
Michigan Association of Planning

Planning and Zoning Essentials

Table of Contents

Part One:

The Planning Commission

Master Planning ***pages 2-18***

The Zoning Ordinance ***pages 19-57***

Part Two:

The Planning Commission and Zoning Board of Appeals

Making Effective Decisions ***pages 58-82***

Part Three:

The Zoning Board of Appeals

Appeals ***page 83***

Interpretations ***page 85***

Variance Requests ***page 86***

Nonconformities ***page 90***

Voting Requirements ***page 93***

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Introduction

This guidebook was developed for planning commissioners, elected officials, zoning board of appeals members, new planning professionals, zoning administrators, and developers.

The first section, **The Planning Commission**, gives an explanation of master plans and zoning ordinances, and planning commissioner responsibilities.

Making Effective Decisions is the next section, and it gives an explanation of public hearings, effective decision making, and risk management.

The final section, **Zoning Board of Appeals**, will cover their specific roles and responsibilities for zoning board of appeals members.

Those individuals serving as an elected official, new planning professional, zoning administrator, or both a planning commissioner and a zoning board of appeals member, could benefit from all three sections.

This publication will be updated periodically and your comments and suggestions for an improved program are encouraged and welcomed. Please forward any comments or suggestions to:

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Planning

Master Planning

Why Prepare a Master Plan?

A community without a master plan must react to individual development proposals without a game plan. A comprehensive plan can help give answers to questions such as:

- What do the residents, business owners, and community officials most value and want?
- How much single family, multiple family, commercial, or industrial land use should we have?
- Where should it go?
- How intense should it be?
- What will be the impact on the environment?
- Can the land or utility system support the land uses?
- Can the road system handle it? If not, what improvements are needed and when?
- Should spot uses be allowed to remain in the future or gradually eliminated removed?
- What is planned by adjacent communities and agencies with jurisdiction within your community?
- What changes are needed to regulations, procedures, or community facilities and services to improve the community in the future?
- What considerations should be made to prepare for a new economy and stabilization in times of economic change?

Why do we Plan?

- Anticipate change
- Ensure wise use of resources
- Protect our environment
- Preserve our quality of life
- Keep strong neighborhoods
- Foster new development



Plan Timeframe. The plan is intended to be long range, as the planning acts require planning for the next 20 years. Because it is difficult to predict beyond a few years, many plans include specific short-term recommendations, with more general or flexible guidelines farther into the future. Some communities can use the plan for a relatively long period of time, while others, particularly those facing growth pressures, may need to update their plan more frequently. Some communities update various elements of the plan on a more frequent basis to respond to new information or issues.

Legal Basis for Zoning. State law (M.C.L. 125.3101 *et seq.* and specifically M.C.L. 125.3203) requires that communities have a “basic plan” as the foundation for, and to legitimize, the zoning ordinance and other regulations that shape the physical and social development of the community. The lack of an up-to-date master plan makes it more difficult to defend decisions.

Guides Land Use Decisions. Recommendations in the master plan can be used to guide decisions on zoning or changes to land use. Consistent use of the plan to support decisions improves credibility with the public. Residents and landowners can see that decisions have a basis and are not just made randomly. Zoning decisions that consistently use a well-prepared plan can also increase likelihood of support by the courts in litigation.

Guides Decisions on Changes to Regulations and Improvements to Public Facilities and Services. Recommendations in the master plan, in the form of goals, objectives, strategies, methods, and policy, can be used to guide community decisions on changes to regulations, such as the zoning ordinance, sign, or subdivision/land division ordinances. The plan may also recommend certain improvements to roads, utilities, parks, and community facilities (city hall, library, police or fire stations, etc.).

Provides Support and Improves Funding Eligibility for Projects. The planning process usually identifies a number of projects for which funding is needed. In some cases, identification helps build community support for local funding, such as through a special millage or special assessment. In other cases, the likelihood for county, state, or federal funding participation is increased through their inclusion in the planning process. For example, Michigan Department of Natural Resources (MDNR) funding requires the parks and recreation plan be no more than five years old. Required studies for federally funded projects include a review of the local plans. In still other cases, foundations or civic groups have rallied support for projects first identified through the planning process.

Planning

What is a Master Plan?

A master plan (sometimes called the comprehensive plan) is an official document, authorized by Michigan law (M.C.L. 125.3801 *et seq.*) and adopted by the planning commission, unless the legislative body has exercised its option to be the final authority to adopt a plan. It serves as the basis for zoning and guides decisions on development, public capital improvements, and many other public policy issues. The master plan can be viewed as a blueprint for the community's future. The intent is to ensure that for each decision, the cumulative and long term impacts on the entire community are considered. This future orientation necessitates that the plan is a guide and needs to be flexible, to some degree, to respond to changing conditions and new information.

The typical master plan identifies and evaluates existing conditions and trends, makes projections for the future, establishes goals with public input, considers alternatives, and provides recommendation for the physical development or redevelopment of the community.

Historically in Michigan, community plans include goals, objectives, strategies, a future land use plan and then some of a variety of other elements. Additional elements that can be found in plans include: environmental resources management, housing, economic or market analysis, long range transportation plans, non-motorized (pathway) plans, community facilities and services, parks and recreation, utility plans, and implementation steps such as a capital improvement plan. If the master plan is being done for a community with zoning, one of the required elements is a zoning plan. The zoning plan can be its own chapter, a separate stand-alone document, or the parts of the zoning plan might be intermingled throughout the master plan.

According to the Planning Enabling Act of 2008, M.C.L. 125.3801 *et seq.*, the overall purpose of a master plan is to *"guide and accomplish, in the planning jurisdiction and its environs, development that satisfies all of the following criteria:*

Is coordinated, adjusted, harmonious, efficient, and economical.

Considers the character of the planning jurisdiction and it's suitability for particular uses, judged in terms of such factors as trends in land and population development.

Will, in accordance with present and future needs, best promote public health, safety,

mores, order, convenience, prosperity, and general welfare.”

This is done by establishing a master plan that is appropriate given the market demands, community character, environmental conditions, the availability or capacity of public infrastructure and services, and relationship to other existing or planned land uses. The plan should protect property rights by allowing individuals to invest in their property with a certain degree of expectation about the future surroundings.

Components of the Master Plan

Master plans may also be referred to as a “comprehensive plan,” “general development plan,” “future land use plan,” “growth management plan,” or any number of other names.

A main component of the master plan is the future land use plan and map. It is important to note that future land use plans are more than just future land use maps. As the map provides a guide for the desired land use pattern in the community, the plan provides further guidance in social and economical issues.

Because every community faces a variety of unique current and impending issues, the contents of master plans vary. A growing community may face land use and development issues, while an urban community may face redevelopment and infill issues. The selection of elements included in each plan must fit the community’s needs and resources.

The typical components of a master plan are explained in more detail below.

Background information, including a history of the community, demographic trends, land use trends, current issues, and the master plan history establish a foundation for the plan itself. The analyses of changing populations and trends in land use and development patterns provide a basis for the evaluation of existing facilities and services. These analyses assist in determining the capacity of infrastructure and services needed for the future of the community. Often this part of the plan is published as a separate background, data, or fact book.

Population analysis is based upon the existing and projected demographics of the community. Information included in this section will be population, age distribution, and

Planning

	<i>Future Land Use Plan</i>	<i>Comprehensive Plan</i>	<i>Growth Management Plan</i>
PLAN ELEMENTS ■ = <i>typical</i> ☒ = <i>optional</i>			
1. Land use:			
(a) Regional Context	■	■	■
(b) Existing Land Use	■	■	■
(c) Natural Features/Environment including: topography, wetlands, woodlands, drainageways/floodplains, wildlife habitats, prime farmlands, soils, watersheds, and open space, etc.	■	■	■
(d) Market Assessment	☒	■	☒
2. Socioeconomics			
(a) Population and employment trends and projec-	■	■	■
(b) Housing trends and projections/needs	■	■	■
(c) Age characteristics/educational attainment	■	■	■
3. Transportation			
(a) Roadway functional classification		■	■
(b) Crash information/problem areas		☒	☒
(c) Capacity level of service analysis (existing and fu-		■	■
(d) Transit/ Railroads/Airports		■	■
(e) Bike path / pedestrian ways		■	☒
4. Utilities/Services			
(a) Public facility and service needs		■	■
(b) Police/Fire		■	■
(c) Water system/wells capability	■	■	■
(d) Sanitary sewer/septic system capability	■	■	■
(e) Stormwater management		■	■
(f) Fiscal Impact Analysis of Alternatives		☒	■

household characteristics. Much of the data used in this section are derived from the U.S. Census, supplemented by regional, county, and local information. This section can include future population projections and may include a buildout analysis for the community. A

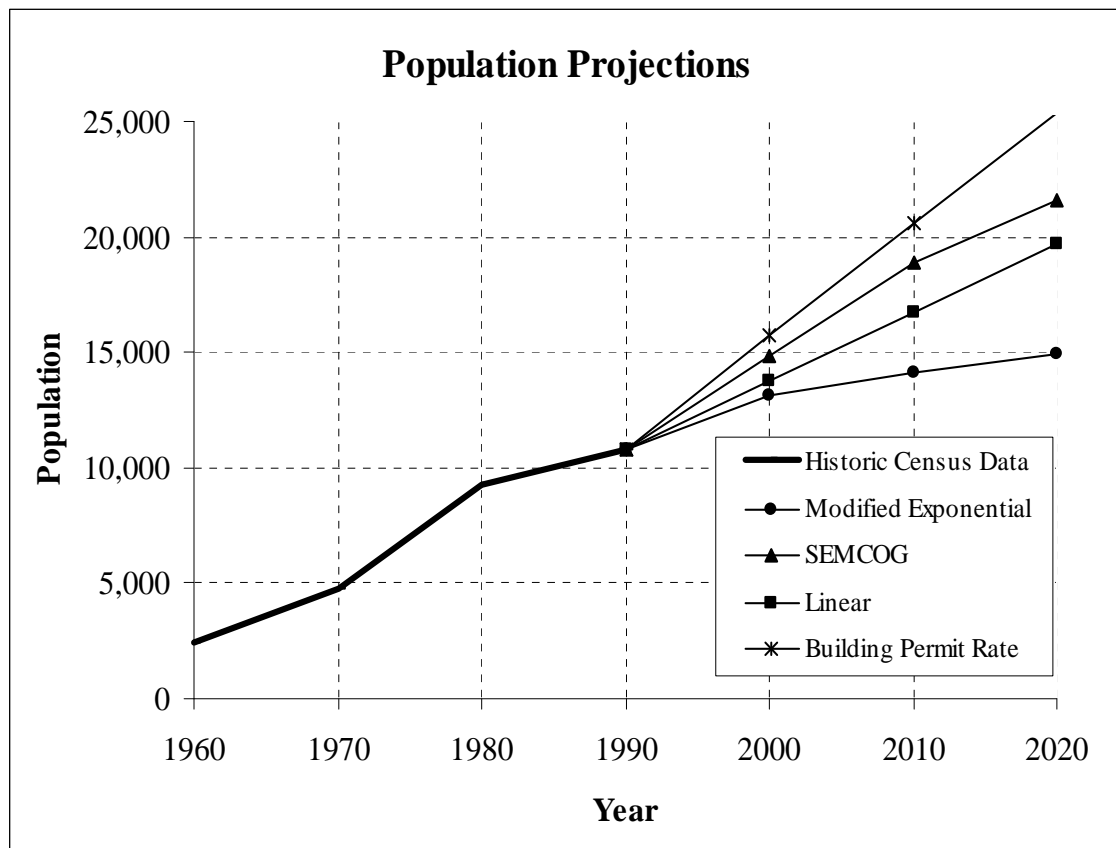
	<i>Future Land Use Plan</i>	<i>Comprehensive Plan</i>	<i>Growth Management Plan</i>
PLAN ELEMENTS <i>n = typical x = optional</i>			
5. Plan Recommendations			■
(a) Future Land Use and Densities/Timing	■	■	■
(b) Timing of land use changes			■
(c) Growth Boundary			☒
(d) Improvements to Public Facilities and Services		■	■
(e) Utilities - Service Areas and Improvement Needs		■	■
(f) Parks, Recreation, and Open Space		■	■
(g) Redevelopment strategies		■	■
(h) PDR, TDR programs; innovative techniques			■
6. Special Studies			■
(a) Subarea plans including corridor plans, downtown plans		☒	☒
(b) Urban Design Guidelines		☒	☒
(c) Historic Preservation		☒	☒
(d) Neighborhoods		☒	☒
7. Implementation Strategy			
(a) Regulatory Changes and Zoning Amendments	☒	■	■
(b) Capital Improvements Program	☒	☒	■
(c) Policies/Procedures		■	■

buildout analysis estimates the population and associated impacts of the community if the community grows to the projected capacity. This analysis provides a basis for planning adequate public services, utilities, and roads.

Goals (community values) and objectives. Background information and evaluation of trends helps identify issues the plan should address. These issues establish the rationale for the plan

Planning

goals, objectives, and strategies (including policy and methods). Goals are typically very general statements about the quality and character of the community and must be translated into specific and measurable objectives, which can be prioritized and pursued. Objectives may have a series of specific action steps, or guides for carrying out the goals. These are often the strategies, methods, and policy. Proposed goals and objectives are intended as guidelines for the future development policies and decisions, and provide the necessary focus for long-range policies and action programs.



The **natural features or environment** section includes mapping and evaluation of environmental features in the community. Information described in this section of the master plan includes soils (information such as septic suitability, prime farmland, or limitations for construction, as applicable), woodlands, lakes, streams, wetlands, key vistas, significant topography, view sheds, active prime farmland, and water quality issues. Unique and fragile environmental areas are located and evaluated. Plans often include strategies for protection and management of key natural features.

It is essential in this section of the plan for communities to establish what natural or environmental features are most important to them. Whether a series of high quality wetlands, a greenway

surrounding the community, or a particular forest of tree species, the master plan should address the features, attributes, and challenges that it faces in the future. This provides the basis for the goals and objectives of the natural environment.

A **housing analysis** estimates the amount of new housing needed by type and rehabilitation status. This is based upon the number of households, household size, types of housing, housing occupancy status, and housing conditions. By using the buildout analysis and population projections in conjunction with persons per household data, communities are able to assess whether current housing conditions and trends meet the future needs of its population, or if changes are needed.

Economic base describes the income and employment characteristics of the community, and may include commercial and industrial base analysis. The purpose of this section is to determine how well existing commercial and industrial facilities serve needs, and to determine the extent of new commercial and industrial development that will be required to serve the future population. This section can also help identify land area required for certain uses and eventually to what extent a community should increase or decrease land zoned for commercial and industrial uses.

The **future land use plan** is an essential component of the master plan. It describes the existing land use, development patterns, and constraints and opportunities for development. Depending upon the growth rate of a community, future land use plans can plan for 5 to 10 or even 20 years ahead. This section of the master plan often serves as a culmination of the various other sections of the master plan (natural resources, transportation, utilities, etc.) as they relate to the future land use.

The future land use plan is generally broken into land use categories such as agricultural, residential, commercial, and industrial. The plan illustrates the arrangements and intensity of land use in consideration to existing land use, environmental features, and capacity of public utilities, traffic conditions, etc.

In addition to land use, the master plan should facilitate the provision of public improvements such as transportation, sewage disposal, safe and adequate water supply, and other public services consistent with the current and future population demand. Often

Planning

the plan will include an analysis of land use change outlining the existing and future breakdown of land uses (i.e. percent change in land use by category). This in combination with a build-out analysis is often used in determining future public service needs.

(It should be noted that land use categories may not identically correspond to the categories on the zoning map. The future land use categories are general in nature and refer to larger areas, while the zoning map categories specifically describe the land use function and are often parcel specific.)

The land use plan should also identify the suitability for particular uses of the land based upon existing community and natural characteristics, trends in land use development, population growth, and adjacent communities. Additionally, the land use plan should identify areas for redevelopment including brownfields and abandoned properties.

The **transportation** component provides a comprehensive review of existing transportation conditions, projects future volumes based on development patterns, and suggests improvements to more than just roads (including sidewalks, bike lanes and multi-purpose pathways, rail lines, air ways, and ports). Major elements will include mapping and evaluation of existing conditions, current and proposed roadway functional classification, and a description of future conditions based on modeling future land use patterns. Some plans may address specific transportation issues such as walkable communities and traffic calming. Additionally, this section should be careful to recognize the needed cooperation of the road commission, Michigan Department of Transportation (MDOT), Metropolitan Planning Organization in Urban Areas and adjacent communities.

Components of the Master Plan

- Highway Corridors
- Watersheds
- River Corridors
- Regional Plans Business Districts
- Neighborhoods



Some plans include **design guidelines** for landscaping, access management, site design, and other specific planning elements. Normally, the guidelines are part of a comprehensive program of community design and are implemented by various ordinances and review processes.

Other components of the master plan will address specific **infrastructure and community services**. These include parks and recreation plans, community facilities plans, including schools, libraries, police, and fire protection, as well as utility plans. While the MDNR requires that a separate parks and recreation plan be prepared, the goals, objectives, and recommended policies should be incorporated and reflected in the master plan. Likewise, it is essential that the future land use plan be coordinated with utility plans and other agency facility plans. These items are all necessary to support the projected future population and development.

Community facilities plans may also address education facilities: available programs, enrollment, and services to the community; healthcare facilities: hospitals, mental health, outpatient services, and nursing homes; cultural facilities; and features which give a community a sense of pride or sense of place.

Special **sub area plans**, divide communities into smaller areas based upon, but not limited to: geography; land use; existing conditions; function; natural features; jurisdictional areas; and census tracts. These sub areas plans may be plans for a river corridor, road corridor, interchange area, downtown, or historic area. Generally, for each subarea separate goals and policies are prepared.

