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Land Use and Planning Issues

Comprehensive Planning and Zoning

The Comprehensive or Master Plan is not the same thing as a community's zoning map. The zoning map is the law. The master plan, unless a local ordinance or charter provision provide otherwise, is simply a guide.

La. R.S. 33:106 grants municipalities and parishes (through their planning commissions) the authority to "adopt a master plan for the physical development of the municipality (unincorporated territory of the parish)." Master plans include "recommendations" for "guiding and accomplishing a co-ordinated, adjusted, and harmonious development of the parish or municipality . . . which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare," La. R.S. 33:107.

In non-home rule charter communities, the master plan is adopted by the planning commission, not by the council or police jury, La. R.S. 33:108. The statute requires notice and a public hearing prior to adoption and permits the plan to be approved in sections. In home-rule charter communities, the master plan is adopted by whatever body the charter provides.

The legal effect of the master plan is provided for in La. R.S. 33:109. After a master plan is approved by the planning commission:

> no street, square, park or other public way, ground, or open space, or public building or structure, or public utility whether publicly or privately owned, shall be constructed or authorized in the parish or municipality . . . until the location, character, and extent thereof has been submitted to and approved by the commission. In case of disapproval, the commission shall communicate its reasons to the local legislative body which shall have the power to overrule such disapproval by a recorded vote of not less than two-thirds of its entire membership . . . The failure of a commission to act within sixty days from and after the date of official submission to a commission shall be deemed approval.

La. R.S. 109 also requires that the council or police jury "consider" the master plan "before adopting, approving, or promulgating any local laws, ordinances, or regulations which are inconsistent with the adopted elements of the master plan." It does not require that the council or police jury only pass zoning or other ordinances in compliance with the adopted a master plan. However, some home rule charter communities, including the City of New Orleans and East Baton Rouge Parish, do require that changes to the zoning map be in compliance with the master plan.

What is the practical use of the master plan? A master or comprehensive plan often contains studies of the community's current and likely future demographics. These studies help the city plan for transportation and utility needs, schools and parks and where it can raise the money to pay for these things. In addition to the economic and quality of life benefits that coordinating the planned location for different types of land uses as well as roadways, schools, parks and utility facilities, the master plan also provides significant assistance to the city or parish when dealing with zoning disputes.

In zoning litigation, the question is usually whether the community acted in an arbitrary and capricious manner in making a zoning decision. *King v. Caddo Parish,* 97-1873 (La. 10/20/98), 719 So.2d410; *Palermo Land Co. v. Calcasieu Parish*, 561 So.2d 482 (La. 1990). It is certainly very easy and very persuasive for the community to simply point to its master plan

(if the zoning decision is in conformance with the master plan) to show that the decision cannot be arbitrary and capricious.

Rezonings

The Statutes specifically provide for the amendment of zoning ordinances. La R.S. 33:4725 provides that zoning regulations "may, from time to time, be amended, supplemented, changed, modified or repealed." Indeed, good planning requires that zoning regulations be reviewed and amended to take into account changes in the character of an area and in the nature of particular uses. Though some older cases held that changes in zoning should only be made where there is proof of a mistake in the original zoning or that there has been a substantial change to the character of the surrounding neighborhood (See *Dafau v. Jefferson Parish*, 200 So.2d 335 (1967)) Newer cases have appropriately held that an amendment to a zoning ordinance or map is presumptively valid and that there is no burden on the community to set forth the reasons that the change was made. (See *Palmero Land Co. v. Calcasieu Parish*, 561 So.2d 482 (1990).

In seeking a zoning change or amendment (or a conditional use) it is very important that the developer fully prepare prior to filing the application. In addition to knowing the history of property and surrounding properties, the developer must meet with the neighborhood groups and councilman whose district the property is located to make sure they are "on board." The failure to obtain the councilman's approval in New Orleans and many other communities completely dooms the project. The councilman, of course, is most likely to withhold his/her support until he/she knows where the neighborhood groups (the "perceived" voters) stand on the development. You must also be prepared to deal with the NIMBYs (Not In My Back Yard) and, in some communities, the preservationists.

Planned Unit Developments and "Smart Growth"

A Planned Unit Development ("PUD") is a zoning device that permits flexibility in large scale developments allowing uses and/configurations that otherwise could not be developed under the applicable zoning classification. In many instances an application for a PUD combines what would otherwise be applications for multiple variations and conditional uses. If the property is large enough, the development might combine several different uses such as shopping centers, multiple family residential and an office building, or may be a single use development. A single detailed plan submitted by the developer and approved by the municipality or parish usually includes, not only the uses and layout of the development, but specific details regarding the architecture, building materials, and landscaping to be used in construction.

