

CHAPTER 12

PLANNING AND ZONING

Comprehensive planning, zoning, and subdivision regulations are used by Idaho's counties, as well as cities, to provide for orderly change, growth and to stabilize and protect property values. This Chapter explores:

- Planning
- Idaho Land Use Planning Law
- Areas of City Impact
- Planning, Zoning or Planning and Zoning Commissions
- Joint City-County and Regional Planning Commissions
- Zoning Ordinances
- Subdivision Ordinances
- Regulatory Takings
- Additional Powers Granted to Counties

PLANNING

Introduction

The county planning process is an opportunity for a county and its citizens to prepare a vision, a blueprint, or a set of goals and strategies for the future.¹ The process involves assessing current resources, making assumptions, and preparing goals and policies regarding future development (Rosebrock & Freemuth, p. 3).

Rosebrock and Freemuth identify three basic characteristics of the planning process. First, the scope of the planning process is long-range in nature. It is not unusual for a plan to project five to twenty years into the future, a time span that typically coincides with the life span of public projects such as roads, sewers, and water lines. Second, the planning process is comprehensive in that it covers an entire geographical area (such as a town, city, county, or region) and the plan, using maps, charts, and reports, must consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for sixteen different planning components.² Finally, the plan can be described as a policy document. Not only is it the official document used to make land use decisions, but it also forms the legal basis for the zoning ordinance, the subdivision ordinance and other land use regulations (Ibid. p. 4).³

¹ Rosebrock, Dale and Sheri Freemuth. 1991. Local Planning in Idaho. _____ [add city & publisher]. p.3

² Idaho Code, Section 67-6508. The ~~sixteen~~ ~~fourteen~~ planning components include: Property Rights; Population; School Facilities and Transportation; Economic Development; Land Use; Natural Resources; Hazardous Areas; Public Services, Facilities, and Utilities; Transportation; Recreation; Special Areas or Sites; Housing; Community Design; Agriculture; National Interest Electric Transmission Corridors; and Implementation.

³ In Idaho, land use regulations must be "in accordance with" the Comprehensive Plan. See, *Balser v. Kootenai County*; *Bone v. City of Lewiston*.

In addition to creating a solid legal foundation, there are several added advantages to planning noted by Rosebrock and Freemuth. Environmental benefits are one such advantage. Well-designed streets and housing, clean air and water come as a direct result of quality planning. Such a well-planned county will be more attractive to potential new industry and business (and their employees), which, once established in the community, strengthens the economic base of the county. Further, private benefits are gained from land use controls that protect and enhance the value of private property. Finally, the planning process can help a county cope with change--something that has become increasingly important for many Idaho areas that are confronted with rapidly expanding or contracting economic and population bases (Ibid. p. 11). Along with a comprehensive plan, many local governments also develop a capital improvements plan or program (sometimes referred to as a "CIP") to help identify how funds can be raised to support needed public facilities, and when and on what those funds can be spent. (Ibid. p. 36).

In discussing planning, it bears repeating that zoning, subdivision and design review ordinances are specific land use regulations that are incorporated into county codes and must be based on an adopted comprehensive plan (Ibid. p. 9). The primary purpose of zoning is to divide the community into districts or zones and impose different land use controls or regulations on each district.⁴ As will be discussed briefly below, although the regulations are likely to be very different between different zones, the regulations must be uniformly applied within each district.

Specifying the permitted and conditionally permitted uses of land and buildings, the intensity or density of such uses, and the bulk of buildings on the land are some of the specific tasks that are addressed by a zoning ordinance (Ibid. p. 251). It is the zoning ordinance, along with the capital improvements program, that are the most common methods used in implementing land use goals stated in the comprehensive plan (Rosebrock & Freemuth, p. 36). Indeed, the zoning ordinance is considered to be the best mechanism to assure that the community's planning vision becomes a reality (Ibid. p. 10).

