property owner experienced a physical invasion of 1½ cubic feet by the cable boxes that were required to be permitted on the property.

A regulatory taking means that if a regulation goes too far, it will be recognized as a taking.[56] This is illustrated in *City of El Paso v. Madero Development*: a developer was restricted to constructing only 11 houses instead of 150 due to a city ordinance with the purpose of preserving the hillside on which the developer owned the property.[57] Rather than the government requiring a physical invasion on the property, its regulations may diminish the rights of the property owner. Although the *Madero* case was decided on the issue of ripeness and did not resolve the regulatory takings issue, the facts are common to many regulatory taking claims.

Courts use a balancing test to determine whether a regulation has gone too far. The Supreme Court has identified three factors that a court or local government should consider before implementing zoning regulations that are challenged as takings: 1) the economic impact of the regulation, 2) the extent to which the regulation has interfered with investment-backed expectations, and 3) the character of the regulation as a physical invasion or regulatory adjustment.[58] Other factors considered are the diminution in value of the property, the size of the parcel, the average reciprocity of advantage, and the balancing of the regulation as

[54] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419 (1982).
[55] *Id*. at 439.
[56] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)
[57] El Paso v. Madero Dev., 803 S.W.2d 396 (Tex. App.—El Paso 1991).
[58] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

between preventing a harm and conferring a benefit.[59] Although these factors provide guidance, they cannot be applied the same in every case, and every case requires a different analysis.[60]

Lucas v. S.C. Coastal Council expanded on the application of a regulatory taking when it involves deprivation of all of a property's economic use.[61] The taking in *Lucas* was regulatory due to a South Carolina law that precluded an owner of beachfront property from building any permanent habitable structures on his parcels.[62] The 1992 Supreme Court, in an opinion written by Justice Scalia, reasoned, "when the property owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[63] This case highlights the expanding nature of regulatory takings jurisprudence.

Texas established its approach to takings challenges in line with the above federal case law in *Mayhew v. Town of Sunnyvale*.[64] The Supreme Court analyzed the takings claims under the established federal standards, citing *Lucas*, *Penn Central*, *Dolan,* and *Nollan*.[65] The Court's two-part analysis involved whether the property regulation "substantially advanced" a legitimate governmental interest, and whether the regulation denied an owner of all economically viable use of the land.[66] The Court also considered the investment-backed expectations of the property owner, and decided that the property owner did not have a reasonable investment-backed expectation of quadrupling the town's population.[67]

Zoning regulations must leave the owner with a reasonable use of the property. This is a highly litigated issue in takings cases. For example, what if a property is rezoned from a multi-family category—the most profitable land use classification for that property owner—to a single-family category—a less

[59] MALLOY, *supra* note 9 at 159.
[60] *Id*. at 160.
[61] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[62] *Id*. at 1007.
[63] *Id*. at 1019.
[64] Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998); 1 Texas Municipal Zoning Law § 11.100 (2019).
[65] *Mayhew*, 964 S.W.2d at 932-34 (citing Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Com, 483 U.S. 825 (1987)).
[66] *Mayhew*, 964 S.W.2d at 933; 1 Texas Municipal Zoning Law § 11.100.
[67] *Mayhew*, 964 S.W.2d at 937; 1 Texas Municipal Zoning Law § 11.100.

profitable classification. The property owner would likely bring a regulatory taking claim based on what a reasonable use is for that property. Regulators rendering land use decisions need to consider the reasonable investment-backed expectation of that property owner—did he already begin constructing apartment buildings; had he purchased a majority of the building materials?

1st Amendment—Freedom of Speech and Religion

Finally, the 1st Amendment plays a role in zoning.[68] The 1st Amendment's interactions with zoning law come into play typically with the protection of freedom of speech and freedom of religion.[69] The primary consideration in a 1st Amendment challenge to a zoning regulation is that the regulation focuses on the use and secondary effects of the use, and not the user's content of speech or expression.[70] Consider the use—not the user! This is a phrase that every local government member and advocate should commit to memory.

For example, a city ordinance which regulates the content of signs posted in the city, applying different restrictions to each category of sign, does not pass the strict scrutiny test for content-based regulations of speech.[71] The government cannot survive the strict scrutiny analysis: the regulation does not serve a compelling governmental interest and not is narrowly tailored to achieve that interest.[72]

Secondary effects are things such as traffic impacts, noise, light, air, crime, and the facilitation of the adequate provision of water, sewers, schools, parks and other public requirements.[73] While a zoning regulation may address these factors, it may not focus on the use or the user's speech or expression content. This is best illustrated in challenges to zoning decisions involving adult entertainment. In *City of Renton v. Playtime Theaters, Inc.*, the Supreme Court upheld a municipal ordinance that prohibited adult motion picture theaters from being located within 1,000 feet of any residential zone, single- or multiple-family

[68] USCS Const. Amend. 1.
[69] *Id.*
[70] MALLOY, *supra* note 9 at 242.
[71] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).
[72] *Id.* at 2223.
[73] Tex. Loc. Gov't Code § 211.004.

dwelling, church, park, or school.[74] The Court found that the ordinance was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."[75] Decisions on zoning applications should be made based on an analysis of the impact of the proposed use on the neighborhood and on the city as a whole.