Though there is no specific statutory provision in Louisiana for PUDs, many zoning ordinances provide for them, usually as a separate zoning district or an overlay zone. However, most zoning ordinances contain specific procedures for granting PUDs that are much more extensive than are required to obtain a simple zoning map amendment.

The PUD process usually combines a site plan review process with subdivision. Depending on the proposed use and those already existing on surrounding properties, a "concept" plan may be required to determine if the Planning Commission and Council/Police Jury will even consider this type of development prior to substantial funds being spent on engineering and architectural design. Virtually all ordinances require a preliminary plan to be presented. Such a plan will include the layout of the property, including the size and location of roads and buildings, and the specific uses to be placed on the property. Preliminary plan

approval also usually includes a fair amount of engineering to show that drainage can be taken care of and that utilities can be brought to the site.

After preliminary plan approval, the developer may pull permits and begin clearing the land and constructing the utility infrastructure. At some point, prior to anything actually being built, the developer will need to appear before the Planning Commission again, this time for final plan approval. Final plan approval should include detailed engineering plans, the exact location of utilities, and depth of drainage facilities. It should also include detailed architectural sketches of the buildings, material samples and a detailed landscaping plan.

Because PUDs can be hundreds of acres, specific items are sometimes left to be decided later, such as the placement and size of signage or even the specific use and architectural plans for a portion of the property that the developer is not yet ready to developed.

There are inherent advantages and disadvantages to PUDs. Critics contend that PUDs are akin to "contract" or "spot" zoning. However, most agree that requiring the developer to take advantage of the unique characteristics of an area and coordinate living, recreational and commercial aspects of the development in one design permits a better quality development. Further, PUDs allow the means of obtaining large, open or recreational spaces while still giving the developer the density that he needs in order to economically make the development happen. In addition, the community makes sure that the development is aesthetically pleasing and that it serves the needs of not only the developer, but of the community at large.

"Smart Growth" is a planning and zoning concept also sometimes called "New Urbanism" or "Traditional Neighborhood Developments. The Smart Growth concept seeks to prevent urban sprawl and to create smaller "communities" where residential, employment, shopping and recreational uses are all close together. In addition to having different uses close

together, for residential areas, Smart Growth concepts often call for home closer to the roads, front porches and detached garages, behind the homes, on alleys. Smart Growth, many proponents insist, will create an almost utopian community - commutes are shortened or eliminated, residents are able to walk to work, shopping and recreational spaces and activities and residents who sit on their front porches and know their neighbors. The organization, Smart Growth America answers the question "What is Smart Growth?" thusly:

> Smart growth is a better way to build and maintain our towns and cities. Smart growth means building urban, suburban and rural communities with housing and transportation choices near jobs, shops and schools. This approach supports local economies and protects the environment.
>
> At the heart of the American dream is the simple hope that each of us can choose to live in a neighborhood that is beautiful, safe, affordable and easy to get around. Smart growth does just that. Smart growth creates healthy communities with strong local businesses. Smart growth creates neighborhoods with schools and shops nearby and low-cost ways to get around for all our citizens. Smart growth creates jobs that pay well and reinforces the foundations of our economy. Americans want to make their neighborhoods great, and smart growth strategies help make that dream a reality.

http://www.smartgrowthamerica.org/what-is-smart-growth

Lafayette has a well known and successful "smart growth" development – River Ranch. When looking at Smart Growth developments, it is important to consider their scale. River Ranch is very large – 320 acres. Those same Smart Growth concepts do not often translate into smaller scale developments. According to its website, River Ranch has more than 2500 residents (and it is not yet completed). A smaller scale "Traditional Neighborhood Development" is not Smart Growth. 150 residential units cannot support a dry cleaner or an ice cream shop, let alone a grocery or a restaurant. This type of development is simply a mixed use development and should be treated as such.

Strategies for Recovering the Cost of Development

There are two types of costs associated with development that I will address. Indirect costs – the costs for new schools, parks, fire and police stations and infrastructure improvements; and Direct costs – the costs for zoning and planning review, construction plan review and inspections.

To the extent permitted by statute (which is very limited) indirect costs can be recovered via impact fees. Another possible way to recover indirect costs, at least for water and sewer improvements is through connection fees.

