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# CURRENT STATE LEGISLATIVE AND JUDICIAL PROFILES ON LAND-USE REGULATIONS IN THE U.S.

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**September 20, 2005**

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# INTRODUCTION

This paper summarizes and calibrates the legislative and judicial environment surrounding residential land-use regulation in each of the fifty states.

## BACKGROUND

This paper is part of a large project on residential land-use regulation currently being conducted by the Zell/Lurie Real Estate Center in the Wharton School of the University of Pennsylvania.

The overall objectives of the project are (1) to develop a thorough and systematic data base on the nature of the land-use environment throughout the United States, and (2) to use these data to help better understand the underlying causes and effects of the variation in residential-use regulations across local communities.

Several types of data have been, and still are being, assembled:

(1) a nationwide land-use regulation survey sent to a sample of 6,897 municipalities;
(2) the same survey sent to every jurisdiction (368) in the Philadelphia Metropolitan Statistical Area;
(3) an extensive socioeconomic and housing activity profile from the 2000 Census (and previous Censuses);
(4) data that measure community pressure in a variety of ways (ballot initiatives and membership in conservation organization, e.g.);
(5) the legislative activity and judicial bent in each state – the subject of this paper.

Two major types of econometric analyses are planned: (1) analysis of the effects of variations in regulatory severity among municipalities on employment and population shifts, housing costs, and the tradeoff between efficiency and public good benefits; (2) analyses of the effects of population and employment characteristics, environmental pressures and state judicial and legislative activities on regulatory severity.

## STATE LEGISLATIVE AND JUDICIAL PROFILES ON RESIDENTIAL LAND-USE REGULATION

This paper has fifty state profiles describing the legislative and judicial climate in which land-use regulations take place in the individual jurisdictions in the state. The legislative environment is assessed on the basis of the level of activity over the last ten years in the executive and legislative branches. The judicial environment is assessed on the basis of the tendency of appellate courts to uphold or restrain four types of municipal land-use regulations – impact fees and exactions, fair share development requirements, building moratoria, and spot or exclusionary zoning.

The state assessments are described in three ways:

(1) The legislative activity and judicial tendencies are described in each of the state profiles.
(2) A score is assigned to each for each state. The legislative score is based on the extent of recent activity – 1 for little recent activity, 2 for moderate recent activity, and 3 for a high level of recent activity. The judicial score is based on the extent of restraint imposed by the appellate courts – 3 if supportive of municipal regulation, 2 if neither highly restrictive nor highly supportive, l if restrictive, 0 if there is insufficient case law to make a determination.
(3) A summary table of the material in each of the profiles is included.

We are now in the process of analyzing these results – their role in the determination of the severity of land-use regulations in different states, and the characteristics of the states associated with the legislative and judicial characteristics.

# SCORING KEY FOR STATE LEGISLATIVE AND JUDICIAL ACTIONS ON LAND-USE REGULATION IN THE U.S.

The following key explains the scoring system used in each of the state surveys. The Legislative score is based on the level of activity in the Executive and Legislative branches over the past ten years that is directed toward enacting greater statewide land use restrictions. The Judicial score reflects the tendency of appellate courts to uphold or restrain municipal land use regulations.

**LEGISLATIVE SCORE:**

| Score | Summary |
|---|---|
| 1 | Little recent activity |
| 2 | Moderate activity |
| 3 | High level of activity |

**JUDICIAL SCORE:**

| Score | Summary |
|---|---|
| 0 | Insufficient case law to make a determination<br>*There are several reasons why this situation occurs, including but not limited to: a particularly directed statutory framework that makes the appeal of a trial court decision unlikely or the relative lack of municipal land use restrictions.* |
| 1 | Restricts municipal land use regulation<br>*A typical example is a state in which the majority of appellate decisions have invalidated spot zoning and the imposition of impact fees, or have placed a relatively high standard for local governments to meet in implementing these land use tools.* |
| 2 | Neither highly restrictive nor highly supportive of municipal regulation<br>*A typical example is a state in which the majority of appellate decisions have struck down impact fees and upheld spot zoning.* |
| 3 | Supportive of municipal regulation<br>*A typical example is a state in which the majority of appellate decisions uphold impact fees, spot zoning and the use of building moratoria. These states may also have judicially imposed fair share housing or development requirements.* |

# ALABAMA

**Summary:** Alabama has largely placed land use planning powers in the hands of municipal governments, and there has been little activity in the legislature aimed at imposing state-wide development restrictions. Similarly, there has been relatively little litigation related to land use regulations. In those areas that have been litigated—sewer hookup moratoria and spot zoning—the courts have consistently deferred to the regulatory authority of the municipalities.

## LEGISLATIVE SUMMARY

In 2000, then-Governor Don Siegelman created the Alabama Commission on Environmental Initiatives through Executive Order 26.[1] Despite the recommendations of the Commission, however,[2] the Alabama Legislature has done very little to change the State's existing land use planning system. As a consequence, land use planning remains largely the responsibility of local governments, and there is no evidence that the state legislature is likely to impose meaningful restrictions on these powers in the near future. As one study suggests, "[T]he challenge facing planners may be more of one preventing bills from being adopted that erode the ability of local government to plan for, and regulate, land use and development."[3]

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

Given the limited implementation of land use restrictions in Alabama, the state's judiciary has had only a few opportunities to shape its jurisprudence in this area. Regarding building moratoria and spot zoning, the courts have largely supported municipal regulation. In the area of building moratoria, this municipal regulation is limited to the imposition of sewer hook up moratoria. In the area of exclusionary zoning, the courts have adopted the less prevalent position that grants broad power to the municipality to make changes to the comprehensive plan.

- **Judicial Rating: 3** (Generally supportive of municipal regulation)

1. Impact Fees / Exactions: There are no Alabama cases that directly address the issue of impact or development fees. Regarding municipal fees in general, Alabama courts have largely upheld a broadly defined power for municipalities to impose such fees. As an example, the court in *Densmore v. Jefferson County* upheld a municipal storm-water management fee based on the principle that, "for a fee to be sustained as valid, the benefit conferred on property owners need not relate directly to the exact amount paid."[4]

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[1] Executive Order No. 26 (2000) *available at* http://www.jsu.edu/depart/epic/executiveorder26.html.
[2] The full text of the report is available at http://www.jsu.edu/depart/epic/ACEIreport.htm.
[3] APA 2002 State of the States p 32
[4] 813 So. 2d 844, 854 (Ala. 2001) (citing Board of Water & Sewer Commissioners of the City of Mobile v. Yarbrough, 662 So. 2d 251 (Ala. 1995)).

2. Fair Share Development Requirements: The Alabama judiciary has not imposed any fair-share development requirements on municipalities.

3. Building Moratoria: Alabama jurisprudence on the issue of building moratoria has exclusively addressed the issue of sewer hook up moratoria. On this issue, the courts have clearly upheld the power of a municipality to enforce such a restriction. Specifically, one court has held that moratoria on new connections to an existing sewer system are "manifestations of the sovereign's paramount police power which has long been held to 'embrace the protection of the lives, health, and the property of the citizens . . .' and to which private contractual obligations must yield."[5] Arbitrary, case-by-case restrictions in the absence of a universal moratorium, however, have not survived judicial scrutiny.[6] Taken together, these decisions may be viewed as upholding municipal restrictions within an established regulatory scheme. More telling, however, is the absence of litigation challenging general building moratoria. The absence of litigation on this issue suggests that such moratoria are not widely imposed by municipalities in Alabama.

4. Spot Zoning / Exclusionary Zoning: The Alabama Courts have adopted the less common position on the issue of spot zoning that holds valid any change in zoning where there is a comprehensive plan in effect. As one court has stated, "where an existing comprehensive plan is in effect, no amendment thereto can be attacked as being 'spot' zoning."[7] This rule and the subsequent decisions that apply it are not necessarily restrictive or non-restrictive, since spot zoning may be used to either promote or discourage a particular development project. The rule does grant a high degree of deference to the local government in the areas of planning and zoning. In fact, since 1950, no Alabama court has invalidated a change in the zoning classification of a property on the grounds that it resulted in spot zoning.

[5] *See* Peterson v. Jefferson County, 372 So. 2d 839, 842 (Ala. 1979) (citing *Van Hook v. City of Selma*, 70 Ala. 361, 363 (1881)).
[6] *See* Pritchett v. Nathan Rodgers Constr. & Realty Corp., 379 So. 2d 545 (Ala. 1979).
[7] COME v. Chancy. 298 Ala. 555, 564 (1972).

# ALASKA

**Summary:** The availability of vast areas of land and very low population density in Alaska have led to very few conflicts over restrictions on development. With the exception of small disputes over conditional property uses, most of the judicial activity in this area relates to the allocation of mineral and fishing rights. For the purposes of this study, it is difficult to evaluate the judiciary's position on these issues.

## LEGISLATIVE SUMMARY

Land use planning in Alaska today is limited to the largest cities and boroughs and the disposition of state-owned land.[8] Comprehensive, state-wide restrictions on development are virtually non-existent, and there is no indication that either the legislature or the governor is intent on reforming the existing system.

- **Legislative Rating: 1**(Little recent activity)

## JUDICIAL SUMMARY

Given the availability of land in Alaska, there has been very little conflict between governmental restrictions and development. It is difficult, therefore, to determine whether the courts have adopted a consistent position on this issue. The spot zoning jurisprudence suggests that the courts are tremendously deferential to governmental regulation, but there has not been any litigation in the areas of impact fees, fair share development or building moratoria.

- **Judicial Rating: 0** (Insufficient case law to make a determination)

1. Impact Fees / Exactions: Alaska courts have not decided any disputes involving impact fees or exactions in exchange for development rights. This likely indicates that such fees are rare or non-existent in the state.

2. Fair Share Development Requirements: Alaska courts do not impose additional specific fair share development requirements on municipalities.

3. Building Moratoria: No moratorium on development has been challenged in the Alaska courts.

4. Spot Zoning / Exclusionary Zoning: Alaska courts treat small-scale zoning decisions, or "spot zoning," as legislative actions rather than judicial ones. As a result, the decision may not be appealed to Alaska courts.[9] As one court summarized, "[j]ust as the act of spot zoning is a legislative act, the decision to spot zone is a legislative decision."[10]

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[8] American Planning Association, 2002 State of the States, 33. *See also,* Alaska Department of National Resources *available at* http://www.dnr.state.ak.us.
[9] *See* Cabana v. Kenai Peninsula Borough, 21 P.3d 833, 835 (Alas. 2001).
[10] Id.

# ARIZONA

**Summary:** Certain factions within the Arizona legislature and the governor's office have led efforts recently to increase the amount of state-wide planning restriction and the power of municipal governments to impose such restrictions. These efforts have met mixed success both within the legislature and among the public. It is likely, however, that the state will continue to move in the direction of increasing restrictions on development. The judiciary has largely supported municipal efforts to restrict development. Specifically in the areas of impact fees and spot zoning, the courts have deferred to municipal regulatory decision-making.

**LEGISLATIVE SUMMARY**

The rise of the "smart growth" movement in Arizona has lead to significant activity on the part of both the legislature and the governor to enact greater state-wide planning restrictions and to increase the power of municipalities to restrict development. The momentum in the state is in the direction of greater restrictions on development, but there is still a significant portion of the population and of the legislature that opposes greater restrictions on property rights.

- **Legislative Rating: 3** (High level of activity) *However, legislature has resisted many proposed reforms.*

- In May 2000, the legislature approved the Growing Smarter Plus Act. This act revised the State's municipal zoning statutes to include[11]:
  - The requirement that certain fast growing communities present general development plans to voters for their approval.
  - Granting counties the power to assess impact fees
  - Requiring local general plans to be consistent with projections for water availability
  - Citizen review required for rezoning

- In November 2000, the Governor was instrumental in putting a constitutional amendment on the ballot that would have authorized the creation of a large open space land trust known as the Arizona Conservation Reserve. This measure, called Proposition 100, was defeated 52%-48%. In the same year, voters rejected by a margin of 40% a ballot initiative that would have required certain cities to establish growth boundaries.[12]

- In February 2001, the Governor created the Growing Smarter Oversight Council, which is focused on making improvements to the Growing Smarter and Growing Smarter Plus Acts.[13]

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[11] See, American Planning Association, 2002 State of the States, 35 (2002).
[12] See Phyllis Meyers, Growth at the Ballot Box: Electing the Shape of Communities in November 2000, Brookings Institution Center on Urban and Metropolitan Policy. February 2001.
[13] American Planning Association, *supra* note 1.

**JUDICIAL SUMMARY**

Arizona courts have largely supported municipal efforts to restrict development. In the area of impact fees and exactions, for example, the courts have upheld a broad power to implement such fees and have even found that broad-based municipal development fees do not fall within the restrictions imposed by the U.S. Supreme Court's definition of takings. Similarly, the courts have upheld all municipal zoning decisions that have been challenged as violating spot zoning restrictions.

- **Judicial Rating: 3** (Generally supportive of municipal regulation)

1. Impact Fees / Exactions: Arizona courts have granted municipalities broad leeway in imposing impact fees on development. Unlike many states, municipalities in Arizona need not demonstrate that the fee confers a "direct benefit" on the developer.[14] Also, the state's jurisprudence holds that development fee ordinances are different than special assessments and are therefore not subject to the Supreme Court's takings jurisprudence.[15] The courts have, however, struck down the imposition of impact fees imposed by cities and towns for the purpose of funding school construction, since the provision of education is specifically a state function under the Arizona Constitution.[16]

2. Fair Share Development Requirements: Arizona courts do not impose any fair-share development requirements on municipalities.

3. Building Moratoria: No general building or development moratoria have been challenged in the Arizona courts.

4. Spot Zoning / Exclusionary Zoning: Though there is limited case law on this issue, the courts have sided exclusively with municipalities in upholding zoning designations that were challenged on the grounds that they constituted spot zoning[17] and in upholding denials of rezoning permits on the grounds that such rezoning would constitute spot zoning.[18]

[14] Home Builders Ass'n v. City of Scottsdale, 187 Ariz. 479 (1997).
[15] Home Builders Ass'n v. City of Scottsdale, 183 Ariz. 243 (1995).
[16] Home Builders Ass'n v. City of Apache Junction, 198 Ariz. 493 (2000).
[17] See e.g., Phoenix v. Fehlner, 90 Ariz. 13 (1961); Haines v. Phoenix, 151 Ariz. 286 (1986);
[18] See e.g., New Pueblo Constructors v. Pima County, 120 Ariz. 354 (Ariz. App. 1978); Phoenix v. Beall, 524 P.2d 1314 (Ariz. App. 1974).

# ARKANSAS

**Summary:** Land use planning in Arkansas remains largely a power delegated to municipal governments. There has been little activity in the legislature indicating that this is likely to change in the near future. Additionally, there have been relatively few court cases challenging municipal land use restrictions. This lack of litigation likely indicates a permissive land use regime among municipalities.

## LEGISLATIVE SUMMARY

As is true in many neighboring states, planning in Arkansas occurs primarily at the city and county level.[19] The state legislature has not undertaken any significant efforts to reduce this authority or to implement state-wide planning restrictions. In fact, one article notes that "the last time any significant changes were made to the [state planning] statute . . . was 1957."[20] One exception to this trend may be a recent amendment to the state's constitution that authorizes cities and counties to issue bonds to finance blight remediation and prevention.[21] This new bond authority may favor new development in certain communities.

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

There is relatively little case law in the Arkansas courts on issues related to governmental restriction or encouragement of development. In the case law that does exist, impact fee and exaction jurisprudence indicates that the courts are willing to uphold municipal power to regulate land use but that the courts will strictly enforce statutory limitations on this power.

- **Judicial Rating: 1** (Generally restricts municipal land use regulation)

1. Impact Fees / Exactions: Arkansas courts have generally acted to restrict the power of local governments to impose impact fees and exactions.
    a. In the case of *Marion v. Baioni*[22]*,* the court held that the ability of municipalities to charge exactions on development was limited to a charge that reflected the costs directly attributable to the development project. Any fees charged in excess of this amount should properly be viewed as a tax and may therefore be imposed only after ratification by the voters of the municipality.
    b. A summary of the relevant law by the Arkansas Attorney General identifies four other restrictions that the courts have imposed on municipal impact fee issuance authority[23]:

[19] Ed Bolen, et al., Smart Growth. 8 Hastings W.-N.W. J. Env. L. & Pol'y 145, 151 (2002).
[20] American Planning Association, 2002 State of the States, 37 (2002).
[21] Voters approved Amendment 78 to the Arkansas Constitution in November 2000.
[22] 312 Ark. 423, 427 (1993).
[23] *See* 1995 Ark. AG LEXIS 196.

i. First, the municipality must have a "reasonably definite" master plan in effect that includes the amount and nature of public facilities in a given area.[24]
ii. Secondly, the municipality must have adopted specific regulations for the imposition of such a fee.[25]
iii. Third, the municipality must give the developer the opportunity to dedicate land or otherwise incorporate the required public facilities into the development plan in lieu of paying an impact fee.[26]
iv. The community or public facilities acquired with the impact fee must serve the development against which the fee is assessed.[27]

2. Fair Share Development Requirements: Arkansas courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low-income housing.

3. Building Moratoria: This is an issue that has not been raised in the Arkansas courts.

4. Spot Zoning / Exclusionary Zoning: In the single case that addresses this issue, the Supreme Court of Arkansas adopts the following position on spot zoning, "Spot zoning, by definition, is invalid because it amounts to an arbitrary, capricious and unreasonable treatment of a limited area within a particular district. As such, it departs from the comprehensive treatment or privileges not in harmony with the other use classifications in the area and without any apparent circumstances which call for different treatment. Spot zoning almost invariably involves a single parcel or at least a limited area."[28] In applying this position, the Supreme Court held that a municipal zoning decision may be overturned only on the grounds that it is "arbitrary and capricious."[29] This holding is highly deferential to municipal authority. Given the very limited case law on this issue, this deferential position is relatively untested and may therefore reflect the fact that municipalities have not broadly exercised their rezoning powers in a way that restricted proposed development.

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[24] City of Fayetteville v. IBI, Inc., 280 Ark. 484, 659 S.W.2d 505 (1983).
[25] City of Jonesboro v. Vuncannon, 310 Ark. 366, 837 S.W.2d 286 (1992).
[26] Id; A.C.A. § 14-56-417(b)(6) (2004).
[27] Id.
[28] Riddell v. Brinkley, 272 Ark. 84, 118 (1981) (citing R. Wright and S. Webber, *Land Use* (1978)).
[29] Id.

# CALIFORNIA

**Summary:** Land use planning in California remains largely a function of local government, although the state has established an extensive statutory framework in which local governments must operate. Over the past ten years, policy makers at the state level have actively pursued reform of that structure and have advanced initiatives in the areas of open space preservation, infill development and targeted infrastructure siting. California courts have largely mirrored this approach by granting substantial deference to local land use decisions, particularly in the areas of impact fees, building moratoria and spot zoning. In the area of fair share housing the courts have developed a jurisprudence that has both restricted and protected municipal regulation.

**LEGISLATIVE SUMMARY**

Over the past ten years, California has seen a high level of activity aimed at crafting and reforming statewide land use restrictions. During this time, the Governor and the State Legislature have pursued numerous initiatives, and several other land use reforms were enacted through ballot initiatives.

- **Legislative Rating: 3** (High level of activity)

- In 1995 several public and private organizations teamed with a group called the Greenbelt Alliance to produce a report entitled *Beyond Sprawl: New Patterns of Growth to Fit the New California.*[30] This report outlined a series of recommendations aimed at "rethink[ing]" the ways in which the state should grow in the future.

- In January 2000, state Assemblywoman Patricia Wiggins founded the Smart Growth Caucus, an organization comprised of legislators from both parties aimed at studying and presenting proposals for "smart growth" reform in the state.[31] In 2001, the Caucus held hearings on affordable housing, infill development and agricultural land preservation.[32]

- Over the past ten years, there has been a significant amount of land use reform legislation introduced in the Legislature. Although much of this legislation has not been passed, relative to other states, the Legislature has approved a considerable volume of legislation during this period. For example, in 2001 legislation was passed in the areas of "environmental justice," minimum water supply requirements, school siting, transportation planning, open space preservation, and low-income housing.[33] In 2002, the Legislature passed bills amending the California Environmental Quality Act, creating infill development incentives, requiring state infrastructure spending in developed areas, and prohibiting certain density restrictions.[34]

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[30] The full report is available at http://www.greenbelt.org/resources/reports/report_beyondsprawl.html.
[31] *See* Smart Growth Caucus at http://www.assembly.ca.gov/sgc/.
[32] *See* American Planning Association, *2002 State of the States*, 38 (2002).
[33] Id.
[34] O'Melveny & Myers LLP, *New California Land Use Legislation*, October 2002 at 1. Available at http://www.omm.com/webdata/content/publications/eb_10_02.pdf.

- During his tenure, former Governor Gray Davis was active in promoting land use reforms as well. For example, in 2001, he signed an Executive Order directing the Department of General Services to site state buildings in downtowns and other developed areas.[35] He also established the Governor's Commission on Building for the 21st Century.[36] The Commission issued a series of reports from 1999-2001 that outlined recommendations for state capital expenditures over the ensuing five years.[37] During his campaign for Governor, Arnold Schwarzenegger pledged to support planning reform, specifically in the areas of brownfields redevelopment and infill investment.[38] It remains unclear what form these proposals might take.

**JUDICIAL SUMMARY**

In California, unlike in many states, local government land use regulation is largely governed by state statutes. The extensive body of case law related to land use restrictions, therefore, largely centers on the courts' interpretation of these statutes. In the majority of cases, the courts have adopted a rule that defers to municipal determinations. This is particularly true in the areas of impact fees, building moratoria and spot zoning, where the courts have interpreted the relevant state statutes in a way that provides considerable latitude to municipal judgments. In the area of fair share housing requirements, the issue is slightly more complicated. Here the courts similarly interpret the relevant statutes in a broad manner, but depending on whether the municipality seeks to justify its approval of low income housing or restrict the entry of low income housing into its jurisdiction, this interpretation may be either supportive or restrictive of municipal regulation.

- **Judicial Rating: 3** (Supportive of municipal regulation)

1. Impact Fees / Exactions: Impact fees and exactions in California are governed by a series of state statutes that authorize various fees and generally require that a local government clearly identify the purpose of the fee and establish a reasonable relationship between the development and the amount and use of the funds be established by the government body imposing such fees.[39]

    a. In interpreting these statutes, California courts have shown deference to a municipality's decision to assess impact fees and monetary exactions against developers. In fact, courts have expressly articulated a policy of "substantial judicial deference" in this area.[40] Impact fees and exactions have been permitted for conversion of residential property into tourist accommodations,[41] increased transit costs,[42] increased water use,[43] the development of parks and recreation

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[35] E.O. D-46-01 (2001).
[36] E.O. D-4-99 (1999).
[37] These reports are available at http://www.ltg.ca.gov/programs/cb21/index.asp.
[38] *See* CNN.com , *Schwarzenegger Embraces 'Smart Growth' Ideas To Curb Sprawl,* November 21, 2003 at http://www.cnn.com/2003/ALLPOLITICS/11/21/arnold.ap/.
[39] *See e.g.,* Cal. Gov. Code § 66410 et seq. (2005) (providing for certain allowable impact fees to be imposed as a condition of subdivision approval); Cal. Gov. Code § 66000 et seq. (2005) (governing impact fees generally).
[40] San Remo Hotel v. City and County of San Francisco, 27 Cal. 4th 643, 671 (Cal. 2002) *quoting* Ehrlich v. City of Culver City, 12 Cal. 4th 854, 892 (Cal. 1996).
[41] San Remo Hotel v. City and County of San Francisco, 27 Cal. 4th 643 (Cal. 2002).
[42] Blue Jeans Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164 (Cal. Ct. App. 1992).

facilities,[44] and increased costs incurred by local school districts through development of property within the school district.[45]

b. Courts will, however, invalidate impact fees if the municipal government cannot show a rough proportionality between the anticipated impact of the development and the fees charged.[46] Courts have also restricted the imposition of additional impact fees after a subdivision map has already been approved, as such fees are generally allowed only where they imposed before building permits are issued and actual construction begins.[47]

2. Fair Share Development Requirements: Under California law, “cities and counties should undertake all necessary actions to encourage, promote, and facilitate the development of housing to accommodate the entire regional housing need.”[48] Additionally, the law provides that every general plan shall include a housing element which, "shall make adequate provision for the housing needs of all economic segments of the community.”[49]

   a. California courts have strictly enforced and, in some cases, expanded on these statutory requirements. As one court has held, it is not enough for a community to measure the housing needs for its current residents; it “must be responsive to the housing needs of a fair share of those households who do not live in the locality but whose housing opportunities are affected by the planning decisions of the locality.”[50] Another court held that the state law created a “duty on the City in certain circumstances to require replacement housing for low or moderate-income persons or families where units occupied by qualifying persons are converted or destroyed.”[51]

   b. In addition to applying fair share housing and development principles as a basis for compelling certain communities to accept development, California courts have also used these principles to uphold zoning decisions that were challenged by residents and neighboring municipalities who sought to limit growth.[52]

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[43] Carlsbad Mun. Water Dist. v. QLC Corp., 2 Cal. App. 4th 479 (Cal. Ct. App. 1992); Russ Building Partnership v. City and County of San Francisco 188 Cal.App.3d 977 (Cal. Ct. App. 1987).
[44] Associated Homebuilders of the East Bay v. City of Walnut Creek 4 Cal.3d 633 (1971).
[45] Western/California, Ltd. v. Dry Creek Joint Elementary School Dist., 50 Cal. App. 4th 1461 (Cal. Ct. App. 1996); Trent Meredith v. City of Oxnard 114 Cal.App.3d 317 (Cal. Ct. App. 1981).
[46] *See e.g.,* Ehrlich v. City of Culver City, 12 Cal. 4th 854 (Cal. 1996); Bixel v. City of Los Angeles 216 Cal.App.3d 1208 (Cal. Ct. App. 1989).
[47] Western/California, Ltd. v. Dry Creek Joint Elementary School Dist., 50 Cal. App. 4th 1461 (Cal. Ct. App. 1996); Kaufman & Broad Cent. Valley v. City of Modesto, 25 Cal. App. 4th 1577 (Cal. Ct. App. 1994).
[48] Cal Gov Code § 65584 (2005).
[49] Stocks v. City of Irvine, 114 Cal. App. 3d 520, 533 (Cal. Ct. App. 1981) *Quoting* Cal. Gov. Code § 65302.
[50] Id. at 534.
[51] Venice Town Council v. City of Los Angeles, 55 Cal. Rptr. 2d 465, 469 (Cal. Ct. App. 1996).
[52] *See e.g.,* City of Del Mar v. City of San Diego, 133 Cal. App. 3d 401 (Cal. Ct. App. 1982); Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261(Cal. Ct. App. 2004).

c. Where a local government has developed a plan to provide for low income housing the court will not disturb that plan absent a showing that the plan is "not arbitrary, capricious, or without evidentiary support."[53]

3. Building Moratoria: Under California law, local governments are permitted to enact building moratoria, and courts have largely upheld their use.[54]

   a. California courts have upheld these moratoria as a proper exercise of governmental police power in the majority of cases.[55] Underlying these decisions is a rule that applies a presumption of validity to a zoning ordinance so long as it is reasonable and not arbitrary and oppressive.[56] In several cases, building moratoria have been upheld where the purpose of the moratorium was to prevent future development until appropriate levels of public services were available to match the anticipated impact of the development.[57] The courts have even extended this presumption of validity in cases where the local government did not fully comply with all applicable statutory guidelines. In one such case, a moratorium on building permits in order to implement a water conservation program was deemed reasonable even though appropriate public notice of the moratorium was not given.[58]

   b. In cases where moratoria have been overturned, courts have largely cited the failure of a local government to follow procedures outlined in the relevant state statute. For example, in one case the court struck down a moratorium that had exceeded the two year limitation for interim zoning measures allowed under California law.[59]

4. Spot Zoning / Exclusionary Zoning: California courts have largely deferred to local governments on the issue of spot zoning. The courts have held that spot zoning is allowed when changes in a neighborhood make such a rezoning compatible with the new uses of the neighborhood.[60] In determining whether to permit spot zoning the size and population density of the area in question will be measured by the court.[61] As a general rule, courts will not interfere with the decisions of local zoning boards and will not inquire into the motives of such bodies unless the zoning appears to unfairly discriminate in favor of a specific piece of property.[62] For example, a zoning board's refusal to allow

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[53] Hernandez v. City of Encinitas, 28 Cal. App. 4th 1048, 1064 (Cal. Ct. App. 1994).
[54] 12-415 California Real Estate Law & Practice § 415.09; *See e.g.,* Cal. Gov't Code § 65858 (2005).
[55] William A. Falik & Anna C. Shimko, *Recent Developments in "Takings" Jurisprudence: The "Takings" Nexus*, 39 Hastings L.J. 359, 373 (1988).
[56] Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 515 (Cal. Ct. App. 1963)
[57] *See e.g.,* Associated Home Builders, Inc. v. Livermore, 18 Cal. 3d 582 (Cal. 1976).
[58] Id. at 515.
[59] Martin v. Superior Court, 234 Cal. App. 3d 1765 (Cal. Ct. App. 1991).
[60] Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 419 (Cal. Ct. App. 1969).
[61] Friel v. County of Los Angeles, 172 Cal. App. 2d 142, 149 (Cal. Ct. App. 1959).
[62] G & D Holland Construction Co. v. City of Marysville, 12 Cal. App. 3d 989, 994 (Cal. Ct. App. 1970).

a property holder to rezone a lot, so that the lot could be divided, was invalid spot zoning when the surrounding lots were zoned in a similar fashion to the desired rezoning.[63]

[63] Ross v. City of Yorba Linda, 1 Cal. App. 4th 954, 959 (Cal. Ct. App. 1991).

# COLORADO

**Summary:** Despite strong efforts by the Governor and certain citizen groups to impose state-wide development restrictions, land use decisions in Colorado are largely made at the local level. Generally these local governments have enacted less restrictive land use codes than exist in more densely populated states. The trend among the Legislature and the Governor, however, is in the direction of greater restriction. To date the Colorado courts have taken a mixed view on development restrictions and their jurisprudence cannot properly be classified as either restrictive or non-restrictive.

## LEGISLATIVE SUMMARY

Land use decisions in Colorado largely reside with local governments, though the Governor has led a concerted effort over the past few years to enact significant state-wide reforms. Most significantly, Governor Bill Owens' "Smart Growth: Colorado's Future" initiative seeks to implement the recommendations of the Governor's Commission on Saving Open Spaces, Farms and Ranches.[64] Many of these recommendations would severely restrict development.[65] The state legislature, however, has been slow to adopt these recommendations. To date Colorado has enacted some legislation that places restrictions on development, such as the authorization of impact fee collection by municipalities.[66] Other reforms, such as tax incentives for infill development and limits on municipal annexation do not necessarily restrict or encourage development *per se*. Given the attention that this issue has received from the Governor's Office and the efforts of smart growth advocates to introduce greater restrictions via referenda, it is likely that restrictions on development will continue to increase in the coming years .

- **Legislative Rating:** 3 (High level of activity)

- Governor Bill Owens initiated the Governor's Commission on Saving Open Spaces, Farms and Ranches. The Commission's recommendations formed the foundation for the Governor's "Smart Growth: Colorado's Future Initiative."

- Through two special sessions of the Legislature dedicated to the Governor's smart growth agenda, the Legislature has passed two pieces of legislation that restrict development in the State. First, H.B. 1001 allows local governments to consider additional factors in developing their comprehensive development plans, including the limitation of development based on the available water supply. Additionally, S.B. 01S2-015 authorizes certain municipalities to collect limited impact fees.

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[64] "Colorado's Legacy to its Children." Governor's Commission on Saving Open Spaces, Farms & Ranches, report, December 2000.
[65] *See e.g.,* S.B. 01S-1025 (2001) (allowing "voters the opportunity to limit the increase in the number of residential building permits to three percent, while limiting the development of rural lands outside a municipality to no less than 35 acres or cluster developments."). American Planning Association, State of the States 2002, 42 (2002).
[66] S.B. 01S2-015 (2001).

- In 2000, the Governor created the Office of Smart Growth to study and present further recommendations on the state's planning code and procedures.

## JUDICIAL SUMMARY

There is not a large body of law by which to judge the Colorado judiciary's impact on land use regulation in the state. As the Governor and other citizen groups continue their push for greater state-wide planning regulation, it is likely that such disputes will arise more frequently in the coming years. The available jurisprudence demonstrates a fairly neutral approach to this issue. In the area of fair share housing requirements, the courts have struck down attempts by local governments to impose restrictions on development. In the areas of spot zoning and building moratoria, however, the courts have generally upheld municipal regulation. Colorado jurisprudence on impact fees is mixed.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: In *Krupp v. Breckenridge Sanitation District*[67] the Colorado Supreme Court held that Plant Investment Fees ("PIF")—fees charged by the city of Breckenridge to pay for the cost of infrastructure improvement required to support development—are not subject to the Nollan/Dolan Constitutional takings analysis. As a result, the municipality is not required to demonstrate a "rational nexus" between the size and nature of the fee and the impact of the proposed development. This gives the municipality greater leeway in assessing this fee. However, in another instance the Court limited municipal impact fees by holding that counties may not impose impact fees to pay for school buildings as a condition for issuing a building permit for a new home.[68]

2. Fair Share Development Requirements: Colorado courts have not imposed a specific fair share housing requirement in the state. Additionally, in *Town of Telluride v. Lot Thirty-Four Venture L.L.C.*[69], the Colorado Supreme Court struck down a Telluride ordinance requiring 40% of the housing need generated by a particular development to be made available at a stated price. The court found that this scheme amounted to rent control and therefore violated Colorado's Constitution.

3. Building Moratoria: There have not been a large number of cases on this issue in Colorado. As a result, the state's jurisprudence does not expand greatly on the U.S. Supreme Court's leading cases on the issue. Of note, however, is the Colorado Supreme Court's holding that a ten-month moratorium did not constitute a compensable taking.[70]

4. Spot Zoning / Exclusionary Zoning: Citing the absence of "significantly changed conditions," a county's change in the zoning designation of three lots from residential to commercial was struck down. The court applied a test of whether the change in question was

[67] 19 P.3d 687 (Colo. 2001).
[68] Board of County Comm'rs v. Bainbridge, Inc., 929 P.2d 691 (Colo. 1996).
[69] 3 P. 3d 30, 35 (Colo. 2000).
[70] Williams v. City of Central, 907 P.2d 701, 705 (Colo. Ct. App. , 1995).

made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations.[71] In *Carron v. Board of County Commissioners*[72], however, the court upheld a zoning ordinance that allowed for separate uses within the same zoning district and held that in determining the appropriate zoning for an area, "standards may include consideration of whether certain uses will cause pollution or traffic congestion or whether they will otherwise be detrimental to the health, safety, or welfare of the county."[73]

[71] Clark v. Boulder, 146 Colo. 526 (1961).
[72] 976 P.2d 358 361-362 (Colo. Ct. App., 1998)
[73] Id at 362.

# CONNECTICUT

**Summary:** Land use regulation in Connecticut has long been left to municipal governments, but the last eight years have seen increased efforts on behalf of the legislature and governor to enact greater state-wide development restrictions and open space preservation. These efforts have not had a significant impact on the state's land use and planning regime, but it is likely that the small reforms to date signal the start of greater legislative action in this area. In contrast, the Connecticut courts, particularly in the areas of impact fees and low-income housing development, have limited the power of municipalities to restrict development.

## LEGISLATIVE SUMMARY

Overall, the Connecticut Legislature has taken a few small steps to empower municipalities with stronger planning tools and, along with former Governor Rowland, has worked to encourage greater development in urban areas. Neither the Legislature nor the Governor, however, has moved strongly to either restrict or loosen constraints on development. The trend in Connecticut, however, is clearly in the direction of greater state-wide planning restrictions, open space preservation, and empowering municipalities with stronger planning tools.

- **Legislative Rating: 2** (Moderate activity) *Likely to be more active on these issues in the near future*

- In 2001, the legislature passed legislation that allows the state's municipalities to share services and tax revenue.[74] This legislation may encourage municipalities to plan jointly and channel growth to existing developed areas.

- Open Space Preservation Initiatives. One area in which the state government has been active is in the area of open space preservation. In 1997, Governor Rowland formed a task force to study the issue, and subsequently more than $140 million has been allocated to this effort.[75]

## JUDICIAL SUMMARY

Connecticut courts have largely adopted a jurisprudence that favors development over municipal restriction of property use. In the area of impact fees and exactions, these courts have imposed strict limits on the ability of municipalities to impose off-site development requirements in exchange for permits and approvals. Additionally, the courts have strictly enforced the intent of the state's fair share housing statute by holding in favor of low-income housing developers in zoning appeals. The courts' spot zoning decisions have generally upheld municipal action, but the action that they have upheld has been equally split between the allowance for greater development and the restriction of development.

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[74] *See* Public Act 01-117 (2001).
[75] Ed Bolen, et al., Smart Growth. 8 Hastings W.-N.W. J. Env. L. & Pol'y 145, 154 (2002); American Planning Association, 2002 State of the States, 46 (2002).

