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PRACTICE CODIFICATION



Codifying Zoning's Little Helpers

By David M. Morley, AICP, and Nicholas A. Walny

Since its inception, the primary purpose of zoning has been to control the form and function of future development by dividing a local jurisdiction into “zones” or “districts” with different permissible “uses” or “structures.” While the first zoning codes were narrowly focused on district-based use permissions and dimensional standards, it wasn’t long before many zoning codes started to grow, seemingly exponentially, in scope and specificity.

The physical growth of local zoning codes wasn’t exactly surprising. As all planners know, local regulations have a tendency to expand over time, and it’s not uncommon for a small city to be governed by hundreds (if not thousands) of individual ordinances adopted over a period of many decades.

Consequently, though, the codification of local regulations can be a daunting process for staff and local officials. The location of a specific set of provisions within the local code of ordinances affects both the efficiency of code administration and the legibility of the code to residents, business owners, and other community stakeholders.

While it is increasingly common to bring various development-related local regulations together in a unified development code, very few unified development codes actually incorporate

every type of local regulation that affects the use of land. Many of these specialized regulations are rooted in different legal traditions than zoning and are not explicitly enabled by state statutes related to local subdivision or zoning control.

These non-zoning regulations include ordinances related to special event permitting, business licensing, animal control, housing tenure, and property maintenance, just to name a few. In larger cities and counties, local officials may delegate administration of each of these ordinances to a different department. Meanwhile, in smaller communities planning staff may be charged with administering all of these non-zoning regulations. And in communities small and large, there are often questions about where a particular ordinance should be codified and who should be responsible for its administration and enforcement.

This article looks at the intersections between zoning and other specialized local regulations that affect the use of land. The following sections look at how the scope of local zoning codes has expanded over time and discuss several types of non-zoning provisions that occasionally get incorporated into local zoning codes before concluding with a proposed framework for making codification decisions about land-use related ordinances.

ZONING’S EXPANDING WAISTLINE

Early zoning ordinances were straightforward and concise—just a simple list of permitted uses, setbacks, and height limits for each zoning district and an accompanying zoning map. It didn’t take long, though, for those zoning codes to start bulking up.

First, the number of zoning districts increased to accommodate greater variation in residential, business, and industrial districts. Then development standards expanded beyond proscriptive dimensional limits to include parking, landscaping, lighting, signage, and other site design requirements.

After World War II, the process of expansion continued with new zoning techniques. First came planned unit developments (PUDs), which functioned like customized zoning codes for a single parcel of land. Then, zoning codes began incorporating overlay districts that modified some, but not all, of the base zoning district standards for certain parcels as well as specialized floating zoning districts that could be mapped and applied through the development application process.

In the 1970s and 80s, many zoning codes began incorporating performance standards that provided developers with additional flexibility but also broadened the scope of zoning to include environmental protection. Provisions addressing floor area ratio, impervious coverage ratio, and various measurable environmental impacts, such as noise, glare, vibration, and odors, became commonplace. Meanwhile, there was a growing trend toward combining subdivision, zoning, and other specialized development-related ordinances into unified development codes.

Starting in the 1990s, it became increasingly common for zoning codes to include extensive prescriptive site and building design standards (i.e., form controls) for specific districts or development types. For some communities this meant a complete reconceptualization of zoning for certain districts, where form controls replaced many use-based standards. In many other instances, form controls became an added layer of regulation. And in the most extreme cases, communities began adopting parallel codes, meaning the same parcel may



Many localities include provisions in the zoning code for temporary events on private property, such as this food truck gathering in Lower Manhattan, and provisions for similar events on public property outside of the zoning code.

be subject to two distinct zoning codes, offering applicants a choice of which code to apply to a particular development proposal.

During this same period, use- or structure-specific development standards proliferated. While most codes retained universal district-based development standards, many began including new sections for standards that governed specific uses or structures (e.g., fast food restaurants or town houses), often without regard to zoning district.