An **implementation section** is critical to the success of a master plan. The implementation or action plan is a summary of goals and policies that were developed for each element in the plan and the actions and specific programs or options that aid in the implementation of these specific policies. Sometimes intermingled throughout the Plan, the implementation plan further helps prioritize the goals, policies, and recommendations stated within the plan, and can form the basis for the Capital Improvements Program (CIP). The programs are often developed after the community formally adopts the master plan (including policies and goals).

An example of a basic implementation section is provided on the next page:

Planning

<i>Plan Recommendation</i>	<i>Implementation Mechanisms</i>
Natural Resources Management	
Lower density zoning districts for areas with significant fragile natural resources.	1) Maintain lower density Country Estate and Rural Residential zoning districts.
Natural features setbacks from wetlands, creeks, ponds and lakes.	2) Maintain setback requirements from waterways in Zoning ordinance. 3) Utilize clustering allowed by PUD to preserve wetlands as open space and provide greater setbacks from shorelines.

Build-out and fiscal impact analysis. Some communities include a build-out evaluation. This involves a projection of the density and associated impacts if the community was completely developed under current allowed zoning densities or planned land uses. The results can be surprising. Computer models, for example, can allow a community to test the traffic volumes that could be expected with different development scenarios. Similarly, an evaluation of the general tax base and service costs for different types of development, called “fiscal impact analysis,” may be able to give a general indication of the economic health of the community in the future.

The **Capital Improvements Program (CIP)** this annual stand-alone document is a multi-year schedule for capital expenditures necessary to implement the master plan. The Planning Enabling Act indicates that proposed new municipal buildings, parks, municipal equipment (i.e. fire trucks) and infrastructure improvements be included in the CIP plan. The CIP plan shall include project names, descriptions, costs, priorities, years to be implemented, and potential funding sources. The CIP can ensure that plans for community facilities will be carried out over a 6 year period. As opportunities and budgets change, the CIP needs to be updated on an annual basis.

The Planning Process

Comprehensive planning is a continuous process that involves a number of steps. Just as the contents of the master plan vary and depend upon the community’s needs, the planning process also varies.

A typical process includes the following:

1. Prior to developing the plan, every community must send a notice by first class mail to communities that surround your community, those that are within your community; the county, and other entities that have registered with the community for the purpose of being notified. Some communities use this opportunity to also send a notice to stakeholders in their community to invite them to be directly engaged in the planning process right from the start;
2. An analysis of existing trends and conditions (the background, data, or fact book preparation);
3. The preparation of technical studies and maps that evaluate existing conditions and trends;
4. Discussion of problems, trends, and community desires for the future. This may be done in one section or on a chapter by chapter basis;
5. Formulation of goals and objectives;
6. The development of alternatives for community growth;
7. Discussion and development of a consensus on the desired alternatives using public participation;
8. Once the planning commission has prepared a draft plan, and the elected body approves its distribution, the plan may be sent out for review to the same list which was used in number one, above. Comments are received from neighboring municipalities, regional planning commissions, the county, and registered utilities and other governmental entities. The planning commission should review comments received and based on those, make changes to the draft plan, or document the reasons why the plan should not be changed. Some communities include a record of that review in an appendix of the final plan. Then the next draft of the plan should be prepared;
9. Public hearing and adoption of a plan, according to the planning statute. The planning commission should review comments received at the public hearing and based on those make changes to the draft plan, or document the reasons why the plan should not be changed. Some communities include a record of that review in an appendix of the final plan. Then the next (third) draft of the plan (the final version) should be prepared.

Planning

10. The planning commission either adopts the plan or makes a recommendation to the elected body, who then adopts the plan;
11. Implementation of various plan proposals, zoning map amendments, new zoning districts, etc.; and
12. State statute requires each community to review its plan at least every five years. Periodic review and updating of the plan may be necessary as community conditions change.

Cooperation Between Agencies and Adjacent Communities. State statute requires communication with all neighboring communities, the county, and at times the region. Public utilities, railroads, or other governmental entities interested in becoming involved in the planning process must register its name with the community. These entities should be encouraged to register and they should be encouraged to include the local municipality in their planning efforts, as well. Examples of “other governmental entities” include MDOT, the county road commission, drain commissioner, health department, a library board, Downtown Development Authorities (DDA), or school district.

Taking cooperation one step further, a number of communities have even decided to prepare joint plans, such as a city or village and surrounding township(s). This type of cooperation is strongly encouraged.

Publication. A successful plan should beckon to be read. The plan should be thorough, yet understandable to a wide audience. Many communities have found the best way to ensure the plan is used, especially in the future by those not involved in the preparation process, is to publish a brief summary. This summary is sometimes published in a booklet or even a poster format. The more detailed information to support the plan is then published in a separate technical appendix, or the final plan is three documents: the data or fact book, the formally adopted plan, and a user-friendly summary or poster of the plan.

Public Involvement. An essential component and large measure of the success of the master plan process is public involvement. If long-range planning is to be representative of a community’s desires, it must take place in an open forum with opportunities for public participation. For the community goals and objectives to truly articulate the general public’s views, there needs to be a well-organized public involvement program.

It is important to involve the “stakeholders,” the groups and individuals that have a stake in improving the quality of life in the community, in as many public participation opportunities as possible and as early in the process as possible. As it is important to be aware of the various interests in the community, obtaining community consensus is crucial. Consensus, however, does not mean that a group has arrived at 100% agreement in making a decision. What it does mean is that group members have collected all their individual ideas, placed them on a table for discussion, and arrived at a decision the group can support.

Most comprehensive planning projects begin with the desire to initiate and sustain high levels of public participation. Unfortunately, for many projects such participation does not materialize or, at best, reaches only modicum levels of success. Continued public involvement is essential in considering the many creative ideas, concerns, and opinions of the community. The earlier people can be involved, and the more actual authority and influence they have about the plan then the more people will choose to participate, will feel engaged, and will support the plan. With this approach the planning commission might view its role as facilitator of the process, and only secondarily as the author of the plan.

During this process community officials, residents, business representatives, and community interest groups, including major landholders, real estate developers, law enforcement, educators, representatives from adjacent communities, the unemployed, disabled, and elderly should actively participate in the dynamic process that helps form a basis for the future "vision" of the community.

The planning enabling act also requires a minimum of one public hearing on the draft master plan, subarea plan, or chapter, prior to adoption. However if that formal public hearing at the end of the process is the first, or only public participation on the plan, that is ineffective, too late, and only a token commitment to public participation. The purpose of the public hearing is to give residents and landowners an opportunity to review and provide comments on the draft plan. As it is important to involve a large and diverse cross-section of the population in the planning process, and to have an effective and meaningful public involvement program, many communities provide additional forums for public involvement early in the planning process such as those listed:

Planning

1. **Public Hearings.** This formal public hearing is held towards the end of the planning process. Because of this, the public hearing alone provides the public with limited opportunity to become involved early in the planning process. The public hearing is done because statute requires it. However the public hearing format is widely considered the least effective tool for quality public participation in planning.
2. **Public Visioning.** Public visioning sessions are generally “brainstorming sessions” held early in the planning process used to identify issues, aspirations, and ideas from the public. These meetings help establish where the community would like to be in the long term.
3. **Focus Groups.** Focus groups may be formed according to geographic area or by representing a particular organization. Focus groups involve participants in a dynamic, creative, synergistic environment aimed at producing discussion, conclusions, and consensus. Community stakeholders are often involved as well as active citizens and public officials. Individuals are assigned to smaller “break-out” groups to have participatory interactive discussions on assigned topics.
4. **Public Workshops or Town Meetings.** Town Meetings are widely publicized meeting with invitations extended to homeowners' associations and community organizations. These meetings are generally less formal and provide an open forum for interested parties to voice opinions, express concerns, and raise questions.
5. **Design Charrettes.** Generally focused on the design issues for a subarea or particular development, a design charrette allows participation of, and idea generation from, a small group of interested individuals.
6. **Presentations to Civic Groups.** Presentations to community civic groups provide an opportunity to discuss process, goal and objective, and recommendation information to a small group of individuals. Often the support of such organizations may be gained.
7. **Use of Media.** Through press releases and invitations to planning process events, the media can become involved with the master plan process, in addition to keeping residents up-to-date on the progress of the plan, and notifying residents of public event dates.

8. **Community Surveys.** Well-organized surveys can be an effective supplement to other public participation efforts. Surveys formats can include written, telephone, and visual preference. Each survey, if properly drafted and conducted, can produce results that help guide a community's future. It is best if surveys are designed by professional to minimize bias.
9. **Personal Interviews.** Interviewing the various stakeholders in a community provides additional public attitudes, ideas, and concerns for the future development of the community as a whole.
10. **Web Page.** A community web page can provide a venue for the public to understand what the plan is all about, to inform the public on ways to be involved in the process, or even submit comments. Once the plan is completed, it can be attached to the web page for easy access.

Starting the Plan

Typically, when starting a master plan there are a number of questions.

- What needs to be accomplished?
- What is the Scope, what elements need to be included?
- Who should be involved in the process?
- What public involvement methods will be used?
- How much time and money can be committed?
- Will there be any subareas?

All of these questions will be considered at some point, but the answers are essentially up to the community. While master plans generally plan for the next twenty (20) years, growing communities may want shorter range plans that look to the next five (5) years. As are many aspects of the master planning process, each plan is customized to the community's needs and resources. A master plan may be prepared all at once, or even section by section. What is essential is that the plan and process work for the community in protecting its integrity, heritage, and people.

Using the Comprehensive Plan

The comprehensive plan is an instrument that guides the evolution of the community by bringing social, physical, economic, and political considerations into more meaningful focus

Planning

The comprehensive plan and the planning process have many other practical advantages as decision making guides.

As the comprehensive plan provides the basis for the zoning ordinance, zoning decisions should be consistent with the plan. Recommendations in the comprehensive plan should be given a significant weight when the planning commission considers rezonings requests, zoning ordinance amendments, special land uses, site plan and subdivision plat review. If the comprehensive plan is rigorously followed, it will often support controversial decisions made in favor of the plan.

The comprehensive plan can serve as a powerful tool in guiding utility extensions and capital improvements. The future land use plan describes the projected development of the community and identifies where capital improvements will be necessary to support growing populations and expanding business. The data and the analysis of the interrelations of land uses included in the comprehensive plan provide a sound basis for evaluating the impacts of proposed development.

As with many components of the comprehensive plan process, there is no precise guideline as to when to update the comprehensive plan. As each community's growth rate is different, the update to the plan may be done every five years. In some instances it may only be necessary to update portions or sections of the plan as it pertains to the changing community conditions and trends.

Writing Goals:

- Be specific, but not too detailed;
- Instead of "The Township will maintain its rural character," say:
New development in the Township will be designed to preserve natural features, rural views, and similar elements intended to maintain rural character.
- *Goals are intended to lead to actions!*

Goals should:

- Be realistic and achievable;
- Be broad enough to inspire but narrow enough to be implemented;
- Be limited to no more than 2-3 major points; and
- Paint a picture of the future as the community and it's residents would like to see it.

Zoning

The Zoning Ordinance

The master plan provides the planning commission with the opportunity to look beyond the day-to-day zoning issues and provide guidance for the future use of land and development in the community. A properly developed, well thought-out master plan can be of great value to a community in its efforts to improve quality of life, make more efficient use of financial and other resources, provide a cleaner environment, and build an economically healthy community.

However, the value of any master plan is directly related to the community's willingness to follow the plan, and its diligence in keeping the plan current and relevant to today's conditions. Once adopted the plan must be implemented through appropriate zoning regulations, and changes to the zoning districts or map. This must be followed by consistent use of the plan. Failure to do so consistently will discredit any attempt to use the plan as a defense for actions challenged by property owners or developers.

Likewise, prompt implementation and consistent and vigorous use of the plan will lend credibility to the community's decisions on rezonings or other zoning actions. While the courts of the State of Michigan have not been consistent concerning the absolute authority of the master plan, they do lend much more credibility to actions supported by careful planning than those which appear to be taken arbitrarily against an individual property owner.

Making sure the zoning ordinance is based on a plan is best planning practice because that assumes the judge will be very particular about zoning based on a plan. There is not any way to know which judge(s) a court challenge may be in front of and no real way to know how a particular judge will view the requirement for a plan. The Michigan Zoning Enabling Act (of 2006) and the Michigan Planning Enabling Act (of 2008) are slightly different from the older zoning and planning acts. These two new acts further strengthen the tie between zoning and a plan. So, while in the past court cases produced a wide range of decisions as to how the "based on a plan" provision is complied with, it is safe to anticipate the requirement that zoning is "based on a plan" is stronger, and it is more likely future court cases will reflect that.

Zoning

The relationship between the master plan and the zoning ordinance is often misunderstood, but there are clear legal and administrative differences. For example, while the master plan is a *guide* for the future use of land, the zoning ordinance *regulates* the use of land in the present. As a guide, the plan is not a binding, legal document, but is useful to support the legal strength of the zoning ordinance.

A key difference between a master plan and the zoning ordinance is timing. The master plan is intended to show the future use of land *at some point during the planning period*, which could project as far ahead as 20 years or more. The zoning ordinance, on the other hand, is immediate, regulating land use today.

Since the master plan determines the future use of land, rezonings, a change in the zoning ordinance that changes a described parcel of land from one zoning district to another should generally be consistent with the plan. This is not to say that all rezonings that are consistent with the plan should automatically be approved. Nor does it mean that a request that is not consistent with the plan should automatically be denied.

Rather, it is necessary for the planning commission to examine the conditions that were present when the plan was adopted and determine if those conditions are still present or

Updating the Zoning Ordinance

QUIZ: When is the best time to update your Zoning ordinance?

- A. Whenever we get sued and lose...
- B. When our attorney or planner tells us
- C. Whenever something comes up we hadn't thought of
- D. After the master plan is completed
- E. Minimum once a year
- F. All of the above

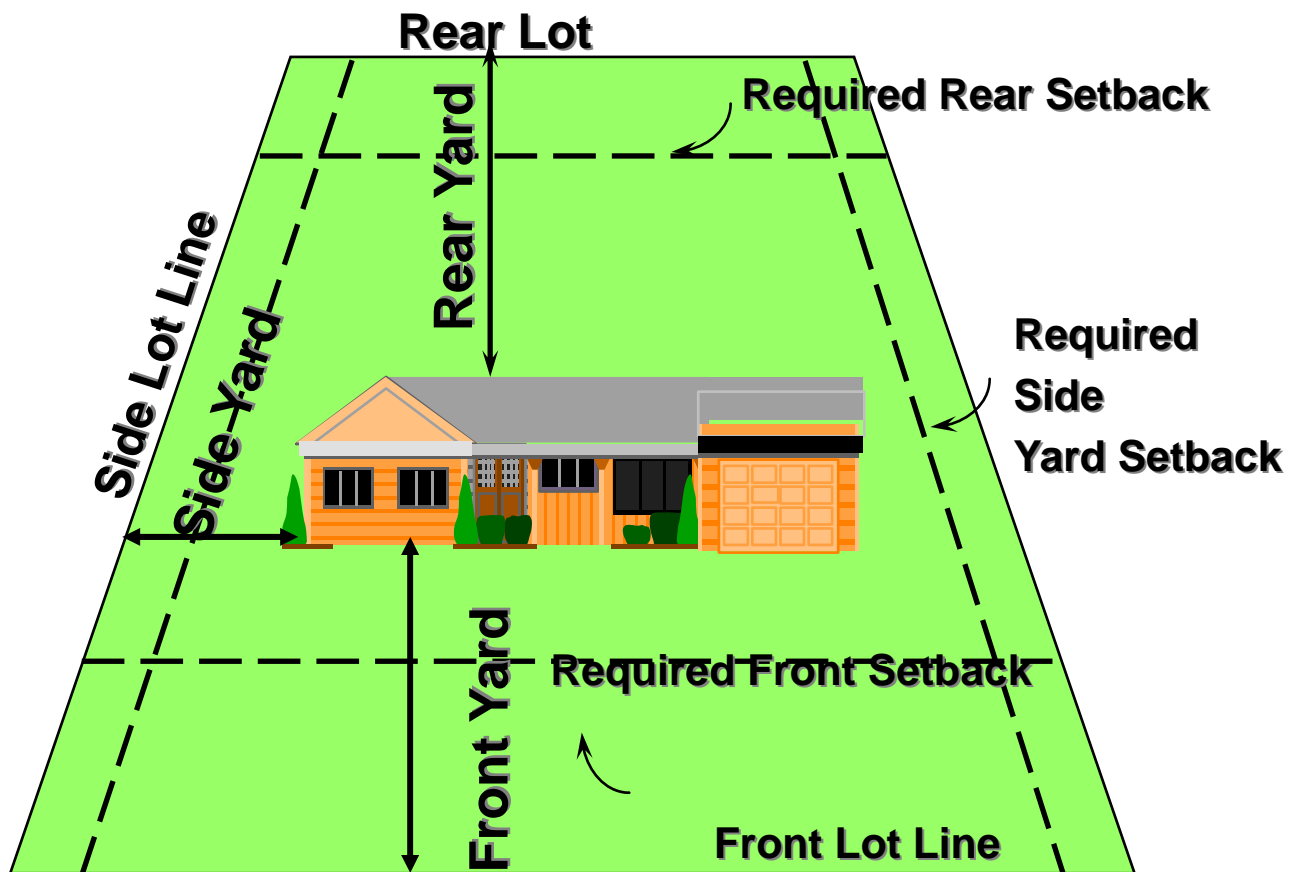
Which answer did you choose? There is some truth in all of these responses; any number of events may create the need to update the zoning ordinance. However, one of the appropriate times for a thorough review and update is after the master plan has been completed, or updated.

true. If the conditions originally present when the plan was adopted have changed significantly, the plan may warrant reconsideration. If no changes have occurred, the plan should be given strong deference. For those instances where the request is inconsistent with the plan, it is appropriate to require an amendment to the plan prior to acting on the rezoning request. This affords the planning commission the opportunity to consider the long range implications of their actions, rather than being driven by a specific rezoning request.

