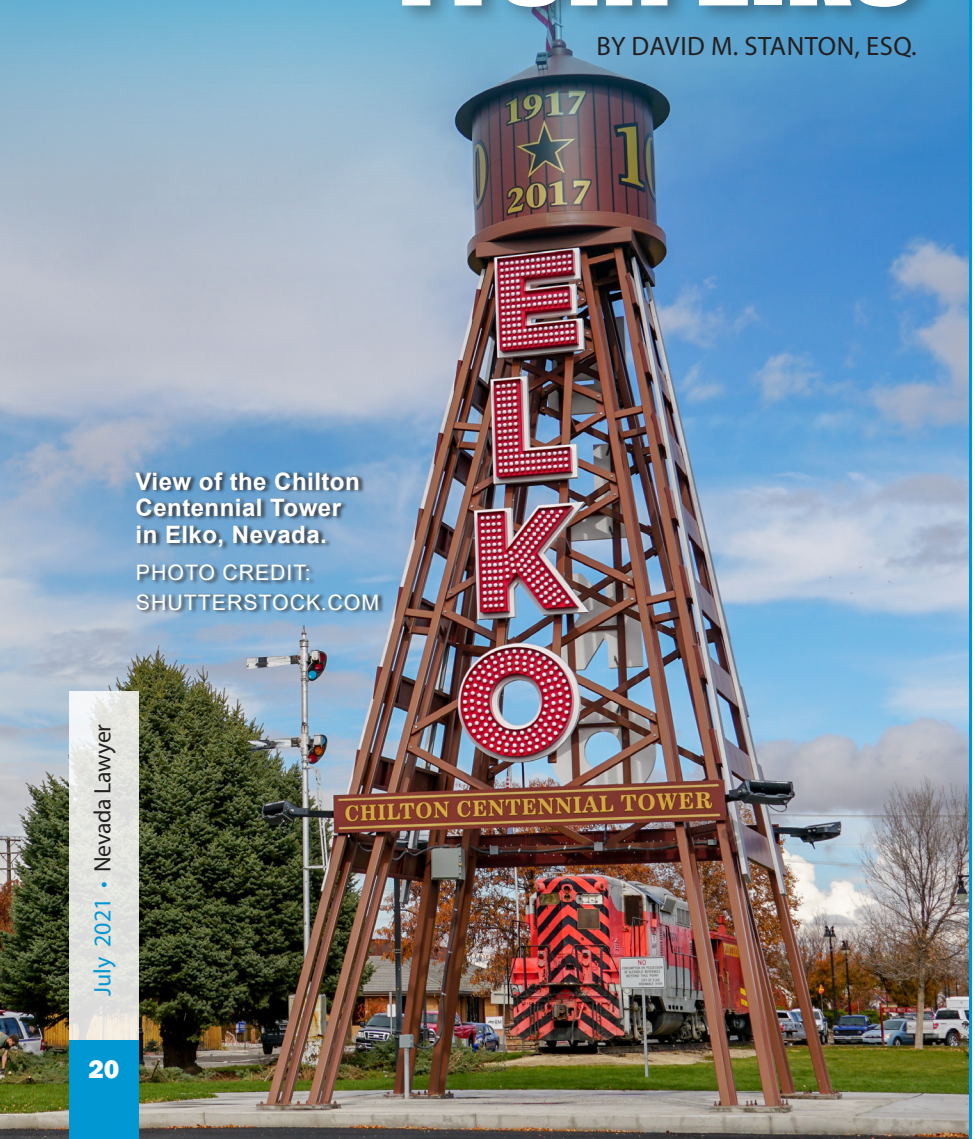
Land-Use Planning and Control: A Perspective From Elko

BY DAVID M. STANTON, ESQ.

Land-use planning and control occupies a complex and at times controversial area of the law, where constitutionally protected property rights intersect with a community's need to prevent unplanned growth. From a city's perspective, the process involves balancing a multitude of interests, including aesthetics, practicality, and socioeconomic factors. However, such regulations have been criticized for impacting property values, introducing an artificial rigidity to what should be determined by the marketplace, and creating a strain on public services.



View of the Chilton Centennial Tower in Elko, Nevada.

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Although this article provides an overview of land-use planning and control from my perspective as the Elko City Attorney, the same principles apply to many communities throughout state.

Master Plan

In Nevada, the land-use planning process typically begins with a master plan—a document designed to serve as a pattern and guide for the orderly physical growth and development of a city or county in a manner that will cause the least amount of natural resource impairment and ensure an adequate supply of housing, including affordable housing. Certain cities and counties are also required to ensure conformity with an adopted population plan.[1] Master planning provides a "30,000-foot view" of growth patterns, guiding on-the-ground decisions that ideally maximize the use of space while mitigating the effects of development on existing uses. Master plans are intended to work more as a set of guidelines for other land-use decisions rather than a "legislative straitjacket," and they are typically amended from time to time.

The city of Elko Master Plan is the city's guiding document for nearly all land-use decisions, taking into consideration transportation requirements, parks and recreation, open space, arts and culture, housing, and historic preservation. The Elko Master Plan also contains geographic classifications with intentionally vague land-use descriptions, such as ranges of residential development densities appropriate for

specific areas. These generalized area classifications are then used to guide more specific land-use decisions, such as zoning classifications and subdivision development standards.

Zoning

Zoning regulation is where the broad visions and aspirations of the master plan become enforceable development standards. Zoning districts are intended to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."[2] Zoning regulations must be compatible with the master plan but need not be in perfect conformity with every master plan policy, so long as the zoning regulation does not frustrate the master plan's goals and policies.[3] Zoning regulations should reflect the character of the area and its peculiar suitability for particular uses, with a view to conserving the value of buildings and encouraging the most appropriate use of land.[4] As with the master plan, Elko's zoning ordinances are reviewed and amended periodically.

