

LAND USE LAW IN OHIO

By
Joseph E. Gibson, Esq.

I. The Theory of Property (and Property Rights – Ownership)

- A. Personal Property
 - Biblical Principles/Ancient “law”
 - British Common Law & “The Crown”
 - American Law
- B. Real Property (“Land”)
 - Biblical Principles/Ancient Law
 - British Common Law & “The Crown”
 - American Law
- C. The Scope of Real Property
 - Rights to the Land
 - Rights to the Sky
 - Rights to the “depths”
 - Water Rights
 - The Right of Exclusion
 - Responsibilities to the “Crown” (Yes, taxes)
 - Newer “responsibilities” to one’s fellow earthlings/planet/environment
 - American Law

D. Is this even the right way to go with all of this? “When you say ‘this is mine’ you exclude the entire world from the use, and over-all benefit of that thing that you say is yours. This is a bad thing for society, and the world.” (Editor’s note: This applies to both real and personal property)

-who said this?? Answer: Revealed at presentation. Proposals welcomed.

-economic/social/political ramifications of this statement.

II. The Use of Real Property (and Limits on the Use)

- A. Private Use/Control

1. Quiet enjoyment: Just leave me alone and let me mind my own business (and you mind your own) !
2. Trespass to Land-Just leave me alone and let me mind my own business and stay off my land, and don't come here unless I want you to.
3. Development-Just leave me alone, and maybe I will make this area a better place for me, and perhaps those near me.
4. Restrictive Covenants-You can't do that on this land, even after I am dead !

B. Public Land Use & Regulation (are these the same thing?)

1. "Takings" (*Eminent Domain*)
2. Land Use Law
 - Zoning
 - Development
 - *Economic Development
 - Bringing-in businesses (How EXACTLY do you do this?)
 - *Residential Development
 - Housing/affordable housing
 - What this means to the City's costs in providing services

III. Constitutional Components of Land Use Law

A. The Tenth Amendment:

1. What does it say? "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" Emphasis added
2. What does it mean? Whatever we didn't cover here, the States are in charge of.
3. Pre-Emption? What does this mean? Why is it relevant?

B. Other Amendments that Pertain to Land Use Law

1. Privileges and Immunities/Due Process of Law (5th and 14th Amendments):

Remember your Con-Law in law school?

You've got 5th Amendment Due Process and 14th Amendment Due Process. Or perhaps you learned it as 5th Amendment P & I, versus 14th Amendment P & I. Which applies to what?

a. 5th Amendment Due Process: “. . . No person shall be deprived of life, liberty or property without due process of law . . .” The FEDERAL GOVERNMENT

b. 14th Amendment Due Process: “. . . No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any State Deprive any person of life, liberty or property without due process of law. . . .”

These concepts set the state for a constitutional inter-play between states, the Federal Government, and even local governments so that we have a patchwork of local, state, and federal laws concerning possession, taking and land-use law concerning property where perhaps there should be none.

2. First Amendment (for land use? Yes !)

Freedom of speech vs. freedom from speech (the right to NOT be heard)

3. Fifth Amendment (the biggie) The so-called “Takings Clause”. Maybe this should have been FIRST on the list.

“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.”

-Issues: “Deprived” (Reduction in value = deprived ?)

Compensation

Compensation that IS JUST

C. Search and Seizure Issues and the Fourth Amendment

4th Amendment of the United States Constitution: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.” Emphasis added

Of course, the big question here is “what is reasonable?” Is the mere noticing of an issue or problem on someone’s property (or person, or in their car) sufficient probable cause such that a search of that person is “reasonable”?

Warrantless searches, or “No-knock searches” (dare we said “a raid” ?) can undermine both the Second and Fourth Amendments. Across the country, citizens have shot at police because armed homeowners believed they were being burglarized when police enter without notice. In ***Quinn v. Texas*** (2006), a gun-owner was shot in his own home after the police obtained a no-knock warrant to search his home. The search was based solely on the suspicion of the presence of his “firearms”. The firearms were legally owned and obtained, and were used only for the purpose of self-defense. When the police smashed open Quinn’s door in the middle of the night without warning (not even knocking !), Quinn grabbed his gun thinking he was the victim of a home invasion. He was shot and later penalized. The Supreme Court has since refused to hear the case. Attorneys for Quinn argued in the case that legal gun ownership (as protected by the Second Amendment) is not grounds for law enforcement officers to evade the protections of the Fourth Amendment. So the mere possession of a gun can be enough for police to raid your home for just about any reason.

