

# Basic Legal Issues Involved in Municipal Land Use

## **2019 Lakewood Citizens' Planning Academy**

**Robert (Bob) Widner**

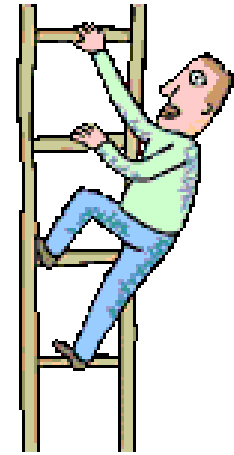
**Widner Juran LLP**

**City Attorney, City of Centennial**

**Adjunct Professor of Law, Univ. of Colorado**

**September 12, 2019**

# Goals for Session



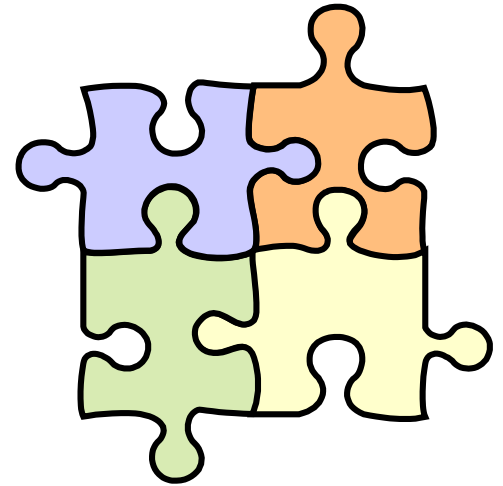
- Understand Two Critical Themes in Land Use Law
- Introduce Some Current Legal Issues in Land Use & Planning

# “Disclaimers”



- Personal Perspective
  - 30 Years Representing Local Government
- The “90% Law Rule”
  - Exceptions, special circumstances, and minority positions always exist
- No Specific Questions/Applications to Projects

# MAJOR THEMES



# Theme One



# Theme One

Land Use Law is Often an  
Effort at Seeking

**Balance**



# Basic Balance Idea

Property  
Rights

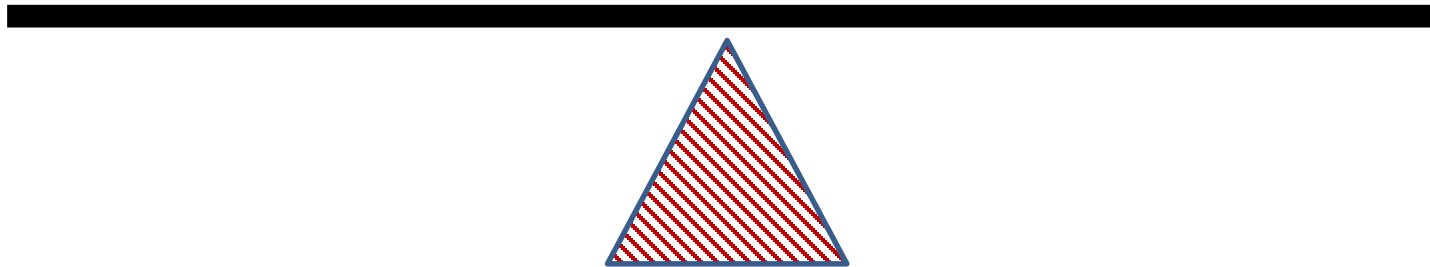
Regulation



# Basic Balance Idea

Property  
Rights

Regulation



**Legal/Constitutional  
Protections**

# Property Rights

- Importance of “land” in late 18th-century agrarian society
- British Common Law’s “Bundle of Rights”
- American Recognition of “Property” as Protected
- Fifth Amendment of 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.”



# Regulation

- “Police Power”
  - Inherent Power of Government
  - Protect “Public Health, Safety & Welfare”

**Courts repeatedly tell us:**

**A corollary to the right to hold property is a duty to refrain from using it in a manner that would cause harm to neighboring landowners or the general public.**

Common Theme in  
Regulating Land Use:

**Balance**

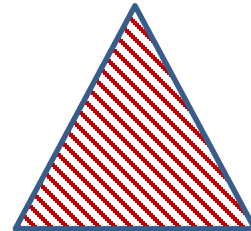
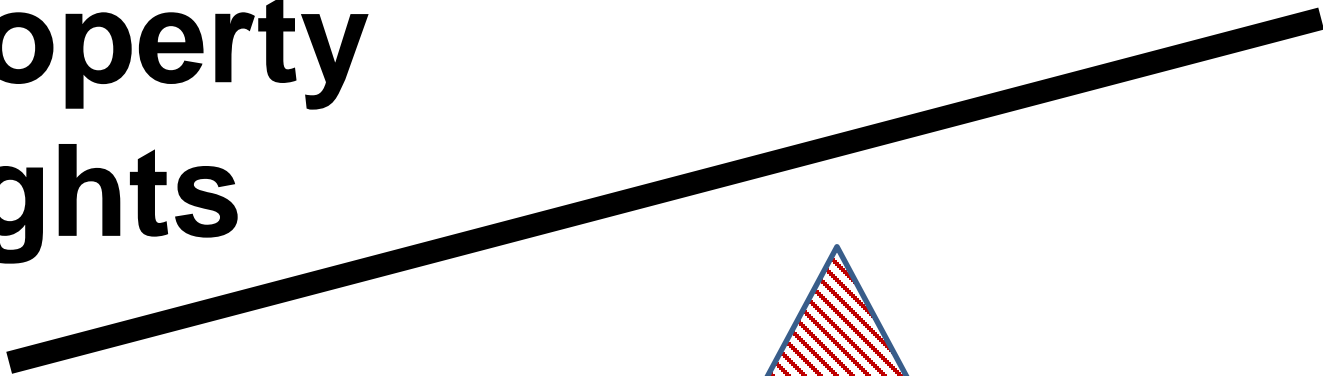
Property Rights with  
Regulation

