

INTRODUCTION TO  
**LAND USE  
PRACTICE**

*an excerpt from*

**HANDLING THE LAND USE CASE**

THIRD EDITION

JOHN J. DELANEY  
STANLEY D. ABRAMS  
FRANK SCHNIDMAN

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# **Introduction to Land Use Practice**

**an excerpt from**

## **Handling the Land Use Case Land Use Law, Practice & Forms**

*Third Edition*

**John J. Delaney**

Member, Maryland and District of Columbia Bars

**Stanley D. Abrams**

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District of Columbia Bars

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By

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# Chapter 1

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#### *Additional References*

**West's Digest, Zoning and Planning 1, 1.5, 2 to 4, 351, 354**

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### § 1:1 Introduction

The regulation of land use in the United States has traditionally and primarily been a function of local government. Of course, federally enacted environmental laws, such as the Federal Water Pollution Control Act<sup>1</sup> (now referred to as the Clean Water Act), the Clean Air Act,<sup>2</sup> and the Endangered Species Act<sup>3</sup> have had an impact on land development, particularly upon industrial activity. Several states have enacted statewide land use laws in an effort to protect designated critical areas. Regional commissions have been created in numerous areas of the country to regulate the use and development of bodies of water, coastlines, wetlands, and other sensitive areas. Although the participation of these other levels of government in land use regulation is a relatively recent and growing phenomenon, the primary responsibility for controlling land use and development remains with local government. Consequently, the majority of state and federal litigation in the land use area involves the actions of local governing bodies.

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#### [Section 1:1]

<sup>1</sup>33 U.S.C.A. §§ 1251 et seq.

<sup>2</sup>42 U.S.C.A. §§ 4321 et seq.

<sup>3</sup>16 U.S.C.A. §§ 1531 et seq.

**§ 1:2 Introduction—Legislative, Administrative, and Judicial Activities**

The preeminence of local government in land use regulation is not likely to change significantly in the near future. While some land use issues, such as affordable housing and protection of shorelands and wetlands, may, by virtue of their nature or complexity, require a regional rather than a local regulatory response, most land use cases present issues that are essentially local. The recognition that local government is the most appropriate unit of government to engage in land use regulation has existed since zoning ordinances were first enacted in the early 1900s. The United States Congress, after flirting in the early 1970s with a federal land use bill that would have encouraged a greater state role in land use planning, declined to enter the field even to this limited degree.

At the state level, state constitutions or “home-rule” enabling acts often delegate primary responsibility for land use regulation to the legislative bodies of local political subdivisions. The state legislature is bypassed in such states and is generally precluded from interfering with local legislation on land use matters. Even where this is not the case, state legislatures, motivated primarily by political considerations, have exhibited little interest in local land use issues. Instead, they have delegated the state’s police power in this area to local political subdivisions by way of specific zoning enabling legislation.<sup>1</sup> Where conflicts do occur between state and local laws, they often involve matters of regional rather than local concern. If the dispute is found to involve a regional matter, it is likely that the state law will be given effect.<sup>2</sup> On the other hand, local law will prevail if the matter is determined to be primarily local in character.<sup>3</sup>

The regulation of land use by local government involves both

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**[Section 1:2]**

<sup>1</sup>While zoning and land use regulation remain peculiarly local government functions, some states, most notably Oregon and Florida, have established mandatory regional or statewide planning programs in which local governments are required to participate as a condition for engaging in zoning or in other forms of land use regulation. Under such programs, local governments are required to adopt master plans and regulations that must be submitted to and approved by state planning agencies before being implemented at the local level.

<sup>2</sup>See *Orange County Air Pollution Control Dist. v. Public Utilities Comm’n*, 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).

<sup>3</sup>See *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm’rs*, 149 Colo. 284, 369 P.2d 67 (1962).

legislative and administrative activity. At the legislative level, the local legislative body, such as the mayor and council, typically performs the following functions:

- (1) adoption of a comprehensive plan;
- (2) enactment of the zoning ordinance text amendments, including the designation of zoning or use districts;
- (3) adoption of the official map and/or zoning map, whereby the municipality is divided into zoning or use districts;
- (4) enactment of comprehensive and local amendments to the zoning map; and
- (5) adoption of subdivision and development-related regulations.<sup>4</sup>

At the administrative level, land use regulation is likely to involve one or more agencies of local government, depending on the size of the municipality. Typical administrative functions and the agencies performing them include:

- subdivision control and site plan review by the planning board or planning department
- local master planning by the planning board
- review by the board of appeals of applications for special exceptions and variances, as well as appeals from agency actions
- review and approval of required permits, such as building and sewer connection permits, by the building department or environmental agency<sup>5</sup>

The legislative and administrative actions by local government controlling the use of land are, of course, subject to administrative and judicial review. The nature and scope of land use review are discussed in Chapters 5, 7, 8, and 9. Suffice it to say here, by way of introduction, that court review can be invoked in a number of ways. The proceedings most often utilized are:

- Statutory administrative appeals based upon the record made before the agency, rather than *de novo* hearings;
- Applications for injunctive relief and enforcement proceedings;
- Declaratory judgment actions; and
- Other actions expressly authorized by statute.

The degree of court involvement and the scope of review may well depend upon how the court construes the action of the agency. The extent of court review is inevitably greater if the ac-

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<sup>4</sup>These functions are described in detail in §§ 1:4 through 1:26.

<sup>5</sup>These functions are also discussed in §§ 1:4 through 1:26.

tion is deemed to be administrative, as opposed to legislative, in character.<sup>6</sup> Judicial review is also more expansive where errors of law are involved rather than challenges to factual findings.

### § 1:3 Introduction—Planning Process vs. Development Process

Public planning and the private development process share some attributes. Each is an ongoing process, the intensity of which depends upon such factors as the municipality's resources and the economic climate. Each has an impact on the land within a municipality and on the community's socio-economic well-being.

Ideally, public planning should precede development, but in many jurisdictions this has not happened. Instead, public planning agencies are often responding to development pressures that already exist. This has been the situation since the very outset of land use regulation in the United States. The first zoning ordinances at the beginning of the twentieth century were a response to burgeoning private development activity in major growth centers. In many existing and developing communities around the country, public planning agencies still react to, rather than plan for, private development.

As a result of this phenomenon, tension often exists between the public and private sectors while planning and development activities proceed. On occasion, this tension may boil over into conflict, as when questions arise regarding the vesting of one's rights to develop.<sup>1</sup> The attorney for the private developer can ease this tension and help avoid conflict by acquiring a proper understanding of each process. With such an understanding, the attorney is better able to present the client's case in such a way that the client's interest will be perceived as coinciding with the public's interest. Agency counsel can also play an important role in this regard — first, by assisting the attorneys for the developer or civic group in improving their knowledge of the planning process and, second, by ensuring that agency professional staff and board members understand the constitutional and statutory police-power limitations under which they operate.

The planning process is directed to matters of public policy, such as housing, transportation, growth management or protection of environmentally sensitive areas. But the private development process focuses upon the economic feasibility of a given

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<sup>6</sup>See §§ 5:1 to 5:11, 5:70 to 5:75, 7:2, and Ch 8 in general.

[Section 1:3]

<sup>1</sup>See Chapter 35.

project. Resolution of certain planning policy questions may require significant amounts of time, due to a lack of information or the need for assistance from other agencies. Budgetary and staff constraints may also delay completion of plans, and the agency may not be in a position to respond immediately to a specific development proposal. The developer facing strict time limitations in which to commence construction and generate needed cash flow may find such delays intolerable. When this occurs, serious questions arise for each side. The planning agency must determine how important the project is to the municipality. Will deferral or rejection cause the project to be lost? Will approval of the project, without proper evaluation or the public infrastructure to support it, have an unacceptable adverse impact upon the community? What is the likely attitude of the courts if the developer files suit?

The private developer must make similar judgments to determine whether to continue with the project as proposed or to modify or abandon it. Will the project or one like it be better received in another community? Can financing arrangements, cash flow, and profit projections be altered to accommodate the delay incurred by awaiting results of the planning process or of filing suit?

Again, counsel for the parties and the agency can play constructive roles in accommodating the private development process to the public planning process, or vice versa. Knowledgeable counsel can assist in resolving disputes or in directing the client's attention to the major issues, so the areas of disagreement may be identified and narrowed. For example, the developer or the developer's consultant may be able, by virtue of their expertise in a given area, to assist the agency in resolving a problem. Cooperation and compromise enhance the planning and development processes and best serve the interests of the public and private sectors.

### § 1:4 Elements of the Planning Process

For the practitioner approaching land use litigation for the first time, understanding the planning process may prove to be a major challenge. This is understandable. It is a difficulty shared by those with considerable experience in the field. The undefined character of the "science" of planning, coupled with the unique susceptibility of the land planning process to political pressures, has resulted in chronic inconsistencies in the application of planning principles at all levels of government. The result is a major credibility problem.

For example, while national transportation and energy policy is directed toward discouraging use of the automobile as the primary commuter mode in metropolitan areas, many political subdivisions pursue land use policies — such as large-lot zoning — that result in even greater reliance on the automobile. Again, a declared national goal, enunciated in the Housing Act of 1949,<sup>1</sup> is a decent home and a suitable living environment for every family in the United States. Yet land use policies of local political entities too often frustrate achievement of this goal; their zoning, subdivision, and building codes effectively exclude those moderate- and low-income families most in need of decent, affordable housing. Conversely, many political subdivisions have adopted plans and policies reflecting sensitivity to such national priorities as conserving energy resources and providing “fair share” housing opportunities for people at all income levels. But when the time arrives for implementing such plans and policies in response to specific land use proposals, political pressures — often from resident civic associations speaking in the “public interest” — cause local officials to demur. Sadly, these officials are often able to cite the recommendations of their own planning boards or professional planning staff in support of their actions.

Small wonder, then, that the planning process is often afflicted by a lack of credibility. The practitioner must strive to exploit this credibility gap when the planning process works against the client, rather than fall prey to cynical responses that fail to contribute positively toward making a strong record. Alternatively, when representing legislative or administrative bodies, care must be taken to provide support for each element in the decision-making process and to keep the client continually aware of legal and public responsibilities. This type of representation will better enable administrative or legislative bodies to respond to pressures from various interest groups.

Notwithstanding some recent indications to the contrary in a minority of jurisdictions, and although the planning process involves the exercise of discretion, it has generally been thought of as essentially administrative in character. On the other hand, reclassifying land on a municipal zoning map, whether comprehensively or in response to a local map-amendment application, has been regarded as essentially legislative in character. The distinction is important, not only because of the greater deference generally given by courts to legislative actions, but because

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[Section 1:4]

<sup>1</sup>42 U.S.C.A. §§ 1471 et seq.

the traditional role of the planning process has been advisory in character. Traditionally, recommendations emanating from the planning process — whether master plans or planning reports in specific cases — are, unless a statutory provision declares otherwise, only advisory and are not binding either upon the legislative body making a final decision in a map-amendment case or the administrative board acting upon an application for a special-use permit. Nevertheless, it is desirable, and often imperative from a practical standpoint, to gain the understanding and support of the local planning agency in any land use proposal. If this cannot be done, the practitioner must be prepared to offset an adverse recommendation from the public planning agency with a cogent land use analysis and testimony from the client's consultant team. Mere forensic footwork by the attorney is not likely to carry the day.

Planning primarily operates within the political and organizational framework of local government. Elected officials have the ultimate responsibility for shaping the future of the areas they serve, and their decisions are made with the assistance of a planning board or department. For more than 60 years, local governments have attempted to create a legislative and administrative framework that can produce regulations to enforce their planning concepts while presenting the courts with a sensible standard for evaluation and review.

### **§ 1:5 Elements of the Planning Process—Planning Board and Professional Planning Staff**

The planning board and professional planning staff attempt to coordinate land use planning, and development activities taking place in the daily operation of government. The board and staff attempt to provide the information needed to forecast trends and determine what type of development and growth is necessary and desirable. They use as their guide the “comprehensive plan” adopted by the local legislative body. The comprehensive plan is the basic policy statement for the political subdivision and represents its long-term objectives.<sup>1</sup>

In some municipalities, the planning board and its professional

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#### **[Section 1:5]**

<sup>1</sup>In most jurisdictions, the local legislative body must adopt a comprehensive plan before it may engage in any zoning activity. See *Raabe v. City of Walker*, 383 Mich. 165, 174 N.W.2d 789 (1970). Thereafter, its zoning actions must be “in accordance with” the comprehensive plan. Courts liberally construe both what constitutes a comprehensive plan and what is “in accordance with” a comprehensive plan. An “official map,” designating zoning districts for each

staff also prepare and adopt local advisory master plans for subregions within the municipality. This planning process often requires holding one or more public hearings. Participation by property owners and other interested persons in master plan hearings may be even more important than testifying in subsequent rezoning proceedings designed to implement the master plan. Counsel for the private property owner should not allow the planning process to be preempted by the planning board and its professional staff. In jurisdictions where local master plans are given great weight by legislative and administrative bodies, it is crucial that the planning process itself include expert testimony and legal argument from the private sector. Traditionally, a master plan recommendation for a specific parcel of land is advisory only and does not of itself change the designation of the parcel on the official zoning map. However, the results of the planning process may virtually preordain the decision in any subsequent zoning proceeding involving the parcel. In some cases, statutory or zoning ordinance provisions require substantial conformity to the recommendations of these planning documents, giving all the more urgency to the intimate involvement of property owners and their counsel in the master plan approval process.<sup>2</sup>

The planning board and its professional staff are also responsible for preparing recommendations in specific land-use cases, whether rezoning applications directed toward the local legislative body or special-use permit requests (special exceptions) directed toward the board of zoning appeals. The attorney serving the planning board has the responsibility of guiding the process to ensure that its actions are based upon legally adequate evidence.

Finally, the planning board is usually responsible for administering the local subdivision regulations and coordinating the various agencies of local government so that needed public infrastructure (e.g., roads, utilities, and schools) will be provided as development proceeds.

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area of the municipality and coupled with a rudimentary set of regulations for each district, may suffice for a comprehensive plan. See *Jablon v. Town Planning & Zoning Comm'n*, 157 Conn. 434, 254 A.2d 914 (1969). In developed municipalities, the comprehensive plan may include a compendium of policy documents addressing such aspects as housing, economic development, transportation, environmental protection, and public facilities. See § 1:9 and Ch 19.

<sup>2</sup>See *Board of County Comm'rs v. Gaster*, 285 Md. 233, 401 A.2d 666 (1979).

### § 1:6 Elements of the Planning Process—Local Legislative Body

The local legislative body is responsible for enacting the zoning ordinance, official zoning map, local subdivision regulations and for their amendment when necessary. In most jurisdictions, these actions are regarded as legislative or quasi-legislative in character. As noted, any such activity must be in accordance with a comprehensive plan that has been previously adopted by the local legislative body.<sup>1</sup> The zoning map is usually regarded as a legislative document designating, among other things, the zoning or use district for each parcel of land. The zoning ordinance contains the text of regulations for each zoning district. It is also normally construed as a legislative document, as are the subdivision regulations regarding the platting of property and streets and adequate public facilities requirements.

It should be noted that, in an increasing number of jurisdictions, the local legislative body is becoming more deeply involved in the planning process itself. This involvement may include the legislature's holding hearings and approving local master plans, following adoption of the master plan by the planning board. The bestowal of legislative approval upon a local master plan enhances the status of this document to a considerable degree. This enhanced status has caused some courts to reexamine the traditional advisory role of such plans.<sup>2</sup>

### § 1:7 Elements of the Planning Process—Board of Appeals

When a property owner is aggrieved by the manner in which the zoning ordinance is applied to a specific parcel of land or wishes to challenge the decision of a zoning official or permit department, he or she usually has the right to appeal the matter to an administrative agency, such as a board of appeals. The legislation creating this agency generally contains specific

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#### [Section 1:6]

<sup>1</sup>While zoning and land use regulation remain peculiarly local government functions, some states, most notably Oregon and Florida, have established mandatory regional or statewide planning programs in which local governments are required to participate as a condition for engaging in zoning or in other forms of land use regulation. Under such programs, local governments are required to adopt master plans and regulations that must be submitted to and approved by state planning agencies before being implemented at the local level.

<sup>2</sup>See § 1:9 and Ch 19.

procedural requirements pertaining to the administrative review process. These procedural steps must usually be completed before the matter is "ripe" enough to be taken to court.

The board of appeals is also typically empowered to hear and decide applications for special-use permits or special exceptions (e.g., a group home in a residential zone), as well as applications for variances or waivers from the strict application of the provisions of the zoning ordinance. These types of proceedings, which are usually administrative or quasi-judicial in character, consume most of the board's time and present the practitioner with problems and issues similar to those encountered in a rezoning case.

The board of appeals, like the planning board, is an appointed body. Unlike the planning board, however, its staff is ordinarily quite limited; it may consist only of an executive secretary and one or more clerical personnel. Thus the board of appeals must usually rely upon the professional staff of the planning board and other agencies of local government for substantive assistance. The practitioner must be alert to the fact that in many instances, agency submittals to the board of appeals (e.g., traffic reports) are on an informal basis, notwithstanding the likelihood that the board will afford them considerable probative value. If such reports are adverse to the client's case, counsel should consider the possibility of either subpoenaing the author for the purpose of cross-examination or challenging the admissibility of the report itself.<sup>1</sup>

#### **§ 1:8 Elements of the Planning Process—Zoning Hearing Examiner**

A number of jurisdictions, particularly in rapidly developing areas, have employed the zoning hearing examiner as a means of disposing of their docket of local land use cases in a more expeditious and equitable manner. Experience to date indicates that in most instances the zoning hearing examiner is an attorney. Typically, the zoning hearing examiner is authorized to conduct hearings on local map-amendment applications and special exceptions, where the need for fair adjudication of the rights and claims of specific parties involving specific parcels of land is most apparent. Due to the press of aldermanic business in many metropolitan areas, the ability of local legislative and administrative bodies to conduct such proceedings expeditiously and in a manner

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#### **[Section 1:7]**

<sup>1</sup>See generally §§ 5:30 to 5:46.

designed to afford due process is severely limited. Accordingly, many such governing bodies have delegated to the zoning hearing examiner the responsibility for conducting the public hearing and preparing a report and recommendation based upon the testimony and evidence of record. The ultimate decision-making authority is either retained by the legislative body or is vested in the zoning hearing examiner, subject to a certiorari-type review by the legislative body. The zoning hearing examiner usually possesses subpoena power, which can be utilized to ensure that no important testimony or evidence is omitted. The opportunity for obtaining a full adjudicatory hearing for one's client is generally enhanced in jurisdictions employing the hearing examiner system.