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Connecticut courts have generally acted to restrict the ability of municipalities to impose impact fees.
   a. Where the improvement required was off-site, a municipality must show that the improvement is both reasonable and necessary, otherwise the courts will find the exaction to be invalid.[76]
   b. In interpreting a municipal regulation, one court struck down a requirement for developer-funded road widening as a condition of the development plan approval noting that the municipality failed to show that the road widening was truly necessitated by the development.[77] The court held that the requirement of an off-site improvement is permitted only upon a showing that the improvement is necessitated by the proposed development and that no other property owners receive a benefit from the improvement.[78]
   c. One exception to this trend is the Connecticut judiciary's willingness to uphold a requirement that developers who demolish old housing stock must replace the housing or contribute to a low-income housing fund.[79]

2. Fair Share Development Requirements: Under Conn. Gen. Stat. § 8-30g, developers have an automatic right to appeal land use decisions denying affordable housing permits in towns where affordable housing makes up less than 10% of the total housing stock.[80] In ruling on these appeals, courts have generally required that the affordable housing permit be approved regardless of the underlying zoning.[81]

3. Building Moratoria: Since Connecticut municipalities lack specific statutory authority to adopt a moratorium on development, this is not an issue that has been litigated in the Connecticut courts to any significant degree. In one related case, however, the Connecticut Supreme Court upheld a zoning regulation that prohibited business development in a portion of the town's business zone for a nine month period.[82] The court, however, noted that the commission's power to impose a *de facto* moratorium was limited to the specific facts of the case.[83]

4. Spot Zoning / Exclusionary Zoning: Connecticut courts have heard a significant number of cases on the issue of spot zoning, and in nearly every case the court has held in favor of the municipality, particularly when it has made zoning changes that are consistent with its comprehensive plan. Of 53 cases heard in the Connecticut courts since 1948 where a zoning change was challenged on the grounds that it constituted spot zoning, the courts

[76] Property Group v. Planning & Zoning Comm'n, 226 Conn. 684 (Conn. 1993).
[77] Id.
[78] Property Group, Inc. v. Planning & Zoning Comm'n, 29 Conn. App. 18 (Conn. App. 1992).
[79] *See e.g,,* Gagne v. City of Hartford, 1994 Conn. Super. LEXIS 61 (Conn. Super. 1994).
[80] For a summary of Connecticut's Fair Share Housing Statute, see http://www.bpichicago.org/rah/pubs/state_statutes.pdf.
[81] *See e.g.,* Wisniowski v. Planning Comm'n, 37 Conn. App. 303 (Conn. App. 1995).
[82] *See e.g.,* Arnold Bernhard and Co. v. Planning and Zoning Comm'n, 479 A.2d 801 (Conn. 1984).
[83] Id.

held in favor of the municipality 46 times. It is important to note, however, that the municipal decisions upheld by the courts were nearly evenly split between zoning changes that restricted development and zoning changes that permitted new development.

# DELAWARE

**Summary:** Over the past ten years, the Delaware state government has been very active in creating additional statewide land use restrictions. Governor Minner's "Livable Delaware" initiative has been particularly powerful in compelling action by State Agencies and the Legislature in this area. This action has resulted in, among other initiatives, greater local comprehensive planning, increased impact fee authority and significant new open space preservation. Delaware courts have largely deferred to local government regulatory authority on these issues. Specifically, the courts have granted broad municipal authority in the areas of building moratoria and spot zoning.

**LEGISLATIVE SUMMARY**

Under the leadership of both the Governor and the Legislature, the Delaware government has been very active in promoting statewide land use restrictions over the past ten years. Following the1995 release of a report from the Cabinet Committee on State Planning Issues, entitled "Shaping Delaware's Future,"[84] Delaware began a significant overhaul of its comprehensive planning laws. In continuing these efforts, Governor Minner's "Livable Delaware" initiative and several other legislative efforts have increased the amount and type of statewide land use restrictions. Specifically, the Legislature has acted to approve greater planning coordination requirements, impact fee authority, brownfields tax credits, and open space preservation.

- **Legislative Rating: 3** ( High level of activity)

- **"Shaping Delaware's Future"** Based on the findings of the Office of State Planning Coordination, the Legislature passed this legislation in 1994, and thereby created a cabinet-level committee to study the issue of land use in the state and reform the state's comprehensive planning provisions.[85]

- **"Livable Delaware"** is the Governor's smart growth agenda that sets forth a series of legislative priorities and executive orders related to managing land use across the state.[86] One executive order requires each agency to file a plan as to how they will implement the goals set forth in the "Shaping Delaware's Future" report.[87] The final plan for implementing these goals was presented in a report entitled "Livable Delaware: The Strategies for State Policies and Spending." This report was updated with a new five year plan in 2004.[88] Additionally, the agenda resulted in legislation aimed at accomplishing five core goals: implementing graduated impact fees, a requirement that zoning ordinances match local comprehensive plans, the creation of a Governor's Advisory Council on Planning Coordination, changes to land use laws that

[84] The report is available at http://www.state.de.us/planning/shape/sdf.pdf.
[85] *See* Ed Bolen et al., *Smart Growth*, 8 Hastings W.-N.W.J. Env. L. & Pol'y 145, 155 (2002).
[86] *See generally,* Delaware Office of State Planning Coordination, *Livable Delaware* at http://www.state.de.us/planning/shape/shaping.htm; State of Delaware, *Livable Delaware Agenda* at http://www.state.de.us/planning/livedel/.
[87] This executive order was update in 2004 with Executive Order #59. The text of the Executive Order is available at http://www.state.de.us/governor/orders/webexecorder59.shtml.
[88] The report is available at http://www.state.de.us/planning/strategies/strategies.shtml.

require large developers to coordinate with state and local officials, and a new open space preservation system.[89]

- **Open Space Preservation** As part of the Livable Delaware legislative agenda, the Legislature created the Realty Transfer Tax for Conservation Trust Fund.[90] Under this program, Delaware will contribute $9 million per year for eighteen years to the purchase and preservation of open space.[91]

**JUDICIAL SUMMARY**

Delaware courts have largely deferred to municipal judgments regarding the implementation of land use restrictions and have not imposed any significant constraints on the power to enforce such restrictions. Although the Delaware courts have not heard a significant number of cases challenging impact fees, their wide deference in the areas of building moratoria, density requirements, and spot zoning are telling of their position on land use regulations generally.

- **Judicial Rating: 3** (Generally supportive of municipal regulation)

1. Impact Fees / Exactions: Delaware appellate courts have not heard a significant number of cases on the issue of impact fees. Although the courts have implicitly approved of their implementation[92], they have not ruled specifically on this issue. Legislation passed in 2001 permits counties to impose impact fees on non-agricultural properties and establishes a commission to propose a statewide fee schedule for certain categories of properties.[93] Given this specific delegation of authority, challenges to impact fees imposed by a county are less likely.

2. Fair Share Development Requirements: Delaware courts have not imposed specific fair share housing or development requirements. Additionally, they have not interfered with local determinations regarding lot size and permissible density.[94]

3. Building Moratoria: Although Delaware courts have not heard a large number of cases challenging building moratoria, their jurisprudence on this issue largely supports the imposition of such restrictions. As one court noted, a municipality "is permitted to impose a moratorium to prevent or alleviate problems as long as the restraint is kept within the limits of necessity."[95] Challenges to these moratoria have primarily involved a

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[89] *See* Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 St. Louis U. Pub. L. Rev. 271, 282 (2002). For a summary of legislation related to this initiative, see Livable Delaware Legislation at http://www.state.de.us/planning/livedel/legislat.htm.
[90] H.B. 192 (2001).
[91] *See* American Planning Association, 2002 State of the States, 47 (2002).
[92] *See e.g.,* Sterling Prop. Holdings, Inc. v. New Castle County, 2004 Del. Ch. LEXIS 65 (2004); Pettinaro Enterprises v. Stango, 1992 Del. Ch. LEXIS 162 (1992).
[93] H.B. 235 (2001).
[94] *See* Buckson v. Town of Camden, 2002 Del. Ch. LEXIS 126.
[95] Bayville Shore Development Corp. v. County Council of Sussex County 1991 WL 202182, *6 (Del.Ch.) (Del.Ch.,1991)

landowner seeking compensation for a taking, and in all cases these claims were denied relief.[96]

4. Spot Zoning / Exclusionary Zoning: The leading case on this issue is the Delaware Supreme Court's decision in *McQuail v. Shell Oil Co.,* which held that "'Spot-zoning' is generally defined as an attempt to wrench a small lot or a small area from its environment and give it a new rating that disturbs the tenor of the community . . . .  Normally, spot-zoning benefits a private interest and has no relation to the general public interest." [97] In applying this rule, however, courts have largely supported municipal action. [98] As one court noted, "The courts of Delaware have never ruled that spot zoning is illegal."[99]

[96] See, State v. Raley, 1991 WL 18114 (Del. Supr. 1991); see also, Maplewood Industries, Inc. v. Department of Natural Resources and Environmental Control 1989 WL 155944, *8 (Del.Ch.) (Del.Ch.,1989).
[97] 183 A.2d 572,**579 (Del.1962).
[98] The following cases all denied claims based on spot zoning: Dale v. Town of Elsmere, 702 A.2d 1219 (Del. Supr. 1997)(denying plaintiff's claim of spot zoning); Pettinaro Enterprises v. Stango, 1992 WL 187625 (Del. Ch. 1992); Hudson v. County Council of Sussex Cnty, 1988 WL 15802 (Del. Ch. 1988);and Red Mills Farms Prop. Owners Assn, Inc, v. County Council of Sussex Cnty., 1983 WL 142515 (Del. Ch. 1983).
[99] Deibler v. Sea Gate Village 1983 WL 142507, *2 (Del.Ch.) (Del.Ch.,1983).

# FLORIDA

**Summary:**

Statewide land use restrictions have been part of the legal landscape in Florida for the past twenty years. Since 1999, the Governor has made some efforts in the direction of statewide land use reform, but neither the Executive nor the Legislative branches have taken significant action between 1999 and the present. On the whole, Florida courts have upheld municipal development restrictions. This record reflects the more restrictive land use regulations in Florida throughout the past twenty years, but it is also has independent significance. In particular, the courts' willingness to widely support municipal impact fees and building moratoria demonstrate a trend toward favoring more government restriction in the area of land use.

**LEGISLATIVE SUMMARY**

Under the oversight of the Department of Community Affairs[100], Florida has operated a statewide growth management system for the past twenty years.[101] While this system once represented an innovative development in state-level growth management, in practice the program has not restricted development to the extent that many expected.[102] In 1999, Governor Bush appointed a commission to propose changes to the state's growth management program. The Commission published its recommendations in 2001, but the Legislature has taken little action to implement these reforms. Florida's existing statutes continue to provide greater state-level restrictions on development than in many other states, but it is unclear whether enforcement procedures or future reforms in Florida will strengthen or weaken these powers.

- **Legislative Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *Although Florida's growth management system is relatively restrictive, there has been little activity over the past ten years.*

- An overhaul of the state's land use planning statutes in 1985 included the introduction of a comprehensive state land use plan, which required the adoption of compatible local and regional plans. This plan included a concurrency requirement mandating sufficient public infrastructure to support any new development.[103]

- In 2000, Governor Bush appointed the Growth Management Study Commission to evaluate the state's planning system and to recommend reforms.[104] The Commission's final report, *A Livable Florida for Today and Tomorrow*[105], included the following recommendations for legislative action:

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[100] http://www.dca.state.fl.us/

[101] *See* American Planning Association, *2002 State of the States* 49 (2002).

[102] Id.

[103] Ominibus Growth Mangement Act and the Local Government Comprehensive Planning and Land Development Regulation Act. Fla. Stat. 163.3161-.3215 (1985).

[104] *See* Ed Bolen, et. al, *Smart Growth,* 8 Hastings W.-N.W. J.Env.L.&Pol'y 145, 157-158 (2002)

[105] *See* http://www.dca.state.fl.us/growth/

- Allow for state-level review of local comprehensive plan amendments that "implicate a compelling state interest" (instead of reviewing all amendments)
- Design and implement regional cooperation agreements
- Develop incentives that will serve as the foundation for an urban revitalization program
- Allow for the transfer of development rights from rural areas to more densely populated areas

- Since the publication of this report, however, the Legislature has not taken any decisive action to implement the Commission's recommendations.[106]

- The state government has dedicated money to the preservation of open space through a program known as Florida Communities Trust.[107] Under this program, the state government has provided more than $470 million to local communities for the purpose of preserving parks and open space.[108] Many of these dollars have been supplemented by local government funding.

**JUDICIAL SUMMARY**

In general, Florida's land use jurisprudence tends to lean toward supporting municipal restrictions on development. The courts have imposed a straightforward, two-part test for evaluating impact fees, and have broadly upheld fees that satisfy the threshold test. The courts have also given municipalities relatively broad authority to enact both temporary and permanent moratoria on development. Jurisprudence in the area of spot zoning is mixed, with the deciding question being whether the proposed zoning change is consistent with the comprehensive plan.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: In general, Florida courts have upheld the imposition of impact fees, subject to a two-part requirement: (1) that the fees only be used for their designated purpose and (2) that the designated purpose be reasonably related to the impact of the proposed development.[109]
   a. The Florida Supreme Court has subsequently upheld the imposition of impact fees to fund new school construction, subject to this two-part test.[110]

   b. The courts have even upheld impact fees imposed after the issuance of a building permit, including situations where some of the housing units have already been sold.[111]

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**106** Florida Department of Community Affairs, Growth Management Initiative: Redefining the State-Regional-Local Partnership for Managing Florida's Growth (Draft, Nov. 15, 2004). *Available at* http://www.floridaplanning.org/legislative/05Documents/DCA%20GMConcepts11-15-04.doc.
107 *See http://www.dca.state.fl.us/ffct/*
108 Id.
109 *See* Hollywood v. Broward County, 431 So. 2d 606, 610 (Fla. Dist. Ct. App. 1983).
110 Saint Johns County, Florida v. Northeast Florida Builders Association, 583 So. 2d 635, (Fla. 1991).
111 *See* Key West v. R.L.J.S. Corp. 537 So. 2d 631 (Fla. Dist. Ct. App. 1989).

   c. Under Florida jurisprudence, impact fees may be charged where a property owner seeks a change of use for an existing, developed site[112] but not where the site changes ownership while maintaining the same use.[113]

2. Fair Share Development Requirements: Florida courts have not imposed any fair share development or housing requirements on municipalities or developers.

3. Building Moratoria:
   a. Temporary Moratoria: Florida courts have followed the U.S. Court of Appeals for the 9th Circuit's holding in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 216 F.3d 764, 777 (9th Cir. 2000) , which states that a temporary moratorium "could rarely, if ever, completely deprive the owner of all economically beneficial use" and therefore does not constitute a compensable taking.[114] Where a moratorium is specifically designated as a temporary measure, Florida courts have given municipalities wide latitude in their implementation of such restrictions.

   b. Permanent Moratoria: Florida courts have also allowed municipalities relatively broad power to enact permanent development moratoria. In one case, a Florida court upheld a municipal ordinance outlawing further commercial development in order to protect certain environmental and public safety concerns.[115]

   c. Florida courts have, however, been quick to strike down moratoria that do not meet the notice and hearing requirements for zoning changes.[116]

4. Spot Zoning / Exclusionary Zoning: Although Florida courts have heard a significant number of spot zoning cases, no clear trend has emerged in their treatment of this issue.
   a. In several cases, Florida courts have found the denial of a rezoning application to constitute reverse spot zoning.[117] In each of these cases, the zoning of a particular parcel was not consistent with the zoning in the surrounding area and was not supported by a comprehensive plan.

   b. In cases where the zoning is clearly consistent with the municipality's comprehensive plan, courts have consistently upheld the zoning.[118]

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[112] *See* City of Zephyrhills v. Wood, 831 So. 2d 223 (Fla. Dist. Ct. App. 2002).
[113] *See* City of Punta Gorda v. Burnt Store Hotel, 639 So. 2d 679 (Fla. Dist. Ct. App. 1994).
[114] Bradfordville Phipps P'Shp v. Leon County, 804 So. 2d 464 (Fla. Dist. Ct. App. 2001).
[115] Lee County v. Morales, 557 So. 2d 652 (Fla. Dist. Ct. App. 1990).
[116] *See e.g.,* Sanibel v. Buntrock, 409 So. 2d 1073 (Fla. Dist. Ct. App. 1981), Gainesville v. GNV Invest., Inc., 413 So. 2d 770 (Fla. Dist. Ct. App. 1981).
[117] *See e.g.,* Debes v. City of Key West, 690 So. 2d 700 (Fla. Dist. Ct. App. 1997), City Com'n of City of Miami v. Woodlawn Park Cemetery Co., 553 So. 2d 1227 (Fla. Dist. Ct. App. 1989)
[118] *See e.g.,* Town of Juno Beach v. McLeod, 832 So. 2d 864 (Fla. Dist. Ct. App. 4th Dist. 2002).

c. The volume of spot zoning cases relative to other states may in and of itself be telling, however. This relatively large number of cases may indicate a belief on the part of property owners that Florida courts are willing to strike down spot zoning as invalid. Although there is no clear trend in Florida jurisprudence to support the notion that the courts are in general likely to find illegal spot zoning, the record is sufficiently mixed to encourage such a challenge.

# GEORGIA

**Summary:**

Statewide land use policy at the legislative and executive levels in Georgia is quite advanced. Over the past sixteen years, the Governor and Legislature have worked in tandem to advance a "bottom-up" planning regime. Today every local government has a comprehensive land use plan and these plans are all fully integrated into a regional plan. The next step is for a statewide comprehensive plan, but that work has not yet begun. In addition to the high level of planning participation, Georgia is actively working to preserve 20% of each county's land as open space and has created a quasi-governmental authority with certain regional planning powers. Another part of this planning reform was the introduction of a process for mediating land use disputes. The near absence of land use cases in the Georgia courts suggests that disputes are largely being settled through this process. As a result, it is not possible to assign a trend score to the courts' land use jurisprudence.

## LEGISLATIVE SUMMARY

Over the past sixteen years, there has been a good deal of focus on statewide planning initiatives in Georgia. Because of the state's "bottom-up" approach to planning, it is misleading to characterize these changes as restricting development. Today, all of Georgia's 688 local governments have developed local comprehensive plans, and each of these plans has been integrated into a regional plan. Additionally, the Governor and Legislature have worked together to develop a program designed to preserve 20% of the state's open space and to create a regional quasi-government in the form of the Georgia Regional Transportation Authority. The GRTA has certain regulatory authority in thirteen of Atlanta's most populous counties.

- **Legislative Rating: 3** (High level of activity)

- **The Georgia Planning Act**. Adopted in 1989, The Georgia Planning Act provides for a "bottom-up" planning model.[119] Under this framework, local governments must devise a comprehensive plan that meets minimum standards established by the state government.[120] As of 2002, "99 percent of Georgia's 688 local governments [had] developed comprehensive plans and met the requirements of the 1989 Georgia Planning Act."[121] Under a 1992 amendment to this act, regional and then state comprehensive plans were to be drawn from the local plans.[122] Further, certain large scale developments, or Developments with Regional Impacts (DRI), are required to secure regional approval.[123]

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[119] A copy of the Georgia Planning Act and other information on planning in Georgia is available through the State Department of Community Affairs Planning & Codes page. *Available at* http://www.dca.state.ga.us/planning/.
[120] *See* American Planning Association, 2002 State of the States 51 (2002).
[121] Id.
[122] Id.
[123] Georgia Department of Community Affairs, Planning & Codes, *at* http://www.dca.state.ga.us/planning/.

- In the area of open space preservation, the Legislature passed legislation establishing a state policy of protecting 20% of the state's land as open space.[124] Under this program, large counties that meet certain growth rates are eligible for certain state grants if they take action to preserve 20% of their land.[125]

- The Legislature has also empowered the Georgia Regional Transportation Authority to have certain planning authority and veto powers in 13 metro counties.[126] This represents an effort by the Legislature to encourage regional planning, particularly in the counties surrounding Atlanta.

**JUDICIAL SUMMARY**

The 1989 Georgia Planning Act included two key provisions that have strictly limited the number of land use cases heard in Georgia courts since that time. First, the Planning Act established a process for mediating land use disputes that has largely kept these disputes out of the Georgia courts. Second, the Planning Act required local governments to develop comprehensive plans. The use of public input to develop a clear set of guidelines for development in a given area is likely to eliminate some sources of conflict that inevitably arise when land use decisions are made in a piecemeal fashion. As a result of these two factors, there is very little land use case law in Georgia following the adoption of the Planning Act. Determining any jurisprudential trends from this limited sample is not possible.

- **Judicial Rating: 0** (Insufficient case law)

1. Impact Fees / Exactions: By statute, local governments in Georgia are specifically authorized to impose impact fees for the purpose of "planning and financing public facilities needed to serve new growth."[127] Impact fees levied under this statute have not been heavily litigated in part because the Georgia Planning Act provides for a mediation procedure in circumstances where a private party wishes to challenge an impact fee. In one case, a Georgia court ruled that summary judgment in favor of a county was not warranted where the county raised its impact fees at a time when its surplus fees amounted to more than $2 million.[128] Otherwise, there are no cases that allow for an analysis of Georgia jurisprudence on this issue.

2. Fair Share Development Requirements: Georgia courts do not impose any specific fair share development or housing requirement on local governments or developers.

3. Building Moratoria: Since 1989 no moratorium on development has been challenged in the Georgia courts.

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[124] S.B. 399, 2000 Gen. Assemb., Reg. Sess. (Ga. 2000).
[125] Ed Bolen et al., *Smart Growth*, 8 Hastings W.-N.W.J. Env. L.&Pol'y 145, 159 (2002).
[126] *See* http://www.grta.org/.
[127] O.G.C.A. § 36-71-1 *et seq.* (2005).
[128] Home Builders Ass'n of Savannah v. Chatham County, 276 Ga. 243 (2003).

4. Spot Zoning / Exclusionary Zoning: Since 1989, no zoning decision has been challenged in the Georgia courts as illegal spot zoning.

# HAWAII

**Summary:**

There has been very little activity in the area of statewide land use regulation in Hawaii over the past twenty-five years. Although zoning in Hawaii is largely designated at the state level, very little reform to the existing state land use plan has taken place. Additionally, land use case law in Hawaii is nearly non-existent.

## LEGISLATIVE SUMMARY

Despite the fact that Hawaii enacted this country's first statewide planning program, there has been almost no change to that plan over the past twenty-five years. Zoning remains largely a state function, though counties do have some role, particularly with smaller projects (less than 15 acres).

- **Legislative Rating:** 1 (Little recent activity) *fairly restrictive plan initially, but very little action over the past twenty-five years*

- Since 1961, Hawaii has operated under a statewide zoning system, administered by the Hawaii State Land Use Commission.[129] While this system grants some powers to individual counties, it largely determines the composition of zoning categories at the state level. The State Land Use Commission divides the state into four categories—urban, rural, agricultural, and conservation districts.

- In 1978, the Legislature adopted the state land use plan as law, but there have been no significant developments in Hawaii's land use regime since that time.

- In 2001, the Governor vetoed Senate Bill 1473, which would have required the Governor to appoint a smart growth advisor.

- Over the past five years, the Legislature has considered several reform proposals, including a moratorium on changes in zoning for agricultural lands, establishing a program to protect open space, and a decentralization of the zoning process.[130] None of these proposals passed, however.

## JUDICIAL SUMMARY

The amount of land use case law in Hawaii is not sufficient to develop a meaningful evaluation of the courts' jurisprudence on these issues.

- **Judicial Rating: 0** (Insufficient case law to make a determination)

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[129] *See* State of Hawaii-Land Use Commission *at* http://luc.state.hi.us/about.htm.
[130] Id at 53-54.

1. Impact Fees / Exactions: Impact fees have not been challenged in the Hawaii appellate courts. One likely reason for this is Hawaii's impact fee enabling statute, which requires a series of preliminary steps, including a needs study, before a county can impose an impact fee.[131]

2. Fair Share Development Requirements: Hawaii courts do not impose any specific fair share housing or development requirements.

3. Building Moratoria: Although Hawaii courts have not heard challenges to building moratoria *per se*, they have seemingly acknowledged their legitimacy in decisions on related matters.[132]

4. Spot Zoning / Exclusionary Zoning: Hawaii courts have denied claims contesting the legality of spot zoning in all five cases that they have heard on this issue. The courts, however, have adopted a rule that seems to favor the private property owner. In *Save Sunset Beach Coalition v. City & County of Honolulu*, the Supreme Court noted that, "[t]he usual presumption of validity may not be accorded spot zoning because of the absence of widespread community consideration of the matter."[133] This rule removes the standard deference usually afforded to local government zoning decisions in cases where the court finds spot zoning to have occurred.

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[131] *See* David L. Callies, *Exactions, Impact Fees And Other Land Development Conditions*, Proceedings of the 1998 National Planning Conference *available at* http://www.asu.edu/caed/proceedings98/Callies/callies2.html.
[132] *See e.g.,* Life of Land v. City Council of Honolulu, 61 Haw. 390 (1980) (upholding a moratorium variance granted to a condominium developer).
[133] 102 Haw. 465, 473 (2003).

# IDAHO

**Summary:**

Land use in Idaho is largely the province of local governments. Very little activity has been undertaken to enact statewide planning restrictions. While there has not been a tremendous amount of land use case law in the Idaho courts, the cases that have been decided have shown a distinct trend toward supporting local government regulation. The rule adopted in evaluating impact fees places a very low hurdle in the path of local government regulation, and the jurisprudence in the area of spot zoning universally upholds municipal zoning decisions.

## LEGISLATIVE SUMMARY

Idaho is and is likely to remain a state where zoning powers are left almost exclusively to local governments. There has been very little activity aimed at enacting statewide land use restrictions.

- **Legislative Rating:** 1(Little recent activity)

- Since 1998, the Legislature has passed a few single-issue proposals. These new laws include legislation that empowers municipalities to establish transfer of development rights programs[134] and permits the use of mediation to resolve land use disputes.[135]

## JUDICIAL SUMMARY

The two areas of land use law in which the Idaho courts have decided cases, impact fee validity and spot zoning challenges, reflect a clear trend toward allowing municipalities significant leeway in regulating land use. The rule adopted by the Idaho Supreme Court in judging impact fees creates a relatively easy test for local governments to meet, and spot zoning challenges have exclusively resulted in the validation of local government judgments, regardless of whether it favored or restricted further development.

- **Judicial Rating:** 3 (Generally supportive of municipal regulation)

1. Impact Fees / Exactions: The two leading Idaho cases on this issue[136] stand for the rule that impact fees are permissible so long as they are sufficiently tailored and that the money is used for a related purpose. The two-part test set out by the Idaho Supreme Court creates a fairly low standard for the municipality to meet: "First, we consider whether, on its face, the impact fee is a tax or a regulation. If it at least appears to be a regulation, we then reach the question of whether or not it is reasonably related to the

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[134] S.B. 1201, signed March 29, 1999.

[135] H.B. 601, enacted 2000. For a review of developments in Idaho land use law see American Planning Association, 2002 State of the States 55 (2002).

[136] KMST, LLC. v. County of Ada, 138 Idaho 577 (2003); Idaho Bldg. Contractors Ass'n v. City of Coeur D'Alene, 126 Idaho 740 (1995).

regulated activity."[137] The local government in *Idaho Building Contractors* failed to meet this burden, but the Supreme Court found that the municipality did meet this test in *Loomis v. Hailey*.[138]

2. Fair Share Development Requirements: Idaho courts do not impose any specific fair share development or housing requirements on local governments or developers.

3. Building Moratoria: Appellate courts in Idaho have not heard a challenge to a moratorium on building or development.

4. Spot Zoning / Exclusionary Zoning: In deciding spot-zoning cases, Idaho courts have almost exclusively upheld the local government's decision on the matter. These decisions, however, have at times supported development and in other circumstances restricted it.

    a. In *Evans v. Teton County*[139] the Idaho Supreme Court upheld a zoning change that allowed for the development of a golf course and residential resort on existing farmland. The court held that a two-part analysis applied to spot zoning challenges, "Type one spot zoning may simply refer to a rezoning of property for a use prohibited by the original zoning classification. The test for whether such a zone reclassification is valid is whether the zone change is in accord with the comprehensive plan. Type two spot zoning refers to a zone change that singles out a parcel of land for use inconsistent with the permitted use in the rest of the zoning district for the benefit of an individual property owner. This latter type of spot zoning is invalid."[140] Under this framework, the court found that because the zoning change was supported by both the comprehensive plan and sufficient, credible testimony it should be allowed.

    b. In *Balser v. Kootenai County Bd. of Comm'rs*,[141] the Supreme Court upheld a county zoning decision that denied a zoning change despite the fact that the zoning change was consistent with the recently amended comprehensive plan. Citing a failure to demonstrate a change in conditions or special circumstances that warranted the zoning change, the court upheld the county's denial of the zoning change.[142]

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[137] Id at 743.
[138] 119 Idaho 434 (1991).
[139] 139 Idaho 71 (2003).
[140] Id at 77.
[141] 110 Idaho 37 (1986).
[142] Id at 38.

# ILLINOIS

**Summary:** Statewide land use restrictions have received considerable attention from both the Governor and the Legislature in Illinois. This attention has resulted in several executive orders imposing land use reform. Although the Legislature has issued several studies on this issue, it has not enacted any significant reforms. There is no indication that the current administration of Governor Blagojevich will seek to continue the move toward greater restrictions initiated by its predecessor's administration. Illinois courts have a mixed record on this issue. They have imposed significant restrictions on the ability of local governments to impose impact fees but have largely deferred to local government regulation in other areas.

**LEGISLATIVE SUMMARY**

Over the past five years, statewide growth management has received significant attention from both the Governor and Legislature in Illinois. Under former Governor Ryan's Illinois Tomorrow program, the state government took significant action to preserve open space, encourage infill development, and require integrated transportation and land use planning. Following this lead, the Legislature introduced a number of planning reforms, but none of the most significant proposals passed. Given the importance of the Governor's leadership in spurring Legislative interest in this issue, it is not clear whether the Legislature will continue to consider additional planning-related legislation under the new administration of Governor Blagojevich.

- **Legislative Rating: 2** (Moderate activity)

- **Illinois Tomorrow.** In April 2000, Governor Ryan introduced a consolidated program of growth-management initiatives known as Illinois Tomorrow.[143] Under this program, the Governor used executive orders to pursue several statewide planning initiatives. None of these initiatives changed the planning and land use control process in the state. Instead, they focused on creating incentives for infill development and funding/training that encouraged integrated infrastructure and land use planning at the local level.[144]

- **Illinois Growth Task Force.** In 2000, the State Legislature created the Illinois Growth Task Force with the mission of developing statewide land use, housing and transportation goals.[145] The task force produced a series of reports, which included proposals for planning assistance to local governments, a statewide advisory planning commission, and greater intergovernmental planning coordination.[146]

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[143] *See* Ed Bolen, et al., *Smart Growth*, 8 Hastings W.-N.W. J. Env. L. Pol'y 145, 161-162 (2002).
[144] *See* id; Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century,* 21 St. Louis U. Pub. L. Rev. 271, 285 (2002).
[145] *See* id.
[146] *See, e.g.,* Illinois Growth Task Force, *Final Report 2002*, *available at: http://dnr.state.il.us/orep/nrrc/igtf/reports/finalreport.htm.*

- The State Legislature has considered a number of planning measures over the past five years, but no significant reforms have been passed.[147] Among the proposals that the Legislature has rejected are:
    - Illinois Growth Act-creating a Balanced Growth Council to work with the Governor's Balanced Growth Cabinet in recommending planning reforms.
    - Growth Planning Act-requiring nearly every county to file a county growth plan with the Department of Commerce and Community Affairs
    - An act to amend the Regional Planning Commission-establishing regional planning bodies to coordinate infrastructure and land use planning at a regional level.

**JUDICIAL SUMMARY**

Illinois jurisprudence in land use restriction disputes generally allows significant latitude for municipal land use regulation. In the area of impact fees, however, the courts have placed restrictions on this power. Additionally, the courts have not imposed fair share development requirements.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *Generally restricts the use of municipal impact fees, otherwise deferential to municipal regulation*

1. Impact Fees / Exactions: Although impact fees are specifically authorized by Illinois statute, courts in this state have taken a very narrow reading of the enabling statute and thus placed significant restrictions on the ability of local governments to impose these fees.
    a. Under Illinois law, certain local governments are explicitly granted the power to enact impact fees in conjunction with their regulation of infrastructure, public service facilities, and land use generally.[148]
    b. The courts have imposed a "uniquely attributable test" to the imposition of impact fees. That is, an impact fee will be held valid only where a new development "creates the need, or an identifiable portion of the need, for additional capacity to be provided by . . . [the] improvement."[149] Further, "[e]ach new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid."[150] This requirement not only greatly restricts the ability of a local government to impose an impact fee; it also creates a requirement for local governments to make a detailed impact assessment in order to justify any impact fee.
    c. In 2002, an Illinois Appellate Court held that local governments lacked the power to impose impact fees used for the construction of school buildings.[151] Although

[147] *See*, American Planning Association, *2002 State of the States*, 57-58 (2002).
[148] *See, e.g.,* 55 ILCS § 5/5-1042, 5/11-12-5 (2004).
[149] Northern State Home Builders Ass'n v. County of Du Page, 165 Ill. 2d 25, 33-34 (1995).
[150] Id.
[151] Thompson v. Vill. of Newark, 329 Ill. App. 3d 536 (Ill. App. 2002).

the legislature later amended the relevant statutes to explicitly allow for impact fees related to school construction, this decision is reflective of limitations imposed on impact fee authority by Illinois courts.

   d. Illinois courts have further restricted the collection of impact fees by holding that attempts to collect impact fees once a building certificate has been issued are without legal force.[152]

2. Fair Share Development Requirements: Illinois courts have not imposed any fair share housing or development requirements.

3. Building Moratoria: Although this issue has not given rise to many appellate cases in the Illinois courts, the courts have consistently upheld the power of a municipality to impose a temporary moratorium on certain types of development.[153] Courts have also upheld the denial of permits requested during a moratorium where zoning changes enacted during the moratorium provided grounds for the denial.[154]

4. Spot Zoning / Exclusionary Zoning: Illinois jurisprudence on this issue applies a high hurdle for property owners to meet in order to demonstrate illegal spot zoning.

   a. The courts have largely upheld zoning ordinances and require a land owner who challenges zoning on the grounds that it constitutes spot zoning to show that the zoning classification imposed on the property is, "a change in zoning applied only to a small area which is out of harmony with comprehensive planning for the good of the community and which violates a zoning pattern that is homogeneous, compact, and uniform."[155]
   b. The two cases in which Illinois courts have found local zoning ordinances to constitute illegal spot zoning occurred in the mid 1960's[156], and it is not clear that these cases reflect the courts' current disposition on this issue.

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[152] Genuine Parts Co. v. Du Page County, 236 Ill. App. 3d 685 (Ill. App. 1992).
[153] *See e.g.,* Pioneer Trust & Sav. Bank v. County of Cook, 49 Ill. App. 3d 630 (Ill. App. 1977) (denying request for writ of mandums to compel issuance of zoning approval where a moratorium on certain development was in place.)
[154] *See e.g.,* Zeitz v Village of Glenview 304 Ill. App. 3d 586 (Ill. App. 1999).
[155] 1350 Lake Shore Assocs. v. Casalino, 352 Ill. App. 3d 1027, 1039 (Ill. App. 2002) (citing Hanna v. City of Chicago, 331 Ill. App. 3d 295, 307, 771 N.E.2d 13, 264 Ill. Dec. 609 (2002)).
[156] *See* Colvin v. Skokie, 54 Ill. App. 2d 22 (Ill. App. 1964); Lancaster Dev., Ltd. v. River Forest, 84 Ill. App. 2d 395 (Ill. App. 1967).

# INDIANA

**Summary:** There has been little significant activity in the area of statewide land use reforms in Indiana. An effort founded by Governor O'Bannon in 2000 did not result in any new land use restrictions, and the current administration has ended funding for this effort all together. Indiana courts have not heard many cases in this area of the law, but their jurisprudence in the areas of building moratoria and spot zoning demonstrate a strong inclination toward upholding municipal regulation.

## LEGISLATIVE SUMMARY

To date there has been little effort by either the Governor or State Legislature to enact statewide land use reforms.[157] As a result, land use planning in Indiana is conducted almost exclusively at the county and municipal level.[158] In 2000, Governor Frank O'Bannon worked with the Legislature to create the Indiana Land Resources Council, which was designed to provide recommendations for land use reforms and planning assistance to local communities.[159] Aside from offering several proposals, the Council was never well funded, and in January 2005, Governor Daniels eliminated this program.[160]

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

Indiana courts have heard relatively few cases related to land use restrictions. In the area of impact fees, this is likely attributed to the very detailed statutory framework that the Legislature has implemented. In the areas of building moratoria and spot zoning, courts have largely upheld municipal regulation. In particular, Indiana jurisprudence in the area of spot zoning creates a heavy burden for the landowner to meet in proving that a zoning decision constitutes illegal spot zoning.

- **Judicial Rating: 3** (Generally supportive of municipal regulation) *There is a fairly limited amount of case law, though courts have tended to uphold municipal regulation in this small sample.*

1. Impact Fees / Exactions: Indiana law spells out a very detailed set of rules for the imposition of impact fees,[161] but appellate courts in Indiana have not heard any cases challenging the imposition of these fees.

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[157] American Planning Association, *2002 State of the States,* 59 (2002).
[158] *See* Ed Bolen, et al., *Smart Growth*, 8 Hastings W.-N.W. J. Env. L. Pol'y 145, 162 (2002).
[159] *See* Patricia Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century,* 21 St. Louis U. Pub. L. Rev 271, 287 (2002).
[160] *See* Seth Slabaugh, *Farm Land Protection Council Suspended*, The Star Press January 15, 2005 3A.
[161] *See* Burns Ind. Code Ann. § 36-7-4-1300 *et seq.* (2004).

2. Fair Share Development Requirements: Indiana courts have not imposed a fair share development or housing requirement on either local governments or individual developers.

3. Building Moratoria: There are no appellate cases in Indiana that address the validity of a broadly-imposed moratorium on development. Disputes arising from challenges to the validity of more narrow development moratoria—those involving single parcels—do offer some insight as to the courts' general disposition on this issue. In the leading case of this type, an Indiana Appeals Court upheld a moratorium on development in a single subdivision based on a failure to meet general storm water management guidelines.[162] While the courts have generally allowed for this type of specific moratorium, they have prohibited the application of a moratorium to properties for which building permits have already been issued.[163]

4. Spot Zoning / Exclusionary Zoning: In the area of spot zoning, Indiana courts have been very deferential to municipal regulation. For example, in *Houser v. Bd. of Comm. of DeKalb Co.*[164] the Indiana Supreme Court upheld a zoning ordinance that allowed a certain parcel to be approved only for use as an asphalt plant. As one appellate court noted, "In Indiana, spot zoning is not illegal per se if the zoning action bears a rational relation to the public health, safety, morals, convenience or general welfare."[165] This decision places a significant burden on the challenging landowner as he or she is not only required to demonstrate that spot zoning has occurred but also that the spot zoning does not support the overall welfare of the community.