to Protect the Health, Safety  
and Welfare of the Public

# A Common Owner Perspective

Regulation

**Property  
Rights**

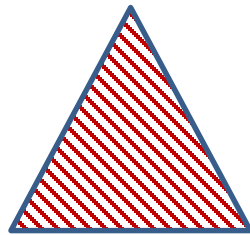


**Legal/Constitutional  
Protections**

# A Common Citizen Perspective

Property  
Rights

**Regulation**

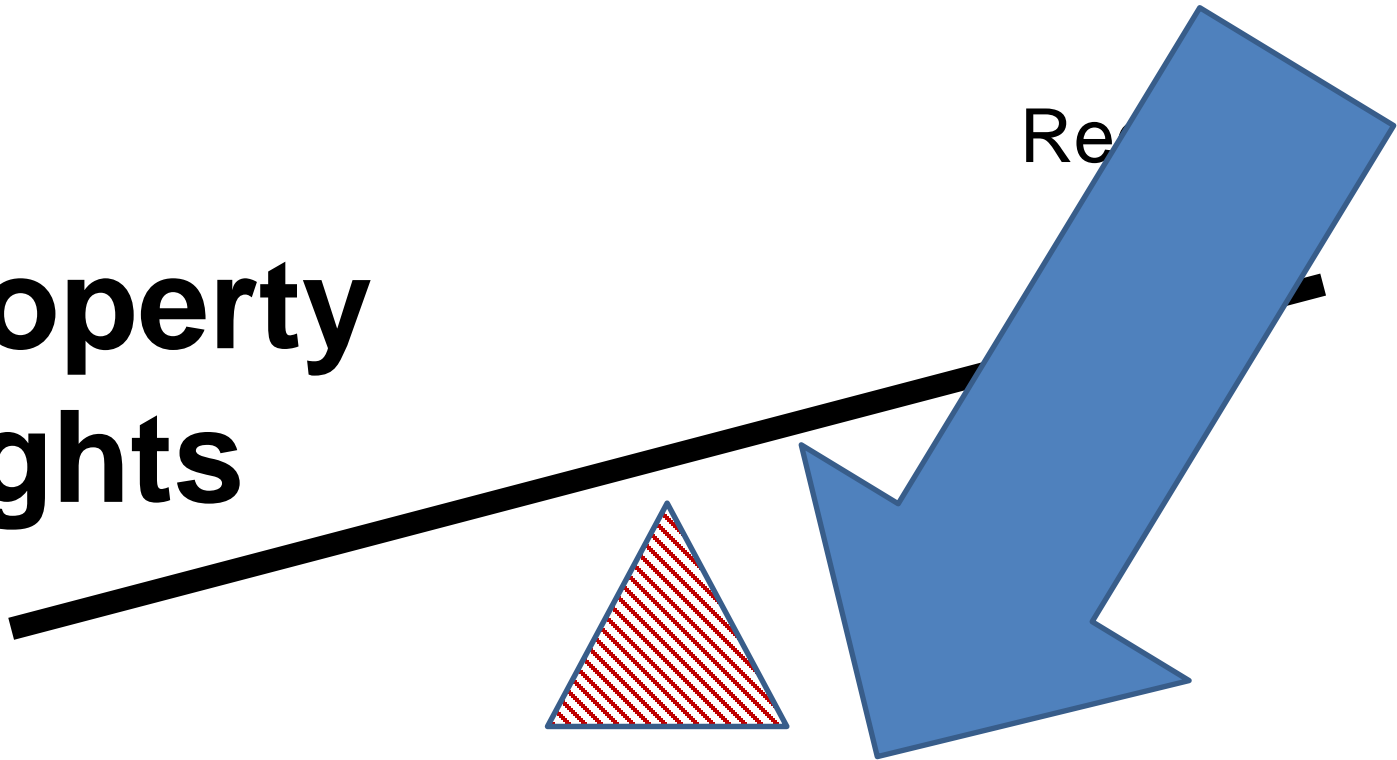


**Legal/Constitutional  
Protections**

# A Common Owner Perspective

**Property  
Rights**

Re

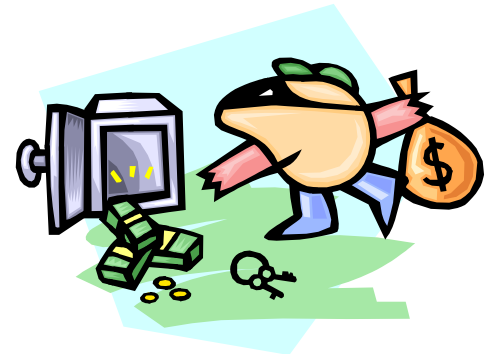


**Legal/Constitutional  
Protections**

# One Protection – “**Takings Clause**”

## Fifth Amendment of Constitution

“... nor shall private property be **taken** for public use, without just compensation.”



# One Protection – “**Takings Clause**”

- Eminent Domain/Condemnation
- Physical Occupancy by Government
- Regulations That Go “Too Far”
  - Deny “All Reasonable Use”
    - Zoning to Open Space
    - Zoning to Unreasonable Use



# Another Protection

## “Due Process Clause”

Fifth Amendment of Constitution

“No person shall be . . . deprived of . . . property, without due process of law.”

- Essentially a guarantee of basic fairness.

# Another Protection

## “Due Process Clause”

### “Procedural” Due Process

- Notice and an opportunity to be heard at a meaningful time in a meaningful way.
- Neutral and Unbiased Judge or “Tribunal”

### “Substantive” Due Process

- “Substantive” rights are general rights inherent in society (e.g., life, liberty, happiness) despite the government’s desire to the contrary.....
- Reasonable laws supported by rational justification.