Although the role of the zoning hearing examiner in the planning process is somewhat narrow — being limited generally to hearing and submitting recommendations on applications for local map amendment — the examiner's potential for affecting the process in a positive manner is considerable. One example is the removal or distancing of the decision from political influences or considerations. Moreover, some jurisdictions are considering use of the zoning hearing examiner to assist the planning board and the board of appeals in their traditional functions.

### § 1:9 Elements of the Planning Process—Comprehensive Plan and Local Master Plans

Section 3 of the Standard State Zoning Enabling Act of 1926<sup>1</sup> states that regulation of land and the uses to which it should be put is to be done "in accordance with a comprehensive plan." The purpose of this provision, according to an explanatory footnote, is to "prevent haphazard or piecemeal zoning."<sup>2</sup>

Many jurisdictions regulate land use pursuant to enabling acts identical or closely similar to the Standard State Zoning Enabling Act quoted above. Confusion about the meaning of the phrase "in accordance with a comprehensive plan" in such enabling acts persists. On the one hand, since the comprehensive plan is but a "plan," its function must be deemed to be limited merely to guiding the legislative body in its regulation of land

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#### [Section 1:9]

<sup>1</sup>Advisory Comm. on Zoning, U.S. Dep't of Commerce, *The Standard State Zoning Enabling Act* (rev. ed. 1926), reprinted in A.H. Rathkopf and D.A. Rathkopf, 5 *Rathkopf's The Law of Zoning and Planning App. A* (4th ed. 1991).

<sup>2</sup>Advisory Committee on Zoning, U.S. Dept. of Commerce, *Standard State Zoning Enabling Act* 6 n.22 (rev. ed. 1926).

use. On the other hand, there is no avoiding the mandate that such regulation be “in accordance with a comprehensive plan.” Courts seem to have treated the comprehensive plan as a somewhat unique form of master plan. Such a plan, albeit primitive, must exist in order for land use regulation to occur.<sup>21</sup> However, just about anything will suffice as a “comprehensive” plan, be it simply the zoning map and regulations in a less developed community, or a series of complex planning documents and maps in a more highly developed area.<sup>3</sup> The comprehensive plan must contain all elements required by the enabling legislation. If it does not, it is subject to legal challenge.<sup>31</sup> Yet once a comprehensive plan is found to exist, virtually any reasonable land use regulatory activity subsequently undertaken by the governing body will be deemed to be “in accordance with” such a plan.

Simply stated, the comprehensive plan is a “super master plan,” adopted by the local legislative body. It is a general guide to land development within the municipality. It sets forth general goals and policies to be followed during the life of the plan, and in so doing addresses a range of issues related to land use. As Professor Charles Haar observed in 1955, the comprehensive plan “directs attention to the goals selected by the community from the various alternatives propounded and clarified by planning experts, and delimits the means (within available resources) for arriving at these objectives.”<sup>4</sup>

If local advisory master plans for subregions of a municipality are prepared, they are normally prepared and adopted by the planning agency. Unlike the community’s comprehensive plan, these subregion plans usually address only a limited area within the municipality. However, they do so in a more specific and focused manner. For example, where the comprehensive plan may designate an area for “residential” use with general

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<sup>21</sup>See, e.g. *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000) (County’s enactment of two ordinances regulating odors and flies as an effect of livestock facilities, held to be rooted in zoning and therefore invalid because County had not adopted a comprehensive plan.)

<sup>3</sup>See also C. Haar, “In Accordance with a Comprehensive Plan,” 68 *Harv L Rev* 1154 (1955); D. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 *Mich L Rev* 900 (1976).

<sup>31</sup>See, e.g. *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 133 Idaho 320, 986 P.2d 343 (1999), reh’g denied, (Oct. 19, 1999) (City’s failure to include a land use map or a property rights component in its comprehensive plan, as required by the State Local Land Use Planning Act, invalidated a down-zoning of landowner’s property from business to residential.)

<sup>4</sup>C. Haar, “In Accordance with a Comprehensive Plan,” 68 *Harv L Rev* at 1155 (1955).

guidelines as to density, the local master plan might contain detailed recommendations regarding residential zoning or use districts to be applied to individual parcels of land within the area in question.

Until recently it was safe to assume that comprehensive plans and local master plans were mere declarations of policy and intent and did not, in and of themselves, have a regulatory effect. In at least two jurisdictions, however, where local legislative bodies have become directly involved in the planning process, courts have invalidated subdivision plan approvals that complied with the zoning ordinance but were not in accord with master plans more recently approved by the legislative body.<sup>5</sup> Thus the planning function, which heretofore has been considered as a policy-oriented advisory activity without binding effect upon the local legislative body, may be assuming a new and more formidable role in communities where the legislative body is involved in formally adopting master plans.<sup>6</sup>

### § 1:10 Land Use Restrictions: Zoning

The public policy enunciated by the comprehensive plan is implemented through various rules and regulations. These include zoning and subdivision controls, written and graphic guidelines setting forth respectively what may be done and how to do it. Of all the regulatory powers, zoning has been the most significant and controversial. The growing complexity of American life has resulted in the need for greater governmental regulation limiting what are usually considered to be the historic rights of property owners. This need has nurtured zoning — a product of the police power concept — the power of government to enact regulations to protect the health, safety, and welfare of its citizens.

Zoning is an integral part of the planning process and one of the most important tools for carrying out the land use objectives of the comprehensive plan. In its generic sense, zoning embraces all aspects of land use regulation, from the basic legislative act of adopting an ordinance and establishing use districts on the zoning map to the various administrative activities essential to the land use regulatory process. In its basic legal sense, however, zoning is regarded as a legislative act by a legislative body,

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<sup>5</sup>Youngblood v. Board of Supervisors, 71 Cal. App. 3d 655, 139 Cal. Rptr. 741 (1977); Board of County Comm'rs v. Gaster, 285 Md. 233, 401 A.2d 666 (1979).

<sup>6</sup>See Ch 19.

representing its judgment of how land within a municipality should be utilized and where the lines of demarcation between various zoning or use districts should be drawn.<sup>1</sup> The “legislature” in this context is the elected municipal body (sometimes acting as a zoning commission) or its designee. Depending upon the type of municipality, its source of power to enact a zoning ordinance is a specific enabling act passed by the state legislature, the state constitution itself, or a combination of the two.<sup>2</sup>

### § 1:11 Land Use Restrictions: Zoning—Zoning Ordinance

The zoning ordinance is a unique form of legislation. Although most legislation is textual in form, present-day zoning ordinances ordinarily consist of two parts, the text of the regulations and the zoning map itself. The zoning map (as distinguished from the “comprehensive plan,” “master plan,” or “official map”) is an integral part of the zoning ordinance and is in every sense a legislative document. The zoning map delineates various use district boundaries and may also designate such items as major traffic arteries, school sites and parks. When it is amended, either by comprehensive or piecemeal rezoning, the law, insofar as properties affected by the map amendment are concerned, is changed to the same degree as if the zoning ordinance text had been amended for the use districts in question. An amendment to a comprehensive plan, on the other hand, will not ordinarily modify the law, i.e., the zoning ordinance pertaining to any specific parcel of land.<sup>1</sup> It is by examining the zoning map that a landowner can determine the exact classification of a specific parcel.

### § 1:12 Land Use Restrictions: Zoning—Comprehensive Zoning

Comprehensive zoning, as its title indicates, involves an amendment to the entire zoning map of the municipality or a substantial portion thereof. Some courts will construe zoning as

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#### [Section 1:10]

<sup>1</sup>See K. Young, *Anderson’s American Law of Zoning* § 1.13 (4th ed. 1996).

<sup>2</sup>See Ch 36.

#### [Section 1:11]

<sup>1</sup>However, the practitioner should be mindful of the fact that in some jurisdictions, depending upon the enabling acts involved and court interpretations thereof, an amendment to the master plan could affect one’s right to develop one’s property, even though the zoning ordinance (text or map) has not been amended. See *Board of County Comm’rs v. Gaster*, 285 Md. 233, 401 A.2d 666 (1979).

“comprehensive” if the zoning body considers a substantial land area, even though only a relatively small number of parcels within that area are actually rezoned.<sup>1</sup> Comprehensive zoning or rezoning is usually undertaken at the initiative of the municipality, rather than the individual property owner. It is similar to rulemaking proceedings under administrative procedure acts and is utilized to implement the comprehensive plan or other public policy relative to land use. Just as the comprehensive plan addresses broad policy questions, comprehensive zoning is the primary regulatory tool for designating on the zoning map basic land use policies, e.g., policies relating to such matters as protection of watersheds and flood-plains, historic preservation, transportation, or housing. Since comprehensive zoning addresses an extended area, it may not always bring about the most appropriate zoning classification for every parcel involved. Where errors occur, or the zoning map needs updating, affected property owners may seek redress through the piecemeal rezoning process.

### § 1:13 Land Use Restrictions: Zoning—Piecemeal or Local Zoning

An application for a piecemeal or local zoning-map amendment seeks reclassification on the zoning map of a specific parcel or parcels of land. Such cases are usually initiated by the property owner or someone having a contractual or other proprietary interest in the property. They are more adjudicatory in character than comprehensive zoning proceedings and are analogous to contested cases under administrative procedure acts. Piecemeal rezoning applications comprise the vast majority of zoning cases that come before the local legislative body. It is not surprising, then, that the bulk of land use litigation involves local or piecemeal zoning cases. The applicant in such cases often seeks a higher density or more intensive zoning classification for the land. In these cases, the presumption of correctness normally accorded to existing zoning must be overcome. For example, physical changes in the neighborhood or modifications of master plans or land use policies since the last comprehensive zoning may warrant reclassification of the property. What constitutes change sufficient to warrant rezoning will vary from case to case and from jurisdiction to jurisdiction. A mistake in comprehensive zoning insofar as the property is concerned may also justify rezoning. If the cate-

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[Section 1:12]

<sup>1</sup>See *Scull v. Coleman*, 246 A.2d 223, 251 Md. 6 (1968).

gory sought is a “floating zone,” (i.e., a zoning district that is created by text amendment but is not necessarily located on the zoning map at the time of comprehensive zoning), the applicant must demonstrate that the proposal comports with the purpose clause of the zone as set forth in the ordinance and that the proposed rezoning will be compatible with the zoning and use of surrounding properties.

The applicant for piecemeal rezoning bears the burden of proof in most states. In some states this also includes the “burden of persuasion”.<sup>1</sup> Even where sufficient evidence, including expert testimony, is presented to warrant rezoning, the legislative body in the absence of compelling circumstances (such as the likelihood of confiscation if the property is not reclassified) is not required to grant the request.

#### § 1:14 Land Use Restrictions: Zoning—Zoning or Use Districts

Zoning ordinances are generally structured upon a series of use districts, reflecting a hierarchy of uses. Regulations within each zone or use district must be uniform. Commencing with the earliest zoning ordinances and those modeled upon the U.S. Department of Commerce Standard State Zoning Enabling Act of 1926, the goal of municipalities has typically been to establish the single-family residential zone as the highest zoning district. As Richard F. Babcock has observed, “The insulation of the single-family detached dwelling was the primary objective of the early zoning ordinance, and this objective is predominant today . . .”<sup>1</sup> The standard zoning ordinance establishes at least four basic zoning or use districts, as follows:

- (1) single-family residential;
- (2) multiple-family residential;
- (3) commercial; and
- (4) industrial.

In highly developed or rapidly developing municipalities, the number of zoning districts established may be substantially

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#### [Section 1:13]

<sup>1</sup>See, e.g. *Angelini v. Harford County*, 144 Md. App. 369, 798 A.2d 26 (2002), (the burden of proof includes both the production burden and the burden of persuasion, which in the instance of non-persuasion can be merely an honest doubt).

#### [Section 1:14]

<sup>1</sup>Babcock, *The Zoning Game* 3 (1966).

greater. The general hierarchy is nevertheless maintained, with residential uses afforded the greatest protection, and industrial the least. For example, while no commercial uses are permitted in the single-family residential zone, the reverse does not necessarily follow. Some older ordinances allow single-family residential uses in commercial or industrial zones. As one descends the ladder of use districts in such ordinances, regulations pertaining to permitted uses and area requirements become substantially less restrictive. These ordinances are called cumulative zoning ordinances. When the districts are separate, and no mixture of use allowed, the ordinances are called noncumulative zoning ordinances.

### **§ 1:15 Land Use Restrictions: Zoning—Permitted Uses and Special Exceptions**

The typical zoning ordinance establishes two basic categories of land uses in each zoning or use district. The first category includes permitted uses — uses permitted as a matter of right in the district. No further authority is necessary to implement a permitted use, other than compliance with subdivision plan and/or development plan approval and a building and/or occupancy permit. The second basic category embraces special exceptions, also known as “special” or “conditional” uses. The ordinance authorizes such uses in the district if specified standards are met. The standards usually relate to such matters as compatibility with adjacent uses, building height, bulk, setback and coverage, traffic, parking, landscaping and screening, and noise.

Qualifying for a special exception usually requires a public hearing before an administrative board, such as a board of appeals or board of zoning adjustment. The burden of proof is normally placed on the applicant to demonstrate compliance with ordinance standards. Since the special exception is *prima facie* appropriate (i.e., in accordance with the comprehensive plan) if the specified ordinance standards are met, the administrative board's authority is limited to deciding a special-exception application in accordance with such standards. It is not empowered to apply its own standards in such matters. Much litigation in special-exception cases involves the issue whether the administra-

tive board has exceeded its delegated authority.<sup>1</sup> The practitioner must remember — and sometimes must remind the administrative body — that special-exception decisions are administrative, not legislative, in character.

The decision to grant or deny a special exception, unlike the decision in a zoning case, does not involve a change in the basic law underlying the parcel of land in question. The zoning applicable to the parcel as indicated on the zoning map remains the same.

### § 1:16 Land Use Restrictions: Zoning—Variances

The typical zoning ordinance also includes a variance or waiver provision in order to afford administrative relief in appropriate cases from the strict application of ordinance provisions. The variance is the mechanism employed to avoid a confiscation or taking problem where a specific parcel does not conform to zoning ordinance requirements. It is sometimes referred to improperly as a special exception, thereby causing confusion for those who are unfamiliar with zoning practice and procedure. As in the case of special exceptions, one seeking a variance must usually submit to a public hearing before an administrative body, such as a board of appeals or board of zoning adjustment. Unlike special exceptions, however, variances are not “permitted” upon a showing of compliance with statutory standards. Thus, they are not per se in accordance with the comprehensive plan. Rather, the variance is a waiver provision. It usually may be granted by the administrative board only upon a showing of extraordinary hardship or practical difficulty incurred by the property owner due to some problem unique to the property in question, such as its size, shape or topography. The variance has, therefore, been described as the “constitutional safety valve” allowing the variance where the impact of the ordinance on a specific parcel would otherwise be unconstitutional in that it deprived the owner of all reasonable use of the property. In most jurisdictions, variances are not granted if the property owner’s “hardship” is deemed to be self-created, such as by subdividing a parcel so as to create a lot that is too small for the intended use.

The most popular form of variance is the area or yard variance. It involves waivers of dimensional requirements, such as setback lines, frontage, or lot coverage. The practical-difficulty test is

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#### [Section 1:15]

<sup>1</sup>See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 262 A.2d 499 (1970).

most often employed in zoning ordinances to determine the merits of such variances. Some ordinances also provide for a use variance, which permits the administrative board to authorize upon a showing of “unique or extreme hardship” the utilization of a specific parcel for a use other than that allowed in the applicable use district. Use variances are frowned upon in the majority of municipalities because of the danger that the board of appeals, an administrative agency, may be tempted to “legislate,” and thereby frustrate the will of the municipal legislature. Also, since use variances are demonstrably contrary to the comprehensive plan, the degree of unique or extreme hardship required to be shown is often so great that, as a practical matter, such variances are seldom granted.<sup>1</sup>

#### **§ 1:17 Land Use Restrictions: Zoning—Administrative Appeals**

As already noted, the typical zoning ordinance may empower an administrative body, such as the board of appeals or board of zoning adjustment, to sit as an “administrative court.” The board can hear and decide appeals in which one alleges that there is error in an order or decision made by an administrative official of the municipality in carrying out the provisions of the zoning ordinance, subdivision regulations, building code or housing code. As noted in § 5:72, the doctrine of exhaustion of administrative remedies is often imposed, requiring resort to the administrative appeal process before one will be afforded access to the courts.

#### **§ 1:18 Land Use Restrictions: Subdivision Controls**

Second only to zoning in importance in the land use regulatory picture is subdivision regulation. The official zoning map, along with the text of the zoning ordinance controls what may be developed on a specific parcel of land; but the subdivision regulations direct how such development will occur. Subdivision regulation is the means by which the municipality ensures that the infrastructure necessary for proper functioning of the community (i.e., local streets, parks, school sites, and utility easements) is planned and implemented. Subdivision, as the name implies, is the division of a parcel of land into two or more parts and is often so defined in the regulations, with certain specifically enumerated exceptions, usually including sale of farmland, or sale of a portion of a tract to a relative for his or her own abode. A

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[Section 1:16]

<sup>1</sup>Variances are discussed in detail in Ch 34.

resubdivision is the subdividing of a previously subdivided parcel or lot.

Subdivision control, along with the preparation of comprehensive and master plans, is normally the responsibility of the planning board. Subdivision control supplements zoning as a means of directing private development toward conformity with the comprehensive plan. However, the practitioner should be mindful of the fact that subdivision regulation — as opposed to zoning — is not ordinarily a legislative activity. It is generally regarded as an administrative function. Court review of subdivision actions is likely to be less restrained than in zoning decisions.

#### **§ 1:19 Land Use Restrictions: Subdivision Controls— Steps in Subdivision Process**

Subdivision regulations differ from jurisdiction to jurisdiction, yet there are several common elements. Such elements include standards for street design, lot configuration, flood-plain protection, required public improvements, reservations and utilities, endorsement of police and fire and health officials, and a review process.

