A Question of Balance

by C. Gregory Dale, FAICP

Suppose you are a planning commissioner in a town near a major metropolitan area, and your town is beginning to experience substantial growth pressures. It still has a large rural agricultural area, but this area is starting to see increased development pressure to convert farmland into suburban residential and commercial uses.

As a result of an extensive planning process, you have before you a comprehensive plan draft that calls for low density in rural areas, with new growth to be clustered around existing developed areas where services can be provided in a more efficient manner. Further, the plan is based upon a policy of preserving a distinction between rural and urban/suburban as a way to maintain community character. As a result, the plan recommends residential densities in rural areas of five to ten acres per dwelling unit, which would be a change from the existing policy and zoning of one to three acres per dwelling unit.

At the adoption stage in the process, numerous farmers and landowners from the rural part of town show up at your meetings, angry that you are interfering with their private property rights. "My land is my 401(k)," they say. They accuse you of "taking" their property and threaten litigation. Before you even act on the plan, they begin their lobbying efforts with the elected officials, turning it into a politically charged issue.

Sound familiar? Welcome to the intersection of planning and private property rights.

This article will consider some of the issues associated with the interplay of property rights with planning and zoning, and provide you with some tips for how to balance these issues.

The "protection" of private property rights from perceived threats by local government regulation has long been a prominent feature of the political landscape. The issue emerged more acutely in the latter years of the Reagan administration, but it has been playing out in both the political and legal arenas at both the national and state levels for many decades.

> THE COMPREHENSIVE PLAN IS THE STARTING POINT FOR ESTABLISHING PUBLIC PURPOSE AS IT RELATES TO GROWTH AND DEVELOPMENT.

Virtually every local, state, and federal court has struggled with the issue of balancing private property rights with local government regulation, and many state legislatures have attempted to address the issue. The U.S. Supreme Court has also, over the years, handed down a series of opinions that have kept lawyers and law professors busy monitoring, studying, and analyzing meanings.

Let us first cover some basics of this debate:

1. The property rights debate occurs because community goals are often addressed and pursued through restrictions on the use of private property. Zoning and subdivision regulations limit how people can use their property – in the interest of accomplishing a broader public purpose. For example, prohibiting a property owner from operating a heavy industry in the middle of a single-family neighborhood constitutes a restriction on private property, but one almost everyone would agree is in the broader public interest.

2. Local land use regulations such as zoning have long been accepted as a legitimate exercise of government power, subject to certain legal standards and tests. As far back as 1926, the Supreme Court upheld the exercise of zoning as a legitimate local power in *Village of Euclid v. Ambler Realty Company*. In that case, the Court determined that the village's zoning ordinance had a rational relationship to the "public health, safety, morals, and general welfare" of the community.

3. The question facing planning commissioners is not *whether* regulations can limit the use of private property, but *how* such regulations are crafted and administered, and particularly, how private property rights are balanced with public purposes.

The inherent conflict between individual private property rights and the larger public good often plays out in the legal arena in the form of a "takings" claim. While countless articles and books have been written about takings, it is helpful for planning commissioners to understand that it is actually a fairly straightforward concept.

The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use without just compensation." This allows government to take private property for public purpose as long as it provides fair compensation to the owner. This has, of course, been used many thousands of times over the years for the construction of public improvements such as roads and dams, where an actual physical taking occurred.

The Fifth Amendment has also been interpreted by the courts, however, as applying to non-physical takings, as may occur if a regulation (such as a zoning ordinance) goes so far as to allow no economically viable use of property, or advances no legitimate public purpose. This is what is known as a "regulatory

taking." Debate continues over what constitutes an economically viable use, as well as what constitutes a legitimate public purpose (and current law may vary from state to state). *For an overview of the basic legal principles involved in takings law, see Dwight Merriam's article on page 3 of this issue.*

If a community is determined by a court to have "taken" a property through its regulations, it may be liable for monetary damages, although the number of instances in which communities have actually had to pay monetary damages is quite small.

So, what does this mean for planning commissioners – do you have to have both a real estate economics degree and a law degree to make decisions? Obviously not, or planning commissions would not be able to function. With that in mind, the following are some suggestions for working your way through this difficult debate:

Your community needs to have a current comprehensive plan that is based on solid public involvement. When balancing public purpose with private interests, it is helpful to have a strong sense of what constitutes public purpose in your community. If you can point to a comprehensive plan as the place where your community's values are defined and the public purpose is articulated, you are much better off than deciding what the public purpose is on a case-by-case basis. In other words, the comprehensive plan is the starting point for establishing public purpose as it relates to growth and development.

Respect both sides of the argument. A community can err on one side or the other. On the one hand, it is clear that private property rights are not absolute – they are subject to the constraint that you should use your property so as not to harm others, which is a fundamental concept behind local planning and zoning regulations. On the other hand, you should always be trying to balance the strength of the public purpose against the impact that regulations might have on private property.

Understand that as a planning commission member, your responsibility is to fairly administer the laws and policies as adopted by your governing body – including regulations which may restrict the use of private property. That is not to say you can't recommend changes to those regulations. But again, once you agree to serve as a commissioner, you've taken on a role that does have limits, especially when you are reviewing development applications or rezoning requests.[1]

Do not be intimidated by "takings threats." Take them seriously and consult with your municipal (or county) attorney if you receive them. As land use lawyer Carolyn Baldwin has aptly noted: "Don't let yourself be bullied by threats of litigation, unconstitutional takings, and other bluster which may come your way. Make your decision based upon the law as set forth in your ordinances and regulations. ... Courts do not lightly overturn planning commission decisions if they are in accordance with duly adopted regulations and are firmly based on factual findings."[2]

The balancing of individual property rights with the larger public purpose is inherent in all of your decisions. The best advice is keep a level head, rely on good legal counsel, and act in as fair a manner as possible. ◆

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1 For planning commissioners frustrated by not being policymakers, take a look at Otis White's article "Should You Run?" in *PCJ #33* on questions to ask yourself before running for a position on the governing body (available to order & download at: <www.plannersweb.com/wfiles/w218.html>).

2 From "Legal Issues Facing Planning Commissions & Zoning Boards," PCJ #22 (available to order & download at: <www.plannersweb.com/wfiles/w359.html>).