How about the “right to privacy”. Especially as it relates to land use and property rights. Where is this in the Constitution ?

D. The Taxing and Commerce Clauses (Another biggie)

1. The Commerce Clause: Article 1, Section 8 of the United States Constitution (the old one-two punch):

“Congress shall have the Power to lay and collect taxes, duties, Imposts, and excises, to pay debts and provide for the common Defense and general welfare of the United States. . . .”

“ . .to regulate Commerce with foreign Nations, and among the several states . . .”

- a. Nearly unlimited power here. [Ask Justice Roberts in his ObamaCare decision, ***National Federation of Independent Business v. Sebelius*** 567 U.S. 519, 132 S.Ct. 2566, 183 L.Ed.2nd 450 (2012)].
- b. And remember Chief Justice John Marshall who said “the power to tax is the power to destroy” ! ***McCulloch v. Maryland*** 17 U.S. 327 (1819)

The Bottom-line, NEVER (EVER) underestimate the power of Congress under this Clause of the United States Constitution. Go back to your Bar Exam review,

where they told you any answer to a Commerce Clause question indicating that Congress exceeded its power is always wrong. Still the same today.

2. Proposition 13 (born & raised in the State of California) Limits the rate of taxation, etc. It can be considered a 10th Amendment-style limit to the powers of the State Government.

In addition to decreasing property taxes and changing the role of the state, Proposition 13 also contained language requiring a two-thirds (2/3) majority in both legislative houses for future increases of any state tax rates or amounts of revenue collected, including income tax rates and sales tax rates.

E. State Constitutional Issues as to Land Use and Property

1. Ohio State Constitution: Primacy of Private Property (& *Eminent Domain*)

Article I, Section 19a Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

2. Other Constitutional Provisions Concerning Land Use:

- a. Article 1 Section 19b Ground Water Rights
- b. Article II Section 36 Conservation of Natural Resources (Forestry, etc)

4. Case Law

- a. ***Kohl v. United States*** 91 U.S. 367, 23 L.Ed. 449, U.S. LEXIS 1378 (1876) The first case on eminent domain, and they said Yes, the government CAN take land. The tenor of the holding almost seems to say “do we really need to answer this question? Of course they can!” A nice throw-back to the crown, and why we ditched England a hundred years prior !
- b. ***Norwood v. Horney*** 111 Ohio St.3d 353, 2006-Ohio-3799 (don’t make fun of the name of the case, OK ?) If you take someone’s land, you gotta have a good reason, and you gotta do it right !

IV. Land Use

- A. O.K. so we know the government can “regulate” land use, what does that mean?

- B. It means that the government can ACTUALLY tell you what you are allowed to do with your property. Yes, your own land
- C. How do they do it?
 - 1. Land use/zoning laws. They tell you what you can build, and where you can build it.
 - a. Validity of Zoning Ordinances *City of Euclid, Ohio v. Amber Realty Co.* 272 U.S. 365 47 S.Ct. 114, 71 L.Ed 303 (1926)
 - 2. Acquisition by *escheat*. Remember this ?
 - 3. Acquisition through *Eminent Domain*.
 - a. What is it? The power of the federal, state or local government to take private property for public use. See above cases, too.
 - b. Public Use ?
 - c. Just compensation ?
 - d. Now it's evolved into private use (see *Kelo* below)
 - e. They literally take your land away from you. A nice sub-text: they can take your land for private use too: *Kelo v. City of New London*, 545 U.S. 469, 12 S.Ct. 2655, 162 L.Ed.2d 438 U.S. LEXIS 5011 (2005)
 - 4. So, they can tell you HOW to use your land, AND they can also take it way from you. The State and local governments actually have MORE power over you in this area of the law than the Feds.(1 exception: criminal acts)
 - 5. Many MANY land deals are based on what the zoning laws are that are in effect concerning the property in question. Many deals fall through because of this.
 - 6. Thus it can NOT be understated how HUGE land use laws are in this country, even though we hear a lot of “lip service” in the law about how important and precious private property is for everyone in society.

V. Practical Applications

- 1. The Local Government is WHERE IT'S AT !! It starts (and ends) there.
 - a. Cities

- Charter City
(What does this mean?)
- Statutory City
(What does this mean?)
- Ruling bodies:
 - *City Councils
 - *"Strong" Mayors
 - *Planning Board
 - *Board of Zoning Appeals
 - *Zoning Administrator

b. Counties

- Ruling Bodies:
 - *Code of ordinances ?
 - *County Commissioners
 - *Zoning/Land Use Boards
 - *The County Tax Assessor (what the heck is THIS doing here?)
 - *Board of Appeals

c. Townships (Other Jurisdictions that affect Land Use)

- Do they have their own rules
- Reliance on the County?