General Content and Typical Organization of a Zoning Ordinance

Zoning requirements are described in two documents: the official zoning map and zoning ordinance. The zoning map simply shows the boundaries and labels of the zones into which the community has been divided. The zoning ordinance describes the regulations on use, lot size, density, setbacks and building height, general development regulations, and processes and standards for development. The procedures for review and approval of various types of uses will be outlined. The following is a general outline of the contents of a zoning ordinance.

The Zoning Lot: The Importance of Language



Zoning

Definitions: The definitions section of the zoning ordinance sets forth definitions for terms used in the zoning ordinance. Precise definitions for terms are vital to interpretation of the zoning ordinance. While terms such as “lot,” “rear lot line,” “lot frontage,” “density,” etc. may seem clear, precise definitions are needed to state how the regulations apply, particularly in unique or complicated situations.

General Provisions: These are standards and regulations that apply to all uses, buildings, and structures within all districts, unless otherwise specified. General provisions include standards for single-family dwelling design, storage and repair of vehicles and recreational vehicles, uses not addressed in any district, prohibited uses, accessory buildings, swimming pools, waste receptacles, fences, natural features, exterior lighting, intersection clear vision zones, temporary or seasonal events and sales, wireless communications, etc. In some zoning ordinances, nonconforming regulations are included in the general provisions.

Zoning Districts: Land uses are traditionally divided into four basic categories: residential, commercial, industrial, and agricultural. A small community may only have a few variations of these zones, while a large community may have many subcategories such as several single family, multiple family, and manufactured housing park districts. Some communities may have more specialized zoning districts such as central business district, public facilities district, or waterfront district.

Under these regulations there are typically two categories of allowed uses: permitted uses, or “uses by right” allowed in the zone without further review and without limitation other than bulk and intensity requirements of the zone; and uses allowed by special land use approval. Generally, each district has different lot area, density, and bulk regulations.

Schedule of Regulations: While some communities list the lot area and bulk regulations in each district, other zoning ordinances have all of the requirements of the various districts consolidated into a single table referred to as the “Schedule of Regulations.” These regulations specify the minimum lot area, maximum density, minimum building setbacks, maximum lot coverage, and maximum building height. These tables are generally footnoted with provisions such as allowable projections into setbacks, such as decks, exceptions to building height, such as church steeples, or other dimensional standards that cannot be easily placed in the table, such as separation between groupings

of multiple family buildings.

Site Plan Review: Site plan review procedures and standards provide a consistent and uniform method of review for proposed development plans. The requirements ensure full compliance with the standards of the ordinance, applicable local ordinances, engineering standards, and county, state, and federal laws.

Special Land Use Standards and Procedures: Certain unusual land uses require special controls. Special land uses may have impacts or effects on surrounding areas that require some degree of mitigation through requirements of standards for making the determination as to whether the use is appropriate in the stated location. The standards allow a determination of the use's compatibility with surrounding area and natural environment; capability to be served by existing or planned public facilities; compliance with the intent of the ordinance; and consistency with public health, safety, and welfare.

Zoning Ordinance Amendments and Rezonings: Includes provisions to amend, modify, supplement, or revise zoning district boundaries shown on the zoning map, or to amend, modify, supplement, or revise zoning ordinance language. The process requirements and criteria are explained. These regulations build upon the procedures outlined in the state Zoning Act.

Nonconforming Regulations: Nonconformities are lots, uses, structures, buildings, or sites that were lawfully established prior to the date of adoption or amendment of the zoning ordinance, but do not conform to current requirements. This section of the zoning ordinance outlines the conditions under which nonconformities are permitted to continue and regulates restoration, reconstruction, extension, or substitution of non-conformities.

Administrative Roles and Responsibilities: Requirements for administration and enforcement of the ordinance including duties of administrators, permit processes, inspections, fees, etc. Penalties for violation of the ordinance will be provided. The zoning ordinance will include a section dealing with the zoning board of appeals, outlining the authority of the ZBA and procedures for variances and appeals.

Development Standards - Parking and Loading, Landscaping, Access Management, Signs: Most ordinances will contain standards applicable to all developments such as off-street parking, landscaping, signs, access management, and floodplains. It is not uncommon for these topics to be included in the "General

Zoning

Provisions” part of the zoning ordinance. Off-street parking requirements stipulate the number of spaces required based upon the type and size of the use, construction standards for parking lots and requirements for loading areas. Landscaping regulations will include requirements for street trees, parking lot landscaping, and landscape screening between uses. Sign regulations deal with size, location, and lighting of signage. Some ordinances include access management standards to ensure that driveways are properly located and designed to maximize safety and efficiency of traffic along roads accessing the site. Communities that are traversed by rivers will usually have floodplain regulations.

How to Use the Zoning Ordinance

The first step in using the zoning ordinance is to become familiar with the structure of the ordinance. Identify the locations of general provisions and development regulations and review the districts to see the relationships. The uses allocated in each district are listed within the applicable section of the zoning ordinance. Each district has a list of permitted uses; many districts also contain a specific list of possible special land uses subject to special review standards and a public hearing process. There will be area and bulk requirements that apply to each district located in the district or in a schedule of regulations.

When application for development is made, first review the list of permitted uses or special land uses for the zoning district of the site. The proposed development must be one of these uses. If the use is not listed, review other districts to see if it is permitted elsewhere. If the use is not listed in the ordinance, then a determination needs to be made as to where the use is allowed. The process for determining this will vary between an administrative determination, planning commission determination, interpretation by the zoning board of appeals, or in most cases an amendment to the zoning ordinance. In some limited instances, there may not be a suitable location for a use in a community, although it is very difficult to justify excluding a use.

Once it is determined that the use is allowed, either as a permitted or a special land use, the type of development approval needed must be determined. Uses such as commercial,

manufacturing, institutional, multiple family, or condominium development must receive site plan approval. Some ordinances allow small-scale expansions or changes in use to existing sites to be approved with a less detailed sketch plan. The site plan review procedures will be outlined in the zoning ordinance. It is best practice to require site plan or sketch plan for all land uses.

In addition to the required conditions of each zoning district, there may be other regulations within the zoning ordinance which apply to all developments, including parking, loading, landscaping and screening, driveways and access management, signs, lighting, and other general provisions or development standards of the zoning ordinance. Be aware of “hidden’ regulations that are located in the general provisions such as modifications to allowable building height. The zoning board of appeals needs to also become familiar with the ZBA procedures and the nonconforming regulations.

Zoning Decisions

Amendments to the Zoning Text and Zoning Map

Text Amendments: This involves changing the language of the zoning ordinance. Text amendments may be necessary to clarify language of the Ordinance (perhaps as interpreted by the zoning board of appeals), add new zoning techniques (such as planned unit development), add new uses to zoning districts, bring standards up to date (e.g. parking requirements), implement a change in procedure (such as a change in the number of board of appeals members), or any number of other reasons.

Before text amendments are undertaken, an evaluation should be conducted to determine the impact on the community as a whole. The proposed zoning amendment should also be reviewed for compliance with the Master Plan, and the Plan's criteria for zoning amendments. Often, a single text change can have an affect on many properties; a change that may solve one problem may create numerous others. In addition, a text change may also require changes in references throughout the ordinance. A thorough review of the entire ordinance is necessary before any amendment is adopted.

Map Amendments - Rezoning Evaluations: Changing the zoning designation on any

Zoning

property can have far reaching consequences, physically, environmentally, financially, and legally. Therefore, a careful evaluation of proposed rezonings is essential. The proposed zoning amendment should also be reviewed for compliance with the Master Plan, and the Plan's criteria for zoning amendments. The process, or steps for amending the zoning map is the same as for text amendments. As with any zoning decision, the use of standards is essential to reaching fair and consistent decisions. Although the Michigan Zoning Enabling Act does not require written standards in the ordinance for rezoning decisions, a number of court decisions and professional and legal writings have resulted in some common evaluation tools. Those included the following:

(1) ***Is development under current zoning reasonable?***

It is the right of every property owner to receive a reasonable return on the investment placed on property. This does not mean that zoning is a slave to the "highest and best use," which is not a zoning, but a real estate term. It does mean that there should be a reasonable use available within the zone district.

(2) ***Consistency with the goals, policies, and future land use plan of the Master Plan.***

If conditions upon which the master plan was developed have changed significantly since the master plan was adopted, such as economic factors, demographic shifts, new utility lines, changing traffic conditions, or other reasons, the planning commission and elected body should consider these events as part of their deliberation to insure that the master plan is current.

(3) ***Capability of site size and environmental conditions to accommodate uses.***

All of the uses allowed in the proposed district should be compatible with the environmental conditions present on the site and in the immediate vicinity of the site.

(4) ***Compatibility with surrounding land uses.***

All of the uses allowed in the district should be compatible with neighboring properties, especially in terms of density, character, traffic, aesthetics, and property values. The purposes of zoning, as noted earlier, are designed to insure this compatibility.

(5) ***Availability and capacity of public streets, utilities, and services.***

All of the uses permitted in the district should be able to be served with appropriate public or private facilities and services. This includes not only water and sewer, but also fire and police protection and other necessary services.

(6) *Demand for the use and appropriateness of location.*

There should be some relationship between the amount of land zoned to accommodate certain uses and the logical demand for those uses. An excessive amount of land zoned for individual categories of use can lead to blighted areas and haphazard development.

Other factors may be considered, as required by the specific conditions found on the site.

Conditional Rezoning

The Michigan legislature has authorized “conditional” zoning. For reasons noted later in this writing, a more accurate term may be “zoning agreement.”

Authorization for Michigan’s communities to enter into zoning agreements was introduced in September 2004, and became effective in 2005. Michigan is now one of more than twelve states (depending on the definition of “authorization”) where similar authorization for agreements between a property owner and a local unit of government specify conditions and terms of land development.

The conditional rezoning language in the Zoning Act is short, and leaves open a number of questions. The basic authorization states:

An owner of land may voluntarily offer in writing, and the (applicable unit of government) may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.

As part of this agreement, the Act allows or requires:

- Setting a time frame during which the voluntary offers from the owner must be fulfilled.
- A requirement that should the offers not be fulfilled that the zoning reverts to the previous classification.
- A provision that prohibits the municipality from requiring an owner to offer conditions as a condition of the rezoning.

***A community's zoning ordinance should be amended, if it is not already, to clearly state that conditional zoning amendments are not possible in the municipality, or the zoning

Zoning

ordinance changed to include a rather detailed process for considering conditional rezonings. The Michigan Townships Association has an excellent example of conditional rezoning zoning ordinance text.

Zoning Agreements: What's In a Name?

“Contract” zoning is an illegal practice, in that it was largely a process that committed the community to rezone in exchange for the acceptance of certain requirements and conditions related to the development of the property in question. The downfall of this procedure was the promise to rezone if the requirements were fulfilled, and in some instances, an agreement not to change the zoning in the future. Contract zoning is still illegal in Michigan, as it is in nearly all states.

“Conditional” rezoning was likewise a problem in that the municipality imposed certain conditions and requirements on property owners, with or without their consent, as a part of the rezoning. Over time, these terms (contract and conditional) have tended to become interchangeable, even though they are not. There are some distinct and important differences.

MAP suggests using the term “zoning agreement” to avoid confusion with contract or conditional zoning, and to clearly distinguish what is authorized by the Zoning Act.

Zoning agreements can add a level of flexibility to the zoning process by providing the potential to account for some of the negative effects of rezoning. However, the ability to enter into zoning agreements is not without its critics. Some argue that appropriate land use tools such as planned unit developments, special land uses, and site plan review are already in place to control land development and that the use of zoning agreements will result in a hodge-podge of “spot zoned” areas throughout the community. Others fear that zoning agreements will encourage development that is inconsistent with a community’s master plan. Perhaps one of the most compelling concerns is that a community will bargain away its authority resulting in negotiated, ad-hoc agreements that will weaken confidence in zoning regulations that were intended to apply equally to all land and uses.

Those supporting zoning agreements stress the greater predictability for local jurisdictions and neighbors because the conditions of land use, such as landscaping, building design and necessary utility improvements can be specifically tied to the rezoning. A development project that deviates from any aspect of the agreement cannot move forward and, in fact, requires the municipality to return the zoning to its former classification. They also note that because the owner must “offer” the conditions to be included in the agreement, that it can be a “win-win” for the community and the owner.

Issues

The Zoning Act authorization to enter into zoning agreements raises numerous questions since it lacks detail, has not been widely implemented by local communities in their revised zoning ordinances, and has yet to be applied in a wide range of real world situations. As a result, some general guidance may be useful when addressing these issues, including looking to other states to determine how the practice of using zoning agreements has evolved. To accomplish this, the following section will examine some of the potential issues raised by the language of the Zoning Act. Without a doubt, additional concerns and issues will be raised as communities gain more experience, and perhaps learn some harsh lessons, about zoning agreements.

Voluntary Offers

The Zoning Act requires that conditions be voluntarily offered in writing by a property owner. Ideally, this offer should be provided with the initial application for rezoning. In practice, however, an applicant may not know what offers might be acceptable, or indeed, that an offer would be useful, until well into the application review process.

Some of this may be resolved with either formal or informal pre-application meetings, where concerns may be identified that the applicant may have the opportunity to address. Caution must be undertaken, even during these early stages, to make it clear that approval of a rezoning is not guaranteed, even if an offer is made. Rather, the community may simply make its concerns clear regarding the potential effects of the proposed zoning change. The offers included in the zoning agreement’s terms can then be used to address

Zoning

these issues to ease the community's concerns.

At a minimum offers or revisions to offers should be submitted well before a public hearing to avoid confusion and inefficient meetings where exhaustive discussions occur with little time left to address substantive issues. It may be necessary to table a request so that the public and decision makers can be afforded the time to understand exactly what is being offered. If the offer comes too late in the rezoning process, it may be necessary to conduct additional public hearings.

The ultimate test is that the applicant not be able to imply that the conditions were coerced, either directly or indirectly, or that promises of rezoning were made in exchange for the offer. While some degree of negotiation is inevitable, it must be a true negotiation, rather than an attempt by any party to coerce an agreement.

"Offers"

While there is a broad range of offers that may be considered by the community, it is clear that other states and their courts have insisted that the conditions offered cannot permit a land use or activity that would not otherwise be allowed in the new zoning district. For example, the zoning agreement could not allow a drive through window to be added to a restaurant where drive-through facilities were otherwise not permitted in the new district. Similarly, it could not permit a greater density of development for residential projects than that permitted under the new zoning district.

Similarly, the agreement should not be used simply to vary the basic requirements of the district, such as the number of parking spaces, signs, etc. The zoning board of appeals must still address these issues. In addition, if a special land use approval is required for the use being considered as part of the agreement, that process must still be pursued.

One offer that might be tempting to some communities is one that would limit the number of uses allowed after the rezoning is in place. As noted earlier, rezoning denials in the past were often based on the concern of allowing a wide range of uses, some of which might be disruptive to the area. A zoning agreement can act to minimize this concern,

however, a change in zoning classification is still a land use change – and must be considered in that light.

One negative effect of approving a zoning agreement limiting uses might follow this course: a commercial rezoning is approved limiting the use of the property to a “professional office.” What might happen once the office building is constructed, but the use fails to thrive, and a vacant building results? Presumably, under the terms of the agreement, if a professional office use is not in place for the property, the terms would not be met, and under the Zoning Act, the property must revert to the previous zoning classification. However, this leaves the community with an office building on a residentially zoned lot. To avoid this, allowing a wider range of uses might be useful, or, a list of uses not allowed (those that would have the most negative effects on the area) might be part of the agreement.

Another restriction on “offers” is that they be related to the rezoning. A clear potential for abuse will be offers from applicants for cash contributions to recreation programs, or offers to build new community facilities that have no connection to the application for rezoning. A community cannot put itself in a position where it appears as though an applicant has “bought” the rezoning.

So what can be offered, or more importantly, what could be accepted as part of a zoning agreement? While a complete listing is simply not possible, some examples may be useful.

A community’s master plan notes that rezonings for high density residential uses will not be considered until public utilities are available to the property. The owner offers to extend public utilities to the site at his expense.

Concerns about the small size of dwelling units allowed in the new district are expressed by neighboring property owners during a rezoning public hearing. The applicant offers to increase the size of the homes to be consistent with those in the area.

A rezoning is requested from a residential to a commercial classification. Adjacent properties are zoned for residential use. The owner offers to install a landscape screen

Zoning

between the homes and the planned commercial uses where a landscaping requirement is otherwise not part of the current ordinance.

Some zoning agreement provisions such as these could be called into question:

The new district restricts buildings to a height of 35 feet. The applicant offers to increase the setback of the building in exchange for an increase in building height to 50 feet. (The agreement cannot permit something that would not otherwise be allowed in the new district.)

As part of a rezoning request for a new commercial development, the owner offers to provide the community a cash payment to improve its park and recreation facilities. (The condition must bear some relationship to the rezoning under consideration.)

The agreement includes a clause that prohibits the community from changing the zoning of the property at any time in the future. (The community cannot “bargain away” its zoning authority, or commit a future legislative body to a certain zoning.)

Zoning Reversion

The legislation requires that unless the conditions of rezoning approval are met within a period of time specified by the local jurisdiction the land shall revert back to the previous zoning classification. Other states where conditional zoning is already valid have found that this provision is an important enforcement tool to control development and help guarantee the implementation of agreements.

Under Michigan’s language, the process required for reversion is unclear. Courts in other areas of the country where zoning agreements are used have held that a reversion actually constitutes a second rezoning. The best course of action would be to follow a formal rezoning process. Therefore, in crafting a zoning text amendment to accommodate zoning agreements it is important to identify who, or what body initiates the reversion process (planning commission or the legislative body) and require that all statutory procedures and requirements for public notice and a hearing be followed.