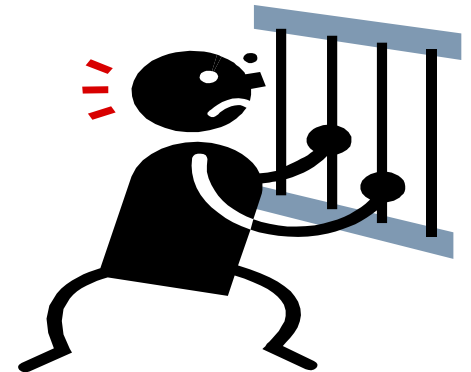
# Regulation

Another Protection  
**“Local Land Use Law”**

Most Land Use Law  
is  
Local Law

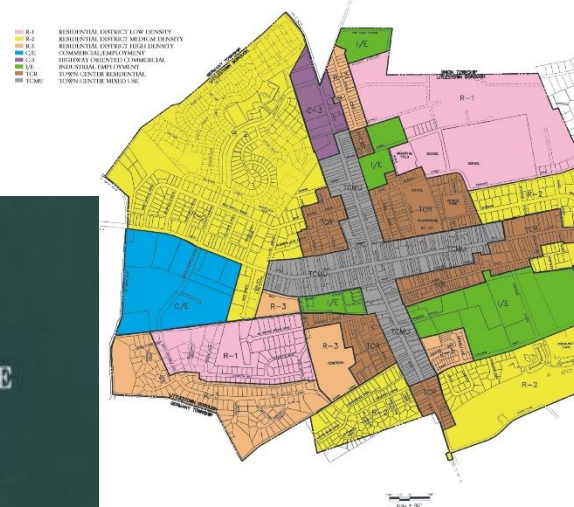
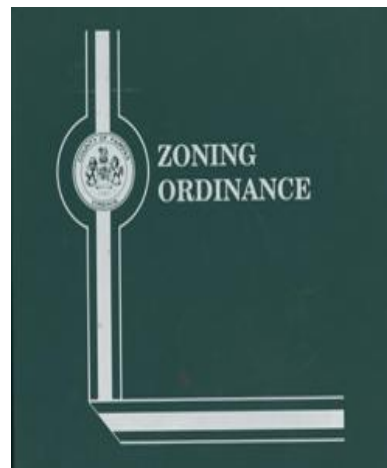
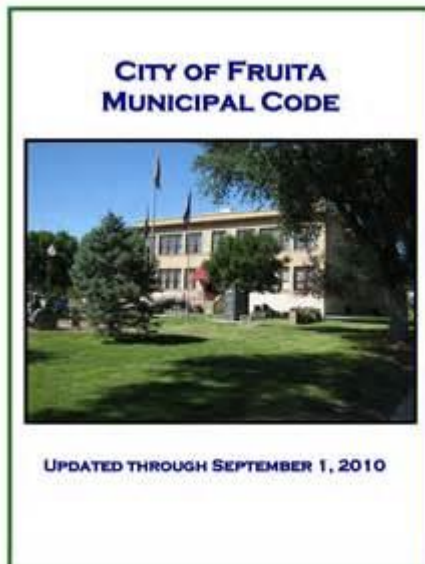
# Source of Local Land Use Law

- Statutory Municipalities
- Home Rule Municipalities
- “Concerns” and Limitations
  - Statewide Concern
  - Local Concern
  - Mixed Statewide & Local
- Lakewood – Home Rule Municipality



# Source of Local Land Use Law

- Zoning Regulations and Zoning Map
- Subdivision Regulations
- Municipal Code



TOWN OF PROSPECT,  
CONNECTICUT

**SUBDIVISION  
REGULATIONS**



July 1, 2004

# Theme Two

# **Theme Two**

**Land Use Decisions  
Involve Three Powers that  
Govern Just About  
Everything  
(Process, Rights, Appeal)**

# Governmental Action - Generally

- Separation of Powers
  - Legislative
  - Judicial
  - Administrative (Executive)

# Governmental Action - Generally

## Legislative Action

Creating/Amending Laws

General Applicability to Public

No Specific Individual Rights

## Judicial Action

Specific Applicability/Individual Rights

## Executive/Administrative Action

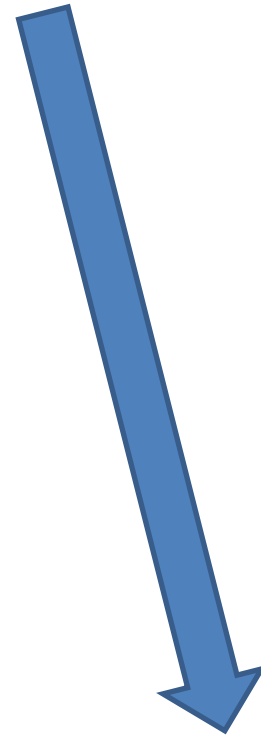
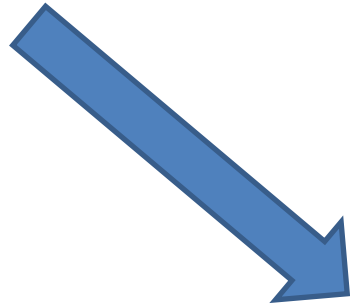
Implementing Established Policy or Decision

# Governmental Action

Enact Laws (Legislate)