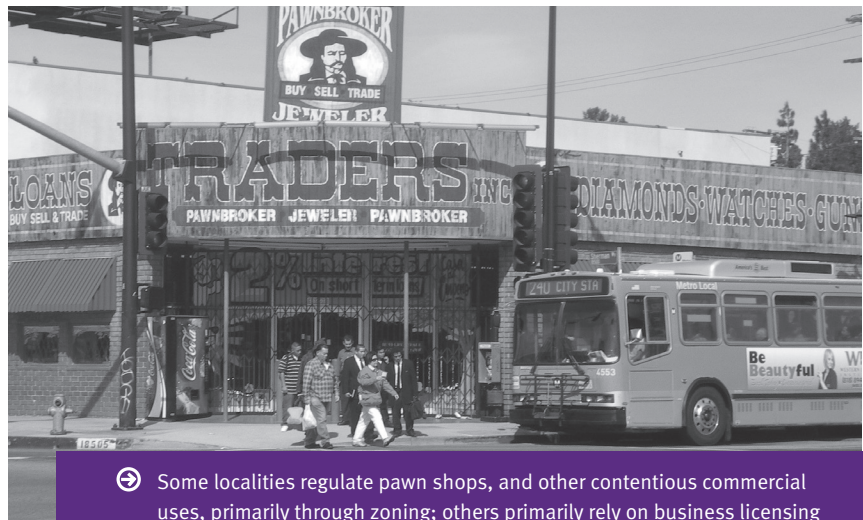
By the first decade of the 21st century, the average big-city zoning code was many hundreds of pages long, and there was considerable variation from code to code in terms of scope, approach, and organization. Many, if not most, zoning experts agree about opportunities to reform zoning by streamlining the number of zoning districts, organizing use permissions and standards under broad categories, and minimizing reliance on discretionary approvals. However, relatively few of these experts envision a return to the simplicity of the earliest zoning codes.

The natural evolution of zoning has blurred the lines between various types of local regulations with distinct regulatory traditions, and it raises several questions about how localities should approach codification. Given that nearly identical sets of land-use-related provisions may appear in very different sections of any given local code of ordinances, what principles should guide planners and local officials charged with making codification decisions? Does it make sense to bring all provisions with an arguable connection to land use under the umbrella of “zoning”? Or should some ordinances related to land use remain distinct from zoning?

THE BASIC RATIONALES FOR CODIFICATION

While some (mainly very small) localities are governed by a small set of uncoded ordinances, most cities and counties choose to systematically arrange the laws they’ve adopted into codes of ordinances, with the zoning or unified development code as just one of many major titles, chapters, or articles. Typically, the codification process groups ordinances by subject matter or administrative unit, and a well-organized code of ordinances has a number of potential benefits over a collection of uncoded ordinances.

First, both users and administrators can easily see the general breadth and depth of local regulations. A quick scan should reveal



“Pawn Shop at Sherman Way & Reseda Blvd., Reseda, CA” by CH62, Wikimedia Commons (CC-BY-SA-3.0)

➔ Some localities regulate pawn shops, and other contentious commercial uses, primarily through zoning; others primarily rely on business licensing standards.

whether or not a broad subject is addressed by a local ordinance. Second, a well-organized code of ordinances reduces the likelihood of local officials adopting redundant or contradictory provisions. Finally, having a well-organized code of ordinances means that both the citizens who are subject to local regulation and the staff charged with administering those regulations will be able to quickly identify relevant provisions.

However, just having a code of ordinances doesn’t automatically answer all questions about where a new ordinance or set of provisions should “live” in the code. In many instances, there are complex relationships among different code sections, and of course zoning is not immune to these complexities.

THE RELATIONSHIP BETWEEN ZONING AND TEMPORARY EVENT REGULATION

Many localities sanction the use of public or private property for short-term events or activities that would not otherwise be permitted as long-term uses of a specific parcel of land. Because zoning was not originally conceived of as a mechanism for controlling the use of public land, provisions governing the temporary use of public land traditionally live outside of the zoning code in a section dealing with special or temporary event permitting. Meanwhile, the temporary use of private land is typically addressed in the zoning code through temporary use permissions and development standards. Some localities, though, colocate all provisions pertaining to short-term events or activities, either in the zoning code or in a separate sec-

tion of the code of ordinances.

Temecula, California, illustrates the conventional approach to codifying regulations for special events and temporary uses. The city has codified provisions related to holding special events on public property—including concerts, parades, circuses, festivals, block parties, street fairs, community events, sporting events, and community celebrations and observances—in the Streets, Sidewalks, and Public Places title of its code. Meanwhile, all regulations pertaining to temporary uses of private property live in the Zoning title.

In contrast, both Naperville, Illinois, and Arvada, Colorado, colocate provisions related to short-term events or activities on public and private land. In the case of Naperville, the provisions are codified in the Business and License Regulations title of its code, and the conditions of approval for special events cross reference many other applicable code sections. However, these conditions explicitly address land-use impacts related to parking, access, traffic, and noise without cross-referencing the zoning code. In Arvada’s code, all special event and temporary use provisions are located in the Land Development Code part.

But does one approach make more inherent sense than another? Well, if a locality is in a state where courts have deemed public land to be exempt from local zoning, there is a pretty strong argument for keeping provisions related to short-term events or activities on public land out of the zoning code. In other contexts, though, collocating provisions in the zoning code makes conceptual sense.

