
OKAPA17 Chapter Conference

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LEGAL ASPECTS OF PLANNING & DEVELOPMENT

“The Future’s Not What It Use To Be”

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I. WELCOME: WHAT'S THE POINT?

Planners wear many hats and are faced with addressing a plethora of issues in their communities – from promoting healthy living to environmental considerations and planning “green” to form-based zoning codes. Underlying each of these complex issues is one essential principle: *Planning affects property rights.*

Fundamental property rights in America stem from two branches of the same tree: the United States Constitution and State Constitutions, and the “common law” (also known as judge-made law. That is, rights that are created by court decisions instead of statutes). While the basic concept of planning a community has long been around (think Chinese, Romans, and Medieval Europe), modern zoning laws as the mechanism used to regulate and restrict the use of land have barely been around 100 years. The implications of these zoning laws are broad, and, as one can imagine, have faced various legal and constitutional challenges since their inception.

While the legal concepts continue to be challenged by lawyers and molded by judges and legislatures, planners are charged with implementing the ordinances and plans of their community and innovating new ideas for the future. The goal here is to provide a 30,000-foot framework of constitutional property rights, of the procedural requirements of the Oklahoma statutes, and of important case law, all to enable you, the planner, a context in which to design and maintain a beautiful and functional city. Along the way, we hope to provide insight from “the other side” by sharing interesting issues that have come across our desks.

II. A BRIEF HISTORY OF PROPERTY RIGHTS

The everyday understanding of property and ownership is a physical one. As the saying goes, “possession is 9/10ths of the law.” However, as a legal concept, “property” is not physical but relational. In an abstract sense, the object does not matter so much as the rights a person has to that object in relation to those around him (rights to exclude, use, and transfer the object). Critical to this concept working is the role of the government. Think back to the feudal system of England where the King and his lords owned the land and allowed people to possess it in exchange for their service or labor. Our “modern” system is a social construct in which the government is not the master but more of a participant. The Constitution and common law place certain protections for both individuals and the government. On the one hand, the government acts for the public interest but is restricted from improperly interfering with private property rights. On the other hand, the government acts as the protector of private property rights by enforcing certain individual protections. In other words, there is a constant balancing act between the interests of the individual and the interests of a community.

III. CONSTITUTIONAL CONSIDERATIONS - WHERE DO GOVERNMENTS GET THEIR POWER TO REGULATE LAND AND WHAT IS THE SCOPE OF THAT POWER?

A. Due Process

The Fifth Amendment of the United States Constitution states:

No person shall ... be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

The rationale behind the Fifth Amendment is that it is “designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” See *Penn Central* [infra].

The Fourteenth Amendment applies the protections of the Fifth Amendment to States. Section One of the Fourteenth Amendment of the United States Constitution states:

[N]or shall any State deprive any person of life, liberty or property, without due process of law.

In the context of the 14th amendment with respect to land use, the primary role of the United States Supreme Court has been to carve out and define the acceptable boundaries of the state’s police power when it is used to regulate the use of property.

The Oklahoma Constitution, Article 2 Section 7 states:

No person shall be deprived of life, liberty, or property without due process of law.

B. Equal Protection

The Fourteenth Amendment also provides equal protection under the law. Note that cases challenging the government’s treatment of a party seeking permission to develop can also be, and often are, framed as equal protection claims, which focus on the treatment of the party and do not require a property interest like due process challenges. A rudimentary application of the equal protection clause in the context of land use would be the prohibition of conditional zoning (i.e., creating special restrictions or conditions not applicable to other property similarly zoned).

C. Takings, Zoning, and the Grey Area In Between

Physical takings arise from a government’s power of eminent domain and the public use doctrine, by which the government has the authority to take private land for a public use, so long as it provides just compensation.

Below are brief summaries of important cases relating to physical takings in the context of land use and development.

- a. *Berman v. Parker*, 348 U.S. 26 (1954).
In *Berman*, the City proposed eminent domain as the method to clear away “slums” and extreme blight in Washington D.C. as part of an urban renewal program (the District of Columbia Redevelopment Act). The City justified the taking under its police power because the slums were injurious to the public health, safety, and welfare. The catch in this case was that the City was going to immediately turn around and sell the land to a private developer to carry out the development plan and construction. Above the objections of the current property owners (who owned a building in the slum), the Court found this to be a valid public purpose, despite the fact that a new private owner would be carrying it out, “the public end may be

as well or better served through an agency of private enterprise than through a department of government.”

- b. *Kelo v. City of New London*, 545 U.S. 469 (2005).
The Court examined a similar issue as in *Berman*. However, in this case, the “take” was not a blighted area at all. The properties being condemned were simply in the proposed development area. The Court held that promoting economic development is a traditional and long accepted government function. The City had a carefully considered development plan, which served a public purpose. The Court found that the City’s determination that the area was sufficiently distressed to justify a program of economic rejuvenation was entitled to deference.
- c. *Board of County Commissioners of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006).
Many states reacted to *Kelo* and its broad interpretation of economic development as a public purpose.¹ This case is Oklahoma’s response and rejection of *Kelo*. Muskogee County instituted condemnation proceedings to allow for water line easements that would solely serve a new proposed power plant. The Court held that economic development alone, in Oklahoma, is not a valid public purpose. “The transfer of property from one private party to another in furtherance of potential economic development or enhancement of a community *in the absence of blight* as a purpose, must yield to our greater constitutional obligation to protect and preserve the individual fundamental interest of private property ownership.” Importantly, Oklahoma’s constitution is more restrictive on this issue than the federal Fifth Amendment and expressly states that no private property shall be taken or damaged for private use with or without compensation.²

Moving from condemnation to zoning, regulatory takings occur where regulation denies all economically beneficial or productive use of land.

Below are brief summaries of important cases relating to regulatory takings in the context of land use and development.

- a. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
This case is the first to recognize a regulatory taking. The Pennsylvania Coal Company sold its surface rights to a parcel of land, retaining the

¹ “Public reaction to *Kelo* was swift and furious. As one commentator noted, once the case was decided, “all hell broke loose.” (See Cole, *Why Kelo is Not Good News for Local Planners and Developers*, 22 GA. ST. U. REV. 803, 803 (2006)) In fact, the case spawned the most intense public reaction ever to a Supreme Court decision not involving race or abortion. Critics quickly emerged from both the right and the left. Conservatives saw the decision as an attack on the foundation of private property while progressives saw it as further evidence that local governmental agencies were in the hip pockets of large corporations and real estate developers.... Virtually every state commenced some sort of legal change - most commonly in the form of legislation or constitutional amendment - to “roll back” the broad definition of public use.” Callies, David L. et al., *Concise Introduction to Property Law*, 1st ed. LEXISNEXIS (2011) (internal quotations omitted).

² See Oklahoma Constitution Article 2 Sections 23 and 24.

mineral rights. Subsequently, Pennsylvania enacted the Kohler Act, banning coal mining if it caused subsidence to any structure used for human habitation. Pennsylvania Coal sued on the theory that the Act amounted to a taking by depriving all rights it had to the minerals of the property. The Court held: “the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” However, while this case first recognized the regulatory take, the remedy was not necessarily just compensation but instead, invalidating the offending ordinance. That position has since been overturned by the Supreme Court (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)).

- b. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).
This is the seminal case establishing zoning ordinances as a valid exercise of legislative authority and not a regulatory taking. The City of Euclid adopted a zoning ordinance, which divided the town into zones and restricted uses within those zones. A property owner sued on Fourteenth Amendment grounds and sought to enjoin the enforcement of the entire ordinance and all attempts of the Village to impose restrictions on his property. The Court examined the ordinance as a whole and found it justified in the City’s exercise of its police power.

Note: This is the Euclid of the term “Euclidean Zoning”.

- c. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).
New York City enacted the Landmarks Preservation Law to protect historic landmarks and neighborhoods, which included Grand Central Terminal. The plans to construct a multi-story office building over the station were rejected and the owner sued, claiming the Landmarks Law constituted a regulatory taking. The Court rejected this argument and found historic preservation to be a valid exercise of police power. In doing so, the Court established certain factors to aide in determining whether such a taking has occurred: (i) the economic impact of the regulation on the [property owner]; (ii) the extent to which the regulation has interfered with distinct investment-backed expectations; and (iii) the character of the governmental action.
- d. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
The plaintiff owned beachfront property that he planned to build residential houses on, similarly to the rest of the houses that currently existed down the beach. South Carolina enacted the Beachfront Management Act which prohibited the construction of any occupiable improvements. The Court reiterated its definition of a regulatory taking (“The Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests or denies the owner economically viable use of his land.”) The Court further defined a regulatory taking requiring just compensation

as “the total deprivation of beneficial use” of property, reasoning that “from a landowner’s point of view, [this] is the equivalent of a physical appropriation.”

IV. STATUTORY FRAMEWORKS - WHERE DOES THE GOVERNMENT GET ITS POWER TO ZONE?

Inherent in the power to govern is the police power.³ The governmental police power is simply the power vested in a government to regulate on behalf of the health, welfare, and safety of its citizens.⁴ In other words, it is authority of the state and its political subdivisions to impose restraints on private rights as necessary for the general welfare.

The power of local governments, such as municipalities and counties, to regulate land is not an inherent power of the local government but derived from the state’s police power. Generally, local governments are given a broad delegation of this power from the state (see below Title 11 and 19), but importantly, a city or county only has those powers expressly delegated to it in the relevant enabling statutes.

In Oklahoma, the enabling statutes for counties and municipalities to regulate land use are found in Title 19 and Title 11, respectively. The statutory structure of Title 19 is complicated and contains various enabling provisions, primarily depending on the population size of the county. However, the language contained in each enabling provision in Title 19 is generally the same.

By way of example, 19 O.S. § 863.13 states:

For the purposes of promoting the public health, safety, peace, morals, comfort, convenience, prosperity, order, quality of life, and general welfare, and to lessen danger and congestion of public transportation and travel, and to secure safety from fire and other dangers, and to prevent overcrowding of land, and to avoid undue concentration of population, and to provide adequate police protection, transportation, water, sewerage, schools, parks, forests, recreational facilities, military and naval facilities, and other public requirements, and to prevent undue encroachment thereon, the council, as respects the municipality and the board of any such county, as respects the unincorporated areas of the county, are hereby empowered in accordance with the conditions and procedures specified in this act, in the areas, respectively, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of the lot or area which may be occupied, the size of yards, courts and other open spaces, the density and

³ “It is a well-settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the right of the community.” *Commonwealth v. Alger*, 61 Mass. 84-85 (1851) (quoting Justice Lemuel Shaw). Early notions of the police power are found in the Latin maxims *sic utere tuo ut alienum non laedas* (“use that which is yours so as not to injure others”), and *salus populi suprema lex esto* (“the welfare of the people shall be the supreme law”).

⁴ “Every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.” Theodore Roosevelt, *The New Nationalism*, August 31, 1910, in *SOCIAL JUSTICE AND POPULAR RULE* (1926).

distribution of population, and the uses of buildings, structures and land for trade, industry, residence, recreation, civic and public activities and other purposes.

With respect to municipalities, Title 11 is a bit less cumbersome. 11 O.S. § 43-101 states:

For the purpose of promoting health, safety, morals, or the general welfare of the community, a municipal governing body may regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of the lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

V. WHAT SPECIFIC POWERS ARE ENUMERATED AND WHAT PROCEDURES MUST BE FOLLOWED?

A. Counties

County zoning is regulated under Chapter 19A of Title 19 of the Oklahoma Statutes. Below is an abbreviated summary of some of the provisions of Chapter 19A.

1. 19 O.S. § 863.1 et seq. Counties Containing City of 180,000 Population

(a) *§ 863.1 City-County Cooperative Planning Commission and County Board of Adjustment Created in Certain Counties*

(b) *§ 863.2 Counties and Cities to which Applicable-Metropolitan Area Planning Commission-Contributions*

- Any county having more than 50% of the incorporated area of a city having not less than 180,000 population;
- Can form a cooperative planning commission with that city and may combine their funds;
- The city-county cooperative planning commission shall be called the Metropolitan Area Planning Commission;
- The city may adopt a city plan and the county may adopt a county plan for the unincorporated areas of the county.

(c) *§ 863.5 Members of Commission-Appointment-Term-Vacancy-Removal-Ex Officio Members-Members to Serve without Compensation*

- 11 members:
 - 6 appointed by the Mayor and approved by City Council;
 - 3 appointed by the Board of County Commissioners;
 - Mayor or his designee and chairman or his designee shall be ex officio members and entitled to vote on all matters.

(d) § 863.7 *Master Plan-Purposes-Public Hearing-Adoption*

- The Commission shall make, adopt, and may publish a master plan of the municipality, and of the unincorporated area of the county, for the purpose of bringing about a coordinated physical development in accordance with the present and future needs of such area.

(e) § 863.9 *Rules and Regulations Governing Plats and Subdivisions-Violations of Act*

- No plat of a subdivision shall be received for record in the office of the county clerk until it has been approved by the Commission;
- Approval or refusal to approve shall take place within thirty (30) days of its submission, otherwise, the plat shall be deemed approved.

(f) § 863.13 *Power to Regulate Type and Use of Buildings-Exceptions*

- This is the enabling language granting the power to zone.

(g) § 863.20 *County Board of Adjustment-Members-Meetings-Employees-Expenses-Fees*

- 5 members
 - Residents of the county;
 - 2 must reside outside the corporate limits of the county seat;
 - 3-year term.

2. 19 O.S. § 866.1 et seq. City-County Planning and Zoning

(a) § 866.1 *City-County Planning and Zoning-Metropolitan Area Planning Commission-County Board of Adjustment-Act Expanded to Include Smaller Cities*

- In any county where there is no city with a population more than 200,000, one or more city and county planning and zoning commissions may form a Metropolitan Area Planning Commission, and a county board of adjustment.

(b) § 866.2 *City and County Powers*

- This section does not prohibit a city from creating its own separate planning commission to act within the boundaries of the municipality.

(c) § 866.10 *Metropolitan Comprehensive Plan*

- This section sets forth the requirements for the content of a comprehensive plan along with the approval process.

3. 19 O.S. § 865.51 et seq. County Planning and Zoning

(a) § 865.51 *County Planning Commission and County Board of Adjustment Authorized*

- A County Board of Adjustment and planning commission may be formed in the alternative to a metropolitan area planning commission.

(b) § 865.53 *Territorial Jurisdiction*

- Jurisdiction over all unincorporated portions of the county.

(c) § 865.58 *Adoption and Amendment of Plan-Notice and Hearing-Public Record*

- The county may adopt a plan. This section sets forth the procedure to do so.

(d) § 865.69 *Existing County Planning Commissions-Advisory Agency*

- Any incorporated city or town within a county having a county planning commission is authorized to contract with or retain such commission to function as an advisory, consultative, and coordinating agency for such city or town in its urban planning activities.

4. 19 O.S. § 868.1 et seq. Counties of Over 500,000

(a) § 868.5 *Procedure of County Planning Commission*

- One regular meeting a month;
- Notice of every hearing at least each week for 3 successive weeks prior to the date of the hearing.

(b) § 868.6 *Master Plan*

- County planning commission shall adopt a master plan.

(c) § 868.11 *Zoning by Board of County Commissioners*

- Board of county commissioners is empowered to adopt zoning regulations for the unincorporated areas of the county. The zoning power conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted except as specifically provided in this act.

(d) § 868.12 *Zoning Regulations Defined*

- Zoning regulations are hereby defined as regulations restricting the height, number of stories and size of buildings, the percentage of lots that may be occupied, the size of yards, courts, and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, recreation and other purposes.

(e) § 868.15 *Procedure for Adoption of Zoning Regulations*

- County planning commission makes recommendation by preliminary report to the board of county commissioners;
- Public hearings to be held;
- Within 90 days after final adjournment of public hearings, commission makes final report with summary of results of the public hearings;
- County commissioners may adopt or refer back to the planning commission for further consideration.

B. Cities

City zoning is regulated under Articles XLIII, XLIV, XLV, XLVI, and XLVII of Title 11 of the Oklahoma Statutes. Below is an abbreviated summary of selected provisions of these Articles.

1. Article XLIII Buildings and Zoning

(a) § 43-101 *General Powers of Municipalities*

- This is the requisite enabling language.

(b) § 43-103 *Purpose of Regulations-Comprehensive Plan*

- Municipal regulations as to buildings, structures, and land shall be made in accordance with a comprehensive plan.

(c) § 43-109 *Appointment of Zoning Commission*

- In order to avail itself of the powers conferred by this Article, the municipal governing body shall appoint a commission to be known as the zoning commission to recommend the boundaries of the various original districts and to recommend appropriate regulations to be enforced therein. The commission shall make a preliminary report and hold public hearings thereon before submitting its final report. The governing body shall not hold its public hearings or take action until it has received the final report of the commission. Where a municipal planning commission already exists, it shall be appointed as the zoning commission.

(d) § 43-110 *Planned Unit Developments*

- This section defines PUDs and the procedures required for application, review, and approval.

2. Article XLIV Board of Adjustment

(a) § 44-101 *Board of Adjustment-Appointment*

- Where a municipality is exercising zoning powers, as conferred by [this Article], the governing body of the municipality shall provide by ordinance for the appointment of a Board of Adjustment.

(b) § 44-104 *Powers*

- The Board of Adjustment has the following powers:
 - To hear appeals of Administrative Determinations;
 - To hear and decide special exceptions;
 - To authorize variances.

3. Article XLV Municipal Planning Commissions
- (a) § 45-101 *Municipal Planning Commissions-Appointment Authorized-Ordinances*
- A municipal governing body may appoint a municipal planning commission whenever it is deemed expedient and may pass suitable ordinances for carrying out the provisions of this article.
- (b) § 45-103 *Duties and Powers of the Planning Commission-Employees*
- Prepare plans for the betterment of the municipality;
 - Make recommendations to the governing body;
 - Make surveys, maps, or plans.
4. Article XLVI Regional Planning Commissions
5. Article XLVII City Planning - Cities With Populations Over 200,000
- (a) § 47-102 *Grant of Power to Municipality*
- Creation of city planning commission.
- (b) § 47-106 *General Powers and Duties*
- The function and duty of the commission shall be to make and adopt a master plan for the physical development of the municipality.
- (c) § 47-112 *Transfer of Zoning Powers and Duties to Planning Commission*
- In order to avoid a multiplicity of boards and commissions and to avoid a duplication of functions, the council may transfer to the city planning commission all of the powers and duties of any zoning commission or planning commission now existing and may authorize the city planning commission to exercise the powers and to perform the duties relative to the formulation of zoning regulations which are now authorized by law. The provisions of this article shall not be construed as a general grant of power to municipalities to create districts and regulate buildings and land uses therein, but that power shall continue as may be authorized by law.

VI. WHAT HAPPENS WHEN THE GOVERNMENT'S POWER IS CHALLENGED? JUDICIAL REVIEW OF LOCAL GOVERNMENT DECISIONS

A. Standards of Review on Appeal: Boards of Adjustment, Planning Commissions, and Municipal Governing Bodies

Planning Commissions are, for the most part, an advisory body to the governing municipal authority (typically a City Council or Board of County Commissioners).⁵ Appeal of a decision from these governing municipal authorities hinge on the reasonableness of the decision and whether or not it was arbitrary and capricious. Courts do not like to interfere with legislative functions and afford great deference to these decisions.

When a municipality is acting in its legislative capacity, “its expressed judgment on the subject will not be overridden by the judiciary, unless the same is unreasonable, arbitrary, or constitutes an unequal exercise of police power.” *Oklahoma City v. Barclay*, 1960 OK 254 ¶ 16.

“[U]nless the zoning decisions of a municipality are found not to have a substantial relation to the public health, safety, moral or general welfare or to constitute an unreasonable, arbitrary exercise of police power, its judgments will not be overridden by the district court.” *Mid-Continent Life Insurance Co. v. City of Oklahoma City*, 1985 OK 41 ¶ 9.

In assessing whether a municipal action is arbitrary and capricious, courts follow the “fairly debatable rule,” which states, “if the question is fairly debatable as to whether or not the ordinance is unreasonable, arbitrary, or an exercise of unequal power, it should be allowed to stand.” *Barclay* ¶ 16 (citing *In re Dawson*, 1928 OK 754). Thus, “if the minds of reasonable men differ as to whether a particular zoning classification is reasonable, the legislative enactment will stand and the judiciary will not interfere.” *Barclay* ¶ 16. Further, “the ‘fairly debatable’ rule is not a rule applicable to mere words or expressions of opinions, but is applicable to the basic physical facts which would make each zoning ordinance stand or fall on the pertinent basic physical facts involved.” *Id.* ¶ 22.

The Oklahoma Supreme Court has held that “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.” *Hoffman v. City of Stillwater*, 1969 OK 190.

From a procedural standpoint, the statutes set out the specific manner in which a legislative decision must be appealed. Pursuant to 11 O.S. § 43-109.1, “Any suit to challenge any action, decision, ruling or order of the municipal governing body under the provisions of this article shall be filed with the district court within thirty (30) business days from the action, decision, ruling or order.”

Further, because the action by a city council is legislative in nature, as discussed above, “a person aggrieved by the action of [the municipality] in passing upon an application for change of a zoning ordinance may challenge such action by filing a petition in the district court seeking injunctive relief in an equitable action against the ordinance.” *O’Rourke v. City of Tulsa*, 1969 OK 112.

⁵ See e.g., Title 19, Section 863.23 Appeals to District Court from acts of the Commission, “There shall be no right to appeal from any act of the commission in its advisory capacity to the council and board or from any of its acts which are subject to review, repeal or modification by said governing bodies.”

Below are brief summaries of important Oklahoma cases relating to the appeal of legislative decisions in court and the application of the “fairly debatable” rule.

- a. *Garrett v. City of Oklahoma City*, 1979 OK 60.
Plaintiff filed an application to OKC City Council to rezone from Single Family to Restricted Commercial. The subject property was located one lot west of a major arterial street, zoned largely Restricted Commercial, and multi-family. The City denied the application and Plaintiff sought injunction in district court. City confessed that single family was probably too restrictive for the area. The district court found the City’s refusal to rezone unreasonable and an arbitrary and capricious exercise of police power. City appealed. The Supreme Court affirmed in part, finding “an examination of the record indicates the facts support a finding by the trial court that retention of the single family dwelling classification by City was unreasonable as applied to subject property.”

- b. *Mid-Continent Life Insurance Co. v. City of Oklahoma City*, 1985 OK 41.
Plaintiff filed application to the City to rezone property from single family and historical preservation to restricted commercial, for use of parking lots. City denied the application and plaintiff challenged in district court. The district court enjoined the City from enforcing the zoning classifications because the use of the property as a parking lot would in no way affect the health, safety, or welfare of the inhabitants of the City. The City appealed. The Supreme Court reversed the district court, finding the City’s zoning decision “fairly debatable.” It found that in creating the historical preservation district, the City was attempting to create a stable residential haven free from commercial intrusion into a historic section of the City. While this alone would not be enough for the City to deny the zoning, the existence of conflicting opinions and the City’s presentation of highly regarded planning experts was added indication that the zoning decision was fairly debatable.

- c. *Oklahoma City v. Barclay*, 1960 OK 254.
The City adopted a zoning ordinance that expanded the boundaries of a commercial zoning district. Residents of surrounding lots challenged the ordinance but the City adopted it against their protests and against the recommendations of the Planning Commission. The trial court found the ordinance invalid and unreasonable because it had no relation to public safety or welfare, that in fact it would create additional dangers, that there had been no change in the character of the use of the property nor was the new zone a result of any comprehensive scheme for improving zoning. The Supreme Court affirmed.

Unlike municipal governing authorities and planning commissions, boards of adjustment are quasi-judicial bodies, separate from the governing municipal authority. Appeals of board of adjustment decisions are heard *de novo* by a court. In other words, the court steps into the shoes of the board and does not have to consider the decision made below, only the facts of the case.⁶

⁶ See *e.g.*, Title 19, Sections 863.21 and 863.22 Appeals to Board, Judicial Review in District Court.

B. Other Important Oklahoma Land Use Cases

1. *City of Tulsa v. Mizel*, 265 P.2d 496 (1953).
A property owner was denied a certificate of occupancy for use of his property as wholesale and retail sales of new and used oil well supplies. The Board of Adjustment affirmed the denial of the certificate of occupancy, arguing that the use was not allowed in the particular zoning district because it was not solely a commercial business but also constituted an industrial use, which was not permitted in such zoning district. The trial court reversed the Board's decision and the Oklahoma Supreme Court affirmed the trial court. The Court interpreted the zoning code at issue and found for the property owner, using the rule of statutory construction that zoning ordinances, in derogation of common law right to use private property so as to realize its highest utility, should not be extended by implication to cases clearly not within their scope and purpose.
2. *Oklahoma City v. Harris*, 126 P.2d 988 (1941).
A property owner was granted a special exception by the Board of Adjustment and the City appealed. The City argued that the use was not allowed due to private plat restrictions. The Court found that (1) Cities are empowered with the legislative power to zone; and (2) Boards are empowered to make exception or "vary" the zoning ordinance in specific cases. The Court reasoned that "if exceptions are not to be contemplated and indulged in proper cases, the ordinance might be in some instances an oppressive, arbitrary and capricious ordinance and therefore unconstitutional." Additionally, the City's reliance on the plat restrictions was improper.
3. *Mustang Run Wind Project LLC v. Osage County Board of Adjustment*, 387 P.3d 333 (2016).
Mustang Run requested a special exception for a wind turbine farm and was denied by the Board of Adjustment. This case involves various procedural and substantive issues. The Court further expounded on the quasi-judicial powers of a Board of Adjustment but noted these powers are not unfettered. In the context of special exceptions, the Board has the discretion to impose reasonable conditions on a use that is already permitted by the ordinance. When balancing competing interests of a property owner and the public, the Board's decision must be based on the evidence before it and fixed principles.
4. *Bankoff v. Board of Adjustment of Wagoner County*, 875 P.2d 1138 (1994).
An owner applied for a conditional use permit to operate sanitary landfill and the Board denied. On appeal, the trial court reversed and ordered the Board to set appropriate conditions. The Board appealed. While the appeal was pending, the County amended the zoning code that would have rendered the appeal moot. The Court held that amendments to zoning

ordinances cannot apply retroactively to require a change or destruction of an existing lawful use of property (as in this case). However, generally a property owner does not have a vested interest or right in the continuation of an existing zoning classification. The property owner's plans for future development were not protected against later zoning amendments.

5. *Holtzen v. Tulsa County Board of Adjustment*, 97 P.3d 1150 (Okla. Civ. App. 2004).

The Board of Adjustment granted a special exception to expand Bell's Amusement Park. Opponents appealed to the district court, which found the special exception should not have been granted because it was not in accordance with the comprehensive plan. The Appeals court reversed, finding that where a zoning ordinance and comprehensive plan are in conflict, the zoning ordinance prevails.

6. *Glaser v. Tulsa Metropolitan Area Planning Commission*, 360 P.2d 247 (1961).

Approval or denial of subdivision plats is within the limits conferred by statute. In this case, the TMAPC approved a plat and the Court found that, while it may result in the diminution of the value of a piece of property for development purposes, it was not arbitrary and capricious. Under the circumstances of this case, "the rights of the individual must yield to the rights of the public as a whole."

7. *Terry v. Bishop*, 158 P.3d 1067 (2007).

The City of Owasso approved zoning of a parcel for a new hospital. Property owners in Owasso sought to rezone the same property to single-family residential for ten years by initiative petition. The Court found the initiative petition to unconstitutionally bind the City from exercising its legislative power to zone.

VII. PROFESSIONAL PERSPECTIVE - COMMON ISSUES FACED BY LAND-USE ATTORNEYS

A. Notice Issues

"Compliance with statutory notice and public hearing requirements is essential to the validity of a zoning ordinance." *E&M Invs. Co. v. Town of Dickson*, 1985 OK CIV APP 45, ¶ 14, 713 P.2d 1052. When a municipality fails to comply with the statutory notice requirements, the subject ordinance is void. *Id.*

B. Ambiguity

It is well established in Oklahoma that zoning ordinances are to be strictly construed in favor of the landowner. In *City of Tulsa v. Mizel*, 1953 OK 353, 265 P.2d 496, the property owner was denied a certificate of occupancy for use of his property as wholesale and retail sales of new and used oil well supplies. The Board of Adjustment affirmed the denial of the certificate of

occupancy, arguing that the use was not allowed in the particular zoning district because it was not solely a commercial business but also constituted an industrial use, which was not permitted in such zoning district. The trial court reversed the Board's decision and the Oklahoma Supreme Court affirmed the trial court. In interpreting the zoning ordinance, the Court held that "*zoning ordinances, being in derogation of the common-law right to use private property so as to realize its highest utility, should not be extended by implication to cases not clearly within their scope and purpose.*" *Id.* at 498 (citing *Modern Builders v. Building Inspector of City of Tulsa*, 197 Okla. 80, 168 P.2d 883) (emphasis added). Moreover, zoning ordinances "will be strictly construed and *any ambiguity or uncertainty decided in favor of property owners.*" *Id.* (citing *Kubby v. Hammond*, 68 Ariz. 17, 198 P.2d 134) (emphasis added).

This approach to the interpretation of zoning ordinances is not unique to Oklahoma. "The prevailing rule in most jurisdictions, in the absence of any statute to the contrary, is that zoning laws should be strictly construed in favor of the property owner or to favor the free use of property." 83 Am. Jur. 2d *Zoning and Planning* § 595 (2017).

Courts around the country rely on this maxim of strict construction when it comes to the derogation of common law property rights and the restrictions imposed by municipal zoning laws. See, e.g., *In re Willowell Foundation Conditional Use Certificate of Occupancy*, 140 A.3d 179, 184-85 (Vt. 2016) ("A fundamental land-use principal . . . zoning ordinances must be construed narrowly in favor of the landowner to minimize their hindrance on property rights. *Strict construction ensures that a landowner understands what it can and cannot do with the land.*") (emphasis added) (Internal citations omitted); *Newton Square East, L.P. v. Township of Newton*, 101 A.3d 37, 51 (Pa. 2014) ("Of course, property rights may be reasonably limited by zoning ordinances enacted pursuant to a municipality's police power. However, *because restrictions imposed by zoning ordinances are in derogation of a landowner's property rights, they must be strictly construed.*"); and *Haralson County v. Taylor Junkyard of Bremen, Inc.*, 729 S.E.2d 357, 360 (Ga. 2012) ("Zoning ordinances are to be strictly construed in favor of the property owner. Since statutes or ordinances which restrict an owner's right to freely use his property for any lawful purpose are in derogation of the common law, they must be strictly construed and *never extended beyond their plain and explicit terms.* Any ambiguities in the language employed in zoning statutes should be resolved in favor of the free use of property.") (emphasis added).

VIII. CONCLUSION

The foregoing overview is far from exhaustive of the legal framework and context behind regulating the use of land. Nonetheless, it should provide insight into the underlying public policy considerations. When planning for your community or your client and working with your local planning authorities, a better understanding of the law will allow you to avoid the mistakes other have made in the past and focus on the future.