



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we have another in our “Listen and Learn” series – this one covering zoning rules in real property. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hi, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast. Today, we’re talking about a frequently tested real property issue – zoning. We’ll cover zoning variances, as well as the different ways in which zoning ordinances can be challenged. Sounds exciting, right? Let’s get started!

Lee Burgess: First, we’ll cover some basics. What is a zoning ordinance, exactly? A zoning ordinance is a rule that defines how real property can, or can’t, be used. These are typically passed by city and county governments, and address what is allowed to happen on plots of land in specific geographical areas. For example, a zoning ordinance might deal with whether land can be used for residential or commercial purposes. In addition, they might regulate lot size and placement, the types of homes that can be built there, which businesses are allowed to operate there, the density of occupants or structures, and the size or appearance of structures.

Lee Burgess: Here’s an example of a zoning ordinance. A rural county in State X passes a zoning ordinance that requires a 500-acre area of land to be used for residential purposes, and provides that only single-family homes can be built there. This means that no apartment complexes – which are multi-family dwellings – would be allowed in that area. You wouldn’t be able to operate a retail store there, either.

Lee Burgess: Now, let’s talk about how zoning ordinances are usually tested on the bar exam. When you see a zoning ordinance in a fact pattern, you’ll likely see a property owner who either wants an exception from the ordinance or wants to invalidate the ordinance itself. As you’ll come to learn, these issues are ripe for testing, because many of the applicable rules involve multi-factor balancing tests.



Lee Burgess: We're going to start off by talking about exceptions to zoning ordinances. There are two types of exceptions to zoning ordinances. The first is called a "variance", and the second is called a "previous nonconforming use". This second type of exception is also referred to as a "prior nonconforming use" or "pre-existing use". These terms all mean the same thing, so don't get tripped up if you see them being used interchangeably.

Lee Burgess: Let's talk about variances. A variance is typically requested by a property owner before the property owner begins to use the land in a certain manner. There are two types of variances. The first is a "use variance", and this is requested when a property owner wants to use a particular piece of property in a manner that is inconsistent with the applicable zoning ordinance. For example, let's say City X passes a zoning ordinance that specifies that all property along its Main Street between First Avenue and Tenth Avenue must be used exclusively for commercial purposes. Paul the property owner purchases a vacant lot on Main Street and Fifth Avenue. He wants to build a home there, so he would ask City X for a "use variance".

Lee Burgess: Now, let's switch up the facts to illustrate an "area variance". For this example, we're still in City X dealing with the Main Street commercial zoning ordinance that applied to Paul. Now, Patty the property owner purchases six adjacent lots on Main Street between Sixth Avenue and Seventh Avenue. Patty wants to build residential duplexes on each of the lots, so she would ask City X for an "area variance" that covers these six lots. Does the difference between a use variance and an area variance make sense now?

Lee Burgess: So, what's the legal standard that applies to an application for a variance? Here's the first of the many balancing tests we'll discuss during this episode. There are two factors in this test. A variance may be granted if the property owner, one, shows that he or she will suffer hardship because of the ordinance; and two, the variance will not damage or harm the public welfare. This is the type of balancing test that bar examiners love to test, because applicants will need to really use the facts to demonstrate which side – the property owner or the government that enacted the ordinance – has the stronger argument.

Lee Burgess: Let's work through another example together. Town B adopts a zoning ordinance that permits office buildings and retail stores in a certain downtown corridor, but not manufacturing facilities. Peter has owned and operated a popular bicycle company called Town B Bikes for two decades, and knows that many of his customers buy Town B Bikes because they are manufactured locally. After the lot where his original Town B Bikes factory was located is irreparably damaged in an earthquake, Peter buys a new lot in the downtown corridor



where the zoning ordinance applies. This is the only lot in Town B that could accommodate a bike factory sufficient for Town B Bikes to continue its operations, and bike factories are typically very quiet and don't cause any pollution. What will Peter need to show in order to get a use variance to build the bicycle factory there?

Lee Burgess: We're going to apply the two-factor balancing test. First, Peter will need to argue that he will suffer an undue hardship if Town B forbids him from building his factory on the lot in the downtown corridor. Peter is going to use the facts about the success of his Town B Bikes business as the preference of his customers to buy these bikes because of where they're manufactured – in Town B. He's also going to argue that there are no other sustainable lots in Town B, so this is the only option to rebuild without harming his business operations.

Lee Burgess: What else does Peter need to show? Under the second prong of the two-factor balancing test, Peter needs to demonstrate that the variance will not damage or harm the public welfare. Peter is going to argue that bicycle factories aren't very loud and don't cause any pollution, so the Town B Bikes factory won't disrupt the tenants in the nearby office buildings or any of the shoppers in the nearby retail stores. On these facts, it seems like Peter has a pretty strong case for a use variance, right?

Lee Burgess: Now, let's cover another type of exception to a zoning ordinance. This is called a previous nonconforming use, prior nonconforming use, or pre-existing use. Again, the terms are used interchangeably and mean the same thing. The doctrine of previous nonconforming use allows a property owner to continue to use his or her land in violation of a later enacted zoning law.

Lee Burgess: Here's the rule that you need to know: Where the prior use of the land was originally legal, the subsequent enactment of a zoning law will not bar the continued use of the land as it was legally used before the law's enactment. A nonconforming use will only be "grandfathered in" if it remains in use continuously. If the use is not continuous, it may no longer be protected.

Lee Burgess: Let's walk through an example together to better understand how the previous nonconforming use doctrine operates. Let's say that Pamela the property owner operates a very successful restaurant in a historic mansion in the West Hill neighborhood of City Y. She opened the restaurant in 2010 and has operated it continuously since then. In 2019, City Y enacts a zoning ordinance that all lots in West Hill must be used only for residential purposes. On these facts, can Pamela continue to operate her business after the ordinance takes effect on the basis of a previous nonconforming use? Yes, she probably can. She operated the



restaurant continuously, so her nonconforming use will be “grandfathered in”, and the new zoning law won’t apply to her.

Lee Burgess: Now let’s change up the facts a bit. Let’s say Pamela temporarily closed her restaurant for six months in 2015 to tour the French countryside and learn new recipes. Pamela would need to argue that this six-month closure doesn’t disrupt the 10+ years of continuous use. She may win here, but a longer disruption might not pass muster. The key is whether the pre-existing use was continuous.

Lee Burgess: There’s another issue related to pre-existing use that you should know. What about when a property owner wants to change the nature of his or her use, and this change might violate a later-enacted zoning law? The key is understanding the rationale behind the pre-existing use doctrine. This doctrine is meant to protect the prior investment in real property. Insubstantial changes and reasonable alterations to repair the property are typically allowed under this rule. However, the enlargement, alteration, or extension of a nonconforming use that constitutes a substantial change is prohibited. When a change is inconsistent with the current zoning law, any doubts are resolved against the change.

Lee Burgess: Let’s walk through another example. Pierre the property owner has continuously operated a grocery store on County Line Road in County X since 2010. In 2015, County X enacted a zoning ordinance which requires that only restaurants and office buildings can operate along County Line Road. Pierre has a prior nonconforming use, so he’s allowed to keep operating his grocery store. Let’s say that in 2018, Pierre decided to add a walk-up ATM in the parking lot of the grocery store. Is this an insubstantial change (which would be allowed), or a substantial change? On these facts, Pierre probably has a pretty strong argument that the ATM should be allowed. An ATM is the type of service you’d expect at a grocery store and would probably be permitted since this isn’t a substantial change.

Lee Burgess: But what if Pierre wants to build a gas station and car wash in the parking lot of the grocery store? This probably constitutes the kind of “substantial change” that would be inconsistent with the zoning ordinance that only allows restaurants and office buildings along County Line Road. A gas station and car wash aren’t anything like a restaurant or office building, and doesn’t have much to do with Pierre’s grocery store that was “grandfathered in”. And because doubts are resolved against a change like this, Pierre would likely be prohibited from building the gas station and car wash.



Lee Burgess: Before moving on, let's quickly recap exceptions to zoning ordinances. There are two types of exceptions to a zoning ordinance. The first is a zoning variance, and the second is a prior nonconforming use. We've covered the different standards that apply to these exceptions and gone through a few scenarios to help illustrate these rules. Hopefully these concepts are clearer for you now!

Lee Burgess: Now we're going to pivot to another zoning topic, and that's how someone can challenge a zoning ordinance. There are three ways in which a property owner can do this. First, the property owner can argue that a zoning ordinance is an unconstitutional taking under the Fifth Amendment to the United States Constitution. Second, the property owner can argue that a zoning ordinance is an impermissible use of "spot zoning". Finally, a property owner can rely on the vested rights doctrine to block a later-enacted zoning ordinance from being applied after the property owner begins construction.

Lee Burgess: We'll talk about the Takings Clause of the Fifth Amendment first. Under the Takings Clause, the government may take private property for public use only if it provides just compensation. A taking is deemed for public use as long as there is a reasonable belief that it will benefit the public. Practically speaking, this is a very low bar, and the government always wins on this prong. The second piece of this test, just compensation, is measured by the fair market value of the property at the time of the taking.

Lee Burgess: So, how might a zoning ordinance violate the Takings Clause? A zoning ordinance that causes property to become economically unviable might be deemed a "regulatory taking". Here comes another balancing test! To determine whether a regulatory taking has occurred, courts apply a three-factor balancing test that was set forth in a 1978 Supreme Court case that's commonly referred to as [Penn Central](#). The court will first consider, one, the character of the regulation – that is, whether there was a physical invasion of the property by the government; two, the economic impact on the landowner; and three, the extent of interference with the property owner's investment-backed expectations. This is a hard standard to meet, and courts have been pretty amenable to the government when it comes to zoning ordinances. Courts are typically reluctant to find that a regulatory taking has occurred, especially when the regulation promotes the general welfare.

Lee Burgess: We can use the facts in the *Penn Central* case as an example here. In this case, a New York City law empowered the city to designate certain structures and neighborhoods as "landmarks" or "landmark sites". Penn Central Transportation Company acquired the beautiful Grand Central Terminal in Manhattan. At the time it acquired the terminal, Penn Central secured the right to construct and



operate a 20-story office building atop the terminal. But Penn Central wanted to build an even larger office building that would be more than 50 stories high. It submitted its designs to the New York City Landmarks Preservation Commission for approval, which rejected the application on the basis of the landmark preservation law. Penn Central argued that limiting the office building to 20 stories would have a negative economic impact and interfere with its investment-backed expectations in acquiring the terminal. Ultimately, the Supreme Court was unpersuaded and Penn Central lost this case. In upholding New York City's rejection of Penn Central's application to build the 58-story high rise, the Supreme Court reasoned that Penn Central could reap enough economic benefit from the 20-story high rise, and that doubling the size of the building far exceeded Penn Central's investment-backed expectations.

Lee Burgess:

We're going to quickly cover two less-frequently tested challenges to zoning ordinances. The first is "spot zoning", which occurs when a small area of land is zoned differently than land in nearby areas for the benefit of the owner of the small area. This type of ordinance will only be upheld if it is supported by a reasonable basis. So, how does the court decide whether there is a reasonable basis for the ordinance? That's another three-factor balancing test. The first factor is the size of the specific area of land targeted by the ordinance. The second is whether the zoning is arbitrary or compatible with an existing comprehensive zoning plan. Finally, the court will weigh the benefits and detriments to the specific landowners, surrounding landowners, and the community.

Lee Burgess:

There's one more way in which a zoning ordinance can be challenged, and this is called the "vested rights doctrine". The vested rights doctrine protects landowners from subsequent changes in zoning if, one, substantial construction has begun; and two, substantial expenditures have been made in reliance on a valid permit. Generally, if no construction has begun, landowners will not be able to rely on the vested rights doctrine to continue development, even despite substantial expenses incurred for planning services.

Lee Burgess:

So, let's recap the ways in which a property owner can challenge a zoning ordinance. If you see a zoning ordinance that lessens the value of a property, you should be thinking about the Takings Clause of the Fifth Amendment and apply the three-factor Penn Central test. If you see a piece of land being treated differently than all others nearby, think about whether the government is engaged in impermissible spot zoning. Finally, if you see a zoning ordinance passed after a property owner has secured a construction permit, consider the vested rights doctrine.



Lee Burgess: And that's all we have for today's episode. We hope this helped you better understand zoning ordinances and how they're tested. I know it's a lot, but these examples should help you understand when to apply each of the various tests we discussed.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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