Idaho Land Use Planning Law

Idaho's Local Land Use Planning Act⁵ gives local governments broad powers in the area of planning and requires all counties to comprehensively plan, to adopt that plan by resolution or ordinance, and to implement that plan through the adoption of additional ordinances (for example, a zoning ordinance). The plan can be modified at any time unless a minimum lesser interval is provided by resolution. Absent an resolution stipulating otherwise, an individual can petition the commission for plan amendment at any time. The Local Land Use Planning Act provides an excellent road map on how to get the job done by describing the analyses to be completed in connection with each of the sixteen components of a comprehensive plan:

⁴ So, Frank and Judith Getzels. 1988. The Practice of Local Government Planning. Washington D.C.: ICMA. p. 251.

⁵ Idaho Code, Section 67-6501 et seq.

1. Property Rights -- An analysis of provisions which may be necessary to insure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property.⁶
2. Population -- A population analysis of past, present, and future trends in population including such characteristics as total population, age, sex, and income.
3. School Facilities and Transportation -- An analysis of public school capacity and transportation considerations associated with future development.
4. Economic Development -- An analysis of the economic base of the area including employment, industries, economies, jobs, and income levels.
5. Land Use -- An analysis of natural land types, existing land covers and uses, and the intrinsic suitability of lands for uses such as agriculture, forestry, mineral exploration and extraction, preservation, recreation, housing, commerce, industry, and public facilities. A map shall be prepared indicating suitable projected land uses for the jurisdiction.
6. Natural Resource -- An analysis of the uses of rivers and other waters, forests, range, soils, harbors, fisheries, wildlife, minerals, thermal waters, beaches, watersheds, and shorelines.
7. Hazardous Areas -- An analysis of known hazards as may result from susceptibility to surface ruptures from faulting, ground shaking, ground failure, landslides or mudslides; avalanche hazards resulting from development in the known or probable path of snow slides and avalanches, and floodplain hazards.
8. Public Services, Facilities, and Utilities -- An analysis showing general plans for sewage, drainage, power plant sites, utility transmission corridors, water supply, fire stations and fire fighting equipment, health and welfare facilities, libraries, solid waste disposal sites, schools, public safety facilities and related services. The plan may also show locations of civic centers and public buildings.
9. Transportation -- An analysis, prepared in coordination with the local jurisdiction(s) having authority over the public highways and streets, showing the general locations and widths of a system of major traffic thoroughfares and other traffic ways, and of streets and the recommended treatment thereof. This component may also make recommendations on building line setbacks, control of access, street naming and numbering, and a proposed system of public or other transit lines and related facilities including rights-of-way, terminals, future corridors, viaducts and grade separations. The component may also include port, harbor, aviation, and other related transportation facilities.
10. Recreation -- An analysis showing a system of recreation areas, including parks, parkways, trailways, river bank greenbelts, beaches, playgrounds, and other recreation areas and programs.
11. Special Areas or Sites -- An analysis of areas, sites, or structures of historical, archeological, architectural, ecological, wildlife, or scenic significance.

⁶ This analysis is outlined in much greater detail in the Idaho Regulatory Takings Act; Idaho Code, Section 67-8001 et seq.

12. Housing -- An analysis of housing conditions and needs; plans for improvement of housing standards; and plans for the provision of safe, sanitary, and adequate housing, including the provision for low-cost conventional housing, the siting of manufactured housing and mobile homes in subdivisions and parks and on individual lots which are sufficient to maintain a competitive market for each of those housing types and to address the needs of the community.
13. Community Design -- An analysis of needs for governing landscaping, building design, tree planting, signs, and suggested patterns and standards for community design, development, and beautification.
14. Agriculture -- An analysis of the agricultural base of the area including agricultural lands, farming activities, farming-related businesses and the role of agriculture and agricultural uses in the community.
15. Implementation -- An analysis to determine actions, programs, budgets, ordinances, or other methods including scheduling of public expenditures to provide for the timely execution of the various components of the plan.
16. National Interest Electric Transmission Corridors -- An analysis and/or designation of high-voltage transmission corridors (after notice by the Idaho Public Utilities Commission).

The plan must specify why a component is not included. Additional components may be considered if the county feels such components are necessary. All plans and subsequent single family zoning districts must allow for the siting of manufactured housing (67-6509A).

