DOWNZONING IN A CHANGING URBAN ENVIRONMENT

by Roger W. Caves

As cities begin to experience varying degrees of population and economic growth, a great deal of land must be converted from less intensive uses to more intensive uses. Unfortunately, many cities have actually over-zoned their land. For example, large areas zoned industrial have been dormant for years. Today, many of these areas are being rezoned to less intensive uses.

The process of changing zoning from a higher to lower classification, such as from residential to conservation or multi-family to single-family use, is generally referred to as "downzoning."[1] In a time of growth and change, it is essential that all participants involved in the land conversion process become acquainted with the concept of downzoning, the relationship between downzoning and a city's comprehensive plan and the importance of having vested rights in a piece of property.

Zoning Restrictions

Cities have placed restrictions on the use of land for many years. It is certainly not a new phenomenon. By establishing zoning ordinances, cities are merely seeking to put some order into their land use situation. Without any zoning controls, there is an excellent chance that uncontrolled and haphazard development patterns may surface.

An important question that must be answered is what gives local governments the rights to impose restrictions on the use of private property. The answer to this question is that localities have been entrusted with the police power. Although originally vested in the states, states have delegated the power to the localities for the purpose of promoting and protecting the health, safety, welfare and morals of the citizens. This power has been used to alleviate traffic congestion, abolish nonconforming uses, prevent the overcrowding of land and to preserve the character of the land.

The dynamic nature of our cities makes it imperative that zoning be responsive to the changing needs of the cities. As change occurs, restrictions placed on a given piece of land may have to change. For instance, land once zoned industrial that is now vacant may be needed to provide housing for a growing population.

Whenever there are any restrictions placed on the use of property, there are bound to be a number of outcries from property owners. After all, the rezoning of land can be very costly for many of the land owners. The value of a newly downzoned piece of property could be less than half of what it was before the rezoning. It should therefore come as no surprise that many downzonings are challenged in the courts.

Many property owners challenge the validity of downzonings by claiming it isn't a valid exercise of the police power and doesn't conform to any plan. Although all property is subject to the police power, regulation can go too far.[2] Whether it does, in fact, go too far must be determined on a case to case basis.

Downzoning Police Power and Comprehensive Planning

According to the decision of *First Hartford Realty Corporation v. Zoning Commission of Town of Bloomfield,* two of the tests used to determine the validity of a downzoning are, first, that the zoning change must be in accord with the comprehensive plan; second, that it must be reasonably related to the normal police power policies.[3] At issue in this case was a downzoning of property from commercial to residential use. The reasons given for the land's downzoning were that it was in accordance with the comprehensive plan, it would promote the health and safety of the citizens and that it would lessen traffic congestion.[4] By meeting the above require-

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ments, the downzoning was sustained.

Some six years earlier, the case of *Samp Mortar Lake Company v. Town Planning Commission* dealt with a similar situation.[5] In this case, the property was downzoned from industrial to residential use for the following reasons: that it was in accordance with the comprehensive plan; that it would promote the health and safety of the citizens; that it was in accordance with the residential character of the neighborhood; that it would lessen traffic congestion; that it would maintain property and residential values; and that the land is suitable for residential use.[6]

One of the arguments used by the property owner was that the downzoning caused a drastic reduction in the value of his property. The total market loss was approximately $52,000.[7] After all, as cited in *Pa. Coal v. Mahon*, "Government hardly could go on if to some extent values incident to property could not be diminished without compensation for every such change in the general law."[8] The same principle was voiced in *Heram Holding Corporation v. City of Albany* where the downzoning caused a reduction from $12,000 per acre to only $6,500 per acre.[9]

Generally, two points can be made from this discussion. First, if the downzoning was done with proper motives, it will generally be upheld. As voiced in *Kavanewsky v. Zoning Board of Appeals of the Township of Warren*, "A zoning authority is endowed with a wide and liberal discretion but this discretion is to be overruled when the authority has not acted fairly with proper motives and upon valid reason."[10] Second, just because a property owner may suffer some financial loss is no reason to invalidate a restriction on the use of land. This point was noted in *State Department of Assessments, Etc. v. Clark*, "When a restriction is supportable as a proper exercise of the police power, it is not enough for the property owner to show that the restriction results in substantial loss or hardship."[11]

Burden of Proof in Downzoning Cases

When a downzoning is challenged, who has the responsibility of proving it is illegal?

If a landowner claims that a downzoning was arbitrary, unreasonable or deprives him of the use of his land, it is he who has the burden of proof. After all, there is a strong presumption in favor of correctness of zoning. This has been held time and time again in a number of court cases.

