



NAVIGATING

THE

LAND USE MAZE

Reprinted with permission from the Real Estate Center at Texas A&M University.

BY REID C. WILSON

Property owners and real estate professionals frequently have to deal with local government land use regulations pertaining to zoning, platting, signage, parking, traffic access and historic preservation. After more than 25 years practicing real estate and land use law in Texas, I have heard all possible complaints:

“It’s so complex and convoluted!”
“Who could navigate that maze?”
“Whose idea was this?”
“No one at city hall has ever had to make a dollar!”
“Can’t the city speed it up?”

The land use process frustrates many owners and developers. However, using some proven tips will expedite the process and benefit any private party interacting with a local government on a land

use issue. These four essential tips include understanding why land use regulation exists, appreciating the tough position of city or county staff, doing your homework on specific land use regulations and reserving adequate time for the process.

WHY LAND USE REGULATION EXISTS

Without question, local governments should have some say in land use in order to protect public health, safety and welfare. Land use regulation was created to protect consumers from abuse and to encourage and support good planning practices that would preserve and enhance property values.

For example, zoning regulations prevent incompatible adjacent uses, such as an industrial facility next to single-family homes. Platting

requires the proper expansion of utilities and roads, as well as appropriate planning of lots for development. A totally unregulated environment could harm consumers and adjacent property owners. Land use regulation is intended to level the playing field by protecting both groups.

In Texas, most observers believe that land use regulation is increasing as the state becomes more urban. Counties, which previously had few land use regulatory powers, are implementing an ever-expanding array of regulatory controls. However, most land use regulation in Texas is still exercised by cities within their municipal boundaries.

Few will deny that government land use regulation can be inefficient, overly time consuming and sometimes maddening. But, for better or for worse, it is here to stay.

APPRECIATE THE STAFF'S POSITION

The proper extent of land use regulation is a popular and often contentious debate that is best reserved for political rallies and cocktail parties. When you are seeking governmental approval for a project, do not debate the issues or complain to government staffers. For the time being, let it go. Your focus should be on a project-specific interpretation or approval. Nothing good will come from a philosophical discussion.

When meeting with regulatory staff, keep in mind that they have job responsibilities to satisfy. Generally speaking, they like their jobs and want to perform them well, with the expectation of advancement. Certainly, city staff members have personalities, attitudes, philosophical beliefs and work ethics that run the gamut.

In my experience, the number one goal for most staff members is to protect the public. They feel a solemn duty to do so. Their public service often requires a financial sacrifice, but they accept that in exchange for the feeling of “wearing the white hat.” Just as we recognize the public service of our military, we should consider supporting and encouraging public servants in the real estate arena. Acknowledge staff members’ responsibilities and the legitimacy of the public interest they serve. Do your best to communicate in a way that works for them and effectively conveys your message in a reasoned manner.

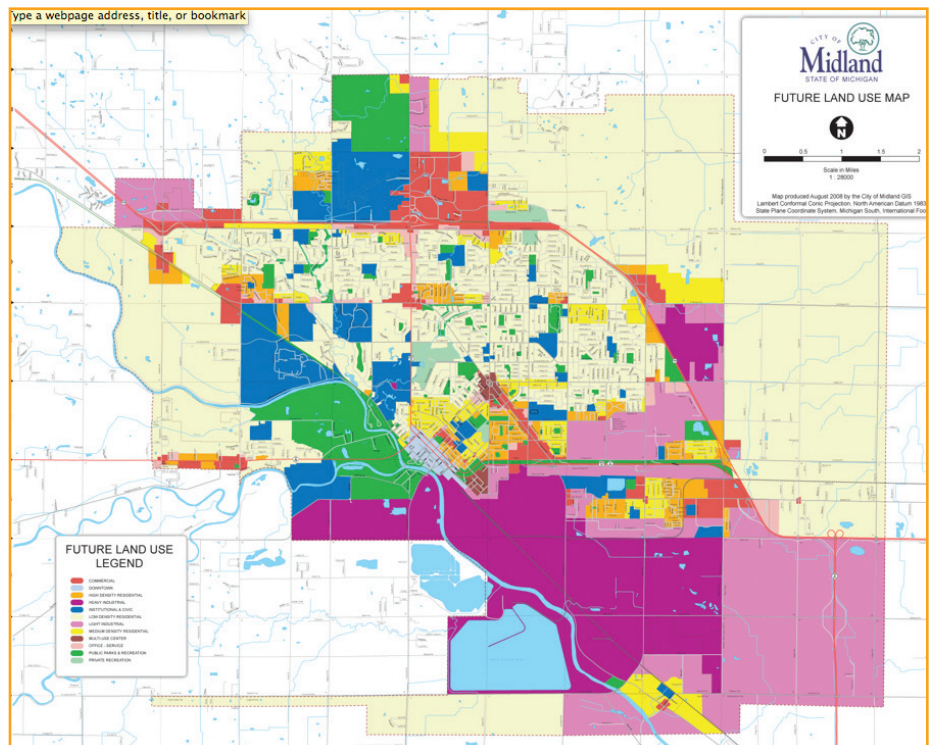
Keep in mind that governments are structured entities. Process is paramount. You are not dealing with an entrepreneur, but a process-burdened public employee. Ask the staffer to help you work through the bureaucratic maze, to expedite your

project and to help you help them. Just as your mother taught you, civility, respect and appreciation go a long way when communicating with an overburdened, underpaid staffer. The difference between expediting a project and being trapped in a mind-numbing bureaucratic delay could be the gratuitous assistance of a staffer who makes a suggestion, hand-carries an application to the next stop in the process or reminds you of a deadline.