Since the rezoning that follows acceptance of the zoning agreement is a change to the zoning ordinance, it may follow that amendments to the agreement should also be subject to the same notice and hearing procedures used for the initial rezoning.

A unique situation that could arise is if a project is partially implemented and the agreement is not completely fulfilled by the owner. In this instance, decisions may have to be made as to whether to revert the entire property to the previous classification, or only that portion that has not be implemented. If the entire property is reverted to the previous zoning, it is likely that nonconforming uses, buildings or lots will be created. On the other hand, if the earlier phases complied with the terms of the agreement, the areas affected should not be part of the reversion.

Rezoning Evaluations with Zoning Agreements

While zoning agreements may prove a useful tool in tailoring land development to individual sites and situations, they should not be used to avoid the fundamental planning principles upon which communities are built. Zoning agreements should not be viewed as a panacea that cures all problems related to zoning. Instead, they should be entered into only after careful consideration and deliberation.

Legal challenges associated with zoning agreements are often based not on the terms of the agreement (except where the terms are clearly inappropriate). Rather courts tend to evaluate the rezoning decision itself, testing the decision on the same standards that are used for any rezoning. Consistency with the master plan, ensuring that the uses or activities covered by the agreement (and the subsequent rezoning) are compatible with the neighborhood, and other rezoning considerations are still valid.

Unlike rezonings undertaken without agreements, it may be useful in some circumstances, where applicable, to include a site plan with the zoning agreement showing the elements of the agreement as a visual reference. This, however, does not replace the other site plan review requirements that may be imposed as part of the establishment of a new use. Other zoning requirements not covered by the agreement must still be met. However, the

Zoning

agreement cannot include a guarantee of rezoning, or prevent the community from making future zoning changes.

Protection from Subsequent Rezoning

The zoning agreement legislation stipulates that a local government cannot alter the provisions during a period of time specified in the agreement. Ostensibly this is meant to provide some level of protection for a landowner or developer by locking in the agreement provisions for at least some specified time. However, if conditions are not met during that period a local government has two choices; either extend the time frame, or, as noted earlier, start action to enforce a violation of the zoning ordinance, and initiate the process to return the zoning to its previous classification.

As noted above, although this “no tinkering” provision affords some protection it would not prevent a jurisdiction from rezoning a property to another district or changing code requirements. For this reason, a property owner who has received a desired rezoning may wish to move quickly to establish vested rights.

Implementing Zoning Agreements

Before taking any steps concerning zoning agreements, the community should first consider whether it wants to participate in the process. The language of the amended Zoning Act clearly states that the process is a voluntary one for both parties. Ultimately, the first choice will be the community’s as to whether or not they wish to take advantage of this new process. A necessary first step should be an amendment to the zoning ordinance to clearly outline the process and requirements for zoning agreements. The Zoning Act may act as a starting point, covering the basics of offers, procedures for zoning reversions, etc. Since a zoning agreement is a voluntary process, the amendment will not replace the current procedures for a “normal” rezoning. Rather, the zoning agreement process should be written as a separate procedure. Make sure that an amendment process is included. Again, the Michigan Townships Association has prepared a good sample ordinance addition on this topic. If the decision is not to entertain zoning agreements, then the zoning ordinance should be amended to say so.

Application procedures should be put into place that clearly describe the process, from the point when an offer to enter into a zoning agreement is submitted, to the final step of recording of the agreement. Careful review by the community's attorney and consultants must also be part of the process. Finally, staff and decision makers should be made aware of these requirements, and educated as to the advantages and potential dangers for misuse and abuse of zoning agreements.

The zoning agreement itself may either be a separate document, or part of the amending ordinance implementing the rezoning. Municipal attorneys may have their preferences about which format to use. Over time "model" agreements may become available as well. Regardless of its form, zoning agreements can only be approved by the legislative body, after receiving recommendations from the planning commission and other interested parties, not only on the rezoning, but on the agreement provisions as well.

Contents of the Agreement

Prior to entering into any agreement, it should be thoroughly reviewed by the community's planner, attorney, and other appropriate professionals, both for content as well as legality. The agreement should cover a broad range of situations and leave as little as possible to interpretation.

When considering voluntary offers they must be clearly stated, avoiding vague terms or conditions. Check to see whether terms used in the agreement are already defined in the zoning ordinance and if they are, make sure there is agreement between those definitions; for example does a part of the agreement preserving open space include wetlands, or storm water management areas?

To avoid attempts by property owners to exempt future development plan changes from complying with future code requirements, steer clear of language that ties a rezoning to zoning regulations or codes that exist at the time of approval. Although "locking in" development regulations may be permissible in some states where development agreements are permitted through state enabling legislation, Michigan currently lacks this authority.

Zoning

For public improvements, such as streets and utilities, make sure the construction schedule is clear and that it has a breakdown of costs and obligations; for example who is required to pay for engineering drawings, inspection fees, obtain permits and prepare as-built drawings? If other agencies are involved, such as a road, or drain commissioner, make sure the decision making process for final design approvals is clearly specified and get the agency involved in reviewing the offer early in the process. As an additional layer of protection, include submission of performance bonds or similar tools in the agreement to guarantee that infrastructure and road improvements committed to by a developer will in fact be made.

Try not to re-invent the zoning ordinance in the agreement; rely on current ordinances for the details and just list the items that are part of the agreement.

Finally, since this is one circumstance where a site plan will be useful to illustrate the “offers” a plan and supporting documents should be attached to the agreement, clearly referenced by title and date.

In discussions with a number of Michigan municipal attorneys some basic requirements for zoning agreements are recommended.

Once executed, the zoning agreement should be recorded with the county register of deeds to ensure that future owners are aware of the agreement. To this end, the agreement should also include a clause binding future owners successors, signs, transferees, and creditors.

Costs for developing the language of the agreement may be passed on to the applicant, either through the community’s escrow fee account, or through language in the agreement. The time period (or any extensions) during which the agreement is to be implemented must be clearly stated.

Note that the agreement is in addition to the other requirements of the zoning ordinance and that the agreement does not waive or alter any of those that are not affected by the agreement.

Note what happens should the terms of the agreement fail to be met. Determine first whether it may be possible to find other ways to enforce the agreement. Ultimately, if the terms are not met, the Act requires the community to return the zoning to the previous classification. Include a provision that the terms of the agreement are binding on both parties and that only the legislative body can approve an amendment to the agreement on behalf of the municipality.

Make sure that a process is in place in case there is a dispute over the meaning of the terms of the agreement. Of course, it is best to avoid this by being thorough in the beginning.

If a site plan is needed as part of the agreement, make sure it is referenced and included as an attachment.

Conclusion

The benefits of zoning agreements may off-set potential concerns as long as Michigan communities view this new tool as another option to add flexibility to land use decisions rather than as a substitute for traditional, sound zoning principles and practices. Based on the experiences of other states and the posture of courts any offers made by a property owner to condition rezoning must be carefully considered.

- The offer must be made voluntarily, it cannot bargain away a community's ability to make future zoning decisions;
 - The agreement must bear a reasonable relationship to the potential impacts that result from the rezoning, considering the general welfare rather than private interests;
 - It must be consistent with a community's master plan and be in harmony with the normal zoning plan for the area; and
 - It must clearly state the restrictions that are proposed for the property.
- buffers or transition areas, landscaping or open space could be used to soften the impact on surrounding properties or uses.

Zoning

What is a Spot Zone?

Public hearings for rezonings are often filled with comments about the creation of a "spot zone," and the dire results of such an approval. But spot zoning is a derogatory and often misused term.

Spot zoning has some specific characteristics. It is not simply the appearance of a "spot" on a zoning map. Many acceptable zone districts may be "islands," surrounded by other zone districts. But while some may disagree on whether or not a specific case is a spot zone, nearly everyone agrees that it is a poor zoning practice. An unjustified spot zone is, therefore, likely to be viewed by the courts as unlawful.

In order to qualify as a spot zone the property will meet each of the following four characteristics:

Small in Size: As the term "spot" implies the location of a spot zone will be a relatively small parcel, particularly with respect to the sizes of the parcels in the vicinity. While there are no firm rules on what size a spot needs to be, the larger the area, the less likely it will be considered a "spot." If the property was large enough to accommodate

Inconsistent Uses: The second quality is that the spot zone will permit uses that are inconsistent with the uses already established or allowed in the vicinity. The inconsistent nature of the spot zone's uses should be clear, i.e. the uses should be very different. These uses, either by virtue of building design, traffic, or intensity will be incompatible with uses allowed in surrounding districts. For example, a proposed two-family district rezoning in a single family zoned area would not be an inconsistent use. A sporting goods store in the midst of a residential area, however, would be an entirely different situation.

Special Benefit: Spot zoning also confers a "special benefit" on a single property owner that is not available to other similar property owners in the area. Since the uses allowed by the spot zone are inconsistent with, and often more intense than those

allowed in surrounding districts, a special benefit is given to the holder of the spot zone, to the detriment of nearby properties.

Contrary to the Master Plan: The final characteristic of a spot zone is the one that most distinguishes it as a poor zoning practice. If the master plan designates a small parcel in a rural or agricultural area for commercial use to serve residents in the general area, it may have the look of a classic spot zone. In fact, it may even meet the first three characteristics. However, it is not a spot zone since the master plan intended for its creation. Consequently, labeling a rezoning a "spot zone" simply because it is on a small parcel and the uses allowed are different from the other uses around it is not always correct.

Zoning

Special Land Uses (SLU)

Special Land Use Review to Insure Compatibility: Special land uses (SLU), known by a variety of terms, are uses of land which are not essentially incompatible with the uses permitted in a zoning district, but possess characteristics or location qualities which require individual review and possible restriction in order to insure compatibility with the natural environment of the site, the character of the surrounding area, public services and facilities, and adjacent uses of land.

- Special land uses are uses of land permitted when certain standards, stated in the ordinance have been met.. The list of possible special land uses must be specific, and cannot include general terms such as "commercial", "industrial" or phrases such as "and other similar uses."
- Special land uses may also be known as special uses, conditional uses, and special exception uses.
- Site plan review is required for all special land uses.
- A "Statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed" must be provided with any special land use decision.

Some uses often treated as special land uses include:

- Junk yards
- Sand and gravel operations
- Wireless communication towers
- Kennels
- Hospitals
- Small aircraft landing fields
- Race tracks
- Sanitary landfills
- Service stations
- Drive-through restaurants

Zoning

Whether a use should be handled as a special land use depends on its compatibility with other uses permitted in the zone in which it is proposed.

Statutory Requirements for SLU: The ordinance must specify the following:

- “The special land uses and activities eligible for approval and the body of official responsible for the reviewing and granting approval. The application and review process must be outlined.” For example the ordinance must specify who has final approval of a special use permit. That can be the zoning administrator, the planning commission, or the legislative body after hearing and recommendation by the planning commission or zoning administrator. Most local governments assign the task to the planning commission. Considerable caution, concerning making a distinction between administrative and legislative functions, should be exercised before assigning the final decision to the legislative body.
- “The requirements and standards for approving a request for a special land use.”
- “The procedures and supporting materials required for the application, review, and approval of a special land use”

The following items are often included in zoning ordinance SLU regulations:

- The ordinance should also specify the limitations of the zoning board of appeals on special land uses. The Act specifies that a decision on a special land use may not be taken to the zoning board of appeals unless the zoning ordinance specifically provides for it. As a general rule special land use decisions are not allowed to be appealed to the zoning board of appeals.
- Some ordinances specify the amount of change or expansion to an approved special land use that is allowed without needing to hold another public hearing. As an example, if an existing special land use is proposed to be expanded to double its current size, this may be considered a “major” amendment to the special land use, requiring a public hearing for approval.

Standards of Review: Most zoning ordinances contain two kinds of standards. There are general standards that apply to all special land uses and specific standards that apply only

to a particular type of special land use. The general standards will often be *discretionary*; specific standards will often be *nondiscretionary*.

General/Discretionary standards are those that involve judgment to determine compliance. Conditions imposed must meet the following requirements:

Be designed to protect natural features, the health, safety, and welfare, as well as the social and economic well-being, of those who will use the land use or activity under consideration, residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.

Be related to the valid exercise of the police power and purposes which are affected by proposed use or activity.

Be necessary to meet the intent and purpose of the zoning requirements, be related to the standards established in the zoning ordinance for the land use or activity under consideration, and be necessary to insure compliance with those standards.

Example:

"The project will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and will not change the essential character of the area."

Specific/Nondiscretionary standards are measurable or otherwise certain to establish. No judgment is used.

"The use shall be located on property with direct access to a major arterial street, as designated in the comprehensive plan."

Note that if applicant meets all ordinance standards, approval **must** be given.

Zoning

General/Discretionary Standards Example:

The planning commission's decision on proposed special use permits shall be based solely upon compliance with the specific requirements contained elsewhere in this ordinance, and the general standards listed below:

1) Compatibility with the comprehensive plan: The proposed special land use shall be compatible with, and in accordance with, the general principles and objectives of the comprehensive plan, and shall promote the intent and purpose of this ordinance.

2) Compatibility with adjacent uses: The proposed special land use shall be designed, constructed, operated, and maintained to be compatible with existing or planned uses on surrounding land. In determining whether a special land use will be compatible and not create a significant detrimental impact, as compared to the impacts of permitted uses, consideration shall be given to the degree of impact the special land use may have on adjacent property, as compared with the expected value to the community. The following types of impacts shall be considered:

- Use activities, processes, materials, equipment, or conditions of operation;
- Vehicular circulation and parking areas;
- Outdoor activity, storage, and work areas;
- Hours of operation;
- Production of traffic, noise, vibration, smoke, fumes, odors, dust, glare, and light;
- Impacts on adjacent property values; and
- The relative ease by which the impacts above will be mitigated.

3) Impact of traffic on the street system: The location and design of the proposed special land use shall minimize the negative impact on the street system in consideration of items such as vehicle trip generation (i.e. volumes), types of traffic, access location and design, circulation and parking design, street and bridge capacity, traffic operations at proposed access points, and traffic operations at nearby intersections and access points.

- 4) Impact on natural features: The proposed special land use shall not have an unacceptable significant adverse effect on the quality of the natural environment in comparison to the impacts associated with typical permitted uses.
- 5) Storage of potentially hazardous materials: Information has been provided to help ensure proper hazardous waste storage and handling to minimize adverse effects on adjacent properties, lakes, wetlands, and drinking water. Uses utilizing, storing, or handling hazardous material have provided secondary containment facilities and provide documentation of compliance with state and federal regulations, as required.
- 6) Compliance with zoning ordinance standards: The proposed special land use shall be designed, constructed, operated, and maintained to meet the stated intent of the zoning district.
- 7) Public services: The proposed special land use shall be located where it can be adequately served by essential public facilities and services, such as streets, pedestrian or bicycle facilities, police and fire protection, drainage systems, water and sewage facilities, and schools.

Specific/Nondiscretionary Standards Example:

Shopping centers may be approved as a special land use in C-1 District by the planning commission provided the special land use general standards and the following specific standards are met:

- 1) The use is established on a minimum site area of ten (10) acres.
- 2) All outdoor activity areas, parking lots, main buildings, and accessory buildings are located at least fifty (50) feet from the property lines, and any ordinary high water lines where applicable. The resulting fifty (50) foot setbacks shall be maintained as a buffer area wherein all natural tree/shrub cover is retained in a healthful growing

Zoning

condition. Planting greenbelts may be required by the planning commission to protect scenic views, screen structures, prevent soil erosion, and sedimentation, or other purposes deemed necessary by the planning commission.

- 3) The use shall be located on property with direct access to a major arterial street, as designated in the comprehensive plan.
- 4) Lighting for parking areas or outdoor activity areas shall be shielded to prevent light from spilling onto any property used or zoned for residential purposes.
- 5) Access driveways shall be located no less than fifty (50) feet from the nearest part of the intersection of any street or any other driveway.

Special Land Use Decision Guidelines: Standards for special uses can be found in several places in the zoning ordinance. Often the discretionary, generic, standards are found in the part of the zoning ordinance that talks about special use approval procedures. Additional standards for specific special uses may be found elsewhere, such as in its own section of the ordinance. Other standards include all of the applicable parts found in "General Provisions" and finally the regulations that apply to the zoning district where the special use is proposed. The principal question that should be asked in reviewing a special land use request: ***Is the proposed location an appropriate location for that use?*** If the facts show that it is an appropriate location (that the use is compatible), and all standards are met (both the general/discretionary and the specific/nondiscretionary standards), approval must be given.

The decision to approve, deny, or approve with conditions must be incorporated in a statement listing the findings of facts, conclusions (the decision), the basis for the decision (reasons), and any conditions. Appeal to the ZBA on decisions regarding special land uses is permitted only if the ordinance specifically provides for such an appeal.

Site Plan Review (SPR)

Site plan review is the process of reviewing documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.

Statutory Requirements for SPR: The Zoning ordinance must specify the:

- Land use or activity requiring site plan approval
- Requirements and standards upon which decisions will be made
- The application and review process
- The body or official responsible for review and approval (can be the zoning administrator, the planning commission, the zoning board, and/or the elected body, but it cannot be the board of appeals). Considerable caution, concerning making a distinction between administrative and legislative functions, should be exercised before assigning the final decisions to the legislative body.

Typical site plans show:

- Scale
- North arrow
- Who prepared the drawing and the date
- Property boundaries
- Topographic relief
- Existing zoning
- Setback line
- Parking
- Landscaping
- Existing/proposed buildings
- Existing/proposed roads and utilities
- Existing natural features & wetlands
- Driveways
- Loading areas

Review Standards Example: Site plan approval shall be granted only if the site plan meets all applicable standards set forth in the zoning ordinance as outlined below:

- 1) **Adequacy of Information:** The site plan shall include all required information in

Zoning

sufficiently complete and understandable form to provide an accurate description of the proposed use(s) and structure(s).