The subdivision review process may involve as many as three steps. In the first, the applicant presents a pre-application sketch or pre-preliminary plan to the planning agency's professional staff and receives information from the informal discussions with the staff about what will be required when a formal subdivision application is made. The second step occurs when the applicant presents a preliminary subdivision plan and application to the planning agency. The preliminary subdivision plan is considerably more detailed than the pre-application sketch. Based upon its examination of the preliminary plan, the planning agency may deny or give conditional approval to the proposed subdivision. Final approval of the preliminary plan is usually preceded by a public hearing before the planning agency. The next step in the process is the submission by the subdivider of a final subdivision plat, also known as the record plat. It is at this step that the planning agency determines whether or not all requirements of the subdivision regulations have been met. If approval is obtained, either the subdivider or the planning agency files the record plat with the appropriate municipal official for recording among local land records.

The requirement that subdivision plats be approved and recorded in approved form among the local land records is one of the greatest sanctions that can be used against the developer. Most subdivision regulations prohibit the development or sale of

subdivided land, unless a subdivision plat is first approved and recorded. One who fails to comply with the requirement for an approved and recorded subdivision plat will usually be unable to obtain requisite building permits and may encounter difficulty in obtaining financing and conveying clear title.

### § 1:20 Land Use Restrictions: Subdivision Controls— Infrastructure

Municipalities may use the zoning map as a means of protecting those areas deemed necessary for future public improvements. In the alternative, some municipalities rely upon what is called the official map. The official map designates existing public streets and highways, parks, utility and drainage easements, and other public land. By amendment, the official map may also show proposed public lands to be acquired and the construction schedule for planned public facilities.

Municipalities typically acquire land required for public use by:

- purchase or gift
- purchase as a result of the exercise of their eminent domain authority
- exaction, i.e., dedication of such land to public use (or through fee payments in lieu thereof) by the subdivider.

Land needed for major public improvements, such as regional parks, major highways, or school sites, is usually acquired by purchase. However, this is not always the case. For example, where such land is part of a major undertaking, and the need for the improvement is directly linked to the proposal, such as a large-scale planned unit development (PUD) or new town, the economies of scale attributable to the magnitude of the development provide the basis for the municipality to require the developer to dedicate land needed for major public improvements or even to build certain of the improvements. Moreover, even in smaller-scale developments, the zoning ordinance may contain incentives, such as cluster development provisions incorporating density bonuses, which enable the developer to build a density greater than allowed under the zoning ordinance on a portion of the parcel, if common open-space lands are provided. Obviously where this occurs, the developer will be more amenable to dedicating all or part of the land that may be needed for a major park or school site. The benefit to the community is, of course, its obtaining needed public improvements, without cost, together

with a development that is likely to be more attractive and sensitive to environmental concerns.<sup>1</sup>

In the absence of such incentives in the zoning or subdivision ordinance, the municipality must often resort to temporary reservations of land for major public improvements until funds to purchase the needed land become available. The degree of tolerance with which courts view such reservations varies from jurisdiction to jurisdiction. Often the validity of a reservation will depend upon its duration and the quid pro quo offered to the property owner. One example would be a moratorium on real estate taxes for the life of the reservation. Prolonged or indefinite reservations of land for future public use are not favored by the courts.<sup>2</sup>

#### § 1:21 Land Use Restrictions: Subdivision Controls— Purposes of Subdivision Regulation

Subdivision regulation has two primary purposes. One of these is to enable the municipality to obtain land for public facilities necessary to serve its future residents. These are not the major public facilities described in the previous section, but such items as subdivision streets, utility and drainage easements, and stream valley parks. If the municipality had to purchase all the land needed for these facilities, acquisition of such land would be long delayed, if not precluded. By judicious use of the subdivision regulatory process, municipalities are able to obtain most of the land needed for public facilities in the form of dedications by the developer. The dedication process is the quid pro quo by which the municipality is compensated for allowing the subdivider to have access to its record platting system.

The rationale for exacting dedication of needed land from the subdivider is that the subdivision itself will generate the need for the required improvements. Courts have traditionally upheld such exactions where they can be shown either to be “uniquely attributable to” or “reasonably related to” or have a “rational nexus” to the subdivision in question. The issue of what needed public improvements are “uniquely attributable” or “reasonably related” or have a “rational nexus” to a given subdivision is often

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#### [Section 1:20]

<sup>1</sup>See Chapter 27.

<sup>2</sup>*Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), vacated, 417 F. Supp. 1125 (N.D. Cal. 1976).

the subject of litigation.<sup>1</sup> The issue is usually settled prior to litigation, however, because the developer's bargaining position and staying power cannot match that of the municipality. If the issue is litigated, jurisdictions applying the rational-nexus test are generally more liberal in construing the validity of the exaction. Under the reasonably-related or rational-nexus test, as long as a reasonable or rational connection can be demonstrated between the required public improvement and the subdivision, the exaction will be upheld.<sup>2</sup> Under the more conservative uniquely-attributable test, the municipality must demonstrate that the need for the dedication or improvement is specifically and uniquely generated by the subdivision.<sup>3</sup> In 1994, the Supreme Court adopted a new standard for validating regulatory exactions, holding that there must be "rough proportionality" between the permit requirement and the needs created by the development.<sup>4</sup> This is intended to be a higher standard of review than the rational nexus test, and a lower standard than the uniquely attributable test.<sup>5</sup>

In lieu of dedication of land, another means employed by municipalities to obtain public infrastructure is to provide for payment by subdividers of fees. The municipality then uses such fees for the acquisition and/or construction of facilities, such as roads, parkland or school sites, that need not necessarily be located in proximity to the subdivision in question. By use of an in-lieu fee, costs can also be assessed against even the smallest development proposal. Notwithstanding this feature, the usual standard of the jurisdiction for court review remains the same.

The second main purpose of subdivision regulation is to ensure that the subdivision is properly laid out, that public improvements are or will be available and that those improvements constructed within the subdivision are built in accordance with municipal standards. The planning agency is empowered, for example, to protect major flood plains and to require the developer to provide properly located and constructed public

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[Section 1:21]

<sup>1</sup>See Ch 31.

<sup>2</sup>See *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

<sup>3</sup>*Rosen v. Village of Downers Grove*, 19 Ill.2d 448, 167 N.E.2d 230 (1960). The details of the burden of proof that must be met under these tests are discussed in § 31:2.

<sup>4</sup>See *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

<sup>5</sup>See §§ 32:3 and 32:5.

improvements, such as subdivision streets. This gives the planning agency and its sister agencies the opportunity to review the proposed development in relation to the master plan and adjacent developments and to ensure that it can be accommodated within the physical characteristics of the site.

The most common public improvement constructed by the developer/subdivider is the subdivision street. Whereas the municipality will normally construct major arteries, interior subdivision streets are invariably built by the developer in accordance with municipal standards. Since such streets are constructed in what is or will be a public right-of-way, the developer is usually required to execute a public works agreement with the municipality and provide the municipality with a performance bond. Upon completion of the subdivision street in accordance with municipal standards, the municipality will accept it for public use and thereafter maintain it.

A street may be dedicated on a record plat to public use but may never be built. The status of platted but unimproved public streets can be a vexing problem for property owners, planners, and public officials, particularly when abandonment petitions are filed and the question of proper land use of such areas must be faced.<sup>6</sup> Furthermore, where a “paper” street is formally abandoned, the ultimate disposition of the underlying fee simple interest must be determined. This may depend upon such variables as the ownership of adjoining properties and whether the municipality received merely a dedication of right-of-way or a fee simple interest in the land underlying the street.<sup>7</sup>

### § 1:22 Land Use Restrictions: Standards Administration

A number of land use restrictions establish administrative standards. These include building codes, demolition permit requirements, historical preservation mandates, housing codes, and environmental regulations. All of these significantly impact land development and construction.

### § 1:23 Land Use Restrictions: Standards Administration—Building Codes

Although not always regarded as a land management tool, building codes are playing an increasingly important role in the developmental process. As a consequence, litigation relating to the building code and its administration is increasing.

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<sup>6</sup>See *Welker v. Strosnider*, 22 Md. App. 401, 323 A.2d 626 (1974).

<sup>7</sup>Additional discussion of subdivision regulations appears in Ch 31.

The purpose of a building code is to make sure that all structures are safe for occupancy. Building codes set standards for materials used in construction. They regulate systems of construction and the manner in which the structure itself must be built. To establish a technically competent regulatory scheme, most local governments adopt, with local amendments, a comprehensive performance code published by a national authority of recognized competence, such as the National Building Code of the American Insurance Association, the Uniform Building Code of the International Conference of Building Officials, the Southern Building Code of the Southern Building Code Conference, or the Basic Building Code of the Building Officials Conference of America. The typical building code purports to regulate all matters concerning the construction, alteration, repair, removal, demolition, use, and occupancy of buildings and structures. On-site access facilities, such as ramps, walkways, and driveways, may also come within the ambit of the building code.

Administration of the building code is the responsibility of an agency of the municipality, such as the Building Department, Department of Environmental Protection, or the Department of Licenses and Inspections. Although the agency may be staffed by professionals, the integrity of the entire process is usually based upon a certification procedure that relies heavily upon professionals in the private sector. For example, the typical building code requires the architect or engineer employed by the permit applicant to submit affidavits relative to the competency of working drawings and the conformity of building construction to approved plans. In addition, municipal officials responsible for administering and enforcing the building code may accept the certifications of accredited outside agencies regarding compliance of construction materials, such as electrical fixtures, with accepted engineering standards for quality and design.

The building code may contain a galaxy of permit requirements, including the following:

Demolition	Sewer connection
Excavation	Septic and well systems
Grading	Building structure
Sediment control	Street construction
Foundation	Use and occupancy

Building codes may preclude issuance of building permits for any construction in sensitive areas, such as steep slopes or designated flood plains, and may authorize the municipality to direct demolition or removal of unsafe buildings.

Building codes may incorporate or cross reference to related ordinances, such as the grading ordinance, highway code, fire code and health code. Moreover, the building permit process usually provides a check-off mechanism under which various officials exercising police power functions are afforded an opportunity to review individual permit applications. The fire marshal and health inspector are among the most conservative of these officials. Because their areas of responsibility directly involve basic issues of health and safety, their decisions may often appear to be harsh or arbitrary. A substantial amount of litigation dealing with building codes is attributable to the decisions of these two officials, but reviewing agencies and courts are reluctant to overturn them. This reluctance is traceable to a natural disinclination to accept responsibility for countermanding orders involving matters of public health and safety.

Most building codes contain a waiver provision, based upon practical difficulties or undue hardships in complying with structural or mechanical provisions of the code. The responsible municipal official is empowered to modify provisions of the code on a case-by-case basis, provided that the basic integrity of the code is observed and no adverse effect upon public health, welfare, or safety results.

The building code may authorize the revocation or suspension of permits and the issuance of stop-work orders wherever the building official determines that construction is proceeding in violation of the building code or the permit or in a manner endangering public health or safety. One who proceeds with construction in the face of a revocation or stop-work order does so at considerable peril. Unless the building official can be convinced to allow work to continue, pending an administrative or court appeal, the attorney for the builder is left with the choice of advising the client to suspend construction for an indefinite period, pending the appeal process, or seeking an immediate court injunction. This situation is difficult for the builder, since ex parte injunctions or temporary restraining orders will not ordinarily be issued unless it can be demonstrated that the stop-work order is causing immediate, substantial, and irreparable injury. Another potential obstacle to judicial intervention may be the requirement that the permittee first exhaust administrative remedies by appealing the agency order to a board of appeals. If an injunction is issued, a substantial bond may be required of the builder. If revocation of the permit deprives the builder of constitutionally or statutorily protected rights, the builder may

have a cause of action for damages against the municipality under § 1983 of the Civil Rights Act of 1871.<sup>1</sup>

**§ 1:24 Land Use Restrictions: Standards  
Administration—Demolition Permits and Historic  
Structures**

Since demolition is often a prerequisite to construction, it should be noted that a major new issue, preservation of historic sites and structures, has emerged during the past decade. Many municipalities have amended their building codes or other laws to incorporate extensive regulations designed to protect historic sites and structures. These codes often mandate a delay in the issuance of demolition permits if any structure or site has been designated as having historical or architectural significance or if the process of such designation is ongoing. Thus, substantial delay may be encountered before a decision on one's application for a demolition permit is forthcoming. Some ordinances provide for a time limit within which action on the demolition permit application must be taken. The regulations may also require a public hearing at which evidence is received on such issues as the feasibility of preserving the structure; the cost of restoration or maintenance; whether a competing public interest may militate against preservation; whether retention of the structure will impose an undue hardship upon the property owner; and whether retention of the structure is warranted in the public interest, notwithstanding some degree of hardship upon the property owner.<sup>1</sup>

The appeal provisions of the building code are very important to the practitioner. Most building codes include provisions for administrative appeals, usually to a board of zoning adjustment. Appeals are allowed from agency decisions with respect to the issuance, suspension, or revocation of building or other permits. The practitioner should note whether the code requires a stay of demolition or construction activity pending the outcome of the appeal process. Where such stay provisions are lacking, one desiring to halt activity during the pendency of the administrative appeal process must usually seek a court injunction and post bond.

The practitioner should be mindful of the time limitations

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**[Section 1:23]**

<sup>1</sup>See Ch 18.

**[Section 1:24]**

<sup>1</sup>See Ch 25 for a more detailed discussion of historic landmark preservation.

prescribed in the building code for noting appeals. Since the building code may consist of a comprehensive performance code prepared by an independent entity and adopted by the municipality, it is possible that the appeal provisions therein may not coincide with provisions of the municipality's code pertaining to administrative appeals generally. Thus, confusion can result. Where conflicts do occur, the practitioner is well advised to adopt a conservative approach and note the appeal within the shortest time limit prescribed.

### § 1:25 Land Use Restrictions: Standards Administration—Housing Codes

Housing codes set minimum standards for the occupancy of residential dwellings. Their purpose is to safeguard the health and safety of occupants. Typically, housing codes set forth occupancy standards for single-family dwellings, apartments, and rooming houses; while hotels, motels, and similar facilities for transient residential use are separately regulated. The housing code contains minimum standards for required facilities within a dwelling, such as kitchen, bathroom, rubbish storage facilities, and water heating equipment. Standards may also be prescribed relating to ceiling height, lighting, ventilation and heating, use of electricity, screen windows, smoke detectors, and finish materials to be used on floors and interior walls. Minimum space requirements are ordinarily set for both for the dwelling itself and its bedrooms. Space requirements have been challenged as exclusionary where their primary purpose is to prevent the construction of housing below a desired price level.<sup>1</sup> Spatial requirements based upon aesthetic or economic grounds have also been subject to challenge.<sup>2</sup> These challenges can be overcome by demonstration that the space requirements relate to matters of health and safety.

Since housing codes deal with a variety of residential uses, and since the occupant of a dwelling may not always be its owner, the housing code will ordinarily set forth separately the responsibilities of "owners" and "occupants." The line of demarcation between these responsibilities becomes important when dealing with multiple-family dwellings. Responsibility for maintenance of individual dwelling units within a multiple-family dwelling is imposed upon the dwelling's respective occupants. These respon-

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#### [Section 1:25]

<sup>1</sup>See § 22:5.

<sup>2</sup>See Chs 14, 22.

sibilities include maintaining the premises in a sanitary condition; disposing of rubbish and garbage; and properly utilizing unit facilities, such as plumbing and electrical fixtures. The owner's responsibilities include proper maintenance of heating, ventilation, and air conditioning systems; the building itself, and common areas within and without the building. The code usually provides that the property owner is entitled to enter individual dwelling units during reasonable hours for the purpose of making repairs.

Inspections of dwellings by municipal officials are normally authorized, subject to prior notice and consent of the owner or occupant. Where such consent is not forthcoming, and in the absence of an imminent health or safety problem, such as leaking gas or fire, the municipal official may not enter a dwelling. If there is no imminent threat, an application for a warrant must be filed in court, containing a satisfactory explanation of why entrance to the unit is necessary.<sup>3</sup>

The housing code normally contains procedures for designating dwellings as unfit for human habitation and posting appropriate notice to that effect. If an owner or occupant fails to remedy an unsatisfactory condition, the code empowers the municipality to direct repair or removal of the building.

Enforcement of the housing code normally commences with the responsible municipal official giving the required notice of code violation to the owner, occupant, or person responsible for the dwelling. Such notice should clearly describe the violation, as well as the remedial action to be taken, and allow a reasonable time for compliance. However, in emergency situations, if the housing official determines that an immediate danger to public health, safety, or welfare exists, the official is usually empowered to order immediate action to correct or abate the emergency, including suspension of occupancy.<sup>4</sup>

The housing code may establish a housing commission or board

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<sup>3</sup>Without a warrant, the enforcement official can be refused admission, and no charges can be brought against the occupant. The Fourth Amendment has been held to bar prosecution of a person who refuses to permit a warrantless code-enforcement inspection of his or her personal residence. See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 87 L. Ed. 2d 930 (1967).

<sup>4</sup>It should be noted that the Seventh Circuit Court of Appeals has held that tenants who were required by the city to vacate dwellings because of housing code violations were entitled, under the Fifth Amendment, to just compensation for taking of their leasehold rights. Building owners, however, were held not entitled to compensation. *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981), cert. denied, 469 U.S. 836, 105 S. Ct. 130, 83 L. Ed. 2d 71 (1984).

of review authorized to hear appeals from any notice or order given by the housing official. Filing an appeal from the housing official's order may act as a stay of the order in cases where no emergency exists. In some jurisdictions, a single administrative appeals board is empowered to hear appeals from decisions of all administrative officials. Normally, a hearing before the appellate body must be specifically requested by the person aggrieved by the housing official's action. Such administrative hearings are generally de novo and may be a prerequisite to seeking judicial review, particularly where authorized by statute. Although the hearing is likely to be informal, the practitioner should determine whether the proceedings before the appellate agency are governed by a state or local administrative procedures act.

Housing codes also contain waiver or variance provisions, usually based on a showing of economic hardship. For example, if the cost to repair or rehabilitate a dwelling unit is prohibitive or if relocation housing is unavailable, and if it involves no adverse effect on public health or safety, the housing official may grant a temporary variance.

Violations of housing codes may be subject to criminal as well as civil sanctions. Many housing codes provide that such violations may be punishable as misdemeanors. Upon conviction, the offending party is subject to fine or imprisonment. Becoming more prevalent is the use by local jurisdictions of a civil citation process similar to a traffic summons in which the burden of proof upon the government is substantially more lenient than required where the violations are misdemeanors. The municipality is also empowered to seek injunctive relief in enforcing the housing code.