According to Dwight Merriam, FAICP, special events and temporary uses have an inherent connection to land-use regulation, since they can have serious impacts on surrounding properties, regardless of whether the event or activity is happening on public or private property.

However, Eric Damian Kelly, FAICP, notes that collocating provisions doesn't remove the need to cross-reference with licensing provisions, especially if the event or activity involves alcohol.

THE RELATIONSHIP BETWEEN ZONING AND BUSINESS REGULATION

In most communities, businesses are subject to local licensing requirements as well as zoning. Typically, at a minimum, business owners must apply for a local business license tied to a specific location, and the business must be allowed in that location according to the list of permitted uses for the relevant district in the zoning code. In some cases, though, localities have codified additional standards for specific businesses that owners must satisfy in order to obtain or maintain a business license or zoning permit.

Traditionally, localities have codified standards controlling aspects of business operation that do not affect site development outside of the zoning code in a section dealing specifically with business regulation. These standards may include operator qualifications, record-keeping requirements, and security measures. However, any use-specific standards directly related to site or building design would live in the zoning code. These standards may include off-street parking requirements, minimum lot size requirements, and signage allowances.

However, these territorial distinctions between zoning and business licensing are far from universal. In fact, nearly identical sets of provisions may be codified in the zoning code in one locality and in a section dealing with local business regulation in another locality. This is perhaps most common with certain high-impact businesses, such as pawn shops, where the community has special concerns related to crime prevention and community character protection.

As an illustration of the traditional approach, Poway, California, has codified record-keeping and goods-handling requirements for pawn shop proprietors in its Business Licenses and Regulation title. Meanwhile, Poway's Zoning title includes a special requirement that no two lots containing pawn shops be located closer than 1,000 feet apart.

In contrast, Tyrone, Georgia, has codified



"Our Chicken Coop" by funwang, Flickr (CC0-2.0)



Some localities add provisions related to chicken keeping in residential districts to their zoning codes, while others codify these provisions under animal control.

all operational requirements and use-specific development standards for pawn shops in its Licenses, Taxation, and Miscellaneous Business Regulations chapter. In addition to restrictions on hours of operation and record-keeping requirements, these provisions also include spacing requirements from other pawn shops as well as from schools, churches, day care centers, parks, libraries, and residences. They also require entrances to be visible from a public right-of-way and the interior of the store to be visible from the outside at all times. Riverside, California, has a similar set of provisions in its code, but these provisions are located in the Zoning title.

The fact that zoning was not originally intended to address operational characteristics does not automatically raise a red flag in regard to colocation provisions in the zoning code. The widespread adoption of environmental performance standards provides a clear model for referencing operations in zoning, even when there is no inherent link to physical development. In fact, there have been very few legal challenges to zoning codes that include operational requirements for specific uses, provided those requirements are uniformly applied and do not violate state enabling laws or licensing schemes.

However, there are some administrative considerations that may tip the scales in favor of keeping operational requirements outside of the zoning code. In many communities a zoning

approval runs with the land in perpetuity until a change of use occurs, but local business licenses often require annual renewal. This annual renewal process theoretically gives localities an opportunity to better monitor business operations and ensure ongoing code compliance. Furthermore, staff charged with zoning enforcement may not be well-equipped or positioned to enforce operational requirements, so colocation provisions do not automatically streamline administration or enforcement.

Whether or not provisions are colocated, both Kelly and Merriam encourage a careful review of all definitions, operational requirements, and development standards for a particular business to ensure consistency.

THE RELATIONSHIP BETWEEN ZONING AND ANIMAL REGULATION

Many localities have adopted animal control ordinances to minimize the likelihood of privately owned animals becoming public nuisances. These ordinances often include provisions requiring owners to take measures to prevent animals from running at large and to clean up animal waste in public. Most animal control ordinances also place limits on the types of animals that owners can keep as pets, and many cap the total number of different types of animals that an owner can have at a single premises.

Traditionally, localities have used animal control provisions to regulate animals kept

for companionship or commercial purposes (e.g., breeding operations or exotic pet dealers) but not for agricultural purposes. Typically, the local code of ordinances would either be completely silent about keeping animals for productive use or would explicitly permit farm animals in agricultural zoning districts.

Over the past decade, interest in keeping chickens, bees, and livestock in residential districts has risen dramatically. Consequently, many localities have responded by adding provisions to their codes that address farm animals in nonagricultural districts. However, in terms of codification, some localities integrate these provisions into their animal control regulations, while others regulate chickens, bees, and livestock through zoning.