Areas of City Impact (*See Footnote on Blaha vs. Eagle City Council on Page 5*)

A separate but extremely important planning duty of each county, and each city within that county, is the negotiation and agreement on the boundaries of each area of city impact within the county.⁷

An area of city impact is the developing area adjacent to, but outside the limits of the city; it is the area into which the city will eventually annex.

In defining an area of city impact, the county and the cities consider: trade area; geographic factors; and areas that can reasonably be expected to be annexed to the city in the future. Areas of impact may be of any geographical size or shape. This area of impact negotiation process is considered so important to the overall planning process that Idaho Code establishes a detailed procedure to compel compliance by any county or city.

A separate ordinance, adopted by both the county and the city, identifies the boundaries of the area of impact, and also identifies which plans and ordinances (that is, the county's or the city's) will apply to development in that area outside of the city's existing limits. The concept is meant to allow a city to have some influence over how development will occur in that area that will eventually be annexed into the city, without imposing too greatly on property that is still within the county's jurisdiction. The ordinance provides for one of the following alternatives:

⁷ See, Idaho Code, Section 67-6526.

1. Application of the city plan and ordinances to the area of city impact; or
2. Application of the county plan and ordinances to the area of city impact; or
3. Application of any mutually agreed upon plan and ordinances to the area of city impact.⁸

As with all ordinances adopted under the Local Land Use Planning Act, the area of impact ordinance is considered by the county board and the city council after receipt of a recommendation by the county's and the city's planning, zoning, or planning and zoning commission. The notice and hearing procedures provided in Idaho Code, Section 67-6509, must be followed: at least one public hearing must be held in which interested persons have an opportunity to be heard; public notice of the hearing must be provided at least fifteen days prior to the hearing; the notice must contain the time and place of the hearing and a summary of the ordinance proposed to be discussed; and the notice must be published in the official newspaper of general circulation within the county.

Further state direction to counties negotiating area of city impact agreements include:

- An area of city impact may cross county boundaries by agreement of the city and county concerned if the city is within three miles of the adjoining county;
- If areas of city impact overlap, the cities involved must negotiate boundary adjustments to be recommended to the respective city councils;
- If the cities cannot reach an agreement, the board of county commissioners must, upon a request from either city, recommend adjustments to the area of city impact;
- After adoption, areas of city impact, plan and ordinance requirements shall remain fixed until both governing boards agree to renegotiate;
- Governing boards must undertake a review of the areas of impact at least every ten years; and
- Growth and development is not precluded in areas of any county which are not within the areas of city impact.

County officials should consult legal counsel and the latest version of the Idaho Code when applying this often-altered Code section.

Planning, Zoning or Planning and Zoning Commissions.⁹

Any board of county commissioners can exercise all of the powers authorized by the Local Land Use Planning Act. However, if a county board does not elect to exercise those powers, the board must establish a planning commission and a zoning commission or a planning and zoning

⁸ Note that the Idaho Supreme Court has made it clear that the county and city can determine what ordinances are used in the area of impact, but until any property in the area of impact is formally annexed into the city, that property is still under county jurisdiction and city ordinances can only be used to make recommendations to the county. See, *Blahe_v. Eagle City Council et al.*, 134 Idaho 768, 9 P.3d 1234 (2000) .

⁹ See, Idaho Code Section 67-6504.

commission, which acts with the full authority of the board, excluding the authority to adopt ordinances or to finally approve subdivisions of land.

Any such commission must consist of not less than three nor more than twelve voting members, all appointed by the chairman of the county board and confirmed by majority vote of the county board. Written organization papers or bylaws of the commission must be adopted. Criteria for membership and options concerning length of terms are established by Idaho Code.¹⁰

Each commission must elect a chairman and create and fill any other office that the commission deems necessary. A commission may establish subcommittees, advisory committees or neighborhood groups to advise and assist. A record of meetings, hearings, resolutions, studies, findings, permits, and actions taken must be maintained. All meetings and records must be open to the public. At least one regular meeting shall be held each month for not less than nine months in a year.