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[162] Foster v. Board of Comm'rs, 647 N.E.2d 1147 (Ind. Ct. App. 1993)
[163] *See,* Board of Zoning Appeals v. Shell Oil Co., 164 Ind. App. 497 (Ind. Ct. App. 1975).
[164] 252 Ind. 312 (1969).
[165] L & W Outdoor Advertising Co. v. State, 539 N.E.2d 497, 499 (Ind. App. 1989) (citing *Hundt v. Costello*, 480 N.E.2d 284 (Ind. App. 1985). For an example where a court has upheld this type of zoning, see also Penn v. Metropolitan Plan Com., 141 Ind. App. 387 (Ind. App. 1967).

# IOWA

**Summary:** In recent years, statewide land use restrictions have not been the subject of significant action by either the Governor or State Legislature in Iowa. A 1997 commission authorized by the Legislature to study this issue has not been active since 1999, and its recommendations did not result in any modifications to the land use and planning regime in place in Iowa for the past eighty years. Iowa courts have taken a mixed view on land use restrictions. In the area of impact fees, the Supreme Court has placed significant constraints on the ability of local governments to impose such fees. The Court has, however, given municipalities broad discretion in the area of spot zoning.

## LEGISLATIVE SUMMARY

There has been little effort on the part of Iowa state government officials to enact any type of statewide land use restrictions. In 1997, the State Legislature authorized the creation of the Commission on Urban Planning, Growth Management of Cities and Protection of Farmland.[166] This Commission issued its final report in 1999, but no significant legislative action resulted.

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

The two areas related to land use restriction that have arisen in Iowa courts are challenges to impact fees and spot zoning. The Iowa Supreme Court has been split on its jurisprudential leanings in these two areas. With regard to impact fees, the Court has placed significant restrictions on the power of municipalities to impose such fees. In the area of spot zoning, however, the Court has granted local governments wide latitude to enact zoning ordinances that treat specific properties differently than surrounding parcels.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Because the Iowa Legislature has not specifically empowered local governments to broadly impose impact fees, the Iowa Supreme court has held that such fees must be viewed as an exercise of the local government's general police powers.[167] This holding places significant restrictions on the ability of local governments to impose such fees. Under this analysis, the Iowa Supreme Court has determined that any fee not directly linked to a specific benefit conferred upon a property owner must be viewed as a tax and that the power to tax must be specifically granted by the Legislature.[168] The Legislature has granted this power in certain narrowly defined areas,

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[166] *See* American Planning Association, *2002 State of the States*, 60 (2002). More information on the Commission is available at its website: http://www.legis.state.ia.us/GA/77GA/Interim/1997/comminfo/urbplan.htm.
[167] Home Builders Ass'n v. City of West Des Moines, 644 N.W.2d 339 (Iowa 2002).
[168] Id at 345.

such as fees to support the development of sewer infrastructure.[169] Even where this power is specifically granted, the Supreme Court has restricted these powers, as it did in *Kreifels v. South Panorama Sanitary Dist.*[170] In this case, the Court struck down a sewer connection fee structure on the grounds that it did not meet the requirement of "evenhanded fairness" by equally assessing the fee against all properties.[171]

2. Fair Share Development Requirements: Iowa courts have not imposed a specific fair share housing or development requirement on either local governments or individual developers.

3. Building Moratoria: No broad moratorium on development has been challenged in an Iowa appellate court.

4. Spot Zoning / Exclusionary Zoning: Applying a three-prong test in analyzing spot zoning challenges, the Iowa Supreme Court has granted significant latitude to local governments in their use of spot zoning. Holding that spot zoning is not per se illegal, the Supreme Court in *Perkins v. Bd. of Supervisors*[172] articulated the three criteria that local governments must satisfy in order to impose such zoning: "(1) whether the new zoning is germane to an object within the police power; (2) whether there is a reasonable basis for making a distinction between the spot zoned land and the surrounding property; and (3) whether the rezoning is consistent with the comprehensive plan."[173] In applying this test, the Supreme Court has largely upheld municipal spot zoning ordinances.[174] The Supreme Court has invalidated spot zoning ordinances only where the zoning was in clear contradiction to the comprehensive plan and the property was indistinguishable from surrounding property, which was zoned for a different use.[175]

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[169] Iowa Code § 358.20 (2003).
[170] 474 N.W.2d 567 (Iowa 1991).
[171] Id at 569.
[172] 636 N.W.2d 58 (Iowa 2001).
[173] Id at 68.
[174] *See e.g.,* Fox v. Polk County Bd. of Supervisors, 569 N.W.2d 503 (Iowa 1997); Neuzil v. Iowa City, 451 N.W.2d 159 (Iowa 1990); Jaffe v. Davenport, 179 N.W.2d 554 (Iowa 1970).
[175] *See e.g.,* Little v. Winborn, 518 N.W.2d 384 (Iowa 1994).

# KANSAS

**Summary:** Within the Legislative and Executive Branches, there has been no action in the direction of statewide land use restrictions. Modest changes to the planning code in 1984 and 1991 were the last time the Legislature addressed the issue. The related jurisprudence in Kansas appellate courts heavily supports municipal restrictions. In the areas of impact fees and spot zoning, the Courts have held in favor of broad municipal regulatory power.

## LEGISLATIVE SUMMARY

Statewide land use restrictions have not received attention from state leaders in Kansas over the past ten years. Since making moderate reforms to the planning and zoning laws in 1984 and 1991, neither the Governor nor the Legislature has championed any significant changes in this area.[176] In 2001, legislation was introduced to encourage the revitalization of urban areas, but that legislation did not pass.[177]

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

There have not been a significant number of challenges to local government land use restrictions in the Kansas appellate courts. Where challenges have been brought, the courts have largely upheld municipal regulation, particularly in the area of spot zoning. The Kansas Supreme Court has also interpreted the state's home rule provision to allow local governments to impose impact fees despite the lack of a specific enabling statute.

- **Judicial Rating: 3** (Generally supportive of municipal regulation) *There is fairly limited case law on these issues, but courts have generally upheld municipal restrictions in the cases that have been heard.*

1. Impact Fees / Exactions: This is not an issue that has been extensively litigated in Kansas appeals courts. A 1995 decision by the Kansas Supreme Court has, however, given local governments a broad authority to enact impact fee ordinances despite the absence of state legislation specifically empowering them to do so.[178] Relying on the home rule powers authorized in Article 12, §5 of the Kansas Constitution, the Court held that as long as a fee was not "unreasonable" a local government was free to impose it.[179]

2. Fair Share Development Requirements: Kansas courts have not imposed a specific fair share development or housing requirement.

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[176] *See* American Planning Association, *2002 State of the States,* 61.
[177] Id; S.B. 244 (2001).
[178] McCarthy v. City of Leawood, 257 Kan. 566 (1995).
[179] Id at 579.

3. Building Moratoria: This is an issue that has not been litigated in Kansas appellate courts. A review of municipal planning activities, however, indicates that some local governments are imposing such moratoria.[180]

4. Spot Zoning / Exclusionary Zoning: In cases challenging local zoning determinations on the grounds that they constitute spot zoning, the Kansas courts have largely ruled in support of the municipal action. In *Dent v. Kansas City*, the Kansas Supreme Court held that spot zoning is not per se illegal, "'spot zoning' is not unreasonable and invalid if it is related to the general welfare and the best interests of the community-at-large."[181] The court further held that spot zoning is not illegal simply because it is not consistent with an adopted comprehensive plan.[182]

[180] *See e.g.,* City of Lawrence, *Long Range Planning*, at *http://www.lawrenceplanning.org/lr-currentprojects.shtml.*
[181] 214 Kan. 257, 263 (1974) (citing *Coughlin v. City of Topeka,* 206 Kan. 552, 611.)
[182] Id.

# KENTUCKY

**Summary:**

Land use reform in Kentucky has attracted the attention of both the current and former Governor as well as the State Legislature. In large measure, however, this attention has been focused on studying this issue, and there have been relatively few lasting programs or legislation generated over the past ten years. Kentucky courts have developed a jurisprudence that is neither supportive nor restrictive of development. Particularly in the areas of spot zoning and impact fees, the courts have articulated some meaningful restrictions on municipal power but in applying these restrictions, the courts have been evenly supportive and restrictive of municipal regulation.

**LEGISLATIVE SUMMARY**

Both the Legislature and the Governor have been moderately active in pursuing statewide land use reforms over the past ten years in Kentucky. Much of this activity has been directed at studying the issues of smart growth and land use reform, and the resulting programs and legislation have been relatively modest in number.

- **Legislative Rating: 2** (Moderate activity)

- In 1996, Governor Paul Patton created a program called Renaissance Kentucky, which assists local governments with downtown revitalization initiatives through the cooperation of various governmental and non-profit entities.[183] Although the program has been renamed, Renaissance on Main, it continues to receive support under the current administration of Governor Ernie Fletcher.[184]

- In 2001, Governor Paul Patton issued an executive order creating the "Governor's Smart Growth Task Force."[185] The Task Force issued a final report in 2001 that explored the issue of Smart Growth and offered several options for pursuing statewide smart growth policies.[186] The final report did not, however, make any recommendations or specific policy proposals.[187]

- The Kentucky General Assembly has undertaken several efforts to study growth controls generally and specific policy initiatives. In October 1999, for example, the Subcommittee on Planning and Land-use issued its "Blueprint for a New Century of Growth in Kentucky," which outlined several legislative proposals that were advanced but not passed by the General Assembly. Additionally, the Legislature has considered but not passed bills establishing a brownfields reclamation program, preserving farmland, and providing a mechanism for issuing impact fees.

[183] *See*, Ed Bolen et al., *Smart Growth*, 8 Hastings W.-N.W.J.Env.L.&Pol'y 145, 166 (2002).
[184] *See*, Governor's Office for Local Development, *Renaissance on Main*, at http://www.gold.ky.gov/renmain/.
[185] E.O. 2001-628 (2001).
[186] Governor's Smart Growth Task Force, "A Report" (November 2001). *Available at* http://www.iompc.org/documents/.
[187] Id.

**JUDICIAL SUMMARY**

Kentucky appellate case law is relatively limited in this area, and the existing cases do not clearly demonstrate a trend toward restricting or supporting municipal regulation. In the area of impact fees, the courts have developed a rule that places meaningful restrictions on municipal regulation, but the limited case law in this area is mixed with regard to supporting municipal regulation. Similarly, in spot zoning cases, the courts have developed a rule that places restrictions on municipal action but have been evenly split in upholding and invalidating zoning changes.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Although there is limited case law in this area, the rule in the Kentucky courts is clear: "a developer should not be made to contribute to the cost of public improvements in an amount that far exceeds the anticipated use necessitated by his/her development."[188] In specifically rejecting a test that allows for contributions only where the necessity for new public improvements is "uniquely attributable" to the development, the court has instead held only that "there must be a reasonable connection between the condition placed on the developer and the purpose of the condition."[189] In applying this rule, the courts have been nearly evenly split in upholding and restricting municipal regulation.

2. Fair Share Development Requirements: Kentucky courts have not imposed any specific fair share development or housing requirements. Additionally, the courts have not specifically ruled on the validity of minimum lot size or other density restrictions.

3. Building Moratoria: There has been limited case law directly on this issue in the Kentucky appellate courts. Existing cases related to this issue, however, indicate that the court will generally uphold builiding moratoria as long as all procedural requirements are followed in enacting the moratorium ordinance.[190] The courts, however, have held that a municipality may be liable for damages when the basis for the moratoria is their own negligence in failing to provide sufficient public services.[191]

4. Spot Zoning / Exclusionary Zoning: Kentucky courts have been evenly split in upholding and invalidating municipal zoning decisions that were challenged on spot zoning grounds.

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[188] Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d 557, 559 (Ky. App. 1992). *See also.* Lampton v. Pinaire, Ky. App., 610 S.W.2d 915, 919 (1980).
[189] Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d at 559.
[190] *See* Reiss v. Jefferson County Fiscal Court, 1988 Ky. App. LEXIS 124.
[191] *See*, Frankfort v. Byrns, 817 S.W.2d 462 (Ky. App. 1991) (holding city officials liable for damages where negligence in planning and construction of sewer system required the imposition of a moratorium on new hookups); *Cf.* Greenway Enters. v. City of Frankfort, 148 S.W.3d 298 (Ky. App. 2004) (finding that the municipality was not liable for damages where a moratorium on new sewer hookups was discretionary).

a. Under the general rule in Kentucky, "In the absence of special circumstances, the selection of a small tract for special use, after a comprehensive plan has been adopted, simply does not reasonably fit with the plan. It constitutes an exception favoring a particular property owner or owners. It is in the nature of special legislation, having no relationship to the general welfare."[192] Additionally, Kentucky courts require, "where the sole basis for change is that the property is different in condition or character from the surrounding property in the same zoning classification, a finding to the effect that a rezoning would promote the welfare of the community as a whole (which is tantamount to "sound and wife") must be supported by evidence not only proving the difference in situation, but also negating in clear and convincing fashion the probability of substantial resulting detriment to other property likely to be affected."[193]

b. In applying this rule, the courts have invalidated several municipal zoning changes in determining that they constituted illegal spot zoning.[194]

c. The courts, however, have also applied the general rule in upholding the use of spot zoning. For example, where there was a clear showing that the conditions in an area had changed in a way that required greater multi-family housing, the approval of such housing in an area designated for single family homes was not found to be spot zoning.[195] Additionally, where a zoning designation is not in harmony with the surrounding area but is part of an approved comprehensive plan, the court will not find the zoning designation to constitute impermissible spot zoning.[196]

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[192] Aylor v. Sun Oil Co., 453 S.W.2d 18, 20 (Ky. 1970).
[193] Hodge v. Luckett, 357 S.W.2d 303, 306 (Ky. 1962).
[194] *See e.g.,* Aylor v. Sun Oil Co., 453 S.W.2d 18 (Ky. 1970); Hodge v. Luckett, 357 S.W.2d 303 (Ky. 1962); Fritts v. Ashland, 348 S.W.2d 712 (Ky. 1961); Mathis v. Hannan, 306 S.W.2d 278 (Ky. 1957).
[195] Wells v. Fiscal Court of Jefferson County, 457 S.W.2d 498 (Ky. 1970).
[196] Ward v. Knippenberg, 416 S.W.2d 746 (Ky. 1967).

# LOUISIANA

**Summary:** The state government in Louisiana has not addressed the issue of statewide land use regulation in any significant way over the past ten years. In fact, there have even been very few proposals, commissions or studies related to this issue. Similarly, Louisiana courts have heard relatively few cases in this area. With regard to spot zoning, the courts have adopted a rule that defers to municipal determinations but at the same time have also acted to invalidate a number of spot zoning implementations.

## LEGISLATIVE SUMMARY

Planning in Louisiana remains almost exclusively the province of municipal governments. To date, there has been no effort by either the Legislature or the Governor to enact statewide land use restrictions.[197] In 2001, the Senate introduced legislation to require three hours of formal training for planning and zoning commissions, but this legislation did not pass the House.[198]

- **Legislative Rating: 1**(Little recent activity)

## JUDICIAL SUMMARY

With the exception of spot zoning cases, Louisiana land use jurisprudence is fairly limited. Specifically, the courts have not addressed the issues of impact fees and building moratoria. It appears that to impose impact fees a local government must enact legislation permitting such action, which has only occurred in one city. On the issue of spot zoning, the courts have adopted a rule that is extremely deferential to municipal regulation, but in practice the courts have upheld this regulation in only a slight majority of cases.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *Outside of impact fee cases, the jurisprudence is very limited in this area.*

1. Impact Fees / Exactions: The courts of Louisiana have not specifically addressed the issue of impact fees. In a November 30, 1998 letter the Attorney General's office issued an opinion letter stating that without operative legislation in place authorizing such action a municipality may not impose impact fees on developers.[199] It appears that only one municipality, that of St. Tammany Parish, has enacted such legislation authorizing impact fees.[200]

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[197] *See* Urban Futures.org, *State Planning and Growth Management Database: Louisiana* at http://www.urbanfutures.org/state.cfm?state=Louisiana ("To date, Louisiana has not adopted statewide 'smart growth' planning or growth management legislation. Its cities and parishes are allowed, but not mandated, to undertake comprehensive planning activities.")

[198] S.B. 1084, 2001 Leg., Reg. Sess. (La. 2001).

[199] La. Atty. Gen. Op. No. 1998-447 (La. AG , 1998).

[200] La. R.S. 33:4064.5

2. Fair Share Development Requirements: Louisiana courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. They have also not interfered with municipal density regulations.

3. Building Moratoria: Louisiana courts have not addressed the issue of building moratoria.

4. Spot Zoning / Exclusionary Zoning: Louisiana courts adopted a rule that grants deference to the use of spot zoning. In practice, however, the courts have been nearly even in upholding and invalidating municipal spot zoning ordinances.

    a. The prevailing rule in Louisiana is that the presumption of validity attaches to all zoning ordinances, including spot zoning.[201] The courts will not substitute their judgment for the judgment of the local zoning boards, but will only examine spot zoning challenges for abuse of power by the legislature.[202]

    b. For example, in *Palermo Land Co. v. Planning Com. of Calcasieu Parish*[203] the court permitted the town to rezone the area around a landfill to prevent the expansion of the landfill. In another case, a Louisiana court upheld a spot zoning ordinance on the grounds that the pursuit of the public welfare "could have justified the ordinances."[204]

    c. Although this standard seems to favor municipal regulation, the courts have invalidated municipal spot zoning with nearly the same regularity. In one case, the court held spot zoning to be illegal where, "the zoning change bestows a special advantage over adjoining similar property."[205] In another case, the court invalidated spot zoning upon a finding that "[t]he zoning . . . is patently discriminatory since it does not conform to that in the surrounding area."[206]

    d. Additionally, the courts have on occasion substituted their judgment and forced rezoning from residential to commercial when a residential tract is surrounded by commercial property – failure to rezone in this instance was deemed impermissible reverse spot zoning.[207]

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[201] Palermo Land Co. v. Planning Com. of Calcasieu Parish, 561 So. 2d 482, 491 (La. 1990).
[202] Id. at 492.
[203] 561 So. 2d 482 (La. 1990).
[204] Save Our Neighborhoods v. St. John Baptist Parish, 592 So. 2d 908, 910 (La. Ct. App. 1991).
[205] Lauritsen v. New Orleans, 503 So. 2d 580, 584 (La. Ct. App. 1987).
[206] Trustees under Will of Pomeroy v. Westlake, 357 So. 2d 1299, 1304 (La. Ct. App. 1978)
[207] Monte v. Parish of Jefferson, 2005 La. App. LEXIS 255 (La. Ct. App. 2005); Coogan v. Jefferson, 381 So. 2d 1320 (La. Ct. App. 1980).

# MAINE

**Summary:** Statewide land use planning has received considerable attention from both the Legislature and Governor in Maine over the past ten years. Beginning with a sub-Cabinet committee report in 1999, then-Governor Angus King led an effort to reform statewide planning and direct government expenditures to support the goals of open space preservation, downtown revitalization, and the creation of dense, walkable communities. This effort resulted in significant legislation and executive agency policy reform. Governor Elias Baldacci and subsequent Legislatures have continued to take substantive action in this area. Courts in Maine have largely deferred to municipal regulation, particularly in the areas of impact fees and spot zoning.

## LEGISLATIVE SUMMARY

Both the Legislature and Governor have been very active in promoting statewide land use restrictions in Maine over the past ten years.[208]

- **Legislative Rating: 3** (High level of activity)

- In his 2000 State of the State address, then-Governor Angus King introduced a legislative agenda and a series of policy proposals called "Smart Growth: the Competitive Advantage."[209]

- The Governor's legislative agenda led to the passage, in 2000, of two key pieces of legislation. The first directs state capital investments to designated growth areas (identified in local comprehensive plans), creates a fund to encourage downtown revitalization efforts, and requires the siting of local schools in designated growth areas.[210] The second bill modifies the state's tax regulations to encourage the preservation of agricultural land and open space.[211]

- In 2000, the Legislature also passed L.D. 2550 which requires the Department of Transportation and the Bureau of Planning, Research and Community Service to provide training and technical assistance to local governments that would enable them to "preserve traditional downtowns, walkable communities and compact neighborhoods."[212]

- Under the Governor's direction, the State Planning Office created a $3 million low-interest loan program available to developers who build "denser, walkable, mixed-use communities."[213]

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[208] For a current review of statewide land use provisions in Maine, see The Maine State Planning Office, *Land Use Planning*, at http://www.state.me.us/spo/landuse/.
[209] A summary of the proposal is available at http://mainegov-images.informe.org/spo/landuse/docs/evaluation2003/appendixi.pdf.
[210] Me. L.R. 3908 (2000).
[211] Me. L.R. 4129 (2000).
[212] Me. L.D. 2550, P.L. 676 (enacted April 12, 2000).
[213] *See* American Planning Association, *2002: State of the States*, 67 (2002).

- Several bills are currently pending before the Maine Legislature that would, among other things: increase consistency requirements, require municipalities to designate growth areas, improve tools for multi-municipal planning, and finance open space preservation.[214]

## JUDICIAL SUMMARY

Maine courts have been extremely deferential to municipal government determinations on issues related to local land use restrictions. While the issues of fair share development and building moratoria have not been addressed in any comprehensive manner, the courts, when given the opportunity, have not explicitly required fair share development nor have they struck down building moratoria. On the issue of impact fees and spot zoning, the courts have largely deferred to the judgment of municipal governments.

- **Judicial Rating: 3** (Supportive of municipal regulation)

1. Impact Fees / Exactions: Maine courts have been extremely deferential to local municipalities in assessing impact fees. This is probably a result of local municipalities being authorized by state law to pass legislation which allows them to impose impact fees.[215] Impact fees for sewer expansion have been permitted on multiple occasions[216] as have impact fees for recreational purposes and to preserve open spaces.[217] So long as the impact fee is not "arbitrary, unreasonable or irrational" state courts will not interfere.[218]

2. Fair Share Development Requirements: The court in *Pharos House v. City of Portland* held that an amendment to the city's zoning ordinances which attempted to prevent the creation of additional pre-release houses for ex-felons was impermissible.[219] The city of Portland argued, to no avail, that surrounding cities had not adopted their "fair share" of the burden in providing for such developments.[220] The court notes that the City of Portland failed to prove that it had accepted its fair share of pre-release homes, implying perhaps that exclusionary zoning might be permissible if the city had shown it had provided its fair share of housing in this area.[221] While this decision does not impose a specific "fair-share" requirement, it indicates that under a different circumstance, they may be willing to do so.

3. Building Moratoria: The Maine courts have only addressed the issue of building moratoria on one occasion and even then only in a tangential manner. In *Burr v. Rangley* the court did not question the municipality's ability to impose a building moratorium on

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[214] *See* GrowSmart Maine, *Legislative Action*, at http://www.growsmartmaine.org/.
[215] ME. REV. STAT. ANN. Tit. 30 § 4354 (2004).
[216] Downey v. Wells Sanitary Dist., 561 A.2d 174 (Me. 1989); Giles v. York Sewer Dist., 1992 Me. Super. LEXIS 123 (Me. Super. Ct. 1992).
[217] Wilson v. INH, 2004 Me. Super. LEXIS 220 (Me. Super. Ct. 2004).
[218] Supra n. 2 at 176 *quoting* Lambert v. Wentworth, 423 A.2d 527, 531 (Me. 1980).
[219] Pharos House v. City Of Portland, 1996 Me. Super. LEXIS 127 (Me. Super. Ct. 1996).
[220] Id. at *2.
[221] Id. at fn. 7.

multi-family dwellings. [222] Plaintiff challenged the moratorium on the grounds that it did not apply to them and was unconstitutional. Plaintiff was defeated on both points, and a building moratorium was held to be a valid exercise of state police power.[223]

4. Spot Zoning / Exclusionary Zoning: Spot zoning has been sanctioned by the court on multiple occasions, and often it is found to be in conjunction with a multi-purpose comprehensive plan.[224] The courts of Maine have articulated a policy of not substituting their judgment on such issues for the judgment of the legislature. The term "spot zoning" is defined as a neutral term that alone does not raise judicial suspicion,[225] and courts will not presume improper motives should spot zoning be alleged without a showing that the ordinance is "unreasonable, oppressive or discriminatory."[226] However, a zoning board decision to rezone a single lot for commercial use in order to permit a party to run a construction company from his home was held not to be in harmony with the town's comprehensive plan when the surrounding lots were all zoned for residential use only.[227]

[222] Burr v. Rangeley, 549 A.2d 733 (Me. 1988).
[223] Id. at 735.
[224] City of Old Town v. Dimoulas, 2002 ME 133 (Me. 2002); Vella v. Town of Camden, 677 A.2d 1051 (Me. 1996).
[225] Vella, 677 A.2d at 1053.
[226] Bonn v. City Of Portland, 1992 Me. Super. LEXIS 112, fn. 3 (Me. Super. Ct. 1992).
[227] Cyr v. Inhabitants of Fort Kent, 1990 Me. Super. LEXIS 218 (Me. Super. Ct. 1990).

# MARYLAND

**Summary:** For the past fifteen years, statewide land use planning has been the subject of significant legislative and executive activity in Maryland. Through major legislative reforms in 1992, 1997 and 2001, Maryland has created one of the most comprehensive state-level land use systems in the country. Many of these reforms took place under the leadership of former Governor Paris Glendening, and it appears that the current Governor, Robert Ehrlich, will continue to advance reforms in this area. Maryland courts have heard a significant number of cases related to land use restrictions over this time, but their jurisprudence does not clearly favor or restrict municipal regulation. The courts' jurisprudence in the area of impact fees and spot zoning places some meaningful restrictions on local government authority, while decisions in cases challenging building moratoria have generally supported municipal regulation.

## LEGISLATIVE SUMMARY

Over the past fifteen years, Maryland has developed one of the most comprehensive statewide land use programs in the country.

- **Legislative Rating: 3** (High level of activity)

- In 1992, Maryland passed the Economic Growth, Resource Protection and Planning Act.[228] This Act requires local governments to establish comprehensive plans and mandates that most local regulations be consistent with that plan.[229] The Act also establishes an oversight role for the State Economic Growth, Resource Protection, and Planning Commission.[230]

- In 1997, the General Assembly adopted a package of "smart growth" legislation that expanded on the mandates of the 1992 Act. Among other provisions, this legislation included:[231]

  - *The 1997 Smart Growth Areas Act:* directed state funding to developed areas and areas designated for growth. The Act requires that certain state infrastructure and development funds may only be used in areas designated as "Smart Growth Areas" or "Priority Funding Areas."

  - *The 1997 Rural Legacy Act:* established a grant program designed to preserve open space. The Act empowers local governments and private land trusts to purchase easements and development rights in "Rural Legacy Areas."

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[228] Chapter 437, Acts of 1992.
[229] *See* Ed Bolen, et al., *Smart Growth*, 8 Hastings W.-N.W.J. Env. L. & Pol'y 145, 172 (2002).
[230] For more information on the Commission, see http://www.mdp.state.md.us/general/commission/commission1.html.
[231] *See* G. Squires (ed). 2002. Urban Sprawl: Causes, Consequences and Policy Responses. Washington, D.C: Urban Institute Press.

- *The Brownfields Voluntary Cleanup and Revitalization Incentive Programs*: offers loans, grants, tax incentives, and limits on liability designed to encourage the redevelopment of contaminated properties.

- *The Live Near Your Work Program*: funded state grants to match certain employer contributions to programs that subsidize employees' purchase of homes near their workplace.

- In July 2001, Maryland created the Office of Smart Growth.[232] The Office coordinates Smart Growth policy statewide, makes recommendations on required changes in state law, and provides planning assistance and information to citizens and local governments.[233]

- In 2001, the Maryland Legislature also passed an additional series of smart growth bills. Included in these bills were provisions for protecting environmentally-sensitive areas, improving community parks and playgrounds, and assisting communities in neighborhood revitalization efforts.[234]

- Under Governor Robert Ehrlich, many of the smart growth programs initiated under his predecessor, Paris Glendening, have been continued. Additionally, Governor Ehrlich has advanced a policy initiative, called the Priority Places Strategy.[235] Under this initiative, state resources are directed to areas designated as "Priority Places" to aid in planning and infrastructure development.[236]

**JUDICIAL SUMMARY**

Maryland courts have developed an extensive jurisprudence on issues related to land use restrictions. This jurisprudence, however, has not been consistently supportive or restrictive of municipal regulation. In the area of impact fees, courts have imposed significant restrictions on municipal regulation. In the leading case in this area the Court of Appeals held that an impact fee was a tax and could therefore not be imposed by a municipality. In contrast, the courts have granted substantial deference to municipalities in the imposition of building moratoria. Finally, the courts' jurisprudence on spot zoning determinations has been evenly mixed between supporting and restricting municipal regulation.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Under the Maryland Declaration of Rights, city governments may not impose an impact fee without specific authorization from the General

[232] Chapter 566, Acts of 2001.
[233] *See generally,* Maryland Office of Smart Growth at http://www.smartgrowth.state.md.us/.
[234] *See* Bolen, *Smart Growth*, supra note 2 at 175.
[235] The Priority Places website is available at http://www.priorityplaces.com/.
[236] Id.

Assembly.[237] The General Assembly has, however, granted such authority, although the authority is generally limited to financing capital improvements.[238]

a. As a result of these statutory limitations, Maryland jurisprudence on this issue has focused on determining whether a particular impact fee constitutes a regulatory measure, which is permitted under certain statutes, or a tax, which may be levied by counties but not by cities. In the leading case on this issue, the Maryland Court of Appeals held in 1994 that an impact fee used to fund road construction was an impermissible tax and not a regulatory measure.[239] In this case, the court held that an impact fee's primary purpose was to raise revenue, and it must therefore be viewed as a tax.[240] The court further indicated that in order for such a charge to be considered a regulatory fee, its primary purpose must be one of regulation, and often the fee must be imposed with certain additional conditions besides paying the sum.[241]

b. Under Maryland law, counties do have the power to levy taxes.[242] In a leading case, the Court of Appeals held that a development impact tax was a valid excise tax and therefore did not violate the uniform taxing restrictions that apply to property taxes under Maryland law.[243]

2. Fair Share Development Requirements: Maryland courts have not imposed a distinct fair share housing or development requirement on municipalities or private developers. The courts have also generally not interfered with minimum lot size requirements and density restrictions as long as the zoning ordinance bears a reasonable relationship to a legitimate government interest, such as promoting the safety, health and welfare of its citizens.[244]

3. Building Moratoria: As long as a moratorium is enacted to protect the "health, safety and welfare of the people" Maryland courts have upheld their use.[245] In one case the court even upheld a moratorium on permit application review that was enacted as a matter of course in the months leading up to a general election.[246] The courts have, however, placed some restrictions on the use of moratoria. For example, one court has held that a moratorium on sewer expansion may not be used as a pretext for the denial of a building permit where the property owner has made other arrangements for waste disposal.[247] Additionally, the statutory time limits for the expiration of permit applications may not continue to run during the course of a moratorium.[248]

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[237] Article XIV; Maryland Constitution, Article XI-E, § 5.
[238] *See e.g.,* Md. Code Ann. Art. 25, § 9; Art. 25B §13D.
[239] Eastern Diversified Properties, Inc. v. Montgomery County**,** 319 Md. 45 (Md.,1990)
[240] Id.
[241] Id at 53.
[242] Md. Ann. Code art. 25A, § 5 (2004).
[243] Waters Landing Ltd. Partnership v. Montgomery County, 337 Md. 15 (1994).
[244] See, JMC Constr. Corp. v Montgomery County, 54 Md App 1 (Md. App. 1983)(allowing two acre minimum lot size);
[245] Colwell v. Howard County, 31 Md. App. 8 (1976).
[246] Colao v. County Council, 346 Md. 342 (1997).
[247] Board of Appeals v. Marina Apartments, Inc., 272 Md. 691 (1974).
[248] Hartman v. Prince George's County, 264 Md. 320 (1972).

4. Spot Zoning / Exclusionary Zoning: In order to establish that a zoning change constitutes illegal spot zoning or that the failure to approve a zoning change constitutes reverse spot zoning, "*strong* evidence of mistake in the original zoning or comprehensive rezoning or evidence of substantial change in the character of the neighborhood must be produced."[249] Additionally, the Court of Appeals has held that the "zoning is not invalid per se merely because only a single parcel is involved or benefited . . . . [The] real test for spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community."[250] In applying these standards, the courts have been evenly split in upholding and invalidating local zoning determinations. Where a municipality rezones a property based on a strong showing of changed conditions in the area, the court has generally upheld the reclassification.[251] Similarly, where a property owner cannot demonstrate an error in the zoning classification or a change in the surrounding conditions, the court will not interfere with a denial of a request for rezoning.[252]

[249] Stratakis v. Beauchamp, 268 Md. 643, 653 (1973).
[250] Mayor & Council of Rockville v. Rylyns Enters., 372 Md. 514, 544 (Md., 2002)
[251] *See e.g.,* Rohde v. County Board of Appeals, 234 Md. 259 (1964); Kirkman v. Montgomery County Council, 251 Md. 273 (1968); *But see* Smith v. Board of County Comm'rs, 252 Md. 280 (1968) (holding that County did not sufficiently demonstrate mistake or change in conditions that justified rezoning).
[252] *See e.g.,* Mothershead v. Board of County Comm'rs, 240 Md. 365 (1965). *But see*, England v. Rockville, 230 Md. 43 (1962).

# MASSACHUSETTS

**Summary:** Massachusetts has seen an increasing level of activity in both the legislative and executive branches aimed at promoting land use reforms. Under former Governor Paul Cellucci and the current Governor, Mitt Romney, the state has taken significant action in the areas of comprehensive planning, open space protection and infill development. The courts in Massachusetts have largely supported municipal action, although they have placed significant restrictions on the use of impact fees.

## LEGISLATIVE SUMMARY

Statewide planning reform in Massachusetts has been the subject of an increasing level of activity in both the executive and legislative branches over the past ten years.

- **Legislative Rating: 3** (High level of activity)

- In 1996 and again in 2000, former Governor Paul Cellucci signed two executive orders related to land use reform in the state. The first, Executive Order 385, established the Governor's "Planning for Growth" strategy, which sought to improve the state's land use procedures through regulatory reform, greater interagency coordination and technical aid for municipalities.[253] The second executive order established the Community Development Program—a program that coordinates state agency involvement in guiding municipalities through the development of Community Development Plans.[254]

- In 2000, the Legislature passed the Community Preservation Act, which allowed communities to use a three percent property tax surcharge to create local Community Preservation Funds as a means of funding open space and historic preservation.[255]

- During this time, the legislature passed the Commonwealth's Brownfields Act, and the Executive Office of Environmental Affairs announced that it had protected 100,000 acres of open space in the 1990s.[256]

- State level land use initiatives continue today under Governor Mitt Romney. Through the Office for Commonwealth Development, Massachusetts has created incentives for infill housing development, increased funding for new park development, developed a funding structure that encourages transit oriented development, and channeled state capital investments into existing developed areas.[257]

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[253] E.O. 385 (1996).
[254] *See* Ed Bolen, et al., *Smart Growth*, 8 Hastings W.-N.W.J. Env. L.& Pol'y 145, 179 (2002).
[255] Mass. Gen. Laws. ch. 44B (2000).
[256] *See* Bolen supra note 2 at 180-181.
[257] *See* Massachusetts Office for Commonwealth Development, *Smart Growth in the Commonwealth: A Year of Progress* (2004) available at http://www.mass.gov/ocd/docs/year_progress.pdf.