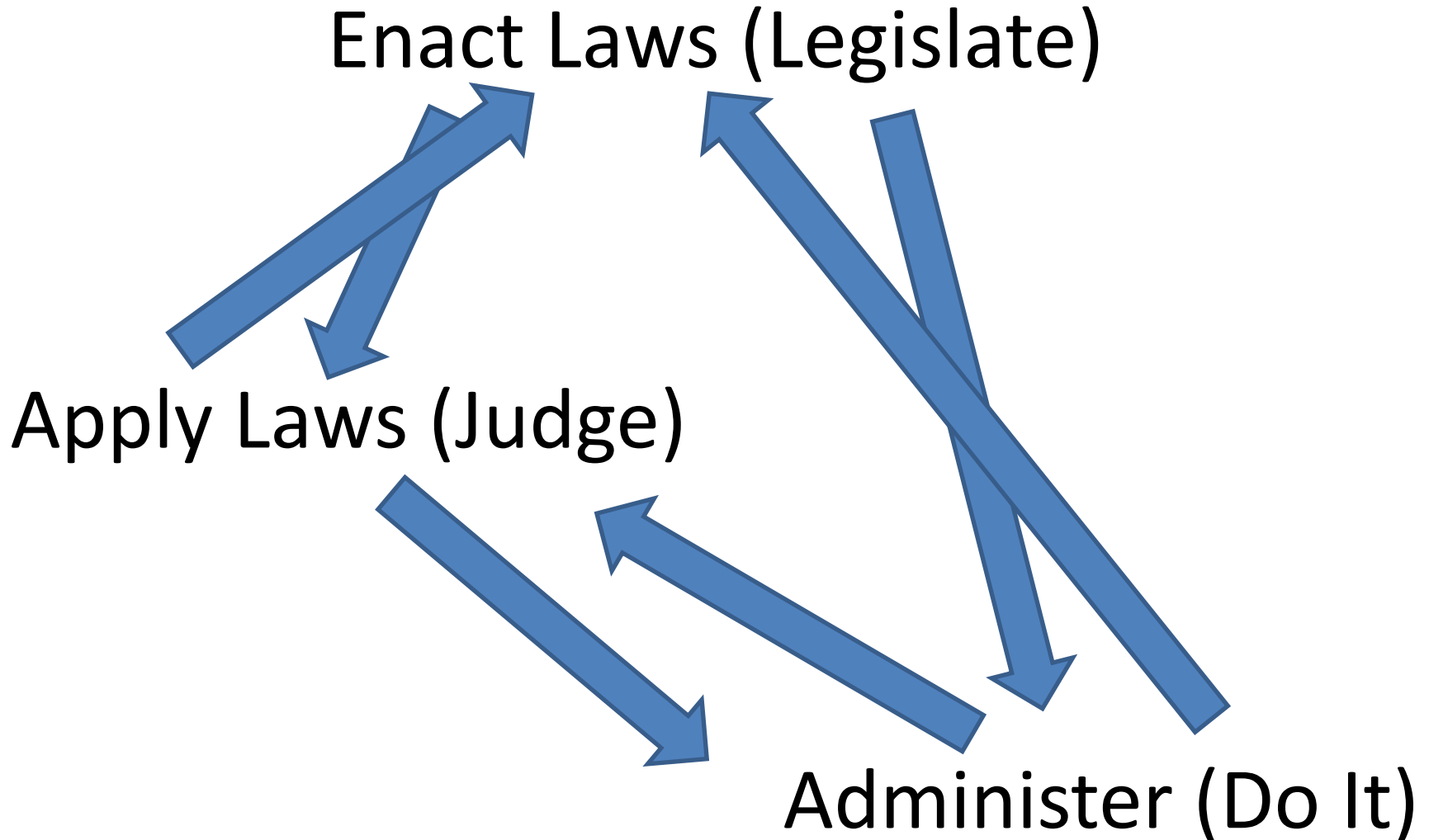


Apply Laws (Judge)



Administer (Do)

# Governmental Action

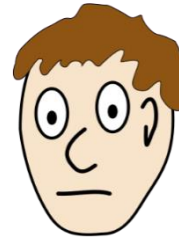
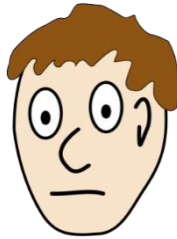


Federal

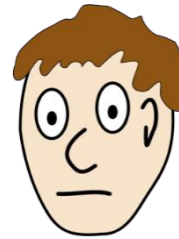
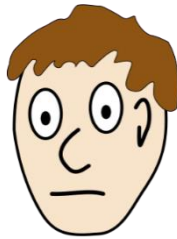
State

Local

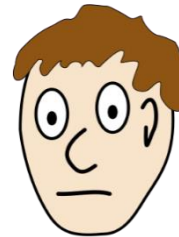
Legislative



Judicial



Executive



Federal

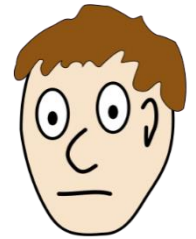
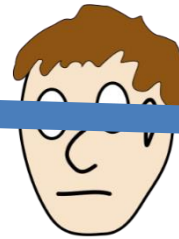
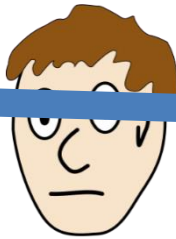
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Local

