

# Win-Win Regulation

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Land use regulations can be among the most contentious and controversial issues municipal officials face.

Ordinances and decisions on zoning, subdivision control, signs, historic preservation and design review often provoke strong reactions pro and con on the part of elected officials, developers, municipal planners, businesspeople, city and village attorneys, property owners and neighborhood groups.

The issues are often framed as clashes between “good planning” and “private property rights” or “job creation” versus “preservation of community character.” But how do you take sides if you’re in favor of all of the above?

Perhaps because it is so often litigated, land use regulation has been seen as an adversarial zero-sum game. The perception of some is that the more the developer wins, the more the community loses, and vice-versa.

But the real world is not so black-and-white. Zoning has to contend with competing *legitimate* interests. The community has worthy goals, but so usually do the property owner and businessperson. Most times there are no bad guys. And if there are no bad guys, then there should be no losers. And that means there’s something to be said for replacing the adversarial model with what might be called Win-Win Regulation—development control that works for everyone.

Win-Win Regulation, like other good things, takes a bit more thought and effort to bring about. But our experience in developing land use regulations for cities around the Midwest suggests some guidelines for municipal officials who want to redo their zoning or other development ordinances to encourage win-win outcomes.

## 1. Get Everyone Into the Act

In many municipalities preparation and revision of land use regulations are delegated to the local planning staff or a consultant on the assumption that they are most knowledgeable about the subject. But zoning is one of those things that are just too important to leave to the experts.

That’s because land use regulations—unlike building, plumbing, electrical and fire codes—are largely *policy*

rather than technical in nature. Policy decisions can only properly be made by the village board or city council based on what the community wants and will accept. And because zoning is mostly policy, even the experts don’t agree on what is best. But experts who know what many other communities have done and can come up with good ideas can still make policymakers’ jobs much easier.

We usually suggest that an *ad hoc* public-private advisory committee oversee the development of the regulations and make a recommendation to the plan commission. We urge that a spectrum of views be represented, including those resistant to or skeptical of land use regulations. If only municipal officials participate, or if only strongly pro-regulation people are involved, it’s harder to achieve a win-win outcome and difficulties are more likely both at the public hearing and after the ordinance becomes law.

Bringing everybody into the act up front is the best way to avoid troubles later on. Members of the community are more likely to support regulations in which they have developed ownership.

An open and participatory process can make zoning the *community’s* project rather than the *planner’s* project it too often is. I tell clients that if they adopt my ordinance they’re making a mistake. The only ordinance they should adopt is one that is their own.

Win-win regulation usually requires redoing current ordinances, which in many places are quite dated. The big problem with older regulations, of course, is that *nobody* got into the act—at least nobody who’s still around. Current village board and city council members inherited these ordinances from the Ghost of Planners Past. They may not agree with many of their provisions—or even be aware that they are there. (When we redo their regulations, my clients tend to find some real surprises in what their current ordinances say.)

Instead of being changed, these hand-me-down policies are either ignored or just repeatedly variances away. But it’s much better if land use regulations incorporate policies supported by current elected officials.

## 2. Start With a Clean Sheet of Paper

When you're doing new regulations, there's little point in benchmarking against the old ones, as familiar as they are. Municipal officials sometimes mistakenly assume their current ordinance represents the only way to do things. Or else someone's picked up an ordinance from another town and decided *that's* the only way to go.

I encourage clients to start not with a particular kind of provision they have or desire but with the *outcome* they want to achieve. There are usually multiple ways to reach any regulatory goal and still stay within the parameters of the law. There's often at least one win-win option among them.

Zoning ordinances, subdivision controls, sign codes, historic preservation regulations and the like are unnecessarily similar from town to town. That's because cities and villages copy each other, many of the local consultants that cities commonly hire offer little more than boilerplate codes, or local officials slavishly follow so-called "model" ordinances.

But communities can differ markedly in their economies, demographics, political climates and capacities for zoning administration as well, of course, in their values and goals. So in the sensitive area of land use control, one size does not fit all. Nor do regulations have to be conventional to be either legal or effective.

One of the problems, for example, with sign regulations is that they can be maddeningly fussy and complex simply because there are so many different kinds of signs today. To avoid any sign displays slipping through the cracks, codes often define separate regulations for a dozen

or more different sign types. But doing so can make sign provisions daunting to both the businessperson and the zoning inspector and increase the likelihood of arbitrariness and inconsistency among the various provisions.

The clean-sheet-of-paper technique helped us develop new regulations for one city with a small zoning staff that really didn't need any superfluous complexity, thank you. We folded multiple sign classifications into just two based on the visual obtrusiveness of the various types. That gave us two sets of standards rather than a dozen.

## 3. Look at Alternatives

Since local people don't always agree on zoning issues, it can be helpful to look at more than one way to solve a regulatory problem.

The first provision drafted by the local planner or consultant may not be the most workable option. Voting it up or down may just produce a win-lose outcome. Thinking up variations that can remove objections and work for everyone can be a better bet.

Home-based businesses became an issue to one of our clients after a tattoo parlor set up shop as a home occupation. City officials were torn between desiring to protect unobjectionable existing businesses and wanting to respond to neighbors' complaints and keep residential zoning intact.