St. Petersburg, Florida, is an example of a city that collocates all animal regulations in the Animals chapter of its code of ordinances. In addition to provisions related to household pets and wild or vicious animals, this chapter permits residents to keep chickens, goats, horses, and other farm animals, subject to minimum lot area, setback, and sheltering requirements.

In contrast, Seattle has codified provisions related to keeping farm animals as an accessory use in its Land Use Code title, but maintains a distinct set of provisions related to licensing, controlling, and protecting household pets and prohibiting exotic animals in its Animals title. This approach makes it clear that the city views animal keeping as a land use and ensures that any changes to numerical

limits or dimensional standards would need to go through the zoning amendment process.

Both Kelly and Merriam agree that animal keeping is, at least in some circumstances, a zoning issue. The connection to zoning is strongest in instances where the presence of animals is intrinsic to the economic function of a parcel of land (e.g., farms, animal boarding or breeding operations, pet stores, etc.). Additionally, accessory animal keeping has a clear connection to zoning whenever the potential impacts on adjacent property owners threaten to alter the character of the zoning district. However, provisions related to public animal behavior probably don't belong in the zoning code. Again, this highlights the importance of cross-referencing related code sections.

THE RELATIONSHIP BETWEEN ZONING AND TENURE-RELATED REGULATIONS

Zoning was not originally designed to control tenure. This is because ownership structure is not inherently related to land-use impacts. Developments with different ownership structures can be identical in form and use. For example, a single-family home may be occupied by a fee-simple owner, a condominium owner, or a renter, but in each case the use of the property is for household living. The most common way of explaining this concept is that zoning controls use not the user (Pindell 2009).

While this general principal holds in contemporary zoning practice, there are some limited exceptions and a lot of gray area. Courts

have generally upheld owner-occupancy requirements for accessory dwelling units and as a condition of approval for a project requiring a discretionary use permit (Pindell 2009). In other instances, courts are looking for clear evidence that any tenure-based provisions have a strong connection to land-use impacts (Ziegler 2008).

While not commonplace, many localities have adopted rental restrictions or restrictions on condominium conversions or development. In some cases, localities codify these provisions in the zoning code, but in other cases, these provisions live outside of the zoning code.

For rental restrictions, there seems to be a key distinction between procedural restrictions and other types of restrictions. Localities generally codify procedural rental restrictions, which require landlords to register rental units and submit to periodic inspections in order to minimize problems associated with poor management, outside of the zoning code.

Meanwhile, localities seem more evenly divided on where to codify other types of rental restrictions, which often require owners to comply with specific locational or operational standards as condition of approval. This is perhaps most obvious in the realm of short-term and vacation rental regulation (see the October 2015 issue of *Zoning Practice*), where localities seem split on whether to treat short-term rentals primarily as a zoning issue or as a business licensing issue.

While courts have generally frowned upon using zoning to require administrative review of



“Quarry Bend Sandy Utah Oct 2012” by LivingLandscapeArchitecture, Flickr (CC-BY-2.0)

➞ From a land-use perspective, the ownership structure of these town homes in Sandy, Utah, is irrelevant. However, many local zoning codes base lot size and setback requirements on a fee-simple ownership model, making condominium development difficult without special provisions addressing condominium subdivisions.

condominium conversions, zoning provisions that deal with condominium conversion or development have been upheld in cases where the regulation is primarily concerned with land-use impacts and not ownership (Ziegler 2008). In practice, it is not uncommon to see very similar sets of provisions codified in the zoning code for one locality and outside of the zoning code for another.

For example, West Valley City, Utah, regulates condominium development and conversion through a dedicated title of its code of ordinances. Meanwhile, Claremont, New Hampshire, includes similar provisions in its Zoning chapter.

The connection between condominium development and the traditional justifications for land-use regulation is perhaps most clear when projects involve multiple structures on a single lot of record. In these instances, the condominium form of ownership creates a situation where functionally and structurally identical projects might receive very different treatment under zoning, unless the code includes special provisions to compensate.

THE RELATIONSHIP BETWEEN ZONING AND BLIGHT PREVENTION REGULATIONS

The traditional role of zoning in blight prevention was limited to excluding potentially incompatible land uses from single-family residential districts. The primary regulatory tool localities use to prevent blight is an exterior property maintenance ordinance, which is typically codified outside of the zoning code. Whether rooted in a version of the International Property Maintenance Code or drafted independently, most property maintenance ordinances address structural problems (e.g., cracked foundations and leaky roofs, broken windows, unsecured doors), nonstructural issues (e.g., accumulated trash or overgrown weeds), and in some instances, aesthetic concerns (e.g., chipped paint or broken decorative architectural features).

Many contemporary zoning codes include provisions that seem closely related to property maintenance standards. For example, zoning provisions that address outdoor storage in residential districts, parking vehicles in front yards, or junk accumulation are relatively common. And in some cases, localities have incorporated extensive exterior property maintenance standards into their zoning codes.

To illustrate, Orem, Utah, has incorporated a set of standards titled Conservation of Values into its zoning code. These provisions

require exterior painting and planting of landscaping within a year of occupancy. They also prohibit parking vehicles on lawns; accumulating trash, rubbish, or debris; or storing inoperable vehicles, merchandise, or salvage materials outside of opaque enclosures.

Similarly, Snellville, Georgia, has also placed property maintenance standards in its zoning code. These provisions require fences and walls to be well maintained and prohibit uncultivated vegetation over 12 inches in height, unauthorized vehicle storage, and vehicle parking in front yards.

According to Kelly, localities need to be sure that zoning provisions related to nonconformities do not prevent property investments that would remedy unsafe conditions, even if those investments would not decrease the zoning nonconformity. Merriam takes a stronger position; he doesn't think zoning should address property maintenance. In fact, he thinks the primary role of zoning in relation to blight should be to incentivize redevelopment and reinvestment (see the December 2009 issue of *Zoning Practice*). For example, Nashville encourages the residential redevelopment of vacant commercial properties along aging retail strip corridors through its Urban Zoning Overlay District.

A FRAMEWORK FOR MAKING ZONING CODIFICATION DECISIONS

As evidenced by the preceding discussion, codification decisions can be extremely complicated. And there is relatively little specific guidance in the planning literature to help planners and local officials make decisions about which (legally defensible) provisions belong in the local zoning code and which are best codified elsewhere. With that in mind, here are a few basic considerations to guide local discussions about whether or not to add new provisions to the zoning code.

Does It Pass the 'Ultra Vires' Test for Zoning?

The most basic test for any potential addition to the local zoning code is the "ultra vires" test. Simply put, the new provisions must be reasonably related to the objects or purposes expressed by the relevant state zoning enabling statute. Home rule and chartered localities are typically afforded wide latitude to adopt local regulations in order to protect the health, safety, and the general welfare of the public, provided those regulations are not preempted by and do not conflict with state or federal law (see the December 2014 issue of *Zoning Practice*). However,

the right to regulate does not mean the right to regulate through zoning specifically.

What Is Your Zoning Philosophy?

There are, essentially, two major contemporary zoning philosophies. Either you believe that zoning should focus narrowly on controlling the character of the built environment, or you believe zoning should do all of the local regulatory heavy lifting when it comes to preventing and mitigating potentially harmful land-use impacts of place-based activities and development. If you adhere to the first principle, you'd be more likely to exclude provisions that didn't explicitly relate to the form of new development from the zoning code. Otherwise, you'd be more likely to try to bring together all provisions that passed the ultra vires test for zoning in a unified development code.

Will It Help or Hinder Administration?

In many cases it makes sense to group all provisions that will be administered by one department or agency together in a single title or chapter. For example, if the planning department is charged with processing applications for local business licenses, it may make sense to group all operational and development standards for specific businesses together in the zoning code. However, in cases where administrative authority is more diffuse, it may be more efficient to keep operational standards out of the zoning code.

However, it's important to keep in mind that the approach that makes the most sense from an administrative perspective may not be intuitive to residents or applicants. In other words, there are instances where administrative expediency runs contrary to external user expectations. For example, if a prospective retail business operator is interested in leasing an existing storefront space, he may not think to look in the zoning code to find operational standards for his business. This potential tension between administrative efficiency and external user friendliness highlights, again, the importance of cross-referencing related code sections, especially when related provisions are not colocated.

Is It a Matter of Political Expediency?

Occasionally, localities make codification decisions based, in part, on political expediency. In many communities, amending the zoning code is a more complicated process than amending other parts of the code of ordinances. Petitions to amend the zoning text often require both a

hearing in front of the planning commission and a hearing in front of the local legislative body. Meanwhile, adding or changing other code titles may only require one hearing in front of the city council or county board.

If a proposed change is particularly controversial (or especially time-sensitive), local officials may be tempted to expedite the process by codifying new provisions outside of the zoning code. In cases where the text change is unrelated—or tangential—to mitigating land-use impacts or protecting community character, this may be wise. But if the codification decision is an attempt to undermine the intent of the zoning code, planners have an ethical responsibility to advocate for handling the text change through the rezoning process.

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WHAT CRITERIA INFORM
ZONING CODIFICATION
DECISIONS?

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