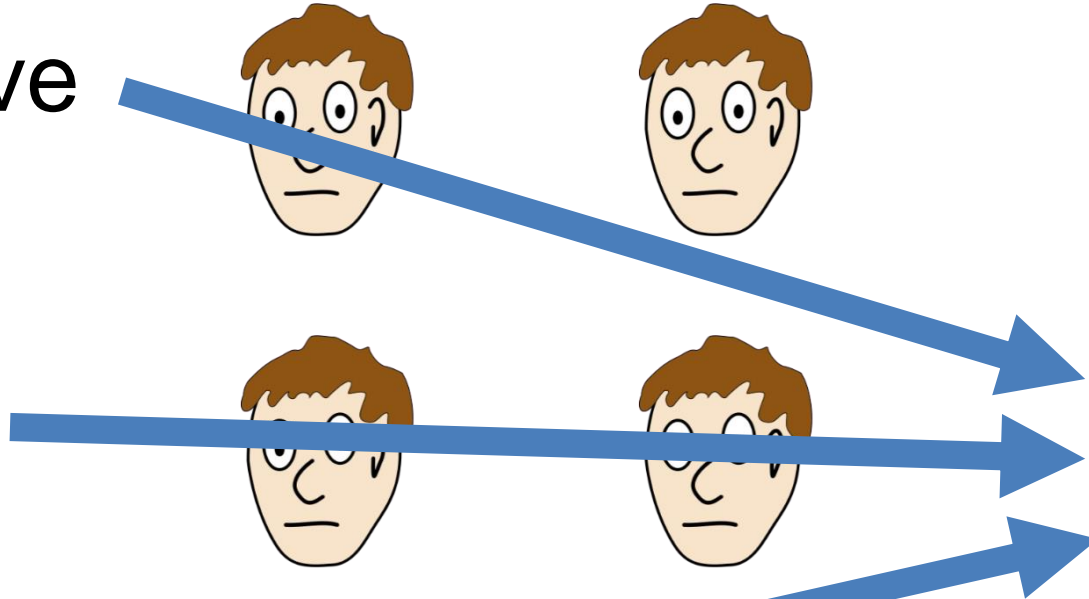
Legislative



Judicial



Executive




# Local Governmental Action

## Land Use

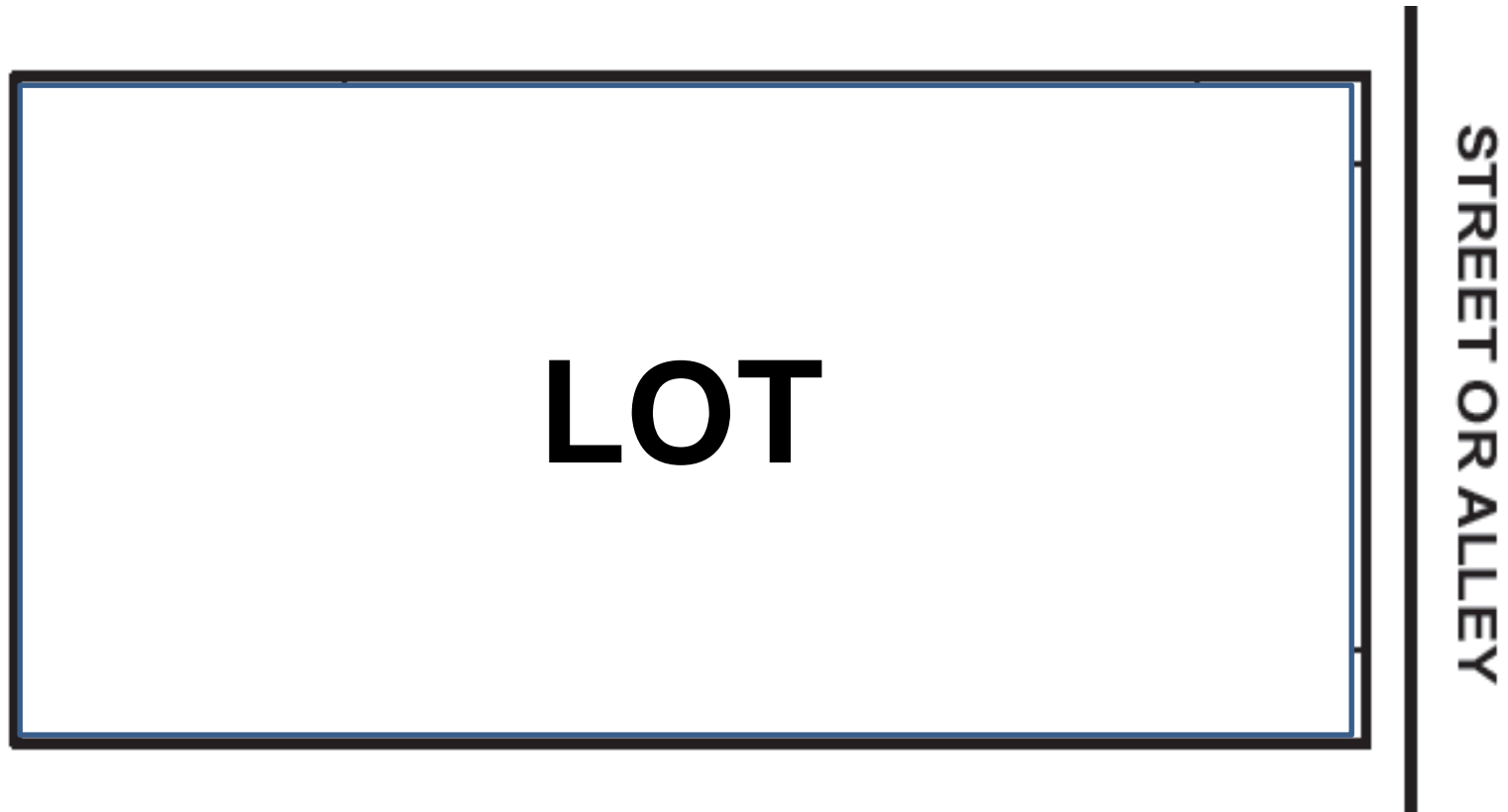
- Legislative
  - Enacting or Creating Land Use Laws
- “Quasi”-Judicial
  - Most Actions Requiring Notice & Public Hearing
  - Applying Legislation/Laws to Specific Property
- Administrative/Executive
  - Enforcing Zoning and Other Land Use Laws
  - “Administrative” Site Plan Processes
  - Building Permit Inspection & Issuance