### **§ 1:26 Land Use Restrictions: Standards Administration—Environmental Regulations**

The late 1960s and early 1970s were years of increased public concern over environmental degradation. Prior to this period, federal statutes dealt mainly with studies and planning grants, and no federal standards were effectively enforceable. At the state and local levels, very few statutes or ordinances required that environmental quality considerations be integrated with the land development planning or review process.

Congressional response to widespread public pressure for environmental protection was swift. Several statutes were passed and a new federal bureaucracy was established. The 91st and 92nd Congresses were responsible for the major environmental legislation of today. The National Environmental Policy Act

(1969),<sup>1</sup> the Clean Air Act (1970),<sup>2</sup> the Federal Water Pollution Control Act Amendments (1972),<sup>3</sup> and the Coastal Zone Management Act (1972)<sup>4</sup> were enacted in rapid succession. Other significant environmental legislation enacted since 1972 includes the Endangered Species Act of 1973.<sup>5</sup>

These federal statutes and other environmentally oriented federal statutes and regulations have a strong emphasis on federal participation. Implementation of these statutes has had a significant impact on land use decisionmaking at all levels of government. From a 1960s remedial approach to pollution problems, we now have an approach designed to prevent pollution and to foster better land use planning at the federal, state, and local levels.

Federal legislation was originally aimed at better federal decisionmaking. The National Environmental Policy Act of 1969 (NEPA) requires an environmental impact statement (EIS) for all major federal actions that will have a significant effect on the quality of the human environment.<sup>6</sup> The EIS must detail possible impacts, and include alternatives to the proposed action. Though only requiring such analysis by federal agencies, NEPA has fostered a number of state statutes and local ordinances that require environmental impact analysis of state and local decisions — including the granting of permits.<sup>7</sup>

The Clean Air Act (CAA) and the Federal Water Pollution Control Act Amendments (FWPCA) established national standards and required state planning to achieve the goals set by these acts. If the state programs were inadequate, the legislation provided that the Environmental Protection Agency could actually prepare and implement state plans. After a number of suits to determine the “congressional intent” behind the CAA and the FWPCA, the EPA promulgated extensive regulations that have had profound effect on local land use controls.<sup>8</sup>

Under the CAA, states must prepare Air Quality Maintenance

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[Section 1:26]

<sup>1</sup>42 U.S.C.A. §§ 4321 et seq.

<sup>2</sup>42 U.S.C.A. §§ 7401 et seq.

<sup>3</sup>33 U.S.C.A. §§ 1251 et seq.

<sup>4</sup>16 U.S.C.A. §§ 1451 et seq.

<sup>5</sup>16 U.S.C.A. § 1531.

<sup>6</sup>See NEPA § 102(2)(c), 42 U.S.C.A. § 4332(2)(c).

<sup>7</sup>See § 9:11 for further discussion of the impact statement process.

<sup>8</sup>See L. Malone, *Environmental Regulation of Land Use Regulation* Chs 8,

Plans to meet air-quality standards or choose to delegate this responsibility to local or regional governmental bodies. Section 110 of the act required states to develop State Implementation Plans (SIPs) to ensure that, once air-quality standards were met, they would be maintained. As an element of a negotiated settlement in the air-quality maintenance litigation, EPA promulgated Indirect Source Regulations. These regulations required preconstruction review for all major indirect sources of air pollution. Indirect sources are projects and facilities that in themselves do not contribute to air pollution; they are subject to controls because automobiles driven to these facilities create air pollution problems. Indirect source facilities include shopping centers, apartment buildings, office complexes, highways, etc. Intense controversy was generated by these regulations because of the substantial impacts on growth and development patterns and, in 1974, they were suspended. The 1977 amendments retain the authority to impose indirect source controls but have delegated to the states the decision on whether to impose them.

The courts also ordered EPA to promulgate regulations that would prevent significant deterioration in air quality. This prevention of significant deterioration (PSD), or nondegradation policy, pertains to areas that may have cleaner air than is required to protect public health. Each state is responsible for designating land areas into one of three classifications:

- (1) Those areas in which practically any change in air quality would be considered significant;
- (2) Those areas in which deterioration accompanying moderate, well-controlled growth would be considered insignificant; or
- (3) Those areas in which deterioration up to the national standards would be considered insignificant.

New "major source" categories, as defined by federal regulations, have to conform to the "deterioration" increments of their location's classification. The deterioration increments are established as maximum limits on pollution. Plainly, state designation and subsequent permitting requirements regulate the amount of future industrialization that can take place in certain areas.

The Federal Water Pollution Control Act Amendment of 1972 (FWPCA) was the next major piece of federal legislation to affect the land-development planning and regulatory process. The act established a National Pollution Discharge Elimination System (NPDES), which requires that a permit be obtained prior to the discharge of pollutants into the nation's waterways. These

amendments were actually a rewrite of water pollution control legislation, and established complex and detailed abatement requirements, streamlined enforcement procedures, and levied heavy penalties for violations.

The NPDES required EPA to establish national effluent limitations and national net source performance standards for sources of water pollution, including municipal sewage treatment plants, power plants, industrial facilities, and animal feedlots. The discharger is required to monitor its discharge and report the amount and nature of all specified waste components. These requirements affect operation, construction, and expansion of municipal waste treatment plants, and therefore have a substantial impact upon developers who seek permission to connect to sewage-treatment plants or to construct small plants of their own. These requirements have also created a lengthy review process for permitting industrial facilities.

Another feature of the FWPCA was a program to regulate the location, modification, or construction of any facility that might contribute to water pollution. Known as the Areawide Waste Treatment Management Planning Regulation, or § 208, this portion of the act and its implementing regulations provided grants to state- and area-wide agencies that plan for waste-treatment management. The plans also established procedures and methods to control pollution resulting from construction activity. Consequently, regulatory agencies dealing with development permits incorporated many of these procedures and methods into their review and permitting process.

Regulations affecting the use of land are a basic element of the § 208 program. All construction activity is subject to "non-point source" regulations. These regulations regard environmental damage that does not originate from a discernible and confined location, such as a pipe. Non-point source regulations are designed to prevent soil erosion and run-off from construction sites. These regulations are administered by either local or state agencies after approval by EPA.<sup>9</sup>

Section 404 of the act concerns dredge-and-fill regulations and requires a permit from the Army Corps of Engineers (COE) before any dredge or fill activity can take place in virtually any waters or wetlands of the United States.<sup>10</sup>

Other environment-related programs that affect land use

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<sup>9</sup>L. Malone, Environmental Regulation of Land Use Regulation § 8.06 [1].

<sup>10</sup>See Ch 40 for a more detailed discussion of dredge-and-fill permits.

include the federal Flood Insurance Program<sup>11</sup> and the federal Coastal Zone Management Program.<sup>12</sup> The Flood Insurance Program is the first federal program that uses the availability of financing as the self-enforcing mechanism to ensure compliance. The program covers 20,000 communities in the United States, and requires the adoption of land use controls for all construction and major renovation in flood-hazard areas. If a community chooses not to participate in the program, conventional financing will not be available for building in flood-hazard areas as designated on COE prepared floodplain maps.

The Coastal Zone Management Act of 1972 provides federal grants to state agencies to prepare plans and actions to protect and provide for the balanced use of lands and waters in the coastal zone. New development and modification of existing development in the coastal zone are covered by state-level permit review.

Other federal and state statutes and local ordinances, though not environmental laws themselves, require the integration of environmental quality concern in the land development review process. In preparing to submit or review a land use project, it is important to examine the possible environmental impacts the project may have, determine the environmental regulations that apply, and review the specifics of the applicable regulations.<sup>13</sup>

### § 1:27 Elements of the Development Process

Although one of the largest industries in the country, the real estate development industry, is extremely diverse and fragmented, few, if any, of its members are listed among major American corporations. Moreover, real estate development is one of the nation's most unstable and high-risk industries, due particularly to an increasingly complex and time-consuming regulatory review process, the extreme vulnerability of housing construction to economic recession, and its limited capacity to compete for capital against government and other industries.

Within this process, the developer plays the principal role. Whether an individual, a general or limited partnership, a joint venture, or a corporation, the developer is the entrepreneur who brings together the other actors and ingredients make them work.

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<sup>11</sup>42 U.S.C.A. §§ 4001 to 4128.

<sup>12</sup>6 U.S.C.A. §§ 1451 to 1464.

<sup>13</sup>Clark Boardman Callaghan's Environmental Law Series has a number of volumes which address these issues. See especially, L. Malone, *Environmental Regulation of Land Use* (1990).

The developer has traditionally assumed most, if not all, of the considerable risks attendant to development. Foreclosure and bankruptcy are no strangers to the development industry.

The 1980s marked the beginning of greater participation by the institutional investor in the development process, particularly in larger projects. With the institutional investor as a partner, the developer's risks are lessened and opportunity for the investor to share in development profits and appreciation is enhanced. The elements of the development process that the developer must blend together and manage in order to succeed are usually the following:

- land
- laws, regulations, and policies
- materials
- labor
- capital

Obviously, land, the first element of the process, is the central ingredient for any development. The better its location for the intended purpose, the more likely is the opportunity for success.

Laws, regulations, and policies affecting real estate development are promulgated primarily by local government. We refer here to zoning ordinances, subdivision regulations, adequate public facilities ordinances, site plan and design review requirements, building and street codes, health and environmental ordinances, master plans, and related documents. In communities where substantial development pressures exist, capital improvement programs and ordinances requiring adequate public facilities may play an important role. In many jurisdictions, the legislation to be addressed by the developer may also include such things as condominium conversion regulations, rent control laws, and historic district and landmark preservation codes. While land use regulation continues to be the prime responsibility of local government, the federal presence in this area has increased in recent years as a result of the passage of environmental laws and regulations.<sup>1</sup> Federal housing laws and regulations also play an important role in the development process. At the state level, several states have, for a variety of reasons, enacted into law statewide land use legislation designed to regulate development in designated "critical areas." Other states have enacted coastal zone and wetlands protection laws. Thus, posses-

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[Section 1:27]

<sup>1</sup>See § 1:26.

sion of a building permit from local government may no longer be the final “ticket” required to commence development. The variety of laws, regulations, and policies affecting real estate development will be further addressed in subsequent chapters.

Materials are another essential ingredient in the development process. Their availability and timely delivery to the site are critical for success. For example, federal, state, and local policies that affect the harvesting of timber, the mining of sand and gravel, or the manufacture of finished products from such materials, or that increase transportation cost, have an obvious impact upon the supply and cost of materials.

Labor, both skilled and unskilled, professional and nonprofessional, plays an important role in planning, designing, and engineering the development of labor is also vital in obtaining requisite governmental approvals, constructing the improvements, and, finally, selling or otherwise disposing of the finished product.

Adequate capital is crucial to the development process. The developer must provide an adequate amount of equity capital. Equity capital is the developer’s own money or that of fellow investors, used to acquire and develop the land. As noted, equity capital in larger projects may come primarily from an institutional investor, but the owner of the land often becomes a venturer and equity partner by contributing the land to the venture. The developer in turn contributes time, money, and skill to the endeavor. Upon completion of the development, profits are shared according to a ratio based upon the predetermined value of each participant’s contribution to the venture. The developer must also borrow the remaining funds necessary to see the project through the construction phase and into its ultimate destiny as a project to be owned by the developer or sold, or otherwise disposed of in the marketplace.

#### **§ 1:28 Elements of the Development Process— Development Chronology**

The development process involves several distinct stages, some of them simultaneous. A typical development chronology includes:

- (1) feasibility and market analysis;
- (2) site selection and acquisition;
- (3) planning and engineering;
- (4) governmental approvals;
- (5) financing;
- (6) construction; and

(7) disposition.

The above chronology, with some variations, applies to most forms of development, including single- and multiple-family residential, office, and retail. For purposes of illustration, the tract development of single-family homes is used here to illustrate the stages.<sup>1</sup>

### § 1:29 Elements of the Development Process—Feasibility and Market Analysis

At the outset, the developer must examine the likely market area for the proposed product to determine what percentage of potential purchasers within the market area will be attracted to the product. To accomplish this objective, supply and demand factors within the market area must be evaluated. For the residential tract developer, the relevant supply factors include the existing supply of similar housing, planned or ongoing construction of similar housing within the market area, and the availability of mortgage money.

The developer must weigh the supply situation against demand factors, most of which are not as tangible. Relevant demand factors for the tract-home developer include such matters as population trends; the percentage of families within the market area of a size, income, and socio-economic character likely to be attracted to the product; location of employment centers, major institutions and schools; location of major transportation arteries; and availability of public transportation.

The feasibility analysis must also assess the public sector, most notably the laws, policies and attitude of the municipality relative to land use and land development. The developer must be aware of local zoning ordinances, subdivision regulations, master plans, staging plans, and land use policies. For example, one must know whether the proposed use will require rezoning, further subdivision activity, site-plan approval, adequate public facilities review, or merely approval of a building permit and related permits. Of crucial importance is the projected processing time for each of the required municipal approvals. As will be seen, most developments are funded through debt financing. With the interest meter running daily, the developer must know with reasonable certainty the likely time for completion of construction.

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#### [Section 1:28]

<sup>1</sup>For further information, see U.S. Conference of Mayors, National Community Development Association & Urban and Institute, *The Private Development Process: A Guidebook for Local Government* (1979) (prepared for the U.S. Dept. of Housing and Urban Dev.).

**§ 1:30 Elements of the Development Process—Site Selection and Acquisition**

When selecting a site, the purchaser/developer must ascertain whether the property is within an area that is subject to development restrictions or moratoria outside of the normal considerations expressed above. These restrictions may involve historic district/site regulations<sup>1</sup> or perhaps more importantly, adequate public facilities constraints, which may prohibit development within certain areas or require large financial commitments (i.e., construction of or contribution to road or other public facilities improvements, impact fees, development district taxes, linkage programs), or commitments to provision of certain services (car and van pool plans, daycare facilities). The economic impact of these considerations plays a large part in the developer's timetable and overall project feasibility.

One aspect of site selection that has become increasingly more important in recent years due to the rise of enormous financial liability to unsuspecting developers/purchasers is in the area of potential costs for the cleanup of toxic wastes and hazardous substances. The federal Comprehensive Environmental Response, Compensation and Liability Act<sup>2</sup> (CERCLA) and its more recent progeny, the Superfund Amendments and Reauthorization Act<sup>3</sup> (SARA), along with similar state laws, impose joint and several liability for environmental cleanup, not only on previous owners of the property (who may or may not have caused the contamination), but also upon innocent and unsuspecting present owners. Further, an owner whose property is only a small part of an overall problem, or whose property was contaminated by off-site activities, can be required to bear the entire cost of the property's cleanup. Thus, several preliminary steps should be taken in site selection before any decision to submit a purchase contract is made.

In addition to viewing the present status and use of the property and immediate surrounding areas, an investigation of the prior use of the property and contiguous areas is essential, particularly where convenient areas for waste disposal are present (e.g., abandoned mine shafts, quarries and open pits, ponds; streams and culverts). Previous use of the property and contiguous land areas by companies whose businesses involved the use

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**[Section 1:30]**

<sup>1</sup>See Chapter 25.

<sup>2</sup>42 U.S.C.A. §§ 9601 et seq.

<sup>3</sup>42 U.S.C.A. §§ 9601 et seq.

of chemicals or solvents, waste disposal, fuel or chemical storage immediately raises a warning signal. Thus, a preliminary investigation of the property's land use history obtained from not only the present and any previous owners but also from neighbors, local and state zoning, permitting and environmental inspection agency personnel and records, and viewing all aerial photos of the area are a few methods to pinpoint obvious signs of trouble.<sup>4</sup>

In selecting a specific site, the developer is subject to the same constraints as mentioned in § 1:29 relating to feasibility and market analysis. For example, the location of the property and its proximity to major employment areas, schools, and access roads are of vital concern. Intermingled with these factors are such considerations as the price of the property; whether it is in a raw lot or finished lot condition; whether it is immediately available for development (and if not, the amount of time and risk required to make it so); the socio-economic character of the immediate community; the availability of utilities (particularly sewer, water, electricity, and gas) and their connection costs; the availability of other public facilities and amenities (such as police and fire protection, parks, and recreation areas); and whether the site is possessed of sufficient natural features to make it attractive to potential purchasers. In weighing these factors, the developer engages in the age-old art of trading off the various pluses and minuses of each site to determine which is most suitable for the intended purpose.

The developer usually acquires a degree of control over the site during the period of feasibility study and permitting. Actual transfer of ownership to the developer is deferred and indeed is usually contingent upon obtaining all the government approvals requisite for the development to proceed. When ownership is transferred, if it is a large-scale project, the developer may initially take title to only a portion of the property, exercising subsequent purchase options with phasing of the development. Another major contingency is the ability of the developer to obtain needed financing for acquisition and construction. Since the developer can normally learn rather quickly whether financing can be obtained, the time required to meet the financing contingency need not be nearly as long as that necessary to obtain governmental approvals.

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<sup>4</sup>More comprehensive provisions to protect against the risk of financial liability are discussed in § 1:31, and cases relating to this problem are found in Ch 39.

**§ 1:31 Elements of the Development Process—The Option and Contingent Contract**

To allow the development process to begin and yet afford requisite legal protection to both the property owner and developer, the option contract or contingent contract is often employed. The purpose of an option is to allow the developer a reasonable period to determine the feasibility of the project. Based upon determination of feasibility, which is made solely by the developer, the developer may terminate the development effort and walk away, or enter into a formal purchase agreement. In effect, the option contract gives the developer a specific time period to think about the purchase without having to undertake any specific actions. During this period, the developer does not have to worry about others purchasing the property. A contingent contract, on the other hand, is itself a formal purchase agreement that still allows the developer a reasonable initial period of testing and study in which to conduct engineering, financing, economic, legal, and other analyses relative to feasibility. The testing and study period normally ranges from 30 to 90 days. Within this period, the developer may opt, entirely at his or her own discretion, to terminate the project or to proceed further. The developer may terminate at this stage without incurring any liability to the property owner beyond the possible requirement that a portion of the deposit be relinquished, together with any engineering studies and site plans prepared by the developer.

Due to the risk upon purchasers of property of financial liability for cleanup costs of toxic and hazardous wastes, as discussed in § 1:30, the purchaser/developer must understand its potential liability in this area and provide appropriate testing and contingency provisions in the purchase agreement.<sup>1</sup> When the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was amended by the Superfund Amendments and Reauthorization Act (SARA), the “Innocent Landowner” defense to liability for cleanup costs under CERCLA was created. The defense is available to those who, when they acquired the property, “did not know, and had no reason to know” that the property was contaminated, but who had made “all appropriate inquiries.” This places an investigatory responsibility upon the purchaser to exercise certain degrees of diligence in investigating the condition of the property and the present and previous uses of the property. Several states provide similar obligations and limited defenses within their own laws.