With approval of the county board, the commission can receive and spend funds, goods, and services from the federal government or agencies and instrumentalities of state or local governments or from civic and private sources. Expenditures by a commission must be within the amounts appropriated by the county board. Within such limits, any commission is authorized to hire or contract with employees and technical advisors, including planners, engineers, architects, and legal assistants.

Joint City-County Planning Commissions¹¹

Combinations of several city and county boards may form a joint planning, joint zoning or joint planning and zoning commission. Minidoka County, as one example, has a joint city/county planning commission and a county zoning commission. Idaho Code empowers the county boards of two or more adjoining counties, alone or together with any one or more city within the counties, or one county board and the council of one or more cities within the county, or the councils of two or more adjoining cities, to cooperate in the establishment of a joint commission. The number of members of a joint commission, the method of appointment, and the allocation of costs for activities must be agreed upon by the county boards and city councils involved.

Joint city-county and regional planning commissions are important in providing a guide for orderly development of entire regions and in relating the needs and resources of these regions to both urban and rural factors.

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¹⁰ Ibid.

¹¹ See, Idaho Code Section 67-6505.

A zoning ordinance contains the technical rules and regulations to implement the vision of the comprehensive plan within districts or zones, which traditionally are very strictly segregated uses within those zones. Today, we often see an interplay of uses within districts or zones. Modern land use ordinances often provide for mixed uses within a zone in order that individuals have the opportunity to live, work and play in close proximity and/or that businesses and industry have greater flexibility in design and location decisions.

The first zoning ordinance in the United States was adopted in 1916 as a response to social reforms taking place in large cities at the turn of 19th to 20th century. Zoning, as a technique, began as an attempt to separate uses such as soot-belching factories from the homes of the workers in those factories. Zoning was, and is, a way to separate what is viewed as incompatible uses. The ability to separate incompatible uses is viewed as a local government's use of its police power to protect the health, safety and welfare of its citizens.¹²

Zoning Ordinances

Each county is required to adopt a zoning ordinance in accordance with the policies set forth in the adopted comprehensive plan and in accord with particular notice and hearing procedures.¹³ Amendments can be made to the ordinance but, if the county was to find that the particular zoning ordinance amendment was not in accord with the plan, the plan would have to undergo amendment first.¹⁴ If a zoning classification is adopted pursuant to a request by a property owner, the county cannot change the zoning classification of that property for four years without the consent of the then current property owner.¹⁵

In addition to creating separate districts, counties have the authority to establish standards within each zoning district to regulate items such as: building height; number of stories, size, construction, reconstruction, alteration, repair of buildings and structures; size of yards and open spaces; density of population; the location and use of buildings and structures on lots; and parking requirements.¹⁶

Zoning ordinances may involve safety objectives. For example the regulations could help minimize dangers to life and property by prohibiting the building of homes and businesses on riverbank areas

¹² In large cities where tenements were built so close to other buildings, light and air was minimal, and buildings were often so close to one another that fires would spread from building to building rapidly. In an attempt to protect the health, safety and welfare of its citizens, local governments started to dictate restrictions on the height of buildings, the open space or yards around buildings, the location of those buildings on lots, the setbacks of building away from streets and other buildings, and the particular uses allowed in an area or zone. Incompatible uses were not viewed as wrong, but just out of place. In 1926, in upholding zoning laws, the U.S. Supreme Court said that: "A nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard." See, *Euclid v. Ambler*, 272 U.S. 365 (1926).

¹³ See, Idaho Code, Section 67-6509.

¹⁴ Idaho Code, Section 67-6511(c).

¹⁵ Idaho Code, Section 67-6511(d).

¹⁶ See, Idaho Code, Section 67-6511.

that frequently flood, or on steep hillsides that might present geologic hazardous. Businesses may be required to provide adequate off-street parking for their employees and customers, and industry may be regulated by performance standards in relation to such pollutants as noise, glare, smoke, exhaust, gases, and sewage. A particular industry, confined animal feeding operations (CAFO's), is treated extensively by Idaho Code.¹⁷ Standards for CAFO operations may be set forth by ordinance. In absence of such an ordinance, code provides maximum animal units and minimum standards for such operations. It also provides for siting assistance through the Idaho Department of Agriculture, when requested by the county commissioners.