# Local Governmental Action

## Land Use

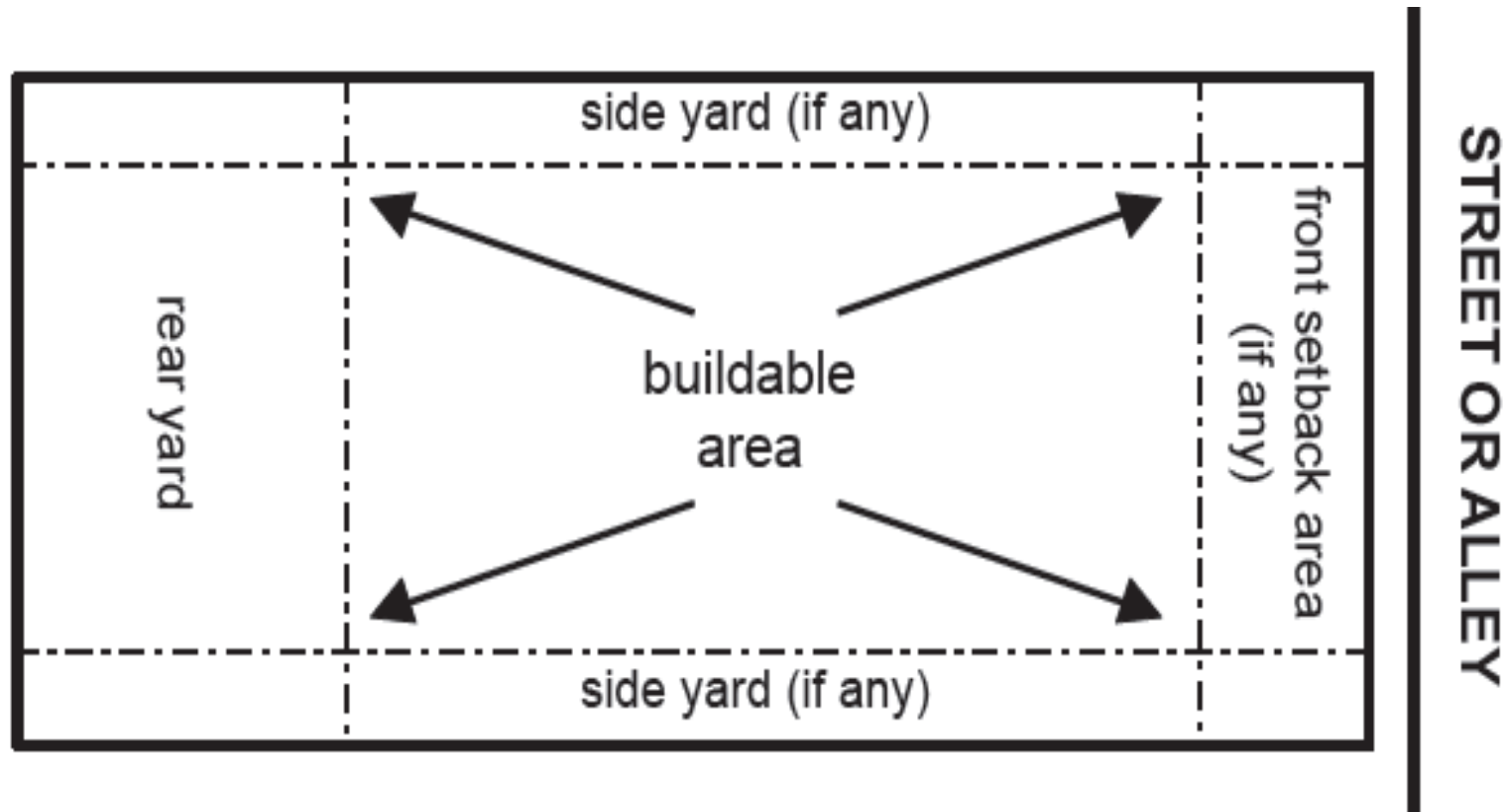
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  - Building Permit Inspection & Issuance

# Legislative (Law)



# Legislative (Law)

## R-1 Zone District Setbacks



# Quasi-Judicial (Judge)

## CITY OF FORT LUTON LAND USE APPLICATION

PROJECT NAME: \_\_\_\_\_ DATE: \_\_\_\_\_

LEGAL DESCRIPTION (attach sheet if necessary): \_\_\_\_\_

### TYPE OF APPLICATION (check all that apply):

☐ Annexation ☐ Preliminary plat ☐ Site plan  
☐ Change of Zoning ☐ Final plat ☐ Special use  
☐ PUD plan ☐ Administrative Review ☐ Other  
☐ Use by Special Review ☐ Minor Subdivision ☐ Variance  
☐ Subdivision sketch plan ☐ Amended Plat ☐ Other

\*NOTE: ATTACH COMPLETED CHECKLIST FOR EACH TYPE OF APPLICATION

### PROPERTY DESCRIPTION:

Address or location: \_\_\_\_\_  
Current zoning: \_\_\_\_\_ Proposed zoning: \_\_\_\_\_  
Current land use: \_\_\_\_\_ Proposed land use: \_\_\_\_\_

### CONTACT INFORMATION:

OWNER: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Fax: \_\_\_\_\_  
e-mail: \_\_\_\_\_

APPLICANT: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Fax: \_\_\_\_\_  
e-mail: \_\_\_\_\_

### OWNER CERTIFICATION (sign in BLUE ink):

I certify that I am the landowner of the land included in this application, and that I consent to this application.

Owner: \_\_\_\_\_ Date: \_\_\_\_\_

I certify that the information submitted with this application and shown on the face of any plat or map, is true and correct, and that the application will be processed only after submission of a complete application, including all required documents, fees and fee deposits.

Applicant: \_\_\_\_\_ Date: \_\_\_\_\_

### FOR OFFICE USE ONLY:

Date Received: \_\_\_\_\_ Total Fees: \_\_\_\_\_ Received by: \_\_\_\_\_



## Raintree Village Shopping Center

2519-2567 S. Shields Street, Fort Collins, Colorado 80526

**VELDMAN MORGAN**  
COMMERCIAL  
1940 Madison Key Blvd., Suite 200, Fort Collins, CO 80526

Scale: 1" = 40' 0' 20' 40' 60' 100' north

# Administrative (Do)

Examples:



Building Inspection



Public Works

# Governmental Action - Land Use

Why is this  
Important?

# Due Process & Governmental Action

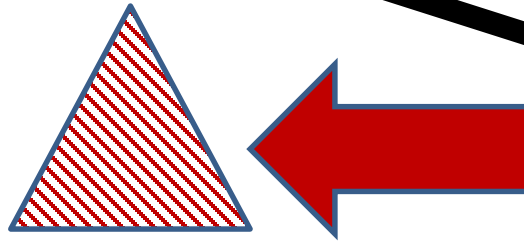
In general, the more important the individual right in question, the more process that must be afforded.

- ***Legislative*** Action = Virtually little procedural due process
- ***Quasi-Judicial*** Action = Greater rights requiring “more” due process
- ***Executive*** Action = Virtually no procedural process due

# Legislative Power

Specific  
Property Rights

Authority to  
**Regulate**

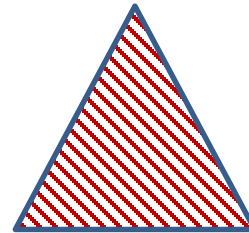
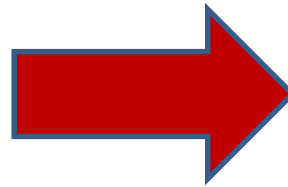
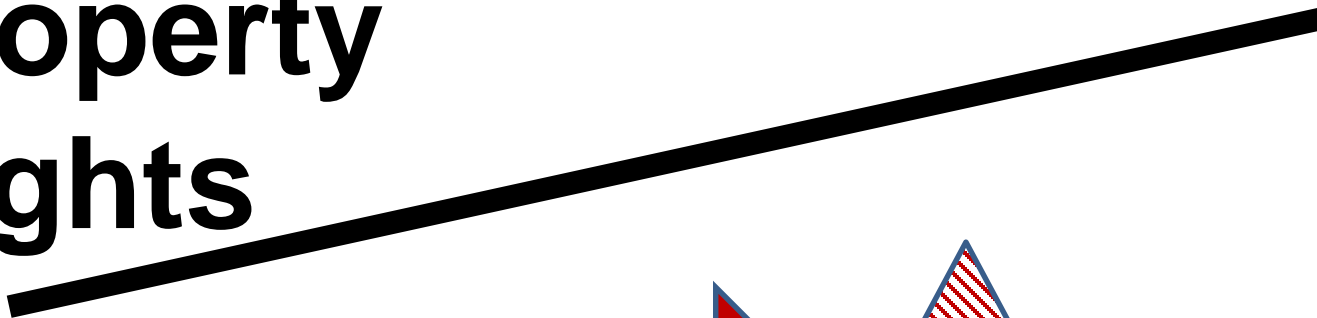


**Due Process**

# Quasi-Judicial Power

**Specific  
Property  
Rights**

Imposing Regulation

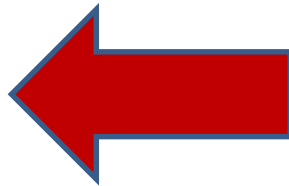
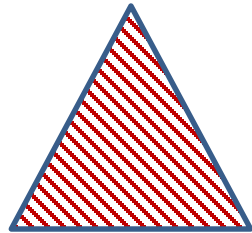


**Due Process**

# Executive/Administrative Power

Concern for  
Specific Property  
Rights

Authority to  
**Regulate**



**Due Process**

# Local Government Decision Making

What is the Basis for Local  
Government Decision Making?

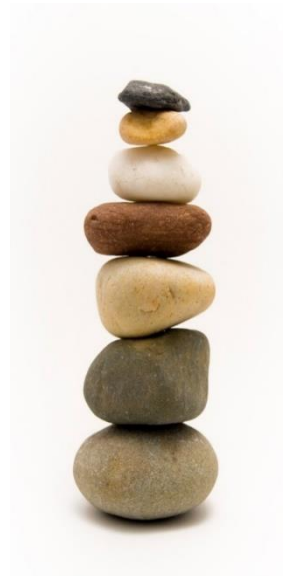
Or

Why Did They Do That?



# Local Government Decision Making

- The Language of the Law & Policies
- The Intent of the Law & Policies
- The Facts
- Health, Safety, and Welfare of the Community
- Community Policies & Preferences
- Public Relations/Media/Public Perceptions
- Cost of Adminstrating the Policy or Direction
- Administrative Staff Capacity/Burden
- Cost of Enforcement or Compliance
- Litigation or Conflict Potential
- Delay from Litigation or Conflict
- Risk Tolerance
- Cost of Litigation
- Past Precedent
- Future Application of Decision
- “Slippery Slope” Concerns/Unintended Effects
- Likelihood of State Legislative Response
- Intergovernmental Relationships
- Interference with Existing Contracts and Agreements
- Political Pressures (“I want to get reelected”)
- And many, many others.....



# Legislative Decision Making

- The Language of the Law & Policies
- The Intent of the Law
- The Facts
- **Health, Safety, and Welfare of the Community**
- **Community Policies & Preferences**
- **Public Relations/Media/Public Perception**
- **Cost of Administering the Policy or Direction**
- **Administrative Staff Capacity/Burden**
  - Cost of Enforcement or Compliance
  - Litigation or Conflict Potential
  - Delay from Litigation or Conflict
- **Risk Tolerance**
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  - Past Precedent
  - Future Application of Decision
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  - Likelihood of State Legislative Response
  - Intergovernmental Relationships
  - Interference with Existing Contracts and Agreements
- **Political Pressures (“I want to get reelected”)**
  - And many, many others.....



