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ZONING AND LAND USE: THE METAMORPHOSIS OF GOVERNMENTAL POWER

Michael P. Haymans

November, 2004



In 1926 The U.S. Supreme Court first ruled that zoning is a valid governmental function. Charlotte County, Florida did not adopt a zoning code until 1960. Prior to adoption of a zoning code, property owners could use their property for any purpose, restricted only by personal desires, economic realities, private agreements, and the threats and actualities of common law nuisance suits from neighbors. With the advent of zoning, the use of one's property became subject to governmental control. Market forces and personal choice declined as factors in owners' land use decisions. Neighbors' private responsibility and expense responding to nuisances was replaced by reliance on government to prevent and cure incompatible land use problems.

Zoning laws were conceived, justified, and validated as an exercise of inherent "police power" to prevent harm. As such, a common law, judicial principle requires that zoning laws be strictly construed because the law restricts private property rights. However, complicating the judiciary's role as an arbiter between the police power and private property is the competing institutional principle of separation of powers. Zoning decisions by local governments, although strictly construed, were to be upheld by the courts as a valid act if the action was "fairly debatable". That very deferential standard of review was based upon zoning decisions being legislative action for which the courts are not inclined to substitute their judgment. As a result, zoning decisions have almost always been upheld.

In the 1980s the Florida legislature adopted the Growth Management Act, requiring all local governments to create and implement a Comprehensive Land Use Plan. The local plans are required to be consistent with a Regional Plan and the State Plan. All local development orders and zoning decisions are required to be consistent with the adopted local Comprehensive Land Use Plan. Through a series of court decisions, the Comprehensive Land Use Plan was deemed to be the legislative pronouncement subject to the fairly debatable standard, and rezoning decisions became a question of factual applicability to the Comprehensive Land Use Plan. Therefore, zoning and rezoning decisions became quasi-judicial determinations requiring that competent substantial evidence be presented to the governmental fact-finders to implement the zoning change.

This change did at least two things: 1) it moved the basic governmental decision about land uses to a planning consideration, and 2) it cast local commissioners and council members into the role of judges as opposed to legislators for zoning matters. Such a judicial role is an unfamiliar and confusing circumstance for people who are used to making legislative decisions under a fairly



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debatable standard. The change to a quasi-judicial process is confusing for applicants for rezoning who are used to otherwise speaking generally without evidentiary constraints to their elected officials. More importantly, planning land uses comprehensively blurs the line between preventing a harm concerning use of a piece of property vis-à-vis neighboring property, and providing more general community benefits. The change institutionalized a general trend over the years to view governmental control of land not so much as a police power to protect adjoining landowners from a harm, but rather as a tool to provide a public benefit.

Following that trend, Charlotte County has implemented a further step in the control of property through its Comprehensive Land Use Plan and its zoning codes by the establishment of a Transfer of Development Rights ordinance in 2002 (TDR), which by the time of the publication of this article will most likely be a similar but less cumbersome Transfer Development Units ordinance of 2004 (TDU). The stated intention of the County in adopting the TDR ordinance was to cap the total density in Charlotte County. As a result, no Plan amendment or rezoning can occur to increase the residential density of a piece of property without the applicant acquiring residential development rights from another property, or through purchase of residential development rights from the government. As a result the residential density potential of a piece of property has become a commodity. TDR rights can only be used in areas deemed "Receiving Areas", where the government intends to direct growth and can only be obtained from areas deemed "Sending Areas", where for environmental or planning reasons the government prefers there not to be residential density.

A new factor has been added to what was once a tension between police power and private property rights. As a result, local government may now decide that property to be developed with a higher residential density is not a detriment to its neighbors, but only if the owner of the property to be rezoned pays money either to other people or to the government for the increase in density. We as a society have institutionalized the reduction of individual responsibility in favor of collective action, and we have shifted the paradigm of justification and burden of proof from preventing harm to providing benefit in local land use decisions.

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