

LAND-USE REGS: LEARNING THE ROPES

by Paul DeBaggis

An introduction to the tangled thicket of regulations you'll need to know to play the game

Once, the development game was simple. Until the early 1900s, speculators bought land, slapped up buildings, and sold them for hefty profits. Then, in 1926, the U.S. Supreme Court validated local zoning. Since that decision, cities and towns have churned out laws faster than rabbits make rabbits, and today's building regulatory network consists of a confused public, frustrated developers, and hypertensive law enforcers, all languishing in layers of legalese.

The Supreme Court acted rightly. And the building industry should not really gripe with the lawmakers, either. Certainly, a few towns have concocted some witless zoning bylaws, trying to use them to stop building from now until the next ice age. But in general, the public sector has passed land-use controls for more noble purposes: the protection of dwindling water supplies, the stabilization of property values, and the quiet enjoyment of individual homeowners.

To work successfully in these complex times, a stiff dose of knowledge is needed. Would-be developers must identify, study, and understand real estate as it relates to its local regulatory system. We cannot print every land-use regulation, nor define the ones we do discuss to the most minute detail. But we'll review some general bylaws found in many communities, and offer advice on how best to cope with them.

Zoning Bylaws

While turn-of-the-century zoning dealt with such basic issues as keeping factories out of residential neighborhoods, today's bylaws govern the height and size of buildings, population density, flood migration, protection of city water supplies, growth control, resource removal, sign and billboard reg-

ulations, and a multiplicity of other land-use issues.

Cities and towns get their authority to enact zoning from their respective states through enabling legislation. To varying degrees, these state enabling laws exempt farms, schools, public utilities, and certain other land uses from the provisions of local zoning. And though the enabling laws do provide guidelines, zoning regulations vary from town to town.

The Book and the Maps

The city or town council, town meeting, or other local legislative body approves or amends the zoning bylaw and makes it available to the public through printed booklets. Formats vary: Some towns list only permitted uses for each area and specify that all other uses are prohibited. Other towns list all uses and all zoning districts and specify "yes" (allowed) or "no" (not allowed) for each.

The booklet may also contain the zoning maps. The base zoning map shows every parcel of land and its zone—business, residential, industrial, multi-family, etc. Flood hazard districts, wetlands, and groundwater districts occasionally show up on the base zoning map, though more often these specialized zones appear on transparencies called overlays.

Those few towns that still administer zoning without maps use the zoning text to describe districts. For example, one jurisdiction may allow commercial buildings within a one-mile radius of the central business district.

Density

The planning community refers to density as the number of dwelling units allowed on an acre of land. Density requirements also regulate height of

buildings, yard sizes, and percent of lot coverage. On larger parcels the percentage of building coverage may not be a concern, but on a one-acre lot, the allowable size of a commercial building makes a project either feasible or impractical.

The Special Permit

A large professional building built in the midst of a cluster of well-crafted homes can destroy a neighborhood's character. But what about the developer who wants to open a three- or four-person office in one of the homes of that same neighborhood? Towns tend to discourage such activity. Yet they understand that some cases do have merit, so they allow some uses by special permit. First a public hearing is advertised in the local newspaper, and the zoning board sends notice of the hearing to all abutters. The applicant explains his proposal on the night of the hearing, often aided by an attorney. Abutters may speak in support of or in opposition to the proposal. After the hearing, the zoning board approves or disapproves the special permit application. In the event of a yes vote, citizens and abutters have the right of a court appeal, and the applicant must hold off on the project until the appeal period passes.

Site Plan Review or Approval

Some towns require site plan review or approval for larger projects like shopping malls and office parks. The typical site plan shows site location and boundaries, proposed building and land uses, existing and revised grading, wetlands, flood plains, future streets, driveways, walls, hydrants, utilities, outdoor lighting, landscaping, signs, parking lots, and other proposed improvements.

Site plan review is just that—a non-binding review of your plans by local authorities. In jurisdictions that use the more formal process of site plan approval, zoning boards notify abutters, hold public hearings, and retain the right to deny site plans not deemed in their best interests. Towns may also require that professional engineers or landscape architects design the site plan. It is often helpful to meet informally with the authorities to get their input prior to making the formal presentation.

Flood Plain Districts

As mandated by the federal government, each city or town must adopt a flood hazard regulation if its homeowners are to qualify for low-cost flood insurance. Based on the input of consulting engineers, and information from local residents, the Federal Emergency Management Agency (FEMA) maps the flood plains of municipalities. FEMA also provides model bylaws for incorporation into the local health, zoning, and subdivision regulations. The regulations generally require the buildings built in the flood plains follow more rigorous construction standards.