The question before the court in *Heram Holding Corporation v. City of Albany* was whether a downzoning of property from heavy industrial use to single-family residential use was reasonable.[12] Pertinent to the case was the fact that the land in question was extremely close to the greatest concentration of industrial operations in Albany. In addition, an expert witness testified the property wasn't even suited for residential use. The court indicated that the plaintiff had the burden of proof. In order for the downzoning to be unconstitutional, Heram Holding Corporation had to show it was unconstitutional beyond a reasonable doubt. The corporation complied with this requirement and the downzoning was declared unreasonable.

The same question emerged four years later in *Roberts v. Grant*.[13] In this case, the action challenged was a rezoning of land from light manufacturing to residential use. Once again, the burden of proof was on the individual challenging the downzoning. As the court indicated, "In order for an individual property owner to remove himself from comprehensive rezoning, he must show the plan will deprive him of any reasonable use of his property or that it is not in the general public interest or welfare."[14] In the end, the plaintiff failed to live up to the burden of proof.

A similar decision was reached in *Hyland v. Mayor and Township Committee of Township of Morris*.[15] This case involved a zoning ordinance amendment which downzoned land from an office and laboratory zone to a residential zone. Hyland charged that the amendment deprived him of a reasonable use of his property. The court held he didn't meet the burden of proof and that the land could be used to develop one-family homes.[16] As a result, a use did exist for the land.

A number of ideas surface in relation to the phrase "reasonable use." First, what constitutes a reasonable use in one case may be an unreasonable use in another case. Thus, a set definition of reasonable is impossible. It will vary from case to case. The issue facing the courts is well stated by John Connell, Executive Director of the Construction Industry Legislative Committee, "As far as 'reasonable economic use' after the downzoning is concerned, if you have a piece of property zoned resort and then they downzone it so all you can do is sell leis on it; I don't think that is reasonable. So, a method has to be found to define what is reasonable and from whose viewpoint."[17]

In upholding downzoning, courts must constantly decide whether the downzoning has singled out one piece of property. An example of this dilemma can be found in *Westwood Forest Estates v. Village of South Nyack*.[18] The case involved a downzoning from highrise apartments to garden apartments to no apartments at all. According to the Village of South Nyack the reason for the downzoning was to alleviate the burden on the sewage disposal system. Recognizing the power of the village to deal with sanitation problems, alleviating the problem must be done on a fair and equitable basis. In this case, Westwood Forest Estates proved it was singled out. The problem was caused by many other people. As the Court of

Appeals of New York held, "It is therefore impermissible to single out this plaintiff to bear a heavy financial burden because of the condition in the community."[19]

Although the burden of proof rests upon the individual alleging the illegality of the downzoning, is there any time where the burden shifts to the city? This was one of the issues in *Board of Supervisors of Fairfax County v. Snell Construction Company.*[20] The controversy centered around a piecemeal zoning ordinance involving two parcels. Acknowledging the fact that the burden of proof is on the one who assails the zoning ordinance,[21] the Supreme Court of Virginia held that "If aggrieved landowner makes prima facie case showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health or safety, the burden of going forward with evidence of mistake, fraud, or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained."[22] In this case, the action was not fairly debatable. Subsequently, the action was held to be illegal by the Supreme Court of Virginia.

Vested Rights

Another issue consistently raised in downzoning cases is that of vested rights. By definition, vested rights occur "Where an owner of land obtains a building permit based upon existing zoning laws and expends substantial sums or incurs substantial liabilities in reliance thereon, he obtains a vested right to complete construction in accordance with the terms of the permit even though the zoning ordinance is changed after the issuance of the permit."[23] Subsequently, zoning cannot be changed to his detriment. It would simply not be fair to the owner of the affected property. As Calvin Hamilton, director of planning for the City of Los Angeles, has recently observed, "If somebody in good faith has put part of the development in, put a lot of planning money in ... then he should be permitted to go ahead. There are examples that you have heard this morning which indicate that in California a developer can spend up to $2 million and still get cut off. I don't think that's correct from a moral point of view. There is to me a difference between a moral obligation that the public and citizens have to a landowner versus the legal niceties of the law cases."[24]

A number of cases have dealt with the issue of vested rights and whether or not landowners possessed them at the time of rezoning. For example, in *County Council for Montgomery County v. District Land Corporation*, the court had to decide whether having spent over $1 million in studies and plans for development and possessing a building permit amounted to the property owner having vested rights.[25] The District Land Corporation claimed that the facts did entitle them to vested interests. Unfortunately for them, the court disagreed by noting that "having a building permit creates no vested right in an existing zoning classification unless substantial construction had been undertaken in reliance thereon."[26] Thus, the downzoning was allowed in this case.