- 2) **Site Design Characteristics:** All elements of the site design shall be harmoniously and efficiently organized in relation to topography, the size and type of lot, the character of adjoining property, and the type and size of buildings. The site shall be developed so as not to impede the normal and orderly development or improvement of surrounding property for uses permitted by this ordinance. The site shall be designed to conform to all provisions of the zoning ordinance. Redevelopment of existing sites shall be brought into conformance with all site improvement provisions of the zoning ordinance which are relative to and proportionate to the extent of redevelopment, as determined by the planning commission.
- 3) **Buildings:** Buildings and structures will meet or exceed setback standards, height and other dimensional standards, and be placed to preserve environmentally sensitive areas. Redevelopment of existing structures shall meet or exceed all standards for which a variance has not been obtained.
- 4) **Preservation of Natural Areas:** The landscape shall be preserved in its natural state, insofar as practicable, by minimizing tree and soil removal, alteration to the natural drainage courses, and the amount of cutting, filling, and grading. Insofar as practical, natural features and the site topography shall be incorporated into the proposed site design.
- 5) **Privacy:** The site design shall provide reasonable visual and sound privacy for dwelling units located therein and adjacent thereto. Fences, walks, barriers, and landscaping shall be used, as appropriate, for the protection and enhancement of property and the privacy of its occupants.
- 6) **Emergency Vehicle Access:** All buildings or groups of buildings shall be arranged so as to permit emergency vehicle access by some practicable means to all vehicles.

- 7) **Ingress and Egress:** Every structure or dwelling unit shall be provided with adequate means of ingress and egress via public streets and walkways.
- 8) **Vehicular and Pedestrian Circulation Layout:** The arrangement of public or common ways for vehicular and pedestrian circulation shall respect the pattern of existing or planned streets and pedestrian or bicycle pathways in the area. The width of streets and drives shall be appropriate for the volume of traffic they will carry. The site plan shall provide a pedestrian circulation system that is protected as completely as is reasonably possible from the vehicular circulation system.
- 9) **Traffic Impact:** The expected volume of traffic to be generated by the proposed use shall not adversely impact existing roads and the circulation thereon.
- 10) **Drainage:** Stormwater management system and facilities shall preserve the natural drainage characteristics and enhance the aesthetics of the site to the maximum extent possible, and shall not substantially reduce or increase the natural retention or storage capacity of any wetland, water body, or water course, or cause alterations which could increase flooding or water pollution on or off the site.
- 11) **Soil Erosion:** The proposed development shall include measures to prevent soil erosion and sedimentation.
- 12) **Public Services:** The scale and design of the proposed development shall facilitate the adequate provision of services currently furnished by or that may be required including fire and police protection, stormwater management, water supply, sanitary sewage removal and treatment, traffic control, and administrative services.

SPR Decision Guidelines:

- A site plan must be approved if it meets the standards and requirements of the zoning ordinance and other applicable ordinances, and the conditions placed on the approval are met.
- Once approved, a site plan is an enforceable document.

Zoning

- Once approved, site plans may only be changed with the mutual agreement of the community and the applicant. Many communities process major changes by the approving body and minor changes as an administrative procedure.
- Approval of a site plan may expire if not under construction within a time period specified in the ordinance.

Planned Unit Developments (PUD)

Planned Unit Developments (PUD) are authorized in Zoning Enabling Act. It is a development process that ties a site plan to zoning approval and allows for modification of zoning standards where innovative design can achieve significant benefits for the community. A PUD is usually used for large, complex projects to ensure coordinated development, and provide for negotiation between community and developer in order to achieve the best design for the site and the community overall.

Planned Unit Developments provide for more flexible design as zoning regulations can be modified in exchange for certain community benefits, and allows mixing of uses or lot sizes in order to create an integrated development, mixed use design, clustering and open space preservation, and other similar characteristics. PUDs can also be used to preserve natural features through clustering of dwelling units to save open space.

The PUD approval usually ties development to a concept plan and in some communities a "PUD Development Agreement." The Development Agreement can be used as a mechanism to ensure the timing of development is related to the availability of adequate public facilities and roads.

PUD Qualifying Criteria and Community Benefit: The ordinance must specify what criteria shall be used to determine if a site qualifies for a PUD. Criteria generally includes:

- Minimum site area
- Adequate public infrastructure
- Significant natural features or unique site characteristics
- Consistency with the comprehensive plan

There must be some demonstrated community benefit to the PUD. Many PUD ordinances

require the PUD to provide one or more of the following:

Preservation of significant natural assets such as woodlands, rolling topography, significant views, natural drainage ways, water bodies, floodplains, wetlands, or natural corridors, provision of recreation facilities and open spaces, and provision of a complimentary and integrated mixture of uses, residential densities, and housing types.

PUD Approval Process: The process for review and approval for a PUD varies from community to community. A PUD may be reviewed and approved concurrently with a site plan or subdivision plat approval. Where a PUD is granted as a zoning amendment, it can be in the form of a “PUD District,” a “PUD Overlay District” or a “PUD Ordinance.”

In the case of a PUD handled similar to a special use permit, the ordinance must specify the body or official responsible for review and approval (can be the zoning administrator, the planning commission and/or the elected body, but it cannot be the board of appeals). Considerable caution, concerning making a distinction between administrative and legislative functions, should be exercised before assigning the final decision to the legislative body. If PUD approval is granted as a zoning amendment, then the approval authority must fall under the legislative authority of the elected body.

In all instances, a PUD requires a public hearing. Where a “PUD rezoning” is required, the public hearing process will follow the same procedure as a zoning amendment. In other instances, a public hearing would be held following the procedures for special land use approval.

Typically, the approving body or official will grant a “PUD concept plan” approval following a public hearing. This PUD concept plan will set forth the terms and conditions of the PUD and outline what modifications will be allowed to the basic zoning regulations. If PUD approval is granted as a zoning amendment, the elected body will grant the “PUD rezoning and concept plan approval” based upon a recommendation by the planning commission.

Some ordinances require a “PUD Agreement.” If required, this PUD Agreement will accompany the PUD concept plan. The PUD Agreement is a contract between the

Zoning

developer and the municipality that sets forth the terms and conditions of the PUD, and outlines what modifications will be allowed to the basic zoning regulations.

Following approval of the PUD concept plan and/or PUD rezoning, detailed site plans or plats are generally submitted for each individual phase of the overall project.

PUD Density: The PUD ordinance needs to specify how the residential density is determined. There are two general methods to determine density:

- Density can be calculated by taking the overall site area and dividing it by the density that is allowed by the underlying zoning district (pre-PUD zoning). As an example, if the underlying zoning requires one acre per dwelling unit, then a 40-acre parcel would allow 40 dwelling units. Variations are often made to this such as deducting public road right-of-way and submerged lands from the site area and discounting wetland area to count at 50% equivalent to upland area.
- Another method that is used to determine density is through preparation of a “parallel plan” or an “alternate plan.” This involves the developer preparing a layout that shows how the site would be developed with a conventional subdivision zoning. This sets the allowable density for the project, and the PUD can then be designed with the same number of units but under a clustered design.

In addition to determining the basic density, the PUD ordinance needs to specify if a “density bonus” is allowed and the criteria for granting a density bonus.

Flexibility and Design Standards: To encourage flexibility and creativity consistent modifications may be permitted from the requirements of the zoning ordinance such as lot area and setbacks. Where modifications are granted to the basic zoning standards, the PUD ordinance needs to specify criteria for when to grant the modifications. Generally, any modification should be approved through a finding that the deviation will result in a higher quality development than would be possible using conventional zoning standards.

In addition to allowing modifications to encourage creativity in design, some PUD Ordinances have specific design standards that apply to PUDs. These can include:

- Performance standards for mixed use developments;
- Requirements for additional site amenities such as landscaping, ornamental street lights, pedestrian facilities, and recreational facilities; and
- Standards for preservation of natural features such as setbacks from wetlands, streams and water bodies, limitations on tree clearing, and open space preservation areas.

Enforcement

Even the best ordinances are of little use without an effective enforcement program. Three keys to fairly and consistently enforcing ordinances are:

Commitment: There must be a firm commitment from the community's elected, administrative, and legal officials to commit the necessary manpower and resources to conduct a proper enforcement program. This also means that these officials can not interfere with the duties of enforcement officials.

Ordinances: It is important to write and adopt ordinances that can be effectively enforced. A test for this might be asking the enforcement officials prior to adoption of the regulation, to explain how they could enforce an ordinance. If it appears as though enforcement is not practical, either the ordinance should be reconsidered, or the regulations need to be changed.

Process: It is especially important that the enforcement program follow a consistent and lawful process. Property owners are entitled to due process, including proper notification, along with one or more opportunities to correct the violation.

Methods of Dividing Land

Subdivisions, Site Condominiums, and Land Divisions

The division (exempt division, bonus division, and redivision), as well as the subdivision, splitting, replatting, and establishment of a condominium on a parcel of land in Michigan are governed by two statutes. Those laws include the Land Division Act (MCL 560.102 *et seq.*) and the Condominium Act (MCL 559.101 *et seq.*). Accurate record keeping of land transactions is intended by both of these State laws. Procedures and standards are spelled out in each statute for the processing and recording of each type of land transaction. The following provides an overview of each statute and the implication to local communities.

Zoning

Subdivision Regulations: The Land Division Act provides for review and approval of subdivision plats by local units of government, county, and state agencies. Local units of government may adopt ordinances regulating the layout and design of subdivisions. All subdivision lots are required to conform to the regulations contained in the zoning ordinance for lot area, width, and setbacks. In addition to the area and bulk regulations of the zoning ordinance, the subdivision ordinance may contain standards for the following:

- Lot layout and configuration;
- Roadway circulation and access;
- Pedestrian facilities;
- Drainage;
- Utilities;
- Street lighting;
- Landscaping; and
- Preservation of natural features.

Pre-Application Meeting

Currently, the Land Division Act (LDA) requires filing of a preliminary and final plat of a subdivision. Each has its own procedure for review and approval. Prior to this amendment, after submittal of a preliminary plat, a municipality had 90 days to give tentative approval, approval with conditions, or reject the preliminary plat. The amendment provides a means to shorten this review period for the community to 60 days, and hasten the entire review process for the plat.

To get this expedited review, a subdivider (called the “proprietor” in the Act) may request a pre-application review meeting prior to filing a preliminary plat. This request must be sent in writing to the Chair of the County Plat Board and, once received, the meeting must be held within 30 days.

At the same time as the request, copies of a “concept plan for the preliminary plat” must be sent to the municipality, the County Road Commission (if the plat abuts or includes County roads), the County Drain Commissioner (or the County Board, if there is no Drain

1967, the Land Division Act, and PA 59 of 1978, the Condominium Act. Accurate record keeping of land transactions is intended by both of these State laws. Procedures and standards are spelled out in each statute for the processing and recording of each type of land transaction. The following provides an overview of each statute and the implication of each to local communities. Commissioner), and the County Health Department (if the plat is to be serviced with on-site water and septic systems).

The concept plan and notice of the meeting must be provided to the state departments of Transportation and/or Environmental Quality if the property abuts a state road, a shoreline, or includes wetlands and/or flood plains, but representatives are not required to attend.

The pre-application review meeting must be attended by the proprietor, a representative of the municipality, and, if applicable, representatives of the County Road Commission, County Drain Commissioner and the local health department. The Act does not state what happens if any of these representatives fails to attend.

The amendment also does not state who is supposed to coordinate this meeting. While the Chair of the County Plat Board receives a written request, the Act does not require the Chair's attendance, and it is not clear as to who is required to conduct the meeting or issue invitations to the other agencies.

If a pre-application meeting is held, the municipality must tentatively approve, approve with conditions, or reject the tentative preliminary plat within 60 days. If no pre-application meeting is held, tentative approval or rejection must occur within 90 days.

Agency/Community Review

The amended LDA now provides for a *simultaneous* rather than the previous sequential review of the preliminary plat by the applicable county and state authorities following tentative approval by the local governing body and after the county has adopted an ordinance to facilitate this simultaneous review. These authorities are required to act within 30 days after receipt of the preliminary plat. To accommodate this review process, the LDA now allows reviewing authorities to approve a preliminary plat "subject to conditions." Previously, approval and rejection were the only options.

The LDA also provides for communication between the reviewing agencies in the event

Zoning

one of them attaches conditions to the plat or rejects it. For instance, if MDOT attaches conditions to the plat, it may affect the decision of the County Road Commission, or vice versa. Previously, there was no requirement for the agencies to communicate their decisions to each other, which often led to confusion and approval delays.

Once approval is obtained from all of the applicable authorities, the proprietor will then submit the written approval of the preliminary plat to the local governing body for final approval of the preliminary plat. Resolving conflicts between the authorities is still the responsibility of the proprietor. The process for review and approval of a final plat (except for a reduction in the number of plat copies provided to each agency) is unchanged.

Subdivision Process: The process for review and approval of a subdivision plat is precisely outlined in the Land Division Act. It can be summarized as follows:

A **Tentative Preliminary Plat** is first submitted to the municipality for review of basic street layout and lot arrangement and additional information required under local ordinance. The planning commission shall review the Tentative Preliminary Plat and make a recommendation to the elected body for approval or denial. The municipality is required by the Act to approve or deny the tentative preliminary plat within 90 days from the date of filing.

Following tentative approval of the Preliminary Plat by the municipality, the **Preliminary Plat** is then submitted to the various state and county agencies for review and approval.

Following approval of the Preliminary Plat by all applicable state and county agencies, the plat is submitted to the municipality for approval or denial of the Final Preliminary Plat. The elected body is required to review the Final Preliminary Plat within 30 days of the date of a complete filing with all state and county approvals.

The Act does not define “concept plan,” nor does it state what a concept plan must contain. However, the reference to concept plan for the preliminary plat may infer that the concept plan should largely conform to the preliminary plat requirements.

Following approval of the **Final Preliminary Plat**, all infrastructure improvements are installed and inspected by the applicable municipal, county and state agencies. All lots are surveyed and monumented.

Once all infrastructure improvements are complete, a Final Plat is prepared and submitted for review and approval by all applicable state and county agencies. **Final Plat** approval is then granted by the elected body of the municipality.

The splitting of a recorded lot in a subdivision is governed by Section 262 (MCL 560.263) of the Land Division Act. A recorded lot cannot be split into more than four additional parts without replatting or the establishment of a site condominium. Some attorneys take the position that a lot, in an existing subdivision, can not be further divided unless a local ordinance specifically provides for the splitting and includes a local review process. Splitting of recorded lots is usually governed by local ordinance to assure compliance with local zoning including lot width and lot area standards.

Site Condominiums: Condominiums are regulated by the Condominium Act and local ordinance. Condominiums are a means of legally dividing ownership of real property. The condominium is controlled by an association through the Master Deed and Bylaws established for the condominium. Generally, a condominium is subject to local site plan approval. The process for review and approval will vary depending upon local ordinances.

Traditionally, condominiums took the form of attached housing or multiple family housing where each resident owned a dwelling unit and the land, exterior building walls, utilities, common corridors etc. were owned in common by the condominium association. Condominiums have more recently been used to divide land in a manner that resembles a single family subdivision; commonly referred to as a "Site Condominium," where the resident owns a detached dwelling unit and the land area surrounding the dwelling.

Communities have regulated site condominiums similar to subdivisions. While the approval procedures vary between subdivisions and condominiums, many municipalities have adopted ordinances requiring site condominiums to meet design standards similar to subdivisions.

An important key is that site condominiums be treated and subject to the same regulations as a traditional subdivision. A community cannot discriminate against site condominiums. A number of communities adopt a single ordinance, with a single uniform set of development standards, which applies to divisions, bonus divisions, re-divisions, subdivisions, and site condominiums.

Zoning

Land Divisions: In addition the Land Division Act provides for division of land outside of the subdivision process. "Exempt Divisions" is when someone is creating new large parcels, 40 acres or the equivalent or larger. "Exempt Divisions" are exempt from any local government review and can just be done.

"Divisions" are when new parcels being created are smaller than 40 acres or the equivalent but fewer in number than statute allows from a single "parent parcel". If a layout of new parcels retains 60% of the "Parent Parcel" as one large parcel, then a larger number of new parcels can be created, called "bonus divisions." If a layout of new parcels results in not creating any new driveways onto a public road(s), then a larger number of new parcels can be created, called "bonus divisions." Ten years after an "Exempt Division," "Division," or "Bonus Division" has been created they can be divided further into "Redivisions".

"Exempt Divisions are limited by a minimum size of the newly created parcel (40 acres or the equivalent). "Division," "Bonus Division" and "Redivisions" are limited by the number of parcels created from the "Parent Parcel". That limited number is a sliding scale dependant on the size (in acres) of the "Parent Parcel." Generally the "Parent Parcel" is any one parcel or two or more parcels sharing a common line and owned by the same person as it existed on March 31, 1997. (The counting to determine the maximum number of "Division," "Bonus Division" and "Redivisions" includes all of the new parcels created starting on March 31, 1997. If one wishes to create more new parcels than allowed by land divisions, then one turns to a subdivision or site condominium process.

The review and approval of is done by the tax assessor for the municipality or another individual appointed to perform that task by the legislative body. Most frequently that review job is assigned to the zoning administrator. (The task should be assigned to an "official", not to a board, commissions, or legislative body.)

Review of "Division," "Bonus Division" and "Redivisions" can only be for the following items:

- Parcel size (local ordinance)
- Parcel width (local ordinance)
- Width to depth of 1:4 for parcels less than 10 acres in size (or other width to depth established by local ordinance)
- Number of divisions (MCL 560.108)
- Accessibility (MCL 560.109(1)(e) or local ordinance)
- Adequate and accurate legal description (MCL 560.109(1)(a)).

Making Effective Decisions

Authority and Limits of State Legislation

Planning law has become very complex over the past several decades due to revisions to Michigan statutes, court decisions, attorney general opinions, development of more complex regulations, and a growing number of laws to exempt certain uses from zoning to varying degrees. In addition, there can be a great deal of pressure from the public and applicants or their representatives.