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[Section 1:31]

<sup>1</sup>See Ch 39.

During the testing or feasibility period provided for in the purchase agreement, an environmental site audit should be performed by a qualified environmental engineering firm. This audit, known as a "Phase I" audit, will obtain, review, and evaluate the following information:

- historical aerial photographs and use permit records;
- state and federal Superfund site lists and agency data;
- geologic, hydrologic, and topographic data
- site reconnaissance

Based upon the results of this review, the advisability of the necessity of a "Phase II" audit, providing for detailed soil and water sampling/monitoring for contaminants, can be assessed.

The purchase agreement should provide for contingencies if contaminants are found, as well as warranties or representations from the seller. Contingency provisions may include provision for termination of the agreement (and refund of a deposit) if contaminants are found or, alternatively, for specific responsibility for cleanup prior to settlement. The latter alternative will usually involve a "cap" on the amount to be expended by the party responsible for the cleanup. Warranties in the agreement from the seller should establish that there is no known contamination, and that the seller or seller's tenants have done nothing to contaminate the property. Further, these seller warranties should be stated in the agreement as surviving any transfer of title to the property, and are not merged within any deed or conveyancing document.

If upon completion of the testing and study period, the developer elects to proceed with the development, the developer no longer has absolute discretion under the contingent contract to terminate the project. Instead, the developer is required to use his or her best efforts within the stated contingency period to fulfill the contingencies. At this stage, the most likely remaining contingency is "final" government approval, such as rezoning, subdivision approval, special exception, or a building permit. Although under no financial or performance obligations during this period, the property owner must cooperate with the developer in ways such as co-signing applications for permits and record plats.

If all contractual contingencies are not performed within the stated time, either the developer or property owner may terminate the agreement, in which event the parties are released from further liability. It is prudent for the developer's attorney in this type of arrangement to insist that the contingent contract provide that the developer may waive any contingency and proceed to closing, even if some conditions and contingencies have not been

met. This protects the developer who has expended substantial time, effort, and money and made considerable progress in obtaining governmental approvals, but who has not finally succeeded in doing so within the stated contingency period. It is reasonable that a developer in such circumstances has the right to proceed to settlement with the property owner and assume the risk that final approval may not occur. It is also advisable that a specific outside date or time for all contingencies to occur be stated in the contract.

In negotiating a fair contingency period, it is important for the developer and the developer's counsel to be sensitive to the likelihood of litigation, particularly litigation initiated by third parties during the development process. For example, counsel should evaluate whether nearby property owners or a community association are likely to oppose the development, the amount of time that would be consumed in such litigation, and whether such time can reasonably be incorporated into the contingency provision. The property owner may be unwilling or unable to defer closing pending final determination of all court appeals. In this event, the developer may have to close before governmental approval is obtained and assume the risk of any subsequent court reversal. A related factor for consideration by developer's counsel is whether the developer may want to appeal an adverse governmental decision. If so, will the property owner be willing to defer closing until such an appeal is finally determined? The time required for litigation can add months or years to the contingency period.

The contingent real estate contract should adequately define what is meant by a "final decision" approving the project. Does final decision mean merely the agency decision, or does it also mean the passage of any periods thereafter within which an appeal can be noted and favorable court review and determination obtained? Determining a reasonable contingency period that will fairly accommodate the interests of the property owner and developer can be difficult. Contingency periods may range from a few months to years, depending upon the magnitude of the project, the negotiating position of the parties, and the time likely required to obtain governmental approvals.<sup>2</sup>

On relatively rare occasions, such as when a developer is purchasing finished lots for which building permits have already

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<sup>2</sup>A. V. Rabkin & M. Johnson, *Current Legal Forms with Tax Analysis: Real Estate/Sales Transactions*. Form 21.38A(36), (53), (68), and (69) (1973) (typical contingency provisions in real estate development contracts relative to obtaining approval of building, permits, and zoning).

been obtained, few, if any, conditions need to be fulfilled. The contingency period in such cases need only be long enough to allow the purchaser to verify the status of the property and obtain needed financing.

### § 1:32 Elements of the Development Process—Planning and Engineering

The planning and engineering phase requires the developer to become involved in one or more of the following processes: rezoning, special exception or variance or subdivision approval, site plan review, or permit review.

*Rezoning.* If existing law does not permit the proposed use, an amendment to the law must be sought. The amendment will take the form of either an application to amend the zoning map to a zoning category wherein the proposed use is permitted, or an application to amend the text of the zoning ordinance to allow the proposed use under its existing zoning.

*Special exception (conditional use permit).* If the contemplated use is permitted under the zoning category applicable to the subject property, but not as a matter of right, (e.g., a gas station, group home or private health club), an application for a special exception or conditional-use permit must be made to the local board of appeals. This will require a public hearing, at which the developer has the burden of proving that the proposed use satisfies ordinance standards for the special exception in question.

*Variance.* If the proposed use is permitted, but physical conditions unique to the subject property (such as topography, peculiar shape, or other extraordinary condition) preclude compliance with dimensional standards within the zoning district (such as yard setbacks, coverage, or green-space requirements) a variance request must be filed with the board of appeals. At the public hearing before the Board, the applicant is usually required to demonstrate that because of practical difficulties uniquely attributable to the property in question, the proposed use cannot be constructed as planned. As noted in § 1:16, the variance application is essentially a request that the board waive the zoning ordinance requirements with respect to the subject property.

*Subdivision approval.* If no rezoning is required to effect the proposed use, the developer may proceed immediately to seek the municipality's approval of the preliminary plan of subdivision. As noted in §§ 1:18 –1:21, at this stage of the development process the developer may be required to negotiate with the municipality regarding the exactions upon which it will condition the subdivision approval. Once the preliminary plan is approved, a final rec

ord plat is prepared and, upon approval by the municipality, is recorded in governmental land records.

*Site-plan review.* If the zoning district in which the subject property is located requires final site-plan review by the municipality, a detailed site plan must be submitted to the planning agency and approved by it before construction can proceed. Site-plan review is usually required in mixed-use and planned-unit developments, as well as in floating zones. However, many jurisdictions require site plan review of essentially all development or redevelopment as a separate part of their approval process. The site-development plan must show major characteristics of the property, including topography, water bodies and streams, vegetative cover, existing improvements, and roads. In addition, the developer must submit a detailed plan of the proposed development, showing among other things:

- (1) the location, bulk and height of buildings;
- (2) recreation and open space areas;
- (3) school sites;
- (4) proposed roads, access points and public parking areas;
- (5) sewer, water, and storm drainage facilities; and
- (6) proposed landscaping and screening.

The municipality may also require submission and approval of storm-water management, grading, reforestation, afforestation and erosion-control plans during site-plan review.

*Permit Review.* Depending on the size and scope of the project, the permit process may involve the preparation of working drawings necessary for obtaining a galaxy of permits, ranging from demolition and/or grading to foundation and/or final building permit. During the permit process, if not before, in the course of site-plan review, the developer must consider major topographical and environmental features affecting the site (e.g., steep slopes, wetlands, soil or siltation conditions, and perhaps even wildlife habitat) and address them in grading, storm water, or sediment control plans. Permits from other government agencies will also be required, including sewer and water connection, street construction and access permits. In the case of the building permit itself, detailed working drawings addressing all technical aspects of the project, including structural, mechanical, and electrical aspects, must be submitted to and reviewed by the municipality. Such detailed working drawings — as opposed to preliminary site plans and elevation drawings of the type normally utilized at the rezoning or special-exception stage — require substantial time and effort by the project architect and engineer. They are items of considerable expense to the developer.

Also a significant expense, depending upon the size and scope of required public improvements, are various bonding requirements. Before these working drawings are commenced, the developer has usually made a final decision to proceed with the project.

### § 1:33 Elements of the Development Process—Financing

As previously noted, equity financing for a portion of the project cost is normally provided by the developer and any co-investors. It may be generated in a variety of ways. Equity financing produces the funds with which to commence the development by acquiring the land and initiating planning and preconstruction activity. With the exception of projects built by sole proprietors, equity financing involves the selling of an entrepreneurial interest in the project.

The vast majority of project costs are funded through debt financing. Prior to the 1990s, traditional debt financing of a real estate development consisted of two distinct phases, the construction loan and the permanent loan. As traditional financing concepts change, some large institutional lenders assume an equity position in the project, and/or combine construction lending and long-term financing in a single package. The construction loan, as the name implies, is intended to provide funding for the construction phase. It is of relatively short duration, usually not more than one to two years. The construction lender has historically been a bank or savings and loan company. More recently, insurance companies have also acted as construction lenders. Because of the higher risks involved in the construction phase, the interest rate on a construction loan may be considerably higher than that charged for the permanent loan. The construction loan is secured by the property itself. In most cases, if a prior-recorded purchase money mortgage is held by the property owner, it is subordinated to the subsequently recorded construction loan mortgage so that the latter will be the priority lien upon the property during the course of construction. Funding of the construction loan, unlike the permanent loan, is accomplished in stages throughout the construction period. Draws are made by the developer as construction proceeds and as the value of the secured property increases. The progress of construction is verified through a system of vouchers submitted to the lender by the developer, with verification of work progress being provided by the project architect or by a representative of the lender.

Permanent financing is achieved through the permanent loan, representing funds borrowed by the developer (or by individual

purchasers in a residential or condominium development) to pay for all or a portion of the value of the completed development. In past years, this was often referred to as a "take out loan," since it is the vehicle by which the construction loan is repaid and the construction lender is taken out of the project. Permanent financing has traditionally been provided by life insurance companies or pension funds. In the case of individual residential purchasers, permanent financing once made available by savings and loan associations, is now provided by banks and mortgage lenders. Since the permanent loan involves considerably less risk than the construction loan, it has usually been obtained at a lower interest rate. Recent trends indicate a greater use of the variable-rate mortgage rather than the fixed-rate mortgage for permanent financing of residential development. Institutional lenders for other forms of development may require that an ownership interest be afforded to the lender in return for a long-term fixed-rate mortgage. The developer normally seeks to obtain a commitment for permanent financing at or prior to the time a construction loan is arranged.

#### **§ 1:34 Elements of the Development Process— Construction**

Construction is the phase of development when improvements are placed into and on the site. The construction phase involves two distinct forms of improvement. First, construction of necessary infrastructure to create a finished lot or lots and a finished, ready-to-build parcel. Such construction would include roads (curbs, gutters, and sidewalks), drainage structures, water and sewer facilities, and park and recreation areas. Second, of course, is construction of on-site improvements, the buildings themselves.

In this connection, a distinction should be made between the "developer" and "builder." Due to tax considerations and the complexities involved in constructing and marketing buildings, many developers prefer not to become directly involved in the building phase of the construction process. They are content to create the infrastructure needed to provide a finished lot or subdivision, which is then sold or leased to residential, commercial, or industrial builders. Developers preferring to remain on the scene through the construction phase often form separate entities for this purpose, such as construction corporations or joint ventures.

#### **§ 1:35 Elements of the Development Process—Disposition**

The developer needs to ensure that sale or lease of the

completed improvements proceeds expeditiously. Disposition of the completed improvements entails creation of a marketing strategy at the outset of development and the ability to adjust to any changes in market conditions as construction proceeds. Delays in disposing of the finished product can destroy the economic viability of the project, to the same extent as construction delays or slowdowns in the permitting process. Depending on the size of the project, the developer may require the services of professionals in advertising, merchandising, and real estate sales.

### § 1:36 Elements of the Development Process— Administrative Relief

The land use regulatory process consists of two basic subprocesses, one legislative or quasi-legislative, and the other administrative or quasi-judicial. Functions such as comprehensive zoning and changes to the text of zoning, building, and subdivision regulations are legislative in nature. In some jurisdictions, the planning process is also regarded as legislative. Special exception and variance cases are generally regarded as quasi-judicial or administrative, as are proceedings involving enforcement of building, subdivision, and housing codes. Piecemeal rezoning proceedings are also categorized as quasi-judicial in a substantial number of jurisdictions.

Administrative relief involves seeking redress from quasi-judicial or administrative decisions that are considered arbitrary or unlawful. It is, in essence, a review mechanism imposed between the challenged administrative decision and traditional methods of court review, such as injunction, mandamus, or declaratory judgment.

In most jurisdictions, statutes provide express procedures for the appeal of administrative decisions and actions. Under the doctrine of exhaustion of administrative remedies, judicial relief may not be sought unless all prescribed administrative remedies and procedures have been exhausted. Thus a request for mandamus or mandatory injunction to compel the issuance of a building permit may not be brought until the prescribed administrative appeal requirements have been followed. Certain exceptions to the exhaustion doctrine have been recognized, such as the right to seek immediate court intervention in which constitutionally protected rights are impinged upon, or where exhaustion of administrative remedies would be futile. Nevertheless, an increasing number of courts are requiring that the

administrative appeal process be followed before other relief is sought.<sup>1</sup>

Administrative relief is looked upon as a means for keeping local land use matters out of the courts and limiting judicial intervention. This view recognizes that municipal governments should, within constitutionally permitted limits, control their own destinies. It is quite removed from early concepts of land use regulation, such as enforcement of restrictive covenants and private nuisance actions, which completely bypassed municipal involvement and left enforcement of such matters totally within the province of the judiciary. It is a further recognition of the complexity of land use regulation and of the fact that municipal governments are better prepared than the courts to deal with these issues.

Administrative relief starts with the agency charged with making the initial decision. For example, if an application for a building permit is denied, administrative relief is generally authorized by statute, either in the form of an appeal of the decision or a request to a board of appeals for a variance. The appeal or variance request must be filed with supporting information and documentation and within a prescribed time. After due notice to interested parties, the matter is scheduled for public hearing. The evidence gathered at the hearing is then reviewed in the light of some prescribed standard, such as whether the action of the agency, department, or official was arbitrary or clearly erroneous. Based on the evidence submitted at the hearing, a decision is rendered. Code provisions may require further appeal to a higher municipal body, such as the city council, or provide for direct appeal to the courts from the reviewing board's decision. In either case, the prescribed appeal procedure must be followed. If it is not, the court's jurisdiction to hear the appeal may be subject to challenge.

Administrative relief has both desirable and undesirable effects. While it is advocated as a cheaper, more expedient alternative to the courts, it may be neither. In many cases, lawyers and expert witnesses must be retained, and the degree of preparation for an administrative agency proceeding can be as great as that for a court case. The docket of the administrative agency may be as crowded as the court's, thereby precluding expeditious review. While the administrative board may be regarded as having a certain expertise in its particular area so as

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[Section 1:36]

<sup>1</sup>See §§ 5:70 to 5:75.

to warrant a degree of judicial deference, often the members of the board are political appointees who respond more readily to pressure from special interest groups than to the evidence of record. Moreover, they often have limited professional or technical expertise.

Administrative relief does, nonetheless, carry certain advantages. It provides a means whereby local governments can control the land use process by placing the initial decision and reviewing functions in administrative agencies that must account for their actions. The procedures and proceedings are more informal and strict evidentiary rules are not required or followed; consequently, it is often easier to prepare and present a case. Finally, the decision is still reviewable by the courts. Where administrative appeals are authorized and reviewed on the basis of an already established record (as opposed to a *de novo* proceeding), the appeal is pursued by filing the necessary pleadings, memoranda, and oral argument, without the requirement or necessity of presenting additional evidence or of retrying the case.<sup>2</sup>

Judicial decisions have attached considerable importance to administrative relief and review. Many appellate courts have held that the function of a court reviewing administrative decisions is not to substitute judicial judgment for the expertise of the agency. The courts view their sole role in such matters as determining whether the agency decision is legally supportable. Judicial review of the evidence in these cases usually defers to the agency's findings, even if the court does not arrive at the same conclusion on the same set of facts, or does not concur in the agency's reasoning. The court, of course, is the final arbiter of questions of law.

### § 1:37 Particular Features of Land Use Litigation

Land use litigation requires essentially the same skills as other areas of litigation. Once a competent litigator has researched and understood the substantive land use law at issue, it is simply a matter of preparation. The crucial concern is that the attorney fully grasp the substantive legal issues affecting the client's interests from the very beginning of the administrative process. To ensure the best attack or defense, there must be a complete strategy for approaching the factual situation.

Each case should be approached as if it were eventually going to be tried. Preparation of a trial book from the very outset can

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<sup>2</sup>This process is discussed in detail in Ch 8. See Appendix E, Sample Documents E1 through E6.

help organize information and serve as a reminder that the proceedings at hand may be a prelude to litigation.<sup>1</sup> It will also assist counsel in recognizing or anticipating issues as they develop in the administrative process.

This Chapter is designed to provide a framework for understanding the land use regulatory process from an administrative and judicial perspective.<sup>2</sup> However, a threshold discussion of three main concerns of land use litigation is appropriate. These concerns are the role of the courts, choice of forum, and parties.

### § 1:38 Particular Features of Land Use Litigation—Role of the Courts

When the municipality's decision in a zoning case is challenged, it will normally be accorded a presumption of validity by the courts, particularly in jurisdictions that regard such decisions as legislative. In those jurisdictions that do not recognize zoning actions as legislative, the presumption that otherwise attaches to the municipality's decision is either nonexistent or substantially diluted. In its place is a weight-of-evidence test. This test allows the court considerably more leeway in delving into the record and using its own judgment in weighing the evidence and the merits of the case.<sup>1</sup>

The strength of this presumption of validity varies considerably from jurisdiction to jurisdiction. In most jurisdictions, however, a strong presumption of validity attaches to actions involving amendments to the zoning ordinance text. Such actions are almost universally regarded as legislative in character. Challengers of text amendments may, in the absence of specific statutory authority, find it difficult even to establish their standing to contest such amendments. Similarly, a strong presumption usually favors comprehensive zoning actions since they are more readily perceived as purely legislative in character. One seeking to challenge comprehensive zoning may be limited to casting about for some procedural defect, such as lack of notice or inadequate description of the parcels involved or contending that the action is confiscatory, impairs a constitutionally protected right, or violates federal statutes.

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#### [Section 1:37]

<sup>1</sup>See §§ 5:34 to 5:37, 7:20.

<sup>2</sup>Substantive issues in a variety of common problem areas are treated in Part II.

#### [Section 1:38]

<sup>1</sup>See Chs 5, 8.