A similar decision was reached in the 1978 case of *Wincamp Partnership v. Ann Arundel County, Maryland.*[27] As a result, courts are not likely to claim foul on downzoning if the land in question has remained idle or vacant for some time. In that instance, the property owner only has the right to rely on the rule that a change will not be made unless it is required for the public good.[28]

This same issue was under consideration some 18 years earlier in *City of Ann Arbor, Michigan v. Northwest Park Construction Corporation.*[29] The case involved a downzoning from commercial use to residential use. In its argument, the Northwest Park Construction Corporation claimed it had vested rights since trees and stumps had been removed from the land in preparation of development, building permits had been secured and the land had been graded. The Sixth Circuit Court of Appeals, however, disagreed with Northwest Park by indicating they did not have vested rights.[30] A similar decision was reached in *Avco Community Developers, Inc. v. South Coastal Regional Commission.*[31]

The Changing Nature of Cities

Cities are constantly undergoing some type of change. They are not static in nature. Therefore, planning must take into consideration the changing nature of cities. Perhaps that is why planning is defined as a continuous and future-oriented process. In the same regard, although zoning is concerned with the present, it must also be prepared to meet and anticipate the future needs of a city.

Many cases have viewed the changing nature of areas necessitating a change in zoning. The United States Supreme Court in *Euclid v. Ambler* considered the evolution of cities in regard to a city's zoning by noting what is an unreasonable use today may be a reasonable use tomorrow.[32] An example of this type of reasoning can be found in *Shelbourne, Inc. v. Conner.*[33] This case involved a downzoning from neighborhood shopping to residential use. The citizens of the affected area didn't object to the downzoning because they felt there was no need for additional facilities. In regards to the changes taking place, the court noted that "Changes constantly occur. If the energy crisis continues, perhaps the public and their elected officials would be more receptive to the construction of a neighborhood shopping center."[34] This fact has since become a reality throughout the United States. However, whether the energy crisis will play a major role in shaping the zoning of a city remains to be seen.

Overall, zoning must keep pace with the changes taking place in an area. It is imperative that zoning adapt to new circumstances. As voiced by the court in *First Hartford Realty Corporation v. Planning and Zoning Commission of Town of Bloomfield*, "A zoning authority must be free to modify its regulations whenever time, experience, and responsible planning for contemporary or future conditions reasonably indicate the need for change."[35] Failure to adjust to these new conditions will result in an inadequate zoning scheme and assuredly more legal actions.

NOTES

1. John W. Reilly, *The Language of Real Estate* (Chicago, Real Estate Education Company, 1977), 134.
2. For a discussion of this point, see *Pa. Coal v. Mahon*, 260 U.S. 393 (1922).
3. 338 A.2d 490 (Connecticut, 1973).
4. Ibid.
5. 231 A.2d 649 (Connecticut, 1967).
6. Ibid., at 650.
7. Ibid., at 651.
8. 260 U.S. 413.
9. 311 N.Y.S.2d 198 (New York, 1970).
10. 279 A.2d 567,568 (Connecticut, 1971).
11. 380 A.2d 28, 42 (Maryland, 1977).
12. 311 N.Y.S.2d 198.
13. 315 A.2d 103 (Maryland, 1974).
14. Ibid.
15. 327 A.2d 675 (New Jersey, 1974).
16. Ibid., at 680.
17. John Connell, statement in a reaction panel in *Proceedings of a Conference on Planning for Growth Management*, June 22, 1979, Honolulu, Hawaii, 57.
18. 244 N.E.2d 700 (New York, 1969).
19. Ibid., at 702.
20. 202 S.E.2d 889 (Virginia, 1974).
21. Ibid., at 890.
22. Ibid., at 893.
23. Jerome G. Rose, *Legal Foundations of Land Use Planning* (New Brunswick, New Jersey, Rutgers — The State University of New Jersey, 1979), 143.
24. Calvin Hamilton, "Vested Rights/Development Rights —The Los Angeles Experience" presented in *Proceedings of a Conference on Planning for Growth Management*, 67.
25. 337 A.2d 712 (Maryland, 1975).
26. Ibid., at 721.
27. 458 F. Supp. 1009 (D. Maryland, 1978).
28. See *Wakefield v. Kraft*, 96 A.2d 27,30 (Maryland, 1953).
29. 280 F.2d 212 (6th Cir., 1960).
30. Ibid., at 215.
31. 553 P.2d 546,547 (California, 1976).
32. 272 U.S. 365 (1926).
33. 315 A.2d 620 (Delaware, 1974).
34. Ibid., at 623.
35. 338 A.2d 490,491 (Connecticut, 1973).