DO YOUR HOMEWORK

A common problem with private sector owners and developers is the attitude that the regulatory officials work for them. Of course, in one sense, that is true. However, it is all too common for owners, developers or their agents to neglect their due diligence and simply ask a low-level government staffer, “What permits do I need?” This abdication of

responsibility leads to rejected permits, incomplete applications, missed approvals and worse. Asking a staffer is only a part of your due diligence. Owners and developers should conduct independent investigations of the regulatory process. City websites usually have copies of land use regulations and application forms. A “Frequently Asked Questions” section is often available along with other easily accessible information. Some cities have a “developer package” with a complete set of relevant information for anyone developing new improvements. The more due diligence, the better. Before spending too much time researching, call the appropriate staffer (in cities, usually a member of the planning department) for initial guidance. An introductory meeting with staff may direct you on the applicable regulations and perhaps even an initial interpretation. Thereafter, diligent review of current regulations is required to raise all relevant issues. Follow-



Permitting can become even more complex when there are multi-use zoning issues, as in this city.

up questions should be asked of staffers, and, where practical, written notes and memos documenting conversations should be retained.

Tedious as it may seem, you should read the actual regulations. For cities, the applicable section in their code of ordinances can typically be found on the city website or at www.municode.com. Often, there are noncodified rules and regulations for implementing ordinances, which are usually available from the city planning director or city secretary.

When appropriate, land use experts (planners, architects, engineers, surveyors and lawyers) should be retained, because if a staffer makes an incorrect interpretation, the owner or developer is not protected, even by a good faith reliance. If the regulation prohibits or limits the project, even a negligent misinterpretation by a staffer will not prevent enforcement of the regulation, except in extraordinary situations. In some cases, structures built with erroneously issued permits have been torn down.

The law implies a requirement for the owner or developer to make an independent review and interpretation. Relying on staff is insufficient. If a diligent review uncovers the staffer's erroneous interpretation, time, money and damages will be saved.

The equitable defenses of waiver and estoppel that might apply in a relationship between two private parties do not, in most instances, apply to the relationship between an owner or developer and the government. Additionally, governments have special immunities from damages, liability and lawsuits. It may not seem fair to the layperson, but the government has special defenses in litigation. However, there are some special protections for owners and developers granted by

the legislature in the area of platting and vested rights. Therefore, it is critical that all applicable approvals be properly applied for and received.

While each state may have its own process variations, in Texas we have access to zoning information and tips for navigating the approval processes through "A Citizen's Guide to Texas Zoning," published by the Real Estate Center at Texas A&M University at: www.recenter.tamu.edu/pdf/1294.pdf.

RESERVE ADEQUATE TIME

The regulatory timeline can make or break a deal. Approvals are required both before project commencement and to determine final completion. The length of the approval process depends on the type of approval required. Generally speaking, someone familiar with a particular process can provide a reasonable estimate of the time needed to obtain specific types of routine approvals, such as building permits and subdivision platting. The law mandates deadlines for certain staff responses.

Time estimates are best in areas where well-defined rules (such as subdivision platting) are applied. However, when a discretionary approval is requested, the crystal ball becomes cloudy. Examples include variances, special exceptions and rezoning.

A variance is a site-specific approval to deviate from the general rule. Except for

zoning, variance authority must be stated in the regulation itself. Some variances are granted by staff and others require approval from an administrative panel such as a planning commission, board of adjustment, buildings and standards commission, general appeals board or city council.

Special exceptions are discretionary site-specific approvals given by a board of adjustment. They must be specifically authorized in the regulation. Rezoning, including simple map changes, specific-use permits, planned development districts or planned unit developments, are a lengthy, procedure-laden process. They often require six months to complete a three-step process to obtain city staff, zoning commission and city council approvals.

When acquiring land for development, the purchaser should conduct extensive regulatory due diligence to ensure the proposed project is approvable and the time estimated for the regulatory approval process is adequate. Contract provisions for land use approvals can be complicated and appropriate legal representation is recommended.

IN SUMMARY

Land use regulations can be daunting. Landowners and developers must understand why land use regulation exists, appreciate the tough position of city staff members, do their own homework on specific regulations and reserve adequate time for the process.

Reid C. Wilson

Reid is a board-certified commercial real estate attorney with Wilson, Cribbs & Goren P.C. of Houston, a fellow of the American College of Real Estate Lawyers and a Counselor of Real Estate. He has a long-standing relationship with the Real Estate Center at Texas A&M University through the commercial seminar offered jointly by the Center and the South Texas College of Law. He can be reached at rwilson@wcglaw.net.