# Quasi-Judicial Decision Making

- **The Language of the Law & Policies**
- **The Intent of the Law & Policies**
- **The Facts**
  - Health, Safety, and Welfare of the Community
  - Community Policies & Preferences
  - Public Relations/Media
  - Public Perceptions
  - Cost of Adminstrating the Policy or Direction
  - Administrative Staff Capacity/Burden
  - Cost of Enforcement or Compliance
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  - Delay from Litigation or Conflict
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  - Interference with Existing Contracts and Agreements
  - Political Pressures (“I want to get reelected”)
  - And many, many others.....



# How Do We Decide?

Apply

Federal, State, Local **Laws**

to the

**Facts**

To Reach a Defensible **Outcome**

Then Balanced Against

the Host of Other Concerns & Risk of Challenge

# Administrative Decision Making

- **The Language of the Law & Policies**
- **The Intent of the Law & Policies**
  - The Facts
  - Health, Safety, and Welfare of the Community
  - Community Policies & Preferences
  - Public Relations/Media/Public Perceptions
  - Cost of Adminstrating the Policy or Direction
- **Administrative Staff Capacity/Burden**
  - Cost of Enforcement or Compliance
  - Litigation or Conflict Potential
  - Delay from Litigation or Conflict
  - Risk Tolerance
  - Cost of Litigation
  - Past Precedent
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- **“Slippery Slope” Concerns/Unintended Effects**
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  - Intergovernmental Relationships
  - Interference with Existing Contracts and Agreements
- **Political Pressures (“I want to keep my job”)**
  - And many, many others.....

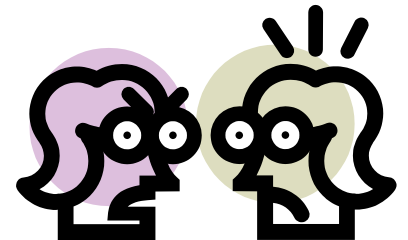


# Effective Citizen Participation

- DO
  - Know the Type of Decision
  - Read the Staff Report & Criteria for Approval
  - Focus on the Criteria for Approval
  - Stay Credible & Factually Accurate
  - Stay on Same Level as Decision-maker
- DON'T
  - Toss out Ludicrous Assertions (Cats & Dogs Mating)
  - Threaten, Belittle, Condescend, or Argue

# Ex parte Communications

- “Ex parte” = from (by or for) one party
- Quasi-Judicial Action ONLY – DUE PROCESS
- Neutral, Unbiased, and Fair Decision makers
- Commences upon submission of application



# SOME CURRENT LEGAL ISSUES



# A Host of Issues

- Aging Population Increase
- Disabled Population Increase
- Lower Income Housing/Homelessness
- Land Use Conflicts with Religious Institutions
- Environmental/Emergency/Disasters
- Energy & Sustainability (Renewable Resources)

# A Host of Issues

- Water, Water, Water in the West
- Land & Use Preservation – Recreation, Scenic, Agricultural, Historical
- Transportation (including Autonomous Cars)
- Shifting Demographics (Urban/Suburban)
- Telecommunications & Federal Preemption
- Oil & Gas Preemption (Western US)
- Marijuana (Federal/State/Local)
- Host of Others

# Regulation

Another Protection  
**“Local Land Use Law”**

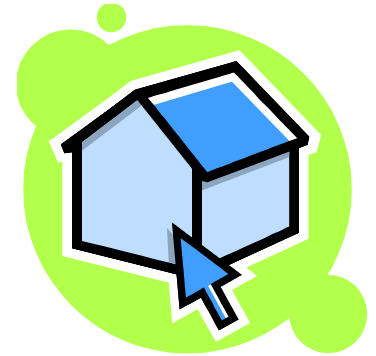
Most Land Use Law  
is  
Local Law

# Regulation

Another Protection  
“**Local Land Use Law**”

Most (**But Not All**) Land Use Law  
is  
Local Law

# Group Homes



- Past Practices and Historical Development
  - Push Group Homes into Commercial/Industrial
- Fair Housing Amendments Act (FHAA)
  - 42 U.S.C. §§ 3601 et seq.
- Protect “Handicapped Persons” Right to Residential Accommodations
- “Reasonable Accommodation”

# Group Homes

- Colorado Revised Statutes § 31-23-303 (1975)
- Group Homes Protected as a Residential Land Use
  - Developmentally Disabled
  - Elderly
  - Mentally Ill
- Matter of “Statewide Concern”



# Group Homes

- Key Issues
  - Type of Home
    - Federally Or State “Protected”
    - Other (Not Protected)
      - Runaway Homes
      - “Halfway” and Criminal Release Homes
  - Permitting Programs or Licensing
  - Public Hearings
  - “Spacing”

# Religious Institutions

- Historic Treatment of Churches and Other Religious Institutions
- Religious Land Use & Institutionalized Persons Act (“RLUIPA”) found at [http://www.usdoj.gov/crt/housing/housing\\_rluipa.htm](http://www.usdoj.gov/crt/housing/housing_rluipa.htm) OR [www.rluipa.com](http://www.rluipa.com)
- No “Substantial Burden” on Religious Land Uses without “Compelling Governmental Interest”
  - Absence of Zoning or Limited Zoning
  - Permit Only Requirement (lengthy and expensive)
  - Unreasonable Curtailment of Reasonable Expansion
- *Generally Equal Treatment of*  
Secular and Non-Secular Uses



# Questions