After we drafted rules one way, some city officials pressed for a much more easy-going policy. So we produced a very different and rather unorthodox but still defensible set of rules. The City ultimately went back to the first draft, but looking at a different option undoubtedly clarified their thinking.

#### 4. Identify the Real Issue

Especially when city officials or people in the community are divided on a regulatory question, it can be helpful to figure out what the *real* issue is. It's not always what it seems at first blush.

In one city that hired us to do sign regulations, some favored a strict amortization mandate to get rid of existing legal signs that were considered undesirable. Advocates cited other communities with such a requirement in their ordinances. It turned out, however, that those towns' amortization programs had not worked out very well in practice. The local billboard company threatened to sue if amortization were enacted since it would wipe out their entire inventory in town.

We found that the real concern was not amortization but simply finding a way to remediate adverse effects of existing legal signs considered too big or too tall. We proposed an alternative way to do that through negotiation supported by both mandates and incentives. The billboard company was happy, and so were the activists. It was a win-win.

Blanket prohibitions of particular land uses are particularly troublesome and often legally vulnerable as well. It's better to identify the specific objectionable effects of, say, mobile homes or junk yards and consider rules to mitigate those effects. Real land use issues are often much more confined than they initially appear, and provisions that are narrowly tailored are more likely to be broadly accepted.

One city completely banned portable signs. Three years ago it singled out two small businesses displaying small attractively-designed portables that they needed to compensate for poor visibility and took them to court. The court threw out the prohibition, and now the city has no restrictions on the size or appearance of these signs. Had city officials been less broad-brush in their regulatory demands years ago, they might enjoy more control of these signs today. Perhaps the best reason to avoid win-lose regulations is that the apparent winner can sometimes end up the loser.

#### 5. Find Creative Compromises

Local people with opposite and apparently irreconcilable views can seem to be a headache to local officials trying to arrive at acceptable zoning policies. But they can really be a spur to innovation. Good win-win regulations can sometimes come out of impossible situations if we're willing to get a little creative.

Municipal officials sometimes shy away from creativity and seek the apparent security of provisions that some other town has already adopted or that have been tested in court. But copycat regulations aren't always the best solution.

Creativity must, of course, stay within the confines of the law. But for many really new provisions those limits are not yet known. The protection in such situations starts with the counsel of your city or village attorney, who can advise as to what the courts might decide should someone sue. But the other protection is simply to make it less likely that anyone will *want* to sue by trying to address the diverse interests of different stakeholders in crafting the regulations.

Some zoning rules are little more than customs that



With the usual win-lose regulation, the winner sometimes becomes the loser. When a court invalidated one city's attempt to regulate away this small A-frame, the city was left with no controls at all on portable signs. Gann Associates photo.

can occasionally stand in the way of good solutions. One of the downsides of relying on the usual experts is that they can be a bit too wedded to the conventions of the past. Everyone "knows," for example, that except for the occasional special-purpose overlay zone, you can't have more than one zoning district on the same acreage at the same time. A lot is zoned R-1 or B-2 but never both. But there is in fact nothing in statute to say it can't be both.

In a changing mixed use district in a large city we worked for, no one could agree whether zoning should reflect the older existing land use or newer uses that seemed to represent the wave of the future. Zoning for the former would avoid the problem of creating nonconformities but would impose the barrier of rezoning to the eventual replacement of older uses as they moved out. And zoning for the latter would hurt the ability of older businesses to expand or improve and possibly create land use conflicts as new uses came in.

The city's planners understandably didn't want to have to favor either group. So we suggested concurrently mapping one zoning district reflecting the present land use plus a second reserve-type district allowing prospective successor uses. The reserve zoning could kick in when the time came subject to certain conditions but without the need for rezoning. Unorthodox though it was, this compromise found win-win favor with both the local businesses and the planners.

#### 6. Consider Incentives

Mandates and prohibitions—the warp and woof of nearly all land use regulations—tend to be win-lose affairs. They are often divisive, some in the community pushing for their inclusion in local regulations and others trying to keep them out. But regulations can sometimes *reward* desired development actions without *insisting* on them.

A good example is exactions. Mandatory donations of land for open space or payments like impact fees can be controversial since developers argue they raise home prices. There can, however, be other ways to reach the same result.

Open space, for example, can be preserved with trans-



**Win-win incentive regulations can encourage preservation of open spaces without economic loss to property owners. Gann Associates photo.**

ferable development rights or density transfer provisions. These mechanisms allow full property rights to be realized and even added to when substantial land is set aside as open space.

Older cities sometimes find their downtowns booming with office construction while investment bypasses their neighborhoods. Years ago some cities tried “linkage” exactions to in effect tax downtown development to benefit the neighborhoods. For one city we instead recommended Neighborhood Development Bonuses that gave downtown developers extra allowable floor space if they voluntarily made investments outside of downtown.

### **Creating Winners**

The difficulties municipal officials often experience with respect to zoning decisions on development proposals can often be traced back to how their cities’ regulations were written years ago.

The impetus for adoption of many of these regulations was often a threat or perceived threat—from rapid development, say, or a particular “nuisance” land use. But reacting to threats can inspire a win-lose approach that can backfire in the long run. Because nobody likes to lose.

Win-Win Regulation says communities can win without making their residents, businesses, property owners, or developers into losers. For municipal officials, creating winners can be good community relations, good politics and good government. ■

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