

HOW TO AVOID PROBLEMS WITH LOCAL GOVERNMENT: ZONING ISSUES

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I. ZONING AND HOW IT AFFECTS YOU

Zoning is basically the right to control how people use their real estate. The term "zoning" to the average American or business owner means a municipality's right to divide itself into regions based upon types of property use, building size and other like regulations such as industrial zones versus residential zones. We associate this term with local government; the city, county or other municipalities within which we live and work. So the big question is where do cities, towns, villages, counties and municipalities get the right to tell us how we can use our property.

In America the power of local government to regulate how we use our property is known as the Police Power, and it originates from an English legal principal which states that you have the right to enjoy your property in a manner that does not cause injury to the property of another. The Tenth Amendment of the United States Constitution provides that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

So, the federal government gives your state the right to regulate you and the way you use your property. In turn, state government gives your local community government the power to regulate how you use your property. The States usually give this power to local communities through what are known as State Enabling Statutes, State Constitutions and State Constitutional Home Rules. State Enabling Statutes are basically laws enacted by state legislatures that authorize municipalities to develop and enact comprehensive zoning ordinances. Such a statute will provide municipalities the power to create zoning laws, the procedures for implementing, administering and policing the laws, and the limitations on the powers of the municipalities. Some states use Enabling Statutes and further provide that local governments may enact laws that are "not inconsistent with the constitution or any general law relating to its property, affairs or government. (i.e. laws related to acquisition, maintenance and care of highways, roads, streets etc.. or protection of physical or visual environment) and these may be referred to as State Constitutional Home Rules.

Although local communities ultimately control how you use your property there are certain protections provided to you under the U.S. Constitution. First, you are entitled to "Due Process." Due Process generally means following procedures to assure that you have the right to be notified that your property will be affected and how, and it assures that you have a fair

hearing to address your concerns. Due Process has two categories: 1) Substantive Due Process; and 2) Procedural Due Process. Substantive Due Process means every law regarding land use must have a rational relationship to a legitimate governmental purpose (i.e. public health, safety, morals or welfare), and it must be free from arbitrary and capricious governmental actions. (i.e. Do the ends justify the means?) Procedural Due Process mandates adequate notice of a hearing to parties to be affected and an opportunity for the affected parties to be heard. In addition to Due Process, the U.S. Constitution also guarantees you "Equal Protection" under the law. Equal Protection means each person is entitled to equal protection of the laws. In zoning this means that not only does the zoning ordinance have to be related to a rational government purpose, but it must treat all similarly situated parties the same.

Understanding how your community can regulate you is only the beginning. It is important to understand that when a community enacts an ordinance there is a presumption of validity. In other words, unless you challenge the ordinance it will stand as the law even if it is not fair or violates the principals of due process and equal protection. Zoning ordinances are generally presumed to be valid unless they are arbitrary or capricious on their face. The party attacking the statute has the burden to establish that the statute is invalid, arbitrary or capricious. Factors considered by Courts to determine if an ordinance is valid or not include the character of the neighborhood, traffic conditions, authorized land usage, suitability of property for its use and the public benefit or detriment that will result from the ordinance.

The foundation behind valid zoning laws is a "comprehensive plan" for the community. A comprehensive plan consists of the following:

1. Inclusion of all land within the regulatory jurisdiction of the local government;
2. A comprehensive approach to the subject matter, including the physical aspects of the community development (i.e. future land use, transportation needs, sewer and water services, parks and recreation, school sites and public facilities such as airports, train stations, landfills, fairgrounds etc..., and expansion areas for colleges, future parks etc...); and
3. A relatively long-term view, usually 20 years into the future (but it is periodically reviewed and modified; usually every 5 years, or as needed).

Knowing what your community plan is can help you in both assessing whether intended or current use of your property is legal, and whether later attempts by government to regulate your property are legitimate.

