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LEGAL LESSONS

AN AMERICAN LAW OF ZONING

If you zone it, they will judge.

By Michael Allan Wolf

IN 2016, THE SUPREME COURT of Iowa considered whether Dyersville's city council had properly approved a rezoning from agricultural to commercial use for the iconic baseball field featured in the motion picture *Field of Dreams*. The ruling in *Residential & Agric. Advisory Commission, LLC v. Dyersville City Council* found that this did not constitute illegal "spot zoning"—that is, local land-use regulators had not unfairly singled out the parcel for favorable treatment.

Predictably, the court relied on Iowa precedents to reach this ruling. But tracing that decisional tree back to its source reveals that in the Hawkeye State's first spot zoning case, *Keller v. Council Bluffs* (1954), Iowa justices relied on decisions from state high courts in Illinois, Maryland, and New York. And in similar fashion, the court's 2016 decision derived from rulings made by the supreme courts of Washington,

The ruling in the 2016 case about the real-life Field of Dreams in rural Iowa relied on judicial precedents that, along with legislation, make up the American law of zoning.

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New Jersey, and Wisconsin. In that sense, the ultimate ruling on the future of the real-life Field of Dreams was truly based on an American common law of zoning.

The American law of zoning is, of course, based on codes and enabling acts created by local and state legislation. But equally important is our body of judge-made law. Crafted over the last century in trial and appellate courts throughout the nation, these judicial decisions have created a "commonlaw" of zoning that is surprisingly uniform, despite state variations at the margins. It helps us understand the surprising vitality of height, area, and use classifications even today, when zoning's birthday cake holds more than 100 candles.

> One truism of American zoning law serves as a leitmotif for the entire field: zoning concerns use, not ownership.

Shaping a body of law

The Standard State Zoning Enabling Act, drafted and circulated under the auspices of the U.S. Department of Commerce in the early 1920s, provides a general framework for zoning at the local government level. But many zoning questions remain unaddressed by SZEA-inspired acts and the local ordinances they have produced.

In many cases, judges have answered those questions, often after sampling decisions from other jurisdictions. Assisted and inspired by experts in academia and in practice, American state court judges have shaped a fairly consistent body of law that seamlessly traverses jurisdictional boundaries. Here are five prime examples:

1. SPOT ZONING. Sometimes the common law of zoning addresses situations that arise in practice that may not have been anticipated by framers of the enabling legislation. Perhaps the most prominent example of this is the question of spot zoning, as in the Field of Dreams case.

The term found its way into the legal lexicon as early as the 1930s. Over the succeeding decades, courts have taken various approaches to distinguishing permissible from impermissible small-scale zoning amendments. While defining spot zoning and determining its validity remain challenges for judges and advocates to this day, it is undeniable that this concept was and remains an essential component of zoning law.

2. LEGISLATIVE OR QUASI-JUDICIAL. Questions of judicial review—particularly determinations of whether zoning decisions like amendments, variances, and special use permits are legislative or quasi-judicial in nature—comprise another substantial segment of the common law of zoning.

For more than 50 years, American courts have attempted to draw a defensible demarcation between legislative and non-legislative decisions. Leading cases include *Fasano v. Board of County Commissioners* (Oregon, 1973) and *Board of County Commissioners v. Snyder* (Florida, 1993). While the variations in state court approaches are greater than in other areas like spot zoning, the effort to resolve questions regarding judicial review remains an instructive aspect of the judicial project of crafting a common law of zoning.

3. DEFINING HARDSHIP. Judges, as they have in other disputes over the use of real property, have grafted equitable principles onto the body of zoning law. Concern that landowners were taking undue advantage of the empathy of their neighbors on the board of adjustment (or zoning appeals) eventually led courts to develop a new rule that variance applicants would be disqualified if the only hardship they could demonstrate was self-created or self-imposed. Judicial recognition of the problem came early, as illustrated by the 1927 opinion of Chief Judge (later Justice) Benjamin Cardozo of the Court of Appeals of New York in *People ex rel. Fordham Manor Reformed Church v. Walsh*.

4. USE OVER OWNERSHIP. One of the more familiar (and quaint and curious) practices of judges formulating the common law has been the invocation of legal maxims. One truism of American zoning law serves as a leitmotif for the entire field: zoning concerns use, not ownership.

This maxim appears in numerous decisions from throughout the nation, in cases involving not only conditions and nonconformities, but also certificates of occupancy, residential use restrictions, change of ownership of an approved development, state immunity from zoning ordinances, owner occupation requirements, development by multiple owners, conditional use permits, and short-term rentals.

5. AESTHETIC-BASED RESTRICTIONS. Euclidean zoning's height, area, and use controls have garnered their fair share of serious criticisms. State judges, aware of early critics' accusations that zoning was based solely on aesthetic preferences, first shied away from, then ultimately embraced the idea that zoning and other land-use restrictions based solely on aesthetics are legitimate. This area of zoning law features an intriguing interplay between constitutional and common law, most notably the state decisions approving aesthetic controls that were inspired by the U.S. Supreme Court's 1954 opinion in *Berman v. Parker*.

The next time you confront a situation involving spot zoning or a self-imposed hardship, remember that it was judges working on a national scale, not state or local legislators, who were responsible for the concept and its rules. Perhaps this phenomenon of trial-and-error litigation over the course of 10 decades helps to explain why, after so many demographic, ideological, economic, and technological changes, zoning has not only hung on, but continued to thrive.

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