**JUDICIAL SUMMARY**

Massachusetts courts have developed a relatively complex jurisprudence on matters related to land use restrictions. In the lone case challenging the imposition of municipal impact fees, a Massachusetts court held that broad-based impact fees constitute an impermissible tax under the state's constitution. In the area of spot zoning, the courts have adopted a rule that makes such zoning *per se* illegal. In applying this rule over the past fifteen years, however, the courts have almost exclusively upheld municipal ordinances against spot zoning challenges. Finally, Massachusetts jurisprudence in the areas of building moratoria and density restrictions largely defers to municipal regulation.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: In the lone case on this issue, the Massachusetts Court of Appeals placed significant restrictions on the power of local governments to impose impact fees.[258] Under the Massachusetts Constitution, municipal governments may impose a fee but not a tax. A fee is distinguished from a tax under the *Emerson College* test, which holds that: (1) fees are charged in exchange for a particular government service which benefits the party paying the fee in a manner "not shared by other members of society"; (2) fees are paid by choice—the citizen could choose to forgo the additional service and not pay the fee; and (3) fees are collected not to raise revenues but to compensate the governmental entity providing the services for the expenses.[259] In applying this test to a school impact fee imposed by the Town of Franklin, the court found that such a fee was not sufficiently particularized to meet the three part *Emerson College* test and therefore constituted an impermissible tax.[260]

2. Fair Share Development Requirements: Under Massachusetts law, a developer may be entitled to a comprehensive zoning permit that allows for multi-family housing in an area not zoned for this use where some of the units in the property are dedicated to low and moderate income housing.[261] In applying this law, Massachusetts courts have held that the obligation to provide for such housing exists as long as the property continues to violate the established zoning classification for the area in which it is located.[262] The courts have, however, broadly upheld the use of density and minimum lot sizes

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[258] See, Greater Franklin Developers Ass'n, Inc. v. Town of Franklin, 49 Mass.App.Ct. 500 (Mass.App.Ct.,2000) (noting that the test employed in Massachusetts is "far more stringent" than the "rational nexus" test employed in Florida and other jurisdictions).
[259] Emerson College v. Boston, 391 Mass. 415 (1984).
[260] See, Greater Franklin Developers Ass'n, 49 Mass. App. Ct. at 500 (invalidating school impact fee); Molla v. Town of Franklin, Misc. Case No. 129682 (Land Ct. 1989); see also, Brian W. Blaesser, *Impact Fees in Mass?*, 7/31/00 Nat'l. L.J. M4 (2000)(discussing impact fees in Massachusetts).
[261] ALM GL ch. 40B, § 21 (2005); *See e.g.,* Woburn Bd. of Appeals v. Hous. Appeals Comm., 17 Mass. L. Rep. 704 (Mass. Super. 2004).
[262] Zoning Bd. of Appeals of Wellesley v. Ardemore Apts. L.P., 436 Mass. 811 (2002).

restrictions where such restrictions promote the health, safety, convenience, morals or welfare of an area's residents.[263]

3. Building Moratoria: Massachusetts courts have largely upheld the validity of building moratoria as within the powers of a town under the zoning enabling act.[264] Furthermore, the Courts have held that a 23-month building moratorium on a landowner's property to enable a study on the proper zoning for the property was a permissible interim zoning tool and not a compensable taking.[265] In general, the courts will place a "presumption of validity" on the town's zoning decision and the challenger has the burden to prove the moratorium is both unreasonable and beyond the scope of the powers granted to the town in the enabling act or under the Federal or State constitutions.[266] In order to be effective, however, a moratorium must be enacted by a municipal ordinance and may not be imposed through the promulgation of a regulation.[267] Additionally, the courts have upheld moratoria that are imposed through state level legislation, even when a development proposal is submitted and approved prior to the enactment of the state legislation.[268]

4. Spot Zoning / Exclusionary Zoning: Although Massachusetts courts have adopted a rule that makes spot zoning per se illegal, they have also afforded great deference to municipalities in determining whether a zoning amendment actually constitutes spot zoning.

    a. Massachusetts courts have described spot zoning as "a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot," and stated that such "zoning constitutes a denial of equal protection under the law guaranteed by the State and Federal Constitutions, and violates the 'uniformity' requirement" of Massachusetts law.[269]

    b. Over the past fifteen years, however, Massachusetts courts have consistently upheld municipal ordinances against spot zoning challenges. Applying the standard that "if the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body . . . should be sustained and the reviewing court should not substitute its own judgment," the court in *Van Renselaar v. City of Springfield* held that commercial uses in the general area of a property that was

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[263] See, Simon v. Needham, 311 Mass. 560 (Mass. 1942)(upholding one-acre minimum lot size); See also, Zanghi v. Board of Appeals of Bedford, 61 Mass.App.Ct. 82 (Mass.App.Ct.,2004)(holding imposition of 26,000 square feet minimum lot size restriction did not amount to a constitutional taking). See also, New Seabury Corp. v. Board of Appeals of Mashpee, 28 Mass.App.Ct. 946 (Mass.App.Ct.,1990) (upholding density restrictions).
[264] See, Collura v. Town of Arlington, 367 Mass. 881 (Mass. 1975)(holding that two year moratorium on construction of apartment buildings constituted an allowable restriction).
[265] W.R. Grace & Co.-Conn. v. Cambridge City Council, 56 Mass.App.Ct. 559 (Mass.App.Ct.,2002).
[266] See, Collura, supra note 6; See also, Hamel v. Board of Health of Edgartown, 40 Mass.App.Ct. 420 (Mass.App.Ct.,1996)(upholding moratorium on development until environmental study of surrounding water was completed).
[267] Gengel v. Town of Rutland, 2003 Mass. Super. LEXIS 468 (Mass. Super. 2003).
[268] *See* Island Properties, Inc. v. Martha's Vineyard Com., 372 Mass. 216 (1977).
[269] Santullo v. City of Woburn, 59 Mass.App.Ct. 1103, (Mass.App.Ct.,2003).

rezoned for commercial use constituted a sufficient basis for the town's rezoning determination.[270] In another case, the court upheld a zoning amendment against a reverse spot zoning charge, holding that "the legality of a given zoning amendment turns not on what parcel has been singled out, or even on the effect on the parcel, but rather on whether the change can fairly be said to be in furtherance of the purposes of the Zoning Act."[271]

[270] 58 Mass. App. Ct. 104 (Mass. App. 2003) (citing National Amusements, Inc. v. Boston, 29 Mass. App. Ct. 305, 309 (1990))
[271] W. R. Grace & Co.-Conn v. Cambridge City Council, 56 Mass. App. Ct. 559, 569 (Mass. App. 2002).

# MICHIGAN

**Summary:** Over the past ten years, state policymakers have been moderately active in promoting greater statewide land use restrictions. The pace of this reform, however, has accelerated under Governor Jennifer Granholm. In 2003, the Governor established the Michigan Land Use Leadership Council, the recommendations from which have been the basis for several pieces of legislation, including brownfields, joint planning and land preservation reform. The Michigan courts have developed a fairly complex jurisprudence in this area. Although the courts have allowed exactions, density restrictions and impact fees, they have placed meaningful restrictions on the use of all three.

## LEGISLATIVE SUMMARY

In the late 1990s and early in the new century, statewide land use restrictions attracted a moderate level of activity within the Michigan legislative and executive branches. Over the past few years these efforts have accelerated. Governor Granholm has indicated that land use reform will remain one of her priorities.

- **Legislative Rating: 3** (High level of activity) *Recent moderate level of activity is likely to increase in the coming years.*

- In 1994, the Michigan Natural Resources Commission (NRC) created the Task Force on Integrated Land Use.[272] The Task Force was charged with reviewing and recommending changes to the state's planning and zoning laws.[273]

- In January 2002, then-Governor Engler signed a three-bill land use reform package that required municipalities to allow neighboring governments to comment on land use and capital investment plans.[274] This reform followed a package of legislation that clarified and standardized the zoning appeals process at the city, county and township levels and funded a program for municipal governments to preserve local agricultural lands.[275]

- In February 2003, Governor Jennifer Granholm created the Michigan Land Use Leadership Council to recommend changes aimed at "minimize[ing] the negative effects of current and projected land use patterns on Michigan's environment and economy."[276] The Council's 2003 report, *Michigan's Land, Michigan's Future*,[277] has led to a significant amount of government action aimed at reforming the state's land use regime. Among these legislative and executive actions was an executive order encouraging state facilities to be located in urban areas

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[272] *Toward Integrated Land Use Planning*, Planning and Zoning News, No. 5, March 1996, pp. 5-6.
[273] Id.
[274] *See* American Planning Association, *2002 State of the States,* 73 (2002).
[275] Id at 73-74.
[276] Michigan Land Use Leadership Council, *Summary: Michigan's Land, Michigan's Future*, 2 (2003) available at http://www.michiganlanduse.org/Progress.pdf.
[277] The full report is available at http://www.michiganlanduse.org/finalreport.htm.

and legislation that expanded the state's brownfields program, authorized multi-municipal planning, and expanded the state's farmland preservation program.[278]

**JUDICIAL SUMMARY**

Michigan courts have developed a fairly complex position on land use issues that restricts municipal power in some cases and defers to it in others. Though the appellate courts have not heard any impact fee cases, they have imposed some moderate restrictions on the use of specific exactions as a condition of development approval. The courts have similarly placed restrictions on density restrictions and spot zoning, though recent cases in both areas are modestly supportive of municipal regulation.

- **Judicial Rating: 2** (Niether highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Under Michigan law, municipalities do not have specific authority to levy impact fees.[279] It does not appear that a significant number of municipalities have attempted to impose these fees, and Michigan appellate courts have not heard any cases specifically on this issue. Instead, the jurisprudence in this area centers on challenges to municipal exactions. In such cases, Michigan courts have granted municipalities significant leeway in requiring improvements as a condition of a building permit or plan approval.[280] Under the prevailing test, exactions must "bear the required relationship to the projected impact of [the] . . . proposed development".[281] The Michigan Supreme Court has held, however, that a municipality may not condition approval of a proposed plat on the developer making improvements located entirely *outside* of the platted subdivision. [282]

2. Fair Share Development Requirements: Michigan courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. The courts have, however, placed moderate restrictions on the ability of a municipality to regulate density. Under the prevailing rule, Michigan courts

[278] *See* Michigan Land Use Leadership Council *supra* note 5.
[279] *See* Brian Imus & William Coyne, *Development Impact Fees in Michigan: A Tool to Stop Subsidies and Promote Efficient Growth,* 20 (2003) available at http://www.pirgim.org/reports/impactfees11_03.pdf.
[280] See, Gild General Associates v. Township of Grosse ILE 2000 WL 33535521, *4 (Mich.App.) (Mich.App.,2000)(upholding conditioning of a permit on sidewalk improvements); Loyer Educational Trust v. Wayne County Road Com'n 168 Mich.App. 587, 425 N.W.2d 189 (Mich.App.,1988)(holding that road commission could require, as condition to granting of driveway permit, private developer to install passing lane on opposite side of road to allow for safe and efficient left-turn traffic); C.P.W. Investments No. 2 v. City of Troy 156 Mich.App. 577, *585, 401 N.W.2d 864, **868 (Mich.App.,1986)(conditioning permit approval on road improvements within subdivision); but see, *Eyde Const Co v. Meridian Twp,* 149 Mich.App 802, 807-816; 386 NW2d 687 (1986)(holding town could not condition approval on construction of playground).
[281] Dowerk v. Charter Tp. of Oxford 233 Mich.App. 62, 68-69, 592 N.W.2d 724, 728 (Mich.App.,1998) (citing Dolan v. City of Tigard, 512 U.S. 374, 388 (1994))(allowing local ordinance which required landowner to upgrade and extend private road that was the only access to his landlocked property as a condition to obtaining building permits).
[282] Arrowhead Development Co v. Livingston Co Road Comm, 413 Mich. 505, 510, 513-520; 322 NW2d 702 (1982).

require a reasonable relationship between a legitimate government interest and a zoning ordinance or regulation that requires a minimum lot size or a maximum number of dwelling units per acre.[283] Over the past ten years, however, challenges to zoning ordinances requiring minimum lot sizes or density restrictions have largely failed as the Michigan courts have found that the ordinances have met this test.[284]

3. Building Moratoria: Michigan appellate courts have not addressed the issue of building moratoria.

4. Spot Zoning / Exclusionary Zoning: Michigan courts have a mixed record in the area of spot zoning, but recent jurisprudence in this area seems to favor municipal action.

    a. The prevailing rule recognizes that "A zoning ordinance or amendment . . . creating a small zone of inconsistent use within a larger zone is commonly designated as 'spot zoning.' Such an ordinance is closely scrutinized by a court and sustained only when the facts and circumstances indicate a valid exercise of the zoning power."[285]

    b. In applying this rule, the courts have found several uses of spot zoning to be illegal.[286] In one case, the Michigan Supreme Court cited a lower court's opinion in holding that a particular zoning ordinance was "arbitrary and unreasonable," in that "the general character of the 2 blocks . . . to which the zoning ordinance in question applies, is not particularly different or set apart by reason of location or physical structures thereon from the immediately surrounding neighborhood."[287]

    c. Over the past fifteen years, however, the jurisprudence has seemed to shift in favor of municipal control.[288] In these cases, the court has limited the scope of the

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[283] *See e.g.*, Scots Ventures v Hayes Township 212 Mich App 530 (Mich. App. 1995)(" Real motivations behind facade of "public health and welfare" appeared to be aesthetics, retention of "rural character," and desire to exclude new homeowners from township); Guy v Brandon Township 181 Mich App 775(Mich. App. 1989), *app den* 437 Mich 876, 466 NW2d 281(invalidating zoning ordinance with required minimum lot size which resulted in a unconstitutional taking of the owners property);Dunk v Brighton (1974) 52 Mich App 143 (Mich. 1974)(invalidating 40,000 square foot minimum lot size).

[284] *See*, Conlin v. Scio Twp., 262 Mich.App. 379 (Mich.App.,2004)(denying landowners challenge of zoning ordinances which contained density restrictions); see also, Township of Yankee Springs v. Fox, 264 Mich. App. 604, 692 N.W.2d 728 (2004)(upholding minimum lot size restrictions as bearing a reasonable relationship to legitimate government interest); Frericks v. Highland Tp., 228 Mich. App. 575 (Mich App. 1998)(allowing minimum lot size restriction because it advanced reasonable government interests related to the public health, safety and general welfare).

[285] Penning v. Owens 340 Mich. 355, 65 N.W.2d 831 (Mi.1954)

[286]In the following cases, the court held that illegal spot zoning had occurred. See, Trenton Development Co. v. Village of Trenton, 345 Mich. 353, 75 N.W.2d 814 (1956); Hudson v. Buena Vista Tp. Zoning Bd., 6 Mich. App. 625, 150 N.W.2d 167 (1967).

[287] Trenton Development Co. v. Trenton, 345 Mich. 353, 357 (Mich. 1956).

[288] In the following cases, the court has ruled that no illegal spot zoning took place. See, City of Essexville v. Carrollton Concrete Mix, Inc. 259 Mich. App. 257 (Mich.App.,2003); Schoolcraft Egg, Inc. v. Schoolcraft Tp. 2000 WL 33409627, *7 (Mich.App.,2000); Rogers v. City of Allen Park 186 Mich.App. 33, *39 (Mich.App.,1990); Bruni v. City of Farmington Hills, 96 Mich. App. 664 (Mich. App. 1980); Lanphear v. Antwerp Tp., Van Buren County, 50 Mich. App. 641(1973).

type of zoning to which it will apply the spot zoning standard. In one case, the court found that the rezoning of a small parcel of waterfront property did not constitute spot zoning where the zoning board amended the zoning as part of a larger waterfront development strategy.[289] In another case, the court held that spot zoning did not occur where the conditions surrounding a property had changed such that it was no longer part of the adjacent neighborhood and now was reasonably classified as part of a commercial corridor that had developed along a road leading to the neighborhood.[290]

[289] City of Essexville v. Carrollton Concrete Mix, Inc. 259 Mich. App. 257 (Mich.App.,2003)
[290] Rogers v. Allen Park, 186 Mich. App. 33 (Mich. App. 1990).

# MINNESOTA

**Summary:** Statewide planning restrictions have received a considerable amount of attention within the state government of Minnesota. Beginning with the 1996 Sustainable Development Act the Legislature and, later, Governor Jesse Ventura passed a series of reforms that enabled Minnesota municipalities to access a wide-range of planning assistance and several new planning tools. The Minnesota courts have not clearly favored or restricted municipal regulation in this area. Their jurisprudence on land use matters allows for the use of building moratoria and spot zoning but places some meaningful restrictions on their implementation. Case law in the areas of impact fees and fair share requirements is not sufficient to allow any useful conclusions.

## LEGISLATIVE SUMMARY

Although the number of statewide land use reforms introduced in Minnesota over the past ten years is not high relative to states that have been very active in this area, Minnesota has enacted several meaningful initiatives over this time.

- **Legislative Rating: 3** (High level of activity)

- In 1996, the Legislature passed the Sustainable Development Act, which requires the Office of Strategic and Long-Range Planning to develop a model ordinance and planning guide "based on the principles of sustainable development."[291] The planning guide, *Under Construction: Tools and Techniques for Local Planning*, offers a detailed guide and series of recommendations for municipalities interested in pursuing sustainable development initiatives.[292]

- In 1997, the Legislature passed the Community-Based Development Act[293], which among other things created an alternative dispute resolution process for land use conflicts, empowered municipalities to enact urban growth boundaries, and provided planning-assistance funding to municipalities.[294]

- In 1999, then-Governor Jesse Ventura unveiled the Ventura Smart Growth Initiative.[295] This Initiative highlighted three strategies by which the state could "Maximize economic opportunity for all while protecting and enhancing the assets that make Minnesota a great place to live — healthy communities, clean air and water, and Minnesota's unique natural, cultural and historical areas."[296]

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[291] Minn. Stat. § 4A.07 (2004).
[292] The full guide is available at http://server.admin.state.mn.us/pdf/2002/UnderConstruction.pdf.
[293] Minn. Stat. § 462.3535 (2004).
[294] *See* Minnesota Department of Planning/Local Assistance, *Overview of Community Based Planning in Minnesota*, at http://www.lpa.state.mn.us/CBP/cbpinmn.html; American Planning Association, *2002 State of the States,* 75 (2002).
[295] *See* Office of Governor Jesse Ventura, *Growing Smart in Minnesota*, available at http://server.admin.state.mn.us/pdf/1999/eqb/smartgro.pdf.
[296] Id.

- Over the past ten years, the Legislature has passed several other planning reforms, including laws that: require the Minnesota Planning Office to enact a 20-year state development strategy, require the Environmental Quality Board to draft impact statements on various aspects of urban development, and create private-public partnerships for the purpose of preserving state woodlands.[297]

**JUDICIAL SUMMARY**

Minnesota jurisprudence in the area of land use restrictions is relatively complex and does not clearly favor or restrict municipal action. The issue of impact fees has yet to be decided by Minnesota courts, though the single case related to this issue struck down a municipal development fee without deciding the legality of impact fees. Minnesota courts have not imposed a specific fair share development requirement, but one court has applied a fair share analysis in restricting municipal action that was inconsistent with a regional development plan. In cases challenging building moratoria and spot zoning, the courts have recently allowed municipalities to impose these regulations but have developed a standard that puts some meaningful restrictions on their use.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: There has been very little case law in this area, and the existing case on point does not decide the issue of whether impact fees are valid in Minnesota. The Minnesota Supreme Court in *Country Joe, Inc. v. City of Eagan,*[298] declined the opportunity to decide whether impact fees in Minnesota were legal. There is no impact fee enabling statute in Minnesota, though this has not been dispositive in other jurisdictions. Instead, the court determined that a fee not based directly on the cost of the required improvements was a tax and therefore illegal.[299] At this point, the legality of impact fees remains undecided in Minnesota.

2. Fair Share Development Requirements: Minnesota courts have not imposed a specific fair share development requirement, though in one case they did use a fair share analysis in determining whether a city was required to plan in accordance with the overall regional plan. The court held, "If Lake Elmo does not accept its fair share of metropolitan population growth, this population growth will likely go elsewhere. This . . . will increase the cost of providing sewer and transportation infrastructure."[300] By contrast, Minnesota courts have generally given municipalities significant leeway in imposing density restrictions[301] and minimum lot size requirements[302].

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[297] *See* Minnesota Department of Administration / Environmental Quality Board, *Sustainable Development Legislation,* at http://www.eqb.state.mn.us/SDI/legislation.html.

[298] Country Joe, Inc. v. City of Eagan 560 N.W.2d 681, *685 -686 (Minn.,1997).

[299] Id. (Minn.,1997)(" By definition, an impact fee must be "in an amount which is proportionate to the need for the public facilities generated by new development.")

[300] City of Lake Elmo v. Metropolitan Council 685 N.W.2d 1 (Minn.,2004)

[301] *See e.g.*, Hokanson v. Town of Marshan 1998 WL 218186, *2 (Minn.App.)("Marshan Township chose to retain its rural, agricultural character. One of the methods it selected for doing so is density restrictions on nonagricultural development.")

3. Building Moratoria: Prior to the change of Minnesota planning law in 1965,[303] Minnesota generally disallowed building moratioria.[304] More recently, however, Minnesota courts have upheld a municipality's authority to impose building moratoria provided there is a rational purpose[305], the moratoria is for a defined, reasonable time[306] and it does not unreasonably affect one property owner.[307] Minnesota courts will also place an emphasis on whether the zoning board acted in good faith in its decision to impose a moratorium.[308]

4. Spot Zoning / Exclusionary Zoning: Minnesota courts do not allow spot zoning, but have developed a fairly narrow test for determining whether spot zoning has occurred.

    a. Minnesota courts define "spot zoning" as "the reclassification of a small area of land in a manner that is not compatible with the surrounding neighborhood for the benefit of the property owner and to the detriment of others. . . . It is preferential treatment, piecemeal zoning, [and] the antithesis of planned zoning."[309]

    b. Minnesota courts have held that spot zoning is *per se* illegal[310] but have developed a detailed analysis to determine whether spot zoning has occurred. In general the analysis consists of whether the ordinance is inconsistent with the comprehensive plan,[311] creates an island of nonconformity,[312] was arbitrary and capricious,[313] and results in the substantial diminution of property value.[314] In

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[302] *See e.g.,* Pine County v. State, Dep't of Natural Resources, 280 N.W.2d 625, 629 (Minn.1979) ("Restrictions such as . . . minimum lot sizes are common to zoning ordinances generally."); see also, Graham v. Itasca County Planning Com'n 601 N.W.2d 461, *466 (Minn.App.,1999)("The establishment of a standard lot size is a legitimate governmental zoning purpose.")

[303] Minn.St. 462.351 - 462.364 (1965).

[304] See, Alexander v. City of Minneapolis 267 Minn. 155, 125 N.W.2d 583 (MINN 1963)(holding that a municipality was not authorized to adopt a "hold order" on building permits for 9 years); *see also*, Ostrand v. Village of North St. Paul 275 Minn. 440, 147 N.W.2d 571 (MINN 1967)(holding 2 year moratorium invalid).

[305] See, TPW, Inc. v. City of New Hope, 388 N.W.2d 390, 394 (Minn.App.1986) (reversing a district court holding that a moratorium was arbitrary because it found that the existing land use plan was lacking in safeguards and that the city needed more time to conduct a study), *review denied* (Minn. Aug. 13, 1986).

[306] Almquist v. Town of Marshan 308 Minn. 52, *63, 245 N.W.2d 819, **825 (Minn., 1976)(holding moratorium valid citing length of moratorium as a distinction between past cases invalidating moratoria).

[307] See, Medical Services, Inc. v. City of Savage, 487 N.W.2d 263 (Minn.App.1992)(finding city to have acted arbitrarily because only one pending proposed facility was affected by the moratorium).

[308] See, Duncanson v. Board of Supervisors of Danville Tp. 551 N.W.2d 248, *252 (Minn.App.,1996)("[I]t is clear that the *Almquist* court found the element of good faith to be critical. We find in this case, as did the court in *Almquist,* that the board acted in good faith.")

[309] Amcon Corp. v. City of Eagan 348 N.W.2d 66, 73 (Minn.,1984).

[310] *See,* State by Rochester Asso. of Neighborhoods v. Rochester, 268 N.W.2d 885, 892 (Minn. 1978)

[311] In re Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits in City of Mounds View 664 N.W.2d 1, *7 (Minn.,2003)(affirming administrative law judge determination that spot zoning occurred).

[312] State, by Rochester Ass'n of Neighborhoods v. City of Rochester 268 N.W.2d 885, *891 - 892 (Minn.,1978)(holding that zoning change did not create an island of nonconforming use).

[313] Amcon Corp. v. City of Eagan 348 N.W.2d 66, *74 (Minn.,1984)(holding that zoning change was arbitrary and capricious).

[314] Alexander v. City of Minneapolis 267 Minn. 155, *160, 125 N.W.2d 583,**586 - 587 (Minn., 1963)("[T]he enactment of 'spot' zoning ordinances or amendments to comprehensive zoning ordinances under the police power

applying this standard the courts have been split—siding nearly equally with municipalities and with land owners.

which results in a total destruction or substantial diminution of value of property affected thereby without just compensation therefor constitutes the taking of property without due process.")

# MISSISSIPPI

**Summary:** Statewide land use reform has not been the subject of any significant activity among state policy makers or legislators in Mississippi over the past ten years. Similarly, Mississippi courts have heard very few cases in this area. In the area of impact fees, the courts' traditional deference to municipal regulatory authority was upset by a recent Supreme Court decision expanding the application of spot zoning analysis to zoning variances.

**LEGISLATIVE SUMMARY**

There has been almost no state level activity in Mississippi aimed at enacting greater land use restrictions. In 2001, the Legislature considered the Smart Growth Economic Development Act,[315] which would have provided a source of infrastructure funding for certain distressed communities.[316] Ultimately, this measure was not passed. At present, there is a bill before the Senate that would specifically authorize the use of municipal impact fees,[317] though it is not clear whether this proposal will garner the support necessary to become law.

- **Legislative Rating: 1** (Little recent activity)

**JUDICIAL SUMMARY**

Mississippi case law in this area is limited to cases on the issue of spot zoning. Although the courts have traditionally granted great deference to municipalities in this area, the most recent Supreme Court case on the issue takes a much more restrictive position.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Mississippi appellate courts have only heard one case on this issue, and it does not appear that impact fees are widely used by the state's municipalities. In part, this results from the lack of impact fee enabling legislation. In the sole case on this issue, the Mississippi Supreme Court struck down an "impact fee" for water and sewer connection where the fee was charged only to a single property owner and was not directly related to the costs of providing the additional service to the property.[318]

2. Fair Share Development Requirements: Mississippi courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity

[315] S. B. 2917 (2001).
[316] *See* American Planning Association, *2002 State of the States,* 77 (2002).
[317] S.B. 2967 (2005).
[318] Sweet Home Water and Sewer Ass'n v. Lexington Estates, Ltd. 613 So.2d 864, 870 (Miss.,1993) ("While Sweet Home [the public utility] may, under § 19-5-195, assess "rates, fees, tolls, or charges," those assessments must be reasonably calculated to provide for the system's functioning and growth.")

of low income housing. Additionally, the courts have not acted to disturb any municipal density restrictions on the grounds that they unfairly burdened surrounding areas.

3. Building Moratoria: Mississippi appellate courts have not addressed the issue of building moratoria.

4. Spot Zoning / Exclusionary Zoning: Although Mississippi Courts have held spot zoning to be illegal, when determining whether a particular zoning change constituted spot zoning the courts have overwhelmingly held in favor of the municipality.

    a. From 1967-2005 sixteen challenges to zoning ordinances have alleged spot zoning, and in all but two[319], the court held that spot zoning had not occurred. The primary test used to decide whether a zoning change constitutes spot zoning is whether the zoning change is inconsistent with the comprehensive plan for the area in question.[320]

    b. In an interesting development in this area of the law, the Mississippi Supreme Court has recently applied its spot zoning analysis to the granting of zoning variances. In *Drews v. City of Hattiesburg*, the Mississippi Supreme Court held that a zoning variance allowing a use that was inconsistent with the surrounding area constituted spot zoning.[321]

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[319] *See*, Drews v. City Of Hattiesburg 2005 WL 729473 (Miss.) (Miss.,2005); Jitney-Jungle, Inc. v. City of Brookhaven 311 So.2d 652 (Miss. 1975)(holding change in character of neighborhood was not significant enough to warrant spot zoning request).

[320] See, Fondren North Renaissance v. Mayor and City Council of City of Jackson 749 So.2d 974, 979 (Miss.,1999)("[I]t is not spot-zoning when an ordinance or amendment is enacted in accordance with a comprehensive zoning plan."); McKibben v. City of Jackson 193 So.2d 741, 744 (Miss. 1967) ("The term 'spot zoning' is ordinarily used where a zoning ordinance is amended reclassifying one or more tracts or lots for a use prohibited by the original zoning ordinance and out of harmony therewith.")

[321] 2005 WL 729473 (Miss.) (Miss.,2005)(holding decision to grant six variances that were inconsistent with the comprehensive plan to be illegal spot zoning).

# MISSOURI

**Summary:** In both the Legislative and Executive branches, there has been almost no activity related to statewide land use reform in Missouri over the past ten years. With the exception of a few initiatives in the area of downtown revitalization, there have been no significant studies, proposals or legislation in this area. Missouri jurisprudence on land use questions is highly deferential to municipal authority. In particular, a substantial majority of cases challenging impact fees and spot zoning have upheld the challenged municipal action.

**LEGISLATIVE SUMMARY**

There has been little activity in Missouri over the past ten years aimed at implementing greater statewide planning restrictions. In 1999, then-Governor Bob Holden considered issuing an executive order establishing a "growth and investment task force" to review local land use provisions.[322] Before signing the order, however, the Governor withdrew this proposal. In 2001, the Governor did sign an executive order requiring Missouri state agencies to locate state buildings in central downtowns "when economically prudent."[323] Downtown redevelopment has also been the subject of 1999 tax credit legislation and an initiative by the Department of Economic Development.[324] No other state-level activity was reported.

- **Legislative Rating: 1** (Little recent activity)

**JUDICIAL SUMMARY**

Missouri courts have granted great deference to municipal land use decisions, particularly with regard to impact fees and spot zoning. In the area of impact fees, the court has held that municipalities may even mandate that a developer provide the infrastructure required by a new development as a condition for granting a building permit. The courts have not imposed any fair share development or housing requirements and have not addressed the validity of building moratoria.

- **Judicial Rating: 3** (Supportive of municipal regulation) *Missouri courts grant great deference to municipal authority, particularly in the areas of impact fees and spot zoning.*

1. Impact Fees / Exactions: Missouri courts have largely granted great deference to municipal governments in their assessment of impact fees.

    a. Under the prevailing rule in Missouri, "Where . . . the development increases the needs of the county or municipality the cost of meeting those needs may reasonably be required of the developer."[325]

[322] *See* American Planning Association, *2002 State of the States,* 79 (2002).
[323] Executive Order 01-22. Text available at http://www.sos.state.mo.us/library/reference/orders/2001/eo01_022.asp.
[324] *See* Ed Bolen, et al., *Smart Growth*, 8 Hastings W.-N.W.J.Env.L.&Pol'y 145, 185 (2002).
[325] Treme v. St. Louis County, 609 S.W.2d 706, 717 (Mo. Ct. App. 1980).

b. The courts have applied this rule liberally by allowing municipalities to require developers to either pay an impact fee or actually provide the infrastructure required by the new development. In one such case a Missouri court upheld a city ordinance that required a developer to provide required street and sewer infrastructure as a condition of approval for a building permit.[326]

c. In *Home Builders Assoc. v. Kansas City* the court upheld a set aside law that required new developments to dedicate a certain portion of the land in a subdivision for recreational use.[327] Under this holding, if the actual property set side is impractical, then the developer is required to deposit a set fee with the county treasurer that will correlate to the number of units being built.[328] This fee is to be used to develop recreational land close to the new development. While the court does not use the term "impact fees" or "exactions," these recreational development set asides or monetary payments are functionally the same as a traditional impact fee.

2. Fair Share Development Requirements: Missouri courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing.

3. Building Moratoria: Missouri courts have not addressed the issue of building moratoriums.

4. Spot Zoning / Exclusionary Zoning: The Missouri courts have granted considerable deference to municipal governments in deciding spot zoning challenges. These courts have generally held that zoning decisions are legislative in nature,[329] and the judiciary should not seek to substitute its judgment for that of the local government.[330] Furthermore, the term spot zoning does not indicate a practice that is *per se* illegal,[331] and a presumption of reasonableness will apply to all zoning decisions.[332] Under this presumption, Missouri courts will only invalidate spot zoning decisions on a finding that such decisions are arbitrary, unreasonable or against the public interest.[333] For example in *Fairview Enters. v. City of Kan. City* the court invalidated a spot zoning determination where the public interest was greatly outweighed by the detriment to a private landowner whose property value was destroyed by the rezoning.[334] In a great majority of the cases on this issue, however, the courts have left local spot zoning decisions undisturbed.[335]

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[326] State ex rel. Remy v. Alexander, 77 S.W.3d 628 (Mo. Ct. App. 2002).
[327] 555 S.W.2d 832 (Mo. 1977).
[328] Id. at 833.
[329] Fairview Enters. v. City of Kan. City, 62 S.W.3d 71, 76 (Mo. Ct. App. 2001).
[330] Broadway Apartments, Inc. v. Longwell, 438 S.W.2d 451, 454 (Mo. Ct. App. 1968) (citation omitted).
[331] Treme v. St. Louis County, 609 S.W. 2d 706, 713 (Mo. Ct. App. 1980).
[332] Fairview Enters, 62 S.W. 3d 71.
[333] Id.; Renick v. Maryland Heights, 767 S.W.2d 339 (Mo. Ct. App. 1989); McDermott v. Calverton Park, 454 S.W.2d 577 (Mo. 1970)
[334] Fairview Enters, 62 S.W.3d 71.
[335] *See e.g.,* Broadway Apartments, Inc. 438 S.W.2d 451; McDermott v. Calverton Park, 454 S.W.2d 577 (Mo. 1970); Strandberg v. Kansas City, 415 S.W.2d 737 (Mo. 1967); Gould v. Kansas City, 316 S.W.2d 571 (Mo. 1958); State ex rel. Christopher v. Matthews, 362 Mo. 242 (Mo. 1951).

# MONTANA

**Summary:** Neither the Montana Legislature nor the Governor have been very active in pursuing statewide land use restrictions. Several proposals have been presented in the Legislature, but none of significance have passed. The jurisprudence of Montana courts on these issues does not paint a clear picture. Although the courts have placed meaningful restrictions on municipal regulatory power in their holdings, they have not used these restrictive rules to invalidate specific municipal regulations.

## LEGISLATIVE SUMMARY

Statewide land use reforms have attracted some attention within the Montana Legislature, but to date there have only been a few modest reforms in this area. Among these reforms are 1999 changes to the comprehensive planning laws[336] and a bill requiring consistency between local growth policies and subdivision regulations.[337] During this time, the Legislature has also rejected several proposals for greater statewide land use restrictions.[338] Additionally, newly-elected Governor Schweitzer has not included land use reform in his first-year legislative agenda.[339] Given the results of a 2001 poll, which suggests that 45 percent of Montana residents want greater growth management and 49 percent want less,[340] it is unlikely that in the short term the Legislature will address this issue in any significant way.

- **Legislative Rating: 1** (Little recent activity)

- **Montana Growth Policy Forum** Initiated by the Montana Consensus Council in 2001, the Growth Policy Forum was a partnership of state agencies, local governments, private stakeholders and citizens designed to make recommendations on growth management strategies for the state.[341] There is no indication, however, that the forum generated any legislative proposals that were enacted into law.

## JUDICIAL SUMMARY

Montana courts have taken a mixed position on municipal land use restrictions. While the Supreme Court has found both an implied fair share housing requirement and an implied power to enact building moratoria, there is no evidence that these holdings have had a significant practical effect in restricting municipal regulation. In the cases that have established these rules, the court did not overturn the municipal regulation at issue. Additionally, the court has evenly upheld and invalidated municipal spot zoning regulations. .

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[336] S.B. 97 (May 10, 1999).
[337] H.B. 0543 (2001).
[338] *See* American Planning Association, 2002 *State of the States*, 81 (2002).
[339] *See* State of Montana, *News Release: Governor Schweitzer* Applauds Legislature for Successful First Half Priority Bills On Jobs, Healthcare and Education Moving Through, *at* http://governor.mt.gov/news/pr.asp?ID=183.
[340] Peggy Trenk, *What Citizens Think About Growth*, Montana Growth Policy Forum newsletter, Fall 2001 at 2.
[341] *See* Montana Growth Policy Form Newsletter, Fall 2001 at 1.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Montana appellate courts have not heard any cases on this issue. At least one local government has adopted impact fees under authority implied in general police power and infrastructure provision statutes.[342] It is not clear whether the lack of case law on this issue stems from a low number of similar municipal fees in the state or whether impact fee challenges are simply being resolved at the local government or trial court level.

2. Fair Share Development Requirements: Montana courts require municipalities to allow for sufficient low and moderate income housing. The court has specifically applied this rule to require that municipalities provide for the location of manufactured housing. As the Supreme Court has stated, "a municipality must insure that a fair share of housing is within the reach of persons of low and moderate incomes."[343] Despite this ruling, no appellate court in Montana has overturned a local ordinance for failing to meet this requirement.[344]

3. Building Moratoria: The Montana Supreme Court has held that temporary building moratoria are within a municipality's implied police powers, provided that such moratoria meet statutorily imposed procedural restrictions. In holding such a moratorium to be invalid, the Supreme Court stated, "We perceive therefore in the statutes a legislative intent for a broad general grant of power to municipalities in their zoning regulations, and that implied in the power to restrict the use of land, as an exercise of police power, is the authority to adopt reasonable moratoriums. The procedure for the adoption of such moratoria, however, must be according to the statutes out of which the implied authority arises." [345]

4. Spot Zoning / Exclusionary Zoning: Although the case law is not extensive in this area, the court has both upheld[346] and invalidated[347] zoning ordinances based on the spot zoning test put forth in *Little v. Board of County Commissioners of Flathead Count:*[348]

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[342] *See e.g.,* City of Bozeman-Impact Fees Summary *at* http://www.bozeman.net/planning/impctfee/IFsummry.htm (citing Constitutional and statutory authority for the implementation of impact fees).
[343] Mack T. Anderson Ins. Agency v. Belgrade, 246 Mont. 112, 119 (1990). *See also,* Martz v. Butte-Silver Bow Government 196 Mont. 348, *353-354, (Mont., 1982) ("where a zoning ordinance limits mobile home parks to less than 1% of the land zoned, the zoning is tantamount to an exclusionary ban on mobile home parks and is unconstitutional; and pointed out that a zoning ordinance which permits mobile homes on lots having a large minimum size may be exclusionary.")
[344] *See id.*
[345] State ex rel. Diehl Co. v. City of Helena 181 Mont. 306, 312-313, (Mont., 1979) (holding a building moratorium invalid due the town's failure to comply with proper procedures).
[346] See, Boland v. City of Great Falls, 225 Mont. 128 (Mont. 1996)(holding that zoning change to allow condominiums in an area zoned primarily for residential single family homes did not constitute illegal spot zoning as the requested use was not significantly different from prevailing use in the area).
[347] See, Greater Yellowstone Coalition, Inc., v. Board of County Com'rs of Gallatin County, 305 Mont. 232 (Mont. 2001)(holding that changing undeveloped property's designation from residential to planned unit development was illegal spot zoning).
[348] 193 Mont. 334 (Mont. 1981).

a. Whether the requested use is significantly different from the prevailing use in the area;
b. Whether the area in which the requested use is to apply is small, although not solely in physical size. An important inquiry under this factor is how many separate landowners will benefit from the zone classification;
c. Whether the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or general public. Under the third factor for spot zoning, the inquiry should also involve whether the requested use is in accord with a comprehensive plan.[349]

[349] Little v. Board of County Com'rs of Flathead County 193 Mont. 334, 346, (Mont., 1981).

# NEBRASKA

**Summary:** Over the past ten years, Nebraska state policy makers have not taken any significant action aimed at promoting statewide land use restrictions. Planning in the state occurs almost exclusively at the local level. Although case law in this area is limited, Nebraska courts have overwhelmingly deferred to municipal judgments in land use disputes, particularly in the area of spot zoning.

## LEGISLATIVE SUMMARY

Statewide land use reform has not been the subject of significant legislative or executive action in Nebraska. As one study has suggested, this is likely because, "population growth during the past decade has not created serious urban sprawl or scattered development in Nebraska."[350] Research did not reveal any studies, executive orders or legislative action aimed at promoting greater statewide land use restrictions. Planning in Nebraska remains largely the province of local governments.[351]

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

Although case law in the area of land use restrictions is relatively limited in Nebraska, the courts have generally deferred to municipal authority when given the opportunity. Appellate courts in Nebraska have yet to directly address the issues of impact fees, fair share development and building moratoria. On the issue of spot zoning, the courts have overwhelmingly held that local zoning boards, rather than the courts, are in a better position to determine the type of zoning that is best for the general welfare of a community. So long as the decision does not appear to be unreasonable, the courts of Nebraska will defer to local zoning boards on questions of spot zoning.