Impact Fees

Impact fees are often part of a subdivision control ordinance. The fees allow governmental entities to obtain money or land from developers to recover the cost of planning and constructing public facilities such as roads, schools, water and sewer plants, drainage canals and recreational facilities that are made necessary by the new development. As an example, development of a new 200-unit residential subdivision may require a new school be built or that roads are widened, sewer treatment plants expanded, even that a new fire station be built. Impact fees imposed on a developer based upon the number of lots and the size of the home to be constructed (because this coincides with population) can be used by the community to defray the cost of these new facilities instead of taxing its current residents for the costs of growth.

Impact fees are not widely used in Louisiana. I am aware of only a few impact fee statutes. The first allows parishes and municipalities with a population of more than 425,000 that have adopted a recreation plan as part of their master plan to require that subdividers of land donate not more than 5% of the land for park, playground and public school purposes to serve the people who will reside on the property. The community can require the developer to donate

cash in lieu of land (or a combination of money and land). Any money donated can only be used to acquire land for parks, playgrounds and schools that will serve the people who will reside on the property.

A study must be performed and appropriate formula developed to determine the amount of land needed for these purposes and assure that land is actually needed because of the development and not solely due to existing needs of the community. (La R.S. 33:112)

Another impact fee allows St. Tammany Parish to assess development impact fees for planning and engineering associated with sewerage and water systems in the parish. Under the statute, impact fees of $5.00 per building permit application plus one cent per square foot residential and mobile home plan review and two cents for commercial plan review and $20.00 plus $5.00 per lot for tentative plan approval of a subdivision, $10.00 per lot upon application for preliminary plan approval and $15.00 per lot upon an application for final plan approval. (La R.S. 33:4064.5)

In 2006 the legislature enacted La R.S. 33:3091 that, after a referendum, permitted Folsom to impose an impact fee on any new development – "the construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of a building or structure, any change in the use of a building or structure, or any change in the use of land, any of which creates additional demand and need for capital improvements." The statute defines capital improvements very broadly, including virtually any public facility. Folsom began imposing the impact fees on January 1, 2008.

<u>Connection Charges and Recapture Agreements</u>

Another possibility for financing infrastructure is through connection fees for water and sewer. These fees are often included in and required by a bond issue for water or sewer

improvements and are imposed on anyone wanting to make a new connection to the water and/or sewer system. The money is then used to either pay off the bonds or, if there is no bond, to reimburse the local governmental entity for the monies it spent extending these systems for new development.

In my opinion, an even better mechanism would be a recapture agreement. A developer who must extend water or sewer lines is required to oversize those lines to accommodate future development "further down" from their property. The developer enters into an agreement with the governmental entity wherein the governmental entity will charge a connection fee to "recapture" the oversizing costs when those properties "further down" seek to connect to the utilities.

Permit Fees, Application Fees and Reimbursement Agreements

Local governments usually charge application fees and building permit fees. While building permit fees are often calculated to truly cover the local government's costs in reviewing construction drawings for compliance with building codes and on-site inspections of construction, in many communities, the zoning application fees charged and paid by developers often do not come close to covering the actual costs incurred by the community for the zoning process. These costs can include:

- Permit Review to determine compliance with zoning;
- The local government's expert review costs related to traffic, drainage and utilities; and
- Legal fees for attorney review

In my experience, developers in south Louisiana are notorious for complaining about the costs of the zoning process. They can be proposing a $10,000,000 project and yet they still

complain about a $500 zoning application fee and "all the copies" of plans required to be submitted. They complain even more when their project is denied – "even after I spent $2000 going through the process.

The truth is that few governmental entities in Louisiana charge developers anything close to what developers are charged in other places. Developers should be required to cover all of the municipality's or Parish's costs related to the zoning process. They should be required to enter into an agreement and make a deposit that will cover the community's planning, legal and engineering costs related to the review and construction of their proposed development. Construction and/or occupancy permits could then be held until the amounts owed are paid or. If the development approval is denied, a contract claim can be made.

Moratoria and Other Methods for Controlling Growth

Though not specifically provided for, a local government can impose a moratorium on accepting zoning and development applications and/or issuing building permits. I caution that, a moratorium cannot conflict with the sixty day statutory time period for granting/denying approval of a subdivision plat (La.R.S. § 33:112). This is why it is often a good idea for moratoria to prevent the filing of an application for zoning or other relief rather than prohibiting the issuance of that relief.