State code provides a great deal of guidance to counties on the procedures that are to be used in adopting and applying zoning ordinances. For example, notice and hearing procedures,¹⁸ the ability to call for mediation in contested situations,¹⁹ the use of hearing examiners,²⁰ the need for a transcribable record,²¹ and the appeal procedure after a final county decision.²²

County plans and land use ordinances regulate state and local government activities, except:

1. Transportation systems of statewide importance;
2. An activity of a public utility if such land use plans or ordinances are in conflict with an order by the Public Utility Commission,²³ and
3. More restrictive state requirements.

NEEDS UPDATED WITH PASSAGE OF S1265 IN 2014

A good example of what occurs when there are state requirements that are more restrictive than local land use regulations involves The Airport Zoning Act.²⁴ Under this Act, the State, through the Idaho Transportation Department (ITD) is given power to promulgate regulations for the zoning of airports and airport hazard areas (as defined by State statute). These regulations specify uses allowed, specify the height for both structures and trees, and can require a landowner to obtain a permit from the director of ITD before constructing any structure in the zoned area. In the event that a county has adopted a zoning ordinance covering an airport or airport hazard areas, the airport zoning regulations can be incorporated into the zoning ordinance and be administered and enforced in connection with the zoning ordinance. However, if there is a conflict between any airport zoning regulations and any other regulations applicable to the same area, the more stringent regulations govern. County officials should confirm with ITD to determine whether such regulations are in place in connection with any airport located within the county.

¹⁷ Idaho Code, 67-6529A – 6529G.

¹⁸ Idaho Code, Section 67-6509.

¹⁹ Idaho Code, Section 67-6510.

²⁰ Idaho Code, Section 67-6520.

²¹ Idaho Code, Section 67-6536.

²² Idaho Code, Section 67-6521.

²³ See, Idaho Code Section 67-6528.

²⁴ See, Idaho Code Section 21-501 et seq.

Subdivision Ordinances

Counties are required to adopt a subdivision ordinance that specifies procedures for the processing of land subdivision applications (67-6513). Subdivision ordinance require that subdivision developers install improvements for the subdivided lands they sell. A subdivision ordinance can provide for mitigation of the effects of subdivision development on the ability of counties and other political subdivisions, including school districts, to deliver services without compromising the existing quality of service delivery to current residents or imposing substantial additional costs upon current residents to accommodate a proposed subdivision.²⁵ . The ordinance must be adopted, amended, or repealed in accordance with the notice and hearing proceedings provided set out elsewhere in the Local Land Use Planning Act.²⁶

Subdivision regulations in a county attempt to establish minimum standards for the development of land. These regulations also assist in the implementation of a comprehensive plan, though it is not necessary that a plan be adopted before subdivision regulations apply. Ideally, these regulations control the character and the quality of development areas outside of cities in an effort to provide for integrated and orderly growth within the county and within a city when a subdivision is ultimately annexed into a city.

Idaho law regarding subdivision plats²⁷ pertains to subdivisions in both incorporated and unincorporated areas. Subdivision plats are subject to very strict technical requirements. The county must choose and require a legally qualified professional land surveyor to review all plats before they can be filed in the office of the county recorder. If the plat is in any area of the county outside a city, the plat must be approved by the board of county commissioners.

In regard to process, counties have the authority by ordinance to process certain zoning and land use applications administratively. In absence of such an ordinance all applications, including plats, must be submitted to the planning and zoning commission for the commission's examination before being submitted to the county board (67-6519). Plats must also be checked by the county treasurer to assure that all taxes are paid before lands can be subdivided. After the plat is approved, it is filed with the county recorder.

Regulatory Takings

The police power of a local government is tempered by the restrictions of our Constitutions. Zoning regulations will be declared invalid by a court if the regulation is found to violate the Fifth Amendment of the U.S. Constitution: "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."²⁸ In Idaho, we have a similar constitutional provision: "Private property

²⁵ Idaho Code, Section 67-6513.

²⁶ Idaho Code, Section 67-6509.