The presumption of validity attributed to local or piecemeal zoning decisions is invariably weaker than that given to text amendments or comprehensive zoning. As will be discussed in Chapters 5, 8, and 9, this is traceable to the understanding that local or piecemeal zoning proceedings are more adjudicatory and, therefore, less legislative in character than text or comprehensive map amendments. This fact notwithstanding, the majority of courts still require one seeking to overturn a decision in a piecemeal rezoning case to demonstrate that the decision was not based upon substantial evidence and was clearly arbitrary or capricious. Issues of law are within the sole province of the court and, of course, are not analyzed under the substantial evidence standard.

### § 1:39 Particular Features of Land Use Litigation— Choice of Forum

In controversies over the use of land, it is easy to identify the land in question and the interested parties. Land use cases are usually tried in the state court of the state where the property is situated. Rarely is a federal forum sought. In recent years, however, there has been an increasing use of the federal courts for challenges involving regulatory takings, zoning actions that impinge upon rights of free association; challenges based upon claimed federal due process and equal protection violations in exclusionary zoning cases; and actions arising under federal law, such as the Fair Housing Act or the Civil Rights Act of 1964.

To date, over 10,000 reported opinions have dealt with land use controls. Over 95% of this litigation deals with zoning and, surprisingly, it is heavily concentrated in relatively few states. Professor Norman Williams has found that about 75% of the nationwide total has come from only 13 of the 50 states — Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Ohio, Michigan, Illinois, Florida, Texas, and California. Professor Williams further notes that seven of the 13 states are located in the northern “megalopolis,” three in the midwestern industrial belt and the rest in the far south or west. What are considered leading cases come largely from these 13 states and, even though the incidence of land use litigation is increasing rapidly throughout the country, it continues to be centered in these states.<sup>1</sup>

For nearly 50 years after the landmark 1926 decision in *Vil*

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[Section 1:39]

<sup>1</sup>N. Williams, *American Land Planning Law* § 3.01 (1988).

lage of *Euclid v. Ambler Realty Co.*,<sup>2</sup> land use matters were almost completely absent from United States Supreme Court decisions. By contrast, land use cases have long provided state courts with major issues in constitutional law. With only minor exceptions since the validity of land use controls was established, the Supreme Court consistently refused to review decisions in this field. Commencing in the mid-1970s, however, this began to change; and a number of important decisions, particularly on the subject of regulatory takings, have been rendered by the Supreme Court since 1974.<sup>3</sup>

The pattern of zoning case law seems to be changing in recent years. Reported opinions are significantly increasing, with conflicts over residential density and residential building type accounting for a large portion of the increase. Whereas litigation once came primarily from large and medium-sized cities, a shift to the suburbs has been under way since about 1940, and, since the 1960s, a significant number of cases have come from rural areas as well.<sup>4</sup>

In attempting to discover common factors in the geographic spread of the case law, Professor Williams identifies these factors as important in generating a large amount of zoning litigation:

- (1) a high density of settlement;
- (2) a period of rapid growth; and
- (3) a sympathetic judiciary.<sup>5</sup>

The prevailing judicial attitude to public regulation of developers' property rights in land is of paramount importance in the understanding and practice of land use litigation. According to Professor Williams, this attitude, on a nationwide basis, has gone through four successive stages:

- *Prezoning*, when only attempts to deal with nuisances and to exclude certain objectionable occupations (e.g., slaughterhouses, storage of gunpowder) from whole towns or from residential areas were upheld;
- *Acceptance of zoning*, when privately owned land could be made subject to broad restrictions on its use, without compensation, and the uses of land could be arranged into districts;
- *Faith in local autonomy*, where a presumption of validity of

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<sup>2</sup>*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

<sup>3</sup>See §§ 12:3 and 36:3.

<sup>4</sup>N. Williams, *American Land Planning Law* § 3.01 (1988).

<sup>5</sup>*Id.*

municipal zoning and planning action exists and the aggrieved party has to overcome the presumption — this, for the most part, is the present judicial attitude; and

- *Sophisticated judicial review*, an emerging attitude, not yet constituting a coherent doctrine, which is seen as a more skeptical and more realistic view of local government and of the various parties in interest.<sup>6</sup>

Nationally, the courts are hovering somewhere between the third and fourth stages. Courts in the third stage follow the doctrine of presumption of legislative validity, not examining motives or actual effects. Courts in the fourth stage take greater cognizance of these factors, realizing that there are needs to restrict developers' property rights to avoid harmful impact on neighboring property or the environment. Yet the courts also recognize that local land use restrictions may be exclusionary in intent or in effect, products of parochial vision, unduly harsh with little compensating public benefit, or merely inept. As New Jersey Supreme Court Justice Hall said in his now-famous dissent in *Vickers v. Township Committee of Gloucester Township*:

Municipal legislative action is always assumed to have been taken conscientiously, sincerely and honestly. The test of validity is certainly something much more than bad faith or corruption. Local officials, no matter how conscientious and sincere in their own minds, may be legally wrong in formulating into legislation what they think is best for their community. The judicial branch does not meet its full responsibility when, as here, its concept of review gives unquestioning deference to the views of local officials.<sup>7</sup>

In the leading case decided by a state court, *Southern Burlington County NAACP v. Township of Mount Laurel*,<sup>8</sup> handed down in 1975 (Justice Hall this time authoring the majority opinion), the court set up a new principle of judicial review when zoning ordinances are challenged on exclusionary grounds. The case held that if a municipality's land use regulations do not allow for a variety and choice of housing, including the opportunity for low- and moderate-income housing, or if the land use regulations expressly preclude or substantially hinder low- or moderate-income housing, then a violation of substantive due process or

<sup>6</sup>Id. at §§ 5.01-5.05 (1988).

<sup>7</sup>*Vickers v. Township Committee of Gloucester Township*, 37 N.J. 232, 262, 181 A.2d 129, 145, (1962), cert. denied and appeal dismissed, 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 435 (1963).

<sup>8</sup>*Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), cert. denied and appeal dismissed, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975) (*Mount Laurel I*). See Chapter 22.

equal protection under the New Jersey State Constitution has been shown. When this occurs, the burden of proof shifts to the municipality to establish a valid basis for its action or inaction.

In addition to a new principle of judicial review, the court adopted a "fair share" concept to measure the affirmative obligation of localities to provide low- and moderate-income housing. This concept requires the accommodation of a fair share of regional population growth. The decision also summarizes the entire spectrum of the exclusionary issue, listing what is allowed and what role the state legislature can play in the whole matter.<sup>9</sup>

This shift to "sophisticated judicial review," as Professor Norman Williams calls it, has not been as popular with the federal courts. An example of this is the decision of the Court of Appeals for the Ninth Circuit in *Construction Industry Association of Sonoma County v. Petaluma*.<sup>10</sup> The trial court had held that "any limitation on growth motivated by a desire to exclude residents is unconstitutional," as violating the right to travel.<sup>11</sup> The Petaluma Plan allowed for the construction of 2,500 subdivision units during a five-year period. Only subdivisions of five or more units would be affected, and they were to be judged according to a point system that measures the quality of the development and provisions for public facilities. In reversing the district court opinion, the court of appeals stated that "the reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit." It ruled that "the concept of public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small-town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."<sup>12</sup> For support, the court, quoting from the 1974 decision by the U.S. Supreme Court, *Village of Belle Terre v. Boraas*,<sup>13</sup> stated that "A quiet place where yards

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<sup>9</sup>See § 22:5.

<sup>10</sup>*Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

<sup>11</sup>*Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 375 F. Supp. 574, 587 (N.D. Cal. 1974).

<sup>12</sup>*Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975), cert. denied, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

<sup>13</sup>*Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."<sup>14</sup>

These decisions show a split in the attitudes of state and federal courts. The federal courts appear to defer first to the legislative enactments at the local level and, second, to the readiness of state courts to enter the land use maze. In reviewing the state court case law in the 13 states that have had 75% of the zoning litigation, Professor Williams finds that four distinct categories emerge:

- Strongly favoring the municipality — California, New Jersey, Massachusetts, and Maryland;
- Strongly developer-minded — Illinois and perhaps Rhode Island;
- Highly erratic — Michigan, Ohio, Florida, perhaps New York, definitely Pennsylvania; and
- The good, gray middle — Connecticut and Texas.<sup>15</sup>

These categories include recent litigation, and evidence exists that the trends will change in the near future.

The federal courts, however, present a different picture. Since zoning is an exercise of the police power reserved to the states, the attitude of the federal courts seems to be that, absent a clear constitutional violation such as blatant racial discrimination, or more recently a regulatory taking of private property for public use without just compensation, they will be reluctant to interfere actively with municipal zoning. The state courts are less constrained because they view zoning decisions as well within their authority to review.

The above review highlights the problems facing the practitioner in the selection of a state or federal forum. The attitude of the state court toward municipal decision-making and toward private liberties or property rights may dictate seeking federal review. Similar factual situations may be treated differently in different states, depending on how strongly the presumption of validity attaches to legislative activity and on the willingness of the court to examine the intent and effect of governmental actions.

The federal courts have become an attractive alternative in states where jurisdiction can be established and where the more restrictive federal standard on standing can be met.<sup>16</sup> Yet even if

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<sup>14</sup>416 U.S. at 9.

<sup>15</sup>N. Williams, *American Land Planning Law* at § 6.01 (1988).

<sup>16</sup>See §§ 9:19 and 12:2.

jurisdiction is established and standing requirements are met, the federal court may still refuse to hear the case by applying the doctrine of abstention. The federal courts apply this doctrine when there is a possibility that the assertions of federal power will produce friction between state and federal governments. Abstention has been used in the following situations:

- (1) to avoid constitutional questions if the case can be disposed of by applications of state law;
- (2) to avoid unnecessary conflict between the federal judiciary and the state's administration of its own affairs;
- (3) to allow unsettled areas of state law to be settled by the state courts; and
- (4) to ease the backlog of the federal dockets.<sup>17</sup>

If fundamental rights are at stake, however, the federal courts usually do not abstain. Nor do they abstain if rights may be impaired by delay while the plaintiff proceeds through the state courts. Even though land use regulation is essentially local, the exercise of federal court jurisdiction by no means constitutes unnecessary interference when the federal questions of taking, deprivation of civil rights, and conspiracy to abrogate the plaintiff's civil rights are at the center of the suit. Lastly, if effective state remedies do not exist, the federal courts will hear the case.

It should be noted that if the state forum is selected, a plaintiff may not then relitigate in federal court claims that have been denied in state court, even if different relief is being sought. Yet, if the claim at issue has not been litigated in the state courts, abstention should not be applied, even if the state and federal constitutional provisions are similar.

In summary, exhaustion of state remedies is not required as a condition to federal court review when claims are based upon federal constitutional or statutory rights. This then leaves the plaintiff's attorney with the responsibility to examine legal interests involved, causes of action available, and applicable case law, to determine the appropriate forum.

#### **§ 1:40 Particular Features of Land Use Litigation— Parties**

Land use controversies usually involve a specific parcel of prop-

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<sup>17</sup>See W. Ryckman, "Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrine," 69 Calif L Rev 377 (1981); Note, "Land Use Regulation, the Federal Courts, and the Abstention Doctrine," 89 Yale LJ 1134 (1980) Note, "Land Use Regulation, the Federal Courts, and the Abstention Doctrine," 89 Yale LJ 1134 (1980).

erty, and the parties in interest can be identified easily. These parties traditionally include the owner or contract purchaser, neighbors, and government agencies. Recently, there has been increased involvement by those who desire to move into a community but find for various reasons that they are excluded, and by tenants in buildings on the property in question who allege a greater-than-common-law right to their leasehold or who have been provided greater rights by statute or judicial determination. Another recent phenomenon is the participation of individuals and associations whose interests involve such diverse matters as historic preservation, environmental protection and wildlife habitats.

From the outset, it is the responsibility of the attorney to recognize potential parties to any controversy that may arise. These parties should be evaluated for the role they may play, and depending upon the situation, they should be contacted prior to commencing administrative or legal action.

The private attorney does not usually select his or her private client and therefore is not creating the best possible factual situation to take before an administrative body or a court. The government attorney, however, often has the opportunity to work with municipal officials to determine which factual situations best provide the opportunity for success.

A difficulty facing both private and public attorneys is that affected parties are not always represented in each case and, therefore, their legitimate concerns may not be placed before the court. In such situations, their testimony at public hearings at the administrative level should be encouraged. In a judicial situation, it may be appropriate to seek their support as *amicus curiae* in the event they are unable to become involved as parties to the litigation.

### § 1:41 Dealing with the Client

Because no simple and satisfactory shortcuts can lessen the costs of administrative and judicial review, no "economy model" for land use cases exists. Therefore the case should be evaluated as to possible costs, and then it should be litigated correctly, with adequate preparation, or it should be settled. Governmental bodies and their attorneys must be as aware of these costs as are private clients and their attorneys. Government expenses in litigation are subject to public disclosure, and this fact may have significant strategy impact in prelitigation negotiation.

Since litigation can be so uneconomical and since compromise can save money, if not pride, the attorney has the responsibility

to place before the client the available options. Discussing a compromise, however, requires candor and openness between attorney and client. Sometimes, when reasoning seems impossible, the attorney should reflect on the motivations for the client's actions. For example, when the municipal governing body insists on defending a dubious action rather than modifying it or settling, public officials may be blinded by anger or other emotion or by political considerations. In this sort of situation, the municipal attorney must attempt to bring the client's bias to light and explain the risk in pursuing the litigation.

Builders are similarly subject to emotional decision-making. Perhaps a local election results in a change in attitude by the town board from pro-development to anti-development. The change of climate from friendly to hostile may result in feelings of unfair treatment and may generate an urge to sue. In these and similar situations, the builder's attorney should search for a compromise less costly than litigation.

A preliminary discussion of basic steps to be taken in representing various clients appears below.<sup>1</sup>

#### **§ 1:42 Dealing with the Client—Governmental Agency as Client**

One advantage of representing a governmental agency is the opportunity, in at least some cases, of being involved in the land use decision-making process from the beginning. With a continuity of client contact, the attorney can play a very effective role even before the first administrative hearing.

Prior to the hearing, the government attorney should hold a pre-application conference to discourage applicants who are not yet sufficiently prepared or who have proposals that in their present form have little chance of success. The attorney can foster internal coordination of the municipal review process and can make the applicant aware of what work needs to be done. An equally important role is the preparation of an outline for the staff report and the review of the draft staff report for form and sufficiency.

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[Section 1:41]

<sup>1</sup>See also §§ 5:12 to 5:37 and §§ 7:3 to 7:8.

At the hearing stage, it is the attorney's responsibility to monitor all due process concerns.<sup>1</sup> The discussion in this section focuses on the role of the municipal attorney.

"Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise."<sup>2</sup> Any land use decision may affect a variety of property rights and therefore must afford due process. Due process in a land use context includes notice, opportunity to be heard, a decision made on the basis of known standards, and the opportunity to appeal. Once beyond the hearing stage and before the legislative body for a decision, the issue of whether the decision is legislative or adjudicatory may require further consideration of the factual basis for the decision.<sup>3</sup>

During the hearing, the responsibility of the government attorney is to ensure that procedural due process rights are protected and to detail the burden of proof that must be met by the applicant in order to receive permission for the proposed project. For example, if the applicant is seeking a variance from an area requirement of the ordinance, such as a yard setback, the applicant's burden may be to demonstrate to the municipal body that the present zoning will result in an "unnecessary hardship" and that the hardship is due to unique physical circumstances, not to general conditions in the neighborhood. If the hardship were general to the neighborhood, then the proper remedy would be to seek a change of zoning for the entire district rather than to request variances for individual owners. The attorney's responsibility is to ensure that both sides understand the burden of proof to be met by the applicant and to offer an opinion to the hearing body as to whether it has been legally met.

Finally, it is the attorney's responsibility to make sure a record is prepared. The procedural law of the jurisdiction may dictate the type of record to be prepared.<sup>4</sup>

If the applicant's proposal is denied, the government attorney should meet with the applicant to suggest resubmission before an appeal is taken. If the applicant sues on the basis of the decision, the attorney should be prepared to question the standing of the plaintiff and the ripeness of the issue. The merits defense should

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[Section 1:42]

<sup>1</sup>These concerns are discussed more fully in §§ 5:1 to 5:11.

<sup>2</sup>Am Jur 2d Constitutional Law § 808.

<sup>3</sup>This problem is discussed in §§ 5:1 to 5:11 and §§ 5:70 to 5:75.

<sup>4</sup>See § 5:68.

begin with the presumption of the validity of the agency action and should rely on substantial supporting evidence of record. The attorney should be prepared to show that all due process requirements were followed and that no equal protection violation occurred. Even if there is a strong basis for defense, the possibility of compromise should not be overlooked. The government attorney should outline compromises that are legally possible when discussing litigation strategy with the elected officials.

### **§ 1:43 Dealing with the Client—Landowner or Developer as Client**

Where possible, the attorney for the landowner or developer should be involved with the proposal from its inception. Otherwise the attorney must retrace the events to date to understand the proposal's history. If counsel is sought only when the proposal is ready for submission or public hearing, it may be too late for legal advice. A project may have been planned that requires a zoning change that could have been avoided or, worse, the developer could already be committed to a parcel that will need rezoning.

Once the project is planned, and if a zoning change is needed, it is crucial to determine the exact zone to be sought. The attorney and client should consult with the zoning administrator and then assess the chances of success. If the administrative process presents foreseeable obstacles, it should nonetheless be noted that a judicial appeal could more than triple the time of the approval process — if it is successful. The litigant, even if successful in court, obtains no guarantee that the project as planned can be immediately built.<sup>1</sup>

The zoning history of the property and of the neighborhood should be traced. This research can provide valuable guidance as to whether the parcel's previous owners have sought rezoning and whether similar proposals have been made elsewhere in the neighborhood. All relevant municipal agency plans and studies should be reviewed, and availability of public services and the policy for their provision should be examined. A meeting should then be scheduled with the staff of the municipal planning office to obtain its opinion on the proposed use.

The next step is to meet with the client to assess potential citizen reaction. Providing notice and working with citizen groups is

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#### **[Section 1:43]**

<sup>1</sup>This problem of the effectiveness of a favorable judicial determination is discussed in §§ 9:13 to 9:17.

now an integral part of the land development approval process. One must decide whether compromise is required, and whether and when it will be offered.

After meeting with interested individuals and citizen groups, it is the time for counsel to fill out forms and submit applications. If local procedure allows, a "statement in support" should be appended to the application. Next, it is advisable to meet again with planning office staff to discover what problems, if any, they have with the application. Modification at this point in light of staff comments may be entirely appropriate; incorporating staff suggestions may gain their support for the application. Once the application is submitted, further meetings should be set with concerned citizen groups and any involved regional, state, or federal agencies. This step provides the basis for meetings with the client and the development team in preparation for the hearings. Success at the administrative hearing stage depends upon this groundwork as much as on a well-organized presentation.

After the hearing is held, if the application is approved and no objections are made, work can be started. If the application is approved but a citizen group files suit, does the project progress or does it stall pending the outcome of the suit? Usually the municipality is the defendant and a judicial reversal of the decision approving the application is sought by the citizen group. In this event, the developer's attorney should not only seek to have the developer made a party defendant, if appropriate, but should also insist that a bond be posted by the citizen group. Many times, the citizen group cannot afford to post a bond, and the complaint is dismissed. In some jurisdictions, however, the appeal statute does not require the appellant to post a bond.

If the application is denied after the hearing, the attorney should recommend that the client return to the planning office to see what changes would be required for approval before considering administrative or judicial appeal.<sup>2</sup>

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<sup>2</sup>The administrative appeal process is analyzed in §§ 5:70 to 5:75, and a detailed discussion of the judicial process appears in Chs 7, 8.

**§ 1:44 Dealing with the Client—Citizens Association as Client**

In this section, an overview of the role of the attorney representing citizens associations is presented.<sup>1</sup>

The initial concern of the attorney representing a citizen or civic group is analysis of the case. Meetings should be held with the clients to discuss their concerns. The developer's application should be examined, along with newspaper clippings and anything else obtainable that results in a better understanding of the controversy. A meeting should be held with the developer to discuss the developer's concerns, and copies of the developer's experts' reports and working papers should be requested. Though such reports need not be produced, a developer seeking to work with the citizens association may provide them.

Money is often a problem for citizens associations. Setting and collecting the legal fee is discussed in § 1:47 and in Chapter 10, but other expenses can also be considerable. The attorney should openly discuss what costs may be incurred and ask that the client honestly assess its capacity for meeting those expenses. Retaining needed experts, for example, is a big expense; perhaps the citizens association has the needed expertise among its members. This sort of evaluation can produce a list of available resources — financial and otherwise — and a strategy for utilizing them.

The source of most technical information will be the municipal planning office. Contact with the staff should be made early, and staff comment should continually be sought on issues being debated. Other involved government agencies should also be contacted to learn what data they have available. If the application is to be scheduled for a hearing, staff reports prepared on the application should be reviewed and, if possible, discussed with the authors.

The review and approval process is often quite technical, and the citizens association's ability to win depends often on the applicant's making a mistake and providing the issue to raise. It is important that, as information is sought, counsel for the citizens association not act in a manner that appears conspiratorial. In adjudicatory proceedings, for example, ex parte or clandestine meetings with the responsible government officials should be

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**[Section 1:44]**

<sup>1</sup>Sections 5:24 to 5:29 discuss the role of citizens associations in the administrative process, and § 7:7 explores their role in the judicial process.

avoided. The group should be openly and honestly concerned with the public interest, and all actions should reflect this concern.

Immediately after the hearing, if the facts reasonably show weak points, citizens association counsel should meet with the government attorney to discuss these problems and to ask what, if any, recommendation government counsel will make. This is also the time to offer to the developer the citizens association's support of a proposal modified to address the group's concerns. If the developer is worried about a rejection, the application may be withdrawn and modified to obtain the group's support. If no compromise can be reached, and the application is approved, it is again time to examine both the legal basis for an appeal and the financial staying power of the citizens association to pursue the appeal, once initiated.

### § 1:45 Dealing with the Client—What the Client Seeks

Development of strategy at either level is closely aligned to the client's goal.<sup>1</sup> Unfortunately, client and counsel too often fail to communicate adequately on this important matter at the outset of their relationship. The result can range from mere misunderstanding to disaster as the proceeding unfolds.

If, for example, the client is a developer, is the proposal under discussion the absolute minimum acceptable? Or is the developer in a position to compromise by trading some reduction in density, floor-area ratio, or height in return for an accelerated proceeding more likely to result in approval of the proposal? If the client is a civic group, is it unalterably opposed to the proposed development under any circumstances, or might it accept a modified proposal in the interest of ending speculation over the contested property and promoting stability in the neighborhood? If the client is the government, how closely does the proposal comply with the master plan? Can it be accommodated within the approved capital improvement program? Is the project one that is needed in the community but will be jeopardized if delayed while new land use policies or capital improvement programs are developed?

Issues and options like these should be considered by the client during the earliest stages of the proceeding. The attorney can play a major role in articulating the issues and developing the client's position concerning them.

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#### [Section 1:45]

<sup>1</sup>Sections 5:12 to 5:37 discuss strategies to be considered by the various parties to the administrative agency proceeding. In §§ 7:3 to 7:8 litigant strategy in the judicial proceeding is discussed.

**§ 1:46 Dealing with the Client—Initial Visit**

If possible, prior to the initial meeting, the client should be sent a questionnaire to complete; it will force the client to organize relevant information and provide facts and opinions in a logical manner. The questionnaire should also contain a section for a short narrative statement. A private client or the client's consultants usually fill out the questionnaire themselves, but an attorney representing government may be responsible for gathering the information, the major source for which will be the planning department staff.<sup>1</sup>

The completed questionnaire should be returned to the attorney prior to the initial meeting, along with copies of relevant documents. This allows for a productive first conference and makes it possible to present from the start the full range of difficulties that might be encountered. The completed questionnaire also assists the attorney in preparing for the meeting. Based upon the information supplied, an initial determination can be made of the likelihood of success and of the appropriateness of the attorney's representation.

In some situations, it may be best not to accept a client because of past representations, or at least to let the client know of them and allow the client to decide if the attorney's services are still desired. The supplied information may indicate that in this instance another attorney would be better able to represent the client, based upon his or her particular experience.

During the initial meeting, it is particularly important for the client to feel that the attorney's complete attention is focused upon the client's problems. Routine calls should be held, and the attorney's desk or conference room should reflect the fact that the client's concern has top priority. The client should be allowed to discuss proposed actions, and this discussion should continue for a reasonable time. The attorney should take notes during the meeting and list questions to be asked and information needed.

In land use matters, it is essential that the client understand the unpredictability of the review and approval processes. The problem areas should be summarized and related to a projected schedule. An early understanding of the time required to pursue the case is necessary to make a realistic assessment of adequacy of the client's resources. This discussion leads to an examination of estimated costs in preparing the case. Care should be taken to

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**[Section 1:46]**

<sup>1</sup>See §§ 5:38 to 5:45.

explain in detail the billing procedure for attorney's fees, costs of necessary consultants and how they are to be retained, application fees and charges, and the range of possible additional expenses that may prove necessary.<sup>2</sup> An understanding must also be reached on the relative responsibilities of the attorney and client in gathering and organizing necessary information and in preparing required application material.

After this session, the client should immediately be sent a letter outlining what had been discussed and what actions are to be taken. This letter should include a list of the possible results, both positive and negative, and the details of the fee arrangement. The attorney should not delay the preparation of this letter. Immediate drafting of the letter, while the conference is still fresh in the attorney's mind, results in a better letter, and the immediate follow-up helps assure the client of the attorney's interest in the case and competence to handle the matter.

### § 1:47 Dealing with the Client—Setting and Collecting the Fee

Chapter 10 discusses in depth the setting of fees and use of the retention letter. This section, however, presents an overview of these important topics.

The fee arrangement should be in writing to forestall any later disagreements. This arrangement should establish the rate of fees, when they are payable, and by whom they will be paid. Two basic approaches are normally used. Some attorneys charge a flat fee for certain types of cases. Others provide services on an hourly basis because of the unpredictability of the time requirements. Contingency fees are also an option; however, with the exception of certain condemnation cases, it is sometimes difficult to determine the value of the contingency basis. One method of valuing a contingent fee, for example, is to relate it to specific units of increased density or floor-area ratio in the event of a successful result, e.g., a fixed-dollar amount for each additional dwelling unit permitted after the property is rezoned.

The agreement should provide that upon default in payment, the attorney has the right to withdraw, no matter what the stage of representation. It should discuss the scope of the attorney's employment and procedures to be followed in hiring experts (noting carefully that the client is responsible for the expert's fees), negotiating a settlement, taking an appeal, and related matters.

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<sup>2</sup>See Ch 10.

It is advisable to require a reasonable retainer in advance, and to make it clear how these funds will be applied.<sup>1</sup>

### § 1:48 Dealing with the Client—Organizing the Case

It is easy to spend time and money preparing a case. Organization from the start will help minimize these expenses. A clearly defined goal should exist, and the leeway for compromise at each step of the approval process should be defined. A time line should be prepared, covering the necessary steps, their order, and their probable length.

The attorney and client should establish a procedure to ensure that all approvals at every level are complete, well-documented, and proper. A complete list of the individuals involved in each aspect of the project approval should be kept, as well as a list of and copies of all laws, ordinances, and regulations in effect. The client questionnaire prepared for the initial visit can provide the basic information for what is to be done; but as decisions are made, care should be taken to prepare for the files memoranda outlining the factors considered. A copy is sent to the client. The resulting files can be consulted at any time as the case proceeds to learn why specific actions were taken.

It is important to maintain complete case files. Agency files should be periodically reviewed and date-stamped duplicate copies obtained of all information. Government files may be unorganized, due in part to the fact that they are constantly subject to perusal by the public. Employees who deal with the files and the project may not be available when a problem occurs. Problems do happen, and it is in the client's interest for the attorney to have an ability to reconstruct the sequence of events when necessary.

In addition to concern over the agency actions being taken in relation to the project, an effort must be made to learn of similar projects and agency response, and to keep informed of subsequent agency activity. Keeping informed may include attending all administrative hearings personally.

The goal of the client helps determine the activity to be undertaken. The basic step in all instances, however, is to review the relevant law and the responsibilities of the agencies assessing the project. Memoranda should outline the applicable statutes and regulations, the agencies responsible for their implementa-

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#### [Section 1:47]

<sup>1</sup>Chapter 10 provides further detail on attorney's fees. Appendix B1 contains a sample retainer agreement.

tion, the sequence of the review process, and the substantive legal issues. This information will make it possible efficiently to familiarize parties with the issues, to prepare correspondence inquiring why certain actions are being taken or not being taken, and to respond quickly to requests for information.

Preparation is the key to success, and the collection, organization, and evaluation of information is the basis of preparation. This type of organization assists at all steps in the process, and will help in making realistic decisions.

### **§ 1:49 Dealing with the Client—Organizing the Case— Preparing a Filing System**

The first step in organization is the preparation of a filing system that can serve as the basis of the attorney's information-gathering activity. Organization of files for a landowner/developer is discussed here because it is the landowner/developer who initiates the process and begins the research effort. Government usually plays the reactive role, responding to and evaluating proposals.

A detailed filing system will greatly assist in preparation for the approval process and will help to provide a greater chance of success. If information is collected and organized as discussed, it will allow for quick and accurate response to any crisis, and it could save substantial money in consultant fees because the consultants will be able to get necessary, basic information directly from these files.

The outline below is a comprehensive summary that, if taken seriously by those using it, can greatly expedite the development review process. Moreover, going through the suggested analysis provides a landowner with a realistic picture of the situation. This prevents the creation of false expectations and helps one to act on a more rational basis.

First is a list of 11 files that should be made for each project, along with the information that should be collected for each file. Second is a list of recommended actions to take to fill these files; and, finally, there are suggestions about where or from whom to obtain the necessary information.

The 11 files are:

1. Information on Landowner, Builder, or Developer
2. Property Information
3. Property Characteristics
4. Area Land Use Pattern
5. Land Use Plans

6. Land Use Regulations
7. Public Infrastructure
8. Proposed Use
9. Responsibilities
10. Copies of Minutes of Meetings
11. Contacts and Public Relations.

Before listing the suggested contents of each file, some guidance on how the files should be organized would be beneficial. Files should be clearly labeled and be able to have all material fastened so that if the file is accidentally dropped, papers will not fall out. Also, while experimenting with the best order to keep the information, chronological order (oldest on the bottom, most recent on the top) is a good way to start. Additionally, there should be a tab indicating each item and an index of the contents of the file.

Other organizational instructions include attaching a cover sheet to each file showing a "Things to Do" list, which provides a ready list of what is needed. Additional blank sheets should also be in the file for notes on various telephone conversations. Business cards appropriate to each file can be taped inside the front cover along with a list of telephone numbers. Finally, deadline dates can be written on the outside of the file so that a quick glance will indicate when it is necessary to review the file.

These files are:

I. *Information on Landowner, Builder, or Developer*

- A. Name
- B. Address(es) and Telephone Numbers
- C. Responsible Party or Alternate(s) Authorizations to Sign Documents
- D. Previous Projects, Especially Potentially Damaging Prior Activity
- E. Degree of Sophistication in Land Use Matters Employee/Staff Experience and Availability
- F. Expected Role of Consultants, Lawyers, Planners, Engineers, Environmental Scientists, etc.
- G. Project Budget
- H. Project Timing and Contractual or Financial Constraint

II. *Property Information*

- A. Copy of Deed of Property
- B. Legal Description
- C. Form of Ownership or Interest
  1. Corporate, Individual, Partnership, Trust, Other
  2. Fee, Vendee, Options, Other

- D. Title Report or Summary of Abstract of Title Location
    - 1. City, County, Special Districts, etc., and Address and Telephone Number of Each of Them
  - E. Tax Lot
    - 1. Status of Tax Payments
  - F. Maps/Recorded Plats
  - G. Aerial and Other Photos and Videotapes
  - H. History of the Property in the Community
    - 1. Prior Owners and Prior Uses (Hazardous Waste Possibility)
    - 2. Prior Proposals or Cases Involving the Property
    - 3. Minutes of Meetings for Prior Proposals Prior Studies Done (Potable Water, Percolation, etc.)
  - I. Owner's History with Property Taxes Paid, etc.
  - J. Contract Provisions and Contingency Timing Approvals Required
- III. *Property Characteristics*
- A. Acreage
  - B. Present Use
  - C. Description and Location of Existing and Planned Improvements (Any Evidence of Asbestos, Underground Storage Tanks, or Other Hazardous Materials/Wastes)
  - D. Topography and Floodplains
  - E. Soil Classification
  - F. Geology/Hydrology
  - G. Existing Vegetation, Wildlife, Wetlands, and Any Evidence of Endangered Species
  - H. Road Service (Public or Private)
  - I. Utilities (Public or Private)
  - J. Service Facilities and Equipment (Fire, Police, etc.)
  - K. School Districts
  - L. Special Districts, i.e., Drainage, Fire, or Police
  - M. Noise Impacts from Airports or Highways
  - N. Special Features, Views, etc.
- IV. *Area Land Use Pattern*
- A. Property Use(s)
  - B. Character of Area/Demographics/Zoning Pattern
  - C. Current Community Issues/Concerns
  - D. Attitude of Residents/Local Builders/Property Owners
  - E. Attitude of Media
  - F. Existing Citizens Groups and Key Leaders and Actions They Have Taken in Relation to Other Properties in the Neighborhood

### V. *Land Use Plans*

- A. Existing Comprehensive or Master Plan Description and Copies of Relevant Documents for Site and Vicinity
- B. State and Regional Plan Designation or Controls
- C. Special Planning District(s)
  - 1. Greenway, Viewshed, Floodplain, Wetland, Coastal Zone, Study Area, etc.
  - 2. Historic
- D. Governmental Regulation and Planning Controls
  - 1. Existing Plan and Applicable Recommendations
  - 2. Planning and Zoning Commission Process & Policies
  - 3. Plan Status
  - 4. How the Municipality Dealt with Other Similar Projects
  - 5. Pending Amendments or Moratoria
  - 6. Restrictions on Amendments, i.e., Number of Times a Year and When
  - 7. Review Timetable
  - 8. Proposed Controls
  - 9. Philosophy of Elected Commission
  - 10. Architectural Style Preferences
  - 11. Unique Political Problems
  - 12. Staff Reports on Proposed Project

(Note: seek and file confirming letters from government officials — become their “pen pal.”)

### VI. *Land Use Regulations*

- A. Existing Zoning
- B. History of Zoning and Plan Designation for Project and for Surrounding Properties (What Proposed, What Accepted, and What Built)
- C. Urban Growth Boundaries
- D. Agencies with Jurisdiction and the Process Needed for Approval
- E. Philosophy of Agencies with Jurisdiction and the Political Climate Applicable to the Agencies
- F. Burden of Proof and Response to Each Element of Proof
- G. Development Standards Compliance
- H. Pending Amendment of Regulations Impacting Project
- I. Procedural Requirements for Approval
- J. Exaction Requirements
  - 1. Statutory Regional Plan and Local Code Delivery and Impact Mitigation Policies/Requirements

2. Dedication and Reservation
  3. Fees (Impact Fees and Fees in Lieu of Dedication)
  4. Credits
  5. Linkage
  6. Open Space
  7. Moderately Priced Dwelling Units (MPDUs)
  8. Transferable Development Rights (TDRs)
- K. Environmental Quality Consideration and Regulations
1. Air
  2. Noise
  3. Open Space
  4. Coastal Zone
  5. Water
  6. Wetlands
  7. Wildlife
- L. Historic Preservation Applicability and Limitations
- M. Possibility of Regulatory Changes for the Project
1. Special Exceptions
  2. Zoning Text Amendments
  3. Use Variances
  4. Master Plan Amendment
- N. Possibility of Alternatives for the Project
- VII. *Public Infrastructure*
- A. Existing Infrastructure
1. Roads, Commuter Rail
  2. Water and Sewer
  3. Storm Water Management (Quantity and Quality Controls)
  4. Schools
  5. Fire and Police
  6. Parks
- B. Applicable Local and State Capital Improvements Plans or Public Facilities Projects
- VIII. *Proposed Use*
- A. General Description of Project
- B. Each Government Agency Affected
1. Name, Address, and Telephone Numbers
  2. Approvals Required
  3. Timing for Approvals
  4. Contact Person at Each Agency

5. Availability of Pre-Application Conference (Restrictions on Contacts)
  - C. Services Required
  - D. Code Requirements
    1. Need for Amendments to Accommodate Project
  - E. Height and Area of Improvements
  - F. Value of Improvements
    1. Tax Revenue Derived from Project
    2. Public Need for Project
  - G. Number of Employees, Residents, Customers, Automobile Trips Generated, etc.
  - H. Market Information and Market Study
  - I. Impacts — Positive and Negative
    1. Adjacent Properties
    2. Neighborhood
    3. Historic Areas
    4. Taxes
    5. Water Quality
    6. Air
    7. Noise
    8. Wildlife
    9. Vegetation
    10. Open Space
    11. Traffic
    12. Local Economy
    13. Special Land Characteristics
    14. Floodplain
    15. Wetland
    16. Utilities (Sewer, Water, Solid Waste, Energy)
  - J. Who Benefits from Status Quo and Who Benefits from Proposed Use
- IX. *Responsibilities*
- A. Overall Direction/Coordination and Project Management
  - B. Consultants (Including Time and Fee Estimates, and Written Contracts)
  - C. Reports
  - D. Visual Aids
  - E. Community Relations
  - F. Press Relations
  - G. Government Staff Relations
  - H. Assessment of Hearing Board Members

- I. Rules of Procedure Governing Hearings
- J. Coordination with Other Permit Processes
- K. Coordination with Financing Aspects of Project
- X. *Copies of Minutes of Meetings*
  - A. Advisory Bodies
  - B. Political Bodies — Transcripts of Public Hearings or Copies of Audiotapes
  - C. Notes from Various Meetings
- XI. *Contacts and Public Relations*
  - A. Supporters Contacted; Names, Addresses, Telephone Numbers, and Correspondence
  - B. Opposition Contacted; Names, Addresses, Telephone Numbers, and Correspondence
  - C. Public Relations; Names, Addresses, Telephone Numbers, and Correspondence
    - 1. Direct
    - 2. Media

### § 1:50 Dealing with the Client—Organizing the Case— Information Gathering

There are a number of actions that should be undertaken to fill these files. If the following information is obtained or actions undertaken, the file will be substantially complete.

- Obtain legal description, boundary survey, topographic plat and, if available, recorded plat of property.
- Obtain zoning vicinity map or zoning atlas sheets.
- Determine what uses are currently permitted or authorized by special exception.
- Prepare a clear and detailed description of type and character of development.
- Determine whether the property conforms to site and building design criteria and development standards in zoning district regulations.
- Review subdivision regulations to determine if property must be platted or replatted under subdivision regulations and what controls or exactions may be required if platting is required.
- Review local comprehensive plan and supporting documents.
- Review jurisdiction's sewer and water plan and ask local utility whether adequate service is available or when it is planned for extension — water, sewer, electric, etc.
- Review zoning code if site plan approval required.
- Review federal, state, and local governmental regulations.

- Determine if project size triggers threshold of extraordinary review.
- Determine requirements and timing for building, use, and occupancy permit approvals.
- Read the local newspapers — current and six months back. Talk, meet with, and consult early with everyone. Also read newsletters of all neighborhood associations, condominium associations, and citizens groups. Listen to radio broadcasts or watch cable broadcasts of zoning board or commission meetings.
- Have a preliminary “technical review session” with the local planning staff responsible for reviewing the project.

The next issue to address is where this information can be obtained. There are four major sources:

- Landowner, developer, or builder themselves, and company records
- Company consultants
- Newspapers and newsletters
- Agencies and officials directly involved

Make sure:

- All agencies involved — local, regional, state, and federal — have been contacted.
- The department of the agency contacted is the one properly charged with the responsibility for the project.
- The official contacted can speak with knowledge and authority.

This file system model can help the attorney organize for the administrative process of land use approval, and if steps toward such organization are taken, it will help in the efficient and effective preparation for the approval process. And, as stated, it could also save substantial money on consultant fees because the consultants will be able to get necessary, basic information directly from these files.

For the government attorney, the file system only varies slightly, and government can usually obtain substantial information from the applicant. The key, though, is to make sure information is placed in the file when available and that it is periodically updated, recognizing changes in the applicant’s proposal and changes in government policy or position.

## **APPENDIX A**

### **Glossary**

In any competitive event, be it sports, a debate or a public proceeding, the same general cautionary note is applicable. In order to play the game successfully you must have at least a working knowledge of the vocabulary utilized. The zoning game really is not any different in this respect than a game of football. Thus, if you are not familiar with the words, phrases, and terminology utilized by the participants you really cannot expect to successfully participate or even observe unless you know the language.

In order to make participation in and observation of the zoning game meaningful there is supplied below and on succeeding pages a list of terms and their respective definitions which may arise in zoning ordinances, texts, hearings and decisions. As in any game the informed player has a distinct advantage over an uninformed player. A decisive command of the language, while not a vehicle to make one an instant expert, can be used to an advantage in both the presentation and opposition (as well as observation) of a zoning or other land use application.

The definitions utilized in this glossary by no means are the exclusive and exhaustive definitions of any particular term. They represent the author's understanding of the terms in a practical sense and are at times congealed from statutory, case law and textbook language. Terms may vary between jurisdictions, such as, the term "special exception" may be used in one jurisdiction and "conditional use permit" in another. They essentially are the same animal but this distinction in name should be recognized so as to preclude confusion and misinterpretation.

## APPENDIX A1

### Zoning and Land Use Terms

*Administrative Appeal* — The appeal of a zoning or other land use decision pursuant to prescribed statutory procedures wherein judicial review is sought of said decision.

*Aggrieved Party* — The status of a person (or organization) to appeal a land use decision by virtue of the fact that their personal or property rights are adversely affected by said decision.

*Amenity Space* — Space required by a zone or plan devoted to such use as uncovered open space for public enjoyment and use. Such areas include green areas, gardens, malls, plazas, arcades, walks, lawns, fountains, plantings and recreational areas. Such areas generally exclude areas for parking and maneuvering vehicles.

*Applicant* (also known as Petitioner) — One who seeks or requests a zoning or other land use change or approval by virtue of ownership or other proprietary interest in the property under consideration.

*Average Daily Traffic* — The measurement of traffic volume on a street or highway or at an intersection during an average 24-hour period.

*Buffer Areas* — The placement of vacant land or a less intensive land use or zoning category between incompatible zoning categories or between zones or uses of the same general nature but of varying intensities.

*Building* — A structure having one or more stories and a roof, designed primarily for the shelter, support, enclosure or commerce of persons, animals or property of any kind.

*Building Restriction Line* (also known as Setback Restriction) — An area measured in distance from a property line

towards the center of a parcel within which buildings and other structures cannot be erected or maintained.

*Bulk* — The size of buildings and other structures and their comparative relationship to each other and to open areas.

*Burden of Proof* — The standard of proof upon a petitioner seeking rezoning or other land use approval pertaining to the quantum of evidence necessary to be produced to demonstrate compliance with zoning requirements upon which a favorable decision may be justified.

*Cluster Method of Development* — A method of development whereby residential dwellings of an attached or detached nature are permitted in groups on individual lots smaller than standard, at an increased density, thus permitting flexibility of layout to preserve open space and natural topographic features.

*Compatibility* — The harmonious influence and effect of one land use or zone upon another usually adjoining land use or zone taking into consideration the proposed land, location, size and form of structure and activities permissible in each zone as well as potential effects thereon.

*Confiscation* — The “taking” of one’s property without just compensation by virtue of a zoning action which restricts or prohibits all reasonable use and enjoyment of one’s property.

*Density Controlled Development* — A method of development for land to permit variations in lot sizes without an increase in the density, population or development generally required by the zoning district provisions. This allows residents a choice of lot sizes according to their needs while preserving open space and the natural topography.

*Dwelling* — A building or portion thereof designed for single or multiple-family residential occupancy, exclusive of such commercial uses as hotels, motels, boardinghouses. An attached dwelling is a unit which is connected to another unit by party walls on one or more sides. A detached dwelling has no structural connections to another dwelling unit and is surrounded by open yard area.

*Euclidean Zoning* — A legislative method or device for controlling land use by establishing districts with set boundaries and providing for specific uniform regulations as to type of permitted land use, height, bulk and lot coverage of structures, setback and similar building restrictions.

*Expert Witness* — A person who by virtue of long study, education, professional training and experience in a particular field is capable of rendering opinions and conclusions of a technical nature concerning the person's field of endeavor (e.g., architect, engineer, real estate broker or appraiser, land planner, etc.).

*Fairly Debatable Test* — The determination by an administrative body from testimony and documentary evidence wherein reasonable persons could arrive at different conclusions.

*Floating Zone* — A special detailed use district of undetermined location, a district with no pre-defined boundaries in which the proposed kind, location, size and form of structure must be pre-approved, and which, like a special exception use, is legislatively pre-deemed compatible with the areas in which it may thereafter be located on a particular application, provided specific standards are satisfied and actual incompatibility is not revealed.

*Floor Area* — The total area measured in square feet of the horizontal sections of a structure taken at its greatest dimensions on each floor.

*Floor Area Ratios (F.A.R.'s)* — The gross floor area of a building divided by the area of the parcel upon which it is situated. This is a method of computing and setting density and height restrictions.

*Fourplex* — Any single structure on one level containing four separate living units, each with its own private exterior entrance.

*Frontage* — That side or sides of a lot or parcel abutting on a street or other right-of-way or upon a waterway.

*Gallons Per Day* — The measurement accorded to water usage and sewerage generation from various types of land use and development.

*Height, Building* — The vertical distance measured from the surface grade closest to street level to the highest point of the coping or deck line of the roof.

*Lot* — A parcel of land occupied or to be occupied by a building (and any accessory buildings) or by group dwellings, together with such open space and parking areas as may be required by law.

*Lot Area, Net* — The total horizontal area within the property lines, excluding area required to be dedicated for public use.

*Lot Lines* — The lines bordering a lot on the front, sides and rear.

*Lot, Outlot* — A parcel of land which is shown on a record plat but which is not permitted to be improved with a building due to its size, location or other characteristics.

*Lot, Record* — Land designated as a separate and distinct parcel on a legally recorded subdivision plat recorded among the land records of a municipality.

*Map Amendment, Local* — A change in the zoning ordinance map applicable to a single or adjoining parcels of land. This is usually the more common method of effecting a rezoning and is initiated generally by a property owner or one with a proprietary interest in the land under consideration.

*Map Amendment, Sectional (or District)* — A change in the zoning ordinance map for a substantial area of land as part of a comprehensive zoning. This is usually initiated by a governmental authority.

*Master Plan* — A guide or recommended policy for future action by the legislature pertaining to future land use and public facilities. It embodies recommendations for an area's development based upon studied predictions of needs and resources for an estimated future period. It is the end product of the planning function as distinguished from the zoning function.

*Need, Public* — Expedient, reasonably convenient, and useful to the public.

*Neighborhood* — A flexible geographic area delineated by natural or artificial boundaries within which there is a community of use and purpose. Such areas will vary according to the geographic locations involved and will be larger in size in rural and semi-rural areas than in urban or suburban areas.

*Nonconforming Use* — A use of property which may or may not be continued even though such use and structures thereon do not conform to existing zoning regulations. If the property were a lawful permitted use at the time the zoning regulations were changed to prohibit or alter that use, the activity may continue so long as such use is not abandoned for a prescribed time period. The converse is true if such use were not lawful prior to the change in zoning regulations and it may not be continued.

*Occupancy* — The purpose or activity for which a building is used or intended to be used.

*Open Space* (also known as Green Area) — An unoccupied area of land associated with or located on the same tract of land as any building or group of buildings to provide light and air, or utilized for scenic, recreational or similar purposes. Such space may include lawns, planting and forested areas, play areas, ponds and watercourses but generally does not include parking lots or driveway surfaces.

*Peak Hour Traffic* — The measurement of traffic volume on a street or highway or at an intersection at peak commuter hours in the A.M. and P.M. periods.

*Reclassification* — A change from one zoning category or use district to another.

*Special Exception* (also known as Conditional Use Permit) — A permissive land use category authorized by a zoning or administrative body pursuant to existing zoning ordinance provisions and subject to standards and conditions for such special use. It is a use which has been legislatively predetermined to be conditionally compatible with uses permitted as of right in a particular zone, the conditions being that a zoning body must, in each case, decide under specified statutory standards whether the presumptive compatibility in fact exists.

*Story* — A vertical measurement and portion of a building between the surface of any floor and the surface of the next floor above it or the ceiling if no floor above.

*Street Line* — The dividing line between a lot, parcel or tract and a contiguous or abutting street, road or highway.

*Structure* — An assembly of materials forming a construction for occupancy or use which requires location on the ground. Generally includes buildings, stadiums, stands, towers, tanks, fences, signs, walls and poles.

*Substantial Evidence Rule* — Means more than a mere scintilla of evidence. Such evidence as a reasonable mind might accept as adequate to support a conclusion and enough to justify if the trial were by jury, the refusal to direct a verdict.

*Text Amendment* — An amendment to the text language of the zoning ordinance pertaining to regulations and requirements governing zoning and land use. It may also involve the creation of new zones and procedures and the modification or amendment of existing zones and procedures.

*Townhouse* — A single-family residential unit attached to similar units by party walls.

*Triplex* — Any single structure on one level containing three separate living units, each with its own private exterior entrance.

*Use* — The principal purpose for which a lot or the main building or structure thereon is designed, arranged or intended and for which it is or may be used, occupied or maintained.

*Use, Accessory* — A use of a lot or parcel or portion thereof which is customarily incidental and subordinate to the principal use of the main building or lot.

*Variance* — A lawful exception from specific zoning ordinance standards and regulations predicated upon the practical difficulties and/or unnecessary hardships upon the petitioner being required to comply with those regulations and standards from which an exemption or exception is sought.

*Vested Rights in Zoning* — A stage at which the improvement and use of property in accord with the zoning then in effect could not be terminated or altered by rezoning or governmental action without payment of just compensation. This usually occurs after building permits are granted and substantial construction has commenced and continues in good faith.

*Yard* — Open space on the same lot with a building or group of buildings lying between the building or outer building of a group of buildings and the nearest lot or street line.

*Zone* — An area within which certain uses of land and buildings are permitted and certain others are prohibited; yards and other open spaces are required; lot areas, building height and coverage and other requirements are established and all of foregoing are identical for the zone in which they apply.

*Zoning* — A legislative method to separate a given community or an area within that community into districts within which selected land uses can be developed in accord with defined regulations and requirements. It is a method of land use control and at times a method of implementing land use plans.

*Zoning, Comprehensive* — A legislative action that is the product of long study, applicable over a substantial area within a community that establishes zoning categories on property therein to control land use consistent with the public interest. It is more than merely a detailed zoning map for it encompasses also regulation of uses ( *i.e.*, height, area, type of use, etc.).

*Zoning, Conditional* — The imposition or exaction of conditions or promises upon the grant of zoning by the zoning authority.

*Zoning, Piecemeal* — A legislative action, usually instituted by a property owner to modify or amend the zoning ordinance map as to a single lot or parcel which thereafter changes the nature of uses and regulations applicable to those uses.

*Zoning, Spot* — A zoning action which places a small area in a zone substantially different from that of the surrounding area. If it is an arbitrary and unreasonable devotion of the small area to a use inconsistent with the uses to which the remainder of the

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**HANDLING THE LAND USE CASE**

district is restricted and done for the sole benefit of the private interests of the owner it is invalid. However, if the zoning of the small parcel is in accord and in harmony with the comprehensive plan, is done for the public good and thus bears a substantial relationship to the public health, safety and welfare, it is valid.

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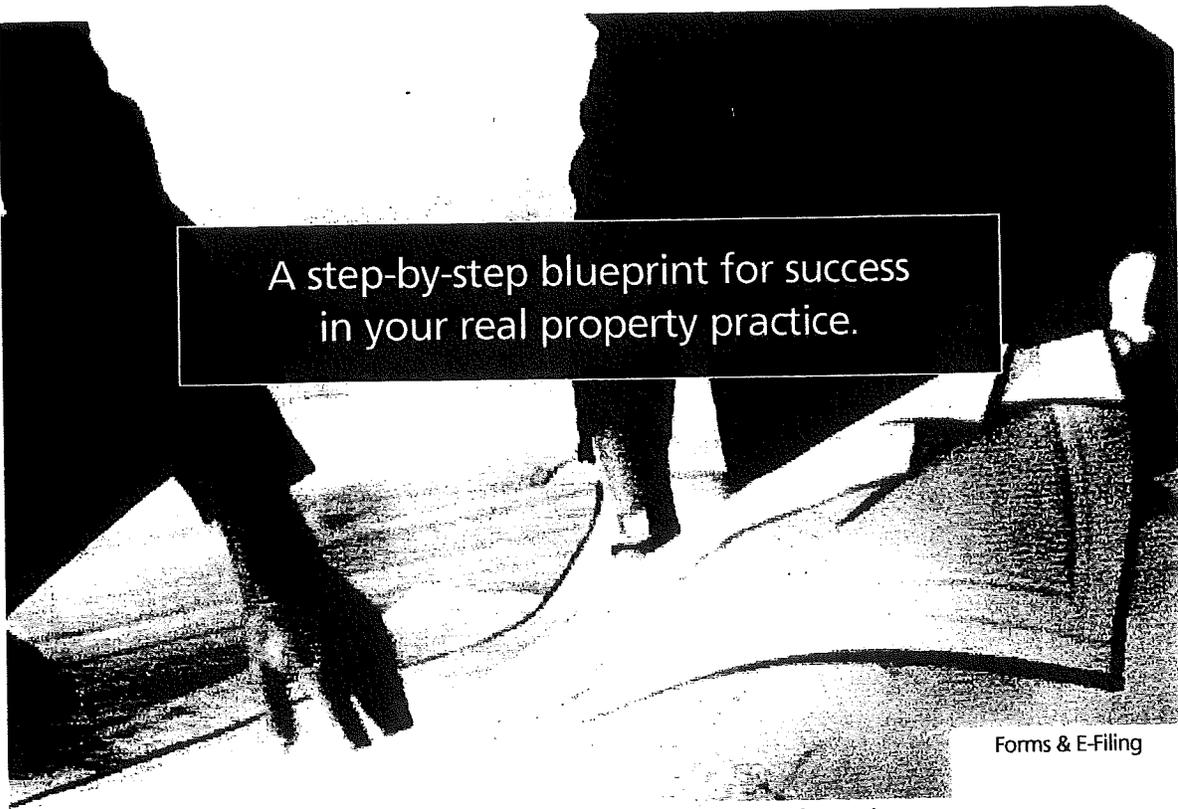
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