Resource Removal

We process sand and gravel into concrete, masonry block, and hot-tub products, and we chisel bedrock into granite curbs and concrete aggregates. Rural loam nourishes suburban lawns. And trees—even the urban variety—give us framing, finish lumber, and firewood. But we've clear cut many forests. And in many communities rusty power shovels sit in abandoned pits that resemble artillery practice ranges. So, cities and towns have regulated the removal of earth, and, in some cases, trees.

While the first earth-removal bylaws affected only non-construction activity, more and more communities now restrict earth and tree removal in conjunction with development projects. Some bylaws limit the depth of cuts and fills. Such regulations may dramatically alter both the landscape of a proposed project and the profits to be made from off-site hauling.

Groundwater Protection

Faced with the spectre of polluted surface water and polluted aquifers underground, communities throughout the nation are adopting groundwater and aquifer protection bylaws. Often, the municipality hires a planning consultant to designate the protected area on the official zoning map—sometimes with the help of a hydrogeologist.

Groundwater protection regulations are sometimes tricky. For example, in one community in Southeastern Massachusetts that normally permits 10,000-square-foot house lots, the bylaw states that, "Unless the area [within the groundwater district] is serviced by public sewers, a lot area of forty thousand square feet per dwelling unit is required."

Moratoria and Development Scheduling

Communities cite rapid growth, overcrowded school systems, and archaic water and sewerage systems as causes for "moratoria," temporary bans on whole categories of building activity. Under a moratorium, all water, sewer, or building permit issuance ceases. Unless adopted for emergency purposes related to the public health or safety, most moratoria could be overturned through a court challenge.

Development scheduling, on the other hand, regulates building by reducing building permit issuance and spreading it over a greater time span, sometimes years. One current bylaw in several Massachusetts communities restricts one- and two-family construction to no more than three-hundred units townwide in any twenty-four month period. Within that threshold, individual builders may obtain building permits for no more than twenty-five percent of the lots in any parcel. Another community in this area has stipulated that no more than ten lots in any parcel may be built in a given year.

Wetland Regulations

Through wetland regulations, often confused with flood plains, local and state governments control building within wet meadows, marshes, swamps, and other small storm retention areas. Wetlands need not contain standing water; they only need to sustain wetland plant life. Some local and state laws actually list the kinds of vegetation found predominantly in wetlands. Ask a local conservation or wetlands commissioner for a list. Better yet, ask him to walk the land and give his opinion.

Potable Water Supply

Most jurisdictions require an operating artesian well or a local water entrance permit before issuing a building permit. Cities and towns usually set standards for well depth, gallons per minute, and water quality. Some locales, however, will issue a building permit on receipt of a signed agreement between a builder and a well installer. From a developer's point of view, the agreement method allows work to begin sooner. But he is still at risk until water actually flows through the new building's interior plumbing system.

Sewage or Septic?

If the city's sewer lines run past the land, that's a start. But what is the capacity and physical condition of the city sewer treatment facility? Is it modern with plenty of capacity, or outdated, undersized, and in need of replacement or repair? If the latter is true, chances are the community may restrict or prohibit sewer connections pending renovations or replacement of their system.

A septic system is an individual, on-site sewer system, used in the absence of municipal sewerage. Septic construction requires a permit, usually from the board of health, and that agency makes inspections as the system is constructed. Land must pass a percolation test—a sub-surface examination of soils and their ability to absorb moisture—to qualify for an on-site system. The “perc” test should be taken before the would-be developer buys the land; more than one investor has lost big money on property that won't perc.

Subdivision Regulations

Developers employ engineers or land surveyors to divide large parcels into individual lots. The product, called a subdivision plan, is then submitted to the local planning agency. Subdivision regulations govern roadway construction on these proposed private ways, including paving, curbing, sidewalks, drainage, water and sewers, grass plots, tree removal, etc. Local subdivision regulations vary: Curbing, for example, could be granite, reinforced concrete, or hot top, depending on the town specification. Familiarize yourself with these road building standards. Lots of money is involved.

Driveway Curb Cuts

A few towns require curb-cut permits wherever a new driveway or subdivision road intersects a town way. If new local roads and driveways connect with state highways, most states require the same permit. While cities and towns rarely disapprove curb-cut applications, they may suggest or require changes for traffic safety reasons.

Ledge Blasting

Bedrock removal usually requires blasting with dynamite which in turn requires permission from the state fire marshal or local fire chief. As a rule, the developer may use the fractured bedrock on site, but the earth-removal bylaw may restrict off-site hauling or on-site processing.