²⁷ Idaho Code, Section 50-1301 et seq.

²⁸ U.S. Const., Amendment IV.

may be taken for public use, but not until a just compensation ... shall be paid therefor.”²⁹ Idaho’s state statutes define a regulatory taking as “. . .a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution.”³⁰

Ownership of property includes the right of an owner to use, enjoy and develop the property. If the government interferes with the use, enjoyment and development of property, beyond that necessary to protect the public good, the government may be found by a court to have “taken” the property for public use. If the property is taken for public use, the private owner has the right to just, or fair, compensation.

The taking of private property and the payment of fair compensation is easy to see in “physical invasion” circumstances. For example, if a government condemns private property for use as a road or a canal there is a permanent, physical invasion or taking of the people’s private property for public benefit for which payment is required.

The taking of private property and the payment of fair compensation is not always as easy to see in connection with encumbering private property with regulations. But regulating private property can go “too far” if the regulation extracts from a private property owner some public benefit that in all fairness should be paid for by the public as a whole. The issue becomes whether the public at large, rather than a single property owner, must bear the burden of the government’s exercise of police power in the public interest.

During the 1990s, the U.S. Supreme Court determined that a regulation can effect a taking for which compensation is due under two distinct circumstances. First, if the regulation denies an owner economically viable use of his or her land. And second, if the regulation does not “substantially advance a legitimate state (or public) interest.”

When a regulation is alleged to deny economically viable use of land the court will look at: the character of the governmental action; and the economic impact of the regulation on the landowner. If the character of the governmental action is a physical invasion of property, no further analysis is needed. There is a taking of property. Likewise, when a regulation denies all economically beneficial use of land that regulation affects a taking.³¹

Economic deprivation is not the only measure of takings claims. A regulation that does not

²⁹ Idaho Const., Art. I, Section 14.

³⁰ Idaho Code, Section 67-8002(4).

³¹ See, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). Mr. Lucas bought 2 lots surrounded by beach homes. He intended to develop those lots, and live in one of the houses. Thereafter, the Commission passed the Beach Front Management Act which expanded certain “critical areas” within which homes could not be built. Although Mr. Lucas hailed the Act as having a legitimate purpose, nonetheless he claimed that the Act denied him all economical use of the property and was thus a compensable taking. The Court said yes. Total economic deprivation of property is to be treated just the same as a physical invasion of property.

economically deprive a property owner may still be a taking if it does not “substantially advance legitimate state interests.” Two federal court cases provide lessons for local governments on how to avoid takings issues.³²

In *Nollan*, the owners of beachfront property were required, in exchange for a building permit, to grant a public access easement along the beach. The beach was separated from a public road by the Nollan house, and the reason for the easement along the beach was to provide visual access from the road to the beach. The issue was, did the condition of approval foster a legitimate state (and, if the issue involved a local government, the local) interest? The Court said that even assuming there was a legitimate state interest to provide visual access, there was not a sufficient “nexus” or “tie” between that public purpose and the particular permit condition to justify the condition.

The Court expanded this concept in *Dolan* in saying that there must be “rough proportionality” between a regulation and the promotion of the public interest. In the *Dolan* case, in return for a building permit to expand a hardware store by approximately 200 square feet and pave a parking lot, Dolan, the owner of the hardware store, was required by the City of Tigard, Oregon to dedicate a 15-foot public greenway/floodplain easement and an additional 8-foot bike path. If the City had used its condemnation power to obtain the easement and bike path, the City would have paid Dolan fair market value for the land and there would have been no issue. Instead, the City used its police power to place restrictions or conditions on the grant of a building permit and paid nothing for the land. Dolan asked the Court to determine how far the City of Tigard could go in passing on the cost of public facilities (in this case the floodway easement and the bike path) to private landowners.

The Court said the City could pass these costs on to the private landowner only to the extent the required dedication of land, exaction, or condition of approval was related both in nature and extent to the impact of the proposed expansion of the hardware store. That is, the conditions of approval, the restrictions, had to be “roughly proportional” to the permit request being made.