Zoning may be used to create buffers between otherwise incompatible uses. For example, multi-family residences (e.g., apartment buildings), which have moderate impacts, may be used as a transition between single-family residential and commercial zoning districts. Similarly, a mixed-use district, such as a residential-office district, might be designated along a busy thoroughfare to separate heavy traffic from single-family residences in quiet neighborhoods.

In Elko, zoning districts generally divide permitted uses into principal uses, accessory uses, and uses requiring conditional-use permits. Principal uses and accessory uses require little to no review by the city, having been predetermined to be compatible within the district. On the other hand, uses requiring a conditional-use permit have the potential to be incompatible with other land uses in the district. Requiring conditional permits gives the city the discretion to consider various factors, such as policy conflicts, noise impacts, changes to community character, public health issues, and lowering of property values.[5] For example, in a commercial district where bars are listed as conditional uses, the city could impose such conditions as increased exterior lighting to discourage loitering, fighting, and other activities that might prove troublesome to surrounding businesses. Thus, through the conditional-use process, the city may impose mitigating standards in advance of the proposed use.

Variances, often confused with conditional-use permits, provide yet another means of permitting uses of land that are not in strict conformity with the zoning district while giving the city discretion to examine the unique circumstances of the proposed use. Variances may be appropriate when an exception is needed to make effective use of an otherwise conforming use, such as where a structure must be constructed within a property line setback area in order to meet minimum area requirements. In such cases, the city is able to exercise discretion in deciding whether to grant the variance, taking impacts on surrounding uses into account.

To mitigate the impact of changing zoning regulations, existing nonconforming uses are generally "grandfathered" as "legal nonconforming uses." In other words, uses that are now nonconforming but were compliant when they commenced are generally permitted to continue indefinitely unless abandoned or unless they are found to be contrary to the health, safety, welfare, or morals of the community.[6]

> **The process of land-use planning and control in Nevada is subject to a variety of statutes and court-made rules designed to strike a balance between the need for cities and counties to regulate growth and development, and the need to protect property rights.**

Development Standards

Development standards provide another means of protecting the public from the effects of unchecked growth. In Elko, a person seeking to subdivide and develop land must follow a comprehensive review and approval process through which the city is able to ensure the adequacy of infrastructure and improvements. To compel compliance with development standards, the city can, among other things, utilize performance and maintenance guarantees, and ultimately withhold certification of the final subdivision map—a prerequisite to the developer's ability to sell property within the subdivision. Through various regulations, the city has the ability to impose conditions on the developer for the protection of the public, including future residents of the development. Thus, a developer would ordinarily be required to install public improvements and obtain will-serve letters from utilities before selling residential lots to trusting buyers.

Regulatory Takings

Questions about regulatory takings can come up in the context of land-use planning and control. Everything from master planning to conditional-use permit requirements can restrict or even prevent desired land uses. Courts over the years have settled on a rule that protects "investment-backed expectations" in the majority of regulatory taking cases.[7] For example, in *NDOT v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 420-21 (2015), the Nevada Supreme Court found that an amendment to a master plan did not constitute a regulatory taking, in part, because the impact on the developer's investment-backed expectations to develop its property was negligible. The *NDOT* court further found that the character of the government action was more akin to "adjusting the benefits and burdens of economic life to promote the common good" than to a physical invasion, concluding that the regulation's impact on the developer's property did not constitute a regulatory taking. *Id.*

Zoning ordinances, which are presumed to be valid, are analyzed similarly in the context of condemnation and takings claims.[8] For example, in *Clark County v. Alper*, 100 Nev. 382 (1984), the Nevada Supreme Court held that a "reasonable and prudent buyer"

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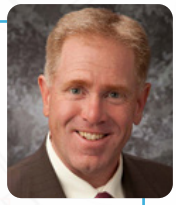
standard is used in determining the market value of land in a takings case. Thus, a landowner generally takes the risk of present and likely future zoning changes.[9]

The process of land-use planning and control in Nevada is subject to a variety of statutes and court-made rules designed to strike a balance between the need for cities and counties to regulate growth and development, and the need to protect property rights. The goal is to do this in a way that is enlightened, rational, and sustainable in the midst of myriad changing uses and competing interests.

ENDNOTES:

1. Pursuant to NRS 278.200, the master plan must "be a map, together with such charts, drawings, diagrams, schedules, reports, ordinances, or other printed or published material, or any one or a combination of any of the foregoing[.]"; *Sustainable Growth v. Jumpers, LLC*, 122 Nev. 53, 62 (2006) (citing NRS 278.150(1)(2)).
2. NRS 278.250(1).
3. *Jumpers,* supra, 122 Nev. at 64-65.
4. NRS 278.250(3).
5. *See, e.g., Redrock Valley Ranch v. Washoe County*, 127 Nev. 451, 457 (2011) (noting factors as county's grounds for denial of special use permit.)
6. *See Kuban v. McGimsey*, 96 Nev. 105, 112 (1980) (prohibited use not taking if valid exercise of police powers); 8A McQuillin, Law of Municipal Corporations § 25:248 (2020) (nonconforming uses subject to regulatory ordinances.)
7. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *see Vacation Village, Inc. v. Clark County*, Nev., 497 F.3d 902, 918 (9th Cir. 2007); *McCarran Intern. Airport v. Sisolak*, 122 Nev. 645, 662 2006) (discussing regulatory per se takings.)
8. *McKenzie v. Shelly*, 77 Nev. 237, 242 (1961).
9. *City of Las Vegas v. Bustos*, 119 Nev. 360, 362 (2003).



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