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Local Zoning? Could Be An Executive Order For That



FEBRUARY 6, 2017

By **MICHAEL SAHN** and **NICHOLAS CAPPADORA** //

President Trump has made it clear that his administration is dedicated to reducing and in some cases eliminating

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Local zoning? Could be an executive order for that

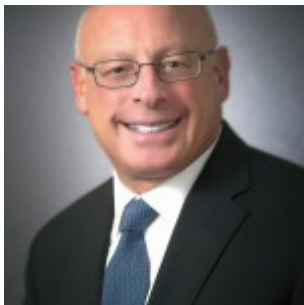
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many areas of government regulation. These areas include health care, financial services, environmental regulation, education and energy. Will these anti-regulation efforts reach down to local land use and zoning regulations and policy? Most certainly.

Local governments – counties, cities, towns and villages – have always had the primary jurisdiction to enact and enforce land use and zoning regulations and policy. Zoning is a cornerstone of municipal home rule. Local governments exercise home rule by enacting zoning ordinances designed to carry out their vision of the best plan for their community.



Michael Sahn

Over the years, municipalities have enacted more and more zoning regulations to deal with a wide variety of issues. What municipality doesn't have multiple types of zoning districts in their code for every conceivable use of land? Whether it is residential, commercial,

industrial, mixed-use or agricultural uses, just to name a few examples.

Let's take residential uses. There are residential zoning districts for an array of residential properties, including single family dwellings, two-family dwellings, townhouses, multi-family occupancy, apartments, golden age housing, transit oriented development, condominiums and workforce housing zones, just to mention some examples.

Given the complexity of these laws, municipal zoning is ripe for de-regulation. Here are some ways it could happen:

+ Local officials often reflect national and state-wide trends. It's easy to foresee that local officials will want to follow the trends set by the president, and simplify local zoning laws.

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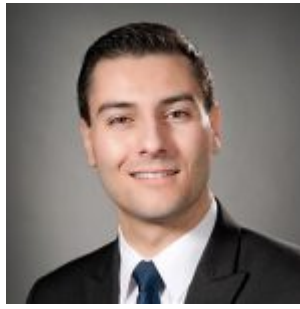
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+ Based on the president's initiatives, commercial and residential property owners will start to demand less zoning regulation. What local government hasn't heard complaints about over-restrictive zoning laws? If the deregulation trend takes hold in other sectors of the economy, there's no doubt that people will demand more flexibility and fewer controls over how they use and can develop their own property.



Nicholas Cappadora

Even before Trump, there was a large, vocal constituency arguing against zoning over-regulation, and advocating for the free market to dictate land use controls.

+ Judicial decisions will also impact local zoning. This is already happening. In a recent United States Supreme Court case involving the permissible scope of regulating signs, Justice Thomas, writing for the Court, said that in order to be constitutional, local laws regulating signs must be "content neutral."

In another, broader case, *Koontz v. St. Johns River Water Management District*, Justice Alito penned a decision which limits the rights of local land use agencies to impose restrictions in granting a permit, and limits the right to deny a permit for failure to comply with a condition. As more conservative minded judges are appointed to the federal bench, this trend of restricting the scope and power of local zoning authorities will continue, and no doubt filter down to the state courts.

+ Since the president wants to undertake huge infrastructure projects, it is likely that the federal government will seek to do away with, or severely limit, local controls that stand in the way of plans to construct new highways, bridges, tunnels, rail lines and the like.

+ In the area of energy development, the president has already exercised authority to allow the Keystone pipeline to proceed. Likewise, when it comes to mining, fracking

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or other new energy developments, such as wind power, the federal government will seek to pre-empt local controls on these types of uses.

+ The federal government can roll back regulations imposed on local jurisdictions by federal agencies, such as the Environmental Protection Agency, the U.S. Army Corps of Engineers and others, that now affect local development projects.

These ideas illustrate some ways the national de-regulation trend will affect local land use and zoning policy. We must anticipate change, hopefully for the positive. Local governments have to start thinking about this now, before the next Executive Order catches everyone by surprise.

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