- **Judicial Rating: 3** (Supportive of municipal regulation) *Case law in Nebraska appellate courts is relatively limited, but the lack of fair share development requirements and deferential spot zoning standards support this rating.*

1. Impact Fees / Exactions: The courts of Nebraska have yet to address the issue of impact fees. The lack of case law on this issue appears to stem from the limited use of impact fees by municipalities in Nebraska. Research revealed only one municipality, the City of Linclon, that has imposed such fees.[352]

2. Fair Share Development Requirements: Nebraska courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity

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[350] American Planning Association, *2002 State of the States*, 83 (2002).
[351] *See* Ed Bolen, et al., *Smart Growth*, 8 Hastings W.-N.W.J.Env.L.&Pol'y 145, 186 (2002).
[352] *See* City of Lincoln Policy Statement, *City of Lincoln Program for Payment of Arterial Street Impact Fee to Promote Economic Development,* at http://www.lincoln.ne.gov/city/pworks/ifs/exemincn/econdev/pdf/policy.pdf.

of low income housing. Additionally, in the limited case law on this issue, the courts have not disturbed minimum lot size and density zoning restrictions.[353]

3. Building Moratoria: Nebraska courts have not addressed the issue of building moratoria.

4. Spot Zoning / Exclusionary Zoning: Nebraska appellate courts have been very deferential to municipal judgments on the issue of spot zoning. Under Nebraska jurisprudence, spot zoning is not per se illegal.[354] In *Giger v. Omaha* the local zoning board rezoned a parcel of property to permit mixed use development.[355] The court held that this was permissible spot zoning and that for spot zoning to be illegal generally all three of the following factors had to be present: (1) a small parcel of land is singled out for individual treatment; (2) the singling out is not in the public interest; (3) the action is not in accord with a comprehensive plan.[356] In *Giger* the court noted that the rezoned property was adjacent to similarly zoned tracts of land, which also militated against a determination of illegal spot zoning.[357] The courts have also permitted spot zoning where the rezoning was determined not to be "radical"[358] or when the general welfare has been served by the rezoning.[359] In general, the courts of Nebraska have adopted a jurisprudence based in the principle that the public good is best determined by a local zoning board.[360]

[353] *See e.g.,* Mendlik v. Bd. of Adjustment for City of W. Point, 2004 Neb. App. LEXIS 80.
[354] Bucholz v. Omaha, 174 Neb. 862, 870 (Neb. 1963).
[355] 232 Neb. 676 (Neb. 1989).
[356] *Id.* at 696 (citation omitted).
[357] *Id.*
[358] Holmgren v. Lincoln, 199 Neb. 178 (Neb. 1977).
[359] Weber v. Grand Island, 165 Neb. 827, 832-33 (Neb. 1958).
[360] Bucholz, 174 Neb. at 869.

# NEVADA

**Summary:** At the state level, there has been a moderate level of activity in the area of land use restrictions. Most of the statewide restrictions imposed by the Legislature have been relatively limited in their scope, but the Legislature has empowered regional authorities such as the Tahoe Regional Planning Agency to enact coordinated land use restrictions. Nevada courts have largely deferred to local authority in this area but have placed some restrictions on the use of impact fees and spot zoning.

## LEGISLATIVE SUMMARY

The state government in Nevada has allowed local and regional governments to retain control over most issues related to land use restrictions. At the state level, there has been relatively little activity aimed at promoting statewide restrictions. Because Nevada has such a tremendous diversity of population densities among its communities, the Legislature has generally empowered regional authorities to address issues related to coordinated land use restrictions. The Tahoe Regional Planning Agency[361] and the Southern Nevada Strategic Planning Coalition[362] are the two most notable efforts of this type. Additionally, the Legislature has taken action on several, smaller planning-related issues, including: increasing the list of capital improvements that may be used to justify impact fees; changing the requirements for Clark County's master plan; and allowing for greater coordinated planning among local governments.[363]

- **Legislative Rating: 2** (Moderate activity)

## JUDICIAL SUMMARY

Nevada courts have largely adopted a jurisprudence that defers to local land use authority, particularly in the area of building moratoria. With regard to impact fees and spot zoning, the courts have applied a similar deference but have placed some restrictions on this regulatory authority.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *Courts have generally deferred to local land use authority but have placed some restrictions on the use of this power.*

1. Impact Fees / Exactions: The Nevada Legislature has developed a very specific set of statutes governing the use of impact fees.[364] As a result, Nevada courts have not heard a significant number of cases on this issue. In the cases that have arisen, however, the Nevada courts have acted to place moderate restrictions on the use of these fees:

[361] *See* http://www.trpa.org/
[362] *See* http://www.snrpc.org/
[363] *See* American Planning Association, *2002 State of the States*, 86-87 (2002).
[364] NRS § 278B (2005).

a. In *Douglas County Contractors Association v. Douglas County*[365], the Nevada Supreme Court struck down the county's attempt to impose a school-improvements fee because the fee ultimately was considered an impermissible tax that was outside of the scope of the state's enabling statute.
b. In *Southern Nevada Homebuilders Assn, Inc v. City of Las Vegas*[366], the Nevada Supreme Court held that the list of permissible uses for impact fees in N.R.S. § 278B.020 is exclusive. Impact fees to fund projects not listed in the statute will be held invalid.
c. The courts have, however, found certain fees to be permissible cost-based fees rather than impact fees. In one such case, the court held that a water connection fee was not an impact fee and therefore not subject to the statutory limitations that apply to impact fees.[367]

2. Fair Share Development Requirements: Nevada courts have not imposed specific fair share development or housing requirements.

3. Building Moratoria: Although there is little case law in this area, the Nevada courts have generally allowed for the imposition of building moratoria by county planning agencies. The challenges made have generally been by landowners alleging that the moratoria amount to a "taking" without just compensation, and have ultimately been unsuccessful.[368]

4. Spot Zoning / Exclusionary Zoning: The Nevada Courts have generally applied great deference to zoning board decisions in the context of spot zoning challenges.[369] The courts have, however, required zoning determinations to be consistent with a county's master plan. As the Nevada Supreme Court has held, "The test of spot zoning is whether the amendment was made with the purpose of furthering a comprehensive zoning scheme or whether it was designed merely to relieve the land of a restriction which was particularly harsh upon that particular land."[370] If a zoning change fails to conform with the county's master plan, courts have been willing to strike down the ordinance as illegal spot zoning.[371]

[365] 112 Nev. 1452 (Nev. 1996).
[366] 112 Nev. 297 (Nev. 1996).
[367] City of North Las Vegas v. Pardee Const. Co. of Nevada, 117 Nev. 260 (Nev. 2001) (allowing city to impose a fee for sewer construction after construction had begun as a permissible cost based fee, which was distinct from a development impact fee).
[368] See, Kelly v. Tahoe Regional Planning Agency 109 Nev. 638, 855 P.2d 1027 (Nev.,1993) (overturning lower court decision stating "regulations merely temporarily limited development in environmentally sensitive areas").
[369] See, Nevada Contractors v. Washoe County 106 Nev. 310, 313-314, (Nev.,1990)("[I]t is not the business of the courts to decide zoning issues).
[370] McKenzie v. Shelly 77 Nev. 237, 243 (Nev.1961).
[371] See, Enterprise Citizens Action Committee v. Clark County Bd. of Com'rs 112 Nev. 649, 660-661 (Nev.,1996) (invalidating a spot zoning determination on the grounds that it was inconsistent with the county's master plan).

# NEW HAMPSHIRE

**Summary:** Over the past five years, the governor, legislature and executive agencies in New Hampshire have actively pursued greater statewide land use restrictions. These changes have occurred through legislation, agency policy and executive order and have affected nearly all aspects of planning in the state. New Hampshire courts have largely granted deference to local governments in regulating land use. Although the courts have imposed some modest restrictions in the areas of building moratoria and fair share development requirements, they have granted broad authority in the areas of impact fees and spot zoning.

**LEGISLATIVE SUMMARY**

Statewide land use planning has been the subject of a considerable amount of activity in both the executive and legislative branches, particularly over the past five years.

- **Legislative Rating: 3** (High level of activity)

- In 1998 the Land Use Management and Farmland Preservation Committee was formed to study ways in which future growth could be planned in a way that preserved the rural character of the state.[372] The Committee recommended several proposals, including: providing greater information to communities on the costs of sprawl, directing state agencies to shape policies that prevent sprawl growth, and providing economic incentives to communities who enact growth control plans.[373]

- In 1999, the New Hampshire Council on Resources and Development made a series of recommendations that formed the basis for then-Governor Shaheen's smart growth legislative and policy agenda.[374] The Council also issued a follow-up report in 2001 that highlighted progress on their initial recommendations and several proposals for future action.[375]

- Over the past five years, the New Hampshire General Court (state legislature) has been very active in promoting planning reform. In 2000, the Legislature passed bills that: (1) directed the Office of State Planning to provide planning assistance to local communities[376]; (2) established the Land and Community Heritage Investment Program, which provided funds for open space preservation[377]; and (3)established a brownfields revolving loan fund[378]. In 2001, the General Court created several commissions to develop legislative recommendations in the areas

[372] *See* Ed Bolen et al, *Smart Growth*, 8 Hastings W.-N.W.J.Env.L.&Pol'y 145, 188-89 (2002).
[373] Id.
[374] The full text of the report is available at http://nh.gov/oep/resourcelibrary/referencelibrary/s/sprawl/documents/sprawlreport1999.pdf.
[375] The full text of the report is available at http://nh.gov/oep/resourcelibrary/referencelibrary/s/sprawl/documents/sprawlreport2001.pdf.
[376] H.B. 1259 (2000).
[377] S.B. 401 (2000).
[378] H.B. 1416 (2000).

of reducing regulatory barriers to planning, improving transportation planning, and protecting the state's shorelands.[379]

- In 2001, then-Governor Shaheen issued a legislative and policy agenda called "Grow Smart NH."[380] This initiative combined new legislation and executive orders to further advance efforts in the areas of infrastructure construction, brownfields redevelopment, downtown redevelopment, economic incentives to encourage growth management, and increasing local planning requirements.[381]

## JUDICIAL SUMMARY

New Hampshire courts have imposed modest restrictions on municipal land use regulation, but have largely deferred to local government land use decisions. Additionally, in several cases the courts have broadly construed relevant state statutes to further empower municipalities. In the areas of impact fees and spot zoning, New Hampshire courts have given municipalities significant regulatory discretion. The courts' jurisprudence on fair share development requirements and building moratoria, however, is slightly more restrictive.

- **Judicial Rating: 3** (Supportive of municipal regulation) *Although the court has placed some moderate constraints on the implementation of land use restrictions, New Hampshire jurisprudence on the whole tends to support municipal regulation.*

1. Impact Fees / Exactions: New Hampshire courts have largely deferred to local planning board decisions in challenges to impact fees. Under New Hampshire law, municipalities have the power to use impact fees to offset the costs of development.[382] In interpreting this power the courts have granted broad authority to municipalities[383] and have disturbed municipal decisions only where certain procedural requirements have not been met.[384] If the board has been properly empowered to impose impact fees and all procedural requirements have been followed, the courts will not overturn the imposition of such fees.[385] The courts have, however, held that impact fee issuance authority does not extend to public utility commissions.[386]

2. Fair Share Development Requirements: New Hampshire courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. New Hampshire law specifically provides for the

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[379] *See* American Planning Association, *2002 State of the States*, 89 (2002).
[380] *See* Tom Fahey, *Sprawl Control Effort Launched. NH High Court Backs Deregulation Plan,* Manchester Union Leader, February 2, 2001 at A2.
[381] *See* American Planning Association *supra* note 8.
[382] N.H. Rev. Stat. Ann. § 674:21 (2004).
[383] *See* New Eng. Brickmaster v. Salem, 133 N.H. 655 (1990) (interpreting the state statute to allow impact fees for both on-site and off-site improvements).
[384] Simonsen v. Town of Derry, 145 N.H. 382 (N.H. 2000); Board of Water Comm'rs v. Mooney, 139 N.H. 621 (N.H. 1995)
[385] R.J. Moreau Cos. v. Town of Litchfield, 148 N.H. 773 (N.H. 2002); Lampert v. Town of Hudson, 136 N.H. 196 (N.H. 1992); New Eng. Brickmaster v. Salem, 133 N.H. 655 (N.H. 1990).
[386] Mooney, 139 N.H. 621.

enactment of density restrictions designed to control and manage growth in a community.[387] In interpreting this statute, the courts have required such density restrictions to be enacted pursuant to a master plan or capital improvement program, and only after a documented study on the impact of such restrictions.[388]

3. Building Moratoria: Although New Hampshire courts generally allow the imposition of temporary building moratoria, the use of such moratoria must be limited in duration. As one court has held, "an unduly prolonged procedure in considering amendments to a zoning ordinance will not be permitted to be used by a municipality to impose either a selective or a general moratorium on local land development."[389]

4. Spot Zoning / Exclusionary Zoning: Spot zoning is considered to be illegal zoning in New Hampshire, though courts have generally deferred to municipal land use decisions in finding that spot zoning has not occurred.[390]

    a. Under the prevailing rule, "[t]he mere fact that an area is small and is zoned at the request of a single owner and is of greater benefit to him than to others does not make out a case of spot zoning if there is a public need for it or a compelling reason for it."[391] Even where a small piece of property is incongruously zoned, the courts will not find spot zoning where a public need is met by the zoning determination or some other compelling reason exists.[392]

    b. In a small number of cases, New Hampshire courts have found illegal spot zoning where no public use or compelling reason is demonstrated as the basis for rezoning a small area.[393]

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[387] N.H. Rev. Stat. Ann. § 674:22 (2004).
[388] *See* Stoney-Brook Development Corp. v. Town of Fremont 124 N.H. 583 (1984) (invalidating growth restriction ordinance for lack of documented study of appropriate growth rate).
[389] Navin v. Exeter, 115 N.H. 248, 252 (1975); *But cf.* Socha v. Manchester, 126 N.H. 289 (holding that zoning deliberations were not unduly prolonged).
[390] Portsmouth Advocates v. Portsmouth, 133 N.H. 876 (N.H. 1991); Treisman v. Bedford, 132 N.H. 54 (N.H. 1989); Schadlick v. Concord, 108 N.H. 319 (N.H. 1967).
[391] Schadlick v. Concord, 108 N.H. 319, 322-23 (1967).
[392] Miller v. Town of Tilton, 139 N.H. 429 (N.H. 1995).
[393] Munger v. Exeter, 128 N.H. 196 (N.H. 1986).

# NEW JERSEY

**Summary:** New Jersey has been a national leader in the areas of "smart growth" and open space preservation for the past twenty years. These efforts have largely originated from the legislative and executive branches, though a recent effort by the Governor to impose greater statewide development restrictions was rejected by the legislature. The decisions of New Jersey courts, however, have largely encouraged greater development. Perhaps the most important state land use decisions are the Mount Laurel decisions. While these decisions were intended to increase the availability of affordable housing in New Jersey, they also empowered developers to file curative lawsuits, which has resulted in increased development.

## LEGISLATIVE SUMMARY

Efforts by the New Jersey Governor and State Legislature, particularly over the past four years, have clearly been in the direction of greater state-imposed development restrictions. Although a recent effort by the Governor to impose a highly-restrictive, state-wide zoning plan failed to garner sufficient support in the Legislature, other restrictive legislation has become law. It is likely that this trend will continue.

- **Legislative Rating: 3** (High level of activity)

- Since the 1985 adoption of the New Jersey State Planning Act[394], New Jersey has been a national leader in the areas of "smart growth" and open space preservation. The 1985 Planning Act authorized the creation of a State Planning Commission. In 1992, the Commission issued the State's first Development and Redevelopment Plan, which identified "urban areas" and "compact centers" and issued a mandate to direct future growth to those areas. The Commission does not have actual zoning authority. Rather, it works with municipalities and other stakeholders to target areas for development and directs state agencies to consider a municipality's compliance with the State Plan in funding and permitting decisions.

- Recent actions by the New Jersey legislature have placed greater restrictions on development, particularly in certain areas of the state. As an example, The Highlands Water Protection and Planning Act, signed in August 2004, requires New Jersey Department of Environmental Protection approval for nearly all development in an area that encompasses almost one hundred municipalities.[395]

- In the future, New Jersey will likely move in the direction of greater restrictions on development, but the smart growth movement suffered a recent setback. In January 2003, Governor McGreevy announced his "Smart Growth" initiative which contained many new restrictions on development in New Jersey. The centerpiece of this initiative, the Blueprint for Intelligent Growth Map ("BIG Map") established a statewide zoning scheme designed to channel future growth toward those areas that were already developed and preserve undeveloped land. A

[394] N.J. Stat. Ann. § 52:18A-196 *et seq.* (2004).
[395] Information available at http://www.nj.gov/dep/highlands/.

strong protest by the state's building and construction industries ultimately led to the defeat of this initiative in the legislature.

## JUDICIAL SUMMARY

In contrast to efforts by the Legislature and Governor to allow for greater land use restrictions, New Jersey courts have largely favored fewer restrictions on property rights. Relative to jurisprudence in other states, New Jersey decisions in the four areas of land use law outlined below are generally restrictive of municipal land use regulation.

- **Judicial Rating: 1** (Restrictive of municipal regulation)

1. Impact Fees / Exactions: Municipal authority to condition development approvals on the developer's agreement to provide or contribute to off-site improvements is limited by N.J.S.A. 40:55D-42, which permits such contributions only with respect to street improvements and water, sewerage and drainage facilities, and only to the extent required by the anticipated impact of the development on those facilities. Courts have strictly enforced this statutory framework by requiring municipalities to make a showing of the specific infrastructure requirements that are attributable to a particular project.[396] In general, New Jersey courts have limited the scope of allowable impact fees and thereby created jurisprudence that, relative to other states, may be seen as less restrictive toward development.

2. Fair Share Development Requirements: Following the landmark Mount Laurel decisions[397], New Jersey communities are obligated to meet their "fair share of the present and prospective need" for low and moderate income housing.[398] One of the primary means of enforcing this requirement is by empowering developers to file suit against any municipality that fails to meet its Mount Laurel requirements.[399] These suits, known as builders' remedies, allow developers to seek court approval for development plans in which at least twenty percent of the project is dedicated to low income housing.[400] As a result of this enforcement mechanism, New Jersey courts have in many circumstances permitted development that was otherwise prohibited by the municipality.

3. Building Moratoria: New Jersey's statutory and case law on the issue of building moratoria are generally favorable to development. As a starting point, New Jersey law prohibits municipalities from placing a moratorium on development for the purpose of preparing a master plan or development regulations.[401] Any moratorium that is enacted must pass a "strict necessity test,"[402] and a municipality cannot place a moratorium on applications for development or enact interim zoning ordinances unless the municipality

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[396] Twp. of Marlboro v. Planning Board 279 N.J. Super 638, 642-43 (1995). See also, N.J. Stat. Ann. § 40:55D-42 (2004)
[397] Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151 (1975) [Mount Laurel I]; Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983) [Mount Laurel II].
[398] Mount Laurel I.
[399] Hills Dev. Co. v. Bernards Township, 103 N.J. 1, 35-36, 510 A.2d 621 (1986)
[400] Oakwood at Madison v. Township of Madison, 72 N.J. 481 (1977)
[401] N.J. Stat. Ann. § 40:55D-90
[402] New Jersey Shore Builders Ass'n v. Mayor and Township of Middletown, 561 A.2d 319 (N.J. 1989).

affirmatively demonstrates that there is a clear and imminent danger to the health of the inhabitants of the municipality.[403] A municipality may enact a moratorium only if the situation is "exigent," and it must be demonstrated that other solutions have been investigated and found to be not feasible. If a moratorium is allowed, it can last a maximum of only six months.[404]

4. Spot Zoning / Exclusionary Zoning: New Jersey jurisprudence on this issue is included in the Mount Laurel analysis described in Section 2. Developers may challenge a municipality's zoning ordinance on the grounds that it is exclusionary under the builder's remedy outlined in the Mount Laurel decisions.

[403] N.J. Stat. Ann. § 40:55D-90 (2004).
[404] See New Jersey Shore Builders Ass'n v. Township Commissioner of Township of Dover, 468 A.2d 742 (N.J. 1983), N.J. Stat. Ann. § 40:55D-90 (2004).

# NEW MEXICO

**Summary:** Statewide planning reform has attracted a modest level of activity among members of the New Mexico Legislature, but there has been little substantive action on this issue over the past ten years. Substantial reform to the state's planning code from 1993-1995 and a report on growth-related issues in 1996 constitute the most significant initiatives during this time. New Mexico courts have generally supported municipal land use regulation, although their prevailing rule in the area of impact fees places substantial limitations on their use.

**LEGISLATIVE SUMMARY**

There has been a modest level of activity directed toward statewide land use planning reform in New Mexico over the past ten years, though the Legislature has ultimately taken only limited steps in passing these reforms. Perhaps the most substantive reform occurred from 1993-1995, when the Legislature revised the state's land use planning code.[405] Included in this series of reforms was the New Mexico Development Fees Act,[406] which gives specific authority to municipalities to use such fees to offset the costs of new development. Presently there are several proposals before the Legislature to change the scope of this authority.[407] In1996, the State Legislature passed Senate Joint Memorial 34, authorizing the Local Government Division to "conduct a comprehensive study of the costs and benefits of growth and evaluation of growth management alternatives."[408] The resulting study, *Growth in New Mexico: Impacts and Options*, provided a series of policy options available to the state but took no position on recommending any specific options.[409] Since the release of this study, however, the Legislature has not taken significant action in addressing these policy recommendations, and several planning reform measures introduced during this time have not been passed.[410]

- **Legislative Rating: 2** (Moderate activity) *Although there has been little substantive reform to land use regulation in New Mexico over the past ten years, the 1993-1995 reform of the planning code and the issues addressed by proposed legislation represent significant reform efforts.*

**JUDICIAL SUMMARY**

New Mexico jurisprudence has largely allowed municipal regulation in the areas of density restrictions and building moratoria. In the area of spot zoning, the courts have applied a rule that defers to a property's original zoning classification and requires the municipality to make a showing that a change in the surrounding area justifies the use of spot zoning. In applying this rule over the past twenty years, however, the courts have put significant limitations

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[405] *See* American Planning Association, *2002 State of the States*, 93 (2002).
[406] N.M. Stat. Ann. § 5-8-1 et seq. (2004).
[407] *See* H.B. 805 (requiring fees to be based on average rather than marginal capital costs); S.B. 1017 (increasing the scope of costs that may serve as the basis for impact fees).
[408] S.J.M 34 (1996). The full text of Senate Joint Memorial 34 is available at http://legis.state.nm.us/Sessions/96%20Regular/memorials/senate/SJM034.pdf.
[409] The report is available through 10,000 Friends New Mexico at http://www.1000friends-nm.org/PDF/nmgrowth.pdf.
[410] *See* American Planning Association, *supra* note 1 at 92.

on their definition of spot zoning. As a result, they have not found any zoning changes challenged during this time to constitute spot zoning and have, therefore, not required the municipalities to make a showing of changed conditions.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: New Mexico appellate courts have not heard any cases related to the imposition of impact fees. The absence of case law in this area is likely a result of the detailed statutory regulations imposed under the Development Fees Act.[411] This Act specifically describes capital improvement costs that may and may not be offset through municipal impact fees.[412]

2. Fair Share Development Requirements: New Mexico courts have not imposed specific fair share housing or development requirements. There are, however, two cases in which the court indirectly discussed minimum lot size restrictions without finding them to be invalid.[413].

3. Building Moratoria: The New Mexico courts have generally viewed a building moratorium as a valid exercise of a county or municipality's police power provided such restrictions reasonably advance a legitimate state interest in the safety and health of the inhabitants.[414]

4. Spot Zoning / Exclusionary Zoning: The prevailing rule in New Mexico courts requires a specific showing that a zoning change is justified by a change in the character of the area in which the property is located. In applying this rule, however, courts have been reluctant to find that specific zoning changes constituted spot zoning.

   a. Under the prevailing rule, established in *Miller v. City of Albuquerque*[415], the original zoning classification of a property is presumed to be correct, and a change in that zoning must be based on a showing "that either there was a mistake in the original zoning or that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made."[416] In 1982, the New Mexico Supreme Court found illegal spot zoning under the *Miller* standard where an eight

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[411] N.M. Stat. Ann. § 5-8-1 et seq. (2004).
[412] N.M. Stat. Ann. § 5-8-4, 5 (2004).
[413] Gould v. Sante Fe County, 131 N.M. 405 (N.M. App. 2001); Village of Los Ranchos de Albequerque v. Shiveley, 110 N.M. 15 (N.M. App. 1989)
[414] See, Brazos Land, Inc. v. Board of County Comm'rs, 115 N.M. 168, 174 (N.M. Ct. App., 1993) (upholding moratorium in place during the development of more stringent waste disposal requirements for subdivisions); see also, Santa Fe Trail Ranch II v. Board of County Comm'rs, 125 N.M. 360, 362-363 (N.M. Ct. App., 1998)(upholding one year moratorium on subdivisions).
[415] 89 N.M. 503, 554 P.2d 665 (1976).
[416] Id at 668.

block area was rezoned from mid/high density housing to single family housing.[417]

b. Since the 1982 decision in *Davis*, New Mexico courts have not disturbed municipal spot zoning decisions.[418] In finding that spot zoning had not occurred, several courts have held that the determining factors in assessing whether spot zoning has occurred are: (1) the size of the parcel; (2) whether the use fails to comply with comprehensive plan (3) whether the use is inconsistent with surrounding area or (4) whether the use grants discriminatory benefit to landowner, and/or harms neighboring properties or community welfare.[419] By narrowing the type of rezoning to which *Miller* applies, the courts have significantly limited the impact of the rule announced in that decision.

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[417] Davis v. City of Albuquerque 98 N.M. 319, *321, 648 P.2d 777, **779 (N.M., 1982)(holding that city's decision to alter zoning was arbitrary and capricious, not in conformity with the comprehensive plan and disproportionately affected a single landowner).

[418] In the following cases the court held that spot zoning had not occurred: Bennett v. City Council for City of Las Cruces 126 N.M. 619, 973 P.2d 871 (N.M.App.,1998); Embudo Canyon Neighborhood Ass'n v. City of Albuquerque 126 N.M. 327, 968 P.2d 1190 (N.M.App.,1998); Bogan v. Sandoval County Planning and Zoning Com'n 119 N.M. 334, 890 P.2d 395 (N.M.App.,1994); Watson v. Town Council of Town of Bernalillo 111 N.M. 374, 805 P.2d 641 (N.M.App.,1991); City of Albuquerque v. Paradise Hills Special Zoning Dist. Com'n 99 N.M. 630, 661 P.2d 1329 (N.M.,1983).

[419] See, Bennett v. City Council for City of Las Cruces 126 N.M. 619,625-626, 973 P.2d 871, 877-878 (N.M.App.,1998)("The smaller the property being rezoned, the more likely the finding of spot zoning; while the larger the tract, the less inclined courts are to find spot zoning."); Watson v. Town Council of Town of Bernalillo 111 N.M. 374, 805 P.2d 641 (N.M.App.,1991) (identifying the criteria to be used in making a spot zoning determination).

# NEW YORK

**Summary:**

Over the past ten years Governor Pataki has led efforts to address greater statewide land use restrictions. These efforts have not resulted in a significant amount of related legislation, but the Governor has pursued several objectives through the use of Executive Order. New York courts have been mixed on their approach to municipal land use regulation. In the area of impact fees, the courts have severely restricted municipal power. In contrast, the courts have allowed broad authority to impose moratoria on development.

**LEGISLATIVE SUMMARY**

Primarily under the leadership of Governor George Pataki, there has been a moderate level of activity in the state government related to increased statewide land use restrictions. In the early 1990s, the Legislature enacted a series of planning reforms that, among other things, authorized comprehensive planning.[420] Over the past five years, however, several new restrictions have been introduced in the Legislature but have failed to pass.[421] Among these proposals were the creation of local Smart Growth Commissions to develop smart growth plans and the establishment of a revolving loan fund to provide money for open space preservation and infill development.[422] Nonetheless, Governor Pataki has continued to advance planning reforms through executive action.

- **Legislative Rating: 2** (Moderate activity) *Although there have been a number of planning reform initiatives, the Legislature has largely rejected these proposals.*

- **Quality Communities Interagency Task Force.** In January 2000 the Governor created the Quality Communities Interagency Task Force.[423] The Task Force's January 2001 final report made recommendations on a number of subjects, including reforms to the state's planning system.[424] Many of these reforms (greater open space preservation funding, state-funded GIS mapping for use in planning, grants to fund community-based comprehensive planning, and greater transportation planning coordination) were included in a series of bills advanced by the Governor, including the Quality Communities Planning Act[425] and the "Quality Communities Act of 2001."[426] While this legislation did not pass, the Governor has implemented several of the Task Force's recommendations through Executive Order.

- **Open Space Conservation Plan.** Under the direction of Governor Pataki, the New York State Department of Environmental Conservation has used $378 million from the Environmental

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[420] *See* Rodney Cobb, *Toward Modern Statutes, A Survey of State Laws on Local Land-Use Planning*, Growing Smart Working Papers Vol. 2 (American Planning Association 1998)
[421] *See* American Planning Association, 2002 State of the States, 94 (2002).
[422] Id.
[423] *See* Executive Order 102 (2000) *available at* http://www.gorr.state.ny.us/gorr/EO102_fulltext.htm.
[424] The full report is available at http://www.state.ny.us/ltgovdoc/summary_of_recommendation_5_10.html.
[425] S.B. 5527, 224th Leg., Reg. Sess. (N.Y. 2001).
[426] S.B. 5560, 224th Leg., Reg. Sess. (N.Y. 2001).

Protection Fund and the Clean Water/Clean Air Bond Act to preserve open space in New York.[427]

**JUDICIAL SUMMARY**

New York courts' jurisprudence in land use disputes does not clearly favor municipal controls nor does it generally restrict those controls. The courts have restricted municipal governments in their efforts to impose impact fees, but they have also granted broad leeway in the area of temporary building moratoria. With regard to spot zoning, courts have clearly applied a rule that requires spot zoning to be consistent with an established comprehensive plan. In doing so, they have equally favored municipal governments and private land owners.

**Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: New York courts have largely acted to restrict efforts by municipalities to enact impact fees.
    a. In part, this position is dictated by state legislation reserving control over certain impact fees. For example, the court in *Albany Area Builders Association v. Town of Guilderland*[428] held that "a local ordinance imposing a 'transportation impact fee' was invalid because such a fee as imposed locally had been preempted when the state legislature enacted a comprehensive and detailed regulatory scheme in the field of highway funding."[429] The court in *Home Builders Ass'n v. County of Onondaga* reached a similar holding with regard to impact fees for sewer construction funding.[430]

    b. New York courts have, however, granted some leeway to municipal governments in requiring a fee in lieu of off-site improvements. In *Jenad, Inc. v. Village of Scarsdale*[431] the court held that requiring the dedication of parkland within a subdivision, or allowing a fee in lieu of the dedication was permissible.

2. Fair Share Development Requirements: New York courts do not impose any fair share affordable housing or development requirements.

3. Building Moratoria: New York courts have granted municipal governments significant leeway to enact moratoria on development, particularly where such a moratorium is in place to allow the municipality to review and revise its current zoning. In *Home Depot U.S.A., Inc. v. Village of Rockville Center*, the court upheld two consecutive, six-month commercial development moratoria, where these moratoria had the effect of preventing the development of a Home Depot store.[432] Noting that "courts must apply a local government's zoning ordinance as it exists at the time of judicial review, unless there is

[427] *See* New York State Open Space Conservation Plan at http://www.dec.state.ny.us/website/opensp/.
[428] 74 N.Y.2d 372, 547 N.Y.S.2d 627, 546 N.E.2d 920 (1989)
[429] Frank J. Wozniak, Annotation, *Validity, Construction, and Application of Road or Transportation Impact Fee Statutes or Ordinances*, 97 A.L.R.5th 123 (2004).
[430] 573 N.Y.S.2d 863 (N.Y. App. Div. 1991).
[431] 218 N.E.2d 673 (N.Y. 1966).
[432] 295 A.D.2d 426 (N.Y. App. Div. 2002).

proof of special facts which indicate that the local government acted in bad faith in delaying a landowner's application for a building permit while the zoning law was changed" the court found that a moratorium enacted after the submission of a building application did not constitute "bad faith."[433] Likewise, in *Maple Lane Assocs. v. Town of Livingston,* a New York court upheld a moratorium on all development while a town reviewed and revised its master plan though the moratorium was enacted as a response to the submission of a specific development proposal.[434]

4. Spot Zoning / Exclusionary Zoning: New York courts have a mixed record on this issue. The general principle for the evaluation of spot zoning was first announced in the Court of Appeals' decision in *Rodgers v. Tarrytown*, where the court held that spot zoning was to be allowed if it was done in concert with a comprehensive plan.[435] Consistent application of this principle in subsequent decisions has led to a mixed record of supporting and striking down municipal spot zoning.

    a. Courts have used adherence to a comprehensive plan as a proxy for determining whether the zoning was done for the good of the community as a whole or for a single landowner.[436] Under this line of reasoning, the courts have found a number of municipal zoning determinations to be illegal.[437]

    b. Courts have also extended this reasoning to nullify determinations that do not violate an established comprehensive plan but simply have not been "enacted for the benefit of or with regard to the neighbors of the parcel or the community as a whole."[438]

    c. Where the spot zoning is consistent with an established comprehensive plan, however, courts have consistently upheld the municipal determination.[439]

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[433] Id at 428.
[434] 197 A.D.2d 817 (N.Y. App. Div. 1993).
[435] 302 N.Y. 115, 124 (1951).
[436] Id.
[437] *See e.g.,* W. Branch Conservation Ass'n v. Town of Ramapo, 284 A.D.2d 401 (N.Y. App. Div. 2001); Yellow Lantern Kampground v. Town of Cortlandville, 279 A.D.2d 6 (N.Y. App. Div. 2000).
[438] Cannon v. Murphy, 196 A.D.2d 498, 500 (N.Y. App. Div. 1993).
[439] *See e.g.,* Rayle v. Town of Cato Bd., 295 A.D.2d 978 (N.Y. App. Div. 2002); Boyles v. Town Bd., 278 A.D.2d 688 (N.Y. App. Div. 2000).

# NORTH CAROLINA

**Summary:** Over the past ten years, the Legislature and Governor in North Carolina have given considerable attention to the issue of statewide land use restrictions. This attention has largely taken the form of studies and commissions, however, and little legislative reform has occurred during this time. Much of the impetus behind these efforts resulted from Governor Jim Hunt's legislative agenda. Since taking office in late 2001, Governor Mike Easley has not given this reform the same priority, and many of the efforts that began under the Hunt administration have not been continued. North Carolina courts have had a mixed response to municipal land use regulations. With regard to building moratoria, the courts have granted considerable deference to municipal regulation. The courts have, however, placed significant restrictions on the use of spot zoning and some restrictions on the use of municipal density controls.

**LEGISLATIVE SUMMARY**

Land use planning reform has received considerable attention in North Carolina over the past ten years, although most of the substantive reforms remain in the form of recommendations and commission findings. Although former-Governor Hunt's efforts appear to be the catalyst for much of the activity in this area, the Legislature has responded by generating a specific legislative agenda of its own. Many of the proposals generated during Governor Hunt's tenure appear to have died under the leadership of Governor Mike Easley, who took office at the end of 2001. The Million Acre Initiative—the state's open space preservation effort—continues to move forward, but many of the proposals issued by various commissions and committees that were formed under Governor Hunt have yet to become law.

- **Legislative Rating: 2** (Moderate Level of Activity) *Under the Hunt administration, there was considerable study of statewide land use reforms but little substantive action. There is little indication that this momentum has carried into the current administration.*

- **Land Policy Council** Under the North Carolina Land Policy Act[440], the Land Policy Council is required to complete and continue to update a comprehensive land use plan for the state.[441] Additionally, the Council is assigned the task of advising on state agency and local land use decision-making in an effort to ensure that these decisions are consistent with State Land Use Policy.[442] The Council, however, does not have any authority to enforce its determinations.[443]

- **Million Acre Initiative** In 1999, a commission initiated by then-Governor Hunt proposed that North Carolina protect one million acres of open space by 2009. As a result, a report was issued[444] and the Legislature enacted a bill designed to achieve this goal.[445] Relying

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[440] *N.C. Gen. Stat.*113A-150 et seq. (2000).
[441] *See* Ed Bolen et al., *Smart Growth*, 8 Hastings W.-N.W. J. Env. L. & Pol'y 145, 199 (2002).
[442] *N.C. Gen. Stat.* 113A-153 (2000).
[443] *See* Bolen *supra* note 2.
[444] *See Million Acre Plan for North Carolina* available at http://www.enr.state.nc.us/docs/millionsummary.pdf.
[445] S.B. 1328/H.B.1633; enacted June 28,2000.

on a mixture of state and local programs,[446] the Million Acre Initiative has successfully protected more than 280,000 acres.[447]

- **Commission to Address Smart Growth, Growth Management and Development Issues** In 2001, a commission established by the State Senate and General Assembly released a report entitled "Commission to Address Smart Growth, Growth Management and Development Issues: Findings and Recommendation,"[448] which detailed specific ways in which the State Legislature should reform land use in the state.[449] Also called the "Smart Growth Commission," this group continues to meet to evaluate proposals for land use reform, but there is no evidence that any of the proposals have been the basis for legislative action.

- **Other Initiatives** Governor Hunt issued several other statewide land use reform proposals, but these initiatives have not survived under the present administration. Some of these initiatives include: The Quality Growth Task Force, The 21st Century Community Task Force and the Balanced Growth Policy.[450]

**JUDICIAL SUMMARY**

North Carolina courts have taken a mixed approach in evaluating municipal land use regulations. The issue of impact fees has yet to be decided by North Carolina appellate courts, though a case has recently been appealed to the Court of Appeals. The courts have generally upheld temporary building moratoria, subject to statutory notice requirements, but they have placed significant restrictions on the use of spot zoning.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Although at least one federal court has interpreted North Carolina law[451] to permit the local imposition of impact fees[452], state appellate courts had not decided any cases on this issue prior to March 2005. Relying on the federal court decision, some North Carolina municipalities are currently employing impact fees to offset the costs of development.[453] News reports also indicate that the North Carolina

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[446] For a review of the funding sources used to preserve open space, see North Carolina Million Acre Initiative: Funding and protection programs *at* http://www.onencnaturally.org/pages/prog/programs.html.
[447] 2004 Annual Report: NC Million Acre Initiative *at* *http://www.onencnaturally.org/pages/progress/2004_Million_Acres_Annual_Report.pdf.*
[448] The full report is available at http://www.ncleg.net/committees/commissiononsma/commissiononsma.pdf.
[449] *See* American Planning Association, 2002 State of the States, 97 (2002).
[450] For a description of these programs, see Ed Bolen et al., *supra* note 2.
[451] N.C. Gen. Stat. § 160A-313.
[452] South Shell Investment v. Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988).
[453] Interview with Nicholas J. Tennyson, Executive Vice President
Home Builders Association of Durham & Orange Counties (April 1, 2005). *See also.,* Claudia Assis, *Sudden impact: New Fees Kick In;*
*Developers Paying Extra for New Residential Construction,* The Herald-Sun (Durham, NC) January 2, 2004 Friday (discussing impact fees in Durham County); James Moffat, *Burlington, N.C. Weighs Options On Developer Impact Fees to Build New Schools,* Times-News, Burlington, North Carolina December 13, 2004, Monday.

Court of Appeals will soon hear an appeal of a trial court's invalidation of a Durham County impact fee used to fund local schools.[454]

2. Fair Share Development Requirement: North Carolina courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. North Carolina courts have, however, struck down municipal regulations designed to control density in certain circumstances.[455]

3. Building Moratoria: North Carolina courts have generally allowed temporary moratoria as long as statutory notice requirements are satisfied. Temporary building moratoria are permissible so long as "the board of commissioners shall hold a public hearing on the ordinance . . . [and] shall cause notice of the hearing to be published once a week for two successive calendar weeks."[456] Article 18 of Chapter 153A of the General Statutes of North Carolina permits such a moratorium so long as proper notice is given. Without proper notice the moratorium will be invalidated.[457]

4. Spot Zoning / Exclusionary Zoning: Spot zoning is not per se illegal in North Carolina. However the courts have imposed significant restrictions on its use. Under the prevailing rule in North Carolina, the general presumption of validity afforded to municipal regulation is "set aside" in the case of spot zoning and the municipality must "offer a 'clear showing' that there was a 'reasonable basis' for its decision."[458] The factors used to determine whether a "reasonable basis" exists are numerous and flexible to allow judicial balancing of interests. Some factors as outlined by the court are:[459]
    a. the size of the tract in question;
    b. the compatibility of the disputed zoning action with an existing comprehensive zoning plan;
    c. the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community;
    d. and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

   Applying these factors, the courts have placed a significant burden on municipalities in making their rational basis showing. In practice, this burden has proved difficult to meet.[460]

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[454] The case is *Durham Landowners Association v. Durham County. See* Maximilian Longley, *Decision Ramps up Impact-Fee Dispute,* Carolina Journal Online, March 31, 2005 *at http://carolinajournal.com/exclusives/display_exclusive.html?id=2339.*
[455] *See e.g.,* William Brewster Co. v. Town of Huntersville, 161 N.C. App. 132 (2004).
[456] N.C. Gen. Stat. § 153A-323 (2003).
[457] Vulcan Materials Co. v. Iredell County, 103 N.C. App. 779, 782 (N.C. Ct. App., 1991).
[458] Good Neighbors of S. Davidson v. Town of Denton, 355 N.C. 254, 258 (2002).
[459] Chrismon v. Guilford County, 322 N.C. 611, 628 (N.C., 1988)
[460] *See e.g.,* Budd v. Davie County, 116 N.C. App. 168 (1994) (invalidating spot zoning where detriments outweighed benefits and use was not compatible with surrounding area); Alderman v. Chatham County, 89 N.C. App. 610 (1988) (invalidating spot zoning in an absence of a showing that conditions in the area had changed in a way that created a "rational basis" for the zoning change); Lathan v. Union County Bd. of Comm'rs, 47 N.C. App. 357 (1980) (invalidating spot zoning where the years of property ownership and the property's proximity to a creek did not constitute a "rational basis").

# NORTH DAKOTA

**Summary:** The North Dakota Legislature has taken little action over the past ten years to implement statewide land use restrictions. To date, the creation of inner city Renaissance Zones and a commission to study impact fees represent their only efforts in this regard. The courts have similarly heard very few cases related to land use restrictions. On the issue of spot zoning, they have placed moderate restrictions on municipal authority, but they have allowed municipalities to impose special assessments related to infrastructure development even in the absence of specific impact fee authority.

## LEGISLATIVE SUMMARY

Statewide land use restrictions have not received significant attention from leaders in the North Dakota Legislative and Executive branches. Over the past five years, however, there have been two minor developments in this area. First, in 1999, the Legislature approved the Renaissance Zone program, which provides tax incentives and grant programs to encourage the development of urban centers. Second, the Legislature approved legislation in March 2005 that creates a legislative council to study the issue of municipal impact fees.

- **Legislative Rating: 1** (Little recent activity) *The Legislature has advanced two programs of moderate significance.*

- **Renaissance Zone Legislation** Legislation initially passed in 1999,[461] and subsequently amended, allows certain municipalities to designate "Renaissance Zones." Under this program, communities may apply to the Department of Community Services for approval in securing tax credits and exemptions to encourage the development of commercial and residential properties in a central city.[462]

- **Impact Fee Legislation** In March 2005, the Legislature considered legislation that would empower municipalities to impose impact fees on certain development.[463] As amended, however, this bill only provides for a legislative council to study the issue.

## JUDICIAL SUMMARY

In the area of land use restrictions, North Dakota courts have heard disputes only in the area of spot zoning. These decisions (there are only three at the appellate level) place moderate restrictions on the ability of municipalities to implement spot zoning by requiring demonstration of a "reasonable basis" for the zoning that is inconsistent with the uses on surrounding properties. As North Dakota's municipalities are not yet empowered to impose impact fees, this issue has not been heard by the courts.

[461] N.D.C.C. ch. 40-63 (2004).
[462] *See* North Dakota Department of Community Services, *Community Development Programs*, at http://www.state.nd.us/dcs/community/zone/.
[463] 2005 ND S.B. 2390.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *The case law in this area is very limited, however.*

1. Impact Fees / Exactions: A bill outlining the process for imposing impact fees on new development was amended to create a committee to study the issue. This bill was signed by the Governor of North Dakota on March 16, 2005.[464] At present, North Dakota municipalities still lack the authority to impose such fees, and the courts have therefore not heard any disputes on this issue. The North Dakota Supreme Court has, however, allowed the limited use of municipal special assessments, which assign a portion of new infrastructure costs to existing development.[465]

2. Fair Share Development Requirements: North Dakota courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing.

3. Building Moratoria: North Dakota courts have not addressed the issue of building moratoria.

4. Spot Zoning / Exclusionary Zoning: This is an issue that the North Dakota courts have addressed on only three occasions. Under the prevailing rule, courts have placed only moderate restrictions on the municipal use of spot zoning. This rule holds that a municipality exceeds its authority only where it does not have a “reasonable basis” for spot zoning. In *Gullickson v. Stark County Bd. of County Comm'rs*, the North Dakota Supreme Court chose to invalidate a variance granted by the County Board of Commissioners as unjustified spot zoning because the variance was not in harmony with the surrounding property.[466] However, a rezoning plan that involves several contiguous plots and erects buildings of a similar nature to those already in existence in a subdivision is not considered spot zoning.[467]

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[464] Id.
[465] *See e.g.,* Crane Johnson Lumber Co. v. City of Fargo, 2003 ND 181 (2003).
[466] 474 N.W.2d 890, 894 (N.D., 1991).
[467] Bigwood v. City of Wahpeton, 1997 ND 124, P22 (N.D., 1997).

# OHIO

**Summary:** At the state level, Ohio has made significant reforms in the areas of urban infill development and open space preservation, but statewide land use reform appears to be limited to these two areas. The foundation for much of this action is the November 2000 approval by Ohio voters of a $400 million dollar per year bond issuance to support the Governor's "Clean Ohio" initiative. Ohio courts, however, have placed some significant restrictions on the power of municipalities to regulate land use. Although courts have allowed the use of impact fees and temporary building moratoria, they have constrained regulation in this area through both substantive and procedural hurdles. Additionally, the courts have adopted a rule that spot zoning is *per se* illegal, thus placing a significant burden on municipalities that wish to show that such zoning is necessary.

## LEGISLATIVE SUMMARY

Over the past ten years, statewide land use reform has largely been limited to open space preservation and urban infill development initiatives. Other land use restrictions have been proposed but have not been passed by the Legislature.[468] In November 2000, voters approved State Issue 1, which provides for a $400 million dollar per year fund for farmland preservation, conservation projects and brownfields revitalization.[469] Additionally, in June 2000, Governor Taft acted on the recommendations of the Urban Revitalization Task Force and created the Office of Urban Development.[470] The purpose of this department is to encourage "new investment [and] innovative land use" in Ohio's older communities.[471]

- **Legislative Rating: 2** (Moderate activity) *Ohio has taken significant action in the area of brownfields redevelopment and open space preservation, though other land use reforms have not been the subject of state-level action.*

## JUDICIAL SUMMARY

Ohio jurisprudence in the area of land use restrictions has placed significant limits on the power of municipalities to regulate property use in their jurisdictions. Although Ohio courts have allowed the use of impact fees, they have placed meaningful restrictions on their implementation. Similarly, the courts have allowed building moratoria, but they have required that such moratoria be clearly temporary and that a solution for the condition giving basis for the moratorium must be devised at the time of the moratorium. Regarding the issue of spot zoning, the courts have adopted a rule that spot zoning is *per se* illegal and is therefore allowable only in specific circumstances. In contrast, however, courts have upheld the power of a municipality to prevent the urbanization of an area through density restrictions.

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[468] *See*, American Planning Association, *2002 State of the States,* 101 (2002) (highlighting several failed attempts at requiring the implementation of comprehensive plans at the county level).
[469] Details of this program, called "Clean Ohio," are available at http://clean.ohio.gov/.
[470] Information available at http://www.odod.state.oh.us/ud/.
[471] Id.

- **Judicial Rating: 1** (Restricts municipal land use regulation)

1. Impact Fees / Exactions: Ohio courts have generally allowed the use of impact fees but have placed some restrictions on this power by requiring that the fees be directly related to the nature and magnitude of the development's impact.

    a. In 2000, the Ohio Supreme Court held that impact fees used to support the cost of new roadways required by a development, even when not accompanied by matching fees from the government, were permissible.[472]

    b. Impact fees that were required by city ordinance and paid into a general fund which solely financed park and recreation development were held to be a nonuniform tax, rather then an exaction fee. As such they impermissibly shifted the financial burden of the town's recreational system to private developers.[473] A sufficient connection did not exist between new residents and increased maintenance costs relating to the municipality's recreational system. The court does suggest that matching funds from the current residence of the neighborhood would have, perhaps, corrected the problem.[474]

    c. In general, however, a permissible impact fee cannot exceed the government cost of additional services required because of the development.[475]

2. Fair Share Development Requirements: Ohio courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. Additionally, the courts have specifically allowed zoning to prevent density, even where a community is in the clear path of development. As one court noted, "[z]oning regulations may also be used to control the density of development. Controlling density protects the citizens of the community from the 'ill effects of urbanization.'"[476]

3. Building Moratoria: In the single Ohio appellate case related to this issue, the courts found a building moratorium to be invalid. In *November Properties, Inc. v. City of Mayfield Heights*, the court held that in general, a municipality is permitted to issue a *temporary* building moratoria if there are inadequate public services to support development.[477] For the moratorium to be valid, however, the municipality must have a plan in place to correct the public service shortcoming "in a reasonable time."[478] Without a plan in place such a moratorium is invalid.[479] This holding stands for the proposition

[472] Home Builders Ass'n of Dayton v. City of Beavercreek, 89 Ohio St. 3d 121, 124 (Ohio 2000).
[473] Building Indus. Assoc. v. City of Westlake, 103 Ohio App. 3d 546 (Ohio Ct. App. 1995).
[474] Id. at 554.
[475] Id. at 551.
[476] MDJ Props. v. Union Twp. Bd. of Trustees, 2000 Ohio App. LEXIS 1264 at *11 (Ohio Ct. App. 2000).
[477] November Properties, Inc. v. City of Mayfield Heights, 1979 Ohio App. LEXIS 10604 (Ohio Ct. App. 1979).
[478] Id. at *45 – 46.
[479] Id. at *32.

that moratoria will only be allowed where they are clearly temporary, and where a proposed solution has already been devised.

4. Spot Zoning / Exclusionary Zoning: Spot zoning is *per se* illegal in Ohio, and is defined as an "ordinance which is invalid because it singles out a lot or small area for different treatment than similar surrounding land."[480]

    a. Under the general rule, the power to zone is a purely legislative function that will only be interfered with if such power is exercised in an "arbitrary and unreasonable manner in violation of Constitutional guarantees . . . ."[481] The courts have largely concluded, however, that spot zoning is an arbitrary and unreasonable manner in which to zone property.[482]
    b. Under Ohio law a town must develop a comprehensive zoning plan in order to avoid spot zoning.[483]
    c. The courts have, however, limited their influence in this area to properties that are sufficiently small to be the target of spot zoning. As the court in *Willott v. Beachwood* held, an 80 acre parcel of land is too large to be a candidate for spot zoning and the courts are not as well qualified as local governments to address such issues.[484]

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[480] Board of Township Trustees v. Ott, 1994 Ohio App. LEXIS 114 (Ohio Ct. App. 1994).
[481] Johnson v. Griffiths, 141 N.E.2d 774 (Ohio Ct. App. 1955).
[482] *See e.g.,* Renner v. Makarius, 1979 Ohio App. LEXIS 9363 (Ohio Ct. App. 1979).
[483] Id. at *9.
[484] Willott v. Beachwood, 175 Ohio St. 557, 559-60 (Ohio 1964).

# OKLAHOMA

**Summary:** Efforts to create statewide land use restrictions in Oklahoma have been largely non-existent since the adoption of the state's planning code in 1947. Notably, there has also been almost no proposed legislation or commission-level study of this issue. Oklahoma courts have not heard a sufficient number of cases in this area to allow for a meaningful assessment of their position on municipal regulatory authority.

**LEGISLATIVE SUMMARY**

There has been almost no activity in Oklahoma aimed at increasing statewide land use restrictions. To date, most of Oklahoma's planning laws remain almost unchanged since their adoption in 1947.[485] In 2000, a bill was introduced in the State Senate to form a commission charged with evaluating state land use laws and recommending changes.[486] This bill did not pass, however.

- **Legislative Rating: 1** (Little recent activity) *There has been almost no land use activity in the legislature over the past fifty years.*

**JUDICIAL SUMMARY**

In general, there is very little appellate case law in Oklahoma related to land use restrictions. The courts of this state have not addressed the issues of impact fees, fair share development or building moratoria. The case law on spot zoning is sparse and inconsistent. Although the courts adopt a highly deferential standard when evaluating spot zoning decisions, they have found several spot zoning determinations to violate this standard.

- **Judicial Rating: 0** (Insufficient case law to make a determination) *Oklahoma courts have only heard cases related to spot zoning, and the jurisprudence on this issue is not sufficiently clear to allow a meaningful determination.*

1. Impact Fees / Exactions: Oklahoma courts have not addressed the issue of impact fees or exactions. According to a July 1, 2003, letter from the Oklahoma City Manager to the Oklahoma City Council, a few municipalities in the state have imposed impact fees for limited purposes, but all have done so in the absence of enabling legislation at the state level.[487]

2. Fair Share Development Requirements: Oklahoma courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing.

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[485] *See* American Planning Association, *2002 State of the States*, 103 (2002).
[486] S.B. 1151 (2000) Text available at http://www2.lsb.state.ok.us/1999-00sb/sb1151_int.rtf.
[487] Letter from Oklahoma City Manager, James D. Couch dated July 1, 2003. *Available at* http://www.okc.gov/mgr/mgr_library/20030701/impact_fees.html.

3. Building Moratoria: Oklahoma courts have not addressed the issue of building moratoria.

4. Spot Zoning / Exclusionary Zoning: The case law in this area is quite limited, and the jurisprudence paints a mixed picture as to the courts' deference to municipal regulation. The prevailing rule in Oklahoma is that courts must apply a deferential standard known as the "fairly debatable standard." This standard was articulated by the court in *Hoffman v. City of Stillwater,* "[i]n our view, a proper application of the fairly debatable rule requires a trial court . . . to consider and weigh all the evidence submitted. If plaintiff's evidence, standing alone, establishes that the reasonableness of the zoning classification is fairly debatable, the ordinance should be upheld."[488] Under the fairly debatable standard, the *Hoffman* court held that the rezoning of a residential tract to an industrial tract, even though the surrounding area was still residentially zoned, was permissible.

   In practice, however, the courts have found several spot zoning determinations to fall short of this standard. For example, in *City of Tulsa v. Mobley* the court overruled a local zoning board's decision not to engage in spot zoning and demanded that a particular tract of land be rezoned from residential to commercial because the character of the neighborhood had changed, making such rezoning appropriate.[489]

[488] Hoffman v. City Of Stillwater, 461 P.2d 944, 948 (Okla. 1969).
[489] City of Tulsa v. Mobley, 1969 OK 85 (Okla. 1969); *see also* City Of the Village v. McCown, 1968 OK 154 (Okla. 1968) (holding that a zoning boards refusal to rezone a lot from residential to commercial was not "fairly debatable" when the lot in question was better suited for business purposes). *See also,* City of the Village v. McCown, 1968 OK 154 (Okla. 1968) (holding that a failure to engage in spot zoning constituted an arbitrary and capricious abuse of decision-making authority).

# OREGON

**Summary:** Since 1973, state-level land use restrictions in Oregon have been among the toughest in the nation. Over the past ten years, however, there has been a high level of activity aimed at reducing and modifying these restrictions. In particular, a 2004 ballot initiative has placed significant limitations on the enforcement of these restrictions, and it remains unclear how this ballot initiative will impact local land use decisions in the future. Oregon courts have taken a mixed view in interpreting local land use authority. The courts have granted significant deference in the areas of impact fees, density restrictions and building moratoria but have placed important limitations on the use of spot zoning.

**LEGISLATIVE SUMMARY**

Over the past ten years, much of the state-level land use reform in Oregon has concentrated on efforts to reduce and modify the land use restrictions imposed by the 1973 Land Use Planning Act. During this time there has, however, been a moderate level of activity aimed at creating sustainable development policies within state agencies.

- **Legislative Rating: 2** (Moderate activity)

- Oregon's 1973 Land Use Planning Act established what continues to be one of the most comprehensive and restrictive planning systems in the country.[490] The current version of this law: (1) requires local governments to adopt comprehensive plans; (2) mandates that local land use actions are consistent with comprehensive plans; (3) establishes minimum density requirements for cities; (4) promotes cooperative regional planning efforts; (5) provides incentives for mixed-use infill development; (6) requires coordination between state agency land use activities; and (7) provides a statewide dispute resolution process.[491] Since 1973, there have been several substantive amendments to this Act, but much of the legislative activity over the past ten years has been aimed at overturning the provisions of the Act. As one journal noted, "In 1995 alone, legislators considered seventy bills to overturn or weaken the state's land use planning system . . . ."[492]
- In 2000 state voters approved Measure 7—a ballot initiative that required payment to landowners for reductions in property value that resulted from government regulation.[493] This measure would have placed significant restrictions on the planning powers available under the 1973 Act. In a 2002 decision, however, the Oregon Supreme Court invalidated Measure 7 on the grounds that there were procedural flaws in its adoption.[494] On November 2, 2004, the voters approved Measure 37, which puts in place many of the same provisions included in Measure 7.[495]

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[490] S.B. 100 (1973).
[491] Ed Bolen et al., *Smart Growth*, 8 Hastings W.-N.W.J.Env.L.&Pol'y 145, 207-208 (2002).
[492] Id at 208.
[493] *See* American Planning Association, *2002 State of the States,* 106 (2002).
[494] League of Or. Cities v. State, 334 Ore. 645 (2002).
[495] *See* Oregon Department of Land Conservation and Development, *Measure 37 Information*, at http://www.oregon.gov/LCD/measure37.shtml#Measure_37_Approved_by_Voters.

- While the voters of Oregon and the State Legislature have taken significant action to limit statewide land use restrictions over the past ten years, Governor Ted Kulongoski, his predecessor, Governor John Kitzhaber and the State Legislature have taken some action to pursue additional statewide sustainable development policies. In 2000, Governor Kitzhaber signed Executive Order 00-07, which created a sustainable development working group and directed state agencies to adopt new sustainable development practices.[496] In 2001, the State Legislature passed the Oregon Sustainability Act, which created a state advisory board on sustainable development and required state agencies to adopt policies that furthered "sustainability" and "sustainable communities."[497] Additionally, in 2003, Governor Kulongoski signed Executive Order 03-03, which is "intended to support and drive the goals of the Oregon Sustainability Act . . . and directs the [Oregon Sustainability] Board and state employees to move us closer to a more 'sustainable' state."[498]

**JUDICIAL SUMMARY**

Oregon courts have developed a mixed jurisprudence in the area of land use restrictions. In part because the legislature has established a detailed statutory scheme for the implementation of building moratoria and impact fees, the courts have generally not interfered with their use. In the area of spot zoning, however, the courts have placed significant restrictions on the ability of counties to use this land use tool.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *State statutes govern the use of impact fees and building moratoria, and courts have granted substantial deference in these areas. The courts, however, have restricted the use of spot zoning.*

1. Impact Fees / Exactions: Oregon courts have granted great deference to local governments in the area of impact fees, otherwise known in Oregon as system development charges ("SDC"). There is a statutory scheme that governs SDCs, requiring that the funds be only used for capital improvements.[499] Courts have not interfered with the imposition of fees that have been enacted in accordance with the state statute. For example, in *Roger Mach v. Wash County,* the Court of Appeals of Oregon found that traffic impact fees assessed to an office development were permissible because they did not violate the state statutes governing SDCs.[500] The courts have also broadly interpreted local authority under the statutes. In *Oregon State Homebuilders Association v. Tigard*, the court held that SDCs, which were imposed on a pro rata basis corresponding to estimated property prices, were permissible.[501] In another case the court allowed impact fees to be calculated on the basis of the likely benefit that new infrastructure would provide to a particular property.[502]

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[496] EO-00-07 (2000) available at http://www.sustainableoregon.net/execOrder-2000/sustain_eo-2000.cfm. The working group's December 2000 report is available at http://www.sustainableoregon.net/govt/group.cfm.
[497] H.B. 3948 (2001) text available at http://www.sustainableoregon.net/sust_act/HB3948.cfm.
[498] EO-03-03 (2003) available at http://www.sustainableoregon.net/execOrder/sustain_eo.cfm.
[499] Or. Rev. Stat. § 223.297 (2003).
[500] 181 Ore. App. 369 (Or. Ct. App. 2002).
[501] 43 Ore. App. 791 (Or. Ct. App. 1979).
[502] Vail v. Bandon, 53 Ore. App. 133 (Or. Ct. App. 1981).

2. Fair Share Development Requirements: Oregon courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. Additionally, the courts have upheld the use of density restrictions, particularly as a means of preserving agricultural land.[503]

3. Building Moratoria: Building moratoria in Oregon are regulated by a detailed statutory scheme that establishes a separate list of valid bases for moratoria for rural and urban areas.[504] Under the statute, a moratorium is generally permissible if the local government can show a lack of adequate public services to support additional buildings or some other compelling need. Although the case law in this area is relatively limited, courts have generally deferred to the decisions of local government in imposing temporary moratoria. For example, in one case, a temporary building moratorium, justified by a lack of adequate water storage capacity for the city, was found to be permissible where the procedural requirements set forth in the state statute were satisfied.[505] In another case, the court upheld a moratorium where there was no lack of public services, but the local government demonstrated that environmental damage caused by future development would cause "irrevocable public harm."[506] In this case, the court upheld a temporary building moratorium in order to allow a city to acquire the funds necessary to purchase land for a new park.[507]

4. Spot Zoning / Exclusionary Zoning: Oregon courts have placed significant restrictions on the ability of municipalities to engage in spot zoning.

    a. Under the prevailing rule, spot zoning decisions fall outside the default rule that grants deference to local legislative decisions. [508] The local government must therefore show "substantial evidence of change in the neighborhood in order to justify the rezoning of a small tract as an amendment in keeping with the comprehensive plan."[509]

    b. In applying this rule, Oregon courts have regularly invalidated municipal spot zoning decisions. In one such case, the court found the County Commissioners' evidence showing that the circumstances in the area surrounding the property had changed to be insufficient and therefore invalidated the county's spot zoning ordinance.[510] In another case, the court struck down a similar ordinance upon a finding that the zoning change was inconsistent with the county's comprehensive plan.[511]

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[503] 1000 Friends of Oregon v. Land Conservation & Dev. Com., 305 Ore. 384 (1988).
[504] Or. Rev. Stat. § 197.505 *et seq.* (2003).
[505] Schatz v. City of Jacksonville, 21 Or. LUBA 214 (6th Cir. 1991).
[506] Davis v. Bandon, 105 Ore. App. 425, 428 (Or. Ct. App. 1991).
[507] Id.
[508] Smith v. County of Washington, 241 Or 380, 384 (1965).
[509] Id.
[510] Brandt v. Marion County, 6 Ore. App. 617 (1971).
[511] Roseta v. County of Washington, 254 Ore. 161 (Or. 1969); Perkins v. Marion County, 252 Ore. 313 (Or. 1968).

c. In a minority of cases, the court has found that a zoning board has had a reasonable basis to engage in spot zoning. For example, where the County Commissioners presented extensive evidence that spot zoning to allow a car dealership in an agriculturally zoned area was justified where the property was located in an area with significant commercial activity and limited new residential development, the court upheld the zoning determination.[512]

[512] Follmer v. County of Lane, 5 Ore. App. 185, 195 (Or. Ct. App., 1971).

# PENNSYLVANIA

**Summary:** Land use regulation in Pennsylvania remains largely a power that is delegated to municipalities. Over the past ten years, the tools available for these municipalities to restrict and manage growth have continued to increase through both executive and legislative initiatives. It is likely that this trend will continue, though it remains to be seen how municipalities will wield their available powers. Pennsylvania jurisprudence on this issue is mixed. While Pennsylvania courts have expanded the fair share requirement for municipalities engaging in joint planning and have validated the use of impact fees as a planning tool, the courts have ruled in favor of greater property rights on the issues of spot zoning and building moratoria.

**Legislative:** The statutory framework for land use in Pennsylvania is defined in the Municipalities Planning Code ("MPC").[513] The MPC delegates most land use decisions to municipalities, and it is therefore not possible to assign an overall rating to the state's land use regime. Moreover, legislative and executive efforts over the past decade have largely strengthened the regulatory powers of municipalities in this area. Additionally, the current administration favors further "smart growth" initiatives that are likely to grant additional powers to municipalities.

- **Legislative Rating: 3** (High level of activity)

- In 2000, the state legislature enacted a major overhaul of the MPC[514] in response to the Governor's "Growing Smarter" legislative agenda.[515] This reform—known collectively as Acts 67 and 68—established several provisions that grant additional powers to municipalities to regulate development. Among the most significant provisions of this legislation are[516]:
  - Greater requirements for consistency between county and municipal comprehensive development plans
  - The authorization of intergovernmental cooperation, inter-municipal transfers of development rights and tax revenue sharing
  - A grant of power to municipalities that allows for the designation of "growth areas," "future growth areas," and "rural resource areas"
  - Permission for state agencies to consider relevant comprehensive plans when making infrastructure permitting decisions
  - Greater protections for municipalities against developer law suits

- At present, Governor Rendell is urging passage of a legislative agenda called "Growing Greener 2."[517] Although there are few specific details on the nature of this program, the

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[513] 53 Pa. Cons. Stat. §§ 10101 – 11202 (2004).
[514] H.B. 14, 1999 Sess. (Pa. 1999) (enacted as Act 67 of 2000) and S.B. 300, 1999 Sess. (Pa. 1999) (enacted as Act 68 of 2000).
[515] See Pa. Exec. Order No. 1997-4 (1997).
[516] For a comprehensive review of Act 67 and 68 provisions, see Adam Loiz, Land Use In Pennsylvania: An Analysis of Changes to Pennsylvania's Municipalities Planning Code in 2000 36 (2001), *available at* http://www.pennenvironment.org/reports/landusereport8_01.pdf.
[517] More information on this program may be found at http://www.growinggreener2.com/.

"Growing Greener" website notes that the program, "will help clean up polluted streams, reclaim abandoned mines and clean up brownfields, fund important farm preservation and open space protection initiatives, invest in clean energy sources, improve our recreation resources and inject new life into our communities."[518] This program description is clear evidence of the Governor's desire to move forward with greater development restrictions in the coming years.

## JUDICIAL SUMMARY

In contrast to efforts by both the legislative and executive branches to further strengthen the power of municipalities to restrict development, Pennsylvania jurisprudence has been mixed with regard to municipal attempts to control development. As outlined by the notes below, Pennsylvania courts have permitted the use of impact fees by municipalities—subject to the restrictions imposed by United States Supreme Court decisions on this issue—and have loosened their interpretation of fair share development requirements following the enactment of Acts 67 and 68. In contrast to these decisions, however, Pennsylvania courts have held that building moratoria exceed the planning powers of municipalities and have similarly held a tough line on the definition of spot zoning.

- **Judicial Rating: 1** (Restrictive of municipal regulation)

1. Impact Fees / Exactions: Amendments to the MPC in 1990 and 2000 allow Pennsylvania municipalities to charge impact fees to developers based on the cost of the infrastructure required to support that development. Acts 67 and 68 and the United States Supreme Court decisions in *Nollan v. California Coastal Commission*[519] and *Dolan v. City of Tigard*[520], however, require that these fees be limited only to the costs directly attributable to a particular development project. In 1993, the Pennsylvania Supreme Court held that the 1990 Amendment to the MPC allowing impact fees is constitutional.[521] The Commonwealth Court has further allowed for payments to municipalities in lieu of required on site improvements.[522]

2. Fair Share Development Requirements: Since 1977, the Pennsylvania Supreme Court has prohibited municipalities in "the path of urban-suburban" growth from enacting zoning ordinances that have the effect of excluding higher-density, multi-family residential uses.[523] A recent decision by this same court, however, has loosened this restriction by allowing municipalities that engage in joint planning under the provisions of Acts 67 and 68 to meet this requirement across the joint planning area rather than in each municipality individually.[524]

3. Building Moratoria: In the case of *Naylor v. Township of Hellam*, The Pennsylvania Supreme Court held that the Municipalities Planning Code does not permit municipalities

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[518] Id.
[519] 483 U.S. 825 (1987).
[520] 512 U.S. 374 (1994).
[521] Cranberry Township v. Builders Ass'n, 533 Pa. 271 (1993) (lower court decision reversed on other grounds).
[522] Soliday v. Haycock Township, 785 A.2d 139 (Pa. Comm. 2001).
[523] Surrick v. Zoning Hearing Board of the Township of Upper Providence, 382 A.2d 105 (Pa. 1977).
[524] *In re* Petition of Dolington Land Group, 576 Pa. 519 (2003).

to enact temporary building moratoria while they are revising their planning and zoning ordinances.[525]

4. Spot Zoning / Exclusionary Zoning: A 2003 decision by the Pennsylvania Supreme Court[526] invalidated a “reverse spot” agricultural zoning designation for a piece of property surrounded by commercial development. The municipality sought to preserve the undeveloped nature of the property through zoning, and the Supreme Court found this to exceed the powers granted to the municipality. This decision further clarifies the definition of spot zoning first defined in *Plymouth v. County of Montgomery*[527] as "zoning provisions adopted to control the use of a specified area of land without regard to the relationship of those land use controls to the overall plan and the general welfare of the community."

[525] 565 Pa. 397 (2001).
[526] In re Realen Valley Forge Greenes Assocs., 576 Pa. 115 (2003).
[527] 109 Pa. Commw. 200 (1987) (appeal denied).

# RHODE ISLAND

**Summary:** Over the past ten years, there has been a great deal of activity in both the Legislature and the Governor's office directed toward statewide planning reform. In 1988, the state took significant steps to increase statewide land use power, and many of the changes over the past ten years have built on this effort. During this time, the Governor has formed the Growth Planning Council and established a legislative and policy agenda to enact even greater planning reforms. Additionally, the Legislature has, among other things, delegated specific impact fee authority to municipalities and study ways in which the state could further encourage sustainable development. Perhaps because much of the planning power is concentrated at the state level, Rhode Island courts have not heard a significant number of cases related to these issues. These courts have generally allowed impact fees and spot zoning but have also placed some limited restrictions on the use of these tools.

## LEGISLATIVE SUMMARY

Beginning in 1988 with the Comprehensive Planning and Land Use Regulation Act,[528] there has been a significant amount of statewide land use reform in Rhode Island. This reform has been spurred by action in both the Legislature and the Governor's office and encompasses a very wide array of issues. Additionally, it is important that this activity be viewed in the context of the significant statewide planning reform that was already in place at the time. Rhode Island is one of the few states that conducts much of its planning at the state level—under the purview of the State Planning Council[529]--and requires municipalities to adopt comprehensive land use plans.

- **Legislative Rating: 3** (High level of activity)

- **Growth Planning Council** On February 17, 2000, Governor Lincoln Almond signed an Executive Order creating the Growth Planning Council.[530] This Council, comprised of state and local government officials, members of the business community and local citizens, is responsible for "examining economic, environmental and social impacts of development in the state."[531] To date the Council has issued several reports, some of which have served as the basis for legislative action.

- **Impact Fee Legislation** One of the recent reforms passed by the Legislature is the Development Impact Fee Act.[532] This Act specifically empowers municipal governments to recover the direct costs of development in the form of impact fees and in doing so helps to ensure that sufficient infrastructure exists to support all new development in the state.

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[528] Codified as R.I. Gen. Laws § 45-22.2 (2005).
[529] Website available at http://www.planning.ri.gov/.
[530] *See* State of Rhode Island Growth Planning Council at http://www.planning.state.ri.us/gpc/default.htm.
[531] *See* American Planning Association, *2002 State of the States*, 111 (2002).
[532] H.R. 7308, 2000 Gen. Assemb., Jan. Sess. (R.I. 2000).

- **Open Space 2000** In 2000, voters in the state approved a $34 million bond issue to support the Governor's Open Space 2000 program.[533] Under this program, the state has partnered with other public, private and non-profit programs to preserve "land for parks, farmland, wildlife habitat."[534]

**JUDICIAL SUMMARY**

Rhode Island jurisprudence in cases related to land use restrictions is fairly limited. In the cases that do exist, Rhode Island courts have taken an approach that is neither very favorable nor very restrictive of municipal regulation. The courts have generally allowed the use of impact fees, though they have imposed a rule requiring strict uniformity. In the area of spot zoning, the courts have consistently applied the rule that spot zoning is permissible only when it is consistent with a comprehensive plan.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation).

1. Impact Fees / Exactions: Because the Rhode Island Legislature has specifically granted municipalities in the state the power to impose impact fees[535], the Rhode Island courts have decided very few cases in the area of impact fees. The courts have imposed one restriction on the use of these fees. When applied, impact fees must be uniform. In one notable case, the Supreme Court held that a town may relieve a developer of impact fees only on a showing that the fees would make the construction of low-income housing economically unfeasible.[536]

2. Fair Share Development Requirements: Rhode Island courts have had no cases that directly consider the question of fair share development requirements.

3. Building Moratoria: Rhode Island appellate courts have not heard any cases challenging building moratoria in the state.

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[533] *See* State of Rhode Island Department of Environmental Management, *Rhode Island Open Space 2000 Campaign*, at http://204.139.0.230/programs/bpoladm/plandev/landacq/rios2000.htm.
[534] Id.
[535] R.I. Gen. Laws § 45-22.4-1, et seq. (2005).
[536] Town of Coventry Zoning Bd. of Review v. Omni Development Corp, 814 A.2d 889 (R.I. 2003).

4. Spot Zoning / Exclusionary Zoning: Rhode Island courts have generally deferred to municipal regulation in the area of spot zoning as long as the zoning is consistent with the municipality's comprehensive plan. In the leading case on this issue, the Rhode Island Supreme Court has held, "The phrase 'spot zoning' is a descriptive term and not a word of art. There is valid spot zoning and invalid spot zoning. The fact that a small portion of land is involved in a legislative action does not make it ipso facto illegal spot zoning. The crucial test for determining if an amendment to a zoning ordinance constitutes illegal spot zoning depends upon whether its enactment violates a municipality's comprehensive plan."[537]

    e. In applying this rule, the courts have consistently upheld spot zoning that was in accordance with the comprehensive plan.[538]

    f. Where the plan is not consistent with a comprehensive plan, a showing that the zoning is simply "in the best interests of the community" is not sufficient to justify spot zoning.[539]

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[537] Carpionato v. Town Council of North Providence, 244 A.2d 861, 863 (R.I. 1968).
[538] *See e.g.***,** Hall v. Town Council Mbrs. of S. Kingstown, 2003 R.I. Super. LEXIS 41 (R.I. Super. Ct. 2003); MILL DEV. CO. v. CURTIN, 1992 R.I. Super. LEXIS 123 (R.I. Super. Ct. 1992).
[539] D'Angelo v. Knights of Columbus Bldg. Ass'n, 89 R.I. 76 (1959).

# SOUTH CAROLINA

**Summary:** State level land use reform has attracted a modest level of activity in South Carolina over the past ten years. Although they have not passed any substantial changes to the state's planning code, the Legislature has considered several proposals in this area. During his tenure, Governor James Hodges formed several committees and signed a series of executive orders aimed at reforming land use policy at the state level. The South Carolina courts have generally deferred to municipal action, particularly in the areas of impact fees and spot zoning. They have, however, held that local governments do not have the power to enact moratoria on development.