Subsequently, this makes it difficult for a full time planning professional, let alone the average lay person, to be aware of all the changes. Fortunately, in spite of this dilemma, there are some basic guidelines to help ensure good decisions – keep your planning and zoning tools up-to-date, refer to ordinance standards, be consistent, use common sense, and get help when you need it.

State Legislation for Planning in Michigan

The local planning commission derives its primary authority from the Planning Enabling Act (MCL 125.3801 *et seq.*). This act includes the following elements:

- Authority to create a planning commission;
- Duties of the planning commission;
- Authority to adopt a master plan;
- master plan public hearing and adoption procedures;
- Requirement for a planning commission to review development and public works proposals;
- Authority to create subdivision regulations (except counties).
- Compensation for meetings and expenses;
- Public funds for attendance at educational conferences; and
- Employment of appropriate staff.

State Legislation for Zoning in Michigan: The authority to zone comes from The

Making Effective Decisions

Michigan Zoning Enabling Act; (MCL 125.3101 *et seq.*). This law includes the following elements:

- General Provisions, including definitions
- Zoning Authorization and Initiation
- Zoning Commission
- Zoning Adoption and Enforcement
- Special Zoning Provisions
- Zoning Board of Appeals
- Statutory Compliance and Repealer

The Planning and Zoning Team

Typical Roles and Responsibilities

There are four official members of the community planning team. Those members include the legislative body, elected by the public, the planning commission, and the zoning board of appeals, appointed by the legislative body, and professional staff such as the zoning administrator and the Planning Director. State law spells out the duties, functions, and responsibilities of each team member in accordance with specific requirements.

The Team Members

Planning Commission – appointed residents of the community who give guidance to the land use, zoning, and planning process in the community. They formulate and adopt the master plan, make recommendations on zoning ordinances, and typically review site plans, special use requests, planned unit development requests, subdivision plats, condominiums, and street and alley vacation requests. The planning commission will include members that also sit on the legislative body and that sit on the zoning board of appeals. These members are *ex officio* members between the various boards.

Legislative Body – elected residents of the community who make policy decisions, adopt ordinances and laws, appoint members of the planning commission and zoning board of appeals, and approve funds for planning. They set policy and adopt procedures for the operation of the local government. This group gives final approvals to certain

developments such as subdivision plats, condominiums, rezonings, and sometimes special land uses. This group may be the city council, village council, township board of Trustees, or the county board of commissioners.

Zoning Board of Appeals – appointed residents of the community who act in a judicial capacity under the requirements of the zoning ordinance. This Board deals with requests for variances, ordinance interpretations, and the appeal of administrative decisions by the Staff or planning commission. Administratively, this is a Board of last resort, as the only appeal from their decision is to Circuit or Federal Court.

Administrative Staff and/or Support Staff – hired by the legislative body which may include a zoning administrator, zoning or code enforcement officer, planning department, building department, or outside planning consultant, legal council to provide technical, legal and professional planning advice to the legislative body, the planning commission, and the zoning board of appeals. Some communities delegate the hiring and oversight of the zoning administrator and planner to the planning commission.

The Role of Decision Makers

Planning commissioners, and other decision makers, come to their positions with a variety of backgrounds and personalities. As such, there is no expectation that a decision maker will deliberately change themselves – while the reasons why a commissioner or board of appeals member was selected vary widely, what is always true is that they are expected to act for the overall good of the community. At the same time, they are expected to use their own experiences and knowledge to help make their decisions.

Sometimes the actions of individual decision makers may stray from their intended purpose. Time spent by the planning commission dealing with relatively insignificant details or simply time spent redesigning a site plan is time that is not available for other, far more important tasks. At some point, the planning commission must determine that it is time to let go of small details and get on with the job they were intended to do in the first place – planning the community.

Making Effective Decisions

Responsibilities and the Process of Working Together

Planning and zoning team members have a variety of functions and duties, some are shared and others are distinct to the particular board or commission. During the implementation of their respective assignments, issues usually include matters controlling and guiding growth as well as recognizing the implications of development in terms of potential costs to the community. Certain processes are followed to achieve approval of development proposals. The processes include the submittal of materials, planning commission review and consideration, zoning board of appeals review where necessary, and action by the legislative body if required.

Submission for Staff Review: Any development application information along with site plans, are submitted to the community by a landowner or developer to enable use of their land. The submitted material is usually reviewed by staff or consultant to assure compliance with the local development regulations. These regulations may include the zoning ordinance, the land division ordinance, and similar requirements.

Planning Commission Hearing and Recommendation (or decision): The application is submitted to the planning commission with the staff recommendation. In certain cases, the planning commission will hold a public hearing on the proposal to allow public input. Some approvals are granted by the planning commission, while others are forwarded to the legislative body for approval or denial. This process is set forth in local ordinances. There are cases where a variance from the zoning board of appeals might be needed before a proposal is approved.

Zoning Board of Appeals: The Board for consideration of varying the specific requirements of the zoning ordinance is the zoning board of appeals. State legislation allows the ZBA to consider several issues, but the most usual matter is the request for a variance to the specific requirements of the zoning ordinance.

Generally, the consideration of a variance or other ZBA action would occur after a decision is made by a zoning administrator, the planning commission or the legislative body. The applicant is asking the ZBA to eliminate/modify/reduce the zoning requirement as it applies to their situation such as a setback. When considering a site plan issue under the provisions of the zoning ordinance, the ZBA action could take place after consideration by

the planning commission or after the final action by the legislative body. It really depends upon what the local custom is and how the local community wants to process such requests.

Legislative Body: The legislative body is the township board, the city council, the village council, or the county board of commissioners. These bodies have the power to make laws and adopt ordinances. Often such groups are the final step in a decision making capacity with regard to subdivisions, site plans, and zoning amendments based on the recommendation of the planning commission. In some communities, administrative decisions are made by the legislative body; such as site plan review, special land uses, and planned unit developments which are handled similar to special land uses. Considerable caution concerning making a distinction between administrative and legislative functions, should be exercised before assigning the final decision to the legislative body.

Communication Between the Bodies: All communications between these members of the team should be in writing, whether in resolutions, motions, or memo form. The written record of actions taken, staff reviews, letters sent to the applicant and similar matters form the official record of each case. Minutes of all pertinent meetings should also be included in the package sent from the planning commission to the zoning board of appeals and then onto the legislative body. Leave nothing to chance. Include all letters from nearby residents and property owners, including petitions and similar documents. The essence of good decision making is adequate information and a complete set of facts. Decisions based upon an emotional appeal, threats, or intimidation cannot meet the standards of the ordinance and therefore, should not be a part of the record. Good written communication from each reviewing body leaves nothing to chance and limits misunderstanding. Many communities will supplement communication with quarterly joint meetings with the legislative body, the planning commission and the zoning board of appeals.

County Planning Commission: Zoning ordinances and zoning amendments (changes to the zoning text and/or map) in townships are required to be reviewed by the county planning commission for a recommendation prior to adoption by the township. The county planning commission will review the ordinance following the township planning commission's public hearing and prior to the township's adoption. County review is

Making Effective Decisions

required unless the county has specifically waived its review. The statutes also specify time limits that if the county planning commission does not provide a recommendation the township may assume they have waived their right for review (30 days for zoning ordinances). The village, city, township, and county may assume another unit of government has waived their right to review a master plan if comments are not received within 95 days.

The following table lists the respective roles and functions of each Team Member and provides information regarding the relationship of the Members to each other.

TYPICAL ROLES AND RESPONSIBILITIES	Elected Body	Planning Commission	Board of Appeals	Zoning Administrator
Inform and involve residents/businesses	4	4	4	4
Determine policies on growth and redevelopment	1	3		3
Adopt and implement master Plans, subarea, corridor plans	Optional	1		
Coordinate information from other agencies/communities	4	4		4
Coordinate with other bodies	4	4	4	4
Review public works proposals	1	3		
Review rezonings, subdivisions, PUD's	1	3		3
Site plan reviews, special land uses	1	3/1		2/3
Zoning ordinance amendments, rezonings (map changes)	1	3		
Prepare and revise subdivision and site condominium regulations	1	3		
Approve land divisions	(Rare)	1		1
Ordinance interpretation			1	
Appeals/variances			1	
Temporary Uses	(Rare)	2	2	2
Permits, enforcement, performance bonds, violation	2	2		2

1 = Common Approval Body 3 = Reviews and Makes Recommendation
2 = Approval Body in some communities 4 = Responsibility

Why do we plan and zone?

Purpose of Planning and Zoning

Every individual or group plans for the future, to some extent --for budgets, insurance programs, education, retirement, vacations, business investments, or daily activities. Cities, villages, townships, and counties must plan in order to determine the wisest use of their resources to reach established goals. The master plan process considers a broad range of community characteristics to establish a strategy for future development.

The value of the community master plan is directly related to the community's willingness to follow it, and its diligence in keeping the plan current by anticipating changing conditions.

Creation of the master plan is a very important project for the planning commission to undertake. Once completed, implementation of the master plan is realized through the zoning ordinance. As growth continues, the community is required to address complex zoning issues brought on by the pace and increasing sophistication of development projects.

Basic Principles

Zoning is authorized by law and upheld by state and federal court decisions over the last 100 years as a process for local control of land use necessary to protect the public health, safety and welfare. The planning principles upon which zoning is based include the need to:

- Balance competing interests of all landowners and residents with the rights of individual landowners;
- Help provide a long term community vision;
- Environmental enhancement and protection;
- Provision of public services throughout the community;
- Assure good quality of life desired by residents;
- Provision of fairness and consistency with reviews;

Making Effective Decisions

- Minimize land use conflicts; and
- Promote public health, safety, and general welfare.

Basics of Zoning

Zoning is public regulation of the use of land. It involves the adoption of an ordinance that divides a community into various districts, or zones, and describes regulations on use, buildings, structures, and land within the various zones. Each district lists the permitted uses of land within that zone (such as residential, commercial, or industrial). Zoning is considered a "police power" regulation, one of a number of laws (such as building and health codes), which are adopted to protect the public health, safety, and general welfare.

Purposes of Zoning

Michigan law requires that zoning be based upon a plan designed to promote the public health, safety, and general welfare of all citizens. Thus, zoning is based upon a master plan, prepared and periodically updated by the planning commission (in a few communities the planning board), which serves as a legal foundation for the zoning ordinance.

Among the many objectives to be achieved through zoning:

- Protecting property values by providing minimum standards for land use and preventing incompatible land uses from locating in a given area;
- Protecting natural resources through prevention of over-development of the land and providing standards for natural features protection;
- Preventing nuisances through maintaining harmonious land use relationships and requiring setbacks between uses;
- Insuring compatibility of uses through dividing land uses among districts;
- Preventing overcrowding by limiting the intensity and density of development, limiting the congestion of transportation systems and other public facilities and

- controlling the rate, location, and timing of development; and
- Preventing overuse of land through density limitations, setbacks, and lot coverage standards.

Decision Making Process

Following an effective decision making process is one of the most important methods of avoiding challenges to decisions. Careful consideration and support of decisions through the **use of the standards** of the zoning ordinance is important.

Remember, it is not enough to deny an application because of a vague notion that the use is not a "good idea," or that it will "harm the neighborhood." The record must show sufficient **facts** to back up the findings made according to the zoning ordinance standards. If traffic is a concern, describe those concerns as precisely and factually as possible.

If the decision is challenged, the importance of using the ordinance's standards becomes self-evident. A well-supported decision provides the background needed to build a **solid legal foundation** for the decision.

Zoning actions do not simply take place at a single planning commission or Board of Appeals meeting. Rather, it is a complicated and sometimes lengthy process involving several key members of the planning and zoning team. Consequently, it is necessary to understand each one of the steps in this process, and to ensure that the community has a clear understanding of what roles each member of the team must play and the responsibilities each must fulfill. Equally important is the knowledge that protecting the validity of these actions is enhanced by making sure that all of the procedures and processes required by the Planning and Zoning Acts are followed, and that decision makers follow a sound process to arrive at a decision. The following divides the zoning process into its sequential parts and discusses appropriate procedures and methods for each step: Information, Preparation, Deliberation, and Documentation.

Making Effective Decisions

Information

Pre-Application

Normally, a potential applicant will contact the community prior to submitting a formal application. This initial contact is important because it sets the tone for the entire zoning process. The community should have a trained zoning administrator (or a staff member or consultant) who is intimately familiar with the zoning requirements and process. Once designated, the zoning administrator (and/or other designated person) should be the only person(s) who answers zoning related questions. If they are not available, the potential applicant should be asked to make an appointment or return when the proper authorities are available.

This means individual planning commissioners and other members of appointed or elected bodies should not be giving advice on zoning procedures and requirements. Instead, they should refer these questions directly to the zoning administrator.

Questions at this point may generally include specifics about zoning ordinance provisions (setbacks, parking, signs, etc.), application requirements, fees, meeting dates, and other information needed for a complete application. The applicant should know what information has to be provided to the community and when it must be submitted. Sending a follow-up letter detailing this information, along with copies of forms and fee schedules is also advisable.

If possible, it may also be helpful to suggest that the person make a personal appointment with the zoning administrator to show preliminary plans and receive the information firsthand. The zoning administrator, in discussions with the potential applicant should try to learn as much about the possible project as possible. This is not an attempt to ferret out confidential information, but rather to ensure the most accurate and complete information is made available to the applicant.

Basic information should include:

- Location and size of property.

- Zone district.
- Proposed use(s) and dimensions of proposed buildings.
- Any unique aspects of the property (large wetlands, access agreements with adjoining properties, etc.) known to the applicant. If the zoning administrator is aware of any such facts, they should be made known to the applicant.

For zoning administrators, a key point is to never answer questions strictly from memory. Always refer to the zoning ordinance to ensure that the information provided is correct.

Once the meeting has been concluded the zoning administrator should make a note of the discussion, including the applicant/owner, address, phone number, and what information was learned as well as what was provided to the applicant.

Applications

Application forms will generally include basic information, such as the name and address of the applicant (including email and other means of contacting them), the address/parcel number of the property to be affected by the application, and other basic information. (A sample application form is included in the Appendix.) Complete applications should also include the proper number of copies of the site plan and supporting material as required by the zoning ordinance. Other information that may be required includes an explanation of how the proposal meets the standards of the zoning ordinance.

It is especially important that the application be reviewed by the zoning administrator (or other specifically designated individuals) prior to formal acceptance to ensure that all of the materials are present and are complete. Incomplete applications should be returned to the applicant with instructions as to what additional materials or corrections are needed.

Applications should be submitted far enough in advance to allow for the preparation of notices and mailing lists, submission for publication in a newspaper (if required), complete technical reviews by various staff members (planner or consultant, Fire Chief, engineer, etc.), prior to the meeting at which the application is to be considered. In addition, enough time should be allowed so that the information may be sent to the reviewing body members at least a week in advance of the meeting. Much has to happen in the time

Making Effective Decisions

period between the application submission and first meeting; allow for adequate time.

Preparation

Notices

The Zoning Enabling Act has specific public notice requirements for most zoning approvals granted by a community. Approval of permitted, or use by right, land uses by the zoning administrator and site plan review are the only zoning approvals that do not require specific public notice or hearings.

Generally, required notices must contain a description of the request; a listing of all existing street addresses within the property; the time, date, and location of the meeting; and when and where the application information can be viewed or copies obtained. It should also include information as to when and to whom comments may be sent if someone is unable to attend the meeting.

Notices should be worded simply enough that someone unfamiliar with the issue can understand the action being proposed. Include a street address rather than just a legal description. Maps, when appropriate, are also helpful.

If in doubt as to whether or not a notice should be sent, send it.

With few exceptions, the Zoning Enabling Act indicates that if a notice is required for zoning decisions, it shall:

- Be posted in a newspaper of general circulation in the local unit of government.
- Be mailed or personally delivered to:
 - The owners of the property being considered;
 - All persons whom real property is assessed within 300 feet of the property, and;
 - The occupants of all structures within 300 feet, of the property regardless if the property is located within a neighboring jurisdiction
- Given not less than 15 days before the date the application will be considered.

If a notice is required to be published in a newspaper of general circulation, a Notice of Publication should be obtained from the newspaper.

The mailing list for notices should also be kept as the "affidavit of mailing." The list is the community's declaration that the names and addresses noted on the list were sent a notice, which is attached to the list, on a specific date. The mailing list should include the date notices were mailed. Keep the mailing list on file, along with the notice of publication.

If, during the hearing, a neighbor makes the claim that a notice was not received, check the affidavit list to determine if a notice was mailed. If so, the hearing may proceed and a decision made. If, for one reason or another, the proper notices were not sent, or notification requirements were not met, the application should be re-noticed and a second meeting or hearing held.

Site Visits

Before making any decision, it is necessary that those charged with that responsibility have an adequate amount of information to allow a reasonable conclusion. Visiting the site is often critical in rendering a good decision. Still, some precautions should be used. A site visit by a majority of the membership of a decision-making body must be preceded by notice under the **Open Meetings Act** and the requirement to allow the audience to also attend on the site visit --something a private property owner may not want to allow due to liability and insurance reasons.

Given the potential problems associated with Open Meetings Act compliance, as well as other regulations, such as the Americans With Disabilities Act (**ADA**), site visits by individual members is a suitable preferred option.

Two cautions for individual visits: 1) do not go onto the site unless specific **written permission** has been granted by the property owner or the site is otherwise available to the public (such as an existing shopping center); and 2) do not talk to the property owner, neighbors or applicant outside of the meeting. This is known as an "**ex-parte**" **contact** (or from only one point of view) and can be perceived as prejudicial. The intent of information gathering is to insure that everyone has the same information on which to base a decision.

Making Effective Decisions

If a contact cannot be avoided, it should be reported to the rest of the planning commission, along with the general content of the conversation.