II. PREVENTIVE MEASURES

When you look to either purchase land or lease land for the purpose of operating a portable storage business there are various issues of importance. Perhaps the most important question for you to answer before signing a contract to purchase land or lease property is: what are the zoning regulations for the land I want to purchase or lease?

If you decide to purchase or lease property you first want to make sure that there is nothing in the land purchase agreement or lease agreement that would preclude you from operating a portable storage business. Equally important is the matter of examining local zoning regulations to determine how the property is zoned. **NEVER SIGN A LAND PURCHASE AGREEMENT OR LEASE AGREEMENT WITHOUT FIRST KNOWING THE ZONING REGULATIONS FOR THE PROPERTY YOU WISH TO PURCHASE OR LEASE.** However, if you want or need to tie down a seller or landlord to prevent someone else from buying or leasing the property, but you do not want to commit yourself until you know that you can operate your business in the district, then you should add a provision to the contract/lease making the contract/lease contingent upon the acceptance of your request by the zoning board or your acceptance of the contract/lease after review of the zoning laws. The contingency provision should require the seller or landlord to take all steps necessary to assist you with gaining acceptance of your zoning request, including the filing for a variance for the use of the property.

If you sign an agreement to either purchase or lease land, the agreement will likely state that you take the land subject to any existing laws, and if you are leasing it will require you to operate your business in accordance with all local, state and federal ordinances, statutes and regulations. As a result, if you sign the purchase agreement or lease agreement without knowing your rights under the zoning ordinances, and the property is not zoned for a portable storage business, you will be stuck with a piece of property you can not use for a portable storage business. While you may be able to operate other businesses on such property, you will not be able to operate the type of business you intended, and you will still have to pay the seller or landlord the contracted for amount. Even if you determine that it is lawful to use the property you wish to purchase or lease as a portable storage yard, you should review the local laws concerning container stacking requirements, fencing requirements, set back requirements, lighting requirements, buffer zone regulations and landscape requirements because all of the foregoing can significantly increase your cost of set-up and operation.

Local communities have master plans which subdivide the community into zoning districts and each district has certain permissible uses of property. For instance there are residential, industrial, light industrial, commercial and retail districts, and often times a mix of the foregoing. Most communities have dual districts such as commercial/retail, or residential/retail. These district designations have written definitions that state what types of land uses are permissible in each district. Therefore, it is important for you to understand what your district allows, and more importantly what it prohibits.

The best place to locate local regulations or obtain guidance is your city, county, village etc... government. Your local government will generally have a planning and zoning department, building and permits department or zoning commission that create and enforce the zoning regulations. Visit you local government and ask to see the zoning plan and map for your area. You will also need to review the local regulations that define the districts so that you can better determine what a permissible land use is in your district. You may find it helpful to ask the zoning department personnel for guidance and assistance as they will be familiar with the local regulations. Before you contact your local zoning board you can also attempt to locate your community's regulations at www.municode.com. Understand that local regulations are sometimes so broad that they do not give you specific enough information and that you may have

to submit a request to the local zoning board to obtain permission to use your land as a portable storage yard in the district. Alternatively, you may need to seek a variance in certain circumstances. A variance is a request to the zoning board seeking permission to use your property in a manner that is not normally permitted in that particular district. Generally variances must be filed by the owner of the property.

III. LONG TERM PROTECTION OF YOUR PROPERTY

Once you are operating your portable storage business, you cannot ignore what is going on around you. Communities across America are starting to regulate shipping and portable storage containers more and more everyday. Some regulation is in response to complaints of community residents, and other regulation is government's concern over aesthetics, terrorism, and lost tax revenue from unused rental property caused by retail and other businesses using portable storage products rather than leasing more space or building larger buildings. Additionally, many communities are starting to ban portable storage products, and especially containers, for aesthetic reasons. Those in favor of aesthetic zoning claim that they have the right to regulate zoning to preserve property values, promote tourism and to prevent the destruction of neighborhoods, historic sites or scenic areas such as parks. Those against aesthetic zoning argue that permitting such subjective standards permits a vacuum for abuse by politicians, imposes conformity rather than individuality, produces mediocrity, and threatens liberty, freedom of speech and freedom of expression. As a result, it is vital that you continually monitor what local government is doing to regulate your business. There are generally two ways you will be regulated: 1) through local ordinances; and 2) through zoning ordinances.