There are a multitude of Louisiana cases where moratoria are discussed and upheld as reasonable, but none that expressly say what would be unreasonable. However, I suggest that any moratoria ordinance include the purpose of the moratoria (usually to permit a period of time to study and implement new zoning regulations for an area or for certain uses or to plan for or implement drainage, utility and transportation infrastructure) and a time limit for the moratoria (until the study, amending ordinance is implemented or __ months, whichever is sooner).

Further, I suggest that the ordinance not contain a waiver provision. Instead, anyone seeking a waiver should have to go through the zoning process and have an ordinance granting the relief passed by the council and signed by the mayor. A waiver provisions in an ordinance may subject a decision to less deference in the courts – legislative discretion vs. quasi-judicial/administrative discretion. (See *Williamson v. Williams*, 543 So. 2d 1339, 1344 (La. App. 4th Cir. 1988).)

Religious Uses, Cell Towers and Alcoholic Beverage Outlets

Zoning for Religious Uses and Cell Towers is affected by federal statutes. Regulation of alcoholic beverage outlets via zoning is, to some extent, an oddity of Louisiana alcoholic beverage control.

Religious Uses

Zoning that specifically addresses religious uses - as opposed to auditoriums or other places of assembly - can raise First Amendment issues as well as the Religious Land Use and Institutionalized Persons Act ("RLUIPA) (42 USCA § 2000cc). The RLUIPA provides:

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction

Cell Towers

Municipal/Parish ability to regulate the siting of cellular/PCS antennas is governed by the Telecommunications Act of 1996. While the Act provides limitations on governmental entities'

ability to deny an application for an antenna site, they may regulate the siting and construction of cellular/PCS antenna facilities through zoning and building codes so long as they do not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." Municipalities may require that a special use permit or variation be obtained prior to the construction of an antenna structure and may regulate location, height and aesthetics -- landscaping, colors, etc. To some extent, municipal control of cellular/PCS facilities can be analogized to adult (and other First Amendment protected) uses. A municipality can regulate them, but it must permit them somewhere in the community.

Section 704 of the Telecommunications Act of 1996 provides in pertinent part:

(7) PRESERVATION OF LOCAL ZONING AUTHORITY. --

(A) GENERAL AUTHORITY. -- <u>Except as provided in this paragraph</u>, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) LIMITATIONS. --

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not <u>unreasonably discriminate</u> among providers of <u>functionally equivalent services</u>; and

(II) shall not <u>prohibit or have the effect of prohibiting</u> the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a <u>reasonable period of time</u> after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be <u>in writing</u> and <u>supported by substantial evidence contained in a written record</u>.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service

facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the commission for relief.

(C) DEFINITIONS. -- For purposes of this paragraph --

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in Section 303(v)).

(Emphasis added) (47 U.S.C. §332(c)(7).

Though there is now a pretty substantial amount of case law, the Conference Report which accompanied the version of the bill that was enacted is still a major source for help in interpreting the Act. It is clear from the Conference Report that Congress intended that the municipality's regular zoning requirements and processes could and should be imposed on wireless communications providers. The Conference Report states:

> If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject the request to any but the generally applicable time frames for zoning decisions.

This preference for regular zoning processes has been eroded with the recent passage of the "Middle Class Tax Relief and Job Creation Act of 2012." Not surprisingly, this law – which

had bipartisan support – was stuffed with "extras", including a provision limiting local governments' ability to consider changes to existing towers. The law requires that a local government may not deny, and shall approve, any request for a modification of an existing wireless tower or base station involving co-location of new transmission equipment; removal of transmission equipment; or replacement of transmission equipment, so long as the modification does not substantially change the physical dimension of the tower or base station. Approval must be granted regardless of provisions in the Telecommunications Act of 1996 (Section 704) or any other provision of law. Of course, what constitutes a "substantial change" was not defined in the act.

Alcoholic Beverage Outlets

Many zoning ordinances in States across the country provide for restaurants with liquor, bars and liquor stores as conditional uses. In most of these jurisdictions, if a alcoholic beverage outlet closes (usually for a period of 6 months), the conditional use permit expires. In most jurisdictions in Louisiana, instead of a conditional use, the property is zoned for liquor and that zoning remains until it is changed – something a little more difficult to accomplish. Louisiana local governments also tend to regulate opening and closing times and other operational aspects of liquor outlets through zoning instead of through the local liquor licensing processes. Regulating liquor this way opens up the community to challenges based on zoning considerations. I believe that local governments would be better able to control liquor if regulation was done through a licensing scheme – with different types of liquor licenses with different hours of operation and different requirements then through zoning.