Details to look for during a site visit include traffic conditions, natural features, surrounding land uses, and general neighborhood characteristics. Visits at different times and days would also be useful. You should describe your findings to the rest of the planning commission so that they may have the benefit of your observations and comments. Photographs, slides or video tape may be a good option, particularly for larger, inaccessible sites.

Prior to the meeting you should also take the time to review all of the material made available to you. Make sure that your ordinance requires enough site plan copies so that each member can be sent a plan prior to the meeting. You should also look at the zoning ordinance to review the applicable standards and requirements prior to the meeting.

Deliberation

Conducting Public Meetings

The planning commission will conduct a variety of public meetings. These may include workshops and regular meetings to consider development applications. All meetings are open to the public, but certain business items require a public hearing be conducted following specific rules and procedures.

Although many planning commissions and other bodies follow Robert's Rules of Order in their meetings (or any number of other published rules of parliamentary procedure), there are some aspects of meetings that, while not unique to planning and zoning related decisions, nonetheless are important to consider.

Public Hearing Process: The Chair has the singular responsibility of enforcing meeting procedures. Having a set procedure for meetings helps keep the decision-makers focused and allows the meeting to proceed in an orderly fashion. Hearing rules and procedures should be printed on the back of the agenda, or along with the agenda, so that everyone is aware of them.

The following is a suggested process to follow for each public hearing.

- (1) Chair opens public hearing and announces subject.
- (2) Chair summarizes procedures/ rules to be followed during the hearing. Explains if questions will be answered individually, or if the commission just intends to listen to comments and react later.
- (3) Staff/Chair presents main points of application and recommendation.
- (4) Correspondence or persons speaking in support of application are recognized, beginning with the applicant.
- (5) Correspondence or persons speaking in opposition to the application are recognized.
- (6) Rebuttal comments by applicant (if appropriate or desired).
- (7) Chair closes public hearing. Explains the next steps, and that the commission may or may not make a decision that night.
- (8) Planning commission deliberates and reaches a decision.

Role of the Chair: The role of the Chair is to maintain order throughout the meeting. Since zoning hearings can become emotional, strict adherence to this policy is important. The Chair should announce each agenda item and note the rules that apply to the hearing. During the meeting, the Chair should ensure that courtesy is maintained and that speakers are not interrupted.

By ensuring that all comments are directed to and through the Chair it is often possible to avoid debates between members of the audience, between the presenter and the audience, and between the commission/Board and the audience or presenter.

Meeting Rules - Hints for a More Orderly Public Hearing:

- Print hearing rules on agenda. Each planning commission may provide for how zoning hearings will be conducted. These rules should be written and placed within the by-laws.
- Do not always attempt to answer every question, some comments cannot be answered.
- If things get out of hand, take a recess.

Making Effective Decisions

- Do not feel compelled to make a hasty decision the night of the hearing. Everyone should feel comfortable with their vote; if not, obtain whatever additional information is needed before proceeding with the decision.
- Remember, you represent the long term interests of the entire community, not just those at the public hearing.
- **Meeting Rules for Speakers:** It is appropriate for the planning commission to adopt standard meeting rules for people who wish to address you. Meeting rules can go far toward having an efficient and worthwhile meeting. Some common rules follow which you may find useful.
- **Comments should be made through the chair.**
- **Limit speaking time**, when necessary. If there are many people who wish to speak, it is appropriate to limit the time of each speaker, with the exception of the applicant. The applicant should be given as much time as needed, within reason, to present his or her case. If questioned, the Chair should indicate that the applicant is but one person (or a few people) and the people wishing to speak (generally against) are many.
- **Limit the number of times** one person may speak. Generally, each person need only be given a single opportunity to speak. At the discretion of the Chair, persons may be allowed to speak a second time to respond to earlier comments. However, the Chair should emphasize that repeat comments are unnecessary. Your rules may also require sign-up sheets for those persons wishing to speak, with the Chair only recognizing those who have signed.
- The Chair may also ask if there is a **spokesperson** for the audience and ask that the spokesperson speak for the others present who agree with his/her point of view. The Chair should allow those for whom the spokesperson is speaking to be recognized, either through a show of hands or by standing. The spokesperson may be given additional time in recognition of his/her role.
- After the **public hearing is closed**, the public is not involved in the discussion unless the chair brings them into it, which is not always a sound idea to continue including them.

Handling Angry People: Most of you probably know by now that people do not generally come to a meeting in support of a particular project; most have concerns that they wish addressed, many are simply opposed to what it proposed. *The foremost concern*

Making Effective Decisions

that any planning commission should have is to ensure fairness for all concerned; the applicant as well as the public. To ensure fairness, keep some simple things in mind.

- Everyone must have the opportunity to speak and present evidence at public hearings. While some limitations may be placed on this right, as described later, no action should be taken that would deprive a person of their right to be heard.
- Most people are uncomfortable speaking in public. One of mankind's greatest fears is not death; it is public speaking. While the Chair cannot make everyone effective speakers, he/she can make sure that meeting rules are followed and order maintained. Keeping a subtle balance between the degree of formality required, and the degree of informality that is sometimes needed is a learned art.
- Recognize emotional responses and treat them with concern and understanding. Land use issues, as you may have discovered, can bring out strong emotions. Strong responses, within limits, should be expected and understood. Controlling your own emotions is essential, even when the comments get personal.
- The Chair can help things to stay calm by following meeting rules and requiring that comments are made only on the subject at hand. (It is often helpful to point out what request is being made and to ensure that the public understands the limitations of the board or commission).

Meeting Rules for Decision Makers: Commissioners and ZBA Members

There are some rules that the planning commission and ZBA should follow as well.

- **All comments should be directed through the Chair.** Just as the audience must be recognized by the Chair, so too should the commissioners. Not only does this respect the role of the Chair, it also sets a precedent for the audience to follow.
- **All deliberations should be in the open.** This goes beyond the strict requirements of the Open Meetings Act. It is important that the audience view your commission as an open, fair, and deliberative body. Remember, people are generally suspicious of government; don't add substance to that perception.
- Do not hold private conferences prior to meeting - Don't meet in a group in a small room or other place outside the chamber in which your meeting is held. When arriving at the meeting, stay in the chamber. While socializing is acceptable, make

Making Effective Decisions

sure that the audience doesn't perceive that you are informally meeting to decide an issue or trying to unduly influence one another. Do not talk with your neighbor during the meeting. Make all of your comments aloud during the deliberations. If you have a question, ask the applicant or the Chair, rather than your neighbor.

- **Express your opinions.** Don't just vote without letting everyone know why you are voting, whether for or against the issue. Your comments may help others to decide (or change their vote). It also lets the applicant and the audience know the strengths or weaknesses of the proposal.
- The deliberation should focus on insuring **conformance with ordinance standards.**
- The discussion should proceed long enough for someone to feel confident in proposing a complete motion that embodies most of the important findings.
- If you intend to use a formal "findings of fact" format, this should first be agreed upon by all members.

Documentation

Documentation of decisions is the last formal step in the decision-making process.

Documentation takes place in the form of a motion; consisting of findings of fact, reciting reasons for the decision, the decision, and conditions, if any.

Motions: The motion to approve, deny or approve with conditions should state findings of facts, the conclusion, and the rationale for the conclusion, indicating how the facts support the decision reached. A motion must have: a maker and supporter; a description of the nature of the request; the action taken (approval, approval with conditions, denial, tabling), any conditions attached to affirmative decisions; and, the reasons for the action taken (applicability of standards).

In some communities, discussion on the issue, if thoroughly documented in the minutes, may be adequate to provide enough information related to findings of facts, compliance with the standards of the ordinance. Otherwise, a summary of the discussion is appropriate. Referencing staff or consultant reports, when available, is also appropriate.

In some communities, either staff or legal counsel prepares a motion or several motions in advance with space for additions/deletions. This is not an effective practice since it implies that decisions were determined prior to the public hearing.

Some hints for making motions:

- Motions may have to withstand scrutiny by a court and should be **carefully phrased**.
- Be sure everyone is **clear on the motion**.
- **Reference relevant sections of the ordinance** and staff reports.
- Whenever possible, make **motions in the positive**. This helps eliminate confusion associated with negative motions, when a motion to deny means that a "yes" is actually a "no." The public and the applicant (or the members) may not be sure of the result of the vote.
- Conditions may be imposed on any zoning decision, except rezonings (unless part of a planned unit development rezoning or a conditional rezoning).

Conditions must be:

- **Reasonable** and intended to protect natural resources, the health, safety, and welfare and the social and economic well being of people.
- Related to a valid exercise of the police power.
- Necessary to meet the intent and purpose of the zoning ordinance, are **related to the standards** established in the ordinance for the land use or activity under consideration, and are necessary to insure compliance with those standards.

The motion should include who is responsible to ensure conditions are implemented, such as "a revised site plan shall be submitted for the Secretary of the planning commission or zoning administrator to certify that all conditions have been met..."

Special Voting Requirements:

For the zoning board of appeals, the Zoning Enabling Act specifically requires a vote of the

Making Effective Decisions

majority of the membership of the Board to decide any request. If less than the full membership of the Board is present, the applicant may be given the option of requesting a tabling until all members are present. This is the principal reason the Zoning Act authorizes an alternate member for the zoning board of appeals. A vote to adopt a Master Plan, or an amendment to a Master Plan requires a majority of the full membership voting for the Plan, not just a majority of those present at the meeting.

Finding of Fact: Many things are said at a public hearing, many claims made by staff and by the applicant. The Planning Commission/ZBA's job is to sort through what was said and determine what it finds as the facts in the case. It will include things like:

- Parcel identification
- Applicant
- What approval/action is asked for
- Compliance with the ordinance (section by section: e.g., # parking spaces required, # parking spaces on site plan; parcel size, size of parcel in the application; . . .)

The findings may be drafted during the meeting and might be contained in a staff report so the motion adopts the staff report by reference. The approval can be "completed" by approving the minutes at the next regular meeting of the planning commission/ZBA, or a separate record of approval can be prepared and signed so one does not have to wait for the next meeting.

Post-Decision Documentation

- The applicant and Secretary of the approving body should each **sign at least two copies** of the approved site plan (for PUDs, site plan reviews, etc.). The applicant should keep one copy and the community at least one other. This provides a record of understanding of what site plan was approved and when. The Secretary should include with the signature, the date of the minutes of the approval.
- A **copy of the minutes** should be sent to the applicant following review by the approving bodies.
- A letter should be sent to the applicant specifically noting the action taken by the approving body, including any conditions placed on the approval, if appropriate.

- This letter may include further instructions regarding the proposal. For example, if the approval granted was for a Preliminary Site Plan, the letter may state that Final Site Plan approval is necessary prior to issuance of a building permit. If other approvals are necessary, such as a variance, this should be noted as well.

Record Keeping: Project files should include, at a minimum:

- Copies of **notices** and affidavits of publishing and mailing.
- **Relevant pages of minutes** at which the proposal was discussed.
- **Staff notes**, meeting notes, correspondence, telephone conversation notes, etc.
- **Copy of the application and supporting material.**
- Approved/signed copy of the **site plan**.
- Follow-up **correspondence** (as noted above).

Avoiding Litigation

The short answer to avoiding litigation is simple; you can't! Governments are always open to lawsuits, regardless of the methods used to reach a decision. Disappointed applicants and neighbors far too often look to the courts to make a decision favorable to their position. However, there are some actions that you may take to strengthen your legal position.

The first way to avoid a legal challenge to your decisions is to follow the procedures and principles outlined in this handout. As you have seen, the zoning process involves a wide variety of technical, administrative, and judgmental factors. The technical factors may include compliance with the numerical requirements of the zoning ordinance, such as setbacks, height, parking, etc. The administrative requirements include such items as ensuring that notices are mailed and published, meeting procedures followed, and other similar actions. It is important to make sure your community takes detailed and complete minutes that document each action, includes findings of fact, reasons, the action, and conditions. Make sure a complete record is kept for each case (minutes, meeting notices, and so on).

Making Effective Decisions

Finally, and probably most important, are the judgmental factors that are required in making effective zoning decisions. The standards provided in the Zoning Ordinance for various types of decisions are the clearest guide given to decision makers. All decisions should be based on these standards and the facts that are used to apply them.

General Guidelines for Planning and Zoning Decisions to Minimize Risk

To minimizing the risk associated with planning and zoning decisions, some basic guidelines include:

Know the Rules

Knowledge and consistent use of published rules and procedures are very important to efficient and effective decisions. Equal treatment, before, during and after the meeting provide the logical and legal basis for decision making. This procedure prevents “making it up as you go along” and clearly provide direction to the operation of the planning commission, the zoning board of appeals and also to the legislative body.

Do Things Right

Applying the same set of rules allows the community to carefully manage its affairs in a professional manner, treating people fairly and providing a forum for public discussion of community plans and programs. Risk management requires the community to apply the same set of requirements to each person or group that appears before the planning commission, ZBA or any other body of the community. By following the rules and procedures, the community and its leaders will minimize mistakes, which could be costly if a court judgment goes the wrong way.

Minimize Mistakes

As painful as it may be, careful record keeping is good risk management. Keep detailed minutes of all meetings. Maintain consistency with the processing and record keeping associated with local planning and zoning efforts. This will result in fewer mistakes.

Community planning not only involves land use and zoning decisions, but also includes adoption of appropriate business practices to actually run the business of government. Without the procedures and practices, equal treatment will not be possible and decision making will be fraught with mistakes.

Minimize Your Liability

Accordingly, planning commissions and other bodies and officials making zoning decisions need not fear that a taking is imminent, but caution is needed in making decisions to minimize legal liability. There are some relatively simple actions that can be taken to help strengthen the community's legal position in zoning actions.

- Keep your master plan and zoning ordinance up-to-date. A current plan and ordinance, reflecting the needs and desires of the community can bolster an effective defense. An outdated plan or ordinance is subject to attack as not relevant to today's conditions.
- Recognize the landowner's right to a reasonable rate of return, but remember that it may not be the use that provides the highest profit.
- Do not exclude lawful land uses if there is a demand and an appropriate location in your community (see zoning enabling acts).
- Don't try to steal or extort property by zoning; buy it. Also, do not try to hold applicants hostage to approvals by demanding utility and road improvements, parks, or other improvements that are not part of or essential to the project.
- Base decisions on the ordinances and facts, not emotion, your opinion of the applicant, or what the audience wants you to do. You are acting in the best interests of all of the community, not just those who come to the meeting.
- Make consistent decisions using the standards written into the zoning ordinance and document those decisions as part of the record (minutes) of the meeting.
- Know the rules of procedure and follow them, consistently.
- Resolve questions of doubt before taking action; do not act hastily. Seek opinions from your community attorney, planner or other expert where helpful. Zoning decisions are permanent; take care that the decision you make is the correct one.
- Know the limits of your authority and act in good faith.
- Make sure that the people making decisions are properly trained. Some communities require attendance at annual training sessions as a condition of reappointment.
- Correct immediately any situations that could be/are found liable.
- Review your insurance policies.
- If sued, hire competent legal counsel familiar with the type of litigation involved.

Conflict of Interest

Identification: You probably have a conflict of interest if...

- You are the applicant;
- A close relative is the applicant;

Making Effective Decisions

- A business associate, lender or renter is the applicant;
- The applicant is a party with whom you have close ties;
- The proposal could allow you, a relative, or a business associate to receive a financial gain or benefit; or
- If you have to ask, chances are others are asking as well. It is better to avoid the perception of a conflict, even though you may conclude that a conflict does not exist. Ultimately, the decision is a personal one. If you feel that you can make honestly make an objective decision, and the presence of a conflict is not clear, take the action with which you are most comfortable.

What to Do: In order to maintain public trust and insure fairness, it is critical to follow some simple steps if you have, or are legitimately perceived to have a conflict of interest. When reviewing these steps, keep in mind that the perception of a conflict is just as important as reality. These steps are:

1. Declare your apparent conflict of interest. Failure to do so by a zoning board of appeals member is cause for removal from the board.
2. If operating under Robert's Rules of Order, or if a charter township board, members must be excused from voting by other members. In any case, the bylaws should address conflicts of interest.
3. Abstain from voting and do not participate in deliberations, either as a member of the board or commission, or as a "citizen."
4. Once the conflict is declared, leave the room. Although you cannot be prohibited from speaking as a "citizen," remember that your comments will likely be viewed by the audience as being very influential, and have the appearance of bias. It may be wiser to ask someone to speak for you --your spouse, a friend, business partner, your attorney, or other agent.
5. For a ZBA, an alternate member may take your place in the event of a conflict of interest and serve on the board until that case is completed.

Some Don'ts, if you have a conflict of interest,

- Don't discuss the proposal, either formally or informally with any member of a board or commission who might have to act.

- Don't use inside knowledge and contacts. Make sure that you obtain minutes, staff materials, etc., through the same procedures as any other applicant.

If you are the applicant, don't represent yourself; have someone else represent you—your spouse, a friend, business partner, your attorney, or other agent.

Takings

A common complaint from property owners negatively affected by zoning decisions (and after referring with an attorney) is that the community is “taking” their property. The term alone can sometimes strike fear in the hearts of zoning officials since the penalties for a proven taking of property without compensation can be significant.

As the legal context of takings is constantly shifting, it is not always easy to firmly establish just what would constitute a legal taking. The constitutional wording is that private property can not be taken for public use without compensation. Various U.S. Supreme Court decisions over the past two decades or more have attempted to further define the issue. One refinement is that the taking need not be a physical taking, but one that in its effect renders a property “valueless.”

A basic principle in zoning is that the regulation must provide a reasonable use of property, both from a functional as well as from a financial standpoint. Therefore, any regulation which deprives a property of a reasonable use is suspect.

On the other hand, using zoning to simply reduce the value of a property is not generally a taking unless it goes too far in doing so. For example, rezoning a property from a valuable commercial district to a less valuable single family district is not necessarily a taking, as long as the single family district provides a reasonable use of property.