The most likely way a portable storage business will be adversely affected is through zoning regulations. In order to understand what is happening in your community you need to pay attention to local newspaper articles, and zoning hearing notices published in the newspaper and posted around town. If a community is enacting new ordinances or modifying old ordinances, the community must follow certain procedures. These procedures include notifying any person or entity to be affected and to allow those affected parties to be heard. Failure of a community to follow the specific procedures of the Enabling Statute or law concerning the enactment of new laws or modification of existing laws may result in the same being struck down if challenged by an affected party. Accordingly, you should be aware of notices and attend hearings, and if need be, meet with community leaders or zoning board members to find out why changes are being made.

While monitoring zoning in your community you should be aware of what changes are coming and why; as to the "why" look at the publicly stated reasons and the hidden reasons. As noted above, aesthetic zoning is on the rise, and this can kill your business. Understand that local government has the right to protect the health, welfare, safety and moral character of its community and that laws regulating use of your land must be based upon these principals. Often local government will claim they are banning or more strictly regulating portable storage products for reasons of public health, welfare or safety, but in reality they are acting for reasons of aesthetic concern. Therefore, do your homework when regulations are proposed by local government and make sure there are legitimate concerns for the public health, welfare and safety of the community. Also, look at other similar businesses in your district and see if they are

included in the zoning law changes. If other similar businesses or products are not included in the ban or regulation, you may have an argument to have the new regulation declared unlawful. The most prominent area of discrimination is shipping containers being banned while semi-trailers are an accepted form of storage.

One way to avoid adverse regulation is to marry your business to the community. It is important to develop government contacts and relationships within the community. You can sell or donate your products to local government as a useful alternative to avoid having to purchase more land or buildings for the storage of government equipment, vehicles or property. Also, you can sell or donate your products to local schools, churches, hospitals or charities to develop a reliance upon and acceptance of your products. Nothing will help you protect the future use of your property and the prosperity of your business than community contributions and relationships.

The moral of the story is to stay informed so that you can head off trouble before it begins. Remember knowledge is power.

IV. WHAT TO DO IF A COMMUNITY DECLARES YOU IN VIOLATION OF THE ZONING LAWS OR ATTEMPTS TO BAN OR OVER REGULATE YOUR BUSINESS

A. WHAT TO DO IF YOU ARE CITED FOR A ZONING VIOLATION?

Many zoning boards are lax on enforcement of zoning ordinances until a matter is brought to their attention by the public. Others are sticklers for the rules. Either way you may find yourself being cited for violation of zoning ordinances. Most Enabling Statutes (i.e. the law setting general guidelines for zoning laws in a state) will consider violations of the zoning ordinances misdemeanors punishable by fine, imprisonment or both, and other civil remedies may apply. Civil remedies may include specifically performing some act to come into compliance or it may be an injunction against your business stopping you from doing some act or perhaps operating at all. So what do you do?

First, you can comply with the citation and pay any fines assessed, or take the appropriate action to rectify the situation if that is required. Second, you can fight the citation if you believe that you have done nothing wrong. If you choose to fight the citation, then you will be required to follow the appropriate procedures set forth in your community's zoning laws. Usually, you will file a notice of appeal with the board of adjustments or zoning board (the name will vary from community to community) and seek a hearing on your matter. Note that any appeal must be made in a timely matter and it must state the purpose of the appeal. The board will then give the affected parties/parties in interest notice of the hearing, and post or publish a public notice of a hearing on the matter. Most Enabling Statutes permit the board to affirm, reverse or modify the original decision. In the event that any affected party is unhappy with the board's decision, most Enabling Statutes will provide said party thirty days from the date of the board decision to seek judicial review of the board decision. Any lawsuit filed to challenge a board decision must specify the errors complained of by the affected party.

