

**AMERICAN DEVELOPMENT:
STATE AND LOCAL (AND, YES, FEDERAL) LAND USE CONTROLS**

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- I. AMERICAN LAND USE CONTROLS STEM FROM GOVERNMENT’S INHERENT “POLICE POWER” TO “REGULATE” IN ORDER TO PROTECT “PUBLIC HEALTH, SAFETY OR GENERAL WELFARE.”**

- II. MOST LAWS AND REGULATIONS ARE ADOPTED AT LOCAL GOVERNMENT LEVEL UNDER PLANNING AND ZONING ENABLING STATUTES ADOPTED BY EACH STATE PURSUANT TO STATE AND FEDERAL CONSTITUTIONS.**

- III. FEDERAL AND STATE CONSTITUTIONS**
 - A. Federal and state constitutions recognize and protect private property rights.
 - B. Land use or environmental regulation cannot “deprive” citizens of private property without “due process” of law; nor can private property be “taken” for public use without “just compensation.”
 - C. Taking or Just Compensation Clause has been interpreted by the Supreme Court to apply not only to “eminent domain” and “physical invasion” but also “regulation” of property; three regulatory tests:
 1. Whether all economically beneficial use of land is denied;
 2. If not, then balance economic impact on the owner, interference with the owner’s distinct investment-backed expectations, and character of the governmental action; or
 3. Whether a land use exaction (property, money) is directly and proportionally connected to the impact of a proposed development on the public.

IV. STATE GOVERNMENTS

- A. All have adopted statutes enabling localities to plan, to zone, and to subdivide land.
- B. Some states have also enacted statewide or regional planning or “growth management” statutes or policies to be implemented by state agencies and/or to enable local governments to have broader land use powers over pace and pattern of development.

Generally occurs more often in U.S. coastal states facing rapid growth and strains on public infrastructure and natural resources.

- C. Other typical land use statutes authorize: vested development rights; historic preservation; impact fees.
- D. Common state environmental laws: wetlands; endangered species; brownfield development.

V. LOCAL GOVERNMENTS

- A. Fundamental land use ordinances:
 - 1. Zoning and Planning
 - 2. Subdivision
- B. Planning: “comprehensive plans,” “master plans” or “general plans” are community land use guides (generally not law); typical plan elements: existing and proposed land uses, transportation, environmental or natural resource areas, housing needs, historic preservation resources, parks and other public facilities (recreation, schools, etc.), zoning maps, growth management policies, etc.
- C. Zoning: law that in large part implements land use and zoning recommendations of a comprehensive plan; zoning takes the form of both “text” (ordinance of different land use classifications and requirements, including “variance” procedure for hardship cases) and “map” (specific zones applied to specific properties); zoning or rezoning actions are initiated by local government or property owner.
 - 1. Zoning is by local legislative body
 - 2. Zoning text amendment is legislative act
 - 3. Zoning map amendment:
 - a. if applied comprehensively to several properties, is legislative act

- b. if applied to a single property, is often deemed quasi-judicial act
- 4. Zoning “permitted uses” are as of right uses of property
- 5. Zoning “special exceptions” or “conditional uses” are discretionary uses, as determined by a Board of Appeals (also hears variance cases)
- D. Subdivision: law that lays out standards to be applied in dividing land into developable “lots” and developing land for zoned uses; subdivision applications are initiated by property owners or contract purchasers.
- E. Comprehensive or Master Plans are written by local planning commissions and adopted by local legislatures with heavy community involvement (e.g., citizens advisory committees, task forces, public forums and hearings).
- F. Zoning is generally a legislative act (adopted by a municipality’s legislative body based on recommendations from the municipality’s planning commission).
- G. Subdivision is an administrative act (done by planning staff or a planning commission, which is usually appointed by a municipality’s elected executive and legislature).
- H. Other land use ordinances:
 - 1. Historic Preservation
 - 2. Growth Management
 - 3. Impact Fees
 - 4. Adequate Public Facilities

VI. FEDERAL GOVERNMENT

- A. In the narrowest sense, no federal laws regulating local land use and zoning have been enacted by Congress (note: 29% of land in U.S. is federally owned, most in the West).
- B. Yet numerous federal environmental statutes and regulations enacted pursuant to the Commerce Clause overlay and impact local land use and state environmental programs.
 - 1. Clean Water Act
 - a. Section 404 Dredge and Fill Permit -- Wetlands
 - b. Section 401 Certification -- State Water Quality

- c. Section 402 National Pollutant Discharge Elimination System (NPDES) Permit -- Stormwater Management
 - d. Section 303 -- Total Maximum Daily Load (TMDL) of pollutant runoff into impaired waters
2. Endangered Species Act
 3. Clean Air Act
 4. Coastal Zone Management Act
 5. National Historic Preservation Act
 6. National Environmental Policy Act (NEPA)