The Zoning Board of Appeals

Duties and Powers

A community that has adopted a zoning ordinance must have a zoning board of appeals (ZBA) to provide relief for properties that cannot adhere to the specific requirements of the ordinance. The ZBA has the quasi-judicial function of interpreting the zoning ordinance to ensure that it has, or will, be properly applied. The basic responsibilities of the ZBA include:

- Appeals of administrative decisions;
- Variance requests;
- Ordinance interpretations (text and map);
- Sometimes nonconforming situations; and
- Appeals of special land uses and planned unit developments (but only if provided for in the ordinance).

Appeals of Administrative Decisions

The zoning board of appeals has the responsibility to hear and decide on appeals of any decision or determination of an official or body charged with the administration of the zoning ordinance. The administration of the ordinance typically falls under the direction of the zoning administrator and planning commission. Examples of administrative functions that may be appealed include:

- Processing of zoning applications;
- Ordinance enforcement; and
- Site plan review.

Examples of possible scenarios for which administrative appeals may occur include:

- An applicant disagrees with the zoning administrator's denial of his/her site plan due to the lack of details submitted on the plan. The applicant believes the site plan

Zoning Board of Appeals

complies fully with the submittal requirements of the ordinance and should be placed on the planning commission agenda. He/she appeals the decision of the zoning administrator.

- A township recently updated their master plan. The plan recommends the installation of service drives for commercial properties along certain major streets in order to alleviate traffic congestion and improve safety. As a condition of site plan approval, the planning commission refers to the master plan and requires the applicant to provide an easement for a future service drive. The applicant objects, believing that while the master plan recommends service drives, the zoning ordinance does not require them. He/she appeals the decision of the planning commission, seeking to have the service drive requirement removed.
- The zoning administrator observes an ordinance violation. He/she informs the property owner of the violation and requires the matter to be resolved within 30 days. The property owner objects, claiming the time is insufficient and that the violation poses no threat to anyone's health or safety. He/she asks for a minimum of 90 days within which to remedy the problem. The zoning administrator refuses. The applicant believes the zoning administrator is unreasonable and appeals the 30 day correction period.

As appeals of administrative decisions are considered, it is the ZBA's responsibility to determine whether the "administrative official or body" acted properly, within the scope of their authority. If so, the ZBA should uphold the administrative action taken.

Appeals of ZBA decisions are made at the court level. Decisions of the ZBA may only be appealed to the county circuit court. This appeal must be requested a certain number of days from the final decision of the ZBA. If the ZBA's decision is only recorded in its minutes, then the appeal must be made within 21 days after the minutes have been approved at the ZBA's next meeting. If the ZBA issues its decision in writing and signed, then the appeal must be made within 30 days of the written decision. All administrative remedies must be exhausted at the community level prior to appeal to court, unless the challenge is one of a constitutionally protected right, such as failing to follow due process.

.An appeal to the ZBA is considered the final administrative remedies at the community level.

Ordinance Interpretations (Text and Map)

From time to time, certain aspects of the ordinance may be questioned or challenged. This may result from undefined and/or ambiguous terms or phrases, poorly defined standards, lack of map clarity concerning the location of a zone district boundary, or other such matters. The ZBA is the only local body authorized to render “official” interpretations of the ordinance and zone district map. Interpretation by others, such as the zoning administrator, planning consultant, or legal counsel, represent opinion of the matter or issue at hand.

Once made, the official interpretation becomes the meaning, standard, or rule by which the associated and subsequent zoning actions are guided. In many cases, zoning ordinances are subsequently amended either to reflect the ZBA's interpretation, or to establish alternative language to better clarify the ordinance.

When making interpretations, the following guidelines should be used:

Avoid broad interpretations. Text interpretations should be narrow, be based on a thorough understanding of the ordinance and not have the effect of amending the ordinance.

Map interpretations should be made based on the rules described in the ordinance and any relevant historic information. Such information might include prior editions of the zoning map and current and prior editions of the master plan map upon which the ordinance is based.

- If the ordinance is silent on a particular use, and the use is not similar to others already listed in the ordinance, say so, and leave the applicant to seek an ordinance amendment.
- Give weight to reasonable, practical interpretations by administrative officials and bodies if applied consistently over a long period. Seek planning and legal advice as needed.
- Keep good records of all interpretations. Consider maintaining a “log” of

Zoning Board of Appeals

interpretative actions. This will help ensure consistency between past and future decisions.

- Where the legislative intent is unclear and the facts cannot be read to support only one interpretation, the benefit of doubt should go to the applicant.

Dimensional (Non-Use) Variances

The most common variance is a dimensional or non-use variance. These requests typically pertain to buildings and structures that cannot be constructed in the location required by the zoning ordinance or that other certain requirements of the ordinance cannot be met. To obtain a dimensional variance, the applicant must demonstrate that a practical difficulty exists on the property.

Variance Requests

A variance is official permission to deviate from a requirement of the zoning ordinance. The authority to grant a variance is discretionary and includes the general guidelines of practical difficulty for dimensional variances and unnecessary hardship for use variances. Many communities however establish standards and criteria for which the decision is based.

There are two types of variances: 1) Dimensional Variances 2) Use variances

Common dimensional variance requests include:

- Front, side or rear yard setbacks;
- Height;
- Lot coverage regulations;
- Parking requirements;
- Sign regulations; and
- Landscaping/buffering requirements.

The key to dimensional variances is that the condition which dictates the need for a variance should be unique to the property, not just a condition that is unique to the applicant's operation or peculiar method of operation. Variances are granted to pieces of land - not to individual applicants.

Practical Difficulties

In order to demonstrate that a dimensional variance is appropriate, the board must find that there is a practical difficulty that affects the property that causes compliance with the zoning ordinance would represent an excessive burden to the development of the property.

In order to prove that a practical difficulty exists, the board must review standards. Standards may vary, but generally they will consist of some or all of the following review standards:

- The condition or situation is unique and not shared by neighboring properties in the same zone and amending the ordinance text or rezoning is not a reasonable solution.
- A variance would not be significantly detrimental to adjacent property and the surrounding neighborhood.
- The practical difficulty was not created by an action of the applicant and either existed at the time of adoption of the requirement from which the variance is requested, or is necessary as the result of governmental action such as a road widening.
- The variance is the minimum necessary to permit reasonable use of the land and buildings.

Periodically, site plans possessing non-conformities are submitted to the planning commission for review and approval prior to obtaining necessary variances. It is somewhat common for planning commissions to approve such plans conditioned on the receipt of proper variances through the ZBA. Communities utilizing this approach should do so with caution. ZBAs may feel compelled to approve (“rubber-stamp”) inappropriate variances or to avoid attaching conditions due to the approval action taken by the Commission.

Zoning Board of Appeals

Use Variances

A use variance permits a use of land that is otherwise not allowed in that district either as a permitted use or as a special land use.

The Zoning Enabling Act gives cities and villages the statutory authority to consider use variances if unnecessary hardships exist. The Zoning Enabling Act is different however, for townships and counties.

Some townships and counties may consider use variances. These townships and counties include:

- Township or counties who granted a use variance prior to February 15, 2006; and/or
- Those that included a provision in their zoning ordinance allowing consideration of a “use variance” or “variances from uses of land” as of February 15, 2006.

*Unless a township or county meets the requirements above, they are NOT authorized to grant use variances.

However cities and villages and, even if eligible, townships or counties can decide not to allow use variance applications. The Act only permits use variances, it does not require them to be heard. If allowed, the zoning ordinance must require a 2/3 vote of the entire membership to approve use variances.

In order to demonstrate a use variance is needed, the board must find that there is an unnecessary hardship that affects the property that causes compliance with the use provisions of the zoning ordinance to create an excessive effect on the property.

To obtain a use variance, the applicant must show the **unnecessary hardship** by demonstrating:

- The property in question cannot be put to a reasonable use if permitted to be used only under the conditions allowed by the regulations in the current zoning district in which it is located.

- The unnecessary hardship of the regulation on the property in question is due to very unique circumstances.
- A variance would not alter the essential character of the area or neighborhood.
- The conditions upon which the application for a variance is based would not be applicable to other property within the same zoning classification.
- A variance would not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located.
- The purpose of the use variance request is not based merely upon a desire to make more money out of the property.
- The variance is the minimum necessary to permit reasonable use of the land and buildings.

As can be seen from the above, use variances are, and should be, very difficult to obtain. Normally very few would be approved. Alternatively an applicant might consider seeking a zoning amendment or conditional zoning amendment. The improper granting of use variances can usurp the authority of the planning commission and the legislative body and can have the same general effect as a rezoning without going through the rezoning process. In many instances, the effect and resultant impact is similar to that experienced by spot zoning. There may be other situations however where a rezoning would negatively impact an area, as it would permit a multitude of uses, not all of which are desired. A use variance would permit a specific use with specific conditions that would ensure compatibility with the surrounding area. While this approach may sound desirable especially in transitional and historic residential areas, it is important to consider the long-term implications of use variances in relation to a community's master plan. When considering use variances, the ZBA should therefore remember that the primary purpose of the variance is to allow a reasonable use of the land (e.g. to allow a reasonable return on one's investment). The variance is not intended to optimize one's return on his/her investment.

Zoning Board of Appeals

Common *incorrect* reasons used to grant a variance:

- No one came to object
- It's the only sign they make
- The ordinance is too strict
- We have to give it to them or they will leave
- It will make the area better
- We gave this variance before
- It's already built
- We know he will do a good job
- It's only a small variance

In *Paragon Properties Company v. City of Novi*, Michigan Supreme Court indicated courts should not hear zoning cases unless all administrative remedies for a rezoning denial have first been exhausted. If the community has the ability to grant use variances, the use variance would be considered one of the administrative remedies that would have to be tried first. (If the court challenge is based on denial of constitutional rights or procedures, then the rule of exhausting all administrative remedies does not apply, and one can go immediately to court.) So, if the community has decided not to hear use variances, it is no longer an available remedy and an application would not be required.

Variances were never intended to be easily obtained. Unfortunately, for some communities this is not the case. In most situations, this is a result of the board's feeling that they are there to grant relief from the ordinance. In fact, the opposite is true; the board is actually tasked with upholding the ordinance, and granting relief only in those special circumstances when conditions unique to that property are present.

Nonconforming Situations

Some ZBAs are delegated specific responsibilities regarding nonconforming uses, structures, and lots. A nonconforming use is the use of a structure or land that legally existed prior to the adoption or amendment of the ordinance which made it nonconforming. A nonconforming structure is a building that fails to meet the minimum setback or height requirements of the ordinance.

A nonconforming lot is a lot of record that fails to meet the minimum dimensional requirements of the ordinance such as lot width or area.

Typical examples of situations reviewed by ZBAs include:

- The enlargement or alteration of nonconforming buildings and structures and expansion of a non-conforming use;
- Replacement of buildings damaged by flood, fire, or vandalism;
- Reduction of setbacks for nonconforming lots of record;
- Change (substitution) of one nonconforming use for another; and
- Upgrades to nonconforming site development features, such as parking lots, landscaping, etc.

The standards used by the ZBA to authorize any of the above actions must be clearly specified in the zoning ordinance.

Suggest Ordinance Amendments

Since the boards of appeals deal with variance requests, they are aware of ordinance/code sections that may need to be amended. The board should suggest ordinance changes to the planning commission and legislative body based on granting of frequent variances or problems with interpretation. However, boards of appeals do not have the power to alter or change the zoning district classification of any property.

Limitations

The Zoning Enabling Act only allows ZBAs to review special land use and PUD decisions if provided for in the zoning ordinance. This practice should be carefully considered, as these types of zoning decisions should generally be left to the planning commission and legislative body only. The ZBA has no authority with regard to other municipal ordinances

Zoning Board of Appeals

outside of the zoning ordinance unless specifically provided for in that specific ordinance.

Membership and Voting

- In communities with less than 5,000 residents there must be no less than 3 members and in communities of 5,000 or more residents; no less than 5 members. The number of zoning board of appeals members shall be specified in the zoning ordinance.
- The regular members shall reside within the zoning jurisdiction of that local unit of government.
- Term of office is 3 years for regular members
- One member of the ZBA shall also be a planning commission member (for cities and villages only). One member of the ZBA may serve on the township or county planning commission.
- One member of the ZBA may also serve on the legislative body; but may not serve as chairperson for the zoning board of appeals.
- The legislative body may appoint up to two alternate members who may serve in the place of regular members. An alternate may be called if a regular member is unable to attend one or more meetings. An alternate member may also be used in the place of a regular member who has abstained for reasons of conflict of interest.
- A zoning board of appeals shall not conduct business unless a majority of the members are present.

The primary function of the Zoning Board of Appeals is to uphold the requirements of the zoning ordinance; except in unusual circumstances related to the condition of the property.

It is NOT the job of the board of appeals to help applicants find a way around the requirements of the zoning ordinance because of a matter of inconvenience, or because of the circumstances of an individual property owner.

One difference for Cities and Villages...

- The city or village council may act as the ZBA and establish rules to govern its procedures as a zoning board of appeals. Having the legislative body also act as the Zoning Board of Appeals should be considered with caution, especially with concerns of mixing legislative with quazi-judicial responsibilities.

Voting Requirements

General administrative (housekeeping) issues: Based on having at least a quorum present, and a majority of those present voting for a motion for approval of general administrative issues requires a majority vote (more votes may be needed if provided for by the ZBA rule of procedure).

Official determinations (except use variances): "The concurring vote of a majority of the [all] members [regardless if present or not] of the ZBA is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, or to decide in favor of the applicant on any matter upon which they are required to pass under an ordinance or to effect a variation in an ordinance..."

Use variances: Communities which are permitted by state statute to consider use variances, a concurring vote of two-thirds of the regular members [regardless if they are present or not] of the board is required to grant a use variance.

Partial membership present: Because a variance requires the concurring vote of a majority of the members (not just those in attendance), the ZBA should indicate to the applicant that they may wish to table the item if all members are not present. This is the principal reason the Zoning Acts provide for alternates.

Projects Where Planning Commission and ZBA Approval Is Needed

Certain applications for site plan approval from the planning commission may also require an area variance(s) from the ZBA. There is some question whether the variance should be

Zoning Board of Appeals

obtained prior to site plan approval.

The three possible scenarios include:

- The variance is obtained prior to planning commission action;
- The application goes to the planning commission first for preliminary site plan approval or comment and recommendation to the ZBA. After a decision on the variance is made, the proposal then goes back to the planning commission for final site plan review; or
- The planning commission gives conditional site plan approval prior to ZBA action on the variance request..

Considerations for ZBA Decisions

- It is important that the procedures of the meeting (applicant presentation, public comment, questions, discussion, and vote) be handled well so that meetings appear orderly and generally professional.
- The standards of the zoning ordinance must be used in making a decision. It is important that the board focus on those facts that are exclusively related to the standards of review. The ordinance requires that all standards be satisfied for each request.
- Minutes of the meetings, including the finding of fact, cannot be relied upon as a

- Variances were *not* intended to allow property owners to *avoid* compliance with the zoning ordinance.
- The variance process was provided to recognize that not all properties had the same physical character.
- Variances granted with little or no justification may have the effect of encouraging others to avoid compliance with the ordinance.
- Granting of unwarranted variances has the long term effect of shifting zoning policy making to the ZBA and away from elected officials.

sufficient record of the proceedings without sufficient comments from the board on each standard of the ordinance. Such supporting documentation is critical for future reference. The author of the minutes, or the preparer of a finding of fact, is not permitted to fill in the blanks to help justify a decision.

- Remember that aesthetics and economics are not rationale for granting variances. Economics, in particular, cannot be considered justification for failing to comply with the requirements of the zoning ordinance. Similarly, judging or enforcing community aesthetics is not the function of the board of appeals. Those efforts are the responsibility of others and the board should not attempt to take over those duties.
- "Hardship" will often be cited by applicants because the zoning requirements don't allow them to do what they want to do. This often does not mean that the property is rendered unusable by the requirements; rather, it might not be used as intensively or in the manner "preferred" by the owner. The board is being asked in these cases to not require a property owner to do something that perhaps hundreds of other property owners have had to do.
- When requests relate to an applicant not wanting to comply with the ordinance rather than being unable to comply, the board may encourage others to seek the same opportunity and, over time, erodes the effectiveness of the ordinance. It is important that the board distinguish between variances that apply to property and those that apply to an applicant's individual needs. An infamous example occurred in one township where an applicant requested an accessory building height variance because of a boat that would not fit into a building at the height required by the ordinance. Approval of this variance would not be appropriate in that it has nothing to do with the property. Should the applicant move away from the property, the original stated need for the variance would then disappear.
- A high approval percentage of requests generally suggest that the board either doesn't fully appreciate its function or is not correctly applying the variance review standards of the ordinance, or the zoning administrator is effective at screening, or coaching applicants from making variance requests which would not be likely to receive a variance.

Zoning Board of Appeals

- The opinion of the neighbors should not be a compelling factor in the review. Rather, the input of neighbors should be gathered to provide relevant information as to how the standards of review are or are not met. The responsibility for decision-making is the board's alone, even if the entire neighborhood is supportive or against the particular request.
- A common problem for many board members is they may either disagree with a specific ordinance requirement or do not appreciate its rationale. As a result, requested variances may tend to be viewed more leniently. Following this philosophy will permit variances for no legitimate reason. Whether the board agrees or disagrees with any provision in the ordinance is irrelevant. The board's job is to enforce the provisions of the ordinance as they are written; variances are for those very specific instances where unique conditions exist that would make compliance with the requirements impractical. Those conditions are defined in the ordinance.

The next time you feel badly about turning down a request...

Thank about:

- The hundreds of property owners who DID comply with the ordinance.
- The amount of time and effort the drafters of the ordinance spent in developing this language.
- The effectiveness of your ordinance if it is commonly known that all you need to do is *ask* for a variance and it will be granted.