B. WHAT DO YOU DO IF YOU ARE NOT HAPPY WITH A PORPOSED CHANGE IN YOUR COMMUNITY'S ZONING LAW?

In the event that a new zoning law or modification of an old law is proposed by your local government, and it will adversely affect your business, there are multiple steps that you can take to protect your business. If you are directly and adversely affected by proposed changes in the law, you should hire a lawyer to represent you and determine the best course of action. If you choose not to hire an attorney, or you want to do some leg work on your own, then you should first obtain a copy of the "Comprehensive Plan and Zoning Map" for your community. Obtaining the Plan and Map will assist you in evaluating whether the law proposed is in accordance with the "Comprehensive Plan." The "Comprehensive Plain" should be available through your local zoning department or the property records at your local courthouse. You should also evaluate whether proper notices were given in a timely and proper manner with the proper information required by your local zoning regulations (i.e. published and posted). While investigating the foregoing, you should also evaluate whether aesthetic or exclusionary zoning is taking place (i.e. are they unhappy with the way your property looks or do they have a legitimate government interest to protect?). If everything is in order at this time, you should attend any hearings on the matter and present your case.

At any time after you become aware of a proposed change in the law, you can take other more diplomatic steps to protect your interest as well. When local governments are attempting to ban portable storage yards from their communities, they usually have difficulty banning existing businesses. However, they can keep existing businesses from expanding or modifying their yards. In the foregoing instance, you may be able to negotiate "grandfather" status whereby the local government recognizes in their legislation that any existing business may stay, but no new businesses may enter the area. While "grandfathering" can be beneficial, concerns remain because you may not be able to expand your business. Also, if you lease property and are unable to reach an agreement with your current landlord on a new lease in later years, then you will not be able to relocate in the same vicinity. If location is crucial, "grandfathering" may still be detrimental to your business. Additionally, if your landlord understands the laws and your need to stay where you are, then the landlord will have the upper hand in negotiations, so beware and plan accordingly.

Another manner in which to address a proposed change in legislation is to negotiate with the local government for modifications to the proposed laws before they are enacted. Naturally, involving a lawyer is advised if you choose to negotiate changes in the law. The negotiation of change option should be seriously considered. Many communities nationwide are attempting to ban portable storage yards to aesthetically improve their community to attract new business or banning them due to concerns over the attraction to criminal elements. However, some portable storage yards have been able to effectively work with local government to create reasonable laws concerning portable storage businesses. In some cases portable storage businesses have used combinations of negotiating changes in the proposed laws and "grandfathering".

In certain limited circumstances you may be able to apply for a variance if your state and local government laws. A variance is a decision by an administrative person or board that allows property to be used in a manner that differs from the existing zoning ordinances. Generally, there

are two recognized types of variances: 1) a use variance; and 2) an area variance. A use variance is most likely what you would seek, but be advised that some states do not allow use variances. A use variance permits you to use your property in a manner that is inconsistent with existing zoning codes. An area variance permits you to deviate from existing regulations concerning required yard space, set backs for buildings, floor space etc... If you choose to seek a variance you need to understand that variances will only be permitted upon a showing by you that without the variance you are sustaining an undue hardship or practical difficulties.

As an alternative to a variance you may be in a position to seek a "special permit". A special permit is different from a variance in that it allows a use of the property previously permitted if you meet the specific criteria of the zoning code, whereas a variance permits a use of the property currently prohibited by the zoning code.

It is advisable to seek legal advice to determine what your options are and what your best course of action is. If you are unsuccessful stopping the change in law, obtaining either reasonable changes to the proposed laws or obtaining "grandfather" status, then you will find yourself on track for challenging the enacted law. As with the situation of being cited for a violation, you will have to follow your local governments zoning procedures to appeal and challenge the new law. Ultimately, if you are not happy with the outcome, then you may be able to seek judicial review.