Historical Districts

Does the city or town have a historical district? If so, all renovations or new construction within the district must be architecturally “compatible” with existing structures. Local or state historical commissions review plans and specifications, generally before issuing a building permit.

Fees

Each year, cities and towns take in millions of dollars in building regulatory fees. The approvals for a four-lot subdivision can exceed the cost of a new pick-up truck. Communities charge fees for: all building-related permits, percolation tests, water and sewer connections subdivision reviews and inspections, and earth removal inspections. Make sure you plan for these fees in your project budget.

Using the System

Avoiding today's pitfalls. In the early land development days, a clever chimp with a slide rule could have made money. But today's developers succeed through hard work, financial connections, and mastery of specialized knowledge. The would-be developer who fails to understand basic land-use concepts was probably put here on earth for some other purpose. And the one who knows, but wanders carelessly through the regulatory maze, risks unfavorable publicity, work stoppages, and five-digit legal fees. So study well, and good fortune will likely follow.

Make purchase-and-sales agree-

ments subject to all permits. Sometimes it's not possible; the buyer of land may need secrecy, as in negotiating a long-term lease with a multi-national corporation. Hopefully, in those cases, the buyer will hire a competent attorney, one familiar with local regulations. Otherwise, developers should buy property subject to all permits. Today's regulations are too complex to take chances.

Calculate land losses. How much of that prime acreage will be lost to wetlands, flood plains, easements, roadways, and other regulatory encumbrances? Though each parcel differs, one thing is certain: In every parcel developed under conventional subdivision control methods, 10 to 20 percent of the land area becomes roadways.

Use local or county soil surveys, where available. We heard of one local health agent with a mysterious and uncanny knack for predicting bedrock, hard pan, and other sub-surface soil conditions—the kind of problems that cost money to correct. One day someone asked his officer his secret. The health agent smiled, opened his desk drawer, and handed his interrogator a copy of a county soil survey.

These soil surveys address limitations for one- and two-family homes, commercial buildings, parks, road construction, and other developmental purposes. Compiled from aerial photographs and holes dug at predetermined sites, soil reports can be purchased or reviewed in many communities.

Study current bylaws. Many cities and towns print one-hundred to five-hundred booklets at a time and keep the booklets current by stuffing loose pages of amendments inside the front cover. Be sure to purchase current bylaws, including all amendments. More than once a developer has strutted out of a city hall carrying an outdated bylaw book.

Evaluate potential gains under cluster zoning. In towns where cluster zoning is allowed, developers may group housing units onto a portion of a given parcel, leaving the remainder land for parks, athletic fields, or open space. The incentive is obvious: Smaller lots mean less roadway construction. On most projects, that adds up to tens or hundreds of thousands of dollars.

Ask for overlay maps. Some communities use overlays; some don't. When placed over a base map, such as a zoning-district map, the overlay will show which land is affected by flood plains, wetlands, groundwater-protection districts, and other special regulations.

Know the players. Generally two categories exist—the law makers, and the enforcers. State legislatures, town meetings, city councils, planning boards, water and sewer commissions make the laws. Some might argue that zoning boards and conservation commissions are quasi-judicial agencies who interpret the laws. It's true, but for our discussion, we'll call those agencies legislators. Building inspectors, zoning agents, health agents, environmental officers, city engineers, water and sewer inspectors, and the like, enforce the laws. The developer who understands these functions won't be “ping-ponged” from agency to agency, searching for simple answers. ■

Paul M. DeBaggis is an instructor at Minuteman Vocational School in Lexington, Mass. He has 20 years of experience as a Building Commissioner and served the Massachusetts Board of Building Standards in several adjunct functions. He is a former president and director of the South-eastern Mass. Building Inspectors and Fire.

HOW LONG WILL IT TAKE?

Months and sometimes years pass while development proposals bump their way through the regulatory maze. Estimating completion dates is more of an art than a science; too many contingencies arise. But if a developer comes forward with completed applications, the following time frames are typical for regulatory approvals:

Zoning changes. Six to eight months—rarely sooner. Occasionally a year or more.

Special permits, variances. Three to five months.

Site plan review or approval. One to four months.

Earth removal permit. Generally three or four months.

Subdivision approval. Three to five months, barring complications.

Wetlands permits. Usually within four months.

Septic system approval. Often within a month, though some towns refuse to perc during the dry season. Others require deep observation pits installed for one full rainy season.

Water and sewer permits. Up to a month.

Building permits. Within thirty days—often within a week or so.

—PDB