2. Tools of the Local Government

- a. The City's "Charter"
- b. The City's "Code of Ordinances"
- c. The "Comprehensive Plan"
- d. The City's "Strategic Goals"
- e. Zoning Code
- f. Land-Use Code
- g. Property Maintenance Codes
- h. Other "Codes"
- i. Economic Development (Generally)

3. Working with the Local Governments on a land deal

- a. Changing the Zoning Code/Zoning Map

- what this means
 - the process
 - b. Obtaining a “special use” permit
 - what this means
 - the process
 - c. Obtaining a “permitted use” permit
 - what this means
 - the process
 - d. Getting a “variance”
 - what this means
 - the process
4. Overview of the process (typical city)
- a. Determination by “Zoning Administrator”
 - Issues/Process/What to know
 - b. Appeal to Planning Board
 - Issues/Process/What to know
 - c. Appeal to Board of Zoning Appeals
 - Issues/Process/What to know
 - d. Appeal to City Council (in some cases)
 - Issues/Process/What to know
 - e. Appeal to Court system (Common Pleas Court, Court of Appeals, S.Ct.)
 - Issues/Process/What to know
 - you lawyers know it from here, right?

VI. Other Issues

- A. Challenging/Defending the Constitutionality of Zoning and Land Use Actions
- B. Ethics in Zoning and Land Use Law
- C. Conflict in ownership
- D. Conflict in the government action
- E. The Land Subdivision Process

- F. Controlled Growth and Homeowner Association Issues (“CUD’s”)
- G. Annexation Issues
 - 1. For Residents
 - a. Tax base
 - b. Workers
 - 2. For Businesses
 - a. Tax base
 - b. workers
- H. Water/Sewer/Electric/Streets/Police Protection Infrastructure improvements/costs
- I. Other “political” reasons
- J. Challenges to Annexation
 - Legal
 - Electoral (ballot initiatives)
- K. Environmental Concerns
 - EPA (Federal)
 - EPA (State)

VII. So what do we walk away with on this?

-Your LOCAL government has more power and control over you, your property (real and person) and your way of life than many of us give them credit for.

-Get involved with your local government, either as an area of practice, or by serving your community on a board or commission not only to be a good citizen, but also (if, for no other reason) to stay informed.

-Finally, if you do NOT involve yourself in local government, you do so at your own peril.

THANK YOU !!!

JOSEPH E. GIBSON

Attorney at Law

545 Helke Road

Vandalia, Ohio 45377-1503

Phone: (937) 264-1122

Fax (937) 264-0888

Web-site: gibsonlawofficesohio.com

e-mail: joe@gibsonlawohio.com

Celebrating 25 years (1994-2019)

Joseph Gibson is an attorney with a private practice focusing on Workers' Compensation law (representing both employers and injured workers) litigation, and firearms law. He is the owner of Gibson Law Offices, a solo-practitioner law firm with locations in Vandalia, Fairborn Tipp City, and Middletown. Born and raised in Southwest Ohio, in 1987 he graduated from the University of Dayton with Bachelor of Arts in Political Science. He went on to attend the University of Dayton School of Law, and where he earned his Juris Doctor degree in 1990. In the late 1980's and early 1990's, he worked for the Department of Defense at Wright-Patterson Air Force Base Air Force Logistics Command. His time there was mainly in the Air Force Contract Law Center where he reviewed Contracting Officer's Decisions for legal sufficiency. He was then appointed by the Ohio Bureau of Workers Compensation to be the local district attorney for Dayton and Springfield service offices where he represented the BWC at all levels of administrative hearing. He advised claim and risk staff on claim questions, premium issues, and agency policy. He has instructed at Sinclair Community College and Edison State Community College in the Political Science and Business Law Fields. In 2009 he was elected to County Council in his hometown of Tipp City, Ohio earning the highest number of votes a candidate has ever won up to that time. He was re-elected 4 years later and again in 2017. In 2014 he was selected to be Council President. Currently he serves as the City's Mayor. Her served on the City's Land Use Revision Committee, and the property maintenance code review committee. He also serves on the Tipp City-Monroe Township Cable Access Commission and the Miami County Council. He has advised gun shop owners and private citizens on firearms law issues for several years, and has spoken on the subject to trade groups, recreational organizations and local civic groups. He is a Lifetime/Benefactor Member of the National Rifle Association of America.