## LEGISLATIVE SUMMARY

The South Carolina Legislature has considered several statewide planning reforms over the past ten years but has not enacted any substantive changes to the state's planning laws.[540] Among the proposals that they considered and rejected are: the Comprehensive Infrastructure and Sustainable Development Act, which would have required "sustainable development" planning at the local and regional level[541]; the Farm and Forest Lands Protection Act, which would have allowed for the purchase of agricultural easements[542]; and the South Carolina Conservation Bank Bill, which would have provided $10 million for open space preservation[543]. During this same period, the Legislature also considered and rejected two "property rights" proposals, which both required compensation to offset any diminution of property value resulting from government regulation.

In 1999 and 2000, then-Governor James Hodges addressed this issue through several studies and executive orders. His March 2000 "Governor's Summit on Growth"[544] and "Task Force on Historic Preservation and Heritage Tourism"[545] were two such efforts. Additionally, the Governor signed several Executive Orders, including one which established an Interagency Council on Natural Resources Policy. This goal of the Council was to coordinate environmental policy within the various executive agencies. With the exception of the Historic Preservation Task Force, it does not appear that any of these other initiatives have continued under Governor Mark Sanford.

- **Legislative Rating: 2** (Moderate activity)

## JUDICIAL SUMMARY

On most issues related to land use regulations, South Carolina courts have given great deference to municipal regulatory authority. There are very few examples of a court disturbing municipal

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540 *See generally,* American Planning Association, *2002 State of the States* 114-115 (2002).
541 G.B. 945 (2000).
542 H.B. 3111 (2000/01); S.B. 156 (2000/01).
543 HB. 3462 (2000/01); S.B. 297 (2000/01).
544 *See* Lolita Huckaby, *Statewide Conference to Focus on Growth Issues*, Carolina Morning News, March 26, 2000 at http://www.lowcountrynow.com/stories/032600/LOCgrowth.shtml.
545 *See* http://www.state.sc.us/scdah/taskforce.htm.

actions in the areas of impact fees and spot zoning. The courts have, however, specifically held that the enactment of building moratoria exceeds the power of local governments.

- **Judicial Rating: 3** (Supportive of municipal regulation) *The degree to which courts have granted deference to municipal governments in the areas of impact fees and spot zoning outweighs the single case in which a building moratorium was found to be invalid.*

1. Impact Fees / Exactions: Although there have been a limited number of decisions in this area, South Carolina courts have generally upheld the assessment of impact fees. In *J.K. Const., Inc. v. Western Carolina Regional Sewer Authority*, the South Carolina Supreme Court allowed the regional sewer authority to levy an impact fee on customers who wished to connect to the sewer system or upgrade to a larger water line.[546] The courts also approved a decision by a public service commission to allow a utility to charge an impact fee "to recover a portion of the capital investment made by the utility in providing the capacity needed to serve a single family equivalent unit."[547]

2. Fair Share Development Requirements: South Carolina courts have not created specific fair share development or housing requirements, nor have they invalidated the use of density restrictions.

3. Building Moratoria: In the lone case on this issue, the court held that municipalities are not empowered under South Carolina zoning law to enact building moratoria.[548] The court in *Simpkins v. City of Gaffney* specifically held that "nothing in section 5-23-40, section 5-23-50, or any other statute supplies authority for a municipal corporation to suspend an ordinance by merely passing a motion creating a moratorium."[549]

4. Spot Zoning / Exclusionary Zoning: South Carolina courts have granted great deference to municipal authority in spot zoning challenges.

    a. First, the South Carolina courts have adopted a limited definition of spot zoning. In the leading case on this issue the South Carolina Supreme Court has defined spot zoning as the "process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to [the] detriment of other owners."[550]

    b. Second, spot zoning in South Carolina is not *per se* illegal. Instead, as one court has noted, the rule to be applied in evaluating the legality of spot zoning is "to closely scrutinize the following factors: (1) the adherence of the zoning to the City's comprehensive plan; and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown."[551] Further the court has

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[546] 519 S.E.2d 561 (S.C. 1999). *See also,* Ford v. Georgetown County Water & Sewer Dist., 341 S.C. 10 (holding that a charge in exchange for service constituted a permissible impact fee and was not a general revenue tax).
[547] Hamm v. South Carolina Public Service Com'n, 422 S.E.2d 118 (S.C. 1992).
[548] Simpkins v. City of Gaffney 431 S.E.2d 592, (S.C. Ct. App. 1993).
[549] Id at 594.
[550] Bob Jones University v. City of Greenville, 133 S.E.2d 843, 848 (1963).
[551] Knowles v. City of Aiken, 407 S.E.2d 639, 642 (S.C. 1991).

held that “Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable.”[552]

[552] Id.

# SOUTH DAKOTA

**Summary:** Because of the slow population growth and considerable quantity of open space, statewide growth restrictions have not been the subject of state-level government activity over the past ten years in South Dakota. The absence of studies or commissions in this area indicates that this trend is unlikely to change in the near future. Similarly, South Dakota courts have not heard a significant number of cases related to these issues. The cases they have heard are limited to spot zoning challenges. In each of these challenges the court has held in favor of the municipality.

## LEGISLATIVE SUMMARY

Land use planning in South Dakota remains almost exclusively a function of local government. Comprehensive, state-wide restrictions on development are virtually non-existent, and there is no indication that either the legislature or the governor is intent on reforming the existing system.

- **Legislative Rating: 1** (Little recent activity).

## JUDICIAL SUMMARY

South Dakota appellate courts have not heard a significant number of cases related to land use restrictions. In the area of spot zoning, the Supreme Court has exclusively upheld municipal ordinances challenged on these grounds.

- **Judicial Rating: 3** (Generally supportive of municipal regulation)

1. Impact Fees / Exactions: South Dakota appellate courts have not heard any cases challenging the imposition of impact fees. There is no impact fee enabling statute in South Dakota, and it appears that local governments have not made extensive use of this tool.

2. Fair Share Development Requirements: South Dakota courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. Additionally, the courts have not heard any cases challenging municipal density restrictions.

3. Building Moratoria: South Dakota appellate courts have not heard any cases challenging temporary building moratoria.

4. Spot Zoning / Exclusionary Zoning: South Dakota appellate courts have not invalidated any zoning ordinances on the grounds that the challenged ordinance constituted impermissible spot zoning. In one case, *Schrank v. Pennington County Board of Commissioners*, the South Dakota Supreme Court held that impermissible spot zoning

did not occur when a zoning decision was correctly enacted and was not unreasonable or arbitrary.[553] In another case, the Supreme Court determined that the test for spot zoning was whether the "property has been singled out for improper or unusual treatment."[554] Additionally, courts have recognized valid "spot zoning ordinances" as ordinances that exempt a specific property from existing zoning requirements.[555]

[553] 610 N.W.2d 90 (S.D. 2000).
[554] Chokecherry Hills Estate, Inc. v. Deuel County, 294 N.W.2d 654, 656 (S.D. 1980).
[555] *See e.g.,* Dodds v. Bickle, 77 S.D. 54 (1957); Pennington County v. Moore, 525 N.W.2d 257 (1994).

# TENNESSEE

**Summary:** Statewide land use reforms in Tennessee have attracted a moderate level of attention from both the Governor and the Legislature over the past ten years. In 1998, the Legislature passed a significant planning reform bill, the Growth Policy Act, but there has not been a significant amount of substantive change in the subsequent years. Tennessee courts have developed a jurisprudence that is highly deferential to municipal authority, particularly in the areas of impact fees and spot zoning.

## LEGISLATIVE SUMMARY

Tennessee has seen a moderate level of activity aimed at implementing statewide land use restrictions over the past ten years. Perhaps the most significant development in this area is the 1998 Growth Policy Act.[556] This Act imposes county-wide planning requirements and establishes new zoning regulations, particularly in newly-annexed areas.[557] Subsequent to this Act, several state agencies have developed incentive programs to encourage municipalities to adopt growth plans consistent with the requirements of the Act.[558] Additionally, then-Governor Sundquist created the Tennessee Strategically Targeted Areas of Redevelopment (TN S.T.A.R) committee[559], which helps to promote economic development activities in targeted urban areas. The State Legislature has also been active in developing a brownfields cleanup program for the state.[560] It appears that Governor Sundquist's initiatives have not carried over to the current administration of Governor Phil Bredsen, and the future course of reform in the state remains unclear.

- **Legislative Rating: 2** (Moderate activity)

## JUDICIAL SUMMARY

Tennessee courts have largely supported municipal regulation in cases challenging land use restrictions. In the area of impact fees, the court has broadly interpreted the impact fee enabling statutes to allow for the additional imposition of a privilege tax on development to offset general governmental expenditures. Additionally, the courts have developed an extremely deferential standard in evaluating the validity of spot zoning ordinances.

- **Judicial Rating: 3** (Supportive of municipal regulation)

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[556] Public Chapter 1101 (1998).
[557] Id. *See also*, Tennessee Advisory Commission on Intergovernmental Relations, *Implementing Tennessee's Growth Policy Act*, 1999 available at http://www.state.tn.us/tacir/PDF_FILES/Growth_Policy/Implementation.pdf.
[558] *See* American Planning Association, *2002 State of the States*, 118-19 (2002).
[559] By Executive Order No. 24 (Dec. 16, 1999).
[560] S.B. 1889 / H.B. 1916 (2001).

1. Impact Fees / Exactions: Under Tennessee law, municipalities may issue impact fees only when specifically authorized by the state legislature.[561] The Tennessee legislature has chosen to approach this authorization in piecemeal fashion, by issuing statutes that apply only to specific municipalities.[562] As of August 2004, thirty municipalities had been granted authority to issue such fees.[563]

    a. Tennessee courts have broadly upheld the imposition of impact fees and taxes levied on development. In *Thorneberry Properties v. Allen*, the appeals court determined that a tax issued in exchange for the privilege of developing a property and used to broadly offset the costs of that development did not violate the equal protection provisions of the Tennessee Constitution.[564] Additionally, one court has held that municipalities may choose to impose either an impact fee—the funds from which must directly benefit the property—or a privilege tax—the funds from which may be used to fund general government operations—on new development.[565]

    b. Tennessee courts have defined a fee "as that which is 'imposed for the purpose of regulating specific activity or defraying the cost of providing a service or benefit to the party paying the fee.'"[566] In order for such a fee to be valid under a municipality's police powers, the fee imposed must "bear a reasonable relation to the thing being accomplished."[567] Additionally, the fee must be "used and expended to the benefit of the development that pays the fair share impact fee."[568]

2. Fair Share Development Requirements: Tennessee courts have not imposed specific fair share housing or development requirements. The courts have, however, allowed density restrictions. In *Mobile Home City of Chattanooga v. Hamilton County*, the Tennessee courts upheld a zoning ordinance requiring that single unit mobile home districts be at least five acres in size, citing a reasonable relation to public health.[569]

3. Building Moratoria: The Tennessee courts have not addressed the validity of building moratoria. It is clear that at least some municipalities have imposed building moratoria, as the issue was raised in a case where the court declined to decide the validity of a moratorium on the grounds that the claim was moot.[570]

4. Spot Zoning / Exclusionary Zoning: Tennessee courts have largely deferred to municipal authority on the issue of spot zoning.

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[561] Tennessee Advisory Commission on Intergovernmental Relations, *Financing Growth In Tennessee: Local Development Taxes And Impact Fees,* No. 11 (August 2004) at http://www.state.tn.us/tacir/PDF_FILES/Growth_Policy/Financing%20Growth.pdf.
[562] Id.
[563] Id.
[564] 987 S.W.2d 37 (Tenn.Ct.App. 1998).
[565] Home Builders Ass'n of Middle State v. Maury County, 2000 Tenn. App. LEXIS 600 at *9 (Tenn. App. 2000).
[566] *See,* Porter v. City of Paris, 184 Tenn. 555 (1947)
[567] City of Tullahoma v. Bedford County, 938 S.W.2d 408 (Tenn. 1997).
[568] Home Builders Ass'n of Middle State v. Maury County, 2000 Tenn. App. LEXIS 600 at *9 (Tenn. App. 2000).
[569] 552 S.W.2d 86 (Tenn.Ct.App. 1976).
[570] Laney Brentwood Homes, LLC v. Prechtel, 2003 Tenn. App. LEXIS 963 (Tenn. App. 2003).

a. In deciding these cases, the courts have applied an extremely deferential standard: "If there is a rational or justifiable basis for the enactment and it does not violate any state statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination."[571] As one court has held, "Almost all zoning regulations tend to benefit some persons more than others and many confer benefits on particular persons while inflicting harm on others. This results from the very nature of zoning and does not invalidate a regulation unless it is shown clearly to be unreasonable. The burden rests upon the one who assails the regulation."[572] In *Crown Colony Homeowners Association, Inc. v. Ramsey*, the court went even further in holding that a city zoning ordinance would be upheld as long as its merits were "fairly debatable."[573]

b. In several cases, however, the court has invalidated zoning ordinances on the grounds that they constituted illegal spot zoning. For example, in *Crockett v. Rutherford County*, the court found illegal spot zoning where the zoning determination was arbitrary and capricious and where there was "an adverse impact on adjoining landowners."[574] Additionally, in 1954 the Tennessee Supreme Court found illegal spot zoning when a county attempted to rezone a single residential plot solely for the personal financial gain of its owner.[575]

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[571] Fallin v. Knox County Bd. of Com'rs, 656 S.W.2d 338, 342 (Tenn. 1983). *See also,* Crockett v. Rutherford County, 2002 Tenn. App. LEXIS 545 at 8 (Tenn. App. 2002) ("Spot zoning is only illegal if it is arbitrary, capricious, unreasonable, or violates a state statute or constitutional guaranty.")
[572] Ruckhart v. Schubert, 224 Tenn. 139, 141 (Tenn. 1970).
[573] WL 148058 (Tenn.App. 1991).
[574] 2002 Tenn. App. LEXIS 545 at *10 (Tenn. App. 2002).
[575] Grant v. McCullough, 270 S.W.2d 317 (Tenn. 1954).

# TEXAS

**Summary:** Land use regulation in Texas has largely been a local government function. Over the past ten years, however, the Legislature has taken action to place some moderate restrictions on local government authority in this area. Texas courts have developed an extensive body of case law on issues related to land use restrictions, but their jurisprudence does not clearly favor nor restrict local government regulation. The courts have generally allowed building moratoria and density restrictions, though they have placed some limitations on their use. With regard to spot zoning and impact fees, the courts have reached mixed results in evaluating local ordinances.

## LEGISLATIVE SUMMARY

For more than eighty years, land use planning in Texas has largely been the domain of local governments and has been protected by the state constitution's strong home rule provisions. Over the past ten years, however, the State Legislature has been moderately active in restricting the ability of municipalities to exercise control in the land use and planning areas. Although the balance of power in land use matters continues to reside with local governments, reforms over the past this time have shown a trend toward increasing state control over land use controls and development in general.

- **Legislative Rating: 2** (Moderate activity)

- During the 2001 legislative session, two bills were passed that placed modest limits on the use of building moratoria[576] and impact fees[577].

- In 1997, legislation was passed that permits, but does not require, local governments to enact comprehensive plans and conform their zoning laws to the provisions of such a plan.[578]

- Additionally, in 1999 the legislature again enacted a series of modest reforms in the areas of "subdivisions, property rights, impact fees, public notice as it relates to the regulation of adult uses and affordable housing."[579]

## JUDICIAL SUMMARY

Texas jurisprudence on issues related to land use restrictions is fairly complex and does not clearly favor or restrict municipal regulation. In the area of impact fees, the courts have interpreted the state enabling statute to both support and invalidate municipal fees. In the area of spot zoning, the courts have a similarly mixed record. Although they have placed some significant restrictions on the use of spot zoning, the courts have also acted to uphold a fair number of spot zoning amendments. In examining density restrictions, the courts have largely deferred to municipal judgments, except in the case of subdivision approvals. Finally, the courts

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[576] S.B. 980 (2001).
[577] S.B. 243 (2001).
[578] *See* American Planning Association, *2002 State of the States*, 121 (2002).
[579] Id.

have allowed building moratoria but have a required a showing of a legitimate government purpose.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: Texas law establishes a detailed set of regulations that govern the implementation and use of impact fees.[580] As a result, Texas courts have not heard a substantial number of cases on this issue. In the limited number of cases challenging impact fees, the Texas courts have consistently applied the rule that "An ordinance assessing impact fees is invalid unless it complies with the procedures outlined in Texas Local Government Code."[581] In applying this rule, the courts have both validated and invalidated local impact fees.

    a. A 2004 Texas Supreme Court decision ruled that an impact fee imposed by the Town of Flower Mound on a developer amounted to taking for which the developer must be compensated.[582] In making its decision, the court stated that the town failed to show any relationship between the required road improvements and the impact of the development.[583] The court stated, "conditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled".[584]

    b. In *Black v. City of Killeen*, a Texas Appeals Court upheld water connection fees that exceeded the cost of connection and were used to fund the additional infrastructure required to support new development, where the fees were imposed in a manner consistent with the state statute.[585]

2. Fair Share Development Requirements: Texas courts have not imposed a specific fair share development or housing requirement. Additionally, the courts have generally upheld the validity of a town's minimum lot size restrictions provided the restrictions advance a legitimate government interest.[586] The courts have also ruled that setting minimum lot sizes does not constitute a regulatory taking.[587] One exception to this general rule applies in the approval of subdivision plats. As the court in *Integrity Group, Inc. v. Medina County Commissioners Court* held, approval of plats is regulated by state

[580] Tex. Local Gov't Code § 395.011 (2004).
[581] Black v. City of Killeen, 78 S.W.3d 686, 697 (Tex. App. 2002).
[582] Town of Flower Mound v. Stafford Estates Ltd. Partnership 135 S.W.3d 620 (Tex.,2004).
[583] Id. at 645.
[584] Id.
[585] 78 S.W.3d 686 (Tex. App. 2002).
[586] See, Town of Flower Mound , 135 S.W.3d 620 (Tex.,2004). (holding that increase in lot size restrictions from 6,500 to 12,000 square feet substantially advanced legitimate government interests in avoiding the ill effects of urbanization and preserving the rate and character of community growth).
[587] See, Id (holding increase in lot size restrictions did not constitute a taking). See also, Mayhew v. Town of Sunnyvale 964 S.W.2d 922 (Tex.,1998)(holding zoning ordinance requiring one-acre minimum lot size did not deprive owner of all economically viable land use, did substantially advance legitimate state interests, and therefore did not effectuate a taking).

statute and therefore a county's imposition of minimum lot size requirements may not apply to subdivision development.[588]

3. Building Moratoria: Texas courts have generally supported the use of building moratoria by municipalities provided they are enacted to further a legitimate government purpose. Under the prevailing rule in Texas a moratorium will constitute a compensable taking if it "either (1) did not substantially advance the City's legitimate interests, (2) deprived [the landowner] of all economically viable use of its property, or (3) unreasonably interfered with [the landowner's] use of the property as measured by the severity of the economic impact . . . and the extent to which its investment-backed expectations had been defeated."[589] In applying this standard in a 2004 case, the Texas Supreme Court held that a fifteen-month moratorium on the filing and acceptance of plats in planned developments did not constitute a taking of the developer's property.[590]

4. Spot Zoning / Exclusionary Zoning: In general, Texas courts have placed some significant restrictions on municipalities in the area of spot zoning, although recent case law seems to favor municipal regulation.

    a. There were a substantial number of spot zoning challenges in the late 1970s and early 1980s; however, appellate courts have only heard two spot zoning challenges over the past ten years. In both of the more recent cases, the courts have upheld the zoning ordinance.[591]

    b. Under the prevailing rule, Texas courts have defined spot zoning as occurring "where a small area is singled out for different treatment from that accorded to similar surrounding land without any showing of justifiable changes in conditions, and especially when such preferential treatment is given in an amendatory ordinance which is contrary to a long-established comprehensive zoning plan."[592] Although spot zoning is not per se illegal, Texas courts have held that "spot zoning is generally condemned."[593]

    c. In applying this rule, the courts have invalidated a significant number of zoning ordinances. In one case, the court held that the rezoning of a 4.1 acre site constituted illegal spot zoning where the city did not make a finding of changed conditions in the area as a justification for the zoning change.[594] The courts have

[588] 2004 Tex. App. LEXIS 9186 (Tx. App. 2004).
[589] Mayhew v. Town of Sunnyvale 964 S.W.2d 922, 41 Tex. Sup. Ct. J. 517 (Tex. 1998); *See* Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tx. 2004) (applying the *Mayhew* standard in upholding municipal ordinance).
[590]See, Sheffield Development Co., Inc. v. City of Glenn Heights 140 S.W.3d 660 (Tex.,2004)(stating that the developer failed to show that the moratorium had an economic impact distinct from the rezoning or how his reasonable, investment-backed expectations excluded the possibility of a fifteen-month delay).
[591] See, City of San Antonio v. Arden Encino Partners, Ltd. 103 S.W.3d 627, 631 -632 (Tex.App.-San Antonio,2003)(not spot zoning); Drakulich v. City of San Antonio 2000 WL 33128678, *5 (Tex.App.-San Antonio) (Tex.App.--San Antonio,2000)(not spot zoning).
[592] Thompson v. City of Palestine 510 S.W.2d 579, 582 (Tex. 1974).
[593] Weaver v. Ham, 149 Tex. 309, 318 (1950).
[594] Thompson, 510 S.W.2d 579 (Tex. 1974). *See also* Hunt v. San Antonio, 462 S.W.2d 536 (Tex. 1971).

also held that where a spot zoning ordinance is not consistent with the comprehensive plan and does not advance the public welfare, it is invalid.[595]

d. Texas courts will, however, uphold the use of spot zoning, particularly if a town can justify the rezoning based on a change in circumstances to the area.[596] For example in *Pharr v. Tippitt*, the Texas Supreme Court upheld a zoning amendment that allowed for multi-family housing where the parcel in question was in the natural path of development, the rezoning was not arbitrary in view of the comprehensive plan, and the rezoning benefited the general welfare of the town.[597]

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[595] *See* Rusk v. Cox, 665 S.W.2d 233 (Tex. App. 1984).
[596] See, City of Texarkana v. Howard 633 S.W.2d 596, 597 (Tex. App. 6 Dist., 1982)("We uphold a spot zoning only if changes have occurred that justify treatment of a small area different from the surrounding land.").
[597] 616 S.W.2d 173 (Tx. 1981). *See also* McWhorter v. Winnsboro, 525 S.W.2d 701 (Tex. Civ. App. 1975).

# UTAH

**Summary:** At the state level, the Governor and Legislature have been moderately active in pursuing land use planning reform in Utah over the past ten years. The most significant action in this area was the "Quality Growth Act of 1999," which established the Quality Growth Commission and set out a framework for growth control measures at the state level. Utah courts have generally deferred to municipal regulation in their land use jurisprudence. In the area of impact fees, the courts have limited the scope of restrictions imposed by recent state legislation and deferred to municipal determinations on the use and calculation of many development fees. In cases alleging spot zoning, the courts have adopted a deferential standard by which they evaluate municipal zoning determinations.

## LEGISLATIVE SUMMARY

Over the past ten years, Utah state policymakers have been moderately active in promoting greater statewide land use reforms.

- **Legislative Rating: 2** (Moderate activity)

- The most significant reform was the "Quality Growth Act of 1999."[598] The Act, which created a Quality Growth Commission and provided funding for local planning assistance, was designed to implement five specific goals: "(1) encouraging conservation of critical lands and discouraging urban sprawl, (2) eliminating barriers to affordable housing, (3) promoting the effective workings of the free-market sector, (4) encouraging efficient development of infrastructure and efficient use of land, and (5) addressing issues through economic incentives to local government, not through state mandates."[599] The Quality Growth Commission continues to report annually to the Legislature on the state of growth in the state.[600]

- The Legislature has also taken significant action to regulate the annexation process in the state in an effort to ensure that growth occurs only where infrastructure is sufficient to service new development.[601]

- Additionally, the Legislature passed the Impact Fees Act in 2003, which regulates the use of impact fees in funding capital improvements.[602]

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[598] H.B. 119 (1999).
[599] Jill M. Burton, *Growing in Utah: The Quality Growth Act of 1999,* Hinkley Journal of Politics, Vol. 2, No. 1, pp. 7-14 (Spring 2000). For more information on the Quality Growth Commission, see the Commission's homepage at http://governor.utah.gov/Quality/.
[600] The reports are available on the Commission's website. Id.
[601] *See* American Planning Association, *2002 State of the States*, 124 (2002).
[602] Utah Code Ann. §§ 11-36-101 to -501 (2003).

## JUDICIAL SUMMARY

In general, Utah courts have developed a jurisprudence that is supportive of municipal regulation. In the area of impact fees, the court's prevailing rule until 2003 placed some meaningful restrictions on the ability of municipalities to issue such fees. Since the passage of the Utah Impact Fees Act, however, the courts have narrowly limited the application of the state law and have not disturbed municipal impact fees under its provisions. Utah jurisprudence in the area of spot zoning applies a deferential standard in evaluating municipal decisions.

- **Judicial Rating: 3** (Supportive of municipal regulation)

1. Impact Fees / Exactions: Prior to the 2003 enactment of the Utah Impact Fees Act, Utah courts placed moderate restrictions on the use of municipal impact fees. Since the change in the law, the court has similarly upheld municipal fees by narrowly interpreting the new statute's application to various development fees.

    a. Prior to 2003, Utah courts applied a modestly restrictive "reasonableness" standard in evaluating impact fees. *Banberry Development Corp. v. South Jordan City* sets out factors that courts must look at to determine reasonableness, including: weighing the impact fee against the actual cost of improvements, the financing methods used to fund infrastructure development, the extent to which other property owners in the area have contributed to infrastructure costs, and the extent to which new properties create an "extraordinary" cost to the municipality.[603] Using this standard, courts have allowed impact fees when developers failed to establish that the fees were unreasonable.[604]

    b. In 2003, Utah passed the Impact Fees Act which codifies the process of implementing impact fees.[605] This statute requires that the local municipality producing a written analysis of each impact fee. In applying the statute, recent court decisions have narrowly interpreted the scope of the statute's application by finding that certain development fees are not controlled by the statute. In one such case, a fee levied for developing a secondary water system on a property was not found to be an impact fee.[606]

2. Fair Share Development Requirements: Utah courts have not imposed specific fair share housing or development requirements.

3. Building Moratoria: Although Utah appellate courts have not specifically addressed a challenge to building moratoria, the court in *Diamond B-Y Ranches v. Tooele County,* held that there was a material question of fact as to whether a property was rendered

[603] 631 P.2d 899 (Utah 1981).
[604] Home Builders Ass'n v. City of North Logan, 983 P.2d 561 (Utah 1999).
[605] Utah Code Ann. §§ 11-36-101 to -501 (2003).
[606] Board of Trustees of Washington County Water Conservancy Dist. v. Keystone Conversions, LLC., 103 P.3d 686 (Utah 2004). *See also,* Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp., 2004 UT 37 (2004) (holding that a storm drainage fee was a service fee and not an impact fee governed by the Impact Fees Act).

"economically idle" by a temporary moratorium and subsequent denial of a conditional use permit.[607]

4. Spot Zoning / Exclusionary Zoning: Utah state appellate courts have developed a rule that is deferential to local land use decisions in the area of spot zoning. In *Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co.*, the court upheld a zoning decision allowing multiple housing units in an area previously zoned for agriculture.[608] The court deferred to the municipal government, noting that the decision did not offend the zoning plan, nor was it "illegal, arbitrary, discriminatory or capricious."[609] In applying the arbitrary and capricious standard, courts have consistently upheld zoning ordinances against spot zoning challenges.[610]

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[607] 2004 UT App 135 (2004).
[608] 545 P.2d 1150 (Utah 1976).
[609] Id., 1152.
[610] *See* e.g., Donner Crest Condo. Homeowners' Ass'n v. Salt Lake City, 2005 UT App 163 (2005).

# VERMONT

**Summary:** Vermont's state land use policies have been among the most restrictive in the nation for the past thirty-five years. Over the past decade, state lawmakers have amended existing land use provisions and have enacted several new initiatives, the most significant of which is the creation of the Governor's Development Cabinet in 2000. Perhaps because of the well-established statutory scheme in place, Vermont courts have largely deferred to local land use decisions and have generally interfered in these decisions only where a local government has failed to meet procedural requirements outlined in the state statute.

**LEGISLATIVE SUMMARY**

For the past thirty-five years, Vermont has had one of the most restrictive state land use policies in the nation. The 1970 enactment of the state Land Use Development Law (Act 250), the Growth Management Act of 1988 (Act 200), and subsequent amendments to both laws have formed the basis for significant restrictions on land use in the state.

- **Legislative Rating: 2** (Moderate level of activity) *Although the number of new land use initiatives introduced in Vermont over the past ten years has been moderate relative to other states, the level of activity in Vermont should be viewed in the context of the exceptional land use restrictions that have been in place for the past thirty-five years.*

- Under the provisions of Act 250, the State Environmental Review Board has established three-member District Environmental Commissions across the state whose review is required for the permitting of many types of development.[611] The District Environmental Commissions are required to evaluate ten criteria when making a permit decision, including: the effect of the development on water pollution, the impact of the project on aesthetics and scenic beauty, traffic implications, and conformance with local land use and capital facilities plans.[612] In 2001, the Legislature approved a series of pilot projects to test a streamlined appeals process under the Act[613] and further streamlined the approval and appeals process in 2003.

- Act 200 was designed to supplement the provisions of Act 250 by establishing a coordinated, regional approach to growth management.[614] The goals of Act 200 are to promote centralized growth in designated areas and to match public infrastructure investment with this planned growth.[615] Although several state agency initiatives originally launched as an effort to meet the requirements of Act 200 no longer exist, the Act continues to influence state policy, particularly in the areas of infrastructure investment and planning assistance.[616]

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[611] Vt. Stat. Ann. Tit. 10 § 151 (2004). For more information, see the Environmental Review Board's informational pamphlet, *Act 250: A Guide to Vermont's Land Use Law* at http://www.nrb.state.vt.us/lup/publications/Act250.pdf.
[612] Id.
[613] H. 475 (2001). *See* American Planning Association, *2002 State of the States*, 126 (2002).
[614] *See* Ed Bolen, et al, *Smart Growth*, 8 Hastings W.-N.W.J.Env.L.&Pol'y 145, 221-22 (2002).
[615] Id.
[616] *See* Vermont Department of Housing and Community Affairs, *Status Report: 15 Years After Act 200*, available at www.dhca.state.vt.us/Planning/ACT**200_15**Years.doc.

- In 2000, then-Governor Howard Dean issued an executive order creating a Development Cabinet to coordinate state agency activity in support of economic growth and sustainable development goals.[617] The same year, the General Assembly passed legislation formally establishing the Cabinet as an ongoing entity.[618]

**JUDICIAL SUMMARY**

Land use case law in Vermont is relatively limited, but the existing jurisprudence clearly points to a judiciary that is supportive of municipal regulation. As long as local governments meet statutory procedural requirements, the courts have largely deferred to their authority. This is particularly true in the area of impact fees and spot zoning. Case law related to building moratoria and fair share development requirements is considerably more limited.

- **Judicial Rating: 3** (Supportive of municipal regulation)

1. Impact Fees / Exactions: Assessment of impact fees on new developments is authorized by statute in Vermont.[619] Although courts have not heard a significant number of cases in this area, their jurisprudence grants municipalities broad authority to impose impact fees to finance capital projects as long as the procedural requirements outlined in the relevant statute are followed.[620]

    a. As an example of the broad authority courts have granted in this area, the court in *Robes v. Town of Hartford* permitted impact fees which were earmarked for the *future* expansion of the sewer system.[621] In fact, the court recognized the use of impact fees to offset future capital costs as "a laudable degree of foresight."[622] The court further held that an impact fee that does not equally impact all new properties may nonetheless be valid.[623]

    b. However, impact fees were held to be invalid in *Herbert v. Town of Mendon* where the local selectman failed to publish proper notice of an impact fee schedule that was to apply to residential development.[624] In addition to stringent adherence to procedural requirements, the courts also require that the fees, at least in part, benefit the development to which they relate and that the fees are used for capital expenditures not simply general operating costs.[625]

2. Fair Share Development Requirements: Vermont courts have not required municipalities to accept a certain level of development or to provide a particular quantity of low income

[617] Executive Order 01-00 (February 9, 2000).
[618] H. 209 (2000); Vt. Stat. Ann. Tit. 3 § 2293 (2004).
[619] Vt. Stat. Ann. Tit. 24 §§ 5200 – 5206 (2004).
[620] Robes v. Town of Hartford, 161 Vt. 187, 189 (Vt. 1993).
[621] Id.
[622] Id.
[623] Id.
[624] Herbert v. Town of Mendon, 159 Vt. 255 (Vt. 1992).
[625] Re: Swanton Housing Associates, 1997 VT ENV LEXIS 44 (VT ENV, 1997).

housing. In fact, the courts have specifically held that municipalities may enact zoning regulations for the purpose of restricting population density."[626]

3. Building Moratoria: Vermont courts have not specifically addressed the validity of building moratoria. In a related case, however, the Supreme Court invalidated a state law that enacted a *de facto* moratorium during the consideration of changes to a zoning ordinance because the law permitted zoning boards to allow undefined exceptions to the moratorium.[627]

4. Spot Zoning / Exclusionary Zoning: Vermont's appellate courts have in all instances permitted spot zoning. In *Granger v. Town of Woodford* the court held that spot zoning a residential piece of property for commercial use was permissible because the rezoning provided a benefit to the community, was in the vicinity of other similarly zoned plots and was a reasonable interpretation of the town's development plan.[628] Vermont's Supreme Court has articulated a four factor test to determine whether spot zoning is permissible: "(1) whether the use of the parcel is very different from the prevailing use of other parcels in the area; (2) whether the area of the parcel is small; (3) whether the classification is for the benefit of the community or only to provide a specific advantage to a particular landowner; and (4) whether the change in the zoning classification complies with the municipality's plan."[629] The four factor test is not binding but rather guiding. In general the Vermont courts have deferred to local government decisions with respect to spot zoning.[630]

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[626] *See e.g.,* Bryant v. Essex, 152 Vt. 29, 35 (1989). *See also* 24 V.S.A. § 4401(b)(1)(D)
[627] In re Handy, 171 Vt. 336 (2000).
[628] Granger, 167 Vt. 610 (Vt. 1998).
[629] Id. at 611.
[630] *Id.*; Smith v. St. Johnsbury, 150 Vt. 351 (Vt. 1988); Galanes v. Brattleboro, 136 Vt. 235 (Vt. 1978).

# VIRGINIA

**Summary:** Over the past ten years, leaders in Virginia state government have been moderately active in pursuing statewide land use reform. Although a number of individual programs have resulted from this activity, most have not been particularly well-funded or long-lived. Virginia courts have taken a very mixed approach in their land use jurisprudence. In the area of impact fees and to a lesser extent in the area of building moratoria, the courts have significantly restricted the power of local governments. In cases related to spot zoning and density restrictions, however, the courts have largely deferred to local legislative determinations.

## LEGISLATIVE SUMMARY

State-level land use restrictions have been the subject of a moderate level of activity in Virginia over the past ten years. This activity has not yielded significant reform but has advanced several individual programs.

- **Legislative Rating: 2** (Moderate activity)

- In 1996, the Legislature passed the Regional Competitiveness Act, which established an incentive structure to encourage multi-municipal cooperation in areas related to development.[631] This program, however, was last funded in FY2002.[632]

- In February 2001, the Legislature established the Commission on Growth and Economic Development, to examine: the adequacy of infrastructure revenue sources, the revitalization of urban areas, the redevelopment of brownfields and methods of preserving open space.[633] According to information from the Division of Legislative Services, the Commission last met in the fall of 2002.

- Over the past five years, the Legislature has also passed several smaller measures aimed at open space preservation and brownfields redevelopment.[634]

## JUDICIAL SUMMARY

The Virginia courts have taken a mixed approach in their land use jurisprudence. On the issue of impact fees, the courts have placed significant restrictions on municipal action. In cases related to spot zoning, the courts have developed a rule that grants tremendous deference to local zoning determinations. The court is similarly mixed in other areas—allowing the use of density restrictions and denying the use of certain development moratoria.

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[631] Va. Code Ann. §15.2-1306 through §15.2-1310 (2004). For more information, the Regional Competitiveness Program's most recent annual report is available at http://www.dhcd.virginia.gov/CD/RCP/Docs/GA%20Ann%20Rpt%20fall%202002.pdf.
[632] *See* Department of Housing and Community Development, *Report on Re-establishing the Regional Competitiveness Program, 2003*, at http://www.dhcd.virginia.gov/CD/RCP/Docs/Re_establisment_report.pdf.
[633] H.J.R. No. 671 (Feb. 24, 2001).
[634] *See* American Planning Association, *2002 State of the States*, 128-129 (2002).