The Court said that there were three issues to consider:

1. Does the permit condition seek to promote a legitimate state interest?
2. Is there an essential nexus or tie between the legitimate state interest and the permit condition?
3. Is there a connection between the exaction (i.e., condition) and the projected impact of this particular development?

The Court easily disposed of the first two issues. The prevention of flooding and the reduction of traffic (through the use of a bike path) qualified as legitimate state interests, especially since the Tigard Comprehensive Plan reflected these statewide land use management goals previously adopted at the state level. Next the Court found it “obvious” that a nexus exists between preventing flooding and limiting development in floodplains, and reducing traffic by providing

³² See, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 687 (1994).

alternative means of transportation.

However, the last issue was not so easy. The Court found the connection between the conditions imposed on Dolan and the projected impact of the store expansion inadequate. The Court said there must be a “reasonable relationship” or “rough proportionality” between the required dedication and the impact of the proposed development and that Tigard demanded too much from the property owner to pass the “rough proportionality” test. The Court said:

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment [free speech, press, religion, association, assembly] or the Fourth Amendment [search and seizure] should be relegated to the status of a poor relation in these comparable circumstances.³³

In conclusion, local government permit conditions or exactions, especially if involving land dedication, must clearly and unequivocally solve problems generated by a development, and in proportion to the impact the proposed development is likely to have. For example, requiring schools or school grounds in response to a residential development is more likely to be upheld than if the exaction is tied to an industrial development. Below are three key reminders for counties to use when conditioning development permits:

1. Know what the legitimate state (i.e., local) interests are.
2. Make sure any condition or exaction imposed has a “nexus” or relationship to that public interest.
3. Make the condition roughly proportional to the impact of the particular development.

The bottom line for counties is that they must plan because a comprehensive plan embodies the county’s local government interests. *Dolan* will have the most effect on counties that do not plan, and that do not adopt and apply their zoning ordinance consistently with the comprehensive plan.

Since the mid-1990s, when the State adopted the Idaho Regulatory Takings Act, Idaho has established an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law.³⁴ The State’s Attorney General has developed a checklist to assist all local governments, which checklist is available on the Attorney General’s website or office.

Recent revisions to the Act have made it clear that an owner of real property that is the subject of a regulatory or administrative action by a county can request that the County prepare a written

³³ 512 U.S. at 392.

³⁴ See, Idaho Code, Section 67-1001 et seq.

takings analysis in connection with the action. That analysis must comply with the process set out in the Act and the Attorney General's checklist.³⁵

Additional Powers Granted to Cities and Counties

County officials should take the opportunity to review with their attorney the various provisions in the Local Land Use Planning Act to understand the various provisions granting land use powers to each county. What follows are just a few of the specific sections of the Act and the powers granted.

1. Emergency ordinances and moratoriums can be adopted for a specific reason and time period of not more than 182 days when an imminent peril to health, safety and welfare exists (67-6523). Interim ordinances and moratoriums can be adopted for a specified time period (not to exceed one year) (67-6524). Interim ordinance often serve as placeholders while the comprehensive plan is amended. They are not required to be consistent with the comprehensive plan.
2. Elected officials may perform the duties of the planning commission (67-6504).
3. Counties may provide for the ability to issue special use permits (67-6512), process planned unit development permits (67-6515), and to grant variances (67-6516).
4. A hearing officer may be appointed to hear and make recommendations on subdivisions and variance and rezoning requests (67-6520).
5. A future acquisitions map may be adopted that identifies lands proposed for public acquisition for up to a 20-year period (67-6517). Implementation of this grant of authority has proven difficult, particularly in the absence of revenue resources to support it.
6. Transferrable Development Rights to provide flexibility in meeting zoning requirements, such as density and height and setbacks. This system allows for the trading or purchase of such "rights" through a voluntary arrangement, landowner to landowner or developer to developer. (67-6515A)
7. Planned Unit Developments to provide for a variety of uses within a defined land area with requirements particular to that development. (67-6515)
8. Development Agreements to provide binding commitments between the developer and the county that ensure certain standards or components are included in the development. (67-6511A)

³⁵ See, Idaho Code, Section 67-8003.

NOTES: