

## **POLICE POWERS**

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“Police power” is the inherent authority of the state (and, through delegation, local governments) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests: personal interests in autonomy, privacy, association, and liberty as well as economic interests in freedom to contract and uses of property.

For more than a century, a government’s police power has been used to justify regulating the use of land. Courts have upheld the delegation of these broad powers to state and local governments on the basis of, first, the Tenth Amendment to the US Constitution, which delegates police power to the states, and, second, state constitutions, which typically delegate police powers to local governments (see, for example, Article 11 of the California Constitution). Police power is broad in scope and elastic in nature, expanding to meet the changing needs of modern life.

Subject to federal and state constitutional limits, an ordinance promulgated by a state or local government is legitimate so long as the use of police power has a rational relationship to a legitimate state purpose such as protection of the public’s health, morals, safety, or general welfare. Governments may find the rational basis for their ordinances in scientific studies or other types of less rigorous data or information that arguably support a legislative body’s conclusion that a regulation is justified. Epidemiological reports and public health data are strong grounds upon which to base government policies or local ordinances. Because government agencies are provided broad discretion in determining which policies or ordinances are needed to protect the health, safety, welfare, and morals of their community, the ordinances will be upheld in court unless they are arbitrary, capricious, or entirely lacking in evidentiary support.

## **LAND USE CONTROLS**

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Local governments use police powers to restrict a private property right so as to avoid harm to the public. A primary way that police powers are expressed is through city planning and public health departments using their respective powers to further the public good. In fact, the modern disciplines of public health and city planning developed from common roots with similar objectives, strategies, and standards.

During the 19th century, land use planning emerged as a mechanism designed to address 2 endemic public health problems: tuberculosis and cholera. The spread of disease was associated with pervasive overcrowding, a lack of sanitation, poor hygiene, insufficient water supply, insufficient fresh air, limited opportunity for outdoor recreation, and long

working hours in the factories and mills. Reformers, most notably Edwin Chadwick, were the driving force behind the sanitary laws that formed the basis of both city planning and public health practice. In 1843 in England, these innovative laws culminated in the first comprehensive public health act. While this act did not include zoning as a specific regulatory function of government, it did call for the mapping of sewage facilities to ensure that new dwellings were equipped with drains and lavatories.

New York City was the forerunner of modern zoning; in the 1890s, it established design standards to ensure that light, air, water, and sewage were available to residents of tenement houses. Zoning ordinances apply both general and location-specific restrictions on certain uses of property. They establish the uses of property in different areas or “zones” within a government’s geographic boundaries. For example, residential, commercial, industrial, or agricultural zones determine where housing, shopping, manufacturing, and animal husbandry may or may not occur within the jurisdiction. Mixed-use zones allow a variety of activities to occur in the same area. Ideally, zoning ensures that activities that should be near each other—such as housing and grocery stores—can be near each other and that those activities that should be separated—such as housing and heavy industry—are indeed separate.

The Standard State Zoning Enabling Act, ultimately enacted in nearly every municipality in the nation (except Houston, Tex), was developed by the US Department of Commerce in the 1920s to assist in the delegation and spreading of zoning powers from state to local governments, and it included promotion of “health and general welfare” as one goal of zoning.

In 1926, the US Supreme Court confirmed that cities and counties possessed the necessary police powers of the state to regulate public and private land uses for the “health, safety, welfare, and morals” of the people of those jurisdictions. The court stated that the need for zoning regulations “is so apparent that they are now uniformly sustained” and that the “scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.”

Conditional use permits (CUPs), sometimes called “special use permits” or “special exceptions,” are a refinement of zoning powers whereby the government makes exceptions for specific uses of land otherwise prohibited by general zoning controls as long as the property owner meets certain conditions. With a CUP requirement, a local government can make an *individualized* determination as to suitability of a proposed use in a particular location. CUPs give governments additional flexibility to determine whether a particular proposed use is compatible with existing, neighboring uses of property and afford an opportunity to impose particularized conditions to mitigate potential problems posed by the use. They also give governments the ability to deny a zoning request if the applicant cannot show a community “need” for the proposed use.

Public health advocates have reconnected with the historic roots of zoning controls as a mechanism for promoting public health and welfare and have applied the traditional city planning tools of zoning and CUPs to modern issues of public health protection. In addition to a familiar focus on vector control and building codes—which are still pressing public health concerns in communities plagued by antiquated or inadequate public infrastructures or dilapidated housing—public health advocates are using zoning and other land use tools to control the proliferation and negative public health effects of alcohol, tobacco, and gun sales in urban environments. While there is significant variation among states regarding local authority to control these types of outlets, zoning tools nonetheless offer creative new opportunities for communities to exert control over public health, safety, and welfare as deemed necessary at the local level.

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**Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants**

[Marice Ashe](#), JD, MPH, [David Jernigan](#), PhD, [Randolph Kline](#), JD, and [Rhonda Galaz](#), JD