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation) *The jurisprudence related to impact fees is restrictive, but the courts have granted significant deference to local governments in the area of spot zoning.*

1. Impact Fees / Exactions: Virginia courts have placed significant restrictions on the ability of municipalities to impose impact fees.

    a. The Virginia Supreme Court has held that an impact fee cannot be assessed unless it is statutorily authorized.[635] In applying this rule, the court invalidated a local zoning board's attempt to deny a building permit because a developer would not pay a recommended impact fee.[636] Currently, the only impact fees that are statutorily authorized in Virginia are road impact fees, which may be assessed against new developments.[637] The Virginia Supreme Court has read this statutory authorization as a prohibition on other impact fees.[638]

    b. Where a municipality imposes a development fee that does not fall within the specific, statutory definition of "impact fee," the Supreme Court has held that this is a valid exercise of the municipality's police power.[639] Additionally, where the impact fee is voluntarily accepted by the developer, the court will hold the fee to be valid.[640]

2. Fair Share Development Requirements: Virginia courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. Additionally, in limited case law on the issue, the court has not interfered with uniform density restrictions, designed to preserve the "character of the neighborhood."[641]

3. Building Moratoria: The case law in this area is limited, but the Virginia Supreme Court has held that local governments lack the power to impose a moratorium related to the approval of subdivision plats. As the Court noted, local governments lack "express or implied authority for the enactment by the Board of ordinances imposing a moratorium on the filing of site plans and preliminary subdivision plats."[642]

4. Spot Zoning / Exclusionary Zoning: Virginia courts, especially in recent years, have been very deferential to local governments on the issue of spot zoning.[643] Because spot

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[635] Board of Supervisors v. Reed's Landing Corp., 250 Va. 397, 399 (1995).
[636] *Id.*
[637] Va. Code Ann. § 15.2-2319 (2004)
[638] Reed's Landing Corp. 250 Va. at 399 (1995).
[639] Tidewater Ass'n of Homebuilders, Inc. v. Virginia Beach, 241 Va. 114 (Va. 1991).
[640] Gum Springs v. Loudoun County Supervisors, 59 Va. Cir. 509 (Va. Cir 2001).
[641] Neustadter v. Zoning Appeals Bd. of Round Hill, 38 Va. Cir. 185 at *3 (Va. Cir. 1995).
[642] Board of Supervisors v. Horne, 216 Va. 113, 122 (1975).
[643] Worley v. Town of Wash., 65 Va. Cir. 14 (Va. Cir. Ct. 2004); Guest v. King George County Bd. of Supervisors, 42 Va. Cir. 348 (Va. Cir. Ct. 1997); McLean Hamlet Citizens v. Fairfax County Bd. of Supervisors, 40 Va. Cir. 69 (Va. Cir. Ct. 1995).

zoning is not *per se* illegal,[644] the courts of Virginia have adopted a test to help guide such a determination. Under the prevailing rule, spot zoning will be considered arbitrary and capricious when the purpose of the spot zone is to serve the private interests of landowners.[645] However, if the legislative purpose of the spot zoning is to further the general welfare of the community at large then it is not illegal spot zoning even if private interest are served.[646] Furthermore if the decision of the local zoning board is "fairly debatable" then the courts will defer to the local legislative body.[647] As a rule, Virginia courts will not substitute their judgment for that of a local zoning board,[648] and ultimately the courts have upheld nearly all uses of spot zoning as long as some benefit to the community can be demonstrated.[649]

[644] Board of Supervisors v. Fralin & Waldron, Inc., 222 Va. 218, 226 (Va. 1981).
[645] Barrick v. Board of Supervisors, 239 Va. 628, 633 (Va. 1990) (citation omitted).
[646] Id.
[647] *Id.* at 631.
[648] Guest, 42 Va. Cir. 348 at 363 (citation omitted).
[649] *See e.g.,* Riverview Farm Assocs. Va. Gen. Pshp. v. Board of Supervisors, 259 Va. 419, 430 (Va. 2000).

# WASHINGTON

**Summary:** State level land use policy in Washington is among the most comprehensive and restrictive in the nation. This policy is largely imposed through the 1990 Growth Management Act and its amendments. Although the volume of land use regulation that has occurred in Washington over the past fifteen years does not indicate a high level of activity in this area, the scope and significance of the Growth Management Act requires Washington to be considered among the most active states in promoting land use restrictions. Washington courts have taken a mixed view of land use regulations in the state. In the areas of building moratoria and spot zoning, the courts have shown considerable deference to local land use decisions. The courts have, however, placed some meaningful restrictions on the use of impact fees.

## LEGISLATIVE SUMMARY

In 1990, the Washington Legislature passed the Growth Management Act ("GMA")[650]—one of the most comprehensive and restrictive land use planning statutes in the nation. Since that time, most of the state land use reform efforts have been aimed at amending this Act.

- **Legislative Rating: 3** (High level of activity) *Although the number of new land use initiatives introduced in Washington over the past ten years has been moderate relative to other states, the scope and significance of the GMA translates to a high level of activity.*

- *The Growth Management Act*: According to the state's website, "The GMA requires state and local governments to manage Washington's growth by identifying and protecting critical areas and natural resource lands, designating urban growth areas, preparing comprehensive plans and implementing them through capital investments and development regulations."[651] The GMA establishes a state-level planning regime that is unique in this country.

- Over the past ten years, much of the land use reform in the state has been aimed at amending provisions of the GMA. Some of the provisions that have been enacted to amend the GMA include legislation that expanded the scope of the GMA and changed the standard of review employed by Growth Management Hearing Boards.[652]

- Additionally, legislation over this period has established an outcomes-based environmental protection grant program, implemented a pilot program to test streamlined permitting procedures, and set specific timelines for local government approval of permits.[653]

## JUDICIAL SUMMARY

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[650] Wash. Rev. Code § 36.70A (2004).
[651] Washington State Growth Management Hearings Boards, *The Growth Management Act,* at http://www.gmhb.wa.gov/gma/.
[652] Id.
[653] *See* American Planning Association, *2002 State of the States*, 130 (2002).

Washington courts have taken a mixed approach in evaluating municipal land use regulations. In the area of impact fees, the courts have imposed some meaningful restrictions on the use of these fees but have been evenly split in holding for and against municipalities. With regard to building moratoria, the courts have broadly interpreted municipal statutory authority in this area and have granted great deference to municipalities. Similarly, the courts have developed jurisprudence in the area of spot zoning that defers to municipal determinations.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation). *Considerable deference in the areas of building moratoria and spot zoning is offset by restrictions on impact fees.*

1. Impact Fees / Exactions: Washington courts have imposed some meaningful restrictions on the use of impact fees and have been evenly split in upholding and invalidating municipal action.

    a. Impact fees are statutorily sanctioned by the Washington legislature.[654] Under this statute, fees collected by a local municipality must not only bear a reasonable relationship to the impact of the development but must also be kept in an escrow account in which unspent fees are returned to the developer after five years.[655]

    b. In interpreting this statute, Washington courts have held that the fee charged must be reasonably related to the individualized impact of the project,[656] though the courts have allowed these fees to be used for the general benefit of the entire area.[657]

    c. Washington courts have been evenly split in evaluating the validity of municipal impact fees. That is, they have allowed such fees but have not extended any great deference to the decisions of local government. The courts have upheld right of way dedications needed for road improvements[658], school impact fees,[659] and transportation impact fees.[660] However, fees that do not comply with the statutory requirements will be found illegal. For example, the failure to identify the direct impact of a development resulted in impact fees being held illegal.[661] Courts have also invalidated impact fees that could not be shown to be roughly proportional to the actual impact of the project[662] and where no reasonable relationship could be demonstrated between the development and the fee charged.[663]

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[654] Wash. Rev. Code. § 82.02.050 (2004).
[655] Wash. Rev. Code. § 82.02.020 (2004).
[656] City of Olympia v. Drebick, 119 Wn. App. 774 (Wash. Ct. App. 2004).
[657] Pavlina v. City of Vancouver, 122 Wn. App. 520, 526 (Wash. Ct. App. 2004).
[658] Sparks v. Douglas County, 127 Wn.2d 901 (Wash. 1995).
[659] Wellington River Hollow, L.L.C. v. King County, 113 Wn. App. 574 (Wash. Ct. App. 2002).
[660] New Castle Invs. v. City of LaCenter, 98 Wn. App. 224 (Wash. Ct. App. 1999).
[661] Henderson Homes v. City of Bothell, 124 Wn.2d 240 (Wash. 1994).
[662] Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wn. App. 127 (Wash. Ct. App. 1999).
[663] United Dev. Corp. v. City of Mill Creek, 106 Wn. App. 681 (Wash. Ct. App. 2001).

2. Fair Share Development Requirements: Washington courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing.

3. Building Moratoria: There are two types of building moratoria that are authorized by statute in Washington, and the courts have generally allowed significant latitude in enacting either type.

    a. One type of building moratoria is issued by the Department of Natural Resources and goes into effect after clear cutting of trees has occurred on a piece of property.[664] This type of moratorium forbids the rezoning of cleared land, as the rezoning may be used to circumvent environmental regulations that attach to recently cleared land. Courts have generally upheld this type of moratorium.[665]

    b. The other type of statutorily authorized building moratoria is one enacted by a local government body in conjunction with the local government's zoning powers.[666] In these instances the courts have been deferential to the judgment of the local legislature. These moratoria can be adopted as emergency zoning without public notice or hearing.[667] Courts have also permitted such moratoria when the local legislature claimed that further development was not in line with the town's growth management plan and would have an adverse impact on school and fire protection.[668]

4. Spot Zoning / Exclusionary Zoning: Over the past thirty years, the jurisprudence of Washington courts has evolved from one that restricts the use of spot zoning[669] to one that defers to municipal regulation in this area. Washington courts do not look at whether the actual rezoning is incongruous with the manner in which surrounding plots are zoned but instead make a determination on whether the rezoning is substantially related to the welfare of the county.[670] When rezoning fosters the general welfare of the town it will be upheld. More recently, this standard has shifted even further. The most recent cases suggest that where spot zoning is found not to be overly detrimental to the community, it will also be upheld.[671] This is a contrast to older case law that invalidated spot zoning that was generally out of character with the community. In one case of this type, the court invalidated a spot zoning ordinance on the grounds that a shopping center would harm the rural character of a town.[672]

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[664] Wash. Rev. Code. § 76.09.060 (2004).
[665] *See e.g.,* Ord v. Kitsap County, 84 Wn. App. 602 (Wash. Ct. App. 1997).
[666] Wash. Rev. Code. § 35.02.147 (2004); Wash. Rev. Code. § 35.63.200 (2004).
[667] Matson v. Clark County Bd. of Comm'rs, 79 Wn. App. 641 (Wash. Ct. App. 1995).
[668] Id.
[669] Anderson v. Island County, 81 Wn.2d 312 (Wash. 1972); Smith v. Skagit County, 75 Wn.2d 715 (Wash. 1969); Anderson v. Seattle, 64 Wn.2d 198 (Wash. 1964).
[670] Save a Neighborhood Environment (SANE) v. Seattle, 101 Wn.2d 280 (Wash. 1984); Save Our Rural Environment v. Snohomish County, 99 Wn.2d 363 (Wash. 1983).
[671] Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp., 115 Wn. App. 417 (Wash. Ct. App. 2003).
[672] Save a Valuable Environment (SAVE) v. Bothell, 89 Wn.2d 862 (Wash. 1978).

# WEST VIRGINIA

**Summary:** Statewide land use restrictions have not been the subject of any significant legislative or executive initiatives in West Virginia over the past ten years. West Virginia courts, however, have taken a mixed view of municipal land use restrictions. In the limited cases related to municipal land use the courts have held that municipalities do not have the power to enact building moratoria but have granted broad deference to municipal decisions in spot zoning challenges.

## LEGISLATIVE SUMMARY

Over the past ten years, statewide land use restrictions have not been the subject of any significant activity among state policy makers in West Virginia. In 2000, the Legislature enhanced the state's farmland protection program, but there not been any other significant legislative action in the State Legislature.[673] Additionally, research did not reveal any reports, commissions or other studies related to this issue.

- **Legislative Rating: 1** (Little recent activity)

## JUDICIAL SUMMARY

Case law on the issues surrounding land use restrictions is relatively limited in West Virginia, although the courts have established clear positions on building moratoria and spot zoning. The courts have generally held that municipalities lack the power to impose building moratoria except in cases where the zoning of a particular parcel requires further investigation. However, the courts have upheld municipal zoning decisions against claims of illegal spot zoning, applying a very deferential "fairly debatable" standard in evaluating such decisions.

- **Judicial Rating: 2** (Neither highly restrictive nor highly supportive of municipal regulation)

1. Impact Fees / Exactions: West Virginia appellate courts have not directly addressed the legality of impact fees. The lack of case law on this issue likely reflects the broad statutory authority granted to counties in West Virginia under the Local Powers Act.[674] This Act provides: "County governments affected by the construction of new development projects are hereby authorized to require the payment of fees for any new development projects constructed therein in the event any costs associated with capital improvements or the provision of other services are attributable to such project. Such fees shall not exceed a proportionate share of such costs required to accommodate any such new development. Before requiring payment of any fee authorized hereunder, it must be

[673] S.B. 209 (2000).
[674] W.V. Code § 7-20-4 (2004).

evident that some reasonable benefit from any such capital improvements will be realized by any such development project."[675]

2. Fair Share Development Requirements: West Virgina appellate courts have not imposed any fair share development or housing requirements. Additionally the courts have not heard any challenges to density zoning restrictions.

3. Building Moratoria: West Virginia courts have adopted a rule that prevents municipalities from imposing wide spread building moratoria. In *Bittinger v. Corporation of Boliviar*, the court held that, there is "no authority which would permit a town council to impose a blanket moratorium on a valid ordinance."[676] One court, however, has held that a four-month moratorium on development that applied only to a specific property was allowed where time was required for a town government to investigate citizen concerns related to a permit request.[677]

4. Spot Zoning / Exclusionary Zoning: Although there is limited case law in this area, West Virginia courts have applied a very deferential standard in evaluating spot zoning challenges. As a result, the courts have generally not overturned zoning decisions because of illegal spot zoning. Under the prevailing standard, "if the decision of the zoning authorities is *fairly debatable* the courts will not interfere with such decision."[678] In applying this standard, the West Virginia Supreme Court of Appeals refused to overturn a town zoning ordinance that rezoned several parcels from residential to commercial where the surrounding area was commercially zoned and the ordinance met the a "fairly debatable" standard.[679] Additionally, in *Par Mar v. City of Parkersburg*, a town's refusal to rezone a property for commercial use was upheld because the zoning decision was found to be fairly debatable.[680]

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[675] Id.
[676] 395 S.E.2d 554 (W.Va. 1990).
[677] Hutchison v. City of Huntington, 198 W. Va. 139 (W.Va. 1996).
[678] Anderson v. City of Wheeling, 149 S.E.2d 243, 249 (W.Va. 1966) (emphasis in original).
[679] Id.
[680] 398 S.E.2d 532 (W.Va. 1990).

# WISCONSIN

**Summary:** Over the past ten years, Wisconsin has taken significant action in the area of statewide land use reform. The center of this reform was 1999's Act 9, which imposed a series of comprehensive planning and other land use reforms. Additionally, the state has actively studied and implemented reforms in the areas of incremental tax financing and brownfields remediation. Wisconsin courts have largely deferred to local governments in deciding land use issues, particularly in the areas of impact fees and spot zoning.

**LEGISLATIVE SUMMARY**

Through both gubernatorial initiatives and legislative action, Wisconsin state policy makers have been particularly active in promoting land use reform over the past ten years.

- **Legislative Rating: 3** (High level of activity)

- The 1999 state budget bill contained a series of initiatives aimed at planning reform in the state.[681] Under this bill: (1) all communities must enact local land use plans by 2010; (2) all land use decisions must be consistent with comprehensive plans; (3) beginning in 2002, all cities and villages larger than 12,500 residents must adopt the state's model traditional neighborhood development ordinance; and (4) state agencies must modify their policies to conform to local smart growth planning efforts.[682] This bill also provided for a "smart growth dividend" to be made available to municipalities that meet the state's land use standards.[683]

- State leaders have also taken action in the area of tax incremental financing and transportation planning. Through legislation and executive agency policies both tools are being used to encourage greater infill redevelopment.[684]

- Finally, over the past seven years, the Wisconsin Brownfields Study Group has issued a series of reports on required reforms to the state's brownfields laws.[685] The recommendations of this group have led to a brownfields program that now serves as model for states across the country.[686]

**JUDICIAL SUMMARY**

[681] Act 9, A.B. 133 (1999).
[682] *See* Campaign for Sensible Growth, *Sensible Growth Legislative Models from Nearby States*, 4 (2001) at http://www.growingsensibly.org/cmapdfs/ideasv1.pdf.
[683] *See* American Planning Association, *2002 State of the States*, 134 (2002).
[684] Id. For more information on TIF in Wisconsin, see the Wisconsin Department of Revenue, *Tax Incremental Financing,* at http://www.dor.state.wi.us/slf/tif.html.
[685] *See* Wisconsin Department of Natural Resources, *Brownfields Study Group*, at http://dnr.wi.gov/org/aw/rr/rbrownfields/bsg/#budget2.
[686] *See* Barbara Wells, *Governors' Smart Growth Initiatives*, Northeast-Midwest Institute 2001 *at* http://www.nemw.org/Gov_sgi.pdf.

Wisconsin courts have largely deferred to municipalities in challenges to land use restrictions. In the area of impact fees, the courts have largely held that, where the fees have been properly authorized through municipal ordinances, they will be valid. Additionally, the courts have held that spot zoning is not per se illegal and will be upheld so long as the zoning reflects the public interest. In the area of building moratoria, the courts have upheld such moratoria when properly enacted through a municipal ordinance. The courts of Wisconsin have not addressed fair share development requirements, though they have declined to interfere with municipal density restrictions.

- **Judicial Rating: 3** (Supportive of municipal regulation)

1. Impact Fees / Exactions: In addressing challenges to the validity of impact fees, Wisconsin courts have generally granted broad authority to municipalities in imposing such fees.

    a. In 1994 the Wisconsin legislature enacted a statute permitting local municipalities to impose impact fees on developers once they had passed an enabling law.[687]

    b. The courts have interpreted this statute to give broad authority to municipalities to impose impact fees. In *State ex rel. Burch v. Village of Hammond*, the court held that when a municipal impact fee is enacted in accordance with the state statute, the court would not interfere with its implementation.[688] In a subsequent challenge, a court broadly interpreted the state enabling statute to allow for use of impact fees to fund a water-sprinkler park where the impact fees were collected for the purpose of funding an aquatic center.[689]

    c. Cases where the courts have invalidated impact fees have involved procedural challenges to their implementation. For example, in one case, impact fees were invalidated when a municipality approved a developer's site plan before proper legislation was in place to assess impact fees and there was a pre-existing agreement between the parties that all impact fees would be paid up-front.[690]

2. Fair Share Development Requirements: Wisconsin courts have not specifically required municipalities to accept a certain level of development or to provide a particular quantity of low income housing. Additionally, Wisconsin courts have generally not interfered with municipal density regulations.[691]

3. Building Moratoria: Although Wisconsin courts have not heard a significant number of cases challenging building moratoria, the prevailing rule is that building moratoria imposed through a municipal ordinance are valid.[692] The courts have suggested that a

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[687] Wis. Stat. § 66.0617 (2004).
[688] State ex rel. Burch v. Vill. of Hammond, 2003 WI App 134, P10 (Wis. Ct. App. 2003).
[689] Metro. Builders Ass'n of Greater Milwaukee v. German..., 2005 Wisc. App. LEXIS 310 (2005).
[690] Country Meadows W. P'ship v. Vill. of Germantown, 2000 WI App 127 (Wis. Ct. App. 2000).
[691] *See e.g.,* Northwest Props. v. Outagamie County, 223 Wis. 2d 483 (Wis. Ct. App. 1998).
[692] *See* Lake Bluff Housing Partners v. City of South Milwaukee, 188 Wis. 2d 230, 235-36, 525 N.W.2d 59 (Ct. App. 1994).

moratorium enacted by resolution may not be valid, although they have declined to rule specifically on this issue.[693] According to an article from the University of Wisconsin Law Review, the use of building moratoria by Wisconsin municipalities is relatively widespread.[694]

4. Spot Zoning / Exclusionary Zoning: The courts of Wisconsin have been very deferential to local government when reviewing instances of spot zoning.

    a. Under the prevailing rule, courts will permit spot zoning when it is determined to be in the public interest and not solely for the benefit of the party requesting the rezoning.[695] Where a neighborhood had undergone a transition from residential housing to commercial uses, the rezoning of a property for commercial use was not considered inconsistent with the use of other property in the area.[696]

    b. In determining whether rezoning a particular tract of land is permissible spot zoning, the courts will consider the size of the piece of land in question—the larger the property, the less likely its rezoning will be considered illegal spot zoning.[697] The courts of Wisconsin will presume that a zoning ordinance is valid and such ordinance will be liberally construed in favor of the municipality.[698]

    c. On a few occasions, however, the courts have found illegal spot zoning to have occurred. In one case, the court struck down a zoning ordinance upon a finding that the spot zoning was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare of the community."[699]

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[693] *See* Town of Delafield v. Winkelman, 269 Wis. 2d 109 (2004).
[694] Tracy K. Kuczenski, *Wisconsin Shoreland Management Program: An Assessment With Implications for Effective Natural Resource Management and Protection*, 1999 Wis. L. Rev. 273, 299 (1999).
[695] Bell v. Elkhorn, 122 Wis. 2d 558 (Wis. 1985); Howard v. Elm Grove, 80 Wis. 2d 33 (Wis. 1977). *See also,* Howard v. Elm Grove, 80 Wis. 2d 33 (Wis. 1977).
[696] Bell 122 Wis. 2d at 568.
[697] Rodgers v. Menomonee Falls, 55 Wis. 2d 563 (Wis. 1972).
[698] Id. at 572 *quoting* Cushman v. Racine, 39 Wis. 2d 303, 306 (Wis. 1968).
[699] Heaney v. Oshkosh, 47 Wis. 2d 303, 313 (Wis. 1970).

# WYOMING

**Summary:** Since1975, neither the Legislature nor the Governor in Wyoming has focused a great deal of activity on the issue of statewide land use reform. There has been some limited study in the area of open space preservations, but no significant legislative or executive action has followed. Wyoming courts have generally deferred to municipal regulatory power in land use disputes. In the areas of impact fees, density restrictions and building moratoria, the court has rarely interfered with municipal actions.

## LEGISLATIVE SUMMARY

In 1975, the Wyoming legislature modified the state's land use and planning regime through the Land Use Planning Act of 1975.[700] This Act required mandatory preparation and adoption of local land use plans and mandates that counties must incorporate local plans in any county-wide plans that are developed.[701] Since 1975, there has been little further activity in this area. The limited activity that has occurred has been predominately in the area of open space preservation.

- **Legislative Rating: 1**(Little recent activity)

- In 1995, former Governor Jim Geringer convened an open space preservation conference and released a guidebook on open space preservation in the state.[702] In his 2001 State of the State address, the former Governor noted that Wyoming has "the greatest opportunity to control our growth and guide our future."[703] Research did not reveal any significant initiatives that supported this statement, however.

## JUDICIAL SUMMARY

In general, Wyoming courts have given broad latitude to municipalities in enacting and enforcing land use restrictions. In the area of impact fees, the Supreme Court has broadly interpreted state statutes allowing the municipal regulation of water and sewer infrastructure to allow for the imposition of an impact fee related to this regulation. The courts have also given great deference to municipalities in placing moratoria on development within their jurisdiction. Finally, when given the opportunity, courts have not disturbed municipal density restrictions.

- **Judicial Rating: 3** (Supportive of municipal regulation)

1. Impact Fees / Exactions: Although Wyoming law does not provide specific authority for municipalities to impose impact fees, the Wyoming Supreme Court has held that the power to impose both development fees and exactions may be implied under the Wyoming Constitution. In *Coulter v. Rawlins*, the Supreme Court upheld a water/sewer

[700] W.S.S. 9-8-101 through 9-8-302.
[701] Id.
[702] Office of the Governor, Wyoming, Like No Place On Earth: Ways To Conserve Wyoming's Wonderful Open Lands—A Guide Book (1995) available at http://home.datawest.net/dawog/Wyoming/openspaces.htm.
[703] 2001 State of the State address.

connection fee on the grounds that the power to impose impact fee was implied in the power to "provide and regulate the construction, repair and use of sewers and drains."[704]

2. Fair Share Development Requirements: Wyoming courts have specifically declined to require municipalities to accept a certain level of development. In *Board of County Commissioners v. Crow*, the Wyoming Supreme Court upheld a density restriction ordinance, the main purpose of which was to "promote[] the legitimate public objectives of protecting, promoting and preserving . . . community character, . . . rural character, . . . [and] rural western character . . . ."[705]

3. Building Moratoria: The courts of Wyoming have addressed the issue of a building moratorium or land use freeze on several occasions. In general, courts have allowed the use of moratoria where municipalities have met proper notice and procedural requirements. In one instance inadequate drainage for a new development prompted the city to put a building moratorium in place.[706] The court in *Sun Ridge Development. v. Cheyenne* held that the building moratorium was a proper exercise of state police power when its purpose was to protect the general welfare of those affected by the inadequate drainage.[707] In an earlier case addressing building moratoria, the court supported a temporary land use freeze by the local zoning board. However, it required proper notice and a hearing if the temporary freeze was to take on a more permanent character.[708] The portion of the land use freeze that extended beyond the initial permissible moratorium was found to be invalid because proper public notice was never given and an accompanying hearing never occurred.[709]

4. Spot Zoning / Exclusionary Zoning: Wyoming appellate courts have not specifically addressed the issue of spot zoning.

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[704] 662 P.2d 888, 896 (1983) (citing § 15-1-103(a), W.S.1977 (1980)).
[705] 2003 WY 40 at *P39 (Wy. 2003) (citing Teton County, Wyo., Land Dev. Reg. § 2450).
[706] Sun Ridge Dev. v. Cheyenne, 787 P.2d 583 (Wyo. 1990).
[707] *Id.*
[708] Schoeller v. Board of County Comm'rs, 568 P.2d 869 (Wyo. 1977).
[709] *Id*. at 874

# SUMMARY TABLE: CURRENT STATE LEGISLATIVE AND JUDICIAL PROFILE ON LAND-USE REGULATIONS IN THE U.S.

| State | Relative Locus of Govt. Authority | | | Executive and Legislative Activity | | | | | Judicial Posture | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Rating[2] | Executive | | Legislative | | Rating[3] | Impact Fees | | | Fair Share Requirement | | | Building Moratoria | | | Spot Zoning | | |
| | State | Local[1] | Mixed | | Study | Action | Study | Action | | Local Deference | Restricts Local | Mixed | Local Deference | Restricts Local | Mixed | Local Deference | Restricts Local | Mixed | Local Deference | Restricts Local | Mixed |
| 1 Alabama | | ✓ | | 1 | | | ✓ | | 3 | ✓ | | | ✓ | | | ✓ | | | ✓ | | |
| 2 Alaska | | ✓ | | 1 | | | | | 0 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 3 Arizona | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 4 Arkansas | | ✓ | | 1 | | | | | 1 | | ✓ | | ✓ | | | ---- | ---- | ---- | | ✓ | |
| 5 California | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | | ✓ | | ✓ | | | ✓ | | |
| 6 Colorado | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 2 | | | ✓ | | | ✓ | | | ✓ | | | ✓ |
| 7 Connecticut | | | ✓ | 2 | ✓ | | ✓ | ✓ | 2 | | ✓ | | | ✓ | | | | ✓ | ✓ | | |
| 8 Delaware | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ✓ | | | ✓ | | |
| 9 Florida | | | ✓ | 2 | ✓ | | | | 2 | ✓ | | | ✓ | | | ✓ | | | | | ✓ |
| 10 Georgia | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 0 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | ---- | ---- | ---- |
| 11 Hawaii | ✓ | | | 1 | | | ✓ | | 0 | ---- | ---- | ---- | [5] | | | ---- | ---- | ---- | [5] | | |
| 12 Idaho | | ✓ | | 1 | | | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 13 Illinois | | | ✓ | 2 | ✓ | ✓ | ✓ | | 2 | | ✓ | | ✓ | | | ✓ | | | ✓ | | |
| 14 Indiana | | ✓ | | 1 | ✓ | | ✓ | | 3 | ---- | ---- | ---- | ✓ | | | | | ✓ | ✓ | | |
| 15 Iowa | | ✓ | | 1 | | | ✓ | | 2 | | ✓ | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 16 Kansas | | ✓ | | 1 | | | ✓ | | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 17 Kentucky | | ✓ | | 2 | ✓ | ✓ | ✓ | | 2 | | | ✓ | ✓ | | | ✓ | | | | | ✓ |
| 18 Louisiana | | ✓ | | 1 | | | | | 2 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | | | ✓ |
| 19 Maine | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | | | ✓ | ✓ | | | | | ✓ |
| 20 Maryland | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 2 | | ✓ | | ✓ | | | ✓ | | | | | ✓ |
| 21 Massachusetts | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 2 | | ✓ | | | | ✓ | ✓ | | | | | ✓ |
| 22 Michigan | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 2 | | | ✓ | | | ✓ | ---- | ---- | ---- | | | ✓ |
| 23 Minnesota | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 2 | ---- | ---- | ---- | ✓ | | | | | ✓ | | | ✓ |
| 24 Mississippi | | ✓ | | 1 | | | ✓ | | 2 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | | | ✓ |
| 25 Missouri | | ✓ | | 1 | ✓ | | | | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |

---- Insufficient case law to determine judicial posture
1. Local refers to municipality or county
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4. If there are no significant decisions that restrict local authority, the judicial holdings on "Fair Share" are classified as "Local Deference"
5. Because locus of land-use regulation authority is the state, judicial posture does not apply to deference or restriction of local authority
6. Legislature has empowered regional authorities to enact coordinated land-use regulations

## SUMMARY COMMENTS: CURRENT STATE LEGISLATIVE AND JUDICIAL PROFILE ON LAND-USE REGULATIONS IN THE U.S.

| | | |
|---|---|---|
| 1 | Alabama | Little legislative, executive or judicial activity; strong local authority. |
| 2 | Alaska | Vast land availability, very low population density, large state and federal land ownership resulting in little land-use regulation. |
| 3 | Arizona | Growing momentum, but continued resistance, to legislative action; strong judicial deference to local authority. |
| 4 | Arkansas | Very little executive, legislative or judicial activity. |
| 5 | California | Exceptional codification by state of land-use regulation; judicial interpretation largely deferential to local authority. |
| 6 | Colorado | Recent executive and legislative trend to more state control; mixed judicial holdings. |
| 7 | Connecticut | Recent executive and legislative trend to more statewide planning restrictions; judiciary restrictive on local authority. |
| 8 | Delaware | Active in past 10 years in creating new statewide land-use restrictions; strong judicial deference to local authority. |
| 9 | Florida | Growth management relatively restrictive, but little executive or legislative action in past 20 years; judiciary deferential to local authority. |
| 10 | Georgia | State active, but directed at strengthening local authority; limited case law. |
| 11 | Hawaii | Unique in the extent of state authority over land-use regulation; nearly non-existent case law. |
| 12 | Idaho | Land-use regulation largely done by local governments; judiciary deferential to local authority. |
| 13 | Illinois | Significant executive action, little legislative action; mixed judicial holdings. |
| 14 | Indiana | Little significant executive or legislative activity in statewide land-use reform; judiciary strongly deferential to local authority. |
| 15 | Iowa | Little significant activity in statewide land-use reform; mixed judicial holdings. |
| 16 | Kansas | Little significant activity in statewide land-use reform; judiciary strongly deferential to local authority. |
| 17 | Kentucky | Increased attention to executive and legislative studies, few enactments; mixed judicial holdings. |
| 18 | Louisiana | Inactive in executive and legislative branches; limited case law. |
| 19 | Maine | Significant executive and legislative activity; judiciary deferential to local authority. |
| 20 | Maryland | Unusually active in executive and legislative branches; mixed judicial holdings. |
| 21 | Massachusetts | Legislative and executive activity has continued to increase over the past 10 years; mixed judicial holdings. |
| 22 | Michigan | Significant legislative and executive activity in past 3 years; mixed judicial holdings. |
| 23 | Minnesota | Active executive and legislative branches, directed at increasing local authority; mixed judicial holdings. |
| 24 | Mississippi | Unusually inactive executive and legislative branches; mixed judicial holdings. |
| 25 | Missouri | Unusually inactive executive and legislative branches; judiciary highly deferential to local authority. |

## SUMMARY TABLE: CURRENT STATE LEGISLATIVE AND JUDICIAL PROFILE ON LAND-USE REGULATIONS IN THE U.S.

| | State | Relative Locus of Govt. Authority | | | Executive and Legislative Activity | | | | | Judicial Posture | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | State | Local[1] | Mixed | Rating[2] | Executive | | Legislative | | Rating[3] | Impact Fees | | | Fair Share Requirement | | | Building Moratoria | | | Spot Zoning | | |
| | | | | | | Study | Action | Study | Action | | Local Deference | Restricts Local | Mixed | Local Deference | Restricts Local | Mixed | Local Deference | Restricts Local | Mixed | Local Deference | Restricts Local | Mixed |
| 26 | Montana | | | ✓ | 1 | ✓ | | ✓ | | 2 | ---- | ---- | ---- | | ✓ | | ✓ | | | | | ✓ |
| 27 | Nebraska | | | ✓ | 1 | | | | | 3 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 28 | Nevada | | | ✓[6] | 2 | | | ✓ | ✓ | 2 | | | ✓ | ✓ | | | ✓ | | | | | ✓ |
| 29 | New Hampshire | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | | | ✓ | | | ✓ | | | ✓ |
| 30 | New Jersey | | | ✓ | 3 | ✓ | ✓ | ✓ | ✓ | 1 | | ✓ | | | ✓ | | | ✓ | | | ✓ | |
| 31 | New Mexico | | | ✓ | 2 | | | ✓ | ✓ | 2 | ---- | ---- | ---- | ✓ | | | | | ✓ | ✓ | | |
| 32 | New York | | | ✓ | 2 | ✓ | ✓ | ✓ | | 2 | | ✓ | | ✓ | | | ✓ | | | | | ✓ |
| 33 | North Carolina | | | ✓ | 2 | ✓ | ✓ | ✓ | | 2 | ---- | ---- | ---- | | | ✓ | ✓ | | | | ✓ | |
| 34 | North Dakota | | ✓ | | 1 | | | ✓ | | 2 | ✓ | | | ✓ | | | ---- | ---- | ---- | | | ✓ |
| 35 | Ohio | | | ✓ | 2 | ✓ | ✓ | ✓ | | 1 | | ✓ | | ✓ | | | | ✓ | | | ✓ | |
| 36 | Oklahoma | | ✓ | | 1 | | | | | 0 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | | | ✓ |
| 37 | Oregon | ✓ | | | 2 | ✓ | ✓ | ✓ | ✓ | 2 | ✓ | | | ✓ | | | ✓ | | | | ✓ | |
| 38 | Pennsylvania | | ✓ | | 3 | ✓ | ✓ | ✓ | ✓ | 1 | ✓ | | | | ✓ | | | ✓ | | | ✓ | |
| 39 | Rhode Island | ✓ | | | 3 | ✓ | ✓ | ✓ | ✓ | 2 | | ✓ | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 40 | South Carolina | | | ✓ | 2 | ✓ | ✓ | ✓ | | 3 | ✓ | | | ✓ | | | | ✓ | | ✓ | | |
| 41 | South Dakota | | ✓ | | 1 | | | | | 3 | ---- | ---- | ---- | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 42 | Tennessee | | | ✓ | 2 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 43 | Texas | | | ✓ | 2 | | | ✓ | ✓ | 2 | | | ✓ | ✓ | | | ✓ | | | | | ✓ |
| 44 | Utah | | | ✓ | 2 | | | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 45 | Vermont | ✓ | | | 2 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ---- | ---- | ---- | ✓ | | |
| 46 | Virginia | | | ✓ | 2 | | | ✓ | ✓ | 2 | | ✓ | | ✓ | | | | ✓ | | ✓ | | |
| 47 | Washington | ✓ | | | 3 | | | ✓ | ✓ | 2 | | | ✓ | ✓ | | | ✓ | | | ✓ | | |
| 48 | West Virginia | | ✓ | | 1 | | | | | 2 | ---- | ---- | ---- | ✓ | | | | | ✓ | ✓ | | |
| 49 | Wisconsin | ✓ | | | 3 | ✓ | ✓ | ✓ | ✓ | 3 | ✓ | | | ✓ | | | ✓ | | | ✓ | | |
| 50 | Wyoming | | ✓ | | 1 | ✓ | ✓ | | | 3 | ✓ | | | ✓ | | | ✓ | | | ---- | ---- | ---- |

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**SUMMARY COMMENTS: CURRENT STATE LEGISLATIVE AND JUDICIAL PROFILE ON LAND-USE REGULATIONS IN THE U.S.**

| | | |
|---|---|---|
| 26 | Montana | Relatively inactive executive and legislative branches; mixed judicial holdings. |
| 27 | Nebraska | Unusually inactive executive and legislative branches; judiciary highly deferential to local authority. |
| 28 | Nevada | Unique use of regional planning authorities for land-use regulation; judiciary largely deferential to local authority. |
| 29 | New Hampshire | Unusually active executive and legislative branches; judiciary largely deferential to local authority. |
| 30 | New Jersey | Only state where executive, legislative and judicial branches are restrictive of local authority. |
| 31 | New Mexico | Very modest legislative activity since 1993-95 planning code reforms; judiciary generally deferential to local authority. |
| 32 | New York | Significant executive action, little legislative enactment; mixed judicial holdings. |
| 33 | North Carolina | Recent executive and legislative studies, but little reform; mixed judicial holdings. |
| 34 | North Dakota | Relatively inactive executive and legislative branches; limited case law. |
| 35 | Ohio | Recent executive action, little legislative enactment; restrictive judicial holdings. |
| 36 | Oklahoma | Unusually inactive in executive and legislative branches; insufficient case law. |
| 37 | Oregon | Moderate legislative action directed at reducing role of state; judicial deference to local authority where statutes exist, restrictive otherwise. |
| 38 | Pennsylvania | Relatively active executive and legislative branches directed at increasing power of local authority; judiciary holdings restrictive. |
| 39 | Rhode Island | History of legislative and executive activity; somewhat limited case law. |
| 40 | South Carolina | Moderate executive action, little legislative enactment; judicial holdings largely deferential to local authority. |
| 41 | South Dakota | Unusually inactive executive and legislative branches; limited case law. |
| 42 | Tennessee | Recent, but not current, moderate executive and legislative activity; judiciary largely deferential to local authority. |
| 43 | Texas | History of strong local control, but recent trend towards state control; mixed judicial holdings. |
| 44 | Utah | Legislature active in developing a state framework; judiciary largely deferential to local authority. |
| 45 | Vermont | History of strong state control, moderately active executive and legislative branches; judiciary largely deferential to local authority. |
| 46 | Virginia | Moderate legislative activity; mixed judicial holdings. |
| 47 | Washington | Legislature passed exceptionally comprehensive land-use regulations in 1990; mixed judicial holdings. |
| 48 | West Virginia | Relatively inactive legislative and executive branches; mixed judicial holdings. |
| 49 | Wisconsin | Recent legislative and executive activity; judiciary largely deferential to local authority. |
| 50 | Wyoming | Unusually inactive legislative and executive branches; judiciary largely deferential to local authority. |