The 1st Amendment's protection of freedom of religion can also be challenged in zoning regulations. In 2001, the Supreme Court of Illinois held that a city's denial of a special use permit for a church in a commercial zone of the city was improper.[76] The Court found that the church was a compatible use under the zoning code, despite the comprehensive development plan that was in place, therefore the denial was arbitrary and capricious.[77] Furthermore, the Court noted, "there is nothing of record in this case which would indicate that [property owner's] use of its property as a church would have any adverse effects on surrounding properties above and beyond those that would inherently be associated with any church."[78]

Freedom of religion against land use regulations is further protected by federal statute.[79] The Religious Land Use and Institutionalized Persons Act (RLUIPA) focuses on religious liberty in land use regulation.[80] The Act protects places of worship, faith-based social service providers, religious schools, and individuals using land for religious purposes.[81] RLUIPA specifically protects against substantial burdens on religious exercise, unequal treatment for religious assemblies and institutions, religious or denominational discrimination, total exclusion of religious assemblies, and unreasonable limitation of religious assemblies.[82]

Zoning Practices and Concepts

[74] Renton v. Playtime Theatres, 475 U.S. 41, 43 (1986)
[75] *Id*. at 47.
[76] City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries, 749 N.E.2d 916 (2001).
[77] *Id*. at 924.
[78] *Id*. at 929.
[79] 42 U.S.C.S. § 2000cc et seq.
[80] *Id*.
[81] MALLOY, *supra* note 9 at 277.
[82] *Id*.

Nonconforming Use

A nonconforming use is a use of the property which existed before a new zoning regulation came into effect and is now non-compliant with the now implemented zoning regulation, but allowed to remain.[83] The term is somewhat synonymous with "grandfathered" or "prior nonconformity."[84] Because all zoning plans are implemented after property uses have already been put into place, almost every zoning plan should include provisions regarding nonconforming uses.

Variance

Variances are zoning exceptions that are typically granted by a local government's Board of Adjustments. A variance can be either an *area variance* or a *use variance*.[85] Area variances involve an exception to regulations on setback distances, the area that a structure can cover, and the height of a structure.[86] For an area variance to be passed, the property owner typically needs to show a practical difficulty in complying with the code.[87] A use variance allows a use that is not otherwise permitted by the zoning code.[88] The property owner must demonstrate a *unique or undue hardship* to receive a use variance.[89]

Vested Rights

When a landowner, typically a developer, acquires the right to develop a project, they plan to do so under existing regulations. Developing land requires considerable time, money, and resources. Therefore, if zoning regulations change during the project, the developer will make a claim of vested rights based on their prior expenditures.[90] This concept is in the same vein of the argument for reasonable, investment-backed expectations in a takings analysis.

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[83] 1 Texas Municipal Zoning Law § 8.000.
[84] *Id.*
[85] *Id.* at 299.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] 1 Texas Municipal Zoning Law § 11.700.

Regulations That Change Land Area

Zoning may not only affect the use of the land, but also the area of the land. However, due to public notice requirements, a zoning decision can result in the property area being *reduced*, but not *increased*. For a zoning change to occur there must be public notice of the proposed zoning change. Since the public notice contains a description of the property for which a zoning change is sought, there would not be adequate notice of a change in the increased area. On the other hand, decreasing the amount of land included in a zoning change would not violate the public notice requirements. The fact that a zoning change has been affected on only a portion of the land instead of all of the land is not injurious to those individuals who have an interest in the zoning change.

Regulations for More Intensive Use

Another important question is whether the area of land can be zoned to a more intense use than was granted in the zoning regulation. Again, this is limited by the public notice requirement. For example, if the notice stated that the zoning change application was from agricultural to residential with lots of 10,000 square feet, the governing body of the municipality could not zone the land to residential with lots of 5,000 square feet since there would not be proper notice and the use is more intense than was notified in the application. This would involve, theoretically, twice as many homes and homeowners due to the splitting of lot sizes in half. Therefore, this would be more intensive in the sense that the land would be used by twice as many people.

Contract Zoning

Contract zoning can also be a form of corruption by local government bodies. This occurs when a property owner or developer agrees to develop or use property in a certain way in exchange for receiving a particular zoning classification from the city.[91] It involves an enforceable promise on the part of either the

[91] MALLOY, supra note 9 at 350.

property owner or the zoning authority to rezone property. This type of quid pro quo must be scrutinized if a city attempts to settle zoning and land use litigation by entering into a written settlement agreement.

Exclusionary Zoning

Local governments should never create a situation where a landowner could make a claim of exclusionary zoning. Exclusionary zoning precludes certain uses of land by property owners for arbitrary reasons that would deprive property owners of substantive due process, particularly in situations involving wealth classifications.[92] For example, a land use regulation which foreclosed the opportunity of low and middle-income housing would be an improper harm to the general welfare.[93] Exclusionary zoning must be altered to require a broader view of general welfare.[94] "Proper provision of adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation."[95]

Spot Zoning

Spot zoning is a rezoning of property that benefits a specific tract of land with a use classification that is *less* restrictive than provided by the original zoning ordinance. Spot zoning can very well be found illegal on a theory that spot zoning involves an arbitrary departure from the comprehensive plan. Furthermore, an allegation of spot zoning may also accompany claims under due process and equal protection.

Conditional Zoning

Finally, local governing bodies must avoid conditional zoning—the granting of a zoning change by a governing body which is subject to agreed upon specific conditions which limit permitted uses in a zoning district or which require the construction of off-site infrastructure. Unlike contract zoning,

[92] 1 Texas Municipal Zoning Law § 10.403.
[93] S. Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151 (1975).
[94] *Id.* at 180.
[95] *Id.* at 179.

conditional zoning requires an owner to perform some future act in order to receive rezoning, but does not enter into an enforceable agreement promising such rezoning. The typical scenario involves a governing body securing a property owner's agreement either to (i) limit the use of the subject property to a particular use (or uses), or (ii) to subject the tract to certain restrictions as a precondition to any rezoning.